

## **APPENDIX**

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United States Court of Appeals  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Argued October 8, 2019

Decided February 21, 2020

No. 18-1241

NTCH, INC.,  
APPELLANT

v.

FEDERAL COMMUNICATIONS COMMISSION,  
APPELLEE

DISH NETWORK CORPORATION,  
INTERVENOR

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Consolidated with 18-1242

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On Petition for Review and Notice of Appeal of  
Orders of the Federal Communications Commission

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*Donald J. Evans* argued the cause for appellant. With him on the briefs was *Keenan Adamchak*.

*Maureen K. Flood*, Counsel, Federal Communications Commission, argued the cause for appellee. With her on the brief were *Michael F. Murray*, Deputy Assistant Attorney General, U.S. Department of Justice, *Robert B. Nicholson* and *Frances E. Marshall*, Attorneys, *Thomas M. Johnson Jr.*, General Counsel, Federal Communications Commission,

*David M. Gossett*, Deputy General Counsel, and *Richard K. Welch*, Deputy Associate General Counsel. *Jacob M. Lewis*, Associate General Counsel, Federal Communications Commission, entered an appearance.

*Bryan N. Tramont* and *J. Wade Lindsay* were on the brief for intervenor. *Jennifer B. Tatel* entered an appearance.

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No. 18-1243

NTCH, INC.,  
PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED  
STATES OF AMERICA,  
RESPONDENTS

DISH NETWORK CORPORATION,  
INTERVENOR

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On Petition for Review of Orders of the  
Federal Communications Commission

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*Donald J. Evans* argued the cause for petitioner. With him on the briefs was *Keenan Adamchak*.

*Sarah E. Citrin*, Counsel, Federal Communications Commission, argued the cause for respondents. With her on the

brief were *Michael F. Murray*, Deputy Assistant Attorney General, U.S. Department of Justice, *Robert B. Nicholson* and *Frances E. Marshall*, Attorneys, *Thomas M. Johnson Jr.*, General Counsel, Federal Communications Commission, *David M. Gossett*, Deputy General Counsel, and *Richard K. Welch*, Deputy Associate General Counsel. *Jacob M. Lewis*, Associate General Counsel, and *Maureen K. Flood* and *Thaila Sundaresan*, Counsel, Federal Communications Commission, entered appearances.

*Bryan N. Tramont* and *J. Wade Lindsay* were on the brief for intervenor. *Jennifer B. Tatel* entered an appearance.

Before: TATEL, GARLAND, and GRIFFITH, *Circuit Judges*.

Opinion for the court filed PER CURIAM.

PER CURIAM: Title III of the Communications Act of 1934 charges the Federal Communications Commission with the regulation of the “channels of radio transmission.” 47 U.S.C. § 301. These cases arise out of three Commission spectrum-management decisions. First, the Commission “modified” Dish Network Corporation’s licenses in the “Advanced Wireless Services-4 Band” (the “AWS-4 Band”) to authorize the company to develop a stand-alone terrestrial network that could support wireless broadband services. Then, a year later, the Commission “waived” certain technical restrictions on these modified licenses, though it conditioned the waivers on Dish’s commitment to bid a certain sum of money in a public auction for adjacent spectrum in the so-called “H Block.” And finally, the Commission designed and conducted “Auction 96,” in which Dish bid as promised and won the H Block licenses.

NTCH, Inc., a competitor to Dish, challenges all three decisions. For the reasons set forth below, we deny its petitions

for review of the orders modifying Dish’s AWS-4 licenses and establishing Auction 96’s procedures. But because the Commission wrongly dismissed NTCH’s challenges to the waiver orders for lack of administrative standing, we remand to the Commission to consider those claims on the merits.

## I.

### A.

The AWS-4 Band’s history begins, for present purposes, with the disappointing commercial deployment of “mobile satellite service” (MSS)—“a satellite-powered technology that provides email and cellular-like phone services,” particularly in hard-to-reach areas and during natural disasters. *Globalstar, Inc. v. FCC*, 564 F.3d 476, 480 (D.C. Cir. 2009). Back in 1997, bullish on MSS, the Commission allocated spectrum for MSS and soon granted licenses to eight operators.

By 2003, however, satellite’s prospects seemed bleak compared to terrestrial technologies—*i.e.*, those that route radio communications through cell towers. To put MSS spectrum to better use, the Commission authorized MSS licensees to offer “ancillary” terrestrial services. *See In re Service Rules for Advanced Wireless Services in the 2000-2020 MHz and 2180-2200 MHz Bands*, 27 FCC Rcd. 3561, 3564–65, ¶¶ 5–6 (2012) (“AWS-4 NPRM”). The Commission thus allowed “MSS operators to augment their satellite services with terrestrial facilities” by “re-using frequencies assigned to MSS operations.” *Id.* at 3564, ¶ 5. But the Commission imposed a condition on this new flexibility: before an MSS licensee could offer terrestrial services, it would first need to provide “substantial satellite service.” *Id.*

This condition thwarted the development of terrestrial networks. Unable to make “substantial” satellite service commercially viable, licensees could not avail themselves of the terrestrial option. *Id.* at 3565, ¶ 8. By 2011, six of eight MSS licensees had surrendered their licenses. When the last two licensees filed for bankruptcy, Dish swooped in, acquiring the licenses from the bankrupt companies.

As the MSS spectrum fell into desuetude, the market for “wireless broadband” (which sends information to data-hungry devices like iPhones and iPads) was booming. Indeed, the Commission worried that, soon enough, “mobile data demand [would] exhaust spectrum resources.” *Id.* at 3567, ¶ 10. In response, Congress enacted legislation instructing the Commission to develop a “national broadband plan” to “ensure that all people of the United States have access to broadband capability.” American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, § 6001(k)(2)(D), 123 Stat. 115, 516. The Commission’s resulting *National Broadband Plan* acknowledged that its insistence on “substantial satellite service” in the AWS-4 Band made it “difficult for MSS providers to deploy ancillary terrestrial networks.” *See* FEDERAL COMMUNICATIONS COMMISSION, CONNECTING AMERICA: THE NATIONAL BROADBAND PLAN 87-88 (2010). The plan thus recommended a subtle but critical shift in the AWS-4 Band: authorize “stand-alone terrestrial services” *without* the requirement that licensees first offer satellite service. *Id.* And in 2011, the Commission took a first step towards implementing this recommendation, setting aside “co-primary” terrestrial allocations in the satellite ranges. *AWS-4 NPRM*, 27 FCC Rcd. at 3568, ¶ 14.

NTCH’s first challenge—to the modification of Dish’s licenses, *see infra* Part II—arises out of the Commission’s efforts to further implement the *National Broadband Plan*’s

recommendation. In March 2012, the Commission sought comments on a proposal to “increase the Nation’s supply of spectrum for mobile broadband” by creating service rules and assigning licenses for “terrestrial services” in the AWS-4 Band. *AWS-4 NPRM*, 27 FCC Rcd. at 3563, ¶ 1. But the Commission also sought to preserve the possibility of satellite service. Noting that its 2011 decision allocated the AWS-4 Band “on a co-primary basis,” the Commission insisted that its new policies should protect satellite systems from “harmful interference caused by [terrestrial] systems.” *Id.* at 3569–70, ¶ 17; 3587, ¶ 80.

Given its continued commitment to satellite, the Commission proposed to use its authority under § 316 of the Communications Act to “modify” Dish’s licenses to allow it to offer terrestrial services. *Id.* at 3585–86, ¶¶ 74–78; *see* 47 U.S.C. § 316(a). The Commission reasoned that allowing “same-band, separate-operator” sharing of the spectrum—*i.e.*, dividing the terrestrial and satellite rights between two licensees—could hinder coordination between the two operators, and thus cause interference between the two services. *Id.* at 3586–87, ¶¶ 79–80. Back in 2003, when the Commission first opened the AWS-4 Band for ancillary terrestrial use, the Commission found that same-band, separate-operator sharing was unworkable, and the Commission expected that operators would face the same issues in 2012. Seeking more information, however, the Commission asked commenters whether “technological advances” since 2003 should “reinforce or alter” the Commission’s expectations. *Id.* at 3584, ¶ 72. If commenters established the feasibility of separate licensees, the Commission explained, it would consider changing course to “seek comment on other approaches,” including “the assignment of new initial licenses” to the terrestrial rights through “competitive bidding.” *Id.* at 3587, ¶ 80.

Nobody changed the Commission’s mind. And so, in December 2012, the Commission’s *AWS-4 Order* adopted the *AWS-4 NPRM*’s proposed approach. *See In re Service Rules for Advanced Wireless Services in the 2000-2020 MHz and 2180–2200 MHz Bands*, 27 FCC Rcd. 16,102, 16,110–12 (2012) (“*AWS-4 Order*”). As the Commission explained, it “received numerous comments” confirming that “technical hurdles [to operator sharing] remain” and that granting a terrestrial license to “an entity other than the MSS incumbent remains impractical.” *Id.* at 16,165, ¶ 166. Although one commenter suggested that “known technologies” would allow spectrum sharing, *id.* at 16,172, ¶ 182; *see* 18-1243 J.A. 142–54 (comments of MetroPCS), the Commission disagreed, claiming that these technologies were not “market-proven” and could only work if one operator controlled both uses of the spectrum. *Id.* at 16,172, ¶ 182. The Commission also noted that “no commenter,” MetroPCS included, submitted technical evidence that disputed its 2003 finding. *Id.* at ¶ 183.

The Commission announced that it would use its § 316 modification authority to “allow [Dish] to operate terrestrial services, rather than make the band available . . . under a sharing regime.” *Id.* at 16,171, ¶ 181. Acknowledging that Dish’s licenses would “increase in value,” the Commission reasoned that modifying these licenses was the “best and fastest method for bringing this spectrum to market.” *Id.* at 16,170, ¶ 178.

The *AWS-4 Order* also imposed two relevant restrictions on Dish’s licenses. First, the Commission protected the remaining satellite services from interference by designating the AWS-4 Band’s lower portion (*i.e.*, 2000–2020 MHz) for “uplink” operations and the upper portion (*i.e.*, 2180–2200 MHz) for “downlink” operations. *Id.* at 16,117, ¶ 39. The

“downlink” channel sends information from cell towers to mobile devices, and the “uplink” channel goes the other way. 18-1241 FCC Br. 9 n.2. Although mobile data networks use far more downlink than uplink data, the Commission concluded that this limitation was necessary to ensure functioning satellite service in the AWS-4 Band. *AWS-4 Order*, 27 FCC Rcd. at 16,117, ¶ 39. Second, to ensure the “timely deployment” of Dish’s new terrestrial rights, the Commission imposed “performance requirements” on Dish’s use of the AWS-4 Band. *Id.* at 16,176, ¶ 193; 16,173–74, ¶¶ 187–88. Relevant here, failure to offer reliable terrestrial services within seven years of the order would trigger the automatic termination of Dish’s licenses. *Id.*

In February 2013, the Wireless Telecommunications Bureau (the “Bureau”—a sub-delegatee within the Commission, *see* 47 C.F.R. § 0.131—modified Dish’s licenses according to the terms of the *AWS-4 Order*. The following month, NTCH filed identical petitions for reconsideration with the Commission, challenging the *AWS-4 Order* and the modification of Dish’s license. In August 2018, the Commission dismissed and alternatively denied the petitions. NTCH timely filed a petition for review, and we have jurisdiction under 47 U.S.C. § 402(a) and 28 U.S.C. § 2342. We address the merits of this petition in Part II.

## B.

In 2012, as the Commission took steps to modify Dish’s AWS-4 licenses, Congress also sought to address the “growing need for spectrum” for wireless networks. *National Ass’n of Broadcasters v. FCC*, 789 F.3d 165, 168–69 (D.C. Cir. 2015). Congress thus passed the Spectrum Act, which directed the Commission to use a “system of competitive bidding” to “allocate” a spectrum band dubbed the “H Block.” Middle

Class Tax Relief and Job Creation Act of 2012 (the “Spectrum Act”), Pub. L. No. 112-96, § 6401(a)-(b), 126 Stat. 156, 222-23 (codified at 47 U.S.C. § 1451(b)).

In response, the Bureau announced that it would hold Auction 96 to allocate 176 licenses in the H Block, segregated based on geographic area. *See Auction of H Block Licenses in the 1915-1920 MHz and the 1995-2000 MHz Bands*, 28 FCC Rcd. 10,013, 10,045-46 (2013) (“Auction Proposal”). The Bureau sought comment on whether it should “establish a reserve price” for the auction, below which the spectrum would not be sold. *Id.* at 10,026, ¶ 52. The Bureau further proposed to set that reserve price based “on the aggregate of the gross bids for the H Block licenses, rather than license-by-license.” *Id.* Commenters generally agreed with the Bureau’s proposal, though none suggested a specific aggregate reserve price.

On September 9, 2013, after the comment period closed, Dish filed a two-page letter suggesting an aggregate reserve price of at least “\$0.50 per megahertz of bandwidth per population (‘MHz-POP’).” 18-1241 J.A. 50. MHz-POP is a unit equal to the number of megahertz multiplied by the population of a region; for example, if ten megahertz of spectrum reaches 750,000 people, then MHz-POP equals 7,500,000. *See* 18-1241 FCC Br. 12 n.3. Dish derived its estimate from private sales and Commission auctions of similar spectrum, and referenced reports from financial institutions valuing the H Block between \$0.62 and \$1 per MHz-POP.

That same day, Dish also filed a petition asking the Bureau to “waive” some of the restrictions on its AWS-4 licenses. 18-1241 J.A. 54. Specifically, Dish sought to use the lower AWS-4 Band for downlink operations (rather than just uplink operations, as the *AWS-4 Order* required). *See* 47 C.F.R. §§ 27.5(j), 27.53(h)(2)(ii). Dish also requested a one-year

extension to the seven-year deadline to offer substantial terrestrial service in the AWS-4 Band. Dish claimed that the waivers would allow it to “harmonize[]” its uses of the H Block and the AWS-4 Band, and Dish committed to bid the “aggregate nationwide reserve price . . . in the upcoming H Block auction (not to exceed \$0.50 per MHz/POP)” if the Bureau granted the waivers. 18-1241 J.A. 68.

Four days later, on September 13, the Bureau took two key actions: it sought public comment on Dish’s waiver petition and announced the procedures for the H Block auction. In its announcement, the Bureau credited Dish’s valuation of \$0.50 per MHz-POP and thus set the aggregate reserve price at \$1.564 billion.

NTCH quickly registered its opposition to both proposed actions. First, on September 30, it filed a public comment objecting to Dish’s waiver petition, claiming that Dish and the Commission made a “backroom deal” amounting to a “cash-for-waiver quid pro quo.” 18-1241 J.A. 194–95. NTCH further objected that granting Dish’s waivers would bring no “public interest benefits.” *Id.* Second, on October 18, NTCH filed a petition for reconsideration of the auction procedures. *Id.* at 215. NTCH asked the Bureau to revisit Auction 96’s aggregate reserve price, claiming that a “deal brokered by the Commission” generated this “astronomical” sum. *Id.* at 218–220. Meanwhile, as Dish’s waiver petition and NTCH’s petition for reconsideration were pending, NTCH chose not to sign up for Auction 96 by the deadline. NTCH thus never bid on the H Block licenses.

The Bureau denied NTCH’s petition for reconsideration, explaining that NTCH offered no reason to lower the reserve price, and that any “arrangement” was already disclosed because Dish’s waiver petition was filed in a public docket

where interested parties could submit comments. *See In re NTCH, Inc.*, 28 FCC Rcd. 16,108, 16,112–13, ¶¶ 13–17 (Wireless Bureau 2013). Moreover, to the extent NTCH took issue with Dish’s commitment to pay the reserve price in the *waiver* request, the Bureau concluded that NTCH’s objection was misplaced. *Id.* at 16,113–14, ¶¶ 17–19. Because Dish’s petition would be “resolved in a separate proceeding,” NTCH’s petition for reconsideration of the auction procedures was not an “appropriate vehicle for a premature attack on . . . the waiver request.” *Id.*

The Bureau then granted Dish’s waiver petition on December 20. *See In re Dish Network Corp.*, 28 FCC Rcd. 16,787 (Wireless Bureau 2013). Responding to NTCH’s objections, the Bureau denied any inappropriate backroom deal with Dish and stated that it had made its decision “based on the public record.” *Id.* at 16,808, ¶ 53. Given Dish’s “unique” status as an AWS-4 and MSS licensee, the Bureau concluded that applying the rules to Dish “would be both unduly burdensome and contrary to the public interest.” *Id.* at 16,794, ¶ 18. The Bureau further concluded that it could consider Dish’s “commitment to ensure that the H Block auction satisfies the aggregate reserve price” as an “additional public interest benefit.” *Id.* at 16,808–09, ¶ 53. The Bureau therefore granted Dish’s waiver, allowing Dish to “elect” whether to switch to downlink operations. *Id.* at 16,802–03, ¶ 38. The Bureau also granted the one-year extension for Dish’s performance requirements in the AWS-4 Band. *Id.* at 16,804–05, ¶¶ 41–43.

The Bureau then conducted Auction 96 as proposed. Dish bid a total of \$1.564 billion on the licenses—exactly the aggregate reserve price—and won them all.

In December 2013 and January 2014, NTCH timely filed two applications for review of the Bureau’s orders—one challenging Auction 96’s procedures, the other challenging the Bureau’s grant of Dish’s waivers for its AWS-4 licenses. The Commission sat on these applications until 2018, then rejected both. Regarding NTCH’s objections to the auction procedures, the Commission dismissed NTCH’s application because it failed to “specify with particularity” the Bureau’s errors, as the Commission’s rules required. *In re NTCH, Inc.*, 33 FCC Rcd. 8446, 8450–51, ¶ 11 (2018); *see* 47 C.F.R. § 1.115(b). Alternatively, the Commission rejected NTCH’s various arguments on the merits. *Id.* at 8451–54, ¶¶ 12–18. Regarding NTCH’s objections to the Bureau’s grant of Dish’s waivers, the Commission dismissed NTCH’s application for lack of administrative standing, concluding that NTCH’s failure to register for the auction—not the Commission’s grant of the waivers—caused NTCH to lose its opportunity to bid on the licenses. *In re Dish Network Corp.*, 33 FCC Rcd. 8456, 8459 ¶ 9 (2018).

NTCH timely petitioned for review of the auction orders, and we have jurisdiction under 47 U.S.C. § 402(a) and 28 U.S.C. § 2342. NTCH also timely appealed the Commission’s denial of its application for review of the waiver order, and we have jurisdiction under 47 U.S.C. § 402(b). We address the merits of both petitions in Part III.

## II.

We begin with NTCH’s petition for review of the Commission’s decision to modify Dish’s licenses in the AWS-4 Band. NTCH advances three reasons that we should set aside these modifications: (1) the Commission’s decision was arbitrary and capricious because the Commission failed to consider reasonable alternatives and because the decision

lacked support in the record; (2) § 309(j) of the Communications Act compelled the Commission to auction off the terrestrial rights as “initial licenses”; and (3) the Commission’s changes to Dish’s licenses were so substantial that they exceeded its authority to modify licenses under § 316. Because we find the first and second arguments meritless and the third forfeited, we deny NTCH’s petition for review.

#### A.

Before tackling NTCH’s arguments, we must confirm our jurisdiction to consider them. *See American Rivers v. FERC*, 895 F.3d 32, 40 (D.C. Cir. 2018). To have Article III standing, NTCH must show that it suffered an “injury in fact,” that the “conduct under challenge” caused such injury, and that a “favorable decision” will likely “redress the injury.” *DIRECTV, Inc. v. FCC*, 110 F.3d 816, 829 (D.C. Cir. 1997). NTCH argues that it has done so because the Commission’s modification of Dish’s licenses “deprived [it] of an opportunity [to] obtain an AWS-4 license by a fair and open process.” 18-1243 NTCH Br. 15.

This suffices to show standing. An “unsuccessful bidder” in a Commission auction suffers a cognizable injury if the Commission deprives the bidder of the right to a “legally valid procurement process.” *DIRECTV*, 110 F.3d at 829; *see also Alvin Lou Media, Inc. v. FCC*, 571 F.3d 1, 6-7 (D.C. Cir. 2009). An unfair auction places a bidder at a “substantial competitive disadvantage” that constitutes Article III harm. *DIRECTV*, 110 F.3d at 830. It makes no difference whether that disadvantage flows from unfair procedures or the Commission’s failure to conduct any auction at all. NTCH contends that the modification decision was flawed and that the Commission should have auctioned off the terrestrial rights instead, and we must assume—at this stage—NTCH’s success on the merits.

*See City of Waukesha v. EPA*, 320 F.3d 228, 235 (D.C. Cir. 2003). Assuming as much, NTCH’s loss of a chance to bid on the spectrum constitutes an Article III harm caused by the Commission’s decision to modify Dish’s licenses.

The Commission contends, however, that NTCH cannot satisfy Article III’s “redressability” element. According to the Commission, it has no *obligation* to conduct a public auction, so a favorable decision is not likely to redress NTCH’s injury. 18-1243 FCC Br. 33-35. As the Commission explains, its duty to auction off licenses only kicks in once it receives “mutually exclusive applications” for “initial licenses,” 47 U.S.C. § 309(j)(1), and the Communications Act preserves the Commission’s discretion to “avoid mutual exclusivity in application and licensing proceedings”—thus averting the need to auction the licenses. 47 U.S.C. § 309(j)(6); *see also M2Z Networks, Inc. v. FCC*, 558 F.3d 554, 563 (D.C. Cir. 2009). More still, the Commission points out, it could decline to allocate the terrestrial rights in the AWS-4 Band altogether.

All this is true, but the Commission may not use its discretion to defeat NTCH’s standing. As the Supreme Court stated in *FEC v. Akins*, a challenger’s injury is redressable even if an agency “might reach the same result exercising its discretionary powers lawfully.” 524 U.S. 11, 25 (1998). Indeed, the Commission’s argument proves too much, for it would allow agencies to shield their actions from judicial review by invoking their policymaking discretion. In any event, the administrative record suggests that the Commission would likely conduct an auction on remand. The *AWS-4 NPRM* stated that, if commenters changed the Commission’s mind about the modification approach, the Commission would “seek comment on other approaches”—including the “assignment of new initial licenses via competitive bidding.” *AWS-4 NPRM*, 27 FCC Rcd. at 3,587, ¶ 80. Therefore, NTCH has standing.

**B.**

Now to the merits. NTCH’s core argument is that we should vacate the *AWS-4 Order* because the Commission failed to consider reasonable alternatives and because its decision lacked support in the record. We will set aside the Commission’s decision if it is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A). But when the Commission acts to foster “innovative methods of exploiting the spectrum,” it “functions as a policymaker” to which we afford “the greatest deference.” *Mobile Relay Associates v. FCC*, 457 F.3d 1, 8 (D.C. Cir. 2006). We will accept the Commission’s “technical judgment[s]” when supported “with even a modicum of reasoned analysis, absent highly persuasive evidence to the contrary.” *Id.* (internal quotation marks omitted). And the Commission’s “predictive judgments” “within [its] field of discretion and expertise are entitled to particularly deferential review, as long as they are reasonable.” *See Earthlink, Inc. v. FCC*, 462 F.3d 1, 12 (D.C. Cir. 2006) (internal quotation marks omitted).

This deferential standard of review makes NTCH’s task a daunting one. The Commission’s decision to authorize stand-alone terrestrial services in the AWS-4 Band sought to encourage “innovative methods of exploiting the spectrum,” *Mobile Relay Associates.*, 457 F.3d at 8, to address the “urgent need” for wireless broadband, *AWS-4 NPRM*, 27 FCC Rcd. at 3567, ¶ 10. And the Commission chose to modify Dish’s licenses largely because of the “technical judgment,” *Mobile Relay Associates*, 457 F.3d at 8, that same-band, separate-operator sharing of the spectrum would be impractical. Indeed, NTCH conceded at oral argument that it does not challenge this finding. Oral Arg. Tr. (No. 18-1243) 5:4–9.

Accepting this technical judgment, however, the Commission’s decision to modify Dish’s licenses follows quite logically. As the Commission explained, Dish could easily minimize interference between its satellite and terrestrial uses of the spectrum, *AWS-4 Order*, 27 FCC Rcd. at 16,171, ¶ 181, and Dish already had some authority to offer ancillary terrestrial services, *id.* at 16,169–70, ¶ 177. Besides resolving this core technical issue, modifying Dish’s licenses would also, the Commission anticipated, ensure quicker use of the spectrum. To encourage Dish’s development of a terrestrial network, the Commission compelled Dish to develop “reliable terrestrial signal coverage”—or else forfeit its licenses in the AWS-4 Band. *Id.* at 16,173–74, ¶¶ 187–88.

NTCH responds that the Commission failed to consider alternative policies—specifically, that it should have reallocated the *entire* AWS-4 Band to terrestrial use alone. 18-1243 NTCH Br. 21–29. The technical concern about splitting up satellite and terrestrial licenses dissolves if the Commission eliminates satellite service. And because the Commission agrees with NTCH that commercial satellite service remains “virtually non-existent,” 18-1243 Reply Br. 18 (quoting *AWS-4 Order*, 27 FCC Rcd. at 16,171, ¶ 177), NTCH reasons that nothing would be lost by eliminating satellite rights. Indeed, NTCH is not alone in this contention; before the Commission, commenters offered similar suggestions. AT&T claimed, for instance, that the Commission could reduce satellite service to twenty megahertz of the AWS-4 Band, then auction off the remaining twenty megahertz as pure terrestrial service. 18-1243 J.A. 116–18; *see also id.* at 148–49 (similar, comments of MetroPCS); *id.* at 190–91 (similar, comments of T-Mobile).

But this alternative was beyond the scope of the Commission’s rulemaking. As the Commission points out, the *AWS-4 NPRM* never suggested that it was considering

eliminating Dish’s satellite rights in the AWS-4 Band. 18-1243 FCC Br. 34. Instead, the Commission sought to enable terrestrial services in a way that “protect[ed] the incumbent [satellite] licensee from harmful interference.” *AWS-4 NPRM*, 27 FCC Rcd. at 3583, ¶ 68. Accordingly, when NTCH suggested eliminating satellite service, the Commission dismissed its comment as an “untimely” petition to reconsider its earlier order “co-allocating” the AWS-4 Band for terrestrial and satellite uses. *AWS-4 Order*, 27 FCC Rcd. 16,171, ¶ 180 n.532. Likewise, when NTCH filed its petition for reconsideration, the Commission determined that NTCH’s argument was “beyond the scope of the matters that [could] be addressed in this proceeding.” 18-1243 J.A. 408, ¶ 20 (citing 47 C.F.R. § 1.429(l)(5)).

In these circumstances, we cannot say that the Commission’s failure to consider stripping Dish of its satellite rights was unreasonable. Boiled down, NTCH claims that the Commission should have expanded the rulemaking’s scope to consider NTCH’s preferred resolution of the problem. But the Commission need not “resolve massive problems in one fell regulatory swoop;” instead, it may “whittle away at them over time.” *Massachusetts v. EPA*, 549 U.S. 497, 524 (2007). Here, the Commission reasonably limited the rulemaking proceeding to proposals to expand terrestrial uses of the AWS-4 Band. *See National Mining Ass’n v. Mine Safety & Health Administration*, 116 F.3d 520, 549 (D.C. Cir. 1997) (noting that the agency’s explanation that a comment was “beyond the scope of the rulemaking” was an “adequate” explanation of its decision).

NTCH also argues that the Commission wrongly assumed that modifying Dish’s licenses would be the “most efficient and quickest path to enabling flexible terrestrial use” of the AWS-4 Band. 18-1243 NTCH Br. 29-32; *AWS-4 Order*, 27 FCC Rcd.

at 16,164, ¶ 162. As evidence of the Commission’s alleged misjudgment, NTCH references events that occurred *after* the *AWS-4 Order*. 18-1243 NTCH Br. 30. Specifically, NTCH claims that Dish failed to meet its interim deadlines and that the Commission granted Dish’s request for a one-year extension of the final deadline. *Id.* But NTCH’s claim that the agency “turn[ed] out to be mistaken *ex post* is of limited significance,” as we must “judge the reasonableness of an agency’s decision on the basis of the record before the agency at the time it made its decision.” *Rural Cellular Ass’n v. FCC*, 588 F.3d 1095, 1107 (D.C. Cir. 2009). And though NTCH claims that the Commission’s “blunder” was “actually quite apparent back in 2013,” 18-1243 NTCH Br. 31, it musters as evidence a single comment that questions Dish’s qualifications, 18-1243 J.A. 147 (comment of MetroPCS). Because the Commission’s “predictive judgments” on this matter “are entitled to particularly deferential review,” a single contrary comment does not render the agency’s conclusion unreasonable. *See Earthlink*, 462 F.3d at 12 (internal quotation marks and alteration omitted).

Finally, NTCH claims that the Commission’s failure to conduct an auction gave Dish an undeserved “windfall” and neglected to “recover[] for the public” a “portion of the value of the public spectrum resource.” 18-1243 NTCH Br. 33–35 (citing 47 U.S.C. § 309(j)(3)). But the Commission retains the authority “to forgo an auction,” so long as it acts “in the public interest.” *M2Z Networks*, 558 F.3d at 563; *see also* 47 U.S.C. § 309(j)(6)(E). The Commission conceded the modifications would “result in an increase in value” for Dish, but nonetheless concluded that license modification was the “best and fastest method for bringing this spectrum to market.” *AWS-4 Order*, 27 FCC Rcd. at 282, ¶ 178. These sorts of “judgments on the public interest are entitled to substantial judicial deference,” *M2Z Networks*, 558 F.3d at 558 (internal quotation marks

omitted), and we see no reason to second-guess the Commission’s decision to choose a functioning wireless broadband network over a possible influx of cash. We therefore decline NTCH’s invitation to set aside the *AWS-4 Order*.

### C.

NTCH next argues that § 309(j) of the Communications Act required the Commission to auction off the terrestrial rights in the AWS-4 Band as “initial licenses.” 18-1243 NTCH Br. 35–41; 47 U.S.C. § 309(j)(1). Specifically, it claims that an initial license is one “first awarded for a particular frequency under a new licensing scheme, that is, one involving a *different set of rights and obligations for the licensee*.” 18-1243 NTCH Br. 37–38 (quoting *Fresno Mobile Radio, Inc. v. FCC*, 165 F.3d 965, 970 (D.C. Cir. 1999) (emphasis added)). NTCH believes that, because the AWS-4 rights give Dish a “different set of rights and obligations,” § 309(j) compels the Commission to allocate them through a public auction. 18-1243 NTCH Br. 37–38.

NTCH misunderstands the structure of the Communications Act. The Commission must conduct an auction only if it accepts “mutually exclusive applications” for initial licenses, 47 U.S.C. § 309(j)(1), but the Communications Act also states that nothing in § 309(j) shall “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,” *id.* § 308(j)(6)(E) (emphasis added); *see also M2Z Networks*, 558 F.3d at 562–63. In this case, because the Commission never accepted “mutually exclusive applications,” it wasn’t obligated to conduct an auction. NTCH nevertheless claims that our decision in *Fresno Mobile Radio*

requires the Commission to treat the AWS-4 rights as “initial licenses.” 18-1243 NTCH Br. 37–40. But *Fresno Mobile Radio* compels no such thing. There, we held that the Commission reasonably chose to treat certain spectrum rights as initial licenses, rather than to allocate them to the incumbent licensees, because the licenses included “a different set of rights and obligations.” 165 F.3d at 970–71. But a holding that the Commission *may* treat a “different set of rights and obligations” as initial licenses provides no support for NTCH’s contention that the Commission *must* do so.

#### D.

Finally, NTCH argues that the Commission’s decision to modify Dish’s licenses exceeded its authority under § 316 of the Communications Act. 47 U.S.C. § 316(a). Under that provision, the Commission enjoys “broad power to modify licenses” if those modifications “serve the public interest, convenience and necessity.” *California Metro Mobile Communications, Inc. v. FCC*, 365 F.3d 38, 45 (D.C. Cir. 2004). But the Commission’s “power to modify existing licenses does not enable it to *fundamentally change* those licenses.” *Cellco Partnership v. FCC*, 700 F.3d 534, 543-44 (D.C. Cir. 2012) (internal quotation marks omitted and emphasis added); *see also Community Television, Inc. v. FCC*, 216 F.3d 1133, 1140-41 (D.C. Cir. 2000) (same).

NTCH insists that the Commission’s changes to Dish’s licenses were so “fundamental” that they go beyond its modification authority under § 316. 18-1243 NTCH Br. 41-44. We need not address this argument, however, because NTCH failed to raise it until its petition for reconsideration. Generally, a challenger “forfeit[s] an opportunity to challenge an agency rulemaking on a ground that was not first presented to the agency for its initial consideration.” *Advocates for Highway &*

*Auto Safety v. Federal Motor Carrier Safety Administration*, 429 F.3d 1136, 1150 (D.C. Cir. 2005); *see also Washington Ass'n for Television & Children v. FCC*, 712 F.2d 677, 681 (D.C. Cir. 1983) (noting that the provision authorizing review of Commission decisions “codif[ies] the judicially-created doctrine of exhaustion of administrative remedies”). As NTCH concedes, nowhere in its comments on the *AWS-4 NPRM* did it challenge the Commission’s authority under § 316 to modify Dish’s licenses. 18-1243 J.A. 404, ¶ 15. In denying NTCH’s petition for reconsideration, the Commission dismissed NTCH’s argument because its belated objection “frustrate[d]” the Commission’s ability to “address [it] during the course of the rulemaking.” *Id.* at 405, ¶ 15.

NTCH offers two rejoinders, but neither has merit. First, NTCH claims that Dish’s comments regarding § 316 preserved NTCH’s argument for our review. Dish argued that the Commission lacked § 316 authority to force Dish “to relinquish MSS or terrestrial rights to its spectrum,” 18-1243 J.A. 206–207—in other words, to do exactly as NTCH suggested. But Dish’s objection that the Commission could not unilaterally *abolish* its satellite or terrestrial rights hardly preserves NTCH’s contention that the Commission lacked authority to *authorize* stand-alone terrestrial services. 18-1243 NTCH Br. 41–44.

Second, NTCH claims that the Commission *did* consider its argument, so NTCH may address the issue here without “sandbagging” the Commission. 18-1243 Reply Br. 10. True enough, the Commission alternatively rejected NTCH’s § 316 argument on the merits. 18-1243 J.A. 404–06. But the Commission’s thoroughness does not salvage NTCH’s forfeited claim. We will not grant “relief on the merits” when the Commission has “properly dismissed the pleading on procedural grounds.” *BDPCS, Inc. v. FCC*, 351 F.3d 1177,

1183 (D.C. Cir. 2003). Because the Commission correctly treated NTCH’s claim as procedurally barred, “we have no occasion to reach the merits.” *Id.* at 1184.

\* \* \*

Because none of NTCH’s challenges to the *AWS-4 Order* has merit, we deny its petition for review.

### III.

This brings us, finally, to NTCH’s challenges to the order granting Dish’s request for a waiver of certain AWS-4 rules and to the Auction 96 procedures. We consider each in turn.

#### A.

We begin with the Commission’s dismissal of NTCH’s application for review of the Bureau’s order granting Dish’s waivers. *In re Dish Network Corp.*, 33 FCC Rcd. 8456 (2018).

Under § 5(c)(4) of the Communications Act, NTCH may only seek review of the waiver if it was “aggrieved” by the Commission’s action. The Commission interprets “aggrieved” in § 5(c)(4) to impose the “Supreme Court’s test for constitutional standing.” *Id.* at 8460 n.42. In this case, the Commission concluded that NTCH lacked administrative standing because it failed “to demonstrate any direct causal link” between the waiver and “any actual or concrete injury to NTCH.” *Id.* at 8461, ¶ 13. NTCH claimed that the Bureau’s grant of the waivers “thwarted” its plans to participate in the H Block auction by skewing the auction in Dish’s favor, but the Commission determined that NTCH “made a voluntary, business decision not to participate in the auction . . . prior to the” Bureau’s order. *Id.* As the Commission concisely says on

appeal, NTCH “proximate[ly] cause[d]” its own injury by choosing not to bid. 18-1241 FCC Br. 59.

The Commission misunderstood NTCH’s alleged injury. NTCH claims that the Commission deprived it not of a license itself, but rather of a fair and valid auction process. As discussed, such a claim “asserts a cognizable injury.” *U.S. AirWaves, Inc. v. FCC*, 232 F.3d 227, 232 (D.C. Cir. 2000); *see also DIRECTV*, 110 F.3d at 830, even if the prospective bidder “voluntarily withdr[aws]” from the unfair auction. *Alvin Lou Media*, 571 F.3d at 7.

The Commission responds, correctly, that NTCH withdrew from the auction *before* Dish received the challenged waivers. But under our caselaw, the Commission still caused NTCH’s harm. In *Airwaves*, we held that a disappointed bidder had standing to seek reconsideration of an auction, despite “challeng[ing] only the way in which the Commission treated licensees *after* the auction was completed.” 232 F.3d at 232. The Commission’s actions still caused that injury because the bidder “would have bid more had it known that financial terms more favorable than those announced at the time of the auction would later be offered to winning bidders.” *Id.* Much like the challenger in *Airwaves*, NTCH has standing because it “would have” participated in Auction 96 if it had not anticipated that the Commission’s grant of the waivers would skew the auction in Dish’s favor.

We therefore vacate the Commission’s order dismissing NTCH’s application for review. But because the Commission never reached the merits of NTCH’s challenge to the waiver, neither shall we. Having concluded that the Commission erred in its threshold analysis, we “remand to the agency for additional investigation or explanation.” *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985).

**B.**

NTCH also sought Commission review of the Bureau’s Auction 96 procedures. The Commission denied NTCH’s application for review both on procedural grounds and on the merits. *In re NTCH, Inc.*, 33 FCC Rcd. 8446 (2018). Because NTCH has failed to show that the Commission’s decision was arbitrary or capricious, we deny the petition for review.

As a threshold issue, the Commission again challenges NTCH’s standing. The Commission argues that NTCH cannot assert an Article III injury because the reserve price “did not hinder NTCH’s ability to compete for licenses.” 18-1241 FCC Br. 34. Specifically, the Commission claims that the *aggregate* reserve price presented no bar to NTCH competing for *specific* licenses within the H Block. *Id.* at 34–35. Once again, the Commission betrays a cramped view of NTCH’s asserted injury. As discussed, the deprivation of a “valid procurement process,” *Airwaves*, 232 F.3d at 232, constitutes an independent Article III injury, distinct from NTCH’s ultimate failure to obtain a license. And because NTCH traces that deprivation to the Commission’s adoption of Dish’s proposed reserve price—a price that, in NTCH’s view, skewed the auction mechanics—NTCH has standing to challenge the auction procedures.

Turning now to the merits, the Commission dismissed NTCH’s application for review of the Bureau’s order because NTCH failed to comply with the Commission’s procedural rules. Under such rules, an application for review must “specify with particularity” why—selecting from five factors—the Bureau’s order warrants the full Commission’s review. 47 C.F.R. § 1.115(b)(2). The Commission concluded that NTCH failed to do so. *In re NTCH, Inc.*, 33 FCC Rcd. 8446, 8450, ¶ 11 (2018). We review this “dismissal of

pleadings on procedural grounds under the familiar standards of the Administrative Procedure Act,” *BDPCS*, 351 F.3d at 1183, and we find the Commission’s decision reasonable.

Under a header entitled “Factors Warranting Commission Consideration,” NTCH cited three errors: (1) the reserve price was set “contrary to precedent” and was “unsupported by the facts of record,” (2) “adopting a reserve price based on a deal with a potential auction bidder [wa]s unprecedented,” and (3) the Bureau’s action “constitute[d] a prejudicial procedural error.” 18-1241 J.A. 269. NTCH’s asserted errors parrot the factors in the Commission’s rules, but the agency found that NTCH identified no “statute, regulation, case, precedent, or established Commission policy (or any evidence of record)” undermining the Bureau’s decision. *In re NTCH, Inc.*, 33 FCC Rcd. 8,446, 8,450–51, ¶11 (2018). Likewise, NTCH identified no “concrete harm or prejudice it may have suffered” from the alleged procedural error. *Id.* In other words, NTCH alleged “unprecedented” action and “prejudicial” error without citing precedent or showing prejudice.

NTCH responds that the Commission’s rules require it only “to identify briefly” which factors from the “menu of five possible choices” justify review. 18-1241 Reply Br. 14. NTCH thinks it cleared this “minor hurdle” because it “carefully and explicitly laid out” specific factors. *Id.* But again, NTCH cites no authority supporting its assertion, and we’ve said in a similar context that the Commission “need not sift pleadings and documents to identify arguments that are not stated with clarity.” *Bartholdi Cable Co., Inc. v. FCC*, 114 F.3d 274, 279 (D.C. Cir. 1997) (internal quotation marks omitted). Given the “highly deferential standard” we apply under arbitrary and capricious review, *Cellco Partnership*, 357 F.3d at 93, NTCH has given us no basis to conclude that the agency’s dismissal was improper. Because the Commission acted lawfully, “we

have no occasion to reach the merits.” *BDPCS*, 351 F.3d at 1184.

Finally, in its briefs before this court, NTCH argued that we should set aside Auction 96 because it resulted in Dish bidding on not just the H Block licenses, but on the value of spectrum licenses *plus* the waivers. NTCH compares the bidding to an auction where “the auctioneer has a side deal with one bidder that if she is the winning bidder on ten cars, she will be given a brand new Cadillac,” and, “[u]nder textbook economic theory,” that arrangement skews the auction. 18-1241 NTCH Br. 44–45. Though NTCH’s example is evocative, we cannot consider it. As NTCH conceded at oral argument, it failed to raise this argument before the Commission. Oral Arg. Tr. (No. 18-1241) 37:10–14. Accordingly, it is forfeited. *See Advocates for Highway & Auto Safety*, 429 F.3d at 1150. We therefore deny NTCH’s petition for review.

#### IV.

For the reasons given above, we deny NTCH’s petitions for review of both the initial order modifying Dish’s AWS-4 licenses and the order setting the Auction 96 procedures. Because the Commission wrongly dismissed NTCH’s application for review of the Bureau’s grant of the waivers, however, we vacate the Commission’s order and remand to the Commission to consider those claims in the first instance.

*So ordered.*

United States Court of Appeals  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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**No. 18-1241**

**September Term, 2019**  
FILED ON: FEBRUARY 21, 2020

NTCH, INC.,  
APPELLANT

v.

FEDERAL COMMUNICATIONS COMMISSION,  
APPELLEE

DISH NETWORK CORPORATION,  
INTERVENOR

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Consolidated with 18-1242

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On Petition for Review and Notice of Appeal of  
Orders of the Federal Communications Commission

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Before: TATEL, GARLAND, and GRIFFITH, *Circuit Judges*

**JUDGMENT**

These causes came on to be heard on a petition for review and notice of appeal of orders of the Federal Communications Commission and were argued by counsel. On consideration thereof, it is

**ORDERED** and **ADJUDGED** that the petition for review of the Auction 96 procedures be denied; the Commission's order dismissing NTCH's challenges to the waiver orders be vacated, and the case be remanded to the Commission to consider NTCH's claims on the merits, in accordance with the opinion of the court filed herein this date.

**Per Curiam**

**FOR THE COURT:**  
Mark J. Langer, Clerk

BY: /s/

Daniel J. Reidy  
Deputy Clerk

Date: February 21, 2020

Opinion Per Curiam

**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

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<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

<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

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

In the Matter of )  
 )  
DISH Network Corporation ) WT Docket No. 13-225  
 )  
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**

**Adopted: August 14, 2018**

**Released: August 16, 2018**

By the Commission:

1. In this Order, we dismiss for lack of standing NTCH, Inc.'s Application for Review<sup>1</sup> of the Wireless Telecommunications Bureau *Memorandum Opinion and Order* granting DISH Network Corporation a waiver of certain rules to allow DISH the flexibility to use 20 megahertz of Advanced Wireless Services-4 (AWS-4) spectrum at 2000-2020 MHz for either uplink or downlink operations and extending DISH's final AWS-4 build-out deadline from seven to eight years.<sup>2</sup>

**I. BACKGROUND**

2. DISH Network Corporation (DISH) is the sole holder of the 2 GHz Mobile Satellite Service (MSS) and corresponding AWS-4 terrestrial licenses.<sup>3</sup> DISH acquired the 2 GHz MSS licenses in March 2012.<sup>4</sup> In December 2012, the Commission authorized full terrestrial use of the 2000-2020 MHz and 2180-2200 MHz bands,<sup>5</sup> thereby expanding the possibilities for terrestrial use previously authorized under the Ancillary Terrestrial Component (ATC) of 2 GHz MSS licenses.<sup>6</sup> Specifically, the Commission determined that the public interest would be served by granting AWS-4 terrestrial operating authority to

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<sup>1</sup> NTCH, Inc.'s Application for Review, WT Docket No. 13-225 (filed Jan. 22, 2014) (Application for Review).

<sup>2</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 (WTB 2013) (DISH Waiver Order).

<sup>3</sup> MSS is a radiocommunication service involving transmission between mobile earth stations and one or more space stations. See 47 CFR § 2.1(c). AWS-4 service refers to terrestrial wireless service in the 2000-2020 MHz and 2180-2200 MHz frequency bands. *Service Rules for Advanced Wireless Services in the 2000-2020 MHz and 2180-2200 MHz Bands et al.*, WT Docket No. 12-70 et al., Report and Order and Order of Proposed Modification, 27 FCC Rcd 16102, 16103, para. 1 (2012) (AWS-4 Report and Order).

<sup>4</sup> *DBSD North America, Inc., Debtor-in-Possession et al.*, Order, 27 FCC Rcd 2250, 2262, paras. 1, 31 (IB 2012) (DISH Transfer Order). The AWS-4 and associated MSS licenses are actually held by DISH subsidiaries Gamma Acquisitions L.L.C. (MSS call sign E060430, AWS-4 call signs T060430001 through T060430176) and DBSD Services Limited (MSS call sign E070272, AWS-4 call signs T070272001 through T070272176). For convenience, we refer to these licensees collectively as DISH.

<sup>5</sup> *AWS-4 Report and Order*, 27 FCC Rcd at 16103, para. 1.

<sup>6</sup> See *Flexibility for Delivery of Communications by Mobile Satellite Service Providers in the 2 GHz Band, the L-Band, and the 1.6/2.4 Bands et al.*, Report and Order and Notice of Proposed Rulemaking, 18 FCC Rcd 1962, 1964, para. 1 (2003).

the existing MSS licensees in the band<sup>7</sup> and replaced the ATC rules with Part 27 flexible use rules for terrestrial operations.<sup>8</sup> The AWS-4 rules designated the Lower AWS-4 band (2000-2020 MHz) for mobile and low power fixed (i.e., uplink) operations and the 2180-2200 MHz band (Upper AWS-4 band) for fixed and base station (i.e., downlink) operations.<sup>9</sup> Pursuant to this decision and Section 316 of the Communications Act of 1934, as amended (Act), the Commission proposed to modify DISH's MSS licenses to include the AWS-4 terrestrial authorizations.<sup>10</sup> On January 22, 2013, DISH accepted the proposed license modifications,<sup>11</sup> and on February 15, 2013, the Wireless Telecommunications Bureau (WTB or Bureau) and the International Bureau granted these license modifications.<sup>12</sup> WTB issued the modified licenses to DISH on March 7, 2013.<sup>13</sup>

3. On September 9, 2013, DISH filed a waiver petition requesting the option to use the Lower AWS-4 band for either downlink or uplink operations (DISH Petition).<sup>14</sup> DISH also requested a one-year extension or waiver of the final build-out milestone for DISH's use of the AWS-4 band.<sup>15</sup> DISH stated that, should the Commission grant these requests, DISH would commit to: (1) file an election with the Commission "as soon as commercially practicable, but no later than 30 months after the grant of [its] petition," specifying "whether it will deploy the [Lower AWS-4] 2000-2020 MHz band for downlink or uplink use,"<sup>16</sup> and (2) "bid[] at least a net clearing price equal to any aggregate nationwide reserve price established by the Commission in the upcoming H Block auction (not to exceed the equivalent of \$0.50 per MHz/POP)." At 1995-2000 MHz, the Upper H Block (prescribed for downlink under the

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<sup>7</sup> *AWS-4 Report and Order*, 27 FCC Rcd at 16164-73, 16220-21, 16224, paras. 161-86, 319-20, 331-32.

<sup>8</sup> See generally *AWS-4 Report and Order*, 27 FCC Rcd 16226-47 (Appx. A).

<sup>9</sup> 47 CFR § 27.5(j)(1) ("Two paired channel blocks of 10 megahertz each are available for assignment as follows: Block A: 2000-2010 MHz and 2180-2190 MHz; and Block B: 2010-2020 MHz and 2190-2200 MHz."); *AWS-4 Report and Order*, 27 FCC Rcd at 16116, para. 33 ("We . . . establish the AWS-4 spectrum band as 2000-2020 MHz uplink band paired with 2180-2200 MHz downlink band."). The Commission intended this pairing to parallel that of the 2 GHz MSS band, so as to "minimize the possibility that AWS-4 operations could interfere with 2 GHz MSS operations and . . . [to] offer the greatest opportunity for synergies between the two mobile services." *AWS-4 Report and Order*, 27 FCC Rcd at 16117, para. 39.

<sup>10</sup> *AWS-4 Report and Order*, 27 FCC Rcd at 16164-73, 16220-21, 16224, paras. 161-86, 319-20, 331-32.

<sup>11</sup> Letter from Jeffrey H. Blum, Senior Vice President & Deputy General Counsel, DISH, to Marlene H. Dortch, Secretary, Federal Communications Commission, WT Docket No. 12-70 et al. at 1 (filed Jan. 22, 2013).

<sup>12</sup> See *Service Rules for Advanced Wireless Services in the 2000-2020 MHz and 2180-2200 MHz Bands et al.*, Order of Modification, 28 FCC Rcd 1276, 1278, paras. 6-10 (IB/WTB 2013) (*AWS-4 Order of Modification*).

<sup>13</sup> NTCH filed a petition for reconsideration of the AWS-4 Report and Order in WT Docket Nos. 12-70, 04-356 and ET Docket No. 10-142. See NTCH, Inc., Petition for Reconsideration, WT Docket Nos. 12-70, 04-356, ET Docket No. 10-142 (filed Mar. 7, 2013). Shortly thereafter, NTCH also filed a petition for reconsideration of the AWS-4 Order of Modification. See NTCH, Inc., Petition for Reconsideration, WT Docket Nos. 12-70, 04-356, ET Docket No. 10-142 (filed Mar. 18, 2013); *Service Rules for Advanced Wireless Services in the 2000-2020 MHz and 2180-2200 MHz Bands*, WT Docket No. 12-70, ET Docket No. 10-142, WT Docket No. 04-356, Order on Reconsideration, FCC 18-121 (rel. Aug. 16, 2018 (NTCH AWS-4 Order on Recon.)).

<sup>14</sup> DISH Network Corp., Petition for Waiver of Sections 27.5(j) and 27.53(h)(2)(ii) and Request for Extension of Time, WT Docket No. 13-225, at 1-2, 5-16, 19-20 (filed Sept. 9, 2013) (DISH Petition).

<sup>15</sup> *Id.* at 16-19, 19-20. The AWS-4 construction deadlines are specified in section 27.14(q) of the Commission's rules. 47 CFR § 27.14(q).

<sup>16</sup> DISH Petition at 1-2.

<sup>17</sup> *Id.* at 2, 15. DISH stated that its bidding commitment was contingent on the waiver being granted at least 30 days before the H Block auction commences. *Id.* at 2 n.1, 15.

Commission's rules) is immediately adjacent to the Lower AWS-4 Band (prescribed for uplink under those rules) authorized for use by DISH.<sup>18</sup>

4. On September 13, 2013, the DISH Petition was placed on public notice.<sup>19</sup> AT&T Services, Inc., Sprint Corporation, and NTCH, Inc. (NTCH) filed comments, and Sprint and DISH filed reply comments.<sup>20</sup> Only NTCH opposed the requests.<sup>21</sup>

5. Short-form applications to participate in the H Block auction were due on November 15, 2013, with upfront payments due on December 18, 2013.<sup>22</sup> Based on its review of the short-form applications submitted, the Commission found 23 applicants to be qualified to bid in the auction.<sup>23</sup> These did not include NTCH, which did not file a short-form application.<sup>24</sup>

6. On December 20, 2013, the Bureau granted the DISH Petition, subject to certain conditions. The Waiver Order first provided DISH with the flexibility to elect whether to use the Lower AWS-4 band for uplink or downlink operations. The Order then extended DISH's final build-out milestone for the AWS-4 licenses from seven to eight years.<sup>25</sup> The grant of this relief was conditioned upon DISH's performing two actions.<sup>26</sup> First, DISH would be required to bid in the H Block auction at least a net clearing price equal to the aggregate reserve price set for the auction (\$1.564 billion).<sup>27</sup> Second, DISH would be required to file its uplink or downlink election, which would apply to all AWS-4 licenses, "as soon as commercially practicable but no later than 30 months [after] the release date of [the

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<sup>18</sup> See *Service Rules for Advanced Wireless Services H Block*, Report and Order, 28 FCC Rcd 9483 (2013).

<sup>19</sup> *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).

<sup>20</sup> AT&T supported the DISH proposal as promoting the Commission's flexible use policies. AT&T Services, Inc. Comments at 2. Sprint did not oppose the proposal, but urged that granting the DISH petition should be conditioned upon enforcing DISH's commitment to bid the reserve price in the H Block auction, and requiring DISH to fulfill the cost-sharing obligations to be required of future H Block licensees under the rules. Sprint Corporation Comments at 3-8; Sprint Corporation Reply at 2, 4-7.

<sup>21</sup> See generally NTCH Comments.

<sup>22</sup> See *Auction for H Block Licenses in the 1915-1920 MHz and 1995-2000 MHz Bands Rescheduled for January 22, 2014; Notice of Changes to Auction 96 Schedule Following Resumption of Normal Commission Operations*, Public Notice, 28 FCC Rcd 14529, 14529, para. 3 (WTB 2013).

<sup>23</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>24</sup> See *Auction of H Block Licenses in the 1915-1920 MHz and 1995-2000 MHz Bands; Status of Short-Form Applications to Participate in Auction 96*, Public Notice, 28 FCC Rcd 16372, 16382-83, Attachs. A and B (WTB 2013).

<sup>25</sup> *DISH Waiver Order*, 28 FCC Rcd at 16787-88, 16792-805, paras. 1, 12-43.

<sup>26</sup> *Id.* at 16805, paras. 44-46.

<sup>27</sup> *DISH Waiver Order*, 28 FCC Rcd at 16805, paras. 44, 46; see also *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); *NTCH, Inc.; Petition for Reconsideration of Public Notice Announcing Procedures and Reserve Price for Auction of H Block Licenses* (continued)

(Auction 96), Memorandum Opinion and Order, 28 FCC Rcd 16108, 16112-13, paras. 13-16 (WTB 2013) (Auction 96 Procedures Public Notice Recon Order).

Bureau's *DISH Waiver Order*].”<sup>28</sup> Should DISH elect to use its Lower AWS-4 band spectrum for downlink, the Bureau also specified the technical parameters that any such downlink operations would be required to meet in order to prevent DISH from causing harmful interference to licensees in nearby spectrum bands.<sup>29</sup> The Bureau rejected NTCH's arguments in opposition to the *DISH Petition*.<sup>30</sup>

7. On January 22, 2014, NTCH filed an Application for Review of the *DISH Waiver Order*.<sup>31</sup> On February 6, 2014, DISH filed an opposition to that Application for Review in which DISH not only opposed NTCH's substantive arguments, but also argued that NTCH lacked standing to challenge the *DISH Waiver Order* because it was not a licensee with affected spectrum, and it did not represent that it planned to participate in the H Block auction.<sup>32</sup> NTCH filed a reply to the DISH opposition on February 19, 2014.<sup>33</sup>

8. The H Block auction (Auction 96) began on January 22, 2014, and closed on February 27, 2014, with DISH winning all of the licenses available in the auction.<sup>34</sup>

## II. DISCUSSION

9. The Application for Review is governed by Section 5(c)(4) of the Communications Act of 1934, as amended (Act),<sup>35</sup> and Section 1.115 of the Commission's rules.<sup>36</sup> We dismiss NTCH's Application for Review for a lack of standing.

10. DISH argues that NTCH lacks standing under Section 1.115(a) of the Commission's rules because it has not been aggrieved by the Bureau's grant of the *DISH Petition*.<sup>37</sup> As an initial matter, NTCH argues that every member of the public has standing to challenge the waiver grant based on a generalized “right and . . . interest in seeing that rules adopted by the FCC are in the public interest,”

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<sup>28</sup> *DISH Waiver Order*, 28 FCC Rcd at 16805, paras. 44-45.

<sup>29</sup> *Id.* at 16798-801, 16806, paras. 26-33, 47.

<sup>30</sup> *Id.* at 16807-09, paras. 50-54.

<sup>31</sup> See Application for Review at 1, 14. NTCH also submitted a supplement to its Application for Review outside of the 30-day filing window specified in Section 1.115(d), 47 CFR § 1.115(d), for the filing of an application for review and any supplement thereto. See Supplement to NTCH, Inc.'s Application for Review, WT Docket No. 13-225 (filed Apr. 17, 2014) (NTCH Supplement).

<sup>32</sup> Opposition of DISH Network Corporation to NTCH's Application for Review, WT Docket No. 13-225, at 1, 2-6, 7 (filed Feb. 6, 2014).

<sup>33</sup> NTCH Inc.'s Reply to Opposition, WT Docket No. 13-225, at 1, 7 (filed Feb. 19, 2014) (NTCH Reply).

<sup>34</sup> See *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, Attach. A (WTB 2014); 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>35</sup> 47 U.S.C. § 155(c)(4).

<sup>36</sup> 47 CFR § 1.115.

<sup>37</sup> DISH Opposition at 2. DISH also argues that NTCH failed to serve its Application for Review on DISH as required by Commission rules. See DISH Opposition at 2 n.4 (citing 47 CFR §§ 1.47, 1.115(f)). While our rules require service upon parties to the proceeding, 47 CFR § 1.115(f), DISH received actual notice of NTCH's filing and was able to timely respond to NTCH's application.

though it fails to cite any legal authority for this proposition.<sup>38</sup> We reject NTCH’s argument because it fails to recognize the distinction between (1) standing to file comments in response to a waiver request; and (2) standing to file an application for review. For a waiver proceeding, the Commission may, but does not have to, allow the public or affected parties to submit comments.<sup>39</sup> By contrast, both the Commission’s rules and the Act provide only for a person “aggrieved” by an action taken on delegated authority to file an application for review by the Commission.<sup>40</sup> Thus, contrary to NTCH’s contention, standing does not extend to every member of the public.

11. Section 5(c)(4) of the Act provides that “[a]ny person aggrieved by any . . . order, decision, report or action [made or taken pursuant to delegated authority] may file an application for review by the Commission.”<sup>41</sup> In interpreting the term “aggrieved,” the Commission has required the applicant to allege facts sufficient to: (1) show an injury; (2) demonstrate a direct causal link between the challenged action and its alleged injury; and (3) show that the injury would be prevented or redressed by the requested relief.<sup>42</sup>

12. NTCH asserts on reply that it has standing based on its “thwarted plan to participate in the H Block auction.”<sup>43</sup> Specifically, NTCH claims that it “had every intention of seeking to acquire PCS licenses in that auction until the Commission stacked the deck in DISH’s favor by” two separate actions: (1) “allowing DISH . . . the flexibility” to elect between uplink/downlink status for the adjacent AWS-4 spectrum, and (2) in an earlier Bureau order from which NTCH is separately seeking Commission review,<sup>44</sup> setting the reserve price for the H Block auction so high as to “effectively price[] most carriers, including NTCH, out of the market.”<sup>45</sup> NTCH argues that “[t]he setting of the reserve price for the H Block auction was tied directly to the grant of the waivers sought here,” and thus that it “cannot challenge

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<sup>38</sup> NTCH Reply at 2.

<sup>39</sup> See 5 CFR § 1.925(c) (“The Commission, in its discretion, may give public notice of the filing of a waiver request and seek comment from the public or affected parties.”); see also *id.* § 1.45(b) (imposing no restrictions on who may file an opposition to a waiver request). For the *DISH Petition*, the Bureau specifically stated that “[a] party or interested person” may file comments on the waiver request. *DISH Waiver Public Notice*, 28 FCC Rcd at 12988.

<sup>40</sup> 47 CFR § 1.115(a); 47 U.S.C. § 155(c)(4).

<sup>41</sup> 47 U.S.C. § 155(c)(4); accord 47 CFR § 1.115(a) (“Any person aggrieved by any action taken pursuant to delegated authority may file an application requesting review of that action by the Commission. . . . Any application for review which fails to make an adequate showing in this respect will be dismissed.”).

<sup>42</sup> *K Licensee, Inc.*, Memorandum Opinion and Order, 31 FCC Rcd 841, 842, para. 3 (2016); accord *New Jersey Public Broadcasting Authority Request to Cancel License for Translator DW276BX, Pompton Lakes, New Jersey*, Memorandum Opinion and Order, 29 FCC Rcd 5558, 5558-59, paras. 2-3 (2014). The Commission based this interpretation on the U.S. Supreme Court’s test for constitutional standing. *E.g.*, *K Licensee, Inc.*, 31 FCC Rcd at 842, para. 3 n.8 (citing *Duke Power Co. v. Carolina Envtl. Study Grp., Inc.*, 438 U.S. 59 (1978)).

<sup>43</sup> NTCH Reply at 1; accord *id.* at 1-3. NTCH also states that it still plans to bid on the AWS-4 spectrum based on its assumption that the Commission will grant its petitions for reconsideration of the *AWS-4 Report and Order* and the *AWS-4 Order of Modification*. *Id.* at 2-3. See *NTCH AWS-4 Order on Recon*.

<sup>44</sup> On September 13, 2013, the Bureau released a public notice establishing procedures for an auction of the H Block bands (1915-1920 MHz and 1995-2000 MHz) and set an aggregate reserve price of \$1.564 billion. See *Auction 96 Procedures Public Notice*, 28 FCC Rcd at 13064, para. 172. The Bureau subsequently denied NTCH’s petition for reconsideration of that Public Notice. See *Auction 96 Procedures Public Notice Recon Order*, 28 FCC Rcd at 16110-11, 16114, paras. 9, 21. On December 27, 2013, NTCH filed an application for review of that Order. See *NTCH, Inc.’s Application for Review*, AU Docket No. 13-178 (filed Dec. 27, 2013). See also *infra* note 52.

<sup>45</sup> NTCH Reply at 1-2.

the . . . H Block proceedings without also challenging the grant of the waiver.”<sup>46</sup> Finally, NTCH asserts that grant of the DISH waiver “may adversely affect its rights as AWS-4 licensee down the road when those licenses are ultimately opened to competitive bidding.”<sup>47</sup>

13. NTCH lacks standing because it has failed to demonstrate any direct causal link between the Bureau’s decision to grant DISH’s petition for waiver and any actual or concrete injury to NTCH. As DISH points out, NTCH does not claim to be a licensee operating on adjacent spectrum that might be adversely affected by DISH’s potential use of the Lower AWS-4 band for downlink rather than uplink transmission.<sup>48</sup> Nor does NTCH assert any injury from the waiver extending DISH’s construction period for its AWS-4 licenses. To the extent NTCH argues that it has standing because grant of the DISH waiver “affects the value of the adjacent H Block,”<sup>49</sup> we find such a claim to be insufficient to confer standing. NTCH has not demonstrated the required direct causal link between grant of the DISH waiver petition and any alleged injury to it, or that such injury will be prevented or redressed by denying DISH such relief. As noted above, the deadline for the filing of short-form applications required to participate in the H Block auction was November 15, 2013. The Bureau did not act on DISH’s waiver petition until December 20, 2013. NTCH made a voluntary, business decision not to participate in the H Block auction by not filing a short-form application, which was due *prior* to the adoption of the Bureau’s order for which it is seeking review here. Thus, because NTCH “itself chose not to seek to qualify to bid for the licenses” in the H Block auction, it lacks standing as a party aggrieved by the subsequent grant of the DISH waiver.<sup>50</sup>

14. Moreover, to the extent NTCH argues that the Bureau’s public notice, setting what it asserts was an “unprecedentedly high” reserve price in the H Block auction proceeding, “effectively priced most carriers, including NTCH, out of the market,”<sup>51</sup> that argument is the subject of NTCH’s application for review filed in a separate proceeding.<sup>52</sup> In any event, NTCH has failed to demonstrate how DISH’s commitment to bid a specific amount equal to the *aggregate* reserve price for all H Block licenses (much less the Bureau’s establishment of that aggregate reserve price in a wholly separate order)

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<sup>46</sup> *Id.* at 2.

<sup>47</sup> *Id.* at 3.

<sup>48</sup> DISH Opposition at 2.

<sup>49</sup> Application for Review at 11; NTCH Reply at 1-3.

<sup>50</sup> See *Applications of Alaska Native Wireless, L.L.C.*, Order, 18 FCC Rcd 11640, 11644-45, paras. 11-12. See also *High Plains Wireless, L.P. v. FCC*, 276 F.3d 599 (D.C. Cir. 2002) (no standing with respect to licenses for which challenger did not compete). Nor is this a situation in which NTCH would have been forced to bid against an allegedly invalid application, or which it has claimed that it would have subjected itself as a winning bidder to a divestiture or other requirement that would have precluded its auction participation as a practical matter. See *Alvin Lou Media, Inc. v. FCC*, 571 F.3d 1 (D.C. Cir. 2009).

<sup>51</sup> NTCH Reply at 2-3.

<sup>52</sup> NTCH has filed a separate Application for Review of the Bureau order denying NTCH’s Petition for Reconsideration of Bureau’s Public Notice setting the H Block reserve price. See NTCH, Inc.’s Application for Review, AU Docket No. 13-178 (filed Dec. 27, 2013). NTCH’s challenge to the *Auction 96 Procedures Public Notice Recon Order* has been resolved in a separate order. See *NTCH, Inc., Application for Review of Public Notice Announcing Procedures and Reserve Price for Auction of H Block Licenses (Auction 96)*, AU Docket No. 13-178, Memorandum Opinion and Order, FCC 18-122 (rel. Aug. 16, 2018). To the extent that NTCH argues that the proceedings on the H-Block reserve price and the instant waiver for uplink flexibility are linked (NTCH Reply at 2), NTCH’s challenge to the reserve price decision in the earlier-issued Procedures PN cannot confer standing to challenge the decision to grant a waiver of technical requirements for a wholly separate band.

would have caused NTCH to be “priced . . . out of the market” for any *specific* H Block licenses.<sup>53</sup> Because NTCH fails to allege any injury fairly traceable to the Bureau’s decision to permit DISH the flexibility to use the Lower AWS-4 block for uplink operations, the relief requested, i.e., reversal of the order granting the DISH petition, was properly denied.

15. NTCH also incorrectly suggests that it has standing because it remains interested in acquiring AWS-4 spectrum when it is ultimately made available for other applicants and that this decision to grant the DISH Waiver could affect its rights as an AWS-4 licensee.<sup>54</sup> NTCH is not an AWS-4 licensee. NTCH’s claim turns on the wholly speculative assumptions that the Commission might eliminate DISH’s terrestrial authority, that it might thereafter make this spectrum available for non-AWS-4 licensees, and that it might determine after further proceedings to do so by auctioning licenses for terrestrial operations in this band, notwithstanding the Commission’s prior determination that separate MSS and terrestrial broadband licensees cannot co-exist in that band.<sup>55</sup> Such unfounded speculation does not establish any actual or imminent injury.<sup>56</sup> Therefore, this claim also provides no basis for establishing that NTCH has standing to challenge the Bureau’s decision to grant the DISH Waiver in particular, which is premised on the existing rules under which DISH, not NTCH, is the Commission’s sole AWS-4 licensee.

### III. CONCLUSION

16. For the reasons set forth above, we conclude that NTCH has failed to establish standing for seeking Commission review of the Bureau’s *Memorandum Opinion and Order*, and accordingly dismiss the Application for Review. As a result, we need not address the merits of NTCH’s challenge to the Bureau’s order.

### IV. ORDERING CLAUSES

17. Accordingly, IT IS ORDERED, pursuant to Sections 4(i), 5(c), and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 155(c), 303(r), and Section 1.115 of the Commission’s Rules, 47 CFR § 1.115, that the Application for Review filed by NTCH, Inc. on January 22, 2014, IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch  
Secretary

<sup>53</sup> The only minimum threshold for bidding on an individual license in the H Block auction was the “minimum opening bid” amount—an individualized minimum for placing an opening bid on a license calculated by a factor ranging from less than \$.01/MHz-pop to \$.16/MHz-pop (depending on the license)—a requirement and valuation to which NTCH had no objection. *See Auction of H Block Licenses in the 1915-1920 MHz and 1995-2000 MHz Bands Scheduled for January 14, 2014; Notice and Filing Requirements, Reserve Price, Minimum Opening Bids, Upfront Payments, and Other Procedures for Auction 96*, Public Notice, 28 FCC Rcd 13019, 13065, paras. 176-77 (WTB 2013). While the aggregate reserve price was calculated by a factor of \$.50/MHz-pop (yielding an aggregate value for the total license pool of \$1.564 billion), that price was not applied on license-by-license basis, and the reserve price requirement did not preclude bidders from placing bids on any individual license that were less than that license’s proportionate share of the aggregate reserve price.

<sup>54</sup> NTCH Reply at 2.

<sup>55</sup> *See AWS-4 NPRM*, 27 FCC Rcd at 3584, para. 71.

<sup>56</sup> *N.Y. Reg'l Interconnect, Inc. v. FERC*, 634 F.3d 581, 587 (D.C. Cir. 2011); *see also Pub. Citizen, Inc. v. NHTSA*, 489 F.3d 1279, 1292-93 (D.C. Cir. 2007).

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

In the Matter of )  
 )  
DISH Network Corporation ) WT Docket No. 13-225  
 )  
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**

**Adopted: December 20, 2013**

**Released: December 20, 2013**

By the Acting Chief, Wireless Telecommunications Bureau:

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**I. SUMMARY OF ACTION**

1. With this Memorandum Opinion and Order, the Wireless Telecommunications Bureau (“Bureau”) grants waivers of the Commission’s rules, subject to certain conditions, in response to a petition filed by DISH Network Corporation to provide DISH with flexibility to use 20 megahertz of Advanced Wireless Services-4 (“AWS-4”) spectrum at 2000-2020 MHz (the “Lower AWS-4 Band”) for uplink or downlink operations. We also waive DISH’s final AWS-4 build-out milestone, extending the

deadline from seven to eight years.<sup>1</sup> In granting this relief, we determine that, provided DISH complies with several conditions, the request meets our general waiver standard as well as requirements specific to wireless services.

2. The waiver is subject to DISH meeting the following two conditions. First, pursuant to commitments made in its waiver request, DISH must bid in the upcoming H Block auction “either directly or indirectly through an affiliated entity or designated entity, at least a net clearing price” equal to the aggregate reserve price set for that auction of \$1.564 billion.<sup>2</sup> Second, DISH must file its uplink or downlink election, which shall apply to all AWS-4 licenses, as soon as commercially practicable but no later than 30 months after the release date of this Memorandum Opinion and Order.<sup>3</sup> Failure by DISH to comply with either of these conditions will automatically terminate the waivers granted in this order.

3. In the event that DISH first preserves its election ability and then elects to use its Lower AWS-4 Band spectrum for downlink operations, we specify the technical parameters such operations must meet to avoid causing harmful interference to licensees of nearby spectrum bands. These parameters are similar to those established for similar AWS and PCS downlink bands, including the AWS-1 downlink band.

4. In granting the DISH Petition, we decline to grant Sprint’s request that we impose a specific cost sharing payment condition upon DISH should it be a winning bidder in the H Block auction, because that payment requirement is already established by the Commission’s rules applicable to any winning bidder in that auction. We also decline to address in this particular adjudication Sprint’s request that we issue a blanket waiver to all future H Block licensees of certain H Block technical rules. Finally, we reject NTCH’s various arguments requesting that we deny or delay consideration of the DISH Petition.

## II. BACKGROUND AND DISH PETITION

5. In 2012, the Commission’s AWS-4 *Report and Order* authorized full terrestrial use of the 2000-2020 MHz/2180-2200 MHz band, initially authorized only for Mobile Satellite Service (“MSS”) and its associated Ancillary Terrestrial Component (“ATC”).<sup>4</sup> This action followed a 2011 Commission Order adding co-primary Fixed and Mobile terrestrial allocations to the 2 GHz MSS bands,<sup>5</sup> which was

<sup>1</sup> See DISH Network Corporation, Petition for Waiver of Sections 27.5(j) and 27.53(h)(2)(ii) and Request for Extension of Time, WT Docket No. 13-225 (filed Sept. 9, 2013) (“DISH Petition”). DISH filed its waiver request on behalf of itself and its wholly owned subsidiaries Gamma Acquisitions L.L.C. and New DBSD Satellite Services G.P. *Id.* at 1. This order refers to DISH Network Corporation and these subsidiaries collectively as “DISH.”

<sup>2</sup> See Auction of H Block Licenses in the 1915-1920 MHz and 1995-2000 MHz Bands Scheduled for January 14, 2014; Notice and Filing Requirements, Minimum Opening Bids, Upfront Payments, and other Procedures for Auction 96, AU Docket No. 13-178, *Public Notice*, 28 FCC Rcd 13019, 13064 ¶ 172 (WTB 2013) (“Auction 96 Procedures PN”); NTCH, Inc. Petition for Reconsideration of Public Notice Announcing Procedures and Reserve Price for Auction of H Block Licenses (Auction 96), AU Docket No. 13-176, *Memorandum Opinion and Order*, DA 13-2281 (WTB/Auctions Division, Nov. 27, 2013) (“Auction 96 Procedures PN Recon Order”); see also DISH Petition at 15.

<sup>3</sup> See *infra* at ¶¶ 39-40.

<sup>4</sup> MSS is a radiocommunications service involving transmission between mobile earth stations and one or more space stations. See 47 C.F.R. § 2.1(c). The ATC rules allowed authorized MSS operators to augment their satellite services with terrestrial facilities. See *Flexibility for Delivery of Communications by Mobile Satellite Service Providers in the 2 GHz Band, the L-Band, and the 1.6/2.4 Bands*, IB Docket Nos. 01-185, 02-364, *Report and Order and Notice of Proposed Rulemaking*, 18 FCC Rcd 1962, 1964 ¶ 1 (2003).

<sup>5</sup> 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, ET Docket No. 10-142, *Report and Order*, 26 FCC Rcd 5710 (2011) (“2 GHz Band Co-Allocation Order”).

intended to “lay the foundation for more flexible use of the band in the future, thereby promoting investment in the development of new services and additional innovative technologies.”<sup>6</sup> In the *AWS-4 Report and Order*, the Commission further observed that there had been “little commercial use of the [2000-2020 MHz and 2180-2200 MHz] spectrum for MSS and none for terrestrial (ATC) service,”<sup>7</sup> and replaced the ATC rules with Part 27 flexible use rules for terrestrial operations.<sup>8</sup> The AWS-4 rules designate the 2000-2020 MHz band for mobile and low power fixed (*i.e.*, uplink) operations and the 2180-2200 MHz band for fixed and base station (*i.e.*, downlink) operations.<sup>9</sup> The Commission intended this pairing to parallel that of the 2 GHz MSS band, so as to “minimize the possibility that AWS-4 operations could interfere with 2 GHz MSS operations and . . . offer the greatest opportunity for synergies between the two mobile services.”<sup>10</sup>

6. DISH is the sole holder of the 2 GHz MSS and corresponding AWS-4 licenses.<sup>11</sup> DISH acquired the 2 GHz MSS licenses in 2012.<sup>12</sup> In granting DISH’s applications for transfer of control, the International Bureau reiterated the Commission’s intent “to remove regulatory barriers in this band through a rulemaking to unleash more spectrum for mobile broadband.”<sup>13</sup> Subsequently, in the *AWS-4 Report and Order*, the Commission determined that the public interest would be served through grant of AWS-4 operating authority to the existing MSS licensees in the band.<sup>14</sup> Pursuant to this decision and Section 316 of the Communications Act, the Commission proposed to modify DISH’s MSS licenses to include the AWS-4 authorizations.<sup>15</sup> On January 22, 2013, DISH accepted the proposed license modifications.<sup>16</sup> On February 15, the Wireless Telecommunications Bureau and the International Bureau

<sup>6</sup> *Id.* at 5714, 5716 ¶¶ 8, 13.

<sup>7</sup> Service Rules for Advanced Wireless Services in the 2000-2020 MHz and 2180-2200 MHz Bands, WT Docket No. 12-70, *Report and Order and Order of Proposed Modification*, 27 FCC Rcd 16102, 16108, at ¶ 10 (2012) (“AWS-4 Report and Order”).

<sup>8</sup> See generally *AWS-4 Report and Order*, 27 FCC Rcd 16102. AWS-4 service refers to terrestrial wireless service in the 2000-2020 MHz and 2180-2200 MHz frequency bands. *Id.* at 16103 ¶ 1.

<sup>9</sup> 47 C.F.R. § 27.5(j) (“Two paired channel blocks of 10 megahertz each are available for assignment as follows: Block A: 2000-2010 MHz and 2180-2190 MHz; and Block B: 2010-2020 MHz and 2190-2200 MHz.”); *AWS-4 Report and Order*, 27 FCC Rcd at 16116 ¶ 33 (we “establish the AWS-4 spectrum band as 2000-2020 MHz uplink band paired with 2180-2200 MHz downlink band”).

<sup>10</sup> *AWS-4 Report and Order*, 27 FCC Rcd at 16117 ¶ 39.

<sup>11</sup> The AWS-4 and associated MSS licenses are held by DISH subsidiaries Gamma Acquisitions L.L.C. (MSS call sign E060430, AWS-4 call signs T060430001 through T060430176) and New DBSD Satellite Services G.P. (MSS call sign E070272, AWS-4 call signs T070272001 through T070272176).

<sup>12</sup> New DBSB Satellite Service G.P., Debtor-in-Possession, and TerreStar Licensee Inc., Debtor-in-Possession, Request for Rule Waivers and Modified Ancillary Terrestrial Component Authority, *Order*, 27 FCC Rcd 2250, 2250-51, 2262 ¶¶ 1, 31 (2012).

<sup>13</sup> *Id.* at 2261 ¶ 29 (citing *2 GHz Band Co-Allocation Order*, 26 FCC Rcd 5710; Connecting America: The National Broadband Plan, Recommendation 5.8.4 at 87-88 (2010), available at [http://hraunfoss.fcc.gov/edocs\\_public/attachment/DOC-296935A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachment/DOC-296935A1.pdf) (last visited Nov. 22, 2013) (“National Broadband Plan”)).

<sup>14</sup> *AWS-4 Report and Order*, 27 FCC Rcd at 16164-73, 16220-22, 16224 ¶¶ 161-86, 319-22, 331-32.

<sup>15</sup> *Id.* at 16164-73, 16220-22, 16224 ¶¶ 161-86, 319-22, 331-34.

<sup>16</sup> Letter from Jeffrey H. Blum, Senior Vice President & Deputy General Counsel, DISH, to Marlene H. Dortch, Sec’y, Federal Communications Commission, WT Docket No. 12-70 (filed Jan. 22, 2013).

modified DISH's MSS licenses to authorize DISH to provide AWS-4 service.<sup>17</sup> The Wireless Telecommunications Bureau issued DISH these modified licenses on March 7, 2013.

7. In preparation for the H Block (1915-1920 MHz/1995-2000 MHz) Auction, on July 15, 2013, the Bureau released a Public Notice announcing Auction 96 and seeking comment on procedures for conducting the auction, including a proposal to set a reserve price and what factors should be considered in determining the reserve amount.<sup>18</sup> On September 9, 2013, DISH filed an *ex parte* submission supporting the proposal to set a reserve price and suggesting that the H Block spectrum should be valued at "at least \$0.50 per megahertz of bandwidth per population ("MHz-pop") on a nationwide aggregate basis."<sup>19</sup> On September 13, 2013, the Bureau released the *Auction 96 Procedures Public Notice* establishing procedures and setting an aggregate reserve price of \$1.564 billion.<sup>20</sup> In doing so, the Bureau indicated that "the limited comment we received on this issue is generally supportive of our reserve price proposals, and we received no opposition to the use of a reserve," and pointed to DISH's estimated valuation of at least \$0.50 per MHz-pop based on prior auction results, secondary market transactions, and financial institutions' estimates as the basis for its calculation.<sup>21</sup> On October 18, 2013, NTCH, Inc. filed a petition for reconsideration of the *Auction 96 Procedures Public Notice* seeking changes in the procedures and other relief.<sup>22</sup> The Bureau subsequently denied NTCH's petition.<sup>23</sup> Auction 96 is scheduled to begin on January 22, 2014.

8. On September 9, 2013, contemporaneous with its filings in support of an agreement on interoperability in the 700 MHz band,<sup>24</sup> DISH filed a waiver petition requesting the option to use the Lower AWS-4 Band either for downlink or uplink operations.<sup>25</sup> DISH also requested a one-year extension of the final construction milestone for DISH's AWS-4 licenses.<sup>26</sup> DISH states that should the Commission grant these requests, it will commit to: (1) filing an election with the Commission stating whether it will use the AWS-4 2000-2020 MHz band for uplink or downlink "as soon as commercially practicable, but no later than 30 months after the grant of [its] petition"; and (2) "either directly or indirectly through an affiliated entity or designated entity, bidding at least a net clearing price equal to any

<sup>17</sup> See generally Service Rules for Advanced Wireless Services in the 2000-2020 MHz and 2180-2200 MHz Bands, *Order of Modification*, 28 FCC Rcd 1276 (2013) ("AWS-4 Order of Modification").

<sup>18</sup> See 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*, DA 13-1540, 28 FCC Rcd 10013, 10026 ¶¶ 52-53 (WTB 2013) ("Auction 96 Comment PN"). A summary of this public notice was published at 78 Fed. Reg. 45524 (Jul. 29, 2013).

<sup>19</sup> Letter from Jeffrey H. Blum, Senior Vice President & Deputy General Counsel, DISH, to Marlene H. Dortch, Sec'y, Federal Communications Commission, AU Docket No. 13-178, at 1 (filed Sept. 9, 2013). In support of its proposal, DISH stated that the 2006 AWS-1 spectrum auction resulted in an average valuation of \$0.54 per MHz-pop, and recent secondary market purchases of AWS spectrum valued it between \$0.61 and \$0.69 per MHz-pop, with financial institutions giving current estimates of the value of the H Block spectrum at between \$0.62 and \$1.00 per MHz-pop. *Id.*

<sup>20</sup> *Auction 96 Procedures PN*, 28 FCC Rcd at 13064 ¶ 172.

<sup>21</sup> *Id.* at 13064 ¶¶ 170, 172.

<sup>22</sup> Petition for Reconsideration of NTCH, Inc., AU Docket No. 13-178 (filed Oct. 18, 2013).

<sup>23</sup> See *Auction 96 Procedures PN Recon Order*.

<sup>24</sup> Letter from Jeffrey H. Blum, Senior Vice President & Deputy General Counsel, DISH, to Marlene H. Dortch, Sec'y, Federal Communications Commission, WT Docket No. 12-69 (filed Sept. 10, 2013).

<sup>25</sup> DISH Petition at 2.

<sup>26</sup> *Id.* at 16-19. The AWS-4 construction deadlines are specified in section 27.14(q) of the Commission's rules. 47 C.F.R. § 27.14(q).

aggregate nationwide reserve price established by the Commission in the upcoming H Block auction (not to exceed the equivalent of \$0.50 per MHz/POP).<sup>27</sup>

9. The Bureau gave public notice of the petition on September 13, 2013.<sup>28</sup> Comments were due on September 30, 2013, and reply comments were due on October 10, 2013, but the latter deadline was extended to October 28, 2013.<sup>29</sup> Three parties filed comments and two parties filed reply comments.<sup>30</sup> AT&T expressed support for the DISH proposal because it would promote the Commission's flexible use policies.<sup>31</sup> NTCH expressed opposition to the proposal, as discussed below.<sup>32</sup> Sprint does not oppose granting DISH's request so long as the Commission can enforce DISH's commitment to bid the \$1.564 billion reserve price and DISH fulfills its cost-sharing obligations should it obtain an H Block license at auction.<sup>33</sup> DISH agrees with Sprint's position—stating that it “is uncontested”—that grant of the DISH Petition should be conditioned upon DISH bidding the aggregate reserve price in the H Block auction, but opposes Sprint's request for a cost-sharing condition.<sup>34</sup> DISH also opposes NTCH's comments.<sup>35</sup> Further, on December 13, 2013, DISH submitted an *ex parte* letter stating that, if its waiver request is granted and it elects to use the Lower AWS-4 Band for downlink, it commits to comply with the requirements of certain additional AWS technical rules.<sup>36</sup>

### III. DISCUSSION

10. As explained below, we grant the DISH Petition with certain conditions. In so doing, we first review the claimed technical and other public interest benefits of DISH's proposal, and examine whether the public interest benefits and unique circumstances posed by DISH's request meet our waiver standard. We also identify the rules that must be waived in the event that the band is used for downlink and analyze the interference environment associated with a possible downlink election to identify the technical requirements necessary to ensure that harmful interference would not arise in the event of such an election. Next, we discuss the election period that accompanies our grant of DISH's waiver, allowing it a specified period of time to elect whether to use the band as uplink or downlink. We then consider DISH's request for a one-year extension or waiver of the final build-out requirement. Thereafter we enumerate and describe the express conditions that must be fulfilled for DISH to effectuate the relief granted herein. Finally, we examine Sprint's request that we condition a waiver grant on DISH's timely

<sup>27</sup> DISH Petition at 1-2, 15. DISH states that its bidding commitment is contingent on the waiver being granted at least 30 days before the H Block auction commences. *Id.* at 2, 15.

<sup>28</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*, DA 13-1877 (Sept. 13, 2013), published at 78 Fed. Reg. 59,633 (Sept. 27, 2013).

<sup>29</sup> *Id.*; Revised Filing Deadlines Following Resumption of Normal Commission Operations, *Public Notice*, DA 13-2025, at 6 (Oct. 17, 2013), published at 78 Fed. Reg. 66,002 (Nov. 4, 2013).

<sup>30</sup> See Appendix A.

<sup>31</sup> AT&T Comments at 2 (capitalization omitted).

<sup>32</sup> See generally NTCH Comments.

<sup>33</sup> See Sprint Comments at 3-7; Sprint Reply at 2 (“In its comments, Sprint expressed narrow and qualified support for DISH's waiver request, noting that the public interest benefits of revising the Commission's AWS-4 technical rules were uncertain and that a grant of the waiver should be subject to two important conditions.”)

<sup>34</sup> DISH Reply at 2-3.

<sup>35</sup> *Id.* at 4-6.

<sup>36</sup> Letter from Jeffrey H. Blum, Senior Vice President and Deputy General Counsel, DISH, to Marlene H. Dortch, Sec'y, Federal Communications Commission, WT Docket No. 13-225 (filed Dec. 13, 2013) (“DISH December 13 Letter”).

and complete reimbursement of the Broadcast Auxiliary Service (BAS) clearing expenses for any H Block licenses it may be granted in the H Block auction and examine the arguments raised by NTCH in opposition to the waiver request.

#### A. Waiver Standard

11. Waiver applicants are obligated to demonstrate “good cause” for obtaining a waiver of the Commission’s rules.<sup>37</sup> Under this standard, waivers are appropriate only if “both (i) special circumstances warrant a deviation from the general rule, and (ii) such deviation will serve the public interest.”<sup>38</sup> Section 1.925 of the Commission’s rules, which pertains to wireless radio services, further provides that “the Commission may grant a request for waiver if it is shown that: (i) The underlying purpose of the rule(s) would not be served or would be frustrated by application to the instant case, and that a grant of the requested waiver would be in the public interest; or (ii) in view of the unique or unusual factual circumstances of the instant case, application of the rule(s) would be inequitable, unduly burdensome or contrary to the public interest, or the applicant has no reasonable alternative.”<sup>39</sup> The Bureau is addressing this waiver request under its delegated authority pursuant to Sections 0.131 and 0.331 of the Commission’s rules.<sup>40</sup>

#### B. Waiver of Technical Rules

##### 1. DISH Petition

12. The AWS-4 band plan places AWS-4 uplink spectrum immediately adjacent to downlink spectrum of another service (1995-2000 MHz, the “Upper H Block”). Because of these contrasting but adjacent uses, the AWS-4 rules impose carefully calibrated power and out-of-band emission (“OOBE”) limits on the 2000-2020 MHz band in order to protect operations in the adjacent 1995-2000 MHz band, and require AWS-4 licensees to accept limited interference from operations in that adjacent band.<sup>41</sup> Correspondingly, the H Block rules impose restrictive OOBE limits on the 1995-2000 MHz band in order to protect operations in the 2005-2020 portion of the AWS-4 band.<sup>42</sup>

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<sup>37</sup> 47 C.F.R. § 1.3.

<sup>38</sup> See, e.g., Lazo Technologies, Inc., *Order on Reconsideration*, 26 FCC Rcd 16661, 16668 & n.56 (2011); see also *Northeast Cellular Tel. Co. v. FCC*, 897 F.2d 1164 (D.C. Cir. 1990).

<sup>39</sup> 47 C.F.R. § 1.925(b)(3). This rule applicable to wireless services requires “substantially the same” showing as 47 C.F.R. § 1.3. Barry P. Lunderville, *Memorandum Opinion and Order*, 28 FCC Rcd 665 ¶ 14 n.51 (2013).

<sup>40</sup> 47 C.F.R. §§ 0.131, 0.331.

<sup>41</sup> *AWS-4 Report and Order*, 27 FCC Rcd at 16111, 16126-45, 16157-61 ¶¶ 18, 61-100, 135-51; see also Service Rules for Advanced Wireless Services H Block—Implementing Section 6401 of the Middle Class Tax Relief and Job Creation Act of 2012 Related to the 1915-1920 MHz and 1995-2000 MHz Bands, WT Docket No. 12-357, *Report and Order*, 28 FCC Rcd 9483, 9503 ¶ 50 (2013) (“H Block Report and Order”).

<sup>42</sup> *H Block Report and Order*, 28 FCC Rcd at 9508-13 ¶¶ 63-73. The OOBE limits from the Upper H Block were set such that “the overall interference imposed on the AWS-4 uplink operations [at 2000-2020 MHz] is no more than currently exists, to the greatest extent possible, without imposing a harsh and undue burden on Upper H Block downlink operations.” *Id.* at 9509 ¶ 66. To balance the utility of the H Block and the AWS-4 spectrum bands, the H Block OOBE limit was set at  $43+10\log(P)$  dB overall, with a tighter limit of  $70+10\log(P)$  dB imposed on emissions into the 2005-2020 MHz band. *See id.* at 9508-9513 ¶¶ 63-73. In balancing the needs of these bands, the Commission also required AWS-4 and 2 GHz MSS licensees to accept harmful interference from lawful Upper H Block operations if such interference is due to OOBE into the 2000-2005 MHz band or due to receiver overload into the 2000-2020 MHz band. *See AWS-4 Report and Order*, 27 FCC Rcd at 16135, 16160-61, 16220 ¶¶ 80-81, 149-51, 319.

13. DISH requests waiver of the Commission's rules that specify that the Lower AWS-4 Band be used for uplink operations, asking that we provide it with the flexibility to elect whether to use this band for uplink or downlink operations. DISH commits to making this election as soon as commercially practicable, but no later than 30 months after any grant of its petition.<sup>43</sup> Specifically, DISH seeks waivers of Commission rules 27.5(j) (specifying, *inter alia*, the AWS-4 frequencies and frequency pairings), 27.50(d)(7) (Lower AWS-4 Band power limits), 27.53(h)(2)(ii) (Lower AWS-4 Band out-of-band emission (OOBE) limits), 27.65 (Lower AWS-4 Band acceptance of interference from operations at 1995-2000 MHz), and “to the extent required . . . other technical AWS-4 rules . . . that impose technical requirements on AWS-4 uplink operations at 2000-2020 MHz, but would not on their face apply to DISH’s proposed downlink terrestrial operations in the 2000-2020 MHz band.”<sup>44</sup>

14. DISH asserts that waiving the necessary technical rules to permit terrestrial downlink use of the 2000-2020 MHz band would increase the utility of this AWS-4 spectrum.<sup>45</sup> Further, DISH claims that “more flexible use of AWS-4 spectrum may allow it to best optimize its 2 GHz satellite and terrestrial services.”<sup>46</sup> DISH also contends that the waiver would provide “increase[d] protection and utility” to the Upper H Block because, should DISH decide to use 2000-2020 MHz for downlink, it “would commit . . . to accept a less restrictive OOBE limit on H Block emissions above 2000 MHz.”<sup>47</sup> DISH states that “the requested flexibility would have no adverse operational impact on any other Commission licenses.”<sup>48</sup> DISH proposes conditioning grant of the waivers it seeks on standard power and OOBE limits generally applicable to high-power downlink operations where adjacent-band usage is compatible.<sup>49</sup> DISH additionally “commits to comply with any requirements imposed on DISH as an AWS licensee pursuant to Sections 27.1133, 27.55(a)(1), 27.50(d)(3), and 27.50(d)(10) of the Commission’s rules.”<sup>50</sup>

15. DISH also argues that grant of the waiver could enhance the utility and value of adjacent bands, H and J Blocks, with the potential to provide substantial economic benefits from harmonized PCS/AWS operations.<sup>51</sup> Specifically, with regard to the 2020-2025 MHz band (formerly the “Lower J Block”), which the Commission has proposed designating for uplink use in the AWS-3 proceeding,<sup>52</sup> DISH argues that, if 2000-2020 MHz were a downlink band, “the lower J Block could also be auctioned for downlink operations” in a manner “analogous to the existing AWS-1 downlink and the BAS arrangement, which has a successful co-existence track record.”<sup>53</sup>

<sup>43</sup> DISH Petition at 1-2.

<sup>44</sup> *Id.* at 2 n.2; *see* 47 C.F.R. §§ 27.5(j), 27.50(d), 27.53(h)(2)(ii), 27.65.

<sup>45</sup> DISH Petition at 9-10.

<sup>46</sup> *Id.* at 13 (footnote omitted).

<sup>47</sup> *Id.* at 14.

<sup>48</sup> *Id.* at 2.

<sup>49</sup> *Id.* at 11.

<sup>50</sup> DISH December 13 Letter.

<sup>51</sup> DISH Petition at 14.

<sup>52</sup> Amendment of the Commission’s Rules with Regard to Commercial Operations in the 1695-1710 MHz, 1755-1780 MHz, and 2155-2180 MHz Bands, GN Docket No. 13-185, *Notice of Proposed Rulemaking and Order on Reconsideration*, 28 FCC Rcd 11479, 11500, 11501 ¶¶ 44, 48 (2013) (“AWS-3 Notice of Proposed Rulemaking”). The Commission’s proposal envisions using the 2020-2025 MHz band either with yet-to-be-identified spectrum or unpaired. *Id.* at 11482 ¶¶ 2-3.

<sup>53</sup> DISH Petition at 15-16.

16. Overall, DISH concludes, “[t]he requested flexibility may permit AWS-4 operations in the 2000-2020 MHz band to be harmonized and co-directional with operations in the PCS band, and the H and J Blocks, thus providing up to 30 MHz of contiguous downlink spectrum.”<sup>54</sup> DISH suggests that this spectrum harmonization could facilitate commercial deployment of the new spectrum, and reduce user equipment complexity and cost.<sup>55</sup> Further, DISH states its commitment to bid “at least a net clearing price” equal to the aggregate reserve price of \$1.564 billion in the H block auction would provide critical funding for the nationwide, interoperable public safety broadband network to be operated by the First Responder Network Authority (FirstNet).<sup>56</sup>

17. Finally, DISH asserts that grant of its waiver would result in several non-technical benefits, including accelerated broadband deployment, increased supply of downlink spectrum, increased wireless broadband competition, enhanced 700 MHz interoperability, and increased revenues from the H and J Block auctions.<sup>57</sup>

## 2. Application of Waiver Standard

18. After consideration of the DISH Petition and the record compiled in this proceeding, we conclude that, subject to the conditions outlined below, the technical rule waivers sought by DISH are warranted based on the unique factual circumstances of DISH’s status as a licensee of both AWS-4 and 2 GHz MSS licenses. In these circumstances, application of the rules for which DISH seeks a waiver would be both unduly burdensome and contrary to the public interest.

19. As noted above, the central purposes of the Commission’s proceedings leading to the *AWS-4 Report and Order* have been to lay the foundation for more flexible use of this band, and to promote investment in new and innovative mobile broadband services by unleashing more spectrum for these critical services. We agree with AT&T that the DISH Petition “falls squarely within the scope of the Commission’s highly successful flexible use policy.”<sup>58</sup> Flexibility encourages research, innovation, and investment, spurs the development of new technologies and their deployment to customers, and overall encourages efficient use of spectrum.<sup>59</sup> By affording licensees the flexibility to make fundamental choices about service offerings, taking into account market factors such as consumer demand, availability of technology, and competition, the Commission’s approach tends to result in efficient and highly-valued uses of spectrum.<sup>60</sup> Typically, the Commission limits technical flexibility only where needed to prevent harmful interference to other users of the spectrum. The Commission followed this approach in the

<sup>54</sup> *Id.* at 16.

<sup>55</sup> *Id.* While DISH seeks the ability to elect to use both AWS-4 bands for downlink operations, it does not seek any waiver of the configuration of the 2 GHz MSS band plan. DISH acknowledges that its proposal “may introduce certain MSS/AWS-4 interference issues,” but maintains that, due to its common control of both MSS and AWS-4 networks, it will be able to mitigate interference and use its MSS facilities dynamically to augment terrestrial services. *Id.* at 12-14. Specifically, DISH states that “[o]nly DISH is in a position to implement a unified reverse-mode solution.” *Id.* at 13 n.25.

<sup>56</sup> DISH Petition at 2.

<sup>57</sup> *Id.* at 3-5.

<sup>58</sup> AT&T Comments at 2.

<sup>59</sup> See, e.g., Allocation of Spectrum Below 5 GHz Transferred from Federal Government Use, ET Docket No. 94-32, *Second Report and Order*, 11 FCC Rcd 624, 631 ¶ 15 (1995); *AWS-4 Report and Order*, 27 FCC Rcd at 16187-88 ¶¶ 224-25.

<sup>60</sup> See Spectrum Policy Task Force, ET Docket No. 02-135, *Report*, p. 16 (rel. Nov. 15, 2002), available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-228542A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-228542A1.pdf) (last visited Nov. 22, 2013); *AWS-4 Report and Order*, 27 FCC Rcd at 16186-88 ¶¶ 221-26; see also DISH Petition at 8-9 n.18 (quoting Spectrum Policy Task Force); AT&T Comments at 2.

*AWS-4 Report and Order*, stating that its aim in establishing technical rules is to maximize the flexible use of the spectrum while appropriately protecting operations in adjacent and nearby bands from harmful interference.<sup>61</sup>

20. We find that a grant of the DISH request for flexibility to use the 2000-2020 MHz band for either uplink or downlink would meet these policy objectives of the *AWS-4 Report and Order*, provided the spectrum use conforms to the interference protections discussed below. Grant of the request would also serve a variety of other public interest goals described below, by obviating in the event of downlink use the need for certain interference limitations that would otherwise govern both AWS-4 and adjacent H Block operations, by promoting a variety of statutory goals underlying both the service rules for H Block licenses to be offered at auction and the auction procedures for the bidding scheduled to begin in January 2014,<sup>62</sup> and by furthering the intent of the Spectrum Act to use the proceeds of the H Block auction to help finance the construction of a nationwide public safety broadband network (FirstNet).<sup>63</sup> Two aspects of the rules established in the Commission's *AWS-4 Report and Order*—the rules designating the 2000-2020 MHz band for uplink operations and the 2180-2200 MHz band for downlink and the determination that same-band, separate operator sharing between mobile satellite and terrestrial operations remained “impractical”—were intended to minimize the possibility of interference between terrestrial and satellite services. Because DISH controls both of these networks and all of the associated spectrum and possesses the singular ability to design, integrate, and direct the operations of both terrestrial and satellite services, we conclude that these unique circumstances warrant a deviation from the rule in light of the corresponding reduction of interference constraints between AWS-4 and H Block operations resulting from the alignment of downlinks in these two services, and the substantial additional public interest benefits from such a waiver.

21. Beyond the benefits inherent in flexibility, the technical waivers DISH seeks offer the potential for compelling public interest benefits, including improved spectrum management. Should the Lower AWS-4 Band be used for downlink, it would effectively serve as an extension of the broadband PCS and H Block downlink bands, collectively at 1930-2000 MHz. This is analogous to the Commission's finding in the *H Block Report and Order* that “[a]s the 1930-1995 MHz PCS band is used for downlink transmissions, the 1995-2000 MHz band [also used for downlink transmissions], in many respects, will operate as an extension of the PCS band.”<sup>64</sup> Band plan harmonization unshackles the 2000-2020 MHz band from restrictive technical limits, potentially opening the band to more effective use.<sup>65</sup>

<sup>61</sup> *AWS-4 Report and Order*, 27 FCC Rcd at 16124, 16126 ¶¶ 55, 61.

<sup>62</sup> See 47 U.S.C. § 309(j)(3)(A) (“development and rapid deployment of new technologies, products, and services for the benefit of the public, including those residing in rural areas”), 309(j)(3)(C) (“recovery for the public of a portion of the value of the public spectrum resources made available for commercial use”), 309(j)(3)(D) (“efficient and intensive use of the electromagnetic spectrum”), 309(j)(4)(F) (reserve price or minimum bid required absent Commission determination that it is not in the public interest). We observe that the Bureau established a reserve price after carefully considering the record it received on its proposal to do so, mindful of its obligation to promote recovery for the public of a portion of the value of the spectrum resource under Section 309(j)(3)(C).

<sup>63</sup> See 47 U.S.C. §§ 309(j)(8)(F), 1457; *H Block Report and Order*, 28 FCC Rcd at 9486 ¶ 3 & n.16.

<sup>64</sup> *H Block Report and Order*, 28 FCC Rcd at 9493 ¶ 21.

<sup>65</sup> See Sprint Comments at 4; Sprint Reply at 3-4. According to DISH, implementation of the terrestrial band plan change may also open the door to possible harmonization of the 2020-2025 MHz band (also referred to as the J Block), if that band were ultimately devoted to downlink operations. DISH Petition at 15-16. However, the Commission has currently proposed to use this band for uplink. See *AWS-3 Notice of Proposed Rulemaking*, 28 FCC Rcd at 11497 ¶ 35. Because that question will be resolved in WT Docket No. 12-185 based on the record in that proceeding, we do not rely in our decision here on any such potential harmonization.

Indeed, the Commission previously suggested the benefits of this type of band plan harmonization when it proposed making 1995-2025 MHz a PCS expansion downlink band in the *AWS-4 Notice of Inquiry*.<sup>66</sup>

22. These benefits, however, would be insufficient to support grant of a waiver if the proposed operation would cause harmful interference to other services. DISH asserts that the proposed downlink operation would not adversely affect other licensees.<sup>67</sup> Our review, coupled with the technical requirements we set forth below, confirms that assertion. Because DISH is the sole 2 GHz MSS/AWS-4 licensee, as noted above, it can manage co-existence of its integrated MSS/AWS-4 service, as well as any co-channel AWS-4 interference that may arise; and there are no other licensees in this band that might be adversely affected by the waivers sought. And as discussed further below, we find that the interests of operators in adjacent bands can be fully protected in the event of a downlink election by technical conditions common to similarly situated high-power downlink operations, in lieu of the technical requirements premised on low-power uplink operation that now apply to the 2000-2020 MHz band. Moreover, downlink election would result in increased spectrum utilization and efficiency as it would obviate the need for technical constraints designed to address interference associated with uplink use in the band.<sup>68</sup>

23. In light of the above findings, we conclude that DISH has justified a waiver based on the special circumstances described above, the consistency of its proposals with the core purpose of the AWS-4 rules to provide flexible use terrestrial spectrum, the potential for reduced risk of interference between the Lower AWS-4 Band and the adjacent Upper H Block, the benefits from effectively extending the PCS and H Block downlink bands, and the additional public interest benefit of DISH committing to bid “at least a net clearing price equal to any aggregate reserve . . . in the upcoming H block auction (not to exceed [\$1.564 billion]).”<sup>69</sup> In setting \$1.564 billion as the aggregate reserve price for the H Block auction, the Bureau observed that it would help contribute to meeting the statutory goal of recovery for the public of a portion of the value of the spectrum resource, which in this case will contribute to funding FirstNet, as contemplated by the Spectrum Act.<sup>70</sup> Therefore, we find that DISH’s commitment in this regard would further the public interest. Moreover, granting a waiver in this instance will potentially enhance wireless broadband competition, encourage innovation, speed up broadband deployment, and increase the supply of in-demand downlink spectrum to be used on an unpaired basis or paired with non-AWS-4 spectrum. Accordingly, we find it in the public interest and consistent with sections 1.3 and 1.925 of the Commission’s rules, as well as the underlying purpose of the rules from which DISH seeks relief, to waive the Commission’s technical rules for the Lower AWS-4 Band to permit the election of downlink use of this band, subject to the specific conditions below, and that application of these rules in this unique circumstance would be unduly burdensome.

### 3. Technical Analysis

24. Having determined that there is good cause to waive the rules to provide AWS-4 licensees with flexibility to use the Lower AWS-4 Band for downlink operations, we must clearly identify which specific technical rules we are waiving and the requirements necessary for downlink use of this

<sup>66</sup> See Service Rules for Advanced Wireless Services in the 2000-2020 MHz and 2180-2200 MHz, *Notice of Proposed Rulemaking and Notice of Inquiry*, 27 FCC Rcd 3607, 3607-3611 ¶¶ 137-47 (2012). Because of the band plan established in the *AWS-4 Report and Order*, including setting the 2000-2020 MHz band for uplink, the Commission declined to pursue the *AWS-4 Notice of Inquiry* concept. *AWS-4 Report and Order*, 27 FCC Rcd at 16222 ¶ 323.

<sup>67</sup> See DISH Petition at 2.

<sup>68</sup> Cf. *AWS-4 Report and Order*, 27 FCC Rcd at 16127-45 ¶¶ 64-100.

<sup>69</sup> DISH Petition at 2.

<sup>70</sup> *Auction 96 Procedures PN*, 28 FCC Rcd at 13063 ¶ 172; *Auction 96 Procedures PN Recon Order* at ¶ 14.

band. We agree with Sprint that we “should not permit DISH to decide which technical rules it wishes to comply with,”<sup>71</sup> and rather must specify those requirements ourselves.<sup>72</sup> Only by doing so will we provide the necessary certainty for AWS-4 licensees to use the Lower AWS-4 Band for downlink operations (should they so elect), as well as ensure that adjacent and nearby bands are appropriately protected from harmful interference from downlink operations in the Lower AWS-4 Band.<sup>73</sup>

25. *Waiver of technical limitations designed for uplink use.* We agree with DISH that rules 27.5(j) (as it pertains to the pairing of AWS-4 spectrum blocks), 27.50(d)(7), 27.52(h)(2)(ii), and 27.65 are either inappropriate or unnecessary should the Lower AWS-4 Band be used for downlink operations. First, section 27.5(j) requires, *inter alia*, that 2000-2010 MHz and 2180-2190 MHz operate as paired frequencies with 2010-2020 MHz and 2190-2200 MHz, respectively.<sup>74</sup> To the extent that channel blocks A and B for the Lower AWS-4 Band at 2000-2020 MHz are ultimately used for downlink operations, there is no need to *require* the blocks to be used in a paired manner with their counterparts in the Upper AWS-4 Band at 2180-2200 MHz. While DISH could choose to aggregate operations of different downlink blocks, it could also choose to operate them as distinct bands, including, perhaps, pairing either or both spectrum bands with non-AWS-4 uplink bands.<sup>75</sup> Second, section 27.50(d)(7) specifies the power limits for uplink operations in the Lower AWS-4 Band.<sup>76</sup> Although power limits for downlink operations will be necessary, the limits set in section 27.50(d)(7) were based on the use of mobile uplink in the band, not on the use of base or fixed stations for downlink operations in the band.<sup>77</sup> Accordingly, the limits in this section are not appropriate should downlink operations be used in the band. Third, 27.53(h)(2)(ii) sets forth the OOB limits for operations in the Lower AWS-4 Band.<sup>78</sup> The Commission adopted this rule because of concerns that uplink use of the 2000-2020 MHz band would harm future downlink operations in the adjacent 1995-2000 MHz band,<sup>79</sup> concerns that would be obviated if both 1995-2000 MHz and 2000-2020 MHz bands were used for downlink. Fourth, section 27.65 requires that terrestrial operations in 2000-2020 MHz accept certain interference described in section 27.65(a).<sup>80</sup> This requirement was premised on a scenario in which base-to-mobile operations in the 1995-2000 MHz band might cause interference to base station receivers in the 2000-2020 MHz band.<sup>81</sup> Such a scenario would not occur if the 2000-2020 MHz band is used for downlink operations. Accordingly, we determine that waiving these four rules in the event of downlink operations in the Lower AWS-4 Band is appropriate for all of the foregoing reasons, and because the purpose of the rules premised on uplink operations would not be served by their application to downlink operations.<sup>82</sup> We have also examined the remainder of the

<sup>71</sup> See Sprint Reply at 5.

<sup>72</sup> See Sprint Comments at 4 (“the Commission should ensure . . . it has the ability to enforce DISH’s commitments and ensure its compliance with the Commission’s rules”).

<sup>73</sup> See AWS-4 Report and Order, 27 FCC Rcd at 16124 ¶ 55 (the Commission’s “aim in establishing technical rules is to maximize the flexible use of spectrum while appropriately protecting operations in neighboring bands.”); AT&T Comments at 2 (“flexibility should be allowed, but only consistent with interference constraints”).

<sup>74</sup> 47 C.F.R. § 27.5(j)(1).

<sup>75</sup> See DISH Petition at 3-4.

<sup>76</sup> 47 C.F.R. § 27.50(d)(7).

<sup>77</sup> See AWS-4 Report and Order, 27 FCC Rcd at 16157-60 ¶¶ 135-48.

<sup>78</sup> 47 C.F.R. § 27.53(h)(2)(ii).

<sup>79</sup> AWS-4 Report and Order, 27 FCC Rcd at 16126-27 ¶¶ 62-63.

<sup>80</sup> 47 C.F.R. § 27.65.

<sup>81</sup> AWS-4 Report and Order, 27 FCC Rcd at 16160-61 ¶¶ 149-50.

Commission's AWS-4 rules and determine that no additional rules need to be waived in order for the Lower AWS-4 Band to be used for downlink operations. The following table lists the technical rules we waive in this order.

**AWS-4 Technical Rules Conditionally Waived**

Part 27 Rule Section	Description
27.5(j)	AWS-4 Frequency pairings
27.53(h)(2)(ii)	OOBE limits on AWS-4 mobiles (uplink)
27.50(d)(7)	Power limits on uplink
27.65(a)	Acceptance of Interference in 2000-2020 MHz

26. *Technical requirements for downlink use.* In support of its waiver request, DISH states that it "would commit . . . to operate any future downlink terrestrial fixed or base stations in the 2000-2020 MHz band consistent with the technical requirements applicable to other fixed/base stations in the AWS-4 band at 2180-2200 MHz and adjacent operational PCS/AWS bands."<sup>83</sup> DISH proposes to operate downlink operations in the Lower AWS-4 Band at power levels consistent with those set forth in sections 27.50(d)(1) and (d)(2) of the Commission's rules and subject to OOB limits consistent with those specified in sections 27.53(h)(1) and (h)(3) of the Commission's rules.<sup>84</sup> DISH also proposes to operate downlink operations in the Lower AWS-4 Band in a manner consistent with the requirements on an AWS licensee of "Sections 27.1133, 27.55(a)(1), 27.50(d)(3), and 27.50(d)(10) of the Commission's rules with respect to [the Lower AWS-4 Band]."<sup>85</sup> Sprint argues that, if DISH is allowed to operate the Lower AWS-4 Band as downlink, DISH should be required to follow many of the requirements that apply to Part 27 services in general and Upper H Block operations in particular.<sup>86</sup> Sprint asserts that DISH should be required to meet power requirements that apply to adjacent downlink operations in the Upper H Block, such as (1) section 27.50(d)(5), which contains an equipment authorization requirement and an average power measurement requirement,<sup>87</sup> and (2) section 27.50(d)(6), which contains peak transmit power measurement requirements.<sup>88</sup> Sprint further argues that DISH should be required to coordinate high-powered Lower AWS-4 downlink operations with adjacent H Block licensees located within 120 kilometers,<sup>89</sup> which would mirror a requirement in the Commission's rules that Upper H Block licensees coordinate such operations with adjacent PCS G Block licensees.<sup>90</sup> In addition, Sprint argues that we should require DISH to comply with certain rules that generally apply to all Part 27 services, including sections 27.53(i) and 27.53(n), which enable the Commission to require greater attenuation when an emission outside an AWS operator's authorized bandwidth causes harmful interference.<sup>91</sup> Finally, Sprint

(Continued from previous page) \_\_\_\_\_

<sup>82</sup> In waiving section 27.5(j) of the Commission's rules, we waive only the requirement that the AWS-4 bands be paired. We do not waive the specifying of 2000-2020 MHz and 2180-2200 MHz as AWS-4 spectrum.

<sup>83</sup> DISH Petition at 11.

<sup>84</sup> *Id.* at 11-12; *see* 47 C.F.R. §§ 27.50(d)(1)-(2), 27.53(h)(1), (3).

<sup>85</sup> DISH December 13 Letter.

<sup>86</sup> *See* Sprint Reply at 4-6.

<sup>87</sup> 47 C.F.R. § 27.50(d)(5).

<sup>88</sup> 47 C.F.R. § 27.50(d)(6).

<sup>89</sup> Sprint Reply at 5.

<sup>90</sup> *See* 47 C.F.R. § 27.50(d)(10).

<sup>91</sup> 47 C.F.R. § 27.53(i), (n).

argues that we should require DISH to comply with all the technical rules in Subpart C of Part 27 and “other appropriate sections” of our technical rules.<sup>92</sup>

27. In waiving the above rules, we agree with Sprint that AWS-4 licensees must continue to comply with all applicable Commission rules not expressly waived by this order. For example, we continue to require, as the Commission determined in the *AWS-4 Report and Order*, that “any licensee of AWS-4 operating authority . . . comply with other [non-Part 27] rule parts that pertain generally to wireless communications services.”<sup>93</sup> DISH must also continue to comply with all Part 27 requirements, technical or otherwise, except those waived in this order. These include, but are not limited to, sections 27.50(d)(5)-(6), 27.53(i), and 27.53(n) of the Commission’s rules cited by Sprint.<sup>94</sup> Thus, if DISH elects to use 2000-2020 MHz for terrestrial downlink operations, it will be subject to any rules that are generally applicable to downlink operations, except to the extent they are expressly waived by this order.

28. In addition, we condition DISH’s waiver on further technical requirements necessary to govern the operation of downlink operations in the Lower AWS-4 Band. These requirements are necessary to prevent downlink operations from causing harmful interference to co-channel or adjacent or nearby operations. DISH has committed to comply with these requirements if it elects to use the Lower AWS-4 Band for downlink operations.<sup>95</sup> First, to avoid the possibility of co-channel interference in the event that the Lower AWS-4 Band is used for downlink operations, field-strength limits are necessary to prevent harmful interference between geographically adjacent licensees operating in the same spectrum.<sup>96</sup> We find that the required field-strength limits in 27.55(a)(1) should apply to downlink operations in the 2000-2020 MHz band in the same manner that they apply to downlink operations in the AWS-4 2180-2200 MHz band and other similar downlink AWS and wireless communications service bands.<sup>97</sup> Accordingly, we impose these limits on downlink operations as waiver conditions.

29. Second, for downlink operations in the Lower AWS-4 Band, and to avoid harmful interference into adjacent and nearby bands, DISH has conditioned its request for relief on application of the power-limit requirements contained in section 27.50(d)(1), which specifies base or fixed equivalent isotropically radiated power (EIRP) in rural areas, and in section 27.50(d)(2), which specifies base or fixed EIRP in non-rural areas.<sup>98</sup> We agree that this condition is appropriate and necessary to ensure against harmful interference, and we accordingly adopt it as a condition of grant of the waivers provided here. These are the same power limits that the Commission has consistently adopted for base stations in other AWS services, and are substantially similar to the power limits for PCS base stations.<sup>99</sup> We also require AWS-4 licensees to coordinate with all Government and non-Government satellite entities operating in the 2025-2110 MHz band to the same extent that AWS-1 downlink operations in the 2110-2155 MHz band are required to coordinate with such operations in that band as specified in rule

<sup>92</sup> 47 C.F.R. Part 27. Sprint also argues that our waiver grant should include (1) a waiver of certain out-of-band emissions limits on H Block licensees in the event that DISH elects to use lower AWS-4 as downlink, *see* 47 C.F.R. § 27.53(h)(2)(iv), and should be conditioned on DISH complying with certain cost-sharing rules, *see* 47 C.F.R. §§ 1021 (cost-sharing reimbursement obligation of licenses at 1915-1920 MHz), 1031 (cost-sharing reimbursement obligation of licensees at 1995-2000 MHz). *See* Sprint Reply at 6. We address these arguments below. *See infra* at ¶¶ 34-37, 48-49.

<sup>93</sup> *See, e.g., AWS-4 Report and Order*, 27 FCC Rcd at 16203-04 ¶¶ 277-78.

<sup>94</sup> Sprint Reply at 5.

<sup>95</sup> DISH Petition at 10-12; DISH December 13 Letter.

<sup>96</sup> *C.f. AWS-4 Report and Order*, 27 FCC Rcd at 16154 ¶ 125.

<sup>97</sup> 47 C.F.R. § 27.55(a)(1).

<sup>98</sup> 47 C.F.R. § 27.50(d)(1), (d)(2); *see* DISH Petition at 11.

<sup>99</sup> *H Block Report and Order*, 28 FCC Rcd at 9504-06 ¶¶ 53, 57.

27.50(d)(3).<sup>100</sup> AWS downlink operations in the 2000-2020 MHz band would create substantially the same interference environment for operations in the 2025-2110 MHz band as do AWS downlink operations in the 2110-2155 MHz band. In addition to setting power limits for AWS-1 operations to protect operations in the 2025-2110 MHz band, the Commission established coordination requirements for AWS-1 licensees to protect certain operations in the 2025-2110 MHz band, which are set forth in rule 27.50(d)(3).<sup>101</sup> As DISH acknowledges, those coordination requirements have proven successful for avoiding harmful interference.<sup>102</sup> We therefore condition the waivers granted here on compliance with the same requirement on AWS-4 licensees in the event they elect to use the Lower AWS-4 Band for downlink operations.<sup>103</sup>

30. Third, we similarly determine that, in a downlink scenario, 2000-2020 MHz licensees should be required, as a condition of DISH's waiver, to coordinate with adjacent 1995-2000 MHz licensees in the same manner that section 27.50(d)(10) requires 1995-2000 MHz H Block licensees to coordinate with adjacent 1990-1995 MHz (PCS G Block) licensees.<sup>104</sup> Just as the Commission found in the *H Block Report and Order* that advanced coordination of high-powered Upper H Block downlink operations was consistent with the Commission's statutory obligation to protect an adjacent band,<sup>105</sup> we determine here that advanced coordination of high-powered Lower AWS-4 operations would be consistent with protecting the adjacent Upper H Block band. Thus, if DISH elects to use the Lower AWS-4 Band for downlink, licensees operating a base or fixed station in the 2000-2020 MHz band utilizing a power greater than 1640 watts EIRP and greater than 1640 watts/MHz EIRP are required to coordinate in advance with all Upper H Block licensees authorized to operate on adjacent frequency blocks in the 1990-1995 MHz band within 120 kilometers of the base or fixed station operating in this band.

31. Fourth, we clarify the OOB limits that would apply to downlink use of the Lower AWS-4 Band, and we impose them as a condition of DISH's waiver. Unlike for power limits, where waiver of the rule applicable to the Lower AWS-4 Band would leave us without a specific limit absent our specifying the applicable limit in this order, the manner in which the OOB limit rule—27.53(h)—is drafted results in application of a specific OOB limit for downlink use of the band. Specifically, by

<sup>100</sup> See 47 C.F.R. § 27.50(d)(3).

<sup>101</sup> See Biennial Regulatory Review – Amendment of Parts 1, 22, 24, 27 and 90 to Streamline and Harmonize Various Rules Affecting Wireless Radio Services, WT Docket No. 03-264, *Third Report and Order*, 23 FCC Rcd 5319, 5330-31 ¶ 26 (2008); Facilitating the Provision of Spectrum-Based Services to Rural Areas and Promoting Opportunities for Rural Telephone Companies To Provide Spectrum-Based Services, WT Docket Nos. 02-381, 01-14, 03-202, *Report and Order and Further Notice of Proposed Rulemaking*, 19 FCC Rcd 19078, 19133-4 ¶¶ 100-01 n.305 (2004). As discussed below, additional coordination requirements are contained in section 27.1133 of the Commission's rules. See *infra* ¶ 32 (discussing 47 C.F.R. § 27.1133).

<sup>102</sup> DISH Reply at 16; *see also* Reply Comments of DISH Network Corporation, GN Docket No. 13-185, WT Docket Nos. 07-195, 04-356, 07-16, 07-30, at 4-5 (filed Oct. 17, 2013).

<sup>103</sup> In requiring compliance with this requirement, we clarify that AWS-4 licensees need not follow the coordination requirements in section 27.50(d)(3) pertaining to the Broadband Radio Service in the 2155-2160 MHz band because the Lower AWS-4 Band is not proximate to the 2155-2160 MHz Band.

In addition, we observe that the 2020-2025 MHz band, which is located between the Lower AWS-4 Band and the 2025-2110 MHz band is currently unassigned and service rules for that band are subject to an on-going proceeding. See AWS-3 *Notice of Proposed Rulemaking*, 28 FCC Rcd at 11497 ¶ 35.

<sup>104</sup> 47 C.F.R. § 27.50(d)(10). The Commission's rules also contain similar rules requiring coordination between adjacent AWS-1 block operations in the 2110-2155 band and requiring coordination between adjacent AWS-4 blocks in the 2180-2200 MHz band. 47 C.F.R. § 27.50(d)(3), (8).

<sup>105</sup> *H Block Report and Order*, 28 FCC Rcd at 9504-05 ¶ 53.

operation of our waiving the additional requirement of section 27.53(h)(2)(ii), the general OOB<sup>106</sup> protection levels specified in 27.53(h)(1) and the OOB<sup>107</sup> measurement procedure specified in 27.53(h)(3) apply by their own terms to the 2000-2020 MHz band.<sup>106</sup> DISH confirms its understanding that the requirements contained in these rule sections would apply to downlink use of the Lower AWS-4 Band and commits to operate by these OOB<sup>107</sup> limits if downlink use of the Lower AWS-4 Band is elected.<sup>107</sup>

32. Finally, for the same reasons that we determine above to apply the coordination requirements of section 27.50(d)(3) to downlink operations in the Lower AWS-4 Band, we condition any use of the Lower AWS-4 Band for downlink operations on compliance with the protection and coordination requirements in section 27.1133 for previously licensed BAS and Cable Television Radio Service (CARS) operations in the 2025-2110 MHz band.<sup>108</sup> These requirements include an obligation to protect BAS and CARS operations and an obligation to coordinate planned stations with those operations before constructing and operating any base or fixed station. We believe that these coordination and protection requirements will provide needed protection for BAS and CARS operations against OOB<sup>109</sup> and overload interference from potential AWS-4 downlink operations in 2000-2020 MHz. For example, section 27.53(h) of the Commission's rules sets a general OOB<sup>109</sup> limit of  $43 + 10 \log_{10}(P)$  dB for both AWS bands. In setting this protection level for AWS-1 downlink operations, however, the Commission also determined that it would be insufficient to protect BAS and CARS operations in the 2025-2110 MHz from harmful interference from AWS-1 downlink operations absent the additional coordination and protection requirements.<sup>109</sup> Thus, just as the Commission found coordination and protection requirements necessary to avoid harmful interference from AWS-1 operations to BAS and CARS operations in the 2025-2110 MHz band, we find it appropriate to apply the same requirements here should DISH use the Lower AWS-4 Band for downlink operations.

33. We summarize the specific technical requirements that will apply to downlink operations in the Lower AWS-4 Band below in Section E (Waiver Conditions).<sup>110</sup>

34. *Waiver of Upper H Block Technical Rules.* Sprint argues that the grant of DISH's waiver should specify that, if DISH elects to use the 2000-2020 MHz band as downlink, a waiver will be granted to "all future H Block licensees and . . . Section 27.53(h)(2)(iv) of the rules will not apply."<sup>111</sup> Sprint states that, because this technical rule in the Upper H Block exists to prevent interference to adjacent band uplink operations, if the Lower AWS-4 Band were used for downlink, this H Block rule would be unnecessary.<sup>112</sup> In such a scenario, Sprint states, "the normal base station OOB<sup>109</sup> requirements in

<sup>106</sup> 47 C.F.R. § 27.53(h)(1), (h)(3). In waiving section 27.53(h)(2)(ii), above, and applying the general OOB<sup>109</sup> limit set forth in section 27.53(h)(1) instead, if downlink is elected, we clarify that we are not requiring DISH to apply the requirements of section 27.53(h)(2)(i) to downlink operations in the Lower AWS-4 Band. *See* 47 C.F.R. § 27.53(h)(1)-(2)(ii). Section 27.53(h)(2)(i) applies specifically to operations in the 2180-2200 MHz band. 47 C.F.R. § 27.53(h)(2)(i).

<sup>107</sup> *See* DISH Petition at 11-12.

<sup>108</sup> 47 C.F.R. § 27.1133 ("AWS operators must protect previously licensed Broadcast Auxiliary Service (BAS) or Cable Television Radio Service (CARS) operations in the adjacent 2025-2110 MHz band.") Arguably, this rule would apply to downlink use of the Lower AWS-4 Band on its own terms without an additional express determination here. We need not reach that issue insofar as we affirmatively require the protection and coordination requirements contained therein to apply to downlink use of the Lower AWS-4 Band.

<sup>109</sup> Service Rules for Advanced Wireless Services in the 1.7 GHz and 2.1 GHz Bands, *Report and Order*, WT Docket No. 02-353, 18 FCC Rcd 25162, 25211-12 ¶¶ 129-30 (2003).

<sup>110</sup> In applying these requirements to downlink use of the Lower AWS-4 Band, we acknowledge that such requirements will not apply should DISH elect not to use the Lower AWS-4 Band for downlink use.

<sup>111</sup> Sprint Reply at 8.

<sup>112</sup> Sprint Comments at 8.

27.53(h)(1) would then apply automatically, as would be appropriate when downlink base stations operate on adjacent frequencies.”<sup>113</sup> DISH, while not responding to Sprint’s proposal, stated in its Petition that, should the waiver be granted, it would agree “to accept a less restrictive OOB limit on H Block emissions above 2000 MHz” under an operator-to-operator agreement or FCC regulatory action.<sup>114</sup>

35. We decline to address in this particular adjudication Sprint’s request that, in the event DISH elects to use the Lower AWS-4 Band for downlink operations, we waive for all future H Block licensees the OOB limit specified in section 27.53(h)(2)(iv) of the Commission’s rules. We do not believe that the instant DISH waiver proceeding regarding requirements for AWS-4 licensees is the appropriate proceeding in which to address waivers of the technical rules applicable to future H Block licensees.

36. We recognize that, as Sprint asserts, the H Block rule it asks the Commission to waive imposes a tighter OOB limit than is typically set forth in the Commission’s rules and was adopted to address a technical issue arising from the specific interference environment in which uplink operations in the Lower AWS-4 Band would need to coexist with downlink operations in the adjacent Upper H Block. Specifically, in the *H Block Report and Order*, the Commission found that “a stricter OOB limit is warranted because the Upper H Block (downlink) is adjacent to the AWS-4 / 2 GHz MSS uplink band.”<sup>115</sup> Should DISH elect to use the Lower AWS-4 Band for downlink purposes, the interference environment effectively would consist of one continuous downlink band from 1930-2020 MHz, comprised of PCS, H Block, and AWS-4 spectrum. The rules and requirements in place would then require OOB protections of all adjacent blocks within this spectrum range, including (pursuant to this waiver order) from the Lower AWS-4 Band into the Upper H Block, at a level of  $43 + 10 \log_{10}(P)$  dB. The only exception in the Commission’s rules to this consistent OOB limit between adjacent blocks would be the section 27.53(h)(2)(iv) requirement that operations in the Upper H Block attenuate OOB at  $70 + 10 \log_{10}(P)$  dB into 2005-2020 MHz. Such a discrepancy pertaining solely to the Upper H Block rules would appear to be unnecessary if downlink is elected in the adjacent Lower AWS-4 Band. Indeed, DISH has recognized that the OOB limits for Upper H Block emissions into the Lower AWS-4 Band could be relaxed if it is granted the flexibility, and so elects, to use the Lower AWS-4 Band for downlink operations.<sup>116</sup> Thus, absent the potential for harmful interference to adjacent Lower AWS-4 Band operations, it would appear appropriate to examine whether to relax the OOB limits on the Upper H Block.

37. We find, however, that it is premature to address this request to waive the H Block OOB requirements in this order, given that the H Block auction has not yet occurred and that it is not yet clear if the AWS-4 band will be used for uplink or downlink. To the extent that Sprint, or any other party, desires a waiver or change of any of the H Block rules in light of this order, or DISH’s subsequent actions pursuant to the order, it may file an appropriate request.

### C. Election Period

38. In seeking flexibility to determine whether to use the AWS-4 2000-2020 MHz band for uplink or downlink operations, DISH commits that, as soon as commercially practicable but no later than 30 months after grant of its petition, it will file an election stating which option it chooses.<sup>117</sup> DISH

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<sup>113</sup> *Id.* at 8.

<sup>114</sup> DISH Petition at 14.

<sup>115</sup> *H Block Report and Order*, 28 FCC Rcd at 9513 ¶ 73 (adopting an OOB limit of  $70 + 10 \log_{10}(P)$  dB into 2005-2020 MHz); *see generally H Block Report and Order*, 28 FCC Rcd at 9503-9516 ¶¶ 49-80; Sprint Comments at 8.

<sup>116</sup> DISH Petition at 14.

<sup>117</sup> *Id.* at 1-2.

maintains that it needs this flexibility in order to “obtain[] a degree of certainty as to the availability of new uplink spectrum, and the extent to which such spectrum would be suitable for pairing.”<sup>118</sup>

39. We condition DISH’s waiver on making an election in accordance with this time limitation. DISH states that it needs this time to fully evaluate its options for putting the spectrum to its best use. No party substantively responded to this rationale, and the only party to comment on this election time frame, NTCH, neither comments on the utility of the potential use of the Lower AWS-4 Band as downlink, nor addresses DISH’s argument that it needs this time to ensure its ability to find new uplink spectrum for pairing with 2000-2020 MHz downlink spectrum.<sup>119</sup> Rather, NTCH argues that an election period extending beyond the upcoming H-Block auction<sup>120</sup> would unfairly advantage DISH in that auction, because DISH’s “unilateral control [of] the technical configuration of the adjacent [AWS-4] band” would create uncertainty about the value of the H Block during the auction.<sup>121</sup> We are unpersuaded by NTCH’s argument. Rather, DISH correctly observes that neither of its election options would decrease the value of the H Block;<sup>122</sup> the only possible change would be an increase resulting from the improved usability described above.<sup>123</sup> Moreover, regardless of which election DISH ultimately makes, the interference environment is known now and H Block licensees will receive appropriate interference protections from AWS-4 licensees. In addition, all H Block bidders should be aware of DISH’s request for the waiver granted in this order,<sup>124</sup> and should be able to take the terms of the waiver into account in their bidding strategies. Thus, we are not persuaded that the length of the election period will create uncertainty with regard to the interference protection environment or give DISH any advantage in that regard.

40. In granting DISH as long as is commercially practicable, up to 30 months, to make its uplink or downlink election, we clarify that the election is a one-time, irrevocable event, and that it must be filed in the manner described below.<sup>125</sup> Once DISH determines how it will utilize the band, nearby licensees must have the certainty of knowing how the band will be utilized, for uplink operations or for downlink operations. Thus, the election must occur only once. Further, the election must, as DISH states, “apply uniformly to all AWS-4 licenses in the nation.”<sup>126</sup> Accordingly, DISH’s waiver is conditioned on its filing an election within 30 months of the date of the release of this order, as DISH has proposed.

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<sup>118</sup> DISH Reply at 4-5 n.14.

<sup>119</sup> See DISH Petition at 4; DISH Reply at 4 n.14.

<sup>120</sup> The H-Block auction is scheduled to begin on January 22, 2014. Auction of H Block Licenses in the 1915-1920 MHz and 1995-2000 MHz Bands Rescheduled for January 22, 2014, AU Docket No. 13-178, *Public Notice*, DA 13-2033 (Oct. 21, 2013).

<sup>121</sup> NTCH Comments at 4-5.

<sup>122</sup> That is, neither option would subject the Upper H Block to more stringent technical requirements than now apply, and neither would adversely affect the interests of potential bidders in the H-Block auction.

<sup>123</sup> See DISH Reply at 4; *see also* NTCH Comments at 4.

<sup>124</sup> See *Auction 96 Procedures PN Recon Order* at ¶ 19 (“Auction 96 applicants can assess the impact of existing rules and the possible impact, if any, of the technical changes proposed by DISH. Prior to an auction, we consistently advise bidders that they are solely responsible for conducting due diligence . . . upon a license being offered at auction, including pending matters. Thus, we urge bidders to consider any pending challenges or waiver requests in determining whether and how much to bid on licenses at auction.”) (internal citation omitted); *see also* *Auction 96 Procedures PN*, 28 FCC Rcd at 13033-34 ¶¶ 41-45; *Auction 96 Comment PN*, 28 FCC Rcd at 10016-17 ¶¶ 11-14 (rel. July 16, 2013).

<sup>125</sup> See *infra* Section III.E. (Waiver Conditions).

<sup>126</sup> DISH Reply at 5.

**D. One-Year Waiver of the Final Build-Out Milestone**

41. *Background.* DISH also seeks a one-year extension or waiver of the final construction milestone for its AWS-4 licenses.<sup>127</sup> Section 27.14(q) states that AWS-4 licensees must provide coverage and service to at least (1) 40 percent of their aggregate license areas' population within four years (interim build-out requirement),<sup>128</sup> and (2) 70 percent of the population in each of their license areas within seven years (final build-out requirement).<sup>129</sup> DISH seeks only a one-year waiver of the final build-out requirement deadline, which would allow it eight years rather than seven years to meet the final build-out requirement.<sup>130</sup>

42. DISH justifies its request by stating that electing to use the Lower AWS-4 Band for downlink operations would engender new and additional work for network design and the development of base stations for use in the band.<sup>131</sup> DISH observes that the Commission has previously extended construction milestones due to band reconfigurations and technical changes.<sup>132</sup> It argues that the brief extension it seeks would promote the public interest by spurring broadband deployment, making more efficient use of available spectrum, and encouraging innovation.<sup>133</sup> DISH also notes that it does not seek an extension of the applicable interim build-out milestone that applies to the 2000-2020 MHz band.<sup>134</sup>

43. *Discussion.* Under the waiver standard articulated above, we grant the one-year waiver DISH requests. In adopting the AWS-4 performance requirements, the Commission observed it "establishes performance requirements to promote the productive use of spectrum, to encourage licensees to provide service to customers expeditiously, and to promote the provision of innovative services throughout the license area(s), including in rural areas."<sup>135</sup> Other than NTCH's objection, which is conclusory and merely ancillary to its opposition to the waiver of the uplink provision described below, no party opposed a one-year waiver of the final build-out deadline.<sup>136</sup> Under the unique circumstances of this case, because DISH must make a determination about whether to use the Lower AWS-4 Band for

<sup>127</sup> DISH Petition at 16-19.

<sup>128</sup> See 47 C.F.R. § 27.14(q)(1) ("An AWS-4 licensee shall provide terrestrial signal coverage and offer terrestrial service within four (4) years from the date of the license to at least forty (40) percent of the total population in the aggregate service areas that it has licensed in the 2000-2020 MHz and 2180-2200 MHz bands ("AWS-4 Interim Build out Requirement.")).

<sup>129</sup> See 47 C.F.R. § 27.14(q)(2) ("An AWS-4 licensee shall provide terrestrial signal coverage and offer terrestrial service within seven (7) years from the date of the license to at least to at least seventy (70) percent of the population in each of its license areas in the 2000-2020 MHz and 2180-2200 MHz bands ("AWS-4 Final Build out Requirement.")).

<sup>130</sup> DISH Petition at 5.

<sup>131</sup> *Id.* at 17 ("The potential conversion of the 2000-2020 MHz spectrum to downlink use presents a number of technical challenges. Among other things, DISH will need to initiate work for a new standard from the 3rd Generation Partnership Project ("3GPP") and will need to restart work to design devices and base stations, and make substantial changes to its network planning.").

<sup>132</sup> DISH Petition at 18 (citing Improving Public Safety Communications in the 800 MHz Band, WT Docket No. 02-55, ET Docket No. 00-258, ET Docket No. 95-18, *Report and Order, Fifth Report and Order, Fourth Memorandum Opinion and Order, and Order*, 19 FCC Red. 14969 ¶ 205 (2004); Amendment of Part 27 of the Commission's Rules to Govern the Operation of Wireless Communications Services in the 2.3 GHz Band, WT Docket No. 07-293, IB Docket No. 95-91, *Order on Reconsideration*, 27 FCC Red. 13651, 13700 ¶ 121 (2012)).

<sup>133</sup> DISH Petition at 19.

<sup>134</sup> *Id.* at 5.

<sup>135</sup> *AWS-4 Report and Order*, 27 FCC Red at 16173-74 ¶ 187.

<sup>136</sup> NTCH Comments at 1, 5.

uplink or downlink operations, allowing it an extra year to complete its final build-out requirement is a reasonable accommodation to ensure that it has sufficient time to assess how this band might be put to more efficient use, without unduly delaying completion of the required full build-out due to the limited, one-year nature of the extension. DISH does not seek a waiver of the interim build-out deadline.<sup>137</sup> In the AWS-4 proceeding, DISH committed to “aggressively build-out a broadband network” using AWS-4 spectrum and the Commission stated that it “expect[ed] this commitment to be met.”<sup>138</sup> Furthermore, given the public interest benefits we have found in waiving the technical rules for DISH, we find that those same public interest benefits would support the limited waiver of the final build-out deadline that we grant today. We observe that DISH’s circumstances are readily distinguishable from cases where applicants have had an extended period of time to build out and made a choice not to build facilities.<sup>139</sup>

#### E. Waiver Conditions

44. If DISH elects to use the Lower AWS-4 Band for terrestrial downlink operations, such use will be subject to any rules that are generally applicable to AWS downlink operations,<sup>140</sup> except to the extent they are expressly waived by this order,<sup>141</sup> as well as all applicable license conditions and the following express conditions.

45. *Election period.* We require DISH to submit or cause to be submitted as soon as commercially practicable but no later than 30 months from the release date of this Memorandum Opinion and Order a filing(s) in WT Docket 13-225 and in the Universal Licensing System (ULS) for all AWS-4 licenses, stating unequivocally its election—applicable to all AWS-4 licenses—of either uplink or downlink operations (but not both) at 2000-2020 MHz. Failure to meet this condition will terminate the waivers granted herein, without the need for further agency action. Notwithstanding that the election will not be made for up to 30 months, the election when made by DISH shall be binding on all AWS-4 licensees who are AWS-4 licensees on the release date of this Memorandum Opinion and Order or at any time thereafter.<sup>142</sup>

46. *H Block Auction Commitment.* Given our public interest analysis of DISH’s bidding commitment in the H Block auction, we grant this waiver on the express condition that DISH fulfill its commitment to bid “at least a net clearing price” equal to the aggregate reserve price of \$1.564 billion in the H Block auction. Failure by DISH to meet this commitment will terminate the waivers granted herein, without the need for further agency action.<sup>143</sup>

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<sup>137</sup> DISH Petition at 17.

<sup>138</sup> *AWS-4 Report and Order*, 27 FCC Rcd at 16176 ¶ 194 (quoting DISH AWS-4 Comments at 18).

<sup>139</sup> See, e.g., FiberTower Spectrum Holdings, LLC, *Memorandum Opinion and Order*, 28 FCC Rcd 6822 (2013), *recon. pending*.

<sup>140</sup> See *supra* ¶¶ 26-27.

<sup>141</sup> See *supra* ¶¶ 24-25.

<sup>142</sup> See *supra* ¶¶ 38-40.

<sup>143</sup> See *supra* ¶¶ 20, 23.

47. *Downlink Operations in 2000-2020 MHz.* If DISH does elect to use 2000-2020 MHz for downlink operations, in place of the rules waived above, the following requirements (based on our technical analysis detailed above), shall apply:<sup>144</sup>

Technical Issue	Requirement
Power Limits	(1) The EIRP limits for rural and non-rural areas set forth in rule sections 27.50(d)(1)-(2); and (2) Coordination with 1995-2000 MHz licensees in the same manner that rule section 27.50(d)(10) requires 1995-2000 MHz licensees to coordinate with 1990-1995 MHz licensees.
OOBE Limits	The OOBE limit set forth in rule section 27.53(h)(1), with the measurement procedure set forth in rule 27.53(h)(3).
Power Strength Limits (Co-Channel Interference)	The field strength limits set forth in rule section 27.55(a)(1).
Coordination with and protection of certain operations in the 2025-2110 MHz band	The coordination and protection requirements set forth in rule sections 27.50(d)(3) and 27.1133.

## F. Other Record Matters

### 1. Reimbursement of BAS Clearing Costs

48. *Background.* Sprint requests that the Commission condition its grant of the DISH Petition upon “DISH’s timely and complete reimbursement to Sprint of the BAS clearing expenses for any H Block licenses that DISH may be granted through the H Block auction.”<sup>145</sup> DISH opposes such a condition because the Commission has already imposed a reimbursement obligation on all winning bidders in the H Block auction.<sup>146</sup> DISH argues that the Commission should not apply a different enforcement regime to one prospective licensee (DISH).<sup>147</sup> It also states unequivocally that it does not object to Sprint’s being reimbursed under the terms outlined in the *H Block Report and Order*.<sup>148</sup> Sprint responds, stating that DISH’s past challenges to the Commission’s cost-sharing rules show that the Commission should attach conditions to its grant of the waiver to assure that DISH will complete its obligations in a timely and complete manner.<sup>149</sup>

49. *Discussion.* We decline to impose a specific cost-sharing reimbursement condition on our grant of DISH’s waiver request. When granting relief to a licensee, the Commission generally declines to impose conditions that require that licensee to comply with rules and policies that it is already obligated to follow.<sup>150</sup> As DISH explains, in the instant case a fully enforceable cost-sharing rule already

<sup>144</sup> See *supra* ¶¶ 26-33.

<sup>145</sup> Sprint Comments at 5-6.

<sup>146</sup> DISH Reply at 3-4.

<sup>147</sup> *Id.* at 4.

<sup>148</sup> *Id.*

<sup>149</sup> Sprint Reply at 7.

<sup>150</sup> See, e.g., *Applications of Softbank Corp., Starburst II, Inc., Sprint Nextel Corporation, and Clearwire Corporation For Consent to Transfer Control of Licenses and Authorizations*, 28 FCC Rcd 9642, 9674 ¶ 81 (2013) (“consistent with Commission precedent, we conclude that such conditions [which would require the companies to (continued....)

applies to any and all H Block winning bidders.<sup>151</sup> Thus, to the extent that DISH (directly or indirectly) is a winning bidder at the H Block auction, it (as well as any other winning bidders) will be required by the terms of the *H Block Report and Order* and the rules promulgated thereunder to make the relevant cost-sharing payments.<sup>152</sup> We are not persuaded by Sprint’s argument that DISH’s past challenges to the application of Commission cost-sharing rules and policies show that we must attach extra conditions here. Rather, we expect all H Block winning bidders to follow the applicable Commission bidding and other requirements. We believe that, as explained in the *H Block Report and Order*, the Commission’s existing enforcement mechanisms are adequate tools to address any issues regarding a failure to make required cost-sharing payments.<sup>153</sup>

## 2. NTCH Objections

50. *Background.* NTCH raises a number of objections to our granting the DISH Petition. First, NTCH observes that it has a pending reconsideration petition before the Commission and that, while the issues raised in that petition “remain[] up in the air, the Commission cannot usefully evaluate the instant [DISH] waiver request.”<sup>154</sup> NTCH requests that the Commission resolve its reconsideration petition before resolving the DISH Petition.<sup>155</sup> Second, NTCH asserts that the Commission is moving too “hastily” and implies that the comment cycle was insufficient, particularly as the proceeding raises interference issues that can normally take months or years to resolve.<sup>156</sup> Third, NTCH claims that there is “the appearance of impropriety in the dealings between DISH and the Commission.”<sup>157</sup> Fourth, NTCH asserts that the DISH Petition should be treated as a petition for rulemaking, not as a waiver request.<sup>158</sup> DISH responds that NTCH fails to address the public interest benefits of DISH’s petition,<sup>159</sup> and that past practice and precedent have allowed the Commission discretion in addressing similar (or even broader) waivers than DISH’s requested relief.<sup>160</sup>

(Continued from previous page) \_\_\_\_\_  
continue to comply with existing FCC requirements] are unnecessary, as they only serve to require entities to comply with legal obligations that are already in effect and fully enforceable”); *Application of Puerto Rico Telephone Authority and GTE Holdings, LLC*, 14 FCC Rcd 3122, 3134 ¶ 28 (1999) (stating that the requested conditions are not necessary because they “would simply require PRTC to comply with its existing legal obligations”).

<sup>151</sup> See 47 C.F.R. §§ 27.1021 (cost-sharing reimbursement obligation of licenses at 1915-1920 MHz), 27.1031 (cost-sharing reimbursement obligation of licensees at 1995-2000 MHz).

<sup>152</sup> See generally *H Block Report and Order*, 28 FCC Rcd at 9543-9551 ¶¶ 157-173.

<sup>153</sup> See *id.* at 9550 ¶ 172 (citing Improving Public Safety Communications in the 800 MHz Band, 25 FCC Rcd 13874, 13904 ¶ 73 (2010)).

<sup>154</sup> NTCH Comments at 1.

<sup>155</sup> *Id.* NTCH has actually filed two reconsideration petitions—one asking the Commission to reconsider the *AWS-4 Report and Order* and the other asking it to reconsider the *AWS-4 Order of Modification*—but it fails to specify which petition it is referring to. See Petition for Reconsideration, WT Docket Nos. 12-70, 04-356, ET Docket No. 10-142 (filed March 18, 2013) (“Petition for Reconsideration of the *AWS-4 Order of Modification*”), Petition for Reconsideration, WT Docket Nos. 12-70, 04-356, ET Docket No. 10-142 (March 7, 2012) (“Petition for Reconsideration of the *AWS-4 Report and Order*”); see also *AWS-4 Order of Modification*, 28 FCC Rcd 1276.

<sup>156</sup> NTCH Comments at 2.

<sup>157</sup> *Id.* at 2-4.

<sup>158</sup> *Id.* at 4. NTCH also asserts that the elective element of the DISH waiver, if granted, would provide DISH with an advantage over other H Block bidder. We address this issue above. See *supra* ¶ 39.

<sup>159</sup> DISH Reply at 4-6.

<sup>160</sup> *Id.* at 6.

51. *Discussion.* We are not persuaded by NTCH’s arguments that we should delay or deny DISH’s request. We respond to each of NTCH’s arguments in turn. First, we disagree with NTCH’s assertion that we should defer our consideration of DISH’s request. Rather, we conclude that there is merit to waiving the applicable technical rules for the Lower AWS-4 Band at this time.<sup>161</sup> Specifically, waiving the rule now is consistent with our overall spectrum management obligation and will provide DISH, the licensee at 2000-2020 MHz, with the ability to develop its plan to utilize the AWS-4 spectrum most efficiently. Delaying action on the waiver would not advance the Commission’s policy goal of promoting deployment of broadband service in this band. Thus, by granting DISH Petition at this time, we maximize the opportunity for planning and flexibility that DISH seeks through its request, and also do so in advance of the January 2014 H Block auction so as to permit DISH to “develop [its] business plans.”<sup>162</sup> The NTCH reconsideration petitions remain pending and will be resolved in separate proceedings.

52. Second, we disagree with NTCH that the comment cycle was insufficient. In this case, DISH filed its waiver request on September 9, 2013; the Commission released a public notice seeking comment on the petition on September 13, 2013; the public notice specified that comments were due on September 30, 2013, and that reply comments would be due on October 10, 2013. Following the intervening closure of the Commission, on October 17, 2013, the Commission extended the reply comment deadline until October 28, 2013.<sup>163</sup> There is no set pleading cycle for waiver requests specified in the Communications Act or the Commission’s rules. NTCH, which filed comments on the original deadline, does not make any demonstration that it has been denied a meaningful opportunity to be heard on DISH’s petition. In this case, we have thoroughly considered the record in support of and in opposition to DISH’s request, and we conclude that the time period allowed did not preclude interested parties from obtaining a meaningful opportunity to be heard.

53. Third, we reject NTCH’s argument about “the appearance of impropriety” in addressing the DISH Petition. The terms and conditions requested by DISH in connection with its waiver are contained in the DISH Petition, as well as in its filing dated September 10, 2013, in the lower 700 MHz interoperability proceeding (WT Docket No. 12-69). We are addressing the DISH Petition based on the public record before us and our analysis thereof, which is explained throughout the course of this order. All interested parties, including NTCH, have had an opportunity to review these terms and commitments and to comment on whether the Commission should grant the DISH Petition on these terms, as well as to suggest additional terms or conditions, as did Sprint. We have addressed DISH’s proposal based on the

<sup>161</sup> To the extent that NTCH may be arguing that we are precluded from addressing the DISH Petition because of either of its pending petitions for reconsideration, such a claim would be without merit. The AWS-4 rules are legally in effect and DISH, as the present AWS-4 licensees, is bound by those rules. The fact that a reconsideration of those rules is pending in the AWS-4 docket does not stay or postpone the legal effect of those rules. 47 U.S.C. § 405(a) (“No [petition for reconsideration before the Commission] shall excuse any person from complying with or obeying any order, decision, report, or action of the Commission, or operate in any manner to stay or postpone the enforcement thereof, without the special order of the Commission.”); 47 C.F.R. § 1.429(k) (“the filing of a petition for reconsideration shall not excuse any person from complying with any rule or operate in any manner to stay or postpone its enforcement”); *see also* 47 U.S.C. § 154(j); *FCC v. Schreiber*, 381 U.S. 279, 289 (1965) (Congress has “delegat[ed] to the Commission power to resolve subordinate questions of procedure” and “has left largely to [the Commission’s] judgment the determination of the manner of conducting its business which would most fairly and reasonably accommodate the proper dispatch of its business and the ends of justice.”) (internal quotation marks omitted); *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134 (1940) (applying the principle from *Schreiber*); *City of Angels Broadcasting, Inc. v. FCC*, 745 F.2d 656, 664 (D.C. Cir. 1984) (noting the Commission’s “wide discretion in fashioning its own procedures” under Section 4(j) of the Act as recognized in *Schreiber*). These statutory policies also apply to petitions for reconsideration of non-rulemaking actions. *See* 47 C.F.R. § 1.106(n).

<sup>162</sup> *See* 47 U.S.C. § 309(j)(3)(E)(ii).

<sup>163</sup> *See supra ¶ 9.*

public interest benefits set forth in its filings and the comments received and our independent evaluation of the interference questions and public interest considerations discussed above. Thus, we reject NTCH's assertions that DISH's proposal and our consideration of it have not been transparent to the public. Further, we do not find it inappropriate to consider DISH's commitment to ensure that the H Block auction satisfies the aggregate reserve price, because we traditionally evaluate requests for waiver of the Commission's rules using a public interest calculus.<sup>164</sup> As discussed above, we have set a reserve price pursuant to the policies in the statute after considering the record. Regardless of NTCH's wholly speculative claims about what parties may or may not participate in the H Block auction, the fact that DISH has undertaken to ensure that the auction successfully meets that reserve price (which also furthers an added statutory goal of providing funding for FirstNet) is an additional public interest benefit to be considered in connection with evaluation of its waiver request.

54. Fourth, we disagree with NTCH that DISH's request must be addressed by rulemaking rather than adjudication. Indeed, we have granted similar waivers of the Commission's technical rules when the waiver allowed licensees to operate in a manner not contemplated by the rules.<sup>165</sup> As the courts have made clear, the Commission's "discretion to proceed in difficult areas through general rules is intimately linked to the existence of a safety valve procedure for consideration of an application for exemption based on special circumstances."<sup>166</sup> To the extent NTCH is suggesting that such an adjudicatory approach to technical rules based on individual facts and circumstances is somehow inapplicable to services in which there is only one (or a small number) of licensees, it is inconsistent with this basic corollary to the Commission's rulemaking authority. As noted above, we have determined that the unique situation we have described warrants a deviation from one aspect of those rules. That determination is well within the scope of our waiver authority under sections 1.3 and 1.925 of the Commission's rules.<sup>167</sup> NTCH has also had a full and fair opportunity to comment on DISH's proposal and makes no showing of prejudice from our decision to address that proposal based on the particular facts and circumstances of DISH's AWS-4 and 2 GHz MSS license holdings in accordance with our well established rules governing waivers, and after notice and opportunity to comment.

#### IV. ORDERING CLAUSES

55. ACCORDINGLY, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and Sections 1.3 and 1.925 of the Commission's Rules, 47 C.F.R. §§ 1.3, 1.925, that the Petition for Waiver of Sections 27.5(j) and 27.53(h)(2)(ii) and Request for Extension of Time filed by DISH Network Corporation on September 9, 2013 IS GRANTED subject to the conditions indicated herein.

56. IT IS FURTHER ORDERED that AWS-4 licenses of Gamma Acquisitions L.L.C., call signs T060430001 through T060430176, and the AWS-4 licenses of New DBSD Satellite Services G.P., call signs T070272001 through T070272176, SHALL BE REFERRED to the Wireless

<sup>164</sup> See NTCH Comments at 3.

<sup>165</sup> See generally RC Technologies, *Memorandum Opinion and Order*, 25 FCC Rcd 124 (WTB 2010) (granting a waiver of certain technical rules that would otherwise prevent the entity seeking a waiver from using lower and upper segments of a band, instead of the just the middle segment of the band); see also State of Alaska, *Memorandum Opinion and Order*, 18 FCC Rcd 16315, 16323-24 (WTB 2003) (waiving certain technical rules where the purpose of the rule was to avoid interference and granting the waiver would not increase the potential for harmful interference to other licensees).

<sup>166</sup> *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969) (citing, e.g., *United States v. Storer Broadcasting Co.*, 351 U.S. 192, 204-05 (1956)).

<sup>167</sup> This is also not a case, like *Tribune Co. v. FCC*, 133 F.3d 61 (D.C. Cir. 1998), where the licensee sought to challenge the validity of the rule itself, or a well-established waiver policy.

Telecommunications Bureau, Broadband Division, for processing consistent with this Memorandum Opinion and Order.

57. IT IS FURTHER ORDERED that this Memorandum Opinion and Order, or a summary thereof, SHALL BE PUBLISHED in the Federal Register.

58. IT IS FURTHER ORDERED that this Memorandum Opinion and Order SHALL BE EFFECTIVE upon release.

59. This action is taken under delegated authority pursuant to Sections 0.131 and 0.331 of the Commission's rules, 47 C.F.R. §§ 0.131, 0.331.

FEDERAL COMMUNICATIONS COMMISSION

Roger C. Sherman  
Acting Chief, Wireless Telecommunications Bureau

**APPENDIX**

**List of Comments and Reply Comments**

**Comments**

AT&T Inc.  
NTCH, Inc.  
Sprint Corporation

**Reply Comments**

DISH Network Corporation  
Sprint Corporation

United States Court of Appeals  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 18-1241

September Term, 2019

FCC-18-123

Filed On: April 28, 2020

NTCH, Inc.,

Appellant

v.

Federal Communications Commission,

Appellee

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DISH Network Corporation,  
Intervenor

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Consolidated with 18-1242

**BEFORE:** Srinivasan, Chief Judge; Henderson, Rogers, Tatel, Garland,  
Griffith, Millett, Pillard, Wilkins, Katsas, and Rao, Circuit Judges

**ORDER**

Upon consideration of petitioner's petition for rehearing en banc in No. 18-1242,  
and the absence of a request by any member of the court for a vote, it is

**ORDERED** that the petition be denied.

**Per Curiam**

**FOR THE COURT:**  
Mark J. Langer, Clerk

BY: /s/  
Michael C. McGrail  
Deputy Clerk

Before  
the  
Federal Communications Commission

In re  
Notice and Filing Requirements  
for Auction 96  
To: The Commission

Docket AU Docket 13-178

NTCH, Inc.'s Application for Review

NTCH, Inc. ("NTCH") hereby applies to the full Commission pursuant to Section 1.115 of the rules for review of the Wireless Telecommunications Bureau's November 27, 2013 Memorandum Opinion and Order ("Recon Denial Order") denying NTCH's petition for reconsideration of the Bureau's *Auction 96 Procedures Order* (DA 13-1885). NTCH's petition was founded largely on the Bureau's sudden and unprecedented adoption of an extremely high reserve price for the H Block auction, on the Bureau's failure to acknowledge or discuss the backroom deal that drove the Commission's adoption of the particular reserve price proposed by DISH, and the potential skewing of the auction in favor of DISH by the Commission's grant of a waiver to DISH which would give DISH the unilateral right to either increase or decrease the value of the H Block in which it is a bidder.

**A. Questions Presented for Review**

1. Did the Commission's entry into an agreement with DISH Network involving a commitment to a minimum bid by DISH in Auction 96 in exchange for certain other

extraordinary benefits to be granted to DISH in connection with its other licenses constitute changed circumstances warranting reconsideration by the Bureau?

2. Was the Bureau's \$.50 per MHz/pop reserve price supported by either facts or precedent?
3. Has the Commission's deal with DISH been made a part of the record of Auction 96?
4. Does the Commission's grant of an uplink/downlink waiver to DISH in connection with its AWS-4 license skew Auction 96 by giving DISH a unique advantage over all other bidders?

## **B. Factors Warranting Commission Consideration**

1. The Bureau's action constitutes a prejudicial procedural error.
2. The Bureau's action in adopting a reserve price based on a deal with a potential auction bidder is unprecedented.
3. The reserve price set in the auction is contrary to precedent and unsupported by the facts of record.

## **C. Argument**

1. Reconsideration was justified by new developments. The Bureau's Recon Denial Order appears to be based on part on a finding that NTCH's petition for reconsideration was not based on facts that were known prior to the last opportunity to comment. Let us be very clear. The period for submitting comments on the Bureau's reserve price proposal for Auction 96 closed on August 5, 2013. On September 9, DISH submitted a 2-page ex parte comment proposing out of the blue a reserve price seven times higher than the minimum bids which the

Commission had proposed. DISH did not mention any connection between its new reserve price proposal and the resolution of interoperability issues which had been agreed to by the Commission. Late on September 10, Acting Chairwoman Clyburn released a statement announcing a "voluntary industry solution" to 700 MHz interoperability involving DISH Network and a few other industry stakeholders who "worked collaboratively with FCC staff to hammer out a solution that benefits all consumers." The terms of the collaborative solution were not revealed, nor have they ever been revealed by the Commission.

On September 9, DISH apparently also filed a request for a waiver of the rules in connection with its AWS-4 license and for extensions of time to achieve certain build-out obligations with respect to that license and its 700 MHz license. The Petition was assigned its own docket (13-225), and the public was given eleven days to respond to the petition. Strangely, the copy of the DISH petition in Docket 13-225, though dated September 9, 2013, is stamped as "filed and accepted" on September 25. In this document for the first time is revealed DISH's "acknowledgement" that the Commission's grant of the various benefits it requested in the petition is to be conditioned on its bidding the reserve price set in Auction 96, not to exceed 50 cents a MHz/pop. While there were press speculations about the terms of the interoperability "deal" reached in early September, no one has formally acknowledged that a deal exists, and the September 9/25 DISH filing was the first notice in any Docket that there was a quid pro quo between the proposed DISH bid in Auction 96 and the grant of its waiver/extension request. The Commission issued a Public Notice on September 13 alerting the public to the DISH waiver petition and seeking comment. September 13 was the same date the Bureau adopted the Auction 96 Procedures Order.

It is incontrovertible that there were dramatically new facts and circumstances affecting the setting of a reserve price in Auction 96 which could not have been known by the public prior to September 13 -- the day the Bureau issued the Order under review here. And the reserve price proposal itself was only made a few days before the Commission adopted the Order -- hardly time for anyone to become aware of the filing, much less make a responsive comment. For the Commission to ignore these circumstances only exacerbates the appearance of a secret arrangement. NTCH's petition for reconsideration timely and very properly raised and questioned the propriety of these new circumstances.

2. The reserve price is unsupported by facts or precedent. The Recon Denial Order states that the Bureau adopted DISH's proposed reserve price and the related methodology "after careful consideration." *Recon Denial Order* at Para.16. This careful consideration occurred over a matter of a few days with no effective opportunity for any response from the public. The Bureau's adoption of the \$.50/MHz/pop reserve price is notable in three respects. First, there is no support in the record whatsoever for the figure adopted. DISH's brief submission merely indicates that the value of the H Block is estimated to be "at least \$0.50 per ... MHz-pop." DISH then goes on to cite a 7 year old value for AWS-1 spectrum, and several more recent valuations of AWS spectrum ranging from 61 cents to \$1.00 per MHz-pop. None of the cited sources support a 50 cent reserve price. If anything they appear to justify a higher reserve price north of 60 cents if secondary market AWS valuations are to be used as the basis for a reserve price. Yet the Bureau adopted the 50 cent figure without any explanation for its reasoning.

Second, the Bureau pointed to a couple of earlier auctions in Footnote 38 of the *Recon Denial Order* to justify a reserve price for PCS spectrum which is seven times the minimum bid

amount. None of the examples cited were PCS auctions -- in fact, in no previous auction going as far back as 1999 has the Commission ever set a reserve price for a PCS auction. Rather, the FCC stated in one such auction that “effectively the minimum opening bids operate as reserve prices” (*Auction of Broadband PCS Spectrum Scheduled for May 16, 2007, Notice and Filing Requirements, Minimum Opening Bids, Upfront Payments and Other procedures for Auction No. 71, DA 07-30, Public Notice, ¶146 (2007)*). And even in the AWS auctions cited by the Bureau, the reserve prices adopted were only two or four times the minimum bids. The setting of a PCS reserve price at seven times the minimum bid value is literally unprecedented.

Finally, as will be discussed below, the Bureau's discussion of how and why it arrived at the 50 cent reserve price ignores both DISH's commitment to bid that price and the conditional nature of that commitment. Given the extraordinarily high reserve price and the Commission's stated desire to maximize its take to support FirstNet, it was disingenuous for the Commission to act as though the grant of DISH's waiver was an open question. Unless the DISH waiver petition was granted -- as in fact it was duly granted on December 20 -- the high reserve price might well have caused Auction 96 to fail entirely, especially given the absence of major players in the auction. Yet this connection was nowhere acknowledged in Docket 13-178.

3. The understanding between DISH and the other parties to the "voluntary agreement" among stakeholders should be made public. As we have seen, there is a strong appearance that the Commission agreed informally to grant DISH a waiver of the rule mandating uplink use of the 2000-2020 MHZ AWS-4 band, along with extensions of time to meet certain build-out requirements, in exchange for concessions from DISH on potential interference to its 700 MHz

holdings and its commitment to bid at least 50 cents per MHz/pop in the H Block auction. The latter commitment amounted in some ways to a negotiated sale of the H Block rather than a free and open auction in which the bids of auction participants set the price for the auctioned licenses. NTCH itself 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 the licenses could otherwise have been bought. At the same time, the flexibility granted to DISH to change the band adjacent to the H Block from uplink to downlink at its sole option gave it a unique advantage in the auction which was undisclosed to other bidders at the time the auction procedures were adopted, applications were filed, and upfront funds were posted. It was incumbent upon the Commission to let other auction participants know that it was planning to give one bidder a major advantage in establishing the value of the licenses. Not to reveal these circumstances fundamentally corrupted the integrity of the auction.

It should be noted in this regard that the Commission scrupulously polices collusion between bidders in the auction, even taking steps to preclude signaling of bidding intentions by the way bids are entered. This is entirely appropriate because it is essential that auction participants have the assurance that the bidding has not been stacked or rigged against them. Yet that is precisely what the Commission's agreement with DISH does -- it guarantees that the prices for licenses in the auction will not be based on values set by the auction process itself but rather by the Commission's a priori deal. Only here the collusion is not between two bidders but rather between one bidder and the auctioneer.

4. The grant of DISH's waiver skews the auction. All parties, including DISH itself, agree that the status of the AWS-4 2000-2020 MHz band as uplink or downlink dramatically

affects the value of the adjacent H Block. Indeed, the Commission went to great lengths in adopting the service rules for the AWS-4 band to ensure that it securely protected the adjacent H Block from interference. That is why the adjacent band was made an uplink band. The uplink/downlink status will certainly affect the utility of the H Block. By giving DISH the unilateral power after the auction is over to decide whether the adjacent band is used for uplink or downlink, the Commission has given DISH a huge advantage in knowing how much to bid. It is almost as though the Commission told DISH it could decide after the auction was over whether the H Block would be 10 MHz or 7.5 MHz, but only DISH would know which one it was going to be. The auction cannot possibly be fair under these circumstances.

The Bureau's only response to this major flaw in the integrity of the auction is to remind bidders that they must diligently take into account all contingencies in making their bids, with one contingency being that one of the bidders could render the licenses acquired less valuable by its own fiat. For bidders to conduct any kind of reasonable due diligence, however, they must all have access to the same information about the rules governing the auction, the service requirements, and the potential for interference from adjacent bands. By giving DISH the exclusive right to adjust that last variable up or down, the Commission has effectively handicapped all other bidders at the starting gate.

#### **D. Conclusion**

The procedures adopted by the Bureau for Auction 96 make it a virtual certainty that DISH will win all or the great majority of the licenses involved. The auction is so strongly skewed in favor of DISH as a result of an undisclosed "collaboration" between DISH and the Commission that no other bidder has a chance, other than to pick up any small scraps that DISH

may leave behind. The auction is therefore a farce. Unless the reserve price is set to levels consistent with the minimum bids and unless DISH is forced to make an election about the uplink/downlink status of the adjacent AWS-4 band before the auction begins, the auction should be cancelled. When the procedures are corrected, the short form period should be re-opened to bidders who wish to participate in a fair auction.

Respectfully submitted,

NTCH, Inc.

By: \_\_\_\_\_ /s/ \_\_\_\_\_

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**Before the**  
**FEDERAL COMMUNICATIONS COMMISSION**  
**Washington, D.C.**

In re )  
 )  
DISH Network Corporation )  
Petition for Waiver of Sections 27.5(j) and )  
27.53(h)(2)(ii) of the Commission's Rules and ) WT Docket 13-225  
Request for Extension of Time )  
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To: The Commission

**NTCH, INC.'S APPLICATION FOR REVIEW**

NTCH, Inc. ("NTCH") hereby applies to the full Commission pursuant to Section 1.115 of the rules for review of the Wireless Telecommunications Bureau's December 20, 2013 Memorandum Opinion and Order, DA 13-2409 ("*Waiver Order*") granting, over NTCH's objections, DISH Network's ("DISH's") petition for certain waivers and extensions.

**SUMMARY**

The Bureau's action below was a product of a novel and pernicious policy decision to take cash payments to the Commission by petitioners into account in making public interest decisions. As will be discussed below, the waiver of the AWS-4 build-out deadline was inconsistent with long and consistent FCC precedent regarding the grounds for providing construction build-out relief. The downlink/uplink waiver completely overturned the result of "considerable analysis" by the Commission of the record in this Docket which had established the band plan and uplink/downlink configuration for the newly created AWS-4 service set forth

in the rules.<sup>1</sup> The Bureau's abrupt abandonment of the Commission's analysis in the absence of any new facts whatsoever (other than the deal with DISH) is unsustainable. Moreover, the change in the uplink/downlink configuration, if elected by DISH, would effectively change the rule requiring uplink operation in the 2000-2020 MHz band for the sole licensee of AWS-4 and all future licensees. There is literally nothing left of the rule, and a rulemaking was therefore the required mechanism under the Administrative Procedure Act to accomplish this change. Finally, by granting DISH the right to make its uplink/downlink election up to 30 months from the date of the Waiver Order, the Commission gave DISH a huge advantage in the auction by allowing it to unilaterally increase the value of the adjacent H Block by the election it makes.

#### **A. Questions Presented for Review**

1. Is it lawful or good policy for the Commission to accept cash payments in exchange for benefits granted to petitioners, i.e., to make the payment of money to the Commission an element of the Commission's public interest analysis?
2. Was the Bureau's grant of a build-out extension based on the petitioner's business judgments consistent with precedent that bars business judgment-based delays as a justification for build-out extensions?
3. Did the Bureau properly justify the abandonment of the uplink/downlink plan which the Commission had previously determined would minimize interference and be most conducive to interservice synergies?
4. When a waiver of a rule effectively eliminates the rule entirely, must the Commission proceed by rulemaking rather than waiver?
5. Did the grant of a 30 month period for DISH to determine the direction of the 2000-2020 band give it an unfair advantage in the H Block auction by allowing it to unilaterally increase the value of the H Block?

#### **B. Factors Warranting Commission Consideration**

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<sup>1</sup> Service Rules for Advanced Wireless Services in the 2000-2020 MHz and 2180-2200 MHz Bands, WT Docket No. 12-70, *Report and Order and Order of Proposed Modification*, 27 FCC Rcd 16102, 16108, at ¶ 25 (2012) (“AWS-4 Service Rules Order”).

1. The Bureau's reliance on a cash payment as a public interest consideration is a novel issue of law and policy, as is its grant of a waiver which is electable by the grantee at its option.
2. The Bureau's action was inconsistent with the Commission's prior precedent supporting the existing uplink/downlink configuration, was inconsistent with precedent and the Administrative Procedure Act by effectively changing a rule without going through required rulemaking procedures, and directly conflicted with precedent in granting a build-out extension based on DISH's business judgment to defer construction pending other developments.

### C. Argument

#### 1. FCC public interest determinations should not be based on the amount of cash promised by a petitioner.

The situation presented here is a novel one. It is undisputed that the rule waivers and build-out extension which were granted here by the Bureau were granted, in part or in whole, in exchange for DISH's agreement to bid about \$1.5 billion in the H Block auction. While the Bureau offered feeble public interest justifications to support its actions, it clearly would not have taken the actions absent DISH's commitment to pay the H Block cash. Indeed, the Bureau's actions were expressly conditioned on receipt of that payment. Obviously, if the Bureau's actions had been independently supported or justified by normal public interest considerations, there would have been no need for the payment condition because the actions would have stood on their own. There can thus be no ambiguity at all about the role of the cash payment in this action. It was an explicit quid pro quo: cash for waivers and extensions. Indeed, the Bureau made no bones about it. It stated that the delivery of funds by DISH that would ultimately go to fund FirstNet "is an additional public interest benefit to be considered in connection with evaluation of its waiver request." *Waiver Order* at ¶53.<sup>2</sup>

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<sup>2</sup> It is immaterial in this connection that the cash payment was promised in the context of an auction. That happened to be a vehicle where the Commission would shortly be receiving payments from the public, so it was a convenient way funnel the payment. But there is theoretically no reason why cash consideration could not be paid outside the

This is extraordinary. So far as NTCH has been able to determine, there is no other instance in the annals of FCC law or, for that matter, in the annals of federal administrative law generally, where the agency has openly accepted cash as consideration for favorable action on a matter before it. If a public official accepted cash in exchange for the same action, that would be called "bribery." Here there is no suggestion of corruption. We have no doubt that the Commission will receive and direct the promised funds to a worthy cause and that no individual is benefitting. The question of first impression here is whether the Commission itself may engage in conduct which it would be unlawful for one of its employees to engage in.

At first blush, the Bureau's assertion that the receipt of cash for a worthy cause is in the public interest and therefore justifies the action has some facial merit. How could it be wrongful for a cash-starved government agency to get money from its supplicants in exchange for favors when the money is supporting a service that will further public safety? There are four answers to that question.

(1) Lord Acton famously declaimed that power tends to corrupt and absolute power corrupts absolutely. A corollary to that dictum is that money tends to corrupt, and lots of money corrupts absolutely. In this context, what that means is not that the agency suffers a moral failure but rather that the attraction of money is inevitably likely to tilt the balance of judgment in the direction dictated by the money, and when lots of money is involved, the balance will *always* tilt towards the money. We need only look at the instant case to see the truth of this principle. In adopting the AWS-4 rules, the Commission evaluated at considerable length a full record and concluded on that basis that the uplink rule it adopted was in the public interest for a variety of reasons. It rejected a number of available alternatives based on that considered review. When

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auction context, just as forfeitures or "voluntary contributions" to the treasury are made in connection with consent decrees.

DISH made its cash offer, all of those considerations, which had been thoroughly considered and approved by the full Commission, were thrown out the window even though *nothing else had changed!* The only new element was the money, and that completely outweighed the "the totality of the facts and circumstances" which the Commission had "considered as a whole." *AWS-4 Service Rules Order* at ¶25. A billion and a half reasons easily overcame the other more pedestrian public interest factors which had driven the Commission in the first instance to adopt the configuration it did.

(2) If the payment of money to the FCC is a relevant and permissible public interest factor, shouldn't it be a factor in all FCC decisions? Assuming as we must that all of the FCC's functions are somewhat worthy of support, even if not so flag-draped as FirstNet, why shouldn't the Commission accept money in evaluating all of its decisions -- which applications should be granted, which rules adopted, which waivers granted, which applications denied. In each case, the promise of money to support the FCC's functions (or, even more broadly, the functions of the federal government) would (and should, under the Bureau's new approach) be taken into account in every decision. The Commission can always use more field inspection offices, more lawyers, more office space and computer capacity, nicer offices, etc. Under the Bureau's theory, not only would it be permissible for the Commission to accept funds for such purposes in connection with requests for Commission action, but it would be foolish not to. This renders the process of seeking public interest determinations by the Commission the equivalent of medieval pardoners selling indulgences.

(3) The consideration of cash offers in connection with the Commission's public interest deliberations necessarily disadvantages the poor. Under the Bureau's public interest calculus, the amount of money offered to the Commission for worthy purposes is a legitimate

basis for decision. If a disadvantaged minority group or a public interest group, for example, was advocating for a particular outcome, but was opposed by a corporate giant, the Commission could base its decision on how much money the opposing parties could pony up. The rich corporation would win most of, if not all of, the time. Letting policy decisions be driven by cash payments rather than non-cash public interest factors will lead to a Jeffersonian nightmare, an unabashed plutocracy rather than a democracy.

(4) Finally, we note that the adoption of this new "cash for benefits" policy is a dramatic new direction for the Commission. There is no precedent whatsoever for the Bureau's action, and therefore it was, at a minimum, beyond the authority of the Bureau to pursue this course without direction from the full Commission. See 47 C.F.R. Section 0.331(a)(2) ("The Bureau shall not have authority to act on any [petitions] when such [petitions] present new or novel questions of law or policy which cannot be resolved under outstanding Commission precedent or guidelines.") There is no precedent whatsoever for the Bureau's action, and thus its action was beyond its delegated authority.

But more importantly, this is also a dramatic change in direction for the Commission itself. The adoption of cash payments to the government as a public interest consideration is something new under the sun. Never before has the Commission adopted or even entertained such a conception of the public interest. As we have briefly set forth above, the path of cash-for-benefits is fraught with adverse consequences for the Commission's independence, the integrity of its decisions, the confidence that the public must have in the impartiality of its decisions, and virtually every other aspect of its regulatory mission. The courts have frequently opined that the Commission may change direction, but when it does so it must do so in a considered way that evaluates and considers the change in direction. *FCC v. Fox TV Stations, Inc.*, 556 U.S. 502, 515

(2009): "To be sure, the requirement that an agency provide reasoned explanation for its action would ordinarily demand that it display awareness that it *is* changing position. An agency may not, for example, depart from a prior policy *sub silentio* or simply disregard rules that are still on the books. And of course, the agency must show that there are good reasons for the new policy." (internal citations omitted; *Anna Jaques Hospital v. Sebelius*, 583 F.3d 1, 6 (2009); *Clinton Memorial Hospital v. Shalala*, 10 F.3d 854, 859 (1993); *NAACP v. FCC*, 682 F.2d 993, 999 (1982). Here the Commission has set its course down that new path with seemingly only the slightest reflection (cash furthers the statutory goal of funding FirstNet and therefore it is in the public interest). The full Commission should pause and think this through.

**2. The Bureau's grant of an extension for the AWS-4 license was directly contrary to precedent.**

Section 1.946(e) of the Commission's rules prescribes that an extension of time to construct may be granted upon a showing of a "loss of site or other cause beyond its control." In assessing what circumstances constitute a cause beyond a licensee's control, the Commission has repeatedly and consistently held that delays attributable to the licensee's own business decisions do not justify extensions of build-out periods. See, e.g., *Star Search Rural TV and Cellular, Inc.*, 28 FCC Rcd 11182 (WTB, 2013) (licensee's failure to construct was due to its business plan requiring a multitude of receive stations); *Wireless America, LLC*, 24 FCC Rcd 804 (WTB, 2009) (licensee undertook to build out a 6.25 KHz channel, then decided not to construct when it had trouble getting equipment); *Bristol Mas Partners*, 14 FCC Rcd 5007 (WTB, 1999). These and a host of other cases hold that a licensee may not delay or defer construction based on business vagaries of its own creation. The Commission also typically frowns on extension requests when the petitioner has made no actual efforts toward construction.

The *Waiver Order* ignores that body of precedent. The Bureau granted the one year extension based solely on the fact that DISH would not be able to begin construction until it made the uplink/downlink election which the Bureau granted at the same time. It was DISH that requested the extraordinary authority to have 30 months to make up its mind about which direction the 2000-2020 MHz band would run, and then that indecision is used as a basis for extending the construction period. This is precisely the sort of licensee-created business decision which the Commission has without exception refused to accept as a ground for extension of time to construct, yet here without distinguishing (or even acknowledging) the long line of cases to the contrary, the Bureau simply granted the extension. Moreover, DISH had expressly committed in the AWS-4 proceeding to "aggressively build out a broadband network," *Waiver Order* at Para. 43, just as the hapless licensee in *Wireless America*, *supra*, did. In that case, the commitment was thrown back in its face when the licensee sought an extension; here the commitment appears to have been ignored since DISH did not request an extension of the interim build out period.

Even if DISH's payment was a legitimate factor to take into account, the Bureau still needed to address how or why past precedents were being ignored. Although the Bureau insists that it independently evaluated the public interest considerations involved in the waiver and extension requests without regard to the cash, it later concedes that the cash was a factor. Indeed, there is no other explanation for its abrupt deviation from precedent.

### **3. The Bureau's deviation from the technical configuration of the 2000-2020 MHz band is unsupported.**

In the course of the AWS-4 Service Rules proceeding, the Commission conducted an exhaustive analysis of the configuration of the AWS-4 band, including its potential effects on adjacent services. It considered numerous band plan options and specifically considered the best

ways to configure the band for uplink and downlink operations. In November, 2012, it adopted an Order concluding, based on the "totality of the record," that the band should be configured as it was -- i.e., with the 2000-2020 band as an uplink band. In particular, the Commission found that the specific uplink/downlink plan it adopted would "facilitate the continued use of existing satellites for MSS. ... Stated otherwise, having the AWS-4 band parallel the spectrum pairing of the 2 GHz MSS band, in terms of their uplink and downlink designations, will minimize the possibility that AWS-4 operations could interfere with 2 GHz MSS operations and will offer the greatest opportunity for synergies between the two mobile services. Our finding is supported by the record."<sup>3</sup>

In the year that intervened between the adoption of the AWS-4 rules and the grant of the waiver here, nothing had changed. DISH remains, as it was in the fall of 2012, the only licensee of the two S band MSS licenses. The Commission plainly contemplated at the time that DISH would agree to the modification of its licenses as permitted there -- indeed, the whole service is premised on that happening. *None* of the technical considerations have changed. The sole change is that DISH has now offered a large amount of money to get the option to configure the band differently than the Commission originally found to be in the public interest. If the totality of the record supported the configuration a year ago, how can those factors not now be compelling?

Finally, we must note the irony that one of the justifications offered by the Commission for granting this waiver was a finding that it would "enhance wireless broadband competition, encourage innovation, speed up broadband deployment, and increase the supply of in-demand downlink spectrum to be used on an unpaired basis or paired with non-AWS-4 spectrum."

*Waiver Order* at Para. 23. It is frankly impossible to see how anything in the record shows that

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<sup>3</sup> *H Block Service Rules Order* at Para. 39.

this waiver will in any way "encourage innovation." It is even more impossible to see how it will "speed up broadband deployment" since the Commission actually gave DISH *more* time to roll out its service than the original rule required. The inevitable result is that broadband deployment will be *delayed*, not accelerated; there can have been no other reason for requesting the extension. What these patently unfounded assertions in the *Waiver Order* underscore is that the Bureau was simply grasping at fine-sounding but meaningless justifications for a waiver that was plainly driven by dollars, not by merit.

**4. The Commission must proceed by rulemaking if the effect of a waiver is to leave the rule a nullity.**

The rule waiver granted to DISH covers DISH, the sole licensee in the AWS-4 service, and all entities who later become licensees. It is permanent. Once DISH makes the election as to which direction it wants the 2000- 2020 MHz band to go, that determination lasts forever and applies to everyone. Accordingly, the requirement that that band to be used solely for uplink will of no further effect. The Bureau has therefore effectively written the rule out of the Code of Federal Regulations without ever going through the procedures specified by the Administrative Procedure Act. 5 U.S.C. Sections 553(b) and (c).

It is a black-letter principle of law that a waiver of a rule must not swallow the rule itself. *Nextel Communications, Inc.*, 14 FCC Rcd 11678, 11691-92 (WTB, 1999) ("It is axiomatic that the Commission must not eviscerate a rule by a waiver."); *In the Matter of AT&T*, 88 FCC 2d 150 at ¶ 15 (1981) ("Where a waiver is found to be in the public interest, it is generally expected that the waiver will not be so broad as to eviscerate the rule. Rather, the waiver must be tailored to the specific contours of the exceptional circumstances."); *In the Matter of Applications for Authority to Construct*, 3 FCC Rcd 4690 at ¶ 10 (1988) ("This is not an appropriate case for a waiver. Maritel's requested relief is so broad that it goes to the basis of the

rule and can only be addressed in rulemaking.” ) Use of a waiver to entirely abrogate a rule unlawfully sidesteps the strict provisions of the APA.

The Bureau's response is that waivers act as a safety valve for exemptions from the general rules based on special circumstances. *Waiver Order* at Para. 54. But unlike the cases cited by the Commission, which involved true exceptions for entities with unique problems in specific problem areas (non-standard use of certain frequencies in Alaska to accommodate that state's remote and sparsely populated situation and a waiver of the EBS transition rules for a small system in a remote part of South Dakota), here the waiver applies universally and permanently to the entire universe of AWS-4 licensees. There can be no clearer case of the exception swallowing the rule.

##### **5. The waiver gives DISH an unfair advantage in the H Block auction.**

Everyone, including the Commission and DISH, agree that the configuration of the AWS-4 band will affect the value of the adjacent H Block which is coming up for auction on January 22. As the Commission noted, and DISH concedes, converting the 2000-2020 band to downlink-only would have a beneficial effect by making possible the elimination of protective measures (OOBE limits) by H Block licensees that would otherwise be needed to protect the AWS-4 licensee from interference. The Bureau recognized that these limits could be eased if the adjacent band is downlink rather than uplink. This change in the uplink status of the AWS-4 band would thus make the H Block more valuable; not making the change would leave the value of the H Block where it is. Only DISH, a bidder in the auction, has been given the key to decide whether to add that value or not.

The situation might be likened to an auction for a parcel of property which is immediately adjacent to a sanitary landfill. The auctioneer has granted one of the bidders in the

right to decide after the auction is over whether the landfill will be discontinued and turned into a park or not. The favored bidder, obviously, can gauge its bids on its knowledge of what it intends to do, presumably bidding higher than it otherwise would if the landfill will go away. The other bidders cannot fairly assess the value of the property because they don't know a key variable which has been given to one of their competitors. The integrity of the auction is necessarily distorted from the start by the imbalance in the fairness of the bidding process.

The Bureau's answer to this problem was to caution all bidders that they should be aware of the uncertainties involved in bidding on this particular spectrum band,<sup>4</sup> but that does address the point: *one* of the bidders does not have to factor in that uncertainty because that bidder controls the main element of uncertainty. This problem could have been ameliorated by at least requiring DISH to make its election before the H Block auction begins. That way all bidders would be able to make their bids with full knowledge of how the adjacent band would be configured. In addition, the rules for this auction strictly maintain secrecy as to the identity of bidders and potential amounts to be bid by each bidder. Yet this "secret bidder" policy is completely undermined by DISH's stated commitment to bid \$1.5 billion in the auction, a factor that the Bureau did not even acknowledge in reconsidering the auction rules. As it is, the H Block auction is irrevocably flawed.

## **CONCLUSION**

For the reasons stated above, the Commission should review the cash- for- benefits policy adopted by the Bureau, categorically reject that policy as a basis for granting waivers or taking any other FCC actions, reverse the grant of the uplink/downlink waiver both as unsupported by the record and as a violation of the Administrative Procedure Act, initiate a rulemaking to

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<sup>4</sup> In re Petition for Reconsideration of Public Notice Announcing Procedures and Reserve Price for the H Block Auction (Auction 96), DA13-2281, re. November 27, 2013 at Para. 19.

consider the matters handled by waiver, permit the H Block auction to go forward only if the status of the adjacent 2000-2020 MHz band is finally resolved, and reverse the grant of the extension of time to construct as being in conflict with Commission precedent.

Respectfully submitted

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47 C.F.R. § 0.331(a)(2)

The Chief, Wireless Telecommunications Bureau shall not have authority to act on any complaints, petitions or requests, whether or not accompanied by an application, when such complaints, petitions or requests present new or novel questions of law or policy which cannot be resolved under outstanding Commission precedents and guidelines.

47 C.F.R. § 1.115(a)

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

47 C.F.R. § 1.115(b)(2)

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

- (i) The action taken pursuant to delegated authority is in conflict with statute, regulation, case precedent, or established Commission policy.
- (ii) The action involves a question of law or policy which has not previously been resolved by the Commission.
- (iii) The action involves application of a precedent or policy which should be overturned or revised.
- (iv) An erroneous finding as to an important or material question of fact.
- (v) Prejudicial procedural error.

47 C.F.R. § 1.2105(a)(2)(viii)

The short-form application must contain the following information, and all information, statements, certifications and declarations submitted in the application shall be made under penalty of perjury . . . Certification that the applicant has provided in its application a brief description of, and identified each party to, any partnerships, joint ventures, consortia or other agreements, arrangements or understandings of any kind relating to the licenses being auctioned, including any agreements that address or communicate directly or indirectly bids (including specific prices), bidding strategies (including the specific licenses on which to bid or not to bid), or the post-auction market structure, to which the applicant, or any party that controls as defined in paragraph (a)(4) of this section or is controlled by the applicant, is a party.

47 C.F.R. § 1.2105(c)(1)

After the short-form application filing deadline, all applicants are prohibited from cooperating or collaborating with respect to, communicating with or disclosing, to each other or any nationwide provider that is not an applicant, or, if the applicant is a nationwide provider, any non-nationwide provider that is not an applicant, in any manner the substance of their own, or each other's, or any other applicants' bids or bidding strategies (including post-auction market structure), or discussing or negotiating settlement agreements, until after the down payment deadline, unless such communications are within the scope of an agreement described in paragraphs (a)(2)(ix)(A) through (C) of this section that is disclosed pursuant to paragraph (a)(2)(viii) of this section