Michael P. Goggin
Assistant Vice President –
Senior Legal Counsel

AT&T Services, Inc.
1120 20th St NW, Suite 1000
Washington, DC 20036

+1.202.457.2055
michael.p.goggin@att.com

NOTICE OF EX PARTE

November 1, 2019

By ECFS
Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C., 20554

Re: *Expanding Flexible Use of the 3.7 to 4.2 GHz Band, GN Docket No. 18-122*

Dear Ms. Dortch:

On October 30, 2019, Hank Hultquist and Raquel Noriega of AT&T, Eric DeSilva of DLA Piper, Jim Young and Chris Shenk of Sidley Austin, and the undersigned met with Thomas Johnson, Ashley Boizelle, Michael Carlson, Bill Richardson, and David Horowitz of the Office of General Counsel.

In the meeting, AT&T reiterated its view that the reallocation of the C-Band should occur as quickly as is reasonably practicable. To that end, significant progress is being made: there is increasing agreement among the parties that the Commission should make 300 MHz of C-Band spectrum available for terrestrial 5G use, while maintaining satellite connectivity and establishing robust interference protections for existing users.[1] Consistent with its prior advocacy, however, AT&T remains concerned that many parties have made non-trivial legal arguments against the principal proposals on the record, including the C-Band Alliance ("CBA")

[1] *See, e.g.*, Letter from Hank Hultquist, AT&T, *et al.*, to Marlene H. Dortch, FCC, GN Docket No. 18-122, dated October 29, 2019 ("Joint Parties 10/29/19 *Ex Parte*"); Joan Marsh, "Progress on the C-Band," AT&T Public Policy Blog, October 25, 2019 ("Marsh C-Band Blogpost"), available at https://www.attpublicpolicy.com/5g/progress-on-the-c-band. *See also* Comments of AT&T Services, Inc., GN Docket No. 18-122, filed October 29, 2018 ("AT&T Opening Comments"); Reply Comments of AT&T Services, Inc., GN Docket No. 18-122, filed December 11, 2018 ("AT&T Opening Reply Comments"); Comments of AT&T Services, Inc., GN Docket No. 18-122, filed July 3, 2019 ("AT&T Legal Comments"); Reply Comments of AT&T Services, Inc., GN Docket No. 18-122, filed July 18, 2018 ("AT&T Legal Reply Comments").

proposal.[2] AT&T is concerned that such challenges could delay the availability of this vital mid-band spectrum. For example, some parties have asserted that the CBA's private sale of "clearing rights" with winning bidders subsequently applying for licenses would violate the requirement that new spectrum licenses be awarded through a system of competitive bidding, and that allowing CBA to determine the outcome would be an unlawful subdelegation of the Commission's duties.[3] Further, without a detailed transition plan vetted by all stakeholders and approved by the Commission, it might prove difficult to demonstrate that modification of licenses held by satellite and earth station owners would allow them to provide essentially the same services after the transition and, as a result, would not result in a "fundamental change" to their authorizations.[4]

AT&T is also concerned that, without notice and comment to adopt detailed *Commission* rules governing the auction and the transition, various stakeholders may bring notice or arbitrariness claims under the Administrative Procedure Act and otherwise reduce their support for, and participation in, the reallocation process. AT&T is thus concerned that adoption of any of these proposals as currently constituted will spark judicial appeals, and because of the nature of the objections, those appeals could leave the proposed auction in an extended legal limbo that could delay reallocation of this spectrum for years.

Accordingly, during the meeting, AT&T emphasized that the best way to ensure that the C-Band is re-deployed for 5G on schedule would be to take steps now to put the reallocation process on the surest possible legal footing. As AT&T has repeatedly made clear, AT&T does not oppose a private auction.[5] But such an approach would likely stay on schedule *only* if the Commission closely oversees the auction to ensure it complies with the legal and policy principles adopted by Congress for auctions, based on a complete record where all stakeholders are given the opportunity to comment on the auction procedures. AT&T further emphasized that it will be critical for the Commission to seek input from all interested stakeholders, through

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[2] *See, e.g.*, Letter from Bill Tolpegin, C-Band Alliance, to Marlene H. Dortch, FCC, GN Docket No. 18-122, dated October 28, 2019 ("CBA 10/28/19 *Ex Parte*"); Letter from Henry Gola, Wiley Rein LLP, to Marlene H. Dortch, FCC, GN Docket No. 18-122, dated October 31, 2019 ("CBA 10/31/19 *Ex Parte*").

[3] *See, e.g.*, Reply Comments of T-Mobile, GN Docket No. 18-122, at 24-27 (filed December 11, 2018); Letter from Elizabeth Andrion, Charter, to Marlene H. Dortch, FCC, GN Docket No. 18-122, dated February 22, 2019.

[4] *See, e.g.*, Reply Comments of ABS, Hispasat, and Embratel Star One, GN Docket No. 18-122, filed December 11, 2018 ("SSO Reply Comments"); Comments of C-Band Alliance, GN Docket No. 18-122, filed July 3, 2019, at 15-20.

[5] *See, e.g.*, Marsh C-Band Blogpost; AT&T Opening Comments at 15-18; AT&T Opening Reply Comments at 9-17; AT&T Legal Comments at 2-7; AT&T Legal Reply Comments at 1-6; Joint Parties 10/29/19 *Ex Parte* at 1-2.

notice and comment, on the technical and service rules, and on a transition plan that the Commission would adopt and oversee itself.[6]

First, with respect to the auction, a private auction is feasible and likely to be an efficient way to reallocate C-band spectrum to mobile use. However, as many commenters have noted, there is significant potential for a private auction to become mired in legal challenges, or to fail altogether.[7] To minimize the potential for such delays, it is important for the Commission to be closely involved in developing and supervising the auction. Specifically, the Commission should, through notice and comment, adopt auction procedures that, for example, comport with the policy directives of Section 309(j)[8] and attempt to account, to the maximum extent feasible, for the types of concerns raised by the Small Satellite Operators (ABS, Hispasat A.A., and Claro S.A.; collectively, "SSOs") related to the necessary license modifications under Section 316.[9]

The best starting point for a private auction approach would be the proposal AT&T previously set forth in this proceeding, because that auction proposal is the most firmly grounded in well-established sources of Commission authority and would avoid the many novel legal issues parties have raised concerning other plans.[10] Under AT&T's proposal, the Commission would begin by using its authority under Section 316 to modify the space station owners' licenses to create a partitioned authorization for flexible terrestrial use. The grant of partitioned flexible use authorizations would be subject to the condition that space station owners sell the partitioned spectrum, via a private auction (which could be conducted by CBA), by a date certain.

AT&T's proposal, because it is based on the modification of existing licenses and subsequent sale in the secondary market of those licenses, would avoid the legal objections leveled at other plans. Most notably, AT&T's proposal is the *only* private auction proposal in the record that would largely eliminate auction-related objections under Section 309(j).[11] AT&T's proposal would be a true secondary market sale: it would involve only the lawful modification of existing licenses and a direct sale of those modified existing licenses by the existing licensees. The Commission has long experience managing and approving the transfer of licenses on the secondary market. Critically, however, no purchaser of a license under this auction plan would ever have to file an application for an "initial license," which means that the auction requirements of Section 309(j), which apply only to initial licenses, would never be implicated.

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[6] *See, supra*, n.5.

[7] *See, e.g.*, Letter from Russell Fox (counsel to T-Mobile) to Marlene H. Dortch (FCC), GN Docket No. 18-122 (Mar. 4, 2019); Letter from Elizabeth Andrion, Charter, to Marlene H. Dortch, FCC, GN Docket No. 18-122, dated February 22, 2019.

[8] *See* 47 U.S.C. § 309(j).

[9] *See* 47 U.S.C. § 316. *See, e.g.*, SSO Reply Comments.

[10] *See, e.g.*, AT&T Opening Reply Comments at 9-13; AT&T Legal Comments at 2-6; AT&T Legal Reply Comments at 1-6.

[11] *See* 47 U.S.C. § 309(j).

Moreover, because the license modification and approval of any license transfers subsequent to a private auction would be performed by the Commission, there would be no credible "subdelegation" objection. Further, because the private sale process would be determined by the Commission on the record following notice and comment, claims about whether the process was "fair" would be heard and determined prior to the sale.

In addition, although all proposals in the record for reallocation of this spectrum will require some modification of the licenses of both space station owners and earth station owners, the license-modification aspect of AT&T's proposal is well-supported by established precedent. As the D.C. Circuit has explained, "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."[12] The D.C. Circuit has interpreted this provision to mean that the Commission may modify the terms of existing licenses, as long as the modification does not involve a "fundamental change" to the license.[13] Under this standard, the D.C. Circuit has rejected arguments that a license modification resulted in a "fundamental change" where "broadcasters will [be able to] provide essentially the same services" after the modification.[14]

The modifications that permit AT&T's secondary market sale would satisfy these standards. If the Commission adopts the appropriate technical, service, and interference rules, along with a fully vetted transition plan, then the license modifications should reasonably permit the space station owners and all other existing users to continue to conduct the business they would be able to conduct under their current licenses with minimal disruption. As explained below, the design of such rules and a transition plan would likely require another round of notice and comment to ensure that the interests of stakeholders are properly taken into account.[15] Once the Commission takes these steps, however, the necessary license modifications should not constitute an unlawful "fundamental change" under existing precedent.[16]

Second, for the auction to proceed expeditiously and not become mired in legal and other challenges, it is important that the Commission, in advance, develop a clear transition plan for all stakeholders and clear technical and service rules.[17] A clear transition plan is necessary to demonstrate that existing uses will be protected, that the transition steps and costs are known, and that transition costs will be fully reimbursed. Absent a detailed transition plan that makes

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[12] *California Metro Mobile Communications, Inc.* v. *FCC*, 365 F.3d 38, 45 (D.C. Cir. 2004).

[13] *Cellco P'ship* v. *FCC*, 700 F.3d 534, 544 (D.C. Cir. 2012).

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

[15] *See* AT&T Opening Reply Comments at 10-11 (emphasizing that detailed proposals for these elements of the reallocation should be subject to notice and comment).

[16] *Community Television, Inc.*, 216 F.3d at 1141.

[17] As AT&T has previously shown, the Commission has ample authority to specify the rules that would govern any private auction and the reimbursement of all incumbents, including the earth station owners and other incumbent users under Sections 4(i) and 303(r) of the Act. *See* AT&T Legal Comments at 5-6.

clear how current stakeholders will be made whole, current C-Band licensees and their customers will face significant risks of fundamental business disruption and, as a result, are far more likely to oppose and resist the reallocation, which could only lead to delays. Similarly, clear technical and service rules are needed so that existing stakeholders can have confidence that their existing uses will be protected from interference, and to ensure that potential bidders fully understand what they are bidding for. The Commission is the only entity that has the perspective and the expertise to gather information from *all* relevant stakeholders—wireless carriers, space station owners, and terrestrial C-Band users—and to design rules that take all of the stakeholders' legitimate interests into account.

As to the transition plan, it is critical that it be fully vetted through a notice and comment proceeding. Clearing 300 MHz of C-Band spectrum will require extensive repacking efforts that will include the sunsetting of standard definition video transmissions and universal adoption of more efficient encoding, compression, and modulation technologies.[18] This, in turn, will often require the installation of new hardware, and the re-configuration of thousands of existing affiliate reception sites.[19] Existing users need clarity and confidence that their existing uses will be accommodated with as little disruption as possible, and that their costs of upgrades and new filters will be reimbursed. To date, CBA's filings have offered little detail beyond vague commitments. This is not entirely surprising, as CBA's members have no contractual relationship with the vast majority of C-Band users and therefore are not in a position to know what equipment upgrades are needed, how much they would cost, or how long implementation would take. The Commission should permit all stakeholders to see a more detailed proposal and submit comment, which would allow the Commission to take their interests into account and increase the potential for widespread acceptance of the final plan.

At the same time, detailed technical and service rules adopted by the Commission, after notice and comment, are also important.[20] As noted, for the auction to be successful, participants need to understand what they are bidding for. In addition, incumbent users need clarity and predictability about how their existing uses will be protected from interference. There are a number of situations that call for Commission rules to adequately balance the needs of wireless carriers providing 5G services against the interests of existing users in protecting their services from interference. A variety of other difficult technical questions also remain, such as how to design solutions that deal with interference near the border from Canada and Mexico operations and co-channel arrangements for TT&C locations.[21] CBA's submissions so far lack sufficient

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[18] *See, e.g.*, Letter from Michael P. Goggin, AT&T, to Marlene H. Dortch, FCC, GN Docket No. 18-122, dated October 23, 2019.

[19] *See id.*

[20] The Commission has not proposed any such rules to date.

[21] *See* Letter from Michael P. Goggin, AT&T, to Marlene H. Dortch, FCC, GN Docket No. 18-122, dated October 22, 2019 ("AT&T 10-22/19 *Ex Parte*"); Letter from Hank Hultquist, AT&T, to Marlene H. Dortch, FCC, GN Docket No. 18-122, dated May 23, 2019 ("AT&T 5/23/19 *Ex Parte*"). Indeed, CBA's recent letters (*see, e.g.*, CBA 10/28/19 *Ex Parte*; CBA 10/31/19 *Ex Parte*) offering additional information about the proposed early tranche clearing process provides

information for stakeholders (including AT&T's Warner Media affiliates) to plan their future operations, and the tentative proposals it has set forth have not been properly vetted by all stakeholders, as would occur in a full notice and comment Commission proceeding. CBA's commitments to work with the Commission and other stakeholders to find solutions in the future do not solve these fundamental shortcomings.

A Commission-led effort, through notice and comment, to address these issues would also reduce the potential for litigation-related delays based on alleged notice claims under the Administrative Procedure Act. And, to the extent Commission rules can provide clarity and predictability to all stakeholders, the Commission is more likely to avoid challenges to individual aspects of the auction or the transition as arbitrary and capricious. Equally important, if the transition proceeds on the basis of vague promises and assumptions rather than well-defined technical rules and a detailed, fully vetted transition plan, any attempt at reallocation of this spectrum is likely to run into logistical delays and increased costs as well, which would further delay the availability of C-Band spectrum for 5G deployments.

The C-Band represents a vital opportunity for the United States to maintain its leadership in 5G. If done correctly, this reallocation would simultaneously make substantial amounts of contiguous mid-band spectrum available for 5G deployments, while accelerating technology upgrades in the satellite and content delivery industries. A hasty reallocation, however, relying on vague promises and a shaky legal justification, is likely to result in delay and disruption. This is far too important to leave to chance. Measure twice, cut once.

For all of these reasons, the Commission should promptly issue an order making clear that 300 MHz of the C-Band will be made available for flexible, terrestrial service to accommodate broadband deployments. The order should also establish the general process by which this reallocation will be accomplished: the Commission should make clear that it will modify existing satellite licenses, with space station licensees receiving flexible use rights on the condition that they be sold by a date certain through a clock auction process approved and supervised by the Commission. The Commission should also seek further comment on a detailed transition plan and the technical and service rules to apply to this spectrum.

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no detail on how issues such as interference from Canada and Mexico would be resolved, and until critical details such as these are resolved, participants cannot reasonably be expected to bid for such licenses.

Should any questions arise concerning this ex parte, please contact me at (202) 457-2055.

Sincerely,

/s/ Michael P. Goggin
Michael P. Goggin

cc (via email):

Thomas Johnson (thomas.johnson@fcc.gov)
Ashley Boizelle (ashley.boizelle@fcc.gov)
Michael Carlson (michael.carlson@fcc.gov)
Bill Richardson (william.richardson@fcc.gov)
David Horowitz (david.horowitz@fcc.gov)