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VIA ELECTRONIC FILING

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
Office of the Secretary
445 12th Street, SW
Washington, DC 20554

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

Dear Ms. Dortch:

The C-Band Alliance hereby responds to several recent submissions in the above-captioned proceeding regarding the C-Band Alliance's proposal that the Commission adopt a Market-Based Approach that would quickly and efficiently expand terrestrial use of spectrum in the C-band Downlink. These submissions wrongly contend that the Market-Based Approach violates the Communications Act and is inconsistent with precedent. The C-Band Alliance has previously explained how the Market-Based Approach is fully consistent with all applicable laws, including the Communications Act, and agency precedent.[1] This *ex parte* letter supplements the C-Band Alliance's prior filings by addressing the new objections raised by recent submissions.

I. The Market-Based Approach Is Consistent With The Communications Act.

The Commission has "broad authority under the Communications Act to 'consider the public interest in deciding whether to forgo an auction.'"[2] As the C-Band Alliance has explained, the negotiated secondary market agreements contemplated by the Market-Based Approach fit comfortably within the expansive language of the Communications Act, which refers specifically to "negotiation" as a permissible alternative to an auction[3]; and, if the Commission were to adopt

[1] *See* Comments of the C-Band Alliance, GN Docket No. 18-122 (Oct. 29, 2018) ("C-Band Comments"); Reply Comments of the C-Band Alliance, GN Docket No. 18-122 (Dec. 7, 2018) ("C-Band Reply Comments").

[2] *Service Rules for Advanced Wireless Services in the 2000-2020 MHz and 2180-2200 MHz Bands et al.*, Order on Reconsideration, 33 FCC Rcd. 8435, 8442-43 (2018) (quoting *M2Z Networks, Inc. v. FCC*, 558 F.3d 554, 563 (D.C. Cir. 2009)).

[3] *See* C-Band Comments, at 4, 29-30; C-Band Reply Comments, at 36-41.

the proposed approach, its construction of the statute would be entitled to *Chevron* deference.[4] None of the contrary arguments asserted by other parties to this proceeding is persuasive.

A. The Market-Based Approach Is Consistent With Section 309(j)(1).

Several reply commenters assert that the Market-Based Approach would violate Section 309(j)(1) because, in their view, Section 309(j)(1) mandates the use of competitive bidding. They are mistaken.

Section 309(j)(1) authorizes competitive bidding where certain statutory criteria are met. "If, consistent with the obligations described in [Section 309(j)](6)(E), mutually exclusive applications are accepted for any initial license or construction permit, then, . . . the Commission shall grant the license or permit to a qualified applicant through a system of competitive bidding."[5] The plain language of the statute is conditional; it limits use of competitive bidding to instances where the Commission has "accepted" mutually exclusive applications "consistent with" Section 309(j)(6)(E). Section 309(j)(6)(E), in turn, provides that "[n]othing in [Section 309(j)], or in the use of competitive bidding, shall be construed to relieve the Commission of the obligation in the public interest to continue to use engineering solutions, negotiation, threshold qualifications, service regulations, and other means in order to avoid mutual exclusivity in application and licensing proceedings."[6] This provision, the D.C. Circuit has explained, "instructs the agency, in order to avoid mutual exclusivity, to take certain steps, such as the use of an engineering solution."[7]

Ignoring the conditional language of Section 309(j)(1) and the obligations imposed by Section 309(j)(6)(E), several commenters assert that the mere possibility that mutually exclusive applications will be submitted is enough to trigger the competitive auction requirement. For example, T-Mobile argues that competitive bidding is required because, if the Commission made the C-band Downlink spectrum available "in the normal course, it would certainly receive mutually exclusive applications covering initial authorizations for terrestrial wireless broadband services."[8]

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[4] *See, e.g.*, *Benkelman Telephone Co. v. FCC*, 220 F.3d 601 (D.C. Cir. 2000); *Orion Communications Ltd. v. FCC*, 213 F.3d 761 (D.C. Cir. 2000).

[5] 47 U.S.C. § 309(j)(1).

[6] 47 U.S.C. § 309(j)(6)(E).

[7] *DIRECTV, Inc. v. FCC*, 110 F.3d 816, 828 (D.C. Cir. 1997); *accord Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band*, Second Report and Order, 12 FCC Rcd. 19079, 19104 (1997) ("Section 309(j)(6)(E) requires us to adopt such methods where we find them to be 'in the public interest.'").

[8] Reply Comments of T-Mobile USA, Inc., GN Docket No. 18-122, at 24 (Dec. 11, 2018) ("T-Mobile Reply").

These arguments miss the point. The conditional "[i]f . . . then" structure employed by Section 309(j)(1) authorizes the Commission to hold a competitive auction only if "mutually exclusive applications are accepted" "consistent with" Section 309(j)(6)(E). And Section 309(j)(6)(E) directs the Commission to consider certain means to "avoid" accepting mutually exclusive applications when required by the public interest. If, pursuant to this statutory obligation, the Commission elects to use the Market-Based Approach and require applicants to enter into negotiated spectrum clearing agreements with incumbents as a condition of the Commission accepting their application, no mutually exclusive applications will be accepted. Thus, under the statute, it is irrelevant whether mutually exclusive applications would have been accepted but for the Commission's adoption of the Market-Based Approach designed to avoid that result. Indeed, the interpretation of Section 309(j)(1) offered by the reply comments would read Section 309(j)(6)(E) out of the statute entirely; the whole purpose of Section 309(j)(6)(E) is for the Commission to consider alternatives that would make the submission of mutually conflicting applications unnecessary.

The legislative history of Section 309(j)(1) confirms that the reply commenters' arguments are mistaken. For decades, the Commission addressed applications for broadcast licenses through comparative hearings. Congress enacted Section 309(j) in 1993 to authorize competitive bidding.[9] In 1997, Congress expanded the Commission's auction authority.[10] Because Congress was concerned that "the Commission might interpret its expanded competitive bidding authority in a manner that minimizes its obligations under section 309(j)(6)(E)" and "overlook[s] engineering solutions, negotiations, or other tools that avoid mutual exclusivity," it amended Section 309(j)(1) to include an express cross-reference invoking Section 309(j)(6)(E).[11] The amendment was thus expressly designed to communicate to the Commission that it "must still ensure that its determinations regarding mutual exclusivity are consistent with the Commission's obligations under section 309(j)(6)(E)" "notwithstanding its expanded auction authority."[12] This history provides further evidence that the reply commenters' efforts to avoid the Market-Based Approach by highlighting the Commission's auction authority are legally infirm.

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[9] *See* Omnibus Budget Reconciliation Act of 1993, Pub L. No. 103-66, 107 Stat. 312 § 6002(b) (1993).

[10] *See* Balanced Budget Act of 1997, Pub. L. No. 105-33, 111 Stat. 251 § 3002(a)(1) (1997); *Implementation of Section 309(j) of the Communications Act*, First Report and Order, 13 FCC Rcd. 15920 (1998).

[11] *See* H.R. Rep 105-217, at 572 (1997).

[12] *See id.*

B. The Market-Based Approach Is Consistent With Section 309(j)(6)(E).

Several reply commenters assert that even if Section 309(j)(6)(E) applies, the provision is not broad enough to encompass the Market-Based Approach. Again, these reply commenters are mistaken.

Section 309(j)(6)(E), as noted above, places on the Commission an "obligation in the public interest to continue to use engineering solutions, *negotiation*, threshold qualifications, service regulations, *and other means* in order to avoid mutual exclusivity in application and licensing proceedings."[13] As the C-Band Alliance has previously explained, these broad statutory terms are not designed to restrict the Commission to a particular set of alternative mechanisms, but rather are intended to give the agency broad discretion in designing alternative approaches. The negotiated secondary market agreements contemplated by the Market-Based Approach fit comfortably within the expansive language of the statute, which refers specifically to "negotiation" as a permissible alternative.[14] That conclusion is confirmed by D.C. Circuit precedent holding that the Commission is entitled to *Chevron* deference in interpreting the precise means authorized by Section 309(j)(6)(E).[15]

The American Cable Association and T-Mobile assert that the Market-Based Approach would violate Section 309(j)(6)(E) because it contemplates negotiations among "private parties," which they suggest is beyond the scope of the statute.[16] These entities offer no support for their contention that the statutorily authorized "negotiations" cannot take place among private parties. Nothing in the language of the statute limits this term, and their position flies in the face of D.C. Circuit precedent which confirms that "settlement negotiations" "sure[ly]" are a permissible "means of avoiding mutual exclusivity" under Section 309(j)(6)(E).[17] In *Damsky v. FCC*, three applicants filed "mutually exclusive applications" for a permit to construct a new FM broadcast station in Homewood, Alabama.[18] Two of the applicants entered into a privately negotiated settlement agreement contingent on the disqualification of the third applicant.[19] The Commission disqualified the third applicant and assigned the permit pursuant to the settlement agreement.[20]

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[13] 47 U.S.C. § 309(j)(6)(E) (emphasis added).

[14] *See* C-Band Comments, at 4, 29-30.

[15] *See, e.g.*, *Benkelman Telephone Co. v. FCC*, 220 F.3d 601 (D.C. Cir. 2000); *Orion Communications Ltd. v. FCC*, 213 F.3d 761 (D.C. Cir. 2000).

[16] Reply Comments of the American Cable Ass'n, GN Docket No. 18-122, at 14 (Dec. 11, 2018); *see also* T-Mobile Reply, at 26.

[17] *Orion*, 213 F.3d at 763 (quotation marks omitted).

[18] *Damsky v. FCC*, 199 F.3d 527, 529 (D.C. Cir. 2000).

[19] *Id.* at 530.

[20] *Id.*

The D.C. Circuit affirmed. Deferring to the Commission's construction of the relevant provisions in Section 309, the Court held that the disqualified applicant was "not entitled to an auction" and that the Commission had acted reasonably in blessing "the negotiated outcome" reached by the parties.[21] The same result should obtain if the Commission adopts the Market-Based Approach.

In a related argument, T-Mobile claims that "the Commission has previously rejected" the view that Section 309(j)(6)(E) authorizes "private negotiations."[22] But the precedent T-Mobile cites does not support that claim. There, the Commission determined that a particular industry proposal to use settlement agreements to avoid mutually exclusive applications did not satisfy "the public interest."[23] Thus, while the agency rejected *that specific* proposed mechanism, nothing in the decision suggests that the FCC believed private negotiations were not permitted by the statute. Indeed, the Commission expressly acknowledged that "Section 309(j)(6)(E) requires us to adopt such methods where we find them to be 'in the public interest.'"[24] Thus, far from supporting T-Mobile's position that private negotiations are not permitted by the statute, the precedent the company cites actually confirms the C-Band Alliance's interpretation.

Comcast and NBCUniversal take an even more aggressive position. Citing *U.S. Telecom Association v. FCC*, the companies argue that the Market-Based Approach would violate Section 309(j)(6)(E) because it involves an impermissible subdelegation of the Commission's licensing authority to the C-Band Alliance.[25] This argument also fails, for at least two reasons.

First, the Market-Based Approach does not subdelegate the Commission's licensing authority. "An agency delegates its authority when it shifts to another party almost the entire determination of whether a specific statutory requirement has been satisfied, or where the agency abdicates its final reviewing authority."[26] But courts, including the D.C. Circuit in *U.S. Telecom Association*, have long acknowledged that "a federal agency entrusted with broad discretion to permit or forbid certain activities may condition its grant of permission on the decision of another entity" without running afoul of the subdelegation doctrine "so long as there is a reasonable connection between

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[21] *Id.* at 529; *see id.* at 535-36.

[22] T-Mobile Reply, at 26 & n.90.

[23] *See Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band*, Second Report and Order, 12 FCC Rcd. 19079, 19104 (1997).

[24] *See id.*

[25] Reply Comments of Comcast Corporation and NBCUniversal Media, LLC, GN Docket No. 18-122, at 10 (Dec. 11, 2018) (citing *U.S. Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004).

[26] *Louisiana Forestry Ass'n Inc. v. Sec'y U.S. Dep't of Labor*, 745 F.3d 653, 672 (3d Cir. 2014) (citation and ellipses omitted).

the outside entity's decision and the federal agency's determination."[27] The Market-Based Approach falls well within the precedents finding an acceptable conditioning on outside party input rather than an impermissible subdelegation. Under the Market-Based Approach, the Commission would require as a condition of accepting an application for a spectrum license the completion of a negotiated spectrum clearing agreement. But all other aspects of the licensing determination—including, for example, the assessment of the applicant's "citizenship, character, and financial, technical, and other qualifications . . . to operate the station"[28]—would remain with the Commission. So too would the final authority to approve or deny the license. The Market-Based Approach therefore does not involve an impermissible subdelegation to the C-Band Alliance.

Second, subdelegation is not *per se* prohibited; it is only impermissible if it is not authorized by statute. To the extent the Market-Based Approach were found to subdelegate authority to the C-Band Alliance, that subdelegation would be authorized by Section 309(j)(6)(E)'s direction to explore "negotiation" where consistent with the public interest.[29] As noted above, courts have recognized that Section 309(j)(6)(E) contemplates negotiated agreements between private parties.[30] That distinguishes the provision at issue here from the statute involved in *U.S. Telecom Association*, which "instruct[ed] 'the Commission' to 'determine' which network elements" would be made available to competitors on an unbundled basis and contained no hint that the Commission could involve outside parties.[31]

In short, there is no subdelegation of the type that was at issue in *U.S. Telecom Association*, and even if there were, the statute plainly contemplates that entities other than the Commission are permitted to play a central role in determining whether competitive bidding will be required.

C. The Market-Based Approach Is Consistent With Section 309(j)(3).

T-Mobile also claims that "[p]rivate spectrum transactions contravene the purpose of Section 309(j)(3), which requires the Commission to 'protect the public interest' when assigning licenses by auction."[32] According to T-Mobile, acceptance of the Market-Based Approach proposed by

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[27] *U.S. Telecom Ass'n*, 359 F.3d at 567 (collecting cases).

[28] 47 U.S.C. § 308(b).

[29] 47 U.S.C. § 309(j)(6)(E).

[30] In addition to the cases cited above, see *Neustar, Inc. v. FCC*, 857 F.3d 886, 901 (D.C. Cir. 2017), which affirmed an FCC order designating a numbering administrator based upon its selection by a private entity acting as a "delegated decisionmaker."

[31] *U.S. Telecom Ass'n*, 359 F.3d at 565 (brackets omitted) (quoting 47 U.S.C. § 251(d)(2)).

[32] T-Mobile Reply, at 27.

the C-Band Alliance might permit "self-interested private operators" to "undervalue or overvalue spectrum based on their own interests and market power."[33] This argument is a red herring.

First, as T-Mobile concedes, Section 309(j)(3), by its text, applies only where "the Commission" issues licenses "by competitive bidding."[34] In that circumstance, Section 309(j)(3) requires the Commission to promote certain statutory objectives.[35] But the provision does not purport to expand through the enumeration of these objectives the scope of competitive bidding authorized by Section 309(j)(1)—*i.e.*, where mutually exclusive applications are accepted consistent with Section 309(j)(6)(E). Nor does it purport to limit the Commission's "obligation" under Section(j)(6)(E) to "avoid" acceptance of mutually exclusive applications where consistent with the public interest. To the contrary, as the Commission has explained, the objectives enumerated

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[33] *Id.*, at 27.

[34] 47 U.S.C. § 309(j)(3); *see* T-Mobile Reply 27 n.92.

[35] The objectives enumerated in 47 U.S.C. § 309(j)(3) are:

> (A) the development and rapid deployment of new technologies, products, and services for the benefit of the public, including those residing in rural areas, without administrative or judicial delays;
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> (B) promoting economic opportunity and competition and ensuring that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women;
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> (C) recovery for the public of a portion of the value of the public spectrum resource made available for commercial use and avoidance of unjust enrichment through the methods employed to award uses of that resource;
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> (D) efficient and intensive use of the electromagnetic spectrum;
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> (E) ensure that, in the scheduling of any competitive bidding under this subsection, an adequate period is allowed—
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> > (i) before issuance of bidding rules, to permit notice and comment on proposed auction procedures; and
> >
> > (ii) after issuance of bidding rules, to ensure that interested parties have a sufficient time to develop business plans, assess market conditions, and evaluate the availability of equipment for the relevant services; and
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> (F) for any auction of eligible frequencies described in [47 U.S.C. 923(g)(2)], the recovery of 110 percent of estimated relocation or sharing costs as provided to the Commission pursuant to [47 U.S.C. 923(g)(4)].

in Section 309(j)(3) function as limits on the Commission's use of its auction authority.[36] Thus, the enumeration of certain objectives in Section 309(j)(3) does not provide support for T-Mobile's position that the Commission must reject the Market-Based Approach in favor of an auction.

Second, to the extent the Commission has discretion to consider the objectives outlined in Section 309(j)(3) when determining whether the avoidance of mutually exclusive applications is in the public interest under Section 309(j)(6)(E), the Market-Based Approach advances those objectives. The C-Band Alliance has previously explained how the Market-Based Approach will achieve pro-competitive benefits,[37] promote the rapid deployment of 5G technologies and services,[38] and maximize the public utility of the C-band Downlink.[39] These public interest goals are fully consistent with Section 309(j)(3), which directs the Commission to promote "economic opportunity and competition," "rapid deployment of new technologies," and "efficient and intensive use of the electromagnetic spectrum."[40]

T-Mobile provides no persuasive argument to the contrary. For example, the company worries that the Market-Based Approach would fail to appropriately value the C-band Downlink spectrum, but fails to account for evidence in the record regarding the competitive pressure afforded by the availability of other spectrum suitable for terrestrial use.[41] Similarly, T-Mobile speculates that "[p]rivate spectrum negotiations . . . are not likely to result in optimal outcomes" when conducted by "satellite operators," but in the next breath insists that wireless carriers like itself should remain "free to negotiate different arrangements post-auction."[42] These insubstantial and self-serving objections fail to show how the Market-Based Approach is inconsistent with Section 309(j)(3). Thus, to the extent the Commission considers the policy goals outlined in Section 309(j)(3), the Market-Based Approach would fully advance them.

D. The Market-Based Approach Is Consistent With Section 309(j)(8)(G).

T-Mobile further observes that Section 309(j)(8)(G) "states that the Commission may encourage a licensee to relinquish voluntarily some or all of its spectrum in order to permit assignment of

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[36] *See Implementation of Section 309(j) of the Communications Act*, Second Report and Order, 9 FCC Rcd. 2348, 2356 (1994) ("a system of competitive bidding may only be used if it would promote the objectives of Section 309(j)(3)"); *cf. DIRECTV*, 110 F.3d at 827.

[37] *See* C-Band Comments, at 34; C-Band Reply Comments 29-33.

[38] *See* C-Band Comments, at 11, 31; C-Band Reply Comments 24-29.

[39] *See* C-Band Comments, at 31.

[40] 47 U.S.C. § 309(j)(3)(A), (B), (D).

[41] *See* C-Band Comments, at 35-37; C-Band Reply Comments 27.

[42] T-Mobile Reply, at 27-28.

flexible-use licenses by sharing some of the proceeds of the auction revenue with the licensee."[43] According to T-Mobile, the Market-Based Approach would do the same thing, "except without the Commission involvement that the Communications Act requires."[44]

Once again, the provision T-Mobile cites is inapposite. Like Section 309(j)(3), Section 309(j)(8)(G) applies only in the context where the Commission has already decided to employ "a competitive bidding system under this subsection."[45] It does not limit the Commission's antecedent obligation to consider other means to avoid competitive bidding in the first place.

To be sure, if Congress had wanted to impose a requirement that *all* licensees be awarded through competitive bidding, it could have done so. Similarly, if Congress had wanted to mandate that *all* private transactions concerning band clearing include a percentage cut for the government, it could have done that, as well. It did neither.

E. The Market-Based Approach Is Consistent With Sections 303(c) And 307(b).

Finally, T-Mobile asserts that the Market-Based Approach would usurp the Commission's role under Sections 303(c) to "assign" frequencies to stations and under Section 307(b) to "distribut[e]" frequencies equitably "among the several States and communities."[46] According to T-Mobile, the Market-Based Approach violates these provisions because it transfers the Commission's statutorily assigned duties to the C-Band Alliance.

Both arguments fail for the same reasons. First, as explained above, there is no improper subdelegation of authority under the Market-Based Approach either because the Commission would retain its licensing authority, or because Section 309(j)(6)(E) expressly authorizes subdelegation.

Second, neither provision cited by T-Mobile overcomes the specific instruction in Section 309(j)(6)(E) to "avoid" mutual exclusivity when it serves the public interest. Sections 303(c) and 307(b) are general provisions that assign to the Commission the responsibility for assigning spectrum licenses on a nondiscriminatory basis.[47] Neither provision purports to prescribe any particular means to be used, or a precise result to be achieved. By contrast, Section 309(j)(6)(E)

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[43] *Id.* at 28.

[44] *Id.*

[45] 47 U.S.C. § 309(j)(8)(G)(i); *see also id.* § 309(j)(8)(A).

[46] T-Mobile Reply, at 28-29 (quoting 47 U.S.C. §§ 303(c), 307(b)); *see also* Comcast Reply, at 10 n.25 (echoing Section 303(b) argument).

[47] *See, e.g.*, *Harris Found. v. FCC*, 776 F.3d 21, 25 (D.C. Cir. 2015) (explaining Section 307(b) leaves to Commission "discretion" "the task of balancing myriad considerations" relating to geographic distribution).

specifically directs the Commission "to take certain steps" in the assignment of licenses,[48] thus bringing it within the well-established canon of statutory construction that "the specific governs the general."[49] Application of that canon is particularly appropriate where, as in the Communications Act, "Congress has enacted a comprehensive scheme and has deliberately targeted specific problems with specific solutions."[50] Thus, to the extent that Section 309(j)(6)(E) authorizes the Market-Based Approach advocated by the C-Band Alliance, the general provisions in Sections 303(c) and 307(b) should not be read to contradict this specific provision.

II. Precedent Supports The Market-Based Approach To Using Secondary Market Agreements To Clear Spectrum For Flexible Use Licensees.

The C-Band Alliance's purpose is to solve a novel spectrum resource issue[51] with a cutting-edge, market-based solution that will bring valuable spectrum to market years ahead of any alternative proposal. As a recent *ex parte* letter filed by the C-Band Alliance makes clear, the Commission has a long track record of expanding rights and approving transactions to maximize spectrum use.[52] T-Mobile responds that no precedent is perfectly analogous—a banal observation, given the unique challenges raised in this proceeding, including shared access by satellite operators to C-band spectrum.[53]

More tellingly, T-Mobile fails to point to any Commission decision contrary to those cited by the C-Band Alliance. Whether by design or misunderstanding, T-Mobile mischaracterizes the CBA

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[48] *See DIRECTV*, 110 F.3d at 828.

[49] *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012) (quoting *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992)).

[50] *Id.* (citation omitted).

[51] *See Expanding Flexible Use of the 3.7-4.2 GHz Band et al.*, Order and Notice of Proposed Rulemaking, 33 FCC Rcd. 6915, 6935-37 (2018) (describing the band-specific difficulties that make a government-run auction infeasible) ("*NPRM*").

[52] *See Ex Parte* Letter of the C-Band Alliance, Att. A, GN Docket No. 18-122 (Jan. 2, 2019) ("CBA Letter").

[53] *See NPRM* at 6920 ("These unique characteristics [of licensing and use of the C-band] are relevant when considering possible mechanisms for a band transition that would account for incumbent operations."); *id.* at 6938 ("A secondary market approach might make spectrum available more quickly than other available mechanisms, such as an FCC auction, and thus could facilitate rapid deployment of next generation wireless broadband networks.").

Letter as claiming the Commission has granted expanded rights for immediate sale.[54] But the CBA Letter said no such thing. As the CBA Letter explained,

> [f]requently, the Commission grants additional flexibility or new flexible use rights to incumbents, who then are able to use those expanded rights and/or conduct secondary market transactions to convey those rights. . . . Here, the CBA proposal seeks a much narrower expansion of its members' rights in order to convey clearing rights through secondary market transactions . . . .

In each of the examples that the C-Band Alliance cited—BRS/EBS,[55] AWS-4,[56] Straight Path,[57] FiberTower[58]—the Commission granted additional or new flexible-use rights that licensees could then use or transfer. Rather than address this undeniable fact, T-Mobile puts words in the C-Band Alliance's mouth and attributes to the CBA Letter statements that it never made.

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[54] *See Ex Parte* Letter of T-Mobile USA, Inc., GN Docket No. 18-122, at 1 (Jan. 30, 2019) ("T-Mobile *Ex Parte*") ("Contrary to the C-Band Alliance's assertions, the Commission has not previously granted new or expanded rights to incumbent licensees with the intention that those rights would be immediately sold . . . .").

[55] *Amendment to 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) (granting flexible use rights to the incumbents and new users of the Educational Broadband Service and the Broadband Radio Service).

[56] *Service Rules for Advanced Wireless Services in the 2000-2020 MHz and 2180-2200 MHz Bands et al.*, Report and Order and Order of Proposed Modification, 27 FCC Rcd. 16102 (2012) (approving DISH's acquisitions of New DBSD and TerreStar); *Applications for consent to assign/transfer control of licenses and authorizations of New DBSD Debtor-in-Possession and TerreStar Debtor-in-Possession*, Order, 27 FCC Rcd. 2250 (2012) (granting AWS-4 authority to MSS licensees, including DISH).

[57] *Application of Verizon Communications Inc. and Straight Path Communications, Inc. For Consent to Transfer Control of Local Multipoint Distribution Service, 39 GHz, Common Carrier Point-to-Point Microwave, and 3650-3700 MHz Service Licenses*, Memorandum Opinion and Order, 33 FCC Rcd. 188 (WTB 2018) (approving Verizon's acquisition of Straight Path after Straight Path's licenses were granted terrestrial mobile allocation).

[58] *Application of AT&T Mobility Spectrum LLC and FiberTower Corporation For Consent to Transfer Control of 39 GHz Licenses*, Memorandum Opinion and Order, 33 FCC Rcd. 1251 (WTB 2018) (approving AT&T's acquisition of FiberTower after FiberTower's licenses were granted terrestrial mobile allocation).

In fact, it is T-Mobile's position that flouts Commission precedent. According to T-Mobile, the sales of 28 and 39 GHz licenses from Straight Path and FiberTower were not in the public interest because the sales "prevent[ed] others from accessing the spectrum."[59] But that logic proves too much, as it applies to every sale that involves transfers of spectrum licenses, including the spectrum that T-Mobile seeks to acquire from Sprint. And the Commission squarely rejected T-Mobile's arguments about "windfall" profits in the Straight Path and the FiberTower proceedings.[60] Despite its attempt to re-litigate the discredited positions it took in those earlier proceedings, T-Mobile—perhaps in an act of projection—brazenly accuses others of disregarding Commission precedent.

T-Mobile also cites irrelevant examples to show that government-run actions are better than private transactions. For example, T-Mobile points to DISH's supposed failure to build out its AWS-4 spectrum.[61] Even if that is true, it has no causal relationship with how the licensee acquired the spectrum in the first place. Indeed, SpectrumCo and Cox failed to build out AWS-1 licenses acquired through government auction, which the Commission identified as a justification for approving the license transfers to Verizon.[62] Anti-warehousing and build-out rules can ensure that licensees deploy their spectrum, irrespective of whether the Commission uses a market-based approach or T-Mobile's government-run design.

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Please contact the undersigned with any questions regarding this letter.

Respectfully submitted,

/s/ Jennifer D. Hindin
Jennifer D. Hindin
Counsel for the C-Band Alliance

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[59] T-Mobile *Ex Parte* at 4.

[60] *See, e.g.*, Comments of T-Mobile USA, Inc., ULS File No. 0007783428, at 2 (Mar. 7, 2018); Comments of T-Mobile USA, Inc., ULS File Nos. 0007652635 & 0007652637, at 6 (Mar. 27, 2018).

[61] T-Mobile *Ex Parte* at 4.

[62] *See Applications of Cellco Partnership d/b/a Verizon Wireless and SpectrumCo LLC and Cox TMI, LLC For Consent To Assign AWS-1 Licenses et al.*, Memorandum Opinion and Order and Declaratory Ruling, 27 FCC Rcd. 10698, 10715 (2012) ("[T]he Commission has encouraged the use of secondary market transactions such as the one before us to transition unused spectrum to more efficient use and allow network providers to obtain access to needed spectrum for broadband deployment.").