

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

NTCH, INC.)	
)	
Appellant,)	
)	
v.)	Nos. 18-1241
)	
FEDERAL COMMUNICATIONS COMMISSION)	
AND UNITED STATES OF AMERICA)	
)	
Appellee.)	

MOTION TO DISMISS

The Federal Communications Commission hereby moves the Court to dismiss NTCH, Inc.’s notice of appeal in the above-captioned case for lack of jurisdiction. NTCH does not have Article III standing to challenge the Commission order on review, which upheld the decision of the agency’s Wireless Telecommunications Bureau to grant DISH Network Corporation (DISH) a waiver of certain technical rules that applied to DISH’s spectrum licenses. *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*, 2018 WL 3955598, ¶ 3 (Aug. 14, 2018) (*Waiver MO&O*). As set forth below, NTCH does not have standing because it lacks the necessary “injury in fact.” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

BACKGROUND

1. 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 for Use by the Mobile-Satellite Service*, 12 FCC Rcd 7388, 7390 ¶ 4 (1997) (*MSS Allocation Order*). MSS sends radio communications through two or more satellites to earth stations (*i.e.*, antennas and radios) to, *inter alia*, support mobile voice and data services in rural areas (where it is difficult to provide service using terrestrial facilities), or during disaster recovery (when coverage may be unavailable from terrestrial-based networks). *See* 47 C.F.R. § 2.1(c); *MSS Allocation Order* ¶ 4.¹

In December 2012, the Commission adopted “flexible service rules” that enabled the provision of terrestrial (*i.e.*, non-satellite) service in the 2 GHz MSS spectrum (in addition to MSS); it designated that terrestrial service “Advanced Wireless Service-4” (AWS-4). *Service Rules for Advanced Wireless Services in the 2000-2020 MHz and 2180-2200 MHz Bands*, 27 FCC Rcd 16102, ¶ 1 (2012) (*AWS-4 Order*). In the same order, the Commission allocated the lower portion of

¹ In 2003, the Commission reduced the spectrum allocated for MSS to 2000-2020 MHz and 2180-2200 MHz. *See 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).

the AWS-4 Band (2000-2020 MHz) for “uplink” operations and the upper portion of the AWS-4 Band (2180-2200) for “downlink” operations.² *Id.* ¶ 39 47 C.F.R. § 27.5(j). The Commission determined that these designations – which mirrored the designations for MSS – would “minimize the possibility that AWS-4 operations could interfere with 2 GHz MSS operations.” *AWS-4 Order* ¶ 39.

The Commission also decided that the new AWS-4 rights should be assigned to incumbent MSS licensees, because the record showed that “harmful interference would occur if the 2 GHz MSS and AWS-4 terrestrial spectrum rights were controlled by different entities.” *Id.* ¶ 181. The Commission thus proposed to modify existing MSS licenses to include AWS-4 authority.

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.*

² Radiofrequency spectrum often has 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.

DISH – the sole holder of 2 GHz MSS licenses – accepted the proposed license modifications in January 2013, and the next month the Commission’s Wireless Telecommunications and International Bureaus jointly issued an order modifying DISH’s MSS licenses by adding AWS-4 authority. *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*).³

2. In September 2013, 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. *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, DISH 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. *Waiver Order* ¶ 8. DISH stated that should the Commission grant these requests, it would commit to: (1) file an election with the Commission, “as soon as practicable, but no later than 30 months after the grant of [its] petition” specifying

³ 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.

“whether it will use the [Lower AWS-4 Band] for uplink or downlink”; and (2) “bid[] at least a net clearing price equal to any aggregate nationwide reserve price⁴ established by the Commission in the upcoming H Block auction (not to exceed the equivalent of \$0.50 MHz/POP).” *Id.*⁵

3. On December 20, 2013, the Wireless Bureau granted DISH the requested waiver, conditioned on DISH’s fulfillment of the commitments discussed therein. *See generally Waiver 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,

⁴ A reserve price is an amount below which a license will not be sold.

⁵ The Middle Class Tax Relief and Job Creation Act of 2012, (Spectrum Act), Pub. L. No. 112-96, 126 Stat. 156, directed the Commission, no later than February 13, 2015, to allocate for commercial use and license for commercial use spectrum known as the H Block (the 1915-1920 MHz and 1995-2000 MHz spectrum bands) using a system of competitive bidding. To fulfill that statutory mandate, the Bureau on September 13, 2013, released a Public Notice that established the procedures for the H Block Auction, including an aggregate reserve price of \$1.564 billion – an amount that was calculated using the proposal submitted by DISH that valued the H Block spectrum as “at least” \$0.50 per megahertz of bandwidth per population (MHz/POP). *See Auction of H-Block Licenses in the 1915-1920 MHz and 1995-2000 MHz Bands Scheduled for January 14, 2014; Notice and Filing Requirements, Reserve Price, Minimum Opening Bids, Upfront Payments, and Other Procedures for Auction 96*, 28 FCC Rcd 13019, 13064, ¶ 172 (WTB 2013) (*Auction 96 Public Notice*).

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 granting the petition would result in improved spectrum management. It noted that the Commission in the *AWS-4 Order* designated the Lower AWS-4 Band for uplink and the Upper AWS-4 Band 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 the Lower AWS-4 Band (2000-2020 MHz) is immediately adjacent to the Upper H Block (1995-2000 MHz), which had been designated for downlink operations. If DISH elected to use the Lower AWS-4 Band for downlink operations, the Bureau explained, the Lower AWS-4 Band would “effectively serve as an extension” of the H Block. *Id.* ¶ 21. It also would promote more effective use of the AWS-4 Band by eliminating the need for the restrictive technical limits placed on that band to protect the H Block. *Id.* ¶ 21.

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 determined 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 this 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 considerations" discussed in the Order. *Id.* ¶ 53.

NTCH filed an application for Commission review of the *Waiver Order* on January 22, 2014.⁶

⁶ NTCH also filed a petition for reconsideration of the *Auction 96 Public Notice*, see n.5, above, which the Bureau denied. See *NTCH, Inc. Petition for Reconsideration of Public Notice Announcing Procedures and Reserve Price for*

4. On August 16, 2018, in the order on review, the Commission dismissed for lack of standing NTCH's application.

To start, the Commission found no merit in NTCH's assertion that it had standing to challenge the *Waiver Order* "based on a generalized 'right and ... interest in seeing that rules adopted by the FCC are in the public interest.'" *Waiver MO&O* ¶ 10 (quoting NTCH, Inc.'s Reply to Opposition, WT Docket No. 13-225, at 2 (filed Feb. 19, 2014)). The Commission stated that under the Communications Act and its rules, only a person "aggrieved" by an action taken by the agency's staff may file an application for review by the Commission, and that the agency's interpretation of "aggrieved" requires an applicant to "allege facts sufficient to: (1) show an injury; (2) demonstrate a direct causal link between the challenged action and its alleged injury; and (3) show that the injury would be prevented or redressed by the requested relief." *Waiver MO&O* ¶¶ 10-11 & n.42; 47 U.S.C. § 155(c)(4); 47 C.F.R. § 1.115(a). Applying this standard, the Commission determined that NTCH had "failed to demonstrate" that the Bureau's action in granting the waiver caused "any actual or concrete injury to NTCH." *Waiver MO&O* ¶ 13.

Auction of H Block Licenses, 28 FCC Rcd 16108 (WTB 2013). NTCH then filed an application for full Commission review of the Bureau's decision, which the Commission dismissed and alternatively denied on August 16, 2018. *See id.*, 2018 WL 3955597 (2018).

First, the Commission rejected NTCH's assertion that grant of the waiver "affect[ed] the value of the adjacent H Block," which allegedly prevented NTCH from acquiring spectrum licenses in the H Block auction. *Id.* ¶ 13; *id.* ¶ 12. The Commission noted that the short-form applications⁷ required to participate in the H Block auction were due on November 15, 2013 – more than a month before the Bureau released the December 20, 2013 *Waiver Order*. *Id.* ¶ 13. The Commission concluded that by not filing a short-form application, NTCH "made a voluntary business decision not to participate in the H Block auction" and that it accordingly "lack[ed] standing as a party aggrieved by the subsequent grant of the DISH waiver." *Id.*

The Commission also rejected NTCH's argument that grant of the waiver "could affect its rights as an AWS-4 licensee" if it ever acquired AWS-4 spectrum. *Id.* ¶ 15. According to the Commission,

NTCH's claim turns on the wholly speculative assumptions that the Commission might eliminate DISH's terrestrial authority, that it might thereafter make this spectrum available for non-AWS-4 licensees, and that it might determine after further proceedings to do so by auctioning licenses for terrestrial operations in this band, notwithstanding the Commission's prior determination that separate MSS and terrestrial broadband licenses cannot co-exist in that band.

⁷ The streamlined short-form application is used to determine an applicant's eligibility to participate in an auction. *See* 47 C.F.R. § 1.2105(a).

Id. The Commission concluded that “[s]uch unfounded speculation does not establish any actual or imminent injury.” *Id.*

ARGUMENT

This Court should dismiss NTCH’s petition for review for want of jurisdiction. NTCH lacks standing to challenge the *Waiver MO&O*, in which the Commission dismissed NTCH’s application for review of the Bureau *Waiver Order*.

To invoke the jurisdiction of a federal court, a party must have standing. “To establish constitutional standing, a petitioner must show an actual or imminent injury in fact, fairly traceable to the challenged agency action, that will likely be redressed by a favorable decision.” *Exxon Mobil Corp. v. FERC*, 571 F.3d 1208, 1219 (D.C. Cir. 2009) (citing *Lujan*, 504 U.S. at 560-61). An injury in fact is “an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical.” *Lujan*, 504 U.S. at 560 (quotations and citations omitted).

NTCH lacks standing to challenge the agency’s grant of the DISH Petition because it cannot demonstrate the requisite “injury in fact.” *Lujan*, 504 U.S. at 560. As the Commission observed, NTCH is neither an AWS-4 licensee, nor 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. *Waiver MO&O* ¶ 13. Likewise, NTCH has never claimed an injury from the waiver extending DISH’s build-out milestones. *Id.*

Instead, before the agency, NTCH claimed that the Bureau’s grant of the DISH Petition “thwarted [its] plan to participate in the H Block auction.” *Id.* ¶ 12. To be sure, this Court has held that “[a] bidder in a government auction has a ‘right to a legally valid procurement process’; a party allegedly deprived of this right asserts a cognizable injury.” *U.S. Airwaves v. FCC*, 232 F.3d 227, 232 (D.C. Cir. 2000) (quoting *DIRECTV, Inc. v. FCC*, 110 F.3d 816, 829 (D.C. Cir. 1997)). Here, however, the *Waiver Order* could not have deprived NTCH of that “right,” for two independent reasons. First, the procedures for the H Block auction were established by the *Auction 96 Public Notice*, which was issued in a separate proceeding.⁸ Second, and in any event, NTCH elected not to participate in the H Block auction *before* the Bureau decided to grant DISH’s waiver request. *Waiver MO&O* ¶ 13. And because NTCH did not compete for licenses, it suffered no redressable injury by the Commission’s decision to affirm the waiver grant. *See High Plains*

⁸ On the same day that NTCH filed its notice of appeal in this case, it filed a petition for review of the Commission order affirming the Bureau’s denial of NTCH’s application for review of the *Auction 96 Public Notice*. *See NTCH, Inc. v. FCC*, D.C. Cir. No. 18-1242 (filed Sept. 7, 2018); *see* n.6, above. On October 10, 2018, the Commission filed an unopposed motion with this Court to consolidate both cases. That motion remains pending. This motion to dismiss applies solely to NTCH’s challenge to the *Waiver MO&O* in D.C. Cir. No. 18-1241.

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).

Nor does NTCH's asserted "'interest[] in acquiring AWS-4 spectrum," and the possible effect on NTCH's (hypothetical) "rights as [a future] AWS-4 licensee," provide NTCH standing to challenge the agency's grant of the DISH Petition. *Waiver MO&O* ¶ 15. This Court has held that "[a] petitioner that asserts a harm that may occur 'some day,' with no 'specification of *when* the some day will be' does not establish its standing." *Kansas Corp. Comm'n v. FERC*, 881 F.3d 924, 930 (D.C. Cir. 2018) (quoting *Lujan*, 504 U.S. at 564) (emphasis in original). That is the case here, where "[t]he particularized effect" of the waiver grant "will not be felt by [NTCH] unless an 'attenuated chain of possibilities' occurs." *Id.* (quoting *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 410 (2013)); accord *New York Reg'l Interconnect, Inc. v. FERC*, 634 F.3d 581, 587 (D.C. Cir. 2011) (*NYRI*). Indeed, for NTCH to become an AWS-4 licensee whose interests are affected by the waiver grant, a daisy-chain of events would have to transpire. The Commission would have to (1) eliminate DISH's AWS-4 rights, (2) make those rights available for non-MSS licensees, and (3) determine after further proceedings to do so by auctioning licenses. *Waiver MO&O* ¶ 15. NTCH's alleged harm merely "stacks speculation upon hypothetical upon speculation," and thus does not establish an

“actual or imminent injury.” *NYRI*, 634 F.3d at 587 (quoting *Lujan*, 504 U.S. at 560); see *Pub. Citizen, Inc. v. NHTSA*, 489 F.3d 1279 (D.C. Cir. 2007).

Finally, NTCH’s general “interest in seeing that rules adopted by the FCC are in the public interest” does not provide it standing to challenge the waiver grant. *Waiver MO&O* ¶ 10 (quoting NTCH Reply 2); see also *NTCH, Inc. Statement of Issues to be Raised* (D.C. Cir. No. 18-1241) at 2 (asserting that one of the issues to be raised is “[w]hether grant of the waivers and an extension of time to construct a system were part of an unlawful agreement between the FCC and an auction participant to trade certain cash payments in the auction for other FCC-granted benefits”). 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.”).

CONCLUSION

Because NTCH does not have Article III standing, the Court lacks jurisdiction and therefore should dismiss NTCH's appeal.

Respectfully submitted,

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October 24, 2018

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CERTIFICATE OF FILING AND SERVICE

I, Maureen K. Flood, hereby certify that on October 24, 2018, I filed the Motion to Dismiss with the Clerk of the 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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