ORAL ARGUMENT NOT YET SCHEDULED

No. 16-1100

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, *et al.,*

Respondents.

On Petition for Review from
the Federal Communications Commission

REPLY BRIEF FOR PETITIONERS

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MISCELLANEOUS

GLOSSARY

APA	Administrative Procedure Act, 5 U.S.C. § 500 *et seq*.
Channel Sharing Order	Third Report and Order and Fourth Notice of Proposed Rulemaking, *Amend. of Parts 73 and 74 of the Commission's Rules to Establish Rules for Digital Low Power Television and Television Translator Stations,* MB Docket No. 03-185, GN Docket No. 12-268, ET Docket No. 14-175, FCC 15-175 (rel. Dec. 17, 2015), 81 Fed. Reg. 5041 (Feb. 1, 2016), 31 FCC Rcd. 120205
Commencing Operations Order	Report and Order, *Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions,* GN Docket No. 12-268, FCC 15-140 (rel. Oct. 22, 2015), 81 Fed. Reg. 4969 (Jan. 29, 2016), 31 FCC Rcd. 14927
Commission	Federal Communications Commission
Communications Act	Communications Act of 1934, as amended, 47 U.S.C. § 151 *et seq*.
FCC	Federal Communications Commission
FRFA	Final Regulatory Flexibility Analysis
Hobbs Act	28 U.S.C. § 2344
Incentive Auction R&O	Report and Order*, Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, GN Docket No. 12-268, 29 FCC Rcd. 6567 (2014)

LPTV	Low-Power Television
MHz	Megahertz
NPRM	Notice of Proposed Rulemaking
RFA	Regulatory Flexibility Act, 5 U.S.C. § 601 *et seq*.
Second Recon. Order	Second Order on Reconsideration, *Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, GN Docket No. 12-268, 30 FCC Rcd. 6746 (2015)
Spectrum Act	Title VI of the Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96, 126 Stat. 156, codified in part at 47 U.S.C. §§ 1451-57
VoIP	Voice over Internet Protocol

INTRODUCTION

The government's brief ("FCC Br.") articulates internally inconsistent rationales that respond not to what Petitioners in fact argued, but rather to arguments the FCC *wishes* had been made. The Commission's assertion that Free Access *et al.* are relitigating issues settled by the Court's *Mako* decision (*e.g.,* FCC Br. at 17)[1] is a subtle but characteristic attempt to confuse the Court on what this case is about.

As one prominent example, the FCC flatly mischaracterizes our argument, asserting: "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." FCC Br. at 13. But nothing in the petition for review or opening brief challenged the FCC's spectrum "repack" guard bands determinations. Likewise, a central theme of the FCC's response is that Petitioners are contesting the agency's "decision not to protect [low-power television] stations from displacement in the repacking process." *Id.* at 12-13, 14, 18-19, 23, 27. Yet the opening brief forthrightly stated that "neither

[1] *Mako Comms., LLC v. FCC*, 835 F.3d 146 (D.C. Cir. 2016).

Petitioners nor other LPTV interests insist[] that current LPTV channels are required to be preserved in the repack." Pet. Br. at 40 & n.41. The validity of two FCC auction orders in light of the Court's *Mako* holding construing 47 U.S.C. § 1452(b)(5) and under the Administrative Procedure Act is what is at issue in this appeal. *Id.* at 29-32.

As Justice Scalia observed, the FCC "has repeatedly been rebuked in its attempts to expand the statute beyond its text, and has repeatedly sought new means to the same ends." *Talk Am., Inc. v. Michigan Bell Tel. Co.,* 131 S. Ct. 2254, 2266 (2011) (Scalia, J., concurring). That is what confronts the Court in this landmark auction case: an administrative agency which decides its own unilateral policy, to the disdain of the enabling legislation and statutory limits on its powers, and that then tries to insulate its actions from judicial scrutiny with misdirection, makeweight justiciability objections and mutually inconsistent excuses. The FCC Orders here should accordingly be reversed or, alternatively, vacated and remanded.

ARGUMENT

I. THE FCC'S CONTRADICTORY AND MUDDLED EXPLANATIONS MUST BE REVERSED OR, ALTERNATIVELY, VACATED AND REMANDED

Petitioners' principal issue is whether the challenged Orders comply with the Spectrum Act, 47 U.S.C. § 1452(b)(5), as construed by this Court in *Mako*. Pet. Br. at 6, 30, 34-36. On that key question, the FCC's response is internally divergent and bewildering.

For both its Hobbs Act objection (FCC Br. at 2, 21-22) and its defense of what Petitioners insist is a mandatory shut-down requirement for LPTV broadcasters in the TV spectrum to be "repurposed" for sale to wireless providers (*id.* at 24-26), the Commission has articulated uneven, shifting rationales that contradict each other and the agency's earlier decisions. Under this Court's own, recently-reaffirmed precedent, the FCC's "muddled treatment" of these central issues at least "requires vacatur and remand." *AT&T v. FCC*, No. 15-1059, slip op. at 13 (D.C. Cir. Nov. 18, 2016).

A. The Asserted Jurisdictional Challenge to Appellate Review is Without Merit

Petitioners argued that the *Commencing Operations Order* impermissibly "require[s] *all* LPTV licensees to vacate the entire 600

MHz Band, without regard to interference, and whether or not there are other, available post-auction channels to which LPTV stations can relocate." Pet. Br. at 33 (emphasis in original). The FCC's jurisdictional opposition to review, FCC Br. at 2, 13, 21-23, is premised on an unprecedented application of the Hobbs Act's "party aggrieved" language[2] and a characterization of its incentive auction proceeding (GN Docket No. 12-268) that is, frankly, nonsensical.

The FCC simultaneously claims that the challenged decisions (a) were made earlier in "the proceeding" (*i.e.,* in the prior *Incentive Auction R&O* and *Second Recon. Order*), and so are time-barred, FCC Br. at 16-21, but also that (b) petitioners did not participate in its later, "independent" proceedings for Hobbs Act purposes. FCC Br. at 3, 22. Yet as a matter of fact and law, either these are the same proceeding or they are not. The Commission cannot have it both ways.

For the FCC to maintain that different parts of GN Dkt. No. 12-268 are completely different proceedings is disingenuous. (Of course if these *are* the same proceeding, there is concededly no jurisdictional

[2] 28 U.S.C. § 2344.

issue.) The agency cites no precedent or FCC decision holding that subsequent orders in the same docket are considered different proceedings under § 2344.[3] Moreover, the FCC itself manages its proceedings and assigns docket numbers. Both orders, like most aspects of the auction, have been considered in Dkt. 12-268; both were explicitly captioned Dkt. 12-268, in which it all but one Petitioner (Word of God Fellowship) participated.

If the FCC were right that these Orders arise from an "independent" proceeding, separation of the incentive auction into numerous different proceedings (let alone multiple orders) would represent an impermissible and arbitrary "administrative shell game" designed to avoid effective judicial review. *AT&T v. FCC*, 978 F.2d 727, 732 (D.C. Cir. 1992), *aff'd sub nom. MCI Telecoms. Corp. v. AT&T Co.*, 512 U.S. 218, 223 (1994) (endorsing this Court's critical language on FCC's "defer[ral]

[3] FCC counsel rely solely on *NASUCA v. FCC,* 457 F.3d 1238, *opinion modified,* 468 F.3d 1272 (11th Cir. 2006) (per curiam); FCC Br. at 22. Yet *NASUCA* does not support a conclusion—one not substantiated either by the Commission's Orders or brief—that the *Incentive Auction R&O* was issued in "a proceeding 'procedurally and substantively independent' from the challenged order[s]." *Id.*, *quoting Simmons v. ICC,* 716 F.2d 40, 45 (D.C. Cir. 1983). The 11th Circuit decision is not binding in this Circuit and offers no reasoning.

to a later rulemaking consideration of an issue which was dispositive of an adjudicatory complaint").[4] Under the agency's approach, no court could possibly review, in a single case, the Commission's auction decisions and policies *resulting from a single NPRM*.

In a larger context, Petitioners have been making the same argument throughout Dkt. 12-268: that the proposed auction design, rules and procedures unlawfully dictate mass extinction of LPTV stations in violation of 1452(b)(5), justified neither by claimed "purposes" of the Spectrum Act nor an asserted "spectrum shortage" requiring elimination of most LPTV stations nationwide. *E.g.,* Pet. Br. at 4, 37, 49-50, 51 & n.17. How many times are parties required to press the same objections to avoid procedural default and preserve their right to appeal?

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[4] *See Global Crossing Telecoms., Inc. v. FCC,* 259 F.3d 740, 748 (D.C. Cir. 2001) (in *AT&T*, the FCC "appeared to be trying to 'avoid judicial review' of its order by engaging in 'a sort of administrative law shell game'") (*quoting AT&T,* 978 F.2d 731-32); *Nat'l Small Shipments Traffic Conf., Inc. v. ICC,* 590 F.2d 345, 354 (D.C. Cir. 1978) (ICC's "transfer" of issue to another proceeding "was merely a dilatory action, a 'shell game' contrived through ex parte contacts to create an interim during which [the agency's rule] would be arguably lawful").

By dividing the auction into a number of parallel Orders, including some still pending despite the fact that the incentive auction has *already completed* Stage 2,[5] the FCC has not "made quite clear under which shell the pea lies." *Global Crossing,* 259 F.3d at 748. The Court is therefore faced with a moving target—a series of decisions that contradict each other and which are posited to be immune from judicial scrutiny. As this Court unanimously emphasized in 2011, narrowly construing jurisdiction and administrative preservation in the way the FCC seeks would only "encourage strategic vagueness on the part of agencies and overly defensive, excessive commentary on the part of interested parties seeking to preserve all possible options for appeal.

[5] *Amendment of Parts 15, 73, and 74 of the Commission's Rules to Provide for the Preservation of One Vacant Channel In the UHF Television Band for Use by White Space Devices and Wireless Microphones*, Notice of Proposed Rulemaking 30 FCC Rcd. 6711, 6712 (2015); *see Stage Two of FCC's Forward Incentive Auction Dies After Single Round,* Multichannel News (Oct. 19, 2016) (The "second stage of the FCC's forward auction for 600 MHz spectrum has ended after just one round…. [B]idding concluded without meeting the final stage rule and without meeting the conditions to trigger an extended round."), *available at* http://ht.ly/XqSS306m42z.

Neither response well serves the administrative process." *Portland Cement Ass'n v. EPA,* 665 F.3d 177, 186 (D.C. Cir. 2011) (per curiam).[6]

B. The FCC's Explanation of Mandatory Post-Auction 600 MHz "Displacement" Is Internally Inconsistent and Facially Violative of *Mako*

Buried in the FCC's defense of the *Commencing Operations Order* are its representations that (1) the agency has allocated the post-auction 600 MHz Band exclusively to wireless services, FCC Br. at 33 ("The Commission itself established…that new wireless licensees are entitled to exclusive access to their licensed spectrum"), and (2) "LPTV stations and wireless operations cannot practically co-exist on the same spectrum," *id.* at 26. Those arguments directly refute its claim that the Order does not require termination of LPTV service in this spectrum band

[6] *Portland Cement* concerned a statute that, like the Hobbs Act and 47 U.S.C. § 405(a) (reconsideration required if appellant "was not a party to the proceedings" at FCC), requires arguments to have been "raised with reasonable specificity during the period for public comment" before the agency. The Court excused strict compliance with that test because while it expects "some degree of foresight on the part of commenters, we do not require telepathy. We should be especially reluctant to require advocates for affected industries and groups to anticipate every [rulemaking] contingency." 665 F.3d at 186.

without regard to interference with "primary" licensees. FCC Br. at 23-24.[7]

As Petitioners argued without rebuttal, exclusive assignment of spectrum away from LPTV is flatly inconsistent with *Mako* because the reorganization powers in § 1452(b) are limited by subsection (b)(5), which precludes displacing LPTV stations other than for interference. Pet. Br. at 35 n.7. That is precisely what exclusive assignment of TV spectrum to wireless uses does vis-à-vis LPTV. Any contention that the FCC "is empowered in the spectrum reorganization to assign the 600 MHz Band exclusively to new wireless licensees…flies squarely in the face of § 1452(b)(5)." *Id.*

The FCC offers no support for its claimed authority, in light of subsection (b)(5) and *Mako,* to assign "exclusive access" in the 600 MHz Band to new wireless providers. It cannot present a justification because spectrum exclusivity, by definition, negates any right of "second-

[7] Notably, the FCC's brief offers no citations. The *Incentive Auction R&O* did not make exclusive spectrum assignments and did not discuss any inherent technical incompatibilities.

ary" broadcasters such as LPTV to operate unless they cause interference. *Mako,* 835 F.3d at 152 ("LPTV stations' secondary status renders them subject to displacement insofar as they cause interference to primary services…."). Under "[s]ubsection (b)(5)'s prohibition…the Commission's repacking authority does not enable it to displace LPTV stations even if they cause no interference to primary services." *Id*.

The FCC correctly notes that Petitioners' citation to one regulation, 47 C.F.R. § 74.802(f), was misplaced. FCC Br. at 24-25.[8] Yet the same earlier orders it says prove LPTV will *not* be displaced in the 600 MHz Band without regard to interference directly controvert what agency counsel now argue. The Commission was adamant in 2014 that "[n]o station will be allowed to operate on a channel that has been reassigned or repurposed more than 39 months after the repacking process becomes effective. In other words, *the repurposed spectrum will be*

[8] The FCC insists this rule was "adopted in" the 2014 *Incentive Auction R&O.* FCC Br. at 24. Yet the rule was specifically "revised" in Appendix A of the *Commencing Operations Order,* JA __, making clear that the FCC "explicitly or implicitly…actually reconsidered it" under the "reopening" doctrine. *Nat'l Ass'n of Reversionary Property Owners v. Surface Transp. Bd.,* 158 F.3d 135, 141 (D.C. Cir. 1998); *compare* FCC Br. at 20-21 (arguing reopening doctrine is inapplicable).

cleared no later than 39 months after the effective date." *Incentive Auction R&O,* 29 FCC Rcd. at 6573 ¶ 11 (emphasis added; footnotes omitted). This is part of what the FCC termed "a phased transition of spectrum from broadcast to wireless operations, which will occur in the U.S. over a period lasting up to 39 months after the broadcast station repacking becomes effective," *id.* at 6680 ¶ 255 n.782, and its efforts to "adopt more definitive channel clearing obligations for LPTV and TV translator [sic] than were implemented in the 700 MHz transition." *Id.* at 6840 ¶ 671.[9]

These conflicting statements, along with the agency's present contention that it has allocated the 600 MHz Band "exclusively" for new wireless licensees, do little to establish "definitive" channel-clearing obligations for LPTV. Petitioners and the Court are thus faced with a

[9] It is illustrative that the 700 MHz Band was also "cleared" for the digital television transition with an FCC decree that all LPTV stations operating on 700 MHz frequencies *must* terminate operations and move to an "in-core" channel (2-51) by a hard deadline (Dec. 31, 2011). *Amendment of Parts 73 and 74 of the Commission's Rules to Establish Rules for Digital Low Power Television, Television Translator, and Television Booster Stations,* 26 FCC Rcd. 10732, 10749-50 ¶ 5 (2011); *see Incentive Auction R&O,* 29 FCC Rcd. at 6840 ¶ 671 n.1867.

moving target: inconsistent pronouncements and contradictory regulations that on the one hand are claimed only to mandate clearing of 600 MHz "guard bands" by LPTV (which Petitioners do not challenge), *see* FCC Br. at 26-27, but on the other hand, as quoted above, expressly direct that the 600 MHz Band be "cleared" of LPTV 39 months after the auction because the FCC wants wireless carriers to have "exclusive" use of that spectrum. If the latter, there is no legitimate basis to affirm the *Commencing Operations Order* under the *Mako* panel's construction of § 1452(b)(5).

This Court was confronted with a situation in which the agency's rationales and "muddled" explication were similarly inconsistent in *AT&T v. FCC,* No. 15-1059 (D.C. Cir. Nov. 18, 2016). That case wrestled with several FCC orders and regulations regarding application of telecom access charges to Voice over Internet Protocol ("VoIP") calls, *i.e.,* "how the disputed services are to be classified." Slip op. at 2. The operative issue was whether certain services provided to AT&T for inter-exchange VoIP calls were "functionally equivalent" to end-office or tandem-switching. Since the FCC's various statements had not "disclose[d] the Commission's reasoning with the requisite clarity to enable

us to sustain its conclusion," the Court held that the agency's "muddled treatment" of functional equivalence required that it "vacate and remand the order to the Commission for further explanation." *Id.* at 5, 13.

Petitioners believe the FCC has indeed concluded that the entire 600 MHz Band must be vacated ("cleared") by LPTV 39-months after the auction, regardless of harmful interference to either relocated full-power TV stations or new wireless licensees. That certainly is the impression informal FCC workshops and other *non-record* pronouncements have conveyed to LPTV licensees. Yet because judicial review under the APA is confined to the administrative record, the cursory, inexplicable and divergent positions highlighted above leave the Court at a loss for *precisely what the FCC has actually decided.* If not reversed for failure to provide the requisite "reasoned explanation for its action," *FCC v. Fox Tele. Stations, Inc.,* 556 U.S. 502, 515 (2009), the *Commencing Operations Order* should be vacated and remanded as in *AT&T v. FCC.*

II. PETITIONERS' SUBSTANTIVE OBJECTIONS TO THE FCC'S ORDERS REMAIN UNREFUTED

The FCC spends little time addressing the merits. Most of Petitioners' APA arguments were met with silence or misdirection.

What slight justifications the FCC tenders are markedly insufficient to sustain its Orders.

A. The FCC's "Guard Bands" Excuse is a Red Herring

The FCC recasts Petitioners' arguments as contesting the agency's decision to terminate LPTV service in the "guard bands" allocated as part of its spectrum reorganization. FCC Br. at 13, 26-27. That is a red herring. Nowhere in this case or in *Mako* have LPTV stations contended the Commission is disabled from allocating guard band spectrum to unlicensed or licensed use, whether on a "primary" or other basis. Consequently, the fact that the statutory protection of LPTV in § 1452(b)(5) is inapplicable to the development of guard bands pursuant to 47 U.S.C. § 1454, *see* FCC Br. at 27, is irrelevant.

B. The Court Can Enforce Its *Mako* Mandate As To Interference-Based Displacement In This Appeal

In Section I(B), Petitioners' brief maintained that two aspects of the Orders "violate the Spectrum Act for reasons neither reached nor decided by the *Mako* panel." Pet. Br. at 37. These are (1) subordinating LPTV spectrum usage rights to both new licensed wireless *and* unlicensed uses the FCC wants to promote as a policy matter, and (2) displacing LPTV stations "without any alternative station on which to

relocate, circumstances dramatically different from those governing LPTV broadcasting prior to the incentive auction."[10] *Id.* The FCC's contention that the Court is precluded from considering these issues is unfounded.

It is black-letter law that "once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case." *Allen v. McCurry,* 449 U.S. 90, 94 (1980). This *res judicata* doctrine of issue preclusion applies to matters "actually litigated" and "necessarily decided" in the first case, and only if no unfairness results. *E.g., Yamaha Corp. of Am. v. United States,* 961 F.2d 245, 254 (D.C. Cir. 1992).

Those are not the circumstances here. It is abundantly clear the *Mako* panel neither actually considered nor necessarily decided whether

[10] While the FCC asserts (incorrectly) that *Mako* decided LPTV stations may be displaced in the FCC's spectrum reorganization whether or not another post-auction channel is available, it also contends that accepting Petitioners' argument would require "set[ting] aside a channel in the remaining television bands for every LPTV station." FCC Br. at 28. None of the agency's orders in Dkt. 12-268 makes such a finding. That uncorroborated assertion in the FCC's brief is also incorrect. Pet. Br. at 41 n.12.

unlicensed use of former LPTV spectrum is barred by § 1452(b)(5) or whether the lack of an alternative, post-auction channel represents an "alter[ation]" of LPTV stations' "spectrum usage rights." Therefore, the doctrine applicable to the *Mako* disposition is *stare decisis,* not *res judicata* or issue preclusion. And under *stare decisis,* there is no rule preventing a later panel of this Court from deciding issues left open in a prior appeal *or* from enforcing the mandate of an earlier decision. That would not be "abandonment of [a] well established precedent," *Critical Mass Energy Project v. NR*C, 975 F.2d 871, 877 (D.C. Cir. 1992), because *Mako* is a decision of first impression, only a few months old, and Petitioners ask that it be *followed.*

As construed in *Mako*, the Spectrum Act prevents the FCC from leaving LPTV stations without at least a "secondary" right to broadcast after the auction's spectrum reorganization unless "an LPTV station's transmissions interfere with a primary service." *Mako,* 835 F.3d at 148. Consequently, even if the FCC is right that the questions of unlicensed use and alternative post-auction relocation channels were not decided or reopened in the Orders under review here, an agency application of

the statute that reaches results inconsistent with *Mako* is unlawful—whether made now or in its prior orders.

In other words, to the extent it is the *Incentive Auction R&O* or the *Second Recon. Order* that deviate from the holding of *Mako* for the reasons presented in Petitioners' brief, as the FCC suggests, those prior orders are unlawful and void under *Mako.* The panel deciding this case has full authority to apply *Mako* to issues not reached there and to enforce that case's mandate by invalidating portions of the FCC's prior orders that conflict with the Court's judgment. That is fully consistent with the law of this Circuit that "prior opinions of other panels of this court bind us." *BellSouth Corp. v. FCC,* 162 F.3d 678, 696 (D.C. Cir. 1988) (Sentelle, J., concurring).

C. The Commission's Cursory Justification of Its Orders Cannot Satisfy Routine APA Standards for Rational Agency Decision-Making

In a mere three pages, the FCC defends the purported rationality of its Orders under the APA's prohibition against arbitrary and capricious agency action. FCC Br. at 28-32. Those proffered justifications dodge the dispositive question whether the agency itself articulated a rational connection between the record and its determinations. *Motor*

Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).

First, the FCC argues that the *Channel Sharing Order* was designed to "mitigate," not "remedy," LPTV displacements resulting from the auction and repack. FCC Br. at 29-30. Even if this linguistic distinction were material, Petitioners did not contend the FCC must remedy displacement, but instead that "the Commission's claim that channel sharing and delaying the digital conversion deadline for LPTV stations 'mitigate the impact of the auction and repacking process on LPTV' find[s] no support" in the record. Pet Br. at 44 (citing JA __ ¶ 3).[11]

The Commission fails to point to any evidence that channel sharing or delayed digital transition for LPTV stations would actually "mitigate" the effects of the auction "repack" on displaced LPTV licensees. As we pointedly observed, while it "may save some LPTV owners some money," channel sharing "does not at all mitigate the loss of existing LPTV channels without an available alternative on which to continue

[11] The Commission, not Petitioners, advanced the claim that its "mitigation" steps, first outlined (but not proposed or adopted) in 2014, would "alleviate the consequences of LPTV…station displacements." *Incentive Auction R&O,* 29 FCC Rcd. at 6838 ¶ 664.

broadcasting independently." Pet. Br. at 47. The FCC's brief conspicuously fails to cite, explain or defend the Order's rationale that there is merely a "*possibility* that [sharing] may be a useful arrangement for some stations." *Id.* (citing JA__ ¶ 24) (emphasis added). The agency also ignores that "by failing to identify or project the scope of any cost savings from channel sharing," the Commission "forfeited its delegated administrative discretion to line-draw because it did not 'examine the relevant data.'" Pet. Br. at 41-42 (quoting *State Farm,* 463 U.S. at 43).[12] On any or all these grounds, the *Channel Sharing Order* should be reversed.

Second, the FCC maintains that "requir[ing] LPTV stations to vacate repurposed spectrum on notification that they are 'likely' to interfere with new wireless operations," FCC Br. at 30, does not impermissibly reverse the agency's interference rules because "[t]his is the way the prior rules for the repurposing of spectrum through the digital

[12] FCC counsel's contention that "Petitioners' real dispute is not with the decision to allow channel sharing, but with the decision not to protect LPTV stations from displacement," FCC Br. at 30, is wrong. Nothing in our APA arguments may fairly be construed to contend that § 1452(b)(5) prohibits displacement if and when LPTV stations cause interference to full-power TV licensees or other primary services.

television transition worked as well." *Id.* at 31. No citations were offered in support of this contention.

To the contrary, (i) during the digital transition the FCC acted just as Petitioners claim here, directing that all LPTV services in the 700 MHz Band be shut down by a date certain (*see supra* at 11 n.9), and (ii) the Commission's extant rules and prior decisions, the Communications Act and this Court's *Mako* opinion all provide it is actual, "harmful" interference, not "likely" interference, that triggers an LPTV station's "displacement" obligation as a secondary licensee.[13] That is the

[13] *E.g.,* 47 C.F.R. § 2.104(d)(3) (secondary stations "[s]hall not cause harmful interference to stations of primary services to which frequencies are already assigned or to which frequencies may be assigned at a later date"); *Incentive Auction R&O,* 29 FCC Rcd. at 6674 ¶ 239 n.741 ("LPTV and TV translator stations [are] not permitted to cause harmful interference to primary services…and cannot claim protection from harmful interference from primary services."); *The Future Role of Low Power Television Broad. and Television Translators*, 48 Fed. Reg. 21478, 21478 (1983) ("Secondary status means that low power stations may not create objectionable interference to full service television stations."); *Mako,* 835 F.3d at 148 ("if an LPTV station's transmissions interfere with a primary service, the LPTV station must either eliminate the interference or cease operations"). *See* 47 U.S.C. § 333 (prohibiting "willfully or maliciously interfer[ing] with or caus[ing] interference to" any station "licensed or authorized" by the FCC); 47 C.F.R. § 2.1(c) (defining "harmful interference" as interference which "seriously degrades, obstructs, or repeatedly interrupts a radiocommunication service").

same interference prohibition long applicable to unlicensed wireless devices. 47 C.F.R. §§ 15.5(a), (c) (unlicensed usage is "subject to the condition[] that no harmful interference is caused;" an unlicensed user "shall be required to cease operating the device upon notification by a Commission representative that the device is causing harmful interference."). It is, ironically, now also the standard applicable to "guard bands" under the Spectrum Act. 47 U.S.C. § 1454(e) (FCC may not permit "any use of a guard band that the Commission determines would cause harmful interference to licensed services").

In light of these extensive citations, the FCC's unsupported contention that "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" (FCC Br. at 29) is frivolous. By promulgating new rules mandating that LPTV stations cease operations on notification by a wireless licensee of "likely" interference, the Order thus in fact reverses long-standing interference rules for secondary users without the overt recognition and explanation required by *FCC v. Fox,* 556 U.S. at 515 ("An agency may not…depart from a prior policy *sub silentio.*"); *see*

AT&T Wireless Servs., Inc. v. FCC, 270 F.3d 959, 965 (D.C. Cir. 2001) ("[a]bsent harmful interference," secondary spectrum usage "does not trammel upon petitioners' rights as [primary] licensees").

Third, the FCC again insists that in contesting the agency's "balance" of competing interests, Petitioners "make no pretense of challenging the orders on review." FCC Br. at 31-32. That is incorrect. What we pointed to was the Commission's assertion that these Orders "balance[d] the policy goal of providing an orderly transition process for secondary and unlicensed users in the band" with that of providing 600 MHz Band licensees "access to their spectrum as soon as they are ready to deploy wireless service in the band" by "tak[ing] the interests of secondary and unlicensed users into account." Pet. Br. at 25-26 (quoting JA __ ¶¶ 7, 9).

Petitioners argue in this appeal that the FCC did not "balance" any of LPTV's interests:

> [U]nder the revised rule, an LPTV station must vacate the licensed spectrum it has been using regardless of whether it is able to identify another, available channel in the post-auction reorganized television band or whether, in the rare circumstance in which such a channel actually exists, the LPTV owner's post-auction "displacement application" has been processed and approved by the FCC….

> *That the Commission rejected more severe wireless industry proposals, including a ludicrous contention that the Spectrum Act* required *elimination of LPTV service once a new 600 MHz license is granted (JA __ ¶¶ 10-13), does not demonstrate that the FCC "balanced" anything.* Postponing the deadline for LPTV owners to shut down is a temporary stay of execution, not any balance of rights vis-à-vis other affected parties. It epitomizes capricious agency action.

Pet. Br. at 26, 48-49 (emphasis supplied).

The FCC offers literally no response to this APA-specific argument. And while it is evident Petitioners disagree with the *Mako* panel's uncritical acceptance of the "purposes" of the Spectrum Act, *id.* at 49-52, our arguments were all directed to the deference, if any, owed in this appeal to the agency's line-drawing and claimed "balancing" of interests. For the unrefuted reasons above and in our opening brief, the FCC failed to satisfy even the APA's minimal requirements.

D. The FCC Failed to Provide Any Legitimate Response Supporting Its Implementation of the Simple Requirements of the Regulatory Flexibility Act

The FCC's perfunctory rebuttal to Petitioners' Regulatory Flexibility Act ("RFA") challenge (FCC Br. at 37-39) does not provide a legitimate basis on which the Court may affirm the *Channel Sharing Order*.

1. Lack of Quantification

The FCC concedes *sub silentio* that it could not avoid its RFA obligations with a certification under 5 U.S.C. § 605(b) because the auction orders will admittedly have a "significant economic impact" on nearly all LPTV stations, which the agency accurately deemed small entities. Therefore, under § 607, the Commission was required to provide "a quantifiable or numerical description" of that impact or an explanation why quantification "is not practicable or reliable."

The Commission argues only that the RFA "does not require economic analysis" (FCC Br. at 38)—which is not disputed—but never even asserts that it included a quantifiable description or set forth why quantification of the impacts on LPTV licensees was impracticable. *Id.* Astonishingly, the FCC approved channel sharing without even estimating the extent to which sharing will be an available post-auction option, given the necessary predicate: "the obviously rare instances where another LPTV station serves the same geographic area but for some reason, never identified by the Commission, is not also 'dis-

placed.'" Pet. Br at 55 n.21. Accordingly, the FCC has provided no legitimate basis to affirm the RFA analysis of the *Commencing Operations Order*.

2. Failure To Consider Alternatives

The FCC claims its Order "did consider alternatives to channel sharing," FCC Br at 38-39, of which it identifies only "efforts to assist displaced LPTV stations to find new channels on which to operate." *Id.* Yet as Petitioners pointed out, while the FCC in 2014 promised that it would "explore ways of maximizing the number of channels" available to LPTV "in the remaining [*i.e.,* post-'repack'] television bands*," Incentive Auction R&O,* 29 FCC Rcd. at 6839 ¶ 666, it "has still not made a proposal or sought comment on this topic, which is (for obvious reasons) vitally important to LPTV broadcasting." Pet. Br. at 22.

In fact, the *Channel Sharing Order* **rejected** every proposal for "assisting" displaced LPTV stations except allowing internal Commission staff to utilize its auction software, post-displacement, to search for vacant channels not subject to interference. JA __ ¶ 18. That is a single measure, not multiple "efforts," and as Petitioners demonstrated, one that is both extraordinarily late and almost totally ineffective. Pet. Br.

at 26, 41 n.12 (FCC has "precluded use of that software by 'displaced' LPTV stations…until years from now, [after] other broadcasters or wireless providers occupy their former spectrum").

C. Adopting Steps That Do Not "Minimize" Adverse Impact

With respect to the RFA's requirement that agencies describe the steps they "have taken" to "minimize" the adverse effects of their decisions on small entities, 5 U.S.C. § 604, Petitioners argued that "the most serious failure of the [*Channel Sharing Order*] is that it is internally contradictory and thus, in fact, fails to describe any steps the Commission has taken to 'minimize' the impact of displacement on LPTV station owners." Pet. Br. at 57. The FCC's response evades this contention, never addressing the flat inconsistency. FCC Br. at 39.

In summary, while the Order recites only that there is a "possibility" sharing "may" be useful for "some" LPTV stations, JA __ ¶ 24, its RFA section extolls sharing by claiming that "[t]he Commission's decision to allow LPTV and TV Translator to share channels between themselves *will greatly minimize the impact on small entities*." JA __, App. C ¶ 16 (emphasis added). The Commission reluctantly concedes that is an "exaggeration," FCC Br. at 39, but defends it, nonetheless, without even

purporting to answer Petitioner's argument that "channel sharing does nothing to aid a displaced LPTV station" because possibly lowering a station's capital expenditures—by what extent the FCC does not know—does not "minimize" the impact of losing all or (even with sharing) some the broadcaster's operating spectrum. Pet. Br. at 57. "Budgets and profit margins are irrelevant where a broadcaster can no longer deliver television programming." *Id.*

It is not necessary for this Court to agree that channel sharing is totally useless or that the record does not support its claimed benefits in order to overturn the Commission's RFA determinations. What matters under § 604 is an agency's regulatory flexibility analysis and the adequacy of its RFA disclosures, not substantive APA standards for on-the-record rulemaking. The *Channel Sharing Order* FRFA does not accurately describe the steps the Commission itself claims "minimize" the adverse impact of the auction on LPTV licensees, and thus must be reversed or remanded under 5 U.S.C. § 611(a)(4) and *U.S. Telecom Ass'n v. FCC*, 400 F.3d 29, 42 (D.C. Cir. 2005).

III. THE COURT CAN AND SHOULD CONSIDER THE CONSTITUTIONAL ISSUES RAISED BY THE FCC'S ORDERS

As the FCC recognizes, this Court "will not submit to an agency's interpretation of a statute if it 'presents serious constitutional difficulties.'" FCC Br. at 33 (*quoting Nat'l Mining Ass'n v. Kempthorne,* 512 F.3d 702, 711 (D.C. Cir. 2008)). The Commission's procedural and substantive response to the private delegation and Fifth Amendment "takings" arguments presented by Petitioners are glib and wholly incorrect.

A. Administrative Preservation

Initially, the FCC contends that like our RFA points (FCC Br. at 38), the constitutional arguments were not preserved and that a reconsideration petition was mandatory pursuant to 47 U.S.C. § 405(a). FCC Br. at 32-33 & n.9. To the contrary, Petitioners cited and quoted submissions from the parties, including several acting *pro se,* that raised both Fifth Amendment and "due process" objections. Pet. Br. at 22, 47 n.14, 59 n.22.[14] Given the liberal treatment routinely afforded litigants

[14] *See also* JA __ [Int'l Broad. Network (EICB's predecessor) Pet. for Recon. at 2 (Sept. 13, 2014)] (FCC improperly concluded LPTV stations have "no rights and their spectrum could be freely taken with neither due process nor just compensation…").

appearing without counsel, these preserved their objections, as private delegation is decidedly a matter of constitutional due process. *Ass'n of Am. R.R. v. Dept. of Transp.*, 821 F.3d 19, 28 (D.C. Cir. 2016) ("*Amtrak II*").

In any event, which issues may be taken up for the first time on review is left "primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases." *Singleton v. Wulff,* 428 U.S. 106, 121 (1976). Issue preservation "does not demand the incantation of particular words," *Nelson v. Adams USA, Inc.,* 529 U.S. 460, 470 (2000), and the D.C. Circuit considers non-preserved questions where "the issue is purely one of law important in the administration of federal justice, and resolution of the issue does not depend on any additional facts not considered" below. *Roosevelt v. E.I. Dupont de Nemours & Co.*, 958 F.2d 416, 419 n.5 (D.C. Cir. 1992).

"Our precedent construing section 405(a) does not require an argument to be brought up with specificity, but only reasonably 'flagged' for the agency's consideration." *NTHC, Inc. v. FCC,* No. 15-1145, slip op. at 20-21 (D.C. Cir. Nov. 15, 2016) (*quoting Time Warner Entm't Co. v.*

FCC, 144 F.3d 75, 81 (D.C. Cir. 1998)). The Court also decides non-preserved issues notwithstanding § 405(a) when agency presentation, as here, is demonstrably futile. In *Omnipoint Corp. v. FCC,* 78 F.3d 620, 635 (D.C. Cir. 1996) (citation omitted), for example, the Court found futility in an auction appeal where the Commission "was rapidly expediting the proceeding and appeared 'wedded to the procedures that it had employed.'"

It is impossible to assess the FCC's auction decisions and fairly conclude the agency here was not in fact "wedded" to its prior decisions—indeed, that is the thrust of the FCC's argument on issue preclusion. *See supra* at 1, 2, 3-4. This appeal accordingly arises in a situation in which (i) it would have been futile to raise the issues, *see All Am. Cables & Radio, Inc. v. FCC,* 736 F.2d 752, 761 (D.C. Cir. 1984), and (ii) the challenged Orders are "patently in excess of [the agency's] authority." *Washington Ass'n for Television and Children v. FCC,* 712 F.2d 677, 682 (D.C. Cir. 1983).

B. Constitutional Avoidance

The FCC's substantive responses to Petitioners' private delegation and Fifth Amendment arguments are conclusory and wrong.

1. Private Delegation

The FCC insists that "the only control in the hands of private entities concerns the timing of the displacement notification" under its *Commencing Operations Order*. FCC Br. at 34. That is demonstrably false. The Commission does not and cannot contest that an LPTV station must cease operations, post-auction, based solely upon "a unilateral notice from the third-party, without FCC review, approval or appeal." Pet. Br. at 59. In fact, the FCC's rules do not define the applicable criterion ("likely" interference) and provide none of the core elements of procedural due process: a carrier's pre-operational notice is not filed with the agency, or subject to administrative authorization, and the Commission provides no mechanism for review or appeal. *Id.* at 61.

The Commission argues that the procedure "is subject to final [agency] review" because "the notice must be provided 120 days in advance…[such that] an LPTV station will have ample time to contest the evidence underlying the likelihood of interference." FCC Br. at 35. That is false. *First,* there is no requirement that such wireless carrier notices even be submitted to the FCC, let alone any procedure for "final review" by the agency. As Petitioners observed without contradiction, the

Commencing Operations Order's reference to use of the agency's "enforcement mechanisms" is illusory because the only available process is administrative complaints, which are regularly relegated to the "black hole" of the FCC's bureaus, without any deadline for decision, and typically disposed of on so-called "delegated authority" not ripe for judicial review. Pet. Br. at 66 n.20. Thus, the FCC's facile assurance that affected LPTV licensees will have "ample time" to contest a notice of likely interference (FCC Br. at 35) is unavailing, because the agency plainly cannot offer assurance that 120 days is sufficient to resolve a complaint.

Second, the notifying wireless carrier has no obligation to disclose, let alone submit to the Commission, any "evidence" of likely interference.

Third, the FCC's decisions conflict with the claim that private parties have no dispositive role. Its rules specifically provide that upon receiving a notification, "the LPTV or TV translator station *must cease operations or reduce power*…even if…[the station] has submitted a displacement application that has not been granted." *Incentive Auction R&O*, 29 FCC Rcd. at 6840 ¶ 669 (emphasis added).

Finally, the FCC's rules are obviously more than a mere timing provision; they pass to new wireless carriers—large, well-financed corporations with vested economic interests adverse to LPTV licensees—the power to decide *whether* the regulatory standard is satisfied *and* are premised on the carriers' proprietary, "planned" network testing launch. "Both of those are subject to unverifiable manipulation to the detriment of LPTV stations forced to shut down." Pet. Br. at 66.

It is "anathema to 'the very nature of things,' or rather, to the very nature of governmental function," to grant corporations with adverse financial interests the ability to regulate competitors. *Amtrak II,* 821 F.3d at 29. To avoid this constitutional issue, the Court should accordingly follow *Mako* and vacate those portions of the *Commencing Operations Order* that require an LPTV station to cease operations on receipt of a unilateral notice of "likely interference" from a wireless provider.

2. Regulatory Taking of Property

The issue of an unconstitutional regulatory taking of private property—a question the FCC cannot and does not deny was explicitly pressed before the Commission below—is treated with disdain by the agency in one conclusory paragraph. FCC Br. at 35-36. Petitioners have always

acknowledged that *Mobile Relay Assocs. v. FCC,* 457 F.3d 1, 12 (D.C. Cir. 2006), follows old Supreme Court cases in holding that an FCC license is not equivalent to an ownership interest in spectrum. *Id.* Yet the real question is whether tectonic legal developments in the three quarters of a century since *FCC v. Sanders Bros. Radio Station,* 309 U.S. 470, 475 (1940), change that conclusion.

Petitioners respectfully submit that this issue is a weighty one which deserves the Court's attention. Leading scholars have opined that in an era of spectrum auctions, in which private companies in fact "buy" spectrum usage rights with a codified license renewal expectancy (47 U.S.C. § 309(k)), the *Sanders Bros.* framework may no longer be valid. Now that "the 'renewal expectancy' creates de facto property rights…it seems safe to predict that a takings case will be prosecuted successfully, sooner or later." Peter W. Huber *et al.,* 2 FEDERAL TELECOM LAW § 10.3.8 (2d ed. 2015).

As Petitioners implored, the Court should take this issue into account in applying § 1452(b)(5) because avoiding the grave constitutional questions lurking in this case would "spar[e] federal courts from a host

of future constitutional cases about LPTV station-specific 'displacements,' channel reassignments and shut-down notices." Pet. Br. at 59. That those challenges may need to be pressed as a jurisdictional matter in the Court of Federal Claims and the Federal Circuit should not dissuade this Court from its traditional practice of construing statutes and agency decisions to avoid controversial or divisive constitutional issues where possible.

CONCLUSION

The Court should grant this petition for review, reversing and vacating the challenged FCC orders or remanding and deferring their enforcement.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Circuit Rule 32(a), this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) in that the brief contains 6,906 words, excluding the parts exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) in that it has been prepared with a proportionally spaced typeface using Microsoft Word in Century Schoolbook 14-point font.

/s/ Glenn B. Manishin
Nov. 25, 2016 Glenn B. Manishin

CERTIFICATE OF SERVICE

I hereby certify that all counsel of record who have consented to electronic service are being served today with a copy of this document via the Court's CM/ECF. All parties in this case are represented by counsel consenting to electronic service.

/s/ Glenn B. Manishin