



Perspectives from FSF Scholars
September 12, 2022
Vol. 17, No. 45

**D.C. Circuit Upholds FCC's 5.9 GHz Order Reallocating Spectrum for
Unlicensed Use**

by

Seth L. Cooper *

Federalist Society [Blog](#)
September 12, 2022

On August 12, the U.S. Court of Appeals for the D.C. Circuit upheld the Federal Communications Commission's 5.9 GHz Band Order (2020) that reallocated 45 megahertz (MHz) of spectrum for unlicensed use. In [Intelligent Transportation Society of America v. FCC](#), the D.C. Circuit concluded that the FCC's order did not violate the 1998 Transportation Equity Act for the 21st Century. The decision reinforced the FCC's broad authority in making spectrum allocations and the strong judicial deference accorded to the Commission's predictive judgments about spectrum use.

The Transportation Equity Act directs the Department of Transportation (DOT) to develop a national "intelligent transportation system" for travel safety and efficiency. In 1999, the FCC allocated 75 MHz of spectrum in the 5.9 GHz band for intelligent transportation systems and services such as amateur radio. But in its [5.9 GHz Band Order](#), the Commission repurposed 45

The Free State Foundation
P.O. Box 60680, Potomac, MD 20859
info@freestatefoundation.org
www.freestatefoundation.org

MHz of that allocation for unlicensed uses, such as Wi-Fi. The FCC’s aim was to put the 5.9 GHz band to its best use. The Commission found that, as of 2020, no commercially-marketed vehicles used that spectrum for vehicle safety.

Petitions filed by incumbent users of the 5.9 GHz band claimed that the 5.9 GHz Band Order violated the Transportation Equity Act and therefore was arbitrary and capricious under the Administrative Procedure Act. In an opinion written by Judge Justin Walker, the unanimous three-member D.C. Circuit panel denied the petitioners’ claims.

The D.C. Circuit recognized that the FCC’s “broad authority” over wire and radio communication includes assigning bands of frequencies for spectrum use. The court rejected petitioners’ argument that the Transportation Equity Act transferred away the FCC’s authority over spectrum related to intelligent transportation systems. According to the court, the Act “simply required the FCC to account for the Department of Transportation’s views and the needs of intelligent transportation systems when it does so . . . The FCC did that here.” The court similarly rebuffed the argument that the Act gave the DOT a veto over FCC spectrum allocations, observing that “[i]t is far-fetched to think that Congress would so indirectly strip the FCC of its broad power to manage the spectrum.”

Additionally, the D.C. Circuit concluded that the FCC adequately explained why 30 MHz is sufficient for intelligent transportation systems. The court observed that FCC predictions about future technologies and spectrum use are entitled to “great deference.” And it sided against the petitioners’ argument that the FCC’s judgment should not receive deference because the Commission lacks DOT’s traffic safety expertise. As the court wrote, the Commission “has a statutory duty to allocate the spectrum to its best use . . . And figuring out how much of that spectrum is needed to support a particular activity is exactly what the FCC does.”

[*Intelligent Transportation Society of America v. FCC*](#) is particularly notable in view of the DOT’s public opposition to the 5.9 GHz Band Order. In recent years, other executive agencies also have clashed with the Commission over its spectrum allocations. But the D.C. Circuit’s decision reaffirmed the FCC’s primacy among federal agencies on commercial spectrum policy.

* Seth L. Cooper is Director of Policy Studies and a Senior Fellow of the Free State Foundation, a free market-oriented think tank in Rockville, MD. The views expressed in this *Perspectives* do not necessarily reflect the views of others on the staff of the Free State Foundation or those affiliated with it. *D.C. Circuit Upholds FCC's 5.9 GHz Order Reallocating Spectrum for Unlicensed Use* was published on the *Federalist Society Blog* on September 12, 2022.