

No. 20-410

In the Supreme Court of the United States

NTCH, INC., PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

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

**BRIEF FOR THE FEDERAL RESPONDENTS
IN OPPOSITION**

THOMAS M. JOHNSON, JR.
General Counsel
ASHLEY S. BOIZELLE
Deputy General Counsel
JACOB M. LEWIS
Associate General Counsel
RACHEL PROCTOR MAY
Counsel
Federal Communications
Commission
Washington, D.C. 20554

JEFFREY B. WALL
Acting Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTIONS PRESENTED

1. Whether this Court should consider, in the first instance, petitioner's claims concerning the Federal Communications Commission's grant of a waiver to a third party, where the court of appeals remanded the claims to the Commission so that it could consider them on the merits.

2. Whether the Commission acted arbitrarily and capriciously in denying, on procedural grounds, petitioner's application to review an earlier radio spectrum auction.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-26) is reported at 950 F.3d 871. The orders of the Federal Communications Commission (Pet. App. 28-37, 38-44) are reported at 33 FCC Rcd 8446 and 33 FCC Rcd 8456 respectively.

JURISDICTION

The judgment of the court of appeals was entered on February 21, 2020. A petition for rehearing was denied on April 28, 2020 (Pet. App. 70). The petition for a writ of certiorari was filed on September 23, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case concerns two orders issued by the Federal Communications Commission (FCC or Commission)

with respect to licenses to use the radio spectrum. See Pet. App. 28-37; *id.* at 38-44. The court of appeals vacated one of the orders and remanded the matter to the Commission for further proceedings, but denied the petition to review the other order. *Id.* at 1-26.

1. Congress has authorized the Commission to award licenses to use the radio spectrum. See 47 U.S.C. 307, 309. This case involves two adjacent bands of that spectrum: the H Block and the AWS-4 Band. See Pet. App. 3.

In 2012, Congress directed the FCC to use an auction to award licenses in the H Block. Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96, § 6401(b), 126 Stat. 222 (47 U.S.C. 1451(b)). Congress empowered the Commission to set rules for the auction, and it required the agency to “seek to promote,” among other objectives, “recovery for the public of a portion of the value of the public spectrum resource made available.” 47 U.S.C. 309(j)(3)(C). Congress also authorized the Commission to set a “reasonable reserve price” for the auction—*i.e.*, a price below which a sale would not be made. 47 U.S.C. 309(j)(4)(F).

In 2013, the Commission sought public comment on whether to establish a reserve price for the H Block auction, and in particular on whether to set the reserve price based “on the aggregate of the gross bids for the H Block licenses, rather than license-by-license.” Pet. App. 9 (citation omitted). Respondent DISH Network Corp. (Dish) filed a letter proposing a specific aggregate reserve price. *Ibid.* Other commenters generally agreed with the Commission’s proposal to set an aggregate reserve price, but none of them proposed a specific

figure. *Ibid.* In September 2013, the FCC set an aggregate reserve price that was consistent with Dish's proposal. *Id.* at 10.

Separately, in 2012, Dish acquired licenses to use the AWS-4 Band. See Pet. App. 5, 38. The licenses were initially subject to certain technical restrictions designed to promote productive use of the spectrum. *Id.* at 7-8. Dish petitioned the Commission for a waiver of those restrictions. *Id.* at 9. In its petition, Dish committed to bid the aggregate reserve price in the upcoming H Block auction if the agency granted the waivers. *Id.* at 10.

In December 2013, the FCC granted the waiver petition, subject both to the conditions that Dish had proposed and to certain additional requirements. Pet. App. 45-68. The Commission observed that, under its regulations, it could grant a waiver if the applicant showed "good cause"—more specifically, if the applicant showed that "special circumstances warrant a deviation from the general rule" and that "such deviation will serve the public interest." *Id.* at 50 (citations omitted); see 47 C.F.R. 1.3, 1.925(b)(3). The agency found that Dish had satisfied that standard here because the application of the general rules to Dish would be "unduly burdensome" and "contrary to the public interest." Pet. App. 52.

2. Petitioner NTCH, Inc., competes with Dish. Pet. App. 3. Petitioner has alleged that the Commission and Dish entered into a "backroom deal" involving a "cash-for-waiver quid pro quo," with the Commission waiving restrictions on Dish's AWS-4 Band licenses in exchange for a purportedly secret commitment to bid in the H Block auction. *Id.* at 10 (citation omitted).

Petitioner first registered its objection in a public comment on Dish's petition for a waiver. Pet. App. 10. The Commission rejected its argument. *Id.* at 66. The agency explained that the terms and conditions of Dish's waiver were available in the "public record," and that "[a]ll interested parties, including [petitioner], have had an opportunity to review these terms and commitments and to comment on whether the Commission should grant the [waiver] on these terms." *Ibid.* The FCC also explained that it had addressed Dish's proposal based on its "independent evaluation" of the propriety of the waiver, not on the basis of any alleged backroom deal. *Id.* at 67. The Commission further explained that it "d[id] not find it inappropriate to consider [Dish's] commitment" to bid the reserve price in the H Block auction. *Ibid.* The agency stated that it had "traditionally evaluate[d] requests for waiver of the Commission's rules using a public interest calculus," and that "the fact that [Dish] has undertaken to ensure that the [H Block] auction successfully meets the reserve price * * * is an additional public interest benefit to be considered in connection with evaluation of its waiver request." *Ibid.*

Petitioner raised the same objection in a petition for reconsideration of the auction procedures. See Pet. App. 10. The Commission again rejected the argument, explaining that "any 'arrangement' was already disclosed because Dish's waiver petition was filed in a public docket where interested parties could submit comments." *Id.* at 10-11.

On the day that bidding in the spectrum auction began, petitioner renewed its objection in an application for review of the agency's grant of Dish's waiver petition. Pet. App. 12. In the first of the two orders at issue

here (the “waiver order”), the FCC denied that application. *Id.* at 38-44. The Commission determined that petitioner lacked administrative standing—*i.e.*, that it was not an “aggrieved” person entitled to file an application for review, 47 U.S.C. 155(c)(4)—because it had failed to show that the grant of the waiver to Dish had caused it any concrete injury. Pet. App. 43. Having rejected the application for review on that threshold ground, the Commission stated that it “need not address the merits of [petitioner’s] challenge” to the grant of the waiver. *Id.* at 44.

Petitioner also renewed its objection in a separate application for review of the auction. See Pet. App. 12. In the second of the orders at issue here (the “auction order”), the FCC denied that application as well. *Id.* at 28-37. The agency first stated that the application did not “meet the procedural requirements” set out in the applicable regulations. *Id.* at 28. In particular, the FCC observed that, under its regulations, an application must “specify with particularity, from among [five listed factors], the factor(s) which warrant Commission consideration of the questions presented.” *Id.* at 32 (quoting 47 C.F.R. 1.115(b)(2)) (brackets in original). The agency determined that the application here did not satisfy that requirement because it contained only “[v]ague statements asserting error.” *Id.* at 33. As an “independent and alternative basis” for its decision, the Commission also rejected petitioner’s challenges to the auction procedures “on their merits.” *Ibid.* It observed that Congress had expressly empowered it to set a reserve price, and that the agency had set that price for the H Block auction after considering public comments and balancing “a variety of public interests and objectives.” *Id.* at 34.

3. The court of appeals vacated the waiver order and remanded for further consideration by the agency, but the court denied the petition to review the auction order. Pet. App. 1-26.

The court of appeals rejected the Commission's conclusion that petitioner lacked administrative standing to challenge the grant of a waiver to Dish. Pet. App. 22-23. In the court's view, petitioner had alleged that the waiver "skew[ed] the auction in Dish's favor," and petitioner's claim that it had been denied "a fair and valid auction process" stated "a cognizable injury." *Id.* at 23 (citation omitted). The court explained, however, that "because the Commission never reached the merits of [petitioner's] challenge to the waiver," the court would not do so either. *Ibid.* The court instead remanded the matter to the agency so that it could consider the merits of petitioner's challenge in the first instance. *Ibid.*

Turning to the auction order, the court upheld the FCC's determination that petitioner's application for review of that order was procedurally deficient. Pet. App. 24-26. The court explained that the Commission had established procedural rules for applications for review, and that the agency had not acted arbitrarily and capriciously by concluding that petitioner's application violated those rules. *Id.* at 24-25. The court found it unnecessary to reach the Commission's alternative determination that the application failed on the merits. *Id.* at 25-26.

ARGUMENT

Petitioner renews (Pet. 15-19) its challenges to the FCC's waiver and auction orders. The court of appeals vacated the waiver order and remanded petitioner's claims for further consideration by the Commission. To

the extent the petition for a writ of certiorari seeks further review with respect to that order, it invites this Court to consider issues that neither the agency nor the court of appeals has yet decided—a course that the Court ordinarily eschews. The court of appeals correctly denied the petition to review the auction order, and its ruling does not conflict with any decision of this Court or another court of appeals. Further review is not warranted.

1. Petitioner challenges (Pet. 15-17) the waiver order. In that order, the FCC denied the application for review on the ground that petitioner lacked administrative standing, and it expressly declined to reach the merits of petitioner’s claims. Pet. App. 44. The court of appeals vacated the Commission’s decision on administrative standing, and it remanded petitioner’s claims to allow the agency to consider them on the merits. *Id.* at 23. Although neither the Commission nor the court of appeals has yet considered the merits of petitioner’s challenges to the waiver order, petitioner urges this Court (Pet. 15-17) to grant review and to address the merits in the first instance.

The interlocutory posture of the petition for a writ of certiorari “alone furnishe[s] sufficient ground for the denial of the application.” *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916); see, e.g., *National Football League v. Ninth Inning, Inc.*, No. 19-1098, 2020 WL 6385695, at *1 (Nov. 2, 2020) (statement of Kavanaugh, J., respecting the denial of certiorari); *Guedes v. ATF*, 140 S. Ct. 789, 791 (2020) (statement of Gorsuch, J.); *Abbott v. Veasey*, 137 S. Ct. 612, 613 (2017) (statement of Roberts, C.J., respecting the denial of certiorari). If petitioner prevails before the Commission on remand, or before the court of appeals

on review of the Commission's remand decision, this Court's intervention may prove unnecessary. If petitioner does not prevail, it will have the opportunity to press both its present claims and any additional claims that arise on remand in a single petition for a writ of certiorari. See *Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504, 508 & n.1 (2001) (per curiam).

In any event, this Court is “a court of review, not of first view”; it ordinarily does not address issues that “were not addressed by the Court of Appeals.” *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005). And when a reviewing court concludes that an Executive Branch agency has improperly failed to address a particular issue, the court is “not generally empowered to conduct a *de novo* inquiry into the matter being reviewed and to reach its own conclusions.” *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985). Rather, “the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation.” *Ibid.* Petitioner identifies no sound reason for the Court to depart from those principles and to decide the merits of its challenges to the waiver order before either the court of appeals or the agency has considered them.

2. Petitioner also challenges (Pet. 17-19) the Commission's auction order. That challenge likewise does not warrant this Court's review.

It is a “basic tenet of administrative law” that agencies are “free to fashion their own rules of procedure.” *Perez v. Mortgage Bankers Ass'n*, 575 U.S. 92, 102 (2015) (citation omitted). The FCC has exercised that authority to promulgate procedural requirements for applications for review, including a requirement that the application “specify with particularity” the basis for

the application. 47 C.F.R. 1.115(b)(2). In this case, the Commission determined that petitioner's application violated that requirement because it contained only "[v]ague statements" and "fail[ed] to specifically identify" the basis for review. Pet. App. 32-33. The court of appeals correctly sustained that determination, holding that the agency's application of its procedural rule to this case was not arbitrary and capricious. *Id.* at 24-26.

Petitioner contends (Pet. 17) that, in assessing whether the Commission's procedural ruling was arbitrary and capricious, the court of appeals should have exhibited "skepticism" rather than "deference," in light of what petitioner calls the "unusual facts of this case." That argument lacks merit.

The Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.*, "sets forth the full extent of judicial authority to review executive action for procedural correctness." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 513 (2009). Although the APA allows a court to set aside arbitrary and capricious agency action, that standard is "narrow" and "deferential." *Department of Commerce v. New York*, 139 S. Ct. 2551, 2569 (2019) (citation omitted). Petitioner identifies nothing in the APA's text or in this Court's decisions that suggests that a court should apply a more demanding version of that standard simply because a case involves "unusual facts." Pet. 17; see, *e.g.*, *Fox*, 556 U.S. at 514 (rejecting the application of a "heightened standard" or "more searching review" for particular forms of agency action).

Petitioner also argues (Pet. 18-19) that it complied with the FCC's procedural rule. The Commission explained, however, that while its procedural rules required specificity, petitioner's application offered only

“[v]ague statements.” Pet. App. 33. For example, the application “fail[ed] to specifically identify any statute, regulation, case precedent, or established Commission policy (or any evidence of record)” supporting petitioner’s claims. *Id.* at 32. The application also “fail[ed] to specifically identify any concrete harm or prejudice [petitioner] may have suffered.” *Id.* at 33. The court of appeals found “the Commission’s decision reasonable,” *id.* at 25—which is all the arbitrary-and-capricious standard requires.

Petitioner does not argue that the court of appeals’ decision with respect to the auction order conflicts with any decision of this Court or another court of appeals. It instead asserts (Pet. 15, 17) that the court reached the wrong decision in this “unique case” on its “unusual facts.” Those factbound contentions do not warrant further review. See Sup. Ct. R. 10 (“A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.”); *United States v. Johnston*, 268 U.S. 220, 227 (1925) (“We do not grant a certiorari to review evidence and discuss specific facts.”).

3. A further reason to deny the petition for a writ of certiorari is that it rests on an inaccurate description of the facts. See Sup. Ct. R. 15.2 (“In addition to presenting other arguments for denying the petition, the brief in opposition should address any perceived misstatement of fact * * * in the petition that bears on what issues properly would be before the Court if certiorari were granted.”). For example, petitioner repeatedly states that the Commission bargained with Dish “secretly” (Pet. 2, 15, 16), that the agency accepted “under-the-table” payments (Pet. 15, 16), and that it tried to

conceal its agreement with Dish (Pet. 9-12). In fact, the terms of Dish's proposed waiver were set out in "the public record," and "[a]ll interested parties, including [petitioner], have had an opportunity to review these terms and commitments and to comment on whether the Commission should grant the [waiver] on these terms." Pet. App. 66; see *id.* at 67 ("[W]e reject [petitioner's] assertions that [Dish's] proposal and our consideration of it have not been transparent to the public."). Indeed, petitioner actually filed timely comments urging the FCC to deny Dish's petition for waiver. See *id.* at 10, 66.

Petitioner also asserts (Pet. 19) that, in the auction order, the FCC invoked "a minor procedural technicality" as a "mere pretext to get rid of a troublesome issue for the agency." In fact, the Commission not only rejected the application on procedural grounds, but also determined, "as an independent and alternative basis for [its] decision," that the challenges to the auction would fail "even if * * * considered on their merits." Pet. App. 33.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THOMAS M. JOHNSON, JR.
General Counsel

ASHLEY S. BOIZELLE
Deputy General Counsel

JACOB M. LEWIS
Associate General Counsel

RACHEL PROCTOR MAY
Counsel
Federal Communications
Commission

JEFFREY B. WALL
Acting Solicitor General

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