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25 March 2019

Ex Parte

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 et al.*; GN Docket No. 18-122, RM-11791 & RM-11778.

Dear Ms. Dortch:

Between the lines of the comments filed in this proceeding lies an emerging consensus that *all* C-band stakeholders—satellite operators, earth station owners, and taxpayers alike—must have their interests recognized for the proposed repurposing of this spectrum to succeed on the timeline desired.[1] Critically, providing for this common sense outcome is well within the Commission's legal authority, and the pending proposals that diverge from such common sense are unlawful.

As a matter of spectrum management, the conclusion that all stakeholders should have their interests recognized is beyond serious dispute. It follows directly from the basic structure of the lower C-band, which is shared among multiple categories of licensees.[2] Although these licensees

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[1] *See, e.g.*, Declaration of Jeffrey Eisenach ¶¶ 28-29, attached to Reply Comments of the C-Band Alliance, IB Docket No. 18-122 (filed Dec. 7, 2018) ("CBA Reply Comments") (acknowledging that taxpayer benefits are important); Letter from Jennifer Hindin, Counsel, C-Band Alliance, to Marlene H. Dortch, Secretary, FCC, at 2, IB docket No. 18-122 (filed Jan. 31, 2019) (acknowledging that "voluntary" participation by incumbent licensees is vital to the success of this proceeding); Letter from Elizabeth Andrion, Charter Communications, to Marlene H. Dortch, Secretary, FCC, at 5 & n.16, IB Docket No. 18-122 (filed Feb. 22, 2019) ("Charter Feb. 22 Ex Parte") (explaining that the reallocation should benefit taxpayers, provide incentives to satellite operators, and protect "earth stations affected by the transition"); Letter from Steve Sharkey, T-Mobile USA, Inc., to Marlene H. Dortch, Secretary, FCC, at 2-6, IB Docket No. 18-122 (filed Feb. 15, 2019) ("T-Mobile Feb. 15, 2019 Ex Parte") (claiming that its proposal would compensate earth station operators, satellite operators, and taxpayers); Reply Comments of ABS Global Ltd., Hispasat S.A., and Embratel Star One S.A. (the Small Satellite Operators) at 1-7, 21-26, IB Docket No. 18-122 (filed Dec. 11, 2018) ("SSO Reply Comments") (emphasizing that all stakeholders must be included and proposing that the Commission adopt a distribution model to ensure that result); Letter from Scott Blake Harris, Counsel, SSOs to Marlene H. Dortch, Secretary, FCC, at Attachment pp. 4-5, 7-9, GN Docket No. 18-122 (filed Dec. 18, 2018) (illustrating one potential outcome of an inclusive and incentive-based distribution model) ("SSO Dec. 18, 2018 Ex Parte"); Letter from Pantelis Michalopoulos, Counsel to the American Cable Association, to Marlene H. Dortch, Secretary, FCC, at 2-5 (filed Feb. 12, 2019) ("ACA Feb. 12, 2019 Ex Parte") (arguing that earth station owners should be made whole with reallocation proceeds); Reply Comments of the Public Interest Spectrum Coalition at 24, IB Docket No. 18-122 (filed Dec. 11, 2018) (emphasizing the need to compensate taxpayers).

[2] Consistent with the *NPRM* and the FCC's processing of satellite applications, we use the term "licensee" as applied to C-band satellite operators to include operators of space stations authorized to operate in the C-band in the United States either by the issuance of a Part 25 license or by the FCC's grant of U.S. market access as part of the FCC's satellite licensing process. *See Expanding Flexible Use of the 3.7 to 4.2 GHz Band, et al.*, Order

may hold different use rights and have different amounts invested, the relinquishment of FCC authorizations and the transition to a compressed band plan will be painful for all involved. Moreover, because the FCC grants C-band spectrum rights on a non-exclusive basis, no licensee should consider it sacrilege to admit that a significant share of the value created by repurposing part of the spectrum ought simply to inure to the Treasury.

Consistent with these principles, the position of the Small Satellite Operators ("SSOs") has been and remains as follows. Regardless how the sale is conducted, the Commission should adopt a distribution and scoring model ("DSM") that sets common sense into motion with respect to the allocation of proceeds generated from repurposing the band.[3] Instead of inviting satellite operators and earth station owners to litigate for years over what it will take to relocate, a DSM would provide earth station owners with a relocation reimbursement plus an incentive payment that would encourage them to complete the transition quickly—and render variations in relocation estimates somewhat beside the point. A DSM also would allocate proceeds fairly among all satellite operators with space stations authorized to transmit in the U.S. C-band, and not just the four members of the CBA.[4] A DSM would compensate these satellite operators without shortchanging earth station owners (unlike the current CBA proposal), and it would compensate earth station owners without shortchanging satellite operators (unlike T-Mobile's latest auction proposal). Critically, it would recognize taxpayer interests in this important public resource.

Some have suggested that legal impediments preclude a reasonable outcome to this proceeding. In this instance, at least, the law and common sense are not at odds. The Commission has ample authority under Sections 303(c), 303(r), and 4(i) of the Communications Act to ensure that earth station owners receive incentive-based compensation and that taxpayers, too, receive a portion of the value created by repurposing the spectrum.[5] Moreover, while the SSOs remain open to a reasonable auction alternative, the Communications Act would prohibit T-Mobile's incentive auction proposal in its current form.[6]

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and Notice of Proposed Rulemaking, 33 FCC Rcd. 6915, 6939 ¶ 59 (2018) (*"NPRM")*. With respect to receive rights, the SSOs use the term "licensee" to include earth station operators whether they access C-band service using an earth station licensed under Part 25 or registered using an FCC Form 312.

3 *See* SSO Reply Comments at 1-6, 21-26; SSO Dec. 18, 2018 Ex Parte at Attachment pp. 4-5, 7-9 (describing one possible outcome of a reasonable DSM). While this letter focuses on important issues regarding the distribution of proceeds among spectrum suppliers, the SSOs also recognize that a market-based approach, if adopted by the Commission, should contain common-sense protections on the demand-side to promote the efficient allocation of spectrum.

4 *See generally* SSO Reply Comments; Letter from Scott Blake Harris, Counsel, Small Satellite Operators, to Marlene H. Dortch, Secretary, FCC, IB Docket No. 18-122 (filed Feb. 21, 2019) ("SSO Feb. 21, 2019 Ex Parte").

5 This is not to say that the Commission *must* adopt a market-based transition to ensure a just result. The SSOs remain open to an auction process that would fairly compensate incumbents for their loss of spectrum.

6 *See* T-Mobile Feb. 15, 2019 Ex Parte at 2-4 (proposing an incentive auction that effectively would exclude satellite incumbents).

I. THE COMMISSION HAS AUTHORITY TO ENSURE THAT EARTH STATION OWNERS AND THE PUBLIC RECEIVE FAIR COMPENSATION

Under Section 303(c) of the Communications Act, the Commission must "assign bands of frequencies to the various classes of stations, and assign frequencies for each individual station," as the "public convenience, interest, or necessity requires."[7] To fulfill these and other statutory obligations, Section 4(i) of the Act authorizes the Commission to "perform any and all acts, . . . and issue such orders, not inconsistent with the [Act], as may be necessary in the execution of its functions."[8] Described as the Act's "necessary and proper clause,"[9] Section 4(i) provides the Commission with a "wide-ranging source of authority" and "significant discretion to choose among a range of reasonable remedies."[10] Importantly, Title III contains its own "necessary and proper clause" in Section 303(r) of the Act, reinforcing the breadth of Commission's authority over spectrum allocation and licensing decisions.[11] These provisions provide the Commission with all the authority it needs to require payments to the Treasury and earth station operators out of the proceeds derived from re-purposing C-band spectrum.

As observed by the Fifth Circuit, these general grants of rulemaking authority empower the Commission to "require payments from parties even without express statutory authorization."[12] Importantly, the court made that observation relying in part on *Mtel*, which sets forth the analysis

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7 47 U.S.C. § 303(c).

8 47 U.S.C. § 154(i).

9 *See, e.g.*, *Mobile Commc'ns Corp. of America v. FCC*, 77 F.3d 1399, 1404 (D.C. Cir. 1996) ("*Mtel*"); *Texas Office of Pub. Util. Counsel v. FCC*, 183 F.3d 393, 443 (5th Cir. 1999) (in light of the "FCC's 'necessary and proper' authority under [Section 4(i)] . . . we are convinced that Congress intended to allow the FCC broad authority to implement" the Act"). *See also New England Tel. & Tel. Co. v. FCC*, 826 F.2d 1101, 1107-08 (D.C. Cir. 1987) (holding that Section 4(i) provides sufficient authority for the Commission to adopt an earnings sharing mechanism requiring wireline providers to pay refunds to consumers); *N. Am. Telecomms. Ass'n v. FCC*, 772 F.2d 1282, 1292 (7th Cir. 1985) ("Section 4(i) empowers the Commission to deal with the unforeseen . . . to the extent necessary to regulate effectively those matters already within the boundaries" of the Act).

10 *New England Tel. & Tel. Co.*, 826 F.2d at 1107-08; *see also Mtel*, 77 F.3d at 1404; *Fox v. FCC*, 293 F.3d 537, 539 (2002) (recognizing that "the Supreme Court and [the D.C. Circuit] have interpreted 'necessary' in [Section 4(i)] to mean useful rather than indispensable"); *United States v. Southwestern Cable Co.*, 392 U.S. 157, 180, 88 S. Ct. 1994, 2006 & n.46 (1968) (Section 4(i) permits the Commission "to issue orders 'necessary in the execution of its functions'" absent a specific statutory provision "depriv[ing]" the Commission "of [that] authority").

11 *See* 47 U.S.C. § 303(r) (the Commission shall "[m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this chapter[.]"); *NBC v. United States*, 319 U.S. 190, 220, 63 S. Ct. 997, 1011 (1943) (rejecting a "cramping construction" of the Commission's authority under Section 303(r)); *United States v. Storer Broadcasting Co.*, 351 U.S. 192, 203, 76 S. Ct. 763, 770 (1956) (Section 303(r) "grant[s] general rulemaking power not inconsistent with the Act or law"); *Springfield Television of Utah, Inc. v. FCC*, 710 F.2d 620, 622 (10th Cir. 1983) (noting that the FCC "was given broad rulemaking authority" under "47 U.S.C. § 303(r)"); *Fox*, 293 F.3d at 539 (acknowledging that in Section 303(r), just as in Section 4(i), the term "necessary" means "useful rather than indispensable" under applicable precedent).

12 *Texas Office of Pub. Util. Counsel*, 183 F.3d at 444 & n.98 (upholding the transition to the explicit provision of universal service high-cost support against challenges to the FCC's authority to assess contribution obligations).

applicable here.[13] In *Mtel*, the D.C. Circuit upheld the FCC's decision to require an applicant to pay the Treasury a discounted market-based rate for a license awarded outside of the auction context.[14] Mtel challenged the FCC's authority to require the payment, arguing that Section 4(i)'s general grant of authority was insufficient in light of the "lack of affirmative statutory support" specifically permitting charges of the kind imposed.[15] Finding no direct conflict between the payment and any other provision of the Act, the court rejected Mtel's arguments. The court concluded that Section 4(i) permitted the payment so long as it advanced the Commission's statutory duty to ensure that license grants "serve the public interest, convenience, and necessity."[16] Deferring substantially to "the Commission's judgment regarding how the public interest is best served," the court accepted the Commission's public interest justifications and denied Mtel's petition in relevant part, remanding only for the Commission to consider a narrow separate issue unrelated to its statutory authority.[17]

Mtel thus makes clear that the Commission may rely on in its general rulemaking authority to require payments from parties, even if those payments are directed to the Treasury and even if they are imposed outside the auction context, so long as the Commission reasonably concludes that the payments advance a statutory purpose and are not explicitly prohibited by other Act provisions. A Commission order that requires the transition facilitator to allocate proceeds according to an inclusive and incentive-based DSM would easily satisfy that analysis.[18] The Commission has a statutory mandate to allocate and establish rules for the licensing of spectrum, and, as in *Mtel*, those allocation and licensing decisions must serve the "public convenience, interest, or necessity."[19] In light of the unique characteristics of the lower C-band ecosystem, it would be more than reasonable for the Commission to conclude that incentivizing earth station operators

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13 *Mtel*, 77 F.3d at 1404-1407.

14 *Id.*

15 *Id.* at 1406.

16 *Id.*

17 Noting that the FCC had "reversed itself at the eleventh hour" after repeatedly stating in prior decisions that "Mtel would not be required to pay," the court remanded for the Commission to provide Mtel with "an opportunity to state its reliance concerns and to have the Commission address whatever Mtel may say." *Mtel*, 77 F.3d at 1407. Of course, "reliance concerns" in the C-band strongly favor an inclusive and incentive-based DSM. Incumbent operators, especially satellite operators, have committed enormous sums of investment capital on the basis of their authorizations and the rules governing the lower C-band as they exist today.

18 Importantly, the fact that Mtel was an applicant for a license, as opposed to an existing licensee or consortium of existing licensees, was irrelevant to the court's analysis of the Commission's statutory authority to require a payment. The Commission may require any entity within its jurisdiction to make such payments, *see, e.g.*, *New England Tel. & Tel. Co.*, 826 F.2d at 1108, *Improving Public Safety Communications in the 800 MHz Band*, Report and Order, Fifth Report and Order, Fourth Memorandum Opinion and Order, and Order, 19 FCC Rcd. 14,969 ¶¶ 34, 75 (2004) ("*800 MHz Rebanding Order*"), and thus may implement a DSM by requiring a transition facilitator to allocate proceeds in accordance with the model.

19 *See* 47 U.S.C. § 303(c). *See also* 47 U.S.C. § 303(f) (authorizing the FCC to "[m]ake such regulations not inconsistent with law as it may deem necessary to prevent interference . . . and to carry out the provisions of this chapter," so long as "changes in the frequencies . . . of any station" have the "consent of the station licensee" or "will promote public convenience or interest or will serve public necessity").

and compensating the Treasury as part of the reallocation would serve the public convenience, interest, and necessity, and there are no statutory provisions that would preclude that just result.

Earth station operators. A DSM that reimburses and incentivizes earth station owners would serve the public convenience, interest, and necessity for several reasons.

As an initial matter, earth station operators, like satellite operators, have made substantial investments in reliance on their FCC authorizations, which must be respected to maintain strong incentives for spectrum users to commit capital and innovate in this band and all others.[20] While satellite operators have expended enormous resources to launch C-band satellites, others (including cable and content companies) have contributed substantially to the C-band ecosystem by investing in the ground footprint necessary to deliver advanced and reliable services to businesses and consumers.[21] Thus, to ensure that market incentives promote efficient spectrum use now and in the future, earth station operators should receive both reimbursement for all of their relocations costs and an additional incentive payment for relocating promptly.

Practical challenges further establish the need to compensate earth station owners using a DSM—and to ensure that their payment includes a robust incentive component. Widespread ownership of C-band earth stations makes it obvious that individual negotiations over relocation simply will not work.[22] The record shows that there are roughly 20,000 earth stations registered in the lower C-band.[23] While the top 24 operators own about half, 2,700 distinct entities own an FCC-registered C-band earth station.[24] Even at a fraction of the scale required, individual negotiations

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[20] *See, e.g.*, Letter from Jennifer D. Hindin, Counsel, C-Band Alliance, to Marlene H. Dortch, Secretary, FCC, at 11 & n.55, IB Docket No. 18-122 (filed Feb. 6, 2018) (citing precedent for allowing incumbents to participate in the gains of a spectrum reallocation); SSO Feb. 21, 2019 Ex Parte at 3 (explaining that the CBA's precedent prohibits the CBA's arbitrary exclusion of competing satellite operators); *Use of Spectrum Bands Above 24 GHz for Mobile Radio Services*, Report and Order and Further Notice of Proposed Rulemaking, 31 FCC Rcd. 8014, 8031, 8091-92 ¶¶ 41-42, 219-220 (2016) (allowing incumbent licensees to convert their authorizations to flexible use); *Service Rules for Advanced Wireless Services in the 2000-2020 MHz and 2180-2200 MHz Bands*, Notice of Proposed Ruelamking and Notice of Inquiry, 27 FCC Rcd. 3561, 3563 ¶ 2 (2012); *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, 14,176 ¶ 20 (2004).

[21] *See, e.g.*, Reply Comments of CBS Corporation, Discovery, Inc., The Walt Disney Company, 21st Century Fox, Inc., Univision Communications Inc., and Viacom Inc. at 7 & n.24, IB Docket No. 18-122 (filed Dec. 11, 2018) ("Content Companies Reply Comments"); ACA Feb. 12, 2019 Ex Parte; Comments of Comcast Corporation and NBCUniversal Media, LLC, IB Docket No. 18-122 (filed Oct. 29, 2018); Comments of Charter Communications, Inc. at 3, IB Docket No. 18-122 (filed Oct. 29, 2018); Comments of NCTA—The Internet & Television Association at 4, IB Docket No. 18-122 (filed Oct. 29, 2018); Comments of the National Association of Broadcasters at 4, IB Docket No. 18-122 (filed Oct. 29, 2018); Reply Comments of the National Association of Broadcasters at 3, 8, IB Docket No. 18-122 (filed Dec. 11, 2018).

[22] SSO Reply Comments at 21-26; SSO Dec. 18, 2018 Ex Parte (suggesting a fixed, per-antenna incentive payment).

[23] SSO Dec. 18, 2018 Ex Parte at Attachment p.12.

[24] *Id*.

will flounder, hinder the transition, and ultimately delay 5G deployments, reinforcing the need for a DSM that provides fixed payments on a per-antenna basis or using a similar, and simple, rubric.

Along the same lines, the inclusion of an incentive component into the payments made to earth station operators would dramatically reduce the risk of disputes over relocation expenses—and the record reveals that such conflicts are already brewing.[25] If disbursed in installments, an incentive payment would encourage earth station operators not only to participate in the transition, but also to complete it quickly, instead of holding out or pursuing litigation. Moreover, if reasonable in amount, the incentive payment would make even significant variations in the estimate of relocation costs trivial in context, thus paving the way for a successful transition. Critically, the importance of minimizing litigation with earth station operators is difficult to overstate. Avoidable litigation acts like a tax on the transition and ultimately will delay it—while also undermining the reliability of price discovery mechanisms in the secondary market by freighting flexible use licenses with legal risk.

Precedent also supports the proposition that the provision of incentives for earth station operators is a permissible and, indeed, the correct path forward. For example, in the 18 GHz band, the Commission sought to facilitate the ubiquitous deployment of satellite earth stations in spectrum shared between satellite operators and site-based Fixed Service ("FS") licensees on a co-primary basis. Before downgrading FS incumbents to make room for expanded satellite deployments, however, the Commission required satellite operators to negotiate with FS operators over the terms of their displacement. Importantly, in those negotiations, the Commission explicitly permitted the FS operator to "demand[] a premium" on top of replacement costs, over the objections of some satellite interests.[26] When a satellite operator challenged the requirement that it pay for more than just relocation, the D.C. Circuit upheld the Commission's transition plan, recognizing that the Commission was "extremely concerned with providing incentives to incumbents to relocate" quickly.[27]

The Commission pursued a similar approach in the 700 MHz band. Relying in part on its authority under Section 4(i), the Commission permitted new terrestrial mobile licensees to negotiate "voluntary agreements" with broadcasters to encourage their transition to DTV allocations.[28] The Commission recognized that the incentives offered as part of those agreements would promote the

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[25] *See, e.g.*, Letter from Neal Goldberg, NCTA—The Internet & Television Association, to Marlene H. Dortch, Secretary, FCC, at 2-3, IB Docket No. 18-122 (filed Feb. 8, 2019) (expressing deep skepticism of the CBA's "commitments" to protect C-band customers); Kelcee Griffis, *Lawsuits Inevitable With C-Band Sale, Google And Charter Say*, Law360 (Feb. 5, 2019, 7:06 PM), https://www.law360.com/articles/1125958/lawsuits-inevitable-with-c-band-sale-google-and-charter-say.

[26] *Teledesic LLC v. FCC*, 275 F.3d 75, 81, 87 (D.C. Cir. 2001).

[27] *Id.* at 87.

[28] *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).

"expeditious recovery of the 700 MHz television spectrum for use in providing other services," while also "expedit[ing]" the DTV transition.[29]

Taxpayers. In light of the framework and composition of the lower C-band, a DSM that provides for a payment to the Treasury likewise would ensure that the reallocation serves the public convenience, interest, and necessity.

While the non-exclusive licensing regime in the C-band provides for spectral efficiency through frequency reuse, it also means that, absent the Commission's freeze, new satellite systems might have applied to share the spectrum that the Commission wishes to reallocate as part of this proceeding at no direct cost to incumbent licensees. In addition, although satellite licensees are authorized to transmit anywhere in the country, and while the C-band remains critical to the satellite, cable, and programming industries (among others), the record shows that some C-band spectrum remains unused in parts of the country. These characteristics demonstrate that the lower C-band, when compared to spectrum licensed on an exclusive basis, includes a significant "commons" component. Thus, while incumbent licensees should be allowed to participate in the gains of the reallocation as permitted by the FCC time and time again,[30] taxpayers, too, should and can receive some of the value of the benefit.

Precedent also supports requiring a Treasury payment. As explained above, in *Mtel*, the FCC conditioned the grant of a license application awarded outside of competitive bidding on a Treasury payment made by the applicant.[31] Likewise, to implement the 800 MHz rebanding, the Commission adopted an industry proposal that required Nextel to pay the Treasury if the costs of administering the rebanding fell short of the value created by Nextel's migration to 1.9 GHz.[32] In doing so, the Commission again relied upon its general rulemaking authority under Sections 4(i) and 303(r) of the Act.[33] Finding important public interest benefits and no statutory provision that prohibited the payment, the Commission concluded that it had sufficient legal authority to adopt the proposal after a lengthy analysis.[34] On appeal, the D.C. Circuit upheld the rebanding plan, rejecting arguments concerning the FCC's method of calculating the Treasury payment amount, among other challenges.[35]

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[29] *Id.*; *see also 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 ¶ 142 (2000) (allowing new licensees to negotiate compensation with incumbent licensees over any matter necessary to "accomodat[e] new licensees"). The many Commission decisions that expanded the use rights of incumbent licensees as part of a spectrum reallocation provide further support for the provision of incentives to C-band incumbents, including earth station operators. *See generally supra* note 20.

[30] *See generally supra* note 20.

[31] *See supra* notes 13-19 and accompanying text.

[32] *800 MHz Rebanding Order* ¶ 34.

[33] *Id.* ¶ 64, 75.

[34] *Id.* ¶¶ 74-87.

[35] *See Mobile Relay Assocs. v. FCC*, 457 F.3d 1, 13 & n.12 (D.C. Cir. 2006).

A Treasury payment also would be consistent with the Commission's decision to allow DTV licensees to provide supplementary and ancillary services subject to a recovery mechanism.[36] The Commission's decision demonstrates that when it allows incumbents to benefit financially from expanded use rights not contemplated in their initial authorizations, taxpayers must be allowed to recover some of those gains.

Finally, there should be no concern that a Treasury payment would violate *NCTA v. FCC*'s prohibition against administrative taxation, or even implicate that decision.[37] There, the issue before the Court was the appropriate measure of an annual regulatory fee imposed on cable companies pursuant to the Independent Offices Appropriation Act ("IOAA"), which directs agencies to assess fees for certain federal government functions.[38] Interpreting *that statute*, the Court held that the fee should have been calculated based on the "value to the recipient" of the cable license, in part to ensure that agencies do not misinterpret the IOAA as permitting them to engage in general taxation.[39] Because the FCC had determined the fee based on an estimate of its supervision costs, and not the value of the authorizations from the perspective of the cable industry, the Court reversed and remanded.[40]

Of course, a DSM that provides a percentage to the Treasury *would* determine the fee owed based on the "value to the recipient" of the rights granted by the FCC, and thus would be permitted by *NCTA v. FCC*, assuming the decision applied. But the limitations at issue in *NCTA v. FCC* are actually irrelevant here. As explained by the Commission, and as recognized by several federal courts of appeals, because *NCTA v. FCC* concerned the Commission's assessment of fees pursuant to IOAA, it does not govern payment requirements adopted pursuant to separate provisions in the Communications Act.[41] Moreover, a Treasury payment assessed as part of the reallocation could not be considered general taxation, which was the outcome that the *NCTA* court sought to prevent. The payment would be assessed simply to ensure that the public recovers the value of a public resource, and not to meet Congress's general budgetary needs or to "discourage" certain types of "activity," which are the hallmark objectives of taxation.[42] In addition, because it would be

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[36] *Advanced Television Systems and Their Impact Upon the Existing Television Broadcasting Service*, Fifth Report and Order, 12 FCC Rcd. 12,809 ¶ 35 (1997).

[37] *Nat'l Cable Television Ass'n, Inc. v. FCC*, 415 U.S. 336 (1974) ("*NCTA v. FCC*").

[38] 31 U.S.C. § 9701 (cited as 31 U.S.C. 483a in *NCTA v. FCC*).

[39] *NCTA v. FCC*, 415 U.S. at 342-343.

[40] *Id.* at 343-344.

[41] *See, e.g., Communique Telecommunications, Inc. d/b/a Logicall Application for Review of the Declaratory Ruling*, Memorandum Opinion and Order, 14 FCC Rcd. 13,635, 13,657 ¶ 39 & n.130 (1999) (rejecting the argument that *NCTA v. FCC* prohibits the FCC from collecting USF because they are not calculated based on the "benefit received by the payor"); *San Juan Cellular Tel. Co. v. Pub. Serv. Comm'n of P.R.*, 967 F.2d 683, 686 (1st Cir. 1992) (noting that *NCTA v. FCC* "focused upon a particular statute"); *Union Pacific R.R. Co. v. Pub. Util. Comm'n of State of Or.*, 899 F.2d 854, 860 (9th Cir. 1990).

[42] *NCTA v. FCC*, 415 U.S. at 340-41.

calculated based on the benefit of government action received by others, it would not determine amounts due on the basis of the payor's "ability to pay[]."[43]

No statutory prohibition. No statutory provision even arguably would prohibit incentive payments to earth station operators or payments to the Treasury. While some provisions of the Act specifically authorize the FCC to collect administrative fees,[44] the D.C. Circuit has already held that the presence of those specific directives do not imply the absence of authority to require payments in different contexts, including in the Commission's spectrum management decisions.[45]

Moreover, to the extent Section 309(j) constrains the distribution of proceeds from an FCC auction held after mutually exclusive initial applications are accepted for filing, that provision, by its own terms, would not govern a market-based transition.[46] Indeed, in *Mtel*, not only did the Commission require payment for a license awarded *without* competitive bidding, it also determined that the fee should differ substantially from the payment that would have been due had an auction been conducted—thereby confirming that a market-based transition need not mirror the outcomes permissible under Section 309(j).[47] In any event, a DSM of the kind suggested by the SSOs would be consistent with the principles underlying Section 309(j): it would "recover[] . . . value" for taxpayers,[48] incentivize all incumbents for "relinquish[ing] spectrum usage rights,"[49] and accelerate more "intensive use" of C-band spectrum through the use of incentives.[50]

II. T-MOBILE'S CURRENT INCENTIVE AUCTION PROPOSAL IS INCONSISTENT WITH THE COMMUNICATIONS ACT.

T-Mobile recently revised its incentive auction proposal to include a reverse phase that determines the price of supply by requiring earth station owners to bid against satellite operators.[51] While the SSOs are open to an FCC-led auction that compensates incumbents for their loss of spectrum, T-Mobile's plan misses the mark—and demonstrates the need for a middle ground proposal.

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43 *Id.*

44 *See* 47 U.S.C. §§ 158, 159.

45 *See Mtel*, 77 F.3d at 1404-05 (rejecting the argument that "the expressio unius maxim" limits the Commission's general rulemaking authority under Section 4(i), and upholding the Commission's decision to require a license payment as part of its creation of a new wireless radio service).

46 *See* 47 U.S.C. 309(j)(1); *see also* 47 U.S.C. § 309(j)(6)(C).

47 *Mtel*, 77 F.3d at 1403 (noting that the payment required of Mtel reflected a substantial discount relative to winning bids for other PCS licenses assigned at auction).

48 47 U.S.C. § 309(j)(3)(C).

49 *Id.* § 309(j)(8)(G)(ii).

50 *Id.* § 309(j)(3)(D).

51 *See* T-Mobile Feb. 15, 2019 Ex Parte.

Perhaps most significantly, the Communications Act would prohibit a reverse auction designed as T-Mobile suggests. Section 309(j) of the Act requires the Commission to ensure that incentive auctions determine supply by soliciting bids from "competing licensees." Yet T-Mobile's proposal would require licensees with non-competing, and indeed, *complementary,* use rights to bid for the right to supply a given market. In addition to contradicting the text of the statute, this supply-side mismatch would dismantle the price discovery mechanisms of a traditional reverse auction, creating additional concerns under Section 309(j) and Commission precedent.

A. Earth Station Owners and Satellite Operators Are Not "Competing" Licensees.

Section 309(j) authorizes the Commission to hold incentive auctions subject to certain limitations. One existential limitation is that "at least two *competing* licensees participate in the reverse auction."[52] The requirement that participants be "competing" licensees is fundamental to the successful operation of the reverse auction, which is intended to identify the price at which incumbents "would be willing to voluntarily relinquish some or all of their spectrum usage rights"[53] and provide them with "a share of the proceeds" from the repurposing.[54] Competition between auction participants ensures that the bid submitted by the winning supplier provides a useful appraisal of the "value" of the "rights" being "relinquished."[55]

As the Commission recognized in the *NPRM*, the economic and "legal requirement" that a reverse auction generate bids from "competing licensees" poses significant challenges in the C-band, where licenses are granted on a nonexclusive basis.[56] While the SSOs appreciate T-Mobile's effort to develop a reasonable alternative to the CBA plan, the revised proposal fails to overcome the precise challenges described by the Commission. Instead of creating a way for competing licensees to bid for the right to supply each market, T-Mobile proposes to fabricate "competition" where none exists by requiring earth station owners and satellite operators to bid against each other.

The problem with T-Mobile's proposal is that earth station owners and satellite operators do not "compete" in any sense of the term. To begin with, they hold different and incommensurable spectrum usage rights. Earth station operators hold receive rights for antennas installed at specific locations. Satellite operators, by contrast, hold transmit rights authorizing operations anywhere in the country. Moreover, earth station owners and satellite operators do not use their distinct spectrum usage rights to provide competing services. To the contrary, earth station owners are

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52 47 U.S.C. § 309(j)(8)(G)(ii)(II).

53 *See, e.g., Expanding the Economic & Innovation Opportunities of Spectrum Through Incentive Auctions*, Report and Order, 29 FCC Rcd. 6567, 6708 ¶ 325 (2014).

54 *NPRM* ¶ 103.

55 47 U.S.C. 309(j)(8)(G)(i).

56 *NPRM* ¶ 105; *see also id.* ¶ 112-113; *see also id.* ¶ 59 (noting that "because all FSS licensees have equal, nonexclusive rights to the entire band under Part 25 of our rules, they cannot compete in the same way that broadcast television licensees did in the broadcast incentive auction").

customers of satellite operators, and their usage rights thus function as complements, not substitutes. Both licenses function together to ensure the reliable and interference-free operation of a single satellite network—which is why the Commission recently proposed to allow GSO operators to apply for a single, unified satellite network license.[57]

Importantly, treating earth station owners and satellite operators as "competing licensees" would undermine the reverse auction's fundamental objective of valuing and compensating current uses of the band. Because the rights of satellite operators and earth station operators are neither comparable nor rivalrous within the areas and frequencies for which they are licensed, there would be no reason to expect winning bids to reflect the actual value of the spectrum rights held. At best, T-Mobile's proposal would measure the utility to the least-used earth station alone—and reduce terrestrial operators' purchase price to that artificially deflated target. Thus, while T-Mobile's proposal may be a convenient way to subsidize terrestrial operators, it is inconsistent with both the text and purpose of the statute. As a result, the search for a lawful and economically valid auction alternative must continue.

B. Requiring Satellite Operators to Consistently Underbid Would Violate Section 309(j) and Commission Precedent.

Under Section 309(j), reverse auctions must "determine the amount of compensation that licensees would accept in return for voluntarily relinquishing their spectrum usage rights."[58] To be conducted "voluntarily," an incentive auction must provide licensees with an opportunity to win a share of the proceeds if they place a bid that accurately appraises the value of their spectrum usage rights. Under T-Mobile's proposal, however, satellite operators would have to bid pennies on the dollar of the actual value of their spectrum rights just to have a *chance* at winning the auction against an earth station operator. This is because the transmit rights held by satellite operators are more valuable than earth station receive rights: space station licenses allow satellite operators to serve many users across multiple earth stations anywhere in the country, subject only to coordination requirements.

A related problem with T-Mobile's proposal is that it incorrectly assumes the Commission can reallocate the band by clearing earth station owners alone. This untested approach to clearing the band would have disastrous consequences that are unintended yet entirely predictable, because it would reward the category of incumbents with the least extensive usage rights and the least facilities-based investment. In addition to creating perverse incentives for spectrum licensees in the future, that outcome would violate precedent from virtually every area of FCC policymaking, which has consistently emphasized the need for FCC decisions to promote investment in network facilities.[59] It also would conflict with the Commission's recent approach to spectrum

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[57] *See Further Streamlining Part 25 Rules Governing Satellite Services*, Notice of Proposed Rulemaking, IB Docket No. 18-314, FCC 18-165, ¶ 4 (rel. Nov. 15, 2018).

[58] 47 U.S.C. 309(j)(8)(G)(ii)(I).

[59] *See, e.g.*, *Use of Spectrum Bands Above 24 GHz for Mobile Radio Services*, Notice of Proposed Rulemaking, FCC Rcd. 11,878, 11,881 ¶ 2 (2015) (proposing to repurpose millimeter wave spectrum for terrestrial 5G services using

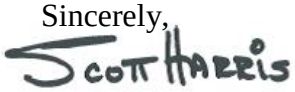
reallocations, which endeavors to ensure that all incumbents receive appropriate compensation for their loss of spectrum.[60] Moreover, it would be inconsistent with the Commission's understanding, enshrined in Part 25, that once a space station is authorized by the FCC, it can serve as a point of communication for earth stations constructed wherever and whenever frequencies can be coordinated.[61]

* * *

The SSOs focused their initial response to the *NPRM* on the CBA's attempt to exclude rival satellite operators by applying an arbitrary and capricious double standard to the transition[62] in defiance of Commission precedent.[63] But it is now clear that, as many parties have articulated, a reallocation of this magnitude will only succeed if all stakeholders are invested in the outcome.

Fortunately, the Commission has clear authority to ensure that a market-based transition is inclusive and incentive-based by adopting a DSM or similar mechanism. While it may be possible for an auction-based proposal to achieve the same result, T-Mobile's revised incentive auction proposal falls short of meeting that objective, and would violate statute and established precedent.

Sincerely,



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a "framework . . . built off of two decades of successful policies that stimulate and promote innovation and investment in wireless technologies and services"); *Reexamination of Roaming Obligations of Commercial Mobile Radio Serv. Providers & Other Providers of Mobile Data Servs.*, Report and Order, 26 FCC Rcd. 5,411, 5,428 ¶ 30 (2011) (adopting data roaming requirements to "promote significant investment in facilities-based broadband networks"); *Business Data Servs. in an Internet Protocol Env't*, Report and Order, 32 FCC Rcd. 3,459, 3,461 ¶ 1 (2017) (seeking to "create a regulatory environment that promotes long-term innovation and investment").

60 *See supra* note 20.

61 *See* 47 C.F.R. § 25.115(c)(2) (describing requirements for C-band earth station applications, which "will be routinely processed"); *see also id.* §§ 25.131, 25.203(a).

62 *See* SSO Reply Comments at 11-12 (explaining that the CBA's imposition of a past revenue requirement on satellite licensees would be inconsistent with the entire economic justification for the CBA proposal, which seeks to compensate satellite operators for their *future* loss of spectrum); SSO Feb. 21, 2019 Ex Parte at 1-2 (same). *See also* Letter from Jennifer D. Hindin, Counsel to CBA, to Marlene H. Dortch, Secretary, FCC, at Attachment, IB Docket No. 18-122 (filed Feb. 7, 2019) (revealing that many CBA-member C-band transponders do not have U.S. customers).

63 *See* SSO Feb. 21, 2019 Ex Parte at 2-4 (explaining that decisions governing AWS-1, AWS-4, EBS/BRS and UMFUS spectrum prohibit the imposition of a past revenue requirement—especially on licensees who, like the SSOs, have successfully deployed licensed facilities); SSO Reply Comments at 8-15 (explaining that the CBA's proposal to apply a past revenue requirement would conflict with the Commission's decisions in the *Spectrum Frontiers* proceeding and FCC competition precedents).