ORAL ARGUMENT NOT YET SCHEDULED
No. 20-1190 (consolidated with Case Nos. 20-1272, 20-1274, 20-1284, 20-1216 & 20-1281)

IN THE

United States Court of Appeals for the District of Columbia Circuit

ASSOCIATION OF PUBLIC-SAFETY COMMUNICATIONS OFFICIALS INTERNATIONAL, INC.,
Petitioner,
v.
FEDERAL COMMUNICATIONS COMMISSION
Respondent,

On Appeal of an Order of the
Federal Communications Commission

REPLY IN SUPPORT OF EMERGENCY MOTION FOR STAY PENDING APPEAL AND, IN THE ALTNERNATIVE, EXPEDITED CONSIDERATION

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INTRODUCTION

The Commission has a statutory mandate to protect public safety. It failed to honor that mandate, and that failure is likely to endanger the nation's public safety communications systems. In its opposition, the Commission continues to ignore the public safety impact of allowing unlicensed devices in the 6 GHz band.

First, the Commission attempts to diminish its statutory duty to perform "the focused and specific study of public safety implications that the law requires." *Mozilla Corp. v. FCC*, 940 F.3d 1, 63 (D.C. Cir. 2019). To the extent the Commission can claim it acknowledged any public safety organization's concerns, these acknowledgements generally occurred where public safety issues overlapped with other incumbents' concerns, and primarily related to preventing interference from *standard-power* unlicensed devices, not the *unregistered low-power devices* that are the subject of APCO's motion. *See* Opp. 22; Inv. 14–15. The Commission makes several *post hoc* rationalizations that its findings "apply with full force to APCO's members," its conclusions "adequately address[] APCO's… public safety concerns," and it "affirmatively adopted rules" to prevent harmful interference with public safety services. Opp. 21–24. But the Order's analysis was entirely generic to the whole class of incumbents and not specific to public safety. The Commission's arguments are too little, too late.

Second, the Commission tries to move the goalposts and establish an extreme standard of irreparable harm that is legally baseless. It would essentially make it impossible to demonstrate that irreparable harm is certain and imminent until *after* the harm has occurred—a significant risk since public safety emergencies arise in unpredictable and unknowable ways. This would contradict the idea that injunctive relief can prevent irreparable harm *before* it occurs and prevent public safety from doing its job.

Third, a stay remains in the public interest. The opposition alleges that expanding unlicensed spectrum is necessary to ease congestion and "usher in a new generation of faster, better-performing Wi-Fi," and makes vague claims of "exploding demand," without providing evidence that the preexisting amount of unlicensed spectrum pre-Order would be insufficient for the duration of this litigation. Opp. 2; Inv. 20. The Commission has made no case that more unlicensed spectrum must be made available before the Court can hear the case on its full merits or disagreed that the unlicensed spectrum already available in the Commission's inventory was sufficient for these needs. And if 6 GHz deployments are indeed imminent enough that a stay would prevent companies from receiving the benefits of investments they have made, the Commission has effectively conceded that sufficient devices will exist to cause irreparable harm. In any case, public safety services are a paramount public interest under the stay

factors. Public safety agencies across the country depend on the 6 GHz band, and they already face a substantial challenge in responding to the COVID-19 pandemic (among other major disasters including unprecedented wildfires and hurricanes) before unlicensed devices impede emergency response. A stay of the Order is necessary to protect public safety.[1]

ARGUMENT

I. APCO REMAINS LIKELY TO PREVAIL ON THE MERITS.

A. The Commission Cannot Rationalize Its Failure to Analyze the Effect of Its Order on Public Safety.

The Commission alleges that *Mozilla* is "inapt." Opp. 24. That is wrong. *Mozilla* imposes a procedural and a substantive requirement: "the [Commission's] decisions must take into account its duty to protect the public." *Mozilla*, 940 F.3d

[1] APCO disagrees with the implication that its Motion was not filed with urgency. *See* Opp. 9 ("Now, several months after the Order was adopted and published. . . ."); Inv. 2. The Order was published in the Federal Register on May 26, 2020. APCO filed a petition for stay with the Commission two days later. More than two months later, the Commission denied APCO's petition on August 13 after APCO inquired as to its status. The Commission's Office of Engineering and Technology published draft guidance the following day for manufacturers seeking to certify low-power unlicensed 6 GHz devices. Once this guidance is final, the Commission is expected to begin certifying devices for sale. *See* Denial Order ¶ 31; *Commission Office of Engineering and Technology Laboratory Division Knowledge Database* ("At the end of the comment period, revised documents may be published, withdrawn or modified and submitted for additional review."), *available at* https://bit.ly/32FSOk5. Following these developments, APCO moved expeditiously to file an emergency motion for stay with this Court. At every stage of this process, APCO has acted with urgency to protect its members' affected public safety communications.

at 60 (internal quotations omitted). Much like in *Mozilla*, numerous public safety agencies warned the Commission of the dire "implications for public safety" stemming from the new rules and how its decisions could "imperil the ability . . . to communicate during a crisis," but the Commission disregarded its duty to analyze the impact of its order on public safety. *Id.* at 59–60, 63. And again like in *Mozilla*, the Commission attempts to rely on "off-limits *post hoc* rationalization" to "supplement their record comments." *Id.* at 61–62.

Although the opposition attempts to retrofit the Order with a public safety analysis, the Commission's so-called "robust attention" to public safety concerns is simply a list of examples where public safety comments overlapped with those of other incumbent licensees. Opp. 20; Inv. 15. Belatedly arguing that public safety agencies' concerns were "redundant of the arguments made" by other commenters, as the Commission does here, is precisely the "facially inadequate" reasoning that fails to satisfy the Commission's statutory requirement. *Mozilla*, 940 F.3d at 62. The Commission's argument that public safety links are "typical[]" of other fixed microwave links misses the fact that when public safety is involved, lives are at stake. Opp. 21; *see also Mozilla*, 940 F.3d at 62. Thus, the Commission failed to comply with a statutory requirement to consider public safety. *See Nuvio Corp. v. FCC*, 473 F.3d 302, 307–08 (D.C. Cir. 2006).

Similarly, the Commission misrepresents "APCO's influence on the Order." Opp. 22. Acknowledging some comments in the record about public safety concerns does not mean the Commission has fully analyzed the "multi-faceted public safety concerns" involved. *See Mozilla*, 940 F.3d at 63. In fact, the Commission never disputes that it omitted several elements essential to an analysis of public safety implications, such as an estimate of how many public safety agencies rely on the 6 GHz band for life-safety communications, how harmful interference to these agencies' systems will impact public safety operations, or how frequently and where harmful interference from the new devices will disrupt public safety systems. *See* Mot. 11. Emblematic of the Commission's failure to analyze public safety or address the specific concerns APCO raised, neither the Order nor any Commission statement since has addressed the fact that the Order effectively strips public safety agencies of interference protection while operating microwave links under an emergency special temporary authority, an important public safety use of the 6 GHz band, particularly in the wake of major disasters. *See* Mot. 10.

B. The Commission Mischaracterizes the Adequacy of Its Safeguards.

As an initial matter, Commission rules establish a broad definition of impermissible harm for "safety services," namely operations that "endanger" such services. 47 C.F.R. § 15.3(m). "Endanger," in turn means, the "act or an instance

of putting someone or something in danger; exposure to peril or harm." Black's Law Dictionary (11th ed. 2019). The Commission's reliance on an outdated Webster's Dictionary from 1981 to argue that "operations are not endangered unless harm is sufficiently likely," continues a pattern of willful blindness to the impact of the regulatory changes on public safety. Opp. 12.

The Commission argues that new devices like Wi-Fi routers operating on the same channels used by public safety systems will not endanger these systems because the Order limited power levels, required a contention-based protocol, and limited access points to indoor locations. *See* Opp. 6–7. The Commission omits critical information.

First, even one device operating at the power level permitted by the Commission's rules can disrupt public safety communications. *See* Anderson Decl. ¶ 8. APCO cited evidence from multiple real-world field tests that were conducted after the Order was adopted. *See* Mot. 17. These real-world tests should be given significant weight because, as the Commission admits, the Order's analysis of the potential for interference was not based on field testing. Opp. 17 n.5.[2]

[2] The Commission's explanation that it "almost never" conducts field tests highlights the fact that it sometimes does conduct field tests prior to adopting new rules. Opp. 17 n.5. The Commission's decision to forego field testing when implementing a novel spectrum sharing approach that threatens public safety

Second, a contention-based protocol will not protect public safety systems. The opposition glosses over the fact that these protocols are intended to ensure devices like Wi-Fi routers avoid transmitting when they recognize a signal from a competing Wi-Fi router, not a fixed service microwave link. The use of contention-based protocols might reduce access point activity but will not ensure that unlicensed devices avoid transmitting when doing so would interfere with a public safety signal. *See* Order ¶ 141 n.374 ("Although indoor unlicensed devices may not always be able to detect the presence of microwave signals, the contention-based protocol requirement will still help prevent interference by ensuring that unlicensed devices do not transmit continuously.").

Third, the Commission's assertion that it "limited [these] access points to indoor locations" is misleading. Opp. 6. While the Order decreed that the devices should not operate on battery power and should be labeled for indoor use only, the Commission's draft guidance for manufacturers indicates their certified devices may in fact operate on battery power and use e-labelling, meaning the device may electronically display the required regulatory information in lieu of a physical label.[3] Even if Commission guidance to device makers did not undermine the

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communications, with a record replete with disputed technical findings, remains a mystery.

[3] *Office of Engineering and Technology Draft Guidance for Low-Power Indoor Access Points* at 6 (e-labelling is permitted), 30 (explaining that battery power is allowed but that the user manual must clearly state that the battery is for power

Order, the Commission's interference protections still rely on unsubstantiated hopes that Wi-Fi devices will never be placed on balconies, rooftops, courtyards, or even in a room with an open window.

The Commission does not dispute the Order's failure to establish a method to quickly identify, locate, and eliminate interference when it occurs. In claiming that the Enforcement Bureau can stop harmful interference "once . . . identified," Opp. 19, the Commission ignores the reality that identifying and remedying the source of interference can take days or weeks, *see* Mot. 15 n.4, if it is even possible given the anonymous, sporadic, and bursty nature of Wi-Fi transmissions and the amount of spectrum unlicensed devices will have to operate on. Moreover, nothing about this process will undo the harm caused by interference.

II. THE REMAINING FACTORS SUPPORT A STAY.

A. The Opposition Argues for an Unreasonable Standard for Demonstrating Irreparable Harm.

The Commission argues that a stay is not warranted to prevent irreparable harm because APCO can only speculate about where and when harmful interference to public safety will occur. Opp. 25. The Commission's standard would contradict the purpose of injunctive relief: to prevent irreparable harm from occurring. Accepting this argument, moreover, would establish an unreasonable

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outages and not meant for operating the device outside), *available at* https://bit.ly/3kmc5x8.

hurdle for public safety because the time, place, and duration of emergencies are inherently unpredictable, so it would be nearly impossible to demonstrate that irreparable harm is certain and imminent until *after* the harm has occurred.

The opposition attacks sworn declarations that even one unlicensed device operating near a public safety receiver poses a high risk of disrupting public safety communications on the basis that these concerns are too speculative to warrant a stay. *See* Opp. 26; Inv. 18. Public safety professionals cannot predict when or where emergencies will occur or where Wi-Fi routers will be at a given time. Nobody can. Yet the Commission dismisses such concerns as "entirely speculative that any worst case would materialize." Opp. 26. This is wholly unreasonable and another illustration of the Commission's failure to consider the consequences for public safety. Once the new unlicensed devices are in circulation and causing harmful interference, it will be too late to prevent irreparable harm. And it will be too late to prevent ongoing harm because the Commission did not establish a process to track and recall the devices after they are sold.

The Commission's analysis of whether its rules present a "significant potential" for harmful interference conflates the issues of whether harmful interference will occur and whether it will occur frequently. Opp. 13–14. Even if harmful interference to public safety systems proves infrequent, it will occur and will be far from insignificant. As noted above, the Commission ignores the critical

shortcomings of the measures designed to reduce harmful interference and never says that unlicensed devices will not cause harmful interference to public safety systems.

The Commission also presents incompatible views about the imminence of harm, alternately claiming there is no evidence that deployment of 6 GHz devices will reach a critical threshold by a date that warrants a stay, Opp. 28, and that a stay would harm consumers and businesses nationwide by delaying the delivery of such devices and "delay[ing] companies from receiving the benefit of the investment they have made." Opp. 29–31. The Commission explained in denying APCO's request for an administrative stay that harm is not imminent because devices must be tested pursuant to Commission measurement guidance that was still being developed before they can reach the public. *See* Denial Order ¶ 31. A draft of this guidance was published for public comment the day after the Denial Order was released.[4] This process ends September 25. After that, no Commission rule—and tellingly no commitment by the Commission or the proponents of these new devices—sets a later specific date for these devices to be sold to every household, campus, and business across the country.[5]

[4] *See supra* note 3.

[5] This is why APCO suggests September 25 for a decision on the motion.

B. The Commission's Analysis of the Public Interest Continues to Ignore the Importance of Public Safety.

As with the Order, the Commission's analysis of the public interest fails to consider how the impact on public safety weighs against the potential benefits of additional unlicensed spectrum. Citing unlicensed spectrum and efficiency goals that are far from new, the Commission ignores its statutory responsibility to promote public safety. *See* Opp. 29; *see also* 47 U.S.C. § 151.

The Commission never discussed COVID-19 in the Order, so the pandemic's impact on the need for new unlicensed spectrum is misguided and irrelevant. *See* Opp. 30; *see also Mozilla*, 940 F.3d at 62 (ignoring Commission reasoning for bypassing public safety analysis that was not made in the Order). Again, the Commission demonstrates its failure to consider public safety, maintaining willful ignorance of the pandemic's burden on the public safety community. It has provided no evidence that unlicensed devices or spectrum are unable to handle current needs. Indeed, the statement of Chairman Pai in adopting the Order indicated that unlicensed spectrum is currently sufficient for supporting virtual doctor's appointments simultaneously with streaming video solely for entertainment purposes.[6]

[6] *See* Order 3986 (statement of Chairman Ajit Pai) ("[Wi-Fi] allows Americans with medical issues to have virtual doctor's appointments while those they live with stream *Tiger King* on Netflix.").

CONCLUSION

For these reasons, and those in the motion, the Court should grant APCO's motion for stay pending review. This Court should also order expedited briefing and argument.

Respectfully submitted,

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/s/ Jeffrey S. Cohen
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I certify that on September 18, 2020, the foregoing document was filed via CM/ECF, which caused a true and correct copy of the same to be served on all attorneys registered to receive such notices. I also caused a copy of the foregoing to be served on the following counsel of record and administrative agency by mail:

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