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

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INTRODUCTION AND EXECUTIVE SUMMARY

The FCC's upcoming incentive auction—"a once-in-a-lifetime opportunity for broadcasters," Order on Reconsideration, GN Docket No. 12-268, ¶ 3 (Feb. 12, 2016) ("Reconsideration Order")—is scheduled to begin on March 29, 2016. In a series of orders, the FCC has denied auction eligibility and discretionary protection in the spectrum repacking process to The Videohouse, Inc.; Fifth Street Enterprises, LLC; and WMTM, LLC ("Petitioners"). *See id.*; Second Order on Reconsideration, GN Docket No. 12-268 (June 19, 2015) ("Second Order on Reconsideration"); Report & Order, GN Docket No. 12-268 (June 2, 2014) ("Report & Order"). Petitioners sought judicial review of those orders in the D.C. Circuit. *See The Videohouse, Inc. v FCC*, No. 16-1060 (D.C. Cir.). After Petitioners filed a motion with the Court seeking expedited consideration of that case, the FCC opposed, arguing (among other things) that Petitioners should seek a stay of the auction pending judicial review. Over the FCC's opposition, the Court issued an order expediting the case. In doing so, the Court necessarily concluded "that the decision under review is subject to substantial challenge." D.C. Cir. Handbook of Practice and Internal Procedures at 33. But the Court ordered a schedule for merits briefing and argument that will not be completed until after the auction commences on March 29, 2016.

Because the March 29, 2016 start date of the auction is rapidly approaching, Videohouse is compelled to file this Emergency Motion for a Stay. After March 29, 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." Report & Order at ¶ 1. In addition, after March 29, 2016, Petitioners 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, Videohouse hereby requests that the Commission stay the March 29, 2016 start of the incentive auction pending resolution of *The Videohouse, Inc. v. FCC,* 16-1060 (D.C. Cir.).

Videohouse will consider this motion denied if the Commission takes no action by March 2, 2016.

BACKGROUND

Because the Commission is familiar with the facts and background of this case, and in the interest of brevity, Videohouse respectfully refers the Commission to its Emergency Motion for Stay and Other Relief, GN Docket 12-268 (filed Dec. 11, 2015), and otherwise dispenses with a lengthy recitation of the regulatory background and procedural history of this matter. The facts most pertinent to this mandamus petition are as follows:

In a series of orders relating to the upcoming incentive auction, the FCC denied auction eligibility and discretionary protection to Petitioners. *See* Reconsideration Order at ¶¶ 7-19; Second Order on Reconsideration at ¶¶ 53-62; Report & Order at ¶¶ 233-35. On February 12, 2016, the FCC issued the last of those orders. On that same day, Petitioners filed a Petition for Review challenging it, as well as the Report & Order and the Second Order on Reconsideration.[1] On February 17, 2016, Petitioners filed an emergency motion for expedited consideration of this matter, proposing a schedule to complete briefing and have the case resolved prior to the March 29, 2016 start date of the auction. On February 23, 2016, the Court issued an order expediting the schedule, with briefing to conclude on April 1, 2016 and oral argument likely to occur in May 2016. On February 25, 2016, Petitioners filed their opening merits brief in that case.

[1] On February 26, 2016, Petitioners filed a second petition for review in response to the publication of the Second Order on Reconsideration in the Federal Register. *See The Videohouse, Inc. v. FCC*, No. 16-1071 (filed Feb. 26, 2016). The Court consolidated the two petitions for review that same day. *See Order, The Videohouse, Inc. v. FCC,* No. 16-1060 (Feb. 26, 2016).

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. 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)). All four factors are met here.

I. Petitioners Are Likely To Prevail On The Merits

To make this showing, Petitioners need only raise "questions going to the merits so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation and thus for more deliberative investigation." *Holiday Tours, Inc.*, 559 F.2d at 844. For several reasons, Petitioners "satisfy that modest standard" for a stay. *Comm. on Judiciary of U.S. House of Representatives v. Miers*, 542 F.3d 909, 912 (D.C. Cir. 2008) (Tatel, J., concurring).

As an initial matter, the D.C. Circuit already has recognized that Petitioners meet this standard. Before expediting an appeal, the Court will ensure "that the decision under review is subject to substantial challenge." D.C. Cir. Handbook at 33. Thus, in ordering expedited review of the case, the Court necessarily determined that the FCC orders under review are "subject to substantial challenge." There can be no dispute, then, that this appeal raises a substantial question. Especially given Petitioners' strong showing on the other stay factors, *infra* at 6-8, no more is required. A stay is appropriate, in other words, because Petitioners raise "a serious legal question," "little if any harm will befall other interested persons, or the public," and "denial of the order would inflict irreparable injury on the movant." *Holiday Tours, Inc.*, 559 F.2d at 844.

In any event, Petitioners have demonstrated a likelihood of success on the merits. *First*, the decision is arbitrary and capricious because of the retroactive "deadline" the FCC imposed with regard to the date by which stations would need to submit an application to convert from LPTV to Class A status in order to be eligible for the auction. Brief for Petitioners, *The Videohouse, Inc. v. FCC*, No. 16-1060, at 40-44 (filed Feb. 25, 2016) ("Pet. Br."). "Generally, an agency may not promulgate retroactive rules without express congressional authorization." *Arkema Inc. v. EPA*, 618 F.3d 1, 7 (D.C. Cir. 2011) (citation omitted). But even if the FCC had statutory authority to impose some deadline, the agency was still obligated to give affected parties notice of the deadline *before* imposing it. *Retail, Wholesale & Dep't Store Union v. NLRB*, 466 F.2d 380, 390 (D.C. Cir. 1972); *NLRB v. Majestic Weaving Co.*, 355 F.2d 854, 860 (2d Cir. 1966) (Friendly, J.). Here, the FCC did not set the February 22, 2012 deadline until 27 months after it had passed. Pet. Br. 4, 40. By cutting off Petitioners' rights and stripping them of the value of substantial investments without any advance notice of the legal consequences of not filing certain forms by that date, the FCC violated the APA. *U.S. Airwaves, Inc. v. FCC*, 232 F.3d 227, 233 (D.C. Cir. 2000). The FCC's retroactivity problem is exacerbated by the fact that its staff instructed licensees to delay in filing Form 302-CA, thereby inducing them to file it much later in the conversion process than they would have. By causing the very delays the FCC would later use to penalize Class-A eligible stations, it improperly sought to impose new liabilities on licensees "for past actions which were taken in good-faith reliance on [agency] pronouncements." *NLRB v. Bell Aero. Co.*, 416 U.S. 267, 295 (1974).

Second, the FCC's decision to allow KHTV—but not Petitioners' stations—to participate in the auction arbitrarily treat[s] similar situations dissimilarly." *Local 777 v. NLRB*, 603 F.2d 862, 872 (D.C. Cir. 1978); *see* Pet. Br. 45-51. The FCC acknowledged that KHTV fell within the

"category" of "out of core" Class A-eligible LPTV stations that obtained an in-core channel "but did not file for a Class A license to cover by February 22, 2012." Reconsideration Order ¶ 3. The FCC tried to distinguished KHTV by virtue of its "repeated efforts" to secure an in-core channel over the course of a decade and the fact that it filed a Form 302-CA only days after February 22, 2012. *Id*. But the FCC failed to give equal consideration to Petitioners' similar efforts to secure a viable in-core channel. Pet. Br. 46-48. In doing so, it unfairly subjected Petitioners to disparate treatment. To be clear, the FCC properly afforded KHTV auction eligibility and repacking protection. But having afforded such relief to KHTV, the FCC must afford it to Petitioners as well.

Third, the FCC's reasons for rejecting Petitioners' request for discretionary protection do not pass muster. Pet. Br. 51-54. The FCC ruled that Petitioners' 2014 reconsideration petitions were insufficiently detailed and thus procedurally defective. But the FCC protected roughly a dozen LPTV stations that *never even sought reconsideration*, using Petitioners' purportedly defective petition as the vehicle for doing so. If Petitioners' requests were insufficiently detailed, then they could not possibly have served as the basis for relief for stations that never requested relief at all. The FCC also previously claimed that there were approximately 100 similarly situated stations and including Petitioners would require it to protect these other stations, which "would increase the number of constraints on the repacking process, thereby limiting [the FCC's] repacking flexibility." Second Order on Reconsideration at ¶ 54. In the most recent order, however, the FCC abandoned that claim, conceding that its substantive basis for excluding Petitioners "does not bear on the decisional issue presented by the [Reconsideration] Petition." Reconsideration Order at ¶ 16. In sum, neither reason given for rejecting Petitioners' request for discretionary review can withstand APA review.

Finally, if the Court determines that Latina Broadcasters is likely to prevail on its stay motion, *see Latina Broadcasters of Daytona Beach, LLC v. FCC*, No. 16-1069 (D.C. Cir. filed Feb. 26, 2016), Videohouse has conclusively met its burden given that Petitioners and Latina Broadcasters are similarly situated. "A long line of precedent has established that an agency action is arbitrary when the agency offered insufficient reasons for treating similar situations differently." *Transactive Corp. v. United States*, 91 F.3d 232, 237 (D.C. Cir. 1996).

II. The Balance Of Harms And The Public Interest Support A Stay.

Videohouse easily satisfies the remaining three factors necessary to obtain a stay. *First*, Petitioners 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." *Reconsideration Order* at ¶ 3. 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." *Id.* ¶ 1. Millions of dollars are at stake for Videohouse. Moreover, stations without repackaging protection may be stripped of their licenses without any compensation or other relief. Order ¶¶ 232-235; *id*. ¶ 234 (acknowledging that stations will lose substantial financial investments without repackaging protection).

Once the reverse auction begins, there will be no way to remedy their injuries. Indeed, it appears no court has ever vacated the results of an FCC auction after it has taken place. If Petitioners are excluded from the auction, then, they will forever lose the unique opportunity to sell their spectrum rights and/or receive repackaging protection. Such unrecoverable economic losses constitute irreparable harm. *Wis. Gas Co. v. FERC*, 758 F.2d 669, 675 (D.C. Cir. 1985). The fact that the Court granted expedited review, *see* D.C. Circuit Handbook at 33 (explaining that the Court "grants expedited consideration very rarely" and that the "movant must demonstrate that the delay will cause irreparable injury"), and that the FCC has encouraged

Petitioners to seek a stay from this Court in order to protect their legal rights, *supra* at 1, confirms that they will suffer irreparable harm in the absence of a stay pending appeal.

Second, in contrast to the irreparable harm that Petitioners will suffer without a stay, the FCC will suffer little—or likely no—harm if the auction is delayed while this matter is litigated. Congress passed the Spectrum Act more than four years ago and the FCC has until 2022 to complete the three-step auction process. *See* 47 U.S.C. § 1452(f)(3). The FCC's ability to timely complete the auction will not be remotely jeopardized. Indeed, the stay being sought here is quite short. The briefing will be complete by April 1, 2016 and argument will likely be in May 2016. Given this highly expedited schedule, the FCC will suffer no harm from having the first step of the auction process modestly delayed.

The balance tips decisively in Petitioners' favor given that it is the FCC's actions that necessitated this motion. It took one mandamus petition to force the FCC to agree to timely dispose of the Reconsideration Petition, and, remarkably, it took a second mandamus petition to force the FCC to actually fulfill that promise. Pet. Br. 31. Then, in response to the motion to expedite, the FCC objected to the proposed "breakneck" schedule and suggested they should instead seek a "stay pending judicial review." FCC Response to Motion to Expedite at 1, 3. There is a "strong presumption favoring judicial review of administrative action." *Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645, 1651 (2015). Accordingly, the Court has expressed concern when an agency appears to engineer resolution of a matter before it in order "to avoid judicial review." *Am. Tel. & Tel. Co. v. FCC*, 978 F.2d 727, 733 (D.C. Cir. 1992). This is just such a case.

Finally, the public interest will benefit if a stay is granted. Proceeding with the auction without Petitioners will not further Congress's or the FCC's goals. 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." Order, ¶ 1. Moreover, by encouraging "[p]ayments to broadcasters that participate in the reverse auction," the FCC can "strengthen broadcasting by funding new content, services, and delivery mechanisms." *Id.* 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." *Id*. All these goals would be furthered by allowing Petitioner to participate in the auction and by granting them protection in the repacking process.

CONCLUSION

For the foregoing reasons, the Commission should stay the broadcast television spectrum incentive auction scheduled to begin March 29, 2016 pending resolution of *The Videohouse, Inc. v. FCC*, No. 16-1060 (D.C. Cir.).

Movants will consider this motion denied if the Commission takes no action by March 2, 2016.

Dated: February 29, 2016

Respectfully submitted,

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