

**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: March 10, 2016

Released: March 10, 2016

By the Chief, Media Bureau:

I. INTRODUCTION

1. On March 1, 2016, Free Access & Broadcast Telemedia, LLC (Free Access), Word of God Fellowship, Inc. (WOGF), and Mako Communications, LLC (Mako) (collectively, Movants), licensees of or investors in low power television (LPTV) stations, filed a request to stay the *Incentive Auction R&O*¹ and the *2015 Reconsideration Order*² pending resolution of their Petitions for Review of those Orders by the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit or Court).³ Although Movants filed their Petitions for Review between five and seven months ago, they have asked for a stay just four weeks before the scheduled commencement of the incentive auction on March 29, 2016. 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.⁴ The Commission declined to extend protection to LPTV stations in the repacking process called for by the Spectrum Act,⁵ explaining that protection is not mandated by section 1452(b)(2), which requires protection of full-power and Class A television licensees only.⁶ The Commission interpreted section 1452(b)(5), which provides that “nothing in [section 1452(b)] shall be construed to alter the spectrum usage rights of [LPTV] stations,”⁷ to clarify the meaning and

¹ *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).

² *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*”).

³ Petition for Stay Pending Judicial Review filed by Free Access & Broadcast Telemedia, LLC, Word of God Fellowship, Inc., and Mako Communications, LLC, GN Docket No. 12-268 (filed March 1, 2016) (Stay Motion).

⁴ *See generally Incentive Auction R&O*. *See also* 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).

⁵ 47 U.S.C. § 1452(b). Through the repacking process, the Commission will reorganize the television bands to make spectrum available for a forward auction of new, flexible-use licenses suitable for mobile broadband service.

⁶ 47 U.S.C. §§ 1401(6), 1452(b)(2). *See Incentive Auction R&O*, 29 FCC Rcd at 6673, para. 238.

⁷ 47 U.S.C. § 1452(b)(5).

scope of section 1452, without limiting the Commission's spectrum management authority.⁸ In addition, the Commission explained that not protecting LPTV stations in the repacking process did not "alter" their spectrum usage rights because, as secondary services, they are subject to displacement by primary services.⁹ Moreover, the Commission explained that there are more than 5,500 licensed LPTV and TV translator stations, and almost 4,500 of these stations are licensed on UHF channels, and that "protecting them would increase the number of constraints on the repacking process significantly, and severely limit our recovery of spectrum to carry out the forward auction, thereby frustrating the purposes of the Spectrum Act."¹⁰ The Commission affirmed these conclusions in the *2015 Reconsideration Order*.¹¹

3. Mako filed a Petition for Review of the *2015 Reconsideration Order* on August 6, 2015,¹² the same day the Commission announced the incentive auction's March 29, 2016 commencement date.¹³ Free Access and WOGF filed a Petition for Review of the *2015 Reconsideration Order* and the *Incentive Auction R&O* on October 5, 2015.¹⁴ Briefing in both cases will be complete as of March 21, 2016, and oral argument is scheduled to take place on May 5, 2016.¹⁵

III. DISCUSSION

4. 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.¹⁶ 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 Movants have failed to meet the test for this extraordinary equitable relief.

A. Movants Are Unlikely to Prevail on the Merits

5. Movants have failed to demonstrate that they are likely to succeed on the merits. The Commission's interpretation of the Spectrum Act is consistent with the statute's language, structure, and purpose. Section 1452(b)(5) looks only to the existing rights of LPTV stations; it does not grant such stations additional rights in the repacking process. The rights of LPTV stations have always been secondary to those of licensed primary users of the spectrum. Their rights are therefore not altered by their potential displacement to accommodate new users in the repurposed spectrum. In addition, the Spectrum Act's overarching goal of repurposing spectrum for uses other than broadcast television would

⁸ See *Incentive Auction R&O*, 29 FCC Rcd at 6673-74, para. 239.

⁹ See *id.* at 6673-74, para. 239 and 6674-75, para. 241.

¹⁰ *Id.* at 6674-75, para. 241.

¹¹ See *2015 Reconsideration Order*, 30 FCC Rcd at 6777-79, paras. 67-68.

¹² Petition for Review, *Mako Communications, LLC v. FCC*, No. 15-1264 (D.C. Cir. filed Aug. 6, 2015).

¹³ See *FCC Establishes Bidding Procedures for 2016 Incentive Auction: Auction Scheduled to Begin March 29, 2016*, News Release (rel. Aug. 6, 2015), available at https://apps.fcc.gov/edocs_public/attachmatch/DOC-334756A1.pdf. See also *Broadcast Auction Scheduled to Begin March 29, 2016*, Public Notice, 30 FCC Rcd 8975 (rel. Aug. 11, 2015) (*Auction 1000 Bidding Procedures PN*). Mako's Petition was consolidated with a Petition for Review filed by Beach TV Properties, Inc. ("Beach"), which is not a party to the Stay Motion. See Petition for Review, *Beach TV Properties, Inc. v. FCC*, No. 15-1280 (D.C. Cir. filed Aug. 14, 2015).

¹⁴ See Petition for Review, *Free Access & Broadcast Telemedia, LLC et al. v. FCC*, No. 15-1346 (D.C. Cir. filed Oct. 5, 2015).

¹⁵ See [[n.21]], *infra*.

¹⁶ 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*).

be substantially impaired if LPTV stations could not be displaced where necessary to accommodate new uses for spectrum vacated by full-power and Class A broadcasters. The Commission has fully explained in the *Incentive Auction R&O* and the *2015 Reconsideration Order* its decision not to protect LPTV stations in the repacking process.¹⁷ Moreover, the Commission has filed Briefs with the D.C. Circuit that fully respond to and refute the arguments made by Movants in their Stay Motion.¹⁸ Accordingly, we conclude that the Movants have not demonstrated that they are likely to succeed on the merits.

B. Movants Will Not Suffer Irreparable Injury

6. Movants also have failed to show that they will suffer irreparable injury absent a grant of the Stay Petition.¹⁹ As an initial matter, Movants' claims of irreparable injury are undermined by their tardiness in seeking a stay. The Commission announced on August 6, 2015 that the auction would commence on March 29, 2016.²⁰ Nevertheless, Movants waited to file their Stay Motion until March 1, 2016, seven months (in the case of Mako) or five months (in the case of Free Access/WOGF) after filing their Petitions for Review, and just four weeks before the incentive auction is scheduled to begin. Moreover, Movants waited over three weeks after the Court denied their motion to expedite oral argument to file the Stay Motion.²¹ Movants offer no explanation for their tardiness.

7. Movants have not demonstrated that the alleged injury they will suffer is either certain or irreparable. Movants' claim that the auction "will eliminate the channels currently used by countless LPTV stations [and] forc[e] many if not most larger-market LPTV licensees to shut down" is speculative.²² The likelihood that individual LPTV stations in which Movants have interests will be

¹⁷ See *Incentive Auction R&O*, 29 FCC Rcd at 6672-75, paras. 236-41; *2015 Reconsideration Order*, 30 FCC Rcd at 6776-80, paras. 64-71.

¹⁸ FCC Brief, *Free Access & Broadcast Telemedia, LLC et al. v. FCC*, No. 15-1346 (D.C. Cir. filed Feb. 22, 2016); FCC Brief, *Mako Communications, LLC et al. v. FCC*, Nos. 15-1264, 15-1280 (D.C. Cir. filed Jan. 22, 2016).

¹⁹ 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).

²⁰ See *Auction 1000 Bidding Procedures PN*, 30 FCC Rcd at 8975.

²¹ On January 29, 2016, Movants filed a Motion to Expedite Oral Argument asking the Court to schedule oral argument on the first available date after March 21, 2016, the date final briefs are due in the Free Access/WOGF appeal. See *Mako Communications, LLC et al., Petitioners' Motion to Expedite Oral Argument, Mako Communications, LLC et al. v. FCC*, Docket Nos. 15-1264, 15-1280, and *Free Access & Broadcast Telemedia, LLC et al. v. FCC*, Docket No. 15-1346 (D.C. Cir. filed Jan. 29, 2016). On February 8, 2016, the Court denied this Motion and provided that oral argument would be held in May 2016. See *Mako Communications, LLC et al. v. FCC*, Docket Nos. 15-1264, 15-1280, and *Free Access & Broadcast Telemedia, LLC et al. v. FCC*, Docket No. 15-1346, Order (D.C. Cir. Feb. 8, 2016). The Court subsequently scheduled oral argument for May 5, 2016.

²² Stay Motion at 1-2. See *id.* at 19-22. We note that this alleged harm does not pertain to Free Access, which is only an investor in LPTV stations and does not hold LPTV licenses. See FCC Brief, *Free Access & Broadcast Telemedia, LLC et al. v. FCC*, No. 15-1346 (D.C. Cir. filed Feb. 22, 2016), at 21-22. Movants claim they will lose "millions of dollars in revenue" and "options for buying controlling interests in many other LPTV stations," but fail to provide any details. Movants also claim that LPTV licensees are "exercising important First Amendment rights" and that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury" sufficient for a stay, Stay Motion at 20 (quoting *Elrod v. Burns*, 427 US 347, 373 (1976)), but "there is no 'unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish.'" *FCC v. National Citizens Comm. for Broad.*, 436 U.S. 775, 799 (1978) (quoting *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 388 (1969)).

displaced depends on several factors, such as broadcaster participation 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.²³ If an LPTV station is displaced, it will be able to seek a replacement channel.²⁴ The Commission has adopted a number of measures to facilitate displaced LPTV stations' efforts to find replacement channels.²⁵

8. In addition, Movants have not demonstrated that the alleged injury is irreparable. Allowing the auction to go forward on March 29 will not defeat the power of the Court to grant adequate relief at a later date.²⁶ The repacking process will not become effective until after the auction is complete, which may take months.²⁷ The subsequent transition process will take an additional 39 months,²⁸ and during that period displaced LPTV stations will not be required to cease operations on their current channels until notified by a primary licensee that it is ready to use the spectrum.²⁹ Thus, the repacking will not be implemented until long after the Court hears oral argument in May.

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

9. Movants have failed to demonstrate that their request to stay implementation of the *Incentive Auction R&O* and the *2015 Reconsideration Order* will not harm third parties and will serve the public interest. In fact, their requested stay, which would have the effect of staying the auction pending judicial review, would disserve the public interest.³⁰ As the Commission explained in the *Incentive*

²³ 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).

²⁴ See *Incentive Auction R&O*, 29 FCC Rcd at 6834-35, para. 657.

²⁵ These measures include a special post-auction filing window for selecting a new channel, see *Incentive Auction R&O*, 29 FCC Rcd at 6834-35, para. 657, flexibility for stations with mutually exclusive displacement applications to reach a settlement or an engineering solution, see *id.*, rules allowing LPTV and TV translator stations to share channels, see *Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, MB Docket No. 03-185, GN Docket No. 12-268, ET Docket No. 14-175, Third Report and Order and Fourth Notice of Proposed Rulemaking, 2015 WL 9260876, para. 21 (Dec. 17, 2015) (“[S]tations that are displaced by the incentive auction and repacking process that have difficulty finding available channels may be able to use channel sharing to team with other such stations in the same predicament. . . . Alternatively, a displaced LPTV or TV translator station could agree to share the channel of a non-displaced station.”), and use of the incentive auction optimization and repacking software to identify new channels. See *id.* at paras. 40-43.

²⁶ 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.”).

²⁷ See *Incentive Auction R&O*, 29 FCC Rcd at 6783-84 para. 529.

²⁸ See *id.* at 6797 para. 563.

²⁹ See *id.* at 6840-41, paras. 670-72. Displaced LPTV stations in the spectrum transferred to wireless use (other than those in the spectrum assigned to guard bands) will not be required to relocate until the new wireless licensee is ready to commence operations, which in many cases may be more than 39 months. 47 C.F.R. § 73.3700(g)(4)(iii). Displaced LPTV stations in the spectrum assigned to guard bands, including the duplex gap, must relocate no later than the end of the 39-month transition period. 47 C.F.R. § 73.3700(g)(4)(v). In the spectrum continuing to be allocated and assigned to broadcast television, LPTV stations may continue to operate until displaced by a full power or Class A television station that is reassigned a new channel in the repacking process. See *Incentive Auction R&O*, 29 FCC Rcd at 6840 n.1866.

³⁰ See Stay Motion at 22-24.

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.”³¹ The Commission has accordingly devoted considerable time and resources since the enactment of the Spectrum Act to preparing for the reverse auction, as well as the forward auction to sell repurposed broadcast spectrum to new, flexible-use licensees for providing mobile broadband services—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.³² A delay would disserve consumers as well as eligible entities who have made extensive preparations for the auction based on the current schedule, including securing financing and deferring other business plans.³³

10. Movants also understate the delay and disruption entailed by the stay they request.³⁴ The beginning of the auction is now only three weeks away. The Court has scheduled oral argument in May and will need time after that to reach a decision. In addition to the harms described above, a stay would extend the quiet period that is now in effect for both the reverse and forward auctions,³⁵ which limits the types of discussions that would otherwise take place between and among broadcasters and prospective forward auction bidders.³⁶ 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 Spectrum Act.³⁷

11. Movants also suggest that the Commission easily could protect LPTV stations by including them in the repacking process.³⁸ As an initial matter, Movants fail to address the Commission’s finding in the *Incentive Auction R&O* that protecting LPTV stations “would increase the number of

³¹ 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*”).

³² 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.

³³ While Congress established 2022 as the deadline for conducting a broadcast television spectrum incentive auction, see Stay Motion at 3, 22 (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.

³⁴ See Stay Motion at 2, 3, 24 (claiming without support that the requested stay would be “brief”).

³⁵ For the reverse auction, the quiet period prohibits 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). A quiet period also pertains to the forward auction. 47 C.F.R. § 1.2105(c)(1). These quiet periods continue until either the results of the auction are announced (for the reverse auction quiet period) or the deadline has past for making post-auction down payments on winning bids (for the forward auction quiet period).

³⁶ See *Guidance Regarding the Prohibition of Certain Communications During the Incentive Auction*, Public Notice, 30 FCC Rcd 10794, 10798, n.17 (2015) (“Communications with covered parties remain safest before or after the quiet period, when no violation of the Commission’s rule can occur.”).

³⁷ 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”).

³⁸ Stay Motion at 23.

constraints on the repacking process significantly, and severely limit our recovery of spectrum to carry out the forward auction, thereby frustrating the purposes of the Spectrum Act.”³⁹ Moreover, Movants’ assertion that it would be “simple, indeed trivial” for the Commission to include LPTV stations in the repacking process reflects a fundamental misunderstanding of the complexity of the auction process and ignorance of the substantial efforts taken by both the Commission and stakeholders over the past four years in preparation for the auction. For example, the Commission would have to conduct a rulemaking proceeding to determine how to protect LPTV stations in the repacking process (the Commission’s current rules do not protect LPTV stations from interference due to their secondary status) and which LPTV licensees and facilities are eligible for such protection. Having resolved such issues, the Commission would have to undertake additional procedures to ensure the accuracy of the technical data in the Commission’s databases,⁴⁰ recalculate the interference constraints (both inter-service and TV-to-TV) and recalculate opening bid prices for eligible broadcast television licensees, and start the reverse auction application process over again. The delay resulting from these additional efforts would be measured in years, not months.

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.

13. IT IS FURTHER ORDERED that the Petition for Stay Pending Judicial Review filed by Free Access & Broadcast Telemedia, LLC, Word of God Fellowship, Inc., and Mako Communications, LLC IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William T. Lake
Chief

³⁹ *Incentive Auction R&O*, 29 FCC Rcd at 6674-75, para. 241. See also *Nat’l Assoc. of Broadcasters*, 789 F.3d at 180 (deferring to Commission’s “reasonable judgment” that protecting secondary digital replacement translators would “significantly affect[] repacking flexibility in markets where they are licensed”) (citations omitted).

⁴⁰ 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) (requiring full power and Class A television stations to verify and certify to the accuracy of the information contained in the Commission’s databases with respect to their protected facilities).