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
	)	

REPLY COMMENTS OF AT&T

AT&T Services, Inc., on behalf of itself and the subsidiaries and affiliates of AT&T Inc. (collectively, "AT&T"), submits these reply 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]

The comments reflect little consensus on the legal issues raised in the *Public Notice*. The commenters spend many pages arguing about various auction-related issues under Section 309(j), the scope of the Commission's authority to modify licenses under Section 316, and the rights of license holders (and whether certain entities hold statutory "licenses" at all). As AT&T has explained, however, the Commission can meet its goal of efficiently reallocating a portion of the C-band to mobile 5G wireless services without resolving these novel legal issues. Under AT&T's proposal, the Commission would modify the space station operators' existing licenses to create a partitioned authorization for flexible terrestrial use, on the condition that they sell the modified flexible use licenses in a private auction, after the Commission approves transition and

[1] Public Notice, *International Bureau and Wireless Telecommunications Bureau Seek Focused Additional Comment In 3.7-4.2 GHz Band Proceeding*, GN Docket No. 18-122, RM-11791, RM-11778, DA 19-385 (rel. May 3, 2019) ("*Public Notice*").

auction plans that compensate current users for relocating their existing operations to a subset of the C-band. The Commission should adopt AT&T's proposal, which relies on well-established legal authority firmly grounded in precedent and past practice without implicating the complex and novel legal issues about which there is substantial dispute in the record.

First, AT&T's proposal does not raise any auction-related issue under Section 309(j). Under AT&T's proposal, the Commission would modify the space station operators' existing licenses to authorize flexible use in a portion of the C-band, on the condition that the space station operators sell the flexible use portion of their licenses on the secondary market in a private auction.[2] This approach involves a true secondary market sale. Therefore, no party would have to file an application for an "initial license" within the meaning of Section 309(j)(1). Because Section 309(j)'s auction regime applies only to the issuance of initial licenses, AT&T's proposal would not implicate the Section 309(j) auction regime at all. Accordingly, if it were to adopt AT&T's proposal, the Commission would avoid all of the Section 309(j) issues raised by commenters. In particular, the Commission would avoid having to resolve not only whether the Section 309(j)(6)(E) exceptions are broad enough to support the CBA proposal's attempt to avoid a Section 309(j) auction for initial licenses,[3] but also whether the statutory prerequisites for

[2] Reply Comments of AT&T Services, Inc., *Expanding Flexible Use of 3.7 to 4.2 GHz Band*, GN Docket No. 18-122, at 9-10 (Dec. 11, 2018) ("AT&T Reply Comments"); Comments of AT&T Services, Inc., *Expanding Flexible Use of 3.7 to 4.2 GHz Band*, GN Docket No. 18-122, at 2-3 (July 3, 2019) ("AT&T July Comments").

[3] *See, e.g.*, Comments of Competitive Carriers Association, *Expanding Flexible Use of 3.7 to 4.2 GHz Band*, GN Docket No. 18-122, at 16-18 (July 3, 2019) ("CCA July Comments") (stating that "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."); Comments of The Open Technology Institute at New America, *Expanding Flexible Use of the 3.7 to 4.2 GHz Band*, GN Docket No. 18-122, at 11-12 (July 3, 2019) ("Open Technology July Comments") (stating that "[s]ince CBA has now proposed a private auction based on multiple rounds of sealed bids, it can no longer claim that

an incentive auction could be met here.[4]

Second, as AT&T has explained, the Commission has ample authority under Section 316 to modify the space station operators' existing licenses to carve out portions of the C-band that could be sold to wireless carriers in a private auction.[5] The courts have held that the Commission has broad authority to modify the terms of existing licenses, as long as the modification does not involve a "fundamental change" to the license.[6] As many commenters recognize,[7] it is well-established that a license modification is not an unlawful fundamental change if it allows the licensee to provide "essentially the same services" that it provided before the modification.[8] AT&T's proposal *guarantees* that space station (and earth station) operators

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the private sale it contemplates is some form of 'negotiation' aimed at avoiding mutual exclusivity.").

[4] *See, e.g.*, Comments of ABS Global LTD., Hispasat S.A., and Claro S.A., *Expanding Flexible Use of 3.7 to 4.2 GHz Band*, GN Docket No. 18-122, at 22-25 (July 3, 2019) ("SSO July Comments") (arguing 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); Comments of the C-Band Alliance, *Expanding Flexible Use of 3.7 to 4.2 GHz Band*, GN Docket No. 18-122, at 29-30 (July 3, 2019) ("CBA July Comments") (arguing that "[r]eceive-only earth stations . . . have no licensed rights to relinquish and in any event are not 'competing licensees,' so the plain language of the statute forecloses their participation" in an incentive auction).

[5] *See* AT&T July Comments at 4.

[6] *See, e.g., Cellco P'ship v. FCC*, 700 F.3d 534, 543-44 (D.C. Cir. 2012); *Community Television, Inc., v. FCC*, 216 F.3d 1133, 1140-41 (D.C. Cir. 2000); *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.")

[7] *See, e.g.*, Comments of Dynamic Spectrum Alliance, *Expanding Flexible Use of 3.7 to 4.2 GHz Band*, GN Docket No. 18-122, at 15-18 (July 3, 2019) (stating that "reducing the range of C-band frequencies in which space stations are guaranteed interference protection would not represent a 'fundamental change'…provided that satellite operators are able to continue operating essentially the same service"); Open Technology July Comments at 21-23 (explaining that consolidating space stations into the upper portion of C-band would not constitute a fundamental change because the operators will be able to maintain current services).

[8] *Community Television*, 216 F.3d at 1141. *See* Fourth Further Notice of Proposed Rulemaking,

will be able to continue offering their existing services within the meaning of this standard, because under AT&T's proposal, the license modifications would occur only after the Commission approves transition and auction plans designed to ensure those outcomes after notice and comment.[9]

CBA's argument that the Commission has no authority to modify space station operators' licenses under Section 316 is not correct.[10] CBA argues that the Commission cannot "unilaterally" modify space station operators' licenses so as to authorize conflicting terrestrial uses that would interfere with existing FSS operations.[11] This is a straw man: no party is advocating a scheme that would result in harmful interference to space station operators (or to earth station operators). AT&T's proposal, in particular, would make its modifications contingent on Commission approval of detailed plans that would repack all existing FSS operations into a smaller portion of the C-band, protect space station operators' ability to provide their C-band transmission service, and compensate space station operators and others for their relocation costs. Whatever the boundaries of the Commission's Section 316 authority may be, the Commission can easily support AT&T's proposed license modification, which both preserves existing operations and compensates all parties for their transition costs.

Use of Spectrum Bands Above 24 GHz for Mobile Radio Services, 33 FCC Rcd 7674 (2018) (stating that Section 316 permits Commission to modify licenses and relocate licensees in the 39 GHz band that choose not to participate in an incentive auction for new spectrum uses in that band).

[9] *See* AT&T July Comments at 4-5; AT&T Reply Comments at 13-15.

[10] CBA July Comments at 15-20.

[11] *Id*. at 15; *see, e.g., id.* at 16-17 (stating that any "authorization of new terrestrial operations" would constitute an unlawful fundamental change because "the new terrestrial operations contemplated by the Commission would cause significant interference to incumbent FSS operations in CONUS"; "[i]f the FCC were to authorize terrestrial mobile operations in any portion of the C-band, the resulting interference to FSS operations would be catastrophic and unlike anything the Commission has ever approved using its modification authority").

Third, AT&T's proposal would avoid the need to resolve questions about who holds a statutory "license." Most commenters recognize that earth station operators cannot be statutory "licensees." As CBA notes, the statutory definition of a "radio station license" requires transmission, and thus "receive-only earth station operators cannot be considered licensees within the meaning of the statute because they do not transmit."[12] Indeed, if receive-only earth stations could be considered "licensees" with "spectrum usage rights," such a holding could have very broad implications far beyond this proceeding. Nonetheless, there is still significant dispute in the record on this issue, and it is largely a matter of first impression. If the Commission were to adopt AT&T's proposal, the Commission could avoid having to confront this issue here.[13]

In short, AT&T's proposal relies on elements that are time-tested and firmly grounded in precedent. The Commission has well-established authority to modify licenses under Section 316, place conditions on sales in the secondary market, and provide compensation for relocated services in such circumstances.[14] The Commission could therefore adopt AT&T's proposal without having to grapple with the many novel legal issues that most of the other proposals in the record raise and that occupy the bulk of the comments here. Accordingly, the Commission

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[12] CBA July Comments at 30-31. *See, e.g.*, Comments of Verizon, *Expanding Flexible Use of 3.7 to 4.2 GHz Band*, GN Docket No. 18-122, at 2 (July 3, 2019); SSO July Comments at 22-25.

[13] *See, e.g.*, AT&T July Comments at 5-6 (explaining that the Commission has ample authority to condition the sale of the licenses on compensation for earth station operators' transition costs); Comments of Charter Communications, Inc., *Expanding Flexible Use of 3.7 to 4.2 GHz Band*, GN Docket No. 18-122, at 7-10 (July 3, 2019) (arguing that under the Commission's *Emerging Technologi*es policy, new entrants must provide incumbents with comparable facilities that will allow them to maintain their same services in terms of throughput, reliability, and operating costs).

[14] *See* AT&T July Comments at 4-7 (citing *California Metro Mobile Communications, Inc. v. FCC*, 365 F.3d 38, 45 (D.C. Cir. 2004); Report and Order, *Redesignation of 17.7-19.7 GHz Frequency Band*, 15 FCC Rcd 13430, ¶ 82 (2000)).

should re-focus this proceeding on taking the steps necessary to implement AT&T's proposal, which offers the surest and fastest way to reallocate this spectrum for 5G.[15]

CONCLUSION

For the foregoing reasons, and as explained in AT&T's prior submissions, the Commission should adopt AT&T's proposal.

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[15] A few commenters argue that the Commission should permit co-primary, fixed point-to-multipoint ("P2MP") operations in the C-band. *See, e.g.*, Comments of Google LLC, *Expanding Flexible Use of 3.7 to 4.2 GHz Band*, GN Docket No. 18-122, at 8-14 (July 3, 2019); Comments of Wireless Internet Service Providers Association, *Expanding Flexible Use of 3.7 to 4.2 GHz Band*, GN Docket No. 18-122, at 15-17 (July 3, 2019). AT&T previously refuted these arguments in detail. *See* Comments of AT&T Services, Inc., *Expanding Flexible Use of 3.7 to 4.2 GHz Band*, GN Docket No. 18-122, at 12-15 (Oct. 29, 2018); AT&T Reply Comments at 25-27. As AT&T has explained, the goals of this proceeding require the portion of the C-band that is maintained for satellite use to be optimized specifically for FSS use. Permitting conflicting uses such as P2MP in the FSS portion of the band would undermine the goal of "repacking" existing FSS operations in the smallest possible subset of the C-band. The "flexible use" portion of the C-band would accommodate P2MP services, and therefore any company that wishes to engage in P2MP operations should obtain C-band spectrum in the private auction, like everyone else. *See* AT&T Reply Comments at 25-26.