

**STATEMENT OF COMMISSIONER GEOFFREY STARKS
DISSENTING**

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

We live in an age when the demand for wireless service is growing at an almost-exponential pace. It seems like everyone is on their smartphone – on the street, in the subway, and even up here on the dais! But there are less obvious activities taking place too – like the utility connecting sensors throughout its power grid to monitor energy consumption; the manufacturer placing inventory-tracking monitors throughout its factory; or the city installing routers on its buses to provide free Wi-Fi to passengers. This demand will only increase with time, and full deployment of Fifth-Generation wireless service and its capabilities will kick things into high gear.

5G and the applications that will grow from it are critical to our economic future. They promise to change the way we work, increase our health and safety, and create new opportunities for education and entertainment. The number of 5G connections is growing fast around the world. According to one recent study, the number of 5G global connections will reach 1.3 billion by 2025, covering 40 percent of the world's population or approximately 2.7 billion people.

Mid-band spectrum like that at issue in this proceeding is essential to this future. Compared to the millimeter wave spectrum that has been the focus of late, transmissions on mid-band spectrum can travel greater distances and penetrate farther into buildings. Moreover, mid-band spectrum is not only important for 5G, but can also help address the problem of internet inequality by connecting people who live outside the most densely populated urban centers.

While the Commission has been working on other mid-band spectrum bands, none have received as much attention in the last few years as the C-Band. Among other purposes, this band is currently used by fixed satellite service operators to deliver programming to broadcasters and cable operators; however, overall use of the C-Band has been declining for decades as customers take advantage of alternative technologies. The underused nature of the band, combined with its size and proximity to the 3.5 GHz CBRS band, make it an ideal candidate for reallocation for expanded flexible use.

We must seize this great opportunity. But in its haste to make this spectrum available for new wireless terrestrial uses, the majority has over-stretched our legal precedent and entered into a deal that will take money from American taxpayers to placate foreign satellite operators who may not even keep up their end of the bargain. I'm concerned that today's order ultimately will most benefit these satellite operators and the largest wireless carriers, at the expense of both competition and the American taxpayer.

The days of easy spectrum decision-making are over. Low-hanging fruit has already been plucked. While technology continues to make feasible the use of spectrum bands where terrestrial wireless use was previously deemed impossible, there is only so much spectrum to go around. Basic physics dictates that we must reexamine our current spectrum allocations to determine where we can operate more efficiently. For the foreseeable future, spectrum policymaking will likely require progressively more difficult decisions, including the possibility that we will need to relocate entrenched incumbents to make room for new entrants and new technologies.

That's why it is so critical that we get today's order right – incumbents everywhere are watching, assessing whether the FCC proceeds based on a well-established and principled basis, and what it will mean for parties that seek similar arrangements.

As today's decision makes clear, the Commission has broad authority under Section 316 of the Communications Act to modify existing licenses where doing so would serve the public interest. Nor is the Commission required to have the licensees' consent – all that is necessary is for the agency to find that the modification “serves the public interest, convenience and necessity.”¹ And while the agency cannot “fundamentally change” a license under Section 316 of the Communications Act, a modification is permissible where a licensee can continue to provide substantially the same service.²

Unfortunately, certain members of the apparently defunct C-Band Alliance have repeatedly dashed our hopes of quickly making C-Band spectrum available for terrestrial wireless use by threatening to sue and overturn any order. They have argued that they deserve not only reasonable reallocation expenses as a result of any C-Band reallocation, but also a windfall of historic proportions. To make matters worse, they also sought to control the process for license reassignment and payments through a private sale or auction, arguing that this is the fastest way to put C-Band spectrum to terrestrial wireless use.

Several months ago, I said “enough,” and was the first on the Commission to demand a public auction. I'm glad that my colleagues all agree with me here today and say “yes” to the public auction. A private sale or auction of the C-Band would have been unlawful under Section 309(j) of the Act, which requires the use of a “system of competitive bidding” in which “all proceeds” are deposited in the U.S. Treasury.³ The private sale or auction proposals, however, would have converted funds that should go to the U.S. Treasury into an unprecedented windfall for a group of private entities. It would have established a terrible precedent for wireless policy by handing control over the licensing process to that same small group of foreign satellite operators. And our experience with conducting public spectrum auctions demonstrates that a public auction will not only ensure a fair distribution of the auction funds but also will quickly make the C-Band spectrum available for terrestrial wireless use.

I'm glad that we have chosen to conduct a public auction. But I must object to the majority's response to the satellite operators' demands. To be clear, I recognize that the threat of litigation and/or bankruptcy is real and could delay the availability of this important spectrum band. I also recognize the *Emerging Technologies* line of cases, in which the Commission created an incentive regime to encourage incumbent licensees to expedite spectrum reallocation efforts.

But those cases make it clear that, while the Commission can require winning bidders to contribute to a fund for the benefit of the incumbent licensees, those mandatory payments are limited to reasonable relocation costs. In those proceedings, any payments to encourage incumbents to expedite their departure from the affected spectrum beyond ordinary relocation costs resulted from voluntary negotiations between the bidders and the incumbents, subject to the Commission's oversight.

In this case, rather than voluntary payments negotiated between private parties, the majority has adopted a scheme of mandatory payments from winning bidders into a fund calculated and divided via a process that remains something of a mystery. Such an approach is not supported by our statutory authority. Section 309(j) of the Act authorizes the Commission to conduct competitive bidding for licenses to operate consistent with the agency's rules. But it does not include any authority to require, in addition, that winning bidders contribute towards a fund that would result in billions of dollars paid to satellite incumbent operators beyond their reasonable relocation costs.

¹ *California Metro Mobile Communications, Inc. v. FCC*, 365 F.3d 38, 45 (D.C. 2004).

² *Cnty Television, Inc. v. FCC*, 216 F.3d 1136, 1140-41 (D.C. Cir. 2000).

³ 47 U.S.C. § 309(j).

The majority points to the Commission’s authority to require payment of those costs as support for its mandatory accelerated relocation payment scheme. But the order never cites any authority permitting the Commission to require winning bidders to compensate incumbents above their reasonable costs. Instead, the majority discusses potential issues with a voluntary negotiation scheme and the economic benefits of an accelerated rollout of 5G in the C-Band. While these are worthwhile policy considerations, none of them create new legal authority for the scheme we adopt today.

Instead, the approach in today’s order creates a potential spectrum policy headache that I fear we will be addressing for years to come. As I mentioned earlier, the age of “easy” spectrum allocation decisions is over. For the foreseeable future, this agency will have to re-distribute underutilized spectrum away from incumbents – both federal and non-federal -- to make it available for more efficient use. Requiring billions of dollars in mandatory payments to the incumbents here will only encourage demands for similar treatment from similarly situated incumbents. This may not be especially problematic for large, well-funded bidders, but the additional expense of mandatory contributions towards an “accelerated relocation” fund may place bidders with fewer resources at a significant financial disadvantage.

But the issues don’t stop with the mandatory nature of the incentive payments. As I noted earlier, the courts have permitted incentive payments that result from negotiations between the new entrants and the incumbent licensees. Such payments, however, must be “proportionate to the cost of providing comparable facilities.”⁴

In this case, however, the majority does not even attempt to calculate the additional cost to the satellite operators of an expedited exit from the lower portion of the C-Band. Instead, it bases the incentive payments on an estimate on how much an accelerated relocation would increase the profits of new licensees. Under the order’s reasoning, the accelerated payments should be based on the amount that the “overlay licensees themselves would be willing to pay to clear this spectrum early.” The order calculates that this value is about \$10.52 billion, then determines that the satellite operators should receive \$9.7 billion, which it characterizes as “reasonably close” to that amount. As explained above, however, neither our rules nor our caselaw justify such a basis for incentive payments. And even if we accepted that the Commission can both require bidders to make incentive payments unrelated to the cost of accelerated relocation and set the exact amount of those payments, how we arrived at the precise \$9.7 billion figure is never explained other than as a “necessarily imprecise” result of a “line-drawing exercise.”

Moreover, the order’s division of the \$9.7 billion amongst some – but not all – of the satellite operators authorized to operate in the C-Band is vaguely explained as based on the “relative contribution that each eligible space station operator is likely to make towards accelerating the transition of the 3.7-3.98 GHz band to flexible use and clearing the 3.98-4.0 GHz band....”⁵ Late last week, SES introduced an accounting firm’s analysis – attested to by the members of the C-Band Alliance at the time –

⁴ See *Teledesic LLC v. FCC*, 275 F.3d 75, 82 (D.C. Cir. 2001); *Amendment to the Commission’s Rules Regarding a Plan for Sharing the Costs of Microwave Relocation*, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 8825, ¶ 32 (1996) (when negotiating voluntary accelerated relocation payments, to constitute good faith negotiations, incumbents may only seek premiums for accelerated clearing that are reasonably related to the cost of providing comparable facilities). See also *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*, Ninth Report and Order, 21 FCC Rcd 4473, 4546 (2006) (in determining whether an incumbent is bargaining in good faith over accelerated relocation payments, the Commission will consider whether the demand for payment is “directly related to relocation” and “proportion[ate]” to “the cost of providing comparable facilities”).

⁵ Report and Order at para. 227.

describing the 2017 C-band downlink revenue shares for those operators.⁶ The order asserts that this filing is the “best evidence” in the record in support of the division of the \$9.7 billion in accelerated relocation payments because it reflects the C-Band Alliance members’ own understanding of their relative contribution to clearing the spectrum.⁷

But this filing contains no information supporting its findings and does not even discuss all of the operators receiving money under this order. Indeed, Intelsat has responded that this filing merely reflects “a private agreement that was predicated on a completely different structure is legally irrelevant and factually unsupported.”⁸ Even the order recognizes that there are many variables relevant to each operator’s “contribution” to clearing the spectrum, including their number of earth stations, transponder usage, and coverage. While we do consider some of those factors in how we divide the acceleration payments, however, we give the greatest weight by far to the C-Band Alliance report.

I do not believe that we should delegate our statutory responsibilities and provide billions of dollars to foreign satellite operators based primarily on an opaque private agreement between the parties that most stand to benefit from our decision. And even if we ignore those issues, we still have the underlying problem that nothing in the record suggests that the \$9.7 billion figure has any relation to the actual additional costs that the satellite operators will incur if they expedite their relocation to meet the deadlines in this decision.

We are told to accept these financial and legal gymnastics because, in the end, this will ensure that the C-Band will be put to terrestrial use as quickly as possible. But, as events in the last few weeks have shown, the foundation of this bargain appears to be crumbling. In the last two weeks, a large investor has acquired a major stake in Intelsat and is pushing the company to seek a larger payout by declining the accelerated relocation payments, declaring bankruptcy and taking the Commission to court.⁹ Since then, Intelsat has effectively declared the end of the C-Band Alliance and filed a series of *ex partes* objecting to the \$9.7 billion overall payout as too low, demanding as much as 67 percent of the \$9.7 billion and disputing our authority to modify its licenses in the first place.¹⁰ Meanwhile, SES argues that, if anything, it also deserves an increased percentage of the \$9.7 billion, and arguing that any adjustment in Intelsat’s favor would simply be “placate[ing] disgruntled, financially-troubled companies.”¹¹ Finally, Eutelsat, another former member of the C-Band Alliance has proposed an entirely different calculation model that would award it an additional \$1 billion, at the expense of SES.¹² The C-Band Alliance has turned into a circular firing squad.

⁶ Letter from John Purvis, Chief Legal Office, SES Americom, Inc., to Marlene H. Dortch, Secretary, FCC, GN Docket No. 18-122 (filed Feb. 20, 2020).

⁷ Report and Order at para. 228.

⁸ Letter from Laura H. Phillips, Counsel, Intelsat US LLC, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 18-122 (filed Feb. 21, 2020).

⁹ Alexandra Scaggs, “David Tepper Wants Intelsat to Fight the FCC on 5G Spectrum Move. Its Stock Surged 26%,” *Barron’s* (Feb. 18, 2020), at <https://www.barrons.com/articles/david-tepper-wants-intelsat-to-fight-the-fcc-on-5g-spectrum-move-its-stock-surged-26-51582064179>.

¹⁰ Letter from Laura H. Phillips, Counsel, Intelsat US LLC, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 18-122 (filed Feb. 21, 2020).

¹¹ Letter from John Purvis, Chief Legal Officer, SES Americom Inc., to Marlene H. Dortch, Secretary, FCC, GN Docket No. 18-122 (filed Feb. 20, 2020).

¹² Letter from Carlos M. Nalda, Consultant, Eutelsat S.A., to Marlene H. Dortch, Secretary, FCC, GN Docket No. 18-122, at 5 (filed Feb. 20, 2020).

After years of debate and thousands of pages of comments, it would be ironic if, having compromised on so much, we ended up in the same position that we had so desperately hoped to avoid – stuck in litigation and with any auction on indefinite hold. But that appears to be a very real possibility at this moment.

It didn't have to be this way. We could have followed our precedent and established clear rules and strict deadlines to govern voluntary negotiations that were consistent with our precedent. Even now, Congress is considering bipartisan legislation that would grant us clear authority to auction this spectrum in a manner that would clear away the threat of litigation and direct auction proceeds towards funding rural broadband and next-generation 911 services. I remain hopeful that Congress will provide us guidance and authority to reduce the threat of litigation and empower us to address these critical public policy needs.

One final note. Congress directed the Commission to design auctions that “promot[e] economic opportunity and competition . . . 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.”¹³ This proceeding not only represents an important opportunity to spur the future deployment of 5G, but also to encourage wireless competition and diversity. As noted earlier, by requiring mandatory payments into an accelerated relocation fund, we may discourage auction participation by smaller, less well-funded bidders. But I'm also disappointed that we are refusing to place reasonable spectrum aggregation limits on the auction. Multiple parties representing small and rural carriers have urged the Commission to consider such limits to protect competition and ensure that a wide variety of applicants have access to the spectrum.¹⁴ The Commission has imposed such limits previously, including in the 3.5 GHz auction Public Notice we adopt today, and other countries have adopted similar measures with success.¹⁵ I believe we should have followed their example.

Finally, while I disagree with much of the reasoning of this order, I would be remiss if I didn't acknowledge the hard work of the Commission staff throughout the building on this proceeding. Thank you all for your continued service.

¹³ 47 U.S.C. § 309(j)(3)(B).

¹⁴ *See, e.g.*, Letter from Competitive Carriers Association, NTCA – The Rural Broadband Association, INCOMPAS, Wireless Internet Service Providers Association, and Computer & Communications Industry Association to Marlene H. Dortch, Secretary, FCC, GN Docket No. 18-122 (filed Feb. 18, 2020).

¹⁵ *See* Letter from Steve B. Sharkey, T-Mobile, Vice-President, Government Affairs, Technology and Engineering Policy, T-Mobile USA, Inc., to Marlene Dortch, Secretary, FCC, GN Docket 18-122 (filed Feb. 5, 2020) (citing Taiwan, Italy, Canada).