NOT YET SCHEDULED FOR ORAL ARGUMENT

Nos. 18-1209, 18-1210, 20-1507, 20-1508

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NORTHSTAR WIRELESS, LLC, And SNR WIRELESS LICENSECO, LLC,
Petitioners-Appellants,

DISH NETWORK CORPORATION,
Intervenor,

V.

FEDERAL COMMUNICATIONS COMMISSION,
Respondent-Appellee,

UNITED STATES OF AMERICA,
Respondent,

AT&T SERVICES, INC., T-MOBILE USA, INC., VTEL WIRELESS, INC.,
Intervenors

On Petition for Review of and Appeal from Orders of the
Federal Communications Commission

INITIAL BRIEF OF THE PHOENIX CENTER FOR ADVANCED LEGAL AND ECONOMIC PUBLIC POLICY STUDIES AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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July 19, 2021

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

The undersigned attorney of record, in accordance with D.C. Cir. R. 28(a)(1), hereby certifies as follows:

A. Parties and Amici

The following parties currently appear before this Court:

- Northstar Wireless, LLC, *Petitioner-Appellant*
- SNR Wireless LicenseCo, LLC, *Petitioner-Appellant*
- Federal Communications Commission, *Respondent-Appellee*
- The United States of America, *Respondent*
- DISH Network Corporation, *Intervenor for Appellant*
- AT&T Services, Inc., *Intervenor for Appellee*
- T-Mobile USA, Inc., *Intervenor for Appellee*
- VTel Wireless, Inc., *Intervenor for Appellee*

B. Rulings Under Review

The Phoenix Center for Advanced Legal and Economic Public Policy Studies files this brief as *amicus curiae* in support of the Petitioners seeking review of two FCC orders: *In re Northstar Wireless, LLC, SNR Wireless LicenseCo, LLC, Applications for New Licenses in the 1695-1710 MHz, and 1755-1780 MHz and*

2155-2180 MHz Bands, File Nos. 0006670613, 0006670667, FCC 18-98 (July 12, 2018) ("*2018 Order*") (JA__-__), and *In re Northstar Wireless, LLC, SNR Wireless LicenseCo, LLC, Applications for New Licenses in the 1695-1710 MHz, and 1755-1780 MHz and 2155-2180 MHz Bands*, File Nos. 0006670613, 0008243409, 0006670667, 0008243669, FCC 20-160 (Nov. 23, 2020) ("*2020 Order*") (JA__-__).

C. Related Cases

The Phoenix Center is not aware of any other related cases.

s/ *Lawrence J. Spiwak*

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CERTIFICATE OF COUNSEL REGARDING AUTHORITY TO FILE AND SEPARATE BRIEFING

On July 8, 2021, the Phoenix Center filed with this Court its notice that it intends to file a brief of up to 6500 words as amicus curiae in support of the various Petitioners in this case. All Petitioners, Respondents and Intervenors in this case have consented to the filing of this brief. Pursuant to Circuit Rule 29(d), counsel for the Phoenix Center hereby certifies that no other non-government *amicus* brief of which they are aware relates to the subjects addressed herein. Accordingly, the Phoenix Center, through counsel, certifies that filing a joint brief would not be practicable.

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CORPORATE DISCLOSURE STATEMENTS

Pursuant to Federal Rule of Appellate Procedure 26.1 and D.C. Circuit Local Rule 26.1, the Phoenix Center for Advanced Legal & Economic Public Policy Studies submits the following corporate disclosure statement. The Phoenix Center is a non-profit 501(c)(3) non-stock corporation organized under the laws of Maryland. As such, the Phoenix Center has no parent companies and no one holds an ownership interest in the Phoenix Center.

s/ *Lawrence J. Spiwak*

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CERTIFICATE REGARDING AUTHORSHIP

Pursuant to Federal Rule of Appellate Procedure 29(c)(5), the Phoenix Center certifies that no party's counsel authored this brief, in whole or in part; that no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and that no person other than the Phoenix Center contributed money that was intended to fund preparing or submitting the brief.

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GLOSSARY

Auction 97:	The auction at issue in the case at bar
AWS:	Advanced Wireless Services
DE:	Designated Entity
FCC:	Federal Communications Commission

INTERESTS OF AMICUS CURIAE

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 Federal Communications Commission ("FCC") has designed and implemented spectrum auctions, including the both the legal and economic underpinnings of the "Designated Entity" program at issue in this case. The Phoenix Center has also written extensively about the Commission's practice and procedure, including the Agency's mixed track record in following procedural due process and legal precedent. The Phoenix Center, therefore, has an established interest in the outcome of this proceeding and we believe that our perspective on the issues will assist the Court in resolving this case.

SUMMARY OF ARGUMENT

When this case was first before this Court in *SNR I*, this Court upheld the Commission's finding that DISH exerted *de facto* control over SNR and NorthStar in violation of the Federal Communications Commission's rules in effect at the time of Auction 97. That said, this Court also agreed with Petitioners that "there was considerable uncertainty at the time of Auction 97 about the degree of control those rules would tolerate." As a result, this Court found that because the "'confusion' at the ground level 'is … evidence that the agency's interpretation of its own regulation' failed to provide fair notice", this Court ruled that "petitioners had little basis on which to anticipate that a Commission that read the *de facto* control standard to prohibit DISH's powerful influence over petitioners would not only deny petitioners bidding credits, but charge them penalties without at least offering them a chance to seek to cure." Accordingly, this Court's instructions to the Commission on remand were clear and unequivocable: because the Commission "did not give clear notice that such an opportunity [to cure] would be denied, *we conclude that an opportunity for petitioner [sic] to renegotiate their agreements with DISH provides the appropriate remedy here."*

Yet as Petitioners amply demonstrate in their Brief (and as explored in more detail below), the Commission offered them no such opportunity—even though

negotiations are a common practice at the FCC. In fact, the Commission refused to engage with Petitioners, providing the Petitioners with no notice of the standard of review and essentially forcing the Petitioners to guess what concessions (if any) would satisfy the Commission.

Worse, when viewing the facts of this case dispassionately under the "totality of the circumstances," it is also readily apparent that the Commission was not impartial. As explained below, the root of the Commission's hostility towards Petitioners stems from the facts that not only did Petitioners' actions expose the Commission's sloppy administration of Auction 97 (indeed, the Commission had no choice but to concede that Petitioners broke no rules), but Petitioners' conduct also exposed the flaws in the Commission's poorly designed Designated Entity program, thus forcing the Commission in a subsequent proceeding to redesign its Designated Entity program going-forward.

But political embarrassment over its own regulatory negligence is no excuse for the Commission to deprive Petitioners of their due process rights. In response to this regulatory bonfire of the vanities, the Commission on remand both refused to negotiate in direct contravention of this Court's ruling in *SNR I* and repeatedly went out of its way to breach the Agency's "unwritten rules" of practice and procedure that are well-known among the communications bar. The Commission's conduct in

this case therefore raises serious issues of lack of notice and basic fairness. Indeed, regardless of Petitioners' repeated good faith efforts to negotiate a cure, it is readily apparent that the proverbial cake was baked: *The Commission would accept nothing but the total rejection of SNR's and Northstar's status as Designated Entities.*

It is true that courts must accord administrative agencies great deference when interpreting their own rules (however ambiguous) and when reviewing their decisions under the "arbitrary and capricious" standard. But this deference provides no shield when an agency engages in an obvious pattern of hostility towards a regulated entity and strips them of basic due process. For this reason, this case is less about whether Petitioners should be entitled to Designated Entity status and more about whether a reviewing court should condone an administrative agency's naked deprivation of a fair and impartial hearing without adequate notice. For if this Court condones such conduct in this case, then what about the next case down the road?

Accordingly, we join with Petitioners in urging this Court to reverse the Commission's *2020 Order* denying Petitioners' bidding credits, to return Petitioners' defaulted licenses, and to refund their fines. Alternatively, we join with Petitioners in urging this Court to set aside the FCC's orders and remand this matter

for the Commission to afford Petitioners the opportunity to engage with the Commission in the negotiated cure process previously ordered by this Court.

ARGUMENT

I. By Refusing To Negotiate With Petitioners, The FCC Deliberately Ignored This Court's Instructions On Remand

A. *The Court's Instructions On Remand Were Clear*

When this case was first before this Court, this Court upheld the Commission's finding that DISH exerted *de facto* control over SNR and NorthStar in violation of the Agency's "Designated Entity" rules in effect at the time of Auction 97. *SNR Wireless LicenseCo v. Federal Communications Commission*, 868 F.3d 1021 (2017), *cert. denied,* 138 S.Ct. 2674 (2018) (*hereinafter "SNR I"*).[1] That said, this Court also agreed with Petitioners that "there was considerable uncertainty at the time of Auction 97 about the degree of control those rules would tolerate." *Id.* at 1044 (JA at __). As a result, this Court found that because the "'confusion' at the ground level 'is … evidence that the agency's interpretation of its own regulation' failed to

[1] For a concise summary of the Commission's Designated Entity Program, *see* L.J. Spiwak, *How the AWS Auction Provides a Teachable Moment on the Nature of Regulation,* BLOOMBERG BNA (April 28, 2015).

provide fair notice", *id.* at 1045 (*citing General Elec. Co. v. United States EPA*, 53 F.3d 1324, 1332 (D.C. Cir. 1995)), this Court ruled that "petitioners had little basis on which to anticipate that a Commission that read the *de facto* control standard to prohibit DISH's powerful influence over petitioners would not only deny petitioners bidding credits, but charge them penalties without at least offering them a chance to seek to cure." *Id.* at 1045 (JA at __). Accordingly, this Court's instructions to the Commission on remand were clear and unequivocable: because the Commission "did not give clear notice that such an opportunity [to cure] would be denied, *we conclude that an opportunity for petitioner [sic] to renegotiate their agreements with DISH provides the appropriate remedy here." Id.* at 1046 (*citing General Electric*, *supra,* 53 F.3d at 1329) (emphasis supplied) (JA at __). Yet as Petitioners amply demonstrate in their Brief (and as explored in more detail below), the Commission offered them no such opportunity.

Despite this Court's clear instructions, the Commission believed it was within its rights to refuse to negotiate and provide guidance as to what concessions it would consider adequate to merit a cure. To justify its improper refusal to negotiate, the Commission it its *2020 Order* pointed to this Court's dicta in *SNR I* that "[n]othing in our decision requires the FCC to permit a cure. That choice lies with the FCC."

2020 Order at ¶ 28 (*citing SNR I*, 858 F.3d at 1046) (JA at __). But the Commission's argument is too cute by half.

First, the Commission is correct that if, *after negotiations*, the Petitioners were unwilling or unable to agree to conditions that would satisfy the Commission, the Agency was under no obligation to "permit a cure." However, this Court's instructions in *SNR I* made it clear that engaging in good faith negotiations is a condition precedent to the FCC reaching that potential outcome. As described below, given the FCC's demonstrated prejudice towards the Petitioners, it is apparent that the Commission wanted to skip dinner and move right to dessert.

Second, and relatedly, we have another notice problem (a recurring theme in this case). Not only does the Commission's *2020 Order* deliberately ignore this Court's instructions to negotiate with Petitioners, but the very next sentence after the one quoted by the Commission clearly states that "if the very opportunity to seek [a cure] is to be foreclosed, *applicants must have clear, advance notice to that effect.*" *SNR I,* 858 F.3d at 1046 (JA at __) (emphasis supplied). The Commission never provided such notice—either in the first round of this case or on remand—that Petitioners would be prohibited from negotiating a cure. Instead, on remand the Petitioners were stonewalled and their efforts to negotiate a cure were met with total silence from key offices in the Commission.

B. *Negotiations Are Commonplace At The FCC*

The fact that the FCC refused to negotiate with Petitioners in accordance with this Court's express directions is particularly troubling given that negotiations between regulators and the firms they regulate is a long-standing standard practice at many administrative agencies, and the FCC is no exception. As Judge Frank Easterbrook recognized nearly forty years ago:

> Often an agency with the power to deny an application (say, a request to commence service) or to delay the grant of the application will grant approval only if the regulated firm agrees to conditions. The agency may use this power to obtain adherence to rules that it could not require by invoking statutory authority. The conditioning power is limited, of course, by private responses to the ultimatums—firms will not agree to conditions more onerous than the losses they would suffer from the agency's pursuit of the options expressly granted by the statute. The firm will accept the conditions only when they make both it and the agency (representing the public or some other constituency) better off. Still, though, the agency's options often are potent, and the grant of an application on condition may greatly increase the span of the agency's control."

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 to exert some pound of flesh in exchange for regulatory approval is now unfortunately 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 we detailed in this paper, for over two decades, in almost every major "high profile" regulatory proceeding 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). As a result, negotiations have become so institutionalized that whenever a regulated entity seeks agency approval for something significant, the application process essentially becomes 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*.

Negotiations over Designated Entity eligibility in FCC spectrum auctions—where, as this Court observed, "hundreds of billions of dollars are at stake", *SNR I,* 868 F.d at 1046 (JA at __)—are no exception. As this Court acknowledged in *SNR I*, the FCC has a history of affording parties the opportunity to negotiate a cure when the Commission found them in violation of its Designated Entity Rules. Pointing to the Commission's ruling in *ClearComm*, this Court recognized that Petitioners legitimately assumed that "if the Commission found them in violation of the control rules they would have a chance to cure." *Id.* at 1045 (*citing In re Application of*

ClearComm, L.P., 16 F.C.C. Rcd. 18627 (2001)) (JA at __). Thus, not only was the Commission's refusal to enter into good faith negotiations with Petitioners to seek a potential cure a blatant and improper disregard of this Court's instructions on remand, *see* 47 U.S.C. § 402(h) ("In the event that the court shall render a decision and enter an order reversing the order of the Commission … it shall be the duty of the Commission … to forthwith give effect thereto"), but the Commission's refusal marks a significant departure from its own precedent—a departure for which the Commission gives 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. 502, 515 (2009)) (when an agency changes course it "must show that there are good reasons for the new policy").

II. The FCC's Conduct In This Case Raises Significant Due Process Concerns

A. *The Commission Refused To Give Petitioners Adequate Notice Of What It Would Consider To Be An Acceptable Cure*

After this Court remanded this case ordering the Commission to negotiate with Petitioners about a possible cure, the Commission released an *Order on Remand* on January 24, 2018, ostensibly to begin that process. *In the Matter of NorthStar Wireless; SNR Wireless, Applications for New Licenses in the 1695-1710 MHz, and*

1755-1780 MHz and 2155-2180 MHz band, DA 18-70, ORDER ON REMAND, 33 FCC Rcd. 231 (rel. January 24, 2018); *aff'd, In the Matter of Northstar Wireless, LLC; SNR Wireless LicenseCo, LLC; Applications for New Licenses in the 1695-1710 MHz, and 1755-1780 MHz and 2155-2180 MHz Bands,* FCC 18-98, MEMORANDUM OPINION AND ORDER, 33 FCC Rcd 7248 (rel. July 12, 2018). This proceeding was only window dressing, however, as the Commission refused to engage in any iterative negotiations to seek a resolution.

Faced with the Commission's recalcitrance, in June 2018 Northstar and SNR, on their own motion, filed amended agreements based on previously FCC-approved Designated Entity structures, a reasonable reading of the *2015 Order*, and this Court's ruling in *SNR I*, which they believed cured all the alleged *de facto* control issues identified by the FCC. (JA at __.) Yet for the next two years, and despite numerous requests from the Petitioners to meet and negotiate, the Commission refused to inform Petitioners whether their proposed cures were satisfactory or that more concessions were necessary. Total silence.

The case finally came to a head last November when the Commission voted on the *2020 Order* on appeal which denied the Petitioners' proposed cure. The *2020 Order* contains nearly fifty pages of detailed forensic analysis of the Petitioners'

contracts with DISH of why the Agency believed the Petitioners' proposed cures were unsatisfactory.

But for this Court to focus on the Commission's forensic analysis misses the forest for the trees.

As noted *supra*, this Court remanded the case in *SNR I* with clear instructions that the Commission and the Designated Entities attempt to negotiate a solution. Maybe these negotiations would prove successful; maybe not. But these negotiations should have at least occurred (and are, as noted *supra*, common in FCC major regulatory adjudications). Instead, the FCC refused to engage, essentially forcing the Petitioners to guess what concessions would satisfy the Commission.

Yet as evidenced by the detailed forensic analysis in the *2020 Order*, the Commission knew *exactly* where the perceived flaws lay with Petitioners' proposed cure but refused to share this information with them. Although the Commission clearly knew what it did not like about the agreements, it never once gave any indication to SNR and Northstar about what concessions (if any) would satisfy it. In the absence of this necessary information, it was impossible for Petitioners to present a counter-offer. The Agency's lack of adequate notice of what criteria it used to

evaluate Petitioners' proposed cure therefore presents a *prima facie* case of a denial of procedural due process.

This Court has made clear that when "sanctions are drastic"—in this case forfeiture of licenses of prime mid-band spectrum plus severe billion-dollar penalties—"'elementary fairness compels clarity' … [of] the actions with which the agency expects the public to comply." *General Electric*, 53 F.2d at 1329 (citations omitted). By refusing to negotiate there was no way for Petitioners to ascertain with any certainty whether its proposals were adequate or whether more concessions were required. *See Trinity Broadcasting of Florida v. FCC*, 211 F.3d 618, 629 (D.C. Cir. 2000) (the standard of notice is "ascertainable certainty").[2]

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[2] In the *2020 Order*, the Commission takes great pains to claim that Petitioners failed to satisfy the six factors articulated in *Intermountain Microwave, Intermountain Microwave,* 24 RAD. REG. (P&F) 983 (1963). *See 2020 Order* at ¶¶ 31 *et seq*. But as this entire case revolves around Petitioners' "incorrect views" of Commission precedent (*see 2015 Order, infra,* at ¶ 132 and the fuller discussion in Section B.I *infra*), in the absence of direct negotiations where Petitioners could have divined some clarity about the Commission's concerns, any argument that Petitioners could have reasonably ascertained with any certainty exactly how it was supposed to comply with the *Intermountain Microwave* factors rings particularly hollow.

B. *The Commission Was Not Impartial*

1. *The Commission Was Embarrassed That Petitioners' Actions Exposed The Agency's Regulatory Negligence In Running Auction 97 And The Designated Entity Program Generally*

The expectation of impartiality and a fair hearing by the Government is the cornerstone of American democracy. *See, e.g.,* Administrative Procedure Act, 5 U.S.C. § 556(b)(3) (an administrative agency shall conduct their hearings "in an impartial manner"). With great regret, when viewing dispassionately the Commission's actions under the "totality of the circumstances" of this case , it is obvious that the FCC failed to live up to these ideals. Given the Agency's conduct during the remand, it is apparent that regardless of Petitioners repeated good faith efforts to negotiate a cure, the proverbial cake was baked: *The Commission would accept nothing but the total rejection of SNR's and Northstar's status as Designated Entities.*

But why such hostility by the Commission towards the Petitioners? The answer lies with the simple fact that politicians do not like it when their regulatory negligence is exposed. To give the Court some context, perhaps some history is in order:

The Commission's first *faux pas* was to let Petitioners participate in the auction under the assumption that they were entitled to bidding credits even though the

Agency was fully aware of their financial relationships with DISH. 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. At that point, the Commission and all bidders are fully aware of the identity of the firms involved and the nature of their financial relationships. Based on that information, the Agency has the authority to grant or deny both Designated Entity status and "Qualified Bidder" status.

In the case at bar, the Commission specifically instructed potential bidders seeking Designated Entity status to "review carefully the Commission's decisions regarding the designated entity provisions." *July 2014 Public Notice* at ¶ 79 (JA at __). The Petitioners did so, and both fully disclosed their relationship as well as provided detailed summaries of their agreements with DISH prior to the auction in their Short Form application, basing their agreements directly upon agreements the Commission previously found to be acceptable (as the Commission directed). These facts are not in dispute: As the Commission conceded in its *2015 Order,* "the entire record indicates" that the Petitioners complied with the Agency's rules and properly disclosed their ownership structure and related Agreements as required. *Northstar Wireless, LLC, SNR Wireless LicenseCo, LLC, Applications for New Licenses in the*

1695-1710 MHz, and 1755-1780 MHz and 2155-2180 MHz Bands, FCC 15-104, MEMORANDUM AND ORDER, 30 FCC Rcd. 8887 (August 18, 2015) at ¶ 132 (JA at __). Despite this full disclosure by Petitioners, the Commission found no objection with these investments and both certified the Petitioners as "Qualified Bidders" and allowed the Petitioners to participate in the auction as "Designated Entities." *October 2014 Public Notice*. If the FCC had a problem with the relationship between the Petitioners and DISH, then the FCC could have rejected the Petitioners' Short Form and prevented them from participating in the auction. It did not.

While the FCC's Short Form process may be perfunctory, it is not *pro forma*.[3] After all, it strains credulity to think that the Agency would allow an entity who publicly discloses detailed financial relationships with two other bidders—including the use of joint bidding agreements—to participate in a federal spectrum auction based on a mere "rubber stamp." If so, then the competency of the Agency to run

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[3] *See July 2014 Public Notice* at D-15 (JA at __) ("After the deadline for filing short-form applications, the Commission will process all timely-submitted applications to determine which are complete, and subsequently will issue a public notice identifying (1) those that are complete, (2) those that are rejected, and (3) those that are incomplete or deficient because of minor defects that may be corrected. Once that public notice is released, any interested parties may be able to view the short-form applications by searching for them in the Commission's database.")

an auction with billions of dollars at stake is in doubt. Participation by Designated Entities is not innocuous; such participation affects auction prices.

Along a similar vein, in light of the open disclosures in the Petitioners' Short Form applications that DISH and Petitioners had entered into joint bidding agreements—as permitted by the Commission's own rules—it was naïve for the Commission to think that the Petitioners would be passive participants in the auction. Anyone with even a passing knowledge of the mobile 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 (1,915-1,920; 1,995-2,000) 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 and tortured experience with the Designated Entity Program (*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. *Id.*

Which brings us to the Commission's second *faux pas*: The FCC unquestionably knew early in the auction that the Petitioners 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 of those credits going to the Petitioners. 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). 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 natural disaster, technical obstacle, administrative or weather necessity, evidence of an auction security breach or unlawful bidding activity, *or for any other reason that affects the fair and efficient conduct of competitive bidding*." *July 2014 Public Notice* at ¶ 180 (JA at __) (emphasis supplied). If the FCC had a problem with the Petitioners' relationship with DISH and the size of the bidding credits

accrued, then it was at this point the Commission should have acted rather than delay action until the omelet was scrambled.

Despite its direct knowledge of both the size of the bidding credits (within the first week) and, equally as important, the parties eligible for such bidding credits, *the FCC again opted to do nothing*. Instead, the Commission let Auction 97 proceed without intervention for a total of 341 rounds. It was only after the winners of the auction and the size of the bidding credits were publicly announced—and the subsequent media attention—did the fireworks begin and the FCC felt politically pressured to act. *See* R. Knutson, *FCC to Tighten Reins on Wireless Licenses*, WALL STREET JOURNAL (March 18, 2015).

Importantly, 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).[4]

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[4] While $3.6 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 $3.6 billion is certainly a lot of

(Footnote Continued….)

However, size matters in politics. As such, shortly after Auction 97 concluded allegations began to swirl that that the Petitioners (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 just discussed, such allegations were false. The fact that the FCC allowed the Petitioners 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, both Democrat and Republican FCC Commissioners tried to deflect attention away from the Commission's regulatory malpractice and toward the Petitioners. (The classic

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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*.

"blame game" popular among politicians.) For example, on the Republican side, then-Commissioner (and subsequently Chairman) Ajit Pai, testifying before the Senate Appropriations Committee, remarked that "[a]llowing DISH to obtain over $3 billion in taxpayer-funded discounts makes a mockery of the small business program." *Statement of Ajit Pai, Commissioner, Federal Communications Commission, Hearing Before the Senate Appropriations Subcommittee on Financial Services and General Government* (May 12, 2015). Not to be outdone, then-FCC Chairman Tom Wheeler testified before Congress that he intended to "fix this" because he was "against slick lawyers coming in and taking advantage of a program that was designed for a specific audience and a specific purpose" and opposed having "designated entities be beards" for large companies. WALL STREET JOURNAL, *FCC to Tighten Reins.* Such statements belie dispassionate oversight of a multi-billion dollar auction and bear the stink of embarrassment.

Yet rather than admit that it found no problem prior to the auction with the Petitioners participating under the assumption that they were entitled to bidding credits or admit that it could have stopped the auction at any time, the Commission doubled-down to prove it was on the case. To start, the Agency amended its Designated Entity Rules both to significantly cap the amount of bidding credits a Designated Entity may receive and to ban joint-bidding agreements for future

auctions. *See In the Matter of Updating Part 1 Competitive Bidding Rules; Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions; Petition of DIRECTV Group, Inc. and EchoStar LLC for Expedited Rulemaking to Amend Section 1.2105(a)(2)(xi) and 1.2106(a) of the Commission's Rules and/or for Interim Conditional Waiver; Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission's Competitive Bidding Rules and Procedures,* FCC 15-80, REPORT AND ORDER; ORDER ON RECONSIDERATION OF THE FIRST REPORT AND ORDER; THIRD ORDER ON RECONSIDERATION OF THE SECOND REPORT AND ORDER; THIRD REPORT AND ORDER, 30 FCC Rcd. 7493 (rel. July 21, 2015).

But while amending its Designated Entity Rules might have served the need for temporary political optics, seasoned telecom professionals chuckled as the Commission dug themselves deeper into a hole. Not only did such a conspicuous amending of its Designated Entity Rules amount to a concession that the unexpected outcome of Auction 97 was a logical outgrowth of its own rules in place at the time of Auction 97, but these amended rules—passed with an increasingly rare 5-0 vote with three Democratic Commissioners in favor—effectively neutered the Designated Entity program going-forward. Having to pass these reforms no doubt angered then-Chairman Wheeler, who prior to Auction 97 was quietly attempting to

loosen existing protections in the Designated Entity program so that his 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, supra n.* 1.

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 Petitioners complied with the Agency's rules and properly disclosed their ownership structure and related Agreements as required. *2015 Order* at ¶ 132 (JA at __). (In fact, the Commission also conceded 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 (JA at __).) To get around this inconvenient truth, the Commission instead claimed that the Petitioners simply "proceeded under an incorrect view about how the Commission's affiliation rules apply to these structures" (*2015 Order* at ¶ 132; JA at __) and, under the "totality of the circumstances" (*2015 Order* at ¶ 49; JA at __), the Petitioners did not warrant Designated Entity classification. Yet as this Court recognized nearly thirty-five 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 Petitioners the Commission did, both by revoking the licenses Petitioners won at auction and by imposing billion-dollar penalties. While this Court ultimately upheld the Commission's finding that DISH exerted *de facto* control over the Petitioners in *SNR I*, the FCC's actions on remand reveal that the embarrassment of Auction 97 still stings and that the Commission was intent on further punishing the Petitioners by denying them a fair shot at negotiating a potential cure. All the while, billions of dollars and the contested spectrum licenses sat idle.

2. *Viewing The FCC's Conduct In This Case Under The "Totality Of The Circumstances" Reveals A Profound Bias Against Petitioners*

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*, 940 F.3d 1, 73 (2019). 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 also developed its own culture and professional courtesies—fully understood by both the regulator and the

regulated alike—which everyone generally adheres to 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.[5]

In this case, however, the Commission offered Petitioners none of these courtesies. To the contrary, the Petitioners have demonstrated a disturbing pattern of conduct by the Commission that violate the Agency's well-understood "unwritten

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[5] 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. Separate from that, each new Commissioner is given a piddly little three-ring binder containing outdated loose-leaf pages that provide, at best, guidance on what may or may not happen at certain junctures in Commission activities. And that is it. 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.

rules." Again, while perhaps no rule in the C.F.R. was ever formally violated, the Agency's sustained pattern of hostility towards Petitioners provides overwhelming evidence that the proverbial "cake was baked" and that the Commission had no intention of ever entering into good faith negotiations with Petitioners to find a potential cure.

As Petitioners pointed out in their November 17, 2020 *Ex Parte,* the Commission systematically engaged in "unfair and disparate" treatment towards the Petitioners during this Court's mandated cure process, violating many of the Commission's "unwritten rules." *Petitioners' November 17, 2020 Ex Parte* at 11 (JA at __). Let's just take a couple of glaring examples of the Agency's passive-aggressive acts towards the Petitioners.

First, not only did the Commission refuse to designate Petitioners' 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 Petitioners to work through the meaning of unclear language in the *2015 Order* and FCC staff concerns. *Petitioners' November 17, 2020 Ex Parte* at 11 (JA at __). While the Commission certainly had the right to proceed in this fashion, this Court needs to understand that the Agency's decisions to refuse to classify the proceeding

as "permit but disclose" and refuse take meetings with Petitioners 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. 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. *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 Petitioners' 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 this court recognized in *SNR I,* 868 F.3d at 1028. Yet when the FCC issued its *Order in Remand*, the Commission welcomed these formerly rejected complainants back with open arms. In the *Order* on appeal, the Commission justified its backtracking by claiming that these complainants should be allowed to participate because following the Court's instructions on remand essentially constitutes a new proceeding that raises 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. This Court did not remand this case *in SNR I* with directions that the Petitioners

negotiate with third parties, because the satisfaction of third parties over whether DISH has *de facto* control over the Petitioners is completely irrelevant. Instead, this Court remanded this case with clear instructions that the *Commission—and the Commission alone*—enter into good faith negotiations with Petitioners (with, of course, DISH's acquiescence to any concessions) to see if a possible cure could be reached.

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); D.A. Lyons, *FCC Process Reform Protect the Rule of Law,* PERSPECTIVES FROM FSF SCHOLARS, Free State Foundation (April 12, 2021). 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 adhered to the "three-week notice" policy for nearly the entirety of Chairman Pai's tenure, the Petitioners enjoyed no such courtesy. 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. *Petitioners' November 17, 2020 Ex Parte* at 11 (JA at __). So, once again, while the Commission was under no formal legal obligation to provide three-weeks notice before it voted on the *Order* on appeal, if the Commission routinely extended this courtesy to the rest of the industry, then the Commission should have extended this same courtesy to Petitioners. More importantly, had the Commission adhered to its "three-week notice" policy, then Petitioners would have been able to see exactly what the Commission did not like and could have attempted to further modify their proposed cure prior to the Commission's vote. But, as noted above, the Commission never had any intention of ever letting Petitioners retain their Designated Entity status.

Accordingly, 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 carried a profound bias against the Petitioners and had no intention of giving them a fair shot at negotiating a cure. To reiterate the point once again, the Commission never had any intention of granting Petitioners Designated Entity status. The remand was a charade.

III. Policy Implications

It is a basic maxim of economics that firms are not passive recipients of regulation. As a result, firms will always push the bounds of regulation for their benefit. While politicians do not like it when firms try to exploit rules and regulations to their advantage, this arbitrage exposes the flaws in a poorly designed regulatory regime.

Such is the case at bar. As the Commission itself conceded, Petitioners violated no rule nor perpetuated any fraud upon the Commission. (*See supra*.) What the Petitioners did do, however, is expose both flaws in the Agency's Designated Entity Rules (forcing the Commission to substantially re-write those rules in 2015) and the Commission's sloppy administration of Auction 97. The problem in this case is that the Commission was intent on punishing the messenger. This Court cannot condone such conduct by the Government.

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. 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 a regulated entity and ignores basic principles of fairness and due process. Absent a reversal by this Court, allowing the Commission's conduct in this case to go unsanctioned places us at the precipice of a very steep and slippery slope and sets a dangerous precedent for any party who may have business before the Commission.

CONCLUSION

For the reasons set forth herein, we join with Petitioners in urging this Court to reverse the Commission's *2020 Order* denying Petitioners bidding credits, to return Petitioner's defaulted licenses, and to refund their fines. Alternatively, we join with Petitioners in urging this Court to set aside the FCC's orders and remand this matter for the Commission to afford Petitioners the opportunity to engage with the Commission in the negotiated cure process previously ordered by this Court.

Respectfully submitted,

s/ *Lawrence J. Spiwak*

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Dated: July 19, 2021

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C) and D.C. Circuit Rule 32(e), the undersigned certifies that this brief complies with the applicable type-volume limitations. This brief was prepared using a proportionally spaced type (Times New Roman, 14 point). Exclusive of the portions exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii) and D.C. Circuit Rule 32(e)(1), this brief contains 6398 words. This certificate was prepared in reliance on the word-count function of the word-processing system (Microsoft Office 365) used to prepare this brief.

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CERTIFICATE OF SERVICE

I hereby certify that, on July 19, 2021, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

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