Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of:	)	
	)	
Expanding Flexible Use of the 3.7 to 4.2 GHz Band, *et al*.	)	GN Docket No. 18-122
	)	
	)	RM-11791
	)	RM-11778
	)	

COMMENTS OF AT&T

AT&T Services, Inc., on behalf of itself and the subsidiaries and affiliates of AT&T Inc. (collectively, "AT&T"), hereby submits the following comments in response to the International Bureau and Wireless Telecommunications Bureau Public Notice soliciting comment on the Commission's legal authority as it relates to the 3.7-4.2 GHz band proceeding.[1]

There is broad agreement about the *goals* of this proceeding: the Commission should repurpose the C-Band from Fixed Satellite Service ("FSS") to 5G mobile wireless service to the maximum extent possible, while preserving the services that currently rely on C-Band satellite downlink transmissions. Many parties also agree that it would be preferable to achieve these goals with the voluntary participation of the incumbent satellite and earth station operators via some sort of private sale or auction. As the *Public Notice* makes clear, however, parties have raised legal objections to the principal proposals for achieving a voluntary, private transaction, including both the C-Band Alliance's ("CBA") private auction proposal[2] and T-Mobile's

[1] Public Notice, *International Bureau and Wireless Telecommunications Bureau Seek Focused Additional Comment In 3.7-4.2 GHz Band Proceeding*, GN Docket No. 18-22, RM-11791, RM-11778, DA 19-385 (rel. May 3, 2019) ("*Public Notice*").

[2] *See, e.g.*, *Public Notice* at 1-4 (raising questions about the lawfulness of various issues implicated by CBA's proposal); Letter from Elizabeth Andrion (counsel to Charter) to Marlene

incentive auction proposal.[3] These uncertainties raise the specter of judicial appeals that could significantly delay the reallocation of this important block of much needed mid-band spectrum.

AT&T's alternative private auction proposal, which is firmly grounded in well-established sources of Commission authority, raises none of these legal issues.[4] Under AT&T's proposal, the Commission would modify the space station owners' licenses to make them flexible use licenses, on the condition that the space station owners sell the newly modified, flexible use licenses directly to interested parties under a private auction process approved by the Commission after notice and comment. This process would create a type of secondary market sale that would accomplish all of the universally agreed-upon goals of this proceeding: repurposing as much C-Band spectrum as possible, securing the voluntary participation of the incumbents, compensating space station and earth station owners and other incumbent users for their relocation/reconfiguration/modification costs, and preserving without disruption the services that currently depend on C-Band downlink transmissions. But it would do so without

H. Dortch (FCC), GN Docket No. 18-122, at 7-13 (Feb. 22, 2019) (arguing that CBA's proposal violates the statutory auction requirements under Section 309(j)(1); is not a "negotiation" that permits the Commission to avoid an auction under Section 309(j)(6)(E); is an unlawful sub-delegation of the Commission's responsibilities; is unsupported by record evidence; and is an unlawful modification of licenses in violation of 47 U.S.C. § 316); Letter from Russell Fox (counsel to T-Mobile) to Marlene H. Dortch (FCC), GN Docket No. 18-122 (Mar. 4, 2019) (same).

[3] *See, e.g.*, *Public Notice* at 4-7 (raising questions about the lawfulness of T-Mobile's incentive auction proposal); Letter from Scott Blake Harris (counsel to Small Satellite Operators) to Marlene H. Dortch (FCC), GN Docket No. 18-122, at 9-12 (Mar. 25, 2019) (explaining that T-Mobile's incentive auction proposal violates the statutory requirement to include at least two competing licensees in any "reverse" auction phase and incorrectly classifies receive-only earth stations as licensees eligible to participate).

[4] *See* Reply Comments of AT&T Services, Inc., *Expanding Flexible Use of 3.7 to 4.2 GHz Band*, GN Docket No. 18-122, at 7-17 (Dec. 11, 2018) ("AT&T Reply Comments").

raising the novel legal issues that have pre-occupied stakeholders for the last several months and on which the Commission felt the need to seek additional comment in the *Public Notice*.

Under AT&T's proposal, the Commission would begin by using its authority under Section 316 to modify the space station owners' licenses to create a partitioned authorization for flexible terrestrial use. The Commission would determine, based on the record in this proceeding, the amount of spectrum to be repurposed for flexible use. CBA has already conceded that at least 200 MHz could be cleared for mobile broadband services within three years,[5] but the Commission should make its own independent public interest determination about how much spectrum can be set aside for mobile services while protecting incumbent users, including space station owners, earth station owners, content companies, and other FSS C-Band customers that rely on those transmissions—and seek additional comment if necessary.

The grant of partitioned flexible use authorizations would be conditioned on several requirements. The principal condition would be that space station owners would have to sell the partitioned spectrum, via a private auction, by a date certain (*e.g.*, within twelve months). The grant would also be conditioned on the submission of two plans: (1) a Transition Plan, which would detail how operations would be shifted in the C-Band to support current and reasonably projected future demand for existing services after the transition, as well as estimate the cost of the transition; and (2) an Auction Plan, which would describe the competitive procedures that would be followed for the private transaction. The Commission would put both plans out for

[5] Letter from Bill Tolpegin (counsel to CBA), to Marlene H. Dortch (FCC), GN Docket 18-122, at 1-2 (May 21, 2019).

notice and comment before approving them. Revenues from the auction would be used to cover the transition costs, the auction costs, and a reasonable premium.[6]

Not a single party has questioned the legality, practicality, or feasibility of AT&T's procedural proposal. Understandably so. The Commission has broad authority under Section 316 to modify the space station owners' licenses.[7] The Commission may modify the terms of existing licenses, as long as the modification does not involve a "fundamental change" to the license.[8] Applying this standard, the D.C. Circuit has rejected arguments that a license modification resulted in an unlawful "fundamental change," where "broadcasters will [be able to] provide essentially the same services" after the modification.[9] For similar reasons, the Commission recently determined that it has legal authority, under Section 316 of the Act, to modify licenses and relocate licensees in the 39 GHz band that do not choose to participate in an incentive auction for new spectrum uses in that band.[10]

The license modifications contemplated by AT&T's proposal would satisfy these standards. Under their modified licenses, the space station owners (and associated earth station owners) would still be able to conduct all of the business they would be able to conduct under

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[6] This would effectively establish a minimum aggregate bid for the space station owners, but as in CBA's proposal, the proceeds above the aggregate clearing level could be distributed to the space station owners according to the Transition Plan. Alternatively, the Commission could choose to allocate a portion of the proceeds for other purposes designed to advance the public interest.

[7] 47 U.S.C. § 316; *California Metro Mobile Communications, Inc.* v. *FCC*, 365 F.3d 38, 45 (D.C. Cir. 2004) (stating that "Section 316 grants the Commission broad power to modify licenses; the Commission need only find that the proposed modification serves the public interest, convenience and necessity").

[8] *Cellco P'ship* v. *FCC*, 700 F.3d 534, 543 (D.C. Cir. 2012).

[9] *Community Television, Inc.* v. *FCC*, 216 F.3d 1133, 1141 (D.C. Cir. 2000).

[10] Fourth Further Notice of Proposed Rulemaking, *Use of Spectrum Bands Above 24 GHz for Mobile Radio Services*, 33 FCC Rcd 7674 (2018).

their current licenses. AT&T's proposal *guarantees* that this is the case. The license modifications would not occur until the Commission approves, after notice and comment, both the Transition Plan—which details how the current licensees and users would be able to continue their existing operations after the transition—and the Auction Plan, which ensures that the proceeds will fund the relocation/reconfiguration/modification costs and support the Commission's public policy goals, such as enabling a vibrant, competitive 5G ecosystem. The license modifications are also conditioned on the secondary market sale of the flexible use portion of the licenses, which the space station owners would sell voluntarily.[11] Given that the modifications will protect existing services and the private auction will fund the transition, these modifications are well within the Commission's Section 316 authority.

Second, the Commission has repeatedly recognized that it has authority to specify the rules for the private auction and reimbursement of all incumbents, including the earth station owners and other incumbent users. For example, in 2000, the Commission revised the approach used to allocate 18 GHz spectrum among FSS and terrestrial services. The Commission ordered that "[i]n the event that agreement is not reached in any negotiation period, the FSS licensee will have the option of invoking involuntary relocation. . . . Under involuntary relocation, a terrestrial fixed station must relocate provided that the FSS licensee guarantees payment of relocation costs, completes all activities necessary for implementing the replacement facilities, and builds and tests the replacement system for comparability."[12] This decision was upheld by

[11] *See* AT&T Reply Comments at 8 (providing that if the auction fails, the conditional license modifications would be "void").

[12] Report and Order, *Redesignation of 17.7-19.7 GHz Frequency Band*, 15 FCC Rcd 13430, ¶ 82 (2000).

the D.C. Circuit.[13] The Commission has adopted similar conditions in other cases.[14] AT&T's proposal would therefore provide a lawful way to compensate all parties, including earth station owners.[15]

Third, AT&T's proposal would be a true secondary market sale, and therefore it would avoid the auction-related legal objections that other parties have raised with respect to other proposals.[16] Specifically, AT&T's proposal would involve only the lawful modification of existing licenses and a direct sale of those modified existing licenses by the existing licensees. Therefore, no purchaser of a license would ever have to file an application for an "initial license" and thus the auction requirements of 47 U.S.C. § 309(j) would not be implicated. In this way,

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[13] *Teledesic, LLC* v. *FCC*, 275 F.3d 85 (D.C. Cir. 2001).

[14] For example, in 1992, the Commission sought to redevelop 220 MHz of spectrum in the 2 GHz range, which was at the time occupied and used for fixed microwave services. *See* First Report and Order and Third Notice of Proposed Rulemaking, *Redevelopment of Spectrum to Encourage Innovation in the Use of New Telecommunications Techs.*, 7 FCC Rcd 6886 (1992). The Commission encouraged parties to redevelop this spectrum through private agreement, but if that failed, "the emerging technology service provider could request involuntary relocation of the incumbent. However, in that case, the emerging technology service provider must guarantee payment of all relocation expenses, build the new microwave facilities at the relocation frequencies, and demonstrate that the new facilities are comparable to the old." *Id.* ¶ 24. The Commission adopted similar procedures for the relocation of BRS and other spectrum in 2006. *See* Ninth Report and Order and Order, *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*, 5 FCC Rcd 4473, ¶ 40 (2006) (holding that if private negotiations failed, new users could "proceed to involuntary relocation of the incumbent" with the new user "guarantee[ing] payment of all relocation expenses necessary to provide comparable replacement facilities").

[15] *See, e.g.*, *United States* v. *Southwestern Cable Co.*, 392 U.S. 157, 181 & n.46 (1968) (explaining that 47 U.S.C. §§ 154(i) & 303(r) provide the Commission with authority "to issue such orders . . . necessary in the execution of its functions" absent a specific statutory provision "depriv[ing]" the Commission "of [that] authority."); *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192, 203 (1956) (holding that Section 303(r) "grant[s] general rulemaking power not inconsistent with the Act or law").

[16] *See* nn.2-3, *supra*.

AT&T's proposal permits the incumbent space station owners to sell their spectrum rights and benefit from the proceeds of the sale, but without raising any "auction issue" under Section 309(j).

CONCLUSION

For the forgoing reasons, and for the reasons set forth in AT&T's prior pleadings in this proceeding, AT&T's proposal for reallocating C-Band spectrum is the only approach that would avoid the legal issues raised in the *Public Notice* and elsewhere, while meeting all of the principal objectives of the Commission and the various stakeholders. Accordingly, the Commission should re-focus this proceeding on completing the review necessary to implement AT&T's proposal and should proceed promptly to the reallocation and deployment of this spectrum for 5G.

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July 3, 2019