ORAL ARGUMENT NOT YET SCHEDULED

Nos. 20-1146 and 20-1147

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

ABS GLOBAL LTD., EMPRESA ARGENTINA DE SOLUCIONES SATELITALES S.A., HISPAMAR SATÉLITES S.A., and HISPASAT S.A.,

Appellants/Petitioners

v.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA,

Appellee/Respondents

On Appeal from and Petition for Review of an Order of the Federal Communications Commission

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APPELLEE/RESPONDENT FEDERAL COMMUNICATIONS COMMISSION'S OPPOSITION TO MOTION FOR STAY

The Federal Communications Commission opposes the motion for stay pending review filed by ABS Global Ltd., Empresa Argentina de Soluciones Satelitales S.A., Hispamar Satélites S.A., and Hispasat S.A. (the "Small Operators").

INTRODUCTION AND SUMMARY

In the *Order* under review, the FCC put procedures in place to make 300 out of 500 MHz of critical mid-band spectrum (the "C-Band") available to support next-generation ("5G") wireless broadband networks. Report and Order & Order of Proposed Modification, *Expanding Flexible Use of the 3.7 to 4.2 GHz Band*, 35 FCC

Rcd. 2343 (2020) (*Order*) (Mot. Ex. C). Currently, large satellite operators use that 300 MHz to transmit programming to radio and television stations and ultimately to consumers. Wireless operators interested in deploying 5G networks will now have an opportunity to bid on that spectrum in a public auction in late 2020, on condition that they also pay any costs necessary for the satellite operators to relocate their operations to the upper 200 MHz of the C-Band. While the Commission required that satellite operators complete that relocation by 2025, it also provided that those operators could accept accelerated relocation payments from incoming wireless carriers in exchange for clearing the band earlier. Record evidence showed that such early clearing could add billions of dollars in value to the economy and help secure American leadership in 5G.

There are several large satellite providers who will need to migrate their existing operations for the Commission's C-Band plan to be effective. The petitioners here, by contrast, are three small satellite operators that hold licenses to transmit in the C-band but have never served any customers in the United States. Because the Small Operators have no existing business or customers to migrate out of the lower 300 MHz of the C-Band, and thus would not incur any costs or require any incentives to relocate, they do not appear to be eligible for the *Order*'s various payments. But the Small Operators, despite supporting relocation before the agency, now oppose the *Order* because the Commission declined to provide them with compensation to relocate customers and operations they do not have.

The Small Operators are not entitled to a stay pending review. First and foremost, they cannot show that they will suffer imminent and irreparable harm without a stay. By the terms of the *Order*, no satellite incumbent will be required to do anything until the deadline for ceasing operations in the lower 300 MHz arrives in December 2025—and it will take no effort for the Small Operators to clear that spectrum, because they are not currently using it to serve any U.S. customers.

Perhaps aware that these facts counsel decisively against a stay, the Small Operators contend that if the multi-year transition is allowed to begin, it could at some unspecified point become too difficult to unwind. But none of the *Order*'s initial transition measures, which will extend over the next year or more, would harm the Small Operators in any way. And there is ample time for the Court to consider and decide this case before any payments are made to any satellite operator. The Small Operators concede as much, asking in the alternative (Mot. 3) that the Court simply expedite this appeal "so that it can be decided prior to" December 8. The Commission stands ready to brief the appeal on any timetable convenient to the Court. But in any event, both this Court and the Commission would have full power to ensure that the Small Operators are made whole in the unlikely event that they ultimately prevail on appeal.

The low likelihood the Small Operators would prevail is another reason to deny a stay. None of their arguments comes close to overcoming the highly deferential review that applies to the Commission's spectrum-management

decisions. The Commission's actions fall comfortably within its broad power to modify licenses by migrating licensees from one spectrum range to another where they will be able to continue providing comparable service. The Small Operators have no right to compensation for lost spectrum when they will be able to continue serving any business with the spectrum they retain.[1] And the Commission reasonably supported its policy decisions as to the nature and amount of relocation payments and accelerated relocation payments.

Finally, the public interest and the equities weigh heavily against a stay. The United States faces a pressing public need to make new spectrum available quickly to keep pace with skyrocketing demand for wireless services and to ensure American leadership in the global race to deploy 5G. Speed is essential both to meeting that demand and ensuring that the United States does not cede critical ground to China in 5G deployment. Any delay, even a short administrative stay, would cause significant harm. The record includes studies estimating that every year of delay in

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[1] Both the large satellite companies and the Small Operators told the Commission that it was possible to transition any operations to the new spectrum range, without any reduction in service or interruption for their customers, through the use of compression and other readily available technology. *Order* ¶¶ 32 & n.103, 130 & nn.368-369, 135; *see, e.g.*, Small Operators 9/13/19 Letter at 1 ("300 megahertz of C-band spectrum could be made available * * * through the use of non-proprietary, readily available compression technology"), *at* https://go.usa.gov/xwPdb; Small Operators 10/9/19 Ex Parte at 1 ("We expressed support for repurposing 300 megahertz of C-band spectrum, suggesting it could be done quickly through the use of compression technology"), *at* https://go.usa.gov/xwPd8.

making C-band spectrum available would reduce consumer welfare by billions of dollars, and any delay in auctioning this spectrum would likely reduce recovery to the U.S. Treasury as well. Incumbent satellite operators, terrestrial wireless companies, and equipment manufacturers all represented to the Commission that they have already begun taking substantial steps needed to meet the current transition schedule and that any delay would cause significant disruption. Ultimately, any delay in bringing this new spectrum to market would slow the deployment of next-generation wireless networks, imperil American leadership in 5G, and delay the introduction of new products and services 5G networks will support, to the detriment of wireless consumers nationwide and the American economy.

BACKGROUND

The C-band is a range of "mid-band" spectrum that the Commission found "critical" for the development of next-generation wireless services. *Order* ¶ 3. As the *Order* explains, "[m]id-band spectrum is essential for 5G buildout due to its desirable coverage, capacity, and propagation characteristics." *Ibid.*; *see also id.* ¶ 5. And the spectrum immediately below the C-band is already licensed for terrestrial wireless use, enabling substantial benefits from dedicating adjacent spectrum to the same use. *Id.* ¶ 12. The record before the Commission showed that reallocating C-band spectrum for terrestrial wireless use "will lead to substantial economic gains, with some economists estimating billions of dollars in increases on spending, new jobs, and America's economy." *Id.* ¶ 20.

In Section 605(b) of the MOBILE NOW Act, Congress directed the Commission to evaluate "the feasibility of allowing commercial wireless services, licensed or unlicensed, to use or share use of the frequencies between 3700 megahertz and 4200 megahertz." *Id.* ¶ 6 (quoting Pub. L. No. 115-141, Div. P, Tit. VI, Sec. 605(b), 132 Stat. 1097, 1100 (2018)). Eight satellite operators were previously licensed to use this spectrum, primarily for distributing programming to television and radio broadcasters throughout the country. *Id.* ¶¶ 8, 115, 161. In July 2018, the Commission issued a Notice of Proposed Rulemaking seeking more information on how the C-band was being used and public comment on proposals to make some or all of the C-band available for terrestrial use. *Id.* ¶¶ 15-17; *see also id.* ¶ 11 (discussing additional information collection in May 2019).

After extensive deliberation, the Commission issued its *Order* reallocating the lower 300 MHz of the C-band to make it available for terrestrial wireless use and requiring incumbent satellite operators to migrate their service to the upper 200 MHz. Based on the record, the Commission found that satellite operators "will be able to maintain the same services in the upper 200 megahertz as they are currently providing across the full 500 megahertz" by making more efficient use of spectrum through data compression and other readily available technology. *Id.* ¶ 20; *see id.* ¶¶ 32, 130, 135, 139-140, 144, 196. The lower 300 MHz will be made available to terrestrial wireless operators (except for a 20 MHz guard band) through a public

auction that will be conducted by the Commission. *Id.* ¶¶ 24-31. After the new terrestrial licenses are awarded, the new licensees will be required as a condition of their licenses to reimburse incumbent users for all reasonable costs necessary to clear the lower 300 MHz and to migrate those operations to the upper 200 MHz. *Id.* ¶¶ 179-204.

To implement this transition, the Commission announced that it would modify incumbent satellite operators' licenses to require them to clear the lower 300 MHz by December 5, 2025. *Id.* 155, 160. The Commission recognized, however, that there would be substantial public benefit to clearing the spectrum more quickly and allowing new terrestrial licensees to offer service earlier. *See, e.g., id.* ¶¶ 162, 185, 190. At the same time, the Commission observed that there were "disagreements in the record" about whether the transition could be accomplished sooner, and that doing so without customers suffering any interruption or loss of service would require exceptional efforts by satellite operators not only to transition their own facilities to the upper 200 MHz but also "to take upon themselves responsibility for transitioning all registered earth station operators that receive their services." *Id.* ¶¶ 154, 157-159, 186, 192.

As an incentive for satellite operators to migrate service more quickly, the Commission established a system of "accelerated relocation payments" to be paid by new licensees to eligible satellite operators who successfully clear spectrum on an accelerated basis. *Id.* ¶¶ 168-172, 184-192, 211-234. The Commission found that

making these accelerated relocation payments available "will promote the rapid introduction" of new spectrum "by leveraging the technical and operational knowledge of [satellite] operators, aligning their incentives to * * * enabl[e] that transition to begin as quickly as possible." *Id.* ¶ 169; *see also id.* ¶ 154.[2]

All of the satellite operators with service that must be migrated—*i.e.*, those providing C-band service to registered earth stations within the contiguous United States, *see id.* ¶ 200—have elected to pursue accelerated relocation. The Small Operators, who do not serve any registered earth stations within the contiguous United States and therefore do not have any existing service to migrate and are not expected to receive any payments, petitioned the Commission to stay the *Order*. The agency denied that request on June 10, finding that the Small Operators failed to show irreparable harm absent a stay, that their challenges to the *Order* are unlikely to succeed, and that a stay would harm the public interest and the interests of other parties. Order Denying Stay Petition, *Expanding Flexible Use of the 3.7 to 4.2 GHz Band*, --- FCC Rcd. ---, 2020 WL 3166235 (WTB rel. June 10, 2020) (*Stay Denial*) (Mot. Ex. D).

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[2] The first acceleration deadline requires eligible satellite operators to clear 100 MHz of spectrum by December 5, 2021. *See Order* ¶¶ 170-171. The second acceleration deadline requires them to clear an additional 180 MHz of spectrum by December 5, 2023. *Id.* ¶¶ 170-171.

ARGUMENT

To obtain the extraordinary remedy of a stay pending review, the Small Operators must show that (1) they are likely to prevail on the merits, (2) they will suffer irreparable harm without a stay, (3) a stay will not harm others, and (4) the public interest favors a stay. *Wash. Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977). The Small Operators fail to satisfy those exacting requirements.

I. THE SMALL OPERATORS HAVE NOT SHOWN IRREPARABLE HARM.

As a threshold matter, the stay motion does not meet the "high standard for irreparable injury." *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297 (D.C. Cir. 2006). To obtain a stay, the Small Operators must show an injury "both certain and great; it must be actual and not theoretical." *Wisc. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985). In addition, they must "substantiate the claim that irreparable injury is 'likely' to occur. Bare allegations of what is likely to occur are of no value since the court must decide whether the harm will *in fact* occur." *Ibid.* (citation omitted). The Small Operators have not made that showing.

1. The Small Operators have not shown that they will directly suffer any imminent harm if the *Order* is not stayed. The Small Operators will not be required to cease operations in the lower 300 MHz of the C-band until December 2025. *See Order* ¶¶ 155, 160. And they will face little difficulty meeting that deadline, because they have no eligible service in the contiguous United States that they need to

migrate. *Stay Denial* ¶ 8 n.28; *see id.* ¶¶ 13, 25; *Order* ¶¶ 241-249. There will be ample time for the Court to decide this case long before the Small Operators are directly affected by anything in the *Order*.[3]

2. The Small Operators' theory of competitive injury is equally unavailing. If eligible satellite operators begin to incur costs toward new satellites and seek repayment, but the *Order* is later vacated, the Small Operators speculate that those other operators "will claim that their bounty is irrevocable" (Mot. 24), and allowing them to retain any payments toward satellites (or any accelerated relocation payments) would allegedly afford those operators a competitive advantage. That theory fails on several levels.

First, no such harm is imminent because *no* relocation payments are expected to be disbursed until a year or more from now, and accelerated relocation payments and payments toward new satellite costs will likely take even longer. *See Stay Denial* ¶ 8. Because these payments will be made by the new terrestrial licensees, "[r]eimbursement of relocation costs * * * may begin only once the auction is complete, new licenses are issued, and new licensees make payments to the Relocation Payment Clearinghouse." *Ibid.* (citing *Order* ¶¶ 263-264). The auction

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[3] To the extent the Small Operators contend that the potential future effects of the *Order* are creating difficulty for their business plans now (Mot. 26), a stay pending review would provide no relief, since the prospect that the *Order* will be upheld will persist until the Court ultimately rules on the merits. *Stay Denial* ¶ 12 n.56.

is currently scheduled to begin in December, and after the auction is completed there are multiple additional steps that must take place before any new licenses are issued. Based on recent comparable auctions, in which those additional steps have taken six to nine months, new licenses will not likely be awarded—and no payments will begin—until between July and October 2021. *Id.* ¶ 8 & n.33.

Moreover, the particular payments that underlie the Small Operators' theory of competitive harm—accelerated relocation payments and reimbursement of new satellite costs—will likely take even longer. No acceleration payments will be due until satellite operators fulfill the first acceleration deadline, which is not until December 2021.[4] *Stay Denial* ¶ 8. New satellites, meanwhile, will not be needed until the second acceleration deadline in December 2023, and "relocation costs related to new satellites are likely to require complex cost allocations that may take longer to review and process" for reimbursement. *Id.* ¶ 8 & nn.34-35. Because "no payments are likely to be disbursed for a year or more," and the particular payments the Small Operators object to are likely to be made even later, the Court will have ample time to decide this case before any purported harm occurs. *Id.* ¶ 11. And if there were any doubt on that score, the Court could simply grant the Small Operators' request for expedited briefing.

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[4] The Small Operators speculate (Mot. 27) that satellite operators might meet the acceleration deadlines earlier, but the record reflects that these deadlines are already as aggressive as possible, *see Order* ¶¶ 157, 165, and the Small Operators offer no reason to think satellite operators could or will move faster.

Second, the Small Operators do not explain—and it is not at all evident—how other satellite operators could seek or retain relocation payments if the *Order* were vacated. *Stay Denial* ¶ 9 n.38. After all, the requirement that new licensees pay for eligible satellite operators' relocation costs and any accelerated relocation payments comes from the *Order*, so if it were vacated, satellite operators would have no basis to seek these payments, and there would be no new licensees to pay them. And even if some early payments were disbursed before the Court ruled, the new licensees who funded these payments would doubtless seek their return. *Cf. United Gas Improvement Co. v. Callery Props., Inc.*, 382 U.S. 223, 229 (1965) ("An agency, like a court, can undo what is wrongfully done by virtue of its order."); *Stay Denial* ¶ 9 & n.39. At the least, this issue—whether, if the Small Operators were to prevail on the merits, the Court should vacate or let stand the portion of the *Order* authorizing relocation payments—is one the Court can address when it rules on the merits, not an issue that requires a stay to preserve the Court's ability to provide relief later.

3. The Small Operators briefly contend (Mot. 7, 9-10) that they could suffer "harmful interference caused by new terrestrial licensees." But the Small Operators do not have any meaningful U.S. business to interfere with, *see infra* nn.6-8, and new licensees will not commence service until after incumbents complete "all necessary relocation," *Order* ¶ 179 & n.475. And if the Small Operators prevail in overturning the *Order*, the spectrum will no longer be allocated for terrestrial use

and the new terrestrial licenses would no longer be valid. *Stay Denial* ¶ 10 n.44. The Commission has unwound auctions in response to judicial decisions in the past, *id.* ¶ 10 & n.45, or "the Court could order the Commission to rescind the new licenses," *id.* ¶ 10; *see FCC v. Radiofone, Inc.*, 516 U.S. 1301, 1301 (1995) (Stevens, J., in chambers) ("[A]llowing the national auction to go forward will not defeat the power of the Court of Appeals to grant appropriate relief in the event that [movants] prevail[] on the merits."), *mot. to vacate denied*, 516 U.S. 938 (1995). And if the *Order* is upheld, applications for new earth stations with interference protection can be submitted once the transition is complete. *See Order* ¶ 151.

4. In the end, the Small Operators' real objection appears not to be to the migration and reallocation of spectrum—which they supported during the administrative proceedings below, *see supra* note 1—but instead that they want financial compensation for the modification of their licenses. But "recoverable economic harm does not warrant the issuance of a stay," because the Small Operators can always be made whole later if they prevail. *Wisc. Gas*, 758 F.2d at 675; *see also Va. Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958) ("The possibility that * * * corrective relief will be available at a later date * * * weighs heavily against a claim of irreparable harm."). And the Small Operators have not shown that it would be infeasible for them to obtain relief at that time, because if they prevail in challenging the Commission's compensation scheme, the

Commission can adopt a revised framework that provides them with compensation. *Stay Denial* ¶ 10.[5]

II. THE SMALL OPERATORS ARE UNLIKELY TO PREVAIL.

Turning to the merits, the Small Operators face a "daunting" task to overcome the "deferential standard of review" that applies to the Commission's spectrum-management decisions. *NTCH, Inc. v. FCC*, 950 F.3d 871, 880 (D.C. Cir. 2020). Title III of the Communications Act "endow[s] the Commission with 'expansive powers' and a 'comprehensive mandate to "encourage the larger and more effective use of radio in the public interest."'" *Cellco P'ship v. FCC*, 700 F.3d 534, 542 (D.C. Cir. 2012) (quoting *NBC v. United States*, 319 U.S. 190, 219 (1943), quoting in turn 47 U.S.C. § 303(g)). Thus, when "the Commission is 'fostering innovative methods of exploiting the spectrum,' it 'functions as a policymaker' and is 'accorded the greatest deference by a reviewing court.'" *Mobile Relay Assocs. v. FCC*, 457 F.3d 1, 8 (D.C. Cir. 2006) (quoting *Teledesic LLC v. FCC*, 275 F.3d 75, 84 (D.C. Cir. 2001)).

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[5] The Small Operators speculate that new licensees "will not agree to pay * * * to compensate the[m]" (Mot. 24), but the *Order* indicates that "new licensees are responsible for any unanticipated funding requirements." *Stay Denial* ¶ 10. Auction bidders assume any risk that their payment obligations may be affected by this litigation—just as auction bidders inevitably assume any number of risks, both known and unknown. *See Order* ¶ 205 (winning bidders "will be responsible for the entire allowed cost of relocation—even to the extent that those costs exceed the estimated range"). Notably, moreover, the alternative compensation scheme advocated by the Small Operators "would *reduce*, not increase, new licensees' total payment obligations," *Stay Denial* ¶ 10 n.42, so there would be no basis for new licensees to oppose it. The Small Operators acknowledge these statements (Mot. 28), yet refuse to take the agency's orders at their word.

As relevant here, the Communications Act gives the Commission "'broad power to modify licenses' if those modifications 'serve the public interest, convenience, and necessity." *NTCH*, 950 F.3d at 882 (quoting *Cal. Metro Mobile Commc'ns, Inc. v. FCC*, 365 F.3d 38, 45 (D.C. Cir. 2004)). The Commission's "'judgments on the public interest are entitled to substantial judicial deference,'" and courts ordinarily will not "second-guess the Commission's decision." *Id.* at 881; *see FCC v. WNCN Listeners Guild*, 450 U.S. 582, 596 (1981). Similarly, the Commission's "predictive judgments" about "the most efficient and quickest path to enabling flexible terrestrial use" of spectrum "'are entitled to particularly deferential review.'" *NTCH*, 950 F.3d. at 881 (quoting *Earthlink, Inc. v. FCC*, 462 F.3d 1, 12 (D.C. Cir. 2006)).

A. The Commission Reasonably Exercised Its Power To Modify Licenses.

1. Section 316 of the Communications Act, 47 U.S.C. § 316, empowers the Commission to "modif[y]" any license "if in the judgment of the Commission, such action will promote the public interest, convenience, and necessity." It is well established that this authority allows the Commission to migrate licensees from one spectrum range to another, at least when licensees are able to continue providing comparable service in the new spectrum range and are reimbursed for their relocation costs. *Order* ¶¶ 129-131, 135-140; *see, e.g., Cmty. Tel., Inc. v. FCC*, 216 F.3d 1133, 1139-41 (D.C. Cir. 2000). That's what the Commission did here: The

Order directs licensees to migrate their operations in the lower 300 MHz of the C-band to the upper 200 MHz, where the record reflects they will be able to continue providing comparable service through the use of more efficient technology, and it ensures that licensees will be reimbursed for their relocation costs.

The Small Operators argue (Mot. 9) that because the Order "entirely eliminates" their right to "transmit in 60% of the C-band," their licenses have been "fundamentally change[d]," not simply modified. But as the Commission explained, a change is not fundamental if "the licensee can still provide the same basic service under the modified license that it could prior to the modification." *Order* ¶ 138; *see also id.* ¶ 135 ("the primary consideration * * * is whether the licensee will be able to continue providing substantially the same service after the modification"). And nothing in Section 316 or its use of the word "modif[y]" requires that licensees must receive "new rights" (Mot. 11) when their licenses are modified.

Here, the Commission found—and the record confirms—that the Small Operators "will be able not only to maintain their current level of service * * * but to potentially serve new clients" using the upper 200 MHz of spectrum. *Order* ¶ 196; *accord id.* ¶ 32 (satellite operators "will be able to deliver the equivalent quality of service and even expand that service in the remaining 200 megahertz"); *id.* ¶ 139 (200 MHz "is sufficient to at least serve the licensees' existing customers * * * and may provide flexibility to obtain additional customers"). As the Commission noted, "all incumbent [satellite] operators"—as well as their major customers—"have

agreed that the upper 200 megahertz portion of the band provides a sufficient amount of spectrum to support their services." *Order* ¶ 130. Indeed, the Small Operators themselves represented that all satellite operators will be able to fully migrate their services and clear the lower 300 MHz "through the use of non-proprietary, readily available compression technology." Small Operators 9/13/19 Letter at 1; *see supra* note 1. Because satellite operators will remain able to "provide essentially the same services" after the transition, the *Order* is not "a fundamental change to the terms of" their licenses, and instead "can reasonably be considered [a] modification[] of existing licenses." *Cmty. Tel.*, 216 F.3d at 1141.

The record confirms that the Small Operators will not be impaired by the transition to the upper 200 MHz. The three Small Operators—Hispasat,[6] ABS,[7] and

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[6] Hispasat told the Commission "that all of the Hispasat satellite's C-band capacity was contracted for non-United States services through the end of 2019." *Order* ¶ 243; *accord id.* ¶ 243 n.632 ("[N]othing in [Hispasat's] filing demonstrates provision of service to the contiguous United States."); *see also id.* ¶¶ 242-246. After the Commission scheduled a final vote on the *Order*, Hispasat claimed to discover that it provided service to "nine earth stations * * * operated by an evangelical church that did not register its earth stations with the Commission." *Id.* ¶ 242. But incumbent earth stations "must have been registered * * * to qualify for relocation." *Ibid.*; *see also id.* ¶ 244 (the Commission "required existing earth stations to register" to avoid "th[is] type of last-minute gamesmanship"). The Commission also found that this last-minute claim was not credible because the supposed earth stations are outside the footprint where Hispasat's satellite is capable of providing C-band service, *id.* ¶ 244, and Hispasat has not provided "any further documentation," *id.* ¶ 243.

[7] ABS's sole satellite with any ability to reach the United States "is positioned just south of the Ivory Coast of northwest Africa," where it primarily targets "the South Atlantic Ocean, Africa, the Middle East, Europe, and South America," and

ARSAT[8]—have *no* eligible C-band business in the contiguous United States and no reasonable prospect of developing substantial U.S. business with their current satellites. *See Stay Denial* ¶¶ 13, 25; *Order* ¶¶ 139, 241-249. The Small Operators "provided no evidence to rebut these claims." *Order* ¶ 196. They now concede (Mot. 14) that they "have few *existing* customers," yet contend that "the Commission seems blind to the fact that businesses grow." But they failed before the Commission to "demonstrate how they plan to expand their businesses in a market that is declining,"[9] *Order* ¶ 196, and in all events they will retain any ability to serve future customers using the upper 200 MHz of spectrum. *Id.* ¶¶ 32, 139, 196. Given "the failure of the Small Satellite Operators to demonstrate any significant past, present, or future base of earth station customers" in the United States, the Commission

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is capable of providing only limited "edge coverage to portions of the Eastern United States." *Order* ¶ 248; *see also Stay Denial* ¶ 25 n.125 (explaining that this satellite's "ability to provide service to the United States * * * is significantly limited in both geography and signal strength"). That satellite "was operational for a year-and-a-half before [ABS] sought U.S. market access," and once it did receive authorization to construct an earth station in eastern New York, it never built the station. *Order* ¶ 248.

8 "Likewise, there is no evidence that" ARSAT (referred to in the order as Empresa)—which never responded to the Commission's information requests—"provides any service to the contiguous United States." *Order* ¶¶ 11 n.30, 135 n.382, 241 n.625.

9 The Small Operators now insist they will thrive because of (rather than despite) their lack of a "traditional * * * business model" (Mot. 13-14), but they still fail to show how they will attract significant business in a market that's in decline and where their satellite coverage and capacity is "significantly limited," *Stay Denial* ¶ 25 & n.125, compared to their competitors.

reasonably found that "any opportunities they might be losing * * * are, on a practical level, *de minimis*." *Id.* ¶ 139.

2. There is likewise no basis for the Small Operators' argument (Mot. 10-11, 15-16) that they must be financially compensated for their lost right to operate in the lower 300 MHz going forward.

To begin with, Section 316 allows the Commission to modify licenses if it determines that "such action will promote the public interest, convenience, and necessity," without imposing any compensation requirement. 47 U.S.C. § 316(a)(1); *see Cal. Metro*, 365 F.3d at 45 ("the Commission need only find that the proposed modification serves the public interest"). The purpose of relocation payments and accelerated relocation payments established by the *Order* is to reimburse licensees for actions they must take to comply with the license modification or to incentivize licensees to expedite those actions—not to compensate them for reduction in spectrum itself. *Id.* ¶¶ 196 n.526, 214, 241, 246.

Nor, in any event, does a hypothetical possibility that the Small Operators one day might deploy additional facilities and develop enough business to need additional spectrum entitle them to compensation. Contrary to the Small Operators' position (Mot. 11, 13), a license has never conferred a vested right to potential uses of spectrum that the licensee has not developed. *See, e.g.*, *Mobile Relay*, 457 F.3d at 10-12 (rejecting argument by a licensee that it was entitled to compensation because changes to the 800 MHz band deprived it of the right to later convert its high-site

dispatch system to a more lucrative cellular system); *Celtronix Telemetry, Inc. v. FCC*, 272 F.3d 585 (D.C. Cir. 2001) (rejecting a similar vested-rights argument); *see also* 47 U.S.C. § 309(j)(4)(B) (directing the Commission "to prevent stockpiling or warehousing of spectrum by licensees"). Indeed, this Court has warned that "to conclude otherwise would hamstring" the FCC's "spectrum management." *Mobile Relay*, 457 F.3d at 11.

The Small Operators are likewise incorrect in claiming (Mot. 15-18) that the Commission departed unreasonably from its past approach to migrating licensees to new spectrum ranges, and that they therefore lacked fair notice the Commission might do so. On the contrary, the Commission explained at length how its approach here comports with its longstanding *Emerging Technologies* framework for spectrum transitions. *See*, *e.g.*, *Order* ¶¶ 181-191, 222-224, 240. In past transitions, the Commission has authorized premium payments or superior facilities "'as an incentive to the incumbent to relocate quickly,'" as it did here. *Id.* ¶ 184. And when it has expanded displaced incumbents' rights, it has done so to ensure they will be able to continue providing comparable or expanded service in their new spectrum ranges—not simply as compensation for lost spectrum access rights. *Cf. id.* ¶ 40 (explaining that the Commission has expanded incumbents' rights to enable them to provide new or expanded services, but not to simply provide them financial benefit). Thus, contrary to the Small Operators' claims, "the Commission has consistently limited reimbursement to those costs directly tied to relocation," and has not

provided compensation when modifying licenses for abstract spectrum access rights or for "lost revenues" or "opportunity costs." *Id.* ¶¶ 196 & n.526, 240 & n.622.[10]

In any event, any claim to compensation by the Small Operators is misplaced here, because they did not show that they were likely to attract substantial new business that they cannot continue to serve with their remaining spectrum. Because the Small Operators "will remain capable of providing the same services they provide today throughout and after the transition," there is no basis for any award of "lost revenues." *Order* ¶¶ 207-208 & n.561; *accord id.* ¶ 249 (no compensation based "on an assumption of future use of currently unused capacity that far exceeds reasonably foreseeable demand—the loss of capacity that has not been used, is not used, and not likely to ever be used given the significant unused capacity that remains available"). The Small Operators have demonstrated no need for more spectrum, and "[c]ompensating licensees for such speculative claims of future loss would be inconsistent with established Commission precedent and would not serve the public interest." *Id.* ¶ 196.

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[10] *See also Order* ¶ 140 n.395 (no compensation "for hypothetical customer loss"); *id.* ¶¶ 237-239 (no compensation for "stranded capacity"); *id.* ¶ 241 (no "premium" payments unrelated to need to relocate or accommodate existing service); *id.* ¶ 249 (no compensation for "an assumption of future use of * * * capacity that has not been used"). While the Commission has sometimes reallocated spectrum through a reverse auction rather than through license modifications, it explained why it couldn't do that here. *See id.* ¶ 44.

B. The Commission Reasonably Explained Its Policy Decisions Concerning Relocation Payments And Accelerated Relocation Payments.

1. The Commission reasonably denied the Small Operators' demand (Mot. 20-21) to categorically bar reimbursement of satellite-related costs. Consistent with this Court's decisions and longstanding FCC precedent, *see Order* ¶¶ 181-183, the Commission required new licensees "to reimburse eligible [satellite] operators for their actual relocation costs, as long as they are not unreasonable, associated with" the transition. *Id.* ¶ 199. The Commission further acknowledged that "procuring and launching new satellites may be reasonably necessary" when needed to "support more intensive use of the [remaining 200 MHz] after the transition." *Ibid.* Although some commenters represented that "as many as 10 new satellites may be needed," the Commission "express[ed] no opinion regarding the number of such new satellites that may be reasonably necessary." *Id.* ¶ 199 n.534. And it cautioned that reimbursement will cover only "reasonable," "prudent," and "efficient" costs that are "necessitated by the relocation" to "continue * * * provid[ing] substantially the same service," and will not cover "gold-plat[ing]" or "additional functionalities * * * that are not needed to facilitate the swift transition." *Id.* ¶¶ 194-195.

The Small Operators identify no sound reason to allow payment of other necessary relocation costs but exclude satellite-related costs. They provide no concrete support for their claim that operators will seek reimbursement for satellites that "would have been launched even without the relocation" (Mot. 20), and the

record instead demonstrates that operators' satellite needs "changed substantially as a result of" the *Order*. *See Stay Denial* ¶ 23 & nn.113-114. Even if the satellites at issue might have been needed one day in the future, moreover, the transition is what makes them needed *now*. And while comparable new satellites might hold greater value than older satellites they are replacing, this Court has upheld "such a result as the legitimate byproduct of a process whereby [incumbents] are uprooted against their will to accommodate newer technologies." *Teledesic*, 275 F.3d at 86; *see also id.* at 85 (holding that the "policy goals" of providing full reimbursement for comparable replacement facilities "are reasonable and do not, on their face, result in windfalls"). Finally, even if satellite operators were to *seek* reimbursement for unnecessary or gold-plated satellites, that does not mean the Commission would *allow* such payments. *See id.* at 85-86; *Order* ¶¶ 194-195.

2. The Commission also reasonably explained its decisions concerning the purpose and amount of the accelerated relocation payments. The Commission has long provided for new licensees "to make accelerated relocation payments—payments designed to expedite a relocation of incumbents from a band." *Order* ¶ 184. These payments "promote the rapid introduction" of new spectrum "by leveraging the technical and operational knowledge of [satellite] operators, aligning their incentives to achieve a timely transition, and enabling that transition to begin as quickly as possible." *Id.* ¶ 169. Although a broad range of commenters—including the Small Operators themselves (Mot. 21-22)—agreed that the Commission

should offer accelerated relocation payments, *see Order* ¶¶ 189-90, they "proposed a wide range of values" of up to $38.5 billion, *id.* ¶ 213.

The Commission proceeded to identify an "upper bound" of the new licensees' willingness to pay, which it estimated as roughly $10.52 billion. *Order* ¶¶ 217-218. Beneath that upper limit, however, the Commission recognized that selecting an amount "large enough to provide an effective incentive" is "[u]ltimately * * * a line-drawing exercise." *Id.* ¶ 219. Recognizing "the complex policy considerations at issue" and that "[t]here is no precise science" that can point to a right answer, the Commission found that "a $9.7 billion accelerated relocation payment strikes the appropriate balance between these considerations and the amounts advocated in the record." *Id.* ¶¶ 219-220, 226. It explained that choosing this amount near the upper end of the range "maximizes the possibility that such a payment will be sufficient to incent early clearing," while still providing close to a "'billion-dollar bump'" in additional proceeds to the U.S. Treasury if eligible satellite operators agree to accelerated relocation (as they have all now done). *Id.* ¶¶ 219 n.580, 226.

The Small Operators argue (Mot. 21) that the Commission should have allotted a smaller amount to accelerated relocation payments.[11] But the Commission

[11] The Small Operators emphasize that other satellite operators had already proposed transitioning in under 36 months (Mot. 8, 19), but they neglect to mention that the proposal assumed total compensation of *$21.5 to $38.5 billion*. *See Order* ¶ 213. They also attempt to fault the Commission for not ascertaining "what operators 'might accept'" (Mot. 22), but the Commission in fact explained

explained that this would have created greater "risk that such a payment w[ould] be insufficient to incent earlier clearing," and the Commission reasonably chose to "minimize[] that risk" rather than take such a "gamble." *Order* ¶ 226. The Small Operators now insist that the Commission must offer some more concrete basis for its judgment (Mot. 22-23), but courts do not "require 'complete factual support' in the record when the agency's ultimate conclusions necessarily rest on 'judgment and prediction rather than pure factual determinations.'" *Telocator Network of Am. v. FCC*, 691 F.2d 525, 538 (D.C. Cir. 1982) (quoting *WNCN Listeners Guild*, 450 U.S. at 594-95). Here, the agency reasonably exercised its best judgment to select an amount within the range supported by the evidence available.

Finally, the Small Operators are simply incorrect (Mot. 19-20) that *Teledesic* requires acceleration payments to be "proportionate" to relocation costs. In that case, the Commission required new licensees and incumbents to try to negotiate their own transition plan before eventually allowing a new licensee to involuntarily displace the incumbent. 275 F.3d at 81. The Commission—not the court—looked to proportionality "as a check against holdout problems created by mandatory good-faith negotiations." *Order* ¶ 224. Here, by contrast, there is no possible holdout problem because the Commission itself has set the amount of accelerated relocation

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that it could not do so because satellite operators "have had every incentive not to disclose precisely how high an accelerated relocation payment must be for them to accept it." *Order* ¶ 226.

payments, rather than leaving it to be privately negotiated. *Cf. id.* ¶ 186 (explaining why a negotiation-based approach would be ineffective). The Commission thus fully explained in the *Order* that because this transition does not present the same holdout problem, it was free to "choose a different approach." *Id.* ¶ 224; *see also Teledesic*, 275 F.3d at 84 (deferring to the Commission's determinations on "how best to strike [a] balance [on matters] involv[ing] both technology and economics").

III. THE PUBLIC INTEREST AND THE EQUITIES WEIGH AGAINST A STAY.

Finally, the record reflects that "the harm to the public caused by a nationwide postponement of the auction would outweigh the possible harm to" the Small Operators. *Radiofone*, 516 U.S. at 1301-02 (vacating stay of an FCC auction); *see also Nken v. Holder*, 556 U.S. 418, 427 (2009) (a stay "'is not a matter of right, even if irreparable injury might otherwise result'"). The public interest and the equities therefore tilt sharply against the Small Operators' request for a stay.

1. As this Court has recognized, "the use of wireless networks in the United States is skyrocketing," and the country "faces a major challenge to ensure that the speed, capacity, and accessibility of our wireless networks keeps pace with these demands in the years ahead." *Nat'l Ass'n of Broad. v. FCC*, 789 F.3d 165, 169 (D.C. Cir. 2015) (internal quotation marks omitted). The Commission determined that there is a pressing public need to make new spectrum available expeditiously to support the deployment of 5G wireless networks. *See, e.g.*, *Order* ¶¶ 3, 28, 154, 162, 185; *see also* 47 U.S.C. § 309(j)(3)(A) (directing the Commission to promote "rapid

deployment of new technologies, products, and services for the benefit of the public * * * without administrative or judicial delays"). The Commission's actions are likewise essential to ensure "American leadership in the 5G ecosystem," *Order* ¶¶ 3, 185, where there currently is a global race between the United States and China.

"Speed is essential" to fulfilling these goals. *Stay Denial* ¶ 27. In numerous filings before the Commission, "[s]takeholders 'repeatedly emphasized the need to make C-band spectrum available for [terrestrial] use as quickly as possible.'" *Ibid.* (emphasis omitted) (quoting *Order* ¶ 28). And "[t]he Commission agreed, finding that 'delaying the transition of this spectrum longer than necessary will have significant negative effects for the American consumer and American leadership in 5G.'" *Ibid.* (quoting *Order* ¶ 162). That conclusion is supported by multiple studies in the record "estimat[ing] that one year of delay in transitioning the C-band spectrum would reduce the spectrum's value between seven and 11 percent, and reduce consumer welfare by $15 billion."[12] *Id.* ¶ 28; *see Order* ¶¶ 185, 190 (discussing studies finding "significant public interest benefits" to clearing C-band spectrum more quickly). By comparison, the Small Operators claim (Mot. 29) they will be able to save the public at most "$8-9 billion" even if they prevail in full.

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[12] The Small Operators claim (Mot. 30) that the Commission valued the spectrum at a lesser (multibillion dollar) amount, but the discussion it points to estimated only the direct economic value to new terrestrial licensees, *see Order* ¶¶ 215-218, not total consumer welfare gains throughout the economy.

The transition process "is already underway," *Stay Denial* ¶ 27, and although no relocation payments will be made for at least a year or more, the complexity of the transition process means that many steps must begin now so that all parties are in a position to complete the transition on schedule. As the *Order* explains, the transition is "an enormous and complex task" that requires "communications and coordination among * * * thousands of satellite and earth station stakeholders" and "'will involve a painstakingly choreographed set of precise steps.'" *Order* ¶¶ 159, 165, 227. "[T]o meet the clearing deadlines set by the Commission and, in so doing, maximize the economic and social benefits of providing spectrum for next generation wireless services, [satellite] operators will need to begin the clearing process immediately." *Id.* ¶ 186.

2. A stay is also unwarranted because it would inflict significant harm on other parties. *See, e.g.*, *Sherley v. Sebelius*, 644 F.3d 388, 398-99 (D.C. Cir. 2011) (interim relief improper where it would result in "certain and substantial" hardship to other parties).

A wide array of other stakeholders urged the Commission to deny the Small Operators' administrative stay request because delay would cause substantial hardship to them and their customers. Satellite operators represented to the Commission that they "'ha[ve] already undertaken substantial planning and other capital- and time-intensive activities'" to meet the accelerated relocation deadlines, and that a stay "'would bring these activities to a halt.'" *Stay Denial* ¶ 27-28 &

nn.137-138. Terrestrial wireless companies similarly represented that they "'have structured their contractual and financial arrangements in anticipation for the upcoming auction,'" and that a stay would substantially disrupt these plans. *Id.* ¶ 28. Wireless equipment manufacturers likewise rely on the transition schedule when developing new equipment and devices timed to make use of anticipated new spectrum. *Ibid.*

Thus, many parties have *already* taken significant actions in reliance on the *Order*. Any stay "'would upend these plans, causing tremendous uncertainty and chilling investment.'" *Stay Denial* ¶ 28. And the downstream effects of any delay in bringing new spectrum to market—slowing the deployment of next-generation wireless networks and the new products and services these networks will support, and imperiling American leadership in 5G, *see Order* ¶ 3—would be felt acutely by wireless consumers and the entire American economy.

CONCLUSION

The Small Operators' motion for stay pending review should be denied.

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Respectfully submitted,

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