

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of
Service Rules for Advanced Wireless Services in
the 2000-2020 MHz and 2180-2200 MHz Bands
Fixed and Mobile Services in the Mobile 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 in
the 1915-1920 MHz, 1995-2000 MHz, 2020-2025
MHz and 2175-2180 MHz Bands

WT Docket No. 12-70

ET Docket No. 10-142

WT Docket No. 04-356

ORDER ON RECONSIDERATION

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By the Commission:

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I. INTRODUCTION

1. In this Order, we dismiss, or in the alternative deny, two petitions for reconsideration filed by NTCH, Inc. (NTCH).¹ The first asks us to reconsider the AWS-4 Report and Order,² and the second asks

¹ NTCH, Inc., Petition for Reconsideration, WT Docket Nos. 12-70, 04-356, ET Docket No. 10-142 (filed Mar. 7, 2013) (Petition for Reconsideration of the AWS-4 Report and Order); NTCH, Inc., Petition for Reconsideration, WT Docket Nos. 12-70, 04-356, ET Docket No. 10-142 (filed Mar. 18, 2013) (Petition for Reconsideration of the AWS-4 Order of Modification).

² Service Rules for Advanced Wireless Services in the 2000-2020 MHz and 2180-2200 MHz Bands et al., WT Docket No. 12-70 et al., Report and Order and Order of Proposed Modification, 27 FCC Rcd 16102 (2012) (AWS-4 Report and Order).

us to reconsider the *AWS-4 Order of Modification*.³ Both petitions rely on the same two arguments. First, NTCH asserts that the Commission lacks the authority to change the 2 GHz licenses as it has done here because the changes were more than modifications and effectuated a “fundamental” change in such licenses.⁴ Second, NTCH argues that in conjunction with its decision to use the Part 27 flexible-use framework to license the 2 GHz band (specifically, the 2000-2020 MHz and 2180-2200 MHz bands, also known as “AWS-4” or the “AWS-4 band”), the Commission should have eliminated from its service rules the authority to use this spectrum band for Mobile Satellite Service (MSS).⁵ We dismiss NTCH’s petitions because NTCH has failed to show that it has met the threshold requirements to justify Commission reconsideration. In any event, as a separate and independent ground for rejecting the petitions, we deny them on the merits.

II. BACKGROUND

2. In 2011, the Commission added co-primary Fixed and Mobile terrestrial allocations to the 2 GHz band.⁶ This action, which built upon a recommendation in the Commission’s National Broadband Plan,⁷ was intended to “lay the groundwork for more flexible use of the band, including for terrestrial broadband services, in the future.”⁸

3. In the March 2012 *Notice of Proposed Rulemaking* in these dockets, the Commission cited three reasons for proposing, as a general matter, that AWS-4 spectrum in the 2 GHz band be assigned to the incumbent MSS licensees.⁹ First, the complexities of coordination between MSS and terrestrial uses—which had led the Commission in 2003 to limit terrestrial use of the band to an ancillary terrestrial component (ATC) of the licenses held by the MSS incumbents¹⁰—suggested that assignment of terrestrial

³ Service Rules for Advanced Wireless Services in the 2000-2020 MHz and 2180-2200 MHz Bands et al., *Order of Modification*, 28 FCC Rcd 1276 (Sat. Div., IB and Broadband Div., WTB 2013) (*AWS-4 Order of Modification*). Pursuant to Section 1.106(a)(1) of the Commission’s rules, 47 CFR § 1.106(a)(1), the Petition for Reconsideration of the *AWS-4 Order of Modification* is being referred to the Commission because it involves implementation of the *Order of Proposed Modification* included in the *AWS-4 Report and Order* that is the subject of NTCH’s first Petition for Reconsideration, which is addressed to the Commission, and as noted below incorporates by reference the arguments in that first Petition.

⁴ Petition for Reconsideration of the *AWS-4 Report and Order* at 4-7; Petition for Reconsideration of the *AWS-4 Order of Modification* at 2-3.

⁵ Petition for Reconsideration of the *AWS-4 Report and Order* at 7-8; Petition for Reconsideration of the *AWS-4 Order of Modification* at 2-3.

⁶ Fixed and Mobile Services in the Mobile 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, ET Docket No. 10-142, *Report and Order*, 26 FCC Rcd 5710, 5714, para. 8 (2011) (*2 GHz Band Co-Allocation Order*). MSS is a radiocommunications service involving transmission between mobile earth stations and one or more space stations. See 47 CFR § 2.1(c).

⁷ Connecting America: The National Broadband Plan, Recommendation 5.8.4, p. 87 (2010), cited in *2 GHz Band Co-Allocation Order*, 26 FCC Rcd at 5710, paras. 1-2.

⁸ *2 GHz Band Co-Allocation Order*, 26 FCC Rcd at 5710, para. 2.

⁹ Service Rules for Advanced Wireless Services in the 2000-2020 MHz and 2180-2200 MHz Bands et al., *Notice of Proposed Rulemaking and Notice of Inquiry*, 27 FCC Rcd 3561, 3583-84, paras. 69-71 (2012) (*AWS-4 NPRM*).

¹⁰ See Flexibility for Delivery of Communications by Mobile Satellite Service Providers in the 2 GHz Band, the L-Band, and the 1.6/2.4 GHz Bands et al., *Report and Order and Notice of Proposed Rulemaking*, 18 FCC Rcd 1962, 1965, para. 2 (2003) (*ATC Report and Order*) (“Specifically, based on the record and our detailed technical analyses, we find that granting shared usage of the same MSS frequency band to separate MSS and terrestrial operators would likely compromise the effectiveness of both systems . . .”). As the Commission concluded, “The

licenses to an entity other than the incumbent MSS licensee remained impractical.¹¹ Second, interference problems associated with having separate terrestrial licensees in the same band pointed to assigning the AWS-4 licenses to the incumbent MSS licensees.¹² Third, this approach would not diminish the MSS licensees' existing ability to provide terrestrial service in the band.¹³

4. The Commission cited similar reasons to support its proposal to take the associated, more specific step of issuing an Order of Proposed Modification to initiate the Section 316 process for modifying the current 2 GHz licenses to grant terrestrial authority pursuant to new AWS-4 service rules.¹⁴ In making this proposal, the Commission noted its earlier conclusion that separately controlled MSS and terrestrial operations in the same 2 GHz band would be “impractical and ill-advised” because of the technical hurdles to a workable sharing arrangement.¹⁵ The Commission also observed that modifying the existing 2 GHz licensees' authority—which already included ATC authority¹⁶—would enhance their ability to offer high-quality, affordable terrestrial wireless broadband services.¹⁷

5. In its later *AWS-4 Report and Order*, the Commission established the AWS-4 service rules and, citing its “broad power” with respect to license modifications under Section 316, adopted the foregoing proposals.¹⁸ The *AWS-4 Report and Order* thus included an *Order of Proposed Modification*, proposing to modify the 2 GHz licenses held by two DISH Network Corp. (DISH) subsidiaries, consistent with the Commission's general decision to authorize incumbent 2 GHz licensees to provide AWS-4 service under their 2 GHz licenses.¹⁹ Based on the record, the *AWS-4 Report and Order* reaffirmed the Commission's earlier technical findings regarding the impracticability of same-band, separate-operator sharing, and thus declined to assign AWS-4 terrestrial rights through a system of competitive bidding, as proposed by NTCH.²⁰ The Commission also concluded that this 2 GHz license modification approach would best serve the public interest, as this appeared to be the best and fastest method for bringing this spectrum into full use, in the context of growing demand for wireless broadband services.²¹

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record demonstrates that sharing between MSS and terrestrial mobile services is neither advisable, nor practical.” *Id.*, 18 FCC Rcd at 1999, para. 65.

¹¹ *AWS-4 NPRM*, 27 FCC Rcd at 3584, para. 71.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.* at 3585, para. 75 (proposing 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”); *see also* 47 U.S.C. § 316.

¹⁵ *AWS-4 NPRM*, 27 FCC Rcd at 3583, para. 69 (internal quotation marks omitted).

¹⁶ *See ATC Report and Order*, 18 FCC Rcd at 1964, para. 1.

¹⁷ *AWS-4 NPRM*, 27 FCC Rcd at 3586, para. 78.

¹⁸ *AWS-4 Report and Order*, 27 FCC Rcd at 16167, para. 172 (2012) (quoting *Cal. Metro Mobile Commc'ns, Inc. v. FCC*, 365 F.3d 38, 45-46 (D.C. Cir. 2004)); *id.* at 16167-73, 16220-22, paras. 169-86, 319-22.

¹⁹ *Id.* at 16220-22, paras. 319-22.

²⁰ *Id.* at 16167-69, 16171-72, paras. 169-71, 180-83.

²¹ *Id.* at 16169-70, paras. 177-78.

6. DISH (through its wholly-owned subsidiaries) is the sole holder of the 2 GHz licenses,²² which it acquired in 2012.²³ As noted above, in the *Order of Proposed Modification*, the Commission proposed to modify DISH's 2 GHz licenses to include the AWS-4 authorizations.²⁴ On January 22, 2013, DISH accepted the proposed license modifications.²⁵ On February 15, 2013, the Wireless Telecommunications Bureau and the International Bureau issued an order to modify DISH's 2 GHz licenses by adding an authorization to provide AWS-4 service.²⁶ On March 7, 2013, the license modifications took effect, and the Wireless Telecommunications Bureau issued DISH these modified licenses.

7. On March 7, 2013, NTCH filed a Petition for Reconsideration of the *AWS-4 Report and Order*.²⁷ This petition first argued that the Commission had exceeded its authority under Section 316 of the Communications Act because the proposed license modifications constituted a “fundamental change” rather than a “moderate change” to the DISH licenses.²⁸ NTCH listed a number of indicia purporting to show that DISH's 2 GHz licenses were radically or fundamentally changed, including: (1) the renaming of the service to “AWS-4”; (2) the relocation of the applicable rules from Part 25 to Part 27; (3) the differences between the Part 25 and Part 27 technical rules; and (4) the effect that the *AWS-4 Report and Order* had on the value of the AWS-4 licenses.²⁹ Second, the petition argued that the *AWS-4 Report and Order* could have avoided the technical problems posed by satellite and terrestrial operations in the same band by “adopt[ing] changes to the underlying service rules” to foreclose satellite use.³⁰ NTCH argued that the Commission “cursorily dismissed this proposal in a footnote [by] saying that this suggestion was, in effect, an untimely request for reconsideration of the [decision in the] *2 GHz Band Co-Allocation Report and Order*” to adopt a co-primary allocation of the band for satellite and commercial use.³¹ NTCH concedes that the argument it made in the AWS-4 proceeding before the Commission issued the *AWS-4 Report and Order* “was perhaps confusing,” but it sought to “clarify” that it was asking the Commission to use the service rules to limit the band to terrestrial service, rather than asking the Commission to alter the co-primary allocation previously adopted in the *2 GHz Band Co-Allocation Report and Order*.³²

8. On March 18, 2013, NTCH filed a separate Petition for Reconsideration—this one seeking reconsideration of the *AWS-4 Order of Modification*.³³ This second petition incorporated by reference the

²² The 2 GHz licenses are held by DISH subsidiaries Gamma Acquisitions L.L.C. (MSS call sign E060430, AWS-4 call signs T060430001 through T060430176) and New DBSD Satellite Services G.P. (MSS call sign E070272, AWS-4 call signs T070272001 through T070272176). For convenience, we refer to these subsidiaries collectively as DISH.

²³ 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, *Order*, 27 FCC Rcd 2250, 2250-51, 2262, paras. 1, 31 (IB 2012).

²⁴ *AWS-4 Report and Order*, 27 FCC Rcd at 16164-73, 16220-22, 16224, paras. 161-86, 319-22, 331-32.

²⁵ Letter from Jeffrey H. Blum, Senior Vice President & Deputy General Counsel, DISH, to Marlene H. Dortch, Sec’y, Federal Communications Commission, WT Docket No. 12-70 et al., at 1 (filed Jan. 22, 2013).

²⁶ *AWS-4 Order of Modification*, 28 FCC Rcd at 1278, paras. 6-10.

²⁷ Petition for Reconsideration of the *AWS-4 Report and Order*.

²⁸ *Id.* at 3, 4-7.

²⁹ *Id.* at 6-7.

³⁰ *Id.* at 8; *accord id.* at 3-4, 7-8.

³¹ *Id.* at 7-8.

³² *Id.* at 8.

³³ Petition for Reconsideration of the *AWS-4 Order of Modification*.

arguments in the first petition.³⁴ “[F]iled in an abundance of caution,” the second petition states that it is intended “to ensure that the Commission retains the right to reverse the [license] modifications consistent with its resolution of the issues presented in” this docket.³⁵

9. On March 28, 2013, DISH filed an opposition to NTCH’s second petition for reconsideration (from the *AWS-4 Order of Modification*).³⁶ DISH argued, as a threshold matter, that NTCH lacked standing to seek reconsideration of the *AWS-4 Order of Modification*. Noting that NTCH had admitted that it had no standing under Section 316 to protest the proposed modification, DISH asserted that NTCH could not then assert standing to seek reconsideration of the order issued pursuant thereto. In addition, DISH argued that a stated desire to bid on licenses for a service where no auction has even been proposed “appears too remote and speculative to confer standing in this case.”³⁷ DISH responded to NTCH’s Section 316 argument by noting the Commission’s repeated exercise of Section 316 authority to eliminate harmful interference³⁸ and arguing that its Section 316 modification “is for the same spectrum and the same services (MSS and terrestrial wireless) that it has now.”³⁹ It noted that the Commission had appropriately rejected NTCH’s argument for eliminating MSS use of the 2 GHz band as amounting to an untimely petition for reconsideration of the Commission’s earlier allocation order.⁴⁰ DISH also argued that adopting AWS-4 service rules limiting the use of the spectrum to terrestrial use “would deprive the public of benefits of MSS,” including rural services and disaster recovery.⁴¹ Finally, DISH argued that NTCH’s request for rescission of the license modifications pending final resolution of its petition for reconsideration of the *AWS-4 Report and Order* amounted to a request for stay for which no appropriate showing had been made.⁴²

10. On November 13, 2013, DISH also filed an opposition to NTCH’s first petition for reconsideration (from the *AWS-4 Report and Order*), which incorporated by reference DISH’s previous opposition.⁴³ In the context of the petition for reconsideration of the rulemaking order, DISH maintained that NTCH’s Section 316 argument failed to satisfy Section 1.429(b) of the Commission’s rules, under which a party may not raise new facts or arguments in a petition for reconsideration unless it shows that the facts have changed, the issues were unknown to that party, or consideration of the facts or arguments is required by the public interest.⁴⁴

11. Also on November 27, 2013, NTCH filed a reply to DISH’s November 13, 2013 opposition. It asserted, among other things, that Section 1.429(b) of the Commission’s rules applies only to new facts,

³⁴ *Id.* at 2-3.

³⁵ *Id.* at 3.

³⁶ DISH Network Corp., Opposition to NTCH Petition for Reconsideration [of the *AWS-4 Order of Modification*] (filed Mar. 28, 2013). NTCH’s first petition, with respect to the *AWS-4 Report and Order*, was placed on public notice on September 24, 2013. See Petition for Reconsideration of Action in Rulemaking Proceeding, WT Docket No. 12-70 et al., *Public Notice*, 2013 WL 5348458, at *1 (CGB Sept. 24, 2013). As noted below, DISH also thereafter filed a separate opposition to that petition. DISH Network Corp., Opposition to NTCH’s Petition for Reconsideration [of the *AWS-4 Report and Order*] (filed Nov. 13, 2013).

³⁷ Opposition to NTCH Petition for Reconsideration [of the *AWS-4 Order of Modification*] at 3.

³⁸ *Id.* at 4.

³⁹ *Id.* at 5.

⁴⁰ *Id.* at 6-7.

⁴¹ *Id.* at 7.

⁴² *Id.* at 7-8.

⁴³ Opposition to NTCH’s Petition for Reconsideration [of the *AWS-4 Report and Order*] at 1 n.1.

⁴⁴ *Id.* at 3-4 (citing 47 CFR § 1.429(b)).

not new arguments.⁴⁵ NTCH also claimed that DISH's invocation of the limits of Section 316 to oppose NTCH's proposal to remove satellite use of the band made it appropriate to seek reconsideration of the determination to add terrestrial use of the band.⁴⁶ Finally, NTCH noted that its proposal to limit operations in this band to terrestrial was conditioned on "DISH's voluntary agreement with the process," absent which "the DISH licenses should stay exactly as they are, with no conversion to terrestrial use."⁴⁷ On December 11, 2013, DISH submitted an *ex parte* filing that quoted the current version of Section 1.429(b) of the Commission's rules, which states that the limitations in that section apply to new facts *and* new arguments.⁴⁸

III. DISCUSSION

12. We resolve NTCH's petitions for reconsideration pursuant to Sections 1.106 and 1.429 of the Commission's rules.⁴⁹ The petition for reconsideration of the *AWS-4 Report and Order*, which involves rulemaking, is governed by Section 1.429, while the petition for reconsideration of the *AWS-4 Order of Modification* is governed by Section 1.106.

13. Both rules bar grant of petitions for reconsideration that rely on facts *or arguments* not previously presented to the Commission, unless: (1) they relate to events that have occurred or circumstances that have changed since the last opportunity to present such matters to the Commission; (2) they were unknown to petitioner until after the last opportunity to present them to the Commission, and petitioner could not, through the exercise of ordinary diligence, have learned of the facts or arguments in question before such opportunity; or (3) the Commission determines that consideration of the facts or arguments relied on is required in the public interest.⁵⁰

A. NTCH's First Petition for Reconsideration

1. Section 316 License Modification

14. We first address NTCH's argument that the Commission's decision to propose a modification of the 2 GHz licenses pursuant to Section 316 of the Communications Act constituted a "fundamental" rather than a "moderate" change in the licenses and therefore exceeded the scope of our authority.⁵¹ We reject this claim on two alternative and independent grounds.

15. First, NTCH's argument fails to satisfy Section 1.429(b). NTCH does not dispute that it failed to raise this argument prior to the *AWS-4 Report and Order*,⁵² and it has done nothing to show that it satisfies the standard in Section 1.429(b).⁵³ NTCH's argument that DISH had "raised the issue of the

⁴⁵ NTCH's Reply to Opposition at 2 (filed Nov. 27, 2013) (NTCH Reply).

⁴⁶ *Id.* at 3.

⁴⁷ *Id.* at 5.

⁴⁸ Letter from Jeffrey H. Blum, Senior Vice President & Deputy General Counsel, DISH, to Marlene H. Dortch, Sec'y, Federal Communications Commission, WT Docket No. 12-70 et al., at 1-2 (filed Dec. 11, 2013).

⁴⁹ 47 CFR §§ 1.106, 1.429.

⁵⁰ 47 CFR §§ 1.106(c), 1.429(b); *see* Amendment of Certain of the Commission's Part 1 Rules of Practice and Procedure and Part 0 Rules of Commission Organization, *Report and Order*, 26 FCC Rcd 1594, 1627-28, 1634-35 (2011).

⁵¹ Petition for Reconsideration of the *AWS-4 Report and Order* at 4-7.

⁵² NTCH Reply at 2-3.

⁵³ NTCH Reply at 2-3; Petition for Reconsideration of the *AWS-4 Report and Order* at 4-7. This standard prohibits the raising of new facts or arguments unless they relate to changed circumstances or were previously unknown

limits on Section 316” during the rulemaking is of no avail because DISH was addressing a very different issue than the one NTCH raised on reconsideration, notwithstanding that both involve Section 316.⁵⁴ Specifically, DISH had argued that Section 316 did not provide the Commission with authority to eliminate a satellite allocation altogether and thereby prohibit the MSS licensees from providing any MSS service,⁵⁵ while NTCH is arguing that the Commission’s supplementation of the MSS licensees’ existing ATC authority with rights and obligations under the new AWS-4 service rules is such a substantial change of license that it no longer constitutes a mere license modification under Section 316.⁵⁶ These two arguments relate to very different proposals—the first to *deprive* MSS licensees of a satellite allocation, and the second to *add* to their existing terrestrial rights. We do not consider these two arguments sufficiently related to conclude that the presentation of DISH’s argument had given the Commission a reasonable opportunity to address the argument NTCH later raised on reconsideration. The purpose of Section 1.429’s requirements is to ensure that commenters raise arguments so that the Commission can address them during the course of the rulemaking.⁵⁷ NTCH’s failure to do so clearly frustrates that goal, and pursuant to our well-established policy, we have determined that consideration of the issue on reconsideration is not in the public interest. Accordingly, this argument is dismissed.⁵⁸

16. Second, we reject on the merits NTCH’s claim that the Commission exceeded its Section 316 authority by adding full terrestrial rights to the existing MSS licenses.⁵⁹ The Commission has authority to change a license under Section 316 so long as it is not undertaking a “fundamental” or “radical” change to the license.⁶⁰ The change to the licenses in this case was neither fundamental nor radical. Both before and after the *AWS-4 Order of Modification*, the terms of DISH’s 2 GHz licenses allowed it to provide MSS service in the 2000-2020 MHz and 2180-2200 MHz bands.⁶¹ And both before and after the *AWS-4 Order of Modification*, the terms of DISH’s 2 GHz licenses allowed it to provide terrestrial service in the 2000-2020 MHz and 2180-2200 MHz bands. Specifically, before the license modification at issue, the 2 GHz licenses had already allowed DISH to exercise terrestrial authority under the ATC rules.⁶² Thus,

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notwithstanding the exercise of ordinary diligence, or the Commission determines that consideration of the new facts or arguments is required in the public interest. 47 CFR § 1.429(b).

⁵⁴ NTCH Reply at 3.

⁵⁵ DISH Reply Comments at 18-20 (filed June 1, 2012).

⁵⁶ Petition for Reconsideration of the *AWS-4 Report and Order* at 4-7.

⁵⁷ 47 CFR § 1.429(b). *See, e.g.*, Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions, *Order on Reconsideration*, 31 FCC Rcd 1367, 1372, para. 10 (2016); Petition of USTelecom for Forbearance, *Order Denying Petition for Reconsideration*, 32 FCC Rcd 3885, 3886-87, paras. 5-8 (WCB 2017).

⁵⁸ *See, e.g., WLIL, Inc. v. FCC*, 352 F.2d 722, 725 (D.C. Cir. 1965) (“[W]e cannot allow the appellant to sit back and hope that a decision will be in its favor, and then, when it isn’t, to parry with an offer of more evidence. No judging process in any branch of government could operate efficiently or accurately if such a procedure were allowed.”) (internal quotation marks omitted); Amendment of Section 73.202(b), FM Table of Allotments, FM Broadcast Stations (Banks, Redmond, Sunriver and Corvallis, Oregon), *Memorandum Opinion and Order*, 19 FCC Rcd 10068, 10075, para. 20 (2004) (same).

⁵⁹ Petition for Reconsideration of the *AWS-4 Report and Order* at 4-7. *See generally AWS-4 Report and Order*, 27 FCC Rcd 16102.

⁶⁰ *Cellco P’ship v. FCC*, 700 F.3d 534, 543-44 (D.C. Cir. 2012); *see also Cmty. Television, Inc. v. FCC*, 216 F.3d 1133, 1141 (D.C. Cir. 2000).

⁶¹ *AWS-4 Order of Modification*, 28 FCC Rcd at 1277-78, paras. 2-5, 7-10.

⁶² *Id.*; *see also* 47 CFR pt. 25 (satellite communications rules, which contain the ancillary terrestrial component rules). The *ATC Report and Order* adopted specific application, service, and technical rules governing the provision

modifying the 2 GHz licenses to allow full-flexible use under the Part 27 AWS rules was merely a modification to, and an extension of, the terrestrial authority already granted to DISH as a 2 GHz licensee. As in *Community Television*, MSS licensees “will provide essentially the same services”⁶³—here, the services that they were already authorized to provide pursuant to ATC authority. The operating parameters applicable to DISH under Part 27 generally align with those to which it was previously subject under Part 25.⁶⁴ Furthermore, the Commission recognized in the *AWS-4 Report and Order* that it has ample authority under Section 316 to modify such parameters applicable to a provider’s licensed operations.⁶⁵

17. NTCH’s reliance on *MCI Telecommunications Corp. v. AT&T*,⁶⁶ a case in which the Supreme Court interpreted the Commission’s authority to “modify” filed tariffs under Section 203, is misplaced.⁶⁷ In that case, the Court held that the Commission’s authority to “modify any requirement” of a tariff did not provide it with authority to “do away with tariffs altogether.”⁶⁸ Modifying the terms of the terrestrial authority that is already a part of licensees’ existing MSS authority does not “do away with” anything (ironically, NTCH’s argument that we do away with the MSS authority contained in that license is more likely to violate that statutory provision—although we need not decide that issue here). As the Court further explained in *MCI*, the Commission’s decision to exempt non-dominant carriers from filing tariffs reversed Congress’s determination as to whether an entire industry would be rate regulated.⁶⁹ In contrast, the Commission’s modification to the terms of licenses already held by an operator to give that same operator additional authority to provide terrestrial services, for which it already held ancillary authority, can hardly be considered an attempt to reverse an entire statutory regime.

18. NTCH also suggests that the Commission’s failure to offer a “fair opportunity to [DISH’s] potential competitors to acquire . . . new or re-purposed spectrum . . . is contrary to established Congressional and Commission policy,” and that such spectrum “must be made available” for auction as an “initial license.”⁷⁰ As a threshold matter, as noted above, the Commission in this case did not issue any

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of ATC service by MSS licensees. *ATC Report and Order*, 18 FCC Rcd at 1999-2030, 2109-10 (adopting 47 CFR § 25.252).

⁶³ *Cnty. Television, Inc.*, 216 F.3d at 1141.

⁶⁴ *AWS-4 Report and Order*, 27 FCC Rcd at 16123-24, para. 54. For example, the interference protection to the broadband Personal Communications Service (PCS) downlink band at 1930-1995 MHz remains $70 + 10 \log_{10}(P)$ dB. *AWS-4 Report and Order*, 27 FCC Rcd at 16126-27, paras. 62-63. Similarly, the interference protection to the AWS-2 Lower J block (2020-2025 MHz) remains at $43 + 10 \log_{10}(P)$ dB. *AWS-4 Report and Order*, 27 FCC Rcd at 16146, paras. 101-02. The Commission also made adjustments to other technical rules such as adopting more restrictive power limits for AWS-4 mobile operations and modifying the out-of-band emissions that are permitted into the 1995-2000 MHz band. *AWS-4 Report and Order*, 27 FCC Rcd at 16133-35, 16157, paras. 74-79, 137.

⁶⁵ *AWS-4 Report and Order*, 27 FCC Rcd at 16167-68, paras. 172-73. See, e.g., *Cellco P’ship v. FCC*, 700 F.3d 534, 541-44 (D.C. Cir. 2012); *Cal. Metro Mobile Commc’ns, Inc. v. FCC*, 365 F.3d 38, 44-46 (D.C. Cir. 2004). See also *Celtronix Telemetry, Inc. v. FCC*, 272 F.3d 585, 589 (D.C. Cir. 2001) (“It is undisputed that the Commission always retained the power to alter the term of existing licenses by rulemaking.”).

⁶⁶ Petition for Reconsideration of the *AWS-4 Report and Order* at 4.

⁶⁷ See *MCI Telecomms. Corp. v. AT&T*, 512 U.S. 218, 224-34 (1994); see also 47 U.S.C. § 203(b)(2).

⁶⁸ *Cnty. Television, Inc.*, 216 F.3d at 1141 (citing *MCI Telecomms. Corp.*, 512 U.S. at 229); see also *Cellco*, 700 F.3d at 543-44.

⁶⁹ *MCI Telecomms. Corp.*, 512 U.S. at 229-32.

⁷⁰ Petition for Reconsideration of the *AWS-4 Report and Order* at 2 (citing *Fresno Mobile Radio, Inc. v. FCC*, 165 F.3d 965 (D.C. Cir. 1999)).

“initial licenses,” which is the prerequisite for any spectrum auction.⁷¹ Instead, it modified the ATC authority under the existing MSS licenses so as to be governed by the new AWS-4 band rules.⁷² In any event, however, NTCH’s argument gives short shrift to the Commission’s broad authority under the Communications Act to “consider the public interest in deciding whether to forgo an auction.”⁷³ In the *AWS-4 Report and Order*, the Commission agreed with the virtually unanimous views of commenters that MSS and terrestrial sharing of the same band by different operators likely would lead to harmful interference.⁷⁴ Accordingly, the Commission determined that modifying DISH’s licenses was the “most efficient and quickest path to enabling flexible terrestrial use of this band while ensuring compliance with the MSS protection rule.”⁷⁵ Nothing in the Commission’s auction authority under the Act or the use of competitive bidding “diminish[es] the authority of the Commission” under its broad Title III mandate “to regulate . . . spectrum licenses.”⁷⁶ Similarly, the Commission’s auction authority is not designed to relieve it of its obligations to ensure that its public interest evaluations take full consideration of all relevant considerations, including the potential use of “engineering solutions . . . , threshold qualifications, service regulations, and other means in order to avoid mutual exclusivity.”⁷⁷ That is what the Commission did here, in light of the record evidence of the difficulties of coordinating use of the same band by different terrestrial and MSS licensees.

2. Service Rules Limiting the AWS-4 Bands to Terrestrial Use

19. We turn now to the second half of NTCH’s Petition for Reconsideration of the *AWS-4 Report and Order*, which argues that the Commission should, even if it maintains the MSS co-primary allocation, adopt service rules that limit the use of the band to terrestrial operations.⁷⁸ According to NTCH, nothing in the *2 GHz Band Co-Allocation Report and Order* precluded the Commission from adopting service rules that limited the use of the AWS-4 bands (2000-2020 MHz and 2180-2200 MHz) to terrestrial use.⁷⁹ We reject this argument.

20. In its comments, NTCH characterized its argument as “*Dropping the Satellite Allocation*.”⁸⁰ NTCH stated that “[i]t is time to simply *let go of the satellite allocation* here and allow the spectrum to be

⁷¹ See 47 U.S.C. § 309(j)(1).

⁷² See, e.g., Call Sign T060430001.

⁷³ See *M2Z Networks, Inc. v. FCC*, 558 F.3d 554, 563 (D.C. Cir. 2009) (upholding the Commission’s determination to forgo an auction).

⁷⁴ *AWS-4 Report and Order*, 27 FCC Rcd at 16171, para. 180.

⁷⁵ *Id.* at 16164, para. 162. Notably, NTCH did not raise, nor do we decide here, whether DISH’s failure to meet its interim buildout requirements undermines this rationale for action. See Letter from Donald Stockdale, Chief, FCC Wireless Telecommunications Bureau, to Jeffrey Blum, Senior Vice President & Deputy General Counsel, DISH Network L.L.C. at 2 (July 9, 2018) (<https://docs.fcc.gov/public/attachments/DOC-352379A1.pdf>).

⁷⁶ 47 U.S.C. § 309(j)(6)(C). While *Fresno Mobile* found that the Act did not *foreclose* the Commission from auctioning new SMR licenses by establishing “a new licensing scheme,” 165 F.3d at 970-71, it did not *require* the Commission to establish such new licensing schemes under all circumstances, notwithstanding public interest factors disfavoring the adoption of such a scheme in a given case.

⁷⁷ 47 U.S.C. § 309 (j)(6)(E); see *id.* § 309(j)(1) (“If, consistent with the obligations described in paragraph (6)(E), mutually exclusive applications are accepted for any initial license or construction permit, then . . . the Commission shall grant the license or permit to a qualified applicant through a system of competitive bidding . . .”).

⁷⁸ Petition for Reconsideration of the *AWS-4 Report and Order* at 3-4, 7-8.

⁷⁹ *Id.*

⁸⁰ NTCH Comments at 8 (emphasis added).

put to its highest use unfettered by unnecessary interference considerations.”⁸¹ NTCH’s proposal that we make the AWS-4 bands terrestrial-only and eliminate DISH’s MSS rights was beyond the scope of the proceeding to establish service rules for AWS-4, and accordingly warrants dismissal on that basis.⁸² Notably, the issue of eliminating DISH’s MSS rights and making the band terrestrial-only was not only not raised in the *Notice of Proposed Rulemaking and Notice of Inquiry* in the AWS-4 proceeding, but it also ran directly counter to that proceeding’s direction (*i.e.*, whether or not to *expand* the authorized spectrum use).⁸³ Because the Commission “did not seek comment regarding changes” that would diminish DISH’s MSS rights or curtail in any way its existing terrestrial rights, NTCH’s proposal to limit licensed operations in this band to terrestrial service was “beyond the scope of the matters that can be addressed” in this proceeding.⁸⁴ Indeed, Commission action on NTCH’s proposal to eliminate MSS operations in the band would require that the Commission consider a host of significant questions that the underlying *Notice* neither raised nor suggested (expressly or implicitly), such as how best to accommodate the rights of existing MSS licensees, and what the impact on the public would be if MSS were no longer available to address the needs of rural access, disaster recovery and the like.⁸⁵ We do not believe it would be appropriate to resolve such questions without providing the public with an opportunity for comment.

B. NTCH’s Second Petition for Reconsideration

21. NTCH’s second petition for reconsideration challenges the *AWS-4 Order of Modification*. As noted above, because that order is not a rulemaking order, NTCH’s second petition is governed by Section 1.106 of the Commission’s rules.

22. NTCH characterizes its second petition as a pleading filed “in an abundance of caution,” which incorporates its first petition by reference.⁸⁶ We have rejected that first petition for the reasons set forth above and reject the second petition for the same reasons.⁸⁷

⁸¹ *Id.* at 9 (emphasis added).

⁸² See 47 CFR § 1.429(l)(5).

⁸³ See generally *AWS-4 NPRM*, 27 FCC Rcd 3561.

⁸⁴ *Creation of a Low Power Radio Service*, Sixth Order on Reconsideration, 28 FCC Rcd 14489, 14491, para. 7 (2013).

⁸⁵ See Opposition to NTCH’s Petition for Reconsideration of the *AWS-4 Report and Order* at 7; Opposition to NTCH Petition for Reconsideration of the *AWS-4 Order of Modification* at 7; DISH Reply Comments at 18-19.

⁸⁶ See *supra* para. 8.

⁸⁷ Accordingly, we need not address DISH’s arguments that NTCH has no standing under Section 405 of the Act to seek reconsideration of an order of modification under Section 316 that NTCH concedes it had no statutory right to protest.

IV. ORDERING CLAUSE

23. Accordingly, IT IS ORDERED that, pursuant to Sections 4(i) and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 405, and Sections 1.106 and 1.429(b) of the Commission's rules, 47 CFR §§ 1.106, 1.429(b), the petition for reconsideration filed by NTCH, Inc., on March 7, 2013, is DISMISSED, or alternatively DENIED, and that the petition for reconsideration filed by NTCH, Inc., on March 18, 2013 is DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary