

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Northstar Wireless, LLC)	File No. 0006670613
)	
SNR Wireless LicenseCo, LLC)	File No. 0006670667
)	
Applications for New Licenses in the 1695-1710 MHz, and 1755-1780 MHz and 2155-2180 MHz Bands)	Report No. AUC-97AUC

MEMORANDUM OPINION AND ORDER

Adopted: July 11, 2018

Released: July 12, 2018

By the Commission:

1. In this *Memorandum Opinion and Order*, we affirm, with one minor modification, the Wireless Telecommunications Bureau *Order on Remand*,¹ which established a procedure to afford Northstar Wireless LLC and SNR Wireless LicenseCo, LLC (collectively “Applicants”) the opportunity to cure their Auction 97 applications pursuant to the mandate of the U.S. Court of Appeals for the District of Columbia Circuit in *SNR Wireless v. FCC*.² For the reasons discussed below, we grant the Applicants’ request to file a pleading to address any issues raised by the parties to these proceedings (collectively “Parties of Record”) but otherwise deny the Applicants’ joint Application for Review (AFR).³

I. BACKGROUND

2. In Auction 97, Northstar was the winning bidder for 345 licenses with an aggregate gross bid of \$7,845,059,400, and SNR Wireless was the winning bidder for 357 licenses with an aggregate gross bid of \$5,482,364,300.⁴ Both Northstar and SNR Wireless claimed on their FCC Form 601 that they were eligible for a 25 percent bidding credit because they each qualified as a very small business.⁵ In August 2015, the Commission ruled that the Applicants were not eligible for the very small business

¹ *Northstar Wireless, LLC, SNR Wireless LicenseCo, LLC, Applications for New Licenses in the 1695-1710 MHz, 1755-1780 MHz and 2155-2180 MHz Bands*, Order on Remand, 33 FCC Rcd 231 (WTB 2018) (*Order on Remand*)

² *SNR Wireless LicenseCo, LLC, et al. v. Federal Communications Commission*, 868 F.3d 1021 (D.C. Cir. 2017) (*petition for cert. filed*) (*SNR Wireless v. FCC*).

³ Joint Application for Review of Northstar Wireless, LLC, SNR Wireless LicenseCo, LLC, ULS File Nos. 0006670613 and 0006670667 (Feb. 21, 2018).

⁴ See *Auction of Advanced Wireless Services (AWS-3) Licenses Closes, Winning Bidders Announced for Auction 97*, Public Notice, 30 FCC Rcd 630, Att. B at 2 (2015).

⁵ See Northstar Wireless, LLC Long-Form Application, FCC Form 601, ULS File No. 0006670613 (filed Feb. 13, 2015); SNR Wireless LicenseCo, LLC Long-Form Application, FCC Form 601, ULS File No. 0006670667 (filed Feb. 13, 2015).

bidding credits they had sought in Auction 97 because DISH Network Corporation (“DISH”) exercised *de facto* control over the Applicants.⁶ Applicants appealed the Commission’s decision.

3. On appeal, the Court of Appeals held that the Commission “reasonably applied its longstanding precedent to determine that DISH exercised a disqualifying degree of *de facto* control over SNR [Wireless] and Northstar.”⁷ It also held, however, that the Commission did not give Applicants “adequate notice that, if their relationships with DISH cost them their bidding credits, the FCC would also deny them an opportunity to cure.”⁸ The Court stated that “an opportunity for petitioner to renegotiate their agreements with DISH provides the appropriate remedy here,” and therefore remanded the matter to the Commission for further proceedings consistent with its opinion.⁹ The Court directed the Commission to give Applicants an opportunity to “negotiate a cure for the *de facto* control the FCC found that DISH exercises over them.”¹⁰

4. On January 24, 2018, the Bureau issued the *Order on Remand*, which instituted a process to provide the Applicants with an opportunity to cure pursuant to the Court’s mandate.¹¹ The *Order on Remand* establishes a 90-day window, with the possibility of a 45-day extension, for each Applicant to “renegotiate [its] respective agreements with DISH and the other parties and to file the necessary documentation in the record to demonstrate that, in light of such changes, each Applicant qualifies for the very small business bidding credit that it sought in Auction 97.”¹² The *Order on Remand* provides that any additional documents or amendments to the existing applications filed by the Applicants will be made publicly available and affords the Parties of Record the opportunity to file comments.¹³ The Applicants may further amend their agreements in response to those comments.¹⁴ The Parties of Record may file comments about the Applicants’ amended agreements.¹⁵ Following completion of the record, the Commission will determine if “either Applicant qualifies for the very small business bidding credit it sought in Auction 97.”¹⁶

5. On February 21, 2018, Applicants filed the instant joint AFR requesting that the Commission change the cure process because it “provides no assurance that iterative and responsive

⁶ *Northstar Wireless, LLC, SNR Wireless LicenseCo, LLC, Applications for New Licenses in the 1695-1710 MHz, 1755-1780 MHz and 2155-2180 MHz Bands*, Memorandum Opinion and Order, 30 FCC Rcd 8887 (2015) (*Northstar and SNR Wireless MO&O*).

⁷ *SNR Wireless v. FCC*, 868 F.3d at 1025.

⁸ *Id.*

⁹ *Id.* at 1046.

¹⁰ *Id.* at 1025.

¹¹ *See Order on Remand*.

¹² *Order on Remand*, 33 FCC Rcd at 232, para. 5.

¹³ *Id.* at 233, para. 7. The Parties of Record for each application proceeding are specified in the appendices to the *Order on Remand*.

¹⁴ *Id.* at para. 8. The Applicants are permitted to request an additional 45 days to submit the information. *Id.*

¹⁵ *Id.*

¹⁶ *Id.* at para. 9.

negotiations between the Applicants and the [FCC] will occur.”¹⁷ They allege that the process instituted by the Bureau is contrary both to the mandate of the Court and the Commission’s own precedent.¹⁸ Specifically, they allege that because the Court interpreted the Commission’s *ClearComm*¹⁹ decision to require the Commission to provide the Applicants with an opportunity to cure, they are entitled to the “iterative” negotiation process with the Commission that they claim was provided in *ClearComm*. Further, they allege that without such “iterative” negotiations, they will be deprived of the opportunity to cure mandated by the Court. They also claim that because the Commission staff has engaged in such negotiations before granting applications and designated entity (DE) bidding credits in other situations, they must do so following the court’s remand in this case.²⁰

6. In addition, the Applicants argue that the Commission should remove as Parties of Record “the entities previously dismissed from these license application proceedings for lack of standing or failure to timely file pleadings” and T-Mobile which, Applicants argue, did not file a pleading in connection with the Applicants’ license applications.²¹ In addition, the Applicants request an opportunity to file pleadings, in addition to amending their agreements, in response to the comments and arguments made by the Parties of Record, which they contend is not provided to them in the *Order on Remand*.²² The Applicants also request that the Commission toll the deadlines specified in the *Order on Remand* while it considers this AFR.²³

7. T-Mobile filed an opposition to the AFR stating that the Communications Act and the Commission’s rules require that T-Mobile be allowed to comment because the purpose of amending the applications in these cases would be to transfer control from DISH.²⁴ If control transfers from DISH, T-Mobile claims this would constitute a major change under the Commission’s rules and entitle all interested parties to file petitions to deny.²⁵ In addition, T-Mobile argues that nothing in the Court’s mandate requires the Commission to provide the Applicants with customized iterative guidance on their contract negotiations with DISH.²⁶

8. In response to the T-Mobile Opposition, the Applicants state that T-Mobile should not be included as a party in the remand proceedings because T-Mobile was not a party to the proceedings at the

¹⁷ AFR at 1.

¹⁸ *Id.*

¹⁹ *In re Application of ClearComm, L.P.*, 16 FCC Rcd. 18627 (2001) (*ClearComm*).

²⁰ AFR at 15-17.

²¹ AFR at 4

²² AFR at 23.

²³ AFR at 23-24.

²⁴ Opposition of T-Mobile USA, Inc. to Joint Application for Review, ULS File Nos. 0006670613 and 0006670667 at 5-8 (filed Mar. 8, 2018) (T-Mobile Opposition).

²⁵ T-Mobile Opposition at 6, citing 47 C.F.R. §§ 1.927(h), 1.929(a), 1.939(a).

²⁶ T-Mobile Opposition at 12-15. “The specificity of the clause-by-clause direction that the DISH DEs demand of the Commission is unprecedented. There is no reasonable interpretation of the court’s opinion that could possibly require what the DISH DEs are demanding. They have manufactured from whole cloth their assertion that the D.C. Circuit created a special, custom process of ‘iterative and responsive negotiations’ just for them.” *Id.* at 13-14.

time the Applicants filed their appeal.²⁷ The Applicants also reiterate that they are entitled to an iterative and responsive cure negotiation process which they claim is the same treatment that other DE applicants have received.²⁸

9. On March 19, 2018, Northstar also requested a meeting to discuss the AFR and procedures in connection with the court's remand to the Commission.²⁹ VTel Wireless, Inc. (VTel), one of the Parties of Record, opposed Northstar's request. VTel argues that the *Order on Remand* appropriately rejected Applicants' "demands that the cure process be conducted 'in an iterative and responsive' manner in meetings held with the Commission behind closed doors."³⁰ On March 20, 2018, the Commission's General Counsel responded to Northstar's letter, stating that in the circumstances of this restricted proceeding, and since the questions raised by Northstar relate to the procedures governing the court's remand, its meeting request would be more appropriately addressed by the Commission in responding to the AFR, and in light of the responses and replies received with respect thereto.³¹ Following that response, SNR submitted questions to the Bureau about whether certain revised interest rate, loan maturity, passive investor protections, and other provisions would be appropriate.³² On May 4, 2018, the Applicants and other Parties of Record filed supplemental pleadings in support of their respective positions.³³

II. DISCUSSION

A. The *Order on Remand* Complies with the Court Mandate

10. Upon review, we find the process established in the *Order on Remand* to be responsive to the Court's mandate and we affirm the *Order on Remand*. The mandate does not require the Commission to hold "responsive, back-and-forth discussions" with the Applicants.³⁴ Nothing in Section 402(h) of the Act³⁵ or the Court's mandate limits the FCC's discretion under Section 4(j) of the Act³⁶ so as to require

²⁷ Joint Reply to Opposition of T-Mobile USA, Inc, to Joint Application for Review, ULS File Nos. 0006670613 and 0006670667 at 2-4 (filed Mar. 21, 2018) (Applicants' Reply).

²⁸ Applicants' Reply at 4-5.

²⁹ Letter from Mark F. Dever, Counsel to Northstar, to Rachael Bender, Wireless Advisor to Chairman Pai, Federal Communications Commission, ULS File Nos. 0006670613 (March 7, 2018).

³⁰ Letter from Bennett L. Ross, Counsel to VTel, to Rachael Bender, Wireless Advisor to Chairman Pai, Federal Communications Commission, ULS File Nos. 0006670613 and 0006670667 at 2 (March 19, 2018). We reject the argument by Northstar and SNR that V-Tel's letter should be dismissed. To the extent that this letter responded to the foregoing Northstar request for a meeting, there is no basis in our rules for dismissing such a response. To the extent it was a reply to T-Mobile's opposition, the V-Tel letter was timely filed. See 47 C.F.R. § 1.115(d).

³¹ Letter from Thomas M. Johnson, Jr., General Counsel, Federal Communications Commission to Mark F. Dever, Counsel to Northstar, ULS File Nos. 0006670613 and 0006670667 (March 20, 2018) (*Johnson March 20th Letter*).

³² Letter from Ari Q. Fitzgerald, Counsel to SNR Wireless, to Donald Stockdale, Chief, Wireless Telecommunications Bureau, ULS File No. 0006670667 at 1 (March 26, 2018) (*SNR Wireless March 26th Letter*).

³³ See Letter from Mark Dever, Counsel to Northstar and Ari Q. Fitzgerald, Counsel to SNR Wireless, to Marlene H. Dortch, Secretary, Federal Communications Commission, ULS File Nos. 0006670613 & 0006670667 (May 4, 2018) (*Northstar and SNR Wireless May 4 Presentation*); Letter from Bennett L. Ross, Counsel to VTel Wireless, Inc. to Marlene H. Dortch, Secretary, Federal Communications Commission, ULS File Nos. 0006670613 & 0006670667 (May 4, 2018).

³⁴ AFR at 14.

³⁵ 47 U.S.C. § 402(h).

³⁶ 47 U.S.C. § 154(j) (Commission "may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice"). See also *Vermont Yankee Nuclear Power Corp. v. Natural*

the FCC to “negotiate iteratively” with Northstar and SNR Wireless in the fashion they now contemplate. We agree with T-Mobile that the *Order on Remand* follows the Court’s “plain instruction to allow the [Applicants] . . . an opportunity to re-negotiate their agreements with DISH and to file new or amended applications based on those agreements.”³⁷

11. The Court’s mandate states only that the Applicants be provided with an “opportunity to cure” and does not require the Commission to engage in an “iterative cure negotiation process”³⁸ with the Applicants. To the extent the Court refers at one point to a “negotiated cure,” the Court’s opinion clearly states that the Applicants are to negotiate with DISH and not with the Commission. Specifically, the Court states that:

Petitioners contend that, in the past, the FCC has “compensate[d] for [a] lack of clarity in its control rules” by giving small companies a chance to modify their contractual agreements with large investors, in an effort to give the small companies enough independence to satisfy the FCC. Pet’r Br. 56-57. Petitioners seek precisely that kind of opportunity to modify their agreements with DISH. *See id.* at 57-58. Because the FCC did not give clear notice that such an opportunity would be denied, **we conclude that an opportunity for petitioner[s] to renegotiate their agreements with DISH provides the appropriate remedy here.** *See Gen. Elec.*, 53 F.3d at 1329 (explaining that, “in many cases,” an agency can alert regulated entities to its interpretation of its own rules by making “efforts to bring about compliance” with the rules before imposing sanctions). We therefore remand this matter to the FCC for further proceedings consistent with our opinion.³⁹

12. Section 402(h) requires a remand to be conducted “upon the basis of the proceedings already had and the record” of the appeal—but not if “otherwise ordered by the court.”⁴⁰ Here the Court affirmed the Commission’s *de facto* control findings, but ordered the Commission to conduct “further proceedings”⁴¹ to afford Northstar and SNR Wireless “an opportunity . . . to renegotiate their agreements with DISH” with the benefit of the Commission’s *de facto* control analysis and findings in the *Northstar and SNR Wireless MO&O*, which the Court affirmed and elucidated.⁴² Northstar and SNR Wireless claim that the further proceedings established by the *Order of Remand* to provide them with an opportunity to renegotiate their agreements with DISH and to amend their applications is contrary to the Court’s mandate by not allowing the Applicants to negotiate with the Commission.⁴³ But nothing in the mandate prescribes what form that opportunity must take, much less compels the cycle of “iterative negotiations” that Northstar and SNR Wireless now demand. As T-Mobile notes, neither the word “iterative” nor the word “responsive” appears in the Court’s order nor any suggestion of “responsive, back-and-forth discussions” between the Applicants and the Commission.⁴⁴

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Resources Defense Council, Inc., 435 U.S. 519, 524-25, 543-44 (1978) (“very basic tenet of administrative law that agencies should be free to fashion their own rules of procedure”).

³⁷ T-Mobile Opposition at 15.

³⁸ AFR at 7.

³⁹ *SNR Wireless v. FCC*, 868 F.3d at 1046 (emphasis added).

⁴⁰ 47 U.S.C. § 402(h).

⁴¹ *SNR Wireless v. FCC*, 868 F.3d at 1046.

⁴² *Id.*

⁴³ AFR at 7-14.

⁴⁴ T-Mobile Opposition at 13.

13. In *SNR Wireless v. FCC*, the Court first determined that the Commission’s application of its prior decisions on *de facto* control to the specific facts of these agreements with DISH was reasonable and consistent with existing law, that the “unexplained approvals” of other DE applications “are non-precedential” and “even examining their substance, do not detract from the FCC’s [*de facto* control determination] here.”⁴⁵ However, the Court found that “there was considerable uncertainty *at the time of Auction 97*” about the application of that *de facto* control standard.⁴⁶ The Court noted Applicants’ observation that in the past the Commission has “giv[en] small companies a chance to modify their contractual agreements with large investors,” as well as Applicants’ desire for “precisely that kind of opportunity to modify their agreements with DISH.”⁴⁷ As noted above, in view of Applicants’ entreaties, the Court stated that “the appropriate remedy here” is “an opportunity for petitioner[s] to renegotiate their agreements with DISH.”⁴⁸ That is exactly what the *Order on Remand* does.

14. The Court further noted that “[n]othing in our decision requires the FCC to permit a cure.”⁴⁹ Nor, as noted below, did it prescribe the procedures that the Commission should employ in discharging the mandate. The limited scope of the Court’s mandate was fully consistent with the recognition by the Supreme Court and the D.C. Circuit’s prior decisions that “the function of the reviewing court ends when an error of law is laid bare.”⁵⁰ In the leading case cited by Applicants,⁵¹ Judge Leventhal noted that the mandate “must preserve and respect the distinctive administrative role of the agency and not encroach on its permissible zone of discretion” or “interfere with the public interest entrusted to the agency by Congress.”⁵² Noting in particular the need to ensure “meaningful participation by petitioners [to deny]” with statutory rights under Section 309, the D.C. Circuit has also concluded that “[w]e have neither the inclination nor the authority to command the FCC to adopt procedures that seem desirable to us.”⁵³

15. Indeed, Congress provided wide latitude for the Commission to conduct its proceedings “in such manner as will best conduce to the proper dispatch of business and to the ends of justice.”⁵⁴ In *FCC v. Schreiber*, the Supreme Court recognized that Section 4(j) confers on the Commission “broad discretion to prescribe rules for specific investigations” and to “fashion [its] own rules of procedure and to pursue methods of inquiry capable of permitting [it] to discharge [its] multitudinous duties.”⁵⁵ Thus, the D.C. Circuit has also long recognized the need for the Commission, where appropriate, to “open[] the

⁴⁵ *SNR Wireless v. FCC*, 868 F.3d at 1034, 1035-36.

⁴⁶ *Id.* at 1044 (emphasis added).

⁴⁷ *Id.* at 1046.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Center for Biological Diversity v. EPA*, 861 F.3d 174, 189, n.12 (D.C. Cir. 2017), quoting *FPC v. Idaho Power Co.*, 436 U.S. 775, 792 n.15 (1978).

⁵¹ AFR at 18, n. 63.

⁵² *Greater Boston Television Corp. v. FCC*, 463 F.2d 268, 280-81, 287, 291 (D.C. Cir. 1971); see also *Association of National Advertisers, Inc. v. FTC*, 627 F.2d 1151, 1179 (D.C. Cir. 1979) (Leventhal, J., concurring).

⁵³ *Bilingual Bicultural Coalition on Mass Media, Inc. v. FCC*, 595 F.2d 621, 635 (D.C. Cir. 1978) (*en banc*).

⁵⁴ 47 U.S.C. § 154(j).

⁵⁵ 381 U.S. 279, 289-90 (1965).

record following a remand from this court.”⁵⁶

16. This is not a case where the Commission’s remaining role is “ministerial.”⁵⁷ Nor is it like *Qualcomm Inc. v. FCC*, where the Commission “had no discretion on remand to reevaluate [the] application” or was directed simply “to fashion an appropriate remedy” for the applicant.⁵⁸ Here, as noted above, the Court specifically reserved for the Commission the decision of whether or not to deny Applicants the bidding credits they seek. The Court’s point was not that the Commission (or staff) had established a specific procedure for cure that it had failed to afford these Applicants, but that it had failed to provide reasonable notice that it “would deny them an opportunity to cure” at all.⁵⁹ Nothing in the Court’s discussion of the Commission staff’s decision in *ClearComm* about a “chance to cure,” or in the Commission’s reference to that staff decision, or in the staff decision itself prescribes any particular procedure for affording the opportunity to cure, much less the open-ended “iterative” process demanded by Applicants here.⁶⁰ The Court did direct the Commission to provide for an opportunity to cure, and that is precisely what the *Order on Remand* does. Indeed, it provides not only an opportunity to cure based on the detailed road map provided by the Commission’s prior decision, as now highlighted by the Court in this case, but also an opportunity to make further amendments to Applicants’ agreements with DISH in response to any supplemental criticisms that may now be raised by the other Parties of Record. Contrary to Applicants’ claims, nothing in the Court’s actual mandate can be read to require the relief they seek, or to override these basic principles of administrative law.

B. The Order on Remand is Consistent with Commission Precedent

17. The Applicants also argue that the *Order on Remand* departs from the Commission’s own precedent and state that the Commission has consistently used an iterative negotiation process to address concerns with designated entity applicants.⁶¹ To support their viewpoint, the Applicants cite a number of contested proceedings in which they argue that the FCC has reached out to the applicant and engaged in an iterative negotiation process.⁶² In particular, the Applicants claim that this remand process should be similar to the process provided in *ClearComm*.⁶³

18. As discussed above, the *Order on Remand* is a reasonable exercise of the Commission’s broad discretion under Section 4(j) to fashion appropriate rules of procedure to provide the Applicants the

⁵⁶ *Committee for Community Access v. FCC*, 737 F.2d 74 (D.C. Cir. 1984); see also *Eastern Carolinas Broadcasting Co. v. FCC*, 762 F.2d 95 (D.C. Cir. 1985).

⁵⁷ AFR at 8.

⁵⁸ *Qualcomm Inc. v. FCC*, 181 F.3d 1370, 1376 (D.C. Cir. 1999).

⁵⁹ *SNR Wireless v. FCC*, 868 F.3d at 1043-44, 1044-45.

⁶⁰ The Commission’s subsequent citation to the staff-level *ClearComm* decision in 2006, which the court cited as “Commission-level” support for an opportunity to cure, *id.* at 1045-46, cited *ClearComm* for the proposition that the Commission had undertaken investigations designed to avoid circumvention of the DE rules. *Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission’s Competitive Bidding Rules and Procedures*, Second Report and Order and Second Further Notice of Proposed Rulemaking, 21 FCC Rcd 4753, 4800 and n.206 (2006). We address below the context and holding of the staff decision itself.

⁶¹ AFR at 14-17.

⁶² AFR at 15.

⁶³ AFR at 8, 10, 15.

opportunity to cure that is required by the Court's decision.⁶⁴

19. Applicants disagree, contending that, whatever the scope of the Court's mandate in this case, the Commission must nevertheless replicate in these circumstances whatever procedures the staff applied in *ClearComm*, which the D.C. Circuit cited in its opinion. We reject this argument. Nothing in the Court's decision, nor the staff decision in *ClearComm* (or the Commission's subsequent citation to it in 2006), prescribes a specific procedure or iterative process for the opportunity to cure.⁶⁵ As noted above, the Commission has broad authority to fashion procedures appropriate to the facts and circumstances of the proceedings before it, and we have done so here.

20. In any event, even if the Court's decision and its reliance on *ClearComm* could be read as requiring some form of back and forth with the Commission (and they do not), that requirement would be satisfied on the unique facts of this case. Here, the Commission's extensive analysis of the *de facto* control problems contained in the Applicants' initial agreements with DISH set forth in great detail the application of the *de facto* control standard—based on cited Commission decisions—to the very agreements at issue in the case. The Court's remand, which contained a point-by-point elaboration of the Commission's analysis, provided ample further guidance as to the specific problematic aspects of Applicants' agreements.⁶⁶ Therefore, prior to any cure opportunity, Applicants had extensive information about the Commission's views on the ways in which their initial Applications were defective. Then, the staff's *Order on Remand* provided Applicants with multiple additional opportunities to cure the provisions already identified to them as resulting in *de facto* control by their principal investor. Applicants' argument, in other words, reduces to a claim that the Commission is required to provide Applicants with ever more granular advice on precisely how to structure their agreements through an indefinite number of meetings or correspondence. Nothing in the D.C. Circuit's remand or Commission precedent requires that.

21. Applicants cite no other prior rulings by the Commission or even by its staff to support their claim of disparate treatment. Instead, they point only to staff correspondence in connection with

⁶⁴ This procedure also complies with the Commission's *ex parte* rules applicable to restricted proceedings, described below. Applicants do not assert otherwise.

⁶⁵ As noted above, the multiple opportunities afforded to Applicants by the *Order on Remand* to cure the flaws in their agreements with DISH, all of which have already been extensively catalogued by the Commission and the Court, are fully consistent with similar opportunities described in the D.C. Circuit's decision and any plausible reading of the Commission staff's *ClearComm* order. We note in addition that the *ClearComm* order took great care to distinguish the "limited circumstances" of that case (an assignment of licenses in connection with agreements entered into with a new lender long after the auction) from an auction scenario. *ClearComm*, 16 FCC Rcd at 18633, 18643, paras. 11, 27. *ClearComm* noted that permitting the revision of such agreements to obviate the staff's initial concerns related to *de facto* control problem "might not apply where, for example, an auction [long form] applicant compromised the integrity of an auction." *Id.* at 18643, n.104. *ClearComm* also stated that the decision "in no way limits our ability to determine that *auction applicants* do not meet the eligibility criteria for benefits afforded to designated entities." *Id.* (emphasis added). Nor did *ClearComm*, as the staff order made clear, involve a situation in which the DE had ceded control to its investor. *Id.* at 18635-36, para. 14. Here, in contrast, the court upheld a Commission finding that Applicants had ceded such control to DISH. While we recognize that the D.C. Circuit cited *ClearComm* favorably in support of providing Applicants with an opportunity to cure, the unique circumstances of *ClearComm* counsel against interpreting the decision as prescribing the precise procedures that must be employed in every cure proceeding, regardless of context.

⁶⁶ *SNR Wireless v. FCC*, 868 F.3d at 1029-35. The court also recognized that the Commission's "pragmatic application" of its established precedents appropriately "transcends formulas" and turns on the "the special circumstances presented." *Id.* at 1033-34. Thus, because the *de facto* control inquiry as applied in these precedents turns on the consideration of all of the provisions in the applicant's agreements, SNR's demand that the Commission answer SNR's "initial list of questions" about how Applicants' agreements with their investors should be restructured is particularly inappropriate. See *SNR Wireless March 26th Letter* at 1. SNR makes no claim that even unpublished staff practice provides any precedent for such an approach, and we reject it here for all of the foregoing reasons.

other applications.⁶⁷ In this proceeding, however, the Applicants' FCC Form 601s have already been accepted for filing, parties have filed petitions to deny and other filings with respect to those applications, the Commission has issued an order describing the *de facto* control issues, and the Court has provided detailed guidance addressing those issues.

22. Moreover, in three of the proceedings cited by the Applicants,⁶⁸ the Commission staff simply requested that those applicants submit additional information so that the applications could be accepted for filing. All of these requests took place prior to the applications being accepted for filing and prior to any petitions to deny being filed.⁶⁹ Commission staff had exactly this type of iterative discussions with both Applicants and requested additional information in order for the Northstar and SNR Wireless applications to be acceptable for filing.⁷⁰

23. The Applicants also cite two other instances in which the Commission staff requested additional information and/or documentation after acceptance for filing to supplement the applications.⁷¹ Regardless of whether the staff may or did request additional information in certain circumstances, we do not believe cure discussions between the Applicants and the Commission, in addition to the iterative procedures set forth in the *Order on Remand*, are necessary or appropriate in the circumstances of this restricted proceeding in light of the detailed Commission order describing the *de facto* control issues and the Court's comprehensive guidance to the Applicants addressing those issues.

24. The process the Bureau adopted also accommodates the Section 309(j)(3)(A) mandate to fashion auction methodologies designed to promote more "rapid deployment . . . for the benefit of the public, including those residing in rural areas, without administrative or judicial delays."⁷² Nowhere is that more important than in making spectrum available to promote the intensive bandwidth requirements for wireless broadband services. Almost 200 licenses for which Applicants placed winning bids remain in limbo even though Auction 97 concluded over three years ago. And Applicants recognize that the apparently unlimited "iterative" process they demand could take "more than a year" of additional time.⁷³

25. In summary, although the *Order on Remand* does afford Applicants multiple opportunities to cure the flaws in their agreements with DISH, we do not believe that any prior staff actions require the kind of "iterative" negotiations demanded by the Applicants.⁷⁴ When addressing the

⁶⁷ AFR at 15 n.53.

⁶⁸ See AFR at 2, 15-16, n.4, 53 citing Letter from Linda C. Ray, Deputy Chief, Policy and Rules Division, Commercial Wireless Division, WTB, FCC, to Michelle Farquhar, Counsel to Alaska Native Wireless, L.L.C., FCC Form 601, ULS File Nos. 0000363827 and 0000364320 (Feb. 20, 2001); Letter from Linda C. Ray, Deputy Chief, Policy and Rules Branch, Commercial Wireless Division, WTB, FCC, to Theresa Z. Cavanaugh, Counsel to Northcoast Communications, L.L.C., ULS File No. 0000365464 (Feb. 20, 2001).

⁶⁹ The conversations took place before February 21, 2001, and petitions to deny were not filed until March 9, 2001.

⁷⁰ See *Northstar and SNR Wireless MO&O*, 30 FCC Rcd at 8949, n.431.

⁷¹ See AFR at 2, 15-16, n.4, 53 citing Alaska Native Wireless, LLC, FCC Form 601, ULS File No. 0000363827, Amended Exhibit E (Jan. 11, 2002) and Letter from Roger S. Noel, Mobility Division, WTB, FCC, to Thomas Gutierrez, Counsel to King Street Wireless, L.P., ULS File No. 0003379814 (Apr. 14, 2009).

⁷² 47 U.S.C. § 309(j)(3)(A),

⁷³ See AFR at 9. See also *SNR Wireless March 26th Letter* at 1-2, submitting an "initial list of questions" asking for Commission terms for restructuring SNR's own agreements, which SNR "can then accept or reject."

⁷⁴ Nor did the Commission, in *Airgate Wireless, L.L.C.*, Memorandum Opinion and Order, 15 FCC Rcd 13557 (2000), "endor[s]e," much less require, the "iterative and responsive negotiation and engagement" demanded by Applicants here. See *Northstar and SNR Wireless May 4 Presentation* at 8. In that decision, the Commission declined to consider the revenues of the applicant's predecessor-in-interest, because that entity had "fully relinquished control of the applicant" prior to the filing of the applications. 15 FCC Rcd at 13560 para. 7. Here, by

question of whether the Commission appropriately reviewed the DE qualifications of the Applicants with respect to their initial long-form applications, the court upheld the Commission's finding that DISH is in *de facto* control of the Applicants and the Court's order provides a comprehensive analysis of the flaws in their applications based on specific Commission precedents. In addition, the Bureau's *Order on Remand* appropriately addresses the intent of the Commission's *ex parte* rules to provide transparency and fairness to the Parties of Record, which is consistent with the statutory goal of expediting an already lengthy licensing process for critical wireless broadband spectrum. As a result, the Applicants now have what they need: a "meaningful opportunity to understand and respond" to their *de facto* control problem.⁷⁵ For the reasons stated herein, the Commission denies Applicants' requests for meetings or other proposals to engage in an iterative process to discuss questions that are appropriately addressed through the multiple written submissions contemplated by the *Order on Remand*.⁷⁶

C. The *Order on Remand* Includes the Appropriate Parties

26. The Applicants also argue that the Commission should remove as Parties of Record "the entities previously dismissed from these license application proceedings for lack of standing or failure to timely file pleadings" and T-Mobile, which Applicants argue did not file a pleading in connection to the Applicants' license applications.⁷⁷ Specifically, the Applicants state that including parties that have had their filings previously dismissed violates Section 402(h) because the proposed remedy is inconsistent with the Court's remand instructions.⁷⁸ In addition, they argue that FCC precedent precludes the Commission "from granting party status to an entity that, by its own actions, is no longer part of the proceeding."⁷⁹

27. As discussed above, the Court's remand instructions state only that the Commission needs to conduct further proceedings consistent with the Court's opinion to provide the Applicants with an opportunity to cure "the *de facto* control the FCC found that DISH exercises over them."⁸⁰ The remand instructions were silent about whether the Parties of Record to the applications should be divested of their *ex parte* status during the remand process.

28. The Applicants, however, argue that the *Order on Remand* "exceeded the Court's

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contrast, DISH had an interest in both Applicants when they filed their long-form applications, it continues to have a stake in each company, and Applicants are demanding that the agency negotiate with them so that DISH's interest does not render them ineligible for bidding credits. Further, the Bureau's order in *Airgate Wireless, L.L.C.*, Memorandum Opinion and Order, 14 FCC Rcd 13557 (CWD 1999) did not address "iterative negotiations" between Bureau staff and the applicant, let alone state that any such discussions were both necessary to and determinative in the Bureau's decision to grant the application. Accordingly, in affirming the Bureau order, the Commission did not "endorse" the procedure demanded by Applicants, and we are thus not required to apply similar procedures in this proceeding.

⁷⁵ AFR at 8. *See also* Letter from James L. Winston, President, National Association of Black Owned Broadcasters, and Maurita Coley, Acting President, Multicultural Media, Telecom & Internet Council, ULS File Nos. 0006670613 and 0006670667 at 3 (May 15, 2018) ("reasonable opportunity to cure any deficiencies identified by the Commission in [Applicants'] bidding credit applications").

⁷⁶ *See, e.g., SNR Wireless March 26th Letter.*

⁷⁷ AFR at 4; *see also*, Applicants' Reply at 2-4 ("At the time Applicants' appeal was filed, T-Mobile had chosen voluntarily not to be a party").

⁷⁸ AFR at 18.

⁷⁹ *See* AFR at 19.

⁸⁰ *SNR Wireless v. FCC*, 868 F.3d at 1025.

mandate,” because “nothing in *SNR v FCC* directs the FCC to readmit the Dismissed Parties.”⁸¹ This has the issue backwards. Since the mandate does not address this issue, the FCC is free to exercise its broad discretion under Section 4(j) to determine whether to exclude the Parties of Record from continued participation in these remand proceedings.⁸² Because the Court did not provide any instructions about this issue, we are guided by our *ex parte* rules.⁸³ These state in pertinent part that a party includes any person who files an application, and any person filing a “written submission referencing and regarding such pending filing which is served on the filer.”⁸⁴

29. This definition of a “party” is based on whether or not a filing is made and not on whether the party has standing to make the filing or if the filing was procedurally correct. The Commission’s rules make clear that the purpose of the *ex parte* rules—to ensure fairness and integrity of Commission decision-making process—is independent of whether a party “has satisfied any other legal or procedural requirements, such as the operative requirements for petitions to deny or requirements as to timeliness.”⁸⁵ Accordingly, the parties who have expressed objections to the applications have a clear right to participate under the *ex parte* rules regardless of whether they have established standing.⁸⁶ We agree with the Bureau that, under our *ex parte* rules, all the Parties of Record continue to be parties in these proceedings until the applications are no longer subject to administrative reconsideration or review or judicial review.⁸⁷

⁸¹ AFR at 19. Although the Applicants argue that it is inappropriate to include the dismissed and new parties to these proceedings, they do not argue that Central Texas Telephone Investments LP, Rainbow Telecommunications Association, Inc., and VTel Wireless, Inc. should be excluded (although they seek to limit VTel’s participation). *See* AFR 18-22.

⁸² *See supra* para. 10.

⁸³ “To ensure the fairness and integrity of its decision-making, the Commission has prescribed rules to regulate *ex parte* presentations in Commission proceedings. These rules specify ‘exempt’ proceedings, in which *ex parte* presentations may be made freely (§1.1204(b)), ‘permit-but-disclose’ proceedings, in which *ex parte* presentations to Commission decision-making personnel are permissible but subject to certain disclosure requirements (§1.1206), and ‘restricted’ proceedings in which *ex parte* presentations to and from Commission decision-making personnel are generally prohibited (§1.1208).” 47 CFR § 1.1200(a). “Restricted” proceedings, include, but are not limited to, all proceedings that have been designated for hearing and applications for authority under Title III of the Communications Act. *Ex parte* presentations in restricted proceedings are generally prohibited in restricted proceedings until the proceeding is no longer subject to administrative reconsideration or review or judicial review. *See* 47 CFR § 1.1208.

⁸⁴ 47 CFR §1.1202(d).

⁸⁵ *See* 47 CFR §1.1202(d), n.3.

⁸⁶ Because we are denying the Applicants’ request to have cure negotiation meetings, the issue of whether to restrict VTel’s participation in any cure negotiation meetings is moot. *See* AFR at 21-22. In addition, Applicants’ claim that VTel should have limited rights to participate in these proceedings because of the pendency of VTel’s *qui tam* lacks any rational basis. It appears that the Applicants want to limit VTel’s access to the Applicants’ filings. The *Order on Remand* already addresses this by using the Commission’s well-established confidentiality rules, which both limit the ability of the Applicants to keep material information confidential but also provide the Parties of Record with an opportunity to challenge the Applicants’ claim of confidentiality in connection with specific filings. *Order on Remand*, 33 FCC Red at 233, n.16.

⁸⁷ *See* note 83 *supra*. Although T-Mobile filed its pleading after the *Northstar and SNR Wireless MO&O* was released, its filing referenced and regarded the applications that have been remanded to the Commission and the filing was sent to Northstar and SNR Wireless. *See* Letter from Kathleen Ham, Senior Vice President Federal Government Affairs, T-Mobile, to Marlene H. Dortch, Sec’y, Federal Communications Commission, ULS File Nos.

30. In any event, the Commission has broad discretion to consider the views of such interested parties as informal objections under section 1.41 of the Commission's rules.⁸⁸ The D.C. Circuit has found it a "commendable procedure" for the Commission to address an untimely filed petition to deny as an informal objection "[i]n view of the importance of the questions raised by the petition."⁸⁹ In the *Northstar and SNR Wireless MO&O*, the Commission did not determine whether the Parties of Record could file informal objections pursuant to section 1.41 of Commission's rules. For these reasons, we do not believe it is appropriate at this time to preclude filings by T-Mobile, which was a bidder in the AWS-3 auction that bid on many of the licenses for which Applicants applied.⁹⁰

31. If T-Mobile or a Party of Record submits a filing during the remand process, the Applicants can object to the filing and the Commission will determine if the filing was appropriate.⁹¹ We need not consider in advance whether entities have standing to oppose any amendments to Applicants' applications, or the applicability of the Commission's "major change" rules to such amendments in light of the Court's order.⁹²

32. Although the Commission has the discretion to change this proceeding to "permit-but-disclose" and allow *ex parte* presentations for "the resolution of issues, including possible settlement,"⁹³ we do not believe it is appropriate to exercise that discretion simply to make this proceeding "conducive to responsive, back-and-forth discussions between the Applicants and the Commission."⁹⁴ Rather, for the reasons stated above, and in light of the clear path afforded by the Court on the *de facto* control issue in these cases, we conclude it is important to conduct this remand in an efficient fashion that accommodates the legitimate interests of the multiple Parties of Record.⁹⁵

D. Responsive Pleadings by the Applicants

33. The Applicants express concern that the *Order on Remand* provides only that Applicants

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0006670613, 0006670667 (filed Nov. 17, 2015). As a result, T-Mobile is also considered a "party" in these proceedings. Applicants do not claim otherwise.

⁸⁸ See, e.g., *Adelphia Communications Corp.*, 21 FCC Rcd 8203, 8216, paras. 19-20 (2006); *Wireless Telecommunications, Inc.*, 24 FCC Rcd 3162, 3167, para. 11 (WTB 2009); *Jonathan Stewart*, 7 FCC Rcd 4454, para. 5 (MSD 1992).

⁸⁹ *Marsh v. FCC*, 436 F.2d 132, 136 (D.C. Cir. 1970).

⁹⁰ See T-Mobile Opposition at 8.

⁹¹ We note that T-Mobile argues that it has the "right to comment on, or file a petition to deny, any applications that the [the Applicants] . . . may eventually file for any AWS-3 licenses they won in the auction." T-Mobile Opposition at 5. Because these filings have not been made, the issue is not yet ripe and we will decide at a later time if T-Mobile files comments or a petition to deny.

⁹² See T-Mobile Opposition at 5-8.

⁹³ 47 CFR §§ 1.1204(a)(10), 1.1208 n.2.

⁹⁴ See AFR at 21.

⁹⁵ This is not a case, like *Southland Television Co.*, Memorandum Opinion and Order, 44 FCC 1239, 1242 at para. 12 (1958), in which the Commission precluded a party from the proceeding after that party took affirmative steps (withdrawing its appeal) to abandon its application. In this case, the Parties of Record have not taken any affirmative steps to abandon these proceedings. Moreover, their right to continued participation did not require them to participate in the Court of Appeals case as intervenors in support of the Commission's order. See *Texas Star Broadcasting Co.*, 9 RR 373 (1952) (readmitting a party to the remand proceedings that did not appeal the Commission's decision). In any event, *Southland Television* predated the Commission's adoption of *ex parte* rules in 1965, which as noted above clearly extend participation rights to these Parties of Record in order to further the purposes of fairness and transparency articulated by the D.C. Circuit. See *Regulations Concerning Ex Parte Communications and Presentations in Commission Proceedings*, 52 FR 21052 (1987).

may amend their applications to address concerns raised by Parties of Record” but does not give them an opportunity “to rebut any filings by other parties.”⁹⁶ We read this to mean that the Applicants want an opportunity to respond to any comments and arguments made by the Parties of Record in addition to having the opportunity to file amendments to agreements.⁹⁷ We agree with the Applicants that they should have an opportunity to respond to the Parties of Record. If the Applicants choose, they may file a pleading to address any issues raised by the Parties of Record (including any new standing claims). Specifically, the Applicants will have up to 45 days from the day that comments are due from the Parties of Record to file their pleading.⁹⁸

III. CONCLUSION

34. For the reasons discussed above, we are affirming, with one modification, the procedures the Bureau adopted to afford Northstar and SNR Wireless the opportunity to cure their Auction 97 applications.⁹⁹ We do not find any merit in the Applicants’ argument that the *Order on Remand* is “flawed and improper” and therefore have determined not to toll the deadlines specified in the *Order on Remand*.¹⁰⁰

IV. ORDERING CLAUSE

35. ACCORDINGLY, IT IS ORDERED that, pursuant to section 5(c)(5) of the Communications Act of 1934, as amended, 47 U.S.C. § 155(c)(5), and section 1.115(b) of the Commission’s rules, 47 C.F.R. § 1.115(b), the Joint Application for Review of Northstar Wireless, LLC and SNR Wireless LicenseCo, LLC, File Nos. 0006670613 and 0006670667, IS GRANTED IN PART, as discussed in paragraph 33 above, and OTHERWISE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

⁹⁶ See AFR at 23.

⁹⁷ See *id.* Given the Applicants’ objection to the *Order on Remand*’s process that allows Parties of Record to participate, we do not read the AFR to be faulting the Bureau for not raising the possibility of filings by non-Parties of Record (and the Applicants’ right to rebut any such filings). Nonetheless, if that is the Applicants’ complaint, we clarify on our own motion that the Applicants are permitted to rebut any such filings within the timeframes provided in the *Order on Remand*.

⁹⁸ If necessary, an Applicant may submit a request to the Bureau requesting up to an additional 45 days to address issues raised by the Parties of Record. The letter requesting additional time must be filed in ULS prior to the end of the Applicant’s initial 45-day response deadline, served on all Parties of Record, and a copy e-mailed to the Bureau, in care of Paul Malmud at Paul.Malmud@fcc.gov. The opportunity to respond to the Parties of Record does not provide the Applicants with any additional opportunities to further amend their FCC Form 601 or their agreements. See *Order on Remand*, 33 FCC Rcd at 232-234, paras. 6-8.

⁹⁹ For the same reasons, in the circumstances of this restricted proceeding, we decline to revise those procedures to include meetings designed to engage in “iterative negotiations.” See also *Johnson March 20th Letter*, *supra*.

¹⁰⁰ See AFR at 23-24. The Applicants requested an additional 45 days to negotiate their agreements so the original due date of April 24, 2018, was extended to June 8, 2018. See Letter from Ari Q. Fitzgerald, Counsel to SNR Wireless, to Paul Malmud, Assistant Chief, Broadband Division, ULS File No. 0006670667 (April 9, 2018); Letter from Mark F. Dever, Counsel to Northstar, to Paul Malmud, Assistant Chief, Broadband Division, ULS File Nos. 0006670613 (March 7, 2018). See also *Order on Remand*, 33 FCC Rcd at 232, para. 5.