

No. _____

**In The
Supreme Court of the United States**

NTCH, INC.,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, THE UNITED STATES OF AMERICA,
AND DISH NETWORK CORPORATION,
Respondents.

On Petition for Writ of Certiorari to the United States
Court of Appeals for the District of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In the course of notice and comment proceedings to set the rules for an auction of spectrum licenses, the FCC entered into a secret agreement with one potential bidder to grant that bidder valuable waivers of unrelated FCC rules on the condition that the company bid at least \$1.564 billion in the FCC's H-Block Auction.

May an administrative agency accept cash payments in exchange for granting regulatory benefits which are required to be granted solely on relevant public interest considerations?

Does the entry into such a secret agreement by the Commission corrupt the integrity of the auction such that the auction should be declared invalid?

PARTIES TO THE PROCEEDING

The parties before the United States Court of Appeals for the District of Columbia Circuit were NTCH, Inc., Petitioner here and Appellant below; the Federal Communications Commission, Respondent here and Appellee below; the United States of America, Respondent here and Appellee below; and DISH Network Corporation, Respondent here and Intervenor below.

RULE 29.6 DISCLOSURE STATEMENT

NTCH, Inc. is a privately held Delaware corporation. No publicly held company owns 10% or more of its stock. Ally Finance Corporation owns approximately 91.77% of its equity in the form of non-voting stock.

STATEMENT OF RELATED PROCEEDINGS

On September 7, 2018, NTCH filed a petition for review, or in the alternative notice of appeal, with the U.S. Court of Appeals for the D.C. Circuit of the FCC's Order on Reconsideration in *Service Rules for Advanced Wireless Services in the 2000-2020 MHz and 2180-2200 MHz Bands, et al.*, 33 FCC Rcd. 8435 (adopted Aug. 14, 2018; released Aug. 16, 2018). Petition for Review, *NTCH, Inc. v. FCC*, No. 18-1243 (D.C. Cir. Sept. 7, 2018). On February 21, 2020, the D.C. Circuit denied NTCH's petition for review, or in the alternative, notice of appeal, in the same decision as the principal cases here. *See NTCH, Inc. v. FCC*, 950 F.3d 871 (D.C. Cir. 2020).

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OPINIONS AND ORDERS

The FCC's order in *DISH Network Corporation, Petition for Waiver of Sections 27.5(j) and 27.53(h)(2)(ii) of the Commission's Rules and Request for Extension of Time* ("2018 *DISH Waiver Order*"), was released August 16, 2018 and is reported at 33 FCC Rcd. 8456 (2018) (App. 38-44). In the *2018 DISH Waiver Order*, the Commission dismissed NTCH's Application for Review ("DISH Waiver Application for Review"), filed January 22, 2014 (App. 79-92), of the FCC's Wireless Telecommunications Bureau's Order ("2013 *DISH Waiver Order*") in the same case, which was released December 20, 2013, and is reported at 28 FCC Rcd. 16787 (WTB 2013) (App. 45-69).

The FCC's order in *NTCH, Inc., Application for Review of Public Notice Announcing Procedures and Reserve Price for Auction of H Block Licenses (Auction 96)* ("2018 *H-Block Auction Order*"), was released August 16, 2018 and is reported at 33 FCC Rcd. 8446 (2018) (App. 38-44). In the *2018 H-Block Auction Order*, the Commission dismissed NTCH's Application for Review ("H-Block Auction Application for Review"), filed December 27, 2013 (App. 28-37), of the Wireless Telecommunications Bureau's Order ("2013 *H-Block Auction Order*") in *NTCH, Inc., Petition for Reconsideration of Public Notice Announcing Procedures and Reserve Price for Auction of H Block Licenses (Auction 96)*, which was released November 27 2013, and is reported at 28 FCC Rcd. 16108 (WTB 2013).

The opinion of the D.C. Circuit was entered on February 21, 2020, and is reported at *NTCH, Inc. v. FCC*, 950 F.3d 871 (D.C. Cir. 2020) ("*NTCH v. FCC*") (App. 1-26). On April 1, 2020, NTCH filed a Petition for Rehearing or Rehearing En

Banc, of the D.C. Circuit’s opinion in *NTCH v. FCC*. The D.C. Circuit’s order denying NTCH’s Petition for Rehearing was released on April 28, 2020, and is reported at Order, *NTCH, Inc. v. FCC*, 950 F.3d 871 (D.C. Cir. April 28, 2020) (App. 70).

JURISDICTION

The D.C. Circuit entered judgment on February 21, 2020. NTCH, Inc. filed a petition for rehearing or rehearing en banc on April 1, 2020, which the D.C. Circuit denied on April 28, 2020. This Court granted a general extension of time to file petitions for certiorari by Order issued March 19, 2020. This Petition is therefore timely filed. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS

The appendix reproduces 47 C.F.R. § 0.331(a)(2), 47 C.F.R. § 1.115(a), and 47 C.F.R. §§ 1.2105(a)(2)(viii) & (c)(1) (App. 93-96).

STATEMENT OF THE CASE

I. The Genesis of the Cash for Waivers Deal

This case of first impression arises from a scheme concocted by the Federal Communications Commission (“FCC” or the “Commission”) to generate a larger-than-expected take in the Commission’s auction of H-Block spectrum in Auction 96 (“H-Block Auction”) by secretly granting valuable waivers of its rules to a single prospective bidder, DISH Network Corporation (“DISH”), in exchange for a commitment of a large cash bid in the auction. The specific quid pro quo which eventually emerged was that: (i) DISH would be granted an extension of time to construct a nationwide wireless network, without which its license would be

forfeited; and (ii) the technical spectrum configuration of DISH’s license for that network would be reversed to make it more compatible with the adjacent spectrum – which DISH now could expect to win in the auction. In exchange, DISH would bid at least \$1.564 billion in the auction of licenses in the so-called “H-Block” of spectrum, a much higher figure than would have been anticipated for the licenses on offer.

How this deal came about has never been disclosed by either DISH or the FCC. We know that in 2013, the FCC was trying to resolve technical issues in an unrelated 700 MHz band which had been the subject of contention among license holders in that band. The Acting FCC Chairwoman, Mignon Clyburn, had personally convened meetings of the major licensees in the band in an attempt to resolve the technical interoperability issues among the parties. DISH, as a large 700 MHz licensee, was a party to these negotiations. Petitioner NTCH was not a 700 MHz licensee, and therefore did not participate in these discussions.

On September 10, 2013, Chairwoman Clyburn issued a self-congratulatory release expressing her gratification that a “voluntary industry solution” had been reached among the interested parties to resolve the 700 MHz interoperability issues.¹ As part of this deal, DISH agreed to reduce the transmitted power levels of its 700 MHz stations. The Clyburn News Release made no mention of any other concessions made to DISH unrelated to 700 MHz interoperability issues. Nor were

¹ FCC News, *Acting FCC Chairwoman Clyburn Statement on Voluntary Industry Solution Resolving Lower 700 MHz Interoperability* (rel. Sept. 10, 2013) (“Clyburn News Release”), available at <https://docs.fcc.gov/public/attachments/DOC-323229A1.pdf>.

the FCC’s commitments at issue here disclosed in the order that was subsequently issued effectuating the 700 MHz agreements.²

On the same day as the Clyburn New Release, however, DISH filed a letter with the FCC memorializing the terms of a deal that materially affected other services as well as the 700 MHz band.³ This letter confirmed DISH’s willingness to reduce its 700 MHz power levels *provided* that the FCC granted DISH two additional benefits: (i) an exclusive two-and-a-half-year option to change the direction of a portion of its unrelated AWS-4 band operations from uplink to downlink (the “Downlink Option”); and (ii) a one-year extension of time to complete construction of that same AWS-4 network (the “Construction Extension”).⁴ DISH did not mention any related obligation by DISH to bid at least \$1.564 billion in the H-Block Auction.

Attached to the DISH Letter was a petition whereby DISH formally requested grant of the Construction Extension and Downlink Option.⁵ The DISH Waiver Petition laid out the supposed public interest in the FCC granting DISH these benefits, but it also expressed DISH’s “acknowledgement” that the grant of these benefits was conditioned on DISH bidding a price “equal to any aggregate

² See *Promoting Interoperability in the 700 MHz Commercial Spectrum*, 28 FCC Rcd. 15122, 15122-23, ¶ 1 (2013).

³ See Letter from Jeffrey H. Blum, Senior Vice President & Deputy Gen. Counsel, DISH, to Chairwoman Mignon Clyburn, FCC at 1-2, WT Docket No. 12-69 (Sept. 10, 2013) (“DISH Letter”).

⁴ *Id.* at 2-4.

⁵ Petition for Waiver of Sections 27.5(j) and 27.53(h)(2)(ii) and Request for Extension of Time of DISH Network Corporation at 1, WT Docket No. 13-225 (dated Sept. 9, 2013) (“DISH Waiver Petition”).

nationwide reserve price established by the Commission in the upcoming H-Block auction (not to exceed the equivalent of \$0.50 per MHz/POP).”⁶ DISH simultaneously submitted an ex parte letter in the H-Block Auction proceeding proposing that the reserve price in the auction be set at \$0.50 per MHZ/pop, which works out to exactly \$1.564 billion.⁷

The Commission leadership was concerned at the time that recent spectrum auctions had fetched relatively paltry sums toward the \$7 billion+ needed to fund the nascent First Responder Network Authority (“FirstNet”) public safety network. At a September 11, 2013 Congressional hearing, then-Commissioner Pai lamented the FCC’s “paltry” and “disappointing” auction record – noting that the FCC had raised only \$72 million since January 2009.⁸ How the whopping \$1.564 billion payoff amount from DISH to the Commission was arrived at has never been explained, but it was presumably the product of private negotiations between DISH and the FCC since both parties knew by September 10, 2013 (i.e., the date of the DISH Letter) exactly much the payment had to be for DISH to get the waivers.

⁶ *Id.* at 15.

⁷ Ex Parte Letter of DISH Network Corporation at 1, AU Docket No. 13-178 (Sept. 9, 2013). Because the MHz/pops involved in the H-Block auction were 10 MHz x 312,800,000 pops, the total MHz-pops were 3,128,000,000, and therefore the resulting reserve price payable by DISH would be \$1.564 billion (\$0.50 x 3,128,000,000 pops). See DISH Waiver Petition at 15 .

⁸ FCC, *Statement of Ajit Pai Commissioner, Federal Communications Commission Hearing Before the Appropriations Subcommittee on Financial Services and General Government*, 2013 WL 4850516, at *1 (F.C.C. Sept. 11, 2013).

In furtherance of the agreement, the FCC hastily adopted the extraordinarily high reserve price⁹ – which DISH proposed just four days earlier – and failed to mention in its justification of the reserve price that the settled-upon reserve price was the product of a private agreement between the FCC and DISH. Members of the public who were interested in bidding for H-Block licenses had no inkling that this deal was extant since the only place it had been publicly alluded to at all was in the DISH Waiver Petition, which was in a separate docket bearing no connection whatsoever to the conduct of an FCC auction of a different spectrum block. The FCC’s Public Notice seeking comment on the DISH Waiver Petition did not mention the quid pro quo at the core of DISH’s waiver request.¹⁰ Petitioner NTCH, who had been interested in seeking a license in this auction, only became aware of the deal by happening to look at the DISH Waiver Petition.

On the deadline for filing the paperwork necessary to participate in the H-Block Auction, NTCH elected not to participate in the auction since the reserve price was set so unrealistically high that it was unlikely NTCH could win any licenses. Several major wireless carriers like AT&T, T-Mobile, and Sprint who had

⁹ The FCC itself had originally proposed that minimum bids be set at between \$0.01/MHz-pop and \$0.16/MHz-pop. *Auction of H Block Licenses in the 1915-1920 MHz and the 1995-2000 MHz Bands*, 28 FCC Rcd. 10013, 10026-27, ¶ 55 (2013). As the Wireless Bureau has acknowledged, the minimum opening bid amount typically also serves as the reserve price for an auction. *See id.* at 10025, ¶ 50. One would have expected the H-Block Auction’s reserve price to be in the \$0.07/MHz-pop range (roughly \$219 million). The “minimum bid amount” is the minimum bid that the FCC will accept for any given license in an auction. *See id.* at 10025, ¶ 50. The “reserve price” is the total amount that must be bid in an auction for the auction to be valid. *See id.*

¹⁰ *See generally Wireless Telecommunications Bureau Opens Docket to Seek Comment on DISH Network Corporation’s Petition for Waiver and Request for Extension of Time*, 28 FCC Rcd. 12987 (WTB 2013).

previously expressed considerable interest in participating in the auction also opted not to participate.

An affiliate of DISH, American H Block Wireless, LLC (“American H Block”), duly submitted the application form necessary to participate in the auction. Although the H-Block Auction instructions and the FCC’s rules required auction participants to disclose “any agreements, arrangements or understandings relating to the licenses being auctioned,”¹¹ American H Block did not disclose the FCC-DISH agreement either in its pre-auction short-form or in its post-auction long-form applications. The FCC was obviously aware of its own agreement with DISH, but it did not enforce its requirement that this agreement relating to the licenses being auctioned be disclosed.¹² In all, 23 bidders ultimately qualified to bid in the H-Block Auction including American H Block.¹³

On December 20, 2013, the FCC’s Wireless Telecommunications Bureau (“Wireless Bureau”) not surprisingly granted the DISH Waiver Petition, only cursorily noting the deal with DISH. *See 2013 DISH Waiver Order*, 28 FCC Rcd. 16805, ¶ 46 (App. 63). The grant is not surprising because, having set the reserve

¹¹ *Auction of H Block Licenses in the 1915-1920 MHz and 1995-2000 MHz Bands Scheduled for January 14, 2014, Notice and Filing Requirements, Reserve Price, Minimum Opening Bids, Upfront Payments, and Other Procedures for Auction 96*, 28 FCC Rcd. 13019, 13027, ¶ 19 (2013) (“Auction 96 Procedures Public Notice”) (citing 47 C.F.R. §§ 1.2105(a)(2)(viii) & (c)(1) (App. 95-96)).

¹² *See Auction of H Block Licenses in the 1915-1920 MHz and 1995-2000 MHz Bands*, 28 FCC Rcd. 16372, 16372, ¶ 2 (2013) (“H-Block Auction Application Status Public Notice”) (accepting DISH’s short-form application as complete); *Wireless Telecommunications Bureau Grants H Block (1915-1920 MHz and 1999-2000 MHz) Licenses*, 29 FCC Rcd. 4782 (2014) (granting DISH’s long-form application without requiring DISH to amend application).

¹³ *H-Block Auction Application Status Public Notice*, 28 FCC Rcd. at 16372, ¶ 2; *Auction of H Block Licenses in the 1915-1920 MHz and 1995-2000 MHz Bands*, 29 FCC Rcd. 77, 77, ¶¶ 1-2 (2014).

price at the level agreed to with DISH, the FCC necessarily had to grant the waivers to ensure the reserve price in the auction was reached. Not to do so would almost certainly have caused the auction to fail. The Wireless Bureau had to hasten to grant the waivers in order to meet DISH's demand that the waivers be granted at least 30 days before the auction began. After going through the motions of trying to justify the waivers on historically recognized grounds, the Wireless Bureau noted that the grant of the Construction Extension and the Downlink Option were expressly conditioned on DISH bidding at least \$1.564 billion in the H-Block Auction:

Given our public interest analysis of DISH's bidding commitment in the H-Block auction, we grant this waiver on the express condition that DISH fulfill its commitment to bid 'at least a clearing price' equal to the aggregate reserve price of \$1.564 billion in the H-Block auction. Failure by DISH to meet this commitment will terminate the waivers granted herein, without the need for further agency action. *Id.*

The Wireless Bureau indicated that DISH's commitment to make a high auction bid would contribute to funding FirstNet and would therefore further the public interest. *Id.* at 16796, ¶ 23 & 16808-09, ¶ 53 (App. 54, 66-67). Obviously, by expressly conditioning the waiver grants on payment of the agreed price, the FCC acknowledged that the waivers could not stand on their own merits. These few sentences in the *2013 DISH Waiver Order* represent the only acknowledgment ever by the Commission that the deal with DISH existed. Accordingly, its corruptive and distorting impact on the H-Block Auction has never been addressed by the full Commission.

The DISH Waiver Petition expressly provided that unless the FCC granted the Construction Extension and the Downlink Option at least 30 days before bidding began in the H-Block Auction, DISH’s bidding commitment would “no longer apply.”¹⁴ The deal was therefore off if either party failed to meet its part of the bargain. The parties to this back alley agreement plainly did not trust each other, but the mutual conditions bound both parties.

Bidding in the H-Block Auction began on January 22, 2014, and ended on February 27, 2014. DISH’s affiliate won *every single license* – a feat never accomplished before or since. Towards the end of the auction, all of the other bidders were outbid, and the DISH entity had to keep bidding *against itself* in order to get the final bid amount up to precisely the \$1.564 billion total that DISH had promised.

II. The FCC’s Deliberate Concealment of the Deal with DISH

That the FCC went to considerable lengths to cloak the deal in secrecy is beyond dispute. As we have seen, the cash-for-waivers arrangement was related to the “voluntary industry solution” that arose out of backroom negotiations to resolve differences among 700 MHz licensees chaired by Chairwoman Clyburn. The Chairwoman, however, never disclosed that the 700 MHz deal included a kicker involving another frequency band that was available only to DISH. Neither her proud announcement of the deal nor the Commission’s formal order implementing

¹⁴ DISH Waiver Petition at 15.

the technical and operational modifications that had been agreed to mentioned that one of the parties was getting a unique favor.

At no point was the deal disclosed or made a part of the H-Block Auction docket, leaving prospective participants in that auction unaware that a special arrangement between the auctioneer and DISH would make it highly unlikely that anyone but DISH would win any licenses because only DISH would receive unrelated but highly valuable waivers from the FCC in addition to the H-Block licenses it won. The FCC's subterfuge was especially calculated in relation to the setting of the auction reserve price. Both DISH and the FCC pretended publicly that the reserve price was based exclusively on historical license values and the like without mentioning that the reserve price was actually an independently negotiated part of their deal.

When NTCH challenged both the deal itself and the FCC's concealment of it as unfair to auction participants, the FCC responded that the *H-Block Auction Procedures Public Notice* had advised auction participants that they were responsible for knowing about any Commission proceedings that might impact their bidding strategies. *2018 H-Block Auction Order*, 33 FCC Rcd. at 8449-10, ¶ 8 (App. 31). In other words, instead of the FCC simply alerting prospective bidders to this highly-material element affecting the conduct of the auction, potential bidders were supposed to check thousands of completely unrelated Commission dockets to see if the FCC had quietly reached a unique arrangement with one particular H-Block Auction participant. The mention of the deal in connection with DISH's waiver

request was the only place where the FCC admitted that it had a cash-for-waivers agreement with DISH that explicitly drove its grant of the waivers.

This cloak of secrecy cast by the FCC violated the FCC's own rules. Those rules require that ex parte contacts directed toward the merits of a notice and comment rulemaking-type proceeding must be summarized and placed in the record of the proceeding.¹⁵ The agreement to set the reserve price at an agreed level and to grant DISH waivers if it bid that amount were therefore required disclosures in the Commission's H-Block Auction Procedures docket. Neither the FCC nor DISH made any such disclosure. In addition, as noted above, the FCC's auction rules and application form strictly require auction applicants to include in their application a brief description of any "agreements, arrangements or understandings of any kind relating to the licenses being auctioned, including any agreements that address or communicate directly or indirectly bids . . .".¹⁶ DISH made no such public disclosure and the FCC did not require the disclosure. To date, DISH has suffered no penalty or sanctions whatsoever for its involvement in this scheme.

The FCC's calculated efforts to conceal the existence of its agreement with DISH, its lengthy delay in addressing NTCH's intra-agency appeal of the matter, its repeated violations of its own disclosure rules, and its continual refusal to acknowledge its wrongdoing render it inextricably complicit in the scheme to rig the

¹⁵ See generally 47 C.F.R. § 1.1206.

¹⁶ *Id.* § 1.2105(a)(2) (App. 95).

H-Block Auction. Its persistent efforts to evade review of the matter on procedural grounds must be viewed in that light.

III. Appellate Proceedings

As required by the FCC's rules, NTCH timely filed applications for review of the Wireless Bureau's actions: (i) setting the reserve price at \$1.564 billion; (ii) granting the DISH Petition; and (iii) generally rigging the H-Block Auction by promising DISH benefits contingent upon its auction bids which no other bidder was entitled to. *See generally* DISH Waiver Application for Review; H-Block Auction Application for Review (App. 79-92, 71-78). NTCH challenged the very concept that an administrative agency can grant benefits based not on the public interest merits of a proposal, but rather, on how much money the proponent is willing to pay the agency.

The FCC sat on NTCH's Applications for Review for four years until NTCH petitioned the D.C. Circuit for a writ of mandamus directing the FCC to act. When the FCC was thus forced to act, instead of addressing the merits of the unprecedented actions taken by its delegated authority, the FCC dismissed NTCH's applications for review on procedural grounds. The Commission first claimed that NTCH did not have standing to raise these challenges because it had not participated in the auction. *2018 H-Block Auction Order*, 33 FCC Rcd. at 8451, ¶ 12 (App. 33); *2018 DISH Waiver Order*, 33 FCC Rcd. at 8459-61, ¶¶ 10-12 (App. 41-43).

The Commission also found that NTCH's Application for Review of the *2013 H-Block Auction Order* was procedurally defective because it did not declare with

specificity which of a menu of five possible bases for Commission review NTCH was relying on. *2018 H-Block Auction Order*, 33 FCC Rcd. at 8450-51, ¶ 11 (App. 32-33).¹⁷ In fact, NTCH fully complied with the FCC’s rule by precisely indicating which of the five bases it was relying on and then explaining its reasoning in the body of its pleading. As NTCH demonstrated to the D.C. Circuit, the FCC routinely ignores this minor procedural rule, yet in this important case the FCC chose to adopt a strict and novel reading of the rule.¹⁸ This allowed the Wireless Bureau’s acceptance on the Commission’s behalf of what would normally be considered a bribe¹⁹ to go unreviewed, unexamined, and unjustified by the full Commission. The Commission’s dismissal of the application for review on a procedural technicality also allowed an entirely unprecedented action by a delegated authority – in direct violation of the Commission’s own rules²⁰ – to stand as the FCC’s final word on the lawfulness of its action.

On review, the D.C. Circuit rejected the Commission’s contention that NTCH did not have standing to challenge the integrity of the auction. *NTCH v. FCC*, 950 F.3d at 884 (App. 23). Consistent case precedent has held that a party which has expressed an interest in participating in a government auction can challenge the

¹⁷ The Commission’s rules require a party seeking review of an action by a delegated authority to specify from a menu of five possible bases for appeal which particular ones are being invoked. 47 C.F.R. § 1.115(b)(2) (App. 94).

¹⁸ Petition for Rehearing or Rehearing En Banc at 3-5, *NTCH, Inc. v. FCC*, 950 F.3d 871 (D.C. Cir. April 1, 2020) (“Rehearing Petition”).

¹⁹ There is no suggestion that anyone at the Commission benefited personally from the DISH payment; it was the agency itself which reaped the benefit.

²⁰ 47 C.F.R. § 0.331(a)(2) (App. 92).

procedures for the auction without having to actually participate. *See id.* (App. 23) (citing *U.S. AirWaves, Inc. v. FCC*, 232 F.3d 227, 232 (D.C. Cir. 2000)). The D.C. Circuit therefore remanded to the FCC the issue of whether the Commission should have granted the DISH Waiver Petition based on the cash payments since the Commission had not addressed the merits of that issue. *Id.* at 884 (App. 23). The Court, however, affirmed the Commission’s dismissal of NTCH’s Application for Review challenging the integrity of the H-Block Auction based on the supposed lack of specificity in NTCH’s H-Block Auction Application for Review. *Id.* at 885 (App. 25). The D.C. Circuit therefore refused to consider the merits of the FCC’s unlawful conduct with respect to the H-Block Auction. Since the grant of the waivers was directly tied to DISH’s bids in the auction, it is unclear how the lawfulness of the waiver can be reviewed by the FCC without considering the lawfulness of the auction. The D.C. Circuit en banc denied NTCH’s petition for rehearing. Order, *NTCH, Inc. v. FCC*, 950 F.3d 871 (D.C. Cir. April 28, 2020) (App. 70). As of this writing, the FCC has taken no steps to initiate the remand proceedings required by the D.C. Circuit.

REASONS FOR GRANTING CERTIORARI

The course of this unique case has left intact a principle which must be utterly abhorrent to our system of jurisprudence: that federal administrative agencies may base their public interest determinations not on the merits of the petitions before them, but on how much money a proponent secretly offers to pay them in exchange for favorable treatment. Petitioner has been unable to unearth any judicial precedents addressing the questions presented here, perhaps because the position adhered to by the Commission is so preposterous. It should require only a moment's consideration to conclude that our system of equal justice under the law would be irrevocably and fatally undermined if litigants are permitted to effectively bribe federal agencies to waive their rules in exchange for cash.

Petitioner pointed out to the D.C. Circuit that Lord Acton's famous bromide about the tendency for power to corrupt and absolute power to corrupt absolutely is equally compelling here. When the public interest is at stake, money tends to corrupt, and lots of money – here a billion and a half dollars – corrupts absolutely. The money received by the Commission through the rigged auction went to a worthy cause – a fund to launch the public safety First Responders Network – but there are a host of other worthy causes that an agency could point to as being benefitted by cash payments for favorable treatment: more personnel, more equipment, nicer offices, better computers, etc. Agencies, like people, can always find a way to improve their lot by spending additional money.

Unfortunately, if under-the-table cash inducements become a lawful element in administrative agencies' decisional processes, the rights and public interest

concerns of regular people, small businesses, poorer Americans, and non-profit public interest groups will always be overcome in any public interest debate by the positive lure of getting more money into the agency's coffers. This country will have become a naked plutocracy where the rules adopted for the public good will not apply to companies or individuals who can buy waivers.

There is also the problem of whether an agency can accept these cash payments secretly since payers would not know how much they have to pay for particular waivers. If each inducing payment is individually negotiated without a published schedule of pay-off amounts, there will be no fairness even among those who can afford to make such payments. This, we are told, is a practical problem with ordinary illegal bribes of government officials. How much is the right amount to offer? Here the FCC and DISH somehow arrived at a value of \$1.564 billion for the benefits DISH was receiving – in addition, of course, to the value of the actual licenses it won in the auction. But how does one place a cash value on having to obey other rules?

Trying to fit under-the-table payments into a lawful framework for administrative agency decisionmaking quickly becomes an absurd exercise. There is no law explicitly preventing the FCC from accepting promises of cash in return for waivers, other than the overriding principle of equal justice. No legislator evidently ever thought that such a prohibition would be necessary, but today we find sadly that justice at the FCC can be bought and sold for a price. It is up to this

Court to firmly and finally declare the FCC's new policy to be as fundamentally anathema to administrative justice as it is to judicial justice.

The Claim of Procedural Error

In affirming the FCC's dismissal of NTCH's appeal from the Wireless Bureau to the full Commission on minor procedural grounds, the D.C. Circuit applied the "highly deferential" standard applicable to arbitrary and capricious reviews.

NTCH v. FCC, 950 F.3d at 885 (App. 25) (quoting *Cellco Partnership v. FCC*, 357 F.3d 88, 93 (D.C. Cir. 2004)). Given the indisputable evidence of the FCC's direct involvement in the unlawful fixing of the auction, its efforts to conceal the agreement, and its further efforts to delay and evade judicial scrutiny of the acts it had taken, there were ample grounds for the D.C. Circuit to give no deference at all to the FCC's procedural move to stifle review of its actions. On the contrary, the unusual facts of this case would support heightened skepticism about the FCC's stated purpose for dismissing NTCH's application for review rather than deference since the FCC itself was culpable of serious wrongdoing.

Under fundamental principles of administrative law,

where . . . *an agency justifies its actions by reference only to the information in the public file while failing to disclose the substance of other relevant information* that has been presented to it, a reviewing court cannot presume that the agency has acted properly, but must treat the agency's justifications as a fictional account of the actual decision making process and must perforce find its actions arbitrary.

Home Box Office, Inc. v. FCC, 567 F.2d 9, 54-55 (D.C. Cir. 1977) (emphasis added).

The highly *irregular* circumstance here of a covert deal favoring a single auction bidder – which the agency repeatedly failed to place in the public record of the

auction – is ample reason for rebutting any presumption of regularity in the FCC’s actions.

The procedural rule (47 C.F.R. §1.115(a)) relied on by the FCC simply requires one seeking review by the full Commission to identify one or more out of five categories of appeal that merit full Commission review. NTCH specified which of those categories applied in the preface to its pleading, and then presented the supporting argument in the body – just as administrative appellants have done for decades. *See generally* H-Block Auction Application for Review (App. 71-78). NTCH also presented the D.C. Circuit with results of a brief survey of FCC appeals that showed that in most appeals to the full FCC the appellant identifies none of the Section 1.115 categories whatsoever.²¹ The FCC regularly reviews those appeals anyway since the substance of the appeal is determinable from the body of the pleading, as was the case here.

Moreover, contrary to the FCC’s assertion that NTCH did not offer precedents and facts to support its assertions about the error in setting the reserve price, NTCH actually provided detailed precedents and facts from prior auctions showing that the FCC had deviated from those precedents under the influence of the agreement with DISH. *See* H-Block Auction Application for Review at 4-5 (App. 74-75). The FCC never denied that one of the bases for appeal specified by NTCH (i.e., the improper influence of a deal between the FCC and a potential bidder to set the reserve price) was both explicitly set forth in compliance with Section

²¹ Rehearing Petition at 9-11.

1.115(b)(2) of the Commission’s rules and explained in the text. Because the FCC’s action was indeed “unprecedented,” NTCH could hardly find precedents to the contrary. Yet the Commission dismissed the entire application for review.

There can be no question that the FCC’s reliance here on a minor procedural technicality which: (i) posed no substantive impediment to the FCC’s review; (ii) was in fact complied with by NTCH; (iii) is in practice rarely enforced by the FCC; and (iv) was a mere pretext to get rid of a troublesome issue for the agency. Given the FCC’s collusion in the very unlawful agreement NTCH was challenging, there were solid grounds to question and reverse the FCC’s summary dismissal of NTCH’s application for review.

CONCLUSION

This case is the first opportunity for the Court to articulate the fundamental principle that administrative agencies may not solicit or receive cash payments (or other consideration) in exchange for granting waivers of their rules. That this bedrock principle must be declared is a disheartening sign of our times, but if the FCC’s lead here is followed by itself and other agencies, the negative consequences for the system of administrative law that has developed in this country over the last century will be severe. The petition for certiorari should be granted.

Respectfully submitted,

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