No. 10-834

IN THE
Supreme Court of the United States

COUNCIL TREE INVESTORS, INC., BETHEL NATIVE CORPORATION, AND THE MINORITY MEDIA AND TELECOMMUNICATIONS COUNCIL,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION AND THE UNITED STATES OF AMERICA,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF *AMICUS CURIAE* JOHN B. MULETA IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether a reviewing court has the discretion under Section 706 of the Administrative Procedure Act, 5 U.S.C. § 706, to decline to set aside, or provide any remedy for, unlawful agency action?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Administrative Decisions

Other Authorities

INTEREST OF *AMICUS CURIAE* [1]

John B. Muleta is an attorney licensed in the District of Columbia who is a member of the Supreme Court Bar in good standing. Mr. Muleta served as Chief of the Federal Communications Commission ("FCC" or "Commission") Wireless Telecommunications Bureau from 2003 to 2005 and was responsible for developing a wide variety of wireless and spectrum policies. Mr. Muleta received his undergraduate degree in Systems Engineering at the University of Virginia's School of Engineering and Applied Sciences and his JD/MBA at the University of Virginia's School of Law and the Darden Graduate School of Business Administration.

Mr. Muleta also served at the FCC from 1994 to 1998 as Deputy Chief of the Common Carrier Bureau (now known as the Wireline Bureau), Chief of the Enforcement Division of the Common Carrier Bureau and an attorney-advisor to the FCC's Office of Plans and Policies. Following his most recent service as chief of the Wireless Telecommunications Bureau, Mr. Muleta entered private practice as co-head of the Telecommunications Practice at Venable LLP. In

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[1] Pursuant to Supreme Court Rule 37.2(a), amicus represents that counsel of record for all parties received timely notice of the intent to file this brief and all parties have provided written consent. A letter from the Petitioners reflecting their global consent to the filing of *amicus curiae* briefs is on file with the Clerk of the Court. No counsel for any party has authored this brief in whole or in part, nor has any person or entity, other than amicus and his counsel, made a monetary contribution to the preparation or submission of this brief.

addition to his legal experience, Mr. Muleta has also had a distinguished career in the private sector having worked in various executive capacities at GTE Corporation, Coopers & Lybrand, PSINet Inc., Navisite, Inc. and M2Z Networks, Inc.

For 25 years, Mr. Muleta has been involved in nearly all facets of the telecommunications business and has extensive knowledge and background about the legal, regulatory, operational and financial implications of FCC spectrum auctions. This brief provides a perspective into how a meaningful remedy can and must be provided for the harm caused by the FCC's actions.[2]

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[2] Mr. Muleta wishes to acknowledge the valued assistance of John C. Fuller, Esquire, of Bryn Mawr, Pennsylvania, in the research and preparation of this brief.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

This petition allows the Court to resolve the issue of whether lower courts have the discretion under Section 706 of the Administrative Procedure Act, 5 U.S.C. § 706, to decline mandating a judicial remedy after finding an agency has acted unlawfully. In this case, the United States Court of Appeals for the Third Circuit held that the FCC conducted two important spectrum licensing auctions (Auctions 66 and 73) pursuant to unlawful rules that significantly frustrated the ability of small businesses to meaningfully participate. Despite having set aside the offending rules as unlawfully promulgated and remanding the case to the FCC, the Third Circuit failed to mandate that the agency craft any remedy thereby giving rise to petition supported herein.

Petitioners have made a very strong argument on the express language of Section 706, but the focus of this brief is on the need, under any circumstances, for an effective remedy for unlawful agency action. This brief supports the Petitioners by challenging the reasonableness of the Third Circuit's assertion that mandating the FCC to provide a remedy would be "imprudent and unfair." *Council Tree Comm'ns v. FCC*, 619 F.3d 235, 257 (3d Cir. 2010). If universally applied, the Third Circuit's refusal to call for a remedy would effectively nullify the rights of aggrieved parties that seek judicial protection from unlawful agency actions. Such a result is untenable because it denies petitioners the very thing they seek in coming to the courts. It is also misguided because

the Third Circuit's decision to avoid mandating a remedy is based on policy arguments about the potential disruption of a complex industry – something best left for the expert agency at fault to determine and address in the first instance. The right answer would have been, as has been the practice by other courts, to order that the offending agency use its statutory authority and expertise to craft the proper remedy for the interests it has aggrieved.

There is no denying that the FCC has created a mess by its unlawful actions. But not requiring it to provide a remedy because of the complications that its actions have created establishes a dangerous precedent wherein agencies will try to insulate their unlawfulness by taking actions that are simply too big to remediate. It is the creation of this hazard that merits review of this case.

The Third Circuit's discussion of remedies fails to recognize that unlawful agency action harms not only particular parties, like Petitioners, but more importantly the public interest in general. *See Council Tree Comm'ns,* 619 F.3d 235, 257-8. The FCC's actions likely created unjustified windfalls for the winning licensees by effectively eliminating a statutorily based category of competition for the spectrum. In the context of this great harm to the public interest, the brief examines two possible remedies and how the FCC can effectuate them in ways that are balanced and equitable to the parties involved.

ARGUMENT

I. A Judicial Mandate Is Necessary to Ensure the FCC Rights Its Wrongful Act

This Court has held that an agency can rescind its previous action in order to give effect to the judicial decision invalidating its previous order and that administrative agencies have broad discretion in fashioning remedies especially when an agency is giving effect to a judicial decision. *See United Gas Improvement Co. v. Callery Properties, Inc.*, 382 U.S. 223, 227 (1965). Lower courts have also supported an expansive view of agencies' power to provide remedies. In *Natural Gas Clearinghouse v. FERC,* 965 F.2d 1066 (D.C. Cir. 1992), the D.C. Circuit stated that "[a]n agency, like a court, can undo what is wrongfully done by virtue of its order" and that in the absence of such broad "corrective power, . . . judicial protection might be a virtual nullity." 965 F.2d at 1074-75.

The FCC itself has also previously acknowledged the breadth of its own discretion to fashion novel and unique remedies. *See QUALCOMM, Inc.* 16 F.C.C.R 4042 (2000). The FCC's ability to fashion an appropriate remedy is derived from two separate parts of Section 4 of the Communications Act of 1996, 47 U.S.C. §§ 151 et seq. ("Communications Act"). First, Section 4(i) establishes the general, broad authority for the Commission to "perform *any and all acts*, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions." 47 U.S.C. § 154(i)

(emphasis added). The Commission has previously relied on Section 4(i) of the Communications Act to justify the creation of a remedy for which there was no separate, specific statutory authorization as would be the case here. *See New England Tel. & Tel. Co. v. FCC*, 826 F.2d 1101, 1107 (D.C. Cir. 1987) ("We find this wide-ranging source of authority adequately supports the Commission's remedial action"); *see also N. Am. Telecomm. Ass'n v. FCC*, 772 F.2d 1282, 1292 (7th Cir. 1985) (Section 4(i) "empowers the Commission to deal with the unforeseen – even if that means straying a little way beyond the apparent boundaries of the Act – to the extent necessary to effectively regulate those matters already within the boundaries.").

The "not inconsistent with the Act" provision of Section 4(i) therefore operates as a distant limit to the scope of remedies that the FCC can fashion as the Commission carries out its duties under the Communications Act – including its duties under Section 309 at issue in this case. *See New England Tel. & Tel. Co.*, 826 F.2d at 1107. Second, Section 402(h) specifically authorizes the Commission to "carry out the judgment of the court," and thereby compels the FCC to enforce a reviewing court's judgment. 47 U.S.C. § 402.

Despite the FCC having the power to create a wide range of remedies, the agency is compelled to rectify the harm its actions have caused only by a clear mandate from a reviewing court. In *Qualcomm, Inc. v. FCC*, 181 F.3d 1370 (D.C. Cir 1999), the D.C. Circuit was forced to reiterate to the Commission that it was required under the facts of that case to exercise its broad power to fashion a novel and apt remedy that would amount

to "concrete relief." 181 F.3d at 1376-7. In this case, the absence of such clarity from the Third Circuit rewards the Commission for being derelict in its proper implementation of Section 309(j) of the Communications Act.

II. The Likelihood of an Unjust Windfall and the Stifling of Competition Are Harms that Need to Remedied

In choosing not to impose a remedy, the Third Circuit focused on perceived inequity to the entities that won licenses at Auctions 66 and 73. Specifically, the court cited the "massive uncertainty, waste, and frozen development [that] would occur from the time of the rescission until the re-auction." *Council Tree Comm'ns,* 619 F.3d 235, 257. In addition, the Third Circuit agreed with intervening parties that "the state of the economy and the credit markets has changed dramatically since the auction; consequently, participation by some parties might be impractical or impossible" and would be unfair because it would "require these intervenors to pay sums that they may not have in order to protect investments they have already made, and perhaps cannot recoup without the relevant spectrum licenses." *Id.* at 257-8. The Third Circuit also found little reason to disturb current licensees and their investments because "[t]he record gives no indication that these intervenors and amici, or other winners of Auctions 66 and 73, were

anything but innocent third parties in relation to the FCC's improper rulemaking." *Id.* at 257.[3]

The Third Circuit's concern about possible inequities to the current licensees blithely ignores the fact that these licensees won their spectrum in auctions where the FCC's rules unfairly restrained competition. The very essence of the FCC's Designated Entity ("DE") program in question in this case is to encourage new entry and to entice more competition for the spectrum through the use of bidding credits, eligibility restrictions, low reserve prices and other mechanisms. *See* 47 U.S.C. §§309(j)(3)(B), (4)(D); *see also Council Tree Comm'ns,* 619 F.3d at n.30. It is axiomatic that increasing the number of participants in an auction is likely to increase the value of the goods being sold. Moreover, in the case of spectrum, which is the core and very scarce resource needed for entry into the marketplace for wireless services, anti-trust theory holds that the *mere* potential of new entry increases the value of the licenses because incumbent service providers are likely to place a higher value on the spectrum above and beyond their own operational needs in order to foreclose marketplace competition from developing. *See Ex Parte* Submission of the United States Department of Justice, *Economic Issues in Broadband Competition, A National*

[3] Petitioners note that the Third Circuit's characterization of current licensees as "innocent third parties" is misguided as all auction participants were expressly warned by the FCC about, and therefore assumed, all risk of legal challenges to and consequences of the auctions. *See* Supplemental Brief of Petitioners at 34, *Council Tree Comm'ns v. FCC*, No. 08-2036 (3d Cir. Aug. 11, 2008).

Broadband Plan for Our Future, GN Docket No. 09-51, 7 (Jan. 4, 2010), *available at* http://www.justice.gov/atr/public/comments/253393.htm.[4] The record in the case before this Court demonstrates that the now vacated rules that were in place for Auctions 66 and 73 reduced the number of DE participants in those auctions.[5] Thus, the absence of properly crafted DE rules resulted in less competition for the spectrum and therefore likely created a substantial windfall to the winning bidders. *See Report and Order, Fifth Report and Order, Fourth Memorandum Opinion*

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[4] The Department of Justice discussed the role of market power in spectrum auctions:

> [T]he private value [of spectrum] for incumbents in a given locale includes not only the revenue from use of the spectrum but also any benefits gained by preventing rivals from eroding the incumbents' existing business. The latter might be called the "foreclosure value" as distinct from the "use value." The total private value of spectrum to any given provider is the sum of these two types of value. However, the "forclosure value" does not reflect consumer value; to the contrary, it represents the private value of forestalling entry that threatens to inject additional competition into the market.

Ex Parte Submission of the United States Department of Justice, *Economic Issues in Broadband Competition, A National Broadband Plan for Our Future,* GN Docket No. 09-51, 7 (Jan. 4, 2010), *available at* http://www.justice.gov/atr/public/comments/253393.htm.

[5] The record demonstrates that DEs had a significantly reduced role in Auctions 66 and 73 winning only 4% and 2.6% of the licenses in terms of dollar values, respectively, as compared to 70% in prior auctions. *Council Tree Comm'ns*, 619 F.3d 235, 248.

and Order, and Order, WT Docket 02-55, 19 F.C.C.R. 14969, para. 75-76 (2004).

The Third Circuit's decision to heavily balance the purported inequities in favor of the previous winners without also recognizing the likelihood of a windfall is central to this review. *Council Tree Comm'ns,* 619 F.3d 235, 257-8. The proper view of remedies in this case should not focus on the challenges that they may pose for the beneficiaries of distorted auctions, but rather on whether they can recover any unjust windfall that was created at the expense of the public interest.

III. Possible Remedies that Address the Harm to the Public Interest

The Third Circuit's opinion makes it abundantly clear that its decision to not mandate a remedy for the Petitioners rests primarily on its understanding of *one* particular remedy. *See Council Tree Comm'ns,* 619 F.3d 235, 257-8. That opinion, however, does not fully examine the latitude that the FCC has under the Communications Act to effectuate other remedies that alternatively might be appropriate for the harm its actions caused. In the court's limited view, the only possible remedy is a re-auction of the spectrum that would attempt to put all the *parties back in exactly the same place they were before the start of the auctions.*

The court should have instead focused on the fact that the Commission has the requisite expertise and authority to develop *novel or unique* remedies to address the likelihood that its actions created an unjustified windfall for the incumbent

licensees and limited spectrum opportunities for small businesses and new entrants.[6] Although the continuum of possible remedies for these harms is unknown, the rest of the brief examines how the agency can use its existing authority to fashion two possible remedies that allow for a balancing of competing interests at stake.

A. A "Topping Off" Re-Auction Would Recapture any Unjust Windfall and Could Be an Appropriate Retrospective Remedy

A carefully and equitably crafted re-auction process could claw back any unjust windfall and directly address the harm caused by the FCC auctions.[7] The Commission can do this by

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[6] The Commission itself believes that the Communications Act does not specifically prohibit it from creating novel remedies in the public interest. *See Qualcomm, Inc. v. FCC,* 181 F.3d 1370, 1376 (D.C. Cir. 1999). In developing remedies warranted by the facts of this case, the FCC can avail itself of a great number of tools including bidding credits, eligibility restrictions in future auctions, or even its power to "avoid mutual exclusivity" for licenses at its disposal. 47 U.S.C. § 309(j)(6)(E).

[7] Not only is a re-auction possible but the Commission has done so regularly in order to address policy failures and procedural errors. In 2000, the FCC successfully re-auctioned spectrum that it reclaimed from Nextwave pursuant to its cancellation of those licenses because of Nextwave's failure to make its installment payments. *See FCC v. Nextwave Pers. Comm'ns*, 537 U.S. 293, 296-99 (2003). In other instances, the FCC has conducted re-auctions whenever it has deemed that the auction rules that it promulgated failed to achieve its purposes. In 2002, the FCC auctioned the Lower 700 MHz spectrum using reserve prices that failed to achieve winning bids for a number of

conducting a limited "topping off" auction wherein DEs and the previous winning bidders would be afforded a chance to bid above and beyond the previous auction value of the spectrum licenses. In this particular process, the reserve prices for the re-auctioned spectrum would be set at the price paid for the spectrum in the previous auction plus any direct costs incurred by the previous winners for maintaining the spectrum's viability in the interim. Each incumbent licensee would be provided with bidding credits equal to the reserve price. To directly address the harm caused to DEs by the unlawful agency action and to prevent the likelihood of competitive gamesmanship among market participants, the FCC would promulgate eligibility requirements restricting the bidding for any particular license to DEs and the current licensee. Such a safeguard would ensure that the remedial auction would only provide the opportunity to DEs who were excluded by the Commission's unlawful actions.

To the extent that the reserve price for a particular license is not met, the current licensee

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licenses. *See Revised Inventory and Auction Start Date For Auction of Lower 700 MHz Band Licenses; Comment Sought on Reserve Prices or Minimum Opening Bids and Other Auction Procedures*, 68 Fed. Reg. 6452 (Feb. 7, 2003). The FCC re-auctioned these licenses by changing the auction rules and was able to find a clearing price for all the licenses. Similarly, in 2005 the FCC re-auctioned PCS spectrum left over from the 1994 and 1996 auctions that failed to achieve clearing prices. *See Auction for Broadband PCS Spectrum Scheduled for May 16, 2007; Comment Sought on Competitive Bidding Procedures for Auction No. 71*, 71 Fed. Reg. 69125 (Nov. 29, 2006).

would keep its license; should bids be higher than the reserve, winning bidders would be issued their license when they have paid the existing licensee the reserve price and the United States Treasury the net between the reserve and the winning bid amount. As was the case in all of its previous auctions, the FCC would also establish a deadline for the transfer of the spectrum and encourage the new and previous licensees to enter into private negotiations and contracts to facilitate an earlier transition on their own accord and based on their respective circumstances. *See Ass'n Pub.-Safety Comm'ns Officials-Int'l v. FCC*, 76 F.3d 395 (D.C. Cir 1996).

This type of re-auction is similar to and contains key elements of past FCC auctions which have reallocated spectrum between parties and between different uses. Because the auction is designed only to test whether there would be any "topping-off" bids for each license, it would address the problem that the licenses might have been sold at less than market value because the FCC unlawfully limited competition.[8]

[8] The FCC has previously used its statutory authority to craft an anti-windfall mechanism designed to capture, in the public interest, the windfall that might result from its spectrum allcocation process. *See Report and Order, Fifth Report and Order, Fourth Memorandum Opinion and Order, and Order,* WT Docket 02-55, 19 F.C.C.R. 14969, para. 75-76 (2004).

B. Use of Auction Discount Vouchers Would Encourage Competition for Spectrum and Could Be an Appropriate Prospective Remedy

If, as the FCC contends, it is not practical to look backwards, an alternative remedy would be to look forward and ensure that small businesses are guaranteed meaningful access to future spectrum auctions. The FCC's use of Auction Discount Vouchers ("ADVs"), which are bidding credits that can be redeemed at future auctions, is a precedent for this approach. Although a forward looking remedy such as an ADV does not address the fundamental inequities of the FCC's actions in Auctions 66 and 73, it is a tool that the FCC has relied on in the past. In 2002, in an analogous case, the FCC resolved litigation with Qualcomm by granting Qualcomm a transferable ADV in the amount of over $125 million that had to be used in any spectrum auction over a three year period. *See QUALCOMM, Inc.*, 16 F.C.C.R. 4042 (2000).[9] As in the instant case, the FCC's use of ADVs allowed the agency to fulfill its statutory obligation to encourage new competition for spectrum while providing an equitable remedy to the aggrieved petitioner without necessarily affecting the

[9] Qualcomm was able to use its ADVs to aggregate licenses from various auctions to create a new class of wireless services underscoring the value of the ADVs. *See* Qualcomm, Inc., Press Release, *Qualcomm Subsidiary to Support Nationwide Delivery of Mobile Multimedia in 700 MHz Spectrum* (Nov. 1, 2004), *available at* http://www.qualcomm.es/news/releases/2004/041101_mediaflo_700mhz_print.html.

immediate rights of the parties that obtained licenses in the interim. *Id.*

In the instant case, the use of ADVs may prove to be the most practical remedy since the FCC has recently indicated that large amounts of spectrum will be auctioned over the next decade. In order to meet growing demand for wireless broadband services the FCC and the Obama Administration have called for 500 megahertz of spectrum to be made available for mobile, fixed and unlicensed broadband use over the next 10 years. *See* Federal Communications Commission, *Connecting America: The National Broadband Plan* (Mar. 16, 2010), *available at* http://download.broadband.gov/plan/national-broadband-plan.pdf; *see also* Presidential Memorandum on Unleashing the Wireless Broadband Revolution, 75 Fed. Reg. 38387 (July 1, 2010).

CONCLUSION

The Third Circuit's failure to order the FCC to provide a remedy for its unlawful actions creates a dangerous and morally hazardous legal precedent whereby agencies are indemnified from the cost of their unlawful actions by doing things that are simply too big to undo. Remedial actions to be taken by the FCC for recalibrating the opportunity cost of the spectrum that was unlawfully auctioned in Auctions 66 and 73 including those outlined in this brief will be complicated by the passage of time, the number of licenses issued, and the sums of monies involved. Those complications in no way lessen the imperative for the Third Circuit to have mandated an effective remedy. For the foregoing

reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

January 26, 2011

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