

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

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

REPLY COMMENTS OF VENTURE TECHNOLOGIES GROUP, LLC

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Venture Technologies Group, LLC (“Venture”), the licensee of ten full-power, Class A, and low-power broadcast television stations, hereby submits reply comments in response to the Commission’s *Notice of Proposed Rulemaking* (“NPRM”) in the above-captioned proceeding.¹ The reply comments focus on two areas of utmost importance to Venture. *First*, the FCC’s rules must afford Class A station KHTV-CD auction eligibility and repacking protection. *Second*, the FCC must evaluate the reverse auction bids and afford appropriate repacking protection for all digital Class A stations based on the station’s licensed facility as of the date the auction begins or another future date certain.

I. INTRODUCTION AND SUMMARY

The Commission’s final auction rules must afford auction participation and repacking protection to the very limited number of Class A stations – including Venture station KHTV-CD, Los Angeles, California (Fac ID 60026) – that remained Class A eligible since 2000 and received Class A licenses after February 22, 2012. The rules must also afford all Class A stations auction participation rights and repacking protection for their licensed facilities as of the commencement

¹ *In the Matter of Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, Notice of Proposed Rulemaking, 27 FCC Red. 12357 (2012) (“NPRM”).

of the reverse auction. At an absolute minimum, the rules must protect facilities licensed prior to a future date certain.

The Community Broadcasters Protection Act of 1999 (“CBPA”) guaranteed Class A stations permanent status as long as the licensee remained in compliance with the applicable rules. The Spectrum Act confirmed the importance of Class A stations and neither explicitly nor implicitly altered the CBPA’s mandate. It is a fundamental principle of statutory construction that statutes are to be harmonized whenever possible. Reading the CBPA together with the Spectrum Act produces just one permissible interpretation: Class A station KHTV-CD must be eligible for the auction and must be protected in repacking.

The *NPRM* correctly proposes to allow the very small number of Class A stations in KHTV-CD’s position to participate in the spectrum auction based on their spectrum usage rights held at the commencement of the reverse auction process.² This result is consistent with and, indeed, compelled by the relevant statutory scheme, and any other outcome would violate the Administrative Procedure Act (“APA”). So, too, is the Commission’s proposal to protect, as part of the repacking process, the digital facilities of Class A stations that *first* received a digital license after February 22, 2012.³ Indeed, any interpretation of this proposal that would fail to protect the initial Class A license of KHTV-CD, granted after February 22, 2012, would in essence downgrade KHTV-CD to a low power television station and thus run afoul of the prohibition on retroactive rulemaking and the Takings Clause of the Fifth Amendment.

Venture made significant financial investments in KHTV-CD reliant upon FCC Orders which first promised Class A status to qualified stations and then incentivized the digital low-

² *Id.* ¶ 80.

³ *Id.* ¶¶ 80, 115.

power television (“LPTV”) transition.⁴ KHTV-CD patiently abided by its Class A obligations and diligently and in good faith perfected its Class A license after 12 long years. Adoption of auction or repacking rules that would unjustly strip KHTV-CD of the benefits of its Class A status would contravene the underlying tenets of the incentive auction, as guided by the Communications Act, of fairness, efficiency, and equity,⁵ and would violate the Commission’s obligations under the APA and the Constitution.

In addition to ensuring auction eligibility and repacking protection for KHTV-CD, the Commission must provide *all* digital Class A facilities auction evaluation and repacking protection for their licensed facilities as of the date the reverse auction commences or, at the earliest, a future date certain. The *NPRM* proposal to protect only the digital license of Class A stations received prior to February 22, 2012, and not any subsequent modifications of that license, must be rejected.⁶ Failure to protect and to evaluate for purposes of the reverse auction or repacking all Class A facilities licensed as of the auction’s commencement, or a future date certain would violate the Spectrum Act, the CBPA, the APA, and the Constitution.

II. KHTV-CD MUST BE AFFORDED AUCTION ELIGIBILITY AND REPACKING PROTECTION.

The *NPRM* rightly proposes that a “television station licensee,” such as Class A station KHTV-CD, “may participate in the reverse auction so long as it holds a license for the spectrum it seeks to relinquish prior to the date it submits its application to participate in the reverse auction.”⁷ Likewise, the Commission must protect all Class A stations in the repacking process.

⁴ See *Digital Low Power Television, Television Translator, and Television Booster Stations and to Amend Rules for Digital Class A Television Stations*, Second Report and Order, 26 FCC Rcd 10732 (2011) (“*LPTV DTV Second Report and Order*”); *Class A Television Service*, 15 FCC Rcd 6355 (2000).

⁵ See 47 U.S.C. § 307(b).

⁶ *Id.* ¶ 80 n.120.

⁷ See *NPRM*, Proposed Rule 73.3700(b).

Any other outcome would contravene the Spectrum Act and the CBPA, the APA, and the Constitution.

A. Venture Diligently Sought and Obtained a Class A License for KHTV-CD in Reliance Upon the CBPA and the Commission’s Rules and Policies.

Reliant upon the CBPA and the Commission’s rules, Venture endured a long, arduous journey of more than 12 years to achieve Class A status for KHTV-CD. All of Venture’s persistence, investment, and good-faith efforts finally paid off in July 2012 when the Commission granted KHTV-CD its Class A license.⁸

The story for KHTV-CD began on January 27, 2000, when within the statutory-specified period, Venture filed a Class A Statement of Eligibility for KHTV-LP. On May 25, 2001, the Commission licensed KHTV-LP on Channel 48 in Inland Empire, California as an LPTV station.⁹ Less than two months later, on July 12, 2001, Venture filed an application to convert its LPTV license to Class A status.¹⁰ More than a year later, on August 5, 2002, the FCC denied the application because the station was predicted to cause interference to DTV allotments and authorized DTV facilities. On September 26, 2002, in its order on Venture’s Petition for Reconsideration, the Commission recognized that Venture “face[d] circumstances beyond [its] control” and declared that KHTV-LP “remain[ed] eligible for Class A Television Status.”¹¹

Thus, Venture became part of a limited number of Class A-eligible licensees without a suitable Class A channel, and its quest for an in-core channel which did not cause impermissible

⁸ See CDBS File No. BLDTA-20120224ABQ.

⁹ See CDBS File No. BLTTL-20010507AAM.

¹⁰ See CDBS File No. BLTTA-20010712AHT.

¹¹ See Letter from Hossein Hashemzadeh, Associate Chief, Video Division, Media Bureau, Federal Communications Commission to Venture Technologies Group, LLC c/o Gregory L. Masters, Esq., at 2 (Sept. 26, 2002), CDBS File No. BLTTA-20010712AHT. In the *Class A Television Service Report and Order*, the Commission stated that “[w]here potential applicants face circumstances beyond their control that prevent them from filing within 6 months, we will examine those instances on a case-by-case basis to determine their eligibility for filing.” *Class A Television Service*, at ¶ 14.

interference to DTV facilities continued. First, Venture tried Channel 45, filing a minor change displacement application on October 16, 2002 and an application to convert to Class A status on November 25, 2002.¹² The application conflicted with an application filed by KLAU-LP, Redlands, California, which also proposed operation on Channel 45, and the FCC dismissed Venture's application on January 17, 2006. Meanwhile, the operation of KOCE-DT, Huntington Beach, California (Fac. ID 4328) on Channel 48 displaced KHTV-LP in May 2003, forcing the station to seek and be granted special temporary authority ("STA") to operate on Channel 67 through 2011.¹³

Venture then tried Channel 46, filing an application on October 30, 2006 for a digital companion channel in Los Angeles, California,¹⁴ but the FCC dismissed it on December 4, 2007 following an objection by the Mexican government. Next, on May 28, 2008, Venture proposed a digital displacement application to move KHTV-LP to digital channel 5,¹⁵ but, due to XHAQ-TV operating as a full-power analog television station on channel 5 in Mexicali, Baja California, Mexico, the FCC dismissed the application on July 23, 2009.¹⁶ Then, on October 14, 2008, Venture proposed another digital displacement application to move KHTV-LP to digital channel 44,¹⁷ which was dismissed per its request on April 22, 2010.¹⁸

¹² See CDBS File Nos. BPTTL-20021016AAZ; BLTTA-20021125ABC. The Form 302-CA Class A conversion application remained pending until July 11, 2012.

¹³ See, e.g., CDBS File No. BSTA-20040914AGD.

¹⁴ See CDBS File No. BDCCDTL-20061030ARX

¹⁵ See CDBS File No. BDISDVL-20080528AFZ.

¹⁶ See Federal Communications Commission, Public Notice, Report No. 47036 (rel. July 28, 2009).

¹⁷ See CDBS File No. BDISDTL-20081014AFC.

¹⁸ See Federal Communications Commission, Public Notice, Report No. 47223 (rel. April 27, 2010).

Venture finally found a suitable home beginning with its August 21, 2009 displacement application to operate on Channel 27.¹⁹ On March 24, 2010, San Bernardino Community College District filed an Informal Objection against the application, claiming Venture did not have permission to use a full-service mask filter. Although the Media Bureau had routinely granted requests for waivers to allow the use of a full-service mask filter in the past, nonetheless Venture amended the application on April 23, 2010 to propose technical parameters that did not use a full-service mask filter, making the application suitable for grant. However, the Media Bureau did not act on the application. Over a year later on August 26, 2011, the FCC amended Section 73.793 of its Rules to permit digital LPTV applications to use full-service emission masks.²⁰ That same day, and with the application still pending, Venture again amended the application to specify a full-service mask filter under the new rules. Nearly 22 months after the application was suitable for grant and nearly six months after the rule amendment and second amendment explicitly authorized grant, the FCC granted the application on February 15, 2012. Two days later, on February 17, 2012, Venture diligently filed a license to cover application,²¹ which the FCC granted on February 22, 2012. Without wasting any time, Venture converted its licensed facility to Class A on February 24, 2012,²² which the FCC granted on July 11, 2012.

These circumstances are unique. Many low-power stations filed statements of Class A eligibility in 2000; a very small number of those stations had yet to perfect their Class A licenses by the time the Spectrum Act was enacted; a tiny subset of those stations continued to abide by

¹⁹ See CDBS File No. BDISDTL-20090821ADM.

²⁰ See Federal Register, Digital Low Power Television, Television Translator, and Television Booster Stations and to Amend Rules for Digital Class A Television Stations, 76 Fed. Reg. 44821, 44821, 44828 (2011).

²¹ See CDBS File No. BLDTL-20120217ABO.

²² See CDBS File No. BLDTA-20120224ABQ. Venture notes that the FCC identified the license to cover permit No. BDISDTL-20090821ADM issued on February 22 as a “Digital Class A Broadcast Station License.” See *id.*; Attachment A.

the FCC’s Class A continuing eligibility requirements for the last 12 years (Venture estimates fewer than 10); and yet an even tinier subset of that subset will have been granted Class A status before the reverse auction commences. KHTV-CD is in this smallest subset.

B. Failure to Permit KHTV-CD to Participate in the Auction and Protect KHTV-CD in Repacking Would Violate the Spectrum Act and CBPA.

The express terms of the Spectrum Act make clear Congress’s intent to permit *all* stations holding valid Class A licenses at the time the auction commences to participate. Two sections of the Spectrum Act are relevant to the question of auction eligibility. First, the Spectrum Act defines “broadcast television licensee” as “the licensee of a full-power television station; or a low-power television station that has been accorded primary status as a Class A television licensee under [47 C.F.R. § 73.6001(a)].”²³ Second, it provides reverse auction eligibility to “each broadcast television licensee” which would “voluntarily relinquish[] some or all of its broadcast television spectrum usage rights”²⁴

By explicitly including Class A licensees in the definition of “broadcast television licensees,” the Spectrum Act unambiguously demonstrates an intention to protect the Class A status afforded by the CBPA, not to allow the FCC to “implicitly repeal” its “categorical statutory commands.”²⁵ The Spectrum Act also does not limit the Commission’s ability to grant Class A licenses after February 22, 2012; indeed, the FCC’s grant of KHTV-CD’s Class A license nearly five months after that date on July 11, 2012, demonstrates the agency’s own contrary view. Although the Spectrum Act separately requires the Commission to provide *repacking* protection by, at a minimum, “preserv[ing], as of [February 22, 2012], the coverage

²³ 47 U.S.C. § 1401(6).

²⁴ 47 U.S.C. § 1452(a)(1).

²⁵ *Nat’l Ass’n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 664 (2007).

area and population served of each broadcast licensee,”²⁶ the February 22, 2012 date appears nowhere in the provisions governing auction *eligibility*. The statute’s use of a date in the separate section on repacking, *see* 47 U.S.C. § 1452(b)(2), further shows that if Congress intended to restrict auction eligibility to stations licensed as of February 22, 2012, it would have done so explicitly.²⁷

Venture agrees with the FCC that it must “protect in the repacking process certain digital Class A facilities that were not licensed as of February 22, 2012” because failing to do so “would be fundamentally unfair” and “deprive the public of important benefits.”²⁸ This view is entirely consistent with the Spectrum Act, which unambiguously requires the Commission – *at a minimum* – to “make all reasonable efforts to preserve” the “coverage area and population served of each broadcast television licensee” as of the date of its enactment.²⁹ The Spectrum Act imposes a floor, and not a ceiling, and “does not,” as the *NPRM* rightly states, “prohibit the Commission from granting protection to additional facilities where appropriate.”³⁰ It is appropriate – and required – to protect Class A station KHTV-CD in repacking.

Nor did the Spectrum Act bestow additional discretion for the FCC to revoke or downgrade Class A licenses once granted. The CBPA explicitly states that Class A licenses are permanent “as long as the station continues to meet the requirements for a qualifying low-power station”³¹ This makes clear that KHTV-CD did not receive its Class A license with a hidden

²⁶ 47 U.S.C. § 1452(b)(2).

²⁷ *See, e.g., Whitfield v. United States*, 543 U.S. 209, 216 (2005).

²⁸ *NPRM*, ¶ 115.

²⁹ 47 U.S.C. § 1452(b)(2).

³⁰ *NPRM*, ¶ 113.

³¹ 47 U.S.C. § 336(f)(1)(A) (emphasis added).

expiration date of whenever the reverse auction and repacking commence.³² Nothing in the Spectrum Act gives the FCC power to revoke, downgrade, or otherwise leave unprotected Class A stations. It is well established that “Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions — it does not . . . hide elephants in mouseholes.”³³

The FCC must implement the Spectrum Act against the backdrop of existing law governing Class A licensees, including the CBPA.³⁴ When the Spectrum Act and CBPA are read in harmony, it is clear that *all* Class A stations licensed as of the start of the reverse auction, not just those licensed prior to February 22, 2012, are entitled to auction participation and repacking protection. Through the CBPA, Congress created “a permanent Class A license for qualifying low-power stations.”³⁵ There are no new Class A-eligible stations; to be eligible, stations had to submit a Class A Statement of Eligibility to the FCC by January 27, 2000.³⁶ To qualify as a Class A licensee, the statute requires stations to: (1) broadcast a minimum of 18 hours per day, including an average of three hours per week of programming produced within the station’s market area; (2) comply with all applicable low power television requirements; and (3) comply with the operating rules for full power television stations.³⁷ In addition, the CBPA prohibits the Commission from granting Class A licenses to stations operating on out-of-core channels

³² The license expires on the renewal date for all California broadcast television stations, December 1, 2014. See CDBS File No. BLDTA-20120224ABQ.

³³ *Whitman v. Am. Trucking. Ass’ns, Inc.*, 531 U.S. 457, 468 (2001).

³⁴ *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (“It is a ‘fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.’ . . . A court must therefore interpret the statute ‘as a symmetrical and coherent regulatory scheme,’ . . . and ‘fit, if possible, all parts into an harmonious whole. . . .’”) (internal citations omitted).

³⁵ Report of the Committee on Commerce, Science, and Transportation, S. Rep. 105-411 1 (1998).

³⁶ 47 U.S.C. § 336(f)(1)(B).

³⁷ 47 U.S.C. § 336(f)(2).

(channels 52-69) until the channel is assigned a channel within the core spectrum.³⁸ By establishing these qualifications, Congress intended to provide “regulatory certainty” to Class A stations and their investors.³⁹ That is why once the FCC awards a Class A licensee, the statute gives the agency no discretion to revoke or downgrade the Class A license in any way – and explicitly requires Class A stations to be “accorded primary status as . . . television broadcaster[s]” – “as long as the station continues to meet the requirements for a qualifying low-power station”⁴⁰ Because the Commission intends to permit *full-power* stations licensed after February 22, 2012 but before the auction commences to participate and to be protected,⁴¹ the CBPA requires the same treatment of Class A stations.

Enacted on February 22, 2012, the Spectrum Act in no way amended, changed, or repealed the CBPA. Supreme Court precedent unambiguously states that with regard to later enacted statutes, “repeals by implication are not favored and will not be presumed unless the intention of the legislature to repeal is clear and manifest.”⁴² The Supreme Court “will not infer a statutory repeal unless the later statute expressly contradicts the original act or unless such a construction is absolutely necessary in order that the words of the later statute shall have any meaning at all.”⁴³ The interpretation must “harmonize[] the statutes,” not “abrogate [the prior

³⁸ 47 U.S.C. § 336(f)(6)(A).

³⁹ Section-by-Section Analysis to S. 1948, the Act known as the “Intellectual Property and Communications Omnibus Reform Act of 1999,” as printed in the Congressional Record of November 17, 1999 at pages S 14707-14726 (“Section-by-Section Analysis”), at S 14725.

⁴⁰ 47 U.S.C. § 336(f)(1)(A) (emphasis added).

⁴¹ *NPRM* ¶ 77 (“We also propose to make eligible to participate in the reverse auction an entity that held an original construction permit for a full power television station on February 22, 2012, the date of the enactment of the Spectrum Act, if it obtains a license by the commencement of the auction process.”); ¶ 114 (“[I]n the repacking process we propose to protect the facilities authorized in unbuilt construction permits for new full power television stations as of February 22, 2012.”).

⁴² *Nat’l Ass’n*, 551 U.S. at 662 (internal quotations and citations omitted).

⁴³ *Id.*

enacted statute's] statutory mandate"⁴⁴ Here, it is not only possible to harmonize the two statutes, but, as discussed above, that is the *only* reading consistent with the Spectrum Act's express terms.

C. Failure to Permit KHTV-CD to Participate in the Auction and to Protect KHTV-CD in Repacking Would Violate the APA.

Denying KHTV-CD the right to participate in the auction and protection in repacking would also violate the APA, under which the FCC may not issue a rule that is “arbitrary, capricious, an abuse of discretion, . . . otherwise not in accordance with law,” or unsupported by record evidence.⁴⁵ To satisfy its obligations under the APA, the Commission “must examine and consider the relevant data and factors, and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made.”⁴⁶ Failure to permit Class A stations licensed after February 22, 2012 to participate in the auction and a refusal to protect these same Class A stations in repacking would run afoul of these requirements in a number of respects.

First, the *NPRM* rightly recognizes that, due to the “unique circumstances” involved, it would be “unfair to those Class A licensees that have yet to convert to digital operation” but “that have made transition plans in reliance on the rules we adopted just months before the enactment of the Spectrum Act to protect only those facilities licensed as of February 22, 2012 in the repacking process.”⁴⁷ As explained above, Venture persistently pursued and invested in KHTV-CD's digital Class A facilities “in reliance on the [Commission's *LPTV DTV Second*

⁴⁴ *Id.* at 664-665.

⁴⁵ 5 U.S.C. § 706(2)(A), (E).

⁴⁶ *Motor Vehicle Mfrs. Ass'n, Inc. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983).

⁴⁷ *NPRM*, ¶ 80; *see id.* ¶ 115 (proposing to “protect in the repacking process certain digital Class A facilities that were not licensed as of February 22, 2012” because failing to do so “would be fundamentally unfair” and “deprive the public of important benefits”).

Report and Order”⁴⁸ and the CBPA.⁴⁹ It would be equally if not more “unfair” and arbitrary to deny KHTV-CD the right to auction participation and repacking protection at all after more than 12 years of diligent, good-faith effort to find a suitable in-core channel, especially considering that its application was fit for grant 22 months before the President signed the Spectrum Act.⁵⁰

Second, such action would be wholly irrational. Due to the very small number of stations involved, permitting KHTV-CD’s auction participation and protecting it in repacking will have no appreciable impact on the Commission’s ability to accomplish its goals for the spectrum auction.⁵¹

Third, the *NPRM* proposes to protect and allow participation for *full-power* stations licensed after February 22, 2012 but before the commencement of the auction, recognizing that this proposal is “consistent with the language of the Spectrum Act, which authorizes reverse auction participation by licensees, and with [the] goal of maximizing the amount of spectrum available in the reverse auction.”⁵² Failure to afford Class A stations equivalent treatment would

⁴⁸ *Id.* ¶ 115.

⁴⁹ *See supra* Section II.

⁵⁰ *See, e.g., Business Roundtable v. SEC*, 647 F.3d 1144, 1153-54 (D.C. Cir. 2011) (“internally inconsistent” agency explanation held arbitrary and capricious); *Airline Pilots Ass’n v. FAA*, 3 F.3d 449, 450 (D.C. Cir. 1993) (“fundamental inconsistencies” in applying statute were unreasonable under Chevron and arbitrary and capricious); *General Chemical Corp. v. United States*, 817 F.2d 844, 855 (D.C. Cir. 1987) (finding agency decision arbitrary and capricious due to its “inconsistencies” and “failures of explanation”).

⁵¹ *See, e.g., Home Box Office, Inc. v. FCC*, 567 F.2d 9, 36 (D.C. Cir. 1977) (“a regulation perfectly reasonable in the face of a given problem may be highly capricious if that problem does not exist”) (internal quotation marks omitted).

⁵² *See NPRM* ¶ 77; *supra* Section III.A.

improperly undermine that very same goal⁵³ and would be arbitrarily discriminatory in violation of the APA.⁵⁴

D. Failure to Permit KHTV-CD to Participate in the Auction, and Failure to Protect KHTV-CD in Repacking, Would Be Impermissibly Retroactive.

Denying Class A stations licensed after February 22, 2012 repacking protection and the right to participate in the auction would also be impermissibly retroactive, in violation of both the APA and the Due Process Clause. The APA limits “rules” to agency actions with “future effect.”⁵⁵ Here, Venture invested significant resources in diligently prosecuting a series of applications and constructing facilities based on a reasonable expectation – supported by the express terms of the CBPA – that it would be afforded the same rights as all other Class A and full-power stations in the future. Denying Class A stations licensed after February 22, 2012 would be primarily retroactive, and thus *per se* unlawful, because it would “impair rights [Venture] possessed when it acted” to implement business plans following receipt of its license.⁵⁶ Failing to protect KHTV-CD in repacking would not just “impair” the rights it possessed when it made such investments, it would totally eviscerate them and would thus be primarily retroactive and *per se* unlawful.⁵⁷ Even if somehow construed as merely “secondarily retroactive,” rules that prohibited Class A stations licensed after February 22, 2012 from participating in the auction

⁵³ See, e.g., *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984) (even if a statutory provision is ambiguous, an agency’s interpretation will be struck down if unreasonable); see also *Office of Comm’n of United Church of Christ v. FCC*, 779 F.2d 702, 707 (D.C. Cir. 1985) (stating that one of the basic “dictates” of “[r]ational decisionmaking” is that an agency not “employ means that actually undercut its own purported goals”).

⁵⁴ See, e.g., *Melody Music, Inc. v. FCC*, 345 F.2d 730, 733 (D.C. Cir. 1965); see also *FEC v. Rose*, 806 F.2d 1081, 1089 (D.C. Cir. 1986) (“[A]n agency’s unjustifiably disparate treatment of two similarly situated parties works a violation of the arbitrary-and-capricious standard.”).

⁵⁵ 5 U.S.C. § 551(4).

⁵⁶ *DIRECTV, Inc. v. FCC*, 110 F.3d 816, 825-26 (D.C. Cir. 1997) (quoting *Landgraf v. USI Film Prods.*, 511 U.S. 244, 280 (1994)).

⁵⁷ *DIRECTV, Inc.*, 110 F.3d at 825-26.

and failed to afford repacking protection would be lawful only if “reasonable” in substance and in terms of retroactive application.⁵⁸ Here, it is indisputable that such a rule would “affect a regulated entity’s investment made in reliance on the regulatory status quo before the rule’s promulgation” by significantly devaluing “substantial past investment incurred in reliance upon the prior rule.”⁵⁹ And, as discussed above, failing to afford Class A stations receiving licenses after enactment of the Spectrum Act would violate that Act’s terms as well as the CBPA and be arbitrary and capricious, rendering such action unreasonable for these reasons as well.

E. Failure to Protect KHTV-CD in Repacking and Permit KHTV-CD to Participate in the Auction Would Violate the Takings Clause.

Finally, failure to afford KHTV-CD repacking protection for facilities authorized after February 22, 2012, but, at a minimum, before final auction rules are effective would violate the Fifth Amendment’s Takings Clause. The practical effect of denying such protection would be to downgrade KHTV-CD to a low power television station and thus force KHTV-CD out of existence, particularly in the congested Los Angeles market – where it took KHTV-CD twelve years to find a suitable in-core channel. This would deny KHTV-CD *all* economically beneficial use of its license and the expenditures made in reliance on it, thus amounting to a *per se* taking which, absent just compensation, would violate the Takings Clause.⁶⁰

Further, a refusal to recognize Class A stations licensed after February 22, 2012 as eligible to participate in the auction would also violate the Takings Clause of the Fifth Amendment. Venture has a protected property right in the value of the investments that it made to obtain and implement the Class A license for KHTV-CD, as well as the reasonable expectation that it might be able to obtain substantial auction proceeds itself or sell its license to

⁵⁸ *U.S. Airwaves, Inc. v. FCC*, 232 F.3d 227, 233 (D.C. Cir. 2000).

⁵⁹ *Mobile Relay Assocs. V. FCC*, 457 F.3d 1, 11 (D.C. Cir. 2006).

⁶⁰ *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982).

a third party wishing to participate in the auction. FCC action that strips KHTV-CD's auction eligibility and these significant benefits would "interfere[] with [its] distinct investment-backed expectations" and thus constitute an unlawful regulatory taking.⁶¹

III. FOR ALL DIGITAL CLASS A STATIONS, THE COMMISSION SHOULD BASE ITS REVERSE AUCTION BID EVALUATION AND REPACKING PROTECTION ON THE STATION'S LICENSED FACILITY ON THE DATE OF THE REVERSE AUCTION OR, AT THE EARLIEST, A FUTURE DATE CERTAIN.

Beyond ensuring that the limited number of Class A stations licensed after February 22, 2012 have auction eligibility and repacking protection, the Commission is required to provide *all* digital Class A facilities repacking protection and proper auction valuation for their licensed facilities as of the date the reverse auction commences or, at the earliest, a future date certain. The *NPRM* proposes to evaluate and to protect the facilities of Class A stations which completed their digital transition by February 22, 2012 as of that date, while proposing to evaluate those Class A stations which did not complete their digital transition, but do so before the date the reverse auction commences, as of the reverse auction date.⁶² But the Spectrum Act does not countenance such disparate treatment. Moreover, failure to protect and evaluate for purposes of the reverse auction all Class A facilities licensed as of the auction's commencement would violate the APA. Finally, failure to protect such facilities as of, at the earliest, a future date certain, would be impermissibly retroactive and contravene the Fifth Amendment's Takings Clause.

⁶¹ *Penn Cent. Trans. Co. v. City of New York*, 438 U.S. 104, 124 (1978).

⁶² *See NPRM*, ¶¶ 80, 115.

A. Evaluation and Protection of All Class A Stations' Facilities as of the Commencement of the Reverse Auction, or at Minimum a Future Date Certain, Is Consistent with the Spectrum Act.

Venture agrees with the FCC that “it would be unfair to those Class A licensees that have yet to convert digital operation, and that have made transition plans in reliance on the rules” to ignore the value of investment made in station operations after February 22, 2012.⁶³ As discussed above, the Spectrum Act imposes a floor, and not a ceiling, and “does not,” as the *NPRM* rightly states, “prohibit the Commission from granting protection to additional facilities where appropriate.”⁶⁴ Such circumstances readily apply to Class A stations that were licensed or modified their facilities after February 22, 2012, in part because, unlike full-power television stations, they are still in the midst of their digital transition.⁶⁵

Moreover, if the Commission determines to afford full-power television broadcasters with auction evaluation and repacking protection as of the date of the reverse auction, the CBPA would require equivalent treatment of Class A stations. As discussed above, once a Class A license is granted, the CBPA requires that each “class A licensee shall be accorded primary status as a television broadcaster as long as the station continues to meet the requirements for” eligibility.⁶⁶

B. Failure to Protect and to Evaluate Class A Stations' Facilities as of the Commencement of the Reverse Auction, or at Minimum a Future Date Certain, Would Violate the APA.

A refusal by the FCC to protect and to evaluate all Class A stations' facilities as of the date the reverse auction starts would also violate the APA in several ways. First, if failing to protect and to evaluate the prospective digital facilities of Class A television stations that *did not*

⁶³ *NPRM*, ¶ 80.

⁶⁴ *NPRM*, ¶ 113.

⁶⁵ *NPRM*, ¶¶ 80, 115.

⁶⁶ 47 U.S.C. § 336(f)(1)(A) (emphasis added); *see supra* Section III.A.

have digital licenses as of February 22, 2012 would be “fundamentally unfair to such licensees and would deprive the public of important benefits of the Class A digital transition,”⁶⁷ then so, too, would failure to protect and to evaluate the facilities of Class A stations that *were* licensed as of February 22, 2012 but have subsequently modified their facilities. The APA prohibits disparate treatment of similarly-situated entities. The Commission’s divergent approach to repacking and auction evaluation based on when a station received its Class A license, however, is based upon a distinction without a difference, and the *NPRM* fails to justify why stations that transitioned to digital earlier than others should be disadvantaged against their Class A competitors as part of the auction process.⁶⁸

Second, the rules that the *NPRM* relies on in justifying its proposal regarding Class A stations that had not yet converted to digital on February 22, 2012 incentivized the very early digital adoption which the *NPRM* now seeks to penalize. In adopting rules governing the Class A digital transition, the FCC emphasized that “stations should not be penalized for getting an early start on the transition process” and that the September 2015 conversion deadline would “encourage stations to file applications for their digital facilities as soon as possible.”⁶⁹ Venture agrees with Casa En Denver that “the Commission should continue to provide licensees with incentives to continue to improve digital services via facilities upgrades prior to the

⁶⁷ *Id.* ¶ 115.

⁶⁸ *Melody Music*, 345 F.2d at 733; *FEC v. Rose*, 806 F.2d at 1089; *Burlington N. & Santa Fe Ry. Co. v. Surface Transp. Bd.*, 403 F.3d 771, 777 (D.C. Cir. 2005) (FCC must “do more than enumerate factual differences” to justify differential treatment of similarly situated parties).

⁶⁹ *Amendment of Parts 73 and 74 of the Commission’s Rules to Establish Rules for Digital Low Power Television, Television Translator, and Television Booster Stations and to Amend Rules for Digital Class A Television Stations*, Second Report and Order, 26 FCC Rcd 10732, ¶ 14 (2011) (“*LPTV DTV Second Report and Order*”). Commission policy has consistently sought “to hasten the transition of low power television stations to digital operations.” *Id.* ¶ 3.

commencement of the reverse auction process.”⁷⁰ Indeed, any other result would contravene the very policy in favor of digital operation that the Commission has sought to further in the Class A context, and would violate the APA for this additional reason as well.⁷¹ It would also sharply discourage auction participation by Class A stations, lower the supply of available spectrum, and raise the risk of auction failure, in conflict with the goals of the Spectrum Act itself.⁷²

Third, protecting and evaluating facilities that were authorized on February 22, 2012, but that are later modified consistent with applications granted by the Commission would be irrational. This outcome would appear to have the Commission protecting and evaluating facilities that will not be in existence when repacking occurs. This simply makes no sense.

C. Failure to Protect and to Evaluate Class A Stations’ Facilities as of, at the Earliest, a Future Date Certain Would Be Impermissibly Retroactive.

For essentially the same reasons discussed above with respect to KHTV-CD’s auction eligibility and repacking protection, failure to afford Class A stations repacking protection and auction eligibility based on their licensed facilities as of, at the earliest, a *future* date certain would also be impermissibly retroactive.⁷³ Such stations indisputably have made, or will make, investments necessary to prosecute their applications and construct new or modified facilities, that then will be rendered essentially useless if not protected in repacking. The rights these parties possessed when they made such investments would be more than “impaired” – they would be totally eviscerated, and would thus be primarily retroactive and *per se* unlawful.⁷⁴ It

⁷⁰ Comments of Casa En Denver, at 3.

⁷¹ See, e.g., *Office of Comm’n of United Church of Christ*, 779 F.2d at 707 (stating that one of the basic “dictates” of “[r]ational decisionmaking” is that an agency not “employ means that actually undercut its own purported goals”).

⁷² See *Chevron*, 467 U.S. at 843.

⁷³ See *supra* Section III.C.

⁷⁴ *DIRECTV, Inc.*, 110 F.3d at 825-26.

would, at a minimum, amount to “unreasonable secondary retroactivity,” by “mak[ing] worthless substantial past investment incurred in reliance upon the prior rule.”⁷⁵

D. Failure to Protect Class A Stations’ Facilities as of, at the Earliest, a Future Date Certain Would Violate the Takings Clause.

Finally, failure to afford Class A stations repacking protection for facilities authorized after February 22, 2012, but, at a minimum, before a future date certain would violate the Fifth Amendment’s Takings Clause. Arbitrarily cutting off repacking protection rights as of February 22, 2012 would interfere with affected stations’ reasonable investment-backed expectations and amount to an impermissible regulatory taking.⁷⁶

IV. CONCLUSION.

For these reasons, the Commission’s final auction rules must afford auction participation and repacking protection to the very limited number of Class A stations – including KHTV-CD – that remained Class A eligible since 2000 and received Class A licenses after February 22, 2012. The rules must also afford all Class A stations repacking protection for their licensed facilities as of the commencement of the reverse auction. At an absolute minimum, the rules must protect facilities licensed prior to a future date certain.

Respectfully submitted,

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March 12, 2013

⁷⁵ *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 220 (1988) (Scalia, J. concurring).

⁷⁶ *See Penn Cent.*, 438 U.S. at 124.

Attachment A



United States of America
FEDERAL COMMUNICATIONS COMMISSION
DIGITAL CLASS A
BROADCAST STATION LICENSE

Authorizing Official:

Official Mailing Address:

VENTURE TECHNOLOGIES GROUP, LLC
5670 WILSHIRE BLVD STE 1300
LOS ANGELES CA 90036

Hossein Hashemzadeh
Deputy Chief
Video Division
Media Bureau

Facility Id: 60026

Grant Date: February 22, 2012

Analog TSID: 8156

This license expires 3:00 a.m.
local time, December 01, 2014.

Digital TSID: 8157

Call Sign: KHTV-LD

License File Number: BLDLTL-20120217ABO

This license covers permit no.: BDISDTL-20090821ADM

Subject to the provisions of the Communications Act of 1934, subsequent acts and treaties, and all regulations heretofore or hereafter made by this Commission, and further subject to the conditions set forth in this license, the licensee is hereby authorized to use and operate the radio transmitting apparatus herein described.

This license is issued on the licensee's representation that the statements contained in licensee's application are true and that the undertakings therein contained so far as they are consistent herewith, will be carried out in good faith. The licensee shall, during the term of this license, render such broadcasting service as will serve the public interest, convenience, or necessity to the full extent of the privileges herein conferred.

This license shall not vest in the licensee any right to operate the station nor any right in the use of the frequency designated in the license beyond the term hereof, nor in any other manner than authorized herein. Neither the license nor the right granted hereunder shall be assigned or otherwise transferred in violation of the Communications Act of 1934. This license is subject to the right of use or control by the Government of the United States conferred by Section 606 of the Communications Act of 1934.

