Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington DC 50554

In the Matter of the Right of	)	
EBS Licensees to Sell	)	Docket No. _____

REPLY TO T-MOBILE'S LETTER OPPOSITION TO CHRISTIAN COLLEGE OF GEORGIA'S PETITION FOR DECLARATORY RULING

James H. Johnston
Counsel for Christian College of Georgia, Inc.
4907 Crescent Street
Bethesda MD 20816
(202) 262-1375
jamesh.johnston@gmail.com

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TABLE OF CONTENTS

Reply to T-Mobile's Letter Opposition to Christian College of Georgia, Inc.'s Petition for Declaratory Ruling

Christian College of Georgia replies to T-Mobile's November 15, 2021 Letter Opposition to Christian College of Georgia, Inc.'s Petition for Declaratory Ruling ("Letter Opposition").

I. Summary.

T-Mobile attempts to trivialize the college's petition for declaratory ruling as a contractual spat that should be left, perhaps, to the courts of Georgia. That is hardly the case. The issue here, whether EBS licensees can sell, affects most if not all of the more than 1,000 EBS licensees who lease to T-Mobile. A few are already in litigation with the carrier. Far more have, like Christian College, been threatened with litigation. In its petition, the college provided a rough estimate that more than $4.5 billion is at issue. Both the estimate of T-Mobile's share of the EBS market and the dollar amount involved are likely conservative.

The petition asks the Commission to decide whether the windfall should go to educators or T-Mobile. At least thirty-seven public school systems in Georgia, for example, have EBS licenses. Georgia universities and private schools hold more. (A list of EBS licensees headquartered in the state compiled from the Commission's ULS database is Attachment A). The dominant shareholder of T-Mobile, on the other hand, is the German telecom giant, Deutsche Telecom, which holds 48.4% of T-Mobile's stock.[1] The real-world financial issue is whether this windfall should benefit the taxpayers of Georgia, other states, and indeed the United States or shareholders of this international behemoth.

[1] Christian Hetzner, "Deutsche Telekom aims for majority stake in T-Mobile US by 2024," *Fortune Magazine* (May 20, 2021).

At the heart of the legal challenge is Christian College's charge, which T-Mobile admits in its Letter Opposition, that T-Mobile's spectrum lease, as it interprets it, constituted a transfer of control some twelve years ago, when it was unlawful for T-Mobile and its assignors to hold an EBS license. Because of the high stakes involved, the college suggests that in addition to putting the petition on public notice, the Commission order T-Mobile to notify all its lessors of the proceeding in order to give these EBS licensees an opportunity to be heard on a matter of such importance to them.

II. The Financial Stakes Are in the Billions of Dollars.

As Christian College pointed out in its initial petition, the financial stakes with respect to its license are $4.526 million. That is, taking WCO Spectrum's offer of $5.526 million as the fair market value and subtracting T-Mobile's price of $1 million shows T-Mobile's windfall from acquiring this single license would be $4.526 million. But T-Mobile is taking the same position with other EBS licensees, and it has leases with more that 50% of the 2,046 leased, EBS licensees. Using the simple calculation of multiplying the windfall in the college's case times the 1,000 or more leases T-Mobile has yields a potential national windfall of over $4.526 billion.[2] This is an unconscionable result, and better approximations may produce a far higher number. Licensees that need to sell their licenses have to accept whatever T-Mobile offers. It is T-Mobile's price or nothing.

[2] .More sophisticated estimates of the windfall are desirable but unavailable to Christian College. Putting the petition on public notice may well elicit a better approximation. It is likely to be far higher.

This is money that belongs to education not to T-Mobile's shareholders. The ULS database shows fifty-six EBS licensees in Georgia. At least thirty-seven are public school systems.[3]

T-Mobile hoists itself on its own petard with the sarcastic argument that by signing the lease the college and other lessors bargained away their claim to the windfall: "In other words, the College now regrets having agreed to the terms in section 3(a) of the Lease Agreement, and is brazenly asking the Commission to rewrite the terms of that contract."[4] It is T-Mobile that is not only disingenuously asking the Commission to rewrite the lease but is also asking the Commission to forget its past rulings that lessees were not entitled to a windfall. For example, in deciding in 2006 to extend the permissible length of leases from fifteen to thirty years, the Commission heard arguments from all sides as to how many years lessees needed before recovering their investments. The Commission opted for a thirty-year term in order to ensure lessees could do this: "Thus, for all EBS leases, we continue to permit renewal options or rights of first refusal for lessees, while prohibiting automatic renewal provisions that do not afford licenses the opportunity to renegotiate their leases at the end of the lease term."[5] Lessees like T-Mobile were entitled to use the leases to earn money for thirty years, but no one suggested they held an equity position in the license.

As for what the parties at the time believed the Commission policy to be, the Commission noted NextWave Broadband felt "as the Commission indicated in the *Secondary Markets Order,*

[3] Search of ULS on 11/21/2021 for EBS licensees in Georgia that were licensed to entities in Georgia with the determination of whether they were public school systems based on their names.
[4] Letter Opposition 4.
[5] *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*, 21 FCC Rcd 5,606, 5,716 (2006).

the Commission does not consider de facto spectrum leases as outright purchases."[6] The Commission did not disagree.

In fact, two years ago the Commission extolled the virtues of its decision to let T-Mobile and others buy EBS licenses by saying "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 disrupt existing leases because: (1) *The decision about whether to lease or transfer or assign a license remains with the EBS licensee*…. "[7] T-Mobile quoted the same passage in its Letter Opposition – but deleted the last sentence.

There is good reason to believe T-Mobile has or will make the same claim with regard to all its leases. Lawsuits involving this same claim or variations of it are in the courts. In one such case, T-Mobile says that "dozens" of its lessors have received offers. In the same filing, T-Mobile expresses concern, without proof, that those acquiring these EBS licenses plan to "compete" with it.[8] In other words, T-Mobile has competitive reasons for its unfounded claim.

Not until WCO began offering to purchase licenses from T-Mobile's lessors did T-Mobile or anyone else assert that EBS licensees did not have the right to sell. This is an argument of T-Mobile's invention to gobble up licenses at below-market prices and thwart competition.

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[6] Id. 5,713.

[7] *Transforming the 2.5 GHz Band*, 34 FCC Rcd, 5,446, 5,452.

[8] A search of the Pacer database of court filings turned up the complaint in *TDI Acquisition Sub LLD v. Albright College*, Court of Common Pleas of Berks County, Pennsylvania filed May 27, 2021. (Attachment B). TDI appears to be a subsidiary of T-Mobile. The filing references a TDI dispute with a second licensee, La Roche University. The filing says WCO "has attempted to acquire dozens of EBS licenses…. Although it has refused to disclose its plans for any licenses it acquires, it is clear that WCO is trying to assemble a large block of EBS spectrum as would be used in a telecommunications network." T-Mobile asked the court to issue a declaratory judgment that the time for TDI to exercise a ROFR would not begin until Albright established that WCO was not a "Competing Entity."

T-Mobile's control over the leases impacts the overlay auctions. If T-Mobile has control of existing licenses, it can ward off competition in the auctions by blocking its lessors from selling to overlay winners. This will reduce the value of overlay licenses to its competitors and hence lower the bids. In this event, the U.S. Treasury, and ultimately the taxpayers, are the losers.

Thus, T-Mobile's control will allow it to reap huge rewards in two ways. It can buy up existing licenses for far less than fair market value, taking money from education. And it will lower the bidding in the overlay auctions, taking money from the U.S. Treasury.

III. T-Mobile Admits That Its EBS Leases Constituted a Transfer of Control in 2009 When This Was Unlawful. This Can Void All EBS Leases with Such Terms in Them.

T-Mobile's central argument boils down to this. It acquired control of license WND620 through its de facto spectrum lease in 2009 and so controls sale of the license. It has always had the right to prevent Christian College from selling, and now, since the Commission allows T-Mobile to be the licensee, it can use its control to take advantage of the college's need to sell and pick up the license for a song, offering 18% of a competing offer. It has offered $1 million, but it could just as well peg the price at one dollar. T-Mobile further asserts that Christian College agreed to this unlawful bargain and the Commission approved it. Note, this is not a matter of a right-of-first refusal (ROFR), which would require T-Mobile to match or better WCO Spectrum's offer.[9]

[9] Further questions to be considered in this matter are whether T-Mobile can throw additional hurdles in the path of a sale by objecting to the assignment of the lease from Christian College to the buyer and whether it will allow the college to show the buyer a copy of the lease before the sale is consummated. For this reason, Christian College asks the Commission to affirm a right to sell with all the cooperation from T-Mobile that this may entail.

T-Mobile misunderstands and misconstrues the Commission's decisions and policies on leasing. It is a mere lessee with de facto control of the communications facilities and systems. It doesn't hold the license, nor can it exercise control over the license.

In 1983, the Commission first adopted the notion of "excess capacity leases" for EBS. These were a novelty in communications law because they gave someone other than the licensee control of the communications facilities and systems.

This was an ad hoc approach, however, and so in 2003 the Commission issued the first of a series of decisions on "de facto" leases.[10] Notably, the de facto rules imposed the same eligibility requirement on lessees that licensees had to meet – except for EBS lessees since they couldn't hold EBS licenses.

Moreover, the Commission insisted that de facto lessors had to retain "de jure" control of the license. That is, while a lessee might control the communications facilities and use them in a communications system, the licensee was still responsible to the Commission for compliance with its rules. The Commission was not to be a mere recorder-of-deeds, keeping title records. As required by Section 310(d), it continued to have a statutory obligation to look behind title and determine who controlled the title-holder.

This introduced some linguistic confusion since even with a de facto lease, the lessor must have de jure control.[11] In a subsequent decision, the Commission explained de jure control meant "legal control, or control as a matter of law," referencing its decision *In re Application of Fox Television Stations, Inc.,* 10 FCC Rcd 8452.[12] This decision in turn cited the Commission

[10] *Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets*, 18 FCC Rcd 20,604, 20,609. (2003)
[11] This is alluded to in Christian College Petition for Declaratory Ruling 11-12.
[12] *Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets*, 19 FCC Rcd 17,503, 17,508 (2004).

decision and the court of appeals decision in *Lorain Journal Company v. FCC*, 351 F.2d 824 (D.C. Cir. 1964) as precedent.

Lorain is thus the seminal case for defining de jure control, and the holding there is crucial to understanding the de facto lease concept. In *Lorain*, Sanford Shafitz was granted a construction permit for a television station. He later applied for and was granted a transfer of control to a corporation. The application stated that he owned 100% of the stock of the corporation. But the Commission looked behind appearances. Shortly after the Commission approved the transfer, it was determined, Shafitz had agreed to changes in the charter and bylaws of the corporation. The Commission found these had the effect of "control passing to Journal [the Lorain Journal Company owned by Harry Horvitz] by means of its hold on the corporation's pursestrings." 351 F.2d 827. The court agreed completely with the Commission: "[T]he statute [Section 310(d)] is to be implemented in accordance with the agency's interpretation that passage of control need 'not be legal control in a formal sense, but may consist of actual control by virtue of the special circumstances presented.'" 351 F.2d 829.

In short, a licensee must retain de jure control. Here, however, T-Mobile broadly and baldly says it controls license WND620. The exclusivity clause in the lease, T-Mobile claims, gives it not merely exclusive use of the leased "capacity" but rather exclusive use of the license. Thus, it has the power to veto sale of the license. Counsel for T-Mobile's initial letter to the college equated such capacity with the license itself to support the argument that the lease prohibits assignment of the license.[13] Similarly, in its letter in opposition, T-Mobile argues in the

[13] The letter is attached to Christian College's petition for declaratory ruling.

alternative that the lease transferred control of the license to T-Mobile in 2009 and that the Commission approved that transfer of control on May 9, 2009.

That T-Mobile believes its leases give it control is manifest even without these damning admissions. Its original letter to Christian College said the college could not sell, and it has made the same assertion against other EBS licenses.

This is a classic example of so-called "negative control," which is the power to block the licensee from taking action. Acquisition of or change of negative control has always required approval under Section 310(d). An example is in the Letter from Roy Stewart, Chief Mass Media Bureau, to Pacific Telestations, Inc., (July 29, 1998), 13 FCC Rcd 25,341. Control of the licensee was split 50/50, meaning each party had negative control. Either party could veto action. Neither could act without the other. When the relative shares changed and one party acquired a 50.05% interest, a transfer of control, i.e., from negative to positive control, occurred and required Commission approval. The Bureau ruled:

> Section 310(d) of the Act prohibits the transfer of control of a station license and rights thereunder, without prior Commission consent. There is no exact formula by which control of a broadcast station can be determined. It is well settled that 'control' as used in the Act and pertinent Commission rules, encompasses all forms of control, actual or legal, direct or indirect, negative or affirmative, and that the passage of *de facto* as well as *de jure* control demands the prior consent of the Commission." (citations omitted). 13 FCC Rcd 25,343

T-Mobile advances the argument that its control is "temporary."[14] Putting aside how ridiculous it is to call a thirty-year lease "temporary," a temporary transfer of control is a transfer of control. There is no exception in Section 310(d) for temporary transfers without approval.

[14] Letter Opposition 3.

T-Mobile was not eligible to hold de jure control of a license in 2009. Only educational institutions could hold EBS licenses until the new rules took effect in 2020. T-Mobile seems to not only admit its leases violate the Communications Act and Commission precedents, it also is claiming the Commission was complicit in this violation.

These claims of Commission complicity are self-serving though. Past Commission decisions warned spectrum lessees not to try to leverage their leases into licenses, which is precisely what T-Mobile is doing here. In its 2003 decision on spectrum leases, the Commission said:

> The Commission retains the ability to investigate and terminate any spectrum leasing arrangement to the extent it determines, post-notification, that the arrangement constitutes an unauthorized transfer of de facto control under our new standard or raises foreign ownership, competitive, or other public interest concerns. We will closely monitor leasing information and activity to ensure that licensees and lessees do not use this leasing option as a means of thwarting or abusing the Act or applicable Commission policies and rules (e.g., the basic qualifications and rules applicable to licensees). [15]

This warning was repeated later in the decision: "Clearly, any transfer and assignment arrangements found to be eligible for forbearance-based regulatory processing must be subject to appropriate conditions to ensure that crucial Commission policies are not thwarted by means of secondary market arrangements."[16] Section 310(d) is surely a crucial Commission policy. More, it is a Congressional mandate.

The Commission returned to the issue in 2006. Among other things, it decided to permit leases to include purchase options and eliminated the requirement for copies of leases to be filed. A coalition of EBS licensees objected to purchase options, saying they would create "a lasting incentive to subvert the Commission's policy" against commercial ownership of EBS licenses.

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[15] *Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets*, 18 FCC Rcd 20,660 (2003)
[16] Id. 20,706

Sprint, which held the college's lease before assigning it to T-Mobile, favored allowing purchase options in leases. According to the Commission, Sprint assured it that "EBS entities understand how best to utilize their spectrum resources to meet their own unique and vital educational missions, and *they should then be permitted to dispose of the spectrum in whatever manner they see fit*."[17] (emphasis added). But of course, T-Mobile, which is an assignee of Sprint, argues the opposite. In its view, it, not the EBS licensees, controls how the spectrum may be disposed.

The Commission rejected the coalition's proposal. It ruled that the coalition "has failed to establish that any real harm results from the provisions." If the eligibility rules were ever changed to permit exercise of purchase options, the Commission promised, it "will still have the opportunity to review the transaction and decide whether allowing such a transfer would be in the public interest."[18]

In other words, the Commission has expressly reserved the power to void lease terms that subvert Commission policy.

The same coalition also proposed that the leases be filed in unredacted form or made available by EBS licensees for public inspection. This, it argued, would let abusive practices in leases to be brought to light. The Commission rejected the proposal because in the twenty plus years of EBS leasing, it "has not discovered any evidence that abusive practices exist and are so pervasive as to necessitate heightened scrutiny."[19] It has now and by T-Mobile's own admission.

Finally, T-Mobile's argument that the Commission approved a transfer of de jure control over the college's license in 2009 is patently wrong. The Commission's processes for approving

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[17] *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*, 21 FCC Rcd 5,606, 5,707 (2006).
[18] Id.
[19] Id. 5,707-09.

de facto leases were derived from the so-called "forbearance" powers given it by the 1996 amendments to the Communications Act. Those amendments and the Commission's authority to forbear from regulation only applied to Title II regulation of common carriers.[20] The Commission was not given authority to forbear from regulation of transfers of control in the Educational Broadband Service, which was not regulated under Title II in 2009.

IV. The Commission Has Not Permitted De Facto Leases to Pass De Jure Control to T-Mobile and Has Preempted State Regulation of Such Lease Transfers.

T-Mobile's specious argument that de facto leases are contracts whose central terms, such as license, spectrum, and capacity, may pass de jure control to be interpreted by tribunals other than the Commission overlooks the precedents and ignores legal realities.[21]

The Commission indicated an intention to preempt state regulation of de facto leases in its first foray into the development of a broad policy on spectrum leasing, the 2000 *Policy Statement*: "Spectrum management is one of the Commission's core functions…. In exercising our spectrum management role, *consistent with our licensing authority and the public interest obligations in the Communications Act*, we plan to substantially enhance the system of secondary markets for spectrum usage rights."[22] (emphasis added). That is, the Commission would retain jurisdiction over any and all matters of federal law under the Act, such as Section 310(d) on transfers of control, related to leases. A similar sentiment was expressed in the first decision on

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[20] See for example *Forbearance from Applying Provisions of the Communications Act to Wireless Telecommunications Carriers,* 13 FCC Rcd 16,857 (1998).

[21] Letter of Opposition 4, footnote 18. Oddly, T-Mobile cites the "Dawson Order", S. A. Dawson, Memorandum Opinion and Order, 17 FCC Rcd 472 (2002) in support of its argument that questions of control should be left to other forums. However, in Dawson, the bureau chief ruled that the alleged contractual dispute was within the Commission's jurisdiction and ordered a hearing because it raised issues of control. Christian College urges the Commission to order T-Mobile to provide copies of its EBS leases rather than rely on T-Mobile's version of their contents. Otherwise, this proceeding will be like boxing in the dark.

[22] *Promoting the Efficient Use of Spectrum by Encouraging the Development of Secondary Markets, Policy Statement,* 15 FCC Rcd 24,178, 24,185 (2000).

de facto leasing. To the extent such leases involved "compliance with the Communications Act and applicable Commission polices and rules," jurisdiction lay exclusively with the Commission.[23]

Furthermore, as evidenced by the various decisions discussed here, the Commission has repeatedly ruled that it has the power to determine what terms can and cannot be in de facto leases. It has asserted jurisdiction over how long they can run, how much spectrum must be reserved for the lessor, and whether the lessor may reclaim spectrum. It has warned against abusive practices and reserved the power to terminate leases altogether. A de facto lease is a creature of the Commission's own invention. It didn't exist in the law until the Commission conceived of it as a way to get around its precedents on de facto control through the new forbearance legislation. Alternate forums, state law, and state courts are preempted on federal communications law questions, including the one at issue here: That the Commission has previously ruled that Christian College owns license WND620, controls it, and has the right to sell it.[24]

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[23] *Promoting Efficient Use of Spectrum ThroughElimination of Barriers to the Development of Secondary Markets*, 18 FCC Rcd 20,613.

[24] Applying Georgia law to a long-term, de facto, spectrum lease is daunting. Georgia has a number of provisions on property and leases, but nothing on spectrum leases. If the analogy is to Georgia real estate lease, T-Mobile might be estopped from challenging Christian College's title. "The tenant may not dispute his landlord's title or attorn to another claimant while he is in actual physical occupation, while he is performing any active or passive act or taking any position whereby he expressly or impliedly recognizes his landlord's title, or while he is taking any position that is inconsistent with the position that the landlord's title is defective." 44 Georgia Code § 44-7-9. Or, T-Mobile's claim that Christian College's power to sell is encumbered by the lease might be void under Georgia law on "choses in action." A choses in action is the right to future possession. 44 Georgia Code § 44-12-20. And a right to future possession, the right to vest title in another, can always be assigned: "Except as may be otherwise provided in Title 11, all choses in action arising upon contract may be assigned so as to vest the title in the assignee." § 44-12-22. State statutes on leases commonly vary depending on the kind of property leased. There are statutes on residential property leases, commercial property leases, leases of personal property, and oil and gas leases. How does a spectrum lease fit in, and could a state enact its own communications act to control spectrum leases?

VI. Conclusion.

For thirty-eight years since the Commission decided in 1983 to allow ITFS licenses to lease their excess capacity and through scores of later rulings, the Commission has never said that lessees owned the license itself nor has it ever said they might hold either positive or negative control over that license. Such ownership and control were unlawful when Christian College and Clearwire signed this lease in 2009. T-Mobile has said nothing to rebut this clear history. It has cited no decision to support its claim that the Commission permitted it to acquire control of the license.

It seems obvious why T-Mobile came up with this argument. It wants to control the EBS spectrum. Billions of dollars are at stake. It wants this windfall for its shareholders. It also fears competitors have designs on this huge hunk of valuable spectrum. An overlay auction looms, and control of existing licenses may give it an insurmountable advantage in those auctions.

The only thing standing in the way of T-Mobile's designs at the moment is Christian College. It therefore asks the Commission to put its Petition for Declaratory Ruling on public notice, where everyone will see it, and to order T-Mobile to give actual notice of the proceeding to its lessors.

Respectfully submitted,

James H. Johnston
Counsel for Christian College of Georgia, Inc.
4907 Crescent Street
Bethesda MD 20816
(202) 262-1375
jamesh.johnston@gmail.com

November 26, 2021

Attachment A

Call Sign	License Name	
WNC335	LAURENS COUNTY SCHOOLS	G
WNC945	SCHLEY COUNTY BOARD OF EDUCATION	G
WLX652	LAURENS COUNTY SCHOOLS	G
WNC560	GEORGIA STATE UNIVERSITY, BY AND ON BEHALF OF BOARD OF REGENTS OF TH	G
WLX788	PIEDMONT ACADEMY INC	H
WLX683	BRANTLEY COUNTY BOARD OF EDUCATION	G
WLX797	WEST GEORGIA RESA	G
WLX839	LOUISVILLE MIDDLE SCHOOL	G
WLX867	Newton County Board of Commissioners	G
WNC367	DEERFIELD-WINDSOR SCHOOL	H
WNC425	BAKER COUNTY BOARD OF EDUCATION	G
WNC451	BURKE COUNTY COMPREHENSIVE HIGH SCHOOL	G
WNC844	TIFT COUNTY BOARD OF EDUCATION	G
WLX623	Glynn County School System	G
WNC804	ATLANTA EDUCATIONAL SERVICES, INC.	C
WNC944	TAYLOR COUNTY BOARD OF EDUCATION	G
WND494	JACKSON COUNTY BOARD OF EDUCATION	G
WLX766	CHEROKEE COUNTY SCHOOL DISTRICT / ETOWAH HIGH SCHOOL	G
WLX676	LOWNDES MIDDLE SCHOOL	G
WND620	CHRISTIAN COLLEGE OF GEORGIA, INC.	H
WLX856	MORGAN COUNTY MIDDLE SCHOOL	G
WNC414	WEST GEORGIA RESA	G
WNC416	WEST GEORGIA RESA	G
WLX861	HEARD COUNTY SCHOOL SYSTEM	G
WNC389	WEST GEORGIA RESA	G
WND455	Northeast Georgia RESA	G
WHR755	ATLANTA INTERFAITH BROADCASTER INC	C
WLX604	WEBSTER COUNTY BOARD OF EDUCATION	G
WNC561	GEORGIA INSTITUTE OF TECHNOLOGY	G
KVI65	EMORY UNIVERSITY	H
WLX600	CENTRAL ELEMENTARY/HIGH SCHOOL	G
WND548	MORGAN COUNTY HIGH SCHOOL	G
WND594	Board of Regents of Univ. System of GA by and on behalf of Univ. of GA	G
WND592	CLARKE COUNTY SCHOOL DISTRICT	G
WLX574	LANIER COUNTY BOARD OF EDUCATION	G
WLX597	COOK COUNTY SCHOOLS	G
WLX615	CRAWFORD CTY COMPREHENS' HIGH SCHOOL	G
WLX680	CHARLTON COUNTY HIGH	G
WLX695	BLECKLEY COUNTY SCHOOLS	G

WLX698	EVANS COUNTY SCHOOL SYSTEM	G
WLX852	GLASCOCK COUNTY SCHOOLS	G
WLX862	WRENS MIDDLE SCHOOL	G
WNC229	AMERICAN FOUNDATION FOR INSTRUC TV	null
WNC289	Glynn County School System	G
WNC294	LEE COUNTY BOARD OF EDUCATION	G
WNC390	WEST GEORGIA RESA	G
WNC415	WEST GEORGIA RESA	G
WNC418	BULLOCH COUNTY BOARD OF EDUCATION	G
WNC452	BURKE COUNTY MIDDLE SCHOOL	G
WNC665	JOHN L COBLE ELEMENTARY SCHOOL	G
WNC669	CALHOUN COUNTY BOARD OF EDUCATION	G
WNC843	BERRIEN COUNTY BOARD OF EDUCATION	G
WNC915	WALKER COUNTY BOARD OF EDUCATION	G
WND460	Chattahoochee County Education Center	G
WLX701	JOHN L COBLE ELEM SCHOOL	G
WLX795	HEARD COUNTY SCHOOL SYSTEM	G

KLEINBARD LLC
By: Steven J. Engelmyer
PA ID No. 42840
sengelmyer@kleinbard.com
Paul G. Gagne, PA ID No. 42009
pgagne@kleinbard.com
Three Logan Square
1717 Arch Street, 5th Floor
Philadelphia, PA 19103
Telephone: 215-568-2000
Attorneys for Plaintiff
TDI Acquisition Sub LLC

TDI ACQUISITION SUB LLC, Plaintiff v. ALBRIGHT COLLEGE, Defendant.	:	IN THE COURT OF COMMON PLEAS OF BERKS COUNTY, PENNSYLVANIA CIVIL ACTION/DECLARATORY JUDGMENT NO.

NOTICE TO DEFEND

NOTICE TO DEFEND
NOTIFICACIÓN PARA DEFENDERSE

NOTICE

You have been sued in court. If you wish to defend against the claims set forth in the following pages, you must take action within twenty (20) days after this complaint and notice are served, by entering a written appearance personally or by attorney and filing in writing with the court your defenses or objections to the claims set forth against you. You are warned that if you fail to do so the case may proceed without you and a judgment may be entered against you by the court without further notice for any money claimed in the complaint or for any other claim or relief requested by the plaintiff. You may lose money or property or other rights important to you.

YOU SHOULD TAKE THIS PAPER TO YOUR LAWYER AT ONCE. IF YOU DO NOT HAVE A LAWYER, GO TO OR TELEPHONE THE OFFICE SET FORTH BELOW. THIS OFFICE CAN PROVIDE YOU WITH INFORMATION ABOUT HIRING A LAWYER.

IF YOU CANNOT AFFORD TO HIRE A LAWYER, THIS OFFICE MAY BE ABLE TO PROVIDE YOU WITH INFORMATION ABOUT AGENCIES THAT MAY OFFER LEGAL SERVICES TO ELIGIBLE PERSONS AT A REDUCED FEE OR NO FEE.

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AVISO

Le han demandado a usted en el tribunal. Si usted quiere defenderse de las demandas expuestas en las páginas siguientes, usted debe tomar acción en el plazo de veinte (20) días a partir de la fecha en que se le hizo entrega de la demanda y la notificación, al interponer una comparecencia escrita, en persona o por un abogado y registrando por escrito en el tribunal sus defensas o sus objeciones a las demandas en contra de su persona. Se le advierte que si usted no lo hace, el caso puede proceder sin usted y podría dictarse un fallo por el juez en contra suya sin notificación adicional y podría ser por cualquier dinero reclamado en la demanda o por cualquier otro reclamo o desagravio en la demanda solicitado por el demandante. Usted puede perder dinero o sus propiedades u otros derechos importantes para usted.

USTED DEBE LLEVARLE ESTE DOCUMENTO A SU ABOGADO INMEDIATAMENTE. SI NO TIENE ABOGADO O NO PUEDE CORRER CON LOS GASTOS DE UNO, VAYA O LLAME POR TELEFONO A LA OFICINA EXPUESTA ABAJO. ESTA OFICINA PUEDE POVEERLE INFORMACION RESPECTO A COMO CONTRATAR A UN ABOGADO.

SI NO PUEDE CORRER CON LOS GASTOS PARA CONTRATAR A UN ABOGADO, ESTA OFICINA PUDIERA PROVEERLE INFORMACION RESPECTO A INSTITUCIONES QUE PUEDAN OFRECER SERVICIOS LEGALES A PERSONAS QUE CALIFICAN PARA LA REDUCCION DE HONORARIOS O QUE NO TENGAN QUE PAGAR HONORARIOS.

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del Colegio de Abogados del Condado Berks
544 Court Street
Reading, Pennsylvania 19601
Teléfono (610) 375-4591
www.BerksBar.org

KLEINBARD LLC
By: Steven J. Engelmyer
PA. ID No. 42840
sengelmyer@kleinbard.com
Paul G. Gagne, PA ID No. 42009
pgagne@kleinbard.com
Three Logan Square
1717 Arch Street, 5th Floor
Philadelphia, PA 19103
Telephone: 215-568-2000
Attorneys for Plaintiff
TDI Acquisition Sub LLC

TDI ACQUISITION SUB LLC, Plaintiff v. ALBRIGHT COLLEGE, Defendant.	IN THE COURT OF COMMON PLEAS OF BERKS COUNTY, PENNSYLVANIA CIVIL ACTION/DECLARATORY JUDGMENT NO. JURY TRIAL DEMANDED

COMPLAINT FOR BREACH OF CONTRACT AND DECLARATORY JUDGMENT

Plaintiff TDI Acquisition Sub, LLC, by its undersigned counsel, hereby alleges the following for its complaint against Defendant Albright College:

NATURE OF THE ACTION

1. In this action, Plaintiff TDI Acquisition Sub LLC ("TDI") seeks to prevent Defendant Albright College ("Albright") from selling—in breach of the parties' contract—a Federal Communications Commission ("FCC") license to use certain radio frequency spectrum in the Reading, Pennsylvania area (the "License"). Section 3(a) of the contract is an exclusivity

provision that prohibits Albright from selling or assigning the License unless [redacted] set forth in subsection 10(c) applies. [redacted] as that term is defined in subsection 10(c). Because Albright is the party seeking to invoke this [redacted], it bears the burden of establishing that [redacted] applies. Albright has not carried that burden. Although both it and the proposed assignee of the License—an entity called WCO Spectrum LLC ("WCO"), which provided Albright with a non-binding offer to buy the License—have offered purely conclusory statements to the effect that WCO is not [redacted] both Albright and WCO have refused to provide any information that would substantiate (or disprove) those statements. And the little information WCO has disclosed provides reason to believe [redacted] does not apply.

2. Accordingly, unless and until Albright establishes that the [redacted] applies—including, most significantly, that WCO is not [redacted]—it should not be permitted to sell or assign the License to WCO, or should be required to unwind any such transaction to the extent Albright already has purported to effect it.

3. In addition, Section 3(b) of the contract grants TDI a [redacted] Under that provision, [redacted]

[redacted]

PARTIES

4. Plaintiff TDI is a Delaware limited liability company. Its ultimate parent company is T-Mobile US, Inc, 12920 SE 38th St., Bellevue, Washington 98006.

5. Defendant Albright College is a Pennsylvania non-profit corporation headquartered in Reading, Pennsylvania, with its main address at 1621 N. 13th St., Reading, Pennsylvania 19604.

JURISDICTION AND VENUE

6. This Court has jurisdiction over this action pursuant to 42 Pa. C.S.A. § 931 and 42 Pa. C.S.A. § 7532.

7. This Court has general personal jurisdiction over Albright because it is incorporated in Pennsylvania and its principal place of business is in Pennsylvania. This Court has specific personal jurisdiction over Albright because Albright's conduct relative to this dispute occurred in this forum.

8. Pursuant to Pennsylvania Rule of Civil Procedure 2179(a)(1)-(3), venue is proper because Berks County is the county where (1) Albright's principal place of business is located; (2) Albright regularly conducts business; and (3) the transaction or occurrence took place out of which TDI's causes of action arose.

BACKGROUND

A. The License.

9. Albright has long held an FCC license to use four unique channels of radio-frequency spectrum in the Reading, Pennsylvania area. The channels are designated D1, D2, D3, and D4, and the FCC "call sign" for the license is WND475.

10. The licensed channels are part of the Educational Broadband Service ("EBS"), which is a range of spectrum that the FCC historically has licensed to educational organizations. There are 20 EBS channels in any particular geographic area. They fall within the band of spectrum from 2496 to 2690 MHz, commonly referred to as the "2.5 GHz" spectrum band.

11. On March 2, 2007, Albright entered into a lease agreement for the four channels with Nextel Spectrum Acquisition Corporation (the "Lease Agreement").[1] Nextel Spectrum Acquisition Corporation subsequently changed its name to "NSAC LLC," and on November 5, 2019, NSAC LLC assigned all of its rights and obligations under the Lease Agreement to TDI. *See* Ex. B.

12. Following the Sprint–T-Mobile merger in April 2020, TDI is now an indirect subsidiary of T-Mobile US, Inc. Its business is to acquire and hold spectrum rights for use by other T-Mobile affiliates.

B. Relevant Lease Agreement Terms

13. The Lease Agreement contains several terms that are relevant in the event that Albright—referred to in the Lease Agreement as "Licensee"—receives an offer to purchase the

[1] A copy of the Lease Agreement is attached hereto as Exhibit A. TDI has filed the Lease Agreement and another EBS lease agreement (Exhibit F) under seal because the parties to those contracts agreed to keep their terms confidential. TDI has also filed certain exhibits with redactions where those exhibits disclose confidential pricing information.

License. First, Section 3(a) provides in relevant part that, [redacted]

14. Subsection 10(c), in turn, provides:

[redacted]

15. Subsection 10(c) defines [redacted]

[2] EBS and BRS, which is short for Broadband Radio Service spectrum, occupy different parts of the 2.5 GHz spectrum band.

[redacted]

16. Under the [redacted] provision of subsection 3(b), TDI has the right to [redacted] To effectuate this right, the provision requires that, [redacted] Once all of those conditions (as well as the other conditions precedent in the Lease Agreement) are satisfied—[redacted]—TDI has the right to [redacted]

17. Finally, subsection 3(f) of the Lease Agreement grants TDI a [redacted]

[redacted]

Like the provisions of subsections 3(a), 3(b), and 10(c), subsection 3(f) constitutes a condition precedent that Albright must satisfy before selling the License.

C. The FCC Changes the Rules for Holding EBS Licenses

18. Prior to April 2020, FCC regulations allowed only educational entities to hold EBS spectrum licenses. The FCC, however, permitted EBS licensees such as Albright—most of which lacked the technical knowledge, expertise, and infrastructure to operate a commercial telecommunications network—to lease all but five percent of their spectrum to non-educational entities such as TDI. Nearly all of the 1,300 EBS licensees nationwide did so. That includes Albright, which entered into the Lease Agreement with TDI's predecessor. These leases took spectrum that otherwise would have gone unused and used it to support modern high-speed broadband telecommunications services.

19. Effective April 27, 2020, the educational-use requirement for EBS licenses was eliminated. According to the FCC, this change was enacted because "technological changes over the last 30 years enable any educator with a broadband connection to access a myriad of educational resources." Transforming the 2.5 GHz Band, 86 Fed. Reg. 10839, 10840 (2021). Hence, "[o]nly a handful of EBS licensees ha[d] deployed their own networks or use[d] their EBS licenses in a way that require[d] dedicated spectrum. Instead, most licensees rel[ied] on lessees [such as TDI] to deploy and operate broadband networks and use[d] the leases as a source for revenues or devices." *Id.*

20. With EBS licenses now available to non-educational actors—and with 2.5 GHz spectrum being one of the most important components of the emerging 5G telecommunications technology—several new entities have entered the market for spectrum licenses, seeking to acquire such licenses for commercial gain. One such entity is Winnick & Company, which operates

through a number of affiliates, including WCO. Prior to its dealings relative to this case, WCO has attempted to acquire dozens of EBS licenses. And Winnick & Company touts on its website that it has played an instrumental role in founding and operating multiple telecommunications providers, including Global Crossing and MetroPCS. *See* Selected Transactions, www.winnickco.com/transactions.html (last visited May 13, 2021). WCO's letters to La Roche University, another Pennsylvania college which received a WCO offer, and Albright both state that the "principals of WCO have sourced and deployed billions of dollars to fund transformative technologies and corporate innovation, providing capital and counsel to dozens of companies in a wide range of industries, including Wireless Telecommunications Operations." Exs. C at 1, D at 1. Although it has refused to disclose its plans for any licenses it acquires, it is clear that WCO is trying to assemble a large block of EBS spectrum as would be used in a telecommunications network.

D. WCO's Earlier Offer to La Roche University

21. This is not the first time TDI has been forced to vindicate its rights under an EBS lease agreement under the threat of a purported sale of the license to WCO. In October 2020, WCO offered to purchase an EBS license leased by TDI and held by La Roche University ("La Roche") in Pittsburgh, Pennsylvania. *See* Ex. C. La Roche received a term sheet from WCO that was substantially similar to the one it presented to Albright. *See* Ex. C at 3–5. The cover letter to that term sheet states that (a) WCO is a "specialist in financing ***and operating telecommunications assets and companies***"; (b) WCO "has previously been active in the telecom industry"; and (c) Gary Winnick's companies "have consistently received FCC transfer approvals." Ex. C at 1 (emphasis added).

22. After it learned of the La Roche term sheet, TDI asserted its rights under its EBS lease agreement with La Roche. On November 25, 2020, Heather Brown, in-house counsel for T-Mobile, sent a letter to Mary Beth Fetchko, Esq., General Counsel at La Roche. Ex. E. The letter requested the information and assurances due to TDI under the La Roche lease agreement.[3] The La Roche lease agreement provided TDI with substantially similar rights as the Lease Agreement at issue here, including but not limited to: (i) [redacted]; (ii) [redacted] (iii) [redacted] (iv) [redacted] (v) [redacted] *See* Ex. F.

23. In response, on December 8, 2020, WCO sent TDI a letter purporting to assure it that WCO was not a [redacted]" Ex. G. But the letter merely parroted the definition of [redacted] from the lease agreement and summarily denied that WCO meets any of that definition's criteria. WCO provided no facts to support these conclusory assertions.

24. The next day, TDI and La Roche executed a standstill agreement to give themselves more time to fulfill TDI's rights. As part of that effort, on December 15, 2020, TDI had a call with Winnick & Co. Chairman Gary Winnick. The call was unproductive, as Mr. Winnick did not address any of the contractual rights or concerns raised in Ms. Brown's November 25 letter. He did, however, make clear that WCO's efforts to acquire EBS licenses would not stop with La Roche.

[3] The letter referenced NSAC rather than TDI, but as stated NSAC had assigned its rights to TDI.

25. WCO and La Roche also requested written questions from TDI regarding the specific information to which TDI was entitled. TDI complied, and on December 17 and 18, 2020, sent similar sets of questions to La Roche and WCO, respectively. *See* Exs. H, I. These included a series of questions under the heading "Whether WCO Is a [redacted] which were designed to probe the veracity of WCO's conclusory assertions that it does not meet the [redacted] On December 23 and 24, 2020, WCO and La Roche responded. *See* Exs. J, K. WCO again recited the Lease Agreement's definition of [redacted] stated that it does not meet any of the three criteria, and provided no supporting information or explanation for the assertion. WCO refused to respond to any of the other questions—including those about the statements in its cover letter—which it claimed "are outside the bounds of any legal obligation WCO has to [TDI]." Ex. J. La Roche's response was similarly unilluminating on the question. *See* Ex. K.

26. TDI avoided litigation with La Roche only by exercising its ROFR and purchasing the La Roche license.

E. WCO's Non-Binding Term Sheet to Albright

27. On April 30, 2021, WCO sent Albright a two-page, non-binding term sheet, which proposed a sale of the License for [redacted]. *See* Ex. D.

28. The term sheet purports to "summarize[] the basic terms and conditions pursuant to which WCO Spectrum, LLC (the 'Buyer') proposes to acquire a certain [EBS] license from Albright College." It makes clear, however, that

> The terms and conditions summarized herein are provided FOR DISCUSSION PURPOSES ONLY. They do not represent a binding offer, agreement, or commitment from the Buyer to acquire the EBS license or any other assets, nor are they all-inclusive. Closing of the proposed transaction is subject to completion of due diligence by the Buyer, the satisfaction of customary conditions precedent and execution of definitive agreements mutually acceptable to the parties (the

> 'Definitive Agreements'), the provisions of which shall be materially consistent with, though supersede, this Term Sheet and all other understandings between the parties.

Ex. D at 3.

29. The accompanying cover letter similarly provides that it "is not, and should not be, considered a legally binding indication or agreement in any manner, and the failure to execute definitive documentation or consummate the proposed acquisition shall impose no liability on WCO or Licensee." Ex. D at 2.

F. TDI Unsuccessfully Seeks Information to Which It Is Entitled

30. Following its receipt of the Albright term sheet on May 4, 2021, TDI sought the various types of information and assurances to which it is entitled under the Lease Agreement—just as it did with La Roche.

31. To that end, on May 11, 2021, Ms. Brown sent a letter to Jeffrey L. Strader, Vice President for Finance and Strategic Partnerships at Albright. *See* Ex. L. Ms. Brown requested the information and assurances to which TDI is entitled under Section 10(c)(iv), concerning whether WCO is a Competing Entity; under Section 10(c)(i), to ensure that WCO will [redacted] under the Lease Agreement and [redacted]; under Section 10(c)(ii), [redacted]; under Section 3(b), which [redacted] These rights are critical not only because the requested information is important in its own right, but because it bears directly on whether TDI will [redacted]. TDI's letter

also included a list of questions intended to facilitate the exchange of information required by the Lease Agreement.

32. Ms. Brown sent a similar letter to WCO on the same day. Ex. M. In that letter, Ms. Brown requested substantially the same information, consistent with TDI's rights under the Lease Agreement. The letter included a similar series of questions, including several under the heading [redacted] which were designed to probe the veracity of WCO's conclusory assertions that it does not meet the Lease Agreement's [redacted] Ex M. TDI also asked the basis of WCO's statement in its cover letter to Albright that the "principals of WCO have sourced and deployed billions of dollars to fund transformative technologies and corporate innovation, providing capital and counsel to dozens of companies in a wide range of industries, including Wireless Telecommunications Operations." Ex. M at 2. And TDI asked—again—for the basis of WCO's statements that (a) it is a "specialist in financing ***and operating telecommunications assets and companies***"; (b) WCO "has previously been active in the telecom industry"; and (c) Mr. Winnick's companies "have consistently received FCC transfer approvals." Ex. M at 2 (emphasis added).

33. WCO responded in a letter dated May 13, 2021, which was evasive and uninformative. Ex. N. With respect to whether it is a Competing Entity, WCO again parroted the Lease Agreement's definition of [redacted] verbatim and stated that it does not meet any of that definition's three criteria. Ex. N at 1. Again, WCO provided no supporting information or explanation of any kind. Ex. N at 1. And it refused to respond to TDI's questions seeking to elicit that information—including those about the statements in WCO's letters to Albright and La Roche—which it claimed "are outside the bounds of any legal obligation WCO has to [TDI]." Ex N at 2. In addition, although WCO acknowledged that, "[i]f the assignment of the license

WND475, from Albright to WCO is consummated, WCO hereby confirms that it will assume all of Albright's obligations and acknowledge NSAC's rights under the Lease Agreement," Ex N at 2, it offered no confirmation with respect to TDI's contractual rights.

34. Albright responded to TDI in a letter dated May 14, 2021. Ex. O. Albright's response, while slightly more fulsome than WCO's, provided no additional information concerning WCO's status as a [redacted]. Ex. O. To the contrary, it stated that, except for referring TDI to the conclusory statements made by WCO, it "has no other information" about the [redacted] issue or about the various questions that TDI posed in an effort to elucidate it. Ex. O at 5. Albright declined to provide any information regarding its communications with WCO—which undoubtedly addressed the [redacted] issue—claiming that "the Lease Agreement does not provide TDI with any right to receive this information." Ex. O at 4. Nor did Albright provide any additional information with respect to WCO's agreement in writing to assume all of Albright's obligations and acknowledge all of the TDI's rights; Albright again merely referred TDI to WCO's letters, which say nothing about TDI. Ex. O at 3.

35. Albright's letter then interpreted TDI's [redacted] in a way that sabotages TDI's ability to verify that any third party buyer of the License is not, in fact, a [redacted] Specifically, Albright contended that the phrase [redacted] in Section 3(b) applies only to [redacted]"—and that TDI's [redacted] is merely a "non-discrimination provision," which similarly does not entitle TDI to receive the information it requested. Ex. O at 2. Albright's position, that TDI is entitled to the terms of the offer and nothing more, gives TDI no means with which to vindicate its right to prevent a sale of

the License to a Competing Entity, and would force TDI to rely on nothing more than WCO's conclusory assertions to that effect.

36. To be clear, the [redacted] has never started running because Albright: (i) did not carry its burden of establishing that WCO is not [redacted], and thus that its term sheet was a [redacted] that Albright could validly accept; (ii) has not fulfilled its obligations under Section 3(f) regarding TDI's [redacted] because it refuses to share with TDI all of the information to which TDI is entitled under that provision; and (iii) has not ensured that WCO has given [redacted]

37. TDI has done everything in its power to obtain the information to which it is entitled without resorting to litigation. *See* Exs. L (TDI letter to Albright), M (TDI letter to WCO), N (WCO response), O (Albright response). Those efforts uniformly have been unsuccessful. Now, as a last resort, TDI brings this action based on Albright's breaches of [redacted], and for a declaration that Albright has failed to [redacted]

CAUSES OF ACTION

COUNT I
(Breach of Contract – Exclusivity)

38. Paragraphs 1–37 above are incorporated as if fully set forth herein.

39. The Lease Agreement constitutes a valid and enforceable contract between TDI and Albright.

40. TDI complied with all conditions precedent and fully performed its obligations under the Lease Agreement.

41. Albright breached Section 3(a) of the Lease Agreement. That section provides that, [redacted] Subsection 10(c), in turn, [redacted] Notably, that provision [redacted]

42. As a matter of law, because subsection 10(c) [redacted] of Section 3(a), Albright bears the burden of demonstrating that the requirements of Section 10(c) are met.

43. Albright has not carried that burden with respect to showing that [redacted]. The only information that it or WCO has provided concerning the [redacted] is WCO's unsupported statements that it does meet any of the three criteria for qualifying as such an entity. Albright has informed TDI that it has no information about these issues beyond WCO's assertions; WCO has flatly refused to provide any additional information that would substantiate (or disprove) them; and both Albright and WCO have refused to provide any information about their discussions, which unquestionably addressed the [redacted] issue. These failures are especially concerning given that TDI has good reason to suspect that WCO is, in fact, [redacted]. WCO made a point of touting to Albright that "principals of WCO have sourced and deployed billions of dollars to fund transformative technologies and corporate innovation, providing capital and counsel to dozens of companies in a wide range of industries, including Wireless Telecommunications Operations."

Ex. D at 1. And in making its offer to La Roche, WCO stated that (a) it is a "specialist in financing ***and operating telecommunications assets and companies***"; (b) it "has previously been active in the telecom industry"; and (c) Mr. Winnick's companies "have consistently received FCC transfer approvals." Ex. C at 1 (emphasis added). Compounding these troubling statements is Winnick & Company's history of operating competing telecommunications providers like Global Crossing and Metro PCS, as well as Mr. Winnick's assertion during the December 15 telephone conversation regarding the La Roche offer that WCO's efforts to acquire EBS licenses would be ongoing. And when TDI has inquired as to the basis for WCO's statements, it has been stonewalled by WCO, La Roche, and now Albright. That is notable because (a) Albright has had discussions with WCO about the non-binding term sheet, and it is inconceivable that the [redacted] issue was not addressed during those discussions; (b) WCO clearly is attempting to put together a substantial block of EBS spectrum; and (c) an entity seeking to build a 5G network naturally would focus on acquiring 2.5 GHz spectrum. All of this raises legitimate concerns that WCO is in fact a [redacted]. Against this background, Albright has not carried its burden of establishing that WCO is ***not*** a [redacted].

44. Albright also has not carried its burden with respect to subsection 10(c)(i). Under Section 10(c), [redacted] As discussed above, WCO has not assured TDI, the current Licensor under the Lease Agreement, in writing that it will "assume all of Licensee's obligations hereunder

and acknowledges all of [TDI's] rights hereunder." WCO has only offered such assurances to NSAC—TDI's predecessor in interest.

45. Because Albright seeks to assign the License without having carried its burden to show that the [redacted] in Section 10(c) applies, it is in breach of Section 3(a).

46. Consequently, the Court should enjoin Albright from proceeding with any sale, assignment, or other transfer of the License or its rights thereunder to WCO, or should unwind any such transaction that Albright and WCO already have purported to consummate.

WHEREFORE, TDI respectfully asks the Court to:

a. Order necessary and appropriate injunctive relief, including a permanent/final injunction preventing Albright from selling, transferring, or assigning the License to WCO or any of its affiliates, or unwinding any such transaction to the extent Albright already has purported to effect it;

b. Award TDI compensatory damages in an amount exceeding $50,000;

c. Award TDI all costs and interest allowed by law;

d. Pursuant to Section 21(f) of the Lease Agreement, [redacted]

e. Award TDI such other relief as the Court deems just and reasonable.

f. Award TDI such other relief as is just and reasonable; and

g. Provide TDI with the right to amend this complaint in the event the Court determines TDI has failed to adequately plead any of the foregoing claims against Albright or as other events may warrant.

COUNT II
(Breach of Contract – Right to Participate)

47. Paragraphs 1–46 above are incorporated as if fully set forth herein.

48. The Lease Agreement constitutes a valid and enforceable contract between TDI and Albright.

49. TDI complied with all conditions precedent and fully performed its obligations under the Lease Agreement.

50. Albright breached Section 3(f) of the Lease Agreement. That section provides that, [redacted] TDI, in addition to TDI's [redacted] under subsection 3(f)(v).

51. Upon information and belief, Albright solicited bids, proposals, and offers from WCO for the sale or assignment of the License and those solicitations occurred both before and after WCO sent the non-binding term sheet to Albright.

52. Albright has refused to share extensive information concerning WCO's non-binding term sheet, including, without limitation, its refusal to share any information about its communications with WCO, which obviously centered around the term sheet. Albright thus has failed to provide TDI with the same opportunity as WCO to receive information with respect to WCO's bid and to discuss that information with Albright.

53. TDI is entitled to all legal and equitable remedies available under the law, including specific performance of Albright's obligations under Section 3(f) of the Lease Agreement.

WHEREFORE, TDI respectfully asks the Court to:

a. Order necessary and appropriate injunctive relief, including a permanent/final injunction preventing Albright from selling, transferring, or assigning the License to WCO or any of its affiliates, or unwinding any such transaction to the extent Albright already has purported to effect it;

b. Order specific performance by Albright of Section 3(f) of the Lease Agreement, [redacted]

c. Award TDI compensatory damages in an amount exceeding $50,000;

d. Award TDI all costs and interest allowed by law;

e. Pursuant to Section 21(f) of the Lease Agreement, [redacted]; and

f. Award TDI such other relief as the Court deems just and reasonable.

g. Award TDI such other relief as is just and reasonable; and

h. Provide TDI with the right to amend this complaint in the event the Court determines TDI has failed to adequately plead any of the foregoing claims against Albright or as other events may warrant.

COUNT III
(Declaratory Judgment – ROFR)

54. Paragraphs 1–53 above are incorporated as if fully set forth herein.

55. Under Section 3(b) of the Lease Agreement, [redacted] Because Section 10(c) of the Lease Agreement [redacted]

[redacted]

56. As a matter of law and equity, the time period during which TDI must [redacted] does not begin running until Albright has established that the third party offer is *bona fide* and can be accepted. Otherwise, Albright could obtain an invalid offer—the invalidity of which is concealed—and compel TDI to match it or risk losing its right to do so. If TDI chose to match it, then Albright would have coerced a significant sum of money [redacted] in this case) that TDI never was required to pay. Such a result is precluded by the Lease Agreement and governing equitable principles.

WHEREFORE, TDI respectfully asks the Court to:

a. Issue a declaratory judgment that the time period during which TDI must decide whether to exercise its ROFR will not start running, if at all, until Albright has established that WCO is not a Competing Entity;

b. Award TDI all costs and interest allowed by law;

c. Pursuant to Section 21(f) of the Lease Agreement, [redacted];

d. Award TDI such other relief as is just and reasonable; and

e. Provide TDI with the right to amend this complaint in the event the Court determines TDI has failed to adequately plead any of the foregoing claims against Albright or as other events may warrant.

Dated: May 27, 2021

Respectfully submitted,

By: __/s/_Steven J. Engelmeyer_____

KLEINBARD, LLC
Steven J. Engelmyer, PA ID No.
42840 Paul G. Gagne, PA ID No.
42009 Three Logan Square
1717 Arch Street, 5th Floor
Philadelphia, PA 19103
Telephone: (215) 568-20007230
sengelmyer@kleinbard.com
pgagne@kleinbard.com

WILLIAMS & CONNOLLY LLP
Kenneth J. Brown*
Christopher J. Mandernach*
Thomas White*
Denis R. Hurley*
725 Twelfth Street, N.W.
Washington, DC 20005
Telephone: (202) 434-5000
Facsimile: (202) 434-5029
kbrown@wc.com
cmandernach@wc.com
twhite@wc.com
dhurley@wc.com
* application for admission *pro hac vice* forthcoming

Attorneys for TDI Acquisition Sub LLC