

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

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

COMMENTS OF COMPETITIVE CARRIERS ASSOCIATION

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INTRODUCTION AND SUMMARY

Competitive Carriers Association (“CCA”)¹ submits these comments in response to the Public Notice Seeking Focused Additional Comment in 3.7-4.2 GHz Band Proceeding (“Public Notice”). The Public Notice relates to the July 2018 Notice of Proposed Rulemaking in which the Federal Communications Commission (“FCC” or “Commission”) proposes to expand terrestrial use of the 3.7-4.2 GHz band (“C-Band”) for Fifth Generation (“5G”) wireless services. In that Notice, the Commission sought comment on its authority to clear the C-Band by, in essence, gifting terrestrial spectrum rights to four foreign satellite operators, who would sell 180 megahertz of this spectrum to domestic terrestrial wireless network operators at values that could exceed \$23 billion. The Commission now seeks comment on its statutory authority under Sections 309(j) and 316 of the Communications Act to adopt this scheme and has asked commenters to address “any other issues . . . concerning proposals for enabling terrestrial use of the C-band.”²

Administrative agencies may issue regulations only pursuant to authority delegated to them by Congress.³ “The FCC, like other federal agencies, ‘literally has no power to act . . . unless and until Congress confers power upon it.’”⁴ That fundamental administrative law

¹ CCA is the nation’s leading association for competitive wireless providers and stakeholders across the United States. Its membership includes nearly 100 competitive wireless providers ranging from small, rural carriers to regional and national providers serving millions of customers. CCA also represents associate members including vendors and suppliers that provide products and services throughout the mobile communications supply chain.

² International Bureau and Wireless Telecommunications Bureau Seek Focused Additional Comment in 3.7-4.2 GHz Band Proceeding, 84 Fed. Reg. 25,514, 25,514 (June 3, 2019).

³ *Am. Library Ass’n. v. FCC*, 406 F.3d 689, 691 (D.C. Cir. 2005).

⁴ *Id.* at 698 (quoting *La. Pub. Serv. Comm’n v. FCC*, 476 U.S. 355, 374 (1986)).

principle limits how the Commission may proceed with enabling additional terrestrial use of the 3.7-4.2 GHz spectrum band. The C-Band Alliance (“CBA”) proposes an unprecedented approach—that the Commission forgo a public auction and, instead, hand over to private parties the management and financial benefits of tens of billions of dollars of critical spectrum with no return to taxpayers. This proposal cannot be reconciled with Congress’s instructions to the Commission in Section 309 of the Communications Act on how to assign licenses in the face of mutually exclusive applications for spectrum use. Turning over authority for allocating C-Band spectrum to satellite operators also contravenes a number of basic Constitutional and administrative law requirements.

Denying applicants an opportunity to pursue free and fair competition to acquire C-Band spectrum resources would harm terrestrial wireless operators and new entrants, including many CCA member companies. That harm is not only concrete and imminent, but also likely to frustrate efforts for the United States to lead the world in 5G deployment. Among other things, the CBA proposal would reduce, if not completely foreclose, competitive carrier access to a band that the Commission itself has described as poised to “provide a critical input to operators to deploy new and improved wireless services to rural, remote, and underserved areas of the country.”⁵ The Commission can neither “rewrite clear statutory terms to suit its own sense of how the statute should operate,”⁶ nor can it “exercise its authority in a manner that is inconsistent

⁵ See *Expanding Flexible Use in Mid-Band Spectrum Between 3.7 and 24 GHz*, Notice of Inquiry, 32 FCC Rcd. 6373 (2017), available at <https://docs.fcc.gov/public/attachments/FCC-17-104A1.pdf>.

⁶ *Util. Air Regulatory Grp. v. EPA*, 573 U.S. 302, 328 (2014); see also *Colo. River Indian Tribes v. Nat’l Indian Gaming Comm’n*, 466 F.3d 134, 139–140 (D.C. Cir. 2006) (quoting *MCI Telecommunications Corp. v. AT&T*, 512 U.S. 218, 231 n.4 (1994)) (“Agencies are . . . ‘bound,

with the administrative structure that Congress enacted into law.”⁷ In short, there is no basis for the Commission to deviate from the Communications Act’s requirement that it go through the normal public-auction channels, which promote an open, public, and transparent assignment of spectrum, according to a congressionally defined set of criteria the Commission is obliged to follow.

For all of these reasons, the Commission should adopt one of the widely accepted, statutorily authorized methods of reallocating spectrum for new uses.⁸ CBA’s proposal to forgo

not only by the ultimate purposes Congress has selected, but by the means it has deemed appropriate, and prescribed, for the pursuit of those purposes.”).

⁷ *Verizon v. FCC*, 740 F.3d 623, 634 (D.C. Cir. 2014) (quoting *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 91 (2002)).

⁸ Several proven mechanisms are available under the Communications Act to make the C Band spectrum available for terrestrial wireless use. As in Auctions 101 and 102, the Commission can simply reallocate some (or all) of the available spectrum from its current satellite use to terrestrial wireless operations and then provide the displaced earth station operators with comparable facilities in other satellite bands, through microwave links or fiber optic connections. *See Service Rules for Advanced Wireless Services in the 2000-2020/2180-2200 MHz Bands (AWS-4)*, Report and Order, 27 FCC Rcd. 16,102 (2012); *see also Redevelopment of Spectrum to Encourage Innovation in the Use of New Telecommunications Technologies*, Second Memorandum Opinion and Order, 9 FCC Rcd. 7797 (1994); *aff’d*, *Association of Public Safety Communications Officials-International, Inc. v. FCC*, 76 F.3d 395 (D.C. Cir. 1996) (collectively, “Emerging Technologies proceeding”); *Redevelopment of Spectrum to Encourage Innovation in the Use of New Telecommunications Technologies*, Memorandum Opinion and Order, 9 FCC Rcd. 1943 (1994); *Redevelopment of Spectrum to Encourage Innovation in the Use of New Telecommunications Technologies*, Third Report and Order and Memorandum Opinion and Order, 8 FCC Rcd. 6589 (1993) (“Emerging Technologies Third R&O and MO&O”); *Redevelopment of Spectrum to Encourage Innovation in the Use of New Telecommunications Technologies*, Second Report and Order, 8 FCC Rcd. 6495 (1993); *Redevelopment of Spectrum to Encourage Innovation in the Use of New Telecommunications Technologies*, First Report and Order and Third Notice of Proposed Rule Making, 7 FCC Rcd. 6886 (1992) (“Emerging Technologies First R&O”). Alternatively, as in Auction 1000 and as planned for Auction 103, the Commission may conduct an incentive auction that would allow incumbent earth station operators to receive incentive payments if they relinquish their spectrum protection rights afforded to them by the Commission. *See Middle Class Tax Relief and Job Creation Act of 2012 (Spectrum Act)*, Pub. L. No. 112-96, §§ 6402, 6403, 125 Stat. 156 (2012) (codified at 47 U.S.C. §§ 309(j)(8)(G), 1452).

competitive bidding and award public benefits to private parties through a scheme designed to maximize the return for the shareholders of CBA's member companies rather than advance the public interest would circumvent the Commission's congressionally defined authority.

DISCUSSION

I. Reallocating C-Band Spectrum for Terrestrial Use Will Require “Initial Licenses” and “Competitive Bidding” Subject to Section 309(j).

The CBA's proposal will significantly reconfigure the existing rights and duties of parties in the 3.7–4.2 GHz spectrum band, bringing new market players into that space for new purposes—most notably establishing 5G wireless capabilities. Under the CBA's proposal, four of the seven C-Band space station operators authorized to use a Fixed-Satellite Service (“FSS”) allocation in the 3.7-4.2 GHz band would identify 200 megahertz of what CBA claims are their non-exclusive, nationwide “rights to use all 500 MHz of the C-band spectrum” in the United States.⁹ These select space-station operators would then idle 20 megahertz of the 200 megahertz of selected spectrum for guard band to separate legacy FSS operations from new terrestrial operations. Next, the CBA members would disaggregate the remaining 180 megahertz of spectrum into nine, twenty-megahertz-wide blocks of spectrum. At that point, the CBA members would partition the previously nationwide FSS operating authority into 486 discrete, exclusive-use, terrestrial mobile licenses, using a Partial Economic Areas (“PEA”) geographic definition previously adopted by the FCC. Finally, the CBA would auction up to 4,374

⁹ See *Expanding Flexible Use of the 3.7-4.2 GHz Band, et al*, Reply Declaration of Jeffrey A. Eisenach, Ph.D., available at <https://ecfsapi.fcc.gov/file/1207392316779/Eisenach%20Declaration%20for%20Reply%20Comments%20of%20the%20C-Band%20Alliance.pdf>.

geographic area licenses through a multi-stage auction process featuring elements of combinatorial bidding, followed by an assignment stage to determine frequency selection.¹⁰

The CBA concedes— as it must—that this wholesale reordering of use, channelization, and geographic rights in the C Band is “extremely complicated” and features countless “trade-offs” among how best to reconfigure the rights of the parties involved.¹¹ The CBA also concedes that this reordering of the band under a plan of the CBA’s own design would trigger “many complex technical, operational, and logistical issues related to clearing and transitioning 200 MHz of C-band spectrum from satellite service to terrestrial 5G.”¹² This massive reordering of rights—not to mention the multivalent policy choices behind these decisions—only highlights that if the CBA’s proposal were to be implemented, the Commission would necessarily “have instituted a new regulatory regime” that involves “a different set of rights and obligations for the licensee” awarded “a particular frequency.”¹³ To authorize that reconfiguration, the Commission will by definition have to grant “initial license[s]” to new licensees with new rights that do not

¹⁰ See Letter from Bill Tolpegin, CBA Chief Executive Officer, filed May 21, 2019 (“May Tolpegin Letter”), available at <https://ecfsapi.fcc.gov/file/1061231991411/CBA%20-%20Auctionomics%20white%20paper%20ex%20parte%206.12.2019.pdf>; [https://ecfsapi.fcc.gov/file/1207392316779/Reply%20Comments%20of%20the%20C-Band%20Alliance%20\(C-Band%20NPRM\).pdf](https://ecfsapi.fcc.gov/file/1207392316779/Reply%20Comments%20of%20the%20C-Band%20Alliance%20(C-Band%20NPRM).pdf).

¹¹ See *Expanding Flexible Use of the 3.7 to 4.2 GHz Band, et al*, Reply Comments of the C-Band Alliance, available at [https://ecfsapi.fcc.gov/file/1207392316779/Reply%20Comments%20of%20the%20C-Band%20Alliance%20\(C-Band%20NPRM\).pdf](https://ecfsapi.fcc.gov/file/1207392316779/Reply%20Comments%20of%20the%20C-Band%20Alliance%20(C-Band%20NPRM).pdf); See *Expanding Flexible Use of the 3.7 to 4.2 GHz Band, et al*, Reply Comments of the C-Band Alliance, available at https://ecfsapi.fcc.gov/file/102980223165/Intel_Intelsat_SES_Joint_NPRM_Comments%20Final%2010-29.pdf; See May Tolpegin Letter, available at <https://ecfsapi.fcc.gov/file/10521277644574/CBA%20-%20Band%20Plan%20Ex%20Parte.pdf>

¹² *Id.*

¹³ *Fresno Mobile Radio, Inc. v. FCC*, 165 F.3d 965, 970 (D.C. Cir. 1999) (explaining that “initial licenses” are required under a new regulatory regime even “if such a license authorizes no new service and covers spectrum already in use”).

exist today.¹⁴ And Congress specifies how those initial licenses are to be granted: Subject to certain enumerated exemptions, “the Commission shall grant the license or permit to a qualified applicant through a system of competitive bidding.”¹⁵ In other words, the Commission is required to assign licenses through a system of competitive bidding consistent with Section 309(j) of the Communications Act.

II. CBA’s Proposed Assignment Plan Does Not Satisfy the Requirements of Section 309(j).

CBA’s proposal does not satisfy the “competitive bidding” requirements of Section 309(j). The statute repeatedly requires that control over the design and implementation of the competitive bidding auction must remain with the Commission—not a private party. The statute requires that “the *Commission* shall, by regulation, establish a competitive bidding methodology.”¹⁶ Then it provides that “[t]he *Commission* shall seek to design and test multiple alternative methodologies under appropriate circumstances.”¹⁷ Next, the “*Commission* shall, directly or by contract, provide for the design and conduct (for purposes of testing) of competitive bidding”¹⁸ Further, “the *Commission* shall include safeguards to protect the public interest in the use of the spectrum and shall seek to promote the purposes specified in

¹⁴ *Id.*

¹⁵ 47 U.S.C. § 309(j)(1).

¹⁶ 47 U.S.C. § 309(j)(3)(emphasis added).

¹⁷ *Id.* (emphasis added).

¹⁸ *Id.* (emphasis added).

section 151 of this title”¹⁹ And finally, when it comes to qualifying bidders, the statute requires that the “Commission” do so.²⁰

Nothing in the statute suggests that the Commission may bestow these statutorily required functions upon a third party. At most, the “by contract” language in Section 309(j)(3) permits the Commission to hire a private party to run certain administrative aspects of the competitive bidding, but in all cases the Commission must retain ultimate authority over the competitive bidding process. License design, for example, is fundamental to the auction and extends to the amount of spectrum offered; the size of the geographic license area each license covers; and the technical constraints within which each license must operate. But none of these policy decisions fall within the Commission’s purview under the CBA’s proposed scheme. The competitive bidding process is likewise full of “critical pitfalls” that can result in competitive and consumer harm if left unchecked.²¹ These harms, which range from collusion to entry deterrence, can prove “hard to challenge legally”²² in time to make a meaningful economic difference and, thus, fall squarely within the ambit of administrative oversight that Congress established in the Communications Act.²³ The Commission, of course, navigates these hazards through detailed rules governing prohibited communications; joint bidding arrangements; clock

¹⁹ *Id.* (emphasis added).

²⁰ *Id.* § 309(j)(5).

²¹ Paul Klemperer, *What Really Matters in Auction Design*, 16 J. OF ECONOMIC PERSPECTIVES 1 (Winter 2002).

²² *Id.*

²³ See *Orion Comm’ns Ltd. v. FCC*, 213 F.3d 761, 763-64 (D.C. Cir. 2000) (“[G]iven our statutory obligation to utilize auctions as a primary licensing tool, the protection of the integrity of the auction process is of paramount importance, and we are consequently concerned about actions that compromise the integrity of the process.”).

auction design considerations; policies governing bid stoppages, delays, suspensions and cancellations; minimum activity requirements; reserve prices; rules governing bid removals and bid withdrawals; and determining when winners must make final payments and what the penalties for bid withdrawal or default will be.²⁴ But the CBA would have the Commission jettison these rules in favor of a CBA-run auction that may lack some, or all, of the safeguards that the Commission has repeatedly said are critical to free and fair competitive bidding.²⁵ Any design adopted by the FCC should be accountable to Congress's directives and should adequately determine whether, when and how to apply rules that protect the integrity of the bidding process and foster participation by a variety of stakeholders seeking to invest in this valuable spectrum.²⁶

The FCC has a “statutory obligation to manage spectrum in the public interest”²⁷ and is statutorily bound to design competitive bidding systems that fulfill congressionally defined objectives.²⁸ The Commission cannot comply with these statutory obligations by sub-delegating its auction authority to third parties.²⁹ And sub-delegating to third-parties is never more

²⁴ *Auctions of Upper Microwave Flexible Use Licenses for Next-Generation Wireless Services*, Public Notice, FCC 18-109 (Aug. 3, 2018).

²⁵ See, e.g., *id.* at 22 ¶ 51.

²⁶ If the CBA were to adopt the FCC's auction design and bidding safeguards in their entirety, then one would legitimately wonder what gains the CBA's scheme is intended to accomplish that the FCC's time-tested auction designs cannot.

²⁷ *Implementation of Sections 309(j) and 337 of the Communications Act of 1934 as Amended*, Memorandum Opinion and Order, 17 FCC Rcd. 7553 (2002), available at <https://docs.fcc.gov/public/attachments/FCC-02-82A1.pdf>.

²⁸ 47 U.S.C. § 309(j)(3).

²⁹ See, e.g., *United States Telecomms.Ass'n v. FCC*, 359 F.3d 554, 566 (D.C. Cir. 2004)(*USTA II*) (holding that “while federal agency officials may sub-delegate their decision-making authority to subordinates absent evidence of contrary congressional intent, they may not sub-delegate to outside entities—private or sovereign—absent affirmative evidence of authority to do so.”).

freighted with legal risk than where, as here, the agency would forgo any meaningful exercise of its independent judgment and analysis over whether and how the private redistribution of rights would satisfy the statutory objectives mandated by section 309(j) of the Communications Act.³⁰

Nor would it be in the public interest for the Commission to outsource oversight over competitive bidding. CBA's proposal asks the Commission to cede most, if not all, oversight authority over this critical license-assignment question to private parties who stand to benefit to the tune of tens of billions of dollars.³¹ In return, there would be no corresponding gain to the American taxpayer. As the D.C. Circuit has recognized, the Commission is duty-bound "to consider the public interest in deciding whether to forgo an auction."³² And Congress has explained how the Commission must fulfill these obligations: The FCC is statutorily required to advance a broad set of congressionally enumerated objectives that include "mak[ing] available, so far as possible, to all the people of the United States, ... a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, for the purpose of promoting safety of life and property through the use of wire and radio communications."³³ In making auction-design decisions, moreover, the Commission's objectives include:

- "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";

³⁰ *USTA II*, 359 F.3d at 569 ("An agency may not... merely 'rubber-stamp' decisions made by others under the guise of seeking their 'advice.'").

³¹ *Expanding Flexible Use of the 3.7 to 4.2 GHz Band, et al*, Comments of the C-Band Alliance 9, available at <https://ecfsapi.fcc.gov/file/1029067703990/C-Band%20Alliance%20NPRM%20Comments%2010.29.2018.pdf>.

³² See *M2Z Networks, Inc. v. FCC*, 558 F.3d 554, 563 (D.C. Cir. 2009).

³³ Communications Act of 1934, 47 U.S.C. § 151.

- “promoting economic opportunity and competition and ensuring that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women”; and
- “recovery for the public of a portion of the value of the public spectrum resource made available for commercial use and avoidance of unjust enrichment through the methods employed to award uses of that resource.”³⁴

Unlike a Commission-conducted auction (which would ensure full public participation, raise public revenues from the assignment of a public resource, and take into account other competing objectives such as rural service and small business opportunities without administrative or judicial delays), CBA’s proposal would undermine “the public interest, convenience, and necessity” that Congress intended to be the touchstone of licensing decisions.³⁵ And unlike the FCC, the four foreign space-station operators who comprise the CBA have one and only one overarching obligation, notwithstanding their professed public statements: a fiduciary responsibility to “act[] to promote the value of the corporation for the benefit of [their] stockholders.”³⁶

If a private sale of rights were permitted here, it would also create dangerous precedent because incumbent licensees would *always* be incentivized to resist surrendering or sharing unused spectrum, unless the Commission agrees to give them all of the public revenue that would otherwise go to the U.S. Treasury and, by extension, American taxpayers. That is not the law, and it would not make for good policy, either.

³⁴ 47 C.F.R. §309(j)(3).

³⁵ *See, e.g., id.* § 309(a).

³⁶ *See eBay Domestic Holdings Inc. v. Newmark*, 16 A.3d 1 (Del. Ch. 2010).

CBA's plan is problematic for another reason as well: in order for it to work, not only would the Commission have to forfeit control over the auction to CBA, but also it would have to forfeit ownership over the spectrum itself. CBA's proposal is to "auction" rights that it does not possess, and CBA cannot do so unless the Commission allows the CBA to define and sell sticks in the property bundle that it otherwise would not hold. But Section 301 of the Communications Act bars the Commission from awarding property interests in spectrum licenses.³⁷ The Communication Act also recognizes that use of spectrum is "temporary, limited, and subject to withdrawal in a wide variety of circumstances."³⁸ Section 304 of the Act likewise requires that any applicant seeking to use spectrum waive any claim to the use of any particular frequency or of the electromagnetic spectrum as against the regulatory power of the United States.³⁹ Taken together, these provisions "make it clear that spectrum ultimately belongs to the public and not to individual licensees."⁴⁰ The CBA proposal cannot be reconciled with that requirement.

III. CBA Cannot Avoid Section 309(j)'s Auction Requirements by Redefining the Terms of the Statute.

CBA attempts to sidestep Section 309(j) by suggesting that the Commission might be able to simply avoid "accept[ing]" mutually exclusive applications. But Congress directed the Commission to use "competitive bidding" to allocate spectrum licenses when "mutually

³⁷ 47 U.S.C. § 301 ("It is the purpose of this chapter, among other things, to maintain the control of the United States over all the channels of radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority...").

³⁸ *Principles for Promoting the Efficient Use of Spectrum by Encouraging the Development of Secondary Markets*, Policy Statement, 15 FCC Rcd. 24178 (2000) ("Spectrum Policy Statement"), citing 47 U.S.C. § 301.

³⁹ 47 U.S.C. § 304.

⁴⁰ *See Spectrum Policy Statement*.

exclusive applications are accepted,” subject to certain exceptions that do not apply here.⁴¹ CBA asserts that after its private competitive bidding process resolves competing applications for the same public spectrum resources, only one application will be “accepted” by the FCC under its proposal, thus purportedly sidestepping this critical statutory constraint.⁴² That argument does not reflect a fair reading of the text and would amount to an end-run around Congress’s purpose in enacting this provision. If the Commission could bypass its obligation to conduct an auction simply by “accepting” only one application, then it would never have an obligation to use competitive bidding.

Congress instructed the Commission to use competitive bidding as a *process* when there are multiple interested parties for which licenses would be mutually exclusive. There can be no doubt that there are multiple interested parties who are interested in submitting mutually exclusive applications for usage rights to the C-Band. As the White House Office of Science and Technology Policy has found, the C-Band is “a leading 5G band” throughout the world that is “in high demand by 5G stakeholders” in the United States.⁴³ Wireless operators of all sizes and new entrants to the sector have voiced intense interest in acquiring C-Band spectrum.⁴⁴ Demand

⁴¹ 47 U.S.C. § 309(j)(1).

⁴² See, e.g., Letter from Jennifer D. Hindin, Wiley Rein LLP, Counsel for the C-Band Alliance, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 18-122 (filed Feb. 6, 2019), <https://ecfsapi.fcc.gov/file/1020637266095/C-Band%20Ex%20Parte%202-6-19.pdf>.

⁴³ White House Office of Sci. and Tech. Policy, *Emerging Technologies and Their Expected Impact on Non-Federal Spectrum Demand* 64-65 (2019), available at <https://www.whitehouse.gov/wp-content/uploads/2019/05/Emerging-Technologies-and-Impact-on-Non-Federal-Spectrum-Demand-Report-May-2019.pdf>.

⁴⁴ See, e.g., Letter from Colby May & Ravi Potharlanka, Trinity Broadcasting Network & LPN Spectrum LLC, to Marlene H. Dortch, Secretary, Federal Communications Commission (May 16, 2019), available at <https://ecfsapi.fcc.gov/file/105161423013222/TBN%20and%20LPN%20Ex%20Parte%20on%20C-Band%20Proceeding.pdf>; *Expanding Flexible Use of the 3.7 to 4.2 GHz Band*, Comments of AT&T Services, Inc., GN Docket No. 18-122 (2018); *Expanding Flexible Use of the 3.7 to 4.2*

is indeed so high that credible estimates place the value of this 500 megahertz swath of spectrum at \$40 billion or more.⁴⁵ Multiple CCA carrier members have expressed intense interest in acquiring C-Band spectrum and are able and ready to bid for licenses in the 3.7-4.2 GHz band at issue here. If the Commission could side-step its statutory obligation to hold an auction merely by refusing to “accept” those mutually exclusive applications, Section 309(j) as a whole would have no meaning.

The Supreme Court said as much in *Ashbacker v. FCC*.⁴⁶ In *Ashbacker*, the Commission received two mutually exclusive applications and granted one without providing a hearing on the relative merits of both submissions. The aggrieved applicant appealed on grounds that Section 309(a) of the Act grants parties a right to a hearing before their applications are denied. The Supreme Court reversed the Commission’s decision. “[I]f the grant of one [application] effectively precludes the other, the statutory right to a hearing which Congress has accorded applicants before denials of their applications becomes an empty thing,” the Court wrote.⁴⁷ Preserving a hearing in name only at some later date was simply insufficient to satisfy the Commission’s statutory obligations under the law. In the same way, nominally refusing to “accept” an application that would otherwise qualify for Commission review would effectively deny competing providers an opportunity to be heard on the relative merits of alternative

GHz Band, Comments of T-Mobile US, Inc., GN Docket No. 18-122 (2018); *Expanding Flexible Use of the 3.7 to 4.2 GHz Band*, Comments of United States Cellular Corporation, GN Docket No. 18-18-133 (2018); *Expanding Flexible Use of the 3.7 to 4.2 GHz Band*, Comments of Verizon, GN Docket No. 18-122 (2018).

⁴⁵ See Letter from Colby May & Ravi Potharlanka to Marlene H. Dortch, *supra* note 44.

⁴⁶ *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327, 333 (1945) (“[W]here two bona fide applications are mutually exclusive the grant of one without a hearing to both deprives the loser of the opportunity which Congress chose to give him.”).

⁴⁷ *Id.* at 330.

spectrum uses. “Legal theory is one thing,” the *Ashbacker* Court observed. “But the practicalities are different.”⁴⁸ For this reason, both the Commission and the courts have rejected efforts to vitiate *Ashbacker* rights through procedural or linguistic sleights of hand.⁴⁹

Thus, while the Commission may promulgate procedural rules limiting the eligibility of parties to file mutually exclusive applications, “applicants subject to such procedures must be treated equally and fairly.”⁵⁰ And for the same reason, the Commission may not use its rulemaking authority in ways that would defeat mandated requirements to resolve mutual exclusivity absent “truly compelling grounds that are special to the particular proceeding in which the Commission proposes” an alternative process.⁵¹ As the Commission explained, the Supreme Court’s *Ashbacker* decision “held that the Commission must use the same set of procedures to process the applications of all similarly situated persons who come before it

⁴⁸ *Id.* at 332.

⁴⁹ See, e.g., *Aeronautical Radio, Inc. v. FCC*, 928 F.2d 428, 451 (D.C. Cir. 1991) (rejecting a Commission action which “established the licensee itself by rule” by awarding a license to a consortium of qualified and interested applicants rather than selecting a single licensee because “[a]dopting a rule which eliminates mutual exclusivity through the simple expedient of prohibiting license applicants from pursuing their individual applications and requiring them to form a joint agreement . . . [would] render[] the comparative hearing requirement a nullity”); Federal Commc’ns. Comm’n., Opinion Letter, 29 FCC Rcd. 11287, 11289 (Sept. 19, 2014) (citing *Bachow v. FCC*, 237 F.3d 683, 689–90 (D.C. Cir. 2001) (holding that *Ashbacker* rights inhere in potential applicants whose right to file a timely competing application is frustrated by a Commission freeze order)).

⁵⁰ Federal Commc’ns Comm’n, Opinion Letter, 29 FCC Rcd. 11287, 11290 (Sept. 19, 2014).

⁵¹ *Aeronautical Radio, Inc. v. FCC*, 928 F.2d at 452 (D.C. Cir. 1991) (“While we concede that delay, expense and arduous choices are among the burdens associated with comparative hearings, they are burdens that Congress found to be outweighed by the benefits of a reasoned assessment of the public interest by the agency entrusted with furthering that interest. Accordingly, these burdens do not justify the Commission’s avoidance of a comparative procedure.”).

seeking the same license.”⁵² Or as the Commission aptly summarized earlier this year, “[t]he ability to compete on an equal basis . . . is the essence of *Ashbacker*.”⁵³ And ultimately it is the lack of free and fair competition that is the central problem with the CBA’s attempt to avoid Section 309(j) and other provisions of the Communications Act intended to promote competition, prevent unjust enrichment, and ensure the highest and best use of available radiofrequency spectrum.

Nor does Section 309(j)(6)(E) of the Communications Act permit the Commission to avoid its statutory obligations. That provision merely permits the Commission to use “negotiation” to mitigate mutual exclusivity when doing so is “in the public interest” and “within the framework of existing policies.”⁵⁴ “Negotiations” are dealings “conducted between two or more parties for the purpose of reaching an understanding.”⁵⁵ In keeping with the meaning of this term, the Commission has acknowledged the capacity of good-faith bargaining among competitors for the same resource to serve as an alternative to competitive bidding.⁵⁶ But the

⁵² *Maxcell Telecom Plus, Inc. v. FCC*, 815 F.2d 1551, 1555 (D.C. Cir. 1987).

⁵³ See Federal Commc’ns Comm’n, Opinion Letter (June 5, 2019) (citing *Committee for Effective Cellular Rules v. FCC*, 53 F.3d 1309, 1321 (D.C. Cir. 1995)); *Aeronautical Radio, Inc.*, 928 F.2d at 452 (“The Commission’s rulemaking authority is not unbounded.”).

⁵⁴ 47 U.S.C. § 309(j)(6)(E) (2018); *Orion Communications Ltd. v. FCC*, 341 U.S. App. D.C. 404, 213 F.3d 761 (D.C. Cir. 2000); see also *Northpoint Tech., Ltd. v. FCC*, 414 F.3d 61, 74 (D.C. Cir. 2005) (observing that Section 309(j)(6) is a “hortatory provision” only).

⁵⁵ *Negotiation*, *Black’s Law Dictionary* (10th ed. 2014); Webster’s Third New International Dictionary, Unabridged 1514 (1993) (defining “negotiate” as, among other things, “to arrange for or bring about through conference and discussion” or to “work out or arrive at or settle upon by meetings and agreements or compromises”). Cf. *Compel*, *Black’s Law Dictionary* (10th ed. 2014) (defining compel as “[t]o cause or bring about by force, . . . or overwhelming pressure” or “to convince . . . that there is only one possible resolution”).

⁵⁶ See, e.g., *Implementation of Sections 309(j) and 337 of the Communications Act of 1934 as Amended*, Report and Order and Further Notice of Proposed Rulemaking, 15 FCC Rcd. 22709 (2000).

agency's receptivity to the private resolution of disputes through "negotiations" or "other means" under Section 309(j) has never extended to anything as complex—or as one sided—as the CBA's proposed approach.

Commission-supported negotiations typically involve a handful of competing applicants pursuing various engineering solutions, application dismissals, or other modifications to resolve discrete issues of mutual exclusivity.⁵⁷ To avoid unjust enrichment and protect the integrity of its procedures, the Commission requires parties to any agreement not only to explain how the proposed resolution advances the public interest, but also to certify that neither the conflict, nor its resolution were made to secure "money or other consideration."⁵⁸ The Commission has applied the same principles of equity, fairness, and prohibition of unjust enrichment to those rare cases where it has supported negotiations among more numerous and heterogeneous sets of stakeholders. In adopting some of the original millimeter wave rules, for example, the Commission, after public notice and opportunity to comment and with the approval from the Office of Management and Budget and the General Services Administration, formed a Negotiated Rulemaking Committee featuring representation from a diverse and inclusive set of stakeholders.⁵⁹ Efforts to resolve more complex disputes through negotiations appear to have

⁵⁷ See, e.g., Notice of Receipt of Settlement Agreements and Removal of Applications From Closed Broadcast Auction, Public Notice, Report No. 24557A (rel. Aug. 25, 1999), available at <https://www.fcc.gov/sites/default/files/wireless/auctions/25/releases/24557.pdf>.

⁵⁸ See, e.g., *Incentive Auction Task Force and Media Bureau Announce Settlement Opportunity for Mutually Exclusive Displacement Applications Filed During the Special Displacement Window*, Public Notice, 33 FCC Rcd. 10748 (2018), available at <https://docs.fcc.gov/public/attachments/DA-18-1108A1.pdf>

⁵⁹ See, e.g., *Rulemaking To Amend Parts 1, 2, 21, and 25 of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band, To Reallocate the 29.5-30.0 GHz Frequency Band, To Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services*, CC Docket 92-297(1997).

failed far more often than they have succeeded.⁶⁰ But regardless of size, scope or propensity for success, Commission-sanctioned negotiations share a key element wholly absent from CBA’s proposal—namely, the lack of any predetermined outcome. A “negotiation” in which CBA has received all of the rights to award terrestrial licenses is not a consensual resolution of differences, but a regulatory edict effected through CBA.

The CBA’s proposal would depart from decades of precedent in which the FCC has viewed Section 309(j) as imposing a “statutory obligation to utilize auctions as a primary licensing tool”⁶¹ and has repeatedly found competitive bidding to offer a more equitable and expeditious alternative to “giv[ing away] spectrum for free.”⁶² The CBA, in short, provides no basis for the Commission to deviate from the statutory auction requirement found in the Communications Act.⁶³

⁶⁰ See, e.g., *id.*

⁶¹ *Orion Comm’ns Ltd.*, 213 F.3d at 763-764.

⁶² See *Applications for License and Authority to Operate in the 2155-2175 MHz Band*, Order, 22 FCC Rcd. 16563 (2007).

⁶³ *EchoStar Satellite L.L.C. v. FCC*, 704 F.3d 992 (D.C. Cir. 2013) (reversing FCC requirements after finding that “the statute’s language is not as capacious as the agency suggests”); *Cincinnati Bell Tel. Co. v. FCC*, 69 F.3d 752 (1995) (reversing an FCC decision against auctioning spectrum because the agency had not only failed to support its conclusions, but also “failed to explain why the less restrictive alternatives that it had already adopted (namely the competitive bidding process and the strict build-out requirement) would not achieve the same goals”); *Wold Comm’ns, Inc. v. FCC*, 735 F.2d 1465, 1475 (D.C. Cir. 1984) (holding that the FCC does not have “unfettered discretion” in its regulatory powers).

IV. Decisions Granting Flexibility to Incumbents Have Allowed Existing Operators to Deploy More Efficiently and Do Not Contemplate a Wholesale Reallocation of Spectrum and Reordering of Rights among Licensees.

CBA's reliance on decisions such as *Straight Path* and *FiberTower* as precedent for an unprecedented award of billions of dollars of U.S. spectrum-selling rights to foreign satellite operators does not in fact support its proposal.⁶⁴ In the *Spectrum Frontiers Order* that authorized *Straight Path*, *FiberTower*, and dozens of other licensees to deploy new services in the band, the Commission simply found that technological advances would permit existing licensees to more intensively use the spectrum they already occupied.⁶⁵ When incumbents can make use of the spectrum they already possess, allowing incumbents to “exercise the full extent of their rights – including mobile rights – for geographic areas and bands in which they currently hold licenses”⁶⁶ holds advantages over awarding an entirely new set of licenses from scratch.⁶⁷ In this case,

⁶⁴ Letter from Jennifer D. Hindin, Wiley Rein LLP, Counsel for the C-Band Alliance, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 18-122 (filed Jan. 2, 2019), available at <https://ecfsapi.fcc.gov/file/10102956519300/CBA%20-%20Ex%20Parte%201-2-19.pdf>; see *Application of Verizon Communications Inc. and Straight Path Communications, Inc. for Consent to Transfer Control of Local Multipoint Distribution Service, 39 GHz, Common Carrier Point-to-Point Microwave, and 3650-3700 MHz Service Licenses*, Memorandum Opinion and Order, 33 FCC Rcd. 188 (WTB 2018); *Application of AT&T Mobility Spectrum LLC and FiberTower Corporation For Consent to Transfer Control of 39 GHz Licenses*, Memorandum Opinion and Order, 33 FCC Rcd. 1251 (WTB 2018); see also, e.g., *Service Rules for Advanced Wireless Services in the 2000-2020 MHz and 2180-2200 MHz Bands*, Order on Reconsideration, WT Docket No. 12-70, FCC 18-121, ¶ 16 (rel. Aug. 16, 2018); *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*, 19 FCC Rcd. 14165 (2004).

⁶⁵ See *Use of Spectrum Bands Above 24 GHz For Mobile Radio Services*, Report and Order and Further Notice of Proposed Rulemaking, 31 FCC Rcd. 8014, 8017-18 (2016).

⁶⁶ See *Transforming the 2.5 GHz Band*, Notice of Proposed Rule Making, WT Docket No. 18-120 (2018).

⁶⁷ See, e.g., *Flexibility for Delivery of Communications by Mobile Satellite Service Providers in the 2 GHz Band, the L-Band, and the 1.6/2.4 GHz Bands*, Report and Order, 18 FCC Rcd. 1962 (2003) (“We could either prohibit MSS licensees from deploying MSS ATC in order to preserve,

however, technological advances neither permit the incumbents satellite operators to offer new services, nor allow the incumbent satellite licensees to avoid having the FCC issue an entirely new set of licenses to an entirely new set of rights holders in the band.

In the *Spectrum Frontiers* proceeding, the Commission found expanding incumbent rights would “minimize transaction costs and provide the fastest transition to expanded use of the band.”⁶⁸ The Commission also concluded that changes in use patterns and technical advances had made policing the thin line between the types of “fixed” services incumbents were permitted to deploy originally and the kinds of “mobile” services they would like to deploy in the future increasingly complex and administratively untenable.⁶⁹ And the Commission found authorizing separate licenses for fixed and mobile operation in the same geographic area for the same spectrum threatened to “create unusually large challenges related to interference.”⁷⁰

None of the premises behind the flexibility granted in the *Spectrum Frontiers* proceeding and similar decisions are present here. First, a novel combinatorial bidding procedure conducted by an untested player under a legally dubious regime seems highly unlikely to save either time or money compared to a congressionally authorized, Commission-led auction with a long and demonstrable history of timely moving spectrum resources to their highest and best use. Second,

on princip[le], the initial service and operational rules for MSS. Or we could grant additional authority to the MSS incumbents to improve their services and efficient use of spectrum at the cost of giving the incumbents more operational authority than they had originally sought. Forced to choose, we believe granting, rather than withholding, access to spectrum resources represents the better course.”).

⁶⁸ *Use of 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. 10988 (2017) (“Spectrum Frontiers Order”), available at <https://docs.fcc.gov/public/attachments/FCC-17-152A1.pdf>.

⁶⁹ *Id.*

⁷⁰ *Id.*

the differences between satellite and terrestrial services are meaningful and persistent and, in all events, nowhere near as “blurred” as the Commission found the distinction between terrestrial fixed and terrestrial mobile operations to be in its *Spectrum Frontiers* proceeding. Third, maintaining satellite space station operations in the band will have no preclusive effect on terrestrial operations—unlike fixed links where “one point-to-point link could preclude mobile use of the spectrum in a downtown region,” transmissions from distant geostationary earth orbit space stations will not impair the deployment of terrestrial mobile broadband networks.⁷¹ Far from creating interference by introducing contradictory operations into the same spectrum, the Commission can readily split the band between satellite and terrestrial uses and, indeed, band-splitting represents the very essence of CBA’s proposal.⁷² Fourth and finally, Straight Path and FiberTower sold spectrum with terrestrial mobile rights that they already possessed and could have used whereas the satellite operators do not—and will never—possess or use the terrestrial wireless rights they seek only to sell to third-parties. The CBA shrugs off these and other important differences between recent flexibility orders and the sweeping grant of spectrum-

⁷¹ See, e.g., Letter from Russell H. Fox, Mintz, Counsel to T-Mobile USA, Inc., to Ms. Marlene H. Dortch, Secretary, FCC, GN Docket No. 18-122 (filed Apr. 11, 2019); Letter from Russell H. Fox, Mintz, Counsel to T-Mobile USA, Inc., to Ms. Marlene H. Dortch, Secretary, FCC, GN Docket No. 18-122 (filed Mar. 19, 2019). In any case, if CBA is to be believed earth station receivers have no legally cognizable right to protection from interference that the FCC must respect, or – more plausibly – can be accommodated through an incentive auction that encourages earth station licensees to exit the band or through a traditional auction that features relocation to comparable facilities consistent with longstanding Commission practice.

⁷² If some incumbent operators in the *Spectrum Frontiers* bands chose to exit the band rather than deploy services there, that exit is incidental to the agency’s larger objective of promoting more intensive use of the nation’s spectrum resources by existing licensees. The Commission did not grant flexibility to millimeter wave incumbents *because* they intended to exit the band. Rather, the Commission granted flexibility after reasonably finding that the incumbents could make more intensive use of the spectrum they already occupied.

selling authority as mere “banal” objections.⁷³ But in reality, the differences spotlight multiple flaws implicit in CBA’s approach.

V. The Commission Cannot Invoke Its Section 316 Authority To “Modify” Existing Space Station Licenses to Include Terrestrial Broadband Rights Because Doing So Would Work a “Fundamental Change.”

The Commission’s authority to “modify” existing licenses under Section 316 of the Communications Act does not allow the Commission to perform an end-run around its statutory obligation to open up spectrum allocation for public auction. Section 316 provides that “[a]ny station license . . . may be modified by the Commission” when the Commission determines that modification “will promote the public interest, convenience, and necessity.”⁷⁴ While that authority certainly allows the Commission to change some terms of existing licensees, it does *not* permit the sweeping transformation that would be required to effectuate the CBA’s proposal.

The key word in Section 316 is “modified.” The Supreme Court has held that the term “modify” as used in the Communications Act “connotes moderate change,” and that there is “not the slightest doubt” that Congress intended a “narrow definition.”⁷⁵ Or, as Justice Scalia more memorably put it: “It might be good English to say that the French Revolution ‘modified’ the status of the French nobility—but only because there is a figure of speech called understatement

⁷³ See Letter from Jennifer D. Hinden, Counsel to the C-Band Alliance to Marlene H. Dortch, Secretary, Federal Communications Commission (May 16, 2019), *available at* <https://ecfsapi.fcc.gov/file/105161423013222/TBN%20and%20LPN%20Ex%20Parte%20on%20C-Band%20Proceeding.pdf>; Letter from Jennifer D. Hinden, Counsel to the C-Band Alliance to Marlene H. Dortch, Secretary, Federal Communications Commission (Feb. 6, 2019), *available at* <https://ecfsapi.fcc.gov/file/1020637266095/C-Band%20Ex%20Parte%202-6-19.pdf>.

⁷⁴ See 47 U.S.C. § 316(a)(1) (1983).

⁷⁵ *MCI Telecommunications Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. at 228 (1994).

and a literary device known as sarcasm.”⁷⁶ The upshot of Congress’s choice to use the term “modify” means that the Commission may not, under the mantle of Section 316, work “a fundamental change to the terms” of existing licenses.⁷⁷

Yet that is precisely what the CBA’s proposal would do.⁷⁸ Reconfiguring the 3.7–4.2 GHz band to allow for terrestrial 5G services would radically transform the nature of existing licenses, while at the same time opening up that spectrum to a host of other mobile operators—thus shifting the current use away from satellite-based operations. The Commission long ago recognized—and rejected—efforts to “modify” licenses as a means of avoiding mutually exclusive applications.⁷⁹ In a 1994 Order interpreting the agency’s new auction authority, the Commission could not have been more clear: “if the modification application that is filed by the first applicant is substantial enough to require prior permission from the Commission, . . . it is the equivalent of a new or initial application and we are thus permitted to use auctions to resolve the mutual exclusivity.”⁸⁰ Because “satellite-based” and “terrestrial” uses imply “two different kinds of licenses,”⁸¹ the CBA’s proposal is not a “modification.” If the Commission wanted to

⁷⁶ *Id.*

⁷⁷ *Cnty. Television, Inc. v. FCC*, 216 F.3d 1133, 1141 (D.C. Cir. 2000).

⁷⁸ *Expanding Flexible Use of the 3.7 to 4.2 GHz Band, et al*, Comments of the C-Band Alliance 31-32 n.69, available at <https://ecfsapi.fcc.gov/file/1029067703990/C-Band%20Alliance%20NPRM%20Comments%2010.29.2018.pdf>.

⁷⁹ *Implementation of Section 309(j) of the Communications Act—Competitive Bidding*, Second Report and Order, 9 FCC Rcd. 2348, 2355 (1994) (“Where a modification would be so major as to dwarf the licensee’s currently authorized facilities and the application is mutually exclusive with other major modification or initial applications, the Commission will consider whether these applications are in substance more akin to initial applications and treat them accordingly for purposes of competitive bidding.”).

⁸⁰ *Id.* at 2355 n.29.

⁸¹ *See Northpoint Tech., Ltd. v. FCC*, 414 F.3d at 74–75 (D.C. Cir. 2005).

bring about the changes proposed by the CBA, it could do so by invoking Section 309(j)—and then following Section 309(j)’s competitive-bidding directives. But the Commission cannot forgo an auction under Section 309(j) simply by invoking Section 316 and labelling the ensuing transformation of the C-Band a “modification.”

Finally, it bears mention that Section 316 also creates procedural safeguards for “any” existing licensee “who believes its license or permit would be modified by the proposed action” to file a “protest” before that modification becomes effective.⁸² Given the largescale reallocation that the CBA’s proposal entails, there are a number of existing licensees of the 3.7–4.2 GHz terrestrial band facing protest-generating “modification.” If even a fraction of these existing licensees filed protests, that would greatly increase the administrative burdens on the Commission and cause precisely the sort of delay that the CBA claims its proposal would avoid. For these reasons and many others, the Commission should reject the CBA’s unlawful and unwise proposal and instead require that the C-Band be allocated through competitive bidding in an open, public, and transparent auction process.

VI. The CBA’s Proposal Abrogates Basic Constitutional Principles.

In addition to violating the Communications Act, the CBA’s proposal would put the Commission on a collision course with basic Constitutional principles. First and foremost, the Constitution forbids federal agencies from delegating to private parties enumerated authority that has been entrusted to the federal government. Under what is often called the “private non-

⁸² See 47 U.S.C. § 316(a)(2)–(3) (1983).

delegation” doctrine,⁸³ neither Congress nor administrative agencies carrying out Congress’s instructions can cede to private parties the authority that the Constitution grants them. The Supreme Court has long recognized that “[s]uch a delegation of legislative power is unknown to our law, and is utterly inconsistent with the constitutional prerogatives and duties of Congress.”⁸⁴ For good reason. Because private parties are not bound by the same procedural and substantive standards that govern federal agencies, permitting an agency to delegate its authority to a private party would effectively shield the resulting licensing actions from meaningful review. That would result in an unprecedented— and unconstitutional—enlargement of executive powers.

To be sure, private persons and entities can and often do “help a government agency make its regulatory decisions” by providing expert perspectives and engaging in the deliberative regulatory process.⁸⁵ But the Constitution does not allow that “help” to usurp the Government’s role in and responsibility for making public-policy choices. Abdicating this power “is 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

⁸³ See generally James M. Rice, Note, *The Private Nondelegation Doctrine: Preventing the Delegation of Regulatory Authority to Private Parties and International Organizations*, 105 CAL. L. REV. 539, 541 (2017).

⁸⁴ *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 537 (1935) (“But would it be seriously contended that Congress could delegate its legislative authority to trade or industrial associations or groups so as to empower them to enact the laws they deem to be wise and beneficent for the rehabilitation and expansion of their trade or industries? Could trade or industrial associations or groups be constituted legislative bodies for that purpose because such associations or groups are familiar with the problems of their enterprises?”).

⁸⁵ See 32 Charles Alan Wright *et al.*, *Federal Practice & Procedure* § 8116.1 (1st ed. 2019) (citing *Ass’n of Am. Railroads v. U.S. Dep’t of Transp.*, 721 F.3d 666, 671 (D.C. Cir. 2013), *vacated and remanded sub nom. Dep’t of Transp. v. Ass’n of Am. Railroads*, 135 S. Ct. 1225 (2015)).

adverse to the interests of others in the same business.”⁸⁶ Congress has delegated to the Commission responsibility for allocating spectrum and awarding new licenses. The CBA’s proposal violates these Constitutional limits by granting to a partisan subset of market actors the authority to exercise powers reserved for public officials to reconfigure, for their own benefit, the 3.7-4.2 GHz band.

By outsourcing a basic governmental function to private actors, the Commission would run head-long into the Communications Act’s strong preference for auctions to decide questions of spectrum allocation and assign those rights among similarly situated parties in a manner that is not arbitrary or capricious. Without a countervailing, evidence-based reason articulated in the record—and the record betrays no such reason here—there is no basis for the Commission to deviate from Congress’s preferred approach.

VII. The CBA’s Proposal Violates the Administrative Procedure Act.

The CBA’s proposal also would run afoul of the APA. Under that statute, the Commission must abstain from action that would prove “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”⁸⁷ The arbitrary and capricious standard requires that agencies “examine the relevant data and articulate a satisfactory explanation” when seeking to take regulatory actions, and that they demonstrate a “rational connection between the

⁸⁶ *Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936); *see also Wellness Int’l Network, Ltd. v. Sharif*, 135 S. Ct. 1932, 1957 (2015) (Roberts, C.J., dissenting) (“It is a fundamental principle that no branch of government can delegate its constitutional functions to an actor who lacks authority to exercise those functions.”); *U.S. Telecom Ass’n v. FCC*, 359 F.3d 554, 565 (D.C. Cir. 2004) (“[W]hen an agency delegates power to outside parties, lines of accountability may blur, undermining an important democratic check on government decision-making.”).

⁸⁷ 5 U.S.C. § 706(2)(A) (1966).

facts found and the choice made.”⁸⁸ Before making a decision, agencies are required to have “weighed competing views, selected an approach with adequate support in the record, and intelligibly explained the reasons for making that choice.”⁸⁹ Regulatory action is generally held arbitrary and capricious when “the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.”⁹⁰ And a critical aspect of that standard is ensuring an agency’s “substantive decision” be “supported by ‘substantial evidence’ in the administrative record.”⁹¹

The CBA’s proposal does not meet these standards. First, the proposal would grant lucrative rights to space-station “licensees” but not earth station “licensees” in the same spectrum. Second, the CBA proposal would grant lucrative rights to some space-station licensees but not others who hold the same claim of authority on U.S. spectrum resources.

a) The CBA’s Proposal Provides No Reasonable Basis for Treating Earth Station Licensees Differently than Space Station Licenses.

Receive-only registrants qualify as “licensees” under the Communications Act. As such, the Commission may not treat them differently from other licensees without a meaningful, non-arbitrary reason for doing so.

⁸⁸ *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)).

⁸⁹ *United States Telecom Ass’n v. FCC*, 825 F.3d 674, 706 (D.C. Cir. 2016) (quoting *FERC v. Electric Power Supply Ass’n*, 136 S.Ct. 760, 784 (2016)) (alteration omitted).

⁹⁰ *See State Farm*, 463 U.S. at 43.

⁹¹ *Nat’l Lifeline Ass’n v. FCC*, 921 F.3d 1102, 1111 (D.C. Cir. 2019) (quoting *Comcast Corp. v. FCC*, 579 F.3d 1, 5, 7 (D.C. Cir. 2009)).

The Communications Act defines a “licensee” as “the holder of a radio station license granted or continued in force under authority of this chapter.”⁹² Section 153(49) of the Act then defines a “license” as an “instrument of or authorization required by this chapter or the rules and regulations of the Commission made pursuant to this chapter, for the use or operation of apparatus for transmission of energy, or communications, or signals by radio, *by whatever name the instrument may be designated by the Commission.*”⁹³ And Section 153(57) of the Act defines the term “transmission of energy by radio” to include “both such transmission and all instrumentalities, facilities, and services incidental to such transmission.”⁹⁴ The Commission’s approval through registration of receive-only earth stations falls squarely within the definition of Section 153 of the Act.⁹⁵

Although receive-only earth stations do not themselves transmit “energy, or communications, or signals,”⁹⁶ that is not the entirety of the statutory test. The statute expressly defines the term “transmission of energy by radio” to include “both such transmission and all

⁹² 47 U.S.C. § 153(30).

⁹³ *Id.* § 153(49) (applying the term “station license” to also include “radio station license” or “license”) (emphasis added).

⁹⁴ *Id.* § 153(57)

⁹⁵ See *Regulation of Domestic Receive-Only Satellite Earth Stations*, First Report and Order, 74 F.C.C.2d 205, 217 (1979) (“Consequently, based on our evaluation of the record before us in this proceeding and on our experience with the current regulatory scheme, we conclude that the public interest will be served by immediate implementation of voluntary licensing for receive-only earth stations.”); see also *Establishment of Domestic Communications-Satellite Facilities by Non-Governmental Entities*, Report and Order, 22 F.C.C.2d 86, 128 (1970) (“Satellite operating entities should have equal status with terrestrial users in interference problems and in access to the radio spectrum.”).

⁹⁶ International Bureau and Wireless Telecommunications Bureau Seek Focused Additional Comment in 3.7-4.2 GHz Band Proceeding, 84 Fed. Reg. 25,514, 25,517 (June 3, 2019).

instrumentalities . . . incidental to such transmission.”⁹⁷ “Incidental” means “depending on something else, is likely to happen or is happening in addition to another event.”⁹⁸ By definition, a receive-only earth station is incidental to transmission; the act of transmission has no real-world benefit without a receiver, and vice versa. Receive-only earth stations thus are licensees, “by whatever name the instrument may be designated by the Commission.”⁹⁹

Consistent with the Communications Act’s generous definition of “license,” the Commission itself equated registration with licensing when it first adopted the process in 1991.¹⁰⁰ Accepting CBA’s novel argument presumes that earth station registrants’ rights are “non-protected interest[s], defeasible at will” and would fly in the face of the statutory text as well as relevant Commission and judicial precedent.¹⁰¹ Under the APA, mere titular differences in the authorizations that two categories of licensees hold cannot support substantive differences in the protections they receive.

b) The CBA’s Proposal Provides No Reasonable Basis for Treating Some Foreign Space Station Rights Holders Differently Than Others.

The CBA proposal also would provide an arbitrary windfall to some satellite operators at the expense of other satellite operators with an interest in the C-Band. The seven foreign space

⁹⁷ *Id.*

⁹⁸ *Incidental*, *Black’s Law Dictionary* (10th ed. 2014).

⁹⁹ 47 U.S.C. § 153(49).

¹⁰⁰ See, e.g., *Amendment of Part 25 of the Commission’s Rules & Regulations to Reduce Alien Carrier Interference Between Fixed-Satellites at Reduced Orbital Spacings & to Revise Application Processing Procedures for Satellite Commc’ns Servs.*, First Report and Order, 6 FCC Rcd. 2806 ¶ 7 (1991) (“In response to the commenters’ concerns, we emphasize that a registration program will afford the same protection from interference as would a license issued under our former procedure.”).

¹⁰¹ *Orange Park Florida T.V., Inc. v. FCC*, 811 F.2d 664, 674 n.19 (D.C. Cir. 1987).

station operators that transmit from space to the United States using C-Band spectrum do not generally hold “licenses” from the FCC, but rather typically have received “letters of authority” from the Commission after having filed petitions for declaratory ruling to access the U.S. market using non-U.S. licensed space stations.¹⁰² The terminology the FCC has used for the various space station authorizations the CBA members possess is not always uniform and can vary from order to order.¹⁰³ But as with earth station operators, who nominally receive “registrations” rather than “licenses” from the Commission, the Communications Act treats all forms of

¹⁰² See, e.g., *Intelsat License LLC, Application for Modification of the Intelsat 5 Authorization to Specify Operation at the 157° E.L. Orbital Location, Application for Modification of the Intelsat 5 Authorization to Extend the License Term for the Space Station*, Order and Authorization, 30 FCC Rcd. 2703, 2706, ¶¶ 8-9 (Int’l Bur., Sat. Div. 2015); see generally *Amendment of the Commission's Regulatory Policies to Allow Non-U.S. Licensed Space Stations To Provide Domestic and International Satellite Service in the United States*, Report and Order, 12 FCC Rcd. 24,094 (1997).

¹⁰³ The FCC has issued authorizations for space-station operators in myriad forms, with seemingly little discernable distinction. See, e.g., Fed. Commc’n Comm’n, SAT-LOA-20160408-00034, *Granted Application for Satellite Space Authorizations* (2016); Fed. Commc’n Comm’n, SAT-LOA-20140114-00005, *Granted Application for Satellite Space Authorizations* (2015); Fed. Commc’n Comm’n, SAT-RPL-20120326-00061, *Granted Application for Satellite Space Authorizations* (2012); Fed. Commc’n Comm’n, SAT-LOA-20110727-00139, *Granted Application for Satellite Space Authorizations* (2012); Fed. Commc’n Comm’n, SAT-A/O-20091223-00151, *Granted Application for Satellite Space Authorizations* (2010); Fed. Commc’n Comm’n, SAT-RPL-20090123-00007, *Granted Application for Satellite Space Authorizations* (2009); Fed. Commc’n Comm’n, SAT-LOA-19960419-00059, *Granted Application for Authority to Construct, Launch and Operate a Fixed-Service Communications Satellite* (2004); Fed. Commc’n Comm’n, SAT-LOA-20000119-00028, *Applications of Intelsat LLC for Authority to Operate, and to Further Construct, Launch, and Operate C-band and Ku-band Satellites that Form a Global Communications System in Geostationary Orbit*, Memorandum Opinion Order and Authorization, 15 FCC Rcd. 15,460 (2000).

authorization—whether “letters of authority,” “registrations” or something different entirely—as “licenses” that hold equal rights and authority under the law.¹⁰⁴

All seven of the space-station operators hold essentially the same rights, but under the CBA proposal, four foreign satellite operators—Intelsat, SES, Eutelsat, and Telesat—would receive rights to resell terrestrial spectrum even as three other similarly situated satellite operators—ABS Global Ltd., Hispasat S.A., and Embratel Star One S.A.—would not.¹⁰⁵ CBA would have the Commission rest the differential treatment on the presence or absence of service links to associated end points in the United States.¹⁰⁶ But the deployment of service links to terrestrial end points is incidental to the front-loaded cost of launching and operating space

¹⁰⁴ The Act specially defines the terms “station license,” “radio station license,” and “license” broadly as “that instrument of authorization required by this chapter or the rules and regulations of the Commission made pursuant to this chapter, for the use or operation of apparatus for transmission of energy, or communications, or signals by radio, by whatever name the instrument may be designated by the Commission.” 47 U.S.C. § 153(49) (2010). In turn, the Act broadly defines “transmission of energy by radio” or “radio transmission of energy” to include “both such transmission and all instrumentalities, facilities, and services *incidental to such transmission*.” *Id.* § 153(57) (emphasis added).

¹⁰⁵ See Letter from Scott Blake Harris, Counsel to the Small Satellite Operators, Harris, Wiltshire & Grannis, to Marlene H. Dortch, Secretary, Federal Communications Commission (Mar. 11, 2019) (“Most importantly, the CBA’s proposal excludes other operators that would have C-band satellite facilities that are capable of serving the United States and that have been authorized by the Commission to do so.”); Letter from Scott Blake Harris & V. Shiva Goel, Counsel to the Small Satellite Operators, Harris, Wiltshire & Grannis, to Marlene H. Dortch, Secretary, Federal Communications Commission (Feb. 21, 2019) (“Under its proposal, the CBA would require any satellite operator with an FCC C-band authorization to have had U.S. C-band revenues in 2017 in order to participate in transition proceeds. The CBA’s requirement of past revenue, which *by definition* excludes licensed competitive entrants . . . would deprive competing operators of compensation for their loss of spectrum use rights in the U.S. C-band.”); *Expanding Flexible Use of the 3.7 to 4.1 GHz Band*, Reply Comments of ABS, Hispasat and Embratel Star One at 29, GN Docket No. 18-122, (2018) (“The CBA proposal . . . would unreasonably exclude competitors to the four largest satellite providers from the transition.”).

¹⁰⁶ *Expanding Flexible Use of the 3.7 to 4.2 GHz Band, et al*, Comments of the C-Band Alliance, available at <https://ecfsapi.fcc.gov/file/1029067703990/C-Band%20Alliance%20NPRM%20Comments%2010.29.2018.pdf>.

stations.¹⁰⁷ Like the self-selected CBA members, the smaller satellite operators ABS, Hispasat, and Embratel have incurred the high fixed cost of launching and operating satellites with lengthy mission lifecycles in reliance on prior grants of access to the U.S. market.¹⁰⁸ And like the CBA members, each of the smaller satellite operators possesses the same authority to sell into the United States market that Intelsat, SES, Eutelsat, and Telesat hold.¹⁰⁹ The Commission may

¹⁰⁷ Letter from Scott Blake Harris & V. Shiva Goel to Marlene Dortch, *supra* note 105. CBA, which has said that the possession of receive-only earth station rights should not entitle the earth station registrant to any particular expectation of continued service availability, cannot reasonably maintain that the presence of earth stations that happen to communicate with a given space station should matter in determining satellite operators' rights and expectations, especially where, as here, the operators do not hold licenses for most, if not all, of the terrestrial end points they support.

¹⁰⁸ *See id.* ("Yet here, the CBA is attempting to exclude competing satellite licensees who not only have complied with all applicable FCC rules, but have successfully deployed numerous U.S. C-band stations after hundreds of millions of dollars of U.S.-focused investment.").

¹⁰⁹ *See, e.g.*, Fed. Commc'n Comm'n, SAT-PPL-20160918-00093, Granted Application for Satellite Space Authorizations (2017); Fed. Commc'n Comm'n, SAT-RPL-20121228-00227, Granted Application for Satellite Space Authorizations (2015); Fed. Commc'n Comm'n, SAT-PPL-20120823-00140, Granted Application for Satellite Space Authorizations (2012); Fed. Commc'n Comm'n, SAT-RPL-20110429-00082, Granted Application for Satellite Space Authorizations (2011); Fed. Commc'n Comm'n, SAT-RPL-20100120-00014, Granted Application for Satellite Space Authorizations (2010); Fed. Commc'n Comm'n, SAT-PPL-20060516-00061, *Petition for Declaratory Ruling for Inclusion of ANIK F3 on the Permitted Space Station List*, Order, 22 FCC Rcd. 588 (2007); Fed. Commc'n Comm'n, SAT-PPL-20050504-00094, Granted Application for Satellite Space Authorizations (2005); Fed. Commc'n Comm'n, SAT-PPL-20041004-00194, Granted Application for Satellite Space Authorizations (2004); Fed. Commc'n Comm'n, SAT-LOA-20020104-00002, Granted Application for Satellite Space Authorizations (2004); Fed. Commc'n Comm'n, SAT-LOA-20000407-00080, *Authorization to Launch and Operate a Geostationary C-band Replacement Satellite in the Fixed-Satellite Service at 37.5 W.L.*, Memorandum Opinion and Order, 16 FCC Rcd. 20,176 (2001); Fed. Commc'n Comm'n, SAT-PDR-20000420-00083, *Petition for Declaratory Ruling for Inclusion of ANIK F1 on the Permitted Space Station List*, Order, 15 FCC Rcd. 24828 (2000); Fed. Commc'n Comm'n, SAT-LOA-19971222-00230, *Application for Authority to Launch and Operate a Replacement C/Ku Hybrid Fixed Satellite Service Space Station at 72 W.L.*, Memorandum Opinion, Order and Authorization, 15 FCC Rcd. 19,671 (2000); Fed. Commc'n Comm'n, SAT-PPL-20050708-00144, Granted Application for Satellite Space Authorizations (2007); Fed. Commc'n Comm'n, SAT-PPL-20050706-00143, Granted Application for Satellite Space Authorizations (2006); Fed. Commc'n Comm'n, SAT-PDR-20030430-00090, *Petition for*

lawfully distinguish the *degree* to which the operations of ABS, Hispasat and Embratel may require compensation or access to comparable facilities following a reallocation of spectrum for satellite to terrestrial use, but cannot contend that these similarly situated operators lack any rights that are entitled to due process and statutory protections under law.

Whether it is distinguishing earth station operators from space station operators or space stations operators from one another, the Commission must provide a defensible basis for treating similarly situated parties differently. Under CBA's approach, however, no cognizable standard exists to support awarding valuable spectrum rights to one set of parties but not another similarly situated group.¹¹⁰

VIII. There Are Numerous Alternative Options to the CBA's Scheme That Would Be Preferable From Both a Statutory and Policy Standpoint.

Perhaps the biggest concern with the CBA proposal is that there are numerous other regulatory pathways that would provide rapid access to mid-band spectrum for 5G use while

Declaratory Ruling to Add HISPASAT-1D Satellite at 30 W.L. to the Permitted Space Station List, Order, 18 FCC Rcd. 21,142 (2003).

¹¹⁰ The proposed action would also violate the Miscellaneous Receipts Statute. 31 U.S.C. § 3302(b). The Miscellaneous Receipts Statute requires that money received for the use of the United States be deposited in the Treasury unless otherwise authorized by law. An agency cannot avoid the Miscellaneous Receipts Statute simply by changing the form of its transactions to avoid the receipt of money otherwise owed to it. U.S. Gov't Accountability Office, B-303413, *Whether the Federal Communications Commission's Order on Improving Public Safety Communications in the 800 MHz Band Violates the Antideficiency Act or the Miscellaneous Receipts Statute* (Nov. 8, 2004). In the license-modification context, agencies can avoid violations of the Miscellaneous Receipts Statute only if the modified license does not "differ in some significant way from the license it displaces" and does not "involv[e] a different set of rights and obligations for the licensee." *Benkelman Telephone Co. v. FCC*, 220 F.3d 601, 605 (D.C. Cir. 2000) (citing *Fresno Mobile Radio, Inc. v. FCC*, 165 F.3d 965, 970 (D.C. Cir. 1999)). The question in this case, therefore, is whether awarding expansive and valuable new terrestrial rights to selected satellite operators for purposes of resale avoids the receipt of money otherwise due the United States that would be raised from a process of free and fair competitive bidding required under Section 309(j) of the Communications Act. The answer is a resounding "no."

remaining consistent with the Communications Act, reasoned agency decision-making, and sound public policy. The simplest, fastest, and least costly means of freeing spectrum for 5G use is for the Commission to reallocate the band from satellite to terrestrial use and provide comparable facilities or require bidders to provide compensation for the adversely affected earth station operators through a traditional spectrum auction. An incentive auction offers another well established, statutorily permitted option for allowing higher-valued uses of the C-Band spectrum.¹¹¹ These methods have extensive precedent, fit comfortably within the law, and do not require the contortions that the CBA offers in an effort to provide a fig leaf of legality for its proposal.

For nearly three decades, the Commission has used rules-based auctions to clear outdated uses and establish new ones and, in the process, has positioned the United States the global leader in wireless technology. Rather than pursue a novel and legally suspect path to deliver 5G spectrum for terrestrial wireless use, the Commission should follow its proven path—and the law—and either reallocate and auction the C-Band with the incumbents receiving compensation or comparable facilities, or conduct a two-sided auction of the C-Band in a way that shares some of the proceeds with incumbents as an incentive for them to exit the band as quickly as possible.

CONCLUSION

Congress has identified auctions as the most equitable way to assign spectrum rights among similarly situated parties while fulfilling other statutory goals, such as promoting competition, extending service to rural areas and creating opportunities for small businesses.

¹¹¹ See Letter from ACA Connects, Competitive Carriers Association, and Charter Communications, Inc. to Marlene H. Dortch, GN Docket No. 18-122 (filed July 2, 2019).

CBA's proposal to forgo the competitive bidding required by Section 309(j) of the Act and award public benefits to private parties without permitting free and fair competition would circumvent the Commission's congressionally defined authority. The Commission should adopt one of the statutorily authorized methods of assigning spectrum for new uses consistent with the Constitution, the Administrative Procedures Act, the Communications Act and decades of agency precedent.

Respectfully submitted,

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