No. 22-672

In the Supreme Court of the United States

NORTHSTAR WIRELESS, LLC, ET AL., PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Federal Communications Commission (FCC) regulations governing a 2014 auction for wireless-spectrum licenses permitted "very small business[es]" with less than $15 million in annual revenue, 47 C.F.R. 27.1106(a)(2) (2014), to obtain bidding credits that gave winning applicants a discount in the payment needed to secure a license. Petitioner Northstar Wireless, LLC—a newly formed company 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 $7 billion. Petitioner then claimed very-small-business credits to discount, by nearly $2 billion, the amount that it owed. Applying existing regulations and guidance, and based on a review of numerous agreements entered into between petitioner and DISH, the FCC determined that DISH had *de facto* control over petitioner, rendering petitioner ineligible for the very-small-business bidding credits it claimed. The court of appeals upheld that determination but remanded for the agency to provide petitioner an opportunity to cure the deficiencies in its agreement with DISH.

On remand, petitioner renegotiated its agreements with DISH and resubmitted its application for bidding credits. Applying the same regulations and guidance, the FCC determined that petitioner remained under DISH's *de facto* control. The court of appeals affirmed. The question presented is as follows:

Whether petitioner had fair notice that the FCC would view petitioner's renegotiated agreements with DISH as preserving DISH's *de facto* control of petitioner, so that petitioner remained ineligible for an auction bidding credit.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-55) is reported at 38 F.4th 190. The opinions and orders of the Federal Communications Commission are reported at 30 FCC Rcd 8887 (Pet. App. 109-276), 33 FCC Rcd 7248 (Pet. App. 277-306), and 35 FCC Rcd 13317 (Pet. App. 307-436).

JURISDICTION

The judgment of the court of appeals was entered on June 21, 2022. A petition for rehearing was denied on August 18, 2022 (Pet. App. 56-57). On November 7, 2022, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including December 16, 2022. On December 16, 2022, the Chief Justice further extended the time within which to file a petition for a writ of certiorari to and including January

15, 2023, and the petition was filed on January 17, 2023 (a Tuesday after a Monday holiday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. 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 Commission to award most spectrum licenses "through a system of competitive bidding," *i.e.*, by auction. 47 U.S.C. 309(j)(1).

The Act requires the FCC to design auction rules that, among other objectives, advance "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) and (4). "Commission regulations encourage small businesses to participate in spectrum auctions by offering qualifying businesses 'bidding credits,' which are discounts applied after an auction to reduce the cost of the acquired licenses." Pet. App. 4 (quoting 47 C.F.R. 1.2110(f) (2014) and citing 47 C.F.R. 1.2110(a) (2014)) (brackets omitted). "FCC regulations specify that bidding credits can only be used by genuine small businesses–not by small sham companies that are managed by or affiliated with big businesses." *Id.* at 62.

To be eligible for a small-business bidding credit, an applicant must demonstrate that its gross revenues, in combination with those of its "attributable" interest holders, fall below limits that are specific to a particular auction or service. 47 C.F.R. 1.2110(b)(1)(i) (2014). The regulations attribute to an applicant the revenues of

certain other entities, including any entity (deemed an "affiliate") with *de facto* or *de jure* control of the applicant. 47 C.F.R. 1.2110(c)(5)(i).

In 1994, the FCC explained that, for purposes of claims for bidding credits, an applicant's relationship with other entities would be evaluated under the factors 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 Commc'ns Act - Competitive Bidding*, 10 FCC Rcd 403, 449-450 (¶ 83) (1994) (*Fifth MO&O*). 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. (summarizing *Intermountain Microwave*, 12 F.C.C.2d at 560). In the *Fifth MO&O*, the FCC further advised 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." 10 FCC Rcd at 456 (¶ 96). "In such a case, the Commission will deem the small business *de facto* controlled from the time of the auction." Pet. App. 7.

2. a. In May 2014, the Commission announced that it would conduct an auction (Auction 97) to award more

than 1600 licenses in a spectrum band designated for certain advanced wireless services. In July 2014, the Commission's Wireless Telecommunication Bureau announced procedures for the auction. *Auction of Advanced Wireless Servs. (AWS-3) Licenses Scheduled for Nov. 13, 2014*, 29 FCC Rcd 8386 (2014) (*Procedures Notice*). The *Procedures Notice* explained that entities with less than $40 million in attributable revenues ("small businesses") could receive a 15% bidding credit. *Id.* at 8411-8412 (¶¶ 80, 82). Entities with less than $15 million in attributable revenues ("very small business[es]") could receive a 25% bidding credit. 47 C.F.R. 27.1106(a)(2); see *Procedures Notice*, 29 FCC Rcd at 8412 (¶ 82).

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 begins, any entity seeking to participate in the auction must submit a "streamlined, short-form application" certifying its eligibility. *Ibid.* Second, after bidding concludes, each winning bidder must submit a more comprehensive "long-form application," which is used to determine whether the entity is qualified to hold a spectrum license. *Ibid.* "[D]eferring grantability determinations until after an auction" allows the agency to "forego consideration of the unsuccessful applicants." *Alvin Lou Media, Inc.* v. *FCC*, 571 F.3d 1, 10 (D.C. Cir. 2009).

A provisionally winning bidder that claims a bidding credit must also 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). In the *Procedures Notice*, the FCC advised applicants to "review carefully the Commission's decisions regarding the designated entity provisions," specifically directing parties to consult the agency's decision in *Intermountain Microwave*, and a staff decision in *In re Baker Creek Communications, L.P.*, 13 FCC Rcd 18,709 (1998), for "further guidance on the issue of *de facto* control." 29 FCC Rcd at 8411 (¶ 79), 8412 n.151. In *Baker Creek*, Commission staff had provided a list of "typical[]" decisions in which investors may participate without being found in *de facto* control, while cautioning that "[i]nvest[or] protection provisions may confer actual control upon the minority owner where they give it the power to dominate the management of corporate affairs." 13 FCC Rcd at 18,714-18,715 (¶ 9).

b. Auction 97 began on November 13, 2014, and ultimately raised more than $40 billion from 31 winning bidders, including petitioner Northstar Wireless, LLC and SNR Wireless LicenseCo, LLC (SNR). Pet. App. 65. Petitioner and SNR are "small companies that were formed just in time to file short-form applications" to participate in Auction 97 as very small businesses. *Ibid.* "At the time they filed their short-form applications, both companies 'lacked officers, directors,' and virtually any revenue." *Id.* at 8 (citation omitted). Nevertheless, SNR was the winning bidder for 357 licenses, with an aggregate gross bid amount of $5,482,364,300, *id.* at 125, while petitioner was the winning bidder for 345 licenses, with an aggregate gross bid amount of $7,845,059,400, *id.* at 127.

Shortly after the auction, petitioner and SNR filed long-form applications claiming that each was entitled to the 25% bidding credit available to very small

businesses. Pet. App. 124, 126. Those claimed credits would have reduced SNR's net bid amounts by $1,370,591,075 and petitioner's net bid amounts by $1,961,264,850. *Id.* at 125, 127.

In their long-form applications, the companies stated that they had acquired the capital required to pay their winning bids from DISH, a "Fortune 250" company, that had $13 billion in gross revenues in the three years preceding Auction 97. Pet. App. 259. In exchange for its investment, DISH had acquired a non-controlling 85% interest in each company. *Id.* at 130. Petitioner and SNR entered into numerous agreements with DISH, including management-services agreements, credit agreements, and joint bidding agreements, which they filed with their long-form applications. See *id.* at 128-130. Neither company attributed DISH's revenues to itself, however, and each certified that it was eligible for a 25% very-small-business bidding credit. *Id.* at 123.

3. Several entities opposed the grant of bidding credits to petitioner and SNR because of their relationships with DISH. Pet. App. 140-141. Based on a comprehensive review of the companies' long-form applications, and the circumstances of their participation in Auction 97, the Commission concluded that the companies were ineligible for the credits. *Id.* at 109-276.

a. Applying *Baker Creek*, the Commission found that DISH's investor protections gave it *de facto* control over petitioner and SNR. It noted that the companies' 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." Pet. App. 175-177; *id.* at 168-181. The FCC emphasized that DISH "held several levers to

tightly constrain the Companies' spending," which, given the "large sums" the companies would have to spend to build a wireless network, "placed DISH firmly in the driver's seat." *Id.* at 10.

The FCC also found that DISH had *de facto* control under the factors outlined in its *Intermountain Microwave* decision. The Commission determined that, under the companies' agreements, DISH "dominates the financial aspects of [the companies'] businesses." Pet. App. 195-196. It noted that DISH had paid 98% of the companies' winning bids in Auction 97 and had "further agreed to provide all future funds for build-out and working capital." *Id.* at 196. Petitioner and SNR also "lack[ed] authority to raise capital" from other sources "without DISH's consent." *Ibid.* The Commission further found that "any profits that are generated" from the businesses would "only accrue to DISH" because "SNR and Northstar must first repay * * * billions of dollars in loans," plus interest, before "realizing any profits from their business operations." *Id.* at 200-202. Lastly, the FCC concluded that the agreements restricted the companies' authority to make essential policy decisions concerning acquisition of new spectrum licenses, network construction, and disposition of the businesses. *Id.* at 203-216.

Independent of its holding based on *Intermountain Microwave*, the FCC separately concluded that DISH had *de facto* control of petitioner and SNR under the *Fifth MO&O*. The Commission emphasized that the agreements were "'cumulatively * * * designed to force the [companies] into a sale'" to DISH. Pet. App. 213-214 (quoting *Fifth MO&O*, 10 FCC Rcd at 456 (¶ 96)). A "put option" allowed petitioner and SNR to force DISH to buy out their interests before they had

to repay their multi-billion-dollar loans—but only during a 30-day window at the end of the fifth year of the license term. *Id.* at 210-214 (citation omitted). This timing coincided exactly with the expiration of the "unjust enrichment" period in the Commission's rules, when the companies could sell their licenses to a company that is not a designated entity without having to repay their bidding credits. 47 C.F.R. 1.2111(b) (2014).

The FCC accordingly concluded that petitioner and SNR had failed to demonstrate their eligibility for bidding credits in the auctions, and it denied their requests for credits. Pet. App. 259, 262.[1]

b. Under the FCC's rules, when an auction participant places a bid, it assumes a binding obligation to pay the full amount if that bid is accepted, even if it is denied a bidding credit. 47 C.F.R. 1.2104(g); *Procedures Notice,* 29 FCC Rcd at 8445 (¶ 214). A bidder who does not fulfill that obligation is subject to a default penalty. 47 C.F.R. 1.2104(g)(2), 1.2109(b). Having determined that petitioner and SNR were ineligible for the very-small-business bidding credits they claimed, the FCC directed petitioner and SNR to pay the full price of their licenses or face default penalties. Pet. App. 259-263.

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[1] The companies had asked the FCC to "allow[] [them] to address specific Bureau concerns, amend organizational documents, if necessary, and supplement [their] application[s] to resolve those issues" before the agency determined their bidding-credit eligibility. Pet. App. 257-258 n.451 (citation omitted; brackets in original). In denying that request, the Commission explained that its staff had "repeatedly" asked for additional documents and "explanations," and that providing the companies yet another opportunity "would likely promote disincentives to the structuring of investments that adhere in the first instance to the limitation of our [designated-entity] rules." *Id.* at 258 n.451.

The companies notified the FCC that they would pay the full bid amounts for some of the licenses but would default on their other winning bids. Pet. App. 323. That default triggered penalties, the precise amount of which depends on the winning prices for which those licenses are re-auctioned. 47 C.F.R. 1.2109; see 47 C.F.R. 1.2104(g)(2) (2014). In the meantime, the Wireless Bureau notified petitioner and SNR that they owed interim default payments of approximately $334 million and $181 million respectively. 30 FCC Rcd 10,700 (petitioner); 30 FCC Rcd 10,704 (SNR). The companies made those payments, and on October 27, 2015, the Wireless Bureau granted their applications for the retained licenses. 30 FCC Rcd 11,622.

4. a. Petitioner and SNR filed petitions for review in the United States Court of Appeals for the District of Columbia Circuit. The court upheld the Commission's determination that DISH had *de facto* control over the companies, explaining that the agency's "pragmatic application" of the *Intermountain Microwave* test "was reasonable and consistent with existing law." *SNR Wireless LicenseCo, LLC* v. *FCC*, 868 F.3d 1021, 1033-1034 (D.C. Cir. 2017), cert. denied, 138 S. Ct. 2674 (2018).

The court of appeals separately "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." *SNR Wireless*, 868 F.3d at 1035; see *id.* at 1034-1035. The court relied on an example provided in the *Fifth MO&O*, which explained that the FCC 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 1035 (citation omitted). The court found that example "materially identical to the facts" in the case before it. *Ibid.* The court observed that, because DISH could prevent the companies from borrowing money to construct a wireless network, or from selling their businesses to a third party, the companies were "doomed to default on [their] loans" if they "sought to act independently of DISH to actually build [their] own wireless business." *Id.* at 1034. The agreements thus "left [the companies] only one path to avoiding certain financial failure": to exercise their put options and sell themselves to DISH. *Ibid.*

The court of appeals further held that petitioner and SNR had sufficiently clear notice about the control test the Commission would apply. 868 F.3d at 1044. The court concluded that, "[o]n these facts, for all the reasons set forth" in the court's analysis of the merits, the companies "should reasonably have anticipated that the FCC might find them to be under DISH's *de facto* control." *Ibid.*

b. Over the FCC's objection, however, the court of appeals also held that the companies had "lacked reasonable notice that, in the event it found *de facto* control, the Commission would deny them an opportunity to cure" that problem. *SNR Wireless*, 868 F.3d at 1044. The court "conclude[d] that an opportunity for [the companies] to renegotiate their agreements with DISH provide[d] the appropriate remedy," and it remanded the case to the Commission to provide that opportunity. *Id.* at 1046.

c. Petitioner and SNR filed a petition for a writ of certiorari, which this Court denied. *SNR Wireless LicenseCo, LLC* v. *FCC*, 138 S. Ct. 2674 (2018).

5. a. On remand, the Wireless Bureau established the procedures by which petitioner and SNR could seek to eliminate DISH's disqualifying control. See *In re Northstar Wireless, LLC*, 33 FCC Rcd 231 (2018). Those procedures gave the companies a 90-day window to "renegotiate their respective agreements with DISH" and to submit documentation demonstrating their eligibility for very-small-business bidding credits. *Id.* at 232 (¶ 5). Any new or amended agreements filed in support of the companies' bidding-credit applications would be made available for comment by the other parties to the proceeding; the companies could then elect to amend their agreements in response to those comments; and the other parties to the proceeding could submit comments on the amendments, if any. *Ibid.* The Commission would then determine, based on the record before it, whether the companies were eligible for bidding credits. *Id.* at 234 (¶ 9).

Petitioner and SNR appealed the Wireless Bureau's order to the FCC, asserting that the opportunity to cure mandated by the D.C. Circuit's remand decision entitled them to an "iterative" process of direct negotiation with Commission staff. Pet. App. 281. On review, the Commission rejected those arguments and affirmed the Wireless Bureau's remand procedures. In determining that the court of appeals had not required FCC staff to engage in "responsive, back-and-forth discussions" with the companies, the Commission emphasized the court's statement "that an opportunity for [the companies] to renegotiate their agreements with DISH provides the appropriate remedy here." *Id.* at 286-288 (citation and emphasis omitted).

In August 2018, petitioner and SNR asked the D.C. Circuit to review the FCC's order. At the companies'

request, the court held the case in abeyance pending further FCC action on the companies' renewed requests for very-small-business bidding credits. Pet. App. 15.

b. In June 2018, petitioner and SNR submitted amended long-form applications, supported by renegotiated agreements with DISH. Three parties filed comments questioning the companies' eligibility for very-small-business bidding credits. Pet. App. 332. The companies and DISH declined to make further changes to their agreements. *Id.* at 333.

In November 2020, petitioner and SNR held meetings with three of the five Commissioners and members of their staffs, as well as a member of a fourth Commissioner's staff and an attorney from the agency's Office of General Counsel. Pet. App. 335. At those meetings, the companies presented arguments that they had successfully cured DISH's *de facto* control. *Ibid.* The companies' responses to questions asked by the Commissioners and their staffs were documented in lengthy letters filed with the agency. *Ibid.*; C.A. App. 1592, 1615-1645.

c. After an extensive review of the record, the FCC concluded that DISH retained *de facto* control of petitioner and SNR and again denied the companies very-small-business bidding credits.

The FCC acknowledged at the outset that the companies had made several changes to their agreements with DISH, including eliminating the management-services agreements that had given DISH day-to-day control of the companies' licenses. Pet. App. 370-371, 406. The Commission observed, however, that the investor protections in the renegotiated agreements still empowered DISH to prevent the companies from acquiring third-party financing for the billions of dollars needed

to construct and operate wireless networks. *Id.* at 362-363. Because DISH still "can determine whether, to what extent, and from whom, [the companies] can raise additional 'significant' unsecured funding," the FCC found that DISH "can continue to exercise control over whether the [the companies] can use" their licenses. *Id.* at 396 (emphasis omitted). The Commission further observed that "DISH now has—for the first time—a unilateral veto over any 'lease' by the [companies] of any major asset" (including spectrum licenses), which the agency viewed as "further limit[ing] the [companies'] 'range of business options.'" *Id.* at 396-397 (citations omitted).

Next, applying the *Intermountain Microwave* factors, the FCC concluded that DISH retained significant financial leverage over the companies. Pet. App. 372-373. The companies' modified agreements with DISH had converted most of their debt to DISH into preferred equity, leaving each company with $500 million of debt to DISH, plus interest. *Id.* at 373. The agreements also required the companies to make quarterly dividend payments that, if missed, would accumulate as additional preferred equity for DISH. *Id.* at 372-374. The Commission observed that, "while the [companies] have negotiated changes as to the *form* of their debt to DISH, the sheer quantity of their financial obligations remains the same." *Id.* at 374.

The Commission further found that "any profits of [the companies'] operations are still * * * 'only likely to benefit DISH.'" Pet. App. 391. The FCC explained that DISH's power to control the companies' use of their spectrum could stymie their ability to make quarterly dividend payments, which in turn would dilute the value of the managing members' equity in the

companies and reduce (or eliminate) their future rights to profits upon sale or dissolution of the businesses. *Id.* at 388-389. The Commission also noted that the renegotiated agreements still prohibit the managing members of both companies from transferring their interests to any DISH competitor—a prohibition that greatly diminishes (and as a practical matter could eliminate) the pool of potential buyers. *Id.* at 412-413.

Finally, independent of its holding based on *Intermountain Microwave*, the FCC found that DISH retained *de facto* control under the guidance set forth in the *Fifth MO&O*. Pet. App. 406-419. Specifically, the Commission determined that the companies' renegotiated put rights—which expanded the original put window from 30 to 90 days, and provided for a second window in year six—"are not materially different" from the original put rights. *Id.* at 408-409. "[B]y exercising either the year-five or year-six put options," the FCC observed, the companies "receive healthy, above-market returns even if they have not constructed networks or repaid their loans (*i.e.*, with virtually zero risk)." *Id.* at 410. By contrast, the Commission explained, if the companies do *not* exercise their put rights and sell themselves to DISH, they will be required to pay their outstanding obligations to DISH, and DISH could effectively preclude them from doing so by restricting the companies' access to capital and vetoing any attempt to lease their spectrum licenses. *Id.* at 410-411. Finding that the renegotiated put rights still appear to be "designed to maximize the incentive of the [companies] to sell," the FCC concluded that those rights continue to provide evidence of DISH's *de facto* control. *Id.* at 413 (quoting *SNR Wireless*, 868 F.3d at 1035).

6. Petitioner and SNR sought review of the FCC's remand order, and the D.C. Circuit consolidated that proceeding with the companies' challenge to the Commission's auction-procedures order. The court upheld both orders. Pet. App. 1-55. The court found that the FCC had "complied with [the court's] previous decision by affording the Companies an opportunity to cure"; had "reasonably applied its precedent to the Companies"; and had given the companies "fair notice of the legal standards that it would apply in analyzing their claims to be very small companies." *Id.* at 3.

a. The companies argued that the FCC had "violated [the court of appeals'] remand order by declining to negotiate iteratively with [them] over how to secure their *de facto* independence from DISH." Pet. App. 19. The court rejected that argument, explaining that its decision in *SNR Wireless* had directed the FCC to provide a "'chance to cure'"—"[n]othing more and nothing less"—and that on remand "[t]he Commission followed that directive" by "g[iving] the Companies an 'opportunity * * * to renegotiate their agreements with DISH' and then apply again for the very-small-business bidding credits they sought." *Id.* at 19-20 (quoting *SNR Wireless*, 868 F.3d at 1046) (asterisks in original).

The court of appeals then addressed the companies' argument that its decision in *SNR Wireless* had "ordered both that they be permitted to renegotiate with DISH *and* that Commission staff engage directly in back-and-forth discussions with them." Pet. App. 21. The court rejected that argument, explaining that its "prior ruling gave the Companies 'an opportunity to negotiate a cure,' which was to consist of 'an opportunity to renegotiate their agreements with DISH.'" *Ibid.* (quoting *SNR Wireless*, 868 F.3d at 1046) (brackets

omitted). The court emphasized that its "remand order required only that the Companies be allowed the opportunity for a cure, not that Commission staff prescribe the cure." *Id.* at 21-22.

The court of appeals was also unpersuaded by the companies' argument that the FCC had "den[ied] them the kind of repeated staff negotiations the agency had provided to address control problems in the past." Pet. App. 22. The court explained that the companies were "comparing apples to oranges[,] * * * because[] 'prior to any cure opportunity, [they] had extensive information about the Commission's views on the ways in which their initial Applications were defective' right from the Commission's mouth, along with th[e] court's 'point-by-point elaboration of the Commission's analysis.'" *Ibid.* (quoting *id.* at 294 (brackets omitted)). The court stated that "[t]he Companies identify no other entity that has been given that same amount of individualized and on-point guidance about the basis for the Commission's *de facto* control finding." *Ibid.*

b. On the merits, the court of appeals held that the FCC had "reasonably found that DISH continues to exercise *de facto* control over the Companies." Pet. App. 24. The court explained that the Commission had "grounded its decision on three settled agency rulings." *Ibid.*

First, the court of appeals found that, "under *Baker Creek*, DISH's veto powers, though trimmed from the prior agreements, continued to materially dominate the Companies' business decisions." Pet. App. 24. The court held that the FCC had "reasonably found" that DISH's authority to block the companies from incurring "'significant'" third-party debt "empowered DISH to roadblock any of the Companies' buildout plans." *Id.* at

26 (citation omitted). The court also agreed with the Commission's assessment that DISH's "whole new power[]" to prevent the companies from leasing any "'major assets'" not only goes "beyond the scope of the [investor] provisions listed in *Baker Creek*, but it also allows DISH to foreclose a critical route for the Companies to raise money: spectrum leasing." *Id.* at 27-28 (citation omitted).

Second, the court of appeals found that, "under the Commission's *Fifth Memorandum Opinion & Order*, SNR and [petitioner] were still financially compelled to sell themselves to DISH." Pet. App. 24. The court held that the FCC had "adequately explained" that "the Companies' slightly longer windows to obtain a DISH buyout under the revised agreements did not change the fundamental economics of the pressure to sell, and to sell to DISH alone." *Id.* at 34.

Third, the court of appeals upheld the FCC's determination that "the *Intermountain Microwave* factors again pointed to DISH's *de facto* control." Pet. App. 24. The court affirmed the agency's finding that "DISH continue[s] to dominate the Companies' finances," *id.* at 40, holding that "the Commission reasonably concluded that the Companies remain fundamentally dependent on DISH for financing because DISH controls whether the Companies can access sufficient funds to build a national network and from whom they can seek that funding," *ibid.* The court further held that "the Commission's finding that DISH was likely to vacuum up the Companies' revenues was * * * well-supported in the record." *Id.* at 41.

While acknowledging that "the amended agreements addressed some of the Commission's prior concerns about DISH's control," Pet. App. 42, the court of

appeals noted the agency's conclusion that the companies' "new 'rights [were] mere fig leaves,' because DISH could, by blocking their credit lines and leasing revenue, prevent them from making money," *id.* at 43 (quoting *id.* at 396) (brackets in original). The court further observed that "DISH could still 'influence if, how," and "when * * * [the companies] exit the business.'" *Ibid.* (quoting *id.* at 398).

c. The court of appeals further held that petitioner and SNR "had fair notice of the legal rules and factors that led to the Commission's finding of *de facto* control." Pet. App. 46-47.

"First," the court of appeals pointed to its holding in *SNR Wireless* that "the Commission's decision was 'clearly presaged' by the *Fifth Memorandum Opinion & Order*." Pet. App. 47 (quoting *SNR Wireless*, 868 F.3d at 1035). The court found that "[t]he agreements at issue here parallel" the *Fifth MO&O*'s example of an agreement that confers *de facto* control "by combining brief windows for the Companies to take guaranteed payouts from their dominant investor or face looming—and overwhelming—financial obligations." *Id.* at 47-48.

"Second," the court of appeals explained that the FCC had "doubled-down on that point in its *2015 Order*," in which the Commission had observed that the combination of the companies' repayment terms and license-deployment deadlines—timed closely to the put option—pressured the companies to sell themselves to DISH. Pet. App. 48. The court further noted that "[t]he Companies also had the benefit of [its] 2017 decision," which "reinforc[ed] that warning" by "sustain[ing] the Commission's finding of *de facto* control" under the *Fifth MO&O*. *Ibid.* Observing that the companies' modified agreements with DISH "retained the same

essential structure that the Commission had long said—and had just told them, with [the court's] affirmation—is a signature form of *de facto* control," the court concluded that the companies had fair notice that the Commission once again would find *de facto* control under the *Fifth MO&O*. *Id.* at 49.

"Third," the court of appeals found that "the Commission's *Baker Creek* and *Intermountain Microwave* decisions" had given the companies fair notice that the FCC would find that DISH retained *de facto* control. Pet. App. 49. In the court's view, *Baker Creek* had given the companies fair notice that "DISH's power to veto significant loans" and its "ability to prevent the Companies from leasing [their] spectrum, * * * veered outside the control lines drawn in Commission precedent." *Id.* at 50. The court further found that "the Commission's *2015 Order* in this case foreshadowed its application of the *Intermountain Microwave* factors" in the remand order. *Id.* at 51. The court explained that "[t]he *2015 Order* told [the Companies] that their abject financial dependence on DISH, paired with DISH's ability to dictate how they borrow money, use their licenses, build their networks, and sell their businesses, provided powerful evidence that they were not freestanding small companies." *Ibid.* The court observed that, "[o]n remand, the Commission found no material loosening of the Companies' financial handcuffs," which led the agency to conclude that DISH had retained *de facto* control. *Ibid.*

In sum, the court of appeals held that "the Commission gave the Companies comprehensible and actionable guidance about the standards that it would apply to determine if they were independent, very small businesses or were instead under the *de facto* control of

DISH." Pet. App. 51. "Fair notice," the court concluded, "requires no more." *Ibid.*

7. On November 15, 2021, SNR's owners exercised their right under the terms of their put option to sell their interests to DISH. Pet. App. 17-18 n.7. SNR subsequently filed an application to transfer its spectrum licenses to DISH. See Application of SNR Wireless Management, LLC and American AWS-3 Wireless III LLC for Consent to Transfer Control of SNR Wireless LicenseCo, LLC, ULS File No. 0009958900 (filed Mar. 18, 2022). SNR has not sought further review of the court of appeals' decision.

On October 21, 2022, petitioner's owners exercised their right under the terms of their put option to sell their interests to DISH, and on December 14, 2022, petitioner filed an application to transfer control of its spectrum licenses to DISH. See Application of Northstar Manager LLC and American AWS-3 Wireless II LLLC for Consent to Transfer Control of Northstar Wireless, LLC, ULS File No. 0010313192. The transfer applications filed by SNR and petitioner remain pending before the FCC.

ARGUMENT

Petitioner contends that it lacked fair notice of how the FCC would apply its control regulations and precedents to the circumstances of this case. Petitioner also asserts that it did not receive a sufficient opportunity to cure the control problems that the agency and the court of appeals had previously identified.

Petitioner has exercised a put right that requires DISH to purchase petitioner, and petitioner's request to transfer control of its licenses to DISH is pending before the FCC. If the Commission approves that request, DISH will have undisputed *de jure* control of

petitioner's licenses, and the question whether DISH already had *de facto* control will be moot. 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 FCC proceedings may eliminate the practical significance of the legal issues that petitioner raises.

Petitioner contends (Pet. App. 22-23) that the Commission denied it fair notice of how to comply with the agency's *de facto* control guidelines, and that the agency also failed to provide it a meaningful opportunity to cure the *de facto* control problems that rendered it ineligible for a very-small-business bidding credit. But on November 21, 2022, petitioner's owners exercised their right to sell their interests to DISH, and on December 14, 2022, petitioner filed an application with the Commission to transfer its spectrum licenses to DISH. If the FCC grants that request, the dispute in this case will be moot: At that point DISH will have acquired *de jure* control over petitioner, so that petitioner would not benefit from any further opportunity to cure the *de facto* control problems that the Commission identified. These intervening events provide a sufficient reason for this Court to deny review.

2. This Court's review would not be warranted even if the FCC ultimately denies petitioner's request to transfer its licenses to DISH. The court of appeals correctly upheld the Commission's determination that petitioner was ineligible for very-small-business bidding credits because it is subject to *de facto* control by DISH, a Fortune 250 company with $13 billion in revenues that for this purpose are attributable to petitioner. In this Court, petitioner does not directly challenge the legal

standards applied by the court of appeals or the court's conclusion that petitioner was *de facto* controlled by DISH under the applicable FCC rules. Nor does petitioner contend that the D.C. Circuit's holding conflicts with any decision of another court of appeals. Instead, petitioner contends (Pet. 26) that it lacked fair notice of the standards the FCC would apply in evaluating its renegotiated agreements with DISH. Petitioner further argues (Pet. 27-28) that it did not receive a meaningful opportunity to cure the previously identified *de facto* control deficiencies. These factbound contentions lack merit and do not warrant this Court's review.

a. "[A] party has fair notice when, 'by reviewing the regulations and other public statements issued by the agency,' it can 'identify, with ascertainable certainty, the standards with which the agency expects parties to conform.'" Pet. App. 46 (quoting *General Elec. Co.* v. *United States EPA*, 53 F.3d 1324, 1329 (D.C. Cir. 1995)). Applying that standard, which petitioner does not contest, the court of appeals correctly held that petitioner "had fair notice of the legal rules and factors that led to the Commission's finding of *de facto* control." *Id.* at 46-47. Petitioner's contrary arguments (Pet. 23-32) are incorrect.

i. Petitioner argues (Pet. 26) that it lacked "clear ex ante guidance" from the FCC as to the standards the agency would apply in assessing *de facto* control. The court of appeals correctly rejected that contention, concluding that petitioner had multiple sources of guidance on which to draw.

First, Petitioner had fair notice of the Commission's *de facto* control finding under the *Fifth MO&O*. In that order, the Commission identified a specific circumstance that might lead to a finding of *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." 10 FCC Rcd at 455-456 (¶ 95). "[T]he Commission doubled down on that point in its *2015 Order*," Pet. App. 48, and the court of appeals "reinforc[ed]" it in *SNR Wireless* by "sustain[ing] the Commission's finding of *de facto* control" under the *Fifth MO&O*, *ibid.* (citing *SNR Wireless License Co., LLC* v. *FCC*, 868 F.3d 1021, 1040 (D.C. Cir. 2017)).

Even as renegotiated, "[t]he agreements at issue here parallel" the *Fifth MO&O*'s "paradigm example" of an agreement that confers *de facto* control "by combining brief windows for the Companies to take guaranteed payouts from their dominant investor or face looming—and overwhelming—financial obligations." Pet. App. 47-48. Under the circumstances, "the Companies had ample notice that the agreements' pairing of an approaching and seemingly insurmountable financial commitment with irresistible get-out-of-debt-free cards from DISH would lead to a finding of *de facto* control." *Id.* at 48. Although petitioner restates (Pet. 25-26) more generalized guidance in the *Fifth MO&O,* it does not engage with that "paradigm example of" an agreement that transfers *de facto* control to a small company's investor. Pet. App. 47. It was the similarity between petitioner's agreements and that example that underpinned the FCC's *de facto* control finding and the court of appeals' decision upholding it. *Id.* at 48.

Separately and independently, "the Commission's *Baker Creek* and *Intermountain Microwave* decisions provided further notice that the Companies'

overwhelming financial and decisionmaking dependence on DISH, coupled with its restrictive investor protections, would support a finding that DISH [was] in *de facto* control." Pet. App. 49. In *Baker Creek*, the FCC "held that terms barring [a] small business from taking out secured debt and giving [its] investor a right of first refusal over outside loans went 'beyond permissible investment protections' when considered alongside other provisions." *Id.* at 50 (quoting 13 FCC Rcd 18,709, 18,722 (¶ 24)). Likewise here, DISH's "power to veto significant loans," combined with its "ability to prevent [petitioner] from leasing spectrum," "veered outside of the control lines drawn" by that precedent. *Ibid.*

The *2015 Order* provided further guidance as to how the agency would apply its *Intermountain Microwave* factors on remand. In the *2015 Order*, the FCC had "told [the companies] that their abject financial dependence on DISH, paired with DISH's ability to dictate how they borrow money, use their licenses, build their networks, and sell their businesses, provided powerful evidence that they were not freestanding small companies." Pet. App. 51. Noting with approval the Commission's determination that there had been "no material loosening of [petitioner's] financial handcuffs," the court of appeals held that petitioner had sufficient notice that the FCC would find that DISH had retained *de facto* control under *Intermountain Microwave*. *Ibid.*

ii. Petitioner objects (Pet. 26) that the FCC's two-step process for determining eligibility for bidding credits did not provide petitioner with an opportunity to "check in advance with the FCC" to see whether petitioner would qualify for such credits. But petitioner cites no decision of this Court entitling regulated entities to absolute certainty about how an administrative

agency will apply its existing legal standards in a given case. Petitioner relies on both *Christopher* v. *SmithKline Beecham Corp.*, 567 U.S. 142 (2012), and *FCC* v. *Fox Television Stations, Inc.*, 567 U.S. 239 (2012). But neither decision announced a general administrative fair-notice standard, and neither suggests that petitioner was deprived of adequate notice in this proceeding.

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 agency's interpretation. See *id.* at 155-159. And even in that context, the Court noted with approval the "ascertainable certainty" standard applied 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 567 U.S. at 253-259. Petitioner does not contend that the FCC regulations or precedents implicated in this case were unconstitutionally vague.

Christopher and *Fox*, moreover, involved the imposition of liability on regulated parties. See *Christopher*, 567 U.S. at 152-153; *Fox*, 567 U.S. at 247-252. Here, by contrast, the FCC's decision merely deprived petitioner 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, petitioner had an opportunity to avoid those obligations by renegotiating its agreements with DISH. Even if *Christopher* and *Fox* required a heightened degree of

notice in the contexts they addressed, petitioner was not penalized for prior conduct but was simply found to be ineligible for a special public benefit.

iii. Petitioner also argues (Pet. 30-31) that it lacked notice that the FCC might depart from a prior staff-level decision by the Wireless Bureau that petitioner contends was contrary to the result in this case. That argument similarly lacks merit. As petitioner conceded below, actions by subordinate agency components do not bind the agency itself. See Pet. App. 53-54. Petitioner asserts (Pet. 30) that, regardless of whether staff decisions are binding, the agency's supposed departure from past precedents contributed to a lack of notice. 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, in light of the "concrete guidance" provided by the agency's *2015 Order* and the court of appeals' decision in *SNR Wireless*, the "wholly unexplicated ruling by the [Wireless] Bureau d[id] not change the fair notice calculus." Pet. App. 54.

b. Petitioner also challenges the Commission's decision to determine *de facto* control "on a case-by-case basis." Pet. 29; see Pet. 26-27. Petitioner concedes that "an agency's decision to consider multiple factors is not surprising when the inquiry goes beyond de jure arrangements to an inquiry into de facto control." Pet. 29. It appears to suggest (see Pet. 2, 26, 28, 29), however, that the FCC cannot properly resolve the question of *de facto* control by applying a "totality of the

circumstances" analysis, but must instead adopt regulations establishing a bright-line test.

Petitioner's 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 [with the] 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-by-case basis." *Id.* at 202-203. This is especially true of *de facto* control, which can come in many guises.

Petitioner asserts (Pet. 29) that, when "multipart balancing tests" are employed on a case-by-case basis, they can be "manipulated" to favor certain parties. But the availability of judicial review, and the prohibition of the Administrative Procedure Act, 5 U.S.C. 701 *et seq.*, against arbitrary and capricious application of FCC rules and precedents, guard against that possibility. And there is no evidence of "manipulation" in this case, where the court of appeals issued two detailed, unanimous opinions upholding each of the Commission's *de facto* control findings.

Moreover, petitioner's criticisms of the "totality of the circumstances" approach pertain only to the FCC's application of the *Intermountain Microwave* factors. The Commission's separate holding that DISH maintained its *de facto* control under the *Fifth MO&O*, Pet.

App. 406-419, was based not on a multifactor test, but on the similarity between petitioner's agreements with DISH and a specific control-transferring arrangement described in the *Fifth MO&O*. See pp. 14, 18-19, 22-23, *supra*; Pet. App. 407-415.

c. Petitioner further contends (Pet. 3) that it was deprived of a "meaningful opportunity" to cure the deficiencies that the FCC had identified. That argument lacks merit. The Commission offered petitioner the opportunity to renegotiate its agreements with DISH and then to reapply for a bidding credit "in light of the detailed guidance" provided by the FCC's control rules and precedent; by the *2015 Order*, which described the *de facto* control problems in petitioner's original agreements; and by the *SNR Wireless* decision, in which the court of appeals had analyzed the findings in the *2015 Order*. Pet. App. 20-21, 22. Taken together, these sources gave petitioner "individualized and on-point guidance * * * for the Commission's *de facto* control finding" that far exceeded the guidance provided to other bidding-credit applicants. *Id.* at 22.

In addition, "on remand, [petitioner] w[as] given the opportunity to field live questions about [its] amended agreements from the majority of sitting Commissioners." Pet. App. 23. Petitioner and SNR thus "were hardly shortchanged in Commission attention and advice." *Ibid.* Although petitioner describes these meetings as "perfunctory," Pet. 3, and an "empty formalism," Pet. 27, it does not explain why the chance to make its case to the individuals who would actually decide its eligibility for a bidding credit was not meaningful.

Petitioner identifies other spectrum auctions in which it contends applicants were allowed to "undertake discussions" with Wireless Bureau staff. Pet. 27

(citation omitted). But any interactions the Wireless Bureau may have had with other bidding-credit applicants did not entitle petitioner to back-and-forth discussions with the Commission to resolve its own control problems. Petitioner's argument "presupposes an obligation on the part of the Commission to map out the precise details of an arrangement with DISH that would pass muster. That is not how the process works." Pet. App. 23. And unlike any prior bidding-credit applicant, petitioner "'had extensive information about the Commission's views on the ways in which [its] initial Application[] [was] defective' right from the Commission's mouth," in addition to the court of appeals' "'point-by-point elaboration of the Commission's analysis.'" *Id.* at 22 (quoting *id.* at 294).

d. Finally, petitioner contends (Pet. 35) that "the financial impact of the decision" on it "militates in favor of certiorari." But the penalties levied on petitioner did not result from the FCC's determination that petitioner was ineligible for a very-small-business bidding credit. Because the Commission concluded that petitioner was qualified to hold licenses, Pet. App. 263, the company would have kept all of the licenses it won in Auction 97 and would not have been subject to any default penalties if it had paid the full amount of its winning bids. Rather than follow that course, however, petitioner selectively defaulted on some of its winning bids. That deliberate choice triggered the default penalties under the Commission's rules.

In all events, it is unclear whether petitioner will actually be required to pay the penalties imposed for its selective defaults. After the FCC issued the *2015 Order* denying petitioner's request for a very-small-business bidding credit, petitioner and DISH executed an

amended credit agreement in which DISH promised "to pay any default payment and deficiency payments due and owing to the FCC." C.A. App. 272 n.10. Petitioner's ultimate financial liability thus remains uncertain.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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