Charter
COMMUNICATIONS

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February 22, 2019

VIA ECFS

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

Re: Notice of Ex Parte Presentation

GN Docket No. 18-122, *Expanding Flexible Use of the 3.7 to 4.2 GHz Band*
RM-11791, *Petition for Rulemaking to Amend and Modernize Parts 25 and 101 of the Commission's Rule to Authorize and Facilitate the Deployment of Licensed Point-to-Multipoint Fixed Wireless Broadband Service in the 3.7-4.2 GHz Band*
RM-11778, *Fixed Wireless Communications Coalition, Inc., Request for Modified Coordination Procedures in Band Shared Between the Fixed Service and the Fixed Satellite Service*

Dear Ms. Dortch:

The 3.7-4.2 GHz spectrum band ("C-Band") has the potential to be an important component in the deployment of 5G. This spectrum would enable wider channel bandwidths for true 5G speeds while also offering much better RF propagation characteristics than millimeter wave spectrum. The future of this band has significant national security implications. China is reallocating 500 megahertz of mid-band spectrum to 5G, which it can use as a base for 5G deployment.[1] The economic implications are similarly profound. The United States stands to

[1] *See, e.g.*, David E. Sanger et al., *In 5G Race With China, U.S. Pushes Allies to Fight Huawei*, N.Y. Times (Jan. 26, 2019), https://www.nytimes.com/2019/01/26/us/politics/huawei-china-us-5g-technology.html ("In an age when the most powerful weapons, short of nuclear arms, are cyber-controlled, whichever country dominates 5G will gain an economic, intelligence and military edge for much of this century."); *see also* Presidential Memorandum on Developing a Sustainable Spectrum Strategy for America's Future, 83 Fed. Reg. 54,513, 54,513 (Oct. 30, 2018), https://www.govinfo.gov/content/pkg/FR-2018-10-30/pdf/2018-23839.pdf ("As the National Security Strategy of 2017 made clear, access to spectrum is a critical component of the technological capabilities that enable economic activity and protect national security. . . . [, and] it is imperative that America be first in fifth-generation (5G) wireless technologies.").

create over one million jobs and reap almost $274 billion in additional GDP if a significant amount of this spectrum becomes available for wireless broadband use.[2]

The question before the Commission is how to make this important public resource available for 5G use in the quickest, fairest, most efficient way possible, to enable the United States to win the global 5G race. As described in more detail below, Charter Communications, Inc. ("Charter") believes that the best way to do so is for the Commission to exercise its clear statutory authority to determine the appropriate portion of the C-Band to reallocate for terrestrial use and then award the resulting terrestrial licenses through a system of competitive bidding that satisfies the requirements of the Communications Act ("Act").

Importantly for the race to 5G, the auction required by the Communications Act is also the most expeditious path. For the past quarter-century, the Commission has utilized this well-grounded approach to successfully repurpose a wide array of spectrum bands, including those previously allocated to satellite use. This process is fair, open, and transparent, and ensures that decisions about this critical public spectrum resource, such as how much should be reallocated for 5G and license sizes, are made in a way that maximizes the public good and ensures 5G deployment is widespread, including to rural areas. Such an auction, if prioritized by the Commission, could be completed within 12-18 months and the spectrum cleared and ready for 5G use within 36 months from adoption of an order in this proceeding.

As it has done in prior auctions, the Commission can require winning bidders to reimburse satellite providers and earth station licensees for their relocation costs. Drawing on its broad licensing authority, the Commission could also require winning bidders to pay incumbents a "reserve charge" equal to a percentage of auction revenues determined by the Commission to compensate them for intangible or other costs related to relinquishing spectrum or the value of their relinquished spectrum without having to implement a lengthy and complex incentive auction.

In contrast with this well-established approach, the C-Band Alliance ("CBA") asks the Commission to discard its normal process—and to abdicate its responsibility for overseeing the C-Band and for advancing the public interest—in favor of an unprecedented and unlawful private takeover of the allocation and sale of this critical spectrum. Given the national security and economic interests at stake, it would be entirely inappropriate to allow foreign-owned private parties to determine the supply of 5G spectrum in the C-Band. Indeed, the satellite companies have an obvious incentive to limit the supply of this spectrum in order to drive up the price they can get from wireless providers who want to use the spectrum to deploy 5G.

The CBA suggests that its process poses less litigation risk than the alternatives, but CBA's claim has no legal merit. The CBA's proposal to unilaterally determine the amount of spectrum to reallocate to terrestrial use and then enter into "secondary market agreements" with "interested parties" has led to closed-door negotiations and asymmetric information sharing with interested parties that simply do not satisfy the statutory framework for allocating and assigning

[2] *See* David W. Sosa & Greg Rafert, Analysis Group, *The Economic Impacts of Reallocating Mid-Band Spectrum to 5G in the United States* 1, 4-5 (Feb. 2019), https://api.ctia.org/wp-content/uploads/2019/02/The-Economic-Impacts-of-Reallocating-Mid-Band-Spectrum-to-5G-1.pdf.

spectrum. Critically, any FCC action authorizing this approach would spawn years of litigation, while the C-Band sits underutilized and the United States forfeits leadership in the deployment of 5G. The CBA's estimate of 36 months to clear the spectrum is therefore wholly unfounded. The challenges the CBA raises to a standard public auction of the C-Band are dubious at best,[3] and the CBA ignores the many obvious legal infirmities in its own proposal. The CBA's attempt to conflate its radical proposal with previous secondary sales of spectrum that had *already* been repurposed are unavailing.

Tellingly, the only entities supporting the CBA's proposal are the foreign satellite companies who stand to benefit from its adoption, companies who manufacture satellites and satellite equipment, and one of the largest wireless providers.[4] The other participants in this proceeding, representing a wide array of interests including competitive wireless carriers, small satellite operators, technology companies, cable providers, and public interest organizations, have raised strenuous objections to the proposal, laying the groundwork for future legal challenges if the Commission departs from its well-established practices.

The CBA's plan would artificially limit the amount of mid-band spectrum made available for 5G and plunge the Commission into a legal quagmire that would delay the availability of 5G. Instead of ignoring the potential national security, economic, and timing risks, the Commission should avoid this quagmire, reject the C-Band's proposal, and foster the most widespread deployment of 5G by repurposing the C-Band using the tools provided in the Communications Act.

I. A Commission-Led Process Is the Most Efficient, Effective, and Legally Sound Way to Repurpose the C-Band for 5G.

Since 1994, with the noted exception of the recent broadcast incentive auction, the Commission has repurposed spectrum for new technologies and services by exercising its clear authority to reallocate the band in question following an opportunity for public comment[5] and then following the statutory directive to auction the initial authorizations in the spectrum band it reallocated.[6] This fair, open process has successfully repurposed spectrum bands from low

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[3] *See, e.g.*, Letter from Jennifer D. Hindin, Counsel, C-Band Alliance, to Marlene H. Dortch, Secretary, FCC, attachment at 2-3, GN Docket No. 18-122 (Jan. 2, 2019) ("*CBA January 2 ex parte*").

[4] *See also* Comments of Verizon at 9, GN Docket No. 18-122 (Oct. 29, 2018) ("Verizon Comments") ("[T]he market-based mechanism has the advantage of providing the most flexibility for interested spectrum sellers and buyers to reach mutually beneficial agreements.").

[5] *See* 47 U.S.C. § 303(c) ("[T]he Commission . . . as public convenience, interest, or necessity requires, shall . . . [a]ssign bands of frequencies to the various classes of stations, and assign frequencies for each individual station.").

[6] *See* 47 U.S.C. § 309(j)(1) (authorizing the Commission to institute a process of competitive bidding to assign spectrum licenses "through a system of competitive bidding" if "mutually exclusive applications are accepted for any initial license or construction permit"); *see also In re Amendment of the Commission's Rules with Regard to Commercial Operations in the 3550-3650 MHz Band*, Report and Order and Second Further Notice of Proposed Rulemaking, 30 FCC Rcd 3959, 4001-02 ¶ 130 (2015) ("Section 309(j)(1) provides the Commission with the obligation to conduct competitive bidding when all applicants to participate in bidding on particular licenses cannot be granted the subject licenses because at

frequencies to millimeter wave,[7] including the reallocation of spectrum from satellite to terrestrial use.[8] A Commission-led process employs market forces to ensure that the award of licenses goes to the highest and best use, does not favor any particular party or parties, provides transparency with respect to the process, types of licenses and terms, and promotes adherence to statutory objectives such as avoiding excessive concentration of licenses, disseminating licenses among a wide variety of applicants,[9] and the distribution of licenses in a "fair, efficient, and equitable" manner.[10] Reliance on these well-established mechanisms is more likely to promote confidence in the outcome and thus minimizes the risk that the Commission's efforts to repurpose the C-Band would become tied up in litigation.

The Commission's long-standing experience with this process means that it can readily be applied to the C-Band. With its broad responsibility for managing spectrum to make available rapid and efficient radio communications service with adequate facilities,[11] the Commission is best positioned to balance the interests of C-Band satellite operators and their customers, on the one hand, with the desire to utilize this spectrum for 5G services, on the other, to determine an

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the time of application submission, the applicants seek the same license or different licenses that would interfere with each other, or when the requests for interchangeable channels exceed the available supply. The Commission has such authority irrespective of whether each of the parties applying to bid for a license subsequently bids for the subject license." (footnotes omitted)).

[7] *See, e.g.*, *In re Redevelopment of Spectrum to Encourage Innovation in the Use of New Telecommunications Technologies*, First Report and Order and Third Notice of Proposed Rulemaking, 7 FCC Rcd 6886 (1992) ("*Emerging Technologies Order*"); *In re Amendment of Parts 2, 15, and 97 of the Commission's Rules to Permit Use of Radio Frequencies Above 40 GHz for New Radio Applications*, Second Report and Order, 12 FCC Rcd 10,571, 10,595 ¶ 66 (1997) ("The Commission has broad authority under the Communications Act to designate spectrum usage, as well as the authority to perform any and all acts necessary in the execution of our functions."); *In re Amendment of Part 2 of the Commission's Rules to Allocate Spectrum Below 3 GHz for Mobile and Fixed Services to Support the Introduction of New Advanced Wireless Services, Including Third Generation Wireless Systems*, Second Report and Order, 17 FCC Rcd 23,193 (2002); *see also In re Allocation of Spectrum Below 5 GHz Transferred from Federal Government Use*, First Report and Order and Second Notice of Proposed Rulemaking, 10 FCC Rcd 4769, 4791 ¶ 44 (1995) ("Nothing in the language of Section 303 establishes or suggests any limitation or restriction on the Commission's … authority to assign (or allocate) frequencies to the various classes of stations.").

[8] *See In re Spectrum Bands Above 24 GHz for Mobile Radio Services*, Report and Order and Further Notice of Proposed Rulemaking, 31 FCC Rcd 8014, 8017-18, 8097 ¶¶ 1, 3, 244 (2016) ("*Spectrum Frontiers Report & Order*"); *see also In re Spectrum Bands Above 24 GHz for Mobile Radio Services*, Second Report and Order, Second Further Notice of Proposed Rulemaking, Order on Reconsideration, and Memorandum Opinion and Order, 32 FCC Rcd 10,988, 10,990 ¶¶ 2, 3 (2017) ("[W]e make available an additional 1700 megahertz of mmW spectrum for flexible wireless use, in the 24.25-24.45 and 24.75-25.25 GHz band (24 GHz band) and the 47.2-48.2 GHz band. . . . At the same time, we adopt rules that will allow the mmW bands to be shared with a variety of other uses, including satellite, fixed, and Federal government uses.").

[9] *See* 47 U.S.C. § 309(j)(3).

[10] *Id.* § 307(b).

[11] *Id.* §§ 151, 301.

appropriate reallocation of the band. A Commission-led reallocation process will also avoid the complexities of an incentive auction[12] and presents the least risk of delay due to litigation because it falls well within the Commission's defined authority.[13] Moreover, in exercising this authority, the Commission could maximize the amount of spectrum to be repurposed by transitioning at least some earth station users to fiber rather than relying solely on the launch of additional satellites (as the CBA has proposed and its vendors support, not surprisingly[14]). Prior experience suggests that the Commission could move from adoption of C-Band service rules to an auction of new C-Band terrestrial licenses within approximately 12 months.[15]

The Commission also has ample authority to ensure that this process adequately compensates incumbent satellite providers and earth station licensees in order to allow for the efficient repurposing and repacking of the C-Band, including reimbursement for the costs of earth station licensees to transition to fiber.[16] As it has in connection with prior auctions, the

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[12] Letter from Paul Milgrom, Chairman, Auctionomics Inc., to Marlene H. Dortch, Secretary, FCC, GN Docket No. 18-122 (Jan. 21, 2019). By avoiding a reverse auction of satellite spectrum usage rights, moreover, this totally vitiates the CBA's argument that an auction of satellite spectrum somehow violates Section 647 of the Open-market Reorganization for the Betterment of International Telecommunications ("ORBIT") Act. *See* Comments of the C-Band Alliance, at 38, GN Docket No. 18-122 (Oct. 29, 2018) ("CBA Comments"). As the Commission recognized in the NPRM, the ORBIT Act is of little relevance here because the auction would be for spectrum used to provide domestic terrestrial service. *In re Expanding Flexible Use of the 3.7 to 4.2 GHz Band*, Order and Notice of Proposed Rulemaking, 33 FCC Rcd 6915, 6949-50 ¶ 109 (2018) ("*C-Band NPRM*"). T-Mobile recently filed a modified incentive auction proposal. *See* Letter from Steve B. Sharkey, Vice President, Government Affairs, T-Mobile USA Inc., to Marlene H. Dortch, Secretary, FCC, GN Docket No. 18-122 (Feb. 15, 2019). Charter continues to evaluate T-Mobile's proposal, but it appears to offer another potentially viable alternative for reallocating the C-Band spectrum for 5G.

[13] To the extent the Commission must modify existing satellite or earth station licenses to effectuate the repurposing of the C-Band, it has clear authority to do so under a statutorily-prescribed procedure. *See* 47 U.S.C. § 316(a)(1); *but see id.* § 304 (a licensee has no "claim to the use of any particular frequency or of the electromagnetic spectrum as against the regulatory power of the United States.").

[14] CBA Comments at 17-18; Letter from Jennifer D. Hindin, Counsel, C-Band Alliance, to Marlene H. Dortch, Secretary, FCC, attachment at 1, GN Docket No. 18-122 (Dec. 19, 2018) ("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."); *see also* Comments of the Boeing Company, at 3, GN Docket No. 18-122 (Dec. 11, 2018).

[15] *See, e.g., Auction of Advanced Wireless Services (AWS-3) Licenses Scheduled for November 13, 2014*, Public Notice, 29 FCC Rcd 8386, 8388 ¶ 1 (2014) (less than 8 months from the adoption of service rules to the auction's commencement).

[16] Despite the CBA offering vague statements and assurances indicating that "[i]ncumbent users will be protected and made whole," the CBA has yet to offer any enforceable protections for incumbent earth stations affected by the transition of the C-Band. Reply Comments of the C-Band Alliance, at 5, 12, GN Docket No. 18-122 (Dec. 7, 2018); *see also* Letter from Jennifer D. Hindin, Counsel, C-Band Alliance, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 18-122 (Feb. 7, 2019) (providing minimal plans for accommodating all existing C-Band customers and an unenforceable commitment to cover the costs of the transition). The Commission, however, has already proposed to protect incumbent earth stations from harmful interference related to terrestrial use in the band, and also is seeking comment on reimbursing the

Commission could require winning bidders to reimburse satellite providers for associated relocation costs.[17] The Commission could also require winning bidders to compensate incumbents beyond their relocation costs pursuant to its Title III authority.[18] This payment could take the form of a "reserve charge," calculated as a percentage of auction revenues determined by the Commission to compensate incumbents for intangible or other costs related to relinquishing spectrum or for the value of their relinquished spectrum. The Commission has recognized that payments for spectrum rights over and above relocation costs are in the public interest and within the Commission's authority to approve.[19]

By following the law and building on its long and successful track record of repurposing spectrum, the Commission can most efficiently and effectively reallocate the C-Band in the public interest by successfully balancing the multiple interests in the band.

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reasonable costs incurred by incumbent earth station operators and C-Band customers as part of any C-Band transition. *See C-Band NPRM*, 33 FCC Rcd at 6926-27 ¶ 29.

[17] The Commission has required winning bidders in spectrum auctions to reimburse incumbent licensees for their relocation costs since the earliest auctions. *See Emerging Technologies Order*, 7 FCC Rcd at 6886, 6890 ¶¶ 1, 24; *In re Amendment of Part 2 of the Commission's Rules to Allocate Spectrum Below 3 GHz for Mobile and Fixed Services to Support the Introduction of New Advanced Wireless Services, Including Third Generation Wireless Systems*, Ninth Report and Order and Order, 21 FCC Rcd 4473, 4495-96, 4505 ¶¶ 39-40, 58 (2006); *Teledesic LLC v. FCC*, 275 F.3d 75, 78-79, 85-86 (D.C. Cir. 2001).

[18] *See, e.g.*, 47 U.S.C. § 303(r); *P&R Temmer v. FCC*, 743 F.2d 918, 928 (D.C. Cir. 1984) ("An FCC licensee takes its license subject to the conditions imposed on its use. These conditions may be contained in both the Commission's regulations and in the license. Acceptance of a license constitutes accession to all such conditions. A licensee may not accept only the benefits of the license while rejecting the corresponding obligations."); *Greater Boston Television Corp. v. FCC*, 463 F.2d 268, 287 (D.C. Cir. 1971) ("There is also latitude for the FCC to insert conditions protective of the public interest, *see* 47 U.S.C. § 319(c)."). Such a compensation requirement would also promote "the development and rapid deployment of new technologies, products, and services for the benefit of the public, including those residing in rural areas, without administrative or judicial delays." 47 U.S.C. § 309(j)(3)(A).

[19] *See, e.g.*, *Mobile Commc'ns Corp. of Am. v. FCC*, 77 F.3d 1399, 1406-07 (D.C. Cir. 1996) (holding that the FCC has authority to require payment for license if it finds that the payment is "necessary to 'ensure the achievement of the Commission's statutory responsibilit[y]' to grant a license only where the grant would serve the public interest, convenience, and necessity" (citation omitted) (bracket in original)); *In re Service Rules for the 746-764 and 776-794 MHz Bands, and Revisions to Part 27 of the Commission's Rules*, First Report and Order, 15 FCC Rcd 476, 533-34 ¶¶ 142-145 (2000) (permitting new licensees in the 700 MHz band to reach voluntary agreements with incumbent licensees "that would compensate incumbents for (1) converting to DTV-only transmission before the end of the statutory transition period; (2) accepting higher levels of interference than allowed by the protection standards; or (3) otherwise accommodating new licensees." (footnotes omitted)); *see also In re Service Rules for 746-764 and 776-794 MHz Bands, and Revisions to Part 27 of the Commission's Rules*, Memorandum Opinion and Order and Further Notice of Proposed Rulemaking, 15 FCC Rcd 20,845, 20,863-67 ¶¶ 46-53 (2000) (finding that the Commission had statutory authority under Sections 309(j)(14) and 337(d)(2) of the Act to review and approve voluntary agreements between incumbent broadcasters and new 700 MHz band wireless licensees to expedite the clearing process.).

II. The CBA's Unlawful Proposal Will Inevitably Lead to Protracted Litigation and Corresponding Delays.

The CBA's proposal stands in stark contrast to this transparent, orderly process for reallocating spectrum. The CBA proposal shifts responsibility for the C-Band from a transparent government agency charged with allocating spectrum in the public interest to an unaccountable group of foreign, self-interested actors who would decide for themselves how much of the spectrum to repurpose, who may apply for licenses and on what terms, and how best to repack incumbent satellite operators.[20] While the CBA acknowledges that the Commission must modify the table of allocations in order to allow terrestrial use in the C-Band,[21] it otherwise arrogates to itself the determination of what is in the "public interest" with no accountability, transparency, or oversight from the Commission.[22]

There is no reason to expect the CBA to allocate the C-Band efficiently or ensure that the C-Band is put to its highest and best use. On the contrary, the CBA's proposal would result in backroom deals for C-Band spectrum, with windfall profits for the CBA's members and the inefficient allocation of a limited resource. The CBA contends that its proposal is preferable because its private reallocation of the C-Band can be completed within 18 to 36 months.[23] This is fanciful, both because the CBA's proposal is completely unprecedented and because it is unlawful. The obvious legal infirmities in the plan, detailed below, and the wide array of stakeholders who would be locked out of the CBA's process—including half of the C-Band satellite operators themselves[24]—guarantee that the CBA's proposal will ensnare the Commission in protracted litigation that will delay the ultimate repurposing of the C-Band for years. And when this litigation is finally resolved, the Commission will most likely end up right back where it started in this proceeding: searching for the best—lawful—way to reallocate the C-Band.

The legal bases for such challenges have been well-documented in the comments in this proceeding, and they range from fundamental due process fouls to violations of specific provisions of the Communications Act applicable to the deployment of public spectrum

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[20] Reply Comments of Charter Communications, Inc. at 7 & nn.12-13, 8, GN Docket No. 18-122 (Dec. 11, 2018) ("Charter Reply Comments"); *see also* CBA Comments at 5 n.7 ("[The CBA] has undertaken the process of identifying all parties with an interest in the spectrum and begun preliminary discussions with prospective purchasers to explore desired band plans and technical parameters.").

[21] *See* CBA Comments at 4.

[22] *See Teledesic*, 275 F.3d at 79 ("Among its many responsibilities, the FCC is charged with regulating and overseeing radio spectrum."); *Am. Radio Relay League, Inc. v. FCC*, 617 F.2d 875, 877 (D.C. Cir. 1980) ("As part of the regulatory scheme, Congress created the Federal Communications Commission and gave that agency broad authority to regulate the use of space on the radio spectrum.").

[23] *CBA January 2 ex parte* attachment at 3.

[24] *See* Reply Comments of ABS, Hispasat, and Embratel Star One, at 2-3, GN Docket No. 18-122 (Dec. 11, 2018) ("SSO Reply Comments").

resources. The comments also provide a strong indication of the wide array of potential parties who would have a reason to bring such challenges.

Failure to Auction Licenses Where There Are Mutually Exclusive Applicants. Under Section 309(j)(1), the Commission must hold an auction if "mutually exclusive applications are accepted for any initial license or construction permit."[25] Based on the tremendous interest by parties who have filed in this proceeding, it is clear that there would be mutually exclusive applications for terrestrial C-Band licenses if the licensing process were fair and open.[26] Even the C-Band Alliance has acknowledged that there are more than 400 entities that are "potential participants in the U.S. 5G ecosystem."[27] If the Commission were to abandon its usual practice of holding an auction in this case, it would be violating Section 309(j)(1) and therefore inevitably invite a wave of legal challenges from interested parties.

The CBA argues that an auction is unnecessary because Section 309(j)(6)(E) of the Act authorizes the Commission "to use engineering solutions, negotiation, threshold qualifications, service regulations, and other means in order to avoid mutual exclusivity,"[28] but CBA's argument rests entirely on an inaccurate and untenably broad reading of that provision.[29] While Section 309(j)(6)(E) provides "an exception to th[e] general call for auctions" enshrined in Section 309(j)(1),[30] the Act by its terms requires the *Commission* itself to employ those other means. Thus the *Commission* must oversee the negotiations intended to avoid mutual exclusivity where there are more interested parties than there is available spectrum. As discussed above, however, given the tremendous amount of interest in the use of C-Band spectrum for 5G, it is extremely unlikely that the Commission could avoid mutual exclusivity through a negotiated settlement that includes all interested parties.

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[25] 47 U.S.C. § 309(j)(1).

[26] *See, e.g.*, Charter Reply Comments at 3-4; Verizon Comments at 2-3; Comments of AT&T Services, Inc., at 3-6, GN Docket No. 18-122 (Oct. 29, 2018); Comments of T-Mobile USA, Inc., at 1-2, 36, GN Docket No. 18-122 (Oct. 29, 2018); Comments of United States Cellular Corp., at 3, GN Docket No. 18-122 (Oct. 29, 2018); Comments of CTIA, at 5-10, GN Docket No. 18-122 (Oct. 29, 2018); Comments of Competitive Carriers Association, at 3, GN Docket No. 18-122 (Oct. 29, 2018); Comments of the Public Interest Spectrum Coalition, at 23-24, GN Docket No. 18-122 (Oct. 29, 2018) ("PISC Comments"); Comments of Starry, Inc., at 2-3, GN Docket No. 18-122 (Oct. 29, 2018); Comments of Google LLC, at 10-12, GN Docket No. 18-122 (Oct. 29, 2018); Reply Comments of Dynamic Spectrum Alliance, at 20-21, GN Docket No. 18-122 (Dec. 11, 2018) ("DSA Reply Comments").

[27] *See* Letter from Jennifer D. Hindin, Counsel, C-Band Alliance, to Marlene H. Dortch, Secretary, FCC, at 1, GN Docket No. 18-122 (Feb. 12, 2019); Letter from Jennifer D. Hindin, Counsel, C-Band Alliance, to Marlene H. Dortch, Secretary, FCC, attachment at 1, GN Docket No. 18-122 (Dec. 20, 2018).

[28] 47 U.S.C. § 309(j)(6)(E).

[29] Letter from Jennifer D. Hindin, Counsel, C-Band Alliance, to Marlene H. Dortch, Secretary, FCC, at 2-3, GN Docket No. 18-122 (Feb. 6, 2019) ("*CBA February 6 ex parte*").

[30] *M2Z Networks, Inc. v. FCC*, 558 F.3d 554, 562 (D.C. Cir. 2009).

The CBA cites *Damsky v. FCC*[31] as an example of the Commission resolving mutual exclusivity by allowing two applicants to lock out a third applicant through a private settlement agreement,[32] but the CBA's citation to *Damsky* completely misses the mark. In *Damsky*, the Commission considered all applications and the Commission determined the third applicant to be financially disqualified from receiving a license. Contrary to the CBA's suggestions, the Commission did not exclude her from the process by *fiat* in order to avoid mutual exclusivity.[33] The Commission's decision to adopt the remaining two parties' settlement agreement was thus thoroughly unremarkable, unlike what the CBA proposes here.[34]

As T-Mobile has pointed out,[35] the Commission has rejected a prior proposal by incumbents to make licensing decisions that excludes interested parties.[36] While the CBA claims that the Commission rejected only the specific industry mechanism in that case,[37] the Commission did so in reliance on the broader principle that "[w]e do not believe it is in the public interest to 'resolve' the competing claims of incumbents and non-incumbents for spectrum [pursuant to Section 309(j)(6)(E)] by establishing a settlement mechanism that is limited to incumbents and excluding non-incumbents from the process."[38] That same rationale applies with even greater force to the CBA's proposal.

Moreover, Section 309(j)(6)(E) does not impose a requirement on the Commission to avoid auctions whenever possible, as the CBA suggests.[39] To the contrary, the Commission's authority under Section 309(j)(6)(E) to avoid auctions is expressly limited to actions that meet

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[31] *Damsky v. FCC*, 199 F.3d 527 (D.C. Cir. 2000).

[32] *CBA February 6 ex parte* at 4-5.

[33] *Damsky*, 199 F.3d at 529, 533-35.

[34] Moreover, the Commission adopted the settlement agreement pursuant to Section 309(*l*), which gave the Commission express authority to resolve conflicting applications filed before July 1, 1997 through a settlement agreement during a limited 180-day period. *See id.* at 535-36; 47 U.S.C. § 309(*l*)(3).

[35] Reply Comments of T-Mobile USA, Inc., GN Docket No. 18-122, at 26 & n.90 (Dec. 11, 2018) ("T-Mobile Reply Comments").

[36] *In re Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHZ Frequency Band*, Second Report and Order, 12 FCC Rcd 19,079, 19,084 ¶ 6 (1997).

[37] *CBA February 6 ex parte* at 5.

[38] *Id.* at 19,104 ¶ 62.

[39] *See CBA February 6 ex parte* at 3; *Orion Commc'ns Ltd. v. FCC*, 213 F.3d 761, 763 (D.C. Cir. 2000) (per curiam) (rejecting a challenge to the Commission's decision to hold an auction because Section 309(j)(6)(E) "cannot be read to direct the FCC to adopt *all* other means available"). Indeed, the D.C. Circuit has described Section 309(j)(6)(E) as a "hortatory provision" and a rule of construction for interpreting Section 309(j)(1). *Northpoint Tech., Ltd. v. FCC*, 414 F.3d 61, 74 (D.C. Cir. 2005). The D.C. Circuit has also rejected multiple attempts to use Section 309(j)(6)(E) as a way to constrain the Commission's authority to hold auctions. In fact, in all of the D.C. Circuit precedents that the CBA cites in its February 6 ex parte on this point, the court affirmed the Commission's decision to use an auction and *rejected* petitioner's argument that Section 309(j)(6)(E) required the Commission to do otherwise.

"the public interest."[40] As explained below, the CBA's unprecedented proposal to empower private parties to determine the assignment of an entire band of spectrum through "secondary market agreements" fails the public interest test.

First, it has long been established that the Commission must distribute licenses in a "fair, efficient, and equitable" manner.[41] That requires every qualified applicant to be able to compete for a license on an equal footing.[42] The CBA's proposal would inevitably exclude many of the would-be bidders described above from the reassignment of the C-Band in order to "avoid" mutual exclusivity.[43] Such a result would violate the directive to distribute licenses fairly and equitably. In effect, it would swallow the "general call for auctions"[44] in Section 309(j)(1).

Second, Section 309(j)(6)(E)'s limited authorization to avoid mutual exclusivity if doing so is "in the public interest" clearly precludes the Commission from relying on this provision to abandon its broad responsibilities under numerous other provisions of the Act to make available a "rapid, efficient, Nation-wide, and world-wide"[45] system of telecommunications; to "maintain the control of the United States over all the channels of radio transmission";[46] to determine the allocation of spectrum bands;[47] and to "encourage the provision of new technologies and services to the public."[48] A decision by the Commission to give the CBA control over how much spectrum to reallocate, whom to invite to participate in the reallocation, and who ultimately will receive a license to use this newly repurposed spectrum does not comport with any of these public interest objectives. As explained above, the Communications Act charges the Commission with the responsibility for striking the balance between protecting incumbent users and the benefits associated with repurposing spectrum for new uses. The CBA has not cited a single case in which the Commission has adopted anything approaching its sweeping approach to privatize the repurposing of spectrum.[49]

In view of the substantial legal infirmities in the CBA's proposal, it would inevitably spawn protracted litigation if adopted. The would-be bidders whom the CBA will inevitably leave out of the process, and other parties interested in terrestrial C-Band licenses who prefer the

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[40] 47 U.S.C. § 309(j)(6)(E).

[41] 47 U.S.C. § 307(b).

[42] *See Ashbacker Radio Corp. v. FCC*, 326 U.S. 327, 330, 333 (1945); *Bachow Commc'ns, Inc. v. FCC*, 237 F.3d 683, 689 (D.C. Cir. 2001); *In re Alexander Broadcasting, Inc.*, Memorandum Opinion and Order, 21 FCC Rcd 9968, 9971-72 ¶ 8 (2006) (applying the *Ashbacker* doctrine in the auction context); 47 U.S.C. § 309(a)-(b).

[43] CBA Comments at 31-32.

[44] *See M2Z Networks*, 558 F.3d at 562-63.

[45] 47 U.S.C. § 151.

[46] 47 U.S.C. § 301.

[47] 47 U.S.C. § 303(c).

[48] *Id.* § 157(a).

[49] *See infra.* Part III; *see also* p. 8 *supra* (discussing *Damsky v. FCC*).

open and transparent licensing process guaranteed by the Communications Act, will have plenty of motivation and solid grounds to challenge such a decision.[50]

Unlawful Subdelegation. Aggrieved stakeholders would also have a strong argument that the CBA's proposal at its foundation is an unlawful subdelegation of the Commission's responsibility over the C-Band spectrum.[51] The D.C. Circuit has squarely held that "subdelegations to outside parties are assumed to be improper absent an affirmative showing of congressional authorization."[52] That is because subdelegations to outside parties blur critical lines of accountability, undermine democratic checks on government decision-making, and run the risk that the ultimate decision-makers will pursue policies that are contrary to an agency's goals and the underlying statutory scheme.[53] Delegations to private individuals are even more disfavored because these harms are "doubled in degree" when an agency transfers its authority to private individuals, and the viability of legal challenges to such delegations is "unquestionable."[54]

There is no evidence whatsoever that Congress authorized the Commission to delegate its responsibilities to any outside parties, let alone interested private parties like the CBA. The CBA contends that Section 309(j)(6)(E)'s reference to the use of "negotiations" to "avoid mutual exclusivity" constitutes such an authorization,[55] but the wording of that section falls far short of the kind of express delegation found elsewhere in the Communications Act.[56] If anything,

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[50] *T-Mobile ex parte* attachment at 12; Reply Comments of Comcast Corp. and NBCUniversal Media, LLC, at 10-11, GN Docket No. 18-122 (Dec. 11, 2018) ("Comcast Reply Comments"); *see also* Reply Comments of American Cable Association, at 14-15, GN Docket No. 18-122 (Dec. 11, 2018) (arguing that the CBA proposal does not fall within the exception "to the FCC's obligation to allocate initial licenses by auction in the event of mutual exclusivity."); Reply Comments of Google LLC, at 27-28, GN Docket No. 18-122 (Dec. 11, 2018) (suggesting that a potential source of litigation would be "whether Section 309(j) of the [Act] authorizes the use of a private transition facilitator or requires an auction."); SSO Reply Comments at 15 (indicating that the CBA proposal "cannot survive legal muster."). There is no question that new terrestrial C-Band licenses will be "initial authorizations" for purposes of the auction statute.

[51] *See* Comcast Reply Comments at 10.

[52] *U.S. Telecom Ass'n v. FCC*, 359 F.3d 554, 565 (D.C. Cir. 2004) (overturning the Commission's scheme for subdelegating mass market switch and related determinations to state commissions).

[53] *Id.* at 565-66.

[54] *Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC*, 737 F.2d 1095, 1143 n.41 (D.C. Cir. 1984).

[55] *CBA February 6 ex parte* at 6.

[56] *See Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001) ("Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes."); *cf.* 47 U.S.C. § 302a(e) (expressly authorizing the Commission to delegate its responsibility for equipment testing to private laboratories).

Section 309(j)(6)(E) must be construed to *avoid* raising this serious constitutional question.[57] Indeed, Charter and other commenters have identified ample evidence that Congress expects the Commission to make the decisions about how much spectrum to repurpose, who may apply for licenses and on what terms, and how best to repack incumbent satellite operators.[58]

Even if Congress *had* authorized the Commission to delegate its responsibilities to the CBA—which it has not—that delegation would be unconstitutional.[59] Ceding control over the reallocation of the C-Band to the CBA would amount to "legislative delegation in its most obnoxious form; for it is not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of others in the same business."[60] Similarly, the D.C. Circuit has explained that the Commission cannot give exchange carriers the power to set access surcharges for private communications systems and that Congress could not authorize the Commission to do so.[61] The CBA contends against all evidence to the contrary that its proposal would not involve any subdelegation at all, or alternatively that the Commission's subdelegation of its authority to the CBA would be permissible because a federal agency can condition its "grant of permission on the decision of another entity" in some instances.[62] But in the case it cites for the latter proposition, the court was referring to delegation to "a state, local, or tribal government"—not a private consortium of incumbents.[63]

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[57] *See, e.g.*, *Zadvydas v. Davis*, 533 U.S. 678, 689 (2001); *Bell Atl. Tel. Companies v. FCC*, 24 F.3d 1441, 1445 (D.C. Cir. 1994) ("Within the bounds of fair interpretation, statutes will be construed to defeat administrative orders that raise substantial constitutional questions.").

[58] *See* Charter Reply Comments at 4-8; Comcast Reply Comments at 10-11; T-Mobile Reply Comments at 20-31; DSA Reply Comments at 20-21; PISC Comments at 22-25.

[59] *See, e.g.*, *Carter v. Carter Coal Co.*, 298 U.S. 238, 311-12 (1936) ("[I]n the very nature of things, one person may not be intrusted [sic] with the power to regulate the business of another, and especially of a competitor. And a statute which attempts to confer such power undertakes an intolerable and unconstitutional interference with personal liberty and private property."); *Nat'l Ass'n of Regulatory Util. Comm'rs*, 737 F.2d at 1143-44.

[60] *Carter*, 298 U.S. at 311.

[61] *National Ass'n of Regulatory Utility Commissioners*, 737 F.2d at 1143-44.

[62] *CBA February 6 ex parte* at 5-6 (quoting *U.S. Telecom Ass'n*, 359 F.3d at 567).

[63] *U.S. Telecom Ass'n*, 359 F.3d at 567. Neither of the examples of the intergovernmental "subdelegation" cited by the D.C. Circuit comes close to the CBA's proposal to have the Commission give a subset of interested private parties broad responsibility over how to repurpose and allocate spectrum in the C-Band. The CBA also cites *Neustar, Inc. v. FCC*, 857 F.3d 886 (D.C. Cir. 2017) as an example of the court affirming a subdelegation to private parties. *CBA February 6 ex parte* at 6 n.30. But in that case—which involved the implementation of portability rules—Congress specifically directed the Commission to "create or designate one or more impartial entities to administer telecommunications numbering and to make such numbers available on an equitable basis." *Neustar*, 857 F.3d at 888-89 (quoting 47 U.S.C. § 251(e)(1). And unlike what the CBA proposes here, the Commission resolved in that case to select "one or more *independent, non-governmental entities that are not aligned with any particular telecommunications industry segment*." *Id.* at 889 (quotation marks omitted) (emphasis added). Furthermore, the Commission's decision to delegate to a private, neutral entity was not even at

Contrary to the CBA's claims, the Commission cannot cede to private parties its statutorily mandated responsibilities to manage and license spectrum. What the CBA proposes is a subdelegation "in its most obnoxious form."[64] Because the Commission does not have—and could not have—the authority to adopt the CBA's proposal, attempting to do so would inevitably invite legal challenges.

Insufficient Record. As several commenters have pointed out, the CBA has failed to offer the Commission crucial specifics on how its proposal would be carried out.[65] The public record is seriously lacking in information that the Commission would need to make a determination that would pass muster under the Administrative Procedure Act. Adoption of a proposal without such a record would be arbitrary and capricious.[66]

Forced Modification of Satellite Licenses. The CBA proposes to deprive any satellite operators who do not voluntarily participate in the CBA to accept secondary status for their satellite operations, effectively modifying the licenses of these entities without the notice and due process required by the Communications Act.[67] The satellite operators would almost certainly challenge such a unilateral alteration in their spectrum usage rights.

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The risk of protracted litigation, far from providing a basis for adopting the CBA's proposal, is one of the most compelling reasons for the Commission to *reject* the proposal and to move forward expeditiously to reallocate this spectrum band for terrestrial use and assign those licenses using a public auction—a framework that squarely falls within the Commission's authority and avoids the added complexity of an incentive auction.

III. The CBA Mischaracterizes Recent Commission Action on the Use of the Secondary Market and Extending Flexible Use Rights.

In defense of its extralegal scheme, the CBA mischaracterizes prior FCC decisions according flexible use rights to existing licensees and authorizing licensees to engage in secondary sales of their already existing spectrum rights.[68] The CBA characterizes its proposal as a "much narrower expansion" of its members' rights than the Commission has provided under

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issue in that case. Rather, the case involved a challenge by one private entity to the Commission's decision to award the contract for administering numbering to a different entity. *Id.* at 889-91.

[64] *Carter*, 298 U.S. at 310-11.

[65] *See* Comcast Reply Comments at 3-6 & n.10 (collecting similar remarks from other commenters).

[66] *See id.* at 3-6 & n.11; *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) ("The scope of review under the 'arbitrary and capricious' standard is narrow and a court is not to substitute its judgment for that of the agency. Nevertheless, the agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" (citations omitted)).

[67] *See* 47 U.S.C. § 316(a).

[68] *See CBA January 2 ex parte* attachment.

these precedents,[69] but the CBA's argument is without foundation. None of the examples proffered by the CBA offer any precedent for the delegation of such a fundamental Commission responsibility. To the contrary, the Commission has long recognized that "secondary markets are not a substitute for finding additional spectrum when needed and should not supplant [the] spectrum allocation process."[70]

Secondary Sales. In arguing in favor of its proposal, the CBA incorrectly relies on various Commission orders approving the sale of millimeter wave and AWS spectrum licenses. But the examples CBA cites were secondary sales of spectrum that had *already* been repurposed. In none of those cases did the Commission alter spectrum rights at the behest of seller or buyer in order to facilitate a private sale of that spectrum, as the CBA has proposed in this proceeding. CBA's proposal seeks to commingle these precedents in a vain attempt to justify something completely different—the privately managed reallocation of a spectrum band from satellite to terrestrial use. The Communications Act appropriately entrusts such a reallocation—and the identification of licensees for the terrestrial use of this spectrum—to the Commission, not to private parties, and certainly not to the secondary market.

Even assuming that the compensation paid to the sellers in the decisions cited by the CBA reflected the value of flexible use rights in the licenses that were sold, neither the SpectrumCo transaction, nor any of the others cited by the CBA, support the CBA's radical proposal to give incumbents with misaligned incentives free rein to allocate and regulate spectrum as they see fit. To the contrary, even as it was encouraging the use of the secondary market to distribute spectrum, the Commission found that the most efficient means to assign spectrum is through the use of competitive bidding.[71]

AWS-4. The CBA can find no support for its proposal in the Commission's determination to both allow DISH Network Corp. ("DISH") to acquire TerreStar and DBSD, the last two remaining operators in the 2 GHz (2000-2020 MHz and 2180-2200 MHz) Mobile Satellite Service ("MSS") spectrum band, and the Commission's subsequent decision to adopt flexible use rules in this band.[72]

In the *AWS-4 Order*, the Commission—not the satellite licensees—established the terrestrial service, technical, and licensing rules for the affected band. And then the Commission—not the satellite licensees—limited the exercise of those rights to the incumbent satellite licensees by adding those rights to their existing licenses.[73] Likewise, the Commission

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[69] *Id.*, attachment at 1.

[70] *In re Principles for Promoting the Efficient Use of Spectrum By Encouraging the Development of Secondary Markets*, Policy Statement, 15 FCC Rcd 24,178, 24,178-79 ¶ 2 (2000).

[71] *See id.* at 24,181-82 ¶ 10 ("The assignment of spectrum through competitive bidding has facilitated more efficient and rapid licensing of spectrum to those who value it the most.").

[72] *See In re Service Rules for Advanced Wireless Services in the 2000-2020 MHz and 2180-2200 MHz Bands*, Report and Order and Order of Proposed Modification, 27 FCC Rcd 16,102, 16,103, 16,107, 16,109-10 ¶¶ 1, 9, 14 (2012) ("*AWS-4 Order*").

[73] *See AWS-4 Order*, 27 FCC Rcd at 16,110-11, 16,167 ¶¶ 17, 169 ("[W]e reaffirm the Commission's earlier technical findings regarding same-band, separate operator sharing between mobile satellite and

approved DISH's acquisition of TerreStar and DBSD in part because it found that it "may facilitate a quicker and larger scale new entry of 2 GHz MSS and possibly terrestrial service *by a financially secure 2 GHz provider*"[74]—not to effectuate a reallocation of the band through a secondary sale.

In the 3.7-4.2 GHz proceeding, by contrast, the Commission recognizes the challenges of co-channel sharing by satellite and terrestrial use,[75] and so is seeking comment on the reallocation of some or all of the C-Band to terrestrial use, "with clearing for flexible use beginning at 3.7 GHz and moving higher up in the band as more spectrum is cleared."[76] The Commission's objective in the 3.7-4.2 GHz proceeding is therefore not merely to grant new flexible use rights to incumbents of this spectrum band, but rather to clear at least a portion of the spectrum for dedicated terrestrial mobile use. The CBA's proposal, which would assign this determination to its members,[77] far exceeds the flexible use rights the Commission granted incumbent MSS licensees in its *AWS-4 Order*.

Flexible Use Rights. The CBA's reliance on the Commission's determinations to confer flexible use rights to licensees in the UMFUS, EBS, and BRS bands likewise provides no support for the CBA's unprecedented proposal. The grant of such rights to existing licensees in certain spectrum bands reflects the Commission's long-held belief that "[f]lexible allocations may result in more efficient spectrum markets,"[78] which the Commission explicitly

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terrestrial operations in this band. We believe that such a sharing scenario generally remains impractical at this time and would inappropriately affect the rights of the existing MSS authorization holders. . . . [W]e conclude that the Commission's initial proposal to grant terrestrial authority to operate in the AWS-4 band *to the current 2 GHz MSS licensees . . .* is appropriate and will serve the public interest, convenience, and necessity." (emphasis added)).

[74] *In re DBSD North America, Inc., Debtor-In-Possession; New DBSD Satellite Services G.P., DEBTOR-In-Possession; Pendrell Corporation, Transferor; and Terrestar License Inc., Debtor-In-Possession; Assignor, and Dish Network Corporation, Transferee; and GAMMA Acquisition L.L.C.; Assignee Applications for Consent to Assign/Transfer Control of Licenses and Authorizations of New DBSD Satellite Services G.P., Debtor-in-Possession and TerreStar License Inc., Debtor-in-Possession*, Order, 27 FCC Rcd 2250, 2259 ¶ 24 (IB 2012) (emphasis added).

[75] *C-Band NPRM*, 33 FCC Rcd at 6933 ¶ 50 ("We recognize that co-channel sharing of spectrum between the FSS and more intensive terrestrial wireless use in the same geographic area may be difficult.").

[76] *Id.* at 6916 ¶¶ 1-2.

[77] The CBA acknowledges, as it must, that only the Commission can revise the Table of Frequency Allocations to add a co-primary mobile allocation in the 3.7-4.2 GHz band and condition the mobile use in the band on coordination with the fixed-satellite service operators remaining in the band. *See* CBA Comments at 4. But while revising the table is a necessary condition for reallocating the spectrum, it is not reallocation itself. The CBA proposal would usurp the Commission's responsibility to determine how much C-Band spectrum to reallocate to terrestrial use, the terms and conditions of such a reallocation, and the means of awarding terrestrial licenses. *See* Charter Reply Comments at 7 n.12.

[78] *In re Principles for Reallocation of Spectrum to Encourage the Development of Telecommunications Technologies for the New Millennium*, Policy Statement, 14 FCC Rcd 19,868, 19,870 ¶ 9 (1999).

acknowledged in extending such flexibility to UMFUS, EBS, and BRS licensees.[79] But according terrestrial licensees greater flexibility is not the same as the wholesale private reallocation of spectrum from satellite to terrestrial use that the CBA is proposing.

* * *

For the foregoing reasons, the Commission should move quickly to reallocate the C-Band and assign the new terrestrial licenses using the tools and auction authority provided by Congress. This open, fair, transparent process will achieve the goal of reallocating a portion of the C-Band to 5G with the least delay and litigation risk. The CBA's proposal, by contrast, would generate challenges from among the wide array of stakeholders who would be harmed by a private process that lacks public accountability, likely resulting in a limited deployment of 5G and disadvantaging our leadership position in the global race to 5G.

Respectfully submitted,

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[79] *See, e.g.*, *Spectrum Frontiers Report & Order*, 31 FCC Rcd at 8017 ¶ 1 ("We build upon years of successful spectrum policy — including flexible use . . . to create [terrestrial mobile] service rules for using four spectrum bands above 24 GHz."); *In re Amendment to Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands*, Report and Order and Further Notice of Proposed Rulemaking, 19 FCC Rcd 14,165, 14,167 ¶ 1 (2004) ("The actions taken in this order . . . will provide both existing . . . licensees and potential new entrants with greatly enhanced flexibility in order to encourage the highest and best use of spectrum domestically and internationally, and the growth and rapid deployment of innovative and efficient communications technologies and services.").