No. 22-672

IN THE

Supreme Court of the United States

NORTHSTAR WIRELESS,

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

PRIVATE RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Petitioner, a front company for communications giant DISH, participated in a spectrum auction and requested bidding credits reserved for "very small businesses." Petitioner "bid at the auction only after first agreeing to pay the full price for acquired spectrum licenses even if [it was] ultimately denied very-small-business bidding credits." Pet. App. 23-24. The FCC ultimately did deny such credits because it found that DISH controlled petitioner's operations and had contractually ensured that any spectrum licenses petitioner won would end up in DISH's hands.

Petitioner then decided to renege on its pre-auction commitment to pay full price for many of its winning bids. That decision triggered automatic default-payment obligations of which petitioner had undisputed notice. The FCC nonetheless gave petitioner and DISH a second chance to revise their contracts to eliminate the latter's effective control. The companies responded by tweaking only immaterial details in their contractual arrangements. The FCC then reaffirmed its earlier denial of bidding credits, and the court of appeals affirmed.

Properly framed, the question presented is whether the FCC violated due process or administrative law principles (1) by enforcing well-established default-payment obligations for petitioner's breach of its commitment to pay full price for its winning bids in the event bidding credits were denied or (2) by determining that DISH's de facto control over petitioner and its inevitable ownership of the spectrum licenses at issue made petitioner ineligible for "very small business" bidding credits.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The parties to the proceeding are set forth at Pet. iii. The private respondents submitting this brief make the following corporate disclosure statements.

AT&T Services, Inc. performs a variety of centralized administrative support services, including legal advocacy, in support of AT&T Inc. and its subsidiaries and affiliates. AT&T Services, Inc. is wholly owned by AT&T Inc. AT&T Inc. is a publicly traded corporation that has no parent company, and no publicly held company owns 10% or more of its stock.

T-Mobile USA, Inc., a Delaware corporation, is a wholly-owned subsidiary of T-Mobile US, Inc., a Delaware corporation. T-Mobile US, Inc. (NASDAQ: TMUS) is a publicly-traded company listed on the NASDAQ Global Select Market of NASDAQ Stock Market LLC ("NASDAQ"). Deutsche Telekom Holding B.V., a limited liability company (besloten vennootschap met beperkte aansprakelijkheidraies), organized and existing under the laws of the Netherlands ("DT B.V."), owns more than 10% of the shares of T-Mobile US, Inc. DT B.V. is a direct wholly-owned subsidiary of T-Mobile Global Holding GmbH, a Gesellschaft mit beschränkter Haftung organized and existing under the laws of the Federal Republic of Germany ("Holding"). Holding, is in turn a direct wholly-owned subsidiary of T-Mobile Global Zwischenholding GmbH, a Gesellschaft mit beschränkter Haftung organized and existing under the laws of the Federal Republic of Germany ("Global"). Global is a direct wholly-owned subsidiary of Deutsche Telekom AG, an Aktiengesellschaft organized and existing under the laws of the Federal Republic of Germany ("Deutsche Telekom"). The princi-

pal trading market for Deutsche Telekom's ordinary shares is the trading platform "Xetra" of Deutsche Börse AG. Deutsche Telekom's ordinary shares also trade on the Frankfurt, Berlin, Düsseldorf, Hamburg, Hannover, München and Stuttgart stock exchanges in Germany. Deutsche Telekom's American Depositary Shares ("ADSs"), each representing one ordinary share, trade on the OTC market's highest tier, OTCQX International Premier (ticker symbol: "DTEGY").

VTel Wireless, Inc. is a wholly owned subsidiary of Vermont National Telephone Company, Inc. No publicly held company owns 10% or more of Vermont National Telephone Company, Inc.

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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 ("FCC") 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

We concur in the statement of jurisdiction set forth in the Solicitor General's brief in opposition to certiorari ("S.G. Opp.") at 1-2.

STATEMENT

We concur in the Statement set forth in the Solicitor General's brief at 2-20.

ARGUMENT

As the Solicitor General explains, the court of appeals' decision is both correct and factbound; it presents no conflict with any other decision; and petitioner's exercise of its put option, triggering a sale to DISH, presents serious mootness concerns. This brief will not repeat the Solicitor General's comprehensive account of the petition's many deficiencies. Instead, it amplifies a key point in the Solicitor General's brief (at 25-26): in several respects, this case does not even implicate the question presented in the petition and is thus not a plausible vehicle for resolving it.

Petitioner asks the Court to review "[w]hether imposing massive penalties without [1] providing either clear ex ante guidance or [2] a meaningful post hoc opportunity to cure satisfies the fair notice requirements of the Due Process Clause and administrative

law." Pet. i-ii. But the FCC did not impose "penalties" because it disagreed with petitioner about the supposedly unclear rules for bidding-credit eligibility. Instead, the FCC imposed default-payment obligations, which petitioner calls "penalties," only after petitioner reneged on its "agree[ment] to pay the full price for [its] acquired spectrum licenses even if [it was] ultimately denied very-small-business bidding credits." Pet. App. 23-24. The default-payment rules, which apply equally to all auction participants, are crystal clear, and petitioner does not even contend otherwise. The FCC thus gave petitioner "clear ex ante guidance" (Pet. i) about the circumstances that would trigger default-payment liability. Beyond that, the FCC *also* gave petitioner "a meaningful post hoc opportunity to cure" (Pet. ii) DISH's de facto control. For each of those independent reasons, the answer to the question presented in the petition could have no bearing on the outcome of this case.

At bottom, petitioner is quarreling not with any uncertainty in the "penalty" rules, but with the FCC's rationale for denying it discounted access to a public benefit: bidding credits. But that is simply a case-specific challenge to the reasonableness of agency action; it has nothing to do with the due process requirements for imposing "penalties." And petitioner's challenge is not only factbound, but meritless. The FCC quite reasonably denied "very small business" bidding credits to petitioner because it is a mere front company for DISH, with its billions of dollars of annual revenue. And the FCC relied for that conclusion not only on the multi-factor "de facto control" analysis that petitioner criticizes, but also on the independent and adequate rationale that DISH had structured petitioner's contractual put option to ensure that peti-

tioner would inevitably sell itself and its spectrum licenses to DISH.

Finally, petitioner exercised that put option in November 2022 and has formally asked the FCC to approve the sale of its licenses to DISH. As the Solicitor General explains, those developments (which the petition does not mention) raise a significant risk that this case will become moot before the Court could resolve it on the merits. Petitioner obliquely acknowledges that point in its reply brief but has no effective response.

I. Petitioner Incurred "Penalties" Only For Reneging On Its Payment Obligation, Not For Submitting A Bogus Request For Bidding Credits.

Petitioner Northstar Wireless is a "small sham compan[y]" (Pet. App. 4) that was set up for a single purpose: enabling DISH to pay less than market value for spectrum licenses. DISH's $13 *billion* in annual revenues (*id.* at 10) exceeded by orders of magnitude the $15 *million* cutoff for any bidder seeking to qualify as a "very small business" under the FCC's bidding credit rules (*id.* at 111). Thus, had DISH bid in its own name, it would have needed to compete on a level playing field with all other comparable bidders. DISH found that scenario unappealing and instead had petitioner acquire spectrum for it at discounts to which DISH was not entitled. *See id.* at 9.

Unlike DISH, petitioner had no revenues, and it thus superficially appeared to qualify for very-small-business bidding credits. But examination of the companies' contractual arrangements revealed that petitioner was merely an ephemeral dummy corporation for DISH, designed to last just long enough to save DISH money on spectrum. Pet. App. 43-44. In-

deed, DISH helped set up petitioner just before the auction application deadline, and it contractually arranged to acquire petitioner (and its spectrum licenses) as soon as the FCC's "unjust enrichment" period expired—*i.e.*, when DISH would no longer have to pay back any portion of petitioner's bidding credits. *See id.* at 34, 48-49, 81.

Petitioner went into the auction process with its eyes wide open to the possibility that this ruse would be exposed and its bidding credits denied. The court of appeals observed, and petitioner does not dispute, that petitioner "bid at the auction only after first agreeing to pay the full price for acquired spectrum licenses even if [it was] ultimately denied very-small-business bidding credits." Pet. App. 23-24 (citing 47 C.F.R. §§ 1.2104(g)(2), 1.2109(c); *Auction of Advanced Wireless Servs. (AWS-3) Licenses Scheduled for Nov. 13, 2014,* 29 FCC Rcd. 8386, 8417 ¶ 101 n.180 (2014); C.A. Oral Arg. Tr. 32: 19-22)). Of course, petitioner agreed to that condition knowing that DISH would likely cover any liabilities it incurred as part of this scheme.

And that is exactly what happened. The FCC found that petitioner was a mere "arm[] of DISH" and concluded that bidding credits were unwarranted. Pet. App. 43. The FCC thus directed petitioner to pay full price on its winning bids, as petitioner had already obligated itself to do. Petitioner chose instead to default on that obligation with respect to many of these licenses. That default—not the underlying determination of petitioner's ineligibility for bidding credits—automatically triggered well-established default-payment provisions. DISH then guaranteed payment on petitioner's behalf (*id.* at 401 n.262) and ultimately agreed to purchase petitioner outright, *see* S.G.

Opp. 20-21, as the parties' contract had always anticipated, *see* Pet. App. 34, 48-49.

As this summary makes clear, this case is not a vehicle for resolving the question presented in the petition. The petition's whole premise is that petitioner "faces hundreds of millions of dollars in penalties for violating unwritten rules" (Pet. 35). On that basis, petitioner asks the Court to review whether "clear ex ante guidance" is required before "an agency can impose massive penalties on regulated parties." *Id.* at 21; *see id.* at i-ii (question presented). But petitioner did not incur default payment liabilities, which it calls "penalties," because of any lack of clarity in the FCC's rules governing when bidding credits are warranted.[1] Instead, petitioner incurred those liabilities because it chose to renege on its prior commitment to pay the full amount of its winning bids in the event the Commission decided that petitioner was ineligible for bidding credits. And petitioner does not even contend that the well-established, universally applicable rules governing those default payments are unclear, let alone "unwritten" (Pet. 35).

Petitioner misleadingly conflates those default-related rules, which are crystal clear, with the FCC's antecedent rules for deciding when bidding credits

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[1] *See* S.G. Opp. 25-26; *see also United States ex rel. Vt. Nat'l Tel. Co. v. Northstar Wireless, LLC*, 34 F.4th 29, 35 (D.C. Cir. 2022) ("[E]ven assuming that these default payments are civil money penalties, … [t]he default payments were not assessed during the licensing proceeding. In that proceeding, the Commission determined only whether Northstar and SNR were 'qualif[ied]' to hold spectrum licenses and 'eligible' for bidding credits. The question of whether to impose default payments *arose later*, after Northstar and SNR *chose to selectively default on their obligations* to pay for some of their winning bids.") (emphases added) (citation omitted).

are appropriate. For example, petitioner claims that the FCC imposed "penalties" on it "for a non-conforming bid." Pet. 2. That is wrong. The FCC did not penalize petitioner for filing a sham ("non-conforming") request for bidding credits; it simply denied petitioner an improperly claimed discount. Denying a private party's invalid claim to a public benefit is not a "penalty" for due process purposes or any other. *See* S.G. Opp. 25-26. This case is thus worlds apart from those cited by petitioner, which involved unclear rules imposing penalties for private conduct rather than clear rules governing breach of an agreement with the government. *See*, *e.g.*, *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239 (2012) (fines for television programming the FCC deemed indecent); *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 156 (2012) (plaintiffs invoked agency's "interpretation of ambiguous regulations" governing overtime compensation to seek backpay and liquidated damages for company's compensation decisions made "well before that interpretation was announced").

Petitioner nonetheless contends that it "was left with no choice but to selectively default" once the FCC denied its sham request for bidding credits, asserting that it was at that point "[u]nable to conjure billions of dollars in less than a month." Pet. 16. But petitioner's inability to meet its own voluntarily undertaken financial commitments to the government is hardly the government's fault, much less a due process violation. In any event, petitioner had every opportunity *pre*-auction to guard against the consequences of an adverse decision on bidding-credit eligibility. To take an obvious example, petitioner could have submitted bids only in amounts that it could afford to pay if bidding credits were denied. Alterna-

tively, petitioner could have contracted with DISH to cover any resulting disparity in payment obligations for the spectrum licenses that, the FCC found, petitioner was acquiring for DISH's ultimate benefit anyway.

Finally, at the court of appeals' direction, the FCC further dispelled any conceivable fair-notice concerns by giving petitioner and DISH a *second* opportunity to eliminate the contractual features that gave DISH de facto control and made petitioner ineligible for bidding credits. *See* Pet. App. 14-17. In response, the two companies "modified their contracts' bells and whistles" but "retained the same essential structure that the Commission had long said—and had just told them, with [the court of appeals'] affirmation—is a signature form of *de facto* control." *Id.* at 49; *see also id.* at 28 (new contract merely "cemented DISH's … control"); *id.* at 46 (new contract added new "provisions of concern" that "the Commission reasonably found to substantially solidify DISH's control"). But the critical point is that the FCC gave them this second chance whether or not they chose to avail themselves of it. And by the logic of petitioner's question presented, that "post hoc opportunity to cure" (Pet. ii) would address any due process objection *even if* there were some lack of clarity in the relevant "ex ante guidance" (Pet. i).

Petitioner complains that the FCC directed it and DISH to present their own best proposal rather than "work[ing] iteratively" with petitioner (Reply Br. 6) to line-edit the existing deal to produce new contracts that just barely satisfied the eligibility criteria. But as the court of appeals explained, it was enough that "the Companies enjoyed a well-lit path to a cure"; the FCC had no duty "to map out the precise details of an

arrangement with DISH that would pass muster." Pet. App. 21, 23.

II. Petitioner's Administrative Law Challenge To The Commission's Bidding-Credit Determination Is Factbound And Meritless.

As discussed, this case does not implicate the "due process" preconditions for imposing "penalties," the topic ostensibly presented by this petition. Instead, petitioner is ultimately challenging the reasonableness of the FCC's antecedent decision not to grant its requested bidding credits. That challenge, however, is just another factbound objection to the reasonableness of agency action applying a highly technical administrative scheme. The court of appeals properly disposed of that challenge in not one but two detailed opinions, which were comprehensive, well-reasoned, and unworthy of further review.

Moreover, that challenge is not only factbound but meritless, for the reasons the Solicitor General has set forth in detail. Among other things, petitioner misstates what the court of appeals and the FCC actually held about petitioner's underlying claim for bidding credits. Petitioner repeatedly suggests that the FCC deemed it ineligible solely on the basis of an allegedly unpredictable "totality of the circumstances" test, and it urges the Court to review whether agencies may impose "penalties" solely on the basis of such tests. Pet. i (question presented), *see also id.* at 2, 15, 22, 23, 26, 28, 29, 34; Reply Br. 2, 3, 5, 6. But even if a denial of bidding credits were somehow a "penalty," this case still could not serve as a vehicle for addressing petitioner's attacks on multifactor tests because no such test was even necessary to the outcome below. To the contrary, the decisions below independently rested on an alternative, single-factor criterion for denying bidding credits: a contractual

put option carefully structured to ensure that DISH would acquire petitioner and its spectrum licenses just after the "unjust enrichment" period expired.

In prior orders that petitioner all but ignores, "the Commission was direct and explicit that 'agreements between [small businesses] and strategic investors that involve terms … that cumulatively are designed financially to force the [small business] into a sale … *will* constitute a transfer of control under our rules," thus precluding bidding credits. Pet. App. 47 (quoting *In re Implementation of Section 309(j) of the Commc'ns Act—Competitive Bidding*, 10 FCC Rcd. 403, 456 ¶ 96 (1994) (*"Fifth MO&O*") (emphasis added by court of appeals)). Here, petitioner's put arrangement with DISH exactly "parallel[ed]" the *Fifth MO&O*'s "paradigm example of such ensnaring conditions." *Id.* Specifically, it imposed "brief windows for [petitioner] to take guaranteed payouts from [its] dominant investor or face looming—and overwhelming—financial obligations." *Id.* at 47-48. As the court of appeals observed, this put option was an offer that petitioner "could hardly refuse," *id.* at 11, and effectively made it inevitable that petitioner's licenses would end up in DISH's hands. *See also id.* at 48 (put provision was a "non-choice").

The court emphasized that "the Commission's order *independently* rested" on this "put-option analysis under the *Fifth [MO&O]*," irrespective of "the multifaceted considerations prescribed by *Intermountain Microwave* and *Baker Creek*." Pet. App. 52 (emphasis added). The court thus made clear that it would have upheld the Commission's order on the basis of the single-factor put-option analysis even if it had found some fault (which it did not) in the Commission's multifactor *Intermountain Microwave*/*Baker Creek*

analysis. *Id.*[2] In short, petitioner's blunderbuss critique of agency totality-of-the-circumstances tests has no actual bearing on the outcome of this case—which is yet another reason why this case is not a vehicle for addressing that critique.

Finally, in an appeal to policy, petitioner argues that "allowing small businesses to have meaningful participation" in spectrum auctions "requires that they be able to receive substantial financial backing from an established business." Pet. 31. That point, too, is completely irrelevant to the disposition of this case. The FCC's rules do allow legitimate small businesses to obtain financial backing from larger ones and retain eligibility for bidding credits. *See* Pet. App. 85-86. But what a large company may not do is set up a "small sham compan[y]" (Pet. App. 4) as a mere front to obtain spectrum licenses for itself at discounts that are properly reserved for genuine small businesses. As the FCC found, that is exactly what DISH and petitioner tried to get away with here.

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[2] Petitioner misleadingly claims that the Solicitor General's brief "contradict[s] itself" on whether this put-option analysis is a single-factor test. Reply Br. 5. In fact, that analysis is a single-factor test, as the Solicitor General explains (S.G. Opp. 27-28), and as petitioner does not appear to deny. Petitioner nonetheless misattributes to the Solicitor General the notion that, in imposing this test, the *Fifth MO&O* was "a mere 'summar[y]' of *Intermountain Microwave* and its multi-factor test." Reply Br. 5 (quoting S.G. Opp. 3). But the Solicitor General's brief says no such thing; it simply quotes the *Fifth MO&O*'s background summary of the *Intermountain Microwave* analysis. Of course, the *Fifth MO&O* did not merely provide that background summary of prior law; it also announced a distinct put-option analysis, on which it "doubled down" in later orders (Pet. App. 48), and which is fatal to petitioner's arrangement with DISH.

III. Petitioner Offers No Plausible Response To The Solicitor General's Mootness Observation.

On November 21, 2022, petitioner exercised its put option, triggering its long-anticipated sale to DISH. *See* S.G. Opp. 21. On December 14, 2022, petitioner formally applied to the Commission to transfer its spectrum licenses to DISH. *Id.* As the Solicitor General observes, "the dispute in this case will be moot" if and when the FCC grants that application because, "[a]t 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 has identified." *Id.*

After two 30-day extensions, petitioner sought certiorari on January 17, 2023. Yet the petition does not mention petitioner's exercise of the put option or its pending application to cede formal control of its licenses to DISH. Petitioner acknowledged those developments only after the Solicitor General advised the Court of the obvious mootness concerns they raise.

Yet even now the word "moot" appears nowhere in petitioner's reply brief. Instead, petitioner prefers more general euphemisms to describe the Solicitor General's mootness point, such as "vehicle objections" and concerns about "practical significance." Reply Br. 2, 11. It is unclear what petitioner hopes to achieve with such obfuscation. In all events, petitioner never clearly disputes the Solicitor General's observation that this case will no longer present a justiciable case or controversy after the FCC grants the pending license-transfer application. *See id.* at 2, 11-12. Petitioner does argue that, "absent this Court's intervention, there will be nowhere left to turn" for recovery of

the "penalties … assessed in this case." *Id.* at 11. But "this Court's intervention" could not help petitioner recover its default payments no matter how this case is resolved on the merits: as discussed, petitioner incurred default liabilities for independently breaching its commitment to pay in full, not for losing its argument about bidding-credit eligibility. *See* 47 C.F.R. § 1.2109(c) (winning bidder that "defaults … *for any reason*" will be subject to default payments) (emphasis added).

Finally, petitioner argues that "the fact that [it] has been forced to formally transfer control of its licenses to DISH is the consequence of the agency's bait and switch, not a reason to let it stand." Reply Br. 11-12 (emphasis omitted). That argument is both meritless and irrelevant. First, as both the Commission and court of appeals explained, petitioner's *contracts with DISH* were what "forced [petitioner] to formally transfer control of its licenses to DISH" (*id.*), and the put option was structured to force that outcome *no matter what* the FCC decided about petitioner's eligibility for bidding credits. *See* § II, *supra.* In any event, petitioner does not even try to explain how casting the blame on the FCC for petitioner's own contractual choices could rescue this case from mootness; for example, petitioner does not invoke the "capable of repetition, yet evading review" doctrine. That is no surprise because, again, petitioner refuses to address mootness at all.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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