
BRIEF FOR RESPONDENT/APPELLEE AND RESPONDENT

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

Nos. 18-1241 & 18-1242

NTCH, Inc.,

PETITIONER/APPELLANT,

v.

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,

RESPONDENT/APPELLEE AND RESPONDENT.

ON PETITION FOR REVIEW AND NOTICE OF APPEAL OF
ORDERS OF THE FEDERAL COMMUNICATIONS COMMISSION

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

1. Parties.

The petitioner/appellant is NTCH, Inc. The appellee in Case No. 18-1241 is the Federal Communications Commission; respondents in Case No. 18-1242 are the Federal Communications Commission and the United States of America. DISH Network Corporation has intervened in both cases. All parties that appeared before the agency are listed in the brief of petitioner/appellant.

2. Rulings under review.

In Case No. 18-1241, NTCH appeals from *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 (2018). That Order dismissed and denied NTCH's application for Commission review of an order issued by the Commission's Wireless Telecommunications Bureau in 2013. *See NTCH, Inc. Petition for Reconsideration of Public Notice Announcing Procedures and Reserve Price for Auction of H Block Licenses*, 28 FCC Rcd 16108 (WTB 2013) (*Auction 96 Bureau Order*). In Case No. 18-1242, NTCH petitions for review of *NTCH, Inc. Application for Review of Public Notice Announcing Procedures and Reserve Price for Auction of H Block Licenses*, 2018 WL 3955597

(2018). That Order dismissed NTCH's application for review of a different order issued by the Bureau in 2013. *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) (*DISH Waiver Order*).

3. Related cases.

In May 2018, NTCH filed a mandamus petition in this Court that concerned, among other things, NTCH's then-pending applications for review of the *Auction 96 Bureau Order* and the *DISH Waiver Order*. That mandamus petition was dismissed after the Commission released the Orders on review. *In re NTCH, Inc.*, Order, No. 18-1121 (D.C. Cir. Sept. 5, 2018).

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GLOSSARY

AWS	Advanced Wireless Service
AWS-4 Band	2000-2020 MHz and 2180-2200 MHz spectrum bands
GHz	Gigahertz
H Block	1915-1920 MHz and 1995-2000 MHz spectrum bands
Lower AWS-4 Band	2000-2020 MHz spectrum band
MHz	Megahertz
MHz-pop	Megahertz of bandwidth passing one person in the coverage area of a spectrum license
MSS	Mobile Satellite Service
PCS	Personal Communications Service
PCS Band	1930-1995 MHz spectrum band
Upper H Block	1995-2000 MHz spectrum band

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BRIEF FOR RESPONDENT/APPELLEE AND RESPONDENT

INTRODUCTION

In these consolidated cases, NTCH seeks review of two orders of the Federal Communications Commission. In Case No. 18-1242, NTCH challenges Commission procedures in a 2014 auction of licenses in the H Block spectrum band (1915-1920 MHz and 1995-2000 MHz) (Auction 96) – specifically, the \$1.564 billion nationwide aggregate reserve price (the amount below which the licenses will not be sold). *NTCH, Inc. Application for Review of Public Notice Announcing Procedures and Reserve Price for*

Auction of H Block Licenses, 2018 WL 3955597 (2018). Congress set a February 2015 deadline for the Commission to auction and issue the H Block licenses, and it further directed that the auction proceeds be used to help support construction of a nationwide public safety broadband network. Intervenor DISH Network Corporation (DISH) won all the H Block licenses in Auction 96, bidding in total the reserve price of \$1.564 billion.

In Case No. 18-1241, NTCH appeals from an order that dismissed for lack of standing NTCH's challenge to the grant of DISH's request to waive certain rules pertaining to its licenses in a different spectrum band (the Advanced Wireless Service 4-Band) (2000-2020 MHz and 2180-2200 MHz) that is adjacent to the H Block. *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 (2018). That Order conditioned grant of the waiver on DISH fulfilling its expressed commitment to bid at least \$1.564 billion in the H Block auction.

NTCH – which purports to be interested in acquiring H Block licenses – contends that the Auction 96 reserve price (Case No. 18-1242), in combination with the grant of DISH's waiver request (Case No. 18-1241), skewed the H Block auction in DISH's favor.

This Court lacks jurisdiction to consider NTCH's challenges to either Order on review because NTCH lacks Article III standing. NTCH's decision not to participate in Auction 96 before the Commission granted the waiver precludes it from challenging the waiver grant, and it cannot show that the Auction 96 reserve price caused it any injury.

But even if the Court were to reach the merits, NTCH's claims would fail. The Auction 96 procedures – including the reserve price – were reasonable, supported by evidence in the administrative record, and took account of statutory directives concerning the use of the auction proceeds.

Those procedures, in combination with the separate grant of DISH's waiver request, also did not render Auction 96 unfair. The Commission sought comment on DISH's waiver request four months prior to the start of bidding in Auction 96, so all potential bidders were or should have been aware of DISH's request and were therefore able to consider it in determining whether and how much to bid for H Block licenses.

Also, grant of the waiver was conditioned on DISH's compliance with technical rules (similar to the rules that DISH proposed with its waiver request) that would protect H Block licensees from interference. Each potential Auction 96 bidder therefore should have known going into auction that, regardless of the disposition of DISH's waiver request, it would enjoy

full use of its H Block license, should it place the winning bid. Accordingly, the Orders on review did not place NTCH (or any other party) at a competitive disadvantage in Auction 96.

For these reasons, the Court should dismiss both cases for lack of standing. If it reaches the merits, it should deny NTCH's appeal in Case No. 18-1241 and its petition for review in Case No. 18-1242.

JURISDICTION

The Order on review in Case No. 18-1242 was released on August 16, 2018. *See NTCH, Inc. Application for Review of Public Notice Announcing Procedures and Reserve Price for Auction of H Block Licenses*, 2018 WL 3955597 (2018) (*Auction 96 MO&O*) (JA ____). This Court's jurisdiction to review that Order rests on 47 U.S.C. § 402(a) and 28 U.S.C. § 2342. The Order on review in Case No. 18-1241 also was released on August 16, 2018. *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 (2018) (*DISH Waiver MO&O*) (JA ____). As to that adjudicatory order, NTCH seeks to invoke the Court's jurisdiction under 47 U.S.C. § 402(b).

QUESTIONS PRESENTED

1. Whether the Court has jurisdiction to consider NTCH's petition for review of the Commission's order dismissing and alternatively denying NTCH's challenge to the Auction 96 procedures – in particular, the aggregate reserve price for the auction – and if so, whether the Commission reasonably rejected that challenge?
2. Whether the Court has jurisdiction to consider NTCH's appeal from the Commission's dismissal for lack of standing of NTCH's challenge to the grant of DISH's waiver request; and
3. Whether, if the Court finds error in either Commission Order, the Court should vacate that Order and nullify the results of Auction 96?

STATUTES AND REGULATIONS

The pertinent statutes and regulations are attached in an addendum to this brief.

COUNTERSTATEMENT

I. STATUTORY BACKGROUND

Title III of the Communications Act of 1934, 47 U.S.C. §§ 301 *et seq.* (the Communications Act or 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,” 47 U.S.C. § 303(b), to “encourage the larger and more effective use of radio in the public interest,” *id.* § 303(g), to “[m]ake such regulations ... as it may deem necessary to prevent interference between stations,” *id.* § 303(f), 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).

The Communications Act also authorizes the Commission to award licenses to use radio spectrum to provide communications services. *See* 47 U.S.C. §§ 307, 309. Since 1993, the Act has required the Commission to award most spectrum licenses “through a system of competitive bidding,” *i.e.*, by auction. *Id.* § 309(j)(1).

In designing auction rules and procedures, the Commission must “balance a number of potentially conflicting objectives.” *Fresno Mobile Radio, Inc. v. FCC*, 165 F.3d 965, 971 (D.C. Cir. 1999); 47 U.S.C. § 309(j)(3)-(4). Those include ensuring “the development and rapid deployment of new technologies, products, and services for the benefit of the public,” 47 U.S.C. § 309(j)(3)(A), “recovery for the public of a portion of the

value of the spectrum,” *id.* § 309(j)(3)(C), and “efficient and intensive use of the public electromagnetic spectrum,” *id.* § 309(j)(3)(D).

The statute further directs the Commission, in promulgating auction rules, to “prescribe methods by which a reasonable reserve price will be required, or a minimum bid will be established” for spectrum licenses subject to auction “unless the Commission determines that such a reserve price or minimum bid is not in the public interest.” *Id.* § 309(j)(4)(F); *accord* 47 C.F.R. § 1.2104(d). (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.) The Commission has codified this statutory directive in Section 1.2104 of its rules, 47 C.F.R. § 1.2104(c)-(d).

II. REGULATORY BACKGROUND

A. Proceedings Before The Commission

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 at 2 GHz for Use by the Mobile-Satellite Service*, 12 FCC Rcd 7388, ¶ 4 (1997). MSS sends radio communications through one or more satellites to earth stations (*i.e.*, antennas

and radios) to 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). *Id.*¹

In response to the increasing demand for mobile wireless services, the Commission in 2012 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 designated 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”

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).

operations.² *Id.* ¶ 39; 47 C.F.R. §§ 27.5(j), 27.53. The Commission determined that these designations – which mirrored the designations for MSS – would minimize interference between AWS-4 and 2 GHz MSS operations. *Id.* ¶ 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.

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. *See Rules for Advanced Wireless Services in the 2000-2020 MHz*

² Radiofrequency spectrum 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.

and 2180-2200 MHz Bands, 28 FCC Rcd 1276 (IB & WTB 2013), *recon. dismissed/denied*, *Service Rules for Advanced Wireless Services in the 2000-2020 and 2180-2200 MHz Bands*, 2018 WL 3955596 (rel. Aug. 16, 2018), *review pending*, *NTCH, Inc. v. FCC* (D.C. Cir. No. 18-1243) (filed Sept. 7, 2018).

2. 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 by auction spectrum known as the H Block (the 1915-1920 MHz and 1995-2000 MHz spectrum bands) no later than February 13, 2015. Spectrum Act § 6401(b) (codified at 47 U.S.C. § 1451(b)). The Spectrum Act further directed that the proceeds from an auction of the H Block spectrum be deposited into the Public Safety Trust Fund to help develop a nationwide, interoperable public safety broadband network by the First Responder Network Authority (FirstNet). Spectrum Act §§ 6401(c)(4), 6413 (codified at 47 U.S.C. §§ 309(j)(8)(F), 1457). (FirstNet is an independent authority within the U.S. Department of Commerce's National Telecommunications and Information Administration. *Id.* § 6204(a) (codified at 47 U.S.C. § 1424(a))). The Spectrum Act generally authorized the Commission to “take any action necessary to assist [FirstNet] in effectuating its duties and responsibilities.” 47 U.S.C. § 1433.

On July 15, 2013, the Wireless Bureau released a Public Notice that announced the auction of the H Block spectrum and sought comment on procedures for conducting the auction. *See* 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) (*Auction 96 Comment Public Notice*) (JA____), published at 78 Fed. Reg. 45524 (July 29, 2013). Noting the Commission’s obligation to deposit the H Block auction proceeds in the Public Safety Trust Fund for use by FirstNet, the Bureau proposed to set a reserve price based on the aggregate of the gross bids for the H Block licenses rather than license-by-license reserve prices (but did not propose a specific reserve amount). *Id.* ¶ 52 (JA____). The Bureau sought comment on this proposal. *Id.*

In response, 23 parties (but not NTCH) filed comments, reply comments, or *ex parte* letters. *See* NTCH, Inc. *Petition for Reconsideration of Public Notice Announcing Procedures and Reserve Price for Auction of H Block Licenses*, 28 FCC Rcd 16108, 1609, ¶ 4 (WTB 2013) (*Auction 96 Bureau Order*) (JA____). Though commenters generally supported the Bureau’s proposal to set an aggregate reserve price, none suggested a specific reserve amount. *Id.* However, after the comment cycle closed, DISH filed an *ex parte* letter that estimated the value of the H Block spectrum as “at least”

\$0.50 per megahertz of bandwidth per population (MHz-pop)³ on a nationwide aggregate basis – an estimate that DISH supported with data from (1) another recent spectrum auction, (2) spectrum sales in the secondary market, and (3) estimates by financial institutions. Letter from Jeffrey H. Blum, DISH Network Corp., to Marlene H. Dortch, Secretary, Federal Communications Commission (filed Sept. 9, 2013) (DISH *ex parte* letter) (JA____).

3. 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 pertaining to its licenses in the AWS-4 Band. *See* Petition for Waiver of Sections 27.5 and 27.54(h)(2)(ii) and Request for Extension of Time, WT Docket No. 13-225 (filed Sept. 9, 2013) (DISH Waiver Petition) (JA____).

Specifically, DISH sought the flexibility to use the Lower AWS-4 Band for either uplink or downlink operations (rather than only uplink operations), and a one-year extension of the final build-out milestone for its AWS-4 licenses (from seven to eight years). DISH Waiver Petition at 5-6,

³ MHz-pop refers to one megahertz of bandwidth passing one person in the coverage area of a spectrum license. If a license holder has 6 MHz of spectrum reaching a region of one million people, it has 6 million MHz-pop.

16-19 (JA____). 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.* at 1 (JA____). The Bureau placed the DISH Waiver 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) (JA____).

4. After considering public comments addressing its proposed procedures for the upcoming spectrum auction, on September 13, 2013, the Wireless Bureau released the *Auction 96 Procedures Public Notice*, which adopted its proposal to set an aggregate reserve amount. The Bureau set the reserve price for the H Block spectrum at \$1.564 billion – an amount that was calculated using DISH’s estimate of \$0.50 per MHz-pop and rounding to the nearest million. *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 Procedures Public Notice*) (JA ____). The Bureau determined that “this amount will appropriately recover for the public a portion of the value of the spectrum, especially in light of the Spectrum Act’s requirement” to deposit the proceeds in the Public Safety Trust Fund. *Id.* The Bureau also set per-license minimum bid amounts, which ranged from less than \$0.01 per MHz-pop to \$0.16 per MHz-pop. *Id.* ¶¶ 176-177 (JA ____).

NTCH filed a petition for reconsideration of the *Auction 96 Procedures Public Notice* with the Wireless Bureau on October 18, 2013, which the Bureau denied on November 27, 2013. *See* Petition for Reconsideration of NTCH, Inc., AU Docket No. 13-178 (filed Oct. 18, 2013) (NTCH Auction 96 PFR) (JA ____); *see generally* *Auction 96 Bureau Order* (JA ____).

The Bureau rejected NTCH’s request for a significant reduction in the reserve price. *Auction 96 Bureau Order* ¶¶ 13-14 (JA ____). It 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, respectively); 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.* It 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 (JA ____).

The Bureau also rejected NTCH's request to file the DISH Waiver Petition in the Auction 96 proceeding, noting that DISH's *ex parte* letter proposing a reserve price based on \$0.50 per MHz-pop was already included in the record in that docket. *Id.* The Bureau further noted that the DISH Waiver Petition was a matter of public record in a separate proceeding and would be addressed on its own merits. *Id.* Thus, the Bureau explained, NTCH's petition for reconsideration of the *Auction 96 Procedures Public Notice* "is not an appropriate vehicle for a premature attack on any possible resolution of that request." *Id.* ¶ 17 (JA ____).

Lastly, the Bureau rejected NTCH's demand that the Commission deny the DISH Waiver Petition before the start of the H Block auction. It found meritless NTCH's assertion that granting DISH's request for flexibility to employ the Lower AWS-4 Band for uplink or downlink operations could affect the value of the H Block spectrum. *Id.* ¶ 18 (JA ____). The Bureau explained that by soliciting comment on the DISH Waiver 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 (JA ____). Also, the Bureau reminded NTCH that bidders "are solely responsible

for conducting due diligence,” so that it is bidders’ duty “to consider any pending challenges or waiver requests in determining whether and how much to bid on licenses at auction.” *Id.* (citing *Auction 96 Procedures Public Notice* ¶¶ 41-45 (JA ____)).

NTCH filed an application for full Commission review of the Bureau’s Order. *See* NTCH, Inc.’s Application for Review, AU Docket No. 13-178 (filed Dec. 27, 2013) (NTCH Auction 96 AFR) (JA ____).

5. Over NTCH’s objection, the Bureau on December 20, 2013, granted the DISH Waiver Petition, conditioned on DISH fulfilling its expressed 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. *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) (*DISH Waiver Order*) (JA ____).

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 a grant of the requested waiver would be in the public interest; or (ii) in view of the unique or unusual

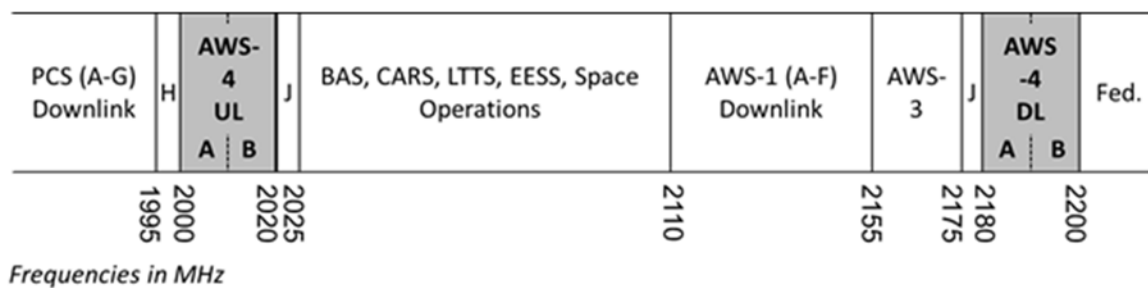
factual circumstances of the instant case, application of the rules would be inequitable, unduly burdensome or contrary to the public interest, or the applicant has no reasonable alternative.” Applying that standard, the Bureau concluded that “the technical rule waivers sought by DISH are warranted based on the unique factual circumstances of DISH’s status as a licensee of both AWS-4 and 2 GHz MSS licenses.” *DISH Waiver Order* ¶ 18 (JA ____).

The Bureau determined that granting the waiver would maximize flexible use of the AWS-4 spectrum while protecting operations in nearby bands from harmful interference. *Id.* ¶ 20 (JA ____). It observed that when 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, it intended to minimize interference between AWS-4 and MSS operations. *Id.* (JA ____). Because DISH is in the unique position of being 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 (JA ____).

The Bureau further determined that granting the waiver would result in improved spectrum management. It 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 (JA ____). It also would promote more effective use of the Lower AWS-4 Band by eliminating the need for the restrictive technical limits placed on that band to protect downlink operations in the Upper H Block from uplink operations in the Lower AWS-4 Band. *Id.*

Upper H Block (1995-2000 MHz) and AWS-4 Bands (2013)



In addition, the Bureau decided that a one-year extension of the final build-out milestone for DISH’s AWS-4 licenses was warranted in these “unique circumstances.” *Id.* ¶ 43 (JA ____). It determined that providing DISH an extra year to meet its build-out 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 Waiver Petition on several grounds, all of which the Bureau found baseless. *See generally* Comments of NTCH, Inc., WT Docket No. 13-225 (filed Sept. 30, 2013) (NTCH Waiver Petition Comments) (JA ____). The Bureau first rejected NTCH's request to dispose of its petition for reconsideration of the *AWS-4 Order*, *see* pp.9-10, above, before acting on the DISH Waiver Petition, 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 (JA ____).

It then rejected NTCH's argument that there was “the appearance of impropriety in the dealings between DISH and the Commission.” *Id.* ¶ 50 (JA ____); *id.* ¶ 53 (JA ____). The Bureau stated that it was addressing the DISH Waiver 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 (JA ____). Observing that the agency “traditionally evaluate[s] requests for waiver of [its] rules using a public interest calculus,” the Bureau found it appropriate to consider the “additional public interest benefit” derived from “DISH’s commitment to ensure that the H Block auction satisfies the aggregate reserve price” (and correspondingly, to provide funding for FirstNet). *Id.*

Finally, the Bureau “disagree[d] with NTCH that DISH’s request must be addressed by rulemaking rather than adjudication.” *Id.* ¶ 54 (JA ____). The Bureau averred that it “ha[d] granted similar waivers of the Commission’s technical rules,” and the fact that the waiver in this case involved a service with a single licensee (DISH) did not limit its broad discretion to address the DISH Waiver Petition in an adjudicatory proceeding. *Id.*

NTCH filed an application for full Commission review of the Order. *See* NTCH’s Application for Review, WT Docket No. 13-225 (filed Jan. 22, 2014) (NTCH Waiver Order AFR) (JA ____).

B. The Orders On Review

1. The Auction 96 MO&O

The Commission in an August 16, 2018 Memorandum Opinion and Order dismissed and alternatively denied NTCH’s application for review of the Bureau’s Auction 96 policies and procedures. *See generally* Auction 96 MO&O (JA ____).

The Commission dismissed NTCH’s application because it did not comply with Section 1.115(b) of the agency’s rules, 47 C.F.R. § 1.115(b), which provides that an application for review must “specify with particularity ... the factor(s) which warrant Commission consideration of the questions presented.” *Auction 96 MO&O* ¶ 11 (JA ____). The Commission determined

that the application “fail[ed] to specifically identify any statute, regulation, case precedent, or established Commission policy (or any evidence of record) that conflicts with the Bureau’s reserve price determination,” and that it also “fail[ed] to specifically identify any concrete harm or prejudice” to NTCH. *Id.* (JA ____).

As an alternative basis for its decision, the Commission denied the application on the merits, for the reasons cited by the Bureau in the *Auction 96 Bureau Order*. *Id.* ¶ 12 (JA ____). Like the Bureau, the Commission determined that the aggregate reserve amount did not prejudice NTCH and should not have discouraged NTCH from participating in the H Block auction, because a high bid for any *specific* license would have qualified as a winning bid, so long as the total proceeds from *all* the licenses met the aggregate reserve price of \$1.564 billion. *Id.* (JA ____).

The Commission also “f[ou]nd no merit in NTCH’s argument that the aggregate reserve price [wa]s unsupported by facts or precedent.” *Id.* ¶ 13 (JA ____). It observed that “[n]o party opposed the use of an aggregate reserve price for Auction 96”; that “NTCH never filed comments in that proceeding”; and that NTCH had not “provided any evidence ... that the reserve price selected did not reflect an appropriate estimate of the H Block’s market value.” *Id.* In fact, the Commission pointed out that “NTCH acknowledge[d]

that the record could have supported an even *higher* aggregate reserve price, even while claiming that the amount set by the Bureau was too high.” *Id.* (citing NTCH Auction 96 AFR at 4) (JA ____)).

Instead, the Commission “f[ound] the valuation selected by the Bureau to have been reasonable.” *Auction 96 MO&O* ¶ 13 (JA ____). The Commission noted with approval that the Bureau had “balanced a variety of public interests and objectives when setting the aggregate reserve price,” – specifically, the Spectrum Act’s directive to deposit the Auction 96 proceeds in the Public Safety Trust Fund, and the directive in Section 309(j)(3)(C) of the Communications Act to “recover[] for the public a portion of the value of the spectrum resource.” *Id.* ¶¶ 13-14 (JA ____). The Commission concurred with the Bureau and commenters that the \$1.564 billion amount would raise “sufficient funds” to satisfy those statutory mandates. *Id.* ¶ 14 (JA ____).

The Commission also found meritless NTCH’s argument that the Bureau failed to disclose DISH’s waiver and extension requests, or “denied potential bidders access to information about DISH’s Waiver Petition.” *Id.* ¶ 16 (JA ____). The Commission noted that the Bureau issued a Public Notice seeking comment on the DISH Waiver Petition four months before the start of bidding in Auction 96, and that NTCH (and other parties) had filed comments in response. *Id.* Accordingly, the Commission concluded that “[a]ll

H Block bidders were (or should have been) aware of DISH's waiver [request] and were therefore able to take the terms of the waiver into account in their bidding strategies.” *Id.* ¶ 17 (JA ____).

Lastly, the Commission rejected NTCH's argument that “the H Block auction was rendered unfair by grant of the DISH Waiver Petition,” because the 30-month election period allegedly gave DISH an “unfair informational advantage.” *Id.* The Commission explained that the waiver grant was conditioned on DISH's compliance with technical rules that would protect H Block licensees from interference from the Lower AWS-4 Band, should DISH make a downlink election. *Id.*; accord *DISH Waiver Order* ¶ 39 (JA ____). Thus, H Block bidders would know going into the auction that they would be protected from interference, regardless of whether DISH used its licenses in the Lower AWS-4 Band for uplink or downlink operations. *Id.*

For the same reason, the Commission found meritless NTCH's argument that DISH's election would make the spectrum less valuable. *Auction 96 MO&O* ¶ 18 (JA ____). Given the technical safeguards imposed on the Lower AWS-4 Band to protect the Upper H Block from interference, each H Block licensee would be able to make full use of the 10 MHz of H Block spectrum whether DISH used the Lower AWS-4 Band for uplink or downlink. *Id.*

Regardless, the Commission explained, the fact that DISH's bids might have reflected its planned use for the spectrum did not skew the auction. *Id.* The Commission observed that bidders in every spectrum auction value spectrum differently, based on their individual circumstances, and "[t]hose variations in value do not render the auction unfair." *Id.*

2. The Waiver MO&O

Also on August 16, 2018, the Commission issued a Memorandum Opinion and Order that dismissed for lack of standing NTCH's application for review of the *DISH Waiver Order*. See generally *DISH Waiver MO&O* (JA ____).

To start, the Commission found no merit in NTCH's assertion that it had standing to challenge the *DISH Waiver Order* "based on a generalized 'right and ... interest in seeing that rules adopted by the FCC are in the public interest.'" *DISH Waiver MO&O* ¶ 10 (JA ____) (quoting NTCH, Inc.'s Reply to Opposition, WT Docket No. 13-225 at 2 (filed Feb. 19, 2014) (NTCH Waiver Petition Reply Comments) (JA ____)). The Commission explained 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" – which is based on the U.S. Supreme Court's test for constitutional standing –

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.” *DISH Waiver MO&O* ¶¶ 10-11 & n.42 (JA ____); see 47 U.S.C. § 155(c)(4); 47 C.F.R. § 1.115(a). Applying this standard, the Commission held that NTCH had “failed to demonstrate” that the Bureau’s action in granting the waiver caused “any actual or concrete injury to NTCH.” *DISH Waiver MO&O* ¶ 13 (JA ____).

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 Auction 96. *Id.*; *id.* ¶ 12 (JA ____). The Commission noted that the short-form applications⁴ required to participate in the H Block auction were due on November 15, 2013 – more than one month prior to the grant of the *DISH Waiver Order* on December 20, 2013. *Id.* ¶ 13 (JA ____). 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

⁴ 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).

waiver.” *Id.* The Commission further held that “NTCH has failed to demonstrate how DISH’s commitment to bid a specific amount equal to the *aggregate* reserve price for all H Block licenses ... would have caused NTCH to be priced ... out of the market for any *specific* H Block licenses.” *Id.* ¶ 14 (JA ____) (internal quotation marks omitted).

The Commission next 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 (JA ____). 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.

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

C. Auction 96

Auction 96 commenced in early 2014, when the Commission designated 23 bidders as qualified to bid in the auction. *See* Public Notice, *Auction of H Block Licenses in the 1915-1920 and 1995-2000 MHz Bands: 23 Bidders Qualified to Participate in Auction 96*, 29 FCC Rcd 77, ¶ 1 (WTB 2014) (JA ____). As noted above, NTCH did not participate. Bidding began on

January 22, 2014 and closed on February 27, 2014. *See* Public Notice, *Auction of H Block Licenses in the 1915-1920 and 1995-2000 MHz Bands; Winning Bidder Announced for Auction 96*, 29 FCC Rcd 2044, ¶ 1 (WTB 2014) (JA ____). American H Block Wireless L.L.C. – a wholly owned subsidiary of DISH – won all the licenses available, with aggregate winning bids totaling \$1.564 billion. *Id.*, Attachment A (JA ____).

D. DISH's Lower AWS-4 Band Election

On June 1, 2016, DISH notified the Commission that it elected to use its Lower AWS-4 Band licenses for downlink operations. *See* Letter from Jeffrey H. Blum, DISH Network Corp., to Marlene H. Dortch, Secretary, Federal Communications Commission (filed June 1, 2016) (DISH election letter) (JA ____).

SUMMARY OF ARGUMENT

1.A. Because NTCH has not demonstrated that it has Article III standing, the Court lacks jurisdiction to consider NTCH's challenge to the Commission's Auction 96 procedures (Case No. 18-1242). NTCH claims to have been injured by the aggregate reserve price in that auction, which NTCH alleges was so unreasonably high that it could not have been a competitive bidder. But the Bureau established an aggregate reserve price for the entire auction instead of on a license-by-license basis, so a high bid for any given

license would qualify as a winning bid so long as the total auction proceeds exceeded the reserve price. That was certain to occur here, given DISH's commitment to bid the reserve price. Consequently, because NTCH never qualified to bid in Auction 96, it cannot demonstrate the injury in fact required for standing.

B. Even if NTCH had standing to challenge the *Auction 96 Order*, the Commission appropriately dismissed NTCH's application for review of that Order on procedural grounds. NTCH's application did not comply with Section 1.115(b) of the agency's rules, 47 C.F.R. § 1.115(b), which provides that an application for review must "specify with particularity, ... the factor(s) which warrant Commission consideration of the questions presented." Though the application stated that NTCH declined to enter Auction 96 because of DISH's commitment to bid the aggregate reserve price, it never explained how the reserve price prevented NTCH from participating in the auction or successfully bidding on the licenses it desired. Because the application failed to demonstrate that the Bureau's decisions caused any concrete harm or prejudice to NTCH, it did not warrant review by the Commission.

C. Regardless, NTCH provides no basis to second-guess the Auction 96 aggregate reserve price. The Bureau sought comment on the appropriate

amount for the reserve price, and parties before the agency supported the Bureau's proposal to establish a reserve price that was different from the sum of the minimum opening bids. The Bureau in setting the aggregate reserve price at \$1.564 billion reasonably considered the public interest and statutory objectives – most significantly, the Spectrum Act's directive that proceeds from the auction be deposited in the Public Safety Trust Fund to help support the development of a nationwide public safety broadband network. In prior spectrum auctions, the agency had similarly taken account of congressional directives concerning the use of the auction proceeds in determining reserve prices. The \$1.564 billion reserve amount – which was based on DISH's estimate that the value of the H Block spectrum was \$0.50 per MHz-pop – also was consistent with reserve prices in other spectrum auctions, and data in the Commission's records pertaining to spectrum license prices. Because the Bureau's decision to adopt that reserve amount was reasonable and based on the evidence in the administrative record, there is no basis for reviewing that decision by imputing an ulterior motive to the Commission.

D. NTCH also cannot demonstrate that the H Block auction was somehow rendered unfair by grant of DISH's waiver request. The Bureau conditioned the waiver grant on DISH's compliance with technical rules that would protect H Block licensees from interference from AWS-4 operators,

regardless of DISH's election. Thus, prior to the start of bidding in Auction 96, every potential H Block licensee should have known that it would get full use of its H Block license and could take that into account when determining whether and how much to bid. And NTCH was certainly aware of those conditions, because it participated in the administrative proceeding concerning DISH's waiver request.

Nor did the election period give DISH an unfair informational advantage in Auction 96. If DISH knew what its election would be prior to the start of bidding, there would have been no reason for DISH to request an additional 30 months from the date of the waiver grant to make its uplink/downlink election. In any event, even if DISH did know its plans for the spectrum, that information did not render the auction unfair. The purpose of an auction is to put a spectrum license in the hands of the entity that values it the most, because that entity will put the spectrum to the highest and best use. For that to happen, bidders must consider their own plans for the spectrum when bidding, and often, that information may not be known to competing bidders. This auction was no different, and NTCH provides no reason why this supposed informational asymmetry constitutes reversible error.

2. This Court also lacks jurisdiction to consider the Commission's grant of DISH's waiver request for flexibility to use the Lower AWS-4 Band for downlink operations, and an extension of the final build-out milestone for certain of its AWS-4 licenses from seven to eight years (Case No. 18-1241). NTCH asserts that the grant of DISH's requests skewed Auction 96 in DISH's favor. But NTCH elected not to participate in the H Block *before* the Commission acted; so it suffered no cognizable injury from the waiver grant and therefore lacks Article III standing.

3. Finally, if the Court finds error in either Order under review, the Court should reject NTCH's request to vacate the Order(s) and nullify the results of Auction 96. That drastic remedy could potentially strand millions of dollars of DISH's investment and disrupt its plans to build out its AWS-4 and H Block licenses. Moreover, as required by the Spectrum Act, the proceeds from the auction of the H Block licenses have been deposited into the Public Safety Trust Fund to help support the construction of a nationwide public safety broadband network. If the Court finds either or both Orders on review unlawful (which it should not) the proper remedy here would be a remand without vacatur.

STANDARD OF REVIEW

The Court reviews the question whether NTCH has standing to challenge the Orders on review *de novo*. *E.g.*, *Affum v. U.S.*, 566 F.3d 1150, 1158 (D.C. Cir. 2009). Assuming the Court has jurisdiction, NTCH bears a heavy burden to establish that the Orders on review are “arbitrary, capricious [or] an abuse of discretion.” 5 U.S.C. § 706(2)(A). Under this “highly deferential” standard, this Court presumes the validity of agency action. *E.g.*, *Nat’l Tel. Co-op. Ass’n v. FCC*, 563 F.3d 536, 541 (D.C. Cir. 2009). The reviewing court “may not ‘substitute its judgment for that of the agency,’ but must instead evaluate whether the agency’s decision considered relevant factors and whether it reflects a clear error of judgment.” *NTCH, Inc. v. FCC*, 841 F.3d 497, 502 (D.C. Cir. 2016) (quoting *Motor Vehicle Mfrs. Ass’n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). “‘When the Commission is fostering innovative methods of exploiting the spectrum, it functions as a policymaker and is accorded the greatest deference of a reviewing court.’” *Globalstar, Inc. v. FCC*, 564 F.3d 476, 483 (D.C. Cir. 2009) (quoting *Mobile Relay Assocs. v. FCC*, 457 F.3d 1, 8 (D.C. Cir. 2006)) (internal quotation marks omitted).

ARGUMENT

I. THE COURT SHOULD DISMISS OR ALTERNATIVELY REJECT NTCH'S CHALLENGE TO THE AUCTION 96 PROCEDURES

This Court lacks jurisdiction to consider NTCH's challenge to the Commission's decision to uphold the Auction 96 procedures adopted by the Bureau – particularly the aggregate reserve price – because NTCH lacks standing to challenge the *Auction 96 MO&O*. But were the Court to reach the merits, it should deny NTCH's petition for review because the Commission reasonably rejected that challenge on procedural grounds, and in any event the Auction 96 procedures were reasonable and consistent with Commission precedent.

A. NTCH Lacks Standing To Challenge The *Auction 96 MO&O*

This Court should dismiss NTCH's petition for review of the *Auction 96 MO&O* (No. 18-1242) for want of standing.

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 v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). 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).⁵

NTCH has not demonstrated any actual or concrete injury caused by the *Auction 96 Procedures Public Notice*, as affirmed by the Commission in the *Auction 96 MO&O*.

1. The aggregate reserve price set by the Bureau did not cause NTCH any injury. NTCH asserts that “the high reserve price eliminated or significantly reduced the possibility of NTCH being a competitive bidder in the auction.” NTCH Br. 29; *id.* 30. But NTCH cites no support for this conclusory statement except for one of its own filings, which addressed the impact of the DISH Waiver Petition and presented no actual evidence. *See id.* 29 (citing NTCH Auction 96 AFR at 7-8 (JA ____) & NTCH Waiver Order AFR at 2, 11-12 (JA ____)).

In fact, the reserve price set by Wireless Bureau did not hinder NTCH’s ability to compete for licenses. The Bureau established a reserve price for the *entire* auction, instead of on a license-by-license basis. *Auction 96 MO&O* ¶ 12 (JA ____); *accord Auction 96 Bureau Order* ¶ 14 (JA ____).

⁵ Because NTCH cannot demonstrate Article III standing, we do not address its claim to prudential standing. *See* NTCH Br. 33-35.

Thus – as both the Bureau and the Commission 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.*; *accord id.* That was a certainty, given DISH’s commitment to bid that amount. NTCH thus had nothing to lose by entering the auction and bidding what it considered a fair price for the specific licenses it wanted; its decision not to participate was purely voluntary. *Id.* Given that voluntary choice not to bid, NTCH has failed to allege any injury fairly traceable to the Auction 96 aggregate reserve price.⁶

2. Nor has NTCH shown that it was injured because the DISH Waiver Petition was not in the record of the Auction 96 proceeding. *See* NTCH Br. 30, 49-50. The Bureau solicited comment on the DISH Waiver Petition (albeit in a separate docket). NTCH filed comments in response on September 30, 2013 – almost four months before the start of bidding in Auction 96 (January 22, 2014). *See generally* NTCH Waiver Petition Comments (JA ____); *DISH Waiver Order* ¶¶ 50-54 (JA ____). Because NTCH

⁶ To be clear, we do not argue that NTCH’s failure to participate in Auction 96 deprived it of standing to challenge any of the Auction 96 procedures set by the Commission (*contra* NTCH Br. 26-28). Rather, it is that the specific Auction 96 procedure that NTCH challenges – the aggregate reserve price – caused it no injury because it in no way prevented NTCH from successfully bidding for any specific license.

had actual notice of the DISH Waiver Petition, it could consider the pending waiver request – including DISH’s commitment to bid in Auction 96 if the waiver were granted – in determining whether and how much to bid for H Block licenses. It thus suffered no injury from the failure to include the DISH Waiver Petition in this docket.

B. NTCH’s Application For Review Of The *Auction 96 Bureau Order* Did Not Comply With The Commission’s Procedural Rules And Thus Did Not Warrant Review By The Agency

Even were the Court to reach NTCH’s challenge to the *Auction 96 MO&O*, the Court should deny the petition for review because the Commission appropriately dismissed NTCH’s application for review of the *Auction 96 Bureau Order* on procedural grounds. As the Commission concluded, NTCH’s application did not comply with Section 1.115(b) of the agency’s rules, 47 C.F.R. § 1.115(b), which provides that an application for review must “specify with particularity, ... the factor(s) which warrant

Commission consideration of the questions presented.” *See Auction 96*

MO&O ¶ 11 (JA ____).⁷

Though NTCH’s application claimed that “[t]he Bureau’s action constitutes a prejudicial procedural error,” NTCH Auction 96 AFR at 2 (JA ____), it “fail[ed] to specifically identify any concrete harm or prejudice” to NTCH. *Auction 96 MO&O* ¶ 11 (JA ____). Indeed, as the Commission pointed out, NTCH’s application “does not explain why it ‘seemed likely’ to NTCH that it could not have won at least some of the Auction 96 licenses.” *Id.* (JA ____) (quoting NTCH Auction 96 AFR at 6 (JA ____)). Under the Commission’s rules, those “[v]ague statements asserting error are not enough to justify review.” *Id.* n.55 (citing *Skybridge Spectrum Foundation; On Request for Inspection of Records*, 26 FCC Rcd 13800, 13804, ¶ 14 n.28 (2011) & 5 U.S.C. § 706).

NTCH’s only response is to call the Commission’s application of Rule 1.115(b) “utterly baseless.” NTCH Br. 25. It makes no attempt to address any

⁷ To warrant Commission consideration, an application for review must establish either that: (i) the delegated actions were in conflict with statute, regulation, case precedent or Commission policy; (ii) the actions involved a question of law or policy that has not previously been resolved by the Commission; (iii) the actions involved the application of precedent or policy that should be overturned or revised; (iv) there has been an erroneous finding as to an important or material question of fact; or (v) there has been prejudicial procedural error. 47 C.F.R. § 1.115(b)(2)(i)-(v).

of the Commission's reasons for finding that its application failed to show the requisite prejudicial error; rather, NTCH simply refers the Court to its application for review. *Id.* That is insufficient to overcome the Commission's reasoned analysis of the shortcomings of NTCH's application.⁸

C. The Auction 96 Procedures Were Reasonable And Consistent With Agency Precedent

NTCH's challenge to the Commission's Auction 96 procedures also fails on the merits.

Section 309(j)(4)(F) of the Communications Act authorizes the Commission to set a "reasonable reserve price" for auctions. 47 U.S.C. § 309(j)(4)(F). In setting a reserve price, the Commission must consider multiple statutory objectives and the public interest. *See id.*; 47 U.S.C. § 309(j)(3)(C).

The Bureau in the *Auction 96 Procedures Public Notice* reasonably exercised that authority when it adopted the \$1.564 billion reserve price. The Bureau had earlier stated its intent to set an aggregate reserve price that was different from the sum of the minimum opening bid amounts. *Auction 96*

⁸ NTCH contends that its petition for reconsideration of the *Auction 96 Procedures Public Notice* complied with 47 C.F.R. § 1.106. *See* NTCH Br. 20-22. The *Auction 96 MO&O* did not rely on that rule to dispose of NTCH's application for full Commission review, so we do not address NTCH's argument in this brief.

Comment Public Notice at ¶ 52 (JA ____). That approach had support in the record, and no party opposed it. *Auction 96 Procedures Public Notice* ¶¶ 170, 172 (JA ____). Commenters told the Commission that “aggregated reserve pricing will accurately reflect overall demand for the spectrum and will ensure that the auction raises the targeted amount.” *Id.* ¶ 170 (citing comments of C-Spire Wireless); *id.* (noting that T-Mobile “supports using both an aggregate reserve price and license-by-license reserve prices to ensure the target amount is raised and individual bidders are not permitted to acquire licenses for below-market values merely because the aggregate reserve price is satisfied.”) (citing comments of T-Mobile). However, despite general support for that approach, no commenter other than DISH “suggested a specific reserve price.” *Auction 96 Bureau Order* ¶ 15 (JA ____).

Thus, after careful consideration, the Bureau set the aggregate reserve price at \$1.564 billion, based on DISH’s estimate that the value of the H Block spectrum was \$0.50 per MHz-pop. *Auction 96 Procedures Public Notice* ¶ 172 (JA ____). The Bureau “believe[d] this amount w[ould] appropriately recover for the public a portion of the value of the spectrum, especially in light of the Spectrum Act’s requirement to deposit proceeds from th[e] auction into the Public Safety Trust Fund.” *Id.* And because that amount was “in line with publicly available information on spectrum licenses

prices,” it would ensure that the H Block licenses were not acquired at below-market value rates. *Auction 96 Bureau Order* ¶ 15 (JA ____).

NTCH asserts that the Auction 96 aggregate reserve price is contrary to Commission precedent and unsupported by the facts. It also argues that the reserve price, in combination with the grant of the DISH Waiver Petition, skewed Auction 96. NTCH is wrong on all counts.

1. The Auction 96 Reserve Price Was Consistent With Reserve Prices In Prior Spectrum Auctions And Relevant Congressional Policies

NTCH argues that the Auction 96 reserve was “unreasonably high.” NTCH Br. 15. According to NTCH, “[t]he setting of a [Personal Communications Service (PCS)] reserve price at *seven times* the minimum bid value was literally unprecedented.” *Id.* 43; *see id.* 42. That argument fails, for several reasons.

First, comparing the reserve price to the sum of minimum opening bids says nothing about the reasonableness of the reserve price – the smaller the minimum bidding amounts, the larger the reserve price looks in comparison, and vice versa. Also, as the Bureau pointed out, *Auction 96 Bureau Order* n.38 (JA ____), and as NTCH concedes, NTCH Br. 43, the Commission in prior spectrum auctions has set reserve prices that are two to four times the sum of the minimum opening bids. NTCH has not explained why a reserve price of

four times the sum of minimum opening bids would be reasonable, but a reserve price of seven times the sum of minimum opening bids would not be reasonable. *See Auction 96 MO&O* ¶ 14 (JA ____).⁹

Second, NTCH's argument wrongly presumes a correlation between minimum bids and the reserve price. To the contrary, a minimum opening bid and a reserve price "have distinct purposes" – the former accelerates competitive bidding, and the latter sets the price below which a license will not be sold. *Auction 96 Bureau Order* ¶ 14 (JA ____); *accord Auction 96 MO&O* ¶ 12 (JA ____). Thus, unlike the reserve price, "[m]inimum opening bids are not meant to set market values." *Auction 96 Procedures Public Notice* ¶ 177 (JA ____).

Third, and relatedly, the Commission has considered factors in addition to the market value of the spectrum – including congressional mandates regarding the use of the auction proceeds – in setting reserve prices. *Auction 96 MO&O* ¶ 14 (JA ____).

⁹ NTCH argues that the use of an aggregate reserve price in Auction 96 was contrary to precedent, because "in no previous auction going as far back as 1999 has the Commission even set a separate reserve price for a PCS auction." NTCH Br. 43. But in none of the PCS spectrum auctions did the Commission have to accommodate a statutory mandate concerning use of the auction proceeds, like the Spectrum Act's directive to deposit the proceeds from the auction of the H Block licenses in the Public Safety Trust Fund.

For example, in setting a reserve price in Auction 73, the Bureau “g[a]ve consideration to” Congress’s directive to raise \$10.1825 billion from that auction (to assist in the February 2009 transition from analog to digital broadcasting by helping to fund the distribution of converter boxes that would enable consumers to continue using their analog television sets after the transition). Public Notice, *Auction of 700 MHz Band Licenses Scheduled for January 24, 2008*, 22 FCC Rcd 18141, ¶ 196 & n.252 (WTB 2007) (*Auction 73 Procedures Public Notice*) .

Likewise, in setting the reserve price in another auction (Auction 66), the Bureau considered Congress’s mandate to recover from the auction proceeds all the costs to relocate certain incumbent federal government licensees to new spectrum. By law, the Commission could not conclude the auction if the proceeds did not cover at least 110 percent of those relocation costs. See Public Notice, *Auction of Advanced Wireless Service Licenses Scheduled for June 29, 2006*, 21 FCC Rcd 4562, ¶ 6 (WTB 2006).

Thus, as the Commission explained, “[t]he issue is not whether the aggregate reserve price is two or four or seven times the minimum opening bid price,” but whether it “reasonably accommodates” relevant statutory and policy objectives “in the circumstances of a particular auction.” *Auction 96 MO&O* ¶ 14 (JA ____). Here, the Bureau reasonably determined that the

\$1.564 billion reserve price would “raise sufficient funds” to satisfy congressional mandates on the use of the Auction 96 proceeds – specifically, the Spectrum Act’s directive that the funds be deposited in the Public Safety Trust Fund, 47 U.S.C. §§ 309(j)(8)(F), 1457, and the Communications Act’s more general directive that the Commission “recover[] for the public ... a portion of the value of the public spectrum resource.” 47 U.S.C. § 309(j)(3)(C). *Auction 96 MO&O* ¶ 14 (JA ____).

When the Commission “must balance a number of potentially conflicting objectives, ... judicial review is limited to determining whether the agency’s decision reasonably advances at least one of those objectives and its decisionmaking process was regular.” *Fresno Mobile Radio*, 165 F.3d at 971; *accord U.S. Airwaves, Inc. v. FCC*, 232 F.3d 227, 234 (D.C. Cir. 2000). The Auction 96 reserve price set by the Bureau, and affirmed by the Commission, easily satisfies that standard. Indeed, NTCH does not identify any countervailing objective that the Commission failed to account for.

2. The Auction 96 Reserve Price Was Supported By Evidence In The Administrative Record

Also lacking merit is NTCH’s assertion that DISH’s proposal to set the reserve price at \$0.50 per MHz-pop was unsupported by the facts in the record. According to NTCH, there was “*no support* in the record” for that amount “apart from” DISH’s *ex parte* letter, and “[n]one of the cited sources”

in that letter “support a \$0.50/MHz-pop reserve price.” NTCH Br. 43. Even if indicators of the market value of the H Block spectrum were the sole determinant of the reserve price (which they are not, *see* pp.41-43, above), NTCH’s argument would fail.

As NTCH admits in its brief, the DISH *ex parte* letter cited “several ... recent valuations of AWS spectrum ... ranging from \$0.61/MHz-pop to \$1.00/MHz-pop.” NTCH Br. 42; *see also* DISH *ex parte* letter at 1 (JA ____). Those prices would have supported setting an even higher aggregate reserve amount. Indeed, in its application for review of the *Auction 96 Procedures Public Notice*, NTCH *conceded* that the H Block could be worth more than \$0.50 per MHz-pop, based on prices in prior spectrum auctions. *See Auction 96 MO&O* ¶ 13 (JA ____) (citing NTCH Auction 96 AFR at 4 (JA ____)). NTCH also anticipated that another bidder (Sprint) would bid more than the \$0.50 per MHz-pop reserve price proposed by DISH. *See* NTCH Waiver Petition Comments at 4 (JA ____).

NTCH contends that DISH and the Bureau erred when they “pointed to” earlier AWS auctions – rather than auctions of PCS spectrum – to “justify” the aggregate reserve price in Auction 96. NTCH Br. 43 (citing *Auction 96 Bureau Order* n.38 (JA ____)). According to NTCH, that comparison was flawed. *Id.* But NTCH does not explain why a reserve price

for the H Block spectrum should be determined by PCS auction results. The H Block (1915-1920 and 1995-2000 MHz) is located between the PCS Band (1930-1995 MHz) and the Lower AWS-4 Band (2000-2020 MHz); so the Commission's decision to set a reserve price for the H Block spectrum based on AWS auction results was at least as reasonable as NTCH's suggested alternative. And of course, in such complex and technical matters, the Commission's choice between reasonable alternatives is entitled to deference. *See Nat'l Assn. of Regulatory Util. Comm'rs v. FCC*, 737 F.2d 1095, 1141 (D.C. Cir. 1984) (“[W]hen an agency makes rational choices from among alternatives ... it has not acted arbitrarily or capriciously.”).

That is particularly true here. The Commission has not held a nationwide auction of PCS licenses since 2001. *See* Public Notice, *C and F Block Broadband PCS Auction Closes*, DA 01-211 (WTB Jan. 29, 2001). By contrast, the nationwide AWS auctions cited by DISH and the Commission were conducted in 2006 and 2007, and thus provided a more current estimate of spectrum prices. *See Auction 96 Bureau Order* ¶ 15 & n.38 (JA ____).

Finally, in Auction 96, the Bureau proposed to set, and in fact set, minimum opening bid amounts based on AWS prices. *See Auction 96 Comment Public Notice* ¶ 55 (JA ____); *Auction 96 Procedures Public Notice* ¶¶ 175-177 (JA ____). NTCH – which did not challenge those amounts below

– does not explain here why it was reasonable for the Bureau to consider AWS prices in determining minimum opening bids, but it was unreasonable for the Bureau to consider AWS prices in establishing the reserve price. Indeed, if the Bureau had set the reserve price equal to minimum opening bid amounts – as NTCH contends it should have, NTCH Br. 43 – the reserve price would be based on AWS prices.

Regardless, “the sole question before [the Court] is whether the [Commission] has acted reasonably, not whether it has acted flawlessly.” *Natural Res. Defense Council v. EPA*, 529 F.3d 1077, 1086 (D.C. Cir. 2008). Here, the Commission explained its reasoning, based on the record evidence, and responded to NTCH’s objections. Thus, even if there existed “better data” about spectrum prices, the agency’s decision to set the Auction 96 aggregate reserve price at \$1.564 billion was not arbitrary and capricious. *Id.*; *see also United States Dep’t of the Interior v. FERC*, 952 F.2d 538, 546 (D.C. Cir. 1992) (agency not required to “have perfect information before it takes any action”).

D. Potential Auction 96 Bidders Were Or Should Have Been Aware Of The DISH Waiver Petition

NTCH separately argues that the Bureau (and derivatively the Commission) erred in failing to include the DISH Waiver Petition in the Auction 96 proceeding. NTCH Br. 45, 48-50. According to NTCH,

“[p]otential Auction 96 participants ... were therefore left in the dark about the [petition] unless they happened to learn about it from sources in the know.” *Id.* 49-50. This was not error; and even if it were, it did not affect NTCH.

NTCH does not acknowledge that the Bureau opened a separate docket to solicit comment on the DISH Waiver Petition approximately four months before bidding started in Auction 96, *Auction 96 MO&O* ¶ 16 (JA ____), and that NTCH plainly had actual notice of the petition because it filed comments on the petition in that proceeding. *See generally* NTCH Waiver Petition Comments (JA ____); *accord Auction 96 Bureau Order* ¶ 17 (JA ____). Moreover, by soliciting comment on the DISH Waiver Petition “well in advance of the start of bidding,” the Commission made it possible for potential bidders to “‘assess the impact of the existing rules and the possible impact, if any, of the technical changes proposed by DISH.’” *Auction 96 MO&O* ¶ 16 (JA ____) (quoting *Auction 96 Bureau Order* ¶ 19 (JA ____)).

Indeed, the Commission has “consistently advise[d]” bidders in spectrum auctions that “they are solely responsible” for performing their own due diligence before deciding whether to participate, and how much to bid. *Auction 96 Bureau Order* ¶ 19 (JA ____); *accord Auction 96 Procedures Public Notice* ¶ 44 (JA ____), *see e.g., Auction 73 Procedures Public Notice*

¶ 42. Thus, it has “urge[d] bidders to consider any pending challenges or waiver requests” (like the DISH Waiver Petition) “in determining whether and how much to bid on licenses at auction.” *Auction 96 Bureau Order* ¶ 19 (JA ____); *accord Auction 96 Procedures Public Notice* ¶¶ 41-45 (JA ____). NTCH’s position ignores the Commission’s repeated and consistent guidance in this regard.

E. The Waiver Grant Did Not Skew Auction 96

NTCH also cannot demonstrate that the H Block auction was somehow rendered unfair when the Commission granted DISH’s waiver request, which provided DISH the flexibility to elect to use its Lower AWS-4 Band licenses for uplink or downlink operations. NTCH Br. 44-47.¹⁰ NTCH contends that “[b]y giving DISH the unilateral power” to make that election “after the auction was over, the Commission gave DISH the huge advantage of controlling a key factor that would impact the utility of the H Block band, and the necessary measures for avoiding interference to the adjacent AWS-4 band.” *Id.* 46. That argument fails because it mischaracterizes the impact of

¹⁰ Though NTCH raised this argument in its applications for review of both the *Auction 96 Bureau Order* and the *DISH Waiver Order*, the Commission addressed it on the merits in the *Auction 96 MO&O*. See *Auction 96 MO&O* ¶¶ 15-18 (JA ____); see generally NTCH Auction 96 AFR (JA ____); NTCH Waiver Order AFR at 12 (JA ____).

the waiver grant and misapprehends the purpose of using an auction to allocate spectrum.

According to NTCH, Auction 96 bidders could not conduct reasonable due diligence investigations because they lacked “access to the same information” as DISH “about the rules governing the auction, the service requirements, and the potential interference from adjacent bands.” *Id.* 47. That argument ignores the waiver condition that required DISH to comply with technical rules designed to protect H Block licensees from any interference if DISH made a downlink election. *Auction 96 MO&O* ¶ 17 (JA____) (citing *DISH Waiver Order* ¶¶ 26-33, 47 (JA ____)). All prospective H Block licensees therefore should have known before Auction 96 commenced that whatever DISH’s election, they would receive “appropriate interference protections from AWS-4 operators.” *Auction 96 MO&O* ¶ 17 (JA____) (citing *DISH Waiver Order* ¶ 39 (JA____)). NTCH certainly knew, because it filed an Opposition to the DISH Waiver Petition. *See* p.47, above. But even had it not, it is a bidder’s duty, as part of its due diligence efforts, to identify any “pending challenges or waivers” that could affect its decision

whether and how much to bid on licenses at auction.¹¹ *Auction 96 Bureau Order* ¶ 19 (JA ____); *see* pp.47-48, above.

For the same reason, there is no basis for NTCH's assertion that the waiver would, in effect, allow DISH to "decide after the auction was over whether the H-Block would be 10 MHz or 7.5 MHz wide, but only DISH would know which one it was going to be." NTCH Br. 46. By protecting H Block licensees from interference (whatever DISH's election), the technical rules in the *DISH Waiver Order* ensured that each H Block licensee would have full use of each 10 MHz H Block license awarded through Auction 96. *See Auction 96 MO&O* ¶ 18 (JA ____); *accord DISH Waiver Order* ¶ 39 (JA ____). In fact, as the Bureau explained, "neither of [DISH's] election options would decrease the value of the H Block," and its downlink election could actually increase the H Block's value by "by obviating in the event of downlink use the need for certain interference limitations that would

¹¹ *See, e.g., MetroPCS Commc'ns, Inc.*, 25 FCC Rcd 2209, ¶ 16 (WTB 2010) (pending legal challenge to licenses being auctioned was a matter of public record, so potential bidder could not demonstrate that it would have bid but for that challenge); *Paging Systems, Inc.*, 20 FCC Rcd 8145, 8149, ¶ 11 (WTB 2005) (participant in spectrum auction was advised to physically inspect the stations on which it might bid, and thus could not demonstrate that inaccurate information in the Commission's licensing database caused it not to bid for a license), *recon. denied sub nom.*, 21 FCC Rcd 2848 (2006).

otherwise govern both AWS-4 and adjacent H Block operations.” *DISH Waiver Order* ¶ 20 (JA ____).

NTCH further contends that the 30-month election period gave DISH an undue informational advantage in Auction 96, because only DISH knew whether the usefulness of the H Block would be enhanced by electing to use the adjacent AWS-4 band for downlink operations. NTCH Br. 44-47. That argument is wrong, for two reasons.

First, it presumes that DISH knew its election prior to the H Block auction, notwithstanding that DISH requested additional time (up to 30 months from the grant of the waiver) to make its downlink election. *See* DISH Waiver Petition 17 (JA ____); *accord* *DISH Waiver Order* ¶ 42 (JA ____). But the DISH Waiver Petition explained that to make a downlink election, DISH first had to find new uplink spectrum to pair with downlink operations in the Lower AWS-4 Band. *See* DISH Waiver Petition at 4 (JA ____). For that reason, DISH told the Commission that it “[could not] commit fully to downlink operations in the Lower AWS-4 Band,” and requested 30 months to make its election. Reply Comments of DISH Network Corp., WT Docket No. 13-225 at 4 (filed Oct. 17, 2013) (JA ____). NTCH also offers no reason to assume that DISH could have made that determination in the one month between the grant of its waiver request (December 20, 2013) and the start of

bidding in Auction 96 (January 22, 2014). In fact, DISH did not make its election (for downlink operations) until June 1, 2016. *See* DISH election letter (JA ____).

Second, 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. The purpose of an auction is to put spectrum in the hands of the entity that values it the most, because that entity will put the spectrum to the highest and best use. *See Auction 96 MO&O* ¶ 18 (JA____) (citing *Implementation of Section 309(j) of the Communications Act – Competitive Bidding*, 9 FCC Rcd 2348, 2349-50, ¶¶ 5, 71-72 (1994)) (*Competitive Bidding Order*); *see also Mobile Comm’n’s Corp. of Am. v. FCC*, 77 F.3d 1399, 1405 (D.C. Cir. 1996) (“[B]ecause the party able to use the license most efficiently will be able to bid the most, the license will end up in the hands of the firm best able to develop its potential.”). That necessarily requires applicants for spectrum licenses to consider their own plans for the spectrum when bidding, not all of which may be known to competing bidders. *Auction 96 MO&O* ¶ 18 (JA____).

With that said, Auction 96 used multiple-round bidding, which by design provides bidders with information regarding the value that other

bidders place on licenses in the auction. *See id.* n.88 (discussing *Competitive Bidding Order* ¶¶ 82-84) (JA ____). As the Commission has explained:

In a multiple round auction, bidders need not guess about the value the second highest bidder places on the license because bidders have the opportunity to raise their bids if they are willing to pay more than the current high bidder. Multiple round bidding is also more likely than single round bidding to be perceived as open and fair. No bidder can argue that it did not have the opportunity to obtain a license if it was willing to pay enough.

Competitive Bidding Order ¶ 82.

Thus, regardless of whether DISH announced its election before the auction, the value it placed on the H Block spectrum would be apparent to other Auction 96 bidders from the amount of its bids.

NTCH's assertion that the auction was unfair therefore misconceives the purpose of an auction. NTCH would have the Commission deny DISH's waiver request – which the Bureau determined could lead to better utilization of the AWS-4 band *and* make the H Block more valuable to all, *see DISH Waiver Order* ¶¶ 22, 29 (JA ____) – just so that NTCH might better calculate its odds of winning H Block licenses before the auction. That “equates [NTCH's] own business interest with the public interest,” and provides no basis to reverse the grant of the DISH Waiver Petition. *BellSouth Corp. v. FCC*, 162 F.3d 1215, 1225 (D.C. Cir. 1999).

**F. Under Established Principles Of Administrative Law,
The Commission's Adoption Of The Auction 96 Reserve
Price Must Be Evaluated Based On The Reasons Stated
In Its Orders**

Throughout its brief, NTCH alleges that the Auction 96 reserve price and grant of DISH's waiver request were the result of an unsubstantiated "backroom deal" between the Commission and DISH. *See, e.g.*, NTCH Br.

48. Thus, according to NTCH, "it was disingenuous for the FCC not to acknowledge that the DISH deal was the driver for the reserve price." *Id.*

44.¹² But this Court has held that "agency opinions, like judicial opinions, speak for themselves." *PLMRS Narrowband Corp. v. FCC*, 182 F.3d 995, 1001 (D.C. Cir. 1999) (citation omitted). Where, as here, the Commission's orders set forth legitimate bases for its decision-making, with support from evidence in the record, there is no reason "to probe the mental processes of the [agency decisionmaker]." *Auction 96 MO&O* ¶ 15 (quoting *Morgan v. United States*, 304 U.S. 1, 18 (1938)) (JA ____); *see SNR Wireless LicenseCo, LLC v. FCC*, 868 F.3d 1021, 1043 (D.C. Cir. 2017) (no evidence that the Commission prejudged an issue when its "opinion refers to and reasonably

¹² NTCH asserts that the resolution of interoperability issues in the 700 MHz band was also part of this purported "deal," NTCH Br. 3-4, 48, but concedes that the 700 MHz proceeding "is not the subject of this appeal." *Id.* 3. We therefore do not address NTCH's allegations regarding that spectrum, which in any event are irrelevant here.

applies rules and precedents”). NTCH “cannot, by sheer multiplication of innuendo, overcome the strong presumption of agency regularity.” *Louisiana Ass’n of Indep. Producers and Royalty Owners v. FERC*, 958 F.2d 1101, 1111 (D.C. Cir. 1992); *see also Int’l Bhd. of Teamsters v. United States*, 735 F.2d 1525, 1534 (D.C. Cir. 1984) (“Agency action comes before [the court] for review accompanied by a presumption of regularity.”).

II. NTCH LACKS STANDING TO CHALLENGE GRANT OF DISH’S WAIVER REQUEST

This Court should dismiss NTCH’s petition for review of the *DISH Waiver MO&O* (No. 18-1241) for want of jurisdiction. NTCH lacks standing because it has not demonstrated any injury-in-fact caused by the *DISH Waiver Order*, or from the Commission’s affirmance of that order in the *DISH Waiver MO&O*.¹³

¹³ The *DISH Waiver MO&O* held that NTCH lacked administrative standing to challenge the *DISH Waiver Order* because NTCH was not a “party aggrieved” by that decision under Section 5(c)(4) of the Communications Act and Section 1.115(a) of the Commission’s rules. *DISH Waiver MO&O* ¶¶ 10-15 (JA ___); 47 U.S.C. § 155(c)(4), 47 C.F.R. § 1.115(a). Because the Commission has based its interpretation of that term on the U.S. Supreme Court’s test for constitutional standing, *see DISH Waiver MO&O* ¶ 11 n.42 (JA ___), the Commission correctly held that NTCH lacked administrative standing for the same reasons that it lacks Article III standing.

1. NTCH asserts that grant of the DISH Waiver Petition (which it refers to as the “DISH-FCC arrangement”) “fundamentally distorted the auction mechanics” in Auction 96 by giving DISH – which allegedly knew (but had not disclosed) its intended use for its AWS-4 spectrum – an advantage over other bidders competing for licenses in the adjacent H Block. NTCH Br. 29.¹⁴ To be sure, this Court has held that “[a] bidder in a government auction has a ‘right to a legal valid procurement process’; a party allegedly deprived of this right asserts a cognizable injury.” *U.S. Airwaves*, 232 F.3d at 232 (quoting *DIRECTV, Inc. v. FCC*, 110 F.3d 816, 829 (D.C. Cir. 1997)). But in this case, the *DISH Waiver Order* could not have deprived NTCH of that “right.”

That is because NTCH elected not to participate in the H Block auction *before* the Bureau granted DISH’s waiver request. *DISH Waiver MO&O* ¶ 13

¹⁴ Attached as an addendum to NTCH’s brief is the Declaration of Glenn Ishihara, President of NTCH, in support of its standing claim. That declaration simply repeats the legal arguments in NTCH’s brief and provides no additional factual support for NTCH’s assertion that it suffered an injury in fact caused by the Auction 96 aggregate reserve price or grant of DISH’s waiver request. NTCH cannot rely on such conclusory allegations to demonstrate Article III standing. *See Hydro Investors, Inc. v. FERC*, 351 F.3d 1192, 1196 (D.C. Cir. 2003) (an “affidavit [that] is mostly legal argument sprinkled with repetitions of [petitioner’s] far-flung allegations of financial improprieties” and “repeats the allegations ... that it makes in its appellate brief” is insufficient to establish standing).

(JA ____). NTCH did not file a short-form application required to participate in the H Block auction by the November 15, 2013 deadline – more than a month prior to the Bureau’s disposition of the then-pending DISH Waiver Petition on December 20, 2013. *DISH Waiver Order* ¶¶ 5, 6, 13, 15 (JA ____). And because NTCH did not compete for licenses, it suffered no redressable injury caused by the Commission’s decision to affirm the Bureau’s grant of the waiver. *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 the petitioner, a disappointed bidder, did not compete).

Relying on this Court’s precedent, NTCH contends that “[a]ctual auction participation (i.e., bidding) ... is *not* required to establish Article III standing if the claimant ‘had already been subjected to the purportedly invalid [auction process] and had been injured in fact.’” NTCH Br. 26-27 (quoting *Alvin Lou Media v. FCC*, 571 F.3d 1, 7 (D.C. Cir. 2009)). But the decisions relied on by NTCH are easily distinguished, because in each case the auction procedures then in effect would have injured the petitioner had it placed bids.

In *Alvin Lou Media*, an applicant for a radio station license challenged the Commission’s decision to designate a technically deficient application as mutually exclusive to its own. 571 F.3d at 7. The agency also deferred technical review of both applications until after the auction. *Id.* The petitioner

asserted that those decisions placed it at a competitive disadvantage, because forcing it to bid against an invalid application could “inflate the price” that the petitioner “would ultimately have to pay” for the license. *Id.* The Court held that the petitioner in that case had standing, because when it “voluntarily withdrew from participating in the auction, it had already been subjected to the purportedly invalid process and been injured in fact.” *Id.*

Similarly, the Court in *DIRECTV, Inc. v. FCC*, 110 F.3d 816 (D.C. Cir. 1997) held that DIRECTV had standing, even though it did not participate in the auction, because the Commission’s auction rules, “as a practical matter, precluded [it] from participating in the auction.” *Id.* at 830. Under those rules, “[i]f DIRECTV had bid and prevailed at the auction, it would have been required to divest itself of [a] substantial block of [valuable] channels ... unless it could get the rule declared unlawful.” *Id.* The Court concluded that DIRECTV “did not have to take the risk that [its] successful bid would be but a costly misstep” to demonstrate the injury-in-fact required for standing. *Id.*

Here, by contrast, the Commission had not yet taken the action (grant of the DISH Waiver Petition) that allegedly injured NTCH before NTCH decided not to participate in Auction 96. *DISH Waiver MO&O* ¶ 13 (JA ____);

Auction 96 MO&O ¶ 12 (JA ____). It thus lacks standing here to challenge the grant of the petition.¹⁵

NTCH tries to justify its “decision to pass on participating in Auction 96” on the ground that “[a]ll of the participants except DISH wasted an enormous amount of time and money by tying up their funds for months in a rigged auction process.” NTCH Br. 27; *accord* Declaration of Standing Addendum 2-3. But its claim that because DISH won all the H Block licenses, the waiver grant caused NTCH injury “suffers from the logical fallacy *post hac ergo propter hoc* (after this, therefore because of this).” *Arpaio v. Obama*, 797 F.3d 11, 21 (D.C. Cir. 2015). The Court “cannot infer based on chronology alone” that grant of the waiver caused the Auction 96 results. Put another way, the proximate cause of NTCH failing to obtain any licenses in the H Block auction was that it chose not to bid. NTCH cannot demonstrate legal injury from the fact that, after it chose not to bid, the Commission granted DISH’s waiver petition.

¹⁵ For this reason, we do not question NTCH’s standing to challenge the aggregate reserve price in the *Auction 96 MO&O* on the basis that NTCH did not participate in that auction. *See* n.6, above. The aggregate reserve price was set before NTCH decided whether to participate in that auction, and thus it does not lack standing to challenge that reserve price based solely on its failure to participate in the auction.

2. NTCH separately claims that after the Commission’s affirmance of the *DISH Waiver Order*, the receipt of money will be a factor in the Commission’s future public interest determinations. According to NTCH, “[u]nder [the Commission’s] theory,” “[t]he FCC’s decisions would literally be bought and sold, as they were here.” NTCH Br. 39; *see id.* 41. Its dire (and unfounded) predictions notwithstanding, NTCH lacks standing to challenge the *DISH Waiver MO&O* on that ground. 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.”).¹⁶

III. THE COURT SHOULD DECLINE NTCH’S INVITATION TO NULLIFY AUCTION 96 AND VACATE THE DECISIONS BELOW

NTCH asks this Court to “vacat[e] the FCC’s decisions, and direct[] the Commission to reauction the H-Block spectrum.” NTCH Br. 30. Even were the Court to rule against the Commission in either case, the Court should deny NTCH’s request for such drastic relief.

Nullifying the Auction 96 results would have an adverse impact on public and private interests. It would require the Commission to unwind a transaction worth \$1.546 billion and covering 176 licenses nationwide. Because DISH has already held the H Block licenses for almost five years, undoing the auction could strand DISH’s potential investment in network

¹⁶ Because the Commission dismissed NTCH’s application for review of the *DISH Waiver Order* without reaching the merits of the arguments in the application, we cannot respond to the arguments in pages 35-41 and 50-61 of NTCH’s brief. If the Court finds that NTCH has standing to challenge the *DISH Waiver MO&O*, the Court should remand Case No. 18-1241 so that the Commission has an opportunity to respond to the arguments in NTCH’s application. *See Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985) (“If the record before the agency does not support the agency action, if the agency has not considered all relevant factors, or if the reviewing court simply cannot evaluate the challenged agency action on the basis of the record before it, the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation.”).

design and infrastructure, and correspondingly disrupt its plans to build-out its H Block licenses. That, in turn, could delay the provision of service to customers. Whereas DISH must meet its final construction milestone by April 29, 2022, it could take the Commission years to reauction the H Block spectrum. In *Council Tree Communications v. FCC*, 619 F.3d 235, 257 (3d Cir. 2010), the Third Circuit rejected a request to unwind an auction for similar reasons. *See also U.S. Airwaves*, 232 F.3d at 235 (“[T]he Commission is reasonably of the view that starting the licensing process all over again” through a reauction “would delay build-out.”).

NTCH argues to the contrary, asserting that “reversing the Auction 96 results would not be unduly burdensome or otherwise unfair to DISH.”

NTCH Br. 32. According to NTCH, “it is apparent that DISH has not come close to completing construction of its H-Block licenses won in Auction 96 – let alone commencing service to the public.” *Id.* But because DISH has another three years to meet its final construction milestone, any speculation about its ability to meet the terms of its licenses at this stage is premature. DISH has represented to the Commission, for example, that it is engaged in network planning, and the development of new standards and equipment, to timely meet its build-out requirements of its licenses. *See generally* Letter from Jeffrey H. Blum, DISH Network Corp., to Donald Stockdale, Chief –

Wireless Telecommunications Bureau, Federal Communications Commission (filed Sept. 21, 2018) (JA ____).

DISH's interests aside, NTCH does not even mention – let alone address – use of the Auction 96 proceeds. Congress ordered the Commission to auction and issue H Block licenses by February 13, 2015, and to deposit the proceeds in the Public Safety Trust Fund. Those proceeds have now been deposited and have been used for, among other things, FirstNet's construction of a nationwide public safety broadband network.

As set forth above, the Court should reject NTCH's challenges to the Orders on review. But if the Court were to find that any of NTCH's arguments have merit, the proper remedy in this case would be to remand the Orders to the Commission for further consideration. This Court has held that “the decision to remand or vacate hinges upon court's assessment of ‘the seriousness of the order's deficiencies (and thus the extent of doubt whether the agency chose correctly) and the disruptive consequences of an interim change that may itself be changed.’” *Chamber of Commerce of U.S. v. SEC*, 443 F.3d 890, 908 (D.C. Cir. 2006) (quoting *Allied-Signal, Inc. v. Nuclear Regulatory Comm'n*, 988 F.2d 146, 150–51 (D.C. Cir. 1993)). NTCH has not demonstrated that, after providing further explanation, the Commission could not adopt the same aggregate reserve price, or grant DISH's waiver request,

in subsequent administrative proceedings. Thus, “because of the possibility that the Commission may be able to justify [its decisions], and the disruptive consequences of vacating” the orders on review, remand is the appropriate remedy if the Court decides to grant NTCH’s petition for review of the *Auction 96 MO&O*, or its appeal of the *DISH Waiver MO&O*. *Allied Signal*, 988 F.2d 151; *accord Chamber of Commerce*, 443 F.3d at 909.

CONCLUSION

NTCH’s notice of appeal in Case No. 18-1241 and its petition for review in Case No. 18-1242 should be dismissed or alternatively denied.

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CERTIFICATE OF FILING AND SERVICE

I, Maureen K. Flood, hereby certify that on February 19, 2019, I filed the foregoing Brief for Respondents/Appellee and Respondent 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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STATUTORY AND REGULATORY ADDENDUM

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5 U.S.C. § 706

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall--

- (1) compel agency action unlawfully withheld or unreasonably delayed; and
- (2) hold unlawful and set aside agency action, findings, and conclusions found to be—
 - (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
 - (B) contrary to constitutional right, power, privilege, or immunity;
 - (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
 - (D) without observance of procedure required by law;
 - (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
 - (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

47 U.S.C. § 155

* * *

(c) Delegation of functions; exceptions to initial orders; force, effect and enforcement of orders; administrative and judicial review; qualifications and compensation of delegates; assignment of cases; separation of review and investigative or prosecuting functions; secretary; seal

- (1) When necessary to the proper functioning of the Commission and the prompt and orderly conduct of its business, the Commission may, by published rule or by order, delegate any of its functions (except functions granted to the Commission by this paragraph and by paragraphs (4), (5), and (6) of this subsection and except any action referred to in sections 204(a)(2), 208(b), and 405(b) of this title) to a panel of commissioners, an individual commissioner, an employee board, or an individual employee, including functions with respect to hearing, determining, ordering, certifying, reporting, or otherwise acting as to any work, business, or matter; except that in delegating review functions to employees in cases of adjudication (as defined in section 551 of Title 5), the delegation in any such case may be made only to an employee board consisting of two or more employees referred to in paragraph (8) of this subsection. Any such rule or order may be adopted, amended, or rescinded only by a vote of a majority of the members of the Commission then holding office. Except for cases involving the authorization of service in the instructional television fixed service, or as otherwise provided in this chapter, nothing in this paragraph shall authorize the Commission to provide for the conduct, by any person or persons other than persons referred to in paragraph (2) or (3) of section 556(b) of Title 5, of any hearing to which such section applies.
- (2) As used in this subsection the term “order, decision, report, or action” does not include an initial, tentative, or recommended decision to which exceptions may be filed as provided in section 409(b) of this title.
- (3) Any order, decision, report, or action made or taken pursuant to any such delegation, unless reviewed as provided in paragraph (4) of this subsection, shall have the same force and effect, and shall be made, evidenced, and enforced in the same manner, as orders, decisions, reports, or other actions of the Commission.

- (4) Any person aggrieved by any such order, decision, report or action may file an application for review by the Commission within such time and in such manner as the Commission shall prescribe, and every such application shall be passed upon by the Commission. The Commission, on its own initiative, may review in whole or in part, at such time and in such manner as it shall determine, any order, decision, report, or action made or taken pursuant to any delegation under paragraph (1) of this subsection.
- (5) In passing upon applications for review, the Commission may grant, in whole or in part, or deny such applications without specifying any reasons therefor. No such application for review shall rely on questions of fact or law upon which the panel of commissioners, individual commissioner, employee board, or individual employee has been afforded no opportunity to pass.
- (6) If the Commission grants the application for review, it may affirm, modify, or set aside the order, decision, report, or action, or it may order a rehearing upon such order, decision, report, or action in accordance with section 405 of this title.
- (7) The filing of an application for review under this subsection shall be a condition precedent to judicial review of any order, decision, report, or action made or taken pursuant to a delegation under paragraph (1) of this subsection. The time within which a petition for review must be filed in a proceeding to which section 402(a) of this title applies, or within which an appeal must be taken under section 402(b) of this title, shall be computed from the date upon which public notice is given of orders disposing of all applications for review filed in any case.
- (8) The employees to whom the Commission may delegate review functions in any case of adjudication (as defined in section 551 of Title 5) shall be qualified, by reason of their training, experience, and competence, to perform such review functions, and shall perform no duties inconsistent with such review functions. Such employees shall be in a grade classification or salary level commensurate with their important duties, and in no event less than the grade classification or salary level of the employee or employees whose actions are to be reviewed. In the performance of such review functions such employees shall be assigned

to cases in rotation so far as practicable and shall not be responsible to or subject to the supervision or direction of any officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency.

- (9) The secretary and seal of the Commission shall be the secretary and seal of each panel of the Commission, each individual commissioner, and each employee board or individual employee exercising functions delegated pursuant to paragraph (1) of this subsection.

* * *

47 U.S.C. § 301

It is the purpose of this chapter, among other things, to maintain the control of the United States over all the channels of radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority, and no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license. No person shall use or operate any apparatus for the transmission of energy or communications or signals by radio (a) from one place in any State, Territory, or possession of the United States or in the District of Columbia to another place in the same State, Territory, possession, or District; or (b) from any State, Territory, or possession of the United States, or from the District of Columbia to any other State, Territory, or possession of the United States; or (c) from any place in any State, Territory, or possession of the United States, or in the District of Columbia, to any place in any foreign country or to any vessel; or (d) within any State when the effects of such use extend beyond the borders of said State, or when interference is caused by such use or operation with the transmission of such energy, communications, or signals from within said State to any place beyond its borders, or from any place beyond its borders to any place within said State, or with the transmission or reception of such energy, communications, or signals from and/or to places beyond the borders of said State; or (e) upon any vessel or aircraft of the United States (except as provided in section 303(t) of this title); or (f) upon any other mobile stations within the jurisdiction of the United States, except under and in accordance with this chapter and with a license in that behalf granted under the provisions of this chapter.

47 U.S.C. § 303

Except as otherwise provided in this chapter, the Commission from time to time, as public convenience, interest, or necessity requires, shall—

* * *

(b) Prescribe the nature of the service to be rendered by each class of licensed stations and each station within any class;

* * *

(f) Make such regulations not inconsistent with law as it may deem necessary to prevent interference between stations and to carry out the provisions of this chapter: Provided, however, That changes in the frequencies, authorized power, or in the times of operation of any station, shall not be made without the consent of the station licensee unless the Commission shall determine that such changes will promote public convenience or interest or will serve public necessity, or the provisions of this chapter will be more fully complied with;

(g) Study new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest;

* * *

(r) Make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this chapter, or any international radio or wire communications treaty or convention, or regulations annexed thereto, including any treaty or convention insofar as it relates to the use of radio, to which the United States is or may hereafter become a party.

* * *

47 U.S.C. § 307**(a) Grant**

The Commission, if public convenience, interest, or necessity will be served thereby, subject to the limitations of this chapter, shall grant to any applicant therefor a station license provided for by this chapter.

* * *

47 U.S.C. § 309

* * *

(j) Use of competitive bidding**(1) General authority**

If, consistent with the obligations described in paragraph (6)(E), mutually exclusive applications are accepted for any initial license or construction permit, then, except as provided in paragraph (2), the Commission shall grant the license or permit to a qualified applicant through a system of competitive bidding that meets the requirements of this subsection.

* * *

(3) Design of systems of competitive bidding

For each class of licenses or permits that the Commission grants through the use of a competitive bidding system, the Commission shall, by regulation, establish a competitive bidding methodology. The Commission shall seek to design and test multiple alternative methodologies under appropriate circumstances. The Commission shall, directly or by contract, provide for the design and conduct (for purposes of testing) of competitive bidding using a contingent combinatorial bidding system that permits prospective bidders to bid on combinations or groups of licenses in a single bid and to enter multiple alternative bids within a single bidding round. In identifying classes of licenses and permits to be issued by competitive bidding, in specifying eligibility and other characteristics of such licenses and permits, and in designing the methodologies for use under this subsection, the Commission shall include safeguards to protect the public interest in the use of the spectrum and shall seek to promote the purposes specified in section 151 of this title and the following objectives:

- (A) the development and rapid deployment of new technologies, products, and services for the benefit of the public, including those residing in rural areas, without administrative or judicial delays;

- (B) promoting economic opportunity and competition and ensuring that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women;
- (C) recovery for the public of a portion of the value of the public spectrum resource made available for commercial use and avoidance of unjust enrichment through the methods employed to award uses of that resource;
- (D) efficient and intensive use of the electromagnetic spectrum;
- (E) ensure that, in the scheduling of any competitive bidding under this subsection, an adequate period is allowed-
 - (i) before issuance of bidding rules, to permit notice and comment on proposed auction procedures; and
 - (ii) after issuance of bidding rules, to ensure that interested parties have a sufficient time to develop business plans, assess market conditions, and evaluate the availability of equipment for the relevant services; and
- (F) for any auction of eligible frequencies described in section 923(g)(2) of this title, the recovery of 110 percent of estimated relocation or sharing costs as provided to the Commission pursuant to section 923(g)(4) of this title.

* * *

(4) Contents of regulations

In prescribing regulations pursuant to paragraph (3), the Commission shall--

- (A) consider alternative payment schedules and methods of calculation, including lump sums or guaranteed installment payments, with or without royalty payments, or other schedules or methods that promote

the objectives described in paragraph (3)(B), and combinations of such schedules and methods;

- (B) include performance requirements, such as appropriate deadlines and penalties for performance failures, to ensure prompt delivery of service to rural areas, to prevent stockpiling or warehousing of spectrum by licensees or permittees, and to promote investment in and rapid deployment of new technologies and services;
- (C) consistent with the public interest, convenience, and necessity, the purposes of this chapter, and the characteristics of the proposed service, prescribe area designations and bandwidth assignments that promote (i) an equitable distribution of licenses and services among geographic areas, (ii) economic opportunity for a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women, and (iii) investment in and rapid deployment of new technologies and services;
- (D) ensure that small businesses, rural telephone companies, and businesses owned by members of minority groups and women are given the opportunity to participate in the provision of spectrum-based services, and, for such purposes, consider the use of tax certificates, bidding preferences, and other procedures;
- (E) require such transfer disclosures and antitrafficking restrictions and payment schedules as may be necessary to prevent unjust enrichment as a result of the methods employed to issue licenses and permits; and
- (F) prescribe methods by which a reasonable reserve price will be required, or a minimum bid will be established, to obtain any license or permit being assigned pursuant to the competitive bidding, unless the Commission determines that such a reserve price or minimum bid is not in the public interest.

* * *

(8) Treatment of revenues

* * *

(F) Certain proceeds designated for Public Safety Trust Fund

Notwithstanding subparagraph (A) and except as provided in subparagraphs (B) and (D)(ii), the proceeds (including deposits and upfront payments from successful bidders) from the use of a system of competitive bidding under this subsection pursuant to section 1451(b)(1)(B) of this title shall be deposited in the Public Safety Trust Fund established by section 1457(a)(1) of this title.

47 U.S.C. § 1424**(a) Establishment**

There is established as an independent authority within the NTIA the “First Responder Network Authority” or “FirstNet”.

* * *

47 U.S.C. § 1433

The Commission may provide technical assistance to the First Responder Network Authority and may take any action necessary to assist the First Responder Network Authority in effectuating its duties and responsibilities under this subchapter.

47 U.S.C. § 1451

* * *

(b) Reallocation and auction**(1) In general**

Notwithstanding paragraph (15)(A) of section 309(j) of this title, not later than 3 years after February 22, 2012, the Commission shall, except as provided in paragraph (4)--

(A) allocate the spectrum described in paragraph (2) for commercial use; and

(B) through a system of competitive bidding under such section, grant new initial licenses for the use of such spectrum, subject to flexible-use service rules.

(2) Spectrum described

The spectrum described in this paragraph is the following:

(A) The frequencies between 1915 megahertz and 1920 megahertz.

(B) The frequencies between 1995 megahertz and 2000 megahertz.

(C) The frequencies described in subsection (a)(2).

(D) The frequencies between 2155 megahertz and 2180 megahertz.

(E) Fifteen megahertz of contiguous spectrum to be identified by the Commission.

(3) Proceeds to cover 110 percent of Federal relocation or sharing costs

Nothing in paragraph (1) shall be construed to relieve the Commission from the requirements of section 309(j)(16)(B) of this title.

(4) Determination by Commission

If the Commission determines that the band of frequencies described in paragraph (2)(A) or the band of frequencies described in paragraph (2)(B) cannot be used without causing harmful interference to commercial mobile service licensees in the frequencies between 1930 megahertz and 1995 megahertz, the Commission may not--

(A) allocate such band for commercial use under paragraph (1)(A); or

(B) grant licenses under paragraph (1)(B) for the use of such band.

* * *

47 U.S.C. § 1457**(a) Establishment of Public Safety Trust Fund****(1) In general**

There is established in the Treasury of the United States a trust fund to be known as the Public Safety Trust Fund.

(2) Availability

Amounts deposited in the Public Safety Trust Fund shall remain available through fiscal year 2022. Any amounts remaining in the Fund after the end of such fiscal year shall be deposited in the general fund of the Treasury, where such amounts shall be dedicated for the sole purpose of deficit reduction.

(b) Use of Fund

As amounts are deposited in the Public Safety Trust Fund, such amounts shall be used to make the following deposits or payments in the following order of priority:

(1) Repayment of amount borrowed for first responder network authority

An amount not to exceed \$2,000,000,000 shall be available to the NTIA to reimburse the general fund of the Treasury for any amounts borrowed under section 1427 of this title.

(2) State and Local Implementation Fund

\$135,000,000 shall be deposited in the State and Local Implementation Fund established by section 1441 of this title.

(3) Buildout by first responder network authority

\$7,000,000,000, reduced by the amount borrowed under section 1427 of this title, shall be deposited in the Network Construction Fund established by section 1426 of this title.

(4) Public safety research

\$100,000,000 shall be available to the Director of NIST to carry out section 1443 of this title.

(5) Deficit reduction

\$20,400,000,000 shall be deposited in the general fund of the Treasury, where such amount shall be dedicated for the sole purpose of deficit reduction.

(6) 9-1-1, E9-1-1, and Next Generation 9-1-1 implementation grants

\$115,000,000 shall be available to the Assistant Secretary and the Administrator of the National Highway Traffic Safety Administration to carry out the grant program under section 942 of this title.

(7) Additional public safety research

\$200,000,000 shall be available to the Director of NIST to carry out section 1443 of this title.

(8) Additional deficit reduction

Any remaining amounts deposited in the Public Safety Trust Fund shall be deposited in the general fund of the Treasury, where such amounts shall be dedicated for the sole purpose of deficit reduction.

* * *

47 C.F.R § 1.115

(a) Any person aggrieved by any action taken pursuant to delegated authority may file an application requesting review of that action by the Commission. Any person filing an application for review who has not previously participated in the proceeding shall include with his application a statement describing with particularity the manner in which he is aggrieved by the action taken and showing good reason why it was not possible for him to participate in the earlier stages of the proceeding. Any application for review which fails to make an adequate showing in this respect will be dismissed.

(b)(1) The application for review shall concisely and plainly state the questions presented for review with reference, where appropriate, to the findings of fact or conclusions of law.

(2) The application for review shall specify with particularity, from among the following, the factor(s) which warrant Commission consideration of the questions presented:

(i) The action taken pursuant to delegated authority is in conflict with statute, regulation, case precedent, or established Commission policy.

(ii) The action involves a question of law or policy which has not previously been resolved by the Commission.

(iii) The action involves application of a precedent or policy which should be overturned or revised.

(iv) An erroneous finding as to an important or material question of fact.

(v) Prejudicial procedural error.

(3) The application for review shall state with particularity the respects in which the action taken by the designated authority should be changed.

(4) The application for review shall state the form of relief sought and, subject to this requirement, may contain alternative requests.

47 C.F.R. § 1.925

(a) Waiver requests generally. The Commission may waive specific requirements of the rules on its own motion or upon request. The fees for such waiver requests are set forth in § 1.1102 of this part.

(b) Procedure and format for filing waiver requests.

(1) Requests for waiver of rules associated with licenses or applications in the Wireless Radio Services must be filed on FCC Form 601, 603, or 605.

(2) Requests for waiver must contain a complete explanation as to why the waiver is desired. If the information necessary to support a waiver request is already on file, the applicant may cross-reference the specific filing where the information may be found.

(3) The Commission may grant a request for 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 a grant of the requested waiver would be in the public interest; or

(ii) In view of unique or unusual factual circumstances of the instant case, application of the rule(s) would be inequitable, unduly burdensome or contrary to the public interest, or the applicant has no reasonable alternative.

(4) Applicants requiring expedited processing of their request for waiver shall clearly caption their request for waiver with the words “WAIVER—EXPEDITED ACTION REQUESTED.”

(c) Action on Waiver Requests.

- (i) The Commission, in its discretion, may give public notice of the filing of a waiver request and seek comment from the public or affected parties.
- (ii) Denial of a rule waiver request associated with an application renders that application defective unless it contains an alternative proposal that fully complies with the rules, in which event, the application will be processed using the alternative proposal as if the waiver had not been requested. Applications rendered defective may be dismissed without prejudice.

47 C.F.R. § 1.2104

* * *

(c) Reserve Price. The Commission may establish a reserve price or prices, either disclosed or undisclosed, below which a license or licenses subject to auction will not be awarded. For any auction of eligible frequencies described in section 113(g)(2) of the National Telecommunications and Information Administration Organization Act (47 U.S.C. 923(g)(2)) requiring the recovery of estimated relocation costs, the Commission will establish a reserve price or prices pursuant to which the total cash proceeds from any auction of eligible frequencies shall equal at least 110 percent of the total estimated relocation costs provided to the Commission by the National Telecommunications and Information Administration pursuant to section 113(g)(4) of such Act (47 U.S.C. 923(g)(4)).

(d) Minimum Bid Increments, Minimum Opening Bids and Maximum Bid Increments. The Commission may, by announcement before or during an auction, require minimum bid increments in dollar or percentage terms. The Commission also may establish minimum opening bids and maximum bid increments on a service-specific basis.

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47 C.F.R. § 1.2105

(a) Submission of Short-Form Application (FCC Form 175). In order to be eligible to bid, an applicant must timely submit a short-form application (FCC Form 175), together with any appropriate upfront payment set forth by Public Notice. All short-form applications must be filed electronically.

* * *

(2) The short-form application must contain the following information, and all information, statements, certifications and declarations submitted in the application shall be made under penalty of perjury:

* * *

(viii) Certification that the applicant has provided in its application a brief description of, and identified each party to, any partnerships, joint ventures, consortia or other agreements, arrangements or understandings of any kind relating to the licenses being auctioned, including any agreements that address or communicate directly or indirectly bids (including specific prices), bidding strategies (including the specific licenses on which to bid or not to bid), or the post-auction market structure, to which the applicant, or any party that controls as defined in paragraph (a)(4) of this section or is controlled by the applicant, is a party.

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47 C.F.R. § 27.5

(j) 2000–2020 MHz and 2180–2200 MHz bands. The following frequencies are available for licensing pursuant to this part in the 2000–2020 MHz and 2180–2200 MHz (AWS–4) bands:

- (1) Two paired channel blocks of 10 megahertz each are available for assignment as follows: Block A: 2000–2010 MHz and 2180–2190 MHz; and Block B: 2010–2020 MHz and 2190–2200 MHz.
- (2) [Reserved]

47 C.F.R. § 27.53

* * *

(h) AWS emission limits.

- (1) General protection levels. Except as otherwise specified below, for operations in the 1695–1710 MHz, 1710–1755 MHz, 1755–1780 MHz, 1915–1920 MHz, 1995–2000 MHz, 2000–2020 MHz, 2110–2155 MHz, 2155–2180 MHz, and 2180–2200 bands, the power of any emission outside a licensee's frequency block shall be attenuated below the transmitter power (P) in watts by at least $43 + 10 \log_{10}(P)$ dB.
- (2) Additional protection levels. Notwithstanding the foregoing paragraph (h)(1) of this section:
 - (i) Operations in the 2180–2200 MHz band are subject to the out-of-band emission requirements set forth in § 27.1134 for the protection of federal government operations operating in the 2200–2290 MHz band.
 - (ii) For operations in the 2000–2020 MHz band, the power of any emissions below 2000 MHz shall be attenuated below the transmitter power (P) in watts by at least $70 + 10 \log_{10}(P)$ dB.
 - (iii) For operations in the 1915–1920 MHz band, the power of any emission between 1930–1995 MHz shall be attenuated below the transmitter power (P) in watts by at least $70 + 10 \log_{10}(P)$ dB.
 - (iv) For operations in the 1995–2000 MHz band, the power of any emission between 2005–2020 MHz shall be attenuated below the transmitter power (P) in watts by at least $70 + 10 \log_{10}(P)$ dB.

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