

FCC Urges DC Circ. To Keep Incentive Auction On Track

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Law360, Washington (March 7, 2016, 8:57 PM ET) -- The [Federal Communications Commission](#) hit back Friday at a Florida broadcaster seeking to delay the upcoming incentive auction or to participate in it provisionally, telling the D.C. Circuit the commission properly ruled the station was ineligible and that a delay will cause significant harm.

The FCC said it acted within its discretion in finding that the station had not met the requirements to participate, and that allowing it to participate provisionally would also delay the auction. The FCC had [concluded in February](#) that WDYB-CD, licensed to Latina Broadcasters of Daytona Beach LLC, cannot participate and is not entitled to protection during the post-auction repacking process despite previous statements to the contrary.

If Latina participated provisionally, it would “invite a flood of eleventh-hour petitions to the commission and this court from stations claiming to be similarly situated,” the FCC said, and the wrongful inclusion of the station on provisional eligibility lists has already prompted demands.

“If the commission were required to include these additional ineligible stations in the auction, it would need to delay the start of the reverse auction by several months or more, and the additional constraints would increase the costs of the reverse auction and hinder the incentive auction’s ability to achieve its objectives,” the FCC said.

The station has not contested the FCC’s determination on the requirements for licensing or permitting for stations to have a statutory right to participate and to repacking protection, the FCC said.

“And there is no dispute that WDYB, which is a low-power station, did not have a Class A license or application for a license as of [the required date],” the commission said.

The commission said after it discovered issues with the station’s permitting and application history, it brought them to the attention of the station, which had the chance to make its case until the FCC’s final decision. Although the station has said it could be displaced and lose the ability to broadcast, it will have access to tools to stay on the air, the FCC said.

“Latina has not shown that the court is likely to reverse that decision, nor is Latina likely to suffer irreparable harm absent a stay,” the FCC said. “And any delay — which would result either from ordering a stay or from ordering last-minute changes, especially ones that may irreversibly affect the final results — would harm other parties and the public interest.”

But the station hit back in a reply Monday, saying the FCC’s response shows that it made a last-minute decision in an “arbitrary act of outcome-driven decision making.” As recently as a December court filing, the FCC said Latina was eligible, the station said.

The FCC has not stripped any other station of eligibility that had been declared eligible, Latina said, and so a decision in its favor will not open the agency to more claims by other stations, and its circumstances match those of another station that is eligible.

In an emailed statement Monday, the station said its owner, Nora Crosby Soto, is one of a handful of Hispanic women who are majority owners of a TV station in the country. She risks losing everything, the station said.

“I’m crushed, disappointed and deeply saddened by the actions of the FCC that will jeopardize everything I’ve worked so hard to build,” she said in a statement. “It is my hope that the commissioners of the FCC will do the right thing.”

Several low-power television stations [also seeking](#) a pause to the auction over their eligibility have argued that the FCC’s initial decision to allow Latina to be part of the auction, despite excluding similarly situated companies, shows its criteria for inclusion was arbitrary and capricious.

The station is represented by David S. Wachen of HCH Legal LLC.

The FCC is represented by Jonathan B. Sallet, David M. Gossett, Jacob M. Lewis and Scott M. Noveck of the FCC and William J. Baer, Robert B. Nicholson and Robert J. Wiggers of the [U.S. Department of Justice](#).

The case is Latina Broadcasters of Daytona Beach LLC v. FCC, case number [16-1065](#), at the U.S. Court of Appeals for the District of Columbia Circuit.

--Additional reporting by Margaret Harding McGill and Jacob Fischler. Editing by Philip Shea.

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