Facebook OTSC Hearing/Oral Argument

November 12th, 2024

Lina M. Khan:

Good morning, everybody. The commission is meeting today in open session to hear oral argument in the matter of Facebook, Docket No. C-4365 on the threshold legal issues raised by respondent in its April 1st, 2024 response to the Commission's Order to Show Cause. The respondent is represented by Mr. Rouhandeh, and counsel supporting the complaint is represented by Ms. Reenah Kim. Each side will have 45 minutes to present their arguments. Counsel for the respondent will make the first presentation and may reserve time for rebuttal. Complaint Counsel will then make its presentation and also may reserve time for rebuttal.

Each side has had the opportunity to submit presentation materials, which we have ordered should be public in all respects. We do not expect that any portion of this argument to require discussion of confidential information. However, if that should be the case, please let us know so that we can close the argument from public view and go into confidential session. If a confidential discussion is required, we will resume the webcast once any confidential discussion has ended. Mr. Rouhandeh, my understanding is that you would like to reserve 15 minutes for rebuttal. Is that correct? Okay. When you're ready, you may start.

James Rouhandeh:

Morning. James Rouhandeh of Davis Polk & Wardwell on behalf of Respondent Meta Platforms, Inc., formerly known as Facebook, Inc. I'm joined at counsel table by Michael Scheinkman, David Toscano, and Tess Liegeois. I appreciate the opportunity to address today the important issues directly with the Commission this morning. I do want to say at the outset of this proceeding it is Meta's position that, as a threshold matter, this proceeding is jurisdictionally improper. The terms of the 2020 order were proposed by the district court. That's what the government and the Commission asked the court to do, and that's what the district court said it was doing. And that order, it is our position, can only be modified by the district court. Now, last Tuesday I was at another lectern not far from here addressing those issues, and the DC circuit will be ruling on those issues. So I do not plan to address any of them here today, but I do want to make clear that for the purposes of my argument, Meta does not and is not waiving any argument that it has advanced before the federal courts, including as to jurisdiction.

Andrew Ferguson:

Counsel, if we are of the view that you have violated the order, what's the appropriate enforcement mechanism? Contempt in the district court? We go back to Judge Kelly and seek a contempt order?

James Rouhandeh:

Or 5(l).

Andrew Ferguson:

Sorry?

James Rouhandeh:

Or 5(l) civil penalties.

Andrew Ferguson:

But it's purely judicial.

James Rouhandeh:

Yes.

Andrew Ferguson:

Okay.

James Rouhandeh:

And that is because, and I will get to it, that the Commission doesn't have the authority to enforce its own orders, which I believe the Commission.... So I intend to address the FTC's lack of statutory authority here, and it is as Chair Khan said, these are threshold legal issues, and they are dispositive regardless of the factual findings that might be made in a proceeding. And to be clear, Meta does vigorously dispute the factual assertions and allegations, but that's not an issue for today. But what is an issue is that even if you assume the truth of those allegations, the Commission cannot reopen and modify the order as it is proposed to do here.

Let me start with the text of the statute itself. Note this monitor doesn't seem to be working, so if I'm looking around, I'm making sure that we're on the right slides. The Commission must have some statutory authority to modify an order, and here the Order to Show Cause states that authority. It relies on Section 5(b) as the sole authority of this proceeding and the basis for reopening and modification. But federal agencies are creatures of statute, and there must be a valid grant of authority from Congress for its orders, and it only possesses the authority that Congress has given it. But Section 5(b) does not authorize the Commission to modify here, and that is clear from a plain reading of the plain language of the statute. It only authorizes modifications of orders made or issued by it under this section.

So what orders does Section 5 authorize the Commission to bank or to issue? It authorizes the Commission under 5(b) to issue and serve an administrative complaint stating its charge and noticing a hearing and that it authorizes the Commission to issue an order only upon such a hearing. No other language in Section 5(b) authorizes the Commission to make or issue an order. And what we have here and is important to recognize, a consent order is a settlement, it's an agreement. It's not an order made or issued upon a hearing under Section 5(b).

Alvaro Bedoya:

Counsel?

James Rouhandeh:

Yes?

Alvaro Bedoya:

Why shouldn't Facebook's consent to modification expressed in 2011 apply through to the current modification?

James Rouhandeh:

Because the point of the 2020 order, the 2019 order was to replace that order. And what's very clear that in the 2012 order, there was a clear statement of agreeing to modification, but that's not in the 2020 order. And one has to assume that that is intentional, and in fact other things were carried over. But in any event, it was a replacement. That's what the Commission has said. That's what Judge Kelly said in the district court twice in his recent opinion in November. He said it was to replace that order because otherwise you'd have a 2012 order on the FTC docket. It needed to be replaced, and Commissioner Ferguson said it also gave 5(l) powers as part of that because it became an administrative order by the FTC. So there was a purpose of it.

Andrew Ferguson:

It became an administrative order issued pursuant to Section 5, right? I mean, our 5(l) authority is premised on a violation of a Section 5 order, right?

James Rouhandeh:

No, it's based on a final order. The language of 5(l) is different than Section 5(b). 5(l) talks about a final order. 5(b) talks about an order issued under this section.

Andrew Ferguson:

So a 5(l) final order, other than Section 5, where do we get the power to issue those?

James Rouhandeh:

There's no other power. There is no power to issue administrative orders other than on 5(l).

Andrew Ferguson:

So your view is that Section 5(l) encompasses a universe of orders that is broader than Section 5(b)?

James Rouhandeh:

Yes.

Andrew Ferguson:

Okay.

Melissa Holyoak:

I'd like to follow up just a minute on your discussion on the 2011 as a replacement. Where in the record or where in the subsequent orders does it talk about replacing? And I point to, you mention in a lot of your briefing talking about contracts, and I would liken this to situations where you have a contract, you have subsequent amendments to that contract. And oftentimes those subsequent amendments talk about superseding. They have superseding clauses that say everything else in the prior clause is now superseded. Is there anything you can point to in those subsequent orders that mentions that this is a replacement of the 2011 agreement, including the modification agreements? Because in that 2011 agreement, there was agreement to have modifications pursuant to 5(b). Is there something in those orders that suggest that it was meant to completely replace that previous agreement?

James Rouhandeh:

Yes. It says it's a new order on the face of the cover order that attached, Attachment A. It says it's a new order, and at the time it was initially proposed, it was initially proposed and provided to the district court in the connection with the consent motion. So there's a motion that the FTC made on consent of Meta. It said that this would replace the prior order, and Judge Kelly has always viewed it as a replacement as he said most recently in November 2023. But to directly answer your question, it's in the order that put it in place said that this was a new order.

Melissa Holyoak:

So the term new order is the only evidence in the record that suggests that it was supposed to supersede all previous provisions of the 2011?

James Rouhandeh:

Well, I think on the face of the document as well, you can tell that it carries over some provisions that were... It clearly is a replacement because there are some provisions in 2012 that are repeated in 2020. Others are not repeated. It's clear on the face if you compare the two documents that it is a replacement and it is a new order. And I think it is fair to look at what the FTC said in court at the time it proposed it and said that this would replace the prior order, and that's what the judge assumed when he was doing it, that it was replacing the prior order.

And in fact the reason articulated of doing this order in the way that it was done was to replace the 2012 order. That was the reason to put an administrative order on the docket in the FTC in 2020 was to replace the 2012 order. That was the entire idea. The allegation was that it hadn't been met, hadn't been satisfied, had been violated, and the court put in and was asked to and impose new relief. And the administrative order followed that, and it was put in place to replace the prior order.

Melissa Holyoak:

So we must assume based on a comparison that all of the previous provisions were superseded? There's no clause.

James Rouhandeh:

There's no clause. I would put it the other way. If the position of Complaint Counsel and of the FTC is that it was an amendment, that would've been a very easy way to say that this was amending it and that those provisions stay in place. And because it was a contract, one would expect that the parties would agree to that, and it would be stated in the agreement that the provisions of the... Normally when-

Melissa Holyoak:

But often in contracts, it says modification, and it doesn't say, and this isn't intending to keep in place. It often says modification only and then has superseding language, so here you have the term modification as well. I don't see any language in the subsequent order suggesting that everything was supposed to be superseded.

James Rouhandeh:

Well, I also don't see anything that suggests that the provisions of 2012 stay in place, and in fact, when it says it's a new order, I think that should be a sufficient basis to determine that it's new, especially in the absence of any statement that any of the prior provisions of 2012 are carrying over. And it also makes no logical sense to read that that way. In fact, one would think that if there was an effort to or a desire to retain the modification provision, like other provisions that were repeated in 2020, that it would've been stated in the 2012 order. Now, of course it makes no sense. I mean, the Commission could have asked and could have bargained for that and could have said, "We want an order that you would agree to modify." It's not in there, and in fact, based on what the Commission has done here, I'm not so sure that litigants are going to agree to orders that the Commission can freely modify it. One doesn't enter into-

Melissa Holyoak:

Counsel, you keep saying that makes no sense, it's not logical, but that's how contracts often work. You have a contract and you have an amendment, and the amendment does not necessarily reincorporate everything in the previous contract. It oftentimes is the opposite, where it says that it's superseding those previous.

James Rouhandeh:

Well, it certainly doesn't say it amends and keeps in place any of the prior provisions, and the FTC said at the time it was a replacement. So to the extent there's ambiguity about it, you could look at what the FTC said at the time, which was that it was a replacement.

Andrew Ferguson:

Can I return to Section 5 for a minute, if you don't mind? The original 2011 order I think we would agree was issued pursuant to Section 5, right? We don't have any authority to issue orders from anywhere else, right?

James Rouhandeh:

Well, it was done on consent. So there's a difference between an order that was done-

Andrew Ferguson:

So what's the statutory status of that then? I mean, if you all had violated the 2011 order, I think you conceded earlier we could have gone to district court either for an injunction or for 5(l) civil penalties. So it's an order for purposes of 5(l) at least, right?

James Rouhandeh:

But there's a very clear distinction.

Andrew Ferguson:

Am I right about that?

James Rouhandeh:

It's an order for purposes of 5(l).

Andrew Ferguson:

Okay, so Section 5(b) says that we have the power to modify any order made or issued under this section, which is not limited to 5(b). It's anything in 5. I guess I'm having a hard time understanding why that wouldn't encompass a consent order, even if it were done without a hearing or stipulated record, because that's undoubtedly issued pursuant to Section 5. And if it's not issued pursuant to Section 5, I don't know why we've been doing them.

James Rouhandeh:

Well the authority for a consent order is consent. The basis for a consent order is the consent of the respondent, and this goes back almost as old as the FTC.

Andrew Ferguson:

Sorry. Even if that's true, it is an order for purposes of 5(l), which fall within this section, right?

James Rouhandeh:

What's this section?

Andrew Ferguson:

This section. 5(b) says we have the power to modify any order made or issued under this section. I don't know why that wouldn't encompass orders under 5(l).

James Rouhandeh:

Because if you look at Rule 2.32, that is a explanation of what 5(b) covers, and it's issued on a hearing on a stipulated or litigated record. What's interesting about this is 5(b) doesn't explicitly give the ability to enter into consent orders. That is an authority that of course the Commission has long settled orders, but the authority for doing that is the consent of the respondent.

Andrew Ferguson:

No, I think the authority is the statute, and we dispense with the hearing and the record because of the consent. But I don't think that you all can consent with the government to allow us to exercise a power we don't actually enjoy. I mean, if Section 5 doesn't allow us to enter consent orders, which I'm starting to think might be your argument, I don't know why we've been doing it at all. I mean, you said it at the beginning, and I totally agree, agencies are all creatures of statutes, and all of our powers have to be defined by Congress. And yes, consent might allow us to dispense with certain otherwise existing procedural requirements, but the order itself has to emanate from somewhere in the FTC Act. And if it's not Section 5, I don't know where it's coming from. And if it is Section 5, I don't know why it's not an order made or issued under this section, which is the text of 5(b).

James Rouhandeh:

Because consent orders can be, like any other litigant, the government can go into court for example and consent and can reach a settlement. And so, back in 1954, this was an issue because the annual report to Congress back in 1954, what was happening was consent orders were being used more often. And what the Commission said was we need to formalize this practice of permitting this more extensive use of consent orders. And so, what it did is it said that the respondent has to agree that the order shall have the same force and effect as an order issued after a full hearing and that it could be modified or set aside in the same manner as issues that are on a litigated and stipulated record.

So what they were saying at the time and is now in Rule 2.32(c) is that a consent order is different, and they're not relying on 2.32(c). But the reason why 2.32(c) is important is it explains what is meant and what the scope of Section 5(b) is because it makes very clear that there would be no reason for 2.32(c) if 5(b) gave the Commission power to issue consent orders. It says, "Here's the procedure." You can do a consent order as long as the respondent does these two things, or maybe a few other things, but agrees it has the full force of effect as an order under 5(b) and agree that it could be modified in the same manner as orders issued on a litigated or stipulated record.

The consent order provision, that 2.32(c), that rule really makes no sense if consent orders were freely modifiable under Section 5(b) in fact because what it's saying is we need consent. It's a rule that says, well, if we're going to settle this, and we're going to settle it without a litigated stipulated record, with no administrative hearing, with no findings of fact, the source of our authority to modify is going to come from the consent.

Lina M. Khan:

Just to go back to this more foundational argument around consent orders and the authority to do so not residing in the statute, I mean, that's pretty striking and would have pretty sweeping ramifications for the thousands of consent orders that the FTC has entered. What can you point us to that ratifies that this accords with how the Commission has approached this authority?

James Rouhandeh:

Well, I think every consent order that it does that requires the respondent to agree to modification and that it would have the full force in effect.

Lina M. Khan:

You need to point us to any case or any other analogous situation where the Commission has either sought to enforce an order or sought contempt or civil penalties, where this issue has come up and the Commission itself has laid out this view.

James Rouhandeh:

Well, not necessarily in a case like this, but the Commission has never actually sought ever. What I would say is the Commission has never sought to do this absent consent.

Lina M. Khan:

And do you believe that the Commission's authority to pursue a case in Part III also includes inherently the authority to settle it?

James Rouhandeh:

No. Well, no, I don't think you'd say it's inherent in the statute. I think it's inherent that parties to litigation settle all the time, and it's very clear that a settlement requires the Commission to seek the agreement of the parties. And what's different about this and what makes this such an unusual case is, and it's never been done before, is that the Commission is saying, "We can modify a consent order without your consent." And one thinks about that. You think about that, it goes against the history of how the consent order process since at least before 1954, but at least as of 1954 has been used, which is, any and every time there's been a modification sought of a consent order, the respondent has agreed. And here they did not agree.

And those are done pursuant to 2.32(c) in the rules of practice, and they're not done pursuant to Section 5(b). They're not granted. The statute of authority is not inherent in Section 5(b). Otherwise, it would state it. It doesn't state it. It's very clear that you're talking about... And even apart from that, it doesn't apply to this order because this order is not the result of an administrative complaint with a notice of hearing at all. It doesn't fall within 5(b) for all of those other reasons, which if you look at 5(b), you say, well, that has to do with administrative complaints. That doesn't have to do with federal court complaints. Those are the ones issued on a notice of hearing. Those are the ones that go to get litigated, the findings of fact, the cease and desist orders. None of that applies.

Andrew Ferguson:

Counsel, I'm right that your argument would be identical even if this had not involved the district court? In other words, just pause it if you will, the 2020 order, but not pursuant to Judge Kelly's order. The Commission negotiated with Meta. You all consented, set the civil penalties aside for purposes of my hypothetical, and we have this order. And then, we issue the OTSC. I'm right that your 5(b) arguments would be identical without the district court's intervention at all, right?

James Rouhandeh:

Right.

Andrew Ferguson:

Okay.

James Rouhandeh:

What you would need would be consent to modify. And the fact that there is no consent, it also makes no rational commercial sense to suggest that there was sort of an implicit idea that this could be modified certainly in the way that it's being modified.

Alvaro Bedoya:

Before we get to the interest of parties, help me understand your take on 2.32. So I heard you say the parties could have bargained for modification, they could have decided to do this, but 2.32(c) says, I think twice, that these agreements shall contain, they shall provide. And so, help me understand how those two things make sense. Then secondly, given this, doesn't it make more sense that 2.32(c) is more of a belt and suspenders measure to head off precisely this kind of dispute? I have a hard time seeing how not abiding by a rule somehow nullifies a right that Congress granted by statute.

James Rouhandeh:

When it says shall, the respondent basically shall agree is what it's saying. And here they didn't ask for... Well, certainly Meta didn't give that agreement, and I think that's probably why complaint counsel is not saying that 2.32(c) applies here because Meta did not agree under that.

Rebecca Slaughter:

But I think Commissioner Bedoya's point is, how could a rule supersede a statute? The statute is the act of Congress. The statute allows for modification of orders. So how would text in a rule supersede that?

James Rouhandeh:

I think the analysis, with all due respect, I think is backwards. That assumes that there's statutory authority. There isn't statutory authority. So we're not suggesting that the rule supersedes statutory authority under 5(b). We're saying that Section 5(b) does not provide the statutory authority, as is clear on its face. It does not apply to this complaint. There was no administrative complaint, no notice of a hearing, nothing. It on its face doesn't apply, so the modification provision in 5(b) does not apply. So one looks at, what is the... The only way that modification would be appropriate is if Meta had agreed, and Meta did not agree to modification. So Section 5(b) on its face does not apply.

And so, what we're saying about 2.32(c) is not that it takes away a power that Congress granted, is that it makes clear that a consent order is different than an order under 5(b). Otherwise, there would be no reason for it. If a consent order was just subsumed by Section 5(b), there's no reason for 2.32 because there's a statutory right to modify. So that's the critical issue is it demonstrates itself the consent orders are not appropriate or permitted, or modification of a consent order is not part of what-

Lina M. Khan:

So just to make sure I understand, so 5(b) also says, "Whenever in the opinion of the Commission conditions of fact or of law have so changed as to require such action or if the public interest shall so require." So is your point that first the Commission would have to determine that one of those conditions were met, and then subsequently the party would have to consent, and it's only through both of those that this power could be vindicated?

James Rouhandeh:

Yes. I mean, Section 5(b) doesn't apply, so those provisions, the modification provision doesn't apply because it's talking about something-

Lina M. Khan:

So why wouldn't it say in the opinion of the Commission and respondent?

James Rouhandeh:

I'm sorry?

Lina M. Khan:

Why wouldn't the text then say in the opinion of the Commission and respondent, conditions have changed? Because you're effectively saying that that provision only comes into effect if there's agreement. So what value does the Commission's determination there really have?

James Rouhandeh:

No, I think that if Section 5(b) applied, it would be a determination by the Commission as to change circumstances in public interest. And in a case like this where it's asserting modification as to Section 5(b), I'm not saying that at that point Meta would have to agree to that. The thing that Meta would've had to agree for the Commission to have the power to modify this order is to agree that it would be ordered, and that's clear that it's not part of Section 5(b). That's why there's a rule that says, okay, a lot of these orders are now getting settled, and we're using settlements. This is 1954, 70 years ago. A lot of these are getting settled. What are we going to put in place to deal with an order on consent?

And the critical piece is, we've got to get the respondents to agree that this is going to be modifiable in the same manner as an order that's on a litigated or stipulated record, which is what 5(b) is, and that it's going to have the same force and effect. The Commission's saying, "We can't just enter into consent orders with no guardrails here. We need to have some specific things so that we have the ability to modify," and one of those is consent, and that's not obtained here.

Alvaro Bedoya:

So Counsel, 2.32(c) also requires some kind of provision saying that consent orders are enforceable in the same manner as other orders, and it's my understanding that's basically hornbook law. So if people don't agree to that, does that also just fall away? It seems that a lot of 2.32(c) is belt and suspenders, the Commission tightening things up to avoid these kinds of disputes. But given all the stuff that includes, it's hard to see how absence of the language that 2.32(c) provides erases what's in the statute.

James Rouhandeh:

Again, that's not our argument that it erases what's in the statute. Our argument is that the statute is missing, and it doesn't apply here in effect. And it's missing the ability to, it doesn't cover consent orders, and it doesn't cover a complaint like this in federal court. It only talks about the administrative process, so it just has no application here, and that's a sole authority that the Complaint Counsel has asserted. And the whole argument about 2.32(c) is to demonstrate that it would be unnecessary if the Commission had the power to issue the consent order under 5(b) because there would be no reason to say we're going to do these consent orders the same way we do in 5(b) as if there was a litigated and stipulated record. So that is the statutory argument.

Alvaro Bedoya:

Why would Attachment A refer to 5(b) then? If you're saying 5(b) does not apply, why would Attachment A say you can modify this one part through 5(b)?

James Rouhandeh:

Yeah, so the modification provision is clear, and this goes back to Melissa Holyoak's question, which is, there are some provisions that are allowed where there's an agreement to modify. And that is Meta in two instances. If there was a right to freely modify, that either could modify pursuant to 5(b), there'd be no reason to pick out these two instances and say that Meta can seek modification pursuant to 5B. I think those provisions actually demonstrate why this is not, in fact, a carryover or amendment of 2012, but, in fact, a replacement. And so does the petition for review. There are other statements in here that really make it clear that it's not section 5B. It says on its face that it is not subject. Section 5B only kicks in after a petition for review, so it's kind of like a condition precedent. After the time for petition review, then you can seek modification.

It never kicks in. 5B modification never kicks in if it's not subject to a petition for review, and you either have an appeal or a petition for review. It's not both. You can't do both, and that's really not disputed. You can go for a notice of appeal under federal rule of the [inaudible 00:30:03], or under the rule 15 for a petition for review.

And here, the question is whether this order gave the right for a petition for review, and it's clear that it didn't. It was subject to an appeal, not a petition for review, and that's in finding number four. It says Meta, but also, "The Commission waives all rights to appeal," so the Commission waived all rights to appeal the order. That's unambiguous. And a waiver has legal consequences. It's got to be an intentional relinquishment of a known right. So in effect, and you can't waive a right that you don't have, so what the Commission was doing was waiving the right to an appeal. That makes no sense and cannot be squared with the idea that this is a section 5B order that would be subject to a petition for review, which...

Rebecca Slaughter:

Wait, I'm sorry, counsel, I don't understand that argument. A waiver of rights to appeal or otherwise challenge or contest the validity of this order is different from saying, "Circumstances have changed," or, "In the public interest we feel this order should be modified." That's not saying the underlying order was invalid: that's saying that circumstances have changed. I don't see how that's unsquareable.

James Rouhandeh:

It's unsquareable with the idea that section 5B applies, because section 5B says the modification right only kicks in after the expiration of a petition for review. This was not an order that was subject to a petition for review: this was an order that was subject to an appeal, and that's why the government gave up its right to appeal that order. What that means, that's another indication, going back to the core argument, which is this is not a section 5B order. If it were, it would make no sense for the Commission to waive a right to appeal the review.

Lina M. Khan:

Just to close the loop on this, the predicate there is that this is a federal court order, not an administrative order, right?

James Rouhandeh:

No.

Lina M. Khan:

That's your point.

James Rouhandeh:

No, you don't even need to reach that. You can forget about the federal court order. There is a federal court order, yes, but the predicate for that is really 5B. If you look at it, just look at 5B and say, "Here's another way in which 5B doesn't apply here to this asserted modification," because for 5B, for the modification provision of 5B to kick in, it only comes after the expiration of a petition for review. This is an order that's not subject to a petition for review. Yes, it's subject to a notice of appeal, that's why it's a federal court order; but if you just put that aside for the second, there's no waiver of a right for a review, and it is an indication. Perhaps I misunderstood your question. Yes, that does confirm that it's a federal

court order, but it also confirms that it is not an order subject to 5B, because 5B only kicks in after the time for petition for review.

Lina M. Khan:

And just to be clear, my question was whether your argument was premised on the fact that it was a federal court order, not that that was my view.

James Rouhandeh:

I think yes and no. It's also an independent argument.

Andrew Ferguson:

I think I'm now confused by this. The expiration time allowed for filing petition review, that never kicked, in your view, because this is issue pursuant to a federal court order, and therefore, if there are no petitions for review, it's just a rule three appeal. Is that right?

James Rouhandeh:

Yes.

Andrew Ferguson:

Okay. If we think you are wrong about that, if I don't think this was just hypothetically, if we think that this has independent freestanding section five authority, it would've been subject to a petition for review for the period after it was entered. Is that right?

James Rouhandeh:

Well, that would be inconsistent, I think, with the language of the order, which talks about a notice of appeal.

Andrew Ferguson:

Okay.

James Rouhandeh:

Thank you.

Andrew Ferguson:

I have one very quick procedural question. I don't want to waste your time on rebuttal. There's a part of your argument on the constitutional question, suggests that you brief them and you brief them extensively for purposes of preservation. If we disagree with you on these statutory questions, do you not want us to reach the constitutional questions?

And the reason I'm asking is, if this is going to go up on a petition for review, which I think is the way you would get judicial review of what's happening here today, you have to exhaust your arguments in front of us, and you generally can't raise, in a court of appeals, arguments you haven't raised here. Have you raised them? I know you've briefed them, but it sort of seems like you don't want us to decide them at all, and I'm not sure if you're raising them.

I'm confused about what you would like us to do with your constitutional arguments if we think you're wrong on the statutory arguments.

James Rouhandeh:

Well, I guess we raised them to preserve them in this proceeding and to the extent that Commission's inclined to seek them, I think it was an argument to address them. I think it's been an argument today, but they are being actively addressed by district court as we speak.

Andrew Ferguson:

Thank you.

Lina M. Khan:

Great. We'll now hear from complaint counsel. Ms. Kim, my understanding is that you wish to reserve 10 minutes for rebuttal. Is that right?

Rena Kim:

Yes, that's correct.

Lina M. Khan:

Great.

Rena Kim:

Good morning, Rena Kim with complaint counsel. If you have particular questions now or concerns you'd like me to address first, please let me know. If not, I'm prepared to go through the legal issues that are the subject of today's hearing, starting with the statutory authority conditions for modification, and if time permits I can touch briefly on Meta's constitutional challenges.

None of Meta's arguments provides a compellingly [inaudible 00:36:12] that would require the Commission to abandon these proceedings. In section 5B of the FTC Act, Congress expressly granted the Commission the authority to issue cease and desist orders and to subsequently modify those orders if certain conditions are met. Pursuant to that authority, the Commission can undertake an inquiry to determine whether the public interest or changes in conditions effect and may call for reopening and potential modification.

Andrew Ferguson:

Can I interrupt? I'm confused, I think, about what the Commission thinks it's addressing here. So normally, if someone violates an order, the redress for that is enforcement of the order, and so you go either to the tribunal that issued the order and ask for whatever enforcement sanctions are available there, or in our case, we go to a different tribunal and ask for sanctions there. But what you don't normally do if someone violates an order is reopen the order and add stuff to it: you normally just get an order enforcing the violations, getting whatever sanctions are available.

As I am reading the OTSC, the Commission has accused Facebook basically of having violated the order and the response to the violation, and we call it "enforcement" in some of our papers, is to reopen the order and add stuff to it. That seems very strange to me, totally inconsistent with how law generally works, which is if there's an order on the books and someone crosses it, you enforce the provisions of the order. You don't rewrite the order to address the violations.

Can you explain, what does complaint counsel think the Commission is doing here? And I guess maybe the second question is, do we think that what we are addressing are violations of the existing order or new violations of section five that have some relationship to the order?

Rena Kim:

So in section five, Congress gave the Commission different tools to address potential violations of its orders. So one path, as you mentioned, is to pursue civil penalty with a litigation in an Article III court. Another option is to take those potential order violations, or if they don't rise to the level of an order violation, deficiencies, and consider whether that provides a reason for revisiting the Commission's own order to determine whether the order as written is not doing what it was supposed to do or what it's meant to do. If the order as written is not effectively carrying out its objectives, modifications may be appropriate.

Andrew Ferguson:

Can I interrupt? Do we think that they are committing legal violations, like violations of section five, and we're sort of saying, "Whoops, I wish we had included this in the original order. Let's amend the order to get that, too?" And if the answer to that is yes, how often and what remove are we allowed to do that?

Because here's my concern: if the position of the Commission is, "If you get a section five order on the books and they commit subsequent section five violations that kind of look like something this order should have addressed if we're thinking about it, we sort of have them on the hook of for this forever. We can just basically bootstrap ourselves eternally into addressing new section five violations by amending the order rather than having to bring new section five proceedings," and that seems to matter because there are different burdens and standards of review for order modifications than there are for launching new section five proceedings.

I'd love it if I could get an answer to the threshold question, which is: is the Commission of the view that the stuff we have identified in the OTSC are violations of the order or violations of section five that currently aren't covered by the order but ought to be covered by the order? Let's answer that one first, and then I'll have a follow-on.

Rena Kim:

The allegations in the order to show cause indicate that there may be violations of the 2020 order, and, by their nature, also, to some extent, section five.

Andrew Ferguson:

Fair enough. But that means that we at least are saying, "We think that you are violating the order, the 2020 order."

Rena Kim:

Correct.

Andrew Ferguson:

It just seems very weird to me to read a modification provision to say, "You can change an order when it's violated." Normally when orders are violated, you enforce the orders. You don't rewrite them. If the orders are being violated, they're enough to get at the underlying prohibited conduct. You just need someone to come in and enforce them. We normally modify orders if we think there's something

happening in the world that should have been covered but isn't covered. That's totally distinct from when someone violates an existing order. If someone violates an order, you enforce the order. If someone's doing other conduct that might have been plausibly encapsulated within the order originally but there's ambiguity, you can modify the order.

And my concern is I don't think modifying an order is a way to enforce the order. I don't think Congress gave us the power to modify orders as a means of enforcing them. We have enforcement tools. We can go to the district court and get... In Facebook's view, we could get contempt. I'm not sure about that, but we could get contempt. But at the very least we could invoke 5L and obtain civil penalties or injunctive relief. But I don't know. It just seems totally foreign to me to say, "When someone violates an order, rewrite the order."

Rena Kim:

Well, this is part of the framework that Congress provided. Congress granted the Commission the authority to choose among the tools that it has given it. Pursuing penalties through a 5L action is one such tool, but potentially modifying its own order is another tool. And violations or other instances of non-compliance by a respondent under order may signal that the order as written is not working as effectively as it should, and this is a common scenario.

I point to a corollary with consent orders in federal district court: if there is a violation or there's conduct that is falling short of what is expected, courts often consider those violations in determining potential modifications.

Lina M. Khan:

Just real quick: in your view, though, this modification authority, is it available only when we believe there's a violation of the order? Is it only an enforcement tool or is it a supplement that could also be activated separate from instances where we believe there is a violation?

Rena Kim:

The Commission's 5B modification authority is not premised on violations. Proving order violations is not required to modify the order under 5B. However, information and evidence regarding non-compliance is relevant, because again, it goes to the circumstances that the Commission would consider, both changed conditions of fact, as well as whether the public interest would warrant the modifications to that order.

Rebecca Slaughter:

Ms. Kim, can I ask a question to address Commissioner Ferguson's point? The orders, FTC orders generally, and the 2012 order and 2020 order specifically, have a number of different provisions. Some are affirmative prohibitions on the respondents conduct. Some are what we colloquially refer to more as "fencing in provisions" to ensure that violations do not repeat in the future, such as the maintenance of a privacy program, for example.

When we're thinking about the difference between order enforcement for non-compliance through 5L civil penalties versus order modifications because the underlying order is not effective in deterring violations, does it matter which parts of the order we're thinking of as having been violated? Because I think Commissioner Ferguson is pointing to a difference between an order modification that would be punitive the way 5L is intended to be punitive and an order modification that is meant to be ensuring that the underlying order is more effective. Do you see that distinction?

Rena Kim:

I do. And order modifications, as Supreme Court has recognized in similar contexts, order modifications are meant to serve as a remedial measure rather than punitive, and that is the case, here. There are no penalties that are being sought. The remedial purposes of the Commission's order is to prevent and deter conduct that is unfair or deceptive or in violation of Section five and the other objectives of the order when it was originally issued. And if that order language as written is not doing enough to serve that deterrent effect and prevent that conduct from happening, the Commission may consider whether modifications would be appropriate.

Melissa Holyoak:

Did the violations of an order, order violations, do you see those as satisfying the change in factor law or here or satisfying this public interest?

Rena Kim:

It could be both, although the statute itself doesn't require that both have to be proven. In this instance, the fact of Meta's violations, or instances of noncompliance under its 2020 order, signal that the order is written may not be doing enough. The question is, "Well, what's changed since 2020 to now?" The difference is that now, Meta has violations and instances of noncompliance under its 2020 order, and courts commonly recognize that past violations are likely to attend future violations. That is what's changed.

As to the second prong on public interest, if the order as written is not doing enough, and there's been some indication in the briefing that Meta's position is, as of the initial assessment, there were no violations, if Meta's own belief that they were fully compliant with the order as of the initial assessment, that also may suggest that there's a discrepancy between what the order is meant to do, in this case, with respect to requiring a robust privacy program, and what Meta understood that to mean and require if what Meta did under that language fell short.

Melissa Holyoak:

So violations of an order, if that fulfills this public interest portion of 5B, that means you could indefinitely change and modify orders based on violations and expand them indefinitely?

Rena Kim:

No, there are limitations. There are limits. There are limiting principles to the Commission's power to modify, and they're bound by the same principles that govern federal district courts, for example, when modifying consent orders under civil procedure rule 60B.

Three points I'll hit very quickly. First, there has to be a factual basis for a modification decision and it has to be supported by substantial evidence. So if a change is based on factual conditions, that change must be significant and not foreseen. If the modification decision is based on the public interest, that public interest has to be specific and substantial. The second point is that to the extent the Commission decides to modify, any such modification has to be suitably tailored to the circumstances. And finally, if the Commission does make a decision on modifying the order, that decision would be subject to further review by the court of appeals.

So when presented with evidence or indicating via potential violations or other instances of non-compliance, the Congress gave the Commission the discretion to choose among the tools available to it.

However, the Commission doesn't have unbounded authority to do whatever it wants when it's presented with this information: it's guided by these principles.

Lina M. Khan:

So with the violation of the 2012 order, the FTC ended up going to court, seeking civil penalties, and through that process, entering a subsequent modified order. In that case the Commission did seek civil penalties. Could you describe to me, what are the back patterns under which the Commission may opt to seek 5B and skip seeking the civil penalties but still achieve a modification? Because going the 5L route doesn't preclude getting, ultimately, a modified order, does that suggest that 5B creates more latitude so that, short of actually finding a violation, there is additional opportunity to get a modification without meeting such a high standard? Just explain to me, what's the point of this other mechanism if we can ultimately achieve order modification in addition to civil penalties through 5L?

Rena Kim:

There would be other factors and various factors that the Commission would take into consideration when making this type of decision. In the past, when the Commission has modified orders, so for example, in the Elmo case and in the Moore case: in one case, there was a question about whether the respondent's conduct rose to the level of a violation. In the other, they did not violate the order, even though it turns out, given the Commission's experience under that order, the order should have been modified to address that conduct that was proven to be harmful to consumers.

So each path, pursuing civil penalties as an enforcement action or considering modifications, offers different advantages and disadvantages, and it really is based on what the facts presents, if evidence is in the record, and what the objectives of that order are and how they're being fulfilled.

Alvaro Bedoya:

One question on 5B. So 5B talks about orders issued upon a hearing. It says, "Upon such hearing..." What hearing was that here? And if there wasn't a hearing, are you arguing that it was waived and 5B applies with equal force to waived hearings?

Rena Kim:

I'm sorry, could you repeat that last part of the question?

Alvaro Bedoya:

What was the hearing? Or are you arguing that that hearing was waived and that this language applies, has no problem with situations where the hearing was waived?

Rena Kim:

Well, the 2020 order was reached as a result of a settlement. But as to the larger point, which counsel for Meta had opened with in his portion of the argument, the question of whether 5B includes consent orders, as with any other litigated order, the answer is yes, and the reason you know this is just by looking at the plain text of that provision. It says, by its terms, it's not limited to only litigated orders, and we know it's not limited because elsewhere in section five, Congress did lay out just such a provision. I'd like to direct your attention to section 5M1B, which is the provision that talks about notice of penalty offenses.

Alvaro Bedoya:

Sorry, are you going to tell me about that hearing?

Rena Kim:

Oh, well, what I'm about to [inaudible 00:51:42].

Alvaro Bedoya:

Okay, great. I just want to make sure we're still talking about that.

Rena Kim:

So in 5M1B, which is the provision that addresses notice of penalty offenses, it says that it "applies where the Commission determines in a proceeding under subsection B that any act or practice is unfair or deceptive and issues a final cease and desist order, other than a consent order." So in that instance, it makes clear that consent orders are generally part of that universe of any final and final cease and desist order issued under subsection B. Subsection B is the provision you were just citing that talks about hearing, notice and all those procedural steps.

Andrew Ferguson:

Do you think that that provision is the source of our authority to do consent orders? I had this exchange with your friend on the other side, and I'm going to ask him about it again when he returns. But is it your view that the Commission could not enter consent orders if section five did not authorize it?

Rena Kim:

Yes.

Andrew Ferguson:

Okay. And is this provision the thing that authorizes it, this reference in 5M1B?

Rena Kim:

5B is what authorizes the issuance of any cease and desist orders and the authority to subsequently modify them. My reference to 5M is to make clear that that language is inclusive of any Commission order, because Congress has made clear elsewhere in 5M, they take the universe of final cease and desist order and they specifically carve out consent orders in that language; whereas in five B, there is no such limitation.

Andrew Ferguson:

5M was added well after 1914, right? Do you think the reference to consent order is basically referencing existing Commission practice? Because 5B doesn't suggest by itself the existence of consent orders. Talks about complaint notice, hearing, et cetera. Do you think that Congress was ratifying a practice or something? The reason I'm asking is I'm looking for somewhere in section five for the source of our authority to do orders without hearings, because a lot of Meta's argument rests on that sort of order of operations. This is an express reference to consent orders, but you said 5B is the source of authority to do consent orders. What provision of 5B?

Rena Kim:

Well, 5B itself refers to the final cease and desist orders to prevent deceptive or unfair acts or practices. It talks about the final product, a Commission order, a final Commission order. There are different paths that may get you to that final order.

Andrew Ferguson:

And so though the hearing path, like Commissioner Bedoya was asking you about, that's like an option but not mandatory, in your view?

Rena Kim:

Well, when parties reach agreement on an order, they're waiving that process, the hearing, the other additional... That's essentially what's being waived. They're not going through that full process As far as what Congress had in mind, I'm focused just on the plain text of the statute itself, and what it indicates to me about when Congress needed to make a carve-out specifically for consent orders, it did so very clearly and plainly in this [inaudible 00:55:04] and that's not what you have in 5B.

Andrew Ferguson:

Can I steer you to another one of Meta's arguments, which is what the status of this order is, if it's a Commission order or it's the product of a judicial decree? When Judge Kelly issued his order, are you of the view that the Commission was basically bound to enter the 2020 order, I'll just call it the 2020 order rather than a modification or replacement because I think Commissioner Holyoak's point's well taken, were we bound? Was that a ministerial act? Or did that require us to take a True Commission Act? Because my understanding is that two commissioners dissented: both from presenting the proposal to Judge Kelly at all, and then dissented again when it returned here for its placement on the docket. And I'm trying to figure out whether we were actually exercising some discretion in placing that back on the docket or if we were just obeying a decree to which we were subject under the threat of contempt sanctions.

Rena Kim:

It was the Commission exercising its own discretion to issue the 2020 order. Judge Kelly was presented with this very question and made very clear in his opinion that the stipulated order in federal court, which was the order that had his signature, did not order the Commission to do anything.

Andrew Ferguson:

So we could have entered an entirely different order not encompassed in attachment A, and we would've been complying with Judge Kelly's initial order?

Rena Kim:

Well, then, there would be different problems. If you look at the stipulated order, which is the federal court order, it says that the parties agreed, Meta agreed and consented to waive its normal show cause rights under Commission Rule 3.72. Ordinarily they would go through the process that we're going through here under 3.72: the notice, the hearing, opportunity to be heard. As part of the 2019 settlement, Meta waived its rights under 3.72 and agreed to having the Commission decide to reopen the administrative case and replace the 2012 consent order with the 2020 version. And for clarity's sake,

so everyone would understand what it was. Meta was agreeing to have being substituted in a copy of the what would later become the 2020 order was attached as attachment A to the federal court order.

Andrew Ferguson:

But the Commission's view, then, is that it would've been consistent with Judge Kelly's order to have Judge Kelly finalizes and signs the order, and then the thing that the Commission entered on its docket has substantial changes from the document embodied in attachment A, and that would've been consistent with Judge Kelly's order?

Rena Kim:

It would not. Well, then I think Meta's consent wouldn't have the same weight, because Meta would have a very good argument that they consented to waive their show cause process - procedure rights under Rule 3.72 for the commission to reopen and replace the 2012 order with attachment A.

Andrew Ferguson:

But then, in those circumstances-

Rena Kim:

And if the commission then entered something completely different, [inaudible 00:58:18]-

Andrew Ferguson:

... It would just trigger the right to have what we're having right here. Your view is, it just means we would do this, not that they could go to Judge Kelly and be like, hey, they had a ministerial obligation pursuant to your order to enter attachment A on the docket. Your view is that we would've prevailed and said, we had no obligation to do anything with attachment A, all that the judge ordered us to was to allow you to waive or to put attachment A on and waive the rights that they're exercising today.

Rena Kim:

Yeah.

Andrew Ferguson:

Okay.

Melissa Holyoak:

Can I just follow up with a question on, you used the word replace a few times when you were talking about the 2020 order. The 2020 order says that, " it's modifying the 2012 order with the new decision and order set forth below." That's a quote from the 2020 order. Is it your position that the attachment completely replaced the 2012 order, you used the word replace, or is it that it modified that order?

Rena Kim:

Well, the language says that it modifies it, but in effect, it's replacing it. The 2012 order has now become the 2020.

Melissa Holyoak:

So it replaced all of the provisions in the 2012?

Rena Kim:

Yes.

Rebecca Slaughter:

If that's the case, Ms. Kim, why isn't Meta correct that it also replaces the modification provision in the 2012 order?

Rena Kim:

I'm glad you asked that question, because I'd like to bring some clarity to the issue. Rule 2.32, which is what Meta has been citing, specifically, the plain language of that rule talks about agreements that settle commission complaints. In 2011, when the commission first sued Meta, they issued a commission complaint, there were settlement negotiations, and they reached a settlement agreement. So there were two documents, there was an agreement containing the consent order, and it would settle the commission complaint, and it also included a consent order. The rule says it applies to agreements containing the consent order, it doesn't say that 2.32 language has to be part of the order in order for it to be in effect. So the 2011 agreement containing the consent order has that language, it makes clear that commission consent orders are orders just like any other final cease and desist order, and are subject to the 5B modification authority. The 2020 modification changed the language of the accompanying 2012 consent order, but it did not disturb the 2011 settlement agreement containing that consent order.

Andrew Ferguson:

What work are the express modification provisions in the 2020 order doing, if you're right? There are express modification provisions in the 2020 order for particular parts of that order. If the whole thing was always subject basically to our unilateral modification, pursuant to the proceedings we're having today, what work are those doing?

Rena Kim:

If you're referring to the two references to rule 2.51, which is respondents are free to request changes, that, and I believe Meta acknowledged this in one of its briefs, it's stating what it already has by operation of the rule all along. It's not necessary for them to state explicitly, this provision can be modified at respondent's request. Rule 2.51 applies to the entirety of the order, just as 3.72 does. It doesn't have to be explicitly stated to do so.

Andrew Ferguson:

Why was it explicitly stated, then?

Rena Kim:

It may have been something that Meta sought to negotiate for itself just for clarity's sake, [inaudible 01:01:58] they might've had, I don't want to speculate here, they might've had particular concerns about how those two particular [inaudible 01:02:04] would operate. As a practical matter, the way the

rule operates is that 2.51 gives them the ability and the right to request modification of any part of their order [inaudible 01:02:15].

Andrew Ferguson:

And that's your view of the current order as well. Notwithstanding that the 2.51 language appears only for certain parts of the order. They in fact enjoy that right for the whole thing anyway?

Rena Kim:

Yes. The statutory authority to modify applies to final commission cease and desist orders. It doesn't say it applies to the order where you make a reservation to make sure everyone knows that that's what's happening.

Andrew Ferguson:

And are you of the view that the commission could have sought contempt sanctions against Facebook for the alleged violations of the order, of the administrative order?

Rena Kim:

Well I think right now the order to show cause provides preliminary indications. So preliminary, if they're labeled preliminary findings of fact, but what they're doing is they're laying out information and evidence that was provided in a third party assessor's report regarding the state of compliance as to Meta's program. I understand meta wanted to submit a response. They did respond with additional facts. So in terms of going further along that path and ascertain whether something rose to the level of a violation, that's not the question we have.

Andrew Ferguson:

That's a fair response. That was a bad question for me. Suppose just hypothetically, you all had Meta dead to rights, a square unambiguous violation of the 2020 order. Could the commission seek contempt sanctions for that violation or are we limited to 5L and I guess what we're doing today, in your view?

Rena Kim:

The commission would have the ability if it chose to, it could seek contempt sanctions and also seek to modify the order. It could do 5L as well as a modification under 5B, and in fact the commission has done that in the past.

Andrew Ferguson:

So in your view then the 2020 order is both a judicial decree subject to contempt sanctions and an administrative order.

Rebecca Slaughter:

Can I ask your question a little bit differently commissioner Ferguson? Because I think I understand what you're asking, which is violations of federal court orders are enforced through contempt proceedings. Is that correct?

Rena Kim:

Violations of federal court orders would be enforced by the court that issued that order. What I was getting tripped up with your question is that the commission order is an order issued by the commission.

Andrew Ferguson:

I agree. What I'm asking, well that's sort of like half the dispute today, is what is this thing and I'm asking is it your view that if you had Meta dead to rights on a violation of the 2020 order, could we seek contempt or 5B or 5L relief or only 5B and 5L relief?

Rena Kim:

So to seek contempt of an administrative order, the commission, given the statutory authority, would have to go through 5L and that is to seek civil penalties for a [inaudible 01:05:08].

Andrew Ferguson:

Right

Rena Kim:

It would only go-

Andrew Ferguson:

So, in your view we couldn't return directly to the district court and ask that Meta be held in contempt?

Rena Kim:

It would have to make its case for why this administrative order has been, to demonstrate how it's been violated. It may or may not necessarily go to the same judge, because it's its own order and it would be its own action.

Andrew Ferguson:

Okay.

Lina M. Khan:

So Meta's argument really hinges on viewing an entirely two separate categories, orders that are entered into pursuant to a hearing and consent orders that are not entered pursuant to a hearing, but in their spring from the consent of the two parties rather than section five. In your view, is there any significance to the difference between those two orders for the purposes of section five?

Rena Kim:

No. 5B refers to final commission cease and desist orders, whether that order was arrived at through litigation that involved the hearing that's referenced or whether through consent because there were settlement negotiations that resulted in consent. Both types of orders are commission orders. One additional point I wanted to make on the rule 2.32 I just wanted to make clear, and I think I'd heard it earlier this morning, the commission can't give itself powers use through a rule that Congress hasn't already given it. In other words, in some respects it seems to be that the commission, excuse me, that

Meta is saying, well this order is a consent order and so the commission can't modify it unless [inaudible 01:06:44] and didn't have that magic 2.32 language.

But that doesn't make sense because again, any rule, the commission rule here, 2.32, could only reflect a power that Congress already gave it. Otherwise, it would just be the commission writing rules for itself to get the respondent [inaudible 01:07:02] to exercise powers it doesn't actually have by statute and that wouldn't make sense. Rule 2.32 simply reflects what the statute already says in 5B, that consent orders, just like any other order, can be modified given those conditions and subject to the parameters I was discussing earlier.

Alvaro Bedoya:

Quick question, why does attachment A say this court, the Council insertion at Scrivener's error or what?

Rena Kim:

That is one possibility and that is in fact what Judge Kelly had... That was one of the possibilities.

Alvaro Bedoya:

I know what he said, what are you saying it is?

Rena Kim:

I think it might be a Scrivener's error. I think what's clear from the face of the document and the way it's captioned, it is clearly a commission order. It's not a court order. And the judge in that federal court explicitly said, this isn't my order, it's not my order, it's the commission's order.

Andrew Ferguson:

Do you think the commission ought to wait to decide these until the conclusion of the appeal of Judge Kelly's decision and the conclusion of the appeal of the acts on PI challenge that they've raised?

Rena Kim:

Well, I think the commission can do what it sees as appropriate. I think neither of those challenges raises any real roadblock to what the commission proceeding that's already underway is doing. And in fact, in a number of these areas, a district court has already made a final judgment, for example, that the administrative order is not part of Judge Kelly's final order. I understand that's on appeal, but for race judicata purposes, that has race judicata effect.

Andrew Ferguson:

If the DC circuit reversed it tomorrow and said that this was a part of Judge Kelly's order, we're locked, right?

Rena Kim:

You could then look at the question and evaluate. I think it is a commission order. It's subject to 5B modification of the [inaudible 01:09:00].

Andrew Ferguson:

Meta sought a preliminary injunction though, right?

Rena Kim:

Yes, and they were denied.

Andrew Ferguson:

Right. And if the DC circuit reverses, we are in fact stuck. Right?

Rena Kim:

Well, I don't want to speak to hypotheticals. I think at that point we'd revisit the question. And as to the constitutional issues that have been raised, those are before a different judge. And again, I believe there's a motion to dismiss that's pending. But on the preliminary injunction, judge Moss in that instance, had rejected the arguments unlikely that the commission, that Meta would be able to prevail on them.

Andrew Ferguson:

And Judge Moss's decision was before Jarkazy, right?

Rena Kim:

Yes. And so my understanding from looking at the docket is that the subsequent to Jarkazy there was renewed motion to dismiss on a couple issues that touched on Jarkazy.

Melissa Holyoak:

Question on the rule. You mentioned that commission can't give itself powers that it doesn't have through agreement. And so that 5B, that consent on the ability to have 5B modification of consent orders exists with or without the rule? Is that your position?

Rena Kim:

It's slightly different.

Melissa Holyoak:

Okay.

Rena Kim:

The commission can't give itself powers using a rule that Congress has not given it-

Melissa Holyoak:

Yes.

Rena Kim:

... through statute. So even if the commission and a respondent in a case agreed to something, if it's not a power that Congress had actually given it in the statute, that agreement doesn't make sense.

Melissa Holyoak:

And if it does not include mention of that in a consent order, do you think it has waived that right or that ability to do so? In other words, if you have a consent order that doesn't include the language in 2.32, is the commission waiving its rights to modify under that?

Rena Kim:

No, because 2.32 only applies to the agreements that settle a commission complaint and then consent order itself is a separate document. And in this case the 2011 agreement settling the consent order didn't contain that language.

Melissa Holyoak:

Or if that language was not in agreement, and excuse if I wasn't clear between the two. So if that language wasn't in an agreement then would they be waiving that?

Rena Kim:

By not also having it in a consent order?

Melissa Holyoak:

No. No. In subsequent, so for example, if the 2011 agreement had not contained the language with respect to modification of any under 5B, would they be waiving that ability to modify later?

Rena Kim:

I don't think that's the purpose of 2.32. I think if you look closely at the actual language, it says an agreement citing the complaint shall contain this language. It reads more like a notice provision, simply to put respondents on notice that commission consent orders are treated just like any other litigated order for purposes of potential modification under 5B. So 2.32's purpose, it appears just by the plain language, is to put parties on notice that that's how it's treated. 2.32 itself isn't the operative on-off switch to give the commission that power.

Lina M. Khan:

Ms. Kim, I understand your time has expired. Mr. Rwanda you may proceed with your [inaudible 01:12:31].

James Rouhandeh:

I thought I might've reserved 15, but maybe I took some of that time. Perhaps we won't need it. We're not saying that 2.32 C gives statutory authority to modify. The power, the authority to modify comes only from consent, respect of consent order. And there are two cases I wanted to point to. One is an FTC decision from November 7th, 2018. That's in Ray 1-800-CONTACTS Inc., which dealt with the authority to, and also there's a seventh circuit case, People Who Care, which is 961F second 1335, which says the source of the authority to require the parties to consent decree to act remains the acquiescence rather than, their acquiescence rather than a rule of law.

Elmo, in effect says the same thing which is, and this is the Elmo decision from 1967 of the DC circuit which says, the present hearing apparently is pursuant to the terms of the consent order itself, recognizing that in the context of consent order it's the agreement of the party that gives the authority to modify, if it provides that authority, and here it was not provided.

But I did want to address another part from the statutory argument, I really wanted to turn to the enforcement of orders and the determination of adjudicating compliance because that is another basis why the committee doesn't have authority to proceed here, is it doesn't have authority to enforce its own orders or to adjudicate compliance.

Now, in its brief the complaint counts, the complaint counsel said, "Reopening is one of the multiple avenues by which the commission may seek to ensure compliance with its orders." The source of course compliance with its orders, that's the very definition of enforcement. But for this year the full commission said in a unanimous decision authored by Commissioner Pedoria, that orders are enforceable only by order of the district court. That's the Intuit, [inaudible 01:15:18] Intuit case. And the Supreme Court has made clear that order enforcement and determining whether orders have been violated as a role for the courts. Supreme Court said that in Morton Salt, explaining that it's the responsibility the courts once a commission order has become final to adjudicate questions concerning the order's violation. And JB Williams case, the Second Circuit said, "No decision has ever intimated that Congress has vested the FTC with the power not only to make orders, but determine whether they have been violated." And there's no case cited by complaint counsel to the contrary, it's clearly what the commission is seeking, or the complaint counsel [inaudible 01:16:01] is to determine whether the order has been violated. Just look at what the [inaudible 01:16:03] said, repeatedly-

Lina M. Khan:

And counsel, would your argument here be different if complaint counsel were not suggesting that it was a violation that was triggering the change in circumstance that was then teeing up modification? Would the argument be different in any way?

James Rouhandeh:

Well, it wouldn't suffer from that flaw if this were not an enforcement proceeding. But time and again complaint counsel has said and the commission has said that this is an enforcement proceeding and that a predicate to determine whether circumstances have changed, the whole predicate is a finding that there have been violations. In fact the order to show cause itself says that, it says, "The commission believes Meta violated the commission's prior orders and it will continue to do so absent further enforcement action by the commission." It's in effect styled as an enforcement proceeding.

It's also on the commission's website. The commission put out frequently asked questions in connection with the order to show cause and there it asserts that meta has failed to fully comply with the 2020 order. I think it says it twice there. But the commission, this is sort of another threshold issue. The commission doesn't have that authority and it is never, as I mentioned before, it's never proceeded by order to show cause to address alleged violations of an order. The commission told the district court that the order to show cause was premise under finding of order violations. That was said that Meta had failed to establish and implement an effective compliance program as filed under the 2020 order and also violated the 2012 order. The commission have told the Congress the same thing. So it's just without doubt that the change conditions that are being asserted here require a determination of whether or not there's been compliance and in effect this is enforcement.

Andrew Ferguson:

To make sure I understand your argument, your position then is that order violations can never constitute the change circumstances giving rise to the commission's authority under 5B to modify?

James Rouhandeh:

Yes.

Andrew Ferguson:

Okay, and that's because it's not a change in fact in law or it's not in the public interest. I think Mr. Holyoak asked this earlier, which or all?

James Rouhandeh:

Both. It's a job of an article three court.

Andrew Ferguson:

Well, okay, I mean sort of, but that's sort of question begging. We have the power to modify in some circumstances. Those could include violations. It wouldn't be enforcing in the sense that you're using it. We can't hold you in contempt, we can't hold your client in contempt to do anything to them. That's definitely true and that's always true. But it's entirely possible that when Congress used that language, one of the circumstances that would give rise to the modification authority could be violations. That wouldn't make it enforcement, no matter what language is being used in press releases or whatever, that's not my thing. It still could be circumstances giving rise to modification authority, but it's not enforcement and no matter what we call it, it's not enforcement. We can't make you pay anything. We can't tell your client to submit someone to go to prison until the order has been, the violations have been remedied, but it still could be circumstances sufficient to trigger modification authority.

James Rouhandeh:

Well I understand the point, but I think it's more than just what they've said, what the words are. In effect, when you have a proceeding that is premised on alleged noncompliance, what the commission would have to determine is that there was noncompliant, that's it, before you even get to enforce.

Andrew Ferguson:

But don't we have to do that if we're going to go to the district court too. I mean if we go to the district court to enforce an existing order, we at least have to make the internal determination and we vote on it I think, to conclude that the existing order has been violated. But that isn't enforcement in the sense that you're using it. I can't compel your client to do anything, but it is a commission decision involving enforcement and I guess I'm not following why that categorically could never qualify as grounds to modify an order.

James Rouhandeh:

Well it's not just enforcement, it's that the commission can't make a determination on its own. It can't adjudicate compliance. So what you just said, I would say that there's a fork in the road. If what the commission is doing is adjudicating compliance with an order, at that point it can't go through the modification procedure. It has to go to federal court.

Andrew Ferguson:

So we can make a compliance determination, but once we've concluded there's not compliance, we have only one place we can go and it's district court.

James Rouhandeh:

Right.

Andrew Ferguson:

Okay.

James Rouhandeh:

And that's where, an enforcement kind of follows from that I guess.

Melissa Holyoak:

So if something rises to, there's a deficiency of some sort, but it does not rise to a violation of the order, then we could modify.

James Rouhandeh:

Well, I mean it has to meet the test of changed circumstances or public interest and those are narrow and they're narrowly circumscribed. But there is a scenario under which if it was a non violation but there was some other changed circumstance. So for example, the changed circumstance, potential changed circumstances, that's kind of a classic one and it's the one that Meta bargain for is, let's say there's a technological change that obviates a provision. That would be something where either side could consider possibility that there'd be changed circumstances because the order no longer reflects it.

If you look at the cases, the cases are things like, oh, we made an error in terms of how we described the order, so we need to go back and correct it. They're not violations and order noncompliance, they're sort of like more technical corrections. This is a whole scale attempt to sort of say, we said in 2020 that you violated the 2012 order. Now we're saying in 2023 that you violated the 2020 order, and we're not going to go back to the court that imposed it. We're going to do that ourselves and we're going to adjudicate noncompliance. And our position is apart from the whole section B, section 5B argument, the commissioner doesn't have that authority to do that on its own. It should be going to federal court and it has the means to go to federal court.

Lina M. Khan:

You just said that the statutory triggers for the modification are quite [inaudible 01:22:46], is public interest narrow?

James Rouhandeh:

Yes, I think public interest is, obviously, public interest is used in all sorts of statutes and I guess the commission in the first instance can decide a public interest. But the precedent is not that public interest is so broad that it would encompass anything, and if the public interest is something that the commission's not committed to do, so for example, it's in the public interest to adjudicate whether or not Meta complied with the order. That's doesn't meet the definition of public interest. We would say that there are certain things that don't permit a finding of public interest or change circumstances. And at the heart of this, at the heart of this, and that's why it's said over and over, is this is an enforcement proceeding because we have determined that there is order noncompliance and repeatedly have said there's order noncompliance and our position is the commission doesn't do that. The commission use the 5L route to do things like that.

Andrew Ferguson:

What about a violation of section five that's similar to but not covered by an order? If the commission determined that Meta violated section five in a way that isn't currently covered by the order, in your view does that qualify as grounds to modify it? We wouldn't be concluding or even addressing an order violation, we would just say, look, this conduct is pretty similar but we didn't capture it in the original order, so we're going to reopen it to modify to capture it.

James Rouhandeh:

I would say no, because I think that's really for a new complaint. I mean I think it's not like there's ongoing jurisdiction for anything related to this company, so we found a new issue and we'll just reopen. But I did want to, I see my time is escaping me. I just wanted to close on one issue, which is that I think this case, just from a practitioner's point of view, I think that this case has very serious ramifications for the ability of the commission to obtain consent. And what I mean by that, and let's say it's a consent order that's pursuant to 2.32 C and there's an administrative complaint and a notice of hearing, it doesn't make sense to settle an administrative complaint and agree to modification if the FTC could determine that non-compliance permits it to rewrite the consent order really without any limitation.

Melissa Holyoak:

But isn't that what parties do all the time? I mean this is why you have rule 2.32 and were required this in all of the agreements. I think this is a situation where you didn't have the agreement to have modifications, but parties, that's why you had that rule. Consent orders always included that. So why is this now ground setting, breaking tradition in terms of having the modifications?

James Rouhandeh:

Because it's groundbreaking and different, because it's saying if you didn't comply with an order, and this same argument would be, if the commission goes down the route advanced by complaint counsel and says there are violations of the order and we're going to rewrite the order under a modification provision. Then an order pursuant to 2.32 C I assume will be used, that'll be a precedent for 2.32 C modification. And what I'm saying is, in that classic that's been around more than 70 years, but if litigants before the commission see that the commission is essentially saying you violated the prior order, if not we're going to go to federal court and we're going to prove, we're going to simply rewrite the order, impose new obligations, impose obligations that we didn't get back in 2019 and rewrite a new order. I'm not sure you're going to see quite as many settlements and I think a settlement and a consent order is an important thing for the commission. It's been important since before 1954, that you want to proceed by consent orders. But litigants are going to be very reluctant because now they've seen that the commission is going to look at non-compliance and say that's a reason for modification and we're going to use that to make 800 changes.

Melissa Holyoak:

So it's proceeding on the basis of an order violation that is different, not the agreement to have modifications?

James Rouhandeh:

Right. No, I'm not saying it's endemic to every modification, but a modification that is based on an alleged non-compliance with an order that gives a free-ranging rewrite of an order.

Rebecca Slaughter:

Counsel, I just want to interrupt that because made that point a couple of times. Unilaterally rewrite, free-ranging rewrite. And I realize that today we're talking about threshold legal questions, not ultimately prices that would be involved, but certainly we're here on a contested order to show cause. And I certainly envision that if the commission proceeds past this stage, there would be process involving contested debate between both sides about whether or not the order should be modified and if the commission decided to modify that order, that the modified order would then be subject to judicial review. All of which would proceed in the same way as if we had, in Commissioner Ferguson's hypothetical, just litigated a new administrative complaint rather than reaching a new settlement.

So why is it different if we're having litigation and dispute over whether an order should be modified and how and to what degree that will be subject to judicial review? Why is that different from pursuing a new order in its entirety for related violations? And the tag on question to that is, from an administrablity standpoint, if the commission saw violations or conduct that was similar to but not directly violative of an existing order, isn't it more administrable for both the commission and the parties to have a single modified order that would be enforced going forward than multiple related orders?

James Rouhandeh:

Well certainly not from a litigation point of view. If there's something new and different, I think most litigants would say, "Well that's not part of what the prior proceeding is." You could always settle it sort of together if you wanted to. But I think if there's a new allegation that's not bound up in the prior order, I think most litigants would say, "Bring that as a separate complaint and let us persuade you why there isn't grounds for their complaint." And go through that whole process and maybe even resolve it. But my point is a different one. My point is, this is an unusual procedural situation that we find ourselves in, but how the commission decides it could have a very major impact on the agreement of respondents and the desire of respondents to settle.

Because I think it's cold comfort to say, well again, why don't we tell our client, don't worry, eventually we'll get to a circuit court of our choosing. There'll be substantial deference to whatever the FTC found, whatever the commission found, and you'll get... There's a very sound policy in favor of finality and it's really just not a final order of the commission. If the commission can nitpick it and say, "Here's a violation here, here's a violation there, we're going to use that to modify and rewrite a new order." From my perspective, it's going to make it harder for the commission to get the consent of litigants. Litigants are going to litigate those cases, they're not going to consent.

Rebecca Slaughter:

Yeah, I understood that point to begin with. What I was trying to say is, I don't think it's entirely accurate to say unilateral rewrite without process when the process that applies to modification is not dissimilar in scope and structure from the process that would apply to litigating a new order to begin with.

James Rouhandeh:

I understand, but I think those arguments are a little bit different and I take your point about administerability, but it's really not my point. I mean, it's up to the commission to decide from its perspective what is most administrable. But I think from the perspective of a respondent, if there are new alleged violations that certainly don't relate to the existing order on the books, I think the preference would be, "Let us tell you why that-"... You know, a no complaint should issue with the respect to that. And I think that would be as opposed to, "Let's modify what we have in place."

I mean, obviously, things can always be done by agreement because as I said before, it's really the consent of the respondent that gives the authority of the commission. So you could bring those two together if was all parties consented. You could bring a new and an old settlement together if that was the desire. But I think it really warps the modification provision to say it's broad enough that it covers non-compliance, new violations. It's supposed to be narrow and it shouldn't be broad. Because if it's not narrow, there's not going to be finality to commission orders.

Andrew Ferguson:

You've been on your feet a long time. I've got one more. I appreciate your patience. So five B, the modification stuff cuts both ways. There's a provision authorizing us to reopen to modify if the sort of legal requisites are met. But there's also a provision that allows respondents to petition the commission to reopen, to modify in light of the respondent's view of changed law and facts. In your view, if the commission fails to reduce sort of the agreement on modification to writing in the consent, the modification provisions, that would exclude for example Meta's ability to petition us in the same way, right? On your view of five B? That it's just sort of all out.

James Rouhandeh:

Right.

Andrew Ferguson:

Okay.

James Rouhandeh:

And that's why those two provisions are in there. There's no modification provision but Meta bargained for two potential modifications.`

Andrew Ferguson:

And you disagree with your friend on the other side that you could petition us to modify other parts. Your view is that because basically the two modification provisions were like Dicker terms, your modification rights are limited to those two provisions.

James Rouhandeh:

Neither party has the ability to freely model.

Andrew Ferguson:

Okay, thank you.

James Rouhandeh:

Thank you.

Rebecca Slaughter:

Thanks Mr. [inaudible 01:33:31]. Mrs. Kim?

Rena Kim:

A few points I'd like to make on rebuttal. There's been a lot of talk about the distinction between enforcement action and this current modification proceeding. It's important to remember that an enforcement action, I think what Meta is emphasizing here. Is when it's punitive in nature. In other words, five L actions that seek civil penalty. That's classically punitive in nature. It seeks civil penalties. It's right in the name. We are in a three, excuse me, five B proceeding under rule 3. 72 to modify the order and it has a remedial purpose. While it's true that the commission itself as an adjudicative body, which it is, can't make decisions about order violations and order Meta to pay civil penalties or award any other type of monetary relief, that's not the type of authority that Congress gave it. It doesn't mean that the commission can't consider order violations or noncompliance as part of the circumstances before it. And in fact, again in this instance, the commission is sitting as an adjudicative body. It is looking at potential changes to its order. And in similar cases in federal district court where the commission has stipulated orders, under civil procedure rule 60 B, courts routinely consider order violations in evaluating a request to modify.

Lina M. Khan:

So just to make sure I understand, you disagree that this proceeding is an enforcement action? Is that right? Or is it an enforcement action?

Rena Kim:

Yeah, and we might be, counsel and I, might be thinking of different things when we say enforcement. It is an enforcement in the sense that the commission is considering measures to ensure full compliance with the objectives of its orders. I mean it has every interest in wanting to make sure that respondents under order fully comply with the law and what they meant to have happen with an order. But in terms of being a punitive measure that would result in monetary relief or other types of monetary sanctions, that's not what this proceeding is. I think Meta has cited a couple cases for the point that only courts get to adjudicate violations and not the commission, and I want to give full context, because that's not exactly what those cases said.

So Morton Salt and J.B. Williams are making slightly different points. At the top, neither of those cases held that the commission can't consider order violations or noncompliance as part of the circumstances. The totality of circumstances they're looking at when deciding whether to modify an order. So in red and full in the Morton salt case, that instance, there was a commission order that had said, "Price differentials greater than 5 cents that injure competition are prohibited." And that went to a court and the question and the challenge for the court in that circumstance was, well it's really not for the court to decide if the price differential injures competition because that's prohibited by the Clayton Act and Congress had entrusted the commission with making those decisions about which acts or practices violate the statutes they're enforcing. Court's role is only to enforce the language of the commission order as it's written.

So in that case, the Supreme Court was making a distinction between what the courts do versus what is more properly within the realm of what the commission, as a body of experts entrusted to enforce that law, would decide. So it sent the order back to the commission to make more clear exactly which price differentials injure competition in violation of the Clayton Act. It didn't say the commission can never think about whether there's an order violation or other instance of noncompliance, especially when it's in the context of a potential order modification.

Melissa Holyoak:

Well the commission never has.

Rena Kim:

Pardon?

Melissa Holyoak:

The commission never has. It's never proceeded based on order violations to modify. Isn't that right?

Rena Kim:

No. In district court cases, commission routinely cites order violations as a basis for seeking modification where there are-

Melissa Holyoak:

But under five B?

Rena Kim:

Under five B, I wouldn't say it's never done it, but I will say that it's used very sparingly which undercuts any argument that this is going to somehow create a bad precedent and arm the commission's position with other litigants. I'll note at first, it's a bit premature because there hasn't actually been any action taken on what a remedy looks like.

Andrew Ferguson:

I think, I won't speak for her, but I think Commissioner Holyoke's point is, if we've never done it before, we're doing it for the first time now, sparing use of it was zero before today and this might affect bargaining going forward and maybe Meta's right that this will make it more likely people will litigate against us and less likely that they'll settle.

Rena Kim:

There have been past cases where the commission looked at violations and noncompliance. Or if it doesn't rise to the level of a violation, or there was a question about whether it really did or didn't. Elmo is one case and Moore is another. I believe National Housewares might be a third. So it's not that it's never been done but it's a tool that it's been given to the commission but the commission has used it very sparingly. This is a unique situation. This is an order involving respondent that's already been sued twice before and has been already found in the past to have violated its commission order and whose subsequent noncompliance is what brings us here today. It's a unique situation. The likelihood that if the commission were to go down this path and issue modifications to the order, the idea that that would create a bad precedent and discourage other litigants is much lower than has been argued here.

Andrew Ferguson:

Are the standards of review that a court would exercise in reviewing our modification decisions the same or different from the standard that they would exercise if we sought five L relief for a violation of an order?

Rena Kim:

I believe-

Andrew Ferguson:

They're more generous, I think, in a petition for review. More generous to us.

Rena Kim:

It would be a petition for review of the injunctive relief and the commission order. And that is slightly different. I mean injunctive relief is remedial. It seeks to deter conduct that the act, the FTC Act, is meant to prevent and discourage. Five L action is punitive. There are different, but there would be, I don't want to speak and not have it be accurate, but assuming there were different standards of review for a final commission decision on injunctive relief versus what needs to be proven to seek penalties, that's not unusual. When you think about it, there's different burdens of proof for civil and criminal actions that could be brought for the [inaudible 01:39:55].

Andrew Ferguson:

That's right counsel. But Judge Randolph asked a similar question in the DC Circuit which was, if the commission could proceed on a fresh section five violation, just launch a new complaint, or it could get five L relief, what's the difference here? Why does Meta care if they're proceeding this way? And I think the answer is, because we'll get better judicial review. There are different burdens of proof and a more generous, less searching, standard of review in the judiciary if we proceed this way than if we did it through five L or launching a fresh a section five complaint. Shouldn't that matter when we're deciding whether we have the power to do this?

Rena Kim:

There are different objectives at stake with civil penalties versus, which is punitive, and order modification, which is remedial. And in this instance, to the extent the commission makes a decision to go forward, it wouldn't be unbounded and completely on a whim. It would have to be based on substantial evidence. It would have to be grounded in a robust record and the commission would have to demonstrate that whatever modifications result, whatever injunctive relief is ordered, are suitably tailored to the factual circumstances. So it's not unbounded, and on a court of appeals, the commission would have to demonstrate that it met each of those points.

Melissa Holyoak:

How would an order violation be a change in law or fact? I mean, obviously we were expecting this type of violation. Or, we set forth this language and then they violated it, so it's something to be expected. How is it new? How is this new?

Rena Kim:

So I'll say, it's new in the sense that, well if the question, if I understand it, is well what changed? What's different between today and 2020 when the order was entered? The difference is that Meta has now violated, or there's been evidence presented to the commission of Meta's non-compliance, and those past violations make it more likely that Meta, under this order, will violate again in the future. And that's something that-

Melissa Holyoak:

No. I don't think... That's not quite my distinction. I mean the distinction is, if you have parameters in your order and they violate it, you might very well expect that those parameters might not be satisfied. They might be violated. Something new, a new factor condition, is something different that was not contemplated. So an order violation itself is not anything new.

Rena Kim:

Are you speaking about, I don't know if we're getting into Remedy and sort of-

Melissa Holyoak:

This really speaks to what Commissioner Ferguson was talking about at the very, very beginning of this argument in terms of discussing, are these just order violations of the previous order or is this something new that is happening? Some new violation that's related but not a violation of the order itself?

Rena Kim:

There's order violations, so violations of the order as written in what the order requires, and there's additional section five claims. There's a COPPA claim as well. But it goes to the same objectives. The point of the order was to ensure strong protections for consumer privacy through measures such as a robust privacy program. The evidence presented to the commission was that, at least as the initial assessment, Meta's program fell short of that baseline. And there are examples of things that can go wrong and ways that people can be harmed when that happens.

Andrew Ferguson:

I guess my concern with that approach, it's sort of like endless bootstrapping where we allege a violation or potential violation of an existing order, we expand the scope of the order, we allege a subsequent violation of the expanded version of the order, and we just sort of do this in perpetuity and then subject to very generous judicial review in the form of a 45 C petition for review over and over and over without ever having to go to court and do what we would normally do for enforcement, which is like stand up in front of a district court, subject to the district court's findings of facts not ours, and have to prove our actual case. I mean I think that's part of the concern here is, if this is a mechanism to adjudicate violations of an existing order, we can sort of just do it forever, right? You sort of constantly expand the scope of the order and every subsequent violation of the newly expanded order becomes a reason to modify, et cetera, et cetera, et cetera.

Rena Kim:

It wouldn't be unbounded. It would be limited by the same principles that federal district courts have to abide by when considering whether to modify stipulated court orders under civil procedure rule 60-B. And in fact, in contempt cases, the commission routinely makes these arguments for district courts that a stipulated order, that a defendant in that case because it's a federal court action, is under, that's been violated, there's been contumacious conduct and that provides a reason for the commission to consider modifying that order, whether it was stipulated or through litigation. The fact that the parties had reached agreement on a settlement and it resulted in a consent order doesn't make it any less of a commission order than an order that had gone through litigation. And in fact, in the ITT Continental Baking case, the commission expressly rejected respondents' argument that the commission cannot modify its order unless the respondent agrees to it. Rather, it expressly recognized that the commission

has modification authority under its statute just like a district court would for stipulated orders that are before it as an adjudicative spot.

Rebecca Slaughter:

Can I ask the threshold question, and my colleague's questions here, has been a little bit around, or at least in Commissioner Holyoak's question, has been around whether violations of orders are expected? I'm not sure that's a point that's clear just as a given. Do you think that's true? Do you think that the commission expects its orders to be violated?

Rena Kim:

The commission would expect that an order is complied with. I think that the idea that the commission entered into these negotiations in 2019 and issued a subsequent order with the full expectation that Meta would promptly violate was not part of the commission's calculation. In fact, when considering changed conditions that are related to order violations, there is no reasonably foreseen, reasonably foreseeable, actually foreseen, standard. There's not laid out in the statute. We've cited a number of cases in our briefs where courts modified consent orders that were based on violations or changed conditions of fact that were, if not foreseeable, but actually foreseen. Because part of the calculation for those courts is to look at the context. They look at the violations, or the change conditions of fact, in this case it would be noncompliance, and they look at it in the context of the order's objectives. Given these facts, is the order still working the way it should be?

Andrew Ferguson:

Can I ask a related question? Suppose, just presume the following hypothetical, the commission concludes that some company has violated section five and we have a consent administrative order within the commission that says don't violate section five that way anymore, and then they commit a substantially similar violation of section five after the entry of the order that violates the order. Is that a change in fact that would allow us to modify the order?

Rena Kim:

I think the fact that before you had a respondent that was under order and had not yet violated anything and then you have a respondent that now has violated again, that is-

Andrew Ferguson:

Well they had violated section five. That's what triggered our authority to enter the order in the first instance. And so that's my hypo. Section five violations, commission becomes aware, commission negotiates a settlements order, or a consent order, consent order is issued forbidding the previously committed section five violations, the company commits a substantially similar violation of section five, which also therefore constitutes a violation of the order. Is that subsequent violation a change in fact that would trigger our five B modification?

Rena Kim:

It could be. And courts routinely handle violations in the same way. And I think there were similar facts in both the Elmo and the Moore cases.

Andrew Ferguson:

So that is where I'm struggling and I think that this is the point Commissioner Holyoke has made a couple of times. I have the hard time understanding how that is a change in fact when that was a fact existing in the world when we entered the order. And if that's true, we can do this perpetually. If committing the same violation that someone was committing that led to the entry of the consent order in the first instance constitutes a change in facts sufficient to trigger five B, this can go on forever.

Rena Kim:

I might've misunderstood your question. I think I had understood it as a violation of section five, other misconduct that also violates the section five as it's reflected in the order. I think-

Andrew Ferguson:

It's substantially similar to the conduct that led to the order in the first instance.

Rena Kim:

If that non-compliance demonstrates the order isn't working the way it's written, then maybe modifications are needed. But it doesn't necessarily mean that's what's going to happen every time.

Andrew Ferguson:

I recognize that. I'm just asking about the standard triggering our authority, which conversely, we don't have to modify something even if we had the authority, we have some discretion. I'm asking sort of that triggering event, could conduct that is basically the same as pre-order conduct constitute a change in fact sufficient to trigger five B?

Rena Kim:

And assuming in that question that the second time around that conduct not only violated Section five, it also violated-

Andrew Ferguson:

Exactly.

Rena Kim:

... the order, I mean that is a possibility. But it would really depend on the facts. And again, the commission wouldn't be able to just do it on a whim. They'd have to follow the same principles that district courts routinely do in evaluating 60 B motions for modification.

Andrew Ferguson:

Okay.

Rebecca Slaughter:

But isn't it the case that engaging in conduct before an administrative agency has acted and an order has been entered and engaging in similar or the same conduct once under order is in fact factually different?

Rena Kim:

Yes. And that is the point, I think, because now you have the fact that what's different is the fact that now a respondent who's already been under order has violated the law and or violated the order again, makes them more likely. That's what's changed. And I think in this instance in terms of, I think earlier someone had asked about foreseeability like, well, isn't it something the commission would've or should have expected that there would be a violation? I think the answer to that is, while the commission may have anticipated that there might be one or two instances where something fell short of a hundred percent compliance, certainly it wasn't foreseeable for it to think that so soon after the order Meta would fail to comply in such a fundamental, substantial way. And I mean if that had been the case, that the commission had understood and anticipated that would happen, it wouldn't have made sense for the commission to enter into the order in the first instance.

Rebecca Slaughter:

And does the financial penalty that Meta paid in 2020 bare in any way on that consideration?

Rena Kim:

It's separate. Meta paid a civil penalty to resolve the contempt violations in the government's 2019 complaint. That is separate. They didn't buy themselves immunity from ever having the commission exercise authority to reconsider, from time to time, if the facts presented and the evidence shows that modifications may be appropriate to ensure that the order is continuing to effectuate its objectives. If I'm reading the clock correctly, almost out of time. I just want to say 2020 Meta order falls squarely within the five B authority and nothing that the commission is doing here goes beyond the limits of its legal authority. And further, the way the commission is structured and the way it's functioning doesn't violate the Constitution. So for all of these reasons, Meta's legal arguments on these threshold issues should be dismissed and the commission should proceed with this reopening.

Lina M. Khan:

Thank you Ms. Kim. Thank you Mr. Rwanda for your presentations. We are adjourned.