ORAL ARGUMENT SCHEDULED FOR MAY 5, 2016

Nos. 15-1264 and 15-1346

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

MAKO COMMUNICATIONS, LLC,
Petitioner (No. 15-1264),

FREE ACCESS & BROADCAST TELEMEDIA, LLC,
and WORD OF GOD FELLOWSHIP, INC.,
Petitioners (No. 15-1346),

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,
Respondents.

On Petitions for Review of Orders of
the Federal Communications Commission

RESPONDENTS' OPPOSITION TO MOTION FOR STAY PENDING REVIEW

William J. Baer
Assistant Attorney General

Robert B. Nicholson
Robert J. Wiggers
Attorneys

U.S. DEPARTMENT OF JUSTICE
950 Pennsylvania Ave. NW
Washington, DC 20530

Jonathan B. Sallet
General Counsel

David M. Gossett
Deputy General Counsel

Jacob M. Lewis
Associate General Counsel

Scott M. Noveck
Counsel

FEDERAL COMMUNICATIONS COMMISSION
445 12th Street SW
Washington, DC 20554
(202) 418-1740
fcclitigation@fcc.gov

TABLE OF CONTENTS

Page

INTRODUCTION

Respondents hereby oppose the emergency motion for a stay pending review filed by Petitioners Free Access & Broadcast Telemedia, LLC (Free Access), Word of God Fellowship, Inc. (Word of God), and Mako Communications, LLC (Mako). Petitioners ask the Court to stay the FCC's upcoming broadcast-spectrum incentive auction, scheduled to begin on March 29. These cases are fully briefed, and more than a month ago this Court denied Mako's request for expedited argument and directed that the cases be heard in May. Nonetheless, Petitioners have now requested an emergency stay of the auction. They have not justified this extraordinary (and extraordinarily belated) request for emergency relief.

Mako and Word of God are licensees of low-power television (LPTV) stations, and Free Access is an investor in LPTV stations. The stations at issue do not have Class A licenses. Non-Class A LPTV stations have only "secondary" status, meaning that they may operate only if they do not interfere with "primary" services, such as full-power television and wireless telecommunications. LPTV stations thus have always faced the "possibility that they might be required to alter facilities or cease operations" to make way for primary services. *Low Power Television Service*, 51 Rad. Reg. 2d (P&F) 476, ¶ 95 (1982).

When Congress authorized the FCC to conduct the incentive auction and to reallocate a portion of the broadcast television spectrum for other services, *see* 47 U.S.C. § 1452(b)(1)(B), it directed the Commission to "make all reasonable efforts

to preserve … the coverage area and population served" of full-power and Class A stations, *Id.* § 1452(b)(2); *see also id.* § 1401(6) (defining "broadcast television licensee"). Congress did not, however, extend protection to LPTV stations. Instead, LPTV stations will retain their secondary status and will be allowed to operate on available channels following the auction so long as they do not interfere with any primary service. LPTV stations will therefore retain precisely the same usage rights within the reorganized broadcast television spectrum following the auction as they have always had.

Petitioners nevertheless ask the Court to halt the incentive auction and require the FCC to protect LPTV stations from displacement. As we explain, none of these Petitioners has standing to challenge the Commission's decision not to protect LPTV stations in the incentive auction repacking. In any event, Petitioners have not come close to satisfying the stringent requirements for a stay pending review. Congress granted protection only to full-power and Class A stations—not to LPTV stations, which enjoy only secondary status and have always been subject to displacement by primary services. Nor have Petitioners demonstrated that their own LPTV stations are likely to be displaced or that they will suffer irreparable injury as a result. And delaying the incentive auction, especially at this late date, would inflict substantial hardship on other parties and seriously impair the public interest. Petitioners' motion for a stay pending review should therefore be denied.

BACKGROUND

A. Low-Power Television Service

The FCC created LPTV service in 1982 as a less expensive and more flexible way to provide local programming. *Low Power Television Service*, 51 Rad. Reg. 2d (P&F) 476 (1982). In doing so, however, the Commission expressed its "firm intention that low power stations remain secondary, in terms of spectrum priority." *Id.* ¶ 24; *see also*, *e.g.*, *id.* ¶ 17 ("First and foremost, we intend to maintain the secondary spectrum priority of low power stations"). "Because their spectrum priority is secondary," the Commission warned, "[LPTV] stations always remain vulnerable to new full service entrants or existing full service modifications on interfering channels," *id.* ¶ 64, and thus "their secondary status poses the possibility that they might be required to alter facilities or cease operation at any time," *id.* ¶ 95.

In 1999, Congress created a new Class A license, 47 U.S.C. § 336(f), which enabled low-power stations to obtain primary status by filing a certificate of eligibility, moving to an "in-core" channel (channels 2 through 51), filing a Class A application, and fulfilling certain programming requirements. *See Establishment of a Class A Television Service*, 15 FCC Rcd. 6355, ¶¶ 96, 103 (2000). Sixteen years ago, the Commission advised that "it would be in the best interest of qualified LPTV stations operating outside the core to try to locate an in-core channel now" so they could apply for a Class A license. *Id.* ¶ 103; *see Order* ¶ 234 & n.724. Alt-

hough many stations heeded the Commission's advice and became Class A stations with primary status, the stations at issue here did not and instead remain secondary LPTV stations.

B. The Incentive Auction

In 2012, Congress enacted the Spectrum Act. *See* Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96, Tit. VI, 126 Stat. 156, 201-55. That statute authorizes the FCC to conduct an incentive auction to encourage television broadcasters "to relinquish … some or all of [their] licensed spectrum usage rights" and reallocate a portion of the broadcast television spectrum for other uses, such as mobile broadband service. 47 U.S.C. §§ 309(j)(8)(G)(i), 1452(a)(1).

The incentive auction involves "three interdependent initiatives." *Nat'l Ass'n of Broad. v. FCC*, 789 F.3d 165, 168-69, 169-170 (D.C. Cir. 2015) (*NAB*). The first element is "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). The second involves reorganizing—or "repacking"—the broadcast television spectrum to relocate broadcasters out of a portion of the UHF spectrum and make it available for new uses. *Id.* § 1452(b). The third is a "forward auction" to assign licenses for use of the recovered spectrum. *Id.* § 1452(c)(1).

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, directing the Commission to "make all reasonable efforts to preserve … the coverage area and population served" for covered stations, *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." *Id.* § 1401(6). LPTV stations fall outside this definition.

C. Proceedings Below

In the initial *Order* setting forth the policies and rules for the incentive auction,[1] the FCC determined that the Spectrum Act mandates protection only for qualifying full-power and Class A stations. *Order* ¶¶ 184-189 (discussing 47 U.S.C. § 1452(b)(2)). Statutory protection "is limited to 'broadcast television licensees,' defined by the Spectrum Act as full power and Class A stations only, [and] excludes LPTV and TV translator stations." *Id.* ¶ 185; *see also id.* ¶ 238 ("There is no basis in the text of [§ 1452(b)(2)] to conclude that [LPTV stations] are entitled to … protection[]"). The Commission explained that a contrary decision to grant protection to LPTV stations "would increase the number of constraints on the repacking process significantly, and severely limit [the] recovery of spectrum to carry out the forward auction, thereby frustrating the purposes of the Spectrum Act." *Id.* ¶ 241.

---

[1] *Expanding the Economic & Innovation Opportunities of Spectrum Through Incentive Auctions*, 29 FCC Rcd. 6567 (2014) (*Order*), *pet. for review denied*, *Nat'l Ass'n of Broad. v. FCC*, 789 F.3d 165 (D.C. Cir. 2015) (*NAB*).

The Commission concluded that § 1452(b)(5), which states that "[n]othing in this subsection shall be construed to alter the spectrum usage rights of [LPTV] stations," is not a grant of protection. *Order* ¶ 239. Section 1452(b)(5) simply "clarifies the meaning and scope of [§ 1452(b)]" and "does not limit the Commission's spectrum management authority." *Ibid.* "In any case," the FCC's decision not to protect LPTV stations "does not 'alter' their spectrum usage rights," because these stations "are secondary to full power television stations" and have always been subject to displacement. *Ibid.* Free Access and Mako filed petitions for reconsideration, which the Commission denied.[2]

Mako filed its petition for review in this Court (No. 15-1264) on August 6, 2015; Free Access and Word of God filed their joint petition for review (No. 15-1346) on October 5. On January 29, 2016, Mako filed an unopposed motion for expedited argument "[d]ue to the impending commencement of the incentive auction." Doc. No. 1596291, at 3. This Court denied the motion on February 8 and instead directed the Clerk "to schedule the cases for oral argument on the first appropriate date in May 2016." Order, Nos. 15-1264 & 15-1346 (Feb. 8, 2016). The cases have now been fully briefed, and argument in both cases is scheduled for May 5, 2016.

---

[2] *Expanding the Economic & Innovation Opportunities of Spectrum Through Incentive Auctions*, 30 FCC Rcd. 6746 (2015) (*Reconsideration Order*).

Although this Court refused to hear the cases before the March 29 scheduled commencement of the incentive auction, Petitioners on March 9 asked this Court for an emergency stay pending review.[3]

ARGUMENT

I. THE COURT LACKS JURISDICTION OVER THESE CASES.

At the outset, the Court lacks jurisdiction to grant any relief in these cases.

Free Access lacks standing because it is not the licensee of any LPTV station, but instead merely an investor. Just like a third-party shareholder, Free Access's claims of injury are wholly derivative of injury to the LPTV station licensees, and Free Access lacks standing to bring claims that belong to the stations' licensees. *See Free Access* Resp. Br. 21-25.

Word of God lacks standing—as it has conceded, *Free Access* Reply Br. 16-17 n.9—because it did not participate in the proceedings before the FCC and therefore was not a "party" entitled to seek judicial review under the Hobbs Act. *See Free Access* Resp. Br. 20-21.

Mako's petition, meanwhile, challenged only the *Reconsideration Order*, not the underlying *Order*'s treatment of LPTV stations. *See Mako* Resp. Br. 20-22. None of the documents that Mako filed within the 60-day limitations period, 28

---

[3] Petitioners also asked the Commission for an administrative stay pending review, which Commission staff denied in a written order on March 10. *Expanding the Economic & Innovation Opportunities of Spectrum Through Incentive Auctions*, 31 FCC Rcd. ____, 2016 WL 930581 (Media Bur. Mar. 10, 2016) (*Stay Denial Order*).

U.S.C. § 2201; 47 U.S.C. § 402(a), specified that it was seeking review of the *Order*, so it has failed to invoke this Court's jurisdiction to review the *Order*. *See, e.g.*, *Entravision Holdings, LLC v. FCC*, 202 F.3d 311 (D.C. Cir. 2000); *Sw. Bell Tel. Co. v. FCC*, 180 F.3d 307, 313 (D.C. Cir. 1999); *see also* Fed. R. App. P. 15(a)(2)(C) (petition for review "must … specify the order or part thereof to be reviewed"). And the *Reconsideration Order* cannot be reviewed because it is "'settled law that an order which merely denies rehearing of another order is not itself reviewable'" where, as here, the request for reconsideration was not based on new evidence or changed circumstances. *Sw. Bell*, 180 F.3d at 310; *see ICC v. Bhd. of Locomotive Eng'rs*, 482 U.S. 270, 277-81 (1987).

Absent jurisdiction over these cases, the Court lacks authority to grant even interim relief. *See, e.g.*, *Obama v. Klayman*, 800 F.3d 559 (D.C. Cir. 2015).

II. PETITIONERS HAVE NOT SATISFIED THE STRINGENT REQUIREMENTS FOR A STAY PENDING REVIEW.

Jurisdiction aside, to qualify for the extraordinary remedy of a stay pending review, Petitioners must show that (1) they are likely to prevail on the merits, (2) they will suffer irreparable harm absent a stay, (3) a stay will not harm others, and (4) the public interest favors a stay. *Wash. Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977); *see also Sherley v. Sebelius*, 644 F.3d 388, 392-93 (D.C. Cir. 2011). Petitioners have not satisfied these stringent requirements.

A. Petitioners Have Not Shown A Likelihood Of Success.

Petitioners are unlikely to prevail on their argument that the Commission must protect non-Class A LPTV stations from potential displacement as a result of the auction and repacking process. *Cf.* Mot. 7-14; Mot. 18 (arguing that the Commission must "inclu[de] LPTV [stations] in the 'repack'").

1. Congress granted protection only to "broadcast television licensee[s]," 47 U.S.C. § 1452(b)(2), which it defined to include only licensees of full-power and Class A stations, *id.* § 1401(6). By contrast, Congress did not offer any similar protection to non-Class A low-power stations. *See NAB*, 789 F.3d at 180 (upholding the Commission's determination that "[t]he preservation mandate's terms … do not extend to fill-in translators," another form of low-power television service); *Order* ¶ 238. Petitioners' demand that LPTV stations be protected from displacement cannot be reconciled with this deliberate statutory omission.

Recognizing that Congress chose not to grant LPTV stations repacking protection under § 1452(b)(2), Petitioners instead seek refuge in § 1452(b)(5), which states that "[n]othing in this subsection shall be construed to alter the spectrum usage rights of low-power television stations." *See*, *e.g.*, Mot. 2, 7, 8-9. But the Commission's reasonable interpretation of that provision of the Spectrum Act is due deference, *see NAB*, 789 F.3d at 171, and nothing in that proviso directs the Commission to extend repacking protection to LPTV stations. This is especially clear in light of Congress's decision to omit LPTV stations from the repacking

protection it granted to full-power and Class A stations under § 1452(b)(2).

Section 1452(b)(5) does not purport to grant any affirmative protection against displacement, but instead is framed as a rule setting forth how other provisions are to be "construed." *Recon. Order* ¶ 68. Unlike § 1452(b)(2), moreover, § 1452(b)(5) looks only to LPTV stations' existing rights and does not add to those rights or confer any new protections. If Congress had meant to grant LPTV stations the protections that Petitioners seek, it presumably would have done so expressly and unambiguously—as it did in § 1452(b)(2)—rather than circuitously through a rule of construction that does not purport to confer any rights.

Other features of the Spectrum Act support the Commission's interpretation. Congress granted eligibility for the reverse auction under § 1452(a)(1) to the same "broadcast television licensee[s]" it gave repacking protection under § 1452(b)(2). *See Order* ¶¶ 350-357. It would make little sense if LPTV stations were protected under some other provision yet not eligible to sell their spectrum in the reverse auction. *See id.* ¶ 357 (discussing the need for "[p]arity between repacking protection and reverse auction eligibility"). That would only increase the cost of the remaining spectrum and decrease the likelihood of recovering enough spectrum for the incentive auction to succeed, thereby undermining the Spectrum Act's goals.

In addition, Congress allocated funds to pay for relocation costs incurred by the same "broadcast television licensee[s]"—*i.e.*, full-power and Class A stations, 47 U.S.C. § 1401(6)—that it granted repacking protection under § 1452(b)(2). 47

U.S.C. § 1452(b)(4)(A)(i), (d). If Congress intended to also protect LPTV stations, it is odd that it did not provide them any similar relocation support.

Petitioners object that the Commission will impermissibly cause some LPTV stations to be displaced by "sell[ing] more spectrum in the forward auction than it reclaims in the reverse auction." Mot. 12. But this is simply another way of rephrasing their demand that the FCC reserve space for LPTV stations in the repacking—or, put differently, that LPTV stations be given a form of repacking protection. *See Recon. Order* n.255 ("Such an approach would require protection of LPTV stations in the repacking process, which we decline to do"). As we have explained, however, nothing in the Spectrum Act grants any repacking protection to LPTV stations.

2. In any event, nothing in the incentive auction "alter[s] the spectrum usage rights," 47 U.S.C. § 1452(b)(5), of LPTV stations. *See Order* ¶ 239; *Recon. Order* ¶ 68. LPTV stations have only secondary status, meaning that have always faced the possibility that they may be displaced, or required to cease operations altogether, to make way for new or existing primary services. *Recon. Order* ¶ 68; *see Low Power Television Service* ¶¶ 17, 64, 95. When Petitioners invested in LPTV facilities, they did so with "explicit, full and clear prior notice that operation in the LPTV [service] entails the risk of displacement." *Order* ¶ 241 (internal quotation marks omitted).

Petitioners' contention that the FCC has made LPTV stations secondary to unlicensed services (Mot. 7, 11, 12-13) misunderstands the *Order*, which explains that the spectrum recovered in the reverse auction will be sold in the forward auction only to *licensed* users. *Order* ¶¶ 5, 61-80; *see* 47 U.S.C. § 1452(c)(1)(A) (authorizing "a forward auction in which the Commission assigns licenses for the use of spectrum that [it] reallocates"). Petitioners' misunderstanding apparently stems from proposed rules, which have not been adopted, addressing how the Commission will make use of vacant channels that remain *after* the incentive auction is completed. *See* Mot. 4 & n.5 (discussing a Notice of Proposed Rule-making). Those proposed rules are not relevant here. *See Recon. Order* ¶ 97. Moreover, because they have not been (and might never be) adopted, they are not "final agency action," 5 U.S.C. § 704, and are not ripe for judicial review. *See, e.g., Ctr. for Auto Safety v. NHTSA*, 710 F.2d 842, 846 (D.C. Cir. 1983).

And although the auction will reduce the amount of spectrum allocated for broadcast television service, LPTV stations will retain precisely the same "spectrum usage rights" within the broadcast television spectrum after the auction as before: They will be permitted to operate on an available channel so long as they do not interfere with a primary service. A reduction in total broadcast spectrum therefore does not "alter" LPTV stations' "spectrum usage rights" under § 1452(b)(5). The rights are to use of the spectrum that is available; the provision does not purport to speak to what spectrum remains available.

3. Petitioners likewise cannot prevail on their claim (Mot. 12) that the Spectrum Act should be interpreted to protect them because otherwise they would have a Fifth Amendment takings claim. The Supreme Court and this Court have consistently held that broadcast licenses are not protected property interests and therefore cannot give rise to claims under the Fifth Amendment. *See, e.g.*, *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 475 (1940); *Mobile Relay Assocs. v. FCC*, 457 F.3d 1, 12 (D.C. Cir. 2006). Moreover, as the *Order* explains, the "rights of [LPTV] station licensees to use spectrum are defined by their licenses, which expressly subject them … to interference from primary services." *Order* ¶ 240. LPTV stations do not have any legally cognizable right to be protected against potential displacement, *ibid.*, and thus the Fifth Amendment and the interpretive canon of constitutional avoidance have no application here.

4. Finally, the Spectrum Act's "overarching objective of repurposing broadcast spectrum," *NAB*, 789 F.3d at 178, would 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, and thus "extending protection to [LPTV] stations in the repacking process would [not] be consistent with the goals of the Spectrum Act," *Order* ¶ 241. There are more than 1,800 licensed LPTV stations. Fed. Commc'ns Comm'n, *Broadcast Station Totals as of December 31, 2015* (Jan. 8, 2016), *available at* 2016 WL 112764. Granting protection to these stations "would increase the number of constraints on the

repacking process significantly, and severely limit [the] recovery of spectrum to carry out the forward auction, thereby frustrating the purposes of the Spectrum Act." *Order* ¶ 241. Although LPTV stations can provide a valuable service, the Commission reasonably determined that the benefits from protecting them in the incentive auction "are outweighed by the detrimental impact that protecting [LPTV] stations would have on the repacking process and on the success of the incentive auction." *Id.* ¶ 237.

As this Court held in *NAB*, "it [is] entirely permissible for the Commission to take [the Spectrum Act's goals] into account" in interpreting the Act. 789 F.3d at 178. Indeed, *NAB* held that Commission's decision not to protect TV translator stations—which are another form of low-power television service with secondary status, *id.* at 179, 180—was "reasonable in light of the distinct and secondary status the Commission has generally afforded to translator stations and the Commission's assessment of the significant practical difficulties that would attend" if they must be protected from displacement. *Id.* at 180 (citation omitted). The same is true of LPTV stations.

B. Petitioners Have Not Shown Irreparable Harm.

A stay is also unwarranted because Petitioners have failed to meet this Court's "high standard for irreparable injury." *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297 (D.C. Cir. 2006). To obtain a stay, Petitioners must show an injury "both certain and great." *Wis. Gas Co. v. FERC*, 758 F.2d

669, 674 (D.C. Cir. 1985). "Bare allegations of what is likely to occur are of no value[,] since the court must decide whether the harm will *in fact* occur." *Ibid.*

Although Petitioners contend (Mot. 15) that "many" LPTV stations will be displaced, their motion does not show that *their stations* are likely to be displaced. The risk that a station could be displaced from its current channel depends on a host of factors that Petitioners do not even attempt to analyze—such as the number of broadcasters that participate in the reverse auction, the amount of spectrum that the auction clears, and the particular channel reassignments made in the repacking process. *Stay Denial Order* ¶ 7; *cf. Wis. Gas*, 758 F.2d at 675 (alleged injury only "speculative and hypothetical" where petitioner has "not attempted to provide any substantiation").

Petitioners are also incorrect (Mot. 16-17) that there will be no relief available to allow them to remain on the air if they are displaced in the auction. Any LPTV station that is displaced from its current channel will be permitted to request a replacement channel that is available after repacking, *Stay Denial Order* ¶ 7, and the Commission has sought to ensure that any displaced LPTV stations will be able to obtain replacement channels by creating a special post-auction filing window for these stations, *Order* ¶ 657. In addition, the FCC can help displaced LPTV stations remain on the air using other tools, such as by permitting a station to enter into a channel-sharing agreement with another broadcaster. *Stay Denial Order* ¶ 7 & n.25. If Petitioners prevail on the merits, then for any Petitioner that

has standing, the Court can require the FCC to take all such measures to make replacement channels available for that Petitioner's station or stations.[4]

C. A Stay Would Harm Other Parties And The Public Interest.

Even if Petitioners' claims of imminent harm were more than speculative, a stay "is not a matter of right, even if irreparable injury might otherwise result." *Nken v. Holder*, 556 U.S. 418, 427 (2009) (internal quotation marks omitted). In balancing the equities, the Court may not enter a stay that would largely shift harm onto third parties. *See*, *e.g.*, *Sherley*, 644 F.3d at 398-99 (explaining that interim relief "would in fact upend the status quo," not preserve it, because it would result in "certain and substantial" hardship for other parties).

In this case, staying the auction would impose substantial hardship on a vast array of third parties—as the numerous filings opposing a previous motion to stay the incentive auction amply attest.[5] The incentive auction has been years in the making, and participants were notified of the March 29 start date more than six

---

[4] *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 [Petitioners] overcome[] 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 … corrective relief will be available at a later date … weighs heavily against a claim of irreparable harm.").

[5] *See* Br. *Amici Curiae* of Ellis Commc'ns KDOC Licensee *et al.* (Ellis *Amicus* Br.), Competitive Carriers Ass'n & CTIA—The Wireless Ass'n's J. Resp. in Opp. to Pets.' Emergency Mot. for Stay (CCA-CTIA Resp.), and Consumer Tech. Ass'n's *Amicus* Statement (CTA *Amicus* Statement), all filed in *Latina Broad. of Daytona Beach, LLC v. FCC*, Nos. 16-1065 & 16-1069 (D.C. Cir.).

months ago. Any delay, especially this close to the start of the auction, would upend the settled plans of broadcasters, wireless telecommunications carriers, and other companies that have made significant investments, secured financing, and laid aside other business plans based on the current schedule. *Stay Denial Order* ¶ 9; *see* Ellis *Amicus* Br. 5-6; CCA-CTIA Resp. 4-6; CTA *Amicus* Statement 8-9. In addition, "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* ¶ 10 (citing 47 C.F.R. §§ 1.2105(c)(1), 1.2205(b)); *see* Ellis *Amicus* Br. 6; CCA-CTIA Resp. 9. A stay would thus place a significant segment of the communications marketplace on extended hold, a prospect that weighs decidedly against granting a stay.

A stay would also have significant detrimental downstream effects. Broadcast industry suppliers will not know which stations will sell their spectrum and will face significant delays in purchase orders. Ellis *Amicus* Br. 7. Wireless telecommunications companies will be unable to quickly bring new spectrum to market. CCA-CTIA Resp. 6-10; CTA *Amicus* Statement 4-7. And consumer electronics companies (and their entire supply chains) will be unable to begin manufacturing wireless devices that make use of anticipated new spectrum.

The public interest would also be harmed by a stay. As this Court has recognized, "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 in the years ahead." *NAB*, 789 F.3d at 169 (internal quotation marks omitted). The Commission has therefore determined that there is a compelling public need to conduct the incentive auction with dispatch to help meet the increasing demand for spectrum-based services. *Stay Denial Order* ¶ 9; *see also* 47 U.S.C. § 309(j)(3)(A). A stay of the auction would seriously impair this important public interest.

Because "the harm to the public caused by a nationwide postponement of the auction would outweigh [any] possible harm to" Petitioners, *FCC v. Radiofone, Inc.*, 516 U.S. 1301, 1301-02 (Stevens, J., in chambers), *mot. to vacate denied*, 516 U.S. 938 (1995), the public interest weighs heavily against granting a stay.

CONCLUSION

The motion for a stay pending review should be denied.

Dated: March 15, 2016

Respectfully submitted,

/s/ *Scott M. Noveck*

Jonathan B. Sallet
General Counsel

David M. Gossett
Deputy General Counsel

Jacob M. Lewis
Associate General Counsel

Scott M. Noveck
Counsel

FEDERAL COMMUNICATIONS COMMISSION
445 12th Street SW
Washington, DC 20554
(202) 418-1740
fcclitigation@fcc.gov

William J. Baer
Assistant Attorney General

Robert B. Nicholson
Robert J. Wiggers
Attorneys

U.S. DEPARTMENT OF JUSTICE
950 Pennsylvania Ave. NW
Washington, DC 20530

CERTIFICATE OF FILING AND SERVICE

I, Scott M. Noveck, hereby certify that on March 15, 2016, I filed the foregoing Opposition to Motion for Stay Pending Review with the Clerk of Court for the United States Court of Appeals for the District of Columbia Circuit using the electronic CM/ECF system and by causing an original and four paper copies to be hand-delivered to the Clerk's Office. Participants in the case, listed below, who are registered CM/ECF users will be served electronically by the CM/ECF system. Some participants, marked with an asterisk, are not CM/ECF users; I certify that I have caused paper copies of the foregoing document to be served on those participants by first-class mail, unless another attorney for the same party is receiving electronic service.

/s/ *Scott M. Noveck*
Scott M. Noveck
Counsel for Respondent
Federal Communications Commission

Service List:

Rodney Scott Caulkins
CAULKINS & BRUCE, PC
123 Main Street N.W.
2300 Wilson Boulevard
Suite 240
Arlington, VA 22201
scaulkins@caulkinsbruce.com
Counsel for Petitioner
Mako Communications, LLC

*Aaron P. Shainis
*Lee J. Peltzman
SHAINIS & PELTZMAN CHARTERED
1850 M Street, NW
Suite 240
Washington, DC 20036
Counsel for Petitioner
Mako Communications, LLC

[Service List Continued from Previous Page]

C. Boyden Gray
Adam Jeffrey White
Adam Rabun Fast Gustafson
BOYDEN GRAY & ASSOCIATES, PLLC
801 17th Street, NW
Suite 350
Washington, DC 20006
info@boydengrayassociates.com
adam@boydengrayassociates.com
gustafson@boydengrayassociates.com

Counsel for Petitioners Free Access & Broadcast Telemedia, LLC and Word of God Fellowship, Inc.

Glenn B. Manishin
PARADIGMSHIFT LAW LLP
6735 Breezy Drive, Suite 101
Warrenton, VA 20187-2716
glenn@manishin.com

Counsel for Petitioners Free Access & Broadcast Telemedia, LLC and Word of God Fellowship, Inc.

*Robert L. Olender
KOERNER & OLENDER PC
7020 Richard Drive
Bethesda, MD 20817

Counsel for Petitioner Word of God Fellowship, Inc.

Kristen Ceara Limarzi
Robert B. Nicholson
Robert J. Wiggers
U.S. DEPARTMENT OF JUSTICE
950 Pennsylvania Ave. NW
Washington, DC 20530
kristen.limarzi@usdoj.gov
robert.nicholson@usdoj.gov
robert.wiggers@usdoj.gov

Counsel for Respondent United States of America