

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

In the Matter of	)	
	)	
Service Rules for Advanced Wireless Services H	)	WT Docket No. 12-357
Block—Implementing Section 6401 of the Middle	)	
Class Tax Relief and Job Creation Act of 2012	)	
Related to the 1915-1920 MHz and 1995-2000	)	
MHz Bands	)	

**ORDER ON RECONSIDERATION**

**Adopted: April 10, 2019****Released: April 12, 2019**

By the Commission: Commissioner Starks issuing a statement.

**I. INTRODUCTION**

1. In 2013, the Commission released the *H Block Report and Order*, which adopted licensing and technical rules as well as a band plan for the 1915-1920 MHz and 1995-2000 MHz bands (the “H Block”) and procedures for assigning H Block licenses through a system of competitive bidding.<sup>1</sup> The Rural Wireless Association, Inc. (RWA) filed a Petition for Reconsideration later that year asking the Commission to reconsider its decisions to license H Block spectrum using Economic Areas (EAs) and to adopt population-based performance requirements.<sup>2</sup> Applying the rules that had been adopted in the *H Block Report and Order*, the Commission auctioned the H Block spectrum in Auction 96, which closed on February 27, 2014.<sup>3</sup> In this Order, we dismiss in part and deny in part RWA’s Petition for Reconsideration because the Commission acted well within its discretion, struck a reasonable and well-justified balance among multiple statutory goals, and complied fully with the requirements of Section 309(j) of the Communications Act of 1934, as amended (Communications Act).<sup>4</sup>

**II. BACKGROUND**

2. In 2012, Congress enacted Title VI of the Middle Class Tax Relief and Job Creation Act (Spectrum Act).<sup>5</sup> Among other things, the Spectrum Act required the Commission to assign and license spectrum for commercial use in the H Block using a system of competitive bidding.<sup>6</sup> The Communications Act in turn prescribes certain requirements for such an auction. Section 309(j)(4) of the Communications Act requires that, when the Commission prescribes regulations to establish a

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<sup>1</sup> *Service Rules for Advanced Wireless Services H Block—Implementing Section 6401 of the Middle Class Tax Relief and Job Creation Act of 2012 Related to the 1915-1920 MHz and 1995-2000 MHz Bands*, WT Docket No. 12-357, Report and Order, 28 FCC Rcd 9483 (2013) (*H Block Report and Order*).

<sup>2</sup> The Rural Wireless Association, Inc., Petition for Reconsideration (Sept. 16, 2013) (RWA Petition). The Rural Wireless Association was formerly known as the Rural Telecommunications Group, Inc., (RTG) and filed comments and reply comments in this proceeding as RTG. See RWA Petition at 1 n.1; RTG Comments (Feb. 6, 2013); RTG Reply Comments (Mar. 6, 2013).

<sup>3</sup> *Auction of H Block Licenses in the 1915-1920 MHz and 1995-2000 MHz Bands Closes; Winning Bidder Announced for Auction 96*, Public Notice, 29 FCC Rcd 2044 (WTB 2014) (*H Block Closing PN*).

<sup>4</sup> 47 U.S.C. § 309(j).

<sup>5</sup> Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96, §§ 6001-6703, 126 Stat. 156, 201-55.

<sup>6</sup> See Spectrum Act § 6401(b) (codified at 47 U.S.C. § 1451(b)).

methodology for the grant of licenses through the use of competitive bidding, it must “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.”<sup>7</sup> In addition, Section 309(j)(3) provides, *inter alia*, that, in establishing eligibility and other characteristics of licenses slated for auction and in designing competitive bidding methodologies, the Commission shall “seek to promote . . . [six specified] objectives,”<sup>8</sup> including the “promot[ion of] economic opportunity and competition . . . 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,”<sup>9</sup> and “the development and rapid deployment of new technologies, products, and services for the benefit of the public.”<sup>10</sup> Section 309(j)(4) also requires that, when the Commission prescribes regulations to assign licenses through competitive bidding, it must “include performance requirements . . . to ensure [the] prompt delivery of service to rural areas, to prevent stockpiling . . . of spectrum by licensees or permittees, and to promote investment in and rapid deployment of new technologies and services.”<sup>11</sup>

3. The 2013 *H Block Report and Order* adopted licensing and technical rules, as well as a band plan for the H Block, and procedures for assigning H Block licenses through a system of competitive bidding.<sup>12</sup> To satisfy the statutory requirements and objectives of Section 309(j), the Commission adopted an Economic Area-based service area for the H Block, concluding that such a decision may encourage rapid deployment in and use of the spectrum, present opportunities for efficiencies, facilitate access by smaller providers, encourage widespread geographic buildout (including in rural areas), and provide licensees with sufficient flexibility to scale their networks.<sup>13</sup> The Commission also established population-based performance requirements for the H Block, after concluding that this would maximize the productive use of spectrum, encourage licensees to rapidly provide services to customers, and promote innovative services in all license areas, including rural areas.<sup>14</sup>

4. RWA filed a Petition for Reconsideration<sup>15</sup> requesting that the Commission reconsider its decisions to: (1) license H Block spectrum using Economic Areas (EAs), rather than Cellular Market Areas (CMAs), and (2) adopt population-based, rather than geographic-based, performance requirements.<sup>16</sup> RWA asserts that these policy choices violate the statutory requirements of Section

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<sup>7</sup> 47 U.S.C. § 309(j)(4)(D).

<sup>8</sup> *Id.* § 309(j)(3).

<sup>9</sup> *Id.* § 309(j)(3)(B).

<sup>10</sup> *Id.* § 309(j)(3)(A).

<sup>11</sup> *Id.* § 309(j)(4)(B).

<sup>12</sup> See *H Block Report and Order*, 28 FCC Rcd at 9495-581, paras. 24-262.

<sup>13</sup> *Id.* at 9500-01, paras. 37-39, 42.

<sup>14</sup> *Id.* at 9558, para. 195. The Commission also concluded that “objective performance requirements are an important means of ensuring that there is meaningful deployment of broadband services in the H Block in the near future, consistent with [its] obligations [under Sections 303(r) and (y)(2)(A), 307, and 309 of the Communications Act] to adopt rules and license spectrum in the public interest.” *Id.* at 9561-62, para. 204.

<sup>15</sup> RWA’s Petition for Reconsideration is governed by Section 405 of the Communications Act and Section 1.429 of the Commission’s rules. 47 U.S.C. § 405; 47 CFR § 1.429.

<sup>16</sup> RWA Petition at 1, 4. RWA also asked the Commission not to use package bidding, particularly Hierarchical Package Bidding, in the H Block Auction. RWA Petition at 11-12. We dismiss this request as moot because package bidding was rejected in a related proceeding. See *Auction of H Block Licenses in the 1915-1920 MHz and 1995-2000 MHz Bands Scheduled for January 14, 2014; Notice and Filing Requirements, Reserve Price, Minimum Opening Bids, Upfront Payments, and Other Procedures for Auction 96*, AU Docket No. 13-178, Public Notice, 28

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309(j) and harm the public interest because the Commission did not safeguard the participation of small and rural carriers in the auction and did not promote the delivery of H Block deployments to rural communities.<sup>17</sup> NTELOS Holdings Corp. (nTelos) and NTCA—The Rural Broadband Association (NTCA) filed comments in support of RWA’s Petition for Reconsideration of the EA licensing approach.<sup>18</sup> No other parties filed comments addressing the Petition.

5. The auction for the H Block spectrum (Auction 96) was conducted in January and February of 2014. The auction closed on February 27, with 176 licenses raising a total of \$1,564,000,000.<sup>19</sup>

### III. DISCUSSION

6. We disagree with RWA’s contention that the Commission should have: (1) licensed H Block spectrum using CMAs rather than EAs, and (2) adopted geographic-based, rather than population-based, performance requirements.<sup>20</sup>

#### A. Service Area Size

7. RWA, in urging the Commission to reconsider its decision to license H Block spectrum using EAs, rather than CMAs, asserts that EA-based licensing of the H Block spectrum violates Section 309(j) of the Communications Act and is contrary to the public interest.<sup>21</sup> We reject these arguments.

8. The Commission complied fully with Section 309(j) and acted in the public interest in adopting EA-based licensing for the H Block. When designing a system of competitive bidding for a particular band, the Commission conducts a service-specific examination in which it weighs the various objectives of Section 309(j)(3).<sup>22</sup> For example, in determining the service area size for a particular service or spectrum band, the Commission balances whether to adopt: (1) larger service areas that may promote more efficient and intensive use of spectrum resources; or (2) smaller service areas that may facilitate dissemination of licenses among a wider variety of applicants, including small and rural providers.<sup>23</sup>

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FCC Rcd 13019, 13053-54, paras. 130-33 (WTB 2013) (declining to employ hierarchical package bidding for H Block licenses in Auction 96); *see also* 47 CFR § 1.429(l).

<sup>17</sup> RWA Petition at 4-5.

<sup>18</sup> NTELOS Holdings Corp., Comments in Support of the Petition for Reconsideration of the Rural Wireless Association, Inc. 3-7 (Nov. 12, 2013) (nTelos Comments); NTCA-The Rural Broadband Association, Reply to Oppositions 2-5 (Nov. 22, 2013) (NTCA Reply). Notably, neither commenter supported RWA’s Petition for Reconsideration of the population-based performance requirements.

<sup>19</sup> *H Block Closing PN*, 28 FCC Rcd at 2044.

<sup>20</sup> We do not, however, consider the merits of RWA’s request not to use package bidding. *See supra* note 16.

<sup>21</sup> RWA Petition at 5-12. The Bureau of Economic Analysis defines EAs as “one or more economic nodes—metropolitan areas or similar areas that serve as centers of economic activity—and the surrounding counties that are economically related to the nodes.” Final Redefinition of the BEA Economic Areas, 60 Fed. Reg. 13,114 (Mar. 10, 1995). There are 176 EA license areas. *See* 47 C.F.R. § 27.6. The 734 CMAs are defined at Common Carrier Public Mobile Services Information, Cellular MSA/RSA Markets and Counties, DA 92-109, *Public Notice*, 7 FCC Rcd 742 (1992).

<sup>22</sup> *Facilitating Provision of Spectrum-Based Services to Rural Areas and Promoting Opportunities for Rural Telephone Companies to Provide Spectrum-Based Services*, WT Docket No. 02-381, Report and Order and Further Notice of Proposed Rulemaking, 19 FCC Rcd 19078, 19092-93, 19096, paras. 23, 31 (2004) (*Rural Spectrum Report and Order*).

<sup>23</sup> *Facilitating Provision of Spectrum-Based Services to Rural Areas and Promoting Opportunities for Rural Telephone Companies to Provide Spectrum-Based Services*, WT Docket No. 02-381, Notice of Inquiry, 17 FCC Rcd 25554, 25558, para. 7 (2002).

9. In the *H Block Report and Order*, the Commission reasoned that licensing the H Block on an EA basis met several statutory goals listed in Section 309(j), including “providing for the efficient use of spectrum; encouraging deployment of wireless broadband services to consumers; and promoting investment in and rapid deployment of new technologies and services.”<sup>24</sup> The Commission also noted that licensing the H Block on an EA basis “will facilitate access by smaller carriers because EAs are small enough to provide spectrum access opportunities to such carriers”<sup>25</sup> Indeed, CCA—whose members include smaller providers—agreed.<sup>26</sup> Furthermore, the Commission found that EAs “encourag[e] widespread geographic buildout (including in rural areas) and provid[e] licensees with sufficient flexibility to scale their networks.”<sup>27</sup>

10. RWA argues that the Commission failed to properly consider the directives of Section 309(j), which require the Commission to promote the development and rapid deployment of new technologies, products, and services to the benefit of the public, including those residing in rural areas, in its determination of service-area size and instead relegated small and rural carriers to the wilds of the secondary market.<sup>28</sup> But nothing in RWA’s petition acknowledges the tensions among the various factors or addresses the Commission’s discretion reasonably to balance them as it has done. As the U.S. Court of Appeals for the District of Columbia Circuit has recognized, Section 309(j)(3) has “potentially conflicting objectives”<sup>29</sup> so the Commission has to consider and balance those objectives and explain the balance it strikes.<sup>30</sup> The Commission is not “required” to promote one particular objective over the others.

11. In addition, RWA has not shown that the Commission’s adoption of EA-based licensing has harmed the public interest.<sup>31</sup> In the H Block service rules proceeding, parties expressed varying views on the appropriate service area size for the H Block.<sup>32</sup> Sprint, for example, agreed that the consistent use of EA-based licensing in the adjacent PCS, AWS-4, and H Block bands would encourage quick deployment in the H Block spectrum.<sup>33</sup> The Commission fully considered different possibilities—including CMAs—and decided to adopt EAs for this spectrum band.<sup>34</sup> The Commission reasoned that adopting EAs would promote the efficient use of spectrum, encourage the deployment of wireless

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<sup>24</sup> *H Block Report and Order*, 28 FCC Rcd at 9500, para. 37 (footnotes omitted) (citing 47 U.S.C. §§ 309(j)(3)(A), (3)(D), (4)(C)(iii)).

<sup>25</sup> *H Block Report and Order*, 28 FCC Rcd at 9500, para. 39. Furthermore, the Commission rejected licensing the H Block on a nationwide basis or by Major Economic Area (MEA), which are both larger than EAs. *Id.* at 9501, para. 41.

<sup>26</sup> *Id.* at 9501, para. 40. Contrary to RWA’s suggestion (RWA Petition at 6-7), CCA did not later seek to relitigate this question. CCA Reply Comments (AU Docket No. 13-178) at 1-2. Instead, CCA continued to agree that because of the “unique nature” of the H Block auction, relating to “the configuration of neighboring bands,” the use of EAs “may be justified.” *Id.* at 2, 3. CCA argued that this should not serve as a “precedent” for future auctions (*id.* at 4), and as noted below, in light of the Commission’s established policy of prescribing license areas based on the specific circumstances of each band, it did later license the AWS-3 and 600 MHz bands using smaller areas. *See* note 34 *infra*. Like RWA, CCA also counseled against the use of package bidding, as originally proposed for the H Band. As another commenter noted, “the absence of package bidding would provide smaller carriers with a reasonable opportunity to acquire licenses for less densely-populated areas.” Reply Comments of US Cellular Corp. (AU Docket No. 13-178) at 10. Acknowledging commenters’ concerns about package bidding, the Wireless Telecommunications Bureau later abandoned that proposal. *See* note 16 *supra*.

<sup>27</sup> *H Block Report and Order*, 28 FCC Rcd at 9501, para. 42.

<sup>28</sup> RWA Petition at 6.

<sup>29</sup> *Fresno Mobile Radio, Inc. v. FCC*, 165 F.3d 965, 971 (D.C. Cir. 1999) (*Fresno Mobile Radio*).

<sup>30</sup> *See Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets*, Second Report and Order, Order on Reconsideration, and Second Further Notice of Proposed Rulemaking, 19 FCC Rcd 17503, 17538-39, para. 72 (citing *Melcher v. FCC*, 134 F.3d 1143, 1154-55 (D.C. Cir. 1998)) (*Efficient Spectrum Second Report and Order*); *see also MobileTel, Inc. v. FCC*, 107 F.3d 888, 895 (D.C. Cir. 1997) (“[O]nly

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broadband services to consumers, promote investment in and rapid deployment of new technologies and services, and provide spectrum opportunities to smaller carriers.<sup>35</sup> For these reasons, the Commission affirms its decision that it is in the public interest to adopt EAs as the service area size for the H Block.

12. In adopting the service rules, the Commission also carefully considered and addressed how the rules would affect small and rural providers.<sup>36</sup> The Commission expected that EAs would encourage “quick deployment in the H Block spectrum,” which helps both rural and urban areas receive wireless services more quickly.<sup>37</sup> In addition, the Commission authorized partitioning and disaggregation “to expedite the provision of service to rural and other underserved areas,”<sup>38</sup> and spectrum leasing to “increase the use and utility of the H Block by allowing a diverse group of parties to efficiently and dynamically use the spectrum.”<sup>39</sup> Further, the Commission adopted bidding credits to promote participation by small businesses, which would help provide access to capital to these companies if they chose to bid on the H Block spectrum.<sup>40</sup> Rather than hinder rural deployment and participation, the Commission took specific steps in the H Block proceeding to encourage both. Therefore, we disagree with RWA claims that the Commission did not “discuss nor analyze how this licensing methodology will result in the rural carriers’ participation in the auction or otherwise benefit consumers residing in rural areas.”<sup>41</sup> Furthermore, we do not believe that adoption of EA-based licenses deprives providers of opportunities to devise spectrum configurations that are appropriate for serving rural customers.<sup>42</sup>

13. We also reject RWA’s contention that the Commission erred in considering the service area size of the adjacent bands when adopting EAs instead of CMAs.<sup>43</sup> The Commission determined in the *H Block Report and Order* that adopting the same sized geographic area as is used in the adjacent bands may foster efficiencies and encourage rapid deployment of service because a licensee could utilize both the H Block and AWS-4 band in the same area with the same geographic boundaries.<sup>44</sup> If CMAs were adopted, these efficiency gains would be reduced significantly because CMAs do not nest into EAs. This decision appropriately sought to promote several statutory objectives, including “the development

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the Commission may decide how much precedence particular policies will be granted when several are implicated in a single decision.”).

<sup>31</sup> See RWA Petition at 4 (“[T]he Commission’s adoption of EA-based license areas . . . fails to satisfy the Congressional mandates of Section 309(j) of the Act and harms the public interest.”).

<sup>32</sup> *H Block Report and Order*, 28 FCC Rcd at 9500, para. 36.

<sup>33</sup> *Id.* at 9500, para. 38.

<sup>34</sup> *Id.* at 9500-02, paras. 37-43. RWA also argues that adopting EAs for the H Block “establishes dangerous precedent with respect to other upcoming spectrum auctions.” RWA Petition at 10. We emphasize that the service area size for a particular band is based on the specific facts as they relate to each band. *E.g.*, *Rural Spectrum Report and Order*, 19 FCC Rcd at 19092-93, para. 23, 19096, para. 31. For instance, while the Commission found EAs to be the best choice for the H Block, we adopted smaller service areas in two subsequent rulemakings based on the particular circumstances of those spectrum bands: the AWS-3 and 600 MHz Band. See *Amendment of the Commission’s Rules with Regard to Commercial Operations in the 1695-1710 MHz, 1755-1780 MHz, and 2155-2180 MHz Bands*, GN Docket No. 13-185, Report and Order, 29 FCC Rcd 4610, 4612, para. 2 (2014) (adopting CMAs for the 1755-1760/2155-2160 MHz band); *Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, GN Docket No. 12-268, Report and Order, 29 FCC Rcd 6567, 6597-98, paras. 71-73 (2014) (adopting Partial Economic Areas for the 600 MHz band).

<sup>35</sup> *H Block Report and Order*, 28 FCC Rcd at 9500, 9501, paras. 37-39, 42.

<sup>36</sup> See *id.* at 9500-01, para. 38-39. RWA argues that the only way for the Commission to “safeguard[] the participation of small and rural carriers . . . and promot[e] the delivery of H Block deployments to rural communities,” as required by Section 309(j) and the public interest, was to adopt CMAs and impose geographic-based performance requirements. RWA Petition at 4-5.

<sup>37</sup> See *H Block Report and Order*, 28 FCC Rcd at 9500, para. 38. The Commission specifically addressed the requirement of Section 309(j)(3)(A) to promote “the development and rapid deployment of new technologies,

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and rapid deployment of new technologies, products, and services” and “efficient and intensive use of the electromagnetic spectrum.”<sup>45</sup> Accordingly, we find that the Commission did not violate the statutory objectives of Section 309(j)(3) by licensing the H Block by EA.<sup>46</sup>

14. Finally, we reject RWA’s arguments that simply echo comments that were fully considered and rejected in the *H Block Report and Order*. For example, RWA repeatedly has argued that small and rural carriers cannot afford EA-based licenses<sup>47</sup> and that EA-based licensing would allow licensees to focus their buildout efforts on densely populated urban areas to the detriment of rural consumers.<sup>48</sup> The Commission specifically acknowledged and responded to these arguments in the *H Block Report and Order*, where it concluded that “[o]n balance, we are not persuaded that we should adopt geographic license areas smaller . . . than EAs” and that “licensing the spectrum on an EA basis best balances the Commission’s public interest goals of encouraging widespread geographic buildout (including in rural areas) and providing licensees with sufficient flexibility to scale their networks.”<sup>49</sup> Arguments that have been fully considered and rejected by the Commission within the same proceeding “plainly do not warrant consideration.”<sup>50</sup> The Commission’s original rejection of these arguments stands.

## B. Performance Requirements

15. RWA also asks the Commission to reconsider its decision to adopt population-based, rather than geographic-based, performance requirements, on the grounds that the population-based requirements violate Section 309(j)(4)(B) of the Communications Act and that they are contrary to the public interest because carriers will not provide H Block services to rural consumers in a timely manner.<sup>51</sup> We reject these arguments.

16. The Commission remains committed to encouraging the deployment of telecommunications services in rural areas, but it must balance this goal with the other goals contained in Section 309(j)(4)(B).<sup>52</sup> Section 309(j)(4)(B) states that the Commission “shall . . . include performance

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products, and services for the benefit of the public, including those residing in rural areas.” See *id.* at 9500, 9501, paras. 37-39, 42.

<sup>38</sup> *Id.* at 9573, paras. 237; see 47 CFR § 27.15.

<sup>39</sup> *H Block Report and Order*, 28 FCC Rcd at 9574, para. 242.

<sup>40</sup> *Id.* at 9581, para. 262. We note that ten bidders for H Block spectrum applied for bidding credits for these EA sized licenses, including rural providers such as James Valley Cooperative Telephone Company, and Piedmont Rural Telephone Cooperative, Incorporated. See *Auction of H Block Licenses in the 1915-1920 MHz and 1995-2000 MHz Bands; 23 Bidders Qualified to Participate in Auction 96*, Public Notice, 29 FCC Rcd 77, Att. A (WTB 2014).

<sup>41</sup> RWA Petition at 6. RWA also argues that: (1) some carriers would “not be able to participate in upcoming auctions if the Commission adopts EAs,” (RWA Petition at 7); (2) EAs, which generally contain ‘metropolitan or similar areas’ as well as surrounding counties, are often unaffordable to small and rural carriers and . . . too vast to be served economically by such carriers.” (RWA Petition at 7-8; see also *id.* at 10-11); and (3) “Americans living, working and traveling in rural areas would benefit from licensing the H Block on the basis of CMAs because this licensing approach segregates rural and urban areas[, and rural c]arriers that serve rural areas and have a rural customer base are better positioned to acquire CMA licenses that target rural geographic areas” instead of EAs. (RWA Petition at 8). nTelos and NTCA agree with RWA and contend that licensing on an EA basis does not provide small rural carriers a meaningful opportunity to compete at auction. nTelos Comments at 2, 5-7; NTCA Reply at 3-5.

<sup>42</sup> RWA Petition at 9. This particular portion of RWA’s argument could and should have been made in its initial comments because petitions for reconsideration generally may not rely on facts or arguments that have not been previously presented to the Commission. See 47 CFR § 1.429(b). The purpose of Section 1.429 is to ensure that commenters raise arguments so that the Commission can address them during the course of the rulemaking. See *Expanding the Economic and Innovation Opportunities of Spectrum through Incentive Auctions*, Order on Reconsideration, 31 FCC Rcd 1367, 1372, para. 10 (2016); *Petition of USTelecom for Forbearance*, Order Denying Petition for Reconsideration, 32 FCC Rcd 3885, 3886-87, paras. 5-8 (WCB 2017). RWA’s failure to do so clearly

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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.”<sup>53</sup> The U.S. Court of Appeals for the District of Columbia Circuit has recognized that Section 309(j)(4)(B) “endorses three different, and potentially competing, goals.”<sup>54</sup> As discussed above in the context of Section 309(j)(3), the Commission must adopt rules that promote these statutory goals generally, recognizing that specific goals may conflict in specific instances. As a result, in adopting performance requirements, the Commission is tasked with considering all of the statutory goals, including preventing spectrum warehousing and promoting investment and rapid deployment.

17. In the *H Block Report and Order*, the Commission specifically considered and rejected geographic-based requirements because “population served is a more accurate measure of useful coverage for this band.”<sup>55</sup> In addition, the Commission wanted to ensure that H Block licensees have the flexibility to scale their networks in a cost-efficient manner while they are attempting to meet performance requirements.<sup>56</sup> Measuring benchmarks within an EA according to population is also more appropriate because of the substantial capital investment and logistical challenges associated with a licensee building out a network.<sup>57</sup> The Commission noted that a population-based requirement is consistent with the performance requirements for bands with similar technical characteristics and service-area sizes.<sup>58</sup> After carefully balancing the competing goals of Section 309(j)(4)(B), the Commission decided to adopt population-based performance requirements, along with strict penalties to prevent spectrum warehousing, to promote rapid deployment.<sup>59</sup>

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frustrates that goal and our well-established policy. *See, e.g., WLIL, Inc. v. FCC*, 352 F.2d 722, 725 (D.C. Cir. 1965) (“[W]e cannot allow the appellant to sit back and hope that a decision will be in its favor, and then, when it isn’t, to parry with an offer of more evidence. No judging process in any branch of government could operate efficiently or accurately if such a procedure were allowed.” (internal quotation marks omitted)); *Amendment of Section 73.202(b), FM Table of Allotments, FM Broadcast Stations (Banks, Redmond, Sunriver and Corvallis, Oregon)*, Memorandum Opinion and Order, 19 FCC Rcd 10068, 10075, para. 20 (2004). Although the rules allow a petitioner under limited circumstances to raise facts or arguments that previously were not presented to the Commission, RWA has not shown that those circumstances exist here. *See* 47 CFR § 1.429(b). Specifically, Section 1.429(b) prohibits the raising of new facts or arguments, unless they relate to changed circumstances or were previously unknown notwithstanding the exercise of ordinary diligence, or the Commission determines that consideration of the new facts or arguments is required in the public interest. *Id.* Thus, this argument is procedurally defective pursuant to Section 1.429(b), (1)(2)-(3) of the Commission’s rules, and we dismiss it for that reason. *See id.* § 1.429(b), (1)(2)-(3). Nevertheless, because we are addressing other RWA arguments about the size of the license areas, we also, as a separate and independent ground, will address the argument on the merits.

<sup>43</sup> RWA Petition at 5. RWA argues that the Commission considered the service area size of the adjacent bands instead of complying with the requirements of Section 309(j). *Id.* at 5-6. *See also* RWA Petition at 5-6, 8-9, 11

<sup>44</sup> *H Block Report and Order*, 28 FCC Rcd at 9500, para. 38.

<sup>45</sup> *See* 47 U.S.C. § 309(j)(3)(A), (D).

18. Although RWA contends that the Commission erred in considering the cost and logistical challenges of building out a network, it fails to articulate why these economic factors are not relevant to the statutory goals, especially the goal of “promot[ing] investment in and rapid deployment of new technologies and services.” Furthermore, RWA fails to explain why the Commission erred in considering the performance requirements for bands with similar technical characteristics and service-area sizes. While arguing that the Commission should have focused exclusively on the prompt delivery of service to rural areas, RWA fails to adequately explain why the Commission should disregard the other statutory goals in Section 309(j)(4)(B).

19. In the *H Block Report and Order*, the Commission noted that “nothing in this decision forecloses the consideration of geographic-based benchmarks in other bands, particularly if such bands have different technical characteristics or service rules based on factors specific to those bands.”<sup>60</sup> For example, the Commission established geographic-based performance requirements for the 700 MHz B Block in light of technical characteristics and the CMA geographic license area size specific to that band.<sup>61</sup> In that instance, the Commission found that uniqueness of the 700 MHz spectrum (e.g., excellent propagation characteristics) justifies the use of geographic benchmarks.<sup>62</sup>

20. Finally, we reject RWA’s argument that population-based requirements for the H Block are contrary to the public interest.<sup>63</sup> As discussed above, the Commission adopted these requirements to prevent spectrum warehousing and to promote investment and rapid deployment of services. Furthermore, by adopting stringent build-out benchmarks and penalties, the Commission sought to encourage spectrum build-out throughout the entire EA—including to rural areas. For example, in response to public comments, the Commission increased the final build-out benchmark to seventy-five percent of the EA’s population.<sup>64</sup> Additionally, the Commission rejected Sprint’s proposal to base the build-out requirements on the total population of all of the H Block licenses acquired by a licensee.<sup>65</sup> Finally, the Commission adopted rules to automatically terminate a license if the licensee fails to comply

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<sup>46</sup> In addition, neither of the supporting commenters provide any evidence or reason to call into question the Commission’s conclusions about the opportunities for rural providers.

<sup>47</sup> RWA Petition at 8, 9; RTG Comments at 2-4; RTG Reply Comments at 3, 5.

<sup>48</sup> RWA Petition at 8, 9, 11; RTG Comments at 3, 4-5; RTG Reply Comments at 2-3.

<sup>49</sup> *H Block Report and Order*, 28 FCC Rcd at 9501, para. 42. See also *id.* at 9501, paras. 37-42.

<sup>50</sup> See 47 CFR § 1.429(l).

<sup>51</sup> RWA Petition at 12-15. RWA further argues that: (1) the Commission impermissibly based this decision on the performance requirements adopted for similar bands, and (2) the Commission erred in finding that population-based performance requirements are necessary to ensure that H Block licensees have flexibility to scale their networks in a cost-efficient manner. *Id.* at 12-13.

<sup>52</sup> *Efficient Spectrum Second Report and Order*, 19 FCC Rcd at 17538-39, para. 72 (citing *Melcher v. FCC*, 134 F.3d 1143, 1154-55 (D.C. Cir. 1998) (*Melcher*)).

<sup>53</sup> 47 U.S.C. § 309(j)(4)(B).

<sup>54</sup> *Melcher*, 134 F.3d at 1162.

<sup>55</sup> *H Block Report and Order*, 28 FCC Rcd at 9560, para. 202.

<sup>56</sup> *Id.* at 9560-61, para. 202.

<sup>57</sup> *Id.* at 9561, para. 202.

<sup>58</sup> *Id.* at 9560, para. 201.

<sup>59</sup> *Id.* at 9558-59, 9560-61, 9563-64, paras. 195-96, 201-02, 209-11.



with the final build-out benchmark.<sup>66</sup> For these reasons, we decline to reconsider the population-based performance requirements adopted in the *H Block Report and Order*.

#### IV. ORDERING CLAUSE

21. Accordingly, IT IS ORDERED pursuant to Sections 4(i), 4(j), 303(r), and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 303(r), and 309(j), as well as Section 1.429 of the Commission's rules, 47 CFR § 1.429, that the Petition for Reconsideration filed by the Rural Wireless Association, Inc., on September 16, 2013, IS DISMISSED to the extent specified in this Order on Reconsideration and, alternatively and independently, DENIED as specified herein.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch  
Secretary

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

<sup>60</sup> *Id.* at 9561, para. 202.

<sup>61</sup> *Service Rules for the 698-746, 747-762 and 777-792 MHz Bands et al.*, Second Report and Order, 22 FCC Rcd 15289, 15349-51, para. 157-161 (2007).

<sup>62</sup> *Id.* at 15349, para. 158.

<sup>63</sup> RWA Petition at 4-5, 12.

<sup>64</sup> *H Block Report and Order*, 28 FCC Rcd at 9562-63, paras. 206-07.

<sup>65</sup> *Id.* at 9562, para. 205. If this requirement were adopted, a licensee could build out the more populous EAs to a greater extent rather than providing services throughout the nation.

<sup>66</sup> *Id.* at 9564, para. 211.

**STATEMENT OF  
COMMISSIONER GEOFFREY STARKS**

Re: *Service Rules for Advanced Wireless Services H Block—Implementing Section 6401 of the Middle Class Tax Relief and Job Creation Act of 2012 Related to the 1915-1920 MHz and 1995-2000 MHz Bands*, WT Docket No. 12-357

Today we act on a Petition for Reconsideration of the rules governing an auction that took place more than 5 years ago. I am voting to approve this order because I believe that the Commission made reasonable decisions about service area size and performance requirements based on the statutory factors and the facts available at the time. Nevertheless, I am gratified that the Commission reached a different conclusion on the service area issue in subsequent rulemakings—based on the specific circumstances of those spectrum bands—by adopting smaller service areas that expanded opportunities to more providers.

In addition, as with all licensing proceedings, I note that the Commission must ensure that licensees satisfy the agency's buildout requirements in a timely manner. To maximize the efficient use of our limited spectrum, those requirements need to mean something. I will be watching.