



6712-01

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[GN Docket No. 12-268; FCC 16-12]

Expanding the Economic and Innovation Opportunities of Spectrum through Incentive Auctions

AGENCY: Federal Communications Commission.

ACTION: Final rule; petition for reconsideration.

SUMMARY: In this document, the Commission dismisses, and on separate grounds, denies petitions for reconsideration seeking reconsideration of the Commission's decisions in the Incentive Auction R&O and the Incentive Auction Second Order on Reconsideration not to protect certain broadcast television stations (WOSC-CD, Pittsburgh, PA; WPTG-CD, Pittsburgh, PA; WIAV-CD, Washington, DC; and KKYK-CD, Little Rock, AK) in the repacking process or make them eligible for the reverse auction. The Commission also concludes that WDYB-CD, Daytona Beach, Florida is not entitled to discretionary repacking protection or eligible to participate in the reverse auction.

DATES: Effective [**INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER**].

ADDRESSES: Federal Communications Commission, 445 12th Street, SW, Washington, DC 20554.

FOR FURTHER INFORMATION CONTACT: Lynne Montgomery, (202) 418-2229, or by email at Lynne.Montgomery@fcc.gov, Media Bureau; Joyce Bernstein, (20) 418-1647, or by email at Joyce.Bernstein@fcc.gov, Media Bureau.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Order on Reconsideration in GN Docket No. 12-268, FCC 16-12, adopted on February 8, 2016 and

released on February 12, 2016. The full text may also be downloaded at: www.fcc.gov. People with Disabilities: To request materials in accessible formats for people with disabilities (braille, large print, electronic files, audio format), send an email to fcc504@fcc.gov or call the Consumer & Governmental Affairs Bureau at 202-418-0530 (voice), 202-418-0432 (tty).

Synopsis of Order on Reconsideration

I. INTRODUCTION

1. Petitioners The Videohouse, Inc. (Videohouse), Abacus Television (Abacus), WMTM, LLC (WMTM), and KMYA, LLC (KMYA) seek reconsideration of the Commission's decision, on procedural and substantive grounds, not to protect their broadcast television stations in the repacking process or make them eligible for the reverse auction. At the time the Petition was filed, Videohouse, Abacus, WMTM, and KMYA were the licensees of the following stations, respectively: WOSC-CD, Pittsburgh, Pennsylvania; WPTG-CD, Pittsburgh; WIAV-CD, Washington, D.C.; and KKYK-CD, Little Rock, Arkansas. WPTG-CD and KKYK-CD have since been acquired by Fifth Street Enterprise, LLC and Kaleidoscope Foundation, Inc., respectively. We dismiss and, on alternative and independent grounds, deny the Petition. For the reasons below, we also conclude that WDYB-CD, Daytona Beach, Florida, licensed to Latina Broadcasters of Daytona Beach, LLC (Latina), is not entitled to discretionary repacking protection or eligible to participate in the reverse auction.

II. BACKGROUND

2. In the Incentive Auction R&O, the Commission concluded that the Spectrum Act mandates that the Commission make all reasonable efforts to preserve, in the repacking process associated with the broadcast television spectrum incentive auction, the coverage area and population served of only full power and Class A broadcast television 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. The Commission did not interpret the Spectrum Act, however, as precluding it from exercising discretion to protect additional facilities beyond the statutory floor. The Commission granted discretionary protection to a handful of categories of facilities, based on a careful balancing of

different factors in order to achieve the goals of the Spectrum Act and other statutory and Commission goals.

3. One category to which the Commission declined to extend discretionary protection was “out-of-core” Class A-eligible LPTV stations”: low power television (LPTV) stations that operated on “out-of-core” channels (channels 52-69) when the Community Broadcasters Protection Act (CBPA) was enacted in 1999 and obtained an authorization for an “in-core” channel (channels 2-51), but did not file for a Class A license to cover by February 22, 2012. The CBPA accorded “primary” or protected Class A status to certain qualifying LPTV stations. Although the statute prohibited granting Class A status to LPTV stations on out-of-core channels, it provided such stations with an opportunity to achieve Class A status on an in-core channel. The Commission explained that protecting these stations, which numbered approximately 100, would encumber additional broadcast television spectrum, thereby increasing the number of constraints on the repacking process and limiting the Commission’s flexibility to repurpose spectrum for flexible use. The Commission recognized that these stations had made investments in their facilities, but concluded that this equitable interest did not outweigh the “significant detrimental impact on repacking flexibility that would result from protecting them,” especially in light of their failure to take the necessary steps to obtain a Class A license and eliminate their secondary status during the ten-plus years between passage of the CBPA and the Spectrum Act. The Commission did decide to protect one station in this category, KHTV-CD, based on licensee Venture Technologies Group, LLC’s (Venture) showing in response to the Incentive Auction NPRM that discretionary protection of KHTV-CD was warranted, based upon the fact that it made repeated efforts over the course of a decade to find an in-core channel, had a Class A construction permit application on file certifying that it was meeting the regulatory requirements applicable to Class A stations prior to enactment of the Spectrum Act, and filed an application for a license to cover a Class A facility on February 24, 2012, just two days after the Spectrum Act was enacted.

4. Abacus and Videohouse, licensees of two stations in the out-of-core Class A-eligible LPTV station category, filed petitions for reconsideration of the Incentive Auction R&O asking the

Commission to protect their stations in the repacking process and make them eligible for the reverse auction. The Commission rejected their claims that they are entitled to repacking protection under the CBPA. The Commission dismissed on procedural grounds their claims that they should be protected because they are similarly situated to KHTV-CD, but also considered and rejected the claims on the merits. In addition, the Commission rejected arguments disputing its estimate that the category of out-of-core Class A-eligible stations included approximately 100 stations. Asiavision, Inc, the previous licensee of WIAV-CD, submitted a responsive filing raising arguments similar to those raised by Abacus and Videohouse and the Commission dismissed this filing as a late-filed petition for reconsideration but nonetheless treated it as an informal comment.

5. In the Reconsideration Order, the Commission also clarified that a Class A station that had an application for a license to cover a Class A facility on file or granted as of February 22, 2012 is entitled to mandatory protection, but that a Class A station that had an application for a Class A construction permit on file or granted as of that date would not be entitled to such protection. An application for a license to cover a Class A facility signifies that the Class A-eligible LPTV station has constructed its authorized Class A facility, and authorizes operation of the facility. A Class A construction permit application seeks to convert an LPTV construction permit to a Class A permit. Grant of a construction permit standing alone does not authorize operation of the authorized facility. Based on a careful balancing of relevant factors, it also decided to extend discretionary protection to stations in the latter category—stations that did not construct in-core Class A facilities until after February 22, 2012 but requested Class A construction permits prior to that date. The Commission reasoned that these stations are similarly situated to KHTV-CD because as of February 22, 2012, the date established by Congress for determining which stations are entitled to repacking protection, these stations had certified in an application filed with the Commission that they were acting like Class A stations. 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. Among other things, each was required to certify that it ‘does, and will continue to, broadcast’ a minimum of 18 hours per day and an average of at least three hours per week of local programming and that it complied with requirements applicable to full-power stations that apply to Class A stations. The Commission concluded that there were significant equities in favor of protecting the approximately 12 stations in this category that outweighed the limited adverse impact that such protection would have on its flexibility to repurpose spectrum for flexible use through the incentive auction. The Commission also recognized that, having first filed a Class A construction permit application prior to February 22, 2012, the licensees of these stations may not have realized that the stations were not entitled to mandatory protection under the Spectrum Act. Conversely, the Commission explained, Abacus and Videohouse did not certify continuing compliance with Class A requirements until after the enactment of the Spectrum Act.

6. Abacus, Videohouse, and the licensees of two other stations in the out-of-core Class A-eligible LPTV category that did not seek to obtain Class A status until after February 22, 2012, seek reconsideration of the Reconsideration Order. Petitioners also attached to the Petition a copy of each of their Petitions for Eligible Entity Status (“Eligibility Petition”) filed July 9, 2015 in GN Docket No. 12-268 in response to the Media Bureau’s June 9, 2015 Public Notice. They argue that the Commission erred procedurally by dismissing the 2014 Petitions, and exceeded its authority by extending protection to a different group of Class A stations that had not asked for reconsideration. On the merits, they contend that their stations are no different from the out-of-core Class A-eligible LPTV stations that the Commission decided to protect, and that extending protection to their stations would not adversely impact the Commission’s repacking flexibility. They claim the equities weigh in favor of protecting stations that obtained a Class A license by the Pre-Auction Licensing Deadline (May 29, 2015) and met other auction-related filing requirements. For the reasons below, we affirm our action in the Reconsideration Order.

III. DISCUSSION

7. Petitioners’ claims are both procedurally and substantively defective and we therefore dismiss their claims and, in the alternative, deny them on the merits.

A. Petitioners' Claims Are Procedurally Improper

8. First, as we explained in the Reconsideration Order, the Commission squarely raised the question of which broadcast television facilities to protect in the repacking process in the Incentive Auction NPRM, but none of the Petitioners presented facts or arguments as to why its station should be protected until after the Commission adopted the Incentive Auction R&O, although all of the facts and arguments they now present existed beforehand. While Videohouse notes that its owner on behalf of a related entity (Bruno Goodworth Network, Inc.) filed reply comments in response to the Incentive Auction NPRM, those comments did not pertain to out-of-core Class A-eligible LPTV stations generally or to its station in particular. Videohouse also claims that it discussed out-of-core Class A-eligible LPTV stations with Commission staff at an industry forum in April 2013, but Videohouse never made these statements part of the record of this proceeding until July 2015, over a year after adoption of the Incentive Auction R&O. Abacus refers to an email it sent Commission staff in March 2014, but Abacus never filed this email in the record, and the first reference to it in the record was not until July 2015. In contrast, Venture submitted comments in response to the Incentive Auction NPRM regarding the particular facts and circumstances that it maintained—and the Commission agreed—justified protection of KHTV-CD. Contrary to Petitioners' arguments, therefore, the Commission did not err in dismissing the 2014 Petitions, and the current Petition likewise is subject to dismissal. In addition, the facts and arguments put forth in the Petition are repetitious with regard to Abacus, Videohouse, and WMTM, each of whom sought reconsideration of the Incentive Auction R&O: the Commission considered and rejected those facts and arguments in the Reconsideration Order. Asiavision, the previous licensee of WIAV-CD, now licensed to WMTM, filed informal comments in response to the 2014 Petitions.

9. For reasons similar to those on which we relied in the Reconsideration Order, we also reject Petitioners' new argument that, notwithstanding their failure to advocate protection of their stations in a timely manner, their claims were procedurally proper because other parties generally advocated protection of Class A stations in response to the Incentive Auction NPRM. Contrary to Petitioners' argument, no commenter generally advocated discretionary protection of out-of-core Class A-eligible

stations. With the exception of the Venture Reply Comments, which pertain specifically to KHTV-CD only, none of the comments in response to the Incentive Auction NPRM cited by Petitioners address out-of-core Class A-eligible LPTV stations at all. As we previously explained, Venture put forth particular facts in response to the Incentive Auction NPRM demonstrating why KHTV-CD should be afforded discretionary protection. The decision to protect KHTV-CD was based in part on this evidence. Petitioners now argue that, like KHTV-CD, each of their stations faced “unique” “hardships and obstacles.” But as we noted in the Reconsideration Order, Petitioners did not attempt to demonstrate in response to the Incentive Auction NPRM why they should be afforded discretionary protection. Venture’s presentation regarding KHTV-CD’s unique circumstances does not bear at all on Petitioners’ stations and did not constitute an “opportunity [for the Commission] to pass” on the facts and arguments that Petitioners now rely on. We note that whether the Commission had an “opportunity to pass” on an issue is not the relevant statutory test. Rather, Section 405(a) provides that “no evidence other than newly discovered evidence, evidence which has become available only since the original taking of evidence, or evidence which the Commission or designated authority within the Commission believes should have been taken in the original proceeding shall be taken on any reconsideration.” Additionally, as discussed below, Petitioners fail to meet the test for discretionary protection adopted in the Reconsideration Order.

10. While the rules allow petitioners to raise facts or arguments on reconsideration that have not previously been presented under certain circumstances, Petitioners have not demonstrated such circumstances, and their reliance on section 1.429(b)(1) is therefore misplaced. Contrary to Petitioners’ claims, the July 9, 2015 deadline for submission of the Pre-Auction Technical Certification Form is not a relevant event that has occurred since their last opportunity to present facts or arguments. That date would be relevant only if we agreed with their challenges. As we do not, the July 9, 2015 deadline is not a relevant circumstance for purposes of section 1.429(b)(1). We also reject Petitioners’ argument that the public interest would be served by reconsideration. The Commission has a “well-established policy of not considering matters that are first raised on reconsideration,” premised on the statutory goals of “procedural regularity, administrative efficiency, and fundamental fairness.” Those goals would not be

served by allowing Petitioners to sit back and hope for a decision in their favor, and only then, when the decision is adverse to them, to offer evidence of why they should be treated differently. We also reject Petitioners' claim that section 1.429(b)(2) is met here because they could not have known that the Commission would reject their Petition and extend protection to a different group of Class A stations. As explained below, our decision in the Reconsideration Order to extend protection to certain stations but not to Petitioners' was a logical outgrowth of the proposals in the Incentive Auction NPRM and consistent with our statutory authority. Accordingly, it does not furnish a basis for reconsideration under section 1.429(b)(2).

B. Petitioners' Claims Fail on Substantive Grounds

11. As an alternative and independent ground for our decision, we consider and deny Petitioners' claims that discretionary protection of their stations is warranted. Petitioners argue that the Commission failed to distinguish their efforts to demonstrate compliance with the regulatory requirements applicable to Class A stations from those of the out-of-core Class A-eligible LPTV stations that it decided to protect. On the contrary, we clearly explained in the Reconsideration Order that KHTV-CD and the other stations in the protected group filed applications for a Class A construction permit (FCC Form 302-CA) before February 22, 2012, and Petitioners did not. The Form 302-CA requires the applicant to certify that it "does, and will continue to" meet all of the full power and Class A regulatory requirements that are applicable to Class A stations, subject to significant penalties for willful false statements. Thus, as of February 22, 2012, the date established by Congress for determining which stations are entitled to repacking protection, these stations had on file with the Commission certifications that they were operating like Class A stations. Petitioners concede that they did not file a Form 302-CA application before February 22, 2012. Videohouse identifies no reasonable basis for its claim that it believed it could not file a Form 302-CA application in March 2009 because it was not certain the in-core channel it proposed in its LPTV construction permit application was feasible. With respect to Abacus and WMTM, we previously addressed their claims that Commission staff advised them not to file a Form 302-CA until after their in-core facilities were licensed as LPTV stations. In addition, to the extent these

entities relied on informal staff advice, they did so at their own risk. KMYA offers no explanation for failing to file a Form 302-CA application before February 22, 2012. Their other pre-February 22, 2012 filings on which they rely do not demonstrate that their stations were operating like Class A stations. Unlike the Form 302-CA, the documents Petitioners placed in their public inspection files before February 22, 2012 did not certify that their stations were in compliance with the full power requirements that apply to Class A stations. Petitioners claim to have met one requirement applicable to full power stations: the airing of children's programming. In the cases of Abacus and Videohouse, however, the required children's television reporting forms (FCC Form 398) were not filed until the second half of 2012, purporting to cover periods dating back to 2006. Moreover, Videohouse's FCC Forms 398 concede that WOSC-CD did not comply with certain children's television requirements because the station "has not filed its application for a Class A license." In the case of Petitioner WMTM, the FCC Forms 398 in WIAV's online public file commence in the first quarter of 2013, and say nothing as to whether it was complying with children's programming requirements as of February 22, 2012. Also unlike the Form 302-CA, the certifications contained in these documents as to compliance with regulatory requirements that apply to Class A stations only were voluntary and unenforceable, making them less reliable indicators as to whether the stations were providing the service required of a Class A station as of February 22, 2012. In addition, Form 302-CA must be filed with the Commission, whereas there is no means to verify when Petitioners' certifications were placed in their public files. In their most recent filing, Petitioners for the first time claim that KKYK-CD obtained a Class A construction permit on February 16, 2012, prior to the statutory enactment date. This claim is unsupported by an examination of the Commission's records. Petitioners' apparent attempt to recast the history of KKYK-CD, like their efforts to demonstrate that they were acting like Class A stations prior to February 22, 2012 based on post-dated public file submissions, illustrate the reasonableness of the Commission's bright-line test based on the filing of FCC Form 302-CA.

12. Contrary to Petitioners' arguments, it was reasonable for us to limit discretionary repacking protection and auction eligibility to out-of-core Class A-eligible LPTV stations that filed a

Form 302-CA application before February 22, 2012, because that is the date established by Congress for determining which stations are entitled to repacking protection. A station that filed a Form 302-CA application before February 22, 2012, demonstrated that it sought to avail itself of Class A status as of that date, and thus warranted protection and auction eligibility under the statutory scheme. Conversely, Petitioners neither requested Class A status, nor demonstrated that they were 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—over ten years after the CBPA made them eligible for such status. On the date of enactment of the Spectrum Act, Petitioners operated LPTV stations. Congress did not include LPTV stations within the definition of broadcast television licensees entitled to repacking protection, and protecting them as a matter of discretion would significantly constrain the Commission’s repacking flexibility. In addition, Petitioners’ stations are particularly likely to impact repacking flexibility because they are located in congested markets such as Pittsburgh and Washington, D.C. where the constraints on the Commission’s ability to repurpose spectrum through the auction will be greater than in less congested markets. Accordingly, we reject the comments of the LPTV Coalition and WatchTV alleging that the Petitioners’ four stations would have little or no impact on repacking flexibility. While some of the protected Class A stations also are located in congested markets, the impact on repacking flexibility is just one of the factors we must consider

13. While Petitioners are correct that there was no deadline for out-of-core Class A-eligible LPTV stations to file an application for a Class A construction permit (or an application for a license to cover a Class A facility), a Class A-eligible LPTV station with a Form 302-CA application pending or granted as of February 22, 2012 demonstrated objective steps, prior to enactment of the Spectrum Act, to avail itself of Class A status, subject to all of the regulatory requirements that status entails. Prior to February 22, 2012, these stations invested in broadcast television facilities based on the expectation that the facilities would receive protection as “primary” Class A stations. In contrast, Petitioners only sought Class A status after Congress designated such stations as eligible to participate in the auction – and after the date set by Congress to establish entitlement to repacking protection and auction eligibility.

14. We also reject Petitioners' argument that, regardless of whether they demonstrated that their stations were acting like Class A stations as of February 22, 2012, discretionary protection is warranted based on their overall efforts to achieve Class A status. Soon after enactment of the CBPA in 1999, the Commission warned 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, as the core spectrum is becoming increasingly crowded and it is likely to become increasingly difficult to locate an in-core channel in the future." Unlike KHTV-CD, which demonstrated that it commenced efforts to achieve Class A status soon after enactment of the CBPA, Petitioners are silent as to any such efforts before 2009, almost a decade after enactment of the CBPA. Videohouse claims that it had to wait until the DTV transition ended in 2009 to seek a new channel because it operated in a "highly congested market" (Pittsburgh), yet Venture demonstrated efforts to find a new channel for KHTV-CD in the even more congested Los Angeles market despite the DTV transition. Furthermore, as discussed above, the evidence presented by Petitioners regarding their efforts to obtain Class A status between 2009 and February 22, 2012 does not demonstrate that they acted like Class A stations during that time period. Granting discretionary protection based on Petitioners' initiation of Class A service after February 22, 2012 would not serve Congress's goal of preserving full power and Class A service as of the Spectrum Act's enactment date. We also reject KMYA's claim that it is entitled to protection under the terms of the Incentive Auction R&O and CBPA. KMYA is not entitled to protection under section 336(f)(6)(A) of the CBPA because it did not file an application for a Class A authorization (either a Class A license or a Class A construction permit) with its application for a construction permit to move to an in-core channel. Rather, KMYA did not file an application for a Class A authorization until July 2012, after enactment of the Spectrum Act.

15. We reject Petitioners' claim that the equities weigh in favor of granting discretionary protection to stations that obtained a Class A license by the Pre-Auction Licensing Deadline (May 29, 2015) and met other auction-related filing requirements. Petitioners have conveniently found a line that would protect their stations, but the Commission never linked the May 29, 2015 Pre-Auction Licensing Deadline to repacking protection for out-of-core Class A-eligible LPTV stations. On the contrary, the

Commission plainly stated that it would not protect such stations based on their obtaining Class A licenses by that deadline. By contrast, the line the Commission chose is tied directly to the date established by Congress for repacking protection. As discussed above, Petitioners have not shown that their stations provided the service required of Class A stations before that date, or that they took steps to avail themselves of Class A status until it was clear that doing so could yield substantial financial rewards through auction participation. Accordingly, we reject the contention that the equities weigh in favor of granting the relief Petitioners seek.

16. Petitioners attempt to buttress their argument for discretionary protection by questioning the validity of the Commission's statement that approximately 100 stations would be eligible for protection if it protected out-of-core Class A-eligible LPTV stations that obtained Class A licenses after February 22, 2012, as Petitioners advocate. But that statement does not bear on the decisional issue presented by the Petition: the reasonableness of the Commission's determination not to protect Petitioners' four stations. As set forth above, the equities do not weigh in favor of granting such protection, regardless of how many stations fell into the relevant category at the time the Incentive Auction R&O was adopted.

17. In any event, Petitioners' complaints regarding the Commission's estimate—that it never provided a list of the stations, and that its explanation of how interested parties could identify the stations is unworkable—lack merit. Interested parties were free to compile their own station lists from publicly available data. We explained in the Reconsideration Order that the stations can be identified by comparing the publicly available list of LPTV stations whose certifications of Class A eligibility were accepted by the Commission in 2000 to the public records in the Commission's Consolidated Database System (CDBS) to determine which LPTV stations were on out-of-core channels and obtained authorizations for in-core channels, and then determining when the station filed an application for a license to cover a Class A facility. Those stations (both Class A and Class A-eligible LPTV stations) that did not file such an application by February 22, 2012 (with the exception of KHTV-CD) fall into the category identified by the Commission. Petitioners mistakenly argue that the 2000 list cannot be

compared to the CDBS records because many stations have converted from analog to digital using a digital companion channel since 2000 and were assigned a new digital facility ID number and call sign in CDBS that cannot be matched with the 2000 list. The new digital facility ID numbers are linked to the former analog facility ID numbers in CDBS, meaning that any change in facility ID numbers does not impede matching stations to the 2000 list. In addition, despite Petitioners' claims, Commission staff has never deleted an underlying analog facility ID number associated with a station. Similarly, while a call sign may be "deleted" through the entry of a "D" before a cancelled or revoked station's call sign, the call sign nonetheless remains in the station's record in CDBS. Moreover, after filing the Petition, Petitioners developed their own list of stations based on analysis of the 2000 list and CDBS. Petitioners' November 2015 List confirms that any interested party could have conducted the same exercise as the Commission using publicly-available data. Although Petitioners' analysis does not match the Commission's estimate of approximately 100 stations because Petitioners sought to demonstrate something different, even their analysis does reflect that there are at least 55 stations in the category the Commission defined.

18. We also reject Petitioners' claim that our "refus[al] to consider" their claims on procedural grounds, while at the same time extending discretionary protection to other stations that never filed for reconsideration, arbitrarily discriminated against them. As an initial matter, we did not "refuse to consider" Petitioners' claims. While we dismissed certain claims on procedural grounds, we went on to consider all of their claims (including those we dismissed) on the merits. In any event, the Commission acted within its authority in dismissing or denying Abacus's and Videohouse's 2014 Petitions in the Reconsideration Order, but extending protection to other stations that did not ask for reconsideration. First, the Commission did not reconsider the Incentive Auction R&O in clarifying that out-of-core Class A-eligible stations that had a Class A construction permit application pending or granted as of February 22, 2012 and now hold a Class A license are not entitled to mandatory repacking protection. The Commission may act on its own motion to issue a declaratory ruling removing uncertainty at any time. The Commission's authority to issue declaratory rulings to remove uncertainty is well-established. The lack of a citation to Section 1.2 of the rules in the Reconsideration Order did not undermine the

Commission's authority to issue a declaratory ruling. Petitioners are mistaken that there was no ambiguity in the Incentive Auction R&O that required clarification. The Incentive Auction R&O explained that stations would be entitled to mandatory protection if they held a Class A license or had a "Class A license application" on file as of February 22, 2012. The Incentive Auction R&O was ambiguous, however, as to whether a "Class A license application" meant only an application for a license to cover a Class A facility or whether it also meant a Class A construction permit application. Examination of the record also reflected uncertainty as to the scope of mandatory protection under the terms of the Incentive Auction R&O. The Reconsideration Order clarified this ambiguity.

19. Second, in extending discretionary protection to these stations, the Commission acted well within its authority to act on reconsideration. The Commission is "free to modify its rule on a petition for reconsideration as long as the modification was a 'logical outgrowth' of the earlier version of the rule, . . . and provided the agency gave a reasoned explanation for its decision that is supported by the record." Here, the issue of which Class A stations to protect in the repacking process, either as required by the Spectrum Act or as a matter of discretion, was squarely within the scope of the Incentive Auction NPRM. There is no support for Petitioners' contention that the Commission on reconsideration is limited to either granting or denying the specific relief requested in a petition for reconsideration. The D.C. Circuit rejected this claim in Globalstar. Petitioners attempt to distinguish Globalstar by arguing that the petitioner in that case requested broadly that the Commission "reverse" its decision, whereas Abacus and Videohouse asked the Commission to extend discretionary protection only to their stations in the 2014 Petitions. This is a distinction without a difference. The 2014 Petitions asked the Commission to reconsider the scope of discretionary protection for out-of-core Class A-eligible LPTV stations that now hold Class A licenses. Both Abacus and Videohouse stated in sweeping terms that the Commission "should exercise its discretion to ensure that similarly situated entities are not subject to arbitrarily disparate treatment." In response, the Commission appropriately reconsidered the scope of discretionary protection for stations in that category and extended protection to a number that it concluded are similarly situated to KHTV-CD, the station in the same category that it already had accorded such protection.

Because the Commission addressed the specific issue that was presented by the 2014 Petitions, the suggestion that the Commission exercised “unbounded discretion” on reconsideration lacks merit.

20. Finally, Petitioners complain that the Commission “[w]ithout any explanation” included WDYB-CD on the June 30, 2015 list of eligible stations although, like Petitioners, WDYB-CD’s current licensee, Latina, did not file an application for a license to cover a Class A facility until after February 22, 2012 or advocate for protection of its station until after adoption of the Incentive Auction R&O. WDYB-CD was included on the June 30, 2015 list in light of our decision 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.” Further examination of the record reveals, however, that WDYB-CD did not have an application for a Class A authorization pending or granted as of February 22, 2012. WDYB-CD’s prior licensee obtained a Class A construction permit prior to that date, but the permit expired in December 2011. Instead of constructing the Class A station, Latina filed an application for an LPTV construction permit for WDYB-CD in February 2011, which superseded the Class A construction permit. The LPTV application did not require a certification that WDYB-CD was and would continue to meet all of the full power and Class A regulatory requirements that are applicable to Class A stations. WDYB-CD was constructed and operated as an LPTV station until November 2012. Thus, Latina was not pursuing Class A status before the Commission as of February 22, 2012.

21. We disagree with Latina that WDYB-CD properly was included in the eligible stations list simply because it had a Class A authorization prior to February 22, 2012, regardless of its status as of that date. Latina’s argument that our authority on reconsideration is limited to granting or denying the relief requested by Petitioners fails for the same reasons as Petitioners’ arguments regarding our authority to act on reconsideration. We also find unpersuasive Latina’s recent estoppel and notice arguments. Latina maintains that it relied on the standard the Commission announced in the Second Order on Reconsideration, its inclusion in eligibility notices beginning in June 2015, and the Commission’s statements regarding WDYB-CD in litigation. Latina’s reliance on the Second Order on Reconsideration was misplaced: as Petitioners point out, the Commission specifically rejected Latina’s

argument that it was entitled to protection because it was similarly situated to Petitioners, and Latina never argued that it was entitled to protection on any other basis until filing its 1/22 Ex Parte Letter. The eligibility notices that Latina cites emphasized that they were neither final nor intended to decide eligibility issues. For example, the June 9, 2015 public notice stated that it was “not intended to pre-judge [the] outcome” of pending reconsideration petitions regarding the scope of protection, a June 30, 2015 public notice emphasized that “the list of stations included in the baseline data released today is not the final list of stations eligible for repacking protection,” and the most recent public notice listing eligible stations noted the possibility of revisions to the baseline data. Finally, before the D.C. Circuit, the Commission merely pointed out that, unlike Petitioners’ stations, Class A construction permits had been obtained for WDYB-CD prior to February 22, 2012, without stating that this factual distinction entitled WDYB-CD to protection under the standard in the Second Order on Reconsideration. We therefore conclude that WDYB-CD is not entitled to discretionary repacking protection or eligible to participate in the reverse auction.

22. In the Incentive Auction Report and Order, and again in the Second Reconsideration Order, the Commission determined that if a Class A station obtains a license after February 22, 2012, but is displaced by the auction repacking process, it will be eligible to file for a new channel in one of the first two filing opportunities for alternate channels. WDYB-CD would be eligible to file such a displacement application. Previously, we delegated authority to the Media Bureau to determine whether such stations should be allowed to file during the first or the second filing opportunity. We now direct the Media Bureau to allow such stations to file during the first filing opportunity. In the event of mutual exclusivity with an application from a full power or Class A station entitled to repacking protection the application of the full power or Class A station will prevail.

23. This document does not contain new or modified information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13. In addition, therefore, it does not contain any new or modified information collection burden for small business concerns with fewer than 25 employees, pursuant to the Small Business

Paperwork Relief Act of 2002, Public Law 107-198, see 44 U.S.C. 3506(c)(4).

24. The Commission will not send a copy of this Order pursuant to the Congressional Review Act, see 5 U.S.C. 801(a)(1)(A) because no rules are being adopted by the Commission.

IV. ORDERING CLAUSES

25. **IT IS ORDERED** that, pursuant to section 405 of the Communications Act of 1934, as amended, 47 U.S.C. 405, and section 1.429 of the Commission's rules, 47 CFR 1.429, the Petition for Reconsideration filed by The Videohouse, Inc., Abacus Television, WMTM, LLC, and KMYA, LLC **IS DISMISSED AND/OR DENIED** to the extent described herein.

26. **IT IS FURTHER ORDERED** that WDYB-CD, Daytona Beach, Florida, which is licensed to Latina Broadcasters of Daytona Beach, LLC, is not entitled to discretionary repacking protection or eligible to participate in the reverse auction.

27. **IT IS FURTHER ORDERED** that this Order on Reconsideration **SHALL BE EFFECTIVE** upon release.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch,
Secretary.

[FR Doc. 2016-03801 Filed: 2/22/2016 8:45 am; Publication Date: 2/23/2016]