

**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

PETITIONER'S CONSOLIDATED REPLY TO OPPOSITIONS

Donald J. Evans
Counsel of Record
Keenan Adamchak
Fletcher, Heald & Hildreth
1300 N. 17th St., 11th Floor
Arlington, VA 22209
703-812-0430
evans@fhhlaw.com

Counsel for Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
I. Review is Requested only of the Circuit Court’s Decision with Respect to D.C. Circuit Case No. 18-1242.....	1
II. The FCC Nowhere in the Record of the H-Block Auction Disclosed the Deal with DISH.....	2
III. The Lawfulness of Rigging a Federal Auction in Return for Cash is an Important Federal Question that has not been, but Should be, Settled by the Court.....	3
IV. The Court Should Not Defer to the Agency’s Transparently Self-Serving Dismissal of Petitioner’s Application for Review on Insignificant Procedural Grounds	4
V. Conclusion	5

TABLE OF AUTHORITIES

<i>NTCH, Inc. v. FCC,</i> 950 F.3d 871 (D.C. Cir. 2020)	1, 4
--	------

Petitioner NTCH, Inc. hereby replies to the Briefs in Opposition submitted by Respondents United States of America and DISH Network Corporation. This Reply will address four points raised by those parties.

I. Review is Requested only of the Circuit Court’s Decision with Respect to D.C. Circuit Case No. 18-1242

The United States unaccountably and erroneously suggests that Petitioner is here seeking review of U.S. Court of Appeals for the District of Columbia (“D.C. Circuit”) Case No. 18-1241. Federal Respondents Opp. 6-8. That case had been consolidated by the Court of Appeals with the case under review here but had a different outcome. D.C. Circuit Case No. 18-1241 addressed the propriety of FCC’s grant of rule waivers in exchange for cash. That matter was remanded back to the Federal Communications Commission (“FCC” or “Commission”) by the D.C. Circuit because the Commission wrongly dismissed NTCH’s challenges for a lack of administrative standing. *See NTCH, Inc. v. FCC*, 950 F.3d 871, 874 & 884 (D.C. Cir. 2020) (App. 4 & 23). As Petitioner has noted, the FCC, now more than a year since the remand, has taken no action at all to address the propriety of its waiver grants. *See* Pet. 14. The Commission’s resolution of the remand is obviously not presently before this Court because the FCC has so far ignored the remand order.

The case actually under review here, however, is D.C. Circuit Case No. 18-1242, which concerns the D.C. Circuit’s failure to review and set aside the results of the FCC’s H Block Auction. As explained in Petitioner’s petition for certiorari, the Commission’s secret agreement with DISH Network Corporation (“DISH”) to set the H Block Auction’s reserve price at a certain agreed level and to grant valuable

waivers to DISH if it bid the agreed amount effectively rigged the auction. *See Pet.* 2-9. The auctioneer had made a deal with one favored bidder to grant it benefits not available to other bidders, while in the process driving the auction prices well above the prices a fair and uncorrupted auction would have fetched. This is certain because DISH had to bid against itself to get the total auction take up to the artificially high reserve price which the deal had ensured. The remedy for this unlawful process is a reversal of the H Block Auction results and a re-auctioning of the H Block spectrum on a fair and open basis cleansed of the unlawful agreement – something which the D.C. Circuit’s disposition does not guarantee. The case at bar is about the integrity of the FCC’s auction process, while Case No. 18-1241 was about the integrity of the FCC’s waiver evaluation and disposition process. To be sure, the cash-for-waivers deal enters into the auction analysis because it was the promise of a large cash auction bid that caused the auction to be fundamentally corrupted.

II. The FCC Nowhere in the Record of the H-Block Auction Disclosed the Deal with DISH

The United States also argues that the DISH-Commission deal was not secret because it was a matter of “public record.” Federal Respondents Opp. 4 & 11. Petitioner went to some lengths in its Petition to demonstrate how at every stage of the auction process, the FCC not only did not acknowledge the deal but pretended that it did not exist. *See Pet.* 9-12. The existence of the deal was indeed in a public record – the record of an entirely separate FCC proceeding having nothing to do with the H Block Auction. No auction participant or prospective auction participant

would have had any reason to be examining the docket concerning a waiver being sought by an entity for a separate and unrelated license. The government's position is akin to a party before this Court asserting that it had addressed a critical point in its case, but the pertinent material was filed in another unidentified and wholly unrelated docket somewhere in the Court's files. The Court just needs to figure out where in the thousands of dockets that might be. The fact that the deal was concealed from auction participants exacerbated the *per se* wrongfulness of the deal because they did not have an opportunity to comment on the proposed conduct of the auction, and then had to go through the futile exercise of bidding in an auction that they were almost certain to lose.

III. The Lawfulness of Rigging a Federal Auction in Return for Cash is an Important Federal Question that has not been, but Should be, Settled by the Court

DISH insists that the FCC's misconduct here is not cert-worthy because there is no circuit split or any important issue raised by the case. *See* DISH Respondents Opp. at 6-7. This position myopically misses the point of this appeal: the FCC's acceptance of an effective bribe to rig an auction is so egregiously and obviously contrary to our system of law that, so far as we could discern, there is no precedent for or against it. This Court does not need a circuit split to recognize that a policy condoning, and even facilitating, the rigging of auctions for cash is fundamentally contrary to our system of law. To adjudge and condemn such conduct as unlawful is beyond cavil a matter of grave public importance that merits this Court's review. Petitioner is astonished that the Solicitor General is defending undisputed conduct

by an administrative agency that, if not overturned, creates the potential for widespread corruption of agency decision-making by promises of cash rather than the public interest.

IV. The Court Should Not Defer to the Agency’s Transparently Self-Serving Dismissal of Petitioner’s Application for Review on Insignificant Procedural Grounds

The D.C. Circuit declined to review the FCC’s actions here because the FCC ruled that Petitioner had not in the preamble to its application for review to the full Commission specified precisely enough what the basis for its appeal was. *See NTCH*, 950 F.3d at 884-85 (App. 24-26). The Court therefore did not reach the merits of the FCC’s gross auction misconduct. While courts typically defer to agencies’ interpretations of their own rules, the FCC’s direct complicity in the unlawful deal and its various cover up efforts constitute a sufficiently “unique circumstance” to accord little or no deference to the FCC’s ruling in this regard – a ruling which has had the effect of insulating its own misconduct from judicial review. The fact that Petitioner clearly highlighted upfront the highly unprecedented nature of deal between the FCC’s Wireless Telecommunications Bureau and a potential auction bidder should surely have alerted the Commission to the nature and gravity of the issue that was being presented to it. The fact that the FCC routinely ignores the ministerial rule on which its dismissal was premised furthers the conclusion that the alleged insufficient “specificity” of Petitioner’s preamble was nothing more than a pretext for disposing of a bothersome case that the Commission hoped would never see the light of day.

Of course, as the government points out, the FCC itself considered the merits of NTCH’s application for review “as an independent and alternative basis” for its decision. (App. 33). The Circuit Court did not reach that separate and independent basis because the application for review had been dismissed on procedural grounds. Thus, remand of this case to the Court of Appeals would ensure that the merits of the Commission’s action are subject to substantive review.

V. Conclusion

The Court should grant certiorari.

Respectfully submitted,

Donald J. Evans
Counsel of Record
Keenan Adamchak
Fletcher, Heald & Hildreth
1300 N. 17th St., 11th Floor
Arlington, VA 22209
703-812-0430
evans@fhhlaw.com

Counsel for Petitioner