ORAL ARGUMENT NOT YET SCHEDULED

No. 18-1243

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

NTCH, INC.,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,

Respondents.

On Petition for Review of Orders of
the Federal Communications Commission

BRIEF FOR RESPONDENTS

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

(A) **Parties and Amici.** In addition to the parties identified in the petitioner's opening brief, the United States of America is a respondent.

(B) **Rulings under Review.** The petition for review challenges the following orders of the Federal Communications Commission: *Service Rules for Advanced Wireless Services in the 2000-2020 MHz and 2180-2200 MHz Bands*, 27 FCC Rcd 16102 (JA __) (2012) (*Main Order*); a related license modification order issued on delegated authority by the FCC's International and Wireless Telecommunications Bureaus, *Service Rules for Advanced Wireless Services in the 2000-2020 MHz and 2180-2200 MHz Bands*, 28 FCC Rcd 1276 (JA __) (Int'l and Wireless Telecomms. Burs. 2013) (*Modification Order*); and a Commission order denying reconsideration of those two orders, *Service Rules for Advanced Wireless Services in the 2000-2020 MHz and 2180-2200 MHz Bands*, 33 FCC Rcd 8435 (JA __) (2018) (*Reconsideration Order*).

(C) **Related Cases.** In May 2018, Petitioner NTCH, Inc. filed a mandamus petition in this Court that concerned, among other things, NTCH's then-pending petitions for agency reconsideration of the *Main Order* and *Modification Order*. That mandamus petition was dismissed

after the Commission released the *Reconsideration Order*. *In re NTCH, Inc.*, Order, No. 18-1121 (D.C. Cir. Sept. 5, 2018).

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GLOSSARY

APA	Administrative Procedure Act
AWS-4 band	Frequencies from 2000–2020 MHz and 2180–2200 MHz, when discussed in the context of terrestrial service (frequencies also known as the "Mobile Satellite S-band" or "2 GHz Mobile-Satellite band," when discussed in the context of satellite service)
FCC	Federal Communications Commission
GHz	Gigahertz
MHz	Megahertz

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BRIEF FOR RESPONDENTS

INTRODUCTION

Managing the electromagnetic spectrum is a core function of the Federal Communications Commission. In the orders under review (*Orders*), the Commission acted to protect the availability of spectrum for licensed satellite service while also promoting the spectrum's terrestrial use to support new and innovative technologies. Decisions of this kind are in the heartland of the agency's discretion. *E.g.*, *Teledesic LLC v. FCC*, 275 F.3d 75, 84 (D.C. Cir. 2001).

In the first of the *Orders*, the Commission adopted service rules to permit stand-alone terrestrial use of the spectrum at issue, which already was licensed for satellite and "ancillary" terrestrial service to wholly owned subsidiaries of Intervenor DISH Network Corp., Inc. (DISH). *Service Rules for Advanced Wireless Services in the 2000-2020 MHz and 2180-2200 MHz Bands*, 27 FCC Rcd 16102 (JA __) (2012) (*Main Order*).[1] Because the record showed that licensing this spectrum to other terrestrial operators would risk harmful radio interference to DISH's earlier-licensed operations, the Commission proposed to facilitate more flexible use of the spectrum by modifying DISH's licenses to permit stand-alone terrestrial use. *See generally id.* The second of the *Orders* under review implemented that proposal. *Service Rules for Advanced Wireless Services in the 2000-2020 MHz and 2180-2200 MHz Bands*, 28 FCC Rcd 1276 (JA __) (Int'l and Wireless Telecomms. Burs. 2013) (*Modification Order*).

Petitioner NTCH, Inc. (NTCH) contends that the Commission should instead have conducted an auction for the terrestrial rights

[1] Unless otherwise indicated, we refer to these licensees simply as "DISH."

awarded to DISH. But in challenging the Commission's *Orders*—the *Main Order*, *Modification Order*, and a third order in which the Commission denied reconsideration of those decisions, *Service Rules for Advanced Wireless Services in the 2000-2020 MHz and 2180-2200 MHz Bands*, 33 FCC Rcd 8435 (JA __) (2018) (*Reconsideration Order*)—NTCH fails to overcome the high standard of deference to which the *Orders* are entitled.

JURISDICTIONAL STATEMENT

Except for specified categories of licensing decisions not at issue here, *see* 47 U.S.C. § 402(b), this Court's jurisdiction to review final FCC orders arises under 47 U.S.C. § 402(a) and 28 U.S.C. § 2342(1). The *Reconsideration Order* was released on August 16, 2018, and NTCH timely petitioned for review on September 7, 2018. *See* 28 U.S.C. § 2344; 47 U.S.C. § 405. The Court nonetheless lacks jurisdiction to decide certain arguments for which NTCH has not shown Article III standing. *See infra* Part III.A.

QUESTIONS PRESENTED

1. Does the record support the FCC's finding that independent entities cannot feasibly provide terrestrial service in the spectrum

licensed to DISH without risking harmful radio interference to DISH's previously licensed operations?

2. If so, are NTCH's other challenges to the reasonableness of the Commission's *Orders*—which NTCH makes in support of its claim that the Commission was required to eliminate satellite use of the spectrum licensed to DISH—either (a) outside the Court's jurisdiction, because NTCH lacks standing; or (b) foreclosed on other procedural grounds?

3. In any event, do those arguments fail on the merits?

4. Was the Commission statutorily required to conduct an auction to assign the terrestrial rights awarded in the *Orders* to DISH when the Commission neither accepted mutually exclusive applications for those rights nor granted any "initial" license to DISH?

5. Did the Commission correctly dismiss NTCH's argument that the license modifications here exceeded the agency's statutory authority and, if not, does that argument in any event fail on the merits?

PERTINENT STATUTES AND REGULATIONS

Pertinent statutes and regulations are set forth in the statutory addendum bound with this brief.

COUNTERSTATEMENT OF THE CASE

A. Statutory and Regulatory Background

Title III of the Communications Act of 1934 (Communications Act or Act), 47 U.S.C. § 301 *et seq.*, gives the Commission broad authority to oversee radio transmission in the United States, and to "encourage the larger and more effective use of radio in the public interest," *id.* § 303(g). Among other things, the Commission is empowered to designate types or "classes" of "radio stations,"[2] 47 U.S.C. § 303(a), and "[a]ssign bands of frequencies to the various classes of stations," *id.* § 303(c). The Commission "[p]rescribe[s] the nature of the service to be rendered by each class of [station]." *Id.* § 303(b). It also "[m]ake[s] such regulations not inconsistent with law as it may deem necessary to prevent interference between stations," *id.* § 303(f), and issues licenses for the use of specified frequencies, *see id.* §§ 301, 307.

1. Allocations and Service Rules

"[T]o ensure maximum use of the electromagnetic spectrum" and "minimiz[e] potential harmful interference between communications

[2] "The term 'radio station' or 'station' means a [facility] equipped to engage in radio communication or radio transmission of energy." 47 U.S.C. § 153(42). That includes television, mobile telephone service, and other forms of wireless services not commonly thought of as "radio."

services," the Commission's rules include a "Table of Allocations" that reserves designated frequency ranges—or spectrum "bands"—for specified services. *Application of SpaceData International LLC*, 16 FCC Rcd 9266, 9271 ¶ 17 (Int'l Bur. 2001); *see* 47 C.F.R. § 2.106. A spectrum band may be reserved, or "allocated," to one or multiple services. *See id.* §§ 2.104(d)(1), 2.105(c)(1). In bands with multiple allocations, one service may be "primary"—i.e., entitled to interference protection from other services in the band, without a reciprocal obligation to protect those services. *Orbital Imaging Corp.*, 14 FCC Rcd 2997, 2999 n.12 (Int'l Bur. 1999); *see* 47 C.F.R. §§ 2.104(d)(3), 2.105(c)(2). Alternatively, multiple services in a band may be "co-primary," meaning they have equal rights to operate and protection from interference. *Orbital Imaging*, 14 FCC Rcd at 2999 n.12.

Before spectrum reserved in the Table of Allocations is put into use, the Commission adopts rules to govern the provision of the allocated services. Requirements for satellite services are generally contained in Part 25 of the Commission's rules. *See* 47 C.F.R. § 25.101(b). Part 27 contains "rules for miscellaneous wireless communications services." *Id.* § 27.1.

2. Licensing and License Modifications

Since 1993, Section 309(j) of the Communications Act has generally required that the Commission award "initial" spectrum licenses "through a system of competitive bidding" (i.e., by auction)—if "mutually exclusive applications are accepted." 47 U.S.C. § 309(j). But nothing in Section 309(j) "diminish[es] the authority of the Commission under other provisions of [the Act] to regulate . . . spectrum licenses." *Id.* § 309(j)(6)(C). Indeed, the Act makes clear that the competitive bidding system should not be construed "to relieve the Commission of the obligation in the public interest . . . to use engineering solutions, negotiation, threshold qualifications, service regulations, and other means . . . to avoid mutual exclusivity in application and licensing proceedings." *Id.* § 309(j)(6)(E). There is thus "no statutory requirement that the Commission entertain competing applications for initial [spectrum] licenses." NTCH Pet. for Reconsideration 2 (JA __) (Mar. 7, 2018) (Recon. Pet.).

The Commission's "power to modify [existing] licenses" is similarly "broad." *Cal. Metro Mobile Commc'ns, Inc. v. FCC*, 365 F.3d 38, 45 (D.C. Cir. 2004); *see* 47 U.S.C. § 316. Provided that "the holder of the license" receives "reasonable opportunity, of at least thirty days, to protest [a]

proposed order of modification," *id.* § 316(a)(1), "the Commission need only find that . . . modification serves the public interest, convenience and necessity," *California Metro*, 365 F.3d at 45; *see* 47 U.S.C. § 316(a)(1).

B. History of the Mobile Satellite S-Band

1. Early History

"Mobile Satellite Service" sends radio communications through one or more satellites to mobile "earth stations"—ground-based radio equipment for communicating with satellites—to support mobile voice and data services. 47 C.F.R. § 2.1(c); *see Main Order* ¶ 6 (JA __). "[I]n areas where it is difficult or impossible to provide communications . . . via terrestrial base stations," and in times of emergency, Mobile Satellite Service can supply coverage "unavailable from terrestrial-based networks." *Id.*

In 1997, the Commission allocated 70 MHz of spectrum (1990–2025 MHz and 2165–2200 MHz) for Mobile Satellite Service, including 40 MHz (2000–2020 MHz and 2180–2200 MHz) that we refer to here (in keeping with the Commission's past usage) as the "Mobile Satellite S-band."[3] *See*

[3] In recent years, the Commission has more commonly referred to these frequencies as the "2 GHz Mobile-Satellite Service band." *E.g.*, *DISH Network Corp.*, 28 FCC Rcd 16787, 16788–89 ¶ 5 (Wireless Telecomms. Bur. 2013) (*Waiver Order*), *application for review dismissed*, 33 FCC Rcd

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, 7393–95 ¶¶ 10–15 (1997). In 2001, the FCC's International Bureau granted permission for eight companies to provide Mobile Satellite Service in that 70 MHz of spectrum. *Main Order* ¶ 6 (JA __).

2. *Reallocation Order*

Meanwhile, the agency began seeking ways to make additional spectrum available to support a growing demand for "advanced wireless services," including wireless broadband service. *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*, 17 FCC Rcd 23193, 23193 ¶ 1 (2002) (*2002 Order*); *see id.* at 23199–201 ¶ 12.

As part of those efforts, the Commission in 2003 changed the allocation of 30 MHz of the spectrum earlier reserved for Mobile Satellite

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8456 (2018); *see also* 47 C.F.R. § 25.103 (defining "2 GHz Mobile-Satellite Service"). In the *Orders*, the Commission referred to this band as "the AWS-4 band," consistent with the agency's focus, in that context, on the adoption of terrestrial service rules and the modification of DISH's licenses to include stand-alone terrestrial rights. *E.g.*, *Main Order* ¶ 1 (JA __).

Service (1990–2000 MHz, 2020–2025 MHz, and 2165–2180 MHz) to "Fixed" and "Mobile" terrestrial services instead.[4] *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, 2225, 2238 ¶¶ 3, 28 (2003) (*Reallocation Order*). When doing so, the Commission declined to similarly reallocate the Mobile Satellite S-band. *Id.* at 2238 ¶¶ 29 & n.88, 74–75.

3. *Ancillary Service Order*

At the same time, the Commission adopted service rules for the Mobile Satellite S-band that allowed incumbent operators to augment their satellite services with "ancillary terrestrial components." *Flexibility for Delivery of Communications by Mobile Satellite Service Providers in the 2 GHz Band, the L-Band, and the 1.6/2.4 GHz Bands*, 18 FCC Rcd 1962, 1964 ¶ 1 (2003) (*Ancillary Service Order*). The Commission

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[4] The Commission's rules define "Fixed Service" as a terrestrial "radiocommunication service between specified fixed points." 47 C.F.R. § 2.1; *see 2002 Order*, 17 FCC Rcd at 24136 ¶ 1 n.4. "Mobile Service" is a terrestrial "radiocommunication service between mobile and land stations" (facilities not intended for use while in motion) or "between mobile stations." 47 C.F.R. § 2.1; *see 2002 Order*, 17 FCC Rcd at 24136 ¶ 1 n.4.

recognized that incumbent operators stood to benefit financially from this change. *See id.* at 1999 ¶ 65. That result was an acceptable "price," in the Commission's judgment, for "the public interest benefits that" ancillary terrestrial service offered. *Id.*

An important basis for the Commission's decision was evidence that operators other than the incumbents could not practically provide terrestrial service without risk of interference to the incumbents' satellite operations. *See Ancillary Service Order*, 18 FCC Rcd at 1990–92, 1999 ¶¶ 47–49, 65. The Commission deemed it "unreasonable and unwarranted" to address that obstacle by revoking the earlier grants to the incumbents. *Id.* at 1999 ¶ 65. Thus, the Commission instead allowed the incumbents to apply for ancillary terrestrial rights. *See id.*

4. National Broadband Plan

In March 2010, the FCC released a "National Broadband Plan" in which agency staff proposed initiatives to stimulate broadband development. FCC, Connecting America: The National Broadband Plan (2010), *available at* https://www.fcc.gov/general/national-broadband-plan. One such staff recommendation was that the Commission "take action to accelerate terrestrial deployments in" the Mobile Satellite S-band (among other frequencies). *Id.* at 88. More specifically, the Plan

proposed to "add a primary 'mobile' (terrestrial) allocation to the S-band" and give licensees "flexibility" to use that spectrum for "stand-alone terrestrial services." *Id.* At the same time, the Plan underscored that it was "important" to preserve "sufficient spectrum for [Mobile Satellite] incumbent users," *id.* at 87, and to safeguard Mobile Satellite operations, *id.* at 88.

5. *Co-Allocation Order*

In April 2011, building on the FCC staff's recommendation in the National Broadband Plan, the Commission added Fixed and Mobile terrestrial service allocations to the Mobile Satellite S-band. *Fixed and Mobile Services in the Mobile Satellite Service Bands at 1525–1559 MHz and 1626.5–1660.5 MHz, 1610–1626.5 MHz and 2483.5–2500 MHz, and 2000–2020 MHz and 2180–2200 MHz*, 26 FCC Rcd 5710, 5710 ¶¶ 1–2 (2011) (*Co-Allocation Order*). Those new allocations were "co-primary with the existing Mobile Satellite allocation." *Id.* at 5714 ¶ 8; *accord id.* at 5715 ¶ 10. The Commission thus left in place the existing service rules permitting Mobile Satellite Service (and ancillary terrestrial service) in the S-band. *Id.* at 5715 ¶ 10. In doing so, the Commission reaffirmed that "[Mobile Satellite] networks are a necessary and critical part of this nation's communications infrastructure." *Id.* at 5714 ¶ 10.

6. *Notice of Proposed Rulemaking*

Building on that "foundation" for service rules that would promote "more flexible use of the" Mobile Satellite S-band, *Co-Allocation Order*, 26 FCC Rcd at 5716 ¶ 13, the Commission in March 2012 issued the notice of proposed rulemaking that launched the proceeding here, *Service Rules for Advanced Wireless Services in the 2000–2020 MHz and 2180–2200 MHz Bands*, 27 FCC Rcd 3561 (JA __) (2012) (*Notice*).

At the time of the *Notice*, there remained two Mobile Satellite systems in the S-band: DBSD and TerreStar. *E.g.*, *Notice* ¶ 7 (JA __). Each of those licensees had launched satellites, met its operational milestones, and received ancillary terrestrial authority. *Id.* ¶ 8 (JA __). But they had offered little or no commercial satellite service, *id.*, and were in bankruptcy, *id.* ¶ 9 (JA __). In the bankruptcy proceedings, DISH acquired both companies and (with the FCC's consent) their Mobile Satellite licenses. *Id.*

Against that backdrop, the Commission in the *Notice* was "mindful" that the band was already "allocated on a co-primary basis for Mobile Satellite [Service]" and licensed to DISH. *Notice* ¶ 17 (JA __). The Commission also took account of the agency's earlier finding, in the *Ancillary Service Order*, that licensing separately controlled terrestrial

operators in the band would be "impractical and ill-advised." *Id.* ¶ 69 (JA __) (internal quotation marks omitted).

The Commission sought comment on whether technical hurdles to separate-operator sharing remained, anticipating that they did. *See Notice* ¶¶ 69–72 (JA __–__). If responses to the *Notice* confirmed that expectation, the Commission proposed to exercise its authority under Section 316 of the Communications Act to modify DISH's licenses to permit DISH to offer stand-alone terrestrial service "while retaining the right to offer [Mobile Satellite Service]." *Id.* ¶ 78 (JA __); *see id.* ¶¶ 75, 79 (JA __–__).

Alternatively, if the record showed it would be "possible for separately authorized, independent [terrestrial] licensees to protect [Mobile Satellite Service]" in the S-band, the Commission sought comment "on other approaches to authorizing terrestrial use." *Notice* ¶ 80 (JA __). The Commission made clear that any such alternative approach—for example, proposals to assign "new initial licenses via competitive bidding"—"would have to protect" DISH, as the existing Mobile Satellite Service licensee, "from harmful interference." *Id.*

C. *Orders* under Review

1. *Main Order*

The Commission received "numerous comments" in response to the *Notice* agreeing that there remained practical and technical hurdles to separate-operator sharing of the Mobile Satellite S-band. *Main Order* ¶ 166 (JA __); *see id.* (summarizing comments). Only one commenter—MetroPCS Communications, Inc. (MetroPCS)—argued that those obstacles were surmountable. *Id.* ¶ 182 (JA __); *see id.* ¶ 168 (JA __–__). But neither MetroPCS nor any other party, the Commission explained, provided technical support for that claim. *Id.* ¶ 183 (JA __). The Commission thus rejected MetroPCS's view and accepted the weight of contrary analysis. *See id.* ¶¶ 166, 182–183 (JA__–__, __).

Having found that independent terrestrial operators cannot feasibly share the spectrum licensed to DISH, the Commission concluded that modifying DISH's licenses to include Fixed and Mobile terrestrial rights would serve the public interest. *Main Order* ¶ 169 (JA __). There was widespread consensus, the Commission observed, that allowing stand-alone terrestrial service in the Mobile Satellite S-band would benefit the public. *E.g.*, *id.* ¶ 35 (JA __). And the record supported, the Commission explained, that DISH's earlier-licensed satellite operations

were entitled to protection from harmful interference. *Id.* ¶ 160 (JA __). In addition, the Commission found, commenters widely supported the agency's legal authority for the contemplated license modifications, *id.* ¶¶ 173–174 (JA __), and those modifications were consistent with prior FCC orders, *id.* ¶ 175 (JA __).

The Commission acknowledged that modifying DISH's licenses would "increase [their] value"—perhaps by as much as $6 billion. *Main Order* ¶ 178 & n.525 (JA __). But given the obstacles to separate-operator use, the Commission deemed modifying DISH's licenses the "best and fastest method" for bringing the Mobile Satellite S-band into terrestrial use. *Id.* ¶ 178 (JA __). DISH's financial gain, the agency explained, was a tolerable consequence of freeing the spectrum up for that important purpose. *Id.* ¶ 178 (JA __); *see id.* ¶ 3 (JA __). That was particularly so, the Commission believed, given that DISH would be required to meet aggressive performance requirements as a condition of the proposed license modifications. *See id.* ¶¶ 167, 178 (JA __, __); *see also id.* ¶¶ 187–188, 201–204 (JA __–__, __–__) (setting forth those requirements and the penalties for failing to meet them).

NTCH argued that the proposed license modifications would result in an "unjustified windfall" to DISH, and a commensurate "loss to the

public." *Main Order* ¶ 168 (JA __); *see* Comments of NTCH, Inc. 1–7 (JA __–__) (May 17, 2012) (NTCH Comments). But in the Commission's judgment, NTCH's proposal that the Commission circumvent "interference considerations" by "let[ting] go of the satellite allocation" in the Mobile Satellite S-band, NTCH Comments 9 (JA __), constituted an untimely petition for reconsideration of the agency's April 2011 decision to make the band's terrestrial and satellite allocations co-primary—a decision that reflected the benefits of that satellite service. *Main Order* ¶ 180 n.532 (JA __); *see supra* p. 12.

2. *Modification Order*

On January 22, 2013, DISH informed the FCC that it would not protest the license modifications proposed in the *Main Order*. *Modification Order* ¶ 5 (JA __). Accordingly, on February 15, 2013, acting on delegated authority, the FCC's International and Wireless Telecommunications Bureaus issued an order implementing those modifications. *Id.* ¶ 6 (JA __).

3. *Reconsideration Order*

In separate petitions based on identical grounds, NTCH sought agency reconsideration of the *Main Order* and *Modification Order*. *See* Pet. for Reconsideration 2–3 (JA __–__) (Mar. 18, 2013) (Recon. Pet. re

Modification Order) (incorporating by reference NTCH's petition for reconsideration of the *Main Order*); *see generally* Recon. Pet. (JA __–__). The Commission dismissed NTCH's petitions because NTCH had "failed to show that it . . . met the threshold requirements to justify Commission reconsideration." *Reconsideration Order* ¶ 1 (JA __). In addition—"as a separate and independent ground for rejecting the petitions"—the Commission "den[ied] them on the merits." *Id.*

With limited exceptions, the Commission explained, petitions for reconsideration based on new facts or arguments are barred under the agency's rules. *Reconsideration Order* ¶ 13 (JA __) (citing 47 C.F.R. §§ 1.106(c), 1.429(b)). NTCH claimed on reconsideration that the modifications to DISH's licenses were so "fundamental" as to exceed the scope of the Commission's Section 316 authority. Recon Pet. 2, 4–7 (JA __, __–__). But as the Commission explained, NTCH had not (and did not claim to have) ever previously raised that argument. *Reconsideration Order* ¶ 15 & n.52 (JA __). Rather than invoke any permitted exception for new arguments, the Commission observed, NTCH sought to conflate its Section 316 argument with an earlier argument raised by DISH: that Section 316 did not empower the agency to "eliminate a satellite allocation altogether." *Id.* ¶ 15 & n.53 (JA __). DISH's "very different"

argument, the Commission reasoned, had not provided a "reasonable opportunity to address the argument NTCH later raised." *Id.* ¶ 15 (JA __). The Commission thus dismissed NTCH's argument on that procedural ground.

The Commission also denied the argument on its merits. *Reconsideration Order* ¶ 16 (JA __). The modification of DISH's licenses, the Commission explained, "was neither fundamental nor radical." *Id.* DISH had for years been authorized to provide both Mobile Satellite and terrestrial service in the licensed band. *Id.* In the Commission's view, removing the "ancillary" restriction on terrestrial service and moving the terrestrial service rules to Part 27 could "hardly be considered" a reversal of the "entire statutory regime." *Id.* ¶ 17 (JA __); *see id.* ¶ 16 & n.64 (JA __–__).

The Commission likewise rejected NTCH's proposal to adopt service rules restricting the Mobile Satellite S-band to terrestrial use. *See Reconsideration Order* ¶¶ 19–20 (JA __–__). Like NTCH's earlier proposal to "drop" the band's "satellite allocation," the Commission did not regard this new argument for limited "service rules" as within the scope of the underlying *Notice*. *See id.* ¶ 20 (JA __–__). The *Notice*, the Commission explained, asked "whether or not to *expand* the authorized

spectrum use"—not whether to restrict use. *Id.* And "matters outside the scope of the order for which reconsideration is sought," the Commission reasoned, "plainly do not warrant" relief. 47 C.F.R. § 1.429(l)(5); *see Reconsideration Order* ¶ 20 & n.82 (JA __). Moreover, the Commission explained, "action on NTCH's proposal to eliminate [Mobile Satellite] operations in the band would require that the Commission consider a host of significant questions"—among other things, "what the impact on the public would be if [Mobile Satellite Service] were no longer available to address the needs of rural access [and] disaster recovery." *Id.* ¶ 20 (JA __).

STANDARD OF REVIEW

The Court must affirm the *Orders* under review unless the Commission's actions are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Under that highly deferential standard, the 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) (internal quotation marks omitted).

When the Commission "is fostering innovative methods of exploiting the spectrum, it functions as a policymaker and is accorded the greatest deference by a reviewing court." *Mobile Relay Assocs. v. FCC*, 457 F.3d 1, 8 (D.C. Cir. 2006) (internal quotation marks omitted). In such cases, this Court will uphold the agency's actions so long as the Commission has supported its technical judgment "with even a modicum of reasoned analysis," "absent highly persuasive evidence to the contrary." *Id.* (quoting *Hispanic Info. & Telecomms. Network v. FCC*, 865 F.2d 1289, 1297–98 (D.C. Cir. 1989)).

Pursuant to *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), this Court also defers to the FCC's reasonable interpretations of ambiguous terms in the Communications Act. *E.g.*, *California Metro*, 365 F.3d at 43.

SUMMARY OF THE ARGUMENT

This case lies in the heartland of the FCC's discretion: Taking account of technical concerns and competing policy interests, the Commission made a predictive judgment concerning how best to manage the electromagnetic spectrum. NTCH disputes that judgment, but the Commission acted reasonably, explained its actions, and appropriately construed its organic statute. Nothing more is required.

1. When the Commission adopted the *Main Order*, there was an urgent need for greater network capacity to support modern wireless services. All parties agreed that allowing stand-alone terrestrial use of the Mobile Satellite S-band could help meet that need. But that spectrum was already licensed to DISH for Mobile Satellite Service—a service uniquely situated to function in rural areas and after natural disasters. The Commission thus asked whether it was feasible to license independent terrestrial operators without risk of radio interference to DISH's licensed satellite service (and ancillary terrestrial component). The record overwhelmingly indicated that it was not. Accordingly, although recognizing that DISH would benefit financially, the Commission elected to modify DISH's licenses to include stand-alone terrestrial rights. The alternative was to forgo the public interest benefits that stand-alone terrestrial service promised. The Commission reasonably preferred to promote those benefits.

2. The service rules adopted in the *Main Order* are fully consistent with the Commission's finding that separate-operator sharing of the Mobile Satellite S-band is not technically feasible. NTCH contends that allowing DISH to lease spectrum to independent operators belies that finding. But that is not so, because such arrangements would necessarily

involve coordination between DISH and its lessees. And if DISH should fail to meet its terrestrial build-out requirements, the Commission reasonably decided that DISH would then appropriately bear responsibility for interference resulting from the reassignment of DISH's terrestrial rights to independent operators.

3. NTCH lacks standing to raise its remaining arguments based on the Administrative Procedure Act (APA). NTCH contends that the Commission was required to eliminate satellite use of the spectrum licensed to DISH because (a) the record at the time of the *Main Order* did not support that modifying DISH's licenses was the fastest way of bringing that spectrum to market, (b) the Commission did not adequately consider the "windfall" that DISH would otherwise receive, and (c) awarding terrestrial rights to DISH invited spectrum warehousing. But NTCH fails to show why reversing the *Orders* on any of those grounds would redress its claimed injury: that the *Orders* deprived it of an opportunity to bid, in an auction, for the terrestrial rights granted to DISH. The *Notice* in these FCC proceedings did not indicate that the agency might unilaterally curtail DISH's existing Mobile Satellite (or ancillary terrestrial) rights by granting stand-alone terrestrial rights to independent operators at the risk of harmful interference to DISH. If the

Court were to reverse the *Orders*, the Commission thus could not conduct the auction that NTCH desires without first initiating a further rulemaking proceeding to solicit comment on that approach. There is no basis to presume that the Commission would do so.

In any event, NTCH's claim that the Commission should have "converted" the Mobile Satellite S-band to exclusive terrestrial use is procedurally barred—either as an untimely petition for reconsideration of the *Co-Allocation Order* or, more generally, as a claim that is beyond the scope of the *Notice*. And the APA arguments in support of that claim also fail on the merits.

4. NTCH's statutory argument that the Commission was required to conduct an auction to assign the terrestrial rights granted to DISH fails at the threshold, because Section 309(j)(1) of the Act does not apply unless the Commission has first accepted mutually exclusive license applications (which did not happen here). In any event, the Commission reasonably concluded that the disputed license modifications merely extended DISH's existing rights and did not effectively grant an initial license.

5. Finally, the Court should not reach the merits of NTCH's argument that the DISH license modifications exceeded the FCC's

authority under Section 316 of the Act. Neither NTCH nor any other party raised that claim until the agency reconsideration proceeding. At that point, the Commission correctly dismissed it as procedurally barred under the FCC's established rules governing reconsideration petitions—a holding that NTCH does not challenge in its opening brief. In any event, the license modifications were well within the agency's broad authority.

ARGUMENT

I. THE COMMISSION REASONABLY DETERMINED THAT MODIFYING DISH'S LICENSES BEST SERVED THE PUBLIC INTEREST.

Title III of the Communications Act "endow[s] the Commission with 'expansive powers' and a 'comprehensive mandate to encourage the larger and more effective use of radio in the public interest.'" *Cellco P'ship v. FCC*, 700 F.3d 534, 542 (2012) (quoting *NBC v. United States*, 319 U.S. 190, 219 (1943); additional internal quotation marks omitted); *accord* 47 U.S.C. § 303(g). And it is a "sound principle of spectrum management" that when "more efficient, more cost-effective uses of [licensed] spectrum" are identified, but "granting the additional rights to third parties is impracticable or infeasible," "the Commission should permit incumbents the option of deploying" those new uses. *Ancillary Service Order*, 18 FCC Rcd at 1979 ¶ 31. That principle provided compelling support for the

Commission's decision to modify DISH's licenses here. *See Main Order* ¶ 169 (JA __).

The Commission recognized an "urgent" public need for greater network capacity to support modern wireless services, *Main Order* ¶ 3 (JA __), and found that promoting Fixed and Mobile Service in the Mobile Satellite S-band would help serve that vital interest, *e.g.*, *id.* ¶¶ 177–178 (JA __). Commenters widely agreed. *E.g.*, Comments of Alcatel-Lucent 2 (JA __) (May 16, 2012); Comments of the Consumer Electronics Association 1–3 (JA __–__) (May 16, 2012); Comments of Nokia Siemens Networks 2–3 (JA __–__) (May 16, 2012).

At the same time, the record showed that Mobile Satellite Service is uniquely suited to facilitate "communications in areas where it is difficult or impossible to provide communications coverage via terrestrial base stations," or "at times when coverage may be unavailable from terrestrial-based networks." *Main Order* ¶ 6 (JA __); *see Co-Allocation Order*, 26 FCC Rcd at 5714 ¶ 10; *Reallocation Order*, 18 FCC Rcd at 2238 ¶¶ 29 & n.88, 74–75; *Ancillary Service Order*, 18 FCC Rcd at 1989 ¶ 45. Indeed, commenters widely recognized the importance of Mobile Satellite Service for those reasons. *See* Comments of MetroPCS 32–33 (JA __–__) (May 16, 2012) (MetroPCS Comments); Comments of the Mobile Satellite

Users Association 1 (JA __) (May 16, 2012); Comments of the Satellite Industry Association 3 (JA __) (May 16, 2012); Reply Comments of DISH 9 (JA __) (May 31, 2012) (DISH Reply Comments).

The Commission observed that, although DISH had not yet deployed commercial satellite service in the S-band, it had committed to doing so and had met its operational milestones to that end—including launching satellites. *Main Order* ¶ 251 n.733 (JA __); *see Ancillary Service Order*, 18 FCC Rcd at 1999 ¶ 65. The agency had thus never proposed to limit DISH's existing Mobile Satellite rights. *E.g.*, *Reconsideration Order* ¶ 20 (JA __); *Notice* ¶¶ 17, 74, 78, 80 (JA __, __–__).

There was also widespread agreement that terrestrial operators independent of DISH could not practically avoid interference to DISH's Mobile Satellite operations. *Main Order* ¶ 181 (JA __); *e.g.*, Reply Comments of Sprint Nextel Corp. 14–15 (JA __–__) (May 31, 2012); Comments of DISH 4, 9–10 (JA __, __–__) (May 16, 2012) (DISH Comments); Comments of the National Rural Telecommunications Cooperative 4–5 (JA __–__) (May 16, 2012); Comments of the U.S. GPS Industry Council 3 (JA __) (May 16, 2012). A single commenter—Metro PCS—argued that separate-operator sharing of the DISH spectrum was

technically feasible. *Main Order* ¶ 182 (JA __). But that assertion, the Commission found, was unsubstantiated. *See id.* ¶¶ 182–183 (JA __). The agency therefore determined that "spectrum sharing between separately-licensed [Mobile Satellite] and terrestrial operators, while perhaps possible in the future, [was] not [yet] viable." *Id.* ¶ 183 (JA __).

The Commission recognized that modifying DISH's licenses to include terrestrial rights would increase the value of those licenses substantially. *See Main Order* ¶ 178 (JA __). But in exchange, it believed, the public stood to benefit from DISH's more efficient use of the spectrum. *See id.* ¶¶ 177–178 (JA __). Moreover, the Commission recognized, DISH would be required to accept performance requirements that, if DISH failed to meet, would free up the Mobile Satellite S-band for other terrestrial operators. *See id.* ¶¶ 178, 187–188 (JA __, __–__). And because modifying DISH's licenses would allow terrestrial build-out to start without need for further agency proceedings—thus avoiding, for example, the delay inherent in administering an auction, *see* DISH Reply Comments 22 (JA __)—the Commission deemed modifying DISH's licenses "the best and fastest method for bringing [the DISH] spectrum to market." *Main Order* ¶ 178 (JA __).

As at the time of the *Ancillary Service Order*, the Commission confronted "a choice between quickly achieving the public-interest benefits of improved spectrum efficiency . . . at the price of giving [DISH] more than [it] had originally sought, or giving [DISH] only what [it] originally received at the price of [forgoing] the public-interest benefits" from increased terrestrial use of the Mobile Satellite S-band. 18 FCC Rcd at 1999 ¶ 65. The agency's reasonable policy decision to prioritize those public-interest benefits—which was based on well-supported technical and predictive judgments, and which concerned how best to manage the electromagnetic spectrum—deserves this Court's "greatest deference." *E.g.*, *Mobile Relay*, 457 F.3d at 8 (internal quotation marks omitted).

II. THE COMMISSION REASONABLY FOUND THAT SEPARATE-OPERATOR SPECTRUM SHARING WOULD RISK HARMFUL RADIO INTERFERENCE.

As we have stated, *see supra* pp. 15, 22, 27, the record was replete with support for the Commission's determination that allowing terrestrial operators independent of DISH to share the Mobile Satellite S-band would risk interference to DISH's existing operations, *Main Order* ¶¶ 169, 181–183 (JA __, __–__). Indeed, NTCH itself has previously acknowledged that "the co-existence of a satellite operator and a terrestrial operator in [the Mobile Satellite S-band]" would pose

"technical problems." Recon Pet. 7 (JA __). NTCH's changed position here—that the terrestrial service rules adopted in the *Main Order* "belie" the Commission's finding of technical infeasibility, Br. 32—is unpersuasive.

NTCH bases that claim in part on the Commission's decision to allow DISH to "sell or lease its spectrum to other independent operators." Br. 33; *see Main Order* ¶¶ 244–259 (JA __–__). But as NTCH concedes, arrangements of that kind would necessarily involve "voluntary coordination between DISH and the independent operator." Br. 33. For that reason—and because the Commission provided that the interference protection rule adopted in the *Main Order* would "run" with any spectrum that DISH leased or sold, *Main Order* ¶¶ 249, 259 (JA __, __)—the Commission believed that allowing leasing was consistent with the "real" interference concerns based on which it found that other separate-operator arrangements were not feasible. *Id.* ¶ 249 (JA __).[5]

[5] NTCH asserts that "the Commission could simply have required such collaboration as a condition of DISH's modified licenses." Br. 33. But because neither NTCH nor any other party made that argument before the Commission, the argument is barred here. 47 U.S.C. § 405; *see NTCH*, 841 F.3d at 508. In any event, as described below, involuntarily limiting DISH's Mobile Satellite rights by requiring such collaboration

Contrary to what NTCH claims (Br. 33), the prospect of licensing independent terrestrial operators if DISH should fail to meet its terrestrial build-out requirements (or otherwise relinquish its terrestrial license rights) is also consistent with the FCC's concern about interference. DISH acceded to the modification of its licenses to obtain expanded terrestrial rights. *See Modification Order* ¶ 5 (JA __). Accordingly, if DISH does not meet its terrestrial build-out requirements or discontinues terrestrial service, DISH will "be responsible for its own considered choices or for its failure to fulfill the responsibilities [attending] the expansion of its licensed rights into the terrestrial realm." *Main Order* ¶ 209 n.628 (JA __). The Commission thus reasonably decided that "the consequences of any interference" to Mobile Satellite operations that might occur "as an attendant result" of DISH's failure to meet its terrestrial build-out obligations (or decision to discontinue terrestrial service) should be DISH's responsibility to bear. *Id.*

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was not an approach for which the FCC had provided adequate notice under the APA. *See infra* pp. 33–35, 38–39.

III. THE COURT LACKS JURISDICTION TO REACH THE MERITS OF NTCH'S OTHER CHALLENGES TO THE REASONABLENESS OF THE COMMISSION'S ORDERS, WHICH IN ANY EVENT ARE PROCEDURALLY BARRED AND FAIL ON THE MERITS.

NTCH additionally argues that the Commission should have "convert[ed]" the Mobile Satellite S-band to exclusive terrestrial use. *E.g.*, Br. 22. In support of that claim, NTCH contends that (1) the record at the time of the *Main Order* did not support the Commission's conclusion that modifying DISH's licenses was the fastest way to bring the band to market, *see id.* at 31; (2) the Commission did not adequately consider the "windfall" that DISH would receive under the agency's chosen approach, *id.* at 25–26, 34–35; and (3) awarding terrestrial rights to DISH invited spectrum warehousing, *id.* at 27. NTCH lacks standing to raise these arguments because it has not shown why, should the Court credit any of them and reverse the Commission's *Orders* on that basis, a spectrum auction would follow. Moreover, NTCH's overarching claim that the agency should have converted the Mobile Satellite S-band to exclusive terrestrial use is procedurally barred. Should the Court nonetheless reach that claim, each of NTCH's supporting arguments also fails on the merits.

A. NTCH Lacks Standing to Bring These Arguments.

"'[T]he irreducible constitutional minimum of standing contains three elements': (1) the [petitioner] must have suffered an 'injury in fact' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical'; (2) there must exist 'a causal connection between the injury and the conduct complained of'; and (3) it must be 'likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.'" *Friends of Animals v. Jewell*, 828 F.3d 989, 991–92 (D.C. Cir. 2016) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992) (internal quotation marks omitted)). The party invoking federal jurisdiction bears the burden to establish each element. *Id.*

NTCH fails to meet that burden. It contends that the Commission's *Orders* "deprived [it] of an opportunity to acquire [Mobile Satellite S-band] spectrum" through competitive bidding. Br. 14. But NTCH has not shown why the remedy it requests—reversal of the *Orders*, Br. 44—is likely to redress that injury.

From the time of the FCC's earliest efforts to make the Mobile Satellite S-band available for terrestrial use, the agency recognized that (1) both terrestrial and Mobile Satellite Service serve the public interest, and (2) Mobile Satellite licensees that meet their operational milestones

in good faith deserve protection. *See Co-Allocation Order*, 26 FCC Rcd at 5714–15 ¶ 10; National Broadband Plan 87–88; *Reallocation Order*, 18 FCC Rcd at 2238 ¶ 29; *Ancillary Service Order*, 18 FCC Rcd at 1999 ¶ 65.

"[B]uild[ing] on" those earlier efforts here, *Notice* ¶ 17 (JA __), the Commission made clear in the *Notice* that it was soliciting comment on proposals for terrestrial service rules that would not disturb the S-band's co-primary allocation for Mobile Satellite Service or DISH's rights as the incumbent licensee, *e.g.*, *Notice* ¶¶ 17, 20, 23, 68, 70, 71–72, 74, 76, 78, 79, 80, 92, 100 n.172, 114, 117, 119 (JA __–__, __, __, __–__, __, __, __–__, __). The only circumstance in which DISH might lose its Mobile Satellite rights was if the agency awarded terrestrial rights to DISH and DISH failed to meet its terrestrial build-out requirements (or otherwise forfeited its terrestrial authority by, for example, discontinuing service). *See id.* ¶¶ 95–96, 123–124 (JA __–__, __–__).

Commenters widely understood that the Commission was not inviting proposals to revoke or diminish DISH's existing license rights. *See, e.g.*, Comments of T-Mobile USA, Inc. 17 (JA __) ("[T]he Commission *could afford DISH the opportunity* to surrender 20 MHz of its current [Mobile Satellite] allocation in return for receiving flexible terrestrial use

rights in the remaining 20 MHz.").[6] Indeed, NTCH itself has previously characterized its proposal to limit DISH's satellite rights as contingent upon "DISH's voluntary agreement with the process," absent which "the DISH licenses should stay exactly as they [were]" before the *Orders*. NTCH's Reply to Opposition 5 (JA __) (Nov. 29, 2013) (NTCH Recon. Reply).

It follows from the limited scope of the *Notice*, *see Reconsideration Order* ¶ 20 (JA __), and from the Commission's reasonable determination that licensing independent terrestrial operators in the Mobile Satellite S-band would risk harmful interference to DISH's operations, *see supra* pp. 29–31, that a decision reversing the *Orders* would not, in itself, prompt the FCC to reassign DISH's terrestrial rights by auction. At least absent DISH's consent—which DISH has indicated it will not give, *see* DISH Reply Comments 3 (JA __)—the agency could not appropriately

[6] To be sure, some commenters argued that the Commission could require DISH to accept a reduction of its existing rights in exchange for new, more flexible terrestrial rights. *E.g.*, MetroPCS Comments 5, 29–35 (JA __, __–__). But as this Court has recognized, comments on an issue as to which the agency itself never gave notice are not properly within the scope of the agency's rulemaking proceeding. *See, e.g.*, *Fertilizer Inst. v. U.S. EPA*, 935 F.2d 1303, 1312 (D.C. Cir. 1991) ("The fact that some commenters actually submitted comments suggesting [an approach for which the agency itself gave no notice] is of little significance.").

conduct such an auction without first soliciting comment on the wisdom and viability of that approach. *Reconsideration Order* ¶ 20 (JA __).

Particularly given considerations of interference, there is no reason to presume the Commission would take that step. And, "except in the rarest of cases, the decision [whether] to institute rulemaking is one that is largely committed to agency discretion." *WWHT, Inc. v. FCC*, 656 F.2d 807, 815 (D.C. Cir. 1981); *see also WildEarth Guardians v. U.S. EPA*, 751 F.3d 649, 653 (D.C. Cir. 2014) ("[W]e will overturn an agency's decision not to initiate a rulemaking only for compelling cause, such as plain error of law . . . ." (internal quotation marks omitted)).

Moreover, even if the Commission were to solicit comment on a competitive bidding approach, it is uncertain whether the agency would ultimately elect to conduct an auction. As the Commission stated in the *Reconsideration Order*, proposals to eliminate or diminish DISH's Mobile Satellite rights "would require that the Commission consider," among other things, "what the impact on the public would be if [Mobile Satellite Service] were no longer available to address the needs of rural access, disaster recovery and the like." *Reconsideration Order* ¶ 20 (JA __). And the Commission has "broad authority under the Communications Act to 'consider the public interest in deciding whether to forgo an auction.'" *Id.*

¶ 18 (JA __) (quoting *M2Z Networks, Inc. v. FCC*, 558 F.3d 554, 563 (D.C. Cir. 2009)); *see Improving Public Safety Communications in the 800 MHz Band*, 19 FCC Rcd 14969, 15012, 15015–16 ¶¶ 67 & n.219, 72 n.236, 73, 74 n.239 (2004) (*800 MHz Order*).

In sum, the notion that reversing the *Orders* would lead to a spectrum auction is unduly speculative. NTCH has thus not met its burden to show redressability. *See, e.g.*, *Raytheon Co. v. Ashborn Agencies, Ltd.*, 372 F.3d 451, 454 (D.C. Cir. 2004) (when there was no indication that a court order compelling the respondent to appear in arbitration proceedings would prompt the respondent to abandon a suit against the petitioner abroad, the petitioner failed to show that its requested relief would redress the injury it claimed from having to defend itself abroad). And NTCH's failure to show Article III standing deprives the Court of jurisdiction to consider NTCH's challenges to the reasonableness of the *Orders*—arguments that NTCH offers in support of its contention that the Commission should only have allowed terrestrial use of the Mobile Satellite S-band. *E.g.*, *Elec. Privacy Info. Ctr. v. FAA*, 892 F.3d 1249, 1253 (D.C. Cir. 2018); *see infra* Part III.C.

B. NTCH's Claim That the Commission Should Have "Converted" the Mobile Satellite S-Band to Full Terrestrial Use Is Procedurally Barred.

Considerations of standing aside, the limited scope of the Commission's proceeding means that this Court need not reach the merits of NTCH's claim that the Commission should have "only [a]uthorized [t]errestrial [u]se of the [Mobile Satellite S-band]." Br. 21. It is not clear precisely what NTCH means by this claim. NTCH has previously argued alternately that the Commission should have removed the band's Mobile Satellite allocation, *see* NTCH Comments 8–9 (__–__), or barred the band's satellite use by adopting new service rules, *see* Recon. Pet. 8 (JA __). Under either formulation, the Commission correctly concluded that NTCH's proposal was not within the proper scope of the underlying proceeding. *See Reconsideration Order* ¶ 20 (JA __); *Main Order* ¶ 180 n.532 (JA __).

The Commission rejected NTCH's proposal to "[d]rop[]" the Mobile Satellite "allocation," NTCH Comments 8 (JA __), as an untimely petition for reconsideration of the FCC's 2011 *Co-Allocation Order*, *Main Order* ¶ 180 n.532 (JA __); *see Co-Allocation Order*, 26 FCC Rcd at 5714–15 ¶¶ 8, 10 (determining that Fixed, Mobile, and Mobile Satellite allocations in the S-band would be co-primary). Because NTCH has not challenged

that determination in its opening brief, there is no basis for this Court to disturb it. *See, e.g.*, *Am. Wildlands v. Kempthorne*, 530 F.3d 991, 1001 (D.C. Cir. 2008) ("Issues may not be raised for the first time in a reply brief." (internal quotation marks omitted)).

To the extent that NTCH now contends that the FCC should have adopted revised service rules to prohibit the S-band's use for Mobile Satellite Service, the Commission correctly concluded that such an approach lacked adequate APA notice. *Reconsideration Order* ¶ 20 (JA __). As we have explained, *see supra* pp. 33–35, the *Notice* underlying the *Main Order* "did not seek comment regarding changes that would [unilaterally] diminish DISH's [Mobile Satellite] rights," *Reconsideration Order* ¶ 20 (JA __) (internal quotation marks omitted). Contrary to what NTCH contends, *see* Br. 28–29, proposing to abridge those rights in certain limited circumstances for which DISH itself would bear responsibility, *see Notice* ¶¶ 95–96, 124 (JA __–__, __–__), did not suggest that the agency might otherwise adopt service rules to limit or bar satellite operations.

C. These APA Challenges Also Fail on the Merits.

1. The Commission Reasonably Predicted That Modifying DISH's Licenses Would Be the Best and Fastest Way to Bring the Mobile Satellite S-Band to Market.

As NTCH itself recognizes, the reasonableness of the Commission's determination that modifying DISH's licenses would be "the best and fastest method for bringing the [Mobile Satellite S-band] to market," *Main Order* ¶ 178 (JA __), turns on the "available facts" before the agency at the time of that decision, Br. 32; *see, e.g.*, *NextEra Energy Res., LLC v. FERC*, 898 F.3d 14, 25 (D.C. Cir. 2018) (rejecting the petitioners' claim that "load growth failed to occur as the [agency] anticipated" when expert evidence at the time of the relevant order supported the agency's predictive judgment); *Rural Cellular Ass'n v. FCC*, 588 F.3d 1095, 1107 (D.C. Cir. 2009) ("[W]e judge the reasonableness of an agency's decision on the basis of the record before the agency at the time it made its decision."). Accordingly, NTCH's assertions that events since the time of the *Main Order* show "in hindsight" that the FCC's prediction in 2012 was "a blunder," Br. 31; *see id.* at 29–30, 31–32, are beside the point.

The record before the Commission at the time of the *Main Order* showed that awarding terrestrial rights in the Mobile Satellite S-band to

operators unaffiliated with DISH would risk harmful interference to DISH's existing Mobile Satellite rights. *See supra* Part II. The Commission had long made clear that it would honor those rights, deeming it "unreasonable and unwarranted" to curtail the authority of a licensee that had "met [its] implementation milestones in good faith"—a view that the agency reaffirmed when deciding to modify DISH's licenses. *Ancillary Service Order*, 18 FCC Rcd at 1999 ¶ 65; *accord Main Order* ¶ 251 & n.733 (JA __). Comments indicated, moreover, that the existing ancillary service rules did not optimize DISH's ability to bring the S-band to market. *Id.* ¶ 177 (JA __).

These considerations led the Commission to conclude that awarding terrestrial rights to DISH, with accompanying build-out requirements, was the "best," *Main Order* ¶ 178 (JA __), and "most efficient" way, *id.* ¶ 166 (JA __), to bring the spectrum to "meaningful[]" use, *id.* ¶ 178 (JA __); *see id.* ¶¶ 169, 174, 176 (JA __–__). That is precisely the kind of predictive policy judgment to which this Court, in spectrum management cases, routinely defers. *See, e.g.*, *U.S. AirWaves, Inc. v. FCC*, 232 F.3d 227, 235 (D.C. Cir. 2000) (deferring to the Commission's "view that starting the licensing process all over again would delay build-out").

2. The Commission Reasonably Found That Increasing the Value of DISH's Licenses Was Justified.

NTCH contends that the FCC did not adequately consider what NTCH calls a "windfall . . . to DISH at the expense of the U.S. Treasury." Br. 35. But the Commission expressly acknowledged that modifying DISH's licenses would "undoubtedly . . . increase [their] value"—perhaps even by the $6 billion that NTCH claims here. *Main Order* ¶ 178 & n.525 (JA __).

That "increase in value," the Commission explained, was a tolerable "consequence" of promoting stand-alone terrestrial use of the Mobile Satellite S-band when the record showed that separate-operator sharing was not feasible, and when all parties agreed that promoting stand-alone terrestrial use would serve a vital public interest. *See Main Order* ¶ 178 (JA __). The Commission also took into account that DISH would be required, as consideration for its new rights, to meet an aggressive build-out schedule. *See id.*

NTCH disputes the value of the build-out requirements that the Commission imposed. *See* Br. 25. But the claim that those requirements were purely routine is belied by NTCH's subsequent suggestion that no company "could have accomplished [the build-out] goal" set for DISH "in

just seven years." *Id.* at 31. And the agency reasonably concluded that DISH's commitment to meet that "aggressive[]" goal, *Main Order* ¶ 194 (JA __), coupled with the penalties that DISH would incur for failing to do so (which would then free up spectrum for other terrestrial operators, *e.g.*, *id.* ¶ 188 (JA __)), conferred a valuable public benefit, *id.* ¶ 194 (JA __); *see id.* ¶178 (JA __).

NTCH alternately argues that the FCC should have known DISH was unqualified to meet a seven-year build-out requirement. Br. 30. But it is clear from the *Main Order* that the Commission considered and rejected MetroPCS's challenge to DISH's qualifications. *See Main Order* ¶ 194 n.574 (JA __). And particularly given the widespread support among commenters for the proposed license modifications, *e.g.*, *id.* ¶¶ 166–168 (JA __–__), the Commission reasonably credited DISH's express commitment to "aggressively build-out a broadband network" within that period, *id.* ¶ 194 (JA __) (quoting DISH Comments 18 (JA __)).

The reasonableness of the agency's action is not undermined by the subsequent decision to grant a one-year waiver of DISH's final terrestrial build-out deadline. *See generally Waiver Order*, 28 FCC Rcd 16108. The reasonableness of the FCC's decision in 2012 turns on the evidence

available to the agency at that time. *E.g.*, *Rural Cellular*, 588 F.3d at 1107. And in any event, DISH's subsequent waiver request did not indicate that its commitment to deploy a terrestrial broadband network was faltering. *Waiver Order*, 28 FCC Rcd at 16805 ¶ 43. In requesting the waiver, DISH represented that new rights it obtained in 2013 to optimize its use of spectrum gave rise to additional "network design" work. *Id.* at 16804 ¶ 42.[7]

3. The Commission's Action Did Not Invite Spectrum Warehousing.

Also unavailing is NTCH's claim that, because DISH acquired its licenses "out of bankruptcy at a bargain basement price," DISH "had no strong financial incentive to put the [licensed] spectrum to its highest and best uses." Br. 27. As this Court has explained, that theory contravenes basic economic principles. *Fresno Mobile Radio, Inc. v. FCC*, 165 F.3d 965, 969 (D.C. Cir. 1999). "[T]he use to which an asset is put is based not upon the historical price paid for it, but upon what it will return to its owner in the future." *Id.*

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[7] As NTCH recognizes, Br. 30, the reasonableness of the *Waiver Order* and the Commission's subsequent order dismissing DISH's application for review is not at issue in this case. NTCH has separately challenged the FCC's waiver decision in *NTCH v. FCC*, No. 18-1242 (D.C. Cir.).

IV. SECTION 309(j)(1) DOES NOT APPLY, AND IN ANY EVENT THE COMMISSION REASONABLY CONCLUDED THAT THE CHANGES EFFECTED IN THE *ORDERS* DID NOT TRANSFORM DISH'S EXISTING LICENSES INTO "INITIAL" ONES.

NTCH argues that the modification of DISH's licenses was so significant that DISH effectively received an "initial license" that the Commission should have awarded "through a system of competitive bidding." 47 U.S.C. § 309(j)(1); *see* Br. 35–41. The Court need not reach this argument because Section 309(j)(1) only applies once the Commission has "accepted" mutually exclusive license applications, 47 U.S.C. § 309(j)(1)—which the agency did not do and was not required to do here. In any event, the Commission did not award "initial" licenses.

A. Section 309(j)(1) Does Not Pertain Here.

As NTCH recognizes, Section 309(j)(1) of the Act applies only "[o]nce competing [mutually exclusive] applications" for an initial license (or construction permit) "are accepted" by the Commission. Br. 36; *see* 47 U.S.C. § 309(j)(1); *Ancillary Service Order*, 18 FCC Rcd at 2068 ¶¶ 220–223 (recognizing that, in awarding ancillary terrestrial rights to incumbent Mobile Satellite operators, "there would be no mutually exclusive applications triggering the competitive bidding provisions of [S]ection 309(j)").

Both the agency and this Court have recognized that "the Commission is not required to open all frequencies for competing applications, as long as it provides a reasoned explanation of its decision not to do so." *800 MHz Order*, 19 FCC Rcd at 15013 ¶ 69; *see Rainbow Broad. Co. v. FCC*, 949 F.2d 405, 410 (D.C. Cir. 1991). Indeed, NTCH itself has recognized that "there is no statutory requirement that the Commission entertain competing applications for initial licenses." Recon. Pet. re *Modification Order* 2 (JA __).

The Commission's discretion not to accept mutually exclusive license applications is consistent with its "broad authority under the Communications Act to 'consider the public interest in deciding whether to forgo an auction.'" *Reconsideration Order* ¶ 18 (JA __) (quoting *M2Z Networks, Inc. v. FCC*, 558 F.3d 554, 563 (D.C. Cir. 2009)); *see 800 MHz Order*, 19 FCC Rcd at 15012, 15015–16 ¶¶ 67 & n.219, 72 n.236, 73, 74 n.239; *see also Rainbow Broadcasting*, 949 F.2d at 410 ("[T]he Supreme Court has validated the broad parameters within which the FCC may further its view of the public interest without interference from the courts."). Notably, Section 309(j)(6) expressly provides that "[n]othing in . . . subsection [309(j)], or in the use of competitive bidding," either "diminish[es] the authority of the Commission under the other provisions

of [Title III] to regulate . . . spectrum licenses," 47 U.S.C. § 309(j)(6)(C), or "relieve[s] the Commission of the obligation in the public interest to continue to use . . . threshold qualifications, service regulations, and other means in order to avoid mutual exclusivity in . . . licensing proceedings," *id.* § 309(j)(6)(E).

Here, the Commission determined not to accept competing applications for the terrestrial rights awarded to DISH. Instead, it modified DISH's existing licenses pursuant to the agency's own proposal in the *Notice*. *See, e.g.*, *Main Order* ¶ 172 n.504 (JA __) ("[T]he Commission is within its authority to make [license] modifications even without an application from the licensee."). The agency chose that course, in important part, because of evidence that "coordinating use of the same band by different terrestrial and [Mobile Satellite] licensees" was infeasible. *Reconsideration Order* ¶ 18 (JA __); *see Main Order* ¶ 180 (JA __).

The Commission's decision was consistent with several previous instances in which "coordinating new fixed uses with existing mobile uses" of already licensed spectrum would have been difficult, and the FCC thus had not "accept[ed] competing applications from non-incumbents." *Ancillary Service Order*, 18 FCC Rcd at 2071 ¶ 225 n.591.

One such instance was when the Commission allowed incumbent Mobile Satellite operators to seek ancillary terrestrial rights. *Id.* Before that, also without inviting competitive bidding, the Commission removed prohibitions that barred mobile telephone and other "Commercial Mobile Radio Service" licensees from providing wireless services (on anything other than an ancillary basis) for which end users had to be at a fixed location. *See Amendment of the Commission's Rules to Permit Flexible Service Offerings in the Commercial Mobile Radio Services*, 11 FCC Rcd 8965, 8969–70 ¶¶ 5–7 & n.13, 33 (1996). Again without triggering Section 309(j), the Commission permitted licensees that "had formerly provided primarily one-way video services . . . to provide a wide range of high-speed, two-way services to a variety of users." *Amendment of Parts 1, 21 and 74 to Enable Multipoint Distribution Service and Instructional Television Fixed Service Licensees to Engage in Fixed Two-Way Transmissions*, 15 FCC Rcd 14566, 14567 ¶ 1 (2000).

Contrary to what NTCH contends (Br. 34–35), the Commission's decision reflects an appropriate balancing of relevant objectives. The Commission made clear, for example, that it believed modifying DISH's licenses would result in more "efficient and intensive use of the electromagnetic spectrum," 47 U.S.C. § 309(j)(3)(D), as well as promote

the "rapid deployment of new technologies, products and services for the benefit of the public"—"including [persons] residing in rural areas"—"without administrative or judicial delays," *id.* § 309(j)(3)(A); *see Main Order* ¶¶ 174, 177, 180–181, 185 (JA __–__, __). And although the Commission recognized that it would be forgoing funds that an auction could earn for the U.S. Treasury, *see id.* ¶¶ 168, 178 (JA __, __), it found that the benefits of the DISH license modifications justified that cost, *see id.* ¶ 178 (JA __).

B. The Commission Reasonably Concluded That the *Main Order* and *Modification Order* Did Not Award DISH an Initial License.

Because the Commission reasonably chose not to accept competing applications for the stand-alone terrestrial rights awarded to DISH—and Section 309(j)(1) therefore does not pertain—this Court need not determine whether the license modifications effected in the *Orders* transformed DISH's existing licenses into "initial" ones. 47 U.S.C. § 309(j)(1). But in any event, the Commission reasonably concluded that they did not. *Reconsideration Order* ¶ 18 (JA __–__); *see id.* ¶¶ 16–17 (JA __–__).

When an incumbent licensee applies for a license modification that is "so major as to dwarf the licensee's currently authorized facilities," the

Commission may treat that request as an "initial" application. *Implementation of Section 309(j) of the Communications Act—Competitive Bidding*, 9 FCC Rcd 2348, 2355 ¶ 37 (1994). This Court has upheld the Commission's discretion to do so. *See Fresno Mobile*, 165 F.3d at 970–71.

But here, because the Commission reasonably viewed the license modifications effected in the *Orders* as merely extending DISH's existing rights—which included ancillary terrestrial authority—the agency was not bound to treat DISH's modified licenses as "initial" ones. *See Reconsideration Order* ¶¶ 16–18 (JA __–__). Contrary to what NTCH contends (Br. 39), it is not true that the *Orders* left DISH with "a wholly different set of rights and obligations."

To begin with, there is no "dramatic[]" significance (Br. 38) to the Commission's use of the term "AWS-4 band." When frequency ranges are allocated to multiple services, they may go by different names depending on which service is under discussion. Because the focus of the *Orders* was the adoption of terrestrial service rules and the modification of DISH's existing satellite licenses to include stand-alone terrestrial rights, the Commission logically used the term "AWS-4 band" in that context. *See supra* p. 9 n.3. The same frequencies are still called the "Mobile Satellite

S-band" (or the "2 GHz Mobile-Satellite band") with respect to their allocation for Mobile Satellite Service. *Id.*

In addition, DISH's rights and duties to provide Mobile Satellite Service remain effectively unchanged. The rules governing those rights and duties remain in Part 25. *See Main Order* at 16231, Appendix A (JA __) ("[Mobile Satellite Service] shall be provided in a manner consistent with [P]art 25 . . . ."). And, contrary to NTCH's suggestion (Br. 39), the FCC did not anywhere in the *Orders* diminish or otherwise change DISH's "obligation to provide or offer . . . satellite service." *Compare* 47 C.F.R. § 25.161 (2013), *with id.* § 25.161 (2012) (illustrating that the rule cited at Br. 23 n.11 was effectively identical before and after the DISH license modifications). The Commission did provide that DISH could lose protection from interference for its satellite operations if it failed to deploy a terrestrial network. *See Main Order* ¶ 188 (JA __). But imposing that condition as a measure to promote efficient use of the licensed spectrum did not convert DISH's otherwise unchanged satellite rights into something new.

Also contrary to NTCH's claim (Br. 38–39), it is not material that the Commission's rules governing ancillary terrestrial service were contained in Part 25, and the new terrestrial service rules in Part 27. As

the Commission explained, "[t]he operating parameters applicable to DISH under Part 27 generally align with those to which [DISH] was previously subject [when providing ancillary terrestrial service] under Part 25." *Reconsideration Order* ¶ 16 (JA __). NTCH's assertion that "[t]he technical rules governing terrestrial operations are . . . radically different from those applicable to *satellite-based* operations" (Br. 39 (emphasis added)) in no way undermines the Commission's finding that there was no meaningful technical difference between the new Part 27 and old Part 25 rules as applied to *terrestrial* service.

The Commission's determination on these points is consistent with *Fresno Mobile*. As NTCH's description of that case reflects (Br. 37), the modified licensing regime that the FCC had authorized there involved more significant differences from the earlier regime than is the case here. In the *Fresno Mobile* proceeding, the agency "revis[ed] . . . frequency allocations," transformed what were formerly licenses "for small groups of channels and individual transmitters" into licenses "cover[ing] blocks of spectrum and substantial geographic areas," and allowed new licensees "the power to involuntarily relocate other licensees" (something not previously authorized). 165 F.3d at 970–71 (first alteration in original). And the Court's decision in *Fresno Mobile*, applying *Chevron*

deference, that the agency was not "*foreclose[d]* . . . from auctioning" the licenses at issue there does not show that the Commission was required to take the same approach here. *Reconsideration Order* ¶ 18 n.75 (JA __).

V. NTCH'S ARGUMENT THAT THE DISH LICENSE MODIFICATIONS EXCEEDED THE COMMISSION'S SECTION 316 AUTHORITY IS PROCEDURALLY BARRED AND FAILS ON THE MERITS.

Under Section 316 of the Act, the Commission may modify a license in the public interest so long as the changes imposed are not "fundamental" or "radical." *See Cellco*, 700 F.3d at 543–44; *Community Television, Inc. v. FCC*, 216 F.3d 1133, 1141 (D.C. Cir. 2000). There was broad consensus before the Commission that the license modifications proposed in the *Notice* would be lawful. *See Reconsideration Order* ¶ 15 (JA __); *Main Order* ¶¶ 170, 173 (JA __–__). Although NTCH opposed those changes, *id.* ¶ 168 (JA __), it did not claim—as it now does here, Br. 41–44—that the changes would be more radical than Section 316 allows. That argument is therefore procedurally barred. *See* 47 C.F.R. §§ 1.106(c), 1.429(b). And in any event, it fails on the merits.

A. The Commission Correctly Dismissed This Argument as Procedurally Barred.

Reconsideration of FCC rulemaking orders is governed by Section 1.429 of the Commission's rules. 47 C.F.R. § 1.429; *Reconsideration Order*

¶ 12 (JA __). In non-rulemaking proceedings, reconsideration is governed by Section 1.106. 47 C.F.R. § 1.106; *Reconsideration Order* ¶ 12 (JA __). Each of those rules bars the "grant of petitions for reconsideration that rely on facts or arguments not previously presented to the Commission, unless" one of a handful of enumerated exceptions applies. *Reconsideration Order* ¶ 13 (JA __) (emphasis omitted); *see* 47 C.F.R. §§ 1.106(c), 1.429(b).[8]

Here, all comments addressing the Commission's Section 316 authority indicated that the proposed license modifications were lawful. *Main Order* ¶ 173 (JA __). NTCH has not claimed here, and did not claim when seeking reconsideration, that it challenged the "fundamental" nature of the proposed changes at any time before the *Main Order*. *See*

[8] New evidence or arguments can justify reconsideration only if "(1) they relate to events that have occurred or circumstances that have changed since the last opportunity to present such matters to the Commission; (2) they were unknown to petitioner until after the last opportunity to present them to the Commission, and petitioner could not, through the exercise of ordinary diligence, have learned of the facts or arguments in question before such opportunity; or (3) the Commission determines that consideration of the facts or arguments relied on is required in the public interest." *Reconsideration Order* ¶ 13 (JA __) (citing 47 C.F.R. §§ 1.106(c), 1.429(b) and *Amendment of Certain of the Commission's Part 1 Rules of Practice and Procedure and Part 0 Rules of Commission Organization*, 26 FCC Rcd 1594, 1627–28, 1634–35 (2011)).

Br. 42–44; *Reconsideration Order* ¶ 15 (JA __); NTCH Recon. Reply 2–3 (JA __–__). Nor has NTCH invoked any of the permitted exceptions for new arguments on reconsideration. *Reconsideration Order* ¶ 15 (JA __); *see* NTCH Recon. Reply 2–3 (JA __–__); Recon. Pet. 4–7 (JA __–__). The Commission thus correctly dismissed NTCH's challenge to the Commission's Section 316 authority as coming too late under the Commission's procedural rules governing reconsideration. *Reconsideration Order* ¶ 15 (JA __).

NTCH does not challenge that ruling in its opening brief. *See* Br. 41–44. Because "[i]ssues may not be raised for the first time in a reply brief," *e.g.*, *American Wildlands*, 530 F.3d at 1001 (internal quotation marks omitted), any such challenge is now waived.

In any event, should NTCH seek in its reply brief to challenge the Commission's holding, the Section 316 argument that DISH raised in reply comments to the *Notice* did not adequately alert the Commission to NTCH's current claim. *Reconsideration Order* ¶ 15 (JA __). DISH argued that Section 316 does not allow the Commission "to eliminate a satellite allocation altogether and thereby prohibit [DISH] from providing any [Mobile Satellite Service]." *Id.*; *see* DISH Reply Comments 18–20 (JA __–__). But the argument that Section 316 did not empower the agency to

revoke DISH's existing rights was "very different" from NTCH's claim that the Commission could not expand those rights. *Reconsideration Order* ¶ 15 (JA __). The Commission thus correctly dismissed NTCH's argument. *See id.*; *see also U.S. AirWaves*, 232 F.3d at 236 (another party's broad argument that the FCC had exceeded its authority under Section 309 of the Act did not preserve the petitioner's more specific and "materially different" argument). Accordingly, the Court should not reach the merits of that argument here. *See BDPCS, Inc. v. FCC*, 351 F.3d 1177, 1183–84 (D.C. Cir. 2003).

B. The License Modifications Were Not "Radical" or "Fundamental."

In any event, the Commission reasonably held that the DISH license modifications were "neither fundamental nor radical." *Reconsideration Order* ¶ 16 (JA __). DISH was previously authorized to provide not only Mobile Satellite Service but ancillary terrestrial service—"essentially the same services" that DISH may provide now. *Id.* (quoting *Community Television*, 216 F.3d at 1141). The Commission reasonably concluded that adding flexibility to a licensee's existing terrestrial service rights is not "an attempt to reverse an entire statutory regime." *Reconsideration Order* ¶ 17 (JA __); *see supra* Part IV.B.

CONCLUSION

The petition for review should be dismissed in part and otherwise denied.

Dated: February 25, 2019

Respectfully submitted,

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I, Sarah E. Citrin, hereby certify that on February 25, 2019, I filed the foregoing Brief for Respondents with the Clerk of Court for the United States Court of Appeals for the District of Columbia Circuit using the electronic CM/ECF system.

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STATUTORY ADDENDUM

STATUTORY ADDENDUM CONTENTS

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5 U.S.C. § 706 provides:

> **§ 706. Scope of review**
>
> 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. § 301 provides:

> **§ 301. License for radio communication or transmission of energy**
>
> 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 provides, in pertinent part:

§ 303. Powers and duties of Commission

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

(a) Classify radio stations;

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

(c) Assign bands of frequencies to the various classes of stations, and assign frequencies for each individual station and determine the power which each station shall use and the time during which it may operate;

* * * *

(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;

* * * *

(l)(1) Have authority to prescribe the qualifications of station operators, to classify them according to the duties to be performed, to fix the forms of such licenses, and to issue them to persons who are found to be qualified by the Commission and who otherwise are legally eligible for employment in the United States, except that such requirement relating to eligibility for employment in the United States shall not apply in the case of licenses issued by the Commission to (A) persons holding United States pilot certificates; or (B) persons holding foreign aircraft pilot certificates which are valid in the United States, if the foreign government involved has entered into a reciprocal agreement under which such foreign government does not impose any similar requirement relating to eligibility for employment upon citizens of the United States;

(2) Notwithstanding paragraph (1) of this subsection, an individual to whom a radio station is licensed under the provisions of this chapter may be issued an operator's license to operate that station.
(3) In addition to amateur operator licenses which the Commission may issue to aliens pursuant to paragraph (2) of this subsection, and notwithstanding section 301 of this title and paragraph (1) of this subsection, the Commission may issue authorizations, under such conditions and terms as it may prescribe, to permit an alien licensed by his government as an amateur radio operator to operate his amateur radio station licensed by his government in the United States, its possessions, and the Commonwealth of Puerto Rico provided there is in effect a multilateral or bilateral agreement, to which the United States and the alien's government are parties, for such operation on a reciprocal basis by United States amateur radio operators. Other provisions of this chapter and of subchapter II of chapter 5, and chapter 7, of Title 5 shall not be applicable to any request or application for or modification, suspension, or cancellation of any such authorization.

47 U.S.C. § 309 provides, in pertinent part:

§ 309. Application for license

* * * *

(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.

(2) Exemptions

The competitive bidding authority granted by this subsection shall not apply to licenses or construction permits issued by the Commission—

(A) for public safety radio services, including private internal radio services used by State and local governments and non-government entities and including emergency road services provided by not-for-profit organizations, that—

(i) are used to protect the safety of life, health, or property; and

(ii) are not made commercially available to the public;

(B) for initial licenses or construction permits for digital television service given to existing terrestrial broadcast licensees to replace their analog television service licenses; or

(C) for stations described in section 397(6) of this title.

(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.

(5) Bidder and licensee qualification

No person shall be permitted to participate in a system of competitive bidding pursuant to this subsection unless such bidder submits such information and assurances as the Commission may require to demonstrate that such bidder's application is acceptable for filing. No license shall be granted to an applicant selected pursuant to this subsection unless the Commission determines that the applicant is qualified pursuant to subsection (a) of this section and sections 308(b) and 310 of this title. Consistent with the objectives described in paragraph (3), the Commission shall, by regulation, prescribe expedited procedures consistent with the procedures authorized by subsection (i)(2) of this section for the resolution of any substantial and material issues of fact concerning qualifications.

(6) Rules of construction

Nothing in this subsection, or in the use of competitive bidding, shall—

(A) alter spectrum allocation criteria and procedures established by the other provisions of this chapter;

(B) limit or otherwise affect the requirements of subsection (h) of this section, section 301, 304, 307, 310, or 606 of this title, or any other provision of this chapter (other than subsections (d)(2) and (e) of this section);

(C) diminish the authority of the Commission under the other provisions of this chapter to regulate or reclaim spectrum licenses;

(D) be construed to convey any rights, including any expectation of renewal of a license, that differ from the rights that apply to other licenses within the same service that were not issued pursuant to this subsection;

(E) be construed to relieve the Commission of the obligation in the public interest to continue to use engineering solutions, negotiation, threshold qualifications, service regulations, and other means in order to avoid mutual exclusivity in application and licensing proceedings;

(F) be construed to prohibit the Commission from issuing nationwide, regional, or local licenses or permits;

(G) be construed to prevent the Commission from awarding licenses to those persons who make significant contributions to the development of a new telecommunications service or technology; or

(H) be construed to relieve any applicant for a license or permit of the obligation to pay charges imposed pursuant to section 158 of this title.

* * * *

47 U.S.C. § 316 provides:

> **§ 316. Modification by Commission of station licenses or construction permits; burden of proof**
>
> (a)(1) Any station license or construction permit may be modified by the Commission either for a limited time or for the duration of the term thereof, if in the judgment of the Commission such action will promote the public interest, convenience, and necessity, or the provisions of this chapter or of any treaty ratified by the United States will be more fully complied with. No such order of modification shall become final until the holder of the license or permit shall have been notified in writing of the proposed action and the grounds and reasons therefor, and shall be given reasonable opportunity, of at least thirty days, to protest such proposed order of modification; except that, where safety of life or property is involved, the Commission may by order provide, for a shorter period of notice.
>
> (2) Any other licensee or permittee who believes its license or permit would be modified by the proposed action may also protest the proposed action before its effective date.
>
> (3) A protest filed pursuant to this subsection shall be subject to the requirements of section 309 of this title for petitions to deny.
>
> (b) In any case where a hearing is conducted pursuant to the provisions of this section, both the burden of proceeding with the introduction of evidence and the burden of proof shall be upon the Commission; except that, with respect to any issue that addresses the question of whether the proposed action would modify the license or permit of a person described in subsection (a)(2) of this section, such burdens shall be as determined by the Commission.

47 C.F.R. § 1.106 provides, in pertinent part:

> **§ 1.106. Petitions for reconsideration in non-rulemaking proceedings.**
>
> (a)(1) Except as provided in paragraphs (b)(3) and (p) of this section, petitions requesting reconsideration of a final Commission action in non-rulemaking proceedings will be acted on by the Commission. Petitions requesting reconsideration of other final actions taken pursuant to delegated authority will be acted on by the designated authority or referred by such authority to the Commission. A petition for reconsideration of an order designating a case for hearing will be entertained if, and insofar as, the petition relates to an adverse ruling with respect to petitioner's participation in the proceeding. Petitions for reconsideration of other interlocutory actions will not be entertained. (For provisions governing reconsideration of Commission action in notice and comment rulemaking proceedings, see §1.429. This §1.106 does not govern reconsideration of such actions.)
>
> * * * *
>
> (b)(1) Subject to the limitations set forth in paragraph (b)(2) of this section, any party to the proceeding, or any other person whose interests are adversely affected by any action taken by the Commission or by the designated authority, may file a petition requesting reconsideration of the action taken. If the petition is filed by a person who is not a party to the proceeding, it shall state with particularity the manner in which the person's interests are adversely affected by the action taken, and shall show good reason why it was not possible for him to participate in the earlier stages of the proceeding.
>
> (2) Where the Commission has denied an application for review, a petition for reconsideration will be entertained only if one or more of the following circumstances are present:
>
> (i) The petition relies on facts or arguments which relate to events which have occurred or circumstances which have

changed since the last opportunity to present such matters to the Commission; or

(ii) The petition relies on facts or arguments unknown to petitioner until after his last opportunity to present them to the Commission, and he could not through the exercise of ordinary diligence have learned of the facts or arguments in question prior to such opportunity.

(3) A petition for reconsideration of an order denying an application for review which fails to rely on new facts or changed circumstances may be dismissed by the staff as repetitious.

(c) In the case of any order other than an order denying an application for review, a petition for reconsideration which relies on facts or arguments not previously presented to the Commission or to the designated authority may be granted only under the following circumstances:

(1) The facts or arguments fall within one or more of the categories set forth in §1.106(b)(2); or

(2) The Commission or the designated authority determines that consideration of the facts or arguments relied on is required in the public interest.

* * * *

(p) Petitions for reconsideration of a Commission action that plainly do not warrant consideration by the Commission may be dismissed or denied by the relevant bureau(s) or office(s). Examples include, but are not limited to, petitions that:

(1) Fail to identify any material error, omission, or reason warranting reconsideration;

(2) Rely on facts or arguments which have not previously been presented to the Commission and which do not meet the requirements of paragraphs (b)(2), (b)(3), or (c) of this section;

(3) Rely on arguments that have been fully considered and rejected by the Commission within the same proceeding;

(4) Fail to state with particularity the respects in which petitioner believes the action taken should be changed as required by paragraph (d) of this section;

(5) Relate to matters outside the scope of the order for which reconsideration is sought;

(6) Omit information required by these rules to be included with a petition for reconsideration, such as the affidavit required by paragraph (e) of this section (relating to electrical interference);

(7) Fail to comply with the procedural requirements set forth in paragraphs (f) and (i) of this section;

(8) relate to an order for which reconsideration has been previously denied on similar grounds, except for petitions which could be granted under paragraph (c) of this section; or

(9) Are untimely.

47 C.F.R. § 1.429 provides, in pertinent part:

§ 1.429. Petition for reconsideration of final orders in rulemaking proceedings.

(a) Any interested person may petition for reconsideration of a final action in a proceeding conducted under this subpart (see §§1.407 and 1.425). Where the action was taken by the Commission, the petition will be acted on by the Commission. Where action was taken by a staff official under delegated authority, the petition may be acted on by the staff official or referred to the Commission for action.
NOTE: The staff has been authorized to act on rulemaking proceedings described in §1.420 and is authorized to make editorial changes in the rules (see §0.231(d)).

(b) A petition for reconsideration which relies on facts or arguments which have not previously been presented to the Commission will be granted only under the following circumstances:

(1) The facts or arguments relied on relate to events which have occurred or circumstances which have changed since the last opportunity to present such matters to the Commission;

(2) The facts or arguments relied on were unknown to petitioner until after his last opportunity to present them to the Commission, and he could not through the exercise of ordinary diligence have learned of the facts or arguments in question prior to such opportunity; or

(3) The Commission determines that consideration of the facts or arguments relied on is required in the public interest.

* * * *

(l) Petitions for reconsideration of a Commission action that plainly do not warrant consideration by the Commission may be dismissed or denied by the relevant bureau(s) or office(s). Examples include, but are not limited to, petitions that:

(1) Fail to identify any material error, omission, or reason warranting reconsideration;

(2) Rely on facts or arguments which have not previously been presented to the Commission and which do not meet the requirements of paragraphs (b)(1) through (3) of this section;

(3) Rely on arguments that have been fully considered and rejected by the Commission within the same proceeding;

(4) Fail to state with particularity the respects in which petitioner believes the action taken should be changed as required by paragraph (c) of this section;

(5) Relate to matters outside the scope of the order for which reconsideration is sought;

(6) Omit information required by these rules to be included with a petition for reconsideration;

(7) Fail to comply with the procedural requirements set forth in paragraphs (d), (e), and (h) of this section;

(8) Relate to an order for which reconsideration has been previously denied on similar grounds, except for petitions which could be granted under paragraph (b) of this section; or

(9) Are untimely.

47 C.F.R. § 25.103 provides, in pertinent part:

§ 25.103. Definitions.

* * * *

2 GHz Mobile-Satellite Service. A Mobile-Satellite Service that operates in the 2000-2020 MHz and 2180-2200 MHz bands, or in any portion thereof.

* * * *

47 C.F.R. § 25.161 (2013) provides:

§ 25.161. Automatic termination of station authorization.

A station authorization shall be automatically terminated in whole or in part without further notice to the licensee upon:

(a)(1) Failure to meet any applicable milestone for implementation of the licensed satellite system specified in §§ 25.164(a) and/or (b), without demonstrating that the failure was caused by circumstances beyond the licensee's control, or

(2) If there are no applicable milestones for implementation of the licensed satellite system specified in §§ 25.164(a) and/or

(b), the expiration of the required date of completion of construction or other required action specified in the authorization, or after any additional time authorized by the Commission, if a certification of completion of the required action has not been filed with the Commission unless a request for an extension of time has been filed with the Commission but has not been acted on.

(b) The expiration of the license period, unless an application for renewal of the license has been filed with the Commission pursuant to § 25.121(e); or

(c) The removal or modification of the facilities which renders the station not operational for more than 90 days, unless specific authority is requested.

47 C.F.R. § 25.161 (2012) provides:

§ 25.161. Automatic termination of station authorization.

A station authorization shall be automatically terminated in whole or in part without further notice to the licensee upon:

(a)(1) Failure to meet any applicable milestone for implementation of the licensed satellite system specified in §§ 25.164(a) and/or (b), without demonstrating that the failure was caused by circumstances beyond the licensee's control, or

(2) If there are no applicable milestones for implementation of the licensed satellite system specified in §§ 25.164(a) and/or (b), the expiration of the required date of completion of construction or other required action specified in the authorization, or after any additional time authorized by the Commission, if a certification of completion of the required action has not been filed with the Commission unless a request for an extension of time has been filed with the Commission but has not been acted on.

(b) The expiration of the license period, unless an application for renewal of the license has been filed with the Commission pursuant to § 25.120(e); or

(c) The removal or modification of the facilities which renders the station not operational for more than 90 days, unless specific authority is requested.