Ex Parte

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street SW
Washington, DC 20554

Re: Expanding Flexible Use of the 3.7 to 4.2 GHz Band, Order and Notice of Proposed Rulemaking, GN Docket No. 18-122

Dear Ms. Dortch:

I am writing to share our views on the appropriate framework for allocating the costs and revenues in the anticipated public auction for up to 280 megahertz of C-band spectrum. Open Technology Institute (“OTT”) and our broad-based Public Interest Spectrum Coalition (“PISC”) have participated actively in this proceeding from its inception.\(^1\) We have steadfastly maintained that a private sale or auction would both violate Section 309(j) and set a counterproductive policy precedent that could make it exceedingly difficult in the future for the Commission to reorganize underutilized bands, or to authorize shared use (whether licensed and/or unlicensed), if incumbents could point to a precedent entitling them to a massive pay-off for what continues to be a publicly-owned asset.

While Chairman Pai’s very welcome decision to propose a public auction allays these concerns to a considerable degree, we believe that mandatory incentive payments imposed on new licensees would likewise represent a dangerous and regressive precedent that will constrain the Commission as it enters an era where spectrum abundance will require both reorganizing and sharing bands long occupied (and not fully utilized by) incumbent licensees. If the CBA is able to extort payments based on the future value of reallocated spectrum they are not using—and never paid for—every incumbent of an underutilized or outmoded band will use that precedent to

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fiercely resist band reorganization or sharing. The following summary points are supported further below:

- The Commission should concede, as it did prior to 2012 incentive auction legislation, that it needs to wait for Congress to clarify its authority and thereby ensure that C-band revenues flow to rural broadband deployments and Next Generation 9-1-1 infrastructure.

- The Commission has never required winning bidders to make “acceleration” or incentive payments.

- The Emerging Technologies framework is fundamentally voluntary and market-based – not mandatory and designed to usurp the role of Congress to appropriate federal spending.

- The one time the Commission adopted a framework similar to CBA’s proposal, Congress rejected it as “unjust enrichment,” enacted the Auction Reform Act of 2002, and canceled the 700 MHz auction. A few years later, the revised auction raised $20 billion – all of which went to the Treasury.

- The Commission has no general authority that supersedes the clear requirements of Section 309(j) and the clear Congressional intent expressed in 2002 and again in 2012.

- The Commission has no authority to use its licensing authority to mandate incentive payments, not based on cost or compensation for lost business, that will directly reduce public auction proceeds on a dollar-for-dollar basis. Congress has clearly told the Commission in Section 309(j) what circumstances warranted an auction featuring mandatory incentive payments to incumbents, and so has explicitly limited the Commission’s authority.

- As Eutelsat acknowledges, any ‘good faith’ incentive payments or compensation for lost business opportunity is properly based on the current-use value of C-band for FSS (at most $2 billion for all 500 megahertz) and not on the post-reallocation value of the spectrum for a different service by a different industry.

1. **The Commission has never required winning bidders to make incentive or “acceleration” or payments. The Emerging Technologies framework is voluntary and market-based.**

   The recent proposal by the C-Band Alliance is unprecedented and inconsistent with the Commission’s Emerging Technologies framework for reorganizing a band and allocating costs to new licensees. The Commission has never required winning bidders to make “acceleration” or

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other incentive payments beyond the actual costs of relocation. The Commission has repeatedly emphasized that although the payment of relocation costs can be a condition of an entrant’s new license, payments to incentivize incumbents to accelerate their relocation to comparable facilities is properly voluntary, market-based and determined by good faith bargaining among the parties. Winning bidders have never been forced to make an arbitrary Commission-set payment that, in the context of an auction, would inevitably reduce the return to the public on a dollar-for-dollar basis.

The closest the Commission has come to requiring winning bidders to make windfall “acceleration” payments to incumbents was the 700 MHz 3d Report & Order in 2001\(^3\) that Congress nullified by passing the Auction Reform Act of 2002.\(^4\) In that Order, the Commission emphasized that payments to induce incumbents to vacate their spectrum early would be determined by a market-based mechanism negotiated between the incumbent’s consortium (the Spectrum Clearing Alliance) and winning bidders. The Order stated: “We will rely on private secondary auctions and any other such voluntary, comprehensive band clearing arrangements among new 700 MHz licensees and incumbent broadcasters that would result in the voluntary early transition of this band to new services.”\(^5\)

In the 700 MHz band, as in C-band, the spectrum rights of incumbent local broadcast stations – for 6 megahertz within broadcast contours and DMAs – did not align with the wider channels and larger geographic areas contemplated for cellular broadband services. While the broadcast incumbents were organized into a consortium, concerns remained about whether the auction bidders could reach a consensus on the terms of their separate payments into the Spectrum Clearing Alliance incentive fund. Nevertheless, the Commission did not mandate or specify the incentive payments, leaving it to the parties and the market.

Even that voluntary, market-based approach went too far because the deadline for broadcast incumbents to give up their 700 MHz channel was six years distant. Capitalizing on this leverage, the clearing fund and terms designed by the Spectrum Clearing Alliance virtually guaranteed unjust enrichment that would directly reduce the return to the public. Congress recognized that the incumbents had hold-out power that would force the mobile carriers to agree to windfall incentive payments (reported to be as much as the winning auction bids) – payments that would reduce by half the auction proceeds flowing to the Treasury. The Auction Reform Act

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5 700 MHz 3d R&O, supra note 3, at ¶ 44.
of 2002 – signed by President George W. Bush on the day before the scheduled auction – canceled the auction and resulted in a revamped auction that generated $20 billion in public revenue, with not one cent in incentive payments for incumbent licensees, as Congress intended. This is discussed further below.

**The Emerging Technologies Framework: Voluntary and Negotiated Acceleration Payments**

In stark contrast to CBA’s proposal to mandate premium payments, the most apt precedent for C-band, upheld by the D.C. Circuit, is the version of the Emerging Technologies framework that the Commission applied when it subdivided the 18 GHz band. The Commission adopted a plan to migrate incumbent, co-primary Fixed Service links off the lower portion of the band and to authorize blanket geographic licenses for what satellite operators claimed would be “ubiquitous” broadband deployments that could not coexist with thousands of existing FS sites.

Under the Commission’s two-stage framework, during an initial two-year period the FS incumbents could demand a “premium” payment to accelerate relocation. The Commission required incumbents and satellite entrants to engage in “good faith” bargaining – and articulated a enforceable bargaining framework. Part of the enforceable “good faith” requirement was that the premium had to be proportionate to the cost of “comparable facilities” and not an arbitrary or unreasonable hold-out payment. If no agreement was reached within two years, satellite entrants could force the involuntary relocation of FS incumbents at any time (as needed), with satellite users required to pay actual costs for relocation up to ten years after the Order. After ten years any remaining FS incumbents were required to relocate without any cost reimbursement.

A satellite licensee, Teledesic LLC, challenged the Commission’s authority to condition its new licenses on an obligation to pay the full cost of “comparable facilities” for displaced FS incumbents, arguing that payments above book value are an unjustified windfall. The D.C. Circuit upheld the Commission’s decision, noting that the FCC’s “current approach to the relocation of incumbents is not new.” Notably, the court found that “rather than authorizing incumbents to demand inequitable windfalls, the rules explicitly forbid them from doing

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6 *Redesignation of the 17,7-19.7 GHz Frequency Band, Blanket Licensing of Satellite, etc.,* Report and Order, IB Docket No. 98-172 (rel. June 22, 2000), *upheld in Teledesic LLC v. FCC,* 275 F.3d 75, 86 (D.C. Cir. 2001) (upholding FCC authority to require satellite operators to pay relocation costs of FS incumbents moved to the upper portion of the heretofore co-primary 18 GHz band and to negotiate voluntary “premium” payments expedited relocation).

7 See 47 C.F.R. §101.89.

8 See 47 C.F.R. §101.89(b)(2). "Comparable facilities" were defined by the Commission in terms of throughput, reliability, and operating costs. See 47 C.F.R. §§101.89(d), 101.91(b).

9 Id. at ¶ 5.

10 *Teledesic LLC v. FCC,* 275 F.3d 75, 86 (D.C. Cir. 2001) (upholding FCC authority to require satellite operators to negotiate and pay the reasonable relocation costs of FS incumbents moved to the upper portion of the heretofore co-primary 18 GHz band).
The court further noted the Commission’s *Emerging Technologies Order* and other previous band reorganizations in which the *new* licensees were required to shoulder the costs when displaced incumbents were given “comparable facilities” aimed at ensuring no disruption of their ongoing business.\(^ \underline{12} \)

As Verizon correctly observes, the Commission “has used the Emerging Technologies framework for new entrants to clear spectrum for a variety of services, including PCS, 2 GHz MSS, AWS-1, AWS-3, AWS-4, 18 GHz FSS, and Enhanced SMR.”\(^ \underline{13} \) However, Verizon neglects to point out that the Commission has never mandated that new licensees make private windfalls to third parties – payments that inevitably reduce federal revenues on a dollar-for-dollar basis. When the Commission addressed similar opportunities to consolidate or relocate incumbents in an underutilized band, it likewise relied on a traditional auction (where needed) and required winning bidders or other entrants to assume the cost of relocating incumbents, but *only* to ensure “comparable facilities” on different frequencies.

Verizon also claims that OTI’s “contrived reading of the Act would prohibit bidders from paying incumbents to clear (including relocation costs), disregarding extensive *Emerging Technologies* precedent that such payments are lawful.”\(^ \underline{14} \) This is simply not true. Our reading of both the Act and two statutes (in 2002 and 2012) directly expressing Congressional intent on the role of incentives in Section 309(j) maintains that bidders can be authorized and encouraged to negotiate incentive payments (we cite precedents), but bidders cannot be *required* to make large and rather arbitrary incentive or “acceleration” payments to incumbents.\(^ \underline{15} \) Verizon’s filing just keeps repeating the many precedents for the Commission authorizing the voluntary and market-based negotiation of reasonable incentive or acceleration payments, while implying that this is

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\(^{11} \) *Ibid.* “A satellite company will presumably be less willing to pay to relocate an incumbent the longer the latter holds out as the sunset date approaches. These safeguards provide adequate protection against unreasonable negotiation tactics.”


\(^{14} \) *Verizon Jan. 24 Ex Parte* at 9.

\(^{15} \) *Ibid.*
somehow solid authority for billions of dollars in mandatory payments that reduces revenue to the Treasury on a dollar-for-dollar basis.16

**T-Mobile, AT&T and Verizon Proposals are Likewise Legally Infirm and Bad Precedent**

In contrast, the new version of the Emerging Technologies framework proposed by CBA and two national mobile carriers is not remotely consistent with the voluntary and market-based approach the Commission has applied in these situations over the past quarter century. For its part, T-Mobile proposes that the Commission require winning bidders to make “Relocation Payments [that] would also include an additional sum to incentivize these operators to accelerate the relocation process.”17 Verizon seems to concur, opining on reasons why the Commission should provide “upfront clarity on incentive payments.”18 The carrier proposes an approach with two components that imply the premium payments would be mandatory:

(1) a transparent way to identify and calculate the premium payment prior to auction rather than the standard post-auction bargaining under Emerging Technologies, and

(2) certainty that both the satellite operators and winning bidders are bound by the result and winning bidders will commit in advance to the premium payment.19

Going further, the first of AT&T’s three new auction alternatives suggests that the Commission mandate a fixed incentive payment (over and above relocation costs) and force winning bidders to pay it by making it part of the reserve price in the public auction. The auction could not close without raising enough revenue to cover the incentive payments.20

As discussed further below, the Commission cannot require winning bidders to pay a fee (let alone billions of dollars!) for expedited relocation and clearing of the band. Competitive bidding conducted under the authority of Section 309(j) is for a temporary license to use the spectrum for a service consistent with the band allocation. Requiring – whether as a licensing or auction participation condition – that winning bidders make payments to third parties for other

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16 For example, in 2013 the Commission required winning bidders in the Upper H Block auction to make proportional payments to a fund previously established to pay the costs of clearing incumbents from the overall H Band. The Report and Order adopted “cost-sharing formulas based on gross winning bids,” stating that “the Commission has long established that cost-sharing obligations for both the Lower H Block and the Upper H Block should be apportioned on a pro rata basis against the relocation costs attributable to the particular band.” See Service Rules for Advanced Wireless Services H Block — Implementing Section 6401 of the Middle Class Tax Relief and Job Creation Act of 2012 Related to the 1915-1920 MHZ and 1995-2000 MHZ Bands, Report and Order, 28 FCC Rcd. 9483, 9546-9550 ¶¶ 167-173 (2013).


18 Verizon Jan. 24 Ex Parte, at 11 et seq.

19 Id. At 13.

purposes (in this case, for allegedly more “accelerated” band clearing) is beyond the scope and inconsistent with the purposes of Section 309(j). There is no authority for a requirement that auction participants pay for that extra benefit – and particularly not where, as under AT&T’s proposal, it would directly reduce the return to the Treasury required by Section 309(j) on a dollar per dollar basis.

Under the precedent proposed by CBA, Verizon and T-Mobile, could the Commission require winning bidders to pay for other agency priorities, such as perhaps payments to school districts to upgrade their fiber facilities, or perhaps to build a new FCC headquarters? Section 309(j) contemplates competitive bidding for use of spectrum – whereas judgments about imposing extra payments on licensees for particular spending priorities (e.g., faster access for the big mobile carriers) seems more appropriately part of the authorization and appropriation power of Congress.

Moreover, it’s quite likely that among likely bidders, there will be quite different market-based values placed on getting access to the C-band a year or two or three earlier. That’s one reason the Commission has always in the past left the negotiation and payment of voluntary premiums for early clearing to the parties and market forces. While it’s very nice to know that AT&T and T-Mobile are willing to pay whatever arbitrary “acceleration” fee the Commission brokers, the Commission might instead adhere to precedent – and defer to Congress – by making the incentive payments the product of either good-faith, market-based bargaining or the product of a competitive reverse auction for transponder capacity for the relatively small share of the auctioned spectrum (e.g., clearing more than 200 megahertz) for which a reimbursement for “comparable facilities” would not satisfy the requirements of a Section 316 license modification.

With respect to AT&T’s reserve price proposal, it’s understandable that prospective bidders do not want to make a separate large payment to the incumbents outside of the auction, since that would tend to drive up the overall price paid for licenses. Indeed, this was one reason CTIA supported passage of the Auction Reform Act of 2002 at the time. However, AT&T’s proposal to incorporate the incentive pay-off in the public auction reserve price violates Section 309(j) twice over.

First, as noted above, because it would force bidders to make an extra-statutory payment for something over and above competitive bidding for use of the spectrum itself – that is, it would force new licensees to pay an agency-set fee for “accelerated” use of the spectrum. Second, Section 309(j)(8)(A) explicitly requires that every dollar bid in a public auction must be paid to the U.S. Treasury except to the extent that eligible incentive auction payments are made subject to the requirements of Section 309(j)(8)(G), which requires a competitive reverse auction.\(^\text{21}\) The Commission cannot direct auction proceeds to third parties at all, whether or not

\(^{21}\text{47 U.S.C. § 309(j)(8)(A), (G).}\)
it’s made part of the “reserve price.” In short, Congress needs to either legislate on the issue of incentive payments for this particular band and/or clarify the Commission’s authority to do so.

2. Congress explicitly rejected the CBA framework as “unjust enrichment” in the Auction Reform Act of 2002, canceling the initial 700 MHz auction and evincing Congressional intent reinforced by the 2012 TV incentive auction limitations.

Congress clearly told the Commission in Section 309(j) what circumstances warranted an auction featuring mandatory incentive payments to incumbents, and so has explicitly limited the Commission’s authority. Congress has twice passed legislation ensuring that when the TV bands at 700 MHz and 600 MHz were consolidated for auction to mobile carriers, local broadcast stations would either receive no windfall (the 2002 Auction Reform Act) or receive at most incentive payments limited by a competitive reverse auction (the 2012 incentive auction bill).²²

The Auction Reform Act explicitly overturned an FCC order that authorized a scheme virtually identical to CBA’s proposal. The Commission’s 2001 Order scheduled a public auction of 700 MHz spectrum while also authorizing incumbent TV broadcast station incumbents to require winning bidders (mobile carriers) to pay an equivalent amount of incentive payments into a private fund to induce early clearing by the stations participating in the Spectrum Clearing Alliance organized by Paxson Communications.²³ Congress made clear – including by a unanimous voice vote in the Senate – that this approach constitutes “unjust enrichment” and violates Section 309(j) of the Communications Act. The Act’s findings stated: “The Commission’s rules governing voluntary mechanisms for vacating the 700 megahertz band by broadcast stations . . . must not result in the unjust enrichment of any incumbent licensee.”²⁴

More recently, in 2012, when Congress authorized incentive auction payments for a small subset of 600 MHz band incumbents who gave up their spectrum and the advertising revenue attributable to their over-the-air viewership, the statute explicitly sought to minimize unjust enrichment. As a result, the vast majority of broadcasters received only compensation for expenses incurred to switch frequencies, a process that has been ongoing since the auction’s end in 2017.

²² See Comments of the Public Interest Spectrum Coalition, Expanding Flexible Use of the 3.7 GHz Band, GN Docket No. 18-122, at 22-32 (October 29, 2018); Reply Comments of the Public Interest Spectrum Coalition, Expanding Flexible Use of the 3.7 GHz Band, GN Docket No.18-122, at 25-30 (Dec. 11, 2018).
²⁴ Spectrum Reform Act of 2002 at Section 2(6)(B), emphasis added.
In this context, it’s worth noting that like the Commission’s initial 2001 framework for the 700 MHz auction – and unlike the Congressional framework adopted in 2012 to limit incentive payments for the 600 MHz auction – the incumbent local broadcast stations were not necessarily losing any over-the-air viewership or advertising revenue by giving up their current channel earlier than the statutory deadline. As Commissioner Tristani noted in her dissent:

“[N]othing in today’s decision requires a broadcaster engaged in a swap to give up its analog operations in favor of digital-only service. To the contrary, the decision expressly permits a broadcaster to operate in analog format on a digital channel allotment as part of a 3-way agreement . . . [and] request the local cable operator to carry its signal in an analog format, . . .”

Similarly, the CBA’s proposal contemplates that the satellite operators’ C-band transponder business will continue unabated in the upper 200 megahertz of the band. Unlike the minority of relocated 600 MHz band broadcast licensees that Congress agreed could receive incentive payments in exchange for giving up spectrum, viewers and advertising revenue, the CBA is asking for incentive payments on top of cost recovery for “comparable facilities” that will preserve and possibly increase their current C-band revenues – and with winning bidders required to shoulder the costs for upgraded (not just comparable) facilities.

Finally, the CBA attempts to slip this statutory knot by claiming that “[a]cceleration payments to satellite operators are not auction proceeds.”\textsuperscript{25} CBA goes on to argue that “[f]rom the beginning, the FCC has said that ‘an emerging technology licensee may choose to offer premium payments or superior facilities as an incentive to the incumbent to relocate quickly,’”\textsuperscript{26} and that “[s]uch premium payments . . . have never been considered ‘proceeds’ from the auction.”\textsuperscript{27} We agree that all “premium” or incentive payments authorized to date by the Commission were not auction “proceeds” subject to Section 309(j)(8)(a) for the simple reason that they were voluntary and contingent payments subject to private negotiation out of the FCC's control. That is an entirely different situation than the Commission arbitrarily setting and mandating “premium” payments as a licensing or auction eligibility condition. Such definite and mandatory payments determined by the Commission pre-auction would necessarily reduce the public auction proceeds on a dollar-per-dollar basis. Indeed, as noted in the previous section, that is so clear to everyone that AT&T proposes incorporating the incentive payments in the auction reserve price.

\textsuperscript{25} \textit{CBA 50/50 Proposal Ex Parte}, supra note 2, at 9.
\textsuperscript{26} \textit{Id.} at 10, citing \textit{Microwave Relocation NPRM}, ¶ 6; see also \textit{Redesignation of 17.7-19.7 GHz Frequency Band, Blanket Licensing of Satellite Earth Stations in 17.7-20.2 GHz & 27.5-30.0 GHz Frequency Bands}, First Order on Reconsideration, 16 FCC Rcd. 19808, ¶ 78 (2001) (“[W]hether the incumbent receives a windfall is largely a question of whether the new entrant agrees to it.”).
\textsuperscript{27} \textit{Ibid.}
3. The Commission has no general authority that supersedes the clear requirements of Section 309(j) and no authority to use licensing conditions to mandate incentive payments, not based on cost recovery or compensation for lost business, that will directly reduce public auction proceeds on a dollar for dollar basis.

The Commission has no legal authority to require any incentive or “acceleration” payments to C-band incumbents that extend beyond actual and reasonable relocation costs. Section 309(j) is explicit that every dollar bid in a public auction must be paid to the U.S. Treasury except to the extent that eligible incentive auction payments are made subject to the requirements of Section 309(j)(8)(G), which requires a competitive reverse auction. Any requirement that winning bidders make incentive or “acceleration” payments to incumbents above and beyond eligible relocation costs would represent a clear and improper end-run around Section 309(j) that would—dollar for dollar—reduce proceeds that would otherwise go back to the Treasury and that could be designated by Congress to fund rural broadband infrastructure, next generation 911, and other priorities that serve the public interest.

Indeed, if the Commission has the authority to condition licenses won at auction on payments for purposes dictated by the majority of commissioners, the agency would be both reducing revenues to the Treasury and arrogating to itself the authorization and appropriations powers of Congress. If the agency sets a precedent here that it can tax winning bidders to make arbitrary and legally unnecessary payments to third parties, what would stop a future Commission from requiring winning bidders in the future to make payments for a wide range of arguably productive purposes, such as to state government or nonprofit programs? There could be limited accountability as well, since winning bidders, who would have standing, would have little motivation to challenge the practice since they can simply reduce their bids in the public auction by an equal amount.

CBA, Verizon and T-Mobile claim that the Commission’s general authority to assign frequencies and to condition licenses in the public interest are sufficient to support a requirement that winning bidders make side payments to incumbents as an incentive to accelerate relocation and availability of the auctioned spectrum. Our view, articulated in OTI’s July Public Notice Legal Comments, is that these very general or unrelated provisions do not provide the authority for a public or private auction that is not consistent with the explicit provisions of Section 309(j).

29 CBA 50/50 Proposal Ex Parte, supra note 2, at 8; Verizon Jan. 24 Ex Parte at 7; T-Mobile Jan. 29 Ex Parte at 3.
30 See OTI Public Notice Legal Comments at 10-13.
CBA, Verizon and T-Mobile provide a compendium of very general Communications Act provisions unrelated to a system of competitive bidding. Section 303(c) simply gives the Commission the general authority to allocate bands to services and to assign specific frequencies to individual users. Section 4(i) is a general provision often referred to as the ‘necessary and proper’ clauses of the Communications Act, while Section Sections 303(r) similarly authorizes the Commission to Sections 303(r) “[m]ake such rules and regulations . . . as may be necessary to carry out the provisions of this chapter” [Title III]. None of these general provisions address the process for competitive bidding or the allocation of the revenue paid by winning bidders.

Only one section expressly addresses the process for resolving “mutually exclusive applications” for licenses: Section 309(j). That section does not simply give the Commission the general authority to conduct auctions, it states that “the Commission shall grant the license . . . through a system of competitive bidding that meets the requirements of this subsection.” One of those requirements is that “all proceeds from the use of a competitive bidding system under this subsection shall be deposited in the Treasury,” except to the extent Section 309(j)(8) provides an explicit exception, one of which is incentive auction payments to qualifying reverse auction participants under Section 309(j)(8)(G). It seems certain that parties bidding in the C-band public auction will reduce the amount they are ultimately willing to pay to account for any mandatory payments the Commission imposes. This will inevitably reduce the auction proceeds on a dollar-for-dollar basis, effectively end-running the requirements of Section 309(j).

Moreover, even if the general provisions CBA cites made any mention of competitive bidding or FCC discretion to allocate auction revenue (which they do not), a basic canon of statutory construction provides that if there is a conflict between a general provision and a specific provision, the specific provision prevails. In short, no general provision can supersede the very specific authority and mandates that Congress spelled out in great detail in Section 309(j).

4. Any incentive payments or compensation for lost C-band business opportunity is properly based on the current-use value for FSS and not on the post-reallocation value of the spectrum for a different purpose by a different industry

The Commission should concede, as it did in 2010, that it needs to wait for Congress to clarify its authority and ensure that C-band revenues flow to rural broadband deployments and Next Generation 9-1-1 infrastructure. However, assuming arguendo that Congress does not act and that the Commission concludes it has the legal authority to specify incentive or “acceleration” payments, any payments above and beyond a generous definition of “comparable

31 47 U.S. Code § 309(j)(1).
33 See, e.g., Antonin Scalia and Bryan A. Gardner, Reading the Law: The Interpretation of Legal Texts (West, 2012).
facilities” must be based on the actual present value of the FSS transponder business in C-band and absolutely not on the post-reallocation market value of the spectrum for a different purpose (mobile 5G) by a different industry.

If the Commission concludes that a Section 316 license modification represents a “fundamental” change with respect to some portion of the 300 megahertz targeted to be cleared (e.g., clearing target well above 200 megahertz), then the appropriate compensation – in addition to compensation for “comparable facilities” – would be payments to compensate for the actual loss of current transponder revenue. This approach derives directly from the incentive auction framework adopted in 2012 by Congress when it added an exception to Section 309(j) to allow local broadcast station licensees in the 600 MHz band to receive incentive payments in exchange for giving up spectrum, over-the-air viewership and, in all likelihood, advertising revenue.

Here, by contrast, CBA is claiming that winning bidders should pay them for both “comparable facilities” – so that they can continue serving current customers with little or no decline in C-band revenues – and, in addition, an arbitrary hold-out payment. Indeed, in its announcement proposing to increase the clearing target from 200 to 300, the CBA acknowledged that its C-band business would be kept intact through the transition: “The CBA member companies will maintain continuity of all current C-band customer services and maintain the value of the continental U.S. C-band video distribution neighborhoods.”

Of course, the notion that an incentive payment must not be based on the market value of C-band spectrum for 5G mobile services (for which it is not even allocated today) is so obvious that one of the four satellite incumbents has conceded the point. In a December ex parte, counsel for Eutelsat – a former member of CBA – put it bluntly: “Payments to satellite operators should be based on the value associated with the use of the spectrum to provide FSS services,” albeit with the added proviso that the payment should include “an appropriate multiplier for facilitating and expediting permanent relocation of FSS services from the band.”

In a more recent filing, Eutelsat explained the fatal flaw in CBA’s claims of entitlement to payments based on the value of the spectrum to the mobile industry:

The compensation proposal recently filed by the CBA . . . based on the value of the spectrum established at auction for new licenses to provide terrestrial “5G” services falls well outside the established legal framework, and thus continues to miss the mark. This approach is fatally flawed because the auction value of the

licenses bears no connection to the cost of “comparable facilities” to those the satellite operators or earth station operators use today.\textsuperscript{36}

Eutelsat goes on to correctly describe how existing precedent under both the FCC’s \textit{Emerging Technologies} framework and the D.C. Circuit decision upholding it in \textit{Teledesic} precludes any payments based on a share of auction proceeds rather than on compensation related to ensuring an incumbent licensee is left with “comparable facilities”:

Rather, the United States Court of Appeals for the D.C. Circuit has endorsed the Commission’s view that “comparable facilities” are those that are “equivalent to the existing [ ] facilities with respect to throughput, reliability, and operating costs.” As such, any “acceleration payment” tied to the auction result cannot, by definition, be “reasonably related to the actual cost of relocating to an equivalent facility,” as \textit{Teledesic} requires.\textsuperscript{37}

While correct in its analysis, it’s important to realize that Eutelsat proposes a valuation metric that bears little relation to the value of the C-band transponder business. Eutelsat proposes to measure “lost business opportunity” based on “the value of the potential FSS services that could have been generated, if the reallocated spectrum were fully utilized for FSS by each satellite offering coverage to at least half of the population of at least one state . . . for the remainder of its useful life.”\textsuperscript{38}

Although this metric turns out to be far more generous to Eutelsat than the U.S. market share metric proposed by CBA (giving it a proposed 13.4\% of “lost business opportunity”), Eutelsat’s $3.5 billion number is, like CBA’s demand for a 50 percent holdout payment, inflated and unprecedented on its face. The original rationale for commencing this proceeding is that the C-band is grossly underutilized for FSS. At least half (and likely much more) of C-band transponder capacity is fallow and not generating revenue for Eutelsat, for the CBA operators, and certainly not for the Small Satellite Operators with no domestic U.S. business. Eutelsat gets to $3.5 billion by assuming that the satellite operators are generating full-capacity revenue on every transponder in the lower 300 megahertz of the band – and that this will continue unabated for the remainder of the useful life of the fleet.\textsuperscript{39}

One flaw with this approach is highlighted by Eutelsat itself: As quoted above, Eutelsat concedes that under the \textit{Emerging Technologies} framework applied to reorganize the 18 GHz band, any incentive payment must be “‘reasonably related to the actual cost of relocating to an equivalent facility,’ as \textit{Teledesic} requires.”\textsuperscript{40} In \textit{Teledesic}, the D.C. Circuit upheld an application


\textsuperscript{37} \textit{Id.}, citing \textit{Teledesic} at 87.

\textsuperscript{38} \textit{Eutelsat Dec. 19 Ex Parte} at 3 (emphasis added).

\textsuperscript{39} \textit{Id.} at 2-3.

\textsuperscript{40} \textit{Id.}, citing \textit{Teledesic} at 87.
of the *Emerging Technologies* framework that did not mandate “acceleration” payments. Rather, as the Commission has consistently done in the past, the 18 GHz Order required the parties to engage in “good faith” bargaining for “premium” payments (for early clearing), but with the explicit proviso – written into regulation – that incumbents could not hold out for arbitrary windfall payments that did not reasonably relate to their actual costs.\(^{41}\)

In short, no payment justified as compensation for “lost business opportunity” – and paid over and above the actual cost of “comparable facilities” – can be based on hypothetical revenue from C-band transponder business that does not exist.

In reality, the overall present value of the entire U.S. transponder business – for all 500 megahertz – is roughly $2 billion and declining year after year. The study filed by the Trinity Broadcasting Network a year ago made this explicit.\(^{42}\) According to the Trinity study, the enterprise value of the C-Band transponder business in the U.S. was $1.99 billion as of 2017.\(^{43}\) Trinity’s estimate is based on the Satellite Industry Association’s estimate of total U.S. revenue from C-Band transponder agreements ($340 million in 2016) and a generous EBITDA margin and multiple.\(^{44}\) Trinity noted: “Assuming a U.S. population of 325 million, the implied value of this spectrum for satellite use translates to just $0.012/MHz-Pop.”\(^{45}\)

Total C-band transponder revenues are not only flat at around $300 million,\(^{46}\) they are also steadily declining due to a confluence of factors. Another analyst, Northern Sky Research (NSR), explained this and projected its impact on this shrinking corner of the satellite

\(^{41}\) See *47 C.F.R. §101.89(b)(2)* and discussion associated with note 8, *supra*.


\(^{43}\) *Id.*, Addendum to *Trinity Study Ex Parte*, at 9.

\(^{44}\) Trinity based its calculation on total U.S. C-band transponder revenue in 2016 according to a Satellite Industry Association filing (SIA reports the revenue and five-year trend annually in its *2017 State of the Satellite Industry Report*). See Comments of Satellite Industry Association, GN Docket No. 17-183, at 21 (Oct. 2, 2017) (“SIA estimates that the current annual revenue from C-band satellite services alone is $340 million, with the bulk of that coming from programming distribution and smaller shares attributable to enterprise services, military uses, and mobile backhaul and mobility-related offerings.”). Trinity then applied an EBITDA margin of 71% and a generous EBITDA multiple of 8.25X – both of which represented averages of three investment banking equity reports, based on Intelsat and SES public financial reports – to arrive at the $1.99 billion total valuation.

\(^{45}\) *Trinity Study Ex Parte*, at 9. By contrast, Eutelsat’s recent filing estimates that “if the Commission auctions 280 MHz of spectrum and there are 325 million people in the CONUS, then the surcharge would be about 7.7¢ per MHz-POP (i.e., $7 billion ÷ (325 million x 280 MHz) = 7.7¢).” *Eutelsat Jan. 23 Ex Parte* at 7. That is roughly six times the industry’s enterprise value, as estimated by Trinity, on a megahertz/POPs basis.

marketplace: “With spectrum rights expected to expire in the mid-2020s and YoY performance on the C-band U.S. business declining fast (owing to capacity pricing declines and OTT pressure), revenues associated with C-band spectrum do not make economic sense (-6% CAGR in 10 years) in the future as demonstrated in the NSR’s GSCSD 15th Edition report.”

In sum, Eutelsat is correct that there is no justification for basing any incentive or “acceleration” payment on the market value of C-band for a different service and by different licensees. Moreover, if compensation is due for “lost business opportunity” – above and beyond the payment for “comparable facilities” – it should be based on the C-band revenues actually sacrificed by the incumbent orbital slot licensees who share the band. That number is most certainly less than $2 billion. Reports of a fixed incentive payment on the order of $5 billion would be indefensible inasmuch as this implies a payment of 20 times the industry’s annual revenue – a valuation to revenue ratio several times higher that of very profitable and fast-growing companies such as Apple, Facebook and Google.

5. An Alternative Based on Emerging Technologies and Consistent with Section 309(j)

As OTI suggested in filings over the past two months, if the Commission concludes it cannot wait for Congress to act, then a more legally sound C-band auction framework consistent with the Commission’s Emerging Technologies approach could include the following elements:


48 See, e.g., Letter of Michael Calabrese, Open Technology Institute, Expanding Flexible Use of the 3.7 GHz to 4.2 GHz Band, GN Docket No. 18-122, at 2 (Dec. 13, 2019).
• **No requirement or specification of incentive payments**, as this would violate the Communications Act, deny the public a return on its spectrum resource, undermine Congressional efforts to designate proceeds for rural broadband, and create enormous litigation risk;

• A traditional forward auction (e.g., ascending clock auction) for 280 megahertz;

• A requirement that **winning bidders pay all actual transition costs** of incumbent FSS licensees and registered earth stations based on an established, objective formula (e.g., a percentage of gross bids);

• The appointment of an **independent transition facilitator** to estimate transition costs pre-auction based on estimates from incumbent C-band users, to coordinate the transition itself based on input from stakeholders (including both incumbents and likely bidders), and possibly to serve as the intermediary in the negotiation of incentive payments to the extent needed (discussed further below);

• The Commission-approved transition plan should **generously define reimbursable costs** such that FSS licensees and registered earth stations will have “comparable facilities,” or actually be better off (e.g., upgraded facilities), following the transition, thereby satisfying the requirements of a Section 316 license modification;

• The authorization of **“good faith” negotiations for premium payments** to incumbents (space station operators and/or earth stations), over a limited period of time (e.g., two years), in exchange for an expedited clearance and transition, similar to the framework the Commission adopted to segment the 18 GHz band;\(^49\)

• **Modification of FSS licenses** (under Section 316) and receive-only earth station authorizations such that interference protection in the lower portion of the band expires after a fixed period of years.

This framework would obviate the need for any mandatory incentive payments and leave the determination of appropriate incentive payments to market forces. Appointing an independent transition facilitator and estimating costs ahead of the auction would also facilitate greater certainty for both incumbents and bidders alike.

\(^{49}\) This is the approach the Commission adopted – and the D.C. Circuit upheld – to segment the 18 GHz band, forcibly moving Fixed Service licensees to the upper portion of the band, but requiring that new satellite licensees pay actual relocation costs (up to 10 years) and, for an two-year period, negotiate in good faith for premium payments for expedited clearance. *Redesignation of the 17.7-19.7 GHz Frequency Band, Blanket Licensing of Satellite, etc.,* Report and Order, Docket No. 98-172 (rel. June22, 2000). *See also Teledesic LLC v. FCC*, 275 F.3d 75, 86 (D.C. Cir. 2001) (upholding FCC authority to require satellite operators to negotiate the payment of relocation costs of FS incumbents moved to the upper portion of the heretofore co-primary 18 GHz band).
OTI has acknowledged that because the C-band spectrum is shared among all licensed satellite operators, to the extent that any incentive payments seem legally necessary (e.g., for clearing an increment of spectrum above 3900 MHz that would reduce satellite operators’ FSS revenues) there is a “collective action” and potential holdout problem: That is, a winning bidder could not effectively clear a large license area (such as a PEA) by negotiating one-on-one with the satellite operators with transponders operating on the frequencies the winning bidder licenses. To address this challenge, the Commission would likely need to combine two approaches:

First, as in the 18 GHz model upheld in Teledesic, “expiration dates” would need to be placed on both the period available to negotiate and agree upon “accleration” payments, as well as a later expiration on the interference protection of space stations and/or earth stations operating on the auctioned frequencies. As the Commission has done multiple times in the past, this creates a deadline for incumbents to reach an agreement on incentive payments (or, if there is no agreement, to receive only relocation costs up until the second expiration date).

Second, the Commission would need to define a process for the “good faith” bargaining that results in incentive payments generally acceptable to both incumbents and winning bidders. For example, as it did in the 18 GHz re-banding, the Commission could require that the incentive payments be reasonably proportional to the actual transition costs (e.g., no more than that amount for any party). Another key role for an independent transition facilitator could be to mediate the negotiation of appropriate incentive payments between winning bidders (by license area, or overall) and incumbents.

An alternative approach would be a reverse auction for transponder capacity that complies with Section 309(j)(8)(G) of the Communications Act, as the NPRM outlines. An incentive auction for transponder capacity can be limited to the increment of spectrum (e.g., clearing above 3900 MHz) that the Commission finds will disrupt and diminish the ongoing business revenues of the current C-band transponder business and thereby, arguably, constitute a “fundamental” change to the incumbents’ licensing rights. Importantly, at least 200 megahertz could be auctioned using a voluntary and market-based Emerging Technologies approach (such as the outlined above), while limiting incentive payments to that portion of the band that would represent an actual loss of business opportunity to FSS incumbents relative to current use.

Finally, with respect to proposals for auction rules, OTI strongly supports a limit on the amount of C-Band spectrum any bidder can win at auction in a given licensing area. In that respect, OTI generally agrees with the Competitive Carriers Association and T-Mobile that such a limitation is necessary to ensure competitive access to C-Band spectrum.\textsuperscript{50} Inasmuch as a

\textsuperscript{50} Ex Parte Letter from Steve B. Sharkey, T-Mobile, \textit{Expanding Flexible Use of the 3.7 GHz to 4.2 GHz Band}, GN Docket No. 18-122, at 2-4 (Dec. 18, 2019) (supporting an aggregation limit such that no one entity could obtain more than 1/3 of the available C-band spectrum in any license area either overall or in
substantial amount of mid-band spectrum is considered essential to a competitive national or regional 5G mobile network, the Commission must ensure that at least four competing operators have sufficient mid-band spectrum. OTI therefore urges the Commission to ensure that no more than one-third of the available spectrum in any licensing area can go to any one entity. This aggregation limit should apply separately to both the total amount of C-band spectrum auctioned (e.g., 280 megahertz), as well as to any portion of the band that is available sooner than the rest (e.g., an initial tranche of 100 megahertz).

**Conclusion**

While there are options for the Commission to proceed within its authority, the various proposals to impose mandatory incentive payments on winning bidders all suffer form the same fatal flaw. If the Commission wishes to provide incentives for incumbents in a spectrum band, Congress told it how it could do so in Section 309(j). Ignoring the explicit limitations of the Communications Act and the Commission’s own precedent will simply result in a successful appeal, thus further delaying the use of this spectrum for mobile broadband. Rather than leaving it to a future Commission to create a sustainable auction structure, the Commission can do so now by rejecting poorly crafted and self-serving proposals for mandatory incentive payments.

Respectfully submitted,

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