No. 17-1058

In the Supreme Court of the United States

SNR WIRELESS LICENSECO, ET AL., PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

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

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Federal Communications Commission (FCC) regulations governing a 2014 auction for wireless-spectrum licenses permitted certain "very small business[es]" with less than $15 million in annual revenue, 47 C.F.R. 27.1106(a)(2), to obtain bidding credits that gave applicants that won a bid a discount in the payment needed to secure a license. In determining an applicant's annual revenues, the regulations attributed to an applicant seeking such credits the revenues of certain affiliates, including other entities that have *de facto* control over the applicant. Petitioners—two newly formed companies each 85% owned by DISH Network Corporation (DISH), a company with $13 billion in annual revenues—participated in the auction and provisionally won hundreds of licenses worth billions of dollars. Together they claimed very-small-business credits to discount the amount they owed by more than $3 billion. Applying existing regulations and guidance, and based on a review of numerous agreements entered into between each petitioner and DISH, the FCC determined that DISH had *de facto* control over petitioners, rendering petitioners ineligible for the very-small-business bidding credits they claimed. The court of appeals upheld that determination. The question presented is as follows:

Whether petitioners had fair notice that the FCC would view the circumstances of petitioners' agreements with DISH as demonstrating that DISH had *de facto* control of petitioners, rendering petitioners ineligible for very-small-business bidding credits.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-50a) is reported at 868 F.3d 1021. The sealed opinion and order of the Federal Communications Commission (Pet. Supp. App. 218a-382a) is unreported; a public, redacted form of that opinion and order (Pet. App. 53a-217a) is reported at 30 FCC Rcd 8887.

JURISDICTION

The judgment of the court of appeals was entered on August 29, 2017. On November 21, 2017, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including January 26, 2018, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. The Communications Act of 1934, 47 U.S.C. 151 *et seq.*, authorizes the Federal Communications Commission (FCC or Commission) to award licenses to use electromagnetic spectrum to provide communications services. See 47 U.S.C. 307, 309. Since 1993, the Act has required the FCC to award most spectrum licenses "through a system of competitive bidding," *i.e.*, by auction. 47 U.S.C. 309(j)(1).

Congress directed the Commission to adopt regulations addressing "eligibility and other characteristics" of auctioned licenses as well as auction "methodologies" and procedures. 47 U.S.C. 309(j)(3). The Act requires the FCC's rules to "balance a number of potentially conflicting objectives." *Fresno Mobile Radio, Inc.* v. *FCC*, 165 F.3d 965, 971 (D.C. Cir. 1999); see 47 U.S.C. 309(j)(3)-(4). The FCC must seek (*inter alia*) to promote "efficient and intensive use of the electromagnetic spectrum" and the "development and rapid deployment of new technologies, products, and services." 47 U.S.C. 309(j)(3)(A) and (D). It must also "promot[e] economic opportunity and competition * * * by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women," 47 U.S.C. 309(j)(3)(B), and "ensure that" such applicants "are given the opportunity to participate in the provision of spectrum-based services," 47 U.S.C. 309(j)(4)(D). To that end, Congress directed the FCC to "consider the use of tax certificates, bidding preferences, and other procedures." *Ibid.* Congress also instructed the Commission to "require such transfer disclosures and antitrafficking restrictions and payment schedules as may be necessary to prevent unjust enrichment" through auctions. 47 U.S.C. 309(j)(3)(E).

b. To promote participation in spectrum actions by small businesses and other "designated entities" listed in the statute, the FCC has adopted regulations making such entities eligible for bidding preferences called "bidding credits." 47 C.F.R. 1.2110(a) and (f)(1); see 47 C.F.R. 27.1106. Bidding credits are "discounts that may be used to cover part of the cost of any licenses" that eligible designated entities win. Pet. App. 5a. For example, if a designated entity's winning bid is $5,000,000, and it qualifies for a 20% bidding credit, it would be required to pay $4,000,000 for the license.

To be eligible for a bidding credit as a small business, an applicant must demonstrate that its gross revenues, in combination with those of its "attributable" interest holders, fall below auction-specific or service-specific limits. *In re Amendment of Part I of the Commission's Rules—Competitive Bidding Procedures*, 15 FCC Rcd 15,293, 15,323-15,324 (¶¶ 59-60), amended, 15 FCC Rcd 21,520 (2000); see 47 C.F.R. 1.2110(b)(1)(i). The regulations attribute to an applicant the revenues of certain other entities, including (1) any entity that manages the operations of an applicant or licensee pursuant to a "management agreement" that gives the entity authority to "make decisions" or "engage in practices" that "determine, or significantly influence," the "nature or type of services offered by such an applicant," 47 C.F.R. 1.2110(c)(2)(ii)(H); and (2) any entity with *de facto* or *de jure* control of the applicant, which is deemed an "affiliate," 47 C.F.R. 1.2110(c)(5).

In 1994, the FCC explained that management agreements between designated entities and their investors would be evaluated under the factors for examining control previously articulated in *Nonbroadcast & General Action Report No. 1142*, 12 F.C.C. 2d 559 (1963) (*Intermountain Microwave*). See *In re Implementation of*

Section 309(j) of the Communications Act—Competitive Bidding, 10 FCC Rcd 403, 449-450 (¶ 83) (1994) (*Fifth MO&O*). The *Fifth MO&O* explained that, under *Intermountain Microwave*, the potential for one entity to control another is assessed based on six factors:

> (1) unfettered use of licensed facilities and equipment; (2) day-to-day operation and control; (3) determination of and carrying out of policy decisions; (4) employment, supervision, and dismissal of personnel; (5) payment of financial obligations; and (6) receipt of profits from operation of the licensed facilities.

Ibid. (discussing *Intermountain Microwave*, 12 F.C.C. 2d at 560). The *Fifth MO&O* further explained that "agreements between designated entities and strategic investors that involve terms (such as management contracts combined with rights of first refusal, loans, puts, etc.) that cumulatively are designed financially to force the designated entity into a sale (or major refinancing) will constitute a transfer of control under our rules." *Id.* at 456 (¶ 96). The FCC emphasized that, in evaluating control, its "concerns are greatly increased when a single entity provides most of the capital and management services and is the beneficiary of the investor protections." *Ibid.*

To "prevent unjust enrichment" of non-designated entities, 47 U.S.C. 309(j)(4)(E), the FCC's rules require a designated entity that obtains a license using a bidding credit to retain its license for five years. 47 C.F.R. 1.2111(d) (2014). This is known as the unjust-enrichment period. If a designated entity that utilized a bidding credit transfers or assigns its license to a non-designated entity within that period, it must repay to the FCC all or part of its bidding credits. *Ibid.*

2. a. In May 2014, the FCC announced that it would conduct an auction (Auction 97) to award more than 1600 licenses in a spectrum band allocated to certain advanced wireless services. In July 2014, the Commission's Wireless Telecommunication Bureau announced procedures for the auction. See *Auction of Advanced Wireless Services (AWS-3) Licenses Scheduled for November 13, 2014*, 29 FCC Rcd 8386 (2014) (*Procedures Notice*). The *Procedures Notice* explained that small businesses would be eligible for bidding credits, and that the size of the credits would depend on the amount of the designated entities' attributable revenues during the preceding three years. *Id.* at 8411-8412 (¶¶ 80, 82). Entities with less than $40 million in attributable revenues ("small businesses") could receive a 15% discount, and those with less than $15 million in attributable revenues ("very small businesses") could receive a 25% discount. 47 C.F.R. 27.1106(a); see *Procedures Notice*, 29 FCC Rcd at 8412 (¶ 82); 47 C.F.R. 1.2110(f)(2)(ii) and (iii).

The *Procedures Notice* further explained that, consistent with past practice, the FCC would conduct the auction using a two-step process. 29 FCC Rcd at 8407 (¶ 63). First, before bidding began, any entity seeking to participate would submit a "streamlined, short-form application" certifying its eligibility. *Ibid.* Second, at the conclusion of bidding, each winning bidder would be required to submit a "long-form application" along with an "ownership disclosure information report" and supporting materials. *Ibid.* The long-form application is used to evaluate whether the entity is qualified to hold a spectrum license. 47 C.F.R. 1.2107(c). A provisionally winning bidder that claims a bidding credit must provide information justifying its eligibility for the credit and file with its long-form application a copy of each agreement "affect[ing]" its "designated entity status," including "partnership agreements, shareholder agreements," and "management agreements." 47 C.F.R. 1.2110(j). The FCC advised applicants to "review carefully the Commission's decisions regarding the designated entity provisions," specifically directing parties to consult *Intermountain Microwave* and *In re Application of Baker Creek Communications, L.P.*, 13 FCC Rcd 18,709 (1998), "[f]or further guidance on the issue of *de facto* control." *Procedures Notice*, 29 FCC Rcd at 8411 (¶ 79), 8412 n.151.

b. Auction 97 began on November 13, 2014. The auction ultimately raised more than $40 billion from 31 winning bidders, including petitioners SNR Wireless LicenseCo, LLC (SNR) and Northstar Wireless, LLC (Northstar). Pet. App. 8a-9a. SNR submitted provisionally winning bids for 357 licenses totaling approximately $5.48 billion, but it claimed a 25% very-small-business bidding credit of $1.37 billion, reducing its net bids to $4.11 billion. See *id.* at 9a. Northstar submitted provisionally winning bids for 345 licenses totaling approximately $7.85 billion, but it claimed a very-small-business bidding credit of $1.96 billion, reducing its net bids to $5.88 billion. See *ibid.* Together petitioners claimed combined very-small-business discounts of more than $3.33 billion.

Petitioners filed their long-form applications for the licenses they had provisionally won. Pet. App. 9a. Those applications reflected that both petitioners had been established less than three months before Auction 97 commenced, "ha[d] no officers or directors," *id.* at 67a, 69a, and reported "average gross revenues of $399,566 and zero, respectively, over the past three years." *Id.* at 105a; see *id.* at 68a-69a. Petitioners stated that they had acquired the capital required to pay their winning bids from DISH Network Corporation (DISH), a "Fortune 250" company, *id.* at 200a, that had average annual gross revenues of $13 billion in the three years preceding Auction 97. *Id.* at 56a-57a. In exchange for its investments in petitioners, DISH had acquired a non-controlling 85% equity interest in each company. *Id.* at 67a, 69a. Each petitioner also had entered into numerous agreements with DISH, including management-services agreements, credit agreements, and joint-bidding agreements. *Id.* at 72a-73a. In their applications, however, "neither SNR nor Northstar attributed DISH's revenues" to itself, "and each Applicant certified that it was eligible for a 25 percent very small business bidding credit." *Id.* at 67a.

3. Several entities petitioned the FCC to deny petitioners' claimed very-small-business bidding credits because of their relationships with DISH. Pet. App. 83a-84a. Based on a comprehensive review of petitioners' agreements with DISH and the circumstances surrounding their participation in Auction 97, the FCC unanimously denied the bidding credits. *Id.* at 102a-103a; see *id.* at 103a-178a, 198a-208a; see also *id.* at 209a-217a (separate statements of Commissioners Clyburn, Pai, and O'Rielly).

a. The Commission determined that, for "two separate and independent" reasons, DISH was a "controlling entity of, or affiliated with," petitioners under 47 C.F.R. 1.2110. Pet. App. 102a.

i. The FCC found that "DISH ha[d] *de facto* control" of petitioners under the multi-factor analysis explained in the *Fifth MO&O* and *Intermountain Microwave*, considering the "totality of the circumstances surrounding their participation in Auction 97 and the plans for operations after grant of the licenses as reflected in" their numerous agreements with DISH. Pet. App. 102a-103a; see *id.* at 111a-178a. The FCC determined that, under petitioners' agreements, DISH "dominates the financial aspects of SNR's and Northstar's businesses." *Id.* at 138a. It noted that DISH had paid 98% of petitioners' winning bids in Auction 97 and had "further agreed to provide all future funds for build-out and working capital." *Ibid.*; *id.* at 79a-80a. Petitioners also "lack[ed] authority to raise capital" from other sources "without DISH's consent." *Id.* at 138a-139a; *id.* at 79a-80a. The FCC further found that the agreements afforded DISH "19 wide-ranging" investor protections that "go well beyond" "typical" protections "for a purely financial investor that does not intend to control the day-to-day operations of the company in which it has invested." *Id.* at 118a-119a; *id.* at 111a-124a. For example, petitioners "[could] not deviate more than ten percent from any line item in an annual budget"—such as "office supplies"—"without DISH's consent." *Id.* at 120a-121a.

The FCC further determined that "DISH controls SNR's and Northstar's daily operations." Pet. App. 124a. For each petitioner, the relevant agreement designated a DISH subsidiary as the operations manager, with authority over virtually all the "key functions" of a wireless network licensee, including: "engineering and construction of the network; billing and collection services; marketing, sales, advertising, and promotion; and the provision of" essential services, such as 911. *Id.* at 174a. Petitioners could fire the operations manager only (A) for cause through "a complex, costly, and lengthy process" or (B) with 12 months' notice subject to substantial financial penalties. *Id.* at 130a-131a.

The FCC also observed that "any profits that [were] generated" from the businesses "w[ould] only accrue to

DISH." Pet. App. 143a. Under their agreements with DISH, "SNR and Northstar must first repay * * * billions of dollars in loans" before "realizing any profits from their business operations." *Id.* at 141a-142a. Petitioners' only income comes from a modest annual management fee, which the FCC concluded was "hardly sufficient to support the number of management, financial, and technical employees * * * required" to "construct and operate a wireless telecommunications network spanning the nation." *Id.* at 129a; *id.* at 133a-135a, 143a-144a.

The Commission found especially troubling the fact that the agreements were "cumulatively * * * designed to force [SNR and Northstar] into a sale" to DISH immediately after the unjust-enrichment period expires. Pet. App. 154a-155a (quoting *Fifth MO&O*, 10 FCC Rcd at 456 (¶ 96)). The agreements precluded petitioners from transferring their interests during the first ten years of operation without DISH's consent. *Id.* at 150a-151a. They also contained a "put option" that allows petitioners to require DISH to buy out petitioners' interests—but only during a 30-day window at the end of the fifth year, when the unjust-enrichment period ends. *Id.* at 151a-155a. If petitioners do not exercise that option, they must repay their multibillion-dollar loans from DISH by the end of the seventh year. *Id.* at 153a-154a. The FCC concluded that those "repayment terms" would "be difficult, if not impossible, to manage unless [petitioners] exercise their put option." *Id.* at 154a-155a.

The FCC also found that the "bidding conduct" of petitioners and DISH in Auction 97, pursuant to joint-bidding agreements entered into in advance, "corroborate[d] [the FCC's] determination" of *de facto* control.

Pet. App. 59a; see *id.* at 157a-164a. While acknowledging that the use of such agreements "is not inherently indicative of *de facto* control," the Commission found that "the behavior exhibited by the parties during the actual bidding" pursuant to those agreements "demonstrate[d] that DISH was in control of all three companies who worked jointly to advance DISH's interests." *Id.* at 157a, 159a. The FCC observed that, during the auction, petitioners had participated in daily conference calls with a DISH executive who could veto their bidding decisions, and that in many instances petitioners had placed identical bids for the same licenses. *Id.* at 159a, 161a. In addition, the FCC identified at least one instance in which SNR had withdrawn a provisionally winning bid (incurring a penalty of $11 million), causing Northstar to become the provisional winner (with a bid that was $11 million lower). *Id.* at 160a. That "switch added $11 million to SNR's balance sheet to the detriment of its non-DISH owners," but "it was an economic 'wash' to the combined [petitioners], and therefore their common owner, DISH." *Ibid.*

ii. As "[a] separate and independent legal basis for concluding that SNR and Northstar are not eligible for the very small business bidding credits that they s[ought]," the Commission found that "DISH ha[d] the 'authority to make decisions or otherwise * * * determine, or significantly influence ... the nature and types of services [petitioners] offered,'" rendering DISH an affiliate under 47 C.F.R. 1.2110(c)(2)(ii)(H)(1). Pet. App. 173a (brackets and citation omitted). The FCC found that petitioners' agreements—particularly the management-services agreements, under "which DISH w[ould] manage the build-out and day-to-day operations of" petitioners—"operate[d] to limit substantially the ability of [petitioners] to retain personnel to provide such functions and establish a financial dependency upon DISH as the Operations Manager." *Id.* at 173a-174a. The Commission acknowledged that the agreements purported to preserve petitioners' right to "determine the nature and type of services offered." *Id.* at 174a (citation omitted). But it concluded that, "in the context of the economic realities of these transactions, other contractual provisions between the parties negate[d] that provision," and "at a minimum g[ave] DISH the authority to 'significantly influence' these determinations." *Ibid.* (citation omitted).

b. The Commission rejected petitioners' contention that they were entitled to bidding credits because the FCC's Wireless Bureau had previously granted licenses to entities that entered allegedly similar agreements. Pet. App. 170a-172a. The Commission observed that petitioners had not identified "any reported decisions in which the Commission staff[,] much less the Commission," had endorsed the arrangements petitioners had made. *Id.* at 171a. It explained that none of the decisions petitioners cited "ha[d] articulated any basis" to construe the FCC's rules "to permit the coupling of" the aspects petitioners' agreements had in common with previously approved applications "with the kind of extensive 'investor protections' and management responsibilities vested in DISH" that are present here. *Ibid.* The Commission additionally observed that, "[t]o the extent any prior actions of Commission staff could be read to be inconsistent with [the FCC's] interpretation of the Commission's rules in this order," such staff decisions "are not binding on the Commission." *Id.* at 172a n.354 (citing *Comcast Cable Commc'ns, LLC* v. *FCC*, 717 F.3d 982, 1002 (D.C. Cir. 2013) (Edwards, J., concurring), cert. denied, 134 S. Ct. 1287 (2014), and *Comcast Corp.* v. *FCC*, 526 F.3d 763, 769 (D.C. Cir. 2008)). To the extent such decisions existed, the FCC "disavow[ed]" them as inconsistent with 47 U.S.C. 309(j)(3), 47 C.F.R. 1.2110, and Commission precedent including the *Fifth MO&O*. Pet. App. 172a n.354.

The Commission also denied petitioners' request for an additional opportunity to amend their agreements to cure the contractual terms that gave DISH *de facto* control. Pet. App. 198a n.431. The FCC explained that petitioners had already been allowed to amend their applications on numerous occasions, and that, "[i]n any event," granting petitioners' request "would likely promote disincentives to the structuring of investments that adhere in the first instance to the limitations of [the agency's control] rules." *Ibid.*

c. The FCC attributed DISH's revenues to petitioners, rendering them ineligible for the approximately $3.33 billion in very-small-business bidding credits they claimed. Pet. App. 151a. Under the FCC's rules, when an auction participant places a bid, it assumes a binding obligation to pay the full amount of its accepted winning bid, even if it is denied a requested bidding credit. 47 C.F.R. 1.2104(g)(2); *Procedures Notice,* 29 FCC Rcd at 8445 (¶ 214). A bidder who reneges on that obligation is subject to a default payment. 47 C.F.R. 1.2104(g)(2), 1.2109(b). The Commission accordingly directed petitioners to pay the value of the bidding credits, *i.e.*, to pay the full amounts of the gross bids they had won. Pet. App. 205a-206a.

Petitioners notified the Commission that they would pay the full bid amounts (*i.e.*, without receiving bidding credits) for some of the licenses they had won in Auction 97 but would default on their bids for the remainder.

Pet. App. 11a. The precise amount of the default payments petitioners owed would depend on the winning prices for which those licenses were re-auctioned. *Id.* at 12a. The Wireless Bureau notified SNR and Northstar that they owed interim default payments of approximately \$181 million and \$334 million, respectively. 30 FCC Rcd 10,700 (2015) (Northstar); 30 FCC Rcd 10,704 (2015) (SNR). Petitioners made those payments, and on October 27, 2015, the Wireless Bureau granted petitioners' applications for the retained licenses. 30 FCC Rcd 11,622 (2015).

4. Petitioners filed petitions for review in the United States Court of Appeals for the District of Columbia Circuit. Pet. App. 12a. The court upheld the FCC's determination that petitioners were ineligible for very-small-business bidding credits. *Id.* at 12a-43a. The court further held, however, that although petitioners had received fair notice that their bidding credits could be denied, petitioners had not received fair notice that, if the credits were denied, petitioners would have no opportunity to renegotiate their agreements with DISH to cure the *de facto* control problem. *Id.* at 43a-50a. It remanded the proceedings to the FCC to provide petitioners that opportunity. *Id.* at 50a.

a. The court of appeals rejected petitioners' contention that the FCC had departed without explanation from agency precedent when it held that petitioners were ineligible for bidding credits. Pet. App. 12a-43a. It observed that "petitioners d[id] not dispute the authoritative guidance provided by" *Intermountain Microwave*, the *Fifth MO&O*, and Section 1.2110(c)(2)(ii)(H). *Id.* at 26a. The court held that, "[f]ar from ignoring Commission decisions, the FCC reasonably interpreted and applied them when it determined that DISH had *de facto* control over SNR and Northstar." *Id.* at 13a.

i. The court of appeals examined the Commission's consideration of each of the six *Intermountain Microwave* factors and concluded that the Commission's "application" of them here "was reasonable and consistent with existing law." Pet. App. 22a; *id.* at 15a-22a. First, the court held that the FCC had reasonably "found that DISH had control over [petitioners'] daily operations," based on the FCC's detailed findings regarding the management-services agreements. *Id.* at 16a (citing *id.* at 77a-78a, 126a-129a). Second, the court held that the FCC had reasonably "determined that SNR and Northstar had little control over their employment decisions," noting that the nominal rights petitioners had to hire employees were "illusory" given the severe, built-in budgetary limitations. *Id.* at 17a-18a (citing *id.* at 133a-137a). Third, the court deferred to the FCC's finding that petitioners "did not have 'unfettered access to their facilities and equipment,'" noting that the agreements "barred [petitioners] from using their facilities to provide any service that was incompatible with DISH's service," even though DISH had not "specified the service it planned to develop." *Id.* at 18a-19a (quoting *id.* at 164a).

Fourth, the court of appeals held that the FCC had reasonably found that DISH "dominated the financial aspects of SNR's and Northstar's businesses" for the reasons the Commission had identified. Pet. App. 20a (brackets and citation omitted). Fifth, the court affirmed the FCC's finding that the "allocation of profits from [petitioners'] business 'firmly raise[d] the specter of control,'" agreeing with the FCC's assessment that the "extensive construction" petitioners "would need to undertake" before "providing wireless service" made it "very unlikely" they would "be able to repay th[eir] loans and begin earning profits." *Id.* at 20a-21a (quoting *id.* at 142a) (second set of brackets in original). Sixth, the court held that the FCC had reasonably "concluded that DISH made every essential policy decision for SNR and Northstar's businesses." *Id.* at 21a. Those included decisions concerning:

> (a) the type of wireless technology that SNR and Northstar would use; (b) the number of spectrum licenses that SNR and Northstar would hold; (c) the timetable for SNR and Northstar to build networks and begin offering services to customers; (d) when SNR and Northstar might sell their businesses; (e) whether SNR and Northstar could own real property; and (f) SNR and Northstar's bidding strategy.

Ibid. (citing *id.* at 145a-164a). The court of appeals therefore determined that, "[d]espite petitioners' claims that DISH 'is a purely passive investor,' the FCC reasonably concluded that DISH effectively controlled SNR and Northstar's businesses." *Ibid.* (citation omitted).

The court of appeals further "conclude[d] that the *Fifth MO&O* clearly presaged the FCC's *de facto* control finding, and that the FCC applied the *Fifth MO&O* in a reasonable manner" here. Pet. App. 25a; see *id.* at 22a-25a. The court explained that, in the *Fifth MO&O*, the Commission had "specifie[d] that, when an investor 'financially . . . forces' a small company 'into a sale (or major refinancing),' the investor's conduct effects 'a transfer of control.'" *Id.* at 23a (brackets and citation omitted). The court quoted an illustrative example provided in the *Fifth MO&O*, in which the Commission had explained that it might find *de facto* control where an "investor makes debt financing available to the applicant on very favorable terms," and "the designated entity has a one-time put right that is exercisable at a time and under conditions that are designed to maximize the incentive of the licensee to sell." *Id.* at 25a (quoting 10 FCC Rcd at 455-456 (¶ 95)). The court found that example "materially identical to the facts" here. *Ibid.* The FCC had found that petitioners "would be unlikely to be able to build a wireless network and generate enough revenue to repay their multi-billion dollar loans to DISH" in the time required by their agreements and were barred from borrowing more than $25 million from other sources without DISH's consent. *Id.* at 23a. The agreements thus "left SNR and Northstar only one path to avoiding certain financial failure": to exercise their put options during the 30-day window at the end of the fifth year. *Id.* at 24a. The court held that this arrangement gave petitioners "every interest in selling their businesses to DISH at the first possible moment." *Ibid.*

ii. The court of appeals also upheld the FCC's finding that DISH was an affiliate of petitioners under 47 C.F.R. 1.2110(c)(2)(ii)(H) because it had authority to "determine, or significantly influence[,] . . . the nature or type of services offered by the small business." Pet. App. 15a (brackets and citation omitted). The court observed that "DISH had authority to limit the wireless technology that SNR and Northstar used" and "managed the 'build-out and day-to-day operations' of both companies," and that "DISH could 'significantly influence' the 'type of service'" SNR and Northstar provided for their customers. *Ibid.* (citing *id.* at 173a) (brackets omitted). The court "f[ound] nothing unreasonable about the Commission's application of its regulations." *Ibid.*

iii. The court of appeals rejected petitioners' contention that the Commission had improperly deviated from two past decisions by the Wireless Bureau approving "designated-entity" status to Denali Spectrum and Salmon PCS, license applicants in prior auctions. Pet. App. 26a. The court explained that, under settled precedent, "a 'lower component of a government agency' does not bind the agency as a whole." *Id.* at 28a-29a (quoting *Comcast*, 526 F.3d at 769). Here, "[t]he FCC [was] not bound to treat the provisions of agreements filed with a pair of long-form applications, which the Wireless Bureau administratively granted without opinion or any public statement of reasons, as if those provisions established a Commission position from which it could not deviate." *Ibid.* The court observed that both the Denali and Salmon applications had been decided by FCC staff "with a one-word action" and no "opinion or explanation," and the court found no indication that the Commission itself agreed with those staff decisions. *Id.* at 26a, 29a.

The court of appeals further held that, in any event, the Denali and Salmon applications were "materially different" from petitioners' applications in multiple respects and that "the FCC reasonably found that [petitioners'] relationship [with] DISH manifests impermissible control more plainly." Pet. App. 36a, 40a. The court observed that Denali's "chances of establishing a network and turning a profit before it had to start paying back its loans were thus substantially greater than SNR or Northstar's," and that Salmon "had significantly more control and realistic opportunity than SNR or Northstar to build a wireless network and begin collecting revenues before its loans were due." *Id.* at 37a-38a. The court further explained that "SNR and

Northstar's bidding behavior was suspicious in ways that Denali's and Salmon's were not." *Id.* at 39a.

b. Petitioners also contended that, "even if the FCC reasonably applied its precedents regarding *de facto* control, those precedents did not give [petitioners] fair notice" either (A) that their arrangements "might be found to [] manifest *de facto* control" or (B) that, if *de facto* control were found, petitioners would have no opportunity to cure that problem. Pet. App. 43a. The court of appeals explained that "an agency cannot sanction an individual for violating the agency's rules unless the individual had 'fair notice' of those rules," *ibid.* (quoting *General Elec. Co.* v. *U.S. E.P.A.*, 53 F.3d 1324, 1328 (D.C. Cir. 1995)), meaning notice that "allows regulated parties to 'identify, with ascertainable certainty, the standards with which the agency expects them to conform,'" *ibid.* (quoting *Trinity Broad. of Fla., Inc.* v. *FCC*, 211 F.3d 618, 628 (D.C. Cir. 2000)) (brackets omitted).

Applying that principle, the court of appeals held that petitioners had received fair notice about the *de facto* control standard. Pet. App. 43a-44a. The court explained that petitioners had "sufficiently clear" notice about the test the FCC would apply, and that, "[o]n these facts, for all the reasons set forth" in the court's analysis of the merits, "petitioners should reasonably have anticipated that the FCC might find them to be under DISH's *de facto* control." *Id.* at 44a-45a.

In contrast, the court of appeals found, over the FCC's objection, that petitioners "lacked reasonable notice that, in the event it found *de facto* control, the Commission would deny them an opportunity to cure" that problem by modifying the arrangements with DISH. Pet. App. 45a. The court stated that "[t]he foreseeable adequacy of the legal and factual grounds for the Commission's determination that *these* arrangements manifest DISH's *de facto* control over petitioners did not also make clear that such a control determination and its consequent penalties would be non-negotiable." *Id.* at 44a, 47a. The court cited an earlier Wireless Bureau decision—which the court viewed as having been endorsed by the Commission because it had been cited in an appendix to a prior FCC rulemaking order—in which FCC staff had permitted an opportunity for cure. *Id.* at 47a-48a (citing *In re Application of ClearComm, L.P.*, 16 FCC Rcd 18,627 (2001)). The court "conclude[d] that an opportunity for petitioner[s] to renegotiate their agreements with DISH provide[d] the appropriate remedy," and it remanded to the FCC to provide that opportunity. *Id.* at 50a.

5. On remand, the Wireless Bureau issued an order "to establish a procedure to afford [petitioners] the opportunity to cure their Auction 97 applications." 33 FCC Rcd 231, 231 (¶ 1) (2018). The order gave petitioners 90 days "to renegotiate their respective agreements with DISH" and "to file the necessary documentation" with the FCC showing that they qualify for the credits. *Id.* at 232 (¶ 5). Petitioners' deadline has since been extended by 45 days, to June 8, 2018. Once their revised applications are filed, others will have 45 days to file comments, and petitioners will have 45 days to negotiate further with DISH and to file amendments to their applications (on which other parties may also comment). *Id.* at 233-234 (¶¶ 7-8). The FCC then will "determine whether either [petitioner] qualifies for the very small business bidding credit it sought in Auction 97." *Id.* at 234 (¶ 9).

ARGUMENT

Petitioners contend that the court of appeals erred in upholding the FCC's determination that they were ineligible for very-small-business bidding credits in Auction 97. Even if petitioners had identified a certworthy issue, the Court's review would be premature at this time. The court of appeals remanded the matter to the Commission to permit petitioners to attempt to cure the *de facto* control problem by renegotiating their agreements with DISH, and those proceedings are still ongoing. In any event, the court of appeals' decision is correct and does not conflict with any decision of this Court or another court of appeals. Further review is not warranted.

1. Ongoing proceedings on remand to the FCC—commenced at petitioners' request—may eliminate the practical significance in this case of the legal issue petitioners raise. In the initial proceedings before the Commission, petitioners urged that, if the FCC ruled that they were ineligible for credits, petitioners should be given an opportunity to amend their agreements with DISH to cure the *de facto* control problem. Pet. App. 198a n.431; see Pet. C.A. Br. 57-58. Petitioners renewed that request in the court of appeals, arguing that, if the court upheld the FCC's determination that they were ineligible for bidding credits, "the case should be remanded to permit Petitioners to obtain bidding credits by conforming their agreements" to the applicable standards. Pet. C.A. Br. 63; see *id.* at 56-63; Pet. C.A. Reply Br. 32; Pet. App. 49a. After affirming the FCC's bidding-credit-eligibility decision, the court granted petitioners' alternative request for a remand, returning the case to the Commission for further proceedings to afford petitioners the opportunity they had requested

to attempt to renegotiate their agreements with DISH. Pet. App. 49a-50a. Those further proceedings before the FCC are now underway, see p. 19, *supra*, and the process of renegotiation appears to have begun.[1]

This Court's review therefore would be premature even if the issue petitioners raise otherwise warranted plenary consideration. If petitioners successfully amend their agreements with DISH to eliminate DISH's *de facto* control and affiliate status, the dispute in this case will have no continuing practical importance. If instead the Commission adheres to its ineligibility finding at the conclusion of the proceedings on remand, petitioners may seek judicial review of that determination.

Although petitioners correctly observe (Pet. 31) that the feasibility of "a mutually advantageous amendment * * * remains to be seen," that uncertainty is not a reason to grant review now. Petitioners also contend (*ibid.*) that they "were entitled to rely on the rules as they were applied at the time of Auction 97," and they appear to suggest that they should not be required to pursue proceedings on remand before the FCC. But petitioners affirmatively requested an opportunity to cure the *de facto* control problem, and they urged the court of appeals to remand for that purpose. See p. 20, *supra*.

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[1] In publicly available SEC filings, DISH states that it already has terminated the management-services and trademark agreements with petitioners and has amended other agreements with petitioners. The amended agreements apparently exchange all but $500 million of the debt each petitioner owed to DISH for shares of non-voting preferred stock, delete the obligation for SNR and Northstar to confer on budgets and business plans, and remove the requirement that petitioners' systems be interoperable with those of DISH. See SEC Form 8-K of DISH Network Corp., SEC File No. 0-26176 (Apr. 4, 2018); SEC Form 8-K of DISH DBS Corp., SEC File No. 333-31929 (Apr. 4, 2018).

2. This Court's review would not be warranted even if the court of appeals had finally resolved the dispute in the FCC's favor rather than remanding the matter to the Commission. The court of appeals correctly upheld the FCC's determination that petitioners were ineligible for very-small-business bidding credits—available to businesses with less than $15 million in annual revenues—because they are affiliates of, and subject to *de facto* control by, a Fortune 250 company with $13 billion in revenue that is attributable to petitioners under FCC rules. In this Court, petitioners do not directly challenge the court of appeals' conclusion that the FCC reasonably applied its relevant regulations and precedents, nor do they suggest that this holding conflicts with any decision of this Court or another court of appeals. Instead, they challenge (Pet. 22-29) the court of appeals' finding that petitioners had fair notice of how the FCC would apply those regulations and precedents to the circumstances of this case. That contention lacks merit and does not warrant this Court's review.

a. In the court of appeals, petitioners argued that they were entitled to "fair notice" of the standard the FCC would apply in determining their eligibility for very-small-business bidding credits. Petitioners described the applicable standard as requiring notice sufficient to ensure that "a regulated party acting in good faith would be able to identify, with ascertainable certainty, the standards with which the agency expects the parties to conform." Pet. C.A. Br. 51 (quoting *General Elec. Co.* v. *U.S. E.P.A.*, 53 F.3d 1324, 1329 (D.C. Cir. 1995)). The court of appeals recited that test verbatim, Pet. App. 43a, and applied it to the circumstances here, *id.* at 43a-50a. The court determined that, "[o]n these facts, for all the reasons set forth" in its detailed analysis of the Commission's application of its regulations and precedents, petitioners "should reasonably have anticipated that the FCC might find them to be under DISH's *de facto* control." *Id.* at 45a. Petitioners' challenges to the court's determination (Pet. 22-29) lack merit.

i. Petitioners contend (Pet. 22) that the court of appeals applied the "wrong" test for fair notice. That contention should be rejected at the threshold because the court applied the test that petitioners advocated. In any event, petitioners fail to show any error in the test the court applied.

Petitioners cite no decision of this Court entitling regulated entities to something more than "ascertainable certainty," Pet. App. 43a (citation omitted), about the legal standard an administrative agency will apply. They cite (Pet. 23-25) both *Christopher* v. *SmithKline Beecham Corp.*, 567 U.S. 142 (2012), and *FCC* v. *Fox Television Stations, Inc.*, 567 U.S. 239 (2012). As petitioners acknowledge (Pet. 26), however, "neither *Christopher* nor *Fox* presented the opportunity to announce an administrative fair notice standard."

In *Christopher*, the Court rejected the Department of Labor's interpretation of its own regulation. See 567 U.S. at 153-169. The Court addressed fair-notice concerns not as a freestanding basis for rejecting the Department's position, but only in determining whether to give deference to the Department's interpretation. See *id.* at 155-159. And even in that context, the Court noted with approval the "ascertainable certainty" standard followed by lower courts. *Id.* at 156 n.15 (quoting *Dravo Corp.* v. *Occupational Safety & Health Review Comm'n*, 613 F.2d 1227, 1232-1233 (3d Cir. 1980)). The Court in *Fox* addressed a void-for-vagueness challenge to indecency standards adopted by the FCC. See *id.* at

253-259. Petitioners do not contend that the FCC regulations or precedents implicated in this case were unconstitutionally vague.

In *Christopher* and *Fox*, moreover, the Court addressed challenges to *liability* imposed on private parties. See *Christopher*, 567 U.S. at 152-153; *Fox*, 567 U.S. at 247-252. Here, in contrast, the FCC's decision that petitioners were ineligible for bidding credits merely deprived them of a public benefit, *i.e.*, a discount in bidding on spectrum licenses. Although the FCC's decision initially resulted in imposition of default-payment obligations, the court of appeals' decision gave petitioners an opportunity to avoid even those obligations by renegotiating their agreements with DISH. Even if *Christopher* and *Fox* required a heightened degree of notice in the contexts they addressed, it would not follow that the same notice is required in this setting, where petitioners were not penalized for prior conduct but were simply found to be ineligible for a special public benefit.

Petitioners appear to suggest (Pet. 26-29) that agencies should be required to adopt detailed regulatory standards and should be precluded from resolving open interstitial questions in case-by-case adjudications—as the FCC did here in applying its "totality of the circumstances" analysis. Pet. App. 102a. That suggestion contradicts the longstanding administrative-law principle that "the choice made between proceeding by general rule or by individual, *ad hoc* litigation is one that lies primarily in the informed discretion of the administrative agency." *SEC* v. *Chenery Corp.*, 332 U.S. 194, 203 (1947). An agency's decision not to "promulgate a general rule" does not "withdr[aw] all power from that agency to perform its statutory duty"—an approach that would "stultify the administrative process." *Id.* at

201-202. For a variety of reasons, "[n]ot every principle essential to the effective administration of a statute can or should be cast immediately into the mold of a general rule," and "the agency must retain power to deal with the problems on a case-to-case basis." *Id.* at 202-203.

ii. Petitioners are also incorrect in suggesting that the court of appeals applied a "lax" and "lenient" fair-notice standard here. Pet. 18, 22 (capitalization and emphasis omitted). Indeed, although the court held that petitioners had fair notice that their arrangements with DISH could render them ineligible for the bidding credits, it further held that petitioners lacked sufficient notice that, if they were found ineligible for the credits, they would not be given an opportunity to cure that ineligibility by amending those arrangements. Pet. App. 43a-50a. That determination contradicts petitioners' contention that the court failed to apply a "meaningful notice standard." Pet. 22; see Pet. 18-19.

Petitioners emphasize the court of appeals' statement that petitioners "should reasonably have anticipated that the FCC *might* find them to be under DISH's *de facto* control." Pet. 2, 13 (quoting Pet. App. 45a). Contrary to petitioners' suggestion (Pet. 2), the court did not hold or imply that parties are categorically on notice of anything an agency "'might' do." Rather, the court found it "sufficiently clear" and "foreseeable" to petitioners that their arrangements with DISH placed them at risk of being found ineligible for bidding credits based on the FCC's existing regulations and precedents. Pet. App. 44a. As the court had already explained, the Commission's decision here was supported by "three different sources of law": the multi-factor analysis of *Nonbroadcast & General Action Report No. 1142*, 12 F.C.C. 2d 559 (1963)

(*Intermountain Microwave*); the FCC's guidance adopting and elucidating that standard in *In re Implementation of Section 309(j) of the Communications Act—Competitive Bidding*, 10 FCC Rcd 403, 455-456 (¶ 95) (1994) (*Fifth MO&O*); and 47 C.F.R. 1.2110(c)(2)(ii)(H)(1). Pet. App. 14a; see *id.* at 14a-43a. Indeed, the court explained that the *Fifth MO&O*, which was adopted 20 years before Auction 97 and which included an illustrative example that was "materially identical to the facts" here, had "clearly presaged the FCC's *de facto* control finding" in this case. *Id.* at 25a. Even if isolated language in the court's opinion might be read to suggest a less demanding fair-notice standard, the court's overall analysis and conclusion demonstrate that it did not apply the test petitioners impute to it.

iii. Petitioners also argue (Pet. 25-26) that, in determining whether the Commission's decision departed from settled understandings, the court of appeals gave insufficient weight to prior staff-level decisions by the Wireless Bureau. That argument lacks merit. Actions by subordinate components of the agency do not bind the agency itself. Pet. App. 29a-35a (citing, *inter alia*, *Comcast Corp.* v. *FCC*, 526 F.3d 763, 769 (D.C. Cir. 2008)). Petitioners assert (Pet. 25-26) that, regardless of whether staff decisions are binding, they inform regulated entities' expectations about how the agency will treat similar problems. But regulated entities cannot reasonably assume that the agency will adhere in future cases to prior staff decisions that were unaccompanied by written opinions or analysis. As between extensive, longstanding guidance from the agency and unexplained, non-precedential staff decisions, the former are the far more reliable guide. In any event, the staff-level actions petitioners cited "were different enough that petitioners were on notice that they might be disqualified even where the prior designated-entity applicants on which they had sought to model themselves had been approved." Pet. App. 35a-36a; see *id.* at 35a-41a.

b. Petitioners contend (Pet. 13-22) that the courts of appeals have issued conflicting decisions regarding the standard of fair notice that applies to administrative agencies. In fact, the lower courts have applied a substantially uniform standard, and petitioners identify no sound reason to believe that any other circuit would have decided this case differently.

i. The court below explained that, in the context of administrative-agency regulation, "[n]otice is fair if it allows regulated parties to 'identify, with ascertainable certainty, the standards with which the agency expects [them] to conform.'" Pet. App. 43a (citation omitted; second set of brackets in original). The D.C. Circuit has long applied that standard. See, *e.g.*, *Trinity Broad. of Fla., Inc.* v. *FCC*, 211 F.3d 618, 628 (D.C. Cir. 2000); *General Elec.*, 53 F.3d at 1329.

Every other circuit has adopted either the same test or a close variant. The First, Third, and Seventh Circuits employ the same "ascertainable certainty" formulation, often citing D.C. Circuit cases.[2] And the Sixth

[2] See *United States* v. *Lachman*, 387 F.3d 42, 57 (1st Cir. 2004); *FTC* v. *Wyndham Worldwide Corp.*, 799 F.3d 236, 251 (3d Cir. 2015); *Wisconsin Res. Prot. Council* v. *Flambeau Mining Co.*, 727 F.3d 700, 708 (7th Cir. 2013).

and Ninth Circuits' standards for fair notice are similarly based on D.C. Circuit precedent.[3]

Four other circuits apply an equivalent standard on which the D.C. Circuit's own test is based. The D.C. Circuit's "ascertainable certainty" formulation derives from the Fifth Circuit's seminal decision in *Diamond Roofing Co.* v. *Occupational Safety & Heath Review Commission*, 528 F.2d 645, 649 (1976), which referred to an administrative agency's "responsibility to state with ascertainable certainty what is meant by the standards [a regulator] has promulgated."[4] The Fourth, Eighth, and Eleventh Circuits also apply the *Diamond Roofing* standard.[5] Finally, although the Second and Tenth Circuits use slightly different phrasing—referring to "adequate notice" and "fair warning"—they apply standards

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[3] See *ECM BioFilms, Inc.* v. *FTC*, 851 F.3d 599, 618 (6th Cir. 2017) (observing that "[t]he D.C. Circuit's 'fair notice' doctrine * * * restricts the penalties agencies may impose when their regulatory interpretations have not been announced with sufficient clarity" (citing *General Elec.*, *supra*, and *Gates & Fox Co.* v. *Occupational Safety & Health Review Comm'n*, 790 F.2d 154, 156-157 (D.C. Cir. 1986))); *United States* v. *Approximately 64,695 Pounds of Shark Fins*, 520 F.3d 976, 980 (9th Cir. 2008) ("As the D.C. Circuit has explained, 'in the absence of notice—for example, where the regulation is not sufficiently clear to warn a party about what is expected of it—an agency may not deprive a party of property by imposing civil or criminal liability.'" (quoting *Trinity Broad.*, 211 F.3d at 628) (brackets omitted)).

[4] See, *e.g.*, *General Elec.*, 53 F.3d at 1329 (deriving test from *Diamond Roofing*, *supra*); *Gates & Fox*, 790 F.2d at 156 (same).

[5] See *United States* v. *Hoechst Celanese Corp.*, 128 F.3d 216, 224 (4th Cir. 1997), cert. denied, 524 U.S. 952 (1998); *St. Joe Minerals Corp.* v. *Occupational Safety & Health Review Comm'n*, 647 F.2d 840, 846 n.13 (8th Cir. 1981); *Georgia Pac. Corp.* v. *Occupational Safety & Health Review Comm'n*, 25 F.3d 999, 1005 (11th Cir. 1994) (per curiam).

that are essentially the same as, and certainly no more stringent than, the D.C. Circuit's ascertainable-certainty standard.[6]

Petitioners contend (Pet. 14-18) that decisions of the Third, Fourth, Fifth, Seventh, and Ninth Circuits reflect a more "rigorous fair notice standard[]." That is incorrect. In the Fifth and Seventh Circuit decisions petitioners cite, the courts applied the ascertainable-certainty test. See *Employer Solutions Staffing Grp. II, L.L.C.* v. *Office of Chief Admin. Hearing Officer*, 833 F.3d 480, 489-490 (5th Cir. 2016); *Wisconsin Res. Prot. Council* v. *Flambeau Mining Co.*, 727 F.3d 700, 708 (7th Cir. 2013).

Petitioners point (Pet. 15) to the Third Circuit's statement that, "where an agency interprets the meaning of its own regulation," a "higher standard of fair notice applies." *FTC* v. *Wyndham Worldwide Corp.*, 799 F.3d 236, 251 (2015). The court there had no occasion to apply that standard, which turned on the FTC's interpretation of a federal statute. *Id.* at 252. Moreover, the "higher" standard to which it referred was the same "ascertainable certainty" standard that the D.C. Circuit applied here. *Ibid*; cf. Pet. App. 43a.

[6] See *Walker Stone Co.* v. *Secretary of Labor*, 156 F.3d 1076, 1083-1084 (10th Cir. 1998) ("In order to satisfy constitutional due process requirements, regulations must be sufficiently specific to give regulated parties adequate notice of the conduct they require or prohibit." (citation omitted)); *Rock of Ages Corp.* v. *Secretary of Labor*, 170 F.3d 148, 156 (2d Cir. 1999) ("[R]egulations satisfy due process as long as a reasonably prudent person, familiar with the conditions the regulations are meant to address and the objectives the regulations are meant to achieve, has fair warning of what the regulations require.").

Petitioners also cite (Pet. 16-17) *United States* v. *Hoechst Celanese Corp.*, 128 F.3d 216 (1997), cert. denied, 542 U.S. 952 (1998), where the Fourth Circuit relied on *Diamond Roofing* in holding that the Environmental Protection Agency (EPA) had failed to give the owner of a chemical plant fair notice that it was not entitled to an exemption from the agency's benzene-emission regulations. The Fourth Circuit explained that it was the court's "[e]xamination of the particular facts of th[at] case" that "convince[d it] that * * * [the petitioner] did not have fair notice of the EPA's broad interpretation of the term 'use'" in the exemption. *Id.* at 224-225.

Finally, petitioners cite (Pet. 15-16) *United States* v. *AMC Entertainment, Inc.*, 549 F.3d 760 (2008), in which the Ninth Circuit addressed whether a movie-theater chain had adequate notice of its obligation under the Americans with Disabilities Act, 42 U.S.C. 12181 *et seq.*, to provide customers in wheelchairs the same "line of sight" as customers without wheelchairs. 549 F.3d at 762. At the time, the courts of appeals had mandated three different viewing angles, and the government had not clearly articulated its own interpretation of the line-of-sight obligation. *Id.* at 768. It was "[a]mid this morass of litigation" that the Ninth Circuit "decline[d] to hold that a person of ordinary intelligence should have known * * * that [the regulation] was susceptible only to the interpretation the government now champions." *Ibid.* That decision does not suggest that the court imposed a fair-notice standard more demanding than the ascertainable-certainty test.

Indeed, petitioners also observe that other D.C. Circuit decisions have applied a "standard" that "accords with those applied by" the Third, Fourth, Fifth, Seventh, and Ninth Circuits in decisions that petitioners argue are correct. Pet. 19 (citing *NetworkIP, LLC* v. *FCC*, 548 F.3d 116, 123 (D.C. Cir. 2008), and *Rollins Envtl. Servs. (NJ) Inc.* v. *U.S. E.P.A.*, 937 F.2d 649, 654 (D.C. Cir. 1991)). Petitioners assert (Pet. 18-19) that the court below in substance departed from its own precedent by failing to apply a "meaningful" test here. Even if that claim of intracircuit conflict had merit, but see pp. 25-27, *supra*, it would not warrant this Court's review. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam).

ii. In any event, any inconsistency among the courts of appeals' articulations of the governing fair-notice standard is not implicated in this case. The court below held that "three different sources of law" put petitioners on notice that their agreements with DISH placed them at risk of being found ineligible for very-small-business bidding credits. Pet. App. 14a. The court explained in particular that the *Fifth MO&O* "clearly presaged" the Commission's determination, providing an example "materially identical" to the facts here. *Id.* at 25a. And the extent of DISH's control far surpassed that in applications for licenses petitioners cited that had previously been approved. *Id.* at 35a-36a. Petitioners identify no reason to believe that any other court of appeals would have held in these circumstances that petitioners lacked adequate notice of the FCC's requirements for very-small-business bidding credits.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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