

First, there has been no unreasonable administrative delay—much less the “egregious” delay required to justify mandamus. *In re Monroe Commc’ns Corp.*, 840 F.2d 942, 945 (D.C. Cir. 1988). The petition for reconsideration (which is the latest in a series of requests that petitioners have made on these issues) was only filed on September 2, 2015, less than four months ago. During that time,

petitioners (and others) have filed a number of submissions with the Commission addressing petitioners' request, petitioners held a number of meetings with Commission staff on the matter, and (as late as last Wednesday) petitioners submitted additional arguments to the agency in support of reconsideration.

Petitioners assert that they will have “no relief available” (Pet. 19) if the Commission does not act on their reconsideration petition before January 12, 2016—the date on which the Commission has announced it will stop accepting applications to participate in the reverse auction stage of the incentive auction. That claim is baseless. The expiration of the Commission's application window does not foreclose judicial relief (if warranted), particularly since the reverse auction itself is not scheduled to commence until March 29, 2016.

Second, ordering the Commission to act on the pending petition for reconsideration is not “the only way to protect Petitioners' rights.” Pet. 19. Even in the absence of Commission action on the petition for reconsideration, petitioners remain free—as they concede—to “seek relief from this Court under the All Writs Act.” Pet. 27-28 n.2.

Third, a draft order disposing of the petition for reconsideration was circulated to the Commissioners on December 23, 2015. There is thus a reasonable possibility that the Commission will dispose of the reconsideration petition in due course even absent any action by this Court.

For all of these reasons, the Court should deny the petition for a writ of mandamus.

BACKGROUND

A. The Spectrum Act

On February 22, 2012, Congress adopted the Spectrum Act, *see* Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96, Title VI, 125 Stat. 156 (2012), which authorizes the FCC to conduct an incentive auction to “encourage” television broadcasters “to relinquish some or all of [their] licensed spectrum usage rights” for the purpose of reallocating broadcast television spectrum for other uses (such as mobile broadband service). 47 U.S.C. § 309(j)(8)(G)(i).

Under the Spectrum Act, the incentive auction will consist of three phases: (1) a “reverse auction to determine the amount of compensation that each broadcast television licensee would accept in return for voluntarily relinquishing some or all of its broadcast television spectrum usage rights,” 47 U.S.C. § 1452(a)(1); (2) the reorganization (or “repacking”) of the broadcast television spectrum in order to move broadcasters from a portion of the UHF spectrum to make it available for new uses, *id.* § 1452(b); and (3) a “forward auction” to assign licenses for use of the reallocated broadcast television spectrum, *id.* § 1452(c)(1).

See Nat'l Ass'n of Broadcasters v. FCC, 789 F.3d 165, 170 (D.C. Cir. 2015)

(describing structure of auction).

The Spectrum Act provides that during the repacking process “the Commission shall make all reasonable efforts to preserve, as of February 22, 2012, the coverage area and population served of each broadcast television licensee.” 47 U.S.C. § 1452(b)(2). The Act defines a “broadcast television licensee” as “the licensee of ... (A) a full-power television station or (B) a low-power television station that has been accorded primary status as a Class A television licensee” under the Commission’s rules. 47 U.S.C. § 1401(6).

B. The *Incentive Auction Order*

The FCC construed section 1452(b)(2) to mandate all reasonable efforts to preserve the coverage area and population served by “full power and Class A facilities (1) licensed as of February 22, 2012, the date of enactment of the Spectrum Act; or (2) for which an application for a license to cover was on file as of February 22, 2012.” *Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, 29 FCC Rcd 6567, 6652 ¶ 185 (2014) (Pet. App. A-212, A-297) (“*Incentive Auction Order*”).

The Commission found that it nevertheless had the “discretion to protect additional facilities” beyond those specified in section 1452(b)(2). *Incentive Auction Order* ¶ 191 (Pet. App. A-300). In exercising this discretion, the agency

balanced the benefits of protecting additional stations (preserving viewers' existing television service, safeguarding broadcasters' investment) against the costs to the implementation of the auction (increasing constraints on the repacking process, hindering the efficient administration of the auction). *Id.* ¶¶ 192-193 (Pet. App. A-300-A-301). After carefully weighing these competing concerns, the FCC decided to extend protection to some additional stations but not to others. *Id.* ¶¶ 194-245 (Pet. App. A-301-A-322). It also made clear that only broadcasters that receive repacking protection are eligible to participate in the reverse auction. *Id.* ¶¶ 355-357 (Pet. App. A-364-A-365).

For the most part, the Commission declined to afford repacking protection to low-power television ("LPTV") stations that were eligible for Class A status but "had not filed an application for a Class A license as of February 22, 2012."

Incentive Auction Order ¶ 234 (Pet. App. A-316).¹ The Commission concluded

¹ Under the Community Broadcasters Protection Act of 1999 (CBPA), Pub. L. No. 106-113, 113 Stat. Appendix 1, at pp. 1501A-594–1501A-598 (1999), *codified at* 47 U.S.C. § 336(f), an LPTV station became qualified for Class A status if it certified, no later than January 28, 2000, that it had, *inter alia*, broadcast a minimum of 18 hours per day and an average of at least three hours per week of locally produced programming during the 90 days preceding enactment of the CBPA. 47 U.S.C. §§ 336(f)(1)(B) and (f)(2)(A); 47 C.F.R. §§ 73.6001(b), 73.6002(a)(1). Class A-eligible LPTV stations operating on "in-core" television channels (channels 2-51) were required to submit a Class A license application by July 12, 2001. *Mass Media Bureau Extends Filing Deadline for Class A License Applications*, Public Notice, 15 FCC Rcd 23997 (MMB 2000). Class A-eligible LPTV stations operating on "out-of-core" television channels (channels 52-69) became eligible to file a Class A application if they obtained reassignment to in-

that out-of-core Class A-eligible LPTV stations were not entitled to mandatory repacking protection if “their Class A facilities were not licensed or the subject of a pending Class A license as of February 22, 2012.” *Incentive Auction Order* ¶ 233 (Pet. App. A-316). The agency also generally denied such stations discretionary protection. “Protecting such stations,” it explained, would “encumber additional spectrum” associated with “approximately 100 stations,” producing a “significant detrimental impact on repacking flexibility.” *Id.* ¶ 234 (Pet. App. A-316-A-317).

Nonetheless, the Commission exercised its discretion to protect one station in this category. KHTV-CD had shown that it “made repeated efforts” for more than a decade “to convert to Class A status,” and that “unique circumstances” prevented it from filing a Class A license application for its in-core facility “until just two days after February 22, 2012.” *Incentive Auction Order* ¶ 235 (Pet. App. A-317-A-318). The Commission concluded that “the equities in favor of protection of this station outweigh the minimal impact that protecting this one facility will have on our repacking flexibility.” *Id.* (Pet. App. A-318).

C. The *Second Reconsideration Order*

Abacus and Videohouse—two licensees of out-of-core Class A-eligible LPTV stations that filed for and received Class A licenses *after* February 22,

core channels. *See Establishment of a Class A Television Service*, 15 FCC Rcd 6355, 6394 ¶ 96, 6396-97 ¶ 103 (2000).

2012—asked the FCC to reconsider its decision not to grant their stations repacking protection. *See* Pet. App. A-696, A-707. In June 2015, the Commission denied their petitions for reconsideration for multiple independent reasons.

Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions, 30 FCC Rcd 6746, 6767-74 ¶¶ 50-61 (2015) (Pet. App. A-745, A-766-A-773) (“*Second Reconsideration Order*”). First, it dismissed the petition on procedural grounds, finding that petitioners had not shown “why they were unable to raise these facts and arguments before adoption” of the *Incentive Auction Order*. *Id.* ¶ 59 (Pet. App. A-772) (citing 47 C.F.R. § 1.429(b)). Alternatively, the agency rejected petitioners’ claims that they were similarly situated to KHTV-CD and other stations that the agency elected to protect in the repacking process. *Id.* ¶¶ 60-61 (Pet. App. A-772-A-773).

At the same time, the Commission exercised its discretion “to protect stations in addition to KHTV-CD that hold a Class A license today and that had an application for a Class A construction permit pending or granted as of February 22, 2012.” *Second Reconsideration Order* ¶ 62 (Pet. App. A-773). “[A]pproximately a dozen stations fall within this category.” *Id.* n.226 (Pet. App. A-773).² The

² One of those stations is WDYB-CD in Daytona Beach, Florida, currently licensed to Latina Broadcasters of Daytona Beach, LLC. Unlike petitioners’ stations, WDYB had obtained in-core Class A construction permits before February 22, 2012. *See* FCC File Nos. BLTTA-20010712ABL, granted Jan. 18, 2002 and

Commission found “significant equities in favor of protection of these stations that outweigh the limited adverse impact on our repacking flexibility.” *Id.* ¶ 62 (Pet. App. A-773). It noted that these stations “had certified in an application filed with the Commission” before enactment of the Spectrum Act “that they were operating like Class A stations.” *Id.* (Pet. App. A-774). By contrast, Abacus and Videohouse “did not certify continuing compliance with Class A requirements in an application filed with the Commission until after the enactment of the Spectrum Act.” *Id.* (Pet. App. A-774).

D. The Pending Reconsideration Petition

On September 2, 2015, Abacus, Videohouse, WMTM, and KMYA, LLC filed a petition for reconsideration of the *Second Reconsideration Order*. *See* Pet. App. A-904. Among other things, they argued that they should receive repacking protection because they were similarly situated to the stations that the FCC had chosen to protect in the *Second Reconsideration Order*. A number of filings were

BDISTTA-20060922ACY, granted Dec. 2, 2008 (available at https://licensing.fcc.gov/cgi-bin/ws.exe/prod/cdb/forms/prod/cdbsmenu.hts?context=25&appn=100573602&formid=4&fac_num=41375 and https://licensing.fcc.gov/cgi-bin/ws.exe/prod/cdb/forms/prod/cdbsmenu.hts?context=25&appn=101150459&formid=401&fac_num=41375). Latina, therefore, is not “similarly situated to Videohouse” (Pet. 15) or the other petitioners.

made addressing petitioners' reconsideration request.³ On November 18 and 19, 2015, representatives of the petitioners held a number of meetings with Commission staff to urge that their reconsideration petition be granted.⁴ The petition remains pending before the Commission.

The filing window for applications to participate in the reverse auction opened on December 8, 2015, and is scheduled to close on January 12, 2016.⁵ The Commission has announced that bidding in the reverse auction will commence on March 29, 2016.⁶

On December 11, 2015, Videohouse, WMTM, and Fifth Street (the successor in interest to Abacus)—the same parties that have petitioned for a writ of mandamus—filed an emergency motion for stay with the Commission. *See* Pet. App. A-958. They requested that, pending the FCC's disposition of their

³ *See* Comments to Filings in Support of Petition for Reconsideration of The Videohouse, Inc., et al., at 2 (Nov. 17, 2015), available at <http://apps.fcc.gov/ecfs/comment/view?id=60001311046> (discussing filings in support of reconsideration).

⁴ *See* Letter from Ronald J. Bruno, Videohouse, to Marlene Dortch, FCC, Nov. 20, 2015, available at <http://appsint.fcc.gov/ecfs/comment/view?id=60001312718>.

⁵ *See* Public Notice, *Incentive Auction Task Force Releases Revised Baseline Data and Prices for Reverse Auction, Announces Revised Filing Window Dates*, DA 15-1296, 2015 WL 7095182 (rel. Nov. 12, 2015) (Pet. App. A-956).

⁶ Public Notice, *Broadcast Incentive Auction Scheduled to Begin on March 29, 2016*, 30 FCC Rcd 8975 (2015).

reconsideration petition (and any judicial review thereof), (1) the filing deadline for applications to participate in the reverse auction be extended, or (2) they be granted repacking protection and allowed to participate in the reverse auction as currently scheduled. The FCC's Media Bureau denied the stay motion on December 18, 2015, concluding that petitioners failed to make the required showings of likelihood of success on the merits and irreparable harm. *Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, DA 15-1454 (rel. Dec. 18, 2015) (Pet. App. A-972) (“*Stay Denial Order*”).

Last Wednesday, December 23, 2015—the day after they filed their mandamus petition in this Court—petitioners filed with the FCC an ex parte letter that presented additional arguments pertaining to the pending reconsideration petition. *See* Letter from Thomas R. McCarthy, Counsel for Petitioners, to Marlene Dortch, FCC, Dec. 23, 2015, available at <http://apps.fcc.gov/ecfs/comment/view?id=60001362297>.

ARGUMENT

The remedy of “mandamus is drastic; it is available only in extraordinary situations; it is hardly ever granted; those invoking the court’s mandamus jurisdiction must have a clear and indisputable right to relief; and, even if the plaintiff overcomes all these hurdles, whether mandamus relief should issue is

discretionary.” *In re Cheney*, 406 F.3d 723, 729 (D.C. Cir. 2005) (en banc) (internal quotation marks omitted). Petitioners have failed to show that this is “one of the exceptionally rare cases” that warrants a judicial decree directing agency action. *See In re Barr Labs.*, 930 F.2d 72, 76 (D.C. Cir. 1991).

1. Petitioners have no right to a writ of mandamus in this case because there has been no unreasonable delay. Nothing in the Communications Act or the FCC’s rules requires the Commission to act on petitioners’ petition for reconsideration of the *Second Reconsideration Order* within a particular time frame. *See* 47 U.S.C. § 405; 47 C.F.R. § 1.429. The reconsideration petition has been pending for less than four months. Such a relatively brief period of agency deliberation does not come close to the sort of “unreasonable delay” that would justify the extraordinary remedy of mandamus. This is particularly true given that during that period of time the agency has received comments on petitioners’ request, and petitioners themselves have continued—as late as last week—to submit additional arguments for the Commission’s consideration. This Court has denied mandamus petitions in cases involving much longer periods of agency inaction. *See, e.g., Her Majesty the Queen in Right of Ontario v. EPA*, 912 F.2d 1525, 1534 (D.C. Cir. 1990) (delay of “more than nine years” not unreasonable); *Monroe Commc’ns*, 840 F.2d at 945-47 (delay of several years did not warrant mandamus); *Telecomm. Research & Action Ctr. v. FCC*, 750 F.2d 70, 80-81 (D.C. Cir. 1984) (“TRAC”) (delays of two and five

years did not warrant mandamus); *see also Oil, Chem. & Atomic Workers Int'l Union v. Zegeer*, 768 F.2d 1480, 1487-88 (D.C. Cir. 1985) (dismissing mandamus petition upon showing, after five-year delay, that agency would complete rulemaking within two years).

Petitioners have also failed to show that they “will be irreparably harmed through delay.” *See Mexichem Specialty Resins, Inc. v. EPA*, 787 F.3d 544, 554 (D.C. Cir. 2015) (quoting *Sierra Club v. Thomas*, 828 F.2d 783, 796 (D.C. Cir. 1987)). Petitioners claim that the Commission’s delay in acting on their reconsideration petition is unreasonable because if they do not obtain relief before the January 12, 2016 filing deadline, they will be unable to participate in the auction. Pet. 19. But the auction itself will not commence until March 29, 2016. If either the Commission or the Court rules before March 29 that petitioners are eligible to participate in the reverse auction, the Commission will have the ability to ensure that petitioners “have an opportunity to submit an application to participate in the reverse auction” before the agency commences the auction. *See Stay Denial Order* ¶ 14 (Pet. App. A-978). Thus, petitioners have no basis for asserting that, “[a]fter January 12, 2016,” they “will be foreclosed from participating in the reverse auction.” Pet. 18.⁷

⁷ Petitioners also erroneously claim that, “after January 12, 2016,” they “will forever lose their existing spectrum rights with protection in the repacking process.” Pet. 18. The January 12 deadline has no bearing on petitioners’ ability

2. In addition, petitioners have failed to demonstrate that there is “no adequate alternative remedy” to mandamus. *See Al-Nashiri*, 791 F.3d at 78 (quoting *Barnhart v. Devine*, 771 F.2d 1515, 1524 (D.C. Cir. 1985)). Contrary to petitioners’ claim, mandamus is not “the only way to protect their rights.” Pet. 19.

Petitioners argue that “[i]f the FCC waits until after January 12, 2016 to rule on [their] pending petition for reconsideration,” they “will have no ability to obtain relief from this Court.” Pet. 27. That is incorrect. Even assuming that the FCC does not issue a reconsideration order before the filing window for the reverse auction closes on January 12, 2016, petitioners remain free to petition the Court for a stay of the auction under the All Writs Act, 28 U.S.C. § 1651—as petitioners themselves concede (Pet. 27-28 n.2). *See Reynolds Metals Co. v. FERC*, 777 F.2d 760, 762-64 (D.C. Cir. 1985).

It is therefore unnecessary for the Court to direct the FCC to resolve the pending reconsideration petition by January 4, 2016 (or any other date, for that matter). Regardless of when the agency acts on the reconsideration petition, petitioners will have an adequate opportunity to petition this Court for any

to receive repacking protection. Repacking will not be finalized “until after bidding in the incentive auction closes,” and bidding will not close “for many months.” *Stay Denial Order* ¶ 15 (Pet. App. A-978-A-979). At that time, “[i]f the Commission or a court determines that [petitioners] should be protected in the repacking process, the Commission will be able to take appropriate action to protect them.” *Id.* (Pet. App. A-978).

appropriate relief concerning their eligibility to participate in the reverse auction and to receive repacking protection.

3. Finally, we note, on December 23, 2015, a draft order addressing the pending reconsideration petition was circulated to the Commissioners for a vote.⁸ Now that a draft order is before the Commission, there is a reasonable possibility that (even with petitioners' last-minute filing) the agency will dispose of the reconsideration petition well before the incentive auction is scheduled to start. Because the agency is "proceeding toward completion" of its proceeding "within a reasonable time," there is no need "for a court order compelling agency action unreasonably delayed." *See Oil, Chem. & Atomic Workers*, 768 F.2d at 1488; *see also TRAC*, 750 F.2d at 80 (when the FCC "is moving expeditiously," mandamus is unwarranted).

⁸ The list of items that have been circulated to the Commission for action may be found at http://transition.fcc.gov/fcc-bin/circ_items.cgi. The draft disposing of petitioners' petition for reconsideration is identified under the title, "Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auction."

CONCLUSION

Mandamus is “a drastic remedy, to be invoked only in extraordinary circumstances.” *Al-Nashiri*, 791 F.3d at 78 (internal quotation marks omitted). Because petitioners have failed to demonstrate that this case presents such circumstances, the Court should deny the petition for a writ of mandamus.

Respectfully submitted,

Jonathan B. Sallet
General Counsel

/s/ Jacob M. Lewis

Jacob M. Lewis
Associate General Counsel

James M. Carr
Maureen K. Flood
Counsel

Federal Communications Commission
445 12th Street, SW
Washington, DC 20554
(202) 418-1767

December 28, 2015

15-1486

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

IN RE THE VIDEOHOUSE, INC., ET AL.
PETITIONERS

CERTIFICATE OF SERVICE

I, Jacob M. Lewis, hereby certify that on December 28, 2015, I electronically filed the foregoing Opposition of Federal Communications Commission to Emergency Petition for Writ of Mandamus with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

Thomas R. McCarthy
William S. Consovoy
J. Michael Connolly
Consovoy McCarthy Park, PLLC
3033 Wilson Boulevard
Suite 700
Arlington, VA 22201
Counsel for: Petitioners

/s/ Jacob M. Lewis