

**Before the
Federal Communications Commission
Washington, DC 20554**

In the Matter of)	
)	
Service Rules for Advanced Wireless Services in the 2000-2020 MHz and 2180 MHz Bands)	WT Docket No. 12-70
)	
Fixed and Mobile Services in the Mobile Satellite Service Bands at 152501559 and 1626.5-1660.5 MHz, 1610-1626.5 MHz and 2483.5-2500 MHz, and 2000-2020 MHz and 2180-2200 MHz)	ET Docket No. 10-142
)	
Service Rules for Advanced Wireless Services in The 1915-1920 MHz, 1995-2000 MHz, 2020-2025 MHz and 2175-22180 MHz Bands)	WT Docket No. 04-356
)	

To: The Commission

PETITION FOR RECONSIDERATION

NTCH, Inc. (“NTCH”), by its attorneys, petitions the Commission to reconsider its December 17, 2012, *Report and Order and Order of Proposed Modification*¹ (the “*Report and Order*”) in two fundamental respects.

I. Background.

NTCH urged the Commission in the Comments it filed in this proceeding to forthrightly acknowledge that the then-proposed transformation of the DISH licenses constitutes an impermissible substantial and fundamental change in the nature of the licenses. NTCH instead urged the Commission to fashion a forward-looking plan for the spectrum held by DISH which

¹ *In the Matter of Service Rules for Advanced Wireless Services in the 2000-2020 MHz and 2180-2200 MHz Bands, Report and Order and Notice of Proposed Rulemaking*, FCC 12-151 (rel. Dec. 17, 2012), FR Vol. 78, p. 8230 (Feb. 5, 2013).

would be fair to DISH, fair to the public (who are the true owners of the spectrum value being disposed of), and fair to other carriers and potential carriers who are entitled to access to the newly created terrestrial service. *Comments of NTCH, Inc.*

The Commission rejected NTCH's proposals, particularly its suggestion that the re-purposed S-Band spectrum must be made available for competing applications and auctioned because it qualifies as an "initial license" under *Fresno Mobile Radio, Inc. v FCC*, 165 F. 3d 965 (DC Cir. 1999) . While there is no statutory requirement that the Commission entertain competing applications for initial licenses, Congress has consistently promoted competitive bidding in the allocation of new licenses.² Moreover, the Commission has invariably done so over its 78 year history and would therefore be hard pressed to justify a deviation from that policy here. Simply stated, the gifting of spectrum to favored applicants without offering fair opportunity to potential competitors to acquire that new or re-purposed spectrum, whether through first-come/first served procedures, comparative hearings, lotteries or auctions, is contrary to established Congressional and Commission policy. One can see in an instant that if the Commission simply doled out new licenses to favored entities without some fair and open process, such an action could not possibly withstand review for arbitrariness or capriciousness. Yet that is in essence what the Commission has done here.

² See, e.g., *Omnibus Budget Reconciliation Act of 1993*, Pub. Law 103-66, adopting competitive bidding policies and procedures, and specifying the objective of the use of competitive bidding on communications licenses is to "promot[e] economic opportunity and competition and ensuring that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants...." It should be noted that competitive bidding under Section 309 of the Act applies to filed applications for initial license which are mutually exclusive. NTCH suggests that the lack of an application process for the newly-modified (and thus newly-available) spectrum has foreclosed what would no doubt result in mutually exclusive applications which would be filed by NTCH and other competitive carriers. The FCC has therefore failed to promote the goals of competition and wide dissemination of license opportunities instructed by Congress.

NTCH does not intend to revisit those issues here; that will be for the Court of Appeals to consider if the Commission does not earlier rectify the situation. Rather, NTCH here raises two points that were not considered or were misunderstood in the *Report and Order*. First, in its Reply Comments filed June 1, 2012, DISH pointed out that the Commission's authority to modify licenses under Section 316, while broad, is not unlimited.³ In its initial original Comments, DISH had stressed that the Commission has broad authority under Section 316 to modify licenses when the public interest warrants. In its Reply Comments, however, DISH argued that taking away its satellite authority, even on a voluntary basis, would be unlawful because it would "fundamentally change the nature of the service that a licensee may provide under an existing license." NTCH agrees with DISH that there are limits – limits which have been frequently articulated by the courts – to the Commission's license modification authority. Those limits have been exceeded here. Yet the *Report and Order* failed to address the issue of whether the license modification adopted here is so "fundamental" as to be improper.

Second, NTCH had argued in its Comments that the Commission should simply do away with the satellite allocation for this band and thus eliminate the problem posed by having potentially inconsistent terrestrial and satellite operations. It was, of course, this complicating factor that the Commission repeatedly cited as precluding it from making the new AWS-4 available to carriers other than DISH. The Commission brushed off NTCH's proposal in a footnote, indicating that NTCH was seeking an untimely reconsideration of the earlier order that had made satellite and terrestrial use of this band co-primary.⁴ While NTCH did, perhaps inartfully, suggest "reallocation"⁵ of the spectrum, the substance of what it was proposing was

³ DISH Reply Comments at 19.

⁴ *Report and Order* at n. 532.

⁵ NTCH Comments at 8.

that licensees in this band should not be permitted to provide satellite service. That restriction would not require an actual “reallocation” of the spectrum under Part 2 but simply a change in the licensing policies underlying the allocation so that only terrestrial operations could take place. Correctly viewed, the Commission should consider limiting use of this band to terrestrial operations without necessarily changing the allocation in Part 2. This would open up a host of possibilities for distribution of the spectrum that the Commission seems to have considered foreclosed by the co-primary allocation scheme.

II. License Modifications Under Section 316 May Not Be “Fundamental”

DISH correctly pointed the Commission to the seminal case of *MCI Telecommunications Corporation v AT&T*, 512 U.S. 114 , 129 L. Ed. 2d 182 (1994) for an extensive treatment of what the word “modify” means in the context of the Communications Act. The Supreme Court had been called upon to consider whether the FCC’s almost complete abandonment of the tariff-filing requirement was a permissible “modification” of the tariff requirements of the Act. It conducted a detailed review of the definitions of the word “modify” and reached a firm conclusion: “[m]odify,’ in our view, connotes moderate change.” *Id.* at 227. Applying this denotation, the Court determined that “the Commission’s permissive de-tariffing policy can be justified only if it makes a less than radical or fundamental change.” *Id.* at 231.

The DC Circuit followed the Supreme Court by applying the same limitation to license “modifications” under Section 316. In *Community Television, Inc. v. FCC*, 216 F. 3d 1133 (DC Cir. 2000), the court considered whether the conversion of analog station licenses to digital was impermissibly fundamental. It found that the stations involved would be broadcasting television to the public under similar terms both before and after the transition and would be providing “essentially the same services, with some flexibility to provide ancillary services as well.” *Id.* at 1141. The court therefore concluded that the modification effected by the Commission was not a “fundamental” change to the license, and was a permissible invocation of Section 316.

As recently as a few months ago, the DC Circuit again reiterated the operative principle: “Verizon is right that the Commission’s section 316 power to ‘modif[y]’ existing licenses does not enable it to fundamentally change those licenses.” *Cellco Partnership v. FCC*, 700 F. 3d 534, 544 (DC Cir. 2012).

This body of law quite clearly requires the Commission to analyze whether the dramatic alteration of the MSS licenses held by DISH constituted more than a “moderate” change. For if the change is more than moderate but is, rather, a radical or fundamental one, the Commission’s purported modification of DISH’s licenses would be *ultra vires* and could not be implemented. The Commission did not undertake that analysis, so let us do it now.

In the cases in which the FCC’s modification authority has been challenged and affirmed, the Commission has been modifying licenses from one channel or protocol to another (*e.g.*, analog to digital, or swapping one spectrum band for another), but the stations involved were recognizably operating under “similar terms” and “providing essentially the same services” as they were before, as the *Community Television* court put it. *Community Television*, *supra*, at 1141. Similarly, in *California Metro Mobile Communications v. FCC*, 365 F. 3d 38 (DC Cir.

2004), relied on by the Commission, the license was modified by deleting one of the licensee's channels that was a source of potential interference. This action was upheld as an appropriate invocation of Section 316 authority because the modified license remained a land public radio station providing the same service. Similar license modifications in the past shifted spectrum around for Nextel and added ATC authority to satellite licenses, but left the basic service obligations and nature of the services to be offered intact. In no case has the Commission simply changed the nature of a licensed service entirely, as is the case here.

So are the license modifications approved by the Commission here fundamental?

There are numerous indices we can point to:

- The FCC has re-dubbed the spectrum covered by the service with an entirely new name, AWS-4. It is no longer a Mobile Satellite Service band, but a terrestrial band in the same terrestrial service category as the other AWS spectrum bands. This dramatically conveys the fundamental nature of the change in service.
- The rules governing the terrestrial service have been relocated from Part 25 to Part 27. This again places the service squarely in the terrestrial service category along with all the other spectrum bands regulated under Part 27. The technical rules governing terrestrial operations are, of course, radically different from those applicable to satellite-based operations.
- The Commission imposed fixed microwave relocation obligations on the AWS-4 licensee commencing upon the issuance of a modified license to the current MSS license holders. This necessarily implies that terrestrial AWS-type service will predominate; otherwise, the relocation obligations applicable to satellite-only or satellite with ATC licensees would have been appropriate until terrestrial service actually commenced.
- The AWS-4 licensees are under no further obligation to provide or offer any satellite service whatsoever. On the other hand, they are under strict build-out requirements for their terrestrial service. If terrestrial service is not offered within the timeframe set by the rules, the licensee is subject to whole or partial loss of license. No such obligations applied to the satellite operations.
- Partial lessees or transferees of AWS-4 spectrum will not be required to provide protection to satellite operations and may not provide satellite operations themselves. Thus, large categories of users of this band will have no satellite rights whatsoever.

- AWS-4 spectrum returned to the Commission for any reason will have no satellite component upon re-licensing.
- The financial markets clearly perceive that the transformation in the license is fundamental, since, as shown in NTCH’s original Comment in this proceeding and in other comments, the value of the license approximately quadrupled upon the modification from satellite to terrestrial – a change of some \$6 billion in value. The Commission recognized this direct effect. *See Report and Order*, at ¶¶ 67 and 178.

The simple fact is that, except for the vestigial authority to offer satellite service (an authority which terminates upon various occurrences), the DISH licenses have been converted from satellite to terrestrial use. This is not what the Supreme Court would call a “moderate” change contemplated by the authority granted to the FCC by Congress to “modify” licenses; it is, rather, a top-to-bottom transformation of the very nature of the licenses. Such a transformation exceeds the Commission’s authority under Section 316 and therefore must be reversed.

III. Reallocation of the Co-Primary Satellite and Terrestrial Allocation is Not Required

As noted above, NTCH suggested in its Comments that the Commission could avoid the technical problems posed by the co-existence of a satellite operator and a terrestrial operator in this band by “delet[ing] the rules that either require or permit satellite operation in this band.” NTCH Comments at 8.⁶ The Commission cursorily dismissed this proposal in a footnote, saying that this suggestion was, in effect, an untimely request for reconsideration of the 2 GHz

⁶ The Commission clearly contemplates the gradual conversion of this spectrum to full terrestrial use. The National Broadband Plan called for “the Commission [to] enable the provision of stand-alone terrestrial services in the 2 GHz Mobile Satellite Service (MSS) spectrum band. *Report and Order* at ¶ 5. In deferring action on DISH’s initial waiver request to permit all-terrestrial operations, the Commission noted: “The unique characteristics of this band, including the possibility of putting it to full terrestrial use, also make it in the public interest to consider the issues raised by the by the request to waive certain non-technical ATC rules....” New DBSD Satellite Service G.P., Debtor-in-Possession, and TerreStar Licensee Inc., Debtor-In-Possession, Request for Rule Waivers and Modified Ancillary Terrestrial Component Authority, IB Docket Nos. 11-149, 11-150, *Order*, 27 FCC Rcd 2250, ¶ 29 (2012) (*DISH Transfer Order*).

Band Co-Allocation Report and Order. Report and Order at n.532. NTCH's use of the word reallocation in this context was perhaps confusing, and we take this opportunity to clarify.

The substantive concept presented is that – regardless of the co-primary allocation now specified in Part 2 of the rules for this band – the Commission is in no way foreclosed from limiting the use of the band by service rules governing operations in the band. The fact that the allocation *permits* both satellite and terrestrial use on a co-primary basis does not *require* such use and does not limit the Commission's ability to allow only terrestrial use in the band. In fact, the Commission's new service rules expressly envision and provide for scenarios in which future licensees or lessees of the band will *not* be allowed to offer satellite service at all. Therefore, a reallocation of the band from what was authorized in the *2 GHz Band Co-Allocation Report and Order* would not be required in order to re-shape the band in the manner NTCH suggests. The Commission could simply adopt changes to the underlying service rules not unlike those actually adopted by the Commission in the *Report and Order*, but without the residual satellite authority. To the extent that the Commission felt itself compelled in the *Report and Order* to continue to authorize satellite service in the 2 GHz band because the allocation in Part 2 authorizes such use, the Commission erred by needlessly constraining its options to re-shape the spectrum in the band and by failing to consider a licensing regime that would not only reap the benefits of the step-up in value for the American people, but ensure through an auction that the spectrum is made available on an equitable basis to those would put it to its best and highest use.

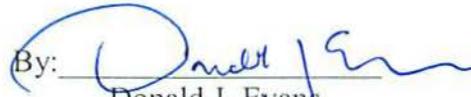
IV. Conclusion.

The Commission erroneously imposed a fundamental license change beyond the scope of its Section 316 modification authority, failed to consider alternative and higher uses of the band, and has foreclosed competitive entry. The *Report and Order* should therefore be reversed insofar

as it fundamentally modifies the DISH licenses and fails to consider a completely non-satellite-based use of the band.

Respectfully submitted,

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Certificate of Service

I, Deborah N. Lunt, a secretary in the offices of Fletcher, Heald and Hildreth, certify that I have sent this 7th day of March, 2013, by first class mail, postage prepaid, copies of the foregoing Petition for Reconsideration to:

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