

**DISSENTING STATEMENT
OF COMMISSIONER AJIT PAI**

Re: *Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, GN Docket No. 12-268.

In this *Order*, the Commission decides to ignore Will Rogers' famous advice: "If you find yourself in a hole, stop digging."

The hole in this case involves the Commission's repeated attempts to separate those "out-of-core" Class A-eligible LPTV stations receiving discretionary repacking protection in the incentive auction from those not receiving such protection. Unfortunately, the Commission's latest decisions make the hole deeper—in particular, the decision to maintain such protection for KHTV while stripping it from Latina Broadcasters of Daytona Beach, LLC's WDYB, one of the few full-power or Class A television stations in the country owned by a Hispanic woman. This is all the more unfair because the Commission had repeatedly represented to Latina that its station would be protected, only to reverse course here less than two months before the start of the incentive auction. This will make it difficult for Latina to obtain full and fair review of its claims in court. For all these reasons, I am unable to support this *Order*.

I.

The mishandling of this issue began two years ago. In 2014, the Commission took its first stab at deciding which Class A television stations would be eligible for the incentive auction (and thus protection during the post-auction repacking process). It stated that any Class A station with an application for a license to cover a Class A facility on file or granted as of February 22, 2012 (the date of the Spectrum Act's enactment) was entitled to such protection as a matter of law.¹ I agreed with that determination.

However, the Commission also went on to give so-called "discretionary protection" to one Class A station that did not meet that standard. That station was KHTV, which is located in the Los Angeles, California market.² This special exception, in my view, stuck out like a sore thumb and could not be justified. Yes, KHTV had tried (but failed) to transition to Class A status prior to February 22, 2012. But so had many other out-of-core Class A-eligible stations in markets where spectrum was tough to come by, and all the Commission had to say to those stations was that they were out of luck. I knew that if we granted KHTV special treatment, other out-of-core Class A-eligible stations would ask for the same benefit, and it would be difficult to deny their requests. And I found it exceptionally curious that the Commission would be going out of its way to grant repacking protection to an additional television station in Los Angeles, one of the most spectrum-constrained markets in the country. Let's just say that course of action was not at all consistent with the general tenor of the Commission's other decisions in this proceeding. For all of these reasons, Commissioner O'Rielly and I asked that the exception for KHTV be removed from the *Incentive Auction Order*. Unfortunately, we fell one vote short.

Sure enough, two out-of-core Class A-eligible stations shortly thereafter filed "me too" petitions for reconsideration, asking the Commission to protect them in the same manner that it had protected KHTV. The Commission realized that granting special discretionary protection to KHTV alone would not be defensible as a matter of law or equity. So it decided to extend discretionary protection to any station that did not construct in-core Class A facilities until after February 22, 2012, *provided that it had requested (or had been granted) a Class A construction permit by that date*.³ This change protected

¹ See *Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, GN Docket No. 12-268, Report and Order, 29 FCC Rcd 6567, 6652–54, paras. 185–89 (2014) (*Incentive Auction Order*).

² See *Incentive Auction Order*, 29 FCC Rcd at 6671–72, para. 235.

approximately 12 additional stations (including Latina), although strangely it did nothing to help those stations that had actually filed the petitions for reconsideration in 2014. At the time, I had some reservations about this new approach. But I felt that it was fairer than the Commission's original decision and voted for it.

Four Class A broadcasters that did not benefit from the Commission's change of heart then filed a petition for reconsideration of last year's decision. This *Order* responds to that petition and represents the Commission's third attempt to figure out which Class A stations should receive discretionary protection. While the Commission here does not grant protection to any additional stations, it does remove Latina's protection, even though no party has ever sought that result. Moreover, as explained below, the Commission maintains KHTV's protection even as it withdraws Latina's, despite the fact that there is no meaningful distinction between the two station's circumstances. So KHTV once again benefits from special treatment while a minority- and female-owned television station is left out in the cold.

II.

In its 2015 decision, the Commission agreed to protect 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."⁴ There is no dispute that Latina's station holds a Class A station license and held it at the time of the Commission's 2015 decision. It is also the case that Latina's station had an application for a Class A construction permit granted as of February 22, 2012. Specifically, the FCC granted such applications on January 18, 2002, and December 2, 2008.

It should therefore come as no surprise that the Commission included Latina's station in the June 2015 list of all television stations eligible for protection in the repacking process, the October 2015 list of opening prices for all protected stations, and the October/November 2015 final constraint files to be used by the repacking software during the incentive auction.

In seeking a writ of mandamus from the D.C. Circuit last December, the petitioners here argued that they too were entitled to protection because their stations were in the same boat as Latina's. The Commission disagreed, however, responding that "[u]nlike petitioners' stations, WDYB [*i.e.*, Latina] had obtained in-core Class A construction permits before February 22, 2012 Latina, therefore, is not 'similarly situated' to Videohouse' or the other petitioners."⁵

Yet fewer than 50 days later and fewer than 50 days before the start of the incentive auction, the Commission does a 180, kicking Latina's station out of the auction and removing its protection during the repacking process. Why? The Commission suddenly claims that Latina did not have an application for a Class A authorization pending or granted as of February 22, 2012. Specifically, it states that Latina's 2008 permit expired in 2011. (Latina's 2001 application, which was granted in 2002, is never mentioned.)

³ 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, 6769, para. 53 (2015) (*Reconsideration Order*). The form in question is FCC Form 302-CA, "Application for Class A Television Broadcast Station Construction Permit or License," available at <https://transition.fcc.gov/Forms/Form302-CA/302ca.pdf>.

⁴ *Reconsideration Order*, 30 FCC Rcd at 6675, para. 62.

⁵ Federal Communications Commission, Opposition to Emergency Petition for Writ of Mandamus, *In re Videohouse, Inc.*, Docket No. 14-1486, at 7-8 & n.2 (D.C. Cir. filed Dec. 28, 2015).

The relevant question is therefore whether Latina had an application for a Class A authorization granted as of February 22, 2012. The Commission's CDBS database says today that the current status for both of Latina's applications is "GRANTED." And there is no dispute that this is what the database showed on February 22, 2012. The matter is more complicated than that, however. With respect to Latina's 2008 application, the CDBS database also lists an expiration date of December 2, 2011. So the Commission's position, as I take it, is that the 2008 application was no longer granted as of February 22, 2012.

But that interpretation of the phrase "granted as of February 22, 2012" cannot be reconciled with the reasons provided by the Commission in 2015 for drawing that line. The Commission explained:

By filing an application for a Class A construction permit prior to February 22, 2012, each of these stations documented efforts prior to passage of the Spectrum Act to remove their secondary status and avail themselves of Class A status. Under the Commission's rules, these stations were required to make the same certifications as if they had applied for a license to cover a Class A facility. . . . Thus, prior to the enactment of the Spectrum Act, such stations had certified in an application filed with the Commission that they were operating like Class A stations.⁶

How does this reasoning apply to Latina? Well, Latina's station clearly documented efforts prior to passage of the Spectrum Act to remove its secondary status and avail itself of Class A status. Indeed, the station began making documented efforts to transition to Class A status more than a decade prior to the passage of the Spectrum Act! Additionally, before the Spectrum Act, Latina's station had *twice* certified in an application filed with the Commission that it was operating like a Class A station. Thus, it seems clear to me that the interpretation of the 2015 decision that had prevailed until today was correct and that Latina was eligible for protection under the standards set forth by the Commission last year. Indeed, in this *Order*, the Commission does not even try to reconcile the explanation set forth in its 2015 decision with its decision today.

Even more troubling to me is the disparate treatment accorded KHTV and Latina's station. The Commission's justification for keeping KHTV in the auction rests on a Form 302-CA it filed way back on November 25, 2002. But what the Commission neglects to mention is that by February 22, 2012, this had long since become a zombie application. The construction permit to which that application was linked had been dismissed years earlier, and KHTV did not have any right to use (or prospect of being able to use) the channel specified in the application. In short, there was no way that the application ever could have been granted. Indeed, when KHTV finally achieved Class A status, it did so through an application that was filed *after* the enactment of the Spectrum Act and specified a completely different channel from its original application. The fact that KHTV's 2002 application remained technically "pending" at the Commission on February 22, 2012 was nothing more than an administrative accident.

So stepping back and looking at the big picture, here are the basic facts. KHTV filed an application for Class A status in 2002, for which the underlying construction permit was dismissed in 2006. And Latina's station filed a similar application in 2001, which was granted in 2002, but for which the underlying construction permit expired in 2004. What, then, is the basis for protecting KHTV and not protecting Latina's station? As of February 2012, neither KHTV's 2002 Form 302-CA nor Latina's 2001 Form 302-CA offered any hope of leading to either station becoming Class A. A new Form 302-CA was necessary for that to happen, and *each station filed that form after February 22, 2012*. The only distinction here is that KHTV's Form 302-CA technically remained pending at the Commission while Latina's had been granted. But there is no reason why that difference should be material for purposes of

⁶ *Reconsideration Order*, 30 FCC Rcd at 6675, para. 62.

deciding whether KHTV and/or Latina should be protected by the Commission during the repacking process.

In reality, what we have here is an entirely outcome-driven process. For whatever reason, the Commission has been driven for years to grant special protection to KHTV. And it has shifted from rationale to rationale to achieve that goal. But given the facts that are in front of us, this has led to an arbitrary outcome. Two stations that are similarly situated are being treated differently; the Commission is tossing KHTV a life preserver but is perfectly content to allow Latina's station to sink.

III.

Turning to the question of whether petitioners' stations should receive discretionary protection during the post-auction repacking process, I have some sympathy for the arguments set forth by the Commission in this *Order*. Once the Commission (mistakenly in my view) decided to go down the road of extending discretionary protection to some out-of-core Class A-eligible stations, there was no perfect line to draw, and the one set forth by the Commission in 2015 appears, at first blush, to be as reasonable as any other.

But here's the problem. We know that stations, including some of petitioners' stations, were ready to file a Form 302-CA in 2011. But they were advised not to do so by Media Bureau staff. Instead, they were told first to file for a low-power construction permit for their "in-core" station, construct those facilities, and then file a Form 302-CA to convert to Class A status. Based both on the evidence in the record as well as my office's inquiries, I have no reason to doubt that this happened, and the Commission does not deny it in this *Order*. Instead, the Commission says that parties rely on informal staff advice at their own peril.

But let's again review what happened here. Media Bureau staff in 2011 advised stations that were ready to file a Form 302-CA *not* to do so. Now the Commission is turning around and denying those stations repacking protection because they failed to file that form by February 22, 2012. The Commission is faulting stations for failing to make certain efforts prior to passage of the Spectrum Act, but ignoring the fact that the agency encouraged stations to delay undertaking those efforts. This game of gotcha might prove lawful; that will be up to a court to decide.⁷ But it is not worthy of the Commission to force someone to play it.

Another area where I part company with the Commission is in its contention that petitioners' claims are procedurally improper. For the reasons set forth by petitioners, I do not agree with that position.

I'll highlight one point in particular. In its 2015 decision, the Commission claimed that reconsideration petitions raising these claims were procedurally improper. But it nonetheless relied upon those petitions to extend discretionary protection to other stations. Today, too, the Commission maintains that this petition for reconsideration is procedurally improper. But this time, it relies upon that supposedly infirm petition in removing protection from Latina's station.

⁷ Cf. *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 295 (1974) (raising possibility of arbitrary and capricious agency action when a "new liability is sought to be imposed on individuals for past actions which were taken in good-faith reliance on [agency] pronouncements"); *U.S. v. Pa. Indus. Chem. Corp.*, 411 U.S. 655, 674 (1973) (raising similar concern when a regulated entity is "affirmatively misled by the responsible administrative agency into believing that the law did not apply" in a particular situation).

Simply put, the Commission can't have it both ways. Either these petitions for reconsideration are procedurally improper or they are not. If they are, then they do not provide the Commission with any basis for taking *any* substantive action in this proceeding. And if they are not, then there is no impediment to the Commission (or a court) reviewing petitioners' substantive claims.

To be sure, the Commission argues that it is rejecting the petitioners' claims on "alternative" grounds. And in the world of fiction, it is possible to have parallel universes or alternate timelines.⁸ But here in the real world, the Commission must choose one reality. And by using these petitions for reconsideration to make substantive changes to the Commission's prior decisions, the Commission has made that choice and is precluded from arguing that these petitions were procedurally improper.

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One of the Commission's foremost obligations is to enforce the law without fear or favor. The Commission doesn't meet that obligation in this *Order*. The decision to remove protection from Latina while maintaining it for KHTV is utterly indefensible. And it is impossible to reconcile the Commission's ostensible support for promoting diversity with such shabby treatment of one of the few television stations in this nation owned by a Hispanic woman. For all of these reasons, I respectfully dissent.

⁸ Consider *The Mosquito's Choice*, a 1993 short story by Henry Cowper (involving parallel timelines where Adolf Hitler's survival depends upon which French Artillery Officer is bitten by a mosquito during World War I), the "Remedial Chaos Theory" episode of the television show *Community* (where Jeff, played by Joel McHale, rolls a die to determine who will walk downstairs to pick up a delivery pizza, and the episode's plot follows how each timeline differs depending on which character has to retrieve the pizza), or that cinematic classic *Hot Tub Time Machine* (where Nick's choice of what song to play at an open mic contest causes the character, played by Craig Robinson, to either work at a dog spa or become a successful music producer).