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

NTCH's Reply to Opposition

NTCH, Inc. (NTCH) submits this brief reply to DISH's Opposition. As will appear, DISH misleadingly and deliberately mischaracterizes the pertinent procedural rule governing petitions for reconsideration in rulemaking proceedings. It also ignores the fact that it *itself* raised the issue of whether a certain modification of its license pursuant to Section 316 would overstretch the boundaries of that section. That discussion necessarily called into question whether the modification that the Commission did decide on was similarly flawed. Substantively, DISH does not bother to address the plethora of factors cited by NTCH which place the license modification here squarely outside the realm of permissible non-"fundamental" mods. Finally, DISH misapprehends NTCH's proposal to limit use of the AWA-4 band to terrestrial applications. As NTCH explained, it is fine to have the allocation in part 2 remain co-primary, as long as the service rules limit it to terrestrial use. This is no different than the

situation that existed during the period when the spectrum had a co-primary satellite/terrestrial allocation but its use was limited to satellite.

I. NTCH's Petition was Procedurally Proper

DISH objects that NTCH's petition is procedurally defective because it relied on an argument not previously raised. To support it position, DISH blatantly mis-states the text of Section 1. 429(b). At footnote 5 of its Opposition, DISH cites the rule, then characterizes it as providing: "A petition for reconsideration may rely on facts or arguments not previously raised only if (1) they 'relate to events which have occurred or circumstance which have changed since the last opportunity to prevent such matters to the Commission...'" The problem here is that DISH simply added words to the preamble of 429(b) that do not exist. The preamble to Section 429(b) actually says: "A petition for reconsideration which relies <u>on facts</u> which have not previously been presented to the Commission will granted only under the following circumstances:..." (Emph. added) The rule only limits the introduction of new *facts*; it imposes no prohibition or limitation on new *arguments*. While being careful not to put its self-serving addition to the rule within the quotation marks, DISH clearly and reprehensibly tried to mislead the Commission as to what the rule proscribes.

Moreover, DISH's modification to the rule makes no sense. Not only does the Commission routinely consider new arguments in rulemaking proceedings, but its policies specifically discourage the "rehashing" of old arguments that have previously been presented. *Heidi Damsky*, 13 FCC Rcd 16352 (1998) ("We will not grant reconsideration merely to rehash points upon which we have already deliberated and spoken."); *Alden Communications Corp., 59 RR2d 1328 (1986)* ("[R]econsideration will not be granted in order to rehash matters previously addressed and resolved."); *Revocation of License of Donald E. Gilbeau*, 91 FCC 2d 1191 (1982)

("[I]t is well settled that reconsideration will not be granted merely to rehash matters already treated and resolved.") DISH's position would limit petitioners to doing nothing but rehashing old arguments, which would seem to serve no one's purposes.

Finally, DISH's itself raised the issue of the limits on Section 316 in connection with its opposition to the plan to remove satellite use of the band. Since the Commission itself had given some consideration to the matter, it was appropriate to raise the issue of whether the limits on license modification highlighted by DISH applied equally to the modification which was ultimately adopted.

II. The Modification to DISH's Licenses is Impermissibly Fundamental

All parties agree that the Commission is not granted unlimited discretion under Section 316 to "modify" a license. The courts have consistently held that "modify" or "modification" in the context of the Communications Act means a change which is "moderate" or not "fundamental." However, in assessing its Section 316 authority in the *AWS-4 Order*,[1] the Commission took a much broader view:

> Section 316 grants the Commission authority to modify a license if the modification promotes "the public interest, convenience, and necessity."[2] The D.C. Circuit has explained the authority granted by Section 316 to be a "broad power to modify licenses; the Commission need only find that the proposed modification serve the public interest, convenience and necessity."[3]

AWS-4 Order at Para. 172. The language cited by the Commission from *California Metro Mobile Communications* is correct, but the Court in *CMMC* was not presented with a case in

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[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 27 FCC Rcd. 16102 (2012) (*AWS-4 Order*).

[2] 47 U.S.C. § 316(a)(1).

[3] *California Metro Mobile Communications v. FCC*, 365 F.3d 38, 45-46 (D.C. Cir 2004) (*CMMC*) (determining that the Commission had acted within its authority and that its license modification served the public interest, even though the analysis on which the Commission based its decision showed potential rather than actual interference).

which the degree of modification of a license was in issue. Where courts have directly faced that issue, as noted by NTCH in its original petition, they have always acknowledged that the modification cannot be a fundamental one. In other words, not only must the Commission find that a proposed modification will serve the public interest, but it must *also* not be a fundamental change in the nature of the license. It does not appear that the Commission considered this important limitation on its authority. NTCH's petition affords it the opportunity to do so here.

NTCH cited a host of factors demonstrating that the modification of DISH's licenses is a radical change, not the least of which are the facts that the new service has been relocated to an entirely different Part of the Code of Federal Regulations outside of the satellite Part, it has been given a new name which no longer references satellite service at all, and licensees are no longer required to offer satellite service at all. The FCC itself obviously no longer conceptualizes the AWS-4 band as a satellite service; it is that conversion to a primarily -- or entirely -- terrestrial-based service that constitutes the "fundamental" change which Section 316 does not allow. None of the other examples cited by the Commission of Section 316 license modification even approach the scope and scale of the change effectuated here.

III. NTCH is Not Seeking Re-Allocation

Despite NTCH's clarification of its intent, DISH repeats the argument that NTCH is seeking to change the allocation of the S Band in Part 2 from Co-Primary Satellite and Terrestrial to Terrestrial only. There is no need to change the allocation in Part 2, nor does NTCH seek such a reallocation. Rather, NTCH believes that the Commission can and should simply limit operations in the band to terrestrial despite the co-primary allocation. This would eliminate the Commission's concern that terrestrial operations cannot co-exist with satellite operations by different licensees in the same band.

There is no requirement that spectrum bands which have been allocated to multiple purposes must actually be used for all such purposes. The allocations table shows many allocations where some or all of the permissible uses are not allowed under the pertinent rules governing the spectrum. The best example here is the S Band itself. The table of U.S. allocations was revised in 2011 to permit both satellite and terrestrial operations on a co-primary basis. But as the Commission noted at the time,

> "the addition of Fixed and Mobile allocations to the 2 GHz MSS band is merely a first step toward providing flexibility to allow greater use of the band for mobile broadband. The existing service rules that permit MSS and ATC operation in the band will not be altered solely by the addition of Fixed and Mobile allocations to the band."[4]

The service rules applicable to the band did not until this year permit terrestrial operations on anything other than an ancillary basis. In other words, the allocation table was broader than the accompanying service rules since only satellite operations were permitted. By the same token, now the service rules would be revised to permit only *terrestrial* operations, despite the broader allocation in Part 2. There is no need to re-visit the allocation table and hence no problem with an untimely petition for reconsideration.

Of course, NTCH proposed that this change in authorized use should only occur in conjunction with DISH's voluntary agreement with the process, an agreement which would provide certain benefits to DISH while opening the band to new entrants who would bid on it via an open auction. Absent DISH's consent, the DISH licenses should stay exactly as they are, with no conversion to terrestrial use.

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[4] *Fixed and Mobile Services in the Mobile Satellite Services Bands at 1525-1559 MHz and 1626.5-1660.5, 1610-1626.5 MHz and 2483.5-2500 and 2000-2020 MHz and 2180-2200 MHz, Report and Order*, 26 FCC Rcd. 5710 , Paragraph 10 (2011)

IV. Conclusion

NTCH's petition should be granted, the Commission should rescind the modification of DISH's licenses, and the Commission should open the AWS-4 band to new entrants on a free and non-discriminatory basis.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Michelle Brown Johnson, do hereby attest that the foregoing Reply to Opposition was sent by first class mail, postage pre-paid on this 27th day of November, 2013 to:

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