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EX PARTE VIA ELECTRONIC FILING

Marlene Dortch
Secretary
Federal Communications Commission
445 12th St., SW
Washington, DC 20554

Re: Transforming the 2.5 GHz Band, WT Docket No. 18-120

Dear Ms. Dortch:

AT&T Services Inc., on behalf of itself and its related entities (collectively “AT&T”), submits this letter to propose two improvements to the *Draft Order* in the above-referenced proceeding¹ that will more effectively allocate 2.5 GHz Educational Broadband Service (“EBS”) spectrum to its highest and best use, while simultaneously ensuring that incumbent 2.5 GHz EBS licensees obtain maximum value for their spectrum rights. First, the Commission should require all incumbent 2.5 GHz EBS spectrum licensees to disclose information about existing deployments in their license areas and about their lease commitments so that potential overlay auction bidders for secondary rights in those incumbent license areas can more accurately assess the value of the auctioned 2.5 GHz EBS spectrum. Second, the Commission should apply the new Performance Requirements² to both new *and existing* licensees, because the currently provided exemption for existing licensees would create perverse incentives and would result in fewer overlay licenses sold, lower prices for the overlay licenses that do sell, and less extensive build-out of 5G services.

1. Information About Incumbent Deployments And Lease Terms. The *Draft Order* explains that purchasers of county-wide overlay licenses will obtain “primary rights to the vacant and available white spaces in the [county] and secondary rights to all incumbent licenses within the county.”³ The *Draft Order* further states that overlay licensees will be allowed to clear the

¹ Report and Order, *Transforming the 2.5 GHz Band*, WT Docket No. 18-120 (rel. June 19, 2019) (“*Draft Order*”), <https://docs.fcc.gov/public/attachments/DOC-358065A1.pdf>.

² See *id.* ¶ 99 (requiring “(1) 80% population coverage for mobile or point-to-multipoint service (50% interim); (2) 40 links per million persons (one link per 25,000) for fixed point-to-point service (20 links per million interim (on link per 50,000)); or (3) 80% population coverage for broadcast service (50% interim)”).

³ *Id.* ¶ 77.

incumbent areas within the county “by purchasing the incumbent licenses.”⁴ This approach means that two of the most significant factors when valuing the county-wide 2.5 GHz EBS overlay licenses will be: (1) the extent of existing and planned deployments within the county by incumbent licensees and their lessees, and (2) the extent to which incumbent licenses in the county are encumbered by existing leases in ways that could impede an overlay licensee’s ability to purchase the incumbent licensees’ licenses. The *Draft Order*, however, contains no mechanism to make this information available to potential purchasers of overlay licenses at auction, which will result in unnecessary uncertainty that could only reduce bids, auction participation, and ultimately 5G deployment.

It is well understood that uncertainty about the true value of a license results in lower auction bids and participation.⁵ The problem here would be even worse, because only some bidders would lack this information. For example, Sprint leases 2.5 GHz EBS spectrum from incumbent EBS licensees in the majority of licensed areas.⁶ Therefore, Sprint will generally have far more information than virtually all other potential auction bidders about incumbent deployments and lease terms, thus enabling Sprint to better assess the potential value of overlay licenses. This substantial information asymmetry will deter auction participation by others who will not want to bid against an entity with materially more information of vital importance. The result will be a significant artificial competitive advantage for Sprint, which could enable Sprint to win overlay licenses in areas where another entity may have valued it more highly and put it to better use absent the extreme information disparity.

Accordingly, to reduce uncertainty and to level the informational playing field, the Commission should modify the *Draft Order* to give all potential bidders information about (1) the incumbent licensees’ existing and planned deployments and (2) the relevant terms of all incumbent licensees’ leases with third-parties. Both categories of information are critical.

Incumbent Deployments. Because the county-wide overlay licensees will have rights that are secondary to the incumbent licensees’, the value of any particular overlay license will depend substantially on the current and future coverage of the incumbent licensee’s (or its lessee’s) deployments. Overlay licenses will generally be more valuable where incumbent operations are more limited, and less valuable where incumbent operations are more extensive. In turn, absent this deployment information, potential auction bidders will not be able to accurately assess the extent to which they would be able to make use of any specific overlay license, thereby creating uncertainty and reducing bids and overall auction participation. Thus, the Commission should ensure that all bidders have access to information sufficient to understand the extent of all existing and planned deployments and uses of 2.5 GHz EBS spectrum by the incumbent licensees and lessors, including, for example, detailed coverage maps, locations of cell sites, and transmission power.

⁴ *Id.*

⁵ See, e.g., Report and Order, *Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, 29 FCC Rcd 6567, ¶ 58 (adopting band plan approach that “provide[s] greater technical certainty . . . and, therefore, will enhance the value of 600 the MHz for bidders and serve the public interest”).

⁶ See *Draft Order* ¶ 79 (“[T]here are 2,193 active, regular EBS licenses” with “2,046 long-term *de facto* control leases involving EBS licenses. The majority of those leases are with Sprint.”).

Incumbents' Leases. Information about the terms of incumbent licensees' leases for 2.5 GHz EBS spectrum is equally important to enabling potential auction bidders to reasonably ascertain the value of overlay licenses. Overlay licenses will be more valuable in counties where an auction winner can clear the entire county by purchasing the incumbent's license. Therefore, the value of an overlay license depends substantially on whether there are lease terms that could foreclose, delay, or otherwise hinder such a purchase. Thus, the Commission should ensure that potential auction bidders have access to such lease information by collecting and making available to potential bidders, in advance of the auction, the relevant terms of any such leases, including, for example, the duration of those leases, any rights of first refusal to renew the lease or purchase the incumbent's license, any rights of first offer, and lease termination provisions.⁷

Commission Issuance of a Public Notice. To determine the relevant deployment information and lease terms that should be provided to potential auction participants, and the manner in which the data would be made available to protect any confidentiality concerns, the Commission should issue a Public Notice seeking comment on these issues. The Commission has ample authority to collect this information and to make it available to potential auction participants pursuant to appropriate protective orders, as it has done for other auctions.⁸ In fact, the Commission routinely collects highly sensitive company-specific information from regulated entities and shares it with other participants in those and other kinds of proceedings.⁹ Indeed, the Commission has already collected from Sprint voluminous data about its leases and deployments as part of Sprint's proposed merger with T-Mobile.¹⁰ Moreover, the Commission's rules specifically provide that spectrum lease agreements must be made "available upon request to the Commission."¹¹

2. Extension of Performance Requirements. The *Draft Order* adopts new "Performance Requirements" that apply to "licenses won at auction and licenses granted through

⁷ To be clear, AT&T is *not* arguing that leases should be modified by the Commission, merely that information be made available to bidders to resolve the information disparity.

⁸ See, e.g., 47 U.S.C. §§ 154(i), 303(r), 309(j), 316; see also, e.g., Eighth Report and Order, Fifth Notice Of Proposed Rule Making and Order, *Amendment of Part 22 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*, 20 FCC Rcd 15866, ¶ 53 (2005) (finding that "reliable, public data on each incumbent system that would be subject to relocation is essential well in advance of the planned auction" and require incumbents to "submit information on the location and operating characteristics of BRS systems (e.g., the location of base or fixed stations by coordinates, tower heights, power levels, etc.); Opinion, *Auction of Advanced Wireless Services Licenses Scheduled for June 29, 2006*, FCC 06-47, ¶¶ 37-47 (April 12, 2006) (requiring incumbents to submit data on their operations because "reliable, public data on each incumbent BRS system that will be subject to relocation is essential well in advance of the planned auction.").

⁹ See, e.g., Order and Further Notice of Proposed Rulemaking, *Special Access for Price Cap Local Exchange Carriers*, 27 FCC Rcd 16318 (2012) (Business Data Services data collection for providers and purchasers); Order on Reconsideration, *Special Access for Price Cap Local Exchange Carriers*, 29 FCC Rcd 10899 (2014) (Business Data Services data collection revisions).

¹⁰ See General Information and Document Request for Sprint, *Applications of T-Mobile U.S., Inc. and Sprint Corp. for Consent to Transfer Control of Licenses and Authorizations*, WT Docket No. 18-197, at 4 (Aug. 15, 2018) (requiring disclosure of spectrum license leases by county or county equivalent and deployment information).

¹¹ 47 C.F.R. § 1.9020(b)(3).

the Tribal Priority window”¹² but not to “existing license[s].”¹³ This failure to apply the new Performance Requirements to existing 2.5 GHz EBS spectrum licenses will create perverse incentives, undermine the overall purpose of the Performance Requirements, and threaten the success of the overlay auction. By contrast, application of the new Performance Requirements to both new *and existing* licensees would better serve the Commission’s objective of maximizing the use of fallow and underutilized 2.5 GHz EBS spectrum and would be entirely equitable.

The *Draft Order* makes clear that the existing 2006 performance requirements—*i.e.*, the “substantial service” and “educational use” requirements—do not adequately serve the goal of ensuring widespread deployment of 2.5 GHz EBS spectrum. It explains that the “substantial service” requirement “lacks firm minimum requirements” and thus “does not adequately safeguard effective use of the relevant spectrum.”¹⁴ Similarly, for the educational requirement, the *Draft Order* explains that “[t]he potential for wireless services to support education is clear; nevertheless this goal will be supported best by adopting stringent build-out requirements that encourage wider deployment of all broadband services.”¹⁵

The *Draft Order* thus finds that the new Performance Requirements “will help address the concerns . . . that current licensees of this spectrum are not deploying to all communities within their license areas.”¹⁶ The *Draft Order* states that “[t]he robust mobile, fixed, and broadcast metrics we adopt in this [*Order*] will promote deployment of wireless services that can be used for all purposes, including education.”¹⁷

Based on these findings, the new Performance Requirements clearly should be applied to all 2.5 GHz EBS spectrum licensees (and by extension to their lessees), not only to new licensees. As noted, the Commission has already found that the existing requirements are insufficient to facilitate widespread use of fallow and underutilized 2.5 GHz EBS spectrum. Thus, leaving the old requirements in place for existing licenses, which cover many, if not most, major metropolitan areas and other significant population centers in the U.S., clearly contravenes the public interest.

In addition, exempting existing 2.5 GHz EBS spectrum licensees from the new Performance Requirements would undermine participation in the overlay auction, because potential participants in the auction could avoid the new Performance Requirements by leasing existing 2.5 GHz EBS spectrum licenses rather than purchasing overlay licenses in the auction. Existing lessees would have especially strong incentives to not participate in the overlay auction. Those lessees already have the right to serve large portions of the counties where they lease 2.5 GHz EBS spectrum with no unmet buildout requirements. Therefore, if the new Performance Requirements are not applied to existing licensees, those licensees would have little incentive to

¹² *Draft Order* ¶ 99.

¹³ *Id.* ¶ 99 n.286.

¹⁴ *Id.* ¶ 101.

¹⁵ *Id.* ¶ 103.

¹⁶ *Id.* ¶ 100.

¹⁷ *Id.* ¶ 103.

voluntarily purchase overlay licenses for those counties, because doing so would subject them to new and substantial build-out requirements.

The Performance Requirement exemption for existing 2.5 GHz EBS spectrum licenses is particularly indefensible for the additional reason that Sprint holds a majority of the EBS spectrum leases in the U.S.,¹⁸ which means that Sprint – one of the four largest nationwide mobile providers – would be able to avoid the new Performance Requirements in many areas, while other providers who purchase overlay licenses would be subject to those Performance Requirements.

Other equitable considerations also strongly favor applying the new Performance Requirements to existing 2.5 GHz EBS licensees. The *Draft Order* would modify existing 2.5 GHz EBS licenses to make them flexible use licenses and remove the educational requirements. These changes will substantially expand the potential uses of these licenses and dramatically increase their value. It is only fair that, in return, existing licensees either extensively deploy this spectrum or sell their spectrum to someone who will.

In this regard, even if the Commission were to determine that compliance with the new Performance Requirements would be unduly burdensome for incumbent 2.5 GHz EBS licensees that have not leased their spectrum for commercial use, the Commission should nevertheless hold that the exemption from the Performance Requirements is limited only to that specific subset of EBS spectrum licensees. In particular, the Commission should, at a minimum, require all incumbent 2.5 GHz EBS licensees that have leased their 2.5 GHz EBS licenses to commercial entities to comply with the new Performance Requirements. Indeed, there is no non-arbitrary justification for effectively exempting large commercial entities like Sprint – which leases a large number of 2.5 GHz EBS licenses – from the Performance Requirements.

In short, the Performance Requirements exemption in the *Draft Order* would (i) create perverse incentives; (ii) result in fewer overlay licensees sold; (iii) lower prices for the overlay licenses that do sell; and (iv) depress build-out of 5G services. The Commission is already modifying the existing 2.5 GHz EBS spectrum licenses to eliminate specific education-related requirements and to authorize flexible use. The Commission should also modify those licenses to impose the more robust Performance Requirements to ensure that current licensees and lessees invest in broadband expansion within their current license areas even if they choose not to participate in the overlay auction.¹⁹

¹⁸ *Id.* ¶ 79 (“[T]here are 2,193 active, regular EBS licenses” with “2,046 long-term *de facto* control leases involving EBS licenses. The majority of those leases are with Sprint.”).

¹⁹ The Commission has broad authority to adopt such requirements. *See, e.g.*, 47 U.S.C. §§ 303(r), 309(j), 316.

Pursuant to the Commission's rules, a copy of this letter is being filed electronically in the above-referenced docket. Please do not hesitate to call me if you have questions.

Respectfully submitted,

/s/Alex Starr

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