Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions	GN Docket No. 12-268

EMERGENCY MOTION FOR STAY AND OTHER RELIEF

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INTRODUCTION AND EXECUTIVE SUMMARY

On December 8, 2015, the Federal Communications Commission ("FCC" or "Commission") opened the application window for a reverse auction that "presents a once-in-a-lifetime opportunity for broadcasters."[1] This reverse auction 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."[2] By encouraging "[p]ayments to broadcasters that participate in the reverse auction," the Commission will "strengthen broadcasting by funding new content, services, and delivery mechanisms" and "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."[3] To participate in this historic auction, broadcasters must submit their applications by January 12, 2015.

Yet despite its diligent efforts, The Videohouse, Inc. ("Videohouse"), Abacus Television ("Abacus")[4] and WMTM, LLC ("WMTM") (collectively "Movants") have been shut out of this "once-in-a-lifetime" process. In its Second Order on Reconsideration, the Commission denied Movants the opportunity to participate in the reverse auction and refused to protect Movants in the repacking process. Because the Commission's decision was flawed on multiple procedural and substantive grounds, Movants, along with KMYA, LLC ("KMYA"), filed a petition for reconsideration of the Second Order on Reconsideration (the "Reconsideration Petition").

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[1] *Report and Order*, "Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions," FCC 14-50, ¶ 3 (rel. June 2, 2014) ("Order").

[2] *Id.*, ¶ 1.

[3] *Id.*

[4] Fifth Street Enterprises, LLC acquired WPTG-CD from Abacus Television on October 2, 2015 and thus is the successor in interest to Abacus for purposes of this Motion.

The Commission, however, has yet to act on the Reconsideration Petition. Because the deadline to participate in the reverse auction is rapidly approaching, Movants are compelled to file this Emergency Motion for a Stay and Other Relief. After January 12, 2016, Movants will be foreclosed from participating in the reverse auction and thus will be unable to "return some or all of their broadcast spectrum usage rights in exchange for incentive payments."[5] In addition, after January 12, 2016, Movants will forever lose their existing spectrum rights, as they are likely to be displaced with little chance of securing a replacement channel following the post-auction repack. Relief from the Commission is urgently needed.

Accordingly, Movants hereby request that the Commission extend the deadline for Movants to file applications to participate in the reverse auction pending the Commission's disposition of the Reconsideration Petition (and any judicial review thereof). Alternatively, the Commission should allow Movants to participate in the reverse auction as currently scheduled, including submitting an application in the window set to close on January 12, 2016, and extend protection to Movants pending the Commission's disposition of the Reconsideration Petition (and any judicial review thereof).

Movants will consider this motion denied if the Commission takes no action by December 18, 2015.

BACKGROUND

On June 2, 2014, the Commission issued a Report and Order ("Order") adopting rules to implement the broadcast television spectrum incentive auction as authorized by the Spectrum Act.[6] In that Order, the Commission, with one exception, chose not to protect legacy out-of-core Class-A eligible television stations that obtained an in-core channel but, due to circumstances

[5] *Id.*, ¶ 1.

[6] *Id.*

beyond their control, were unable to file for a digital Class A license until after February 22, 2012.[7]

On September 15, 2014, Videohouse and Abacus filed petitions for reconsideration with the Commission.[8] They argued, among other things, that the refusal of the Commission to protect these stations in the broadcast television incentive auction (1) contravenes the Spectrum Act's directive regarding service protection[9] and the mandate of the Community Broadcasters Protection Act of 1999 ("the CPBA") that the Commission "shall act to preserve the service areas of low-power television licensees pending the final resolution of a class A application";[10] (2) arbitrarily subjects their stations to disparate treatment as compared to other stations to which the FCC has extended discretionary protection; and (3) strands significant private investment and years of good-faith efforts by Videohouse and Abacus to secure digital Class A licenses for their facilities.[11] Videohouse and Abacus requested that the Commission allow them and others similarly situated to participate in the reverse auction and to provide protection to them in the repacking process.

On June 19, 2015, the Commission issued an order addressing, among other things, the motions for reconsideration ("Second Order on Reconsideration").[12] In the Second Order on

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[7] *Id.*, ¶¶ 20-21.

[8] *See* Petition for Reconsideration of The Videohouse, Inc., GN Docket No. 12-268 (Sept. 15, 2014); Petition for Reconsideration of Abacus Television, GN Docket No. 12-268 (Sept. 15, 2014).

[9] *See* Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96, § 6403(b)(2) (codified at 47 U.S.C. § 1452(b)(2)), 126 Stat. 156 (2012) ("Spectrum Act").

[10] *See* 47 U.S.C. § 336(f)(1)(D).

[11] *See id.*

[12] *See Secord 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").

Reconsideration, the Commission rejected Videohouse's and Abacus's arguments and denied their motions for reconsideration, principally because adopting their argument would require the Commission to protect 100 additional stations, which would "increase the number of constraints on the repacking process, thereby limiting [the Commission's] repacking flexibility."[13] Yet, at the same time, the Commission extended discretionary protection to a similarly situated group of licensees who had not even filed petitions for reconsideration.[14]

On September 2, 2015, Videohouse, Abacus, WMTM, and KMYA ("Petitioners") filed a petition for reconsideration of the Second Order on Reconsideration.[15] Petitioners argued that (1) the Commission's treatment of out-of-core Class A-eligible stations was based on inaccurate factual premises; and (2) the Commission's treatment of out-of-core Class A-eligible stations was procedurally improper. Petitioners asked the Commission to grant the petition for reconsideration, allow them to participate in the reverse auction, and extend protection to them in the repacking process.

As of December 11, 2015, the Commission had yet to act on Petitioners' petition for reconsideration. The application window for broadcasters to file applications to participate in the reverse auction opened on December 8, 2015 and is scheduled to close on January 12, 2016. After January 12, 2016, Petitioners will be foreclosed from participating in the reverse auction and thus will be unable to "return some or all of their broadcast spectrum usage rights in exchange for incentive payments."[16] In addition, after January 12, 2016, Petitioners will forever

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[13] *Id.*, ¶ 54; *see also* ¶¶ 53-61.

[14] *Id.*, ¶ 62.

[15] *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").

[16] Order, ¶ 1.

lose their existing spectrum rights, as they are likely to be displaced with little chance of securing a replacement channel following the post-auction repack.

ARGUMENT

In determining whether to stay the effectiveness of one of its orders, the Commission applies a four-factor test developed by the courts. Under this test, a petitioner must show that (1) it is likely to prevail on the merits; (2) it will suffer irreparable harm if a stay is not granted; (3) other interested parties will not be substantially harmed if the stay is granted; and (4) the public interest favors granting a stay.[17] All four factors are met here.

I. Petitioners Are Likely To Prevail On The Merits

As explained more fully in the Petition for Reconsideration,[18] Petitioners are likely to prevail on the merits of their claims. Petitioners are likely to prevail because (1) the Commission's treatment of out-of-core Class A-eligible stations was based on inaccurate factual premises; and (2) the Commission's treatment of out-of-core Class A-eligible stations was procedurally and substantively improper.

A. The Commission's Treatment Of Out-Of-Core Class A-Eligible Stations Was Based On Inaccurate Factual Premises.

In the Second Order on Reconsideration, the Commission denied the motions for reconsideration on purported procedural grounds. The Commission took the position that, even though multiple parties advanced the argument that the Commission must protect Class A stations not licensed as of February 22, 2012 (and the Commission rejected that argument), the reconsideration motions should be denied because Petitioners had not raised the same argument

[17] Order, Amendment of Parts 73 and 76 of the Commission's Rules, 4 FCC Rcd 6476, ¶ 6 (1989) (citing *Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958); *Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977)).

[18] *See* Reconsideration Petition at 3-17.

themselves.[19] But this is not a valid reason for denying the motions for reconsideration. The motions were procedurally proper as along as the *facts or arguments* were previously presented to the commission.[20] Whether a *particular individual* presented those same facts or arguments thus is irrelevant. Here, the record is replete with comments filed in response to the Incentive Auction NPRM arguing that the Commission must protect Class A stations not licensed as of February 22, 2012.[21] That is sufficient.[22]

Alternatively, the Commission denied the claims on the rationale that Petitioners were not similarly situated to KHTV-CD, the one out-of-core Class A station granted protection in the Order. But denying the reconsideration motion on these grounds is completely arbitrary. Deference to "the Commission's line-drawing decisions extends only so far as the line-drawing is consistent with the evidence or is not patently unreasonable."[23] The Commission never explained why it was reasonable for the Commission to protect KHTV-CD and the additional stations granted protection in the Second Order on Reconsideration but deny protection to Petitioners' four stations, which were similarly situated to the twelve stations afforded protection. As previously documented, these four stations made significant investments of time and money to comply with the letter and spirit of the Commission's rules.[24] There is no basis for treating Petitioners unequally in this process.

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[19] Second Order on Reconsideration, ¶ 59.

[20] *See* Reconsideration Petition at 4-5.

[21] *Id*. at 4 n.10 & 5.

[22] *See id.*

[23] *Prometheus Radio Project v. FCC*, 373 F.3d 372, 420 (3d Cir. 2004) (citing *Sinclair Broad. Grp., Inc. v. FCC*, 284 F.3d 148, 162 (D.C. Cir. 2002)).

[24] *See* Reconsideration Petition at 6 n.14.

Perhaps most troubling, the Commission relied heavily on its belief that its repacking goals would be hindered if it extended discretionary protection to Class A eligible stations that had not applied for a license to cover by February 22, 2012 because it believed that there were some 100 additional stations that would then need to be accommodated similarly.[25] But despite repeated requests, the Commission has never offered support for this naked factual assertion by identifying these other stations, much less demonstrated how they are similarly situated and intend to participate in the auction.

In fact, the undisputed facts demonstrate that the opposite is true. As Petitioners have previously demonstrated, there are only *four* stations remaining—those of Petitioners'—that were Class A-eligible and have satisfied the deadlines to receive protection during the Spectrum Incentive Auction process.[26] Accordingly, there is zero risk that the Commission might have to provide protection to any additional licensees. There can be no question, then, that the Commission could grant Petitioners protection and accomplish its repacking goals. Indeed, in its Second Order on Reconsideration, the Commission "clarif[ied]" that its discretionary protection extends to "approximately a dozen stations" that had an application for conversion on file as of February 22, 2012.[27] In doing so, the Commission found that although "protecting additional stations will impact our flexibility in the repacking process," there were "significant equities in favor of protecting these stations that outweigh[ed] the limited adverse impact on our repacking flexibility."[28] If the impact of accommodating a dozen stations is "limited," then the impact (if any) of providing protection for four similarly situated stations must be negligible. There is no

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[25] *See* Order, ¶ 232; Second Order on Reconsideration, ¶ 54 & nn.177, 222, 224.

[26] *See* Reconsideration Petition at 9-10.

[27] *See* Second Order on Reconsideration, ¶ 62, n. 226.

[28] *See id*. ¶¶ 61-62, nn.224, 226.

legitimate reason why the Commission can protect the twelve stations, but not Petitioners' *four* similarly situated stations. The same equities demand protection of Petitioners' four stations.

B. The Commission's Treatment Of Out-Of-Core Class A-Eligible Stations Was Procedurally And Substantively Improper.

The FCC's decision with respect to out-of-core Class A-eligible stations also violated the Administrative Procedure Act's separate mandate that administrative agencies afford similarly situated parties equivalent treatment.[29] In the Second Order on Reconsideration, the FCC afforded protection to all Class A-eligible stations that had a Class A conversion application pending or granted as of February 22, 2012—even though none of those parties filed timely petitions for reconsideration requesting such relief and many never requested protection at all. At the same time, the FCC faulted Videohouse and Abacus (as well as WMTM's predecessor) for failing to raise the arguments presented in their filings earlier in the proceeding.[30] Moreover, the Commission continued to rely on a backward-looking date (February 22, 2012) that has no apparent legal or factual significance or relation to the forthcoming auction and of which the broadcasters were previously unaware. The Commission offered no explanation for this disparate treatment—let alone one that "explain[s] the relevance of those differences to the purposes of the Federal Communications Act."[31]

Indeed, in the Second Order on Reconsideration, the Commission went out of its way to extend protection to the twelve stations that had not even sought protection. Although it "den[ied]" the earlier petitions for reconsideration of Videohouse and Abacus, the Commission significantly changed the course charted in the Order by extending discretionary protection to

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[29] *See, e.g.*, *Independent Petroleum Ass'n of Am.*, 92 F.3d at 1260; *McElroy Elec. Corp.*, 990 F.2d at 1365; *Melody Music, Inc. v. FCC*, 345 F.2d at 732-33.

[30] *See, e.g.*, Second Order on Reconsideration, ¶¶ 53 n.183, 54, 59.

[31] *Melody Music*, 345 F.2d at 733.

additional stations licensed to parties that did not seek reconsideration.[32] This action went well beyond any reasonable interpretation of "granting" or "denying" the petitions for reconsideration related to out-of-core Class A-eligible LPTV stations. It was patently unreasonable for the Commission to bend the procedural rules to provide protection to stations that had never sought such relief, but deny the meritorious petitions for reconsideration.

II. <u>The Balance Of Harms And The Public Interest Support A Stay.</u>

Movants easily satisfy the remaining three factors necessary to obtain a stay. *First*, Movants will suffer irreparable harm if a stay is not granted. As the Commission has made clear, "[t]he auction presents a once-in-a-lifetime opportunity for broadcasters."[33] 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."[34] Millions of dollars are at stake for Movants.

But if Movants 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 process. Worse still, without protection from the Commission, Movants will forever lose their existing spectrum rights, as they are likely to be displaced with little chance of securing a replacement channel following the post-auction repack, along with the millions of past investment dollars. Indeed, Movants have already expended millions of dollars building out their stations and transitioning from analog to digital in compliance with FCC rules and regulations. A stay until the merits of Petitioners' claims are resolved would ensure that Movants can take part in this "once-in-a-lifetime opportunity."

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[32] Second Order on Reconsideration, ¶¶ 53, 62.

[33] Order, ¶ 3.

[34] *Id.*, ¶ 1.

Second, other interested parties will not suffer if the stay is granted. Movants do not seek to stop the auction from starting on March 29, 2016. On the contrary, Movants seek to participate in the auction on the same terms as everyone else. Movants thus request two alternative forms of relief to that end—extending the deadline for Movants to file applications to participate in the reverse auction pending resolution of the Reconsideration Petition (and any judicial review thereof) or, alternatively, requiring the Commission to accept applications by Movants to participate in the reverse auction pending resolution of the Reconsideration Petition (and any judicial review thereof). Both requests for relief will impose few, if any, burdens on interested parties.

Finally, the public interest will benefit if a stay is granted. Prohibiting Movants from participating in the reverse auction and denying them protection will not further the goals of Congress and the Commission. 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."[35] Moreover, by encouraging "[p]ayments to broadcasters that participate in the reverse auction," the Commission can "strengthen broadcasting by funding new content, services, and delivery mechanisms."[36] 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."[37] All these goals would be furthered by allowing Movants to participate in the reverse auction and by granting them

[35] *Id.*

[36] *Id.*

[37] *Id.*

protection in the repacking process. There is no question that the public interest supports this motion for a stay.

CONCLUSION

For the foregoing reasons, the Commission should extend the deadline for Movants to file applications to participate in the reverse auction pending the Commission's disposition of the Reconsideration Petition (and judicial review thereof). Alternatively, the Commission should allow Movants to participate in the reverse auction as currently scheduled, including submitting an application in the window set to close on January 12, 2016, and extend protection to Movants pending the Commission's disposition of the Reconsideration Petition (and judicial review thereof).

Movants will consider this motion denied if the Commission takes no action by December 18, 2015.

Dated: December 11, 2015

Respectfully submitted,

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