

**Before the
Federal Communications Commission
Washington, D.C. 20554**

Transforming the 2.5 GHz Band

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WT Docket No. 18-120

REPLY COMMENTS OF AT&T

In response to the Notice of Proposed Rulemaking,¹ AT&T hereby submits these reply comments in support of amending the Commission’s rules governing 2.5 GHz Educational Broadband Services (“EBS”) spectrum and auctioning it to enable far more efficient and productive use.

INTRODUCTION

The comments confirm that this proceeding represents a rare, if not unique, opportunity for the Commission to make a significant amount of mid-band spectrum available for 5G deployment within the near term. Thus, it is critically important that the Commission adopt rules and processes that will direct this spectrum to its highest and most valued uses as quickly and efficiently as possible. As AT&T previously explained, that optimal result can occur only if the Commission converts EBS spectrum to flexible use and then uses auctions whenever possible to re-assign the spectrum. Perhaps the most important factor supporting that approach is that a substantial auction of EBS spectrum here is inevitable: Section 309 *requires* an auction for the unlicensed EBS spectrum in the Commission’s inventory. This legal requirement creates an extremely strong public interest in combining the mandated auction of the unlicensed EBS spectrum with an

¹ Notice of Proposed Rulemaking, *Transforming the 2.5 GHz Band*, WT Docket No. 18-120, FCC 18-59 (rel. May 10, 2018) (“*Notice*”).

incentive auction giving existing EBS spectrum licensees the opportunity to sell their licenses in a manner that maximizes their value. A number of commenters oppose an incentive auction—especially self-interested parties like Sprint—but as described below, the commenters’ objections to an incentive auction do not withstand scrutiny.

ARGUMENT

1. The Statute Requires An Auction of the Unlicensed EBS Spectrum. This proceeding presents a compelling opportunity to promote the rapid deployment of 5G services in the United States. As the comments confirm, high-band, mid-band, and low-band spectrum each have a role to play to ensure that consumers enjoy the full potential of 5G technology.² Mid-band spectrum is an important piece of that puzzle.³ Moreover, the 2.5 GHz EBS spectrum at issue here is the only significant block of mid-band spectrum that is available and ready for deployment in the near-term.⁴ Thus, “the importance of assuring that the 2.5 GHz band is used efficiently and effectively

² See, e.g., Comments of Verizon, *Transforming the 2.5 GHz Band*, WT Docket No. 18-120, at 3-4 (Aug. 8, 2018) (“The international race to 5G will thus not be won in the high bands alone, but across the entire range of frequencies”) (“Verizon Comments”).

³ See, e.g., Comments of the Wireless Internet Service Providers Association, *Transforming the 2.5 GHz Band*, WT Docket No. 18-120, at 18 (Aug. 8, 2018) (“As is the case with other mid-band spectrum, favorable propagation characteristics, competitive standard-based equipment, and demand for affordable fixed broadband in rural areas are driving significant interest in licensed spectrum”) (“WISPA Comments”).

⁴ See, e.g., Verizon Comments at 1 (“the 2.5 GHz band constitutes the single largest band of contiguous spectrum below 3 GHz that could be used for 5G. With significant portions of the band lying fallow across about half of the country, the Commission is right to explore ways to make the band an effective and efficient source of spectrum for 5G”); Comments of NTCA—The Rural Broadband Association, *Transforming the 2.5 GHz Band*, WT Docket No. 18-120, at 1 (Aug. 8, 2018) (“The 2.5 GHz band constitutes the single largest band of contiguous spectrum below 3 gigahertz and is prime spectrum for next generation mobile services”) (“NTCA Comments”); Comments of Competitive Carriers Association, *Transforming the 2.5 GHz Band*, WT Docket No. 18-120, at 1 (Aug. 8, 2018) (“The NPRM addresses the largest band of contiguous spectrum below 3 GHz Accordingly, this proceeding offers a prime opportunity to increase spectrum resources for next-generation mobile operations.”) (“CCA Comments”); WISPA Comments at 2.

cannot be [over]stated.”⁵ Although the Commission has proceedings underway to make additional mid-band spectrum available in the 3.5 GHz and 3.7-4.2 GHz bands,⁶ the Commission faces many steep challenges in those proceedings, creating acute uncertainty about when carriers will be able to use that spectrum broadly for 5G deployments.⁷ By contrast, if the Commission were to adopt AT&T’s proposals here, the Commission would be able to make EBS spectrum ready and suitable for 5G relatively quickly and efficiently.

As AT&T explained in its opening comments, the best way to achieve that goal is to use auctions to assign this spectrum.⁸ In particular, the most efficient and accurate way to assign EBS spectrum to its highest valued uses would be to conduct a standard auction for the currently unassigned EBS spectrum in tandem with an incentive auction in which existing licensees would have the option of selling their licenses.⁹

It is important to underscore, however, that Section 309 *requires* the Commission to auction the currently *unassigned* EBS spectrum, rather than assign it through priority windows.¹⁰ Notably, there is widespread support in the comments that the Commission should convert all EBS licenses to “flexible use” and permit any entity that is qualified to hold a Commission license to

⁵ WCAI Comments at 6.

⁶ *Expanding Flexible Use of the 3.7 to 4.2 GHz Band*, Order and Notice of Proposed Rulemaking, FCC 18-91, ¶ 3 (rel. July 13, 2018); *Amendment of the Commission’s Rules with Regard to Commercial Operations in the 3550-3650 MHz Band*, Order on Reconsideration and Second Report and Order, 31 FCC Rcd. 5011 (2016).

⁷ See, e.g., Verizon Comments at 4 (“The Commission is correctly looking at new spectrum allocations for mobile wireless in the mid-band, such as the 3.7-4.2 GHz band, but how much spectrum could be made available in that band remains unclear and there is little other mid-band spectrum on the horizon that could be used for 5G”).

⁸ See Comments of AT&T, *Transforming the 2.5 GHz Band*, WT Docket No. 18-120, at 1-12 (Aug. 8, 2018) (“AT&T Comments”).

⁹ *Id.* at 5-8.

¹⁰ *Id.* at 9-10.

hold an EBS license.¹¹ If the Commission were to adopt those changes—as it should—then Section 309(j) would require the Commission to use an auction to resolve multiple applications for such licenses,¹² and Section 309(j)(17) would prohibit the Commission from excluding any eligible license holder from participating in any such auction.¹³ The elimination of restrictions on the entities eligible to hold EBS spectrum would, in turn, prohibit the Commission from assigning the unlicensed EBS spectrum in its inventory to favored entities through the proposed priority filing windows.¹⁴

Apart from Section 309, many commenters support auctioning the unlicensed EBS spectrum as a policy matter.¹⁵ If the Commission simply gives all (or almost all) of this valuable

¹¹ See, e.g., WCAI Comments at 15, 22 (“all educational specific rules should be eliminated, including eligibility”); NTCA Comments at 3-4 (“EBS licensees should have the flexibility to assign or transfer control of their licenses to entities that are not EBS-eligible”); WISPA Comments at 12-13.

¹² 47 U.S.C. § 309(j)(1) (where there are “mutually exclusive applications. . . the Commission shall grant the license or permit to a qualified applicant through a system of competitive bidding”).

¹³ *Id.* § 309(j)(17)(A) (“Notwithstanding any other provision of the law, the Commission may not prevent a person from participating in a system of competitive bidding under this subsection if such person (i) complies with all the auction procedures and other requirements to protect the auction process established by the Commission; and (ii) either (I) meets the technical, financial, character and citizen qualifications . . . ; or (II) would meet such license qualifications by means approved by the Commission prior to the grant of the license”).

¹⁴ Cf. NTCA Comments at 4 (“the Commission should auction unassigned 2.5 GHz spectrum to any qualified bidder, consistent with the Commission’s plans for flexible use of the spectrum”).

¹⁵ See, e.g., Comments of Sprint Corporation, *Transforming the 2.5 GHz Band*, WT Docket No. 18-120, at 10-11 (Aug. 8, 2018) (the “Commission should forego the *NPRM*’s proposed local priority filing windows for existing EBS licensees and other educational entities . . . [t]he Commission should not restrict eligibility and should permit participation by non-educational parties in the overlay auction”) (“Sprint Comments”); WCAI Comments at 18 (“The quickest and most efficient route to bolstering broadband service in [rural] areas is to license the 2.5 GHz white space to commercial operators via auction after the rationalization of GSAs to county boundaries described above occurs”); Verizon Comments at 5 (“it proposes a white spaces auction to make unlicensed EBS spectrum available to all entities that are interested in using the spectrum. Such an auction could help free up the EBS spectrum not currently used”); CCA Comments at 4 (after license rationalization, “the FCC should expeditiously auction remaining 2.5 GHz spectrum resources”); NTCA Comments at 5 (“NTCA recommends that all unassigned EBS spectrum be

spectrum to favored entities in priority windows, then the Commission would be relying on subsequent secondary market transactions (plus a small, “cats-and-dogs” auction that would have a high risk of failure) to direct this spectrum to its highest valued uses. The *Notice* offers no good reason to pursue that circuitous path, which would inevitably delay and in some cases thwart an efficient allocation of this EBS spectrum. Indeed, as several commenters note, the Commission’s proposed rules (such as “holding periods”) to prevent quick “flipping” by priority-window beneficiaries are themselves problematic and would *further* delay or burden the process of re-allocating this spectrum to its most valued uses.¹⁶ Moreover, as a number of commenters agree, “the overwhelming majority” of current EBS licensees choose to lease their spectrum to mobile wireless operators to the maximum extent permitted under the current rules—which underscores that commercial mobile broadband services are typically the highest and best use of this spectrum—and the Commission should therefore permit all potential license holders to bid directly for that spectrum rather than perpetuate the need for mobile wireless carriers to lease spectrum from a “middleman.”¹⁷

made available for commercial use via competitive bidding”); WISPA Comments at 14 (Commission should “allocate new 2.5 GHz licenses by competitive bidding in which qualified commercial entities would be eligible to participate”).

¹⁶ See WCAI Comments at 24-27 (noting that the fact that the priority windows require a proposed “special holding period” and other rules to prevent “profiteering” is problematic in itself and “will merely keep that spectrum underutilized”); NTCA Comments at 4-5 (holding period “offer[s] no protection that only those with a *bona fide* interest in offering service would seek to obtain the spectrum”); see also AT&T Comments at 11 n.21 (same).

¹⁷ See, e.g., WCAI Comments at 4 (“The stark reality . . . is that the overwhelming majority of EBS licensees lease the maximum capacity of their spectrum permitted under Commission rules (95 percent) for commercial use, allow commercial operators to construct networks using all of their spectrum and have no facilities of their own, and meet their educational requirements merely by riding ‘over the top’ of the commercial network. These actions speak loudly and clearly – educators have moved from the facilities-based video distribution of the 1960s to broadband-based over-the-top distribution of educational content and, as such, they do not require a spectrum set-aside”); *id.* at 24 (“The public interest will best be served by elimination of the EBS ‘middleman’ and allowing commercial broadband system operators direct access to the spectrum”); NTCA

2. The Commission Should Conduct An Incentive Auction of the Currently Licensed EBS Spectrum. Because the Communications Act requires the Commission to auction the currently unlicensed EBS spectrum—which constitutes nearly half of *all* EBS spectrum—the Commission should recognize the strong public interest in pairing that standard auction of unlicensed EBS spectrum with an incentive auction for *licensed* EBS spectrum.¹⁸ As AT&T previously explained, mobile wireless providers generally place more value on spectrum if it can be purchased in larger blocks and together with other geographically contiguous spectrum. Accordingly, conducting simultaneous and coordinated auctions of the licensed and unlicensed EBS spectrum would increase the value at auction of all the spectrum at issue and would create a bidding environment that could not be replicated by hundreds of one-off transactions in the secondary market in terms of speed or efficient outcome (or funds for the U.S. Treasury).¹⁹ As AT&T has also explained, an auctions approach would be an unambiguous “win-win” for everyone involved, because it would give current licensees an additional option that actually offers

Comments at 4 (“To create priority licenses while simultaneously releasing the spectrum from restrictive use, creates a fallacy that the spectrum will be used to serve primarily educational purposes and sets the stage for potential windfalls for parties who obtain the spectrum”); WISPA Comments at 15-17.

¹⁸ See Remarks of Commissioner Rosenworcel, Silicon Flatirons Conference (Sept. 6, 2018) (“The FCC has unused 2.5 GHz licenses in inventory. It also has the authority to hold another voluntary spectrum incentive auction. ... But if we were to combine these sources of 2.5 GHz spectrum, we would be able to hold a substantial nationwide auction for new, flexible commercial use of key mid-band airwaves important to 5G service.”); Separate Statement of Commissioner O’Rielly at 1, *Notice* (“I appreciate the Chairman’s willingness to accept edits to inquire about the downsides of these filing windows and to seek broader comment, as requested by me and Commissioner Carr, on new ways to auction and license this band for commercial use.”); Separate Statement of Commissioner Carr at 2, *Notice* (“For example, the Notice now asks whether we should consider an incentive auction or other mechanisms to allow the market to determine the band’s highest and best use.”).

¹⁹ See AT&T Comments at 7, 11.

them a better chance of realizing the fullest value of their licenses, without taking away any option that any party now holds.²⁰

Although a number of parties argue against an incentive auction, their objections lack merit. For example, the most prominent lessee of EBS spectrum, Sprint, “strongly opposes” any incentive auction,²¹ as do other lessees.²² It is critical to recognize, however, that these lessees have a powerful self-interest in staving off any incentive auction. Current lessees benefit from keeping existing EBS licensees confined to the secondary market, because doing so would likely cause existing EBS licensees to view the current lessees as the only motivated buyers. With little or no bidding competition, lessees like Sprint would be able to buy existing EBS licenses at below market prices once the Commission changes the rules to permit existing licensees to sell their licenses to entities that do not have to meet the current educational requirements.²³ In other words, current lessees—and only current lessees—would be better off if EBS licensees never discover the potential market value of their licenses in the context of a competitive auction, but EBS licensees

²⁰ *See id.* at 7-8.

²¹ Sprint Comments at 14.

²² *See* WCAI Comments at 2-10.

²³ Despite some licensees’ suggestion that they wish to retain their current lease arrangements, many current lessees would likely attempt to purchase the licenses. Even opponents of the incentive auction acknowledge, when they argue in *favor* of auctioning the unlicensed EBS spectrum, that the current model in which the educational institution is the “middleman”/lessor is suboptimal. *See, e.g.,* WCAI Comments at 4-5 (“because critical 2.5 GHz spectrum is only available to those commercial broadband operators by leasing from a middleman (the educator who was fortunate enough to secure spectrum decades ago to serve a need that no longer exists), they have had to overcome unnecessary operational and financial regulatory burdens imposed by the Commission’s outdated command and control regulatory scheme for EBS”); WISPA Comments at 12 (instead of “perpetuating the fiction that educational licensees are necessary middlemen,” the Commission should “remov[e] restrictions that have impaired the ability of licensees to make their own decisions and of commercial lessees to maximize utility, investment, and value”).

and the public interest of putting the EBS spectrum to use quickly and efficiently by deploying advanced wireless services such as 5G would gravely suffer.

Each of these commenters' specific arguments against an incentive auction fail. The principal objection is that most EBS licensees would be precluded (either legally or practically) from participating in an incentive auction because their leases commonly have provisions giving the lessee a right of first refusal if the licensee intends to sell the license.²⁴ But the record lacks any evidence or logic as to why that might be so. First, licensees and lessees would always have the opportunity to negotiate a price at which the lessees would give up their rights and the licensees could then offer their licenses free and clear in the auction.²⁵ Moreover, if the Commission were to determine that there is not a sufficient public interest basis for abrogating any contractual terms that might affect license values in an incentive auction, an incentive auction could still proceed; prospective buyers simply would be bidding for (and would know they were bidding for) a license that is subject to a lease and its terms (where applicable).²⁶ There is no logical reason why an incentive auction could not co-exist with such "right of first refusal" terms, and the particular ways in which the two interact would likely depend significantly (and may vary) depending on the precise terms of the agreement.²⁷ The Commission has the ability to fashion auction procedures

²⁴ Sprint Comments at 14 (incentive auction would not be "feasible from a commercial or regulatory perspective" because most of the existing licenses are subject to leases that "would legally prohibit licensee participation in the reverse auction"); WCAI Comments at 33 (claiming "long-term leases" would "effectively preclude most EBS licensees from participating").

²⁵ *See, e.g.*, WCAI Comments at 30 (acknowledging that "[o]f course, the parties to an existing lease should be free to modify or replace that agreement should they so choose").

²⁶ *See, e.g.*, WISPA Comments at 10 ("existing leases should be grandfathered and the rule changes subject to the provisions of such agreements").

²⁷ As AT&T has argued, the Commission should make the terms of existing leases available to potential bidders, pursuant to appropriate protective orders, to enable bidders to determine the proper value of spectrum encumbered by such leases. *See* AT&T Comments at 8-9.

that give EBS licensees the option of participating in an incentive auction while still honoring their lease terms.

A smattering of existing EBS licensees argue that the Commission should not conduct an incentive auction because they see value in the current leasing model and ask that it be retained.²⁸ Once again, an incentive auction merely *adds* an option that EBS licensees did not already have. If any particular EBS licensee wants to continue its operations as before, it would be free to do so.²⁹ No existing licensee would be forced to participate in the incentive auction (and, indeed, an incentive auction would have other protections that would allow licensees to set their minimum prices). And the mere fact that some fraction of EBS licensees wish to maintain their current arrangements falls far short of demonstrating that all or even most “EBS licensees are of the same view” and would eschew the opportunity to sell their licenses in a competitive auction and use the proceeds—which could be considerable—toward their educational missions.³⁰

The remaining objections are even flimsier. For example, WCAI argues that an incentive auction would be a “one-time event” that would give EBS licensees only a single chance to determine if they were prepared to sell, whereas the secondary market approach would let an EBS licensee sell its license on its own timetable.³¹ Again: the incentive auction is not all-or-nothing

²⁸ See, e.g., Comments of North American Catholic Educational Programming Foundation and Mobile Beacon, *Transforming the 2.5 GHz Band*, WT Docket No. 18-120, at 6-9 (Aug. 8, 2018); Joint Comments of National EBS Association and Catholic Technology Network, *Transforming the 2.5 GHz Band*, WT Docket No. 18-120, at 3-8 (Aug. 8, 2018).

²⁹ WCAI Comments at 17 (“Others will see greater value in retaining the EBS license and either leasing the spectrum to a commercial operator or self-deploying. Most importantly, the decision should remain in the hands of the educator”).

³⁰ Cf. *id.* at 24 (“that does not mean that all EBS licensees are of the same view. Others (likely a silent majority) will prefer to have flexibility in the rules that permits them to assign their spectrum to a commercial operator in exchange for funds that they believe can better be used to meet local educational needs”).

³¹ *Id.* at 34.

but merely adds a new option. The secondary market would continue to exist for licensees that may not be ready to sell in the incentive auction.

WCAI also claims (at 34-35) that an incentive auction is appropriate only where “there is a need for the Commission to organize the market and match the demand of buyers with the supply from sellers.” That is precisely the situation here. Should the Commission, through an incentive auction, be able to offer a deep, nationwide swath of 2.5 GHz spectrum at auction, that would be a huge boon to the Nation’s 5G ambitions. The offer of 50-100 MHz of mid-band spectrum nationwide would give multiple buyers an incentive to participate. This would, in turn, create a more vibrant secondary market post-auction. Today, much of the spectrum is not in the Commission’s inventory but is fragmented and in the hands of many small licensees. No carrier not already invested in 2.5 GHz has a realistic opportunity to assemble a national footprint in the band absent an incentive auction, and therefore no carrier has a real incentive to invest in the band. This means that absent an incentive auction, each EBS licensee has, as a practical matter, only one potential secondary market bidder—its lessee. By contrast, as AT&T has shown, an incentive auction would create a unique bidding environment that would increase the value of all of the spectrum at auction, as an incentive auction would bring potential buyers and sellers together in ways that simply cannot be replicated in the secondary market.

CONCLUSION

For the foregoing reasons, and for the reasons in AT&T’s opening comments, the Commission should adopt the *Notice*’s auction-based proposals, as described above and in AT&T’s opening comments.

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September 7, 2018

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