

LATINA BROADCASTERS OF DAYTONA BEACH, LLC

December 31, 2015

VIA ELECTRONIC FILING

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions, GN Docket No. 12-268

Dear Ms. Dortch:

Latina Broadcasters of Daytona Beach, LLC, (“Latina” or the “Licensee”), licensee of Station WDYB-CD, Daytona Beach, Florida (Facility ID No. 41375) (“WDYB”) hereby submits these Informal Comments pursuant to Section 1.1206 of the Commission’s rules.

In the Incentive Auction *Report and Order*,¹ the FCC restricted the eligibility of certain Class A-eligible stations that had not yet licensed Class A digital facilities as of February 22, 2012 to participate in the Incentive Auction and/or receive protection in the subsequent repacking. Specifically, the Commission declined to protect “stations that are eligible for a Class A license but that did not file an application for such license until after February 22, 2012, even if the application is granted before the auction.” The Commission made a single exception for KHTV-CD.² Although Latina was unable to seek reconsideration of the *Report and Order* because of the pending reconsideration of an order denying WDYB’s Class A license application, Latina filed a partial opposition in the reconsideration proceeding urging the Commission to afford protection to Class A stations similarly-situated with KHTV-CD and setting forth specific facts supporting the extension of protection to WDYB.³

On June 19, 2015, the FCC released its *Second Order on Reconsideration*, in which the Commission exercised its discretion to protect additional Class A stations whose in-core digital facilities were not licensed by February 22, 2012.⁴ Specifically, the Commission agreed to protect “stations in addition to KHTV-CD that hold a Class A license today and that had an

¹ *Expanding the Economic and Innovation Opportunities for Spectrum Through Incentive Auctions*, Report and Order, 29 FCC Rcd. 6567 (2014) (the “*Report and Order*”).

² *Id.* ¶ 224.

³ *See* Latina Broadcasters of Daytona Beach, LLC, *Partial Opposition to Petitions for Reconsideration of Abacus Television and The Videohouse, Inc.*, GN Docket No. 12-268 (filed Nov. 12, 2014) (“*Latina Opposition*”).

⁴ *Expanding the Economic and Innovation Opportunities for Spectrum Through Incentive Auctions*, Second Order on Reconsideration, 30 FCC Rcd. 6746 (2015) (the “*Second Reconsideration Order*”). Although the Commission denied Latina’s opposition on procedural grounds, it considered the opposition as an informal comment. *Id.* ¶ 53 n. 183.

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application for a Class A construction permit pending or granted as of February 22, 2012.”⁵ In support of its decision, the FCC explained that: (1) “[b]y filing an application for a Class A construction permit prior to February 22, 2012, each of these stations documented efforts prior to passage of the Spectrum Act to remove their secondary status and avail themselves of Class A status”; and (2) “prior to the enactment of the Spectrum Act, such stations had certified in an application filed with the Commission that they were operating like Class A stations.”⁶

Four licensees—The Videohouse, Inc., Abacus Television, WMTM, LLC, and KMYA, LLA (“Petitioners”)—sought reconsideration of the *Second Reconsideration Order*.⁷ Although Latina takes no position with regard to the specific circumstances of each of the Petitioners, given that Petitioners have invoked the Commission’s decision to extend protection to WDYB in support of their assertions that the Commission unreasonably discriminated against them,⁸ Latina is compelled to submit the following for the record:

First, the propriety of the FCC’s extension of auction eligibility and repack protection to WDYB is not properly before the Commission. The Commission’s decision with respect to WDYB was not questioned or even mentioned by Petitioners in their Petition for Reconsideration. In fact, Petitioners requested that the Commission reconsider *only* the portion of the *Second Reconsideration Order* in which the Commission refused to extend protection to the stations licensed to Petitioners.⁹ It would contravene due process and the Administrative Procedure Act for the FCC to take any action adverse to WDYB in response to Petitioners’ request. Notice and an opportunity to be heard are fundamental tenets of both administrative procedure and due process,¹⁰ and a Petition for Reconsideration seeking independent relief offers no indication that the Commission’s decision with respect to WDYB would be under consideration.

⁵ *Id.*

⁶ *Id.*

⁷ See The Videohouse, Inc., et al., *Petition for Reconsideration*, GN Docket No. 12-268 (filed Sept. 2, 2015) (“*Videohouse Petition for Reconsideration*”).

⁸ See Letter from Thomas R. McCarthy to Marlene Dortch, Secretary, FCC, GN Docket No. 12-268 at 2-3 (filed Dec. 23, 2015); Emergency Petition for Writ of Mandamus, *In re The Videohouse, Inc.*, 14-1486 (D.C. Cir. filed Dec. 22, 2015); Reply in Support of Emergency Petition for Writ of Mandamus, *In re The Videohouse, Inc.*, 14-1486 at 2 (D.C. Cir. filed Dec. 29, 2015) (“Mandamus Reply”).

⁹ *Videohouse Petition for Reconsideration* at 18.

¹⁰ See *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 546 (1985) (“The essential requirements of due process . . . are notice and an opportunity to respond. The opportunity to present reasons, either in person or in writing, why proposed action should not be taken is a fundamental due process requirement.”); *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (“The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner.”) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)); *Riverbend Farms, Inc. v. Madigan*, 958 F.2d 1479, 1486 (9th Cir. 1992) (“It is a fundamental tenet of the APA that the public must be given some indication of what the agency proposes to do so that it might offer meaningful comment thereon.”).

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Second, the Commission had ample authority to extend protection to WDYB in the *Second Reconsideration Order*. In the *Report and Order*, the FCC concluded that the Spectrum Act does not preclude it from exercising discretionary protection over which stations to protect, subject to the “statutory floor.”¹¹ The extension of protection to additional stations in the *Second Reconsideration Order* was a reasonable exercise of the Commission’s discretion.¹²

Third, the FCC’s decision to protect Latina and other similarly-situated broadcasters was not arbitrary. As explained above, the Commission had a valid reason for including certain broadcasters and not others; specifically, that the broadcasters that were extended discretionary protection had certified prior to February 22, 2012, that they were operating like Class A stations. Although there may have been other valid reasons to protect the Petitioners, this does not detract from the fact that the Commission’s exercise of its discretion with respect to WDYB was reasonable.

Fourth, Latina strongly disputes the suggestion made by Petitioners in these recent filings that the Commission erred by including WDYB in the protected class. As even Petitioners admit, the licensee of WDYB obtained in-core Class A construction permits on two separate occasions prior to February 22, 2012.¹³ In each filing, the licensee of WDYB certified that the station was operating “like a Class A station,” precisely the criteria that the FCC established in the *Second Reconsideration Order* for extending discretionary protection.

Finally, lest there be any doubt, WDYB has already made record of the fact that its circumstances compare favorably to those of the Petitioners and are more like those of KHTV-CD.¹⁴ In addition to having certified prior to February 22, 2012, that it was operating like a Class A station, WDYB also commenced in-core operations before the Petitioners’ stations did; applied for its in-core license before the Petitioners’ stations did; received its in-core license before the Petitioners’ stations did; and filed a valid Class A application before the Petitioners’ stations did.

¹¹ *Report and Order* ¶ 191.

¹² *See Cellco P’ship v. F.C.C.*, 700 F.3d 534, 541 (D.C. Cir. 2012) (“[The Communications Act] affords the Commission ‘broad authority to manage spectrum . . . in the public interest.’”) (quoting *Data Roaming Order*, 26 F.C.C.R. at 5440 ¶ 62) (alteration in original); *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 866, 104 S. Ct. 2778, 2793, 81 L. Ed. 2d 694 (1984) (“When a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency’s policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail. In such a case, federal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do.”).

¹³ *See* FCC File Nos. BLTTA-20010712ABL; BDISTTA-20060922ACY; Mandamus Reply at 4 n.2 (acknowledging that “WDYB-CD in Daytona Beach, Florida (currently licensed to Latina Broadcasters) had obtained in-core Class A permits several years ago”).

¹⁴ *See* Latina Opposition at 5-7.

