

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

In the Matter of)
)
Petition for Rulemaking to Permit MVDDS Use) RM-11768
of the 12.2-12.7 GHz Band for Two-Way Mobile)
Broadband Service)

COMMENTS OF T-MOBILE USA, INC.

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T-Mobile USA, Inc. (“T-Mobile”)^{1/} submits the following comments in response to the Commission’s Public Notice on the above-referenced Petition for Rulemaking (“Petition”) submitted by the MVDDS 5G Coalition (“Petitioners”).^{2/} The Petitioners ask that the Commission initiate a proceeding to adopt rules that would permit Multichannel Video Data and Distribution Service (“MVDDS”) licensees to use their 12.2-12.7 GHz band (“12 GHz band”) spectrum to provide two-way mobile broadband service.^{3/} T-Mobile agrees that it is in the public interest to assess whether additional spectrum can be made available for mobile broadband services. Accordingly, it supports a Commission re-evaluation of whether the 12 GHz band can be used for that purpose. However, because incumbents have failed to make use of their authorized spectrum, additional rights should not be automatically extended to the current MVDDS licensees. Instead, if the Commission reverses its limit on two-way terrestrial use of the 12 GHz band imposed to protect direct broadcast satellite (“DBS”) services, it should make

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

^{2/} *Report No. 3042, Consumer & Governmental Affairs Bureau Reference Information Center Petition for Rulemakings Filed*, Public Notice, RM-11768 (May 9, 2016) (“Public Notice”).

^{3/} *See MVDDS 5G Coalition Petition for Rulemaking to Permit Use of the 12.2-12.7 GHz Band for Two-Way Mobile Broadband Service*, RM-11768, at 1 (filed Apr. 26, 2016) (“Petition”).

any new rights available to all potential licensees, as required by Section 309(j) of the Communications Act, as amended (the “Act”).^{4/}

I. INTRODUCTION AND SUMMARY

T-Mobile, including the MetroPCS brand, offers nationwide wireless voice, text, and data services to approximately 65.5 million subscribers.^{5/} T-Mobile continues to lead growth in the wireless industry, with 2.2 million net additions in the first quarter of 2016 – marking the twelfth consecutive quarter that T-Mobile has generated more than 1 million net customer additions and the sixth time in the past seven quarters with more than 2 million net customer additions.^{6/} In addition, our network expansion is progressing at an accelerated pace. In fact, our 4G Long-Term Evolution (“LTE”) network – the Nation’s fastest 4G LTE network – covers 308 million people, up from 305 million at the end of 2015.^{7/}

As T-Mobile’s continued growth highlights, identifying new spectrum for the provision of mobile broadband services is, and will remain, vitally important for the wireless industry. The public’s demand for wireless broadband spectrum only continues to grow, as Americans’ mobile data usage more than doubled in 2015.^{8/} While T-Mobile applauds efforts by Congress, NTIA, and the Commission to continue to make licensed spectrum available for broadband services,

^{4/} 47 U.S.C. § 309(j).

^{5/} See T-Mobile News Release, *T-Mobile Delivers Unparalleled Financial Results – Tops Revenue and Adjusted EBITDA Estimates* (Apr. 26, 2016), <http://investor.t-mobile.com/file/Index?KeyFile=34010432>.

^{6/} *Id.*

^{7/} *Id.*

^{8/} CTIA Press Release, *Americans’ Data Usage More Than Doubled in 2015* (May 23, 2016), <http://www.ctia.org/resource-library/press-releases/archive/americans-data-usage-more-than-doubled-in-2015>. The number of wireless subscribers increased by 6.3% from 2014 to 2015. Seventy percent of the population owns a smartphone, which is the number one wireless device in the United States. In response, carriers have invested nearly \$32 billion in 2015 and since 2010 have invested over \$177 billion to improve broadband capabilities. *Id.*

including future 5G technologies, more work is needed.^{9/} Re-examining whether currently allocated spectrum is being employed in the way that best serves the public interest is potentially one of the most productive ways to create additional spectrum capacity.

T-Mobile therefore agrees with Petitioners' primary premise – that the Commission should initiate a rulemaking proceeding to determine whether two-way mobile broadband service can be authorized in the 12 GHz band consistent with the need to protect DBS. However, if the Commission concludes that two-way mobile broadband use of the band is feasible, rights to provide that service in the 12 GHz band should not be automatically awarded to existing licensees. When MVDDS was initially authorized, the Commission provided licensees with flexibility regarding the type of services that could be offered but denied all applications for two-way terrestrial use and corresponding waiver requests.^{10/} The Commission stated that permitting

^{9/} For example, in 2012, Congress passed the Spectrum Act, authorizing the Commission to conduct auctions to relicense broadcast spectrum. Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96 (2012). In response, the Commission initiated the Broadcast Incentive Auctions, in which broadcast licensees will voluntarily relinquish spectrum (Reverse Auction 1001) and 600 MHz licenses will be auctioned (Forward Auction 1002). See *Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, Report and Order, 29 FCC Rcd. 6567 (2014). The auction began on March 29, 2016. *Procedures for Competitive Bidding in Auction 1000, Including Initial Clearing Target Determination, Qualifying to Bid, and Bidding in Auctions 1001(Reverse) and 1002 (Forward)*, Public Notice, 30 FCC Rcd. 8975 (2015). In 2015, Congress passed the Bipartisan Budget Act, directing the Department of Commerce through NTIA to identify thirty megahertz of spectrum for reallocation from federal to non-federal use. See *Spectrum Pipeline Act of 2015*, Pub. L. No. 114-74, §§1004-08 (2015). NTIA has taken steps to amend its regulations to conform to the provisions of the Spectrum Pipeline Act. See *Implementing Certain Provisions of the Spectrum Pipeline Act With Respect to the Duties of The Technical Panel*, 81 Fed. Reg. 3337 (Jan. 21, 2016) (to be codified at 47 C.F.R. pt. 301). The Commission has made more spectrum available for wireless broadband use in the 3.5 GHz Band/Citizens Broadband Radio Service in order to “add much needed capacity to meet the ever-increasing demands of wireless innovation). See *Amendment of the Commission’s Rules With Regard to Commercial Operations in the 3550-3650 MHz Band*, Report and Order and Second Further Notice of Proposed Rulemaking, 30 FCC Rcd. 3959, ¶ 1 (2015). It has also commenced the “millimeter wave” proceeding in order to identify higher frequency bands that are suitable for mobile service. See *Use of Spectrum Bands Above 24 GHz For Mobile Radio Services*, Notice of Proposed Rulemaking, 30 FCC Rcd. 11878, ¶ 26 (2015) (“Millimeter Wave NPRM”).

^{10/} *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; Amendment of the Commission’s Rules to Authorize Subsidiary Terrestrial Use of the 12.2-12.7 GHz Band by Direct*

two-way operations in the 12 GHz band “would significantly raise the potential for instances of interference among the operations.”^{11/} If the Commission now reverses course, it should not simply award two-way terrestrial mobile broadband rights to incumbent MVDDS licensees, who have failed to take advantage of their flexibility to provide any service using their authorized spectrum. If two-way mobile rights are authorized, such rights must be made available to all applicants, as required by Section 309(j) of the Act.

Petitioners cite to four proceedings to argue that the Commission should grant mobile broadband rights to current MVDDS licensees. However, Commission action in those proceedings occurred under different circumstances. In those proceedings, the Commission merely extended rights it had already granted licensees – it took no action that triggered an obligation under Section 309(j) of the Act. Here, the Petitioners seek *additional* rights – the ability to provide two-way broadband service – which are not only completely different than the rights currently authorized and even contemplated by the Commission, but were also specifically rejected by the Commission in the past. Moreover, even if the Commission were not required by Section 309(j) of the Act to conduct auctions to license mobile broadband rights to the 12 GHz band, it should still not grant those rights to Petitioners, who have done nothing to deploy the spectrum under technical parameters well-known at the time the licenses were issued.

II. MVDDS HAS BEEN AN INTENTIONALLY LIMITED SERVICE BECAUSE OF DBS

When the Commission developed service rules for MVDDS, it provided licensees with significant flexibility in the types of services they could offer, noting that “any digital non-

Broadcast Satellite Licensees and Their Affiliates; Applications of Broadwave USA, PDC Broadband Corporation, and Satellite Receivers, Ltd. to Provide a Fixed Service in the 12.2-12.7 GHz Band, Memorandum Opinion and Order and Second Report and Order, 17 FCC Rcd. 9614 (2002) (“MVDDS Second R&O”).

^{11/} See *id.* ¶137.

broadcast service, including fixed one-way service direct-to-home/business video and data services” were permitted.^{12/} Nevertheless, the Commission prohibited MVDDS licensees from offering two-way services based, in part, on the technical analysis required by Congress. In particular, the Commission is required to “provide for an independent technical demonstration of any terrestrial service technology proposed by any entity that has filed an application to provide terrestrial service in the direct broadcast satellite frequency band” (*i.e.*, the 12 GHz band) to ensure that the proposed terrestrial service will not cause harmful interference to DBS services.^{13/} Accordingly, prior to authorizing terrestrial use of the 12 GHz band, the Commission commissioned MITRE Corp. (“MITRE”) to analyze the potential effects of MVDDS on DBS services.^{14/} In its report, MITRE cautioned that terrestrial use of the 12 GHz band could cause significant interference to DBS.^{15/}

Relying on the MITRE report, the Commission adopted technical requirements to prevent MVDDS from causing any harmful interference to DBS, specifying equivalent power-flux density limits for different regions of the United States, limiting EIRP to 14 dBm/24 MHz, and only permitting one-way service in the band, except where the band is used for a downstream path while the upstream or return path is located outside the band or over wireline.^{16/} The Commission particularly stressed that “adding a return link [within the band] would unnecessarily complicate the sharing scenario.”^{17/}

^{12/} *Id.*

^{13/} *See* Launching Our Communities’ Access to Local Television Act of 2000 (“LOCAL TV Act”), Pub. L. No. 106-553; 47 U.S.C. § 1110(a).

^{14/} MVDDS Second R&O ¶ 13.

^{15/} *See id.* ¶ 56.

^{16/} *Id.* ¶¶ 68, 137.

^{17/} *Id.* ¶ 137.

Despite the flexibility provided MVDDS licensees and the clear rules developed at the time, the Petitioners ask the Commission to initiate a proceeding in which these historical concerns would be re-assessed. Any such determination requires that the Commission provide for another “independent technical demonstration” to comply with Congressional directive.^{18/} Nevertheless, because of the need to make additional spectrum capacity available, T-Mobile agrees that the Commission should undertake the required evaluation to determine whether, as Petitioners suggest, past impediments can be overcome.

III. IF TECHNICAL CONCERNS ARE RESOLVED, TERRESTRIAL RIGHTS SHOULD BE AUCTIONED

If the interference challenges that Congress recognized can be overcome, the Commission must auction any terrestrial rights to operate in the 12 GHz band instead of awarding those rights to MVDDS licenses who have not, to date, done anything with the spectrum despite the flexibility the Commission has provided. Simply awarding existing licensees mobile rights would be both contrary to law and inequitable.

A. Granting Two-Way Mobile Broadband Rights in the 12GHz Band Requires That the Commission Auction Those Rights Pursuant to 309(j) of the Act

T-Mobile has been a vigorous supporter of the Commission’s rules that permit *all* eligible potential entrants access to newly available spectrum for mobile broadband operations.^{19/} T-Mobile recognizes, however, that in some cases, technology favors and the law permits expanding rights for existing licensees. For example, T-Mobile has supported allowing existing

^{18/} See LOCAL TV Act, Pub. L. No. 106-553; 47 U.S.C. § 1110.

^{19/} See, e.g., Reply Comments of T-Mobile USA, LLC, WT Docket No. 15-125, at 3, 10 (filed July 14, 2015) (explaining the importance of an accessible auction and that “the Commission must take immediate, meaningful measures to promote competition and protect consumers” as well as “ensure access to the critical resources [*i.e.*, spectrum] necessary to sustain meaningful four-carrier competition.”); see also Letter from Neville Ray, Chief Technology Officer, T-Mobile USA, Inc. to Chairman Wheeler, FCC, GN Docket No. 12-268 (filed June 2, 2015) (acknowledging that “implementing a spectrum reserve in the 600 MHz Auction to ensure that a variety of competitors have access to low-band spectrum is a step in the right direction”).

millimeter wave licensees to provide mobile broadband services,^{20/} However, in that proceeding, two-way services are already permitted; there are already mobile allocations for the affected bands; and licensees have made reasonable efforts to use the spectrum.^{21/} Further, in past proceedings, the Commission explicitly recognized that future mobile services in the millimeter wave bands were possible – the exact opposite of the 12 GHz band where the Commission barred two-way operations.^{22/}

Section 309(j) of the Act requires the Commission to grant an initial license or construction permit through competitive bidding, if mutually exclusive applications are accepted for a license or permit.^{23/} The Commission has also interpreted the statute to require it to auction mutually exclusive applications that propose material modification of current licensee rights. “Applications proposing major changes to existing facilities are . . . analogous to applications for construction permits for new stations.”^{24/} In adopting general competitive bidding procedures,

^{20/} See Comments of T-Mobile USA, Inc., GN Docket No. 14-177 (filed Jan. 27, 2016) (explaining that existing 28 GHz and 39 GHz licensees should be authorized for mobile use).

^{21/} See, Millimeter Wave NPRM ¶¶ 26, 36 (citing 47 C.F.R. § 2.106).

^{22/} Compare, e.g., Millimeter Wave NPRM ¶ 26 (“While the Commission has not, to date, authorized any specific service (including LMDS) to provide mobile service in those bands, it previously expressed an expectation that it would expand the LMDS authorization for Fixed Service to include Mobile Service if proposed and supported by the resulting record.”), citing *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, et al.*, Second Report and Order, Order on Reconsideration, and Fifth Notice of Proposed Rulemaking, 12 FCC Rcd. 12545, ¶ 136 (1997) (“Second LMDS Report and Order”), with MVDDS Second R&O ¶ 137 (“[W]e believe that two-way services in the band without relocating the upstream path would significantly raise the potential for instances of interference among operations.”).

^{23/} 47 U.S.C. § 309(j). The Commission considers two or more applications to be mutually exclusive if “their conflicts are such that the grant of one application would effectively preclude, by reason of harmful electrical interference, the grant of one or more of the other applications.” *Implementation of Section 309(j) of the Communications Act – Competitive Bidding*, Second Report and Order, 9 FCC Rcd. 2348, 2351 ¶ 12 n.5 (1994) (“*Competitive Bidding Order*”).

^{24/} *Implementation of Section 309(j) of the Communications Act – Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses; Reexamination of the Policy*

the Commission “concluded that it may be appropriate in some cases to treat a major modification application as an initial application for competitive bidding purposes.”^{25/}

Petitioners seek what constitutes new licenses – authorizations that fundamentally differ from those they currently hold. As noted above, when the Commission established the technical rules for MVDDS, it specifically *prohibited* two-way services within the band.^{26/} By asking that the Commission reverse its carefully considered decision, Petitioners are not seeking extension of rights they already have; they are asking the Commission to grant them rights the Commission explicitly rejected in the past, and Section 309(j) requires that mutually exclusive applications for any such new licenses be issued only through competitive bidding. Although Petitioners characterize their request as a “modification” of their existing licenses, that description ignores the fact that the Commission specifically rejected awarding the type of rights Petitioners now seek. Any decision reversing that prior assessment would result in the Commission issuing new licenses or at least licenses so significantly modified as to constitute new licenses under the Commission’s interpretation of Section 309(j) of the Act.

B. Petitioners Have Failed to Make Any Use of Current 12.2-12.7 GHz Band Spectrum and It Would Be Inequitable to Reward Them for This Failure

Even if the Communications Act did not require the Commission to auction the terrestrial mobile broadband use of the 12 GHz band, the Commission should not reward current licensees’ failure to deploy by granting them those rights. The Commission established clear technical rules governing MVDDS operations and provided licensees with the ability to offer a range of services. It held two auctions for MVDDS spectrum, in 2004 and (for licenses unsold in the first

Statement on Comparative Broadcast Hearings; Proposals to Reform the Commission's Comparative Hearing Process to Expedite the Resolution of Cases, 13 FCC Rcd. 15920, ¶ 14 (1998).

^{25/} *Id.* (internal citation omitted).

^{26/} *See* discussion *supra* Section II.

auction) in 2005.^{27/} Licenses were issued with a 10-year term and renewal expectancy based on a substantial service showing at the end of five and ten years during the license term.^{28/} In 2010, the Wireless Telecommunications Bureau (“WTB”) granted an industry-wide five-year extension to the first substantial showing because MVDDS licensees had failed to obtain MVDDS equipment.^{29/} In 2015, despite the fact that MVDDS licensees did not meet their 10-year construction obligations, the Commission renewed most of the MVDDS licenses through 2024 and extended the initial construction requirement for another five years (until 2019).^{30/}

Currently, there are 213 active MVDDS licenses, and only one license – WQAR561 – appears to be used to provide any service.^{31/} Yet these licensees ask the Commission to reward their failure to place the spectrum in operation, now claiming that the Commission’s rules governing them should no longer apply, just over ten years after they obtained the licenses. Ironically, one of the most prominent of the Petitioners initially took the opposite view. In particular, in 2009, DISH Network, LLC (“DISH”)^{32/} argued against an MVDDS licensee’s

^{27/} See *Auction 63*, FCC (last updated Oct. 3, 2006), http://wireless.fcc.gov/auctions/default.htm?job=auction_summary&id=63; *Auction 53*, FCC (last updated Oct. 3, 2006), http://wireless.fcc.gov/auctions/default.htm?job=auction_summary&id=53.

^{28/} 47 C.F.R. §101.1413.

^{29/} See *Requests of Ten Licensees of 191 Licenses in the Multichannel Video and Data Distribution Service for Waiver of the Five-Year Deadline for Providing Substantial Service*, Order, 25 FCC Rcd. 10097 (2010).

^{30/} See, e.g., South.com LLC Request for Extension of Time, ULS File No. 0006310688, available at <http://wireless2.fcc.gov/ULsApp/ApplicationSearch/applAdmin.jsp?applID=8346501>; South.com LLC Application for Renewal, ULS File No. 0006321204, available at <http://wireless2.fcc.gov/ULsApp/ApplicationSearch/applMain.jsp?applID=8360292>.

^{31/} See Call Sign WQAR561, MDS ANNUAL REPORT FOR MVDDS (2014) (claiming “none” in response to the inquiry “a list of each period of time during the calendar year in which the station rendered no service as authorized, if the time period was a consecutive period longer than 48 hours”). In a recent request for waiver and extension of MVDDS construction deadlines, DISH itself noted that only one MVDDS licensee was offering service to the public – and only in one market. DISH, Public Interest Statement, ULS File No. 0006310838 (filed June 3, 2014).

^{32/} DISH and its affiliate South.com hold approximately 40% of MVDDS licenses and both have failed to place MVDDS facilities into operation, despite the Commission’s several extensions.

request for an extension of time because it masqueraded as a request to operate at higher power levels:^{33/}

The Commission should not reward such regulatory gamesmanship by granting MDS the ability to provide a high-power service now, particularly given the significant risk to over 30 million satellite TV subscribers that share spectrum with MDS today. The Commission should also not allow this proceeding – addressing whether or not MVDDS licensees warrant five additional years to build-out systems consistent with Commission rules – to be hijacked by one licensee seeking to fundamentally alter the nature of the MVDDS industry and its co-existence with satellite operators.^{34/}

In fact, in the same proceeding, DISH stated that, until the industry made a good-faith effort to operate under the existing MVDDS operating and interference parameters, “it would be premature to revisit the technical MVDDS rules.”^{35/} Yet DISH now urges the Commission to do just the opposite – by requesting that the Commission revisit the same MVDDS technical rules – despite DISH’s failure to meet its own build-out requirements – and reward DISH and other MVDDS licensees for their continued failure to place their MVDDS licenses in operation. Absent such a demonstration, current licensees will merely be receiving a windfall at taxpayers’ expense. As DISH’s itself acknowledged, it would not “be appropriate to . . . fundamentally change the operating parameters of the MVDDS service and the DBS/MVDDS sharing rules, or reward providers that have not taken efforts to invest in their licenses.”^{36/}

^{33/} See DTV Norwich, LLC, Petition for Waiver and Extension of Time to Comply with the Commission’s MVDDS Substantial Service Requirements in Section 101.1413, ULS File No. 0003516339 (filed July 25, 2008); see also Petition for Rule Waiver of MDS Operations, Inc., WT Docket No. 07-255 (filed June 25, 2009).

^{34/} Reply of DISH Network L.L.C., ULS File No. 0003516339, at 2 (filed July 27, 2009) (emphasis added).

^{35/} Comments of EchoStar Satellite Operating L.L.C. (“DISH”), at 2, ULS File No. 0003516339 (filed July 10, 2009).

^{36/} *Id.* at 3.

IV. COMMISSION PRECEDENT DOES NOT SUPPORT PETITIONERS' REQUEST

Petitioners claim that modifying the MVDDS rules to allow 5G service within the 12 GHz band is consistent with past Commission decisions that have permitted various licensees the flexibility to provide mobile broadband services.^{37/} However, the cases that Petitioners cite do not support the actions that Petitioners propose. In those cases, Section 309(j) of the Act did not require the Commission to conduct an auction because no new or significantly modified licenses were issued. Moreover, the affected licensees generally met their build-out obligations – meaning that the Commission did not reward licensees that did not build out.

A. Millimeter Wave Bands

Petitioners cite the Commission's ongoing millimeter wave proceeding as one instance in which the Commission proposes to newly assign mobile use rights to existing licensees in a particular band.^{38/} There, the Commission proposes that existing Local Multipoint Distribution Service ("LMDS") and 39 GHz licensees gain flexible use rights, including mobile operating rights.^{39/} As noted above, the Commission has observed that past precedent contemplated potential mobile rights in this segment of the millimeter wave bands.^{40/} In those bands, the Commission is expanding existing fixed two-way terrestrial rights, not substituting a new service for one that it previously specifically rejected. Accordingly, the Commission's actions in the millimeter wave proceeding do not trigger the competitive bidding requirements under Section 309 of the Act because the Commission is proposing to extend *existing* two-way, terrestrial

^{37/} Petition at 13.

^{38/} *Id.* at 15.

^{39/} See Millimeter Wave NPRM ¶¶ 93-96.

^{40/} See *id.* ¶ 96, citing Second LMDS Report and Order ¶ 207; *Amendment of the Commission's Rules Regarding the 37.0-38.6 GHz and 38.6-40.0 GHz Bands*, Report and Order and Second Notice of Proposed Rulemaking, 12 FCC Rcd. 18600, ¶ 24 (1997) ("39 GHz Report and Order").

rights to LMDS and 39 GHz licensees, and the Commission had previously contemplated – and not specifically rejected – this particular extension (*i.e.*, to permit mobile use). Notably, those licensees have also already been required to demonstrate build-out, and have demonstrated substantial service – unlike MVDDS licensees.^{41/}

B. Advanced Wireless Services (AWS-4)

Petitioners claim that the AWS-4 proceeding is another example of the Commission’s willingness to remove regulatory barriers to permit mobile broadband operations using existing licenses where those operations were not originally authorized.^{42/} The circumstances surrounding Petitioners’ request also differ from those of the Commission’s AWS-4 decision. The FCC initially extended terrestrial use rights to existing MSS licensees in the AWS-4 band more than a decade before the AWS-4 decision, creating rights that it considered ancillary to the MSS authorization already issued.^{43/} When the Commission created those ancillary rights, it specifically determined that it was not bound by Section 309(j)’s mandate of competitive bidding

^{41/} As discussed briefly above, the Commission is proposing to extend the rights of LMDS and 39 GHz licensees by authorizing mobile operations. Millimeter Wave NPRM ¶¶ 30, 42. LMDS is currently authorized for fixed services although the Commission “previously expressed an expectation that it would expand the LMDS authorization for Fixed Service to include Mobile Service.” *Id.* ¶ 26. Similar to the LMDS band, the 39 GHz band has a co-primary allocation for fixed and mobile services, although mobile services are not currently authorized. *Id.* ¶ 36; *see also* 47 C.F.R. §2.106. Additionally, LMDS licensees have demonstrated substantial service. *See, e.g.* Call Sign WPLM412, *available at* <http://wireless2.fcc.gov/UlsApp/UlsSearch/license.jsp?licKey=7775> (showing that the licensee, Nextlink Wireless, LLC, obtained this LMDS license in 1998, which the Commission renewed in 2008. Licensee met its construction deadline in 2012); *see also* 47 C.F.R. §101.1011(a) (requiring that LMDS licensees at the end of the ten-year license term – from the initial license grant date (1998-1999) – must demonstrate that they are providing substantial service in each licensed area).

^{42/} Petition at 14-15. In 2012, the Commission permitted terrestrial mobile broadband service in 40 megahertz of spectrum in the 2000-2020 MHz and 2180-2200 MHz bands (“AWS-4 band”) which, until the AWS-4 Order, was used for Mobile Satellite Service (“MSS”) operations. *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 (2012) (“AWS-4 Order”). Prior to the AWS-4 Order, two MSS licensees, Gamma Acquisition L.L.C. (“Gamma”) and New DBSD Satellite Services G.P. (“New DBSD”) – wholly owned subsidiaries of DISH – offered satellite service. AWS-4 Order ¶ 10.

^{43/} AWS-4 Order ¶¶ 7-8, 237.

because it was neither issuing new licenses nor modifying existing licenses to an extent sufficiently “major” to warrant competitive bidding.^{44/} Although, at that time, the FCC was newly providing MSS licensees new terrestrial use rights, it emphasized that those new rights were ancillary to the licensees’ existing authorization – not “so different in kind or so large in scope and scale to warrant competitive bidding if mutual exclusivity exists.”^{45/} Moreover, when it later extended those rights, the Commission considered and rejected creating new terrestrial licenses (which, the Commission notes, would have required assignment through competitive bidding) separate from the satellite authorizations. The Commission reasoned that the public interest would be best served by continuing to permit a single licensee to operate both satellite and terrestrial services using the same authorization.^{46/} In addition, in the AWS-4 Order, when the Commission decided to extend those previously granted terrestrial rights, the licensees were already providing the service for which they were authorized.^{47/} The Commission did not reward licensees that had simply made no use of the spectrum.

Here, the Commission would be awarding new rights to the MVDDS licensees – rights that it specifically rejected awarding in the past. Further, there is no reason that the existing terrestrial licensees, who have taken no action to use the spectrum, should be provided any new operating rights that fundamentally differ from their existing authorizations.

^{44/} See *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; Review of the Spectrum Sharing Plan Among Non-Geostationary Satellite Orbit Mobile Satellite Service Systems in the 1.6/2.4 GHz Bands*, Report and Order and Notice of Proposed Rulemaking, 18 FCC Rcd. 1962, ¶¶ 219-229 (2003) (“ATC Order”).

^{45/} *Id.* ¶¶ 224-226.

^{46/} AWS-4 Order ¶180 (explaining that “same-band, separate operator sharing of the spectrum is not technically feasible . . . to make more spectrum in this band available for flexible terrestrial use, including for mobile broadband, and thereby serve the public interest, we will authorize AWS-4 operations by the incumbent 2 GHz MSS licensees through license modifications”).

^{47/} See *id.* ¶ 10 (explaining that “DBSD and TerreStar launched their satellites in April 2008 and July 2009, respectively, and met their operational milestones in May 2008 and August 2008, respectively”).

C. Wireless Communications Services (“WCS”)

Petitioners also cite the Commission’s revisions to the WCS band technical rules to illustrate the Commission’s willingness to grant existing licensees the right to provide two-way mobile broadband service.^{48/} The WCS case differs from the Petitioners’ request because WCS was already a terrestrial-based service permitting two way mobile use.^{49/} WCS licenses obtained their authorizations at auction with that understanding and were permitted – when the licenses were first issued – to provide fixed, mobile, portable, and radiolocation services.^{50/} In the WCS Order that Petitioners cite, the Commission only modified the WCS rules in order to permit mobile broadband services by modifying the permitted power levels, out-of-band emissions limits, and other technical rules. The Commission found that the WCS technical parameters could be modified so that WCS service could be more effectively provided without SDARS receiving harmful interference.^{51/} The WCS rules were relaxed in order to give WCS licensees

^{48/} In the WCS Order, the Commission modified the WCS technical rules to facilitate mobile broadband service in the WCS Band finding that the rules could be amended without causing harmful interference to adjacent Satellite Digital Audio Radio Service (“SDARS”) licensees. *See 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, ¶¶ 1, 5(2010) (“WCS 2010 Order”). Prior to the WCS Order, the technical rules permitted WCS to offer fixed, mobile, portable, and radiolocation services. *Id.* ¶ 11. Although fixed and mobile services were permitted, the power and OOB limits were different for fixed and mobile services, which made it difficult for WCS licensees to provide mobile broadband services. *Id.* ¶¶ 14, 29.

^{49/} *Id.* ¶¶ 5, 11; *Amendment of the Commission’s Rules to Establish Part 27, the Wireless Communications Service (“WCS”)*, Report and Order, 12 FCC Rcd. 10785, ¶ 45 (1997) (providing for paired channel blocks to “allow for the introduction of both one-way and two-way services” in the WCS band).

^{50/} WCS 2010 Order ¶ 11.

^{51/} *Id.* ¶ 28. The Commission had previously established that WCS and SDARS operations could coexist and set specific power limits and OOB limits for WCS operations in order to protect SDARS operations from harmful interference. *Amendment of the Commission’s Rules to Establish Part 27, the Wireless Communications Service*, Memorandum and Opinion and Order, 12 FCC Rcd. 3977, 3991 ¶ 25 (1997).

more flexibility under their existing authorizations.^{52/} Therefore, the Commission created no new rights that triggered application of Section 309(j) of the Act.

Here, MVDDS was expected to be a service which, while flexible, was limited to one-way service. The necessary protection of DBS operations resulted in the Commission specifically rejecting two-way services in the 12 GHz band.^{53/} Under Petitioners' proposal, the Commission would not merely be revising performance standards and technical limits. Instead, they would be granted major additional rights – the ability to provide two-way mobile broadband service – that the Commission specifically rejected.

D. Broadband Radio Service (“BRS”) and Educational Broadband Service (“EBS”)

Finally, Petitioners claim that the Commission's BRS/EBS proceeding illustrates that the Commission has revised specific spectrum technical and licensing rules and that the FCC should do the same with respect to MVDDS.^{54/} However, the circumstances surrounding the BRS/EBS Order differ from the Petitioners'. Two-way digital service was already contemplated *before* the Commission expanded the rights that Petitioners cite.^{55/} By then, the Commission had already

^{52/} WCS 2010 Order ¶ 196 n.483 (“We believe that the public interest is better served here by applying the new performance requirement to the incumbent WCS licensees within a more flexible technical regime . . .”).

^{53/} See 47 C.F.R. §101.1407.

^{54/} Petition at 13; Petitioners cite to *Amendment of 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*, Report and Order and Further Notice of Proposed Rulemaking, 19 FCC Rcd. 14165 (2004) (“2004 BRS/EBS Order”), as well as *Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Education and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands*, Fifth Report and Order, 29 FCC Rcd. 6331 (2014).

^{55/} The Commission added a mobile allocation to the 2500-2690 MHz band in 2001. See *Amendment of Part 2 of the Commission's Rules to Allocate Spectrum Below 3 GHz for Mobile and Fixed Services to Support the Introduction of New Advanced Wireless Services, Including Third Generation Wireless Systems*, First Report and Order and Memorandum Opinion and Order, 16 FCC Rcd. 17222, ¶19 (2001) (adding a mobile allocation to the 2500-2690 band to provide additional flexibility).

added a mobile allocation to the 2500-2690 MHz band.^{56/} In doing so, the Commission found that permitting additional flexibility in the band would not necessarily result in a change in any service offerings.^{57/} Accordingly, in the 2004 BRS/EBS Order, the Commission built on its early finding that there would be no change in the service offered and simply revised the manner in which licensees could provide two-way service.^{58/} Similar to the millimeter wave proceeding, in the BRS/EBS proceeding, the Commission found that it was expanding the licensees' then-current authority; it did not substitute a wholly-new service that the Commission had specifically rejected in prior proceedings. As in the WCS proceeding, the Commission found that it granted EBS/BRS licensees *greater flexibility*, not additional rights that would require auction of new licenses. Moreover, in the case of the ERS/BRS spectrum, licensees were already providing service;^{59/} the Commission did not simply reward licensees that were not using valuable spectrum.

V. CONCLUSION

T-Mobile supports reevaluating whether the 12 GHz band can support wireless terrestrial broadband services. However, if the Commission now decides that DBS can coexist with a two-way, co-channel mobile service, all potential licensees should have an opportunity to acquire rights to provide such mobile services in the band. Specifically, the Commission must auction any such new licenses under Section 309 of the Act because those licenses would authorize different and additional operations that the Commission has expressly prohibited. Even if the

^{56/} *Id.*

^{57/} *Id.*

^{58/} In the 2004 BRS/EBS Order, the Commission restructured the 2500-2690 MHz band so that licensees could have “enhanced *flexibility*” to provide fixed, portable and mobile services. 2004 BRS/EBS Order ¶ 1(emphasis added).

^{59/} *Id.* ¶ 15.

Commission were not compelled by Section 309 of the Act to auction the licenses, it would be inequitable to grant existing licensees that have not made use of the spectrum with rights specifically rejected by the Commission when the licenses were initially issued.

Respectfully submitted,

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