Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

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

To: The Commission

NTCH, Inc.'s Reply to Opposition

NTCH, Inc. (NTCH) hereby replies to DISH NETWORK CORPORATION's (DISH's) February 6, 2014 Opposition to NTCH's Application for Review.

A. NTCH's standing

NTCH has two distinct but parallel grievances. It objects to the Commission's 2012 action converting the 2 GHz S band licenses to terrestrial use without giving other parties, including NTCH, an opportunity to apply for and bid on those licenses in a fair auction open to all. That objection remains before the Commission on reconsideration of the December 17, 2012 Report and Order and Order of Proposed License Modification, and the resulting license modification. The Commission's action deprived NTCH of the opportunity to apply for the AWS-4 licenses to its detriment.

The Application for Review here arises from NTCH's thwarted plan to participate in the H Block auction. NTCH had every intention of seeking to acquire PCS licenses in that auction

until the Commission stacked the deck in DISH's favor by a) allowing DISH to the flexibility to establish at a later date the uplink/downlink status of the adjacent spectrum, something which DISH itself concedes affects the value of the H Block, and b) setting the reserve price for the auction at an unprecedentedly high level which effectively priced most carriers, including NTCH, out of the market. NTCH expressly implored the Commission not to go forward with the H Block auction until the issues related to the waiver which affect the H Block auction were resolved. (See NTCH's Petition for Reconsideration of *Notice and Filing Requirements, Reserve Price, Minimum Opening Bids, Upfront Payments and Other Procedures for Auction 96*, DA 13-1885, released September 13, 2013. ("*Auction 96 Procedures Order*"). The setting of the reserve price for the H Block was tied directly to the grant of the waivers sought here, so NTCH cannot challenge the extraordinary H Block proceedings without also challenging the grant of the waiver. The Commission and DISH have themselves tied the two proceedings together, so NTCH cannot challenge one without challenging the other.

Moreover, NTCH remains interested in acquiring AWS-4 spectrum when that is ultimately made available for other applicants. The abrupt changes in the AWS-4 technical rules effected by the "waiver" granted to DISH may or may not be good policy. At a minimum, the changes directly contradict the Commission's previous findings about what was in the public's best interest. Under those circumstances, the Commission was required to give interested parties -- including potential H Block applicants and licensees -- the opportunity to comment in a proper notice-and-comment rulemaking proceeding on what are in effect changes in the rules. Every member of the public has a right and an interest in seeing that rules adopted by the FCC are in the public interest -- this is why such proceedings must, by statute, be open to

public comment -- and this is especially so when the proposed rule changes affect prospective licensees in both the AWS-4 and the H Block channels.

NTCH has every reason to oppose the waiver granted here because it directly and adversely affected its ability to participate successfully in the H Block auction and may adversely affect its rights as AWS-4 licensee down the road when those licenses are ultimately opened to competitive bidding. [1]

B. The Bureau's Acceptance of Cash in Exchange for Favors is Bad Policy

Despite DISH's protestations to the contrary, the new policy of accepting cash from petitioners in exchange for granting their petitions is both unprecedented and contrary to the public interest. As NTCH demonstrated at length, a policy of accepting cash consideration in connection with the evaluation of FCC actions cannot but distort the public interest equation, exactly as it did here. Not only did the Bureau reverse a thoroughly considered decision of the Commission regarding the uplink status of the lower AWS-4 spectrum block, but it also granted an extension of time to construct which ran directly contrary to the stated goal of speeding the roll out of broadband services *and* set a reserve price on the H Block auction that inevitably froze out the ability of small carriers to win spectrum in that auction. The Siren-like lure of the $1.5 billion simply outweighed all other considerations, including the provision of Section 309(j) of

[1] DISH complains that NTCH failed to serve the application for review on DISH. While such service would normally be required, here the Commission took the extraordinary step of creating an on-line Docket for the matter and formally denominating it a "permit but disclose" proceeding. DA 13-1877, *Wireless Telecommunications Bureau Opens Docket to Seek Comment on DISH Network Corporation's Petition for Waiver and Request for Extension of Time,* WT Docket 13-225, rel. Sept. 13, 2013. In such proceedings, as directed by the Public Notice and as is customary in all notice and comment-type proceedings, pleadings may be filed electronically in the Docket and interested parties are expected to check the Docket for filings which may be of interest to them. In any case, DISH did check the Docket and has not been prejudiced by the absence of paper service. NTCH is nevertheless serving this Reply on DISH in paper form to ensure that it gets prompt notice of it.

the Act that requires auctions to be designed so as to promote the ability of small businesses to acquire licenses. The acceptance of the money in exchange for the uplink-downlink flip and the extension of time to construct had the ripple effect of contorting the H Block auction so severely that it cannot possibly be sustained as a fair auction.

DISH points to several proceedings in the past 20 years where financial considerations have been offered to the Commission. None of them are apposite. In the case of Google's offer to bid $4.6 billion in the 700 MHz C Block auction,[2] the Commission correctly *rejected* that offer out of hand. That can hardly be deemed support for the proposition that it is OK to accept such offers. In the DBS case,[3] MCI offered to bid $175 million in the auction which was under consideration, but the Commission's reasons for adopting auctions as a method for distributing the satellite spectrum had nothing to do with MCI's offer. And, of course, MCI's offer was not accepted -- it had no obligation whatsoever to bid anything in the auction. These cases, if anything, underscore the wisdom of *rejecting* such offers as a matter of policy.

The Sprint commitment to pay for 800 MHz re-banding costs in 2004 was consistent with the Commission's usual policy of requiring a recipient of cleared spectrum to pay the costs of the involuntarily relocating licensees. Sprint's payments in that proceeding were not paid to the Commission but were tied directly to the anticipated costs of effectuating the relocation of incumbents and were paid to those licensees under the aegis of an independent administrator. None of that money went to the FCC or the federal government.

Finally, DISH points to consent decrees entered into by the Commission in the course of NAL proceedings. To be sure, those monies flow to the federal treasury, but the consent decree is typically a reduction of the fine that would otherwise have been due to the treasury for the

---

[2] *Service Rules for the 698-746, 747-762 and 777-792 MHz Bands, Second Report and Order*, 22 FCC Rcd 15289 (2007).

[3] *Advanced Communications Corp., Memorandum Opinion and Order*, 11 FCC Rcd 3399 (1995).

offense committed by the alleged perpetrator. In those cases, as in a criminal plea bargain, the Commission decides as a matter of prosecutorial discretion that the expense, time and risk of pursuing the enforcement action are outweighed by the certainty of a reduced payment from the alleged wrongdoer.[4] Bargains of this nature have always been accepted in the context of prosecuting allegations of unlawfulness because the plea bargain or consent decree is itself a speedy means of enforcing the underlying law without having to go through the lengthy procedures that would otherwise be required. Such payments cannot be equated to the doling out of waivers, extensions and auction preferences in exchange for cash.

C. The Waiver Has Swallowed the Rule

DISH continues to insist that the Commission may proceed by adjudication rather than rulemaking when it sees fit. That is certainly true but what we have here is not a question of adjudication vs. rulemaking; it's a question of permanently deleting or revising an existing rule by rulemaking. A waiver is by definition an *exception* to the general rule. In every other case cited by DISH, the Commission was carving out an exception to a rule which continued to apply to the rest of the world. The "rule" still had efficacy because there were people and circumstances that it would apply to. In this case, once DISH elects to flip the uplink band to downlink, there is no longer any person or circumstance to whom the uplink requirement would apply. The rule has been for all intents and purposes been discarded; there is no reason even to

[4] The commitment by Verizon to pay specified fines if it failed to meet required objectives for opening its network to competition in connection with its acquisition of GTE was of this ilk: a pre-negotiated fine if Verizon failed to meet its obligations under the terms of the merger approval. *Application of GTE Corp. and Bell Atlantic Corp. for Consent to Transfer of Control, Memorandum Opinion and Order*, 26 FCC Rcd 4238 (2011). Again, this was not a cash-for-favors payment since Verizon would not have had to pay anything if met the requirements to which it had committed.

have it waste space in the Code of Federal Regulations because it is a nullity. The waiver is no longer an exception but has become the rule itself. That is exactly what the law forbids.

D. The Extension Grant Was Contrary to Precedent

DISH asserts that the extension of time it was granted to construct its AWS-4 facilities was consistent with precedent because it was predicated on the new and additional design work necessitated by the possibility that DISH would flip the uplink band. The Commission, DISH notes, has previously granted extensions based on band reconfigurations and technical changes. Order at Para. 42. But in this case, it is DISH itself who has requested the band change and DISH itself who has requested 30 months to decide which band plan it will adopt. Unlike the typical licensee who has been delayed by considerations outside its control, here DISH has asked for the change and has asked to have 30 months to dither over it. This was entirely of DISH's initiation and at its behest. In every conceivable way, the "need" for an extension has been created by DISH, and under decades of precedent, that calculated business decision should not have justified an extension of time to construct. And had the extension not been tied to the $1.5 billion payment, we have no doubt that it would have been denied.

E. Conclusion

The Bureau's decision-making process in acting on the DISH waiver and extension requests was hopelessly and irredeemably distorted by the offer of a large cash payment to the Commission in exchange for favorable action. The cash offer also irremediably skewed the H Block auction as well by setting one bidder in a highly favored position. The Commission

should reverse the Bureau's action on the waiver and extension, reject the $1.5 billion dollar offer, and re-do the H Block auction in a way that comports with the statute and basic fairness.

Respectfully submitted,

NTCH, Inc.

By: _____
Donald J. Evans
Its Attorney

FLETCHER, HEALD & HILDRETH, P.L.C.
1300 North 17th Street - 11th Floor
Arlington, Virginia 22209
Phone: (703) 812-0400

February 19, 2014

Certificate of Service

I, Michelle Brown Johnson, hereby certify that on this 19th day of February, 2014, I caused a copy of the foregoing NTCH, Inc.'s Reply to Opposition to be served via U.S. mail, postage prepaid, upon the following:

Pantelis Michalopolous
Stephanie A. Roy
Andrew W. Guhr
STEPTOE & JOHNSON
1330 Connecticut Avenue NW
Washington, DC 20036
(202) 429-3000
Counsel for DISH Network Corporation

Jeffrey H. Blum
Senior Vice President and Deputy General Counsel
Miriam Sorond
Vice President, Technology Development
Alison A. Minea
Director & Senior Counsel
Hadass Kogan
Associate Corporate Counsel
DISH NETWORK CORPORATION
1110 Vermont Avenue, NW
Suite 750
Washington, DC 20005
(202) 293-0981

Michelle Brown Johnson