No. 17-1058

IN THE
Supreme Court of the United States

SNR WIRELESS LICENSECO, LLC AND
NORTHSTAR WIRELESS, LLC,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION AND
UNITED STATES OF AMERICA,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF PUBLIC INTEREST ORGANIZATIONS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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BRIEF OF *AMICI CURIAE* PUBLIC INTEREST ORGANIZATIONS

The Phoenix Center for Advanced Legal & Economic Public Policy Studies ("Phoenix Center") submits this brief as *amicus curiae* in support of certiorari.[1] Joining the Phoenix Center are the Computer and Communications Industry Association ("CCIA"), the International Center for Law & Economics ("ICLE"), Public Knowledge, R Street Institute and TechFreedom (hereinafter "Public Interest Organizations Amici"). Associate counsel for the Public Interest Organizations Amici are:

- John A. Howes, Jr. – Policy Counsel, Computer & Communications Industry Association;
- Geoffrey A. Manne – Executive Director, ILCE;
- Professor Justin (Gus) Hurwitz – Director of Law & Economics Programs, ICLE;
- Harold Feld – Senior Vice President, Public Knowledge;
- Tom Struble – Technology Manager and Counsel, R Street Institute;

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[1] All parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of the brief. No person other than *amici curiae* or their counsel made a monetary contribution to the preparation or submission of this brief

- Berin Szoka – President, TechFreedom.

INTEREST OF *AMICI CURIAE*

The Phoenix Center is a non-profit 501(c)(3) research organization that studies the law and economics of the digital age. The Phoenix Center has written extensively about the Federal Communications Commission's ("FCC") design and implementation of spectrum auctions, including both the legal and economic underpinnings of the "Designated Entity" ("DE") program. The Phoenix Center has also written extensively on the Commission's practice and procedure, including the Agency's mixed track record regarding protecting procedural due process and adhering to legal precedent. The Phoenix Center, therefore, has an established interest in the outcome of this proceeding and we believe that our perspective will assist the Court in resolving this case.

The Computer & Communications Industry Association (CCIA) is an international nonprofit association representing a broad cross-section of computer, communications, and Internet industry firms that collectively employ nearly a million workers and generate annual revenues in excess of $540 billion. A list of CCIA members is available at https://www.ccianet.org/members.

ICLE is a nonprofit, non-partisan global research and policy center. ICLE works with more than fifty affiliated scholars and research centers around the

world to promote the use of evidence-based methodologies in developing sensible, economically grounded policies that will promote consumer welfare and enable business and innovation to flourish. ICLE's advocacy for evidence-based methodologies gives it a significant interest in helping shape the law governing judicial review of agency decision-making.

Public Knowledge is a non-profit 501(c)(3) that promotes freedom of expression, an open internet, and access to affordable communications tools and creative works by advocating for policies that promote competition and diversity of ownership. In furtherance of this goal, Public Knowledge has participated in FCC spectrum proceedings throughout its 15 year history to advance auction rules that encourage competitive entry and ownership by small businesses, women-owned businesses, and minority owned businesses. This included participation in the proceedings that set the designated entity rules for Auction 97. Public Knowledge therefore has an established interest in the outcome of this proceeding and a perspective that will assist the Court in resolving this case.

R Street Institute ("R Street") is a non-profit, nonpartisan public-policy research organization. R Street's mission is to engage in policy research and educational outreach that promotes free markets, as well as limited yet effective government, including properly calibrated legal and regulatory frameworks that support economic growth and individual liberty. R Street engages regularly with the FCC and other administrative agencies to help guide their decision-making and ensure their actions comport with due

process. Thus, R Street has a particular interest in the outcome of this proceeding.

TechFreedom is a non-profit, non-partisan 501(c)(3) think tank dedicated to educating policymakers, the media, and the public about Internet policy. A central theme TechFreedom's work is on how administrative agencies wield their power in regulating technological change. Accordingly, TechFreedom has a particular interest in the outcome of this proceeding.

INTRODUCTION AND SUMMARY OF ARGUMENT

This Court has long-held that an administrative agency may change policy direction so long as it provides a reasoned explanation for doing do. Articulating this reasoned explanation is crucial to protect due process because an agency should not be able to sanction an individual or entity for violating a new standard absent "fair notice." As Petitioners state in their brief, there is a split in the circuits over what constitutes sufficient "fair notice." Several circuits apply a straight-forward standard, requiring an agency to clarify and articulate their regulatory interpretations. In contrast, other circuits—including the D.C. Circuit in this case—shift the burden and hold that notice is sufficient so long as the public "should reasonably have anticipated" that an agency "might" change policy direction.

As argued below, a notice standard which places the onus upon the public to "reasonably anticipate" what an agency "might" do raises serious issues of due process—particularly given the unique facts of this case. Those facts are straightforward:

First, the FCC established the rules for Auction 97 through public notice and comment. In this public notice, the Commission specifically instructed firms seeking a determination to be a "Designated Entity" (and thus be eligible for bidding credits) to "review carefully" the well-developed Commission precedent on this matter. It appears that Petitioners carefully followed precedent in order to satisfy the FCC's rules, borrowing heavily from agreements previously approved by the Commission. While the Agency leaves a formal examination of these agreements until after the auction concludes, the Short Form process nonetheless provides the Commission (and other potential bidders) with ample information about business arrangements and joint-bidding agreements among DEs and their financial backers. Given full and public knowledge of the agreements and DISH's aggressive spectrum acquisition history, if the FCC had concerns about the relationship between the Petitioners and DISH, then the FCC could have easily rejected the Petitioners' respective Short Forms. (While the FCC's Short Form process may be perfunctory, it is not *pro forma*.) It did not. Apparently unconcerned about Petitioners' relationship with DISH, the FCC certified Petitioners as "Qualified Bidders" and allowed them to participate in the auction as "Designated Entities."

Second, the FCC was likewise unconcerned with the impact of the Petitioners' relationships with DISH during the auction. Auction 97 data reveal that the bidding credits had exceeded $3 billion within one week of the eleven-week auction (Round 23 of 341). Bidding credits would reach nearly $4 billion, almost all of which was attributable to the Petitioners, by the 12th day of bidding. Under the terms of its own auction rules, if the Commission believed that Petitioners were "too successful" in the auction, then the Agency could have intervened at that point. Again, it did not.

Finally, after Auction 97 concluded and the size of the bidding credits were publicly revealed, allegations that Petitioners violated the Commission's rules spread like wildfire around Washington. Only then did the FCC perceive a problem, and that problem was mainly the Commission's embarrassment from media coverage suggesting that the Petitioners had somehow bamboozled the Agency about their relationship with DISH. In response, both Democrat and Republican FCC Commissioners felt the pressure to act. For example, FCC Commissioner (and now Chairman) Ajit Pai, testifying before the Senate Appropriations Committee, remarked that "[a]llowing DISH to obtain over $3 billion in taxpayer-funded discounts makes a mockery of the small business program." Not to be outdone, then-FCC Chairman Tom Wheeler testified before Congress that he intended to "fix this" because he was "against slick lawyers coming in and taking advantage of a program that was designed for a specific audience and a specific purpose" and opposed having "designated entities be beards" for large companies.

A clean "fix" would prove elusive. Within months after Auction 97 concluded, the Agency amended its DE Rules to cap significantly the amount of bidding credits a DE may receive and to ban joint-bidding agreements for future auctions, effectively conceding that the undesired outcome of Auction 97 was a logical outgrowth of the rules in place for that auction. Admitting that it cannot apply its rule changes retroactively, however, the Commission was forced to engage in some legal gymnastics to revoke the Petitioners' bidding credits.

Although the Commission conceded that "the entire record indicates" that Petitioners complied with the Agency's rules and adhered to precedent, the Commission attempted to get around these inconvenient truths by declaring that Petitioners "simply proceeded under an incorrect view about how the Commission's affiliation rules apply to these structures" and under the "totality of the circumstances" the Petitioners did not warrant DE classification. But what about the past Commission precedent upon which Petitioners relied? The Commission—*in a footnote*—simply swept this precedent under the rug, noting—*without any explanation*—that "[t]o the extent any prior actions of Commission staff could be read to be inconsistent with our interpretation of the Commission's rules in this order, those actions are not binding on the Commission—and we hereby expressly disavow them…."

By any standard, the FCC provided no "fair notice" of its change in policy. Instead, as this Court observed in *Auer v. Robbins*, this is a classic case of a "'*post hoc* rationalizatio[n]' advanced by an agency

seeking to defend past agency action against attack." The Commission may not escape responsibility for its choices about running Auction 97 by claiming *post hoc* that Petitioners had an "incorrect view" about FCC precedent but then disavow this same precedent without explanation *when the Commission both knew prior to the auction how the Petitioners interpreted the FCC's rules and precedent yet nonetheless allowed them to bid aggressively and did nothing to stop the auction after the data revealed significant DE bidding credits for the Petitioners.* Allowing an agency to move the goal posts without providing fair notice of a policy change raises serious issues of procedural due process.

The D.C. Circuit, however, was unmoved. According to the D.C. Circuit, before placing their first bid, Petitioners "should reasonably have anticipated" that the Commission "might" change its "effective control" standard post-auction, even though Petitioners—as instructed by the Agency—followed precedent and made the Commission aware of its bidding plans and financial arrangements with DISH. Given that the federal bureaucracy "wields vast power and touches almost every aspect of American life," such an amorphous notice standard makes no sense and establishes a troubling precedent for administrative law.

First, as lawyers are not particularly good soothsayers, if they are charged with having to "reasonably anticipate" how an administrative agency "might" act, then the ability to rely on precedent—no matter how sparse—takes on added significance. In the case at bar, however, the D.C. Circuit has effectively held

that any bureau-level decision made on delegated authority at a federal administrative agency no longer has any precedential value, thus removing a potent source of guidance going forward. While bureau-level decisions, by definition, do not have the full force of agency-level decisions, very often bureau-level decisions are the only guidance available. By eliminating this common and well-accepted source of precedent, the D.C. Circuit's ruling actually makes it harder—not easier—for the public to "reasonably anticipate" what an agency "might" do.

Worse, under the D.C. Circuit's logic, in the absence of a definitive agency-level order, any good-faith reliance on a bureau-level decision can now nonetheless expose regulated entities to significant financial penalties. Such an amorphous "reasonably anticipate" notice standard therefore injects significant regulatory uncertainty for entities subject to federal regulation, potentially leading to diminished investment in critical infrastructure. The effect on investment from heightened regulatory uncertainty will be particularly acute in the telecommunications arena, because the FCC is charged with ensuring that broadband is reasonably deployed to all Americans as directed by Section 706 of the Telecommunications Act of 1996.

Finally, a "reasonably anticipate" fair notice standard does not constrain the power of the administrative state; instead, it greatly expands it. Even at an administrative agency, as then-Judge Gorsuch once observed in *Direct Marketing Association v. Brohl*, decision-makers must respect past decisions "out of fidelity to our system of precedent whether or

not [they] profess confidence in the decision itself." Yet, despite this basic maxim, scholarly research demonstrates that the role of precedent increasingly has little value in administrative agency decision-making. If the Court follows the D.C. Circuit's logic, then the irrelevance of precedent in administrative decision-making will accelerate down the slippery slope. To hold administrative agencies to account, this Court must, in the words of Justice Gorsuch in *Brohl*, force agencies to "attach power to precedent" so that due process does not "surrender[] similarly situated persons to widely different fates at the hands of unrestrained" bureaucrats.

While it is perfectly acceptable for an agency to change policy direction going forward, an agency must not be able to "disavow" precedent cavalierly when it proves inconvenient. Indeed, a "reasonably anticipate" standard creates a "plausible deniability" that an agency's political appointees may invoke without warning in response to purely political pressures. Such a notice standard effectively end-runs the entire purpose of due process—to ensure that agencies operate under a predictable rule of law rather than in response to political expediency.

A "reasonably anticipate" standard therefore will embolden administrative agencies to act without constraint. The central dispute this case is not over the bounds of agency discretion to interpret their enabling statutes, but over the bounds of acceptable conduct when an agency interacts with the public. So long as some circuits place the onus on the public to "reasonably anticipate" what an agency "might" do,

then the government will continue to exploit this gaping legal loophole to avoid responsibility and act with impunity. Any standard which essentially requires the public to read the tea leaves and hope they guess correctly (or otherwise suffer severe penalties) can hardly be considered adequate to protect due process.

ARGUMENT

I. By Any Standard, the Commission's Conduct in this Proceeding Indicates that the Agency Provided No "Fair Notice" of Its Change In Policy.

This Court has long-held that an administrative agency may change policy direction so long as it provides a reasoned explanation for doing do. *Fox Television v. FCC,* 556 U.S. 502 (2009). Articulating this reasoned explanation is crucial to protect due process, because an agency cannot sanction an individual for violating the new standard unless they had "fair notice" of this rule. In this case, no such notice was ever given.

As detailed below, after the Commission issued its auction rules, (a) the Commission was informed prior to the auction about the Petitioners' interpretation of FCC precedent yet nonetheless the FCC certified the Petitioners as "Qualified Bidders" and allowed them to participate in the auction as "Designated Entities"; (b) the Commission was aware one week into the auction that bidding credits exceeded $3 billion yet did nothing to stop the auction as permitted by the Agency's rules; but (c) after the auction concluded and faced with political embarrassment, the Commission

decided to move the goal posts despite finding that Petitioners had complied with the Agency's rules and properly disclosed their ownership structure and related agreements as required. By any standard, the Commission's conduct in this proceeding indicates they provided no "fair notice" of their change in policy. Instead, as this Court observed in *Auer v. Robbins*, this is a classic case of a "'*post hoc* rationalizatio[n]' advanced by an agency seeking to defend past agency action against attack." 519 U.S. 453, 462 (1997).

A. The Commission Could Have Rejected Petitioners as Qualified Bidders Based on the Short Form Application.

Prior to Auction 97, the Commission required interested bidders to file a "Short Form" application and disclose the identity and relationships of those persons or entities that directly own or control the applicant. *See* 47 C.F.R. §§ 1.2105, 1.2112. At that point, the Commission—as well as all other potential bidders—were fully aware of the identity of the firms involved and the nature of their financial relationships. Based on that information, the Agency had the authority to grant or deny both DE status and "Qualified Bidder" status.

In the case at bar, the Commission specifically instructed potential bidders seeking DE status to "… review carefully the Commission's decisions regarding the designated entity provisions." *July 2014 Public Notice* at ¶ 79. The Petitioners did so, and both fully disclosed their relationship as well as provided detailed summaries of their agreements with DISH in their Short Form application (Petitioners' Brief at 16),

basing their agreements directly upon agreements the Commission previously found to be acceptable. *Id., passim*. As the Commission conceded in its *Order*, "the entire record indicates" that Petitioners complied with the Agency's rules and properly disclosed their ownership structure and related Agreements as required. Pet. App. at 180-181a. Accordingly, the Commission found no objection with these investments and both certified Petitioners as "Qualified Bidders" and allowed Petitioners to participate in the auction as "Designated Entities." *October 2014 Public Notice*. If the FCC had a problem with the relationship between the Petitioners and DISH, then the FCC could have rejected the Petitioners' Short Form. Alternatively, the Agency could have notified Petitioners that their applications raised "red flags" that might trigger rejection later in the process. The FCC did neither.

While the FCC's Short Form process may be perfunctory, it is not *pro forma*.[2] After all, it strains credulity to think that the Agency would allow an entity who publicly discloses detailed financial relationships with two other bidders—including the use of joint-bidding agreements—to participate in a federal spectrum auction based on a mere "rubber stamp." As explained in the *Public Notice*, the entire purpose of

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[2] *See July 2014 Public Notice* at D-15 ("After the deadline for filing short-form applications, the Commission will process all timely-submitted applications to determine which are complete, and subsequently will issue a public notice identifying (1) those that are complete, (2) those that are rejected, and (3) those that are incomplete or deficient because of minor defects that may be corrected. Once that public notice is released, any interested parties may be able to view the short-form applications by searching for them in the Commission's database.")

the Short Form review is to determine whether the applications are "incomplete or deficient." Given the enormous amounts of money at stake, basic fairness should require the Agency to at least warn an applicant that a financial relationship permissible in previous auctions could be considered unacceptable for DE credit.

Along a similar vein, in light of the open disclosures in the Petitioners' Short Form application, one has to wonder exactly what the Commission was thinking about the Petitioners and DISH. Anyone with even a passing knowledge of the mobile wireless industry was aware that DISH was on a spectrum buying spree. In 2014, DISH acquired at auction the 10 MHz H Block for $1.56 billion. T. Ream, *Dish Network Sweeps H-Block Spectrum Auction for $1.56 Billion*, FORBES (March 5, 2015). In 2013, DISH made a run to acquire Sprint. (*Id.*) In 2011, DISH purchased 40 MHz of MSS spectrum in the 2 GHz band ("AWS-4 band") for $3 billion. DISH was obviously intending to be a player in Auction 97. In light of the pre-auction disclosures, the Agency's long and tortured experience with the DE Program (*see* S. Labaton and S. Romero, *FCC Auction Hit with Claim of Unfair Bids*, NEW YORK TIMES (February 12, 2001)), and DISH's reputation as a spectrum buyer, the Commission—as the purported "expert" agency—cannot credibly claim that it was ignorant of the facts before the auction began.

B. Auction 97 Data Reveal that the Commission Knew Within Seven (7) Days that Bidding Credits Exceeded $3 Billion Yet Did Nothing to Stop the Auction.

The Commission also cannot claim ignorance of potential problems once Auction 97 got under way. The Auction 97 data make clear that bidding credits crossed the $3 billion threshold in round 23 (of 341), which occurred only 7 days into the 76-day auction. Moreover, credits nearly reached $4 billion by the 12th day of bidding, with almost all of those credits going to the Petitioners. The FCC unquestionably knew early in the auction that the Petitioners had run up billions in bidding credits. G.S. Ford and M. Stern, PHOENIX CENTER POLICY PERSPECTIVE NO. 15-04: *Ugly is Only Skin Deep: An Analysis of the DE Program in Auction 97* (July 20, 2015). Under the plain terms of the rules for Auction 97, the Agency by "public notice or by announcement during the auction [can] delay, suspend, or cancel the auction in the event of natural disaster, technical obstacle, administrative or weather necessity, evidence of an auction security breach or unlawful bidding activity, *or for any other reason that affects the fair and efficient conduct of competitive bidding*." *July 2014 Public Notice* at ¶ 180 (emphasis supplied). If the FCC had a problem with Petitioners' relationship with DISH and the size of the bidding credits accrued, then it was at this point the Commission should have acted rather than delay action until the omelet was scrambled.

Yet, despite direct knowledge of both the size of the bidding credits (within the first week) and,

equally as important, the parties eligible for such bidding credits, the FCC again opted to do nothing. Instead, the Commission let Auction 97 proceed without intervention for a total of 341 rounds. It was only after the winners of the auction and the size of the bidding credits were publicly announced—and the subsequent media attention—did the FCC feel politically pressured to act. *See* WALL STREET JOURNAL, *FCC to Tighten Reins*.

C. Faced with Political Embarrassment, the Commission Moved the Goal Posts and Violated Due Process.

A primary objective of due process is to insulate the administration of justice from political pressures. Given the FCC's apparent unconcern until the headlines created public outrage and Congressional inquiries, it is hard to escape the conclusion that the FCC had no intention of disavowing its past precedent when it first set the auction rules and then impermissibly changed course without warning. Yet while the size of the bidding credits should make no difference to this Court in evaluating the legal questions before it, size matters in politics.[3] Indeed, notwithstanding

[3] While $3.6 billion is a large number, the large value of the bidding credits is not particularly surprising for a $45 billion auction. Across the FCC's spectrum auctions held prior to Auction 97, the average difference between gross and net bids is 14.5% and the median difference is 13%. The range is 0% to 36%. For a $45 billion auction, therefore, the expected bidding credit is around $6 billion, which is nearly twice the total credit from Auction 97. While $3.6 billion is certainly a lot of money, it is a big number in the company of even bigger numbers. By historical standards, the taxpayer got off relatively cheaply in Auction 97. The bidding credits summed to only 8% in that auction, well

the economic reality of the results of Auction 97, the sheer size of the bidding credits became a *cause célèbre* on Capitol Hill and shortly after Auction 97 concluded allegations began to swirl that that the Petitioners had somehow bamboozled the Agency about their relationship with DISH. *See, e.g.,* S. Solomon, *How Loopholes Turned DISH into a "Very Small Business",* NEW YORK TIMES (February 24, 2015) ("Through sleight of hand and aggressive use of partners and loopholes, DISH turned itself into that very small business, distorting reality and creating an unfair advantage.")

In response, both Democrat and Republican FCC Commissioners felt the pressure to act.[4] On the Republican side, FCC Commissioner (and now Chairman) Ajit Pai, testifying before the Senate Appropriations Committee, remarked that "[a]llowing DISH to obtain over $3 billion in taxpayer-funded discounts makes a mockery of the small business program." *Statement of Ajit Pai, Commissioner, Federal*

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below the average 14% share. Ford and Stern, *Ugly is Only Skin Deep*.

[4] Some of this pressure came from other bidders who claimed that Petitioners' participation skewed Auction 97's results. *See, e.g.,* Marx Analysis. However, assuming *arguendo* that such allegations are true, then the fault lies with the FCC—not with Petitioners. By certifying Petitioners as "Qualified Bidders" and allowing them to participate in Auction 97 as "Designated Entities," the Petitioners' bidding behavior (i.e., bidding on the assumption of a 25% discount) affected the prices of *all* licenses in Auction 97, not just those licenses that the Petitioners won. Petitioners' involvement in Auction 97 was pervasive, infecting prices for licenses they won, they lost, and even those they did not bid on. Ford and Stern, *Ugly is Only Skin Deep*.

Communications Commission, Hearing before the Senate Appropriations Subcommittee on Financial Services and General Government (May 12, 2015). Not to be outdone, then-FCC Chairman Tom Wheeler testified before Congress that he intended to "fix this" because he was "against slick lawyers coming in and taking advantage of a program that was designed for a specific audience and a specific purpose" and opposed having "designated entities be beards" for large companies. WALL STREET JOURNAL, *FCC to Tighten Reins*. But how?

As noted above, under established Supreme Court precedent, an administrative agency is free to change policy direction so long as it provides a reasoned explanation. *Fox Television v. FCC,* 556 U.S. 502 (2009). To this end, given its dissatisfaction with the results of Auction 97, less than six months after Auction 97 closed the Commission did exactly that by modifying its DE rules to cap bidding credits and eliminate joint-bidding agreements for future auctions. *See 2015 DE Rules*. However, by its own admission, the Commission could not apply these rule changes retroactively to the Petitioners, who were governed by the rules in place for Auction 97. Pet. App. 55a at n. 5 ("Because Auction 97 took place under our prior rules, our consideration and analysis herein is undertaken under the rules that were in place at the time that the Applicants submitted their respective Form 175 Short-Form Applications ("Form 175 Short-Form Applications") and Form 601 "long-form" Applications…"); *c.f., Bowen v. Georgetown University Hospital*, 488 U.S. 204, 208 (1988) (statutory grants of rulemaking authority will not be understood to encompass the power to promulgate retroactive rules unless that

power is conveyed by Congress in express terms). To escape from this legal pickle, the Commission engaged in some legal gymnastics by both moving the goal posts and then blaming the Petitioners for not understanding the rules of the game.

In particular, the Commission conceded in its *Order* that "the entire record indicates" that Petitioners complied with the Agency's rules and properly disclosed their ownership structure and related Agreements as required. Pet. App. 180-182a. (In fact, the Commission also conceded that "had the Applicants disclosed more detail about what they intended to accomplish through joint-bidding with DISH, such disclosure might have communicated bidding strategies to other applicants in violation of the prohibited communications rule…." Pet. App. 183a at n. 384.) To get around this inconvenient truth, the Commission pivots and claimed that Petitioners simply "proceeded under an incorrect view about how the Commission's affiliation rules apply to these structures" (Pet. App 180-181a) and, under the "totality of the circumstances" (Pet. App 102-103a), the Petitioners did not warrant DE classification.

But what about the past Commission precedent upon which Petitioners relied? The Commission *in a footnote* simply swept this precedent under the rug, noting *without any explanation* that "[t]o the extent any prior actions of Commission staff could be read to be inconsistent with our interpretation of the Commission's rules in this order, those actions are not binding on the Commission—and we hereby expressly disavow them…." The Petitioners had every right to rely on Commission precedent—particularly when

the Commission specifically instructed them to do so and postponed careful review of the applications until after the auction was completed. *July 2014 Public Notice* at ¶ 79 ("… applicants should review carefully the Commission's decisions regarding the designated entity provisions."). Accordingly, rather than take responsibility for its choices in running Auction 97, the Commission instead opted to blame Petitioners *post hoc* for having an "incorrect view" about nearly twenty years of prior Commission behavior.

D. An Agency Must Live With The Consequences of Its Choices.

The Commission may not escape responsibility for its choices about running Auction 97 by claiming *post hoc* that Petitioners had an "incorrect view" about FCC precedent but then disavow this same precedent without explanation *when the Commission both knew prior to the auction how the Petitioners interpreted the FCC's rules and precedent yet nonetheless allowed them to participate and did nothing to stop the auction after the data revealed significant DE bidding credits for the Petitioners.*

The Commission could certainly have conducted a more searching review prior to the auction. Alternatively, the Commission could have made clear that the short form review was entirely *pro forma* and that it would not regard prior bureau-level decisions as binding precedent. Instead, the FCC structured the review process so as to provide the illusion of a substantive pre-screening based on bureau-level as well as Commission-level precedent. By any stand-

ard, the Commission's conduct in this proceeding indicates they provided no "fair notice" of their change in policy. Instead, as this Court observed in *Auer v. Robbins*, this is a classic case of a "'*post hoc* rationalizatio[n]' advanced by an agency seeking to defend past agency action against attack." 519 U.S. 453, 462 (1997). Allowing an agency to move the goal posts without providing fair notice of the policy change, particularly given the Agency's conduct in this case, raises serious issues of procedural due process.

II. The Amorphous "Reasonably Anticipate" Notice Standard Sets a Troubling Precedent in Administrative Law.

As noted in the preceding section, the way the FCC moved the goal posts after Auction 97 concluded raises serious issues of procedural due process. The D.C. Circuit, however, was unmoved.

According to the D.C. Circuit, the Commission was well-within its rights to move the goal posts. In the court's view, the Petitioners "should reasonably have anticipated" that the Commission "might" have adopted its new regulatory standard on how it defines "effective control" before participating in the auction, even though the Petitioners—as instructed by the Agency—followed precedent and made the Commission aware of its bidding plans and financial arrangements with DISH prior to the auction.[5] Given that

[5] Significantly, despite the Commission's conduct, the D.C. Circuit found no notice problem with the Commission's moving of the goal posts after the auction. The only lack of notice

the federal bureaucracy "wields vast power and touches almost every aspect of daily life" *City of Arlington, Tex. v. FCC,* 569 U.S. 290, 313 (2013) (Roberts, C.J., dissenting) (quotation marks omitted), such an amorphous notice standard makes no logical sense and establishes a troubling precedent for administrative law.

A. The D.C. Circuit's Notice Standard Eliminates Bureau-Level Decisions as Valid Precedent Going Forward.

As the Court is aware from first-hand experience, lawyers are not particularly good soothsayers. Thus, if counsel is charged with having to "reasonably anticipate" how an administrative agency "might" act, then the ability to rely on precedent—no matter how sparse—takes on added significance. In the case at bar, the Agency instructed auction participants to "… review carefully the Commission's decisions regarding the designated entity provisions." *July 2014 Public Notice* at ¶ 79. As is standard practice in the telecommunications bar, such a command immediately points counsel to official FCC actions, but also implies that counsel should look to relevant bureau-level decisions made on delegated authority (the vast majority of which are never appealed to the full Commission for review). *See* 47 CFR §§ 1.101 *et seq.*; *see also* Pet. Brief at 8-9; 28-29. While actions taken on delegated authority obviously do not have the full force and effect of a Commission-level order, the fact

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D.C. Circuit was concerned about was that FCC did not tell Petitioners that if they misinterpreted the law, the FCC might not give them an opportunity to cure. *See* Pet. App. at 49a.

remains that bureau-level decisions nonetheless provide a legitimate indication of how the Agency has treated similar fact patterns in the past (particularly when they were never appealed to the full Commission-level).[6] And when bureau-level decisions are the only precedent available when billions of dollars are at stake, counsel should be entitled to accord them some credible level of precedential value.

In *SNR Wireless*, however, the D.C. Circuit effectively held that *all* bureau-level decisions made on delegated authority at a federal agency have no precedential value going forward. Accordingly, by eliminating this common and well-accepted source of precedent, the D.C. Circuit's ruling actually makes it harder—not easier—for the public to "reasonably anticipate" what an agency "might" do. Worse, under the D.C. Circuit's logic, in the absence of a definitive

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[6] The fact that the full Commission did not take up a bureau-level decision could indicate that the Agency had no concerns with the actions taken on delegated authority. As then-Commissioner Ajit Pai testified before the Senate Committee on Commerce, Science, and Transportation,

> It has long been customary at the FCC for Bureaus planning to issue significant orders on delegated authority to provide those items to Commissioners 48 hours prior to their scheduled release. Then, if any one Commissioner asked for the order to be brought up to the Commission level for a vote, that request would be honored. I can tell you from my time as a staffer in the Office of General Counsel that we consistently advised Bureaus about this practice.

Testimony of FCC Commissioner Ajit Pai before the Senate Committee on Commerce, Science, and Transportation (March 18, 2015).

agency-level order, any regulated entity who has made a good-faith reliance heretofore on a bureau-level decision could now be exposed to substantial financial penalties. As detailed in the next section, such an interpretation now injects significant regulatory uncertainty into the market which, in turn, is likely to have a significant adverse impact on economic investment incentives.

B. A "Reasonably Anticipate" Notice Standard Injects Significant Regulatory Uncertainty for Entities Subject to Federal Regulation, Potentially Leading to Diminished Investment in Critical Infrastructure.

An amorphous "reasonably anticipate" notice standard also injects significant regulatory uncertainty for entities subject to federal regulation, potentially leading to diminished investment in critical infrastructure. Of all the myriad ways that regulation can fail, the lack of credibility of the regulator—its inability to keep its word and follow its own precedent—is perhaps the most important. Participating in regulated industries which provide critical infrastructure (e.g., telecommunications, electricity, and transportation) requires large fixed and sunk investments whose returns are realized only sporadically over long periods. If firms (and their investors) fear expropriation of returns by a regulator unable to commit to its policies, however, then investment will be severely curtailed. *See, e.g.,* G.S. Ford and L.J. Spiwak, *The Unpredictable FCC: Politicizing Communications Policy and its Threat to Broadband*

Investment, PHOENIX CENTER POLICY PERSPECTIVE NO. 14-05 (October 14, 2014).[7]

As noted by Levy and Spiller,

> The combination of significant investments in durable, specific assets with the high level of politicization of utilities has the following result: utilities are highly vulnerable to administrative expropriation of their vast quasi-rents. Administrative expropriation may take several forms. Although the easiest form of administrative expropriation is the setting of prices below long-run average costs, it may also take the form of specific requirements concerning investment, equipment purchases, or labor contract conditions that extract the company's quasi-rents. Where the threat of administrative expropriation is great, private investors will limit their exposure.[8]

So although the present controversy emanates from the FCC's actions in running a multi-billion dol-

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[7] The effect of regulatory uncertainty in the telecommunications arena is particularly acute given the FCC's mandate in Section 706(a) of the Telecommunications Act of 1996 (47 U.S.C. § 1302(a)) to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans…"

[8] B. Levy and P. Spiller, *The Institutional Foundations of Regulatory Commitment: A Comparative Analysis of Telecommunications Regulation,* 10 JOURNAL OF LAW, ECONOMICS, & ORGANIZATION, 201-246 (1994).

lar spectrum auction, the need for regulatory certainty extends across the federal bureaucracy. If investors believe that a federal regulatory agency will not honor its commitments simply because it dislikes the results of its policies, then capital will find greener grass. Ford and Stern, *Ugly is Only Skin Deep*.

III. A "Reasonably Anticipate" Fair Notice Standard does not Constrain the Power of the Administrative State; Instead, It Greatly Expands It.

At issue in this case is what should be the appropriate standard of "fair notice" an administrative agency must provide to ensure due process. As Justice Cardozo recognized nearly eighty-five years ago, however, "[d]ue process of law requires that the proceedings shall be fair, but fairness is a relative, not an absolute, concept. It is fairness with reference to particular conditions or particular results." *See Snyder v. Com. of Mass.,* 291 U.S. 97, 116 (1934) (Cardozo, J.)

Certainly, conditions have changed since *Snyder*. As Chief Justice Roberts noted in his dissent in *City of Arlington,* the federal bureaucracy now "wields vast power and touches almost every aspect of daily life" *City of Arlington, Tex. v. FCC,* 569 U.S. 290, 313 (2013) (Roberts, C.J., dissenting) (quotation marks omitted). The problem with a "reasonably anticipate" notice standard, however, is that it does nothing to constrain the power of the modern administrative state; to the contrary, it greatly expands it. As such, there is nothing "fair" or just about this notice standard.

First, even at an administrative agency, decision-makers must respect past decisions "out of fidelity to our system of precedent whether or not [they] profess confidence in the decision itself." *Direct Marketing Association v. Brohl,* 814 F.3d 1129, 1148 (10th Cir.) (Gorsuch, J. concurring), *cert. denied,* 137 S.Ct. 591 (2016). Yet, despite this basic maxim, scholarly research demonstrates that the role of precedent increasingly has little value in agency decision-making. *See* Beard, Ford *et al., Eroding the Rule of Law: Regulation as Cooperative Bargaining at the FCC*, PHOENIX CENTER POLICY PAPER NO. 49 (October 2015). If the Court follows the D.C. Circuit's logic, then the irrelevance of precedent in administrative decision-making will accelerate down the slippery slope. To hold administrative agencies to account, this Court must force agencies to "attach power to precedent" so that due process does not "surrender[] similarly situated persons to widely different fates at the hands of unconstrained" bureaucrats. *Brohl,* 814 F.3d at 1147-48. While it is perfectly acceptable for an agency to change policy direction going forward, an agency should not be able to "disavow" precedent cavalierly when it proves inconvenient.

Increasingly, administrative agencies delegate decision-making to bureaus and offices which effectively create the body of precedent that informs regulated entities on how to behave. A "reasonably anticipate" standard provides a "plausible deniability" that an agency's political appointees may invoke without warning in response to purely political pressures. Such a notice standard effectively end-runs the

entire purpose of due process—to ensure that agencies operate under a predictable rule of law rather than in response to political expediency.

A "reasonably anticipate" standard therefore will embolden administrative agencies to act without constraint. The central dispute in this case is not over the bounds of agency discretion to interpret their enabling statutes, *see, e.g., Brohl, id.*; *Utility Air Regulatory Group v. Environmental Protection Agency*, __ U.S. __; 134 S.Ct. 2427, 2431 (2014), but over the bounds of acceptable conduct when an administrative agency interacts with the public. So long as some circuits place the onus on the public to "reasonably anticipate" what an agency "might" do, then the government will continue to exploit this gaping legal loophole to avoid responsibility and act with impunity. Indeed, any standard which essentially requires the public to read the tea leaves and hope they guess correctly (or otherwise suffer severe penalties) can hardly be considered adequate to protect due process.

CONCLUSION

For the foregoing reasons, this Court should grant the Petition for Writ of Certiorari.

Respectfully submitted,

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