Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re Applications of	)	
NORTHSTAR WIRELESS, LLC	)	Report No. AUC-97 (Auction 97)
For AWS-3 Licenses in the 1695-1710 MHz, and 1755-1780 MHz and 2155-2180 MHz Bands	)	File Number 0006670613

To: Chief, Wireless Telecommunications Bureau

NORTHSTAR WIRELESS, LLC
OPPOSITION TO PETITIONS TO DENY

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Dated: May 18, 2015

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SUMMARY

Northstar Wireless, LLC ("Northstar Wireless" or "Northstar") is an applicant for 345 advanced wireless services ("AWS-3") licenses that were offered in the Commission's recently completed Auction 97. Northstar Wireless, through intervening controlling entities, is ultimately controlled by Doyon, Limited ("Doyon"), an Alaska Native Corporation owned by over 19,000 Alaska Native shareholders. During Auction 97, Northstar Wireless fully complied with all FCC Rules, procedures and past precedents, including the designated entity and bidding Rules, as well as antitrust laws. Doyon believes that Northstar Wireless represents the fulfillment of a number of the Commission's policy objectives, including the goal of increasing the participation of minority-controlled businesses in the provision of spectrum-based services. Northstar Wireless is strong evidence that these Commission policies are effective.

Specifically, Northstar Wireless' participation during Auction 97 — which was fully consistent with Commission Rules and precedent — contributed directly to the financial success of Auction 97. The organization and activity of Northstar Wireless in connection with Auction 97 was entirely consistent with the Commission's longstanding Rules on *de jure* and *de facto* control and procompetitive joint bidding arrangements, and entirely consistent with the antitrust laws. To conclude differently would mean ignoring years of Commission precedent, which would upset settled expectations grounded in the Commission's treatment of similarly-situated parties, and thereby infringe on Northstar Wireless' due process rights.

Now, a handful of parties that have demonstrated no prior interest whatsoever in the licenses for which Northstar Wireless has applied, asks the Commission to deny Northstar Wireless' Auction 97 license applications. The Commission should dismiss or deny the Petitions, which fail as a matter of law and primarily raise policy concerns inappropriate for a licensing proceeding involving a single applicant. As a threshold matter, none of the parties that have filed Petitions to

Deny in this proceeding has standing to challenge the Northstar Wireless applications because none qualify as a "party in interest" under Section 309(d) of the Communications Act. Northstar Wireless was not the winning bidder on any license on which any Petitioner also bid, and none of the Petitioners has alleged cognizable injury connected to the grant of Northstar Wireless' applications.

Petitioners' substantive claims also lack merit. Some Petitioners argue that DISH Network Corporation ("DISH") exercises *de facto* control over Northstar Wireless and its business. However, it is Northstar Manager, LLC ("Northstar Manager"), not DISH, that exercises *de facto* control over Northstar Wireless under the Commission's Rules and precedents. Northstar Manager satisfies all the requirements of *de facto* control under Section 1.2110(c)(2)(i) of the Commission's Rules, whereas DISH does not satisfy any of these criteria. Furthermore, Northstar Manager satisfies all six elements of *de facto* control under the Commission's *Intermountain Microwave* standard. Petitioners do not, and cannot, make a comparable, point-by-point showing of *de facto* control on the part of DISH.

Instead, some Petitioners argue that DISH's financial stake in Northstar Wireless is necessarily an indicator of *de facto* control — a claim that the Commission has explicitly rejected in the past, and that is refuted by auction precedent involving comparable debt and equity structures. Petitioners also object to various typical investor protection provisions that have been approved by the Commission and successfully employed by applicants in previous auctions. Contrary to the Petitioners' claims, the Commission has been clear: non-voting shareholders may be given a decision-making role in major corporate decisions that fundamentally affect their interests as shareholders without being deemed to be in *de facto* control.

One Petitioner, VTel Wireless, Inc. ("VTel"), also claims, incorrectly, that DISH enjoys approval rights over Northstar Wireless' budgets or business plans. However, DISH has only a

right to be consulted on budgetary matters (with no approval right or ability to set or change budgets for Northstar Wireless), and it is Northstar Manager that establishes both budgets and business plans for Northstar Wireless. This consultation right afforded to DISH is an investor protection that is squarely in line with Commission precedent.

Petitioners also wrongly contend that Northstar Wireless' bidding activity under its joint bidding arrangements provides separate evidence of *de facto* control by DISH. Northstar Wireless, however, disclosed the contents and purposes of its joint bidding arrangements prior to the auction, in full satisfaction of the Commission's Rules. The Petitioners' argument ignores the Commission's detailed regime regarding joint bidding arrangements, which Northstar Wireless followed squarely and openly, the Commission's explicit approval of similar joint bidding arrangements under its Rules in prior decisions, and the Commission's history of approving prior license applications where substantively similar joint bidding arrangements were employed.

Some Petitioners suggest that Northstar Wireless' collaborative bidding constitutes "collusive" behavior in violation of the antitrust laws. Again, this argument ignores the fact that cooperation and collaboration regarding bids and bidding strategies arrangements are explicitly allowed under the Commission's Rules as procompetitive, and the fact that Northstar Wireless' collaborative bidding arrangements were clearly disclosed prior to the auction. There was nothing "collusive" (*i.e.*, secret) about the joint bidding arrangements at issue. Moreover, active bidding by the parties to these joint bidding arrangements unquestionably intensified competition during Auction 97 — a fact that VTel and other Petitioners acknowledge — and was therefore procompetitive, which completely undermines their antitrust claims.

The Petitions must also be denied for failing to the meet the statutorily required burden of proof. Each of the Petitioners has failed to raise a "substantial and material question of fact" as required under the evidentiary standard in Section 309(d) of the Communications Act for further

proceedings to review petitions to deny; most have failed to provide the required affidavits of persons with personal knowledge of the facts alleged, and the affidavits which were provided do not allege sufficient facts, based on personal knowledge, to establish a prima facie case for denying Northstar Wireless' applications. Furthermore, VTel's frivolous argument that Northstar Wireless made material misrepresentations to the Commission and exhibited a lack candor fails readily on the facts, and in any event misstates the applicable legal standard.

Ultimately, the criticisms contained in the Petitions are actually directed at changing the Commission's Rules and policies governing the competitive bidding process — in other words, complaints with the Commission's current governing Rules, rather than with Northstar Wireless' compliance with them. The appropriate forum for Petitioners to seek these rule changes is a rulemaking proceeding, such as the one the Commission has already initiated to address issues such as those raised by the Petitioners — not a licensing proceeding involving a single applicant that followed the Commission's Rules and policies in connection with Auction 97.

Indeed, any departure from those existing Rules and policies would violate the law by depriving Northstar Wireless of fair notice of the Commission's operative standard, thereby violating Northstar Wireless' due process rights. Changing the rules and policies after the auction also would create uncertainty for designated entities, other prospective bidders, and broadcasters in the upcoming broadcast incentive auction — chilling their participation, negatively affecting auction revenues, and undermining the auction in general. The Commission has a longstanding policy of working to preserve settled, investment-backed expectations as a way to encourage active participation in competitive bidding. This is clearly as case in which the Commission should do just that.

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NORTHSTAR WIRELESS, LLC
OPPOSITION TO PETITIONS TO DENY

Northstar Wireless, LLC ("Northstar Wireless" or "Northstar"), by its attorneys and pursuant to Section 309(d)(1) of the Communications Act of 1934, as amended ("Communications Act"),[1] and Sections 1.939(f) and 1.2108(c) of the Commission's Rules,[2] hereby opposes the Petitions to Deny filed in the captioned proceeding.[3] For the reasons set forth below, the Commission should dismiss or deny the Petitions and grant the pending Northstar Wireless Auction 97 license applications without delay.

[1] 47 U.S.C. § 309(d)(1). In this Opposition, Northstar Wireless will cite to Auction 97 bidding data available at the Commission's website, which is data "of which official notice may be taken." *See id.* The Auction 97 bidding data is available at: http://wireless.fcc.gov/auctions/auction_results_files.htm?id=97&type=full&setSize=0

[2] 47 C.F.R. §§ 1.939(f); 1.2108(c).

[3] Petitions to Deny were filed on May 6, 2015 by Citizen Action ("Citizen Action"); on May 11, 2015 by Americans for Tax Reform, Center for Individual Freedom, Citizens Against Government Waste, MediaFreedom.org, National Taxpayers Union, and Taxpayers Protection Alliance (together, "Americans for Tax Reform"); by Central Texas Telephone Investments LP ("CTTI") and Rainbow Telecommunications Association, Inc. ("Rainbow") (together, "CTTI/Rainbow"); by Communications Workers of America and National Association for the Advancement of Colored People (together, "CWA/NAACP"); by Ev Ehrlich ("Ehrlich"); by National Action Network ("NAN"); and by VTel Wireless, Inc. ("VTel"); and on May 15, 2015 — well after the filing deadline for petitions to deny — by Hispanic Technology & Telecommunications Partnership ("HTTP") (together, the "Petitions").

I. INTRODUCTION

Northstar Wireless is an applicant for 345 advanced wireless services ("AWS-3") licenses that were offered in the Commission's recently-completed Auction 97. Northstar Wireless is indirectly controlled by Doyon, Limited ("Doyon"), an Alaska Native Regional Corporations organized by Congress under the Alaska Native Claims Settlement Act, 43 U.S.C. § 1601 *et seq*. Doyon is owned by more than 19,000 Alaska Native shareholders of principally Athabascan descent.[4] The return of these Alaska Native shareholders to the ranks of Commission licensees will represent a significant step forward in the Commission's continuing effort to ensure that opportunities to participate in the provision of spectrum-based services are available to members of minority groups.

Northstar Wireless' pending applications for AWS-3 licenses are best understood in light of its history and the history of the Alaska Native peoples ("Alaska Natives"). In 1971, in response to increasing concern regarding the oppressive circumstances of Alaska Natives, Congress passed the Alaska Native Claims Settlement Act.[5] This statute recognized and resolved most aboriginal claims in Alaska, and established twelve minority-owned, for-profit, region-based corporations (the "Alaska Native Regional Corporations") as the stewards of the settlement benefits for Alaska Natives.[6] The Alaska Native Regional Corporations must utilize the proceeds of the settlement benefits in a sound manner to maximize the financial interests of

[4] *See* Declaration of Aaron M. Schutt at ¶ 1 ("Schutt Declaration") (ATTACHMENT 1 hereto).

[5] Alaska Native Claims Settlement Act, 43 U.S.C. §§ 1601 *et seq.*

[6] *Id.*, § 1606(d).

the Alaska Natives.[7] As a direct result of this congressional directive, each of the Alaska Native Regional Corporations has a unique statutory fiduciary duty to its shareholders.

Doyon specifically was incorporated in 1972 with 9,061 Alaska Native shareholders. Doyon was allowed to select 12.5 million acres of land within Interior Alaska, and it was provided with $54.4 million of initial capital as a part of the settlement of aboriginal land claims.[8] Governing an Alaska Native Regional Corporation is incredibly complex. On the one hand, there is a mandate to earn a profit for shareholders; on the other, Alaska Native Regional Corporations must meet social and economic needs of shareholders, manage millions of acres of land, and help to preserve culture. No one recognizes the complexity of the task more than the governing boards of directors and managers of Alaska Native Regional Corporations. The simple act of bestowing shareholder status on Alaska Natives has not eliminated the host of socioeconomic disadvantages that are due in large measure to the effects of two centuries of past discrimination against Alaska Native people.[9]

Cognizant of its special status, the nature of its shareholder base, and the broad mission bestowed on it by Congress, Doyon has diversified the economic base from which it serves its shareholders. Among other things, Doyon has invested in the telecommunications field.[10] Doyon appreciates the growth potential that telecommunications services provide, and it sees the provision of these telecommunications services as an important part of the company's strategy

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[7] *See* Legislative History of the Alaska Native Claims Settlement Act, 1971 U.S.C.C.A.N. 2192 at 2209, 2225.

[8] *See* Schutt Declaration at ¶ 4.

[9] *See id.* at ¶ 5.

[10] *See id.* at ¶ 8.

for the future. However, telecommunications operations are highly capital intensive, which makes competing for valuable spectrum licenses especially difficult.

This problem is particularly pronounced in the case of Alaska Native Regional Corporations. At their core, Alaska Native Regional Corporations are creations of Congress formed in order to settle aboriginal land claims, but mandated to hold and manage land and capital for thousands of Alaska Native individuals. Alaska Native Regional Corporations are statutorily prohibited from selling equity — an important capital resource for telecommunications providers as they grow. Thus, the lack of access to equity capital as a traditional source of financing, compounded by discrimination against minorities in education and employment opportunities in the early years of the telecommunications industry, have created systemic limits to the penetration of these groups into the telecommunications field.[11]

Congress recognized this reality when, as part of the Omnibus Budget Reconciliation Act of 1993, it directed the Commission to consider a variety of measures to ensure that small businesses, rural telephone companies, and businesses owned by minorities and women are given the opportunity to participate in the provision of spectrum-based services when licenses are to be awarded through competitive bidding. The Commission, in turn, developed policies to help ensure that Alaska Native Regional Corporations, among others, have the chance to participate in the wireless industry through license ownership. In the case of Doyon, this is an important opportunity, as it undertakes to broaden the economic base from which it serves its shareholders.[12]

[11] *See id.* at ¶ 9.

[12] *See id.* at ¶ 10.

To participate meaningfully in the capital intensive wireless industry, Doyon capitalized Northstar Manager, LLC ("Northstar Manager") with nearly $44.7 million of its shareholders' money. It also partnered with DISH Network Corporation ("DISH"). The Commission has long recognized that new entrants should have the ability to draw on the experience and resources of established service providers. Indeed, investments by industry veterans in an entity like Northstar Wireless increases its chances for success in service competition by providing access to capital and valuable experience. Nevertheless, both as it relates to its corporate mission and to the Commission's rules, Doyon's control over the business venture, through Northstar Manager is essential.[13] Doyon believes that Northstar Wireless represents the fulfillment of a number of the Commission's policy objectives, including the goal of increasing the participation of minority-controlled businesses in the provision of spectrum-based services.[14] Northstar Wireless is strong evidence that these Commission policies are effective.

Now, however, a handful of parties that have demonstrated no prior interest whatsoever in the licenses for which Northstar Wireless has applied asks the Commission to deny Northstar Wireless' post-auction license applications. As an initial matter, none of the Petitioners has met the pleading requirements for submitting a petition to deny Northstar Wireless' licenses. None of the Petitioners bid on any the licenses for which Northstar Wireless was the winning bidder in Auction 97, and therefore none of the Petitioners has standing to challenge the Northstar Wireless Auction 97 license applications.

Each of the Petitioners also fails to meet its burden of proof under Section 309(d)(1) of the Act, which requires that any petition to deny must contain "specific allegations of fact

[13] *See id.* at ¶ 12.

[14] *See id.* at ¶ 14.

sufficient to show that . . . grant of the application would be prima facie inconsistent with" the public interest, or otherwise must be denied. The Petitions ignore that Northstar Wireless acted in conformance with — and in reasonable reliance upon — long-standing Commission precedent with respect to its corporate structure, bidding agreements, and bidding activities. Furthermore, the Petitioners' claims misconstrue Northstar Manager's exercise of authority and control over Northstar Wireless' bidding decisions.

Arguments that Northstar Wireless and its joint bidding partners violated the Commission's anti-collusion rules or the antitrust laws are similarly without merit. The Commission's anti-collusion rules expressly permit the kind of communications, coordination and cooperation between Northstar Wireless and its joint bidding partners that the Petitioners complain about, when conducted in the context of a joint bidding arrangement disclosed under the Commission's rules. Similarly, the antitrust laws recognize these types of fully disclosed joint bidding agreements as procompetitive. Aside from failing to allege any cognizable legal violation, the Petitions also elide benefits of Northstar Wireless' participation in Auction 97. Northstar Wireless' participation, like that of designated entities generally, yielded significant public interest benefits and contributed to the success of Auction 97. The Petitions' alleged harms are illusory, and fail to address the detrimental effects that denial would have on designated entity participation in future spectrum auctions. For these reasons, and for the reasons set forth below, the Commission should dismiss or deny the Petitions and grant the pending Northstar Wireless Auction 97 license applications without delay.

II. EACH OF THE PETITIONS IS LEGALLY DEFECTIVE AND MUST BE DISMISSED

A. Each of the Petitioners Lacks Standing to Challenge the Northstar Wireless Auction 97 License Applications

Section 309(d)(1) of the Communications Act allows only a "party in interest" to file a petition to deny an application.[15] To establish that a petitioner has the requisite party-in-interest standing to file a petition to deny, the "petitioner must allege facts sufficient to demonstrate that grant of the subject application would cause it to suffer a direct injury"[16] and "demonstrate a causal link between the claimed injury and the challenged action."[17] To demonstrate a causal link, the petitioner must show that the injury is traceable to the challenged action and that it is "likely, as opposed to merely speculative," that the injury would be redressed by the relief requested.[18] As demonstrated below, none of petitioners have alleged any harms that would be remedied if the Commission declined to grant some or all of the licenses to Northstar Wireless (or denied the application of bidding credits).

The Commission and the United States Court of Appeals for the District of Columbia Circuit ("D.C. Circuit") have established precedent for standing requirements specifically in the context of the Commission's spectrum auctions. The D.C. Circuit has ruled 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

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[15] 47 U.S.C. § 309(d)(1).

[16] *Petition for Reconsideration of Various Auction 87 Public Notices, Petition to Deny Long-Form Application of Silke Communications, Inc. (Auction 87), Petition to Deny Long-Form Application of Two Way Communications (Auction 87), Memorandum Opinion and Order*, 27 FCC Rcd 4374, 4382 (WTB 2012) (footnote omitted) ("*Auction 87 Order").*

[17] *Id.* (footnote omitted).

[18] *Alaska Native Wireless, L.L.C., Order*, 18 FCC Rcd 11640, 11644 (2003) ("*Alaska Native Wireless II*"); *Auction 87 Order*, 27 FCC Rcd at 4385.

basis.'"[19] 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.[20] Moreover, to establish party in interest standing, a qualified bidder must have actually participated in competitive bidding for licenses in those markets.[21] Under that standard, each of the Petitioners' claims must be dismissed.

1. Americans for Tax Reform, Citizen Action, CWA/NAACP, Ehrlich, NAN, and HTTP. None of Americans for Tax Reform, Citizen Action, CWA/NAACP, Ehrlich, NAN, or HTTP applied to bid in Auction 97, and none suggests that it did. Not one of these entities or individuals claims that it was a disappointed bidder or that it was able and ready to bid in Auction 97 and that the decision of the Commission prevented it from doing so on an equal basis.[22] Therefore, under the precedent of the D.C. Circuit and the Commission, these entities or individuals lack standing to challenge the Auction 97 license applications of Northstar Wireless, and their respective Petitions should be dismissed.

2. VTel. Likewise, the VTel Petition should be dismissed because VTel did not participate in competitive bidding for licenses in those markets in which Northstar Wireless was the winning bidder for a license. In Auction 97, VTel bid *exclusively* for licenses in Economic

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[19] *High Plains Wireless, L.P. v. FCC*, 276 F.3d 599, 605 (D.C. Cir. 2002) ("*High Plains Wireless*"); *see Auction 87 Order*, 27 FCC Rcd at 4382; *Alaska Native Wireless II*, 18 FCC Rcd at 11644.

[20] *Auction 87 Order*, 27 FCC Rcd at 4382.

[21] *See Alaska Native Wireless, L.L.C., Order*, 17 FCC Rcd 4231, 4235 (WTB, 2002) ("*Alaska Native Wireless*"); apps. for review dismissed, *Alaska Native Wireless II*, 18 FCC Rcd 11640 (2003). *See also High Plains Wireless*, 276 F.3d at 605.

[22] NAN claims that it "has standing to file [its] Petition to Deny based upon the injuries that it and its constituents will suffer." NAN Petition at 1 n.1. Aside from the fact that NAN does not even attempt to demonstrate that it has standing to challenge the Auction 97 license application of Northstar Wireless, NAN does not identify the alleged injuries to which it refers.

Area 004 (specifically, AW-BEA004-A1, AW-BEA004-B1, AW-BEA004-H, AW-BEA004-I, and AW-BEA004-J) and for the license in Cellular Market Area 248 (AW-CMA248-G). Contrary to a claim by VTel,[23] Northstar Wireless was not the winning bidder for *any* license in Economic Area 004 or Cellular Market Area 248.[24] Since VTel did not actually participate in competitive bidding for licenses in those markets in which Northstar Wireless was the winning bidder for a license, VTel does not have standing to challenge the Auction 97 license applications of Northstar Wireless.[25] The VTel Petition should, therefore, be dismissed.[26]

3. CTTI/Rainbow. Likewise, the CTTI/Rainbow Petition should be dismissed. In Auction 97, neither CTTI nor Rainbow bid on any license for which Northstar Wireless was the winning bidder. CTTI placed bids on licenses in fifteen geographic markets in which Northstar Wireless was the winning bidder for a *separate* (Economic Area) license: Cellular Market Areas 220, 255, 281, 295, 655, 656, 659, 660, 664, 665, 666, 667, 669, 670, and 671. And, Rainbow placed bids on licenses in four markets in which Northstar Wireless was the winning bidder for a

[23] *See* VTel Petition at 7 ("VTel bid directly against the DISH entities for several licenses that Northstar . . . won in the state of Vermont.").

[24] *See Auction of Advanced Wireless Services (AWS-3) Licenses Closes, Winning Bidders Announced for Auction 97, Public Notice*, 30 FCC Rcd 630, 640-41, 706 (WTB rel. 2015) ("*Auction 97 Winning Bidders Public Notice*").

[25] *See Auction 87 Order*, 27 FCC Rcd at 4382, 4385; *Alaska Native Wireless*, 17 FCC Rcd at 4235.

[26] VTel could not also suggest that the award of the licenses for which Northstar Wireless was the winning bidder, or the award of bidding credits associated therewith, would somehow deprive it of a valid auction process. *Cf.* VTel Petition at 5, 7 n.5. If the Commission were to refuse Northstar Wireless bidding credits, or even the licenses for which it was the winning bidder, in markets in which VTel did not participate, such an action would not redress VTel's supposed injury in the competitive bidding process in the markets in which it did participate. *See, e.g.*, *Alaska Native Wireless*, 17 FCC Rcd at 4236; *Alaska Native Wireless II*, 18 FCC Rcd at 11646-47 (denying Alaska Native Wireless' applications for other markets would not redress any alleged injury suffered by TPS Utilicom in bidding for licenses that it did not win, because those licenses were won by other auction participants).

separate (Economic Area) license: Cellular Market Areas 179, 301, 431, and 432. Standing to petition to deny a winning bidder's application with regard to a particular license is based on the petitioner's participation in competitive bidding for that *license*,[27] so neither CTTI or Rainbow has standing to challenge the Auction 97 license applications of Northstar Wireless, and their joint Petition against the Northstar Wireless Auction 97 license applications should be dismissed.[28]

B. The Petitions Suffer from Other Procedural Defects that Necessitate Dismissal

Under Section 309(d)(1) of the Communications Act, a petition to deny must "contain specific allegations of fact sufficient to show that . . . grant of the application would be prima facie inconsistent with" the public interest, convenience, and necessity.[29] Any aspect of a

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[27] *See High Plains,* 276 F.3d at 605 (finding that an auction participant had standing to petition to deny the award of a license for which it bid, but lacked standing to challenge the award of licenses on which it did not bid); *Auction 87 Order,* 27 FCC Rcd at 4383-84.

[28] Even if the Commission were to confer standing to petitions to deny a winning bidder's application with regard to a license in a particular geographic market by virtue of the petitioner's participation in competitive bidding for *other* licenses in that market, CTTI would have standing in this case only with respect to Northstar Wireless' license application in the aforementioned fifteen markets in which it bid, and Rainbow would have standing in this case only with respect to Northstar Wireless' application licenses in the aforementioned four markets in which it bid. *See, e.g.*, *Nextel License Acquisition Corp., Memorandum Opinion and Order*, 13 FCC Rcd 11983, 11984, 11988-89 (WTB 1998) (dismissing petition, in part, in all markets where petitioner did not participate as an auction bidder). However, such a reading of Section 309(d)(1)'s standing requirement would be mistaken, given that neither CTTI nor Rainbow would be able to show a "direct injury" from awarding to Northstar Wireless *licenses* on which neither of the Petitioners even bid. *See Auction 87 Order,* 27 FCC Rcd at 4383-85; *Alaska Native Wireless,* 17 FCC Rcd at 4235-36. *See also High Plains Wireless*, 276 F.3d at 605. Stated differently, neither CTTI nor Rainbow can show that they would be deprived of any benefit or suffer any harm from the issuance of Northstar Wireless licenses, and denial of the issuance of Northstar Wireless' licenses could not provide any redress to CTTI and Rainbow if they never even bid on those licenses. Therefore, under the clear precedent of the D.C. Circuit and the Commission, the CTTI/Rainbow Petition to deny the Northstar Wireless Auction 97 license applications must be dismissed.

[29] 47 U.S.C. § 309(d)(1).

petition to deny should be rejected without further investigation if it does not "contain specific allegations of fact sufficient to show . . . that a grant of the application would be *prima facie* inconsistent with the [public interest]."[30] These allegations of fact must be "supported by affidavit of a person or persons with personal knowledge thereof."[31] Even if this initial showing is made, a petition still does not merit further review unless it has alleged "specific facts" sufficient to raise "a substantial and material question of fact requiring" a hearing.[32] A petition to deny that is based only on "[t]he allegation of ultimate, conclusionary facts or more general allegations on information and belief" must be denied.[33]

As discussed in further detail below, none of the Petitions of Americans for Tax Reform, Citizen Action, CWA/NAACP, Ehrlich, or HTTP even purport to rely on anything other than conclusory facts or general allegations, and none makes any specific allegation of fact sufficient to show that grant of the Northstar Wireless application would be prima facie inconsistent with the public interest, convenience, and necessity.[34] To the extent NAN makes a specific allegation

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[30] *Tele-Media, Inc. v. FCC*, 697 F.2d 402, 409 (D.C. Cir. 1983) (quoting 47 U.S.C. § 309(d)(1)).

[31] 47 U.S.C. § 309(d)(1). *See also* 47 C.F.R. § 1.2108(b).

[32] *Citizens for Jazz on WRVR, Inc. v. FCC*, 775 F.2d 392, 395 (D.C. Cir. 1985) (internal quotations omitted).

[33] *Stone v. FCC*, 466 F.2d 316, 322 (D.C. Cir. 1972) (quoting S. Rep. No. 690, 86th Cong., 1st Sess. 3 (1959)).

[34] *See infra*. Section VI. In addition, the HTTP Petition was filed on May 15, 2015, four days after the May 11, 2015 deadline for petitions to deny the Northstar Wireless Auction 97 license applications. *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*, DA 15-503, at 1 (WTB rel. Apr. 29, 2015). Separately, it does not appear that any of the Petitions of Americans for Tax Reform, Citizen Action, Ehrlich, or HTTP was served on Northstar Wireless, *see id.* (requiring service of a petition to deny on the applicant); 47 C.F.R. § 1.47, and none of Petitions of Americans for Tax Reform, Citizen Action, or Ehrlich includes an address for service of this Opposition. (Citizen Action does not even

of fact, it is not directed to Northstar Wireless or the merits of the Northstar Wireless Auction 97 license applications.[35]

Because each of the Petitioners lacks standing to challenge the Auction 97 license applications of Northstar Wireless, and because certain of the Petitions suffer from other procedural defects, the Commission should dismiss the Petitions and grant the pending Northstar Wireless license applications without delay. Notwithstanding these clear legal infirmities that necessitate dismissal, Northstar Wireless will address the merits of these Petitions here.

III. NORTHSTAR MANAGER HAS *DE FACTO* CONTROL OF NORTHSTAR SPECTRUM AND NORTHSTAR WIRELESS

Northstar Manager, LLC ("Northstar Manager") has *de facto* control of Northstar Spectrum, LLC ("Northstar Spectrum") and Northstar Wireless. Certain of the Petitioners attempt to suggest that DISH Network Corporation ("DISH") has *de facto* control of Northstar Wireless,[36] but such claims are wrong. Of course, none of the Petitioners so much as suggests that DISH has *de jure* control of Northstar Wireless, nor could they reasonably do so.[37]

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include its name, which appears to be set forth only as part of the newspaper article attached thereto.)

[35] In reality, the NAN Petition addresses NAN's views with respect to DISH Network Corporation, not with respect to Northstar Wireless or its Auction 97 license applications.

[36] *See* VTel Petition at 16-25. Ehrlich characterizes Northstar Wireless as a "shell" company and a "puppet," Erlich Petition at 1 and Attachment 1 at 1, but Ehrlich has no basis for such a characterization and provides none. CWA/NAACP asserts that Northstar Wireless is "subject to de facto control by DISH," CWA/NAACP Petition at 3, but they do not elaborate. CWA/NAACP goes further by claiming that Northstar Wireless and DISH share "an identity of interest," *id.* at 3-4, 6, but again they do not elaborate. HTTP's late-filed Petition suggests, without support that DISH, rather than Northstar Wireless, will receive the designated entity discount, which could be construed as a claim that DISH has *de facto* control. *See* HTTP Petition at 1.

[37] *De jure* control is evidenced under the Commission's rules by holdings of greater than 50 percent of the voting stock of a corporation, or in the case of a partnership, general partnership interests. 47 C.F.R. § 1.2110(c)(2). In the case of limited partnerships, the general

Northstar Manager, not DISH, has *de facto* control of Northstar Spectrum and Northstar Wireless under the Commission's rules. This conclusion is further confirmed by the fact that Northstar Wireless' corporate structure mirrors that of numerous other designated entities which have applied for, and received, licenses in past spectrum auctions. The Commission has thus already addressed and adjudicated the key control-related issues — in substantially similar factual circumstances — now being raised by the Petitioners. For the same reasons that the Commission declined to find *de facto* control in those prior instances, it should reject the Petitioners' unsubstantiated allegations of control here.

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partners are considered to have *de jure* control, provided that the limited partners are insulated. If so insulated, limited partners are not attributed to the applicant. The Commission has explained that for attribution purposes, limited liability companies are treated like limited partnerships. *See, e.g., Alaska Native Wireless*, 17 FCC Rcd at 4237-38; *Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests, Report and Order,* 14 FCC Rcd 12559, 12619-20 (1999). Non-managing member interests in a limited liability company are treated as similar to limited partnership interests and are not attributed to the applicant. Northstar Wireless is limited liability company formed under the Delaware Limited Liability Company Act and is a wholly owned subsidiary of Northstar Spectrum, another limited liability company formed under the Delaware Limited Liability Company Act. Northstar Manager, a limited liability company formed under the Delaware Limited Liability Company Act, holds a 15 percent controlling member interest in, and is the sole manager of, Northstar Spectrum. The Limited Liability Company Agreement of Northstar Wireless, LLC specifies that its sole member and manager, Northstar Spectrum, "shall manage the company" and "bind the company." Northstar Wireless, LLC Form 601, File Number 0006670613, Exhibit D: LLC Agmt of Northstar Wireless, LLC (filed Mar. 23, 2015), Limited Liability Company Agreement of Northstar Wireless, LLC, by Northstar Spectrum, LLC, entered into as of September 12, 2014, § 4 ("Northstar Wireless Agreement"). The Amended and Restated Limited Liability Company Agreement of Northstar Spectrum, LLC (as amended, the "Amended Northstar Spectrum Agreement") establishes Northstar Manager as the sole manager of, and the only entity with authority to bind, Northstar Spectrum. Northstar Wireless, LLC Form 601, File Number 0006670613, Exhibit D: Amended Northstar Agreement REDACTED (filed Mar. 23, 2015, Amended and Restated Limited Liability Company Agreement of Northstar Spectrum, LLC, by and between Northstar Manager, LLC and American AWS-3 Wireless II L.L.C., entered into as of October 13, 2014, § 6.1 (as amended, the "Amended Northstar Spectrum Agreement"). Consequently, Northstar Manager holds sole voting control of, and the sole attributable interest in, Northstar Spectrum.

A. Northstar Manager Has *De Facto* Control Based on the Totality of Circumstances

Northstar Manager, not DISH, has *de facto* control of Northstar Spectrum and Northstar Wireless[38] under both the minimum requirements of control set forth in the Commission's Rules and the *Intermountain Microwave* factors applied in this context by the Commission.

1. Northstar Manager has De Facto Control Under Section 1.2110(c)(2)(i) of the Commission's Rules

Under the Commission's precedent, the existence of *de facto* control is determined on a case-by-case basis[39] by evaluating the "totality of circumstances."[40] The Commission has established minimum requirements of control that must be demonstrated by an applicant seeking small or very small business status. Specifically, under Section 1.2110(c)(2)(i) the Commission's Rules:

> 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:
>
> (1) The entity constitutes or appoints more than 50 percent of the board of directors or management committee;
> (2) The entity has authority to appoint, promote, demote, and fire senior executives that control the day-to-day activities of the licensee; and

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[38] No Petitioner has suggested that Doyon does not have *de jure* or *de facto* control of Northstar Manager, nor could one responsibly do so.

[39] *See* 47 C.F.R. § 1.2110(c)(2)(i); *Implementation of Section 309(j) of the Communications Act – Competitive Bidding, Fifth Memorandum Opinion and Order*, 10 FCC Rcd 403, 446-47 (1994) ("*Fifth MO&O*"). *See also AirGate Wireless, L.L.C., Memorandum Opinion and Order*, 14 FCC Rcd 11827, 11840 (CWD 1999) ("*Airgate*") citing *Baker Creek Communications, L.P., Memorandum Opinion and Order*, 13 FCC Rcd 18709, 18713 (PSPWD 1998) ("*Baker Creek*").

[40] *See Application of Ellis Thompson Corp. for facilities in the Domestic Public Cellular Radio Telecommunications Service on Frequency Block A in Market No. 134, Atlantic City, New Jersey, Memorandum Opinion and Order and Hearing Designation Order*, 9 FCC Rcd 7138, 7139 (1994) ("*Ellis Thompson*").

(3) The entity plays an integral role in management decisions.[41]

Northstar Manager satisfies each of these requirements. First, Northstar Manager has disclosed its indirect equity interest in Northstar Wireless; as it explained in its applications, Northstar Manager holds 15 percent of all member interests in Northstar Spectrum, which, in turn, holds 100 percent of all member interests in Northstar Wireless.[42] Northstar Manager is sole manager of Northstar Spectrum, which is the sole member and manager of Northstar Wireless.[43] As a result, Northstar Manager controls 100 percent of the "voting interests" in Northstar (subject to limited, permissible investor protection provisions),[44] satisfying the requirement that it "constitutes or appoints more than 50 percent of the board of directors or management committee."

Second, under the Amended Northstar Spectrum Agreement, Northstar Manager has "the exclusive right and power to manage, operate and control [Northstar Spectrum] and to make all decisions necessary or appropriate to carry on the business and affairs of [Northstar Spectrum], including the authority to appoint, promote, demote and terminate executives who oversee the day-to-day activities of [Northstar Spectrum] . . . ."[45] Separately, the Management Services Agreement ("Management Agreement") entered into by and between Northstar Wireless and American AWS-3 Wireless II L.L.C. ("American II"), a subsidiary of DISH, provides that

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[41] 47 C.F.R. § 1.2110(c)(2)(i).

[42] *See* Northstar Wireless, LLC FCC Form 601, File Number 0006670613, EXHIBIT A: Ownership at 1-2 (filed Feb. 13, 2015) ("FCC Form 601 Exhibit A").

[43] *See id.*

[44] *See Alaska Native Wireless*, 17 FCC Rcd at 4237-38. The subjects of the investor protection provisions are referred to as "Significant Matters," *see* Amended Northstar Spectrum Agreement § 6.3, and they are defined in Section 1.1 of the Amended Northstar Spectrum Agreement.

[45] Amended Northstar Spectrum Agreement § 6.1.

Northstar Spectrum "shall retain authority and ultimate control over . . . the employment, supervision and dismissal of all personnel providing services under this Agreement."[46] Likewise, the Management Agreement makes clear that Northstar Spectrum "shall have the right, subject to Applicable Law, (i) to require, upon reasonable notice, the replacement of any Systems Manager or any contact representative for any [Northstar Wireless] System; (ii) to require American II to reassign any employee such that the employee no longer works on any [Northstar Wireless] System or (iii) to reject any personnel proposed by American II as the Systems Manager or contact representative for any [Northstar Wireless] System."[47]

Third, Northstar Manager plays an integral role in management decisions. Under the Amended Northstar Spectrum Agreement, Northstar Manager "shall possess and enjoy and may exercise all the rights and powers of a manager . . . including the full and exclusive power and authority to act for and to bind [Northstar Spectrum] . . . . [Northstar Manager] shall have all specific rights and powers required or appropriate for the day-to-day management of [Northstar Spectrum's] business . . . . Except as determined by [Northstar Manager] pursuant to this Agreement, no Member or representative shall have any right or authority to take any action on behalf of [Northstar Spectrum] with respect to third parties or to bind [Northstar Spectrum]."[48]

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[46] Northstar Wireless, LLC Form 601, File Number 0006670613, Exhibit D: Management Agreement REDACTED (filed Mar. 23, 2015), Management Services Agreement, by and between American AWS-3 Wireless II L.L.C. and Northstar Wireless, LLC, entered into as of September 12, 2014, § 4.1 ("Management Agreement").

[47] *Id.*, § 5.1(c). *See also id.*, § 5.2 (Northstar Spectrum "shall have the right, subject in each case to applicable local, state or federal laws, to require American II to discharge any Independent Contractor performing services under this Agreement, or to bar American II from hiring any specific Independent Contractor to perform services under this Agreement").

[48] Amended Northstar Spectrum Agreement § 6.1.

Northstar Manager is thus the entity with *de facto* control over Northstar Wireless pursuant to 47 C.F.R. § 1.2110(c)(2)(i).

2. Northstar Manager has *De Facto* Control Under the *Intermountain Microwave* Factors

In a 1963 decision known as *Intermountain Microwave*, the Commission also developed six criteria by which it assesses the presence or absence of *de facto* control.[49] The Commission has indicated that "[i]n the case of a proposed nonbroadcast facility where the facility is not yet constructed and there is no record of actual conduct, [it] has modified the *Intermountain* criteria to determine who has actual control of the applicant by focusing primarily on the last four *Intermountain* criteria."[50] Regardless, Northstar Manager unquestionably retains *de facto* control of Northstar Spectrum and Northstar Wireless under all six of the *Intermountain Microwave* criteria.

a. Unfettered Use of All Facilities and Equipment. The first *Intermountain Microwave* criterion relates to whether the licensee has unfettered use of all facilities and

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[49] *See Applications for Microwave Transfers to Teleprompter Approved with Warning; Non-broadcast and General Action Report No. 1142, Public Notice (by the Commission en banc)*, 12 FCC 2d 559, 559–60 (1963) ("*Intermountain Microwave*" or "*Intermountain*"). *See also Fifth MO&O*, 10 FCC Rcd at 451 (confirming application of the *Intermountain Microwave* factors "will ensure that designated entities participate actively in the day-to-day management of the company while allowing reasonable flexibility to obtain services from outside experts as well"); *Order on Reconsideration of the Third Report and Order, Fifth Report and Order, and Fourth Further Notice of Proposed Rulemaking*, 15 FCC Rcd 15293, 15324 ("*De facto* control is determined on a case-by-case basis and includes the [*Intermountain Microwave*] criteria set forth in *Ellis Thompson*.") ("*Part 1 Fifth Report and Order*"); *Updating Part 1 Competitive Bidding Rules, Notice of Proposed Rulemaking*, 29 FCC Rcd 12426, 12439 (2014) ("the criteria of *Intermountain Microwave* . . . will continue to apply to any Commission licensee, including a small business, for purposes of assessing whether it can demonstrate that it retains *de facto* control of its business venture and spectrum authorization").

[50] *Commercial Realty St. Pete, Inc., Memorandum Opinion and Order*, 11 FCC Rcd 15374, 15378 (1996) (citation omitted).

equipment.[51] The Commission has indicated that "the controlling factor [under the first *Intermountain Microwave* criterion] is that [the licensee's] access is unimpeded."[52] Under the Management Services Agreement by and between American II and Northstar Wireless ("Management Agreement"), "American II shall, in accordance with directions and guidance from [Northstar Wireless] . . . build-out, manage and operate the [Northstar Wireless] Systems."[53] The Management Agreement also expressly provides "that [Northstar Wireless] and its Subsidiaries shall retain unfettered use of, and unimpaired access to, all facilities and equipment associated with the [Northstar Wireless] Systems . . . ."[54] Likewise, the Management Agreement makes clear that Northstar Wireless "shall have access, at all reasonable times during normal business hours, to the books and records maintained by American II pursuant to . . . this Agreement . . . ."[55]

b. Control of Daily Operations. The second *Intermountain Microwave* criterion relates to who controls daily operations. Under the Amended Northstar Spectrum Agreement, Northstar Manager, as the manager of Northstar Spectrum, has the "exclusive right and power to

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[51] Under *Intermountain Microwave*, "the Commission has interpreted . . . *de facto* control to require that the licensees exercise close working control of . . . the actual facilities/equipment operating the radiofrequency (RF) energy . . . ." *Facilitating the Provision of Spectrum-Based Services to Rural Areas and Promoting Opportunities for Rural Telephone Companies to Provide Spectrum-Based Services, Report and Order and Further Notice of Proposed Rule Making*, 19 FCC Rcd 19078, 19138 (2004) ("*Rural Services Order*").

[52] *Brian L. O'Neill, Memorandum Opinion and Order and Notice of Apparent Liability*, 6 FCC Rcd 2572, 2775 (1991) ("*O'Neill*").

[53] Management Agreement § 2.1 (emphasis added).

[54] *Id*., § 4.1. Section 4.1 of the Management Agreement also makes clear that nothing in the agreement "is intended to, nor shall it be construed to, give American II *de jure* or *de facto* control over [Northstar], its subsidiaries, the [Northstar] licenses, or the [Northstar] Systems." *Id.*

[55] Management Agreement §§ 8.1, 8.6.

manage, operate, and control" Northstar Spectrum, including "all specific rights and powers required or appropriate for the day-to-day management of [Northstar Spectrum's] business . . ."[56] Likewise, that agreement makes clear that "no Member or representative [other than Northstar Manager] shall have any right or authority to take any action on behalf of the [Northstar Spectrum] with respect to third parties or to bind [Northstar Spectrum]."[57]

Similarly, the Management Agreement is clear that "Northstar Spectrum . . . as the sole member and manager of the [Northstar Wireless], shall retain authority and ultimate control over the day-to-day operations of [Northstar Wireless] and its Subsidiaries . . . ."[58] In addition, all services provided to Northstar Wireless by American II under the Management Agreement are to be provided in accordance with the review, oversight, directions and/or guidance of Northstar Wireless.[59]

c. Determination and Carrying Out of Policy Decisions. The third *Intermountain Microwave* criterion relates to who determines and carries out the policy decisions, including preparing and filing applications with the Commission. Under the Amended Northstar Spectrum Agreement, Northstar Manager, as the manager of Northstar Spectrum, has the "exclusive right

[56] Amended Northstar Spectrum Agreement § 6.1.

[57] *Id.*

[58] Management Agreement § 4.1.

[59] *See id.*, §§ 2.1; 2.2; 9.1(a). The Commission has endorsed the use of management agreements with a broad scope provided that ultimate responsibility is retained by the licensee, concluding that "limiting managers to discrete 'subcontractor' functions . . . could prevent designated entities from drawing on managers with broad expertise. [W]hether a manager undertakes a large number of operational functions is irrelevant to the issue of control so long as ultimate responsibility for those functions resides with the licensee." *Fifth MO&O*, 10 FCC Rcd at 451 (footnote omitted). *See also Bloomington-Normal MSA Limited Partnership, Memorandum Opinion and Order*, 2 FCC Rcd 5427, 5428 (Com. Car. Bur. 1987) ("*Bloomington*") (the requirements of *Intermountain Microwave* do not prevent a minority partner from participating in system operation as long as such participation does not rise to the level of control).

and power to manage, operate, and control [Northstar Spectrum] and to make all decisions necessary or appropriate to carry on the business affairs of [Northstar Spectrum] . . . ."[60] Northstar Manager is responsible for the development of Northstar Spectrum's initial and subsequent five-year business plans and all annual business plans, each of which shall be consistent with the five-year business plan.[61]

Likewise, under the Management Agreement, Northstar Wireless is responsible for the development of the annual business plan and budget governing American II's provision of services to it under the Management Agreement,[62] and American II is expressly prohibited from modifying any annual business plan or budget adopted by Northstar Wireless.[63] Northstar Spectrum, as the sole member and manager of Northstar Wireless, retains "authority and ultimate control over the day-to-day operations of [Northstar Wireless] and its Subsidiaries; the determination and implementation of policy and business strategy; the preparation and filing of all materials with the FCC and other Governmental Authorities . . . ."[64] To the extent that American II makes recommendations to Northstar Wireless regarding any service that may be offered using the Northstar Wireless systems, Northstar Wireless maintains "sole discretion" to "decide whether to cause [Northstar Wireless' network]" to "participate in any such plans."[65]

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[60] Amended Northstar Spectrum Agreement § 6.1.

[61] *Id.* §§ 6.5(a)-(b).

[62] Management Agreement § 9.7(a).

[63] *Id.* § 4.2(a)(i).

[64] *Id.* § 4.1.

[65] *Id.* § 2.3.

Northstar Wireless is also responsible for the development of its network construction schedule, construction plan, and technical services plan.[66]

d. Employment, Supervision, and Dismissal of Personnel. The fourth *Intermountain Microwave* criterion relates to who is in charge of employment, supervision, and dismissal of personnel. Under the Amended Northstar Spectrum Agreement, Northstar Manager "shall, subject to the terms of this Agreement, have the exclusive right and power to manage, operate and control [Northstar Spectrum] and to make all decisions necessary or appropriate to carry on the business and affairs of [Northstar Spectrum], including the authority to appoint, promote, demote and terminate executives who oversee the day-to-day activities of [Northstar Spectrum] . . . ."[67] And, as noted, "[e]xcept as determined by [Northstar Manager] pursuant to this Agreement, no Member or representative shall have any right or authority to take any action

[66] *Id.* § 9.1. Specifically, Northstar Wireless designates one or more individuals to form a committee to prepare drafts of these schedules and plans for Northstar Wireless' review, modification and approval. Northstar Wireless has sole discretion as to the identity of the committee members and may replace any committee member at any time for any reason or even eliminate the committee altogether (in which case Northstar Wireless shall perform the responsibilities of the committee). *Id.* However, the Management Agreement prohibits Northstar Wireless from requiring construction of its network prior to three years after the issuance to Northstar Wireless of the AWS-3 licenses that it won at auction. *Id.*

[67] Amended Northstar Spectrum Agreement § 6.1. Under the Amended Northstar Spectrum Agreement, prior written approval of American II is required, *inter alia*, for "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 . . . ." *Id.*, § 1.1 (definition of Significant Matter (xii)); § 6.3 (supermajority approval rights). This is precisely the type of permissible investor protection provision that the FCC has expressed approval of in this context before. *See, e.g.*, *Alaska Native Wireless*, 17 FCC Rcd at 4239 ("AT&T Wireless' ability to approve the payment of salaries equal to or greater than $ 200,000 per annum also is a permissible investor protection provision in the particular circumstances of Alaska Native Wireless' Applications, as it is limited in scope to senior executives of Alaska Native Wireless, who are likely to earn $ 200,000 or more per annum."); *Fifth MO&O*, 10 FCC Rcd at 448 ("non-majority or non-voting shareholders may be given a decision-making role (through supermajority provisions or similar mechanisms) in major corporate decisions that fundamentally affect their interests as shareholders" such as "setting compensation for senior management . . . .").

on behalf of [Northstar Spectrum] with respect to third parties or to bind [Northstar Spectrum]").[68]

Likewise, under the Management Agreement, "Northstar Spectrum, LLC, as the sole member and manager of [Northstar Wireless], shall retain authority and ultimate control over . . . the employment, supervision and dismissal of all personnel providing services under this Agreement . . . ."[69] In addition, the Management Agreement expressly provides that Northstar Wireless "shall have the right, subject to Applicable Law, (i) to require, upon reasonable notice, the replacement of any Systems Manager or any contact representative for any [Northstar Wireless] System; (ii) to require American II to reassign any employee such that the employee no longer works on any [Northstar Wireless] System or (iii) to reject any personnel proposed by American II as the Systems Manager or contact representative for any [Northstar Wireless] System."[70] And, the Management Agreement makes clear that Northstar Wireless "shall have the right, subject in each case to applicable local, state or federal laws, to require American II to discharge any Independent Contractor performing services under this Agreement, or to bar American II from hiring any specific Independent Contractor to perform services under this Agreement."[71]

e. Payment of Financing Obligations. The fifth *Intermountain Microwave* criterion relates to who is in charge of the payment of financing obligations, including expenses arising out of operations. Under the Amended Northstar Spectrum Agreement, Northstar Manager is responsible for preparing and adopting a "detailed annual budget" for Northstar

[68] Amended Northstar Spectrum Agreement § 6.1.

[69] Management Agreement § 4.1.

[70] *Id.* § 5.1(c).

[71] *Id.* § 5.2.

Spectrum that is consistent with Northstar Spectrum's five-year business plan, and American II does *not* have an approval right over the annual budget.[72] In addition, Northstar Manager has the exclusive right and power to select the financial institutions from which the [Northstar Spectrum] may borrow money.[73] And, the Amended Northstar Spectrum Agreement requires Northstar Manager to "cause [Northstar Wireless] and each of its Subsidiaries to, and [Northstar Wireless] shall and shall cause each of its Subsidiaries to, (i) to the extent that such entities have one or more deposit accounts, each maintain their own deposit account or accounts, separate from the accounts of American II and its Subsidiaries and joint ventures, with commercial banking institutions, and (ii) not commingle their funds with those of American II or any of its Subsidiaries or joint ventures . . . ."[74]

Under the Management Agreement, Northstar Spectrum also "shall retain authority and ultimate control over . . . the payment of all financial obligations and operating expenses (except for Out-of-Pocket Expenses and Allocated Costs, which shall be reimbursed by [Northstar Wireless] pursuant to ARTICLE VII) . . . ."[75] American II cannot cause Northstar Wireless or

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[72] *See* Amended Northstar Spectrum Agreement § 6.5(b).

[73] *Id.* § 6.1.

[74] *Id.* § 6.4(a).

[75] Management Agreement § 4.1. Out-of-pocket expenses are American II's reasonable and documented out-of-pocket expenses actually incurred in the execution and fulfillment of its obligations under the Management Agreement. *Id.* § 7.1(a)(i). Allocated costs are the actual costs of salaries, taxes, insurance and benefits for employees of American II who devote all or a portion of their time to performing American II's obligations under the Management Agreement that are allocated to Northstar. *Id.* § 7.1(a)(ii). Under the Management Agreement, "American II shall . . . provide to [Northstar Wireless] a statement of Out-of-Pocket Expenses and Allocated Costs incurred during that month, together with such documentation for the Out-of-Pocket Expenses and Allocated Costs as [Northstar Wireless] may reasonably request." *Id.* § 7.2(b). And, "[w]ithin ten (10) business days of the date on which [Northstar Wireless] has received an American II statement of Out-of-Pocket Expenses and Allocated Costs, [Northstar Wireless]

any of its subsidiaries that do not hold AWS-3 licenses to incur debt outside of the ordinary course of business; enter into contracts that have an individual value over $100,000 or an aggregate value over $250,000, or to be obligated to pay expenses over $100,000 (except if such expenses are pursuant to contracts executed by Northstar Wireless or its subsidiary).[76] And, American II cannot cause Northstar Wireless subsidiaries that hold AWS-3 licenses to incur any debt (irrespective of whether such debt is in the ordinary course of business), enter into contracts or commitments, or "otherwise obligate" such subsidiaries "in any respect."[77]

Under the Management Agreement, Northstar Wireless is responsible for the development of the annual budget governing American II's provision of services to it under the Management Agreement,[78] and American II is expressly prohibited from modifying any annual budget adopted by Northstar Wireless.[79] And, the Management Agreement establishes that "[a]ll expenses associated with the operation of [Northstar Wireless] Systems (except for Out-of-Pocket Expenses and Allocated Costs [which are discussed above]) shall be paid from [Northstar Wireless'] accounts [and] [t]here shall be no commingling of [Northstar Wireless'] and American II's funds."[80] Northstar Wireless must sign all checks and wire payment authorizations for non-recurring expenses in excess of $15,000 and all checks in excess of $25,000.[81] And, Northstar Wireless is responsible for "all annual federal, state, and local tax returns" and is

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shall remit to American II payment for all non-disputed charges set forth therein from [Northstar Wireless's] accounts." *Id.* § 7.2(c).

[76] *Id.* §§ 4.2(a)(ii)-(iv).

[77] *Id.* § 4.2(b)(iii).

[78] *Id.* § 9.7(a).

[79] *Id.* § 4.2(a)(i).

[80] *Id.* § 7.2(a).

[81] *Id.* § 7.3.

required to pay all such taxes, as well as "all other fees and assessments imposed on" Northstar Wireless and its subsidiaries.[82]

f. Receipt of Moneys and Profits from Operations. The sixth *Intermountain Microwave* criterion relates to who receives moneys and profits from the operation of the facilities. Under the Amended Northstar Spectrum Agreement, after implementing any special allocations addressing certain Treasury Department regulations, "[p]rofits with respect to any fiscal year shall be allocated (a) first, to the Members with negative Capital Account balances in proportion to and to the extent of such negative Capital Account balances; (b) second, to the Members as necessary so that their respective Capital Accounts are in the same proportion as their Percentage Interests and then (c) third, to the Members in accordance with their respective Percentage Interests".[83] And, the Amended Northstar Spectrum Agreement requires Northstar Manager to "cause [Northstar Wireless] and each of its Subsidiaries to, and [Northstar Wireless] shall and shall cause each of its Subsidiaries to, (i) to the extent that such entities have one or more deposit accounts, each maintain their own deposit account or accounts, separate from the accounts of American II and its Subsidiaries and joint ventures, with commercial banking institutions, and (ii) not commingle their funds with those of American II or any of its Subsidiaries or joint ventures . . . ."[84]

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[82] *Id.* § 8.8.

[83] Amended Northstar Spectrum Agreement §§ 3.1(a), 4.1; Northstar Wireless FCC Form 601, File Number 0006670613, Exhibit D: Amended Credit Agreement REDACTED (filed Mar. 23, 2015), First Amended and Restated Credit Agreement, by and between American AWS-3 Wireless II L.L.C., Northstar Wireless, LLC, and Northstar Spectrum, LLC, entered into as of October 13, 2014, § 2.3(e) ("Credit Agreement").

[84] Amended Northstar Spectrum Agreement § 6.4(a).

Separately, the Management Agreement expressly provides that Northstar Wireless "shall receive all monies and profits and bear the risk of loss from the operation of the [Northstar Wireless] Systems."[85] Likewise, as noted above, the Management Agreement establishes that "[Northstar Wireless] shall maintain its own bank account(s)," that "[a]ll receipts and profits associated with the operation of the [Northstar Wireless] Systems shall be deposited in [Northstar Wireless'] bank accounts," and that "[t]here shall be no commingling of [Northstar Wireless'] and American II's funds."[86] In summary, *de facto* control is held by Northstar Wireless and its formally controlling entities under all six *Intermountain Microwave* factors, as well as under Section 1.2110(c)(2)(i) of the Commission's Rules.

3. Petitioners' Claims Are Without Merit

Against this background, Petitioners' various claims are without merit.[87] For example, VTel's suggestions that DISH holds *de facto* control of Northstar Wireless directly conflict with or ignore established Commission precedent finding no conveyance of *de facto* control under substantially similar factual circumstances. First, VTel claims, in essence, that DISH provided the bulk of the Northstar Wireless capital through equity contributions and loans.[88] But, it is well established that DISH's indirect 85 percent equity investment in Northstar Wireless does not

[85] Management Agreement § 4.1.

[86] *Id.* § 7.2(a).

[87] In addition to VTel claims, which are addressed first, CTTI/Rainbow claim that Northstar Wireless and DISH engaged in a joint venture and CWA/NAACP claim that they have an identity of interest. *See* CTTI/Rainbow Petition at 8 ("DISH and its affiliates American II and American III engaged in and carried out a joint venture for bidding in Auction 97 . . . ."); CWA/NAACP Petition at 4 (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"). These arguments are without merit, and they are addressed last.

[88] *See* VTel Petition at 18.

convey *de facto* control of Northstar Wireless to DISH.[89] As explained above, DISH has no authority under the relevant governing documents to act on behalf of Northstar Spectrum or Northstar Wireless, and DISH's 85 percent equity investment does not provide DISH with any voting powers. DISH is granted the benefit of certain investor protections, which the Commission has repeatedly found not to convey either *de jure* or *de facto* control in this context.

Nor do the relative sizes of Doyon's and DISH's equity interests suggest that DISH controls Northstar Wireless under Commission precedent. In adopting the controlling interest standard in 2000, the Commission eliminated minimum equity requirements for controlling interests, recognizing that such requirements are "contrary to our goal of providing legitimate small businesses maximum flexibility in attracting passive financing;" would "limit a small business' ability to raise capital and undermine our intention of promoting small business participation in the highly competitive telecommunications marketplace;" and are not necessary "to ensure appropriate identification of an applicant's controlling interests if the principles of *de jure* and *de facto* control are applied."[90]

Indeed, since these rule changes were adopted, the Commission has routinely granted auctioned licenses to entities that qualified for small or very small business status with equity investment from otherwise non-qualified parties comparable to, and in some cases even greater than, the equity investment at issue here without questioning such control structure. These include:

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[89] Americans for Tax Reform claim that "there is significant evidence to suggest that Northstar and SNR were created only to serve as bidding 'vehicles' for Dish." Americans for Tax Reform Petition at 1 (footnote omitted). Aside from a citation to a *Wall Street Journal* article, the only "support" for this claim is that "Dish owns an 85 percent financial interest in [Northstar Wireless] and provided nearly all of the funding for the licenses that" Northstar Wireless won. *Id.*

[90] *Part 1 Fifth Report and Order*, 15 FCC Rcd at 15325-15326.

- King Street Wireless, L.P. (in which U.S. Cellular held a non-controlling 90 percent equity interest);[91]
- Barat Wireless, L.P. (in which U.S. Cellular held a non-controlling 90 percent equity interest);[92]
- Denali Spectrum License, LLC (in which Leap Wireless held a non-controlling 85 percent equity interest);[93]
- Royal Street Communications, LLC (in which MetroPCS held a non-controlling 85 percent equity interest);[94] and
- Salmon PCS LLC (in which Cingular Wireless held a non-controlling 85 percent equity interest).[95]

Each one of these cases involve applications for licenses offered *after* the 1998 *Baker Creek* decision on which VTel relies,[96] which decision predated the Commission's adoption of the

[91] *See* King Street Wireless L.P, FCC Form 175, File Number 0003247597, EXHIBIT 2 (filed Jan. 2, 2008); *Wireless Telecommunications Bureau Grants 700 MHz Band Licenses, Public Notice*, 24 FCC Rcd 14754 (WTB 2009) (granting 152 700 MHz A and B Block licenses offered in Auction 73 to King Street Wireless, L.P.).

[92] *See* Barat Wireless, L.P., FCC Form 175, File Number 0002605271, INDIRECT OWNERSHIP EXHIBIT (filed May 10, 2006); *Wireless Telecommunications Bureau Grants Advanced Wireless Service Licenses, Public Notice*, 22 FCC Rcd 8416 (WTB 2007) (granting 17 AWS-1 licenses offered in Auction 66 to Barat Wireless, L.P.).

[93] *See* Denali Spectrum License, LLC, FCC Form 175, File Number 0002605611, EXHIBIT A (filed July 7, 2006) at 4; *Wireless Telecommunications Bureau Grants Advanced Wireless Service Licenses, Public Notice*, 22 FCC Rcd 8416 (WTB 2007) (granting one AWS-1 license offered in Auction 66 to Denali Spectrum License, LLC).

[94] *See* Royal Street Communications, LLC, FCC Form 601, File Number 0002069525, EXHIBIT E at 5 (filed May 15, 2005); *Wireless Telecommunications Bureau Grants Broadband Personal Communications Services (PCS) Licenses, Public Notice*, 20 FCC Rcd 20184 (WTB 2005) (granting six Broadband PCS licenses offered in Auction 58 to Royal Street Communications, LLC).

[95] *See* Salmon PCS LLC, Form 601, File Number 0000365189, Exhibit E: Agreements & Other Instruments (Part 1) at 6 (filed Feb. 12, 2001); *Wireless Telecommunications Bureau Grants Forty-Five C and F Block Personal Communications Services (PCS) Licenses, Public Notice*, 16 FCC Rcd 18016 (WTB 2001) (granting 45 Broadband PCS licenses offered in Auction 35 to Salmon PCS LLC).

controlling interest standard in 2000. Indeed, there is a currently pending Auction 97 designated entity license application in which the non-controlling investor holds a 99 percent equity interest in the applicant.[97]

VTel argues that the amount of net capital provided by DISH suggests *de facto* control of Northstar Wireless,[98] but Northstar's Manager's equity investment in Northstar Wireless, as a percentage of total debt plus equity in Northstar Wireless, exceeds the levels established in the case of other designated entities to which the Commission has granted licenses, including the following:

- King Street Wireless, L.P. (in which the equity from the designated entity as a percentage of total debt plus equity equaled 1.71%);[99]
- Barat Wireless, L.P. (in which equity from the designated entity as a percentage of the total debt plus equity equaled 2.00%);[100]

[96] VTel asserts that the Commission should conclude that DISH has *de facto* control of Northstar by comparison to the decision of the Public Safety and Private Wireless Division in *Baker Creek Communications*, the facts of which VTel asserts are "strikingly similar" to those involving Northstar Wireless and DISH. VTel Petition at 17 (citing *Baker Creek Communications, L.P., Memorandum Opinion and Order*, 13 FCC Rcd 18709, 18712 (PSPWD 1998) ("*Baker Creek*")). As shown, however, VTel is wrong.

[97] *See* AWS Spectrum Bidco Corporation, FCC Form 601, File Number 0006670619, Amended Exhibit A – Ownership Information (filed Mar. 10, 2015).

[98] *See* VTel Petition at 17-18.

[99] *See* King Street Wireless L.P, FCC Form 175, File Number 0003247597, EXHIBIT 2 at 1; King Street Wireless L.P, FCC Form 601, File Number 0003379814, EXHIBIT D at 4; *Wireless Telecommunications Bureau Grants 700 MHz Band Licenses, Public Notice*, 24 FCC Rcd 14754 (WTB 2009) (granting 152 700 MHz A and B Block licenses offered in Auction 73 to King Street Wireless, L.P.).

[100] *See* Barat Wireless, L.P., FCC Form 175, File Number 0002605271, INDIRECT OWNERSHIP EXHIBIT; Barat Wireless, L.P, FCC Form 601, File Number 0002774772, EXHIBIT D at 3; *Wireless Telecommunications Bureau Grants Advanced Wireless Service Licenses, Public Notice*, 22 FCC Rcd 8416 (WTB 2007) (granting 17 AWS-1 licenses offered in Auction 66 to Barat Wireless, L.P.).

- Carroll Wireless, LP (in which equity from the designated entity as a percentage of the total debt plus equity equaled 0.69%);[101]
- Royal Street Communications, LLC (in which equity from the designated entity as a percentage of the total debt plus equity equaled 1.02%);[102] and
- Salmon PCS LLC (in which equity from the designated entity as a percentage of the total debt plus equity equaled 2.13%).[103]

And, according to the Commission, financing agreements of possible concern could be those that "essentially give[] the creditor the power to control the enterprise — for example, if the size of the debt is particularly large, the terms of the loan are not commercially reasonable, *and* the definition of default is unconventional."[104] Yet, VTel has made no suggestion that the terms of the credit relationship between Northstar Wireless and DISH are not commercially reasonable or in any way unconventional. Here, Northstar Manager contributed over $132 million to the capital of Northstar Spectrum, well beyond the "negligible amount" at issue in *Baker Creek*,[105]

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[101] *See* Carroll Wireless, LP, FCC Form 175, File Number 0581536056, REVISED EXHIBIT A at 1; Carroll Wireless, LP, FCC Form 601, File Number 0002069484, EXHIBIT E at 3; *Wireless Telecommunications Bureau Grants Broadband Personal Communications Services (PCS) Licenses, Public Notice*, 21 FCC Rcd 121 (WTB 2006) (granting 16 Broadband PCS licenses offered in Auction 58 to Carroll Wireless, LP).

[102] *See* Royal Street Communications, LLC, FCC Form 601, File Number 0002069525, EXHIBIT E at 5, 8; *Wireless Telecommunications Bureau Grants Broadband Personal Communications Services (PCS) Licenses, Public Notice*, 20 FCC Rcd 20184 (WTB 2005) (granting six Broadband PCS licenses offered in Auction 58 to Royal Street Communications, LLC).

[103] *See* Salmon PCS, LLC, FCC Form 601, File Number 0000365189, EXHIBIT E at 6; *Wireless Telecommunications Bureau Grants Forty-Five C and F Block Personal Communications Services (PCS) Licenses, Public Notice*, 16 FCC Rcd 18016 (WTB 2001) (granting 45 Broadband PCS licenses offered in Auction 35 to Salmon PCS LLC).

[104] *Implementation of Section 309(j) of the Communications Act – Competitive Bidding, Second Report and Order*, 9 FCC Rcd 2348, 2396 (1994) ("*Competitive Bidding Second Report and Order*").

[105] *Cf. Baker Creek*, 13 FCC Rcd at 18721-22.

and, unlike in *Baker Creek*,[106] Northstar Manager has the exclusive right and power to select the financial institutions from which [Northstar Spectrum] may borrow money.[107] As the Commission has made clear, "providing legitimate small businesses maximum flexibility in attracting passive financing" is consistent with its "intention of promoting small business participation in the highly competitive telecommunications marketplace" as long as "the principles of *de jure* and *de facto* control are applied."[108]

VTel also claims that "under the various agreements" submitted with the Northstar Wireless Form 601, "DISH remains liable for certain financial obligations of Northstar . . . which is an indicator of *de facto* control."[109] The lone example to which VTel points, however, is Section 11.4 of the Amended Northstar Spectrum Agreement (VTel cites to the corresponding provision in the original Northstar Spectrum Agreement), which provides that in the narrow circumstance that Northstar Manager fails to qualify as a "very small business" under the terms of the Commission's rules, American II shall pay to the Commission the aggregate amount of all payments (including any unjust enrichment payment) due to the Commission in connection with the transfer of control of the applicable licenses held by Northstar Wireless as a result of the redemption of the Northstar Manager members' interests.[110] VTel's claim fails. Section 11.4 does not operate to require DISH to assume the financial obligations of a designated entity in the normal course because it would only become effective if the Commission concluded that

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[106] *See id.* at 18722.

[107] *See* Amended Northstar Spectrum Agreement § 6.1.

[108] *Part 1 Fifth Report and Order*, 15 FCC Rcd at 15325-15326.

[109] VTel Petition at 18 (footnote omitted).

[110] *See* Amended Northstar Spectrum Agreement §§ 11.4(i), (ii). *See also* VTel Petition at 18-19 nn.47-48.

Northstar Manager did not qualify as a designated entity, if such failure caused Northstar Wireless to fail to retain the bidding credits, if American II requested that Northstar Manager's interests in Northstar Spectrum be redeemed and if such interests are actually redeemed. And, the Commission has *already* found a similarly-structured applicant with precisely this type of transaction term to be a qualified very small business licensee.[111]

Second, VTel argues that Northstar Wireless has no authority to raise capital without DISH's approval, noting that "DISH's prior consent is required before Northstar . . . can offer, issue, purchase, or repurchase equity interests or securities."[112] But, the Commission has been clear that investor protections such as this one are "a common practice to induce investment and ensure that the basic interests of such shareholders are protected."[113] And, in the designated entity context, the Commission explained "that allowing such provisions enhances the ability of designated entities to raise needed capital from strategic investors, thereby bolstering their financial stability and competitive viability."[114] Thus, the Commission was clear:

> under our case law non-majority or non-voting shareholders may be given a decision-making role (through supermajority provisions or similar mechanisms) in major corporate decisions that fundamentally affect their interests as shareholders without being deemed to be in *de facto* control.[115]

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[111] *See* Denali Spectrum License, LLC, FCC Form 601, File Number 0002774595, Exhibit D: Agreements and Other Instruments at 17 (filed Apr. 18, 2007) (establishing that, in a similar event, "Cricket shall promptly pay to the Commission, on behalf of Denali License and its subsidiaries, an amount equal to the aggregate amount of all payments due to the Commission as a result of, or as a condition to, the redemption of the Denali Manager's (or its permitted transferees') interests (including any unjust enrichment payment) . . . ."); *Wireless Telecommunications Bureau Grants Advanced Wireless Service Licenses, Public Notice*, 22 FCC Rcd 8416 (WTB 2007) (granting AWS-1 license offered in Auction 66 to Denali Spectrum License, LLC).

[112] VTel Petition at 19 (footnote omitted).

[113] *Fifth MO&O*, 10 FCC Rcd at 447-48.

[114] *Id.* at 448 (footnote omitted).

[115] *Id.* at 448 (footnote omitted) (emphasis added).

And, according to the Commission, "[s]uch decisions generally include . . . issuance or reclassification of stock . . . ."[116] The very provision about which VTel complains, therefore, has been expressly found not to confer *de facto* control.

Third, VTel argues that "the agreements restrict Northstar . . . from taking a wide range of actions without DISH's prior approval."[117] As examples, VTel argues "DISH's consent is required before" Northstar Wireless can:

> (i) incur indebtedness in excess of ten percent of the annual budget; (ii) merge, combine, or consolidate; (iii) initiate any bankruptcy proceeding; (iv) acquire any significant portion of assets from another person or form any partnership or joint venture; (v) change its business purpose; (vi) authorize or adopt any amendment to corporate formation documents; (vii) agree to pay any director, officer, employee, or agent $200,000 or more in a twelve-month period; (viii) acquire any new spectrum licenses; (ix) make any expenditure in excess of certain specified amounts; or (x) sell any asset outside the ordinary course of operation . . . .[118]

Yet, just as with the right to approve the issuance of new equity interests, these investor protection rights do not confer *de facto* control. The Commission has long permitted the use of investor protection provisions, including allowing the non-controlling investor the ability to consult with the applicant on the formation of the business plan and budget and approving the compensation of executive salaries, significant expenditures, and the incurrence of significant corporate debt, without finding that they confer *de facto* control on an otherwise non-controlling investor.[119] The Commission also has found that "requiring the minority shareholder's consent before the corporation can amend its by-laws or articles of incorporation is designed generally to

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[116] *Id.* (emphasis added).

[117] VTel Petition at 19.

[118] *Id.*

[119] *See Alaska Native Wireless*, 17 FCC Rcd at 4239-40.

safeguard the minority shareholder's investment by preventing the dilution of its stock holdings."[120] And, the investor protection provisions characterized above by VTel are of a kind, and often identical to, those that the Commission has found before not to confer *de facto* control to the non-controlling investor.[121]

Tellingly, VTel singles out one additional investor protection provision to attempt to suggest the improper transfer of *de facto* control to DISH. According to VTel:

> These restrictions go beyond mechanisms that are designed to protect nonmajority or non-voting shareholders, without such shareholders being deemed to be in de facto control. For example, while a provision that requires a supermajority or similar mechanism to change compensation for senior management may not indicate de facto control, DISH controls the compensation of every director, officer, employee, or agent of Northstar . . . above a specified threshold.[122]

But, the only provision characterized above by VTel that fits this description is the term requiring the approval of American II for "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 . . . ."[123] This is a type of provision, however, that has been expressly found by the Commission in the past not to confer *de facto* control.[124]

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[120] *MCI Communications Corporation and British Telecommunications plc, Declaratory Ruling and Order*, 9 FCC Rcd 3960, 3962-3963 (internal citations omitted) (1994) ("*MCI* ").

[121] *See* Denali Spectrum License, LLC, FCC Form 601, File Number 0002774595, Exhibit D: Agreements and Other Instruments at 9-11 (filed Apr. 18, 2007) (describing investor protection provisions); *Wireless Telecommunications Bureau Grants Advanced Wireless Service Licenses, Public Notice*, 22 FCC Rcd 8416 (WTB 2007) (granting one AWS-1 license offered in Auction 66 to Denali Spectrum License, LLC).

[122] VTel Petition at 19 n.50 (citation omitted) (emphasis added).

[123] *See id.* at 19 (item vii); Amended Northstar Spectrum Agreement §§ 6.3; 1.1 (definition of "Significant Matter").

[124] *See, e.g.*, *Alaska Native Wireless*, 17 FCC Rcd at 4239 (the Wireless Bureau found to be a "permissible investor protection" the right for non-attributable investors to approve senior executive salaries in excess of $200,000); Denali Spectrum License, LLC, FCC Form 601, File

Fourth, VTel suggests that DISH has *de facto* control of Northstar Wireless because of the presence of a Management Agreement under which American II will help to build out and manage the Northstar Wireless systems.[125] According to VTel, "a DISH subsidiary will arrange for (a) administrative, accounting, billing, credit, collection, insurance, purchasing, clerical, and other general services necessary to administer the wireless systems of Northstar . . . (b) operational, engineering, construction, maintenance, repair, and other technical services; (c) marketing, sales, advertising, and other promotional services; and (d) assistance in the preparation of filings with regulatory authorities and negotiation of transactions involving the AWS-3 licenses."[126]

But, VTel fails to mention that Section 2.1 of the Management Agreement begins by providing that "American II shall, in accordance with directions and guidance from [Northstar Wireless] and subject to the limitations on American II's authority described in ARTICLE IV, build-out, manage and operate the [Northstar Wireless] Systems."[127] Section 2.1 also provides that Northstar Wireless alone "shall determine the nature and type of services offered using the [Northstar Wireless] Systems, the terms upon which the [Northstar Wireless] Systems' services

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Number 0002774595, Exhibit D: Agreements and Other Instruments at 11 (filed Apr. 18, 2007) (giving non-controlling investor right to approve any agreement or arrangement, written or oral, to pay any director, officer, employee or agent of Denali or any of its subsidiaries $200,000 or more in any twelve-month period). *See also Fifth MO&O*, 10 FCC Rcd at 448 ("non-majority or non-voting shareholders may be given a decision-making role (through supermajority provisions or similar mechanisms) in major corporate decisions that fundamentally affect their interests as shareholders" such as "setting compensation for senior management . . . .").

[125] *See* VTel Petition at 19.

[126] *Id.* at 19-20 (citing Management Agreement § 2.1).

[127] Management Agreement § 2.1 (emphasis added).

are offered, and the prices charged for its services . . . ."[128] These provisions expressly demonstrate that *de facto* control is held by Northstar Manager, not DISH.

Also ignored by VTel is the fact that Article IV of the Management Agreement makes clear that:

> Northstar Spectrum . . . as the sole member and manager of the [Northstar Wireless], shall retain authority and ultimate control over the day-to-day operations of [Northstar Wireless] and its Subsidiaries; the determination and implementation of policy and business strategy; the preparation and filing of all materials with the FCC and other Governmental Authorities; the employment, supervision and dismissal of all personnel providing services under this Agreement; the payment of all financial obligations and operating expenses (except for Out-of-Pocket Expenses and Allocated Costs, which shall be reimbursed by [Northstar Wireless] pursuant to ARTICLE VII) and the negotiation and execution of all contracts to be entered into by the [Northstar Wireless] or any of its Subsidiaries. The Parties agree that [Northstar Wireless] and its Subsidiaries shall retain unfettered use of, and unimpaired access to, all facilities and equipment associated with the [Northstar Wireless] Systems and shall receive all monies and profits and bear the risk of loss from the operation of the [Northstar Wireless] Systems. Nothing in this Agreement is intended to, nor shall it be construed to, give American II *de jure* or *de facto* control over [Northstar Wireless], its Subsidiaries, the Licenses, or the [Northstar Wireless] Systems.[129]

Section 4.2 of the Management Agreement also enumerates detailed limitations on the authority of American II thereunder, including action American II may not take without Northstar Wireless' prior written authority[130] and actions American II shall have no authority to take.[131] In addition, as noted above, all services provided to Northstar Wireless by American II under the

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[128] *Id.*

[129] *Id.* § 4.1.

[130] *See id.* § 4.2(a).

[131] *See id.* § 4.2(b).

Management Agreement are to be provided in accordance with the review, oversight, directions and/or guidance of Northstar Wireless.[132]

In the end, the Commission has endorsed the use of management agreements with a broad scope provided that ultimate responsibility is retained by the licensee, concluding that "limiting managers to discrete 'subcontractor' functions . . . could prevent designated entities from drawing on managers with broad expertise. [W]hether a manager undertakes a large number of operational functions is irrelevant to the issue of control so long as ultimate responsibility for those functions resides with the licensee."[133] It is the "final say" on policy-making that matters in an analysis of *de facto* control:

> The factual record in this proceeding demonstrates that Thompson has always had the final say on matters of policy. While Amcell is free to recommend courses of action or policies for the system, all such proposals require Thompson's approval before being put into effect. Part of the expertise of a turnkey manager is in policy making, and Commission precedent makes clear that the adoption by the licensee of a manager's policy recommendations does not affect the licensee's control over his system. . . .[134]

Here, Northstar Wireless is the decision-maker on all such matters, and the role of DISH in connection therewith is to make recommendations that Northstar Wireless is free to accept or reject. Industry and market expertise is something that Northstar Wireless should be able to tap

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[132] *See* Management Agreement §§ 2.1; 2.2; 9.1(a).

[133] *Fifth MO&O*, 10 FCC Rcd at 451 (footnote omitted). *See also Bloomington*, 2 FCC at 5428 (the requirements of *Intermountain Microwave* do not prevent a minority partner from participating in system operation as long as such participation does not rise to the level of control).

[134] *Ellis Thompson Corporation, Summary Decision of Administrative Law Judge Joseph Chachkin*, 10 FCC Rcd 12554, 12559 (ALJ 1995) (footnotes omitted) (emphasis added) ("*Ellis Thompson ALJ Decision*"). Likewise, In *O'Neill*, the FCC noted, with approval, that policy changes "such as the adoption of [the non-controlling party's] billing vendor recommendation and use of its roaming agreements [] were specifically approved of and consented to by [the controlling party]." *O'Neill*, 6 FCC Rcd at 2575.

as it enters the wireless business while Northstar Wireless exercises its independent judgment about its policies and policy choices. Thus, VTel's claims of *de facto* control are based on an incomplete reading of the Management Agreement and lack any merit.

Finally, VTel claims that "DISH has the power to control Northstar's . . . business plans and budgets."[135] According to VTel, Northstar Wireless is "prohibited from taking any action inconsistent with the business plans they develop in consultation with DISH and cannot enter into any agreement or arrangement involving a payment or liability greater than 10 percent of [its] annual budget[]."[136] This appears to be 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."[137] In *Baker Creek*, the relevant partnership agreement "require[d] that the Limited Partner approve Baker Creek's business plan and budget."[138] Among other things, the Bureau concluded that the limited partner's control over the business plan and budget gave it the power to dictate the amount of its own compensation under a management agreement.[139]

Here, in stark contrast, American II has no such control over the Northstar Wireless business plan and budget. Under Section 6.5 of the Amended Northstar Spectrum Agreement, Northstar Manager adopts the five-year high-level business plan of Northstar Spectrum and Northstar Wireless, and Northstar Manager, after consultation with American II, may update the

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[135] VTel Petition at 20.

[136] *Id.* (footnote omitted) (citing Northstar Spectrum Agreement §§ 6.3, 6.5). The permissibility of routine investor protection provisions, such as approval over payment or liability greater than 10 percent of annual budgets, is addressed above.

[137] *Baker Creek*, 13 FCC Rcd at 18719 (footnote omitted).

[138] *Id.* at 18722.

[139] *See id.* at 18723.

five-year business plan and modify the plan to reflect any material changes affecting Northstar Spectrum and Northstar Wireless or their business, including changes in availability of capital.[140]

Annual business plans and annual budgets are also developed exclusively by Northstar Manager, in consultation with American II.[141] Following the initial annual business plan and annual budget, each annual business plan and annual budget shall be consistent with the five-year business plan as in effect at such time.[142] In addition, Northstar Manager may, from time to time, in the exercise of its reasonable discretion, modify the annual business plan and budget, after consultation with American II, to reflect any modification made to the five-year business plan in accordance with Section 6.5(a).[143] The Amended Northstar Manager Agreement makes clear that "[n]o Business Plans or budgets shall be adopted except in accordance with the provisions of this Section 6.5."[144] DISH does not have any approval rights over any budgets or business plans.

Unlike *Baker Creek*, the structure in this case is consistent with the structure of previous applicants to which the Commission has awarded licenses. For example, in *Alaska Native Wireless*, the petitioner claimed that AT&T Wireless had *de facto* control, in the form of negative control, over key aspects of Alaska Native Wireless' business such as the development of the business plan and budget and the incurrence of significant corporate expenditures. But, the Wireless Bureau made clear that "allowing the non-controlling investor the ability to consult with the applicant on the formation of the business plan and budget" was precisely the type of

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[140] *See* Amended Northstar Spectrum Agreement § 6.5(a).

[141] *See id.* § 6.5(b).

[142] *See id.*

[143] *See id.*

[144] *Id.* § 6.5(c).

investor protection provisions that have been approved by the Commission.[145] Thus, contrary to the suggestion of VTel, the terms of Northstar Wireless' business planning and budgeting authority with respect to DISH are squarely consistent with the *Alaska Native Wireless* precedent, among others, and are fundamentally different from the *Baker Creek* fact pattern.

In short, VTel's challenges to *de facto* control of Northstar Wireless are without merit in light of the ownership structure and control terms that VTel simply ignores and in light of specific, on-point Commission precedent for every "example" cited by VTel that, contrary to VTel's claims, demonstrates that *de facto* control remains with Northstar Manager.

Finally, the contention that Northstar Wireless and DISH formed a joint venture or otherwise have an "identity of interest" is also without merit.[146] The collaboration formed between Northstar Wireless and DISH conforms in all aspects of the Commission's rules regarding designated entities, and "control" of Northstar Wireless, as defined by the Commission, remains with Northstar Manager at all times. CTTI/Rainbow make no effort to square their "joint venture" allegations with the Commission's separate, detailed standards for non-attributable investment. If CTTI/Rainbow were to be believed, the Commission's extensive regime governed by application of the principles of *de jure* and *de facto* control[147] — designed as it was to achieve the "goal of providing legitimate small businesses maximum flexibility in

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[145] *Alaska Native Wireless*, 17 FCC Rcd at 4239.

[146] *See* CTTI/Rainbow Petition at 8 ("DISH and its affiliates American II and American III engaged in and carried out a joint venture for bidding in Auction 97 . . . ."); CWA/NAACP Petition at 4 ("The collusive bidding that DISH [and] Northstar . . . engaged in during Auction 97 provides convincing evidence that these entities share an 'identity of interest' controlled by DISH").

[147] *See, e.g.*, *Part 1 Fifth Report and Order*, 15 FCC Rcd at 15325 ("If any investor has either *de jure* or *de facto* control of the applicant, that investor's gross revenues will be attributed to the applicant for purposes of determining whether the applicant qualifies as a small business.").

attracting passive financing"[148] — would be rendered useless, as all such investments would be considered to be "joint ventures" creating an "affiliation."[149] Separately, the Commission determines whether there is an "identity of interest" through an examination of existing familial or spousal relationships[150] or of common existing investments, stock ownership, or officers and directors,[151] none of which is even suggested to exist here. The CWA/NAACP reference to the "identity of interest" concepts is, thus, misplaced.

B. Northstar Wireless' Bidding in Auction 97 Was Consistent with the Commission's Rules and The Product of Northstar Manager's *De Facto* Control

Northstar Wireless's bidding in Auction 97 was squarely consistent with the Commission's Rules and was the product of Northstar Manager's *de facto* control. Assertions to the contrary are wrong. The Commission's rules expressly permit joint bidding arrangements of the kind established between Northstar Wireless, American AWS-3 Wireless I L.L.C. ("American I"), and SNR Wireless LicenseCo, LLC ("SNR") that are entered into and disclosed ahead of the auction. Moreover, there are many examples of licenses awarded in prior Commission auctions to various designated entities engaged in precisely the kind of joint bidding arrangements as entered into by Northstar Wireless, American I, and SNR in Auction 97.

Under the Commission's Rules, an applicant for competitive bidding must include within

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[148] *Id.* at 15325-26.

[149] Plainly, if the Northstar Wireless-DISH relationship constituted a "joint venture" under the Commission's "affiliation" rules, so to would have myriad designated entity transactions over the years. That cannot have been the case.

[150] *See, e.g., Application of Ztark Communications For New Broadband Radio Service Stations in the Albuquerque, New Mexico (BTA008) and Las Cruces, New Mexico (BTA244) Basic Trading Areas*, *Memorandum Opinion and Order*, 28 FCC Rcd 14755, 14759 (WTB 2013).

[151] *See, e.g., AirGate*, 14 FCC Rcd at 11843.

its pre-auction short-form application "[a]n exhibit, certified as truthful under penalty of perjury, identifying all parties with whom the applicant has entered into partnerships, joint ventures, consortia or other agreements, arrangements or understandings of any kind relating to the licenses being auctioned, including any such agreements relating to the post-auction market structure."[152] In addition, the applicant must include a "[c]ertification under penalty of perjury that it has not entered and will not enter into any explicit or implicit agreements, arrangements or understandings of any kind with any parties other than those identified pursuant to paragraph (a)(2)(viii) regarding the amount of their bids, bidding strategies or the particular licenses on which they will or will not bid."[153]

And, Section 1.2105(c)(1) of the Commission's Rules provides that:

> after the short-form application filing deadline, all applicants for licenses in any of the same geographic license areas are prohibited from cooperating or collaborating with respect to, discussing with each other, or disclosing to each other in any manner the substance of their own, or each other's, or any other competing applicants' bids or bidding strategies, or discussing or negotiating settlement agreements, until after the down payment deadline, unless such applicants are members of a bidding consortium or other joint bidding arrangement identified on the bidder's short-form application pursuant to §1.2105(a)(2)(viii).[154]

Under the Commission's Rules, therefore, auction applicants may disclose to and cooperate, collaborate, and discuss with another applicant the substance of their own, or each other's, bids or bidding strategies and settlement agreements if the applicant is a member of a joint bidding arrangement with the other applicant and it is identified on the applicant's short-form application.

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[152] 47 C.F.R. § 1.2105(a)(2)(viii).

[153] *Id.*, § 1.2105(a)(2)(ix) (emphasis added).

[154] *Id.*, § 1.2105(c)(1) (emphasis added).

Here, Northstar Wireless followed these rules, a fact that even VTel concedes.[155] Together with Doyon, Northstar Manager, and Northstar Spectrum, Northstar Wireless entered into a Bidding Protocol and Joint Bidding Arrangement with American II and (for, the purposes of the joint bidding arrangement, American I) as of September 12, 2014 ("Northstar Wireless-DISH Joint Bidding Arrangement"),[156] the deadline for submitting the Auction 97 FCC Form 175 ("short form") application.[157] Northstar Wireless then identified the parties to the Northstar Wireless-DISH Joint Bidding Arrangement in the "Agreements with Other Parties and Joint Bidding Arrangements" section of its Auction 97 short form application,[158] and Northstar Wireless even summarized the terms of the Northstar Wireless-DISH Joint Bidding Arrangement in a detailed exhibit to its Auction 97 short form application.[159]

Likewise, together with Doyon, Northstar Manager, and Northstar Spectrum, Northstar Wireless entered into a joint bidding arrangement Letter Agreement with American I, American II, American AWS-3 Wireless III L.L.C. ("American III") (a DISH subsidiary), SNR Wireless

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[155] *See* VTel Petition at 11 ("Northstar and SNR . . . disclosed the existence of a Bidding Protocol and Joint Bidding Arrangement with DISH (through its affiliates).").

[156] *See* Northstar Wireless, LLC FCC Form 601, File Number 0006670613, Exhibit D: Bidding Protocol & Joint Bidding Arrange.REDACTED (filed Apr. 20, 2015), Bidding Protocol and Joint Bidding Arrangement, by and among Doyon, Limited, Northstar Manager, LLC Northstar Spectrum, LLC, Northstar Wireless, LLC, American AWS-3 Wireless II L.L.C. and American AWS-3 Wireless I L.L.C., entered into as of September 12, 2014.

[157] *See Auction of Advanced Wireless Services (AWS-3) Licenses Scheduled for November 13, 2014; Notice and Filing Requirements, Reserve Prices, Minimum Opening Bids, Upfront Payments, and Other Procedures for Auction 97, Public Notice*, 29 FCC Rcd 8386, 8406-07 (2014) ("*Auction 97 Procedures PN*").

[158] *See* Northstar Wireless, LLC FCC Form 175, File Number 0006458325, Agreements: Northstar Bidding Protocol & Joint Bidding Arrang. (filed Sept. 12, 2014) ("Northstar Wireless Form 175").

[159] *See id.*, EXHIBIT C: Agreements and Other Instruments (filed September 12, 2014) at 25-27 ("Exhibit C").

LicenseCo, LLC, SNR Wireless HoldCo, LLC, and SNR Wireless Management, LLC as of September 12, 2014 ("Northstar Wireless-SNR-DISH Joint Bidding Arrangement").[160] Northstar Wireless then identified the parties to the Northstar Wireless-SNR-DISH Joint Bidding Arrangement in the "Agreements with Other Parties and Joint Bidding Arrangements" section of its Auction 97 short form application,[161] and Northstar Wireless even summarized the terms of the Northstar Wireless-SNR-DISH Joint Bidding Arrangement in a detailed exhibit to its Auction 97 short form application.[162] Thus, consistent with the Commission's Rules, the Northstar Wireless bidding collaboration was public and clearly disclosed in Northstar Wireless's pre-Auction 97 short form application.[163]

Moreover, the *purposes* of the parties' collaboration were fully disclosed. The Northstar Wireless-DISH Joint Bidding Arrangement recognizes that the Amended Northstar Spectrum Agreement contemplates the coordination of Northstar Wireless and American II "through a management agreement, a trademark license agreement, and other arrangements . . . ."[164] The agreement then expresses the parties' intentions regarding their arrangement:

> the parties desire to coordinate bidding in the Auction to comply with spectrum aggregation limits or policies that may be applied under the FCC Rules (as

[160] *See* Northstar Wireless, LLC FCC Form 601, File Number 0006670613, Exhibit D: SNR Joint Bidding Agreement (filed Mar. 23, 2015), Joint Bidding Arrangement, by and between American AWS-3 Wireless I L.L.C., American AWS-3 Wireless II L.L.C., Northstar Wireless, LLC, Northstar Spectrum, LLC, Northstar Manager, LLC, Doyon, Limited, American AWS-3 Wireless III L.L.C., SNR Wireless LicenseCo, LLC, SNR Wireless HoldCo, LLC, and SNR Wireless Management, LLC, entered into as of September 12, 2014.

[161] *See* Northstar Wireless Form 175, Agreements: Letter Agreement.

[162] *See id.*, EXHIBIT C at 27-28.

[163] The Commission reviewed all of these short-form disclosures, including those related to the joint bidding arrangements, and it found all three applicants qualified to participate in Auction 97.

[164] Northstar Wireless-DISH Joint Bidding Arrangement, Recitals.

> defined in the [Amended Northstar Spectrum] Agreement), to facilitate the consolidation of their systems as and to the extent contemplated in the [Amended Northstar Spectrum] Agreement, and to facilitate the Business of the Company as set forth in the [Amended Northstar Spectrum] Agreement . . . .[165]

And, the specific joint bidding provision makes clear that "[t]he parties will coordinate bidding in the Auction to comply with spectrum aggregation limits or policies that may be applied under the FCC Rules (as defined in the Northstar LLC Agreement), to facilitate the consolidation of their systems as and to the extent contemplated in the Northstar LLC Agreement, and to facilitate the Business of the Company as set forth in the Northstar LLC Agreement."[166] This purpose was also summarized publicly in Northstar Wireless' pre-auction short form application.[167]

It is important to note that the Commission has never found the conveyance of *de facto* control through the use of analogous bidding agreements in multiple past spectrum auctions. For example, joint bidding agreements — including comparable coordinated bidding arrangements — were used by Alaska Native Wireless and AT&T in Auction 35;[168] SVC BidCo and Sprint in Auction 35;[169] Salmon PCS and Cingular in Auction 35;[170] Cook Inlet and VoiceStream in Auction 35;[171] VistaPCS and Verizon in Auction 58;[172] Alaska Native Broadband and Leap

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[165] *Id.*

[166] *Id.* at § 4.

[167] *See* Northstar Wireless Form 175, EXHIBIT C at 27-28.

[168] *See* Alaska Native Wireless, LLC, FCC Form 601, File Number 0000363827, EXHIBIT E: Agreements and Other Instruments (filed Apr. 8, 2002).

[169] *See* SVC BidCo, L.P., FCC Form 175, File Number 0351045363, EXHIBIT B: Joint Bidding Arrangement (filed Nov. 5, 2000).

[170] *See* Salmon PCS, LLC, FCC Form 175, File Number 0351034584, EXHIBIT B Joint Bidding Arrangements (filed Nov. 28, 2000).

[171] *See* Cook Inlet/VS GSM V PCS, LLC, FCC Form 601, File Number 0000365280, EXHIBIT E: Joint Bidding Arrangements and Other Agreements (filed Feb. 12, 2001).

Wireless in Auction 58;[173] and Denali and Leap Wireless in Auction 66.[174] In addition to these seven joint bidding agreements, a limited search of the records of Auctions 11, 35, 58, and 73 reveals references to joint bidding agreements involving at least eleven other license applications.[175] In no instance did the Commission find the vesting of *de facto* control through the use of such joint bidding.

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[172] *See* Vista PCS, FCC Form 175, File Number 0581455272, EXHIBIT B-Agreements with Other Parties/Joint Bidding Arrangements (filed Nov. 30, 2004).

[173] *See* Alaska Native Broadband 1 License, LLC, FCC Form 601, File Number 0002069129, EXHIBIT E: Agreements and Other Instruments (filed July 22, 2005).

[174] *See* Denali Spectrum License, LLC, FCC Form 601, File Number 0002774595, EXHIBIT D: Agreements and Other Instruments (filed Apr. 8, 2007).

[175] *See e.g.,* Cook Inlet and Western Wireless JBA (Auction 11), *see* Cook Inlet Western Wireless PV/SS PCS, L.P., FCC Form 601, File Number 00067CWL97, EXHIBIT F (filed Nov. 20, 1998); Cook Inlet and VoiceStream (Auction 35), *see* Cook Inlet/VS GSM V PCS, LLC, FCC Form 601, File Number 0000365280, EXHIBIT E (filed 2/12/01); ConnectBid and Nextel Spectrum Acquisition Corp. (Auction 35), *see* Connectbid, LLC, FCC Form 175, File Number 0351654207, EXHIBIT B (filed Nov. 6, 2000); Poplar PCS and Verizon (Auction 35), *see* Poplar PCS-Central, FCC Form 175, File Number 0351653248, EXHIBIT B (filed Nov. 28, 2000); Chequamegon Communications, WWW Broadband and West Central Telephone Association (Auction 66), s*ee* Chequamegon Communications Cooperative, Inc., FCC Form 175, File Number 0002602553, Agreements Tab references "Joint Bidding Agreement"; Wittenberg Telephone Company, Iowa Integra Consortium, NEIT Wireless. Dakota Wireless Group and NSIGHTEL WIRELESS (Auction 66), *see* Wittenberg Telephone Company, FCC Form 601, File Number 0002774587, EXHIBIT D (filed Oct. 19, 2006); Horry Telephone Cooperative and Sandhill Communications (Auction 66), s*ee* Wittenberg Telephone Company, FCC Form 601, File Number 0002774587, EXHIBIT D (filed Oct. 19, 2006); I-700, Grand River Communications and Iowa Intelegra Consortium in (Auction 73), s*ee* I-700, LLC, FCC Form 175, File Number 0003248044, Agreements Tab references "Joint Bidding Agreement No. 1" and "Common bidders agreement"; Red River Telephone Association and Polar Communications Mutual Aid Auction 73), *see* Red River Rural Telephone Association, Inc., FCC Form 175, File Number 0003244562, Agreement Tab references "Joint Bidding and Partitioning Agreement"; Jack E. Robinson and NatTel (Auction 73), *See* NatTel, LLC, FCC Form 175, File Number 0003246475, GENERAL EXHIBIT at 6 (filed Jan. 4, 2008); Muskrat Wireless and US Cellular (Auction 73), s*ee* Muskrat Wireless, LP, FCC Form 175, File Number 0003246377, EXHIBIT A - Supplemental Info rev 1/4/08 (filed Jan. 4, 2008); *see* Triangle Telephone Cooperative and Nemont Communications (Auction 97), *see* Triangle Communication System, Inc., FCC Form 175, File Number 0006458028, EXHIBIT A – SUPPLEMENTAL INFORMATION (filed Sept. 9, 2014); *see* FTC Management Group, Horry

Against this background, VTel's claims are unpersuasive. First, according to VTel, *de facto* control of Northstar Wireless was allegedly ceded to DISH because DISH had a representative physically present in the same location with Northstar Wireless and had "veto power over deviations from the bidding plans to which" Northstar Wireless and DISH had agreed.[176] In somewhat similar fashion, CTTI/Rainbow argue that, because American II "appointed a member to Northstar's three-member auction committee (the other two members being appointed by Northstar)," then American II is effectively a controlling interest of Northstar."[177] VTel and CTTI/Rainbow are wrong.

As a threshold matter, the idea that Northstar Wireless and DISH would communicate in person during the Auction for the purposes of discussing, cooperating, or collaborating regarding bids or bidding strategies is entirely consistent with both the purpose and practicalities of the collaboration and with Northstar Wireless' short-form disclosures. VTel itself quotes from the Northstar Wireless pre-Auction 97 short form application for the discussion that the parties' "coordination will be effected by communications among authorized representatives of the parties at regular intervals during the auction."[178] There is nothing in the Commission's Rules that suggests such coordination must be done by telephone or by any other means, and there is nothing that suggests that effecting the agreement in person is somehow of a different character than coordination by other means.

Telephone Cooperative, Sandhill Communications and Atlantic Seawinds Communications (Auction 97), s*ee* FTC Management Group, Inc., FCC Form 175, File Number 0006455134, Agreements Tab references "Joint Bidding Agreement."

[176] VTel Petition at 21. *See also id.* at 21-22.

[177] CTTI/Rainbow Petition at 7.

[178] VTel Petition at 11 (footnote omitted) (citing Northstar Wireless Short-Form, Exhibit C at 27-28).

Moreover, the auction committee format used under the Northstar Wireless-DISH Joint Bidding Agreement was fully consistent with Northstar Manager's *de facto* control. Northstar Manager appointed the majority of the Auction Committee members, including the Auction Committee Chair and Bidding Manager, and Northstar Manager had final decision-making power over choices regarding specific bids within the construct of the agreement.[179] VTel attempts to raise issue with the fact that the agreement providing the non-controlling member with approval rights over amendments to that agreement related to the fundamental nature of the agreed upon bidding budget. However, that is entirely consistent with the Commission's precedent on *de facto* control.

As discussed above, the Commission has made clear that "non-majority or non-voting shareholders may be given a decision-making role (through supermajority provisions or similar mechanisms) in major corporate decisions that fundamentally affect their interests as shareholders without being deemed to be in de facto control,"[180] and such major corporate decisions include the right to vote on "significant expenditures."[181] Critically, nothing in the Northstar Wireless-DISH Joint Bidding Agreement permitted DISH to require the Northstar Wireless auction committee chair or the bidding manager to *place* any bid that he or she did not wish to make. In this regard, it is squarely analogous to the facts in *MCI*, where the Commission found it significant that "while BT could block certain major transactions by MCI, BT cannot

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[179] *See* Northstar Wireless-DISH Joint Bidding Agreement § 3(a); Declaration of Allen M. Todd at ¶¶ 13, 17 ("Todd Declaration") (ATTACHMENT 2 hereto); Declaration of Thomas Cullen at ¶ 9 (ATTACHMENT 4 hereto).

[180] *Fifth MO&O*, 10 FCC at 448 (footnote omitted).

[181] *Alaska Native Wireless*, 17 FCC Rcd at 4239.

compel MCI to engage in any major transactions."[182] On that basis, the Commission concluded that BT's power was permissibly limited to protecting its own investment in MCI.[183]

Moreover, bidding committee structures and protocols like that in place here have been employed in previously approved designated entity structures; examples include Alaska Native Wireless in Auction 35,[184] Salmon PCS in Auction 35,[185] Vista PCS in Auction 58,[186] and Denali Spectrum License, LLC in Auction 66.[187] An investor representative — appointed by AT&T, Cingular, Verizon, and Cricket, respectively — was one of three bidding committee members in each of these cases. In no case did the Commission find that this structure conveyed *de facto* control.

Against this background, the idea that American II would have a single member on the three-member Northstar Wireless auction committee is neither novel nor remarkable from a control perspective. The acquisition of spectrum rights in Auction 97 was central to the business of Northstar Wireless and constitutes precisely the type of major corporate decision with respect to which the Commission has concluded non-controlling investors may permissibly have input. Thus, notwithstanding the thin claims of VTel and CTTI/Rainbow, *de facto* control of Northstar Wireless was hardly conveyed as a result.

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[182] *See MCI*, 9 FCC Rcd at 3962.

[183] *See id.*

[184] *See* Alaska Native Wireless, LLC, FCC Form 601, File Number 0000363827, EXHIBIT E: Agreements and Other Instruments at 14 (filed Aug. 2, 2002).

[185] *See* Salmon PCS, LLC, FCC Form 601, File Number 0000365189, EXHIBIT E: Agreements & Other Instruments (Part 1) at 13 (filed Feb. 12, 2001).

[186] *See* Vista PCS, FCC Form 601, File Number 0002069013, EXHIBIT E: Agreements and Other Instruments at 11 (filed Mar. 7, 2005).

[187] *See* Denali Spectrum License, LLC, FCC Form 601, File Number 0002774595, Exhibit D: Agreements and Other Instruments at 25 (filed Apr. 18, 2007).

Second, VTel argues that DISH allegedly coordinated bidding "that resulted in Northstar, SNR, and American I repeatedly placing exactly the same bids for the same licenses in the same markets in the same rounds."[188] But, the possibility that Northstar, SNR, and American I might place "exactly the same bids for the same licenses in the same markets in the same rounds" is not a function of some "sinister"[189] enterprise, but rather the result of the Commission's own auction procedures and routine business judgments. The placement of identical bids is a product of the Commission's establishment of minimum acceptable bid increments. These bid increments limit bidders to set bid amounts at the next increment above the last provisionally winning bid, which, together with "click box bidding," helps to *deter* unlawful collusion through bid signaling.[190] The Commission's rules for Auction 97 specifically limited bidders to nine set bid amounts for each license in each round.[191] Auction data show that 98.6 percent of the 41,377 bids placed by all bidders in Auction 97 were for the minimum acceptable bid for the subject license.[192] Logically, bidders preferred to bid the least amount to win a license. Thus, it is not at all remarkable that Northstar Wireless and the parties with which it coordinated would bid the "same amount" when bidding on the same license in a given bidding round.

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[188] VTel Petition at 21. *See also id.* at 23-24.

[189] *Id*. at 22 (footnote omitted).

[190] *See, e.g.*, *Auction of Licenses in the 747 - 762 And 777 - 792 Mhz Bands Scheduled for September 6, 2000; Procedures Implementing Package Bidding for Auction No. 31; Bidder Seminar Scheduled for July 24, 2000, Public Notice*, 15 FCC Rcd 11526, 11547 (WTB 2000) ("Click box bidding eliminates the use of trailing digits for bid signaling…. The nine-increment limit constrains jump bidding to some degree . . . .").

[191] *See Auction 97 Procedures PN*, 29 FCC Rcd at 8443-44.

[192] There were only 590 bids above the minimally acceptable bid. 252 of those occurred in round 1, and 268 in rounds 2-9. 242 of those later bids occurred in round 7.

Nor is it remarkable that they would bid on the same license. Among other things, in Auction 97, as in prior Commission auctions, bidders were required to be active on a specific percentage of their current bidding eligibility during each round of the auction to remain competitive in future rounds.[193] As the Wireless Bureau explained, "[f]ailure to maintain the requisite activity level will result in the use of an activity rule waiver, if any remain, or a reduction in the bidder's eligibility, possibly curtailing or eliminating the bidder's ability to place additional bids in the auction."[194] In Auction 97, a bidder wishing to remain competitive in future rounds and to maintain its current bidding eligibility was required to be active on licenses representing at least 80 percent of its current bidding eligibility in each bidding round during stage one of the auction. A bidder wishing to remain competitive in future rounds and to maintain its current bidding eligibility was required to be active on 95 percent of its current bidding eligibility during stage two of the auction.[195] Thus, it would have been nearly impossible for bidders with substantial eligibility to maintain to avoid bidding on the same licenses while still satisfying the Commission's activity rules.

Overlaid on these activity requirements were the complementary strategic objectives of Northstar Wireless and the parties with which it had an agreement. As noted above, contemplating the nature of the investment it formed with DISH — including the coordination of Northstar Wireless and DISH through a management agreement, a trademark license agreement, and other arrangements and the possibility of combining their systems — it was in Northstar Wireless' interests to bid on spectrum rights for bands and markets that would potentially

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[193] *See Auction 97 Procedures PN*, 29 FCC Rcd at 8431.

[194] *Id.* (footnote omitted).

[195] In Auction 97, the Commission eventually applied a 98 percent activity requirement beginning in round 98, followed by a 100 percent activity requirement beginning in round 247.

complement the spectrum holdings of DISH and other DISH investments.[196] The relative strategic value of certain licenses to Northstar Wireless, therefore, logically often aligned with the value of those licenses to DISH and to SNR. The value of certain licenses within that class also mean that a subset of licenses that were attractive to Northstar Wireless logically were also attractive to DISH or SNR. And, as the Commission's activity rules require increasing levels of active bidding to avoid a loss of bidding eligibility and remain competitive, the idea that Northstar, DISH, and SNR would be active bidders on many of the same licenses is to be expected and not at all noteworthy.

Notably, the Commission has already observed multiple bidding arrangements in past auctions. In Auction 35, for example, AT&T Wireless deployed 77 percent of its own bids as multiple bids on the same markets at the same price in the same round as its designated entity partner in that auction. In Auction 58, Verizon and its designated entity joint bidding partner both applied to bid on 115 of the 123 open licenses the Commission made available for auction, and its designated entity partner applied to bid on 117 of the 119 closed licenses available. Verizon placed 256 bids on the open licenses for which it was eligible to bid. Even though it was eligible for a 25 percent bidding credit, Verizon's designated entity joint bidding partner place zero bids on those same 115 open licenses for which it was also eligible to bid. Instead, Verizon's designated entity partner placed 100 percent of its bids, or 203 in total, on the closed licenses. The Commission found no vesting of *de facto* control in these circumstances.

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[196] *See* Todd Declaration at ¶ 16. For example, in 2013, the Wireless Bureau issued a waiver permitting DISH to use 20 megahertz of Advanced Wireless Services-4 (AWS-4) spectrum at 2000-2020 MHz for uplink or downlink operations. *See DISH Network Corporation Petition for Waiver of Sections 27.5(j) and 27.53(h)(2)(ii) of the Commission's Rules and Request for Extension of Time, Memorandum Opinion and Order*, 28 FCC Rcd 16787, 16794-95 (WTB 2013).

One product of the Commission's employment of minimum acceptable bid increments is the need to break the "tied" high bids that often result. For this, the Commission employs "a random number generator to select a single provisionally winning bid in the event of identical high bid amounts being submitted on a license in a given round (i.e., tied bids)."[197] Under this approach, the Commission Auction System assigned a random number to each bid upon submission, and the tied bid with the highest random number wins the tiebreaker and becomes the provisionally winning bid in that round.[198]

VTel attempts to leverage the application of this long-standing Commission policy into a suggestion of impermissible "control," claiming that, when Northstar Wireless and the parties with which it collaborated had "tied" high bids on the same license, "they elected to allow the results to stand and did not choose to outbid one another."[199] In this regard, VTel quotes from a Verizon *ex parte* filing for the proposition that the parties "accepted" the Commission's random allocation of the license between or among them at a rate suggesting anticipation of post-auction coordination.[200]

But, as discussed above, the coordination of Northstar Wireless and DISH through a management agreement, a trademark license agreement, and other arrangements and the parties' desire to facilitate the possible combination of their systems as and to the extent contemplated in the Amended Northstar Spectrum Agreement — all disclosed prior to Auction 97 — meant that it was in Northstar Wireless' interests to bid on spectrum rights for bands and markets that

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[197] *Auction 97 Procedures PN*, 29 FCC Rcd at 8444.

[198] *See id.*

[199] VTel Petition at 24.

[200] *See id.* (citing Letter from Kathleen Grillo, Senior Vice President – Federal Regulatory and Legal Affairs, Verizon, to Marlene Dortch, Secretary, FCC, WT Docket No. 14-170, at 2 (filed April 24, 2015) ("Verizon Letter")).

potentially could complement the spectrum holdings of DISH and other DISH investments.[201] And, Northstar Wireless' assessment of "value" available in the auction would lead it to deploy its limited resources as efficiently as possible in furtherance of that goal.[202] For example, if it was not the provisionally winning bidder for a license that was already at or near the best and highest value Northstar Wireless placed on it, and if another license represented a better opportunity at that moment based on the factors guiding Northstar Wireless' assessment of value, it would not have been a sound business judgment if Northstar Wireless were to have continued to spend its efforts and resources in pursuit of the original license.[203]

Finally, once again citing to the Verizon Letter,[204] VTel also argues that American I engaged in a "handoff" of provisionally winning bids, exiting the auction once bidding reached a certain level without risk because Northstar Wireless and SNR bid on top of it. According to VTel, "it seems unlikely to the point of being almost inconceivable that Northstar and SNR would help [American I] in this manner if they were acting independently in their own economic

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[201] *See* Todd Declaration at ¶ 16.

[202] *See id*.

[203] *See id.* Under the Commission's auction procedures, only one "tied" bidder can become the provisionally winning bidder for a license, forcing the other bidders to bid again for the same license or to bid for another license to avoid losing eligibility. As discussed below, VTel's complaint is really with the eligibility, activity, and random number generator rules, among others, applied in Auction 97, not with Northstar Wireless. Curiously, VTel goes on to argue that "[i]n later rounds, when Northstar Wireless and SNR were the last two bidders on a license, they very rarely bid against each other." VTel Petition at 23. VTel does not seem to appreciate that bidders make assessments of value and willingness to pay a higher price throughout the auction, not just in early rounds like VTel, and that having provisionally winning bids on licenses from the previous round counts toward satisfaction of the Commission's activity requirements for so long as the bid is not topped. *See Auction 97 Procedures PN*, 29 FCC Rcd at 8431. Reduced "new" activity in later rounds is hardly surprising as a result.

[204] *See* VTel Petition at 25 n.61.

self-interest . . . ."[205] VTel is, again, wrong.

As noted, DISH had invested substantially in Northstar Wireless and SNR — something that was publicly-known in advance of Auction 97 — and, given the extensive transactional agreements between Northstar Wireless and DISH, it would not be surprising that American I would withdraw from the auction when the capital it could deploy in light of the high level of bidding activity was committed to its investments. The idea that Northstar Wireless could potentially work to build out service using the DISH brand is obviously not without value to DISH, and the desire to facilitate the possible combination of their systems as and to the extent contemplated in the Amended Northstar Spectrum Agreement was both contemplated and disclosed publicly. A decision by American I in these circumstances to stop bidding on its own, and to dedicate its capital to the bidding activities of Northstar Wireless and SNR, is a sound business judgment, not a product of *de facto* control.[206]

More importantly, the very premise that American I avoided "winning" the licenses at issue at full price only by "handing" them off is defeated by the realities of the auction. Some 1,614 licenses were offered in Auction 97 offered, and the auction did not end until round 341. As noted by VTel, American I effectively stopped bidding in or around round 20.[207] In round 16, American I achieved its highest level of provisionally winning bids at $2.07 billion in the aggregate. In later rounds, the subject licenses eventually sold for $4.38 billion, or 111 percent higher, and on average each of those licenses received an additional 12 bids.

Five rounds later, in round 21, the value of American I's provisionally winning bids had

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[205] *Id.* at 25.

[206] *See* Todd Declaration at ¶ 17.

[207] *See id.* at 25.

declined to $313 million in the aggregate. The licenses on which it held such provisionally winning bids eventually sold for $769 million in the aggregate, or 145 percent higher than the aggregate of American I's last provisionally winning bids, and on average each of those licenses received an additional 13 bids. American I exited the auction in a very early stage marked by high license turnover, with licenses each subjected to at least a dozen or more additional bids on average as the 340 round-auction unfolded. Any bidder with sufficient bidding eligibility for over 300 rounds could have bid on those licenses, and as the auction data shows, many bidders did, in fact, subsequently bid on those licenses. Accordingly, VTel's characterization of American I "handing off" licenses or bids to Northstar Wireless or SNR as some form of evidence of *de facto* control is baseless.[208]

The Commission has not found the conveyance of *de facto* control based on analogous bidding practices in multiple past spectrum auctions. Such strategies, like large investors alliances, have a long pedigree of Commission approval, and the FCC short-form 175

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[208] It is also important to note that the Commission's Wireless Telecommunications Bureau supervises the entire conduct of FCC auctions, and it expressly reserved the right in the case of Auction 97 to suspend or cancel the auction in the event that it perceived illegal bidding activity, or bidding activity that affected the fair conduct of the auction. According to the Wireless Bureau:

> [b]y public notice or by announcement during the auction, we may delay, suspend, or cancel the auction in the event of natural disaster, technical obstacle, administrative or weather necessity, evidence of an auction security breach or unlawful bidding activity, or for any other reason that affects the fair and efficient conduct of competitive bidding.

Auction 97 Procedures PN, 29 FCC Rcd at 8437 (emphasis added). In that case, the Wireless Bureau indicated that it, "in its sole discretion, may elect to resume the auction starting from the beginning of the current round or from some previous round, or cancel the auction in its entirety." *Id.* Plainly, if the Wireless Bureau thought that some aspect of the fully-disclosed collaboration of Northstar Wireless, American I, and SNR amounted to "unlawful bidding activity" or bidding activity that affected the fair conduct of competitive bidding, it could have intervened immediately. It did not. Contrary to the claims of VTel and others, this was not behavior in violation of the Commission's competitive bidding rules.

application, based on considered Commission policy decisions and rules, has long expressly permitted disclosed joint bidding strategies.[209] For example, joint bidding agreements — including coordinated bidding arrangements — were permitted between Cook Inlet Western PCS and VoiceStream in Auction 11;[210] Alaska Native Wireless and AT&T in Auction 35;[211] SVC Bidco and Sprint in Auction 35;[212] SalmonPCS and Cingular in Auction 35;[213] Cook Inlet and VoiceStream in Auction 35;[214] VistaPCS and Verizon in Auction 58;[215] Alaska Native Broadband and Leap Wireless in Auction 58;[216] and Denali and Leap Wireless in Auction 66.[217]

These bidding agreements led to instances of overlapping bids; for example, in Auction 35, 77 percent of AT&T Wireless' bids were "double bids" with Alaska Native Wireless, a designated entity with which AT&T had a joint bidding agreement and in which it held a 79.4 percent equity stake. Likewise, AT&T Wireless exited from Auction 35 after round 32 — after

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[209] *See*, *e.g.*, *Auction 97 Procedures PN*, 29 FCC Rcd at 8461, Attachment D (citing to 47 C.F.R. § 1.2105(a)(2)(viii)).

[210] *See* Cook Inlet Western Wireless PV/SS PCS, L.P., FCC Form 601, File Number 00067CWL97, EXHIBIT F (filed Nov. 20, 1998).

[211] *See* Alaska Native Wireless, LLC, FCC Form 601, File Number 0000363827, EXHIBIT E (filed Apr. 8, 2002).

[212] *See* SVC Bidco, L.P., FCC Form 175, File Number 0351045363, EXHIBIT B: Joint Bidding Arrangement (filed Nov. 5, 2000).

[213] *See* Salmon PCS, LLC, FCC Form 175, File Number 0351034584, EXHIBIT B (filed Nov. 28, 2000).

[214] *See* Cook Inlet/VS GSM V PCS, LLC, FCC Form 601, File Number 0000365280, EXHIBIT E (filed Feb. 12, 2001).

[215] *See* Vista PCS, FCC Form 175, File Number 0581455272, EXHIBIT B (filed Nov. 30, 2004).

[216] *See* Alaska Native Broadband 1 License, LLC, FCC Form 601, File Number 002069129, EXHIBIT E (filed July 22, 2005).

[217] *See* Denali Spectrum License, LLC, FCC Form 601, File Number 0002774595, EXHIBIT D(filed Apr. 18, 2007).

placing 1,115 bids — and that was not interpreted as a "hand off" of bids or as establishing *de facto* control of Alaska Native Wireless. Similarly, in that same auction, Nextel Spectrum Acquisition Corp. (now Sprint) teamed with ConnectBid, LLC to coordinate multiple bids. Quite clearly, just as in these earlier cases, the procompetitive coordinated bidding of Northstar Wireless in Auction 97 did not, and does not, implicate *de facto* control.

C. Northstar Wireless was Justified in Relying Upon, and Conforming To, Established Commission Precedent Regarding Indicia of *De Facto* Control, and the Commission Has No Basis on which to Depart from this Precedent

As described above, the Commission has already addressed and adjudicated *de facto* control issues analogous to those raised by VTel and other petitioners. Although the Commission conducts its *de facto* control analysis according to the facts of a particular applicant, the Commission's analysis necessarily rests on the standards it has developed in a series of previous precedents applying the rule; designated entities are justified in using these precedents as a reference point when evaluating their own corporate structures and bidding arrangements, especially in similar factual circumstances.

Northstar Wireless and all the entities involved in its formation, including Northstar Spectrum, Northstar Manager and Doyon, relied on the Commission's precedent in key cases like *Alaska Native Wireless* and the Commission's long history of approving designated entities to form and bid under joint bidding agreements.[218] Departure from these established principles would unreasonably prejudice Northstar Wireless by denying it fair notice of the Commission's operative standard. "Traditional concepts of due process incorporated into administrative law" prevent agencies from acting to the detriment of regulated parties without first providing

[218] *See* Declaration of Harold Furchtgott-Roth at ¶ 23 ("Furchtgott-Roth Declaration") (ATTACHMENT 3 hereto) ("All businesses, including small businesses such as Northstar Wireless, reasonably rely on these auction rules, procedures, and precedents.")

"adequate notice" of the rule to be applied.[219] "Fair notice" has been given when regulated parties can understand the standards the agency will apply "by reviewing the regulations and other public statements issued by the agency."[220] In discussing post-auction changes in FCC wireless auctions, the D.C. Circuit has made clear that "an agency cannot, in fairness, radically change the terms of an auction after the fact."[221]

Consistent with that principle, the Commission has declined to penalize bidders in wireless auctions retroactively when it adopts new interpretations of its auction rules. For example, in *Mercury PCS*,[222] the Commission declined to apply sanctions to a bidder even after concluding that impermissible anti-competitive reflexive bid signaling had occurred. The Commission observed that "[t]raditional concepts of due process preclude the Commission from penalizing a licensee for violating a rule without first providing advance, clear and adequate notice as to the conduct required or prohibited by the rule."[223] It concluded that neither its past interpretations of the relevant rule provision, nor its conduct during the auction itself, provided

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[219] *Satellite Broad. Co., Inc. v. FCC,* 824 F.2d 1, 3 (D.C. Cir. 1987) ("*Satellite*"); *see also Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2167 (2012) (collecting cases identifying the problem of "unfair surprise" to regulated entities).

[220] *Howmet Corp. v. E.P.A.*, 614 F.3d 544, 553-54 (D.C. Cir. 2010).

[221] *U.S. Airwaves, Inc. v. FCC*, 232 F.3d 227, 235 (D.C. Cir. 2000). *See also Verizon Tel. Cos. v. FCC*, 570 F.3d 294, 301 (D.C. Cir. 2009) ("If the FCC changes course, it 'must supply a reasoned analysis' establishing that prior policies and standards are being deliberately changed…") (quoting *Motor Vehicle Mfrs. Ass'n, Inc. v. State Farm Mut. Auto. Ins. Co*., 463 U.S. 29, 57; *Wis. Valley Improvement v. FERC*, 236 F.3d 738, 748 (D.C. Cir. 2001) ("[A]n agency acts arbitrarily and capriciously when it abruptly departs from a position it previously held without satisfactorily explaining its reason for doing so.").

[222] *Mercury PCS II, LLC, Memorandum Opinion and Order*, 13 FCC Rcd 23755 (1998) ("*Mercury PCS"*).

[223] *Id.* at 23759 n.17.

adequate notice of the prohibited conduct.[224] Furthermore, the Commission's "review of the administrative history and prior Commission decisions" also "militate[d] against a finding of adequate notice to auction participants."[225]

The Commission's *Mercury PCS* decision stands in line with the broader principle recognized by the Supreme Court that "[r]etroactivity is not favored in the law."[226] The Supreme Court recently addressed the issue of fair notice in the context of administrative agency rules, rejecting attempts to invoke an agency interpretation of a rule announced long after the conduct in question.[227] The Court refused to "impose potentially massive liability . . . for conduct that occurred well before the interpretation was announced,"[228] holding that to do so "would seriously undermine the principle that agencies should provide regulated parties 'fair warning of the conduct [a regulation] prohibits or requires.'"[229] Recognizing the particular injustice of holding

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[224] *Id*. at 23759.

[225] *Id.*; *cf. Notice of Apparent liability for Forfeiture of Western PCS BTA 1 Corporation, Memorandum Opinion and Order*, 14 FCC Rcd 21571, 21577 (1999) (clarifying the Commission's anti-collusion rule and rescinding a Notice of Apparent Liability for Forfeiture based on insufficient evidence of a violation thereunder).

[226] *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 208 (1988). The Court has further explained that "[e]lementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to confirm their conduct accordingly; settled expectations should not be lightly disrupted." *Landgraf v. USI Film Products,* 511 U.S. 244, 265 (1994).

[227] *Christopher v. SmithKline Beecham Corp.,* 132 S. Ct. 2156, 2167 (2012).

[228] *Id.* at 2167; *see also Marks v. United States*, 430 U.S. 188, 191 (1977) ("To apply Miller retroactively, and thereby punish conduct innocent under [the then-governing standard] Memoirs, violates the Due Process Clause of the Fifth Amendment much as retroactive application of a new statute to penalize conduct innocent when performed would violate the Constitution's ban on ex post facto laws.").

[229] *SmithKline*, 132 S. Ct. at 2167 (citing *Gates & Fox Co. v. OSHRC,* 790 F.2d 154, 156 (D.C. Cir. 1986); *Long Island Care at Home, Ltd. v. Coke,* 551 U.S. 158, 170–171(2007); *Martin v. OSHRC,* 499 U.S. 144, 158 (1991); *NLRB v. Bell Aerospace Co.,* 416 U.S. 267, 295 (1974)) (internal citation omitted).

parties accountable to standards contrary to longstanding agency guidance, the Court further noted that "where, as here, an agency's announcement of its interpretation is preceded by a very lengthy period of conspicuous inaction, the potential for unfair surprise is acute."[230]

The D.C. Circuit has likewise issued a line of decisions requiring fair warning and prohibiting unfair surprise in agency decision-making.[231] The D.C. Circuit has long recognized "[a] 'fair notice' requirement in the civil administrative context," reflecting that an agency may not deprive a party of property under the Due Process Clause in the absence of such notice.[232] For example, in *Trinity Broadcasting of Florida, Inc. v. FCC*,[233] the D.C. Circuit rejected the Commission's denial of a broadcast license based on a new interpretation of the Commission's minority control preference rules. While the D.C. Circuit acknowledged that the Commission's new interpretation of its rules to require *de facto* minority control may have been reasonable, it also found that applicants like Trinity were not apprised of this new interpretation with "ascertainable certainty" in light of the Commission's existing precedent.[234]

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[230] *SmithKline*, 132 S. Ct. at 2168.

[231] As have a number of other circuit courts. *See generally* Derek A. Woodman, *Rethinking* Auer *Deference: Agency Regulations and Due Process Notice*, 82 GEO. WASH. L. REV. 1721, 1736-39 (2014) (collecting and analyzing cases); Douglas C. Dreier, *The Lending-Limit Combination Rules: Regulation by Enforcement at the OCC*, 62 Duke L.J. 1747, 1769 (2013) (same); Albert C. Lin, *Refining Fair Notice Doctrine: What Notice is Required of Civil Regulations,* 55 Baylor L. Rev. 991, 992-1010 (2003) (same).

[232] *General Electric Co. v. EPA*, 53 F.3d 1324, 1328-29 (D.C.Cir.1995) (quoting *Satellite Broadcasting Co. v. FCC,* 824 F.2d 1, 3 (D.C.Cir.1987)).

[233] *Trinity Broadcasting of Florida, Inc. v. FCC*, 211 F.3d 618 (D.C. Cir. 2000).

[234] *Id.* at 628-32. The D.C. Circuit further found that "the Commission's insistence that [its rules requiring *de facto* minority control] provided fair notice particularly problematic in view of the Commission's failure to explain satisfactorily how denying Trinity's license can be reconciled with cases where it found regulatory requirements too unclear to justify sanctioning other broadcasters." *Id.* at 631.

In *Satellite Broadcasting Co. v. FCC,* the D.C. Circuit has also observed that the Commission "through its regulatory power cannot, in effect, punish a member of the regulated class for reasonably interpreting Commission rules" in the absence of fair notice.[235] The Commission had dismissed Satellite's microwave radio station application because it was filed in Washington, D.C., and not in Gettysburg, Pennsylvania, as required by the regulations under the Commission's interpretation.[236] But the regulation did not specify the filing location, and other regulations offered "baffling and inconsistent" direction.[237] The D.C. Circuit concluded that the FCC should not have dismissed Satellite's application, even if the FCC interpretation of the regulation was permissible, because Satellite did not have fair notice of the regulation's requirements. While "[t]he agency's interpretation is entitled to deference . . . if it wishes to use that interpretation to cut off a party's right, it must give full notice of its interpretation."[238]

In the instant case, Northstar Wireless, its controlling entities and their non-controlling investors established a control structure and bidding arrangements relying on the Commission's longstanding precedent in *Alaska Native Wireless* and subsequent decisions in order to participate in the auction. Any departure from established precedent would not simply constitute a failure to provide "advance, clear and adequate notice" — it would represent an affirmative departure from long-standing precedent regarding the Commission's controlling interest

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[235] *Satellite Broadcasting Co. v. FCC,* 824 F.2d at 4; *see also United States v. Chrysler Corp.*, 158 F.3d 1350, 1354-55 (D.C. Cir. 1998) ("a manufacturer cannot be found to be out of compliance with a standard if NHTSA has failed to give fair notice of what is required by the standard."); *McElroy Electronics Corp. v. FCC*, 51 990 F.2d 1351, 1359 (D.C. Cir. 1993); *Gates & Fox Co. v. OSHRC,* 790 F.2d at 156 (D.C.Cir. 1986) ("[T]he due process clause prevents . . . the application of a regulation that fails to give fair warning of the conduct it prohibits or requires….").

[236] *Satellite Broadcasting Co. v. FCC,* 824 F.2d at 3.

[237] *Id.* at 2.

[238] *Id.* at 4.

standard, as applied in substantially similar factual circumstances, resulting in the approval of analogous designated entity applications.[239] While the Commission is permitted to provide bidders with notice of a changed or clarified position, no such notice was provided to Northstar Wireless. Thus, Northstar Wireless was justified in relying upon, and conforming to, established Commission precedent. The Commission cannot punish Northstar Wireless, without fair notice, for adopting agreements and structures that have passed muster under nearly identical circumstances.

IV. NORTHSTAR WIRELESS' BIDDING COMPLIED FULLY WITH THE COMMISSION'S RULES AND THE ANTITRUST LAWS

For more than 100 years, the United States antitrust laws have had the same basic objective: to promote competition. Northstar Wireless' joint bidding activity was conducted pursuant to fully disclosed joint bidding agreements that are contemplated in and allowed under the Commission's auction rules and help new entrants and others to successfully bid against established industry participants. In short, the Northstar Wireless joint bidding activity was procompetitive and fully complied with the antitrust laws.

Importantly, this collaborative joint bidding activity enabled precisely the kind of meaningful, procompetitive participation by new entrants (designated entities) that the Commission's process was designed to encourage. In 1994, the Commission was clear that anticollusion provisions were needed as part of its competitive bidding rules, but that "if anticollusion rules are too strict or are not sufficiently clear, they could prevent the formation of

[239] *See Qwest Servs. Corp. v. FCC*, 509 F.3d 531, 539-40 (D.C. Cir. 2007); *see also Amer. Tel. & Tel. Co. v. FCC*, 454 F.3d 329, 332 (D.C. Cir. 2006) ("'[J]udicial hackles' are raised when 'an agency alters an established rule defining permissible conduct which has been generally recognized and relied on throughout the industry that it regulates.'") (quoting *NLRB v. Majestic Weaving Co.*, 355 F.2d 854, 860 (2d Cir. 1966)).

efficiency enhancing bidding consortia that pool capital and expertise and reduce entry barriers for small firms and other entities that might not otherwise be able to compete in the auction process."[240] Likewise, in 2010, the Commission explained that:

> In designing the anti-collusion rules, the Commission has carefully weighed the competitive risks and benefits of allowing auction applicants to cooperate and share resources. The Commission has recognized that one way of promoting competition is to permit entities to enhance their ability to win licenses in auctions by combining their resources and that small businesses in particular may need to pool financial and other resources in order to compete in auctions.[241]

The Commission has, accordingly, an established record of approving applications involving joint bidding arrangements. As described [*supra* Section III.B], multiple designated entities, across multiple auctions, have disclosed and employed coordinated bidding arrangements involving non-controlling investor entities, all while retaining *de facto* control. Thus, by following the Commission's rules and precedents regarding auction collaboration, far from engaging in secret "collusion," Northstar Wireless engaged in precisely the type of open, procompetitive collaboration that the Commission itself contemplates, encourages, and permits under its competitive bidding rules to increase small business participation, increase efficiency, and increase auction revenues.

A. VTel Misstates the Antitrust Laws

In this context, it is clear that VTel misstates the antitrust laws. VTel claims that "[t]he bidding patterns of Northstar, SNR, and American I evidence a collusive bidding scheme by which the parties fixed prices and allocated markets, which represents anticompetitive conduct

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[240] *Competitive Bidding, Second Report and Order*, 9 FCC at 2386-87.

[241] *Petition for Reconsideration and Motion for Stay of Paging Systems, Inc., Memorandum Opinion and Order*, 25 FCC Rcd 4036, 4061-62 (2010) (footnote omitted) (emphasis added) ("*Paging Systems MO&O*").

prohibited by the antitrust laws."[242] According to VTel, "[a]s ostensible competitors, the agreement by Northstar, SNR, and American I about the licenses on which they would bid, the rounds in which they would bid, and the amount of their bids constitutes bid rigging, which is a *per se* violation of Section 1 of the Sherman Act."[243] This is a misstatement both of the parties' relationship and of established antitrust law.

As a threshold matter, VTel's assertion that Northstar Wireless, SNR, and American I entered into a "collusive bidding scheme" in "per se" violation of the antitrust laws[244] ignores the fundamental difference between illegal "bid-rigging" and collaborations of the kind here in question: lawful joint bidding arrangements commonly found to be procompetitive.[245] Fortunately, the authoritative antitrust treatise on which VTel relies[246] does not make that same mistake: it highlights the difference between "buyer collusion" and joint buying collaborations entailing "economic integration that antitrust should generally encourage."[247] As discussed below, the courts and the antitrust agencies have long permitted analogous joint arrangements as procompetitive.

VTel is particularly mistaken in its repeated characterization of the Northstar Wireless collaboration as "collusive," for there was and is nothing collusive (*i.e.*, secret) about it. Even VTel itself concedes, as it must, that "Northstar and SNR . . . disclosed the existence of a

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[242] VTel Petition at 29 (footnote omitted).

[243] *Id.* (footnote omitted).

[244] *Id.*

[245] *See* Furchtgott-Roth Declaration at ¶ 13 ("When a party concedes that it exited an auction because of the appearance of great competition for a license, this is not evidence of bid rigging. It is evidence of the opposite, competition for a license.").

[246] *Id.* at 29 n.69 (citing P. Areeda and H. Hovenkamp, Antitrust Law, ¶¶ 2005-2006 (3d. ed. 2012) (hereafter *Antitrust Law*)).

[247] *Antitrust Law* at ¶ 2012b, pp. 139-40.

Bidding Protocol and Joint Bidding Arrangement with DISH (through its affiliates)."[248] As noted above, the Commission's Rules provide that:

> after the short-form application filing deadline, all applicants for licenses in any of the same geographic license areas are prohibited from cooperating or collaborating with respect to, discussing with each other, or disclosing to each other in any manner the substance of their own, or each other's, or any other competing applicants' bids or bidding strategies, or discussing or negotiating settlement agreements, until after the down payment deadline, unless such applicants are members of a bidding consortium or other joint bidding arrangement identified on the bidder's short-form application pursuant to §1.2105(a)(2)(viii).[249]

Under the Commission's Rules, therefore, 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 arrangement with the other applicant and it is identified on the applicant's short-form application.

Here, again, Northstar Wireless complied with the rules. Northstar Wireless identified the parties to the Northstar Wireless-DISH Joint Bidding Arrangement in the "Agreements with Other Parties and Joint Bidding Arrangements" section of its Auction 97 FCC short form application,[250] and Northstar Wireless even summarized the terms of the Northstar Wireless-DISH Joint Bidding Arrangement in a detailed exhibit to its Auction 97 short form application.[251] Likewise, Northstar Wireless identified the parties to the Northstar Wireless-SNR-DISH Joint Bidding Arrangement in the "Agreements with Other Parties and Joint Bidding

[248] VTel Petition at 11.

[249] 47 C.F.R. § 1.2105(c)(1) (emphasis added).

[250] *See* Northstar Wireless, LLC FCC Form 175, File Number 0006458325, Agreements: Northstar Bidding Protocol & Joint Bidding Arrang. (filed Sept. 12, 2014).

[251] *See id.*, EXHIBIT C at 25-27.

Arrangements" section of its Auction 97 short form application,[252] and Northstar Wireless also summarized the terms of the Northstar Wireless-SNR-DISH Joint Bidding Arrangement in a detailed exhibit to its Auction 97 short form application.[253] Moreover, even the purposes of the parties' coordination were fully disclosed.[254]

VTel argues that the fact that Northstar Wireless "may have disclosed their bidding arrangements in their Short-Form application[]" is irrelevant.[255] The openness of the collaboration, however, is key to any antitrust analysis. This is clear, for example, from the longstanding policy of the Department of Justice to "approach teaming arrangements [among bidders for Defense Department procurement contracts] that are disclosed in advance of bidding as civil matters under the rule of reason."[256] As both the Department of Justice and the Federal Trade Commission have emphasized, "[r]ule of reason analysis entails a flexible inquiry" and "focuses on the state of competition with, as compared to without, the relevant agreement."[257]

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[252] *See* Northstar Wireless, LLC FCC Form 175, File Number 0006458325, Agreements: Letter Agreement (filed Sept. 12, 2014).

[253] *See id.*, EXHIBIT C at 27-28.

[254] *See id.*, EXHIBIT C at 27.

[255] VTel Petition at 30.

[256] "Will Teaming Be a Problem?," address by Gary R. Spratling, Chief, San Francisco Field Office, Antitrust Division, U.S. Dept. of Justice, Before ABA Annual Meeting (August 7, 1994) *in The Procurement Lawyer*, vol. 30, n. 3, at 23-24. That addresses VTEL's claim that disclosure is "irrelevant." VTEL also suggests the disclosure was inadequate, *see* VTel Petition at 30 ("they did not disclose their scheme to fix prices or allocate markets"), but the parties disclosed everything that the rules required. Finally, VTEL's assertion that "disclosures do not insulate parties from antitrust violations" is of no consequence whatsoever in this instance since, as discussed below, the collaboration in question was unqualifiedly procompetitive and thus could not constitute an antitrust violation.

[257] 2000 Department of Justice and Federal Trade Commission Antitrust Guidelines for Collaborations Among Competitors at §§ 1.2, 3.3, available at https://www.ftc.gov/sites/default/files/documents/public_events/joint-venture-hearings-antitrust-guidelines-collaboration-among-competitors/ftcdojguidelines-2.pdf.

Here, cooperation was key to facilitating Northstar Wireless' ability to participate effectively in Auction 97. Northstar Wireless could not have been a viable competitor in the AWS-3 auction on its own.[258] Its openly-disclosed transactions with DISH and coordination with DISH and SNR were central to its ability to participate in the capital-intensive nationwide auction of spectrum rights. Indeed, Northstar Wireless has detailed arrangements to offer wireless services using DISH trademarks and to use DISH management services. As a result, the collaboration did not *replace* competition that would otherwise have evolved — which is a central factor in every successful antitrust challenge to "buyers' cartels" or other kinds of concerted action among multiple buyers over the course of the past several decades[259] — but instead in actually *enhanced* competition. And, tellingly, this is the central distinguishing factor in each one of the cases VTel itself cites as examples of the illegality of "collusive" bidding.[260]

In fact, far from restricting competition, their collaboration in this instance was "reasonably necessary to achieve procompetitive benefits"[261] of enhancing competition. The collaboration helped to create more robust and effective bidders than Northstar Wireless, SNR, and American I could have each marshaled on its own, enabling Northstar Wireless to acquire

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[258] *See* Todd Declaration at ¶ 12.

[259] *See, e.g.*, *Mandeville Island Farms, Inc. v. Am. Crystal Sugar Co.*, 334 U.S. 219, 235 (1948); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 218 (1940); *Knevelbaard Dairies v. Kraft Foods, Inc.*, 232 F.3d 979, 986 (9th Cir. 2000); *Harkins Amusement Enters. V. Gen. Cinema Corp.*, 850 F.2d 477, 487 (9th Cir. 1988), *cert. denied*, 488 U.S. 1019 (1989)); *United States v. Capitol Serv., Inc.*, 756 F.2d 502, 506 (7th Cir. 1985); *Cackling Acres, Inc. v. Olson Farms, Inc.*,541 F.2d 242, 246 (10th Cir. 1976); *Nat'l Macaroni Mfrs. Ass'n v. FTC*, 345 F.2d 421, 426-27 (7th Cir. 1965); *see also Todd v. Exxon Corp.*, 275 F.3d 191, 201 (2d Cir. 2001); *All Care Nursing Serv., Inc. v. High Tech Staffing Servs., Inc.*, 135 F.3d 740, 747 (11th Cir. 1998); *United States v. Seville Indus. Mach. Corp.*, 696 F. Supp. 986, 989 (D.N.J. 1988).

[260] *See* VTel Petition at 29 nn.70, 72.

[261] 2000 Department of Justice and Federal Trade Commission Antitrust Guidelines for Collaborations Among Competitors, *supra*, at § 3.3.

the spectrum necessary to challenge those same dominant players in the downstream market for wireless communication services.

If any such buyers' collaboration is anticompetitive and thus a possible antitrust violation, it is because the secret collaboration causes the ultimate price obtained by the seller to fall *below* what that price would otherwise have been.[262] Here, the disclosed Northstar Wireless collaboration with DISH and SNR unquestionably intensified competition throughout the auction process and thereby caused ultimate spectrum prices to be higher than they would otherwise have been, thereby increasing — not suppressing — auction revenues. Even CTTI/Rainbow concedes that the Northstar Wireless, DISH, and SNR collaboration "drove up prices . . . ."[263] The net effect was thus procompetitive rather than anticompetitive. Indeed, VTel's real grievance is that the collaboration increased competition and, thereby, caused VTel to lose "blocks on which VTel actively bid . . . ."[264] That is not an antitrust violation.[265]

B. Remaining VTel and CTTI/Rainbow Claims are Really Directed at the Commission's Competitive Bidding Rules

Though articulated in the form of an alleged violation of the antitrust laws, the remaining VTel and CTTI/Rainbow claims in this context are really directed at the Commission's

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[262] *See* IIA Areeda & HovenKamp, Antitrust Law (3d Ed. 2007), ¶ 350b ("When buyers agree illegally to pay suppliers less than the prices that would otherwise prevail, suppliers are obviously injured in fact. The suppliers' loss also constitutes antitrust injury, for it reflects the rationale for condemning buying cartels – namely suppression of competition among buyers….").

[263] CTTI/Rainbow Petition at 5-6.

[264] VTel Petition at 30.

[265] *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977) (stating antitrust laws are enacted for "the protection of competition not competitors") (internal citations omitted).

competitive bidding rules. As a purported example of "anticompetitive conduct," VTel argues that:

> in the A1 and B1 blocks on which VTel actively bid, the collusive bidding of the DISH Entities suppressed price competition by creating the false impression that multiple other parties were interested in these licenses and by generally avoiding bidding against one another. The result was to deprive federal taxpayers of the full amount of funds that would have been received under a competitive auction not tainted by the collusive bidding activities of the DISH Entities.[266]

For its part, CTTI/Rainbow claim that "Northstar, SNR, and [American I] placed double and triple bids on single licenses, which artificially inflated demand, drove up prices, deterred the participation of other bidders, generally distorted the overall auction, and likely had a negative affect [*sic*] on auction revenue."[267] This claim, though, hinges not on the conduct of Northstar Wireless and others but on the competitive bidding rules to which all bidders were subject.

VTel acknowledges that central to this claim is the fact that the Commission applied "anonymous bidding" in Auction 97,[268] pursuant to which the Commission withholds, until after the close of bidding, public release of (1) bidders' license selections on their short-form applications, (2) the amounts of bidders' upfront payments and bidding eligibility, and (3) information that may reveal the identities of bidders placing bids and taking other bidding-

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[266] VTel Petition at 30. *See also id.* at 5 ("VTel would have bid higher amounts for these licenses but for the pattern of coordinated auction bidding and illusory demand orchestrated by the DISH Entities.").

[267] CTTI/Rainbow Petition at 5. Like VTel earlier, CTTI/Rainbow complain that "DISH actively participated in the earlier rounds of the auction, but then suddenly exited when Northstar and SNR were well positioned to overtake DISH's position and apply their bidding credit discounts to win the license for a significantly smaller price (at the expense of American taxpayers to boot)." *Id.* at 5-6. CTTI/Rainbow also argue that "Northstar and SNR accepted the FCC's random assignment of one of them as the winner for licenses in which they were tied as the provisionally winning bidder," all of which "reveal anticompetitive harms due to the bidding activity of Northstar, SNR, and DISH." *Id.* at 6.

[268] *See* VTel Petition at 12.

related actions.[269] A practical result of these rules is that, according to VTel, when more than one bid was placed on a given license in a given round in Auction 97, "VTel did not and could not know the identity of the second bidder."[270] This is at the root of the VTel and CTTI/Rainbow complaint about problems of demand and price discovery. And, importantly, the Commission has addressed virtually identical claims about problems of license valuation and price discovery in an anonymous bidding environment several times, and it has resolved each time that perceived benefits of anonymous bidding outweigh the burdens more limited information might impose on those seeking to make assessments of value.

In 2007, the Commission resolved that adopting anonymous bidding procedures would serve the public interest and promote competition in the auction for 700 MHz band licenses, and it delegated to the Wireless Telecommunications Bureau authority to implement the procedures for Auction 73.[271] In its comments filed as the Commission considered the merits of anonymous bidding, MetroPCS argued that "the most important market information is knowing who the competitors are, and how much spectrum they have."[272] According to MetroPCS:

> a market in which these known competitors are vying for more spectrum in the auction can easily be valued by MetroPCS. MetroPCS might decide to continue bidding at a higher per pop price in this market, as compared to moving to a lower cost market containing new entrants with business plans less distinguishable from that of MetroPCS. This is a pro-competitive use of the bidder information that is only available through open bidding.[273]

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[269] *See Auction 97 Procedures PN*, 29 FCC Rcd 8386, 8428-29.

[270] VTel Petition at 12.

[271] *See Service Rules for the 698-747, 747-762 and 777-792 MHz Bands, Second Report and Order*, 22 FCC Rcd 15289, 15394 -95 (2007) ("*700 MHz Report and Order*").

[272] Comments of MetroPCS Communications, Inc., WT Docket Nos. 06-150, at 46 (filed May 23, 2007) ("*MetroPCS 700 MHz Comments*").

[273] *Id.* at 46-47.

In response, the Commission resolved 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 that will result from withholding public release of certain information about bids and bidder identities . . . ."[274]

Since then, the Wireless Bureau has heard virtually identical claims about lack of information for the valuation of licenses in the adoption of anonymous bidding procedures.[275] And, each time, the Wireless Bureau found that the competitive benefits of limited information disclosure outweighed any potential benefits of full information availability.[276] In the case of Auction 97, the Wireless Bureau wrote that "[w]e disagree with the assertions of commenters that argue that limited information disclosure procedures are unnecessary or harmful to smaller bidders, and conclude that the competitive benefits associated with limiting information

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[274] *700 MHz Report and Order*, 22 FCC Rcd at 15394.

[275] *See, e.g.*, Comments of MetroPCS Communications, Inc., AU Docket No. 08-46, at 8 (filed Apr. 18, 2008) (arguing that bidder identity information helps bidders "form more accurate and confident assessments of license values"); Comments of RDL Management, LLC, AU Docket No. 13-178, at 17 (filed Aug. 5, 2013); Comments of United States Cellular, AU Docket No. 13-178, at 18 (filed Aug. 5, 2013); Reply Comments of United States Cellular, AU Docket No. 13-178, at 28 (filed Aug. 16, 2013); Comments of United States Cellular, AU Docket No. 14-78, at 10 (filed June 9, 2014); Comments of Competitive Carriers Association, AU Docket No. 14-78, at 7-8 (filed June 9, 2014).

[276] *See Auction of AWS-1 and Broadband PCS Licenses Rescheduled for August 13, 2008; Notice and Filing Requirements, Minimum Opening Bids, Upfront Payments, and Other Procedures for Auction 78, Public Notice*, 23 FCC Rcd 7496, 7536 (2008) (also stating the overall competitive benefits of reduced opportunities for bid signaling, retaliatory bidding, or other anti-competitive strategic bidding far outweigh the disadvantages of limited information disclosure procedures); *Auction of H Block Licenses In The 1915-1920 Mhz And 1995-2000 Mhz Bands Scheduled For January 14, 2014 Notice And Filing Requirements, Reserve Price, Minimum Opening Bids Upfront Payments, And Other Procedures For Auction 96, Public Notice*, 28 FCC Rcd 13019, 13055 (WTB 2013); *Auction 97 Procedures PN*, 29 FCC Rcd at 8429.

disclosure support adoption of such procedures and outweigh the potential benefits of full disclosure."[277]

Tellingly, both VTel and CTTI/Rainbow cite to the Verizon Letter for support of their claims about anticompetitive conduct by Northstar Wireless and the parties with which it collaborated in Auction 97.[278] Yet, Verizon itself has long supported the Commission's anonymous bidding procedures. In connection with the formulation of bidding rules for Auction 97, for example, Verizon pointed to the rejection of such "valuation" claims by the Commission and the Wireless Bureau:

> While US Cellular and CCA claim open bidding is necessary to ensure bidders know how much to value a license, they provide no factual support for this claim, and in any event the Commission and Bureau have rejected it. In adopting anonymous bidding for the 700 MHz auction, the Commission found that any usefulness of disclosing specific bid amounts "likely is substantially outweighed by the enhanced competitiveness and economic efficiency of the auction that will result from withholding public release of certain information about bids and bidder identities."[279]

And, in its own comments in 2007, Verizon endorsed anonymous bidding rules, arguing, among other things, that "[i]Imposing limitations on the release of bidder information prior to and

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[277] *Auction 97 Procedures PN*, 29 FCC Rcd at 8429 (footnote omitted). To the extent Vtel and CTTI/Rainbow take issue with the Commission's rules requiring anonymous bidding, their concerns are more appropriate to raise in the course of the Commission's ongoing rulemaking on competitive bidding rules — not in petitions to deny Northstar Wireless' license applications. Similarly, HTTP's argument that the Commission should deny Northstar Wireless's applications "to restore the integrity" of the designated entity program, *see* HTTP Petition at 1, is plainly directed at the outcome of the competition bidding rule proceeding, and is irrelevant in the context of this proceeding.

[278] *See* VTel Petition at 15 n.37, 24 n.60, 25 n.61; CTTI/Rainbow Petition at 2 n.4, 3 n.5,6, 8.n15.

[279] Reply Comments of Verizon Wireless, AU Docket No. 14-78, at 4 (filed June 23, 2014) (footnotes omitted).

during the course of an auction ensures that bidders will be appropriately focused on the licenses and their value, not on other bidders and their bidding strategies."[280]

Here, VTel and CTTI/Rainbow both suggest that they stopped bidding on a given license as a result of the activities of the other bidders.[281] In light of the application of the Commission's anonymous bidding rules in Auction 97, one can presume — as Verizon would have it — that the decision of any other bidder to stop bidding on a given license was the product of an "appropriate" focus on the license and its value. Indeed, had any of these bidders valued the subject license more than the party with the then-prevailing provisionally winning bid, nothing would have prevented that bidder from continuing to compete for the license in the auction process. Auction data reveal that, at the time VTel stopped bidding for the A1 license in BEA004 (AW-BEA004-A1), it could have qualified to be a provisionally winning bidder for the license in the next round by bidding an additional $18,000 (at a net cost of $15,300 to VTel with its 15 percent bidding credit). It chose not to.[282]

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[280] Comments of Verizon Wireless, WT Docket No. 06-150, at 36 (filed May 23, 2007).

[281] *See, e.g.*, VTel Petition at 14 ("Judging that the significant interest in the spectrum from three different bidders would drive up the price to levels it could not afford, VTel dropped out of the bidding"); CTTI/Rainbow Petition at 4 ("Northstar and SNR placed four coordinated double bids on CMA179 in the early rounds of the auction, which artificially inflated demand [and] artificially drove up prices . . . . As a result, Rainbow was deterred from continuing to compete, and exited the auction with respect to CMA179."). Though CTTI/Rainbow claim that bidding activity "artificially drove up prices," and though VTel claims the demand it faced "was artificial," VTel Petition at 14, not once do they suggest that any such bid was insincere or would not be honored by the ultimate winning bidder. *Cf.* Todd Declaration at ¶ 17. It is, thus, not clear what they mean by describing price increases as "artificial."

[282] *See* Furchtgott-Roth Declaration at ¶ 13 ("If Northstar Wireless and others had actually attempted to be engaged in bid rigging, assigning the license to the lowest bidder, a VTel willing to bid competitively would by definition have outbid the bid riggers. VTel did not. It did not even try to compete.")

Tellingly, it seems that VTel behaved differently even within Auction 97. According to VTel's Dr. Guité, in bidding on the A1 license discussed above, he judged "that significant competition for the spectrum from three bidders would drive up the price to levels VTel could not afford," and "decided that VTel should drop out of the bidding."[283] By contrast, VTel was faced with a similar situation relating to the B1 license in the same market (AW-BEA004-B1), but responded differently. In round 18, VTel was the provisionally winning bidder on the B1 license at a price of $104,000 ($88,400 net with its 15 percent bidding credit). In the next round, VTel was outbid by the three parties just as in the A1 license situation described above. Yet, in this case, VTel elected to bid again in round 20, and it became the provisionally winning bidder at $146,000 ($124,100 net).[284] Therefore, a bid from three parties that allegedly dissuaded VTel from bidding on the A1 license apparently did not dissuade VTel from bidding on the B1 license. And, auction data suggest that the actual *number* of competing bidders was not the determining

[283] VTel Petition, Affidavit of Dr. J. Michel Guité at ¶ 13 ("Guité Affidavit").

[284] *See* Guité Affidavit at ¶ 16.

factor in VTel's various decisions to withdraw.[285] CTTI and Rainbow showed similar behavior.[286]

Ironically, VTel later asks that the Commission to reauction the Auction 97 licenses for which it bid while excluding from the reauction Northstar Wireless and all others who did not bid for such licenses "to ensure that licenses are awarded to the bidder that values it most highly."[287] Plainly, however, VTel was not the Auction 97 bidder that valued the licenses most highly, and this appears to be the heart of the VTel complaint. This is not the product of a cognizable antitrust law violation.[288]

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[285] Auction data show that VTel bid for six different licenses in Auction 97 (AW-BEA004-A1, AW-BEA004-B1, AW-BEA004-H, AW-BEA004-I, AW-BEA004-J, and AW-CMA248-G). On two occasions, VTel stopped bidding after bids from three parties (the A1 and the B1 licenses in rounds 21); on two occasions after bids from two parties (I license round 8 (Orion and AT&T) and J-license round 6 (Orion and AT&T)); and on two occasions after a single competing bid (G-license round 17 (Orion) and H-license round 8 (Verizon)). In short, VTel exited the auction within 21 rounds due to one competing bid one-third of the time, two competing bids one-third of the time, and three competing bids one-third of the time, suggesting that the *number* of competing bidders was not the determining factor as stated by Dr. Guité. VTel's real issue appears to be the lack of ability or willingness to bid competitively. In aggregate, VTel placed final bids totaling $3 million on the six licenses on which it was active, and those six licenses eventually sold for $22.1 million, or 7.4 times what VTel bid before withdrawing.

[286] CTTI was the winning bidder on three licenses for a total price of $3.3 million. But, CTTI also bid $13.9 million on 16 additional licenses that it did not win. Those 16 licenses later sold for $30.4 million, or 2.2 times CTTI's aggregate provisionally winning bids for the licenses. Rainbow bid in aggregate $1.96 million for four licenses. Those same licenses later sold for $9.53 million, an amount 4.9 times higher than Rainbows bids. It seems that the principal challenge facing CTTI and Rainbow was the unwillingness and/or inability to bid competitively.

[287] VTel Petition at 34 (emphasis added).

[288] *See Antitrust Law* ¶ 307d (summary disposition issues often arise in suits by unhappy competitors whose sense of oppression "seldom produces any entitlement to legal relief"). *See also* Furchgott-Roth Declaration at ¶ 15 ("VTel seeks to have the Commission award it licenses based on its status as the lowest bidder.")

V. NORTHSTAR WIRELESS ENGAGED IN NO MISCONDUCT, AND VTEL's REQUESTED RELIEF REVEALS ITS TRUE OBJECTIVE

As shown, VTel's efforts to suggest that Northstar Wireless engaged in "misconduct" is completely undermined by the very Commission rules and precedents that governed the conduct of Auction 97. VTel is asking the Commission to change the competitive bidding policies that applied in Auction 97 after the fact, but only as they relate to Northstar Wireless (and DISH and SNR). VTel's real complaint is with the Commission's joint bidding arrangement rules, the anonymous bidding policies, and the eligibility, activity, and random number generator rules, among others, applied in Auction 97, not with Northstar Wireless. Likewise, VTel's complaint is with the application of the principles of *de jure* and *de facto* control instead of a minimum equity requirement in addressing determinations of ownership and attribution and with the Commission's choice to permit reasonable non-controlling investor approval rights that are intended to induce and protect investment without sacrificing *de facto* control. And, the Commission has awarded licenses to other winning bidders who have relied on the same policies with some of the same operative provisions.

These are policy choices made by the agency that has been conducting competitive bidding since 1994, and these are the real target of the VTel Petition. To the extent that VTel has a legitimate policy concern with the manner in which the Commission conducts competitive bidding, or with the manner in which the Commission evaluates something like *de facto* control, VTel can properly address the matter through the Commission rulemaking process.

What VTel does instead reveals its true objective. VTel argues that the "misconduct" of Northstar Wireless means that the Commission should reauction licenses in "the A1 and B1

blocks for BEA004 in Burlington, Vermont on which VTel actively bid."[289] According to VTel, "[i]n conducting a re-auction of licenses in those affected geographic areas, the Commission should exclude the DISH Entities from participating directly or indirectly in the re-auction,"[290] and that "qualified bidders in any re-auction also should be limited to those entities that previously submitted a bid in Auction 97 in the market being reauctioned."[291] This, according to VTel, is "to ensure that licenses are awarded to the bidder that values it most highly."[292]

VTel's motives are plain. VTel declares Action 97 to be a "considerable success" — "vastly exceeding the approximately $10 billion reserve price set by the Commission"[293] — but then complains that this success did not apply in the markets where it was a disappointed bidder, calling for its own second chance, albeit with *less* competition (excluding some parties that placed bids for certain licenses in Vermont and *all* parties that did not).[294] That, of course, will *not* ensure that the licenses about which it complains will go to the bidder that values them most highly. It will only ensure that VTel has a greater chance of acquiring a license at a lower price than the market produced.[295]

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[289] VTel Petition at 31.

[290] *Id.* at 34.

[291] *Id.* (emphasis added).

[292] *Id.*

[293] *Id.* at 1.

[294] This begs the question about what the Commission would do about an Auction 97 bidder that intended to bid on a license for spectrum in Vermont but did not as prices increased.

[295] The very concept of an auction is that bidders must continue to increase their bid prices to successfully win the auctioned item and that an auctioned license will flow to the bidder that values the license most highly. The fully-disclosed joint bidding arrangements between Northstar Wireless, DISH, and SNR did not prevent any auction participant from bidding in Auction 97, and such a claim would not withstand scrutiny. Auction participants bid what they are willing to pay for spectrum rights, and when the price of the spectrum rights exceeds what

VI. NONE OF THE PETITIONERS HAS RAISED ANY SUBSTANTIAL AND MATERIAL QUESTION OF FACT NECESSARY TO JUSTIFY FURTHER DELAY

None of the Petitioners has raised any substantial and material question of fact necessary to justify further delay. As noted, under Section 309(d)(1) of the Communications Act, a petition to deny must, at a minimum, "contain specific allegations of fact sufficient to show that . . . grant of the application would be prima facie inconsistent with" the public interest, convenience, and necessity.[296] Factual allegations satisfy that burden only when "supported by affidavit of a person or persons with personal knowledge thereof."[297] A petition to deny should be rejected without further investigation if it does not "contain specific allegations of fact sufficient to show . . . that a grant of the application would be *prima facie* inconsistent with the [public interest]."[298] The Commission will grant the application unless a petitioner has alleged "specific facts" sufficient to raise "a substantial and material question of fact requiring" a hearing.[299] A petition to deny that is based only on "[t]he allegation of ultimate, conclusionary facts or more general allegations on information and belief" must be denied.[300]

Other than VTel, none of the Petitioners has even appeared to make a minimal attempt to satisfy the Section 309(d)(1) requirement that specific allegations of fact be presented in an affidavit of a person with personal knowledge of the facts alleged. As noted above, Americans

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the bidder is willing to pay, the bidder stops bidding — that is how the Commission's spectrum auctions come to a close. Presumably, VTel bid what it was willing to pay in Auction 97.

[296] 47 U.S.C. § 309(d)(1).

[297] *Id. See also* 47 C.F.R. § 1.2108(b).

[298] *Tele-Media, Inc*, 697 F.2d at 409 (quoting 47 U.S.C. § 309(d)(1)).

[299] *Citizens for Jazz on WRVR*, 775 F.2d at 395 (internal quotations omitted); 47 C.F.R. § 1.2108(d)(1).

[300] *Stone*, 466 F.2d at 322 (quoting S. Rep. No. 690, 86th Cong., 1st Sess. 3 (1959)).

for Tax Reform, Citizen Action, CWA/NAACP, Ehrlich, HTTP, and NAN provide no affidavits at all with their Petitions. The declarations appended to CTTI/Rainbow's Petition are facially insufficient, presenting no specific facts and containing only the barest of conclusory statements purporting to agree with the contents of their Petition, but failing to present any specific facts based on personal knowledge.

As for VTel, its allegations hang on the Guité Affidavit, in which Dr. Guité observes that three bidders — Northstar Wireless, SNR, and American I — bid on two of the same licenses as VTel during Round 21 of Auction 97,[301] when only one other bidder had placed competing bids in the previous rounds. Dr. Guité reportedly assumed that this heightened bidding interest "would drive up the price to levels [VTel] could not afford," so he "decided that VTel should drop out of the bidding"[302] for those licenses. But the fact that Northstar Wireless, SNR, and American I competed directly against VTel for two licenses is not sufficient to establish a *prima facie* case for denying Northstar Wireless' license applications.

Dr. Guité's stated belief that the bids created the "false impression of more robust demand"[303] and that this demand was "entirely artificial"[304] does not make it so. Indeed, the affidavit provides no factual support at all — much less the required "personal knowledge" — for the conclusion that demand was "false" or "artificial." Further, throughout Auction 97, each of Northstar Wireless' entered bids were sincere, *bona fide* bids. Northstar Wireless paid for each its Auction 97 winning bids, and it would have paid for any of its other bids that became a

[301] *See* Guité Affidavit at ¶ 11-13.

[302] According to the affidavit, Dr. Guité elected to drop out of bidding based on his *expectation* that prices would rise beyond what VTel would be willing to pay. *See* Guité Affidavit at ¶ 13. VTel thus faults Northstar Wireless for its own speculative behavior.

[303] Guité Affidavit at ¶ 14; *see also id.* at ¶ 18.

[304] *Id.* at ¶ 20.

winning bid.[305] But, in any event, these unsupported assertions do not constitute "specific allegations of fact" required to satisfy the evidentiary standard of Section 309(d).

Having failed to provide the basic — and mandatory — initial factual showing supported by personal knowledge, the VTel Petition instead shifts to unadorned speculation. For example, VTel argues that a hearing is needed because "it is difficult to understand" a Northstar Wireless withdrawal of a bid for a Philadelphia license.[306] But, the law is clear. A petition does not merit further review unless it has alleged "specific facts,"[307] and one that is based only on "[t]he allegation of ultimate, conclusionary facts or more general allegations on information and belief" must be denied.[308] Here, VTel makes no allegation whatsoever, much less one that includes a "fact." Instead, the VTel appears to seek a hearing to indulge its own curiosity, which is not merited under the law.

As described in the preceding sections, none of these assertions raise any "substantial and material question of fact" requiring further proceedings. No evidence supports the accusation that the placement of identical bids by Northstar Wireless, SNR, and American I for some

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[305] *See* Todd Declaration at ¶ 17.

[306] *See* VTel Petition at 37. According to the Commission, "allowing bid withdrawals facilitates efficient aggregation of licenses and pursuit of efficient backup strategies as information becomes available during the course of an auction." *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, 460 (1997). The Commission has confirmed that its bidding withdrawal policy "allows bidders to most efficiently allocate their resources as well as to evaluate their bidding strategies and business plans during an action while, at the same time, maintaining the integrity of the auction process." *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 Forth Further Notice of Proposed Rulemaking*, 15 FCC Rcd 15293, 15302 (2000).

[307] *Citizens for Jazz on WRVR*, 775 F.2d at 395 (internal quotations omitted).

[308] *Stone v. FCC*, 466 F.2d 316, 322 (D.C. Cir. 1972) (quoting S. Rep. No. 690, 86th Cong., 1st Sess. 3 (1959)).

licenses "would not have occurred unless DISH was directing their bidding activity."[309] VTel also insists that DISH enjoyed "veto power" and "approval rights" over deviations from the Bidding Protocol and Joint Bidding Agreement while eliding the fact that Northstar Wireless' approval was required for any such change, thereby neutralizing DISH's ability to require deviations from the agreed-upon protocols. Moreover, VTel's unsupported assertions of undisclosed *de facto* control by DISH also ignores key provisions of the Northstar Wireless agreements vesting Northstar Manager with exclusive operational control. In sum, VTel's Petition does not cite any specific facts raising material issues that require further review. The petition plainly fails to meet the Communications Act's requirements, and it should be denied.

VII. VTEL'S LACK OF CANDOR ARGUMENT FAILS BASED ON THE FACTS AND AS A MATTER OF LAW

VTel's claims that Northstar Wireless made material misrepresentations to the Commission and exhibited a lack of candor[310] fail based on the facts and as a matter of law, and the Commission should dismiss these arguments as frivolous.

A. VTel's Argument that Northstar Wireless Made Material Misrepresentations to the Commission and Exhibited a Lack of Candor Fails Based on the Facts

VTel's argument that Northstar Wireless made material misrepresentations and exhibited a lack of candor in its application to the Commission fails on the facts because, as established above, Northstar Manager — not DISH — has *de facto* control of Northstar Wireless.[311] VTel's argument regarding Northstar Wireless' alleged lack of candor is entirely based on its claim that Northstar Wireless was under the *de facto* control of DISH and was thus required to disclose

[309] VTel Petition at 23.

[310] *See* VTel Petition at 25-28.

[311] *See supra* Sections III.A. and III.B.

DISH as an affiliate and controlling interest in its applications to the Commission.[312] This argument is not supported by the facts because Northstar Wireless properly disclosed all affiliates and controlling interests, which as has been established, at no point included DISH. Indeed, it *would* have been a misrepresentation to identify DISH as an affiliate or a controlling interest in light of the myriad transaction terms to the contrary and the clear Commission precedent on which they were based.

B. VTel's Argument that Northstar Wireless Made Material Misrepresentations to the Commission and Exhibited a Lack of Candor Fails as a Matter of Law

Applicants and licensees in all radio services, including applicants in the AWS-3 auction, are subject to the Commission's broadcaster character qualifications standards.[313] While Section 1.17 of the Commission's rules prohibits misrepresentations and lack of candor in Commission filings by any applicant for any Commission authorization,[314] the Commission has plainly defined "misrepresentation" as "a false statement of fact made *with intent to deceive*."[315] VTel's

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[312] VTel Petition at 25.

[313] *See, e.g., Policy Regarding Character Qualifications in Broadcast Licensing; Amendment of Part 1, the Rules of Practice and Procedure, Relating to Written Responses to Commission Inquiries and the Making of Misrepresentations to the Commission by Applicants, Permittees, and Licensees, and the Reporting of Information Regarding Character Qualifications, Policy Statement and Order,* 5 FCC Rcd 3252, 3253 ¶ 10 (1990) (adopting 47 C.F.R. § 1.17 to apply the prohibition against misrepresentations and material omissions to applicants, licensees, and permittees in all radio services).

[314] 47 C.F.R. § 1.17. *See Amendment of Section 1.17 of the Commission's Rules Concerning Truthful Statements to the Commission, Report and Order,* 18 FCC Rcd 4016, 4017 (2003), *recon. denied, Memorandum Opinion and Order*, 19 FCC Rcd 5790, *further recon. denied*, Memorandum Opinion and Order, 20 FCC Rcd 1250 (2004) (expanding the scope of Section 1.17 to include written statements that are made without a reasonable basis for believing the statement is correct and not misleading and to "prohibit incorrect statements or omissions that are the result of negligence, as well as an intent to deceive").

[315] *See, e.g., Pendelton C. Waugh, Charles M. Austin, and Jay R. Bishop, Order to Show Cause and Notice of Opportunity for Hearing*, 22 FCC Rcd 13363, 13376 (2007) ("*Waugh Order*") (emphasis added); *Maritime Communications/Land Mobile, LLC*, Order to Show Cause,

argument that the Commission could find an applicant has shown lack of candor absent the intent to deceive is incorrect.[316] To the contrary, the Commission has found that intent to deceive is "[a] necessary and essential element of both misrepresentation and lack of candor."[317]

The Commission has found that providing material factual information without a reasonable basis for believing that it is correct and not misleading (for example, a false certification) could potentially be considered a misrepresentation that would merit corrective action.[318] However, all of the ownership and attribution information that Northstar Wireless has provided to the Commission was submitted, after extensive confirmation and review, in the good faith belief that Northstar Wireless is in full compliance with the Commission's rules and the AWS-3 auction procedures.

Indeed, Northstar Wireless 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 — in many cases ahead of the auction — in conformance with its rules. Against this actual record of comprehensive disclosure by Northstar Wireless, VTel offers only speculations, devoid of any

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Hearing Designation Order, and Notice of Opportunity for Hearing, 26 FCC Rcd 6520, 6542 (2011) ("*Maritime Communications*") ("[L]ack of candor is concealment, evasion, or other failure to be fully informative, accompanied by intent to deceive"); *Gateway Telecom LLC d/b/a Stratuswave Communications, Memorandum Opinion and Order and Order on Reconsideration*, 27 FCC Rcd 6302, 6315 (2012).

[316] *See* VTel Petition at 26.

[317] *Maritime Communications*, 26 FCC Rcd at 6542. Notably, one of the cases VTel cites to support its claim regarding the standard for lack of candor is bad law. *See* VTel Petition at 26, *citing Lebanon Valley Radio, Inc.*, Decision, 35 FCC 2d 243 (Rev. Bd. 1972). In *Lebanon Valley Radio*, the Commission's Review Board's decision to deny a construction permit based on an alleged lack of candor was overturned by the D.C. Circuit, and on remand to the Commission the permit was granted.

[318] *Maritime Communications*, 26 FCC Rcd at 6543.

evidence, that Northstar Wireless lacked a reasonable basis for its submissions to the Commission. VTel's frivolous speculations about Northstar Wireless' supposed lack of candor completely lack any support or justification, and the Commission should reject them.

Although VTel suggests that the Commission should find that Northstar Wireless' amendments to its initial application forms are a sign of lack of candor,[319] the Commission has found that it "will not infer improper motive from errors, inconsistencies or omissions accompanied by speculation that lacks factual support."[320] Indeed, the VTel claim is quite similar to that which the Commission rejected in *Alaska Native Wireless*. There, a petitioner argued that the designated entity failed to be fully candid in its application and should have disclosed revenues of AT&T Wireless, which was a non-controlling investor of the designated entity with non-managing member interests.[321] The Wireless Bureau rejected this argument:

> [Petitioner] fails to allege specific facts demonstrating that Alaska Native Wireless did not disclose information that would affect the determination of Alaska Native Wireless' eligibility as an entrepreneur or designated entity. [Petitioner's] argument appears to be that merely failing to attribute the revenues of AT&T Wireless itself constitutes a disqualifying lack of candor. As discussed above, however, AT&T Wireless' revenues would need to be attributed only if it were an affiliate under our rules.[322]

The Wireless Bureau noted that it is always possible that it could make a determination, on examining the final application for a license, that an interest that an applicant had concluded was non-controlling was, in fact, controlling and therefore attributable, "the applicant's failure to

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[319] VTel Petition at 27.

[320] *Auction 87 Order*, 27 FCC Rcd at 4387-88 (rejecting the "letter-perfect" standard and the allegation of lack of candor for two Auction 87 applicants who reported affiliates in their amended short-form applications that they omitted in their initial filings). Moreover, application amendments are entirely permissible; the Commission has explicitly rejected the "letter-perfect" standard for license applications. *See id.*

[321] *Alaska Native Wireless*, 17 FCC Rcd at 4231.

[322] *Id.* at 4241 (footnote omitted).

satisfy the controlling interest standard" in such a scenario would not implicate a finding of lack of candor.[323] The same result applies here.

VTel fails to allege specific facts demonstrating that Northstar Wireless did not disclose information that would affect the determination of Northstar Wireless' eligibility as a very small business. Instead, just as in *Alaska Native Wireless*, Northstar Wireless "provided the required ownership information — including the existence of [DISH's] ownership interests — within each of its Applications and also provided additional information and documents regarding the ownership and organization of [Northstar] Wireless in response to staff inquiries."[324] VTel's allegation that Northstar Wireless made any misrepresentation or exhibited any lack of candor fails as a matter of law.

VIII. THE PARTICIPATION AND SUCCESS OF NORTHSTAR WIRELESS IN AUCTION 97 FULFILLED THE OBJECTIVES OF SECTION 309(j) OF THE COMMUNICATIONS ACT AND OF THE COMMISSION'S RULES

Northstar Wireless' participation in Auction 97 was in full compliance with both the requirements of section 309(j) of the Communications Act and the requirements of the Commission's implementing rules governing designated entity participation in the auction. None of the Petitioners has standing to petition to deny the Northstar Wireless Auction 97 license applications, and none has raised any substantial and material question of fact to that

[323] *Id. See also Application of DCC PCS Inc., Order*, 18 FCC Rcd 11452, 11461(Commercial Wireless Division WTB 2003) (finding that a license applicant's "failure to satisfy the controlling interest standard would not automatically compel a finding that the applicant lacked candor"). Notably, even in the one proceeding in which the Commission ultimately denied designated entity credits to an applicant, the Commission did not find that the applicant had shown a lack of candor in its submissions. *See Baker Creek*, 13 FCC Rcd at 18728.

[324] *Alaska Native Wireless*, 17 FCC Rcd at 4241 n.74. Thus, contrary to VTel's assertion, Northstar Wireless has not been "incrementally disclosing information about the nature and extent of" its relationship with DISH. *See* VTel Petition at 27.

warrants further delay in the Commission's issuance of the licenses for which Northstar Wireless was the winning bidder. These conclusions alone are sufficient for the Commission to issue Northstar Wireless' licenses forthwith, and to conclude any further inquiry into the various other criticisms Petitioners have raised extraneous to the legal requirements for designated entity participation under the statute and the Commission's implementing rules.

Indeed, as discussed above, it is clear that the various criticisms the Petitioners raise regarding Northstar Wireless' participation in Auction 97 are actually directed at changing the Commission's competitive bidding policies rather than at Northstar Wireless' compliance with the rules for the auction. In other words, criticisms are of the current law itself, rather than identifying any non-compliance with that law.[325] Nonetheless, it is clear upon closer inspection that even these various extraneous criticisms by the Petitioners are without any merit. Contrary to the Petitioners' claims, in addition to complying with the statute and the Commission's legal requirements, Northstar Wireless' participation in Auction 97 significantly furthered accomplishment of the policy objectives of the Commission's designated entity rules under section 309(j).

Petitioners Citizen Action, CWA/NAACP, HTTP, and NAN make unfounded assertions that DISH's investment in and joint bidding agreements with designated entities such as Northstar in Auction 97 somehow contravenes the goals of the Commission's designated entity program to support participation by small and minority-owned businesses in the auction and in

[325] In fact, the Petitions by Ehrlich, Americans for Tax Reform, and HTTP openly call for changes to the Commission's designated entity rules, and the bulk of American Tax Reform's Petition consists of its various pleadings in the Commission's competitive bidding rulemaking proceeding – making quite obvious that their complaint is with the rules themselves, and not about Northstar Wireless' compliance with the rules. *See* Ehrlich Petition at 1-3; Americans for Tax Reform Petition at 2 and attachments; HTTP Petition at 1.

the provision of wireless service.[326] As an initial matter, these criticisms aimed at DISH – whether or not they have any merit – have no legal relevance whatsoever to the Commission's determination of whether Northstar Wireless met bidder qualifications and complies with the Commission's designated entity rules. As such, these criticisms have no place in petitions to deny the issuance of the licenses Northstar Wireless won during the auction, and should be rejected.

In addition to their lack of legal merit, these claims also lack substantive merit. Specifically, these claims ignore how the participation of designated entities like Northstar in Auction 97 benefitted the Commission's fulfillment of its statutory responsibility to disseminate spectrum licenses to small, minority-owned businesses and ensure they have the opportunity to provide wireless services.[327] As discussed above, the participation by Doyon, the Doyon Foundation and the Chugach Corporation in Auction 97 through their ownership interests in Northstar Manager helped ensure that the auction included participation by Alaska Native-owned small businesses.

Petitioners Ehrlich, HTTP, and CWA/NAACP claim that DISH's investment in and joint bidding agreements with designated entities such as Northstar in Auction 97 somehow led to misuse and waste of taxpayer-funded subsidies for small businesses under the Commission's designated entity rules.[328] Again, these claims aimed have no legal relevance whatsoever to the Commission's determination of whether Northstar Wireless met bidder qualifications and complies with the Commission's designated entity rules. As such, these claims have no place in

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[326] *See* Citizens Action Petition at 1-2; CWA/NAACP Petition at 1; HTTP Petition at 1; NAN Petition at 2-4.

[327] *See* 47 U.S.C. §309(j).

[328] *See* Ehrlich Petition at 1; HTTP Petition at 1; CWA/NAACP Petition at 5-6.

petitions to deny the issuance of the licenses Northstar Wireless won during the auction, and should be rejected. Petitioners Ehrlich's and HTTP's claims also appear to be confused about the uses of the Treasury funds supporting small business bidding credits and the Universal Service Funds overseen by the Commission – incorrectly asserting that Northstar's bidding credit would have otherwise somehow gone towards universal service funding for rural broadband or schools and libraries, or the Small Business Administration if not applied to Northstar's bid, thereby calling the rest of Ehrlich's and HTTP's analysis into question.

Apart from their lack of legal merit, Ehrlich's, HTTP's, and CWA/NAACP's unfounded complaints ignore the significant, procompetitive public interest benefits yielded by the participation of Northstar Wireless and other designated entities in Auction 97. The Communications Act expressly requires the Commission to encourage the participation of designated entities in spectrum auctions. Specifically, Section 309(j) directs the FCC 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."[329] In enacting Section 309(j), Congress realized that robust designated entity participation in spectrum auctions is critical both for the success of the auctions themselves and for the future competitiveness of the wireless broadband marketplace.[330]

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[329] 47 U.S.C. § 309(j).

[330] At the advent of spectrum auctions in 1993, a bipartisan Congress recognized that "[o]ne of the primary criticisms of utilizing competitive bidding to issue licenses is that the process could inadvertently have the effect of favoring only those with 'deep pockets,' and therefore have the wherewithal to participate in the bidding process. This would have the consequence of favoring incumbents, with established revenue streams, over new companies or

In particular, when designated entities obtain investments from larger companies with complementary resources, including greater access to capital and complementary spectrum and infrastructure, designated entities are able to raise the funds and develop the necessary expertise to enter and compete in spectrum auctions– just as Northstar Wireless and DISH did in Auction 97. This increases competition during the auction, boosts auction revenues for the government, and ultimately increases wireless competition for consumers.

Designated entity participation "induce[s] competition" in spectrum auctions, which plays a critical role in "prevent[ing] established firms from buying the airwaves at substantial discounts."[331] In particular, by entering into agreements with non-controlling investors for capital, designated entities are able to bid on licenses in major urban markets. Absent outside investment, designated entities would seldom be able to compete in any market, and in future auctions designated entities would be relegated to the least expensive small, rural markets. Limiting the ability of designated entities to raise outside investment would reduce the number of competitive bidders in spectrum auctions, ultimately reducing auction revenues. Because spectrum licenses in urban markets typically command higher values (and higher bids), it would also impede the ability of new competitors to establish a spectrum footprint in the important urban markets that providers need in order to establish a financially viable network.[332]

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start-ups." Omnibus Budget Reconciliation Act of 1993, H.R. Rep. No. 103-111 (May 25, 1993) at 255.

[331] Ian Ayres & Peter Cramton, *Deficit Reduction Through Diversity: How Affirmative Action at the FCC Increased Auction Competition*, 48 Stanford L. Rev. 761, 762, 780 (1996) ("[S]ubsidizing designated bidders created extra competition in the auctions and induced the established, unsubsidized firms to bid higher.").

[332] Outside investment is especially important for designated entities given the increasingly capital-intensive nature of the wireless industry, which places additional barriers to entry on greenfield entities.

The results of designated entity participation in Auction 97 speak for themselves. Ahead of the auction, most estimates predicted that the proceeds from the auction would be no greater than $18 billion.[333] The greater levels of competition from designated entity bidding in Auction 97 generated record-setting auction revenues of $41.3 billion – more than $23 billion higher than the highest pre-auction estimates. Furthermore, this $23 billion surplus in auction revenues far exceeds the approximately $3.5 billion in designated entity bidding credits provisionally awarded in the auction. Far from being a burden on taxpayers or drawing funds away from vital public programs, the designated entity bidding credits spurred designated entities to increase competitive pressure in the auction that generated $23 billion in additional auction proceeds, rendering the bidding credits an excellent deal for taxpayers that paid for themselves many times over.

These record-setting auction revenues in turn yielded $7 billion in funding for the FirstNet interoperable broadband public safety network and nearly than $29 billion in proceeds for the Treasury Department to pay down the national debt, along with helping to pay for an expected $5 billion in AWS-3 spectrum relocation costs.[334] The results of Auction 97 demonstrate the substantial and quantifiable public interest benefits of participation by designated entities like Northstar – benefits that Petitioners Ehrlich and CWA/NAACP entirely ignore.

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[333] As Commissioner Mignon Clyburn stated, "If you had conducted a poll of analysts before the start of the AWS-3 auction, the highest prediction given for its yield would not have exceeded $18 billion." "Statement of Commissioner Mignon L. Clyburn on the Results of the AWS-3 Auction," News Release, FCC (released January 29, 2015), available at: http://www.fcc.gov/document/statement-commissioner-clyburn-aw-3-auction-results.

[334] *See* Comments of the DE Opportunity Coalition, WT Docket No. 14-170, GN Docket No. 12-268, RM-11395, WT Docket No. 05-211, at 9-10 (filed February 23, 2015) ("DE Opportunity Coalition Comments").

Petitioner VTel alludes that Northstar Wireless' participation as a designated entity in Auction 97 "harmed customers of rural providers,"[335] apparently echoing claims that designated entities participating in the auction displaced rural providers from winning licenses.[336] The actual bidding data from the auction, however, demonstrates that large incumbents AT&T and Verizon won the licenses bid on and lost by rural local exchange carrier ("LEC") bidders to a much greater extent than designated entities like Northstar did. The auction data shows that 23 bidders self-identifying as rural LECs bid on and lost 115 licenses valued at $387 million, losing to bidders including AT&T ($139 million), Advantage ($66 million), Verizon ($44 million), SNR ($41 million), Northstar Wireless ($35 million), T-Mobile ($33 million), NE Colorado ($24 million), and others ($5 million). Of the total licenses the rural LECs lost, the licenses won by Northstar accounted for less than a tenth of their total value. AT&T and Verizon played a much more significant role in outbidding rural LECs than Northstar and its joint bidding partners. Moreover, the rural LECs entered total bids equal to $113 million for these licenses — less than 30 percent of the value of the total eventual winning bids. The evidence from the auction bidding data fails to support the characterization that Northstar's bidding displaced rural LECs.

Petitioners CWA/NAACP, Ehrlich, and CTTI each complain about the risks that issuing Northstar Wireless' licenses would present for future wireless auctions, including the upcoming 600 MHz broadcast incentive auction.[337] As an initial matter, these complaints make clear that the Petitioners' real concern is not with Northstar Wireless' compliance with the rules, but rather with how the Commission's existing competitive bidding rules will apply in future spectrum

[335] *See* Vtel Petition at 5.

[336] *See, e.g.,* Statement of Commissioner Ajit Pai (March 16, 2015), available at: https://apps.fcc.gov/edocs_public/attachmatch/DOC-332524A1.pdf.

[337] *See* CWA/NAACP Petition at 6; Ehrlich Petition at 1; CTTI Petition at 8-9.

auctions — concerns that should be raised in a rulemaking proceeding, rather than in a petition to deny issuing Northstar Wireless' licenses under the existing rules. As such, these Petitioners' complaints are misplaced, and should be rejected.

In addition to their legal irrelevance, these Petitioners' complaints ignore the very real benefits for future spectrum auctions in awarding Northstar Wireless' licenses and, similarly, the very real risks for future spectrum auctions in denying these licenses to Northstar Wireless. Specifically, to ensure the success of future spectrum auctions, including the broadcast incentive auction scheduled for early 2016, the Commission needs to ensure that designated entities can rely on transparent and predictable rules governing their participation. Failing to grant Northstar Wireless the licenses that it won in Auction 97 could cause all potential participants in spectrum auctions for the foreseeable future – including both designated entities and incumbent operators – to discount their bids because of the increased perceived risk and lack of certainty in auction participation. Both results could give rise to lower auction revenues, decreased competition in the wireless marketplace and failed auctions.

A. Transparent and Predictable Rules will Promote the Participation of Designated Entities in Future Spectrum Auctions

Transparent and predictable rules are the key to ensuring the participation of designated entities in future auctions, including the broadcast incentive auction.[338] As the Commission has seen in past auctions, impeding designated entity participation in the competitive bidding process reduces auction revenues, increases the risk of foreclosure by dominant providers and negatively affects innovation and competition in the wireless marketplace. Allowing the Petitioners here to alter the final auction results through *ex post* challenges to an established regulatory process

[338] *See* Furchtgott-Roth Declaration at ¶ 19 ("Transparent rules encourage participation in an auction by bidders.").

would undermine designated entity confidence in their ability to participate in future auctions, resulting in lower prices in the incentive auction and having negative consequences for wireless competition.[339]

Denying Northstar Wireless' licenses – in spite of its clear compliance with the Commission's designated entity rules – will undermine the confidence of designated entity bidders participating in future FCC wireless auctions, including the broadcast incentive auction. Furthermore, reducing the confidence of investors regarding the ability of designated entities to participate in the broadcast incentive auction will threaten the ability of designated entities to obtain capital from outside parties and negatively affect their ability to compete in major markets. Ultimately, the public will also suffer from a lack of transparency and certainty in auction rules, because they will lose the benefits of having designated entities serve as disruptive innovators and competitors in the post-auction market for wireless services.

B. Granting the Petitions Could Cause Prospective Bidders to Discount their Bids and Could Lead to a Failed Broadcast Incentive Auction

Spectrum auctions are most likely to be successful when the Commission adheres to key principles of transparency, clarity, fidelity, equity and neutrality. Adhering to these principles helps get spectrum into the hands of those who will make the best use of this scarce resource and at the same time provide fair compensation to the public.[340] In the past, the failure to live up to these principles has led to failed auctions. It is particularly important that the Commission maintain a consistent and coherent spectrum licensing policy in the months leading up to the

[339] *See id.* ("Bidders will be encouraged to participate by clear and enforceable rules. On the other hand, bidders will be discouraged from participating if (1) rules are unclear; (2) rules are unenforceable; (3) rules are subject to change after the auction; or (4) the entire auction is subject to being voided.") (footnote omitted).

[340] *See* R. Preston McAfee & John McMillan, "Auctions and Bidding," 25 J. Econ. Lit. 699, 711-14, 733 (1987).

incentive auction, which is poised to be one of the most important opportunities for wireless broadband providers to obtain particularly valuable spectrum blocks serving markets across the country. Granting the Petitioners' requests to deny Northstar Wireless' license applications in spite of its clear compliance with the Commission's rules for designated entity participation would cast uncertainty on the Commission's commitment to the principles governing its auction process at the same time that prospective bidders in the incentive auction are evaluating their business plans and making a determination as to whether the benefits of participating in the incentive auction outweigh the risks.

In past Commission auctions in which processes were unresolved or unclear, revenues were sharply lower than predicted bid levels. The 1997 auction of Wireless Communications Service ("WCS") licenses offers one example of an auction that ended with disappointing revenues as a result of uncertainty surrounding the principles governing the auction. In the months leading to the auction, the Congressional Budget Office had predicted the sale of licenses for WCS spectrum would raise nearly $2 billion for the United States Treasury.[341] However, in its desire to raise that revenue, Congress established an accelerated auction timeline, which forced the Commission to truncate its process and led to uncertainty about the WCS spectrum that deterred some bidders from participating.[342] Because of the Commission's failure to adhere to the best principles of auction design, when the auction was held the spectrum was drastically undervalued; the net revenue from the WCS auction was only $13.6 million, or approximately

[341] *See* H.R. 105-149 (Jun. 24, 1997).

[342] *FCC Report to Congress on Spectrum Auctions*, WT Docket No. 97-150, FCC 97-353 at 35 (Oct. 9, 1997).

one percent of initial predictions.[343] Many WCS licenses sold for $1.00 and one license in the San Francisco market sold for $6.00.[344] One winning bidder won the right to serve four large states for $4.00 — as Congressman John Dingell noted, "that's about the price of a Happy Meal at McDonalds."[345]

Granting the Petitions here would give rise to uncertainty and lack of clarity for bidders in the incentive auction, and like the WCS auction could reduce participation by all potential bidders.[346] Bidders who are concerned about risks or uncertainty in the proposal process are liable not to participate or to invest the resources they need to participate robustly. Likewise, broadcasters concerned about lower bidding may decide not to participate, thus reducing the amount of spectrum available to be auctioned. Prospective bidders as well as broadcasters will be watching closely the Commission's commitment to the principles it established for Auction 97, and will take their cue regarding the reliability of the incentive auction processes from the Commission's treatment of Northstar Wireless. The Commission — and the United States Treasury — cannot afford for spectrum in the incentive auction to sell for diminished value by creating uncertainty among potential bidders now.

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[343] Timothy Salmon, *Spectrum Auctions by the United States Federal Communications* Commission at 14 (Dec. 6, 2002), *available at* http://faculty.smu.edu/tsalmon/FCCchapter.pdf (last accessed May 18, 2015).

[344] *Id.*

[345] *Id.* at 15. Similarly, the 2000 spectrum auction in the Netherlands, which was plagued by poor auction design and tacit collusion by bidders, raised 30 percent less revenue than had been forecast. *See* Eric van Damme, "The Dutch UMTS-Auction" at 2-4 (Nov. 2001; revised Apr. 2002), *available at* http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.202.7619&rep=rep1&type=pdf (last accessed May 18, 2015).

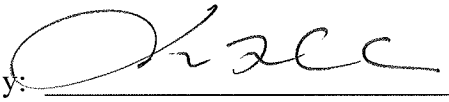
[346] *See* Furchtgott-Roth Declaration at ¶ 31 ("Little will discourage participation in future auctions as much as a sense that the FCC will ensure that the 'right' companies win at auction and the 'wrong' companies lose.").

IX. CONCLUSION

For these reasons, the Commission should dismiss or deny the Petitions and grant the pending Northstar Wireless Auction 97 license applications without delay.

Respectfully submitted,

NORTHSTAR WIRELESS, LLC

By: 

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May 18, 2015

CERTIFICATE OF SERVICE

I, Laura K. Layton, certify that true and correct copies of the foregoing Northstar Wireless, LLC Opposition to Petitions to Deny and associated attachments were delivered on May 18, 2015 by electronic mail (+), hand delivery (*), and/or United States mail, first class postage prepaid (**), to the following:

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Laura K. Layton

ATTACHMENT 1

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re Applications of	)	
NORTHSTAR WIRELESS, LLC	)	Report No. AUC-97 (Auction 97)
For AWS-3 Licenses in the 1695-1710 MHz, and 1755-1780 MHz and 2155-2180 MHz Bands	)	File Number 0006670613

DECLARATION OF AARON M. SCHUTT

1. I, Aaron M. Schutt, am President and Chief Executive Officer of Doyon, Limited ("Doyon"), which is an Alaska Native Regional Corporation organized by Congress under the Alaska Native Claims Settlement Act, 43 U.S.C. §§1601 et seq. ("ANCSA"). Doyon is owned by more than 19,000 Alaska Native shareholders of principally Athabascan descent. I am Koyukon Athabascan; an enrolled tribal member of the Native Village of Tanana; and a Doyon shareholder.

2. In mandating the creation of Doyon and other Alaska Native Regional Corporations, Congress undertook a unique social experiment. As Alaska entered the 1970s, the settlement of aboriginal land claims had not yet occurred in Alaska, but significant oil and gas resources and other mineral resources had been discovered and were on the cusp of development. The United States and the State of Alaska needed aboriginal land claims issues resolved. As Congress considered land claims, it also recognized that Alaska Natives continued to suffer the grave social and economic hardships resulting from the disruption of their culture and lifestyle that began with the arrival of Russian fur traders 200 years earlier. Alaska was also a state where

racism was prevalent and is the only state outside of the deep South subject to the specific provisions of the Voting Rights Act.

3. Rather than form a system of Alaska Native reservations, however, Congress mandated the elimination of all but one of the few reservations that had been previously formed and, instead, directed the creation of twelve Alaska Native Regional Corporations and more than 200 village corporations. Alaska Natives could enroll to the regional and village corporation for the geographic region corresponding to their family's historic community or to the regional corporation representing the area in which they were living at the time. ANCSA corporations issued shares to their members that could not be sold, traded or otherwise pledged. Thus, Alaska Natives were propelled into the world of corporate shareholder status. They became the owners of corporations that, at the direction of Congress, hold the collective results of their land settlements with the federal government. In turn, the corporations are assigned the task of earning profits for those shareholders and attending to their shareholders' real social and economic needs.

4. Doyon was incorporated in 1972 with 9,061 Alaska Native shareholders. Doyon was allowed to select 12.5 million acres of land within Interior Alaska. We were also provided with $54.4 million of initial capital as a part of the settlement of our aboriginal land claims.

5. Governing an Alaska Native Regional Corporation is incredibly complex. On the one hand, there is a mandate to earn a profit for shareholders; on the other, ANCSA corporations must meet social and economic needs of shareholders, manage the company's settlement land, and help to preserve culture. No one recognizes the complexity of the task more than the

governing boards of directors and managers of ANCSA corporations. The simple act of bestowing shareholder status on Alaska Natives has not eliminated the host of socioeconomic disadvantages that are due in large measure to the effects of two centuries of past discrimination against Alaska Native people.

6. As part of its duty to serve its shareholders, Doyon conducts a number of programs that provide scholarships, job training, and the means to preserve Alaska Native culture and history. While these initiatives are important, Doyon has long recognized that generating profits for its shareholders is its primary mission. To fulfill its mandate to provide for its Alaska Native shareholders, Doyon annually distributes dividends to its shareholders. Doyon has a long-standing policy of distributing to shareholders 50 percent of the trailing five-year average of its net income.

7. To generate income, Doyon has built a diverse business in oil field services, government contracting, utilities, tourism, and natural resource development. We have a skilled group of professional executives who are dedicated to the management and development of these businesses.

8. Cognizant of our special status, the nature of our shareholder base, and the broad mission bestowed on us by Congress, Doyon has diversified the economic base from which we serve our shareholders. Among other things, Doyon has invested in the telecommunications field since the late 1990s. Doyon appreciates the growth potential that telecommunications services provide, and it sees the provision of these telecommunications services as an important part of the company's strategy for the future. However, telecommunications operations are

highly capital intensive, which makes competing for valuable federal licenses especially difficult.

9. This problem is particularly pronounced in the case of Alaska Native Regional Corporations. At their core, Alaska Native Regional Corporations are creations of Congress formed in order to settle aboriginal land claims, but mandated to hold and manage land and capital for thousands of Alaska Native individuals. Alaska Native Regional Corporations are statutorily prohibited from selling equity – an important capital resource for telecommunications providers as they grow. Thus, the lack of access to equity capital as a traditional source of financing, compounded by discrimination against minorities in education and employment opportunities in the early years of the telecommunications industry, have created systemic limits to the penetration of these groups into the telecommunications field.

10. Congress recognized this reality when, as part of the Omnibus Budget Reconciliation Act of 1993, it directed the Commission to consider a variety of measures to ensure that small businesses, rural telephone companies, and businesses owned by minorities and women are given the opportunity to participate in the provision of spectrum-based services when licenses are to be awarded through competitive bidding. The Commission, in turn, developed policies to help ensure that Alaska Native Regional Corporations, among others, have the chance to participate in the wireless industry through license ownership. In the case of Doyon, this is an important opportunity, as we undertake to broaden the economic base from which we serve our shareholders.

11. To participate meaningfully in the capital intensive wireless business, Doyon capitalized Northstar Manager, LLC with nearly $44.7 million of our shareholders' money. This

is a large investment for our company. We also partnered with DISH Network. The Commission has long recognized that new entrants should have the ability to draw on the experience and resources of established service providers. Indeed, investments by industry veterans in an entity like ours increase our chances for success in service competition by providing access to capital and valuable industry experience. We also understand that the Commission has acknowledged the competitive benefits of scale and scope in the wireless industry, recognizing that operators with larger footprints can achieve increased efficiencies compared to operators with smaller footprints, promoting the reduction of prices for consumers. Against this background, we welcome DISH as part of our effort to rejoin the ranks of successful Commission licensees. We hope to draw on the experiences and resources of all of our partners as we work to establish our presence in the wireless services market.

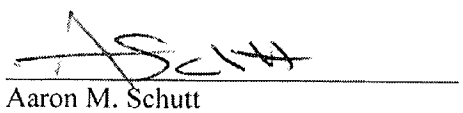
12. Nevertheless, both as it relates to our corporate mission and to the Commission's rules, our control over the business venture is essential. Alaska Native Regional Corporations are recognized under federal law as "unique aggregations" that force individual Alaska Natives to operate as part of a common entity with a common pool of capital. Indeed, in 1988, Congress determined that "[f]or all purposes of Federal law, a Native Corporation shall be considered to be a . . . minority and economically disadvantaged business enterprise." Congress did this for a reason. That our Alaska Native shareholders are the owners of our company does not alter the fact that they still face a host of social and economic disadvantages that have existed since long before Congress enacted ANCSA.

13. Doyon and other Alaska Native Regional Corporations are charged by Congress with addressing these disadvantages through our business activities. As a result, we are an

economic engine for our shareholders, and we do not surrender control of that function to any partner, large or small. Thus, though we hope DISH will be a big part of our success, we alone will determine how best to serve our shareholders through the development of Northstar Wireless.

14. Doyon believes that Northstar Wireless represents the fulfillment of a number of the Commission's policy objectives. Through Doyon, Northstar Wireless is controlled by more than 19,000 Alaska Native shareholders, constituting what may be one of the greatest incidences of minority control of Commission licenses in history. At the same time, Northstar Wireless is organized and funded at a level to permit it to compete in the capital-intensive wireless industry under the direction of our professional executives. The Commission has been working to increase the successful participation of members of minority groups in the provision of spectrum-based services and to ensure that sufficient spectrum is available to support the growing demand for wireless telephony and third generation services. Northstar Wireless is strong evidence that these Commission policies are effective.

I, Aaron M. Schutt, hereby declare under penalty of perjury that the foregoing is true and correct. I have also read the Northstar Wireless, LLC Opposition to Petitions to Deny in the captioned proceeding and, to the best of my knowledge, information, and belief, the facts set forth therein are true and correct. Executed on May 18, 2015.



Aaron M. Schutt

ATTACHMENT 2

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re Applications of	)	
NORTHSTAR WIRELESS, LLC	)	Report No. AUC-97 (Auction 97)
For AWS-3 Licenses in the 1695-1710 MHz, and 1755-1780 MHz and 2155-2180 MHz Bands	)	File Number 0006670613

DECLARATION OF ALLEN M. TODD

1. I, Allen M. Todd, am General Counsel and Assistant Secretary at Doyon, Limited ("Doyon"), 1 Doyon Place, Suite 300, Fairbanks, Alaska 99701.

2. In addition to my responsibilities as General Counsel, I have experiences in an executive capacity, serving as Interim General Manager of Doyon Government Services, Inc. from November 2006 to May 2007 with full responsibility for profit and loss during that period. Since 2000, my duties at Doyon have included close involvement with wireless spectrum acquisitions, and operations.

3. Doyon is an Alaska Native Regional Corporation ("ANC"), one of twelve such corporations established under the Alaska Native Claims Settlement Act, Pub. L. No. 92-203, 85 Stat. 688, as amended, Dec. 18, 1971; 43 U.S.C. §§ 1601-1629h ("ANCSA") to receive and manage for its shareholders the consideration received in settlement of aboriginal land claims in Alaska. That settlement opened the way for delivery of oil from Prudhoe Bay to the Lower 48 states. That oil resource has contributed substantially to the economy and energy security of the United States for decades.

4. Native American Tribes and ANCs often represent groups of relatively poor citizens tied to tribal membership or ANCSA corporation shareholder status. Accordingly, Congress and federal agencies have taken steps to avoid discriminating against these citizens for their status, or the size of their Tribe or ANC. For over twenty years, the rules of the Federal Communications Commission ("Commission") have recognized and enforced this anti-discrimination and pro-diversity principle.

5. Under the Indian Commerce Clause of the United States Constitution, Congress has a separately enumerated power which provides for plenary authority regarding Indian tribes. U.S. Const. Art. 1, § 8. Tribes (including Alaska Native Corporations) are recognized under federal law as "unique aggregations" which force numerous, poor individuals to operate under a common entity with a common pool of capital. *See United States v. Antelope,* 430 U.S. 641 (1977). In 1988, Congress determined that "[f]or all purposes of Federal law, a Native Corporation shall be considered to be a . . . minority and economically disadvantaged business enterprise." 43 U.S.C. § 1626(e).

6. In 1990, Congress enacted legislation which provided that in determining the qualifications for a "small" business status, the Small Business Administration ("SBA") shall determine the size of a small business concern owned by an Indian tribe or an Alaska Native Corporation "without regard to its affiliation with the tribe, any entity of tribal government, or any other business enterprise owned by the tribe." 15 U.S.C. § 636 (j)(10)(J)(ii). This principle, which exempts tribal and Alaska Native Corporation assets from the size determination is based upon the above "forced aggregation" concept and is known as the "tribal affiliation rule." In 1992, the SBA adopted the above statutory language as part of its affiliation regulations for determining the size of a "small" business. 13 C.F.R. § 121.401(b).

7. The Commission is required to ensure that its own policies, in areas outside its area of expertise, are consistent with other bodies of federal law. *See, e.g., La Rose v. Commission*, 494 F.2d 1145, 1147 n.2 (D.C. Cir. 1974). In 1994, following the development of an extensive record concerning the unique structure and economic status of tribes and Alaska Native Corporations, the Commission adopted its own tribal affiliation exemption that is an important component of its competitive bidding Designated Entity ("DE") rules. *See Implementation of Section 309(j) of the Communications Act – Competitive Bidding, Order on Reconsideration*, 9 Commission Rcd 4493, 4493-94 (1994); *Implementation of Section 309(j) of the Communications Act – Competitive Bidding, Fifth Memorandum Opinion and Order*, 10 Commission Rcd 403, 427-29 (1994). In 1995, in the wake of the decision of the Supreme Court of the United States in *Adarand Constructors v. Peña* raising the level of judicial scrutiny of racial classification, the Commission eliminated the race-based preferences built into its broadband PCS competitive bidding rules, but it expressly retained its tribal affiliation exemption. *See Implementation of Section 309(j) of the Communications Act – Competitive Bidding, Sixth Report and Order*, 11 Commission Rcd 136, 143-44, 155-56 (1995). According to the Commission, this "affiliation rule exception is different from the exception applicable only to minority investors in that it is premised on [Indian tribes'] unique legal status as recognized in the 'Indian Commerce Clause' of the United States Constitution." *Id.* at 156 (footnote omitted).

8. Pursuant to these congressional and Commission policies, ANCs have participated meaningfully in Commission competitive bidding events. Beginning in the 1990s, another ANC, Cook Inlet Region, Inc., worked closely with a new entrant in the wireless industry. That new entrant became VoiceStream, which became T-Mobile, and thus T-Mobile was "born" out of the Commission's designated entity program.

9. For its own part, Doyon has developed operational capability and experience in the wireless industry. Together with its co-investors, it has been granted over 45 Commission licenses reflecting $3.3 billion in gross Commission auction winning bids prior to Auction 97. Doyon was one of three ANCs that owned and controlled Alaska Native Wireless ("ANW"), a venture in which AT&T Wireless ("AT&T") was a 79.4 percent non-controlling investor. In Auction 35 in 2000, ANW was the winning bidder for licenses valued at $2.9 billion, becoming the second largest winner in Auction 35, the largest DE winner in Auction 35 and the largest minority-controlled auction winner in Commission's history. Doyon has closely followed this business structure and bidding procedures in subsequent designated entity transactions based on the precedent of the ANW transaction.

10. Doyon owned and controlled Denali Spectrum, a venture in which Leap Wireless was a non-controlling investor. In 2006, as Denali Spectrum was preparing to apply to bid in what was Auction 66, certain changes were made to the Commission's rules just two weeks before the original deadline for short form applications. As a result of these changes to the auction rules, Doyon was forced to substantially reduce the scale of its participation in Auction 66. Nonetheless, Denali Spectrum won the REAG-3 (Great Lakes) 10 MHz D Block license, a license that covered a substantial portion of the Upper Midwest, which included Chicago, the nation's third largest market.

11. Years ahead of the Commission's build-out requirements applicable to the license granted to Denali Spectrum, Doyon, through Denali Spectrum, completely built-out the greater Chicago area and portions of Wisconsin with more than 900 cell sites, a green-field project covering 18,000 square miles and a population of more than 11 million. This service, under the Cricket brand, brought industry-changing contract innovations (*e.g.*, unlimited and no-contract

plans) to the wireless industry and made available the first affordable broadband for the lower-income citizens of Chicago, Madison, Rockford and Kenosha.

12. Motivated by this experience, on September 3, 2014, Doyon formed Northstar Spectrum, LLC, which included a subsidiary of DISH (American AWS-3 Wireless II L.L.C. ("American II")) as an indirect non-controlling investor. In creating Northstar Spectrum and its subsidiary Northstar Wireless, LLC ("Northstar Wireless"), Doyon appreciated that the capital-intensive auction meant that it could not realistically participate in a meaningful way without the investment and experience of DISH. In that regard, in establishing Northstar Wireless and the many terms and conditions of our undertaking, Doyon looked to and relied on the Commission's precedent articulating and confirming the appropriate standards of *de jure* and *de facto* control, including the precedent set forth in *Alaska Native Wireless* and related decisions, in order to organize Northstar Wireless based on principles that the Commission has endorsed.

13. Doyon is the manager of Northstar Manager, LLC ("Northstar Manager"). Northstar Manager is the managing member of Northstar Spectrum ("Northstar Spectrum"), which in turn is the sole member of Northstar Wireless. Doyon exercises control (both *de facto* and *de jure*) of Northstar Wireless. Northstar Wireless participated in Auction 97 held by the Commission from November 13, 2014 to January 29, 2015. Pursuant to a joint bidding agreement with certain of DISH's subsidiaries, which was disclosed in Northstar Wireless' Form 175 application submitted to the Commission prior to Auction 97 (the "Northstar Wireless-DISH Joint Bidding Arrangement"), I served as the Northstar Wireless Auction Committee Chair and Bidding Manager, appointed by Northstar Manager. Thomas Cullen served as another member of the Auction Committee, appointed by American II.

14. Additionally, the following entities entered into a joint bidding arrangement:

American AWS-3 Wireless I L.L.C.; American II; American AWS-3 Wireless III L.L.C.; Northstar Wireless; Northstar Spectrum; Northstar Manager; Doyon; SNR Wireless Management, LLC; SNR Wireless HoldCo, LLC; and SNR Wireless LicenseCo, LLC (the "Northstar Wireless-SNR-DISH Joint Bidding Arrangement" and, together with the Northstar Wireless-DISH Joint Bidding Arrangement, the "Joint Bidding Arrangements").

15. During Auction 97, Northstar Wireless disclosed to, discussed, cooperated and collaborated regarding its bidding, bidding strategies, and settlement agreements with the parties to the Joint Bidding Arrangements, as publicly disclosed in advance of Auction 97, consistent with Section 1.2105(c) of the Commission's rules, prior Commission auction precedent, and the antitrust laws.

16. Doyon saw bidding in Auction 97 as a chance to establish a newer, greater opportunity for our shareholders. Indeed, given the extensive transaction terms into which Northstar Manager entered with DISH and its subsidiaries — including a DISH trademark agreement, a management agreement, and other terms — Northstar Manager hoped to acquire spectrum rights that would be valuable as part of a larger collaboration. Of course, keeping opportunistic flexibility and maintaining eligibility under the Commission's complex rules were also part of the process. This meant deciding when and how to deploy our resources as various licenses became increasingly costly and other opportunities, with potentially better value, existed.

17. Throughout Auction 97, Northstar Manager exercised *de jure* and *de facto* control regarding auction bidding matters for Northstar Wireless, among other things, having final decision-making authority on what bids to make and enter into the Commission's system. In addition, each and every one of Northstar Wireless' entered bids was a sincere, *bona fide* bid,

Northstar Wireless paid for each of its winning bids in Auction 97, and Northstar Wireless would have paid for each and every one of its provisionally winning bids that it made in Auction 97 had it become a winning bid in the end.

18. Doyon is proud of its role in Auction 97. If granted by the Commission, its licenses will bring diverse ownership, allowing participation by Northstar Wireless' 21,700 Alaska Native shareholders (including those shareholders of Chugach Alaska Corporation, another investor in Northstar Manager). Both as to minority and women-owned participation, this will be a landmark in the Commission's struggle to achieve diversity in its award of spectrum licenses. Northstar Wireless' role in Auction 97 unquestionably was instrumental in achieving record revenues for US taxpayers. Accordingly, Northstar Wireless creates the best opportunity in a decade for enhancing diversity and increasing wireless competition on a national scale.

I, Allen M. Todd, hereby declare under penalty of perjury that the foregoing is true and correct. I have also read the Northstar Wireless, LLC Opposition to Petitions to Deny in the captioned proceeding and, to the best of my knowledge, information, and belief, the facts set forth therein are true and correct. Executed on May 18, 2015.

Allen M. Todd

ATTACHMENT 3

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re Applications of	)	
NORTHSTAR WIRELESS, LLC	)	Report No. AUC-97 (Auction 97)
For AWS-3 Licenses in the 1695-1710 MHz, and 1755-1780 MHz and 2155-2180 MHz Bands	)	File Number 0006670613

DECLARATION OF HAROLD FURCHTGOTT-ROTH

I. INTRODUCTION AND BACKGROUND

A. Background and Overview

1. I have been asked by Northstar Wireless, LLC ("Northstar Wireless") to review the Petitions to Deny its applications for AWS-3 licenses[1] and to comment from an economic and regulatory perspective. I limit my comments at this time to how the Commission should evaluate the Petitions to Deny in the context of Commission rules, procedures, and precedent.[2]

2. My review included the VTel petition, which raises concerns about how the

[1]. Petitions to Deny were filed on or before May 11, 2015 by VTel Wireless, Inc. ("VTel"); Citizen Action; Americans for Tax Reform, Center for Individual Freedom, Citizens Against Government Waste, MediaFreedom.org, National Taxpayers Union, and Taxpayers Protection Alliance; Central Texas Telephone Investments LP and Rainbow Telecommunications Association, Inc.; Ev Ehrlich; National Action Network; and Communications Workers of America and National Association for the Advancement of Colored People; and Hispanic Technology & Telecommunications Partnership filed a late petition on May 15.

[2] At this time, I have not reviewed all the relevant documents and am not taking a position regarding whether any auction participant, including Northstar Wireless, has complied with the Commission's Designated Entity ("DE") program rules.

FCC conducted Auction 97 and certain bidding behavior of Northstar Wireless. I conclude that VTel's bid-rigging claims, as well as its auction outcome concerns (also raised by other petitioners), are unsupported by the rules, procedures and policies promulgated for Auction 97 or by economic theory.

3. In addition, many parties, including Northstar Wireless, reasonably relied on the FCC's rules, procedures and precedents for Auction 97. The Commission should promulgate transparent rules, procedures and policies in advance of spectrum auctions and then enforce those rules, procedures and policies consistently, adhering to past precedent and disallowing any *ex post facto* attempts to subvert those rules to render a particular result. Failure to do so could negatively affect future Commission auctions.

B. Qualifications

4. I am president of Furchtgott-Roth Economic Enterprises, an economic consulting firm. I am a senior fellow at the Hudson Institute where I founded and head the Center for the Economics of the Internet. I am an adjunct professor of law at Brooklyn Law School where I teach a course on communications law.

5. I was a commissioner of the Federal Communications Commission ("FCC" or "Commission") from November 1997 through the end of May 2001 while many of the provisions of the Telecommunications Act of 1996 were being implemented. In that capacity, I participated in all decisions of the Commission, including those affecting spectrum auctions.

6. I have worked for many years as an economist. From June 2001 through March of 2003, I was a visiting fellow at the American Enterprise Institute for Public

Policy Research ("AEI") in Washington, DC. From 1995 to 1997, I was chief economist of the House Committee on Commerce where one of my responsibilities included serving as one of the principal staff members drafting the Telecommunications Act of 1996.

7. My academic research concerns economics and regulation. I am the author or coauthor of four books: *A Tough Act to Follow?: The Telecommunications Act of 1996 and the Separation of Powers* (Washington, DC: American Enterprise Institute), 2006; *Cable TV: Regulation or Competition*, with R.W. Crandall (Washington, DC: The Brookings Institution), 1996; *Economics of A Disaster: The Exxon Valdez Oil Spill*, with B.M. Owen, D.A. Argue, G.J. Hurdle, and G.R. Mosteller (Westport, Connecticut: Quorum books), 1995; and *International Trade in Computer Software*, with S.E. Siwek (Westport, Connecticut: Quorum Books), 1993.

8. I received a Ph.D. in economics from Stanford University and an S.B. in economics from MIT.

II. THE COMMISSION SHOULD NOT CONSIDER THE AUCTION 97 OUTCOME IN ASSESSING NORTHSTAR WIRELESS'S COMPLIANCE WITH COMMISSION DE RULES AND PROCEDURES

9. The Petitions to Deny repeatedly refer to the outcome of Auction 97 as a basis to change future auction policies and even, in a few instances, to deny Northstar Wireless's license application.[3] The outcome of the auction, however, is largely irrelevant to, and certainly not dispositive of, whether entities, including Northstar Wireless, complied with the Commission's DE and auction rules. I am not aware of any portion of the DE rules that changes the eligibility of an applicant depending upon their skill or

[3] See, e.g., VTEL Petition.

success at an auction. Had Northstar Wireless won few or no licenses in Auction 97, its DE status should be unaffected.

10. Nor should the Commission assess the overall regulatory compliance of Auction 97 participants based on the auction outcomes. It is impossible to read Commission rules, procedures, and precedents during Auction 97 and reach any conclusion that one set of outcomes would be consistent with the rules and another set of outcomes would be inconsistent with the rules. Indeed, writing on December 1, 2014, I presented calculations of spectrum values under the assumption that *all* licenses in the AWS-3 auction would receive a 25% DE discount.[4] Had all licenses been won by DEs, it would not have been an unreasonable or unpredictable outcome.

11. This pattern for Auction 97 holds true for individual auction participants as well. Success or failure in securing capital is not an indicator of compliance or non-compliance with Commission DE or auction rules for an individual bidder. Similarly, success or failure in winning a license at an FCC auction is not an indicator of compliance or non-compliance with Commission DE or auction rules for an individual bidder. Rather, the Commission does and should evaluate each auction participant on its specific compliance with Commission DE and auction rules, not its success or failure at raising capital or its success or failure at bidding for licenses.

[4] See H. Furchtgott-Roth, "The Changing Market for Spectrum," Forbes.com, December 1, 2014, at http://www.forbes.com/sites/haroldfurchtgottroth/2014/12/01/the-changing-market-for-spectrum/2/.

III. THE PETITIONS TO DENY DO NOT RAISE ECONOMICALLY RATIONAL OBJECTIONS TO THE AUCTION OUTCOMES

12. The Petitions to Deny make serious allegations against Northstar Wireless, some of which can be empirically tested. For example, VTel asserts that Northstar Wireless was engaged in bid rigging.[5] VTel even cites case law explaining that, under bid rigging and collusive bidding, "an agreement between competitors in a bidding contest to submit identical bids or, by preselecting the lowest bidder, to abstain from all bona fide effort to obtain the contract."[6] From an economic viewpoint, VTel or another party not part of the alleged bid rigging scheme presumably would be in a position to outbid the "preselect[ed] lowest bidder" and win the auction for the licenses at issue at fair market value because the alleged scheme would suppress prices, thereby enabling a profit maximizing firm to outbid those in the scheme.

13. But VTel never suggests that it was precluded from bidding for any license. To the contrary, VTel repeatedly states that it initiated bidding for each of the licenses of interest to VTel.[7] Nor does VTel assert that Northstar Wireless's bidding for any of those licenses resulted in bids that were less than what VTel was willing to bid for those licenses. At most, M. Guite asserts "VTel would have bid higher amounts for both the A1 and B1 blocks but for the false impression of greater interest in these licenses."[8] When a party concedes that it exited an auction because of the appearance of great competition for a license, this is not evidence of bid rigging. It is evidence of the opposite, competition for a license. Likewise, M. Guite asserts that VTel would have been willing to bid more

[5] VTel Petition to Deny, p. 29.
[6] VTel Petition to Deny, fn. 70.
[7] Ibid., pp. 12-14.
[8] Guite affidavit, paragraph 21. M. Guite does not state that VTel, had it stayed in the auction, would have outbid Northstar Wireless.

than it actually did, not that it would have actually been the high bidder. If Northstar Wireless and others had actually attempted to be engaged in bid rigging, assigning the license to the lowest bidder, a VTel willing to bid competitively would by definition have outbid the bid riggers. VTel did not. It did not even try to compete.

14. For each license for which it bid, VTel concedes that it dropped out of bidding when bid prices were too high or would be too high.[9] VTel did not drop out of the auction because the auction prices were too low, the result of actual bid rigging. As M. Guite in his affidavit states: "Judging that the significant competition for the spectrum from three bidders would drive up the price to levels VTel could not afford, I decided that VTel should drop out of the bidding."[10]

15. As M. Guite concedes, there were prices that VTel could not afford. Those prices were more than what VTel bid. Had there been one other bidder, or three other bidders, or 100 other bidders does not change the facts that (1) VTel bid less than Northstar Wireless and (2) VTel dropped out of bidding. In short, VTel seeks to have the Commission award it licenses based on its status as the lowest bidder.

16. The number of other competitors in an auction does not give economic reason to overturn the results of an auction. From the seller's perspective, the more bidders on a license the more likely the license will sell for a competitive price, the price for which no other bidder would outbid it. If VTel could truly have put the license to the highest economic value, it should have been able to outbid other bidders, no matter the number. It did not. VTel claims that it would have bid more if it thought it were up

[9] VTel Petition to Deny, pp. 12-14.
[10] M. Guite affidavit, paragraph 13. See similar language at paragraph 17.

against just one competitor rather than three. There is little in economic theory or practice to corroborate this assertion.

IV. MANY PARTIES, INCLUDING NORTHSTAR WIRELESS, REASONABLY RELIED ON THE FCC RULES, PROCEDURES, AND PRECEDENTS FOR AUCTION 97

17. The Commission's rules, procedures, and precedents for each of the Commission auctions are available online.[11] Businesses, including small businesses such as Northstar Wireless, have access to the Commission rules and procedures as well as to expert advice on Commission auctions, and they rely upon them.

18. Transparent and enforceable rules are particularly important for auctions for unique assets, such as the FCC spectrum auctions. This is true for at least two reasons: (1) clearer auction rules lead to more bidders and more competitive bidding; and (2) clearer auction rules reduce the likelihood of disputed auction results, which are difficult to resolve. I will review each in turn.

19. Transparent rules encourage participation in an auction by bidders. Bidders in an FCC auction invest in expert advice on the details of FCC rules and reasonable bidding strategies. To have a competitive auction, the Commission seeks a large number of bidders. Bidders will be encouraged to participate by clear and enforceable rules. On the other hand, bidders will be discouraged from participating if (1) rules are unclear; (2) rules are unenforceable; (3) rules are subject to change after the auction; or (4) the entire auction is subject to being voided.[12]

20. Transparent rules help reduce the likelihood of disputes after an auction.

[11] See http://wireless.fcc.gov/auctions/default.htm?job=auctions_home.
[12] See FCC Auction 35, at http://wireless.fcc.gov/auctions/default.htm?job=auction_summary&id=35.

Our commercial system has developed many low-cost mechanisms to resolve common disputes in high-volume activities. For example, a customer dissatisfied with a consumer electronic device returns it to the seller who, under warranty, provides a new device. The consumer electronic device manufacturer anticipates a certain number of defective products and implements mechanisms to resolve customer complaints.

21. Auctions are different. If the outcome for even a single license in an FCC auction is disputed, much is at stake, so transparent rules are important. The parties that bid on the specific license have an interest in the resolution of the dispute. So too will every other bidder in the auction under the theory that, if the outcome for even one license at auction were tainted, so too might be the outcome of all other licenses at auction because of the complex and interrelated series of decisions that take place real-time in a simultaneous round auction, where all licenses are available for bidding in each round. Unlike the consumer electronics manufacturer, the Commission cannot simply ship a new device to dissatisfied customers. There is no simple resolution to auction disputes. Thus the Commission, along with all auction participants, has a substantial interest in ensuring the transparency, predictability, and enforceability of auction rules.

22. To help ensure a successful Auction 97, the Commission promulgated such rules, procedures and policies. The Commission sought public comment, and interested parties commented throughout the Commission's deliberations on the rules for Auction 97.[13] Likewise, outside parties commented throughout the Wireless Telecommunications Bureau's deliberations on procedures for Auction 97.[14] Parties thus had an opportunity to review and to propose changes to the FCC's existing auction rules and policies during this

[13] AWS-3 Report and Order.
[14] See various documents at FCC's Auction 97 website.

period, with the understanding that any governing rules and precedents not changed would remain in effect for Auction 97. Many outside parties filed comments on the Commission's rules and procedures precisely because they are so relevant to bidder conduct during the auction, and relied upon by the bidders and the FCC once established.

23. All businesses, including small businesses such as Northstar Wireless, reasonably rely on these auction rules, procedures, and precedents. They rely on the Commission rules, procedures, and precedents to decide whether to participate in an auction. They rely on the Commission rules, procedures, and precedents to decide corporate structures necessary to participate in the auction, and to secure the resources they need to compete in the auction. They rely on the Commission rules, procedures, and precedents to decide financial resources and financial structures necessary to participate in the auction. They rely on the Commission rules, procedures, and precedents to identify and follow lawful behavior during an auction. They rely on the Commission rules, procedures, and precedents to decide which licenses to seek to obtain through auction. They rely on the Commission rules, procedures, and precedents to understand and make business plans based on the regulatory restrictions on those licenses should the business succeed in winning a license at auction. They rely on the Commission rules, procedures, and precedents to understand how a license may lawfully be used once it is assigned after an auction.

24. Small businesses, such as Northstar Wireless, particularly rely on Commission rules, procedures, and precedents because, relative to a large corporation, a Commission auction represents a large portion of the activity of a small business.

25. Economists have long recognized the importance of the rule of law in

promoting social welfare.[15] Under rational economic behavior, individuals, businesses, and other entities behave in accordance with rules and information available or expected at that time, not at a different date. To understand behavior in 2014 or 2015 or any time, we must look to the information available at that time; to determine whether that behavior was permissible, we must look to the rules in place at that time.

V. THE COMMISSION SHOULD NOT ENGAGE IN *EX POST FACTO* RULE, PROCEDURE OR POLICY CHANGES

26. Auctions are proceedings open to the public in which large numbers of entities participate. As discussed above, participants reasonably rely on Commission rules, procedures and policies and reasonably assume that the Commission will be even-handed and fair-minded in administering the auction. To be even-handed and fair-minded, the Commission must be indifferent to auction outcomes and the ultimate assignment of licenses won at auction.

27. If the Commission, in either appearance or reality, interferes with Auction 97 outcomes to reassign licenses outside of its rules, procedures and policies, the Commission does great damage: (1) to itself, (2) to parties disfavored by the FCC biases, and (3) to future FCC auctions.

28. First, the damage to itself is reputational and legal. A Commission that circumscribes its own rules, procedures and policies, and plays favorites among parties suffers reputational damage to itself. Parties will not presume its fairness or its adherence to its own rules, procedures and policies, but instead will seek to curry favor with the Commission to circumvent those rules, procedures and policies. I am not aware of any

[15] See, e.g., M. Friedman, *Capitalism and Freedom* (Chicago: Univ. of Chicago Press), 1962, at 22-27.

instances where the Commission has been allowed by courts to change its rules, procedures or policies *ex post facto* in a manner to harm a DE applicant or license-holder.[16]

29. Second, parties disfavored by any Commission biases will be substantially harmed by the FCC's interference. Rather than obtain the fruits of their auction efforts, disfavored parties will receive little or nothing, and are likely to engage the Commission in years of litigation. As noted above, the Commission has no successful precedent of changing rules, procedures or policies *ex post facto* to harm DEs.

30. In the Petitions to Deny and in popular media, anti-economic arguments are sometimes made to disparage Auction 97 participants. One such anti-economic argument is that AWS-3 license values will inexorably go up in value, and that auction winners, particularly DEs, will receive a "windfall." To those who believe the value of one asset can increase indefinitely relative to other assets, economics has a blunt assessment: impossible. The value of spectrum cannot go up forever relative to other assets in the economy or else spectrum will become the value of the entire economy itself. Spectrum values over time resemble more a roller coaster: sometimes going up; sometimes going down. AWS-3 auction winners, including Northstar Wireless, are guaranteed no financial success. Northstar Wireless may be more valuable five years from now than it is today; it may also become worthless. Like all private firms, Northstar Wireless has taken risks. It may succeed; it may not.

[16] I am aware of instances where the Commission changed its rules *ex post facto* to favor DE license holders. See discussion in *A Tough Act to Follow*, Chapter 10, including changes in repayment schedule for PCS auction winners.

31. Third and importantly, future auctions will suffer if the FCC does not adhere to the rules and procedures of Auction 97. Rather than rely on its own rules and the competitive outcome of auctions, the FCC would be substituting its own beliefs and preferences into the application process. Little will discourage participation in future auctions as much as a sense that the FCC will ensure that the "right" companies win at auction and the "wrong" companies lose. Transparency and predictability of FCC auctions would be replaced by opacity of influence solicitations. This would also lead to litigation by the unsuccessful companies.

32. If the results of the AWS-3 Auction were tied up in litigation, it would be much more difficult for the Commission to move forward with the next round of auctions, particularly the auction for 600 MHz spectrum. That auction, like Auction 97, will have DE rules, procedures and policies. If the exact contours and applicability of those rules, procedures and policies were in doubt, it would be difficult for the auction to proceed. Potential auction participants would be less inclined to participate in the auction, and potential investors and financial backers would be less inclined to participate if rules are unclear. These parties would fear the Commission's possible change of the outcome of auctions for arbitrary reasons.

33. Operating businesses are good at assessing operational risks. Banks and financial institutions assess financial risk. But neither set of businesses is particularly experienced or skilled at assessing the risk that the Commission will alter its rules, procedures and policies to favor one party over another after an auction.

34. Finally, the Commission would stand to suffer in proceedings outside of auctions as well. Parties that rely on the transparency and predictability of Commission

rules, procedures, and policies would be disturbed by Commission *ex post facto* rules. An agency that could engage in such rules in auctions could not be trusted to avoid such rules in other proceedings.

35. For all of the various risks and costs that the Commission would incur by engaging in *ex post facto* rules, procedures and policies, there is no identifiable benefit either for the Commission or the American consumer. Parties before the Commission outside of auction proceedings would have no reason to be confident that the Commission might not engage in *ex post facto* rules outside of auctions. As Friedman noted, free and competitive markets depend on the rule of law. The Commission would lose much, and gain nothing, by putting the rule of law at risk.

I, Harold Furchtgott-Roth, hereby declare under penalty of perjury that the foregoing is true and correct. Executed on May 18, 2015.

Harold Furchtgott-Roth

ATTACHMENT 4

Before the
Federal Communications Commission
Washington, DC 20554

In re Applications of	)	
NORTHSTAR WIRELESS, LLC	)	Report No. AUC-97 (Auction 97)
For AWS-3 Licenses in the 1695-1710 MHz, and 1755-1780 MHz and 2155-2180 MHz Bands	)	File Number 0006670613

DECLARATION OF THOMAS CULLEN

1) I am the Executive Vice President, Corporate Development of DISH Network Corporation ("DISH").

2) DISH participated in the AWS-3 spectrum auction ("Auction 97") through an application filed by one of DISH's wholly owned subsidiary companies – American AWS-3 Wireless I L.L.C. ("American I").

3) DISH, through various subsidiaries, all of which are disclosed in Northstar Wireless, LLC ("Northstar's") Auction 97 application, is an indirect non-controlling investor in Northstar.

4) Doyon, Limited is the manager of Northstar Manager, LLC. Northstar Manager, LLC is the managing member of Northstar Spectrum, LLC, which in turn is the sole member of Northstar. Doyon exercises control (both *de facto* and *de jure*) of Northstar.

5) Northstar participated in Auction 97 held by the FCC from November 13, 2014 to January 29, 2015.

6) Pursuant to a joint bidding agreement ("JBA") with certain of DISH's subsidiaries, which was disclosed in Northstar's Form 175 application submitted to the FCC prior to Auction 97 (the "Northstar/DISH JBA"), Allen Todd served as the Northstar Auction Committee Chair and Bidding Manager, appointed by Northstar Manager, LLC. I served as another member of the Auction Committee, appointed by American AWS-3 Wireless II L.L.C. ("American II").

7) Additionally, the following entities entered into a JBA: American I; American II; American AWS-3 Wireless III L.L.C.; Northstar; Northstar Spectrum, LLC; Northstar Manager, LLC; Doyon Limited; SNR Wireless LicenseCo, LLC; SNR Wireless Holdco, LLC; and SNR Wireless Management, LLC (the

"SNR/DISH/Northstar JBA" and, together with the Northstar/DISH JBA, the "JBAs").

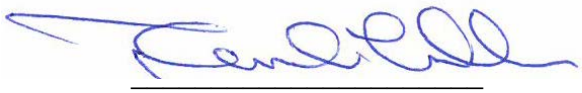
8) During Auction 97, Northstar disclosed, discussed, cooperated and collaborated regarding its bidding, bidding strategies and settlement agreements, with the parties to the JBAs, as disclosed in advance in the JBAs, and consistent with section 1.2105(c) of the Commission's rules, prior FCC auction precedent, and antitrust laws.

9) Throughout Auction 97, Northstar Manager, LLC exercised *de jure* and *de facto* control regarding auction bidding matters for Northstar, among other things, having final decision-making authority on what bids to make and enter into the FCC's system.

10) Throughout Auction 97, each of American I's entered bids were bona fide bids and, if any of those bids had become a winning bid, American I fully intended to pay for those licenses, and would have paid for them.

The foregoing declaration has been prepared using facts of which I have personal knowledge or based upon information provided to me. I declare under penalty of perjury that the foregoing is true and correct to the best of my information, knowledge, and belief.

Executed this 18th day of May 2015.



Thomas Cullen