APPENDIX

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18-1209

NORTHSTAR WIRELESS, LLC AND SNR WIRELESS LICENSECO, LLC,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION,

Respondent,

T-MOBILE USA, INC.,

Intervenor.

Consolidated with 18-1210, 20-1507, 20-1508

Argued: Jan. 14, 2022
Filed: June 21, 2022

Before: Millett and Jackson[*], *Circuit Judges*, and Edwards, *Senior Circuit Judge*.

Millett, *Circuit Judge*:

In late 2014 and early 2015, petitioners Northstar Wireless, LLC ("Northstar"), and SNR Wireless

[*] Circuit Judge Jackson was a member of the panel at the time the case was argued but did not participate in this opinion.

LicenseCo, LLC ("SNR") placed more than $13 billion in winning bids at a Federal Communications Commission auction to license wireless spectrum. Because both Northstar and SNR were brand new companies with virtually no revenue, they each claimed the 25% discounts on their winning bids that the Commission offered in such auctions to very small businesses. After the auction concluded, though, the Commission determined that neither company was eligible for the very-small-business discount because both were *de facto* controlled by their biggest investor, the large telecommunications company DISH Network Corporation ("DISH").

Northstar and SNR (collectively, "Companies") petitioned for review of that decision. In 2017, we affirmed the Commission's order in part. *See SNR Wireless LicenseCo, LLCv. FCC,* 868 F.3d 1021, 1025 (D.C. Cir. 2017). While we held that the Commission's decision to deny the discounts was generally sound, we found that agency precedent required the Commission to give the Companies a chance to cure the problems in their agreements with DISH. *Id.* This court remanded for the Commission to afford the Companies that opportunity. *Id.*

Back before the Commission, Northstar and SNR each modified their agreements with DISH in substantially identical fashion. After the Companies were afforded the opportunity to meet with Commission staff and some Commissioners, the Commission found that the Companies remained under DISH's *de facto* control and denied them the 25% discount on their bid prices. Northstar and SNR have again sought our review, contending that the

Commission flouted this court's orders in *SNR Wireless* by not working closely enough with them to reduce DISH's control, wrongfully found them to be controlled by DISH, and penalized them without fair notice.

We reject the Companies' challenges to the Commission's orders. The Commission complied with our previous decision by affording the Companies an opportunity to cure. The Commission also reasonably applied its precedent to the Companies and gave them fair notice of the legal standards that it would apply in analyzing their claims to be very small companies.

I

A The Communications Act of 1934 tasks the Commission with regulating "all the channels of radio transmission"-that is, the electromagnetic spectrum used to send and receive wireless data. 47 U.S.C. § 301; *see also NTCH, Inc. v. FCC,* 950 F.3d 871, 874 (D.C. Cir. 2020) (per curiam). Because transmissions can interfere with one another when they are broadcast in the same portions of spectrum, the Commission "awards licenses to operate in specific frequency ranges, or 'bands.'" *AT&T Servs., Inc. v. FCC,* 21 F.4th 841, 843 (D.C. Cir. 2021) (citation omitted). Licensed companies can use spectrum to transmit content such as phone calls and videos.

In 1993, Congress gave the Commission the authority to license spectrum through competitive auctions. *See* Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, § 6002, 107 Stat. 312, 387-397 (codified at 47 U.S.C. § 3090)). Congress directed the Commission, in designing its auction rules, to "promot[e] economic opportunity and competition * * *

by disseminating licenses among a wide variety of applicants, including" small businesses. 47 U.S.C. § 309(j)(3)(B); *see also id.* § 309(j)(4)(D). At the same time, Congress directed the agency to avoid "unjust enrichment" and to allow for the "rapid deployment of new technologies, products, and services for the benefit of the public[.]" *Id.* § 309(j)(3)(C), (A).

Commission regulations encourage small businesses to participate in spectrum auctions by offering qualifying businesses "bidding credits[,]" which are discounts applied after an auction to reduce the cost of the acquired licenses. *See* 47 C.F.R. § 1.2110(a), (f) (2014).[1] To qualify for bidding credits, a business must show that its average revenues fall below threshold amounts set by the Commission. *Id.* § 1.21 l0(b)(l)(i), (f)(2).

Because acquiring and using wireless spectrum is expensive, small companies often rely on investments from larger, more established companies. *SNR Wireless,* 868 F.3d at 1044. To ensure that "bidding credits can only be used by genuinely small businesses-not by small sham companies that are managed by or affiliated with big businesses"-the Commission attributes to an applicant the revenues of any entity that *de facto* or *de jure* controls it. *Id.* at 1026; *see also* 47 C.F.R. § 1.2110(b)(1)(i), (c). Nonetheless, to allow small companies to participate in auctions, the Commission's Wireless Telecommunications Bureau ("Wireless Bureau") has granted some small businesses bidding credits even

[1] All regulatory citations are to the 2014 edition of the Code of Federal Regulations, which was in effect at the time of the auction at issue in this case.

when they were subject to "extensive supervision" by their established investors. *SNR Wireless,* 868 F.3d at 1044.

Auction participants apply for bidding credits in a two-step process. *See United States ex rel. Vermont Nat'l Tel. Co. v. Northstar Wireless, LLC,* 34 F.4th 29, 31-32 (D.C. Cir. 2022). Before the auction begins, a business seeking bidding credits must file a short-form application certifying that it qualifies for such credits. *See* 47 C.F.R. § 1.2105(a); *id.* § 1.2110(b). The Commission does not determine bidding credit eligibility before the auction. So a bidding credit applicant that chooses to bid at auction "assumes a binding obligation to pay its full bid amount upon acceptance of the winning bid at the close of an auction." *Id.* § 1.2104(g)(2); *see also Auction of Advanced Wireless Servs. (Aws-3) Licenses Scheduled for Nov. 13, 2014,* 29 FCC Rcd. 8386, 8417 ¶ 101 n.180 (2014) (*"2014 Auction Notice"*).

An applicant that wins a license in the auction and wishes to obtain bidding credits must then submit a more detailed, long-form application that the agency uses to assess whether the applicant is eligible for bidding credits. *See* 47 C.F.R. § 1.2110(j); *SNR Wireless*, 868 F.3d at 1027. If the Commission finds that a business does not qualify for bidding credits, the company must pay the full winning price on its licenses or face default penalties. *See* 47 C.F.R. §§ 1.2104(g)(2), 1.2109(c); *2014 Auction Notice,* 29 FCC Rcd. at 8417 ¶ 101 n.180, 8450-8451 ¶¶ 239-240. While the Commission uses bright-line rules to determine *de jure* control of the applicant companies, it assesses whether they are subject to *de facto* control

by another entity "on a case-by-case basis." 47 C.F.R. § 1.2110(c)(2)(i). The Commission has established several guidelines to analyze this "highly contextual" question. *SNR Wireless,* 868 F.3d at 1026.

First, under a test announced in the agency's *Intermountain Microwave* decision, the Commission considers six factors, such as another entity's control over the small businesses' daily operations and major policy decisions, to determine whether the applicant is *de facto* controlled by that other entity. *See Intermountain Microwave,* 12 F.C.C. 2d 559, 559-560 (1963); *SNR Wireless,* 868 F.3d at 1030-1031.

Second, the Commission has said that an entity may still be considered independent even if a passive investor retains certain veto powers over the business's decisionmaking. *See In the Matter of Implementation of Section 309(j) of the Commc'ns Act—Competitive Bidding,* 10 FCC Rcd. 403, 447-448 ¶¶ 80-81 (1994) (referred to as the "*Fifth Memorandum Opinion & Order*" or "*Fifth MO&O*"); *see also Baker Creek Communications, L.P.,* 13 FCC Rcd. 18709, 18714-18715 ¶ 9 (1998); *see also In re Stratos Glob. Corp.,* 22 FCC Rcd. 21328, 21343 ¶ 36 n.107 (2007) (full Commission adopting *Baker Creek).* A passive investor can "generally" play a role in a small business's major corporate decisions, such as the assumption of "significant corporate debt" and the sale of "major corporate assets[,]" without the Commission automatically deeming the investor to be in *de facto* control. *Fifth MO&O,* 10 FCC Rcd. at 448 ¶ 81. Still, the Commission has been explicit that "the aggregate effect of multiple" investor protections could be

sufficient to find a small business under the *de facto* control of the investor. *Id.* at 449 ¶ 82.

Third, the Commission advised, in its *Fifth Memorandum Opinion & Order,* that it will closely scrutinize applicants' "put options"—that is, their right to sell themselves to investors. *Fifth MO&O,* 10 FCC Rcd. at 455-456 ¶¶ 95-96. Although such rights may appear to give small businesses control over future mergers, the Commission has explained that put options may be combined with other terms to "financially * * * force the [small business] into a sale (or major refinancing)[.]" *Id.* at ¶ 96. In such a case, the Commission will deem the small business *de facto* controlled from the time of the auction. *Id.; see also* 47 C.F.R. § 1.2110(c)(2)(ii)(A)(2).

B

1

In 2014, the Wireless Bureau announced an upcoming auction for companies to bid on more than 1,600 spectrum licenses. *See 2014 Auction Notice,* 29 FCC Rcd. 8386. The agency offered bidding credits covering 25% of the cost of licenses to those winning bidders that had "attributed average annual gross revenues" of $15 million or less over the prior three years. *Id.* at 8412 ¶ 82. The Bureau then referred interested bidders to Commission regulations, as well as the *Intermountain Microwave* and *Baker Creek* orders, for guidance on the agency's *de facto* control standards for bidding-credit applications. *Id.* at 8412-8413 ¶¶ 84-86 & n.151.

Seventy entities qualified to compete in the auction, which ran between late 2014 and early 2015. *See Auction 97: Advanced Wireless Services (AWS-3),*

FCC (2020), https://www.fcc.gov/auction/97 (last accessed June 13, 2022). The winning bids totaled more than $41 billion. *Id.*

Among the biggest winners were SNR and Northstar, two "small companies that were formed just in time to file shortform applications" to participate in the auction as very small businesses. *SNR Wireless,* 868 F.3d at 1027. At the time they filed their short-form applications, both companies "lacked officers, directors," and virtually any revenue. *Id.; see also In re Northstar Wireless, LLC,* 30 FCC Rcd. 8887, 8910-8911 ¶ 53 (2015) ("*2015 Order*"). Northstar and SNR did, though, have one very large investor: DISH, which held an 85% stake in each company. *See 2015 Order,* 30 FCC Rcd. at 8893-8894 ¶ 14, 17; *see also id.* (noting that DISH holds its shares in the Companies through wholly owned subsidiaries). DISH (i) managed the Companies' businesses, (ii) was their principal investor and creditor, (iii) retained the power to veto important corporate decisions, and (iv) coordinated its own bidding strategy in the auction with the Companies. *Id.* at 8896-8897 ¶¶ 21, 23; *SNR Wireless,* 868 F.3d at 1027. Northstar and SNR both described DISH as holding "non-controlling interests" in the Companies.[2]

Together, the newly formed and effectively revenue-less Northstar and SNR won 43.5% of all the licenses in the auction, and their winning bids

[2] SNR Wireless LicenseCo, LCC, FCC Form 175 Exhibit A, Auction File No. 0006458318 (Sept. 12, 2014), at 6; *accord* Northstar Wireless, LLC, FCC Form 601 Exhibit A, ULS File No. 0006670613 (Feb. 13, 2015), at 13 (referring to DISH's "noncontrolling interest").

collectively added up to $13.3 billion. *2015 Order*, 30 FCC Rcd. at 8888 ¶ 3. Collectively, the licenses would together give the Companies spectrum rights "cover[ing] the entire United States." *Northstar Wireless, LLC,* 35 FCC Rcd. 13317, 13345 ¶ 84 n.191 (2020) ("*2020 Order*"). DISH financed approximately 98% of the Companies' winning bids. *2015 Order,* 30 FCC Rcd. at 8924 ¶ 84.

2

Shortly after the auction, Northstar and SNR each filed long-form applications seeking to obtain very-small-business bidding credits worth approximately $3.3 billion. *SNR Wireless,* 868 F.3d at 1027-1028; *2015 Order,* 30 FCC Rcd. at 8891 ¶ 10 nn.15-16. Over the next three months, SNR and Northstar repeatedly amended their filings in response to requests from Commission staff for more information. *2015 Order,* 30 FCC Rcd. at 8891 ¶ 10 nn.15-16, 8949 ¶ 151 n.431.

Several parties petitioned the Wireless Bureau to deny the Companies bidding credits. *See 2015 Order*, 30 FCC Rcd. at 8889 ¶ 4 & n.7, 8900 ¶ 30. In July 2015, officials from the Wireless Bureau, the Office of General Counsel, and the offices of all five Commissioners met with SNR, Northstar, and other interested parties to lay out the Commission's concerns with the applications.[3]

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[3] *See* Letter from Jean L. Kiddoo, Deputy Bureau Chief, Wireless Telecomm. Bureau, to Marlene H. Dortch, Sec'y, FCC (July 22, 2015), https://wireless2.fcc.gov/UlsEntry/attachments/attachmentViewRD.jsp;ATTACHMENTS=BhrpvT1PbTmyhR53DRfGLDpJs0hZ21zkr6xC4k:FmZnslcC0KPMwS!1071318750!560130442?app1Type=search&fileKey=1174580406&attachmentK

In August 2015, the Commission issued an order finding that DISH *de facto* controlled Northstar and SNR. *See 2015 Order,* 30 FCC Rcd. at 8889 ¶ 4. And because DISH had more than $13 billion in average annual revenue in the three years prior to the auction, the agency denied the Companies' request for very-small-business bidding credits. *Id.*

The Commission rested its decision on several findings relevant here. First, the agency concluded that DISH's investor protections swept more broadly than the "typical" protections outlined in *Baker Creek. 2015 Order,* 30 FCC Rcd. at 8913 ¶¶ 60-61. Particularly concerning to the agency was the fact that DISH held several levers to tightly constrain the Companies' spending. *Id.* at 8916 ¶ 64, 8918 ¶ 67. Because the Companies would need to expend large sums to roll out the nationwide wireless network needed to support the acquired licenses, those spending controls placed DISH firmly in the driver's seat. *Id.* at 8918 ¶ 67.

Second, the agency found that DISH controlled the Companies in all six ways identified in *Intermountain Microwave. See 2015 Order,* 30 FCC Rcd. at 8918-8928 ¶¶ 69-99. Not only did DISH possess strong contractual rights to control Northstar and SNR's decisions, but it had also agreed in its Management Services Agreements with the Companies to "build out, manage, and operate [the Companies' wireless] network[s.]" *Id.* at 8919 ¶ 71; *see also id.* at 8935-8936 ¶ 117. Additionally, the

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ey=19721827&attachmentlnd=applAttach ("2015 Kiddoo Letter") (last accessed June 13, 2022).

Companies were barred from paying any of their employees more than $200,000 a year without DISH's permission, and DISH could hire and fire a wide range of workers in its capacity as manager. *Id.* at 8915 ¶ 61, 8922 ¶¶ 80-81. DISH also could channel most of the Companies' profits to itself and so ensure that SNR and Northstar depended on it for future funding. *Id.* at 8924-8925 ¶¶ 85, 89. The Commission was further concerned about DISH's power to dictate the Companies' "use of their licenses" and the "fundamental choice of whether to remain in operation." *Id.* at 8927 ¶ 94. The Companies' failure to compete with one another at the auction-instead operating in tandem to make bids that advanced DISH's interests-underscored their subordinate relationship to DISH. *Id.* at 8931-8934 ¶¶ 109-114.

Third, the Commission found that SNR and Northstar's put options were designed to force the Companies to sell themselves to DISH. *2015 Order,* 30 FCC Rcd. at 8928-8931 ¶¶ 100-105. The agency observed that DISH could prevent the Companies' managers from selling their interests to anyone else for 10 years. *Id.* at 8928-8929 ¶ 101. With the Companies hemmed in, DISH made them offers they could hardly refuse. In particular, the agreements with DISH gave SNR and Northstar a single 30-day window each to exercise their put options, be bought out by DISH at a guaranteed rate of return, and walk away debt free. *Id.* at 8929-8930 ¶ 103. If they turned that deal down, the Companies would face billions of dollars of debt due within two years with far too little revenue to pay it. *Id.* at 8930 ¶ 104. That framework closely mirrored a scenario the Commission had previously indicated could well constitute a *de facto*

transfer of control. *Id.* at 8930-8931 ¶ 105 (quoting *Fifth MO&O,* 10 FCC Red at 456 ¶ 96).

Having found the Companies ineligible for bidding credits, the Commission applied its written policies to require the Companies to pay the full price for their licenses or face default penalties. *2015 Order*, 30 FCC Rcd. at 8951 ¶ 156, 8949-8951 ¶¶ 152-155. The Commission did not give the Companies an opportunity to fix the control issues the agency had identified. *See SNR Wireless,* 868 F.3d at 1028.

Northstar and SNR agreed to buy some of the licenses they had won and defaulted on others. *See 2020 Order*, 35 FCC Rcd. at 13324 ¶ 23 & n.43. As to the defaulted licenses, the Commission ordered the Companies to pay any shortfall between their winning bids and the price the agency obtained for those licenses in future auctions, as well as a penalty of 15% of either the winning bid in the original auction or a subsequent winning bid by a new purchaser, whichever is less. *SNR Wireless*, 868 F.3d at 1029; *see also* 47 C.F.R. § 1.2104(g)(2)(ii); *2014 Auction Notice,* 29 FCC Rcd. at 8451 ¶ 240. While the final amount they owe in penalties has not yet been determined, the Companies already have paid the Commission hundreds of millions of dollars in interim fees. *See SNR Wireless,* 868 F.3d at 1029.

3

Northstar and SNR sought review of the Commission's order in this court. *See SNR Wireless*, 868 F.3d at 1029. We upheld the agency's finding that DISH exercised *de facto* control over both companies, explaining that the Commission's "pragmatic application of *Intermountain Microwave"* comported

with its precedent and supported denying the Companies bidding credits. *Id.* at 1033-1034.

We also upheld the Commission's determination that the Companies' put options, in combination with their debt obligations, gave them no practical choice but to sell themselves to DISH just five years after acquiring their licenses. *See SNR Wireless*, 868 F.3d at 1034-1035. Because DISH could prevent Northstar and SNR from borrowing enough money to build a wireless network, or from selling their businesses to a third party, neither company could hope to pay off its multi-billion-dollar debt. *Id.* That left the Companies with "only one path to avoiding certain financial failure:" sell themselves to DISH in the contractually provided single time frame before their immense loans came due. *Id.* The *Fifth Memorandum Opinion & Order* had warned applicants that such an arrangement could result in a finding of *de facto* control. *Id.* at 1035.

This court also rejected the Companies' argument that the Commission arbitrarily departed from previous *de facto* control decisions by its Wireless Bureau, because the Bureau's unexplained rulings did not bind the agency as a matter of law. *See SNR Wireless,* 868 F.3d at 1035-1042.

But we agreed with SNR and Northstar that they lacked fair notice that the agency would deny them a chance to cure the control issues it had identified. *See SNR Wireless*, 868 F.3d at 1043-1046. While Commission precedent had given the Companies fair notice of the control standards it applied in denying them bidding credits, we held that the agency failed to warn them that they would be denied an "opportunity

to cure" any control problems before being subjected to the Commission's remedies. *Id.* at 1025. We then ordered the Commission to provide "an opportunity for [the Companies] to renegotiate their agreements with DISH[,]" but added that "[n]othing in our decision requires the [Commission] to permit a cure." *Id.* at 1046.

4

Following this court's decision, Northstar and SNR wrote to Commission staff seeking to negotiate an agreement that would allow them to receive the very-small-business bidding credits. The agency did not respond. Instead, in January 2018, the Wireless Bureau issued an order laying out its procedures for the remand. *See In re Northstar Wireless, LLC*, 33 FCC Rcd. 231 (2018). Under that plan, the Bureau gave the Companies time to revise their agreements with DISH and refile a request for very-small-business bidding credits. *Id.* at 232-233 ¶¶ 5-6. Interested third parties could then comment on the filings, and SNR and Northstar would have another chance to revise their agreements in response. *Id.* at 233-234 ¶¶ 7-8.

The Companies appealed the Bureau's order to the Commission. They argued, as relevant here, that this court's decision and agency precedent required the Commission on remand to engage in "iterative, responsive negotiation[s]" with SNR and Northstar to "cure the [Commission's] *de facto* control concerns." Joint Appendix ("J.A.") 377.

The Commission affirmed the Bureau's order in relevant part. *See In re Northstar Wireless, LLC*, 33 FCC Rcd. 7248 (2018) ("*Remand Procedures Order*").

The agency ruled that our decision did not require it to work directly with the Companies to formulate a cure. Instead, all the agency had to do was give Northstar and SNR the opportunity to renegotiate their agreements with DISH to come into compliance with Commission standards. *Id.* at 7251-7252 ¶¶ 10-12. That, the Commission said, was exactly what the Bureau's procedure allowed. *Id.* at 7254 ¶ 16.

In August 2018, the Companies timely sought our review and, at the request of the parties, we held the case in abeyance pending further action by the Commission.

Meanwhile, by June 2018, SNR and Northstar had revised their agreements with DISH and submitted new applications for very-small-business bidding credits. Three parties opposed the Companies' application, all of whom have since intervened in this case. *See 2020 Order*, 35 FCC Rcd. at 13327-13328 ¶ 34. The Companies responded and filed an expert report arguing that "SNR and Northstar each have viable potential business options regarding the use of their respective [spectrum] licenses." J.A. 1548 (Declaration of Carlyn R. Taylor).

In November 2020, SNR and Northstar made their case for bidding credits during virtual meetings with Commissioners Carr, Rosenworcel, Starks, and members of their staff, a member of Commissioner O'Rielly's staff, and an attorney advisor from the agency's Office of General Counsel.[4] At those

[4] *See* Letter from Ari Q. Fitzgerald, Counsel to SNR Wireless LicenseCo, LLC, and Mark F. Dever, Counsel to Northstar Wireless, LLC, to Marlene H. Dortch, Sec'y, FCC (Nov. 4, 2020) ("November 4 Meeting Letter"), J.A. 1592; Letter from Ari Q.

meetings, the Companies answered questions about the nature of their new agreements, and they then supplemented their responses in letters filed with the Commission.[5]

Later that month, the Commission found that the attempted cure had not taken: DISH remained in *de facto* control of SNR and Northstar. *See 2020 Order*, 35 FCC Rcd. at 13318 ¶ 5.

In reaching that conclusion, the Commission acknowledged that the Companies and DISH had changed their agreements in several ways. *See 2020 Order*, 35 FCC Rcd. at 13326-13327 ¶ 32. For example, the amendments generally diminished DISH's ability to veto outright some of the Companies' major business decisions. *Id.* at 13339 ¶ 66. The parties also eliminated the Management Services Agreements, gave the Companies the authority to pay employees as they saw fit, and expanded the number of decisions SNR and Northstar could make without consulting DISH. *Id.* at 13326-13327 ¶ 32, 13342 ¶ 79. Finally, the new agreements reduced SNR and Northstar's debt obligations and gave them a second opening in which to sell themselves to DISH for a guaranteed profit. *Id.* at 13326-13327 ¶ 32.

Fitzgerald, Counsel to SNR Wireless LicenseCo, LLC, and Mark F. Dever, Counsel to Northstar Wireless, LLC, to Marlene H. Dortch, Sec'y, FCC (Nov. 17, 2020), J.A. 1616 ("November 17 Meeting Letter").

[5] *See* November 4 Meeting Letter, at J.A. 1592-1599; November 17 Meeting Letter, at J.A. 1616-1627.

The Commission nevertheless held that DISH was still in *de facto* control of both Companies for two independent reasons.

First, applying Intermountain Microwave and Baker Creek, the Commission found that DISH retained its power to dominate SNR and Northstar by controlling their access to capital and revenue. 2020 Order, 35 FCC Rcd. at 13318-13319 ¶¶ 6-7. The fact that the Companies negotiated substantially identical agreements on remand bolstered this conclusion. Id. at 13319 ¶ 8.

Second, under the *Fifth Memorandum Opinion & Order* the Commission found that Northstar and SNR's put options, considered alongside their financial obligations and DISH's investor protections, remained "virtually certain to entice" the Companies to sell themselves to DISH. *2020 Order*, 35 FCC Rcd. at 13319-13320 ¶ 11 (quoting *SNR Wireless,* 868 F.3d at 1035).

Northstar and SNR filed timely notices of appeal and petitions for review.

While the petitions and notices of appeal were pending, the parties advised the court that non-DISH investors in SNR and Northstar began selling their shares. In late 2020, DISH acquired all but three percent of Northstar's outstanding common shares from Northstar's managing shareholders.[6] The following year, SNR shareholders exercised their right

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[6] *See* AT&T *et al.* Br. 10-11; DISH Network Corporation Form 10-Q, SEC (Nov. 4, 2021), https://www.sec.gov/ix?doc=/Archives/edgar/data/0001001082/000155837021014419/dish-20210930x10q.htm, at 10 (last accessed June 13, 2022).

to sell the company to DISH.[7] And shortly after oral argument, DISH agreed to extend Northstar's right to sell itself-which was set to expire on January 25, 2022-to July 24, 2022.[8]

II

Northstar and SNR filed timely notices of appeal under 47 U.S.C § 402(b) and petitions for review under 47 U.S.C. § 402(a). "Because we plainly have jurisdiction by the one procedural route or the other, we need not decide which is the more appropriate vehicle for our review." *Verizon v. FCC,* 740 F.3d 623, 634 (D.C. Cir. 2014) (internal quotation marks and citation omitted) (finding jurisdiction without deciding whether it vested through a petition for review under 47 U.S.C. § 402(a) or a notice of appeal under 47 U.S.C. § 402(b)).

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[7] *See* DISH Network Corporation Form 8-K, SEC (Nov. 19, 2021), https://www.sec.gov/ix?doc=/Archives/edgar/data/0001001082/000100108221000023/dish-20211115x8k.htm, at 2 (last accessed June 13, 2022); Letter from Maureen K. Flood, Counsel, FCC, to Mark Langer, Clerk, U.S. Court of Appeals for the District of Columbia Circuit (March 22, 2022); Oral Arg. Tr. 6: 12-17.

[8] *See* Letter from Maureen K. Flood, Counsel, FCC, to Mark Langer, Clerk, U.S. Court of Appeals for the District of Columbia Circuit (March 1, 2022). *Compare also* Third Amended and Restated Limited Liability Company Agreement of Northstar Spectrum, LLC by and Between Northstar Manager, LLC and AmericanAWS-3 Wireless II L.L.C. (June 7, 2018), § 8(a), J.A. 679, *with* First Amendment to the Third Amended and Restated Limited Liability Company Agreement of Northstar Spectrum, LLC, FCC (Jan. 24, 2022), https://wireless2.fcc.gov /UlsEntry /attachments/attachmentViewRD.jsp?applType=search&fileKey =1843738938&attachmentKey=21418597&attachmentlnd=app1 Attach (last accessed June 13, 2022).

We must affirm the Commission's decision unless it was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law[.]" 5 U.S.C. § 706(2)(A). Our approach is "deferential," and our task is "simply [to] ensure[] that the agency has acted within a zone of reasonableness"—that is, to determine whether the agency "reasonably considered the relevant issues and reasonably explained [its] decision." *FCC v. Prometheus Radio Project,* 141 S. Ct. 1150, 1158 (2021).

III

A

1

Northstar and SNR argue that the Commission violated our remand order by declining to negotiate iteratively with the companies over how to secure their *de facto* independence from DISH. We disagree. The agency was under no such obligation.

As we explained in *SNR Wireless,* because the Commission's guidelines for *de facto* control are fact intensive and weigh multiple criteria, the Commission has sometimes provided applicants "a chance to cure" control problems identified by the agency. *SNR Wireless*, 868 F.3d at 1045 (citing *In re Application of ClearComm, L.P.*, 16 FCC Rcd. 18627 (2001)). It is that same "chance to cure" that we ordered the Commission to provide the Companies on remand. Nothing more and nothing less.

The Commission followed that directive. The Commission gave the Companies an "opportunity * * * to renegotiate their agreements with DISH" and then apply again for the very-small-business bidding

credits they sought. *SNR Wireless,* 868 F.3d at 1046; *see Remand Procedures Order,* 33 FCC Rcd. at 7253 ¶ 13. Northstar and SNR had the chance to revise their contracts with DISH in light of the detailed guidance they had received from not only prior agency precedent, but also a unanimous Commission decision in their own case, and this court's lengthy analysis of the concerns with their prior agreements. *See Remand Procedures Order*, 33 FCC Rcd. at 7255 ¶ 20; *see also 2015 Order*, 30 FCC Rcd. at 8887-8953; *SNR Wireless*, 868 F.3d at 1029-1042. Together, that afforded the Companies adequate guidance for eliminating DISH's *de facto* control.

Contrary to the Companies' argument, neither the Commission's decision in *In re Application of ClearComm, L.P.*, 16 FCC Rcd. 18627 (2001), nor our discussion of it, *see SNR Wireless*, 868 F.3d at 1045-1046, required more of the Commission. In *ClearComm*, a small business transferred its licenses to NewComm, a corporation created with funding from a large telecommunications company. 16 FCC Rcd. at 18627-18630 ¶¶ 1-5. Commission staff asked the parties questions about their agreements and, after receiving responses, "raised further questions regarding whether certain" elements of the contracts gave the investor control over NewComm. *Id.* at 18631 ¶ 7. The parties submitted proposed revised agreements "to explicitly address the control concerns[,]" and followed up with executed contracts. *Id.*

Likewise, the Commission here explained its control concerns to the Companies in detail and gave them a chance to establish their independence

consistent with that guidance and this court's analysis. *Compare Remand Procedures Order*, 33 FCC Rcd. at 7255 ¶ 20, *with ClearComm,* 16 FCC Rcd. at 18631 ¶ 7. The main difference between the two cases is that the agency here also gave the Companies a lengthy opinion issued by the Commission itself to guide its renegotiations, rather than just interactions with agency staff, and Northstar and SNR had the benefit of additional guidance from a federal court of appeals. On top of that, the Companies had engaged in a back-and-forth with agency staff before the Commission accepted their initial long-form applications, *see Remand Procedures Order,* 33 FCC Rcd. at 7256 ¶ 22, and on remand met with the majority of Commissioners to defend their amended agreements.[9] Rather than a "second shot in the dark[,]" Companies Opening Br. 26, the Companies enjoyed a well-lit path to a cure.

The Companies contend that we ordered both that they be permitted to renegotiate with DISH *and* that Commission staff engage directly in back-and-forth discussions with them. That is not what we said. Our prior ruling gave the Companies "an opportunity to negotiate a cure[,]" which was to consist of "an opportunity to renegotiate their agreements with DISH[.]" *SNR Wireless*, 868 F.3d at 1046. That was "*the* appropriate remedy" ordeRcd. *Id.* (emphasis added). Counsel for the Companies even acknowledged at oral argument that "precise language [requiring] negotiating with staff, of course, isn't in the opinion[.]" Oral Arg. Tr. 29:4-6. In other words, our

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[9] *See* November 4 Meeting Letter, *supra,* and November 17 Meeting Letter, *supra.*

remand order required only that the Companies be allowed the opportunity for a cure, not that Commission staff prescribe the cure.

2

It is black-letter law that agencies must treat like parties alike. The Companies argue that the Commission failed to do so by denying them the kind of repeated staff negotiations the agency had provided to address control problems in the past. The record does not bear out that claim.

First, the Companies are comparing apples to oranges. That is because, "prior to any cure opportunity, [SNR and Northstar] had extensive information about the Commission's views on the ways in which their initial Applications were defective" right from the Commission's mouth, along with this court's "point-by-point elaboration of the Commission's analysis[.]" *Remand Procedures Order*, 33 FCC Rcd. at 7255 ¶ 20; *see also id.* at 7255-7256 ¶ 21. The Companies identify no other entity that has been given that same amount of individualized and on-point guidance about the basis for the Commission's *de facto* control finding.

For the same reason, the Companies get no help from the Commission's observation that agency "staff has usually undertaken discussions" with bidding credit applicants "in order to obtain revisions to agreements" and ensure their independence. *In re Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission's Competitive Bidding Rules and Procedures,* 21 FCC Rcd. 4753, 4769 ¶ 43 (2006). The

Companies did better by getting guidance directly from the Commissioners themselves.

Anyhow, the Companies have had extensive interactions with agency staff. In 2015, Commission staff reached out to the Companies to obtain additional information and allowed them to update their applications repeatedly in response, much as SNR and Northstar say the agency has done with prior applicants. *Compare 2015 Order*, 30 FCC Rcd. at 8949 ¶ 151 n.431, *with* Companies Opening Br. 31-32 & nn.11-13 (citing instances in which Commission staff asked applicants questions about their bidding-credit eligibility). Top-level Commission officials, including representatives from the offices of all five Commissioners, also met with SNR and Northstar to explain the agency's view of their initial agreements with DISH.[10] Not only did the Companies interchange their submissions with agency staff, but on remand they were given the opportunity to field live questions about their amended agreements from the majority of sitting Commissioners.[11] The Companies were hardly shortchanged in Commission attention and advice.

At bottom, the Companies' argument presupposes an obligation on the part of the Commission to map out the precise details of an arrangement with DISH that would pass muster. That is not how the process works. The Companies bid at the auction only after first agreeing to pay the full price for acquired

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[10] *See* 2015 Kiddoo Letter, *supra.*

[11] *Compare* November 4 Meeting Letter, *supra,* and November 17 Meeting Letter, *supra, with* Companies Opening Br. 31-32 & nn.11-13.

spectrum licenses even if they were ultimately denied very-small-business bidding credits. *See* 47 C.F.R. §§ 1.2104(g)(2), 1.2109(c); *2014 Auction Notice,* 29 FCC Rcd. at 8417 ~ 101 n.180; Oral Arg. Tr. 32: 19-22. They then bore the burden of proving their status as genuinely independent very small businesses to obtain bidding credits. Having failed in that task, *SNR Wireless,* 868 F.3d at 1025, they were entitled on remand only to a second opportunity to themselves cure the problems identified. Nothing in the regulatory scheme, past agency practice with other parties, or this court's prior opinion obligated the Commission to work hand in glove with the Companies to draft their blueprint for independence.

B

On the merits, the Commission reasonably found that DISH continues to exercise *de facto* control over the Companies. The agency grounded its decision on three settled agency rulings. First, under *Baker Creek,* DISH's veto powers, though trimmed from the prior agreements, continued to materially dominate the Companies' business decisions. *See 2020 Order*, 35 FCC Rcd. at 13340 ¶¶ 70-71. Second, under the Commission's *Fifth Memorandum Opinion & Order*, SNR and Northstar were still financially compelled to sell themselves to DISH. *Id.* at 13357-13362 ¶¶ 124-146. Third, the *Intermountain Microwave* factors again pointed to DISH's *de facto* control. *Id.* at 13341-13357 ¶¶ 72-123. Those conclusions by the Commission were reasoned, supported by substantial evidence, and consistent with agency precedent.

1

The Commission's conclusion that DISH's revised investor protections "reinforce[d]" its control over the Companies was sound. *2020 Order,* 35 FCC Rcd. at 13340 ¶ 69. The Commission acknowledged that SNR and Northstar's new agreements had whittled down the number of DISH's veto powers over the Companies' business decisionmaking. *Id.* at 13338-13339 ¶ 65. But focusing on quality rather than quantity, the Commission concluded that DISH retained-and, in one critical respect, expanded-its power to control vital business decisions going to the Companies' *raison d'etre:* developing and using the wireless spectrum they had purchased. *Id.* at 13340-13341 ¶¶ 69-71.

Under *Baker Creek,* the agency may deem a small company independent even if an investor retains "a decisionmaking role * * * in major corporate decisions that fundamentally affect[s] [the investor's] interests." 13 FCC Rcd. at 18714-18715 ¶ 9. *Baker Creek* identified six business decisions in which investors in small businesses typically "may" participate without being found in *de facto* control:

> (1) [the] issuance or reclassification of stock; (2) setting compensation for senior management; (3) expenditures that significantly affect market capitalization; (4) incurring significant corporate debt or otherwise encumbering corporate assets; (5) sale of major corporate assets; [and] (6) fundamental changes in corporate structure.

Baker Creek, 13 FCC Rcd. at 18715 ¶ 9; *see also 2015 Order*, 30 FCC Rcd. at 8913 ¶ 60.

The *Baker Creek* decision cautioned, though, that "[i]nvestment protection provisions may confer actual control upon [an investor] where they give it the power to dominate the management of corporate affairs." 13 FCC Rcd. at 18714 ¶ 9.

The Commission acknowledged that many of DISH's veto powers under the amended agreements mirror the six identified in *Baker Creek*. *See 2020 Order*, 35 FCC Rcd. at 13339 ¶ 66. And the agency noted that the contracts purported to limit DISH's authority to veto the Companies' decisions only as "consistent with * * * *Baker Creek*[.]" *Id.* at 13339 ¶ 68 (citation omitted).

But the Commission found that DISH's protections, when paired with other restrictions, went too far, in two respects. *See 2020 Order,* 35 FCC Rcd. at 13340-13341 ¶¶ 69-71.

First, under the new agreements, DISH had the authority to block the Companies from "incurring any significant indebtedness[.]" *2020 Order,* 35 FCC Rcd. at 13340 ¶ 70 (internal quotation marks and citation omitted). That power "could operate to restrict the [Companies] from obtaining additional funding that is necessary for their business plans." *Id.* Constructing a nationwide wireless network is expensive, so the Commission reasonably found that these provisions empowered DISH to roadblock any of the Companies' buildout plans for the spectrum acquired at auction, unless they met with DISH's approval. *See id.* That left the Companies dependent on DISH if they wanted

to use a wireless network to survive as independent businesses.

Second, the Commission found that the amendments gave DISH a whole new power-the ability to prevent the Companies from leasing their licenses. *See 2020 Order,* 35 FCC Rcd. at 13340-13341 ¶ 71. Under the old agreements, the Companies were permitted to lease their "property or assets * * * in the ordinary course of business" without DISH's consent, as long as they did not lease "all or substantially all" of their "business or property[.]" J.A. 183, 180 (Northstar 2014 Credit Agreement§§ 6.18, 6.11(c)).[12]

Under the new amendments, by contrast, the Companies need DISH's written permission to lease any "major asset[,]" including spectrum licenses, and DISH is free to deny a request "for any reason or no reason[.]" J.A. 644,670 (Northstar 2018 LLC Agreement §§ 6.3, 1.1); *accord* J.A. 1158, 1109 (SNR parallels). That, the Commission said, is "a critical *new* index of DISH's *de facto* control over the [Companies'] business opportunities." *2020 Order,* 35 FCC Rcd. at 13340 ¶ 71. Not only is this investor protection beyond the scope of the provisions listed in *Baker Creek,* but it also allows DISH to foreclose a critical route for the Companies to raise money:

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[12] *Accord* First Amended and Restated Credit Agreement By and Among American AWS-3 Wireless III L.L.C. (as Lender) and SNR Wireless LicenseCo, LLC (as Borrower) and SNR Wireless HoldCo, LLC (as Guarantor),§§ 6.18, 6.11(c), FCC (Oct. 13, 2014), https://wireless2.fcc.gov/UlsEntry/attachments/attachment View RD.jsp?applType=search&fileKey=919232078&attachmentKey= 19626515&attachmentlnd=app1Attach, at 33, 30 (last accessed June 13, 2022) ("SNR 2014 Credit Agreement").

spectrum leasing. Notably, spectrum leasing is one of the approaches that the Companies' own economic expert highlighted as a pathway for SNR and Northstar to achieve their independence. *See id.* Yet that path is closed without DISH's approval.

The Companies have three main responses, none of which succeeds.

First, the Companies contend that the amended investor protections comport with *Baker Creek*. The Commission, though, adequately explained why the agreements actually cemented DISH's *de facto* control over SNR and Northstar. In its initial 2015 decision finding *de facto* control, the Commission was concerned about limitations on the Companies' ability to borrow from third parties. *See 2015 Order,* 30 FCC Rcd. at 8924 ¶ 85. While some restrictions on raising debt "have been considered acceptable investor protections in some circumstances," the Commission reasonably found that general rule inapplicable here because the Companies' original agreements allowed them to borrow only "trivial" amounts "in comparison to the value of the[ir] spectrum[.]" *Id.*; *see also SNR Wireless*, 868 F.3d at 1033.

True, under the agreements at issue here, the parties removed the hard limit on the Companies' unsecured debt. *See 2020 Order,* 35 FCC Rcd. at 13340170, 13347-13348191. But the Commission sensibly concluded that DISH's new veto over significant debt-the lifeblood of wireless network development-"blunt[ed] the impact" of that change. *Id.* at 13340 ¶ 70.

In addition, the new leasing provisions went "beyond those identified as typical in *Baker Creek*[.]"

2020 Order, 35 FCC Rcd. at 13340 171. To be sure, *Baker Creek* held that it is generally permissible for non-controlling investors to be involved in a small business's decisions to sell "major corporate assets[.]" *Baker Creek,* 13 FCC Rcd. at 1871519. But the Commission reasonably found that DISH imposed even broader restrictions on the Companies' power to lease or assign licenses, which went too far. When combined with other contractual conditions, DISH's new control over spectrum leasing gave it "the ability to frustrate or prevent the [Companies] from building out their networks[] [or] leasing their spectrum in any significant amount[.]" *2020 Order,* 35 FCC Rcd. at 13340 ¶ 71.

The Companies' argument that the amended agreements did not expand DISH's power to nix their leasing decisions fares no better. The prior agreements had allowed the Companies independently to lease "property or assets * * * in the ordinary course of business," though SNR and Northstar could not lease "all or substantially all" of their "business or property" without DISH's approval. J.A. 183, 180 (Northstar 2014 Credit Agreement §§ 6.18, 6.11(c)).[13] Under the amendments, the parties have materially narrowed the "ordinary course of business" exception by giving DISH a unilateral veto over the lease or transfer of any "major asset" including spectrum licenses. J.A. 644, 670 (Northstar 2018 LLC Agreement §§ 1.1, 6.3); *accord* J.A. 1109, 1158 (SNR parallels).

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[13] *Accord* SNR 2014 Credit Agreement §§ 6.18, 6.11(c), at 33, 30.

The Companies contend that the 2018 agreements did not substantively change their ability to lease licenses without DISH's consent. They point to the fact that the new agreements retained the "ordinary course of business" exception and just added on the new restriction on leasing "major asset[s.]" *See* Companies Reply Br. 16-17; J.A. 644, 670 (Northstar 2018 LLC Agreement §§ 1.1, 6.3); *accord* J.A. 1109, 1158 (SNR parallels). This, the Companies argue, shows that leasing a major asset such as a spectrum license was unlikely ever to be within the ordinary course of business.

But DISH's right hand took away what the left hand gave: Its sweeping new veto power over the lease of any major asset extinguished the force of the previously viable "ordinary course of business" exception. So the Commission reasonably concluded that the leasing restriction was a new and material form of control. *See 2020 Order*, 35 FCC Rcd. at 13340-13341 ¶ 71.[14]

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[14] The Companies' own expert declarant undermines their argument that leasing licenses would "almost certainly" have been outside of the ordinary course of business. Companies Reply Br. 17. She averred that leasing spectrum was a leading business option for SNR and Northstar, *see* J.A. 1550 (Taylor Decl.), as did the Companies' agreements with DISH, *see* J.A. 632 (Northstar 2018 LLC Agreement § 1.1, defining "Business"); J.A. 1093 (SNR parallel). As the Companies' own statements indicate, such basic business opportunities are part of the "ordinary course of business" of spectrum license holders. Or so the Commission could reasonably conclude. *See* U.C.C. § 1-201(b)(9) (American Law Inst. & Uniform Law Comm'n 2021) (Uniform Commercial Code stating that "[a] person buys goods in the ordinary course" when a purchase "comports with the usual or customary practices in the kind of business in which the seller is engaged or with the

Finally, the Companies are not saved by the clauses in their agreements limiting DISH's investor protections to those "consistent with the [agency's] decision in *Baker Creek*[.]" J.A. 641 (Northstar 2018 LLC Agreement § 1.1); *accord* J.A. 1107 (SNR parallel). What matters in the Commission's *de facto* control analysis is "the substance of the terms of DISH's control"-where the rubber meets the road in DISH's actual reserved authority-not "formal recitations of compliance" with the generic language of Commission orders. *SNR Wireless,* 868 F.3d at 1033; *see also 2020 Order,* 35 FCC Rcd. at 13339 ¶ 68. Tellingly, the Companies' counsel conceded at argument that, even with this clause in place, they expected the Commission, in its bidding credits decision, to do the enforcing for them by bringing the contracts into compliance with *Baker Creek*. *See* Oral Arg. Tr. 34-38. Because the Commission was not required "to permit a cure[,]" let alone to craft it for them, the Companies could not reasonably expect the agency to devote its energies to securing their independence through an ongoing process of superintending DISH through piecemeal enforcement actions. *SNR Wireless,* 868 F.3d at 1046.

2

The Commission also reasonably grounded its finding of *de facto* control in its *Fifth Memorandum Opinion & Order*. In that Order, the Commission explained that when a company is "financially * * *

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seller's own usual or customary practices"); Black's Law Dictionary 404 (9th ed. 2009) (defining "course of business" as the "normal routine in managing a trade or business"); 3 Collier on Bankruptcy ¶ 364.02 (16th ed. 2022).

forced" to sell itself to an investor, the investor has *de facto* control. *See SNR Wireless,* 868 F.3d at 1034-1035, 1040 (formatting modified) (quoting *Fifth MO&O*, 10 FCC Rcd. at 456 ¶ 96). The record supports the Commission's conclusion that the revised agreements, while moderated in some respects, nevertheless continued to apply unrelenting financial pressure on SNR and Northstar to sell themselves to DISH.

Under the new agreements, the Companies each had two 90-day windows-one starting in 2020 and the second in 2021-during which they could require DISH to buy them for handsome profits. *See 2020 Order*, 35 FCC Rcd. at 13358- 13359 ¶¶ 128-130. After that, the Companies only had a right to request that DISH buy them at their fair market value. And DISH could refuse.

Those two purchase windows were keyed to the point in time when Commission rules would require the Companies to make use of their spectrum licenses or face weighty and escalating financial consequences. As the Commission explained, its regulations require that licensees in relevant bands provide "reliable signal coverage" to at least 40% of the population in their regions within six years of receiving their licenses. 47 C.F.R. § 27.14(s)(1); *see also 2020 Order*, 35 FCC Rcd. at 13347 ¶ 90 & n.207. That means that the Companies had to offer extensive wireless coverage in many of their license areas by 2021, right at the start of their second put window. If they failed to meet that deadline, the Companies' timeline for providing service to 75% of the population in their coverage area would accelerate by two years, to 2025.

See 2020 Order, 35 FCC Rcd. at 13347 ¶ 90 & n.207; *see also* 47 C.F.R. § 27.14(s)(2)-(3). If the Companies missed that target, their licenses would be revoked. *See* 47 C.F.R. § 27.14(s)(2)(4); *cf 2015 Order*, 30 FCC Rcd. at 8930 ¶ 104 n.313 (Commission citing this rule in its 2015 put-option analysis). Each of the Companies' $500 million in debt plus accrued interest was also to come due in 2025. *See 2020 Order*, 35 FCC Rcd. at 13349-13350 ¶ 99. And throughout, the Companies have owed DISH at least 8% annual dividends on billions of dollars in preferred equity, which they either had to pay in cash or add to their already sizable final tab due immediately upon a merger with any party other than DISH. *Id.* at 13350 ¶¶ 99- 100, 13354-13355 ¶ 114.

Through the amended agreements, DISH presented both Companies a financial lifeline in the face of acute financial pressure: A "generous" price offered in both windows of time for exercising their puts that guaranteed investors "healthy, above-market returns even if they have not constructed networks or repaid their loans *(i.e.,* with virtually zero risk)." *2020 Order*, 35 FCC Rcd. at 13358-13359 ¶ 130.

And DISH threw that lifeline out right when a flood of operational obligations would arise, with accumulating debt hard on their heels. If they declined the rescue, the Companies faced a formidable stick in the form of massive financial and regulatory obligations that DISH could prevent them from meeting by blocking both Companies' ability to build a wireless network or lease spectrum. In other words, DISH's powers set the Companies up to be financially stranded with no viable route to pay off their debts

other than selling out to DISH. *See 2020 Order,* 35 FCC Rcd. at 13359 ¶¶ 131, 133- 134.

Nor could the Companies realistically sell themselves to anyone else. The agreements empowered DISH to veto sales to the most likely buyers-its own competitors. *See 2020 Order*, 35 FCC Rcd. at 13359-13360 ¶ 135. Further shrinking the prospects of a non-DISH merger, the agreements also provided that if either SNR or Northstar sold itself to anyone but DISH, it would immediately owe DISH the full multibillion- dollar value of its outstanding debt and preferred equity. *See id.*; *see also id.* at 13354-13355 ¶ 114.

As the Commission adequately explained, the Companies' slightly longer windows to obtain a DISH buyout under the revised agreements did not change the fundamental economics of the pressure to sell, and to sell to DISH alone. *See 2020 Order*, 35 FCC Rcd. at 13360 ¶ 136. The agreements left the Companies with the Robson's choice of making a riskless sale with above-market returns, or else attempting a risky, debt-laden venture over which DISH had essential veto powers. *See id.* at 13358-13360 ¶¶ 130-136.

The amended contracts' new option for DISH to buy the Companies starting in 2022 at fair market value did nothing to lessen the pressure. By that point, the Commission reasoned, DISH would have no obligation to buy the Companies—it could simply walk away. So that provision hardly reduced the financial pressure on the Companies to take one of the earlier-expiring, generous, and risk-free buyouts. *See 2020 Order,* 35 FCC Rcd. at 13360 ¶ 137. The Commission sensibly found that the contractual provisions once more

gave SNR and Northstar "every incentive simply to sell their interests * * * to DISH in exchange for complete forgiveness of th[eir] loans plus a guaranteed cash payment." *SNR Wireless,* 868 F.3d at 1040.

The Companies respond that the Commission gave scant heed to their ability to become successful independent businesses, and so to avoid the temptation to sell themselves. Not so. The Commission fully explained its contrary judgment. *2020 Order*, 35 FCC Rcd. at 13360-13362 ¶¶ 138-146.

The Companies' argument relies heavily on the analysis of their expert, Carlyn Taylor. She posited that SNR and Northstar had three "viable potential business options" to pursue other than selling themselves to DISH. J.A. 1548. Those were (i) "deploying a wireless network"; (ii) "offering access to the[ir] spectrum * * * via a spectrum sharing model, including spectrum leasing"; and (iii) "offering wireless network capacity or roaming on a wholesale basis[.]" J.A. 1550. Taylor concluded that if the value of the Companies' spectrum licenses grew faster than their financial obligations to DISH, they could reasonably decide not to exercise their put options. J.A. 1549-1550. Taylor added that about half of the Companies' licenses were in bands that had grown in value and could fruitfully be paired with spectrum controlled by DISH. J.A. 1552.

The Commission was unpersuaded, and for good reason. It explained that Taylor had not considered the Companies' failure to monetize their assets even as their financial obligations had piled up. *See 2020 Order*, 35 FCC Rcd. at 13361 ¶ 141. If the Companies believed they could rationally pay their dues to DISH,

they would presumably be looking for money to do so. But there was no evidence they had taken any steps to generate income. *Id.* Instead, both firms had left their valuable spectrum "lying fallow[.]" *Id.* at 13361-13362 ¶ 144 n.294 (citation omitted).

The Commission also pointed out that Taylor underplayed DISH's power to hobble the Companies' business prospects, and, in that way, coerce them into selling. *2020 Order*, 35 FCC Rcd. at 13361-13362 ¶¶ 142, 146. If SNR or Northstar tried to construct a network or lease their spectrum to other carriers—as all three of Taylor's options assumed they could do—DISH could cut them off, either by starving them of buildout funds or vetoing their leasing decisions. *Id.* at 13361-13362 ¶¶ 143- 145; *see also id.* at 13353 ¶ 109.

Lastly, the Commission pointed out that Taylor's finding that the Companies' licenses paired particularly well with DISH's spectrum hardly suggested that they had the capacity to go it alone. *2020 Order*, 35 FCC Rcd. at 13361-13362 ¶ 144.

SNR and Northstar object that the Commission ignored a path to profitability that did not involve leasing their spectrum. But the Commission sufficiently examined the Companies' business options. One possibility the Companies raise in their briefing-making money by pairing their licenses with broadcasters' spectrum-was mentioned by their expert only in a cursory footnote. And the agency adequately explained that if either SNR or Northstar tried this approach, DISH could veto it too. *See 2020 Order*, 35 FCC Rcd. at 13362 ¶ 144 n.297.

Neither did the Commission need to say more about the Companies' claim that they could pursue a

"spectrum sharing model" without leasing. Companies Opening Br. 47 (quoting J.A. 1550). The only mechanism Taylor mentioned for sharing spectrum was leasing, which DISH could quash. And the Companies' attempt to supplement Taylor's report in their briefing is too little too late as our review is confined to the record before the agency at the time of its decision. *See EarthReports, Inc. v. FERC*, 828 F.3d 949, 959 (D.C. Cir. 2016).

In any event, the only question before us is whether the Commission's decision fell within the realm of reason, not whether other judgments could have been made. *See EarthLink, Inc. v. FCC*, 462 F.3d 1, 12 (D.C. Cir. 2006). The Commission's conclusions meet that mark. [15]

3

The Commission's conclusion that, taken together, the six *Intermountain Microwave* factors indicated *de facto* control was likewise proper. Those factors are:

> (1) who controls the daily operations of the small business; (2) who employs, supervises, and dismisses the small business's employees; (3) whether the small business has "unfettered" use of all its facilities and

[15] The Companies argue that the Commission arbitrarily foreclosed consideration of Taylor's testimony. While the Commission initially found the arguments in Taylor's put-option analysis precluded by *SNR Wireless,* it went on to explain over eight paragraphs why it found Taylor's report "both speculative and conclusory-and ultimately unpersuasive." *2020 Order,* 35 FCC Rcd. at 13360-13362 ¶¶ 139-146. That is sufficient consideration.

> equipment; (4) who covers the small business's expenses, including its operating costs; (5) who receives the small business's revenues and profits; and (6) who makes and carries out the policy decisions of the small business.

SNR Wireless, 868 F.3d at 1031.

a

On the first factor, the Commission held that the Companies had not "fully resolved" its concern that DISH controlled their daily operations. *2020 Order*, 35 FCC Rcd. at 13341 ¶ 75. The revised contracts did eliminate some of the Commission's earlier concerns by ending the Management Services Agreements, scrapping the mandatory business plan consultations with DISH, and "clarif[ying]" that the management fee provisions did not limit employee compensation. *Id.* at 13341 ¶ 74.

The problem is, as the Commission explained, that the revised agreements perpetuated five-year business plans that had been crafted under DISH's supervision and which were still in force at the time of the amendments. *See 2020 Order*, 35 FCC Rcd. at 13342 ¶ 75. Because the parties could only modify the five-year plans if a "material change[] affecting" the Companies occurred, the Commission concluded that SNR and Northstar remained "locked in to the business plans prepared during DISH's *de facto* control." *Id.* at 13341-13342 ¶ 75.

The Companies counter that by the time the agency issued its decision in 2020, those business plans had lapsed. That is true. The Companies further argue that the prior business plans did not

predetermine future plans because the revised agreements deleted a provision requiring that new plans "be as consistent as practicable with the prior" document. J.A. 671-672 (Northstar 2018 LLC Agreement § 6.5(a)); *accord* J.A. 1162 (SNR parallel). Also true. We agree with the Companies that the agency was mistaken when it said that they were "locked in" to business plans prepared under the old regime. *2020 Order*, 35 FCC Rcd. at 13342 ¶ 75.

Still, it was reasonable for the Commission to find that DISH continued to materially influence the Companies' daily operations in the period between the 2018 amendments and the termination of the old business plans. And we cannot say that it was arbitrary for the agency to find it significant that the Companies had chosen not to unwind those old plans.

In any event, the Commission did not lean on this daily-control prong when finding *de facto* control. It said instead that this factor did not "support[] the [Companies'] position." *2020 Order*, 35 FCC Rcd. at 13342 ¶ 77; *see also id.* at 13338 ¶ 63 (recognizing that the Companies' amendments "eliminate some of the prior identified concerns regarding DISH's control over * * * aspects of the [Companies'] daily operations"). So the agency's "relatively thin" reasoning here does not render its entire *Intermountain Microwave* analysis unreasonable, as its consideration and balancing of the other factors shows. *SNR Wireless*, 868 F.3d at 1032; *see also* 5 U.S.C. § 706 (in Administrative Procedure Act review, the court shall take "due account * * * of the rule of prejudicial error").

b

On the second and third factors, the Commission agreed with the Companies that the revised agreements had addressed its prior concerns by ending the management agreements and deleting provisions giving DISH authority over employment decisions and technology choices. *See 2020 Order*, 35 FCC Rcd. at 13342-13343 ¶¶ 77-78, 13357¶¶ 121-123.

c

The Commission found that, under the fourth *Intermountain Microwave* factor, DISH continued to dominate the Companies' finances. *See 2020 Order*, 35 FCC Rcd. at 13343-13348 ¶¶ 80-92. Even though the amendments eliminated some of the problems in the original agreements, the Commission reasonably concluded that the Companies remain fundamentally dependent on DISH for financing because DISH controls whether the Companies can access sufficient funds to build a national network and from whom they can seek that funding. *Id.* at 13344 ¶¶ 82-83.

To start, DISH committed to lending the Companies "reasonable" sums to build a telecommunications system, but then capped its financing obligations at an amount that the Commission found grossly unequal to the task. *See 2020 Order*, 35 FCC Rcd. at 13345-13346 ¶¶ 84, 86-89. To be sure, for Northstar-but not for SNR-DISH also agreed to lend the company enough money to meet its "Working Capital requirements." *Id.* at 13346 ¶ 88 (quoting Northstar 2018 Credit Agreement § 2.2(b)(i)). The Commission explained that such support was not enough because working capital loans are typically used for short-term needs, not to finance long-term

investments like a wireless network. *See id.* Those provisions left the Companies unable to rely on DISH to fund the construction of the national networks that provided a critical path to paying off their debt and making profitable use of their spectrum licenses. *Id.* at 13346 ¶¶ 88-89.

The Commission also sensibly found that DISH's new power to block the Companies from incurring "significant" indebtedness financially tethered SNR and Northstar to DISH. *2020 Order*, 35 FCC Rcd. at 13347-13348 ¶¶ 91-92 (citation omitted).

The Commission also found that the funding framework adopted by the Companies mirrored that in *Baker Creek*. *See 2020 Order,* 35 FCC Rcd. at 13348 ¶ 92. There, the agency found that an investor exercised *de facto* control over a small company's finances because it was the source of almost all the small business's capital, and it could control both who funded it and in what amounts. *See Baker Creek,* 13 FCC Rcd. at 18721-18723 ¶¶ 23-25. So too here: Under the revised agreements, DISH can block the Companies from most outside borrowing and need not lend to the Companies in adequate amounts itself. *See 2020 Order,* 35 FCC Rcd. at 13348 ¶ 92.

d

Turning to the fifth *Intermountain Microwave* factor, the Commission's finding that DISH was likely to vacuum up the Companies' revenues and profits was well-supported in the record. *See 2020 Order*, 35 FCC Rcd. at 13348-13351 ¶¶ 93-103. In looking at the changes made by the amended contracts, the Commission "conclude[d] that the parties [had]

changed the form but not the controlling nature of DISH's financial interests[.]" *Id.* at ¶ 98.

Critically, in 2020, the Companies still faced massive debt obligations to DISH. *2020 Order*, 35 FCC Rcd. at 13349- 13350 ¶¶ 97-100. And DISH held the ability to prevent the Companies from "generat[ing] revenues to pay down their debt and make their required dividend payments." *Id.* at 13351 ¶ 102. If the Companies could not make their payments, any profits they generated would likely benefit only DISH, which could force SNR and Northstar to sell themselves to it. *Id.* at ¶¶ 102-103 & n.23 7.

The Companies contend that the Commission ignored the relative modesty of their debts compared to the value of their licenses, and so exaggerated DISH's ability to seize their profits. But the Commission adequately considered the value of those licenses, explaining that (i) DISH can prevent the Companies from profiting from, or significantly borrowing based on, their spectrum, making the $500 million loans difficult or impossible to pay back, and (ii) if either firm wishes to merge with a party other than DISH, it will immediately have to repay DISH billions of dollars. *See 2020 Order*, 35 FCC Rcd. at 13340 ¶ 70, 13350-13351 ¶¶ 100-103, 13354-13355 ¶ 114.

e

As to the last *Intermountain Microwave* factor, the Commission found that DISH continued to dominate the Companies' decisionmaking. *See 2020 Order*, 35 FCC Rcd. at 13351-13357 ¶¶ 104-120. While the amended agreements addressed some of the Commission's prior concerns about DISH's control, the

agency concluded that SNR and Northstar's new "rights [were] mere fig leaves" because DISH could, by blocking their credit lines and leasing revenue, prevent them from making money. *Id.* at 13353-13354 ¶¶ 109-110. The Commission also found that DISH could still "influence if, how, [and] when* * * [the Companies and their managing investors] exit the business" because the Companies would have little choice but to take the generous guaranteed buyouts offered under the agreements. *2020 Order*, 35 FCC Rcd. at 13354 ¶¶ 111-112 (emphasis omitted).

Finally, the Commission determined that the Companies were still "functioning as arms of DISH, rather than as independent small companies[.]" *2020 Order*, 35 FCC Rcd. at 13355 ¶ 115 (formatting modified; quoting *SNR Wireless,* 868 F.3d at 1025). In 2015, the Commission was troubled by the Companies' joint bidding behavior in the spectrum auction. *SNR Wireless,* 868 F.3d at 1042. Yet nothing seemed to change on remand. SNR and Northstar continued to act in concert by amending their agreements with DISH in "virtually identical" fashion. *2020 Order,* 35 FCC Rcd. at 13355-13356 ¶¶ 115-119. Though Northstar had borrowed almost $2 billion more from DISH than SNR had, both reduced their DISH debts to exactly $500 million apiece in exchange for preferred equity. *Id.* at 13356 ¶ 118.

On top of that, despite Northstar's more valuable spectrum holdings, the Companies agreed to similar limits on their ability to borrow from DISH to finance network construction. *See 2020 Order*, 35 FCC Rcd. at 13356 ¶ 118. The Companies' put rights were also virtually identical, and both firms gave DISH the

same expanded veto over spectrum leasing. *See id.* at ¶ 119 & n.264. On this record, the Commission reasonably found that SNR and Northstar, rather than acting like individual businesses with their own interests and identities, only pantomimed independence, while functionally operating at DISH's beck and call.

The Companies argue that it was natural to amend their agreements with DISH in similar ways. That is because the Commission and this court found their previous agreements wanting for identical reasons, so a common response was appropriate.

While that could explain the Companies' similar *structural* changes to their agreements, it does not address their acquiescence in identical numerical amendments, such as converting all but $500 million in debt into preferred equity. *See 2020 Order*, 35 FCC Rcd. at 13356 ¶ 118. That entailed converting approximately $1.8 billion more of Northstar's debt to equity than SNR's. Yet the Companies offer no reason for slashing their differing debts to the exact same dollar amount.

The Companies' second explanation for proceeding in lockstep—that they could jointly "deploy a nationwide network"—also falls flat. Companies Opening Br. 53 (citation omitted). Even if the Companies were planning such a joint venture—and they point to no evidence that they were—they fail to explain why that would motivate them to craft nearly mirror-image agreements with DISH.

f

SNR and Northstar mount two more general attacks on the Commission's *Intermountain Microwave* analysis. Neither is persuasive.

First, the Companies complain that the Commission's decision was arbitrary because it did not find that all six *Intermountain Microwave* factors favored its ultimate control finding. The Commission, though, has not required "a finding of control with regard to all *Intermountain Microwave* factors" to conclude that a small company is *de facto* controlled by another entity. *2015 Order,* 30 FCC Rcd. at 8911 ¶ 56 n.202. Instead, the agency "carefully examines the totality of the facts and circumstances of each case" and "view[s] [the *Intermountain Microwave* factors] together[.]" *Id.* at 8909-8910 ¶ 50, 8911 ¶ 56 n.202.

Second, SNR and Northstar contend that the Commission's *Intermountain Microwave* analysis rested on the false premise that DISH's right to veto leases was materially different from the initial contracts. As already explained, the record fully supports the Commission's conclusion that the constraints on leasing were newly and consequentially expanded. *See* Section 111.B.1, *supra.*

* * * * *

As we held in the Companies' prior appeal, so too here the Commission closely examined the Companies' agreements, applied settled agency precedent, and, after weighing the prescribed factors, reasonably explained its conclusion that DISH continues to "control and benefit from virtually all critical aspects of SNR and Northstar's businesses."

SNR Wireless, 868 F.3d at 1033. To put the point more simply, the Commission's finding that the Companies are not entitled to very-small-business bidding credits was reasoned and squarely grounded in the record.

C

1

The Companies separately argue that they lacked fair notice of the standards that the Commission applied in finding DISH's *de facto* control, and so they should not be subject to the agency's denial of their bidding credits and default penalties. They point out that they removed the contractual provisions of greatest concern to the Commission in 2015, and so could not have reasonably predicted the agency's adverse decision.

For the record, the Companies did not just subtract provisions of concern. They also added new ones, some of which the Commission reasonably found to substantially solidify DISH's control. *See 2020 Order*, 35 FCC Rcd. at 13340--13341 ¶ 71, 13355 ¶ 115.

In any case, a party has fair notice when, "by reviewing the regulations and other public statements issued by the agency," it can "identify, with ascertainable certainty, the standards with which the agency expects parties to conform." *General Elec. Co. v. Environmental Protection Agency*, 53 F.3d 1324, 1329 (D.C. Cir. 1995) (internal quotation marks and citation omitted); *see also Otis Elevator Co. v. Secretary of Lab.*, 762 F.3d 116, 125 (D.C. Cir. 2014). The record in this case establishes that the Companies

had fair notice of the legal rules and factors that led to the Commission's finding of *de facto* control.[16]

First, as we previously held, the Commission's decision was "clearly presaged" by the *Fifth Memorandum Opinion & Order* issued in 1994. *SNR Wireless,* 868 F.3d at 1035. In that Order, the Commission was direct and explicit that "agreements between [small businesses] and strategic investors that involve terms * * * that cumulatively are designed financially to force the [small business] into a sale * * * *will* constitute a transfer of control under our rules." *Fifth MO&O,* 10 FCC Rcd. at 456 ¶ 96 (emphasis added). The Commission's paradigm example of such ensnaring conditions was a contract that offered the small business a temporary right to sell itself debt-free to its large investor around the time it would otherwise have to start paying back its loans. *Id.* at 455-456 ¶ 95; *see also* 47 C.F.R. § 1.2110(c)(2)(ii)(A)(2) (providing that the Commission will analyze put options as if already exercised when "such ownership interests, in combination with other terms * * * deprive an otherwise qualified applicant * * * of *de facto* control" over its own operations). The agreements at issue here parallel that model by combining brief windows for the Companies to take guaranteed payouts from their dominant investor or

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[16] We need not decide whether the Commission's denial of bidding credits alone was a punishment because the default penalties—which the Commission has not rescinded—were. *See SNR Wireless,* 868 F.3d at 1045. So the agency was required to give the Companies fair notice before applying its remedy here. *See id.* at 1043.

face looming—and overwhelming—financial obligations.

Second, the Commission doubled down on that point in its *2015 Order*. The agency stated directly that because the Companies were "committed to repayment terms that [would] be difficult, if not impossible to manage unless they exercise[d] their put option[s,]" the contracts placed undue pressure on Northstar and SNR "to refinance or exit the[ir] business[es]," and "thereby exhibit[ed] an unacceptable degree of control on DISH's part." *2015 Order*, 30 FCC Rcd. at 8930 ¶ 105. Also in 2015, as in 2020, the Commission cited the Companies' license-deployment deadlines—timed closely to the relevant put options—as adding pressure on SNR and Northstar to sell themselves to DISH. *Compare 2015 Order*, 30 FCC Rcd. at 8930 ¶ 104 n.313, *with 2020 Order*, 35 FCC Rcd. at 13347 ¶ 90 & n.207. So the Companies had ample notice that the agreements' pairing of an approaching and seemingly insurmountable financial commitment with irresistible get-out-of-debt-free cards from DISH would lead to a finding of *de facto* control.

The Companies also had the benefit of our 2017 decision reinforcing that warning. We sustained the Commission's finding of *de facto* control there because DISH gave the Companies a non-choice between undertaking "the quixotic mission of generating enough revenue to pay back their multibillion dollar loans" within five to seven years-well before they could realistically earn sufficient sums by building out their networks-or selling themselves to DISH "in exchange for complete forgiveness of those loans plus a

guaranteed cash payment." *SNR Wireless*, 868 F.3d at 1040. Under Commission precedent, those conditions "financially * * * forced" the Companies to exercise their put options. *Id.* (formatting modified and citation omitted).

Notably, the Commission's finding of control in 2020 turned on veto powers very similar to those that led the Commission to find *de facto* control by DISH just five years earlier. In its prior order, the Commission was concerned that DISH (i) could prevent the Companies from selling out to another buyer, (ii) had no obligation to lend them adequate financing, and (iii) could seize the Companies' licenses. *2015 Order,* 30 FCC Rcd. at 8930-8931 ¶ 105. Under the amended agreements, the Commission found that DISH still could thwart the Companies' ability to sell their interests to third parties, to access sufficient financing, or to profit from their spectrum rights. *See 2020 Order,* 35 FCC Rcd. at 13359-13360 ¶¶ 131-137. So while the Companies and DISH had modified their contracts' bells and whistles, they retained the same essential structure that the Commission had long said—and had just told them, with our affirmation—is a signature form of *de facto* control. *See Fifth MO&O,* 10 FCC Rcd. at 455-456 ¶¶ 95-96.

Third, the Commission's *Baker Creek* and *Intermountain Microwave* decisions provided further notice that the Companies' overwhelming financial and decisionmaking dependence on DISH, coupled with its restrictive investor protections, would support a finding that DISH is in *de facto* control.

Baker Creek said that when investor protections provide "the power to dominate the management of corporate affairs[,]" such provisions "may confer actual control upon" the purportedly passive investor. *Baker Creek,* 13 FCC Rcd. at 18714-18715 ¶ 9. That decision expressed particular concern that the investor at issue, which was "the source of all but a negligible amount of [the small business's] capital[,]" could control how much the small business borrowed, and from whom. *Id.* at 18721-18722 ¶¶ 23-24. *Baker Creek* held that terms barring the small business from taking out secured debt and giving the investor a right of first refusal over outside loans went "beyond permissible investment protections" when considered alongside other provisions. *Id.* at ¶ 24.

That gave fair notice of the Commission's similar finding here that the investor protection provisions in the Companies' agreements with DISH "reinforce[d]" its control over SNR and Northstar. *2020 Order*, 35 FCC Rcd. at 13340-13341 ¶¶ 69-71. DISH's power to veto significant loans ensured that DISH, as the undisputed source of almost all the Companies' capital, kept their borrowing under its thumb. *Id.* at 13340 ¶ 70. And DISH's ability to prevent the Companies from leasing spectrum, which substantially increased their financial dependence and went "beyond [provisions] identified as typical in *Baker Creek*[,]" veered outside of the control lines drawn in Commission precedent. *Id.* at ¶ 71; *see also Fifth MO&O,* 10 FCC Rcd. at 449 ¶ 82 ("[W]hile certain provisions benefitting [purportedly passive] investors may not give rise to a transfer of control when considered individually, the aggregate effect of multiple provisions could be sufficient to [transfer] *de*

facto control, particularly if the terms of such provisions vary from recognized standards.").

Likewise, the Commission's *2015 Order* in this case foreshadowed its application of the *Intermountain Microwave* factors in its decision here. The *2015 Order* told SNR and Northstar that their abject financial dependence on DISH, paired with DISH's ability to dictate how they borrow money, use their licenses, build their networks, and sell their businesses, provided powerful evidence that they were not freestanding small companies. *See* 30 FCC Rcd. at 8911 ¶ 54, 8923-8925 ¶¶ 84-86, 8925-8926 ¶¶ 87-90, 8927-8929 ¶¶ 94-101.

On remand, the Commission found no material loosening of the Companies' financial handcuffs. *See 2020 Order*, 35 FCC Rcd. at 13343-13348 ¶¶ 80-92, 13349-13351 ¶¶ 98-103 & n.237, 13353 ¶ 108. The Commission had also warned the Companies in 2015 that if they furthered DISH's interest at their own expense, the natural inference was that they were its creatures. *See 2015 Order*, 30 FCC Rcd. at 8931-8932 ¶¶ 109-114. Despite that advice, the Companies again marched to DISH's beat on remand, rewriting their contracts in preternaturally parallel fashion. *See 2020 Order*, 35 FCC Rcd. at 13355-13356 ¶¶ 115-119.

In short, the Commission gave the Companies comprehensible and actionable guidance about the standards it would apply to determine if they were independent, very small businesses or were instead under the *de facto* control of DISH. Fair notice requires no more. *See Maxcell Telecom Plus, Inc. v. FCC*, 815 F.2d 1551, 1558 (D.C. Cir. 1987) ("If a [regulated party] ignores or fails to understand

reasonably comprehensible requirements, [it] cannot be heard to complain about lack of notice.") (citation omitted); *see also Abhe & Svoboda, Inc. v. Chao*, 508 F.3d 1052, 1060 (D.C. Cir. 2007).[17]

To be clear, because the Commission's order independently rested on two grounds-the put-option analysis under the *Fifth Memorandum Opinion & Order* and the multifaceted considerations prescribed by *Intermountain Microwave* and *Baker Creek-the* Commission's decision would stand as long as the Companies were "able to identify, with ascertainable certainty" how either standard worked. *General Elec. Co.*, 53 F.3d at 1329 (internal quotation marks and citation omitted); *see 2020 Order*, 35 FCC Rcd. at 13357 ¶ 124. That they had fair notice of both is icing on the cake.

2

The Companies press two more fair-notice arguments. Neither has merit.

a

To start, SNR and Northstar contend that, because the Commission has never before denied bidding credits to an entity lacking a management agreement with its large investor, they were not given fair notice that the agency would do so here. But no Commission precedent said that such an agreement was a necessary precondition to finding *de facto* control. To the contrary, in the *Fifth Memorandum Opinion & Order,* the Commission illustrated its

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[17] *Cf* November 4 Meeting Letter, at J.A. 1596 n.17 (Companies' counsel citing *Ma:xcell Telecom* for this court's fair notice standard); *accord* November 17 Meeting Letter, at J.A. 1621 n.27.

concern about put options with an example that did not involve management contracts at all. *See Fifth MO&O,* 10 FCC Rcd. at 455-456 ¶ 95.

More to the point, in the prior decisions as to these very parties, both the Commission and this court found that the Companies' put options, in combination with other terms, demonstrated DISH's *de facto* control-all without relying on the (now-defunct) Management Services Agreements. *See 2015 Order,* 30 FCC Rcd. at 8929-8931 ¶¶ 102-105; *SNR Wireless,* 868 F.3d at 1034-1035, 1040.

b

The Companies separately argue that a contradictory decision by the Wireless Bureau left them without fair notice. They point to the Bureau's decision to grant bidding credits to Advantage Spectrum, L.P., an entity bound by restrictive agreements with a large investor, in an unexplained decision issued after the *2015 Order*. *See Wireless Telecommunications Bureau Grants AWS-3 Licenses in the 1695-1710 MHz, 1755-1780 MHz and 2155-2180 MHz Bands*, 31 FCC Rcd. 7129 (2016); J.A. 1637-1642 (SNR and Northstar presentation to Commissioners comparing their agreements with those of other bidders). While they acknowledge that the Bureau's actions are not binding on the Commission, SNR and Northstar argue that the Advantage Spectrum decision shows the type of "confusion at the ground level" sometimes present when fair notice is lacking. *SNR Wireless,* 868 F.3d at 1045 (internal quotation marks and citation omitted).

The Commission responds that it is not bound by staff decisions, and parties should not count on it to

follow the Wireless Bureau's lead. *See 2020 Order*, 35 FCC Rcd. at 13364-13365 ¶¶ 152-157.

On this record, that wholly unexplicated ruling by the Bureau does not change the fair notice calculus. The clarity of the Commission's precedent, as applied here, the concrete guidance in the *2015 Order* and *SNR Wireless,* and the absence of any contrary analysis in the Advantage Spectrum decision provided ample notice. In fact, because the Companies were afforded a chance to cure, the *2015 Order* (at the least) amounted to the type of "pre-enforcement effort[] to bring about compliance" that we have said typically "provide[s] adequate notice." *General Elec. Co.,* 53 F.3d at 1329; *accord SNR Wireless,* 868 F.3d at 1046.[18]

The Companies rely on *SNR Wireless,* which found that internal inconsistency within an agency could signal a lack of fair notice. But in that case, the agency's decision to deny the Companies a chance to cure was directly undercut by a prior "Commission-level position[.]" 868 F.3d at 1046.

Here, by contrast, the agency's decision was supported, rather than undermined, by prior Commission actions and a ruling of this court. Those binding "administrative and judicial decisions"—including those directed at these very parties—"put the Compan[ies] on fair notice of what was required." *Abhe & Svoboda, Inc.,* 508 F.3d at 1060. There is "no

[18] Remember, the Wireless Bureau granted bidding credits to Advantage Spectrum before our court decided *SNR Wireless,* which provided the Companies with yet more analysis of the relevant *de facto* control standard.

grave injustice in holding parties to a reasonable knowledge of the law[.]" *Id.* (citation omitted).[19]

IV

For all of those reasons, we reject the Companies' challenges to the Commission's orders.

So ordered.

[19] The Companies' argument that the Commission unlawfully discriminated between Advantage Spectrum and them is foreclosed by precedent, as is DISH's similar argument regarding both Advantage Spectrum and another bidder in the same spectrum auction. *See SNR Wireless,* 868 F.3d at 1039; *accord Amor Fam. Broad. Grp. v. FCC,* 918 F.2d 960, 962 (D.C. Cir. 1990) (Commission does not act inconsistently by failing to comport with actions of its "subordinate bod[ies]").

Appendix B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18-1209

NORTHSTAR WIRELESS, LLC AND SNR WIRELESS LICENSECO, LLC,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION,

Respondent,

T-MOBILE USA, INC.,

Intervenor.

Consolidated with 18-1210, 20-1507, 20-1508

Filed: Aug. 18, 2022

Before: Millett, *Circuit Judge*; and Edwards, *Senior Circuit Judge*

ORDER

Upon consideration of appellants' corrected petition for panel rehearing filed on August 8, 2022.

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk
BY: /s/
Daniel J. Reidy
Deputy Clerk

Appendix C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15-1330

SNR WIRELESS LICENSECO, LLC,
Appellant,
v.
FEDERAL COMMUNICATIONS COMMISSION,
Appellee,

Consolidated with 15-1331, 15-1332, 15-1333

Argued: Sept. 26, 2016
Filed: Aug. 29, 2017

Before: Brown and Pillard, *Circuit Judges*, and Williams, *Senior Circuit Judge*.

OPINION

PILLARD, *Circuit Judge:* Petitioners SNR Wireless LicenseCo, LLC (SNR) and Northstar Wireless, LLC (Northstar) are two nascent companies that took action to acquire the wireless spectrum needed to sell wireless internet or phone services to customers around the country. Because of the high cost of providing wireless services, petitioners

borrowed billions of dollars from DISH Network Corporation and its subsidiaries (collectively, DISH) to acquire the spectrum. DISH also agreed to provide management services to petitioners to help them navigate the challenges of building a national wireless network.

In 2014, the Federal Communications Commission (FCC or the Commission) held an auction to sell the kind of wireless spectrum licenses that petitioners would need to build national businesses. Pursuant to FCC regulations designed to encourage small businesses to participate in such auctions, the FCC announced that businesses with less than $40 million in annual revenues could use "bidding credits" to purchase at a discounted price any licenses they won. Petitioners submitted initial short-form applications disclosing their revenues, on the basis of which they were permitted to bid. Believing that they would be entitled to use bidding credits, petitioners bid on and won hundreds of spectrum licenses in the action. While the petitioners' winning bids totaled $13 .3 billion, petitioners asked the FCC for $3.3 billion in bidding credits, which would bring the total cost of the licenses down to $10 billion.

The FCC denied the request to use bidding credits because SNR and Northstar were not simply partners with DISH, but were under DISH's control. As a result, DISH's $13 billion in annual revenues were attributable to petitioners, making them ineligible for bidding credits.

After the FCC denied their application to use bidding credits, petitioners informed the FCC that they could not afford to pay for all of the licenses they

won. They bought some of the licenses at full price and relinquished the rest to the FCC. The FCC fined the petitioners hundreds of millions of dollars for failing to comply with the auction terms that required all bidders to purchase the licenses they won. This appeal followed.

The FCC reasonably determined that DISH exercised *de facto* control (a broad concept about which we have more to say later) over SNR and Northstar's businesses: DISH had contractual rights to manage almost all of the essential elements of the petitioners' businesses, and petitioners faced enormous financial pressure to sell their companies to DISH after five years. In addition, petitioners' auction bids suggested they were both functioning as arms of DISH, rather than as independent small companies each pursuing their own, independent interests. As the FCC has also recognized, however, for companies like DISH that seek to form partnerships with small businesses, there is a fine line between providing the sort of oversight necessary to keep the partnership on track and providing so much oversight that the small business is subject to disqualifying *de facto* control. Petitioners point to past action of the FCC's Wireless Bureau that they assert led them to conclude that their agreements with DISH were not so controlling as to disqualify them from obtaining the credits due to "very small" businesses.

We hold that: (1) The FCC reasonably applied its longstanding precedent to determine that DISH exercised a disqualifying degree of *de facto* control over SNR and Northstar; but (2) the Commission did not give SNR and Northstar adequate notice that, if

their relationships with DISH cost them their bidding credits, the FCC would also deny them an opportunity to cure. As a result, we remand this matter to the FCC to give petitioners an opportunity to seek to negotiate a cure for the *de facto* control the FCC found that DISH exercises over them.

I. Background

A. The FCC's Auction 97

The electromagnetic spectrum is "the range of electromagnetic radio frequencies used to transmit sound, data, and video across the country." *See* FCC, *About the Spectrum Dashboard,* http://reboot.fcc.gov/reform/systems/spectrumdashboard/about (*About the Spectrum*). Under the Communications Act of 1934 (the Act), the FCC may grant private companies licenses to use portions of the spectrum. *See* 47 U.S.C. §§ 307, 309. Once licensed, companies may transmit sound, data, and video, which enables them to provide television, cell phone, and wireless internet service to consumers. *See About the Spectrum*.

In 1993, Congress authorized the FCC to use auctions to allocate spectrum licenses. *See* Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, 107 Stat. 312 (relevant section codified at 47 U.S.C. § 309(i)(1)). Congress directed the FCC to design auction procedures that would serve a number of policy objectives. Those objectives include promoting efficient, intensive, and innovative use of the electromagnetic spectrum without excessive concentration of licenses, while advancing economic opportunity and competition by disseminating licenses "among a wide variety of applicants, including small businesses, rural telephone companies, and

businesses owned by members of minority groups and women" without "unjust enrichment" of licensees that are not *bona fide* small or underrepresented businesses. *See id.* § 309(j)(3)-(4).

Consistent with those statutory instructions, FCC regulations provide that the Commission may encourage "designated entities," including small businesses, to participate in spectrum auctions by giving them bidding credits, *i.e.* discounts that may be used to cover part of the cost of any licenses those businesses win. 47 C.F.R. § 1.2110(a), (f) (2012).[1] FCC regulations specify that bidding credits can only be used by genuine small businesses-not by small sham companies that are managed by or affiliated with big businesses. *See, e.g., id.* § 1.2110(b)-(c).

This case arose out of Auction 97, which the FCC announced on May 19, 2014. On July 23, 2014, the FCC's Wireless Telecommunications Bureau (the Wireless Bureau) published the procedures for the auction (the Auction Notice, or Notice). The Auction Notice explained that small businesses would be eligible to receive bidding credits in Auction 97, and the size of the bidding credits would depend on the amount of the designated entities' "attributable" revenues over the proceeding three years: Entities with less than $40 million in attributable annual revenues could receive a fifteen percent discount on their winning bids, and entities with less than $15 million in attributable annual revenues could receive a twenty-five percent discount. *See Auction of*

[1] Throughout this opinion, we will cite the version of the FCC's regulations in effect at the time of Auction 97, rather than the version in effect today, unless otherwise noted.

Advanced Wireless Servs. (Aws-3) Licenses Scheduled for Nov. 13, 2014, 29 F.C.C. Rcd. 8386, 8411-12 (2014) (*Auction Notice*).

As relevant here, attributable revenues include the revenues of the small business itself and the revenues of any entity with "*de facto* control" over it. *Id.* at 8412-13 (citing 47 C.F.R. § 1.2110Ib)-(c), among other sources). Whereas the question whether one business exercises *de jure* control over another is binary, the highly contextual question of *de facto* control is a matter of degree.

FCC regulations that had been used in past auctions listed various "indicia of control" relevant to the *de facto* control inquiry. *See* 47 C.F.R. § 1.2110(c)(2). They pointed to control over appointments to the entity's board or management committee, control over selection and employment of the senior executives in charge, or general involvement in management decisions. *Id.* The regulations also highlighted as a factor relevant to *de facto* control the presence of a management agreement conferring on someone other than the entity itself authority to determine or significantly influence the nature or types of service the entity offers, or the terns or price on which they are offered. *Id.* § 1.2110(c)(2)(ii)(H). The regulations did not, however, delineate a clear line between permissible influence and *de facto* control.

The Auction Notice generally explained that auction participants should "review carefully the Commission's decisions regarding . . . designated entit[ies]." *Auction Notice,* 29 F.C.C. Rcd. at 8411. The Notice stated, by reference to FCC regulations, that

"[*d*]*e facto* control [would be] determined on a case-by-case basis," *id.* at 8412 (citing 47 C.F.R. § 1.2110(b)(5)). It cautioned participants that *de facto* control might be present if, for example, one company "plays an integral role in [the] management decisions" of another. *Id.* at 8413 (citing 47 C.F.R. § 1.2110(c)).

By way of additional guidance, the Notice directed auction participants to consult the Commission's longstanding but context-dependent precedent on the circumstances that bear on *de facto* control. The two opinions the Notice cited on that point articulate a six-factor test for *de facto* control: *Intermountain Microwave,* Public Notice, 12 F.C.C. 2d 559 (1963) (*Intermountain Microwave*) and *Baker Creek Communications, L.P.,* Memorandum Opinion and Order, 13 F.C.C. Rcd. 18709 (1998) *(Baker Creek). Id.* at 8412 n.151.

The Auction Notice specified that the FCC would use its standard, two-step process to verify the attributable revenues of a small business. *Id.* at 8407. First, before the auction, a small business seeking to qualify for credits had to file a "streamlined, short-form application." *Id.* That form required the business to state, under penalty of perjury, its attributable revenues. *See id.* (citing 47 C.F.R. § 1.2105); *see also id.* at 8412. Second, after the auction concluded, any business that successfully bid for a spectrum license and sought bidding credits would have to "file a more comprehensive long-form application (FCC Form 601)" to hold the license. *Id.* at 8407. The Commission would then review the long-form application to verify the business's eligibility for small-business bidding credits.

Auction 97 began on November 13, 2014, and concluded on January 29, 2015, after 341 rounds of bidding. Thirty-one entities won spectrum licenses, with winning bids totaling more than $40 billion.

B. Petitioners' Conduct

The petitioners are small companies that were formed just in time to file short-form applications for Auction 97: SNR was formed fourteen days and Northstar was formed eight days before the application deadline. As nascent companies, SNR and Northstar lacked officers, directors, and revenues when they each submitted a short-form application to participate in Auction 97 as a "very small business" entitled to a twenty-five percent discount. *In re Northstar Wireless, LLC*, 30 F.C.C. Rcd. 8887, 8893 (2015) (*FCC Op.*).[2]

The petitioners' short-form applications disclosed that they had acquired the capital that they needed to participate in the auction from DISH-a large, established corporation that was itself ineligible for bidding credits. In exchange for its investments in SNR and Northstar, DISH acquired an (indirect) eighty-five percent ownership interest in each company. In addition, DISH became the operations manager for SNR and Northstar with great influence over their operations. DISH also adopted joint bidding

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[2] *See* SNR Wireless LicenseCo, LLC Short-Form Application, FCC Form 175, Auction File No. 0006458318 (filed September 12, 2014, amended October 13, 2014) (SNR Short-Form Application), Attachments A, B; *see* Northstar Wireless, LLC Short-Form Application, FCC Form 175, Auction File No. 0006458325 (filed September 12, 2014, amended October 8, 2014, October 15, 2014) (Northstar Short-Form Application), Attachments A, B.

protocols and agreements with the petitioners, which provided that DISH, SNR, and Northstar could coordinate their bidding strategies for Auction 97.

The petitioners were remarkably successful in Auction 97, collectively winning 43.5% of the licenses in play: SNR won 357 of the 1,614 auctioned licenses, and Northstar won 345. While SNR and Northstar bid a total of$13,327,423,700 during the auction, both companies claimed that they were very small businesses entitled to use FCC bidding credits to cover twentyfive percent of the cost of the licenses. With the use of those bidding credits, SNR and Northstar would together save roughly $3.3 billion.

After the auction, SNR and Northstar submitted long-form applications for the licenses, reiterating their assertions that they were very small businesses entitled to bidding credits. Once the long-form applications became public, eight parties petitioned the Wireless Bureau to deny credits to SNR and Northstar. The challengers included a few of petitioners' less successful bidding competitors and several nonprofit organizations supportive of the designated-entity credit program as a means to aid small businesses, rural telephone companies, and businesses owned by members of minority groups and women, but opposed to what they view as an abuse of the program to enrich large, established firms like DISH.

All eight challengers argued that SNR and Northstar could not claim very-small-business credits because DISH, a large business, effectively controlled them. Some entities also suggested that SNR and Northstar should not be permitted to claim the

licenses they won even if they were willing to pay full price on the ground that they withheld from the FCC material information about their relationships with DISH. The Wireless Bureau referred the petitions to the full Commission for "consideration of the questions posed by the petitions to deny." *See* 47 C.F.R. § 0.5(c) ("In non-hearing matters, the [Wireless Bureau] is at liberty to refer any matter at any stage to the Commission for action, upon concluding that it involves matters warranting the Commission's consideration .. . . ").

The FCC dismissed six of the petitions on the ground that parties who had not themselves participated in the auction lacked standing, but considered the merits of the other two. *FCC Op.,* 30 F.C.C. Rcd. at 8904-05. Ultimately, the FCC decided that SNR and Northstar were not entitled to bidding credits because they were *de facto* controlled by DISH, such that DISH's large annual revenues were attributable to them. *See id.* at 8889.

While the FCC held SNR and Northstar ineligible for bidding credits, it concluded that the companies could retain the spectrum licenses they won in the auction if they were willing to pay full price for them. *See id.* at 8940-48. "The fact that the Commission, upon review of the Agreements, conclude[d] that, as a legal matter, the facts disclosed show that DISH controlled the applicants does not compel a finding that the applicants lacked candor." *Id.* at 8941. The Commission explained that SNR and Northstar had disclosed their relationships with DISH, and no participant in Auction 97 had shown that it was harmed by SNR or Northstar's conduct. *See id.* at

8940-46. Nor had any auction participant shown that SNR and Northstar colluded with one another in violation of federal antitrust laws. *Id.* at 8946-48. The FCC consequently gave SNR and Northstar the opportunity to purchase the licenses at full price, but it did not give them the opportunity to seek to cure the identified control problems.

Following the FCC's Decision, SNR and Northstar notified the Commission that they would pay the full bid amount for some of the licenses they won and would default on their obligation to buy the rest.[3] As a result of the default, the FCC ordered SNR and Northstar to compensate it for the difference between their own winning bids in Auction 97 and the amount that the FCC receives when it re-auctions the licenses. *FCC Op.,* 30 F.C.C. Rcd. at 8950-51; *see* 47 C.F.R. § 1.2104(g)(2)(i) (requiring defaulters to compensate the FCC in the manner the FCC described). The FCC also ordered petitioners to make an additional payment equal to fifteen percent of the petitioners' own bids, or fifteen percent of the winning bid when their licenses are re-auctioned, whichever is less. *See FCC Op.*, 30 F.C.C. Rcd. at 8950-51; 47 C.F.R. § 1.2104(g)(2)(ii) (requiring defaulters to pay a penalty set by the FCC prior to each auction); *Auction Notice,* 29 F.C.C. Rcd. at 8451 (announcing the fifteen-percent penalty for defaulters in Auction 97). While the exact

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[3] *See* Letter to Ari Q. Fitzgerald, Esq., Counsel for SNR Wireless LicenseCo, LLC, from Roger C. Sherman, Chief, Wireless Telecommunications Bureau, FCC, 30 F.C.C. Rcd. 10704 (Oct. 1, 2015); Letter to Mark F. Dever, Esq., Counsel for Northstar Wireless, LLC, from Roger C. Sherman, Chief, Wireless Telecommunications Bureau, FCC, 30 F.C.C. Rcd. 10700 (Oct. 1, 2015).

amount of the petitioners' penalties depends on the winning price for the relevant licenses at re-auction, 47 C.F.R. § 1.2109; *see also id.* § l.2104(g)(2), the parties anticipate that the penalties will amount to hundreds of millions of dollars. Because of the size of the penalties for default, SNR and Northstar each made partial, "interim" payments to the Commission: SNR paid $181,635,840 and Northstar paid $333,919,350.[4]

After making their interim payments, both SNR and Northstar petitioned this court for review of the FCC's decision.

II. Analysis

The petitioners SNR and Northstar urge us to reverse the FCC's decision for two primary reasons. First, the petitioners contend, the Commission departed from agency precedent without explanation. Second, even if the Commission followed its own precedents, petitioners insist those precedents did not provide fair notice that their relationship with DISH could cost them their bidding credits plus a penalty for defaulting without an opportunity to cure. Petitioners' first argument fails, but the second has merit.

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[4] *See* Letter to Ari Q. Fitzgerald, Esq., Counsel for SNR Wireless LicenseCo, LLC, from Roger C. Sherman, Chief, Wireless Telecomm. Bureau, FCC, 30 F.C.C. Rcd. 10704, 10706 (Oct. 1, 2015); Letter to Mark F. Dever, Esq., Counsel for Northstar Wireless, LLC, from Roger C. Sherman, Chief, Wireless Telecomm. Bureau, FCC, 30 F.C.C. Rcd. 10700, 10702 (Oct. 1, 2015).

A. The FCC Reasonably Applied its Own Precedent

We must defer to the FCC's decision in this case unless the decision was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(a). The scope of review under the arbitrary and capricious standard is "narrow" and we cannot "substitute [our] judgment for that of the agency." *Motor Vehicle Mfrs. Ass 'n of the US., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Our job is simply to ensure that the Commission "articulate[d] a satisfactory explanation for its action." *Id.* To provide a satisfactory explanation, an agency must acknowledge and explain any departure from its precedents. *Comcast Corp. v. FCC,* 526 F.3d 763, 769 (D.C. Cir. 2008) (citing *Pontchartrain Broad. Co. v. FCC*, 15 F.3d 183, 185 (D.C. Cir. 1994)); *see also FCC v. Fox Television Stations, Inc.*, 556 U.S. 502,515 (2009) (*Fox I*).

Petitioners argue that the FCC departed without explanation from its precedent regarding designated entities. But that simply is not the case. Far from ignoring Commission decisions, the FCC reasonably interpreted and applied them when it determined that DISH had *de facto* control over SNR and Northstar. We accordingly affirm the Commission's decision that the petitioners are required to pay full price for the spectrum licenses they won in Auction 97.

The Commission began with its own settled regulations and precedent. Established FCC precedent highlights that the likelihood of a *de facto* control finding is "greatly increased" in cases like this one, where a large company (DISH) is the "single

entity provid[ing] most of the capital and management services" for smaller companies. *FCC Op.,* 30 F.C.C. Rcd. at 8911 (quoting *In re Implementation of Section 309(j) of the Commc 'ns Act - Competitive Bidding,* l O F.C.C. Rcd. 403, 456 (1994) *(Fifth MO&O)).* With that warning in mind, the Commission looked to three different sources of law to determine whether DISH had *de facto* control over SNR and Northstar: (1) 47 C.F.R. § 1.2110(c)(2)(ii)(H), the regulation specifying that one company has *de facto* control over another if it manages the operations of the other and has the ability to "determine, or significantly influence" the services offered by the other; (2) the Wireless Bureau decisions, *Intermountain Microwave* and *Baker Creek,* that articulated the six-factor test that the FCC has used for decades in a range of circumstances to determine whether one company controls another; and (3) the Commission's *Fifth Memorandum Opinion & Order,* an opinion regarding the implementation of the competitive bidding system under Section 309(j) of the Communications Act, which describes situations where *de facto* control is present. Drawing on those sources, the Commission reasonably determined that each counseled in favor of a finding that DISH *de facto* controlled SNR and Northstar.

1. The FCC's *De Facto* Control Regulations

The FCC looked to its regulations elaborating the concept of *de facto* control, focusing in particular on their treatment of management agreements granting another entity control over a putative small business. One of those regulations states that

> [a]ny person who manages the operations of [a small business] pursuant to a management

> agreement shall be considered to have a controlling interest in [the small business] if [that] person, or its affiliate, has authority to make decisions or otherwise engage in practices or activities that determine, or significantly influence . . . [t]he nature or types of services offered by [the small business].

47 C.F.R. § 1.2110(c)(2)(ii)(H). Applying that regulation, the FCC found that DISH had a controlling interest due to the way in which it "manage[d]" the operations of SNR and Northstar. *See FCC Op.,* 30 F.C.C. Rcd. at 8938. In that role, DISH had authority to limit the wireless technology that SNR and Northstar used. *Id.* Additionally, DISH managed the "buildout and day-to-day operations" of both companies. *Id.* As a result, DISH could "significantly influence" the "type of service[]" that SNR and Northstar provided for their customers. *Id.* at 8938-40 & n.359. We find nothing unreasonable about the Commission's application of its regulations.

2. The Six-Factor *De Facto* Control Test

The meat of the FCC's analysis of petitioners' circumstances referred to the six factors that *Intermountain Microwave* identifies as particularly relevant to whether one entity has *de facto* control over another. *See FCC Op.,* 30 F.C.C. Rcd. at 8911-36 (relying on *Intermountain Microwave* factors). *See also, e.g., In re Amendments to Parts 1, 2, 87 & 101 of the Comm 'n's Rules to License Fixed Servs. at 24 GHz,* 15 F.C.C. Rcd. 16934, 16970 n.251 (2000) *(Amendments)* (endorsing the *Intermountain Microwave* test); *In re Application of Ellis Thompson*

Corp., 9 F.C.C. Rcd. 7138, 7138-39 (1994) (*Ellis Thompson 1*).

The *Intermountain Microwave* test asks: (1) who controls the daily operations of the small business; (2) who employs, supervises, and dismisses the small business's employees; (3) whether the small business has "unfettered" use of all its facilities and equipment; (4) who covers the small business's expenses, including its operating costs; (5) who receives the small business's revenues and profits; and (6) who makes and carries out the policy decisions of the small business. *See Intermountain Microwave,* 12 F.C.C. 2d at 560.

Addressing the first question, the FCC found that DISH had control over the daily operations of SNR and Northstar. The Commission acknowledged that DISH's agreements with SNR and Northstar contained some language "purporting to give SNR and Northstar control over day-to-day operations," *see FCC Op.,* 30 F.C.C. Rcd. at 8918, but that language had almost no practical effect, *see id.* As noted above, DISH agreed to be the Operations Manager for both SNR and Northstar. *See id.* at 8897-98. Under the parties' comprehensive Management Services Agreement, DISH managed virtually all aspects of SNR and Northstar's businesses, including engineering and construction of signal towers, marketing, record keeping, and contract negotiations. *See id.* at 8897-98, 8919. Their businesses operated under DISH's trademark, for which they paid royalties to DISH. *Id.* at 8899.

The parties' agreement left SNR and Northstar no practical means of ensuring that DISH would use

those managerial powers to further SNR and Northstar's own goals rather than DISH's. *See id.* at 8898-8901. While SNR and Northstar were ostensibly in charge of setting their business objectives, DISH required them to consult it on every important aspect of their business plans. *Id.* at 8920. And SNR and Northstar had extremely strong incentives to follow any suggestions that DISH made during the planning process: As explained further below, DISH had almost complete control over SNR and Northstar's owners' compensation; if DISH felt that it was being ignored during the business planning process, it could command compliance from SNR and Northstar by limiting that compensation. *See id.* at 8920.

Moreover, the process SNR or Northstar would have to navigate if they ever wished to replace DISH with a different operations manager would be prohibitively time-consuming and costly. *See id.* They could terminate their Management Services Agreement (MSA) with DISH only after completing a "complex, costly, and lengthy process, culminating in arbitration," in which they would have to establish that DISH committed a material breach of the Management Services Agreement. *Id.* Termination of the MSA without cause would require them to give DISH 12 months' notice and repay the billions of dollars that they borrowed from DISH to purchase the licenses at an interest rate several points higher than the rate they would otherwise owe. *Id.* at 8921 . Thus, the FCC concluded that SNR and Northstar did not have meaningful control over the day-to-day operation of their businesses.

Moving to the second *Intermountain Microwave* factor, the FCC determined that SNR and Northstar had little control over their employment decisions. *See id.* at 8921-23. DISH had the power to appoint the "Systems Manager" for each company, as the single point of contact with DISH as Operations Manager, and such individual would not be selected by SNR and Northstar but only need be "reasonably acceptable" to them. *Id.* at 8923. The Management Services Agreement for each company purported to give it the "authority and ultimate control over . . . the employment, supervision and dismissal of all personnel providing services." *Id.* at 8923. But the Commission found that authority was illusory because SNR and Northstar each received only a very modest budget each year. *Id.* at 8922. Those sums did not enable SNR and Northstar to hire sufficient personnel to "effectively oversee operations." *Id.* Instead, SNR and Northstar hired scant staff, relying primarily on DISH-as the Operations Manager-to staff SNR and Northstar's operation. *Id.* Neither SNR nor Northstar could offer any employee compensation in excess of $200,000 per year without DISH's permission, giving DISH a veto over hiring decisions for any top executive. DISH meanwhile retained unilateral authority to set its own compensation as the small companies' Operations Manager, subject only to "consultation and direction" from SNR and Northstar. *Id.* The Commission found the compensation arrangement "not compatible with the Applicants' actually having the ability to manage and operate their businesses." *Id.* at 8923.

With respect to the third *Intermountain Microwave* factor, the FCC found that SNR and

Northstar did not have "unfettered access to their facilities and equipment." *Id.* at 8934. When the auction took place, SNR and Northstar did not yet have facilities, but the text of the agreements between SNR, Northstar, and DISH recited that SNR and Northstar would have "unfettered use of, and unimpaired access to, all facilities and equipment associated with [their] [s]ystems." *Id.* The Commission found that language belied by other contractual provisions that gave DISH the right to choose the type of wireless service that SNR and Northstar would offer. *Id.* at 8935.

Because the agreements barred SNR and Northstar from using their facilities to provide any service that was incompatible with DISH's service, and DISH had neither specified the service it planned to develop nor had any current plans to build out its own spectrum, the FCC believed that SNR and Northstar did not have "unfettered use" of their facilities. *Id.* (citing *Ellis Thompson I*, 9 F.C.C. Rcd. 7138, 7140). Petitioners tellingly point out that small providers typically must gear their facilities to their investor's favored technology in order to provide a competitive scope of service. Pet'r Br. 44. The Commission itself has acknowledged the benefits to small providers of "an assurance of basic interoperability," with which small providers "will face less uncertainty over the development of a healthy device ecosystem," and has encouraged voluntary measures to facilitate interoperability. *Amendment of the Commission's Rules with Regard to Commercial Operations in the 1695-1710 MHz, 1755-1780 MHz, and 2155-2180 MHz Bands,* 29 F.C.C. Rcd. 4610, 4698-99 (2014). The FCC's distinction between

other designated entities' command of their facilities and petitioners' lack of choice thus strikes us as relatively thin, resting principally on the risk that petitioners' agreement to interoperate with DISH's yet-to-be-chosen network could prevent them from prompt development of their own spectrum. But our review is deferential, and we conclude that the Commission permissibly found this factor to further demonstrate DISH's control over SNR and Northstar.

Turning to the fourth *Intermountain Microwave* factor, the FCC found that DISH also "dominate[d] the financial aspects of SNR's and Northstar's businesses." *Id.* at 8924. DISH "provided equity contributions and loans to the [petitioners] that account[ed] for approximately 98 percent of the [petitioners'] winning bid amounts and . . . further agreed to provide all future funds for build-out and working capital." *Id.* In addition, SNR and Northstar could not acquire more than $25 million in debt from sources other than DISH. *Id.* The FCC believed any such sum was necessarily "trivial" in comparison to what it would cost to build and use a nationwide wireless network. *Id.*

The FCC also found that the fifth *Intermountain Microwave* factor, regarding the allocation of profits from SNR and Northstar's business, "firmly raise[d] the specter of control." *Id.* at 8925. The FCC explained:

> A preliminary review of the Agreements reflects that the profits generated by SNR's and Northstar's operations are to be distributed *pro-rata* in accordance with the ownership interests of the parties. When examined alone, these provisions appear to be

> conventional cash collection and profit distribution arrangements. However, when considered in conjunction with other provisions in the Agreements that dictate the distribution of revenues received, we find that the business arrangements between the parties are structured in such a way that the profits are likely only to benefit DISH.

Id. Notably, before realizing any profits from their business operations, SNR and Northstar would first have to repay the billions of dollars in loans they owed to DISH. *Id.* And, given that SNR and Northstar would need to undertake extensive construction before they could begin providing wireless service, it was very unlikely for the foreseeable future that they would be able to repay those loans and begin earning profits. *Id.*

With respect to the sixth and final *Intermountain Microwave* factor, the FCC concluded that DISH made every essential policy decision for SNR and Northstar's businesses, including decisions about: (a) the type of wireless technology that SNR and Northstar would use; (b) the number of spectrum licenses that SNR and Northstar would hold; (c) the timetable for SNR and Northstar to build networks and begin offering services to customers; (d) when SNR and Northstar might sell their businesses; (e) whether SNR and Northstar could own real property; and (f) SNR and Northstar's bidding strategy. *See id.* at 8927-34. Despite petitioners' claims that DISH "is a purely passive investor," *id.* at 8894, the FCC reasonably concluded that DISH effectively controlled SNR and Northstar's businesses. *See id.* at 8927-34.

The thrust of the Commission's *Intermountain Microwave* analysis was that the petitioners wrote into their contracts general terms that formally spoke to the six factors in ways that seemed to promise SNR and Northstar's independence, but at the same time functionally belied those promises with specific contract terms empowering DISH to control and benefit from virtually all critical aspects of SNR and Northstar's businesses. What mattered, in the Commission's analysis, was the substance of the terms of DISH's control, not the formal recitations of compliance with *Intermountain Microwave's* six control factors. Such pragmatic application of *Intermountain Microwave* comports with other FCC cases, in which the Commission has emphasized that "[t]he *de facto* control issue 'transcends formulas, for it involves an issue of fact which must be resolved by the special circumstances presented.'" *In re Stratos Glob. Corp.,* 22 F.C.C. Rcd. 21328, 21343 (2007) (quoting *In re Application of Fox Television Stations, Inc.*, 10 F.C.C. Rcd. 8452, 8514 (1995)). We therefore conclude that the FCC's application of the *Intermountain Microwave* test was reasonable and consistent with existing law.

3. Fifth Memorandum Opinion & Order

Together with its *Intermountain Microwave* analysis, the FCC considered whether DISH had *de facto* control of SNR and Northstar under the FCC's *Fifth Memorandum Opinion & Order*, the Commission's 1994 opinion resolving petitions for reconsideration and clarification of competitive bidding rules for broadband and personal communication service (PCS). *See FCC Op.*, 30 F.C.C.

Rcd. at 8929-31 (citing *Fifth MO&O,* 10 F.C.C. Rcd. 403 (1994)).

The *Fifth MO&O* gave additional guidance on the statutory and regulatory provisions that aimed "to ensure that designated entities," such as small, rural, or minority- or women-owned businesses, "have the opportunity to obtain licenses at auction as well as the opportunity to have meaningful involvement in the management and building of our nation's broadband PCS infrastructure." 10 F.C.C. Rcd. 403, 404. Its provisions seek to benefit only those small businesses that plan to participate in the wireless industry themselves, not those that are either proxies for larger investors or plan to become their subsidiaries.

The *Fifth MO&O* specifies that, when an investor "financially . . . force[s]" a small company "into a sale (or major refinancing)," the investor's conduct effects "a transfer of control." *Id.* at 456. As noted above, SNR and Northstar contractually agreed to use the same type of wireless technology as DISH. Nevertheless, at the time of the auction, DISH had no plans to choose a technology or begin building a network. *See FCC Op.*, 30 F.C.C. Rcd. at 8930 & n.312. Thus, SNR and Northstar would have to wait for DISH to make a technology choice before they could start building wireless towers. Even if DISH made that choice very quickly, SNR and Northstar would be unlikely to be able to build a wireless network and generate enough revenue to repay their multibillion dollar loans to DISH before the seven-year deadline passed.

DISH also imposed financing obligations and transfer restrictions on SNR and Northstar: Neither small company could borrow more than $25 million

dollars from other sources to help repay DISH, *id.* at 8924, nor could it sell its business (*e.g.* to a wealthier entity that might be able to shoulder a large debt) without DISH's consent, *see id.* at 8928-29 (explaining that DISH had authority for ten years to freely block the sale of SNR or Northstar, after which the companies could be sold, but only subject to DISH's right of first refusal). Consequently, if SNR or Northstar sought to act independently of DISH to actually build its own wireless business, as opposed to merely collecting its assured payment from DISH, it was doomed to default on its loans. *See id.* at 8929. Moreover, the loans were so large that defaulting could "reduce the value of the membership interests in [SNR and Northstar] to zero." *Id.* at 8930.

The Agreements left SNR and Northstar only one path to avoiding certain financial failure: Five years after acquiring their spectrum licenses, they each had a "put," *i.e.*, a right to require DISH to buy their business for the price of "their investment . . . together with an annual rate of return" that was specified under seal in the contract. *Id.* at 8929. The contract limited SNR and Northstar to a 30-day window at the end of the fifth year to exercise that option. *See FCC Op.*, 30 F.C.C. Rcd. at 8929. Such a relatively generous but fleeting, onetime-only opportunity was virtually certain to entice SNR and Northstar to sell their companies to DISH. *Id.* at 8930. And that financial carrot would appear at a convenient time for DISH: FCC rules provide that, five years after a designated entity acquires a spectrum license-but no sooner-it can sell its business to a large company without paying a penalty to the Commission. *See id.* at 8897 n.82 (citing 47 C.F.R. § 1.2111 (d)(2)(E)). Thus, the FCC

determined that SNR and Northstar would have every interest in selling their businesses to DISH at the first possible moment. *See id.* at 8931 (citing *Fifth MO&O,* 10 F.C.C. Rcd. 403, 456). Such terms may be mutually beneficial to the parties to the agreements, but they are hardly what one would expect if SNR and Northstar wished to build their own independent wireless businesses.

The FCC's conclusion is strongly supported by the *Fifth MO&O,* which provided the following example of an arrangement that could constitute a transfer of control:

> [If] an agreement between a strategic investor and a designated entity provides that (1) the investor makes debt financing available to the applicant on very favorable terms (e.g., 15 year-term, no payments of principal or interest for six years) and (2) [] the designated entity has a one-time put right that is exercisable at a time and under conditions that are designed to maximize the incentive of the licensee to sell (e.g., six years after issue, option to put partnership interest in lieu of payment of principal and accrued interest on loan), we may conclude that *de facto* control has been relinquished.

Fifth MO&O, 10 F.C.C. Rcd. 403, 455-56. The facts in that example are materially identical to the facts here. Here, as in the example, a strategic investor has provided financing to small companies on very favorable terms (no payments of principal or interest for five years) and the small companies have a "one-time put right that is exercisable at a time and under

conditions that are designed to maximize the incentive of the licensee to sell" (including by providing that the right can be exercised "in lieu of payment of principal and accrued interest on loan"). We therefore conclude that the *Fifth MO&O* clearly presaged the FCC's *de facto* control finding, and that the FCC applied the *Fifth MO&O* in a reasonable manner to support its conclusion.

4. The Wireless Bureau's Allowance of Bidding Credits to Denali Spectrum and Salmon PCS is Not Controlling

The petitioners do not dispute the authoritative guidance provided by the controlling-interests rule, 47 C.F.R. § 1.2110(c)(2)(ii)(H), *Intermountain Microwave*, and the *Fifth MO&O*. Their petition rests largely on the assertion that the FCC's analysis, however consistent with those authorities, cannot be squared with what they view as the more specific guidance provided by two Wireless Bureau actions approving applications Denali Spectrum and Salmon PCS filed for designated-entity bidding credits. Petitioners characterize the Bureau's approval of those applications as inconsistent with the Commission's denial of theirs.

Each of the two applications for small-business credits that petitioners highlight was approved by the Bureau with a one-word action communicating that the application was "granted," without any opinion or explanation. Petitioners nonetheless insist that those actions have precedential force, requiring the Commission to approve similar applications. They contend their applications are materially identical, so

the FCC's denials were contrary to its own precedent and constituted an unexplained change of course.

While the absence of a written opinion regarding either Denali Spectrum or Salmon PCS's successful application for bidding credits makes it somewhat difficult to discern the relevant terms, we disagree with SNR and Northstar that those actions require us to grant their pet1t1ons. Under our established precedent, the unexplained approvals of small-business credits to Denali and Salmon are non-precedential and, even examining their substance, do not detract from the FCC's decision here.

i. The Denali and Salmon Approvals Are Non-Precedential

Publicly available documents contain some of the background information that likely informed the Bureau's Denali and Salmon approvals. More than a decade ago, Cricket Communications, Inc. and its affiliates (collectively, Cricket) acquired an eighty-five percent interest in a small business called Denali Spectrum and provided the capital that Denali Spectrum needed to participate in a wireless spectrum auction.[5] Cricket also agreed to serve as Denali Spectrum's manager.[6] The Wireless Bureau granted

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[5] *See* FCC Universal Licensing System, Application File No. 0002774595, http://wireless2.fcc.gov/UlsApp/ApplicationSearch/applAdminAttachments.jsp?applID=3937783 (click on "Organization Chart" hyperlink, created March 23, 2007); *see also id.* (click on "Exhibit D: Agreements and Other Instruments" hyperlink, created April 18, 2007).

[6] *See id.* (click on "Exhibit D: Agreements and Other Instruments" hyperlink, created April 18, 2007).

Denali Spectrum's request for small business credits without opinion.[7]

Cingular Wireless similarly obtained an eighty-five percent stake in a small business called Salmon PCS.[8] Cingular served as Salmon's manager and had a right to weigh in on many aspects of Salmon's business.[9] Yet the Wireless Bureau treated Salmon as an independent small business, allowing it to use bidding credits to offset the cost of a spectrum license.[10] As with Denali, the Wireless Bureau did not explain why it believed Salmon qualified as a designated entity.

The core of petitioners' case rests on their decisions to model many of the provisions in their agreements with DISH on contractual provisions between small businesses and their larger investors that the Wireless Bureau had previously accepted as not evidencing disqualifying *de facto* control. In particular, petitioners contend that material terms of the agreements between DISH and petitioners track

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[7] *See* FCC Universal Licensing System, Application File No. 0002774595, http://wireless2.fcc.gov/UlsApp/ ApplicationSearch/ applAdminAttachments.jsp?applID=3937783; *see also id.* (click on "Exhibit C: Designated Entities" hyperlink, created March 23, 2007).

[8] *See* FCC Universal Licensing System, Application File No. 0000365189, http://wireless2.fcc.gov/UlsApp/ApplicationSearch/ applAdrninAtta chments.jsp?applID=1575639# (click on "Exhibit A: Ownership" hyperlink, created February 11, 2001).

[9] *See id.* (click on "Management Agreement" hyper link, created September 18, 2001).

[10] *See id.; see also id.* (click "Exhibit D: Designated Entities" hyperlink, created February 12, 2001).

terms of Cricket's agreements with Denali Spectrum or Cingular Wireless's agreements with Salmon PCS. *See* Pet. Br., App'x A (comparing the contractual agreements in *Denali* with the contractual agreements in this case). Thus, the petitioners contend, the FCC necessarily departed from precedent when it held that DISH-unlike the investors in Denali Spectrum and Salmon PCS-exercised *de facto* control over the small companies it was managing. We are not persuaded.

As an initial matter, there is no evidence that the FCC has changed its position. The FCC is not bound to treat the provisions of agreements filed with a pair of long-form applications, which the Wireless Bureau administratively granted without opinion or any public statement of reasons, as if those provisions established a Commission position from which it could not deviate without reasoned explanation. *See Fox I*, 556 U.S. at 515; *State Farm*, 463 U.S. at41-42. We have no assurance that the Commission ever accepted those decisions as correct even on their own terms, nor even that the Commission scrutinized the details of the filings on which petitioners now claim to rely.

The FCC did not unreasonably "disavow" its staff-level actions. This court has repeatedly held that a "lower component of a government agency" does not bind the agency as a whole. *Comcast,* 526 F.3d at 769 (collecting cases). In *Comcast,* we "reaffirmed our well-established view" that the reasoning behind unchallenged Media Bureau actions cannot be attributed to the agency unless and until "the agency has . . . endorsed those actions." *Id.* (quoting *Vernal Enters., Inc. v. FCC,* 355 F.3d 650, 660 (D.C. Cir.

2004)). The Wireless Bureau's acceptance of Denali's and Salmon's applications for designated-entity bidding credits did not require the Commission to follow the same approach or explain why it did not do so for SNR and Northstar.

The petitioners make a range of arguments that the FCC was bound to grant bidding credits to them because the Wireless Bureau approved credits in cases they assert are materially indistinguishable. First, the petitioners argue that the Wireless Bureau has the delegated authority to act for the Commission on matters within the Bureau's purview, including implementing the Commission's auction rules. 47 C.F.R. § 0.131; *In re Amendment of Part 1 of the Commission's Rules—Competitive Bidding Proceedings,* 12 F.C.C. Rcd. 5686, 5697-98 (1997). Because the Wireless Bureau's exercises of delegated power have "the same force and effect . . . as orders, decisions, reports, or other actions of the Commission" as a whole, 47 U.S.C. § 155(c)(3), the petitioners assert that Bureau decisions regarding designated entities should be considered full Commission decisions. That is true enough as far as it goes. But it "simply means that [Bureau] rulings are binding on the parties to the proceeding." *Comcast,* 526 F.3d at 770. It most assuredly does not mean that principles one might glean from unexplained, case-specific Bureau actions-whether granting individual waivers as in *Comcast,* or applications for designated-entity status to particular applicants such as Denali Spectrum or Salmon PCS-are somehow to be treated as establishing the position of the Commission.

Second, the petitioners contend that Wireless Bureau actions must be considered Commission precedent under 4 7 C.F.R. § 0.445. That regulation provides that, when "[a]djudicatory opinions and orders of the Commission, or its staff acting on delegated authority" are "published in the Federal Register, the FCC Record, FCC Reports, or Pike and Fischer Communications Regulation," then they may be "relied upon, used or cited as precedent by the Commission or private parties in any manner." 47 C.F.R. § 0.445(a), (f). By contrast, where the "[a]djudicatory opinions and orders of the Commission, or its staff acting on delegated authority" are not so published, they only may "be relied upon, used or cited as precedent . . . against persons who have actual notice of the document in question or . . . against the Commission." *Id.* § 0.445(a), (f). The petitioners contend the unpublished Wireless Bureau staff orders are precedential under Section 0.445 when cited "against the Commission."

Even assuming that the Wireless Bureau's actions approving Denali Spectrum and Salmon's applications for bidding credits may properly be considered "[a]djudicatory opinions and orders"—a proposition not established—petitioners' argument is unpersuasive: The point of Section 0.445 is to prevent use of any documents against a party, including the Commission, that lacks actual notice of it. Section 0.445 does not speak to the weight any particular document has when "used or cited."

Third, *Comcast* dealt with "sporadic action" by the Media Bureau, which was "neither reviewed nor endorsed" by the Commission as a whole; petitioners

would have us differentiate this case on the ground that the full FCC itself has referred to Wireless Bureau actions "to establish the position of 'the Commission.'" Pet'r Br. 34, 40. But the Denali and Salmon decisions, as only two among many dozens of actions on applications for designated-entity credits, were also "sporadic" actions that the Commission neither reviewed nor endorsed. Petitioners grasp at the straw of the Commission's citation to Bureau opinions in support of its standing analysis in the challenged order as if that tacitly endorsed every Bureau action. *See FCC Op.*, 30 F.C.C. Rcd. at 8905 nn.153-54. Just as this court would not, by citing one of its own unpublished judgments in a published opinion, somehow thereby convert all of our unpublished judgments into binding circuit precedent, so the FCC's citation to a Wireless Bureau opinion does not mean the Commission has tacitly embraced all Wireless Bureau actions.

Fourth, the petitioners suggest that the FCC has an obligation to follow Wireless Bureau precedents, at least in this case, because the Auction Notice "directed auction participants to Bureau precedent for 'further guidance' on the specific question of control." Pet. Br. 11. But the Auction Notice identified three specific sources for guidance on the issue of *de facto* control. *Auction Notice,* 29 F.C.C. Rcd. at 8412 & n.151. One of those sources, the *Baker Creek* Memorandum Opinion and Order, was a Wireless Bureau decision-albeit one that the full Commission had already endorsed on multiple occasions. *See, e.g., In re Stratos Glob. Corp.,* 22 F.C.C. Rcd. at 21343 n.107; *In re Application of Bollinger,* 16 F.C.C. Rcd. 18107, 18110 n.9 (200l); *Amendments,* 15 F.C.C. Rcd. at 16970 n.251. No

reasonable auction participant could read the Notice's reference to *Baker Creek* as the Commission's general announcement of a commitment to embrace every principle any party might glean from a past Wireless Bureau action.

Fifth, the petitioners note that the FCC took care in this case to "disavow" Wireless Bureau staff actions, which they contend implies those actions otherwise would count as full Commission actions. The "disavow[al]" appeared in a footnote, where the FCC stated:

> To the extent any prior actions of Commission staff could be read to be inconsistent with our interpretation of the Commission's rules in this order, those actions are not binding on the Commission-and we hereby expressly disavow them as inconsistent with the goals of Section 309(j)(3), the text and purpose of Section 1.2110 of the Commission's rules, and Commission policy as embodied in the *Fifth MO&O,* this decision, and other decisions of the Commission described above. *See Comcast Corp. v. FCC,* 526 F.3d 763, 769 (D.C. Cir. 2008); *accord, Comcast Cable Communications, LLC[] v. FCC,* 717 F.3d 982, 1002 (D.C. Cir. 2013) [Edwards, J., concurring].

See FCC Op., 30 F.C.C. Rcd. at 8937 n.354. The statement itself is quite explicit that staff actions "are not binding on the Commission." Only then, to foreclose any inconsistency that-reasonably or not-"could be read" into past staff actions, did the Commission "disavow" any contrary understanding

and specify the particular statutory provision, rules, and FCC orders to which potential designated entities should look for guidance. That simple reiteration does not carry the powerful negative implication petitioners would have us draw from it.

The sixth reason that petitioners say the Commission unreasonably found *de facto* control where petitioners had tracked Wireless Bureau-approved applications is that the petitioners had no other choice: If copying terms of agreements of designated entities the Wireless Bureau had approved did not require Commission approval, petitioners contend, what would? The petitioners disparage the regulations as providing *"zero* guidance about what does and does not constitute de facto control in the auction context." Pet'r Reply Br. 10. They complain that *Intermountain Microwave's* factors also "fail[] to provide clear guidance," and the *Fifth MO&O's* discussion of when a large company has *de facto* control over an affiliate amounts to only "general admonitions." *Id.* at 11. Thus, the petitioners conclude, the FCC must have intended them to look to the specific application forms and underlying agreements of businessessuch as Denali Spectrum and Salmon PCS-that the Wireless Bureau treated as designated entities entitled to bidding credits.

The petitioners have not cited any case suggesting that, when application of an agency's standard-here, *de facto* control-takes into account a wide range of different types of evidence, the agency cannot act reasonably unless it follows its staff action. To be sure, where a standard itself does not give notice of the conduct it prohibits, a regulated entity cannot be

punished for violating those standards. *See, e.g.*, *Abhe & Svoboda, Inc. v. Chao,* 508 F.3d 1052, 1060 (D.C. Cir. 2007); *Gen. Elec. Co. v. EPA,* 53 F.3d 1324, 1328-29 (D.C. Cir. 1995). We have more to say below about the question of fair notice. But the Commission remained free to determine on the facts that petitioners do not in fact qualify for bidding credits, even though its governing criteria were context-dependent.

Finally, petitioners contend that the Commission's denial of bidding credits was contrary to law because "agencies cannot pretend that informal agency guidance does not exist in considering whether regulated parties conformed their conduct to the law." Pet'r Reply Br. at 17. They invoke the Supreme Court's reference in *FCC v. Fox Television Stations, Inc.,* 567 U.S. 239, 247 (2012) (*Fox II*), to *"unpublished* Bureau-level decisions," as if that recognition invalidates the FCC's decision here for failure to conform to the Wireless Bureau's past actions. Pet'r Reply Br. at 17. But that miscasts the role of the Bureau rulings in *Fox II.* The Court held that Bureau rulings, together with the Commission's rulings and letters on fleeting expletives and nudity, were not consistent and specific enough to provide advance notice of the challenged penalty. *See Fox II,* 567 U.S. at 256-57. *Fox II* does not support treating FCC Bureau decisions as themselves a body of precedent from which the Commission may not deviate without explanation.

The FCC need not follow—or explain its departures from—Wireless Bureau decisions. The Commission is not required to approve applications for

bidding credits just because the applicants modeled terms of their investor contracts on terms used by designated-entity applicants the Wireless Bureau approved. When we consider whether the FCC's *de facto* control rules were clear enough that petitioners should have expected that, were they to fall short they would be penalized for default and denied an opportunity to cure, *see infra*, Section II.B, we will take note of the way that Wireless Bureau staff seemed to interpret those rules.

ii. The Denali and Salmon Applications Were Materially Different from Petitioners'

Even were we to accept the petitioners' assertions that they reasonably relied on Wireless Bureau grants of certain past applications as if they were authoritative precedents, the FCC permissibly determined that the applications in Denali and Salmon were not on all fours with SNR and Northstar's. Those agreements were different enough that petitioners were on notice that they might be disqualified even where the prior designated-entity applicants on which they had sought to model themselves had been approved. At the same time, it does not appear that the agreements were so different that petitioners could have been expected to anticipate that they would be denied an opportunity to negotiate a cure.

SNR and Northstar place great emphasis on their compliance strategy whereby DISH pulled various contractual provisions out of the Denali and Salmon agreements and stitched them together to form its contracts with petitioners here. Whatever the extent of overlap between terms of petitioners' contracts and

terms in one or another of those prior applicants' contracts, the FCC reasonably found that the resulting relationship between the petitioners and DISH manifests impermissible control more plainly than did the relationships between Cricket and Denali, or between Cingular Wireless and Salmon.

Notably, in this case, it is clearer that SNR and Northstar will be "financially . . . force[d]" to sell their businesses to their largest investor, DISH. *See Fifth MO&O*, 10 F.C.C. Rcd. 403, 456. As explained above, instead of scrambling to build a national network in the space of less than five to seven years in the quixotic mission of generating enough revenue to pay back their multibillion dollar loans, the petitioners have every incentive simply to sell their interests at year five to DISH in exchange for complete forgiveness of those loans plus a guaranteed cash payment.

Denali Spectrum's situation was markedly different. It was not clearly foreordained that Denali would sell its business to Cricket. Denali only needed to use one license to provide service in the Chicago area—rather than hundreds of licenses to provide an integrated national network.[11] Denali also had ten years—rather than five—to build its comparatively small-scale service before it had to make its first loan payment, and it had fourteen years—rather than seven—to finish paying off its loans.[12] Denali's

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[11] See FCC Universal Licensing System, Application File No. 0002774595, http://wireless2.fcc.gov/UlsApp/ApplicationSearch/applMarketSum.jsp?applID=3937783.

[12] *See* Credit Agreement By and Among Cricket Communications, Inc. (as Lender) and Denali Spectrum License, LLC (as Borrower) (July 13, 2006), https://www.sec.gov/Archives/

chances of establishing a network and turning a profit before it had to start paying back its loans were thus substantially greater than SNR or Northstar's.

At the same time, under their agreement with DISH, SNR and Northstar faced more powerful temptation to sell their businesses to DISH at the earliest permissible time. The agreements enabled SNR and Northstar "to require DISH to purchase their interest," subject to few conditions. *FCC Op.*, 30 F.C.C. Rcd. at 8929. By contrast, Cricket had not promised to buy Denali Spectrum's business; rather, Cricket "ha[d] the right, but not the obligation," to accept an offer from Denali Spectrum to sell its spectrum.[13] Thus, neither the carrots nor the sticks in *Denali* were as large as those that collectively pressure SNR and Northstar to sell their businesses to DISH.

The business arrangements in this case were also more likely to induce a buyout-rather than network development by the designated entities-than those between Salmon and Cingular. Salmon's Management Services Agreement with Cingular contained a detailed and speedy timeline for building the facilities that Salmon would need in order to provide wireless

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edgar/data/1065049/000093639206000773/a22231exv10w15.htm, *as amended by* Amendment No. 2 to Credit Agreement By and Among Cricket Communications, Inc. (as Lender) and Denali Spectrum License, LLC (as Borrower) (April 16, 2007), https://www.sec.gov/Archives/edgar/data/1065049/000093639207000409/a30090exv 1 0w5w2.htm.

[13] *See* FCC Universal Licensing System, Application File No. 0002774595, at 15, http://wireless2.fcc.gov/UlsApp/ApplicationSearch/applAdminAttachments.jsp?applID=3937783 (click on "Exhibit D: Agreements and Other Instruments" hyperlink, created April 18, 2007).

service to customers.[14] If Cingular did not adhere to the timeline, Salmon had the right to "take any and all action necessary[,] . . . including retaining third parties" to provide services in lieu of Cingular; Cingular would then have an obligation to reimburse Salmon for the reasonable cost of those third-party services.[15] Salmon, like Denali Spectrum, thus had significantly more control and realistic opportunity than SNR or Northstar to build a wireless network and begin collecting revenues before its loans were due. Moreover, Salmon's controlling investor had three different opportunities to sell its interest in Salmon to Cingular.[16] It therefore had more chances to see how Salmon's business was progressing before it made a decision to keep or sell its shares; by contrast, SNR and Northstar had just a single, 30-day window (during the fifth year of the venture) to sell their businesses to DISH. Under these circumstances, the petitioners cannot reasonably claim that they were in the same position as Salmon.

In addition to the terms setting up a forced buyout more clearly here than in Denali or Salmon's circumstances, SNR and Northstar's bidding behavior was suspicious in ways that Denali's and Salmon's were not. As the FCC noted in its decision, SNR and

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[14] *See* FCC Universal Licensing System, Application File No. 0000365189, http://wireless2.fcc.gov/UlsApp/ ApplicationSearch/ applAdminAttachments.jsp?applID=1575639# (click on "Management Agreement" hyperlink, created September 18, 2001).

[15] *See id.* at 23.

[16] *See id.* at 26 (click on "LLC Agreement" hyperlink, created September 18, 2001).

Northstar's bidding conduct suggested that the two entities-although ostensibly separate and independent-were not in fact competing with one another. *See FCC Op.*, 30 F.C.C. Rcd. at 8932-33. To the contrary, they seemed to be working toward the same goal, and indifferent as to which entity paid to achieve it. *See id.* The Commission emphasized, for example, that,

> [C]ontrary to its own independent economic interest, SNR withdrew a bid in round 238 that had been a provisionally winning bid since round 77, an action that resulted in its being liable for an $11 million withdrawal payment ($8 million if adjusted for bidding credits). In the next round, Northstar was able to benefit by SNR's withdrawal to become the provisionally winning bidder for that license at a price $11 million less than SNR's prior bid ($8 million less if adjusted for claimed bidding credits). . . . Accordingly, while the switch added $11 million to SNR's balance sheet to the detriment of its non-DISH owners, it was an economic "wash" to the combined [petitioners] . . . .

Id. at 8933. SNR and Northstar have not established that they had any joint venture or shared business with each other that could explain their a-symmetric cooperation during bidding as reflecting anything other than their control by DISH. At oral argument, their counsel asserted that they did have some shared ventures, but we find no evidence in the record to support that assertion. The only contractual agreement in the record that was signed by SNR *and*

Northstar was the joint bidding agreement. That agreement suggests that SNR and Northstar wanted to coordinate their bids with DISH so that the three companies could combine their products and services to the extent contemplated by their governing agreements. But the governing agreements refer to SNR and Northstar as if they are separate companies who just happen to have the same business manager and financial backer (DISH). Without any other explanation for their non-mutually-beneficial bidding, the FCC reasonably concluded that SNR and Northstar were acting as two arms of DISH, working together to advance DISH's goals. *Id.* at 8932-33.

SNR and Northstar respond that the bidding agreement between SNR, Northstar, and DISH was not materially different from the bidding agreement between Denali and Cricket. But no case that petitioners have identified involved two ostensibly distinct small businesses coordinating their bidding with one another to favor one and disadvantage the other, even while jointly achieving a net benefit. That is the situation we confront here. SNR and Northstar also argue that they should not be penalized because their bidding behavior did not violate any FCC bidding rules. But behavior not itself barred by FCC rules may nonetheless be probative of impermissible control. *Cf Baker Creek*, 13 F.C.C. Rcd. 18709, 18724 (explaining that a particular type of partnership agreement was "permissible" under FCC rules, but "also relevant" to the FCC's control analysis). In the absence of any contractual provisions that would, for example, share the net benefits of coordinated bidding where losses to one firm are offset by gains to the other, the joint bidding strongly suggests that each petitioner was an

arm of DISH. Unless both companies were controlled by DISH, SNR and Northstar's unusually cross-subsidizing bidding behavior is inexplicable from a business perspective.

Thus, under the totality of the circumstances, we believe that the FCC acted reasonably and consistently with its Wireless Bureau's decisions when it held that DISH had *de facto* control over SNR and Northstar.

The petitioners argue lastly that, even if the FCC's decision could be harmonized with FCC and Wireless Bureau precedents, the Chairman of the FCC told Congress that it was not in fact applying those precedents to resolve this case, but applied new auction rules that it developed in the wake of Auction 97. Petitioners claim that it is arbitrary to penalize them for failing to predict and comply with rules that were not yet on the books. But the Chairman's testimony is sufficiently ambiguous where the order itself is clear that it does not carry the weight petitioners assign it.

The Chairman made the following statement about the *de facto* control standard that the FCC would use to determine whether DISH controlled SNR and Northstar:

> [W]e [are] us[ing] a totality of [the] circumstances test that ha[s] never been applied before to say, we don't think that that is a good idea, at a staff level. [SNR and Northstar's case] is coming to the Commission, so, again, I have to rule on that, so I won't go any further. But the fact of the matter is that we [have taken] that totality of

> the circumstances [test] and put it into the [designated entity] rules in this re-write that we just did.[17]

While that testimony is not entirely clear, it affirms the FCC's commitment to the "totality of the circumstances" test as a useful way to determine whether a designated entity is independent or under another's control, so the agency incorporated the test into the most recent "re-write" of its rules. The testimony is hardly crystalline. The "re-write" to which Chairman Wheeler apparently refers added helpful specificity to the applicable rules, including a cap on bidding credits, that was lacking at the time of SNR and Northstar's applications.

Whatever the statement was supposed to mean, "agency opinions, like judicial opinions, speak for themselves." *PLMRS Narrowband Corp. v. FCC,* 182 F.3d 995, 1001 (D.C. Cir. 1999) (internal quotation marks and brackets omitted). So, too, the Commission's rules. Contrary to petitioners' contention, the Chairman's somewhat opaque statement—viewed in context with the rules, the "re-write," and the FCC opinion in this case—is not an admission that the Commission planned to depart from its precedents and apply wholly new rules to petitioners. The FCC opinion refers to and reasonably

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[17] Continued Oversight of the Federal Communications Commission: Hearing before the Subcomm. on Commc'n of the H. Comm. on Energy and Commerce and Tech., 114th Cong., prelim. transcript at 54-55 (July 28, 2015) (testimony of Tom Wheeler, Chairman, Federal Communications Commission), http://docs.house.gov/meetings/IF/IF16/20150728/103819/HHRG-114-IF16-20150728-SD009.pdf.

applies rules and precedents, all of which pre-date the conduct at issue. Nothing in that opinion suggests that the Commission applied novel rules to determine whether DISH had control over SNR and Northstar.

B. Inadequacy of Notice to SNR and Northstar that the FCC Would Deny an Opportunity to Cure

It is a basic principle of administrative law that an agency cannot sanction an individual for violating the agency's rules unless the individual had "fair notice" of those rules. *Gen. Elec.,* 53 F.3d at 1328; *see also, e.g.*, *Howmet Corp. v. EPA,* 614 F.3d 544, 553 (D.C. Cir. 2010); *Trinity Broad. of Fla., Inc. v. FCC*, 211 F.3d 618, 628 (D.C. Cir. 2000). Notice is fair if it allows regulated parties to "identify, with ascertainable certainty, the standards with which the agency expects [them] to conform." *Trinity*, 211 F.3d at 628; *accord Otis Elevator Co. v. Sec'y of Labor*, 762 F.3d 116, 125 (D.C. Cir. 2014).

The petitioners argue that, even if the FCC reasonably applied its precedents regarding *de facto* control, those precedents did not give them fair notice that their arrangements with DISH might be found to (a) manifest *de facto* control disentitling them to the designated-entity status that qualifies very small businesses for bidding credits, or (b) show such a degree of *de facto* control that the FCC would deny them an opportunity to seek to negotiate any cure. We hold that notice was sufficiently clear as to the first proposition but not the second. Petitioners' arguments and the legal sources upon which they rest are both more readily distinguished and less authoritative on the control question than on the opportunity for cure.

The foreseeable adequacy of the legal and factual grounds for the Commission's determination that *these* arrangements manifest DISH's *de facto* control over petitioners did not also make clear that such a control determination and its consequent penalties would be non-negotiable. Indeed, the very point of an opportunity to cure is to give some cushion to firms that must plan under uncertainty. Although it could well elect to do so, the FCC did not make clear that it would withdraw an opportunity to seek a cure in every instance in which the uncertainty applicants face is not so serious as to itself invalidate the Commission's control holding for lack of notice.

The FCC reasonably applied its rules regarding *de facto* control, but the petitioners are right that there was considerable uncertainty at the time of Auction 97 about the degree of control those rules would tolerate. The Commission has emphasized the flexibility of the *de facto* control test, which must account for "economic realities." *See FCC Op.,* 30 F.C.C. Rcd. at 8889-90. One of those economic realities is that wireless spectrum licenses are expensive, and small companies often need to obtain hundreds of millions of dollars in loans to enable them to participate in spectrum auctions. When an investor like DISH stakes such a large investment on new, small businesses, it often demands extensive protections—including the right to supervise the small businesses closely. The FCC's Wireless Bureau has in the past tolerated extensive supervision without either the Bureau or the Commission finding the *de jure* or *de facto* control that makes an investor's revenues attributable to the would-be designated entity. On these facts, for all the reasons set forth

above, petitioners should reasonably have anticipated that the FCC might find them to be under DISH's *de facto* control. But they lacked reasonable notice that, in the event it found *de facto* control, the Commission would deny them an opportunity to cure.

The waters are muddied here in part because the FCC' s original control rules predate cellular technology, and "[a] cellular system is far more complex and sophisticated than the simple microwave systems which the Commission had in mind when it adopted *Intermountain* [*Microwave*]. Switches and cell sites are intricate, multi-million dollar facilities[.]" *In re Application of Ellis Thompson Corp.,* 10 F.C.C. Rcd. 12554, 12556 (1995) (*Ellis Thompson II*). As a practical matter, virtually any small business needs at least the substantial involvement of a larger business to develop successful cellular service. The *Intermountain Microwave* test accounts for those realities through "sufficiently elastic" applications to allow technical experts to advise and support new participants in the market for wireless services. *Id.* (citing *Ellis Thompson I,* 9 F.C.C. Rcd. 7140 n.4). The Commission has sought to leave room for large companies with "broad expertise" to help small providers with a wide variety of "operational functions." *Fifth MO&O,* 10 F.C.C. Rcd. 403,451.

Perhaps recognizing the economic and technological hurdles facing small companies seeking to break into the wireless services industry, Wireless Bureau staff have in earlier decisions repeatedly read the FCC's *de facto* control rules to permit large investors to exert significant influence over their small business partners. For example, the Wireless

Bureau determined that Cingular did not control Denali Spectrum (its small business partner), even though Cingular provided extensive management services to Denali Spectrum, and had the rights to veto Denali Spectrum's expenditures in excess of $10 million; veto deviations of more than ten percent from Denali Spectrum's annual budget; veto Denali Spectrum's decision to pay an employee more than $200,000 per year; provide engineering, construction, advertising, and clerical services for Denali Spectrum; choose a systems manager for Denali Spectrum; and prevent Denali Spectrum from obtaining more than $5 million in loans from other sources. Thus, as in *General Electric,* "confusion" at the ground level "is yet more evidence that the agency's interpretation of its own regulation" failed to provide fair notice. 53 F.3d at 1332. Under the circumstances, petitioners had little basis on which to anticipate that a Commission that read the *de facto* control standard to prohibit DISH's powerful influence over petitioners would not only deny petitioners bidding credits, but charge them penalties without at least offering them a chance to seek to cure.

The FCC answers that, even though the *Intermountain Microwave* test is flexible, DISH's influence over the petitioners was so complete that they should have known that their arrangements ran so far afoul of the FCC's control rules that there was no reasonable prospect of coming into compliance after the auction. As discussed in detail above, the FCC reasonably concluded that DISH's conduct plainly evidenced a greater degree of control over petitioners than the conduct of entities previously found not to have exercised *de facto* control. But that alone is not

sufficient to show that the petitioners had fair notice that they would be denied any opportunity to cure. *Cf Fox II,* 567 U.S. at 257 (finding that a regulated entity did not have fair notice that its broadcast was indecent simply because the broadcast was more provocative than broadcasts that had previously been approved).

The FCC further argues that, even if the relatively flexible *Intermountain Microwave* test was unclear, the *Fifth MO&O* unequivocally states that forced sales "*will* constitute a transfer of control under our rules," 10 F.C.C. Rcd. 403,456 (emphasis added), and that petitioners' put rights made it unreasonable for them to expect to avoid a control finding or retain a chance to cure. But the line is not so bright demarcating when the opportunity for a sale mutually desirable to an investor and a designated entity is so alluring that the FCC will deem it "forced." The determination depends on whether the context as a whole reveals the small business to lack any real plan or potential to build wireless service, so merely exists as a sham for its investor to obtain bidding credits. *See id.* (explaining that the Commission will examine the "totality of [the] circumstances" in each case to determine whether a small company has been forced to sell its business). Petitioners' violation of the "forced sale" rule was not so obvious as to make up for the lack of notice in the regulations, precedent, and Bureau practice that the FCC would deny petitioners a chance to attempt a cure.

ClearComm in particular reasonably supports petitioners' assumption that, in the circumstances of this case, if the Commission found them in violation of the control rules they would have a chance to cure. *In*

re Application of ClearComm, L.P., 16 F.C.C. Rcd. 18627 (2001). ClearComm, a designated entity, sought to transfer its licenses to its subsidiary, NewComm Wireless Services, Inc., whose designated-entity status was challenged because NewComm had a powerful principal investor with put rights and an overbearing management agreement. *Id.* at 18627-18631. The Wireless Bureau granted ClearComm's petition for reconsideration and allowed the transfer, subject to modifications negotiated to eliminate the investor's *de facto* control. *Id.* at 18643-44. Importantly, the Commission endorsed *ClearComm* in an appendix to a final rule as "an adjudicatory investigation to prevent companies from circumventing the objectives of the designated entity eligibility rules." *In re Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission's Competitive Bidding Rules and Procedures,* 21 F.C.C. Rcd. 4753, 4800 & n. 206 (2006). *ClearComm* thus communicates a Commission-level position regarding the opportunity to seek a negotiated cure in a way that the Bureau's actions regarding Denali and Salmon did not with respect to the merits of the *de facto* control issue.

The FCC's effort to distinguish *ClearComm* is unconvincing. The FCC held that SNR and Northstar were in a position analogous to ClearComm's, and would deserve an opportunity to cure only if they, like ClearComm, had "at all times" been considered valid designated entities. *FCC Op.*, 30 F.C.C. Rcd. at 8489 n.431. But it was NewComm's qualification, not ClearComm's, that was under review; ClearComm itself needed no cure opportunity precisely *because* it had always been qualified as a designated entity. The

relevant parallel is between SNR/Northstar and NewComm, each of which sought eligibility as a designated entity, and each of which fell short.

The FCC objects that granting an opportunity to cure here could create an incentives problem, or "moral hazard": There would be little reason for bidders to comply with designated-entity rules in the first place if, when ultimately denied bidding credits post-auction, they are entitled to haggle with the Commission. Nothing in our decision requires the FCC to permit a cure. That choice lies with the FCC. But if the very opportunity to seek one is to be foreclosed, applicants must have clear, advance notice to that effect.

Where, as here, hundreds of millions of dollars are at stake, regulated parties need fair notice of the circumstances in which a finding of *de facto* control will and will not be subject to an opportunity to attempt to negotiate a cure. The FCC's rules and decisions were not clear enough to provide that notice to the petitioners. In sum, we cannot say that the circumstances in which a violation of FCC's control rules would be deemed irreparable were "ascertainab[ly] certain[]" at the time of Auction 97. *Trinity,* 211 F.3d at 628. Petitioners contend that, in the past, the FCC has "compensate[d] for [a] lack of clarity in its control rules" by giving small companies a chance to modify their contractual agreements with large investors, in an effort to give the small companies enough independence to satisfy the FCC. Pet'r Br. 56-57. Petitioners seek precisely that kind of opportunity to modify their agreements with DISH. *See id.* at 57-58. Because the FCC did not give clear

notice that such an opportunity would be denied, we conclude that an opportunity for petitioner to renegotiate their agreements with DISH provides the appropriate remedy here. *See Gen. Elec.,* 53 F.3d at 1329 (explaining that, "in many cases," an agency can alert regulated entities to its interpretation of its own rules by making "efforts to bring about compliance" with the rules before imposing sanctions). We therefore remand this matter to the FCC for further proceedings consistent with our opinion.

So ordered.

Appendix D

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC

No. 0006670613

IN RE NORTHSTAR WIRELESS, LLC

No. 0006670667

IN RE SNR WIRELESS LICENSECO, LLC

Report No. AUC-97AUC

In re Applications for New Licenses in the
1695-1710 MHz, and 1755-1780 MHz and
2155-2180 MHz Bands

Adopted: Aug. 17, 2015
Released: Aug. 18, 2015

MEMORANDUM OPINION & ORDER

I. INTRODUCTION

1. In authorizing the Federal Communications Commission ("FCC" or "Commission") to award spectrum licenses through a competitive bidding "auction" mechanism, Congress required that the

Commission develop procedures that "promot[e] economic opportunity and competition and ensur[e] that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women."[1] To fulfill Congress' mandate, the Commission has established a system whereby eligible small businesses are awarded certain bidding credits (*i.e.*, discounts) against the gross amounts of their winning bids in a spectrum auction.[2] At the same time, Congress directed that the Commission's auction design also incorporate measures that ensure the "avoidance of unjust enrichment."[3]

2. As described in more detail below, the Commission evaluates all applications for bidding credits closely to ensure that the parties requesting a credit are, in fact, qualified for such a discount under Commission rules and precedent. Accordingly, a central principle of Section 1.2110 is to ensure, for purposes of assessing whether an applicant qualifies for these bidding credits as a small business, that the gross revenues of certain other entities are attributed to the applicant. These entities include: (1) those with a "controlling interest," defined to include entities with "*de facto* control of the applicant," and "affiliates" of the applicant, defined to include any entity either

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[1] 47 U.S.C. § 309(j)(3)(B).

[2] *See* 47 C.F.R. § 1.2110.

[3] 47 U.S.C. § 309(j)(3)(C).

controlling or with "the power to control" the applicant; and (2) any entity that "manages the operations" of the applicant pursuant to a management agreement that provides it with authority either "to make decisions" or otherwise to engage in practices or activities that either "determine" or "significantly influence" the nature or types of services to be offered by the applicant, or their terms or prices.[4] This case requires us to apply these provisions of the Commission's rules.

3. The above-captioned proceeding concerns the license applications filed by two of the winning bidders in FCC Auction 97, which commenced on November 13, 2014, and concluded on January 29, 2015. Northstar Wireless, LLC ("Northstar") was the winning bidder for 345 of the 1614 licenses being auctioned in Auction 97, with a total of $5,883,794,550 in net provisionally winning bids, and SNR Wireless LicenseCo, LLC ("SNR," and, together with Northstar, "the Applicants") was the winning bidder for 357 of the 1614 auctioned licenses, with a total of $4,111,773,225 in net provisionally winning bids. SNR and Northstar each has asserted that it had less than $15 million in gross revenues over the past three years and therefore qualifies as a "very small business" under the rules adopted for Auction 97.[5] If found to qualify as "very

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[4] *Id.* §§ 1.2110(c)(2), 1.2110(c)(5)(i), 1.2110(c)(2)(H).

[5] We note that on July 16, 2015, the Commission adopted certain changes to its competitive bidding rules. *See* Updating Part 1 Competitive Bidding Rules, WT Docket No. 14-170, *Report and Order,* FCC 15-80, (rel. July 21, 2015) ("*2015 Report and Order*"). Because Auction 97 took place under our prior rules, our consideration and analysis herein is undertaken under the rules that were in place at the time that the Applicants submitted their

small businesses" SNR and Northstar would be eligible to receive bidding credits equal to 25 percent off the amount of their gross winning bids, amounting to discounts of $1,370,591,075, and $1,961,264,850, respectively. DISH Network Corporation, which, through various intermediate subsidiaries (collectively, "DISH"),[6] holds an 85 percent equity interest in each of the Applicants, has provided the majority of their capital, and has contracted to manage the build-out and operation of their networks.

4. In this *Memorandum Opinion and Order*, the Commission finds that SNR and Northstar are not eligible for the approximately $3.3 billion in bidding credits that they seek because the average gross revenues over the past three years of DISH must be attributed to each Applicant under Section 1.2110 when evaluating its eligibility as a "very small business."[7] DISH had average annual gross revenue of

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respective Form 175 Short-Form Applications ("Form 175 Short-Form Applications") and Form 601 "long-form" Applications (as defined below).

[6] Herein, for convenience only, we refer to DISH Network Corporation and its subsidiaries, including American AWS-3 Wireless I LLC, American AWS-3 Wireless II LLC, and American AWS-3 Wireless III LLC, interchangeably as "DISH."

[7] Pursuant to 47 C.F.R. § 0.5(c), the Wireless Telecommunications Bureau (the "Wireless Bureau") has referred the above-captioned applications to the Commission for consideration of the questions posed by the petitions to deny. We are addressing these questions with respect to both Applicants together because they involve substantially the same facts and issues and the same petitions to deny.

over $13 billion during those years,[8] so SNR and Northstar are not eligible for their requested bidding discounts and are therefore liable for the gross amounts of their winning bids. Accordingly, we are directing the Applicants to make payments in the amounts set forth in this *Memorandum Opinion and Order* and referring the applications to the Wireless Telecommunications Bureau ("Wireless Bureau") for further processing consistent with this *Memorandum Opinion and Order* and the Commission's rules.[9]

5. In evaluating an applicant's claim of eligibility, the Commission closely examines the totality of the facts and circumstances of each case to ensure that the applicant is truly a small business unaffiliated with or controlled by entities that do not qualify as such.[10] The

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[8] *See, e.g.,* DISH Network Annual Report, Year Ending December 31, 2013, available at http://dish.client.shareholder.com/financials.cfm, last visited August 14, 2015, at 55 (2013 total revenue of $13,904,865,000; 2012 total revenue of $13,181,334,000; 2011 total revenue of $13,074,063).

[9] *See* Auction of Advanced Wireless Services (AWS-3) Licenses Closes, Winning Bidders Announced for Auction 97, *Public Notice,* 30 FCC Rcd 630, ¶ 24 (WTB 2015) ("*Closing Public Notice*").

[10] The Commission has consistently held, in the context of various different Title III services, that the question of *de facto* control is one that "requires the Commission to consider the totality of the circumstances to ascertain where actual control resides." Brian L. O'Neill, *Memorandum Opinion and Order and Notice of Apparent Liability,* 6 FCC Rcd 2572, 2574-75 (1991) (*citing* cases). Thus, depending upon the particular facts and circumstances, these have included determinations that applicants or licensees have or have not ceded *de facto* control to others. *See, e.g., id.; Telephone and Data Systems, Inc. v. FCC*, 19 F.3d 42 (D.C. Cir. 1994); Baker Creek Communications, LLC,

Commission's "concerns are greatly increased when a single entity provides most of the capital and management services and is the beneficiary of the investor protections."[11] Those are precisely the facts presented in this case. Both SNR and Northstar have a financial dependency on DISH of unprecedented size and scope, DISH's managerial responsibilities include virtually all of the functions required of a wireless network licensee, and DISH has "investor protections" that extend well beyond those deemed necessary by the other investors in both Applicants. In resolving *de facto* control and similar questions, the Commission and the courts have emphasized the importance of scrutinizing such economic realities of investor relationships, regardless of contractual provisions purporting to reserve the right of a licensee to control the management and operation of its business.[12]

Memorandum Opinion and Order 13 FCC Rcd 18709, 18712-18714 at ¶¶ 6-7 (1998) ("*Baker Creek*"). *See also* Implementation of Section 309(j) of the Communications Act – Competitive Bidding, *Fifth Memorandum Opinion & Order*, 10 FCC Rcd 403, 445-455 at ¶¶ 78-96 (1994) ("*Fifth MO&O*"); Alaska Native Wireless*, Order,* 17 FCC Rcd 4231, 4238-4239 at ¶ 15 (2002) ("*Alaska Native Bureau Order), application for review denied,* 18 FCC Rcd 116401 (2003) ("*Alaska Native Commission Order"*).

[11] *Fifth MO&O*, 10 FCC Rcd at 456 ¶ 96.

[12] *See Phoenix Broadcasting Co.* 44 F.C.C.2d 838, 840 (1973) ("*Phoenix"*); *WLOX Broadcasting Co. v. FCC,* 260 F.2d 712 (D.C. Cir. 1958) ("*WLOX")*; Stereo Broadcasters, Inc., *Opinion,* 87 F.C.C.2d 87 (1981) ("*Stereo")*; *cf.* Fox Television Stations, Inc.*, Second Memorandum Opinion and Order,* 11 FCC Rcd 5714, 5719 ¶ 14 (1995) ("*Fox*") (obligation to examine "economic realities" of the transactions and "not simply the labels attached by the parties to their corporate incidents," in applying 47 U.S.C. § 310(b)).

Interpreting the standards of Section 1.2110 of the Commission's rules in light of these economic realities necessarily involves a determination about DISH's power to control the future operations of these two entities. In this case, however, the bidding conduct of these two ostensibly independent entities in Auction 97 has already served to corroborate our determination concerning the guiding role of DISH, including the use of the same initial list of licenses and the Applicants' subsequent series of identical bids for identical licenses.

6. Based on the record before us, it is manifest that DISH, directly or indirectly, controls or has the power to control the Applicants via a variety of controlling mechanisms including, but not limited to:

- Significant ownership interest;
- Excessive investor protections;
- Control over policy decisions;
- Domination of financial matters;
- Control of financial decisions;
- Control over build-out plans;
- Control over business plans;
- Control over the Auction 97 bidding process;
- Coercive termination provisions;
- Inadequate working capital; and
- Control of employment decisions

7. Any one of these factors or even combinations of them might not amount to *de facto* control over or power to control the Applicants. But our review is not

undertaken on a piecemeal basis.[13] When the relationships between the Applicants and DISH are analyzed with regard to the totality of their actions during Auction 97, the various agreements, and the facts and circumstances of this case, we conclude that DISH has *de facto* control over and the power to control SNR and Northstar.

8. In addition, upon review of the agreements pursuant to which DISH will undertake all necessary actions in furtherance of the build-out, management, and operations of the systems constructed using the AWS-3 spectrum licenses won by the Applicants in Auction 97, denial of the requested bidding credits is also required on a separate and distinct legal basis under Section 1.2110. Notwithstanding nominal contractual provisions to the contrary, the Applicants have each entered into a Management Services Agreement under terms and circumstances that give DISH authority with respect to a wide range of their technology, network design, construction, operation, marketing, billing, accounting, and other functions. Under Section 1.2110, this authority makes DISH's revenues attributable to each of the Applicants given the scope of its decision-making authority and its ability to determine—or at the very least to "significantly influence"—the nature and types of services offered and the terms and prices upon which the services are offered.

9. The cumulative effect of the controls imposed on the Applicants by DISH limits their independence

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[13] *See Fifth MO&O*, 10 FCC Rcd at 447 ¶ 80; *Alaska Native Bureau Order,* 17 FCC Rcd at 4238-4239 ¶ 15; *Baker Creek,* 13 FCC Rcd at 18712-18714 ¶¶ 6-7.

to such a great extent that the Commission must deny the requested bidding credits to avoid unjust enrichment. However, we do not agree with Petitioners' arguments that we must not award the Applicants all or some of the licenses that they won in Auction 97 either on a theory that they did not adequately disclose the nature of their relationship and joint bidding arrangements with DISH, or that their bidding in Auction 97 violated our rules or antitrust laws. As explained below, based on the record before us, we find that the Applicants' disclosure of their agreements and of the existence of their bidding arrangements was sufficient to comply with the disclosure obligations of our rules, and we further find that their bidding activity did not violate the previous FCC rules that governed Auction 97. We therefore conclude that none of the Petitioners' allegations constitute grounds to render an adverse decision as to Applicants' basic qualifications to hold licenses, or to grant any of the relief requested other than the denial of the bidding credits sought by Applicants. The instant *Memorandum Opinion and Order* notifies each Applicant that an additional payment is due. Each of the above-captioned applications will be processed by the Bureau as directed herein once each additional payment is received.[14]

II. BACKGROUND

A. Auction 97

10. On April 29, 2015, the Commission accepted for filing the Form 601 "long-form" license applications

[14] *See* Sections IV (Conclusion) and V (Ordering Clauses), *infra*.

of SNR[15] and Northstar[16] for certain licenses for which each was the winning bidder in Auction 97.[17] As part of its Application, each Applicant also filed an Ownership Disclosure (FCC Form 602).[18] DISH, through various intermediate subsidiaries, is an investor in both SNR and Northstar.[19] The *Accepted For Filing Public Notice* stated that petitions to deny the Applications were to be filed no later than May 11, 2015.[20] Eight Petitions to Deny, seven timely and one untimely, were filed against both of the Applications. The Petitioners claim that DISH exerts *de facto* control over SNR and Northstar and that DISH's gross

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[15] *See* SNR Wireless LicenseCo, LLC Long-Form Application, FCC Form 601, ULS File No. 0006670667 (filed February 13, 2015, amended February 25, 2015, March 9, 2015, March 23, 2015, April 3, 2015, April 9, 2015 and April 20, 2015) ("SNR Application").

[16] *See* Northstar Wireless, LLC Long-Form Application, FCC Form 601, ULS File No. 0006670613 (filed February 13, 2015, amended March 5, 2015, March 23, 2015, April 3. 2015, April 20, 2015 and April 22, 2015) ("Northstar Application," and, together with the SNR Application, "the Applications").

[17] *See* Wireless Telecommunications Bureau Announces That Applications for AWS-3 Licenses in the 1695-1710 MHz, and 1755-1780 MHz and 2155-2180 MHz Bands are Accepted for Filing, *Public Notice*, 30 FCC Rcd 3795 at Attachment A (WTB 2015) ("*Accepted For Filing Public Notice*").

[18] *See* Northstar Wireless, LLC, FCC Ownership Disclosure Information for the Wireless Telecommunications Services, FCC Form 602, File No. 0006670621 (filed Feb. 13, 2015); SNR Wireless LicenseCo, LLC, FCC Ownership Disclosure Information for the Wireless Telecommunications Services, FCC Form 602, File No. 0006670620 (filed Feb. 13, 2015).

[19] *See, e.g.*, *id.*

[20] *See Accepted For Filing Public Notice,* 30 FCC Rcd 3795.

revenues accordingly should have been included in both SNR's and Northstar's designated entity calculations; that SNR and Northstar made material misrepresentations to the Commission by failing to disclose DISH's control; and that DISH, SNR and Northstar exhibited collusive behavior that should lead to re-auction of certain licenses. For the reasons stated herein, we grant two of the Petitions to the extent set forth below and otherwise deny them, and dismiss the other Petitions for lack of standing. In addition, we deny SNR's and Northstar's requests for small business bidding credits.

11. *Auction Process.* On May 19, 2014, the Commission released a public notice announcing the auction of 1614 licenses in the 1695-1710 MHz, 1755-1780 MHz, and 2155-2180 MHz Advanced Wireless Service bands (collectively, the "AWS-3" bands).[21] In a second public notice, the Commission adopted procedures for the auction, designated Auction 97, including a filing deadline of September 12, 2014, for FCC Form 175 short-form applications to participate in the auction.[22] In addition, the *Auction Procedures*

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[21] There are federal incumbents in the 1695-1710 MHz and 1755-1780 MHz bands. Some of these incumbents are transitioning out of these bands but AWS-3 licensees will share these bands, with some Federal incumbents indefinitely. AWS-3 licensees must successfully coordinate with these incumbents prior to operation. *See, e.g.*, 47 C.F.R. § 27.1134.

[22] Auction of Advanced Wireless Services Licenses Scheduled for November 13, 2014, Notice and Filing Requirements, Reserve Prices, Minimum Opening Bids, Upfront Payments, and Other Procedures for Auction 97, AU Docket No. 14-78, *Public Notice*, 29 FCC Rcd 8386 (WTB 2014) ("*Auction Procedures Public Notice*").

Public Notice explained that Auction 97 would be a limited information, or anonymous, auction, meaning that information revealing the identity of auction participants would be withheld until the Auction was completed.[23] Eighty short-form applications were filed with the Commission, and 70 applicants ultimately were found to be qualified to participate in the Auction.[24] These included DISH, as an Auction 97 participant through its wholly-owned subsidiary American AWS-3 Wireless I LLC ("American I"),[25] Northstar[26] and SNR.[27] Both SNR and Northstar claimed that they qualified as "Designated Entities" ("DEs") eligible for a 25 percent bidding credit for "very small businesses."[28] The 70 qualified bidders also included Petitioners VTel Wireless, Inc. ("VTel"),[29] Central Texas Telephone Investments LP

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[23] Auction Procedures Public Notice, 29 FCC Rcd 8386 at ¶ 4.

[24] *See* Auction of Advanced Wireless Services (AWS-3) Licenses 70 Bidders Qualified to Participate in Auction 97, *Public Notice*, 29 FCC Rcd 13465 (WTB 2014) ("*Qualified Bidders Public Notice*").

[25] American AWS-3 Wireless I LLC, Form 175, Auction File No. 0006458188 ("American I 175").

[26] Northstar Wireless, LLC, Form 175, Auction File No. 0006458325 ("Northstar Form 175").

[27] SNR Wireless LicenseCo, LLC, Form 175, Auction File No. 0006458318 ("SNR Form 175").

[28] *See* SNR Form 175; Northstar Form 175.

[29] VTel Wireless, Inc., Form 175, Auction File No. 0006458438.

("CTTI"),[30] and Rainbow Telecommunications Association, Inc. ("RTA").[31]

12. The Auction began on November 13, 2014, and ended on January 29, 2015, after 341 rounds of bidding over 45 days, resulting in 31 winning bidders for the AWS-3 licenses, raising (in net bids) a total of $41,329,673,325.[32] SNR and Northstar were each winning bidders.[33] DISH ceased direct participation in the bidding in Auction 97 after round 26 and was not the winning bidder for any licenses.[34] SNR and Northstar each timely filed an Application, and those Applications were accepted for filing on April 29, 2015.[35] Pursuant to the *Closing Public Notice,* on February 13, 2015, the Applicants made a down payment of 20 percent of their "net bids" (their gross bids minus the 25 percent DE bidding credits they claimed), and on March 2, 2015, Applicants made a final payment of the balance of such net bids. As discussed below, several petitions to deny were filed against the SNR Application and the Northstar

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[30] Central Texas Telephone Investments LP, Form 175, Auction File No. 0006456631.

[31] Rainbow Telecommunications Association, Inc., Form 175, Auction File No. 0006447890.

[32] *See, e.g.*, http://wirelessfcc.gov/auctions/defaulthtm?job=auctionfactsheet&id=97.

[33] *See Closing Public Notice,* 30 FCC Rcd 630 at Attachment A.

[34] In Round 24, DISH, placed one bid: $1,812,964,000 for the paired Block J in New York (AW-BEA010-J NYC-Long Is. NY-NJ-CT-PA-MA-VT). SNR and Northstar each placed identical gross bids for this license ($1,359,723,000 net).

[35] *Closing Public Notice,* 30 FCC Rcd 630 at Attachment A, 10-27, 28-46.

Application, primarily raising issues related to each Applicant's claim to be a designated entity.

13. *Designated Entities.* When it authorized the Commission to conduct competitive bidding for spectrum licenses,[36] Congress required that the Commission's competitive bidding rules ensure that small businesses, rural telephone companies, and businesses owned by members of minority groups and women, be able to participate in the provision of spectrum-based services.[37] To ensure such participation, the Commission offers bidding credits to discount the price of licenses acquired at auction to applicants meeting the applicable criteria.[38] In Auction 97, the Commission made available bidding credits of 15 and 25 percent for small and very small businesses, respectively (collectively "small business bidding credits").[39] SNR and Northstar each claim

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[36] *See* Omnibus Budget Reconciliation Act of 1993 § 6002(a), 47 U.S.C. 309(j)(4)(D).

[37] *See* Implementation of Section 309(j) of the Communications Act – Competitive Bidding, *Second Report and Order*, 9 FCC Rcd 2348, 2349, 2350, 2388-89, ¶¶ 3, 6, 227-230 (1994) ("*Second Report and Order*"); *see also* 47 U.S.C. § 309(j)(3)(B) (objectives of competitive bidding include participation of small businesses).

[38] *See Second Report and Order*, 9 FCC Rcd at 2391-92 ¶¶ 241-42; *see also* Implementation of Section 309(j) of the Communications Act – Competitive Bidding, *Fifth Report and Order*, 9 FCC Rcd 5532 at 5539, 5589-91 ¶¶ 15, 130-33 (1994) ("*Fifth R&O*").

[39] *See* 47 C.F.R. §§ 27.1106(b). *See also* 47 C.F.R. §§ 27.1106(a)(1) (small businesses), 27.1106(a)(2) (very small businesses); *see also* Amendment of the Commission's Rules with Regard to Commercial Operations in the 1695-1710 MHz, 1755 MHz, and 2155-2180 MHz Bands, *Report and Order* 29 FCC Rcd 4610 at 4680-4681 ¶ 189 (2014) ("*AWS-3 Service Rules Report*

eligibility for the 25 percent bidding credit for very small businesses. To qualify as a "very small business," SNR and Northstar each certified that it, together with its respective affiliates and controlling interests, had average gross revenues not exceeding $15 million for the previous three years.[40] In support of that certification, each Applicant was required to disclose the average gross revenues of itself, its affiliates, its controlling interests, the affiliates of its controlling interests, and the entities with which it had an attributable material relationship for the preceding three years.[41] Although each Applicant reported numerous arrangements with DISH, neither SNR nor Northstar attributed DISH's revenues, and each Applicant certified that it was eligible for a 25 percent very small business bidding credit.[42]

B. Contested Long-Form Applications

1. SNR Wireless LLC

14. SNR is a wholly-owned subsidiary of SNR Wireless HoldCo, LLC ("SNR HoldCo").[43] SNR was formed on August 29, 2014, has no officers or directors, and reports that it did not have any gross revenues in

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and Order") (establishing the bidding credit amount available to DEs for AWS-3 licenses acquired through bidding); *Auctions Procedures Public Notice,* 29 FCC Rcd 8386 at ¶¶ 79-91.

[40] *See* SNR Form 175; Northstar Form 175. *See id.* §§ 27.1106(a)(2), 1.2110(f)(2)(ii).

[41] *See* 47 C.F.R. §§ 1.2110(b)(1)(i), 1.2110(b)(3)(iv)(B). *See also Auction Procedures Public Notice*, 29 FCC Rcd 8386 at ¶ 84.

[42] *See* SNR Form 175; Northstar Form 175.

[43] *See* SNR Application. *See also* SNR Form 175.

the preceding three years.[44] The SNR Application states that American AWS-3 Wireless III LLC ("American III"), an indirect wholly-owned subsidiary of DISH, owns an 85 percent non-controlling interest in SNR HoldCo.[45] The SNR Application also states that SNR Wireless Management, LLC ("SNR Management") owns a 15 percent controlling interest in, and is the sole member of, SNR HoldCo.[46] SNR Management has a single manager, Atelum LLC ("Atelum"), which in turn has a sole managing member, John Muleta.[47] SNR Management has two non-controlling investors: Blackrock, Inc. ("Blackrock"), which owns a 51.33 percent non-controlling interest, and Nathaniel Klipper, who owns a 40.94 percent non-controlling interest.[48]

15. SNR seeks a 25 percent bidding credit as a "very small business" under Section 27.1106(a)(2) of the Commission's rules.[49] SNR claims that DISH is a purely passive investor, and that DISH's revenues are therefore not attributable to SNR for the purpose of determining its DE eligibility.[50] SNR certified that the

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[44] *See* SNR Application at Exhibit C.

[45] *See* SNR Application at Exhibit A.

[46] *See* SNR Application at Exhibit A.

[47] *See* SNR Application at Exhibit A. SNR states that John Muleta is an experienced entrepreneur with a broad and established background in Commission spectrum auctions and wireless technology. *See, e.g.*, SNR Opposition at 5.

[48] *See* SNR Application at Exhibit A.

[49] 47 C.F.R. §§ 27.1106(a)(2).

[50] *See* SNR Application at Exhibit A. SNR states that in an abundance of caution, it responded "Yes" to Question 16 of Form 601 Schedule B, regarding whether the company has entered into

average annual gross revenues of SNR, its affiliates, its controlling interests, and the entities with which it has an attributable material relationship, were $399,566, on a cumulative basis, for the preceding three years.[51]

16. On January 29, 2015, the Commission completed Auction 97.[52] SNR won 357 licenses with net winning bids totaling $4,111,773,225 (net of a requested "very small business" bidding credit of $1,370,591,075). On February 13, 2015, SNR filed its Application with the Commission. On April 29, 2015, the Commission placed the SNR Application on public notice as accepted for filing.[53]

2. Northstar Wireless LLC

17. Northstar is a wholly-owned subsidiary of Northstar Spectrum, LLC ("Northstar Spectrum").[54] Northstar was formed on September 4, 2014, has no officers or directors, and reports that it did not have any gross revenues in the preceding three years.[55] The Northstar Application states that American AWS-3 Wireless II LLC ("American II"), an indirect wholly-owned subsidiary of DISH, owns an 85 percent non-

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any agreements which could impact the company's DE status. *See id*., Exhibit C at 3 n. 5.

[51] *See* SNR Application at Exhibit C. This calculation is based on the gross revenues of John Muleta, the managing member of Atelum LLC, which in turn is the managing member of SNR.

[52] *See Closing Public Notice,* 30 FCC Rcd 630 at Attachment B.

[53] *See Accepted For Filing Public Notice*, 30 FCC Rcd 3795 at Attachment A.

[54] *See* Northstar Application. *See also* Northstar Form 175.

[55] *See* Northstar Application at Exhibits A and C.

controlling interest in Northstar.[56] The Northstar Application also states that Northstar Manager, LLC ("Northstar Manager") owns a 15 percent controlling interest in, and is the sole manager of, Northstar.[57] Doyon, Limited ("Doyon"), an Alaska Native Regional Corporation under the Alaska Native Claims Settlement Act,[58] owns a 31.84 percent controlling interest in Northstar Manager.[59] A number of other investors hold non-controlling membership interests in Northstar Manager.[60]

18. Northstar seeks a 25 percent bidding credit as a "very small business" under Section 27.1106(a)(2) of the Commission's rules.[61] Pursuant to Section 1.2110(c)(5)(xi) of the Commission's rules, the gross revenues of Doyon (other than gross revenues derived from gaming activities regulated under the Indian Gaming Regulatory Act ("IGRA")) are not attributable to Northstar for the purpose of determining its DE

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[56] *See* Northstar Application at Exhibit A.

[57] *See* Northstar Application at Exhibit A.

[58] *See* Alaska Native Claims Settlement Act, 43 U.S.C. §§ 1601 *et seq*. Northstar explains that Congress passed the Alaska Native Claims Settlement Act "in response to increasing concern regarding the oppressive circumstances of Alaska Natives. This statute recognized and resolved most aboriginal claims in Alaska, and established twelve minority-owned, for-profit, region-based corporations…as the stewards of the settlement benefits for Alaska Natives." *See* Opposition of Northstar Wireless, LCC to Petitions to Deny (filed May 18, 2015) ("Northstar Opposition").

[59] *See* Northstar Application at Exhibit A.

[60] *See* Northstar Application at Exhibit A.

[61] 47 C.F.R. §§ 27.1106(a)(2).

eligibility.[62] Doyon reports that it has no gaming revenues regulated under the IGRA and thus no revenues attributable to Northstar.[63] Northstar also claims that DISH is a purely passive investor, and that DISH's revenues are therefore also not attributable to Northstar for the purpose of determining its DE eligibility.[64]

19. Northstar won 345 licenses with net winning bids totaling $5,883,794,550 (net of a requested "very small business" bidding credit of $1,961,264,850).[65] On February 13, 2015, Northstar filed its Application with the Commission. On April 29, 2015, the Commission placed the Northstar Application on public notice as accepted for filing.[66]

3. SNR, Northstar, and DISH—Overview of Agreements

20. As noted above, DISH holds an 85 percent equity interest in both SNR and Northstar. DISH is the nationwide licensee of 40 megahertz of AWS-4 spectrum, ten megahertz of AWS H Block spectrum won in Auction 96, and certain 700 MHz band spectrum won in Auction 73. DISH has no terrestrial operations on its AWS and 700 MHz spectrum and has not announced its technology plans for the spectrum, other than to say that it has no current plan to build

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[62] *See* Northstar Application at Exhibit A.

[63] *See* Northstar Form Application at Exhibit A.

[64] *See* Northstar Form Application at Exhibit A.

[65] *See Closing Public Notice*, 30 FCC Rcd 630 at Attachment B.

[66] See Accepted For Filing Public Notice, 30 FCC Rcd 3795 at Attachment A.

out facilities using its spectrum.[67] Among other things, DISH has until June 2016 to decide whether it wants to use its AWS-4 uplink segment at 2000-2020 MHz for terrestrial downlink operations.[68] Also as noted above, the relationships between DISH and SNR, and DISH and Northstar, are well-documented through the numerous agreements filed as attachments to the SNR Form Application and Northstar Application. The terms and conditions of the agreements that DISH has with each of SNR and Northstar, and/or their respective investors and principals, are substantially similar.

21. Pursuant to our rules, Applicants were required to describe in their Applications "how they satisfy the requirements for eligibility for designated entity status, and list and summarize … all agreements that affect designated entity status" and provide summaries and copies of such agreements.[69]

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[67] *See* note 312, *infra.*

[68] *See* Section III.C.2 (Controlling Interest of the Operations Manager Under Section 1.2110(c)(2)(ii)(H)), *infra.*

[69] 47 C.F.R. § 1.2110(j). The rule provides a non-exclusive list of examples of such agreements, including "partnership agreements, shareholder agreements, management agreements, spectrum leasing arrangements, spectrum resale (including wholesale) and all other agreements including oral agreements, establishing, as applicable, *de facto* or *de jure* control of the entity or absence of attributable material relationships." *Id.* Based on this requirement, we assume for purposes of our analysis of the Applicants' eligibility for "very small business" designated entity status that the Applicants provided us with, and that we therefore have been able to review, copies and/or summaries of all oral and written arrangements between themselves and DISH that would bear on their eligibility.

Accordingly, Applicants submitted a number of agreements regarding their relationship with DISH and each other. Among the agreements that DISH entered into with each of SNR and Northstar are LLC agreements ("SNR LLC Agreement" or "Northstar LLC Agreement" and, collectively, "LLC Agreements"), credit agreements ("SNR Credit Agreement" and "Northstar Credit Agreement" and, collectively, "Credit Agreements") and trademark license agreements ("SNR Trademark Agreement" or "Northstar Trademark Agreement" and, collectively, "Trademark Agreements").[70] DISH also has entered into a management services agreement with each of SNR and Northstar ("SNR Management Services Agreement" or "Northstar Management Services Agreement" and, collectively, "Management Services Agreements"). DISH also entered into a Bidding Protocol and Joint Bidding Agreement with each of the Applicants ("SNR Joint Bidding Agreement" or "Northstar Joint Bidding Agreement" and, collectively, "Joint Bidding Agreements").[71] The Applicants also entered into a letter agreement among DISH, Northstar, and SNR with respect to joint bidding.[72] While the parties entered into many

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[70] *See* SNR Application at Exhibit A; Northstar Application at Exhibit A.

[71] *See* SNR Application at Exhibit A; Northstar Application at Exhibit A.

[72] September 12, 2014 Letter Agreement among Doyon, Limited, Northstar Manager, LLC, Northstar Spectrum, LLC, Northstar Wireless, LLC, American AWS-3 Wireless I LLC, American AWS-3 Wireless II LLC, American AWS-3 Wireless III LLC, SNR Wireless Management, LLC, SNR Wireless HoldCo, LLC and SNR Wireless License Co, LLC. ("Letter Agreement").

additional agreements, the agreements specified above (collectively, the "Agreements") are the focus of our discussion herein as, pursuant to these various Agreements, DISH serves as the majority investor, the primary lender for both SNR and Northstar and, pursuant to the Management Services Agreements, the manager ("Operations Manager") responsible for the build-out, management, and operation of any systems constructed using SNR's and Northstar's AWS-3 licenses.

22. *LLC Agreements*. The LLC Agreements create the entity that is the managing member for each license holding company ("LLC Managing Member," which we note is different from the Operations Manager under the Management Services Agreements). The LLC Managing Member for SNR is SNR Wireless HoldCo, LLC, and the LLC Managing Member for Northstar is Northstar Spectrum, LLC. DISH holds an 85 percent interest in each Applicant, the LLC Managing Member holds a 15 percent interest, and each of DISH and the LLC Managing Members has contributed start-up capital and share in profits and losses in proportion to those ownership percentages.[73] Each of the Applicants describes their

[73] October 13, 2014 First Amended and Restated Limited Liability Company Agreement of SNR Wireless Holdco, LLC by and between SNR Wireless Management, LLC, John Muleta and American AWS-3 Wireless III, LLC ("SNR LLC Agreement") at Article 2; October 13, 2014 First Amended and Restated Limited Liability Company Agreement of Northstar Spectrum, LLC by and between Northstar Manager, LLC and American AWS-3 Wireless II, LLC Northstar LLC Agreement at Article 2.

respective LLC Managing Member as the controlling interest for the Applicant.

23. Pursuant to the recitals contained in the SNR and Northstar LLC Agreements, the LLCs have been created for the purposes of: (i) acquiring licenses in the Auction and as otherwise agreed to between the parties; (ii) deploying the licenses by (A) owning, constructing and operating systems to provide wireless broadband services, (B) entering into one or more joint venture, lease, wholesale or other agreements or (C) any other means, but in each case, using technology fully compatible and interoperable with the technology or technologies employed by DISH; (iii) marketing and offering the services and features described in clause (ii); and (iv) any other activities upon which the parties agree.[74] In addition to requiring interoperability with DISH's technology, the LLC Agreements indicate that the licenses will be used to provide fixed or mobile service.[75] In addition, the LLC Agreements provide DISH with a significant list of "investor protection" categories of corporate decisions for which SNR and Northstar must obtain DISH consent.[76] If the LLC Managing Member wishes

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[74] SNR LLC Agreement at 5, definition of "Business;" Northstar LLC Agreement at 5, definition of "Business."

[75] SNR LLC Agreement at 8, definition of "Licensee Company System(s);" Northstar LLC Agreement at 8, definition of "Licensee Company System(s)."

[76] SNR LLC Agreement at 12, 14, definition of "Significant Matter;" Northstar LLC Agreement at 13-15, definition of "Significant Matter." *See* Section III.C.1.a (Investor Protection Provisions), *infra*, for further discussion of the investor protections that limit the actions that SNR and Northstar can take without DISH consent.

to transfer its rights, it also must obtain DISH's consent,[77] and SNR and Northstar must obtain DISH's approval before raising capital from other sources.[78] All actions taken by each Applicant must be consistent with the initial five-year business plans.[79] The LLC Agreements also prohibit the LLC Managing Members from transferring their respective interests in the LLCs without DISH's consent for the first ten years, and after that time any transfer is subject to DISH's right of first refusal and a "tag-along" right that permits DISH to require a potential purchaser to purchase DISH's interests as well.[80] The LLC Agreements also permit the LLC Managing Members of SNR and Northstar to "put" their respective interests to DISH after the five-year anniversary of license grant,[81] which is also when the "unjust enrichment" period ends.[82] After fourteen years, the LLC Managing Member may force the Applicant to

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[77] SNR LLC Agreement at ¶ 6.2; Northstar LLC Agreement at ¶ 6.2.

[78] SNR LLC Agreement at ¶ 6.3; Northstar LLC Agreement at ¶ 6.3.

[79] SNR LLC Agreement at ¶ 6.5; Northstar LLC Agreement at ¶ 6.5. The SNR LLC Agreement states that the initial five-year business plan was developed in consultation with DISH. SNR LLC Agreement at ¶ 6.5.

[80] SNR Management Services Agreement at ¶ 7; Northstar Management Services Agreement at ¶ 7.

[81] SNR Management Services Agreement at ¶ 8.1; Northstar Management Services Agreement at ¶ 8.1.

[82] 47 C.F.R. § 1.2111(d)(2)(E). After the unjust enrichment period, a transfer to a non-DE does not require the DE licensee to pay back any portion of any bidding credits granted with respect to the spectrum licenses purchased in an auction.

incorporate, but DISH is permitted to thwart this process by buying the LLC Managing Member's shares at **[REDACTED]**.[83] If either SNR or Northstar fails to qualify for discounts as a "very small business" and therefore must pay the gross winning bid prices for the spectrum licenses that it won in the Auction 97, DISH will be responsible for all payments to the Commission for the licenses and such Applicant will be obligated to transfer all of its AWS-3 licenses to DISH.[84]

24. *Management Services Agreements.* Under each of the Management Services Agreements, DISH is responsible for taking all necessary actions in furtherance of the build-out, management, and operation of any systems constructed using SNR's and Northstar's AWS-3 licenses in return for being compensated.[85] Essentially, DISH, as the Operations Manager pursuant to the two Management Services Agreements, acting, as recited therein, in accordance with directions and guidance from, and in consultation with, each Applicant, and in accordance with the annual business plan and budget, will provide all services necessary for the day-to-day build-out,

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[83] SNR Management Services Agreement at ¶ 9; Northstar Management Services Agreement at ¶ 9.

[84] SNR Management Services Agreement at ¶ 11.4; Northstar Management Services Agreement at ¶ 11.4

[85] September 12, 2014 Management Services Agreement By and Between American AWS-3 Wireless III, LLC and SNR Wireless LicenseCo, LLC ("SNR Management Services Agreement") at ¶¶ 2.1 and 2.2; September 12, 2014 Management Services Agreement By and Between American AWS-3 Wireless II, LLC and Northstar Wireless, LLC ("Northstar Management Services Agreement") at ¶¶ 2.1 and 2.2.

management, and operation of the wireless systems using the SNR and Northstar licenses.[86] DISH will provide or act as agent with respect to administrative, accounting, billing, credit, collection, insurance, purchasing, clerical, and other such general services; operational, engineering, construction, maintenance, repair, and other such technical services necessary for build-out and operation; and marketing, sales, advertising, and other such promotional services.[87] It will implement promotional and billing programs and systems, negotiate arrangements for roaming agreements, provide sales personnel and technical support for sales operations, and provide "shared services" such as messaging, 911, roaming, SS7 VoIP, CALEA support, number portability support, and circuit management.[88] DISH may not undertake certain enumerated actions without the consent of the Applicant,[89] and there is shorter list of actions that

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[86] SNR Management Services Agreement at ¶ 2.2; Northstar Management Services Agreement at ¶ 2.2.

[87] *Id.*

[88] SNR Management Services Agreement at ¶¶ 2.1, 2.2, 9.2, 9.3, 9.4, 9.5; Northstar Management Services Agreement at ¶¶ 2.1, 2.2, 9.2, 9.3, 9.4, 9.5.

[89] DISH is not permitted to modify the annual business plan or budget, a construction plan or schedule or technical services plan; to cause an Applicant to incur debt outside the ordinary course of business; to cause an Applicant to enter into contracts for more than $100,000 individually or $250,000 in the aggregate; to cause an Applicant to obligated for more than $100,000 in expenses; to bring, prosecute, defend or settle or any Applicant legal action or to perform its obligations in a manner inconsistent with the Management Services Agreements without obtaining the prior consent of each Applicant. SNR Management Services

DISH may not take at all, including selling the licenses, signing applications or incurring any debt on behalf of the Applicants.[90] The Management Services Agreements will terminate upon cause after notice and opportunity to cure, or at will of the Applicant upon one year's prior written notice.[91]

25. *Credit Agreements*. The Credit Agreements set forth the terms of the loans from DISH to each of the Applicants.[92] Pursuant to the Credit Agreements, the Applicants borrowed money to acquire the licenses and will borrow the working capital necessary to fund the build-out and operation of the licenses. DISH is not required to fund the acquisition of any license that was not included as a "Target" license under the Joint Bidding Agreements discussed below.[93] The interest rate for the loans is **[REDACTED]** percent per

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Agreement at ¶ 4.2(a); Northstar Management Services Agreement at ¶ 4.29(a).

[90] SNR Management Services Agreement at ¶ 4.2(b); Northstar Management Services Agreement at ¶ 4.2(b).

[91] SNR Management Services Agreement at ¶ 10.2; Northstar Management Services Agreement at ¶ 10.2.

[92] October 13, 2014 First Amended And Restated Credit Agreement By And Among American AWS-3 Wireless III LLC (As Lender) And SNR Wireless LicenseCo, LLC (As Borrower) And SNR Wireless Holdco, LLC ("SNR Credit Agreement"); October 13, 2014 First Amended And Restated Credit Agreement By And Among American AWS-3 Wireless II LLC (As Lender) And Northstar Wireless, LLC (As Borrower) And Northstar Spectrum, LLC ("Northstar Credit Agreement").

[93] SNR Credit Agreement at ¶ 2.1; Northstar Credit Agreement at ¶ 2.1.

annum[94] and will be capitalized until repayments begin at year five.[95] Repayment of the principal would be at the rate of 1/16th per quarter for two years (a total of 50 percent of the loan amount), followed by a balloon payment for the balance at the end of year seven.[96] The Credit Agreements require the preparation of annual, quarterly, and monthly statements.[97] SNR and Northstar are prohibited from borrowing money from any entity other than DISH except under the limited circumstances of: (1) purchase money financing of telecommunications and broadband equipment of $25 million or less,[98] and (2) unsecured indebtedness of $25 million or less.[99] Among the negative covenants in the Credit Agreements are those that restrict SNR and Northstar from undertaking any business or operations outside of that designated in the LLC Agreements as its purpose; entering into any debt arrangements other than those explicitly permitted in the Credit Agreements; and owning, leasing, or managing any

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[94] The interest rate will increase from **[REDACTED]** percent to **[REDACTED]** percent if the Management Services Agreement is terminated. SNR Credit Agreement at ¶ 2.3(a); Northstar Credit Agreement at ¶ 2.3(a).

[95] SNR Credit Agreement at ¶ 2.3; Northstar Credit Agreement at ¶ 2.3.

[96] *Id.*

[97] SNR Credit Agreement at ¶ 6.8; Northstar Credit Agreement at ¶ 6.8.

[98] SNR Credit Agreement at ¶ 6.9(b); Northstar Credit Agreement at ¶ 6.9(b).

[99] SNR Credit Agreement at ¶ 6.9(g); Northstar Credit Agreement at ¶ 6.9(g).

property or assets outside those necessary to further the purpose of the Applicants as indicated in the LLC Agreements.[100]

26. *Trademark Agreements*. SNR and Northstar also entered into Trademark Agreements with DISH to permit them to use the DISH trademarks for their potential service offerings.[101] The Trademark Agreements also require that the SNR and Northstar systems be interoperable with any DISH systems,[102] while also stating that the services provided over the licenses may be fixed or mobile.[103] SNR and Northstar have agreed to pay DISH a royalty equal to **[REDACTED]** for use of the DISH trademarks.[104]

27. *Joint Bidding Agreements*. Each of SNR and Northstar entered into Joint Bidding Agreements with DISH, and the three parties together entered into a Letter Agreement with respect to bidding during the

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[100] SNR Credit Agreement at ¶ 6.11; Northstar Credit Agreement at ¶ 6.11.

[101] September 12, 2014 Trademark License Agreement Between DISH Network LLC as Licensor and SNR Wireless LicenseCo, LLC as Licensee ("SNR Trademark Agreement"); September 12, 2014 Trademark License Agreement Between DISH Network LLC as Licensor and Northstar Wireless, LLC as Licensee ("Northstar Trademark Agreement").

[102] SNR Trademark Agreement at ¶ 4.1(b), Northstar Trademark Agreement at ¶ 4.1(b).

[103] SNR Trademark Agreement at 3, definition of "Licensee System;" Northstar Trademark Agreement at 3, definition of "Licensee System."

[104] SNR Trademark Agreement at ¶ 5.1; Northstar Trademark Agreement at ¶ 5.1.

Auction.[105] SNR, Northstar, and DISH disclosed in their Forms 175 prior to the auction that they had entered into Joint Bidding Agreements between and among each other to "coordinate regarding bids, bidding strategy and post-auction market structure" and that, "[b]y virtue of DISH's interests in each of American I, Northstar Wireless, Northstar, SNR HoldCo and SNR License, and the Joint Bidding Arrangements, each applicant will be deemed to have knowledge of the other's bids or bidding strategies."[106]

28. "Schedule II" of each of the SNR and Northstar Joint Bidding Agreements included a "First Priority" table listing "Target" licenses and a preferred "priority order" for acquiring the licenses, associated upfront payments to be made by each company, a maximum price for each license, and an overall bidding cap.[107] Under the Joint Bidding Agreements, each Applicant was required to use its "reasonable best efforts" to acquire the licenses that were listed in Schedule II.[108]

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[105] *See* September 12, 2014 Bidding Protocol and Joint Bidding Arrangement between SNR Wireless Management, LLC, SNR Wireless HoldCo, LLC, SNR Wireless License Co, LLC, American AWS-3 Wireless III LLC, and American AWS-3 Wireless I LLC ("SNR Joint Bidding Agreement") at Schedule II; September 12, 2014 Bidding Protocol and Joint Bidding Arrangement between Doyon, Limited, Northstar Manager, LLC, Northstar Spectrum, LLC, Northstar Wireless, LLC, American AWS-3 Wireless II LLC, and American AWS-3 Wireless I LLC ("Northstar Joint Bidding Agreement") at Schedule II; Letter Agreement.

[106] *See, e.g.*, SNR Form 175, Exhibit D: Agreements and Other Instruments at 27.

[107] *See* SNR Joint Bidding Agreement, Schedule II; Northstar Joint Bidding Agreement, Schedule II.

[108] *Id.*

The Joint Bidding Agreements also established an "Auction Committee" for each of the Applicants, consisting of three members, two of whom were appointed by the Applicant's LLC Managing Member and one appointed by DISH.[109] One of the members appointed by the Applicant's LLC Managing Member chaired the Auction Committee and acted as the "Bidding Manager."[110] Each Joint Bidding Agreement directed the Bidding Manager to host a daily conference of members of the Auction Committee and to make bidding decisions in the event the Auction Committee could not reach consensus.[111] Each Joint Bidding Agreement allowed the Auction Committee to modify by consensus the Target licenses, the maximum price for each license, and the bidding cap.[112]

29. The three-party Letter Agreement also indicates that its purpose was for the parties "to acknowledge that they may coordinate bidding in the Auction to fulfill their respective strategic purposes, to comply with the spectrum aggregation limits or policies that may be applied under the FCC rules, to facilitate roaming arrangements among the Parties or their affiliates, and to facilitate consolidation of their systems…"[113]

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[109] *See* SNR Joint Bidding Agreement at ¶ 1(a); Northstar Joint Bidding Agreement at ¶ 1(a).

[110] *Id.*

[111] *See* SNR Joint Bidding Agreement at ¶ 3(a); Northstar Joint Bidding Agreement at ¶ 3(a).

[112] *Id.*

[113] *See* Letter Agreement.

C. Pleadings and Other Filings

1. Petitions to Deny

30. Eight parties filed petitions to deny against the SNR and Northstar applications. Timely Petitions to Deny both the SNR and Northstar applications were filed by Citizen Action ("Citizen Action"), ESC Company ("ESC"), Communications Workers of America/National Association for the Advancement of Colored People ("CWA/NAACP"), National Action Network ("NAN"), Americans for Tax Reform/Center for Individual Freedom, Citizens Against Government Waste/MediaFreedom.org/ National Taxpayers Union/Taxpayers Protection Alliance ("Tax Reform"), VTel Wireless, Inc. ("VTel") and Central Texas Telephone Investments LP/Rainbow Telecommunications Association, Inc. ("CTTI/RTA") (collectively the "Petitioners").[114] The Hispanic Technology & Telecommunications Partnership ("HTTP") filed an untimely Petition to Deny. VTel, CTTI, and RTA were qualified bidders in the Auction.[115] The other Petitioners are public policy oriented groups or individuals that did not participate

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[114] *See* Petition to Deny of Citizen Action Illinois (filed May 6, 2015); Petition to Deny of Communications Workers of America and the National Association for the Advancement of Colored People (filed May 11, 2015) ("CWA-NAACP Petition"); Petition to Deny of Ev Ehrlich (filed May 11, 2015); Petition to Deny of Americans for Tax Reform *et al.* (filed May 11, 2015); and Petition to Deny of National Action Network (filed May 11, 2015). *See* Petition to Deny of VTel Wireless, Inc. (May 11, 2015) ("VTel Petition"); Petition to Deny of Central Texas Telephone Investments LP and Rainbow Telecommunications (May 11, 2015) ("CTTI/RTA Petition").

[115] *See Qualified Bidders Public Notice*, 29 FCC Rcd 13465.

in the auction. All of the Petitioners generally argue that the Commission should deny SNR and Northstar the bidding credits due to their affiliation with DISH.

2. Oppositions to Petitions to Deny

31. On May 18, 2015, SNR and Northstar filed oppositions to the petitions to deny.[116] In its opposition, Northstar claims that none of the Petitioners have standing because they are not parties in interest under Section 309(d) of the Communications Act.[117] Further, Northstar argues that its organization and bidding activity are consistent with FCC rules and precedent.[118] Finally, Northstar highlights that it disclosed its Joint Bidding Agreements prior to the start of the auction and thus there was nothing collusive about the joint bidding arrangements at issue.[119]

32. SNR also argues that Petitioners other than VTel and CTTI lack standing under Section 309(d) of the Communications Act.[120] Moreover, SNR claims that its organizational structure and investor protection provisions properly maintain *de jure* and *de facto* control in SNR's ultimate controlling party, John

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[116] *See* Consolidated Opposition of SNR Wireless LicenseCo, LLC to Petitions to Deny (May 18, 2015) ("SNR Opposition"); Opposition of Northstar Wireless, LCC to Petitions to Deny (May 18, 2015) ("Northstar Opposition").

[117] *See* Northstar Opposition at iii-iv, 7-10.

[118] *See* Northstar Opposition at iii.

[119] *See* Northstar Opposition at v.

[120] *See* SNR Opposition at 8-12. SNR argues that "VTel has standing to challenge only the grant of the BEA004-A1 license, and CTTI has standing to challenge only the grant of the CMA220 license." *Id*. at 11-12.

Muleta.[121] SNR also argues that its organization is essentially identical to those that have been permitted by the Commission in numerous prior auctions, including those involving requests for bidding credits.[122] Finally, SNR maintains that its Joint Bidding Agreements and bidding activities were fully consistent with FCC rules and precedent.[123]

3. Replies to Oppositions to Petitions to Deny

33. On May 26, 2015, VTel and CTTI/RTA filed replies in support of their petitions to deny.[124] In its reply, VTel claims that it has standing as a service provider in Vermont and as a bidder in Auction 97. More specifically, VTel argues that "it was deprived of its right to a legally valid bidding process by the misconduct of DISH" and therefore has "suffered a cognizable injury that satisfies the Commission's standing requirements."[125] Further, VTel reiterates its claim that the Commission should find that Northstar, SNR, and DISH "engaged in a collusive bidding scheme that undermined the integrity of Auction 97 in violation of the federal antitrust

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[121] *See* SNR Opposition at 13-34.

[122] *See* SNR Opposition at 2.

[123] *See* SNR Opposition at 36-60.

[124] *See* Reply of VTel Wireless, Inc. in Support of Petition to Deny (filed May 26, 2015) ("VTel Reply"); Central Texas Telephone Investments LP and Rainbow Telecommunications Association. Inc. Reply to Oppositions to Petitions to Deny (filed May 26, 2015) ("CTTI/RTA Reply").

[125] *See* VTel Reply at 3.

laws."[126] VTel states that it is not aware of any FCC auction in which a "multi-billion dollar company: (1) established and funded not one but two purported [DEs]; (2) used those [DEs] as well as a wholly-owned subsidiary to engage in a collusive bidding scheme to suppress competition; and (3) failed to win a single license while its two [DEs] secured 44 percent of the licenses (702 out of 1,611) and received 93 percent of the total [DE] discounts ($3.3 billion out of $3.6 billion) in the auction."[127] VTel requests that, at a minimum, the Commission designate this matter for hearing because VTel has met its burden of establishing a *prima facie* case that grant of SNR's and Northstar's Applications would not be in the public interest.[128]

34. CTTI/RTA claims that they both have standing as "competitors for the provision of communications services that Northstar and/or SNR may offer in the States of Texas and Kansas … using the licenses acquired in Auction 97."[129] Further, CTTI/RTA argues that, based on the totality of circumstances, DISH has *de facto* control over SNR and Northstar. CTTI/RTA also maintains that the parties' concerted actions during the auction were anticompetitive and in violation of the FCC's rules.[130] Finally, CTTI/RTA urges the Commission to consider every possible remedy when considering SNR's and Northstar's violations, including "offer[ing] their

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[126] VTel Reply at 1.

[127] VTel Reply at 2.

[128] *See* VTel Reply at 5.

[129] CTTI/RTA Reply at 3.

[130] *See* CTTI/RTA Reply at 5 and 11.

licenses to the other highest bidders (in descending order)," or "reauction[ing] their licenses to existing or new applicants."[131]

35. On May 26, 2015, the National Association of Black-Owned Broadcasters, Inc. ("NABOB") submitted a reply urging the Commission to "expeditiously grant SNR's application for the licenses that it won in Auction 97."[132]

4. Additional Pleadings and Submissions

36. On May 18, 2015, AT&T submitted a partial opposition to the Petitions to Deny to address the limited issue of remedy.[133] AT&T claims that "there is no precedent or lawful grounds for a re-auction of a portion of the licenses as a "remedy" for misconduct during the auction, nor is there any basis for simply handing some of those licenses to whichever bidder placed the second-highest bid."[134] On May 26, 2015, both SNR and Northstar submitted motions to strike or dismiss the partial opposition of AT&T.[135] SNR and

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[131] CTTI/RTA Reply at 13.

[132] National Association of Black Owned Broadcasters, Inc. Reply to Petitions to Deny (filed May 26, 2015) ("NABOB Reply").

[133] *See* AT&T Partial Opposition to Petitions to Deny (filed May 18, 2015) ("AT&T Partial Opposition").

[134] AT&T Partial Opposition at 2.

[135] *See* SNR Wireless LicenseCo, LLC Motion to Dismiss, Strike, or Deny Partial Opposition of AT&T Inc. (filed May 26, 2015) ("SNR Partial Opposition Motion Dismissal"); Northstar Wireless, LLC Motion to Strike or Dismiss AT&T "Partial Opposition" to Petitions to Deny (filed May 26, 2015) ("Northstar Partial Opposition Motion Dismissal").

Northstar argue that AT&T's filing is procedurally defective and should be dismissed as late-filed.[136]

37. On June 2, 2015, SNR and Northstar filed motions to strike or dismiss what they allege are new claims raised by VTel and CTTI/RTA in their respective Replies or, in the alternative, seek leave to file surreplies to VTel and CTTI/RTA.[137] On June 5, 2015, VTel, in turn, opposed the motions to strike or dismiss or, in the alternative, requested leave to file surreplies.[138] SNR and VTel subsequently filed another round of pleadings responding to each another.[139] On June 10, 2015, SNR filed a reply to the

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[136] *See* SNR Partial Opposition Motion Dismissal at 2; Northstar Partial Opposition Dismissal at 2.

[137] Northstar Wireless, LLC, Motion to Dismiss New Claims or, in the Alternative, for Leave to File Surreply (filed June 2, 2015) ("Northstar Motion"); SNR Wireless License Co, LLC, Motion to Strike or, in the Alternative, for Leave to File Consolidated Surreply (filed June 2, 2015) ("SNR Motion"); Northstar Wireless, LLC, Surreply (filed June 2, 2015) ("Northstar Surreply"); SNR Wireless LicenseCo, LLC, Consolidated Surreply (filed June 2, 2015) ("SNR Surreply").

[138] VTel Wireless, Inc., Opposition to Motions to Strike/Dismiss or, in the Alternative, for Leave to File Surreplies (filed June 5, 2015) ("VTel Opposition and Surreply").

[139] SNR Wireless License Co, LLC, Reply to the Opposition of VTel Wireless, Inc. (filed June 10, 2015) ("SNR June 10th Reply"); VTel Wireless, Inc., Response to Reply of SNR Wireless License Co, LLC (filed June 16, 2015) ("VTel June 16th Response"). Subsequently, following a July 22, 2015, meeting with Wireless Bureau staff, for which all parties were provided notice and opportunity to participate, SNR and Northstar each submitted supplemental letters on July 28, 2015, and July 29, 2015, respectively, and VTel responded to those letters on August 4, 2015. *See* Letter to Jean L. Kiddoo, Deputy Chief, Wireless Telecommunications Bureau, from Ari Fitzgerald, Counsel to

opposition of VTel claiming that VTel continues to erroneously state that DISH, rather than SNR, made personal loans to John Muleta for his interest in SNR.[140] On June 16, 2015, VTel responded that "John Muleta's capital contribution was funded entirely by loans from SNR Management, a shell company with no revenues."[141]

III. DISCUSSION

A. Standing and Other Procedural Issues

38. For the reasons discussed below, we dismiss HTTP's petition to deny as untimely filed and for lack of standing; dismiss the petitions to deny filed by Citizen Action, ESC, CWA/NAACP, NAN, and Tax Reform for lack of standing; grant the Applicants' motions and dismiss the AT&T Partial Opposition because the filing is not permitted under the Commission's rules, and dismiss NABOB's reply for lack of standing and because the filing is not permitted under the Commission's rules. Furthermore, we deny the motions for leave to file surreplies to the CTTI/RTA Reply and deny motions to strike or dismiss matters raised in the CTTI/RTA Reply and dismiss the surreplies as to CTTI/RTA's Reply. We also deny motions to strike or dismiss matters discussed in the VTel Reply, as explained further below. However, we

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SNR, dated July 28, 2015 ("SNR Letter"); Letter to Jean L. Kiddoo, Deputy Chief, Wireless Telecommunications Bureau, from Mark F. Dever, Counsel to Northstar, dated July 29, 2015 ("Northstar Letter"); Letter to Jean L. Kiddoo, Deputy Chief, Wireless Telecommunications Bureau, from Bennett L. Ross, Counsel to VTel, dated August 4, 2015 ("VTel Letter").

[140] SNR June 10th Reply.

[141] VTel June 16th Response at 3.

grant motions for leave to file surreplies and allow the consideration of the SNR Surreply and the Northstar Surreply, as explained below, for specific discussions raised therein. Because of our action taken above we dismiss, as moot, the VTel Opposition and Surreply; the SNR June 10th Reply; and the VTel June 16th Response.[142]

39. Section 1.2108 of the Commission's rules governs the filing of petitions to deny the applications of winning bidders.[143] Pursuant to Section 1.2108(b), petitions to deny such applications may be filed within a period specified by public notice and after the Commission, by public notice, announces that long-form applications have been accepted for filing.[144] On April 29, 2015, the Bureau issued a *Public Notice* accepting the captioned applications for filing and establishing a deadline of May 11, 2015, for parties to submit petitions to deny.[145] Section 1.2108 requires these petitions to contain allegations of fact supported by affidavit of a person or persons with personal

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[142] CTTI/RTA state that the Applicants and DISH were members of a joint venture pursuant to Section 1.2110(c)(5)(x) of the Commission's rules. See CTTI/RTA Petition at 7-8; CTTI/RTA Reply at 11. However, CTTI/RTA did not support this conclusory statement by demonstrating the existence of the elements required for such a claim. 47 C.F.R § 1.2110(c)(5)(x). We note that, in any event, the claim is moot in view of our conclusions herein finding DISH in *de facto* control of the Applicants.

[143] 47 C.F.R. § 1.2108(a). *See also* 47 U.S.C. § 309(d).

[144] 47 C.F.R. § 1.2108(b) (further providing that the period for filing petitions to deny shall be no more than ten (10) days).

[145] *Accepted For Filing Public Notice*, 30 FCC Rcd 3795.

knowledge thereof.[146] Section 1.939(d) of the Commission's rules also requires that a petition to deny contain specific allegations of fact sufficient to make a *prima facie* showing that the petitioner is a party in interest and that a grant of the application would be inconsistent with the public interest, convenience and necessity.[147] To establish standing as a party in interest, a petitioner must allege facts sufficient to demonstrate that grant of the petitioned long-form application would cause the petitioner to suffer a direct injury.[148] In addition, a petitioner must demonstrate a causal link between the claimed injury and the challenged action,[149] and that any injury would be redressable by the relief requested.[150]

40. The Commission and the United States Court of Appeals for the D.C. Circuit have discussed standing requirements specifically in the context of

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[146] 47 C.F.R. § 1.2108(a).

[147] 47 C.F.R. § 1.939(d). *See also* 47 U.S.C. § 309(d)(1).

[148] *See* Petition for Reconsideration of Various Auction 87 Public Notices, *et al.*, *Memorandum Opinion and Order*, 27 FCC Rcd 4374, 4382 ¶ 21 (WTB MD & ASAD 2012) ("*Auction 87 Order*"); AT&T Wireless PCS, Inc., *Order*, 15 FCC Rcd 4587, 4588 ¶ 3 (WTB CWD 2000) ("*AT&T Wireless*"), *citing Sierra Club v. Morton*, 405 U.S. 727, 73 (1972); Lawrence N. Brandt, *Memorandum Opinion and Order*, 3 FCC Rcd 4082 (CCB DFD 1988).

[149] *Auction 87 Order*, 27 FCC Rcd at 4382 ¶ 21; *AT&T Wireless*, 15 FCC Rcd at 4588 ¶ 3, *citing Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 72, 78 (1978).

[150] *Auction 87 Order*, 27 FCC Rcd at 4382 ¶ 21; Weblink Wireless, Inc., *Memorandum Opinion and Order*, 17 FCC Rcd 24642 ¶ 11 (WTB 2002).

the Commission's spectrum auctions.[151] The Court of Appeals has acknowledged that a bidder has a right to a legally valid auction process, yet the Court has also maintained that "a disappointed bidder, to have standing to challenge the auction outcome, must demonstrate 'that it was able and ready to bid and that the decision of the Commission prevented it from doing so on an equal basis.'"[152] Accordingly, an entity that was not qualified to bid in particular markets in an auction has no standing to file a petition to deny the winning bidders' applications in those markets.[153] Moreover, to establish party in interest standing, a qualified bidder must have actually participated in competitive bidding for licenses in those markets.[154]

41. Under this standard, Citizen Action, ESC, CWA/NAACP, NAN, Tax Reform, and HTTP do not

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[151] *See High Plains Wireless v. FCC*, 276 F.3d 599, 605 (D.C. Cir. 2002) ("*High Plains*") (ruling that an entity that was not qualified to bid in a particular market in an auction does not have standing to file a petition to deny a winning bidder's application in that market); *Auction 87 Order*, 27 FCC Rcd at 4382 ¶ 22*; Alaska Native Commission Order*, 18 FCC Rcd, at 11644-45 ¶¶ 10-11.

[152] *See High Plains*, 276 F.3d at 605; *DIRECTV, Inc. v. FCC*, 110 F.3d 816, 829-30 (D.C. Cir. 1997), citing *Northeastern Florida Chapter of the Associated Gen. Contractors of America v. City of Jacksonville*, 508 U.S. 656, 666 (1993); Auction 87 Order, 27 FCC Rcd at 4382 ¶ 22.

[153] *See High Plains*, 276 F.3d at 605 (finding that an auction participant that did not bid on some of the licenses it was petitioning did not have standing to challenge the award of licenses on which it did not bid and that were won by another entity); *see also Auction 87 Order*, 27 FCC Rcd at 4382 ¶ 22.

[154] *See Auction 87 Order*, 27 FCC Rcd at 4382 ¶ 22; *Alaska Native Bureau Order*, 17 FCC Rcd at 4235 ¶ 9.

have standing to file a petition to deny an Auction 97 long-form application because they did not participate in Auction 97.[155] Further, the referenced petitions to deny lack specific allegations of fact sufficient to make a *prima facie* showing that any of the Petitioners is a party in interest. Indeed, the parties do not even attempt to establish the requisite standing to file against the Auction 97 SNR and Northstar Applications, nor could they make such a showing, as none of these parties was a qualified bidder in the auction. Accordingly, we dismiss, for lack of standing, the petitions to deny filed by Citizen Action, ESC, CWA/NAACP, NAN, Tax Reform, and HTTP.[156]

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[155] We find that the petition to deny filed by HTTP is untimely and accordingly dismiss it. Pursuant to 47 C.F.R. § 1.2108, petitions to deny must be filed no more than ten days after the announcement by public notice of the acceptance of a winning bidder's long-form license application. *See* 47 C.F.R. § 1.2108(c). Moreover, the *Public Notice* specified that petitions to deny must be filed no later than May 11, 2015. *See Accepted For Filing Public Notice,* 30 FCC Rcd 3795.

[156] As noted above, SNR does not contest the standing of VTel or CTTI, with respect to one license each, but asserts that Rainbow lacks standing because a third party (i.e., other than SNR, Northstar, or DISH) was the winning bidder for CMA 179. SNR Opposition at 12. Northstar argues that none of these three Petitioners bid on any license for which Northstar was the winning bidder. Northstar Opposition at 8-10. SNR and Northstar misunderstand the party in interest requirements of Section 309(d). The Commission has determined that parties lacked standing where they were not qualified to bid for the licenses won by the applicant. *Alaska Native Commission Order,* 18 FCC Rcd at 11645 ¶ 12. In this case, however, all three of these Petitioners qualified to bid in the AWS-3 auction. Auction of Advanced Wireless Services (AWS-3) Licenses: 70 Bidders Qualified To Participate in Auction 97, *Public Notice,* 29 FCC Rcd

42. Even if we were to consider the merits of the matters raised in the petitions to deny that are being dismissed for lack of standing, we find nothing therein that would materially add to the record in these matters. For the most part, these Petitioners seek denial of the bidding credits sought by Applicants on various grounds. Citizen Action, ESC, Tax Reform, and HTTP primarily express concern over SNR and Northstar receiving bidding credits that were intended for small businesses in light of DISH's 85 percent ownership of those entities. CWA/NAACP

13465 (WTB 2014). Moreover, VTel and CTTI qualified to bid for *all 1,614* of these available licenses, including those won by Applicants. We also note that litigants have established Article III standing where they allege that the challenged conduct depriving them of a legally valid procurement process caused them to "dro[p] out before securing any licenses," *U.S. Airwaves, Inc. v. FCC,* 232 F.3d 227, 232 (D.C. Cir. 2000), or not to participate in the auction at all. *Alvin Lou Media, Inc. v. FCC,* 571 F.3d 1, 3, 6-7 (D.C. Cir. 2009) ("*Alvin Lou Media").* Here, Petitioners challenge the "coordinated actions of Northstar, SNR, and DISH" as having "anticompetitive effects . . . causing harm to [P]etitioners," all three of whom were competing bidders for some of the same licenses for which both Applicants placed bids. CTTI/Rainbow Petition at 3-5; VTel Petition at 7 and VTel Petition at Affidavit of Dr. J. Michel Guité ("Guité Affidavit"). They thus both "compete[d] against" the Applicants, and allege that Applicants' bidding conduct "deprived [them] of a valid auction process." *High Plains,* 276 F.3d at 605. Although we reject certain of Petitioners' claims on the merits, we must assume for purposes of standing that they would prevail on these claims. *Alvin Lou Media,* 571 F.3d at 7. In any event, we have discretion to consider Petitioners' contentions in reviewing the Applications in light of the requirements of our rules and the public interest standard of Section 309 of the Act. *See, e.g.*, Applications of AT&T Inc. and DIRECTV, *Memorandum Opinion and Order*, FCC 15-94 (rel. July 28, 2015), at ¶ 31 n.90.

contend that SNR and Northstar, through their affiliation with DISH, do not qualify as small businesses eligible for DE bidding credits and argue that issuing bidding credits to SNR and Northstar would violate the Commission's rules and represents "unjust enrichment."[157] In addition, noting DISH's 85 percent financial interest in SNR and Northstar, CWA/NAACP argues that SNR and Northstar have an "identity of interest" with DISH and are subject to *de facto* control by DISH.[158] We note that these arguments are similar to arguments raised by VTel and CTTI/RTA and are addressed elsewhere in this *Memorandum Opinion and Order* and in our consideration of the arguments raised by Petitioners and our own review of the facts and circumstances underlying the Applicants' eligibility as "very small businesses." Our conclusion that DISH is an affiliate of the Applicants under our rules will, in effect, result in the relief sought by these Petitioners—denial of the

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[157] CWA/NAACP Petition at 3. CWA/NAACP argue that 47 U.S.C. § 309(j)(4)(E) requires the Commission to "prevent unjust enrichment as a result of the methods employed to issue licenses." CWA/NAACP Petition at 3, *quoting* 47 U.S.C. § 309(j)(4)(E). CWA/NAACP contend that DISH is not a small business due to its $31 billion market capitalization and $14.6 billion, $13.9 billion, and $13.2 billion, respectively, in revenue for the years 2014, 2013, and 2012. CWA/NAACP Petition at 3-4.

[158] CWA/NAACP Petition at 4-6. CWA/NAACP assert that the collusive bidding that DISH, Northstar, and SNR engaged in during Auction 97 provides convincing evidence that these entities share an "identity of interest" controlled by DISH and that the joint bidding arrangement was designed to ensure that DISH, through its control of SNR and Northstar, won control of 702 spectrum licenses and then was able to take advantage of the 25 percent DE discount. CWA/NAACP Petition at 4-6.

bidding credits that the Applicants seek. Accordingly, and in the alternative, these petitions are denied to the same extent that we deny those of VTel and CTTI/RTA.

43. NAN states that it "takes no position as to whether [the Applicants meet] the criteria of a small business under the FCC's rules."[159] Rather, NAN contends that DISH has an "abysmal record of diversity" in terms of programming on its satellite television service, among its senior leadership suppliers, and has made no overt public commitment to employee diversity.[160] NAN states that DISH's actions in Auction 97 are "merely an opportunistic ploy to hide behind a minority owned company and take advantage of the FCC's rules."[161] If the Commission grants the SNR and Northstar Applications, NAN requests that the Commission impose specific timetables and benchmarks for DISH to improve its record of diversity.[162] NAN cites no precedent for the Commission imposing such obligations on the winning bidder in an auction for wireless licenses or on the controlling interest holder in the applicant. We decline to impose such obligations here.

44. On May 18, 2015, AT&T filed a partial opposition to the petitions to deny. AT&T contends

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[159] National Action Network, Petitions to Deny (filed May 11, 2015) at 2-3 ("NAN Petitions"). NAN filed separate, virtually identical petitions against SNR and Northstar.

[160] NAN Petitions at 2-4.

[161] NAN Petitions at 2 (*emphasis omitted*).

[162] NAN Petitions at 4.

that, if the Commission finds that the Applicants violated FCC rules, the Commission must provide ample support for a variety of strong and effective remedies, including (1) disallowance of the $3.3 billion in bidding credits the DISH entities claimed under the designated entity rules, (2) referral of the matter to the FCC's Enforcement Bureau for possible forfeiture penalties, and (3) referral of the matter to the Department of Justice for investigation of possible violations of antitrust laws.[163] AT&T, however, argues that there is no precedent or lawful grounds for a re-auction of a portion of the licenses as a "remedy" for misconduct during the auction, nor is there any basis for simply handing some of those licenses to the bidder that placed the second highest bid.[164] On May 26, 2015, SNR and Northstar filed motions to strike or dismiss the AT&T Partial Opposition because, pursuant to Section 1.2108(c), the only parties that may file oppositions to the petitions to deny the captioned applications are the Applicants.[165] SNR and Northstar also contend that the AT&T Partial Opposition is an untimely filed petition to deny.[166] We agree with SNR and Northstar. Section 1.2108 of the Commission's rules states that applicants may file

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[163] AT&T Partial Opposition at 1-2.

[164] *See* AT&T Partial Opposition at 5-8 (there is "no precedent for selectively altering the outcome of an auction based on alleged misconduct during the auction, and Petitioners cite none"). AT&T Partial Opposition at 6.

[165] SNR Partial Opposition Motion; Northstar Partial Opposition Motion.

[166] SNR Partial Opposition Motion at 2; Northstar Partial Opposition Motion at 2.

oppositions to petitions to deny that are filed against the applications of winning bidders.[167] In contrast to Section 1.939(f) of the Commission's rules, Section 1.2108 explicitly limits the filing of an opposition to a petition to deny to the applicants against which the petition to deny has been filed. We therefore find that AT&T was not permitted under the rules to file an opposition. Moreover, to the extent that AT&T is seeking to deny the Applications of SNR and Northstar, we find that it is an untimely filed opposition. Accordingly, we grant the motions to strike and dismiss the AT&T Partial Opposition.

45. NABOB filed a reply to the oppositions to the petitions to deny filed against SNR and Northstar. NABOB states that SNR is the most successful African-American-controlled bidder in the history of the FCC's spectrum auctions and that granting SNR's application would advance compliance with the Commission's statutory mandate to encourage small and minority-owned businesses to participate in FCC spectrum auctions; ensure that designated entities participate meaningfully in the forward auction component of the FCC's upcoming Broadcast Incentive Auction ("Incentive Auction"); and further incentivize television broadcasters, including NABOB members, to participate in the reverse portion of the Incentive Auction due to the potential for increased reverse auction revenues resulting from vibrant forward auction competition.[168] Section 1.2108 of the Commission's rules provides that the petitioner may

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[167] 47 C.F.R. § 1.2108.

[168] NABOB Reply at 1-2.

file a reply to oppositions to petitions to deny.[169] NABOB was not a petitioner and therefore, pursuant to Section 1.2108, is not permitted to file a reply. Moreover, to the extent that NABOB is replying to the petitions to deny, we find that it is an untimely filed opposition.[170] Even if it had been timely filed, it would be dismissed because Section 1.2108 explicitly limits the filing of an opposition to a petition to deny to the applicants against which the petition to deny has been filed. We therefore dismiss the reply filed by NABOB.[171] Moreover, even if we were to consider the merits of the NABOB Reply, we would note that today's decision does not find that SNR is not qualified to be a Commission licensee.

B. Motions for Leave to File Surreplies; Motions to Dismiss or Strike; and Surreplies

1. Motions for Leave to File Surreplies to the CTTI/RTA Reply

46. We deny the motions for leave to file surreplies to the CTTI/RTA Reply and deny the motions to strike or dismiss certain matters raised in the CTTI/RTA Reply. Northstar contends that "CTTI/RTA now argue that 'the DISH relationship with Northstar . . . is similar to *Baker Creek* . . . .'"[172] SNR argues that

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[169] 47 C.F.R. § 1.2108(c).

[170] Oppositions to petitions to deny were required to be filed by May 18, 2015. *See Accepted For Filing Public Notice,* 30 FCC Rcd at 3795; *see also* 47 C.F.R. § 1.2108(c). NABOB failed to file its pleading until May 26, 2015.

[171] *See* 47 C.F.R. § 1.2108(c).

[172] Northstar Motion at 5, *citing* CTTI/RTA Reply at 6 n. 21.

CTTI/RTA raises for the first time in the CTTI/RTA Reply arguments relating to SNR's decision not to appoint an additional member to the auction committee.[173] We disagree. Pursuant to Section 1.45 of the Commission's rules, the reply shall be limited to matters raised in the oppositions.[174] Both SNR and Northstar discuss *Baker Creek* at length in their oppositions.[175] Similarly, SNR raises its decision not to appoint an additional member to the auction committee in the SNR Opposition.[176] Therefore, both matters are appropriate for a reply to discuss. Accordingly, the motions to strike or dismiss matters raised in the CTTI/RTA Reply are denied; the motions for leave to file surreplies to the CTTI/RTA Reply are denied; and the surreplies as to CTTI/RTA's Reply are dismissed.[177]

2. Motions for Leave to File Surreplies to the VTel Reply

47. We deny the motions to strike specific matters discussed in the VTel Reply and grant the motions for leave to file surreplies as to the VTel Reply. SNR and Northstar contend that the VTel Reply discusses the Supreme Court's decision in *American Needle, Inc. v.*

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[173] SNR Surreply at 5.

[174] 47 C.F.R. § 1.45(c); Northstar Motion at 2-3.

[175] Indeed, Northstar explicitly raises the issue in stating that an opposition "appears to be [making] a clumsy effort to liken the Northstar Wireless corporate authorities to those at issue in *Baker Creek*, where the Bureau determined that the non-controlling investor actually had "the power to control Baker Creek's business plan and budget." Northstar Opposition at 38.

[176] SNR Opposition at 20; SNR Opposition at n. 75.

[177] *See* SNR Surreply at 5; Northstar Surreply at 2.

the National Football League[178] even though it was not raised in the oppositions.[179] Northstar also argues that VTel raises, for the first time on reply, that DISH has *de facto* control of Northstar because Northstar must use technology that is interoperable with DISH's technologies.[180] Northstar further argues that VTel raises new, specific "questions" that are not in reply to matters discussed in the Northstar Opposition.[181] Pursuant to Section 1.45 of the Commission's rules, the reply shall be limited to matters raised in the oppositions.[182] Both of the Applicants opposed the allegations in VTel's Petition related to antitrust violations and *de facto* control.[183] As such, we find that VTel's Reply was limited to matters discussed in the oppositions. However, in light of the fact that VTel referenced additional contractual provisions in support of its *de facto* control arguments that were not specifically recited in its Petition, we grant SNR and Northstar's motion for leave to file a surreply as to VTel's Reply to allow each applicant a full opportunity to address VTel's specific allegations.

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[178] *American Needle, Inc. v. the National Football League*, 560 U.S. 183 (2010) ("American Needle").

[179] SNR Surreply at 5-6; Northstar Motion at 4; *see* VTel Reply at 39 (first full paragraph and related footnote). We note that VTel discusses *American Needle* in the VTel Petition at n. 76, and we take no action herein to strike matters raised in the VTel Petition.

[180] Northstar Motion at 3; *see* VTel Reply at 16 (first sentence of second full paragraph).

[181] Northstar Motion at 4; *see* VTel Reply at 34-35.

[182] 47 C.F.R. § 1.45(c).

[183] *Id.*

3. VTel Opposition and Surreply; SNR June 10th Reply; and VTel June 16th Response

48. Because of our action taken above, we dismiss, as moot, the VTel Opposition and Surreply; the SNR June 10th Reply; and the VTel June 16th Response.

C. Substantive Issues

49. For purposes of determining whether an applicant is eligible for DE bidding credits, the Commission examines whether the applicant has controlling entities or affiliates as defined by our rules.[184] Under our rules, the gross revenues of such entities must be considered on "a cumulative basis and aggregated [with the gross revenues of the applicant] for purposes of determining whether the applicant (or licensee) is eligible"[185] for the small business bidding credit. As set forth in our rules, affiliation may arise from a number of circumstances and relationships, including having a controlling interest in or power to control the applicant, which in turn can arise from a number of circumstances and relationships.[186] Based on the record before us, we find two separate and independent ways by which DISH is found to be a controlling entity of, or affiliated with the Applicants within our rules: 1) DISH has *de facto* control of the Applicants, or the power to control them, under an analysis of the totality of the circumstances surrounding their participation in Auction 97 and the plans for operations after grant of the licenses as

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[184] 47 C.F.R. § 1.2110.

[185] 47 C.F.R. § 1.2110(b)(2).

[186] 47 C.F.R. §§ 1.2110(c)(2), 1.2110(c)(5).

reflected in the various Agreements entered into among and between DISH, SNR and Northstar; and 2) DISH is an affiliate of the Applicants by virtue of the breadth of DISH's responsibilities under Management Services Agreements with SNR and Northstar. Accordingly, as discussed below, based on the Agreements among and between DISH and the Applicants and other facts before us, we conclude that DISH's revenues should be attributed to each of SNR and Northstar, and therefore neither SNR nor Northstar is eligible for very small business bidding credits.

1. Analysis of *De Facto* Control of SNR and Northstar

50. For Auction 97, we established a two-tiered system of bidding credits that provide a 25 percent discount to eligible very small businesses, and a 15 percent discount to eligible small businesses, that would be applied to their gross winning bids,[187] thereby reducing the actual amount that such winning bidders would pay for their licenses. This designated entity structure was established pursuant to the statutory goal of ensuring that small businesses, rural telephone companies, and businesses owned by members of minority groups and women are better able to compete with larger entities in the acquisition of spectrum in Commission auctions.[188] At the same time, the Communications Act requires that, in providing such opportunity, the Commission must ensure that the award of bidding credits does not

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[187] *See* 47 C.F.R. §§ 1.2110(f)(2)(ii), 1.2110(f)(2)(iii), 27.1106.

[188] 47 U.S.C. § 309(j)(4)(D); *see also id.* § 309(j)(3)(B).

result in the unjust enrichment of entities that are not *bona fide* small businesses.[189] As a result, prior to granting a bidding credit, the Commission carefully examines the totality of the facts and circumstances of each case to ensure that the applicant is truly an independent small business.[190] In making such a determination, the Commission attributes to the applicant the revenues of its controlling entities and "affiliates," defined in our rules as including, among other things, such individuals or entities who "[d]irectly or indirectly control or have the power to control the applicant."[191]

51. To enable the Commission to determine whether an applicant has appropriately attributed the revenues of its affiliates and controlling interests, our rules require all applicants seeking DE bidding credits to submit all agreements and information that support the applicant's eligibility as a small business under the applicable designated entity provisions, including the establishment of *de facto* or *de jure* control or the presence or absence of attributable material relationships.[192] Pursuant to our rules requiring that applicants support their claims of DE eligibility, SNR and Northstar submitted Applications that included copies of their respective agreements between and among themselves and DISH, their other

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[189] *Id.* § 309(j)(4)(E); *see also id.* § 309(j)(3)(C).

[190] 47 C.F.R. §§ 1.2110(c)(2), 1.2110(c)(5); *see Fifth MO&O,* 10 FCC Rcd at 456 ¶ 96; *Baker Creek,* 13 FCC Rcd at 18712-18714 ¶¶ 6-7; *Alaska Native Bureau Order,* 17 FCC Rcd at 4238-4239 ¶ 15.

[191] 47 C.F.R. § 1.2110(c)(5)(i)(A).

[192] 47 C.F.R. §§ 1.2110(j).

investors and principals, and each other. There are numerous provisions in the Agreements that vest DISH with substantial (and essentially identical) rights and responsibilities with respect to the management and operation of the Applicants' businesses, as well as veto rights of certain of their decisions.

52. In analyzing the question of *de facto* control under Section 1.2110, the Commission has traditionally looked to whether an investor, owner, or other party ("investor/owner") is able to determine licensee policies and operations, or dominate corporate affairs.[193] This analysis, based on all the facts and circumstances, must focus on the "realities" of whether such an entity will be implementing such policies, notwithstanding ostensible requirements of approval by the licensee.[194] Thus, the limited legal right to nullify investor/owner domination of functions that are probative of control is not itself dispositive.[195]

53. Both SNR and Northstar represent that they are not controlled by DISH, notwithstanding that they are each 85 percent indirectly owned and capitalized by DISH, that DISH will manage their operations and build-out, and that DISH will operate and maintain their networks. SNR and Northstar reported average gross revenues of $399,566 and zero, respectively, over

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[193] *News International, PLC*, 97 FCC 2d 349 at 355-356 ¶ 16 (1984) ("*News International*").

[194] *Phoenix*, 44 FCC 2d at 840 (1973)*; see also Fox*, 11 FCC Rcd at 5719 ¶ 14 (obligation in enforcing Section 310(b) to examine the "economic realities" of the transactions and "not simply the labels attached by the parties to their corporate incidents").

[195] *Stereo*, 87 F.C.C.2d 87.

the past three years,[196] and each claims eligibility for a 25 percent bidding credit on the basis that each is a "very small business" as defined in our rules.[197] Each of these recently established companies placed billions of dollars in winning bids in Auction 97 funded largely by loans from DISH. SNR's gross winning bids totaled $5,482,364,300, and Northstar's gross winning bids totaled $7,845,059,400—unprecedentedly high amounts based on the Commission's experience with other independent "very small business" entities who have no prior or existing business operations or income.[198] If found to be eligible for their requested discounts, SNR's gross winning bid would be reduced by $1,370,591,075 to $4,111,773,225, and Northstar's gross winning bid would be reduced by $1,961,264,850 to $5,883,794,550.

54. In analyzing whether DISH has *de facto* control over, or the power to control, the Applicants, a significant factor is the unprecedented magnitude of the indebtedness to DISH that SNR and Northstar each incurred to pay for the licenses won. Moreover, the Applicants would face additional costs, which DISH has agreed to finance, to construct facilities for license areas that would span the nation for each Applicant. DISH's extensive responsibilities for management and operation of the Applicants' businesses are also significant, particularly given

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[196] SNR Application at Schedule B; Northstar Application at Schedule B.

[197] 47 C.F.R. §27.1106 (defines very small businesses as entities that received an average of not more than $15 million in average gross revenues over the three years prior to the auction).

[198] *See* paragraph 52, *supra*.

SNR's and Northstar's lack of any existing operating business providing the management and technical personnel required for business and network planning and day-to-day control of build-out, management, and operations necessary to operate a business on a scale commensurate with the scope of the licenses obtained in Auction 97.

55. Our case-by-case review pursuant to Section 1.2110[199] is not limited to any particular set of facts and circumstances that establish a bright line test of what constitutes *de facto* control, but the rules offer examples of ways that control and affiliation may arise and point to a number of other types of affiliations that constitute control.[200] The Commission's competitive bidding rulemakings also offer guidance. For example, in 1994, the Commission noted that:

> agreements between designated entities and strategic investors that involve terms (such as management contracts combined with rights of first refusal, loans, puts, etc.) that cumulatively are designed financially to force the designated entity into a sale (or major refinancing) will constitute a transfer of control under our rules. We will look at the

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[199] *Id.*; *Fifth MO&O*, 10 FCC Rcd at 456 ¶ 96; see also Amendment of Part 1 of the Commission's Rules – Competitive Bidding Procedures, *Order on Reconsideration of the Third Report and Order, Fifth Report and Order and Fourth Further Notice of Proposed Rulemaking*, 15 FCC Rcd 15293 at 15324 ¶ 61 (2000) (incorporating long standing principles of control into Section 1.2110 of the Commission's rules).

[200] *See, e.g.*, 47 C.F.R. § 1.2110(c)(5)(vii)-(x).

> totality of circumstances in each particular case. We emphasize that our concerns are greatly increased when a single entity provides most of the capital and management services and is the beneficiary of the investor protections.[201]

56. The Commission's *Intermountain Microwave* order and other decisions provide further guidance in examining various factors that may be indicia of control. In particular, *Intermountain Microwave* found the following factors to be indicative of control: (1) who controls daily operations; (2) who is in charge of employment, supervision, and dismissal of personnel; (3) whether the licensee has unfettered use of all facilities and equipment; (4) who is in charge of the payment of financing obligations, including expenses arising out of operating; (5) who receives monies and profits from the operation of the facilities; and (6) who determines and carries out the policy decisions, including preparing and filing applications with the Commission.[202]

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[201] *Fifth MO&O*, 10 FCC Rcd at 456 ¶ 96.

[202] *Intermountain Microwave*, 24 Rad. Reg. (P&F) 983 (1963) ("*Intermountain*"); *Application of Ellis Thompson Corp.*, 9 FCC Rcd 7138 (1994) ("*Ellis Thompson*"); *see also News International*, 97 FCC Rcd at 356 ¶ 17; *LA Star Cellular Telephone*, 9 FCC Rcd 7108 at 7110 ¶ 18 (1994) ("*LA Star II*"). We note that a totality analysis does not require a finding of control with regard to all *Intermountain Microwave* factors. Additionally, in reaching our individual conclusions on each of the factors we address herein, we note that each factor may or may not be individually sufficient to support a control finding, but when viewed together, these factors do support our conclusion that DISH has *de facto* control over the Applicants.

57. In evaluating an application for a new license where there is no existing service, we pay particular attention to the terms of all of the relevant agreements among the parties since there is no record of an operating company to inform our analysis of control.[203] In such cases, our determination necessarily involves an assessment of the likely future role of the respective parties in the conduct of the business after grant of the licenses. As the Commission has found in prior cases, although the parties' statements as to how they intend to operate are relevant to a control analysis, "the weight to be ascribed to [such] representations must be evaluated in the light of the entire record."[204] Moreover, we note that SNR's and Northstar's agreements contain language that recites many of the criteria that are evaluated by the Commission in assessing *de facto* control.[205] However,

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[203] *Telephone and Data Systems v. FCC,* 19 F. 3d 655 (D.C. Cir. 1994); *Baker Creek*, 13 FCC Rcd at 18714 ¶ 8.

[204] *Intermountain,* 24 Rad. Reg. (P&F*)* at ¶ 8.

[205] For example, as SNR and Northstar indicate, the LLC Agreements declare that they have "the exclusive right and power to manage, operate and control" and "make all decisions necessary or appropriate to carry on [their] business and affairs." SNR LCC Agreement at ¶ 6.1; Northstar LLC Agreement at ¶ 6.1. Additionally, the Management Services Agreements provide that SNR and Northstar "shall retain authority and ultimate control over . . . the employment, supervision and dismissal of all personnel." SNR Opposition at 13-14. *See* SNR Management Services Agreement at ¶ 4.1; Northstar Management Services Agreement at ¶ 4.1. Furthermore, pursuant to the Spectrum Agreements, SNR and Northstar "shall have all specific rights and powers required or appropriate for the day-to-day management." SNR LLC Agreement at ¶ 6.1; Northstar LLC Agreement at ¶ 6.1

as noted above, the mere insertion of language in agreements to superficially recite the factors set forth in our rules, and in *Intermountain Microwave*, cannot serve to avoid review of the economic realities of the parties' transactions.[206] Our obligation is to consider the entire set of circumstances surrounding an application, not just isolated contractual language inserted in an effort to comply with our rules. Indeed, as VTel notes, the "[p]rospective representations by the parties regarding control…may be highly self-serving, and thus must be accorded the weight indicated by a review of the complete record."[207] Our review of each case considers the connections among and the cumulative effect on control of all of the agreements and their respective provisions, as well as other relevant circumstances and facts that may not appear on the face of the agreements.[208]

58. We have considered SNR and Northstar's respective responses to Petitioners' allegations that the Agreements show that DISH has *de facto* control of the Applicants. Specifically, SNR and Northstar claim that they control their own businesses because they 1) appoint more than 50 percent of their management committees;[209] 2) have authority to appoint, demote and terminate executives that control their day-to-day activities;[210] and 3) play an integral

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[206] *See* note 194, *supra*.

[207] VTel Reply at 17; *Baker Creek*, 13 FCC Rcd at 18714 ¶ 8.

[208] *See* note 202, *supra*.

[209] SNR Opposition at 13; Northstar Opposition at 15.

[210] SNR Opposition at 13; Northstar Opposition at 15-16

role in management decisions.[211] In our analysis, we have considered these arguments and the provisions cited in support thereof and have also independently reviewed those specific contractual provisions within the context of all of the Agreements to determine whether the Agreements demonstrate that SNR and Northstar retain control of their businesses or whether they confer *de facto* control on DISH. As discussed below, we conclude that despite the Applicants' assertions to the contrary, DISH exerts *de facto* control over or power to control SNR and Northstar.

a. Investor Protection Provisions

59. In its Petition, VTel asserts that the Agreements between the Applicants and DISH contain certain restrictions on SNR's and Northstar's ability to undertake a wide range of actions that extend "beyond mechanisms that are designed to protect non-majority or non-voting shareholders" and, together with other factors, confirm that DISH has *de facto* control of or power to control the Applicants.[212] In reply, SNR and Northstar argue that the investor protections in their Agreements with DISH are similar to protections that the Commission has considered in previously granted applications.[213] But our review in a particular case must look at the "totality of the circumstances"[214] and "consider the

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[211] SNR Opposition at 14; Northstar Opposition at 16.

[212] VTel Petition at 19 n. 50.

[213] *See, e.g.,* SNR Opposition at 27-30; Northstar Opposition at 32-34.

[214] *Fifth MO&O*, 10 FCC Rcd at 456 ¶ 96.

Application … as a whole,"[215] not just individual protections. Indeed, as the Commission stated in 1994, "our concerns are greatly increased when a single entity provides most of the capital and management services and is the beneficiary of the investor protections."[216] Based on that review, we find that the extensive provisions requiring DISH consent for a myriad of corporate decisions extend beyond those that give a minority investor a decision-making role in major corporate decisions that fundamentally affect its interests, and instead confer on DISH an impermissible level of control in the management, operations and finances of the Applicants.

60. The LLC Agreements that define the relationships between DISH and each Applicant contain 19 provisions that are designated as investor protections.[217] Investor protection provisions typically are designed to protect the investment of a non-controlling investor or minority shareholder. Such protections do not automatically constitute the potential for such an investor to exercise control over an applicant. As enunciated in *Baker Creek*, "[p]ermissible investment protections typically give the minority shareholder a decision-making role, through supermajority or similar mechanisms, in major corporate decisions that fundamentally affect their interests."[218] The *Baker Creek* order sets forth an

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[215] *Baker Creek,* 13 FCC Rcd at 18718-18719 ¶¶16-18.

[216] *Fifth MO&O*, 10 FCC Rcd at 456 ¶ 96.

[217] SNR LLC Agreement at 12-14, definition of "Significant Matter;" Northstar LLC Agreement at 13-15, definition of "Significant Matter."

[218] *Baker Creek,* 13 FCC Rcd at 18714-18719 ¶ 9.

illustrative list of typical protections including (1) the issuance or reclassification of stock; (2) setting compensation for senior management; (3) expenditures that significantly affect market capitalization; (4) incurring significant corporate debt; (5) the sale of major corporate assets; and (6) fundamental changes in corporate structure.[219] However, as noted in *Baker Creek*, "[i]nvestor protection provisions may confer actual control upon the minority owner where they give it the power to dominate the management of corporate affairs."[220]

61. In the LLC Agreements, DISH has reserved to itself not simply the types of investor protections described as typical in *Baker Creek*, but 19 separate investor protection provisions, each of which requires the prior written consent of DISH before the Applicants can take the specified action.[221] Many of these extend far beyond protections from major corporate decisions fundamentally affecting investor interests and inject DISH deeply into the Applicants' management, finances, and day-to-day operations. They are as follows:

i. any offering, issuance, purchase, repurchase or reclassification of Interests or other Equity Interests or securities (including warrants, options or other rights convertible into or

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[219] *Id.*

[220] *Id.*

[221] SNR LLC Agreement at 12-14, definition of "Significant Matter;" Northstar LLC Agreement, at 13-15, definition of "Significant Matter." The capitalized terms used in the quoted investor protection provisions are defined in the LLC Agreements.

exchangeable for Equity Interests or securities in the Company or any of its Subsidiaries) by the Company or any of its Subsidiaries, except for issuances of Interests to one or more Members so long as the other Members have the right to participate in such issuances *pro rata* in accordance with their respective Percentage Interests;

ii. any agreement or arrangement, written or oral, to which the Company or any of its Subsidiaries is a party, involving a payment or liability that, individually or in the aggregate for all such agreements and arrangements (during any twelve-month period), is greater than ten percent of the annual budget then in effect (other than any such agreements or arrangements approved in any duly adopted annual budget then in effect);

iii. the incurrence, directly or indirectly (for example, by way of guarantee), by the Company or any of its Subsidiaries of indebtedness in excess of ten percent of the annual budget then in effect in the aggregate outstanding amount at any time for all such indebtedness (other than any such indebtedness approved in any duly adopted budget then in effect and other than the obligations of the License Company and its Subsidiaries under the Interest Purchase Agreement and the NSM Security Agreement and the related Subsidiary guarantees and security agreement supplements);

iv. the merger, combination or consolidation of the Company or any of its Subsidiaries with or into any Person other than the Company or a wholly-owned Subsidiary of the Company, regardless of whether the Company or any such Subsidiary is the survivor in any such merger, combination or consolidation; or the sale of all or substantially all of the assets of the Company and its Subsidiaries taken as a whole;

v. the initiation of any Bankruptcy proceeding, liquidation, dissolution or winding up of the Company or any of its Subsidiaries (other than the liquidation of a wholly-owned Subsidiary of the Company into the Company or another wholly-owned Subsidiary of the Company);

vi. the acquisition by the Company or any of its Subsidiaries of any significant portion of assets from another Person; and the formation of any partnership or joint venture involving the Company or any of its Subsidiaries;

vii. changes in the Business Purpose, including any decision by the Company to conduct its business or own any material assets directly or through any Person other than the License Company and its Subsidiaries;

viii. any agreements or arrangements, written or oral, with an Affiliate of the Company or any of its Subsidiaries (whether or not on arm's-length terms and conditions);

ix. any action that is materially inconsistent with the Five-Year Business Plan;

x. (A) termination of the Company's or any of its Subsidiaries' independent accountants or tax advisors unless such accountants or advisors are promptly replaced by a Big Four accounting firm or other accounting firm of nationally recognized standing (provided in each case such firm is an independent registered public accounting firm and will not create independence issues for American II under applicable federal and state securities laws), (B) appointment of the Company's or any of its Subsidiaries' independent accountants or tax advisors unless such accountants or advisors are a Big Four accounting firm or other accounting firm of nationally recognized standing (provided in each case such firm is an independent registered public accounting firm and will not create independence issues for American II under applicable federal and state securities laws), (C) material changes in tax or accounting methods or elections or (D) taking any tax position or making any tax election on behalf of the Company or any of its Subsidiaries;

xi. the authorization or adoption of any amendment to the certificate of formation, limited liability company agreement or any other constituent document (including the exhibits and attachments thereto) of the Company or any of its Subsidiaries;

xii. any agreement or arrangement, written or oral, to pay any director, officer, employee or agent of the Company or any of its Subsidiaries $200,000 or more in any twelve-month period;

xiii. any agreement or commitment by the Company or any of its Subsidiaries not to (A) compete with any other Person, which agreement or commitment continues following the payment of the Put Price, (B) solicit any other Person's business or customers or (C) solicit or hire any other Person's employees;

xiv. the acquisition by the Company or any of its Subsidiaries of any new spectrum licenses (other than those acquired in the Auction);

xv. any expenditure in excess of the lesser of: (i) $2,000,000; or (ii) one percent of the net purchase price of the licenses for which the License Company is the Winning Bidder;

xvi. any deviation of more than ten percent from any line item in any duly adopted annual budget then in effect;

xvii. the sale of any asset outside the ordinary course of operation of the License Company Systems (other than pursuant to the Interest Purchase Agreement, NSM Pledge Agreement and NSM Security Agreement);

xviii. the sale to (A) any Person of any license prior to the fifth anniversary of the Initial Grant Date of such license if the Person acquiring the license is not a Qualified Person; or (B)

any Person of any license at any time except for the licenses set forth on Schedule I to this Agreement to the extent the net winning bids associated with those licenses, either individually or together with licenses previously sold, do not exceed five percent of the Auction Purchase Price (other than, in any such case of (A) or (B), pursuant to the Interest Purchase Agreement, NSM Pledge Agreement and NSM Security Agreement); and

xix. entering into any agreement or commitment to do any of the foregoing.[222]

62. By imposing 19 wide-ranging protections, and considering the nature and scope of the restrictions that they place upon the Applicants taken both as a whole and in the context of DISH's pervasive role as the provider of "most of the capital and management services" and the contractual rights it has been awarded in those respects,[223] DISH has gone beyond what is reasonably necessary and appropriate to protect its investments against extraordinary corporate transactions. Instead, it has inserted itself into the management, operations, and finances of the Applicants to such an extent, when considered with the other control issues we discuss herein, as to

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[222] SNR LLC Agreement at 12-14, definition of "Significant Matter;" Northstar LLC Agreement, at 13-15, definition of "Significant Matter."

[223] *See, e.g.;* SNR Credit Agreement at ¶ 2.3; Northstar Credit Agreement at ¶ 2.3.

amount to *de facto* control over or a power to control the Applicants.

63. Tellingly, DISH, which, as we discuss below, also plays a significant role in the day-to-day operations of the Applicants under the Management Services Agreements and otherwise, has reserved for itself investor protections and rights that extend significantly beyond the more usual and customary types of passive financial investor protections reserved by passive financial investors in SNR and Northstar.[224] We note that even within the same overall business deal, those other investors were content with protections that are reasonably consistent with providing such non-controlling, passive financial investors with a decision-making role only in the types of "major corporate decisions that fundamentally affect their interests."[225] An examination of the individual protections granted to DISH, on the other hand, reveals that they go well beyond the list of six typical investor protections

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[224] *See* September 12, 2014 Limited Liability Company Agreement of SNR Wireless Management, LLC by and Between ASG Airwaves Holdings, Inc., ASG Airwaves Holdings, LLC, ADK Spectrum LP, John Muleta and Atelum LLC (contains investor protections that deal only with major corporate decisions); October 3, 2014 Amended and Restated Limited Liability Company Agreement of Northstar Manager, LLC (by and between Doyon, Limited, Caribou Creek Partners, LLC, Catalyst Investors QP III, LP, Catalyst Investors III, LP, Catalyst QP, Chugach Alaska Corporation), as amended by the First and Second Amendments (which added Dahtsaa, LLC) (contains investor protections that deal only with major corporate decisions).

[225] *Baker Creek,* 13 FCC Rcd at 18714-18715 ¶ 9.

identified in *Baker Creek* and enumerated above[226] that are usual and customary for a purely financial investor that does not intend to control the day-to-day operations of the company in which it has invested. The 19 protections that are contained in the LLC Agreements, particularly when read in the context of the other attributes of control discussed below, have the effect of conferring upon DISH the "power to dominate the management of corporate affairs."[227] Furthermore, contrary to SNR's and Northstar's contentions,[228] the presence of any particular provision or a combination of provisions is not dispositive to our control analysis, which considers each provision within the context of, and in connection with, all of the other factors and provisions unique to each case.

64. Turning to some of the individual protections, one provision states that the Applicants may not enter into any agreement, or series of agreements, involving payments of more than ten percent of the annual budget.[229] On the face of the LLC Agreements, DISH

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[226] *See* ¶ 61, *supra*.

[227] *Id*. The fact that other investors insisted on relatively fewer protections than DISH does not, standing alone, establish whether or not DISH was more than a "passive investor." Our analysis throughout the *Order* here of numerous other attributes of control contained in the Agreements shows that DISH controls the two entities for purposes of our attribution rules. That conclusion is reinforced when one compares the level and type of "protections" that DISH insisted on with the other interest holders.

[228] SNR Opposition at 26; Northstar Opposition at 58-63.

[229] SNR LLC Agreement at ¶ 3.1(b); Northstar LLC Agreement at ¶ 3.1(b).

has no contractual control over the adoption of the budget, other than a right of consultation,[230] so the Applicants in theory should be able to adopt any budget they choose without restriction. However, this provision affords DISH control over additional budget spending, and therefore a "back door" right to control spending decisions in the ordinary course of business.

65. Indeed, this veto right extends even further. The Applicants may not deviate more than ten percent from any line item in an annual budget without DISH's consent.[231] Thus, for example, a line item for office supplies in the annual budget is likely to be a relatively small amount, but this provision would preclude the Applicants from spending more than 110 percent—or less than 90 percent—on the line item without DISH's consent. Considering that the price of the licenses acquired by the Applicants together was over $10 billion, and the costs of nation-wide build-out will be commensurately substantial, requiring the Applicants to obtain DISH's permission to spend additional sums for minor line items in the budget exceeds the role in "major corporate decisions" that investor protections were meant to provide to purely passive investors.[232]

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[230] SNR LLC Agreement at ¶ 6.5(b); Northstar LLC Agreement at ¶ 6.5(b).

[231] SNR LLC Agreement at 14 ¶ xvi (definition of "Significant Matter"); Northstar LLC Agreement at 14, ¶ xvi (definition of "Significant Matter").

[232] For example, apart from DISH, SNR reports two other non-controlling investors: two ASG Airwaves entities that are controlled by BlackRock (7.69 %) and an entity ultimately held by Nathaniel Klipper (6.14 %). *See* SNR Application at Exhibit A;

see also SNR Form 602 at Exhibit A. These passive investors have protections that require their approval for certain actions that could have a major impact their investment in SNR such as: (i) any offering, issuance, purchase, repurchase or reclassification of interests or securities; (ii) the merger, combination or consolidation of the entity or the sale of all or substantially all of the assets (other than through the exercise of the Put Right discussed elsewhere); (iii) the initiation of any Bankruptcy proceeding, or the liquidation, dissolution or winding up of SNR Management; (iv) any change in business purpose; (v) entering into or amending any agreements or arrangements, written or oral, with Atelum as the Manager of SNR Management other than as expressly contemplated by the terms of the relevant agreement; (vi) material changes in tax or accounting methods or elections; (vii) the authorization or adoption of any amendment to the certificate of formation, limited liability company agreement or any other constituent document (including the exhibits and attachments thereto) of SNR Management; (viii) the authorization or adoption of any amendment to the certificate of formation, the LLC Agreement or any other constituent document (including the exhibits and attachments thereto) of SNR, or of any amendment to certain other agreements between the parties, in any manner that could reasonably be expected to adversely affect, directly or indirectly, any Member; (ix) the incurrence of any indebtedness (except as expressly permitted) or the granting of any Lien on all or any part of SNR Management's membership interest in SNR; (x) except in connection with a permitted transfer of interests, the admission of any new members; (xi) entering into any amendment or waiver or granting any consent with respect to, or the Manager's or SNR Management's failing to fully enforce SNR Management's rights and remedies under any of the other related agreements; and (xii) entering into any agreement or commitment to do any of the foregoing. September 12, 2014 Limited Liability Company Agreement of SNR Wireless Management, LLC by and between ASG Airwaves Holdings, Inc., ASG Airwaves Holdings, LLC, ADK Spectrum LP, John Muleta and Atelum LLC at 9-10, definition of "Significant Matter." Unlike DISH, neither of these passive investors have protections that limit the ability of SNR to run its business such as to acquire assets or spectrum from

66. Another example of an overly intrusive provision that purports to be no more than an "investor protection" precludes the Applicants from acquiring any new spectrum holdings other than those acquired in Auction 97 without written permission from DISH,[233] even where the Applicants believe such license acquisitions to be consistent with their business strategy and regardless of how little that spectrum might cost. This provision frustrates the purpose and possible expansion of the Applicants' businesses, which were established to acquire spectrum licenses and, as envisioned by the designated entity rules, develop a network and provide wireless services to the public. For example, the Applicants could not, pursuant to this provision, participate in the Commission's upcoming Incentive Auction, with the goal of securing additional spectrum holdings, without DISH's written approval. Prohibiting the Applicants from deciding, without DISH's consent, to obtain any additional licenses constrains their ability to make judgments about their business operations and goes far beyond the types of

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another entity or sell assets or spectrum, limit the amount it can pay employees or limit its expenditures. Instead, their investor protections appear to limit the passive investors' decision-making abilities to "major corporate decisions that fundamentally affect their interests." *Baker Creek*, 13 FCC Rcd 18714-18715, ¶ 9. Other investors in Northstar had similar protections against fundamental corporate changes. October 3, 2014 Amended and Restated Limited Liability Company Agreement of Northstar Manager, LLC at 11, ¶ 3.1(b).

[233] SNR LLC Agreement at 14 ¶ xiv (definition of "Significant Matter"); Northstar LLC Agreement at 14 ¶ xiv (definition of "Significant Matter").

investor protections necessary to protect DISH's investment.

67. DISH may also veto "any expenditure in excess of $2,000,000."[234] Considering the large number of licenses for which SNR and Northstar were each winning bidders, the vast markets that these licenses cover, and the construction costs that build-out will entail, this veto right effectively places DISH in the position of having the power to control expenditures that will likely be essential to the Applicants' build-out and operation of their facilities.

68. In sum, we find that, when considered as part of the totality of the circumstances, which include the other factors we consider below, the so-called investor protections in the LLC Agreements extend beyond those that give a minority investor a decision-making role in major corporate decisions that fundamentally affect its interests and instead confer on DISH an impermissible level of control in the management, operations and finances of the Applicants under Section 1.2110 of the Commission's rules.

b. Control Over Daily Operations

69. Another factor that we have considered in our *de facto* control analysis is whether SNR and Northstar have *de facto* control over their daily operations. Because the Applicants have yet to commence service, we look to the intention of the

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[234] SNR LLC Agreement at 14 ¶ xv (definition of "Significant Matter"); Northstar LLC Agreement at 14 ¶ xv (definition of "Significant Matter"). The provision states that any expenditure in excess of the lesser of $2,000,000 or one percent of the net purchase price requires DISH consent. We note that one percent of Northstar's winning bids would be nearly $50 million.

parties regarding the management and control of day-to-day operations as set forth in their agreements in order to make our determination. In considering provisions in the agreements that SNR and Northstar have claimed are indicative of their exclusive right to manage, operate, and control their systems,[235] against numerous other provisions that suggest otherwise, we conclude that DISH controls SNR's and Northstar's daily operations. As discussed below, notwithstanding language in the Agreements purporting to give SNR and Northstar control over day-to-day operations,[236] the substance of the Agreements clearly grants DISH an impermissible level of control over fundamental aspects of the Applicants' daily operations.[237]

70. We agree with VTel that the circumstances presented here are similar to those presented in *Baker Creek*, in which Hyperion, ostensibly a non-controlling investor, was found to possess an impermissible level of control over the daily operations of Baker Creek contrary to the Commission's DE rules.[238] In that case, Hyperion had the authority to manage Baker Creek's marketing, record keeping, representation before the government, contract negotiations, employment decisions, system maintenance, engineering, design, and operation, and assist with Commission filings. Additionally, Baker Creek's partnership agreement

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[235] *See* SNR Opposition at 23-24; Northstar Opposition at 18-19.

[236] SNR Opposition at 23-24; Northstar Opposition at 19; SNR Management Services Agreement at ¶¶ 2.1, 4.1, 6.1; Northstar Management Services Agreement at ¶¶ 2.1, 4.1, 6.1.

[237] *See Ellis Thompson*, 9 FCC Rcd at 7141 ¶¶ 22-23.

[238] VTel Reply at 14.

gave Hyperion the authority to manage "day to day operations conducted in accordance with Baker Creek's business plan," which Baker Creek did not "fully" control as it was required to consult with Hyperion thereon.[239] The Division found that these duties, in conjunction with the fact that Baker Creek was "not in control of its budget" or business plan, amounted to Hyperion's management of the day-to-day operations of Baker Creek "in accordance with the business plan ultimately authorized by Hyperion itself."[240]

71. In response to VTel's argument that DISH's role as a manager of SNR's and Northstar's construction and operation under the Management Services Agreements, together with other factors, demonstrates *de facto* control,[241] SNR argues that a management agreement only confers *de facto* control if it meets the specific criteria set forth in Section 1.2110(c)(2)(ii)(H) of our rules.[242] We disagree. To be sure, Section 1.2110(c)(2)(ii)(H) provides certain criteria that define a management agreement that will, in and of itself, confer *de facto* control on the manager.[243] However, contrary to SNR's and

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[239] *Baker Creek,* 13 FCC Rcd at 18719 ¶ 17.

[240] *Id.* at 18718-18719 ¶¶ 16- 17.

[241] VTel Reply at 18-19.

[242] SNR Opposition at 32; 47 C.F.R. § 1.2110(c)(2)(ii)(H).

[243] We find below that DISH is a person who manages the operations of SNR and Northstar and satisfies the controlling interest criteria of Section 1.2110(c)(2)(ii)(H), which provides an independent ground for attributing *de facto* control of the Applicants to DISH. *See* Section III.C.2 (Controlling Interest of the Operations Manager Under Section 1.2110(c)(2)(ii)(H)), *infra.*

Northstar's claims, even if those Agreements did not meet the Section 1.2110(c)(2)(ii)(H) criteria, the existence of a management agreement conveying rights and obligations to build out, manage, and operate an applicant's network is clearly a factor that is relevant to our overall consideration of whether control exists.[244] Indeed, since the early days of our auction program in 1994, we have "emphasize[d] that our concerns are greatly increased when a single entity provides most of the capital *and management services* and is the beneficiary of the investor protections"[245]—and all three of those factors exist here.

72. Moreover, although management agreements between an investor and an applicant are not in and of themselves necessarily dispositive of *de facto* control or the power to control under our rules,[246] the existence of a management agreement whereby the provider of a majority of the applicant's capital who is the beneficiary of investor protections and other rights as an owner and lender, also serves as the manager of the applicant's daily operations, warrants particularly close attention.[247] The SNR and Northstar Management Services Agreements, which provide for

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[244] *See, e.g.*, *Baker Creek,* 13 FCC Rcd at 18719 ¶ 18.

[245] *Fifth MO&O*, 10 FCC Rcd at 456 ¶ 96 (emphasis added).

[246] *Fifth R&O*, 9 FCC Rcd 5532 at ¶ 158 n. 135.

[247] *Baker Creek,* 13 FCC Rcd at 18719 ¶ 18 (noting that such a structure would be subject to "close examination"); *see also Fifth MO&O*, 10 FCC Rcd at 456 ¶ 96 (noting that concerns are increased when a single entity provides most of the capital and management services and is the beneficiary of the investor protections).

a DISH entity to act as the Operations Manager of the entire build-out plan for each Applicant, give DISH effectively the same authority as Hyperion possessed in *Baker Creek* to "supervise, directly or through agents or subcontractors, the day-to-day build-out and operation" of SNR and Northstar, including the authority, as in *Baker Creek*, to manage the Applicants' marketing,[248] record keeping,[249] contract negotiations,[250] employment decisions,[251] system maintenance, engineering, design, and operation, and to assist with Commission filings.[252] Despite some self-serving language in the Management Services Agreements and the Applicants' assurances to the contrary, we agree with VTel that, in the circumstances presented here, "no meaningful limit exists on the ability of DISH, through its subsidiaries, to influence or dictate the build-out, management, and operation of SNR and Northstar's wireless systems,"[253] particularly in light of our conclusion below that the Applicants do not fully control their own business plans.

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[248] SNR Management Services Agreements at ¶¶ 2.1, 2.2; Northstar Management Services Agreement at ¶¶ 2.1, 2.2.

[249] SNR Management Services Agreement at ¶ 8.1; Northstar Management Services Agreement at ¶ 8.1.

[250] SNR Management Services Agreement at ¶ 2.2(a); Northstar Management Services Agreement at ¶ 2.2(a).

[251] SNR Management Services Agreement at ¶¶ 2.1, 2.2(f), 5.2; Northstar Management Services Agreement at ¶¶ 2.1, 2.2(f), 5.2.

[252] SNR Management Services Agreement at ¶ 2.1; Northstar Management Services Agreement at ¶ 2.1.

[253] VTel Reply at 19.

73. Furthermore, although the Applicants are ostensibly responsible for updating the business plans, the mandatory consultations with DISH are particularly pertinent when considered in light of the fact that, as discussed in further detail below, DISH controls SNR's and Northstar's compensation and is thereby able to influence SNR's and Northstar's decisions. As VTel points out, "neither SNR nor Northstar offers any specific parameters that govern DISH's role in developing their business plans and budgets, nor do they point to any meaningful limits on DISH's power over such development."[254] Accordingly, we agree with VTel that DISH's broad consultative role effectively amounts to "veto power," because "it is doubtful that either SNR or Northstar would ever cross DISH"[255] given the leverage that DISH possesses over them.

74. Moreover, as discussed more fully below,[256] the cap of **[REDACTED]**[257] on the total annual compensation that can be paid to the LLC Managing Member of each Applicant is hardly sufficient to support the number of management, financial, and technical employees that we would expect to be required to fully develop an operating budget and perform the myriad other tasks necessary for an enterprise that is obligated to construct and operate a wireless telecommunications network spanning the

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[254] VTel Reply at 18.

[255] VTel Reply at 18.

[256] *See* Section III.C.1.c (Employment Decisions), *infra*.

[257] SNR LLC Agreement at ¶ 6.6; Northstar LLC Agreement at ¶ 6.6.

nation. In addition, DISH, by controlling the purse-strings, and at the same time dictating the technology to be used by the Applicants when building out, operating, and managing their networks, as well having provided the bulk of their capital, will have significant influence over the Applicants' business plans and their entire operations. As a result, it is reasonable to conclude that neither SNR nor Northstar is fully in control of its business plans, particularly in light of the role that DISH, as an 85 percent investor and a multi-billion dollar lender, is likely to play in this start-up business. We therefore conclude that DISH's duties identified above, in conjunction with the business plan that it either prepared or participated in preparing, are important indicia of DISH's control over SNR's and Northstar's daily operations.

75. The termination provisions of the Management Services Agreements further substantiate our conclusion that SNR and Northstar do not effectively control the DISH entity that acts as the Operating Manager. While the Management Services Agreements state that the Applicants can terminate their Management Services Agreements with DISH,[258] these provisions contain significant deterrents. First, SNR's and Northstar's ability to terminate the Management Services Agreements for cause is undermined by restrictive provisions in these Agreements that prescribe a complex, costly, and lengthy process, culminating in arbitration, to establish whether a breach of contract has even been

[258] SNR Management Services Agreement at ¶ 10.2(a); Northstar Management Services Agreement at ¶ 10.2(a).

committed by DISH. Specifically, the Management Services Agreements require that SNR and Northstar notify DISH if they believe a material breach has occurred, at which point a 30-day "Meet and Confer" period is triggered, wherein the parties must attempt to determine "whether" a material breach by DISH has occurred, and if so, an appropriate manner for correcting such breach.[259] Thus, SNR and Northstar must confer with their 85 percent shareholder and multi-billion dollar lender as to whether a breach has occurred, and if they cannot agree on whether a breach has occurred, SNR and Northstar may only terminate the Agreements after filing for arbitration and receiving a final arbitral award confirming the breach of contract. We find that these onerous, if not coercive, procedures establish significant hurdles that affirmatively deter the Applicants from terminating the Management Services Agreement even when they have cause to do so.[260]

76. Second, although the Applicants can terminate the Management Services Agreements at will, we note that DISH requires 12 months' notice of such a termination.[261] If the Applicants were truly in

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[259] *Id.*

[260] We note that the Management Services Agreements provide the Applicants a remedy in lieu of termination. SNR Management Services Agreement at ¶ 10.3; Northstar Management Services Agreement at ¶ 10.3. But this provision requires SNR and Northstar to pay for the "Failed Services" and then seek reimbursement from DISH, which is an illusory remedy given the Applicants' limited ability to obtain third-party financing.

[261] SNR Management Services Agreement at ¶ 10.2(a)(iv); Northstar Management Services Agreement at ¶ 10.2(a)(iv).

control of their operations, once they have decided that they wish to part company with their Operating Manager, they should be able to do so upon reasonable notice. To require 12 months' notice is, in our view, another example of DISH's power to control the management and operation of the Applicants' business.

77. Third, there also is a strong deterrent against termination of the Management Services Agreements contained in the Credit Agreements between DISH and each of the Applicants. The Credit Agreements impose substantial financial penalties on SNR and Northstar if they terminate the Management Services Agreements for any reason other than a material breach (which can only be accomplished by the onerous process discussed above). For example, if the Applicants exercise their contractual rights to terminate the Management Services Agreement at will by giving 12 months' notice, the **[REDACTED]** annual interest rate on the loans will automatically increase to **[REDACTED]** per annum.[262] The higher interest rate is also triggered in certain instances in which SNR and Northstar seek to terminate DISH as Operating Manager for cause if, for example, DISH's act or omission results in the cancellation by the Commission of any of the Applicants' licenses. Thus, even were DISH to cause an Applicant to lose licenses and the Applicant then terminates DISH as Operating Manager after the complex, costly, and lengthy process described in paragraph 75, the interest rate on the Applicant's multi-billion dollar loans would

[262] SNR Credit Agreement at ¶ 2.3(a); Northstar Credit Agreement at ¶ 2.3(a).

increase by **[REDACTED]** percent per annum.[263] Given the multi-billion dollar debt required to obtain these licenses and build out such an extensive wireless network by each of the Applicants, these provisions operate as a powerful limit on their ability to control the actions of their Operations Manager. The opportunity is again illusory—if the parties are unable to reach an agreement, and either the Applicant or DISH terminates their Management Services Agreement, the Applicant will be subject to the higher interest rate.

78. All of these restrictions on the Applicants' ability to terminate the Management Services Agreements detract from their ability to fully control the operations and management of their own businesses by giving DISH effective control over the Applicants' business plans and operations and imposing significant penalties on the Applicants if they try to exercise the authority they have nominally been afforded on the face of the Management Services Agreements.

c. Employment Decisions

79. Another factor in evaluating whether *de facto* control exists is the manner in which employment decisions are made, including, among other things, the ability to exert control over decisions regarding staff at all levels and compensation decisions with respect to the Applicants themselves. Here, we find that the extremely limited LLC management fee that is provided for in the LLC Agreements makes it unlikely

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[263] *Id.*; SNR Management Services Agreement at ¶ 10.2(a)(ii); Northstar Management Services Agreement at ¶ 10.2(a)(ii).

that SNR and Northstar would be able to retain and pay for sufficient employees and supporting facilities to realistically exercise control over their respective businesses. Specifically, as discussed above, the LLC Agreements provide for a maximum annual fee of **[REDACTED]** to be paid to the LLC Managing Members for use in covering not only their costs for personnel and related expenses, but also for all of the other operating costs of their businesses.[264] We conclude that the effect of these financial constraints, and the scope of DISH's control over the purse-strings, is that SNR and Northstar will lack sufficient personnel and other resources to effectively oversee operations and instead will need to rely on DISH, as Operations Manager, for virtually every aspect of running their business, without appropriate control by the Applicants.

80. VTel points out that, to the extent that SNR and Northstar may nominally have the ability to choose their own employees, the LLC Agreements nonetheless restrict the Applicants from entering into any agreements to pay any of their personnel more than $200,000 annually.[265] This is another area regarding control of employment whereby SNR and Northstar are constrained to operate within the parameters of predetermined amounts, particularly given the size of the network required to build-out licenses spanning the nation, and have no authority to

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[264] SNR LLC Agreement at ¶ 6.6; Northstar LLC Agreement at ¶ 6.6.

[265] VTel Petition at 19 n. 50.

adjust them as they may, in their discretion, deem necessary once they obtain their licenses.

81. The power to determine a company's own compensation is another factor that is "relevant to the question of control over employment decisions,"[266] and control is indicated where an entity is compensated with a fee rather than through compensation normally associated with ownership - profit.[267] As previously stated, the compensation for SNR and Northstar in the form of annual LLC management fees to the LLC Managing Member has already been set by the LLC Agreements at a maximum of **[REDACTED]**, and the Agreements lack a mechanism for the Applicants to adjust these amounts. The only way that these amounts could be increased is if DISH were to agree to do so, which gives DISH additional leverage over the financial affairs of SNR and Northstar. Moreover, SNR's and Northstar's predetermined compensation here resembles a salary rather than a distribution of profits that a controlling owner would normally expect

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[266] In *Baker Creek*, the staff held that the power to determine a company's own salary was "relevant to the question of control over employment decisions." Noting that Baker Creek did not have the authority to alter its own salary, which was set by the agreements at $100,000, and that the amount appeared more like a salary than as compensation normally associated with ownership, the staff concluded that this factor provided further evidence of Hyperion's control over Baker Creek. *Baker Creek,* 13 FCC Rcd at 18720 ¶ 20.

[267] Given the changes in the marketplace since 1998 and the magnitude of the operations contemplated in the Agreements, which dwarf the $25.6 million commitment for LMDS licenses by Hyperion, the fact that the Applicants' caps are **[REDACTED]** higher than the cap in *Baker Creek* is immaterial.

to receive.[268] This cap must also be analyzed in light of the absence of any limit on the ability of the Operations Manager to hire and fire personnel to assist in the wide range of functions it is charged with providing as described above, providing persuasive evidence of the likely role of DISH in managing and operating Applicants' businesses. Thus, DISH has the freedom to define the amounts of its own compensation as Operating Manager, subject only to "consultation and direction" from the Applicants, who may not be able to exercise meaningful control in that regard given their own limited resources.

82. In addition to the compensation arrangements discussed above, which are not compatible with the Applicants' actually having the ability to manage and operate their businesses, we conclude that notwithstanding the Applicants' contention that language in the Agreements purports to give SNR and Northstar the power to "retain authority and ultimate control over … the employment, supervision and dismissal of all personnel providing services,"[269] a number of other provisions give DISH a predominant role in the Applicants' employment decisions. Specifically, the Management Services Agreements stipulate that DISH shall provide or arrange for "administrative, accounting, billing, credit, collection, insurance, purchasing, clerical and such other general services as may be necessary to administer the

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[268] *Baker Creek,* 13 FCC Rcd at 18720 ¶ 20.

[269] SNR Opposition at 26; SNR Management Services Agreement at ¶ 4.1; Northstar Opposition at 22; Northstar Management Services Agreement at ¶ 4.1.

License Company Systems."[270] Additionally, DISH shall supervise additional activities such as "retaining necessary sales personnel and technical support for sales operations."[271] Although the Agreements provide that such decisions should be made with "directions and guidance from, and in consultation" with SNR and Northstar,[272] we conclude that DISH has the power to control the actual selecting, arranging and supervising of employees, with little direct involvement by the Applicants given the meager personnel resources that SNR and Northstar will be able to afford and DISH's financial leverage over the Applicants should they disapprove of DISH's choices.

83. There are other important employment decisions set forth in the Agreements that demonstrate DISH's power to control employment decisions. In particular, DISH has the authority to designate a "Systems Manager," who will serve as the single point of contact with the Applicants for the performance of DISH's duties as Operations Manager and who only needs be "reasonably acceptable" to SNR and Northstar.[273] Further, DISH may employ other individuals to be the representative for each market or several markets, again subject only to the proviso that they be reasonably acceptable to SNR and

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[270] SNR Management Services Agreement at ¶ 2.1; Northstar Management Services Agreement at ¶ 2.1.

[271] SNR Management Services Agreement at ¶ 2.2(f); Northstar Management Services Agreement at ¶ 2.2(f).

[272] SNR Management Services Agreement at ¶ 2.1; Northstar Management Services Agreement at ¶ 2.1.

[273] SNR Management Services Agreement at ¶ 5.1(a); Northstar Management Services Agreement at ¶ 5.1(a).

Northstar.[274] That the Applicants will not have a role in the initial selection process for their own representatives is further evidence of DISH's power to control their future operations. We are not persuaded that self-serving language in the Management Services Agreements allowing the Applicants to replace, reassign, or reject personnel in the aforementioned positions overcomes DISH's power to control those appointments, particularly given DISH's ability to exert pressure on SNR's and Northstar's decision-making through limits on their salaries, dependency of their financing, the difficulty in and penalties attached to terminating the Management Services Agreements, and the other circumstances discussed herein.[275]

d. Responsibility for Financial Obligations

84. Another indicator of whether a company will be in control of its own business is the extent to which it has responsibility for its financial obligations. An analysis of the financial aspects of the Applicants' organizations includes such matters as whether SNR and Northstar have control of their own accounts, the sources of their capital, and the ability to secure financing.[276] The record demonstrates that DISH dominates the financial aspects of SNR's and Northstar's businesses. Applicants are both

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[274] SNR Management Services Agreement at ¶ 5.1(a); Northstar Management Services Agreement at ¶ 5.1(a).

[275] SNR Opposition at 26; Northstar Opposition at 22; SNR Management Services Agreement at ¶ 5.1(c); Northstar Management Services Agreement at ¶ 5.1(c).

[276] *Baker Creek,* 13 FCC Rcd at 18721-18723 ¶¶ 23-25.

dependent upon DISH for the amount of capital that they may acquire and the sources of capital available to them. Initially, we note that DISH is the source of the vast majority of SNR's and Northstar's capital, beginning with the initial payment stage of Auction 97, continuing through the final payment, and persisting for future financial obligations such as build-out and operating costs. In total, DISH has provided equity contributions and loans to the Applicants that account for approximately 98 percent of the winning bid amounts and has further agreed to provide all future funds for build-out and working capital.[277] While we do not agree with VTel that the mere percentage of an investor's equity contribution is alone determinative of *de facto* control, we nevertheless consider the unprecedented amounts of combined equity and debt funding here in conjunction with the other factors discussed herein to be pertinent to our analysis, and we find that it is one indicator of the level of DISH's control to be considered in conjunction with the totality of the circumstances here.

85. We also are concerned that the Credit Agreements appear to restrict the Applicants from obtaining additional funding from alternative sources, thereby further intensifying SNR and Northstar's dependence on DISH. We agree with VTel that SNR and Northstar essentially lack authority to raise capital without DISH's consent.[278] The Credit Agreements state that each of the Applicants is

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[277] SNR Credit Agreement, Recitals; Northstar Credit Agreement, Recitals.

[278] VTel Reply at 20.

restricted to a total of $25 million in purchase money financing and is likewise restricted from acquiring more than $25 million in debt aside from the debt they acquire from DISH.[279] These amounts are trivial in comparison to the value of the spectrum (together approximately $13 billion before the requested discounts) and the potential costs associated with building and operating an extensive network or otherwise utilizing the substantial amount of spectrum acquired during this auction. While we agree with SNR and Northstar that the Commission has, in some contexts, acknowledged that restrictions on raising debt have been considered acceptable investor protections in some circumstances,[280] when we consider the restrictions found here in terms of the totality of all other restrictions and provisions by which SNR and Northstar are bound to DISH, we find that this restriction goes too far and along with the other matters discussed herein supports our conclusion that DISH has *de facto* control of and the power to control SNR and Northstar.

86. SNR's and Northstar's assertions that the Applicants maintain separate bank accounts from DISH and do not comingle their funds ignore the fact that the Applicants have derived, and will likely continue to derive, virtually all of their monies from

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[279] SNR Credit Agreement at ¶ 6.9(g); Northstar Credit Agreement at ¶ 6.9(g).

[280] SNR Opposition at 29; Northstar Opposition at 32; *Fifth MO&O*, 10 FCC Rcd at 447-48 ¶ 81.

DISH.[281] Similarly, SNR's and Northstar's claims that DISH cannot force them to incur debt outside the ordinary course of business, enter into individual contracts valued over $100,000,[282] or to be obligated to pay expenses over $100,000 are also unpersuasive as evidence of the Applicants' control given that DISH has undertaken to provide for Applicants' financing and to incur as Operations Manager essentially all of the expenses required for designing, constructing, and operating their licensed networks and marketing their services. Finally, we agree with VTel[283] that SNR's and Northstar's claims that their contractual ability to select their own financial institutions for loans signifies their retention of control of their financial obligations are not persuasive given the severe restrictions on their abilities to secure financing from any lender other than DISH.[284]

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[281] SNR Opposition at 18; Northstar Opposition at 18; SNR Credit Agreement at ¶ 6.19(a); Northstar Credit Agreement at ¶ 6.19(a).

[282] Contracts cannot have an aggregate value over $250,000. SNR Management Services Agreement at ¶ 4.2 (a)(ii)-(iv); Northstar SNR Management Services Agreement at ¶ 4.2 (a)(ii)-(iv). We are unconvinced by other examples of control provided by SNR and Northstar, *see, e.g.,* SNR Opposition at 16-18; Northstar Opposition at 24, which are overshadowed by the more significant issues in which DISH has retained control as discussed in this section.

[283] VTel Reply at 20.

[284] SNR Opposition at 16; Northstar Opposition at 23. *See also* Section III.C.1.d (Responsibility for Financial Obligations), *supra.*

e. Receipt of Monies and Profit

87. The receipt of funds derived from an entity's business ventures, as well as the manner in which profits are distributed among business partners, are other significant factors to consider in a control analysis. SNR and Northstar argue that they meet the control standard for receipt of monies[285] because the Agreements provide that SNR and Northstar will maintain separate accounts[286] and collect the monies generated from their operations.[287]

88. A preliminary review of the Agreements reflects that the profits generated by SNR's and Northstar's operations are to be distributed *pro-rata* in accordance with the ownership interests of the parties.[288] When examined alone, these provisions appear to be conventional cash collection and profit distribution arrangements. However, when considered in conjunction with other provisions in the Agreements that dictate the distribution of revenues received, we find that the business arrangements between the parties are structured in such a way that

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[285] SNR Opposition at 26; Northstar Opposition at 26.

[286] SNR LLC Agreement at ¶ 6.4(a); Northstar LLC Agreement at ¶ 6.4(a); SNR Management Services Agreement at ¶ 7.2(a); Northstar Management Services Agreement at ¶ 7.2(a).

[287] SNR Management Services Agreement at ¶ 4.1; Northstar Management Services Agreement at ¶ 4.1.

[288] SNR Opposition at 27; Northstar Opposition at 25-26; ; SNR LLC Agreement at ¶¶ 3.1(a), 4.1, 6.4; Northstar LLC Agreement at ¶¶ 3.1(a), 4.1, 6.4; SNR Management Services Agreement at ¶ 4.1(a); Northstar Management Services Agreement at ¶ 4.1(a); SNR Credit Agreement at ¶ 2.3(e); Northstar Credit Agreement at ¶ 2.3(e).

the profits are likely only to benefit DISH. Indeed, there are serious questions as to whether *any* profits could be generated that could result in distributions to SNR and Northstar.

89. There are a number of provisions in the Agreements that support our conclusion. For example, prior to realizing any profits from their business operations, SNR and Northstar must first repay the billions of dollars in loans they have secured from DISH. Specifically, the Credit Agreements that they each signed charge interest on the loans at the rate of **[REDACTED]** per annum.[289] The interest is capitalized during the initial five years of the term of the loan.[290] If the Applicants are building out their respective networks during the first five years of the loan, it is unlikely that any profits will be generated. In years five-to-seven of the loan, even if profits are realized, the amount of cash in excess of a reasonable reserve for expenses must be paid to DISH as lender to reduce the multi-billion dollar loans to SNR and Northstar. The Credit Agreement terminates after year seven, and the Applicants are required thereupon to repay the full remaining balance of the loan plus accrued interest. We acknowledge that, in some circumstances, it may be reasonable for a lender to restrict distributions while its loan is outstanding, but here the restriction, when coupled with the other overreaching and intrusive provisions that are discussed in this order, firmly raises the specter of

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[289] SNR Credit Agreement at ¶ 2.3(a); Northstar Credit Agreement at ¶ 2.3(a).

[290] SNR Credit Agreement at ¶ 2.3(c); Northstar Credit Agreement at ¶ 2.3(c).

control. In addition, we note that the Applicants have signed Trademark Agreements that require them to pay DISH **[REDACTED]** if they use Dish's Trademarks. This agreement allows DISH to obtain a priority distribution over the Applicants. Thus, the Credit Agreements require all excess cash to be paid to DISH, and in the unlikely event anything is left over, the Trademark Agreements require royalties to be paid to DISH.

90. In addition, as stated above, under the Credit Agreement the balance of the loan must be repaid in full at the end of the seventh year of the term.[291] In these circumstances, given the Applicants' extensive build-out requirements, the transactional documents effectively ensure that the Applicants are highly unlikely to ever see any profit during the term of the loan. Instead, we view the transactional documents as providing the Applicants with an annual income, via the LLC management fee, for which they oversee building a network chosen at DISH's direction and operated by DISH, as Operations Manager, followed by a put option whereby, if exercised, SNR and Northstar will receive the amount of their capital investment plus interest at the rate of **[REDACTED]** per annum for five years. The Applicants are therefore receiving a fixed rate of return and any profits that are generated during the term of the loan will only accrue to DISH.

91. Additionally, while the Management Services Agreements require that the Applicants reimburse

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[291] SNR Credit Agreement at ¶ 2.3(d); Northstar Credit Agreement at ¶ 2.3(d).

DISH for all out of pocket expenses for managing the build-out and operation of the network,[292] there is no set amount for DISH's compensation. Instead, the work under the contract will be performed by the DISH contracting party or will be sub-contracted to another DISH affiliate or possibly a third party. DISH will include an element of profit in its invoices for any of these arrangements that will be passed on to the Applicants for payment.[293] This structure, unlike a set management fee, enables DISH to control the profit element of the operations which, when coupled with the Credit Agreement issues raised above, makes it unlikely that the Applicants would retain any of the revenues or profits generated by the business.

92. The issues with the Credit Agreement are exacerbated by the repayment terms that require repayment of 50 percent of the loans between the fifth and seventh years of the term, and the balance as a balloon payment at the end of year seven. We note that by the commencement of the repayment, the loans for the payment on the licenses alone are likely to be $4,111,773,225 for SNR and $5,883,794,550 for

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[292] SNR Management Services Agreement at ¶ 7.1; Northstar Management Services Agreement at ¶ 7.1.

[293] SNR and Northstar are required to reimburse DISH for its out of pocket Expenses (*i.e.,* the costs and expenses of managing the build-out and network operations) and its allocated costs, as defined in the Management Services Agreements (to include the costs of shared employees, among other costs). SNR Management Services Agreement at ¶ 7.1; Northstar Management Services Agreement at ¶ 7.1. The costs that will be charged to DISH by third parties will include an element of profit. If the third parties are DISH affiliates, they will benefit from an additional element of profit.

Northstar, plus an additional **[REDACTED]** percent per annum, which is capitalized, plus an as yet undetermined amount with respect to the build out and operating costs of the networks. Such onerous obligations appear likely to ensure that SNR and Northstar will likely have no ability to share in any profits, as would be expected in a normal ownership situation—quite apart from the incentive they provide for Applicants not to remain as licensees.

93. We also find the circularity by which the funds flow from DISH, as lender, to the Applicants and then back to DISH, as Operating Manager, to be indicative of the locus of control over the financial aspects of their business. All funds come from DISH, apart from a small amount of start-up capital, and those funds are used to pay DISH for build-out and operations. The only cash that the Applicants see is their modest annual $ **[REDACTED]** LLC management fee from DISH. This arrangement is difficult to square with any assertion that Applicants will be managing the finances of the licensed operations and results in the appearance that the Applicants are wholly-owned subsidiaries of DISH.

f. Control of Policy Decisions

94. Because policy decisions are crucial to the daily functioning, future outlook, and independence of an entity, we expect that, among other things, an autonomous entity would retain control of major decisions affecting the use of their licenses, such as technology selections, whether to expand their respective businesses by purchasing additional spectrum licenses, and of course, the fundamental choice of whether to remain in operation. Here,

however, there are a number of provisions that restrict SNR and Northstar from critical decisions that would normally remain within an independent entity's control.

95. A review of the transactional documents entered into between the parties strongly suggests that DISH has the ability to control important policy decisions that we would expect to be in the hands of the Applicants if they truly controlled their business and operations. SNR and Northstar argue that they are in control of policy decisions because the documents recite that they have the exclusive right to manage and control their businesses and to make all decisions necessary to carry on their business affairs.[294] However, once again, we find that this language is unconvincing as it is undercut by other provisions that combine to cede to DISH the power to control management and operation decisions. We are likewise unconvinced by SNR's and Northstar's contention that they retain "sole discretion" to decide whether to participate in any services DISH recommends for their systems because there are interoperability provisions that directly contradict this claim,[295] and moreover, as discussed herein, the limits on their employment discretion and financial independence provide DISH with the power to control their decisions. While we agree with SNR and Northstar that actual "final say" on policy making is

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[294] SNR Opposition at 19-20, Northstar Opposition at 19-20. *See, e.g.,* SNR LLC Agreement at ¶ 6.1; Northstar LLC Agreement at ¶ 6.1; SNR Management Services Agreement at ¶ 4.1; Northstar Management Services Agreement at ¶ 4.1.

[295] *See, e.g.*, ¶¶ 96-97, *infra*.

germane to an analysis of *de facto* control, we find that any such provisions here are undermined by the many ways in which DISH possesses leverage to exert control over the Applicants, as discussed herein.

96. *Interoperability Provisions*. Of particular significance is the fact that, as VTel points out, SNR and Northstar are compelled to use technology that is compatible with DISH's own systems notwithstanding the fact that other technologies might be available or more appropriate to the Applicants' business plans (assuming, of course, that they have plans that are not controlled by DISH).[296] This requirement is unnecessarily restrictive because none of the parties currently have an operating wireless system. If SNR and Northstar were in control, we would expect that they would be empowered to select the technology for their operations. Instead, they must wait for DISH to select a technology and then ensure that their own systems are interoperable with it.

97. The Applicants respond to VTel's claim by noting simply that "as with other provisions previously identified by VTel, the Commission has expressly approved technology commitments …."[297] We note that this is markedly different from agreeing to an interoperability provision with an existing carrier with existing networks and network technology. In that context, prior to entering into the contractual relationship, the DE is able to assess whether that identifiable network technology would be compatible with its own independent business plan.

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[296] VTel Reply at 16.

[297] SNR Surreply at 4 n. 15; Northstar Surreply at 4.

However, in this case, DISH lacks an existing network and service, and instead of SNR and Northstar making a conscious choice as to whether DISH's network would be consistent with their business plans, DISH retains control over that future decision, and SNR and Northstar are obligated to implement whatever network technology DISH may choose for its own business purposes. Nothing in SNR's or Northstar's Agreements with DISH, or in their pleadings in this proceeding, has demonstrated that they will have any meaningful role, let alone control, over the decision. We must conclude, therefore, that DISH has *de facto* control over the critical decision of both SNR and Northstar as to their choice of network technology and therefore also of the services that they will be able to offer. In our view, the technology selected, and ultimately, the direction of their business, is one of the most critical decisions a licensee can make regarding its spectrum holdings, and neither SNR nor Northstar is given the opportunity to control that decision.

98. *Restrictions on Acquisition of Additional Spectrum*. Limitations on an entity's range of business options are clearly also a relevant factor in determining control of a company's policy decisions.[298] SNR and Northstar are prevented from expanding their businesses by restrictions placed on their acquisition of additional spectrum licenses. The LLC Agreements require SNR and Northstar to secure written permission from DISH, in its sole and absolute discretion, which can be withheld for any reason or for no reason whatsoever, prior to acquiring *any* new

[298] *Baker Creek,* 13 FCC Rcd at 18724 ¶ 28.

spectrum licenses.[299] Such a requirement belies SNR's and Northstar's claims of independence, quite apart from the restrictions on obtaining alternative financing for such acquisitions and the lack of any obligation of DISH to fund the acquisition or build-out of any licenses other than the licenses acquired at Auction 97.[300] The inability to determine the spectrum licenses that the Applicants consider necessary for the proper operation of their businesses undermines their claims of independence and augments DISH's dominance over SNR and Northstar.

99. *Control of Network Construction*. We also find that SNR and Northstar are not in control of the policy decision regarding the timing of construction of their systems. Although the Agreements provide that the Applicants will direct the construction schedule and plans, this must be done in consultation with DISH.[301] While these arrangements might be unexceptional on their face, they take on a different aspect given that the Applicants' networks must be interoperable with DISH's network. As a practical matter the Applicants simply cannot commence *any* construction of their networks unless and until DISH unilaterally chooses

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[299] SNR LLC Agreement, at 14, definition of "Significant Matter;" Northstar LLC Agreement, at 14, definition of "Significant Matter." The acquisition by the Company or any of its Subsidiaries of any new spectrum licenses (other than those acquired in the Auction) is a Significant Matter that requires DISH approval.

[300] SNR Credit Agreement at ¶ 2.1; Northstar Credit Agreement at ¶ 2.1.

[301] SNR Management Services Agreement at ¶ 9.1(d); Northstar Management Services Agreement at ¶ 9.1(d)

a technology, notwithstanding that they have an obligation under our rules to build out a substantial portion of their networks in six years or risk shortening the term of their licenses.[302] In that light, we find that SNR and Northstar do not adequately control the policy decision on the timing of construction of their systems, notwithstanding contractual provisions that purport to leave that to their direction.

100. *Restrictions on Transfer and Sale of the Business*. The Agreements essentially dictate when SNR and Northstar should sell their interests and exit the business. As part of our totality of the circumstances review, we find that the combination of transfer restrictions and financing obligations eliminate any meaningful ability on the part of the Applicants to choose to maintain their existence, and are therefore very strong indicators of DISH's control.

101. With regard to transfer restrictions, with a few minor exceptions, the LLC Managing Members of SNR and Northstar are unable to transfer their interests during the first 10 years of operation without the consent of DISH in its sole and absolute discretion.[303] Yet DISH can transfer its own interests in SNR and Northstar to any party without the Applicants' approval. After the initial 10-year period, SNR and Northstar have a right to sell their interests subject to a right of first refusal[304] granted to DISH,

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[302] 47 C.F.R. § 27.14(s).

[303] SNR LLC Agreement at ¶¶ 7.1, 7.2; Northstar LLC Agreement at ¶¶ 7.1, 7.2.

[304] A right of first refusal is a "contractual right of an entity to be given the opportunity to enter into a business transaction with

which also holds a "tag along" right.[305] The DISH right of first refusal, coupled with the tag along right, is very coercive and is designed to ensure that any sale by the Applicants will be to DISH, either because DISH will exercise its right of purchase or because the tag along right will deter a purchaser of a 15 percent interest from either of the Applicants because the purchaser would also have an obligation to buy DISH's 85 percent interest. Although restrictions on transferring interests, rights of first refusal, and tag along rights are not *per se* indicative of control, we must consider their existence in light of the other restrictive provisions and the totality of the circumstances. We conclude that these provisions, which will have the effect of depriving SNR and Northstar of control of important policy decisions regarding the disposition of their interests, as well as deterring potential buyers other than DISH from acquiring SNR's and Northstar's interests, are further evidence of DISH's dominance over these entities.

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a person or company before anyone else can. Since an entity with the right of first refusal has the right, but not the obligation, to enter into a transaction that generally involves an asset, it is akin to a having a call option on the asset. If the entity with the right of first refusal declines to enter into a transaction, the owner of the asset is free to open the bidding up to other interested parties." http://www.investopedia.com/terms/r/rightoffirstrefusal.asp.

[305] A tag-along right is "contractual obligation used to protect a minority shareholder (usually in a venture capital deal). If a majority shareholder sells his or her stake, then the minority shareholder has the right to join the transaction and sell his or her minority stake in the company. http://www.investopedia.com/terms/t/tagalongrights.asp.

102. Another matter of particular concern is the way that the LLC Agreements essentially force the Applicants out of the business no later than the end of the seventh year from the start of operations. The LLC Agreements grant the Applicants a put right enabling each of them to require DISH to purchase their interest for a 30-day period at the end of the fifth year.[306] Our review of DE eligibility looks carefully at whether such "put options in combination with other terms to an agreement deprive an otherwise qualified control group of *de facto* control over the applicant."[307] In particular,

> agreements between designated entities and strategic investors that involve terms (such as management contracts combined with rights of first refusal, loans, puts, etc.) that cumulatively are *designed financially to force the designated entity into a sale (or major refinancing)* will constitute a transfer of control under our rules. We will look at the

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[306] SNR LLC Agreement at ¶ 8.1; Northstar LLC Agreement at ¶ 8.1.

[307] *Fifth MO&O,* 10 FCC Rcd at 455-456 ¶ 95. (Thus, a "put" in combination with other terms to an agreement may result in an applicant not retaining *de facto* control. For example, if an agreement between a strategic investor and a designated entity provides that (1) the investor makes debt financing available to the applicant on very favorable terms (e.g., 15 year-term, no payments of principal or interest for six years) and (2) that the designated entity has a one-time put right that is exercisable at a time and under conditions that are designed to maximize the incentive of the licensee to sell (e.g., six years after issue, option to put partnership interest in lieu of payment of principal and accrued interest on loan), we may conclude that de facto control has been relinquished.").

> totality of circumstances in each particular case. We emphasize that our *concerns are greatly increased when a single entity provides most of the capital and management services and is the beneficiary of the investor protections*.[308]

103. The put rights in this case enable the Applicants to receive their investment in their respective company together with an annual rate of return of **[REDACTED]** percent for the 30-day period following expiration of the unjust enrichment period. As VTel points out, by exercising their "put rights," SNR and Northstar "would recoup their cash contributions plus an undisclosed return on their contributions in a relatively short period of time, without their ever having to deploy a wireless system or operate the business."[309] If they fail to exercise the put, the Applicants' only other way of exiting the business will be to sell to DISH before the end of the term of the Credit Agreement at year seven. However, other than in the event they exercise their put rights, DISH is not required to buy the Applicants' interests and, unless refinanced, the Loan must be repaid at the end of the seventh year. If the loan is not repaid, a default would occur that may well reduce the value of the membership interests in the company to zero. As DISH's consent is needed if the Applicants want to sell, if they fail to exercise the put, they will be taking a risk that essentially, the only entity that could buy their interest is DISH, and DISH has no obligation to

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[308] *Id*. at ¶ 96 (emphasis added).

[309] VTel Reply at 11.

give its consent to a third party purchaser or to buy the Applicants' interest itself to do so before the loan matures.

104. In the same vein, we find that the repayment terms of the Credit Agreements are likely to force a default somewhere between year five and the end of the term at year seven. The terms of the loans provide that interest at **[REDACTED]** per annum is capitalized until repayment, which begins on the fifth anniversary of the license acquisition.[310] The entire loan is then amortized at the rate of 1/16 of the amount owed for two years (which constitutes repayment of 50 percent of the loan from years six to seven), followed by a balloon payment for the entire remaining balance due at year seven.[311] It is highly questionable whether SNR and Northstar will have operations sufficient to generate the considerable revenues necessary to meet the large repayment obligations specified by the Agreements. Moreover, DISH's Co-founder, Chairman of the Board, President and Chief Executive Officer has stated that it has no current plans for build-out of its own spectrum.[312] Given the interoperability

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[310] SNR Credit Agreement at ¶¶ 2.3(a), 2.3(c); Northstar Credit Agreement at ¶¶ 2.3(a), 2.3(c).

[311] SNR Credit Agreement at ¶ 2.3(d); Northstar Credit Agreement at ¶ 2.3(d).

[312] *See, e.g.*, Phil Goldstein, *Analysts: Dish execs say wireless options, including wholesale or partnership, are not mutually exclusive*, Fierce Wireless (June 3, 2015), at http://wwwfiercewireless.com/story/analysts-dish-execs-say-wireless-options-including-wholesale-or-partnership/2015-06-03; Ryan Knutson, Thomas Gryta and Shalini Ramachandran, *Dish Network in Merger Talks With T-Mobile*, Wall Street Journal (June 4, 2015), at http://www.wsj.com/articles/dish-network-in-

obligations discussed above, even under a highly optimistic scenario the Applicants cannot provide any revenue-generating service until such time as DISH's plans change.[313]

105. As a result, SNR and Northstar are committed to repayment terms that will be difficult, if not impossible, to manage unless they exercise their put option. In our view, this scenario is likely to force the Applicants to refinance or exit the business, thereby exhibiting an unacceptable degree of control on DISH's part. The alternative of refinancing a loan of this magnitude with a commercial lender is highly unlikely without DISH standing as a guarantor. Accordingly, the only three alternatives practically available under this scenario are that (i) the Applicants could attempt to locate a purchaser for their minority interests, and even if they could find a

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merger-talks-with-t-mobile-us-1433383285 ("Mr. Ergen reiterated in the meeting that Dish has four options for its wireless strategy: join with another company to offer wireless service, sell Dish's spectrum or the whole company, acquire another company with a network, or wholesale the spectrum. Analysts said Dish made clear it has no plans to build a wireless network from scratch"); *see also* UBS Global Research, *DISH Network Corp., But what does Charlie Ergen really think?*, at 1, 3-4 (June 3, 2015); Jeffries Equity Research Americas, *Dish Network Corp., Takeaways from Analyst Meeting*, at 1 (June 2, 2015).

[313] We note that the Commission's interim build-out benchmark for AWS-3 is six years after license grant. *See* 47 C.F.R. § 27.14(s) (licensee shall provide reliable signal coverage and offer service within six years from the date of the initial license to at least 40 percent of the population in each of its licensed areas; if a licensee fails to meet this interim requirement, then the final build-out requirement and the license term is accelerated by two years from 12 to ten years).

willing buyer notwithstanding the loan repayment terms, they would still need DISH's consent to sell, (ii) DISH could provide refinancing on terms that are as yet unknown, though it has no obligation to do so, or (iii) DISH could call a default under the loan when any of the quarterly payments or the balloon payments are not made, and take all SNR's and Northstar's assets in repayment of the loan. It is therefore precisely the sort of arrangement that we have held since 1994 "cumulatively [is] designed to force the designated entity into a sale (or major refinancing) [that] will constitute a transfer of control under our rules."[314]

106. *Interest Rates*. We also note that the interest rates in the Credit Agreement are well above market rate, which is also troubling. In fact, due to the circular nature of the cash flow (money loaned by DISH is then paid out to a DISH affiliate as Operating Manager), the credit risk to DISH is very low. Thus the high interest rates have the effect of driving the loan principal as high as possible given that the interest is capitalized,[315] so that as much cash as possible will flow to DISH and not be available for possible distributions.

107. *Ownership of Property*. The Applicants are prohibited from owning any freehold real property.[316] While we acknowledge that leasehold property could be less expensive than freehold, the lack of an

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[314] *Fifth MO&O,* 10 FCC Rcd at 456 ¶ 96.

[315] *See, e.g.,* text accompanying note 310, *supra.*

[316] SNR Credit Agreement at ¶ 6.12; Northstar Credit Agreement at ¶ 6.12.

unfettered choice as to the type of real estate to hold is another example of DISH's power to control the business decisions of the Applicants.

108. *Right to Obtain the Licenses in the Event of an Adverse DE Eligibility Decision*. As VTel points out, DISH has further control over the Applicants' policy decisions in that DISH has the option to end SNR and Northstar's businesses in the event of an adverse Commission decision regarding the DE credit.[317] Specifically, according to the LLC Agreements, if SNR and Northstar fail to qualify as DEs, DISH can require them to transfer their spectrum licenses to DISH for the sum of their equity contributions minus payment of **[REDACTED]** representing liquidated damages to DISH, without any input or veto from SNR and Northstar.[318] This provision further supports our conclusion that DISH holds *de facto* control in that it provides DISH with absolute control over whether or not the Applicants have any possible option of reorganizing and refinancing their businesses in the event of an adverse Commission decision, since DISH's exercise of its option would deprive the Applicants of the very assets their businesses were established to develop.[319] Thus, DISH has the ability to effectively terminate the continued existence of these companies if they were unable to qualify as DEs and help DISH secure discounted licenses. In the

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[317] VTel Petition at 18.

[318] SNR LLC Agreement at ¶ 11.4; Northstar LLC Agreement at ¶ 11.4.

[319] SNR LLC Agreement at ¶ 11.4 (a); Northstar LLC Agreement at ¶ 11.4(a); SNR Opposition at 19; Northstar Opposition at 32, 58.

totality of the circumstances, the difficulties SNR and Northstar would encounter in order to continue as viable concerns, in consideration with the other circumstances presented herein lead us to conclude that DISH has the means to exert considerable control and influence over these entities.

109. *Joint Bidding*. In this case, our determination about DISH's power to control the Applicants is further informed by the circumstances surrounding the bidding that resulted in SNR's and Northstar's winning bids. SNR and Northstar respond that their Joint Bidding Agreements and bidding behavior in Auction 97 are consistent with the rules in place governing Auction 97 and that they adequately disclosed those Agreements in their respective Applications.[320] While we agree with SNR and Northstar that the use of Joint Bidding Agreements is not inherently indicative of *de facto* control, the unique circumstances of the bidding conduct in this case by ostensibly independent Applicants inform our analysis of *de facto* control based on the totality of their various Agreements and circumstances.

110. The record reflects that both SNR and Northstar entered into separate Joint Bidding Agreements with DISH[321] and that all three parties

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[320] See Section III.C.3.b (Claims that the Applicants Did Not Adequately Disclose and Misrepresented Their Joint Bidding Agreements with DISH), *infra*.

[321] Pursuant to the terms of these Joint Bidding Agreements, auction committees consisting of three members were formed, including one member representing DISH. SNR Joint Bidding Agreement at ¶ 1(a); Northstar Joint Bidding Agreement at ¶ 1(a). Thomas Cullen, who serves as Executive Vice-President of Corporate Development, was the DISH representative for both

subsequently entered into a Letter Agreement whereby they agreed to coordinate their bidding. The Joint Bidding Agreements for both SNR and Northstar included a schedule that contained a list of markets that were designated as the target licenses for each company prior to the auction, as well as the "preferred priority order" for securing the licenses, the specified upfront payment, maximum price, and bidding cap for each license.[322] Notably, this list of licenses was precisely the same for both the Applicants, which demonstrates that both SNR and Northstar had no differentiated business purposes and were jointly interested in securing the same exact target licenses.[323]

111. The behavior exhibited by the parties during the actual bidding demonstrates that DISH was in control of all three companies who worked jointly to advance DISH's interests, rather than SNR and Northstar functioning as independent bidders seeking to advance their own interests. For example, there were many instances where SNR and Northstar placed identical bids for identical licenses in the same markets in the same rounds, rather than submitting

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SNR's and Northstar's auction committees. SNR Joint Bidding Agreement at Schedule I; Northstar Joint Bidding Agreement at Schedule I. We note that a management committee in *Baker Creek* with a similar composition of the auction committees existing here was also found to confer impermissible control upon Hyperion insofar as it gave the allegedly passive investor veto power. *Baker Creek,* 13 FCC Rcd 18709 at ¶ 30.

[322] SNR Joint Bidding Agreement at Schedule II; Northstar Joint Bidding Agreement at Schedule II.

[323]

independent competing bids.[324] Moreover, the parties accepted the random computer assignments that are triggered when identical mutually exclusive bids are submitted for the same licenses in the same rounds, rather than continuing to bid against each other to pursue an independent aggregation of licenses. Similarly, after the Commission announced that the auction would transition to a 100 percent activity requirement, the Applicants acted in a clearly concerted fashion before the increased activity requirement took effect in order to preserve their bidding units of eligibility. Specifically, and contrary to its own independent economic interest, SNR withdrew a bid in round 238 that had been a provisionally winning bid since round 77, an action that resulted in its being liable for an $11 million withdrawal payment ($8 million if adjusted for bidding credits). In the next round, Northstar was able to benefit by SNR's withdrawal to become the provisionally winning bidder for that license at a price $11 million less than SNR's prior bid ($8 million less if adjusted for claimed bidding credits). In the same round in which Northstar bid for the license SNR had just withdrawn, Northstar withdrew a provisionally winning bid of its own, and SNR bid for that license in the following round, but in SNR's case, its bid was the same as Northstar's prior bid, and therefore Northstar

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[324] Indeed, there were approximately 329 instances in which DISH, SNR, and Northstar all did so, and approximately 2,796 instances where two of the three of them did so. *See* https://auctionbiddingfcc.gov/auction/indexhtm?CFID=7208097&CFTOKEN=68123585&jsessionid=yBT5VRsZMyHXn94wcs7qVGnQGC0PThnhzp61TTrblqknXpgMbywj!289651486!-1629602414!1439820921874.

did not incur any withdrawal payment. As a result, whereas SNR became liable for an $11 million withdrawal payment, Northstar, who bid on the license in the next round, benefited from a price that was $11 million less. Accordingly, while the switch added $11 million to SNR's balance sheet to the detriment of its non-DISH owners, it was an economic "wash" to the combined Applicants, and therefore their common owner, DISH. It is therefore reasonable for us to assume that neither entity was acting on its own. We disagree with SNR and Northstar that these types of events lack significance, particularly when considered in light of the other bidding behavior and, more generally, the other attributes signifying DISH's *de facto* control that we have discussed herein.[325]

112. If SNR and Northstar are two separate companies with no disclosed intention to combine services, and are unrelated except for a common majority investor, we would expect their actions would be independently geared towards separately securing their own desired holdings for their independent business plan, rather than pursuing a common list of licenses. The fact that each Applicant specified the exact same target licenses in their Joint Bidding Agreements indicates that it was immaterial to the parties which Applicant actually ended up with any of the target licenses,[326] and further evidences that DISH controlled the parties and that they were all acting with the objective of securing spectrum for DISH, with the simultaneous effect of constraining the

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[325] SNR Opposition at 53; Northstar Opposition at 54-55.

[326] *See, e.g.,* VTel Petition at 23-24; VTel Reply at 27-28.

Applicants' control over the policy decisions related to acquiring their licenses. VTel and CTTI/RTA point out the extent to which the Applicants placed the same bids for the same licenses in the same rounds and the extent to which they were each willing to accept the randomly generated winning bid assignment instead of individually pursuing each license, the fact that approval of a DISH representative was required for every deviation from the initial list of priority licenses (changes that the Joint Bidding Agreements show occurred in most of the rounds of Auction 97), and the fact that as DISH exited the auction the Applicants bid on nearly all of the licenses on which DISH had been a provisional winning bidder and thereby eliminated its financial exposure.[327] VTel asserts that it strains credulity that all this extremely coordinated and choreographed bidding behavior of the Applicants and DISH was driven by "independent determinations made in the exercise of their individual economic self-interest."[328] After considering the bidding behavior of the parties in our analysis here, we agree with VTel that the bidding behavior of SNR, Northstar, and

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[327] VTel Petition at 12-15; VTel Reply at 21-28; CTTI/RTA Reply at 11-13. For example, after round 20 DISH had 269 provisionally winning bids. In round 21 Northstar and SNR bid on 247 of those licenses and became provisionally winning on 242 of them. However, while DISH was outbid on 260 of its 269 provisionally winning bids in round 21, contrary to VTel's assertion it did not fully exit the auction until round 26. *See* https://auctionbiddingfcc.gov/auction/indexhtm?CFID=7208097&CFTOKEN=68123585&jsessionid=yBT5VRsZMyHXn94wcs7qVGnQGC0PThnhzp61TTrblqknXpgMbywj!289651486!-1629602414!1439820921874.

[328] VTel Petition at 20-25, VTel Reply at 25.

DISH during the auction pursuant to the Joint Bidding Agreements is an additional indicator of DISH's common control over SNR's and Northstar's business decisions.

113. It is significant that in this case there are two Applicants both backed by the same majority investor, which also serves as operating manager and lender, and which bid in the auction as a separate entity. The existence of two Applicants further demonstrates that two ostensibly independent Applicants here were not acting in their own individual interests but were acting with a common goal of securing the same list of licenses for DISH's benefit, without importance to which company ended up with any particular license, as particularly evidenced by the Applicants' willingness to accept randomly generated winning bids and the bid withdrawal and rebidding activity noted herein.[329] Therefore, the structure and conduct involved here tying the three companies together differs from the prior examples SNR and Northstar cite.[330]

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[329] *See* VTel Petition at 21-25; VTel Reply at 24-28.

[330] In the SNR Letter and Northstar Letter, Applicants cited three instances in which they alleged other prior auction applicants in which one party had investments in two DEs. SNR Letter at 6 nn. 36, 38, and 40, and cases cited therein*;* Northstar Letter at 6-7 nn. 28, 30, and 32, and cases cited therein. Those cases are clearly distinguishable. In two of them (*i.e.* the Auction 66 and Auction 73 "Hanson" cases), the two DEs bid on entirely separate groups of licenses and the common investor did not bid at all. And in the third case cited by SNR and Northstar (*i.e.* the Auction 58 "Cricket" case), one of the two DEs never submitted any bids at all. *See* VTel Letter at 9-10, and cases cited therein. The VTel Letter pointed out that there were also significant

114. Further, we agree with CTTI-RTA that the presence of a DISH representative on the Auction Committee for each Applicant is also another factor, in the totality, that suggests DISH's dominance over SNR and Northstar because of all the different ways in which DISH can exert influence over them.[331] Presumably due to the bidding cap, the Joint Bidding Arrangements required that any deviation from the initial schedule be approved in writing by all members of the auction committee.[332] Because DISH's consent was required for deviation, we agree with VTel that DISH enjoyed effective veto power over the daily bidding activity, due to DISH's ability to withhold payment for the licenses if the Applicants bid on anything other than DISH's target licenses,[333] another indicator of its ability to dominate SNR and Northstar. Moreover, SNR's and Northstar's attempts to demonstrate their control during the bidding are undermined by DISH's lack of financial responsibility for licenses purchased outside of the target list, which deprived the Applicants of the important policy decision of bidding for licenses outside of what DISH had approved. All these provisions, when taken into consideration as a whole, demonstrate that DISH exercises considerable power over SNR's and Northstar's policy decisions and business affairs.

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ownership differences between the DEs and their respective investors in those three cases and DISH's interests in SNR and Northstar. *Id.*

[331] CTTI/RTA Reply at 8.

[332] SNR Joint Bidding Agreement at ¶ 3(a); Northstar Opposition at ¶ 3(a).

[333] VTel Reply at 3, 12, 21.

g. Unfettered Use of All Facilities and Equipment

115. We have also examined whether the Applicants will have unfettered access to their facilities and equipment.[334] SNR, Northstar, and DISH have no operating wireless facilities at this time. Therefore, we look to their agreements to develop an understanding of their future intent regarding use of the facilities. SNR and Northstar argue that their access to facilities will be unimpeded because the Management Services Agreements give them "unfettered use of, and unimpaired access to, all facilities and equipment associated with [their] Systems . . ."[335] and state that SNR and Northstar "shall have access, at all reasonable times during normal business hours, to the books and records maintained by American II pursuant to . . . this Agreement . . . ."[336] We disagree that this language sufficiently overcomes other provisions in the record that instead lead us to conclude that SNR and Northstar will likely not have unfettered use of all facilities and equipment.

116. Particularly where an applicant is not yet operating, but is partnering with another entity to potentially offer service, the Commission must look closely at relevant contractual provisions regarding

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[334] *See Intermountain Microwave,* 24 Rad. Reg. (P&F) at 98.

[335] SNR Opposition at 23; Northstar Opposition at 18; SNR Management Services Agreement at ¶¶ 1.1, 2.1, 4.1; Northstar Management Services Agreement at ¶¶ 1.1, 2.1, 4.1,

[336] SNR Opposition at 23; Northstar Opposition at 18; SNR Management Services Agreement at ¶¶ 8.1, 8.6; Northstar Management Services Agreement at ¶¶ 8.1, 8.6.

access to facilities.[337] In *Ellis Thompson*, the Commission found that the "technical compatibility and capacity to integrate" parties' networks was a "key feature" of the parties' relationship, as evidenced in their management agreement, and affects whether the applicant has "unfettered use of the facilities."[338] Here, technical compatibility of the Applicants' networks with DISH's specifications is a critical element of the business arrangement between and among SNR, Northstar and DISH.[339] Beyond this strict interoperability requirement, the record indicates a strong likelihood that DISH will either integrate SNR's and Northstar's systems with DISH's network or, by virtue of DISH's position as Operations Manager, require SNR and Northstar to integrate their systems with those of another telecommunications provider selected by DISH.[340] Either method of integration appears to have a potential impact on SNR's or Northstar's unfettered use of the facilities.[341] It is DISH that is charged with the selection and purchase of equipment to be used for the network, and that assumes responsibility for maintaining and repairing the licensees' facilities.[342]

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[337] *See La Star II,* 9 FCC Rcd 7108 ¶¶ 20-21.

[338] *Ellis Thompson,* 9 FCC Rcd at 7140 ¶ 19.

[339] *See* ¶¶ 96-97, *supra*.

[340] *See generally*, ¶¶ 109-114, *supra*.

[341] *Ellis Thompson,* 9 FCC Rcd at 7140 ¶ 19.

[342] SNR Management Services Agreement at ¶¶ 2.1, 2.2; Northstar Management Services Agreement at ¶¶ 2.1, 2.2. *See* In the Matter of Marc Sobel, *Initial Decision of Administrative Judge John M. Frysiak*, 12 FCC Rcd 22879, 22899-900, ¶¶ 67-68 (1997) (finding based "on the record taken in its entirety, it is

117. In *Ellis Thompson*, the Commission found that such "circumstance[s] might reflect valid technical and financial advantages for [the applicant] and be consistent with [the applicant's] retention of unfettered use."[343] Or, "depending on the totality of the circumstances, that arrangement might reflect an intent for [the applicant's partner] to exercise control over an integrated operation contrary to [the applicant's] unfettered use of the facilities."[344] Here, while the Management Services Agreements might reflect valid technical and financial advantages for SNR and Northstar and be consistent with their argument that their access to facilities is unimpeded, it is also possible that the arrangements might reflect DISH's intent to exercise control over an integrated operation in derogation of SNR's and Northstar's unfettered use of the facilities. Moreover, an autonomous company should have the ability to choose its technology without significant contractual constraints. Similar to the Commission's finding in *Ellis Thompson* that the applicant was not in compliance with the "use" requirement of *Intermountain*,[345] here, the totality of the circumstances indicates that SNR's and Northstar's

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abundantly clear that Kay has the ultimate control of Sobel's Management Agreement stations where Kay, among other things, "purchased and provided all the equipment used in connection with the Management Agreement stations" and "is the exclusive supplier of labor required to maintain and repair the stations' facilities").

[343] *Ellis Thompson,* 9 FCC Rcd at 7140 ¶ 19.

[344] *Id.*

[345] *Id.*

ability to enjoy unfettered use of their facilities will be negatively impacted by the Agreements in the record and further demonstrates DISH's dominance of the Applicants.

h. Applicants' Reliance on Prior Applications

118. As noted above, consistent with the statutory goal of avoiding unjust enrichment, the Commission has made clear since the inception of the program of DE bidding credits that agreements that are "cumulatively designed financially to force the designated entity into a sale (or major refinancing) will constitute a transfer of control under our rules." And it has emphasized that "our concerns are greatly increased when a single entity provides most of the capital and management services and is the beneficiary of the investor protections."[346] The Commission has thus determined to be vigilant in ensuring that DE bidding credits are confined to those small businesses and other entities that legitimately lack access to the sources of capital necessary to participate in our spectrum auctions and to build out their wireless networks.

119. The applications of SNR and Northstar present precisely the concern articulated by the Commission in the *Fifth MO&O*. While establishing a financial dependency on DISH of unprecedented size and scope, they have simultaneously entered into virtually identical agreements that in both cases grant to DISH responsibilities as an Operations Manager that include virtually all of the functions required of a

[346] *Fifth MO&O*, 10 FCC Rcd at 456 ¶ 96.

wireless network licensee. They have coupled those arrangements with a set of "investor protections" that extend beyond those deemed necessary by the purely financial investors in SNR and Northstar, and that serve to lock in a pre-established budget and financial plan with extensive veto rights that substantially limit the ability of SNR and Northstar to manage and operate their licensed networks in the ordinary course of business.

120. Because SNR and Northstar are not yet licensees, our application of the standards established in Section 1.2110 must necessarily involve a prediction about the role DISH will likely play in the future operations of these two licensees. That assessment, however, is not an uninformed one. First, as noted above, the bidding conduct of SNR and Northstar in Auction 97 has already demonstrated the guiding role of DISH in the conduct of the Applicants' businesses—reflected in the use by both Applicants of the same initial list of licenses and their subsequent extensive series of identical bids for identical licenses. This parallel course of conduct in the auction by ostensibly independent Applicants could not have been accidental. Second, the Commission and the courts have repeatedly recognized, in prior experience with *de facto* control and similar questions, the importance of scrutinizing the "realities" of such relationships when compared to the nominal inclusion in agreements of provisions purporting to reserve the right of the applicant to control the management and operation of its business.[347] Third, the two

[347] *Phoenix,* 44 F.C.C.2d at 840 (1973). *See also Stereo,* 87 F.C.C.2d 87 ("labels given to the transaction by the parties" not

relationships with DISH reflected in the various agreements in the record must be evaluated in the context of the multibillion dollar financial dependency SNR and Northstar both have on DISH in the financing of their debt to the Commission and their obligation to build out their extensive wireline networks. Our determination that our rules require attribution of DISH's revenues to each of the Applicants is also informed by the underlying purpose of Section 1.2110, which is to discharge our statutory obligation to ensure against unjust enrichment by limiting the use of DE bidding credits to those entities that are in need of the Commission's financial assistance. The award of bidding credits to applicants controlled by large incumbent licensees undermines this purpose.

121. The Applicants' principal argument to the contrary is that they have structured DISH's equity

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controlling in light of "all of the circumstances surrounding the transaction"). In *WLOX,* 260 F.2d at 715, which required the Commission to identify the controlling principals of the applicant for comparative hearing purposes, the court found it "wholly unrealistic to say that a stockholder who is to furnish all the money to his corporation for the construction of a television station and to take part in determining the necessity for advancing it as the work progresses, and is to furnish all the money for the first year's operation, receiving weekly financial statements and giving financial advice, is not in practical effect" such a controlling principal. The court also found it "conclusively clear there is no reasonable hope or expectation that the loan can be repaid from corporate funds before maturity." *Id*., 260 F.2d at 717. *Cf. Fox Television Stations, Inc.,* 11 FCC Rcd at ¶ 14 (obligation in enforcing Section 310(b) to examine the "economic realities" of the transactions and "not simply the labels attached by the parties to their corporate incidents").

participation and its investor protections in accordance with various features contained in other applications previously granted by the Commission.[348] However, the Applicants do not claim to have relied on any reported decisions in which the Commission staff—much less the Commission—has articulated any basis for construing Section 1.2110 to permit the coupling of such features with the kind of extensive "investor protections" and management responsibilities vested in DISH here.[349] Indeed, as noted by VTel,[350] the staff's decision in the *Alaska Native Bureau Order*, cited by Applicants in defense of their investor protections,[351] was fully consistent with—and indeed cited to—the *Fifth MO&O*, in which the Commission emphasized its concern about the combined effects of a single entity providing substantial financial investment, and management services, as well as benefiting from investor protections.[352] The *Alaska Native Bureau Order*

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[348] SNR Opposition at 16-17 (equity participation), 27-30 (investor protections); Northstar Opposition at 29-30 (equity participation), 32-41 (investor protections).

[349] As also noted above, the scope of the investor protections at issue here, particularly when reviewed in light of the size and scope of the Applicants' proposed operations, has significantly greater impact on the conduct of those operations in the ordinary course of business.

[350] VTel Letter at 5.

[351] *See* Northstar Opposition at 15 & n.44, 21 n.67, 33 & n.119, 34 n.124, 39-40 n.145; SNR Opposition at 17 & n.60, 28 & n.116, 29, 30 n.120.

[352] *Alaska Native Bureau Order,* 17 FCC Rcd at 4240 ¶ 18 *citing Fifth MO&O*, 10 FCC Rcd at 456. In its public notices prior to its auctions, the Commission has repeatedly cautioned auction

acknowledged the need for "close examination" of such a combination, but noted that the investor in that case (AT&T Wireless) did *not* provide management services to the applicant and had no direct or indirect investment in the entity that did so.[353] Thus, all of the concerns the Commission has here concerning *de facto* control were not implicated in that case.[354]

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applicants to "review carefully the Commission's decisions regarding the designated entity provisions," including specifically certain of those we rely on in this order. *See, e.g., Auction Procedures Public Notice*, 29 FCC Rcd at 8411-15 ¶¶ 79-92. As Northstar also recognizes, "The Commission's rules, procedures, and precedents for each of the Commission auctions are available online." Northstar Opposition, Attachment 3 (Declaration of Harold Furchtgott-Roth at 7 ¶ 17 & n.11 (*citing* http://wirelessfcc.gov/auctions/default.htm?job=auctionshome).

[353] *Alaska Native Bureau Order, id*., at 4240-41 ¶ 19. We note that the Applicants do not rely for these purposes on the Commission's subsequent denial of review of the staff's order, *see Alaska Native Commission Order,* 18 FCC Rcd 11640, which dismissed such applications for review for lack of standing. On review, the Commission also found that "we have been presented with no basis for sustaining a challenge to [the applicant's] qualifications to hold its C and F block PCS licenses." *Id.* at 11648 ¶ 21. As noted above, that case involved no demonstration that the investor provided any management functions to the applicant, much less the extensive range of management functions and other features at issue here. Nor did the applications for review raise any specific allegations of *de facto* control other than the extent of AT&T Wireless's equity participation. Application for Review (Apr. 10, 2002) (ULS File No. 0000363827 *et al*.) The Applicants do not contend otherwise.

[354] To the extent any prior actions of Commission staff could be read to be inconsistent with our interpretation of the Commission's rules in this order, those actions are not binding on the Commission—and we hereby expressly disavow them as inconsistent with the goals of Section 309(j)(3), the text and

2. Controlling Interest of the Operations Manager Under Section 1.2110(c)(2)(ii)(H)

122. A separate and independent legal basis for concluding that SNR and Northstar are not eligible for the very small business bidding credits that they seek arises from our review of the Management Services Agreements under Section 1.2110(c)(2)(ii)(H) of the Commission's rules. That rule states:

> any person who manages the operations of an applicant or licensee pursuant to a management agreement shall be considered to have a controlling interest in such applicant or licensee if such person, or its affiliate, has authority to make decisions or otherwise engage in practices or activities that determine, or significantly influence: (1) The nature or types of services offered by such an applicant or licensee; (2) The terms upon which such services are offered; or (3) The prices charged for such services.[355]

123. Under the circumstances presented here, we conclude that under the Management Services Agreements pursuant to which DISH will manage the build-out and day-to-day operations of Applicants businesses as Operations Manager, in combination

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purpose of Section 1.2110 of the Commission's rules, and Commission policy as embodied in the *Fifth MO&O*, this decision, and other decisions of the Commission described above. *See Comcast Corp. v. FCC,* 526 F.3d 763, 769 (D.C. Cir. 2008); *accord, Comcast Cable Communications, LLC, v. FCC,* 717 F.3d 982, 1002 (D.C. Cir. 2013).

[355] 47 C.F.R. § 1.2110(c)(2)(ii)(H)

with the interoperability requirements of the LLC and Trademark Agreements that SNR and Northstar have each separately entered into with DISH, DISH has the "authority to make decisions or otherwise engage in practices or activities that determine, or significantly influence …[t]he nature and types of services offered by [Applicants]."[356] As noted above, DISH's comprehensive services as Operations Manager include key functions directly relevant to the nature and types of services to be offered and their terms and prices. These include engineering and construction of the network; billing and collection services; marketing, sales, advertising, and promotion; and the provision of messaging, 911, roaming, VoIP, and other services. In contrast, as discussed above,[357] the Agreements operate to limit substantially the ability of Applicants to retain personnel to provide such functions and establish a financial dependency upon DISH as the Operations Manager. As a result, it is our determination that DISH will have, and exercise, authority to determine or at least significantly influence these aspects of Applicants' operations.

124. We acknowledge that the Management Services Agreements recite that SNR and Northstar retain the right to "determine the nature and type of services offered using the License Company Systems, the term upon which the License Company Systems' are offered, and the prices charged for its

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[356] 47 C.F.R. § 1.2110(c)(2)(ii)(H)(1).

[357] *See* Section III.C.1 (Analysis of *De Facto* Control of SNR and Northstar), *supra*.

services…."[358] But as noted above, and in the context of the economic realities of these transactions, other contractual provisions between the parties negate that provision—or at a minimum give DISH the authority to "significantly influence" these determinations.[359]

125. Our conclusion is reinforced in this case by the unique operational effects of the interoperability requirements in the Agreements. Both the definition of "Business" contained in the LLC Agreements and language from the Trademark Agreements require that the Applicants must use technology that is fully compatible and interoperable with the technologies used by DISH and its affiliates.[360] In addition, the LLC and Trademark Agreements make clear that DISH has not even decided whether the licenses will be used for fixed or mobile services.[361] Since DISH has

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[358] *See* SNR Management Services Agreement at ¶ 2.1; Northstar Management Services Agreement at ¶ 2.1.

[359] While we have determined that the language of the management agreements must be viewed in light of the economic realities of the transactions, we note that in this case neither of the Management Services Agreements even purports to deprive DISH of the contractual ability to "significantly influence" the foregoing determinations with respect to the licensees' services. Nor do the Applicants assert otherwise. *See* SNR Opposition at 30-34; Northstar Opposition at 35-36; *SNR Letter* at 2 & n.8.

[360] SNR LLC Agreement at 5; SNR Trademark Agreement at ¶ 4.1(b); Northstar LLC Agreement at 5; Northstar Trademark Agreement at ¶ 4.1(b).

[361] SNR LLC Agreement at 8, definition of "Licensee Company System(s);" Northstar LLC Agreement at 8, definition of "Licensee Company Systems(s);" SNR Trademark Agreement at 3, definition of "Licensee System;" Northstar Trademark Agreement at 3, definition of "Licensee System."

not yet indicated its technology of choice, SNR's and Northstar's retention of rights to determine the nature and type of services to be provided over its spectrum is essentially meaningless. SNR and Northstar cannot determine "the nature and type of services" that they will provide until DISH determines the technology and network that those services will use. DISH has retained all rights to determine the technology that SNR and Northstar will deploy, giving DISH substantial control over the determination of the nature and type of services to be provided. Therefore, despite the inclusion of language in the Management Service Agreements that attempts to demonstrate that SNR and Northstar are in charge of the choice of services, it is clear that DISH will, at a minimum, have authority as Operations Manager to determine, "or significantly influence" those matters for both SNR and Northstar, creating an affiliation under the rule.

126. Both SNR and Northstar, to support their use of interoperability provisions,[362] simply rely on the fact that the Commission staff has permitted interoperability requirements between DEs and their investors in the past. We acknowledge that such provisions alone do not necessarily divest a DE of authority to determine the nature and type of services offered.[363] But their operation in the foregoing circumstances presents a compelling case for attribution under Section 1.2110(c)(2)(ii)(H). Moreover, the circumstances now before us are different from situations in which the manager/non-

[362] *See* SNR Surreply at 4 n.15; Northstar Surreply at 4.

[363] SNR Opposition at 32-33, Northstar Opposition at 34-35.

controlling wireless investor already had an operating wireless network prior to entering into the arrangement with the designated entity,[364] so that the DE was clearly making a technology and network choice upon entering into the arrangement, and that decision was to choose the manager's technology and network to be its own. That is not the situation before us now.[365]

127. Based on the facts before us here, DISH has not yet made any decisions regarding its choice of technology or network, yet SNR and Northstar are required to be interoperable with that non-existent network using an as-of-yet-undetermined technology.[366] In addition, the fact that the LLC and Trademark Agreements indicate that the service could be fixed or mobile provides further evidence that no technology decision has been made yet.[367] Due to the interoperability requirement contained in the Agreements, DISH's lack of a wireless technology/network is a substantial hindrance to the ability of SNR and Northstar to determine the nature and type of services to be provided over their own licenses, until and unless DISH specifies its wireless

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[364] *See, e.g.,* Denali Spectrum License, LLC Application (ULS File No. 0002774595); Alaska Native Broadband I, LLC Application (ULS File No. 0002069129); Salmon PCS, LLC Application (ULS File No. 0000365189).

[365] In any event, to the extent any prior staff grants reflect a different view of Section 1.2110(c)(2)(ii)(H), as noted above the Commission is not bound by them, and they are hereby disavowed.

[366] *See* note 312, *supra*.

[367] *Id.*

technology. The record before us reflects that DISH has not done so, to date, and has indicated publicly that it has no current interest in settling on a technology, much less building a network for its licensed terrestrial spectrum.[368]

128. Based on the record of each of the captioned applications, we find that DISH has a controlling interest in SNR and Northstar, and is an affiliate thereof, under Section 1.2.110(c)(2)(ii)(H) of the Commission's rules. Accordingly, DISH's gross revenues for 2011, 2012, and 2013 must be attributed to each of Applicants. Once DISH's gross revenues are attributed to SNR and Northstar, each applicant is ineligible for small business bidding credits.

3. Other Allegations in Petitions to Deny

a. Claims that SNR and Northstar Failed to Disclose the Controlling Interest Held by DISH

129. VTel claims that the failure by SNR and Northstar to disclose in their Applications the controlling interest held by DISH constitutes a

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[368] *Id*. DISH holds licenses for all of the AWS-4 spectrum nationwide (2000-2020 MHz paired with 2180-2200 MHz). Under a conditional waiver granted in 2013, DISH must file its uplink or downlink election as soon as commercially practicable but no later than June 2016 and must meet its final construction build-out milestone by March 2021. *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, WT Docket No. 13-225*, Memorandum Opinion and Order*, 28 FCC Rcd 16787 (WTB 2013) ("*AWS-4 Waiver*").

material misrepresentation and demonstrates a lack of candor demonstrating the absence of basic qualifications to hold some or all of the licenses they won during Auction 97.[369] We disagree. VTel fails to identify any "material factual information" that the Applicants failed to disclose in their applications.[370] Accordingly, the Petitioners' claims do not provide a basis to find that the Applicants are not qualified to be Commission licensees.

130. Consistent with our rules, SNR's and Northstar's Form 175 Short-Form Applications included extensive summaries of "all agreements or instruments … that support the applicant's eligibility as a small business under the applicable designated entity provisions, including the establishment of *de facto* or *de jure* control or the presence or absence of attributable material relationships."[371] SNR and Northstar were not required to provide copies of the Agreements with their Form 175 Short-Form Applications, since the Commission does not substantially review DE eligibility claims until provisionally winning bidders file their long-form applications. SNR and Northstar each provided similar summaries, together with copies of all of the Agreements, as part of their respective Applications as required by our rules.[372] These Agreements enabled both the Commission and the Petitioners to fully

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[369] VTel Petition at 25-28; VTel Reply at 29-32. *See also* text accompanying note 380, *infra*.

[370] VTel Petition at 26, 27.

[371] 47 C.F.R. § 1.2112(b)(1)(iii).

[372] 47 C.F.R. § 1.2112(b)(2)(iii).

evaluate and independently assess SNR's and Northstar's claims to DE status. Indeed, as the basis for its conclusions with respect to Applicants' DE status, VTel relies extensively on the disclosures they made in their Form 175 Short-Form Applications and their long-form Applications, as well as materials submitted in multiple amendments to the latter.[373]

131. The fact that the Commission, upon review of the Agreements, concludes that, as a legal matter, the facts disclosed show that DISH controlled the applicants does not compel a finding that the applicants lacked candor. As the Wireless Bureau noted with respect to a similar claim, "[t]he possibility always exists that the Commission may determine [as we have done here] that an interest an applicant has concluded is non-controlling is, in fact, controlling and therefore attributable. Under such a scenario, the applicant's failure to satisfy the controlling interests standard would not automatically compel a finding that the applicant lacked candor."[374]

132. In determining the impact of that conclusion on SNR's and Northstar's fitness to be Commission licensees we consider the Applicants' truthfulness and reliability in their dealings with the Commission in this proceeding[375] to determine whether we can rely on SNR and Northstar to be forthright with the

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[373] VTel Petition at 22.

[374] *Alaska Native Bureau Order,* 17 FCC Rcd at 4240 ¶ 20.

[375] *Baker Creek,* 13 FCC Rcd at 18728 ¶ 34, *citing* Policy Regarding Character Qualifications in Broadcast Licensing, *Report, Order and Policy Statement*, 102 FCC 2d 1179, 1228 (1986), recon. granted in part and denied in part, 1 FCC Rcd 421 (1986) ("*Character Policy*").

Commission in the future.[376] Based on the record before us, we find no substantial and material question of fact as to whether SNR and Northstar have shown a lack of truthfulness or reliability in their dealings with the Commission. There is no showing here that SNR and Northstar attempted to mislead the Commission about their respective relationships with DISH.[377] Rather, the entire record indicates that the Applicants and DISH disclosed their ownership structures and related Agreements as required,[378] and proceeded under an incorrect view about how the Commission's affiliation rules apply to these

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[376] *Id.*

[377] Prior to Auction 97, the Commission reviewed the Applicants' Form 175 disclosures and found SNR and Northstar qualified to participate in the auction. *See Qualified Bidders Public Notice,* 29 FCC Rcd 13465 at Attachment A. Northstar states that it "has made fulsome disclosures to the Commission of hundreds of pages of documentation detailing its corporate structure and ownership, its control structure, and its joint bidding agreements, all produced in good faith and disclosed to the Commission." Northstar Opposition at 84. *But see*, VTel Petition to Deny at 25-28 (arguing that SNR and Northstar failed to make required disclosures and attributions); VTel Reply in Support of Petition to Deny (arguing that SNR and Northstar "engaged in serious, willful misconduct that is inconsistent with the basic character qualifications of a Commission licensee").

[378] SNR and Northstar disclosed to the Commission in their Forms 175 that they had entered into a number of Agreements that set out the organizational structure and relationships between the parties for the periods before, during and after the auction, including plans to coordinate regarding bids and bidding strategies. *See* SNR Form 175, Auction File No. 0006458318. Exhibit E: Agreements and Other Instruments, at 1-3; Northstar Form 175, Auction File No. 0006458325, Exhibit D: Agreements and Other Instruments, at 2.

structures. Thus, although we have concluded that SNR's and Northstar's respective ownership structures establish DISH as an affiliate of and holding a controlling interest in the Applicants under those rules, the record does not suggest that SNR or Northstar will not deal truthfully or reliably with the Commission in the future.[379]

b. Claims that the Applicants Did Not Adequately Disclose and Misrepresented Their Joint Bidding Agreements with DISH

133. In its reply, VTel alleges that SNR and Northstar failed to adequately disclose the true intent of their Joint Bidding Agreements with DISH, and in particular, that they did not disclose that "they would coordinate bidding so as to reduce the impact of the Commission's activity rules" or that SNR, Northstar and DISH representatives would be in the same room throughout the auction. VTel also alleges that SNR and Northstar made material misrepresentations to the Commission in their summaries of their respective Joint Bidding Arrangements with DISH.[380] We disagree.

134. Although Section 1.2105(c)(1) of the Commission's rules generally prohibits short-form applicants for licenses in the same or overlapping geographic license areas from communicating with each other, directly or indirectly, about bids or bidding

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[379] Our action today is without prejudice to any enforcement action relating to SNR's and Northstar's future non-conformity with the designated entity rules or other Commission rules.

[380] VTel Reply at 29-32.

strategies, under the rules applicable to Auction 97 they were permitted to do so if they identified each other on their short-form applications as parties with whom they had entered into agreements under Section 1.2105(a)(2)(viii) of the Commission's rules.[381] SNR, Northstar, and DISH disclosed in their Form 175 Short-Form Applications prior to the auction that they had entered into Joint Bidding Agreements between and among each other and specifically stated that all of the parties would "coordinate regarding bids, bidding strategy and post-auction market structure" and "[b]y virtue of DISH's interests in each of American I, Northstar Wireless, Northstar, SNR HoldCo and SNR License, and the Joint Bidding Arrangements, each applicant will be deemed to have knowledge of the other's bids or bidding strategies."[382]

135. Contrary to VTel's claim that the disclosure made by SNR and Northstar "should have" disclosed "what they really intended to accomplish through joint bidding with DISH,"[383] our competitive bidding rules in effect at the time of Auction 97 simply required that the applicants submit, as part of their Form 175 Short-Form Applications, a list of the names of any joint bidding agreements and did not require that applicants provide a summary of the agreements. Our rule was therefore intended to provide other auction

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[381] 47 C.F.R. § 1.2105(c)(1). For future auctions, the Commission has generally prohibited joint bidding with certain limited exceptions. *See 2015 Report and Order,* note 5 *supra,* at ¶¶ 177-201.

[382] SNR Application, Exhibit D: Agreements and Other Instruments, at 27.

[383] VTel Reply at 30-31.

participants with knowledge of the fact that there is a joint bidding agreement, not what the purposes or terms of that agreement may be.[384] Accordingly, Petitioners' claim about what the Applicants "should have disclosed" conflates the general disclosure obligations pertaining to our prohibited communications rules with the controlling interest disclosures we require of applicants who claim DE eligibility, which require a summary of an applicant's agreements with certain interest holders. But for the fact that Applicants were claiming DE eligibility, Petitioners would not have had to provide any summary of their Joint Bidding Agreements as part of their Form 175 applications.[385] Provisionally winning bidders in Auction 97 claiming DE eligibility filed

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[384] 47 C.F.R. § 1.2105(a)(2)(viii); see also 47 C.F.R. § 1.2110(j). We note that had the Applicants disclosed more detail about what they intended to accomplish through joint bidding with DISH, such disclosure might have communicated bidding strategies to other applicants in violation of the prohibited communications rule, 47 C.F.R. § 1.2105(c).

[385] Moreover, although other sections of our rules do require submission of a list and summary of any agreements and other arrangements pertaining to small business eligibility, 47 C.F.R. § 2112(b)(1)(iii), it does not appear to us that the summary of the purposes of the agreements cited by VTel is materially misleading insofar as it merely referenced the parties' general business purposes as set forth in the Joint Bidding Agreements and did not provide additional information as to precise manner in which their bidding would be conducted. Our rules merely require a summary of relevant agreements, not specific detail as to how the parties will implement those agreements. And, as noted above, such additional specificity as to their bidding strategy as part of the Form 175 Short-Form Applications might have communicated bidding strategies to other applicants in violation of our rules. *See* note 384, *supra*.

copies of their agreements, including any joint bidding arrangements, as part of the long-form application. We therefore find that by virtue of their disclosure of the Joint Bidding Agreements between and among the Applicants and DISH, the Applicants complied with the disclosure obligations of our competitive bidding rules.

136. VTel also complains that "[b]ecause of the Commission's anonymous bidding rules for Auction 97, VTel did not and could not know the identity of the second bidder."[386] Here again, this complaint fails to identify any violation of any Commission rules. In fact, in adopting anonymous bidding in 2007, the Commission rejected arguments that knowledge of the identity of other bidders would be useful, and held that "[a]lthough some potential bidders may find information regarding bidding by other parties useful, on balance this benefit likely is substantially outweighed by the enhanced competitiveness and economic efficiency of the auction."[387] Petitioners had

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[386] VTel Petition at 12.

[387] Service Rules for the 698-746, 747-762 and 777-792 MHz Bands, WT Docket No. 06-150, Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems, CC Docket No. 94-102, Section 68.4(a) of the Commission's Rules Governing Hearing Aid-Compatible Telephones, WT Docket No. 01-309, 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, Former Nextel Communications, Inc. Upper 700 MHz Guard Band Licenses and Revisions to Part 27 of the Commission's Rules, WT Docket No. 06-169, Implementing a Nationwide, Broadband, Interoperable Public Safety Network in the 700 MHz Band, PS Docket No. 06-229, Development of Operational, Technical, and Spectrum Requirements for Meeting

specific notice that bidding in Auction 97 would be anonymous in our *Auctions Procedures Public Notice*, in which we "disagree[d] with the assertions of commenters that argue that limited information disclosure procedures are unnecessary or harmful to smaller bidders, and conclude[d] that the competitive benefits associated with limiting information disclosure support[s] adoption of such procedures and outweigh[s] the potential benefits of full disclosure."[388] Given Applicants' and DISH's disclosure of their Joint Bidding Agreements, Petitioners were on notice of the fact that they would coordinate their bids during the auction.[389] That is all that our rules and Auction 97 auction procedures required.

Federal, State, and Local Public Safety Communications Requirements Through the Year 2010, WT Docket No. 96-86, Declaratory Ruling on Reporting Requirement under Commission's Part 1 Anti-Collusion Rule, WT Docket No. 07-166, *Second Report and Order*, 22 FCC Rcd 15289, 15394 (2007) ("*700 MHz Second Report and Order*").

[388] A*uction Procedures Public Notice*, 29 FCC Rcd at 8429 (footnote omitted).

[389] The Commission made the contents of all applicants' short-form applications for Auction 97 publicly available at the time of the status public notice prior to the auction. *See Qualified Bidders Public Notice* 29 FCC Rcd 13465. Therefore, while under anonymous bidding procedures VTel could not know the identity of a specific applicant bidding against it in a given round, like all applicants in Auction 97, VTel knew or should have known that it was possible for it to be bidding against SNR, Northstar, and DISH, or two or all three of them, in any round. *See* Petition for Reconsideration and Motion for Stay of Paging Systems, Inc., *Memorandum Opinion and Order,* 25 FCC Rcd 4036, 4052 ¶53 (2010).

c. Claims that the Commission Should Re-Auction Certain Licenses Won by Applicants

137. VTel argues that, in addition to requiring SNR and Northstar to pay the amount of the bidding credits that they claim,[390] the Commission should re-auction the BEA 004 licenses in Burlington, VT, and any other licenses for which any other bidder has demonstrated that it was adversely impacted by the joint bidding arrangements among Applicants and DISH.[391] CTTI/RTA goes farther, and argues that the Commission should either re-auction or offer all of the licenses won by SNR and Northstar to the next highest bidder.[392] These arguments fail for several reasons.

138. VTel premises its argument for such a re-auction on Section 1.2109 of the Commission's rules, which authorizes a re-auction in the event of a default by a winning bidder.[393] Here, however, there has been no such default. Herein, we notify the Applicants that additional payments are due and that further

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[390] VTel Petition at 31; VTel Reply at 47-48.

[391] VTel Petition at 32-35; VTel Reply at 46-47.

[392] CTTI/RTA Petition at 8. CTTI/RTA does not offer any specific support for the sweeping relief it requests other than our general rule that bidders found to have violated our rules or the antitrust laws "may be subject, in addition to other sanctions, to forfeiture of their upfront payment, down payment or full bid amount, and may be prohibited from participating in future auctions." CTTI/RTA Petition at 6, n.10 (*citing* 47 C.F.R. § 1.1210(d)). None of those remedies specify either a re-auction or an award to the next highest bidder, and, in any event, bidders have not been found by the Commission to have violated its rules or the antitrust laws.

[393] VTel Petition at 32.

processing of their Applications will not occur until payment of their gross, not net, bids.[394] There has been no "fail[ure] to pay the full amounts of [these] bids." Nor have we permitted either of these applicants to "tak[e] advantage of bidding credit to which it was not entitled."[395]

139. Moreover, neither VTel nor CTTI/RTA has made any showing of how bidders for the licenses they bid on—much less any other licenses—were adversely affected by the conduct of SNR and Northstar effectuated pursuant to bidding agreements whose parties were disclosed to VTel, CTTI/RTA, and all other bidders in their short form applications. To be sure, SNR and Northstar were structured so as to lay claim to DE bidding credits. But they and Petitioners, and all other bidders, were fully aware, as our standard public notice for Auction 97 bidders made clear,[396] that the structure disclosed in these short form applications was subject to the risk that the Commission might—as we have determined in this order—reject those claims of eligibility for DE benefits. VTel was no less capable of factoring those risks into its bidding determinations as SNR, Northstar, or any other bidders.[397]

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[394] *See* Section V (Ordering Clauses), *infra.*

[395] VTel Petition at 32-33. If either Applicant defaults on the additional payments required pursuant to this Order, the Commission will assess at that time the appropriate disposition of the affected licenses. *See* 47 C.F.R. § 1.2109.

[396] *Closing Public Notice,* 30 FCC Rcd at 637 ¶ 33 n.42.

[397] The Commission has previously rejected arguments that the Commission should unwind an auction based on facts concerning a bidder discovered after the auction. *See* Winstar Broadcasting

140. Nor have Petitioners made any demonstration of how the bidding conduct of SNR and Northstar deprived them of the opportunity to bid higher than the Applicants did for any of the licenses they sought. Their only claim is that the Applicants, who at times placed double and triple bids on the same licenses in the same rounds, "create[d] the illusion that [they] were independent of each other" when they were not, and that this illusion "led VTel to believe erroneously that certain spectrum blocks were subject to more intense competition than was actually the case, which deterred VTel . . . from submitting bids that were higher than the winning bids from Northstar and SNR."[398] As noted above, however, this "illusion" was one that all bidders could reasonably have avoided from reviewing the SNR and Northstar Form 175 applications. Moreover, VTel never even alleges that the bidding reached "levels VTel could not afford," or explains why it was precluded from continuing to bid at levels that it could afford.[399]

141. In any event, the Commission has previously declined to consider unsuccessful bidders' assertions regarding their decision to limit their participation in a spectrum auction. The Commission has no way of knowing why parties make certain decisions, and the integrity of its auction procedures would be substantially impaired if it were to act on requests for

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Corp., *Order on Reconsideration*, 20 FCC Rcd 2043, 2052-53 ¶ 19 (2005) (while Commission's application process envisions a post-auction test of qualifications, it does not envision that the post-auction review will undo the auction).

[398] VTel Petition at 2, 32; *see also* CTTI/RTA Petition at 3-5.

[399] *See* VTel Petition at Guité Affidavit ¶¶ 13, 17.

regulatory relief based on a party's *post-hoc* assertions regarding its earlier state of mind.[400] Similarly, we find here that such assertions provide no independent evidence of the validity of VTel's claims.

142. Moreover, were we to consider Petitioners' *post-hoc* assertions regarding their thought process during the auction, we would not find such assertions to be sustainable. Neither VTel nor CTTI/RTA has demonstrated why Applicants' bidding conduct would have had an effect on the market value Petitioners in fact placed on those licenses.

143. Although Petitioners claim that they were led to stop bidding on certain licenses as a result of the joint bidding activities of Applicants and DISH, neither Petitioner demonstrates that their decision to stop bidding on those particular licenses was any different than their decision to do so on other licenses that were won by bidders other than Applicants. Instead, as SNR points out, the auction data refutes Petitioner's claim, and Petitioners "made bids that were substantially less than the bids that ultimately prevailed in almost all of the markets in which they bid and lost"[401]—and not just those in which the Applicants were the winning bidders. For example, VTel's contention that it withdrew from the Auction because of the Applicants' joint bidding behavior ignores the fact that an Applicant (SNR) only won three of the six licenses on which VTel bid. VTel's

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[400] Petition for Reconsideration and Motion for Stay of Paging Systems, Inc., *Memorandum Opinion and Order,* 25 FCC Rcd 4036, 4059 ¶ 75 (2010).

[401] SNR Opposition at 55.

contention also ignores that even without the Applicants and DISH, there was an average of almost four bidders for each of the six licenses.[402] Similarly, of the four licenses on which RTA bid, an Applicant (SNR) won only two of them, and even without the Applicants and DISH, there was an average of five bidders for each of the four licenses.[403] Of the 19 licenses on which CTTI bid (three of which it won), the Applicants bid on ten of them, and an Applicant (SNR) won only one of them, and even without the Applicants and DISH, there was an average of almost four bidders for each of the 19 licenses.[404] Any bidder in our auctions is in control of how long it bids, and presumably ultimately stops when another bidder values the license more than the bidder. As these Auction 97 results clearly show, each Petitioner made such decisions in competition with several different bidders, and not just the Applicants, with respect to all of the licenses on which they placed bids, and other than the three licenses won by CTTI, other bidders valued the licenses more highly than Petitioners.

144. Similarly, SNR demonstrated that, "[o]n average, the final gross [winning] bid was more than

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[402] *See* http://wireless.fcc.gov/auctions/97/. The other three licenses on which VTel bid were lost to AT&T Wireless Services 3 LLC and Orion Wireless LLC.

[403] *Id.* The other two licenses on which RTA bid were lost to Cellco Partnership d/b/a Verizon Wireless and Advantage Spectrum, L.P.

[404] *Id.* The other 15 licenses on which CTTI bid and lost were won by AT&T Wireless Services 3 LLC; Cellco Partnership d/b/a Verizon Wireless; Central Texas Telephone Investments, LP; and T-Mobile License LLC

7 times higher than VTel's last gross bid for the license on which VTel bid and lost."[405] It also points to the example of the only license on which VTel bid that was ultimately lost to an Applicant. SNR shows that VTel stopped bidding for the BEA004-B1 license in round 20 after making a gross bid of $146,000, and SNR's final gross winning bid after round 122 (after bidding against two other bidders, not including DISH and Northstar, was $610,000—more than four times higher VTel's last bid on that license.[406] The same disparity exists for CTTI and RTA. In CTTI's case, the final gross bid on the licenses on which it bid and lost was more than twice CTTI's last gross bid on each of those licenses; in RTA's case, the final gross winning bid was nearly five times higher than RTA's last gross bid on each of those licenses.[407] Northstar also provides auction data that refutes Petitioners' claims that the joint bidding by Applicants and DISH inflated the number of bidders and therefore dissuaded Petitioners from continuing to bid. Specifically, Northstar cites bidding that demonstrates that, VTel's claim that it withdrew from bidding on one license based on its conclusion that "competition from three bidders would drive up the price to levels that VTel could not afford,"[408] was directly contradicted by VTel's bidding on another license, for which VTel

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[405] SNR Opposition at 55-60.

[406] *Id.*

[407] *Id.*

[408] VTel Petition at Guité Affidavit at ¶ 13.

elected to raise its prior bid after being outbid by three other bidders.[409]

145. Petitioners thus fail to demonstrate that the licenses for which they bid were lost other than as a result of other bidders valuing these licenses more highly. As VTel concedes, it has long been "the Commission's policy to ensure that licenses are awarded to the bidder that values it most highly."[410] At all times throughout the auction Petitioners were free to raise their bids against any of the competing bidders and we find no basis to conclude that the bidding behavior of the Applicants, any more than that of the other bidders to whom Petitioners lost licenses, uniquely affected their decision not to continue bidding. In the absence of any showing of demonstrably adverse effects of Applicants' gross bids on the reliability of Auction 97 in ensuring the Section 309(j) goals of promoting "efficient and intensive use" of the licenses and "recovery for the public of a portion of the value" thereof, and in light of the clearly adverse

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[409] Northstar Opposition at 75. Specifically, Northstar shows that while VTel stopped bidding on the A1 license in VBEA004 after three new bids were placed, which VTel claims made it believe that it faced competition from three separate bidders that would drive up the price (Guité Affidavit at 13), it did not similarly withdraw when "faced with a similar situation relating to the B1 licenses in the same market…," and instead elected to bid again in the subsequent round. Northstar Opposition at 75.

[410] VTel Petition at 34 (*citing* Amendment of Part 1 of the Commission's Rules – Competitive Bidding Procedures*;* Allocation of Spectrum Below 5 GHz Transferred from Federal Government Use; 4660-4685 MHz, *Third Report and Order*, 13 FCC Rcd 374, ¶ 153 (1998) ("*Competitive Bidding Third Report and Order*").

effects of a re-auction on the further statutory goals of promoting "rapid deployment . . . without administrative or judicial delays," we decline to re-auction any of the licenses won by Applicants. Further, we find that there are no outstanding "substantial and material question[s] of fact" regarding SNR's and Northstar's applications.[411] Therefore, we also deny Petitioners' requests that the Commission conduct a hearing.[412]

d. Claims Alleging Conduct in Violation of the Antitrust Laws

146. VTel and CTTI/RTA allege that DISH, SNR, and Northstar by their conduct during the auction, engaged in a collusive bidding scheme by which the parties fixed prices and allocated markets, which represents anticompetitive conduct prohibited by the antitrust laws.[413] VTel also claims that the Joint Bidding Agreement between Northstar, SNR, and DISH about the licenses constitutes bid rigging, a *per se* violation of Section 1 of the Sherman Act.[414] SNR and Northstar counter that the activity was fully disclosed in the Joint Bidding Agreements and that there is no evidence of a *per se* violation of the antitrust laws, and assert that the conduct was pro-competitive, the agreements were permitted under the "rule of reason" because they were among participants in a efficiency-enhancing integration of economic

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411 *See* 47 U.S.C. § 309(d)(2).

412 VTel Petition at 36-37; VTel Reply at 32-35; CTTI/RTA Reply at 16.

413 VTel Petition at 29-31; CTTI/RTA Petition at 5-6.

414 VTel Petition at 29.

activity, and that they otherwise fully complied with the antitrust laws.[415] The Commission does not render a decision on the allegations by CTTI/RTA and VTEL that SNR and Northstar acted in violation of antitrust laws.[416] While the Commission may consider federal antitrust policies in applying the Communication Act's public interest standard,[417] VTEL cites no authority that gives the Commission the independent authority to prosecute violations of the Sherman Act.

147. Although we decline to reach a conclusion as to whether the joint bidding behavior of SNR and Northstar, together with DISH, violated the antitrust laws, we note that Section 1 of the Sherman Act "reaches unreasonable restraints of trade effected by a 'contract, combination in the form of trust . . . or

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[415] Northstar Opposition to Petitions at 63-64; SNR Consolidated Opposition to Petitions at 41, 61-62.

[416] CTTI/RTA Petition to Deny at 5-6 (arguing that "auction data reveal that Northstar, SNR and DISH engaged in other highly coordinated actions during Auction 97 that are appropriately described as anticompetitive, which violates federal antitrust laws"); CTTI/RTA Oppositions to Petitions to Deny at 12-13 (arguing that DISH, SNR and Northstar engaged in anticompetitive and collusive conduct "to systematically divide or allocate markets, which by itself is a strong indicator of improper conduct"); VTEL Petition to Deny at 29-31 (alleging that DISH, SNR and Northstar engaged in bid rigging and price fixing in the markets where SNR and Northstar won licenses in Auction 97); VTel Reply in Support of Petition to Deny at 41-43 (arguing that DISH, SNR and Northstar colluded to reduce bidding competition in violation of antitrust laws).

[417] *See United States v. FCC*, 652 F.2d 72, 88 (D.C. Cir. 1980); *see also* VTel Petition at 30 & n.74.

conspiracy" between separate entities."[418] VTel's argument is based, not on a demonstration that these three entities were in fact separate, but on their status as "ostensible" competitors, who "affirmatively asserted" that they were not under DISH's control and "represented" that they were separate economic actors.[419] That argument fails to address the requirement that Section 1 requires an examination of "economic substance" rather than corporate form.[420] Indeed, it appears to be flatly inconsistent with VTel's other arguments that DISH holds *de facto* control over SNR and Northstar.

148. SNR and Northstar both point to their disclosure of the Joint Bidding Agreements as a safe harbor in response to VTel and CTTI/RTA's antitrust allegations. For example, Northstar asserts that, under the Commission's rules, "auction applicants may cooperate with another applicant with respect to the substance of their own, or each other's bids or bidding strategies if the applicant is a member of a joint bidding agreement with the other applicant and it is identified on the applicant's short-form

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[418] *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 768 (1984) ("*Copperweld*"), *citing Albrecht v. Herald Co.*, 390 U.S. 124, 149 (1968), and *Monsanto Co. v. Spray-Rite Corp.,* 465 U.S. 752, 761 (1984).

[419] VTel Petition at 29, 31 n.76

[420] *American Needle, Inc.,* 560 U.S. at 184 (the Court embarks on a functional analysis in which the key is the "economic substance" of the relationship between the entities alleged to be Section 1 co-conspirators, not corporate form, and on whether the market would be deprived of "independent centers of decisionmaking").

application."[421] Similarly, SNR argues, "[t]he FCC's rules recognize that such FCC-disclosed Joint Bidding Agreements will include features such as discussions among members of their respective bidding strategies and planned or actual bids and various forms of potential or actual cooperation or collaboration."[422] Further, SNR and Northstar argue that the openness of their collaboration with DISH and each other is a key factor in any antitrust analysis; and, in this case, the open collaboration between DISH, SNR and Northstar was pro-competitive and not collusive.[423]

149. We reject the Applicants' claims that the disclosure of the Joint Bidding Agreements shields them from antitrust liability and remind parties that auction applicants remain subject to the antitrust laws, which are designed to prevent anticompetitive behavior in the marketplace.[424] Contrary to the

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[421] Northstar Opposition at 66.

[422] SNR Opposition at 64-65, *citing* 47 C.F.R. § 1.2105(c).

[423] SNR Opposition at 61-62, 66-68; Northstar Opposition at 65-69.

[424] *See* Amendment of Part 1 of the Commission's Rules — Competitive Bidding Procedures, WT Docket No. 97-82, *Third Further Notice of Proposed Rulemaking*, FCC 99-384, 14 FCC Rcd 21558, 21560-61 ¶ 4 & n.17 (1999) quoting *Competitive Bidding Memorandum Opinion and Order*, 9 FCC Rcd at 7689 ¶ 12 ("[W]e wish to emphasize that all applicants and their owners continue to be subject to existing antitrust laws. Applicants should note that conduct that is permissible under the Commission's Rules may be prohibited by the antitrust laws."); Implementation of Section 309(j) of the Communications Act — Competitive Bidding, PP Docket No. 93-253, *Fourth Memorandum Opinion and Order*, FCC 94-264, 9 FCC Rcd 6858, 6869 n.134 (1994)("[A]pplicants will also be subject to existing antitrust

Applicants' claims, compliance with the disclosure requirements of Section 1.2105(c) will not insulate an applicant from enforcement of the antitrust laws.[425] Previously, the Commission has cited a number of examples of potentially anticompetitive actions that would be prohibited under antitrust laws: for example, actual or potential competitors may not agree to divide territories in order to minimize competition, regardless of whether they split a market in which they both do business, or whether they merely reserve one market for one and another market for the other.[426] Open agreements between competitors may still be actionable; even if the agreements do not rise to the level of a *per se* violation of Section 1 of the Sherman Act, the agreements may still be analyzed under the rule of reason to determine their overall competitive effect.[427] And, if an applicant is found to have violated the antitrust laws or the Commission's rules in connection with its participation in the competitive bidding process, it may be subject to forfeiture of its upfront payment, down payment, or

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laws.") ("*Fourth Memorandum Opinion and Order*"). *See also Auction Procedures Public Notice*, 29 FCC Rcd at 8398-99 ¶ 35.

[425] *See Competitive Bidding Memorandum Opinion and Order*, 9 FCC Rcd at 7689 ¶ 12. *See also* Justice Department Sues Three Firms Over FCC Auction Practices, *Press Release* 98-536 (DOJ Nov. 10, 1998); *Auction Procedures Public Notice*, 29 FCC Rcd at 8398-99 ¶ 35.

[426] *See*, *e.g.*, *Fourth Memorandum Opinion and Order*, 9 FCC Rcd at 6869 n.134; *see also Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2387 n.165.

[427] *Antitrust Guidelines for Collaborations Among Competitors*, Issued by FTC and DOJ (April 2000); *American Needle, Inc.*, 560 U.S. 183.

full bid amount, and may be prohibited from participating in future auctions, among other sanctions.[428]

150. We are declining to refer this matter to the Department of Justice as requested by Petitioners. Where allegations appear to give rise to violations of federal antitrust laws, the Commission may investigate and/or refer such cases to the United States Department of Justice for investigation.[429] Given that we have found that SNR and Northstar, are affiliates of, and controlled by DISH, VTel's pleadings have failed to demonstrate that they conspired to violate the antitrust laws.[430] Nothing in this decision, however, in any way preempts or prejudges the outcome of any investigation or proceeding that the Department may undertake on its own motion.

IV. CONCLUSION

151. Under the two separate and independent legal bases discussed above, we find that DISH has a controlling interest in and is an affiliate of SNR and Northstar under the Commission's rules governing eligibility for small business bidding credits.[431]

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[428] *See* 47 C.F.R. § 1.2109(d); *see also Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2388 ¶ 226.

[429] *See* Amendment of Part 1 of the Commission's Rules – Competitive Bidding Procedures, *Third Report and Order and Second Further Notice of Proposed Rulemaking*, 13 FCC Rcd 374, 469 ¶ 166 (1997).

[430] *Copperweld Corp.*, 467 U.S. at 768.

[431] SNR and Northstar also question why the Commission staff did not "contact[] the applicant[s] first and allow[] [them] to address specific Bureau concerns, amend organizational

documents, if necessary, and supplement [their] application[s] to resolve those issues." *See Northstar Letter* at 7; *SNR Letter* at 7. In fact, staff contacted SNR and Northstar repeatedly to ask for additional documents, explanations, revised exhibits, and documents containing fewer confidentiality redactions in order for the record to be complete. In response to staff's requests, Applicants were permitted to amended their respective Applications numerous times to provide additional and clarifying information before the Applications were found to be complete and accepted for filing. *See* notes 15-16, *supra. Cf. SNR Letter* at 7-8 n.42; *Northstar Letter* at 7-8 n.34 (*citing* letters seeking or providing additional "ownership and organization" information and other "incomplete components" of a pending application, or clarifying aspects of applicants' "plan to hire additional personnel"). The remaining citations by Applicants do not involve long-form review of DE qualifications issues. The Commission's processing of the applications lay well within its "broad discretion to prescribe rules for specific investigations" and to "fashion [its] own rules of procedure and to pursue methods of inquiry capable of permitting [it] to discharge [its] multitudinous duties." *FCC v. Schreiber,* 381 U.S. 279, 289-90 (1965); 47 U.S.C. §154(j). Nor does this case involve the "specific and unique facts" of *ClearComm, L.P.,* 16 FCC Rcd 18627 ¶¶ 26-27 (AIAD 2001). That staff decision involved a proposed license assignment years after the auction, in which "up until this date, no challenge has been raised regarding [the party's] qualifications under the designated entity rules," the party was "at all times . . . qualified as a designated entity," and "the clear intent of the parties [was] to structure the assignee . . . as a drop-down wholly owned subsidiary . . . ." *Id.* ¶¶ 26-27. Citing *Baker Creek,* the staff noted that "this decision i[n] no way limits our ability to determine that auction applicants do not meet the eligibility criteria for benefits afforded to designated entities." *Id.* n.104. In any event, whatever the staff's processing practices may have been in other cases, we find no basis in the circumstances of this case for adopting the suggestion by Applicants here, when to do so would likely promote disincentives to the structuring of investments that adhere in the first instance to the limitations of our DE rules.

Accordingly, DISH's average gross revenues for the preceding three years must be attributed to SNR and Northstar for purposes of determining whether each applicant is eligible for status as a very small business. DISH describes itself as a Fortune 250 company[432] and its average gross revenues for 2011, 2012, and 2013 far exceed the threshold for eligibility.[433]

152. Accordingly, we conclude that SNR has not met its burden to establish that it is eligible for a very small business bidding credit[434] and we must deny SNR's request for a bidding credit. SNR must therefore pay the full amount of its winning bids. The difference between SNR's gross winning bids and its net winning bids is $1,370,591,075. SNR also withdrew two provisionally bids in Auction 97 for which one of the subsequent winning bids was lower than SNR's withdrawn bid. For that withdrawn bid SNR is obligated to make a bid withdrawal payment. SNR's bid withdrawal payment was made from the funds it had on deposit with the Commission, with the remaining deposit applied to SNR's payment of the balance of its winning bids. Under the Commission's rules, the calculation of a bid withdrawal payment differs when a bidding credit applies to the withdrawn

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[432] *See, e.g.,* http://dish.client.shareholder.com/ last visited on August 14, 2015.

[433] *See, e.g.,* DISH Network Annual Report, Year Ending December 31, 2013, available at http://dish.client.shareholder.com/financials.cfm, last visited August 14, 2015, at 55 (2013 total revenue of $13,904,865,000; (2012 total revenue of $13,181,334,000; 2011 total revenue of $13,074,063).

[434] 47 C.F.R. § 1.2112(b).

bid.[435] Because SNR is not eligible for a bidding credit, its bid withdrawal payment is larger than initially calculated.[436] As a result, the funds on deposit to pay for SNR's licenses are reduced by the additional portion of the deposit being applied to its bid withdrawal payment. Accordingly, SNR owes an additional $2,774,250 to pay its winning bids in full, in addition to the $1,370,591,075 amount of the disallowed bidding credit.[437]

153. Within 30 days of the date of release of this *Memorandum Opinion and Order*, SNR must either (a) submit payment in the amount of $1,373,365,325, or (b) cause to be delivered to the Commission, in a form acceptable to the Commission, an irrevocable, standby letter of credit (an "LOC")[438] in the amount of $1,373,365,325, from a bank that is acceptable to the

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[435] 47 C.F.R. § 1.2104(g)(1). If a bidding credit applies to withdrawn bid or subsequent winning bid, the bid withdrawal payment is either the difference between the net withdrawn bid and the subsequent net winning bid, or the difference between the gross withdrawn bid and the subsequent gross winning bid, whichever is less. *Id.*

[436] Without a bidding credit, SNR's withdrawal payment is $11,097,000 instead of $8,322,750, a difference of $2,774,250.

[437] The *Closing Public Notice* states that if after the long-form application review process is completed, it is determined that an additional payment from an applicant is due, the Bureau will provide instructions in a further public notice or by demand letter. *See Closing Public Notice*, 33 FCC Rcd 630 at ¶ 33 & n.42. We clarify that the instant *Memorandum Opinion and Order* constitutes such demand for payment and instructions.

[438] Such Letter of Credit will comply with the International Standby Practices - ISP98 issued by the International Chamber of Commerce.

Commission.[439] Such LOC shall provide that the Commission may draw upon the LOC if SNR shall have failed to submit payment in the amount of $1,373,365,325 no later than 120 days from the date of release of this *Memorandum Opinion and Order*.[440] Further, at the time it submits the LOC, SNR must provide an opinion letter from legal counsel, acceptable to the Commission, clearly stating, subject only to customary assumptions, limitations and qualifications, that in a proceeding under section 541 of Title 11 of the United States Code (the "Bankruptcy Code"), the bankruptcy court would not treat the LOC or proceeds of the LOC as property of SNR's bankruptcy estate, or the bankruptcy estate of any affiliate requesting issuance of the LOC, under section 541 of the Bankruptcy Code.[441] Failure to complete payment or alternatively deliver the LOC to the Commission as provided above by 3:00 p.m. Eastern Time on September 17, 2015, will result in a default[442] and SNR will be liable for the default payment set forth in section 1.2104(g)(2) of the Commission's rules.[443]

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[439] For the requirements with respect to banks acceptable to the Commission, *see* 47 C.F.R. § 54.1007(a)(1).

[440] The LOC shall not have an expiry date earlier than 6 months from date of release of order.

[441] 11 U.S.C. § 541.

[442] In addition, a default will also occur if payment under the LOC is not made to the Commission upon first presentation of the required documents to the bank.

[443] *See* 47 C.F.R. §§ 1.2104(g)(2), 1.2109(c). Upon default, any amounts due and owing to the Commission hereunder shall accrue interest, penalties and other charges pursuant to 47 C.F.R. § 1.1940. The Commission shall exercise any and all

154. We further conclude that Northstar has not met its burden to establish that it is eligible for a very small business bidding credit[444] and we deny Northstar's request for a bidding credit. Northstar must therefore pay the full amount of its winning bids. The difference between Northstar's gross winning bids and its net winning bids is $1,961,264,850.[445]

155. Within 30 days of the date of release of this *Memorandum Opinion and Order*, Northstar must either (a) submit payment in the amount of $1,961,264,850, or (b) cause to be delivered to the Commission, in a form acceptable to the Commission, an irrevocable, standby LOC in the amount of $1,961,264,850, from a bank that is acceptable to the Commission.[446] Such LOC shall provide that the Commission may draw upon the LOC if Northstar shall have failed to submit payment in the amount of $1,961,264,850 no later than 120 days from the date of release of this *Memorandum Opinion and Order*. Further, at the time it submits the LOC, Northstar must provide an opinion letter from legal counsel, acceptable to the Commission, clearly stating, subject only to customary assumptions, limitations and qualifications, that in a proceeding under the Bankruptcy Code, the bankruptcy court would not

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remedies available to it under the Debt Collection Improvement Act, 31 U.S.C. § 3701, *et seq*., the Federal Claims Collection Standards, 31 C.F.R. § 900, *et. seq*., the Commission's debt collection regulations, 47 C.F.R. § 1.1901, *et seq*. and federal common law to collect all monies owed to it.

[444] 47 C.F.R. § 1.2112(b).

[445] *See* note 437, *supra*.

[446] *See* 47 C.F.R. § 54.1007(a)(1).

treat the LOC or proceeds of the LOC as property of Northstar's bankruptcy estate, or the bankruptcy estate of any affiliate requesting issuance of the LOC, under section 541 of the Bankruptcy Code.[447] Failure to complete payment or alternatively deliver the LOC to the Commission as provided above by 3:00 p.m. Eastern Time on September 17, 2015, will result in a default[448] and Northstar will be liable for the default payment set forth in section 1.2104(g)(2) of the Commission's rules.[449]

156. Finally, we conclude that while we have found that the Applicants are not entitled to the bidding credits that they claimed, for the reasons stated above none of the Petitioners' allegations constitute grounds to render an adverse decision as to Applicants' basic qualifications to hold licenses, or to grant any of the relief requested in the petitions other than the denial of the bidding credits sought by Applicants. We therefore refer the Applications back to the Wireless Bureau for completion of processing

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[447] 11 U.S.C. § 541.

[448] In addition, a default will also occur if payment under the LOC is not made to the Commission upon first presentation of the required documents to the bank.

[449] Upon default, any amounts due and owing to the Commission hereunder shall accrue interest, penalties and other charges pursuant to 47 C.F.R. § 1.1940. The Commission shall exercise any and all remedies available to it under the Debt Collection Improvement Act, 31 U.S.C. § 3701, *et seq*., the Federal Claims Collection Standards, 31 C.F.R. § 900, *et. seq*., the Commission's debt collection regulations, 47 C.F.R. § 1.1901, *et seq*. and federal common law to collect all monies owed to it.

consistent with this *Memorandum Opinion and Order* and the Commission's rules.[450]

V. ORDERING CLAUSES

157. Accordingly, IT IS ORDERED that, pursuant to Sections 4(i) and 309(d),(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 309(d),(j), and Sections 1.939, 1.2108, and 1.2110 of the Commission's Rules, 47 C.F.R. §§ 1.939, 1.2108, 1.2110, Northstar Wireless, LLC's request for a very small business designated entity bidding credit in connection with file number 0006670613 IS DENIED.

158. IT IS FURTHER ORDERED that, pursuant to Sections 4(i) and 309(j) of the Communications Act, as amended, 47 U.S.C. §§ 154(i), 309(j), and Section 1.2109(a) of the Commission's Rules, 47 C.F.R. § 1.2109(a), by 3:00 pm Eastern Time on September 17, 2015, Northstar must either (a) submit payment of the amount of $1,961,264,850 pursuant to the instructions contained in Paragraphs 161-162 below, or (b) cause to be delivered to the Commission the LOC and opinion letter in accordance with paragraph 155 above.

159. IT IS FURTHER ORDERED that pursuant to Sections 4(i) and 309(d),(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 309(d),(j), and Sections 1.939, 1.2108, and 1.2110 of the

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[450] We remind all parties that petitions for reconsideration of our determinations in this *Memorandum Opinion and Order* must be filed within 30 days from the release date. 47 C.F.R § 1.106(f). We further remind all parties that filing such petition does not stay the effectiveness of this *Memorandum Opinion and Order* or the Applicants' obligations to make the payments set forth herein. *See id*. at § 1.106(n).

Commission's Rules, 47 C.F.R. §§ 1.939, 1.2108, 1.2110, SNR Wireless License Co, LLC's request for a very small business designated entity bidding credit in connection with file number 0006670667 IS DENIED.

160. IT IS FURTHER ORDERED that, pursuant to Sections 4(i) and 309(j) of the Communications Act, as amended, 47 U.S.C. §§ 154(i), 309(j), and Section 1.2109(a) of the Commission's Rules, 47 C.F.R. § 1.2109(a), by 3:00 pm Eastern Time on September 17, 2015, SNR must either (a) submit payment of the amount of $1,373,365,325, pursuant to the instructions contained in Paragraphs 161-162 below, or (b) cause to be delivered to the Commission the LOC and opinion letter in accordance with paragraph 153 above.

161. All payments must be in U.S. dollars and made in the form of a wire transfer. No personal checks, credit card payments, automated clearing house ("ACH"), or other forms of payment will be accepted. Questions concerning the submission of the wire transfer payments should be directed to Gail Glasser at (202) 418-0578 or Theresa Meeks at (202) 418-2945.

162. To submit funds by wire transfer, SNR and Northstar will need the following information:

ABA Routing Number: **021030004**

Receiving Bank: **TREAS NYC**

Liberty Street

New York, NY 10045

ACCOUNT NAME: **FCC**

ACCOUNT NUMBER: **27000001**

OBI Field: (Skip one space between each information item) "AUCTIONPAY"

APPLICANT FRN

PAYMENT TYPE CODE: "D097"

PAYOR NAME

PAYOR FRN

CONTACT PHONE NUMBER OR E-MAIL

163. IT IS FURTHER ORDERED that the Petitions to Deny, application FCC Files No. 0006670613, 0006670667, filed by VTel Wireless, Inc. and jointly by Central Texas Telephone Cooperative and Rainbow Telecommunications Association, Inc. on May 11, 2015 ARE GRANTED IN PART to the extent set forth herein and otherwise DENIED.

164. IT IS FURTHER ORDERED that the Petitions to Deny, application FCC Files No. 0006670613 and 0006670667, filed by Citizen Action, ESC Company, Communications Workers of America/National Association for the Advancement of Colored People, National Action Network, Americans for Tax Reform/Center for Individual Freedom, and Citizens Against Government Waste/MediaFreedom.org/National Taxpayers Union/Taxpayers Protection Alliance on May 11, 2015 and by the Hispanic Technology & Telecommunications Partnership on May 15, 2015 ARE DISMISSED.

165. IT IS FURTHER ORDERED that the Motions to Strike or Dismiss AT&T "Partial Opposition" to Petitions to Deny filed by Northstar

Wireless, LLC and to Dismiss, Strike or Deny Partial Opposition of AT&T Inc. filed by SNR Wireless LicenseCo, LLC ARE GRANTED and that the Partial Opposition of AT&T Inc. to Petitions to Deny filed by AT&T Services, Inc. on May 11, 2015 IS DISMISSED. Accordingly, all related pleadings also ARE DISMISSED.

166. IT IS FURTHER ORDERED that the Reply to Petitions to Deny filed by the National Association of Black-Owned Broadcasters, Inc. on May 26, 2015 IS DISMISSED.

167. IT IS FURTHER ORDERED that the Motions to Dismiss New Claims or, in the Alternative, for Leave to File Surreply filed by Northstar Wireless, LLC and to Strike or, in the Alternative, for Leave to File Consolidated Surreply filed by SNR Wireless License Co, LLC on June 2, 2015 ARE GRANTED to the extent discussed in Section III.B above and otherwise DENIED. Accordingly, all related pleadings also ARE DISMISSED.

168. IT IS FURTHER ORDERED that the above-captioned applications are referred to the Wireless Telecommunications Bureau for further processing consistent with this *Memorandum Opinion and Order* and the Commission's rules.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch

Secretary

CONCURRING STATEMENT OF COMMISSIONER MIGNON L. CLYBURN

Re: Northstar Wireless, LLC, SNR Wireless LicenseCo, LLC, Applications for New Licenses in the 1695-1710 MHz, and 1755-1780 MHz and 2155-2180 MHz Bands, File No. 0006670613, File No. 0006670667, Report No. AUC-97AUC.

Since 2010, I have been asking the Commission to establish creative approaches to spur greater participation by new entrants and small businesses in the communications industry -- where small businesses have traditionally lacked access to sufficient capital. This is why last month, I was pleased to support the agency's Competitive Bidding Order which adopted new designated entity (DE) rules that should give small businesses more flexibility to secure financing and develop business models to effectively compete in an increasingly consolidated wireless market.

In the case of North Star Wireless and SNR Wireless, I agree that under a proper interpretation of our rules governing the review of applications for DE bidding credits and the relevant agreements, DISH has the power to effectively control these two applicants. I am voting to concur because it is unfortunate this finding will likely mean that the small businesses, who obviously lacked bargaining power when negotiating these agreements, will not be able to retain their licenses. Under the structure of our rules, if the Commission denies a DE application, the only available remedy is for the applicant to pay the amount of the bidding credit. In addition, the limited liability company agreements provide that, if these

applicants fail to qualify for bidding credits, DISH will make the required payments to the Commission and the applicants must transfer all of their AWS-3 licenses to DISH. This does not advance the public interest goals of promoting economic opportunity and competition and disseminating licenses among a wide variety of applicants. I hope this case will not have an undue chilling effect on the ability of small businesses to enter into relationships with large investors. And I encourage small businesses to follow the guidance offered in this Order as they negotiate similar agreements in the future.

STATEMENT OF COMMISSIONER AJIT PAI

Re: *Northstar Wireless, LLC, SNR Wireless LicenseCo, LLC, Applications for New Licenses in the 1695-1710 MHz, and 1755-1780 MHz and 2155-2180 MHz Bands*, File No. 0006670613, File No. 0006670667, Report No. AUC-97AUC.

When the FCC's Wireless Telecommunications Bureau disclosed that DISH Network Corp. (DISH)—a Fortune 250 corporation with annual revenues of $14 billion and a market capitalization of over $32 billion—owned 85% of two companies that claimed over $3 billion in small business discounts in the AWS-3 auction, I called for the FCC to conduct a thorough investigation.[1]

Having completed that investigation, my colleagues and I now conclude that the two companies—Northstar Wireless, LLC (Northstar) and SNR Wireless LicenseCo, LLC (SNR)—are controlled by DISH and thus are ineligible for any small business discounts. They now owe the U.S. government $3.3 billion. This is the right answer under the law, and it is a win for taxpayers and legitimate small businesses.

At the outset, I want to thank the staff of the Wireless Telecommunications Bureau and the Office of General Counsel for their expertise and attention to detail in handling this matter. When I proposed an investigation, I had an open mind as to the proper

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[1] Statement of Commissioner Ajit Pai on Abuse of the Designated Entity Program, Press Release, http://go.usa.gov/3fcXj (Feb. 2, 2015); Statement of Commissioner Ajit Pai on How Abuse of the FCC's Small Business Program Hurts Small Businesses, Press Release, http://go.usa.gov/3fcXH (Mar. 16, 2015).

outcome. After all, what should be unlawful and what actually is unlawful can be two different things. I hoped FCC staff would offer sober, meticulous analysis of the complex relationships and conduct at play in the AWS-3 auction. They did exactly that, scouring many pages of contractual arrangements, studying the bidding during the auction, and unearthing all relevant precedents. I'm grateful for the work they have done and for Chairman Wheeler's decision to devote the resources necessary for the agency to do its due diligence.

Here is what the staff found and what we ratify today: DISH maintains an extensive level of control over SNR and Northstar, thus eliminating any possibility that they are independent small businesses. To begin, SNR and Northstar are deeply indebted to DISH. Combined, the two companies generated revenues of $0 leading up to the FCC's spectrum auction. But as a result of their spectrum purchases, they now owe DISH approximately $10 billion. This leverage alone could lead many reasonably to conclude that DISH would control these entities. But DISH went even further to cement its dominance. DISH entered into about two dozen separate contracts with the two companies. Those agreements give DISH control over nearly every aspect of SNR and Northstar, including decisive input into their policy, financial, employment, business, marketing, technology, and deployment decisions.

Take just one of those agreements—what is referred to as the "LLC Agreement." One part of that agreement contains 19 wide-ranging provisions that specify decisions that the companies cannot make

without DISH's prior written consent. For example, the companies cannot deviate by more than 10% from any line item in an annual budget without first obtaining DISH's consent. Thus, if an annual budget included $10,000 for office supplies, Northstar or SNR would need DISH's concurrence to spend more than $11,000 or less than $9,000. Nor could these two companies—which purport to be independent wireless licensees—obtain any additional spectrum (regardless of the cost) without first getting clearance from DISH. Taken as a whole, these and the many other controls DISH put in place go far beyond any legitimate protections for an arm's length investor. They smack instead of the wizard controlling the entire show from behind the curtain.

In addition to its dense web of contractual controls over the supposedly independent small businesses, DISH used those businesses to carry out an unparalleled level of coordination during the auction. Analysis shows that they engaged in nearly 4,000 instances of coordinated bidding. This includes hundreds of cases where all three companies placed the exact same bid on the exact same license in the exact same round. This and other forms of coordination gave the DISH entities a significant advantage over every other bidder in the auction. This conduct not only sent false signals regarding the level of demand in particular markets, but also allowed the DISH entities to maintain bidding eligibility deeper into the auction and raise costs on other bidders.

It bears mentioning that this *Order* does not necessarily end the government's inquiry. As we made clear before the auction started, "[r]egardless of

compliance with the Commission's rules, applicants remain subject to the antitrust laws, which are designed to prevent anticompetitive behavior in the marketplace."[2] I leave it to the U.S. Department of Justice's Antitrust Division to decide whether any conduct exhibited during the auction and described herein runs afoul of the Sherman Act's proscriptions.

But for the FCC's part, we are taking strong action to ensure that companies adhere to the letter of the law. This *Order* represents an important step toward ensuring that our designated entity program benefits legitimate, independent small businesses and respects American taxpayers and consumers alike.

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[2] *Auction of Advanced Wireless Services (AWS-3) Licenses Scheduled for November 13, 2014*, AU Docket No. 14-78, Public Notice, 29 FCC Rcd 8386, 8398-99, para. 35 (WTB 2014); *see also Amendment of Part 1 of the Commission's Rules — Competitive Bidding Procedures*, WT Docket No. 97-82, Third Further Notice of Proposed Rulemaking, 14 FCC Rcd 21558, 21560-61, para. 4 & n.17 (1999); *Implementation of Section 309(j) of the Communications Act-Competitive Bidding*, PP Docket No. 93-253, Memorandum Opinion and Order, 9 FCC Rcd 7684, 7689, para. 12 (1994) ("[W]e wish to emphasize that all applicants and their owners continue to be subject to existing antitrust laws. Applicants should note that conduct that is permissible under the Commission's Rules may be prohibited by the antitrust laws."); *Implementation of Section 309(j) of the Communications Act — Competitive Bidding*, PP Docket No. 93-253, Fourth Memorandum Opinion and Order, 9 FCC Rcd 6858, 6869 n.134 (1994) ("[A]pplicants will also be subject to existing antitrust laws.").

STATEMENT OF COMMISSIONER MICHAEL O'RIELLY

Re: Northstar Wireless, LLC, SNR Wireless LicenseCo, LLC, Applications for New Licenses in the 1695-1710 MHz, and 1755-1780 MHz and 2155-2180 MHz Bands, File No. 0006670613, File No. 0006670667, Report No. AUC-97AUC.

The order before us methodically details the myriad of agreements entered into by DISH and the two small businesses, SNR Wireless LicenseCo, LLC and Northstar Wireless, LLC ("DISH DEs"), it created solely for the purpose of obtaining licenses at a discount in the recent AWS-3 auction (Auction 97). It also describes the strategic bidding strategy employed not only by the DISH DEs but also DISH's wholly-owned subsidiary, American AWS-3 Wireless I LLC. Between the agreements and the actual demonstration of control evidenced by the bidding activity, the item provides sufficient evidence and analysis to find that, under our designated entity ("DE") rules, DISH controls these two entities and, therefore, DISH's revenues must be attributed to the DEs disqualifying them for small business benefits.

I vote in support of this decision as it is consistent not only with Commission rules, but also with congressional intent. Specifically, Congress mandated that the Commission implement rules to "ensure that small business . . . are given the opportunity to participate in the provision of spectrum-based services."[1] On the other hand, Congress also recognized the importance of preventing unjust

[1] 47 U.S.C. § 309(j)(4)(D).

enrichment.[2] It was clearly Congress's will to provide small business benefits, such as bidding credits, to eligible entities to promote such goals as competition, avoidance of excessive concentration of licenses and the wide dissemination of licenses,[3] while preventing large, well-financed companies from improperly profiting from a subsidy program and inappropriately extracting a benefit provided by Americans.

I am not sure I agree, however, with the decision that this matter should not be referred to the Department of Justice, but in the interest of obtaining finality in this case, I will not object to this portion of the item. Notwithstanding the disclosures made by DISH and its two DE partners, parties to any DE arrangement, as well as anyone involved in the Commission's auction process, are prohibited from violating our nation's antitrust laws. In this instance, an analysis of the record seems to provide sufficient evidence that the parties may have colluded or attempted to do so in order to make strategic bidding decisions in an anti-competitive manner. This is not and cannot be cured by Commission's disclosure process. As such, I would have preferred that we refer this matter to the Department of Justice, which is the subject matter expert regarding antitrust, and allow it to make its own judgement regarding whether or not the facts presented are worthy of further investigation. This would certainly be superior to the Commission undertaking its own analyses to come to the conclusion that the alleging party "failed to

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[2] *Id.* §§ 309(j)(4)(E), 309(j)(3)(C).

[3] *Id.* § 309(j)(3)(B).

demonstrate that [DISH and the DISH DEs] conspired to violate the antitrust laws."

Appendix E

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC

No. 0006670613

IN RE NORTHSTAR WIRELESS, LLC

No. 0006670667

IN RE SNR WIRELESS LICENSECO, LLC

Report No. AUC-97AUC

In re Applications for New Licenses in the
1695-1710 MHz, and 1755-1780 MHz and
2155-2180 MHz Bands

Adopted: July 11, 2018
Released: July 12, 2018

MEMORANDUM OPINION & ORDER

By the Commission:

1. In this *Memorandum Opinion and Order*, we affirm, with one minor modification, the Wireless

Telecommunications Bureau *Order on Remand*,[1] which established a procedure to afford Northstar Wireless LLC and SNR Wireless LicenseCo, LLC (collectively "Applicants") the opportunity to cure their Auction 97 applications pursuant to the mandate of the U.S. Court of Appeals for the District of Columbia Circuit in *SNR Wireless v. FCC*.[2] For the reasons discussed below, we grant the Applicants' request to file a pleading to address any issues raised by the parties to these proceedings (collectively "Parties of Record") but otherwise deny the Applicants' joint Application for Review (AFR).[3]

I. BACKGROUND

2. In Auction 97, Northstar was the winning bidder for 345 licenses with an aggregate gross bid of $7,845,059,400, and SNR Wireless was the winning bidder for 357 licenses with an aggregate gross bid of $5,482,364,300.[4] Both Northstar and SNR Wireless claimed on their FCC Form 601 that they were eligible for a 25 percent bidding credit because they each

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[1] *Northstar Wireless, LLC, SNR Wireless LicenseCo, LLC, Applications for New Licenses in the 1695-1710 MHz, 1755-1780 MHz and 2155-2180 MHz Bands*, Order on Remand, 33 FCC Rcd 231 (WTB 2018) (*Order on Remand*)

[2] *SNR Wireless LicenseCo, LLC, et al. v. Federal Communications Commission*, 868 F.3d 1021 (D.C. Cir. 2017) (*petition for cert. filed*) (*SNR Wireless v. FCC*).

[3] Joint Application for Review of Northstar Wireless, LLC, SNR Wireless LicenseCo, LLC, ULS File Nos. 0006670613 and 0006670667 (Feb. 21, 2018).

[4] S*ee Auction of Advanced Wireless Services (AWS-3) Licenses Closes, Winning Bidders Announced for Auction 97*, Public Notice, 30 FCC Rcd 630, Att. B at 2 (2015).

qualified as a very small business.[5] In August 2015, the Commission ruled that the Applicants were not eligible for the very small business bidding credits they had sought in Auction 97 because DISH Network Corporation ("DISH") exercised *de facto* control over the Applicants.[6] Applicants appealed the Commission's decision.

3. On appeal, the Court of Appeals held that the Commission "reasonably applied its longstanding precedent to determine that DISH exercised a disqualifying degree of *de facto* control over SNR [Wireless] and Northstar."[7] It also held, however, that the Commission did not give Applicants "adequate notice that, if their relationships with DISH cost them their bidding credits, the FCC would also deny them an opportunity to cure."[8] The Court stated that "an opportunity for petitioner to renegotiate their agreements with DISH provides the appropriate remedy here," and therefore remanded the matter to the Commission for further proceedings consistent with its opinion.[9] The Court directed the Commission to give Applicants an opportunity to "negotiate a cure

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[5] *See* Northstar Wireless, LLC Long-Form Application, FCC Form 601, ULS File No. 0006670613 (filed Feb. 13, 2015)*;* SNR Wireless LicenseCo, LLC Long-Form Application, FCC Form 601, ULS File No. 0006670667 (filed Feb. 13, 2015).

[6] *Northstar Wireless, LLC, SNR Wireless LicenseCo, LLC, Applications for New Licenses in the 1695-1710 MHz, 1755-1780 MHz and 2155-2180 MHz Bands*, Memorandum Opinion and Order, 30 FCC Rcd 8887 (2015) (*Northstar and SNR Wireless MO&O*).

[7] *SNR Wireless v. FCC*, 868 F.3d at 1025.

[8] *Id.*

[9] *Id.* at 1046.

for the *de facto* control the FCC found that DISH exercises over them."[10]

4. On January 24, 2018, the Bureau issued the *Order on Remand*, which instituted a process to provide the Applicants with an opportunity to cure pursuant to the Court's mandate.[11] The *Order on Remand* establishes a 90-day window, with the possibility of a 45-day extension, for each Applicant to "renegotiate [its] respective agreements with DISH and the other parties and to file the necessary documentation in the record to demonstrate that, in light of such changes, each Applicant qualifies for the very small business bidding credit that it sought in Auction 97."[12] The *Order on Remand* provides that any additional documents or amendments to the existing applications filed by the Applicants will be made publicly available and affords the Parties of Record the opportunity to file comments.[13] The Applicants may further amend their agreements in response to those comments.[14] The Parties of Record may file comments about the Applicants' amended agreements.[15] Following completion of the record, the Commission will determine if "either Applicant

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[10] *Id.* at 1025.

[11] *See Order on Remand.*

[12] *Order on Remand*, 33 FCC Rcd at 232, para. 5.

[13] *Id.* at 233, para. 7. The Parties of Record for each application proceeding are specified in the appendices to the *Order on Remand.*

[14] *Id.* at para. 8. The Applicants are permitted to request an additional 45 days to submit the information. *Id.*

[15] *Id.*

qualifies for the very small business bidding credit it sought in Auction 97."[16]

5. On February 21, 2018, Applicants filed the instant joint AFR requesting that the Commission change the cure process because it "provides no assurance that iterative and responsive negotiations between the Applicants and the [FCC] will occur."[17] They allege that the process instituted by the Bureau is contrary both to the mandate of the Court and the Commission's own precedent.[18] Specifically, they allege that because the Court interpreted the Commission's *ClearComm*[19] decision to require the Commission to provide the Applicants with an opportunity to cure, they are entitled to the "iterative" negotiation process with the Commission that they claim was provided in *ClearComm*. Further, they allege that without such "iterative" negotiations, they will be deprived of the opportunity to cure mandated by the Court. They also claim that because the Commission staff has engaged in such negotiations before granting applications and designated entity (DE) bidding credits in other situations, they must do so following the court's remand in this case.[20]

6. In addition, the Applicants argue that the Commission should remove as Parties of Record "the entities previously dismissed from these license

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[16] *Id.* at para. 9.

[17] AFR at 1.

[18] *Id.*

[19] *In re Application of ClearComm, L.P.*, 16 FCC Rcd. 18627 (2001) (*ClearComm).*

[20] AFR at 15-17.

application proceedings for lack of standing or failure to timely file pleadings" and T-Mobile which, Applicants argue, did not file a pleading in connection with the Applicants' license applications.[21] In addition, the Applicants request an opportunity to file pleadings, in addition to amending their agreements, in response to the comments and arguments made by the Parties of Record, which they contend is not provided to them in the *Order on Remand*.[22] The Applicants also request that the Commission toll the deadlines specified in the *Order on Remand* while it considers this AFR.[23]

7. T-Mobile filed an opposition to the AFR stating that the Communications Act and the Commission's rules require that T-Mobile be allowed to comment because the purpose of amending the applications in these cases would be to transfer control from DISH.[24] If control transfers from DISH, TMobile claims this would constitute a major change under the Commission's rules and entitle all interested parties to file petitions to deny.[25] In addition, T-Mobile argues that nothing in the Court's mandate requires the Commission to provide the Applicants with

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[21] AFR at 4

[22] AFR at 23.

[23] AFR at 23-24.

[24] Opposition of T-Mobile USA, Inc. to Joint Application for Review, ULS File Nos. 0006670613 and 0006670667 at 5-8 (filed Mar. 8, 2018) (T-Mobile Opposition).

[25] T-Mobile Opposition at 6, citing 47 C.F.R. §§ 1.927(h), 1.929(a), 1.939(a).

customized iterative guidance on their contract negotiations with DISH.[26]

8. In response to the T-Mobile Opposition, the Applicants state that T-Mobile should not be included as a party in the remand proceedings because T-Mobile was not a party to the proceedings at the time the Applicants filed their appeal.[27] The Applicants also reiterate that they are entitled to an iterative and responsive cure negotiation process which they claim is the same treatment that other DE applicants have received.[28]

9. On March 19, 2018, Northstar also requested a meeting to discuss the AFR and procedures in connection with the court's remand to the Commission.[29] VTel Wireless, Inc. (VTel), one of the Parties of Record, opposed Northstar's request. VTel argues that the *Order on Remand* appropriately rejected Applicants' "demands that the cure process be

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[26] T-Mobile Opposition at 12-15. "The specificity of the clause-by-clause direction that the DISH DEs demand of the Commission is unprecedented. There is no reasonable interpretation of the court's opinion that could possibly require what the DISH DEs are demanding. They have manufactured from whole cloth their assertion that the D.C. Circuit created a special, custom process of 'iterative and responsive negotiations' just for them." *Id.* at 13-14.

[27] Joint Reply to Opposition of T-Mobile USA, Inc, to Joint Application for Review, ULS File Nos. 0006670613 and 0006670667 at 2-4 (filed Mar. 21, 2018) (Applicants' Reply).

[28] Applicants' Reply at 4-5.

[29] Letter from Mark F. Dever, Counsel to Northstar, to Rachael Bender, Wireless Advisor to Chairman Pai, Federal Communications Commission, ULS File Nos. 0006670613 (March 7, 2018).

conducted 'in an iterative and responsive' manner in meetings held with the Commission behind closed doors."[30] On March 20, 2018, the Commission's General Counsel responded to Northstar's letter, stating that in the circumstances of this restricted proceeding, and since the questions raised by Northstar relate to the procedures governing the court's remand, its meeting request would be more appropriately addressed by the Commission in responding to the AFR, and in light of the responses and replies received with respect thereto.[31] Following that response, SNR submitted questions to the Bureau about whether certain revised interest rate, loan maturity, passive investor protections, and other provisions would be appropriate.[32] On May 4, 2018, the Applicants and other Parties of Record filed

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[30] Letter from Bennett L. Ross, Counsel to VTel, to Rachael Bender, Wireless Advisor to Chairman Pai, Federal Communications Commission, ULS File Nos. 0006670613 and 0006670667 at 2 (March 19, 2018). We reject the argument by Northstar and SNR that V-Tel's letter should be dismissed. To the extent that this letter responded to the foregoing Northstar request for a meeting, there is no basis in our rules for dismissing such a response. To the extent it was a reply to T-Mobile's opposition, the V-Tel letter was timely filed. *See* 47 C.F.R. § 1.115(d).

[31] Letter from Thomas M. Johnson, Jr., General Counsel, Federal Communications Commission to Mark F. Dever, Counsel to Northstar, ULS File Nos. 0006670613 and 0006670667 (March 20, 2018) (*Johnson March 20th Letter*).

[32] Letter from Ari Q. Fitzgerald, Counsel to SNR Wireless, to Donald Stockdale, Chief, Wireless Telecommunications Bureau, ULS File No. 0006670667 at 1 (March 26, 2018) (*SNR Wireless March 26th Letter*).

supplemental pleadings in support of their respective positions.[33]

II. DISCUSSION

A. The *Order on Remand* Complies with the Court Mandate

10. Upon review, we find the process established in the *Order on Remand* to be responsive to the Court's mandate and we affirm the *Order on Remand*. The mandate does not require the Commission to hold "responsive, back-and-forth discussions" with the Applicants.[34] Nothing in Section 402(h) of the Act[35] or the Court's mandate limits the FCC's discretion under Section 4(j) of the Act[36] so as to require the FCC to "negotiate iteratively" with Northstar and SNR Wireless in the fashion they now contemplate. We agree with T-Mobile that the *Order on Remand* follows the Court's "plain instruction to allow the

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[33] *See* Letter from Mark Dever, Counsel to Northstar and Ari Q. Fitzgerald, Counsel to SNR Wireless, to Marlene H. Dortch, Secretary, Federal Communications Commission, ULS File Nos. 0006670613 & 0006670667 (May 4, 2018) (*Northstar and SNR Wireless May 4 Presentation*); Letter from Bennett L. Ross, Counsel to VTel Wireless, Inc. to Marlene H. Dortch, Secretary, Federal Communications Commission, ULS File Nos. 0006670613 & 0006670667 (May 4, 2018).

[34] AFR at 14.

[35] 47 U.S.C. § 402(h).

[36] 47 U.S.C. § 154(j) (Commission "may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice"). *See also Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.,* 435 U.S. 519, 524-25, 543-44 (1978) ("very basic tenet of administrative law that agencies should be free to fashion their own rules of procedure").

[Applicants] . . . an opportunity to re-negotiate their agreements with DISH and to file new or amended applications based on those agreements."[37]

11. The Court's mandate states only that the Applicants be provided with an "opportunity to cure" and does not require the Commission to engage in an "iterative cure negotiation process"[38] with the Applicants. To the extent the Court refers at one point to a "negotiated cure," the Court's opinion clearly states that the Applicants are to negotiate with DISH and not with the Commission. Specifically, the Court states that:

> Petitioners contend that, in the past, the FCC has "compensate[d] for [a] lack of clarity in its control rules" by giving small companies a chance to modify their contractual agreements with large investors, in an effort to give the small companies enough independence to satisfy the FCC. Pet'r Br. 56-57. Petitioners seek precisely that kind of opportunity to modify their agreements with DISH. *See id.* at 57-58. Because the FCC did not give clear notice that such an opportunity would be denied, **we conclude that an opportunity for petitioner[s] to renegotiate their agreements with DISH provides the appropriate remedy here**. *See Gen. Elec.*, 53 F.3d at 1329 (explaining that, "in many cases," an agency can alert regulated entities to its interpretation of its

[37] T-Mobile Opposition at 15.

[38] AFR at 7.

> own rules by making "efforts to bring about compliance" with the rules before imposing sanctions). We therefore remand this matter to the FCC for further proceedings consistent with our opinion.[39]

12. Section 402(h) requires a remand to be conducted "upon the basis of the proceedings already had and the record" of the appeal—but not if "otherwise ordered by the court."[40] Here the Court affirmed the Commission's *de facto* control findings, but ordered the Commission to conduct "further proceedings"[41] to afford Northstar and SNR Wireless "an opportunity . . . to renegotiate their agreements with DISH" with the benefit of the Commission's *de facto* control analysis and findings in the *Northstar and SNR Wireless MO&O*, which the Court affirmed and elucidated.[42] Northstar and SNR Wireless claim that the further proceedings established by the *Order of Remand* to provide them with an opportunity to renegotiate their agreements with DISH and to amend their applications is contrary to the Court's mandate by not allowing the Applicants to negotiate with the Commission.[43] But nothing in the mandate prescribes what form that opportunity must take, much less compels the cycle of "iterative negotiations" that Northstar and SNR Wireless now demand. As T-Mobile notes, neither the word "iterative" nor the word

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[39] *SNR Wireless v. FCC,* 868 F.3d at 1046 (emphasis added).

[40] 47 U.S.C. § 402(h).

[41] *SNR Wireless v. FCC,* 868 F.3d at 1046.

[42] *Id.*

[43] AFR at 7-14.

"responsive" appears in the Court's order nor any suggestion of "responsive, back-and-forth discussions" between the Applicants and the Commission.[44]

13. In *SNR Wireless v. FCC*, the Court first determined that the Commission's application of its prior decisions on *de facto* control to the specific facts of these agreements with DISH was reasonable and consistent with existing law, that the "unexplained approvals" of other DE applications "are nonprecedential" and "even examining their substance, do not detract from the FCC's [*de facto* control determination] here."[45] However, the Court found that "there was considerable uncertainty *at the time of Auction 97*" about the application of that *de facto* control standard.[46] The Court noted Applicants' observation that in the past the Commission has "giv[en] small companies a chance to modify their contractual agreements with large investors," as well as Applicants' desire for "precisely that kind of opportunity to modify their agreements with DISH."[47] As noted above, in view of Applicants' entreaties, the Court stated that "the appropriate remedy here" is "an opportunity for petitioner[s] to renegotiate their agreements with DISH."[48] That is exactly what the *Order on Remand* does.

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[44] T-Mobile Opposition at 13.

[45] *SNR Wireless v. FCC,* 868 F.3d at 1034, 1035-36.

[46] *Id.* at 1044 (emphasis added).

[47] *Id.* at 1046.

[48] *Id.*

14. The Court further noted that "[n]othing in our decision requires the FCC to permit a cure."[49] Nor, as noted below, did it prescribe the procedures that the Commission should employ in discharging the mandate. The limited scope of the Court's mandate was fully consistent with the recognition by the Supreme Court and the D.C. Circuit's prior decisions that "the function of the reviewing court ends when an error of law is laid bare."[50] In the leading case cited by Applicants,[51] Judge Leventhal noted that the mandate "must preserve and respect the distinctive administrative role of the agency and not encroach on its permissible zone of discretion" or "interfere with the public interest entrusted to the agency by Congress."[52] Noting in particular the need to ensure "meaningful participation by petitioners [to deny]" with statutory rights under Section 309, the D.C. Circuit has also concluded that "[w]e have neither the inclination nor the authority to command the FCC to adopt procedures that seem desirable to us."[53]

15. Indeed, Congress provided wide latitude for the Commission to conduct its proceedings "in such

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[49] *Id.*

[50] *Center for Biological Diversity v. EPA,* 861 F.3d 174, 189, n.12 (D.C. Cir. 2017), *quoting FPC v. Idaho Power Co.,* 436 U.S. 775, 792 n.15 (1978).

[51] AFR at 18, n. 63.

[52] *Greater Boston Television Corp. v. FCC*, 463 F.2d 268, 280-81, 287, 291 (D.C. Cir. 1971); *see also Association of National Advertisers, Inc. v. FTC,* 627 F.2d 1151, 1179 (D.C. Cir. 1979) (Leventhal, J., concurring).

[53] *Bilingual Bicultural Coalition on Mass Media, Inc. v. FCC,* 595 F.2d 621, 635 (D.C. Cir. 1978) (*en banc*).

manner as will best conduce to the proper dispatch of business and to the ends of justice."[54] In *FCC v. Schreiber*, the Supreme Court recognized that Section 4(j) confers on the Commission "broad discretion to prescribe rules for specific investigations" and to "fashion [its] own rules of procedure and to pursue methods of inquiry capable of permitting [it] to discharge [its] multitudinous duties."[55] Thus, the D.C. Circuit has also long recognized the need for the Commission, where appropriate, to "open[] the record following a remand from this court."[56]

16. This is not a case where the Commission's remaining role is "ministerial."[57] Nor is it like *Qualcomm Inc. v. FCC*, where the Commission "had no discretion on remand to reevaluate [the] application" or was directed simply "to fashion an appropriate remedy" for the applicant.[58] Here, as noted above, the Court specifically reserved for the Commission the decision of whether or not to deny Applicants the bidding credits they seek. The Court's point was not that the Commission (or staff) had established a specific procedure for cure that it had failed to afford these Applicants, but that it had failed to provide reasonable notice that it "would deny them

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[54] 47 U.S.C. § 154(j).

[55] 381 U.S. 279, 289-90 (1965).

[56] *Committee for Community Access v. FCC*, 737 F.2d 74 (D.C. Cir. 1984); *see also Eastern Carolinas Broadcasting Co. v. FCC,* 762 F.2d 95 (D.C. Cir. 1985).

[57] AFR at 8.

[58] *Qualcomm Inc. v. FCC*, 181 F.3d 1370, 1376 (D.C. Cir. 1999).

an opportunity to cure" at all.[59] Nothing in the Court's discussion of the Commission staff's decision in *ClearComm* about a "chance to cure," or in the Commission's reference to that staff decision, or in the staff decision itself prescribes any particular procedure for affording the opportunity to cure, much less the open-ended "iterative" process demanded by Applicants here.[60] The Court did direct the Commission to provide for an opportunity to cure, and that is precisely what the *Order on Remand* does. Indeed, it provides not only an opportunity to cure based on the detailed road map provided by the Commission's prior decision, as now highlighted by the Court in this case, but also an opportunity to make further amendments to Applicants' agreements with DISH in response to any supplemental criticisms that may now be raised by the other Parties of Record. Contrary to Applicants' claims, nothing in the Court's actual mandate can be read to require the relief they seek, or to override these basic principles of administrative law.

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[59] *SNR Wireless v. FCC*, 868 F.3d at 1043-44, 1044-45.

[60] The Commission's subsequent citation to the staff-level *ClearComm* decision in 2006, which the court cited as "Commission-level" support for an opportunity to cure, *id.* at 1045-46, cited *ClearComm* for the proposition that the Commission had undertaken investigations designed to avoid circumvention of the DE rules. *Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission's Competitive Bidding Rules and Procedures,* Second Report and Order and Second Further Notice of Proposed Rulemaking, 21 FCC Rcd 4753, 4800 and n.206 (2006). We address below the context and holding of the staff decision itself.

B. The *Order on Remand* is Consistent with Commission Precedent

17. The Applicants also argue that the *Order on Remand* departs from the Commission's own precedent and state that the Commission has consistently used an iterative negotiation process to address concerns with designated entity applicants.[61] To support their viewpoint, the Applicants cite a number of contested proceedings in which they argue that the FCC has reached out to the applicant and engaged in an iterative negotiation process.[62] In particular, the Applicants claim that this remand process should be similar to the process provided in *ClearComm*.[63]

18. As discussed above, the *Order on Remand* is a reasonable exercise of the Commission's broad discretion under Section 4(j) to fashion appropriate rules of procedure to provide the Applicants the opportunity to cure that is required by the Court's decision.[64]

19. Applicants disagree, contending that, whatever the scope of the Court's mandate in this case, the Commission must nevertheless replicate in these circumstances whatever procedures the staff applied in *ClearComm*, which the D.C. Circuit cited in its opinion. We reject this argument. Nothing in the

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[61] AFR at 14-17.

[62] AFR at 15.

[63] AFR at 8, 10, 15.

[64] This procedure also complies with the Commission's *ex parte* rules applicable to restricted proceedings, described below. Applicants do not assert otherwise.

Court's decision, nor the staff decision in *ClearComm* (or the Commission's subsequent citation to it in 2006), prescribes a specific procedure or iterative process for the opportunity to cure.[65] As noted above, the Commission has broad authority to fashion procedures appropriate to the facts and circumstances of the proceedings before it, and we have done so here.

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[65] As noted above, the multiple opportunities afforded to Applicants by the *Order on Remand* to cure the flaws in their agreements with DISH, all of which have already been extensively catalogued by the Commission and the Court, are fully consistent with similar opportunities described in the D.C. Circuit's decision and any plausible reading of the Commission staff's *ClearComm* order. We note in addition that the *ClearComm* order took great care to distinguish the "limited circumstances" of that case (an assignment of licenses in connection with agreements entered into with a new lender long after the auction) from an auction scenario. *ClearComm*, 16 FCC Rcd at 18633, 18643, paras. 11, 27. *ClearComm* noted that permitting the revision of such agreements to obviate the staff's initial concerns related to *de facto* control problem "might not apply where, for example, an auction [long form] applicant compromised the integrity of an auction." *Id.* at 18643, n.104. *ClearComm* also stated that the decision "in no way limits our ability to determine that *auction applicants* do not meet the eligibility criteria for benefits afforded to designated entities." *Id.* (emphasis added). Nor did *ClearComm*, as the staff order made clear, involve a situation in which the DE had ceded control to its investor. *Id.* at 18635-36, para. 14. Here, in contrast, the court upheld a Commission finding that Applicants had ceded such control to DISH. While we recognize that the D.C. Circuit cited *ClearComm* favorably in support of providing Applicants with an opportunity to cure, the unique circumstances of *ClearComm* counsel against interpreting the decision as prescribing the precise procedures that must be employed in every cure proceeding, regardless of context.

20. In any event, even if the Court's decision and its reliance on *ClearComm* could be read as requiring some form of back and forth with the Commission (and they do not), that requirement would be satisfied on the unique facts of this case. Here, the Commission's extensive analysis of the *de facto* control problems contained in the Applicants' initial agreements with DISH set forth in great detail the application of the *de facto* control standard—based on cited Commission decisions—to the very agreements at issue in the case. The Court's remand, which contained a point-by-point elaboration of the Commission's analysis, provided ample further guidance as to the specific problematic aspects of Applicants' agreements.[66] Therefore, prior to any cure opportunity, Applicants had extensive information about the Commission's views on the ways in which their initial Applications were defective. Then, the staff's *Order on Remand* provided Applicants with multiple additional opportunities to cure the provisions already identified to them as resulting in *de facto* control by their principal investor. Applicants' argument, in other words, reduces to a

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[66] *SNR Wireless v. FCC,* 868 F.3d at 1029-35. The court also recognized that the Commission's "pragmatic application" of its established precedents appropriately "transcends formulas" and turns on the "the special circumstances presented." *Id.* at 1033-34. Thus, because the *de facto* control inquiry as applied in these precedents turns on the consideration of all of the provisions in the applicant's agreements, SNR's demand that the Commission answer SNR's "initial list of questions" about how Applicants' agreements with their investors should be restructured is particularly inappropriate. *See SNR Wireless March 26th Letter* at 1. SNR makes no claim that even unpublished staff practice provides any precedent for such an approach, and we reject it here for all of the foregoing reasons.

claim that the Commission is required to provide Applicants with ever more granular advice on precisely how to structure their agreements through an indefinite number of meetings or correspondence. Nothing in the D.C. Circuit's remand or Commission precedent requires that.

21. Applicants cite no other prior rulings by the Commission or even by its staff to support their claim of disparate treatment. Instead, they point only to staff correspondence in connection with other applications.[67] In this proceeding, however, the Applicants' FCC Form 601s have already been accepted for filing, parties have filed petitions to deny and other filings with respect to those applications, the Commission has issued an order describing the *de facto* control issues, and the Court has provided detailed guidance addressing those issues.

22. Moreover, in three of the proceedings cited by the Applicants,[68] the Commission staff simply requested that those applicants submit additional information so that the applications could be accepted for filing. All of these requests took place prior to the applications being accepted for filing and prior to any

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[67] AFR at 15 n.53.

[68] *See* AFR at 2, 15-16, n.4, 53 *citing* Letter from Linda C. Ray, Deputy Chief, Policy and Rules Division, Commercial Wireless Division, WTB, FCC, to Michelle Farquhar, Counsel to Alaska Native Wireless, L.L.C., FCC Form 601, ULS File Nos. 0000363827 and 0000364320 (Feb. 20, 2001); Letter from Linda C. Ray, Deputy Chief, Policy and Rules Branch, Commercial Wireless Division, WTB, FCC, to Theresa Z. Cavanaugh, Counsel to Northcoast Communications, L.L.C., ULS File No. 0000365464 (Feb. 20, 2001).

petitions to deny being filed.[69] Commission staff had exactly this type of iterative discussions with both Applicants and requested additional information in order for the Northstar and SNR Wireless applications to be acceptable for filing.[70]

23. The Applicants also cite two other instances in which the Commission staff requested additional information and/or documentation after acceptance for filing to supplement the applications.[71] Regardless of whether the staff may or did request additional information in certain circumstances, we do not believe cure discussions between the Applicants and the Commission, in addition to the iterative procedures set forth in the *Order on Remand*, are necessary or appropriate in the circumstances of this restricted proceeding in light of the detailed Commission order describing the *de facto* control issues and the Court's comprehensive guidance to the Applicants addressing those issues.

24. The process the Bureau adopted also accommodates the Section 309(j)(3)(A) mandate to fashion auction methodologies designed to promote more "rapid deployment . . . for the benefit of the public, including those residing in rural areas, without

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[69] The conversations took place before February 21, 2001, and petitions to deny were not filed until March 9, 2001.

[70] *See Northstar and SNR Wireless MO&O*, 30 FCC Rcd at 8949, n.431.

[71] *See* AFR at 2, 15-16, n.4, 53 *citing* Alaska Native Wireless, LLC, FCC Form 601, ULS File No. 0000363827, Amended Exhibit E (Jan. 11, 2002) and Letter from Roger S. Noel, Mobility Division, WTB, FCC, to Thomas Gutierrez, Counsel to King Street Wireless, L.P., ULS File No. 0003379814 (Apr. 14, 2009).

administrative or judicial delays."[72] Nowhere is that more important than in making spectrum available to promote the intensive bandwidth requirements for wireless broadband services. Almost 200 licenses for which Applicants placed winning bids remain in limbo even though Auction 97 concluded over three years ago. And Applicants recognize that the apparently unlimited "iterative" process they demand could take "more than a year" of additional time.[73]

25. In summary, although the *Order on Remand* does afford Applicants multiple opportunities to cure the flaws in their agreements with DISH, we do not believe that any prior staff actions require the kind of "iterative" negotiations demanded by the Applicants.[74] When addressing the question of

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[72] 47 U.S.C. § 309(j)(3)(A),

[73] *See* AFR at 9. *See also SNR Wireless March 26th Letter* at 1-2, submitting an "initial list of questions" asking for Commission terms for restructuring SNR's own agreements, which SNR "can then accept or reject."

[74] Nor did the Commission, in *Airgate Wireless, L.L.C.*, Memorandum Opinion and Order, 15 FCC Rcd 13557 (2000), "endors[e]," much less require, the "iterative and responsive negotiation and engagement" demanded by Applicants here. *See Northstar and SNR Wireless May 4 Presentation* at 8. In that decision, the Commission declined to consider the revenues of the applicant's predecessor-in-interest, because that entity had "fully relinquished control of the applicant" prior to the filing of the applications. 15 FCC Rcd at 13560 para. 7. Here, by contrast, DISH had an interest in both Applicants when they filed their long-form applications, it continues to have a stake in each company, and Applicants are demanding that the agency negotiate with them so that DISH's interest does not render them ineligible for bidding credits. Further, the Bureau's order in *Airgate Wireless, L.L.C.*, Memorandum Opinion and Order, 14 FCC Rcd 13557 (CWD 1999) did not address "iterative

whether the Commission appropriately reviewed the DE qualifications of the Applicants with respect to their initial long-form applications, the court upheld the Commission's finding that DISH is in *de facto* control of the Applicants and the Court's order provides a comprehensive analysis of the flaws in their applications based on specific Commission precedents. In addition, the Bureau's *Order on Remand* appropriately addresses the intent of the Commission's *ex parte* rules to provide transparency and fairness to the Parties of Record, which is consistent with the statutory goal of expediting an already lengthy licensing process for critical wireless broadband spectrum. As a result, the Applicants now have what they need: a "meaningful opportunity to understand and respond" to their *de facto* control problem.[75] For the reasons stated herein, the Commission denies Applicants' requests for meetings or other proposals to engage in an iterative process to discuss questions that are appropriately addressed

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negotiations" between Bureau staff and the applicant, let alone state that any such discussions were both necessary to and determinative in the Bureau's decision to grant the application. Accordingly, in affirming the Bureau order, the Commission did not "endorse" the procedure demanded by Applicants, and we are thus not required to apply similar procedures in this proceeding.

[75] AFR at 8. *See also* Letter from James L. Winston, President, National Association of Black Owned Broadcasters, and Maurita Coley, Acting President, Multicultural Media, Telecom & Internet Council, ULS File Nos. 0006670613 and 0006670667 at 3 (May 15, 2018) ("reasonable opportunity to cure any deficiencies identified by the Commission in [Applicants'] bidding credit applications").

through the multiple written submissions contemplated by the *Order on Remand*.[76]

C. The *Order on Remand* Includes the Appropriate Parties

26. The Applicants also argue that the Commission should remove as Parties of Record "the entities previously dismissed from these license application proceedings for lack of standing or failure to timely file pleadings" and T-Mobile, which Applicants argue did not file a pleading in connection to the Applicants' license applications.[77] Specifically, the Applicants state that including parties that have had their filings previously dismissed violates Section 402(h) because the proposed remedy is inconsistent with the Court's remand instructions.[78] In addition, they argue that FCC precedent precludes the Commission "from granting party status to an entity that, by its own actions, is no longer part of the proceeding."[79]

27. As discussed above, the Court's remand instructions state only that the Commission needs to conduct further proceedings consistent with the Court's opinion to provide the Applicants with an opportunity to cure "the *de facto* control the FCC found that DISH exercises over them."[80] The remand

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[76] *See, e.g.*, *SNR Wireless March 26th Letter*.

[77] AFR at 4; *see also*, Applicants' Reply at 2-4 ("At the time Applicants' appeal was filed, T-Mobile had chosen voluntarily not to be a party").

[78] AFR at 18.

[79] *See* AFR at 19.

[80] *SNR Wireless v. FCC,* 868 F.3d at 1025.

instructions were silent about whether the Parties of Record to the applications should be divested of their *ex parte* status during the remand process.

28. The Applicants, however, argue that the *Order on Remand* "exceeded the Court's mandate," because "nothing in *SNR v FCC* directs the FCC to readmit the Dismissed Parties."[81] This has the issue backwards. Since the mandate does not address this issue, the FCC is free to exercise its broad discretion under Section 4(j) to determine whether to exclude the Parties of Record from continued participation in these remand proceedings.[82] Because the Court did not provide any instructions about this issue, we are guided by our *ex parte* rules.[83] These state in pertinent

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[81] AFR at 19. Although the Applicants argue that it is inappropriate to include the dismissed and new parties to these proceedings, they do not argue that Central Texas Telephone Investments LP, Rainbow Telecommunications Association, Inc., and VTel Wireless, Inc. should be excluded (although they seek to limit VTel's participation). *See* AFR 18-22.

[82] *See supra* para. 10.

[83] "To ensure the fairness and integrity of its decision-making, the Commission has prescribed rules to regulate *ex parte* presentations in Commission proceedings. These rules specify 'exempt' proceedings, in which *ex parte* presentations may be made freely (§1.1204(b)), 'permit-but-disclose' proceedings, in which *ex parte* presentations to Commission decision-making personnel are permissible but subject to certain disclosure requirements (§1.1206), and 'restricted' proceedings in which *ex parte* presentations to and from Commission decision-making personnel are generally prohibited (§1.1208)." 47 CFR § 1.1200(a). "Restricted" proceedings, include, but are not limited to, all proceedings that have been designated for hearing and applications for authority under Title III of the Communications Act. *Ex parte* presentations in restricted proceedings are generally prohibited in restricted proceedings until the

part that a party includes any person who files an application, and any person filing a "written submission referencing and regarding such pending filing which is served on the filer."[84]

29. This definition of a "party" is based on whether or not a filing is made and not on whether the party has standing to make the filing or if the filing was procedurally correct. The Commission's rules make clear that the purpose of the *ex parte* rules—to ensure fairness and integrity of Commission decision-making process—is independent of whether a party "has satisfied any other legal or procedural requirements, such as the operative requirements for petitions to deny or requirements as to timeliness."[85] Accordingly, the parties who have expressed objections to the applications have a clear right to participate under the *ex parte* rules regardless of whether they have established standing.[86] We agree with the Bureau

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proceeding is no longer subject to administrative reconsideration or review or judicial review. *See* 47 CFR § 1.1208.

[84] 47 CFR §1.1202(d).

[85] *See* 47 CFR §1.1202(d), n.3.

[86] Because we are denying the Applicants' request to have cure negotiation meetings, the issue of whether to restrict VTel's participation in any cure negotiation meetings is moot. *See* AFR at 21-22. In addition, Applicants' claim that VTel should have limited rights to participate in these proceedings because of the pendency of VTel's *qui tam* lacks any rational basis. It appears that the Applicants want to limit VTel's access to the Applicants' filings. The *Order on Remand* already addresses this by using the Commission's well-established confidentiality rules, which both limit the ability of the Applicants to keep material information confidential but also provide the Parties of Record with an opportunity to challenge the Applicants' claim of confidentiality

that, under our *ex parte* rules, all the Parties of Record continue to be parties in these proceedings until the applications are no longer subject to administrative reconsideration or review or judicial review.[87]

30. In any event, the Commission has broad discretion to consider the views of such interested parties as informal objections under section 1.41 of the Commission's rules.[88] The D.C. Circuit has found it a "commendable procedure" for the Commission to address an untimely filed petition to deny as an informal objection "[i]n view of the importance of the questions raised by the petition."[89] In the *Northstar and SNR Wireless MO&O*, the Commission did not determine whether the Parties of Record could file informal objections pursuant to section 1.41 of Commission's rules. For these reasons, we do not believe it is appropriate at this time to preclude filings

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in connection with specific filings. *Order on Remand*, 33 FCC Rcd at 233, n.16.

[87] *See* note 83 *supra.* Although T-Mobile filed its pleading after the *Northstar and SNR Wireless MO&O* was released, its filing referenced and regarded the applications that have been remanded to the Commission and the filing was sent to Northstar and SNR Wireless. *See* Letter from Kathleen Ham, Senior Vice President Federal Government Affairs, T-Mobile, to Marlene H. Dortch, Sec'y, Federal Communications Commission, ULS File Nos. 0006670613, 0006670667 (filed Nov. 17, 2015). As a result, T-Mobile is also considered a "party" in these proceedings. Applicants do not claim otherwise.

[88] *See, e.g., Adelphia Communications Corp.,* 21 FCC Rcd 8203, 8216, paras. 19-20 (2006); *Wireless Telecommunications, Inc.*, 24 FCC Rcd 3162, 3167, para. 11 (WTB 2009); *Jonathan Stewart*, 7 FCC Rcd 4454, para. 5 (MSD 1992).

[89] *Marsh v. FCC,* 436 F.2d 132, 136 (D.C. Cir. 1970).

by T-Mobile, which was a bidder in the AWS-3 auction that bid on many of the licenses for which Applicants applied.[90]

31. If T-Mobile or a Party of Record submits a filing during the remand process, the Applicants can object to the filing and the Commission will determine if the filing was appropriate.[91] We need not consider in advance whether entities have standing to oppose any amendments to Applicants' applications, or the applicability of the Commission's "major change" rules to such amendments in light of the Court's order.[92]

32. Although the Commission has the discretion to change this proceeding to "permit-butdisclose" and allow *ex parte* presentations for "the resolution of issues, including possible settlement,"[93] we do not believe it is appropriate to exercise that discretion simply to make this proceeding "conducive to responsive, back-and-forth discussions between the Applicants and the Commission."[94] Rather, for the reasons stated above, and in light of the clear path afforded by the Court on the *de facto* control issue in these cases, we conclude it is important to conduct this

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[90] *See* T-Mobile Opposition at 8.

[91] We note that T-Mobile argues that it has the "right to comment on, or file a petition to deny, any applications that the [the Applicants] . . . may eventually file for any AWS-3 licenses they won in the auction." T-Mobile Opposition at 5. Because these filings have not been made, the issue is not yet ripe and we will decide at a later time if TMobile files comments or a petition to deny.

[92] *See* T-Mobile Opposition at 5-8.

[93] 47 CFR §§ 1.1204(a)(10), 1.1208 n.2.

[94] *See* AFR at 21.

remand in an efficient fashion that accommodates the legitimate interests of the multiple Parties of Record.[95]

D. Responsive Pleadings by the Applicants

33. The Applicants express concern that the *Order on Remand* provides only that Applicants may amend their applications to address concerns raised by Parties of Record" but does not give them an opportunity "to rebut any filings by other parties."[96] We read this to mean that the Applicants want an opportunity to respond to any comments and arguments made by the Parties of Record in addition to having the opportunity to file amendments to agreements.[97] We agree with the Applicants that they

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[95] This is not a case, like *Southland Television Co.*, Memorandum Opinion and Order, 44 FCC 1239, 1242 at para. 12 (1958), in which the Commission precluded a party from the proceeding after that party took affirmative steps (withdrawing its appeal) to abandon its application. In this case, the Parties of Record have not taken any affirmative steps to abandon these proceedings. Moreover, their right to continued participation did not require them to participate in the Court of Appeals case as intervenors in support of the Commission's order. *See Texas Star Broadcasting Co.*, 9 RR 373 (1952) (readmitting a party to the remand proceedings that did not appeal the Commission's decision). In any event, *Southland Television* predated the Commission's adoption of *ex parte* rules in 1965, which as noted above clearly extend participation rights to these Parties of Record in order to further the purposes of fairness and transparency articulated by the D.C. Circuit. *See Regulations Concerning Ex Parte Communications and Presentations in Commission Proceedings*, 52 FR 21052 (1987).

[96] *See* AFR at 23.

[97] *See id*. Given the Applicants' objection to the *Order on Remand*'s process that allows Parties of Record to participate, we

should have an opportunity to respond to the Parties of Record. If the Applicants choose, they may file a pleading to address any issues raised by the Parties of Record (including any new standing claims). Specifically, the Applicants will have up to 45 days from the day that comments are due from the Parties of Record to file their pleading.[98]

III. CONCLUSION

34. For the reasons discussed above, we are affirming, with one modification, the procedures the Bureau adopted to afford Northstar and SNR Wireless the opportunity to cure their Auction 97 applications.[99] We do not find any merit in the Applicants' argument that the *Order on Remand* is

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do not read the AFR to be faulting the Bureau for not raising the possibility of filings by non-Parties of Record (and the Applicants' right to rebut any such filings). Nonetheless, if that is the Applicants' complaint, we clarify on our own motion that the Applicants are permitted to rebut any such filings within the timeframes provided in the *Order on Remand*.

[98] If necessary, an Applicant may submit a request to the Bureau requesting up to an additional 45 days to address issues raised by the Parties of Record. The letter requesting additional time must be filed in ULS prior to the end of the Applicant's initial 45-day response deadline, served on all Parties of Record, and a copy e-mailed to the Bureau, in care of Paul Malmud at Paul.Malmud@fcc.gov. The opportunity to respond to the Parties of Record does not provide the Applicants with any additional opportunities to further amend their FCC Form 601 or their agreements. *See Order on Remand*, 33 FCC Rcd at 232-234, paras. 6-8.

[99] For the same reasons, in the circumstances of this restricted proceeding, we decline to revise those procedures to include meetings designed to engage in "iterative negotiations." *See also Johnson March 20th Letter*, *supra.*

"flawed and improper" and therefore have determined not to toll the deadlines specified in the *Order on Remand*.[100]

IV. ORDERING CLAUSE

35. ACCORDINGLY, IT IS ORDERED that, pursuant to section 5(c)(5) of the Communications Act of 1934, as amended, 47 U.S.C. § 155(c)(5), and section 1.115(b) of the Commission's rules, 47 C.F.R. § 1.115(b), the Joint Application for Review of Northstar Wireless, LLC and SNR Wireless LicenseCo, LLC, File Nos. 0006670613 and 0006670667, IS GRANTED IN PART, as discussed in paragraph 33 above, and OTHERWISE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch

Secretary

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[100] *See* AFR at 23-24. The Applicants requested an additional 45 days to negotiate their agreements so the original due date of April 24, 2018, was extended to June 8, 2018. *See* Letter from Ari Q. Fitzgerald, Counsel to SNR Wireless, to Paul Malmud, Assistant Chief, Broadband Division, ULS File No. 0006670667 (April 9, 2018); Letter from Mark F. Dever, Counsel to Northstar, to Paul Malmud, Assistant Chief, Broadband Division, ULS File Nos. 0006670613 (March 7, 2018). *See also Order on Remand*, 33 FCC Rcd at 232, para. 5.

Appendix F

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC

No. 0006670613, 0008243409

IN RE NORTHSTAR WIRELESS, LLC

No. 0006670667, 0008234669

IN RE SNR WIRELESS LICENSECO, LLC

Report No. AUC-97AUC

In re Applications for New Licenses in the
1695-1710 MHz, and 1755-1780 MHz and
2155-2180 MHz Bands

Adopted: Nov. 17, 2020
Released: Nov. 23, 2020

MEMORANDUM OPINION & ORDER
ON REMAND

I. INTRODUCTION

1. Fostering competition is a touchstone of the Communications Act. To that end, Congress has directed the Federal Communications Commission not

only to award spectrum licenses for the provision of wireless mobile and other services through auctions but also to adopt rules that encourage auction participation by small businesses, rural businesses, and businesses owned by members of minority groups and women. And to satisfy these mandates, the Commission has adopted rules that allow such "designated entities" to receive bidding credits, which are effectively discounts, if they prevail at auction. The Commission's rules generally require winning bidders that claim to qualify as designated entities to submit detailed information to ensure that bidding credits are awarded only to truly qualifying businesses and are not accumulated by larger enterprises through companies under their control. To ensure that these bidding credits provide "the opportunity to participate in the provision of spectrum-based services,"[1] as opposed to mere arbitrage, the Commission's rules also extend for a certain period of time after each auction—the "unjust enrichment" period—so that discounted licenses are not immediately acquired on the secondary market by non-qualifying larger companies.

2. In 2014, the Commission launched Auction 97, in which it made available 1,614 AWS-3 spectrum licenses covering the entire United States. The Commission also offered bidding credits equaling a 15% discount for "small" companies with average gross revenues not exceeding $40 million for the previous three years and a 25% discount for "very small" companies with average gross revenues not exceeding $15 million for the previous three years. At

[1] 47 U.S.C. § 309(j)(4)(D).

the end of the auction, a plurality of the licenses had been won by Northstar Wireless, LLC (winning 345 licenses) and SNR Wireless LicenseCo, LLC (winning 357 licenses) based on their bids totaling over $13.3 billion. Northstar and SNR submitted applications for bidding credits as very small businesses, which would have resulted in over $3.3 billion in discounts.

3. The Commission determined, however, that Northstar and SNR were both under the *de facto* control of their principal investor, DISH Network Corporation, and that they therefore did not qualify as very small businesses. DISH's control over the companies was manifest from, among other things, the unprecedented amount of financing that DISH had provided to Northstar and SNR (approximately 98% of their $13.3 billion winning bid amounts) to participate in the auction; DISH's extensive control over the companies' operations, finances, technologies, employees, and policy choices, as codified in a set of agreements among the parties; the parties' coordinated behavior, even beyond their codified agreements; and "put" rights, which made it inevitable that Northstar's and SNR's LLC Managing Members would sell their interests in the companies (and the spectrum licenses) to DISH after five years—*i.e.*, immediately after the unjust enrichment period.[2]

4. Northstar and SNR petitioned the D.C. Circuit for review, challenging the determination that DISH exercised *de facto* control over them. The D.C. Circuit

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[2] *See Northstar Wireless, LLC, SNR Wireless LicenseCo, LLC, Applications for New Licenses in the 1695-1710 MHz, 1755-1780 MHz and 2155-2180 MHz Bands*, Memorandum Opinion and Order, 30 FCC Rcd 8887 (2015) (*Northstar and SNR Order*).

affirmed the Commission's conclusion and reasoning in their entirety, explaining that under settled FCC precedent, DISH possessed *de facto* control over Northstar and SNR because of its control over their businesses and, alternatively, because exercise of the put rights by the LLC Managing Members was a foreordained conclusion. The D.C. Circuit remanded the matter, however, for the limited purpose of permitting the Northstar and SNR the opportunity to negotiate cures with DISH to eliminate its *de facto* control.[3]

5. Following procedures that the Commission adopted for the remand, Northstar and SNR have now modified their agreements with DISH in virtually identical fashion and claim to have cured its *de facto* control over them. Based on our careful review of the record on remand, we conclude otherwise and find that Northstar and SNR are not eligible for bidding credits because they remain under DISH's *de facto* control.

6. *First*, the parties' renegotiated agreements and relationships preserve DISH's control over Northstar and SNR as business enterprises. For example, absent a material adverse change in their businesses, Northstar and SNR must operate under five-year business plans that DISH prepared or participated in preparing at a time when it was unquestionably in *de facto* control of the companies. Moreover, DISH has the ability to stymie or foreclose all of the alternative business strategies that Northstar and SNR could conceivably pursue. DISH possesses extensive control

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[3] *SNR Wireless LicenseCo, LLC v. FCC*, 868 F.3d 1021 (D.C. Cir. 2017) (*SNR Wireless*).

over whether they can raise the billions of dollars that would be necessary to build out wireless networks. DISH also can frustrate if not prevent them from leasing their spectrum in any material respect or from engaging in sales, mergers, or other corporate transactions with anyone other than DISH. Cumulatively, then, DISH can make it difficult, if not impossible, for Northstar and SNR to generate any revenue—which they will need to satisfy their substantial existing and ongoing financial obligations to DISH.

7. To be sure, the parties have restructured the vast majority of DISH's financial interest in the Northstar and SNR, which no longer takes the form of traditional debt. Now, some of DISH's financial interests take the form of preferred equity, which requires Northstar and SNR to make mandatory quarterly dividend payments that, if missed, accrete as additional preferred equity for DISH. Furthermore, this preferred equity must be paid before any common equity in the event of a merger or other "deemed liquidation event"—making it less likely, over time, that the LLC Managing Members or other investors (if any) would ever see a return on their investments in the companies.

8. Beyond these contractual aspects of the parties' relationships, their conduct during the remand also demonstrates a continued pattern of DISH's controlling Northstar and SNR as enterprises. Notably, despite the fact that these two companies were in different financial positions vis-à-vis DISH and held different spectrum portfolios, they negotiated what are essentially identical purported cures to

DISH's *de facto* control. We would expect that two genuinely autonomous companies with different starting positions would have adopted different negotiating positions and would have reached materially different outcomes. This did not happen, which reinforces our concern that DISH can determine whether these companies are, or could ever become, truly independent enterprises.

9. Taken together, these aspects of the parties' agreements and relationships outweigh and blunt the impact of other changes that the parties negotiated in their attempt to cede DISH's *de facto* control back to Northstar and SNR.[4]

10. *Second and independently*, the parties' revised agreements create incentives that once again appear designed to make it inevitable that the LLC Managing Members will sell their interests to DISH by exercising their put rights. In light of all of the limitations that DISH can impose on the ability of Northstar and SNR to generate revenues to pay off their massive financial obligations to DISH, and the resulting dilution of the value of their limited equity interests, the LLC Managing Members have no rational choice to do otherwise. The put rights guarantee the LLC Managing Members generous returns on their investments at minimal risk—and with no obligation to build out their networks, pay down their debt, or make dividend payments prior to

[4] *Northstar and SNR Order*, 30 FCC Rcd at 8889 para. 5, 8937 para. 120 (holding that it is the "economic realities of investor relationships" that determine *de facto* control, "regardless of contractual provisions purporting to reserve the right of licensee to control the management and operation of its business").

the exercise of the put rights. However, such rights evaporate if they do not transfer their interests to DISH within specified put windows, which occur no more than one year after the expiration of the unjust enrichment period.

11. We find that the parties' modifications to the put rights do not in any way change their significance for the locus of *de facto* control under the Commission's prior analysis as upheld by the D.C. Circuit. Under the revised agreements, the LLC Managing Members have 90 days, rather than 30, to choose whether to exercise their put rights at the first window, which opened on October 21, 2020. If they do not do so during the pendency of the Commission's consideration of their revised agreements, the revised agreements give them another 90-day put option at year six. And under the circumstances, these changes (extending the first put window and creating a second) are superficial. Northstar and SNR continue to have "only one path to avoiding certain financial failure."[5] Such "relatively generous but fleeting . . . opportunit[ies]" involve "conditions that are designed to maximize the incentive of the licensee to sell (e.g., six years after issue . . .)." Indeed, they are "virtually certain to entice" such a sale.[6]

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[5] *SNR Wireless*, 868 F.3d at 1034, 1035 (quoting *Implementation of Section 309(j) of the Communications Act – Competitive Bidding*, PP Docket No. 93-285, Fifth Memorandum Opinion & Order, 10 FCC Rcd 403, 455-56 (1994) (*Competitive Bidding Fifth Order*).

[6] *SNR Wireless*, 868 F.3d at 1034-35.

II. BACKGROUND

12. On May 19, 2014, the Commission released a Public Notice announcing Auction 97, which made available spectrum licenses in the above-captioned bands (AWS-3 bands).[7] Shortly thereafter, the Commission adopted procedures for Auction 97 governing, among other things, filing requirements and deadlines, reserve prices, opening bids, and upfront payments. As directed by Congress, these procedures also included rules designed to ensure that small businesses, rural telephone companies, and businesses owned by members of minority groups and women would be able to participate in the provision of spectrum-based services.[8] Specifically, the Commission offered bidding credits for licenses acquired by applicants meeting applicable criteria, which, in Auction 97 equaled a 15% discount for small businesses (average gross revenue not exceeding $40 million for the previous t hree years) and a 25% discount for very small businesses (average gross revenues not exceeding $15 million for the previous three years).[9] The bidding rules required applicants to

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[7] *Auction of Advanced Wireless Services Licenses Scheduled for November 13, 2014; Comment Sought on Competitive Bidding Procedures for Auction 97*, AU Docket No. 14-78, Public Notice, 29 FCC Rcd 5217 (2014).

[8] 47 U.S.C. § 309(j)(3)(B); *see also Implementation of Section 309(j) of the Communications Act – Competitive Bidding*, PP Docket No. 93-253, Second Report and Order, 9 FCC Rcd 2348, 2349, 2350, 2388-89, paras. 3, 6, 227-230 (1994).

[9] *Auction of Advanced Wireless Services Licenses Scheduled for November 13, 2014, Notice and Filing Requirements, Reserve Prices, Minimum Opening Bids, Upfront Payments, and Other Procedures for Auction 97*, AU Docket No. 14-78, Public Notice,

certify to their eligibility for bidding credits in their "short-form" applications,[10] and required auction winners to submit more comprehensive "long-form" applications and relevant documents to demonstrate eligibility after the conclusion of the auction.[11]

13. Eighty short-form applications were filed with the Commission, and seventy applicants were found to be qualified to participate in the Auction 97.[12] The qualified applicants included DISH, through its wholly owned subsidiary American AWS-3 Wireless I LLC (American I),[13] as well as Northstar[14] and SNR (hereinafter, together, the Applicants).[15] They also

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29 FCC Rcd 8386 (WTB 2014) (*Auction 97 Procedures Public Notice*); *see also* 47 CFR § 27.1106.

[10] *See Northstar and SNR Order*, 30 FCC Rcd at 8940, para. 130 (discussing review of short-form applications).

[11] *See Northstar and SNR Order*, 30 FCC Rcd at 8910, para. 51 ("To enable the Commission to determine whether an applicant has appropriately attributed the revenues of its affiliates and controlling interests, our rules require all applicants seeking . . . bidding credits to submit all agreements and information that support the applicant's eligibility as a small business under the applicable designated entity provisions, including the establishment of *de factor* or *de jure* control or the presence of attributable material relationships.").

[12] *See Auction of Advanced Wireless Services (AWS-3) Licenses 70 Bidders Qualified to Participate in Auction 97*, AU Docket No. 14-78, Public Notice, 29 FCC Rcd 13465 (WTB 2014) (*Auction 97 Qualified Bidders Public Notice*).

[13] American AWS-3 Wireless I LLC, Form 175, Auction File No. 0006458188.

[14] Northstar Wireless, LLC, Form 175, Auction File No. 0006458325.

[15] SNR Wireless LicenseCo, LLC, Form 175, Auction File No. 0006458318.

included three parties that have participated in these proceedings, each of whom unsuccessfully bid for certain of the licenses won by Northstar or SNR at auction and at issue in this remand proceeding: AT&T, T-Mobile, and VTel.[16]

14. At the start of Auction 97, Northstar and SNR were brand new companies "that [had been] formed just in time to file short-form applications for Auction 97: SNR was formed fourteen days and Northstar was formed eight days before the application deadline. As nascent companies, [they] lacked officers, directors, and revenues when they each submitted a short-form application."[17] According to their short-form submissions, DISH, through indirect wholly owned subsidiaries, owned an 85% non-controlling interest in each Applicant.[18] Northstar Manager, LLC indirectly owned the remaining 15% controlling interest in Northstar. Likewise, SNR Wireless Management, LLC indirectly owned the remaining 15% controlling interest in SNR. Both LLC Managing Members had non-controlling investors.[19]

15. The Auction began on November 13, 2014 and ended on January 29, 2015, after 341 rounds of bidding over 45 days. There were 31 winning bidders

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[16] *See* Federal Communications Commission, *Auction 97: Advanced Wireless Services (AWS-3) Results*, https://www.fcc.gov/auction/97/round-results (last visited Oct. 5, 2020).

[17] *SNR Wireless*, 868 F.3d at 1027.

[18] *Northstar and SNR Order*, 30 FCC Rcd at 8888-89, paras. 3, 8893, 8894 paras. 14, 17.

[19] *See Northstar and SNR Order*, 30 FCC Rcd at 8893, 8894 paras. 14, 17.

in Auction 97, which raised (in net bids) a total of $41,329,673,325.[20] American I participated and bid in Auction 97 but was subsequently outbid and was not a winning bidder for any licenses.[21]

16. Northstar was the winning bidder for 345 licenses, with an aggregate gross bid of $7,845,059,400, and SNR was the winning bidder for 357 licenses, with an aggregate gross bid of $5,482,364,300.[22] The Applicants' winning bids were comparable in size to the bids of incumbent providers, including AT&T and Verizon,[23] and dwarfed the bids of entities earning bidding credits in every prior spectrum auction. Following the Auction procedures, Northstar and SNR timely filed FCC Form 601 Long-Form Applications covering the licenses each had

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[20] *See, e.g.*, Federal Communications Commission, *Auction 97: Advanced Wireless Services (AWS-3) Fact Sheet* http://wireless.fcc.gov/auctions/default.htm?job=auctionfactsheet&id=97 (last visited Oct. 5, 2020).

[21] The final bid of DISH's indirect wholly owned subsidiary, American I, was in Round 24 when it placed one bid: $1,812,964,000 for the paired Block J in New York (AW-BEA010-J NYC-Long Is. NY-NJ-CT-PA-MA-VT). Northstar and SNR each placed identical gross bids for this license ($1,359,723,000 net). *See* Federal Communications Commission, *Auction 97: Advanced Wireless Services (AWS-3) Results*, https://www.fcc.gov/auction/97/round-results (last visited Oct. 5, 2020).

[22] *See Auction of Advanced Wireless Services (AWS-3) Licenses Closes, Winning Bidders Announced for Auction 97*, Public Notice, 30 FCC Rcd 630, Att. B at 2 (2015) (*Auction 97 Closing Public Notice*).

[23] *See Auction 97 Closing Public Notice*, 30 FCC Rcd 630.

won.[24] Those Applications were accepted for filing on April 29, 2015.[25] Each entity claimed in its FCC Form 601 that it was eligible for 25% bidding credits because it qualified as a very small business under the rules adopted for Auction 97.[26] As part of their long-form applications, the Applicants included copies of their LLC, management services, credit, trademark, joint bidding, and other agreements (collectively, the 2015 Agreements) with DISH.[27] From the record, it became clear that DISH had provided "equity contributions and loans to the Applicants that account[ed] for approximately 98[%] of the[ir] winning bid amounts."[28] Eight Petitions to Deny were filed against the 2015 Applications, all of which argued that DISH's gross revenues had to be attributed to both Northstar

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[24] *Auction 97 Closing Public Notice*, 30 FCC Rcd at Attachment A, 10-46.

[25] *See Wireless Telecommunications Bureau Announces that Applications for AWS-3 Licenses in the in the 1695-1710 MHz, 1755-1780 MHz, and 2155-2180 MHz Bands are Accepted for Filing*, Public Notice, 30 FCC Rcd 3795 (2015)

[26] Northstar Wireless, LLC Long-Form Application, FCC Form 601, ULS File No. 0006670613 (filed Feb. 13, 2015) (Northstar 2015 Application)*;* SNR Wireless LicenseCo, LLC Long-Form Application, FCC Form 601, ULS File No. 0006670667 (filed Feb. 13, 2015) (SNR 2015 Application).

[27] *See Northstar and SNR Order*, 30 FCC Rcd at 8896-8900 paras. 21-29 (summarizing LLC agreements, management services agreements, credit agreements, trademark agreements, and joint bidding agreements). To indicate when we are referring to the applications or agreements that were filed in 2015, we use "2015 Applications" or "2015 Agreements."

[28] *See Northstar and SNR Order*, 30 FCC Rcd at 8924 para. 84.

and SNR because DISH possessed *de facto* control over them.[29]

17. In August 2015, the Commission issued the *Northstar and SNR Order*, concluding that it was "manifest that DISH, directly or indirectly, controls or has the power to control the Applicants via a variety of controlling mechanisms"[30]:

- significant ownership interest;
- excessive investor protections;
- control over policy decisions;
- domination of financial matters;
- control of financial decisions;
- control over build-out plans;
- control over business plans;
- control over the Auction 97 bidding process;
- coercive termination provisions;
- inadequate working capital; and
- control of employment decisions.

18. The Commission emphasized that its review was "not undertaken on a piecemeal basis": "When the relationships between the Applicants and DISH are analyzed with regard to the totality of their actions . . ., the various agreements, and the facts and circumstances of this case, we conclude that DISH has *de facto* control over and the power to control SNR and

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[29] *See Northstar and SNR Order*, 30 FCC Rcd at 8891, 8900-8901, paras. 10, 30.

[30] *Northstar and SNR Order*, 30 FCC Rcd at 8890, para. 6.

Northstar."[31] The Commission found, for example, that one "significant factor" in establishing DISH's control was the "unprecedented magnitude of the indebtedness to DISH that SNR and Northstar each incurred to pay [the billions of dollars] for the licenses won."[32] The Commission also engaged in an extensive analysis of "the terms of all of the relevant agreements among the parties," noting that such terms are particularly important when evaluating an application for a new license, "since there is no record of an operating company to inform our analysis of control."[33] The Commission also explained, however, that applicants cannot game the system by merely inserting language in agreements to "superficially recite the factors set forth in our rules" in an attempt to "avoid review of the economic realities of the parties' transactions."[34] Thus, the Commission considered the "connections among and the cumulative effect on control of all of the agreements and their respective provisions," including those not cited by the parties, "as well as other relevant circumstances and facts that may not appear on the face of the agreements."[35]

19. This comprehensive analysis involved an application of Commission *de facto* control precedent—including the factors set forth in the

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[31] *Northstar and SNR Order*, 30 FCC Rcd at 8911, para. 54.

[32] *Northstar and SNR Order*, 30 FCC Rcd at 8890, para. 7.

[33] *Northstar and SNR Order*, 30 FCC Rcd at 8912, para. 57.

[34] *Northstar and SNR Order*, 30 FCC Rcd at 8912, para. 57.

[35] *Northstar and SNR Order*, 30 FCC Rcd at 8912, para. 57.

Intermountain Microwave Order[36] as well as the guidance set forth in the *Competitive Bidding Fifth Order*.[37]

20. In *Intermountain Microwave*, the Commission found the following six factors to be indicative of control: (1) who controls daily operations; (2) who is in charge of employment, supervision, and dismissal of personnel; (3) whether the licensee has unfettered use of all facilities and equipment; (4) who is in charge of the payment of financing obligations, including expenses arising out of operating; (5) who receives monies and profits from the operation of the facilities; and (6) who determines and carries out the policy decisions, including preparing and filing applications with the Commission.[38] As the Commission noted, the *Intermountain Microwave* standard requires an analysis of the totality of the facts and circumstances, and thus "does not require a finding of control with regard to all [of these] factors."[39]

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[36] *Intermountain Microwave*, 24 Rad. Reg. (P&F) 983 (1963) (*Intermountain Microwave*).

[37] *Competitive Bidding Fifth Order*, 10 FCC Rcd at 445-455, paras. 78-96. The Commission alternatively found that DISH exercised *de facto* control under FCC Rule 1.2110(c)(2)(ii)(H), which provides that a management agreement affords *de facto* where it allows the manager to "significantly influence" the type of service that an applicant provides. 47 CFR § 1.2110(c)(2)(ii)(H); *see also Northstar and SNR Order*, 30 FCC Rcd at 8938-8940, paras. 122-28. Because this rule applies to the provision of management services, which the parties have terminated from their 2015 Agreements, we do not consider this rule here.

[38] *Intermountain Microwave*, 24 Rad. Reg. at 984.

[39] *Northstar and SNR Order*, 30 FCC Rcd at 8911, para. 56 n.202.

21. And in the *Competitive Bidding Fifth Order*, the Commission noted that

> agreements between designated entities and strategic investors that involve terms (such as management contracts combined with rights of first refusal, loans, puts, etc.) that cumulatively are designed financially to force the designated entity into a sale (or major refinancing) will constitute a transfer of control under our rules. . . . [O]ur concerns are greatly increased when a single entity provides most of the capital and management services and is the beneficiary of the investor protections.[40]

22. Following this precedent, the Commission found, among other things, that: (1) DISH's investor protections in the parties' 2015 LLC Agreements, which included 19 separate and specific prohibitions, extended beyond typical protections giving a minority investor a decision-making role in major corporate decisions and instead conferred on DISH an impermissible level of control in the management, operations, and finances of the Applicants; (2) DISH controlled Northstar's and SNR's daily operations through the Management Services Agreements, as well as consultation, compensation, and termination rights reserved to DISH; (3) DISH exercised substantial control over the Applicants' employment decisions; (4) DISH dominated the financial aspects of Northstar's and SNR's businesses, especially in terms

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[40] *Competitive Bidding Fifth Order*, 10 FCC Rcd at 456, para. 96.

of the amount of capital that they could acquire and the sources of capital available to them; (5) the business arrangements between the parties were structured in such a way that the profits were likely to benefit only DISH; and (6) there were a number of provisions in the 2015 Agreements that restricted Northstar and SNR from making critical policy choices about technology, additional spectrum acquisitions, network construction, and disposition of the business—and especially put rights that maximized the Applicants' incentives to sell to DISH.

23. Based on its finding of *de facto* control, the Commission found that the Applicants were not eligible for very small business bidding credits.[41] The Commission also found, however, that the Applicants had the basic qualifications to hold all of the spectrum licenses they had won at auction provided that they paid the full amount of their winning bids.[42] Rather than do so, the Applicants opted to default on 197 of the licenses and to apply the money that they had already paid for those defaulted licenses to the amount owed for the remaining licenses.[43]

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[41] *See Northstar and SNR Order*, 30 FCC Rcd at 8890, para. 4.

[42] *See Northstar and SNR Order*, 30 FCC Rcd at 8948-8951, paras. 151-156.

[43] Letter from Mark F. Dever, Counsel to Northstar, to Jean Kiddoo, Deputy Bureau Chief, Wireless Telecommunications Bureau, ULS File Nos. 0006670613 (Oct. 1, 2015) (Dever Letter); Letter from Ari Q. Fitzgerald, Counsel to SNR, to Jean Kiddoo, Deputy Bureau Chief, Wireless Telecommunications Bureau, ULS File Nos. 0006670667 (Oct. 1, 2015) (Fitzgerald Letter). *See also Wireless Telecommunications Bureau Actions on AWS-3 Licenses in the 1755-1780 MHz and 2155-2180 MHz Bands*, Public Notice, DA 15-1223 (WTB rel. Oct. 27, 2015). Northstar

24. Thereafter, the Applicants petitioned for review of the *Northstar and SNR Order*. The D.C. Circuit squarely rejected the Applicant's primary argument that the Commission had departed from prior precedent, describing that "[f]ar from ignoring Commission decisions, the FCC reasonably interpreted and applied them when it determined that DISH had *de facto* control over SNR and Northstar."[44] The court thus affirmed "that the petitioners [we]re required to pay full price for the spectrum licenses they won in Auction 97."[45] It specifically concluded that "the Commission reasonably determined" that (1) "each" of the *Intermountain Microwave* factors and (2) the *Competitive Bidding Fifth Order* "counseled in favor of a finding that DISH *de facto* controlled SNR and Northstar."[46]

25. With respect to the *Intermountain Microwave* factors, the D.C. Circuit affirmed that the Commission had reasonably found that *each factor* supported a finding of *de facto* control. The court also specifically endorsed the *Northstar and SNR Order*'s "pragmatic"

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stated that it would selectively default on 84 licenses ($2,226,129,000). *See* Dever Letter at Attachment 2. SNR stated that it would selectively default on 113 licenses ($1,210,905,600). *See* Fitzgerald Letter at Attachment 2. The Applicants purported to reserve their rights with respect to the determination that they were not qualified for bidding credits. Dever Letter at 6; Fitzgerald Letter at 5.

[44] *SNR Wireless*, 868 F.3d at 1030.

[45] *SNR Wireless*, 868 F.3d at 1030.

[46] *SNR Wireless*, 868 F.3d at 1030. As noted above, the court also so concluded with respect to the management services rule, which is no longer applicable under the revised agreements under review here.

approach to applying the factors, which the court found to "comport[] with other FCC cases."[47] As the court explained:

> The thrust of the Commission's *Intermountain Microwave* analysis was that the [Applicants] wrote into their contracts general terms that formally spoke to the six factors in ways that seemed to promise SNR and Northstar's independence, but at the same time functionally belied those promises with specific contract terms empowering DISH to control and benefit from virtually all critical aspects of SNR and Northstar's businesses. What mattered, in the Commission's analysis, was the substance of the terms of DISH's control, not the formal recitations of compliance with *Intermountain Microwave*'s six control factors.[48]

26. With respect to the *Competitive Bidding Fifth Order* guidance, the D.C. Circuit held that the finding of *de facto* control was "*strongly* supported," because the relationships between DISH, Northstar, and SNR were "materially identical" to an example that the Commission had provided in that guidance.[49] In that example, the Commission described that a transfer of control would occur where a strategic investor makes debt financing available on very favorable terms (including no payments of principal or interest for six years) and the applicant is given "one-time put right"

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[47] *SNR Wireless*, 868 F.3d at 1033.

[48] *SNR Wireless*, 868 F.3d at 1033.

[49] *SNR Wireless*, 868 F.3d at 1033 (emphasis added).

exercisable "at a time and under conditions that are designed to maximize the incentive of the licensee to sell (e.g., six years after issue)."[50] Thus, according to the court, the *Competitive Bidding Fifth Order* "clearly presaged the FCC's *de facto* control finding."[51] And, applying that test, the court concluded that the agreements "left SNR and Northstar only one path to avoiding certain financial failure"—*i.e.*, exercise of "a relatively generous but fleeting, one-time-only opportunity" that "was virtually certain to entice SNR and Northstar to sell their companies to DISH."[52]

27. The D.C. Circuit also rejected Northstar's and SNR's argument that the Commission's analysis could not be squared with other approvals from the Wireless Telecommunications Bureau (the Bureau) of bidding credits in purportedly similar circumstances. The court held that this argument suffered from two flaws. First, those Bureau-level actions issued without any accompanying decision explaining their rationale were non-precedential.[53] Second, those approvals involved applications that were materially different from Northstar's and SNR's.[54]

28. The D.C. Circuit also held, however, that the Commission had failed to provide the Applicants "adequate notice that, if their relationships with DISH cost them their bidding credits, the FCC would also deny them an opportunity to cure" by renegotiating

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[50] *Id.*

[51] *SNR Wireless*, 868 F.3d at 1035.

[52] *Id.*

[53] *See SNR Wireless*, 868 F.3d at 1036-1040.

[54] *See SNR Wireless*, 868 F.3d at 1040-1043.

their agreements with DISH.[55] The court stated that "an opportunity for petitioner to renegotiate their agreements with DISH provides the appropriate remedy here," and therefore remanded the matter for further proceedings consistent with its opinion.[56] In response to the Commission's concern about providing disincentives for compliance with the designated entity rules in permitting such an opportunity to cure, the court emphasized that "[n]othing in our decision requires the FCC to permit a cure," and that "[t]hat choice lies with the FCC."[57]

29. In January 2018, the Bureau issued an *Order on Remand*, adopting remand-specific procedures to provide the Applicants with an opportunity to renegotiate their agreements with DISH pursuant to the D.C. Circuit's mandate.[58] The *Order on Remand* established a 90-day window, with the possibility of a 45-day extension, for each Applicant to "renegotiate [its] respective agreements with DISH . . . and to file the necessary documentation in the record to demonstrate that, in light of such changes, each Applicant qualifies for the very small business bidding credit that it sought in Auction 97."[59] The *Order on*

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[55] *SNR Wireless*, 868 F.3d at 1025.

[56] *SNR Wireless*, 868 F.3d at 1025, 1046.

[57] *Id.* at 1046.

[58] *Northstar Wireless, LLC, SNR Wireless LicenseCo, LLC, Applications for New Licenses in the 1695-1710 MHz,1755-1780 MHz and 2155-2180 MHz Bands,* Order on Remand, 33 FCC Rcd 231 (2018) (*Order on Remand*).

[59] *Order on Remand*, 33 FCC Rcd at 232, para. 5. Because of limitations with ULS, a new ULS file number was generated for each Applicant when it filed the Form 601 documenting its

Remand provided that the parties that had filed written submissions regarding the 2015 Applications (collectively "Parties of Record") would have 45 days from the time the Applicants submitted their revised applications to file comments on the Applicants' amended agreements.[60] The Applicants jointly filed an Application for Review (AFR) of the *Order on Remand* contesting the remand process and alleging that the court's mandate required an iterative process in which the Applicants could negotiate contractual changes directly with the Commission.[61]

30. The Commission generally denied the AFR and upheld the remand process with slight modifications. As modified, the procedures provided that (1) the Applicants would seek to negotiate changes to their 2015 Agreements with DISH; (2) the Applicants would file revised applications and agreements to demonstrate that they had cured

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revisions. The record for the remand proceeding for each Applicant encompasses both ULS filings (*i.e.*, the record for the original ULS filing (ULS File No. 0006670613 for Northstar and ULS File No. 0006670667 for SNR)) and the filings associated with the new ULS file number made pursuant to the remand procedures (ULS File No. 0008243409 for Northstar and ULS File No. 0008243669 for SNR). *See Order on Remand*, 33 FCC Rcd at 232, para. 6, n.12.

[60] *Order on Remand*, 33 FCC Rcd at 233, para. 7; Attachment A (listing the Parties of Record to Northstar's 2015 Applications); and Attachment B (listing the Parties of Record to SNR's 2015 Applications). The Applicants filed their revised applications on June 8, 2018; comments were due on July 23, 2018.

[61] *See* Joint Application for Review of Northstar Wireless, LLC, SNR Wireless LicenseCo, LLC, ULS File Nos. 0006670613 and 0006670667 (Feb. 21, 2018) (*AFR*).

DISH's *de facto* control; (3) the Parties of Record would have an opportunity to comment on any such changes; (4) the Applicants would be extended yet a further opportunity to cure in order to make further changes based on the record, and/or to file responsive comments to the submissions by the Parties of Record; and (5) the Commission would consider the record to determine whether DISH still exercised *de facto* control over the Applicants.[62]

31. Following the Commission's modified remand procedures, on June 8, 2018, the Applicants submitted new Form 601 applications for the licenses they had previously defaulted on, along with supporting materials including their amended agreements (collectively, the 2018 Agreements), and new pleadings in support of their applications. In their filings, the Applicants claim that they have substantially modified the 2015 Agreements with DISH to cure every *de facto* control issue identified in the *Northstar and SNR Order*.[63] As a result, the

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[62] *See Northstar Wireless, LLC, SNR Wireless LicenseCo, LLC, Applications for New Licenses in the 1695-1710 MHz, 1755-1780 MHz and 2155-2180 MHz Bands*, Memorandum Opinion and Order, 33 FCC Rcd 7248, 7259-60, para. 33 (2018) (*Northstar and SNR AFR Order*). We note that Northstar and SNR have taken a protective appeal of the *Northstar and SNR AFR Order*, which adopts the remand procedures. The Applicants and the FCC have agreed to stay this appeal pending the outcome of this proceeding. *Northstar Wireless, LLC et al. v. FCC,* Nos. 18-1209, 18-1210 (D.C. Cir. filed Aug. 2, 2018).

[63] Northstar states that it has "cured 'the *de facto* control the [Commission] found that DISH exercise[d]' over Northstar." *See* Northstar 2018 Application, Exhibit D - Appendix, at 11 (Northstar Submission on Remand). Similarly, SNR states that it has "revised their agreements [with DISH] to address the *de*

Applicants argue that they now qualify for very small business bidding credits and should be awarded the licenses on which they defaulted.[64]

32. As discussed at greater length below, the Applicants negotiated many modifications to their agreements with DISH, including, among other things:

- terminating the 2015 Management Services Agreements and the 2015 Trademark License Agreements;
- converting all but $500 million of each Applicant's debt into preferred equity, repayment of which would be required only after a liquidation or deemed liquidation event;
- applying an 8% per annum dividend rate to that preferred equity;
- reducing the annual interest rate on the remaining DISH debt from 12% to 6%;
- eliminating certain of the prior investor protection rights;
- eliminating restrictions on the Applicants' rights to acquire additional spectrum;
- eliminating obligations on the Applicants to consult with DISH regarding budgets and business plans;

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facto control issues." SNR 2018 Application, Exhibit D - Comments in Support of Grant of Bidding Credits, at 2-4 (SNR Comments).

[64] *See* Consolidated Opposition of SNR Wireless LicensceCo, LLC and Northstar Wireless, LLC, ULS File Nos. 0006670613, 0006670667, 0008243409, and 0008243669, at 50-55 (Oct. 22, 2018) (Consolidated Opposition); *see also* Northstar Submission on Remand at 1-2; SNR Comments at 2-5.

- removing interoperability requirements;
- eliminating loan prepayment and required interest payments such that accrued interest would not be payable until the loan maturity date;
- eliminating the excess cash flow recapture provision;
- eliminating restrictions on the Applicants' owning real property;
- reducing from 10 to 5 years the period during which the LLC Managing Members are restricted from selling their ownership interests without DISH's consent;
- removing DISH's right-of-first refusal on sales and DISH's tag-along rights on the sale of the LLC Manager Members' ownership interests;
- eliminating monetary limits on equipment financing and third-party unsecured debt;
- adjusting the put rights to increase the original put window from 30 to 90 days after year five, adding a second put window after year six, and adding an opportunity after year seven for a fair market value appraisal; and
- expanding the Applicants' flexibility to initiate a public offering.[65]

33. The Applicants argue that their 2018 Agreements are consistent with transaction terms of other Auction 97 winners who were awarded bidding

[65] *See* Northstar Submission on Remand at 4-5; SNR Comments at 3-4.

credits by the Bureau after the Commission issued the *Northstar and SNR Order*.[66]

34. Five Parties of Record filed comments. The National Association of Black-Owned Broadcasters and the Multicultural Media, Telecom and Internet Council submitted comments arguing that the FCC should grant Northstar's and SNR's request for bidding credits.[67] In contrast, VTel argues that DISH still has *de facto* control over Northstar and SNR and that the Applicants' request for the bidding credits should be denied.[68] VTel also claims that even if the Applicants have cured the *de facto* control issues, the grant of the defaulted licenses to Applicants would violate the Commission's rules.[69] AT&T filed comments that similarly argue that the Applicants are not entitled to the defaulted licenses and that the Commission should re-auction these licenses.[70] And T-Mobile filed comments, questioning whether, under the 2018 Agreements, exercising the put options and selling to DISH remains the only realistic business path available to the Applicants.[71]

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[66] *See* Northstar Submission on Remand at 24-38; SNR Comments at 4-5.

[67] *See* National Association of Black-Owned Broadcasters Comments (filed July 23, 2018); Multicultural Media Comments, Telecom and Internet Council Comments (filed July 23, 2018).

[68] *See* VTel Comments (filed July 23, 2018).

[69] *See* VTel Comments at 29-32.

[70] *See* AT&T Response to Submissions by Northstar Wireless, LLC and SNR Wireless LicenseCo, LLC (filed July 23, 2018) (AT&T Comments).

[71] *See* T-Mobile USA, Inc. Comments (filed July 23, 2018).

35. The Applicants and DISH elected not to take the opportunity granted by the Commission to make any further changes to their agreements in response to these criticisms. Instead, they filed a consolidated opposition (the Consolidated Opposition) reiterating that Northstar and SNR are each in control of their respective companies and that they have negotiated cures with DISH to all of the *de facto* control issues, arguing that "the capital structures and spectrum assets of Northstar and SNR offer their managing members a set of business options that extend well beyond their contractual put options."[72] The Applicants also echo their previous argument, claiming that the 2018 Agreements are consistent with the transaction terms of other Auction 97 winners who were deemed eligible to receive bidding credits after the issuance of *Northstar and SNR Order*.[73] In response to the other commenters, the Applicants also argue that our review of the 2018 Agreements should be limited to the revised provisions in the 2018 Agreements that address concerns that the Commission identified as problematic in the *Northstar and SNR Order*—to the exclusion of aspects of the relationship that have not materially changed since 2015, or any other matters not identified in the *Northstar and SNR Order*.[74] The Applicants also claim that the Commission should dismiss the filings of AT&T and T-Mobile for lacking

[72] Consolidated Opposition at 28-29.

[73] Consolidated Opposition at 19-23.

[74] Consolidated Opposition at 35-44.

standing.[75] And finally, the Applicants also refute VTel's and AT&T's comments regarding whether they may be awarded the defaulted licenses.[76]

36. On November 21, 2018, T-Mobile filed a "Response" to the Consolidated Opposition, arguing that: (1) DISH still exercises *de facto* control over Northstar and SNR; (2) T-Mobile has standing to comment on the amended applications; and (3) the remand process provided the Applicants with the opportunity to negotiate cures with DISH as required by the D.C. Circuit, and no further iterative, back-and-forth negotiations with Commission staff are necessary or appropriate.[77]

37. In response, the Applicants filed a Motion to Strike or Surreply, arguing that the Commission should strike or dismiss T-Mobile's November 2018 Comments because the filing was inconsistent with the procedures delineated in the *Order on Remand*, and that T-Mobile's arguments are factually and legally incorrect.[78] T-Mobile replied on December 31, 2018, claiming that that the Commission should accept its filing because it is in the public interest and reiterating that the Applicants have not cured their *de*

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[75] Consolidated Opposition at 46-49.

[76] Consolidated Opposition at 50-55.

[77] T-Mobile USA, Inc. Response to Consolidated Opposition (filed Nov. 21, 2018) (T-Mobile Response).

[78] Motion to Strike of SNR Wireless LicenseCo, LLC and Northstar Wireless, LLC. File Nos. 0008243409, 0008243669 at 10-24 (filed Dec. 21, 2018) (Northstar/SNR Motion to Strike).

facto control by DISH.[79] The Applicants responded that T-Mobile's filing should be dismissed because it is procedurally and substantively defective.[80]

38. The Applicants and their counsel attended video conferences with Commissioners and/or their staff in November 2020 to present arguments that they had successfully cured DISH's *de facto* control through the modifications to their agreements. Because of the restricted nature of this proceeding under the *ex parte* rules,[81] the other Parties of Record were afforded an opportunity to attend these meetings—which several Parties did—and to present arguments—which VTel, AT&T, and T-Mobile jointly did through counsel. Consistent with the *ex parte* rules, summaries of those meetings were filed in these proceedings via ULS and constitute part of the record.[82]

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[79] T-Mobile USA, Inc. Comments (filed Dec. 31, 2018) (T-Mobile December 2018 Comments).

[80] Reply to Opposition of Northstar Wireless, LLC and SNR Wireless LicenseCo, LLC. (filed January 11, 2019).

[81] 47 CFR 1.1208.

[82] *See* Letter from Ari Q. Fitzgerald, Counse to SNR Wireless LicenseCo, LLC and Mark F. Dever, Counsel to Northstar Wireless, LLC to Marlene Dortch, FCC, ULS File Nos. 0006670613, 0008243409, 0006670667, 0008243669 (Nov. 17, 2020) (Applicants' 11-17-20 Summary); Letter from Ari Q. Fitzgerald, Counsel to SNR Wireless LicenseCo, LLC, and Mark F. Dever, Counsel to Northstar Wireless, LLC, to Marlene Dortch, Secretary, FCC, ULS File Nos. 0006670613, 0008243409, 0006670667, 0008243669 (Nov. 4, 2020) (Applicants' 11-4-20 Summary); *see also* Letters from Bennet L. Ross, Counsel to VTel to Marlene Dortch, Secretary, FCC (Nov. 16, 2020); Letter from Bennett L. Ross, Counsel to VTel to Marlene Dortch, Secretary, FCC, File Nos. 0006670613, 0008243409, 0006670667,

III. DISCUSSION

39. Our review requires us to consider both procedural issues raised by the Applicants and the substantive questions that determine whether DISH still exercises *de facto* control over Northstar and SNR based on the parties' revised agreements and relationships.

40. The *procedural* issues raised by the Applicants relate to (1) who, if anyone, could submit comments on their 2018 Applications, and/or whether particular filings were procedurally defective; and (2) the scope of the court's remand, and whether there are aspects of the parties' agreements and relationships that are now foreclosed from consideration.

41. The *substantive* question is whether DISH continues to possess *de facto* control over Northstar and SNR.

42. We address these issues mindful of the D.C. Circuit's clear statement that it was not dictating a particular outcome: The Commission has full discretion to determine whether DISH still possesses *de facto* control, based on the application of FCC precedent as endorsed by the D.C. Circuit and the record before us on remand. As explained below, our analysis follows two independent lines of inquiry endorsed by the D.C. Circuit: (1) the factors set forth in the Intermountain Microwave for evaluating de

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0008243669 (Nov. 4, 2020) (Commenters' 11-4-20 Letter). Except where otherwise noted in this order, during these meetings and in their written submissions, the Applicants and Parties of Record reiterated arguments they had made in prior submissions and which have been fully considered as part of the record.

facto control of a designated entity, and (2) the transfer of control that can be effectuated when the relationships between the parties appear to be designed to cause the designated entity to sell its interests to its investors.

A. Procedural Issues

43. Before turning to the substantive question presented on remand, we must resolve several procedural issues raised by the Applicants and the Parties of Record.

44. The first issue involves which if any filings we may consider from AT&T, T-Mobile, and VTel on the Applicants' 2018 Agreements. The Applicants contend that the various filings suffer from various shortcomings, including that AT&T and T-Mobile are prohibited from participating in this proceeding, that T-Mobile's comments filed after the Applicants' Consolidated Opposition are contrary to the remand procedures that the Commission affirmed in the *Northstar and SNR AFR Order* and therefore must be dismissed, and that VTel's comments lack a factual foundation and must be dismissed. The second issue relates to the scope of the remand, and what aspects of the parties' 2018 Agreements and relationships we may consider in determining whether DISH still exercises *de facto* control over the Applicants. The Applicants would limit our review to the modified terms in the 2018 Agreements that address areas of concern that the Commission specifically identified in the *Northstar and SNR Order*. We address each issue in turn.

1. Objections to AT&T and T-Mobile's Filings

45. In their AFR, the Applicants urged us to disqualify from these proceedings those entities who were "previously dismissed from these license application proceedings for lack of standing or failure to timely file pleadings" in opposition to the Applicants' initial pre-remand license applications—*i.e.*, AT&T and T-Mobile.[83]

46. In the *Northstar and SNR AFR Order*, the Commission explained that the D.C. Circuit's remand in *SNR Wireless* states merely that the Commission should conduct further proceedings consistent with the court's opinion: "[T]he remand instructions were silent about whether the Parties of Record to the applications should be divested of their *ex parte* status during the remand process."[84] Because the court's remand was silent on this issue, the Commission found that it was free to exercise its "broad discretion under Section 4(j) to determine whether to exclude the Parties of Record from continued participation in

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[83] *See* Applicants' AFR at 4. On May 18, 2015 AT&T filed a partial opposition to the petitions to deny regarding the 2015 Applications. *See* AT&T Partial Opposition to Petitions to Deny. ULS File Nos. 0006670613 and 0006670667, (filed May 18, 2015) (AT&T Partial Opposition). T-Mobile submitted its filing on November 17, 2015. *See* Letter from Kathleen Ham, Senior Vice President Federal Government Affairs, T-Mobile, to Marlene H. Dortch, Sec'y, FCC, ULS File Nos. 0006670613, 0006670667 (filed Nov. 17, 2015).

[84] *Northstar and SNR AFR Order*, 33 FCC Rcd at 7257 para. 27.

these remand proceedings."[85] The Commission further explained that, under its rules, the definition of a "party," is based on whether or not a filing is made—not on whether a party has standing to make the filing (or on whether the filing was procedurally flawed).[86] The Commission thus concluded that AT&T, T-Mobile, and VTel remained Parties of Record independent of whether each had previously satisfied the legal or procedural requirements for certain filings.[87] The Commission alternatively noted that it has "broad discretion to consider the views of such interested parties as informal objections under section 1.41 of the Commission's rules"—an approach that the D.C. Circuit has described as "commendable" for addressing untimely filed petitions.[88] Nevertheless, it also allowed the Applicants to raise objections to any particular filing on the record and stated that the Commission would, at the close of the record, "determine if [any challenged] filing [is] appropriate."[89]

47. In their Consolidated Opposition, the Applicants renew their objections to AT&T's and T-

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[85] *Northstar and SNR AFR Order*, 33 FCC Rcd at 7258, para. 28.

[86] *Northstar and SNR AFR Order*, 33 FCC Rcd at 7258 para. 29.

[87] *Northstar and SNR AFR Order*, 33 FCC Rcd at 7258 para. 29.

[88] *Northstar and SNR AFR Order*, 33 FCC Rcd at 7259 para. 30 & n.89 (citing *Marsh v. FCC*, 436 F.2d 132, 136 (D.C. Cir. 1970)).

[89] *Northstar and SNR AFR Order*, 33 FCC Rcd at 7259 para. 31.

Mobile's participation in the remand proceedings. They argue that AT&T's filing should be dismissed because its prior opposition to the Applicants' 2015 applications was construed and dismissed as an untimely petition to deny.[90] They argue that T-Mobile's comments should be dismissed because it did not participate in their license application proceedings, and because it has already been found, in a separate proceeding, to lack standing to challenge aspects of the *Northstar and SNR Order*.[91] The Applicants also argue that by including AT&T and T-Mobile in these proceedings, the Commission would violate the remand mandate and Section 402(h) of the Act.[92] The Applicants also request that the Commission dismiss or strike the T-Mobile Response as contrary to the remand procedures established by the Commission.[93]

48. Turning first to AT&T, we reject the Applicants' arguments to deny participation in this remand proceeding, which we conclude would "best conduce to the proper dispatch of business and to the ends of justice" under our broad discretion afforded by Section 4(j) of the Communications Act.[94] While the *Northstar and SNR Order* dismissed AT&T's partial opposition to the petitions to deny the Applicants' 2015 Applications, the Commission did so because

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[90] *See* Consolidated Opposition at 46-47.

[91] *See* Consolidated Opposition at 47-48.

[92] *See* Consolidated Opposition at 48-49.

[93] *See* Motion to Strike or Dismiss or, in the Alternative, Surreply (Dec. 21, 2018).

[94] 47 U.S.C. § 154(j); *see FCC v. Schreiber*, 381 U.S. 279 (1965).

Commission rules did not permit a commenter, like AT&T, to file an "opposition" to petitions to deny license applications, and the Commission further found that if the filing were construed as a petition to deny, it was untimely.[95] The Commission did not hold that AT&T lacked *standing*—a holding that the Commission did reach with respect to numerous other commenters in the 2015 Application proceedings.[96] Indeed, both AT&T and T-Mobile had and have standing here, because they participated in Auction 97 and unsuccessfully bid on licenses in markets that were won by both Northstar and SNR, through application of their bidding credits.[97] The Applicants offer no support or explanation for why a party that previously made one procedurally defective filing thereby forfeits standing to participate in that proceeding on remand.[98] Nor have they made any persuasive showing why the public interest would not be served by permitting comments by such parties with standing to inform our analysis of the facts and

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[95] *Northstar and SNR Order*, 30 FCC Rcd at 8906-07, para. 44.

[96] *See Northstar and SNR Order*, 30 FCC Rcd at 8906, para. 42.

[97] *See* Federal Communications Commission, *Auction 97: Advanced Wireless Services (AWS-3) Results*, https://www.fcc.gov/auction/97/round-results (last visited Oct. 5, 2020); *see also* T-Mobile USA, Inc. Opposition to Joint Application for Review at 8 (Mar. 8, 2018).

[98] *See* Consolidated Opposition at 38 nn.136-37. Footnote 136 merely cites the Commission's prior *de facto* control analysis. Footnote 137 argues that parties may not collaterally attack FCC orders, but allowing AT&T to file a procedurally appropriate filing to address the issue posed by the court on remand is not in any way a collateral attack on the Commission's finding that it filed a procedurally improper filing previously.

circumstances relevant to the *de facto* control question on remand following an opportunity to cure afforded the Applicants and their filing of revised applications.[99]

49. For its part, T-Mobile did not file a Petition to Deny or other pleading regarding Northstar's and SNR's 2015 Applications, but after the Commission issued the *Northstar and SNR Order*, T-Mobile submitted a letter in both application dockets and in the Commission's Incentive Auction docket, regarding the Applicants' partial defaults.[100] T-Mobile also filed a Petition for Reconsideration of the *Application Procedures Public Notice* in the Incentive Auction docket, or in the alternative, requested a declaratory ruling asking the Commission to find that DISH, Northstar, and SNR were "former defaulters" under the Commission's rule, thus subject to paying larger upfront payments to participate in the Incentive Auction.[101] The Bureau dismissed the petition for reconsideration insofar as it addressed aspects of the *Northstar and SNR Order*, finding that T-Mobile did

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[99] In any event, for the reasons set forth below with respect to T-Mobile, we conclude that AT&T's filing should be accepted pursuant to 47 CFR § 1.41.

[100] *See* Letter from Kathleen Ham, Senior Vice President Federal Government Affairs, T-Mobile, to Marlene H. Dortch, Sec'y, Federal Communications Commission, ULS File Nos. 0006670613, 0006670667, WT Docket No. 14-170, 12-269, 12-269 GN Docket No. 12-268, AU Docket No. 14-252, MB Docket No. 15-146 (filed Nov. 17, 2015) (T-Mobile *Ex Parte*).

[101] *See Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions et al.*, GN Docket No. 12-268, Order, 31 FCC Rcd 905 at 909, para.11 (*Incentive Auctions Order*).

not meet the procedural requirements for filing such a petition.[102] The Bureau described that T-Mobile was not a party to the 2015 Applications proceedings when the Commission issued the *Northstar and SNR Order*. The Bureau's ruling, however, was limited to T-Mobile's ability to file a petition for reconsideration and did not constitute a determination on T-Mobile's standing or party status to comment on the issue subsequently posed by the D.C. Circuit on remand following the provision of an opportunity to negotiate cures with DISH and the filing of revised applications.[103]

50. Furthermore, the Bureau's concerns animating its rejection of T-Mobile's petition for reconsideration in the Incentive Auction docket are simply not present here, where the Applicants have refiled entirely new applications with revised agreements designed to inform our consideration of the issues remanded for the Commission's further consideration. There, the Bureau explained that

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[102] *See* 47 CFR § 1.106(b).

[103] The Bureau did describe that "T-Mobile did not file a petition to deny or otherwise participate in either the SNR or Northstar license application proceedings *and it therefore lacks standing* to challenge the determinations in the [*Northstar and SNR Order*]." *Incentive Auctions Order*, 31 FCC Rcd at 914, para. 26 (emphasis added). But the Bureau's conclusion was limited to T-Mobile's "challenge[s]" to the *Northstar and SNR Order*, and, as we discuss, T-Mobile's submissions on remand do not challenge any aspect of that order. However, to the extent the Bureau characterized T-Mobile's failure timely to participate in the earlier proceedings as a lack of standing, we disavow that characterization. *See SNR Wireless*, 868 F.3d at 1037 (citing *Comcast Corp. v. FCC,* 526 F.3d 763, 769 (D.C. Cir. 2008)).

granting T-Mobile's requested relief would require the Bureau to adopt conclusions that were "inconsistent with the Commission's prior findings with respect to the DISH entities' conduct" in the *Northstar and SNR Order*.[104] Permitting T-Mobile's participation now, to comment on the parties' refiled applications reflecting the 2018 Agreements following the opportunity to cure required by the D.C. Circuit on remand, which did not exist in their present form when the Commission issued the *Northstar and SNR Order*, does not involve revisiting or rejecting prior findings and determinations regarding the parties' 2015 Agreements.

51. In the alternative, even if there were some bar to T-Mobile's participation, we would not be precluded from considering the substance of its comments under Commission Rule 1.41.[105] That rule allows us to designate T-Mobile, to the extent necessary, as an informal objector, whose concerns may be considered as part of the record.[106] The D.C. Circuit has described that this is an appropriate and "commendable procedure," especially when a filing raises important questions and issues.[107] We believe that is particularly true here, where the court has remanded these

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[104] *Incentive Auctions Order*, 31 FCC Rcd at 912, para. 21; *see also id.* at 915, para. 26 ("T-Mobile may not challenge the Commission's determinations in the [*Northstar and SNR Order*] with respect to the DISH entities.").

[105] *See* 47 CFR § 1.41.

[106] *See, e.g.*, *Adelphia Communications Corp.*, 21 FCC Rcd 8203, 8216, paras. 19-20 (2006).

[107] *Marsh v. FCC*, 436 F.2d 132, 136 (D.C. Cir. 1970); *see also Northstar and SNR AFR Order*, 33 FCC Rcd at 7259, para. 30.

proceedings for further consideration by the Commission following the filing of revised applications reflecting an opportunity to cure required by the court.

52. We also reject the Applicants' argument that allowing AT&T and T-Mobile to participate on remand is inconsistent with *SNR Wireless* or otherwise violates Section 402(h) of the Act. Their argument relies on the D.C. Circuit's decision in *Qualcomm v. FCC*,[108] and the Commission's decision in *Southland Television*.[109] But *Qualcomm* involved a remand that was materially different. Specifically, in *Qualcomm*, the court's remand dictated a particular outcome—*viz.*, the granting of Qualcomm's application for PCS licenses.[110] Because the remand dictated the outcome, the Commission's subsequent actions to reopen the proceeding for comments were contrary to Section 402(h). Here, the D.C. Circuit's remand provides the Commission "more than a ministerial role"[111] in the remand, permitting us to exercise our broad discretion under Section 4(j) of the Act to request and consider comments by the Parties of Record, based on a wholly new record provided by the filing of revised applications.[112] The Applicants' reliance on *Southland*

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[108] Consolidated Opposition at 49 & n.183 (citing *Qualcomm*, 181 F.3d 1370 (D.C. Cir. 1999)).

[109] Consolidated Opposition at 49 & n.184 (citing *Southland Television*, 44 F.C.C. at 1239).

[110] *Qualcomm*, 181 F.3d at 1376 n.9.

[111] *Qualcomm*, 181 F.3d at 1377.

[112] The Court's remand instructions state that the Commission must conduct further proceedings consistent with the Court's directive to provide the Applicants with an opportunity to cure "the *de facto* control the FCC found that DISH exercises over

Television is likewise misplaced.[113] They cite this precedent for the proposition that Section 402(h) precludes the Commission from granting party status to an entity that, by its own actions, is no longer part of the proceeding. But in that decision, the party who was excluded by Section 402(h) had "voluntarily dismissed" its own appeal from the original proceeding and had taken other steps that effectively disqualified its original application from further consideration on remand.[114] There has been no such conduct by either AT&T or T-Mobile here.

53. Nevertheless, we grant the Applicants' motion with respect to the T-Mobile Response, which was not authorized by the *Order on Remand* or the *Northstar and SNR AFR Order*.[115] Under the process laid out in the *Order on Remand*, the Parties of Record had 45 days from the date that the Applicants filed their revised FCC Form 601 applications to file comments.[116] The Applicants filed their revised applications on June 8, 2018, so comments from the

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them." *SNR Wireless v. FCC*, 868 F.3d at 1025. There is nothing in those instructions that expressly or implicitly requires a certain outcome or limits the participation of commenters. Indeed, as noted above, the D.C. Circuit made clear that "[n]othing in our decision requires the FCC to permit a cure," and that "[t]hat choice lies with the FCC." *Id.* at 1046.

[113] *See Northstar and SNR AFR Order*, 33 FCC Rcd at 7259, para. 32 n.95.

[114] *Applications of Southland Television Co.*, 44 F.C.C. at 1239, 1241 paras. 2, 6-7.

[115] *See* Northstar/SNR Motion to Strike at 4.

[116] *See Order on Remand*, 33 FCC Rcd at 233, para. 7.

Parties of Record were due on July 23, 2018.[117] T-Mobile timely filed its comments on that date.[118] The *Order on Remand* set forth that the Applicants were entitled to amend their agreements again in response to comments from the Parties of Record—in which case, the Parties of Record would have had 30 days from the filing of the further-amended agreements to file additional comments.[119] The Applicants did not further amend their 2018 Agreements, however, and instead took advantage of the revised procedures in the *Northstar and SNR AFR Order* to file a responsive pleading.[120] Accordingly, there was no opportunity for further comment by the Parties of Record.

2. Objections to VTel's Comments

54. Northstar and SNR also request that VTel's filing be dismissed pursuant to Section 309(d)(1) of the Communications Act. Under that provision, a petition to deny a license application must set forth "specific allegations of fact to show that the petitioner is a party in interest and that a grant of the application " is not in the public interest—which allegations of fact "shall, except for those of which official notice may be taken, be supported by affidavit of a person or persons with personal knowledge thereof."[121] The Applicants argue that because VTel's comments on remand seeks to deny a grant of bidding credits in connection with

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[117] *See* Northstar 2018 Application; SNR 2018 Application.

[118] *See* T-Mobile Comments.

[119] *See Order on Remand*, 32 FCC Rcd 233, para. 8.

[120] *See Northstar and SNR AFR Order*, 33 FCC Rcd at 7260, para. 33.

[121] 47 U.S.C. § 309(d)(1)).

revised license applications and are not supported by such an affidavit, the comments should be dismissed.[122]

55. As a threshold matter, we find that Section 309(d) and our related rules[123] are inapplicable given the unique posture of this remand and the sole remaining issue to be resolved. Section 309(d) requires that petitions to deny be based on "specific allegations of fact sufficient to show . . . that a grant of the application would be prima facie inconsistent with [Section 309(a)]."[124] Section 309(a), in turn, requires a showing that a grant of applications will serve the public interest.[125] Here, the questions of whether the Applicants are qualified to hold licenses and whether

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[122] The Applicants make a similar argument that "[t]o the extent the Commission treats the AT&T Comments and T-Mobile Comments as petitions to deny based on allegations of fact, the Commission should dismiss those filings for failing to provide an affidavit of an individual with personal knowledge concerning the facts alleged." Consolidated Opposition at 49 n.185. As explained below, we find that Section 309 and the Commission's implementing rules are not applicable in this posture on remand. Furthermore, and in any event, AT&T's and T-Mobile's party-in-interest status and arguments are based on public information, Commission precedent, and application materials—as to all of which we may take official notice. *See supra* note 97 (public materials reflecting AT&T, T-Mobile, and the Applicants bid in the same market), *infra* note 131 (FCC may take notice of its precedent and applicants' materials). Alternatively, we would accept their filings as informal objections pursuant to Section 1.41 of our rules, discussed *supra* notes 105-107 and accompanying text.

[123] *See* 47 CFR §§ 1.2108, 1.939.

[124] 47 U.S.C. § 309(d)(1).

[125] 47 U.S.C. § 309(a).

grant of the licenses would serve the public interest have already been resolved and are not being challenged on remand. The only remaining question is whether the Applicants qualify for bidding credits or whether they are still subject to DISH's *de facto* control in light of the court's decision—which is not subject to Section 309(d)'s requirements in this posture.[126] Under these unique circumstances, the Communications Act provides us with flexibility to "conduct [our] proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice."[127] The Supreme Court has affirmed that this grant includes the "broad discretion" to "make ad hoc procedural rulings in specific instances,"[128] as the Commission did in the *Order on Remand* and the *Northstar and SNR AFR Order*.

56. Even if Section 309 and Sections 1.2108 and 1.939 of the Commission's rules did apply to VTel's filing, however, we would find those requirements satisfied. VTel submitted the Affidavit of Dr. J. Michel Guite with its original comments on the 2015

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[126] *Cf. In re Auction of Licenses for VHF Public Coast and Location and monitoring Service Spectrum*, Order, 17 FCC Rcd 19746, 19749-50, paras. 6-7 (WTB 2002) (describing that "[e]ligibility to participate in an auction . . . and eligibility to receive a bidding credit are two entirely different issues" and that "[a] determination that an applicant is eligible to participate in an auction . . . does not preclude the Commission from subsequently determining that the applicant is *ineligible for a bidding credit or for grant of a license*" (emphasis added)).

[127] 47 U.S.C. § 154(j).

[128] *FCC v. Schreiber*, 381 U.S. 279, 289 (1965); *see also Mozilla Corp. v. FCC*, 940 F.3d 1, 73 (2019) (same).

status.[129] We see no basis for concluding that a new affidavit was necessary on this point.[130] And VTel's arguments did not require affidavit support, because "its allegations . . . are based on facts contained in [the Applicants'] application[s], pleadings, and declarations, and we find they are, therefore, appropriately considered."[131] And finally, to the extent necessary, we alternatively deem VTel an informal objector under our rules and consider its arguments accordingly.

3. The Scope of the Remand

57. We next turn to questions raised by the Applicants about the scope of our analysis on remand as to whether DISH continues to exercise *de facto* control over the Applicants.

58. The Applicants first argue that we may not consider their bidding conduct with DISH during the

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[129] *See* Petition to Deny of VTel Wireless, Inc. File Nos. 0006670613 & 0006670667, Affidavit of Dr. J. Michel Guite (May 11, 2015).

[130] *See Order on Remand*, 33 FCC Rcd at 232, para 6 n.12 ("The record for the remand proceeding for each Applicant will encompass both ULS filings (*i.e.*, the record for the original ULS filings . . . and the filings associated with the new ULS file number made pursuant to these procedures).").

[131] *In re Applications of Sevier Valley Broadcasting, Inc. (Assignor) and Mid-Utah Radio, Inc. (Assignee)*, Memorandum Opinion and Order, 10 FCC Rcd 9795, 9796, para. 10 n.4 (1995); *see also Fort Myers Broadcasting Co.*, Letter, 19 FCC Rcd 19556, 19560 (2004) ("Even if we were [to] require FMBC to comply with [Section 309(d)(1)'s] pleading standards, matters of which the Commission may take official notice need not be supported by affidavit. Here, FMBC's petition is based on Commission records and precedent, of which we may take official notice.").

course of Auction 97, noting that "[i]n deciding to remand the Commission's action, the D.C. Circuit was fully aware of the . . . stated concerns and analysis regarding the parties' bidding conduct," and yet remanded to allow the parties to cure in any event.[132] They argue that if the bidding conduct had established DISH's *de facto* control, a remand would have been futile, as the Applicants would not be able to "cure" conduct that has already taken place. We accept the Applicants' argument that we should not consider on remand their and DISH's bidding conduct in Auction 97 or VTel's arguments regarding the portfolio of licenses that each company acquired in Auction 97,[133] as these are issues that could not have been "cured." Our decision is based on our review of the parties' revised 2018 Agreements and their conduct *since* the remand.[134]

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[132] Consolidated Opposition at 35; *see also id.* at 35-42.

[133] *See* VTel Comments at 20-23; *see also* Consolidated Opposition at 26.

[134] As discussed below, the *Northstar SNR Order* found the parties' bidding conduct to be relevant to the question of who, ultimately, controlled the Applicants' policy decisions, and the D.C. Circuit agreed that the parties' unusually coordinated conduct was "suspicious" and "strongly suggests that each . . . was an arm of DISH." *SNR Wireless*, 868 F.3d at 1041. So too, here, we find that the Applicants' *post*-remand contractual negotiations with DISH was unusually coordinated, continuing the pattern of the Applicants' acting as arms of DISH. The remand, which did not require the Commission to permit the Applicants' proposed cure but rather left that "choice . . . with the FCC," *id.* at 1046, does not preclude our conclusion that the Applicants' post-remand conduct is "suspicious" in similar ways to their conduct during Auction 97—which was affirmed as

59. The Applicants next argue that we may not consider contractual provisions that were not identified in the *Northstar and SNR Order*—which, according to the Applicants, provided a "roadmap for how to cure potential *de facto* control concerns—and that have not materially changed since that order.[135] This argument fundamentally misunderstands the Commission's long-established standard for evaluating *de facto* control based on an assessment of all of the facts and circumstances. The *Northstar and SNR Order* comprehensively explained how specific features of the 2015 Agreements demonstrated DISH's *de facto* control over the Applicants.[136] But the Commission's ultimate conclusion was based on a totality-of-the-circumstances analysis, which the D.C. Circuit expressly affirmed.[137] We follow the same approach here. Under *Intermountain Microwave* and the *Competitive Bidding Fifth Order*—the application of which was affirmed by the D.C. Circuit here—we consider the modified terms in their 2018 Agreement terms *in relation* to other, unmodified aspects of their agreements, and in relation to other aspects of the relationships between the parties.

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supporting our prior finding of DISH's *de facto* control under the parties' prior agreements.

[135] Consolidated Opposition at 4 n.3; *see also id.* at 42-44.

[136] *See* Consolidated Opposition at 43; *see also Order on Remand*, 33 FCC Rcd at 232, para. 4.

[137] *See SNR Wireless*, 868 F.3d at 1033-34 (affirming FCC's "pragmatic application" of *de facto* control precedent, which transcends formulas and examines the facts and special circumstances presented in each case).

60. Finally, to the extent that the Applicants argue that we may not consider modified provisions in their 2018 Agreements that do not specifically address issues that the Commission identified in the *Northstar and SNR Order*, we reject the argument as inconsistent with precedent, discussed above. Any modifications that the parties made to their agreements are relevant to our analysis. Indeed, in the *Northstar and SNR Order*, the Commission made clear that its analysis involved not only a review of the contractual provisions on which the Applicants relied, but also an independent consideration of other contractual provisions and aspects of the relationships between the parties that were not clear from the face of the agreements.[138] So too here.

B. *De Facto* Control Under the Intermountain Microwave Factors

61. Northstar and SNR claim that under their 2018 Agreements, DISH has ceded *de facto* control back to them. But while the Applicants claim to base these conclusions on the Commission's *de facto* control precedent, their arguments myopically focus on individual changes to their agreements with DISH. This approach fails to reflect the fact that *de facto* control must be assessed based on the totality of the circumstances. And here, the 2018 Agreements in conjunction with the other economic realities of the Applicants' relationships with DISH continue to vest

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[138] *See Northstar and SNR Order*, 30 FCC Rcd at 8912, para. 57 ("Our review of each case considers the connections among and the cumulative effect on control of all of the agreements and their respective provisions, as well as other relevant circumstances and facts that may not appear on the face of the agreements.").

de facto control over both Applicants with DISH under the factors set forth in the *Intermountain Microwave Order*.[139]

62. Specifically, based on our review of the parties' 2018 Agreements and relationships on remand, we find that several of the factors set forth in *Intermountain Microwave* continue to demonstrate DISH's control and that these factors outweigh the changes made to these agreements as indicia of control.

- The Applicants' initial five-year business plans were established at a time when they were under DISH's control, as found by the Commission and confirmed by the D.C. Circuit. The Applicants have negotiated the right to modify their business plans without consultation with DISH but are permitted to effectuate such changes only upon "material changes" affecting their businesses. The practical effect of this restriction is that DISH could object to almost any changes in the ordinary course of business from the path established when DISH controlled them. This substantially reduces

[139] The six *Intermountain Microwave* factors are (1) who controls daily operations; (2) who is in charge of employment, supervision, and dismissal of personnel; (3) whether the licensee has unfettered use of all facilities and equipment; (4) who is in charge of the payment of financing obligations, including expenses arising out of operating; (5) who receives monies and profits from the operation of the facilities; and (6) who determines and carries out the policy decisions, including preparing and filing applications with the Commission. *See* 24 Rad. Reg. at 984. In the *Northstar and SNR Order*, the Commission discussed "investor protections" as a related but separate factor, which we do here as well.

any effect that would otherwise have resulted from the termination of their Management Services Agreements with DISH.

- DISH still has substantial responsibility for the financial aspects of the businesses. This includes control over the Applicants' financial obligations and their access to the funding necessary to buildout and operate wireless networks. DISH has the right, but not necessarily the obligation, to make all such funding available to the Applicants—which, if offered would increase DISH's financial control over the Applicants—while also having the ability to delay, if not prevent, the Applicants from securing any significant funding from other lenders or any funding from third-party investors or partners.
- The 2018 LLC Agreements and 2018 Credit Agreements preserve DISH's ability to stymie or foreclose the Applicants' and the LLC Managing Members' opportunities to generate revenues necessary to satisfy their substantial financial obligations to DISH and/or exit the business. Notably, DISH retained its veto rights with respect to the sale of any "major asset," which assets include spectrum licenses, and it expanded this protection to also encompass the leasing of (and other transactions involving) such major assets. It is noteworthy that under instructions to negotiate cures with DISH, the Applicants gave DISH the newfound ability to control whether the Applicants can pursue the alternative business

model of leasing their spectrum.[140] This expanded restriction shuts down an alternative business model from which the Applicants could generate revenue without engaging in the capital-intensive buildout and operation of their own wireless networks. The fact that the Applicants' own economic expert identified spectrum leasing as one of three viable pathways for the Applicants to monetize their spectrum for a return that could exceed the return from their put rights, without acknowledging that DISH now effectively exercises a veto over their pursuing this pathway in addition to retaining control over the other two pathways, reinforces our finding that this new protection is material.

- The parties' efforts to restructure DISH's financial interests in the Applicants make no material difference to our analysis. The Applicants each

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[140] Under the 2015 Agreements the Applicants could lease their spectrum without seeking DISH's approval but under the 2018 LLC Agreements leasing of major assets (including spectrum) is considered a "significant matter" requiring DISH approval. *Compare* Northstar 2015 Application, Exhibit D - Limited Liability Company Agreement of Northstar Spectrum, LLC § 1.1 (definition of "Significant Matter"), *and* SNR 2015 Application, Exhibit D - First Amended and Restated Limited Liability Company Agreement of SNR Wireless Holdco, LLC § 1.1 (definition of "Significant Matter"), *with* Northstar 2018 Application, Exhibit D - Third Amended and Restated Limited Liability Company Agreement of Northstar Spectrum, LLC (Northstar 2018 LLC Agreement) § 1.1 (definition of "Significant Matter"), *and* SNR 2018 Application, Third Amended and Restated Limited Liability Company Agreement of SNR Wireless Holdco, LLC (SNR 2018 LLC Agreement) § 1.1 (definition of "Significant Matter").

still owe to DISH $500 million in debt as well as substantial amounts of already accrued interest and dividend payments, and face going-forward financial obligations in the form of additional dividend payments and likely additional debt in the range of what may reasonably be estimated to be collectively 10 times this size for the buildout of a nationwide wireless network. Whether billions of dollars of prior debt have been restructured in the form of preferred stock does not change these economic realities. Moreover, DISH has considerable ability to frustrate the Applicants' efforts to make the required quarterly dividend distributions at the rate of 8% per annum in cash, and their failure to do so results in the dilution of the value of the LLC Managing Members' financial interests, accretion of DISH's equity interests, and a further increase of its share of any profits in the Applicants in the event of a liquidation or deemed liquidation event.

- DISH also has retained control over critical policy decisions for the Applicants' businesses. Apart from retaining a substantial restriction on the ability of the Applicants to revise their original business plans in the ordinary course of business, DISH has the ability to stymie or foreclose the Applicants' business opportunities and to frustrate or veto many transactions by which the Applicants or the LLC Managing Members would exit the business or sell their interests or assets. Moreover, during the remand process, the Applicants again appeared to function as "arms of DISH," as the D.C. Circuit put it: The fact that these two purportedly autonomous entities

> attempted to negotiate dozens of modifications to numerous separate agreements, and yet the resulting changes are nearly identical notwithstanding the vast differences in their financial obligations and license portfolios, buttresses our conclusion that DISH is in control of the Applicants' major policy decisions. The Applicants have again failed to demonstrate any significant independent contribution to critical policy decisions—as reflected in the virtually identical terms governing their relationship with their common principal if not exclusive creditor and investor.

63. Based on these findings, and applying Commission precedent to all of the facts and circumstances applicable to Applicants' relationships with DISH in light of the record as supplemented by the remand, we find that the 2018 Agreements preserve DISH's ability to control the Applicants. This control is manifest in the key areas of limiting their ability to revise in the ordinary course of business the business plans established at a time when DISH controlled the Applicants, dominating the financial aspects of their businesses including their enormous credit obligations, retaining and accreting its allocation of monies and profits in the event of liquidation and deemed liquidation events, and continuing to restrict the Applicants in the conduct of their most fundamental policy decisions. We conclude that the parties' modifications to the 2015 Agreements serve to eliminate some of the prior identified concerns regarding DISH's control over other aspects of the Applicants' daily operations, the Applicants employment decisions, and their use of facilities and

equipment. Nevertheless, these changes do not change our bottom-line conclusion that the Applicants remain ineligible for the very small bidding credits that they sought in Auction 97.[141] Because the Applicants do not currently provide service, our assessment of their 2018 Agreements with DISH "necessarily involves an assessment of the likely role of the respective parties in the conduct of the business after grant of the licenses,"[142] which is the kind of predictive judgment that is subject to deferential review.[143]

64. In short, our careful review of all of the facts and circumstances in light of the economic realities of the revised relationships lead us to conclude that DISH's remaining controls continue to vest it with *de facto* control under the *Intermountain Microwave* standard as applied by the Commission and endorsed by the D.C. Circuit.[144]

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[141] *See Northstar and SNR Order*, 30 FCC Rcd at 8911, para. 56 n.202 ("[A] totality analysis does not require a finding of control with regard to all *Intermountain Microwave* factors [and] each factor may or may not be individually sufficient to support a [*de facto*] control finding.").

[142] *See Northstar and SNR Order*, 30 FCC Rcd at 8921, para. 57.

[143] *Sorenson v. FCC*, 897 F.3d 214, 230 (D.C. Cir. 2018); *accord SNR Wireless*, 868 F.3d at 1032 (describing that review of FCC's analysis of *de facto* control is "deferential").

[144] Because we find that DISH still exercises *de facto* control over the Applicants, the question is moot whether we can and/or should reinstate and award the Applicants the licenses on which they defaulted. *Compare* Consolidated Opposition at 50-55 (arguing for reinstatement), *with* AT&T Comments, *and* VTel Comments at 29-33.

1. Investor Protection Provisions

65. In the *Northstar and SNR Order*, the Commission found that the "extensive provisions" in the 2015 LLC Agreements that "require[d] DISH consent for a myriad of corporate decisions extend[ed] beyond those that give a minority investor a decision-making role in major corporate decisions that fundamentally affect its interests, and instead confer[red] on DISH an impermissible level of control."[145] The Commission contrasted DISH's 19 protections in the 2015 LLC Agreements with the "illustrative list" of "typical protections" identified in *Baker Creek* as generally permissible.[146] Those typical protections relate to (1) the issuance or reclassification of stock; (2) setting compensation for senior management; (3) expenditures that significantly affect market capitalization; (4) incurring significant corporate debt; (5) the sale of major corporate assets; and (6) fundamental changes in corporate structure.[147]

66. The Applicants have since renegotiated DISH's investor protections, and the 2018 LLC Agreements' investor protections include variations of the six matters enumerated in *Baker Creek*. The Applicants also included in the 2018 LLC Agreements language stipulating that these protections would apply only to the extent consistent with the decision in

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[145] *Northstar and SNR Order*, 30 FCC Rcd at 8913, para. 59.

[146] *Northstar and SNR Order*, 30 FCC Rcd at 8913, para. 59; *see also Baker Creek Communications, L.P.*, Memorandum Opinion and Order, 13 FCC Rcd 18709 (1998) (*Baker Creek Order*).

[147] *See Baker Creek Order*, 13 FCC Rcd at 18713-714 para. 9.

Baker Creek and the Commission's issuance of bidding credits to other designated entities in Auction 97.[148]

67. Before applying the Commission's established *de facto* control standards to these changes in the sections that follow, it is important to note that *Baker Creek* recognized that even these six protections can confer actual control upon an investor "where they give it the power to dominate the management of corporate affairs": "[T]he analysis of whether an investment protection grants . . . the power to control is a fact-based inquiry with no precise formula for evaluating all factors."[149] The *Northstar and SNR Order* likewise warned the Applicants that they could not rely on these protections as having talismanic properties: It described that *Baker Creek* set forth an "illustrative list" of "typical protections" without categorically endorsing these protections in every context.[150] To construe *Baker Creek* otherwise would require us to repudiate the Commission's longstanding approach to analyzing *de facto* control—

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[148] Northstar 2018 LLC Agreement § 6.3 (Supermajority Approval Rights for all "Significant Matters"); *see also id.* § 1.1 (definition of "Significant Matter"); *accord* SNR 2018 LLC Agreement § 6.3 (Supermajority Approval Rights for all "Significant Matters"); *see also id.* § 1.1 (definition of "Significant Matter").

[149] *Baker Creek Order*, 13 FCC Rcd at 18715 para. 9.

[150] *Northstar and SNR Order*, 30 FCC Rcd at 8913, para. 60; *see also id.* at 8916, para. 63 ("[C]ontrary to SNR's and Northstar's contentions, the presence of any particular provision or a combination of provisions is not dispositive to our control analysis, which considers each provision within the context of, and in connection with, all of the other factors and provisions unique to each case.").

an approach which the D.C. Circuit upheld in this proceeding.

68. Additionally, the fact that the 2018 LLC Agreements expressly state that the protections are limited "to the extent consistent with the decision in *Baker Creek*" is illusory. First, *Baker Creek*'s holding was that the agreements and relationships between Baker Creek and Hyperion *did* confer actual control on the latter under the *Intermountain Microwave* factors; it did not construe or "limit" these six investor protections in a manner that can be incorporated into a contractual provision in any meaningful way. Second, as *Baker Creek* itself acknowledged, investor protections that might be appropriate given one set of relationships and agreements may confer actual control under another set of relationships and agreements. As described in the *Northstar and SNR Order*, "the mere insertion of language in agreements to superficially recite the factors set forth in our rules . . . cannot serve to avoid review of the economic realities of the parties' transactions."[151]

69. Furthermore, when considered as part of the totality of the circumstances, which include the other factors discussed below, two of the remaining investor protections reinforce DISH's control.

70. *First*, the limitation on the Applicants' incurring any "significant" indebtedness—or pledging, assigning, or otherwise using any assets as security

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[151] *Northstar and SNR Order*, 30 FCC Rcd at 8912, para. 57; *see also SNR Wireless*, 868 F.3d 1033 (agreeing that "substance" matters more than "formal recitals of compliance with *Intermountain Microwave*'s six control factors").

for any significant indebtedness—could operate to restrict the Applicants from obtaining additional funding that is necessary for their business plans.[152] At a minimum, this restriction blunts the impact of the parties' eliminating from the 2015 Credit Agreements the cap on the Applicants' incurring more than $25 million in unsecured indebtedness. As discussed in the *Northstar and SNR Order*, the 2015 Credit Agreements' cap limited the Applicants to receiving "trivial" amounts of financing "in comparison to the value of the spectrum . . . and the potential costs associated with building and operating an extensive network or otherwise utilizing the substantial amount of spectrum acquired during this auction."[153] To address this concern, the parties have eliminated the cap in the 2018 Credit Agreement.[154] But DISH can still seek to invoke the 2018 LLC Agreements to veto, at its sole and absolute discretion, for any reason or no reason, any attempt by the Applicants to incur unsecured indebtedness—potentially even in amounts below the $25 million threshold—which DISH can claim is nonetheless

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[152] Northstar 2018 LLC Agreement § 1.1 (definition of "Significant Matter"); *accord* SNR 2018 LLC Agreement § 1.1 (same).

[153] *Northstar and SNR Order*, 30 FCC Rcd at 8924, paras. 85.

[154] Northstar 2018 Application, Exhibit D - Third Amended and Restated Credit Agreement of Northstar Spectrum, LLC (Northstar 2018 Credit Agreement) § 6.9(g); *accord* SNR 2018 Application, Third Amended and Restated Credit Agreement of SNR Wireless Holdco, LLC (SNR 2018 Credit Agreement) § 6.9(g).

"significant."[155] Moreover, this limitation operates in tandem with other restrictions that may make it virtually impossible for the Applicants to find meaningful third-party funding in any event.[156]

71. *Second*, the 2018 LLC Agreements include protections that go beyond those identified as typical in *Baker Creek* by giving DISH a veto right not only over the sale, but now also the transfer, exchange, *lease*, mortgage, pledge, or assignment of any major asset "(where assets include but are not limited to, licenses)";[157] these additional types of transactions (*i.e.*, those other than "sale") were not included in the 2015 LLC Agreements. This expanded protection appears to give DISH the unfettered ability to foreclose the last of the business models (which was not previously restricted) that, as the Applicants' own expert agrees, either Applicant might otherwise choose to pursue to monetize their spectrum assets: "offering access to the spectrum available under the

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[155] *See* NorthStar 2018 LLC Agreement §§ 1.1 (definition of Significant Matters), 6.3 (veto rights for Significant Matters); *accord* SNR 2018 LLC Agreement §§ 1.1, 6.3.

[156] *See* NorthStar 2018 LLC Agreement § 13.3 (priority rights in liquidation); Northstar 2018 Credit Agreement §§ 2.5 (security rights), 6.9 (restrictions on debt); *accord* SNR 2018 LLC Agreement § 13.3; SNR 2018 Credit Agreement §§ 2.5, 6.9. These limitations and their effects on potential third-party financing are discussed at greater length in Parts III.B.4 below.

[157] Northstar 2018 LLC Agreement § 6.3 (Supermajority Approval Rights for all "Significant Matters"); *see also id.* § 1.1 (definition of "Significant Matter"); *accord* SNR 2018 LLC Agreement § 6.3 (Supermajority Approval Rights for all "Significant Matters"); *see also id.* § 1.1 (definition of "Significant Matter").

SNR and/or Northstar FCC licenses via a spectrum sharing model, including spectrum leasing, with an existing wireless provider."[158] This addition in the 2018 LLC Agreements serves as a critical *new* index of DISH's *de facto* control over the Applicants' business opportunities. If DISH so chooses, it has the ability to frustrate or prevent the Applicants from building out their networks, leasing their spectrum in any significant amount, or transferring their spectrum in any significant amount. This leaves the LLC Managing Members with no way to realize a return on their investment except by exercising their put rights so as to vest DISH with sole ownership of both Northstar and SNR.

2. Control Over Daily Operations

72. In the *Northstar and SNR Order*, the Commission found that the first *Intermountain Microwave* factor—who controls daily operations—weighed in favor of finding that DISH exercised *de facto* control over the Applicants. Central to this analysis was the parties' 2015 Management Services Agreement. The Commission recounted that while a "management agreement[] between an investor and an applicant [is] not in and of [itself] necessarily dispositive of *de facto* control or the power to control under our rules," the existence of the agreement whereby the provider of the applicant's capital is also the beneficiary of investor protections and other rights

[158] Consolidated Opposition, Exhibit B Declaration of Carlyn R. Taylor at para. 9 (Taylor Decl.); *see also* Consolidated Opposition at 29.

and serves as manager of the applicant's daily operations warrants "particularly close attention."[159]

73. The D.C. Circuit affirmed this reasoning that both the scope[160] and the restrictive termination provisions[161] of the Management Services Agreements supported a finding that DISH controlled the daily operations of both Applicants.

74. On remand, the Applicants have terminated the 2015 Management Services Agreement. The Applicants also have "clarified" that the compensation cap that appeared to cover many aspects of the LLC Managing Members' day-to-day operations is actually more limited in scope than the Commission previously believed: They have modified the relevant provision in the 2018 LLC Agreements to state "the Management Fee is meant solely as a payment to the Manager in lieu of a board of managers fee . . . and is not meant to cover the operating, overhead, or employee compensation expenses of the Company and its Subsidiaries,"[162] all of which are covered by the 2018

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[159] *Northstar and SNR Order*, 30 FCC Rcd at 8919, para. 72.

[160] *See SNR Wireless*, 868 F.3d at 1031 (finding that "[u]nder the parties' comprehensive Management Services Agreement, DISH managed virtually all aspects of SNR and Northstar's businesses," and that the agreements "left SNR and Northstar nor practical means of ensuring that DISH would use those managerial powers to further SNR and Northstar's own goals rather than DISH's").

[161] *SNR Wireless*, 868 F.3d at 1031 (describing that the termination provisions as establishing a process that would be "prohibitively time-consuming and costly").

[162] Northstar 2018 LLC Agreement § 6.6; *accord* SNR 2018 LLC Agreement § 6.6.

Credit Agreements, which permit the Applicants to draw working capital to pay expenses and operating costs, including costs for personnel.[163] And the Applicants also have negotiated further modifications, such that the 2018 LLC Agreements now make clear that all future business plans and budgets "shall be adopted or modified . . . by the Manager in its sole and unilateral judgment," with only a requirement to provide copies to, rather than engage in consultation with, DISH regarding such plans and budgets.[164]

75. These changes do not fully resolve our concerns. Although the Applicants now can manage their own operations and set their own plans going forward, their choices continue to be circumscribed by previously adopted business plans developed at a time when DISH was in *de facto* control (as confirmed by the Commission and the D.C. Circuit). The Applicants point out that under the 2018 LLC Agreements, they may now "modify" their business plans without consultation with DISH.[165] But their ability to do so is subject to an important limitation: They may not modify those prior business plans in the absence of "material changes affecting" the companies.[166] Under traditional principles of Delaware law under which these agreements are to be construed, the Applicants would bear the burden of demonstrating that a

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[163] Northstar 2018 Credit Agreement §§ 1.1, 2.2; *accord* SNR 2018 Credit Agreement §§ 1.1, 2.2.

[164] Northstar 2018 LLC Agreement § 6.5; *accord* SNR 2018 LLC Agreement § 6.5.

[165] Joint Motion to Strike or Surreply at 9 & n.30.

[166] *See* Northstar 2018 LLC Agreement § 6.5(a); *accord* SNR 2018 LLC Agreement § 6.5(a).

material change has actually occurred to invoke this right.[167] And similar provisions have been construed to require substantial exogenous changes, beyond mere hiccups or short-term effects, outside the ordinary course of business.[168] Absent such a change, the Applicants remain locked in to the business plans prepared during DISH's *de facto* control. In other words, when presented with an opportunity to revise their agreements with DISH to cure such control, the Applicants did not secure the basic right to make any changes to the business plans established during the period of DISH's control absent any showing of such material changes. In the ordinary course of business, the existing business plans restrict the management

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[167] *See Capitol Justice LLC v. Wachovia Bank, N.A.*, 706 F. Supp. 2d 23, 28-29 (D.D.C. 2009) (citing *Hexion Spec. Chems., Inc. v. Huntsman Corp.*, 965 A.2d 715 (Del. Ct. Ch. 2008)).

[168] *Cf. Akorn, Inc. v. Fresenius Kabi, AG*, CA No. 2018-0300, 2018 WL 4719347, at *53 (Del. Ct. Ch. Oct. 1, 2018) (recounting that in merger agreements, "[a] buyer faces a heavy burden when it attempts to invoke a material adverse effect clause" to avoid obligation to acquire; that "[a] short-term hiccup in earnings should not suffice; rather the Material Adverse Effect should be material when viewed from the longer-term perspective of a reasonable acquiror"; and that the adverse change should be "consequential to the company's long-term earnings power over a commercially reasonable period, which one would expect to be measured in years rather than months" (quotation marks omitted)); *accord In re IBP, Inc. Shareholders Litig.*, 789 A.2d 14, 68 (Del. Ct. Ch. 2001) (finding, under New York law, that "even where a Material Adverse Effect conditions is . . . broadly written . . . that provision is best read as a backstop protecting . . . [against] unknown events that substantially threaten . . . overall earnings . . . in a durationally significant manner").

of their operations, regardless of the termination of their Management Services Agreements with DISH.

76. The Applicants argue that the Commission has not historically reviewed business plans when evaluating eligibility for bidding credits.[169] That is true, and, here, we have not reviewed nor evaluated the Applicants' initial business plans (for example, to pass judgment on their efficacy).[170] But even without regard to the substance of the initial plans the contractual restrictions governing those business plans may affect the ability of the Applicants to manage their businesses in the ordinary course of business. Specifically, both 2018 LLC Agreements recite that the business plan for each company was established on the same day, at a time in which DISH was found to be in *de facto* control. Moreover, the Commission previously noted the relevance of the fact that DISH "either prepared or participated in preparing" those business plans.[171] The Applicants argue they have negotiated a cure to address DISH's prior role in controlling daily operations, but the only thing that DISH has done with respect to the business plans is grant the Applicants the theoretical ability to

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[169] *See* Consolidated Opposition at 19, 25; *see also* Applicants' 11-4-20 Summary at 4, 6-7 (arguing that *de facto* control test does not include assessing an applicant's "viability").

[170] In this respect, we expressly reject any argument that the Applicants were required to submit their business plans to demonstrate their eligibility for bidding credits. *See* VTel Comments at 14-17.

[171] *See Northstar and SNR Order*, 30 FCC Rcd at 8920, para. 74.

modify them without DISH's consent *if and only if* circumstances materially change.

77. Under these circumstances, and as explained in the *Northstar and SNR Order*, DISH's role in "prepar[ing] or participat[ing] in preparing" the Applicants' initial business plans and their inability to adjust the management of their operations in the ordinary course of business prevent us from finding that this factor supports the Applicants' position.

3. Employment Decisions

78. In the *Northstar and SNR Order*, the Commission found that the second *Intermountain Microwave* factor also supported a finding of *de facto* control by DISH, given its ability to exert control

over staffing decisions and compensation decisions.[172] The D.C. Circuit affirmed this reasoning that "SNR and Northstar had little control over their employment decisions," noting DISH's power to appoint the Systems Manager for each company, the limited budget each company would receive, the $200,000 cap on employee compensation, and DISH's ability to set its own compensation as the Operations Manager.[173]

79. Since the remand, the parties have negotiated several modifications to address the Commission's prior concerns regarding DISH's control of the Applicant's employment decisions. They have clarified that the LLC management fee is not intended to cover the Applicants' operating costs in retaining and

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[172] *Northstar and SNR Order*, 30 FCC Rcd at 8921-22, para. 79.

[173] *SNR Wireless*, 868 F.3d at 1031.

paying employees and supporting facilities for their businesses.[174] In addition, in the 2018 LLC Agreements, they also have eliminated DISH's veto rights over paying any director, officer, or employee $200,000 or more per year. And finally, as noted, the parties have terminated entirely the Management Services Agreement, eliminating DISH's responsibilities for various aspects of the selecting, arranging, training, and supervising of employees. Accordingly, we find that there is no indication that DISH will exercise control over the Applicants' employment decisions under the 2018 Agreements.[175]

4. Responsibility for Financial Aspects of the Business

80. In the *Northstar and SNR Order*, the Commission found that another indicium of DISH's *de facto* control was its responsibility for the Applicants' financial obligations.[176] Based on its review of the record, the Commission found that DISH "dominate[d] the financial aspects of SNR's and Northstar's businesses," noting initially that DISH was "the source of the vast majority of SNR's and Northstar's capital, beginning with the initial payment stage of Auction 97, continuing through the final payment, and persisting for future financial obligations such as

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[174] *See* Northstar 2018 LLC Agreement § 6.6; *accord* SNR 2018 LLC Agreement § 6.6.

[175] We note that under the 2018 LLC Agreements, the Applicants' LLC Managing Members are still compensated "with a fee rather than through compensation normally associated with ownership—profit." *Northstar and SNR Order*, 30 FCC Rcd at 8922, para. 81.

[176] *Northstar and SNR Order*, 30 FCC Rcd at 8923, para. 84.

build-out and operating costs."[177] While the Commission declined to find DISH's initial investment to be determinative of *de facto* control, the Commission considered the "unprecedented amounts of combined equity and debt . . . to be pertinent to [the] analysis" and an "indicator of the level of DISH's control."[178] The Commission also expressed concern that the 2015 Credit Agreement appeared to "restrict the Applicants from obtaining additional funding from alternative sources, thereby further intensifying Northstar's and SNR's dependence on DISH."[179] The Commission specifically cited the cap that limited each Applicant to a total of $25 million in purchase money financing and $25 million in unsecured debt from third parties—amounts the Commission described as "trivial in comparison to the value of the spectrum . . . and the potential costs associated with building and operating an extensive network or otherwise utilizing the substantial amount of spectrum acquired during this auction."[180] The D.C. Circuit affirmed that these conclusions were a reasonable application of FCC precedent.[181]

81. The Applicants have sought to address these concerns through a variety of changes reflected in the 2018 LLC and Credit Agreements. The Applicants assert that these changes "individually and in the aggregate provide Applicants with substantially

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[177] *Northstar and SNR Order*, 30 FCC Rcd at 8923-24, para. 84.

[178] *Northstar and SNR Order*, 30 FCC Rcd at 8924, para. 84.

[179] *Northstar and SNR Order*, 30 FCC Rcd at 8924, para. 85.

[180] *Northstar and SNR Order*, 30 FCC Rcd at 8924, para. 85.

[181] *See SNR Wireless*, 868 F.3d at 1032-33.

greater financial flexibility than they had" under the 2015 Agreements.[182] First, they have eliminated the $25 million cap on Applicants' acquiring purchase money financing or unsecured third-party debt; such borrowing is now not subject to any quantifiably concrete limit.[183] Second, the parties have negotiated modifications to DISH's interest in the Applicants. These changes include transforming nearly $7 billion in Northstar debt and over $5 billion in SNR debt into new Class A Preferred Equity—leaving a balance of exactly $500 million of indebtedness for each company.[184] The Class A Preferred Equity is non-voting, non-participating, and non-convertible, and it does not have a maturity date.[185] The preferred equity accrues quarterly distributions at the rate of 8% per annum from and after June 7, 2018, which must be paid either in cash or by adding such amounts to the then-current face amount.[186] The liquidation preference on the preferred equity is due and payable upon a liquidation or deemed liquidation event.[187] Third, the parties have also reduced in the 2018 Credit Agreements the interest rate on the remaining

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[182] Consolidated Opposition at 13.

[183] Northstar 2018 Credit Agreement § 6.9(g); *accord* SNR 2018 Credit Agreement § 6.9(g).

[184] Northstar 2018 Credit Agreement § 2.2(g)(ii); *accord* SNR 2018 Credit Agreement § 2.2(h)(ii).

[185] Northstar 2018 LLC Agreement § 2.2(e); *accord* SNR 2018 LLC Agreement § 2.2(f).

[186] Northstar 2018 LLC Agreement § 3.1; *accord* SNR 2018 LLC Agreement § 3.0.

[187] Northstar 2018 LLC Agreement § 3.2; *accord* SNR 2018 LLC Agreement § 3.1.

indebtedness from 12% to 6% per year from and after March 31, 2018, while also eliminating the default interest rate on past due amounts.[188] The parties also have eliminated prepayment obligations and required interest payments, such that accrued interest is not payable until the loan maturity date, which has been extended from 7 to 10 years, while also eliminating the excess cash recapture provisions from the 2015 Credit Agreements.[189]

82. Even after these changes, however, the fact remains that DISH provided Northstar and SNR with approximately $13 billion in loans to participate in Auction 97, and while the Applicants have negotiated changes as to the *form* of their debt to DISH, the sheer quantity of their financial obligations remains the same. Additionally, there is nothing in the record to suggest that either Northstar or SNR has accrued significant investment or debt from anyone other than DISH, either before or after the auction. These facts are not dispositive as to this *Intermountain Microwave* factor, but they remain relevant to our analysis.

83. Moreover, the revisions that the Applicants negotiated still leave each of them $500 million in debt to DISH (in addition to the already accrued interest)—even without regard to the future financing of their buildout obligations under the Commission's rules. Whether the remaining approximately $5 billion (or, in Northstar's case, $7 billion) has been exchanged for

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[188] Northstar 2018 Credit Agreement § 2.3(a); *accord* SNR 2018 Credit Agreement § 2.3.

[189] Northstar 2018 Credit Agreement § 1.1 (definition of "Maturity Date"); *accord* SNR 2018 Credit Agreement § 1.1 (same).

preferred stock with cumulative 8% per annum quarterly dividend distributions does not alter the facts that (1) the Applicants require substantial additional capital for network buildout; (2) DISH has been and remains the primary source of the Applicants' capital; (3) DISH may, but is not obligated to, make adequate buildout funding available; and (4) DISH's contractual protections and the economic realities of the parties' relationships make it difficult if not impossible for the Applicants to raise any secured debt, other than possibly limited amounts of purchase money financing for specific types of equipment, or significant, if any, unsecured financing.

84. For the Applicants to buildout their licenses into wireless networks, they will need substantial additional funding. One source of such funding would be additional loans from DISH. And under the 2018 Credit Agreements, DISH continues to have baseline commitments to fund the Applicants' "reasonable" buildout expenses as well as their "reasonable" working capital expenses.[190] Given the enormously expensive nationwide wireless network represented by the over 700 licenses as to which the Applicants were the highest bidders,[191] this would require

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[190] Northstar 2018 Credit Agreement § 2.2; *accord* SNR 2018 Credit Agreement § 2.2.

[191] Based on a review of the Commission's Universal Licensing System on October 5, 2020. The licenses that Northstar and SNR won in Auction 97, when combined, cover the entire United States. *See also* Federal Communications Commission, *Auction 97: Advanced Wireless Services (AWS-3) Results*, https://www.fcc.gov/auction/97/round-results (last visited Oct. 5, 2020).] The Applicants currently hold approximately 500 licenses, after their selective defaults following the *Northstar and*

substantial further investments by DISH on a going-forward basis. DISH disclosed as much in its 2019 U.S. Securities and Exchange Commission Form 10-K, describing that it might "need to make significant additional loans to [Northstar and SNR] . . . so that [they] may commercialize, build-out and integrate" their licenses into a wireless network.[192] If DISH makes such adequate buildout and operating funding available—which it is under no obligation to do—the provision of such additional debt of this scope would increase DISH's responsibility for Applicants' financial obligations under this *Intermountain Microwave* factor.

85. Our independent conclusion as to the importance of this factor under *Intermountain Microwave* is reinforced by DISH's own continued recognition of its financial responsibility for the Applicants. Under Financial Accounting Standards Board (FASB) Accounting Standards Codification 810-10-25-38A, an entity is required to consolidate its financial statement with other entities where it has (1) the power to direct activities that most significantly impact economic performance and (2) either the obligation to absorb losses that could potentially be significant or the right to receive benefits that could potentially be significant.[193] And in its Q1 2020 SEC

SNR Order, but our assessment of their buildout costs is based on the full portfolio of over 700 licenses that they claim to be entitled to in this proceeding.

[192] DISH Network Corporation, Form 10-K at 22 (filed Feb. 25, 2020) https://ir.dish.com/node/31586/html.

[193] FASB, Accounting Standard Update, Consolidation Topic 810, at 5 (2016), https://asc.fasb.org/imageRoot/28/96871528.pdf.

Form 10-Q, DISH acknowledged that Northstar and SNR are "considered variable interest entities" under "applicable accounting guidance," and, "based on the characteristics of the structure of these entities," DISH "consolidate[d] these entities into [its] financial statements."[194] Further, DISH explained under its "Principles of Consolidation" that it consolidated "all majority owned subsidiaries, investments in entities in which [it has] controlling influence and variable interest entities where [DISH has] been determined to be the primary beneficiary."[195] Notably, DISH's treatment of Northstar and SNR for reporting purposes appears not to have changed following the modifications that the parties negotiated to their agreements in 2018.[196]

86. Nor is that all. DISH also has retained significant control over the financial aspects of Applicants' businesses by placing substantial limits on the amount of its own required financial obligations.

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[194] DISH Network Corp., Form 10-Q, at 9 (May 7, 2020), https://www.sec.gov/ix?doc=/Archives/edgar/data/1001082/000155837020005524/dish-20200507x10q.htm (DISH Q1 2020 10-Q); *see also id.* at 10-11 (discussing redeemable noncontrolling interests in Northstar and SNR for reporting purposes).

[195] DISH Q1 2020 10-Q at 10.

[196] *See* DISH Network Corp., Form 10-Q, at 4-5 (May 11, 2015), https://dish.gcs-web.com/node/29001/html (noting that Northstar and SNR were considered variable interest entities based on similar principles of consolidation under parties' 2015 Agreements). While DISH refers to its investment in the Applicants as "non-controlling" in its most recent 10-Q, that fact is of limited probative value, given that DISH also referred to its investments in the Applicants as "non-controlling" in 2015.

87. Specifically, the SNR 2018 Credit Agreement requires DISH to make buildout loans upon request, but "[i]n no event shall" DISH "be obligated to make an aggregate amount" of such loans "in excess of the "Build-Out Sub Limit."[197] The SNR 2018 Credit Agreement defines "Build Out Sub-Limit" to mean only {[]} "plus such additional amounts" as SNR and DISH "mutually agree are necessary to meet . . . Build-Out plans."[198]

88. The Northstar 2018 Credit Agreement is effectively similar. Its definition of Build-Out Sub Limit is the same as the SNR 2018 Credit Agreement's except that it also "such additional amounts as are required to fund Working Capital requirements."[199] But this change appears to be immaterial for present purposes. The Northstar 2018 Credit Agreement expressly distinguishes "Working Capital requirements" from funds mutually agreed to be necessary for buildout.[200] And typically, a working capital loan is one "taken to finance a company's everyday operations" and "not used to buy long-term assets or investments," but rather "short-term operational needs."[201] In any event, whatever the

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[197] SNR 2018 Credit Agreement § 2.2(b).

[198] SNR 2018 Credit Agreement § 1.1 (definition of "Build-Out Sub Limit"). Material set off by double brackets {[ ]} is confidential and is redacted from the public version of this document.

[199] Northstar 2018 Credit Agreement § 1.1.

[200] *See* Northstar 2018 Credit Agreement § 1.1 ("Build-Out Sub-Limit" and "Working Capital").

[201] Investopedia, *Working Capital Loan - Definition*, https://www.investopedia.com/terms/w/workingcapitalloan.asp#:

scope of "reasonable" working capital expenses may be under the "Working Capital" definition of the agreement, they would appear to be "'trivial' in comparison to what it would cost to build and use a nationwide wireless network."[202]

89. Under these agreements, DISH has the ability to delay or deny funding to the Applicants for network buildout by not agreeing that requested levels of funding above the minimum threshold are necessary to meet buildout plans (which the Applicants have not provided or described). Whatever the scope of this limitation may be, or however it may be exercised in the future, this limitation is especially concerning here because of the levels of buildout funding that would be necessary to deploy wireless networks for the hundreds of licenses that the Applicants acquired across the country in Auction 97. Indeed, we expect that the buildout costs for their shared nationwide set of AWS-3 licenses[203] would likely collectively be many orders of magnitude greater than the designated build-out sub-limit, and ten times the size of Applicants' collective existing debts to DISH, based on DISH's own $10 billion budget for its buildout of another nationwide network—a figure analysts have

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~:text=A%20working%20capital%20loan%20is,company's%20short%2Dterm%20operational%20needs. (last visited Oct. 5, 2020).

[202] *SNR Wireless*, 868 F.3d at 1033.

[203] Based on a review of the Commission's Universal Licensing System on October 5, 2020. Northstar's and SNR's licenses, when combined, cover the entire U.S. *See also* Federal Communications Commission, *Auction 97: Advanced Wireless Services (AWS-3) Results*, https://wwwfcc.gov/auction/97/round-results (last visited Oct. 5, 2020).

criticized as likely being *inadequate* based on other providers' capex in recent years.[204]

90. Additionally, the rules for the AWS-3 licenses that the Applicants won in Auction 97 establish an interim buildout requirement at six years after the grant of the licenses.[205] In the event that a licensee fails to meet this interim benchmark, however, the primary consequence is that final buildout deadline is accelerated by two years (from 12 to 10 years).[206] We find it noteworthy that in either case, the final buildout requirement would occur *after* the Applicants' put windows under the 2018 LLC Agreements. We see nothing that would prevent DISH from declining to provide the funding that would be necessary for the Applicants to satisfy their interim buildout requirements, leaving them in a highly risky position vis-à-vis their final buildout requirements at each put window.[207]

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[204] *See* DISH Network Corporation CEO Erik Carlson Q4 2019 Results, Earnings Call Transcript (Feb. 19, 2020), https://seekingalpha.com/article/4325471-dish-network-corporation-dish-ceo-erik-carlson-q4-2019-results-earnings-call-transcript?.

[205] *See* 47 CFR § 27.14(s).

[206] *See* 47 CFR § 27.14(s).

[207] The Applicants argue that Commission scrutiny of their "buildout progress at this juncture would impose a new DE standard . . . that would violate their due process rights." Applicants' 11-17-20 Summary at 10. But this order does not consider their buildout progress against the AWS-3 deadlines as a regulatory matter, but instead considers whether they have any realistic hope of raising the financing to buildout their networks, which they must do to satisfy their financial obligations to DISH or to have any option other than exercising their put rights.

91. Finally, even under the 2018 Agreements, DISH has significantly limited the availability of other funding sources for the Applicants.[208] Specifically, the 2018 Credit Agreements prohibit the Applicants from incurring *any* secured debt other than purchase money financing of telecommunications and broadband equipment.[209] And, while the Applicants

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[208] The Applicants claim that the Commission should not adopt a "novel and unprecedented *de facto* control standard based on . . . proof of the ability to secure funding from parties other than DISH" because "such standards have never been used to assess eligibility for DE bidding credits." Applicants' 11-17-20 Summary at 5. But an applicant's ability to secure funding is a relevant consideration under this *Intermountain Microwave* factor, as applied in the *Northstar and SNR Order*. *See Northstar and SNR Order*, 30 FCC Rcd at 8924, para. 85.

[209] *See* Northstar 2018 Credit Agreement § 6.9(b); *accord* SNR 2018 Credit Agreement § 6.9(b). The 2018 LLC Agreements also give DISH unilateral veto rights over the incurrence of any debt secured by major assets, including spectrum licenses, which are likely to be the only meaningful assets that these nascent companies hold. *See* Northstar 2018 LLC Agreement §§ 1.1 (definition of "Significant Matter"), 6.3 (veto rights); *accord* SNR LLC Agreement §§ 1.1 6.3. The Applicants claim that DISH's consent is "not required for the Applicants to take on secured debt that does not rise to the threshold of the well-established *Baker Creek* investor protections." Applicants' 11-17-20 Summary at 7. But the *Baker Creek* limitation on the investor protections is illusory, because that decision does not identify some obvious or quantifiable "threshold" of "significance." Moreover, this claim does not account for the 2018 Credit Agreements, which separately prohibit the incurrence of any secured debt other than purchase-money financing of certain equipment. Thus, the Applicants can invoke their investor protections in tandem with the 2018 Credit Agreements' prohibition to block the incurrence of *any* secured debt. And even if DISH permitted a third-party lender to take a security interest in the proceeds of a sale of the licenses or the Applicants, any such security interest likely would

have eliminated the $25 million quantified cap on Applicants' raising purchase money financing and unsecured debt,[210] DISH retains unilateral and unfettered veto rights on the Applicants' incurring any "significant" indebtedness (including unsecured) under the revised investor protections in the 2018 LLC Agreements.[211] Of course, an investor protection that relates to the incurrence of significant third-party debt is not *per se* impermissible. But here, considering the enormity of Applicants' continuing need for capital, as well as DISH's apparent ability to delay or avoid making all of the capital available that would be necessary to build out the Applicants' networks, the protection couples virtually exclusive responsibility for financial operations with powerful financial leverage.

92. Indeed, we are concerned that these aspects of the parties' 2018 Agreements could "have the effect of deterring potential outside lenders in the first instance."[212] As VTel explains, "[c]urrent market trends and institutional lending practices make it

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be subordinate to the debt held by DISH, including any already accrued interest. *See* NorthStar 2018 LLC Agreement §§ 1.1 (definitions of "Deemed Liquidation Event" and "Liquidation Event"), 3.1, 13.3(d); *accord* SNR 2018 LLC Agreement §§ 1.1 (definitions of "Deemed Liquidation Event" and "Liquidation Event"), 3.1, 13.3(d).

[210] *See* Northstar 2018 Credit Agreement § 6.9(g); *accord* SNR 2018 Credit Agreement § 6.9(g).

[211] For this reason, we reject the Applicants' characterization that they are not "limited in any way in their ability to get equipment financing and unsecured debt." Applicants' 11-4-20 Summary at 7.

[212] *Baker Creek Order*, 13 FCC Rcd at 18722 para. 24.

highly unlikely that any creditor would lend funds to Northstar and SNR on an unsecured basis. Nor is it likely that any vendor would be willing to finance the sale of equipment to a company with no customers and no reasonable prospects for ever getting customers."[213] And in *Baker Creek*, the Bureau found that two aspects of the partnership agreement between Hyperion and Baker Creek would likely leave Hyperion "ultimately responsible" for Baker Creek's financial obligations: first, a provision which denied Baker Creek the right to secure loans with partnership property; and, second, a provision which granted Hyperion a right of first refusal with regard to loans sought from outside parties.[214] Here too, the Applicants are prohibited from raising any secured third-party funding (other than purchase money financing for certain equipment), and DISH has a right to veto any "significant" loans sought from third parties. Thus, DISH "has the right to determine the

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[213] VTel Comments at 16. We need not find that it is "highly unlikely that any creditor would lend funds to Northstar and SNR" in *any* amount "on an unsecured basis." But we agree with VTel that it is highly unlikely that any creditor would lend unsecured funds to Northstar and SNR in any significant amount and that, in the highly unlikely event that any creditor were to offer to do so, DISH could veto acceptance by the Applicants. And nowhere in their Consolidated Opposition do the Applicants address VTel's well-founded concerns that third-party creditors will be deterred from providing unsecured or purchase money funding to Northstar and SNR.

[214] *Baker Creek Order*, 13 FCC Rcd at 18722, para. 24. Critically, the Bureau reached this conclusion notwithstanding its recognition that investor protections regarding "encumbering corporate assets" are generally permissible. *Baker Creek Order*, 13 FCC Rcd at 18714-15, para. 9.

amount and source of [Applicants'] future commitments" and appears to have "ultimate responsibility" for their financial obligations.[215]

5. Receipt of Monies and Profit

93. In the *Northstar and SNR Order*, the Commission found that the 2015 Agreements and relationships among the parties "firmly raise[d] the specter of control" by DISH under the fifth *Intermountain Microwave* factor.[216] The Commission noted that while certain provisions of those agreements directed that profits would be distributed *pro rata* in accordance with the ownership interests of the parties, the business arrangements between the parties as a whole were "structured in such a way that the profits [were] likely only to benefit DISH." Thus, the Commission raised "serious questions as to whether *any* profits could be generated that could result in distributions to SNR and Northstar."[217]

94. The Commission initially found that under the 2015 Credit Agreements, "prior to realizing any profits from their business operations, SNR and Northstar" were required to "first repay the billions of dollars in loans they ha[d] secured from DISH."[218] The Commission noted that the interest was capitalized during the initial five years of the loan, which was potentially problematic because the Applicants were likely to be building out their respective network during those first five years," and it was "unlikely that

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[215] *Baker Creek Order*, 13 FCC Rcd at 18722-23 para. 25.

[216] *Northstar and SNR Order*, 30 FCC Rcd at 8925, para. 89.

[217] *Northstar and SNR Order*, 30 FCC Rcd at 8925, para. 88.

[218] *Northstar and SNR Order*, 30 FCC Rcd at 8925, para. 89.

any profits would be generated" during that period.[219] The Commission then noted that if any profits were realized in years five to seven, "the amount of cash in excess of a reasonable reserve for expenses [would have to be] paid to DISH as lender to reduce the multi-billion dollar loans," and that "the Credit Agreement[s] terminate[d] after year seven," at which point the Applicants would be required to repay the full remaining balance plus accrued interest."[220] The Commission summarized that "the transactional documents effectively ensure that the Applicants are highly unlikely to ever see any profit during the term of the loan. Instead, . . . the transactional documents . . . provid[e] the Applicants with an annual income, via the LLC management fee, for which they oversee building a network . . . followed by a put option."[221] The Commission explained that these concerns were "exacerbated by the repayment terms that require[d] repayment of 50 percent of the loans between the fifth and seventh year of the term, and the balance as a balloon payment at the end of year seven."[222]

95. Separately, the Commission expressed concern that the 2015 Management Services Agreements also revealed DISH's control by requiring that the Applicants reimburse DISH for all out of pocket expenses, and by establishing a "circularity by which the funds [would] flow from DISH, as lender, to

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[219] *Northstar and SNR Order*, 30 FCC Rcd at 8925, para. 89.

[220] *Northstar and SNR Order*, 30 FCC Rcd at 8925, para. 89.

[221] *Northstar and SNR Order*, 30 FCC Rcd at 8926, para. 90.

[222] *Northstar and SNR Order*, 30 FCC Rcd at 8926, para. 92.

the Applicants and then back to DISH, as Operating Manager."[223]

96. The D.C. Circuit endorsed this reasoning:

> Before realizing any profits from their business operations, SNR and Northstar would first have to repay the billions of dollars in loans they owed to DISH. And, given that SNR and Northstar would need to undertake extensive construction before they could begin providing wireless service, it was very unlikely for the foreseeable future that they would be able to repay those loans and begin earning profits.[224]

97. The Applicants have renegotiated the terms of their debt to DISH, such that in the 2018 Credit Agreements they each owe $500 million to DISH in the form of debt, with a reduced interest rate and extended maturity date; the remainder of their prior debt (billions of dollars for each company) has been converted into preferred equity with no maturity date and mandatory quarterly distributions at an 8% per annum rate, made in cash or added to the then-current face amount and subject to compounding.[225] Moreover, the parties have terminated the Management Services Agreements.

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[223] *Northstar and SNR Order*, 30 FCC Rcd at 8926, paras. 91, 93.

[224] *SNR Wireless*, 868 F.3d at 1033.

[225] *See* Northstar 2018 Credit Agreement § 2.2(g)(ii); Northstar 2018 LLC Agreement §§ 2.2(e), 3.1; *accord* SNR 2018 Credit Agreement § 2.2(h)(ii); SNR 2018 LLC Agreement §§ 2.2(f), 3.0.

98. Based on our review of the revised agreements, we conclude that the parties have changed the form but not the controlling nature of DISH's financial interests with respect to the receipt of monies and profits.

99. *First*, the changes the Applicants have negotiated do not materially change the economic reality of their shared relationship—an overwhelming financial obligation—with DISH. For example, it appears that the Applicants still owe DISH the 12% annual interest on the full loan amounts ($7.3 billion for Northstar and $5.5 billion for SNR) under the 2015 Agreements that accrued for the three and a half years from the loan advance date up until the date that they entered into the 2018 Agreements.[226] Moreover, the Applicants also owe DISH the 6% annual interest that has accrued and will accrue on the remaining $500 million loan balance from that date forward.[227] The $500 million outstanding debt for each Applicant is also due upon maturity in 2025. And with respect to the new preferred equity, the Applicants appear to have been obligated to pay DISH a 12% per annum distribution for Q2 2018 and now face quarterly distributions at an 8% per annum rate from Q3 2018 forward, either in the form of cash or as an addition to the face value already held by DISH (subject to compounding).[228] Thus, the amounts that the

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[226] *See* T-Mobile Comments at 6; *see also* Northstar 2018 Credit Agreement § 2.3(a); *accord* SNR 2018 Credit Agreement § 2.3.

[227] *See* T-Mobile Comments at 6; *see also* Northstar 2018 Credit Agreement § 2.3(a); *accord* SNR 2018 Credit Agreement § 2.3.

[228] Northstar 2018 LLC Agreement § 3.1; *accord* SNR 2018 LLC Agreement § 3.0.

Applicants already owe and will have to regularly pay to DISH (or add to its face value) going forward are substantial.[229]

100. Moreover, because DISH can control whether the Applicants are able to make their quarterly dividend payments in cash, it can effectively accrete preferred equity on a quarterly basis, which compounds. Although the preferred equity has no maturity date, it operates here as substantively similar to traditional debt upon a liquidation or deemed liquidation event,[230] because it has higher

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[229] VTel argues that the Applicants' liability to DISH under the preferred equity swap will actually be *greater than* the amount of indebtedness either entity would have incurred under the 2015 Credit Agreements. *See* VTel Comments at 18. VTel likewise argues that the Conversion of debt to preferred equity is harmful because the Applicants will no longer be able to reduce their taxable income by a factor of the interest paid to DISH. *See* VTel Comments at 9-10. The Applicants counter that VTel's estimates of the Applicants' net liability is based on a flawed set of assumptions, and that VTel's taxable-income argument ignores the capital-intensive nature of the Applicants' businesses, which make it extremely unlikely that they would ever be able to claim an interest tax deduction. *See* Consolidated Opposition at 13-17. We need not resolve these disputes. Even under the Applicants' own conservative estimates, the extent of DISH's interest in the Applicants will be massive (after 10 years, at minimum, approximately $11.9 billion in preferred equity in Northstar and approximately $8.8 billion in preferred equity in SNR). *See* Consolidated Opposition, Ex. C, Table 3A, Discussion Note 2, Table 3B, Discussion Note 2. Moreover, these estimates assume DISH does not make any other significant additional loans to the Applicants, which, as noted above, DISH itself has recognized in its SEC filings it may have to do for the Applicants to buildout and operate their networks.

[230] The Applicants argue that under Commission precedent, a critical factor in determining whether a debt obligation should be

priority than the LLC Managing Members' common equity.[231] In short, accretion of preferred equity to DISH results in a corresponding dilution of the potential return on the LLC Managing Members' 15% common equity interests in such event, and their theoretical right to any profits upon a sale or larger transaction with any party other than DISH becomes substantially diminished.[232] The fact that "the new preferred equity has no ownership interest in the common equity" is of no moment;[233] the Applicants face a scenario where DISH can dictate whether the LLC Managing Members have any chance of realizing a return on their investment.

101. *Second*, DISH exerts substantial control over whether and how the Applicants will be able to fund

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treated as equity is whether there is an unconditional promise to repay. *See* Consolidated Opposition at 12 (citing *Fox Television Studios, Inc.*, Second Memorandum Opinion and Order, 11 FCC Rcd 5714, 5720, para. 16 (1995) (*Fox II*)). But our conclusion with respect to this *Intermountain Microwave* factor does not require a finding that DISH's preferred equity is the functional equivalent of debt in all or even many respects. What is relevant here is that from Northstar's and SNR's perspective, the preferred equity carries (1) mandatory quarterly distributions (the payment of which DISH can make difficult if not impossible), and (2) distribution priority in the event of a liquidation or deemed liquidation event. Here, this is a critical aspect of "the economic reality and substance" of this transaction. *Fox II*, 11 FCC Rcd at 5270, para. 6.

[231] The Applicants describe the preferred equity as having a "subordinate . . . liquidation priority," but this is misleading, as the preferred equity is senior to the LLC Managing Members' common equity. Consolidated Opposition at 15.

[232] *See* VTel Comments at 9-10.

[233] Consolidated Opposition at 16.

the buildout and operation of their networks—and thus whether they will be able to generate the revenues necessary to satisfy their quarterly and ultimate financial obligations.[234] Even if DISH agrees to fund the Applicants' buildout and operating costs, Applicants would of course increase their overall financial obligations to DISH, and it appears that DISH can frustrate their attempts to do so. The Applicants alternatively could seek to obtain significant amounts of third-party funding for buildout and operating costs. But their doing so would be subject to the 2018 Credit Agreements' prohibition on secured financing other than limited purchase money financing, and the 2018 LLC Agreements' veto rights to any "significant" third-party debt. And even if DISH were to consent to the Applicants' taking on significant third-party debt, we have serious doubts whether Applicants could obtain third-party funding or investment of the magnitude required given that Applicants are still young companies with no revenue, no existing network or operations, no significant assets with which they are permitted to secure the debt, and an investor with veto and priority rights in liquidation.[235]

102. *Third*, DISH also has the ability to exert substantial control over the alternative, non-capital

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[234] *See supra* Part III.B.4.

[235] *See* NorthStar 2018 LLC Agreement §§ 1.1 (definition of Significant Matters), 6.3 (veto rights for Significant Matters), 13.3 (priority rights); Northstar 2018 Credit Agreement §§ 2.5 (security rights), 6.9 (restrictions on debt); *accord* SNR 2018 LLC Agreement §§ 1.1, 6.3, 13.3; SNR 2018 Credit Agreement §§ 2.5, 6.9.

intensive business models by which Northstar and SNR could generate the revenues needed to pay the interest payments and mandatory distributions—*i.e.*, leasing their spectrum in any significant amount or engaging in corporate transactions, major sales, or partnerships with any entity other than DISH.[236] Thus, taken together, DISH's rights allow it to delay, frustrate, or prevent the Applicants from successfully deploying, leasing, or selling their spectrum to the extent that would be necessary to generate revenues to pay down their debt and make their required dividend payments.

103. In sum, even though DISH converted all but $500 million of its loans to each Applicant into preferred equity and modified the loan terms for the remaining debt, we conclude that under this aspect of the *Intermountain Microwave* inquiry any profits of Applicants' operations are still, as the Commission found previously, "only likely to benefit DISH."[237]

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[236] *See infra* Part III.B.6.

[237] Our analysis under this *Intermountain Microwave* factor is also relevant to our alternative holding that the 2018 Agreements confer control on DISH under the *Competitive Bidding Fifth Order* as outlined by the D.C. Circuit. Because DISH can cause the LLC Managing Members' value in their holdings to dilute significantly over time, they will face substantial incentives to exercise their put rights to DISH in order to "recoup their base contributions plus a [set] return on their contributions in a relatively short time without their ever having to deploy a wireless system or operate a business.'" *Northstar and SNR Order*, 30 FCC Rcd at 8929-30, para. 103 (citing Reply of VTel Wireless, Inc. in Support of Petition to Deny of File Numbers 0006458325 and 0006458318 at 11 (filed May 26, 2015)).

6. Control of Policy Decisions

104. As the Commission explained in the *Northstar and SNR Order*:

> Because policy decisions are crucial to the daily functioning, future outlook, and independence of an entity, we expect that, among other things, an autonomous entity would retain control of major decisions affecting the use of their licenses . . . whether to expand their respective businesses by purchasing additional spectrum licenses, and, of course, the fundamental choice of whether to remain in operation.[238]

105. With respect to this *Intermountain Microwave* factor, too, the Commission noted in the *Northstar and SNR Order* that the parties had inserted express recitals in their 2015 Agreements which purported to vest policy control in Northstar and SNR.[239] However, the Commission found these statements "unconvincing" as they were "undercut by other provisions that combine[d] to cede DISH the power to control management and operation decisions."[240] The Commission specifically highlighted the following examples of DISH's control:

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[238] *Northstar and SNR Order*, 30 FCC Rcd at 8927, para. 94.

[239] *See Northstar and SNR Order*, 30 FCC Rcd at 8927, para. 94.

[240] *Northstar and SNR Order*, 30 FCC Rcd at 8927, para. 94.

- Interoperability: Northstar and SNR were compelled to use technology that was compatible with DISH's own system.[241]
- Acquisition of Additional Spectrum: The 2015 LLC Agreements required Northstar and SNR to secure written permission from DISH prior to acquiring new spectrum.[242]
- Network Construction: The Applicants were required to consult with DISH regarding the timing of network construction.[243]
- Transfer and Sale: The 2015 Agreements "essentially dictate[d] when SNR and Northstar should sell their interests and exit the business."[244]
- Interest Rates: The credit rates in the 2015 Credit Agreements were "well above market rate," and would likely "have the effect of driving the loan principal as high as possible given that the interest is capitalized."[245]

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[241] *Northstar and SNR Order*, 30 FCC Rcd at 8927, para. 96; *see also id.* at 8928, para. 97 ("[T]he technology selected, and ultimately, the direction of their business, is one of the most critical decisions a licensee can make regarding its spectrum holdings . . . .").

[242] *See Northstar and SNR Order*, 30 FCC Rcd at 8928, para. 98.

[243] *Northstar and SNR Order*, 30 FCC Rcd at 8928, para. 99.

[244] *Northstar and SNR Order*, 30 FCC Rcd at 8928, para. 100.

[245] *Northstar and SNR Order*, 30 FCC Rcd at 8931, para. 106.

- Ownership of Property: The 2015 Agreements prohibited the Applicants from owning any freehold real property.[246]
- Right to Licenses: A provision in the 2015 LLC Agreements gave DISH the option to end Northstar's and SNR's businesses if denied bidding credits.[247]
- Joint Bidding: The Commission's determinations were informed by the circumstances surrounding the bidding that resulted in Northstar's and SNR's winning bids. "All three companies . . . worked jointly to advance DISH's interests, rather than SNR and Northstar functioning as independent bidders seeking to advance their own interests."[248]

106. The D.C. Circuit affirmed that the Commission had "reasonably concluded that DISH effectively controlled . . . every essential policy decision for SNR and Northstar[]," citing DISH's control over "(a) the type of wireless technology that SNR and Northstar would use; (b) the number of spectrum licenses that SNR and Northstar would hold; (c) the timetable for SNR and Northstar to build networks and begin offering services to customers; (d) when SNR and Northstar might sell their businesses;

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[246] *Northstar and SNR Order*, 30 FCC Rcd at 8931, para. 107.

[247] *See Northstar and SNR Order*, 30 FCC Rcd at 8931, para. 108.

[248] *Northstar and SNR Order*, 30 FCC Rcd at 8932, paras.109, 111; *see also id.* at 8933, paras. 112-14.

(e) SNR's and Northstar's ownership of real property; and (f) SNR and Northstar's bidding strategy."[249]

107. On remand, in addition to making the changes documented above (such as changes to the investor protections in the 2015 LLC Agreements and elimination of the Management Services Agreements), the parties removed restrictions on Northstar's and SNR's rights to acquire additional spectrum, eliminated the interoperability requirements and the prohibition on the Applicants' owning real property, removed DISH's right of first refusal and tag-along rights on the sale of the LLC Managing Members' interests, modified and created new put rights, expanded the Applicants' rights to initiate public offerings, eliminated DISH's rights to reclaim licenses if the Applicants failed to qualify for bidding credits, and reduced from 10 to 5 years the amount of time during which the LLC Managing Members could not transfer their interests without DISH's consent.[250]

108. Notwithstanding these modifications, we nonetheless find that DISH continues to control the Applicants' and their LLC Managing Members' most fundamental policy decisions identified by the D.C. Circuit: Whether, when, and how to use their spectrum, whether to lease their spectrum, whether and how to exit the business, and how to renegotiate arrangements with their principal creditor and investor.

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[249] *SNR Wireless*, 868 F.3d at 365. The D.C. Circuit discussed the effect of the "put" separately, *see id.* at 366-67, as we do below.

[250] *See* Northstar Submission on Remand at 4-5, 16; SNR Comments at 3-4, 15-16, 18; Consolidated Opposition at 4-5, 18.

109. *First*, because DISH can determine whether, to what extent, and from whom, the Applicants can raise additional "significant" unsecured funding (and has prohibited the incurrence of any new secured debt other than limited purchase money financing), it also can continue to exercise control over whether the Applicants ultimately can *use* the spectrum that they selected for acquisition when DISH was in control of their business in order to build and operate nationwide wireless networks. As the Applicants' expert has explained, the primary business model for Northstar and SNR would be deploying a wireless network designed for enterprise or consumer applications and providing wireless network series directly or through partnerships with media, data, or other companies.[251] And an alternative business model would be "offering wireless network capacity or roaming on a wholesale basis to other providers or users of wireless network services."[252] But both of these business models require network buildout, which is highly capital intensive. Thus, even though the Applicants now have the express rights, for example, to own property, to choose their own technologies, and to acquire additional spectrum, those rights are mere fig leaves if they are deprived of access to the substantial funding necessary to implement their decisions.

110. *Second*, in addition to making the changes recounted above, DISH now has—for the first time—a unilateral veto over any "lease" by the Applicants of

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[251] *See* Taylor Decl. at 2, 4, paras. 6, 9.

[252] *See* Taylor Decl. at 4, para 9.

any major asset, where assets include spectrum licenses.[253] As the Applicants' expert has opined, another alternative business option for the Applicants would be "offering access to the spectrum available under the . . . FCC licenses via a spectrum sharing model, including spectrum leasing."[254] Thus, we find the new lease provision in the 2018 LLC Agreements further limits the Applicants' "range of business options"—and the Commission has characterized such limitations as "clearly" relevant when "determining control of a company's policy decisions."[255] And neither Northstar nor SNR currently holds *any* lease of *any* of its many AWS-3 licenses.

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[253] Northstar 2018 LLC Agreement § 6.3 (Supermajority Approval Rights for all "Significant Matters"); *see also id.* § 1.1 (definition of "Significant Matter"); *accord* SNR 2018 LLC Agreement § 6.3 (Supermajority Approval Rights for all "Significant Matters"); *see also id.* § 1.1 (definition of "Significant Matter"). While DISH's rights might not extend to the lease of a single license, it almost certainly would extend to any leasing arrangement from which the Applicants could expect to derive enough revenue to make a meaningful dent in their financial obligations to DISH.

[254] *See* Taylor Decl. at 2, 4, paras. 6, 9.

[255] *Northstar and SNR Order,* 30 FCC Rcd at 8928, para. 98. The leasing restriction is also relevant because it means that DISH can deprive the Applicants of the ability to monetize the value of their licenses without incurring the capital expense of constructing network facilities for a retail or wholesale wireless business (and thereby to meet all or some of their debt and dividend obligations to DISH). As noted below, this provision also reinforces our independent concern that the Applicants have no rational choice but to exercise their put rights, given that DISH can prevent them from meeting the buildout or lease obligations attendant to their spectrum licenses.

111. *Third*, we find that the 2018 LLC and Credit Agreements still give DISH the ability, found significant by the D.C. Circuit, to influence if, how, when, and under what circumstances the Applicants and/or the LLC Managing Members *exit* the business. While the 2018 LLC Agreements permit the LLC Managing Members to sell their interests without DISH's consent after five years,[256] this modification is subject to important limitations which preserve DISH's control in this area.

112. For example, DISH's express veto right as to any transfer of the LLC Managing Members' interests now extends five rather than ten years. But DISH's veto still runs up to precisely the first put window, which is followed by a second put window a year later. The 2018 LLC and Credit Agreements appear likely to result in the LLC Managing Members' exercising one of these two options, so this change is consistent with that intended outcome and thus affects no material change in our analysis.[257]

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[256] Northstar 2018 LLC Agreement §§ 7.1(a), 7.2; *accord* SNR 2018 LLC Agreement §§ 7.1(a), 7.2.

[257] Furthermore, even after five years, any sale by either of the LLC Managing Members of more than 25% of its shares triggers a transfer of management rights to a new manager who is subject to DISH's prior approval. Northstar 2018 LLC Agreement § 7.1(b); *accord* SNR 2018 LLC Agreement § 7.1(b). This restriction further limits the LLC Managing Members' options for disposing of their interests: Any purchaser who acquires less than 25% of the shares held by either LLC Managing Member will hold only non-preferred, common equity (at risk of continuing dilution through missed quarterly dividend distributions) with no management rights; and any purchaser who acquires more than 25% must either abide by DISH's selection of a manager or seek pre-approval from DISH to become

113. Additionally, DISH's remaining investor protections under the 2018 LLC Agreements allow it to veto, even after year five, any "sale, transfer, exchange, or assignment" of any "major asset (where assets include, but are not limited to, licenses)."[258] Thus, if the LLC Managing Members were to try to earn a return on investment by selling a substantial part of the Applicants' spectrum holdings at some point after year 5, DISH can prevent them from doing so. Whatever the permissibility of such an investor protection in other contexts, here, it functions to further box in the Applicants by making it difficult for them to realize a return if their spectrum holdings increase dramatically in value.

114. Relatedly, as VTel points out, any sale by the LLC Managing Members that is a "Deemed Liquidation Event"—any "merger, consolidation or similar transaction" or "the sale, license, or lease of all

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the manager. The 2018 LLC Agreements also continue to restrict the LLC Managing Members from transferring any portion of their interests to any competitor of DISH, any competitor of DISH's affiliates, or an affiliate of a DISH's competitor. Northstar 2018 LLC Agreement §§ 7.1(c), 7.2; *accord* SNR 2018 LLC Agreement §§ 7.1(c), 7.2. This restriction also will likely significantly limit the pool of potential purchasers of the LLC Managing Members' interests. Northstar and SNR—and their assets—will be of value primarily to other companies in the telecommunications industries. While these restrictions are not *per se* indicative of control, here they reinforce our conclusion that it would be difficult, if not impossible, for the LLC Managing Members to sell their interests to any entity other than DISH.

[258] Northstar 2018 LLC Agreement §§ 1.1 (definition of "Significant Matter"), 6.3 (supermajority approval rights for "Significant Matters"); *accord* SNR 2018 LLC Agreement §§ 1.1, 6.3.

or substantially all" of the Applicants' assets—other than as an exercise of their put rights would require that DISH be paid in full for its outstanding debt and its preferred equity.[259] For any such transaction to be acceptable to the LLC Managing Members, the purchase price would need to cover all of DISH's billions of dollars in debt (possibly including the billions of dollars in additional debt for buildout) and preferred stock; otherwise, they would not realize any return. Thus, as with DISH's tag-along rights under the 2015 Agreements, in the event of a Deemed Liquidation Event, "[the] purchaser of [the] 15 percent interest from either of the Applicants . . . would also [effectively] have . . . to buy [out] DISH's 85 percent interest."[260] In isolation, this protection in a liquidation or deemed liquidation event could be permissible, but here it works in tandem with other restrictions to reduce the likelihood that the LLC Managing Members would enter into certain types of corporate transactions with any entity other than DISH.[261]

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[259] *See* VTel Comments at 10-11; *see also* Northstar 2018 LLC Agreement §§ 1.1 (definitions of "Deemed Liquidation Event" and "Liquidation Event"), 3.1, 13.3(d); *accord* SNR 2018 LLC Agreement §§ 1.1, 3.1, 13.3(d).

[260] *Northstar and SNR Order*, 30 FCC Rcd at 8929, para. 101.

[261] We are not persuaded that the 2018 LLC Agreements' modified provisions permitting the LLC Managing Members to take the Applicants to initial public offerings (IPOs) meaningfully changes DISH's *de facto* control. Under these provisions, the LLC Managing Members may now initiate IPOs after 7 years—which is more flexible than the 2015 LLC Agreement's 14-year prohibition, but still outside the put windows. Northstar 2018 LLC Agreement § 9.1; *accord* SNR 2018

115. *Fourth and finally*, we find that the parties' post-remand conduct suggests that both Applicants have continued to demonstrate a pattern of "function[ing] as arms of DISH, rather than as independent small companies each pursuing [its] own, independent interests."[262] Specifically, we find the

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LLC Agreement § 9.1. Moreover, the 2015 LLC Agreements' other restrictions still apply, granting DISH (1) the right to purchase all of the LLC Managing Members' interests in the companies "at a price equal to the midpoint of the [underwriters'] preliminary range" for the price in the offering; (2) the right to purchase all of the shares of the companies at the IPO price; (3) and the right to delay the IPOs by up to 180 days. Northstar 2018 LLC Agreement §§ 9.2-.4; *accord* SNR 2018 LLC Agreement §§ 9.2-.4. Although these provisions do not prevent the LLC Managing Members from disposing of their interests, they do ensure that if the LLC Managing Members are able to take the Applicants to public offerings, DISH still has an opportunity to obtain control over the businesses and the licenses—and to exercise its financial leverage over the buildout and operations of the Applicants to determine what if any value the Management Members' equity would have at such a point in time.

[262] *SNR Wireless*, 868 F.3d at 1025. Our decision in this respect does not depend on the parties' bidding conduct in Auction 97, nor does it contravene the D.C. Circuit's remand in *SNR Wireless*. *See supra* note 134. Instead, we find that the parties' post-remand conduct mirrors its pre-remand conduct in a manner that the D.C. Circuit has confirmed is relevant to our analysis of the locus of control of policy decisions. Our analysis also does not involve consideration of DISH's guarantees for the Applicants' default payments, *see* Consolidated Opposition at 44-46, and we reject VTel's arguments that the guarantees evince DISH's *de facto* control, *see* VTel Comments at 25. *See also* Letter from Roger C. Sherman, Chief, WTB, to Mark F. Dever, Esq., Counsel for Northstar, DA 15-1108 (Oct. 1, 2015) ("These security provisions entered into after the date of the *MO&O* will not be relied upon by the Commission to demonstrate control of Northstar by DISH."); Letter from Roger C. Sherman, Chief,

Applicants' coordinated post-remand contract modifications to be troubling for the same reasons that the Commission and the D.C. Circuit found their pre-remand coordinated conduct in Auction 97 to be suspicious. The Applicants engaged in what appear to be coordinated contract-modification negotiations with DISH during the remand and, despite their purportedly independent nature, the results of these two renegotiations, by two separate Applicants represented by two different set of lawyers, provide persuasive additional evidence of serving as "arms of DISH," in the form of dozens of pages of virtually identical LLC and credit agreement provisions and modifications.

116. DISH responds to this concern by explaining that the overlapping nature of the modifications derives from the fact that "the vast majority of the provisions in their agreements were modeled on—and virtually identical to—the terms of the Denali Spectrum License, LLC transaction," and that the modifications in the 2018 Agreements "address[] a common set of Commission concerns."[263] This response fails.

117. *First*, it was not somehow inevitable that both Applicants would once again look to agreements from other bidding credit awardees to cure DISH's *de facto* control. Indeed, the *Northstar and SNR Order* and *SNR Wireless* decision made clear that applicants

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WTB, to Ari Q. Fitzgerald, Esq., Counsel for SNR, DA 15-1109 (Oct. 1, 2015) ("These security provisions entered into after the date of the *MO&O* will not be relied upon by the Commission to demonstrate control of SNR by DISH.").

[263] Consolidated Opposition at 11-12 n.20.

could not merely copy and paste individual terms of prior agreements to avoid a finding of *de facto* control. The test for *de facto* control looks beyond individual terms to all the facts and circumstances relevant to the parties' relationships.

118. *Second*, the virtually identical contractual modifications are surprising, given that Northstar and SNR differ in ways that might be expected to have resulted in different negotiating strategies and outcomes during the remand process. For example, DISH held nearly $2 billion more in debt in Northstar than in SNR. And yet both Northstar and SNR separately converted all but $500 million of their respective debt loads (*i.e.*, the same amount in both cases) to identical preferred equity (*i.e.*, the same mandatory quarterly dividend distribution at the same rate, and the same priority rights). Northstar and SNR also acquired different spectrum portfolios in different markets, reflected in their very different purchase prices—and yet they acquiesced to effectively the same limit on buildout funding from DISH irrespective of these differences.

119. *Third*, the fact that the Commission identified a common set of concerns with the two Applicants does not somehow mean that it was inevitable that the two Applicants would separately negotiate precisely the same cures. The two sets of virtually identical agreements are quite extensive, and there are many different aspects to them, at least some of which could reasonably have been expected to show some variation following any independent arm's-length negotiations. Yet they do not—even where the Applicants' differences pre-remand would have

augured for a different outcome. For example, to address the Commission's concern about the unprecedented debt held by DISH, it was reasonable for both Applicants to renegotiate DISH's financial interests. But we find it significant, under the circumstances, that both Applicants acceded to (1) retention of (a) the same amount of debt (*i.e.*, $500 million), subject to (b) the same modified maturity and interest rates, and (2) conversion of the remaining debt into preferred equity with the same distribution requirements and priority rights. Similarly, given the Commission's analysis under the *Competitive Bidding Fifth Order*, it is not surprising that each Applicant sought to revise its put rights. What is noteworthy, however, is that for both Applicants, the modified put windows occur at the same times, offer the same rate of return during the first put window, last for the same duration, and entail the same obligations for DISH.[264] We also find it especially noteworthy that both Northstar and SNR separately agreed to give DISH newfound control over their rights to lease their spectrum, even though this grant did not address any of the concerns identified in the *Northstar and SNR Order*.

120. In sum, the 2018 Credit and LLC Agreements continue to give DISH meaningful control

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[264] We acknowledge that the modified put rights differ slightly by offering SNR a slightly more generous return than Northstar for exercising the put at year six. *See* Northstar 2018 LLC Agreement § 8.1(b); SNR 2018 LLC Agreement § 8.1. But we find that this difference is immaterial: In the case of both Applicants, the put rights offer generous, risk-free returns on investment whose allure DISH can make all but irresistible by exercising its rights with respect to the Applicants' policy decisions.

over key policy decisions of the Applicants, quite apart from its prior role in the selection and bidding for the licenses that are now their only significant assets: (1) the Applicants' access to funding that would be necessary for them to *use* their spectrum to buildout and operate a wireless network; (2) the Applicant's rights to *lease* significant blocks (or potentially any) of their spectrum as an alternative business model; (3) the *disposition* of the Applicants' assets or the LLC Managing Members' interests, whether by engaging in larger corporate transactions, targeted sales, or public offerings; and (4) the precise terms of their relationship with the principal creditor and investor they share in common. Taken together, these restrictions continue to demonstrate a pattern of substantial DISH control over the locus of the Applicants' policy decisions.

7. Unfettered Use of All Facilities and Equipment

121. In the *Northstar and SNR Order*, the Commission concluded that the Applicants lacked unfettered access to their facilities and equipment under their 2015 Agreements with DISH. This conclusion was based on two primary findings. First, the Commission found that the interoperability requirement, discussed above, was a "critical element of the business arrangements between and among SNR, Northstar, and DISH," and could deprive the Applicants of use of their networks.[265] Second, the Commission relatedly found that Northstar's, SNR's,

[265] *See Northstar and SNR Order*, 30 FCC Rcd at 8935, para. 116.

and DISH's coordinated bidding behavior suggested a "strong likelihood that DISH would either integrate SNR's and Northstar's systems with DISH's network or, by virtue of DISH's position as Operations Manager, require SNR and Northstar to integrate their systems with those of another telecommunications provider selected by DISH."[266]

122. The D.C. Circuit described that this analysis was "relatively thin," noting FCC precedent affirming the benefits of interoperability for smaller providers.[267] The court nonetheless deferred to the stated concern "that [Applicants'] agreement to interoperate with DISH's yet-to-be-chosen network could prevent them from prompt development of their own spectrum" and found that the Commission had permissibly applied this factor.[268]

123. The parties have since eliminated the interoperability requirement and related consultation requirements that would give DISH clear control over the Applicants' technology choices going forward. Thus, on the present record, we find that this factor does not support a finding of *de facto* control by DISH.

C. *De Facto* Control Under the Competitive Bidding Fifth Order

124. Consistent with the D.C. Circuit's decision in *SNR Wireless*, we find that, even separate and independent from our analysis under the *Intermountain Microwave* factors discussed above, the

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[266] *Northstar and SNR Order*, 30 FCC Rcd at 8935, para. 116.

[267] *SNR Wireless*, 868 F.3d at 1033.

[268] *SNR Wireless*, 868 F.3d at 1033.

Competitive Bidding Fifth Order supports a finding that the modified put rights in the parties' 2018 LLC Agreements effectuate a transfer of control over Northstar and SNR to DISH.

125. In the *Competitive Bidding Fifth Order*, the Commission provided additional guidance on FCC requirements designed to ensure that bidding credits support genuinely qualified entities, "not those that are either proxies for larger investors or plan to become their subsidiaries."[269] The Commission offered the following example of an arrangement that would constitute a transfer of control:

> [If] an agreement between a strategic investor and a designated entity provides that (1) the investor makes debt financing available to the applicant on very favorable terms (e.g., 15 year-term, no payments of principal or interest for six years) and (2) [] the designated entity has a one-time put right that is exercisable at a time and under conditions that are designed to maximize the incentive of the licensees to sell (e.g., six years after issue, option to put partnership interests in lieu of payment of principal and accrued interest on a loan), we may conclude that *de facto* control has been relinquished.[270]

126.In the *Northstar and SNR Order*, the Commission applied this analysis to the 2015 LLC Agreements and found that their put rights, combined

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[269] *SNR Wireless*, 868 F.3d at 1034.

[270] *Competitive Bidding Fifth Order*, 10 FCC Rcd at 455-56, para. 95

with the repayment terms in the 2015 Credit Agreements, were designed to force Northstar and SNR into a sale or major refinancing with DISH—and hence effectuated a transfer of control.[271]

127.The D.C. Circuit squarely agreed with this reasoning.[272] The court described that under the 2015 Agreements, Northstar and SNR each held a one-time right at the end of the five-year designated entity holding period to require purchase by DISH at the price of their investment, and a "generous" annual rate of return.[273] The court affirmed the conclusion that Northstar and SNR "would have every interest" in exercising this put right as the "only . . . path to avoiding certain financial failure."[274] The D.C. Circuit described that the "facts in [the *Competitive Bidding Fifth Order*] example are materially identical to the facts" under the 2015 LLC and Credit Agreements.[275]

128. On remand, the parties negotiated modifications to the LLC Managing Members' put rights by (1) expanding the duration of the put window after year five from 30 to 90 days; (2) adding a second put window after year six; and (3)adding anew window after years even for a fair market value appraisal.[276]

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[271] *See Northstar and SNR Order*, 30 FCC Rcd at 8929-8931, paras. 102-105.

[272] *See SNR Wireless*, 868 F.3d at 1034-35.

[273] *SNR Wireless*, 868 F.3d at1034-35.

[274] *SNR Wireless*, 868 F.3d at1034.

[275] *SNR Wireless*, 868 F.3d at1034.

[276] Joint Opposition at 18; Northstar Submission on Remand at 15-17; SNR Comments at 16; *see also* Northstar 2018 LLC Agreement § 8.1; *accord* SNR 2018 LLC Agreement § 8.1.

The put price after year five remains the same: the LLC Managing Members' invested capital plus a {[ ]} rate of return. At the new second put window after six years, the price is the LLC Managing Members' invested capital plus a {[ ]}.

129. As the Commission explained in the *Competitive Bidding Fifth Order*, "[w]e will look at the totality of circumstances in each particular case," to determine whether the arrangements "are designed financially to force the designated entity into a sale(or major refinancing)."[277] Based on the record, we conclude that the 2018 LLC and Credit Agreements are not materially different in this respect from those that the D.C. Circuit agreed were sufficient to confer *de facto* control, including the put rights at year five that the court analyzed in its decision.

130. We start with the 2018 LLC Agreements' carrot: The put price during the 90-day period after year five remains equally "generous"—a {[ ]} rate of return on theirinvestment.[278] As of the adoption of this Memorandum Opinion and Order on Remand, that put window is currently open, and the LLC Managing Members still may choose to exercise their put rights during it. But even if they do not, the put price after year six also offers a guaranteed rate of return of {[ ]}. And at both points, the generous payout to the LLC Managing Members is independent of the fair market value of the companies, does not depend on whether

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[277] *Competitive Bidding Fifth Order*, 10 FCC Rcd at 456, para.96.

[278] *See SNR Wireless*, 868 F.3d at 1034-35; Northstar 2018 LLC Agreement § 8.1;*accord* SNR 2018 LLC Agreement § 8.1.

they have made any progress in deploying, using, or leasing their spectrum, and does not trigger DISH's priority rights as to its debtor preferred equity. In short, by exercising either the year-five or year-six put options, the LLC Managing Members receive healthy, above-market returns even if they have not constructed networks or repaid their loans (*i.e.*, with virtually zero risk).[279]

131. Next we turn to the stick. As with the2015 Agreements, "SNR and Northstar are committed to repayment terms that will be difficult, if not impossible, to manage unless they exercise their put option[s]."[280] Indeed, if the LLC Managing Members do not exercise their put rights, DISH exerts considerably control over whether they will see any return on their interests.

132. DISH has the unilateral right to prevent the LLC Managing Members from transferring their interests for five years. Accordingly, during this period, the Applicants will be incurring additional interest on their $500 million outstanding loan and will be responsible for quarterly dividend payments that, if not paid, are added to DISH's face value and subject to compounding. These new financial obligations will be additional to what appear to be amounts still owed in the form of the interest that accrued on the full value of the initial loans during the three years before the parties negotiated the 2018

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[279] Northstar 2018 LLC Agreement § 8.1;*accord* SNR 2018 LLC Agreement § 8.1.

[280] *Northstar and SNR Wireless Order*,30 FCC Rcd at 8930-31, para. 105.

Agreements. Nonpayment of these mandatory quarterly dividend distributions will result in continuing dilution of any possible future right to profits by the Applicants.

133. The Applicants' own projections (which assume that DISH provides no further debt to the Applicants for network buildout) confirm that the 2018 Agreements, like the 2015 Agreements, create an overwhelming incentive for the LLC Managing Members to exercise their put rights. According to those projections, during the first put window (*i.e.*, as of the date of this order), Northstar's outstanding obligation to DISH is $9.2 billion, and SNR's is $6.9 billion.[281] Even if we were to credit these projections—which we do not, given the Applicants' need for additional financing for network buildout—they amount to an approximately 10% reduction in Northstar's and SNR's respective obligations to DISH relative to the 2015 Agreements. This reduction does not materially change the calculation for the LLC Managing Members from that found by the Commission and the D.C. Circuit to support a finding of *de facto* control, based on the likelihood that each will choose the guaranteed rate of return on its investment by exercising the put right, rather than risk any return on its investments if it cannot generate enough revenue to satisfy its remaining multi-billion dollar obligation to DISH.

134.Thatis especially so because DISH can make it difficult if not impossible for the Applicants to generate enough revenues to satisfy these

[281] *See* Consolidated Opposition at 15 nn.34-35.

obligations—whether by engaging in the capital-intensive buildout and operation of their networks by the deadline imposed under the Commission's rules[282] or by leasing their spectrum to other network providers. And even if DISH does provide funding to the Applicants for network buildout and operation, that will increase the Applicants' debt to DISH. Thus, DISH can materially influence the Applicants' financial position both before and after the five-year restriction on transfer expires.

135.Even after the five-year transfer-prohibition window, any Deemed Liquidation Event triggers DISH's full prioritized distribution rights. Additionally, any transfer of25% or more the LLC Managing Members' shares triggers a transfer of management rights to a new manager which DISH must approve. And finally, the LLC Managing Members are prohibited from transferring their interests to any DISH competitor (arguably any entity that operates in the telecommunications or adjacent markets). Taken together, these provisions are likely to deter many prospective purchasers and also allow DISH to impose further roadblocks to at least some subset of the prospective purchasers (if any) who are not so deterred—by, for example, designating them

[282] For AWS-3 licenses, the interim buildout requirement for 40% of the licensed area population is six years (*i.e.*, October 2021) which coincides with the second put window. The final buildout requirement for75% of such population is twelve years (*i.e.*, October 2027), or ten years (October 2025) if the licensee does not meet the interimbuildoutrequirement.47 CFR § 27.14(s).

competitors or denying approval for them to receive management rights.

136. In these circumstances, the LLC Managing Members' opportunity to realize a guaranteed return on their investment at year five or year six still appears to be "designed to maximize the incentive of the [Applicants] to sell."[283] The creation of the second put window and the extension of the put windows from 30 to 90 days does nothing to change these realities.

137. The fact that the LLC Managing Members can now request market appraisals at the end of year seven also does not address our concerns. If this occurs, DISH has the right, but not the obligation, to purchase all of the LLC Managing Members' interests. And critically, the purchase price DISH would pay following the appraisals is calculated by subtracting DISH's debt and preferred equity from the fair market valuations before multiplying the remaining amount by the LLC Managing Members' common equity percentages. In other words, under this scenario, the LLC Managing Members will earn a return on their investments only if the companies have achieved valuations that exceed their outstanding debt and equity obligations to DISH after seven years. Moreover, here DISH holds the ability to tilt the scales as to whether the Applicants can generate revenues that would allow them to achieve such growth. Indeed, the 2018 LLC Agreements implicitly recognize as much, since they state that in no event shall the

[283] *See SNR Wireless*, 868 F.3d at 1035.

purchase price following an appraisal be less than zero.[284]

138. The Applicants argue that the LLC Managing Members' exercising their put rights is not inevitable, relying in part on testimony from an economic consultant (the Taylor Declaration) who claims that, depending on the value of spectrum, the LLC Managing Members' equity returns "could potentially" be greater than the value of their put rights.[285] As a threshold matter, we find the arguments raised in this testimony to be foreclosed by the D.C. Circuit's decision in *SNR Wireless*, which found that the incentives created by the put rights were "virtually certain" to entice Northstar and SNR to sell their companies to DISH.[286] To be sure, that would not be true had the Applicants and DISH made any material changes to the put rights at issue before the court. But even after the criticisms identified by the Parties of Record, they did not elect to do so. The Applicants' incentives to exercise their put rights at year five or six is not materially different now from

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[284] Northstar 2018 LLC Agreement § 8.1(c)(ii); *accord* SNR 2018 LLC Agreement § 8.1(c)(ii).

[285] *See* Taylor Decl. at 2. The Applicants alternatively now argue that to the extent they have experienced difficulty pursuing business opportunities, it is because "there is so much regulatory uncertainty regarding the potential application of the FCC's DE eligibility rules." Applicants' 11-17-20 Summary at 10. But there is no reason that the uncertainty surrounding licenses on which the Applicants chose to default should have affected their ability to buildout their networks or make plans in connection with particular markets or services with their existing portfolio of licenses.

[286] *See SNR Wireless*, 868 F.3d at 1035.

what the Commission and the court found problematic before. Nor do we see the slight expansion of the window for the put as a material change.

139. In any event, we find this testimony both speculative and conclusory—and ultimately unpersuasive.

140. The Taylor Declaration essentially argues that the Applicants' decisions at the end of year five and six will depend on the value of their spectrum holdings: If that value is projected to increase to an extent similar to, or greater than, the rate of return from the put price, then the Applicants will hold the spectrum for other uses.[287] The Taylor Declaration then goes on to identify reasons why these spectrum holdings may be expected to increase in value—because, among other things, spectrum values have steadily increased, demand for wireless services continues to increase, the industry is transitioning to 5G, and volatility benefits Northstar and SNR (since the put rights operate as a price floor for their spectrum interests).[288]

141. The Taylor Declaration does not adequately account for the fact that the Applicants already owe a substantial debt to DISH from the accrued interest on the full loan amounts (from issuance through the modification of the agreements in 2018), and must make quarterly mandatory dividend payments to DISH or the LLC Managing Members' interests will lose value. Given these obligations, the Applicants almost certainly needed to start generating revenue

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[287] *See* Taylor Decl. at 3-4, paras.7-8.

[288] *See* Taylor Decl. at 4-6, paras.10-18.

from their spectrum holdings well in advance of the put options. The Taylor Declaration does not identify any activity that the Applicants have taken or are taking in the short term to monetize their holdings to prevent further dilution of the value of their common equity.[289] Nor is there any other evidence on the record that the Applicants have pursued business opportunities that would have allowed them to satisfy some of their financial obligations to DISH: As of October 5, 2020, neither SNR nor Northstar has entered into *any* lease of *any* of its many AWS-3 licenses.[290]

142. The Taylor Declaration also suggests that the Applicants have a long runway because of their capital structure, which has no near-term debt maturities and permits in-kind payments for the mandatory quarterly distributions.[291] But this conclusion overlooks the extent and operation of DISH's investor

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[289] The fact that the Applicants both have "demonstrated experience and knowledge of the wireless industry," Opposition at 29-34, does not address our concern. The qualifications of the Applicants' investors and executives are facts that we may consider among the totality of the circumstances. But here, the Applicants' existing and future financial obligations to DISH, combined with DISH's control over their options for pursuing business opportunities, suggest that no team of investor or executives would be likely to shepherd the Applicants to any outcome other than exercising their put rights.

[290] Based on a review of the Commission's Universal Licensing System on Oct. 5, 2020.

[291] *See* Taylor Decl. at 2, para. 6 & n.4.

protections as well as other aspects of the 2018 LLC and Credit Agreements.[292]

143. For example, the primary business model for the Applicants—building and operating a wireless network—is capital intensive, requiring the Applicants to incur further debt from DISH (which as noted above it may not be obligated to furnish in full) or to seek third-party unsecured funding (subject to DISH's veto when in "significant" amounts). The Taylor Declaration states that DISH's consent rights would not prevent the Applicants from "working with third parties to buildout and operate the spectrum,"[293] without acknowledging the facts (1) that DISH may veto any "significant" third-party debt; or (2) that many prospective partners and purchasers may be deterred from such ventures by the parties' agreements and relationships (especially the companies' preexisting debt and DISH's priority interests).

144. Likewise, the Taylor Declaration notes that the value of the Applicants' spectrum likely has increased because of its synergy with downlink spectrum holdings: "The ability to pair the AWS-3 uplink spectrum with the AWS-4 downlink spectrum makes the AWS-3 uplink spectrum inherently more attractive and valuable to potential business partners

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[292] Taylor's assertion that these are "limited" and "standard" rights, Taylor Decl. at 7, para. 20, is conclusory and does not change our analysis that these protections operate in tandem with other aspects of the parties' agreements and relationships to vest DISH with considerable control over the Applicants.

[293] Taylor Decl. at 7, para. 20.

or purchasers."[294] But the 2018 LLC Agreement allows DISH (1) to veto any lease or sale of a "major asset" where assets include spectrum licenses;[295] and (2) to prohibit the LLC Managing Members from transferring any of their interests in the Applicants to any of DISH's competitors.[296] These restrictions make it difficult, if not impossible, for the LLC Managing Members to monetize this feature of their spectrum with any entity other than DISH.[297] In any event, two

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[294] Taylor Decl. at 6, para. 17. The Applicants recently described that during the COVID-19 pandemic, they have made their spectrum available to any wireless carrier that needed it to bolster capacity, and that AT&T and Verizon quickly integrated the spectrum into their network operations, demonstrating "the ease with which wireless carriers can readily use the spectrum." Applicants' 11-4-20 Summary at 8. But the fact that the Applicants were able to find carriers who could use their spectrum during the COVID-19 pandemic does not demonstrate that the Applicants have viable longer-term business opportunities with any entity other than DISH. Moreover, VTel correctly points out that Northstar's and SNR's actions during the pandemic demonstrate that the spectrum is "lying fallow" and "on the sidelines" because the applicants have no plans to ensure the spectrum is quickly deployed. Commenters' 11-4-20 Letter at 8-9.

[295] Northstar 2018 LLC Agreement §§ 1.1 (definition of "Significant Matter"), 6.3 (supermajority approval rights for "Significant Matters"); *accord* SNR 2018 LLC Agreement §§ 1.1, 6.3.

[296] Northstar 2018 LLC Agreement §§ 7.1(c), 7.2; *accord* SNR 2018 LLC Agreement §§ 7.1(c), 7.2. *See* Commenters' 11-4-20 Letter at 5-6.

[297] DISH could invoke the same provision to prohibit a significant transfer of the spectrum (or interests therein) to broadcasters to pair with their broadcast spectrum for ATSC 3.0 operations. *See* Taylor Decl. at 6, para. 17 n.12.

DISH subsidiaries are the exclusive holders of all of AWS-4 licenses with which the Taylor Declaration notes these licenses could be paired.[298] This business option is thus wholly illusory.

145. Finally, as noted above, the Taylor Declaration overlooks the fact that DISH's investor protections in the 2018 LLC Agreements extend to the second "business option[]"[299] that Taylor identifies as viable for Northstar and SNR—*i.e.*, any leasing arrangements by the Applicants that involve leasing "major" assets (at a time when neither Applicant is yet operational or likely to have many if any other major assets) and that could thus be expected to generate significant revenues from leasing.

146. These shortcomings persuade us that the Taylor Declaration does not reflect the totality of the circumstances, as required by our *de facto* control test, and does not meaningfully establish that Northstar and SNR have viable business options other than exercising their put rights.

D. Applicants' Reliance on Auction 97 and Other Bidding Credit Awards

147. In the *Northstar and SNR Order*, the Applicants' primary argument was that they had "structured DISH's equity participation and its investor protections in accordance with various

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[298] *See Service Rules for Advanced Wireless Services in the 2000-2020 MHz and 2180-2200 MHz Bands*, WT Docket No. 12-70 et al., Report & Order and Order of Proposed Modification, 27 FCC Rcd 16102 (2012). Confirmed by review of the Commission's Universal Licensing System on Oct. 5, 2020.

[299] Taylor Decl. at 4, para. 9.

features contained in other applications [for bidding credits] previously granted by the Commission."[300] The Commission rejected the argument, explaining that the Applicants had not "claim[ed] to have relied on any reported decisions in which the Commission staff—much less the Commission—has articulated any basis" for permitting bidding credits under similar circumstances.[301] The Commission further held that "[t]o the extent any prior actions of Commission staff could be read to be inconsistent with [its] interpretation of the Commission's rules in the [*Northstar and SNR Order*], those actions are not binding on the Commission" and are "disavow[ed]."[302]

148. The Applicants' petition for review to the D.C. Circuit similarly "rest[ed] largely on the assertion that [the *Northstar and SNR Order*] . . . [could] not be squared with" purportedly "more specific guidance provided by two wireless Bureau actions approving applications" for bidding credits by Denali Spectrum and Salmon PCS.[303] The D.C. Circuit rejected the Applicants' argument on two separate bases. Noting that the two applications cited by the Applicants had been "approved by the Bureau with a one-word action communicating that the application was 'granted,'" without any opinion or explanation, the court held that "the unexplained approvals of small business credits [in these cases] are

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[300] *Northstar and SNR Order*, 30 FCC Rcd at 8396, para. 118.

[301] *Northstar and SNR Order*, 30 FCC Rcd at 8397, para. 121.

[302] *Northstar and SNR Order*, 30 FCC Rcd at 8397, para. 121 n.354.

[303] *SNR Wireless*, 868 F.3d at 1035.

non-precedential and [alternatively] do not detract from the FCC's decision here."[304]

149. With respect to its primary holding that staff approvals of this kind are "non-precedential," the D.C. Circuit explained that "[t]he FCC is not bound to treat the provisions of agreements filed with a pair of long-form applications, which the Wireless Bureau administratively granted *without opinion or any public statement of reasons*, as if those provisions established a Commission position from which it could not deviate without reasoned explanation."[305] The court further explained that there were no assurances "that the Commission [had] ever accepted those decisions as correct even on their own terms, nor even that the Commission [had] scrutinized the details of the filings on which petitioners . . . claim[ed] to rely."[306] The court further noted its longstanding holding that "a lower component of a government agency does not bind the agency as a whole."[307] And it concluded that "[t]he Commission is not required to approve applications for bidding credits just because the applicants modeled terms of their investor contracts on terms used by designated entity applicants the Wireless Bureau approved."[308] With respect to its alternative holding, the D.C. Circuit held

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[304] *SNR Wireless*, 868 F.3d at 1036.

[305] *SNR Wireless*, 868 F.3d at 1037 (emphasis added).

[306] *SNR Wireless*, 868 F.3d at 1037.

[307] *SNR Wireless*, 868 F.3d at 1037 (citations and quotation marks omitted).

[308] *SNR Wireless*, 868 F.3d at 1040.

that the approvals were not "on all four with SNR and Northstar's" facts and circumstances.[309]

150. The D.C. Circuit concluded, however, that the Bureau-level approvals cited by the Applicants were relevant to the question of whether the Applicants had received adequate notice that they would receive no opportunity to negotiate cures with DISH. As the court explained, "Wireless Bureau staff have in earlier decisions repeatedly read the FCC's *de facto* control rules to permit large investors to exert significant influence over their small business partners."[310] The court explained that such confusion "at the ground level" can suggest that an agency's interpretation of its own regulations fails to provide fair notice to regulated parties.[311] Thus, the court concluded, the Applicants "had little basis on which to anticipate that a Commission that read the *de facto* control standard to prohibit DISH's powerful influence over [Applicants] would . . . deny [them] bidding credits . . . without at least offering them a chance to seek a cure."[312]

151. Following the remand, the parties once again seek to support their contract modifications with agreements from Bureau-level grants of bidding credits issued *after* the *Northstar and SNR Order*.[313] According to the Applicants, these approvals involve

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[309] *SNR Wireless*, 868 F.3d at 1040.

[310] *See SNR Wireless*, 868 F.3d at 1044-45.

[311] *SNR Wireless*, 868 F.3d at 1045.

[312] *SNR Wireless*, 868 F.3d at 1045.

[313] Consolidated Opposition at 7; *see also* Northstar Submission on Rermand at 24-38; SNR Comments at 9-17.

"contractual passive investor protections that are consistent with, or provide more favorable protections than, Applicants' revised agreements provide to DISH."[314] The Applicants also claim that these approvals "involved levels of indebtedness to large investors significantly greater, as a percentage of total winning bides, than the level of indebtedness to DISH that Applicants now have."[315]

152. The Applicants' reliance on Bureau-level, unwritten approvals granting bidding credits to other auction winners is misplaced. The Commission and D.C. Circuit have both found that such one-word, unexplained approvals cannot be precedential for the Commission, because, among other things, (1) the Commission is not bound by staff actions, (2) such approvals do not address or explain the merits of why there was no finding of *de facto* control; and (3) there is no basis to conclude that the Commission has independently analyzed the underlying agreements or factual circumstances and accepted or agreed with the Bureau's approval.

153. The Applicants try to distinguish the D.C. Circuit's holding with respect to such Bureau-level approvals in two respects. First, the Applicants argue, because the D.C. Circuit considered Bureau-level precedent to be relevant to the question of notice, it purportedly follows that the Commission may not penalize the Applicants for relying on other approvals

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[314] Consolidated Opposition at 19; *see also id.* at 19-24; Northstar Submission on Remand 24-25, 27-38; SNR Comments at 9-11, 14-17.

[315] Consolidated Opposition at 19; *see also* Northstar Submission on Remand at 25-27; SNR Comments at 11-14.

absent fair notice that the Commission would reject the relevance of those approvals.[316] Second, the Applicants argue, even if the Commission is not bound by Bureau decisions, the Bureau was bound by the *Northstar and SNR Order*, such that "[s]ubsequent Bureau decisions . . . must be read as consistent with [that order]."[317]

154. As before, we conclude that one-word, unexplained Bureau-level approvals cited by the Applicants are not precedential—indeed, they are not "decisions" at all. Moreover, the Applicants were undoubtedly aware that these approvals would not be precedential when they once again invoked other parties' agreement terms, rather than engaging in a substantive analysis of DISH's continuing control. And when the Commission afforded them yet a further opportunity to restructure their agreements in light of the criticisms of the Parties of Record, they elected not to do so.

155. We reject the Applicants' first argument—*i.e.*, that we must rely on Bureau-level approvals issued after the *Northstar and SNR Order*, absent a satisfactory reason for rejecting them, because the Commission somehow failed to provide fair notice that it would not rely on those approvals. The Commission has repeatedly made clear—in the *Northstar and SNR Order* and in the Bureau's *Order on Remand* which the Commission largely affirmed—that the Commission would determine *de facto* control based on the specific facts and circumstances of each case, including the

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[316] See Consolidated Opposition at 22.

[317] Consolidated Opposition at 22.

contractual provisions and economic relationships between particular parties.[318] The D.C. Circuit affirmed this approach to evaluating *de facto* control in *SNR Wireless* and rejected the Applicants' prior iteration of this same argument.[319] Accordingly, the Applicants' first argument is now foreclosed.

156. We likewise reject the Applicants' second argument—*i.e.*, that because the Bureau is bound by the Commission, subsequent Bureau approvals must be read as consistent with the *Northstar and SNR Order*, and therefore any agreements based on those subsequent Bureau approvals also must be read as consistent with the *Northstar and SNR Order*. As before, these unwritten approvals do not offer any reasoning as to why the Bureau found there to be no *de facto* control problems; hence any reliance on isolated provisions in the underlying agreements is misplaced. Moreover, given the repeated emphasis in the *Northstar and SNR Order* on the flexible approach to *de facto* control required by the totality-of-the-circumstances test, regulated parties had ample

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[318] In the *Northstar and SNR Order*, the Commission used the phrase "totality of circumstances," or some variation thereof, a total of eighteen times. And in the *Order on Remand*, the Bureau noted that the Commission had "analyzed the relationship between the Applicants and DISH and articulated its findings in detail" as to "specific features of the relationship[s] between each Applicant and DISH, as evidenced by their various corporate agreements and by their bidding behavior throughout the auction." *Order on Remand*, 33 FCC Rcd at 232, para. 4.

[319] *See SNR Wireless*, 683 F.3d at 1038 (rejecting argument that the FCC has an obligation to follow Wireless Bureau precedent because the Auction Notice directed participants to Bureau precedent for further guidance on questions of control).

notice that Bureau-level approvals could not be reasonably relied upon as controlling given different facts and circumstances. Yet the Applicants continue to rely on such non-binding, non-decisional, and non-precedential actions by Commission staff.

157. The D.C. Circuit was very clear in its decision that such one-word, unexplained approvals are not precedential or binding on the Commission—and cannot be reasonably relied upon as precedential by other bidding credit applicants. In any event, to the extent any such staff grants could be viewed as inconsistent with our determination here, we expressly disavow them.

IV. ORDERING CLAUSES

158. ACCORDINGLY, IT IS ORDERED that, pursuant to section 4(i) and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 309(j) and section 27.1106 of the Commission's rules, 47 C.F.R. § 27.1106, Northstar Wireless, LLC request for a very small business designated entity bidding credit in connection with file numbers 0006670613 and 0008243409 is DENIED.

159. IT IS FURTHER ORDERED that, pursuant to section 4(i) and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 309(j) and section 27.1106 of the Commission's rules, 47 C.F.R. § 27.1106, SNR Wireless License Co request for a very small business designated entity bidding credit in connection with file numbers 0006670667, 0008243669 is DENIED

160. IT IS FURTHER ORDERED that the Motion to Strike or Dismiss T-Mobile's "Response of T-Mobile USA, Inc. to Consolidated Opposition" filed by Northstar Wireless, LLC and SNR Wireless LicenseCo, LLC IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch

Secretary

STATEMENT OF CHAIRMAN AJIT PAI

Re: *Northstar Wireless, LLC, File Nos. 0006670613, 0008243409; SNR Wireless LicenseCo, LLC, File Nos. 0006670667, 0008243669; Applications for New Licenses in the 1695-1710 MHz, and 1755-1780 MHz and 2155-2180 MHz Bands*, Report No. AUC-97AUC

The FCC concluded Auction 97, our auction of 65 megahertz of spectrum in the AWS-3 band, on January 29, 2015. In that auction, two entities, Northstar Wireless and SNR Wireless LicenseCo, bid more than $13.3 billion combined on the plurality of licenses offered, even though neither company had ever generated a dime of revenue. And these two companies sought FCC bidding credits—essentially, a taxpayer-funded subsidy intended to benefit very small business entities—totaling approximately $3.3 billion.

This, of course, raised an obvious question. How were very small businesses with no experience, no network, no real assets, no scale, and no revenue able to afford billions of dollars of spectrum? Well, the only reason they were able to bid this much was because they had the backing of DISH Network, a Fortune 250 corporation which held an 85% ownership stake in both entities and, as of the close of the auction, had annual revenues of nearly $14 billion, a market capitalization of over $32 billion, and over 14 million customers. Following the auction, Northstar and SNR were indebted to DISH Network to the tune of approximately $10 billion. In addition to these financial shackles, DISH entered into a series of

agreements with the two entities giving it control over nearly every aspect of their businesses.

Northstar and SNR's participation in Auction 97 (in tandem with DISH's participation) had meaningful consequences. Those entities used their very small business discounts to outbid genuine communications service providers in the heartland, from Nebraska, Kansas, and Oklahoma to Illinois and Vermont.[1] As I noted at the time, DISH's participation made a mockery of the Commission's designated entity program.[2] A program designed to help small businesses was being abused for the benefit of a company worth tens of billions of dollars to the tune of billions of dollars.

Fortunately, the Commission has thrown the flag on these shenanigans. In 2015, the Commission determined that SNR and Northstar were not eligible designated entities because DISH, as a matter of fact and law, had control over these companies. The U.S. Court of Appeals for the D.C. Circuit unanimously

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[1] Statement of Commissioner Ajit Pai on How Abuse of the FCC's Small Business Program Hurts Small Businesses, Press Release, http://go.usa.gov/3fcXH (Mar. 16, 2015). *See also* Kelly Ayotte and Ajit Pai, "Ending Welfare for Telecom Giants," *The Wall Street Journal* (Feb. 4, 2015) ("To nobody's surprise, the biggest competitors have figured out a way to game the system. Industry giants are claiming those taxpayer-funded discounts for themselves and using them to outbid smaller, would-be competitors."), *available at* https://www.wsj.com/articles/kelly-ayotte-and-ajit-pai-ending-welfare-for-telecom-giants-1423095287.

[2] Statement of Commissioner Ajit Pai on Abuse of the Designated Entity Program, Press Release, http://go.usa.gov/3fcXj (Feb. 2, 2015).

affirmed this determination and held that "the FCC reasonably concluded that SNR and Northstar were acting as two arms of DISH, working together to advance DISH's goals."[3] However, the court did remand the matter to the Commission to give the applicants a chance to "cure" DISH Network's *de facto* control over the entities and otherwise come into compliance with our designated entity requirements.

After affording the parties ample opportunity to resolve these deficiencies, today we find that they have failed to do so. Indeed, the exercise has only reconfirmed that Northstar and SNR are not kings of their own destiny, but pawns. For example, even though the two entities are in significantly different positions in terms of their finances and spectrum portfolios, they curiously submitted to the Commission nearly identical revisions to their agreements with DISH Network.[4] These agreements

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[3] *SNR Wireless LicenseCo, LLC v. FCC*, 868 F.3d 1021, 1041-42 (D.C. Cir. 2017).

[4] *Plus ça change, plus c'est la même chose*. *See SNR Wireless License Co, LLC*, 868 F.3d at 1041 ("SNR and Northstar have not established that they had any joint venture or shared business with each other that could explain their a-symmetric cooperation during [Auction 97] bidding as reflecting anything other than their control by DISH. At oral argument, their counsel asserted that they did have some shared ventures, but we find no evidence in the record to support that assertion. The only contractual agreement in the record that was signed by SNR and Northstar was the joint bidding agreement. That agreement suggests that SNR and Northstar wanted to coordinate their bids with DISH so that the three companies could combine their products and services to the extent contemplated by their governing agreements. But the governing agreements refer to SNR and Northstar as if they are separate companies who just happen to

maintain DISH Network's stranglehold over the two companies' businesses and restrict the entities' ability to raise capital, lease their spectrum, or enter into mergers or other corporate transactions. Meanwhile, the parties have negotiated a combination of put rights and repayment terms that will reward Northstar's and SNR's managing members if they sell their interests to DISH Network(regardless of business performance) and penalize them if they refuse to sell.

The parties' endgame is as clear today as it was halfa decade ago: DISH Network and its shell bidders want this spectrum at a taxpayer-funded discount. The Commission's answer is as clear today as it was halfa decade ago: No. Any well-established business that wants to buy spectrum at an FCC auction is more than welcome to do so through our spectrum auctions (and this FCC has made more spectrum available through auctions and has enabled more participation in those auctions than at any other time in its history). But they're not doing it on the taxpayers' dime; they're paying full freight. Americans are sick of regulatory arbitrage and corporate welfare, and so are we.

In short, we find that DISH Network continues to possess *de facto* control over Northstar and SNR, and that these entities are therefore ineligible for very small business designated entity bidding credits.

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have the same business manager and financial backer (DISH). Without any other explanation for their non-mutually-beneficial bidding, the FCC reasonably concluded that SNR and Northstar were acting as two arms of DISH, working together to advance DISH's goals").

My thanks to the FCC staff who worked on this item: Mike Carlson, Maureen Flood, Tom Johnson, Bill Richardson, and Elliot Tarloff from the Office of General Counsel; Kari Hicks, Jean Kiddoo, Paul Malmud, Blaise Scinto, Dana Shaffer, Nadja Sodos-Wallace, Cecilia Sulhoff, and Becky Tangren from the Wireless Telecommunications Bureau; and Patrick Sun from the Office of Economics and Analytics. I also note the valuable participation of Neil Dellarin OGC who sadly passed away earlier this year.

STATEMENT OF COMMISSIONER MICHAEL O'RIELLY CONCURRING IN PART AND DISSENTING IN PART

Re: *Northstar Wireless, LLC, File Nos. 0006670613, 0008243409; SNR Wireless LicenseCo, LLC, File Nos. 0006670667, 0008243669; Applications for New Licenses in the 1695-1710 MHz, and 1755-1780 MHz and 2155-2180 MHz Bands*, Report No. AUC-97AUC

When I first voted on the designated entity status of SNR and Northstar in August 2015, I agreed with the analysis that DISH exercised effective control over these two auction participants, making them ineligible for bidding credits. The order detailed how the actions of the entities during the auction and the agreements entered into by the parties were not consistent with the Commission's rules. In reviewing this decision, the U.S. Court of Appeals for the D.C. Circuit generally agreed with the Commission's findings but remanded the case due to a failure to allow the parties the opportunity to cure their previous filings. Accordingly, the parties have since amended certain agreements in an attempt to come into compliance with the Commission's rules. While I appreciate their efforts, I agree that these revisions are insufficient to warrant a finding that DISH lacks the ability to unduly influence SNR and Northstar's operations and decision making.

The Commission's fact-based designated entity determinations are, under even best-case scenarios, far from a perfect process, and I am sympathetic to the frustrations of all those involved. But, these were the rules in place at the time, and it is unfortunate that

our case-by-case analysis did not give applicants the certainty or transparency they wanted, either prior to the auction or in response to their eligibility being challenged.

These procedural flaws were exaggerated, in this case, because the process has inexplicably been mishandled and dragged out for over five years. While litigation always takes time, the Commission voted in July 2018 on the process to expedite our final decision in response to the court's August 2017 remand. It is now well over two years after the Commission voted on the remand order. All parties deserve quick responses from the Commission, whether they agree with our decisions or not, and whether we agree with the Court or not. Entities need to be able to make business decisions not only about their spectrum needs but about capital expenditures, and we keep them in limbo by failing to adequately respond in a timely fashion. Additionally, letting licenses sit dormant for long stretches of time is very problematic. Everyone deserves better.

For these reasons, I concur in the outcome of today's item, but dissent in part with respect to the extremely flawed process.

STATEMENT OF COMMISSIONER GEOFFREY STARKS CONCURRING

Re: *Northstar Wireless, LLC, File Nos. 0006670613, 0008243409; SNR Wireless LicenseCo, LLC, File Nos. 0006670667, 0008243669; Applications for New Licenses in the 1695-1710 MHz, and 1755-1780 MHz and 2155-2180 MHz Bands*, Report No. AUC-97AUC

Nearly 30 years ago, Congress directed the Commission, in establishing its competitive bidding rules for wireless spectrum licenses, to "promot[e] economic opportunity and competition and ensur[e] that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women."[1] Congress further directed the Commission to promote economic opportunity for those same groups and ensure their participation in the provision of spectrum-based services, including by considering the use of "tax certificates, bidding preferences and other procedures."[2]

While the current agreements between DISH and the companies in this case may have fallen short of our *de facto* control prohibitions, I reiterate my support for the Commission's Designated Entity program and its accompanying rules. Congress has made it clear that

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[1] 47 U.S.C. 309(j)(3)(B).

[2] *Id.* at 309(j)(B)(4)

diversity among Commission licensees is critical. The Designated Entity program seeks to create economic opportunities so that our country's wireless spectrum isn't strictly controlled by a few large carriers. We must do better.

Appendix G

RELEVANT STATUTORY AND REGULATORY PROVISIONS

47 U.S.C. § 309(j)

(j) Use of competitive bidding

(1) General authority

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

(2) Exemptions

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

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

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

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

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

replace their analog television service licenses; or

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

(3) Design of systems of competitive bidding

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

(A) the development and rapid deployment of new technologies, products, and services for the benefit of the public, including those

residing in rural areas, without administrative or judicial delays;

(B) promoting economic opportunity and competition and ensuring that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women;

(C) recovery for the public of a portion of the value of the public spectrum resource made available for commercial use and avoidance of unjust enrichment through the methods employed to award uses of that resource;

(D) efficient and intensive use of the electromagnetic spectrum;

(E) ensure that, in the scheduling of any competitive bidding under this subsection, an adequate period is allowed--

(i) before issuance of bidding rules, to permit notice and comment on proposed auction procedures; and

(ii) after issuance of bidding rules, to ensure that interested parties have a sufficient time to develop business plans, assess market conditions, and evaluate the availability of equipment for the relevant services; and

(F) for any auction of eligible frequencies described in section 113(g)(2) of the National Telecommunications and Information Administration Organization Act (47 U.S.C. 923(g)(2)), the recovery of 110 percent of estimated relocation or sharing costs as provided to the Commission pursuant to section 113(g)(4) of such Act.

(4) Contents of regulations

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

(A) consider alternative payment schedules and methods of calculation, including lump sums or guaranteed installment payments, with or without royalty payments, or other schedules or methods that promote the objectives described in paragraph (3)(B), and combinations of such schedules and methods;

(B) include performance requirements, such as appropriate deadlines and penalties for performance failures, to ensure prompt delivery of service to rural areas, to prevent stockpiling or warehousing of spectrum by licensees or permittees, and to promote investment in and rapid deployment of new technologies and services;

(C) consistent with the public interest, convenience, and necessity, the purposes of this chapter, and the characteristics of the proposed service, prescribe area designations and bandwidth assignments that promote (i) an equitable distribution of licenses and services among geographic areas, (ii)

economic opportunity for a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women, and (iii) investment in and rapid deployment of new technologies and services;

(D) ensure that small businesses, rural telephone companies, and businesses owned by members of minority groups and women are given the opportunity to participate in the provision of spectrum-based services, and, for such purposes, consider the use of tax certificates, bidding preferences, and other procedures;

(E) require such transfer disclosures and antitrafficking restrictions and payment schedules as may be necessary to prevent unjust enrichment as a result of the methods employed to issue licenses and permits; and

(F) prescribe methods by which a reasonable reserve price will be required, or a minimum bid will be established, to obtain any license or permit being assigned pursuant to the competitive bidding, unless the Commission determines that such a reserve price or minimum bid is not in the public interest.

(5) Bidder and licensee qualification

No person shall be permitted to participate in a system of competitive bidding pursuant to this subsection unless such bidder submits such information and assurances as the Commission may require to demonstrate that such bidder's application is acceptable for filing. No license

shall be granted to an applicant selected pursuant to this subsection unless the Commission determines that the applicant is qualified pursuant to subsection (a) and sections 308(b) and 310 of this title. Consistent with the objectives described in paragraph (3), the Commission shall, by regulation, prescribe expedited procedures consistent with the procedures authorized by subsection (i)(2) for the resolution of any substantial and material issues of fact concerning qualifications.

(6) Rules of construction

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

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

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

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

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

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

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

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

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

(7) Consideration of revenues in public interest determinations

(A) Consideration prohibited

In making a decision pursuant to section 303(c) of this title to assign a band of frequencies to a use for which licenses or permits will be issued pursuant to this subsection, and in prescribing regulations pursuant to paragraph (4)(C) of this subsection, the Commission may not base a finding of public interest, convenience, and necessity on the expectation of Federal

revenues from the use of a system of competitive bidding under this subsection.

(B) Consideration limited

In prescribing regulations pursuant to paragraph (4)(A) of this subsection, the Commission may not base a finding of public interest, convenience, and necessity solely or predominantly on the expectation of Federal revenues from the use of a system of competitive bidding under this subsection.

(C) Consideration of demand for spectrum not affected

Nothing in this paragraph shall be construed to prevent the Commission from continuing to consider consumer demand for spectrum-based services.

(8) Treatment of revenues

(A) General rule

Except as provided in subparagraphs (B), (D), (E), (F), and (G), all proceeds from the use of a competitive bidding system under this subsection shall be deposited in the Treasury in accordance with chapter 33 of Title 31.

(B) Retention of revenues

Notwithstanding subparagraph (A), the salaries and expenses account of the Commission shall retain as an offsetting collection such sums as may be necessary from such proceeds for the costs of developing and implementing the program required by this subsection. Such offsetting collections

shall be available for obligation subject to the terms and conditions of the receiving appropriations account, and shall be deposited in such accounts on a quarterly basis. Such offsetting collections are authorized to remain available until expended.

(C) Deposit and use of auction escrow accounts

Any deposits the Commission may require for the qualification of any person to bid in a system of competitive bidding pursuant to this subsection shall be deposited in the Treasury. Within 45 days following the conclusion of the competitive bidding--

(i) the deposits of successful bidders shall be deposited in the general fund of the Treasury (where such deposits shall be used for the sole purpose of deficit reduction), except as otherwise provided in subparagraphs (D)(ii), (E)(ii), (F), and (G); and

(ii) the deposits of unsuccessful bidders shall be returned to such bidders, and payments representing the return of such deposits shall not be subject to administrative offset under section 3716(c) of Title 31.

(D) Proceeds from reallocated Federal spectrum

(i) In general

Except as provided in clause (ii), cash proceeds attributable to the auction of any eligible frequencies described in section 113(g)(2) of the National Telecommunications and Information Administration Organization Act (47 U.S.C. 923(g)(2)) shall be deposited in the Spectrum Relocation Fund established under section 118 of such Act, and shall be available in accordance with that section.

(ii) Certain other proceeds

Notwithstanding subparagraph (A) and except as provided in subparagraph (B), in the case of proceeds (including deposits and upfront payments from successful bidders) attributable to the auction of eligible frequencies described in paragraph (2) of section 113(g) of the National Telecommunications and Information Administration Organization Act that are required to be auctioned by section 1451(b)(1)(B) of this title, such portion of such proceeds as is necessary to cover the relocation or sharing costs (as defined in paragraph (3) of such section 113(g)) of Federal entities relocated from such eligible frequencies shall be deposited in the Spectrum Relocation Fund. The remainder of such proceeds shall be deposited in the Public

Safety Trust Fund established by section 1457(a)(1) of this title.

(E) Transfer of receipts

(i) Establishment of Fund

There is established in the Treasury of the United States a fund to be known as the Digital Television Transition and Public Safety Fund.

(ii) Proceeds for funds

Notwithstanding subparagraph (A), the proceeds (including deposits and upfront payments from successful bidders) from the use of a competitive bidding system under this subsection with respect to recovered analog spectrum shall be deposited in the Digital Television Transition and Public Safety Fund.

(iii) Transfer of amount to Treasury

On September 30, 2009, the Secretary shall transfer $7,363,000,000 from the Digital Television Transition and Public Safety Fund to the general fund of the Treasury.

(iv) Recovered analog spectrum

For purposes of clause (i), the term "recovered analog spectrum" has the meaning provided in paragraph (15)(C)(vi).

(F) Certain proceeds designated for Public Safety Trust Fund

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

(G) Incentive auctions

(i) In general

Notwithstanding subparagraph (A) and except as provided in subparagraph (B), the Commission may encourage a licensee to relinquish voluntarily some or all of its licensed spectrum usage rights in order to permit the assignment of new initial licenses subject to flexible-use service rules by sharing with such licensee a portion, based on the value of the relinquished rights as determined in the reverse auction required by clause (ii)(I), of the proceeds (including deposits and upfront payments from successful bidders) from the use of a competitive bidding system under this subsection.

(ii) Limitations

The Commission may not enter into an agreement for a licensee to relinquish spectrum usage rights in exchange for a

share of auction proceeds under clause (i) unless--

(I) the Commission conducts a reverse auction to determine the amount of compensation that licensees would accept in return for voluntarily relinquishing spectrum usage rights; and

(II) at least two competing licensees participate in the reverse auction.

(iii) Treatment of revenues

Notwithstanding subparagraph (A) and except as provided in subparagraph (B), the proceeds (including deposits and upfront payments from successful bidders) from any auction, prior to the end of fiscal year 2022, of spectrum usage rights made available under clause (i) that are not shared with licensees under such clause shall be deposited as follows:

(I) $1,750,000,000 of the proceeds from the incentive auction of broadcast television spectrum required by section 1452 of this title shall be deposited in the TV Broadcaster Relocation Fund established by subsection (d)(1) of such section.

(II) All other proceeds shall be deposited--

(aa) prior to the end of fiscal year 2022, in the Public Safety Trust

Fund established by section 1457(a)(1) of this title; and

(bb) after the end of fiscal year 2022, in the general fund of the Treasury, where such proceeds shall be dedicated for the sole purpose of deficit reduction.

(iv) Congressional notification

At least 3 months before any incentive auction conducted under this subparagraph, the Chairman of the Commission, in consultation with the Director of the Office of Management and Budget, shall notify the appropriate committees of Congress of the methodology for calculating the amounts that will be shared with licensees under clause (i).

(v) Definition

In this subparagraph, the term "appropriate committees of Congress" means--

(I) the Committee on Commerce, Science, and Transportation of the Senate;

(II) the Committee on Appropriations of the Senate;

(III) the Committee on Energy and Commerce of the House of Representatives; and

(IV) the Committee on Appropriations of the House of Representatives.

(9) Use of former Government spectrum

The Commission shall, not later than 5 years after August 10, 1993, issue licenses and permits pursuant to this subsection for the use of bands of frequencies that--

(A) in the aggregate span not less than 10 megahertz; and

(B) have been reassigned from Government use pursuant to part B of the National Telecommunications and Information Administration Organization Act.

(10) Authority contingent on availability of additional spectrum

(A) Initial conditions

The Commission's authority to issue licenses or permits under this subsection shall not take effect unless--

(i) the Secretary of Commerce has submitted to the Commission the report required by section 113(d)(1) of the National Telecommunications and Information Administration Organization Act;

(ii) such report recommends for immediate reallocation bands of frequencies that, in the aggregate, span not less than 50 megahertz;

(iii) such bands of frequencies meet the criteria required by section 113(a) of such Act; and

(iv) the Commission has completed the rulemaking required by section 332(c)(1)(D) of this title.

(B) Subsequent conditions

The Commission's authority to issue licenses or permits under this subsection on and after 2 years after August 10, 1993, shall cease to be effective if--

(i) the Secretary of Commerce has failed to submit the report required by section 113(a) of the National Telecommunications and Information Administration Organization Act;

(ii) the President has failed to withdraw and limit assignments of frequencies as required by paragraphs (1) and (2) of section 114(a) of such Act;

(iii) the Commission has failed to issue the regulations required by section 115(a) of such Act;

(iv) the Commission has failed to complete and submit to Congress, not later than 18 months after August 10, 1993, a study of current and future spectrum needs of State and local government public safety agencies through the year 2010, and a specific plan to ensure that adequate frequencies

are made available to public safety licensees; or

(v) the Commission has failed under section 332(c)(3) of this title to grant or deny within the time required by such section any petition that a State has filed within 90 days after August 10, 1993;

until such failure has been corrected.

(11) Termination

The authority of the Commission to grant a license or permit under this subsection shall expire December 23, 2022, except that, with respect to the electromagnetic spectrum identified under section 1004(a) of the Spectrum Pipeline Act of 2015, such authority shall expire on September 30, 2025, and with respect to the electromagnetic spectrum identified under section 90008(b)(2)(A)(ii) of the Infrastructure Investment and Jobs Act, such authority shall expire on the date that is 7 years after November 15, 2021.

(12) Repealed. Pub.L. 115-141, Div. P, Title IV, § 402(i)(4)(A), Mar. 23, 2018, 132 Stat. 1089

(13) Recovery of value of public spectrum in connection with pioneer preferences

(A) In general

Notwithstanding paragraph (6)(G), the Commission shall not award licenses pursuant to a preferential treatment accorded by the Commission to persons who make significant contributions to the

development of a new telecommunications service or technology, except in accordance with the requirements of this paragraph.

(B) Recovery of value

The Commission shall recover for the public a portion of the value of the public spectrum resource made available to such person by requiring such person, as a condition for receipt of the license, to agree to pay a sum determined by--

(i) identifying the winning bids for the licenses that the Commission determines are most reasonably comparable in terms of bandwidth, scope of service area, usage restrictions, and other technical characteristics to the license awarded to such person, and excluding licenses that the Commission determines are subject to bidding anomalies due to the award of preferential treatment;

(ii) dividing each such winning bid by the population of its service area (hereinafter referred to as the per capita bid amount);

(iii) computing the average of the per capita bid amounts for the licenses identified under clause (i);

(iv) reducing such average amount by 15 percent; and

(v) multiplying the amount determined under clause (iv) by the population of the

service area of the license obtained by such person.

(C) Installments permitted

The Commission shall require such person to pay the sum required by subparagraph (B) in a lump sum or in guaranteed installment payments, with or without royalty payments, over a period of not more than 5 years.

(D) Rulemaking on pioneer preferences

Except with respect to pending applications described in clause (iv) of this subparagraph, the Commission shall prescribe regulations specifying the procedures and criteria by which the Commission will evaluate applications for preferential treatment in its licensing processes (by precluding the filing of mutually exclusive applications) for persons who make significant contributions to the development of a new service or to the development of new technologies that substantially enhance an existing service. Such regulations shall--

(i) specify the procedures and criteria by which the significance of such contributions will be determined, after an opportunity for review and verification by experts in the radio sciences drawn from among persons who are not employees of the Commission or by any applicant for such preferential treatment;

(ii) include such other procedures as may be necessary to prevent unjust enrichment by ensuring that the value of any such contribution justifies any reduction in the amounts paid for comparable licenses under this subsection;

(iii) be prescribed not later than 6 months after December 8, 1994;

(iv) not apply to applications that have been accepted for filing on or before September 1, 1994; and

(v) cease to be effective on the date of the expiration of the Commission's authority under subparagraph (F).

(E) Implementation with respect to pending applications

In applying this paragraph to any broadband licenses in the personal communications service awarded pursuant to the preferential treatment accorded by the Federal Communications Commission in the Third Report and Order in General Docket 90-314 (FCC 93-550, released February 3, 1994)--

(i) the Commission shall not reconsider the award of preferences in such Third Report and Order, and the Commission shall not delay the grant of licenses based on such awards more than 15 days following December 8, 1994, and the award of such preferences and licenses

shall not be subject to administrative or judicial review;

(ii) the Commission shall not alter the bandwidth or service areas designated for such licenses in such Third Report and Order;

(iii) except as provided in clause (v), the Commission shall use, as the most reasonably comparable licenses for purposes of subparagraph (B)(i), the broadband licenses in the personal communications service for blocks A and B for the 20 largest markets (ranked by population) in which no applicant has obtained preferential treatment;

(iv) for purposes of subparagraph (C), the Commission shall permit guaranteed installment payments over a period of 5 years, subject to--

(I) the payment only of interest on unpaid balances during the first 2 years, commencing not later than 30 days after the award of the license (including any preferential treatment used in making such award) is final and no longer subject to administrative or judicial review, except that no such payment shall be required prior to the date of completion of the auction of the comparable licenses described in clause (iii); and

(II) payment of the unpaid balance and interest thereon after the end of such 2 years in accordance with the regulations prescribed by the Commission; and

(v) the Commission shall recover with respect to broadband licenses in the personal communications service an amount under this paragraph that is equal to not less than $400,000,000, and if such amount is less than $400,000,000, the Commission shall recover an amount equal to $400,000,000 by allocating such amount among the holders of such licenses based on the population of the license areas held by each licensee.

The Commission shall not include in any amounts required to be collected under clause (v) the interest on unpaid balances required to be collected under clause (iv).

(F) Expiration

The authority of the Commission to provide preferential treatment in licensing procedures (by precluding the filing of mutually exclusive applications) to persons who make significant contributions to the development of a new service or to the development of new technologies that substantially enhance an existing service shall expire on August 5, 1997.

(G) Effective date

This paragraph shall be effective on December 8, 1994, and apply to any licenses issued on or after August 1, 1994, by the Federal Communications Commission pursuant to any licensing procedure that provides preferential treatment (by precluding the filing of mutually exclusive applications) to persons who make significant contributions to the development of a new service or to the development of new technologies that substantially enhance an existing service.

(14) Auction of recaptured broadcast television spectrum

(A) Limitations on terms of terrestrial television broadcast licenses

A full-power television broadcast license that authorizes analog television service may not be renewed to authorize such service for a period that extends beyond June 12, 2009.

(B) Spectrum reversion and resale

(i) The Commission shall--

(I) ensure that, as licenses for analog television service expire pursuant to subparagraph (A), each licensee shall cease using electromagnetic spectrum assigned to such service according to the Commission's direction; and

(II) reclaim and organize the electromagnetic spectrum in a

manner consistent with the objectives described in paragraph (3) of this subsection.

(ii) Licensees for new services occupying spectrum reclaimed pursuant to clause (i) shall be assigned in accordance with this subsection.

(C) Certain limitations on qualified bidders prohibited

In prescribing any regulations relating to the qualification of bidders for spectrum reclaimed pursuant to subparagraph (B)(i), the Commission, for any license that may be used for any digital television service where the grade A contour of the station is projected to encompass the entirety of a city with a population in excess of 400,000 (as determined using the 1990 decennial census), shall not--

(i) preclude any party from being a qualified bidder for such spectrum on the basis of--

(I) the Commission's duopoly rule (47 C.F.R. 73.3555(b)); or

(II) the Commission's newspaper cross-ownership rule (47 C.F.R. 73.3555(d)); or

(ii) apply either such rule to preclude such a party that is a winning bidder in a competitive bidding for such spectrum from using such spectrum for digital television service.

(15) Commission to determine timing of auctions

(A) Commission authority

Subject to the provisions of this subsection (including paragraph (11)), but notwithstanding any other provision of law, the Commission shall determine the timing of and deadlines for the conduct of competitive bidding under this subsection, including the timing of and deadlines for qualifying for bidding; conducting auctions; collecting, depositing, and reporting revenues; and completing licensing processes and assigning licenses.

(B) Termination of portions of auctions 31 and 44

Except as provided in subparagraph (C), the Commission shall not commence or conduct auctions 31 and 44 on June 19, 2002, as specified in the public notices of March 19, 2002, and March 20, 2002 (DA 02-659 and DA 02-563).

(C) Exception

(i) Blocks excepted

Subparagraph (B) shall not apply to the auction of--

(I) the C-block of licenses on the bands of frequencies located at 710-716 megahertz, and 740-746 megahertz; or

(II) the D-block of licenses on the bands of frequencies located at 716-722 megahertz.

(ii) Eligible bidders

The entities that shall be eligible to bid in the auction of the C-block and D-block licenses described in clause (i) shall be those entities that were qualified entities, and that submitted applications to participate in auction 44, by May 8, 2002, as part of the original auction 44 short form filing deadline.

(iii) Auction deadlines for excepted blocks

Notwithstanding subparagraph (B), the auction of the C-block and D-block licenses described in clause (i) shall be commenced no earlier than August 19, 2002, and no later than September 19, 2002, and the proceeds of such auction shall be deposited in accordance with paragraph (8) not later than December 31, 2002.

(iv) Repealed. Pub.L. 115-141, Div. P, Title IV, § 402(i)(4)(B), Mar. 23, 2018, 132 Stat. 1089

(v) Additional deadlines for recovered analog spectrum

Notwithstanding subparagraph (B), the Commission shall conduct the auction of the licenses for recovered analog spectrum by commencing the bidding not

later than January 28, 2008, and shall deposit the proceeds of such auction in accordance with paragraph (8)(E)(ii) not later than June 30, 2008.

(vi) Recovered analog spectrum

For purposes of clause (v), the term "recovered analog spectrum" means the spectrum between channels 52 and 69, inclusive (between frequencies 698 and 806 megahertz, inclusive) reclaimed from analog television service broadcasting under paragraph (14), other than--

(I) the spectrum required by section 337 of this title to be made available for public safety services; and

(II) the spectrum auctioned prior to February 8, 2006.

(D) Return of payments

Within one month after June 19, 2002, the Commission shall return to the bidders for licenses in the A-block, B-block, and E-block of auction 44 the full amount of all upfront payments made by such bidders for such licenses.

(16) Special auction provisions for eligible frequencies

(A) Special regulations

The Commission shall revise the regulations prescribed under paragraph (4)(F) of this subsection to prescribe methods by which the

total cash proceeds from any auction of eligible frequencies described in section 113(g)(2) of the National Telecommunications and Information Administration Organization Act (47 U.S.C. 923(g)(2)) shall at least equal 110 percent of the total estimated relocation or sharing costs provided to the Commission pursuant to section 113(g)(4) of such Act.

(B) Conclusion of auctions contingent on minimum proceeds

The Commission shall not conclude any auction of eligible frequencies described in section 113(g)(2) of such Act if the total cash proceeds attributable to such spectrum are less than 110 percent of the total estimated relocation or sharing costs provided to the Commission pursuant to section 113(g)(4) of such Act. If the Commission is unable to conclude an auction for the foregoing reason, the Commission shall cancel the auction, return within 45 days after the auction cancellation date any deposits from participating bidders held in escrow, and absolve such bidders from any obligation to the United States to bid in any subsequent reauction of such spectrum.

(C) Authority to issue prior to deauthorization

In any auction conducted under the regulations required by subparagraph (A), the Commission may grant a license assigned for the use of eligible frequencies prior to the

termination of an eligible Federal entity's authorization. However, the Commission shall condition such license by requiring that the licensee cannot cause harmful interference to such Federal entity until such entity's authorization has been terminated by the National Telecommunications and Information Administration.

(17) Certain conditions on auction participation prohibited

(A) In general

Notwithstanding any other provision of law, the Commission may not prevent a person from participating in a system of competitive bidding under this subsection if such person--

(i) complies with all the auction procedures and other requirements to protect the auction process established by the Commission; and

(ii) either--

(I) meets the technical, financial, character, and citizenship qualifications that the Commission may require under section 303(l)(1), 308(b), or 310 of this title to hold a license; or

(II) would meet such license qualifications by means approved by the Commission prior to the grant of the license.

(B) Clarification of authority

Nothing in subparagraph (A) affects any authority the Commission has to adopt and enforce rules of general applicability, including rules concerning spectrum aggregation that promote competition.

(18) Estimate of upcoming auctions

(A) Not later than September 30, 2018, and annually thereafter, the Commission shall make publicly available an estimate of what systems of competitive bidding authorized under this subsection may be initiated during the upcoming 12-month period.

(B) The estimate under subparagraph (A) shall, to the extent possible, identify the bands of frequencies the Commission expects to be included in each such system of competitive bidding.

47 C.F.R. § 1.2110 Designated entities.

(a) Designated entities are small businesses (including businesses owned by members of minority groups and/or women), rural telephone companies, and eligible rural service providers.

(b) Eligibility for small business and entrepreneur provisions—

(1) Size attribution.

(i) The gross revenues of the applicant (or licensee), its affiliates, its controlling interests, and the affiliates of its controlling interests shall be attributed to the applicant (or licensee) and considered on a cumulative

basis and aggregated for purposes of determining whether the applicant (or licensee) is eligible for status as a small business, very small business, or entrepreneur, as those terms are defined in the service-specific rules. An applicant seeking status as a small business, very small business, or entrepreneur, as those terms are defined in the service-specific rules, must disclose on its short- and long-form applications, separately and in the aggregate, the gross revenues for each of the previous three years of the applicant (or licensee), its affiliates, its controlling interests, and the affiliates of its controlling interests.

(ii) If applicable, pursuant to § 24.709 of this chapter, the total assets of the applicant (or licensee), its affiliates, its controlling interests, and the affiliates of its controlling interests shall be attributed to the applicant (or licensee) and considered on a cumulative basis and aggregated for purposes of determining whether the applicant (or licensee) is eligible for status as an entrepreneur. An applicant seeking status as an entrepreneur must disclose on its short- and long-form applications, separately and in the aggregate, the gross revenues for each of the previous two years of the applicant (or licensee), its affiliates, its controlling interests, and the affiliates of its controlling interests.

(2) Aggregation of affiliate interests. Persons or entities that hold interests in an applicant (or licensee) that are affiliates of each other or have an identity of interests identified in § 1.2110(c)(5)(iii) will be treated as though they were one person or entity and their ownership interests aggregated for purposes of determining an applicant's (or licensee's) compliance with the requirements of this section.

Example 1 to paragraph (b)(2): ABC Corp. is owned by individuals, A, B and C, each having an equal one-third voting interest in ABC Corp. A and B together, with two-thirds of the stock have the power to control ABC Corp. and have an identity of interest. If A & B invest in DE Corp., a broadband PCS applicant for block C, A and B's separate interests in DE Corp. must be aggregated because A and B are to be treated as one person or entity.

Example 2 to paragraph (b)(2): ABC Corp. has subsidiary BC Corp., of which it holds a controlling 51 percent of the stock. If ABC Corp. and BC Corp., both invest in DE Corp., their separate interests in DE Corp. must be aggregated because ABC Corp. and BC Corp. are affiliates of each other.

(3) Standard for evaluating eligibility for small business benefits. To be eligible for small business benefits:

(i) An applicant must meet the applicable small business size standard in paragraphs (b)(1) and (2) of this section, and

(ii) Must retain de jure and de facto control over the spectrum associated with the license(s) for which it seeks small business

benefits. An applicant or licensee may lose eligibility for size-based benefits for one or more licenses without losing general eligibility for size-based benefits so long as it retains de jure and de facto control of its overall business.

(4) Exceptions.

(i) Consortium. Where an applicant to participate in bidding for Commission licenses or permits is a consortium of entities eligible for size-based bidding credits and/or closed bidding based on gross revenues and/or total assets, the gross revenues and/or total assets of each consortium member shall not be aggregated. Where an applicant to participate in bidding for Commission licenses or permits is a consortium of entities eligible for rural service provider bidding credits pursuant to paragraph (f)(4) of this section, the subscribers of each consortium member shall not be aggregated. Each consortium member must constitute a separate and distinct legal entity to qualify for this exception. Consortia that are winning bidders using this exception must comply with the requirements of § 1.2107(g) of this chapter as a condition of license grant.

(ii) Applicants without identifiable controlling interests. Where an applicant (or licensee) cannot identify controlling interests under the standards set forth in this section, the gross revenues of all interest holders in

the applicant, and their affiliates, will be attributable.

(iii) Rural telephone cooperatives.

(A)(1) An applicant will be exempt from § 1.2110(c)(2)(ii)(F) for the purpose of attribution in § 1.2110(b)(1), if the applicant or a controlling interest in the applicant, as the case may be, meets all of the following conditions:

(i) The applicant (or the controlling interest) is organized as a cooperative pursuant to state law;

(ii) The applicant (or the controlling interest) is a "rural telephone company" as defined by the Communications Act; and

(iii) The applicant (or the controlling interest) demonstrates either that it is eligible for tax-exempt status under the Internal Revenue Code or that it adheres to the cooperative principles articulated in Puget Sound Plywood, Inc. v. Commissioner of Internal Revenue, 44 T.C. 305 (1965).

(2) If the condition in paragraph (b)(3)(iii)(A)(1)(i) above cannot be met because the relevant jurisdiction has not enacted an organic statute that specifies requirements for organization as a cooperative, the applicant must show that it is validly

organized and its articles of incorporation, by-laws, and/or other relevant organic documents provide that it operates pursuant to cooperative principles.

(B) However, if the applicant is not an eligible rural telephone cooperative under paragraph (a) of this section, and the applicant has a controlling interest other than the applicant's officers and directors or an eligible rural telephone cooperative's officers and directors, paragraph (a) of this section applies with respect to the applicant's officers and directors and such controlling interest's officers and directors only when such controlling interest is either:

(1) An eligible rural telephone cooperative under paragraph (a) of this section or

(2) controlled by an eligible rural telephone cooperative under paragraph (a) of this section.

(c) Definitions—

(1) Small businesses. The Commission will establish the definition of a small business on a service-specific basis, taking into consideration the characteristics and capital requirements of the particular service.

(2) Controlling interests.

(i) For purposes of this section, controlling interest includes individuals or entities with

either de jure or de facto control of the applicant. De jure control is evidenced by holdings of greater than 50 percent of the voting stock of a corporation, or in the case of a partnership, general partnership interests. De facto control is determined on a case-by-case basis. An entity must disclose its equity interest and demonstrate at least the following indicia of control to establish that it retains de facto control of the applicant:

(A) The entity constitutes or appoints more than 50 percent of the board of directors or management committee;

(B) The entity has authority to appoint, promote, demote, and fire senior executives that control the day-to-day activities of the licensee; and

(C) The entity plays an integral role in management decisions.

(ii) Calculation of certain interests.

(A) Fully diluted requirement.

(1) Except as set forth in paragraph (c)(2)(ii)(A)(2) of this section, ownership interests shall be calculated on a fully diluted basis; all agreements such as warrants, stock options and convertible debentures will generally be treated as if the rights thereunder already have been fully exercised.

(2) Rights of first refusal and put options shall not be calculated on a

fully diluted basis for purposes of determining de jure control; however, rights of first refusal and put options shall be calculated on a fully diluted basis if such ownership interests, in combination with other terms to an agreement, deprive an otherwise qualified applicant or licensee of de facto control.

Note to paragraph (c)(2)(ii)(A): Mutually exclusive contingent ownership interests, i.e., one or more ownership interests that, by their terms, are mutually exclusive of one or more other ownership interests, shall be calculated as having been fully exercised only in the possible combinations in which they can be exercised by their holder(s). A contingent ownership interest is mutually exclusive of another only if contractual language specifies that both interests cannot be held simultaneously as present ownership interests.

(B) Partnership and other ownership interests and any stock interest equity, or outstanding stock, or outstanding voting stock shall be attributed as specified.

(C) Stock interests held in trust shall be attributed to any person who holds or shares the power to vote such stock, to any person who has the sole power to sell such stock, and to any person who has the right to revoke the trust at will or to replace the trustee at will. If the trustee has a familial, personal, or extra-trust business relationship to the grantor or

the beneficiary, the grantor or beneficiary, as appropriate, will be attributed with the stock interests held in trust.

(D) Non-voting stock shall be attributed as an interest in the issuing entity.

(E) Limited partnership interests shall be attributed to limited partners and shall be calculated according to both the percentage of equity paid in and the percentage of distribution of profits and losses.

(F) Officers and directors of the applicant shall be considered to have a controlling interest in the applicant. The officers and directors of an entity that controls a licensee or applicant shall be considered to have a controlling interest in the licensee or applicant. The personal net worth, including personal income of the officers and directors of an applicant, is not attributed to the applicant. To the extent that the officers and directors of an applicant are affiliates of other entities, the gross revenues of the other entities are attributed to the applicant.

(G) Ownership interests that are held indirectly by any party through one or more intervening corporations will be determined by successive multiplication of the ownership percentages for each link in the vertical ownership chain and application of the relevant attribution

benchmark to the resulting product, except that if the ownership percentage for an interest in any link in the chain exceeds 50 percent or represents actual control, it shall be treated as if it were a 100 percent interest.

(H) Any person who manages the operations of an applicant or licensee pursuant to a management agreement shall be considered to have a controlling interest in such applicant or licensee if such person, or its affiliate, has authority to make decisions or otherwise engage in practices or activities that determine, or significantly influence:

(1) The nature or types of services offered by such an applicant or licensee;

(2) The terms upon which such services are offered; or

(3) The prices charged for such services.

(I) Any licensee or its affiliate who enters into a joint marketing arrangement with an applicant or licensee, or its affiliate, shall be considered to have a controlling interest, if such applicant or licensee, or its affiliate, has authority to make decisions or otherwise engage in practices or activities that determine, or significantly influence:

(1) The nature or types of services offered by such an applicant or licensee;

(2) The terms upon which such services are offered; or

(3) The prices charged for such services.

(J) In addition to the provisions of paragraphs (b)(1)(i) and (f)(4)(i)(C) of this section, for purposes of determining an applicant's or licensee's eligibility for bidding credits for designated entity benefits, the gross revenues (or, in the case of a rural service provider under paragraph (f)(4) of this section, the subscribers) of any disclosable interest holder of an applicant or licensee are also attributable to the applicant or licensee, on a license-by-license basis, if the disclosable interest holder uses, or has an agreement to use, more than 25 percent of the spectrum capacity of a license awarded with bidding credits. For purposes of this provision, a disclosable interest holder in a designated entity applicant or licensee is defined as any individual or entity holding a ten percent or greater interest of any kind in the designated entity, including but not limited to, a ten percent or greater interest in any class of stock, warrants, options or debt securities in the applicant or licensee. This rule, however, shall not

cause a disclosable interest holder, which is not otherwise a controlling interest, affiliate, or an affiliate of a controlling interest of a rural service provider to have the disclosable interest holder's subscribers become attributable to the rural service provider applicant or licensee when the disclosable interest holder has a spectrum use agreement to use more than 25 percent of the spectrum capacity of a license awarded with a rural service provider bidding credit, so long as

(1) The disclosable interest holder is independently eligible for a rural service provider bidding credit, and;

(2) The disclosable interest holder's spectrum use and any spectrum use agreements are otherwise permissible under the Commission's rules.

(3) Businesses owned by members of minority groups and/or women. Unless otherwise provided in rules governing specific services, a business owned by members of minority groups and/or women is one in which minorities and/or women who are U.S. citizens control the applicant, have at least greater than 50 percent equity ownership and, in the case of a corporate applicant, have a greater than 50 percent voting interest. For applicants that are partnerships, every general partner must be either a minority and/or woman (or minorities and/or women) who are U.S. citizens and who individually or together own at

least 50 percent of the partnership equity, or an entity that is 100 percent owned and controlled by minorities and/or women who are U.S. citizens. The interests of minorities and women are to be calculated on a fully diluted basis; agreements such as stock options and convertible debentures shall be considered to have a present effect on the power to control an entity and shall be treated as if the rights thereunder already have been fully exercised. However, upon a demonstration that options or conversion rights held by non-controlling principals will not deprive the minority and female principals of a substantial financial stake in the venture or impair their rights to control the designated entity, a designated entity may seek a waiver of the requirement that the equity of the minority and female principals must be calculated on a fully-diluted basis. The term minority includes individuals of Black or African American, Hispanic or Latino, American Indian or Alaskan Native, Asian, and Native Hawaiian or Pacific Islander extraction.

(4) Rural telephone companies. A rural telephone company is any local exchange carrier operating entity to the extent that such entity—

(i) Provides common carrier service to any local exchange carrier study area that does not include either:

(A) Any incorporated place of 10,000 inhabitants or more, or any part thereof, based on the most recently available

population statistics of the Bureau of the Census, or

(B) Any territory, incorporated or unincorporated, included in an urbanized area, as defined by the Bureau of the Census as of August 10, 1993;

(ii) Provides telephone exchange service, including exchange access, to fewer than 50,000 access lines;

(iii) Provides telephone exchange service to any local exchange carrier study area with fewer than 100,000 access lines; or

(iv) Has less than 15 percent of its access lines in communities of more than 50,000 on the date of enactment of the Telecommunications Act of 1996.

(5) Affiliate.

(i) An individual or entity is an affiliate of an applicant or of a person holding an attributable interest in an applicant if such individual or entity—

(A) Directly or indirectly controls or has the power to control the applicant, or

(B) Is directly or indirectly controlled by the applicant, or

(C) Is directly or indirectly controlled by a third party or parties that also controls or has the power to control the applicant, or

(D) Has an "identity of interest" with the applicant.

(ii) Nature of control in determining affiliation.

(A) Every business concern is considered to have one or more parties who directly or indirectly control or have the power to control it. Control may be affirmative or negative and it is immaterial whether it is exercised so long as the power to control exists.

Example. An applicant owning 50 percent of the voting stock of another concern would have negative power to control such concern since such party can block any action of the other stockholders. Also, the bylaws of a corporation may permit a stockholder with less than 50 percent of the voting stock to block any actions taken by the other stockholders in the other entity. Affiliation exists when the applicant has the power to control a concern while at the same time another person, or persons, are in control of the concern at the will of the party or parties with the power to control.

(B) Control can arise through stock ownership; occupancy of director, officer or key employee positions; contractual or other business relations; or combinations of these and other factors. A key employee is an employee who, because of his/her position in the concern, has a critical influence in or substantive control over the operations or management of the concern.

(C) Control can arise through management positions where a concern's

voting stock is so widely distributed that no effective control can be established.

Example. In a corporation where the officers and directors own various size blocks of stock totaling 40 percent of the corporation's voting stock, but no officer or director has a block sufficient to give him or her control or the power to control and the remaining 60 percent is widely distributed with no individual stockholder having a stock interest greater than 10 percent, management has the power to control. If persons with such management control of the other entity are persons with attributable interests in the applicant, the other entity will be deemed an affiliate of the applicant.

(iii) Identity of interest between and among persons. Affiliation can arise between or among two or more persons with an identity of interest, such as members of the same family or persons with common investments. In determining if the applicant controls or has the power to control a concern, persons with an identity of interest will be treated as though they were one person.

Example. Two shareholders in Corporation Y each have attributable interests in the same PCS application. While neither shareholder has enough shares to individually control Corporation Y, together they have the power to control Corporation Y. The two shareholders with these common investments (or identity in interest) are treated as though they are one person and Corporation Y would be deemed an affiliate of the applicant.

(A) Spousal affiliation. Both spouses are deemed to own or control or have the power to control interests owned or controlled by either of them, unless they are subject to a legal separation recognized by a court of competent jurisdiction in the United States. In calculating their net worth, investors who are legally separated must include their share of interests in property held jointly with a spouse.

(B) Kinship affiliation. Immediate family members will be presumed to own or control or have the power to control interests owned or controlled by other immediate family members. In this context "immediate family member" means father, mother, husband, wife, son, daughter, brother, sister, father- or mother-in-law, son- or daughter-in-law, brother- or sister-in-law, step-father or -mother, step-brother or -sister, step-son or -daughter, half brother or sister. This presumption may be rebutted by showing that the family members are estranged, the family ties are remote, or the family members are not closely involved with each other in business matters.

Example. A owns a controlling interest in Corporation X. A's sister-in-law, B, has an attributable interest in a PCS application. Because A and B have a presumptive kinship affiliation, A's interest in Corporation Y is attributable to B, and thus to the

applicant, unless B rebuts the presumption with the necessary showing.

(iv) Affiliation through stock ownership.

(A) An applicant is presumed to control or have the power to control a concern if he or she owns or controls or has the power to control 50 percent or more of its voting stock.

(B) An applicant is presumed to control or have the power to control a concern even though he or she owns, controls or has the power to control less than 50 percent of the concern's voting stock, if the block of stock he or she owns, controls or has the power to control is large as compared with any other outstanding block of stock.

(C) If two or more persons each owns, controls or has the power to control less than 50 percent of the voting stock of a concern, such minority holdings are equal or approximately equal in size, and the aggregate of these minority holdings is large as compared with any other stock holding, the presumption arises that each one of these persons individually controls or has the power to control the concern; however, such presumption may be rebutted by a showing that such control or power to control, in fact, does not exist.

(v) Affiliation arising under stock options, convertible debentures, and agreements to

merge. Except as set forth in paragraph (c)(2)(ii)(A)(2) of this section, stock options, convertible debentures, and agreements to merge (including agreements in principle) are generally considered to have a present effect on the power to control the concern. Therefore, in making a size determination, such options, debentures, and agreements are generally treated as though the rights held thereunder had been exercised. However, an affiliate cannot use such options and debentures to appear to terminate its control over another concern before it actually does so.

Example 1 to paragraph (c)(5)(v). If company B holds an option to purchase a controlling interest in company A, who holds an attributable interest in a PCS application, the situation is treated as though company B had exercised its rights and had become owner of a controlling interest in company A. The gross revenues of company B must be taken into account in determining the size of the applicant.

Example 2. If a large company, BigCo, holds 70% (70 of 100 outstanding shares) of the voting stock of company A, who holds an attributable interest in a PCS application, and gives a third party, SmallCo, an option to purchase 50 of the 70 shares owned by BigCo, BigCo will be deemed to be an affiliate of company A, and thus the applicant, until SmallCo actually exercises its option to purchase such shares. In order to prevent BigCo from circumventing the intent of the rule which requires such options to be considered on a

fully diluted basis, the option is not considered to have present effect in this case.

Example 3. If company A has entered into an agreement to merge with company B in the future, the situation is treated as though the merger has taken place.

Note to paragraph (c)(5)(v): Mutually exclusive contingent ownership interests, i.e., one or more ownership interests that, by their terms, are mutually exclusive of one or more other ownership interests, shall be calculated as having been fully exercised only in the possible combinations in which they can be exercised by their holder(s). A contingent ownership interest is mutually exclusive of another only if contractual language specifies that both interests cannot be held simultaneously as present ownership interests.

(vi) Affiliation under voting trusts.

(A) Stock interests held in trust shall be deemed controlled by any person who holds or shares the power to vote such stock, to any person who has the sole power to sell such stock, and to any person who has the right to revoke the trust at will or to replace the trustee at will.

(B) If a trustee has a familial, personal or extra-trust business relationship to the grantor or the beneficiary, the stock interests held in trust will be deemed controlled by the grantor or beneficiary, as appropriate.

(C) If the primary purpose of a voting trust, or similar agreement, is to separate voting power from beneficial ownership of voting stock for the purpose of shifting control of or the power to control a concern in order that such concern or another concern may meet the Commission's size standards, such voting trust shall not be considered valid for this purpose regardless of whether it is or is not recognized within the appropriate jurisdiction.

(vii) Affiliation through common management. Affiliation generally arises where officers, directors, or key employees serve as the majority or otherwise as the controlling element of the board of directors and/or the management of another entity.

(viii) Affiliation through common facilities. Affiliation generally arises where one concern shares office space and/or employees and/or other facilities with another concern, particularly where such concerns are in the same or related industry or field of operations, or where such concerns were formerly affiliated, and through these sharing arrangements one concern has control, or potential control, of the other concern.

(ix) Affiliation through contractual relationships. Affiliation generally arises where one concern is dependent upon another concern for contracts and business to such a

degree that one concern has control, or potential control, of the other concern.

(x) Affiliation under joint venture arrangements.

(A) A joint venture for size determination purposes is an association of concerns and/or individuals, with interests in any degree or proportion, formed by contract, express or implied, to engage in and carry out a single, specific business venture for joint profit for which purpose they combine their efforts, property, money, skill and knowledge, but not on a continuing or permanent basis for conducting business generally. The determination whether an entity is a joint venture is based upon the facts of the business operation, regardless of how the business operation may be designated by the parties involved. An agreement to share profits/losses proportionate to each party's contribution to the business operation is a significant factor in determining whether the business operation is a joint venture.

(B) The parties to a joint venture are considered to be affiliated with each other. Nothing in this subsection shall be construed to define a small business consortium, for purposes of determining status as a designated entity, as a joint

venture under attribution standards provided in this section.

(xi) Exclusion from affiliation coverage. For purposes of this section, Indian tribes or Alaska Regional or Village Corporations organized pursuant to the Alaska Native Claims Settlement Act (43 U.S.C. 1601 et seq.), or entities owned and controlled by such tribes or corporations, are not considered affiliates of an applicant (or licensee) that is owned and controlled by such tribes, corporations or entities, and that otherwise complies with the requirements of this section, except that gross revenues derived from gaming activities conducted by affiliate entities pursuant to the Indian Gaming Regulatory Act (25 U.S.C. 2701 et seq.) will be counted in determining such applicant's (or licensee's) compliance with the financial requirements of this section, unless such applicant establishes that it will not receive a substantial unfair competitive advantage because significant legal constraints restrict the applicant's ability to access such gross revenues.

(6) Consortium. A consortium of small businesses, very small businesses, entrepreneurs, or rural service providers is a conglomerate organization composed of two or more entities, each of which individually satisfies the definition of a small business, very small business, entrepreneur, or rural service provider as those terms are defined in this section and in applicable

service-specific rules. Each individual member must constitute a separate and distinct legal entity to qualify.

(d) The Commission may set aside specific licenses for which only eligible designated entities, as specified by the Commission, may bid.

(e) The Commission may permit partitioning of service areas in particular services for eligible designated entities.

(f) Bidding credits.

(1) The Commission may award bidding credits (i.e., payment discounts) to eligible designated entities. Competitive bidding rules applicable to individual services will specify the designated entities eligible for bidding credits, the licenses for which bidding credits are available, the amounts of bidding credits and other procedures.

(2) Small business bidding credits.

(i) Size of bidding credits. A winning bidder that qualifies as a small business, and has not claimed a rural service provider bidding credit pursuant to paragraph (f)(4) of this section, may use the following bidding credits corresponding to its respective average gross revenues for the preceding 3 years:

(A) Businesses with average gross revenues for the preceding 3 years not exceeding $4 million are eligible for bidding credits of 35 percent;

(B) Businesses with average gross revenues for the preceding 3 years not

exceeding $20 million are eligible for bidding credits of 25 percent; and

(C) Businesses with average gross revenues for the preceding 3 years not exceeding $55 million are eligible for bidding credits of 15 percent.

(ii) Cap on winning bid discount. A maximum total discount that a winning bidder that is eligible for a small business bidding credit may receive will be established on an auction-by-auction basis. The limit on the discount that a winning bidder that is eligible for a small business bidding credit may receive in any particular auction will be no less than $25 million. The Commission may adopt a market-based cap on an auction-by-auction basis that would establish an overall limit on the discount that a small business may receive for certain license areas.

(3) Bidding credit for serving qualifying tribal land. A winning bidder for a market will be eligible to receive a bidding credit for serving a qualifying tribal land within that market, provided that it complies with § 1.2107(e). The following definition, terms, and conditions shall apply for the purposes of this section and § 1.2107(e):

(i) Qualifying tribal land means any federally recognized Indian tribe's reservation, Pueblo, or Colony, including former reservations in Oklahoma, Alaska Native regions established pursuant to the

Alaska Native Claims Settlement Act (85 Stat. 688), and Indian allotments, that has a wireline telephone subscription rate equal to or less than eighty-five (85) percent based on the most recently available U.S. Census Data.

(ii) Certification.

(A) Within 180 days after the filing deadline for long-form applications, the winning bidder must amend its long-form application and attach a certification from the tribal government stating the following:

(1) The tribal government authorizes the winning bidder to site facilities and provide service on its tribal land;

(2) The tribal area to be served by the winning bidder constitutes qualifying tribal land; and

(3) The tribal government has not and will not enter into an exclusive contract with the applicant precluding entry by other carriers, and will not unreasonably discriminate among wireless carriers seeking to provide service on the qualifying tribal land.

(B) In addition, within 180 days after the filing deadline for long-form applications, the winning bidder must amend its long-form application and file a certification that it will comply with the construction

requirements set forth in paragraph (f)(3)(vii) of this section and consult with the tribal government regarding the siting of facilities and deployment of service on the tribal land.

(C) If the winning bidder fails to submit the required certifications within the 180-day period, the bidding credit will not be awarded, and the winning bidder must pay any outstanding balance on its winning bid amount.

(iii) Bidding credit formula. Subject to the applicable bidding credit limit set forth in § 1.2110(f)(3)(iv), the bidding credit shall equal five hundred thousand (500,000) dollars for the first two hundred (200) square miles (518 square kilometers) of qualifying tribal land, and twenty-five hundred (2500) dollars for each additional square mile (2.590 square kilometers) of qualifying tribal land above two hundred (200) square miles (518 square kilometers).

(iv) Bidding credit limit. If the high bid is equal to or less than one million (1,000,000) dollars, the maximum bidding credit calculated pursuant to § 1.2110(f)(3)(iii) shall not exceed fifty (50) percent of the high bid. If the high bid is greater than one million (1,000,000) dollars, but equal to or less than two million (2,000,000) dollars, the maximum bidding credit calculated pursuant to § 1.2110(f)(3)(iii) shall not exceed five hundred thousand (500,000) dollars. If the

high bid is greater than two million (2,000,000) dollars, the maximum bidding credit calculated pursuant to § 1.2110(f)(3)(iii) shall not exceed thirty-five (35) percent of the high bid.

(v) Bidding credit limit in auctions subject to specified reserve price(s). In any auction of eligible frequencies described in section 113(g)(2) of the National Telecommunications and Information Administration Organization Act (47 U.S.C. 923(g)(2) with reserve price(s) and in any auction with reserve price(s) in which the Commission specifies that this provision shall apply, the aggregate amount available to be awarded as bidding credits for serving qualifying tribal land with respect to all licenses subject to a reserve price shall not exceed the amount by which winning bids for those licenses net of discounts the Commission takes into account when reporting net bids in the Public Notice closing the auction exceed the applicable reserve price. If the total amount that might be awarded as tribal land bidding credits based on applications for all licenses subject to the reserve price exceeds the aggregate amount available to be awarded, the Commission will award eligible applicants a pro rata tribal land bidding credit. The Commission may determine at any time that the total amount that might be awarded as tribal land bidding credits is less than the aggregate amount available to be awarded and grant full tribal land bidding credits to

relevant applicants, including any that previously received pro rata tribal land bidding credits. To determine the amount of an applicant's pro rata tribal land bidding credit, the Commission will multiply the full amount of the tribal land bidding credit for which the applicant would be eligible excepting this limitation ((f)(3)(v)) of this section by a fraction, consisting of a numerator in the amount by which winning bids for licenses subject to the reserve price net of discounts the Commission takes into account when reporting net bids in the Public Notice closing the auction exceed the reserve price and a denominator in the amount of the aggregate maximum tribal land bidding credits for which applicants for such licenses might have qualified excepting this limitation ((f)(3)(v)) of this section. When determining the aggregate maximum tribal land bidding credits for which applicants for such licenses might have qualified, the Commission shall assume that any applicant seeking a tribal land bidding credit on its long-form application will be eligible for the largest tribal land bidding credit possible for its bid for its license excepting this limitation ((f)(3)(v)) of this section. After all applications seeking a tribal land bidding credit with respect to licenses covered by a reserve price have been finally resolved, the Commission will recalculate the pro rata credit. For these purposes, final determination of a credit occurs only after any review or

reconsideration of the award of such credit has been concluded and no opportunity remains for further review or reconsideration. To recalculate an applicant's pro rata tribal land bidding credit, the Commission will multiply the full amount of the tribal land bidding credit for which the applicant would be eligible excepting this limitation ((f)(3)(v)) of this section by a fraction, consisting of a numerator in the amount by which winning bids for licenses subject to the reserve price net of discounts the Commission takes into account when reporting net bids in the Public Notice closing the auction exceed the reserve price and a denominator in the amount of the aggregate amount of tribal land bidding credits for which all applicants for such licenses would have qualified excepting this limitation ((f)(3)(v)) of this section.

(vi) Application of credit. A pending request for a bidding credit for serving qualifying tribal land has no effect on a bidder's obligations to make any auction payments, including down and final payments on winning bids, prior to award of the bidding credit by the Commission. Tribal land bidding credits will be calculated and awarded prior to license grant. If the Commission grants an applicant a pro rata tribal land bidding credit prior to license grant, as provided by paragraph (f)(3)(v) of this section, the Commission shall recalculate the applicant's pro rata tribal land bidding credit after all

applications seeking tribal land biddings for licenses subject to the same reserve price have been finally resolved. If a recalculated tribal land bidding credit is larger than the previously awarded pro rata tribal land bidding credit, the Commission will award the difference.

(vii) Post-construction certification. Within fifteen (15) days of the third anniversary of the initial grant of its license, a recipient of a bidding credit under this section shall file a certification that the recipient has constructed and is operating a system capable of serving seventy-five (75) percent of the population of the qualifying tribal land for which the credit was awarded. The recipient must provide the total population of the tribal area covered by its license as well as the number of persons that it is serving in the tribal area.

(viii) Performance penalties. If a recipient of a bidding credit under this section fails to provide the post-construction certification required by paragraph (f)(3)(vii) of this section, then it shall repay the bidding credit amount in its entirety, plus interest. The interest will be based on the rate for ten-year U.S. Treasury obligations applicable on the date the license is granted. Such payment shall be made within thirty (30) days of the third anniversary of the initial grant of its license. Failure to repay the bidding credit amount and interest within the required time

period will result in automatic termination of the license without specific Commission action. Repayment of bidding credit amounts pursuant to this provision shall not affect the calculation of amounts available to be awarded as tribal land bidding credits pursuant to (f)(3)(v) of this section.

(4) Rural service provider bidding credit—

(i) Eligibility. A winning bidder that qualifies as a rural service provider and has not claimed a small business bidding credit pursuant to paragraph (f)(2) of this section will be eligible to receive a 15 percent bidding credit. For the purposes of this paragraph, a rural service provider means a service provider that—

(A) Is in the business of providing commercial communications services and together with its controlling interests, affiliates, and the affiliates of its controlling interests as those terms are defined in paragraphs (c)(2) and (c)(5) of this section, has fewer than 250,000 combined wireless, wireline, broadband, and cable subscribers as of the date of the short-form filing deadline; and

(B) Serves predominantly rural areas, defined as counties with a population density of 100 or fewer persons per square mile.

(C) Size attribution.

(1) The combined wireless, wireline, broadband, and cable subscribers of the applicant (or licensee), its affiliates, its controlling interests, and the affiliates of its controlling interests shall be attributed to the applicant (or licensee) and considered on a cumulative basis and aggregated for purposes of determining whether the applicant (or licensee) is eligible for the rural service provider bidding credit.

(2) Exception. For rural partnerships providing service as of July 16, 2015, the Commission will determine eligibility for the 15 percent rural service provider bidding credit by evaluating whether the individual members of the rural partnership individually have fewer than 250,000 combined wireless, wireline, broadband, and cable subscribers, and for those types of rural partnerships, the subscribers will not be aggregated.

(ii) Cap on winning bid discount. A maximum total discount that a winning bidder that is eligible for a rural service provider bidding credit may receive will be established on an auction-by-auction basis. The limit on the discount that a winning bidder that is eligible for a rural service

provider bidding credit may receive in any particular auction will be no less than $10 million. The Commission may adopt a market-based cap on an auction-by-auction basis that would establish an overall limit on the discount that a rural service provider may receive for certain license areas.

(g) Installment payments. The Commission may permit small businesses (including small businesses owned by women, minorities, or rural telephone companies that qualify as small businesses) and other entities determined to be eligible on a service-specific basis, which are high bidders for licenses specified by the Commission, to pay the full amount of their high bids in installments over the term of their licenses pursuant to the following:

(1) Unless otherwise specified by public notice, each eligible applicant paying for its license(s) on an installment basis must deposit by wire transfer in the manner specified in § 1.2107(b) sufficient additional funds as are necessary to bring its total deposits to ten (10) percent of its winning bid(s) within ten (10) days after the Commission has declared it the winning bidder and closed the bidding. Failure to remit the required payment will make the bidder liable to pay a default payment pursuant to § 1.2104(g)(2).

(2) Within ten (10) days of the conditional grant of the license application of a winning bidder eligible for installment payments, the licensee shall pay another ten (10) percent of the high bid, thereby commencing the eligible licensee's installment payment plan. If a winning bidder

eligible for installment payments fails to submit this additional ten (10) percent of its high bid by the applicable deadline as specified by the Commission, it will be allowed to make payment within ten (10) business days after the payment deadline, provided that it also pays a late fee equal to five percent of the amount due. When a winning bidder eligible for installment payments fails to submit this additional ten (10) percent of its winning bid, plus the late fee, by the late payment deadline, it is considered to be in default on its license(s) and subject to the applicable default payments. Licenses will be awarded upon the full and timely payment of second down payments and any applicable late fees.

(3) Upon grant of the license, the Commission will notify each eligible licensee of the terms of its installment payment plan and that it must execute a promissory note and security agreement as a condition of the installment payment plan. Unless other terms are specified in the rules of particular services, such plans will:

(i) Impose interest based on the rate of U.S. Treasury obligations (with maturities closest to the duration of the license term) at the time of licensing;

(ii) Allow installment payments for the full license term;

(iii) Begin with interest-only payments for the first two years; and

(iv) Amortize principal and interest over the remaining term of the license.

(4) A license granted to an eligible entity that elects installment payments shall be conditioned upon the full and timely performance of the licensee's payment obligations under the installment plan.

(i) Any licensee that fails to submit its quarterly payment on an installment payment obligation (the "Required Installment Payment") may submit such payment on or before the last day of the next quarter (the "first additional quarter") without being considered delinquent. Any licensee making its Required Installment Payment during this period (the "first additional quarter grace period") will be assessed a late payment fee equal to five percent (5%) of the amount of the past due Required Installment Payment. The late payment fee applies to the total Required Installment Payment regardless of whether the licensee submitted a portion of its Required Installment Payment in a timely manner.

(ii) If any licensee fails to make the Required Installment Payment on or before the last day of the first additional quarter set forth in paragraph (g)(4)(i) of this section, the licensee may submit its Required Installment Payment on or before the last day of the next quarter (the "second additional quarter"), except that no such additional time will be provided for the July 31, 1998 suspension interest and installment payments from C or

F block licensees that are not made within 90 days of the payment resumption date for those licensees, as explained in Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees, Order on Reconsideration of the Second Report and Order, WT Docket No. 97-82, 13 FCC Rcd 8345 (1998). Any licensee making the Required Installment Payment during the second additional quarter (the "second additional quarter grace period") will be assessed a late payment fee equal to ten percent (10%) of the amount of the past due Required Installment Payment. Licensees shall not be required to submit any form of request in order to take advantage of the first and second additional quarter grace periods.

(iii) All licensees that avail themselves of these grace periods must pay the associated late payment fee(s) and the Required Installment Payment prior to the conclusion of the applicable additional quarter grace period(s). Payments made at the close of any grace period(s) will first be applied to satisfy any lender advances as required under each licensee's "Note and Security Agreement," with the remainder of such payments applied in the following order: late payment fees, interest charges, installment payments for the most back-due quarterly installment payment.

(iv) If an eligible entity obligated to make installment payments fails to pay the total Required Installment Payment, interest and any late payment fees associated with the Required Installment Payment within two quarters (6 months) of the Required Installment Payment due date, it shall be in default, its license shall automatically cancel, and it will be subject to debt collection procedures. A licensee in the PCS C or F blocks shall be in default, its license shall automatically cancel, and it will be subject to debt collection procedures, if the payment due on the payment resumption date, referenced in paragraph (g)(4)(ii) of this section, is more than ninety (90) days delinquent.

(h) The Commission may establish different upfront payment requirements for categories of designated entities in competitive bidding rules of particular auctionable services.

(i) The Commission may offer designated entities a combination of the available preferences or additional preferences.

(j) Designated entities must describe on their long-form applications how they satisfy the requirements for eligibility for designated entity status, and must list and summarize on their long-form applications all agreements that affect designated entity status such as partnership agreements, shareholder agreements, management agreements, spectrum leasing arrangements, spectrum resale (including wholesale) arrangements, spectrum use agreements, and all other agreements including oral agreements,

establishing as applicable, de facto or de jure control of the entity. Designated entities also must provide the date(s) on which they entered into each of the agreements listed. In addition, designated entities must file with their long-form applications a copy of each such agreement. In order to enable the Commission to audit designated entity eligibility on an ongoing basis, designated entities that are awarded eligibility must, for the term of the license, maintain at their facilities or with their designated agents the lists, summaries, dates and copies of agreements required to be identified and provided to the Commission pursuant to this paragraph and to § 1.2114.

(k) The Commission may, on a service-specific basis, permit consortia, each member of which individually meets the eligibility requirements, to qualify for any designated entity provisions.

(l) The Commission may, on a service-specific basis, permit publicly-traded companies that are owned by members of minority groups or women to qualify for any designated entity provisions.

(m) Audits.

(1) Applicants and licensees claiming eligibility shall be subject to audits by the Commission, using in-house and contract resources. Selection for audit may be random, on information, or on the basis of other factors.

(2) Consent to such audits is part of the certification included in the short-form application (FCC Form 175). Such consent shall include consent to the audit of the applicant's or licensee's books, documents and other material

(including accounting procedures and practices) regardless of form or type, sufficient to confirm that such applicant's or licensee's representations are, and remain, accurate. Such consent shall include inspection at all reasonable times of the facilities, or parts thereof, engaged in providing and transacting business, or keeping records regarding FCC-licensed service and shall also include consent to the interview of principals, employees, customers and suppliers of the applicant or licensee.

(n) Annual reports.

(1) Each designated entity licensee must file with the Commission an annual report no later than September 30 of each year for each license it holds that was acquired using designated entity benefits and that, as of August 31 of the year in which the report is due (the "cut-off date"), remains subject to designated entity unjust enrichment requirements (a "designated entity license"). The annual report must provide the information described in paragraph (n)(2) of this section for the year ending on the cut-off date (the "reporting year"). If, during the reporting year, a designated entity has assigned or transferred a designated entity license to another designated entity, the designated entity that holds the designated entity license on September 30 of the year in which the application for the transaction is filed is responsible for filing the annual report.

(2) The annual report shall include, at a minimum, a list and summaries of all agreements and arrangements (including proposed

agreements and arrangements) that relate to eligibility for designated entity benefits. In addition to a summary of each agreement or arrangement, this list must include the parties (including affiliates, controlling interests, and affiliates of controlling interests) to each agreement or arrangement, as well as the dates on which the parties entered into each agreement or arrangement.

(3) A designated entity need not list and summarize on its annual report the agreements and arrangements otherwise required to be included under paragraphs (n)(1) and (n)(2) of this section if it has already filed that information with the Commission, and the information on file remains current. In such a situation, the designated entity must instead include in its annual report both the ULS file number of the report or application containing the current information and the date on which that information was filed.

(o) Gross revenues. Gross revenues shall mean all income received by an entity, whether earned or passive, before any deductions are made for costs of doing business (e.g., cost of goods sold), as evidenced by audited financial statements for the relevant number of most recently completed calendar years or, if audited financial statements were not prepared on a calendar-year basis, for the most recently completed fiscal years preceding the filing of the applicant's short-form (FCC Form 175). If an entity was not in existence for all or part of the relevant period, gross revenues shall be evidenced by the audited financial

statements of the entity's predecessor-in-interest or, if there is no identifiable predecessor-in-interest, unaudited financial statements certified by the applicant as accurate. When an applicant does not otherwise use audited financial statements, its gross revenues may be certified by its chief financial officer or its equivalent and must be prepared in accordance with Generally Accepted Accounting Principles.

(p) Total assets. Total assets shall mean the book value (except where generally accepted accounting principles (GAAP) require market valuation) of all property owned by an entity, whether real or personal, tangible or intangible, as evidenced by the most recently audited financial statements or certified by the applicant's chief financial offer or its equivalent if the applicant does not otherwise use audited financial statements.