



September 22, 2021

Via ECFS

Marlene H. Dortch
Secretary
Federal Communications Commission
45 L Street NE
Washington, DC 20554

Re: *Written Ex Parte Communication*

WT Docket No. 20-443, *Expanding Flexible Use of the 12.2-12.7 GHz Band*
GN Docket No. 17-183, *Expanding Flexible Use in Mid-Band Spectrum Between*
3.7-24 GHz

Dear Ms. Dortch:

As T-Mobile USA, Inc. (“T-Mobile”)^{1/} and others have demonstrated,^{2/} the 12.2-12.7 GHz (“12 GHz”) band – with its unique ability to bridge the gap between lower capacity/broader coverage mid-band spectrum and higher capacity/limited coverage millimeter wave spectrum – may hold great promise for supporting terrestrial 5G services. It is therefore critical that if the Commission determines, after a careful evaluation of the technical issues presented in the record,^{3/} that the spectrum should be made available for terrestrial mobile services, the Commission must conduct an auction of those new spectrum rights. DISH Network Corporation (“DISH”) asserts that neither the record nor Commission precedent supports an auction of terrestrial mobile rights in the 12 GHz band and that the Commission should instead simply gift those rights to existing incumbents.^{4/} DISH is both legally and factually wrong.

^{1/} T-Mobile USA, Inc. is a wholly owned subsidiary of T-Mobile US, Inc., a publicly-traded company.

^{2/} See, e.g., Comments of T-Mobile USA, Inc., WT Docket No. 20-443 and GN Docket No. 17-183 (filed May 7, 2021) (“T-Mobile Comments”); Reply Comments of T-Mobile USA, Inc., WT Docket No. 20-443 and GN Docket No. 17-183 (filed July 7, 2021) (“T-Mobile Reply Comments”).

^{3/} T-Mobile has not independently assessed whether the introduction of terrestrial mobile services in the 12 GHz band is technically feasible but agrees with others that the Commission must evaluate all of these issues prior to making a decision on whether and how to make the 12 GHz band available for terrestrial mobile use.

^{4/} See Letter from Pantelis Michalopoulos, Steptoe, Counsel to DISH, to Marlene Dortch, Secretary, FCC, WT Docket No. 20-443 (filed Aug. 29, 2021) (“DISH Aug. 29, 2021 *Ex Parte* Letter”).



Mobile Terrestrial Rights are Not Covered by Existing Authorizations

DISH contends that the Commission has rejected the use of an auction in a similar proceeding regarding the Wireless Communications Service (“WCS”).^{5/} DISH argues that, in that case, the Commission “opted for a more flexible terrestrial-use regime, and refused to ‘displace the existing pool of WCS licensees’ to conduct an auction ‘simply because the revised technical rules afford WCS licensees enhanced spectrum rights.’”^{6/} But DISH overlooks a “crucial difference” between the WCS proceeding and the 12 GHz band. There, incumbents were already permitted to provide terrestrial mobile services, and licensees acquired those rights at auction.^{7/} The “enhanced spectrum rights” afforded to those incumbents were merely relaxed technical restrictions that allowed them to provide full mobile broadband services.^{8/}

In this case, incumbent licensees would obtain entirely *new* rights to provide terrestrial **mobile** services.^{9/} And, as T-Mobile previously explained, Section 309(j) of the Communications Act dictates that the Commission must conduct an auction under those circumstances.^{10/} DISH’s assertion that permitting two-way, mobile use by Multi-Channel Video and Data Distribution Service (“MVDDS”) licensees would not be a “sea change” requiring an auction because “[t]he Commission has acknowledged the possibility of robust terrestrial service by MVDDS licensees since the inception of the MVDDS service rules” misses the point.^{11/} The fact remains that the Commission did not *previously* allow terrestrial mobile services in the 12 GHz band.^{12/} To the contrary, the Commission specifically rejected allowing terrestrial mobile services in the 12 GHz band, noting, as DISH itself acknowledges,^{13/} that MVDDS licensees seeking to provide two-

^{5/} See *id.* at 4, 24 (citing *Amendment of Part 27 of the Commission’s Rules to Govern the Operation of Wireless Communications Services in the 2.3 GHz Band*, Report and Order and Second Report and Order, 25 FCC Rcd 11710, ¶ 28 (2010) (“WCS Order”).

^{6/} *Id.* at 4 (internal citations omitted).

^{7/} See *WCS Order* ¶ 11 (“Licensees in this service are permitted to provide fixed, mobile, portable, and radiolocation services.”).

^{8/} See *id.* ¶ 14 (explaining that “[a]lthough the Commission permitted WCS licensees to provide both fixed and mobile services, it adopted different power and [out-of-band emission (‘OOBE’)] limits for these two classes of service”); see also *id.* ¶¶ 29-34 (finding that “the public interest will be served by revising certain WCS power and OOBE rules to enable the deployment of mobile broadband services in the WCS bands”).

^{9/} See *Expanding Flexible Use of the 12.2-12.7 GHz Band, et al.*, Notice of Proposed Rulemaking, 36 FCC Rcd 606, ¶ 3 (2021) (“NPRM”) (“In the United States, the 12 GHz band is allocated on a primary basis for non-Federal use for Broadcasting Satellite Service (BSS) (referred to domestically in the band as Direct Broadcast Satellite (DBS), Fixed Satellite Service (space-to-Earth) limited to non-geostationary orbit systems (NGSO FSS), and Fixed Service.”).

^{10/} See T-Mobile Reply Comments at 8-9.

^{11/} DISH Aug. 29, 2021 *Ex Parte* Letter at 24.

^{12/} See *NPRM* ¶¶ 7-8.

^{13/} See DISH Aug. 29, 2021 *Ex Parte* Letter at 24 n.125.

way services can use spectrum in *other* bands.^{14/} Accordingly, allowing terrestrial mobile services now would be granting new spectrum rights that must be auctioned. DISH’s assertion that it and other MVDDS licensees already acquired the spectrum via auction also misses the mark.^{15/} No incumbent licensee – no matter how often DISH states to the contrary – obtained the rights to provide terrestrial mobile services at auction.

Giving Away Spectrum Rights is Contrary to Public Policy and the Commission’s Statutory Obligations

Not only are the circumstances in the WCS proceeding inapplicable to the 12 GHz band, but more recent Commission precedent favors an auction. In the C-band proceeding, for instance, the Commission rejected all scenarios that would enable incumbent satellite operators to be “the sole conveyors of newly-created flexible use rights in the band,” and, instead, found that a public auction is the preferable approach.^{16/} The Commission’s determination in that case is not surprising. As evidenced by the AWS-4 proceeding, granting new terrestrial mobile rights to incumbents does not ensure that the spectrum will go to its best and highest use.^{17/} Indeed, while DISH received terrestrial mobile rights to operate in AWS-4 spectrum nearly a decade ago, it has yet to make use of the spectrum, allowing it to remain fallow, contrary to the public interest. The Commission should not make the same mistake again. As the Commission recognized in the WCS proceeding, but which DISH conveniently omitted, “it is the public interest that determines which mechanism should be used for modifying licenses or licensing new rights.”^{18/} Here, the public interest favors an auction because an auction will ensure that the spectrum goes to those who value it the most and are most likely to deploy it, including the providers best suited to deploying service to rural and underserved areas.

Moreover, in the C-band context, incumbents were actually providing service, creating at least an equitable (if not legally unsound) rationale to award them additional rights. Here, there is only *one* active commercial MVDDS deployment.^{19/} Awarding mobile terrestrial rights to spectrum non-users would provide them with an undeserved windfall. DISH’s claim that it will use the

^{14/} See *id.* at 24.

^{15/} See *Amendment of Parts 2 and 25 of the Commission’s Rules to Permit Operation of NGSO FSS Systems Co-Frequency with GSO and Terrestrial Systems in the Ku-Band Frequency Range*, Memorandum Opinion and Order and Second Report and Order, 17 FCC Rcd 9614, ¶¶ 136-37 (2002) (noting that “[a]lthough the Commission has a general policy of flexible spectrum use, the Commission proposed to prohibit mobile and aeronautical operations in the service” and finding that “sufficient flexibility for two-way service may be afforded to MVDDS licensees whereby the 12 GHz band could be used for a ‘downstream’ path, and the ‘upstream’ (or return) path could be located outside of the 12 GHz band in other available spectrum or over a wireline return path”).

^{16/} See *Expanding Flexible Use of the 3.7-4.2 GHz Band*, Report and Order and Order of Proposed Modification, 35 FCC Rcd 2343, ¶ 40 n.124 (2020) (“*C-band Order*”).

^{17/} See *Service Rules for Advanced Wireless Services in the 2000-2020 MHz and 2180-2200 MHz Bands*, Report and Order and Order of Proposed Modification, 27 FCC Rcd 16102, ¶ 180 (2012).

^{18/} *WCS Order* ¶ 196 n.483.

^{19/} See *NPRM* ¶¶ 11, 40.

spectrum “more heavily to improve 5G service to the public”^{20/} is highly doubtful based on MVDDS licensees’ lack of use of the spectrum thus far and DISH’s history of spectrum hoarding in particular.^{21/} If those licensees want to provide 5G service to the public, as they assert, they can obtain those rights at auction like everyone else. In fact, requiring incumbents to pay for terrestrial mobile rights like any other potential new licensee will further ensure that they will deploy the spectrum. As the Commission has recognized, auctioning spectrum requires a substantial financial commitment that encourages those that obtain the spectrum to put it to use.^{22/} In contrast, giving terrestrial mobile rights to incumbents for free, particularly those who have demonstrated a history of non-deployment, would provide no incentive for them to use the spectrum; they will more likely simply continue to sit on the spectrum as they have and let it lie fallow.

In any case, incumbent licensees’ desire to remain in the band is not relevant. The Commission has an obligation to manage the spectrum in the public interest. As the Commission recognized in the C-band proceeding, it may modify a license *without* the consent of a licensee under Section 316 of the Communications Act in order to reallocate spectrum.^{23/} Reallocating the 12 GHz band and relocating incumbents, as T-Mobile and others have suggested, would fall squarely within the parameters of that authority regardless of whether incumbents say they want to “double down.”^{24/}

The Commission Can Act Promptly

Finally, DISH’s alleged concerns about the delays related to an auction of the 12 GHz band are baseless.^{25/} *First*, the Commission cannot avoid its statutory obligations noted above simply because it may be expedient. *Second*, the Commission is capable of conducting an auction quickly whenever service rules are adopted for the 12 GHz band. Currently, only one spectrum auction is underway at the Commission – the 3.45 GHz band auction – and bidding in that auction is scheduled to start in a few weeks.^{26/} The Commission has also already begun the

^{20/} DISH Aug. 29, 2021 *Ex Parte* Letter at 4.

^{21/} See *NPRM* ¶ 40 (recognizing that MVDDS licensees “have failed to provide meaningful commercial service in the band” since being granted rights to operate in 2004 and pointing out that most of the spectrum remains fallow).

^{22/} See, e.g., *Auction of Flexible-Use Service Licenses in the 3.7-3.98 GHz Band For Next-Generation Wireless Services*, Public Notice, 35 FCC Rcd 8404, ¶ 132 (2020) (explaining that the upfront payments required to participate in spectrum auctions protect against frivolous or insincere bidding).

^{23/} See *C-band Order* ¶¶ 128-29.

^{24/} See T-Mobile Comments at 11-12; T-Mobile Reply Comments at 2 (explaining that because the 12 GHz band includes no federal incumbents and only a few non-federal incumbents, it may be well-suited for reallocation with minimal impact on others and that *active* incumbents can be reimbursed for relocation activities under the *Emerging Technologies* framework).

^{25/} See DISH Aug. 29, 2021 *Ex Parte* Letter at 24.

^{26/} See *Auction of Flexible-Use Service Licenses in the 3.45-3.55 GHz Band for Next-Generation Wireless Services; Notice and Filing Requirements, Minimum Opening Bids, Upfront Payments, and*

process of establishing procedures for the 2.5 GHz auction.^{27/} There is no other auction of spectrum on the horizon, which means the Commission has ample resources to conduct an auction of the 12 GHz band in the future, particularly since the adoption of service rules in this proceeding does not appear imminent. But if the Commission wished to act quickly, it could request comment on auction procedures for the 12 GHz band nearly simultaneously with adopting service rules, similar to its approach for the C-band.^{28/} Doing so would be consistent with Acting Chairwoman Rosenworcel’s calls for a calendar of auctions to ensure the Nation’s spectrum resources are promptly and transparently deployed.^{29/}

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Pursuant to Section 1.1206 of the Commission’s rules, a copy of this letter has been submitted in the record of the above-referenced proceedings. If there are any questions concerning this matter, please contact the undersigned directly.

Respectfully submitted,

/s/ Steve B. Sharkey

Steve B. Sharkey
Vice President, Government Affairs
Technology and Engineering Policy

Other Procedures for Auction 110; Bidding to Begin October 5, 2021, Public Notice, DA 21-655, ¶¶ 1-2 (rel. June 9, 2021).

^{27/} See *Auction of Flexible-Use Service Licenses in the 2.5 GHz Band for Next-Generation Wireless Services; Comment Sought on Competitive Bidding Procedures for Auction 108*, Public Notice, 36 FCC Rcd 645, ¶ 1 (2021).

^{28/} Compare *C-band Order with Auction of Flexible-Use Service Licenses in the 3.7-3.98 GHz Band for Next-Generation Wireless Services; Comment Sought on Competitive Bidding Procedures for Auction 107*, Public Notice, 35 FCC Rcd 2601 (2020).

^{29/} See, e.g., *Expanding Flexible Use of the 3.7 to 4.2 GHz Band, et al.*, Order and Notice of Proposed Rulemaking, 33 FCC Rcd 6915 (2018) (Statement of Commissioner Rosenworcel) (“In addition, we need a spectrum calendar. We have no reason for not being transparent about how and when new resources will be made available to the public. With a blitz of proceedings before us involving the 2.5 GHz, 3.5 GHz, 3.7-4.2 GHz, 4.9 GHz, 5.9 GHz, 6 GHz, 12 GHz, 24 GHz, 26 GHz, 28 GHz, 32 GHz, 37 GHz, 39 GHz, 42 GHz, 47 GHz, 50 GHz, and above 95 GHz, it is time to put every band on a schedule that is publicly available.”).