

March 23, 2023

P. Michele Ellison
General Counsel
Federal Communications Commission
45 L Street NE
Washington, DC 20554

Dear Ms. Ellison:

Like you, we are disappointed that Congress did not act to extend the Commission's authority to conduct auctions to select among mutually exclusive applicants for spectrum licenses. Auctioning portions of the radiofrequency spectrum has been integral to how the Commission has managed spectrum for three decades.^{1/} We understand that the Office of General Counsel is evaluating whether the language of the auction statute also deprives the Commission of authority to grant licenses that were awarded by competitive bidding when the auction statute expired. As former General Counsels of the Commission, we believe that the licensing provisions of the Communications Act (the "Act") read in their totality, and the Commission's own past practices, afford the Commission ample authority to grant such licenses notwithstanding the expiration of the agency's power to conduct auctions, and we write to express that view.

The Commission's Authority to Grant Licenses Awarded by Auction is Separate from Its Authority to Conduct Auctions

The Commission's authority to review and grant applications for licenses and construction permits is located in Section 309(a) of the Act.^{2/} That provision empowers and obligates the Commission to "grant [an] application" for a license when it "find[s] that public interest, convenience, and necessity would be served by the granting" thereof.^{3/} This broad authority applies to "*each application*" subject to Section 309^{4/}—in other words, regardless of whether that application was selected by competitive bidding or not.

Section 309(j), by contrast, authorizes the Commission to select from mutually exclusive applications for licenses and construction permits using "a system of competitive bidding that meets the requirements of [Section 309(j)]."^{5/} Section 309(j) authorizes auctions as a means to resolve mutual exclusivity, but it is not itself the source of the Commission's authority to grant licenses. As the Commission has explained, "Congress added Section 309(j) to the

^{1/} See Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, 107 Stat. 312 (permitting the Commission to choose between mutually exclusive applications through a system of competitive bidding, *i.e.*, auctions); 47 U.S.C. § 309(j).

^{2/} 47 U.S.C. § 309(a).

^{3/} *Id.*

^{4/} *Id.* (emphasis added).

^{5/} *Id.* § 309(j)(1).

Communications Act, authorizing the FCC *to use competitive bidding to resolve mutual exclusivity among spectrum license applicants.*^{6/}

It is true that Section 309(j) variously refers to the “grant” of licenses: Section 309(j)(1) states the Commission shall “grant the license or permit to a qualified applicant” using competitive bidding;^{7/} Section 309(j)(3) likewise refers to mutually exclusive licenses as “grant[ed] through the use of a competitive bidding system”;^{8/} and Section 309(j)(11) provides that the Commission’s power “to grant a license or permit under [Section 309(j)]” expires on March 9, 2023.^{9/} Subsection (j) also refers to licenses “issued by competitive bidding.”^{10/}

But while these provisions use the word “grant” or “issue,” the conferral of authority in Section 309(j) is best read as a grant of the power to *conduct auctions*, not to *approve licenses*. Since Section 309(a) already empowers the Commission to approve licenses and permits, Section 309(j)(1)’s reference to the Commission’s power to “grant the license or permit” is most naturally understood as merely *referring back* to the Commission’s 309(a) authority.^{11/} Indeed, if the text of Section 309(j) conferred authority related to the *issuance* of licenses, it would be superfluous—because it would grant the Commission power that it already possessed at the time of Section 309(j)’s enactment.^{12/} Section 309(j) instead directs *how* the Commission should select among mutually exclusive applications—“through a system of competitive bidding that meets the requirements of [Section 309(j)].”^{13/} But the end of the auction process does not eliminate the Commission’s power—still codified in the text of Section 309(a)—to grant applications once mutual exclusivity is resolved.

The result is the same as to the other uses of the word “grant” (and use of the word “issue”) in Section 309(j). Section 309(j)(3) concerns the design of the competitive bidding system, and Section 309(j)(11) *removes* the Commission’s authority set out in subsection (j). Neither affects the Commission’s authority under subsection (a).

Indeed, Section 309(j) itself recognizes that Section 309(a) is the source of the Commission’s authority to grant licenses and that Section 309(j) merely provides the method for resolving mutual exclusivity: Section 309(j)(5) expressly provides that “[n]o license shall be granted to an applicant selected pursuant to [Section 309(j)] unless the Commission determines that the

^{6/} See *FCC Report to Congress on Spectrum Auctions Authority*, Report, 13 FCC Rcd 9601, 9610 (1997) (emphasis added).

^{7/} 47 U.S.C. § 309(j)(1).

^{8/} *Id.* § 309(j)(3).

^{9/} *Id.* § 309(j)(11).

^{10/} *Id.* § 309(j)(3).

^{11/} *Id.* § 309(j)(1).

^{12/} Of course, even if the text of Section 309(j)(1) were read as conferring such authority, the result here would still be the same: The Commission would continue to possess authority to review and grant applications for spectrum licenses under Section 309(a), even after the lapse of the redundant authority contained in Section 309(j).

^{13/} 47 U.S.C. § 309(j)(1).

applicant is qualified *pursuant to subsection (a)*.^{14/} That text demonstrates that Section 309(j) is simply the process by which an “applicant [is] selected,” and that the license is ultimately “granted” pursuant to “subsection (a).”

Other provisions within Section 309(j) confirm this reading. Section 309(j)(2) refers to the “competitive bidding authority granted by this subsection,” not the authority to grant licenses.^{15/} Similarly, Section 309(j)(3) prescribes how a system of competitive bidding should be designed, but is silent on subsequent licensing.^{16/} Section 309(j)(6)(A), meanwhile, states that nothing in Section 309(j) shall “alter spectrum allocation criteria and procedures established by the other provisions of this chapter.”^{17/} And Section 309(j)(6)(E) reminds the Commission of its obligation to “continue to use engineering solutions, negotiation, threshold qualifications, service regulations, and other means in order to avoid mutual exclusivity in application and licensing proceedings,” which only makes sense in light of the Commission’s separate authority to grant licenses under Section 309(a).^{18/}

Read together, these provisions demonstrate that Section 309(j) relates to the system of competitive bidding to resolve mutual exclusivity and not to the grant of licenses, which is governed instead by Section 309(a).

This reading of the statute also comports with the Commission’s own practices in reviewing post-auction long-form applications and awarding licenses. The Commission has always granted long-form applications for licenses by winning auction bidders pursuant to Section 309(a), not Section 309(j).^{19/} The conclusion that the Commission lacks authority to grant licenses won at auction because of the lapse of Section 309(j) would thus conflict with the Commission’s own long-standing actions.

The Commission Can and Should Resolve Any Statutory Ambiguity in the Public Interest

For the foregoing reasons, we think the Act clearly authorizes the Commission to continue to grant licenses for which mutual exclusivity has previously been eliminated by auction. Even to the extent there is ambiguity on this point, however, it is well established that an agency has the

^{14/} *Id.* § 309(j)(5) (emphasis added).

^{15/} *Id.* § 309(j)(2).

^{16/} *Id.* § 309(j)(3).

^{17/} *Id.* § 309(j)(6)(A).

^{18/} *Id.* § 309(j)(6)(E).

^{19/} See *Wireless Telecommunications Bureau Grants Auction 108 Licenses*, Public Notice, DA 23-155, at 1 (rel. Mar. 1, 2023) (“We grant these licenses pursuant to section 309(a) of the Communications Act, 47 U.S.C. § 309(a)[.]”); *accord, e.g., Wireless Telecommunications Bureau Grants Auction 107 Licenses*, Public Notice, 36 FCC Rcd 10972, 10972 (2021); *Wireless Telecommunications Bureau Grants Auction 105 Priority Access Licenses*, Public Notice, 36 FCC Rcd 4926, 4926 (2021); *Wireless Telecommunications Bureau Grants AWS-3 Licenses in the 1755-1780 MHz and 2155-2180 MHz Bands*, Public Notice, 30 FCC Rcd 11347, 11348 (2015); *Wireless Telecommunications Bureau Grants Advanced Wireless Services Licenses*, Public Notice, 21 FCC Rcd 13883, 13884 (2006).

authority to resolve ambiguous or conflicting provisions in its organic statute.^{20/} The Commission therefore may issue its own reasonable interpretation of the Communications Act provisions at issue.^{21/}

It should do so here and eliminate any doubt going forward. As explained above, the better interpretation of the text supports the Commission’s authority to grant applications that have previously gone through the auction process—indeed, in our view, the text is *unambiguous* on this score. An official Commission interpretation would also eliminate any perceived tension caused by use of the word “grant” in both Section 309(a) and Section 309(j). As explained above, in context, “grant” in Section 309(j) simply refers back to the Commission’s Section 309(a) authority. But even were that not so, the Commission and the courts have recognized that the Commission has the authority to apply the same term differently in different statutory contexts.^{22/} The Commission can and should do so here.

^{20/} See *Scialabba v. Cuellar de Osorio*, 573 U.S. 41, 69 (2014) (plurality opinion) (finding that “a statute whose halves do not correspond to each other [] giv[es] rise to an ambiguity that calls for *Chevron* deference”); *id.* at 86 n.3 (Sotomayor, J., dissenting) (suggesting agreement with—and thus five votes for—this aspect of the plurality’s decision); *Young v. Community Nutrition Institute*, 476 U.S. 974, 975 (1986) (finding that tension between 21 U.S.C. § 342(a) and § 346 creates ambiguity that the Food and Drug Administration may resolve by issuing a reasonable interpretation); *Alaska Wilderness League v. Jewell*, 788 F.3d 1212, 1219-20 (9th Cir. 2015) (finding that tension between 33 U.S.C. § 1321(j)(5)(A)(i) and § 1321(j)(5)(D) creates ambiguity that an agency may resolve); *Citizens to Save Spencery Cnty. v. EPA*, 600 F.2d 844, 874 (D.C. Cir. 1979) (recognizing agency authority to “resolve the conflict” between two incompatible statutory provisions).

^{21/} See generally *Nat’l Cable & Telecommunications Ass’n v. Brand X Internet Servs.*, 545 U.S. 967 (2005); *City of Arlington v. FCC*, 569 U.S. 290 (2013); *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

^{22/} See *Petition for Determination of Effective Competition in 32 Massachusetts Communities and Kauai, HI*, Memorandum Opinion and Order, 34 FCC Rcd 10229, 10242 n.89 (2019) (citing *Anglers for Christ Ministries, Inc.*, Memorandum Opinion and Order, Order, and Notice of Proposed Rulemaking, 26 FCC Rcd 14941, 14960, ¶ 36 n.123 (2011) (“[W]e cannot assume that Congress intended for th[e] term [‘economically burdensome’] to have the same meaning in both [statutory] contexts.”); *Communications Assistance for Law Enforcement Act and Broadband Access and Services*, First Report and Order and Further Notice of Proposed Rulemaking, 20 FCC Rcd 14989, 14998-15001, ¶¶ 16-23 (2005) (interpreting “information services” in the Communications Assistance for Law Enforcement Act (“CALEA”) differently from the interpretation of the similarly defined term in the Communications Act), *aff’d sub nom. Am. Council on Educ. v. FCC*, 451 F.3d 226, 232-33 (D.C. Cir. 2006) (finding that the Commission’s “interpretation of CALEA reasonably differs from its interpretation of the 1996 Act, given the differences between the two statutes”); *U.S. West Commc’ns, Inc. v. FCC*, 177 F.3d 1058, 1059-60 (D.C. Cir. 1999) (finding the term “provide” can bear different meanings under the Communications Act depending on the statutory context).

Please let us know if you have any questions.

Respectfully submitted,

/s/ Samuel L. Feder

Samuel L. Feder

Partner

Jenner & Block LLP

sfeder@jenner.com

/s/ Thomas M. Johnson, Jr.

Thomas M. Johnson, Jr.

Partner

Wiley Rein LLP

tmjohnson@wiley.law

/s/ Howard J. Symons

Howard J. Symons

Partner

Jenner & Block LLP

hsymons@jenner.com

/s/ Christopher J. Wright

Christopher J. Wright

Partner

HWG LLP

cwright@hwglaw.com

cc: Hon. Jessica Rosenworcel
Hon. Brendan Carr
Hon. Geoffrey Starks
Hon. Nathan Simington