

BRIEF FOR APPELLEE/RESPONDENTS

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 04-1052 AND CONSOLIDATED CASE  
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NORTHPOINT TECHNOLOGY, LTD., ET AL.,

Appellants/Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION,

Appellee/Respondent,

and

UNITED STATES OF AMERICA,

Respondent.

—————  
ON APPEAL FROM AND PETITION FOR REVIEW OF AN ORDER  
OF THE FEDERAL COMMUNICATIONS COMMISSION  
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## CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

**(A) PARTIES and AMICI:**

According to the Commission's records, all parties, intervenors and amici appearing below and in this Court are listed in the Brief of Appellant/Petitioner.

**(B) RULINGS BEFORE THE COURT:**

*Auction of Direct Broadcast Satellite Licenses*, 19 FCC Rcd 820 (2004) (JA 7).

**(C) RELATED CASES:**

Although there are no related cases within the meaning of Circuit Rule 28(a)(1)(C), we wish to inform the Court that Northpoint is also a petitioner for review in another case involving the Commission's construction of the ORBIT Act, 47 U.S.C. § 765f, the interpretation of which is also before the Court in the present case. That case is *Northpoint Technology Ltd. v. FCC*, No. 02-1194, which is scheduled for oral argument on April 11, 2005.

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## **GLOSSARY**

ITU	International Telecommunication Union
DBS	Direct Broadcast Satellite
BSS	Broadcast Satellite Service (same as DBS)
NGSO-FSS	Non-geostationary Fixed Satellite Service

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BRIEF FOR APPELLEE/RESPONDENTS

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**JURISDICTION**

This Court has jurisdiction over challenges to specific FCC actions under 47 U.S.C. § 402(b), including challenges to FCC licensing actions pursuant to 47 U.S.C. § 402(b)(6); it has jurisdiction over challenges to other FCC orders pursuant to 47 U.S.C. § 402(a) and 28 U.S.C. § 2342(1). In this case, in the order on review, the FCC decided that it had the authority to distribute licenses by auction in the course of a licensing process, which is related to the Commission's licensing function, but does not directly involve the issuance or denial of licenses

themselves. Northpoint and its subsidiary Compass (hereafter collectively Northpoint) have filed both a notice of appeal under § 402(b) and a petition for review under §§ 402(a) and 2342(1). As both were timely filed, the Court need not resolve which jurisdictional provision applies.<sup>1</sup>

### **QUESTIONS PRESENTED**

The ORBIT Act, 47 U.S.C. § 765f, forbids the FCC from assigning by auction “orbital locations or spectrum used for the provision of international or global satellite communications services.” In the order on review, the Commission decided that Direct Broadcast Satellite (DBS) service did not fall within that restriction. The questions presented are:

1) Whether the ORBIT Act prohibits auction of licenses to provide DBS service because the same spectrum on which DBS service is provided is also “used for the provision of international or global satellite communications services” by providers of a *different* service;

2) Whether the FCC permissibly determined that DBS orbital locations and spectrum that by international treaty are assigned to and licensed exclusively by the United States for provision of service to the United States are not locations and spectrum “used for the provision of international or global satellite communications service.”

### **STATUTES AND REGULATIONS**

All pertinent materials are set forth in the brief for appellants.

### **COUNTERSTATEMENT OF THE CASE**

1. This case concerns the Commission’s decision that it has the authority to auction licenses to provide Direct Broadcast Satellite (DBS) service, a communications service in which signals are transmitted by satellites in geosynchronous orbit above the Earth for direct reception

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<sup>1</sup> Nevertheless, the United States is a respondent only under §§ 2342 and 402(a), and is not a party under § 402(b). Should the Court determine that § 402(b) applies, it should dismiss the petition for review in No. 04-1053.

by the general public. 47 C.F.R. §§ 25.201 (definition of Direct Broadcast Satellite Service); 2.1 (definition of Broadcasting Satellite Service). A typical use of DBS is the transmission of video signals to small receiving dish antennas on subscribers' homes. Orbital locations and the associated spectrum on which DBS service operates are limited and must be shared by many countries. Accordingly, most of the countries in the world have joined together to form a treaty-based organization – the International Telecommunication Union (ITU) – to coordinate the use of internationally shared spectrum and orbital locations for DBS (known in international parlance as Broadcast Satellite Service or BSS), roughly analogous to Congress's charging the FCC with managing the use of scarce spectrum. The member states of the ITU, which is a specialized agency of the United Nations, have jointly determined what DBS spectrum and orbital locations will be assigned to individual countries and have crafted detailed technical specifications to protect each country's DBS from interference by other countries' assignments. *See Policies and Rules for the Direct Broadcast Satellite Service*, 17 FCC Rcd 11331, 11334 ¶6 & n.25 (2002) (“*DBS Policies and Rules*”). The individual countries retain licensing authority and other regulatory control.

ITU regulations divide the world into three regions for purposes of assigning DBS spectrum (as well as managing communication spectrum and orbital locations). The United States, along with the rest of North and South America, is within Region 2.<sup>2</sup> The ITU has assigned eight orbital locations and associated spectrum in Region 2 to the United States,<sup>3</sup> which

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<sup>2</sup> Region 1 roughly comprises Europe, Russia and Africa; Region 3 includes Asia and Australia.

<sup>3</sup> Those locations are 61.5°, 101°, 110°, 119°, 148°, 157°, 166°, and 175° west longitude. Three of those locations are capable of providing complete coverage of the 48 contiguous States and are called “full CONUS” locations. The remainder provide only partial coverage of the U.S. *See* 17 FCC Rcd at 11335 ¶6 & n.30.

has exclusive licensing authority over those eight assignments. Although it is technically feasible to serve large portions of the globe from any given DBS orbital location – a number of orbital locations in Region 2 have the hypothetical potential to serve almost all of North and South America and some could serve portions of Asia as well – under the ITU regime the U.S. assignments were designed for “providing broadcasting-satellite service to the United States.” *DBS Policies and Rules*, 17 FCC Rcd at 11334-11335. Thus, the signals of a U.S.-licensed DBS satellite do not cover the entire area that is “visible” from a satellite, but instead are focused, somewhat like a flashlight beam, on the United States to create an “illuminated” area of service.

Importantly, because it is not technologically possible to make the signal conform to the national borders, service to the entire country (or large parts of it) necessarily results in some degree of incidental transborder signal spill-over. Accordingly, DBS satellites designed to serve the United States also provide a usable signal to some parts of Mexico and Canada. Such transborder signal availability results from the physics of satellite signal propagation and could be avoided only by redrawing national boundaries or denying service to substantial parts of the United States.

The principal mechanism through which the ITU regulations protect each Region 2 country’s DBS assignments from interference caused by DBS operations in other countries is a “Band Plan” for Region 2 setting forth detailed technical specifications governing DBS transmissions. (The other regions have their own, joint, Band Plan.) The Band Plan assigns DBS orbital locations and frequencies to a particular country for the purpose of providing service to that country. By pointing their signals in different and non-conflicting directions, providers authorized by different countries can use the same frequencies at the same time to serve their respective countries without interference, in much the same way that multiple terrestrial

transmitters can broadcast on a given channel at the same time in different cities. If a DBS provider wishes to provide service outside of its Region 2 Band Plan assignment, it must seek modification of the Band Plan from the ITU and must also in most cases secure agreements with the foreign country in which it wishes to provide service. *DBS Policies and Rules*, 17 FCC Rcd at 11360 ¶56.<sup>4</sup>

2. Congress has instructed the FCC that when it is faced with mutually exclusive license applications, it generally “shall grant the license ... through a system of competitive bidding,” *i.e.*, an auction. 47 U.S.C. § 309(j)(1). In the ORBIT Act Congress made a statutory exception to that rule for a limited category of licenses: the Act prohibits the Commission from auctioning “orbital locations or spectrum used for the provision of international or global satellite communications services.” 47 U.S.C. § 765f.<sup>5</sup>

In March 2002, Compass submitted an application for licenses to provide DBS service using orbital locations at 157° and 166° west longitude, which were assigned to the United States by the ITU but until that time had remained unused. The Commission dismissed the application on March 3, 2003, in part because the agency had not yet opened an application filing window for the orbital locations at issue pursuant to its competitive bidding rules. Letter of March 3, 2003, from Donald Abelson, Chief, International Bureau, to Antoinette Cook Bush, 18 FCC Rcd 3091. (That dismissal is the subject of further proceedings before the agency and is not itself before the Court in this case.) Also on March 3, 2003, the Commission announced that it would

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<sup>4</sup> Plan modification must also be sought when the technical specifications of a proposed satellite vary from the allowable parameters specified in the Plan. For example, the Plan calls for the use of analog transmission, and it must be modified in order to use digital transmissions.

<sup>5</sup> ORBIT stands for Open Market Reorganization for the Betterment of International Telecommunications, Pub. L. No. 106-180, 114 Stat. 48 (March 12, 2000).

hold an auction of licenses for four ITU-assigned U.S. DBS orbital locations, the two sought by Compass plus two others. *Public Notice: Auction of Direct Broadcast Satellite Service Licenses*, 18 FCC Rcd 3478 (2003) (“*Auction Notice*”) (JA 25). On February 6, 2004, the Commission announced an application filing window for three of those licenses, two for the orbital locations sought by Compass and one for the location at 175° west longitude. *Public Notice: Auction of Direct Broadcast Satellite Service Licenses Rescheduled for July 14, 2004*, 19 FCC Rcd 2018 (2004).

The *Auction Notice* announced and sought comment on the agency’s tentative conclusion that the licenses to be included in the auction “are not subject to the auction prohibition of the ORBIT Act because they are not authorizations to use spectrum ‘for the provision of international or global satellite communications services.’ These licenses are for the use of DBS channels that, under the Region 2 Band Plan ... have coverage patterns that are designed to – and do in fact – serve the United States almost exclusively.” 18 FCC Rcd at 3479 (JA 26). In addition, the *Auction Notice* explained that the technical parameters limiting service to the United States may not be changed “without further international agreement.” The Commission noted that “[f]or a licensee to operate with such modified parameters, the United States, on behalf of the satellite operator, must request and obtain a modification to the Region 2 Band Plan pursuant to ITU procedures. ... Thus, the auction will assign licenses for DBS satellites that can provide almost exclusively national service” and not “international or global” services, in the absence of international regulatory changes. *Id.* at 3479-3480 (JA 26-27).

After receiving comment on the preliminary conclusions drawn in the *Auction Notice*, the Commission affirmed those conclusions in the order on review, *Auction of Direct Broadcast Satellite Licenses*, 19 FCC Rcd 820 (2004) (“*Auction Order*”) (JA 7). Licenses for channels and

orbital locations assigned to the United States under the ITU Region 2 Band Plan, the Commission concluded, “authorize ... service to the United States, and licensees must provide service on those channels and orbit locations to the United States.” *Id.* ¶12 (JA 12-13). The Commission further explained that DBS service must be “delivered almost exclusively to U.S. consumers,” *id.* ¶13 (JA 13), and “it would be unreasonable to conclude that Congress intended that the incidental provision of transborder service would convert an otherwise auctionable license into an unauctionable one,” *id.* ¶14 (JA 13).

It made no difference, the Commission found, that DBS orbital locations were theoretically capable of providing service to areas well beyond the borders of the United States. The Commission stated that “[t]he ‘coverage’ maps referred to by Northpoint” – Northpoint also relies on those maps here, and they are attached to its brief as addendum B – “show areas of the world that are visible from certain orbit locations,” but they do not “show the actual coverage areas of those orbit positions as defined in the ITU Region 2 Band Plan.” *Auction Order* ¶15 (JA 14). To the contrary, the ITU Band Plan limits the use of the locations to service to the United States. “Obtaining a modification of the Region 2 Band Plan, especially for coverage beyond that of the original Plan, is a process that has no guarantee of success, as it requires the agreement of other [governments] ... .” *Ibid.* The FCC specifically determined that modifications to allow international service could not be expected. *Ibid.*

The Commission also found that the Band Plan was more than a procedural hurdle to international service. Although the Commission has several times sought modification of the Plan, the Commission determined that such instances did not support Northpoint’s view that the Region 2 Band Plan “is an insignificant constraint on international DBS service.” *Auction Order* ¶17 (JA 15-16). In fact, the FCC has requested modifications to the plan to allow service beyond

the scope of the signal contours under the Plan only twice (in 1999 and 2002), *id.* ¶17 & nn. 36, 38 (JA 15-16), and neither request has been acted upon (one was withdrawn and one is still pending). The bulk of the requested modifications had to do with technical adjustments to the Plan (such as changes from analog to digital transmissions) that had nothing to do with the provision of service outside the United States. *Id.* ¶17 (JA 15-16). Thus, the Commission determined that the Plan remains a “substantive constraint on DBS operations,” and it was “not a foregone conclusion” that the United States would be able to obtain agreements from other governments whose DBS operations could be affected by a change. That is so “even in the case of a proposed satellite that will serve only the United States.” *Id.* n.41 (JA 17).<sup>6</sup>

The Commission rejected Northpoint’s claim that deeming DBS a domestic service for purposes of the ORBIT Act conflicted with a 1996 FCC order known as *DISCO I. Domestic Fixed Satellites and Separate International Satellite Systems*, 11 FCC Rcd 2429 (1996). Prior to *DISCO I*, FCC policy disfavored the provision of satellite service outside the United States by systems separate from the international satellite system operated by Intelsat, which at that time was a treaty-based international organization. *DISCO I* changed that policy to allow any satellite operator, including a DBS operator, to provide service outside the United States that is otherwise permissible without further approval from the Commission. That policy change concerning FCC authorizations did not render DBS an “international or global” service, the Commission found, because it did not alter the ITU Region 2 Band Plan, which generally limits service to the

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<sup>6</sup> Some international DBS service arrangements would require particularly complicated modifications of the ITU Plans. Northpoint, for example, proposed to provide service to Asia, which would require modification of both the Region 2 Plan and the Plan for Regions 1 and 3. *Auction Order* n.33 (JA 14). Such a modification would be especially difficult because different frequencies are used for BSS service in Regions 1 and 3 than in Region 2.

country of license, without regard to whether the FCC would permit such international service. *Auction Order* ¶16 (JA 14-15). Nor did the ability to provide transborder service due to the incidental overlap of DBS signals across international borders amount to international service within the meaning of the ORBIT Act, because “such service would be ... [only] incidental to domestic service.” *Ibid.* (JA 15). The Commission further explained that as a technical matter (and even putting aside regulatory restrictions) DBS service must be delivered almost exclusively to U.S. customers. *Id.* ¶13 (JA 13). Moreover, the Commission observed, “currently all U.S.-licensed providers of DBS service are providing service only to the United States and not to any foreign countries.” *Id.* ¶16 (JA 15).

Finally, the Commission rejected Northpoint’s claim that, even if DBS service is not itself an international or global service, the spectrum on which DBS is based is “used for” international or global satellite services within the meaning of the ORBIT Act because *other* satellite operators use the same spectrum that supports DBS to provide their own international services. The agency interpreted the ORBIT Act to “focus on whether *the particular spectrum being ‘assigned’* is ‘used for’ international or global satellite communications services.” *Auction Order* ¶20 (JA 19) (emphasis added). That test was not met because “[t]he spectrum licenses at issue here would be ‘assigned’ by competitive bidding to licensees only for DBS service provided from U.S. orbit locations, which are limited almost exclusively to domestic use.” *Ibid.*

3. On July 14, 2004, the FCC conducted an auction of three DBS licenses, two of which were for the 157° and 166° orbital locations Northpoint requested outside the auction process. Two bidders won the three licenses for combined total bids of \$12.2 million. Northpoint did not participate in the auction.

### **SUMMARY OF ARGUMENT**

Congress has set forth a general requirement that the FCC use auctions to assign licenses and has made only a limited exception to that requirement in the ORBIT Act. That exception in the Act does not prohibit the auctioning of DBS licenses because DBS spectrum and orbital locations are not “used for the provision of international or global satellite communications services” within the meaning of the statute.

1. The Commission reasonably rejected Northpoint’s claim that the ORBIT Act applies to DBS licenses because the same spectrum used by DBS providers is also used for international or global communications purposes by an *entirely different service*. The statute does not directly address the precise question whether Congress intended to bar the auction of licenses that will permit only domestic use because the same spectrum will be used by other licensees for international service. Nor is Northpoint’s interpretation of the ambiguous statutory language sensible: there is no reason why Congress would have wanted to preclude the auction of domestic licenses solely because they use the same spectrum as non-domestic ones.

Indeed, the legislative history of the ORBIT Act shows that Congress was concerned with protecting against multiple auctions of the same spectrum by different governments. That could happen with spectrum used for international service, but it cannot happen with DBS licenses. Unlike other satellite operators that provide service to foreign countries using spectrum and orbital locations that might be licensed by those foreign countries, DBS providers use orbital slots and spectrum assigned by the ITU to the United States and are subject to the exclusive licensing authority of the FCC. The agency thus reasonably read the statute consistently with its legislative purpose to mean that the “use” of the spectrum within the meaning of the statute depends on the particular usage at issue in a given licensing proceeding.

2. The Commission also reasonably rejected Northpoint's claims that DBS must be treated as an international service within the meaning of the statute because (i) DBS satellites are theoretically capable of providing international service; and (ii) the signals from U.S.-licensed DBS satellites spill over the U.S. border and may be received in parts of Canada and Mexico.

a. The Commission correctly determined that the technological capability to serve any country that is visible from a DBS satellite does not turn DBS into an international service. Visibility does not equate to service. The very point of the Region 2 Band Plan was to assign orbital locations and spectrum to specific countries for service only to the country of assignment. The Commission thus permissibly found that a hypothetical capability of providing international service does not make an orbital location one that is "used for" such service.

It makes no difference that parties can seek ITU modification of the Band Plan. As a matter of statutory construction, DBS orbital locations are not and cannot be "used for" international service; the statute does not refer to orbital locations and spectrum that are "potentially usable for" such service. Moreover, the Commission found that requesting a modification of the Band Plan is a process that has no guarantee of success, particularly when the modification would entail service outside the original service assignment, so that the consent of other affected governments is required. Indeed, the FCC has asked the ITU for such a modification only twice, and at this point neither request has been granted.

b. The Commission likewise was reasonable in finding that the incidental spillover of DBS signals from U.S.-licensed satellites into Mexico and Canada did not turn DBS into an international service within the meaning of the ORBIT Act. Although the statute might plausibly be read to mean that DBS is an international service because the signal can be received to some degree outside of the United States, that reading is not, in the context of the statute, compelled.

Congress restricted the ORBIT Act only to “international or global” satellite services and thus necessarily considered some satellite services to be domestic. Yet cross-border spill-over is an unavoidable byproduct of the physics of signal propagation. The signals of *any* satellite system designed to serve large areas of the United States will cross the border. To deem such service “international” because of that incidental signal reach effectively reads out of the statute Congress’s limitation to “international or global . . . services” and makes the statute applicable to *all* satellite services. The Commission thus properly rejected Northpoint’s reading of the ORBIT Act.

Under the ITU Region 2 Band Plan, the DBS orbital locations and spectrum at issue in the auction were assigned to the United States for the purpose of providing service to the United States and not for the purpose of providing service to any other country. Indeed, U.S. licensees have actually used the orbital locations and spectrum assigned to the United States solely for domestic service; no company is providing any service abroad. The fundamental use of the spectrum and orbital locations is for domestic service, and incidental cross-border spill-over does not change that basic domestic character. Congress is presumed to have preserved the ITU regulatory regime when it enacted the statute. The Commission’s interpretation of the statute is also reinforced by the second sentence of the statute and the Act’s legislative history, both of which indicate that Congress was concerned with spectrum and orbital locations that could be subject to auctions in multiple jurisdictions, which is not a danger with respect to DBS licenses.

Finally, the Commission’s decision is consistent with its earlier decision in *DISCO I*. *DISCO I* did not involve the meaning of “international service,” particularly the meaning of that phrase as used in the ORBIT Act, which had not yet been enacted. Nor did *DISCO I* have to do with the appropriate licensing mechanism for DBS. Rather, *DISCO I* was a decision to remove

U.S. regulatory barriers to the provision of satellite service outside the United States. The Commission in *DISCO I* expressly recognized that the ITU had allocated orbital locations to the U.S. in order to provide domestic service and that orbital locations and spectrum had to be used in accordance with U.S. treaty obligations. The Commission removed its own barriers to service outside the United States, but that had no effect on DBS operators' obligations to comply with the ITU Region 2 Band Plan.

## **ARGUMENT**

### **I. STANDARD OF REVIEW.**

Northpoint raises both statutory and administrative law arguments. The statutory matters are reviewed under the framework of *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984).

Under *Chevron*, if “the intent of Congress is clear” from the language of the statute, “that is the end of the matter.” But if the statutory language does not reveal the “unambiguously expressed intent of Congress” on the “precise question” at issue, the Court must accept the agency’s interpretation as long as it is reasonable and “is not in conflict with the plain language of the statute.” *National R.R. Passenger Corp. v. Boston & Maine Corp.*, 503 U.S. 407, 417 (1992).

The administrative law matters are reviewed under the standard of the Administrative Procedure Act. The Court may reverse the agency’s determinations only if they are “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C.

§ 706(2)(A). That standard is highly deferential toward the agency; the Commission need only articulate a “rational connection between the facts found and the choice made.” *Motor Vehicle Mfrs. Ass’n v. State Farm Mutual Ins. Co.*, 463 U.S. 29, 43 (1983). The Court “presume[s] the validity of the Commission’s action and will not intervene unless the Commission failed to

consider relevant factors or made a manifest error in judgment.” *Consumer Electronics Ass’n v. FCC*, 347 F.3d 291, 300 (D.C. Cir. 2003).

## II. THE COMMISSION REASONABLY INTERPRETED AND APPLIED THE ORBIT ACT.

The ORBIT Act forbids the Commission from “assign[ing] by competitive bidding orbital locations or spectrum used for the provision of international or global satellite communications services.” 47 U.S.C. § 765f. The Commission reasonably interpreted and applied the Act here.

1. Northpoint contends that even if DBS itself is not an international or global service, DBS licenses nevertheless may not be auctioned because the same spectrum is also allocated for use by another service known as non-geostationary fixed satellite service (NGSO-FSS), which is an international or global service. Br. 24-27. Northpoint argues that “if a particular portion of the spectrum is used *by anyone* for international service, then that spectrum falls within the statutory prohibition on auctions, even if a particular licensee or group of licensees will use that spectrum only for domestic service.” Br. 25. That argument is a *Chevron* Step I assertion: that the statute directly addresses the “precise question” of whether the ORBIT Act forbids auctioning licenses that will permit only domestic use because the same spectrum is also used by other licensees for international satellite services.<sup>7</sup> The Commission reasonably interpreted the statute to refer to the particular usage of the spectrum at issue in a given licensing proceeding.

The statute does not convey Congress’s unambiguous intent on the relevant question. Northpoint’s interpretation of the statute may be one possible reading of the literal language, but

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<sup>7</sup> Northpoint has raised the same argument in *Northpoint Technology Ltd. v. FCC*, No. 02-1194 (argument scheduled April 11, 2005).

it is neither the only one nor a particularly sensible one. It is not sensible because there is no reason (and Northpoint does not even try to suggest one) why Congress would want to exempt domestic service licenses from auction simply because other, international service licensees were using the same spectrum for different purposes. Certainly, the presence of licensees in one service has no bearing on whether licensees in an entirely different service will be subject to auctions in multiple international jurisdictions, the avoidance of which was Congress's apparent intent in passing the statute.

That intent is made apparent in the second sentence of § 765f, which directs the President to oppose in the ITU "any assignment by competitive bidding of orbital locations or spectrum used for the provision of" international or global services. 47 U.S.C. § 765f. The second statutory sentence indicates that Congress was specifically concerned with spectrum and orbital locations that could be subject to auction in foreign jurisdictions. As explained above, that is precisely what the legislative history of the statute indicates as well. Because of their exclusive assignment to the U.S., DBS spectrum and orbital locations licensed by the FCC are not subject to auction in any other country as a result of the incidental signal overlap.

The legislative history of the Act strongly reinforces that understanding. The history consists of a House Committee Report from an earlier, unenacted bill that contained language identical to § 765f. The Committee explained in connection with that precursor bill that "auctions of spectrum or orbital locations could threaten the viability and availability of global and international satellite services, particularly because concurrent or successive spectrum auctions in the numerous countries in which U.S.-owned global satellite service providers seek downlink or service provision licenses could place significant financial burdens on providers of

such services.” H.R. Rep. No. 494, 105<sup>th</sup> Cong. 2d Sess. 65 (1998).<sup>8</sup> The Commission explained in the *Auction Order* that “auctioning . . . U.S. DBS licenses that comply with the ITU Region 2 Band Plan does not raise these concerns because these licenses are for channels designed under the Plan to serve the United States.” *Auction Order* ¶14 (JA 14). In other words, unlike those other satellite operators that provide service to foreign countries using spectrum and orbital locations that might be licensed by those countries, DBS providers that use U.S. assignments use spectrum and orbital locations that under the Band Plan are assigned to and licensed by the United States *alone*. Providers thus face no genuine possibility of multiple auctions for spectrum or orbital locations in different countries due to the incidental signal spill-over. Northpoint thus is wrong when it suggests that the concern expressed by Congress applies here because a U.S. auction may “prompt[] similar requirements in neighboring countries.” Br. 14-15. Because orbital locations and spectrum have been assigned to the United States by the ITU, no other country may auction the same spectrum or orbital rights.

The agency’s far more plausible reading of the statute, which is consistent with the legislative purpose, is that the “use” of the spectrum depends on the particular usage at issue in a

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<sup>8</sup> Northpoint challenges the Commission’s reliance on that legislative history, stating that there is no “legitimate basis for relying on a committee report from a prior Congress on a different bill.” Br. 13. Here, however, the language of the unenacted bill is *identical* to the language passed one congressional session later. *Cf. Alabama Power Co. v. Gorsuch*, 672 F.2d 1, 14 (D.C. Cir. 1982) (when Congress uses the same language two different times it “presumably intended the same effect” in both). It is not uncommon for legislation to take more than one congressional session to reach fruition. Nor does the situation differ substantially from instances where alternative bills are introduced in the House and the Senate, but only one is enacted. In that circumstance, the committee reports on the unenacted bill may well shed light on Congress’s intentions. That is especially so where, as here, there is no contrary legislative history pertaining to the enacted bill. *United States v. X-Citement Video, Inc.*, 513 U.S. 64 (1994), relied on by Northpoint (Br. 13 n.13), is not on point because that case involved changes in statutory language across Congresses, not retention of the exact same language.

given licensing proceeding. *Auction Order* ¶20 (JA 18-19). Thus, although DBS spectrum may be “used” by NGSO-FSS providers to provide international or global satellite service, the relevant consideration is that DBS providers will not “use” the spectrum for such service. Under *Chevron*, that permissible interpretation of the statute must prevail.<sup>9</sup>

2. Northpoint additionally argues that the statute compels the conclusion that DBS is an international service in two distinct ways: first, because DBS satellites are visible from large areas of the Earth and thus have the technical capability of providing service to those areas; and second because DBS signals from U.S.-licensed satellites actually do spill over across the border and are receivable in parts of Canada and Mexico. The Commission reasonably concluded that the hypothetical technical capability to provide service outside the U.S. did not render DBS an international service.

a. Visibility From Satellite. First, the Commission rationally rejected Northpoint’s claim that DBS is an international or global service within the meaning of the ORBIT Act because “DBS satellites are *capable* of serving multiple countries.” Br. 15 (emphasis added). In support of its claim, Northpoint relies on what it calls “coverage maps,” *ibid.*, (attached to its brief in addendum B) showing that much of the Pacific rim and South America is visible from several of the orbital locations assigned to the United States by the ITU, including the orbital locations at 157°, 166° and 175° west longitude. The argument is wrong because visibility of an area from the satellite does not equate to service to that area: the very point of the Region 2 Band Plan was to assign orbital locations to the United States and other countries that were designed to provide service only to the assigned country. *See Auction Order* ¶13 (“the licenses to be included in

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<sup>9</sup> Northpoint’s reliance on *National Public Radio, Inc. v. FCC*, 254 F.3d 226 (D.C. Cir. 2001), and *NCTA v. Gulf Power Co.*, 534 U.S. 327 (2002), is misplaced. Both cases involved entirely unrelated statutes, neither of which the Court found to be ambiguous in its application.

Auction No. 52 must be used to provide a service delivered almost exclusively to U.S. consumers”) (JA 13); ¶15 (Northpoint’s maps “do not ... show the actual coverage areas of those orbit positions”) (JA 14). As such, the Commission was correct that the hypothetical technical capability to provide international service does not make an orbital location one that is “used for” such service.

Contrary to Northpoint’s claim, it makes no difference that parties can seek modification of the ITU Band Plans. Purely as a matter of statutory construction, the orbital locations are not and cannot be “used for” international service in the absence of a modification, so the statutory test for an exemption from auction is not met; the statute says “used for,” not “potentially usable for.” *Auction Order* ¶15 (the licenses “cannot now be ... used to provide any significant degree of international service”) (JA 14). As a result, Northpoint’s extended discussion of the possibility of Band Plan modification (Br. 19-23) is irrelevant to construing the statute: even if Northpoint were right that plan modification is a procedural formality (which it is not), at the time the licenses are made available for assignment they cannot be used to provide international service and thus do not fit within the statutory exception to the auction requirement.

Moreover, the Commission was correct to assume for purposes of its licensing decision that the Region 2 Band Plan would remain binding on Region 2 DBS licensees. It found that “[o]btaining a modification of [a] Band Plan, especially for coverage beyond that of the original Plan, is a process that has no guarantee of success, as it requires the agreement of other administrations that have DBS assignments that may be affected by the modification.” *Auction*

*Order* ¶15 (JA 14); *see also id.* n.33 (JA 14).<sup>10</sup> Northpoint has given no good reason to question that conclusion. It is true that the FCC several times has requested modifications of the Region 2 Plan, but the agency’s request does not automatically result in modification. The ITU’s members are sovereign nations that are under no obligation to agree or cooperate with the United States. *See id.* ¶21 (JA 19) (“We may submit a modification, but may not be able to get the necessary agreements with” other countries). The Commission’s past requests for modification of the Plan do not demonstrate that the Commission erred when it found that U.S.-assigned DBS licenses that would be auctioned could not be used to provide international service. The vast majority of the requested Plan modifications have involved purely domestic issues, such as a change in the physical characteristics of the satellite. Only two have involved provision of service outside the United States. *Auction Order* ¶17 (JA 15-16). Neither was acted upon: one was withdrawn and one (the EchoStar 7 modification discussed at pages 20-21 of Northpoint’s brief) is pending.

Moreover, as Northpoint itself recognizes, “foreign jurisdictions might impose other conditions before permitting a U.S. operator to do business there.” Br. 5. Thus, even a modification of the Band Plan to allow international service does not necessarily allow the provision of international service. The Commission sensibly concluded that DBS licenses assigned to the United States “cannot now be – nor are they anticipated to be – used to provide any significant degree of international service.” *Id.* ¶15 (JA 14).

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<sup>10</sup> The Commission found variously that it is not “a routine matter for the United States to obtain a modification of” the Band Plan, particularly to include service outside the originally designated service area, *Auction Order* ¶17 (JA 16); that “it is not a foregone conclusion that the satellite will be able to operate using technical parameters that are at variance with the Region 2 Band Plan,” even when the proposed satellite will serve only the United States, *id.* n.41 (JA 17); and that the FCC “may not be able to get the necessary agreements with other” governments, *id.* ¶21 (JA 19). In short, the Plan is not “an insignificant constraint on international DBS service.” *Id.* ¶17 (JA 16).

Northpoint claims that the ITU implicitly recognized that the Region 2 Band Plan is not a serious impediment to international service when it changed its regulations in 2000 to delete a footnote stating that the DBS frequencies in Region 2 are “limited to national and subregional systems.” Br. 18-19. We note at the outset that Northpoint did not raise this claim before the agency and is therefore barred from doing so now, as the Commission has had no opportunity to respond to the claim. 47 U.S.C. § 405(a); *Bartholdi Cable Co. v. FCC*, 114 F.3d 274, 279 (D.C. Cir. 1997). The change in the footnote, however, is of no consequence. The ITU altered one *description* of the Band Plan, but the Region 2 Plan itself did not materially change – as Northpoint does not dispute, the plan still assigns DBS orbital locations and frequencies for domestic use. Nor has the ITU changed its process for modifying the Plan.

Northpoint claims that the FCC has also stated that the Band Plan does not seriously impede international service. It quotes a recent FCC order stating that “in general, the DBS satellites have characteristics that require modification to the Plan assignments.” Br. 19. The Commission explained the context of that statement in the *Auction Order*: “The Commission made this statement in the context of its discussion of plans for correcting any impermissible interference with DBS that MVDDS [a terrestrial service using the same frequencies that was the subject of the order] might cause, and the statement had nothing to do with modifications of the ITU Region 2 Band Plan for purposes of international DBS service.” *Auction Order* n.49 (JA 18). Northpoint barely acknowledges that explanation in a footnote, and offers no genuine rebuttal to the Commission’s reasonable explanation of its own earlier order.

b. Incidental Spill-Over. Second, the Commission reasonably rejected Northpoint’s claim that the incidental spill-over of DBS signals beyond the borders of the United States necessarily means that DBS spectrum and orbital locations assigned to the United States by the

ITU are “used for the provision of international or global satellite communications services” under the “plain language” of the statute. Br. 11-12. The argument is another *Chevron* I claim – that the statute necessarily demonstrates Congress’s intent that a satellite service is “international or global” if its signal can be received to any degree beyond the borders of the United States. To prevail, Northpoint must show that its interpretation of the statute is the only reasonable one.

Northpoint’s claim fails because its reading of the phrase “used for the provision of international or global satellite communications services,” while facially plausible, is not, in the context of the statute, reasonable, much less inescapable. Congress restricted the reach of the Act’s auction exception to international and global service and thus necessarily considered some satellite services to be domestic. Yet cross-border spill-over is a byproduct of the physics of signal propagation that cannot reasonably be avoided in any national service. *See Auction Order* ¶15 (JA 14) (“in order to have full coverage of a national territory, coverage of regions beyond those borders is to be expected”). Because of that essentially unavoidable spill-over, the signal of *any* satellite system designed to serve the United States (or large parts of it) will cross the border and render it, in Northpoint’s reading, international. In those circumstances, Northpoint’s interpretation effectively reads out of the statute Congress’s limitation to “international or global ... services” and turns the statute into a preclusion of auctions for *all* satellite spectrum and orbital locations. That outcome violates the central tenet of statutory construction that the Court “give effect, where possible, to every word of a statute.” *Duncan v. Walker*, 533 U.S. 167, 174-175 (2001); *accord Mail Order Ass'n of America v. U.S. Postal Service*, 986 F.2d 509, 515 (D.C. Cir. 1993) (“we are to construe statutes, where possible, so that no provision is rendered inoperative or superfluous, void or insignificant”). Congress must have had in mind something more limited than barring an auction due to incidental spill-over. The agency thus properly

rejected Northpoint’s “exceedingly broad reading of the ORBIT Act,” finding it “unreasonable to conclude that Congress intended that the incidental provision of transborder service would convert an otherwise auctionable license into an unauctionable one.” *Id.* ¶14 (JA 13).

Northpoint’s reading of the ORBIT Act is especially untenable here, where – although DBS signals may spill over the border – DBS operators must provide service under a Band Plan that assigns orbital locations and spectrum for the purpose of providing service to the United States. As such, the Commission reasonably found that spectrum and orbital locations assigned [by the ITU] to the U.S. are not “used for the provision of international ... services” because they “were assigned [by the ITU] to the United States because of their coverage of the United States alone ... [and] must be used to provide a service delivered almost exclusively to U.S. consumers.” *Auction Order* ¶13 (JA 13); *see id.* ¶14 (licenses are for channels “designed under the Plan to serve the United States”) (JA 14). In other words, under the ITU regime, the fundamental use of the spectrum and orbital locations is for domestic service. Incidental cross-border spill-over does not change that basic domestic character. The statute must be read against the background of that international regulatory context. “Congress is presumed to preserve, not abrogate, the background understandings against which it legislates.” *United States v. Wilson*, 290 F.3d 347, 356 (D.C. Cir.), *cert. denied*, 537 U.S. 1028 (2002).<sup>11</sup>

Moreover, the Commission’s finding that incidental spill-over does not mean that DBS spectrum and orbital locations are “used for the provision of international” service is strongly supported by the actual use that has been made of the orbital locations and frequencies assigned

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<sup>11</sup> Indeed, as Northpoint itself emphasizes (Br. 18-19), at the time the ORBIT Act was passed, the ITU’s regulations, as codified in the Code of Federal Regulations, described the DBS spectrum as being “limited to national and subregional systems.” 47 C.F.R. § 2.106 n.S5.488 (2000).

to the United States. Even though DBS signals can be received in Mexico and Canada due to the incidental spill-over, in reality “all U.S.-licensed providers of DBS service are providing service only to the United States and not to any foreign countries.” *Auction Order* 16 (JA 15). The Commission thus appropriately contrasted DBS with genuinely international satellite services, which are designed to transmit “[s]ignals originating in the United States ... to foreign points and vice versa.” *Ibid.* The Commission’s reading of the statute is further supported by the second sentence of § 765f and by the legislative history, both discussed above. Those materials indicate that Congress was concerned about multiple auctions for the same orbital locations and spectrum, a situation not genuinely possible with DBS spectrum and orbital locations.

Northpoint is wrong when it contends that the Commission’s interpretation is inconsistent with the FCC’s own decision in *DISCO I*. Br. 12, 13. *DISCO I* was not about the meaning of “international service,” much less about the meaning of that term within the context of a statute (the ORBIT Act) that had not yet been enacted. Nor did *DISCO I* have anything to do with appropriate licensing processes for DBS or any other satellite service. Rather, *DISCO I* was a decision to remove U.S. regulatory barriers to the provision of satellite services outside the United States, where such services could be provided consistent with international agreements. *Auction Order* ¶21 (JA 19).

Neither is the *Auction Order* inconsistent with the regulatory approach of *DISCO I*. Br. 15-16. *DISCO I* removed a requirement that satellite operators, including DBS operators, obtain FCC approval before providing service outside the United States. Northpoint argues that *DISCO I* “rendered prior distinctions between domestic and international system licensees unnecessary,” and that the agency’s subsequent treatment of DBS as a domestic service for purposes of the ORBIT Act thus “simply cannot be reconciled with *DISCO I*,” Br. 15-16, 17. But *DISCO I*

concerned *FCC-imposed* constraints on satellite operators; it had nothing to do with – and did not in any way purport to change – the ITU’s assignments of DBS orbital locations and spectrum. The *Auction Order* deemed DBS to be a domestic service because of *ITU-imposed* regulations, including restrictions on international service, that rendered DBS fundamentally domestic, not because of the FCC’s own regulatory treatment of satellite services.

Nor did *DISCO I* purport to alter other countries’ restrictions on service provided by foreign satellite operators. 11 FCC Rcd at 2439-2440 ¶70. Indeed, *DISCO I* recognized that the ITU had allocated various orbital locations “from which to provide *domestic* DBS service,” but the agency saw “no reason why *the Commission* should impose any barriers on a licensee willing to provide international DBS service, *in accordance with U.S. treaty obligations.*” 11 FCC Rcd at 2438 ¶57, 2439 ¶66 (emphases added). Thus, the Commission reasonably concluded in the instant proceeding that there was no unexplained change in position: “Although the Commission removed its own regulatory obstacles to the provision of DBS service outside the United States from the U.S. orbit locations in *DISCO I*, that decision had no effect on DBS operators’ obligation to comply with the ITU Region 2 Band Plan.” *Auction Order* ¶21 (JA 19).

Northpoint is likewise wrong that it would have been “nonsense” for the Commission to have removed its restriction on service outside the United States in *DISCO I* “if DBS operators could not, after all, provide international services in the first place.” Br. 17. It made complete sense for the Commission to remove what it considered an unnecessary impediment to satellite service under its own rules, bearing in mind that other legal constraints might also be relevant. The Commission’s recognition in the *Auction Order* that treaty obligations ordinarily prevent international service was entirely consistent with *DISCO I*. Contrary to Northpoint’s contention,

the agency has not “changed its tune” “suddenly, without notice and without justification.” Br.  
18.

**CONCLUSION**

For the foregoing reasons, the Court should deny the petition for review, or the appeal, as  
appropriate.

Respectfully submitted,

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August 23, 2004

IN THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NORTHPOINT TECHNOLOGY, Ltd., et al.,	)	
	)	
APPELLANTS/PETITIONERS,	)	
	)	
V.	)	No. 04-1052 AND
	)	CONSOLIDATED CASE
FEDERAL COMMUNICATIONS COMMISSION,	)	
	)	
APPELLEE/RESPONDENT,	)	
	)	

CERTIFICATE OF COMPLIANCE

Pursuant to the requirements of Fed. R. App. P. 32(a)(7), I hereby certify that the accompanying “Brief for Appellee/Respondents” in the captioned case contains 7726 words.

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