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

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| In re: NTCH, Inc. | ) | No. 18-1121 |

**OPPOSITION OF THE FEDERAL COMMUNICATIONS COMMISSION TO PETITION FOR A WRIT OF MANDAMUS**

The Federal Communications Commission opposes the petition for a writ of mandamus filed by NTCH, Inc. Mandamus is a "drastic" remedy available only in "extraordinary" situations. *Oglala Sioux Tribe of Pine Ridge Indian Reservation v. U.S. Army Corps. of Eng'rs*, 570 F.3d 327, 333 (D.C. Cir. 2009). It is not warranted here, where NTCH has not shown that it would have Article III standing to challenge eventual Commission orders on its pending petitions for reconsideration and applications for review. Thus, this Court would lack jurisdiction to consider subsequent petitions for review, and mandamus is therefore not "'necessary or appropriate in aid of'" the Court's eventual jurisdiction over that litigation. *Telecomms. Research & Action Ctr. v. FCC* (*TRAC*), 750 F.2d 70, 76 (D.C. Cir. 1984) (quoting 28 U.S.C. § 1651(a)). But even supposing NTCH could demonstrate standing, it still has failed to meet the stringent requirements for mandamus relief. Finally, the Commission has taken a concrete and necessary step to address NTCH's petitions and applications: Orders disposing of them recently

were circulated to the Commissioners for a vote. For these reasons, the Court should dismiss and alternatively deny the petition.[1]

## BACKGROUND

1. Title III of the Communications Act of 1934, 47 U.S.C. §§ 301 *et seq.* (the Communications Act), provides the Commission broad authority to oversee radio transmission in the United States, including allocating and assigning radio spectrum for spectrum-based services. *Id.* § 301. To that end, various provisions of Section 303 of the Communications Act authorize the Commission, subject to what the "public convenience, interest, or necessity requires," to "[p]rescribe the nature of the service to be rendered by each class of licensed stations and each station within any class," *id.* § 303(b), to "encourage the larger and more effective use of radio in the public interest," *id.* § 303(g), and to "prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this [Act]." *Id.* § 303(r). In addition, Section 316 of the Communications Act authorizes the Commission to modify existing licenses if "such action will promote the public interest, convenience, and necessity, or the provisions of this [Act] . . . will be more fully complied with." *Id.* § 316(a).

[1] NTCH filed another petition for mandamus on the same day as this petition, which has been docketed as No. 18-1122. Although the Commission earlier filed a single motion in both dockets seeking an extension of time to respond to the petitions, we are filing separate responses to each petition because we have determined that the two petitions are unrelated.

Since 1993, the Communications Act has required the Commission to award most spectrum licenses "through a system of competitive bidding," *i.e.*, by auction, if "mutually exclusive applications are accepted." *Id.* § 309(j)(1). The statute, however, makes exceptions to this general requirement. It provides that nothing about the competitive-bidding system "diminish[es] the authority of the Commission" under its broad Title III mandate "to regulate . . . spectrum licenses." *Id.* § 309(j)(6)(C). The statute further provides that nothing about the competitive bidding system should "be construed to relieve the Commission of its obligation" to ensure that its public interest evaluations take full consideration of all relevant considerations, including the potential use of "engineering solutions . . ., threshold qualifications, service regulations, and other means in order to avoid mutual exclusivity." *Id.* § 309(j)(6)(E).

2. In 1997, the Commission allocated 70 MHz of spectrum in the 2 GHz spectrum band (1990-2025 MHz and 2165-2200 MHz) for Mobile Satellite Service ("MSS"). *See generally Amendment of Section 2.106 of the Commission's Rules to Allocate Spectrum at 2 GHz for Use by the Mobile-Satellite Service*, 12 FCC Rcd 7388 (1997) (*MSS Allocation Order*). MSS sends radio communications through two or more satellites to earth stations (*i.e.*, antennas and radios) to support mobile voice and data services. *See* 47 C.F.R. § 2.1(c). The Commission anticipated that MSS would be offered in rural areas (where it is difficult to provide

communications using terrestrial facilities), or during disaster recovery (when coverage may be unavailable from terrestrial-based networks). *MSS Allocation Order* ¶ 4. By 2001, the Commission's International Bureau had authorized eight satellite operators to provide MSS. *See Flexibility for Delivery of Communications by Mobile Satellite Service Providers in the 2 GHz Band, the L-Band, and the 1.6/2.4 GHz Bands*, 16 FCC Rcd 15532 (¶ 1) (2001). The Commission in 2003 reallocated 30 MHz of the 2 GHz MSS spectrum for terrestrial use, reducing the spectrum allocated to MSS to 2000-2020 MHz and 2180-2200 MHz. *Amendment of Part 2 of the Commission's Rules to Allocate Spectrum Below 3 GHz for Mobile and Fixed Services to Support the Introduction of New Advanced Wireless Services, including Third Generation Wireless Systems*, 18 FCC Rcd 2223, 2238-40 (¶¶ 28-32) (2003).

In 2003, the Commission established Ancillary Terrestrial Component ("ATC") rules for the remaining 40 MHz of 2 GHz MSS spectrum. These rules allowed MSS licensees to provide terrestrial service over that same spectrum, but only to enhance their ability to use that existing spectrum to provide MSS in hard-to-reach places (*e.g.*, to customers inside buildings). *See generally Flexibility for Delivery of Communications by Mobile Satellite Service Providers in the 2 GHz Band, the L-Band, and the 1.6/2.4 GHz Bands*, 18 FCC Rcd 1962 (2003). The Commission granted ATC authority exclusively to incumbent MSS licensees,

because the administrative record showed that it would be too complex to coordinate separately-controlled MSS and terrestrial operations. *Id.* ¶¶ 47-55. Also, the Commission concluded, it would be "unreasonable and unwarranted" to revoke incumbent licensees' MSS authority to enable terrestrial operations by other service providers. *Id.* ¶ 65. The Commission thus modified MSS licenses to include ATC authority, and in doing so, expressly declined to assign terrestrial rights through a spectrum auction. *Id.* ¶ 221.

By 2011, all but two MSS operators (DBSD and TerreStar) had surrendered their MSS licenses. DISH Network Corp. (DISH)[2] acquired both companies out of bankruptcy that year, and in March 2012, the International Bureau granted applications to transfer control of the DBSD and TerreStar MSS licenses, including the ATC authority, to DISH.

When DISH acquired these licenses, commercial use in the 2 GHz MSS spectrum band was virtually non-existent. *See Service Rules for Advanced Wireless Services in the 2000-2020 MHz and 2180-2200 MHz Bands*, 27 FCC Rcd 16102, 16169-16170 (¶ 177) (2012) (*AWS-4 Order*). Given that, and in response to the increasing demand for mobile wireless services, the Commission in 2011 added Fixed and Mobile terrestrial allocations to the 2 GHz MSS spectrum band (that is,

[2] DISH is a provider of Direct Broadcast Satellite (DBS) video programming services.

authorized certain uses of that spectrum unrelated to MSS service). *See Fixed and Mobile Services in the Mobile Satellite Service Bands at 1525-1559 MHz and 1626.5-1660.5 MHz, 1610-1626.5 MHz and 2483.5-2500 MHz and 2000-2020 MHZ and 2180-2200 MHz*, 26 FCC Rcd 5710, 5714 (¶ 8) (2011) (*2 GHz Band Co-Allocation Order*). Those allocations – which were "co-primary" (*i.e.*, co-equal) with MSS – "la[id] the groundwork for more flexible use of the band, including for terrestrial broadband services, in the future." *Id.* ¶ 2.

Shortly thereafter, the Commission adopted a "broad and flexible regulatory framework for licensing" the new terrestrial allocation – which it designated the Advanced Wireless Service-4 (AWS-4) band – to "enable the provision of stand-alone terrestrial services." *AWS-4 Order* ¶ 1. In the same order, the Commission allocated the lower portion of the AWS-4 Band (2000-2020 MHz) for "uplink" operations and the upper portion of the AWS-4 Band (2180-2200 MHz) for "downlink" operations. *Id.* ¶ 39.[3] The Commission determined that this allocation would "minimize the possibility that AWS-4 operations could interfere with 2 GHz MSS operations." *Id*.

[3] Radiofrequency spectrum has often been organized in paired bands – a block of spectrum in a lower frequency band and an associated block of spectrum in a higher frequency band. The "downlink" channel transmits "downstream" from a facility in a service provider's network (*e.g.*, a wireless tower) to a subscriber's mobile wireless device (*e.g.*, an iPhone), and the "uplink" channel transmits "upstream" from the subscriber's mobile device to the facility in the service provider's network.

The Commission decided that the new AWS-4 rights should be assigned to the incumbent MSS licensees. *Id.* ¶ 161-163. Complexities of coordination between MSS and terrestrial use – which led to the Commission's earlier decision to assign ATC authority to incumbent MSS licensees – suggested that assignment of terrestrial licenses to other entities remained impractical. *Id.* ¶ 165. Also, the record showed that assigning separate terrestrial licenses in the same band created interference problems. *Id.* ¶¶ 165-166, 180. And this approach would not diminish MSS licensees' existing authority to provide terrestrial service under the ATC rules. *Id.* ¶ 169. The Commission thus concluded that modifying existing MSS licensees to include AWS-4 authority was the best and fastest method for putting the spectrum to use. *Id.* ¶¶ 177-178.

Alone among commenters, NTCH asserted that the license modification approach was not in the public interest. *Id*. ¶ 180. Though NTCH argued that the Commission should auction AWS-4 rights rather than assign those rights to the incumbent MSS licensees, it did not rebut the Commission's finding that band sharing was technically infeasible. *Id.*

DISH – the sole holder of 2 GHz MSS licenses – accepted the proposed license modifications on January 22, 2013, and on February 15, 2013, the Commission's Wireless Telecommunications and International Bureaus jointly issued an order modifying DISH's MSS licenses by adding AWS-4 authority. *See*

*Service Rules for Advanced Wireless Services in the 2000-2020 MHz and 2180-2200 MHz Bands*, 28 FCC Rcd 1276 (IB & WTB 2013) (*Modification Order*).

NTCH filed a petition asking the Commission to reconsider its *AWS-4 Order* on March 7, 2013, and a petition asking the Bureaus to reconsider their *Modification Order* on March 18, 2013.

3. The Middle Class Tax Relief and Job Creation Act of 2012 (the "Spectrum Act"), Pub. L. No. 112-96, 126 Stat. 156, directed the Commission to allocate and license for commercial use spectrum known as the H Block (the 1915-1920 MHz and 1995-2000 MHz spectrum bands) no later than February 13, 2015. To fulfill that statutory mandate, the Wireless Bureau released a public notice on July 15, 2013, that announced the auction of the H Block spectrum (Auction 96), and sought comment on procedures for conducting the auction – including a reserve price and minimum-opening-bid amounts. Public Notice, *Auction of H-Block Licenses in the 1915-1920 MHz and 1995-2000 MHz Bands; Comment Sought on Competitive Bidding Procedures for Auction 96*, 28 FCC Rcd 10013 (WTB 2013). (A reserve price is an amount below which a license will not be sold. The minimum-opening-bid amount is the amount below which an initial bid will not be accepted. The latter is used to accelerate the bidding process.)

In response, 23 parties (but not NTCH) filed comments, reply comments, or *ex parte* letters. One of those parties was DISH, which on September 9, 2013, filed

an *ex parte* submission that estimated the value of the H Block spectrum as "at least" $0.50 per megahertz of bandwidth per population (MHz/POP) on a nationwide aggregate basis – an estimate that DISH supported with data from another recent spectrum auction, spectrum sales in the secondary market, and estimates by financial institutions. *See NTCH, Inc. Petition for Reconsideration of Public Notice Announcing Procedures and Reserve Price for Auction of H Block Licenses*, 28 FCC Rcd 16108, 16109 (¶ 4) (WTB 2013) (*NTCH Order*). Though commenters generally supported the Bureau's proposal to set an aggregate reserve price, DISH was the only party that suggested a specific reserve amount. *Id.* ¶ 6.

On the same day that it commented on the H Block auction, DISH filed a Petition for Waiver and Request for Extension of Time that asked the Commission to waive certain rules for terrestrial use in the AWS-4 Band (the DISH Petition). *See DISH Network Corp. Petition for Waiver of Sections 25.7(j) and 27.53(h)(2)(ii) of the Commission's Rules and Request for Extension of Time*, 28 FCC Rcd 16787 (WTB 2013) (*Waiver Order*). Specifically, it sought the flexibility to use the Lower AWS-4 Band for either uplink or downlink operations (rather than only uplink operations), and an extension of the final build-out milestone for its AWS-4 licenses from seven to eight years. *Id.* ¶ 8. DISH stated that should the Commission grant these requests, it would commit to: (1) file an election with the Commission, "as soon as commercially practicable, but no later than 30 months

after the grant of [its] petition" specifying "whether it will use the [Lower AWS-4 Band] for uplink or downlink use"; and (2) "bid[] at least a net clearing price equal to any aggregate nationwide reserve price established by the Commission in the upcoming H Block auction (not to exceed the equivalent of $0.50 per MHz/POP)." *Id.* The Bureau placed the DISH Petition on public notice in a new proceeding. *See* Public Notice, *Wireless Bureau Opens Docket to Seek Comment on DISH Network Corporation's Petition for Waiver and Request for Extension of Time*, DA 13-1877 (Sept. 13, 2013), published at 78 Fed. Reg. 59,633 (Sept. 27, 2013).

4. On September 13, 2013, the Wireless Bureau released the *Auction 96 Public Notice*, which set the aggregate reserve price for the H Block spectrum at $1.564 billion – an amount that was calculated using DISH's estimate of $0.50 MHz/POP. *See* Public Notice, *Auction of H-Block Licenses in the 1915-1920 MHz and 1995-2000 MHz Bands Scheduled for January 14, 2014*; *Notice and Filing Requirements, Minimum Opening Bids, Upfront Payments, and Other Procedures*, 28 FCC Rcd 13019, 13064 (¶ 172) (WTB 2013) (*Auction 96 Public Notice*).

NTCH filed a petition for reconsideration of that decision with the Wireless Bureau. Petition for Reconsideration of NTCH, Inc., AU Docket No. 13-178 (filed Oct. 18, 2013). It argued that the aggregate reserve price should be reduced because: (1) it was much greater than the sum of the minimum opening bids for each license; (2) it was based on DISH's commitment to bid that amount in

Auction 96 in return for grant of its pending waiver and extension requests; and (3) the reserve price prevented smaller carriers from participating in the auction. *NTCH Order* ¶¶ 13-17.

The Wireless Bureau's Auctions and Spectrum Access Division denied NTCH's reconsideration petition on November 27, 2013. The Division explained that a minimum bid amount and a reserve price have distinct purposes (*i.e.*, accelerating bidding versus setting the minimum price at which the license could be sold), so there was no basis for NTCH's argument that the reserve price should have been equal to the aggregate of the minimum opening bids. *Id.* ¶¶ 13-14. The Division further pointed out that NTCH had not demonstrated that the Bureau erred in setting the reserve price, which was in line with publicly available information about the value of spectrum licenses. *Id.* ¶ 15.

The Division also rejected NTCH's argument that the Commission must deny DISH's pending waiver petition before the start of Auction 96. According to NTCH, DISH would have an informational advantage were the Commission to grant the petition, because DISH could then determine the interference potential – and correspondingly, the value of the spectrum – based on its ability to choose whether to employ the Lower AWS-4 Band for uplink or downlink operations. *Id.* ¶ 18. The Division explained that by soliciting comment on the DISH Petition well

before the start of bidding, the Commission enabled bidders to assess the possible impact of the technical changes proposed by DISH. *Id*. ¶ 19.

NTCH filed an application for Commission review of the Order on December 27, 2013.

5. In the December 20, 2013, *Waiver Order*, the Wireless Bureau granted the DISH Petition, conditioned on DISH's commitment to bid at least the aggregate reserve price in the H Block auction, and to file its uplink or downlink election not later than 30 months after the release of the Order.

Section 1.925 of the Commission's rules, 47 C.F.R. § 1.925, provides that the Commission may grant a request for a waiver if it is shown that: (i) the underlying purpose of the rule(s) would not be served or would be frustrated by application to the instant case, and that grant would be in the public interest; and (ii) in view of the unique or unusual factual circumstances of the instant case, application of the rules would be inequitable, unduly burdensome or contrary to the public interest, or the applicant has no reasonable alternative. Applying that standard, the Bureau concluded that "the technical rule waivers sought by DISH are warranted based on the unique factual circumstances of DISH's status as a licensee of both AWS-4 and 2 GHz MSS licenses." *Waiver Order* ¶ 18.

The Bureau determined that giving DISH the flexibility to use the Lower AWS-4 Band for uplink or downlink operations was consistent with the flexible

use policy in the *AWS-4 Order*. *Id.* ¶ 19. It also concluded that granting the petition would result in improved spectrum management. The Bureau noted that the Commission in the *AWS-4 Order* designated the Lower AWS-4 Band (2000-2020 MHz) for uplink and the Upper AWS-4 Band (2180-2200 MHz) for downlink to minimize interference between AWS-4 and MSS operations. *Id.* ¶ 20. Because DISH is the sole licensee of both services, the Bureau explained, it can manage any interference between those operations if it elected to use the Lower AWS-4 Band for downlink, and no other licensees could be adversely affected. *Id.* ¶ 22. The Bureau further noted that grant of the waiver would "obviate[e] in the event of downlink use the need for certain interference limitations that would otherwise govern both AWS-4 and adjacent H Block operations . . . resulting from the alignment of downlinks in these two services." *Id.*

The Bureau also decided that a limited waiver of the final build-out milestone for DISH's AWS-4 licenses was warranted in these "unique circumstances." *Id.* ¶ 43. It explained that providing DISH an extra year to complete that requirement was a "reasonable accommodation to ensure that it has sufficient time to assess how this band might be put to more efficient use, without unduly delaying completion of the required full build-out." *Id.*

NTCH had opposed grant of the DISH Petition on several grounds, all of which the Bureau found baseless. The Bureau rejected NTCH's request to dispose

of its petition for reconsideration of the *AWS-4 Order* first, stating that "[d]elaying action on the waiver would not advance the Commission's policy goal of promoting deployment of broadband service in the band." *Id.* ¶ 51.

It also rejected NTCH's argument that there was "'the appearance of impropriety in the dealings between DISH and the Commission.'" *Id.* ¶ 50; *id.* ¶ 53. The Bureau stated that it was addressing the DISH Petition based on DISH's filings, comments received, and its "independent evaluation of the interference questions and public interest benefits" discussed in the Order. *Id.* ¶ 53.

NTCH filed an application for Commission review of the Order on January 22, 2014.

6. The H Block auction began on January 22, 2014, and closed on February 27, 2014, with DISH winning all the licenses available at auction. *See* Public Notice, *Auction of H Block Licenses in the 1915-1920 and 1995-2000 MHz Bands Closes*, 29 FCC Rcd 2044 (WTB 2014). NTCH did not participate in the auction.

## ARGUMENT

"[M]andamus is 'drastic;' it is available only in 'extraordinary situations;' it is hardly ever granted; those invoking the court's mandamus jurisdiction must have a 'clear and indisputable' right to relief; and even if the plaintiff overcomes all these hurdles, whether mandamus relief should issue is discretionary." *In re Cheney*, 406 F.3d 723, 729 (D.C. Cir. 2005) (en banc).

NTCH's mandamus petition contends that the Commission has taken too long to act on its petitions for reconsideration of the *AWS-4 Order* and the *Modification Order*, and its applications for review of the *Auction 96 Public Notice* and the *Waiver Order*. To obtain mandamus, however, NTCH must demonstrate that it would have standing to challenge eventual Commission action on the pending petitions and applications. *TRAC*, 750 F.2d at 75-77. Here, NTCH cannot show that standing. Thus, the Court should dismiss NTCH's petition.

In the alternative, the Court should deny the petition. This Court will order mandamus only where the petition demonstrates that the agency delay is "egregious." *Am. Hosp. Ass'n v. Burwell*, 812 F.3d 183, 189 (D.C. Cir. 2016). In such cases, the Court is guided by the "*TRAC* factors," which are as follows:

> "the time agencies take to make decisions must be governed by a rule of reason"; any statutory "timetable or other indication of the speed with which [Congress] expects the agency to proceed"; "delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake"; "the effect of expediting delayed action on agency activities of a higher or competing priority"; "the nature and extent of the interest prejudiced by delay"; and "the court need not find any impropriety lurking behind agency lassitude in order to hold that agency action is unreasonably delayed."

*TRAC*, 750 F.2d at 76. Application of those principles suggests that mandamus is not appropriate here.

## I. The Court Should Dismiss The Petition Because NTCH Has Not Established That This Court Would Have Jurisdiction Over An Eventual Challenge To The Orders It Claims Have Been Unreasonably Delayed.

It is well established that, in cases seeking mandamus relief to address agency delay, this Court's jurisdiction is derived from the All Writs Act, 28 U.S.C. § 1651(a), and depends on the Court's eventual jurisdiction over the allegedly-delayed order. *See In re Tennant*, 359 F.3d 523, 527 (D.C. Cir. 2004); *TRAC*, 750 F.3d at 76. "The All Writs Act provides that the federal courts 'may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.' As this statutory language makes clear, the Act is not itself a grant of jurisdiction." *Tennant*, 359 F.3d at 527 (quoting 28 U.S.C. § 1651(a)). Here, NTCH has not shown – and cannot show – that it would have Article III standing to challenge adverse decisions on its pending petitions for reconsideration and applications for review. It therefore cannot invoke the Court's All Writs Act jurisdiction to force action on those pending matters, either.

1. Assuming the Commission denies NTCH's petitions for reconsideration of the *AWS-4 Order* and the *Modification Order*, NTCH would lack standing to challenge those denials because it has failed to establish that it is "likely as opposed to merely speculative that [its] injury will be redressed by a favorable decision" of a reviewing court. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). NTCH implies that it has been injured by the Commission's modification

of DISH's licenses to include AWS-4 rights, and that its injury would be redressed if the Commission, on remand from this Court, "made [those rights] available" through a spectrum auction. Pet. 8; *id*. 9. That argument ignores the Commission's determination in the *AWS-4 Order* – which NTCH has never contested – that "harmful interference would occur if the 2 GHz MSS and AWS-4 terrestrial spectrum rights were controlled by different entities." *AWS-4 Order* ¶ 181. Thus, even supposing the Court found on review of an adverse Commission order that the agency exceeded its authority in modifying DISH's licenses to include AWS-4 rights, Pet. 8, NTCH's injury would nonetheless not be redressed because it is technically infeasible to grant AWS-4 licenses to other terrestrial operators, such as NTCH.[4]

[4] NTCH in its comments proposed to "remove the MSS allocation for the 2 GHz band" so that there would be no interference between MSS and terrestrial operations that would prevent the Commission from auctioning the AWS-4 rights. NTCH Comments, WT Docket No. 12-70, at 8-9 (filed May 17, 2012); *id*. 9 ("[i]t is time to simply *let go of the satellite allocation here* and allow the spectrum to be put to its highest use unfettered by unnecessary interference considerations" (emphasis added)). But the co-primary MSS and terrestrial allocations were made in the *2 GHz Band Co-Allocation Order*, which is final and not the subject of any of NTCH's pending requests. Indeed, as the Commission pointed out, NTCH's request to eliminate the MSS allocation was, in effect, an "untimely Petition for Reconsideration" of that final order. *AWS-4 Order* n.532. Thus, NTCH's injury cannot be redressed by limiting licensed operations in the 2 GHz band to terrestrial service, because the MSS allocation is beyond the scope of the *AWS-4 Order* that it is challenging on reconsideration.

Further, even were the Commission to refuse to rescind DISH's AWS-4 rights in response to NTCH's pending reconsideration petitions, and then were this Court to overturn that decision, the agency would still not be obligated to reallocate those rights through a spectrum auction. Under the Communications Act, the Commission is only required to hold an auction when it receives "mutually exclusive applications . . . for any initial license." 47 U.S.C. § 309(j)(1). At this time, there is no assurance that multiple entities would seek the same AWS-4 licenses. And were the Commission to receive mutually exclusive applications, "[t]he statute . . . makes an exception for th[e] general call for auctions." *M2Z Networks, Inc. v. FCC*, 558 F.3d 554, 562 (D.C. Cir. 2009) (discussing 47 U.S.C. § 309(j)(6)(E)); *see* 47 U.S.C. § 309(j)(6)(C). This Court has explained that the agency's statutory authority to conduct auctions allows it "to forgo an auction" so long as it "consider[s] the public interest." *Id*. at 563. It is entirely possible that the Commission, after seeking public comment, would determine that it is not in the public interest to assign AWS-4 rights through an auction. *See Talenti v. Clinton*, 102 F.3d 573, 577 (D.C. Cir. 1996) (petitioner failed to demonstrate that its injury was capable of redress by an action statutorily committed to the President's discretion).

Accordingly, NTCH cannot establish Article III standing to challenge adverse final orders disposing of its reconsideration petitions, because redress of its

alleged injury from those orders is based on speculation about future Commission actions that the agency is under no obligation to take. *See United Transp. Union v. ICC*, 891 F.2d 908, 912 (D.C. Cir. 1989) (if a plaintiff relies on a "chain of allegations for standing purposes," the Court "may reject as overly speculative those links which are predictions of future events"); *Illinois Pub. Telecomms. Ass'n v. FCC*, 752 F.3d 1018, 1027 (D.C. Cir. 2014) (dismissing petitioner's claim for lack of standing because the petition "offer[ed] nothing beyond sheer speculation to support [its] bank-shot approach" to redressability).

2. NTCH similarly has not demonstrated that it would have standing to challenge adverse Commission's actions in response to its applications for Commission review of the *Auction 96 Public Notice* or the *Waiver Order*. It cannot demonstrate the requisite "injury in fact." *Lujan*, 504 U.S. at 560.

a. NTCH cannot show any injury from the *Auction 96 Public Notice*, or from an eventual Commission order affirming that public notice. The reserve price set by the Wireless Bureau did not hinder NTCH's ability to compete for licenses. The Bureau established an aggregate reserve price for the entire auction instead of on a license-by-license basis. *NTCH Order* ¶ 14. Thus, as the Wireless Bureau explained, a high bid for a given license would have qualified as a winning bid, so long as the total proceeds from *all* the licenses in the auction met the aggregate reserve amount. *Id.* That was a certainty, given DISH's commitment to bid that

amount. NTCH thus had little to lose by entering the auction and bidding what it considered a fair price for the licenses it wanted, and its decision not to participate was purely voluntary. *Id.* Given that voluntary determination not to bid in Auction 96, NTCH has no redressable injury caused by the *Auction 96 Public Notice* or an eventual Commission order from which a petition for review could be filed in this Court.

b. NTCH also cannot show that it was injured by the *Waiver Order*, or by an eventual Commission order affirming that order. NTCH is not a licensee operating in adjacent spectrum that might be adversely affected by interference caused by DISH's use of the Lower AWS-4 Band for downlink rather than uplink operations. It does not assert an injury from the waiver extending DISH's build-out milestones. And it is purely speculative that NTCH might someday become an AWS-4 licensee whose interests are affected by the waiver grant. For that to happen, the Commission would have to eliminate DISH's AWS-4 rights, make those rights available for non-MSS licensees, and determine after further proceedings to do so by auctioning licenses – notwithstanding the agency's prior determination that separate MSS and terrestrial operations cannot co-exist in the same band. *AWS-4 Order* ¶¶ 165-166, 180.

Also, contrary to NTCH's assertion, the *Waiver Order* did not "skew" the H Block auction. Pet. 10. In the proceeding below, NTCH contended that grant of the

DISH Petition gave DISH an informational advantage because only DISH knew whether the usefulness of the H Block would be enhanced by its downlink election for the adjacent AWS-4 band. *NTCH Order* ¶ 18. But as the Wireless Bureau explained, all H Block bidders were (or should have been) aware of the DISH Petition and were therefore able to take the possibility of a waiver into account in their bidding strategies. *Id.* ¶ 19; *Auction 96 Public Notice* ¶¶ 41-45. Indeed, in any spectrum auction, each applicant bids what it thinks the spectrum is worth based on its own specific circumstances, not all of which may be known to its competing bidders. *See Implementation of Section 309(j) of the Communications Act – Competitive Bidding*, 9 FCC Rcd 2348, 2349-50 (¶ 5) (1994). Thus, the fact that DISH might have had information about its own potential use of the spectrum did not give it an unfair advantage in the H Block auction.

Regardless, even if the *Waiver Order* had an impact on the value of the H Block licenses, Pet. 10, it did not injure NTCH, which elected not to participate in the auction before the Wireless Bureau granted the DISH Petition.[5] Because NTCH did not compete for licenses, it suffered no injury from the *Waiver Order*, and would suffer no redressable injury by a Commission decision affirming the waiver

[5] NTCH did not submit a short-form application required to participate in the H Block auction. The deadline for filing those applications was November 15, 2013. The Wireless Bureau released the *Waiver Order* on December 20, 2013.

grant. *See High Plains Wireless, L.P. v. FCC*, 276 F.3d 599, 605 (D.C. Cir. 2002) (no standing with respect to licenses for which challenger did not compete).

c. Indeed, NTCH's only stated complaint is that the "acceptance of cash payments in return for administrative approvals must be anathema to our system of government and cannot be permitted to persist." Pet. 13; *id.* 10 (the Commission "established the principle that the agency's public interest determinations may properly be influenced by payments of cash by a petitioning entity"). Even if NTCH properly characterized the conditions on the Wireless Bureau's grant of the DISH Petition – which it does not, *see Waiver Order* ¶ 15 – NTCH lacks standing to challenge the *Waiver Order*. A "plaintiff raising only a generally available grievance about government – claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large – does not state an Article III case or controversy." *Lujan*, 504 U.S. at 573-574; *Capital Legal Found. v. Commodity Credit Corp.*, 711 F.2d 253, 258 (D.C. Cir. 1983) ("A sincere, vigorous interest in the action challenged, or in the provisions of law allegedly violated, will not do to establish standing if the party's interest is purely ideological, uncoupled from any injury in fact, or tied only to an undifferentiated injury common to all members of the public.").

* * *

In summary, because NTCH has not established that it would have Article III standing to obtain review of adverse decisions by the Commission on any of the four items for which it seeks to compel the Commission to act, it similarly lacks standing to seek mandamus. Its mandamus petition should therefore be dismissed.

## II. Alternatively, The Court Should Deny The Petition Because Mandamus Is Not Warranted Under the *TRAC* Factors.

NTCH also fails to demonstrate that mandamus is appropriate under the six-factor test set forth in *TRAC*, 750 F.2d at 80.[6]

1. NTCH asserts that the first *TRAC* factor – "the time agencies take to make decisions must be governed by a 'rule of reason,'" *id.* at 79-80 – supports the grant of mandamus. Pet. 12. It does not.

The rule of reason cannot be applied "in the abstract, by reference to some number of months or years beyond which agency inaction is presumed to be unlawful." *Mashpee Wampanoag Tribal Council v. Norton*, 336 F.3d 1094, 1102 (D.C. Cir. 2003). Rather, "[r]esolution of a claim of unreasonable delay is ordinarily a complicated and nuanced task requiring consideration of the particular

[6] The Commission agrees with NTCH that the third and sixth *TRAC* factors are not relevant here, because "no health, welfare, or impropriety issues are involved." Pet. 12. The Commission does not believe that it is necessary for the Court to consider the fourth *TRAC* factor – the effect of expediting delayed action on agency activities of a higher or competing priority – to dismiss NTCH's petition.

facts and circumstances before the court." *Id.* at 1100. That includes considering (among other things) "the complexity of the task at hand." *Id.* at 1102.

Under this standard, the first *TRAC* factor weighs heavily against a finding of unreasonable delay. Though NTCH blithely asserts that "[t]he issues" before the Commission "are not at all complex," that clearly is not the case. Its petitions for reconsideration and applications for review address the agency's interrelated decisions, in four separate orders, to:

- assign newly created AWS-4 rights to incumbent MSS licensees, and modify MSS licenses to include that authority (*AWS-4 Order* and *Modification Order*);
- adopt an aggregate reserve price for the auction of the adjacent H Block spectrum band (*Auction 96 Public Notice*);
- waive certain technical rules to provide DISH flexibility to use the Lower AWS-4 Band for uplink or downlink operations (*Waiver Order*);
- waive DISH's deadline to build-out its AWS-4 licenses (*Waiver Order*); and
- condition those waivers on DISH's commitment to bid the aggregate reserve amount in the H Block auction and to file its uplink or downlink election no later than 30 months after grant of the waiver (*Waiver Order*).

This Court has held that "it is expected that consideration of such [complex] matters will take longer than might rulings on more routine items." *Monroe Commc'ns Corp.*, 840 F.2d 942, 946 (D.C. Cir. 1988); *see also Cutler v. Hayes*,

818 F.2d 879, 898 (D.C. Cir. 1987) ("complexity of the task confronting the agency" is relevant to ascertaining the reasonableness of delay); *Sierra Club v. Thomas*, 828 F.2d 783, 799 (D.C. Cir. 1987) (in light of "the complexity of the issues" and the "highly controversial nature of the proposal, agency deliberation for less than three years . . . can hardly be considered unreasonable").[7]

Moreover, orders addressing all the pleadings about which NTCH complains – NTCH's petitions for reconsideration of the *AWS-4 Order* and the *Modification Order*, and its applications for review of the *Auction 96 Public Notice* and the *Waiver Order* – were recently circulated to the Commissioners for a vote.[8] The agency has thus taken concrete steps to resolve NTCH's pending submissions. For that additional reason, mandamus is not appropriate here. *Monroe Communications*, 840 F.2d at 946 (denying mandamus where the agency was acting to complete its proceeding); *Grand Canyon Air Tour Coalition v. FCC*, 154 F.3d 455, 477 (D.C. Cir. 1998) (same); *United Steelworkers of Am. v. Rubber Mfgs. Assn.*, 783 F.2d 1117, 1120 (D.C. Cir. 1986) (same).

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[7] NTCH devotes several pages of its petition to discussion of unrelated administrative proceedings, Pet. 3-6, which it contends demonstrate a "continuing and systemic" problem "with the FCC delaying action." *Id.* 7. But those proceedings are irrelevant to the application of the rule of reason framework in this case, which "require[es] consideration of the particular facts and circumstances before the Court." *Mashpee*, 336 F.3d at 1100.

[8] *See* https://www.fcc.gov/items-on-circulation.

2. NTCH further argues that, under the second *TRAC* factor, the Commission was required by 47 U.S.C. § 405(a) to rule on NTCH's petitions for reconsideration and applications for review within 90 days, thus rendering the delay unreasonable. Pet. 12-13; *TRAC*, 750 F.2d at 80; *see* 47 U.S.C. § 405(a) (petitions for reconsideration relating "to an instrument of authorization granted without a hearing" must be acted upon within 90 days of filing). But this Court has consistently held that violation of a statutory deadline does not necessarily warrant a grant of mandamus. *See In re Barr Labs*, 930 F.2d 72, 74 (D.C. Cir. 1991) ("[e]quitable relief, particularly mandamus, does not necessarily follow a finding of a [statutory] violation"); *In re United Mine Workers of Am. Int'l Union*, 190 F.3d 545 (D.C. Cir. 1999) (declining to issue a writ of mandamus notwithstanding agency violated 90-day statutory deadline by failing to act for more than eight years).

3. NTCH also has not demonstrated that is has suffered any prejudice – the fifth *TRAC* factor – from delayed action on its pending petitions and applications. *See TRAC*, 750 F.2d at 80. Its interests in the *AWS-4 Order*, the *Modification Order*, the *Auction 96 Public Notice*, and the *Waiver Order* – to the extent that it has any – are at best slight.

The only interest identified by NTCH pertains to the *AWS-4 Order* and the *Modification Order*. NTCH contends that the agency's inaction on its

reconsideration petitions has prejudiced its interest in rescinding DISH's AWS-4 rights. Specifically, it asserts that DISH's upcoming build-out milestones "raise[] the specter of a later claim [by the Commission] that [DISH] has invested so heavily in the [AWS-4] licenses issued by the FCC that a reviewing court may not rescind the FCC's action – no matter how unlawful." Pet. 9; *id*. 12. This is pure speculation. An argument that the Commission has not made, based on build-out that has not occurred, in litigation that has not commenced, does not warrant the grant of mandamus.

NTCH's petition does not state any interest in the *Auction 96 Public Notice* and the *Waiver Order*, let alone an interest that has been prejudiced by the fact that its applications for review of those orders are pending before the Commission. It has none, for the same reason it lacks standing to eventually challenge those orders in this Court. *See* pp. 16-23, above.

## CONCLUSION

The Court should dismiss the petition because NTCH has failed to show that it has the requisite standing. Alternatively, the Court should deny the petition.

Respectfully submitted,

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August 13, 2018

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I, Maureen K. Flood, hereby certify that on August 13, 2018, I filed the Opposition of the Federal Communications Commission to Petition for a Writ of Mandamus with the Clerk of Court for the United States Court of Appeals for the District of Columbia Circuit using the electronic CM/ECF system. The participants in the case, listed below, who are registered CM/ECF users will be served electronically by the CM/ECF system.

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