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February 8, 2019

**Ex Parte**

Ms. Marlene H. Dortch  
Secretary  
Federal Communications Commission  
455 12th Street, SW  
Washington, DC 20554

**Re: *Expanding Flexible Use of the 3.7 to 4.2 GHz Band, GN Docket No. 18-122***

Dear Ms. Dortch,

The record is clear that broadcasters, programmers, and cable operators today use the C-Band as part of their video programming delivery systems that transmit television content to more than 100 million American households, representing hundreds of millions of people. Consumers will continue to rely on C-Band satellite services to receive television content for the foreseeable future; there is no viable substitute. Furthermore, four Commissioners have agreed that these existing uses must be considered, even while proposing to transition some or all of the band.<sup>1</sup>

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<sup>1</sup> See *Expanding Flexible Use of the 3.7 to 4.2 GHz Band*, Notice of Proposed Rulemaking, 33 FCC Rcd. 6915, 7010 (2018) (statement of Chairman Pai) (“[D]ata will help us figure out how to accommodate the needs of incumbents, which are primarily using the band to provide Fixed Satellite Service.”); *id.* at 7011 (statement of Commissioner O’Rielly) (“[A]ny reallocation must fully protect the incumbent contractees that currently use C-band to bring many services to consumers. From my perspective, any final proposal that doesn’t do that will be close to a non-starter. That does not mean they all must be accommodated on remaining C-band spectrum, but their ability to offer services cannot be disrupted.”); *id.* at 7014 (statement of Commissioner Carr) (“As the item recognizes, we have some challenges in bringing more intensive use to this band in the U.S., including long-standing incumbent operations.”); *id.* at 7015 (statement of Commissioner Rosenworcel) (“[W]e need to acknowledge that these frequencies are used right now by television and radio broadcasters and cable operators to deliver programming to more than 100 million American households. I believe we need a record that addresses [this] challenge[.]”)

Reallocating a significant portion of the C-Band for mobile use would noticeably disrupt television service to hundreds of millions of American consumers unless the Commission takes several enforceable precautions. Specifically, C-Band users must:

- be able to continue operations, with room for growth, technological evolution, and back-up capacity;
- be protected from harmful interference from new wireless uses that could result in black screens for consumers attempting to view programming;
- be reimbursed for costs incurred in any transition necessary to accommodate new services; and
- be able to change frequencies and repoint antennas on short notice.<sup>2</sup>

To date, no party has demonstrated that its proposed approach for repurposing some or all of the C-Band will meet these objectives. Indeed, as a threshold matter, the C-Band Alliance's (CBA) proposal fails to justify its broad delegation to a private entity of the Commission's regulatory authority to decide these and other critical public policy issues.<sup>3</sup> The CBA's private sale proposal in particular raises significant concerns. In the nearly year and a half since Intel and Intelsat initially suggested a private sale scheme, neither they nor the CBA have provided detailed answers or technical analyses in the record to explain how their proposal will answer the many questions parties have raised related to the four core protections above. Instead, the CBA repeatedly attempts to deflect attention from its inattention to other stakeholders' concerns by, among other things, making broad and unfounded assertions about the cable industry and others' motivations in this proceeding.<sup>4</sup>

### ***The CBA Proposal Lacks Transparency, Oversight, and Enforceable Incumbent Protections***

The CBA wants to proceed with its private clearing and sale without meaningful Commission oversight or public input. It does not want to file anything at the Commission setting forth its clearing and incumbent protection plans – much less permit public comment on its plans – and after more than a year of ever-changing technical proposals, *still* has yet to file any of its underlying technical analyses. Instead, the CBA continues to pursue a “just trust us” approach. It spouts breezy platitudes and offers vague assurances that it will “protect[] C-band services in the United States and the rest of the world” without providing supporting evidence,

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<sup>2</sup> See NCTA Comments at 1; NCTA Reply Comments at 1-2.

<sup>3</sup> See, e.g., *U.S. Telecom Ass'n v. FCC*, 359 F.3d 554, 565–66 (D.C. Cir. 2004) (setting aside FCC delegation to state commissions of authority to designate unbundled network elements).

<sup>4</sup> See Letter from Jennifer D. Hindin, Wiley Rein LLP, Counsel for CBA, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 18-122, at 2 (Jan. 31, 2019) (“The CBA asserted that the cable industry would like to continue their high-speed broadband monopoly as long as possible.”).

and further warns that these “commitments” will hold true only if the Commission adopts its proposal “*in all material respects.*”<sup>5</sup>

For instance, CBA has stated that if its “proposal is accepted by the Commission in all material respects, Intelsat and SES will need additional satellite capacity to effectuate [its] plan. Intelsat and SES anticipate that the CBA plan will require them to procure a total of 8 new satellites and, if the CBA plan is accepted, they are prepared to do so.”<sup>6</sup> Yet, the CBA has provided no details about its plans for new satellites – including what scarce orbital slots they may occupy – or any supporting analysis to show that such new satellites would not be at risk of harmful interference from new wireless services in the band.

This is insufficient transparency by any measure. The CBA has an incentive to give short shrift to reimbursing and accommodating the future needs of existing C-Band users in order to maximize profits for itself. Given these misaligned incentives, the CBA should not be permitted to run the transition process or determine what protections incumbents will receive without significant Commission oversight.

Although the CBA says it intends to protect customers, its “commitments” would be largely unenforceable under its proposal. There is also a significant risk that the CBA’s members would increase prices for remaining C-Band satellite services after the private sale, to the ultimate detriment of American consumers. Price increases would have a disproportionate impact on rural cable operators and their customers.

### ***The CBA Proposal Would Result in Limited Competition for New 5G Spectrum and Widen the Digital Divide***

The CBA’s proposal also provides no guarantees of a transparent, competitive process for bidding on reallocated C-Band spectrum. The CBA has an incentive to sell spectrum rights to the highest bidders in the largest possible license areas to maximize revenues and simplify transaction costs. There is a significant risk that the CBA would sell nationwide licenses to the largest one or two mobile carriers, with little or no opportunity for competitive carriers and new entrants to compete. This outcome would be disproportionately harmful in rural areas in which large carriers may never deploy either fixed or mobile wireless services. There should be robust

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<sup>5</sup> See Letter from Jennifer D. Hindin, Wiley Rein LLP, Counsel for CBA, to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 17-183 & 18-122, at Attach. 1 (Oct. 17, 2018) (emphasis added); see also Cardenas, *Kinzinger Urge ‘Balanced’ Approach to Terrestrial Use of C Band*, Communications Daily, at 11 (Jan. 22, 2019) (quoting Preston Padden’s statement in response to the Cardenas-Kinzinger letter, “While making spectrum available for 5G, CBA’s Members will continue their 99.999% reliable C-band service to all current customers and cover the costs of the transition including purchasing and installing filters. No other plan does this.”).

<sup>6</sup> See Letter from Jennifer D. Hindin, Wiley Rein LLP, Counsel for CBA, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 18-122, at 2 (Dec. 19, 2018).

Commission oversight and transparency, commensurate with public auctions of spectrum, over decisions about who can buy spectrum and under what conditions.

### ***The CBA Proposal Would Set Troubling Spectrum Policy Precedent***

Finally, Congress has tasked the Commission with regulating spectrum allocation. Any mechanism for introducing new services into the band must include robust Commission oversight and process protections. The Commission should not accede to the CBA's threats to tie up the process in decades of litigation if the Commission does not adopt every aspect of its private sale approach.

In addition, the CBA's dubious claim that its proposal is the "only efficient mechanism to make substantial C-Band spectrum available to wireless carriers quickly to drive 5G deployment, including in rural areas, while fully protecting existing C-band subscribers"<sup>7</sup> ignores the fact that the Commission has regularly and successfully undertaken complex spectrum reallocations while balancing *all* interests; most importantly, the public interest. Acquiescing to the CBA's take-it-or-leave-it demands would set a bad precedent for the Commission's future efforts to reallocate spectrum.

The CBA recently characterized its proposal as a "much narrower expansion" of its members' rights than previous Commission actions, and attempts to combine these precedents to justify something completely different.<sup>8</sup> Yet, none of its proffered examples come close to paralleling the CBA's proposal to expand rights of incumbent licensees, including the right to determine how much spectrum is reallocated; immediately seek a windfall predicated on those expanded rights using secondary market mechanisms that the CBA expects the Commission to rubber stamp; and then undertake a private, complicated band transition that protects incumbent uses, while insisting on little or no Commission oversight of the process.<sup>9</sup> Indeed, the CBA's examples instead highlight just how unprecedented and broad its scheme is.

### **Conclusion**

More detailed information and analysis about all of the various proposals is necessary for the Commission and interested stakeholders to accurately and adequately assess how to move forward in this proceeding. Any approach the Commission adopts should involve Commission

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<sup>7</sup> See Letter from Jennifer D. Hindin, Wiley Rein LLP, Counsel for CBA, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 18-122 (Jan. 2, 2019).

<sup>8</sup> *Id.* at Attach. 1.

<sup>9</sup> See, e.g., Letter from Steve B. Sharkey, Vice President, T-Mobile, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 18-122, at 1 (Jan. 30, 2019) ("The C-Band Alliance continues to invent reasons why the Commission should adopt its proposal that would enrich its members, who would unilaterally decide how and to whom to sell assets they do not own." "Contrary to the C-Band Alliance's assertions, the Commission has not previously granted new or expanded rights to incumbent licensees with the intention that those rights would be immediately sold. . . .").

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oversight to ensure transparency of any transition process and robust protections for existing C-Band users that are meaningfully enforceable to protect the millions of American consumers who depend on C-Band services today.

Please address any questions regarding the foregoing to the undersigned.

Sincerely,

**/s/ Neal M. Goldberg**

Neal M. Goldberg