

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

In the Matter of

DISH Network Corporation Petition for  
Waiver of Sections 27.5(j) and 27.53(h)(2)(ii)  
and Request for Extension of Time

WT Docket No. 13-225

**REPLY COMMENTS OF DISH NETWORK CORPORATION**

DISH Network Corporation (“DISH”) replies to comments submitted on its request for operational flexibility to use the lower AWS-4 band at 2000-2020 MHz in either transmission direction and for an extension of time to complete the buildout of its AWS-4 licenses (the “Petition”). The comments as a whole demonstrate that DISH’s Petition is narrow, uncontroversial, and consistent with the Commission’s broad policy objectives of freeing up additional spectrum for mobile broadband and maximizing auction revenues to fund FirstNet. The Commission should expeditiously grant DISH’s Petition.

AT&T Service, Inc. (“AT&T”) and Sprint Corporation (“Sprint”) laud the Commission for moving forward on DISH’s request for flexible use of the lower AWS-4 band. The lone opposition, NTCH, Inc. (“NTCH”), merely seeks to rehash its baseless petition for reconsideration of the *AWS-4 Order* and to level unrelated and unwarranted procedural accusations at the Commission.<sup>1</sup> NTCH does not—and cannot—dispute the substantial public

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<sup>1</sup> 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*, WT Docket Nos. 12-70, 04-356; ET Docket No. 10-142, 27 FCC Rcd. 16102 (2012) (“*AWS-4 Order*”), *recon. pending*.

interest benefits of the requested flexible use of the 2000-2020 MHz band for both AWS-4 licensees and future H Block and J Block licensees.

**I. THE DISH PETITION OFFERS SUBSTANTIAL UNCONTESTED PUBLIC INTEREST BENEFITS**

As demonstrated in the Petition, allowing DISH the flexibility to use the 2000-2020 MHz band for either downlink or uplink operations, and to have additional time to complete the buildout of the AWS-4 licenses, would spur broadband deployment, and make more efficient use of available spectrum – all of which promote the public interest.<sup>2</sup> Improving the coexistence between AWS-4 and adjacent H Block operations, in turn, will likely generate greater participation in the H Block auction, thus raising more funds for FirstNet.

Both AT&T and Sprint agree that grant of the Petition will serve the public interest and help resolve interference issues potentially arising under the current rules. AT&T accurately states that granting the DISH Petition will allow flexible spectrum use and promote wireless innovation, investment, and efficiency.<sup>3</sup> AT&T further supports expeditious Commission grant of DISH’s request for greater operational flexibility because affording such flexibility “tends to lead to efficient and highly-valued spectrum uses.”<sup>4</sup> Similarly, Sprint acknowledges that enabling DISH to use the 2000-2020 MHz portion of the AWS-4 band for downlinks would “enable both the AWS-4 licensee and prospective H Block licensees to make more intensive use

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<sup>2</sup> See DISH Network Corporation Petition for Waiver of Sections 27.5(j) and 27.53(h)(2)(ii) and Request for Extension of Time, WT Docket No. 13-225, at 9-16 (Sept. 9, 2013) (“DISH Petition”).

<sup>3</sup> See AT&T Services, Inc. Comments at 2.

<sup>4</sup> *Id.* (internal quotations omitted).

of this spectrum” and “obviate some of the technical requirements now in effect to minimize the risk of interference between immediately adjacent uplink and downlink spectrum.”<sup>5</sup>

## **II. DISH’S COMMITMENTS ARE FIRM AND ENFORCEABLE UNDER THE TERMS SET FORTH IN ITS PETITION**

DISH agrees with Sprint that “the Commission should ensure that . . . it has the ability to enforce DISH’s commitments and ensure its compliance with the Commission’s rules.”<sup>6</sup> In fact, DISH styled its Petition to provide certainty about the nature of DISH’s commitments and the timelines under which it would act. Specifically, DISH expressly “acknowledges that grant by the Commission of the [Petition] shall be conditioned upon DISH, either directly or indirectly through an affiliated entity or designated entity, bidding at least a net clearing price equal to any aggregate nationwide reserve price established by the Commission in the upcoming H Block auction (not to exceed the equivalent of \$0.50 per MHz/POP).”<sup>7</sup> Therefore, Sprint’s call for grant of the Petition to be “strictly conditioned upon . . . DISH bidding at least the aggregate nationwide reserve price in the H Block auction” is uncontested.<sup>8</sup>

Sprint’s additional request to condition grant of the waiver upon DISH’s satisfaction of potential reimbursement obligations to Sprint, however, is unwarranted.<sup>9</sup> The Commission has already decided to “require winning bidders to pay UTAM and Sprint, respectively, the amounts owed within thirty days of the grant of the winning bidders’ long-form license applications.”<sup>10</sup>

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<sup>5</sup> Sprint Corporation Comments at 3.

<sup>6</sup> *Id.* at 4.

<sup>7</sup> DISH Petition at 15.

<sup>8</sup> Sprint Corporation Comments at 4.

<sup>9</sup> *See id.* at 5, FN 12; 6-7.

<sup>10</sup> Service Rules for Advanced Wireless Services H Block, *Report and Order*, 28 FCC Rcd. 9483, 9549 ¶ 170 (2013) (“*H Block Order*”).

Commission enforcement of these requirements should be generally applicable to all winning bidders, and there is no basis for applying additional or different enforcement procedures only to DISH. No party, including DISH, objects to the need for reimbursement to Sprint on the terms set forth by the Commission in the *H Block Order*.

### **III. THE COMMISSION SHOULD REJECT NTCH'S PROCEDURALLY IMPROPER DEMANDS**

The Commission should reject NTCH's opposition, which simply rehashes its petition for reconsideration of the *AWS-4 Order*.<sup>11</sup> NTCH offers no basis for denying or delaying the substantial public interest benefits resulting from DISH's Petition, and dedicates the bulk of its pleading to an *ad hominem* attack on the Commission's successful 700 MHz interoperability policy, rather than the merits of this immediate Petition.

NTCH complains that the "elective element" of DISH's request does not give potential H Block bidders certainty over DISH's AWS-4 operations.<sup>12</sup> That grievance, however, ignores the public interest benefits brought about by more efficient use of the AWS-4 frequencies, and underestimates the additional value of the possibility of increased protection for the H and J Blocks. As NTCH itself admits, the uncertainty faced by potential bidders for the H Block is "whether the value of the spectrum was going to be *enhanced* or not."<sup>13</sup> Yet, NTCH effectively concedes that the grant of DISH's flexibility harms no party and may increase the value of the H Block.<sup>14</sup>

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<sup>11</sup> See NTCH, Inc. Comments at 1-5. Further, NTCH's argument that the Commission cannot grant a waiver to DISH while its petition for reconsideration of the *AWS-4 Order* remains pending is frivolous. By rule, the Commission's *AWS-4 Order* was effective upon issuance.

<sup>12</sup> See NTCH, Inc. Comments at 4.

<sup>13</sup> *Id.* (emphasis added).

<sup>14</sup> In any event, NTCH's demand for certainty is not possible. As DISH explained in its Petition, DISH needs the requested flexibility to aid "its efforts to find new uplink spectrum for pairing

Further, NTCH obscures the limited nature of DISH’s requested relief and the clear path to certainty for all affected stakeholders. The DISH Petition provides that “[i]f the requested relief is granted by the Commission, DISH commits that as soon as commercially practicable, but no later than 30 months after the grant of this petition, DISH will file an election with the Commission stating whether it will deploy the 2000-2020 MHz band for downlink or uplink use.”<sup>15</sup> Importantly, if DISH chooses to continue to use the 2000-2020 MHz band for uplink, then there will be *no* changes to the applicable technical rules that would impact adjacent operations such as the future H Block licensee. DISH’s request for technical rule changes in its Petition<sup>16</sup> would apply *only* if DISH elects to use the 2000-2020 MHz band for downlink. In addition, DISH clarifies and commits that when it makes its election—whether to stay uplink or switch to downlink—it will apply uniformly to all AWS-4 licenses in the nation.

NTCH’s procedural claims are also meritless. Specifically, contrary to NTCH’s mistaken claim that the Commission must proceed by rulemaking here,<sup>17</sup> the Commission is free to act by waiver as it deems fit,<sup>18</sup> particularly when the waiver route offers distinct advantages over a rulemaking.<sup>19</sup> In fact, the Commission “must retain power to deal with the problems on a case-

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through, among other things, strategic partnerships or transactions.” DISH Petition at 4. DISH cannot commit fully to downlink operations in the 2000-2020 MHz band without obtaining a degree of certainty as to the availability of new uplink spectrum, and the extent to which such spectrum would be suitable for pairing.

<sup>15</sup> DISH Petition at 1-2.

<sup>16</sup> *See id.* at 11-12.

<sup>17</sup> *See* NTCH, Inc. Comments at 4.

<sup>18</sup> *See NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294 (1974) (“the choice between rulemaking and adjudication lies in the first instance with the [agency’s] discretion”); *SEC v. Chenery Corp.*, 332 U.S. 194, 202 (1947) (“[A]n administrative agency must be equipped to act either by general rule or by individual order.”).

<sup>19</sup> *See SBC Communications Inc. v. FCC*, 138 F.3d 410, 421 (D.C. Cir. 1998) (“Inherent in an agency’s ability to choose adjudication rather than rulemaking is the option to make policy

to-case basis if the administrative process is to be effective,”<sup>20</sup> and can abuse its discretion if it fails “to waive a rule where particular facts would make strict compliance inconsistent with the public interest.”<sup>21</sup> Further, the Commission has issued much broader—even industry-wide—waivers than that requested here.<sup>22</sup> NCTH offers no precedent or legal impediment to proceeding by waiver here.

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choices in small steps, and only as a case obliges it to.”) (citing *SEC v. Chenery Corp.*, 332 U.S. at 202); Petition for Waiver of the Commission's Price Cap Rules for Services Transferred from VADI to the Verizon Telephone Companies, *Order*, 22 FCC Rcd. 10259, 10264 ¶ 13 (2007) (“The question here does not require the Commission to establish policies or rules for similarly situated carriers in the industry to follow in the future. Rather, the relief that the Bureau grants to Verizon is temporary and is based on discrete facts and unique circumstances that affect only Verizon.”).

<sup>20</sup> *SEC v. Chenery Corp.*, 332 U.S. at 203.

<sup>21</sup> *Northeast Cellular Tel. Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990).

<sup>22</sup> See, e.g., Bellsouth Corporation, Petition for Waiver of Section 32.22, *Memorandum Opinion and Order*, 2 FCC Rcd. 5146 (1987) (providing “a blanket waiver for all carriers” of Section 32.22 of the Commission’s Rules “until the Commission either denies the NYNEX Petition for Rule Making or issues a final decision in a Rule Making proceeding that is initiated in response to that NYNEX petition.”); Telephone Number Portability BellSouth Corporation Petition for Declaratory Ruling and/or Waiver, *Order*, 19 FCC Rcd. 6800 (2004) (granting BellSouth's request for a waiver of the five-year local number portability cost recovery rule and extending the waiver to all incumbent LECs that had yet to include certain costs in their tariffs); Consolidated Request of the WCS Coalition For Limited Waiver of Construction Deadline, *Order*, 21 FCC Rcd. 14134 (2006) (waiving and extending the construction deadline for all Wireless Communications Service licenses); Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices, *Order*, 18 FCC Rcd. 7924, 7926 ¶ 4 (2003) (extending the effective date of the integration until July 1, 2006 for all cable providers); Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices, 20 FCC Rcd. 6794, 6810 ¶ 31 (2005) (extending the effective date of the integration until July 1, 2007 for all cable providers); and TerreStar Networks, Inc., *Order and Authorization*, 25 FCC Rcd. 228, 236 ¶¶ 25-26 (2010) (granting waiver of certain technical rules to TerreStar, because it had already granted the same relief to the only other 2 GHz MSS/ATC operator, New DBSD, on the grounds that the rule was designed merely to protect the Boeing AMS(R)S system, which had never been implemented).

**IV. DISH COMMITS TO THE SAME POWER AND EMISSION LIMITS GOVERNING AWS-4, PCS AND AWS DOWNLINK OPERATIONS**

DISH committed generally in its Petition “to operate any future downlink terrestrial fixed or base stations in the 2000-2020 MHz band consistent with the technical requirements applicable to other fixed/base stations in the AWS-4 band at 2180-2200 MHz and adjacent operational PCS/AWS bands”<sup>23</sup> in order to provide interference protection to adjacent operations. DISH further explained that those technical requirements were the power and emission limits explicitly stated in the Petition, which are consistent with the rules governing AWS-4, PCS and other AWS downlink operations for the protection of adjacent operations.<sup>24</sup>

**V. CONCLUSION**

DISH requests that the Commission expeditiously grant its Petition and provide the needed flexibility to deliver mobile broadband services from the AWS-4 spectrum.

Respectfully submitted,

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<sup>23</sup> DISH Petition at 11.

<sup>24</sup> See DISH Petition at 11-12. DISH’s commitment, however, does not extend to other Commission rules that may apply to other AWS or PCS services.