

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

In the Matter of)	
)	
Service Rules for Advanced Wireless Services)	WT Docket No. 12-70
in the 2000-2020 MHz and 2180-2200 MHz)	
Bands)	
)	
Fixed and Mobile Services in the Mobile)	ET Docket No. 10-142
Satellite Service Bands at 1525-1559 MHz and)	
1626.5-1660.5 MHz, 1610-1626.5 MHz and)	
2483.5-2500 MHz, and 2000-2020 MHz and)	
2180-2200 MHz)	
)	
Service Rules for Advanced Wireless Services)	WT Docket No. 04-356
in the 1915-1920 MHz, 1995-2000 MHz,)	
2020-2025 MHz and 2175-2180 MHz Bands)	
)	

OPPOSITION TO NTCH’S PETITION FOR RECONSIDERATION

I. INTRODUCTION AND SUMMARY

DISH Network Corporation (“DISH”) submits this Opposition to the Petition for Reconsideration (“Petition”) filed by NTCH, Inc. (“NTCH”).¹ NTCH requests that the Commission reconsider two aspects of the *AWS-4 Report and Order and Order of Proposed Modification*² – the Commission’s use of Section 316 of the Communications Act in modifying

¹ NTCH, Inc. Petition for Reconsideration, WT Docket Nos. 12-70, 04-356; ET Docket No. 10-142 (filed Mar. 7, 2013) (“Petition”). NTCH also filed a Petition for Reconsideration of the Commission’s February 15, 2013 *Order of Modification*. See NTCH, Inc. Petition for Reconsideration, WT Docket Nos. 12-70, 04-356; ET Docket No. 10-142 (filed Mar. 18, 2013). DISH timely responded to that Petition. See DISH Network Corporation, Opposition to NTCH Petition for Reconsideration, WT Docket Nos. 12-70, 04-356; ET Docket No. 10-142 (filed March 28, 2013). DISH incorporates its March Opposition to NTCH’s Petition for Reconsideration of the Commission’s *Order of Modification* by reference here.

² See Service Rules for Advanced Wireless Services in the 2000-2020 MHz and 2180-2200 MHz

DISH's licenses and the Commission's refusal to eliminate the 2 GHz band's allocation to the Mobile-Satellite Service ("MSS"). NTCH requests that the *AWS-4 Order* "should [] be reversed insofar as it fundamentally modifies the DISH licenses and fails to consider a completely non-satellite-based use of the band."³ NTCH's Petition should be dismissed or denied because it is legally defective and procedurally deficient in part.

First, NTCH's Petition is procedurally deficient because NTCH attempts to raise an argument that it failed to raise in the proceeding below. Commission rules provide that, absent certain narrow circumstances, a party cannot raise issues in a petition for reconsideration that it previously failed to raise. NTCH argues for the first time in its Petition that the Commission improperly used Section 316 to modify DISH's license. NTCH offers no justification for its failure to raise this argument earlier and also fails to provide any changed events or circumstances, or public interest rationale for the Commission to consider its request now, as required by Commission rules. Accordingly, the Commission should reject the relevant portion of NTCH's Petition on this ground alone.

Second, NTCH's Petition is also substantively defective. NTCH's argument about the limits of Section 316 does not have any merit. NTCH relies on the proposition that the license modification effected by the Commission in the *AWS-4 Order* was too broad—that it was too much of a change and therefore the use of Section 316 was inappropriate. Court and Commission precedent affirm, however, that the Commission's use of Section 316 was appropriate: changes to a license that better enable the licensee to serve the public are well within the scope of Section 316.

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*").

³ Petition at 8-9.

In addition, NTCH's argument that the Commission should prohibit the use of the band for MSS is flawed. NTCH called for the abolition of MSS use of the band in the AWS-4 proceeding, and the Commission appropriately rejected that request in the *AWS-4 Order*. Because the Commission already considered – and rejected – this argument, NTCH is faced with the tall hurdle of showing that the Commission improperly failed to *abolish* an existing service allocation. It has not and cannot overcome that hurdle.

II. A SIGNIFICANT PART OF NTCH'S PETITION IS PROCEDURALLY IMPROPER

In its Petition, NTCH attempts to raise an argument that it failed to raise during the underlying AWS-4 proceeding – that the Commission's use of Section 316 was improper. The Commission's rules provide that a party cannot raise arguments in a petition for reconsideration that it failed to previously present in the underlying proceeding⁴ absent a showing that either the

⁴ See 47 C.F.R. § 1.429(b)(1)-(3). See also Application of Space Station System Licensee and Iridium Constellation LLC, et al, *Memorandum and Opinion Order, Order of Authorization*, 17 FCC Rcd. 2271, 2292 ¶ 54 (2002) (dismissing the petition for reconsideration of the U.S. GPS Industry Council as untimely because they “had not previously raised any objection to the original license application or the application for assignment, [and] it did not contend that it had been unable to do so.”); Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, *Third Order on Reconsideration*, 16 FCC Rcd. 2866, 2871 ¶ 12 (2001) (dismissing Petrocom's petition for reconsideration to include the Gulf of Mexico as an Economic Area in an upcoming auction in part because Petrocom “has not raised it previously in this proceeding”); Application of Sandab Communications Limited Partnership II, *Memorandum Opinion and Order*, 1998 WL 329655 ¶ 71 (1998) (dismissing petition for reconsideration for failure to raise claims previously, noting “Rainbow also raises for the first time in its Petition for Reconsideration new allegations based on Sandab's 1995 EEO Program Report.... However, these matters could have been raised in Sandab's Petition to Deny. A petition for reconsideration based on new matters not previously raised can be granted only upon a showing that the new matters reflect changed circumstances or could not reasonably have been discovered in a timely manner.”).

circumstances have changed, the issues were previously unknown, or that reconsideration is in the public interest.⁵

In its Petition, NTCH offers no valid justification for its failure to make the argument that the Commission's use of Section 316 was improper during the AWS-4 rulemaking proceeding. Indeed, in the *AWS-4 NPRM*, the Commission expressly proposed using Section 316 to modify DISH's licenses and sought comment on this approach.⁶ NTCH also fails to provide any changed events or circumstances, or any public interest rationale for the Commission to consider its request now. Accordingly, the relevant portion of its Petition should be dismissed.

III. THE COMMISSION'S USE OF SECTION 316 WAS APPROPRIATE

In its Petition, NTCH argues that the Commission exceeded its Section 316 modification authority by fundamentally changing the nature of DISH's licenses. NTCH asserts that the license modification was too much of a "fundamental change" to qualify under Section 316.⁷ NTCH is incorrect: the Commission acted well within its authority when it modified DISH's licenses under Section 316.

⁵ See 47 C.F.R. § 1.429(b)(1)-(3). A petition for reconsideration may rely on facts or arguments not raised previously only if (1) they "relate to events which have occurred or circumstances which have changed since the last opportunity to present such matters to the Commission;" (2) they were "unknown to petitioner until after his last opportunity to present them to the Commission, and he could not through the exercise of ordinary diligence have learned of the facts or arguments in question prior to such opportunity;" or (3) their consideration is "required in the public interest."

⁶ See Service Rules for Advanced Wireless Services in the 2000-2020 MHz and 2180-2200 MHz Bands, WT Docket Nos. 12-70, 04-356, ET Docket No. 10-142, *Notice of Proposed Rulemaking and Notice of Inquiry*, 27 FCC Rcd. 3561, 3585 ¶ 75 (2012) ("Here, we propose that, once the AWS-4 service rules are effective, we would issue an Order of Proposed Modification, under Section 316 of the Communications Act, to modify the existing 2 GHz MSS licensee's authority to operate in the 2000-2020 MHz and 2180-2200 MHz bands by adding Part 27 terrestrial authority and obligations, which would apply to all the AWS-4 service areas in these bands. We seek comment on this proposed approach, including the costs and benefits of the proposal.").

⁷ Petition at 4-7.

The Commission’s Section 316 authority allows for modifications when, among other things, the Commission determines that the modification will “promote the public interest, convenience, and necessity.”⁸ The D.C. Circuit has explained that Section 316 grants the Commission “broad power to modify licenses”⁹ and the Commission has repeatedly exercised its Section 316 authority when acting to expand service to the public, as it did with DISH’s AWS-4 licenses.¹⁰

In the *AWS-4 Order*, the Commission made specific and detailed findings that harmful interference could be avoided only if the 2 GHz MSS and AWS-4 terrestrial spectrum rights were controlled by the same entity, requiring the Commission to act through license modification rather than a system of competitive bidding.¹¹ Moreover, the *AWS-4 Order* made rigorously supported findings that the public interest would be served by adding AWS-4 terrestrial authority to DISH’s existing MSS licenses.¹²

Indeed, the modification in this case is limited when compared to the Commission’s previous uses of Section 316. As the *AWS-4 Order* notes, the Commission’s modification is of “a much more limited nature than in previous exercises of Section 316 authority,” such as the 800 MHz rebanding and the grant of entirely new spectrum to Sprint’s predecessor or the relocations of Digital Electronic Message Service (DEMS) licensees.¹³ The authority DISH had before the Section 316 modification is for the same spectrum and the same services (MSS and

⁸ See 47 U.S.C. § 316(a)(1).

⁹ See *AWS-4 Order* ¶ 172, (citing *California Metro Mobile Communications v. FCC*, 365 F.3d 38, 45-46 (D.C. Cir 2004)).

¹⁰ See *AWS-4 Order* ¶ 172.

¹¹ *Id.* ¶¶ 174-75.

¹² *Id.* ¶¶ 174, 176-85.

¹³ *Id.* ¶ 175.

terrestrial wireless) that it has now.¹⁴ There was no “fundamental” change to the authorization that would go beyond the scope of Section 316.

The cases cited by NTCH in fact support DISH’s position that the use of Section 316 is appropriate when modifying a license to enhance service offerings. The D.C. Circuit held in *Community Television* that a Section 316 modification was valid where the Commission allowed a licensee to provide essentially the same services but with additional flexibility to improve its offerings,¹⁵ precisely as it has done in the *AWS-4 Order*. Similarly in *Cellco*, the imposition of new rules was not viewed as an impermissible fundamental change to a license.¹⁶ Thus, the Commission acted well within its Section 316 authority when it modified DISH’s licenses.

IV. NTCH’S CALL FOR THE ELIMINATION OF THE MSS LICENSES HAS BEEN REJECTED ALREADY

After contending that the Commission’s action in the *AWS-4 Order* was too broad, NTCH incomprehensibly reverses course and faults the Commission for not taking the radical step of abolishing MSS use of the 2 GHz band.¹⁷ NTCH’s request is improper. As a threshold matter, NTCH failed to raise the argument that the Commission should abolish the MSS license in the *2 GHz Band Co-Allocation Report and Order*,¹⁸ where the Commission thoroughly examined the appropriateness of the band’s continued allocation to MSS. Instead, NTCH

¹⁴ *Id.* ¶ 317.

¹⁵ *Community Television, Inc. v. FCC*, 216 F.3d 1133, 1140 (D.C. Cir. 2000).

¹⁶ *Cellco Partnership v. FCC*, 700 F.3d 534, 544 (2012) (upholding the imposition of a data roaming rule on a licensee as a permissible modification to an existing license under Section 316).

¹⁷ Petition at 7-8.

¹⁸ Fixed and Mobile Services in the Mobile Satellite Services Bands at 1525-1559 MHz and 1626.5-1660.5 MHz, 1610-1626.5 MHz and 2483.5-2500 MHz, and 2000-2020 MHz and 2180-2200 MHz, *Report and Order*, ET Docket No. 10-142, 26 FCC Rcd. 5710 (2011) (“*Co-Allocation Order*”).

introduced this argument for the first time in the AWS-4 proceeding. In the *AWS-4 Order*, the Commission was correct to dismiss NTCH's request as an untimely petition for reconsideration of the *Co-Allocation Order*.¹⁹ NTCH cannot show either that the earlier substantive examination of the issue was erroneous or that the Commission's dismissal of NTCH's attempt at re-litigation was improper.

In addition, prohibiting MSS in the 2 GHz band would deprive the public of benefits of MSS. As the Commission has already concluded, MSS can serve (or fill gaps in serving) important needs, such as rural access and disaster recovery, and can contribute to serving the needs of the transportation, petroleum, and many other industries.²⁰ NTCH's request, therefore, would disserve the public interest.

V. CONCLUSION

For the foregoing reasons, the Commission should dismiss or deny NTCH's Petition.

Respectfully submitted,

/s/

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November 13, 2013

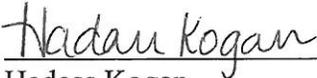
¹⁹ See *AWS-4 Order* ¶ 180, FN 532.

²⁰ See *Co-Allocation Order* ¶ 4.

CERTIFICATE OF SERVICE

I hereby certify that, on this 13th day of November 2013, a copy of the foregoing Opposition to NTCH's Petition for Reconsideration was filed electronically with the Commission by using the ECFS system and that a copy of the foregoing was served upon the following by Federal Express and electronic mail:

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