Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of	)	
	)	
Application of SNR Wireless LicenseCo, LLC	)	ULS File No. 0006670667
	)	
Auction No. 97 – Advanced Wireless Services (AWS-3)	)	Report No. AUC-97
	)	

To: Chief, Wireless Telecommunications Bureau

CONSOLIDATED OPPOSITION OF SNR WIRELESS LICENSECO, LLC TO PETITIONS TO DENY

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May 18, 2015

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I. INTRODUCTION AND SUMMARY

The Commission should grant the Auction 97 application of SNR Wireless LicenseCo, LLC ("SNR") and affirm that SNR qualifies for the 25 percent bidding credit available to very small businesses. Nothing in the petitions to deny filed by the various petitioners warrants a different result. The majority of the petitioners are public policy advocacy groups or individual citizens that have no connection at all to Auction 97 and, accordingly, have no standing to challenge the grant of SNR's application or award of bidding credits to SNR. The remaining two petitions were submitted by auction participants who bid on and arguably have standing to challenge the grant of at most *two* licenses out of the 357 licenses for which SNR was the high bidder, and those two challenges fail on the merits.

The AWS-3 auction was the most successful auction in Commission history, significantly exceeding expectations and generating net proceeds to the U.S. government of over $41 billion[1] – approximately $5.5 billion of which will fund FirstNet and approximately $30 billion of which will go towards deficit reduction. Importantly, the auction has also fostered the potential for

[1] *See* Reply Comments of Council Tree Investors, Inc., WT Docket No. 14-170, Attachment at 8 (Mar. 6, 2015) ("Council Tree Mar. 6 Reply Comments").

significant new competitive entry into the wireless market by small and minority-controlled businesses, such as SNR.

SNR's organizational structure and investor protection provisions properly maintain *de jure* and *de facto* control in SNR's ultimate controlling party, John Muleta, and are essentially identical to those that have been allowed by the Commission in numerous prior auctions, including those involving designated entities ("DEs") or eligible entrepreneurs in which the passive, strategic investor was a major wireless carrier. Indeed, the Commission over the years has approved a total of $22.7 billion in spectrum licenses for such entities and their respective passive, strategic investors, including: Cook Inlet-Western Wireless and Voicestream (now T-Mobile) in Auction 11 and 22; Alaska Native Wireless-AT&T Wireless in Auction 35; Salmon PCS LLC-Cingular Wireless (now AT&T Mobility) in Auction 35; Vista-Verizon Wireless in Auction 58; Wirefree Partners-Sprint in Auction 58; Denali Spectrum License, LLC-Leap Wireless (now AT&T Mobility) in Auction 66; and King Street Wireless L.P.-U.S. Cellular in Auction 73.[2]

SNR's joint bidding agreements ("JBAs") and bidding activities were fully consistent with FCC rules and precedent and complied with the antitrust laws. SNR fully disclosed in its FCC Form 175 short-form auction application its two JBAs with: (i) subsidiaries of DISH Network Corporation ("DISH"), including American AWS-3 I Wireless L.L.C. ("American I"), the DISH subsidiary that directly participated in Auction 97;[3] and (ii) Northstar Wireless, LLC

[2] *See id.*; *see also* Comments in Response to Public Notice Request for Further Comment on Issues Related to Competitive Bidding Procedures, Council Tree Investors, Inc., WT Docket No. 14-170, Exhibit 2 (May 14, 2015) ("Council Tree May 14 Comments") (providing an illustrative list of FCC-approved DE strategic alliances).

[3] Petitioners largely do not distinguish between the two different DISH entities. For convenience and to avoid confusion, SNR refers to American I and DISH interchangeably in this Consolidated Opposition.

("Northstar"), which directly participated in Auction 97, certain affiliates of Northstar and certain subsidiaries of DISH. Accordingly, the parties complied fully with the Commission's anti-collusion rules and were permitted to discuss, disclose to each other, cooperate and collaborate with respect to bids, bidding strategy and settlement agreements during the auction. For this reason, petitioners' arguments that SNR, DISH and Northstar improperly bid on the same licenses in the same round, bid the same amounts for licenses and "accepted" in some instances the FCC's random number assignment tiebreaker mechanism (rather than continue to bid against one another) do not warrant denial of SNR's application.

The actions taken in Auction 97 by SNR, DISH and Northstar that petitioners criticize were not only permitted under the Commission's rules and precedent, but also were fully consistent with the Commission's unanimously adopted Auction 97 rules. For example, the Commission's decision to require anonymous bidding meant auction participants could not determine during the auction the identities of bidders and, therefore, whether the bidding was against other bidders that had entered into previously disclosed JBAs. Similarly, the Commission's bidding activity rules contributed to SNR, Northstar and American I sometimes bidding on the same licenses in a given bidding round. Indeed, given the bidding eligibility of the respective parties (each of which had nearly half the maximum number of bidding units), it would have been impossible to have no overlaps in bidding. Moreover, SNR's participation in Auction 97 contributed directly to the widely recognized, extraordinary success of Auction 97, increasing net auction revenues by an estimated $20 billion.[4]

The petitioners' arguments that SNR, DISH and Northstar violated the antitrust laws have no basis in law, Commission rules or economic reality and should be summarily dismissed.

[4] *See* Council Tree May 14 Comments, Exhibit 4 at 26.

There is no evidence whatsoever of any *per se* violation of the antitrust laws under any relevant precedent. Moreover, the complained-of collaboration and cooperation among SNR, Northstar, and DISH was done openly and in conformance with FCC rules, demonstrably enhanced competition by enabling significant new bidders to participate meaningfully in Auction 97, and brought the existing, highly concentrated, wireless industry closer to the entry of significant new facilities-based competition. In short, the parties' bidding conduct was procompetitive and fully consistent with the antitrust laws.

Fundamentally, the petitioners appear to want the FCC to implement changes to its auction rules and DE program. But, due process and fairness require that any such changes be applied only prospectively, subject to an appropriate rulemaking proceeding. Indeed, the Commission has suggested as much in its currently pending DE rulemaking proceeding (WT Docket No. 14-170), in which many of the petitioners have already submitted filings. Additionally, two of the petitioners are merely disappointed bidders, who lost the chance to acquire licenses they wanted, not because of any auction wrongdoing by others but because the petitioners were unwilling or unable to bid more than other parties who valued the licenses more highly. But sour grapes do not provide a legitimate basis to undo an FCC auction. The Commission should not, and indeed cannot, take actions in this licensing proceeding that would retroactively prohibit or reject SNR's lawful organizational structure, DE status, JBAs, bidding or other actions during Auction 97. For these reasons, the Commission should dismiss or deny each of the petitions to deny and expeditiously grant SNR's application.

II. BACKGROUND

SNR is a Delaware limited liability company ("LLC") and a wholly owned subsidiary of SNR Wireless HoldCo, LLC ("SNR HoldCo"), a Delaware LLC. SNR HoldCo has two members: (i) SNR Wireless Management, LLC ("SNR Management"), a Delaware LLC that

holds a 15 percent controlling membership interest in, and is the sole manager of, SNR HoldCo; and (ii) American AWS-3 Wireless III L.L.C. ("American III"), an indirect wholly owned subsidiary of DISH and a Delaware LLC that holds an 85 percent non-controlling non-managing membership interest in SNR HoldCo.

SNR Management has a single manager, Atelum LLC ("Atelum"), a Virginia LLC, which in turn has a sole managing member, John Muleta ("Muleta").[5] Accordingly, Muleta has *de jure* control of SNR under the FCC's rules.[6]

Additionally, SNR Management has two non-controlling investors: Blackrock, Inc. ("Blackrock"), which holds an aggregate indirect 51.33 percent non-controlling membership interest in SNR Management (which is reportable as a 100 percent aggregate indirect non-controlling interest under the FCC's ownership reporting and multiplier rules); and Nathaniel Klipper ("Klipper"), who under the Commission's attribution rules is deemed to hold an indirect 40.94 percent non-controlling membership interest in SNR Management (which is reportable as a 40.94 percent indirect non-controlling interest under the FCC's ownership reporting and multiplier rules).[7]

Muleta is an experienced entrepreneur with a broad and established background in Commission spectrum auctions and wireless technology. He served for approximately six years at the FCC, including as Deputy Bureau Chief of the FCC's Common Carrier Bureau and Chief of the FCC's Wireless Telecommunications Bureau ("WTB"), where he had primary

[5] *See, e.g.*, SNR, FCC Form 175, Exhibit A at 3-6 (providing a detailed description of SNR's ownership structure); SNR, FCC Form 602, File No. 0006670620, Exhibit A (filed Feb. 13, 2015).

[6] 47 C.F.R. § 1.2110(c)(2). No petitioner disputes Muleta's *de jure* control of SNR.

[7] SNR, FCC Form 602, Exhibit A at 2-6.

responsibility for regulating providers of wireless services and structuring and managing the Commission's wireless spectrum auctions.

Muleta also has extensive technology and wireless industry experience in the private sector. Before joining the FCC, he was employed as a network engineer at GTE Corporation. After his first term at the FCC, he served as a Senior Vice President at PSInet, one of the first commercial ISPs. He also served as an Executive Vice President at Navisite, a company focused on enterprise-class, cloud-enabled hosting, managed applications and services. Before returning to the FCC as Chief of the WTB, Muleta also served as Chairman and CEO of Tellus, Inc., which at that time was a developer of wireless OEM products, including EVDO cards and modems used in portable devices.

Between 2005-2010, Muleta served as the co-founder and CEO of M2Z Networks, Inc. ("M2Z"), a wireless startup company. It was during this period that Muleta developed expertise regarding the AWS-3 spectrum, as well as business experience regarding the competitive and operational challenges of deploying wireless networks. M2Z proposed to deploy a free wireless broadband network, using the 2155-2175 MHz portion of the AWS-3 band, aiming to benefit consumers by disrupting the traditional wireless service delivery model and spurring wireless innovation.[8] In developing both the technical and business plans relating to the M2Z application, Muleta gained an intimate knowledge of the capabilities and limitations of the AWS-3 spectrum. A number of incumbent wireless carriers attacked the M2Z proposal alleging, *inter alia*, that M2Z lacked the financial wherewithal to deploy a network and that, instead of assigning the

[8] *See* Application of M2Z Networks, Inc. for License and Authority to Provide a National Broadband Radio Service in the 2155-2175 MHz Band, WT Docket No. 07-16 (filed May 5, 2006).

spectrum to M2Z via an administrative process, the FCC should auction the spectrum.[9] As a result, the M2Z proposal was ultimately rejected[10] and the spectrum M2Z sought was combined with other spectrum and sold in Auction 97.

On September 12, 2014, SNR timely submitted its Auction 97 short-form application. On October 30, 2014, the FCC issued a public notice stating that SNR was found to be qualified to bid in the auction.[11] Auction 97 commenced on November 13, 2014 and ended on January 29, 2015 after 341 auction bidding rounds.[12]

On January 30, 2015, the Commission announced the Auction 97 winning bidders. SNR was the high bidder on 357 licenses, with gross winning bids totaling $5,482,364,300.00 and a net winning bids totaling $4,111,773,225.00. SNR timely submitted its long-form application and effectuated payment of all monies due. On March 10, 2015, the Commission placed SNR's application on public notice as accepted for filing.[13]

Seven petitions to deny were filed against the SNR application. Five of the petitions to deny were submitted by public policy-oriented groups or citizens (collectively, the "Public Policy Petitioners"), none of whom participated in Auction 97 either directly or indirectly

[9] *See e.g.*, Reply Comments of AT&T, WT Docket No. 07-16 at 11 (Apr. 3, 2007) ("M2Z has failed to demonstrate that has the financial wherewithal to build and operate a nationwide network on the scale proposed in its application.").

[10] *In the Matter of Applications for License and Authority to Operate in the 2155-2175 MHz Band*, Order, 22 FCC Rcd 16563 ¶ 1 (2007).

[11] *See Auction of Advanced Wireless Services (AWS-3) Licenses, 70 Bidders Qualified to Participate in Auction 97*, Public Notice, 29 FCC Rcd 13465, Attachment A (Oct. 30, 2014).

[12] *See Winning Bidders Announced for Auction 97*, Public Notice, 30 FCC Rcd 630, Attachment B (Jan. 30, 2015).

[13] *See Wireless Telecommunications Bureau Announces That Applications for AWS-3 Licenses in the 1755-1780 MHz and 2155-2180 MHz Bands are Accepted For Filing*, Public Notice, DA 15-302 (Mar. 10, 2015).

(through investments).[14] The remaining two petitions to deny were submitted by the following rural local exchange carriers ("RLECs"): VTel Wireless, Inc. ("VTel") located in Vermont; and Central Texas Telephone Investments LP ("CTTI") located in central Texas, filing jointly with Rainbow Telecommunications Association, Inc. ("Rainbow") located in Kansas (collectively, the "RLEC Petitioners").[15] Another entity, the Hispanic Technology & Telecommunications Partnership ("HTTP"), submitted two undated and unsigned documents on May 15, 2015, four days after the petition to deny filing deadline.[16]

III. THE PETITIONERS LACK STANDING TO CHALLENGE THE GRANT OF SNR'S APPLICATION OR AWARD OF BIDDING CREDITS TO SNR

A petition to deny a license application must set forth specific allegations of fact, supported by affidavit from a person with personal knowledge thereof, sufficient to make a *prima facie* showing that the petitioner is a party in interest, and that grant of the application would be inconsistent with the public interest, convenience, and necessity.[17] None of the Public

[14] *See* Petition to Deny of Americans for Tax Reform *et al.* (May 11, 2015) ("ATR Petition"); Petition to Deny of Citizen Action (May 6, 2015) ("Citizen Action Petition"); Petition to Deny of Communications Workers of America and the National Association for the Advancement of Colored People (May 11, 2015) ("CWA-NAACP Petition"); Petition to Deny of Ev Ehrlich (May 11, 2015) ("Ehrlich Petition"); and Petition to Deny of National Action Network (May 11, 2015) ("NAN Petition"). The ATR Petition appears to include three other documents that were filed previously in the FCC's DE rulemaking proceeding, Docket No. 14-170.

[15] *See* Petition to Deny of VTel Wireless, Inc. (May 11, 2015) ("VTel Petition"); Petition to Deny of Central Texas Telephone Investments LP and Rainbow Telecommunications (May 11, 2015) ("CTTI-Rainbow Petition").

[16] *See* Documents of the Hispanic Technology & Telecommunications Partnership (May 15, 2015) ("HTTP Documents").

[17] *See* 47 U.S.C. §309(d)(1)("The petition [to deny] shall contain specific allegations of fact sufficient to show that the petitioner is a party in interest and that grant of the application would be prima facie inconsistent with [the public interest, convenience, and necessity]. Such allegations of fact shall . . . be supported by affidavit of a person or persons with personal knowledge thereof."); *see also* 47 C.F.R. § 1.2108(b) ("Any such petitions [to deny] must contain allegations of fact supported by affidavit of a person or persons with personal knowledge thereof.").

Policy Petitioners have provided any specific allegations of fact, much less any supported by affidavit from a person with personal knowledge thereof, that demonstrate any direct injury that would result from grant of the SNR application or approval of the bidding credits.[18] The FCC has held that in such cases the petitions are procedurally flawed and should be dismissed.[19]

In addition to these procedural infirmities, each of these petitioners has failed to demonstrate that it satisfies the necessary elements for standing, *i.e.*: (i) that the grant of the SNR application or award of the requested bidding credits to SNR would result in direct injury to the petitioner; (ii) that there is a causal link between the claimed injury and the grant of the application or award of the requested bidding credit; and (iii) that injury would be redressable by the relief requested.[20]

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[18] Three of the Public Policy Advocacy Petitioners, Citizen Action (Illinois), Ev Ehrlich, and ATF *et al*. failed to comply with the FCC's rules regarding service to SNR, and the petitions should be dismissed on this basis as well. 47 C.F.R. § 1.47. HTTP also failed to serve SNR or include an affidavit with its submission. A number of petitioners also failed to include their own mailing addresses. SNR conducted a reasonable due diligence to provide service copies, but it was unable to find an address for Ev Ehrlich.

[19] *See, e.g., In the Matter of 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 ¶ 18 (2012) (rejecting petition to deny an auction application for failure to set forth specific allegations of fact) ("*Auction 87 Order*"; *see also United States Cellular Corp. Constructed Tower Near Fries, Virginia, et al*., Order, 24 FCC Rcd 8729 ¶ 15 (2009) (dismissing petition to deny for failure to include an affidavit attesting to petitioner's interest and stating that "[i]t is important for the orderly processing of applications and petitions that parties adhere to the Commission's pleading practices outlined in Part I of the Commission's rules.").

[20] *See, e.g., In the Matter of Paging Systems, Inc., Verde Systems, Inc., Verde Systems LLC, and Skybridge Spectrum Foundation, Applications for Assignment of Licenses,* Order and Order on Reconsideration, 28 FCC Rcd 12606 ¶ 4 (WTB 2013) ("When evaluating standing, the Commission applies the same test that courts employ in determining whether a party has standing under Article III to appeal a court order: the person must show '(a) a personal injury-in-fact that is (2) 'fairly traceable' to the defendant's conduct and (3) redressable by the relief requested.'"); *see also In the Matter of AT&T Wireless PCS, Inc., et al*., Order, 15 FCC Rcd 4587 ¶ 3 (WTB 2000) (citing *Sierra Club v. Morton*, 405 U.S. 727, 733 (1972)); *In the Matter of Access 220, LLC, Assignor, and Spectrum Equity, Inc., Assignee, Application for Assignment of*

None of the Public Policy Petitioners participated in Auction 97 or expressed any desire to do so.[21] Indeed, they have demonstrated no connection at all to Auction 97. For example, the CWA-NAACP Petition states only that the "CWA represents 700,000 workers in communications, media, airlines, manufacturing and public service" and that the "NAACP is our nation's oldest, largest and most widely-recognized grassroots civil rights organization."[22] The NAN Petition similarly states that it is "a nationally recognized non-profit organization dedicated to promoting equal opportunities for all people" and asks the FCC to "impose on DISH concrete obligations to improve its record of diversity," which is wholly unrelated to Auction 97.[23] These filings make clear that the Public Policy Petitioners are primarily focused on encouraging the FCC to adopt certain policies, regarding primarily the FCC's DE program.[24] These are not, however, direct injuries to the Public Policy Petitioners that would result from grant of any license, or award of bidding credits, to SNR. Accordingly, the Commission should dismiss the

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220 MHz Licenses and Request for Waiver, Memorandum Opinion and Order, 27 FCC Rcd 9321 ¶ 8 (WTB 2012); and *Alaska Native Wireless I,* 17 FCC Rcd 4231 ¶¶ 8-9*, app. for review denied*, *Alaska Native Wireless II,* 18 FCC Rcd 11640 ¶ 1.

[21] This same analysis applies to HTTP, which does not specifically ask the Commission to deny the SNR application but appears to have submitted documents encouraging others to file petitions to deny SNR's application.

[22] CWA-NAACP Petition at 1.

[23] NAN Petition at 1, 4.

[24] *See* ATR Petition at 2 ("[T]he FCC must reform the DE program …."); Citizens Action Petition at 1 ("As Illinois' largest public interest organization, we have fought for social and economic justice at the state and national levels for years. As such, we are concerned about DISH's manipulation of the Federal Communications Commission's Designated Entity program."); *see also* HTTP Documents ($3.3 Billion taxpayer-funded discount on wireless spectrum could be "better used to ... feed school lunch to more than 9 million more Hispanic students per day.").

petitions of all of the Public Policy Petitioners.[25] As discussed below, such policy arguments should be addressed in the Commission's pending DE proceeding.[26]

With respect to the RLEC Petitioners, who did participate in Auction 97, the federal courts and FCC have explained that, as a general matter, a petitioner may not challenge the grant of a specific license application unless the petitioner participated in the relevant auction *and bid on the same license at issue in the application*.[27] VTel, CTTI, and Rainbow argue that the collaboration (including bidding on some of the same licenses in the same rounds and in the same amounts) by SNR, DISH and Northstar in Auction 97 rendered the RLECs unable to secure five specific licenses: BEA004-A1 (VTel), BEA004-B1(VTel), CMA220 (CTTI), CMA179 (Rainbow), and CMA 442 (Rainbow).[28] However, the auction data make clear that the RLECs' standing to challenge the grant of SNR's licenses is much more limited. Specifically, VTel has standing to challenge only the grant of the BEA004-A1 license, and CTTI has standing to

[25] For the same reasons, to the extent the FCC treats the HTTP Documents as a petition to deny, it should be dismissed.

[26] *See infra* Section V.E.

[27] *See, e.g.*, *High Plains Wireless, L.P. v. FCC*, 276 F.3d 599, 605 (D.C. Cir. 2002) (petitioner that alleged that applicant engaged in general anti-competitive bidding strategies, denying the petitioner a "legally valid procurement process," had standing to challenge the grant of licenses to applicant in only the one market in which petitioner had also submitted a bid); *see also See In the Matter of Alaska Native Wireless, L.L.C.*, Order, 17 FCC Rcd 4231 ¶ 9 (WTB 2002) (in evaluating standing the FCC will take into consideration other auction participants who also outbid petitioner) ("*Alaska Native Wireless I*"), *app. for review denied*, Order, 18 FCC Rcd 11640 ¶ 10-13 (2003) ("*Alaska Native Wireless II*"). (petitioner that participated in an auction but did not bid on certain market licenses lacked standing to challenge the grant of those licenses because it could not show that any injury would be redressed by denial of the grant) and *Auction 87 Order* ¶ 27 (2012) (petitioner "suffered no ... injury, having placed no bid on the same licenses on which [the applicants'] bid").

[28] *See* VTel Petition at 14-15; CTTI-Rainbow Petition at 3-5.

challenge only the grant of the CMA220 license. As discussed below, these two challenges fail on the merits.[29]

For the BEA004-B1 license, after VTel stopped bidding, there were higher bids placed by two other auction participants (Joseph Sofio and 2014 AWS Spectrum Bidco Corporation on multiple occasions), and thus, VTel would have lost the license regardless of any alleged wrongdoing by SNR, DISH or Northstar. Accordingly, VTel cannot demonstrate that a denial of grant of the license for BEA004-B1 would address its purported injury resulting from the alleged wrongful conduct of "double bidding."[30]

Rainbow has no standing to challenge the grant of any of the licenses to SNR. SNR was not the high bidder for CMA179 – Verizon won that license – and, accordingly, denying the grant of any of the licenses to SNR would not redress any alleged harm to Rainbow for the grant of CMA179 to Verizon.[31] With respect to CMA432, only SNR and other auction participants, not subject to Rainbow's petition to deny, bid on that license during Auction 97. Accordingly, the alleged wrongful conduct of SNR, DISH, and/or Northstar by placing multiple bids in the same round did not, in fact, occur with respect to the bidding for the license for CMA432, and there can be no causal link between the claimed injury and the grant of the license for CMA432.

[29] *See infra* Sections IV-VII.

[30] *See Alaska Native Wireless I*, Order, 17 FCC Rcd 4231 ¶ 9 n.34 (WTB 2002) (in evaluating standing the FCC will take into consideration other auction participants who also outbid petitioner), *app. for review denied*, *Alaska Native Wireless II*, 18 FCC Rcd 11640 ¶ 16.

[31] *See Alaska Native Wireless II*, 18 FCC Rcd 11640 ¶ 15 (Petitioner "does not suggest, as it could not do so reasonably, that the Commission should deny the unchallenged winning bidders their licenses so that a new auction could be held.").

IV. SNR'S ORGANIZATIONAL STRUCTURE AND INVESTOR PROTECTION PROVISIONS DEMONSTRATE THAT MULETA HAS *DE FACTO* CONTROL OF SNR

A. Muleta has *de facto* control of SNR[32]

The Commission's rules provide that an entity holds *de facto* control over a DE if: (i) the entity "constitutes or appoints more than 50 percent of the board of directors or management committee" of the DE; (ii) the entity "has authority to appoint, promote, demote, and fire senior executives that control the day-to-day activities" of the DE; and (iii) the entity "plays an integral role in management decisions" of the DE.[33]

SNR's structure satisfies each of these requirements and, thus, vests *de facto* control in Muleta. First, SNR Management is the manager of SNR.[34] As a result, SNR Management controls 100 percent of the voting interests in SNR satisfying the requirement that it "constitutes or appoints more than 50 percent of the board of directors or management committee."[35] Second, under the SNR LicenseCo Agreement, SNR Management has "the exclusive right and power to manage, operate and control [SNR] and to make all decisions necessary or appropriate to carry on the business and affairs of [SNR], including the authority to appoint, promote, demote and terminate executives who oversee the day-to-day activities of [SNR] . . . ."[36] Separately, the SNR Management Services Agreement provides that SNR "shall retain authority and ultimate control over . . . the employment, supervision and dismissal of all personnel

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[32] As discussed *supra* in Section II, Muleta has *de jure* control of SNR, which no petitioner has challenged.

[33] *See* 47 C.F.R. § 1.2110(c)(2)(i)(A)-(C); *see also Implementation of Section 309(j) of the Telecommunications Act—Competitive Bidding*, Fifth Memorandum Opinion and Order, 10 FCC Rcd 403 ¶ 80 ("*Fifth MO&O*").

[34] *See supra* Section II.

[35] 47 C.F.R. § 1.2110(c)(2)(i)(A)-(C).

[36] SNR HoldCo LLC Agreement, § 6.1; SNR, FCC Form 175, Exhibit E at 21.

providing services under this Agreement."[37] Likewise, the SNR Management Services Agreement makes clear that SNR "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 [SNR] System; (ii) to require American III to reassign any employee such that the employee no longer works on any [SNR] System or (iii) to reject any personnel proposed by American III as the Systems Manager or contact representative for any [SNR] System."[38]

Third, SNR Management has *de facto* control over management decisions. Under the SNR LicenseCo Agreement, SNR Management "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 [SNR] . . . . [SNR] shall have all specific rights and powers required or appropriate for the day-to-day management of [SNR's] business . . . . Except as determined by [SNR Management] pursuant to this Agreement, no Member or representative shall have any right or authority to take any action on behalf of [SNR] with respect to third parties or to bind [SNR]."[39] SNR Management is thus the entity with *de facto* control over SNR. Muleta therefore has indirect *de facto* control of SNR through his control of SNR Management. Importantly, SNR's organizational structure is consistent with the organizational structures of DEs that the Commission has approved in past spectrum auctions.[40]

VTel incorrectly argues that certain investor protection and financing provisions of the agreements between SNR and American III, and the Management Services Agreement, give

[37] SNR Management Services Agreement, § 4.1; SNR, FCC Form 175, Exhibit E at 29.

[38] SNR Management Services Agreement, § 5.1(c); s*ee also id.* § 5.2 (SNR "shall have the right, subject in each case to applicable local, state or federal laws, to require American III to discharge any Independent Contractor performing services under this Agreement, or to bar American III from hiring any specific Independent Contractor to perform services under this Agreement").

[39] SNR HoldCo LLC Agreement, § 6.1.

[40] *See* Council Tree May 14 Comments, Exhibit 2.

DISH *de facto control* over SNR under *Baker Creek.*[41] VTel's argument ignores key factual differences that distinguish the facts here from those in *Baker Creek.*

1. Muleta has control of SNR's financial obligations

In *Baker Creek,* the FCC found that Hyperion Telecommunications, Inc. ("Hyperion") and its controlling principal Adelphia Communications Corp. ("Adelphia") were affiliates of Baker Creek Communications, L.P. ("Baker Creek") and denied Baker Creek DE status after attributing the revenue from Hyperion and Adelphia.[42] Hyperion provided nearly all of Baker Creek's capital, financed nearly all of its total high bid commitments, and assumed responsibility for its financial obligations.[43] Further, in *Baker Creek*, the underlying agreements between the parties restricted the authority of Baker Creek to raise capital without Hyperion's approval."[44] Baker Creek's only primary source of financing was a loan of $10 million from Hyperion, with an additional commitment of over $25.6 million, the terms of which allowed Hyperion to control Baker Creek.[45] Hyperion had a right of first refusal when Baker Creek sought loans from third parties.[46] Additionally, Hyperion had control over the capital that Baker Creek did raise.[47] The Commission found that this gave Hyperion the ability to dominate Baker Creek's business affairs.[48]

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[41] *See* VTel Petition at 16-20; *see also Application of Baker Creek Communications, LP*, Memorandum Opinion and Order, 13 FCC Rcd 18709 (1998) ("*Baker Creek*").

[42] *Id*.

[43] *See* VTel Petition at 18-19.

[44] *See Id.* at 19.

[45] *Baker Creek,* 13 FCC Rcd 18709 ¶ 10.

[46] *Id.* at ¶ 24.

[47] *Id.* at ¶¶ 23-25.

[48] *Id.* at ¶¶ 23-25.

Unlike *Baker Creek*, SNR Management contributed an amount well beyond a negligible amount of capital raised through other non-American III (and non-DISH), non-controlling equity investors, including Blackrock, Klipper and Muleta.[49] In addition, SNR Management has the right "to select the financial institutions from which [SNR] may borrow money," and American III has no right of first refusal if SNR seeks loans from third parties.[50] Further, 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 including:

- King Street Wireless, L.P. (in which U.S. Cellular held a non-controlling 90 percent equity interest);[51]
- Barat Wireless, L.P. (in which U.S. Cellular held a non-controlling 90 percent equity interest);[52]
- Denali Spectrum License, LLC (in which Leap Wireless held a non-controlling 85 percent equity interest);[53]
- Royal Street Communications, LLC (in which MetroPCS held a non-controlling 85 percent equity interest);[54] and

[49] SNR, FCC Form 175, Exhibit A at 3-6.

[50] *See* SNR HoldCo LLC Agreement, § 6.1; SNR, FCC Form 175, Exhibit E at 4.

[51] *See 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.).

[52] *See 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.).

[53] *See id.* (granting one AWS-1 license offered in Auction 66 to Denali Spectrum License, LLC).

[54] *See 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).

- Salmon PCS LLC (in which Cingular Wireless held a non-controlling 85 percent equity interest).[55]

Each of these cases occurred after the *Baker Creek* decision, on which VTel relies, which predated the Commission's adoption of the controlling interest standard in 2000.[56]

Also, contrary to VTel's assertion, American III (and therefore DISH) does not have "the power to control [SNR's] business plan[] and budget[]."[57] American III has only the right to consult with SNR and does not have any "veto power," as VTel falsely alleges, over SNR's budgetary decisions.[58] SNR Management is responsible for preparing and adopting a "detailed annual budget" for SNR that is consistent with SNR Management's five-year business plan.[59] The FCC has indicated that budgetary consultation rights are permissible and do not convey *de facto* control to the holder of such rights.[60]

Additional aspects of SNR's structure and agreements demonstrate that SNR Management has control over SNR's financial obligations. For example, SNR Management has sole control over "the payment of all financial obligations and operating expenses" of SNR.[61] Under the SNR Management Services Agreement, there are strict limitations on the ability of American III to cause SNR and certain of its subsidiaries to incur debt outside of the ordinary

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[55] *See 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).

[56] *See Amendment of Part 1 of the Commission's Rules – Competitive Bidding Procedures, Order on Reconsideration of the Third Report and Order, Fifth Report and Order, and Fourth Further Notice of Proposed Rule Making*, 15 FCC Rcd 15293 (2000) (*"Part 1 Fifth Report and Order*").

[57] VTel Petition at 3.

[58] *Id.* at 21-20.

[59] *See* SNR HoldCo LLC Agreement, § 6.5(b); SNR, FCC Form 175, Exhibit E at 5.

[60] *See Alaska Native Wireless I*, 17 FCC Rcd at 4239.

[61] SNR Management Services Agreement, § 4.1; SNR, FCC Form 175, Exhibit E at 30.

course of business, to enter into contracts or commitments with values exceeding certain thresholds, or to be obligated to pay expenses above certain thresholds.[62]

Further, the Management Services Agreement requires SNR to develop an annual budget for American III's provision of services,[63] and American III is prohibited from modifying that annual budget.[64] All expenses associated with the operation of SNR's future network must be paid from SNR's accounts, which must be separate from American III's accounts.[65] SNR is responsible for "all annual federal, state, and local tax returns" and is required to pay all such taxes, as well as "all other fees and assessments imposed on" SNR and its subsidiaries.[66] SNR Management is also required to sign all checks and wire payment authorizations for non-recurring expenses in excess of $15,000 and all checks in excess of $25,000.[67]

VTel is also incorrect in suggesting that American III "remains liable for certain financial obligations of [SNR]," and arguing that this fact "is an indicator of *de facto* control."[68] The particular provision that VTel cites relates to a single circumstance, which provides that should SNR fail to qualify as a "very small business" under the terms of the Commission's rules,

[62] Specifically, American III cannot cause SNR or any of its subsidiaries that 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 SNR or its subsidiary). *See* SNR Management Services Agreement, § 4.2(a)(ii)-(iv).

[63] *See* SNR Management Services Agreement, § 9.7(a); SNR, FCC Form 175, Exhibit E at 5.

[64] *See* SNR Management Services Agreement, § 4.2(a)(i); SNR, FCC Form 175, Exhibit E at 30.

[65] *See* SNR Management Services Agreement, § 7.2; SNR, FCC Form 175, Exhibit E at 32; SNR HoldCo LLC Agreement, § 3.1(a); *see also* SNR Management Services Agreement, § 7.2(a); SNR, FCC Form 175, Exhibit E at 32. ("There shall be no commingling of [SNR's] and American III's funds.").

[66] SNR Management Services Agreement, § 8.8; SNR, FCC Form 175, Exhibit E at 31.

[67] *See* SNR Management Services Agreement, § 7.3; SNR, FCC Form 175, Exhibit E at 32.

[68] VTel Petition at 3

American III 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 SNR as a result of the redemption of SNR's members' interests.[69] VTel does not cite any support for its assertion that American III's assumption of liability for this particular circumstance gives American III *de facto* control. This provision is also essentially identical to at least one previously approved arrangement of another DE that qualified as a very small business.[70] Finally, the provision is not even triggered unless the FCC reaches the conclusion that SNR does not qualify as a DE.

The terms of American III's loan to SNR are consistent with a long line of debt financing agreements between DEs and their respective non-controlling investors and are, therefore, conventional for this type of investment.[71] The size of American III's loan to SNR is not particularly large for DEs that are participating in FCC spectrum auctions, where licenses covering any significant size population are expensive.

[69] SNR HoldCo LLC Agreement, § 11.4; SNR, FCC Form 175, Exhibit E at 17.

[70] *See* Denali Spectrum License, LLC, File No. 0002774595, Exhibit D (Denali's agreements with Cricket established that "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). Importantly, such a provision cannot reasonably be found to affect *de facto* control of a designated entity because it could be invoked only after the designated entity was found *not* to qualify in the particular instance in which it applies. *See* Council Tree May 14 Comments, Exhibit 2.

[71] *See* Council Tree May 14 Comments, Exhibit 2.

2. Muleta exercised control over the Auction Committee and bidding decisions during Auction 97

VTel argues incorrectly that the physical presence of SNR, DISH and Northstar in the same location during the auction shows "DISH's dominance of the bidding activities" and therefore demonstrates that DISH has *de facto* control over SNR.[72] By agreement, SNR's participation in Auction 97 was to be directed by an Auction Committee comprised of two members appointed by SNR Management and one member appointed by American III.[73] Muleta was appointed by SNR Management to the Auction Committee and served as Chair and Bidding Manager. He was the "authorized bidder" for SNR and was responsible for the preparation and submission of all bids on behalf of SNR in the auction.[74] By agreement, the Auction Committee would seek to obtain a consensus with respect to all bidding decisions. However, if the Auction Committee was unable to obtain a consensus with respect to a bidding decision, the bidding decision was to be submitted to Muleta of SNR Management and the CEO of American III. If they were unable to obtain a consensus with respect to a bidding decision, then the final bidding decision was to be made by Muleta, as Bidding Manager.[75] Thus, Muleta retained ultimate control over SNR's bidding decisions.

The physical presence of JBA parties in the same location during the auction bidding process is irrelevant to the Commission's analysis of the control of bidding during an auction. Indeed, the Commission in prior decisions has acknowledged generally the benefit of JBA

[72] VTel Petition at 21-22.

[73] SNR Bidding Protocol and Joint Bidding Arrangement at 1-2.

[74] *Id.* at 1-2.

[75] *Id.* 2-3. SNR Management chose not to appoint a second member to the Auction Committee. That decision did not impact control of bidding decisions because the Bidding Manager, Muleta, had the final say on all bids if no consensus was reached.

parties sharing resources.[76] For example, in Auction 35, the Commission approved the JBA between Salmon PCS and Cingular Wireless, which provided for shared bidding facilities provided by Cingular.[77] The Commission also has allowed the use of "close communication," likely requiring the use of a single bidding location with respect to Alaska Native Wireless and AT&T Wireless in Auction 35, Denali PCS and Leap in Auction 66, and Cook Inlet and Voicestream in Auction 11.[78] Fundamentally, it is logical that parties to a JBA would desire to share the same bidding facilities in order to communicate more efficiently with each other, and there is no Commission prohibition against this.

DISH's right, as an investor, to approve bids that exceeded the pre-negotiated budget did not provide DISH *de facto* control of the bidding during Auction 97, as VTel incorrectly alleges[79] As discussed above, Muleta had the authority to make SNR's bidding decisions, and American III did not have the power to require SNR to bid on any licenses or control when SNR stopped bidding *within the negotiated budget*. It was only when additional investment capital would be required, which American III would be obligated to provide, that American III's approval was necessary. This type of provision essentially ensures that investors are not overextended financially by the bidding actions of the auction participant. Indeed, the

[76] *Petition for Reconsideration and Motion for Stay of Paging Systems, Inc.*, Memorandum Opinion and Order, 25 FCC Rcd 4036 ¶ 84 (2010) ("*Paging Systems MO&O*").

[77] *Application of Salmon PCS, LLC*, File Number 0000365189, FCC Form 601, Exhibit E: Agreements & Other Instruments (Part 6) § 2.4.2 ("The bidding shall be conducted electronically from facilities in Atlanta, Georgia, made available by Cingular.") ("Salmon Joint Bidding Protocol"); *see also* Council Tree May 14 Comments, Exhibit 2.

[78] *See* Council Tree May 14 Comments, Exhibit 2.

[79] VTel Petition at 21.

Commission has allowed this type of investor protection provision before as part of the applications of other DEs.[80]

The auction data show that Muleta, rather than DISH (or Northstar), controlled bidding for SNR. For example, SNR, DISH, and Northstar outbid each other, when one of the other entities held the provisionally winning bid ("PWB"), at least 1,854 times during the auction. With respect to 40 licenses, that subsequent bid resulted in a final PWB.[81] Moreover, for 23 licenses, SNR, DISH, and/or Northstar *were the only bidders*.[82] Although under the JBAs they could have refrained from bidding against each other when one of the other JBA parties held a PWB for a license,[83] they did, in fact, outbid each other on a number of occasions, further demonstrating that bidding decisions were controlled by separate entities.

3. Consideration of the other factors in *Intermountain Microwave* also demonstrates that Muleta has *de facto* control of SNR

VTel does not contest that SNR Management's control over SNR satisfies the other *Intermountain Microwave* factors used by the Commission to determine the person or entity who

[80] *See e.g.*, Vista PCS LLC, FCC Form 601, File Number 0002069013, Exhibit E at 4, 11-12 (filed March 7, 2005) ("Vista PCS Exhibit E"); *see also* Council Tree May 14 Comments, Exhibit 2.

[81] These licenses are as follows: AW-BEA003-B1, AW-BEA010-A1, AW-BEA012-B1, AW-BEA013-A1, AW-BEA034-A1, AW-BEA034-B1, AW-BEA039-A1, AW-BEA044-A1, AW-BEA049-A1, AW-BEA058-A1, AW-BEA078-A1, AW-BEA082-A1, AW-BEA089-A1, AW-BEA091-A1, AW-BEA092-A1, AW-BEA094-A1, AW-BEA096-A1, AW-BEA099-A1, AW-BEA100-A1, AW-BEA108-A1, AW-BEA109-A1, AW-BEA111-A1, AW-BEA112-A1, AW-BEA114-A1, AW-BEA115-A1, AW-BEA117-A1, AW-BEA118-A1, AW-BEA136-A1, AW-BEA143-A1, AW-BEA145-A1, AW-BEA146-A1, AW-BEA150-A1, AW-BEA158-A1, AW-BEA160-A1, AW-BEA171-A1, AW-BEA171-B1, AW-BEA172-A1, AW-BEA173-A1, AW-BEA174-A1, and AW-BEA175-A1.

[82] These licenses are as follows: AW-BEA039-A1, AW-BEA044-A1, AW-BEA049-A1, AW-BEA078-A1, AW-BEA082-A1, AW-BEA089-A1, AW-BEA091-A1, AW-BEA092-A1, AW-BEA094-A1, AW-BEA096-A1, AW-BEA099-A1, AW-BEA109-A1, AW-BEA111-A1, AW-BEA114-A1, AW-BEA117-A1, AW-BEA118-A1, AW-BEA143-A1, AW-BEA146-A1, AW-BEA150-A1, AW-BEA171-A1, AW-BEA172-A1, AW-BEA173-A1, and AW-BEA174-A1.

[83] *See supra* Section V.

holds *de facto* control of a business: (1) use of facilities and equipment; (2) control of day-to-day operations; (3) control of policy decisions; (4) personnel responsibilities; and (5) receipt of monies and profits.[84] As detailed below, the terms of the various agreements upon which SNR's activities were structured demonstrate that, under *all* of the *Intermountain Microwave* factors, Muleta has *de facto* control of SNR. In the context of a newly-formed DE applying for an initial license where there can be no record of past conduct, the Commission considers the applicant's representations and related contractual provisions in light of the entire record and the current realities of the industry.[85]

a. Use of facilities.

Under the Management Services Agreement between SNR and American III, SNR Management and its subsidiaries "retain unfettered use of, and unimpaired access to, all facilities and equipment associated with [SNR HoldCo]."[86] In addition, SNR Management administers "oversight, supervision, and ultimate control" of SNR's systems.[87] SNR Management also has a right of access to all books and records maintained by American III in connection with the services that it provides to SNR under the Management Services Agreement.[88]

b. Control of day-to-day operations.

SNR Management has control over the day-to-day operations of SNR. Specifically, SNR Management has the "exclusive right and power to manage, operate, and control" SNR

[84] *See Nonbroadcast and General Action Report No. 1142*, Applications for Microwave Transfers to Teleprompter Approved with Warning, *Public Notice*, 12 FCC 2d 559 (1963); *see also Application of Ellis Thompson Corp*., Memorandum Opinion and Order and Hearing Designation Order, 9 FCC Rcd 7138 ¶ 9 (1994) ("*Ellis Thompson*").

[85] *See Baker Creek*, 13 FCC Rcd 18709 ¶ 8.

[86] SNR Management Services Agreement, §§ 1.1, 4.1; SNR, FCC Form 175, Exhibit E at 29.

[87] *See* SNR Management Services Agreement, § 6.1; SNR, FCC Form 175, Exhibit E at 29.

[88] *See* SNR Management Services Agreement, §§ 8.1, 8.6; SNR, FCC Form 175, Exhibit E at 32.

HoldCo.[89] Further, "in addition to any other rights and powers that [SNR Management] may possess, [SNR Management] shall have all specific rights and powers required or appropriate for the day-to-day management of [SNR's] business."[90] Moreover, neither American III, nor any other investor other than SNR Management, has any right or authority to take any action on behalf of SNR HoldCo with respect to third parties or to bind SNR HoldCo.[91]

Similarly, as the manager of SNR HoldCo, SNR Management retains authority and ultimate control over the day-to-day operations of SNR HoldCo and its Subsidiaries and the determination and implementation of policy and business strategy.[92] In addition, all services provided to SNR by American III under the Management Services Agreement are to be provided in accordance with the review, oversight, directions and/or guidance of SNR Management.[93]

c. Control of policy decisions.

SNR Management controls the policy decisions of SNR HoldCo. In addition to the above-referenced provisions that confer on SNR Management the exclusive right to manage, operate, and control SNR HoldCo, including: day-to-day operations, SNR Management also has the authority to "make all decisions necessary or appropriate to carry on the business and affairs of [SNR Holdco], including the authority to appoint, promote, demote and terminate executives who oversee the day-to-day activities of [SNR Holdco] and to select the financial institutions from which [SNR Holdco] may borrow money."[94] In addition, as discussed above, SNR Management is responsible for the development of SNR's initial and subsequent five-year

[89] SNR HoldCo LLC Agreement, § 6.1; SNR, FCC Form 175, Exhibit E at 4.

[90] *Id.*

[91] *Id.*

[92] SNR Management Services Agreement, § 4.1; SNR, FCC Form 175, Exhibit E at 29.

[93] SNR Management Services Agreement, §§ 2.1, 2.2, 9.1(a).

[94] *See* SNR HoldCo LLC Agreement, § 6.1; SNR, FCC Form 175, Exhibit E at 4.

business plans and all annual business plans,[95] as well as SNR HoldCo's annual business plan governing American III's provision of services to it under the Management Services Agreement.[96] American III has no approval right with respect to these business plans, [97] and the Management Services Agreement expressly prohibits American III from modifying any annual business plan adopted by SNR.[98]

Moreover, SNR Management retains "authority and ultimate control" over "the determination and implementation of policy and business strategy" on behalf of SNR.[99] In addition, to the extent that American III makes recommendations to SNR as part of the services that it provides under the Management Services Agreement, SNR Management maintains "sole discretion" to "decide whether to cause [SNR's network]" to "participate in any such plans."[100] Further, SNR Management is responsible for the development of its network construction schedule, construction plan, and technical services plan,[101] and American III has no approval right with respect to these plans, and is expressly prohibited from modifying them.[102]

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[95] *See* SNR HoldCo LLC Agreement, § 6.5(a)-(b); SNR, FCC Form, Exhibit E at 5.

[96] *See* SNR Management Services Agreement, § 9.7(a).

[97] *See* SNR HoldCo LLC Agreement, § 6.5(a)-(b); SNR Management Services Agreement, § 9.7; *see also Ellis Thompson*, 9 FCC Rcd 7138 ¶ 40 (advice from turnkey manager does not confer control on the manager).

[98] SNR Management Services Agreement, § 4.2(a)(i); SNR, FCC Form 175, Exhibit E at 30.

[99] SNR Management Services Agreement, § 4.1; SNR, FCC Form 175, Exhibit E at 29.

[100] SNR Management Services Agreement, § 2.3; SNR, FCC Form 175, Exhibit E at 31.

[101] *See* SNR Management Services Agreement, § 9.1; SNR, FCC Form 175, Exhibit E at 30. Specifically, SNR Management designates one or more individuals to form a committee to prepare drafts of these schedules and plans for SNR Management's review, modification and approval. SNR Management has sole discretion as to the identity of the committee members and may replace any committee member at any time for any reason. *Id.*

[102] *See* SNR Management Services Agreement, § 4.2(a)(i); SNR HoldCo LLC Agreement, § 6.1.

d. Personnel responsibilities.

SNR Management has "the authority to appoint, promote, demote and terminate executives who oversee the day-to-day activities of [SNR HoldCo] …."[103] In addition, the Management Services Agreement provides SNR Management with sole responsibility for the "employment, supervision, and dismissal of all personnel providing services" to SNR under the agreement.[104] Additionally, American III is required to: (i) provide SNR Management with a list of all American III employees who are involved in the provision of services by American III to SNR, as well as any information about those employees that SNR Management may reasonably request;[105] (ii) replace certain key employees at SNR Management's request;[106] (iii) make reasonable changes to American III's personnel policies at SNR Management's request; [107] and (iv) replace or fire any independent contractors retained by American III to provide services to SNR.[108]

e. Receipt of monies and profits.

Neither American III nor any other investor has any special rights to any of the money or profits generated by SNR. Instead, each member of SNR (*i.e.*, SNR Management and American

[103] *See* SNR HoldCo LLC Agreement, § 6.1; SNR, FCC Form 175, Exhibit E at 4.

[104] SNR HoldCo LLC Agreement, § 4.1; SNR, FCC Form 175, Exhibit E at 29.

[105] *See* SNR Management Services Agreement, § 5.1(a); SNR, FCC Form 175, Exhibit E at 31. In addition, the SNR Management Services Agreement requires all American III employees involved with the provision of services to SNR under the agreement to meet with SNR Management at its reasonable request. *Id.* § 8.5(a).

[106] *See* SNR Management Services Agreement, § 5.1(b); SNR, FCC Form 175, Exhibit E at 31.

[107] *See* SNR Management Services Agreement, § 5.1(c); SNR, FCC Form 175, Exhibit E at 31.

[108] *See* SNR Management Service Agreement, § 5.1(c), 5.2; SNR, FCC Form 175, Exhibit E at 31.

III) has a right to an equitable share of SNR's profits based on its membership interest.[109] In addition, SNR Management has the exclusive right to cause SNR to issue distributions.[110]

Further, SNR will receive all monies and profits and bear the risk of loss from the operation of its network.[111] Similarly, all receipts and profits associated with the operation of SNR's networks will be deposited in SNR's bank accounts which, as noted above, must be separate from American III's bank accounts.[112] Thus, under applicable Commission precedent, Muleta has *de facto* control of SNR.

4. The investor protection provisions do not affect Muleta's *de facto* control of SNR

Despite the longstanding Commission precedent allowing standard investor protection provisions, such as those afforded to American III, VTel wrongly asserts that DISH has *de facto* control over SNR by virtue of several of its investor protections that require American III's consent for certain significant corporate actions.[113] As explained below, these investor protection provisions are nearly identical with the investor protections used by DEs and approved by the Commission in numerous other spectrum auctions to ensure that the DEs are able to obtain the necessary capital to be competitive in the auction while maintaining *de facto* control of their companies.

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[109] *See* SNR HoldCo LLC Agreement, § 4.1.

[110] *See* SNR HoldCo LLC Agreement, § 6.1; First Amended and Restated Credit Agreement By and Among American AWS-3 Wireless II, L.L.C. (as Lender) and SNR (as Borrower) and SNR, LLC (as Guarantor), entered into as of October 13, 2014, § 6.16(a)(i)-(iv); SNR HoldCo LLC Agreement, § 3.1(a)(i)&(b).

[111] SNR Management Services Agreement, § 4.1; SNR, FCC Form 175, Exhibit E at 29.

[112] SNR Management Services Agreement, § 7.2(a); SNR, FCC Form 175, Exhibit E at 31-32 ("There shall be no commingling of [SNR's] and American III's funds.").

[113] VTel Petition at 19.

The Commission has long-recognized that, in order to attract capital, entities seeking to qualify under the DE rules must have the ability to offer "investor protections" to non-controlling investors. As the Commission explained in the *Fifth MO&O*:

> [A]llowing such [investor protection] provisions enhances the ability of designated entities to raise needed capital from strategic investors, thereby bolstering their financial stability and competitive viability. . . . [U]nder our case law, non-majority or non-voting shareholders may be give 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.[114]

Consistent with this Commission policy, American III and other investors were granted standard and previously allowed investment protections in the form of approval rights in the SNR HoldCo Agreement over certain "Significant Matters" undertaken by SNR Management.[115] In the context of earlier auctions, the Commission has ruled that these types of investor protection provisions "generally are acceptable and do not *per se* confer control on an otherwise non-controlling investor."[116] Thus, consistent with its precedent, the Commission should find

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[114] *Fifth MO&O*, 10 FCC Rcd 403 ¶ 81 (citations omitted). The also Commission noted in a case involving British Telecom's investment in MCI that "covenants that give a party the power to block certain major transactions of a company do not in and of themselves represent the type of transfer of corporate control envisioned by Section 310(d) [of the Communications Act]." Further, the FCC found it significant that "while BT could block certain major transactions by MCI, BT cannot compel MCI to engage in any major transactions." Thus, the FCC concluded that BT's power was permissibly limited to protecting its own investment in MCI. *See MCI Communications Corporation and British Telecommunications plc*, Declaratory Ruling and Order, 9 FCC Rcd 3960 ¶ 14 (1994) ("*MCI Order*"); *see also* Comments of Verizon Wireless, WT Docket No. 05-211 at ii (Feb. 24, 2006) ("A DE can be bona fide even if it benefits from a large carrier's investment; conversely, prohibiting investment by a large wireless carrier has nothing to do with ensuring a DE is bona fide."); Comments of T-Mobile USA, Inc. WT Docket No. 05-211 at 9 (Feb. 24, 2006) ("From the inception of the DE program, the Commission has recognized that small businesses lack the ability to bid for and win spectrum, much less construct wireless networks, absent significant financial resources and operational support from established companies.").

[115] *See* SNR HoldCo Agreement, § 6.3.

[116] *Alaska Native Wireless I*, 17 FCC Rcd at 4239 ¶ 16. Similar investor protections have been used by other designated entities with non-managing investors to successfully receive spectrum licenses from the FCC. *See e.g.* Vista PCS Exhibit E at 12-13 (consent of the [Verizon]-

that the relevant investor protections are permissible and do not give American III *de facto* control of SNR.

For example, in *Alaska Native Wireless I,* 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 WTB 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 investor protection provisions that have been approved by the Commission.[117] *Alaska Native Wireless I* also held that minority passive investors may hold approval rights over "extraordinary corporate expenditures and debt."[118] Thus, contrary to VTel's suggestion, the terms of SNR's business planning and budgeting authority with respect to

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appointed member of the Vista Management Committee is required "before Vista can take the following major corporate actions: acquire new spectrum licenses, other than in the ordinary course of business; change its accounting methodology; approve annual official statements of Vista; change the compensation for Vista senior management; sell, lease, exchange, transfer or dispose of any licenses or material assets outside of any applicable Put or right of first refusal procedures; make an expenditure in excess of $5 million; make fundamental changes in Vista's corporate structure, including, but not limited to a merger, consolidation, dissolution, or conversion to a corporation; enter into transactions outside of the ordinary course of business; make material amendments to the organizational documents of Vista; make material changes in the business of Vista; deviate in a material manner from the approved annual budget; declare any extraordinary distributions; appoint a liquidating trustee or initiate bankruptcy proceedings; or admit additional members, except in predefined circumstances"); *see also* Council Tree May 14 Comments, Exhibit 2.

[117] *Alaska Native Wireless I,* 17 FCC Rcd 4231 ¶ 15.

[118] *Id.* at ¶ 16; *see also Minnesota PCS Limited Partnership,* Order, 17 FCC Rcd 126, 132 ¶ 12 (2001) ("*Minnesota PCS Order*") ("[O]rdinary commercial covenants that are reasonably designed to protect a lender or investor, such as a limited partner's right to prevent significant non-budgeted or extraordinary expenditures without its prior consent, ordinarily do not raise questions as to *de facto* control."). *See* Council Tree May 14 Comments, Exhibit 2; Vista PCS Exhibit E at 12-13 (requiring the approval of the Verizon-appointed board member to incur indebtedness in excess of $10 million); Denali Spectrum License, LLC, Form 601, File No. 0002774595, Exhibit D at 10 (requiring Leap's approval to incur debt in excess of 10% of the annual budget or liabilities larger than $500,000).

DISH are consistent with Commission precedent, among others, and are fundamentally different from the *Baker Creek* fact pattern.

Further, the Commission also has found that "a minority shareholder's right to prevent any change in a company's by-laws or charter … [and right to] require[e] the minority shareholder's consent before the corporation can amend its by-laws or articles of incorporation [are] designed generally to safeguard the minority shareholder's investment by preventing the dilution of its stock holdings."[119] In addition, the Commission has approved as a "permissible investor protection" the right for non-attributable investors to approve senior executive salaries in excess of $200,000.[120]

Contrary to VTel's assertions, each of the investor protections afforded to American III qualifies under Commission precedent as an acceptable investor protection that does not transfer or otherwise confer *de facto* control to the protected investor. There is no legal basis for Petitioners' arguments to the contrary, and the Commission should reject them.

5. The Management Services Agreement with American III does not provide American III or DISH *de facto* control of SNR.

VTel's claim that DISH will be able to exercise *de facto* control over SNR by virtue of the Management Services Agreement it has entered into is wrong as a matter of fact and law.[121] Pursuant to the Management Services Agreement, American III is required to perform certain build-out, management and operational services for SNR in connection with the AWS-3 licenses

[119] *MCI Order*, 9 FCC Rcd at 3962-3963 ¶ 15 (1994) (internal citations omitted); *see also* Council Tree May 14 Comments, Exhibit 2; Vista PCS Exhibit E at 12 (requiring the approval of the Verizon-appointed member to "make material amendments to the organizational documents of Vista" or "make material changes in the business of Vista").

[120] *Alaska Native Wireless I*, 17 FCC Rcd 4231 ¶ 16.

[121] VTel Petition at 19-20.

held by SNR at the direction of SNR.[122] All such services are to be provided "in accordance with directions and guidance from, and in consultation with, [SNR Management] and in accordance with [SNR Management's] annual business plan and budget."[123] The Management Services Agreement memorializes the parties' express intentions, understandings and agreements as follows and clearly provides that SNR Management through SNR Holdco has control of SNR under the agreement:

> [SNR Holdco], as the sole member and manager of [SNR], shall retain authority and ultimate control over the day-to-day operations of [SNR] 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 the License Company pursuant to ARTICLE VII) and the negotiation and execution of all contracts to be entered into by [SNR] or any of its Subsidiaries. The Parties agree that the License Company and its Subsidiaries shall retain unfettered use of, and unimpaired access to, all facilities and equipment associated with the [SNR] Systems and shall receive all monies and profits and bear the risk of loss from the operation of the [SNR] Systems. Nothing in this Agreement is intended to, nor shall it be construed to, give American III *de jure* or *de facto* control over the License Company, its Subsidiaries, the Licenses, or the [SNR] Systems. Notwithstanding any other provision in this Agreement, (i) no obligations to third parties (other than American III by virtue of the Subsidiary Guarantees) shall be incurred hereunder by or on behalf of any Subsidiary of the License Company that holds Licenses and (ii) American III shall not cause any of the Subsidiaries of the License Company that hold Licenses to incur any obligation or liability to third parties (other than American III by virtue of the Subsidiary Guarantees) nor shall American III permit any of its agents, representatives or Independent Contractors to do so.[124]

Nothing under the Commission's DE rules converts American III's interest into an attributable, much less a *de facto* controlling, interest in SNR. Furthermore, Commission policy

[122] *See* SNR Management Services Agreement, § 2.2 (providing a list of services to be provided by American III); SNR, FCC Form 175, Exhibit E at 27.

[123] SNR Management Services Agreement, § 2.2; *see also* SNR, FCC Form 175, Exhibit E at 33.

[124] SNR Management Services Agreement, § 4.1; *see also* SNR, FCC Form 175, Exhibit E at 29-30.

expressly favors allowing DEs to use management agreements to ensure expert operation of their systems:

> Limiting managers to discrete "subcontractor" functions . . . could prevent designated entities from drawing on managers with broad expertise. Moreover, whether 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.[125]

The Commission's rules "delineate[] areas over which exercise of authority by a manager will trigger attribution of the manager's assets for purposes of determining eligibility for designated entity provisions."[126] An entity providing management services to a DE will have its interests deemed attributable only if the service provider "has authority to make decisions or otherwise engage in practices or activities that determine, or significantly influence: (1) [t]he nature or types of services offered by such an applicant or licensee; (2) [t]he terms upon which such services are offered; or (3) [t]he prices charged for such services."[127] The Commission has held that, where "a management agreement has been entered into by the licensee, the licensee must demonstrate that it retains exclusive responsibility for the operation and control of the licensee's facilities,"[128] as determined under the *Intermountain* factors discussed above.

SNR Management has ensured that it retains ultimate control of each of these rights and powers. Indeed, the Management Services Agreement (i) imposes strict structural separations between SNR and American III;[129] (ii) reserves for SNR Management full control over, *inter*

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[125] *Fifth MO&O*, 10 FCC Rcd 403 ¶ *86* (citations omitted).

[126] *ClearComm, L.P.*, Memorandum Opinion and Order, 16 FCC Rcd 18627 ¶ 13 n. 53 (WTB 2001) (*citing Part 1 Fifth Report and Order*, ¶ 64) ("*ClearComm MO&O*").

[127] *See* 47 C.F.R. § 1.2110(c)(2)(ii)(H).

[128] *ClearComm M&O*, 16 FCC Rcd 18627 ¶ 13 (*citing Fifth M&O*, ¶¶ 83-86).

[129] American III and SNR must (i) maintain independent bank accounts, books and records, and payroll; (ii) refrain from commingling funds; (iii) maintain separate offices or, if they share office space, each pay their fair and appropriate allocation of all costs for such space; (iv) refrain from assuming or guaranteeing each other's debt or holding out to third parties that they will

alia, its operations, business strategy, FCC filings, financing, and employees;[130] (iii) expressly prohibits American III from taking a wide variety of actions on behalf of SNR;[131] (iv) provides SNR Management with the exclusive right, and does not provide American III with any rights, to revenues or profits generated by SNR's operations;[132] and (v) provides SNR Management the right to determine "the nature and type of services" to be offered, "the terms upon which such services shall be offered," and "the prices to be charged with respect to such services."[133] Like other similar arrangements that have satisfied Commission review in the past, the Management

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satisfy each other's debt; and (v) use each other's name or trademarks without the express written consent of the other. *See* SNR Management Services Agreement, § 3.1; *see also* SNR, FCC Form 175, Exhibit E at 45-46.

[130] The SNR Management Services Agreement expressly states that SNR shall retain "authority and ultimate control over [its] day-to-day operations …; the determination and implementation of policy and business strategy; the preparation and filing of all materials with the FCC …; the employment, supervision, and dismissal of all personnel providing services" under the Management Services Agreement; the "payment of all financial obligations and operating expenses …; and the negotiation and execution of all contracts to be entered into by" SNR. SNR Management Services Agreement, § 4.1; *see also* SNR, FCC Form 175, Exhibit E at 30.

[131] The SNR Management Services Agreement expressly prohibits American III from taking any of the following actions without SNR Management's approval: (i) modify any of SNR's annual budgets, business plans, construction schedules or plans and technical services plans; (ii) cause SNR or its non-licensee subsidiaries to incur debt; (iii) entering into any contract or commitments on behalf of SNR or its non-licensee subsidiaries that individually have a value in excess of $100,000 or that collectively have a value in excess of $250,000; or (iv) bring, prosecute, defend, or settle any litigation in the name of SNR or its subsidiaries. *See* Management Services Agreement, § 4.2(a); SNR, FCC Form 175, Exhibit E at 30. Further, American III may not under any circumstance: (i) sell trade or surrender any of SNR's licenses; (ii) sign or make any Commission filings on behalf of SNR; (iii) cause SNR's licensee subsidiaries to incur debt or enter into any contracts or commitments; or (iv) grant a security interest in wireless network assets (other than purchase money security interests granted in the ordinary course of business in accordance with the annual budget). *See* SNR Management Services Agreement, § 4.2(b); *see also* SNR, FCC Form 175, Exhibit E at 30.

[132] *See* SNR Management Services Agreement, § 4.1; *see also* SNR, FCC Form 175, Exhibit E at 29 (stating that SNR "shall receive all monies and profits and bear the risk of loss from the operation of its network").

[133] SNR Management Services Agreement, § 9.7(b); *see also* SNR, FCC Form 175, Exhibit E at 28.

Services Agreement here does not confer upon American III any element of *de facto* control, or negate the *de facto* control of SNR that is and will be exercised by Muleta (through SNR Management).[134] In fact, it expressly states: "Nothing in this Agreement permits, or will be deemed to permit, American III to exercise *de facto* or *de jure* control over [SNR or its subsidiaries] or their respective operations."[135] Thus, Petitioners' claims that American III will hold *de facto* control of SNR by virtue of its responsibilities under the Management Services Agreement have no foundation, either in the agreement itself or in the Commission's rules, precedent or policies.

B. The agreements between SNR and American III do not constitute a joint venture or otherwise give the parties an identity of interest under the FCC's attribution rules

For the same reasons that demonstrate that Muleta has control of SNR, petitioners' contention that SNR, DISH and Northstar formed a joint venture or otherwise have an identity of interest must be rejected.[136] The collaboration formed between SNR and DISH conforms in all

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[134] The Commission has a long track record of approving applications where DEs have service management agreements with non-controlling investors. *See* Council Tree May 14 Comments, Exhibit 2; Vista PCS Exhibit E at 7-8 ("The Management Agreement delegates to Cellco certain responsibilities as the manager of the CMRS systems Vista acquires as a result of Auction No. 58. The Management Agreement specifies that Cellco will manage those systems under Vista's continuing oversight, review, supervision and control (Recitals), that control of the CMRS systems will remain in Vista, and that nothing in the Management Agreement will give Cellco *de facto* or *de jure* control over Vista or its operations.") (citations omitted); Denali Spectrum License, LLC, Exhibit D at 27 ("Denali License and Cricket entered into the Management Agreement as of July 13, 2006. Denali License and Cricket entered into Amendment No. 1 to Management Agreement as of April 16, 2007. Subject to the terms of the Management Agreement, Cricket is to perform various duties to build-out, manage, and operate the Denali License systems…").

[135] SNR Management Services Agreement, § 12.3.

[136] *See* CTTI/Rainbow Petition at 8 ("DISH and its affiliates American I 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").

respects with the Commission's DE rules, and "control" of SNR, as defined by the Commission, remains with Muleta at all times. CTTI and Rainbow make no effort to square their unsubstantiated joint venture allegations with the Commission's separate, detailed standards for non-attributable, passive investments or the numerous FCC-approved investments in DEs in prior auctions that were treated as non-attributable.[137] Similarly, whether there is an identity of interest between different entities is based on an examination of existing familial or spousal relationships[138] or of common existing investments, stock ownership, or officers and directors.[139] CWA/NAACP has provided no specific allegations that address those categories, and accordingly, its argument that SNR and DISH have an identity of interest should be rejected.

C. SNR accurately characterized Muleta's control of SNR in its filings with the FCC

DISH does not control SNR and is not an affiliate, as discussed above. Thus, on the merits, the Commission must reject VTel's argument that SNR lacked candor and misrepresented material facts in its application to the Commission in failing to disclose DISH as an "affiliate" and "controlling interest" under the Commission's rules.[140]

Moreover, even if SNR were incorrect (which it is not) in its assessment of whether DISH is an affiliate or controlling interest of SNR, the company fully disclosed the applicable ownership information in its short-form and long-form applications and, accordingly, could not

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[137] *See* Council Tree May 14 Comments, Exhibit 2 (May 14, 2015).

[138] *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).

[139] *See, e.g., In re AirGate Wireless, L.L.C., and Cricket Holdings, Inc., Assignee, and Application of Leap Wireless International, Inc. for Authorization to Construct and Operate 36 Broadband PCS C Block Licenses, Memorandum Opinion and Order,* 14 FCC Rcd 11827, 11843 (WTB 1999).

[140] *See* VTel Petition at 25-29.

possess, as a matter of law, the requisite intent for lack of candor or misrepresentation. Case law makes clear that the Commission's subsequent disagreement with an applicant's legal analysis on such matters does not establish that the applicant lacked candor or misrepresented to the Commission.[141] Ironically, this is unlike the situation in *In the Matter of Vermont Telephone Company, Inc.* in which the Commission fined VTel for "failing to submit accurate gross revenue information to the Commission in connection with the bidding credit it received through its participation as a Designated Entity in Auction No. 86," and rejected VTel's claim that it "had a reasonable basis for believing its filings were correct and that the omission was not material."[142]

V. THE CONDUCT OF SNR, DISH AND NORTHSTAR DURING AUCTION 97 WAS CONSISTENT WITH THE COMMISSION'S RULES AND PRECEDENT

A. The Commission's anti-collusion rules expressly permit JBAs

Section 1.2105(c) of the Commission's rules, commonly referred to as the anti-collusion rule, provides that "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…*unless* such applicants are members of a bidding consortium or other joint bidding

[141] *See Alaska Native Wireless I*, 17 FCC Rcd 4231 ¶ 20 ("The possibility always exists that the Commission may determine that an interest an applicant has concluded is non-controlling is, in fact, controlling and, therefore, attributable. Under such scenario, the applicant's failure to satisfy the controlling interest standard would not automatically compel a finding that the applicant lacked candor."), *app. for review denied, Alaska Native Wireless II*, 18 FCC Rcd 11640 ¶ 10.

[142] *In the Matter of Vermont Telephone Company, Inc.*, Notice of Apparent Liability for Forfeiture, 26 FCC Rcd 14130 ¶ 10 (EB 2011); Forfeiture Order, 29 FCC Rcd 16052 (EB 2014).

arrangement identified on the bidder's short-form application[.]"[143] Therefore, the existence and disclosure in an applicant's short-form application of JBAs between auction participants exempts those auction participants from the prohibition on discussion, disclosure, cooperation and collaboration otherwise applicable under with the Commission's anti-collusion rules. Indeed, the Commission has characterized the disclosure of such agreements on an auction applicant's short-form application as a "safe harbor" against allegations that communications pursuant to those agreements could be violations of the anti-collusion rules.[144]

The Commission adopted its auction anti-collusion rules in 1994 to ensure that parties could not engage in collusive (*i.e.*, secretive and anticompetitive) agreements to depress auction prices.[145] It created the JBA exception to facilitate the participation of "small firms and other entities who might not otherwise be able to compete in the auction process."[146] In creating the JBA exemption, the Commission sought to "ensure that [the anti-collusion rules] do not inhibit the formation of legitimate efficiency enhancing bidding consortia, which reduce entry barriers for smaller firms, and improve their ability to compete in the auction process and in the provision of service."[147] More recently, in 2010, the Commission reaffirmed those objectives and conclusions in rejecting a petition to deny alleging that two commonly owned entities had engaged in anticompetitive conduct by participating in an auction under a properly disclosed JBA:

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[143] 47 C.F.R. § 1.2105(c)(1) (emphasis added).

[144] *Service Rules for 746-764, 776-794 MHz Bands*, Third Report and Order, 16 FCC Rcd 2703 ¶ 47 (2001).

[145] *Implementation of Section 309(j) of the Communications Act—Competitive Bidding*, Second Report and Order, 9 FCC Rcd 2348 ¶ 221 (1994) ("*Competitive Bidding Second Report and Order*").

[146] *Id.*

[147] *Id.* at ¶ 223.

> 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.[148]

The FCC's determination regarding the need for JBAs was remarkably prescient. Exploding consumer demand for mobile broadband has now driven the price for spectrum licenses to a level where small businesses without considerable financial backing effectively are foreclosed from meaningful participation in spectrum auctions.

Some petitioners allege that SNR, DISH and Northstar could not discuss, disclose to each other, cooperate and collaborate at all with respect to bids, bidding strategy and settlement agreements during the auction with respect to the same licenses or licenses in the same geographic market, regardless of the existence and disclosure of the JBAs.[149] The plain language of the anti-collusion rules refutes this argument. Moreover, the Commission has explained explicitly that the anti-collusion prohibitions apply *only* to those applicants that have applied to bid on the same license or set of licenses.[150] Thus, petitioners' argument that properly disclosed JBAs provide no protection if the parties have applied to bid on the same licenses makes no sense: the parties would *not need* a JBA if they had applied to bid exclusively on different licenses or licenses in different geographic areas.

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[148] *Paging Systems MO&O*, 25 FCC Rcd 4036 at ¶ 84.

[149] *See* CTTI-Rainbow Petition at 6-7; VTel Petition at 20-24, 30.

[150] *See In the Matter of Competitive Bidding Procedures*, Seventh Report and Order, 16 FCC Rcd 17546 ¶ 5 (2001) ("[A]uction applicants that have not applied to bid on licenses in any of the same geographic areas, and thus are not competing applicants, are not subject to the prohibition of Section 1.2105(c)(1).").

A number of petitioners also rely on an *ex parte* letter submitted by Verizon[151] in the currently pending DE/Incentive Auction rulemaking proceeding, in which Verizon suggests that JBAs do not permit coordinated bidding and discussions among applicants for the same licenses or for licenses in the same geographic market, regardless of whether the parties entered into a properly disclosed JBA.[152] That suggestion ignores long-standing FCC precedent and should be rejected. In the *ex parte* letter Verizon mistakenly relies on two FCC documents, the *Fourth Memorandum Opinion and Order* regarding the Commission's competitive bidding rules and a subsequent 1995 WTB Public Notice.[153]

With respect to the first document, the Commission affirmed its prior decisions that prohibited the creation of JBAs among applicants for licenses in any of the same geographic areas *after the deadline for filing short-form applications.*[154] Second, the Commission also affirmed its prior conclusion that applicants with common ownership must enter and properly disclose JBAs if they intend to discuss, disclose, cooperate or collaborate with respect to bids, bidding strategies or settlement agreements, and they intend to bid on licenses in any of the same geographic areas during an auction.[155] It was in this context that the Commission explained, in a

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[151] *See* Letter Kathleen Grillo, Senior Vice President, Verizon Wireless, to Marlene H. Dortch, Secretary, Federal Communications Commission, WT Docket No. 14-170 (April 24, 2015).

[152] *See* CTTI-Rainbow Petition at 2-3; VTel Petition at 20-25.

[153] *In the Matter of Implementation of Section 309(J) of the Communications Act – Competitive Bidding*, Fourth Memorandum Opinion and Order, 9 FCC Rec. 6858 (1994) ("*Fourth Memorandum Opinion and Order*").

[154] *Id.* at ¶ 51 ("While we recognize that allowing consortia to occur could enable many smaller applicants to pool their resources to win licenses, we believe the risks of allowing such arrangements between applicants for the same license (*even when one applicant has withdrawn*) outweigh the benefits at this time.") (emphasis added); *see also id.* at ¶ 52 ("At this time, we find that *post-filing* settlements between applicants for the same license in the broadband PCS competitive bidding process would not serve the public interest….") (emphasis added).

[155] *Id*. at ¶ 59 ("[U]nless the second applicant is expressly identified as an entity with whom the first applicant has an agreement concerning bidding, we will prohibit these parties from

footnote, that "[o]f course, [auction] applicants will also be subject to existing antitrust laws. For example, we would expect that this would prohibit discussions with respect to bid prices between any applicants who have applied for licenses in the same geographic market."[156] Thus, the language that Verizon cites deals specifically with scenarios in which entities would not have satisfied the anti-collusion rules and the JBA exception requirements (*e.g.*, where the entities entered into a JBA after the short-form filing deadline or were applicants with common ownership that did not disclose the existence of a JBA), and in such cases, the Commission "would expect" the antitrust laws" to prohibit discussion of bid prices.[157]

The WTB subsequently referenced this footnote in a 1995 WTB Public Notice, but failed to note that the language was provided in the context of entities that did not meet the anti-collusion rules' JBA exception requirements.[158] Accordingly, in arguing that coordination and discussion of bids for licenses in the same geographic area is prohibited, Verizon has taken the WTB's language completely out of context.

More importantly, it is not the case that the antitrust laws prohibit *any* discussion of bid prices or joint or coordinated bidding in Auction 97, as discussed below. Indeed, when the Commission adopted the anti-collusion rule, it included a nearly identical discussion of antitrust

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communications concerning their bidding strategies. As we stated…this prohibition will hold even if the other bidder is identified on the applicant's short-form application as having a common ownership interest with the application.").

[156] *Id.* at ¶ 59 n.125.

[157] *Id.* at ¶¶ 50-59.

[158] *Wireless Telecommunications Bureau Clarifies Spectrum Auction Anti-Collusion Rules*, Public Notice, 11 FCC Rcd 9645, 9646 (1995) ("As discussed in the Fourth MO&O, under the antitrust laws, the parties to an agreement may not discuss bid prices if they have applied for licenses in the same geographic market."). The notice also failed to provide a citation for its incorrect statement.

authorities, but made no mention of a proscription on discussing bid prices.[159] The antitrust agencies have made clear that teaming agreements (such as permissible JBAs) among "participants in an efficiency-enhancing integration of economic activity" are permitted under the rule of reason when shown to be "reasonably related to the integration and reasonably necessary to achieve its procompetitive benefits."[160]

Countless Commission and WTB decisions and publications make clear that the SNR, DISH and Northstar entities could discuss, disclose to each other, cooperate and coordinate regarding bids, bidding strategies and settlement agreements. For example, in 1996 for Auction 11, the WTB provided the following guidance to potential applicants regarding the anti-collusion rule: "[A]pplicants may not discuss the substance of their bids or bidding strategies with other bidders that have applied to bid in the same geographic license areas, *with the exception of those with whom they have entered into agreements and identified on the short-form application*."[161]

Similarly, in 2001, the Commission engaged in a comprehensive modification of the anti-collusion rule and made clear that disclosure of JBAs, even those involving licenses in the same geographic market, exempt parties from the communication prohibition: "[E]ven if two auction applicants *that have not identified each other as parties to an agreement on the FCC Form 175* are each eligible to bid on only one license area in common, they may not discuss or disclose to

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[159] *See Competitive Bidding Second Report and Order*, 9 FCC Rcd 2348 ¶ 225 n.165.

[160] Federal Trade Commission and the U.S. Department of Justice, *Antitrust Guidelines Antitrust Guidelines for Collaborations Among Competitors* at 8-9 (Apr. 2000), *available at* https://www.ftc.gov/sites/default/files/documents/public_events/joint-venture-hearings-antitrust-guidelines-collaboration-among-competitors/ftcdojguidelines-2.pdf ("*Antitrust Guidelines*").

[161] *747-762 and 77-792 MHz Band Auction Filing Dates and Changes to Attachment J*, Public Notice, 15 FCC Rcd 9196 (2000) (emphasis added).

each other their bids or bidding strategies[.]"[162] The clear implication of this statement is that if parties eligible to bid on the same license *have* disclosed a JBA on their Form 175, then they may discuss, disclose to each other, cooperate or collaborate with respect to bids, bidding strategies and settlement agreements. More importantly, the Auction 97 public notice specifically noted that parties to a JBA could discuss, disclose to each other, cooperate and collaborate with respect to bids, bidding strategies, and settlement agreements.[163]

As a practical matter, JBAs and coordinated bidding have been used and allowed by the Commission numerous times in prior spectrum auctions.[164] In many cases, the JBAs involved DEs and their strategic investors, who were major wireless providers, such as AT&T and Verizon.

To provide a more detailed example, in 2005 Verizon entered into a JBA with a DE named Vista PCS ("Vista") in connection with Auction 58. Verizon owned 80% of the equity of Vista,[165] and Verizon's agreements and structure with Vista mirror closely the structure used by SNR, DISH and Northstar and in multiple DE transactions approved by the Commission since 2000. Verizon applied to participate in Auction 58 as a bidder on its own account,[166] and Vista

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[162] *Amendment of Part 1 of Commission's Rules-Competitive Bidding Procedures,* Seventh Report and Order, 16 FCC Rcd 17546 ¶ 5 (2001).

[163] *Auction of Lower and Upper Paging Brands Licenses Scheduled for July 16, 2013 Notice and Filing Requirements, Minimum Opening Bids, Upfront Payments, and Other Procedures for Auction 95*, Public Notice, 28 FCC Rcd 3132 ¶ 11 (2013) ("*Auction 97 Procedures PN*") ("[U]nless they have identified each other on their short-form applications as parties with whom they have entered into agreements under section 1.2105(a)(2)(viii), applicants for any of the same or overlapping geographic license areas must affirmatively avoid all communications with or disclosures to each other that affect or have the potential to affect bids or bidding strategy.")

[164] Council Tree May 14 Comments, Exhibit 2.

[165] *Paging Systems MO&O*, 25 FCC Rcd 4036 at ¶ 84.

[166] Verizon participated as "Cellco Partnership d/b/a Verizon Wireless." *See* Cellco Partnership FCC Form 601, File Number 0002069007, Exhibit E at 1 (filed March 4, 2005).

filed its own application.[167] Verizon and Vista entered into a JBA "pursuant to which [Verizon and Vista] will *coordinate their bidding strategies prior to and during Auction 58*."[168]

Together, Verizon and Vista applied to bid for licenses that comprised virtually all of the licenses and geographic markets available in Auction 58. Vista applied to bid on 115 "Open Licenses" offered in Auction 58 and sought a 25 percent bidding credit for 87 of those licenses. Vista also applied to bid on 117 "Closed Licenses," which were set aside for eligible entrepreneurs only and not eligible for a bidding credit.[169] Verizon, by contrast, applied to bid on the same 115 Open Licenses.[170] Over 80% percent of the Closed Licenses were located in geographic areas in which Open Licenses were also available.

Verizon and Vista turned out to be the two largest winners in Auction 58 by net dollar value.[171] Verizon won licenses valued at $364.9 million, or 18 percent of the net dollar value of licenses sold in the auction, and Vista won licenses valued at $332.4 million, or 16 percent of the net dollar value of licenses sold in the auction, representing a combined total of 34 percent of the

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[167] *See* Vista PCS LLC, FCC Form 175, File Number 0581455272.

[168] *See* Vista PCS LLC, FCC Form 175, File Number 0581455272, Exhibit B at 1 (emphasis added). The Cellco / Vista/ Valley Bidding Agreement provided that Verizon (Cellco) and Mr. Dwyer (Valley), through an Auction Committee on which they served, "directed all of Vista's bids and bidding decisions, subject to certain bid limits established in the Agreement" and that the parties had "mutually agreed on the markets in which they would bid and set bidding limits for each of the markets." The agreement required unanimous consent of the Auction Committee for bids in excess of the authorized bid limits. The agreement "also gave the Committee some discretion to exceed the bid limits or to bid in additional markets under certain circumstances in order to maintain bidding flexibility." *See* Vista PCS Exhibit E at 4, 11-12.

[169] *See* Vista PCS Exhibit E at 6.

[170] *See Broadband PCS Spectrum Auction*, Public Notice, 20 FCC Rcd 496, 507-08, 518-19 (WTB 2005).

[171] Federal Communications Commission, "FCC Broadband PCS Auction #58 **Final**" showing High Bids in the final round of Auction 58, *available at* http://wireless.fcc.gov/auctions/58/charts/58press6.pdf (last visited May 16, 2015).

net dollar value of Auction 58. This result was achieved through a coordinated bidding strategy by Verizon and Vista in which neither entity bid directly against the other.[172]

Another example involves Alaska Native Wireless ("ANW") and AT&T Wireless PCS ("AT&T") in Auction 35. As part of their JBA, ANW and AT&T agreed to "coordinate bidding for licenses in the auction in order to work towards satisfying the strategic purposes . . . , which include the development of a single national wireless telecommunications system, maintaining compliance with applicable spectrum aggregation limits, and facilitating the consolidation of their facilities in connection with any transactions contemplated by [their other agreements]," and stated that "such coordination will be effected by communications among authorized representatives [of the parties] at regular intervals during the auction, which intervals shall be established by ANW and AT&T.[173]

The parties formed an auction committee consisting of three members, two of whom were appointed by ANW and one of whom was appointed by AT&T.[174] In the course of the auction, ANW and AT&T placed 853 bids for the same amount on the same licenses.[175] AT&T subsequently stopped bidding after round 32. ANW eventually won 44 licenses for a total gross

[172] Verizon's attack on SNR, DISH and Northstar in the DE rulemaking proceeding for coordinated bidding is, therefore, particularly ironic. *See* Letter Kathleen Grillo, Senior Vice President, Verizon Wireless, to Marlene H. Dortch, Secretary, Federal Communications Commission, WT Docket No. 14-170 (April 24, 2015).

[173] FCC Form 601, Exhibit E at 26.

[174] SNR, FCC Form 175, Exhibit D: Agreements and Other Instruments at 26.

[175] *See* Auction 97 Results, *available at* http://wireless.fcc.gov/auctions/default.htm?job=auction_summary&id=97. (last visited May 16, 2015) ("Auction 97 Results").

price of $2,960,258,000 and a total net price of $2,893,144,250 after receiving bidding credits as a "very small business."[176]

The above examples show conclusively that the use of JBAs and coordinated bidding strategies have been commonplace for FCC auctions, and their use here was entirely appropriate.

B. SNR, DISH and Northstar properly and fully disclosed their JBAs in advance of the auction

Auction applicants must include in their pre-auction applications:

- "[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…";[177]
- 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."[178]

Then, in their post-auction long-form application, applicants must include:

- an exhibit providing a detailed explanation of the terms and conditions and parties involved in any bidding consortia, joint venture, partnership or other agreement or arrangement it had entered into relating to the competitive bidding process prior to the time bidding was completed. Such agreements must have been entered into prior to the filing of short-form applications pursuant to 47 C.F.R. § 1.2105.[179]

SNR fully complied with the above-mentioned disclosure requirements.

Specifically, prior to Auction 97, SNR publicly disclosed to the Commission in its short-form application that it had entered into a number of agreements that set out the organizational structure and relationships between these parties and their non-controlling interest holders to

[176] *Notice of Auction Scheduled for July 26, 2000*, Public Notice, 15 FCC Rcd 694 (2000).

[177] 47 C.F.R. § 1.2105(a)(2)(viii).

[178] 47 C.F.R. § 1.2105(a)(2)(ix).

[179] 47 C.F.R. § 1.2107(d).

govern their behavior before, during, and after the auction.[180] Two agreements entered into by the parties specifically established that SNR would discuss, disclose to its partners, cooperate and coordinate regarding bids, bidding strategies and settlement agreements.[181]

American III and American I were parties to a JBA with: SNR Management; SNR HoldCo; and SNR (the "SNR/DISH JBA"). The SNR/DISH JBA was publicly disclosed and summarized in the pre-auction short-form applications of American I (the wholly-owned DISH subsidiary that filed its own application to participate in Auction 97) and SNR.[182] The SNR/DISH JBA stated, *inter alia*, that the parties to the agreement would "coordinate bidding for licenses in Auction 97 in order to comply with spectrum aggregation limits or policies that may be applied under the Commission's rules, to facilitate the consolidation of their systems . . . and to facilitate the business of SNR HoldCo . . ." and that "coordination will be effected by communications among authorized representatives of the parties at regular intervals during the auction."[183]

American AWS-3 Wireless II L.L.C. (a DISH subsidiary) and American I were parties to a JBA with: Doyon, Limited; Northstar Manager, LLC; Northstar Spectrum, LLC; and Northstar (the "Northstar/DISH JBA). The Northstar/DISH JBA was publicly disclosed and summarized

[180] *See* SNR, FCC Form 175, File No. 0006458318, Exhibit E: Agreements and Other Instruments, at 1-3.

[181] *Id*. (identifying the Letter Agreement entered into as of September 12, 2014, by and among American I, American II, American III, Northstar Manager, Northstar Spectrum, Northstar Wireless, Doyon, SNR LicenseCo, SNR HoldCo, and SNR Management and the Letter Agreement entered into as of September 12, 2014, by and among American I, American II, American III, Northstar Manager, Northstar Spectrum, Northstar Wireless, Doyon, SNR LicenseCo, SNR HoldCo, and SNR Management).

[182] American AWS-3 Wireless I, FCC Form 175, File No. 0006458188, Exhibit D: Agreements and Other Instruments, at 27; SNR, FCC Form 175, File No. 0006458318, Exhibit D: Agreements and Other Instruments, at 27.

[183] SNR, FCC Form 175, File No. 0006458318, Exhibit D: Agreements and Other Instruments, at 26.

in the short-form applications of American I and Northstar.[184] The summaries of the Northstar/DISH JBA stated similarly that parties to the agreement would "coordinate bidding for licenses in Auction 97 in order to comply with spectrum aggregation limits or policies that may be applied under the Commission's rules, to facilitate the consolidation of their systems . . . and to facilitate the business of Northstar . . ." and that "coordination will be effected by communications among authorized representatives of the parties at regular intervals during the auction."[185]

Additionally, the following entities entered into a JBA (the "SNR/DISH/Northstar JBA"): American I; American II; American III; Northstar; Northstar Spectrum, LLC; Northstar Manager, LLC; Doyon Limited; SNR; SNR Holdco; and SNR Management. The SNR/DISH /Northstar JBA was publicly disclosed and summarized in the short-form applications of American I, SNR and Northstar.[186] The summary of the SNR/DISH/Northstar JBA stated, *inter alia*, that all of the parties would "coordinate regarding bids, bidding strategy and post-auction market structure" and "[b]y virtue of DISH's interests in each of American I, Northstar Wireless, Northstar, SNR HoldCo and SNR License, and the Joint Bidding Arrangements, each applicant will be deemed to have knowledge of the other's bids or bidding strategies."[187] The summaries also stated that "the parties would coordinate bidding in Auction 97 to fulfill their respective

[184] American I FCC Form 175, File No. 0006458188, Exhibit D: Agreements and Other Instruments at 24; SNR, FCC Form 175, File No. 0006458325, Exhibit D: Agreements and Other Instruments at 24.

[185] *Id*. at 26.

[186] American AWS-3 Wireless I, FCC Form 175, File No. 0006458188, Exhibit D: Agreements and Other Instruments, at 2; SNR, FCC Form 175, File No. 0006458318, Exhibit D: Agreements and Other Instruments, at 2; Northstar Wireless, LLC FCC Form 175, File No. 0006458325, Exhibit D: Agreements and Other Instruments, at 2.

[187] SNR, FCC Form 175, File No. 0006458318, Exhibit D: Agreements and Other Instruments, at 27.

strategic purposes, to comply with spectrum aggregation limits or policies that may be applied under the FCC rules, to facilitate roaming arrangements among the parties or their affiliates, and to facilitate consolidation of their systems to the extent contemplated" by the SNR/DISH JBA and the Northstar/DISH JBA.[188]

The FCC reviewed all of these short-form disclosures and found all three applicants qualified to participate in Auction 97.[189] Accordingly, SNR, DISH and Northstar complied with the Commission's JBA disclosure requirement and, pursuant to the JBA exception to the FCC's anti-collusion rules, were permitted to discuss, disclose to each other, collaborate and cooperate with respect to bids, bidding strategies and settlement agreements during Auction 97.[190]

C. SNR's actions during Auction 97 complied with the Commission's rules which permit bidding decisions to be determined by SNR's Auction Committee

The JBA applicable to SNR's participation in Auction 97 identified bidding objectives, an overall bidding cap, and a maximum price per MHz-POP that the parties agreed would be

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[188] *Id*.

[189] *See Auction of Advanced Wireless Services (AWS-3) Licenses 70 Bidders Qualified to Participate in Auction 97*, Public Notice, 29 FCC Red. 13465 at Attachment A (WTB 2014).

[190] As an additional consideration, the WTB supervised the entire conduct of Auction 97 in real time, and it expressly reserved the right to suspend or cancel the auction in the event that it perceived bidding activity that affected the fair conduct of the auction. *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 at ¶ 180 (WTB 2014) ("*Auction 97 PN*") ("By 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."). If the WTB thought that some aspect of the fully-disclosed collaboration of SNR, DISH and Northstar amounted to "unlawful bidding activity," it could have intervened immediately. It did not intervene, however, thus reinforcing the fact that these collaborations were fully consistent with the FCC's governing rules.

applicable to the bidding and the bidding strategy for SNR in Auction 97.[191] The agreement also established that SNR's participation in Auction 97 was to be directed and implemented by an Auction Committee.[192] Muleta chaired the Auction Committee and acted as the Bidding Manager for SNR throughout Auction 97.

The JBA directed the Bidding Manager to host a daily conference of members of the Auction Committee and to make bidding decisions in the event the Auction Committee could not reach consensus.[193] Muleta exercised *de jure* and *de facto* control regarding Auction 97 bidding matters on behalf of SNR, *inter alia*, by having final decision-making authority on what bids to make and enter into the FCC's system.[194]

Importantly, the SNR Auction Committee structure has been used numerous times in the past, and the Commission has never objected.[195] Petitioners have offered no facts to support their speculative claim that Muleta did not exercise control as the Bidding Manager of the Auction Committee.[196]

D. All of the actions taken by SNR during the auction were consistent with the Commission's established auction rules and/or legitimate auction or business-related objectives

Petitioners' allegations of wrongdoing regarding SNR's bidding during the auction have no merit. SNR's goal for the auction was to win a license portfolio that would maximize value *for all of SNR's investors* and facilitate the build out and offering of wireless services, consistent

[191] Bidding Protocol and Joint Bidding Arrangement, § 2(a), (b), and (c), and Schedule II.

[192] *Id*. at § 1(a).

[193] *Id*. at § 3(a).

[194] *See* Muleta Declaration, at ¶ 10; *see also* Cullen Declaration, at ¶ 10.

[195] Examples include Vista-Verizon in Auction 58 and ANW-AT&T in Auction 35. *See supra* Section V.B.

[196] *See* VTel Petition at 21-23.

with its strategy and the JBAs. The actions about which the Petitioners now complain were consistent with the Commission's auction rules and legitimate auction or business-related goals. Thus, they cannot be violations of the FCC's rules or antitrust laws.

More specifically, SNR (through Muleta) made bidding decisions in an effort to promote the following auction or business-related objectives, among others:

- Taking into account the relative strategic values of given licenses in deploying a viable and competitive wireless broadband services either as a standalone provider and/or based on future market demands, potentially on a complementary basis with others, including but not limited to DISH, Northstar or other wireless and wireline providers as well as non-carrier new entrants;
- Maintaining and maximizing bidding eligibility as required by the FCC throughout the auction to remain competitive in the auction;
- Accounting for market values of given licenses, including historic license valuations, levels of competition from other wireless carriers and/or incumbent telephone companies;
- Ensuring budgetary compliance;
- Considering intangible license specific factors (including potential interference, relocation and coordination issues post-auction);
- Consideration of contemporaneous and prospective auction dynamics;
- Assessing potential synergies with:
    - SNR's then-provisionally winning bids for licenses in Auction 97;
    - DISH's then provisionally winning bids for licenses in Auction 97;
    - DISH's existing portfolio of nation-wide spectrum and the JBAs between the parties;[197]
    - Northstar's then-provisionally winning bids for licenses in Auction 97, consistent with the JBAs between the parties;

[197] *See Service Rules for Advanced Wireless Services in the 2000-2020 MHz and 2180-2200 MHz Bands*, Report and Order and Order of Proposed Modification, 27 FCC Rcd 16102 (2012); *See Auction of H Block Licenses in the 1915-1920 MHz and 1995-2000 MHz Bands Closes, Winning Bidder Announced for Auction 96*, Public Notice, DA 14-279 (Feb. 28, 2014).

- The ease of potential combination of each party's respective systems, as contemplated by the strategic partnership with DISH and the JBAs between the parties; and

- Consideration of potential spectrum aggregation limits or policies that may be applied under the FCC's rules.[198]

Moreover, the relative weight of the above factors varied as the auction progressed. For instance, the need to ensure that all bids were within the auction budget became more important in the later rounds, when the license bid prices were higher and had settled, and constrained SNR from placing additional bids on licenses in larger or more expensive markets without creating risk regarding those licenses for which SNR held the provisionally winning bid. The relative weight of each consideration also changed when the FCC increased the bidding activity requirement, eventually requiring use of 100 percent of the available bidding units and forcing SNR to prioritize between different licenses.

Petitioners allege that the bidding by the parties distorted information available to bidders.[199] The Auction 97 rules, however, expressly imposed anonymous bidding and forbid any auction participant from disclosing its bids to other parties (unless pursuant to a properly disclosed JBA).[200] Thus, by design the Commission specifically intended to limit the information available to auction participants. In doing so, the Commission stated that "[t]he limited information disclosure procedures ... safeguard against potential anticompetitive behavior such as retaliatory bidding and collusion" and "conclude[d] that the competitive benefits associated with limiting information disclosure support adoption of such procedures and

[198] *See* Muleta Declaration at ¶ 13.

[199] VTel Petition at 14.

[200] *Auction 97 PN*, 29 FCC Rcd 8386 at ¶ 152; 47 C.F.R. § 1.2105(c).

outweigh the potential benefits of full disclosure."[201] Indeed, the Commission has imposed anonymous bidding since 2008, repeating its basis for doing so (i.e., to minimize the use of retaliatory bidding as a method of foreclosing competition and forcing bidders to focus on the utility of the spectrum instead of its competition foreclosure value) on numerous occasions.[202] As noted by one commenter in a prior proceeding, "[i]mposing limitations on the release of bidder information prior to and 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*."[203]

Contrary to the suggestion of some parties, SNR's bids (and those of DISH and Northstar) were not intended to create "false" signals or demand. Throughout Auction 97, each of SNR's entered bids were bona fide bids and, if any of those bids had become a winning bid, SNR fully intended to pay for those licenses.[204] Ultimately, SNR fully paid the amounts due for all of the licenses it won at auction, demonstrating that none of its bids were disingenuous, improperly motivated or not otherwise pursuant to legitimate auction or business-related factors.

A number of the petitioners also complain that SNR, DISH and Northstar bid the "same amount" on certain licenses or "accepted" the FCC's random number assignment tiebreaker

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[201] *Id.* at ¶ 150.

[202] *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 ¶ 157 (WTB 2008) (recognizing that limited information procedures may have overall competitive benefits from reduced opportunities for bid signaling, retaliatory bidding, or other anticompetitive strategic bidding); *Auction of 700 MHz Band Licenses Scheduled for July 19, 2011; Notice and Filing Requirements, Minimum Opening Bids, Upfront Payments, and Other Procedures for Auction 92*, Public Notice, 26 FCC Rcd 3342 ¶ 128 (WTB 2011) (finding that the competitive benefits associated with limited information disclosure procedures support adoption of such procedures).

[203] Comments of Verizon Wireless, WT Docket No. 06-50, at 36 (filed May 23, 2007).

[204] Muleta Declaration at ¶ 11.

mechanism rather than continue bidding on licenses against one of the JBA parties.[205] As a preliminary matter, all discussions, disclosures, cooperation and collaborations between SNR, DISH and Northstar regarding bids, bidding strategies or settlement agreements were permitted under the properly disclosed JBAs.[206] Thus, none of these allegations demonstrates that there were violations of the FCC's rules. Moreover, with respect to bids of the "same amount," the auction rules specifically limit bidders to nine set bid amounts for each license in each round.[207] Auction data show that 98.6 percent of the 41,377 bids placed during Auction 97 by all participants were the minimally acceptable bid.[208] Logically, bidders preferred to bid the least amount necessary to win a license. Thus, it is hardly surprising that SNR, DISH, and Northstar bid the "same amount" when they bid on the same license in a given bidding round.

Similarly, the fact that SNR, DISH, and Northstar bid on the same license in the same round on 329 occasions demonstrates nothing, except perhaps that the parties each perceived the auction price for the relevant licenses to be a good value. Indeed, SNR, Northstar and Verizon also bid on the same license in the same round on 331 occasions. Moreover, there is ample precedent for parties to JBAs to bid on the same licenses in FCC auctions. Such bidding occurred 853 times between AT&T and ANW in Auction 35; 13 times between Cricket and Alaska Native Broadband 1 in Auction 58; and 13 times between Cricket and Denali in Auction 66.[209]

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[205] VTel Petition at 21, 23-24; CTTI-Rainbow Petition at 4, 6.

[206] *See supra* Section V.B.

[207] *See Auction 97 PN*, 29 FCC Rcd 8386 at ¶ 203.

[208] More specifically, 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, and most of them were by T-Mobile.

[209] *See* Auction 35 Results, *available at* http://wireless.fcc.gov/auctions/default.htm?job=auction_summary&id=35; Auction 58 Results,

Additionally, the FCC's competitive bidding procedures require auction applicants to maintain specified levels of bidding activity (*i.e.*, to place new bids or rely on standing PWBs) on licenses or lose the capability to bid on licenses in subsequent rounds.[210] These activity rules "require[] bidders to bid actively throughout the auction, rather than wait until late in the auction before participating," and "ensure that an auction closes within a reasonable period of time…."[211] Bidding activity requirements have "proven successful in maintaining the pace of previous auctions."[212] Thus, to remain competitive in the auction and produce the type of procompetitive bidding intended by the Communications Act and the FCC's rules, SNR, DISH and Northstar needed to satisfy these FCC bidding activity requirements. Given the parties' respective bidding units (SNR – 412,000,000 units; DISH – 400,000,000 units; and Northstar – 508,000,000 units) relative to the maximum amount (920,752,900 bidding units), it would have been impossible to have no overlaps in bidding.[213]

VTel's, CTTI's, and Rainbow's argument that the coordinated bidding of SNR, DISH and Northstar deterred others from continuing to participate or displaced other DEs by simultaneously bidding on a license is also without merit.[214] The very concept of an auction is that bidders must continue to increase their bid prices in order to successfully win the auction

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available at http://wireless.fcc.gov/auctions/default.htm?job=auction_summary&id=58; Auction 66 Result, *available at* http://wireless.fcc.gov/auctions/default.htm?job=auction_summary&id=66.

[210] *See Auction 97 PN*, 29 FCC Rcd 8386 at ¶¶ 163-64. A bidder that does not meet the activity requirement would be required to use one of its three activity waivers or reduce its bidding eligibility pursuant to a formula established by the Commission. *Id*. at ¶¶ 168-171.

[211] *Id.* at ¶ 159.

[212] *Id.* at ¶ 160.

[213] *See Auction of Advanced Wireless Services (AWS-3) Licenses Closes*, Public Notice, DA 15-131 at Attachment B (Jan. 30, 2015).

[214] VTel Petition at 2, 14; CTTI-Rainbow Petition at 3-5.

item and that an auctioned license will flow to the bidder that values the license most highly, which even VTel concedes.[215] Thus, it is unclear how any of these affirmative bidding actions, which increased license prices and were fundamentally encouraged under the FCC's rules, could be anticompetitive or contrary to the public interest. At bottom, if an interested bidder had valued the licenses at issue more, it should have bid again to acquire the licenses, rather than simply give up because of a speculative fear that future bidding would put the price of the licenses out of reach.[216] Indeed, in many cases, bidders continued to bid on licenses on which multiple other parties also bid on the license in a single round.[217] Presumably, they did so because the subjective value of the license continued to be higher than the bid price.

VTel, CTTI, and Rainbow suggest that the coordinated bidding by SNR, DISH and Northstar in the auction rendered the companies unable to secure licenses in five specific markets.[218] The auction data, however, refute this assertion. Fundamentally, the RLECs made bids that were substantially less than the bids that ultimately prevailed in almost all of the markets in which they bid and lost.

For example, for the BEA004-B1 license, VTel's last gross bid amount was $146,000 in round 20. SNR's final gross PWB from round 122 was $610,000, more than four times higher

[215] *See Competitive Bidding Second Report and Order* at 9 FCC Rcd 2348 at ¶ 5 (1994) ("Awarding licenses to those who value them most highly, while maintaining safeguards against anticompetitive concentration, will likely encourage growth and competition for wireless services and result in the rapid deployment of new technologies and services."); *see also* VTel Petition at 34.

[216] *See* VTel Petition at 12-14; CTTI-Rainbow Petition at 3-5.

[217] *See supra* Section III.

[218] VTel Petition at 12-14; CTTI-Rainbow Petition at 3-5.

than VTel's last bid.[219] A review of all six of the licenses on which VTel bid provides similar results. On average, the final gross PWB was more than 7 times higher than VTel's last gross bid for the licenses on which VTel bid and lost.

The same disparity exists between the gross PWB and the last bid of each of the other RLECs for the licenses on which they bid and lost, respectively. On average the final gross PWB was more than 2 times higher than the last gross bid for CTTI for the licenses on which it bid and lost. Similarly, on average the final gross PWB was nearly 5 times higher than the last gross bid for Rainbow for the licenses on which it bid and lost. In short, the RLEC Petitioners appeared to have unrealistic market valuations for the licenses in which they bid and lost. It was for this reason alone that they failed to win the licenses ultimately won by SNR (and others),[220] rather than from any alleged wrongdoing by SNR.[221]

Petitioners' arguments that DISH "handed off" licenses to SNR and Northstar in the early rounds of Auction 97 (rounds 20-22)[222] makes little sense and, in any event, would be permitted under the FCC's rules for parties that properly disclosed JBAs, such as the case here. Auction 97 ended in round 341 and the number of PWBs from round 22 that were the final PWBs was only 83 (and of those, DISH held the PWB for only 21 licenses). Thus, to suggest that any licenses were "handed off" is nonsensical. As the auction data show, for over 300 rounds any bidder with

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[219] *See* Auction 97 Results. As discussed earlier, two other bidders (Joseph A. Sofio and 2014 AWS Spectrum Bidco Corporation on multiple occasions) also outbid VTel's grossly under market final bid. *See supra* section III.

[220] The RLECs bid on licenses ultimately won by Verizon Wireless, AT&T Wireless, T-Mobile, Orion Wireless, and Northstar. *See* Auction 97 Results.

[221] Indeed, the same general conclusions are applicable to the 23 bidders in the auction who identified themselves as RLECs. For the 115 licenses the RLECs bid on and lost, in the aggregate they entered total bids equal to less than 30% of the value of the total eventual winning bids. *See* Auction 97 Results.

[222] VTel Petition at 4; CTTI-Rainbow Petition at 5; CWA-NAACP Petition at 5.

sufficient bidding eligibility could continue to bid on the licenses, and many bidders did, in fact, do so.[223] In any event, because SNR, DISH, and Northstar were parties to properly disclosed JBAs, any collaboration and cooperation between them regarding any such "handoffs" was permitted. As discussed above, given DISH's substantial financial investment in SNR and the extensive transactional agreements between SNR and DISH, a decision by DISH on its own to stop bidding on licenses as prices escalated and to dedicate its available capital to the bidding activities of SNR (and Northstar) is a reasonable business judgment, not a result of *de facto* control. Indeed, other parties with properly disclosed JBAs in past auctions have engaged in similar conduct.[224]

E. Petitioners seek changes to the Commission's auction and designated entity rules, which can only be applied prospectively

To a large extent, petitioners' arguments that the Commission should deny the SNR license application or prohibit the award of the requested bidding credits to SNR are essentially requests for the Commission to retroactively apply different rules to Auction 97, which would be both unlawful and unjust.[225] Moreover, doing so would fundamentally undermine the validity of Auction 97, requiring that the Commission hold another auction to reassign the AWS-3 spectrum.[226]

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[223] As discussed *supra* in note 190, the WTB could have also suspended or canceled the auction if it believed that bidding actions were unlawful or otherwise affected the fair and efficient conduct of the auction.

[224] *See supra* Section V.A (discussing ANW-AT&T in Auction 35).

[225] Such requests could also be considered untimely petitions for reconsideration of the Auction 97 rules and dismissed, as a result.

[226] Bloomberg BNA, Spiwak, Lawrence J., *How the AWS Auction Provides a Teachable Moment on the Nature of Regulation*, http://ww.phoenixcenter.org/BloombergBNADesignated Entities28April2015.pdf (last accessed May 16, 2015) ("Given the robust participation of Northstar Wireless and SNR Wireless in the auction, if the FCC engages in post-auction manipulations, then we would likely need an auction do-over.")

As the Supreme Court in *Bowen v. Georgetown University Hospital* made clear, "[r]etroactivity is not favored in the law."[227] In its *Landgraf v. USI Film Products* decision, the Court 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."[228] Likewise, the D.C. Circuit has indicated that, "[w]hen parties rely on an admittedly lawful regulation and plan their activities accordingly, retroactive modification or rescission of the regulation can cause great mischief."[229]

If new rules, interpretations or policies are applied to SNR (including as conditions on SNR's licenses), it would fundamentally change the basis on which the AWS-3 Auction was conducted after the fact and unfairly deprive SNR of the licenses it won at auction. Courts have made clear that agency's that adopt new rules that would radically change the expectations on which past actions were taken is reversible error, where the agency acts arbitrarily or unreasonably.[230] The retroactivity proposed here would be manifestly arbitrary and unreasonable with no rationale other than to counteract SNR's success in Auction 97.

The FCC's Auction 97 and DE rules were disclosed in advance, and the FCC's precedent validated all of SNR's contemplated corporate structures and Auction Committee format. SNR (and all of its investors, including Blackrock and Klipper) reasonably relied on those rules and FCC auction precedent, making significant investments and ordering its business accordingly.

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[227] *Bowen v. Georgetown Univ. Hosp.*, 109 S. Ct. 468, 471 (1988).

[228] *Landgraf v. USI Film Products*, 511 U.S. 244, 245, (1994).

[229] *Yakima Valley Cablevision, Inc. v. FCC,* 794 F.2d 737, 745 (D.C. Cir. 1986).

[230] *See Mobile Relay Associates v. FCC*, 457 F.3d 1, 11 (D.C. Cir. 2006) (secondary retroactivity "occurs if an agency's rule affects a regulated entity's investment made in reliance on the regulatory status quo before the rule's promulgation," and such a rule will be upheld only "if it is reasonable, *i.e*., if it is not arbitrary or capricious") (internal quotations omitted) and *U.S. AirWaves, Inc. v. FCC*, 232 F.3d 227, 233 (D.C. Cir. 2000) (a secondarily retroactive rule is valid "only to the extent that it is reasonable – both in substance and in being made retroactive").

All of SNR's bids and actions during Auction 97 similarly were made against the backdrop of these rules and precedents. If the Commission were to replace those existing rules and precedents with new, more onerous ones, the Commission would "upset settled expectations" on which SNR "reasonably place[d] reliance,"[231] which would be manifestly unjust.[232]

Petitioners' concerns regarding the Commission's existing auction-related rules should be raised in a pending rulemaking of general applicability where all parties have an opportunity to receive notice and provide comment.[233] The Commission has already opened a proceeding and, indeed, issued a Public Notice on April 17, 2015 specifically seeking comment on issues that the petitioners address in this license proceeding.[234] Indeed, a number of the petitioners have themselves raised the same issues in that forum.[235]

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[231] *Qwest Servs. Corp. v. FCC*, 509 F.3d 531, 540 (D.C. Cir. 2007).

[232] *Id*; *see also AT&T 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)); *N.L.R.B. v. Bell Aerospace Co. Div. of Textron*, 416 U.S. 267, 294, (1974) (recognizing that there are "situations where [an agency's] reliance on adjudication would amount to an abuse of discretion or a violation of the Act"); and *Ruangswang v. Immigration & Naturalization Serv.*, 591 F.2d 39, 44 (9th Cir. 1978) (holding that an agency's "use of adjudicative proceedings to change course in midstream" was "beyond the bounds of that which is permissible under *Bell*" when the adverse consequences were "certainly substantial").

[233] *SBC Communications Inc. and AT&T Corp*., Memorandum Opinion and Order, 20 FCC Rcd 18290 ¶ 55 (2005) ("By addressing these issues in the context of a rulemaking, we will be able to develop a comprehensive approach based on a full record that applies to all similarly-situated [entities]."); *see also Nextel Communications, Inc*., Order, 14 FCC Rcd 11678 ¶ 32 (WTB 1999) (recognizing that where an approach would "represent a change in policy with significant far-reaching implications," a rulemaking proceeding is the "appropriate forum to address these issues").

[234] *See Request for Further Comment on Issues Related to Competitive Bidding Proceeding, Updating Part 1 Competitive Bidding Rules*, WT Docket No. 14-170 (Apr. 17, 2015).

[235] *See* Comments of Citizens Against Government Waste, WT Docket No. 14-170 (Feb. 20, 2015); Comments of Americans for Tax Reform et al., WT Docket No. 14-170 (Feb. 20, 2015); Comments of MediaFreedom.org, WT Docket No. 14-170 (Feb. 20, 2015).

F. There is no basis for the Commission to initiate a hearing or investigation

VTel asks the Commission to initiate an evidentiary hearing or investigation to explore SNR's conduct during the auction.[236] As discussed above, all of SNR's actions pertaining to Auction 97 were permissible and in some instances required under the Commission's rules.[237] Accordingly, there can be no substantial and material question of fact that would warrant a hearing.[238] Similarly, there is no basis to initiate an investigation when all of the challenged actions were permissible and pursuant to a procompetitive agreement that not only increased auction revenues but also increases competition in the downstream wireless market.[239]

VTel's curiosity regarding the commercially sensitive, confidential information contained in SNR's Schedule II change order authorizations is not a legitimate reason to initiate a hearing. SNR has provided the Commission with all of that confidential information. Accordingly, there is no substantial or material question of fact as to the contents of that information.

There is also no legitimate basis to initiate a hearing based on the separate decisions by SNR and Northstar in rounds 238 and 239 to withdraw provisionally winning bids on the Boston and Philadelphia licenses, respectively.[240] Bid withdrawals are expressly permitted under the Commission's rules to "allow[] 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."[241] Indeed, SNR decided, for legitimate business reasons, that it would be more valuable to have other licenses in its portfolio, and used

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[236] *See* VTel Petition at 36-37.

[237] *See supra* Section V.C.

[238] 47 U.S.C. § 309(d); *see also* 47 C.F.R. § 1.2108(d).

[239] *See infra* Section VII.

[240] VTel Petition at 36-37.

[241] *Part 1 Fifth Report and Order* at ¶ 14.

the limited bidding eligibility that would have otherwise been used to remain high bidder on the Boston license to bid on those other licenses. SNR paid the respective $8 million withdrawal penalty, as required under the FCC's rules, ensuring that the Commission was not impacted financially by the withdrawal.[242] Because VTel provides nothing but speculation as the basis for initiating a hearing or investigation, its request should be rejected. Similarly, VTel's request that SNR should be assessed a penalty for its bidding actions should be rejected summarily.[243] VTel cites no precedent for taking such an extraordinary action against an auction applicant who complied with the FCC rules, took actions consistent with FCC precedent, and effectuated full and timely payment (totaling more than $4 billion) of the licenses it won at auction.

VI. THE BIDDING ACTIONS BY THE PARTIES DURING THE AUCTION COMPLIED FULLY WITH APPLICABLE ANTITRUST LAWS

Petitioners' extraordinary arguments that SNR, DISH and Northstar violated antitrust laws, have no basis in fact, Commission rules and precedent or economic reality, and should be summarily dismissed.[244] There is no evidence whatsoever of any *per se* violation of the antitrust laws under any applicable precedent. The complained-of collaboration and cooperation among SNR, Northstar, and DISH, was done openly with the knowledge of the FCC, the "seller" of the AWS-3 licenses, and in conformance with FCC rules. Moreover, the parties' actions demonstrably enhanced competition by enabling significant new bidders to participate in Auction 97 and put the existing, concentrated wireless industry closer to the entry of significant new facilities-based competition in the provision of wireless service. In short, the parties'

[242] Northstar did not have to pay a withdrawal penalty because the winning bid was not less than Northstar's withdrawn bid.

[243] VTel Petition at 34.

[244] *See* VTel Petition at 29-31; CTTI-Rainbow Petition at 5-6.

bidding conduct was procompetitive and fully consistent with the Sherman Act's rule of reason.[245]

A. The antitrust laws were enacted for the protection of competition not competitors

VTel's motivations in filing a petition to deny are suspect. VTel won nothing in "the highest earning spectrum auction the United States has ever seen"[246] and now seeks an undeserved second chance by having the Commission misapply antitrust law to award VTel two licenses of desirable spectrum at non-competitive prices. Thus, VTel's true objective is not to promote more vigorous competition for valuable wireless spectrum and generate increased revenues for federal taxpayers.

VTel, by its own admission, chose to "drop out" of the bidding for the A1 and B1 Blocks in Burlington, Vermont because it confronted "significant competition" in the form of rival bids, inferred that this competitive demand would drive up the price, and concluded that it was unwilling to pay the competitive price needed to win the auction.[247] But, with respect to the BEA004-A1 license, SNR outbid VTel by only *$15,000 (gross)* before VTel decided to give up its efforts to acquire that license. VTel's high bids in other markets (*e.g.*, $1,222,000 for the BEA004-J license; $689,000 for the BEA004-I license; and $576,000 for the BEA004-H license) show that VTel easily could have increased its bid for the BEA004-A1 license but apparently did not want to.[248] The cost of its legal challenge now likely far exceeds $15,000, raising serious

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[245] *See* 15 U.S.C. §1.

[246] *FCC Chairman Tom Wheeler Statement on Auction 97*, Press Release (Jan. 29, 2015) ("Today we closed bidding Auction 97 – by far the highest-earning spectrum auction the United States has ever seen.").

[247] VTel Petition, Guité Affidavit at ¶¶ 10-21.

[248] *See* Auction 97 Results.

questions about VTel's interest in the BEA004-A1 license and motivation in submitting its petition to deny.[249]

Now, having acquired nothing, VTel wants the FCC to conduct a new auction for that spectrum *where VTel does not face any competition* from SNR or Northstar (or any other party that did not previously bid on licenses in the geographic area in Auction 97). Given that proposed limited competition, VTel would almost certainly obtain the spectrum licenses on the cheap.[250]

Antitrust authorities invariably look with a jaundiced eye on complainants whose true objective is to use antitrust policies to reduce competition and gain a benefit they otherwise have not earned on the merits.[251] Similarly, the Supreme Court has cautioned that the antitrust laws "were enacted for 'the protection of *competition* not *competitors.*'"[252] The very concept of an auction is that bidders must continue to increase their bid prices in order to successfully win the auction item and that an auctioned license will flow to the bidder that values the license most highly. In fact, tough competition means some firms will win and some will lose. Here, VTel and the other RLECs lost, and sour grapes do not create an antitrust issue.

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[249] *See* Areeda & Turner, Antitrust Law ¶ 317d (1978) (summary disposition issues often arise in suits by unhappy competitors whose "sense of oppression is not matched by any entitlement to legal relief").

[250] VTel Petition at 33-34 (In re-auctioning the BEA004-A1 and BEA004-B1 licenses, the FCC should exclude SNR, Northstar and DISH from participating and limit the auction to "those entities that previously submitted a bid in Auction 97 in the market being re-auctioned.").

[251] *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962) (Antitrust laws "were enacted for 'the protection of competition not competitors.'").

[252] *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc*., 429 U.S. 477 (1977) (emphasis in original) (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 320, 82 S.Ct. 1502, 1521, 8 L.Ed.2d 510 (1962)).

B. The antitrust claims lack merit

FCC rules affirmatively encourage parties to form and disclose to the FCC (and the public) bidding consortia or JBAs as a means of surmounting financial and other barriers to auction participation and ultimately to bring to the consumer marketplace competition and innovation from additional facilities-based wireless service suppliers.[253] The record in this proceeding shows no so-called "collusive behavior" conspiratorially designed and secretly effectuated to make it "more difficult for regulators to detect" and easier for "colluding parties to enforce," as VTel alleges.[254] The FCC's rules recognize that such FCC-disclosed JBAs will include features such as discussions among members of their respective bidding strategies and planned or actual bids and various forms of potential or actual cooperation or collaboration.[255]

Here, as discussed earlier,[256] SNR, Northstar and DISH properly disclosed in their respective short-form applications their JBAs -- specifically the SNR/DISH, Northstar/DISH, and SNR/DISH/Northstar JBAs -- and did so well in advance of the auction. In their FCC filings they identified the JBA parties, their relationships, and their organizational structures, as well as the agreements (including providing public summaries) indicating that they intended to discuss, disclose, cooperate, and coordinate with respect to bids, bidding strategies and settlement agreements. Furthermore, the parties' JBAs and their actions under those agreements followed closely similar arrangements in past auctions that were expressly permitted by the Commission.[257]

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[253] *See supra* Section V.A.

[254] VTel Petition at 29.

[255] 47 CFR 1.2105(c).

[256] *See supra* Section V.B

[257] *See supra* Section V.A (discussing the JBAs in ANW-AT&T in Auction 35 and Vista-Verizon in Auction 58).

VTel seeks to buttress its implausible collusive "price suppression" claim by alleging that parallel competing bids from two JBA members for the same spectrum (which, by the way, increased rather than suppressed the winning bid price) were somehow anticompetitive because VTel subsequently backed out rather than continue competing against two bidders. The FCC's rules do not require a JBA's members to only submit one joint bid. Nor do those rules prohibit the parties, who have entered into previously disclosed JBAs, from bidding separately for the same license in a given auction round.

Nor does VTel's allegation that there was a "bid rigging" conspiracy of illicit false demand signaling[258] have merit because the bidders' identities were secret, as demanded by the FCC's rules.[259] Such FCC-required anonymity surely cannot somehow convert their legitimate overlapping bids into illegal conduct.

In sum, petitioners' claims ignore the fundamental fact that communications pursuant to properly disclosed JBAs and the resulting varieties of bidding coordination within the JBA parties (including double bidding, withdrawal from bidding or parallel pricing of bids) are affirmatively allowed under the FCC's rules and auction precedent and increase auction efficiency and competition.

The FCC, in its expert judgment, has determined that properly disclosed JBAs are procompetitive.[260] Properly disclosed JBAs bear no resemblance to unregulated and secretly devised practices that antitrust agencies or courts have said invariably reduce competition and are therefore *per se* illegal. Indeed, neither the FCC nor the DOJ have ever taken an enforcement

[258] VTEL Petition at 14-15; *see also* CTTI-Rainbow Petition at 3-5.

[259] *See Auction of Advanced Wireless Services (AWS-3) Licenses Scheduled for November 13, 2014*, Public Notice, 29 FCC Rcd 5217, 5224.

[260] *See supra* Section V.A.

action against a properly disclosed JBA in a spectrum auction. Past DOJ enforcement actions have focused instead on parties that: (1) did not make the required disclosures to the FCC and nevertheless (2) engaged in undisclosed tactics to refrain from bidding against each other or otherwise reduce bidding competition.[261]

Courts have rejected the idea that joint undertakings to bid for assets in a sale or auction are invariably anticompetitive and have adamantly declined to characterize them as *per se* illegal. Indeed, courts have routinely determined such arrangements to be procompetitive and have been skeptical that bidding arrangements disclosed to and approved by a seller can ever be anticompetitive.[262] Here, the parties' JBAs and bidding actions fall squarely into this latter category because their collaborations were expressly permitted by the expert agency soliciting the bids and because that expert agency has determined that such collaboration has the requisite redeeming features for producing a procompetitive outcome.[263]

C. SNR's JBAs and bidding actions in Auction 97 were procompetitive

SNR's JBAs and bidding actions were procompetitive in, at least, three ways. First, given the large amounts of capital necessary to acquire spectrum licenses and deploy wireless networks, the JBAs enabled SNR to successfully bid for spectrum that it otherwise would not have been able to acquire, thereby increasing competition for licenses during Auction 97. In this

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[261] *See U.S. v. Omnipoint Corp.*, Complaint, dated November 10, 1998, at paras. 19 – 21, http://www.justice.gov/atr/cases/f2000/2064.htm; *see U.S. v. Mercury PCS II, L.L.C*, Competitive Impact Statement, dated November 10, 1998, at 2, *available at* http://www.justice.gov/atr/cases/f2000/2063.htm; U.S. v. 21st Century Bidding Corp., Complaint, dated November 10, 1998, *available at* http://www.justice.gov/atr/cases/f2000/2074.pdf.

[262] *See, e.g., Pennsylvania Avenue Funds v. Borey*, 569 F. Supp.2d 1126, 1133-34 (W. D. Wash. 2008); *Robertson v. Isomedix, Inc.* (*In re Int'l Nutronics, Inc.*), 28 F3d 965 (9th Cir. 1994) (rejecting bid-rigging claim where alleged anti-competitive "collusion" was apparent on the face of the bid).

[263] *See supra* Section V.A.

way, SNR's collaboration with its partners did not *replace* competition in Auction 97 that otherwise would have evolved, but instead *created* competition that otherwise would not have existed. This impact on competition is a key factor in determining whether concerted action among multiple buyers violates the antitrust laws.[264] Second, the parties' bidding increased net auction revenues. Third, the collaboration allowed SNR to access capital and expertise that will enable SNR to compete effectively in the wireless market, thereby enhancing competition.

As the FTC and the DOJ have recognized, "[i]n order to compete in modern markets, competitors sometimes need to collaborate…. Such collaborations often are not only benign but procompetitive."[265] The FCC has reached the same conclusion in establishing its JBA exception to the anti-collusion rule. Similarly, the FCC has stated that "one way of promoting competition is to permit entities to enhance their ability to win licenses in auctions by combining their resources and … small businesses in particular may need to pool financial and other resources in order to compete in auctions."[266]

In Auction 97, the JBAs and capital investment from DISH facilitated the material and meaningful participation of SNR in an FCC spectrum auction where some of the ultimate license

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[264] *See, e.g.*, *Northwest Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co.*, 472 U.S. 284, 294-98 (1985); *White & White, Inc. v. Am. Hosp. Supply Corp.*, 723 F.2d 495, 504-05 (6th Cir. 1983); *Webster, County Mem'l Hosp. v. United Mine Workers of Am. Welfare & Ret. Fund*, 536 F.2d 419, 420 (D.C. Cir. 1976); *Cartrade, Inc. v. Ford Dealers Adver. Ass'n*, 446 F.2d 289, 294 (9th Cir. 1971); U.S. Dep't of Justice and Federal Trade Comm'n, Statements of Antitrust Enforcement Policy in Health Care, 4 Trade Reg. Rep. (CCH) ¶ 13.153 at 20,812-14; Business Review Letters from R. Hewitt Pate to Robert E. Marsh (Oct. 17, 2003); Joel I. Klein to Garret G. Rasmussen (Mar. 8, 2000), Joel I. Klein to Michael P.A. Cohen (Jan. 13, 1999), Joel I. Klein to Jesse W. Markham (Sept. 4, 1998), Joel I. Klein to James J. Cusack (Mar. 12, 1998), *available at* http://www.usdoj.gov/atr/public/busreview/letters.htm.

[265] *See Antitrust Guidelines* at 1.

[266] *Paging System MO&O* at ¶ 84.

prices were in the billions of dollars.[267] Without DISH's financial support and the JBAs, SNR would not have been able to participate as meaningfully and competitively in the robust bidding of Auction 97. Accordingly, the disclosed collaboration actually *increased* competition in the spectrum auction and, therefore, increased auction revenues. The auction data conclusively show that SNR outbid its rivals, including well-financed, incumbent wireless service providers, as well as the parties to the JBAs, leading directly to *higher* auction prices.

D. Granting the licenses to SNR and awarding the bidding credits will enhance competition in the downstream wireless services market

The wireless industry is concentrated. The FCC's 2014 annual report regarding mobile industry competition found that the four nationwide carriers, Verizon, AT&T, Sprint, and T-Mobile, control more than 95 percent of the industry's mobile wireless service revenue, up from 91.5 percent the year before, and hold close to 80 percent of all spectrum suitable and available for the provision of mobile wireless services, measured on a MHz-POPs basis.[268] Significantly, the two largest carriers, AT&T and Verizon, together control approximately 70 percent of the nationwide market share based on service revenues and were the top two purchasers of AWS-3 licenses.[269] Through bidding collaboration and DISH's financial investment, SNR was able to win AWS-3 licenses, in many instances outbidding the exceptionally well-financed incumbent wireless carriers, such as AT&T and Verizon–which notably still amassed nearly 70% of the

[267] *See infra* Section VII.B.2.

[268] *See Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services*, Seventeenth Report, DA 14-1862, at ¶¶ 30, 104 (December 18, 2014) ("*Seventeenth Report*").

[269] *Id*. at ¶ 30, Table II.C.2.

spectrum valued collectively at $28.6 billion.[270] This introduction of a potential new competitor will enhance competition in the wireless market.

As the FCC has recognized, a facilities-based operator needs enormous scale to compete in the U.S. wireless market.[271] The scale required serves as a substantial barrier to entry for new entrants; rivals also struggle to challenge the market leaders.[272] One way market leaders have been able to remain dominant is through their financial ability to obtain increasingly expensive spectrum at auction.[273]

E. The coordinated bidding by SNR, DISH and Northstar was a necessary, ancillary component to a procompetitive collaboration

As the FCC has recognized, JBAs are an "efficiency-enhancing integration" with procompetitive benefits.[274] In an efficiency-enhancing integration, "participants collaborate to perform or cause to be performed . . . one or more business functions, such as production, distribution, marketing, purchasing or R&D, and thereby benefit, or potentially benefit, consumers by expanding output, reducing price, or enhancing quality, service, or innovation."[275] In the auction context, "[t]he 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

[270] *See* Council Tree Mar. 6 Reply Comments, Attachment at 4.

[271] *Seventeenth Report* at ¶¶ 30, 104.

[272] *Id*.

[273] *See infra* Section VII.B.1.

[274] *Petition for Reconsideration and Motion for Stay of Paging Systems, Inc., Memorandum Opinion and Order,* 25 FCC Rcd 4036 ¶ 84 n.172 (2010); *Second Report and Order*, 9 FCC Rcd 2348 ¶ 222.

[275] *Antitrust Guidelines* at 8.

resources and that small businesses in particular may need to pool financial and other resources in order to compete in auctions."[276]

Here, the JBAs enabled SNR to win spectrum that it otherwise would not likely have been able to win, and the parties' collaboration extends to the possible development and utilization of the acquired spectrum.[277] As discussed above, this collaboration directly enhanced competition for the spectrum during the auction and will introduce potential new competitors in the downstream wireless market.

VII. GRANT OF SNR'S APPLICATION AND AWARD OF THE BIDDING CREDITS WOULD SERVE THE PUBLIC INTEREST

Grant of SNR's applications and award of the bidding credits would promote competition in the wireless market and facilitate the growth of a minority-owned and controlled very small business. Conversely, failure to grant the application and/or award the bidding credits would shake public confidence in the Commission's auction processes, undermine the validity of Auction 97 and the DE program, and provide a windfall to the incumbent wireless carriers by removing SNR as a potential competitor from the wireless market.

A. Granting the application and bidding credits would be consistent with the FCC's statutory obligation to disseminate licenses to small and minority businesses, such as SNR

Section 309(j) of the Communications Act directs the FCC to "ensure that small businesses, rural telephone companies, and businesses owned by members of minority groups and women are given the opportunity to participate in the provision of spectrum-based services."[278] To carry out this obligation, the Commission has designed effective and time-tested

[276] *Paging Systems MO&O*, 25 FCC Rcd 4036 at ¶ 84.

[277] *See supra* Section VI.C.

[278] 47 U.S.C. § 309(j)(4)(D); *see also Fifth MO&O*, 10 FCC Rcd 403 ¶ 447.

rules that have enabled small and very small businesses to enter the wireless market through the use of bidding credits.[279]

SNR is exactly the type of entity that Section 309 requires the FCC to accommodate in its spectrum auctions. As explained above, Muleta is an experienced African-American entrepreneur with a broad and established background in Commission spectrum auctions and wireless technology, including specifically the AWS-3 band.[280] By granting the SNR application, the FCC will be facilitating the entry of a potential new competitor and the most successful African-American owned licensee in the history of the FCC's spectrum auctions.

B. Failing to grant SNR's application and bidding credits would endanger the success of future spectrum auctions

1. The participation of SNR and other designated entities greatly contributed to the success of the AWS-3 Auction

Because of the DE program, and the well-established practice of permitting DEs to enter JBAs with their investors, SNR and other DEs were able to attract sufficient capital to compete meaningfully in Auction 97, including against the dominant wireless incumbents. Indeed, Auction 97 represented a renaissance of the Commission's DE Program. Of the 70 entities qualified to participate in the auction, more than half qualified as DEs eligible for a small business bidding credit under the Commission's rules.[281] Ultimately, fifteen DEs won more than $11 billion for spectrum licenses in the auction.[282] SNR itself won than $4.1 billion worth of

[279] *Second Report and Order*, 9 FCC Rcd 2348 at 2388-2400.

[280] *See supra* Section I.

[281] *See Auction of Advanced Wireless Services (AWS-3) Licenses – 70 Bidders Qualified to Participate in Auction 97*, Public Notice, 29 FCC Rcd 13465, Attachment A (Oct. 30, 2014).

[282] *Winning Bidders Announced for Auction 97*, Public Notice, 30 FCC Rcd 630, Attachment B (Jan. 30, 2015).

spectrum, including licenses in some of the top markets, such as New York City, Los Angeles, Chicago, San Francisco, Dallas, and Philadelphia.

The success of Auction 97 is attributable in part to SNR's financial backing and resulting meaningful auction participation, which would not have existed without the availability of bidding discounts and JBAs.[283] This is in stark contrast to the past two significant spectrum auctions (Auction 66 for AWS-1 spectrum and Auction 73 for 700 MHz spectrum), where changes to the Commission's rules crippled the DE program, drastically reduced DE bidding, and drove down spectrum prices (per MHz-POP).[284]

Additionally, the DE participation in Auction 97, with the strong financial backing of non-controlling investors, prevented incumbent wireless carriers from leveraging their superior financial positions to yet again overwhelm auction competition. For example, in Auction 73, the largest incumbent carriers acquired a dominating 84.4 percent of paired spectrum, compared to a more modest (although still significant) 69 percent in Auction 97.[285] In terms of increasing overall revenues, ensuring that spectrum is assigned a higher price and preventing foreclosure from the dominant incumbent carriers, SNR's participation in Auction 97 was essential to the auction's success. Indeed, the presence of DEs in the auction generated an estimated $20 billion for U.S. taxpayers as a result of robust competition between incumbents and DEs.[286]

[283] *See* Council Tree Mar. 6 Reply Comments; *see also* Reply Comments of Council Tree Investors, Inc., GN Docket No. 12-268 (Mar. 13, 2015).

[284] *See* Council Tree Mar. 6 Reply Comments, Attachment at 9.

[285] *See* Council Tree Mar. 6 Reply Comments at 4, 9.

[286] *See* Council Tree May 14 Reply Comments at 6-8 (arguing that revenues from Auction No. 97 would have been approximately $23 billion dollars lower if not for DE participation).

2. The FCC has long recognized the importance of strategic investors in facilitating the ability of DEs to compete effectively

FCC rules and policies have long recognized and promoted the need for DEs to work with strategic investors in order for DEs to access capital and compete effectively in spectrum auctions and in the marketplace, which are large scale and complex enterprises.[287] Relationships with strategic investors, which can provide important business opportunities and/or operational assistance and expertise, are standard for new entrants and facilitate the financing and build-out of networks.[288]

Indeed, T-Mobile, Leap, MetroPCS and many others began and grew as DEs.[289] Over the years, the most successful DEs have been those which had passive investments from established wireless carriers or other large companies with the financial resources to support competitive bidding during auctions. DEs have raised capital to acquire $22.7 billion worth of licenses in past FCC auctions.[290] The DE program is essential in promoting competition in the wireless market by enabling new entrants to obtain the capital necessary to acquire the most critical input for the provision of wireless services, spectrum licenses.

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[287] *See, In the Matter of Implementation of Section 309(j) of the Communications Act-Competitive Bidding*, Fifth Order and Report, 9 FCC Rcd at 5532 ¶ 14 (1994) ("First, we will structure our attribution rules to allow those extremely large companies that may not bid on [PCS] blocks C and F to invest in entities that bid on those blocks."); *see also* Comments of the Multicultural Media, Telecom and Internet Council, *et al*., WT Docket No. 05-211, *et al*. at 13-14 (Feb. 20, 2015) ("only qualified, strategically structured, well-capitalized DEs possess the business plan flexibility and financial wherewithal to bring true competition on a national scale…") ("MMTC Comments").

[288] MMTC Comments at 22 (explaining strategic partnerships are necessary because DEs, and minority and women-owned business entities in particular have had difficulty gaining access to capital).

[289] Council Tree Mar. 6 Reply Comments at 7.

[290] Council Tree Mar. 6 Reply Comments, Attachment at 8.

3. Failure to grant SNR's application or award bidding credits would discourage designated entities from participating in future auctions

Failing to grant SNR's application and its associated bidding credits would both undermine the validity of the AWS-3 Auction results and create uncertainty regarding the Commission's commitment to the DE program. Potential bidders in the upcoming Incentive Auction are currently evaluating their business plans and seeking to line up investors and creditors to compete for 600 megahertz licenses.[291] The momentous task of obtaining sufficient capital would become next to impossible for DEs if the Commission denies SNR's application and bidding credits despite its strict adherence to the FCC's rules and precedent.[292]

C. Failure to grant SNR's licenses or bidding credits would reduce potential competition in the wireless market and cement the existing spectrum holdings of the dominant providers

The FCC has repeatedly recognized the importance of promoting competition in the wireless market by disseminating licenses to a wide variety of entities, including new entrants.[293] Absent increased competition in spectrum auctions as a result of the participation of DEs, Verizon and AT&T would have been in the position to further cement their dominant spectrum holding and market positions.[294] Indeed, Verizon and AT&T would have completely dominated the auction by outspending all other competitors by a margin of ten-to-one.[295] As the FCC and DOJ have recognized, firms with dominant market position may have the incentive and ability to

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[291] *See Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, Report and Order, 29 FCC Rcd 6567 (2014).

[292] Council Tree Mar. 6 Reply Comments at 12.

[293] *Section 257 Proceeding to Identify and Eliminate Market Entry Barriers for Small Business*, Report, 19 FCC Rcd 3034, 3081-82 ¶ 156 (2003).

[294] *See supra* Section VI.C.

[295] *See* Council Tree Mar. 6 Reply Comments.

engage in a foreclosure strategy in order to raise the price of inputs (*i.e.*, spectrum licenses) their rivals require to compete.[296]

[296] *Policies Regarding Mobile Spectrum Holdings Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, Report and Order, WT Docket No. 12-269, 12-268 at ¶¶ 41-43, 62 (rel. June 2, 2014) (citing Ex Parte Submission of the United States Department of Justice, WT Docket No. 12-269 at 8 (Apr. 11, 2013)).

VIII. CONCLUSION

For the reasons stated above, SNR requests that the Commission dismiss or deny the petitions to deny filed in the above-captioned proceeding and expeditiously grant SNR's application.

Respectfully submitted,

SNR Wireless LicenseCo, LLC

/s/ John Muleta
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May 18, 2015

Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of	)	
	)	
Application of SNR Wireless LicenseCo, LLC	)	ULS File No. 0006670667
	)	
Auction No. 97 – Advanced Wireless Services (AWS-3)	)	Report No. AUC-97
	)	

Declaration of John Muleta

1) I am the Chief Executive Officer and sole member of Aletum, LLC.

2) I previously served as Deputy Bureau Chief of the Common Carrier Bureau and the Chief of the Wireless Telecommunications Bureau at the Federal Communications Commission ("FCC"). I have been involved in various entrepreneurial pursuits in the technology and wireless industry, including serving as CEO of M2Z Networks, Inc. ("M2Z"), a wireless startup company. At M2Z, I developed considerable knowledge and technical background regarding spectrum that comprises the AWS-3 band.

3) Aletum, LLC is the manager of SNR Wireless Management, LLC. SNR Wireless Management, LLC is the managing member of SNR Wireless HoldCo, LLC, which in turn is the sole member of SNR Wireless LicenseCo, LLC ("SNR"). I exercise control (both *de facto* and *de jure*) of SNR.

4) DISH Network Corporation ("DISH") through various subsidiaries, all of which are disclosed in SNR's application, is an indirect non-controlling investor in SNR.

5) SNR participated in the AWS-3 spectrum auction ("Auction 97") held by the FCC from November 13, 2014 to January 29, 2015.

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

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

8) During Auction 97, SNR discussed, disclosed, cooperated and collaborated 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, I exercised *de jure* and *de facto* control regarding auction bidding matters for SNR, among other things, having final decision-making authority on what bids to make and enter into the FCC's system.

10) Throughout Auction 97, I entered all of SNR's bids into the FCC's system.

11) Throughout Auction 97, each of SNR's entered bids were *bona fide* bids, and if any of those bids had become a winning bid, SNR fully intended to pay for those licenses.

12) My auction bidding decisions during Auction 97 were based primarily on the following auction or business-related objectives, among others:

- Taking into account the relative strategic values of given licenses in deploying a viable and competitive wireless broadband service either as a standalone provider and/or based on future market demands, potentially on a complementary basis with others, including but not limited to DISH, Northstar or other wireless and wireline providers as well as non-carrier new entrants;

- Maintaining and maximizing bidding eligibility as required by the FCC throughout the auction to remain competitive in the auction;

- Accounting for market values of given licenses, including historic license valuations, levels of competition from other wireless carriers and/or incumbent telephone companies;

- Ensuring budgetary compliance;

- Considering intangible license specific factors (including potential interference, relocation and coordination issues post-auction);

- Consideration of contemporaneous and prospective auction dynamics;

- Assessing potential synergies with:

    - SNR's then-provisionally winning bids for licenses in Auction 97;

    - DISH's then provisionally winning bids for licenses in Auction 97;

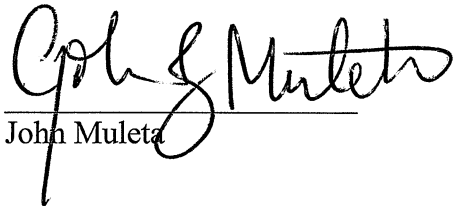
- DISH's existing portfolio of nation-wide spectrum and the JBAs between the parties;[1]
- Northstar's then-provisionally winning bids for licenses in Auction 97, consistent with the JBAs between the parties;

- The ease of potential combination of each party's respective systems, as contemplated by the JBAs between the parties; and
- Consideration of potential spectrum aggregation limits or policies that may be applied under the FCC's rules.

13) I have reviewed the foregoing Consolidated Opposition to Petitions to Deny and the facts stated therein are true and correct to the best of my knowledge and belief.

I hereby declare, under penalty of perjury, that the foregoing is true and correct to the best of my present knowledge and belief.

Executed this 18th day of May, 2015.



John Muleta

[1] *See Service Rules for Advanced Wireless Services in the 2000-2020 MHz and 2180-2200 MHz Bands*, Report and Order and Order of Proposed Modification, 27 FCC Rcd 16102 (2012); *See Auction of H Block Licenses in the 1915-1920 MHz and 1995-2000 MHz Bands Closes, Winning Bidder Announced for Auction 96*, Public Notice, DA 14-279 (Feb. 28, 2014).

Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of	)	
	)	
Application of SNR Wireless LicenseCo, LLC	)	ULS File No. 0006670667
	)	
Auction No. 97 – Advanced Wireless Services (AWS-3)	)	Report No. AUC-97
	)	

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 SNR Wireless LicenseCo, LLC's ("SNR") Auction 97 application, is an indirect non-controlling investor in SNR.

4) John Muleta ("Muleta") is the Chief Executive Officer and sole member of Aletum, LLC. Atelum, LLC is the manager of SNR Wireless Management, LLC. SNR Wireless Management, LLC is the managing member of SNR Wireless HoldCo, LLC, which in turn is the sole member of SNR. Muleta exercises control (both *de facto* and *de jure*) of SNR.

5) SNR 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 SNR's Form 175 application submitted to the FCC prior to Auction 97 (the "SNR/DISH JBA"), Muleta served as the SNR Auction Committee Chair and Bidding Manager, appointed by SNR Wireless Management, LLC. I served as another member of the Auction Committee, appointed by American AWS-3 Wireless III L.L.C. ("American III").

7) Certain subsidiaries of DISH also were parties to a JBA with Doyon, Limited; Northstar Manager, LLC; Northstar Spectrum, LLC; and Northstar Wireless, LLC ("Northstar") (the "Northstar/DISH JBA").

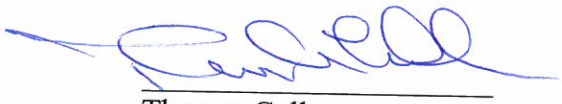
8) During Auction 97, SNR disclosed, discussed, cooperated and collaborated regarding its bidding, bidding strategies and settlement agreements, with the parties to the JBAs, as disclosed in advance in the JBAs, and consistent with section 1.2105(c) of the Commission's rules, prior FCC auction precedent,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

9) Throughout Auction 97, Muleta exercised *de jure* and *de facto* control regarding auction bidding matters for SNR, 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

CERTIFICATE OF SERVICE

I, Noah Cherry, hereby certify that on May 18, 2015, a true and correct copy of the above Consolidated Opposition to Petitions to Deny was sent by electronic mail (+), hand delivery (*), and/or United States mail, first class postage prepaid, to the following:

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/s/ Noah Cherry
Noah Cherry