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

NO. 07-1190

STAR WIRELESS, LLC,

PETITIONER,

v.

FEDERAL COMMUNICATIONS COMMISSION
AND THE UNITED STATES OF AMERICA

RESPONDENTS.

ON PETITION FOR REVIEW OF AN ORDER OF THE
FEDERAL COMMUNICATIONS COMMISSION

THOMAS O. BARNETT
ASSISTANT ATTORNEY GENERAL

ROBERT B. NICHOLSON
ROBERT J. WIGGERS
ATTORNEYS

UNITED STATES
DEPARTMENT OF JUSTICE
WASHINGTON, D.C. 20530

MATTHEW B. BERRY
ACTING GENERAL COUNSEL

JOSEPH R. PALMORE
DEPUTY GENERAL COUNSEL

DANIEL M. ARMSTRONG
ASSOCIATE GENERAL COUNSEL

LAUREL R. BERGOLD
COUNSEL

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554
(202) 418-1740

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GLOSSARY

FCRA	Fair Credit Reporting Act
MHz	megahertz
NAL	notice of apparent liability
Northeast	Northeast Communications of Wisconsin
NPI	Noverr Publishing, Inc.
PCS	Personal Communications Service
RSA	Rural Service Area

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BRIEF FOR RESPONDENTS

STATEMENT OF ISSUES PRESENTED

The Commission in the order on review assessed a monetary forfeiture on petitioner Star Wireless ("Star") for violating the anti-collusion rule, which protects the integrity of spectrum auctions by prohibiting certain collusive communications between entities that have applied to participate in an auction. Specifically, Star and Northeast Communications of Wisconsin ("Northeast") discussed Northeast's interest in certain licenses (which Star then bid on and won at auction) at a time when both were applicants for those licenses. The Commission concluded that this conduct violated the anti-collusion rule notwithstanding that at the time of the conversations Northeast had not made a required payment qualifying it to continue its

participation in the auction. In the Matter of Star Wireless, LLC and Northeast Communications of Wisconsin, Inc., 22 FCC Rcd 8943 (2007) ("Order") (J.A.). The issues on review are as follows:

1. Whether Star has waived the argument that the Commission failed to give adequate notice that it interpreted the anti-collusion rule to apply to all applicants, including those that have become ineligible to bid in the auction, by failing to raise that argument before the Commission; and if not, whether the agency provided fair notice of that interpretation?

2. Whether the Commission acted reasonably in enforcing the plain text of the anti-collusion rule against Star under the circumstances of this case?

3. Whether Star failed to preserve for judicial review its claim that the Commission lacked authority to assess a forfeiture because Star's conduct allegedly was not "willful" under section 503(b)(1) of the Communications Act; and, if not, whether it was reasonable for the agency to conclude that Star's conduct was willful?

STATUTES AND REGULATIONS

Pertinent statutes and regulations that are not reproduced in petitioner's brief are attached in an addendum to this brief.

COUNTERSTATEMENT OF THE CASE

I. Background

A. Statutory And Regulatory Background

The Commission has authority under the Communications Act to grant licenses to applicants seeking to use the electromagnetic spectrum. 47 U.S.C. §§ 301, 308-09. When the Commission receives license applications that are mutually exclusive, i.e., multiple applications

for the same frequency in the same area, section 309(j) of the Act empowers the Commission to choose among the competing applicants by use of a competitive bidding process. 47 U.S.C. § 309(j)(1). See 47 C.F.R. § 1.2102(a).

The Commission has adopted rules governing auction procedure intended to protect the integrity of the competitive bidding process. Section 1.2105(a) requires parties seeking a license awarded at auction to file a short-form application on a date specified by public notice and delineates specific information and certifications that the short-form application must contain. 47 C.F.R. §§ 1.2105(a)(1), 1.2105(a)(2). The application, for example, must include information concerning the identity of the applicant and an exhibit "identifying all parties with whom the applicant has entered into . . . agreements, arrangements or understandings of any kind relating to the licenses being auctioned." 47 C.F.R. § 1.2105(a)(2)(ii)(B)(viii). Among the required certifications is a representation that the applicant "has not entered and will not enter into any explicit or implicit agreements, arrangements or understandings of any kind" with parties not listed in that exhibit "regarding the amount of their bids, bidding strategies or the particular licenses on which they will or will not bid." 47 C.F.R. § 1.2105(a)(2)(ii)(B)(ix); see also 47 C.F.R. § 1.2105(b)(1) (application without these certifications "is unacceptable for filing and cannot be corrected subsequent to the applicable filing deadline").

The anti-collusion rule at issue in this case, section 1.2105(c), prohibits "all applicants for licenses in any of the same geographic license areas" that are not members of a bidding consortium identified in their short-form applications from "cooperating or collaborating with respect to, discussing with each other, or disclosing to each other in any manner the substance of their own, or each other's or any other competing applicants' bids or bidding strategies, or discussing or negotiating settlement agreements, until after the down payment deadline." 47

C.F.R. § 1.2105(c). If any applicant makes or receives a communication prohibited by section 1.2105(c), that applicant is required to report that communication to the Commission within five business days of its occurrence. 47 C.F.R. § 1.2105(c)(6). For purposes of the anti-collusion rule, the term "applicant" "include[s] all controlling interests in the entity submitting a short-form application to participate in an auction." 47 C.F.R. § 1.2105(c)(7)(1).

Another rule, section 1.2106, authorizes the Commission to require an applicant for a license subject to competitive bidding to submit an "upfront payment," which will be credited toward the down payment for the license if the applicant is the high bidder. 47 C.F.R. § 1.2106(a), (d). If the applicant does not submit an upfront payment, "it will be ineligible to bid [and] its application will be dismissed." 47 C.F.R. § 1.2106(c).

After the auction, the high bidder for each license submits a down payment and files an additional application, called a long-form application. 47 C.F.R. § 1.2107. The Commission grants that application if it determines that the winning bidder is qualified to be a licensee and the applicant submits the balance of its winning bid in a timely manner. 47 C.F.R. § 1.2108(d), 1.209(a).

B. Auction 44

On March 20, 2002, the Commission issued a public notice announcing the procedures for Auction 44, an auction for licenses in the 698-746 MHz ("Lower 700 MHz") band.[1] The Commission divided this spectrum into specific geographic licenses and announced that it would conduct a "simultaneous multiple round auction" over the Internet.[2] Under this procedure,

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[1] Public Notice," "Auction of Licenses in the 698-748 MHz Band Scheduled for June 19, 2002," 17 FCC Rcd 4935 (2002) ("March 20 Public Notice"). That spectrum is suitable for both wireless service and certain broadcast operations. Id. at 4938.

[2] March 20 Public Notice, 17 FCC Rcd at 4951.

participants in the auction place bids in successive rounds until no new bids are submitted. The Commission required interested persons to submit a short-form application by May 8, 2002 and established a deadline for upfront payments in late May.[3]

The public notice contained an explicit reminder that "Commission rules prohibit applicants for the same geographic license area from communicating with each other during the auction about bids, bidding strategies or settlements . . . begin[ning] at the short-form application filing deadline and end[ing] at the down payment deadline after the auction." 17 FCC Rcd at 4944. The public notice contained a list of orders in which the Commission or its staff had addressed the application of the anti-collusion rule, including orders that declared explicitly that the anti-collusion rule applies to persons that filed a short-form application but were ineligible to bid.[4] One of those orders was Robert Pettit, in which the staff "clarifi[ed]" that the anti-collusion rule applies to "auction applicants . . . that failed to submit upfront payments and therefore never became qualified to bid."[5]

The Commission received 153 short-form applications for Auction 44, including applications by Star and Northeast.[6] In its application, Star stated its intention to bid for all 740

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[3] Id.; Public Notice, "Auction of Licenses for 6980746 MHz Band," 17 FCC Rcd 9415 (2002) ("May 24 Public Notice").

[4] March 20 Public Notice, 17 FCC Rcd at 5006, Att. G, citing Robert Pettit, 17 FCC Rcd 10080 (Indus. Anal. Div., WTB, 2000) & Mark Grady, 11 FCC Rcd 10895, 10896 (Indus. Anal. Div., WTB, 1996).

[5] See Robert Pettit, 17 FCC Rcd at 10080. In Mark Grady, 11 FCC Rcd at 10896, another order cited in the March 20 Public Notice, the staff declared that "[e]ven when an applicant has withdrawn its application during the course of the auction, the applicant may not enter into a bidding agreement with another applicant bidding on the geographic license areas from which the first applicant withdrew."

[6] May 24 Public Notice, 17 FCC Rcd at 9415.

available licenses and designated David G. Behenna as its authorized bidder.[7] Star represented in its application that it had not entered into any agreements, arrangements or understandings with any third party regarding its Auction 44 bidding activity or post-auction structure.[8]

In its short-form application, Northeast — a company that holds Personal Communications Service ("PCS"), cellular and cable television authorizations in Wisconsin, Iowa and Minnesota[9] — expressed its intention to bid on 734 licenses available in Auction 44 — all licenses for which Star had also stated its intention to bid — and listed Patrick D. Riordan, Northeast's president, as one of its authorized bidders.[10] Northeast in its application stated that it had entered into only two joint bidding arrangements: one with Central Wisconsin Communications, Inc., West Wisconsin Telecom Cooperative, Inc. and Chequamegon Telephone Cooperative, Inc. and another with Alpine Communications.[11] Northeast affirmatively represented that it would not discuss its bidding strategies with any other applicants for any licenses listed in its short-form application.[12]

On May 24, 2002, the Commission, after reviewing all the short-form applications "for completeness and compliance" with its rules, "accepted for filing" the applications of Northeast and 71 other parties.[13] The Commission found that the remaining 81 applications, including

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[7] In re Application of Star Wireless, LLC, 18 FCC Rcd 17648, 17652 (¶ 8) (Enf. Bur. 2003) ("NAL") (J.A.).

[8] NAL, 18 FCC Rcd at 17652 (¶ 8) (J.A.).

[9] Id. at 17652 (¶ 9) (J.A.).

[10] Id.

[11] Id.

[12] Id. at 17653 (¶ 9).

[13] May 24 Public Notice, 17 FCC Rcd at 9415 & App. A, at 9422-32. Northeast is listed as one of the 72 parties that submitted an acceptable application. 17 FCC Rcd at 9427.

Star's, were incomplete and gave the entities submitting those applications an additional week to correct the indicated deficiencies.[14] The Commission reiterated that "auction applicants who have applied for licenses in any of the same geographic areas, and who are also applicants for licenses in the same or competing services must affirmatively avoid all discussions with each other that affect, or in their reasonable assessment have the potential to affect their bidding or bidding strategy."[15] The Commission emphasized that this requirement "will end on the post-auction down payment deadline. . . ."[16]

Star timely corrected its application and submitted an upfront payment.[17] On June 7, 2002, the Commission by public notice identified 128 applicants, including Star, that were qualified to bid in Auction 44.[18] Northeast did not submit an upfront payment due to "limited availability of funds,"[19] and thus was listed among the "applicants that submitted [short-form] applications but [were not] qualif[ied] to bid."[20] The Commission in that public notice again reminded applicants of the requirements of the anti-collusion rule and reiterated that those strictures applied until the post-auction down payment deadline.[21]

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[14] Id., App. B, at 9434-42.

[15] 17 FCC Rcd at 9418.

[16] Id.

[17] See NAL, 18 FCC Rcd at 17653 (¶ 10) (J.A.)

[18] Public Notice, "Auction of Licenses for 698-746 MHz Band," 17 FCC Rcd 10700 (2002) ("June 7 Public Notice").

[19] Letter from Patrick D. Riordan, President, Northeast, to Maureen F. Del Duca, Chief, Investigation and Hearings Division, Enforcement Bureau (July 18, 2003) at 5 (J.A.).

[20] June 7 Public Notice, 17 FCC Rcd at 10700.

[21] Id. at 10705-06.

On June 26, 2002, as a result of newly enacted legislation, the Commission issued a public notice revising the schedule, inventory and procedures for Auction 44 and allowing participants to withdraw from the auction.[22] The Commission in that public notice stated that "[a]ll parties that submitted short-form applications to participate in Auction 44, including *but not limited to qualified bidders*, are reminded that they remain subject to the Commission's anti-collusion rule until the post-auction down payment deadline."[23]

The Commission in a subsequent public notice issued a revised list of 125 qualified bidders that included Star.[24] In that public notice, the Commission again reminded "[a]ll parties that submitted short-form applications to participate in Auction 44, including *but not limited to qualified bidders*" that they were subject to the anti-collusion rule until the post-auction down payment deadline.[25]

The auction commenced on August 27, 2002.[26] During the first two days of the auction, Star bid only on licenses in San Jose and Oxnard, California and in Tampa-St. Petersburg, Florida. On August 28, 2002, Mr. Behenna of Star left Mr. Riordan of Northeast a voice message, requesting Mr. Riordan to call back if Northeast was not participating in the auction. Mr. Riordan returned the call the next morning at 9:18 a.m. Mr. Behenna asked Mr. Riordan whether Northeast was interested in any of the markets in the auction. Mr. Riordan replied that

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[22] Public Notice, "Revised Schedule, License Inventory, And Procedures Auction No. 44," 17 FCC Rcd 1935 (2002) ("June 26 Public Notice").

[23] Id. at 11936 (emphasis added) (J.A.).

[24] Public Notice, "Revised Qualified Bidder Notification Auction No. 44," 17 FCC Rcd 15543 (2002) ("August 7 Public Notice").

[25] Id. at 15549 (emphasis added).

[26] NAL, 18 FCC Rcd at 17654 (¶ 14) (J.A.).

Northeast was interested in four or five Wisconsin markets, including Green Bay, Appleton, Wausau, and Wisconsin RSA No.10.[27]

One half-hour after that conversation, Star began to bid actively for licenses in the specific Wisconsin markets identified by Mr. Riordan and ceased bidding for licenses in California and Florida. On August 29, Star placed bids for licenses in Appleton, Green Bay and Wausau, Wisconsin. On August 30, it placed bids for licenses in Wausau, Wisconsin (Marinette) and Wisconsin 10 (Door). On September 3, it placed bids for licenses in Wausau and Appleton. On September 4 and 5, it bid for licenses in Wisconsin 10 (Door) and Green Bay.[28] At the same time, it also placed a bid for a license in Cedar Rapids, Iowa — a license located in a state in which Northeast's affiliates (but not Star's affiliates) had existing telecommunications operations. [29]

The auction ended on September 18.[30] Star was the high bidder for licenses in four geographic areas: Green Bay, Wisconsin, 4 (Marinette), Wisconsin 10 (Door) and Cedar Rapids, Iowa.[31]

II. Commission Proceedings.

On September 6, 2002, Star informed the Commission of the communications in late August between Mr. Behenna and Mr. Riordan.[32] Star stated that it was filing that letter in

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[27] Id. at 17653 (¶ 14) (J.A.). RSA refers to Rural Service Area, a type of geographic area used by the Commission for licensing certain wireless services.

[28] Id.

[29] Id. at 17653, 17656 (¶¶ 14, 19) & Att. B (J.A.).

[30] Public Notice, "In re Lower 700 MHz Band Auction Closes Winning Bidders Announced," 17 FCC Rcd 17272 (2002).

[31] NAL, 18 FCC Rcd at 17654-15 (¶ 15) (J.A.).

[32] Letter from E. Ashton Johnston and Paul W. Jamieson, Counsel for Star, to Marlene H. Dortch, Secretary, FCC (Sept. 6, 2002) (J.A.) ("Notification Letter").

compliance with its obligation under section 1.2105(c)(1) to report to the Commission any communications that an applicant "believe[s] could be interpreted to run afoul" of the anti-collusion rule. Id. at 3 (J.A.). According to Star, Mr. Behenna at the time of the August 2002 communications believed that section 1.2105(c) did not proscribe communications between a qualified bidder and an applicant ineligible to participate in an auction. Star admitted to the Commission, however, that Mr. Behenna's belief was "mistaken."[33]

After conducting an investigation of the communications between Mr. Behenna and Mr. Riordan on August 28th and 29th, the Commission's Enforcement Bureau issued a Notice of Apparent Liability in 2003 against Star for violation of the anti-collusion rule. NAL, 18 FCC Rcd 17648 (J.A.). After considering Star's opposition, the Bureau adhered to its conclusion that Star had violated the rule and imposed a $100,000 forfeiture.[34]

Star sought Commission review of the Forfeiture Order.[35] Star argued that it had not violated section 1.2105(c) because Northeast never became an "applicant" to Auction 44; that the application of section 1.2105(c) in this case does not effectuate the original intent and public policy considerations underlying the rule; and that Star did not violate the rule repeatedly. Star

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[33] Notification Letter at 2 (J.A.). Star argued in that letter, however, that the particular conversation between Messrs. Behenna and Riordan did not violate the anti-collusion rule because of its content (rather than the identity of the parties). Id. at 3-4 (J.A.). Star subsequently modified its interpretation as to the scope of the anti-collusion rule. In September 2003, Star told the Commission that it was "questionable" whether Northeast was an auction applicant. Letter from Mark Tauber & Paul Jamieson, Counsel, Star, to Maureen F. Del Duca, Chief, Investigations and Hearings Division, Enforcement Bureau, FCC (Sept. 26, 2003) at 2 ("Response") (J.A.). In October 2004, Star asserted that Northeast never became an applicant. Application for Review filed by Star (Oct. 22, 2004) at 7-10 (J.A.).

[34] In re Application of Star Wireless, LLC, 19 FCC Rcd 18626 (2004) ("Forfeiture Order") (J.A.). The Enforcement Bureau issued a similar forfeiture order against Northeast. See In re Northeast Communications of Wisconsin, Inc., 19 FCC Rcd 18635 (Enf. Bur. 2004) (J.A.) ("Northeast Forfeiture Order").

[35] Application for Review (J.A.).

also argued that the Enforcement Bureau failed to give sufficient weight to mitigating factors in determining the amount of forfeiture. Star did not argue that it lacked sufficient notice that the anti-collusion rule applied to applicants that were ineligible to bid or that its actions were not "willful" under section 503(b).

In the Order on review, the Commission granted in part and denied in part the application for review. The Commission affirmed the staff's determination that Star was liable for a monetary forfeiture for violating section 1.2105(c), but reduced the forfeiture to $75,000 in light of Star's past history of compliance with Commission rules. Order, 22 FCC Rcd 8943 (J.A.).[36]

The Commission affirmed the staff determination that Northeast was an applicant to Auction 44 when the contacts between Mr. Behenna and Mr. Riordan took place in late August 2002. Id. at ¶¶ 6-9 (J.A.). The Commission explained that Northeast's timely submission of a short-form application gave it the status of an "applicant" as defined in section 1.2105 and the public notices regarding Auction 44. Id. at 8946 (¶ 6) (J.A.). The Commission pointed out that neither the Commission's rules nor its public notices "condition the term 'applicant' upon the outcome of the Commission's review of submitted applications or its receipt of an upfront payment." Id.

The Commission also found unpersuasive the claim that an entity that submits a short-form application is not an applicant if it subsequently is deemed unqualified to bid in the auction. The Commission explained that "applicants who submit a completed short form application and the required upfront payment are applicants qualified to bid in the auction," whereas "those

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[36] The Commission in its Order also ruled upon Northeast's petition for reconsideration of the Northeast Forfeiture Order. The Commission reduced Northeast's fine to $75,000, and denied its petition for reconsideration in all other respects. Order at ¶ 1(J.A.).

whose applications are not accepted and/or who do not submit the upfront payment are applicants that failed to qualify to bid." Id. at ¶ 8 (J.A.).

The Commission rejected the argument that Northeast's application was dismissed automatically and immediately when it did not submit an upfront payment, thus rendering it a non-applicant. While recognizing that section 1.2106(c) states that applications of entities not submitting upfront payments "will be dismissed,"[37] the Commission pointed out that the regulatory language "indicates future, not immediate or automatic, action" and it "does not circumscribe the definition of applicant for purposes of the anti-collusion rule." Id. at ¶ 7 (J.A.).

The Commission considered, and rejected, Star's claim that the application of the anti-collusion rule to communications between a bidder and a person submitting a short-form application ineligible to bid is inconsistent with the original intent and public policy considerations underlying the rule. The Commission concluded that Star's reading of the rule to apply only to active auction bidders was unduly narrow and also refuted by Commission precedent. Id. at ¶ 16 (J.A.). While the anti-collusion rule originally contained the term "bidder," the Commission explained that it subsequently had "clarified its intent and the anti-collusion rule's language by substituting the term 'applicant' for the term 'bidder.'" Id., citing Implementation of Section 309(j) of the Communications Act, 9 FCC Rcd 7684, 7687 (1994).

The Commission pointed out that its construction of the anti-collusion rule broadly to include all persons timely submitting a short-form application serves the regulatory purpose of "'protect[ing] the integrity and robustness of [the] competitive bidding process.'" Id. at ¶ 16,

[37] 47 C.F.R. § 1.2106(c).

quoting Implementation of Section 309(j) of the Communications Act, 9 FCC Rcd at 7687 (J.A.). Specifically, the construction serves the valid governmental interest in preventing an applicant ineligible to bid from secretly influencing a bidding applicant to obtain licenses the ineligible applicant desires. Id. at ¶ 19 (J.A.). The Commission found it reasonable to presume that the bidding applicant would secure licenses desired by the non-bidder "with an expectation that it would be rewarded by the non-bidder." Id. It concluded that this type of surreptitious and collusive conduct is "unfair to other applicants and clearly undermines the integrity and success of the Commission's auctions." Id.

STANDARD OF REVIEW

Star bears a high burden to establish that the Order on review is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). "Under this 'highly deferential standard of review,' the court presumes the validity of agency action." Cellco Partnership v. FCC, 357 F.3d 88, 93 (D.C. Cir. 2004), quoting Davis v. Latschar, 202 F.3d 359, 365 (D.C. Cir. 2000). The Court must affirm unless the Commission failed to consider relevant factors or made a clear error in judgment.[38]

The Court applies a "highly deferential standard" in reviewing the Commission's interpretation of its own rules.[39] The agency's interpretation of its regulations "is entitled to 'controlling weight unless it is plainly erroneous or inconsistent with the regulation.'" Ballard v. Commissioner of Internal Revenue, 544 U.S. 40, 70 (2005), quoting Bowles v. Seminole Rock &

[38] E.g., Motor Vehicle Manufacturers Association of the United States, Inc. v. State Farm Mutual Automobile Insurance Co., 463 U.S. 29, 43 (1983).

[39] MCI Worldcom Network Services, Inc. v. FCC, 274 F.3d 542, 547 (D.C. Cir. 2001).

Sand Co., 325 U.S. 410, 414, (1945).[40] "'[E]ven where the petitioner advances a more plausible reading of the regulations than that offered by the agency, it is the agency's choice that receives substantial deference." Trinity Broadcasting of Florida, Inc. v. FCC, 211 F.3d 618, 625 (D.C. Cir. 2000), quoting General Electric Co. v. EPA, 53 F.3d 1324, 1327 (D.C. Cir. 1995).

Before assessing a forfeiture against a regulated entity for violating a rule, the Commission must provide that entity with "adequate notice of the substance of the rule." PMD Produce Brokerage Corp. v. USDA, 234 F.3d 48, 52 (D.C. Cir. 2000), quoting Satellite Broadcasting Co. v. FCC, 824 F.2d 1, 3 (D.C. Cir. 1987). In evaluating whether the Commission gave adequate notice of its interpretation of the anti-collusion rule, the Court considers "whether 'by reviewing the regulation[] and other public statements issued by the agency, a regulated party acting in good faith would be able to identify, with ascertainable certainty, the standards with which the agency expects parties to conform. . . ." Trinity Broadcasting, 211 F.3d at 628, quoting General Electric Co. v. EPA, 53 F.3d at 1329. See SBC Communications, Inc. v. FCC, 373 F.3d 140, 147 (D.C. Cir. 2004).

The Court reviews the Commission's interpretation of section 503(b) of the Communications Act in accordance with the standard of review articulated in Chevron USA Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984). Under Chevron, the Court "employ[s] traditional tools of statutory construction" to determine "whether Congress has directly spoken to the precise question at issue." Id. at 843 n.9, 842. If so, "the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." Id. at 842-43. Where "the statute is silent or ambiguous with respect to the specific issue, the question for the

[40] See National Ass'n of Home Builders v. Defenders of Wildlife, 127 S.Ct. 2518, 2537-38 (2007).

court is whether the agency's answer is based on a permissible construction of the statute." Id.. at 843. Under those circumstances, "the task that confronts [the Court] is to decide, not whether the [agency's approach] represents the best interpretation of the statute, but whether it represents a reasonable one." Atlantic Mutual Insurance Co. v. Commissioner of Internal Revenue, 523 U.S. 382, 389 (1998).

SUMMARY OF ARGUMENT

I.A. Star has waived the argument that the Commission failed to give fair notice that Star's communications with Northeast violated the anti-collusion rule. Although the notice issue is the lead argument in the company's brief, Star failed to raise that issue before the agency at any point in the administrative proceedings and thus it is not properly before the Court on review.

I.B. In any event, Star is wrong in claiming that the Commission failed to provide fair notice that the anti-collusion rule applied to conversations between applicants without regard to whether the conversing applicants were eligible to bid in an auction. The Commission provided clear notice that all applicants, even those ineligible to bid, were subject to the rule, and did so through a combination of the regulatory language, a clarifying rule amendment, administrative rulings and multiple public notices, two of which were explicit on the precise point at issue here.

The anti-collusion rule, by its plain language, applies to "applicants" for licenses in any of the same geographic areas "until after the down payment deadline." 47 C.F.R. § 1.2105(c). And the term "applicant" is defined in the anti-collusion rule to include not only the filer of a short-form application but also a person holding a controlling or attributable interest in "the entity submitting a short-form application." Id. Since the upfront payment rule requires a person both to file a short-form application and to submit an appropriate upfront payment to qualify to

bid in an auction, the language of the Commission's rules distinguishes between applicants, i.e., those submitting a short-form application, and those applicants that become qualified bidders. Moreover, the Commission in a 1994 rule amendment eliminated any ambiguity in the text of the anti-collusion rule by making clear that it covered "applicant[s]" and not just "bidder[s]."

The Commission and its staff gave further notice of the rule interpretation through a number of interpretive rulings, including Robert Pettit, a case in which the staff applied the anti-collusion rule to the very circumstances of this case, i.e., to an applicant ineligible to bid because it had failed to submit the appropriate upfront payment. The agency also issued multiple public notices that informed participants that "applicants" were subject to the anti-collusion rule until the post-auction down payment deadline. Two such notices reminded auction participants that the rule applied to all applicants, and explicitly noted that this class included applicants that are not qualified to bid.

Moreover, Star itself admitted to the Commission within days of the communications between it and Northeast that the anti-collusion rule applied despite Northeast's ineligibility to bid in the auction. Star's actual knowledge of the proper scope of the rule undermines its claim that the Commission failed to give fair notice that it interpreted the rule to apply to applicants not qualified to bid.

II. There is no merit to Star's claim that it was arbitrary for the Commission to enforce the anti-collusion rule against Star in the circumstances of this case. The anti-collusion rule is a reasonable prophylactic measure that protects the integrity of the auctions process in a manner that is easily administered and that gives clear notice to applicants about what conduct is prohibited. Bright-line prophylactic rules need not be promulgated with exacting precision and the possibility that such rules might be over-inclusive does not affect their validity.

In any event, the purpose of the anti-collusion rule, i.e., to protect the integrity of the auction process, clearly is served by application of the rule to Star in the circumstances of this case. By engaging in secret communications with Northeast, Star obtained an unfair advantage over other bidders by obtaining exclusive access about potential post-auction demand. At the same time, Northeast effectively was able to circumvent the Commission's auction rules and policies even though it had been disqualified.

Star is wrong in claiming that the application of the rule in this case was arbitrary because Northeast was in the same position as an entity that did not submit a short-form application. Unlike a non-applicant, Northeast filed an application to participate in the auction and thus subjected itself to the obligations that flow from that decision. Moreover, by its very submission of a short-form application, Northeast publicly declared its interest in securing the licenses listed in its application, thereby making it reasonable for the Commission to ensure that it did not obtain those licenses through collusive conduct. In contrast, a non-applicant, by electing not to file a short-form application, affirmatively has indicated that it lacks interest in the licenses. Because the non-applicant is unlikely to engage in collusive conduct, it is reasonable for the Commission to exclude non-applicants from the scope of the anti-collusion rule.

Even if Star were correct in claiming that Northeast was similarly situated to a non-applicant, the application of the rule in this case would not be arbitrary. Agencies have discretion to proceed one step at a time, and the absence of more comprehensive regulations does not establish that the rules the agency has enacted are unreasonable.

III.A. Star did not contest in the administrative proceedings below the staff's finding that its violation of the anti-collusion rule was willful within the meaning of section 503(b)(1). The

staff's determination that Star's conduct was willful therefore has become final, and the issue is not properly before the Court on review.

B. If the Court addresses the "willfulness" issue, it should find that the staff reasonably determined that Star's conduct was willful within the meaning of section 503(b)(1). The term "willful" has a number of different meanings and the staff reasonably interpreted the term in section 503(b)(1) to signify a deliberate commission of an act without regard to the actor's intent to violate the law. The staff's construction accords with the interpretation of "willful" that had consistently been applied by the Commission to section 503(b)(1) forfeiture cases for 44 years. That construction is supported by the legislative history of section 503(b)(1) and was ratified by Congress in 1982.

IV. The Court should not consider whether the Commission correctly determined that Star's violation of the anti-collusion rule was "repeated." The Commission's finding of liability was solely based upon its determination that Star willfully violated the anti-collusion rule. Moreover, because Star failed to challenge the staff's determination that its actions were willful in an application for review, that staff determination has become final. Because the Commission has authority under section 503(b)(1) to assess a forfeiture for rule violations that either are willful or repeated, the agency's final determination as to willfulness is sufficient itself to establish the Commission's authority to issue the forfeiture.

ARGUMENT

I. STAR'S CLAIM THAT THE FCC'S INTERPRETATION OF ITS ANTI-COLLUSION RULE WAS NOT "ASCERTAINABLY CERTAIN" IS NOT PROPERLY BEFORE THE COURT AND OTHERWISE LACKS MERIT.

Star's lead argument — that it was denied "due process" because it had insufficient notice that its conversations with Northeast violated the anti-collusion rule (Star Brief at 16) – is both waived and meritless. Star did not argue before the Commission that its due process right to notice was violated, and it therefore may not do so before this Court. In any event, this claim crumbles under the weight of the many Commission statements making clear that the anti-collusion rule covers communications with all those who apply to participate in an auction and holds until the auction is over. Indeed, Star's claimed lack of notice is undercut by its own admission to the Commission just after its communications with Northeast that the anti-collusion rule covered Northeast at the time and that the contrary view (which it now espouses) was "mistaken."[41]

A. Star Has Waived The Argument That The FCC Did Not Give Adequate Notice That The Anti-Collusion Rule Applied To Communications With Applicants That Are Ineligible To Bid In An Auction.

Star now claims that imposition of a forfeiture violates due process in this case because it lacked adequate notice that its conduct was prohibited, but it did not raise that claim before the Commission and therefore may not do so now. As the Supreme Court has stated, "courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice." Woodford v. Ngo, 126 S.Ct. 2378, 2385 (2006), quoting United States v. L.A. Tucker Truck Lines, 344 U.S. 33, 37

[41] Notification Letter at 2 (J.A.).

(1952). Under the Commission's practice, Star was required first to raise any challenge to the Enforcement Bureau's tentative finding of liability in its response to the NAL and then any challenge to the Forfeiture Order in its application for review to the Commission.[42] Here, it did not raise its notice claim in either context.. Star's failure to raise the notice claim before the agency "constitutes a waiver" that precludes Star from presenting the notice issue on judicial review. See Rogers Radio Communications Services v. FCC, 751 F.2d at 418 n.14.[43]

B. The Commission Gave Star Clear Notice Of Its Reasonable Construction Of The Anti-Collusion Rule Through The Rule's Language, The Clarifying Rule Amendment, Administrative Rulings, And The Auction Public Notices.

In any event, Star had ample notice of the Commission's interpretation of the rule that Star violated. As the Commission explained, the "most reasonable interpretation of the anti-collusion rule" is that the regulation applies to all persons that have "timely submitted a short-form auction application." Order at n.30 (J.A.). With certain exceptions not relevant here, the anti-collusion rule by its express terms applies to "all applicants for licenses in any of the same

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[42] 47 U.S.C. § 155(c)(5) (a party must first raise the issue to the staff in order to preserve that argument for consideration by the Commission in an application for review); Rogers Radio Communications Services v. FCC, 751 F.2d 408, 418 n.14 (1985) (a party must first present the issue to the Commission in an application for review to preserve that argument for consideration by the Court).

[43] We note that for purposes of section 405, 47 U.S.C. § 405, this Court has entertained an argument on appeal where it found that the Commission had been afforded an "opportunity to pass" on the argument without requiring that the petitioner itself had raised the issue below. See, e.g., Office of Communication of the United Church of Christ v. FCC, 465 F.2d 519 (D.C. Cir. 1972). In the Order before the Court, the Commission rejected an argument, raised by Northeast but not Star, that sufficient notice of the applicability of the anti-collusion rule to the Star/Northeast communications had not been given. As argued above, we believe that Star has waived its right to argue the notice issue on its appeal and we do not read United Church of Christ as foreclosing a waiver argument in the circumstances of this case, where a party to a forfeiture failed to raise a claim in response to the NAL or in its application for review.

geographic license areas." 47 C.F.R. § 1.2105(c) (emphasis added). The Commission's rules define an applicant to include not only the filer of a short-form application but also all controlling and attributable interests in "the entity submitting a short-form application." 47 C.F.R. § 1.2105(c)(7)(i).[44] Thus, under the Commission's rules, an applicant is a person that files (or has controlling or attributable interests in one who files) a short-form application. See Order at ¶¶ 6-8, & n.28 (J.A.). And applicants, by the explicit regulatory language, are subject to the anti-collusion rule "until after the down payment deadline." 47 C.F.R. § 1.2105(c)(1).

Under the Commission's rules, not all applicants become qualified to bid in the auction, but they nevertheless remain applicants. To become eligible to bid, a person both "must timely submit a short-form application" and must "submit an appropriate upfront payment set forth by Public Notice." 47 C.F.R. § 1.2105(a). Applicants "whose applications are not accepted and/or who do not submit the upfront payment are applicants that failed to qualify to bid in the auction." Order at ¶ 8 (J.A.). Thus, Northeast became an applicant under section 1.2105(c) by virtue of its timely submission of a short-form application, but was ineligible to bid because it failed to

[44] See Mark Grady, 11 FCC Rcd at 10896 ("For purposes of the Commission's anti-collusion rule, the term applicant includes the entity submitting the application, owners of 5 percent or more of the entity, and all officers and directors of the entity.").

submit an upfront payment as required by section 1.2105(a). See Order at ¶¶ 6-8 (J.A.); Forfeiture Order at ¶¶ 4-6 (J.A.).[45]

As shown above, the "plain language of the anti-collusion rule itself" provides ample notice that the rule applied to all auction applicants,[46] including unqualified bidders such as Northeast. The text of the rule, however, was not the only means by which the Commission informed auction applicants of the scope of the anti-collusion rule.[47]

Indeed, a prior administrative ruling was directly on point. In Robert Pettit, 17 FCC Rcd at 10080, the Commission's staff concluded that the anti-collusion rule applied to Noverr Publishing, Inc. ("NPI"), an entity controlling a filer of a short-form application that had failed to submit the required upfront payment. The staff determined that NPI was an "applicant" "subject to the anti-collusion rule even though it [was] not a bidder in the auction" because the company it controlled had filed a short-form application. Id.[48] Despite the similarity of Robert Pettit to

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[45] In SBC Communications, Inc. v. FCC, 373 F.3d at 151-52, this Court affirmed a $6 million forfeiture against SBC Communications for violations of a merger condition appended to a Commission order, on the basis of a finding that the plain language of the merger condition — without more — gave SBC fair notice of its obligation to provide shared transport services to its competitors. 373 F.3d at 147. In this case, there is equally plain language in the anti-collusion rule. Yet, as described below, there is much more beyond the plain text of the rule: a clarifying rule amendment, administrative rulings, and numerous public notices. On this record, the Court could easily conclude that Star received greater notice of the Commission's interpretation of the relevant rule than did the forfeiture recipient in SBC Communications. As in SBC Communications, the Court should reject Star's "vigorous attempts to create ambiguity" in the anti-collusion rule. 373 F.3d at 147

[46] Order at ¶ 14 (J.A.).

[47] See, e.g., PMD Produce Brokerage Corp. v. USDA, 234 F.3d at 53 (agency "may utilize means other than the language of [the rule] to give adequate notice of [its] interpretation.").

[48] Robert Pettit, and other orders issued by the staff under delegated authority, have "the same force and effect . . . as other actions of the Commission." 47 U.S.C. § 155(c)(3).

the facts of this case, Star in its brief fails to mention Robert Pettit, let alone explain how that ruling failed to provide clear notice of the agency's interpretation of the anti-collusion rule.

Moreover, beyond the plain language of the rule and a precedent directly on point, the Commission provided further notice through a clarifying rule amendment and other administrative rulings.

- Section 1.2105(c)(1), as initially promulgated, barred "bidders" from cooperating, collaborating, discussing, or disclosing the substance of their bids or bidding strategies, whereas the exceptions to that rule codified in §§ 1.2105(c)(2) and 1.201(c)(3) referred to auction applicants. Implementation of Section 309(j) of Communications Act, 9 FCC Rcd at 7687 (¶ 8). To eliminate the confusion resulting from the simultaneous use of the disparate terms "bidders" and "applicants" in section 1.2105, the Commission in a 1994 rulemaking proceeding "clarified its intent and the anti-collusion rule's language by substituting the term 'applicant' for the term 'bidder.'" Order at ¶ 16 (J.A.). Implementation of Section 309(j) of the Communications Act, 9 FCC Rcd at 7687 (¶ 8).
- The Commission and its staff also have declared that an applicant is subject to the anti-collusion rule even after it has withdrawn its auction application. Implementation of Section 309(j) of the Communications Act, 9 FCC Rcd 6858, 6867 (¶ 51) (1994). See John Reardon, 13 FCC Rcd 17877 (Auc. & Indus. Anal. Div., WTB, 1998) ("submitted applications, once the short-form deadline passes, trigger application of the anti-collusion rule even if they are later withdrawn."); Mark Grady, 11 FCC Rcd at 10896 (anti-collusion rule applies to an applicant even after it has "withdrawn its application during the course of the auction.").

The Commission also gave specific notice to the applicants of Auction 44 itself that the anti-collusion rule applied to all persons timely filing a short-form application, including those ineligible to bid. In a series of public notices, the Commission declared that the anti-collusion rule applies to all auction "applicants" from the deadline for filing short-form applications until the post-auction down payment deadline:

- On March 20, 2002, a public notice reminded those interested in the auction that "Commission rules prohibit applicants for the same geographic license area from communicating with each other during the auction about bids, bidding strategies or settlements . . . begin[ning] at the short-form application filing deadline and end[ing] at the down payment deadline after the auction." [49]
- On May 24, 2002, the Commission issued another public notice, this one with a list of agency cases elucidating the scope and application of the anti-collusion rule.[50] That list included citations to Robert Pettit, and other cases in which the agency interpreted the anti-collusion rule to apply to applicants ineligible to bid in the auction.[51]
- Shortly before the auction commenced, the Commission in two separate public notices expressly reminded "[a]ll parties that submitted short-form applications to participate in Auction 44, including but not limited to qualified bidders, . . . , that they remain subject to the Commission's anti-collusion rule until the post-auction

[49] March 20 Public Notice, 17 FCC Rcd at 4944 (emphasis added); see also June 7 Public Notice, 17 FCC Rcd at 10705-06.

[50] May 24 Public Notice, 17 FCC Rcd at 5006, Att. G.

[51] Id. See Forfeiture Order at n.9 (J.A.).

> down payment deadline."[52] Those two statements by themselves gave applicants to Auction 44 explicit and unambiguous notice that the failure of an applicant to become a qualified bidder does not alter the applicability of the anti-collusion rule to that applicant.[53]

The Commission's extensive and varied efforts to make known its interpretation of the anti-collusion rule were successful in reaching Star. Shortly after the communications between Messrs. Behenna and Riordan took place, Star informed the Commission of those communications and acknowledged that they "could be interpreted to run afoul" of the anti-collusion rule.[54] In that disclosure filing, Star itself interpreted the anti-collusion rule to apply to auction applicants not qualified to bid.[55] Had Star truly lacked notice that communications with an applicant subsequently determined to be ineligible to bid were subject to the anti-collusion rule, it would not have filed a mandatory disclosure statement pursuant to section 1.2105(c)(1) or have acknowledged that the anti-collusion rule, as properly interpreted, extended to applicants

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[52] June 26 Public Notice, 17 FCC Rcd at 11936 (emphasis added); August 7 Public Notice, 17 FCC Rcd at 15549 (emphasis added).

[53] Star acknowledges that the Commission gave fair notice of its rule interpretation in an upcoming auction when it declared that the anti-collusion rule "applies to all applicants regardless of whether such applicants become qualified bidders or actually bid." Star Brief at 15 n.79, quoting Auction of 700 MHz Band Licenses Scheduled For January 24, 2008, 22 FCC Rcd 18141, 18149 (¶ 16) (2007). Star fails to explain, however, how that statement differs in substance from the Commission's repeated reminders in Auction No. 44 that the anti-collusion rule applies to applicants, "including but not limited to qualified bidders." June 26 Public Notice, 17 FCC Rcd at 11936; August 7 Public Notice, 17 FCC Rcd at 15549. If the Commission's 2007 statement provides fair notice of the scope of the anti-collusion rule, as Star maintains, the substantively identical statements in 2002 also provided adequate notice.

[54] Notification Letter at 3 (J.A.)

[55] See Notification Letter at 2 (characterizing as "mistaken" an interpretation that the "anti-collusion rules allowed communications with an entity that had filed a short-form application but was later deemed not qualified to participate in an auction") (J.A.).

ineligible to participate in the auction. Thus, Star's own statements and actions in this very case are powerful evidence that the Commission in fact gave fair notice.[56]

C. Star's Attempt To Create Ambiguity In The Anti-Collusion Rule By Resort To The Upfront Payment Rule Fails.

Star claims that the Commission's construction of the anti-collusion rule was not ascertainably certain because "[t]here is another 'reasonable interpretation' of the rule,"[57] i.e., an interpretation that effectively construes the term "applicant" in section 1.2105(c) to mean "qualified bidder." Star does not argue that its interpretation has any support in the language of section 1.2105(c), in its regulatory history, or in the agency's interpretative rulings. Instead, it argues that its construction is necessary to avoid a conflict with the upfront payment rule. That rule states in part that "[i]f the applicant does not submit at least the minimum upfront payment, it will be ineligible to bid, [and] its application will be dismissed." 47 C.F.R. § 1.2106(c).

As this Court has long recognized, statutory and regulatory provisions, "whenever possible, should be construed so as to be consistent with each other."[58] In accordance with that principle, the Commission reasonably found no conflict between the dismissal provision in the upfront payment rule and the anti-collusion rule's application to all applicants "until after the down payment deadline." 47 C.F.R. § 1.2105(c). As the Commission pointed out, both

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[56] In Fabi Construction Co. Inc. v. Secretary of Labor, No. 06-1244, (decided Nov. 27, 2007), the Court held that an agency failed to give fair notice of its rule interpretation by announcing that interpretation "for the first time in the context of [an] adjudication." Slip op. at 10. In this case, by contrast, the Commission gave repeated and explicit notice of its rule interpretation before it enforced the rule against Star.

[57] Star Brief at 17.

[58] McGarry v. Secretary of the Treasury, 853 F.2d 981 (D.C. Cir. 1988), quoting Citizens to Save Spencer County v. EPA, 600 F.2d 844, 879 (D.C. Cir. 1979). See Order at n.28 (J.A.).

regulations "refer to those submitting a short-form application as 'applicants' even though the applicants may not have made an upfront payment." Order at n.28 (J.A.). And although section 1.2106(c) states that an application of a person that fails to submit a required upfront payment "will be dismissed," 47 C.F.R. § 1.2106(c) (emphasis added), that regulatory language "indicates future, not immediate or automatic action." Order at ¶ 7 (J.A.). Because the agency had not dismissed Northeast's application, Northeast's application "remained pending" at the time the prohibited communications took place. Forfeiture Order at ¶ 5 (J.A.).

Star acknowledges that the Commission's construction of the upfront payment rule is reasonable. Star Brief at 19. Star contends, however, that it also is reasonable to construe that rule and Commission precedent to effectuate an automatic and immediate dismissal of Northeast's application, i.e., that Northeast ceased to be an applicant subject to the anti-collusion rule at the moment it failed to submit the required upfront payment. Star is wrong. Its interpretation conflicts with the holding in Robert Pettit that the anti-collusion rule applies to applicants that are ineligible to bid in an auction because they failed to submit an upfront payment. It is inconsistent with the Commission's explicit declarations in Auction 44 that all filers of short-form applications, "including but not limited to qualified bidders," are subject to the anti-collusion rule until the post-auction down payment deadline.[59] It is irreconcilable with the clarifying 1994 amendment that replaced the term "bidder" with the word "applicant" in the anti-collusion rule itself.[60] And it clashes with the plain language of the anti-collusion rule,

[59] June 26 Public Notice, 17 FCC Rcd at 11936; August 7 Public Notice, 17 FCC Rcd at 15549.

[60] Implementation of Section 309(j) of the Communications Act, 9 FCC Rcd at 7687 (¶ 8). See Order at ¶ 16 (J.A.).

which states expressly that the regulation applies to all entities submitting a short-form application "until after the down payment deadline." 47 C.F.R. § 1.2105(c).

Star argues that the "[t]he lack of any formal dismissal order makes clear that at the time of [the prohibited communications]," the FCC in practice viewed the Northeast application as having being dismissed "automatically." Star Brief at 20. Star has it backwards. The absence of "any formal dismissal order"[61] between May 24 (the date the Commission formally accepted Northeast's application for filing[62]) and the date the prohibited conversations took place is evidence that Northeast's application had not been dismissed. Forfeiture Order at ¶ 5 (J.A.). But in any event, under the Commission's interpretation of the rule, once an entity files a short-form application, that entity is subject to the anti-collusion rule until the down payment deadline irrespective of the subsequent disposition of that application. 47 U.S.C. § 1.2105(c). See Order, at ¶ 8 (J.A.).[63] A failed applicant remains an applicant.

In an attempt to establish that the Commission failed to give fair notice of its rule interpretation, Star argues that the Commission's public notices in Auction 44 and its other public pronouncements advance inconsistent and contradictory interpretations of the anti-collusion rule. Star Brief at 23-27. That argument lacks merit. As shown above, the Commission's consistent position has been that all persons that have "submitted short-form applications, including but not limited to qualified bidders" are applicants subject to the anti-

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[61] Star Brief at 20.

[62] May 24 Public Notice, 17 FCC Rcd at 9415 & App. A.

[63] See Implementation of Section 309(j) of the Communications Act, 9 FCC Rcd at 6867 (¶ 51) (1994) (anti-collusion rule applies even after an application is withdrawn). See also John Reardon, 13 FCC Rcd 17877; Mark Grady, 11 FCC Rcd at 10896.

collusion rule.[64] The Commission's accurate observation in some documents that specific subsets of applicants (e.g., applicants qualified to bid) are subject to the regulation is consistent with the agency's established rule interpretation. To demonstrate that the agency has rendered inconsistent or contradictory constructions of the anti-collusion rule, Star would have to point to Commission orders holding, for example, that the rule was limited to qualified bidders only or that the rule was inapplicable to applicants ineligible to bid. Star has not purported to cite any such orders, and there are none.[65]

II. THE COMMISSION ACTED REASONABLY IN APPLYING THE ANTI-COLLUSION RULE AGAINST STAR.

As demonstrated above, Star's communications with Northeast were clearly prohibited by the anti-collusion rule, as shown by its plain text and by the Commission's consistent and longstanding interpretation of it. Star nonetheless argues that enforcement of the rule against it was arbitrary because its "purpose" was not served in this case. This argument fails for several reasons. First, agencies are permitted and encouraged to issue and enforce prophylactic rules that establish bright lines for regulated entities. If such rules were not enforceable as written, there would be no point in issuing them. Second, enforcement of the anti-collusion rule in this case furthers a number of important regulatory objectives. For example, it prevents one participant in the auction from obtaining an unfair advantage over other bidders by obtaining

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[64] June 26 Public Notice, 17 FCC Rcd at 11936; August 7 Public Notice, 17 FCC Rcd at 15549.

[65] Star erroneously argues that the Commission's statement in one public notice that "competing applicants" are subject to the anti-collusion rule conflicts with the Commission's rule interpretation in this case. See Star Brief at 24. The Commission uses the phrase "competing applicant" to denote a person that files a short-form application for licenses in the same geographic area as another applicant. Thus, "Northeast became a 'competing applicant' with Star [Wireless] when it submitted a short-form application specifying its intent to bid on the same markets chosen by Star." Order at ¶ 9 (J.A.).

exclusive access to secret information. It also ensures that entities that apply to participate in an auction but that are excluded as unqualified by the agency do not circumvent that exclusion by collusively participating with another entity.

As Star acknowledges, the anti-collusion rule "is a prophylactic measure."[66] By their very nature, such rules reflect "a judgment" about "the probability of abuse" and a conclusion that "it is more efficient to prevent the opportunity for abuse from arising than it is to try to detect actual incidents of abuse."[67] Prophylactic rules "need not [be] promulgate[d]" with "exacting precision," and their "potential over-inclusiveness does not . . . affect [their] validity."[68] A conclusion that prophylactic rules can be applicable to "those, and only those, who are in the factual position which generated the concern" behind the rule would effectively "ban all prophylactic provisions" and therefore must be rejected.[69]

The Commission has explained that bright-line prophylactic rules are especially important in the auction context, both to protect the integrity of the auctions and to provide clear notice to applicants about what conduct is prohibited. "To prevent and detect collusion, . . . it is important to have clearly stated rules concerning the entities with whom communication about bidding strategies is permissible."[70] It was reasonable for the Commission to apply this

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[66] Star Brief at 30.

[67] Biloxi Regional Med. Ctr. v. Bowen, 835 F.2d 345, 350 (D.C. Cir. 1987); see also Weinberger v. Salfi, 422 U.S. 749, 776 (1975) ("prophylactic rules" are "a widely accepted response to legitimate interests in administrative economy" even though they "doubtless prove[] in particular cases to be 'under-inclusive' or 'over-inclusive,' in light of [their] presumed purpose[s]").

[68] Biloxi Regional Med. Ctr. v. Bowen, 835 F.2d at 350.

[69] Weinberger v. Salfi, 422 U.S. at 777.

[70] Implementation of Section 309(j), 9 FCC Rcd at 7254 (¶ 50).

prohibition to all who apply to participate in an auction; that is a bright-line rule that is easy to administer and follow. It also avoids the need for case-by-case determinations of whether particular entities that had applied were still participating in the auction and, as explained below, prevents circumvention of auction qualification requirements.

In any event, the purpose behind the anti-collusion rule — "to protect the integrity and robustness of [the Commission's] competitive bidding process"[71] — is clearly served by its application to Star in this case. By engaging in communications of a type within the scope of the anti-collusion rule, Star secured an unfair advantage over those bidders in Auction 44 that complied with the Commission's rules. In particular, Star was able to obtain "exclusive access to information concerning Northeast's interest in particular licenses that was unavailable to other auction participants bidding on the Wisconsin and Iowa markets in question." Order at n.59, quoting NAL at ¶ 20. Star then was able to place bids in Auction 44 not only armed with secret knowledge about "potential post-auction demand," id., but also, if it were the high bidder, with the "expectation that it would be rewarded by the non-bidder for obtaining the licenses." Id. at ¶ 19 (J.A.).[72] Star did all of this without disclosing its relationship with Northeast and notwithstanding its prior representation to the Commission that it had disclosed all those entities with whom it had "arrangements or understandings of any kind relating to the licenses being

[71] Order at ¶ 16 (J.A.).

[72] Star argues that the Commission arbitrarily applied the anti-collusion rule against it because "an entity committing a prohibited act must be able to influence the market price" and Northeast lacked the capability. Star Brief at 30. Star, however, challenges the lawfulness of its own forfeiture, not the forfeiture assessed on Northeast. And Star, as a qualified bidder, unquestionably did have the capacity to influence the market price.

auctioned" and that it would "not enter into any explicit or implicit agreements, arrangements or understandings of any kind with any parties" other than those it had previously identified.[73]

Moreover, as a result of its secret communications with Star, "in effect, Northeast was able to participate in the auction from which it had been disqualified and to do so without providing notice to other applicants that might wish to compete against it." NAL at ¶ 20 (J.A.). Northeast was not qualified to participate in the auction because it had failed to make the upfront payment. Applicants can also be disqualified for failure to "correct defects in their applications" identified by Commission staff after submission.[74] Exempting applicants who are disqualified from participation in an auction (as Star advocates) would allow those disqualified applicants to secretly participate nonetheless. That would undermine the upfront payment rule, as well as the Commission's other requirements for short-form applicants. The enforcement of the anti-collusion rule in such circumstances clearly is reasonable.

Star's proposed rule would also "unfairly disadvantage[]" the other auction participants "by creating an impermissible asymmetry of information."[75] As part of its efforts to preserve the integrity of the auction process, the Commission has adopted rules designed to ensure that all auction participants know the identity of the applicants and those that influence their bids. Section 1.2105(a)(ii)(B)(viii) requires an applicant in its short-form application to identify not only itself but also "all parties with whom the applicant has entered into . . . agreements, arrangements or understandings of any kind relating to the licenses being auctioned." 47 C.F.R. § 1.2105(a)(2)(ii)(B)(viii). Section 1.2105(a)(2)(ii)(B)(ix) requires the applicant to certify that it

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[73] 47 C.F.R. § 1.2105(a)(2)(viii) & (ix).

[74] Id. § 1.2105(b)(3).

[75] US West Communications, Inc., 13 FCC Rcd 8286, 8296 (¶ 27) (1998).

"has not entered and will not enter into any explicit or implicit agreements, arrangements or understandings of any kind with any [other] parties" "regarding the amount of their bids, bidding strategies or the particular licenses on which they will or will not bid." 47 C.F.R. § 1.2105(a)(2)(ii)(B)(ix). And the anti-collusion rule prohibits communications between competing applicants about bids, bidding strategies or settlements unless they have been identified in the short-form application as parties that have entered into an understanding under section 1.2105(a)(2)(viii). 47 C.F.R. § 1.2105(c)(1).

Star did not identify Northeast in its short-form application as a party with which it had an arrangement or understanding "of any kind" as to the licenses at issue in Auction 44. Had it done so, the Commission and auction participants would then have known of the relationship between the two companies and the communications between them would have been allowed. Instead, Star chose to inquire during the auction about the markets in Auction 44 of potential interest to Northeast without disclosing its arrangement to other auction participants or the Commission.

Star argues that the enforcement of the anti-collusion rule in this case is inconsistent with the Commission's statement that "bidders who are not bidding against each other" ought not to be subject to the rule. Star Brief at 34, quoting Amendment of Part 1 of the Commission's Rules, 16 FCC Rcd 17546, 17549 n.21 (2001). That argument is simply wrong.

As the Commission has made clear, the anti-collusion rule applies to competing applicants, i.e., those persons that have filed short-form applications evidencing an interest in markets in any of the same geographic areas,[76] whether or not they are both qualified bidders. In

[76] Amendment of Part 1 of the Commission's Rules, 16 FCC Rcd at 17549 (¶ 5).

contrast, applicants whose short form applications do not evidence an interest in markets in the same geographic area, e.g., an applicant for licenses only in New Jersey and an applicant for licenses only in California, are not subject to the anti-collusion rule, even if they both are qualified bidders. When the Commission stated that "bidders who are not bidding against each other"[77] should be excluded from the scope of the anti-collusion rule, it referred to communications between bidders that are bidding for licenses in different geographic areas, not to communications between applicants for the same geographic area, even if one of those applicants chose not to make an upfront payment and thereby did not qualify to enter the actual bidding process. In this case, Star and Northeast applied for licenses in the same geographic areas.

Contrary to Star's contention, it is reasonable for the Commission to apply the anti-collusion rule to Star's communications with Northeast while exempting from the scope of the rule communications between applicants for licenses in wholly different geographic areas. As shown above, Star and Northeast, as competing applicants, engaged in collusive conduct that threatened the integrity of the auction process. The application of the anti-collusion rule to these entities thus furthers important public interest objectives. In contrast, the Commission regards applicants for licenses in wholly different geographic areas as lacking sufficient incentive to collude to subject them to the anti-collusion rule.[78]

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[77] Id. at 17546, 17549 n.21. See Implementation of Section 309(j), 9 FCC Rcd 7245, 7254 (¶ 51) (1994).

[78] See Implementation of Section 309(j), 9 FCC Rcd at 7254 (¶ 51) ("[W]here bidders have not applied for any of the same licenses there is little risk of anticompetitive conduct.")

Similarly without merit is Star's claim that it was arbitrary for the Commission to apply the anti-collusion rule in this case because "Northeast was in the same position as any entity that had never submitted an application." Star Brief at 34. As an initial matter, this argument fails because those other entities did not apply to participate in the auction and therefore subject themselves to all the obligations that follow from that decision. It is entirely reasonable for the Commission to require auction participants to follow its rules (including the up-front payment rule) if they want to qualify for the auction, rather than permitting them to flout those rules but then participate through another applicant.

Second, this argument overlooks the public nature of a short-form applicant. By filing this application, Northeast publicly had expressed an interest in obtaining the licenses listed in its application. In light of that interest, it was appropriate for the Commission to enforce regulatory safeguards designed to deter Northeast from attempting to secure those licenses through collusive conduct. The fact that Northeast's interest in the licenses was publicly known increased the danger of collusive activity. As Star has acknowledged, when Mr. Behenna initiated the August 28th communication with Mr. Riordan, he "was aware that Northeast had filed an application" for Auction 44. Notification Letter at 2 (J.A.). Mr. Behenna may well never have made that overture had Northeast not publicly expressed its interest in the licenses by submitting a short-form application.

In contrast, a non-applicant, by its decision not to file a short-form application, can be understood to have sent a signal that it has no interest in the licenses to be auctioned. Given its expressed lack of interest in the licenses in question, it is unlikely that a non-applicant, even in the absence of a rule prohibition, would engage in collusive conduct that imperils the integrity of the competitive bidding process. It is perfectly reasonable for the Commission not to impose

regulatory restraints in circumstances where such action is unnecessary. The Commission's reasonable decision to exclude non-applicants from the scope of the anti-collusion rule does not preclude the agency from applying the rule, as in this case, to communications between competing applicants, where such enforcement furthers important public interest objectives.

Finally, even if the anti-collusion rule could reasonably be extended to non-applicants, that fact does not make the more limited rule arbitrary. As this Court has recognized, "agencies need not address all problems in one fell swoop."[79] Because agencies have broad discretion to proceed one step at a time, "an agency's failure to regulate more comprehensively" does not establish that "the regulations already promulgated are invalid. . . . Unless the agency's first step takes it down a path that forecloses more comprehensive regulation, the first step is not assailable merely because the agency failed to take a second."[80] See Forfeiture Order at ¶ 8 (J.A.). At the very least, it was a reasonable first step for the agency to prevent collusive communication among license applicants.

III. STAR'S ARGUMENT THAT ITS CONDUCT WAS NOT "WILLFUL" IS NOT PROPERLY BEFORE THE COURT AND OTHERWISE LACKS MERIT.

A. Star's Argument Is Not Properly Preserved For Judicial Review.

Star did not argue at any point in the administrative proceedings that the Commission lacked authority to assess a forfeiture because Star's conduct was not "willful" within the

[79] United States Cellular Corp. v. FCC, 254 F.3d 78, 86 (D.C. Cir. 2001).

[80] Hazardous Waste Treatment Council v. EPA, 861 F.2d 277, 287 (D.C. Cir. 1988), cert. denied, 490 U.S. 1106 (1989).

meaning of section 503(b)(1).[81] For two reasons, Star is barred from raising that issue on review.

First, for the reasons set forth in Section I.A, Star's failure to argue in response to the NAL and in its application for review that its conduct was not willful within the meaning of section 503(b)(1) is sufficient itself to preclude it from raising the issue on judicial review. Under the law of this circuit, its failure to contest the staff's determination in the Forfeiture Order at ¶ 10 (J.A.), that it willfully had violated the anti-collusion rule — a determination that now has become final — "constitutes a waiver" of that issue. Rogers Radio Communications Services v. FCC, 751 F.2d at 413 n.14. See Weyburn Broadcasting Limited Partnership v. FCC, 984 F.2d at 1234.

Second, section 405 of the Communications Act bars the Court from considering issues of law or fact on which the Commission "has been afforded no opportunity to pass." 47 U.S.C. § 405. Because neither Star nor anyone else argued before the Commission that the agency violated section 503(b)(1) by assessing a forfeiture on Star for conduct that was not willful, section 405 precludes Star from raising that issue on review.

The fact that the staff addressed the statutory issue in an earlier phase of the administrative proceedings does not show that the Commission had a fair opportunity to consider that issue in the Order on review. "[Section] 405 requires that the Commission itself — and not merely a Commission bureau — have had an opportunity to pass on the issue." Coalition for

[81] In arguing that the forfeiture was excessive, Star asserted as a factual matter that "Mr. Behenna had no intention of violating the [anti-collusion] [r]ule." Response at 8 (J.A.). But it did not contest below the finding that Star's violation of the rule was not "willful" within the meaning of section 503(b).

Noncommercial Media v. FCC, 249 F.3d 1005, 1009 (D.C. Cir. 2001).[82] See Charter Communications, Inc. v. FCC, 460 F.3d 31, 39 (D.C. Cir. 2006), quoting BDPCS, Inc. v. FCC, 351 F.3d 1177, 1182 (D.C. Cir. 2003) ("This circuit has strictly applied . . . section [405], holding that [the Court] may not consider 'arguments that have not first been presented to the Commission.'"). Accord Qwest Corp. v. FCC, 482 F.3d 471, 474 (D.C. Cir. 2007).

Application of section 405 is particularly appropriate where, as here, the issue the litigant seeks to raise in court involves the Commission's construction of a provision of its governing statute. Verizon Telephone Companies v. FCC, 292 F.3d 903, 911 (D.C. Cir. 2002). In order to give effect to the "federal agencies' rightful role in statutory construction under the Chevron framework," the court must know the expert agency's interpretation of the statute it administers. 293 F.3d at 910, quoting Linemaster Switch Corp. v. EPA, 292 F.3d 1299, 1309 (D.C. Cir. 1991). As a result of Star's failure to raise the issue before the Commission, the Court lacks the benefit of the Commission's elucidation in this case of the meaning of "willful" in section 503(b)(1). In such circumstances, the Court should not consider that issue on review.

B. If The Court Reaches The Issue, It Should Uphold The Staff's Reasonable Determination That Star's Conduct Was Willful.

Star contends that the Commission's staff erred in construing "willful" in section 503(b) as a deliberate commission of an act irrespective of an intent to violate the law. Star relies on a Supreme Court decision issued a month after the Commission's order on review to argue, variously, that it may be held liable for a civil penalty only if it "acted with intent or had knowledge" that it was violating the anti-collusion rule, Star Brief at 35, or if its violation was

[82] See also Bartholdi Cable Co., Inc. v. FCC, 114 F.3d 274, 279 (D.C. Cir. 1977).

"'knowing' or 'reckless,'" Brief at 39, citing Safeco Insurance Co. of America v. Burr, 127 S.Ct. 2201, 2208 (2007). As the Court stated in Safeco, however, "willful[]" "is a 'word of many meanings whose construction is often dependent on the context in which it appears.'" 127 S.Ct. at 2208, quoting Bryan v. United States, 524 U.S. 184, 191 (1998). When enacting the forfeiture legislation in 1960, Congress did not define "willful" or otherwise directly speak to the proper construction of that term in section 503(b)(1). By leaving the statutory language unclear, Congress implicitly delegated to the Commission the authority to determine in a reasonable fashion how the statute should be interpreted. And the Court must give deference to the agency's reasonable interpretation. Chevron, 467 U.S. at 843.

Star claims that the agency's construction conflicts with the "unambiguous language" of section 312(f) and thus should be reviewed under the first step of Chevron. Star Brief at 36. That argument is without merit. In section 312(f), Congress defined "willful" to mean "the conscious and deliberate commission or omission of such act, irrespective of any intent to violate [the Communications Act or the Commission's rules.]"[83] The language of section 312(f) simply expresses Congress's unambiguous intent to require the statutory definition of "willful" to apply to proceedings under section 312. It by no means dictates a different interpretation of the term "willful" in proceedings under section 503(b)(1), let alone evince Congress's clear intent to preclude that term from being construed there in the same way Congress required it to be construed in section 312 proceedings. Indeed, the "normal rule of statutory construction [is] that 'identical words used in different parts of the same act are intended to have the same meaning.'" Sullivan v. Stroop, 496 U.S. 478, 484 (1990), quoting Sorenson v. Secretary of Treasury, 475 U.S. 851, 860 (1986). It is therefore eminently reasonable to construe the term "willful" in

[83] 47 U.S.C. § 312(f).

section 503(b)(1) the same way as it is defined in section 312(f), especially where that construction has been consistently applied by the Commission for decades.

In keeping with this longstanding precedent and the terms of section 312(f), the Commission's staff in this case reasonably construed the term "willful" in section 503(b)(1) to connote the deliberate commission or omission of an act, without regard to the intention of the actor to violate the law. See Forfeiture Order at ¶ 10 (J.A.). Forty-four years ago, the Commission in Midwest Radio Television, Inc., 45 FCC 1137, 1141 (¶ 11) (1963), held that the statutory term "willful" requires only that the regulatee "knew he was doing the acts in question," not that he "knew he was acting wrongfully." And the Commission throughout the years has consistently applied that construction of section 503(b)(1) in forfeiture cases.[84] That construction was properly applied by the staff when it concluded that Star's violation was "willful."[85]

Although there was no occasion here for the Commission to address its established interpretation of "willful," the Commission has explained in previous orders that this interpretation of "willful" was shaped by, and is consistent with, the legislative history of the

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[84] See, e.g., Samson Technologies, Inc., 19 FCC Rcd 4221, 4224 n. 21 (2004); SBC Communications, Inc., 16 FCC Rcd 12306 (¶ 8) (2001); Media General Cable of Fairfax County; 13 FCC Rcd 11868, 11870 (¶ 7) (1998); High Country Communications, Inc., 2 FCC Rcd 7427, 7248 n.4 (1987) Comark Cable Fund II, 103 FCC 2d 600, 612-13 (¶ 17) (1985); Outlet Communications, Inc., 7 FCC Rcd 632, 6333 (¶ 13) (1992); Cate Communications Corp., 60 Rad. Reg. 2d (P & F) 1386 at (¶ 5), 1986 WL 291387 (1986); Vernon Broadcasting, Inc., 60 Rad. Reg. 2d 1275 at (¶ 3), 1986 WL 291948 (1986); Thomasville Broadcasting Co., 50 FCC 2d 949, 950 (¶ 6) (1975); Fay Neel Eggleston,1 FCC 2d 1006, 1007 (¶ 5) (1965).

[85] Contrary to Star's contention, the staff did not base its interpretation "solely" upon the legislative history to section 312(f). See Star Brief at 37. The staff also relied upon the Commission's precedent. See Forfeiture Order at ¶ 11 & n.48 (J.A.). Star could have invoked the Commission's jurisdiction to consider the reversal of the agency's longstanding interpretation of section 503(b) by raising that issue in its application for review but, as noted in Section III.A, it did not do so.

1960 forfeiture legislation.[86] The forfeiture bill as passed by the House required a law violation to be "negligent or intentional."[87] The Senate version of the bill, which was ultimately enacted into law, substituted the phrase "willful or repeated" for "negligent or intentional."[88] The Senate Committee on Interstate and Foreign Commerce in making this substitution explained:

> The phrase "willful or repeated" has a fixed meaning in the Communications Act and it has been interpreted by the Commission and courts a number of times. In your committee's opinion it would be unwise at this time to introduce an entirely new concept for determining a licensee's responsibility for a violation.[89]

The legislative history to the forfeiture legislation thus shows that Congress intended the word "willful" in section 503(b)(1) to be construed in accordance with the established meaning of the term in communications law as of 1960.[90]

In 1960, the Didrikson case[91] was the leading and "the most recent example of both judicial and Commission construction of the term 'willful' in the Communications Act.'"[92] In that case, the Commission had suspended the licenses of three operators for their willful

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[86] See Caranje Broadcasting Co., Inc., 59 FCC 2d 332, 333 (¶ 4) (1976); Hale Broadcasting Corp. 79 FCC 2d 169, 171 (¶ 5) (1980); Midwest Radio Television Inc., 45 FCC at 1139-41 (¶¶ 8-10).

[87] S. Rep.No. 1857, 86th Cong., 2d Sess. (1960)

[88] Id.

[89] Id.

[90] See Midwest Radio Television Inc., 45 FCC at 1140 (¶ 8). "By removing the word 'negligent,' which word denotes a deviation from a reasonable standard of conduct or behavior, Congress eliminated the necessity of determining whether an individual licensee knew or should have known of a violation of the Act or Rules." Caranje Broadcasting Co., Inc., 59 FCC 2d at 333 (¶ 4).

[91] Roald W. Didriksen, 13 RR 425 (P & F) (1956), aff'd sub. nom. Didrikson v. FCC, 254 F.2d 354 (D.C. Cir. 1958).

[92] Midwest Radio Television, Inc., 45 FCC at 1140 (¶ 9).

interference with radio communications. The Commission held that the operators' actions were willful because they "intended to do the acts [in question]," even though they "may have believed that their acts" fell "short of the damage forbidden by statute." 13 RR at 438 (¶ 21). On review, this Court upheld the Commission's construction of the term "willful." Rejecting the operators' claims that "they had no intent to violate the law, and hence did not act 'willfully,'" the Court explained that the operators' belief that their actions were "within the law is unimportant so long as the consequences of the acts here performed were the consequences intended." Didrikson v. FCC, 254 F.2d at 356.

Thus, in 1960, the term "willful" in communications law signified the deliberate commission of an act, without regard to whether the perpetrator intended to commit a law violation. The Commission's incorporation of that established meaning of "willful" into its interpretation of the same term in section 503(b)(1) is certainly consistent with what Congress contemplated in the forfeiture legislation.

Moreover, as the Commission has pointed out, its construction of "willful" in section 503(b)(1) has been ratified by Congress.[93] In 1982, Congress amended section 312 of the Communications Act to incorporate into that section a definition of "willful" that was modeled directly on the Commission's construction of the identical term in section 503(b)(1).[94] Indeed, in reporting the bill that ultimately became section 312(f), the Conference Committee expressly stated that the legislative definition of "willful" is "consistent with the Commission's application

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[93] See Application for Review of Southern California Broadcasting Co., 6 FCC Rcd 4387, 4388 (¶ 5) (1991).

[94] Section 312, inter alia, authorizes the Commission to revoke a station license or communications permit for "willful" violations of the Communications Act or the Commission's rules. 47 U.S.C. § 312.

of [that same term] in Midwest Radio-Television, Inc., 45 FCC 1165 (1963)."[95] The Conference Committee explained further that codification of that definition is "intended primarily to clarify the language in sections 312 and 503."[96] The legislative history of the 1982 amendment to section 312 thus shows clearly that Congress meant the term "willful" in section 503(b)(1) to be interpreted in the same way as the identical term is defined in section 312(f), i.e., "the conscious and deliberate commission or omission of [an] act, irrespective of any intent to violate [the Communications Act or the Commission's rules]," 47 U.S.C. § 312(f).

Star erroneously contends that the agency's construction of the term "willful" in section 503(b)(1) is legally infirm because it differs from the Supreme Court's interpretation of "willful" in various provisions of the Fair Credit Reporting Act ("FCRA") in Safeco Insurance Co. v. Burr, 127 S.Ct. 2201 (2007). In that case, however, the Court did not purport to construe the term "willful" in section 503(b)(1), and nothing in its opinion suggests that the term "willful" in section 503(b)(1) of the Communications Act and in the FCRA must be interpreted to have the same meaning [97] or that the Commission is not entitled to Chevron deference in construing that term.

Indeed, Star clearly is wrong in claiming that the agency would be "required by [Safeco] to apply the common law definition of 'willful.'" Star Brief at 36. As the Court in Safeco recognized, the term "willful" has many different meanings. 127 S.Ct. at 2208. It then

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[95] H.R. Conf. Rep. 97-765, 97th Cong. 2d Sess. (1982).

[96] Id. (emphasis added).

[97] Star argues in effect that the term "willful" in section 503(b)(1) must be construed to have the same meaning as the same term in the FCRA, but cannot be construed to have the same meaning as the same term in section 312(f) of the Commmunications Act. That strained position contravenes "the normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning." Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 230 (1993) (emphasis added).

acknowledged that the "general rule that a common law term in a statute comes with a common law meaning" does not apply if there is "anything pointing another way." 127 S.Ct. at 2209. As shown above, the legislative history of section 503(b)(1), 44 years of consistently-applied Commission precedent, and the ratification of that administrative construction by Congress in 1982 point to a different construction for section 503(b)(1).

IV. THE COURT NEED NOT DETERMINE WHETHER STAR COMMITTED "REPEATED" VIOLATIONS.

Star contends that its forfeiture should be set aside because it did not commit a "repeated" violation of the Act. The Court need not reach this claim for two reasons.

First, the Order on Review did not impose a forfeiture on Star because of a finding that its violations were "repeated." Instead, the Commission based its finding of liability solely on a finding of willfulness.[98] In a footnote, the Commission did reject Star's contention that the message it left for Northeast did not constitute a violation of the anti-collusion rule,[99] but it nowhere based its forfeiture on a finding that Star's violation was "repeated." Indeed, the Commission imposed the same $75,000 forfeiture on both Star and Northeast even though there is no suggestion in the Order that Northeast committed more than one violation. With respect to both companies, the forfeiture was based exclusively on a willful violation of the anti-collusion rule. There is no reason for the court to consider whether the violation was also repeated since such a finding was irrelevant to the Commission's decision.

The Court need not decide whether Star's violation was repeated for a second reason. In the Forfeiture Order at ¶ 10 (J.A.), the Enforcement Bureau held that Star had violated the anti-

[98] Order at ¶ 23 (J.A.).

[99] Id. at ¶ 22 n.68 (J.A.).

collusion rule willfully. As noted above, Star failed to challenge that staff determination in its application for review, and the staff determination as to willfulness has now become final. See Section III.A. Because section 503(b)(1) authorizes the Commission to assess a forfeiture if it finds that the conduct giving rise to the violation either is willful or repeated,[100] the agency's final determination as to willfulness is sufficient in itself to justify the issuance of a forfeiture. As the Forfeiture Order stated, "even if the behavior constituted only one violation on August 29, 2002, [the same monetary] forfeiture is still appropriate."[101] Thus, the Court can, and should, affirm the Order without reviewing the staff's alternative finding that Star repeatedly violated the anti-collusion rule.

CONCLUSION

For the foregoing reasons, the Court should deny the petition for view.

[100] See Application for Review of Southern California Broadcasting Co., 6 FCC Rcd at 4388 (¶ 5).

[101] Forfeiture Order ¶ 11 (J.A.).

Respectfully submitted,

THOMAS O. BARNETT
ASSISTANT ATTORNEY GENERAL

ROBERT B. NICHOLSON
ROBERT J. WIGGERS
ATTORNEYS

UNITED STATES DEPARTMENT OF JUSTICE
WASHINGTON, D.C. 20530

MATTHEW B. BERRY
ACTING GENERAL COUNSEL

JOSEPH R. PALMORE
DEPUTY GENERAL COUNSEL

DANIEL M. ARMSTRONG
ASSOCIATE GENERAL COUNSEL

LAUREL R. BERGOLD
COUNSEL

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554
(202) 418-1740 (TELEPHONE)
(202) 418-2819 (FAX)

December 21, 2007

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

STAR WIRELESS, LLC,	)	
	)	
PETITIONER,	)	
	)	
V.	)	
	)	
FEDERAL COMMUNICATIONS COMMISSION AND THE UNITED STATES OF AMERICA	)	NO. 07-1190
	)	
	)	
RESPONDENTS.	)	

CERTIFICATE OF COMPLIANCE

Pursuant to the requirements of Fed. R. App. P. 32(a)(7), I hereby certify that the accompanying "Brief for Respondents" in the captioned case contains 13618 words.

Laurel R. Bergold
Counsel
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554
(202) 418-1740 (TELEPHONE)
(202) 418-2819 (FAX)

December 21, 2007