

April 23, 2019

The Honorable Ajit Pai
Chairman
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: Transforming the 2.5 GHz Band, WT Docket No. 18-120 – *WRITTEN EX PARTE PRESENTATION*

Dear Chairman Pai:

We are writing on behalf of BeamSpeed, LLC, Evertek, Inc., Redzone Wireless, Rise Broadband, SiouxLan Communications, and Watch Communications. Our companies all utilize leased Educational Broadband Service (“EBS”) spectrum to provide high-quality, competitive broadband services to consumers, often in more rural areas of the United States where broadband options are limited. Collectively, our companies have invested many millions of dollars to assure that our customers enjoy the myriad benefits of broadband, doing so in the expectation that the terms of our EBS *de facto transfer* leases will be honored. Not surprisingly then, we are troubled by a recent filing in this docket by Fred Campbell of Tech Knowledge that urges the Commission to declare null and void certain critical provisions of our EBS leases.¹

Leaving aside his dubious proposition that the Commission has authority to void the contractual provisions at issue here,² doing so would clearly be inconsistent with the Commission’s efforts to expand the availability of broadband services, particularly to less populated, underserved areas. As the FCC is well aware, spectrum is the lifeblood for broadband systems.³ In crafting our EBS leases, our companies have sought to assure that this spectrum

¹ See Campbell, Roadmap for a Voluntary Incentive Auction of Educational Spectrum in the 2.5 GHz Band (“Campbell Paper”), *filed as attachment to* Letter from Fred Campbell, Director, Tech Knowledge to Marlene H. Dortch, Secretary, FCC, WT Docket Nol. 18-120 (filed Mar. 27, 2019).

² The Commission has previously refused to void certain EBS excess capacity leases, finding that although it was troubled by certain provision of those leases “we do not have the authority to void contracts executed by two private parties under the laws of individual states.” Amendment of Parts 1, 21, 73, 74 & 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, *Third Order On Reconsideration And Sixth Memorandum Opinion And Order And Fourth Memorandum Opinion And Order And Second Further Notice Of Proposed Rulemaking And Declaratory*, 23 FCC Rcd 5992, 6044 (2008) [“2008 BRS/EBS Order”].

³ See, e.g., Ajit Pai, Chairman, FCC, Statement at Hearing on the FCC’s Fiscal Year 2020 Budget Request before the Subcommittee on Financial Services and General Government, Committee on Appropriations, U.S. House of Representatives, at 2 (Apr. 3, 2019).

will be available not only today, but sufficiently into the future that we can justify the continuing investment necessary to meet ever-increasing consumer expectations. As a direct result of lease provisions designed to assure our continued access to spectrum, most of us have made the investments necessary to transition from initial deployments using proprietary technology, to WiMAX-based deployments, to, in many cases, LTE-based deployments. And, we do not expect our investment to stop there. Although 5G services likely will be available first in America's urban markets, we anticipate that consumer demand will require us to invest in further system upgrades in the coming years.

The contractual provisions Mr. Campbell would have the Commission nullify are the foundation of our willingness to make the investments necessary to meet America's current and future broadband needs. Our companies have taken different approaches to assuring continued access to EBS spectrum, and different leases will include different combinations and permutations of contractual assurances. Many, for example, include a provision requiring the licensee to offer to assign its license to the lessee or its designee before returning a license for cancellation. It is also common for leases to provide the lessee with a right of first refusal for itself or, if it is not eligible to hold an EBS license, for its designee should the licensee desire to assign its license. Other approaches to assuring long-term access to spectrum are also incorporated into EBS leases.

These sorts of provisions are hardly news to the Commission. The Commission has, for example, specifically blessed rights of first refusal in EBS leases as legitimate vehicles for protecting lessee investment.⁴ Indeed, the *Notice of Proposed Rulemaking* specifically proposes that in connection with the proposed commercialization of the band that "[i]f the EBS licensee's lease provides for an option or right of first refusal with respect to a license, the provisions of the contract would apply, subject to the requirement that all assignment and transfers of Commission licenses are subject to Commission consent."⁵

Mr. Campbell has provided no basis for the Commission to depart from its precedent endorsing contractual provisions that protect lessee access to leased spectrum. To the contrary, it is telling that in the section of his paper that purports to examine the benefits of EBS leasing, Mr. Campbell does not even acknowledge, much less address, the significant benefits that have accrued to our broadband subscribers as a direct result of the availability of leased EBS spectrum.⁶ While the Commission's various "command and control" restrictions surrounding

⁴ Amendment of 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, *Order On Reconsideration And Fifth Memorandum Opinion And Order And Third Memorandum Opinion And Order And Second Report And Order*, 21 FCC Rcd 5606, 5716 (2006).

⁵ Transforming the 2.5 GHz Band, *Notice of Proposed Rulemaking*, 33 FCC Rcd 4687 at n.34 (2018).

⁶ See Campbell Paper at 11-12.

EBS leasing have proven to be obsolete and are in need of change,⁷ there is no question that the public is better off because of the investments our companies have made, and are prepared to continue making, all in reliance on the contractual provisions Mr. Campbell attacks.

Moreover, the Commission should recognize that if in this proceeding it undermines EBS *de facto* transfer leases, such action likely will have the unintended consequence of deterring parties from entering into such leases involving other bands. Just as it has done in the past,⁸ the Commission should reject Mr. Campbell's call for the Commission to void essential EBS lease provisions and, instead, should assure that such lease provisions are honored.

Simply put, the record before the Commission establishes that proposals for the use of EBS incentive auctions for existing licensees are solutions in search of a problem. If the Commission simply eliminates the eligibility and use rules applicable to EBS, secondary market forces will assure that EBS licenses are put to their highest and best use without any disruption of broadband operators' investment-based expectations.

Pursuant to Section 1.1206 of the Commission's Rules, this letter is being filed electronically with the Office of the Secretary via the Electronic Comment Filing System.

Respectfully submitted,

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⁷ See Comments of the Wireless Communications Association International, WT Docket No. 18-120, at 20-24 (filed Aug. 8, 2018).

⁸ See, e.g., 2008 BRS/EBS Order, 23 FCC Rcd at 6044 ("We also agree . . . that even if we could void private contracts, such an action would deter private parties from entering into spectrum leasing arrangements not only in the 2.5 GHz band . . . , but also in other bands as well, thus creating uncertainty among all parties that have entered into or are contemplating arrangement under our Secondary markets rules and policies.").

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