

**IN THE
SUPREME COURT OF THE UNITED STATES**

No. ____

NORTHSTAR WIRELESS, LLC, and SNR WIRELESS LICENSECO, LLC,

v.

FEDERAL COMMUNICATIONS COMMISSION,

**APPLICATION TO THE HON. JOHN G. ROBERTS, JR.,
FOR AN EXTENSION OF TIME WITHIN WHICH TO FILE
A PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE D.C. CIRCUIT**

Pursuant to Supreme Court Rule 13(5), Northstar Wireless LLC (“Applicant”) hereby moves for an extension of time of 30 days, to and including December 16, 2022, for the filing of a petition for a writ of certiorari. Unless an extension is granted, the deadline for filing the petition for certiorari will be November 16, 2022.

In support of this request, Applicant states as follows:

1. The United States Court of Appeals for the D.C. Circuit rendered its decision on June 21, 2022 (Exhibit 1), and denied a timely petition for rehearing on August 18, 2022 (Exhibit 2). This Court has jurisdiction under 28 U.S.C. §1254(1).

2. FCC regulations encourage small businesses to participate in its periodic auctions for licenses to wireless spectrum by offering discounts to qualifying small businesses. The discounts are substantial—up to 25% off the winning bid—and they are often the difference between making money and going bankrupt. But even with the discounts, most small businesses cannot afford to go it alone; spectrum

licenses typically go for tens (if not hundreds) of millions of dollars apiece, and it is the rare small business that can put up that kind of cash. In light of this reality, the FCC permits small businesses to rely on investments from larger, more established companies—as long as the investment does not give the large company too much sway with the business. Small businesses are thus stuck between competing demands: They cannot afford to enter the game without financial backing from an established player; they cannot secure that backing without giving something up in exchange; but if they give up too much to the established player, they lose.

3. Indeed, they more than just lose; they get penalized. The FCC does not evaluate small-business status until after the auction is closed. And if the FCC determines post-auction that a winning bidder does not qualify for bidding credits (because, e.g., a large investor has too much control over the applicant company for the FCC’s liking), the putative small business that “won” the auction does not get to walk away; it must pay the full winning price on its licenses or face default penalties.

4. This unusual form of caveat emptor works relatively unproblematically when it comes to applicants that claim to be small business but in fact are subject to *legal* control by a large-company backer. The FCC uses bright-line rules to determine *de jure* control of applicant companies, so a bidder at least has reasonable notice before it submits a bid of what is and is not allowed (and thus what will or will not cause a bidder to lose its eligibility for credits and face the possibility of penalties).

5. But that is where the fair-notice regime ends. In stark contrast to how it evaluates *de jure* control, the FCC assesses *de facto* control “on a case-by-case

basis,” 47 C.F.R. §1.2110(c)(2)(i), and it has given bidders precious little guidance on where the line is.

6. In recognition of the potential for grave unfairness in determining, after the fact, that the totality of the (non-codified) circumstances disqualify a bidder from a 25% discount that may make the difference between profit and ruin *and then penalizing bidders* for flunking that totality “test,” the FCC has long negotiated iteratively with bidders to allow them to cure their de facto dependence on large investors. That cure process is the difference between a rational regime and an unconstitutional trap. But the FCC abandoned that long-settled practice in this case without notice or explanation, in contravention of fundamental notions of due process and fair dealing.

7. After starting up in 2014, Northstar Wireless, LLC (“Northstar”) placed billions of dollars in winning bids at an FCC spectrum auction. As Commission rules required, Northstar not only disclosed that DISH Network Corporation (“DISH”) is its largest investor, but also described in detail its agreements with DISH and DISH’s financial involvement with the company, which tracked previous arrangements between small bidders and large investors. After the auction, however, the Commission denied Northstar’s application for bidding credits, finding that DISH had too much control over Northstar. Yet unlike in every other instance in which the Commission had concerns regarding an applicant’s eligibility for bidding credits as a designated entity, the FCC did not give Northstar an opportunity to cure the control issues before finding it ineligible for bidding credits. That was not for lack of trying

on Northstar's part: The company asked the FCC to meet with it and allow it to address the FCC's specific concerns. But the FCC did not even so much as respond to Northstar's overtures in this regard. Nor did it let Northstar walk away. After having ignored Northstar for more than a year, the FCC ordered it to pay the shortfall between its winning bids and the price the FCC obtained for those licenses in later re-auctions, *plus* penalties totaling hundreds of millions of dollars.

8. It is difficult to imagine a regime less consistent with due process or basic principles of administrative law. Yet the D.C. Circuit saw nothing wrong with the FCC's behavior, or with the fact that Northstar is now on the hook for nine-figure penalties for failing to comply with amorphous standards that have survived scrutiny thus far only because the agency has always worked with applicants to cure any shortcomings between the applicants' front-end guess of what the agency wants and the agency's back-end, totality-of-the-circumstance determination.

9. Applicant's counsel, Paul D. Clement, was not involved in the proceedings below and requires additional time to familiarize himself with the record, research the legal issues presented in this case, and prepare a petition that fully addresses the important and far-reaching issues raised by the decision below in a manner that will be most helpful to the Court. Mr. Clement also has substantial briefing and argument obligations between now and the current due date of the petition, including oral argument in this Court in *Axon Enterprise, Inc. v. FTC*, No. 21-86 (U.S.), a reply in support of certiorari in *Centripetal Networks, Inc. v. Cisco Systems, Inc.*, No. 22-246 (U.S.), a petition for writ of certiorari in *Consumer Data*

Industry Association v. Frey, No. 22A259 (U.S.), a reply brief in *Cline v. Sunoco, Inc. (R&M)*, No. 22-7018 (10th Cir.), and an opening brief in *Maine Lobstermen's Association v. National Marine Fisheries Service*, No. 22-5238 (D.C. Cir.).

WHEREFORE, for the foregoing reasons, Applicant respectfully requests that an extension of time to and including December 16, 2022, be granted within which it may file a petition for a writ of certiorari.

Respectfully submitted,



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