

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

In the Matter of	)	
	)	
NTCH, Inc.	)	AU Docket No. 13-178
	)	
Application for Review of Public Notice	)	
Announcing Procedures and Reserve Price for	)	
Auction of H Block Licenses (Auction 96)	)	

**MEMORANDUM OPINION AND ORDER**

**Adopted: August 14, 2018**

**Released: August 16, 2018**

By the Commission:

**I. INTRODUCTION**

1. In this Memorandum Opinion and Order, we dismiss and alternatively deny the Application for Review of NTCH, Inc. (NTCH), which challenges the procedures established by staff for the auction of licenses in the 1915-1920 MHz and 1995-2000 MHz bands (H Block) in Auction 96.<sup>1</sup> NTCH seeks review of a decision by the Auctions and Spectrum Access Division (Division) of the Wireless Telecommunications Bureau (Bureau), which denied, among other things, NTCH's request to reconsider the adoption of an aggregate reserve price amount of \$0.50 per MHz-pop.<sup>2</sup> For the reasons set forth below, we conclude that NTCH's Application for Review does not meet the procedural requirements for an application for review and its claims are without merit.

**II. BACKGROUND**

2. The Commission offered H Block licenses in Auction 96 pursuant to the Middle Class Tax Relief and Job Creation Act of 2012 (Spectrum Act).<sup>3</sup> The Spectrum Act directed the Commission, no later than February 23, 2015, to allocate for commercial use and license spectrum in the H Block, using a system of competitive bidding.<sup>4</sup> The Spectrum Act directed that proceeds from an auction of H Block spectrum be deposited into the Public Safety Trust Fund and be used for, among other things, funding (or reimbursement to the U.S. Treasury for the funding) of the nationwide, interoperable public safety broadband network by the First Responder Network Authority (FirstNet).<sup>5</sup>

3. On July 15, 2013, the Bureau released the *Auction 96 Comment Public Notice* in which it announced its intention to auction H Block licenses and sought comment on procedures for conducting

<sup>1</sup> See NTCH, Inc.'s Application for Review, AU Docket No. 13-178 (filed Dec. 27, 2013) (Application for Review).

<sup>2</sup> See *NTCH, Inc.*, Memorandum Opinion and Order, 28 FCC Rcd 16108, 16110-11, 16112-14, paras. 9, 11-20 (WTB 2013) (*NTCH MO&O*).

<sup>3</sup> See Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96, 126 Stat. 156.

<sup>4</sup> Spectrum Act § 6401(b) (codified at 47 U.S.C. § 1451(b)).

<sup>5</sup> *Id.* §§ 6401(c)(4), 6413 (codified at 47 U.S.C. §§ 309(j)(8)(F), 1457); see also *id.* § 6202(a) (codified at 47 U.S.C. § 1422(a)).

the auction.<sup>6</sup> As the Bureau noted,<sup>7</sup> Section 309(j) of the Communications Act (Act) requires the Commission, in designing auction methodologies, to “prescribe methods by which a reasonable reserve price will be required, or a minimum bid will be established, . . . unless the Commission determines that such a reserve price or minimum bid is not in the public interest.”<sup>8</sup> The Bureau explained the difference between these two amounts referred to in Section 309(j): a reserve price is an amount below which a license or licenses will not be sold, while a minimum opening bid amount is an amount below which bids will not be accepted in the first instance, in order to accelerate the bidding process.<sup>9</sup>

4. For the H Block auction, the Commission sought comment on both reserve price and minimum opening bid amounts. In light of the Commission’s obligation to deposit the H Block auction proceeds into the Public Safety Trust Fund, the Bureau proposed to set a reserve price based on the aggregate of the gross bids for the H Block licenses rather than license-by-license reserve prices.<sup>10</sup> The Bureau sought comment on this proposal, including the factors the Bureau should consider in setting the reserve price amount.<sup>11</sup> The Bureau also asked commenters to describe in detail the specific factors that informed their conclusions.<sup>12</sup> For minimum opening bids, the Bureau proposed amounts based on \$0.07 per MHz-pop, but differing from market to market based on the relative prices of winning bids received in prior Auctions 66 (AWS-1 licenses) and 73 (700 MHz licenses).<sup>13</sup>

5. In response to the *Auction 96 Comment Public Notice*, commenters generally supported the Bureau’s proposal to set an aggregate reserve price.<sup>14</sup> Although no commenter recommended a specific reserve price amount,<sup>15</sup> DISH Network Corporation (DISH) filed an *ex parte* letter in the proceeding asserting that its estimate of the value of the H Block spectrum was “at least \$0.50 per

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<sup>6</sup> *Auction of H-Block Licenses in the 1915-1920 MHz and 1995-2000 MHz Bands; Comment Sought on Competitive Bidding Procedures for Auction 96*, AU Docket No. 13-178, Public Notice, 28 FCC Rcd 10013, 10014, 10017-33, paras. 1, 15-83 (WTB 2013) (*Auction 96 Comment Public Notice*). The *Auction 96 Comment Public Notice* was published in the Federal Register on July 29, 2013. 78 Fed. Reg. 45524 (July 29, 2013).

<sup>7</sup> *Auction 96 Comment Public Notice*, 28 FCC Rcd at 10025, para. 49.

<sup>8</sup> 47 U.S.C. § 309(j)(4)(F). The Balanced Budget Act of 1997 specifically directed the Commission to change its approach to reserve prices. Balanced Budget Act of 1997, Pub. L. No. 105-33, § 3002(a)(1)(C)(iii), 111 Stat. 251, 259 (codified at 47 U.S.C. § 309(j)(4)(F)). Prior to the enactment of the Balanced Budget Act, Section 1.2104 of the Commission’s rules provided that it “may establish a reservation price . . . below which a license subject to auction may not be awarded.” 47 CFR § 1.2104(c) (1997). Thus, the Balanced Budget Act effectively established a presumption in favor of a required minimum opening bid or reserve price to prevent licenses from being assigned via auction at unacceptably low prices. *Auction of 800 MHz SMR Upper 10 MHz Band; Minimum Opening Bids or Reserve Prices*, Order, 12 FCC Rcd 16354, 16358, paras. 11-12 (WTB 1997); see also *Amendment of Part 1 of the Commission’s Rules—Competitive Bidding Procedures*, Third Report and Order and Second Further Notice of Proposed Rule Making, 13 FCC Rcd 374, 454-55, paras. 139-40 (1998).

<sup>9</sup> *Auction 96 Comment Public Notice*, 28 FCC Rcd at 10025, para. 50; see also 47 CFR § 1.2104(c)-(d) (distinguishing between reserve prices and minimum opening bids).

<sup>10</sup> *Auction 96 Comment Public Notice*, 28 FCC Rcd at 10026, para. 52.

<sup>11</sup> *Id.* at 10026, paras. 52-53.

<sup>12</sup> *Id.* at 10026, para. 53.

<sup>13</sup> *Id.* at 10026-27, para. 55.

<sup>14</sup> Cellular South Reply Comments at 5-6; Sprint Comments at 11-12; T-Mobile USA Inc. Comments at 6-7; see also Letter from Jeffrey H. Blum, DISH Network Corporation, to Marlene H. Dortch, Secretary, FCC 1 (Sept. 9, 2013) (DISH *Ex Parte*).

<sup>15</sup> T-Mobile advised the Bureau to carefully balance the variety of public interests and objectives, including the need to fund FirstNet, when establishing the reserve price. T-Mobile Comments at 6-7.

megahertz of bandwidth per population (“MHz-POP”) on a nationwide aggregate basis.”<sup>16</sup> DISH stated that its estimate was “based on recent auctions and sales in the secondary market,” citing, as examples, the 2006 AWS-1 spectrum auction, which had resulted in an average valuation of \$0.54 per MHz-pop, recent secondary market purchases that valued AWS spectrum at \$0.61 and \$0.69 per MHz-pop, and estimated average values of H Block spectrum submitted to the FCC by several financial institutions, ranging from \$0.62 to \$1.00 per MHz-pop.<sup>17</sup> All of these estimates referred to data contained in Commission records.<sup>18</sup> NTCH was silent on all issues regarding the reserve price, as NTCH did not file comments or otherwise participate at this stage of the proceeding.

6. On September 9, 2013, DISH filed a petition for waiver of certain Commission rules to allow terrestrial use of the 2000-2020 MHz and 2180-2200 MHz band spectrum (AWS-4 band).<sup>19</sup> Specifically, DISH sought a waiver of certain technical requirements to permit use of the lower AWS-4 band for either uplink or downlink operations.<sup>20</sup> DISH also requested an extension of the final build-out requirement for each of the AWS-4 licenses.<sup>21</sup> The DISH Petition was placed on public notice in a separate proceeding.<sup>22</sup>

7. On September 13, 2013, the Bureau released the *Auction 96 Procedures Public Notice*.<sup>23</sup> The Bureau adopted its proposal to establish an aggregate reserve price that is higher than the sum of the minimum opening bids.<sup>24</sup> As the Bureau explained, “Minimum opening bids are not meant to set market values.”<sup>25</sup> The Bureau noted that “[t]he limited comment received on this issue is generally supportive of our reserve price proposals, and we received no opposition to the use of a reserve.”<sup>26</sup> For the H Block licenses in Auction 96, the Bureau set the aggregate reserve price at \$1.564 billion, which was calculated by using DISH’s suggestion of a minimum spectrum value of \$0.50 per MHz-pop and rounding the result to the nearest million.<sup>27</sup> The Bureau determined that “this amount will appropriately recover for the public a portion of the value of the spectrum, especially in light of the Spectrum Act’s requirement” to deposit the proceeds in the Public Safety Trust Fund for use by FirstNet.<sup>28</sup> The Bureau also adopted its

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<sup>16</sup> DISH *Ex Parte* at 1.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 1 nn.2-5.

<sup>19</sup> Petition for Waiver of Sections 27.5(j) and 27.54(h)(2)(ii) and Request for Extension of Time, WT Docket No. 13-225 (filed Sept. 9, 2013) (DISH Waiver Petition).

<sup>20</sup> *Id.* at 6-16.

<sup>21</sup> *Id.* at 16-19.

<sup>22</sup> *Wireless Telecommunications Bureau Opens Docket to Seek Comment on DISH Network Corporation’s Petition for Waiver and Request for Extension of Time*, WT Docket No. 13-225, Public Notice, 28 FCC Rcd 12987 (WTB 2013).

<sup>23</sup> *Auction of H Block Licenses in the 1915-1920 MHz and 1995-2000 MHz Bands Scheduled for January 14, 2014; Notice and Filing Requirements, Reserve Price, Minimum Opening Bids, Upfront Payments, and Other Procedures for Auction 96*, Public Notice, 28 FCC Rcd 13019, 13064, para. 172 (WTB 2013) (*Auction 96 Procedures Public Notice*).

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 13065, para. 177.

<sup>26</sup> *Id.* at 13063, para. 170.

<sup>27</sup> *Id.* at 13064, para. 172.

<sup>28</sup> *Id.*

proposed minimum opening bid amounts, based on an overall figure of \$0.07 per MHz-pop.<sup>29</sup> On October 18, 2013, NTCH filed a petition for reconsideration of certain aspects of the *Auction 96 Procedures Public Notice*.<sup>30</sup>

8. On November 27, 2013, the Division denied NTCH's Petition for Reconsideration.<sup>31</sup> As pertinent here, the Division concluded that NTCH had failed to raise any facts that were not known or existing or that were not fully considered prior to the release of the *Auction 96 Procedures Public Notice*.<sup>32</sup> Independent of that procedural ground for denial, the Division also concluded that NTCH failed to show that reconsideration was warranted on the merits.<sup>33</sup> The Division rejected NTCH's argument for a significant reduction in the aggregate reserve price for Auction 96. The Division pointed out that: (1) the *Auction 96 Comment Public Notice* had proposed setting an aggregate reserve price in an amount different from the sum of the minimum opening bids and had drawn a clear distinction between the two; (2) the reserve price of \$0.50 per MHz-pop was well supported by the evidence of record and was consistent with publicly available information on spectrum license prices; (3) NTCH had provided no evidence to the contrary; and (4) the reserve price reflects a proper balancing of the public interest objectives of Section 309(j) of the Communications Act.<sup>34</sup> In addition, the Division rejected NTCH's request to make part of the record in the Auction 96 proceeding the alleged "arrangement" by which DISH would bid at its suggested reserve price of \$0.50 per MHz-pop in exchange for grant of its waiver request.<sup>35</sup> While the Division noted that the DISH *Ex Parte* was already part of the record in the Auction 96 proceeding, it stated that the DISH Waiver Petition was a matter of public record in a separate proceeding and would be addressed on its own merits.<sup>36</sup> Finally, the Division rejected NTCH's request to resolve the DISH Waiver Petition regarding the status of the AWS-4 band prior to the start of Auction 96 as inconsistent with the public interest.<sup>37</sup> The Division cited the agency's longstanding advice to potential bidders—"that they are solely responsible for conducting due diligence to investigate and evaluate all technical and marketplace factors that may bear upon their decision to bid upon a license being offered at auction, including pending matters"—and observed that bidders are "[t]hus urge[d] . . . to consider any pending challenges or waiver requests in determining whether and how much to bid on licenses at auction."<sup>38</sup> Moreover, the Division specifically found that applicants choosing to bid in Auction 96 would be able to "assess the impact of existing rules and the possible impact, if any, of the technical changes proposed by DISH."<sup>39</sup> Finally, the Division explained that the Commission does not routinely delay

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<sup>29</sup> *Id.* at 13065, para. 177.

<sup>30</sup> Petition for Reconsideration of NTCH, Inc., AU Docket No. 13-178, at 1-3, 6-7 (filed Oct. 18, 2013) (NTCH Petition for Reconsideration).

<sup>31</sup> *NTCH MO&O*, 28 FCC Rcd at 16110-11, 16111-14, paras. 9, 11-20.

<sup>32</sup> *Id.* at 16110, para. 9.

<sup>33</sup> *Id.* at 16110-11, 16112-16114, paras. 9, 13-20. The Division also denied NTCH's request that it act on the Rural Wireless Association's Petition for Reconsideration of the H Block service rules prior to the start of Auction 96. *Id.* at 16110, 16111-12, paras. 9, 11-12. We will not consider that request because NTCH does not renew it in the Application for Review.

<sup>34</sup> *Id.* at 16112-13, paras. 13-16; *see also* NTCH Petition for Reconsideration at 3-6.

<sup>35</sup> *NTCH MO&O*, 28 FCC Rcd at 16113-14, para. 17; *see also* NTCH Petition for Reconsideration at 6.

<sup>36</sup> *NTCH MO&O*, 28 FCC Rcd at 16113-14, para. 17.

<sup>37</sup> *Id.* at 16114, paras. 18-19; *see also* NTCH Petition for Reconsideration at 6-7.

<sup>38</sup> *NTCH MO&O*, 28 FCC Rcd at 16114, para. 19.

<sup>39</sup> *Id.*

spectrum auctions to resolve such issues and if the Division were to do so here, the delay would undermine its ability to promote the public interest through the policy objectives in Section 309(j).<sup>40</sup>

9. NTCH subsequently filed an Application for Review of the Division's denial of its Petition for Reconsideration.<sup>41</sup> NTCH continues to challenge the Bureau's adoption of an "extremely high" aggregate reserve price of \$1.564 billion for the H Block licenses offered in Auction 96 by arguing that the amount was unsupported by facts or precedent.<sup>42</sup> NTCH also renews claims that the reserve price was driven by a "backroom deal" that should have been made public.<sup>43</sup> Finally, NTCH repeats its argument that the grant of DISH's Waiver Petition would be unfair to potential bidders in Auction 96 because DISH would have the unilateral power to decide whether the adjacent band would be used for uplink or downlink operations.<sup>44</sup>

10. In early 2014, the Commission proceeded with the scheduled auction of H Block licenses. Bidding in Auction 96 began on January 22, 2014,<sup>45</sup> and closed on February 27, 2014.<sup>46</sup> DISH won all the licenses available in the Auction, with aggregate winning bids totaling \$1.564 billion.<sup>47</sup>

### III. DISCUSSION

11. The Application for Review is governed by Section 5(c) of the Communications Act of 1934, as amended,<sup>48</sup> and Section 1.115 of the Commission's rules.<sup>49</sup> At the outset, we conclude NTCH's Application for Review fails to meet the procedural requirements for an application for review set forth in section 1.115(b) of the Commission's rules.<sup>50</sup> Under Section 1.115(b), an application for review must "specify with particularity, from among [five listed factors], the factor(s) which warrant Commission consideration of the questions presented."<sup>51</sup> NTCH asserts that the H Block aggregate reserve price is "unprecedented," "contrary to precedent[,] and unsupported by the facts of the record,"<sup>52</sup> yet the Application for Review fails to specifically identify any statute, regulation, case precedent, or established Commission policy (or any evidence of record) that conflicts with the Bureau's reserve price

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<sup>40</sup> *Id.*

<sup>41</sup> Application for Review. Although as noted above NTCH had not filed comments in response to the *Auction 96 Comment Public Notice*, NTCH argued that its Petition for Reconsideration had relied on new facts, pointing to the *DISH Ex Parte* and the DISH Waiver Petition. *Id.* at 2-4. We need not address this argument, because as noted below we reject NTCH's arguments for other reasons in any event.

<sup>42</sup> *Id.* at 1, 4-5.

<sup>43</sup> *Id.* at 1, 5-6.

<sup>44</sup> *Id.* at 6-7.

<sup>45</sup> See *Auction of H Block Licenses in the 1915-1920 MHz and 1995-2000 MHz Bands: 23 Bidders Qualified to Participate in Auction 96*, Public Notice, 29 FCC Rcd 77, 77, para. 1 (WTB 2014).

<sup>46</sup> *Auction of H Block Licenses in the 1915-1920 MHz and 1995-2000 MHz Bands Closes; Winning Bidder Announced for Auction 96*, Public Notice, 29 FCC Rcd 2044, 2044, para. 1 (WTB 2014).

<sup>47</sup> See *id.* at 2044, 2052-62, para. 1, Attach. A; FCC, Wireless Telecommunications Bureau, Auction 96: H Block Summary (Feb. 28, 2014), [http://wireless.fcc.gov/auctions/default.htm?job=auCTION\\_summary&id=96](http://wireless.fcc.gov/auctions/default.htm?job=auCTION_summary&id=96). The winning bidder, American H Block Wireless L.L.C., is a wholly owned direct subsidiary of DISH Wireless Holding L.L.C., which is a wholly owned direct subsidiary of DISH Network Corporation.

<sup>48</sup> 47 U.S.C. § 155(c).

<sup>49</sup> 47 CFR § 1.115.

<sup>50</sup> *Id.* § 1.115(b)(1)-(2).

<sup>51</sup> *Id.* § 1.115(b)(2).

<sup>52</sup> Application for Review at 2; see 47 CFR § 1.115(b)(2)(i).

determination. Likewise, NTCH claims that the Bureau's decision is a "prejudicial procedural error,"<sup>53</sup> yet the Application for Review fails to specifically identify any concrete harm or prejudice it may have suffered. While the Application for Review asserts that NTCH itself chose not to enter the auction in light of DISH's bidding commitment, it does not explain why it "seemed likely" to NTCH it could not have won at least some of the Auction 96 licenses.<sup>54</sup> Vague statements asserting error are not enough to justify review under our rules.<sup>55</sup> NTCH failed to meet Section 1.115(b)'s procedural requirements, and dismissal of the Application for Review is warranted.

12. In any event, as an independent and alternative basis for our decision, we conclude that even if NTCH's claims are considered on their merits, they must be denied for the same reasons the Bureau cited in the *MO&O*. NTCH has not demonstrated that it was prejudiced by the Bureau's actions.<sup>56</sup> As discussed above, NTCH chose not to participate in the pre-auction process that established the procedures for Auction 96, despite having ample opportunity to express its views on the aggregate reserve price. NTCH also chose not to participate in the auction itself. Although NTCH claims that it "chose not to enter the auction because the agreed minimum bid by DISH equal to the reserve price seemed likely to far exceed the price at which at least some of the licenses could otherwise have been bought,"<sup>57</sup> NTCH appears to have misunderstood the fundamental purpose of a reserve price. A minimum opening bid is a bidding tool used to accelerate the competitive bidding process,<sup>58</sup> whereas a reserve price is an "absolute minimum below which an item or items will not be sold."<sup>59</sup> Thus, because the Bureau established an *aggregate* reserve price for the entire auction instead of on a license-by-license basis,<sup>60</sup> a high bid for a given license would have qualified as a winning bid, so long as the total proceeds from *all* the licenses in the auction met the aggregate \$1.564 billion reserve price. In short, NTCH had little to lose by entering the auction and bidding what it considered a fair price for any licenses it wanted.

13. We find no merit in NTCH's argument that the aggregate reserve price is unsupported by facts or precedent.<sup>61</sup> As noted above, the Bureau had proposed to establish a reserve price based on the aggregate of the anticipated gross bids for the H Block licenses instead of on the sum of the minimum opening bids.<sup>62</sup> The Bureau also requested comment on the methodology for calculating the reserve price.<sup>63</sup> No party opposed the use of an aggregate reserve price for Auction 96. NTCH never filed comments in that proceeding, nor has it provided any evidence in its Petition for Reconsideration that the reserve price selected did not reflect an appropriate estimate of the H Block's market value. Indeed, NTCH

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<sup>53</sup> Application for Review at 2; *see* 47 CFR § 1.115(b)(2)(v).

<sup>54</sup> Application for Review at 6.

<sup>55</sup> *See, e.g., KGAN Licensee, LLC*, Memorandum Opinion and Order, 30 FCC Rcd 7664, 7665, para. 3 (2015).

<sup>56</sup> *See* 47 CFR § 1.115(b)(2)(v); *Skybridge Spectrum Foundation; On Request for Inspection of Records*, 26 FCC Rcd 13800, 13804, para. 14 n.28 (2011) ("Under 47 C.F.R. § 1.115(b)(2)(v), an application for review that rests on alleged procedural error must show prejudice."); *see also* 5 U.S.C. § 706 (requiring that a court reviewing an "agency action" take "due account . . . of the rule of prejudicial error.").

<sup>57</sup> Application for Review at 6.

<sup>58</sup> *Auction 96 Comment Public Notice*, 28 FCC Rcd at 10026, para. 54.

<sup>59</sup> *Id.* at 10025, para. 50.

<sup>60</sup> *Auction 96 Procedures Public Notice*, 28 FCC Rcd at 13064, paras. 172-73.

<sup>61</sup> *See* Application for Review at 4-5.

<sup>62</sup> *Auction 96 Comment Public Notice*, 28 FCC Rcd at 10026, para. 52.

<sup>63</sup> *Id.* at 10026, para. 53.

acknowledges that the record could have supported an even *higher* aggregate reserve price,<sup>64</sup> even while claiming that the amount set by the Bureau was too high. We find the valuation selected by the Bureau to have been reasonable. As suggested by T-Mobile,<sup>65</sup> the Bureau balanced a variety of public interests and objectives when setting the aggregate reserve price.<sup>66</sup>

14. Section 309(j) of the Communications Act authorizes the Commission to set a “reasonable” reserve price for auctions.<sup>67</sup> As noted above, the Act, the Commission’s rules, and the Bureau’s order in this case draw a distinction between the reserve price and the minimum opening bid price. In setting a reserve price, the Commission must consider and balance a variety of public interests and objectives.<sup>68</sup> For the H Block licenses in Auction 96, the Spectrum Act directed that proceeds from the auction be deposited into the Public Safety Trust Fund and be used for, among other things, a nationwide, interoperable public safety broadband network by FirstNet.<sup>69</sup> The Bureau balanced these public interests and objectives when setting the aggregate reserve price at \$1.564 billion, specifically noting that “this amount will appropriately recover for the public a portion of the value of the spectrum, especially in light of the Spectrum Act’s requirement to [fund FirstNet].”<sup>70</sup> Consistent with the views of commenters, this approach was designed “to accurately reflect overall demand,”<sup>71</sup> so that licenses were not acquired for below market values, and that the auction would raise sufficient amounts consistent with the goals of the Spectrum Act, and that of Section 309(j) of “recover[ing] for the public a portion of the value of the public spectrum resource.”<sup>72</sup> The issue is not whether the aggregate reserve price is two or four or seven times the minimum opening bid price,<sup>73</sup> but whether it reasonably accommodates these goals in the circumstances of a particular auction. Thus, we find no error in the Bureau’s decision to adopt an aggregate reserve price consistent with statutory requirements and supported by publicly available information, including information submitted by interested parties.

15. To the extent NTCH seeks to reverse the Bureau’s establishment of this reserve price based not on the evidence of record but rather based on the Bureau’s motive, we decline its invitation. It has long been established that it is generally not appropriate “to probe the mental processes of the [agency decisionmaker].”<sup>74</sup> We adopt the same approach.

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<sup>64</sup> Application for Review at 4.

<sup>65</sup> See T-Mobile Comments at 6-7.

<sup>66</sup> *Auction 96 Procedures Public Notice*, 28 FCC Rcd at 13064, para. 172. The Bureau expressed its belief that the aggregate reserve price would “appropriately recover for the public a portion of the value of the spectrum, especially in light of the Spectrum Act’s requirement to deposit proceeds from this auction into the Public Safety Trust Fund to be used for a nationwide, interoperable public safety broadband network by [FirstNet].” *Id.*

<sup>67</sup> 47 U.S.C. § 309(j)(4)(F); accord 47 CFR § 1.2104(c) (“The Commission may establish a reserve price or prices, either disclosed or undisclosed, below which a license or licenses subject to auction will not be awarded.”).

<sup>68</sup> 47 U.S.C. § 309(j)(3).

<sup>69</sup> Spectrum Act § 6401(c)(4) (codified at 47 U.S.C. § 309(j)(8)(F), 1457); see also *id.* § 6202(a) (codified at 47 U.S.C. § 1422(a)).

<sup>70</sup> *Auction 96 Procedures Public Notice*, 28 FCC Rcd at 13064, para. 172.

<sup>71</sup> Sprint Comments at 12; Cellular South Reply Comments at 5.

<sup>72</sup> 47 U.S.C. § 309(j)(3)(C).

<sup>73</sup> See Application for Review at 5; *NTCH MO&O*, 28 FCC Rcd at 16113, para. 15 & n.38.

<sup>74</sup> *Morgan v. United States*, 304 U.S. 1, 18 (1938); see also *PLMRS Narrowband Corp. v. FCC*, 182 F.3d 995, 1001 (D.C. Cir. 1999) (“It is fundamental that agency opinions, like judicial opinions, speak for themselves.” (internal quotation marks and brackets omitted)).

16. We also find no basis for further consideration of NTCH's suggestions that the Commission failed to disclose DISH's request for additional technical flexibility or that the Commission somehow denied potential bidders access to information about DISH's Waiver Petition.<sup>75</sup> NTCH fails to acknowledge that the Bureau opened a proceeding approximately four months prior to the start of bidding specifically for the purpose of soliciting comment on DISH's request, a proceeding in which NTCH itself participated.<sup>76</sup> As was noted in the *MO&O*, by soliciting public comment on the DISH Waiver Petition well in advance of the start of bidding, the Commission provided the public and all potential bidders with information allowing them to "assess the impact of the existing rules and the possible impact, if any, of the technical changes proposed by DISH" that were being considered.<sup>77</sup> The existence of this proceeding refutes NTCH's contention that consideration of the DISH Waiver Petition was undisclosed to other bidders.<sup>78</sup>

17. Finally, we reject NTCH's claim that the H Block auction was rendered unfair by grant of the DISH Waiver Petition.<sup>79</sup> NTCH provides no basis for its suggestion that DISH's election could somehow render the H Block licenses less valuable.<sup>80</sup> NTCH fails to mention that the Bureau conditioned any downlink operations on DISH's compliance with power limits, out of band emissions restrictions and other technical requirements to reduce risk of harmful interference to operations in adjacent bands (including specifically the H Block).<sup>81</sup> Likewise, we are unpersuaded by NTCH's complaint that grant of the DISH Waiver Petition gave DISH an unfair informational advantage in Auction 96 in that DISH (and only DISH) knew whether the usefulness of the H Block would be enhanced by its downlink election for the adjacent AWS-4 band.<sup>82</sup> NTCH's suggestion that potential Auction 96 applicants could not conduct reasonable due diligence investigations because they lacked "access to the same information about the rules governing the auction, the service requirements, and the potential for interference from adjacent bands" has no basis.<sup>83</sup> The Bureau observed in the *NTCH MO&O* that Auction 96 applicants could assess the impact of existing rules and the possible impact, if any, of the technical changes proposed by DISH, which were being considered in a separate proceeding.<sup>84</sup> Regardless of which option DISH ultimately elected, the interference environment at the time of the auction would be known and prospective H Block licensees would be aware in advance that they would receive appropriate interference protections from

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<sup>75</sup> See Application for Review at 5-6.

<sup>76</sup> See *Wireless Telecommunications Bureau Opens Docket to Seek Comment on DISH Network Corporation's Petition for Waiver and Request for Extension of Time*, Public Notice, 28 FCC Rcd 12987, 12987-88 (WTB 2013) (*DISH Waiver Public Notice*). See generally WT Docket No. 13-225. We note that NTCH filed comments in response to the *DISH Waiver Public Notice*. See NTCH, Inc. Comments, WT Docket No. 13-225 (Sept. 30, 2013).

<sup>77</sup> *NTCH MO&O*, 28 FCC Rcd at 16113-14, 16114, paras. 17, 19; see also *DISH Waiver Public Notice*, 28 FCC Rcd at 12987-88.

<sup>78</sup> See Application for Review at 6.

<sup>79</sup> *Id.* at 6-7.

<sup>80</sup> *Id.* at 7.

<sup>81</sup> See *DISH Network Corporation; Petition for Waiver of Sections 27.5(j) and 27.53(h)(2)(ii) of the Commission's Rules and Request for Extension of Time*, Memorandum Opinion and Order, 28 FCC Rcd 16787, 16798-801, 16806 paras. 26-33, 47 (WTB 2013) (*DISH Waiver Order*) (waiver conditions, technical requirements for downlink use).

<sup>82</sup> Application for Review at 6-7.

<sup>83</sup> *Id.* at 7.

<sup>84</sup> *NTCH MO&O*, 28 FCC Rcd at 16114, para. 19. Notably, NTCH was itself a participant in that proceeding. See *DISH Waiver Order*, 28 FCC Rcd at 16791, para. 9.



AWS-4 operators.<sup>85</sup> All H Block bidders were (or should have been) aware of DISH's waiver, and were therefore able to take the terms of the waiver into account in their bidding strategies.<sup>86</sup>

18. NTCH offers no basis for its assertion that the auction would be unfair because the waiver would, in effect, give DISH an ability to “decide after that auction was over whether the H Block would be 10 [megahertz of spectrum] or 7.5 [megahertz of spectrum], but only DISH would know which one it would be.”<sup>87</sup> The technical safeguards against harmful interference from operations in the adjacent AWS-4 band were designed to allow each H Block licensee to have full use of each 10 megahertz license awarded through Auction 96. DISH may have developed its own valuations for the H Block licenses based on how it believed the downlink election could allow DISH to make more effective use of both bands; however, we disagree that the existence of the election “could render the [H block] licenses less valuable” for other bidders, even if not exercised until after the bidding had begun. In any case, we reject NTCH's claim that the auction was unfair because DISH might have had information about DISH's own potential use of the spectrum. In any spectrum auction, each applicant bids what it thinks the spectrum is worth to it based on its own specific circumstances, not all of which may be known to its competing bidders.<sup>88</sup> Those variations in value do not render the auction unfair. This is consistent with allowing bidders to factor their unique circumstances and values into their bids so that the auction can determine which bidder values the spectrum the most.<sup>89</sup> In any event, NTCH has advanced no basis for even assuming that DISH would have even been in a position at the time of the H Block auction to have known whether it would use the adjacent AWS-4 spectrum for downlink or uplink.<sup>90</sup>

#### IV. ORDERING CLAUSE

19. For the reasons discussed above, we hereby conclude that NTCH's Application for Review regarding the establishment of the reserve price for Auction 96 does not meet the procedural requirements for an application for review and, on independent and alternative grounds, fails to satisfy the applicable standard for obtaining review.

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<sup>85</sup> See *DISH Waiver Order*, 28 FCC Rcd at 16803, para. 39.

<sup>86</sup> See *id.*; *NTCH MO&O*, 28 FCC Rcd at 16114, para. 19 (“urg[ing] bidders to consider any pending challenges or waiver requests in determining whether and how much to bid on licenses at auction.”). See also *Auction 96 Procedures Public Notice*, 28 FCC Rcd at 13033-34, paras. 41-45 (due diligence research guidance for potential Auction 96 participants).

<sup>87</sup> Application for Review at 7.

<sup>88</sup> The Commission has also recognized that an advantage of a multiple round auction design (as used in the H Block auction) is that it provides bidders with information regarding the values that other bidders place on licenses in the auction, resulting in more efficient outcomes. See *Implementation of Section 309(j) of the Communications Act – Competitive Bidding*, Second Report and Order, 9 FCC Rcd 2348, 2362, paras. 82-84 (1994).

<sup>89</sup> See *id.*, 9 FCC Rcd at 2349-50, para. 5.

<sup>90</sup> See *DISH Waiver Order*, 28 FCC Rcd at 16803, para. 39. As DISH had explained, the requested flexibility would “allow it to be more successful in its efforts to find new uplink spectrum for pairing through, among other things, strategic partnerships or transactions.” *DISH Waiver Petition* at 4.

20. Accordingly, IT IS ORDERED, pursuant to Sections 4(i) and 5(c) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 155(c), and Section 1.115 of the Commission's Rules, 47 CFR § 1.115, that the Application for Review filed by NTCH, Inc. on December 27, 2013, IS DISMISSED AND ALTERNATIVELY DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch  
Secretary