

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington DC 50554**

In the Matter of the Right of)
EBS Licensees to Sell)

Docket No. _____

PETITION FOR DECLARATORY RULING
OF CHRISTIAN COLLEGE OF GEORGIA, INC.

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TABLE OF CONTENTS

I. SUMMARY	2
II. PETITION	4
III. STATEMENT OF FACTS	4
IV. ARGUMENT	7
1. Regulatory Background.	7
2. While the Commission has explicitly ruled that de facto leases can be sold to third parties, it must make this clear to T-Mobile.	9
3. If T-Mobile's EBS leases prevent license assignments, they were a transfer of control when signed and violated Section 310(d) of the Communications Act.	11
4. T-Mobile is taking a \$4.526 billion windfall away from education.	13
5. T-Mobile's position raises competitive and public interest questions and completely undermines future overlay auctions in EBS.	16
V. CONCLUSION	17

I. SUMMARY

Christian College of Georgia, Inc. requests the Federal Communications Commission (“Commission”) to issue a declaratory ruling pursuant to Rule 1.2, 47 *CFR* 1.2, stating that spectrum leases in the Educational Broadband Service (“EBS”) may not prohibit the sale, assignment, or transfer of the EBS license. The Commission should make clear that to the extent a spectrum lessee, such as T-Mobile, asserts that terms in its leases with Christian College and others prevent sale, assignment, or transfer of the license, the terms are void and unenforceable as contrary to Commission precedents and policy and the Communications Act.

T-Mobile has made the stunning claim that as mere lessee it controls to whom its lessor, licensee Christian College, can sell: It can only sell to T-Mobile. T-Mobile first made this claim after learning that the college had received an unsolicited offer for its license of \$5.526 million from the private investment company WCO Spectrum. T-Mobile’s counteroffer was \$1 million or 18% of WCO’s offer.

Although the Commission has clearly ruled EBS licensees are free to sell, T-Mobile, which holds a majority position in the 2,046 EBS leases, ignores the precedent. It has threatened Christian College and may be threatening other EBS licensees wishing to sell.

T-Mobile’s claim is contrary to fifty-eight years of Commission precedent on the educational band. It is directly counter to repeated Commission pronouncements that licensees can sell. It turns T-Mobile’s EBS leases into a vehicle for control of the EBS licenses in violation of Section 310(d) of the Communications Act. It destroys the Commission’s fifteen-year old policy on secondary markets in spectrum by allowing a

lessee in the secondary market to control the lessor in the primary market. It gives T-Mobile a windfall estimated to be at least \$4.526 billion that was intended for education. Finally, by essentially converting leases into licenses, it completely undermines future overlay auctions of EBS white space, giving T-Mobile substantial advantages over potential, competing bidders in the geographic areas where it holds leases.

II. PETITION

Christian College requests the Commission declare that T-Mobile may not prohibit the sale of the EBS license of its lessors and that the prohibition is contrary to Commission precedent and policy and the Communications Act. Any such terms in a lease are void. Licensees are free to sell, assign, and transfer their license subject only to fair and reasonable provisions in a lease relating to assignment of the lease. Given Christian College's need for capital, the estimated \$4.525 billion that may be at stake in this matter, and the impact of this ruling on white space overlay auctions, the college asks the Commission to urgently issue a declaratory ruling.

III. STATEMENT OF FACTS

Christian College of Georgia holds Educational Broadband Service license WND620 covering Athens, Georgia. Founded in Athens in 1947, the college offered a supplemental, denominational curriculum for students at the nearby University of Georgia who planned to enter the ministry of the Disciples of Christ, a mainline Protestant denomination. The college now provides a remote curriculum and certification for its own ministries and certification services for the ministries of other denominations.

In 1992, Christian College obtained an Instructional Television Fixed Service (ITFS) license and entered into what was called an "Excess Capacity Airtime Lease" with

BellSouth Wireless Cable, Inc. BellSouth would later assign the lease to AT&T, which still later assigned it to Clearwire Corporation. In 2009, Clearwire and the college entered into an entirely new, thirty-year “de facto” lease. A similar series of assignments followed. Clearwire assigned the lease to Sprint Corporation which assigned it to the current holder, T-Mobile. The terms of the lease are confidential, but they are undoubtedly common to those throughout the industry. As the Commission generalized in opening EBS to commercial entities two years ago:

[T]here are 2,046 long-term de facto control leases involving EBS licenses. The majority of those leases are with Sprint, but there are other lessees in the 2.5 GHz band. These leases are authorized to have terms of up to 30 years and often contain rights of first refusal or purchase options.¹

Since their inception in 1963 and until changed in 2019, Commission rules on ITFS and EBS provided that only educational entities, as defined by the rules, could hold the licenses. This restriction was removed in 2019, allowing any otherwise eligible entity, including commercial carriers like T-Mobile, to hold an EBS license. Importantly though, neither Clearwire nor any of its assignees could hold an EBS license until the FCC rules were changed in 2019.

With the eligibility rules changed, the private investment company WCO Spectrum made an unsolicited offer to Christian College in June 2021 to buy its license for \$5.526 million. The offer was to be subject to the lease, meaning that Christian College would assign the lease to WCO just as the excess capacity lease was assigned from BellSouth to AT&T to Clearwire and Clearwire’s de facto lease was assigned to Sprint to T-Mobile. As the offer said, the assignment would not affect T-Mobile’s right to

¹ *Transforming the 2.5 GHz Band*, 34 FCC Rcd 5446, 5474 (July 11, 2019).

use the spectrum. The rent would simply go to WCO rather than Christian College, and WCO would have other obligations under the lease.

In consequence, in early July, Christian College through counsel asked T-Mobile if it was interested in buying the license and, if so, what it might pay. At T-Mobile's request, the college provided a copy of WCO Spectrum's letter with the \$5.526 million offer.

The next communication Christian College received from T-Mobile came in a letter dated August 11, 2021, from its counsel. (Attached). The letter asserted that the lease prohibits Christian College from selling its license and concluded by saying:

In short, the Lease does not permit the College to sell or assign the License to WCO. Please also be advised that T-Mobile demands strict adherence to all provisions of the Lease including the exclusivity provision, Lease §3(a); the provision for transfers or assignments, *id.* §10; the Competition provision, *id.* §13; and the confidentiality and Non-Disclosure provisions, *id.* §14.

Christian College viewed the letter as a threat of court litigation if it negotiated with WCO. It couldn't afford a court fight with T-Mobile. It did not desire to play David to T-Mobile's Goliath. While the college's tight budget for 2021 is well under \$1 million, T-Mobile's annual revenue for 2020 was \$68.4 billion.² Christian College responded through counsel to the letter from T-Mobile's counsel by saying the college found her interpretation, that the lease barred Christian College from selling, was absurd and a violation of the Commission's rules, decisions, and policies as well as anticompetitive. On September 30, 2021, T-Mobile responded by telephone to the college's July request for what it might pay with a figure of \$1 million.

² T-Mobile Annual Report, <https://investor.t-mobile.com/financial-performance/annual-reports-and-proxy-statements/default.aspx>, accessed October 30, 2021.

Christian College wants to monetize its investment in the license and apply the proceeds to educational needs, but T-Mobile's threat blocks this. It offers about 18% of the market price. For this reason, the college requests clarification from the Commission. As recently as its 2019 decision, the Commission said EBS licensees are free to sell, but T-Mobile disagrees. A declaratory ruling is, therefore, in order.

IV. ARGUMENT

Christian College requests a declaratory ruling that T-Mobile's claim that EBS leases can prohibit sale to a third party are contrary to Commission authority and that any such terms in the lease are void. It is also important to say what this petition does not seek. Christian College is not asking the Commission to interpret the lease. For purposes of this petition, Christian College asks for a declaratory ruling on the assumption that, as counsel for T-Mobile asserts, the lease bars a sale.³

1. Regulatory Background.

EBS evolved from the Instructional Television Fixed Service. Beginning in 1963, ITFS licenses were available to educational institutions, e.g., school districts, for such purposes as beaming instructional programming from a central hub to receive-dishes on the roofs of the schools in the district. The notion was, among other things, that this early version of remote learning would close a perceived "education gap," favoring the Soviet Union. In the Cold War mentality, the fact the Soviets had beaten the United States into space with the tiny Sputnik satellite was proof that Soviet education was the better. In theory, ITFS would bring great professors into every classroom in America -- albeit on tiny cathode-ray-tube television screens.

³ To Christian College, the lease seems a straightforward lease of spectrum. It tracks Commission rules and gives T-Mobile exclusive use of the spectrum, but both the college and T-Mobile have the right to assign it, a right that is common for all kinds of leases.

ITFS received a less-than-overwhelming reception from educators. A 1980 study found there were only eighty-two ITFS stations in operation.⁴ As a result in 1983, the Commission approved allowing commercial operators to use the “excess capacity” on ITFS systems for the purpose of transmitting entertainment programming on a subscription basis. This was known as “wireless cable” with the ITFS transmitters beaming the programs to apartments and homes. Commonly, the ITFS would be used by schools during the day and by the wireless cable operators at night. This was time-sharing of the spectrum. Thus, Christian College obtained a license and entered into an excess capacity lease with BellSouth in 1992. Three years later, the Commission imposed a freeze on further applications and licenses because demand was so heavy that better procedures were needed.

But wireless cable did not live up to the hope technically or financially. The spectrum could be better used to provide wireless broadband, e.g. cellular service. As a result, in 2004, the rules were changed to this end, and the service was renamed Educational Broadband Service. While existing ITFS licensees were transitioned to EBS, the freeze on new licenses remained in effect.⁵

In the same month, the Commission adopted the concept of a “de facto” lease, allowing licensees in certain services to turn over operation of their systems to a lessee.⁶ Leases were said to be a “secondary market” in spectrum with the primary market being

⁴ The history of ITFS is summarized in *In the Matter of Amendment of Parts 2, 21, 74 and 94*, 94 F.C.C.2d 1203 (1983) para. 19.

⁵ *Facilitating the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands*, 19 FCC Rcd 14165 (June 10, 2004).

⁶ *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 (July 10, 2004).

the market for licenses. Thus, in 2009, Clearwire Corporation, which had previously been assigned Christian College's excess capacity lease, canceled it and entered into a new, de facto lease with the college.

The Commission's finding in its 1983 leasing decision that the ITFS spectrum was underutilized with only eighty-two licenses issued proved correct. Despite a freeze lasting two and a half decades, in 2019 there were 2,196 EBS licensees of which 2,046 were leased, meaning there were 150 licenses in 2019 that were not subject to leases.⁷ Stated differently, there were only sixty-eight more, non-leased licenses in 2019 than there had been in 1983.

2. While the Commission has explicitly ruled that de facto leases can be sold to third parties, it must make this clear to T-Mobile.

T-Mobile's claim that EBS leases may not be assigned is in direct conflict with repeated statements in the Commission's 2019 opinion allowing commercial entities, like T-Mobile, to purchase existing licenses. A few samples are illustrative:

[O]nce the rules become effective, both incumbent EBS licenses and new EBS licenses once issued will be free of the eligibility restrictions, and *EBS licensees may assign or transfer their licenses freely.*⁸ (emphasis added).

Perhaps thinking it had not made itself clear, the Commission said explicitly that the decision to sell remained with the licensee:

Despite some claims to the contrary, eliminating eligibility requirements will not disrupt existing arrangements. *Granting incumbent licensees additional flexibility to transfer or assign their licenses will not affect existing leases because: (1) The decision about whether to lease or transfer or assign a license remains with the EBS licensee....*⁹ (emphasis added).

⁷ *Transforming the 2.5 GHz Band*, 34 FCC Rcd 5474 para. 79.

⁸ Id. at 5451 para. 13

⁹ Id. at 5452 para. 17.

Indeed, using the legally-significant word, “control,” the Commission suggested that the right to sell an EBS license is an essential attribute of the licensee’s ownership.

The licensee, not T-Mobile, has control of all aspects of the sale decision.

Providing additional flexibility to incumbent EBS licensees by eliminating the eligibility restrictions will help ensure that *the licensee retains control* of decisions about how the license is to be used, including decisions about *whether, under what terms, and to whom to transfer or assign the license*. Incumbent EBS licensees that wish to retain their licenses and continue participating in public-private partnerships may do so; incumbent EBS licensees that wish to transfer or assign their licenses will now have greater ability to do so.¹⁰ (emphasis added).

By saying licensees would have “greater” ability to transfer their licenses under the new rules, the Commission was obviously referring to the fact that while licenses could always be transferred to educational entities under the old rules, the new rules allowed them to sell to commercial buyers, like WCO or T-Mobile, thus greatly expanding the market of eligible buyers.

T-Mobile’s claim that its leases prevent transfer of the license to anyone but T-Mobile is a recently invented argument. In 2009, when the lease was signed, T-Mobile could not have owned an EBS license. Under T-Mobile’s assertion, prior to the Commission’s 2019 ruling, an educational licensee had its hands tied. No matter how dire its financial needs, it couldn’t sell the license. This is absurd. The Commission clearly did not intend to put educators in such an impossible bind or give lessees so much control over educators’ decisions.

The letter from T-Mobile’s counsel stands in sharp contrast to the Commission’s pronouncements. Compare T-Mobile’s position, “In short, the Lease does not permit the College to sell or assign the License to WCO,” with the Commission’s view, “the

¹⁰ Id. (footnote omitted).

licensee retains control of decisions about whether, under what terms, and to whom to transfer or assign the license.” At no time has the Commission ever said that the license itself could be leased. Commission decisions have only allowed leases of “excess capacity” or “spectrum.”

3. If T-Mobile’s EBS leases prevent license assignments, they were a transfer of control when signed and violated Section 310(d) of the Communications Act.

Section 310(d) of the Communications Act prohibits the transfer of control of a license without Commission approval.¹¹ As stated in the previous section, the Commission alluded to “control” in its 2019 decision opening EBS to commercial ownership in saying EBS licensees had the right to sell their licenses. The plain fact is that a provision in an EBS lease prohibiting the sale or assignment of a license constitutes a transfer of control from the licensee to the lessee and is, therefore, a violation of Section 310(d) unless approved in advance by the Commission. Worse, in the instant case, at the time Clearwire entered into this lease with the college in 2009, Clearwire was not permitted to control an EBS license. In short, if this lease gives the lessee control over Christian College’s assignment, it was unlawful when signed in 2009 and is unlawful today.

The Commission has used a six-part test for control with respect to designated entities, which may be likened to EBS licensees in the sense that both pay less than the market price for their licenses. The Court of Appeals in SNR Wireless Licenseco, LLC v.

¹¹ “No construction permit or station license, or any rights thereunder, shall be transferred, assigned, or disposed of in any manner, voluntarily or involuntarily, directly or indirectly, or by transfer of control of any corporation holding such permit or license, to any person except upon application to the Commission and upon finding by the Commission that the public interest, convenience, and necessity will be served thereby.” 47 U.S.C. 310(d).

Federal Communications Commission, 868 F.3d 1021, 1031 (D.C. Cir. 2017) for

example summarized the test as follows.

(1) who controls the daily operations of the small business; (2) who employs, supervises, and dismisses the small business's employees; (3) whether the small business has "unfettered" use of all its facilities and equipment; (4) who covers the small business's expenses, including its operating costs; (5) who receives the small business's revenues and profits; and (6) who makes and carries out the policy decisions of the small business.

The analogy between Christian College, as an example, and the small business or designated entity in these rules may be imperfect since the college is not a for-profit telecommunications business. The analogy is further complicated by the fact that the de facto lease rules allow a lessee to perform the first five of the six factors.¹² Nonetheless, if Christian College does not have control to freely transfer its license, none of the six factors is present. Under this test, T-Mobile is in complete control of the license.

The power to sell an asset is a *sine qua non* of ownership. Commission rules expressly recognize this, again in the case of designated entities. They provide that stock interests held in trust are attributed to any person who has the sole power to sell such stock. Designated Entities, 47 CFR 1.2110(c)(i)(c). Since Christian College does not have the sole power to sell its license, it does not have control as required by the Communications Act. The lease with T-Mobile was a transfer of control.

The lease strips Christian College of all ownership rights and control over the license except the receipt of rents. The college is a hollow shell as far as the license is concerned. The control is so overwhelming that the college cannot even discuss a sale with a prospective buyer until the lease expires. T-Mobile's letter says: "Importantly, the sole exception to the exclusivity provision applies only where T-Mobile has 'elected

¹² See, *Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets*, 19 FCC Rcd 16999 (July 8, 2004).

not to renew the Agreement,’ and even then a sale of the License is only permitted “with respect to any period following the end of this Agreement.’ Lease § 3(a).”

The notion that an FCC licensee can lease its license is unprecedented, yet that is T-Mobile’s position. It claims that EBS licensees who lease their excess capacity have in fact leased the license itself. T-Mobile’s letter explicitly equates “capacity” with “license,” saying: “During the Term, Licensee will not negotiate or contract with any third party to lease, sell, assign, transfer or use any of the capacity of the Channels[.]’ Selling the License to WCO obviously would constitute “[c]ontracting with [a] third party to . . . sell . . . any of the capacity of the Channels,” and therefore is not permitted under the exclusivity provision.” Under T-Mobile’s interpretation, it, not Christian College, controls this license.

4. T-Mobile is taking a \$4.526 billion windfall away from education.

ITFS originated in the Commission’s well-intentioned desire to improve education in America. The Commission’s principal failing was in thinking it knew how to improve education better than educators did. When it later realized the spectrum was underutilized, it allowed the excess capacity to be used for commercial purposes. Worried that commercial lessees might monopolize the time on an IFTS system, the Commission eventually required the systems to carry a minimum amount of instructional programming, e.g., twenty hours per week per channel or four hours a day during the five-day school week. The Commission continued this after converting to the wireless broadband technology of EBS in 2004 and insisted that leases reserve 5% of the capacity for educational use.

But in extending the allowable lease term to thirty years, the Commission was warned about locking educators into such a long term. As a result, it allowed them to reclaim capacity for educational needs at 15, 20, and 25 years.

[W]e conclude that EBS licensees may enter into a lease with a maximum term of thirty years, subject to conditions designed to ensure that EBS licensees have a fair opportunity to re-evaluate their educational needs. We are persuaded by the analyses presented by commenters indicating the difficulty that commercial lessees may have in obtaining financing if leases are limited to a shorter duration.... [H]owever ... EBS licensees must have a mechanism to ensure that their educational, technological, and spectrum needs are being met. Therefore, we adopt a requirement for all EBS leases with a term of fifteen years or longer to include a right to review the educational use requirements of their leases every five years starting at year fifteen of the lease agreement.¹³

The educator's decision the Commission referred to, that educational needs might change, is exactly the one Christian College has reached. The \$5.526 million offered by WCO will advance the college's educational needs far more than having that money tied up in a wireless broadband system, the annual rent from which is but a fraction of what the college can realize from an outright sale.

Christian College believes these precedents not only free educators to reclaim the capacity or spectrum after 15, 20, and 25 years but also evince a policy of giving the educators, not commercial lessees, the benefit of any appreciation in the value of their licenses.

T-Mobile's claim that the college cannot sell is different from a right-of-first-refusal (ROFR), which, according to the Commission, is permitted in de facto leases. A ROFR is a right to buy at the market price. That is, if a party to a contract wants to accept another's offer, the holder of the ROFR must match the offer. Without speaking to whether this lease has a ROFR, the college notes that in the instant case T-Mobile is not

¹³ *Order on Reconsideration and Fifth Memorandum Opinion and Order and Third Memorandum Opinion and Order and Second Report and Order*, 21 FCC Rcd 4813, 5716 (April 12, 2006) para. 268.

invoking a ROFR. It claims the college cannot sell at all to a third party. It says Christian College cannot even negotiate with WCO in order to secure an offer and hence determine the market price. Yet, T-Mobile's "ballpark" price is only 18% of WCO's offer.

T-Mobile, for its part, will enjoy a staggering windfall from its position. Assuming WCO's offer is an approximation, the fair market value of the college's license is \$5.526 million. But T-Mobile believes the lease allows it to acquire the license for \$1 million. T-Mobile's offer is woefully below the fair market value and would give it a windfall of \$4.526 million. The Commission has said that T-Mobile holds a "majority" of the 2,046 leases, but a more specific number isn't available to the college.¹⁴ Nonetheless, if the disparity here between the fair market value and what T-Mobile will pay is representative, then T-Mobile's 1,024 or more leases could represent a windfall of at least \$4.526 billion if the Commission allows T-Mobile to buy out its lessors at far below market value.¹⁵

This is an unconscionable result. It is surely not the one the Commission intended by its 2019 order opening this spectrum to commercial ownership. In that decision, it said licensees would be free to sell. In that decision, it said a free market would operate. It is surely not the result intended in the 2006 decision that said lessors needed to be free to reconsider their educational needs in 15, 20, and 25 years if they were to be locked into

¹⁴ Congress has specifically mandated the Commission employ procedures in auctions "to prevent unjust enrichment." 47 USC 309(j)(3)(c). Although not mandated by Congress with respect to its 2019 decision to let commercial entities acquire EBS licenses, the Commission can certainly adopt this as its own policy.

¹⁵ The \$4.526 billion is an approximation from public information. The value of a license varies with the population within the service area. Athens is surely not the most valuable market in the United States. How much offers from T-Mobile and investors might vary for other licenses is likewise not known. Nor is T-Mobile's actual share of the EBS lease market known. The Commission has said only that T-Mobile held a "majority."

thirty-year leases. And, it is surely not the result intended by any Commission decision for a service with “education” in its name.¹⁶

5. T-Mobile’s position raises competitive and public interest questions and completely undermines future overlay auctions in EBS.

When the Commission opened the EBS spectrum to commercial ownership in 2019, T-Mobile had a majority of the 2,046 licenses, but it owned not a single license. It couldn’t. It was ineligible. But as the instant petition shows, T-Mobile claims those leases contain a Hobson Choice for licensees. Either sell to T-Mobile, or don’t sell at all.

This was not contemplated by the Commission 2006 decision that authorized de facto leases, the type of lease at issue here. That decision was premised on the existence of two separate markets. The primary market was the market for licenses themselves. The secondary market would be populated by businesses leasing from licensees. The lessees would build and operate communications systems under the authority of license held by their lessors.

Now that T-Mobile can move into the primary market it claims its lease prohibits the existing licensee from selling to anyone but T-Mobile. If approved, this will let T-Mobile extend its majority position in the secondary market into a majority position in the primary market of EBS licenses.

Furthermore, because of the 2019 ruling that allows overlay licenses, T-Mobile’s interpretation enables it to translate its majority share in the secondary market for leases into an even greater share of the primary market, the license market. In its 2019 decision,

¹⁶ Continuing to call this service educational and allowing T-Mobile to get such a windfall not only is contrary to Commission precedent but is also reminiscent of what a higher authority once said: “Is this house, which is called by My name, become a den of robbers in your eyes? Behold, I, even I, have seen it, saith Jehovah.” American Standard Bible (1901), Jeremiah 7:11.

the Commission decided that future awards of EBS licenses would be done through auctions. The geographic areas of the new licenses would cover counties. However, these new licenses would be “overlay licenses.” They would be subject to the right of existing licenses in the county to continue to operate in their geographic areas in the county. In other words, the overlay licensee could only operate in the unlicensed areas or “white space” in the county. In some counties, there is no white space. The entire county is served by existing licensees. In other counties, there are strips or fragments of white space. And some counties may be all white space.

T-Mobile’s interpretation will give an advantage in the overlay auctions for any county where it has a lease. This is because the Commission has said the overlay licensee may buy out the existing licensees. Thus, if T-Mobile participates in and wins an overlay license, it has the exclusive right to buy out the leases it has in those counties at discount prices. Competing bidders do not have this option. Indeed, a competitor who wins an overlay auction for a county where T-Mobile has a lease will never be able to buy out all the other licensees and operate a county-wide system.

This means that T-Mobile’s position as the holder of a majority of EBS licenses gives it an almost insurmountable advantage over competitors in overlay auctions. In those counties where it holds leases, the existing licensees cannot sell to the auction winner. This reduces the value of an overlay license to T-Mobile’s competitors because they cannot hope to buy out existing licensees whereas T-Mobile can.

V. CONCLUSION

For the foregoing reasons, Christian College respectfully requests that the Commission declare that T-Mobile’s EBS leases prohibiting the sale of the license are

contrary to Commission precedent and policy and the Communications Act. Any such term in the lease is void. And, licensees are free to sell, assign, and transfer their licenses subject only to any fair and reasonable provisions in the lease relating to assignment of the lease.

Respectfully submitted,

A handwritten signature in cursive script that reads "James H. Johnston".

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November 3, 2021



August 11, 2021

BY EMAIL

James Johnston
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RE: Potential Sale of EBS License WND620, Athens, Georgia (Christian College of Georgia)

Dear Mr. Johnston:

T-Mobile is in receipt of your email dated July 6, 2021, notifying us that Christian College of Georgia (the "College") has been approached by a third party, WCO Spectrum, LLC ("WCO"), seeking to acquire EBS license WND620 (the "License"). Your email further informs us that the College is interested in exploring whether to sell the License to WCO. As you note, the College leases the capacity of the License to T-Mobile subsidiary Clearwire Spectrum Holdings II LLC, under a April 13, 2009 Educational Broadband Service Long-Term *De Facto* Lease Agreement (the "Lease").

The Lease's exclusivity provision prohibits the College from selling the License to WCO: "During the Term, Licensee will not negotiate or contract with any third party to lease, sell, assign, transfer or use any of the capacity of the Channels[.]" Lease § 3(a). Selling the License to WCO obviously would constitute "[c]ontracting with [a] third party to . . . sell . . . any of the capacity of the Channels," and therefore is not permitted under the exclusivity provision.

Importantly, the sole exception to the exclusivity provision applies only where T-Mobile has "elected not to renew the Agreement," and even then a sale of the License is only permitted "with respect to any period following the end of this Agreement." Lease § 3(a). Neither condition applies here.

Nor is a sale of the License permitted under Section 10 of the Lease, which addresses only an assignment of the College's rights/obligations under the Lease, and does not permit a sale of the License itself: "Subject to Subsections 16(f)–(g), neither Clearwire nor Licensee may assign or transfer ***its rights and/or obligations under this Agreement*** without the prior written consent of the other Party, such consent not to be unreasonably withheld, conditioned, or delayed." Lease § 10 (emphasis added). Needless to say, an assignment of the College's contract rights is distinct from a sale of the License.

In short, the Lease does not permit the College to sell or assign the License to WCO. Please also be advised that T-Mobile demands strict adherence to all provisions of the Lease, including the exclusivity provision, Lease § 3(a); the provision for transfers or assignments, *id.* § 10; the Competition provision, *id.* § 13; and the Confidentiality and Non-Disclosure provision, *id.* § 14.

Sincerely,

/s/ Heather Brown

Heather Brown
Senior Counsel

cc: Dr. Bob Harris, President, Christian College of Georgia (harris0623@aol.com)

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