No. 22-672

IN THE
Supreme Court of the United States

NORTHSTAR WIRELESS, LLC,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION,
Respondent.

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

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

Lawrence J. Spiwak
PHOENIX CENTER FOR ADVANCED LEGAL &
ECONOMIC PUBLIC POLICY STUDIES
5335 Wisconsin Avenue, NW Suite 440
Washington, D.C. 20015
(202) 274-0235
lspiwak@phoenix-center.org

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

CASES: **Page**

Page(s)

Statutes and Regulations

Page(s)

Administrative Materials

Page(s)

Page(s)

Miscellaneous

Page(s)

Page(s)

Page(s)

INTEREST OF *AMICI CURIAE*

Although the Public Interest *Amici* range across the ideological spectrum, they all have significant experience in tech and telecom policy, including extensive experience in dealing with the Federal Communications Commission ("FCC"). Accordingly, the Public Interest *Amici* have an established interest in the outcome of this proceeding and believe that their perspective on the issues will assist the Court in resolving this case.[1]

The Public Interest *Amici* are listed below:

The Phoenix Center is a non-profit 501(c)(3) research organization that studies the law and economics of the digital age. Among other topics of research, the Phoenix Center has written extensively about how the FCC has designed and implemented spectrum auctions, including both the legal and economic underpinnings of the "Designated Entity" program at issue in this case.

The Computer & Communications Industry Association (CCIA) is an international, not-for-profit association representing a broad cross-section of communications, technology, and Internet industry

---

[1] No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of the brief. No person other than *Amici Curiae* or their counsel made a monetary contribution to the preparation or submission of this brief. Pursuant to Rule 37.2, all parties were notified of our intent to file this brief.

firms that collectively employ more than 1.6 million workers, invest more than $100 billion in research and development, and contribute trillions of dollars in productivity to the global economy.

The International Center for Law & Economics is a nonprofit, nonpartisan research center whose mission is to promote the use of law & economics methodologies to inform public-policy debates. ICLE develops and disseminates academic output to build the intellectual foundation for rigorous, economically grounded policy. Its primary activity is the organization, management, and networking of its resident staff and more than 50 affiliated scholars and research centers around the globe.

The Open Technology Institute ("OTI") at New America is a non-profit policy institute that works at the intersection of technology and policy to ensure that every community has affordable access to digital technology and its benefits. OTI advocates for wireless and spectrum policies that promote competition and the general public interest.

Public Knowledge is a non-profit organization that promotes freedom of expression, an open internet, and access to affordable communications tools and creative works.

COMPTEL d/b/a INCOMPAS (INCOMPAS) is the Internet and competitive networks association, a nonprofit trade association that advocates for laws and policies that promote competition, innovation, and economic development in the communications and technology industries. INCOMPAS represents a wide

array of competitive organizations in the broadband and Internet ecosystem, including fiber, fixed wireless, mobile (5G), and satellite providers that connect residences, businesses, and community anchor institutions to broadband. INCOMPAS also represents online content companies and other communications providers that deliver streaming, cloud, social media, voice, text, data, and other online content, services, and goods to meet consumer and business needs across the globe.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Federal Communications Commission's ("FCC") administration of Auction 97 was hardly a model of due process. The Petitioner, following the FCC's instructions and long-standing precedent, fully disclosed its relationship with DISH prior to the auction. As the Commission never notified the Petitioner that anything was amiss, the Petitioner participated aggressively in the auction under the reasonable belief it was entitled to bidding credits as a "Designated Entity" ("DE"). Significantly, even though the FCC knew that the Petitioner had racked up about $3 billion in bidding credits within the first week of Auction 97, the FCC again opted to sit on its hands even though it could have stopped the auction before the omelet was scrambled. Yet even though the Petitioner's bidding credits were consistent with past auctions, after Auction 97 concluded the FCC decided it did not like the outcome and decided to depart from precedent and move the goal posts—again without

any notice—to deny the Petitioner DE status. Worse, when the Petitioner tried to negotiate a cure, the FCC engaged in a sustained pattern of "unfair and disparate" conduct towards the Petitioner, again departing from precedent and standard Commission norms. As a result, not only did the Petitioner have to default on several key licenses won at auction, but it has already paid hundreds of millions in interim penalties and is subject to potentially billions more in penalties.

Accordingly, this Court should grant review and reaffirm bedrock principles of fair notice and due process. Review is warranted not only to remediate the FCC's capricious post-auction treatment of the Petitioner but also to provide timely guidance to all our administrative agencies, ensuring that their pursuit of policy goals does not trample their constitutional and statutory duties to maintain transparent procedures.

ARGUMENT

I. The FCC's Conduct in This Case Raises Significant Due Process Concerns

As Chief Justice Roberts observed, the federal bureaucracy "wields vast power and touches almost every aspect of daily life", *City of Arlington, Tex. v. FCC,* 569 U.S. 290, 313 (2013) (Roberts, C.J., dissenting) (quotation marks omitted). Thus, to ensure due process, the Administrative Procedure Act requires regulatory agencies both to provide adequate notice (5 U.S.C. §§ 553, 554) and to conduct themselves "in an

impartial manner." 5 U.S.C. § 556(b)(3). In the case at bar, the Federal Communications Commission did neither.

A. The FCC's Determination of Designated Entity Status Only After the Close of an Auction Makes the Post-Auction Cure Process Essential to Due Process

Prior to Auction 97, the Commission required interested bidders to file a "Short Form" application and disclose the identity and relationships of those persons or entities that directly own or control the applicant. *See* 47 C.F.R. §§ 1.2112, 1.2105. As part of that process, the Commission specifically instructed potential bidders seeking "Designated Entity" status to "review carefully the Commission's decisions regarding the designated entity provisions" when preparing their application. *July 2014 Public Notice* at ¶ 79.

The Petitioner followed the FCC's instructions and fully disclosed its relationship with DISH in its Short Form application—even going the extra mile by providing detailed summaries of its agreements with DISH which were based directly upon agreements the Commission previously found to be acceptable (as the Commission directed). The Commission reviewed the Petitioner's Short-Form application and certified the Petitioner as a "Qualified Bidder." *October 2014 Public Notice*.

The FCC's process for determining whether the Petitioner was eligible for 25% bidding credits as a Designated Entity was far more convoluted. Under the Commission's rules, the FCC refused to evaluate

an applicant's eligibility for DE status prior to the auction. It was only until *after* an applicant participated in the auction, placed winning bids on licenses, and submitted an application and the entire amount of its winning bids (net of bidding credits for which it has applied) to the Commission that an applicant learned whether the Commission agreed that the applicant qualified for DE status under the FCC's amorphous "totality of the circumstances" analysis. *July 2014 Public Notice* at ¶ 63 and 231 and n. 159.

The FCC's policy of delaying evaluation of an applicant's eligibility for DE status until after the auction concluded was no way to run a proceeding with billions of dollars on the line.

First, even though an applicant may believe it followed the Commission's DE Rules and precedent (which, as noted *infra*, the FCC conceded the Petitioner did in this case), this *post hoc* approval process requires a firm to make a tremendous leap of faith that the FCC will not challenge their bids after the auction concludes. Assuming the firm makes this leap, however, it should come as no surprise that if this firm believes that it is entitled to a 25% discount then it will logically bid higher than it would absent the bidding credits. So while the FCC's rules may result in higher overall auction revenues, other non-DE participants in the auction may rightfully believe that they overpaid as the result of the DE's government-subsidized participation (which is exactly what happened in this case). *See* G.S. Ford and M. Stern, PHOENIX CENTER POLICY PERSPECTIVE NO. 15-04: *Ugly is Only Skin Deep: An Analysis of the DE Program in Auction 97* (July 20, 2015) at p. 7 ("[H]igher

auction proceeds are not the result of DEs winning licenses, but of unsubsidized bidders having to bid more aggressively to win licenses."). Accordingly, given that the FCC refused to provide clear guidance as to who is eligible for DE status prior to the auction, it was essential for the FCC to provide the Petitioner with a meaningful opportunity to address and cure any concerns the FCC had with Petitioner's ownership structure after the auction omelet was scrambled (which the FCC explicitly failed to do in this case).

B. If the Commission Had Problems with Petitioner's Bids at Auction, It Should Have Stopped the Auction Before the Omelet Was Scrambled

The FCC also cannot feign ignorance of the consequences of allowing the Petitioner to participate in Auction 97 under the reasonable belief that it qualified for DE bidding credits.

In light of the open disclosures in the Petitioner's Short Form application that DISH and the Petitioner had entered into joint bidding agreements—as permitted by the Commission's own rules—it was naïve for the Commission to think that the Petitioner would be a passive participant in the auction. Anyone with even a passing knowledge of the wireless industry was aware that DISH was on a spectrum buying spree at the time of Auction 97. In 2014, DISH acquired at auction the 10 MHz H Block (11915-1920 MHz; 1995-2000 MHz) for $1.56 billion. T. Ream, *Dish Network Sweeps H-Block Spectrum Auction For $1.56 Billion*, FORBES (March 5, 2015). In 2013, DISH made a run to acquire Sprint. (*Id.*) In 2011, DISH purchased 40

MHz of Mobile Satellite Service spectrum in the 2 GHz band ("AWS-4 band") for $3 billion. DISH was obviously intending to be a player in Auction 97. Given the pre-auction disclosures, the Agency's long history of allowing other major carriers to invest in DEs without objection (*see* S. Labaton and S. Romero, *FCC Auction Hit with Claim of Unfair Bids*, NEW YORK TIMES (February 12, 2001)), and DISH's reputation as a spectrum buyer, the Commission—as the purported "expert" agency—could not credibly claim that it was ignorant of the possibilities before the auction began. And those possibilities certainly included a large telecom company such as DISH investing in Designated Entities that would purchase substantial amounts of spectrum licenses, just as other large companies had in the past.

Even if the FCC turned a blind eye to this reality, it unquestionably knew early in the auction that the Petitioner had run up billions in bidding credits *yet chose to do absolutely nothing about it*. The Auction 97 data make clear that bidding credits crossed the $3 billion threshold in round 23 (of 341), which occurred only 7 days into the 76-day auction. Moreover, credits nearly reached $4 billion by the 12th day of bidding, with almost all those credits going to the Petitioner. Ford and Stern, *Ugly is Only Skin Deep, supra.*

Under the plain terms of the rules for Auction 97, the Agency by "public notice or by announcement during the auction [can] delay, suspend, or cancel the auction in the event of … unlawful bidding activity, *or for any other reason that affects the fair and efficient conduct of competitive bidding*." *July 2014 Public Notice* at ¶ 180 (emphasis supplied). If the FCC had a

problem with the Petitioner's relationship with DISH and the size of the bidding credits accrued, then the Commission should have acted rather than allow the auction omelet to be scrambled. Instead, the Commission let Auction 97 proceed without intervention for a total of 341 rounds, reaping the benefits of inflated auction prices from DE participation.

C. Even Though the Petitioner Followed the Rules, the FCC Moved the Goalposts Post-Auction Because the Commission Did Not Like the Outcome

So, to recap, even though the FCC knew about Petitioner's relationship with DISH and could have stopped Petitioner's participation both before and during the auction, *the FCC chose not to act*. As such, based on the FCC's conduct to date, it was reasonable for the Petitioner to assume that nothing was amiss.

Unfortunately for the Petitioner, given the highly political nature of the FCC, that assumption was misplaced. After the winners of the auction and the size of the bidding credits were publicly announced—and the subsequent media attention drawn by the record-high revenues—the fireworks began and the FCC felt pressured to act. *See* R. Knutson, *FCC to Tighten Reins on Wireless Licenses*, WALL STREET JOURNAL (March 18, 2015).

Even though the size of the bidding credits in Auction 97 were consistent with, and in fact below, the share of credits to auction revenues from auctions prior to Auction 97 (8% in Auction 97 versus an

average of 14% in prior auctions),[2] size matters in politics. As such, shortly after Auction 97 concluded allegations began to swirl that that the Petitioner (and, by extension, their legal counsel) had somehow perpetuated a fraud upon the Agency about their relationship with DISH. *See, e.g.,* S. Solomon, *How Loopholes Turned DISH into a "Very Small Business",* NEW YORK TIMES (February 24, 2015) ("Through sleight of hand and aggressive use of partners and loopholes, DISH turned itself into that very small business, distorting reality and creating an unfair advantage.") But as noted *supra*, such allegations were false. The fact that the fully-informed FCC allowed the Petitioner to participate aggressively in Auction 97 under the assumption that they were entitled to bidding credits (and then proceeded to do just that) was a mess of the Commission's own making.

Recognizing that the Commission had mis-managed Auction 97, the Commission engaged in a series

---

[2] While $3.3 billion is a large number, the large value of the bidding credits is not particularly surprising for a $45 billion auction. Across the FCC's spectrum auctions held prior to Auction 97, the average difference between gross and net bids is 14.5% and the median difference is 13%. The range is 0% to 36%. For a $45 billion auction, therefore, the expected bidding credit is around $6 billion, which is nearly twice the total credit from Auction 97. While $3.3 billion is certainly a lot of money, it is a big number in the company of even bigger numbers. By historical standards, the taxpayer got off relatively cheaply in Auction 97. The bidding credits summed to only 8% in that auction, well below the average 14% share. Ford and Stern, *Ugly is Only Skin Deep*.

of legal gymnastics to deflect attention away from the Commission's regulatory malpractice and toward the Petitioner.

To start, the Agency amended its DE Rules both to significantly cap the amount of bidding credits a DE may receive and to ban joint-bidding agreements for future auctions. *See 2015 DE Rules,* 30 FCC Rcd. 7493 (rel. July 21, 2015).

But while amending its DE Rules might have served the immediate need for political optics, the Commission dug themselves deeper into a hole. Not only did such a conspicuous amending of its DE Rules amount to a concession that the results of Auction 97 were a logical outgrowth of its own rules in place at the time of Auction 97, but these amended rules—passed with a rare 5-0 vote—effectively neutered the DE program. Having to pass these reforms no doubt further irritated the Commission, who prior to Auction 97 was attempting to loosen existing protections in the DE program so that favored political constituencies could more easily "flip" spectrum after the auction. *See* L.J. Spiwak, *How the AWS Auction Provides a Teachable Moment on the Nature of Regulation,* BLOOMBERG BNA (April 28, 2015).

Adding to the Agency's growing regulatory bonfire of the vanities, the Commission was also forced to concede that "the entire record indicates" that the Petitioner complied with the Agency's rules and properly disclosed their ownership structure and related Agreements as required. *2015 Order* at ¶ 132. (In fact, the Commission discouraged more transparency when conceding that "had the Applicants

disclosed more detail about what they intended to accomplish through joint bidding with DISH, such disclosure might have communicated bidding strategies to other applicants in violation of the prohibited communications rule…." *2015 Order* at n. 384.) To get around this inconvenient truth, the Commission instead claimed *post hoc* that the Petitioner simply "proceeded under an incorrect view about how the Commission's affiliation rules apply to these structures" (*2015 Order* at ¶ 132) and, under the "totality of the circumstances" (*2015 Order* at ¶ 49), the Petitioner did not warrant DE classification.

But what about the past Commission precedent upon which the Petitioner relied? The Commission—*in a footnote*—simply swept this precedent under the rug, noting—*without any explanation*—that "[t]o the extent any prior actions of Commission staff could be read to be inconsistent with our interpretation of the Commission's rules in this order, those actions are not binding on the Commission—and we hereby expressly disavow them…." *2015 Order* at fn. 354. Even at an administrative agency, decision-makers must respect past decisions "out of fidelity to our system of precedent whether or not [they] profess confidence in the decision itself." *Direct Marketing Association v. Brohl,* 814 F.3d 1129, 1148 (10th Cir.) (Gorsuch, J. concurring), *cert. denied,* 137 S.Ct. 591 (2016).

The fact that the orders Petitioner relied upon were made at the Bureau-level—rather than at the Commission-level—is a distinction without a difference. As then-Commissioner (and later FCC Chairman) Ajit Pai explained to the Senate Committee on Commerce, Science, and Transportation,

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

Testimony of FCC Commissioner Ajit Pai before the Senate Committee on Commerce, Science, and Transportation (March 18, 2015). Thus, the fact that the full Commission did not take up a Bureau-level decision could indicate that the Agency had no concerns with the actions taken on delegated authority.

More importantly, whatever the full Commission might decide going forward, the Bureau decisions the Petitioner relied upon represented the governing law at the time the Petitioner submitted its long-form applications. While an agency may certainly change its interpretation of law going forward, *see FCC v. Fox Television Stations, Inc.*, 556 U.S. 502 (2009), it may not do so retroactively simply because it does not like the outcome.

Finally, the agency disregarded its usual practice by refusing to provide the Petitioner an opportunity to cure the deficiencies identified by the Commission after Auction 97 concluded. Again, while the Commission could certainly decide to change its practice going forward, it had no right under the APA to abruptly

change its practices without notice simply because the Agency resented how "slick lawyers" made the Commission look foolish. *See* WALL STREET JOURNAL, *FCC to Tighten Reins.*

Accordingly, when "sanctions are drastic"—in this case forfeiture of licenses of prime mid-band spectrum plus severe penalties that could be in the billion-dollar range—"'elementary fairness compels clarity' … [of] the actions with which the agency expects the public to comply." *General Elec. Co. v. United States EPA*, 53 F.3d 1324, 1329 (D.C. Cir. 1995) (citations omitted). By departing from precedent and providing no notice, it was impossible for the Petitioner to ascertain with any certainty whether its application for DE status was adequate. *See Trinity Broadcasting of Florida v. FCC*, 211 F.3d 618, 629 (D.C. Cir. 2000) (the standard of notice is "ascertainable certainty"). By any standard, the FCC provided no "fair notice" of its change in policy. Instead, as this Court observed in *Auer v. Robbins*, this is a classic case of a "'*post hoc* rationalizatio[n]' advanced by an agency seeking to defend past agency action against attack." 519 U.S. 452, 462 (1997).

As the D.C. Circuit recognized thirty-six years ago in *Satellite Broadcasting Co. v. FCC,* 824 F.2d 1, 4 (D.C. Cir. 1987), the FCC "cannot, in effect, punish a member of the regulated class for reasonably interpreting Commission rules. Otherwise the practice of administrative law would come to resemble 'Russian Roulette.'" *Id.* But punish the Petitioner the Commission did: The Petitioner had to default on several of the licenses it won at auction, and the Commission imposed hundreds of millions in interim penalties and

may impose final penalties of potentially billions more and failed to offer any reasonable attempt to negotiate a solution. While the D.C. Circuit ultimately upheld the Commission's finding that DISH exerted *de facto* control over the Petitioner in *SNR Wireless LicenseCo v. Federal Communications Commission,* 868 F.3d 1021 (2017), *cert. denied* 138 S.Ct. 2674 (2018), the FCC's actions on remand revealed that the embarrassment of Auction 97 still stung and that the Commission was intent on further punishing the Petitioner by denying them a fair shot at negotiating a potential cure.

II. Based on the Lack of Notice, the Commission Should have Negotiated with the Petitioner to Seek a Cure; Instead, the Commission Engaged in Profound Disparate Treatment Towards the Petitioner

As noted above, the FCC's conduct in running Auction 97 raised significant due process concerns, particularly regarding the lack of adequate notice. However, as the Petitioner details in its brief, this systemic lack of notice presumably explains why the FCC has ameliorated its lack of upfront guidance as to what constitutes *de facto* control for small businesses seeking DE bidding credits for spectrum auctions with a robust *ex post* opportunity to cure identified problems and avoid massive penalties. As the Petitioner notes, the "cure process is not an exercise of administrative grace. It is the only thing keeping this regime on the right side of constitutional and nonarbitrariness lines." Petitioner Brief at 22. Yet, the FCC abruptly abandoned that long-settled practice in

this case, revealing a profound disproportionate treatment towards the Petitioner.

A. Negotiations Are Standard Operating Procedure at the FCC

The fact that the FCC refused to negotiate with the Petitioner is particularly troubling given that negotiations between regulators and the firms they regulate is a long-standing practice at many administrative agencies, and the FCC is no exception. *See generally* F. Easterbrook, *The Supreme Court, 1983 Term—Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4, 39 (1984). In fact, the expectation that the regulator will want to negotiate with applicants for approval is now commonplace. *See* T.R. Beard, G.S. Ford, L.J. Spiwak, and M. Stern, *Eroding the Rule of Law: Regulation as Cooperative Bargaining at the FCC*, PHOENIX CENTER POLICY PAPER NO. 49 (October 2015) and published as *Regulating, Joint Bargaining, and the Demise of Precedent*, MANAGERIAL AND DECISION ECONOMICS (27 June 2018).

As detailed by Beard, *et al.*, for over two decades, in almost every major "high profile" merger or acquisition before the Commission required parties to agree to negotiated "voluntary" commitments—many of them wholly unrelated to any specific harm—to secure agency approval. *Id.*; *see also Competitive Enterprise Institute v. FCC,* 970 F.3d 372 (D.C. Cir. 2019). In fact, negotiations have become so institutionalized that whenever a regulated entity seeks agency approval for something significant, the application process is now a bilateral bargain between the regulated

and the regulator—each perhaps not getting everything they want but each party getting what they need. Beard, *et al. supra.* To demonstrate such an obvious point, one need only go onto the FCC's Electronic Comment Filing System ("ECFS") and conduct a cursory search of the major, multi-billion dollar proceedings litigated at the FCC over the last two decades to see the tsunami of *ex parte* filings reporting meetings with FCC Commissioners and staff.

The rise of bilateral bargaining at regulatory agencies also presents a due process problem, even if the regulator and the regulated both benefit from an agreement. As regulatory adjudications devolve into case-by-case negotiations, the role of precedent (and, by extension, the rule of law) is diminished. Beard, *et al., id.* Instead, regulatory approval has become transaction specific. *See also* S. Crawford, CAPTIVE AUDIENCE, THE TELECOM INDUSTRY AND MONOPOLY POWER IN THE GILDED AGE (Yale University Press 2013) at 209 ("Are consumers really well-served by backroom, closed-door negotiations between the regulator and prospective … parties over important public issues?", *citing* T. Koutsky and L. Spiwak, *Separating Politics from Policy in FCC Merger Reviews: A Basic Legal Primer of The "Public Interest" Standard*, 18 COMMLAW CONSPECTUS 329, 346 (2010)). The problem in this case, however, is that the FCC disregarded precedent without any negotiation. The FCC's refusal to engage in a post-remand procedure bearing any relation to its decades-long practice rendered the *2018 Order on Remand* legally infirm. Where, as here, an agency adjudicates the rights of individual entities, "it is incumbent upon agencies to follow their own procedures." *Morton v. Ruiz*, 415 U.S. 199, 235 (1974).

Negotiations over DE eligibility in FCC spectrum auctions—where, as the D.C. Circuit observed, "hundreds of millions of dollars are at stake", *SNR,* 868 F.d at 1046—are no exception. Indeed, the FCC has a history of affording parties the opportunity to negotiate a cure when the Commission found them in violation of its DE Rules. *See, e.g., In re Application of ClearComm, L.P.*, 16 F.C.C. Rcd. 18627 (2001)). Accordingly, the Commission's refusal to negotiate marks a significant departure from its own precedent—a departure for which the Commission provides no compelling explanation. *See, e.g., Mozilla Corporation v. FCC,* 940 F.3d 1, 23-24 (2019); *reh'g denied en banc*, 2020 U.S. App. LEXIS 3726 (D.C. Cir., Feb. 6, 2020) (*citing FCC v. Fox Television Stations, Inc.*, 556 U.S. at 515) (when an agency changes course it "must show that there are good reasons for the new policy").

History has also demonstrated that when the opportunity to negotiate is off the table, firms may forgo participating in a spectrum auction altogether. By way of example, this Court should look at the FCC's failed 2008 "D Block" auction, where the Commission attempted to auction a 10 MHz block of prime spectrum that was to be shared between commercial and public safety use. Even though this spectrum was highly valuable, the FCC failed to receive a single qualifying bid. Why? Under the terms of the auction, the winning bidder was directed to negotiate with the public safety community post-auction to work out a spectrum sharing agreement. If these negotiations failed, then the winning bidder would forfeit its entire bid. As the FCC's Inspector General discovered in a postmortem report, this risk was too large for any

reasonable businessperson to take with billions of dollars on the line. *See* FCC OFFICE OF INSPECTOR GENERAL, D BLOCK INVESTIGATION (April 25, 2008) at p. 20.

The lessons from the D Block bear directly on this case. The FCC's DE Rules were hardly a model of clarity, but Petitioner participated in the auction nonetheless, confident that—based upon precedent—any infirmities would be resolved via negotiations afterwards. Had the Petitioner known that the FCC would move the goal posts without notice and refuse to negotiate any necessary cure, it may have sat the auction out or tempered its bids. Instead, Petitioner's reward for relying on established precedent and the Commission's own conduct both prior to and during Auction 97 was defaulting on several licenses and incurring hundreds of millions in penalties, with potentially more to come.

B. The Commission Systematically Engaged In "Unfair and Disparate" Treatment Towards the Petitioner

It is well-established that an agency has the discretion to establish its own rules and procedures. *See, e.g.,* 47 U.S.C. § 154(j) (the Commission may "conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice."); *FCC v. Schreiber*, 381 U.S. 279, 289 (1965); *see also Mozilla Corp. v. FCC*, *supra,* 940 F.3d at 73. In the case of the FCC, those rules are codified in Title 47, Subpart A of the Code of Federal Regulations. But like all administrative agencies, over the years the Commission has developed its own culture and

professional courtesies—fully understood by both the regulator and the regulated alike—to which all parties generally adhere when practicing before the Commission. While these "unwritten rules" are not formally spelled out in any specific regulation, these professional courtesies embody the "spirit" of the Commission's Rules of Practice and Procedure and are the fundamental glue that binds the tightly knit communications bar together.[3]

In this case, however, the Commission offered the Petitioner none of these courtesies. To the contrary, the Petitioner was subject to a disturbing pattern of conduct by the Commission that violates the Agency's well-understood "unwritten rules."

As the Petitioner explained in its November 17, 2020 *Ex Parte,* the Commission systematically

---

[3] The fact that practicing before the FCC requires knowledge of both the formal rules specified in the C.F.R. as well as knowledge of the plethora of "unwritten rules" has not gone unnoticed by Commissioners themselves. As former FCC Commissioner Michael O'Rielly noted,

> By my rough estimates—because that's all we have—less than 25 percent of our working procedures are in our current rules. *** There is no extensive handbook or manual that can be referenced if procedural questions arise. How can that be? As an agency tied to the Administrative Procedure Act, how can our procedures be less formalized than those of a middle school PTA?

Remarks of FCC Commissioner Michael O'Rielly before the Free State Foundation (June 28, 2018) at 2-3.

engaged in "unfair and disparate" treatment towards the Petitioner as it attempted to negotiate a cure after the D.C. Circuit remanded the case in *SNR*. *Petitioner's November 17, 2020 Ex Parte* at 11.

For example, not only did the Commission refuse to designate Petitioner's Designated Entity bidding request proceedings as "permit-but-disclose" (which limited Applicants' ability to engage with FCC staff regarding their revised agreements with DISH), but key offices in the Commission categorically refused to meet with the Petitioner to work through the meaning of unclear language in the *2015 Order* and FCC staff concerns. *Petitioner's November 17, 2020 Ex Parte* at 11. While the Commission certainly had the right to proceed in this fashion, the Agency's refusal to classify the proceeding as "permit but disclose" and refusal to take meetings with the Petitioner are the rare exception, not the norm. As noted above, negotiations and *ex parte* meetings with the Commission are a central foundation of how the communications bar interacts with the Agency. *See also* Beard, *et al. supra.*

Second, under the Commission's rules in place for Auction 97, only parties that participated in the auction had standing to challenge the Petitioner's Designated Entity status. For this reason, in its *2015 Order* the Commission rejected multiple complainants for lack of standing (*see 2015 Order* at ¶¶ 40-41)—a point the D.C. Circuit recognized in *SNR,* 868 F.3d at 1028. Yet when the FCC issued its *2018 Order on Remand*, the Commission welcomed these formerly rejected complainants back with open arms. The Commission justified its backtracking by

claiming that these complainants should be allowed to participate because after the D.C. Circuit remanded the case in *SNR*, this essentially created a new proceeding that raised different issues from the questions presented in the *2015 Order*. *See, e.g., 2020 Order* at ¶¶ 50, 55. But the Commission's argument does not pass the giggle test: the satisfaction of third parties over whether DISH has *de facto* control over the Petitioner is legally irrelevant.

Finally, one of the more lauded policy initiatives of former FCC Chairman Ajit Pai's tenure was his decision that the Commission must publicly post on its webpage draft orders of any item on the Agency's Sunshine Agenda three weeks before the next Commission meeting. *See, e.g.,* J. Eggerton, *Pai: It's Official Policy to Release Meeting Items in Advance,* BROADCASTING AND CABLE (October 25, 2017). Although this policy was never formally codified in the Code of Federal Regulations, this "unwritten rule" enjoyed bi-partisan support and became established practice at the Agency (and, as of this writing, continues into the Biden Administration).

Yet while the Commission routinely adheres to the "three-week notice" policy, the FCC departed from that practice in the Petitioner's case. Instead, in an apparent attempt to force a hasty vote on the *2020 Order*, an entry regarding the cryptically described draft order appeared on the Sunshine Agenda only days before the Commission's November 18, 2020 Open Meeting. *Petitioner's November 17, 2020 Ex Parte* at 11. So, once again, while the Commission was under no formal legal obligation to provide three-weeks' notice before it voted on the *2020 Order*, if the

Commission followed this practice for other items, then the Commission should have followed the same practice in connection with its *Order* regarding the Petitioner's eligibility for DE status. More importantly, had the Commission adhered to its "three-week notice" policy, then the Petitioner would have been able to see exactly what the Commission did not like and could have attempted to further modify its proposed cure prior to the Commission's vote. Even better, the Commission could have discussed its residual concerns in the normal course of negotiations.

Viewing these sordid examples of the Commission's conduct on remand under the "totality of the circumstances," a reasonable person must conclude that the Commission treated the Petitioner inconsistently with other applicants for DE status in its refusal to afford Petitioner a fair shot at negotiating a cure. The FCC's efforts to work with the Petitioner to find a cure, what little occurred, was a charade from the get-go.

III. Policy Implications

John Adams famously remarked that we are a "government of laws, and not of men." In this case, the FCC appears to have forgotten this core principle of American democracy by choosing to personalize this dispute. The Commission disavowed its prior decisions, treated the Petitioner inconsistently from entities that previously qualified for Designated Entity benefits, and even treated the Petitioner differently from other applicants for such benefits in the same auction. Disparate treatment like this can only happen when an agency feels unconstrained by the

ordinary bounds our Constitutional system imposes on those who wield government power.

Yet if the Commission can act in such a prejudicial way in this case, then what about the next case? It is true that courts must accord deference to administrative agencies both in the interpretation of their own ambiguous rules, *see, e.g., Kisor v. Wilkie*, 139 S. Ct. 2400 (2019), and when reviewing their conclusions under the "arbitrary and capricious" standard, *see, e.g., FCC v. Prometheus Radio Project*, 141 S. Ct. 1150, 1158 (2021), but this judicial deference provides no shield when an agency engages in a sustained pattern of hostility towards an entity it regulates and ignores basic principles of fairness and due process. Absent a reversal by this Court, allowing the Commission's conduct in this case to stand marks the precipice of a very steep and slippery slope, setting a dangerous precedent for any party who may have business before the administrative state. And, as noted above, a word from the Court about appropriate decision-making by federal agencies would be particularly instructive for the current regulatory climate.

CONCLUSION

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

Respectfully submitted,

Lawrence J. Spiwak
Counsel of Record
PHOENIX CENTER FOR ADVANCED LEGAL & ECONOMIC PUBLIC POLICY STUDIES
5335 Wisconsin Ave., NW
Suite 440
Washington, D.C., 20015
(202) 274-0235
lspiwak@phoenix-center.org

Counsel for Amici Curiae

February 21, 2023