BRIEF FOR RESPONDENTS

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

NO. 16-1100

FREE ACCESS & BROADCAST TELEMEDIA, LLC, ET AL.,

PETITIONERS,

V.

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,

RESPONDENTS.

ON PETITION FOR REVIEW FROM ORDERS OF THE
FEDERAL COMMUNICATIONS COMMISSION

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

1. Parties.

All parties appearing in this Court are listed in the brief for petitioners.

2. Rulings under review.

The rulings at issue are: (1) *Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, Report and Order, 30 FCC Rcd 12025 (2015) (JA __); and (2) *Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, Third Report and Order, 30 FCC Rcd 14927 (2015) (JA __).

3. Related cases.

In a prior unpublished decision, this Court dismissed, for lack of jurisdiction, a petition for review filed by two of the petitioners here contending that the FCC's decision not to protect low-power television stations from displacement as a result of the broadcast television spectrum auction violated 47 U.S.C. § 1452(b)(5). *Free Access & Broadcast Telemedia, LLC and Word of God Fellowship, Inc.*, No. 15-1346 (June 28, 2016). The Court subsequently denied the same challenge on the merits in *Mako Commc'ns, LLC v. FCC*, 835 F.3d 146 (D.C. Cir. 2016).

In *Nat'l Ass'n of Broad. v. FCC*, 789 F.3d 165, 179-80 (D.C. Cir. 2015), the Court rejected a challenge, based on different grounds, to the FCC's decision not to protect a specific type of low-power television station from displacement as a result of the auction.

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GLOSSARY

Commencing Operations Order	*Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, Report and Order, 30 FCC Rcd 12025 (2015)
Commission or FCC	Federal Communications Commission
Communications Act	The Communications Act of 1934, as amended, 47 U.S.C. §§ 1, *et seq.*
Channel Sharing Order	*Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, Third Report and Order, 30 FCC Rcd 14927 (2015)
LPTV stations	Low-power television stations subject to displacement by primary services
Repacking	The spectrum reorganization portion of the auction, in which eligible broadcasters may be reassigned to new channels to free up contiguous spectrum for new wireless uses
Spectrum Act	Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96, Title VI, 126 Stat. 156 (2012)

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JURISDICTION

Petitioners seek review of two Commission orders: (1) *Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, Report and Order, 30 FCC Rcd 12025 (2015) (*Commencing Operations Order*), which was published in the Federal Register on January 29, 2016, 81 Fed. Reg. 4969; and (2) *Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, Third Report and Order, 30 FCC Rcd 14927 (2015) (*Channel Sharing Order*), which was published in the Federal Register on

February 1, 2016. 81 Fed. Reg. 5041. Petitioners timely filed their petition for review on March 28, 2016. The Court generally has jurisdiction to review FCC rulemaking orders under 47 U.S.C. § 402(a) and 28 U.S.C. § 2342(1), but it lacks jurisdiction over this petition for review because the petition raises issues that were resolved in prior FCC orders and were not reopened in the orders on review. In addition, no petitioner is a "party aggrieved" by the *Commencing Operations Order* because none participated in the agency proceedings leading to that order. 28 U.S.C. § 2344.

QUESTIONS PRESENTED

Beginning in 2012, the Commission conducted a series of rulemaking proceedings to implement Congress's mandate to conduct a broadcast television spectrum auction. In the principal rulemaking order, the FCC declined to protect low-power television (LPTV) stations from being displaced as a result of the auction. This Court upheld the FCC's decision in *Mako Commc'ns, LLC v. FCC*, 835 F.3d 146 (D.C. Cir. 2016).

In the orders now on review, the Commission addressed discrete issues related to the auction, including measures to help displaced LPTV stations find new channels. The FCC declined to revisit the decision not to protect LPTV stations.

This case presents the following questions:

1. Is the petition for review time-barred because the issues it raises were resolved in prior FCC orders and were not reopened in the orders on review?

2. Is any petitioner a "party aggrieved" by the *Commencing Operations Order* when none participated in the FCC proceedings leading to the *Order*?

3. If the Court reaches the merits, are petitioners' arguments either foreclosed by this Court's decision in *Mako* or based on misreading of the orders on review?

4. Does either order on review raise serious constitutional questions?

5. Did the Commission comply with the Regulatory Flexibility Act in the *Channel Sharing Order*?

STATUTES AND REGULATIONS

Pertinent statutes and regulations are set forth in an addendum to this brief.

COUNTERSTATEMENT

A. The Spectrum Act

The Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96, Title VI, 126 Stat. 156 (2012) (Spectrum Act), directs the FCC to conduct a broadcast television spectrum auction to repurpose valuable spectrum now occupied by broadcast television for mobile broadband services and other new uses. 47 U.S.C. §§ 309(j)(8)(G)(i), 1452; *Nat'l Ass'n of Broad. v. FCC*, 789 F.3d 165, 169-70 (D.C. Cir. 2015).

The auction is comprised of three parts: (1) a reverse auction in which certain broadcasters will bid to relinquish voluntarily their spectrum usage rights in exchange for payments; (2) a repacking process in which broadcasters may be assigned new channels to free up contiguous spectrum for new uses; and (3) a forward auction in which wireless carriers and others will bid on new licenses to use spectrum that is repurposed through the reverse auction and the repacking. 47 U.S.C. § 1452(a)-(c).

In the repacking process, the Spectrum Act authorizes the FCC to "make such reassignments of television channels as the Commission considers appropriate" and to "reallocate such portions of such spectrum as the Commission determines are available for reallocation." 47 U.S.C. § 1452(b)(1)(B). The FCC must "make all reasonable efforts to preserve, as of February 22, 2012, the coverage area and population served of each broadcast television licensee . . ." *Id.* § 1452(b)(2). The Spectrum Act defines "broadcast television licensee" to mean the licensee of a "full-power television station" or only those "low-power television stations that [have] been accorded primary status as a Class A television licensee," *id*. § 1401(6); all other low-power television stations are excluded from the repacking protection. Finally, the statute provides that nothing in 47 U.S.C. § 1452(b) "shall be construed to alter the spectrum usage rights of low-power television stations." 47 U.S.C. § 1452(b)(5).

B. The *Auction Order* and the *Reconsideration Order*

The Commission adopted rules to implement the Spectrum Act in the *Auction Order*. *Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, Report and Order, 29 FCC Rcd 6567 (2014) (*Auction Order*). The FCC declined to protect LPTV stations from displacement by protecting them in the repacking. *Id.* at 6673 ¶ 237.[1] It explained that the statute does not mandate protection for LPTV stations, *id*. ¶ 238; *see* 47 U.S.C. § 1452(b)(2), and that the decision not to protect LPTV stations "does not 'alter' their spectrum usage rights" within the meaning of the Spectrum Act, because LPTV stations have traditionally been secondary to "full-power television stations" and other "primary services." *Auction Order*, 29 FCC Rcd at 6673 ¶ 239.

The Commission also declined to extend protection to LPTV stations as a matter of discretion. *Id.* at 6674 ¶ 241. Although the agency recognized the "valuable services" many LPTV stations provide, *id*. at 6672 ¶ 237, it explained that "[p]rotecting them would increase the number of constraints on the repacking process significantly, and severely limit [its] recovery of spectrum to carry out the forward auction, thereby frustrating the purposes of the Spectrum Act." *Id.* at 6674 ¶ 241.

[1] Only broadcasters that receive repacking protection are eligible to participate in the reverse auction. *Auction Order*, 29 FCC Rcd at 6718-19 ¶¶ 355-57.

The Commission recognized that, without protection, there was "the potential for a significant number of LPTV and TV translator stations to be displaced as a result" of the repacking. *Id.* at 6834 ¶ 657; *see id.* at 6672 ¶ 237, Appendix B at 6948 ¶ 9 (Final Regulatory Flexibility Analysis). It therefore adopted measures to ease the impact of repacking on displaced LPTV stations. *Id.* at 6835 ¶ 657.

Among other things, the Commission provided that LPTV stations may continue to operate on repurposed spectrum unless and until a new wireless licensee provides advance written notice that it is ready to "commence operations" in an area where the LPTV station is likely to cause harmful interference to the new licensee's operations. *Id.* at 6839-41 ¶¶ 668-72; 47 C.F.R. § 73.3700(g)(4).[2] After being so notified, the LPTV station must eliminate the interference risk by reducing power or ceasing operations. *Auction Order*, 29 FCC Rcd at 6840 ¶ 668. The Commission explained that permitting LPTV stations to continue to operate "until a wireless licensee commences operations" served the public interest by allowing the stations "to continue to operate as long as possible." *Id*. at 6840 ¶ 670. The FCC also stated that it would start a proceeding to consider measures "to

[2] The FCC deferred a decision on how to define "commence operations" for purposes of this procedure. *Auction Order*, 29 FCC Rcd 6840 n.1861.

further mitigate the impact of the auction and [the] repacking process" on LPTV stations. *Id.* at 6839 ¶ 666.

On June 19, 2015, the Commission addressed petitions for reconsideration of the *Auction Order*. *Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, Second Order on Reconsideration, 30 FCC Rcd 6746 (2015) (*Reconsideration Order*). The FCC affirmed its decision not to protect LPTV stations from displacement. *Id.* at 6776-79 ¶¶ 64-69. In doing so, it specifically rejected the contention that the decision not to protect LPTV stations "'altered LPTV . . . stations' spectrum usage rights in contravention of section 1452(b)(5)." *Id*. at 6778 ¶ 68. The Commission explained that LPTV stations "have always operated on a secondary basis with [regard] to primary licensees." *Id*. As a result, they "could be displaced … by a primary user and, if no new channel assignment is available, forced to go silent." *Id*. Because that consequence flowed from their secondary status, non-protection did not alter LPTV station rights. *Id*.

C. Prior Judicial Challenges

Two of the petitioners here, Free Access & Broadcast Telemedia, LLC (Free Access) and Word of God Fellowship, Inc. (Word of God), sought to challenge the FCC's decision in the *Auction Order* (as affirmed by the *Reconsideration Order*) not to protect LPTV stations from displacement as violating section 1452(b)(5)'s provision regarding alteration of LPTV station rights. The Court dismissed their

suit for lack of jurisdiction in an unpublished decision. *Free Access & Broadcast Telemedia, LLC, et al. v. FCC*, Case No. 15-1346 (June 28, 2016).[3]

In a second case, brought by a different set of LPTV station petitioners, the Court addressed the merits and sustained the FCC's conclusion that the decision not to protect LPTV stations did not violate section 1452(b)(5). *Mako*, 835 F.3d at 150-151.

In that decision, the Court squarely rejected the argument that section 1452(b)(5) unambiguously compels protecting LPTV stations from displacement. *Id.* As the Court explained, "[i]n order to assess whether the repacking process . . . could 'alter' LPTV stations' spectrum usage rights,' we must initially identify the nature of those spectrum usage rights in the first place." *Id*. at 150. The Court observed that, "[s]ince their inception as a category in 1982, LPTV stations have been accorded secondary status," and thus "have always been subject to displacement by primary services such as full-power [television] stations." *Id*. In addition, the Court recognized, "LPTV stations had been subject to displacement by wireless licensees long before the Spectrum Act." *Id*. at 151. And, because

[3] The Court held that Word of God was not a "party aggrieved" (28 U.S.C. § 2344) by the orders because it did not participate before the agency. *Free Access*, Case No. 15-1346 at 2. The Court held that Free Access could not bring an individual (as opposed to a derivative) action because its alleged injury was not distinct from that of the LPTV stations in which it owns options. *Id.*

"LPTV stations can still remain on cleared spectrum until a wireless provider actually displaces them," the agency's decision "subordinate[s] LPTV stations to wireless licensees in the same way the Commission has done before the Spectrum Act." *Id.*

"Proceeding to *Chevron* step two," the Court found that the Commission "reasonably declined to protect LPTV stations from displacement in the repacking process because doing so would 'severely limit . . . recovery of spectrum to carry out the forward auction, thereby frustrating the purposes of the Spectrum Act.'" *Id.* (quoting *Auction Order*, 29 FCC Rcd at 6674 ¶ 241). The Court also rejected the argument that the Commission's interpretation rendered section 1452(b)(5) "meaningless," explaining that "LPTV stations' secondary status renders them subject to displacement insofar as they cause interference to primary services," *id.* at 152 (citing *Auction Order*, 29 FCC Rcd at 6673-74 ¶¶ 239-240 & n.745), but that the "Commission's repacking authority does not enable [the Commission] to displace LPTV stations even if they cause no interference to primary services." *Id.*

D. The Orders on Review

1. The *Commencing Operations Order*

On March 26, 2015, the FCC invited comment on how to define when a new wireless licensee is ready to "commence operations" for purposes of the displacement procedure adopted in the *Auction Order*. *Comment Sought on*

Defining Commencement of Operations in the 600 MHz Band, Public Notice, 30 FCC Rcd 3200 (2015). None of the petitioners in this case filed a comment or reply comment in response to that public notice, and the record before the agency contains no *ex parte* communications from any of them regarding the public notice. *See Commencing Operations Order* ¶ 6 nn.18-21 (2015) (listing comments and *ex parte* communications) (JA __).

Based on the record in response to the public notice, the FCC adopted an order generally defining "commence operations" to mean when a wireless licensee begins "site commissioning tests" with permanent equipment. *Commencing Operations Order* ¶ 7 (JA __).[4] "It is at this juncture," the Commission explained, "that a wireless licensee moves from construction to testing its system, and needs unfettered access to licensed spectrum to optimize its network in advance of launching commercial service to customers." *Id*.

The agency observed that using site commissioning testing as "the benchmark for defining commencement of operations" furnishes "a relevant and sustainable sign" that the wireless licensees of the repurposed spectrum "are committed to deploying service in a particular area and will begin providing

[4] The FCC also adopted a limited exception to deem licensees to "commence operations" in certain circumstances when performing initial field tests with temporary equipment. *Commencing Operations Order* ¶ 20 (JA __).

commercial service in the immediate term." *Id*. ¶ 9 (JA __). At the same time, it will "minimize, to the extent possible, the time between cessation of secondary and unlicensed use and initiation of commercial wireless service," thereby "tak[ing] the interests of secondary and unlicensed users into account" while "still provid[ing] uncompromised access to the [repurposed spectrum] by wireless licensees when they need it." *Id.* The FCC rejected as untimely requests to revisit other issues regarding the displacement procedure adopted in the *Auction Order*. *Id.* ¶ 21 & n.75 (JA __).

2. The *Channel Sharing Order*

On December 17, 2015, the FCC – in order to ameliorate the impact of the repacking on displaced LPTV stations – permitted LPTV stations to continue operations on shared channels. *Channel Sharing Order* ¶¶ 1-4, 20-43 (JA __). The Commission explained that channel sharing could permit "stations that are displaced by the incentive auction … repacking process that have difficulty finding available channels . . . to team with other such stations in the same predicament." *Id*. ¶ 21 (JA __). It could also permit LPTV stations to "reduce costs . . . by sharing facilities," and "assist [LPTV] stations in meeting… the deadline for transitioning to digital television." *Id*. ¶¶ 22-23 (JA __). In short, the Commission concluded, "[while c]hannel sharing may not be right for all [LPTV] stations," "it may be a useful arrangement for some stations" – one that will both "promote more efficient

use of spectrum," and "allow as many . . . stations as possible to survive following the auction." *Id*. ¶ 24 (JA __) (citations omitted).

In the *Channel Sharing Order*, the Commission again refused to "revisit matters that were resolved" in the *Auction Order* and the *Reconsideration Order*, including its decision not to protect LPTV stations from displacement in the repacking. *Id.* ¶ 64 & n.194 (citing, *e.g.*, *Auction Order*, 29 FCC Rcd at 6672-74 ¶¶ 237-41) (JA __).

SUMMARY OF ARGUMENT

In *Mako*, 835 F.3d at 150-51, this Court upheld the FCC's refusal to protect LPTV stations from displacement in the auction repacking process as a reasonable exercise of the agency's authority that did not alter LPTV stations' spectrum usage rights under section 1452(b)(5) of the Spectrum Act.

Petitioners attempt to relitigate *Mako* by challenging two later Commission orders. The orders on review do not reopen the issue of whether LPTV stations should be protected, and this Court has no occasion to address that issue. In any event, *Mako* was rightly decided, and binds this Court. Likewise, because the FCC in the *Commencing Operations Order* refused to revisit the displacement procedure established in the *Auction Order*, this Court has no occasion to reexamine petitioners' challenges to that procedure.

1. The FCC's decision not to protect LPTV stations from displacement in the repacking process was made in the *Auction Order*, reaffirmed in the *Reconsideration Order*, and not reopened in either of the two FCC orders on review. The FCC also established its displacement procedure for LPTV stations operating in repurposed spectrum in the *Auction Order* and did not revisit the procedure in the orders on review.

This Court lacks jurisdiction to entertain a challenge to a decision of the FCC that was not made in the orders before it for review. In addition, the Court lacks jurisdiction over the petition for review of the *Commencing Operations Order* because no petitioner participated in the proceedings that led to the adoption of that order. Accordingly, none of the petitioners is a "party aggrieved" by the *Commencing Operations Order* within the meaning of the Hobbs Act.

2. Even if the Court were to reach the merits, *Mako* forecloses petitioners' argument that the Commission's decision violates 47 U.S.C. § 1452(b)(5) by altering the spectrum usage rights of LPTV stations. Petitioners' contention that, in constructing the guard bands, the Commission unlawfully subordinated the rights of LPTV stations to unlicensed uses is foreclosed by the Spectrum Act, which deprives LPTV stations of any right to contest the establishment of those bands, and allows them to be used for unlicensed operations.

3. Petitioners' arbitrary-and-capricious challenge to the orders on review likewise fails. The *Channel Sharing Order* was intended to mitigate the auction's impact on LPTV stations. It did not seek to provide LPTV stations with the very relief from displacement that the FCC had already rejected (and that this Court affirmed). Petitioners do not quarrel with the definition of "commence operations" adopted in the *Commencing Operations Order*, and their argument that the FCC's displacement procedure – which was established in a prior order – forces them to vacate repurposed spectrum regardless of interference risk has no basis.

4. Petitioners' constitutional contentions – that the Commission's interpretation might raise issues of undue delegation, takings, or even bill of attainder – do not raise serious issues requiring avoidance of the Commission's statutory interpretation (already upheld by this Court as reasonable). The fact that LPTV stations are obligated to vacate their channels on notification by wireless operators goes only to the timing, not the substance, of government action; it is well settled that broadcast stations, including LPTV stations, have no property right in the radio spectrum; and the Bill of Attainder Clause neither governs agency action nor forbids regulation in the public interest.

5. Lastly, the FCC complied with the Regulatory Flexibility Act's procedural requirements in the *Channel Sharing Order*. The deficiencies that petitioners allege go to the FCC's prior, settled decision not to protect LPTV

stations from displacement in the auction repacking process, rather than to the measures the FCC actually adopted in the *Channel Sharing Order*.

STANDARD OF REVIEW

Judicial review of the Commission's interpretation of the Communications Act and the Spectrum Act is governed by *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). *See Mako*, 835 F.3d at 150. Under *Chevron*, unless the statute "unambiguously forecloses the agency's interpretation," a reviewing court must "defer to that interpretation so long as it is reasonable." *Nat'l Cable & Tel. Ass'n v. FCC*, 567 F.3d 659, 663 (D.C. Cir. 2009).

Courts may hold unlawful Commission action that is "arbitrary, capricious, [or] an abuse of discretion." 5 U.S.C. § 706(2)A). But "[u]nder this 'highly deferential' standard of review, the court presumes the validity of agency action." *Cellco P'ship v. FCC*, 357 F.3d 88, 93-94 (D.C. Cir. 2004). The Court "is not to ask whether [the challenged] regulatory decision is the best one possible or even whether it is better than the alternatives." *FERC v. Elec. Power Supply Ass'n*, 136 S. Ct. 760, 782 (2016). To prevail, "[t]he Commission need only articulate a 'rational connection between the facts found and the choice made.'" *Rural Cellular Ass'n v. FCC*, 588 F.3d 1095, 1105 (D.C. Cir. 2009) (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Ins. Co.*, 463 U.S. 29, 43 (1983)).

Finally, the Regulatory Flexibility Act requires only a "reasonable, good-faith effort," *U.S. Cellular Corp. v. FCC*, 254 F.3d 78, 88 (D.C. Cir. 2001) (quoting *Alenco Commc'ns, Inc. v. FCC*, 201 F.3d 608, 625 (5th Cir. 2000)), to carry out its "'purely procedural'" mandate that agencies "publish analyses that address certain legally delineated topics" related to a rule's impact on small businesses. *Nat'l Tel. Co-op Ass'n v. FCC*, 563 F.3d 536, 540 (D.C. Cir. 2009) (quoting *U.S. Cellular Corp.*, 254 F.3d at 88).

ARGUMENT

I. THIS COURT LACKS JURISDICTION OVER THE PETITION FOR REVIEW

A. Petitioners Challenge Prior, Settled Decisions That the Orders On Review Did Not Reopen

Appellate review here is governed by the Hobbs Act. 28 U.S.C. §§ 2341–2351. That statute allows any "party aggrieved" by a final order of the Commission to file a petition for review of that order "within 60 days after its entry." 28 U.S.C. § 2344. This time limit is jurisdictional. *See, e.g.*, *United Transp. Union Illinois Legislative Bd. v. STB*, 132 F.3d 71, 75 (D.C. Cir. 1998). Petitioners seek to challenge decisions the FCC made in the *Auction Order* and affirmed in the *Reconsideration Order*. The time for challenging those decisions expired on

October 5, 2015,[5] five months before the filing of this petition for review. Petitioners cannot revive their time-barred challenge by seeking review of orders that did not revisit the decisions they wish to challenge.

Thus, petitioners contend that, in the *Commencing Operations Order*, the FCC violated section 1452(b)(5) by requiring that "all LPTV licensees vacate the 600 MHz Band within 39 months after the auction's formal close." Pet. Br. 35.[6] But the decision that LPTV stations are subject to displacement, and the procedure by which they must vacate the repurposed spectrum, were adopted in the *Auction Order* and reaffirmed in the *Reconsideration Order*. *Reconsideration Order*, 30 FCC Rcd at 6776-79 ¶¶ 64-69; *Auction Order*, 29 FCC Rcd at 6672-74 ¶¶ 237-41; 6839-41 ¶¶ 668-72. Those decisions were not revisited in either the *Channel Sharing Order* or the *Commencing Operations Order*. Indeed, the Commission in the *Commencing Operations Order* expressly "reject[ed] as untimely requests … that we modify the transition procedures established in the [*Auction Order*]." *Commencing Operations Order* ¶ 21 (JA __). Likewise, the Commission in the *Channel Sharing Order* denied requests to reconsider matters, including the

[5] The *Reconsideration Order* was published in the Federal Register on August 6, 2015. 80 Fed. Reg. 46824.

[6] The 39-month deadline to which petitioners refer applies not to LPTV stations, but to low power *auxiliary* stations, a different service entirely. *See infra*, § II.1.

decision not to protect LPTV stations, that had been resolved in the *Auction Order* and reaffirmed in the *Reconsideration Order*, finding that they had been "fully considered." *Channel Sharing Order* ¶ 64 (JA ___).

Petitioners also contend that the Commission's "band plan repurposes a significant portion of the spectrum on which LPTV stations have historically broadcast in favor of WiFi, white spaces, and other unlicensed uses," and this "is directly inconsistent with subsection (b)(5) by giving interference priority to unlicensed wireless services relative to LPTV." Pet. Br. 38-39. But the band plan was adopted in the *Auction Order* and affirmed in the *Reconsideration Order*. *See Reconsideration Order*, 30 FCC Rcd at 6747-55 ¶¶ 3-20; *Auction Order*, 29 FCC Rcd at 6581-617 ¶¶ 38-108. Petitioners make no claim that the band plan was revisited in either of the two orders on review.

In addition, petitioners claim that the FCC violates section 1452(b)(5) if it does not ensure "that displaced LPTV stations have an alternative, post-auction channel available on which to operate." Pet. Br. 40. Again, the Commission's decision not to protect LPTV stations from displacement in the auction repacking process, which encompasses the decision not to set aside new, post-auction channels for them, *see infra*, § II.3, was made in the *Auction Order*, *see Auction Order*, 29 FCC Rcd at 6672-74 ¶¶ 237-41, reaffirmed in the *Reconsideration*

Order, *see Reconsideration Order*, 30 FCC Rcd at 6776-79 ¶¶ 64-71, and not revisited in the orders on review.

Petitioners' other arguments likewise concern prior, settled FCC decisions. Petitioners argue the *Channel Sharing Order* was arbitrary because the FCC lacked a reasonable basis to conclude that channel sharing "offers a meaningful remedy" for displacement. Pet. Br. 45; *see id.* 43-47. But having already decided not to protect LPTV stations, the FCC was not seeking to remedy or avoid displacement; the only conclusion it needed to – and did – justify was that channel sharing might ameliorate the impact of displacement on some LPTV stations. *See Channel Sharing Order* ¶ 21 (JA __). Petitioners' constitutional and Regulatory Flexibility Act arguments related to the *Channel Sharing Order* are concerned with the same decision not to protect LPTV stations or include them in the reverse auction. *See* Pet. Br. 53-58 (arguing the FCC violated the Regulatory Flexibility Act by not analyzing the auction's impact on LPTV stations or considering alternatives "such as discretionary inclusion of LPTV stations in the reverse auction"); *id.* 62-65 (arguing that not protecting displaced LPTV stations by setting aside post-auction channels for them raises constitutional questions that should be avoided by rejecting the FCC's statutory interpretation).

Similarly, petitioners' quarrel with the *Commencing Operations Order* is not with the narrow issue of when a new wireless licensee actually "commences

operations" for purposes of the FCC's displacement procedure, but with the procedure itself, which the FCC expressly declined to revisit. *See* Pet. Br. 34-36 (arguing that the FCC arbitrarily failed to explain its departure from prior LPTV displacement procedures); *id.* 59-65 (arguing that the procedure raises constitutional questions that should be avoided by rejecting the FCC's statutory interpretation).

Petitioners are not entitled to relief under the reopening doctrine, which creates "an exception to statutory limits on the time for seeking review [of an agency decision]" when a later proceeding "explicitly or implicitly shows that the agency actually reconsidered" it. *Nat'l Ass'n of Reversionary Property Owners v. Surface Transp. Bd.*, 158 F.3d 135, 141 (D.C. Cir. 1998) (internal quotes and cites omitted). When, however, "an agency invites debate on some aspects of a broad subject, . . . it does not automatically reopen all related aspects including those already decided." *Id.* at 142. Moreover, "an agency does not reopen a rulemaking or policy determination 'merely [by] respond[ing] to an unsolicited comment by reaffirming its prior position.'" *CTIA-Wireless Ass'n v. FCC*, 466 F.3d 105, 110 (D.C. Cir. 2006) (quoting *Kennecott Utah Copper Corp. v. U.S. Dep't of Interior*, 88 F.3d 1191, 1213 (D.C. Cir.1996)).

The narrow issue the FCC addressed in the *Commencing Operations Order* was how to define "commence operations" for purposes of the displacement

procedure already established in the *Auction Order*. *Commencing Operations Order* ¶ 1 (JA __). Likewise, the *Channel Sharing Order* simply adopted measures "to mitigate the potential impact" on displaced LPTV stations of the auction and the repacking process; it did not revisit auction issues already resolved. *Channel Sharing Order* ¶¶ 1, 64 (JA __). Petitioners' attempt to bypass the time limits for judicial review of the Commission's decisions should be rejected.

B. No Petitioner Is a "Party Aggrieved" By the *Commencing Operations Order*

The Hobbs Act, 28 U.S.C. § 2344, also provides that only a "party aggrieved" by a final order of the FCC may file a petition for review of that order. A "party aggrieved" is someone who participated in the proceedings before the agency. *See Simmons v. ICC*, 716 F.2d 40, 42-43 (D.C. Cir. 1983). *See also, e.g.*, *Nat'l Ass'n of State Util. Consumer Advocates v. FCC*, 457 F.3d 1238, 1246, *opinion modified on other grounds*, 468 F.3d 1272 (11th Cir. 2006); *Am. Civil Liberties Union v. FCC*, 774 F.2d 24, 26 (1st Cir. 1985).

None of the petitioners in this case participated in the FCC proceedings leading to the *Commencing Operations Order*. None filed a comment or a reply comment in response to the FCC's invitation for public comment. *See Commencing Operations Order* ¶ 6 & n.18 (JA __) (listing commenters). And the administrative record reflects no *ex parte* presentation by any of the petitioners regarding the issue addressed in the *Commencing Operations Order*. *See* 47 C.F.R.

§ 1.1206 (permitting communications with FCC members and staff directed to the merits or outcome of rulemaking proceedings subject to disclosure).

Five of the six petitioners did participate in other FCC proceedings with the same docket number, including the proceedings leading to the *Auction* and *Reconsideration Orders*. But that does not make them parties aggrieved by the *Commencing Operations Order*. In *NASUCA v. FCC*, the Eleventh Circuit held that the Vermont Board was not a "party aggrieved" where it submitted comments in proceedings for a prior order with the same docket number, explaining that "[t]he comments that the Vermont Board submitted in the proceedings that led to the First Report and Order are immaterial . . . they do not make the Vermont Board a 'party aggrieved by' the Second Report and Order." 457 F.3d at 1247-48. In so holding, the Eleventh Circuit cited this Court's decision in *Simmons* that a petitioner who participated in a proceeding "procedurally and substantially independent" from the challenged order was not a "party aggrieved" by that order. *Simmons*, 716 F.2d at 45; *see NASUCA*, 457 F.3d at 1248.

The FCC proceedings that led to the *Commencing Operations Order* were independent from other agency proceedings with the same docket number: as in *NASUCA* and *Simmons*, the *Order* addressed a discrete issue from the other proceedings based on comments filed in response to a separate public notice. *See*

Commencing Operations Order ¶¶ 4-6 & n.18 (JA __). As a result, none of the petitioners is a party aggrieved by the *Order*.

II. THE ORDERS ON REVIEW DO NOT VIOLATE SECTION 1452(b)(5) OF THE SPECTRUM ACT.

In any event, petitioners' challenges to the Commission's decision not to protect LPTV stations from displacement are either foreclosed by this Court's decision in *Mako* or are otherwise unavailing.

In *Mako*, this Court "sustain[ed] the Commission's understanding and implementation of [section 1452(b)(5)]," 835 F.3d at 150, and rejected, as "incorrect," the contention that section 1452(b)(5) "unambiguously compel[s] protecting LPTV stations from displacement in the repacking process." *Id*. at 151. The court relied on the fact that LPTV stations from their inception have "been accorded secondary status," and "have always been subject to displacement by primary services such as full-power [television] stations," and, "long before the Spectrum Act," "wireless licensees." *Id*. at 150-51. The Court also held that the Commission "reasonably declined to protect LPTV stations from displacement in the repacking process" because, in light of the number of such stations, "doing so would 'severely limit . . . recovery of spectrum to carry out the forward auction,'" and "'thereby frustrat[e] the purposes of the Spectrum Act.'" *Id.* at 151 (citation omitted). Having concluded that "the Commission's treatment of LPTV stations

. . . rests on a reasonable understanding of subsection (b)(5)," the Court "reject[ed] petitioners' arbitrary and capricious argument to the same effect." *Id*. at 152.

1. The Court in *Mako* explained that under the FCC's interpretation, "as was the case before the Spectrum Act, the Commission's repacking authority does not enable it to displace LPTV stations even if they cause no interference to primary services." *Mako*, 835 F.3d at 152. Petitioners seize upon the quoted language to argue that the *Commencing Operations Order* violates the Spectrum Act, because section 74.802(f) of the Commission's rules requires LPTV stations to vacate the repurposed spectrum at the end of 39 months, and thus "alters LPTV's spectrum usage rights without regard to interference." Pet. Br. 34-35 (citing 47 C.F.R. § 74.802(f)).

But the rule petitioners cite (which was adopted in the *Auction Order*) applies not to LPTV stations but to "low power auxiliary stations," a different service altogether. 47 C.F.R. § 74.802(f); *see Auction Order*, 29 FCC Rcd at 6696 ¶ 299 ("Low power auxiliary station ('LPAS') operations … are intended for uses such as wireless microphones, cue and control communications, and synchronization of TV camera signals."). By contrast, "LPTV stations can still remain on cleared spectrum until a wireless provider actually displaces them." *Mako*, 835 F.3d at 151; *see* 47 C.F.R. § 73.3700(g)(4)(iii). Displacement occurs only when a wireless licensee notifies an LPTV station that it intends to commence

operations "where there is likelihood of receiving harmful interference" from the LPTV station. 47 C.F.R. § 73.3700(g)(4)(ii)(B).

To be sure, a different rule than the one cited by petitioners requires LPTV stations to vacate, at the end of 39 months, the spectrum repurposed for "guard bands" the Commission established to prevent interference between licensed services. *Id.* § 73.3700(g)(4)(v). As discussed below, however, the statute authorizes the FCC to implement guard bands without regard to LPTV station rights. 47 U.S.C. § 1454(a); *see infra*, § II.2. Indefinite LPTV operation would be incompatible with the purpose of the guard bands, since the utility of those bands depends on the absence of any but extremely low power operations. *See Auction Order*, 29 FCC Rcd at 6841 ¶ 672.[7]

The *Mako* Court's statement that "the Commission's repacking authority does not enable it to displace LPTV stations even if they cause no interference to primary services" thus has no application to the procedures the Commission

[7] The uses authorized in the guard bands are far less powerful than LPTV stations. *Amendment of Part 15 of the Commission's Rules for Unlicensed Operations in the Television Bands, Repurposed 600 MHz Band, 600 MHz Guard Bands and Duplex Gap, and Channel 37*, Report and Order, 30 FCC Rcd 9551, 9589-90 ¶¶ 102-03 (2015); 47 C.F.R. § 15.709(a)(4); 47 C.F.R. §§ 74.735(a)(2), (b)(2).

adopted to implement the auction, which the Court upheld. *Mako*, 835 F.3d at 151.[8] Those procedures recognize that LPTV stations and wireless operations cannot practically co-exist on the same spectrum. Instead, the Court's observation applied to the hypothetical situation in which the Commission might seek to use its repacking authority to alter the rights of LPTV stations "even if they cause no interference" at all – that is, if their continued operation poses no obstacle to repurposed use of the spectrum. *Id*. at 152. That is plainly not the case here.

2. Petitioners argue that the FCC violated section 1452(b)(5) by subordinating LPTV stations to unlicensed services. Pet Br. 37-40. Although not addressed by the *Mako* decision, that argument is foreclosed by the plain terms of the Spectrum Act.

While the auction generally repurposes spectrum for *licensed* use, *see Auction Order*, 29 FCC Rcd at 6592-603 ¶¶ 61-80, the Spectrum Act expressly provides that "[n]othing in … section 1452 of this title shall be construed to prevent the Commission from using relinquished or other spectrum to implement band plans with guard bands" "to prevent harmful interference between licensed services outside the guard bands." 47 U.S.C. § 1454(a), (b). The Spectrum Act

[8] Indeed, the Court's decision rested in part on the fact that LPTV stations had been subordinated to wireless licensees during a prior transition pursuant to procedures, like those here, "under which an LPTV station could be notified of its displacement by a 'primary' wireless service provider." *Mako*, 835 F.3d at 151.

further states that "[t]he Commission may permit the use of such guard bands for unlicensed use." *Id.* § 1454(c).

Pursuant to this statutory authority, the Commission established guard bands to avoid harmful interference between licensed services adjacent to the guard bands, *Auction Order*, 29 FCC Rcd at 6684 ¶ 270, and made them available for use by unlicensed services. *Id.* at 6685-86 ¶¶ 271-73. Because the establishment of guard bands under the Spectrum Act is not subject to any rights of LPTV stations under section 1452(b) of the Act, and Congress expressly authorized the FCC to permit the unlicensed use of those guard bands, LPTV stations have no basis under the Spectrum Act to challenge the Commission's decision to permit unlicensed services to use the spectrum allocated to the guard bands.

3. Finally, petitioners contend that the Spectrum Act requires that "displaced LPTV stations have an alternative, post-auction channel … on which to operate." Pet. Br. 40. This assertion simply recasts an argument rejected in *Mako*.

The Court in *Mako* said that LPTV stations "'have always operated in an environment where they could be displaced from their operating channel by a primary user and, if no new channel assignment is available, forced to go silent.'" *Mako*, 835 F.3d at 149 (quoting *Reconsideration Order*, 30 FCC Rcd at 6778 ¶ 68). In upholding as "reasonabl[e]" the Commission's decision not to protect LPTV stations from displacement in the repacking process, *id.* at 151, the *Mako*

Court upheld that result, and petitioners have no power to relitigate that binding determination here.

In any event, there is no practical difference between the protection from displacement sought in *Mako* and the contention that "a station's right to broadcast absent harmful interference must remain intact following the auction." Pet. Br. 41. Fulfilling petitioners' claimed "right to broadcast" would require the Commission to set aside a channel in the remaining television bands for every LPTV station. The set-aside channels would be unavailable for auction or for full-power and Class A stations that Congress directed the Commission to protect. Given the number of LPTV stations, guaranteeing a post-auction channel for every LPTV station subject to displacement would "'frustrat[e] the purposes of the Spectrum Act.'" *Mako*, 835 F.3d at 151 (quoting *Auction Order*, 29 FCC Rcd at 6674 ¶ 241). It was therefore entirely reasonable for the Commission to reject that option.

III. THE ORDERS ARE NOT ARBITRARY AND CAPRICIOUS

Petitioners contend that the *Channel Sharing Order* does not offer "a meaningful remedy for the impact of 'displacement,'" Pet. Br. 45, and that the *Commencing Operations Order* constitutes an unexplained reversal of "the rule on 'secondary' broadcast rights" because it requires LPTV stations to vacate a channel when they receive notice of likely interference with licensed wireless operations. Pet. Br. 47. Neither contention has force.

First, the *Channel Sharing Order* adopted a reasonable means of mitigating, not remedying, displacement of LPTV stations, and petitioners' assumption that they were entitled to be made whole for displacement is at odds with *Mako*. Second, petitioners' claim that they had a right that the *Commencing Operations Order* overturned to wait until their operations actually interfere with wireless services finds no support in Commission precedent.

1. Petitioners acknowledge that channel sharing "may save some LPTV owners some money," Pet. Br. 46, but complain that "it does nothing to restore or substitute for LPTV's spectrum usage rights." *Id*. at 46. The FCC did not set out to make displaced LPTV stations whole, however, nor was it required to do so. The agency's goal was more limited: to "help alleviate the consequences" of displacement, recognizing that some LPTV stations would have to "discontinue operations altogether" if they could not find a new channel after the auction. *Channel Sharing Order* ¶¶ 2-3 (JA __).

In light of that goal, there was nothing arbitrary about the FCC's decision to allow channel sharing, nor did the agency fail to provide an adequate basis for believing the rule "would in fact further" its policies. *See* Pet. Br. 58 (quoting *Fox Television Stations v. FCC*, 280 F.3d 1027, 1043 (D.C. Cir. 2002)). The Commission explained that channel sharing could benefit displaced LPTV stations by enabling more of them to continue operating on the channels that remain

available after the repacking, by avoiding mutual exclusivity of applications for the available channels, and by reducing costs. *See Channel Sharing Order* ¶¶ 21-23 (JA __). Although some commenters argued that the benefits were likely to be limited, the FCC reasonably concluded that channel sharing, which is "entirely voluntary," *id*. ¶ 25 (JA __), could prove to be "a useful option" for some LPTV stations. *Id.* ¶ 24 (JA __).

Petitioners' real dispute is not with the decision to allow channel sharing, but with the decision not to protect LPTV stations from displacement. But the latter decision was settled before the *Channel Sharing Order*, and affirmed by this Court in *Mako*, both under the Spectrum Act and the Administrative Procedure Act. *See Mako*, 835 F.3d at 151 (citing *Nat'l Ass'n of Broad.*, 789 F.3d at 176) ("Our analysis [of the petitioners' *Chevron* step two argument] also suffices to dispense of petitioners' arbitrary-and-capricious arguments to the same effect.").

2. Petitioners contend that the *Commencing Operations Order* is arbitrary because it requires LPTV stations to vacate repurposed spectrum on notification that they are "likely" to interfere with new wireless operations, and in any event within 39 months of the close of the auction. Pet. Br. 47-48.

The FCC's auction rules generally allow LPTV stations to continue operating in repurposed spectrum indefinitely, however, subject to notice of potential harmful interference with new wireless operations. 47 C.F.R. §

73.3700(g)(4)(iii). This is the way the prior rules for the repurposing of spectrum through the digital television transition worked as well. Those rules did not require "a showing of actual, harmful interference." Pet. Br. 48. Instead, like the rules challenged here, they required LPTV stations to reduce power or cease operations on notice of "the likelihood of interference" with new licensed wireless operations. 47 C.F.R. § 74.703(g). *See Mako*, 835 F.3d at 151 (rules and procedures implementing the auction "subordinate LPTV stations to wireless licensees in the same way the Commission had done before the Spectrum Act").

The 39-month deadline applies only with respect to LPTV stations located in the guard bands, as noted above. In that context, the FCC reasonably determined – again in the *Auction Order*, not the *Commencing Operations Order* – that continued LPTV operations after the 39-month post-auction transition period would be incompatible with the purpose of preventing harmful interference between licensed services adjacent to the guard bands. *Auction Order*, 29 FCC Rcd at 6841 ¶ 672; *see supra*, § II.1.

3. Finally, petitioners take issue with the balance the Commission struck between the interests of LPTV stations and the licensed providers of mobile broadband and other services in the repurposed spectrum following the auction. Pet. Br. 48-53. In doing so, petitioners make no pretense of challenging the orders on review, but simply seek to relitigate this Court's binding decision in *Mako* to

uphold the reasonableness of the Commission's determination that protecting LPTV stations from displacement "would severely limit . . . recovery of spectrum to carry out the forward auction," and thereby "frustrat[e] the purposes of the Spectrum Act." Pet. Br. 49 (quoting *Mako*, 835 F.3d at 151 (quoting *Auction Order*, 29 FCC Rcd at 6674 ¶ 241)).

IV. PETITIONERS' CONSTITUTIONAL AVOIDANCE ARGUMENTS ARE BASELESS.

Petitioners argue that the orders on review "raise serious, complex, and unsettled constitutional questions" that this Court should avoid deciding "by applying § 1452(b)(5) consistent with [their view of] the *Mako* panel opinion and the reasonable interpretation advanced by Petitioners." Pet. Br. 59. However, this Court's decision in *Mako* upheld the Commission's interpretation of section 1452(b)(5) and the reasonableness of the agency's rules implementing the auction. It is past time for petitioners to revive those contentions in the guise of constitutional claims, even ones directed to constitutional avoidance. In any event, petitioners never presented private delegation or Bill of Attainder Clause arguments in the FCC proceedings leading to the challenged orders. Accordingly, those arguments are barred. 47 U.S.C. § 405(a). *See AD HOC Telecom. Users*

Committee v. FCC, 572 F.3d 903, 911-12 (D.C. Cir. 2009) (applying section 405(a) to bar constitutional claims that were not presented to the agency).[9]

On the merits, this Court "will not submit to an agency's interpretation of a statute if it 'presents serious constitutional difficulties.'" *Nat'l Mining Ass'n v. Kempthorne*, 512 F.3d 702, 711 (D.C. Cir. 2008). But the courts do not "abandon *Chevron* deference at the mere mention of a possible constitutional problem." *Id.* None of the constitutional issues petitioners raise here presents a serious question.

1. Petitioners contend that by requiring LPTV stations to vacate their channels on notification by new wireless licensees that they intend to commence operations, the *Commencing Operations Order* "delegat[ed] governmental enforcement power to private parties in violation of due process." Pet. Br. 59-60.

However, the displacement procedure does not constitute an unconstitutional private delegation. The Commission itself established in the *Auction Order* that new wireless licensees are entitled to exclusive access to their licensed spectrum, as well as the conditions of their exercise of the right. An LPTV station may be displaced by a new wireless licensee if and when the new licensee provides written

[9] Petitioners EICB, Grace Worship/IBN, and Free Access say that they "specifically raised" their private delegation objection before the agency. Pet. Br. 59 n.22. They provide no factual support for this statement, however, and the record does not reveal such an objection in the proceedings leading up to the orders on review.

notice 120 days in advance that it is ready to commence operations and that the LPTV station is likely to cause harmful interference to those operations. 47 C.F.R. § 73.3700(g)(4); *Auction Order*, 29 FCC Rcd at 6840 ¶ 668. Moreover, the interference criteria were established by the Commission and are clearly defined. *Id.* at n.1862; *see Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, Third Report and Order and First Order on Reconsideration, 30 FCC Rcd 12049, 12071-73 (2015) (requiring new wireless licensees to use an FCC methodology "for predicting interference to their operations from [LPTV stations] for purposes of providing . . . advance displacement notice").

Thus, the only control in the hands of private entities concerns the timing of the displacement notification. As petitioners themselves concede, the timing of such a notification is not a prohibited delegation. Pet. Br. 62 (citing *Currin v. Wallace*, 306 U.S. 1, 15-16 (1939) (restriction of law's operation in a market "unless two-thirds of the growers voting favor it" involved no delegation of legislative authority)). The cases on which petitioners rely are inapposite. *See* Pet. Br. 60-61. Thus, in *Carter v. Carter Coal Co.*, 298 U.S. 238, 310 (1936), the Supreme Court found an unconstitutional private delegation where a statute prohibiting the purchase of coal from any mine that did not comply with wage and hour requirements delegated authority to determine those requirements to certain

coal producers. And in *Association of American Railroads v. Department of Transportation*, 821 F.3d 19, 28 (D.C. Cir. 2016), this Court found a due process violation where the statute tasked Amtrak (which the Court held to be economically self-interested) and the Federal Railroad Administration, as a means of helping to determine when Amtrak can trigger a proceeding before the Surface Transportation Board to enforce Amtrak's preexisting statutory preference, with jointly developing standards "intended to measure the performance and service quality of intercity passenger train operations."

Moreover, contrary to petitioners' contention, Pet. Br. 61, the displacement procedure is subject to final review by the Commission, because the notice must be provided 120 days in advance. 47 C.F.R. § 73.3700(g)(4)(ii)(C). Thus, an LPTV station will have ample time to contest the evidence underlying the likelihood of interference if it has a basis for doing so. *See Commencing Operations Order* ¶ 21 n.76 ("the Commission will use appropriate enforcement mechanisms to ensure compliance with the transition procedures.") (JA __).[10]

2. Petitioners also contend that forcing LPTV stations to cease operations as a result of displacement in the repacking process amounts to an unconstitutional

[10] *See also Auction Order*, 29 FCC Rcd at 6840 ¶ 669 n.1864 (requiring that, in the event the commencement date is delayed, a revised notice be sent to the LPTV station and to the Commission).

taking of private property. Pet. Br. 62-64. As they concede, however, *id.* at 64, broadcast licenses are not protected property interests under the Fifth Amendment. *See FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 475 (1940) ("The policy of the [Communications] Act is clear that no person is to have anything in the nature of a property right as a result of the granting of a license."); *Mobile Relay Assocs. v. FCC*, 457 F.3d 1, 12 (D.C. Cir. 2006) ("The Commission grants a licensee the right to 'the use of' the spectrum for a set period of time 'but not the ownership' of channels of communication) (citing 47 U.S.C. § 301). Without such a property right, petitioners can have no claim for an unconstitutional taking.[11]

3. In a footnote, petitioners "raise[] the additional question" of whether the orders on review "represent an unlawful administrative Bill of Attainder" because they "single out" LPTV stations for displacement. Pet. Br. 63 n.25. Petitioners do not claim that they raised this objection before the agency, and for that reason alone it is barred in this case. 47 U.S.C. § 405(a).

In any event, the Bill of Attainder Clause is a restraint on the power of Congress in enacting legislation; it has never been applied to agency action. *See*,

[11] The fact that LPTV licensees may have property interests in their "stations" and their "broadcasting investments" apart from the "license itself," Pet. Br. 63, is of no import. Displacement does not deprive an LPTV station of its facilities or equipment (which may be resold), and the value of the licensee's investment in the station is rightly contingent on the station's ability to operate.

e.g., *Scheerer v. U.S. Att'y Gen.*, 513 F.3d 1244, 1253 n.9 (11th Cir. 2008); *Paradissiotis v. Rubin*, 171 F.3d 983, 988 (5th Cir. 1999) (both collecting cases). In addition, "if legislation has a legitimately nonpunitive function, purpose, and structure, it does not constitute punishment for purposes of the Bill of Attainder Clause." *SBC Commc'ns v. FCC*, 154 F.3d 226, 241 (5th Cir. 1998). As *Mako* held, the FCC's decision not to protect LPTV stations did not punish those stations; it served the purposes of the Spectrum Act and the auction. *Mako*, 835 F.3d at 151.

V. THE *CHANNEL SHARING ORDER* COMPLIED WITH THE REGULATORY FLEXIBILITY ACT

The Regulatory Flexibility Act requires an agency to "prepare a final regulatory flexibility analysis" when the agency "promulgates a final rule under [5 U.S.C. §] 553." 5 U.S.C. § 604(a). While the Act "directs agencies to state, summarize, and describe, the Act in and of itself imposes no substantive constraint on agency [rulemaking]." *Nat'l Tel. Co-op Ass'n*, 563 F.3d at 540.

Petitioners do not dispute that the *Channel Sharing Order* included a final regulatory flexibility analysis that addressed all subjects required by the Regulatory Flexibility Act. *Channel Sharing Order* App. C (Final Regulatory Flexibility Analysis) (JA __). Nevertheless, petitioners maintain that the FCC failed to "conduct any systematic analysis of the effect of its rules on LPTV

stations," consider "alternatives" to its rule, or to adopt measures to minimize the adverse impact of its rule on LPTV stations. Pet. Br. 54-55.

First, these Regulatory Flexibility Act arguments are barred because petitioners did not seek reconsideration of the *Channel Sharing Order* as required by 47 U.S.C. § 405(a). Thus, in *United States Telecom Assoc. v. FCC*, 825 F.3d 674, 701 (D.C. Cir. 2016), the Court held that it lacked jurisdiction to review the agency's final regulatory flexibility analysis where the petitioner did not object to the analysis in a petition for reconsideration. The same result follows here.

In any event, "the RFA plainly does not require economic analysis." *Alenco Commc'ns*, 201 F.3d at 625. Instead, an agency may comply by providing "'either a quantifiable or numerical description of the effects of a proposed rule or alternatives to the proposed rule, or more general descriptive statements if quantification is not practicable or reliable.'" *Id*. (quoting 5 U.S.C. § 607). The Commission met this standard.

Contrary to petitioners' claim (Pet. Br. 55-56), the Commission did consider alternatives to channel sharing, and adopted various measures designed to mitigate the impact of the auction on small businesses, including displaced LPTV stations. *See Channel Sharing Order*, App. C, ¶¶ 14-27 (JA ___). These included extending the date for LPTV stations to complete the transition to digital television, *id*. ¶ 15

(JA __), as well as efforts to assist displaced LPTV stations to find new channels on which to operate. *id*. ¶18 (JA__).[12]

The Commission also described the steps that it took to minimize the impact of the repacking process on LPTV stations. Indeed, the driving force for the channel sharing proposal, as the Commission explained, was the agency's desire to ameliorate the impact of displacement on LPTV stations. *Channel Sharing Order*, App. C, ¶ 16 (JA __).

Petitioners complain that the FCC exaggerated by stating that channel sharing would "greatly" minimize the impact on small entities of displacement. Pet. Br. 57 (quoting *Channel Sharing Order*, App. C ¶ 16 (JA __)). But the *Channel Sharing Order* made clear that the Commission did not adopt channel sharing based on an exaggerated view of its benefits; rather, the Commission reasonably concluded that channel sharing "may be a useful arrangement for some stations." *Channel Sharing Order* ¶ 24 (JA __).

* * * *

[12] Petitioners contend that the FCC should have considered whether to provide "discretionary inclusion of LPTV stations in the reverse auction phase," Pet. Br. 56, but that issue was resolved in prior orders, *see Reconsideration Order*, 30 FCC Rcd at 6811 ¶¶ 145-46; *Auction Order*, 29 FCC Rcd at 6716 ¶ 352, and was not revisited in the *Channel Sharing Order*. *Channel Sharing Order* ¶ 64 (JA __).

The Commission decided not to protect LPTV stations from displacement in implementing Congress's mandate to conduct a broadcast television spectrum auction. This Court in *Mako* affirmed that decision as reasonable and consistent with the Spectrum Act. Petitioners' last-ditch challenge to that decision, by way of later decisions addressing discrete issues, is procedurally barred. In any event, their arguments are foreclosed by *Mako* or based on misreading of FCC rules and orders.

CONCLUSION

The petition for review should be denied.

Respectfully submitted,

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November 14, 2016

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

FREE ACCESS & BROADCAST TELEMEDIA, LLC, ET AL., PETITIONERS, v. FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS.	NO. 16-1100

CERTIFICATE OF COMPLIANCE

Pursuant to the requirements of Fed. R. App. P. 32(a)(7), I hereby certify that the accompanying Brief for Appellee in the captioned case contains 8,840 words.

This brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14-point Times Roman font.

/s/ *William J. Scher*
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Counsel
Federal Communications Commission

Statutory Addendum

47 U.S.C.A. § 1452(b)(1), (2), (5)

§ 1452. Special requirements for incentive auction of broadcast TV spectrum

(b) Reorganization of broadcast TV spectrum

(1) In general

For purposes of making available spectrum to carry out the forward auction under subsection (c)(1), the Commission--

(A) shall evaluate the broadcast television spectrum (including spectrum made available through the reverse auction under subsection (a)(1)); and

(B) may, subject to international coordination along the border with Mexico and Canada--

(i) make such reassignments of television channels as the Commission considers appropriate; and

(ii) reallocate such portions of such spectrum as the Commission determines are available for reallocation.

(2) Factors for consideration

In making any reassignments or reallocations under paragraph (1)(B), the Commission shall make all reasonable efforts to preserve, as of February 22, 2012, the coverage area and population served of each broadcast television licensee, as determined using the methodology described in OET Bulletin 69 of the Office of Engineering and Technology of the Commission.

(5) Low-power television usage rights

Nothing in this subsection shall be construed to alter the spectrum usage rights of low-power television stations.

47 U.S.C.A. § 1454(a), (b), (e)

§ 1454. Guard bands and unlicensed use

(a) In general

Nothing in subparagraph (G) of section 309(j)(8) of this title or in section 1452 of this title shall be construed to prevent the Commission from using relinquished or other spectrum to implement band plans with guard bands.

(b) Size of guard bands

Such guard bands shall be no larger than is technically reasonable to prevent harmful interference between licensed services outside the guard bands.

(e) Protections against harmful interference

The Commission may not permit any use of a guard band that the Commission determines would cause harmful interference to licensed services.

47 C.F.R. § 73.3700(g)(4)

§ 73.3700 Post–Incentive Auction Licensing and Operation.

(4) Notification and termination provisions for displaced low power TV and TV translator stations.

(i) A wireless licensee assigned to frequencies in the 600 MHz band under part 27 of this chapter must notify low power TV and TV translator stations of its intent to commence operations, as defined in § 27.4 of this chapter, and the likelihood of receiving harmful interference from the low power TV or TV translator station to such operations within the wireless licensee's licensed geographic service area.

(ii) The new wireless licensees must:

(A) Notify the low power TV or TV translator station in the form of a letter, via certified mail, return receipt requested;

(B) Indicate the date the new wireless licensee intends to commence operations, as defined in § 27.4 of this chapter, in areas where there is

a likelihood of receiving harmful interference from the low power TV or TV translator station; and

(C) Send such notification not less than 120 days in advance of the commencement date.

(iii) Low power TV and TV translator stations may continue operating on frequencies in the 600 MHz band assigned to wireless licensees under part 27 of this chapter until the wireless licensee commences operations, as defined in § 27.4 of this chapter, as indicated in the notification sent pursuant to this paragraph.

(iv) After receiving notification, the low power TV or TV translator licensee must cease operating or reduce power in order to eliminate the potential for harmful interference before the commencement date set forth in the notification.

(v) Low power TV and TV translator stations that are operating on the UHF spectrum that is reserved for guard band channels as a result of the broadcast television incentive auction conducted under section 6403 of the Spectrum Act may continue operating on such channels until the end of the post-auction transition period as defined in § 27.4 of this chapter, unless they receive notification from a new wireless licensee pursuant to the requirements of paragraph (g)(4) of this section that they are likely to cause harmful interference in areas where the wireless licensee intends to commence operations, as defined in § 27.4 of this chapter, in which case the requirements of paragraph (g)(4) of this section will apply.

47 C.F.R. § 74.802(f)

§ 74.802 Frequency assignment.

(f) Operations in 600 MHz band assigned to wireless licensees under part 27 of this chapter. A low power auxiliary station that operates on frequencies in the 600 MHz band assigned to wireless licensees under part 27 of this chapter must cease operations on those frequencies no later than the end of the post-auction transition period, as defined in § 27.4 of this chapter. During the post-auction transition period, low power auxiliary stations will operate on a secondary basis to licensees of part 27 of this chapter, i.e., they must not cause to and must accept harmful

interference from these licensees, and must comply with the distance separations in § 15.236(e)(2) of this chapter from the areas specified in § 15.713(j)(10) of this chapter in which a licensee has commenced operations, as defined in § 27.4 of this chapter.

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Petitioners,	)	
v.	)	No. 16-1100
FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA,	)	
Respondents.	)	

CERTIFICATE OF SERVICE

I, William J. Scher, hereby certify that on November 14, 2016, I electronically filed the foregoing Brief for Respondents with the Clerk of the Court for the United States Courts of Appeals for the District of Columbia Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

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