

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

In the Matter of

Expanding the Economic and
Innovation Opportunity of
Spectrum Through Incentive
Auctions

GN Docket No. 12-268

**LATINA BROADCASTERS OF DAYTONA BEACH, LLC'S
EMERGENCY MOTION FOR STAY AND OTHER RELIEF**

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Latina Broadcasters of Daytona Beach, LLC (“Latina”) respectfully requests that the Commission stay its Order on Reconsideration released February 12, 2016¹ pending judicial review in the United States Court of Appeals for the D.C. Circuit (“DC Circuit”), pursuant to Latina’s Petition for Review filed on February 19, 2016.² In the alternative, Latina requests that the Commission stay the broadcast television spectrum incentive auction, scheduled to commence on March 29, 2016, pending judicial review of the *February 12 Order*.

Because of the short period between the issuance of the *February 12 Order* and the commencement of the auction on March 29, 2016, Latina will consider this Motion denied if the Commission takes no action by February 24, 2016, and will then seek appropriate judicial relief.

PRELIMINARY STATEMENT

Latina, which operates WDYB-CD in Daytona Beach, Florida, is owned by Nora Crosby Soto, a Hispanic woman who invested her own money to form a broadcast company to serve the Latino community. Latina timely filed an application for WDYB to participate in the incentive auction (“WDYB Application”) prior to the January 12, 2016 reverse auction application deadline. However, on February 12, 2016, the FCC released the *February 12 Order*, and sent a status letter to Latina advising that the WDYB Application was “rejected because [WDYB] is not eligible to participate in” the incentive auction.³ This occurred without any formal notice to Latina that the FCC was even *considering* reversing Latina’s prior inclusion in the reverse auction and repacking. Indeed, prior to its *February 12 Order*, the FCC indicated on no less than seven occasions over

¹ *Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, Order on Reconsideration, GN Docket No. 12-268 ¶ 24 (rel. Feb. 12, 2016) (“*February 12 Order*”).

² Petition for Review, *Latina Broad. v. FCC*, No. 16-1065 (D.C. Cir. filed Feb. 19, 2016).

³ See Letter from FCC to Latina Broadcasters of Daytona Beach, LLC re: Application of Latina Broadcasters of Daytona Beach, LLC for Auction 1001 (Feb. 12, 2016), attached as Ex. A.

the past nine months—including as recently as a month and a half ago—that WDYB *was* eligible to participate in the auction and receive protection in the repacking process. There were no changes in the facts over these nine months to justify the FCC’s about-face. Moreover, no party had even *asked* the FCC to reconsider Latina’s participation.

Given the proximity of the FCC’s action on February 12 to the commencement of the reverse auction on March 29—only 31 business days later—Latina has no choice but to file this Emergency Motion. Absent the relief Latina is seeking, the auction will commence without Latina. If that were to occur, not only would Latina be denied the opportunity to participate, but its spectrum usage rights would be gravely endangered, as WDYB faces a severe risk of displacement with no guarantee of securing a replacement channel following the post-auction repack.

Therefore, Latina requests that the FCC stay its *February 12 Order* and reinstate Latina’s timely filed Form 177 application to participate in the Incentive Auction, pending judicial review. In the alternative, Latina requests that the FCC delay the start of the auction until judicial review of the *February 12 Order* and related matters has concluded.

The primary relief Latina is seeking—a provisional reinstatement of the WDYB Application—is consistent with the FCC’s earlier recognition of the need to preserve the status quo for stations whose auction eligibility is in dispute. In the *Incentive Auction Order*, the FCC determined that a station that was at one time eligible to participate in the auction, but is subject to a license validity proceeding or downgrade order may participate in the auction, subject to the results of any appeal.⁴ The FCC reasoned that “this approach ensures that we do not unfairly deny

⁴ *Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, Report and Order, 29 FCC Rcd. 6567 ¶ 363 (2014) (“*Incentive Auction Order*”), *aff’d*, *Nat’l Assoc. of Broad. v. FCC*, 789 F.3d 165 (D.C. Cir. 2015).

reverse auction eligibility to a broadcaster that might prevail in its challenge.”⁵ Although WDYB is subject to reclassification of its auction status rather than a license validity proceeding or downgrade order, the effect is the same—removal of WDYB’s eligibility to participate in the auction and receive protection in the repack. Because the order reclassifying WDYB’s status is still subject to judicial review, removing WDYB from the auction now would be premature.

Moreover, staying the *February 12 Order*, reinstating the WDYB Application, and preserving Latina’s ability to participate in the auction or receive a protected channel in the repack properly balances Latina’s interest in preserving a viable remedy and the interest of the FCC and other interested parties in commencing the auction on March 29, 2016. Once the auction begins, it will be impossible for the court or the FCC to provide a proper remedy to Latina. The descending clock structure that the FCC adopted in the *Incentive Auction Order* and subsequent public notices is premised on the concept that the auction will begin with a discrete number of participants that can become only smaller as the auction proceeds.⁶ Thus, if Latina were to prevail after March 29, 2016, either it would have no remedy, or the FCC would need to restart the auction.⁷

In contrast to the grave and imminent harm that Latina faces if the auction were to proceed in its absence, permitting a single additional station to provisionally participate in the auction

⁵ *Id.* ¶ 364 (citing comments that “precluding reverse auction participation” before the “order becomes final and non-reviewable would effectively cut off a ... station’s appeal rights”).

⁶ See generally *Incentive Auction Order* ¶¶ 449-55 (describing the bidding process).

⁷ The FCC has, at best, limited authority to restart the auction. First, the authorizing statute permits the FCC to conduct only a single reverse auction. See 47 U.S.C. § 1452(a)(1) (directing the FCC to “conduct *a* reverse auction”) (emphasis added). After the auction begins, the FCC would have no authority to conduct an additional auction. Second, Congress directed the FCC to “take all reasonable steps necessary to protect the confidentiality of FCC-held data of a licensee participating in the reverse auction.” See *id.* § 1452(a)(3). The FCC, in turn, has agreed to “protect confidential information pertaining to unsuccessful bids until two years after the effective date.” *Incentive Auction Order* ¶ 386. It would be difficult, if not impossible, for the FCC to restart the auction without divulging confidential information about a station’s participation in the auction.

would cause either no or *de minimis* disruption. As noted above, the FCC has already contemplated allowing stations to participate in the auction while their eligibility is subject to review. In addition, the FCC has already released sets of data files and calculated opening prices based on the assumption that WDYB *would be eligible* to participate in the auction. Thus, it is difficult to envision any harm that would be suffered by staying the *February 12 Order*, preserving the *status quo ante*, and provisionally extending auction eligibility and repacking protection to WDYB pending completion of judicial review.

A stay—of the *February 12 Order*, or the auction as a whole—is the appropriate vehicle for ensuring that Latina receives meaningful judicial review here. Indeed, the Commission recognized as much last week in its filing in the DC Circuit in *In re Videohouse*.⁸

BACKGROUND

WDYB License History

In 1999, WDYB’s prior licensee timely filed a Certification of Eligibility for Class A status.⁹ On January 16, 2001, the licensee applied for a construction permit (“CP”) to move the station to channel 28, which would allow it to perfect its Class A status.¹⁰ On July 12, 2001, the licensee filed an application to “cover displacement application for construction permit for Class

⁸ See Opposition of Respondents to Petitioners’ Emergency Motion for Expedited Consideration and for an Expedited Briefing Schedule, at 2, *Videohouse, Inc. v. FCC*, No. 16-1060 (D.C. Cir. filed Feb. 19, 2016) (“*FCC Expedition Opposition*”) (“While petitioners claim that they ‘will suffer irreparable injury if they are excluded from the reverse auction’ (Mot. 18), the traditional vehicle for seeking relief in that situation is a stay pending judicial review.”).

⁹ *Certificates of Eligibility for Class A Television Station Status*, 15 FCC Rcd. 9480 (2000).

¹⁰ FCC File No. BPTTL - 20010116AHW, available at http://licensing.fcc.gov/cgi-bin/ws.exe/prod/cdbs/forms/prod/prefill_and_display.pl?Application_id=550571&Service=CA&Form_id=346&Facility_id=41375.

A facilities,” which included certifications applicable to Class A stations.¹¹ On January 17, 2002, the FCC granted the application, issuing a document labeled “Class A Television Broadcast Station License.” On September 22, 2006, the licensee filed a new application, again making Class A certifications and further stating that “the station has been fully operational and fully compliant with the FCC rules concerning Class A operation.”¹² On December 2, 2008, the FCC granted the second Class A application.

In November 2010, Latina purchased WDYB, and, in February 2011, filed for a CP to construct in-core channel 14.¹³ As instructed by the Media Bureau, Latina filed its application on a low power station form, and was informed by that Bureau that it would be able to convert the facility to Class A status when it filed a license application.¹⁴ In November 2012, Latina filed for its license and application to convert to Class A status.¹⁵ On October 23, 2014, the Media Bureau issued a Class A license.¹⁶ On November 12, 2014, Latina then filed a “partial opposition” in the

¹¹ FCC File No. BLTTA - 20010712ABL *available at* http://licensing.fcc.gov/cgi-bin/ws.exe/prod/cdbs/forms/prod/prefill_and_display.pl?Application_id=573602&Service=CA&Form_id=4&Facility_id=41375.

¹² FCC File No. BDISTTA - 20060922ACY *available at* http://licensing.fcc.gov/cgi-bin/ws.exe/prod/cdbs/forms/prod/prefill_and_display.pl?Application_id=1150459&Service=CA&Form_id=401&Facility_id=41375.

¹³ FCC File No. BDISDTL-20110215ACR *available at* http://licensing.fcc.gov/cgi-bin/ws.exe/prod/cdbs/forms/prod/prefill_and_display.pl?Application_id=1418026&Service=LD&Form_id=346&Facility_id=41375.

¹⁴ *See Feb. 12 Order* at 20 (Pai dissenting) (explaining that stations were advised by FCC staff not to file Class A application on Form 302-CA in 2011).

¹⁵ FCC File No. BLDTA-20121115ACK *available at* http://licensing.fcc.gov/cgi-bin/ws.exe/prod/cdbs/forms/prod/prefill_and_display.pl?Application_id=1520361&Service=DC&Form_id=4&Facility_id=41375.

¹⁶ *See* FCC File No. BLDTA-20121115ACK, *available at* http://licensing.fcc.gov/cgi-bin/ws.exe/prod/cdbs/pubacc/prod/app_det.pl?Application_id=1520361.

Incentive Auction docket seeking auction eligibility.¹⁷

WDYB Eligibility for Auction and Repacking

On February 22, 2012, the Spectrum Act became law, and directed the FCC to conduct a voluntary incentive auction of television spectrum by 2022.¹⁸ The Spectrum Act allows the FCC to reallocate portions of spectrum by moving stations to different channels, but the agency must make “all reasonable efforts” to preserve the coverage area and population served of each television licensee (“repacking”).¹⁹ On June 2, 2014, the FCC released its Report and Order implementing the Spectrum Act.²⁰ The FCC interpreted the legislation to require protection of stations that were licensed or had license applications pending as of February 22, 2012, but noted that it had discretion to protect additional facilities.²¹ Generally, the FCC did not protect previously out-of-core Class A eligible stations that obtained in-core channels before February 22, 2012.²² It made a single exception for KHTV-CD.

The *Second Order on Reconsideration*, released June 19, 2015, included a *Declaratory Ruling* extending auction eligibility and repacking protection to “stations in addition to KHTV-CD that hold a Class A license today and that had an application for a Class A construction permit

¹⁷ 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 (Nov. 12, 2014), available at <http://apps.fcc.gov/ecfs/document/view?id=60000982302> (“*Partial Opp’n*”).

¹⁸ Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. 112-96 § 6403 (the “Spectrum Act”), codified at 47 U.S.C. § 1452.

¹⁹ 47 U.S.C. § 1452(b)(2).

²⁰ *Incentive Auction Order*.

²¹ *Id.* ¶ 191.

²² *Id.* ¶¶ 20-21, 232-35.

pending or granted as of February 22, 2012.”²³ The FCC reasoned 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.”²⁴ WDYB met both of these criteria.

Thereafter, on at least seven occasions, the FCC affirmed that WDYB was among those stations protected under the *Declaratory Ruling*:

- The FCC’s June 9, 2015 list of all “station facilities eligible for protection in the repacking process and relinquishment in the reverse auction” included WDYB.²⁵
- Officials from the FCC’s Incentive Auction Task Force, Media Bureau, and Office of General Counsel confirmed to Latina’s counsel in a June 11, 2015 meeting that the June 9 list reflected the staff’s recommendation.²⁶
- On June 30, 2015 (following the release of the *Declaratory Ruling*), the FCC included WDYB in its “baseline data of the coverage area and population served to be protected in the repacking process of all full power and Class A television stations eligible for protection in the repacking process and participation in the incentive auction.”²⁷ Any changes to the list would be “based on corrections from any ‘Petition for Eligible Entity Status’ and any corrected data from the Pre-Auction Technical Certifications.”
- The FCC’s October 15, 2015 “final digital television baseline coverage area and

²³ *Expanding the Economic and Innovation Opportunities for Spectrum Through Incentive Auctions*, Second Order on Reconsideration, 30 FCC Rcd. 6746 at ¶ 53 (2015) (“*Declaratory Ruling*”).

²⁴ *Id.*

²⁵ *Media Bureau Announces Incentive Auction Eligible Facilities & July 9, 2015 Deadline for Filing Pre-Auction Tech. Certification Form*, Public Notice, 30 FCC Rcd. 6153 (rel. June 9, 2015).

²⁶ See Letter from Joan Stewart, *et al.*, to Marlene Dortch, Secretary, FCC, GN Docket No. 12-268 and AU Docket No. 14-252 (June 12, 2015).

²⁷ *Office of Eng’g & Tech. Releases Final Version of TV Study & Releases Baseline Coverage Area & Population Served Info. Related to Incentive Auction Repacking*, Public Notice, 30 FCC Rcd. 6964 (rel. June 30, 2015).

population served information related to ... repacking,” included WDYB.²⁸

- The FCC’s October 16, 2015 auction opening prices included pricing for WDYB.²⁹
- The FCC’s November 12, 2015 opening prices baseline coverage data included WDYB.³⁰
- On December 28, 2015, the FCC filed a brief with the D.C. Circuit, confirming that WDYB was “[o]ne of those stations” to which the FCC extended discretionary protection in the *Declaratory Ruling*.³¹

As a result of these representations, Latina invested in the future of WDYB.³²

Nevertheless, in spite of its representations and without providing Latina any formal notice that it might reconsider WDYB’s status, on February 12, 2016, the FCC released its *February 12 Order*, stripping WDYB of its eligibility to participate in the reverse auction set to begin 31 business days later, and its protection in the repack.³³ On February 19, 2016, Latina filed a Petition for Review in the D.C. Circuit.

²⁸ *Application Procedures for Broad. Incentive Auction Scheduled to Begin on Mar. 29, 2016 Tech. Formulas for Competitive Bidding*, Public Notice, DA 15-1183, 30 FCC Rcd. 11034 (rel. Oct. 15, 2015).

²⁹ *Incentive Auction Task Force & Wireless Telecom. Bureau Release Opening Bid Prices for Reverse Auction*, Public Notice, DA 15-1191, 30 FCC Rcd. 11358 (rel. Oct. 16, 2015).

³⁰ *Incentive Auction Task Force Releases Revised Baseline Data & Prices for Reverse Auction; Announces Revised Filing Window Dates*, Public Notice, DA 15-1296, 30 FCC Rcd. 12559 (rel. Nov. 12, 2015).

³¹ See FCC Opp. to Emergency Petition for Writ of Mandamus, *In re Videohouse*, 14-1486, at 7-8 & n.2, (D.C. Cir. filed Dec. 28, 2015) (the “*FCC Mandamus Opposition*”).

³² See Letter from Nora Crosby Soto to Marlene H. Dortch, GN Docket No. 12-268 (Jan. 30, 2016), available at <http://apps.fcc.gov/ecfs/comment/view?id=60001388677> (detailing actions by Latina in reliance on FCC’s representations).

³³ *Feb. 12 Order* ¶ 24.

ARGUMENT

I. THE FCC SHOULD STAY ITS *FEBRUARY 12 ORDER*, OR, ALTERNATIVELY, THE AUCTION, SO THAT LATINA MAY OBTAIN JUDICIAL REVIEW AND NOT BE DEPRIVED OF THE ABILITY TO PARTICIPATE IN THE AUCTION AND REPACKING

The FCC will stay an order when a party shows that: (1) it is likely to prevail on the merits of its challenge; (2) it will suffer irreparable harm in the absence of a stay; (3) a stay will not injure other parties; and (4) a stay is in the public interest.³⁴ “No single factor is dispositive.”³⁵ However, the circumstances here satisfy all four factors, justifying a stay.

A. Latina Will Likely Prevail on the Merits

1. The FCC Improperly Removed WDYB’s Eligibility, Without Any Formal Request, Notice, or Opportunity to Be Heard

Fundamentally, due process requires notice and an opportunity to be heard.³⁶ The Administrative Procedure Act (“APA”) requires agencies to provide notice of proposed rules in the Federal Register and “give interested persons an opportunity to participate in the rule-making through submission of written data, views, or arguments.”³⁷ An agency’s final rules may differ from the proposed rules only when the final rules are a “logical outgrowth.”³⁸ 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.”³⁹

³⁴ *WMATA v. Holiday Tours*, 559 F.2d 841, 843 (D.C. Cir. 1977); *Review of Part 87 of the Commission’s Rules Concerning the Aviation Radio Service*, 26 FCC Rcd 685, 686-87 ¶ 5 n.16 (2011).

³⁵ *Id.*; *AT&T Corp. v. Ameritech Corp.*, 13 FCC Rcd 14508, 14515 ¶ 14 (1998).

³⁶ *Cleveland Bd. Of Ed. v. Loudermill*, 470 U.S. 532, 546 (1985).

³⁷ 5 U.S.C. § 553(b).

³⁸ *See United Steelworkers, AFL-CIO-CLC v. Marshall*, 647 F.2d 1189, 1221 (D.C. Cir. 1980); *Omnipoint Corp. v. FCC*, 78 F.3d 620, 631 (D.C. Cir. 1996).

³⁹ *Arizona Pub. Serv. Co. v. EPA*, 211 F.3d 1280, 1299 (D.C. Cir. 2000).

The FCC provided no notice that the protection of WDYB was under reconsideration. In fact, before the *February 12 Order*, the FCC had affirmed WDYB’s eligibility to participate in the auction and repacking on at least seven occasions over the past nine months, including, most recently, on December 28, 2015.⁴⁰ The FCC never issued a show cause order or provided any formal notice to Latina that it was even considering removal of WDYB from the auction and repacking. The first formal notice Latina received was the *February 12 Order*, removing WDYB from the auction and repacking. This was particularly surprising since the reconsideration petition that led to the *February 12 Order* did not request reconsideration of Latina’s eligibility.

As a result, the Commission’s removal of Latina without any formal notice or opportunity to be heard deprived Latina of due process.

In addition, because the Commission held in the *February 12 Order* that the petitioners’ claims were “procedurally improper,”⁴¹ it lacked a procedural vehicle for even considering—much less taking—substantive action against Latina.⁴² Moreover, the 30-day period for the FCC’s *sua sponte* reconsideration of the *Discretionary Order*, in which the FCC stated its intent to protect WDYB and other similarly situated stations, expired in September 2015.⁴³

For these reasons, the FCC’s action against Latina was procedurally improper.

2. The FCC Unjustifiably Discriminates Against Latina By Excluding WDYB While Including KHTV

The Commission must exercise its discretion in a fair manner that does not result in

⁴⁰ *Supra*, pp. 7-8 & notes 25-31.

⁴¹ *Feb. 12 Order* ¶ 8

⁴² *Id.* at 20 (Pai dissenting).

⁴³ *See* 47 C.F.R. § 1.108.

disparate treatment of any licensee.⁴⁴ The APA mandates that administrative agencies afford similarly situated parties equivalent treatment.⁴⁵

There is no rational basis for including KHTV in the auction and repacking while excluding WDYB. The relevant circumstances of the two stations are entirely analogous. Neither station had Class A status as of February 22, 2012. Both stations had filed an application for a Class A construction permit that had been granted as of that date. Both stations certified their compliance with the Class A rules on a Class A application filed before February 22, 2012. Because neither station's application was active as of February 22, 2012 or sufficient to support the granting of a Class A license at that juncture, both stations had to file a new Form 302-CA, and both stations did so *after* February 22, 2012.⁴⁶ As a result, each station's final Class A status was granted after February 22, 2012. Thus, the FCC's suggestion that "Latina was not pursuing Class A status before the Commission as of February 22, 2012"—even though Latina had pursued such status *before* that date—does not distinguish it from KHTV, which did not file for Class A status until after February 22, having filed only an LPTV license application (form 347) on February 17, 2012.

Apparently recognizing that the circumstances involving KHTV and WDYB are analogous, the FCC belatedly attempts to offer an arbitrary, new standard for including KHTV while excluding WDYB by contending that "WDYB-CD did not have an application for a Class A authorization pending or granted as of February 22, 2012."⁴⁷ The only difference, however, was that WDYB's application had been granted and the underlying construction permit had expired

⁴⁴ *Melody Music v. FCC*, 345 F.2d 730 (D.C. Cir.1965) (finding FCC must provide adequate explanation for different treatment of licensees);

⁴⁵ *See Independent Petrol. Ass'n v. Babbitt.*, 92 F.3d 1248, 1260 (D.C. Cir. 1996); *McElroy Elec. Corp. v. FCC*, 990 F.2d 1351, 1365 (D.C. Cir. 1993); *Melody Music*, 345 F.2d at 732-33.

⁴⁶ *Feb. 12 Order* at 19 (Pai dissenting).

⁴⁷ *Id.* ¶ 20.

before that date, while KHTV’s had not been granted, and never would have been granted because KHTV’s underlying construction permit had already been dismissed as ungrantable. The FCC’s position seems to be that it was better to file an application that could never be granted (KHTV) than to file an application that *was* granted (WDYB)—essentially rewarding the less diligent party. Both stations had to file a new Form 302-CA to get their Class A licenses, and both did so after February 22, 2012.

By maintaining protection for KHTV while removing it for WDYB, the FCC improperly treated two similarly situated stations differently.⁴⁸ As Commissioner Pai concluded in dissent, “[T]here is no meaningful distinction between the two stations’ circumstances.”⁴⁹

Because the undisputed facts confirm that the Commission’s disparate treatment of WDYB was arbitrary and capricious, Latina will likely prevail in court on its petition for review.⁵⁰

3. Because the FCC Repeatedly Represented that Latina was Eligible for Auction and Repacking, Latina Reasonably Relied on these Representations and the FCC is Estopped from Excluding Latina at this Late Juncture

To apply equitable estoppel against the government, a party must show that (1) “there was a ‘definite’ representation to the party claiming estoppel,” (2) the party “relied on its adversary’s conduct in such a manner as to change his position for the worse,” (3) the party’s “reliance was

⁴⁸ See *FCC v. Fox TV Stats.*, 556 U.S. 502, 516 (2009) (noting “a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy”).

⁴⁹ *Feb. 12 Order* at 18.

⁵⁰ *Transactive Corp. v. United States*, 91 F.3d 232, 237 (D.C. Cir. 1996) (“A long line of precedent has established that an agency action is arbitrary when the agency offered insufficient reasons for treating similar situations differently.”); *Airmark Corp. v. FAA*, 758 F.2d 685, 691 (D.C. Cir. 1985) (“Deference to agency authority or expertise” “is not a license to ... treat like cases differently.”) (citation omitted); *Local 777 v. NLRB*, 603 F.2d 862, 872 (D.C. Cir. 1978) (noting agency “cannot, despite its broad discretion, arbitrarily treat similar situations dissimilarly”).

reasonable” and (4) the government “engaged in affirmative misconduct.”⁵¹ The fourth factor can be established by a showing that government agents engaged in “misrepresentation or concealment,” or behavior that “ha[s] or will cause an egregiously unfair result.”⁵²

The FCC made at least seven “definite” representations,⁵³ beginning on June 9, 2015, when it included WDYB on its “complete list of all Class A and full power station facilities eligible for protection in the repacking process and relinquishment in the reverse auction,”⁵⁴ and then on June 30, when it included WDYB in “baseline data of coverage area and population served to be protected in the repacking process.”⁵⁵ In its *February 12 Order*, the FCC claims that its list wasn’t final, and could be impacted by “pending reconsideration petitions” and “the possibility of revisions to the baseline data.”⁵⁶ However, the language of the June 9 and June 30 notices contemplated the possibility of only *adding* stations that successfully petitioned for inclusion, not removing those stations already included. The FCC on June 9 said that the list was “*intended to represent a complete list* of all Class A and full power station facilities eligible for protection in the repacking process and relinquishment in the reverse auction,” and that only if “a licensee believes that the Appendix *omits* an eligible facility” should it file a petition by July 9, 2015.⁵⁷ Because WDYB was already included, there was no reason or basis for Latina to petition.

⁵¹ *Morris Communicats. Corp. v FCC*, 566 F.3d 184, 191 (D.C. Cir. 2009) (quoting *Graham v. SEC*, 222 F.3d 994, 1007 (D.C. Cir. 2000)).

⁵² *GAO v. Gen. Acct’g Off. Pers. App. Bd.*, 698 F.2d 516, 526 (D.C. Cir. 1983).

⁵³ *Supra*, pp. 7-8 & notes 25-31.

⁵⁴ *Media Bureau Announces Incentive Auction Eligible Facilities & July 9, 2015 Deadline for Filing Pre-Auction Tech. Certification Form*, Public Notice, 30 FCC Rcd. 6153 (June 9, 2015).

⁵⁵ *Supra*, pp. 7-8 & notes 25-31.

⁵⁶ *Feb. 12 Order* ¶ 21.

⁵⁷ *Supra*, note 25 (emphasis added).

Thus, the Commission’s contention that “Latina never argued that it was entitled to protection on any other basis until filing its *1/22 Ex Parte Letter*”⁵⁸ simply underscores Latina’s reasonable reliance, since there was nothing for Latina to argue about once it was included on the list of eligible stations beginning in June 2015. Moreover, the Commission’s statement is factually incorrect. In fact, Latina argued in its submission in November 2014 that it was entitled to protection because it was similarly situated to KHTV.⁵⁹ Further, it is ironic that in the Order in which the FCC falsely accuses Latina of adopting a new position, the FCC itself adopts a new standard for eligibility—31 business days before the auction is to begin.⁶⁰

In any event, Latina submitted its *1/22 Ex Parte Letter* only in response to unofficial whispers it was hearing that, for some inexplicable reason, the FCC might actually revisit Latina’s eligibility at this late juncture despite the FCC’s representation to the DC Circuit on December 28, 2015 that it had properly exercised its discretion to protect WDYB.⁶¹

In attempting to distance itself from this representation to the court, the FCC suggests that it was “merely point[ing] out that WDYB had obtained Class A construction permits prior to February 22, 2012,” “without stating that this factual distinction entitled WDYB-CD to protection under the standard in the *Second Order on Reconsideration*.”⁶² In fact, the FCC represented to the DC Circuit that it had exercised its discretion “to protect stations in addition to KHTV-CD that

⁵⁸ *Feb. 12 Order* ¶ 21.

⁵⁹ *Partial Opp’n* at 5-6.

⁶⁰ It should be noted that none of the other estimated twelve stations to which the FCC extended protection in the *Declaratory Ruling* submitted their specific facts for consideration in the rulemaking, petitioned for reconsideration of the *Incentive Auction Order*, or otherwise argued as to why they were entitled to protection.

⁶¹ *FCC Mandamus Opp’n* at 7-8 & n.2.

⁶² *Feb. 12 Order* ¶ 21.

hold a Class A license today and that had an application for a Class A construction permit pending or granted as of February 22, 2012,” noting that “approximately a dozen stations fall within this category” and that “[o]ne of those stations is WDYB-CD.”⁶³

Because the FCC made no less than seven representations that WDYB was eligible for the auction and repacking, Latina will be able to establish in court that it was eminently reasonable to rely on the FCC representations that it was eligible. There was nothing for WDYB to do in this regard once the FCC listed WDYB as eligible, and no reason to believe that the FCC would do an about-face in response to the reconsideration petition of Videohouse, *et al.*, that resulted in the *February 12 Order*, especially given the FCC’s representation about WDYB to the DC Circuit in opposition to Videohouse’s mandamus petition.

Finally, it is likely that Latina will also prevail on the fourth factor in light of the misstatements and false distinctions in the *February 12 Order*, and the “egregiously unfair result” of protecting WDYB since June 2015, and then unceremoniously stripping WDYB of protection on the eve of the auction, without any official notice from the FCC that it was even considering such action, and without any formal opportunity for Latina to be heard as to why that result is wrong. In addition, at the same time that it was already circulating a draft of what became the *February 12 Order* removing WDYB’s protection, the FCC was telling the DC Circuit—and Latina—that WDYB *was* protected.⁶⁴

For these reasons, it is likely that Latina will prevail on the merits of its petition for review.

⁶³ *FCC Mandamus Opp’n* at 7-8 & n.2 (emphasis added).

⁶⁴ *FCC Mandamus Opp’n* at 14 (noting draft order “was circulated to the Commissioners” on December 23, 2015).

B. Latina Will Suffer Irreparable Harm Without a Stay and the Opportunity to Participate in the Auction and Repacking

As the FCC recognizes, “The auction presents a once-in-a-lifetime opportunity for broadcasters,” and “unique financial opportunity” that will allow broadcasters to “to return some or all of their broadcast spectrum usage rights in exchange for incentive payments.”⁶⁵ Stations that do not participate and do not have repacking protection may be stripped of their licenses without any compensation or other relief.⁶⁶

Without a stay, Latina will likely forever lose the unique opportunity to sell its spectrum rights and/or receiving repacking protection, resulting in a loss of its ability to broadcast and serve the Latina community in the Daytona Beach, Florida area. Such unrecoverable economic losses constitute irreparable harm.⁶⁷

Once the reverse auction begins on March 29, it will be impossible to: undo the auction or allow Latina to realize the full benefits of it, even if the D.C. Circuit overturns the *February 12 Order*; or, remedy the injuries Latina has sustained. It appears no court has ever vacated the results of an FCC auction after it has taken place.

Moreover, absent a stay, it is highly unlikely that Latina will be able to obtain meaningful judicial review prior to March 29.⁶⁸ The FCC recognized as much last week in its opposition to Videohouse’s motion to the DC Circuit for expedited consideration, arguing that the proposed “extraordinarily accelerated,” “breakneck” schedule of briefing, argument, and disposition by the

⁶⁵ *Incentive Auction Order* ¶¶ 1, 3.

⁶⁶ *Id.* ¶¶ 232-35.

⁶⁷ *Wis. Gas Co. v. FERC*, 758 F.2d 669, 675 (D.C. Cir. 1985).

⁶⁸ *See Feb. 12 Order*, at 17 (Pai dissenting) (noting FCC’s reversal “less than two months before the start of the incentive action ... will make it difficult for Latina to obtain full and fair review of its claim in court”).

Court prior to March 29 “is not likely to provide adequate time for the parties to present their arguments effectively or for the Court to make a considered decision on the merits.”⁶⁹

Instead, the Commission argued that the appropriate and “traditional vehicle” for seeking meaningful judicial review in these circumstances is a “stay pending judicial review.”⁷⁰ That is what Latina is requesting here. Without a stay, Latina will be deprived of “meaningful relief before the incentive auction commences on March 29, 2016.”⁷¹

C. The Balance of Harms Favors a Stay of the Order or the Auction

In considering Latina’s stay request, the FCC must “balance the competing claims of injury and ... the effect on each party of the granting or withholding of the requested relief.”⁷² Further, equity requires a stay where, as here, it would be “all but impossible to secure judicial review” before March 29, 2016, when the reverse auction is currently scheduled to begin.⁷³

It is difficult to conceive of any material harm that would result from a stay of the *February 12 Order* so that Latina can participate in the auction and repacking, pending completion of judicial review. Indeed, prior to its *February 12 Order*, the FCC had already released data files and calculated its opening prices based on the assumption that WDYB *would be eligible* to participate in the auction. Thus, more harm would occur by excluding WDYB at this point. The FCC has already contemplated allowing stations to participate while their eligibility is subject to review.⁷⁴

⁶⁹ *FCC Expedition Opp’n* at 1-2.

⁷⁰ *Id.* at 2.

⁷¹ Order, *In re Videohouse*, No. 15-1486, at 1 (Dec. 30, 2015) (ruling based on FCC representations that opportunity for meaningful judicial review would exist following *Feb. 12 Order* and prior to March 29).

⁷² *Nat’l Wildlife Fed’n v. Burford*, 835 F.2d 305, 326 (D.C. Cir. 1987) (citation omitted).

⁷³ See, e.g., *Wireless E911 Location Accuracy Requirements*, Order, DA 08-557, PS Docket No. 07-114, at 2 (rel. Mar. 12, 2008).

⁷⁴ *Supra*, pp. 2-3.

In addition, the FCC indicated that there were “significant equities in favor of protection of [WDYB and others] that outweigh the limited adverse impact on our repacking flexibility.”⁷⁵

By contrast, once the auction begins, it will be impossible to provide a proper remedy to Latina, which, based on at least seven affirmations from the FCC,⁷⁶ prepared for the auction and repacking, invested in its station, and refrained from taking action it might otherwise have taken to ensure its eligibility. On this latter point, because WDYB was included in the FCC’s eligibility list on June 9, 2015, it did not have the opportunity to petition for inclusion by July 9, 2015.⁷⁷ Moreover, by the time Latina began to suspect that its status was in jeopardy, it had already filed the WDYB Application, and the reverse auction “quiet period” (which began on the January 12, 2016 application deadline) was in place, forcing Latina to undertake its last-minute advocacy efforts with one hand tied behind its back.⁷⁸ Thus, clearly the balance of harms favors a stay of the *February 12 Order*.

Should the Commission be unwilling to stay that Order, then the only other option to protect Latina’s rights is a stay of the entire auction, pending the completion of judicial review. Given that it has already been four years since Congress passed the Spectrum Act, another brief period to resolve these issues is reasonable, particularly because this time-crunch was entirely of the Commission’s own making when it chose, on its own, to revisit WDYB’s participation, and to

⁷⁵ *FCC Mandamus Opp’n* at 8 (quoting *Declaratory Ruling* ¶ 62).

⁷⁶ *Supra*, pp. 7-8 & notes 25-31.

⁷⁷ See *Media Bureau Announces Incentive Auction Eligible Facilities & July 9, 2015 Deadline for Filing Pre-Auction Tech. Certification Form*, 30 *F.C.C. Rcd.* 6153 (2015).

⁷⁸ See 47 C.F.R. § 1.2205 (prohibiting broadcasters from “communicating directly or indirectly any incentive auction applicant’s bids or bidding strategies to any other full power or Class A broadcast television licensee or to any forward auction applicant”); Letter from Ari Meltzer, Counsel for Latina, to Marlene Dortch, Secretary, FCC (Feb. 5, 2016), *available at* <http://apps.fcc.gov/ecfs/comment/view?id=60001392822> (describing how FCC anti-collusion rules hampered Latina’s advocacy).

do so with only 31 business days until the auction. It did so, moreover, despite the fact that the Petition for Reconsideration, which ostensibly formed the basis for its decision, was filed September 2, 2015, nearly six months prior to its decision. The FCC has until 2022 to conduct the auction.⁷⁹ There is no danger of coming close to that deadline as a result of a stay so that Latina may have its day in court, particularly given that Latina is willing to agree to a reasonable expedited schedule for resolution of its appeal. Moreover, the FCC has already delayed the auction on numerous occasions, including as a result of litigation and even without a request for a stay.⁸⁰

The balance of harms tilts decidedly in favor of a stay here.

D. The Public Interest Favors a Stay

In addition to Latina's desire to be eligible, pending judicial review, for the reverse auction and repacking, there is a strong public interest in ensuring that auction participation is as robust as possible, for reasons previously recognized by the FCC. Excluding Latina will not only undermine this, but will also lead to the reduction of minority woman-owned television stations, of which there are only about four nationwide. This is in complete contravention of the FCC's goal of *increasing* minority and female ownership. As Commissioner Pai recognized, "[I]t is impossible to reconcile the Commission's ostensible support for promoting diversity with such shabby

⁷⁹ See 47 U.S.C. § 1452(f)(3).

⁸⁰ See, e.g., *In the Matter of Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, Notice of Proposed Rulemaking, 27 FCC Rcd. 12357 ¶ 10 & Statements of Chairman Julius Genachowski and Commissioner Ajit Pai (2012) (anticipating that the FCC "will be able to conduct the auction in 2014"); Tom Wheeler, "The Path to a Successful Incentive Auction," FCC Blog (Dec. 6, 2013, 10:45 a.m.), <https://www.fcc.gov/news-events/blog/2013/12/06/path-successful-incentive-auction-0> (last visited Feb. 20, 2016) (announcing first delay of auction until "the middle of 2015."); Gary Epstein, "Incentive Auction Progress Report," FCC Blog (Oct. 24, 2014, 12:00 p.m.), <https://www.fcc.gov/news-events/blog/2014/10/24/incentive-auction-progress-report> (last visited Feb. 20, 2016) (announcing further delay of auction to early 2016).

treatment of one of the few television stations in the nation owned by a Hispanic woman.”⁸¹

Denying Latina’s request will also adversely impact the Latino community in the Daytona Beach area, which, as a result, would likely be deprived of a Class A broadcaster of Spanish language and Hispanic programming.

CONCLUSION

For these reasons, the FCC should stay its *February 12 Order* pending judicial review, restoring the *status quo ante* so that Latina may participate in the auction and repacking. Alternatively, the Commission should stay or postpone the auction, pending judicial review.

Because of the exigencies created by the FCC’s release of the *February 12 Order* only 31 business days before the auction is to begin, and the difficulties recognized by the FCC in obtaining judicial review in that timeframe, Latina will consider this Motion denied if Latina does not hear from the FCC by February 24, 2016 that a stay will be granted, and will then seek judicial relief.

February 22, 2016

Nora Crosby Soto
LATINA BROADCASTERS OF
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(469) 556-2919

Respectfully submitted,

/s/ David S. Wachen

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⁸¹ *Feb. 12 Order* at 21.



FEDERAL COMMUNICATIONS COMMISSION
445 12th Street, SW
Washington, DC 20554

February 12, 2016

Latina Broadcasters of Daytona Beach, LLC
Nora Crosby Soto
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Suite 105
Carrollton, TX 75006

Re: Application of Latina Broadcasters of Daytona Beach, LLC for Auction 1001
First Confidential Status Letter

The Commission has received your application (FCC Form 177) to participate in the upcoming reverse auction of the Broadcast Television Spectrum Incentive Auction (Auction 1001). Commission staff conducted a preliminary review of your application. This letter provides you with the confidential status of your application, as well as the status of each station that you selected in your application. Your application- and station-level statuses are listed below.

Application-Level Status: Rejected

Your application has been rejected because your station is not eligible to participate in Auction 1001.

Station-Level Status:

41375 [WDYB-CD]: Rejected

This station has been rejected because it is not eligible to participate in Auction 1001.

The Commission adopted an order on February 8, 2016 concluding that station WDYB-CD, licensed to Latina Broadcasters of Daytona Beach, LLC, is not eligible to participate in Auction 1001. See *Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, GN Docket No. 12-268, Order on Reconsideration, FCC 16-12 (rel. Feb. 12, 2016).

Please contact Joyce Bernstein at (202) 418-0660 for specific questions about your status.