

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

Nos. 16-1060 & 16-1071

THE VIDEOHOUSE, INC., ET AL.,

PETITIONERS,

v.

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,

RESPONDENTS.

ON PETITION FOR REVIEW OF AN ORDER OF THE
FEDERAL COMMUNICATIONS COMMISSION

**RESPONDENTS' OPPOSITION
TO MOTION FOR STAY PENDING REVIEW**

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Respondents, the Federal Communications Commission and the United States of America, oppose the motion for a stay pending review filed by The Videohouse, Inc. (Videohouse).¹ Videohouse has not justified its extraordinary request that this Court stay the FCC's upcoming broadcast spectrum incentive auction—now scheduled to begin on March 29, 2016—until the Court resolves Videohouse's claims that it should be allowed to participate. As we explain, the FCC drew a reasonable line in determining auction eligibility; and in applying that line, it reasonably concluded that Videohouse was ineligible.

Videohouse does not contest the Commission's determination that only licensees of stations that had a full-power or Class A low-power license or pending application for a license as of February 22, 2012, have a statutory right to repacking protection and eligibility to participate in the auction. There is no dispute that WOSC—Videohouse's low-power television station in Pittsburgh—did not have a Class A license or pending application for such a license as of that date.

As a matter of its discretion, the FCC extended repacking protection (and auction eligibility) to current Class A stations that had a Class A construction permit or application for a permit on file as of February 22, 2012. But Videohouse does not qualify under the FCC's discretionary standard for auction eligibility

¹ Videohouse is one of three petitioners in this case. The other two petitioners—Fifth Street Enterprises, LLC and WMTM, LLC—have not requested a stay.

either. Although Videohouse has since obtained a Class A license for WOSC, it did not file an application to convert its low-power station to Class A status until January 15, 2013—almost a year after the February 22, 2012 cut-off date.

The FCC has broad discretion in implementing the Spectrum Act and in drawing a line between stations that are eligible for the auction and those that are not. Videohouse cannot show that the Commission has abused its discretion. Nor is Videohouse likely to suffer irreparable injury absent a stay pending review. On the other hand, delaying the auction—as Videohouse has requested—would cause substantial harm to other parties and to the public interest.

Videohouse’s motion for a stay pending review should be denied.

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). This statute authorizes the FCC to conduct an incentive auction to “encourage” television broadcasters “to relinquish some or all of [their] licensed spectrum usage rights” so that broadcast television spectrum may be reallocated for other uses, such as mobile broadband service. 47 U.S.C. § 309(j)(8)(G)(i).

The incentive auction will consist of three interdependent 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).

The Spectrum Act authorizes “broadcast television licensee[s]” to participate in the reverse auction, 47 U.S.C. § 1452(a)(1), and grants them certain protections in the repacking process, instructing the FCC to “make all reasonable efforts to preserve, as of February 22, 2012, the coverage area and population served of each broadcast television licensee,” *id.* § 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. Proceedings Below

1. The Initial Order. In October 2012, the FCC initiated a rulemaking to implement the incentive auction provisions of the Spectrum Act.² After reviewing

² *Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, 27 FCC Rcd 12357 (2012) (NPRM).

voluminous comments from interested parties, the Commission in June 2014 issued an order establishing the policies and rules for the incentive auction.³ It identified several categories of stations eligible for repacking protection, *Order* ¶¶ 183-245; and it decided that only stations that qualify for such protection would be eligible to participate in the reverse auction, *id.* ¶¶ 354-357.

The Commission concluded that the Spectrum Act mandates protection only for full-power and Class A stations that were licensed or had a license application on file as of February 22, 2012, the date of enactment of the Spectrum Act. *Order* ¶¶ 184-189 (discussing 47 U.S.C. § 1452(b)(2)). The Commission then determined that it had discretion to grant reverse auction eligibility and repacking protection to certain other stations. *Id.* ¶¶ 190-194.

Initially, the Commission granted discretionary protection to just one Class A station, KHTV. *Order* ¶¶ 224, 235. KHTV's licensee "made repeated efforts over the course of a decade to convert to Class A status," during which time it "continued to have a Class A license application on file in which it certified that it was meeting, and would continue to meet, all Class A operating requirements." *Id.* ¶ 235 & nn.728-729. But due to circumstances beyond its control, KHTV was unable to find a suitable channel and file its Class A license application until

³ *Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, 29 FCC Rcd 6567, 6652 ¶ 185 (2014) (*Order*), *pets. for review denied*, *Nat'l Ass'n of Broadcasters v. FCC*, 789 F.3d 165 (D.C. Cir. 2015).

February 24, 2012, two days after the Spectrum Act was passed. *Id.* ¶ 235 & nn.727-730. Taking into account these “unique circumstances,” as well as the “certified operation” of KHTV “consistent with Class A operating requirements since 2001” and the “repeated efforts” of KHTV’s licensee “to convert to Class A status” over the past decade, 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 the auction. *Id.* ¶ 235.

2. The *Second Reconsideration Order*.⁴ In petitions for reconsideration of the *Order*, Videohouse and Abacus—licensees of low-power television stations that had filed for and received Class A licenses *after* February 22, 2012—asked the FCC to grant their stations repacking protection. In June 2015, the Commission denied their request. *Second Recon. Order* ¶¶ 50-61. First, it dismissed the petitions on procedural grounds, finding that the licensees had not shown “why they were unable to raise these facts and arguments before adoption” of the *Order*. *Id.* ¶ 59 (citing 47 C.F.R. § 1.429(b)). Alternatively, the agency rejected the licensees’ claims that they were similarly situated to KHTV and other stations that had been granted discretionary repacking protection. *Id.* ¶¶ 60-61.

⁴ *Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, 30 FCC Rcd 6746 (2015) (*Second Recon. Order*). An earlier order on reconsideration, 30 FCC Rcd 6668 (2015), dealt with channel sharing and is not at issue in this case.

At the same time, the FCC decided to extend discretionary protection and auction eligibility to stations “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 Recon. Order* ¶ 62.⁵ It noted that those stations, by filing such an application, “had certified ... with the Commission” before enactment of the Spectrum Act “that they were operating like Class A stations.” *Id.* The filing of the application provided an official and verifiable indication of a station’s Class A operations. By contrast, 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.*

3. The *Third Reconsideration Order*.⁶ In a petition for reconsideration filed in September 2015, several Class A licensees that did not qualify for mandatory repacking protection—including Videohouse—argued that they should receive discretionary protection because they were similarly situated to the Class A licensees that were granted such protection in the *Second Reconsideration Order*.

⁵ The FCC employs a two-stage licensing process for broadcast stations. A station first must obtain a construction permit, which authorizes the station to construct its facility. 47 C.F.R. § 73.3533. Once construction is completed, the station must apply for a “license to cover” the permit, grant of which authorizes the station to operate on its constructed facilities. *See id.* §§ 73.1620(a)(1), 73.3536(a).

⁶ *Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, 2016 WL 593209 (rel. Feb. 12, 2016) (*Third Recon. Order*).

The FCC denied this petition in February 2016, finding that it was “both procedurally and substantively defective.” *Third Recon. Order* ¶ 7.

As a threshold matter, the Commission found that petitioners failed to present facts or arguments as to why their stations should be protected “until after the Commission adopted” the original *Order* in this proceeding, even though “all of [those] facts and arguments ... existed beforehand.” *Third Recon. Order* ¶ 8. Because of this unexcused tardiness, the agency found that the petition should be dismissed. *Id.* ¶¶ 8-10 (citing 47 C.F.R. § 1.429(b)).

“As an alternative and independent ground” for its decision, the Commission rejected petitioners’ claims on the merits. *Third Recon. Order* ¶ 11. The agency explained that it granted discretionary protection to certain Class A stations because, “as of February 22, 2012, the date established by Congress for determining which stations are entitled to repacking protection,” those stations “had on file with the Commission” applications for Class A construction permits, which included “certifications that they were operating like Class A stations.” *Id.* By contrast, Videohouse and the other petitioners “neither requested Class A status, nor demonstrated that they were providing Class A service [through the filing of an application], until after passage of the Spectrum Act created the

potential for Class A status to yield substantial financial rewards through auction participation.” *Id.* ¶ 12.⁷

The Stay Denial Order.⁸ On February 29, 2016, Videohouse asked the FCC to stay the incentive auction. Commission staff, acting on delegated authority, denied that request in an order issued on March 3, 2016 (the same day that Videohouse filed its motion for a stay in this Court).

ARGUMENT

To obtain the extraordinary remedy of a stay, Videohouse must show that:

(1) it is likely to prevail on the merits; (2) it will suffer irreparable injury without a stay; (3) a stay will not harm other parties; and (4) the public interest favors a stay.

⁷ Petitioners also argued that they were like WDYB, a station listed “on the June 30, 2015 list of eligible stations.” *Third Recon. Order* ¶ 20. Upon further review, the FCC found that WDYB “did not have an application for a Class A authorization pending or granted as of February 22, 2012,” *id.*, and that the station therefore was “not entitled to discretionary repacking protection or eligible to participate in the reverse auction,” *id.* ¶ 21. WDYB’s licensee has petitioned for review of that decision and moved for a stay pending review. *See Latina Broadcasters of Daytona Beach, LLC v. FCC*, D.C. Cir. Nos. 16-1065 & 16-1069 (*Latina Broadcasters*).

⁸ *Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, 2016 WL 854392 (Media Bur. rel. Mar. 3, 2016) (*Stay Denial Order*).

Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977). Videohouse has not satisfied any of these prerequisites.⁹

I. Videohouse Has Not Shown A Likelihood Of Success On The Merits.

Videohouse challenges the reasonableness of the FCC's determination that it is not entitled to discretionary repacking protection. This challenge to the agency's line-drawing has little chance of success. This Court is "generally unwilling to review line-drawing performed by the Commission unless a petitioner can demonstrate that lines drawn ... are patently unreasonable, having no relationship to the underlying regulatory problem." *Covad Commc'ns Co. v. FCC*, 450 F.3d 528, 541 (D.C. Cir. 2006) (internal quotation marks omitted). Videohouse has "point[ed] to nothing suggesting that the agency abused its discretion in drawing the line" where it did. *AT&T Corp. v. FCC*, 220 F.3d 607, 627 (D.C. Cir. 2000).

1. Videohouse argues that because the eligibility determinations at issue here hinged on licensees' actions as of February 22, 2012, the FCC improperly imposed a "retroactive 'deadline.'" Mot. 14. Not so. The agency was entitled to consider the

⁹ Videohouse claims that it has met the first two of these requirements because the Court "granted expedited review of this case." Mot. 2. But the Court "*denied*" petitioners' motion for expedited consideration "to the extent that petitioners seek resolution of their petition for review before March 29, 2016." Order, No. 16-1060 (issued Feb. 23, 2016) (emphasis added). In that order, the Court made no findings regarding likelihood of success or irreparable injury. The Court's expedition of merits briefing does not relieve Videohouse of its obligation to demonstrate both a likelihood of success on the merits and irreparable harm before it can obtain a stay. *See Stay Denial Order* ¶ 5.

past conduct of licensees “in determining future eligibility for ... participation” in the incentive auction; such an eligibility requirement “does not operate retroactively.” *See Ass’n of Accredited Cosmetology Schools v. Alexander*, 979 F.2d 859, 865 (D.C. Cir. 1992) (AACCS).¹⁰

Nor does Videohouse have a basis to question the reasonableness of the agency’s approach, much less the “statutory authority” (Mot. 14) underlying the FCC’s decision to adopt the February 22 deadline. That cut-off date “is tied directly to the date established by Congress for repacking protection” in the Spectrum Act. *Third Recon. Order* ¶ 15; *see* 47 U.S.C. § 1452(b)(2) (directing the FCC to “make all reasonable efforts to preserve, *as of February 22, 2012*, the coverage area and population served of each broadcast television licensee”) (emphasis added). It was plainly reasonable for the Commission to base its cut-off on a date that is reflected in the statute itself.

Videohouse also argues that it was entitled to “advance notice” of the February 22 cut-off date. Mot. 15. But that contention is “merely a reiteration” of its “retroactivity argument,” *see AACCS*, 979 F.2d at 867, and is equally unfounded.

¹⁰ *See also Regions Hosp. v. Shalala*, 522 U.S. 448, 456 (1998) (a regulation “is not made retroactive merely because it draws upon antecedent facts for its operation”) (internal quotation marks omitted); *Bell Atl. Tel. Cos. v. FCC*, 79 F.3d 1195, 1207 (D.C. Cir. 1996) (regulations are not “retroactive” if “they contemplate only the use of past information for subsequent decisionmaking”) (internal quotation marks omitted).

Videohouse was not entitled to prior notice in this context because it had “no legally protectable interest in future participation” in the auction. *See id.* at 868.

Videohouse asserts that FCC staff “exacerbated” the agency’s supposed “retroactivity problem” by “inducing” licensees to delay filing applications for Class A construction permits until after February 22, 2012. Mot. 15. But by Videohouse’s own account, *id.* at 4-5, the informal staff advice that allegedly induced this delay occurred in 2011, before Congress had even authorized the incentive auction. Videohouse cannot plausibly claim that licensees had any basis for relying on staff advice in 2011 to preserve their rights to participate in an auction that did not yet exist. In any event, Videohouse cannot blame its own tardiness on staff advice it purportedly received in 2011. Two years earlier, when it filed an application for a low-power construction permit for a channel that was eligible for Class A status, Videohouse failed to comply with a longstanding requirement for stations seeking Class A status: It did not simultaneously file an application for a Class A construction permit. *See Stay Denial Order* ¶ 7 (citing *Establishment of a Class A Television Service*, 15 FCC Rcd 6355, 6396 ¶ 103 (2000)). If it had complied with this requirement, Videohouse would have been eligible to participate in the auction and to receive repacking protection. *See Second Recon. Order* ¶ 62.

2. Videohouse next contends that the Commission acted arbitrarily in treating its station differently than KHTV. Mot. 15-16. But, as the FCC reasonably determined, the two stations are not similarly situated.

In the first place, unlike Videohouse, KHTV's licensee responded to the *NPRM* in this proceeding by submitting "evidence demonstrating why it should be afforded discretionary protection." *Second Recon. Order* ¶ 59. Videohouse did not come forward with any such evidence until it petitioned for reconsideration of the *Order*. And it failed to show "why [it was] unable to raise these facts and arguments before adoption" of the *Order*, as KHTV had done. *Id.* Because Videohouse's arguments were untimely, the FCC properly dismissed them as procedurally barred. *Id.* (citing 47 C.F.R. § 1.429(b)); *see also Third Recon. Order* ¶¶ 8-10.¹¹

In any event, the evidence that Videohouse tardily submitted did not demonstrate that it was otherwise in the same position as KHTV's licensee. As the Commission explained, KHTV's licensee had made "repeated efforts ... to convert to Class A status" since 2001; and throughout that period, KHTV had "a Class A license application on file in which it certified that it was meeting, and would continue to meet, all Class A operating requirements." *Order* ¶ 235. But "unique

¹¹ Videohouse mischaracterizes this procedural ruling. The Commission did not find that petitioners' petitions for reconsideration of the *Order* were "procedurally defective" because they were "insufficiently detailed." Mot. 16.

circumstances” had “prevented [KHTV’s licensee] from filing its Class A license application ... until just two days after February 22, 2012.” *Id.*; *see also id.* nn.727-730. Unlike KHTV, “which demonstrated that it commenced efforts to achieve Class A status” in 2001, Videohouse produced no evidence that it made “any such efforts before 2009”—nearly a decade after it first became eligible to seek Class A status. *Third Recon. Order* ¶ 14. And the evidence that Videohouse presented “regarding [its] efforts to obtain Class A status between 2009 and February 22, 2012” failed to “demonstrate that [WOSC] acted like [a] Class A station[] during that time period.” *Id.*

The FCC reasonably distinguished between KHTV’s licensee and Videohouse based on their relative diligence. Distinctions of this sort are reasonable. *See Blanca Tel. Co. v. FCC*, 743 F.3d 860, 865-66 (D.C. Cir. 2014); *Fla. Inst. of Tech. v. FCC*, 952 F.2d 549, 554 (D.C. Cir. 1992).

3. Videohouse broadly asserts that “the FCC’s reasons for rejecting Petitioners’ request for discretionary protection do not pass muster.” Mot. 16. Its stay motion, however, does not even mention—let alone refute—the agency’s principal rationale for declining to protect its station. The Class A stations that qualified for discretionary protection “had on file with the Commission certifications that they were operating like Class A stations” when the Spectrum Act was passed on February 22, 2012. *Third Recon. Order* ¶ 11. Videohouse’s

station did not. *See Second Recon. Order* ¶¶ 60, 62. Videohouse “neither requested Class A status, nor demonstrated that [it was] providing Class A service, until after passage of the Spectrum Act created the potential for Class A status to yield substantial financial rewards through auction participation.” *Third Recon. Order* ¶ 12. In light of these considerations, the Commission reasonably concluded that “the equities do not weigh in favor of granting [discretionary] protection” to Videohouse. *Id.* ¶ 16.

4. Finally, Videohouse contends that, if this Court were to find that the petitioner in *Latina Broadcasters* (D.C. Cir. Nos. 16-1065 & 16-1069) is likely to succeed on the merits of its stay request, it “would necessarily mean” that Videohouse is “likely to succeed on the merits.” Mot. 16. *Latina*, however, is unlikely to succeed on the merits. *See Respondents’ Opposition to Motion for Stay Pending Review*, D.C. Cir. Nos. 16-1065 & 16-1069, at 9-15.

In any event, while *Latina* (like Videohouse) failed to meet the FCC’s test for auction eligibility, the bases for *Latina*’s claims are distinguishable from those of Videohouse, as *Latina* itself has noted. *See Latina Amicus Statement* at 5-6. The predecessor licensee of *Latina*’s station (WDYB) did file an application for a Class A construction permit before February 22, 2012 (although the application expired before that date). And for a time, WDYB appeared on a provisional list of protected stations (from which it was removed after the Commission determined

that it did not meet the criteria for discretionary protection). *Third Recon. Order* ¶¶ 20-21. Because Latina’s case involves different facts, this Court would not be compelled to grant a stay to Videohouse in the unlikely event that it ruled in Latina’s favor.

II. Videohouse Has Not Demonstrated Irreparable Harm.

A stay is also unwarranted because Videohouse has failed to demonstrate irreparable harm that is “both certain and great,” “actual and not theoretical.” *Wis. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985). “Bare allegations of what is likely to occur” are not enough; to obtain a stay, Videohouse “must provide proof” that irreparable “harm will *in fact* occur” absent a stay. *Id.* It has failed to do so. Videohouse’s unsubstantiated claims of harm (Mot. 18) do not come close to meeting this Court’s “high standard for irreparable injury.” *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297 (D.C. Cir. 2006).

1. Videohouse’s inability to participate in the reverse auction does not constitute irreparable harm. The reverse auction may present a valuable economic opportunity, but it is “well settled that economic loss does not, in and of itself, constitute irreparable harm.” *Wis. Gas*, 758 F.2d at 674. The lack of an opportunity to participate in the reverse auction does not deprive Videohouse of the value of WOSC’s existing operations, nor does it preclude Videohouse from later selling WOSC’s broadcast license or other assets to any interested buyer outside the

incentive auction. The inability to participate in a particular auction does not deprive a broadcaster of any fundamental right or constitute any irreparable harm. *Cf. ConverDyn v. Moniz*, 68 F. Supp. 3d 34, 46-47 (D.D.C. 2014) (loss of an economic opportunity generally does not amount to irreparable injury unless it is likely to force a company out of business).

2. Videohouse asserts that “stations without [repacking] protection may be stripped of their licenses without any compensation or other relief.” Mot. 18. But Videohouse offers no evidence that this situation is likely to confront its television station, WOSC. The risk that WOSC would even be displaced from its current channel depends on a host of factors that Videohouse does not even attempt to analyze—including the number of broadcasters that participate in the reverse auction, the amount of spectrum that the auction clears, and the particular channel assignments made in the repacking process. *Stay Denial Order* ¶ 10; *cf. Wis. Gas*, 758 F.2d at 675 (alleged injury only “speculative and hypothetical” where petitioner has “not attempted to provide any substantiation”).

Even if WOSC were displaced from its current channel as a result of the auction repacking, it could file an application for a suitable replacement channel. *Stay Denial Order* ¶ 10. And because WOSC currently holds a Class A license, it will be given the first opportunity to file such an application, maximizing its chances of obtaining a replacement channel. *Third Recon. Order* ¶ 22. The FCC

also has other tools to help WOSC remain on the air, such as permitting the station to enter into a channel-sharing agreement with another broadcaster or increasing the power of WOSC's signal to address any adjacent-channel interference issues in the event WOSC proposes a replacement channel of its own. *See Stay Denial Order* n.42. If Videohouse eventually prevails on the merits, the Court can require the FCC to take such measures to make a replacement channel available.¹²

III. A Stay Would Harm Third Parties And The Public Interest.

Even if Videohouse's claims of harm were more than speculative, a stay "is not a matter of right, even if irreparable injury might otherwise result" to Videohouse. *Nken v. Holder*, 556 U.S. 418, 427 (2009) (internal quotation marks omitted). In balancing the equities, the Court cannot enter a stay that would merely shift harm from Videohouse to other parties—or cause even greater harm to others than denial of a stay would cause to Videohouse. *See Sherley v. Sebelius*, 644 F.3d 388, 398-99 (D.C. Cir. 2011). In this case, a stay of the auction would undeniably injure other parties and the public interest.

¹² *Cf. FCC v. Radiofone, Inc.*, 516 U.S. 1301, 1301 (1995) (Stevens, J., in chambers) ("[A]llowing the national auction to go forward will not defeat the power of the Court of Appeals to grant appropriate relief in the event that [petitioner] overcomes the presumption of validity that supports the FCC regulations and prevails on the merits."); *Va. Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958) ("The possibility that adequate ... corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm.").

The incentive auction has been years in the making, and participants were notified of the March 29 start date more than six months ago. Any unnecessary delay, especially this close to the start of the auction, would upend the settled plans of those broadcasters, wireless telecommunications carriers, and other companies that have made significant investments, secured financing, and delayed other business proposals based on the current schedule. *See Stay Denial Order* ¶ 12. Indeed, numerous third parties have made clear, in opposing a stay pending review in *Latina Broadcasters*, D.C. Cir. Nos. 16-1065 & 16-1069, that a delay in the start of the auction will harm them because they have engaged in extensive preparations in reliance on the current schedule.¹³

Videohouse ignores the disruptive impact that a stay pending review would have on third parties. It simply asserts that “the FCC will suffer no harm from having the first phase of the auction process modestly delayed.” Mot. 19. But there

¹³ *See* Brief *Amici Curiae* of Ellis Communications KDOC Licensee *et al.*, D.C. Cir. Nos. 16-1065 & 16-1069 (Ellis Amicus Brief), at 5-6 (a stay “would undermine” broadcasters’ “ability to keep their auction teams together or to do so without incurring considerable expense”); Competitive Carriers Association and CTIA—The Wireless Association’s Joint Response in Opposition to Petitioners’ Emergency Motion for Stay, D.C. Cir. Nos. 16-1065 & 16-1069 (CCA-CTIA Response), at 4 (a stay of the auction “could adversely affect” wireless carriers’ “time sensitive business plans based on the current schedule” and “result in wasted expenditures”); Consumer Technology Association’s Amicus Statement, D.C. Cir. Nos. 16-1065 & 16-1069 (CTA Amicus Statement), at 7 (delaying the auction “would irreparably harm CTA’s members, who have invested tens of millions of dollars in preparing for a March 2016 auction”).

is nothing “modest” about the delay Videohouse seeks. Oral argument in this case will not be held until May; and preparation and issuance of a decision may well take additional months. Such a delay, on the eve of the auction’s commencement, would have substantial adverse consequences for third parties and for the public interest.

Among other things, “a stay would extend the quiet period that is now in effect for both the reverse and forward auctions, which limits the types of discussions that would otherwise take place between and among broadcasters and prospective forward auction bidders.” *Stay Denial Order* ¶ 12 (citing 47 C.F.R. §§ 1.2105(c)(1), 1.2205(b)).¹⁴ A stay would thus have the effect of placing business plans in a significant segment of the communications marketplace on an extended hold. That prospect weighs decidedly against granting a stay.

There is also a compelling public need to conduct the incentive auction with dispatch to accommodate the increasing demand for spectrum-based services. With the proliferation of smartphones, “the use of wireless networks in the United States is skyrocketing,” and our nation “faces a major challenge to ensure that the speed, capacity, and accessibility of our wireless networks keeps pace with these demands

¹⁴ See also Ellis Amicus Brief at 6 (the FCC’s quiet period rules place significant “constraints on all broadcast television licensees”); CCA-CTIA Response at 9 (the quiet period rules could chill or prevent “critical business negotiations for a significant period of time” if the incentive auction is delayed).

in the years ahead.” *NAB*, 789 F.3d at 169 (internal quotation marks omitted).

“Meeting this challenge is essential to continuing U.S. leadership in technological innovation, growing our economy, and maintaining our global competitiveness.”

NPRM ¶ 1. The incentive auction will help meet this challenge by freeing up a substantial portion of the broadcast television spectrum for reallocation to wireless networks. A stay of the auction would seriously impede the Commission’s efforts to address this critical issue and thereby harm the public interest.¹⁵

In sum, because “the harm to the public caused by a nationwide postponement of the auction would outweigh [any] possible harm to” *Videohouse*, *Radiofone*, 516 U.S. at 1301-02, the public interest weighs heavily against a stay.

CONCLUSION

Videohouse’s motion for a stay pending review should be denied.

¹⁵ See CTA Amicus Statement at 6 (delaying the auction, “even temporarily, will postpone [wireless carriers’] access” to much-needed new spectrum, “stifling economic progress and threatening the country’s status as a leader in wireless technology”); CCA-CTIA Response at 7 (“a stay” of the auction “would pose significantly severe consequences for wireless consumers’ ability to enjoy the mobile offerings they increasingly demand—offerings that are expected to require far more extensive spectrum resources as carriers evolve toward offering next-generation technologies”).

Respectfully submitted,

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March 8, 2016

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

The Videohouse, Inc., <i>et al.</i> ,)	
Petitioners,)	
)	
v.)	Nos. 16-1060 &
)	16-1071
Federal Communications Commission)	
and United States of America,)	
Respondents.)	

CERTIFICATE OF SERVICE

I, James M. Carr, hereby certify that on March 8, 2016, I electronically filed the foregoing Respondents' Opposition to Motion for Stay Pending Review 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.

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