

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

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

**ORDER DENYING STAY MOTION**

**Adopted: February 25, 2016**

**Released: February 25, 2016**

By the Chief, Media Bureau:

**I. INTRODUCTION**

1. On February 22, 2016, Latina Broadcasters of Daytona Beach, LLC (Latina), the licensee of Class A television station WDYB-CD, Daytona Beach, Florida, filed a request to stay the Commission's February 12, 2016 Order on Reconsideration in the above-captioned proceeding pending judicial review.<sup>1</sup> In the alternative, Latina requests a stay of the broadcast television spectrum incentive auction. For the reasons discussed below, we deny the Stay Motion.

**II. BACKGROUND**

2. In the *Incentive Auction R&O*, the Commission established the framework for the broadcast television spectrum incentive auction.<sup>2</sup> Among other things, the Commission concluded that the Spectrum Act<sup>3</sup> mandates all reasonable efforts to preserve in the repacking process the coverage area and population served of only full power and Class A television facilities (1) licensed as of February 22, 2012; or (2) for which an application for a license to cover was on file as of February 22, 2012.<sup>4</sup> The Commission did not interpret the Spectrum Act, however, as precluding it from exercising discretion to protect additional broadcast television facilities beyond the statutory floor.<sup>5</sup> The Commission has granted

<sup>1</sup> Emergency Motion for Stay and Other Relief filed by Latina Broadcasters of Daytona Beach, LLC, GN Docket No. 12-268 (filed Feb. 22, 2016) (Stay Motion). See *Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, GN Docket No. 12-268, Order on Reconsideration, FCC 16-12 (2016) ("2016 Reconsideration Order"). Latina has filed a Petition for Review of the 2016 Reconsideration Order with the United States Court of Appeals for the District of Columbia Circuit ("D.C. Circuit"). See Petition for Review, *Latina Broadcasters v. FCC*, No. 16-1065 (D.C. Cir. filed Feb. 19, 2016).

<sup>2</sup> *Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, GN Docket No. 12-268, Report and Order, 29 FCC Rcd 6567 (2014) (*Incentive Auction R&O*), *aff'd*, *Nat'l Assoc. of Broadcasters, et al. v. FCC*, 789 F.3d 165 (D.C. Cir. 2015).

<sup>3</sup> Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96, §§ 6402 (codified at 47 U.S.C. § 309(j)(8)(G)), 6403 (codified at 47 U.S.C. § 1452), 126 Stat. 156 (2012) (Spectrum Act).

<sup>4</sup> February 22, 2012 is the enactment date of the Spectrum Act. See 47 U.S.C. § 1452(b)(2); *Incentive Auction R&O*, 29 FCC Rcd at 6652-54, paras. 185-89. Through the repacking process, the Commission will reorganize the television bands to make spectrum available to carry out a forward auction of new, flexible-use licenses suitable for providing mobile broadband services.

<sup>5</sup> *Incentive Auction R&O*, 29 FCC Rcd at 6654-55, para. 191.

or denied discretionary protection to a handful of categories of facilities, after a careful balancing of numerous factors to achieve the goals of the Spectrum Act and other statutory and Commission goals.<sup>6</sup> The Commission also has explained that reverse auction participation is limited to the licensees of full power and Class A television stations that will be protected in the repacking process.<sup>7</sup> Among the categories of Class A stations to which the Commission extended discretionary protection were stations that had an application for a Class A construction permit on file or granted as of February 22, 2012, the date of enactment of the Spectrum Act.<sup>8</sup>

3. In the *2016 Reconsideration Order*, the Commission concluded that WDYB-CD did not have an application for a Class A authorization pending or granted as of February 22, 2012, and therefore was not entitled to discretionary repacking protection or eligible to participate in the reverse auction.<sup>9</sup> The Commission took this action based on an examination of the record, after The Videohouse, Inc. (Videohouse), Abacus Television (Abacus), WMTM, LLC (WMTM), and KMYA, LLC (KMYA), licensees of four stations in the out-of-core Class A-eligible LPTV station category, filed petitions for reconsideration of the *2015 Reconsideration Order* asking the Commission to protect their stations in the repacking process and make them eligible for the reverse auction because, among other things, their stations are similarly situated to Latina's station.<sup>10</sup> The Commission also addressed Latina's claims pertaining to estoppel, due process, and alleged violations of the Administrative Procedure Act ("APA").<sup>11</sup>

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<sup>6</sup> See *id.* at 6655-77, paras. 192-245.

<sup>7</sup> See *id.* at 6719, para. 357 ("Parity between repacking protections and reverse auction eligibility will further the goals of the incentive auction. . . . [I]t would be meaningless for us to recognize for relinquishment broader rights than those which we would protect in the repacking process. Unprotected usage rights will not affect our repacking flexibility or our ability to repurpose spectrum and thus will have no value in the reverse auction.").

<sup>8</sup> See *Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, GN Docket No. 12-268, Second Order on Reconsideration, 30 FCC Rcd 6746, 6774-75, para. 62 (2015) ("*2015 Reconsideration Order*").

<sup>9</sup> See *2016 Reconsideration Order* at paras. 20-21. In the *Incentive Auction R&O*, the Commission declined to extend discretionary protection to low power television (LPTV) stations that operated on "out-of-core" channels (channels 52-69) when the Community Broadcasters Protection Act (CBPA) was enacted in 1999, subsequently obtained a construction permit for an "in-core" channel (channels 2-51), but did not have either a Class A construction permit or license to cover the permit on file as of February 22, 2012. The Commission explained that protecting these approximately 100 stations would encumber additional spectrum, thereby increasing the number of constraints on the repacking process and limiting the Commission's flexibility to repurpose spectrum for flexible use. The Commission recognized that these stations have made investments in their facilities, but concluded that this equitable interest did not outweigh the "significant detrimental impact on repacking flexibility that would result from protecting them," especially in light of their failure to take the necessary steps to obtain a Class A license and eliminate their secondary status during the ten-plus years between passage of the CBPA and the Spectrum Act. See *Incentive Auction R&O*, 29 FCC Rcd at 6670-72, paras. 232-35.

<sup>10</sup> See The Videohouse, Inc. (Videohouse), Abacus Television (Abacus), WMTM, LLC (WMTM), KMYA, LLC (KMYA) Petition for Reconsideration, GN Docket No. 12-268 (filed Sept. 2, 2015) ("Videohouse Petition"). See also *infra* n.19. At the time the Videohouse Petition was filed, Videohouse, Abacus, WMTM, and KMYA were the licensees of the following stations, respectively: WOSC-CD, Pittsburgh, Pennsylvania; WPTG-CD, Pittsburgh; WIAV-CD, Washington, D.C.; and KKYK-CD, Little Rock, Arkansas. WPTG-CD and KKYK-CD have since been acquired by Fifth Street Enterprise, LLC ("Fifth Street") and Kaleidoscope Foundation, Inc., respectively.

<sup>11</sup> See *2016 Reconsideration Order* at paras. 20-21.

4. The filing window for applications to participate in the reverse auction commenced on December 8, 2015 and ended on January 12, 2016.<sup>12</sup> By letter dated February 12, 2016, Commission staff informed Latina that WDYB-CD's application to participate in the auction was "rejected because [WDYB-CD] is not eligible to participate in" the incentive auction, citing to the *2016 Reconsideration Order*.<sup>13</sup> The Commission has announced that bidding in the reverse auction will commence on March 29, 2016.<sup>14</sup>

### III. DISCUSSION

5. In determining whether to stay the effectiveness of one of its Orders, the Commission applies the traditional four-factor test employed by the D.C. Circuit.<sup>15</sup> To qualify for the extraordinary remedy of a stay, a movant must show that: (1) it is likely to prevail on the merits; (2) it will suffer irreparable harm absent the grant of preliminary relief; (3) other interested parties will not be harmed if the stay is granted; and (4) the public interest would favor grant of the stay. For the reasons described below, we conclude that Latina has failed to meet the test for this extraordinary equitable relief.

#### A. Latina Is Unlikely to Prevail on the Merits

6. Latina has failed to demonstrate that it is likely to succeed on the merits. First, Latina is unlikely to succeed on its claim that it was deprived of due process.<sup>16</sup> "The essential requirements of due process . . . are notice and an opportunity to respond."<sup>17</sup> The record demonstrates that both requirements were met. The September 2, 2015 Videohouse Petition asked the Commission to reconsider the scope of protection for "out-of-core" Class A-eligible stations such as Latina and, as the *2015 Reconsideration Order* clearly illustrated, the Commission's authority to act on reconsideration is not limited to the specific relief requested in a petition for reconsideration.<sup>18</sup> Moreover, a December 23, 2015 letter filed by Videohouse, Fifth Street, and WMTM in the record of the rulemaking proceeding specifically mentioned Latina in challenging the Commission's exercise of discretionary protection.<sup>19</sup> Staff of the Incentive Auction Task Force subsequently contacted Latina's counsel to ensure it was aware of the letter.<sup>20</sup> The record further reflects that Latina had ample opportunity to respond. Latina filed 11

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<sup>12</sup> *Incentive Auction Task Force Releases Revised Baseline Data and Prices for Reverse Auction; Announces Revised Filing Window Dates*, AU Docket No. 15-252 et al., DA 15-1296, Public Notice, 2015 WL 7095182 (rel. Nov. 12, 2015).

<sup>13</sup> See Stay Motion at Exhibit A.

<sup>14</sup> *Broadcast Incentive Auction Scheduled to Begin on March 29, 2016*, AU Docket No. 14-252 et al., FCC 15-78, Public Notice, 30 FCC Rcd 8975 (2015). On March 29, reverse auction applicants must commit to an initial bid option.

<sup>15</sup> See *Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977) (*Holiday Tours*); *Virginia Petroleum Jobbers Ass'n v. Federal Power Comm'n*, 259 F.2d 921, 925 (D.C. Cir. 1958) (*VA Petroleum Jobbers*).

<sup>16</sup> See Stay Motion at 9-10.

<sup>17</sup> *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 546 (1985).

<sup>18</sup> See *2015 Reconsideration Order*, 30 FCC Rcd at 6774-75, para. 62. See also *2016 Reconsideration Order* at para. 19.

<sup>19</sup> See Letter from Thomas R. McCarthy, Counsel for Videohouse, Fifth Street, and WMTM, to Marlene Dortch, Secretary, FCC, GN Docket No. 12-268 (Dec. 23, 2015), at 2-3 ("*Videohouse Dec. 23<sup>rd</sup> Letter*"). See also Letter from Thomas R. McCarthy, Counsel for Videohouse, Fifth Street, and WMTM, to Marlene Dortch, Secretary, FCC, GN Docket No. 12-268 (Jan. 25, 2016), at 2.

<sup>20</sup> On December 31, 2015, Latina filed its initial response to the claims made in the *Videohouse Dec. 23<sup>rd</sup> Letter*. See Letter from Latina Broadcasters of Daytona Beach, LLC to Marlene H. Dortch, Secretary, FCC, GN Docket No. 12-268 (Dec. 31, 2015) ("*Latina Dec. 31<sup>st</sup> Letter*") (acknowledging that Videohouse, Fifth Street, and WMTM have "invoked the Commission's decision to extend protection to WDYB in support of their assertions that the

(continued....)

separate letters with the Commission, amounting to a total 44 pages, detailing its arguments as to why WDYB-CD should be extended discretionary protection,<sup>21</sup> and it had no less than five separate meetings (in-person or via phone) with Commission staff to express its views.<sup>22</sup> The Commission fully considered and addressed all of Latina's claims.<sup>23</sup> Moreover, Latina is unlikely to succeed on its claim that the Commission lacked a procedural vehicle for taking substantive action regarding Latina because it determined that the Videohouse Petition addressed in the *2016 Reconsideration Order* was procedurally

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Commission unreasonably discriminated against them" and stating that "Latina is compelled to submit [its response] for the record"; citing *Videohouse Dec. 23<sup>rd</sup> Letter*; Emergency Petition for Writ of Mandamus, In re The Videohouse, Inc., 15-1486 (D.C. Cir. filed Dec. 22, 2015); Reply in Support of Emergency Petition for Writ of Mandamus, In re The Videohouse, Inc., 15-1486 at 2 (D.C. Cir. filed Dec. 29, 2015)).

<sup>21</sup> See Letter from Ari Meltzer, Counsel for Latina Broadcasters of Daytona Beach, LLC, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 12-268 (Feb. 5, 2016); Letter from Latina Broadcasters of Daytona Beach, LLC to Commissioner Rosenworcel, FCC, GN Docket No. 12-268 (Feb. 5, 2016); Letter from Latina Broadcasters of Daytona Beach, LLC to Commissioner Clyburn, FCC, GN Docket No. 12-268 (Feb. 5, 2016); Letter from Ari Meltzer, Counsel for Latina Broadcasters of Daytona Beach, LLC, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 12-268 (Feb. 4, 2016) ("*Latina Feb. 4<sup>th</sup> Letter*"); Letter from Ari Meltzer, Counsel for Latina Broadcasters of Daytona Beach, LLC, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 12-268 (Feb. 2, 2016) ("*Latina Feb. 2<sup>nd</sup> Letter*"); Letter from Latina Broadcasters of Daytona Beach, LLC to Marlene H. Dortch, Secretary, FCC, GN Docket No. 12-268 (Jan. 30, 2016); Letter from Latina Broadcasters of Daytona Beach, LLC to Marlene H. Dortch, Secretary, FCC, GN Docket No. 12-268 (Jan. 28, 2016); Letter from Ari Meltzer, Counsel for Latina Broadcasters of Daytona Beach, LLC, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 12-268 (Jan. 26, 2016) ("*Latina Jan. 26<sup>th</sup> Letter*"); Letter from Latina Broadcasters of Daytona Beach, LLC to Marlene H. Dortch, Secretary, FCC, GN Docket No. 12-268 (Jan. 22, 2016); Letter from Ari Meltzer, Counsel for Latina Broadcasters of Daytona Beach, LLC, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 12-268 (Jan. 21, 2016) ("*Latina Jan. 21<sup>st</sup> Letter*"); *Latina Dec. 31<sup>st</sup> Letter*.

<sup>22</sup> *Latina Feb. 4<sup>th</sup> Letter* (meeting with staff of the Office of General Counsel ("OGC")); *Latina Feb. 2<sup>nd</sup> Letter* (meeting with staff from Office of Commissioner O'Rielly); *Latina Jan. 26<sup>th</sup> Letter* (meeting with staff of the Media Bureau, Incentive Auction Task Force, and OGC); *Latina Jan. 21<sup>st</sup> Letter* (meetings with staff from Offices of Commissioners Clyburn, Pai, and Rosenworcel).

<sup>23</sup> See *2016 Reconsideration Order* at paras. 20-21. Latina claims that because WDYB-CD was included in the Commission's eligibility list on June 9, 2015, it did not have the opportunity to file a Petition for Eligible Entity Status by the July 9, 2015 deadline. See Stay Motion at 13, 18. The opportunity to file a Petition for Eligible Entity Status, however, was intended to ensure that the list of technical facilities eligible for repacking protection and auction participation reflected the Commission's eligibility determinations in the pending rulemaking proceeding, not to entertain challenges of such determinations. See *Media Bureau Announces Incentive Auction Eligible Facilities and July 9, 2015 Deadline for Filing Pre-Auction Technical Certification Form*, Public Notice, 30 FCC Rcd 6153 (MB 2015) (stating that a licensee can file a Petition for Eligible Entity Status explaining the reason it believes an omitted facility is eligible consistent with the *Incentive Auction R&O*). Latina also claims that it conducted its advocacy with "one hand tied behind its back" because it filed an application to participate in the reverse auction and the "quiet period" was in effect beginning January 12, 2016. Stay Motion at 18. During the quiet period, section 1.2205(b) precludes 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." 47 C.F.R. § 1.2205(b). Nothing precluded Latina from presenting its arguments to the Commission under seal with a request for confidentiality, however. See 47 C.F.R. § 0.459. Nor are we persuaded that Latina's advocacy was handicapped by its inability to make arguments based on the specific nature of its bidding strategy. See *Guidance Regarding the Prohibition of Certain Communications During the Incentive Auction, Auction 1000*, AU Docket No. 14-252, GN Docket No. 12-268, WT Docket No. 12-269, Public Notice, 30 FCC Rcd 10794, 10796-97 (WTB 2015) (quiet period prohibition does not prohibit communications about whether or not a licensee has applied to participate in the auction, so long as the licensee does not communicate "the specific nature of the licensee's participation," such as "the bid options or bidding actions that have been or will be selected or taken").

improper.<sup>24</sup> Latina offers no case law to support this claim. And, despite the Videohouse Petition's procedural flaws, the Commission addressed it on the merits. As explained in the *2016 Reconsideration Order*, the Commission acted well within its authority to act on reconsideration.<sup>25</sup>

7. Second, Latina is unlikely to succeed on its claim that there is no rational basis to the Commission's 2014 decision to afford eligibility to KHTV<sup>26</sup> while denying eligibility to WDYB.<sup>27</sup> KHTV's licensee, Venture Technologies Group, LLC (Venture), timely submitted the facts and circumstances that it maintained justified discretionary protection in response to the *Incentive Auction NPRM*.<sup>28</sup> In contrast, Latina did not advocate for protection of WDYB until after adoption of the *Incentive Auction R&O*.<sup>29</sup> Moreover, as of February 22, 2012, Venture was pursuing Class A status for KHTV before the Commission; Latina was not pursuing Class A status for WDYB.<sup>30</sup> KHTV had a pending application for a Class A authorization on file as of February 22, 2012 which included a certification that it "does, and will continue to" meet all of the full power and Class A regulatory requirements that are applicable to Class A stations, subject to significant penalties for willful false statements.<sup>31</sup> The prior licensee of WDYB, Tiger Eye Finance Inc. ("Tiger Eye"), obtained a Class A construction permit prior to February 22, 2012, but the permit expired in December 2011.<sup>32</sup> Instead of constructing the Class A station authorized in the construction permit obtained by Tiger Eye, Latina filed an application for an LPTV construction permit in February 2011, which did not require such a certification.<sup>33</sup> And, after finally locating and constructing a suitable in-core channel, Venture filed its Class A license application for KHTV just two days after February 22, 2012, whereas Latina filed its Class A license application for WDYB almost nine months after this date.<sup>34</sup> The Commission is entitled to distinguish between KHTV and WDYB based on the licensees' efforts in seeking and obtaining Class A status over the course of more than a decade.<sup>35</sup>

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<sup>24</sup> See Stay Motion at 10.

<sup>25</sup> See *2016 Reconsideration Order* at para. 21.

<sup>26</sup> *Incentive Auction R&O*, 29 FCC Rcd at 6671-72, para. 235.

<sup>27</sup> See Stay Motion at 10-12.

<sup>28</sup> See *2016 Reconsideration Order* at para. 8.

<sup>29</sup> See *id.* at para. 20.

<sup>30</sup> See *id.*

<sup>31</sup> See *id.* at para. 11 and para. 20 n.99.

<sup>32</sup> See *id.* at para. 20.

<sup>33</sup> See *id.* As noted in the *Incentive Auction R&O*, the underlying construction permit application associated with Venture's Class A application pending on February 22, 2012 was dismissed. See *Incentive Auction R&O*, 29 FCC Rcd at 6672, n.728. However, the Class A application itself, including the required certifications, was not withdrawn by Venture nor dismissed by the Commission until July 2012. Until this time, including on February 22, 2012, the certification of continuing compliance with Class A requirements remained on file with the Commission and in effect. In contrast, Latina allowed the Class A construction permit obtained by Tiger Eye to expire prior to February 22, 2012.

<sup>34</sup> See *2016 Reconsideration Order* at para. 20; *Incentive Auction R&O*, 29 FCC Rcd at 6671-72, para. 235.

<sup>35</sup> See *Blanca Telephone Co. v. FCC*, 743 F.3d 860, 864-65 (D.C. Cir. 2014) (in rejecting petitioners' argument that they were entitled to a waiver because they were "similarly situated" to parties that received a waiver from the FCC, finding that the FCC had reasonably differentiated among the parties on the basis of their relative "diligence" in coming into compliance with hearing aid compatibility requirements); *Florida Institute of Technology v. FCC*, 952 F.2d 549, 554 (D.C. Cir. 1992) (in upholding dismissal of an untimely application after the staff mistakenly treated the application as timely filed, reasoning that the Court "cannot quarrel with the FCC's refusal to permit [the Institute's] late-filed application ... to have equal footing with [Palm Bay], who has proceeding diligently.").

8. Third, Latina is unlikely to succeed on its claim of equitable estoppel.<sup>36</sup> While Latina cites several eligibility notices as affirming that WDYB-CD would be protected in the repacking process and eligible for auction participation, these notices emphasized that they were provisional and were not intended to decide eligibility issues.<sup>37</sup> Latina's detrimental reliance on its inclusion in provisional eligibility lists was minimal at best.<sup>38</sup> Any reliance Latina placed on the *2015 Reconsideration Order* was misplaced because the Commission specifically rejected Latina's argument that it was entitled to protection.<sup>39</sup> And Latina's reliance on a Commission filing submitted with the D.C. Circuit likewise is misplaced: the Commission was responding to factual arguments regarding WDYB, not making representations to the Court as to the scope of protection provided in the *2015 Reconsideration Order*.<sup>40</sup> Moreover, Latina cannot demonstrate that the Commission "engaged in affirmative misconduct," one of the required elements for a claim of equitable estoppel.<sup>41</sup>

### B. Latina Will Not Suffer Irreparable Injury

9. Latina also has failed to show that it will suffer irreparable injury absent a grant of the Stay Petition.<sup>42</sup> If Latina were to prevail on the merits of its claims, appropriate relief would be available at a later date.<sup>43</sup> Moreover, inability to participate in the reverse auction does not mean that Latina will have to cease operation as a Class A station. While Latina claims that it "faces a severe risk of displacement,"<sup>44</sup> the likelihood of displacement depends on factors such as broadcaster participation

<sup>36</sup> See Stay Motion at 12-15.

<sup>37</sup> See *2016 Reconsideration Order* at para. 21. Despite Latina's claims, nothing in these notices precluded the Commission from removing stations listed as eligible. See Stay Motion at 13. The June 9 Public Notice referenced pending petitions for reconsideration of the *Incentive Auction R&O* and explained that the "Appendix is not intended to pre-judge their outcome," without limiting the outcome to additions of stations. *Media Bureau Announces Incentive Auction Eligible Facilities and July 9, 2015 Deadline for Filing Pre-Auction Technical Certification Form*, Public Notice, 30 FCC Rcd 6153, 6156, n.21 (Media Bur. 2015). The June 30 Public Notice emphasized that "the list of stations included in the baseline data released today is not the final list of stations eligible for repacking protection." *Office of Engineering and Technology Releases Final Version of TVStudy and Releases Baseline Coverage Area and Population Served Information Related to Incentive Auction Repacking*, Public Notice, 30 FCC Rcd 6964, 6965 (OET 2015).

<sup>38</sup> See *Florida Institute of Technology*, 952 F.2d at 553 (Florida Institute was not entitled to rely on mistakenly released list of timely-filed applications, which "was without legal effect" under FCC rules).

<sup>39</sup> See *2016 Reconsideration Order* at para. 21; *2015 Reconsideration Order*, 30 FCC Rcd at 6769 n.183.

<sup>40</sup> See *2016 Reconsideration Order* at para. 21.

<sup>41</sup> *Morris Communications 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)).

<sup>42</sup> Several general principles govern the irreparable injury inquiry. First, "the injury must be both certain and great; it must be actual and not theoretical." *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985). A movant must also "substantiate the claim that the irreparable injury is 'likely' to occur. . . . Bare allegations of what is likely to occur are of no value since the court must decide whether the harm will in fact occur." *Id.* Further, it is "well settled that economic loss does not, in and of itself, constitute irreparable harm." *Id.* The only exceptions to this rule are when (1) the economic loss threatens the "very existence of the movant's business," *id.*, and (2) such loss is great, certain, and imminent. *Cardinal Health, Inc. v. Holder*, 846 F. Supp. 2d 203, 211 (D.D.C. 2012).

<sup>43</sup> See *FCC v. Radiofone, Inc.*, 516 U.S. 1301, 116 S.Ct. 283 (1995) (Justice Stevens vacating a stay of an auction, stating that "allowing the national auction to go forward will not defeat the power of the Court of Appeals to grant appropriate relief in the event that respondent overcomes the presumption of validity that supports the FCC regulations and prevails on the merits"); *VA Petroleum Jobbers*, 259 F.2d at 925 ("The possibility that adequate . . . relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm.").

<sup>44</sup> Stay Motion at 2. See *id.* at 16.

levels in the reverse auction, the amount of spectrum that the auction clears, the individual channel reassignments made to repacked broadcasters, and whether auction closing conditions are satisfied.<sup>45</sup> In the event WDYB-CD is displaced, it will be able to file a displacement application during the first opportunity to do so during the post-auction transition, thereby maximizing its chances of securing a replacement channel.<sup>46</sup> The Commission also has other tools available to facilitate finding a channel for WDYB-CD after the auction in the event it is displaced.<sup>47</sup>

**C. The Requested Stay Will Result in Harm to Others and is Contrary to the Public Interest**

10. Latina has failed to demonstrate that the requested stay will not harm third parties and will serve the public interest. As an initial matter, Latina's request to stay the incentive auction pending judicial review would disserve the public interest.<sup>48</sup> As the Commission explained in the *Incentive Auction NPRM*, "[o]ur country faces a major challenge to ensure that the speed, capacity, and accessibility of our wireless networks keeps pace with these demands in the years ahead, so the networks can support the critical economic, public safety, health care, and other activities that increasingly rely on them. Meeting this challenge is essential to continuing U.S. leadership in technological innovation, growing our economy, and maintaining our global competitiveness."<sup>49</sup> The Commission has accordingly devoted considerable time and resources since the enactment of the Spectrum Act to preparing for the incentive auction—an unprecedented proceeding involving numerous complex and highly technical issues, representing the culmination of four years of work by the Commission and dozens of members of its staff, with significant ramifications for the nation's economy and consumers.<sup>50</sup> The beginning of the auction is now only five weeks away. A delay would disserve both consumers and eligible entities who have developed business plans based on the current schedule, including securing financing and deferring other business plans.<sup>51</sup> Moreover, delaying the auction until all reviews and appeals are final would not be justified by rule or precedent and would be inconsistent with Congress's goals in enacting the

<sup>45</sup> See *Power Mobility Coal. v. Leavitt*, 404 F.Supp.2d 190, 205 (D.D.C. 2005) (a "predict[ion]" that is "at best, remote and speculative" does not merit a finding of irreparable harm).

<sup>46</sup> See *2016 Reconsideration Order* at para. 22.

<sup>47</sup> For example, Latina has an outstanding application for a construction permit to move its antenna to a location closer to Orlando, Florida. See FCC File No. BPDTL-20130503ADD. Granting that application, which is presently subject to a freeze that will be lifted after the auction, see *Incentive Auction R&O*, 29 FCC Rcd at 6659-60, para. 205, may increase the availability of channels for WDYB-CD after the auction. If adjacent-channel interference is an issue, it may also be possible to increase the 3 kW effective radiated power requested in that application to address the issue. The Commission has also proposed to allow Class A stations to enter into channel sharing arrangements outside the auction context, which would open additional opportunities for WDYB-CD to find a new channel if displaced. See *Incentive Auction R&O*, 29 FCC Rcd at 6835, para. 657.

<sup>48</sup> See Stay Motion at 1-2, 18-19.

<sup>49</sup> See *Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, GN Docket No. 12-268, Notice of Proposed Rulemaking, 27 FCC Rcd 12357, 12358, para. 1 (2012) (*"Incentive Auction NPRM"*).

<sup>50</sup> See generally *Nat'l Assoc. of Broadcasters, et al. v. FCC*, 789 F.3d 165 (D.C. Cir. 2015); *Incentive Auction R&O*, 29 FCC Rcd at 6573, para. 13.

<sup>51</sup> While Congress established 2022 as the deadline for conducting a broadcast television spectrum incentive auction, see Stay Motion at 19 (citing 47 U.S.C. § 1452(f)(3)), the Commission has reasonably determined that the increasing demand for spectrum-based services requires it to conduct the auction in advance of that date. Moreover, contrary to Latina's argument, the Commission has never delayed the officially scheduled commencement of bidding in the auction. See Stay Motion at 19 n.80. Latina also attempts to blame the Commission for the "time crunch" between release of the *2016 Reconsideration Order* and the commencement of the auction on March 29, 2016. See Stay Motion at 18-19. Any blame lies with Latina, however, for failing to advocate for protection of its station until after adoption of the *Incentive Auction R&O*. See *supra* para. 7; *2016 Reconsideration Order* at para. 21.

Spectrum Act.<sup>52</sup>

11. We also reject Latina's alternative request to stay the *2016 Reconsideration Order* so that WDYB-CD will be provisionally protected in the repacking process and allowed to participate in the reverse auction pending judicial review.<sup>53</sup> The fact that the Commission "released sets of data files and calculated opening prices" for the auction including WDYB-CD does not justify including it despite the Commission's decision in the *2016 Reconsideration Order* that WDYB-CD is not entitled to repacking protection and auction participation.<sup>54</sup> Latina attempts to analogize its position to that of an eligible licensee that is subject to a non-final license validity proceeding or downgrade order.<sup>55</sup> The Commission decided to protect such licensees in the repacking process and allow them to participate in the reverse auction until the proceeding or order becomes final and non-reviewable.<sup>56</sup> The Commission never stated or implied, however, that such relief would extend to ineligible stations that have pending challenges of the Commission's eligibility decisions. In addition to Latina, three other Class A licensees have sought judicial review of the Commission's eligibility decisions.<sup>57</sup> A former full-power station permittee has filed an Emergency Petition for Writ of Mandamus.<sup>58</sup> Moreover, LPTV interests have sought judicial review of the Commission's decision not to protect LPTV stations, which number in the thousands.<sup>59</sup> Accepting Latina's claim for provisional eligibility, therefore, would also necessitate provisional eligibility for numerous other stations. Adding to the list of stations eligible to participate in the auction and/or receive repacking protection at this stage would entail system modifications that would impact the overall schedule for the auction and frustrate the purposes of the Spectrum Act.<sup>60</sup>

#### IV. ORDERING CLAUSES

12. Accordingly, IT IS ORDERED, pursuant to the authority contained in Sections 1, 4(i), 4(j), 5, 301, 303, and 309 of the Communications Act of 1934, as amended, and Sections 6402 and 6403 of Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96, 126 Stat. 156, 47 U.S.C. §§ 151, 154(i)-(j), 155, 301, 303, 309, 1452, and the authority delegated pursuant to Sections 0.61 and 0.283 of the Commission's rules, 47 C.F.R. §§ 0.61, 0.283, this Order Denying Stay Motion in GN Docket No. 12-268 IS ADOPTED.

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<sup>52</sup> See *Genesis Communications I, Inc.*, Memorandum Opinion and Order, 29 FCC Rcd 4214, 4215, para. 3 (2014) ("[T]here is no rule or case support for the claim that auction or post-auction procedures must be delayed until all reviews and appeals are final."). See also 47 U.S.C. § 309(j)(3)(A) (directing the Commission to design auctions in order to, *inter alia*, promote "the development and rapid deployment of new technologies, products, and services for the benefit of the public, including those residing in rural areas, without administrative or judicial delays").

<sup>53</sup> See Stay Motion at 1-4, 17-18.

<sup>54</sup> *Id.* at 4, 17. See *2016 Reconsideration Order* at paras. 20-21.

<sup>55</sup> See Stay Motion at 2-3, 17.

<sup>56</sup> See *Incentive Auction R&O*, 29 FCC Rcd at 6667, 6722-23, paras. 225, 363-64.

<sup>57</sup> See Petition for Review, *The Videohouse, Inc. et al. v. FCC*, No. 16-1060 (D.C. Cir. filed Feb. 12, 2016).

<sup>58</sup> See Emergency Petition for Writ of Mandamus, *Walker Broadcasting, Inc. v. FCC*, No. 16-1066 (D.C. Cir. filed Feb. 19, 2016).

<sup>59</sup> See Petition for Review, *Mako Communications, LLC et al. v. FCC*, No. 15-1264 (D.C. Cir. filed Aug. 6, 2015); Petition for Review, *Free Access & Broadcast Telemedia, LLC et al. v. FCC*, No. 15-1346 (D.C. Cir. filed Oct. 5, 2015).

<sup>60</sup> Whereas adding to the list of stations eligible to participate in the auction and receive repacking protection at this stage would significantly delay the schedule, removing WDYB-CD from the list will not cause any delay because it need not impact other eligible stations, whose constraints and prices will remain the same.



13. IT IS FURTHER ORDERED that the Emergency Motion for Stay and Other Relief filed by Latina Broadcasters of Daytona Beach, LLC IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William T. Lake  
Chief