

NOT YET SCHEDULED FOR ORAL ARGUMENT
Nos. 15-1330, 15-1331, 15-1332, 15-1333

In the
United States Court of Appeals
for the
District of Columbia Circuit

SNR WIRELESS LICENSECO, LLC and
NORTHSTAR WIRELESS, LLC,

Petitioners-Appellants,

v.

FEDERAL COMMUNICATIONS COMMISSION, et al.

Respondents-Appellees.

On Petition for Review and Notice of Appeal of
an Order of the Federal Communications Commission

**BRIEF OF *AMICUS CURIAE* PUBLIC KNOWLEDGE
IN SUPPORT OF PETITIONERS-APPELLANTS**

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Rule 26.1 Statement

Public Knowledge is a nonprofit organization with 501(c)(3) status, incorporated in the District of Columbia. Public Knowledge has no parent company, nor does any corporation hold an interest of 10% or more of stock in Public Knowledge.

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Glossary of Abbreviations

AWS

Advanced Wireless Service

DE

Designated Entity

FCC

Federal Communications Commission

Rule 29 Statements

This brief is filed with the consent of all parties.

Pursuant to Fed. R. App. P. 29(c)(5), *amicus* states that no party or party's counsel authored this brief in whole or in part, and that no party or party's counsel contributed money that was intended to fund preparing or submitting the brief. No other entity contributed funds intended to be used in preparing this brief.

Pursuant to D.C. Cir. R. 29(d), *amicus* states that a separate brief is necessary for the following reasons:

Public Knowledge understands that one other *amicus* brief will be filed in this case, by the Phoenix Center. The issues addressed by The Phoenix Center, and its perspective on the policy issues at play in this case, differ markedly from the perspective of Public Knowledge. Public Knowledge does not address the FCC's initial determination to deny DE credit, or question the authority of the Commission to announce a standard for "totality of the circumstances" through adjudication. Because the interests, attentions, and policy considerations of The Phoenix Center and Public Knowledge differ so significantly as pertains to this case, *amicus* thus understands the coverage of its brief to be substantially different from any other submitted in this case.

January 19, 2016

Respectfully submitted,

/s/ Harold Feld
Harold Feld

Introduction and Statement of Interest

Public Knowledge is a nonprofit technology policy organization that promotes freedom of expression, an open Internet, and access to affordable communications tools and creative works. As part of that mission, Public Knowledge advocates on behalf of consumer interests for balanced and pro-competitive communications policies by participating in regulatory proceedings, and where appropriate, filing amicus curiae briefs in cases of significance. Communications law, and particularly matters relating to spectrum policy and FCC action such as those at issue in the current case, is a subject area in which Public Knowledge has both strong interests and substantial expertise.

Public Knowledge's interest in this case arises from concerns regarding the consideration of policy objectives and Congressional objectives among the facts and circumstances considered in the FCC's "totality of the circumstances" decision-making. Congressional directives and the policy goals they embody are intangible objectives, and the FCC is charged with meeting those goals. Accordingly, those goals and objectives should be considered within the totality of the circumstances. Furthermore, the FCC's actions appear to conflict with the "fair notice" requirement in *Trinity Broadcasting*.

Public Knowledge staff members frequently testify before Congress on communications policy matters, particularly on wireless spectrum issues. This

amicus brief will provide a valuable and unique perspective on this case, drawn from extensive expertise in communications law and policy. Public Knowledge respectfully submits the tendered brief for the court's consideration in the present case.

Argument

I. BY THE STANDARDS ESTABLISHED BY CONGRESS FOR EVALUATING THE SUCCESS OF AUCTIONS, AUCTION 97 WAS AN UNPRECEDENTED AND UNANTICIPATED SUCCESS.

Measured against the objectives laid out by Congress for the FCC to pursue in auctioning spectrum, Auction 97 was a historic success. It shocked industry analysts by closing with a total of more than \$44 billion in provisional winning bids, a number roughly triple that anticipated throughout the industry. More importantly than the revenue generated, Auction 97, and particularly the successes of Northstar and SNR, dramatically furthered the goals Congress instructed the Commission to achieve through its spectrum auctions.

A. Congress' Stated Goals for Spectrum Auctions Charge the FCC With Meeting a Number of Key Policy Objectives

In granting the FCC authority to distribute spectrum licenses via auction, Congress established a number of objectives the FCC should seek to achieve through its auction design and bidding policies. In particular, the FCC was directed to work to achieve goals of "promoting economic opportunity and competition,"

“avoiding excessive concentration of licenses,” and “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)(B). Furthermore, Congress specifically directed the FCC to “ensure that small businesses, rural telephone companies, and businesses owned by members of minority groups and women are given the opportunity to participate in the provision of spectrum-based services, and, for such purposes, consider the use of tax certificates, bidding preferences, and other procedures. 47 U.S.C. § 309(j)(4)(D). In furtherance of these objectives, the FCC has, over the past two decades, utilized a number of mechanisms, including bidding credits, to ensure that these “designated entities” – small, minority, and women-owned businesses – received an opportunity to enter and compete in wireless spectrum auctions.¹

B. Auction 97 Was Widely Hailed as a Landmark Success, and was Wholly Unanticipated

Prior to Auction 97 getting underway, industry analysts expected the auction to close with bids totaling between \$10 and \$20 billion, with most estimates landing roughly in the middle of that range.² In setting reserve prices for the

¹ See generally *Implementation of Section 309(j) of the Communications Act – Competitive Bidding*, 10 FCC Rcd 403 (1994).

² Phil Goldstein, *IT'S OVER: FCC's AWS-3 spectrum auction ends at record \$44.9B in bids*, FierceWireless (Jan. 29, 2015), <http://www.fiercewireless.com/story/its-over-fccs-aws-3-spectrum-auction-ends-record-449b-bids/2015-01-29> (last accessed Jan. 19, 2016).

licenses, the FCC took a conservative view based on its own economic analyses, and set the reserve prices at “around \$10 billion.”³

Across Washington, responses to the auction reflected Auction 97’s unexpected success. In commenting on the auction’s results, FCC Chairman Tom Wheeler praised “by far the highest-earning spectrum auction the United States has ever seen.”⁴ Commissioner Mignon Clyburn, meanwhile, remarked that “if you had conducted a poll of analysts before the start of the AWS-3 auction, the highest prediction given for its yield would not have exceeded \$18 billion.”⁵ Congress was pleased, as well; Congressman Pallone praised “the most successful wireless auction in history,” an auction described by Congresswoman Doris Matsui as “record-breaking.”⁶ In a bipartisan op-ed, Chairman Wheeler and Congressman Walden observed that “by any measure, this auction was a resounding success. Winning bids came in about three times higher than analysts had expected.”⁷

³ Id.

⁴ John Eggerton, *Washington Hails Success of AWS-3 Auction*, Broadcasting & Cable (Jan. 29, 2015), <http://www.broadcastingcable.com/news/washington/washington-hails-success-aws-3-auction/137541> (last visited Jan. 19, 2016).

⁵ Id.

⁶ Id.

⁷ Chairman Tom Wheeler and Rep. Greg Walden, *The Hill, Spectrum auction is bipartisanship in action*, The Hill (Jan. 30, 2015), available at <http://thehill.com/opinion/op-ed/231196-spectrum-auction-is-bipartisanship-in-action> (last visited Jan. 19, 2016).

C. Auction 97 Was Good For Competition and Diversity, Thus Achieving Congressional Objectives

Auction 97 closed with 31 of 70 eligible bidding entities being awarded provisional winning bids, totaling more than \$44 billion.⁸ Only three of the four major nationwide wireless carriers participated in the auction, while the other 28 bidding entities represented a diverse assortment of smaller providers, new market entrants, and individuals. Of particular note in the auction results were the successes of Northstar Wireless, LLC, (“Northstar”) and SNR Wireless LicenseCo, LLC. (“SNR”) Both entities were small businesses bidding in partnership with DISH Network. Both are minority-controlled small businesses.⁹ DISH itself is a potential new entrant in the wireless market. Its arrangements with Northstar and SNR, combined with DISH’s existing spectrum holdings, dramatically increase the likelihood that DISH will enter the national mobile market, substantially enhancing competition.

Thanks to their increased access to capital made available by the designated entity bidding credits, SNR and Northstar were able to make unprecedented bids in Auction 97, with impressive results. The entities combined to win nearly 25 MHz

⁸ Phil Goldstein, *AWS-3 AUCTION RESULTS: AT&T leads with \$18.2B, Verizon at \$10.4B, Dish at \$10B and T-Mobile at \$1.8B*, FierceWireless (Jan. 30, 2015), <http://www.fiercewireless.com/story/aws-3-auction-results-att-leads-182b-verizon-104b-dish-10b-and-t-mobile-18b/2015-01-30> (last accessed Jan. 19, 2016).

⁹ Northstar and SNR’s status as minority-owned businesses is discussed in Section IID, *infra*.

of licenses nationwide, an unprecedented level of coverage and success in major urban markets for a small business.¹⁰ Prior to the auction, analysts had expected DISH and its small business partners to spend somewhere in the neighborhood of \$6 billion, at most; instead the consortium placed bids totaling more than \$13 billion (including 25% bidding credits anticipated based on SNR and Northstar's plan to seek designated entity status).

D. The DISH DEs Contributed Substantially To, And Embody The Success Of, Auction 97

As the details of each round of bidding in Auction 97 became public, it became clear that the DISH DEs had achieved unprecedented success, for small and minority-owned businesses and new market entrants, in the auction. As described by the FCC, Northstar is controlled by an Alaskan Native American corporation, Doyon, Ltd.¹¹ SNR Wireless is ultimately controlled by John Muleta. *Order*, 30 FCC Rcd. 8894-95, ¶ 17. In addition to being small businesses, therefore, both entities are also minority-owned; their success in the auction through their partnership with potential new market entrant DISH (and other

¹⁰ Phil Goldstein, *Analysts: AWS-3 auction helps AT&T catch up to Verizon in spectrum ownership in major markets*, FierceWireless (Feb. 2, 2015), <http://www.fiercewireless.com/story/analysts-aws-3-auction-helps-att-catch-verizon-spectrum-ownership-major-mar/2015-02-02> (last accessed Jan. 19, 2016).

¹¹ *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*, 30 FCC Rcd. 8887, 8893-94 ¶ 14 (Aug. 18, 2015) (“*Order*”)

fundings) embodies precisely the type of diverse, competitive auction results contemplated by Congress in drafting 47 U.S.C. 309.

Of the 1,614 licenses available in Auction 97, Northstar and SNR combined to secure provisional winning bids for 702 of them – nearly 50% of all available licenses.¹² They secured 25 MHz of spectrum covering a nationwide footprint – an unprecedented level of success for new market entrants. Later analysis demonstrated that the participation of Northstar and SNR in the auction, and their aggressive bidding activities in conjunction with DISH itself; by some accounts, their bidding activities drove market prices for desirable licenses substantially higher, potentially increasing the auction’s total bids by as much as \$20 billion, reflecting the true value of this spectrum to dominant nationwide carriers.¹³

Congress directed the FCC to auction spectrum in a manner that “promot[es] economic opportunity and competition.” 47 U.S.C. § 309(j)(3)(B). In Auction 97, competitive bidding from new market entrants and small businesses Northstar and SNR generated never-before-seen levels of competitive bidding. Congress directed the FCC to auction spectrum while “avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small

¹² See *Analysts*, *supra* note 3.

¹³ See Tim Farrar, *How to blow up a spectrum auction...*, TMF Associates MSS Blog (Jan 31, 2015) <http://tmfassociates.com/blog/2015/01/31/how-to-blow-up-a-spectrum-auction/> (last accessed Jan. 19, 2016).

businesses”. 47 U.S.C. § 309(j)(3)(B). In Auction 97, SNR and Northstar secured more licenses than any other bidder, and secured by far the greatest amount of spectrum ever acquired by small, minority-owned businesses working in cooperation with a new market entrant. Lastly, Congress directed the Commission, by means of competitive bidding procedures, to ensure that licensees include “small businesses, rural telephone companies, and businesses owned by members of minority groups and women.” 47 U.S.C. § 309(j)(3)(B). SNR and Northstar are both minority-owned, and achieved an unprecedented level of competitive success in Auction 97. Measured against the standards set for the FCC by Congress, the participation of SNR and Northstar in Auction 97 should be considered an unqualified success.

II. THE UNIQUE CIRCUMSTANCES OF THIS CASE REQUIRED THE COMMISSION TO PROVIDE THE PARTIES WITH AN OPPORTUNITY TO CONFORM THE CONTRACTS TO AVOID *DE FACTO* CONTROL.

As a general matter, the Commission is free to announce policy by adjudication or by rulemaking. *NetworkIP v. FCC*, 548F.3d 116, 122-23 (D.C. Cir. 2008) (“*NetworkIP*”); *N.Y. State Comm’n on Cable Television v. FCC*, 749 F.2d 804, 815 (D.C. Cir. 1984). Additionally, *amicus* Public Knowledge does not challenge the general proposition that when the Commission puts parties on notice that it will review an application under the “totality of the circumstances,” that the

Commission will examine all relevant factors, including how such factors work in combination.

Nevertheless, while the Commission is free to announce policy through adjudication, it is equally well established that fundamental principles of due process require that an agency may not impose a fine or forfeiture without adequate notice. *See NetworkIP*, 548 F.3d 122 (“Anything less ought not to be dignified with the title of law”); *Trinity Broadcasting of Florida, Inc. v. FCC*, 211 F.3d 618, 628 (D.C. Cir. 2000) (“*Trinity*”). This goes beyond the mere notice that the Commission may make an adverse decision, “[o]therwise the practice of administrative law would come to resemble ‘Russian Roulette.’” *Satellite Broadcasting Co., Inc. v. FCC*, 824 F.2d 1, 4 (D.C. Cir. 1987). Rather, as this court noted in *Trinity*, a regulated entity, “acting in good faith should be able to identify, with ascertainable certainty, the standards with which the agency expects parties to conform.” *Trinity*, 211 F.3d at 628 (citation omitted).

The FCC made no finding of bad faith by Petitioners Northstar and SNR (or DISH or Blackrock) in its Order. To the contrary, the Commission affirmatively rejected arguments that Petitioners acted in bad faith through failure to disclose or through misrepresentation. *Order*, 30 FCC Rcd. 8940-43, ¶¶ 129-36. Rather, it appears that the parties made a diligent effort to interpret the sometimes inconsistent and confusing precedent surrounding the question of how to balance

the goals of allowing small businesses (particularly those owned by women or minorities) and new entrants to enter the market, while simultaneously providing these small businesses with the necessary access to capital and experience needed to compete against large, well-established incumbents. *Updating Part 1 Competitive Bidding Rules*, 30 FCC Rcd. 7493, 7499 ¶ 11 (Jul. 21, 2015). Indeed, at times the Commission itself seemed confused as to how to interpret its previous holdings. *Order*, 30 FCC Rcd. 8939, Fn. 365.

That an agency may clarify an interpretation through adjudication invariably requires some element of retroactivity, even where a party acts in good faith. *See NetworkIP*, 548 F.3d at 123. But, under *Trinity*, the FCC may not impose a penalty unless the nature of the penalty was “reasonably ascertainable.” *Trinity*, 211 F.3d at 628. Indeed, *Trinity* itself involved a determination of *de facto* control which the Court found reasonable, but found the harsh penalty of denial of the license renewal request without further proceedings violated due process.

Here, several factors made it impossible for Petitioners to predict either the scope of their potential liability, or that the Commission would deny the parties the opportunity to modify their agreements to eliminate the *de facto* control identified by the Commission.

First, no one could have anticipated at the time Northstar and SNR indicated their intent to file for a DE credit that the total DE credit would constitute \$3.4

billion. Further, the requirement to produce \$3.4 billion in 30 days virtually guaranteed a default, triggering an actual forfeiture of \$516 million.¹⁴ Even now, Petitioners' liability remains uncertain. Conceivably, Petitioners may find themselves still subject to billions of dollars in penalties, depending on the outcome of the Commission's re-auction of the licenses. See Brief for Petitioners at 56.

This is precisely the kind of "Russian Roulette" *Trinity* found violates due process. The enormous scope of the potential penalty takes this case beyond the usual realm of permissible retroactive application. *Cf. FCC v. Fox Television Stations, Inc.*, 132 S.Ct. 2307 (2012) (finding that a fine of \$1.5 million raises retroactivity concerns). Even if the court finds that Petitioners were on notice that the Commission could reject their claim for a DE credit as a general matter, there is simply no way Petitioners could have predicted that such a decision would trigger a need to raise \$3.4 billion in 30 days, or that they might continue to carry potential liability for billions of dollars for some indeterminate period of time.

¹⁴ The alternative, submission to the Commission of an "irrevocable Letter of Credit" within 30 days for the amount, to be paid within 6 months, and subject to rejection by the Commission triggering default, *see Order* at ¶¶153-55, was even more illusory.

Second, were the Commission to find that SNR and Northstar were not under the *de facto* control of DISH, it would dramatically further the goals of DE program and the intent of Congress under 47 U.S.C. § 309.¹⁵

It was therefore entirely unforeseeable that the Commission would not give Petitioners and DISH the opportunity to revise the relevant contracts – especially after DISH repeatedly indicated its willingness to do so. *Order*, 30 FCC Rcd. 8945, Fn. 431.

As was the case in *Trinity*, the Commission’s refusal to consider any remedy other than denial of the application violated due process. Given the almost unique combination of circumstances of this case, the Commission should, at a minimum, have given the Petitioners the opportunity restructure their agreements. This is not a case where the Petitioners received guidance and chose to ignore the guidance at their peril. *Cf. Star Wireless, LLC v. FCC*, 522 F.3d 469 (D.C. Cir. 2008). Nor is this a case where the Commission’s interpretation is so obviously the “natural” interpretation that Petitioners should have been able to discern their Application would most likely be rejected. *Cf. NetworkIp*, *supra*. Nor is this a case where the Commission can point to prior precedent that would have provided clear guidance,

¹⁵ See discussion of Congress’ stated objectives for the FCC to achieve through spectrum auctions, *supra* Section I A.

making this result “reasonable ascertainable.” *Cf. ICO Global Communications Holdings, Ltd v. FCC*, 428 F.3d 264 (D.C. Cir. 2005).

Rather, this is a case where Petitioners in good faith sought to comply with the Commission’s rules. A “perfect storm” of unpredictable circumstances increased the penalty to Petitioners for guessing wrong to a virtual guarantee of forfeiture in the hundreds of millions of dollars, and billions more in potential liability hanging over their heads for the indefinite future. It is not simply that it would have been better policy for the Commission to allow DISH, SNR and Northstar to attempt to conform their contracts to the Commission’s newly announced standard. By denying the applications, the Commission committed the same violation of due process the court found when the Commission denied the license renewal application in *Trinity*.

Conclusion

The Commission has the right – indeed, the responsibility – to protect the integrity of its rules. As a general matter, this includes a responsibility to ensure that entities do not evade the attribution rules through clever contrivances and corporate shell games. At the same time, as the Court found in *Trinity*, the complexities of the attribution rules can sometimes defy even the reasonable, good faith efforts of those seeking to comply with the rules. When that happens, both

good policy and due process demand that that the Commission avoid draconian penalties that a good faith applicant could not reasonably predict.

Here, it appears that SNR, Northstar and DISH genuinely tried to comply with the attribution rules in good faith. The situation was further aggravated by the unexpected size of the DE credit, raising the risk to DISH and Petitioners beyond anything they could reasonably have anticipated. Furthermore, the Commission had a reasonable alternative to either allowing a violation of its attribution rules to go uncorrected, or effectively imposing a massive forfeiture. The Commission could have allowed DISH and the Petitioners to reconform their agreements to eliminate those terms the Commission identified as creating de facto control. Given how the success of SNR and Northstar furthers the goals of Congress for the auction system, allowing the parties the opportunity to conform their agreements would have been the better policy, as well as the choice consistent with due process.

This does not mean that Commission must give an erring applicant infinite second chances to comply with a Commission's interpretation of its rules. Armed with this new guidance, the parties could not claim a lack of notice if the Commission subsequently rejected the new agreements as well. Nor does a finding that the Commission violated due process by denying the Petitioners request to modify the agreements render the Commission effectively unable to effectively

enforce its rules through adjudication. Rather, the unique facts of this case give rise to unique due process concerns that the Commission should not have ignored.

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Certificate of Compliance

I, Harold Feld, hereby certify that the foregoing brief contains 3,119 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word for Mac 2011 in 14-point Times New Roman.

/s/ Harold Feld
Harold Feld

January 19, 2016