

Before the  
Federal Communications Commission  
Washington, D.C. 20554

In the Matter of )  
 )  
Expanding Flexible Use of the 3.7 to 4.2 GHz ) GN Docket No. 18-122  
Band )

**ORDER DENYING STAY PETITION**

**Adopted: August 31, 2020**

**Released: August 31, 2020**

**TABLE OF CONTENTS**

Heading	Paragraph #
I. INTRODUCTION .....	1
II. BACKGROUND .....	2
III. DISCUSSION.....	10
A. ACA Has Not Shown Likelihood of Success on the Merits .....	11
B. ACA Has Not Shown That Its Members Will Suffer Irreparable Harm.....	30
C. ACA Has Not Shown That the Equities Favor a Stay .....	34
IV. ORDERING CLAUSES.....	40

By the Chief, Wireless Telecommunications Bureau:

**I. INTRODUCTION**

1. On August 13, 2020, ACA Connects—America’s Cable Association (ACA) filed a Request for Stay<sup>1</sup> of the deadline for earth station operators to make lump sum elections under the *3.7 GHz Report and Order*,<sup>2</sup> pending resolution of a concurrently filed Application for Review of the *Final Cost Catalog Public Notice* and any ensuing judicial review.<sup>3</sup> We deny the Stay Request.

**II. BACKGROUND**

2. In the *3.7 GHz Report and Order*, the Commission adopted rules to make 280 megahertz of mid-band spectrum available for flexible use (plus a 20 megahertz guard band) throughout the

<sup>1</sup> Request of ACA for Stay of August 31 Deadline for Electing to Receive Lump-Sum Payment, GN Docket No. 18-122 (filed Aug. 13, 2020) (Stay Request). Oppositions were filed on August 19, 2020.

<sup>2</sup> *Expanding Flexible Use of the 3.7 to 4.2 GHz Band*, GN Docket No. 18-122, Report and Order and Order of Proposed Modification, 35 FCC Rcd 2343 (2020) (*3.7 GHz Report and Order*); *Wireless Telecommunications Bureau Releases Final Cost Category Schedule for 3.7-4.2 GHz Band Relocation Expenses and Announces Process and Deadline for Lump Sum Elections*, GN Docket No. 18-122, IB Docket No. 20-205, Public Notice, DA 20-802 (WTB July 30, 2020) (*Final Cost Catalog Public Notice*).

<sup>3</sup> Application of ACA for Review of the Public Notice of the Wireless Telecommunications Bureau Setting Lump-Sum Payment Amounts, GN Docket No. 18-122 (filed Aug. 13, 2020) (Application for Review). If the Commission does not grant the stay pending review, ACA alternatively requests that the Commission grant a 14-day stay of the deadline, until September 14, to provide time for ACA to seek a stay from the court of appeals.

contiguous United States by transitioning existing services out of the lower portion of the band and into the upper 200 megahertz of the 3.7-4.2 GHz band (C-band).<sup>4</sup> The *3.7 GHz Report and Order* established that new 3.7 GHz Service licensees would reimburse the reasonable relocation costs of eligible FSS space station operators, incumbent FSS earth station operators, and incumbent Fixed Service licensees (collectively incumbents) to transition out of the band.<sup>5</sup> To provide incumbents and new 3.7 GHz Service licensees with a range of reasonable transition costs, the *3.7 GHz Report and Order* directed the Wireless Telecommunications Bureau (the Bureau) to establish a cost category schedule of the types of expenses that incumbents are likely to incur.<sup>6</sup> The *3.7 GHz Report and Order* provided for the creation of a Relocation Payment Clearinghouse (Clearinghouse) to oversee the cost-related aspects of the transition, including collecting relocation payments from overlay licensees and disbursing those payments to incumbents.<sup>7</sup> In determining the reasonableness of costs for which incumbents seek reimbursement, the *3.7 GHz Report and Order* provided that the Clearinghouse would presume as reasonable all submissions that fall within the estimated range of costs in the final cost category schedule.<sup>8</sup> Incumbent earth station operators, satellite operators, and Fixed Service licensees are not precluded, however, from obtaining reimbursement for their actual costs that exceed the amounts in the Cost Catalog, so long as those costs are reasonably necessary to the transition, and incumbents provide justification to the Clearinghouse.<sup>9</sup>

3. The *3.7 GHz Report and Order* also established that incumbent FSS earth station operators may accept either: (1) reimbursement for their actual reasonable relocation costs to maintain satellite reception; or (2) a lump sum reimbursement “based on the average, estimated costs of relocating all of their incumbent earth stations” to the upper 200 megahertz of the C-band.<sup>10</sup> The *3.7 GHz Report and Order* directed the Bureau to “announce the lump sum that will be available per incumbent earth station as well as the process for electing lump sum payments,” and it provided that the Bureau should

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<sup>4</sup> *3.7 GHz Report and Order*, 35 FCC Rcd at 2345, para. 4.

<sup>5</sup> *Id.* at 2391, 2465-66, paras. 111, 326; 47 CFR § 27.4. The *3.7 GHz Band Report and Order* defines the incumbents that will be eligible to be reimbursed for their reasonable relocation costs. Eligible space station operators are defined as “an incumbent space station operator” that “must have demonstrated, no later than February 1, 2020, that it has an existing relationship to provide service via C-band satellite transmission to one or more incumbent earth stations in the contiguous United States.” *See id.* at 2426, para. 200; 47 CFR § 27.1411(b)(1)-(2). Incumbent earth stations are defined as those Fixed Satellite Service earth stations that: “(1) were operational as of April 19, 2018; (2) are licensed or registered (or had a pending application for license or registration) in the IBFS database as of November 7, 2018; and (3) have timely certified, to the extent required by the Order adopted in FCC 18-91 (as we clarify . . . to include certain renewal applications and license and registration applications filed through November 7, 2018), the accuracy of information on file with the Commission.” *3.7 GHz Report and Order*, 35 FCC Rcd at 2392, para. 116; 47 CFR § 27.1411(b)(3). Incumbent Fixed Service licensees are defined as “[i]ncumbent licensees of point-to-point Fixed Service links that relocate out of the 3.7-4.2 GHz band by December 5, 2023.” *3.7 GHz Report and Order*, 35 FCC Rcd at 2465, para. 326. The *3.7 GHz Band Report and Order* provides limited instances in which earth stations outside of the contiguous United States are eligible for reimbursement. *See id.* at 2428, para. 204 (providing for reimbursement for expenses of earth stations located outside of the contiguous United States to the extent it can be demonstrated that the system modifications for which reimbursement is sought is a direct result of the C-band transition). The process by which costs will be determined to be reimbursable is defined in 47 CFR § 25.1416.

<sup>6</sup> *See 3.7 GHz Report and Order*, 35 FCC Rcd at 2448, para. 262 (directing the Bureau to approve a cost category schedule); 47 CFR § 27.1416(a).

<sup>7</sup> *Id.* at 2446, para. 255.

<sup>8</sup> *Id.* at 2448, para. 262; 47 CFR § 27.1416(a).

<sup>9</sup> *See id.* at 2447-48, paras. 260-62.

<sup>10</sup> *Id.* at 2427-28, paras. 202-203. *But see id.* at 2428, para. 204, n.550 (noting that “incumbent earth stations owners may not elect a lump sum payment for earth stations outside of the contiguous United States”).

identify lump sum amounts for various classes of earth stations as appropriate.<sup>11</sup>

4. The Commission engaged a third-party contractor, RKF Engineering Solutions, LLC (RKF), to assist FCC staff in identifying the costs that incumbents might incur, developing a cost category schedule, and calculating the lump sum payment amounts. To compile the information needed to develop a cost catalog, RKF considered the *3.7 GHz Report and Order*'s initial relocation cost estimates, derived from comments and filings in the record,<sup>12</sup> and it then conducted confidential interviews with a broad range of stakeholders, including satellite operators, earth station operators, Fixed Service licensees, and vendors.<sup>13</sup>

5. The Bureau then sought extensive comment on both the methodology and cost estimates developed by RKF to arrive at a Final Cost Catalog. First, on April 27, 2020, the Bureau released (1) a Preliminary Cost Catalog, which contained preliminary categories and estimates of expenses that earth stations could incur in connection with clearing operations; and (2) an accompanying public notice, seeking comment both on the specific estimates in the cost catalog, as well as soliciting further information on the estimates used in the Preliminary Cost Catalog.<sup>14</sup> The Commission received extensive comments in response to this public notice, including information regarding the likelihood that a particular cost will be incurred in a typical transition, requests that additional items or categories be added to the cost catalog, and suggested revisions to the ranges of estimated costs.<sup>15</sup> After review of the record, the Bureau issued a public notice seeking further comment on a revised list of earth station classes, preliminary lump sum payment amounts, and the methodology for calculating those amounts.<sup>16</sup> Specifically, the Bureau sought comment on its proposed methodology for calculating the amount for each cost item to be included in the lump sum payment, whereby, the average cost for a given time (calculated as an average of the range of costs provided in the Preliminary Cost Catalog) was multiplied by the percentage of typical transitions in which that cost item would be necessary.<sup>17</sup> The Bureau sought comment on inclusion of technology upgrade equipment costs that may be necessary to transition certain multichannel video programming distributor (MVPD) incumbent earth stations, the percentage of typical transitions that would require such upgrades, and on whether there might be other methods of addressing technology upgrade needs in the lump sum payment.<sup>18</sup>

6. After considering the comments in response to the *Preliminary Cost Catalog Public Notice* and the *Lump Sum Comment Public Notice*,<sup>19</sup> on July 31, 2020, the Bureau released the *Final Cost*

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<sup>11</sup> See *id.* at 2428, para. 203.

<sup>12</sup> See *3.7 GHz Report and Order*, 35 FCC Rcd at 2428-30, 2465-66, paras. 206-10, 326-27.

<sup>13</sup> See *Wireless Telecommunications Bureau Seeks Comment on Preliminary Cost Category Schedule for 3.7-4.2 GHz Band Relocation Expenses*, GN Docket No. 18-122, Public Notice, 35 FCC Rcd 4440, 4441 (WTB 2020) (*Preliminary Cost Catalog Public Notice*).

<sup>14</sup> *Preliminary Cost Catalog Public Notice*, Attach., 35 FCC Rcd at 4444 (3.7 GHz Transition Preliminary Cost Category Schedule of Potential Expenses and Estimated Costs) (hereinafter, *Preliminary Cost Catalog*).

<sup>15</sup> See *Final Cost Catalog Public Notice* at 6-9, paras. 9-13.

<sup>16</sup> *Wireless Telecommunications Bureau Seeks Comment on Optional Lump Sum Payments for 3.7-4.2 GHz Band Incumbent Earth Station Relocation*, GN Docket No. 18-122, Public Notice, 35 FCC Rcd 5628, 5628-32 (WTB 2020) (*Lump Sum Comment Public Notice*).

<sup>17</sup> See *id.* at 5631 (“For example, if it is estimated that a rental antenna is needed for 33% of the transitions, the lump sum calculation includes 33% of the cost of such an item.”).

<sup>18</sup> See *id.* at 5631-32.

<sup>19</sup> To the extent relevant, the Bureau also considered the preliminary Transition Plans filed by eligible satellite operators in assessing reasonable costs and lump sum amounts for the Cost Catalog. See, e.g., Letter from Michelle V. Bryan, Secretary, Intelsat License LLC, and Executive Vice President, General Counsel, and Chief Administrative Officer, Intelsat US LLC (Intelsat), to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 18-122

(continued....)

*Catalog Public Notice*, which included the Final Cost Catalog of potential expenses and estimated costs associated with the transition, announced the lump sum amounts available to incumbent FSS earth station operators, and provided the process and deadline for electing to receive lump sum payments.<sup>20</sup>

7. Consistent with the *3.7 GHz Report and Order*, the Bureau provided for lump sum payment amounts based on the average, estimated costs of transitioning incumbent earth stations to the upper 200 megahertz of the C-band. Consistent with the proposed approach in the *Lump Sum Comment Public Notice*, the Bureau used a variation of an expected value approach to calculate both the base lump sum payments as well as the technology upgrade installation costs for MVPD incumbent earth stations.<sup>21</sup> Specifically, for both the base lump sum payments (for all antenna types) and for the per-site MVPD technology upgrade installation payment, the Bureau multiplied the average estimated cost (calculated as the average of the range of costs included in the Cost Catalog) for that particular cost item by the probability that the cost item would be incurred by a particular antenna type or class of earth station.<sup>22</sup> Where the Bureau determined that a cost would not be part of a typical transition for a particular antenna type or class of earth station (in other words, where it did not meet a minimum threshold of likelihood that it would be incurred in a typical transition), the Bureau did not include that cost in the lump sum amount.<sup>23</sup> While the methodology for calculating lump sum amounts generally remained the same as described in the *Lump Sum Comment Public Notice*, such methodology accounts for the updates to the lump sum categories and amounts made in response to comments on the *Lump Sum Comment Public Notice*.

8. One difference was the treatment of compression-related technology upgrades that may be needed to transition certain MVPD earth stations. For MVPD incumbent earth stations, the *Final Cost Catalog Public Notice* announced lump sum amounts that included the average, estimated costs associated with installing any necessary compression-related technology upgrades at an MVPD earth station site, but such amounts did not include the cost to purchase the integrated receivers/decoders or transcoders for those technology upgrades.<sup>24</sup> After review of the record, the Bureau found that the selection and purchase of compression equipment for these technology upgrades—such as integrated receivers/decoders and transcoders—are an integral part of the satellite operators' nationwide transition process and, as such, they should be considered as part of the cost associated with the transition of

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and 20-173, Attach. (filed June 19, 2020) (Intelsat Transition Plan); Letter from Brian D. Weimer, Counsel to SES Americom, Inc. (SES), to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 18-122 and 20-173, Attach. (filed June 19, 2020) (SES Transition Plan).

<sup>20</sup> See *Final Cost Catalog Public Notice*, Attach. (3.7 GHz Transition Final Cost Category Schedule of Potential Expenses and Estimated Costs; hereinafter, Final Cost Catalog).

<sup>21</sup> See *id.* at 10; *Lump Sum Comment Public Notice* at 4.

<sup>22</sup> For example, for purposes of the base lump sum calculations, we estimate that 95% of antennas would have filters installed, but that 5% of antennas would need a new low-noise block downconverter installed that would already include the filter. Accordingly, the Bureau multiplied the average filter cost by 0.95 and multiplied the average cost of low-noise block downconverter by 0.05; both costs were then added to the base lump sum amounts. Where a cost is likely to be incurred only in outlier transitions for a particular antenna type or earth station class, the Bureau did not include the probability of incurring such a cost in the lump sum amount.

<sup>23</sup> See *Final Cost Catalog Public Notice* at 10.

<sup>24</sup> *Id.* at 11-21, paras. 17-30. This reflected a change from the approach to technology upgrades for which we sought comment in the *Lump Sum Comment Public Notice*, which would have included the cost and installation of technology upgrades (i.e., MVPD Downlink Technology Upgrades and Program Source Uplink Technology Upgrades) only for those MVPD incumbent earth stations that verified the need for such upgrades. See *Lump Sum Comment Public Notice* at 3, 5.

satellite transponders.<sup>25</sup> Thus, under the Bureau's final approach, satellite operators, in cooperation with programmers, will be responsible for selecting, purchasing, and delivering the necessary compression equipment to their associated incumbent earth stations. In contrast, the Bureau found that the costs of physically installing the compression equipment at the earth station site were more appropriately assigned to incumbent earth station operators (and should therefore be included in the MVPD lump sum amount), given that satellite operators would not usually have direct access to an earth station site and the earth station owner would generally exercise direct control over that process.<sup>26</sup> Consistent with these findings, all MVPD earth station operators that elect the lump sum will receive the relevant lump sum base amounts, including the estimated costs to install integrated receivers/decoders and transcoders (including labor, cabling, and any necessary equipment for such installation, as described in more detail below). The installation costs for technology upgrades will be available to all MVPD earth station operators that elect the lump sum.

9. On August 13, 2020, ACA filed an Application for Review of the *Final Cost Catalog Public Notice*, arguing that the Bureau erred by excluding the cost of integrated receivers/decoders from the MVPD lump sum amount.<sup>27</sup> On August 20, 2020, the Bureau granted in part a request by the Society of Broadcast Engineers seeking an extension of time for incumbent earth station operators to elect the lump sum reimbursement described in the *Final Cost Catalog Public Notice*.<sup>28</sup> The Bureau waived the lump sum deadline in section 27.1419 of the Commission's rules to the extent necessary to extend the filing deadline to September 14, 2020.<sup>29</sup>

### III. DISCUSSION

10. To obtain a stay, ACA must show that: (1) it is likely to prevail on the merits; (2) it will suffer irreparable harm absent grant of the stay; (3) other parties will not be harmed if the stay is granted;

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<sup>25</sup> *Final Cost Catalog Public Notice* at 11-12, para. 17 (citing Letter from Laura H. Phillips, Counsel to Intelsat, to Marlene H. Dortch, Secretary, FCC, at 2 (filed June 24, 2020) (Intelsat June 24, 2020 *Ex Parte*); Letter from Michael P. Goggin, Assistant Vice President – Senior Legal Counsel, AT&T, to Marlene H. Dortch, Secretary, FCC, at 2-3 (filed July 7, 2020) (AT&T July 7, 2020 *Ex Parte*); Letter from Laura H. Phillips, Counsel to Intelsat, to Marlene H. Dortch, Secretary, FCC, at 1 (filed July 27, 2020) (Intelsat July 27, 2020 *Ex Parte*) (quotations omitted)).

<sup>26</sup> See *id.* at 11-12, para. 17; *3.7 GHz Report and Order*, 35 FCC Rcd at 2426, para. 201 (indicating that earth station migration may “require the *installation* of new equipment or software” at earth station locations “for customers identified for technology upgrades necessary to facilitate the repack, such as compression technology or modulation”) (emphasis added).

<sup>27</sup> Application for Review at 1-2.

<sup>28</sup> Order Granting Extension Request, GN Docket No. 18-122, IB Docket No. 20-205, DA 20-909 (WTB, rel. Aug. 20, 2020) (Lump Sum Election Extension Order); see also Request of Society of Broadcast Engineers for Extension of Time to Submit Lump-Sum Cost Reimbursement Payment Elections, GN Docket No. 18-122, IB Docket No. 20-205 (filed Aug. 17, 2020) (seeking an extension of the lump-sum election deadline until September 30, 2020).

<sup>29</sup> Lump Sum Election Extension Order at 2. While the relief granted by the Lump Sum Election Extension Order was similar to the alternate relief requested by ACA in its Stay Request (i.e., a 14-day stay), the Bureau did not address the merits of the ACA Stay Request in the Lump Sum Extension Order. *Id.* at n.6. The Bureau's decision to waive section 27.1419 and partially grant the Society of Broadcast Engineer's request for an extension was made on independent grounds from those advanced by ACA and addressed herein. See 47 CFR § 1.3. We nevertheless find, as a practical matter, that ACA's alternate request for relief in the form of a 14-day stay is mooted by the Bureau's extension of the lump sum election deadline until September 14, 2020. On August 21, 2020, in light of the Lump Sum Election Extension Order, ACA amended its request that the Commission resolve the Stay Request by August 20, 2020, requesting that the Commission issue a decision on the Stay Request by August 26, 2020 and stating that, “[a]bsent a decision by August 26, ACA will seek a stay of the September 14 deadline from the United States Court of Appeals for the D.C. Circuit.” See Letter from Jeffrey A. Lamken, Counsel to ACA, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 18-122 (filed Aug. 21, 2020).

and (4) the public interest favors grant of the stay.<sup>30</sup> ACA falls far short of the required showing for each of those required elements.

**A. ACA Has Not Shown Likelihood of Success on the Merits**

11. ACA advances two arguments on the merits, neither of which are likely to succeed. First, ACA argues that the Bureau improperly excluded integrated receiver/decoder costs from the lump sum amount in conflict with the Commission's directives and purpose in offering the lump sum payment option.<sup>31</sup> Second, ACA argues that the Bureau's process for determining the lump-sum amounts was arbitrary and capricious, and that it violated the notice-and-comment requirements of the Administrative Procedure Act.<sup>32</sup>

12. *Exclusion of integrated receiver/decoder equipment costs.* The Commission acknowledged in the *3.7 GHz Report and Order* that earth station migration may "require the *installation* of new equipment or software" at earth station locations "*for customers identified* for technology upgrades necessary to facilitate the repack, such as compression technology or modulation."<sup>33</sup> While the *3.7 GHz Report and Order* indicates that *installation* of technology upgrades may be an earth station migration cost, it does not mandate that the cost of purchasing the equipment necessary to implement those technology upgrades is an earth station migration cost.<sup>34</sup> Instead, the Commission directed the Bureau to "identify lump sum amounts" based on the "average, estimated costs of relocating all of" an electing earth station operator's incumbent earth stations.<sup>35</sup> The Bureau found that the cost of technology upgrade equipment is not part of the "average, estimated costs of relocating" MVPD incumbent earth stations, "because those costs are more appropriately tied to the satellite operators' transition, in coordination with programmers."<sup>36</sup> The Bureau's decision to include the costs associated with installing any necessary compression-related technology upgrades at an MVPD earth station site, but not to include the cost of the integrated receivers/decoders or transcoders for those technology upgrades, was therefore entirely consistent with the Commission's directives in the *3.7 GHz Report and Order*.

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<sup>30</sup> *Washington Metro. Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977); *Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958) (per curiam).

<sup>31</sup> Stay Request at 7-9; *see also* Comments of RCN Telecom Services, Grande Communications Networks, LLC, WaveDivision, and Astound Broadband, LLC (collectively, RCN) on ACA Request for Stay, GN Docket No. 18-122, at 3 (RCN Comments).

<sup>32</sup> Stay Request at 9-11; *see* 5 U.S.C. § 553.

<sup>33</sup> *3.7 GHz Report and Order*, 35 FCC Rcd at 2426, para. 201 (emphasis added); 47 CFR § 27.1412(e); Opposition of Discovery, Inc., FOX Corporation, The Walt Disney Company, and ViacomCBS Inc. (collectively, Content Companies) and the National Association of Broadcasters (NAB) to ACA Request for Stay, GN Docket No. 18-122, at 4 (filed Aug. 19, 2020) (Content Companies Opposition) ("As directed by the plain text of Section 27.1412(e), the Bureau determined that the cost of earth station migration includes 'the installation' of compression equipment."); Opposition of Verizon to ACA Request for Stay, GN Docket No. 18-122, at 5 (filed Aug. 19, 2020) (Verizon Opposition) ("The Bureau was correct to conclude that the 'costs associated with *physically installing* the compression equipment at the earth station site' are appropriately assigned to the earth station operator.") (citing *Final Cost Catalog Public Notice* at 11, para. 17, emphasis added).

<sup>34</sup> *3.7 GHz Report and Order*, 35 FCC Rcd at 2426, para. 201; *see also* *Final Cost Catalog Public Notice* at 16, para. 21.

<sup>35</sup> *3.7 GHz Report and Order*, 35 FCC Rcd at 2427-28, paras. 202-203. Furthermore, while the Commission delegated specific authority to the Bureau to "identify lump sum amounts for various classes of earth stations" and to "announce the lump sum that will be available," it also broadly delegates authority to the Bureau "to make further determinations related to reimbursable costs, as necessary, throughout the transition process." *Id.* at 2428, 2448, paras. 203, 262; 47 CFR §§ 27.1416(a), 27.1419.

<sup>36</sup> *Final Cost Catalog Public Notice* at 15-16, para. 21.

13. The Bureau therefore acted well within its delegated authority in deciding to exclude integrated receiver/decoder equipment costs from the MVPD lump sum amount.<sup>37</sup> As the entities solely responsible for developing plans to repack existing services into the upper 200 megahertz, eligible space station operators are responsible for determining whether technology upgrades are necessary to the transition and identifying which, if any, earth stations will require such upgrades to continue to receive service after the transition.<sup>38</sup> In the *3.7 GHz Report and Order*, the Commission made clear that “incumbent space station operators are best positioned to know when and how to migrate incumbent earth stations,” and it therefore assigned eligible space station operators the responsibility of developing Transition Plans that could include, among other things, installation of technology upgrades to the extent necessary to facilitate the transition.<sup>39</sup> Despite acknowledging that the decision to implement technology upgrades is the responsibility of space station operators, ACA presents no colorable argument as to why the Bureau was nevertheless required to consider the acquisition of compression equipment to be part of the “average, estimated costs” for incumbent earth stations of transitioning earth stations for the purpose of calculating the lump sum payment amounts.<sup>40</sup>

14. ACA’s argument seems to rest wholly on the unsupported assertion that the Bureau’s decision undermines the Commission’s goal of subsidizing a transition to fiber networks. Here, ACA misrepresents, and indeed misquotes, the Commission’s underlying goals and decision on lump sum payment amounts. ACA argues that “the Commission chose to ‘give incumbent earth station operators flexibility to replace existing earth stations with fiber’ so they could ‘make efficient decisions that better accommodate their needs.’”<sup>41</sup> The relevant text of the Commission’s reasoning, however, reads as follows:

*Some commenters request that the Commission give incumbent earth station operators flexibility to replace existing earth stations with fiber in their transition planning. We agree that providing incumbent earth station operators flexibility may allow them to make efficient decisions that better accommodate their needs. But we also recognize that replacing existing C-band operations with fiber or other terrestrial services may be, for*

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<sup>37</sup> Content Companies Opposition at 5 (exclusion of integrated receiver/decoder equipment costs from the lump sum “is in the fulfillment of, and not in tension with, the plain text of the rule”); AT&T Opposition at 4-5 (noting that the Commission granted the Bureau with flexibility to make determinations related to reimbursable costs throughout the transition process, and arguing the Bureau’s decision to exclude integrated receiver/decoder equipment costs “is a rational exercise of that discretion”) (quoting *3.7 GHz Report and Order*, 35 FCC Rcd at 2448, para. 262 (“We also direct the Wireless Telecommunications Bureau to make further determinations related to reimbursable costs, as necessary, throughout the transition process.”)); Opposition of CTIA to ACA Request for Stay, GN Docket No. 18-122, at 6, 7 (filed Aug. 19, 2020) (CTIA Opposition) (“[T]he Bureau’s determination was squarely grounded in the record, and is well within the authority the Commission granted it to develop and implement the lump sum payment process.”); Opposition of Intelsat License LLC to ACA Request for Stay, GN Docket No. 18-122, at 4-6 (filed Aug. 19, 2020) (Intelsat Opposition); Opposition of SES Americom, Inc. to ACA Request for Stay, GN Docket No. 18-122, at 4 (filed Aug. 19, 2020) (SES Opposition) (“In light of the broad discretion conferred on the Bureau to compute the lump sum and other cost amounts, ACA is mistaken that the Bureau ‘alter[ed] a policy set by the Commission itself’ in exercising that discretion.”) (quoting Stay Request at 9); Verizon Opposition at 5.

<sup>38</sup> *Final Cost Catalog Public Notice* at 12-16, paras. 18-21; Content Companies Opposition at 3 (“[P]rogrammers and satellite companies—not MVPDs—will direct virtually every stage of the compression upgrade process, from choosing the compression format and identifying the IRD and equipment needs, to ordering and configuring the appropriate equipment.”); Verizon Opposition at 5 (“The Bureau rightly concluded that [integrated receiver/decoder] purchase costs are more appropriately tied to the transition of satellites than to that of earth stations.”) (internal quotations omitted).

<sup>39</sup> *3.7 GHz Report and Order*, 35 FCC Rcd at 2454, para. 287.

<sup>40</sup> Stay Request at 12-13; Content Companies Opposition at 3-4.

<sup>41</sup> Stay Request at 1, 7-8.

*some earth stations, more expensive by an order of magnitude.*<sup>42</sup>

15. By quoting a portion of the *3.7 GHz Report and Order* describing what certain commenters *asked* the Commission to do rather than language describing what the Commission *decided*, ACA confuses its own goals for the lump sum payments with those of the Commission.<sup>43</sup> In fact, the Commission squarely rejected this argument by ACA in the *3.7 GHz Report and Order*, where it said:

We disagree with ACA Connects that compensable earth station migration costs should include the costs of transitioning to an alternative form of delivery, such as fiber . . . We have defined clearly the migration in this context as the costs of transitioning C-band services to the upper 200 megahertz of the band (e.g., repo[in]ting, retuning, and replacing antennas, and installing filters and compression hardware).<sup>44</sup>

16. Consistent with the *Emerging Technologies* framework, the Commission was clear that, while a transition to fiber in some cases may be a more efficient or desirable approach for certain earth station operators, incumbents would only be reimbursed for the reasonable costs of relocating existing services to the upper 200 megahertz of the C-band.<sup>45</sup> The Commission therefore provided, as an alternative to reimbursement of an earth station's actual, reasonable relocation costs of "maintaining satellite reception," the option to accept a lump sum payment "based on the average, estimated costs of relocating all of their incumbent earth stations."<sup>46</sup> While incumbent earth station operators that elect the lump sum payment may choose to maintain satellite reception by relocating to the upper 200 megahertz, transition to fiber, or discontinue services completely, the Commission made clear that the lump sum payment was designed to provide compensation for what the average, reasonable costs would have been had the incumbent earth station chosen to seek reimbursement for the actual costs incurred to relocate existing services to the upper 200 megahertz of the C-band.<sup>47</sup> We therefore agree with commenters that

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<sup>42</sup> *3.7 GHz Report and Order*, 35 FCC Rcd at 2427, para. 202 (emphasis added to indicate language omitted from ACA quotation; internal citations omitted).

<sup>43</sup> Stay Request at 1, 7-8; *but see* Opposition of AT&T Services, Inc. to ACA Request for Stay, GN Docket No. 18-122, at 3 (filed Aug. 19, 2020) (AT&T Opposition) (ACA's argument that the Bureau erred in excluding integrated receiver/decoder equipment costs from the lump sum "is constructed on a flawed reading of the [*3.7 GHz Report and Order*]."); Content Companies Opposition at 4 ("ACA Connects cherry picks language from these rules in making this claim, which quickly falls apart upon a reading of the surrounding language.").

<sup>44</sup> *3.7 GHz Report and Order*, 35 FCC Rcd at 2426, n.539

<sup>45</sup> *Id.* at 2415, 2422, 2426-27, paras. 179 ("We find that incumbent space station operators and incumbent earth station operators that must transition *existing services to the upper portion of the band* should be compensated for the costs of that transition.") (emphasis added), 194 (Commission expects incumbents to "obtain the equipment that most closely replaces their existing equipment," and defines "reasonable" relocation costs as "those necessitated by the relocation in order to ensure that incumbent space station operators continue to be able to provide substantially the same or better service to incumbent earth station operators, and that incumbent earth station operators continue to be able to provide substantially the same service to their customers after the relocation compared to what they were able to provide before"); 201 (incumbent earth station transition will require the costs of earth station migration and earth station filtering, and defining earth station migration as "any necessary changes that will allow the earth stations to receive C-band services on new frequencies or from new satellites once space station operators have relocated their services into the upper portion of the band") & n.543 (earth stations could either accept the lump sum amount for what the average relocation costs would have been, or they may accept reimbursement for the reasonable "actual relocation costs *incurred to maintain satellite reception*") (emphasis added).

<sup>46</sup> *Id.* at 2427, para. 202.

<sup>47</sup> *Id.* at 2428, n.547 ("We stress that lump sum payments will only be calculated for the costs of transitioning to the upper 200 megahertz."); AT&T Opposition at 9-10 ("While the Commission is not opposed to MVPDs using C-band transition funding from 3.7 GHz Service licensees to transition to more efficient technology, that is not the policy goal of this proceeding and should not drive the Bureau's decisions on the lump sum payment."); Intelsat Opposition at 7-8 (Rather than guaranteeing a lump sum sufficient to fund a transition to fiber, the *3.7 GHz Report*

(continued....)



argue that ACA's contention that the Bureau erred by excluding integrated receiver/decoder equipment costs from the lump sum amount is based on the erroneous premise that the Commission designed the lump sum payment as a means to fully fund a transition to fiber.<sup>48</sup> Because the Bureau's decision was based solely on the plain directives of the *3.7 GHz Report and Order*, where the Commission rejected the very same arguments ACA advances here, we find that ACA is unlikely to succeed on the merits.

17. *Administrative Procedure Act.* We also find unconvincing ACA's argument that the Bureau violated the Administrative Procedure Act in reaching its final determination with respect to the lump sum amount. ACA argues that the Bureau failed to adequately disclose its lump sum methodology before finalizing the *Final Cost Catalog Public Notice*. ACA further claims that RKF "refused" to meet with ACA and that the Bureau violated the Administrative Procedure Act's public disclosure requirements and the Commission's *ex parte* rules by failing to disclose who had met with RKF and how information from those meetings contributed to the Final Cost Category Schedule.<sup>49</sup> Finally, ACA argues that the Bureau failed to give stakeholders an adequate opportunity to evaluate and criticize the approach it used in its final determination to exclude certain outlier costs from lump sum amounts.<sup>50</sup>

18. *First*, ACA's argument that the Bureau failed to disclose and seek comment on its lump sum methodology before finalizing the *Final Cost Catalog Public Notice* is belied by the Public Notices the Bureau issued as well as the extensive record developed in this proceeding.<sup>51</sup> In establishing the lump sum payment, the Commission directed the Bureau to simply "announce the lump sum that will be available per incumbent earth station as well as the process for electing lump sum payments."<sup>52</sup> Nevertheless, in an effort to solicit stakeholder input and develop a robust record, the Bureau sought comment on proposed categories, cost ranges, and lump sum amounts on two separate occasions. First, on April 27, 2020, the Bureau released the *Preliminary Cost Catalog Public Notice*, seeking comment on preliminary categories and estimates of expenses that earth stations could incur in connection with clearing operations.<sup>53</sup> In response to a request filed by ACA, the Bureau granted an extension of the

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\_\_\_\_\_ *and Order* "instead acknowledges the higher cost of transitioning to fiber and then limits reimbursements to either actual incurred costs by the earth station operator or the average relocation costs of staying on C-Band as determined by the Bureau."); SES Opposition at 4 ("ACA's arguments are fundamentally based on the flawed premise that the Commission agreed to fully fund fiber transitions.").

<sup>48</sup> SES Opposition at 4 ("ACA's arguments are fundamentally based on the flawed premise that the Commission agreed to fully fund fiber transitions."); AT&T Opposition at 9 (The sole question presented by the Stay request is whether ACA "can gerrymander certain [integrated receiver/decoder] and other costs into 'earth station relocation' for the purpose of increasing the lump sum payment and further subsidizing some of its members' conversion of their own plant to fiber."); Intelsat Opposition at 7-8 (arguing that ACA's assertions "misrepresent the nature of the lump sum payment election," and that "[a]bsolutely *nothing* in the Report and Order guaranteed that any lump sum the Bureau later designated would be enough for those electing it to fully support a transition to fiber"); CTIA Opposition at 3 ("ACA's goal is to maximize the amount of funds available to its members, which they could use to transition to fiber or simply to profit from their election by transitioning to the 4.0-4.2 GHz band themselves for less than the lump sum payment.").

<sup>49</sup> Stay Request at 9 (citing *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 57 (D.C. Cir. 1977); *Am. Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 236 (D.C. Cir. 2008)).

<sup>50</sup> Stay Request at 10 (citing *WJG Tel. Co. v. FCC*, 675 F.2d 386, 388-89 (D.C. Cir. 1982)).

<sup>51</sup> Content Companies Opposition at 5 ("The Bureau's decision is based expressly and entirely on the record before it, which was developed over at least two rounds of comments from the public, during which time ACA Connects had ample opportunity to be heard."); Intelsat Opposition at 6 (The Bureau's decision, based on the record, that the purchase of compression equipment must be the responsibility of satellite operators and programmers "is entirely consistent with the way other technology upgrades are performed outside of the C-band transition.").

<sup>52</sup> *3.7 GHz Report and Order*, 35 FCC Rcd at 2428, para. 203.

<sup>53</sup> See generally *Preliminary Cost Catalog Public Notice* and *Preliminary Cost Catalog*.

deadline for filing comments in response to the *Preliminary Cost Catalog Public Notice*.<sup>54</sup> Second, on June 4, 2020, in response to comments filed by ACA and other MVPD earth station operators requesting an additional opportunity for comment specifically on the proposed lump sum amounts contained in the *Preliminary Cost Catalog Public Notice*, the Bureau issued the *Lump Sum Comment Public Notice* in which it provided additional details about proposed lump sum categories and amounts and established yet another comment window for interested parties to make further filings.<sup>55</sup>

19. Substantively, in the *Lump Sum Comment Public Notice* the Bureau sought comment on its proposed methodology for calculating the amount for each cost item to be included in the lump sum payment, whereby, the average cost for a given item (calculated as an average of the range of costs provided in the Preliminary Cost Catalog) was multiplied by the percentage of typical transitions in which that cost item would be necessary.<sup>56</sup> The Bureau sought comment on inclusion of technology upgrade equipment costs that may be necessary to transition certain MVPD incumbent earth stations, the percentage of typical transitions that would require such upgrades, and on whether there might be other methods of addressing technology upgrade needs in the lump sum payment.<sup>57</sup> The *Lump Sum Comment Public Notice* also sought comment on a table of lump sum payments available to each category of earth station on a per-antenna basis.<sup>58</sup>

20. Despite the Bureau's provision of yet another opportunity for comment in response to the *Lump Sum Comment Public Notice*, ACA, along with NCTA, filed yet another request for extension of the comment deadline and also asked the Bureau to "disclose the assumptions and methodology underlying its proposed lump sum payment amounts."<sup>59</sup> We responded to this request in our denial of the extension request,<sup>60</sup> in the *Final Cost Catalog Public Notice*,<sup>61</sup> and we repeat it again here: The *Lump Sum Comment Public Notice* outlined the methodology used to calculate lump sum amounts and sought comment on the assumptions made regarding the average transition for each class of earth station. The *Lump Sum Comment Public Notice* provided the calculation methodology for calculating each lump sum category—i.e., that the average of the range of costs provided in the Preliminary Cost Catalog for a given cost item was multiplied by the probability that such a cost would be incurred. Based on this proposed methodology, commenters could evaluate the total lump sum amounts for each category of earth stations, compare those amounts with the line-item cost ranges in the Preliminary Cost Catalog, and provide

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<sup>54</sup> See Order Granting Extension Request, GN Docket No. 18-122, DA 20-504 (WTB, rel. May 11, 2020) (extending the original May 12, 2020 filing deadline until May 14, 2020); ACA, Request for Extension of Time, GN Docket No. 18-122 (filed May 11, 2020) (Request for Extension of Time). The Bureau provided a total of 17 days to file comments in response to the *Preliminary Cost Catalog Public Notice* and received 16 comments.

<sup>55</sup> See *Lump Sum Comment Public Notice* at n.13; ACA May 14, 2020 Comments at 7-9; Cox May 14, 2020 Comments at 2; NCTA May 14, 2020 Comments at 29-30. On June 12, 2020, the Bureau denied a request by ACA and NCTA to extend the comment deadline by six days, until June 22, 2020. See *Lump Sum Comment Extension Denial Order*; Lump Sum Comment Extension Request at 3-4. While the *Lump Sum Comment Public Notice* was released on June 4, 2020, the Bureau set the 7-day comment window from the date of publication in the Federal Register on June 8, 2020, resulting in a June 15, 2020 deadline for filing comments. The Bureau received eight comments during the 11-day filing window.

<sup>56</sup> See *Lump Sum Comment Public Notice*, 35 FCC Rcd at 5631 ("For example, if it is estimated that a rental antenna is needed for 33% of the transitions, the lump sum calculation includes 33% of the cost of such an item.")

<sup>57</sup> See *id.* at 5631-32.

<sup>58</sup> See *id.* at 5632.

<sup>59</sup> Joint Request of ACA and NCTA for Extension of Time and to Disclose Lump Sum Assumption Methodology, GN Docket No. 18-122, at 3-4 (filed June 9, 2020).

<sup>60</sup> *Lump Sum Comment Extension Denial Order*, 35 FCC Rcd at 5871, para. 7.

<sup>61</sup> *Final Cost Catalog Public Notice* at 10-11, nn.64, 65.

targeted feedback on the appropriate probabilities and costs that should be used as inputs for such a calculation. Commenters did just that. For example, ACA filed the Cartesian Study, which attributed the probability that certain actions will occur to the relevant cost inputs and provided detailed line-item costs for proposed lump sum amounts; Cox noted that upgraded modulation and encoding techniques would require “new IRDs and transcoders—on a per channel basis—for approximately 33% of a typical MVPD’s channels”; the Church of Jesus Christ of Latter-Day Saints requested that compensation be included for “travel costs for rural, mountainous, hard-to reach areas” that it claimed would be needed in 30% of transitions.<sup>62</sup> These comments, among others, demonstrate that the *Lump Sum Comment Public Notice*, in combination with the Preliminary Cost Catalog, provided sufficient information for stakeholders to provide informed comment on the proposed cost categories and lump sum amounts.<sup>63</sup>

21. The record clearly demonstrates that ACA (and all other commenters) were able to “adequately evaluate and critique the Bureau’s methodology.”<sup>64</sup> In response to both the *Preliminary Cost Catalog Public Notice* and the *Lump Sum Comment Public Notice*, ACA was able to provide extensive information regarding the estimated amounts for each cost item in the lump sum payment, the probability that such costs would be incurred in a typical transition, and the appropriate methodology for calculating the amounts to be included in the lump sum payment.<sup>65</sup> Among ACA’s filings was a study conducted by a third-party consultant regarding the costs likely to be incurred by a majority of MVPDs surveyed in the study, which included ACA members and non-members.<sup>66</sup> ACA used the information in these filings to support, for example, its arguments that lump sum amounts should be calculated on a per-site basis, rather than per-antenna as proposed by the Bureau, and that technology upgrade equipment costs should be included in the lump sum according to the average number of integrated receivers/decoders that must be installed at each MVPD earth station site.<sup>67</sup>

22. That the Bureau’s ultimate approach to lump sum payments differed from the one advocated by ACA does not support ACA’s claim that it lacked a meaningful opportunity to provide feedback on the Bureau’s proposals nor that the Bureau failed to consider alternate methodologies advanced in the record. The Bureau addressed all of ACA’s various arguments in the *Final Cost Catalog Public Notice*, and even made certain changes based on ACA’s input; where the Bureau rejected ACA’s

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<sup>62</sup> See, e.g., ACA May 14, 2020 Comments, Attach. at 20, 22, 24 (Cartesian: C-Band Transition Cost Assessment; hereinafter, Cartesian Study); Cox May 14, 2020 Comments at 8; JCLDS June 15, 2020 Comments at 3.

<sup>63</sup> *Lump Sum Comment Extension Denial Order*, 35 FCC Rcd at 5871, para. 7; *Final Cost Catalog Public Notice* at 10-11, nn.64, 65; AT&T Opposition at 6; Verizon Opposition at 7 (“[T]he Bureau provided ample information to interested parties about the estimated expenses from which the lump sum payments are derived, as demonstrated by the robust and detailed record that emerged on the issue.”).

<sup>64</sup> Stay Request at 10. Filings in GN Docket No. 18-122 demonstrate that the Bureau met with ACA six times and reviewed 13 filings it made regarding cost categories and lump sum amounts in the period between release of the *Preliminary Cost Catalog Public Notice* and adoption of the *Final Cost Catalog Public Notice*. See also Content Companies Opposition at n.16 (“In fact, the record of filings by ACA underscores the openness of the Bureau and other Commission officials to consider arguments raised by ACA Connects.”); AT&T Opposition at 5 (noting that the *Final Cost Catalog Public Notice* reflects changes based on ACA’s input) (citing *Final Cost Catalog Public Notice* at 22-24, para. 44); Intelsat Opposition at 4-5 (“The Bureau extensively discussed its reasoning – based on significant record evidence – for rejecting ACA’s advocacy to include the cost of IRD purchases in any lump sum.”).

<sup>65</sup> See, e.g., ACA May 14, 2020 Comments; ACA June 15, 2020 Comments; Letter from Ross Lieberman, Senior Vice President of Government Affairs, ACA, to Marlene H. Dortch, Secretary, FCC, at 2 (filed June 25, 2020) (ACA June 25, 2020 *Ex Parte*).

<sup>66</sup> See Cartesian Study; ACA June 15, 2020 Comments (relying on Cartesian Study and including an attachment of supplemental inputs produced by Cartesian).

<sup>67</sup> ACA June 15, 2020 Comments at 15-18 (citing Cartesian Study at 20-25).

arguments, it did so based on sound reasoning with extensive support in the record.<sup>68</sup> The Bureau's decision to exclude integrated receiver/decoder equipment costs from the lump sum amount, for example, was based on the input of incumbent space station operators, programmers, prospective flexible-use licensees, and MVPD operators that argued that such costs are more appropriately allocated to the satellite transition since the decision to implement technology upgrades is the responsibility of space station operators (and their programmer customers) and the selection and purchase of compression equipment must be made uniformly and on a nationwide basis in order to meet compressed transition deadlines.<sup>69</sup> The *Final Cost Catalog Public Notice* reflects targeted and detailed feedback from a broad range of stakeholders regarding the appropriate costs and probabilities to be considered in determining the final lump sum amounts and there is no basis for the argument that stakeholders lacked a meaningful opportunity to comment on the Bureau's methodology.<sup>70</sup>

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<sup>68</sup> See, e.g., *Final Cost Catalog Public Notice* at 22-23, paras. 34-34 (updating lump sum amounts to include additional costs identified by ACA); see also *id.* at nn.18, 33, 34, 37, 64, 65, 74-76, 80, 85-92, 109, 112, 116-22, 124, and 131 (all citing filings made by ACA during the Bureau's consideration of estimated transition costs and lump sum amounts); Content Companies Opposition at 1 (the Bureau "made a well-reasoned decision based on a comprehensive record in this proceeding"); CTIA Opposition at 6 (arguing the record demonstrated that treating integrated receiver/decoder equipment costs as part of the satellite transition process would best achieve the *3.7 GHz Report and Order's* objectives for a rapid transition of C-band spectrum); SES Opposition at 5-6 ("Given the Bureau's reasoned and record-backed rejections of ACA's assorted arguments, it has little hope of overturning the Bureau's cost allocations with its Application for Review or upon judicial review – especially given the Commission's express delegation on this issue to the Bureau.").

<sup>69</sup> See, e.g., Intelsat May 26, 2020 *Ex Parte* at 2-3 ("[C]ompression equipment – such as integrated receivers/decoders ('IRDs') – should be tied to the satellite transponder because only the earth stations associated with the compressed transponder would need to install these IRDs (or similar compression equipment). Moreover, all affiliates of the programmer being compressed must install the same equipment as the programmer; the affiliates cannot each select their own technology or the programmer will not have an acceptable compression solution and the acceleration timetable likely will not be met."); Content Companies June 15, 2020 Comments at 2-4 (arguing that the integrated receiver/decoder upgrade process "requires careful management and coordination by programmers and their satellite operator vendors" and that in many cases, programmers bear the costs of compression upgrades); NCTA June 15, 2020 Comments at 12 (explaining that "choices about" deployment of technology upgrade equipment "must be made at the national level and adopted across a programmer's distribution chain to ensure that consumers receive high quality service"); AT&T May 14, 2020 Comments at 2-3 (noting that "satellite operators are best positioned to determine, on a customer-by-customer basis, where technology upgrades are necessary to ensure that capacity needs are met post-migration"); Letter from Matthew S. DelNero, Counsel to Content Companies, to Marlene H. Dortch, Secretary, FCC, at 2 (filed June 30, 2020) (Content Companies and NAB June 30, 2020 *Ex Parte*) ("Allocating IRD costs to programmers and satellite operators would serve the transition by centralizing the compression upgrade process and enabling the coordinated installation of the correct IRDs across distribution networks consisting of thousands of earth stations. Centralizing the upgrade process is critical because, prior to delivery, IRDs will need to be configured with the operating parameters of the networks whose signals they will decode. Accordingly, any decentralized approach poses a risk of significant delay for an already accelerated transition timeline."); Content Companies and NAB July 6, 2020 *Ex Parte* at 3-4 ("Compression technology will not function properly unless it is uniform across a programmer's network, and ensuring the timely installation of the necessary equipment at every connected earth station requires careful planning and coordination in the procurement, configuration, and distribution of this equipment. . . . [I]t is imperative that programmers play the central role in coordinating the various segments of the upgrade process."); AT&T July 7, 2020 *Ex Parte* at 2 (arguing that the process for implementing integrated receivers/decoders "cannot be decentralized" and explaining that "different programmers will make different decisions" about compression that "have to be made at the source, as the programmer uplinks a stream that must be decoded and decompressed by thousands of MVPDs"); CTIA July 9, 2020 *Ex Parte* at 2 ("To best ensure a successful transition, the prudent course would be for the Commission to determine that designing and procuring technology upgrades is primarily the obligation of the C-band satellite operators working with programmers."); Intelsat July 27, 2020 *Ex Parte* at 1-2.

<sup>70</sup> Content Companies Opposition at 1; CTIA Opposition at 6; SES Opposition at 5-6.

23. Even if ACA were correct in asserting that the Bureau erred in failing to disclose in the record details regarding RKF's methodology and underlying data, ACA has failed to establish that it suffered any prejudice as a result of this purported error.<sup>71</sup> Here, ACA makes no attempt to explain what it would have said had more granular information been disclosed. To the contrary, ACA was able to supply an exhaustive analysis produced by its own third-party consultant that argued for the inputs that should inform a lump sum amount.<sup>72</sup> The granular detail provided in the Cartesian Study regarding average costs and the probability that such costs will be incurred demonstrates that ACA was fully capable of evaluating the underlying inputs of the Bureau's methodology.<sup>73</sup> For example, in developing its recommendations for the technology upgrade costs to be included in the lump sum amount, ACA relied on pricing information gathered from "several industry vendors," input from various MVPDs regarding "current channel counts and expected proportion of channels undergoing compression/modulation," and conversations with satellite operators regarding the percentage of programmers that will need such upgrades.<sup>74</sup> This analysis demonstrates that, as a representative of "more than 700 small and medium-sized MVPDs that provide video, voice, and broadband services in the U.S.," ACA had the tools and industry expertise to readily evaluate the Bureau's proposed amounts and underlying methodology.<sup>75</sup> Where its final amounts differed from the amounts included in the *Lump Sum Comment Public Notice*, ACA was able to provide detailed feedback to the Bureau regarding the alleged shortcomings of the Bureau's inputs, methodology, and final lump sum determinations, and in fact did so.<sup>76</sup> ACA therefore fails to establish any prejudice resulting from the Bureau's failure to put this information in the record.

24. We also reject ACA's argument that the Bureau erred by announcing the lump sum payment amounts before incumbent space station operators filed their final Transition Plans.<sup>77</sup> The Bureau did not adopt the *Final Cost Catalog Public Notice* until July 30, 2020, over a month after incumbent space station operators filed their initial Transition Plans on June 19, 2020.<sup>78</sup> Although ACA argues that the final Transition Plans "will provide important data on earth station relocation needs," it provides no reason as to why that information could not also have been provided through the comments filed in response to the *Preliminary Cost Catalog Public Notice* and the *Lump Sum Comment Public Notice*.<sup>79</sup> In fact, incumbent space station operators and their programmer customers participated actively throughout the comment windows, and the Bureau's decision to exclude integrated receiver/decoder equipment costs from the MVPD lump sum amount was based in part on the extensive details provided

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<sup>71</sup> *Am. Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 236 (D.C. Cir. 2008)) ("The failure to disclose for public comment is subject, however, to 'the rule of prejudicial error,' 5 U.S.C. § 706, and the court will not set aside a rule absent a showing by the petitioners 'that they suffered prejudice from the agency's failure to provide an opportunity for public comment' . . . .") (quoting *Gerber v. Norton*, 294 F.3d 173, 182 (D.C. Cir. 2002)).

<sup>72</sup> ACA June 15, 2020 Comments (relying on Cartesian Study based on characteristics occurring in 50% or more MVPD earth stations).

<sup>73</sup> See generally Cartesian Study.

<sup>74</sup> *Id.* at 24-25.

<sup>75</sup> Stay Request at 3.

<sup>76</sup> See, e.g., ACA May 14, 2020 Comments (including Cartesian Study); ACA June 15, 2020 Comments (also including Cartesian Study); ACA June 25, 2020 *Ex Parte*.

<sup>77</sup> Stay Request at 2, 10-11.

<sup>78</sup> On June 12, 2020, the Bureau granted a brief extension, until June 19, 2020, of the original June 12, 2020 deadline for filing initial Transition Plans established in the *3.7 GHz Report and Order*. See Order Granting Extension of Transition Plan Filing Deadline, GN Docket No. 18-122, 35 FCC Rcd 5866 (WTB 2020).

<sup>79</sup> Stay Request at 10-11; *but see* Verizon Opposition at 6 ("The existence of individualized final Transition Plans is not a prerequisite to determining average relocation costs.").

by those parties regarding their earth station migration plans and their need to select and purchase compression equipment uniformly and on a nationwide basis.<sup>80</sup> Despite having ample opportunity to review the initial Transition Plans for alleged deficiencies, ACA fails to identify *any* such missing information that would or should have directly affected the final lump sum amounts. Indeed, contrary to ACA's predictions, the Final Transition Plans submitted on August 14, 2020 included no significant changes to incumbent space station operators' plans regarding the use of compression technologies.<sup>81</sup> The Bureau's decision not to delay the lump sum amount determination, which in turn would have further delayed the lump sum election deadline, in no way compromised the opportunity for fulsome notice-and-comment and was entirely consistent with the Commission's directives.<sup>82</sup>

25. *Second*, the Bureau's engagement of RKF to consult and assist with the development of the *Final Cost Catalog Public Notice* was also fully compliant with the Administrative Procedure Act and the Commission's *ex parte* rules. Consistent with Commission precedent, RKF was a contractor retained to conduct confidential meetings with equipment manufacturers, vendors, and other stakeholders to gain information on the expected range of costs that could be incurred in the transition, much of which is commercially sensitive, confidential cost data.<sup>83</sup> In advance of releasing the Preliminary Cost Catalog, RKF prepared its analysis of these costs based on its review of the cost data already filed in the 3.7 GHz Report and Order proceeding (including confidential filings), in light of its own experience as an

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<sup>80</sup> See *Final Cost Catalog Public Notice* at 12-15, paras. 18-20 (citing filings by Intelsat, SES, Content Companies, NCTA, AT&T, and NAB in reaching its conclusion to exclude integrated receiver/decoder equipment costs from the MVPD lump sum amount).

<sup>81</sup> See Letter from Brian D. Weimer, Counsel to SES, to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 20-173, 18-122, at 4-5 (filed Aug. 14, 2020) (stating that its Final Transition Plan does not include additional use of compression technology that certain commenters requested, since doing so would increase the overall cost and complexity of its transition); Letter from Michelle V. Bryan, Secretary and Executive Vice President, General Counsel, and Chief Administrative Officer, Intelsat, to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 20-173, 18-122, Attach. at 14 (filed Aug. 14, 2020) (Intelsat Final Transition Plan) (increasing the number of customers designated for compression upgrades from 10 to 11, noting that each of those customers "has expressed agreement to participate in the compression plan"); Intelsat Opposition at 8 ("The identities of Intelsat's programmer customers undergoing compression, along with their affiliated earth stations, were known publicly since June 19 and did not materially change in the final Transition Plan that Intelsat filed with the FCC on August 14."); Telesat Canada C-band Transition Plan (for US), GN Docket Nos. 20-173, 18-122, at 2 (no video compression or modulation will be needed to execute Transition Plan); Letter from Matthew R. Friedman, Counsel to Claro S.A., to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 20-173, 18-122, at 1 (filed Aug. 14, 2020) (includes only one update to clarify that the Final Transition Plan accommodates all earth stations that Claro is contractually obligated to serve, whether an incumbent earth station or non-incumbent earth station); Eutelsat S.A. Revised Transition Plan, GN Docket Nos. 20-173, 18-122, at 5 (filed Aug. 14, 2020) (consistent with its initial Transition Plan, no plans to implement compression technology).

<sup>82</sup> See *3.7 GHz Report and Order*, 35 FCC Rcd at 2428, n.547 (rejecting a request to extend the lump sum election deadline in light of the accelerated deadlines established by the transition); see also CTIA Opposition at 2-3 (supporting the Bureau's timing and arguing that the earth station lump sum elections are crucial information for both satellite operators and potential bidders); SES Opposition at 8 (arguing that "it is imperative for SES to know the identity of earth station operators that will elect the lump sum, as delaying the lump sum election deadline pushes back the date by which SES will have the necessary information about the scope of these earth station transition efforts").

<sup>83</sup> See *Media Bureau Seeks Comment on Widelity Report and Catalog of Potential Expenses and Estimated Costs*, 29 FCC Rcd 2989, 2990 (MB 2014) ("The Commission engaged Widelity Inc. (Widelity) to aid the Commission in understanding the process and costs associated with the post-incentive auction transition. Widelity developed the suggested prices by conducting confidential interviews directly with industry participants, including both sellers and purchasers of equipment and services with direct knowledge of pricing. The Commission had no role in the development of the suggested prices. Accordingly, these suggested prices are estimates only and are not meant to indicate that reimbursement will reflect the suggested prices."); see also Verizon Opposition at 7.

engineering and communications consulting firm, and as supplemented with additional confidential information from its inquiries to manufacturers and vendors, satellite operators, MVPD and other earth station incumbents, and other stakeholders. After release of the Preliminary Cost Catalog, which initiated the notice-and-comment process in this proceeding, RKF did not hold any meetings with incumbents or other stakeholders. Thus, parties that RKF contacted in seeking cost information for its own analysis were not making a presentation on the merits. Nor was RKF when it conveyed the findings contained in the cost catalog in accordance with its contractual obligations.

26. Further, the product of RKF's outreach was subject to extensive notice-and-comment, consistent with the Administrative Procedure Act. The *Preliminary Cost Catalog Public Notice* included a comprehensive Preliminary Cost Catalog Appendix, which detailed each of the line item costs that RKF assisted the Bureau in identifying and the range of estimated costs for each of those line items. Over the more than three-month window between release of the Preliminary Cost Catalog and adoption of the *Final Cost Catalog Public Notice*, interested parties had ample opportunity to assess the various cost inputs and amounts and provide feedback to the Bureau in the event they disagreed with any of those preliminary results.<sup>84</sup> Tellingly, ACA does not specify any additional information it would have provided or arguments it would have made in a meeting with RKF that it was unable to present in the numerous meetings it had with FCC staff and leadership throughout the proceeding.<sup>85</sup> ACA has failed to demonstrate that the Bureau's engagement of RKF somehow resulted in a lack of adequate notice-and-comment in violation of the Administrative Procedure Act.

27. The Bureau's engagement of RKF to produce estimated cost ranges is also immaterial to the alleged harm for which it seeks relief. The methodology used to calculate lump sum amounts and the decision to exclude the cost of integrated receiver/decoder equipment from the MVPD lump sum amount were policy determinations based on the Commission's directives to the Bureau in the *3.7 GHz Report and Order*. RKF's calculation of the estimated costs associated with particular actions that may or may not be necessitated by the transition were subject to extensive notice-and-comment through the Bureau's release of the Preliminary Cost Catalog and the *Lump Sum Comment Public Notice*.<sup>86</sup> Commenters, including ACA, were able to, and did, provide detailed feedback on the data produced by RKF, and on the specific costs and probabilities that should be included in the lump sum amounts.<sup>87</sup> Indeed, in the *Final*

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<sup>84</sup> Content Companies Opposition at 5 ("The *Final Cost Category Public Notice* extensively documents how the Commission arrived at the final lump sum numbers, and nowhere does it rely on 'secret' meetings or studies to reach its conclusions.").

<sup>85</sup> *Id.* at n.16 ("For ACA Connects to claim now that it was injured by not meeting with a third-party consultant, when it was granted so many audiences with the decision-makers themselves, defies logic."); AT&T Opposition at 5 ("RKF's output was subject to public notice and comment and, in fact, the *Lump Sum Notice* reflects changes made based upon ACA's input, so the lack of a meeting between ACA (or any one party) and the Bureau or RKF is meaningless.").

<sup>86</sup> See Preliminary Cost Catalog at 2 ("The categories and costs contained in the Catalog are intended to serve as a reference guide and are not intended to identify the specific reimbursable expenses incurred by individual satellite, earth station, and fixed service operators."); see also Content Companies Opposition at n.17 (distinguishing from *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 53 (1977), "Here, the Bureau has stated that any meetings the third-party consultant, RKF, held were to provide input to the Bureau in connection with developing the preliminary cost catalog, on which the Bureau then sought public comment.").

<sup>87</sup> See, e.g., ACA June 15, 2020 Comments, Attach. at 2 (proposing inclusion of application fees in lump sum amounts); JCLDS June 15, 2020 Comments at 3-4 (proposing inclusion of "travel costs for rural, mountainous, hard-to reach areas" in 30% of transitions, and of the cost to purchase and install new feed horns on some dishes); NCTA May 14, 2020 Comments at 19 (proposing inclusion of costs associated with system integration of modified earth stations); SES May 14, 2020 Comments at 2 (same); ACA June 15, 2020 Comments, Attach. at 3 (same); Intelsat Transition Plan at 14, 30-38 (indicating that two satellites used for broadcast, religious, radio, and data networks will be replaced and that approximately a quarter of MVPD content stations will be moved to new orbital locations); Cox May 14, 2020 Comments at 7-8 (arguing that a typical MVPD headend will have 10 antennas with one antenna

(continued....)

*Cost Catalog Public Notice*, based on input from commenters, the Bureau made several updates to the lump sum amounts, such as increasing base lump sum amounts to account for certain costs that were not previously included, and by adjusting the lump sum amounts for multi-feed and multi-beam antennas to account for a lower percentage of such antennas needing dual illumination than previously estimated.<sup>88</sup> With respect to the exclusion of integrated receiver/decoder equipment costs from the lump sum amount, the Bureau provided extensive rationale for reaching that decision in the *Final Cost Catalog Public Notice*, which was an independent policy decision based solely and completely on the plain language of the Commission's rules and the robust record developed in response to the *Preliminary Cost Catalog Public Notice* and the *Lump Sum Comment Public Notice*.<sup>89</sup> There is therefore no support for the claim that the Bureau arbitrarily and capriciously relied on information provided by RKF to reach its decisions in the *Final Cost Catalog Public Notice*.

28. Finally, the Bureau provided adequate notice of its decision to exclude from the lump sum amounts certain outlier costs that would not likely be incurred in a typical relocation and of the methodology it used for making such determinations.<sup>90</sup> Consistent with the Commission's directive that the Bureau calculate the lump sum based on the "average, estimated costs" of transitioning an earth station to the upper 200 megahertz, the Bureau made clear in the *Lump Sum Comment Public Notice* that inclusion of a particular cost item in the lump sum amount would be based on the extent to which that cost was part of a "typical transition," and invited commenters "to provide specific data or information on the percentages of typical transitions that would require various expenses."<sup>91</sup> ACA did so, and in fact, its own proposed lump sum amounts included only those costs that it expected to be "sufficiently common in transitioning MVPD headends—i.e., occurring in approximately fifty percent (50%) of cases or more—so as to include them in constructing a lump sum calculation to reflect the 'average' transition of the 'average' earth station."<sup>92</sup> The Bureau also sought comment on whether there were "other methods to address the technology upgrade needs," rather than inclusion of those costs in the lump sum amount for MVPDs.<sup>93</sup> Only after it received extensive feedback from commenters arguing that technology upgrades were more appropriately allocated to satellite transitions did the Bureau issue its final decision to exclude integrated receiver/decoder equipment costs from the MVPD lump sum payment amount.<sup>94</sup> Even ACA

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needing to be repointed to a new satellite location, and may need two additional antennas to point to new satellites, which demonstrates that not more than a quarter of such antennas would need to point to new orbital locations); Cox June 15, 2020 Comments at 8-9 (requesting inclusion of the cost of additional antennas needed to point to new orbital slots); ACA June 15, 2020 Comments at 8 (same); NCTA May 14, 2020 Comments at 27 (same); SES Transition Plan at 11 ("in the vast majority of cases, an antenna is already available at the Incumbent Earth Station to receive service from the new satellite"); Intelsat Transition Plan (new antennas will be needed to point at new satellites "[i]n some cases").

<sup>88</sup> See *Final Cost Catalog Public Notice* at 22-25, paras. 34-38 (providing an exhaustive list of updates to lump sum amounts the Bureau did, and did not, make).

<sup>89</sup> Content Companies Opposition at 5-6 ("In short, the process by which the Bureau determined the final lump sum payments far exceeds the 'narrow' standard by which a court would review the *Final Cost Category Public Notice* under the APA." (citing *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Auto Mut. Ins. Co.*, 463 U.S. 29, 42-44 (1983)).

<sup>90</sup> AT&T Opposition at 6 (arguing the Bureau's exclusion of outlier costs was a "common-sense" decision that "simply reflects rational and sound logic").

<sup>91</sup> *Lump Sum Comment Public Notice* at 4.

<sup>92</sup> Cartesian Study at 20.

<sup>93</sup> *Lump Sum Comment Public Notice* at 4.

<sup>94</sup> See, e.g., Intelsat May 26, 2020 *Ex Parte* at 2-3; Content Companies June 15, 2020 Comments at 2-4; NCTA June 15, 2020 Comments at 12; AT&T May 14, 2020 Comments at 2-3; Content Companies and NAB June 30, 2020 *Ex* (continued....)



itself concedes that developing a lump sum for the “average” MVPD requires certain omissions of certain “unusual” costs that would be a “necessary and reasonable expense in some number of earth station relocations, and therefore *reimbursable outside the lump sum context*.”<sup>95</sup> While ACA may disagree with the *outcome*—i.e., that the costs of integrated receiver/decoder equipment were excluded from the lump sum amount—there is no support for the claim that the Bureau failed to provide notice of its decision to exclude outlier costs from the final lump sum amounts.<sup>96</sup>

29. The Bureau provided ample opportunity for notice and comment on its proposed cost estimates, calculation methodologies, and lump sum amounts through release of the *Preliminary Cost Catalog Public Notice* and the *Lump Sum Comment Public Notice*, in full compliance with the Administrative Procedure Act. In response to publicly available data produced by RKF, commenters developed a robust record from a broad group of stakeholders that provided detailed analysis and feedback on the Bureau’s proposals. ACA’s claims that it was unable to effectively evaluate and critique the Bureau’s calculation of lump sum amounts and present its positions to Commission decisionmakers is belied by the volume and detail of its filings throughout the comment window in this proceeding. ACA has therefore failed to demonstrate that it is likely to succeed on the merits of its procedural-based arguments.

#### **B. ACA Has Not Shown That Its Members Will Suffer Irreparable Harm**

30. ACA alleges that, absent a stay, earth station operators will be required to make an irrevocable decision about whether to take the lump-sum payment and that, “[b]ecause the Bureau’s lump-sum amount was improperly determined, many MVPDs likely will be forced to decline the lump-sum option, and permanently forgo the benefits of potentially more efficient fiber upgrades.”<sup>97</sup> To establish irreparable harm, a moving party must show that it will suffer injury that is “both certain and great,” “actual and not theoretical,” “beyond remediation,” and “of such *imminence* that there is a present need for equitable relief to prevent irreparable harm.”<sup>98</sup> ACA fails to identify any *actual harm* that will result from the exclusion of technology upgrade costs from the lump sum amount, much less harm that would be certain or severe enough to be cognizable as irreparable harm.

31. ACA’s alleged injuries are speculative and based on a misreading of the Commission’s underlying goals when it established the lump sum payment option.<sup>99</sup> Rather than seeking to provide a fully-funded means for MVPDs to transition their earth stations to fiber, the Commission made clear that the lump sum payment was designed to provide flexibility to earth station operators to accept, as an alternative to reimbursement for their actual relocation costs, a lump sum payment for what the average, estimated costs *would have been* to relocate their operations to the upper 200 megahertz of the C-band.<sup>100</sup>

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*Parte* at 2; Content Companies and NAB July 6, 2020 *Ex Parte* at 3-4; AT&T July 7, 2020 *Ex Parte* at 2; CTIA July 9, 2020 *Ex Parte* at 2; Intelsat July 27, 2020 *Ex Parte* at 1-2.

<sup>95</sup> Cartesian Study at 21 (emphasis added). Even if an MVPD believes it cannot elect the lump sum payment because the amount incorrectly omits an “outlier” cost and is inadequate to cover its relocation costs, its alternative is to seek reimbursement of its actual relocation costs, and there is no harm from the alleged failure to disclose (which we do not concede) the methodology and analysis performed in determining the final lump sum amounts.

<sup>96</sup> And, as discussed below, if ACA’s members believe the lump sum amount is insufficient for their particular transition needs, they are free to instead seek reimbursement of their actual relocation costs

<sup>97</sup> Stay Request at 2; *see also* RCN Comments at 3.

<sup>98</sup> *Mexichem Specialty Resins, Inc. v. EPA*, 787 F.3d 544, 555 (D.C. Cir. 2015) (emphasis in original) (internal citations omitted); *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297 (D.C. Cir. 2006).

<sup>99</sup> Content Companies Opposition at 6-8 (ACA’s alleged harm is hypothetical, “remote,” and “speculative, at best.”); Intelsat Opposition at 7 (ACA’s assertions “misrepresent the nature of the lump sum payment election”).

<sup>100</sup> *3.7 GHz Report and Order*, 35 FCC Rcd at 2427, para. 202.

Contrary to ACA's arguments, the *3.7 GHz Report and Order* made clear that the Commission provided no guarantee that the lump sum payment would be sufficient to cover the costs of a transition to fiber, nor did it make any finding that integrated receiver/decoder equipment costs must be included in the lump sum amount.<sup>101</sup> ACA's claim of irreparable harm is therefore an attempt to define such harm as the deprivation of a benefit that the Commission never intended to, and did not, create.<sup>102</sup> As the Content Companies point out, even in ACA's own worst-case scenario in which an unidentified group of MVPDs choose not to elect the lump sum payment and therefore receive reimbursement for all reasonable costs associated with a transition to the upper 200 megahertz, "the allegedly 'harmed' MVPDs would be in a position *at least as good* as today in their ability to receive video programming."<sup>103</sup>

32. Further, ACA's alleged harm consists of economic injuries that are not severe enough to constitute irreparable harm.<sup>104</sup> Courts have held repeatedly that economic loss, on its own, does not constitute irreparable harm and can only justify a stay when such loss "threatens the very existence of the movant's business."<sup>105</sup> Here, the only economic loss that MVPDs might suffer, if any, would be a lower lump sum amount that does not include the costs of integrated receiver/decoder equipment.<sup>106</sup> ACA does not even identify a specific group of MVPDs that will be harmed by this alleged economic loss, much less demonstrate that a lower lump sum amount will threaten the existence of the MVPDs' business.<sup>107</sup>

33. Moreover, to the extent there is any harm, it is not irreparable. MVPDs have two options with respect to the lump sum election: First, an MVPD could still elect the lump sum and pursue either relocation of its facilities to the upper portion of the C-band, a transition to fiber, or some other transition approach.<sup>108</sup> If an MVPD elects the lump sum and wishes to continue receiving C-band services, the costs of technology upgrade equipment, to the extent needed, will be borne by, and reimbursable to, the relevant satellite operators. Such an MVPD would suffer no harm due to the exclusion of integrated receiver/decoder equipment from the lump sum amount. Alternatively, if the MVPD wishes to transition to fiber, it could use the lump sum payment to help fund that transition.<sup>109</sup> Again, the costs of any technology upgrade equipment, to the extent needed, will be borne by, and reimbursable to, the relevant satellite operators. In either case, in the event the Commission or the court were to agree with ACA that

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<sup>101</sup> *Id.* at 2427, para. 202 (By adopting the restriction that earth stations choosing to elect the lump sum payment may not seek additional reimbursement in the event the lump sum is insufficient to cover all of its relocation costs, the Commission sought "to ensure that incumbents have the appropriate incentive to accept the lump sum only if doing so is truly the more efficient option."); *id.* at 2428, para. 203 (granting the Bureau discretion to identify the appropriate lump sum amounts for various classes of earth stations); *see also* Intelsat Opposition at 7-8 ("Absolutely *nothing* in the Report and Order guaranteed that any lump sum the Bureau later designated would be enough for those electing it to fully support a transition to fiber.") (emphasis in original); SES Opposition at 4 (arguing the *3.7 GHz Report and Order* "makes clear the lump sum is not intended to fully fund cable operator fiber transitions").

<sup>102</sup> SES Opposition at 6 ("Having to make a choice based on imperfect information and accepting the known risk that the lump sum may not cover all costs does not create any irreparable harm.").

<sup>103</sup> Content Companies Opposition at 7; *see also* AT&T Opposition at 7; SES Opposition at 6.

<sup>104</sup> CTIA Opposition at 8; AT&T Opposition at 8; Content Companies Opposition at 7-8; Intelsat Opposition at 9; SES Opposition at 6; Verizon Opposition at 8.

<sup>105</sup> *Wis. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985); *see also Mexichem Specialty Resins, Inc. v. EPA*, 787 F.3d 544, 555 (D.C. Cir. 2015); *Cincinnati Bell Telephone Company*, 8 FCC Rcd 6709, 6710 (1993).

<sup>106</sup> Verizon Opposition at 8.

<sup>107</sup> CTIA Opposition at 8; AT&T Opposition at 8; Content Companies Opposition at 7-8; Verizon Opposition at 8-9.

<sup>108</sup> Verizon Opposition at 8.

<sup>109</sup> AT&T Opposition at 7-8 ("At most, ACA's members will forgo an opportunity to deploy private fiber distribution networks—plant that has utility to the MVPDs far beyond C-band replacement—at a cost that is heavily subsidized by 3.7 GHz Service licensees.").

technology upgrade equipment costs should have been included in the lump sum amount, ACA presents no reason why the Clearinghouse could not simply disburse those additional funds to those MVPDs that previously elected the lump sum amount that did not include those costs.<sup>110</sup> Second, even where an MVPD that believes that it cannot elect the lump sum payment without a guarantee that the costs of integrated receiver/decoder equipment are included, the effect of such operator's decision not to elect the lump sum is that it will instead receive reimbursement for its actual relocation costs associated with transitioning to the upper portion of the band.<sup>111</sup> To the extent ACA alleges harm based on its members being "forced" to forego the opportunity of a fiber transition funded by new overlay licensees—an opportunity to which ACA's members were never entitled, and the deprivation of which cannot be deemed a harm at all<sup>112</sup>—such harm is a purely economic loss and does not rise to the level of irreparable harm required to warrant a stay.

**C. ACA Has Not Shown That the Equities Favor a Stay**

34. Finally, ACA has not met its burden of showing that other parties would not be harmed by a stay and that the public interest militates in favor of a stay.<sup>113</sup>

35. *Injury to other parties.* ACA argues that incumbent space station operators and programmers would not be harmed by a stay, since they already filed their Transition Plans before the lump-sum election deadline, and that space station operators in fact may benefit from a stay in the event the Commission agrees that technology upgrade costs should be included in the lump sum, since such a decision could encourage more MVPDs to transition their earth stations to fiber, thereby reducing the overall burden of space station operators' transition.<sup>114</sup> ACA further argues that a stay would in fact avoid the "potential future harm of having to revise or recalibrate [stakeholders'] plans later if the Commission grants ACA's Application for Review."<sup>115</sup>

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<sup>110</sup> CTIA Opposition at 9; Verizon Opposition at 7-8 ("There is nothing about the lump sum payment election deadline that is beyond remediation.").

<sup>111</sup> In adopting rules for the relocation of existing C-band services to the upper portion of the band, the Commission was obligated only to ensure that incumbents are compensated for the reasonable costs incurred to enable incumbents to provide and receive the same services during and after the transition. *See 3.7 GHz Report and Order*, 35 FCC Rcd at 2422, para. 194 (defining "reasonable relocation costs" for which incumbents will be reimbursed as those costs necessitated by the relocation in order to ensure that "incumbent earth station operators continue to be able to provide substantially the same service to their customers after the relocation compared to what they were able to provide before"), n.518 ("We further clarify that comparability for video distribution services requires that the video quality of the end-to-end, programmer-to-viewer chain is at least as good as it is today."); *see also* AT&T Opposition at 7 ("Even if they do not elect the lump sum payment, ACA members will be in no worse position post-transition than they are today."); CTIA Opposition at 9; SES Opposition at 6 (arguing the lump sum option "inherently carries the risk that it will not cover all relocation costs and is not even intended to cover the far greater costs of a fiber transition").

<sup>112</sup> The *Emerging Technologies* framework does not require, and the Commission did not seek to provide, the ability for incumbents to have a fully funded transition to any alternative service of their choosing. *See* CTIA Opposition at 9; SES Opposition at 2, 4. In creating the lump sum payment, the Commission provided an administrative alternative to the more formalized transition and reimbursement process, but it in no way expanded the compensation to which incumbent earth stations would have otherwise been entitled. *See 3.7 GHz Report and Order*, 35 FCC Rcd at 2426, n.539 ("We disagree with ACA Connects that compensable earth station migration costs should include the costs of transitioning to an alternative form of delivery, such as fiber . . . We have defined clearly the migration in this context as the costs of transitioning C-band services to the upper 200 megahertz of the band (e.g., repo[ing]ing, retuning, and replacing antennas, and installing filters and compression hardware).").

<sup>113</sup> *See* Stay Request at 12-14.

<sup>114</sup> *Id.* at 12; *see also* RCN Comments at 3.

<sup>115</sup> Stay Request at 13 (emphasis omitted).

36. We disagree that incumbent space station operators would not be harmed by a stay of the lump sum election deadline beyond the limited extension we have already granted.<sup>116</sup> In order to satisfy the benchmarks under the accelerated relocation timeframe, space station operators have already begun transitioning their services to the upper 200 megahertz of the band.<sup>117</sup> Meeting the accelerated relocation deadlines “requires an intricate series of interrelated steps involving satellite transponder plans, customer frequency assignments, and ground station equipment and operations.”<sup>118</sup> While space station operators were able to begin some aspects of the transition before the lump sum elections were made, they must wait to perform necessary earth station migration actions until they know which earth stations they are responsible for transitioning and which earth stations have elected the lump sum payment and will therefore transition themselves.<sup>119</sup> Programmers would also be harmed by a stay, as the inability of incumbent space station operators to adequately incorporate this critical information into their Transition Plans “risks an uncoordinated process that will increase the potential for mistakes and thus failure of program delivery.”<sup>120</sup> Delaying the lump sum elections would create uncertainty for incumbent space station operators during this crucial transition period and could complicate, or even delay, their overall relocation efforts.<sup>121</sup>

37. Furthermore, lump sum elections will be a critical input in potential bidders’ decisions to participate in the auction of overlay licenses, as well as the amount that they may be willing to bid for particular licenses. The lump sum elections will provide potential bidders with important information on the expected costs of the overall transition and the extent to which incumbent earth station operators will remain in the C-band or choose to transition to alternate services. As AT&T points out, potential 3.7 GHz Service licensees “must have certainty with respect to how the transition will proceed, what costs will be incurred, and when payments will be required to formulate their business and auction plans.”<sup>122</sup> Knowing which earth station operators have made lump sum elections and how those elections may be reflected in the satellite operators’ updated Transition Plans provides potential bidders important information on the potential value of a given overlay license that will be available at auction.<sup>123</sup> Given the upcoming important dates and deadlines for potential bidders—including the auction application window, which

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<sup>116</sup> See Lump Sum Election Extension Order (extending lump sum election deadline until September 14, 2020).

<sup>117</sup> Intelsat Opposition at 3 (“Intelsat’s vendors are already performing field work and Intelsat’s customers are already transitioning.”); SES Opposition at 7 (“SES’s transition activities are rapidly advancing and it is already moving forward to complete the work necessary to transition services received by incumbent earth stations according to a rational and efficient plan.”); Verizon Opposition at 3.

<sup>118</sup> Opposition of Telesat Canada to ACA Request for Stay, GN Docket No. 18-122, at 2 (filed Aug. 19, 2020) (Telesat Opposition); see also Content Companies Opposition at 8-10; CTIA Opposition at 11-12; Intelsat Opposition at 2-4; SES Opposition at 7.

<sup>119</sup> Telesat Opposition at 3 (“Until lump sum elections have been made . . . Telesat’s repacking plans are frozen in place.”); CTIA Opposition at 2-3 (arguing the lump sum election choice will directly affect all satellite operators’ transition plans); Intelsat Opposition at 4 (“Intelsat cannot ascertain which sites and how many antennas for a large portion of the cable earth stations are in scope and cannot plan work until the opt out period closes.”); SES Opposition at 8.

<sup>120</sup> Content Companies Opposition at 9.

<sup>121</sup> CTIA Comments at 11; Intelsat Opposition at 4 (“[A]ny delay or continuing uncertainty that precludes Intelsat from taking necessary actions to further the transition creates potentially serious issues for achieving the accelerated timelines.”); SES Opposition at 8 (“[D]elaying the lump sum election deadline pushes back the date by which SES will have the necessary information about the scope of these earth station transition efforts . . . making it even more difficult to complete the already-challenging task of widespread earth station transition.”).

<sup>122</sup> AT&T Opposition at 8; see also Verizon Opposition at 4.

<sup>123</sup> CTIA Opposition at 4 (stay of lump sum election “would be problematic because of the uncertainty that it would inject into the upcoming auction”); SES Opposition at 9.

opens on September 9 and closes on September 22, the upfront payment deadline of November 2, and the start of bidding on December 8—additional delay in obtaining this information reduces the time for potential bidders to conduct their due diligence.<sup>124</sup> Grant of a stay would therefore harm potential bidders by introducing uncertainty, complicating their auction strategies, and impeding their ability to plan and prepare for the financial obligations of 3.7 GHz Service licensees.<sup>125</sup>

38. *Public Interest.* Finally, ACA argues that a stay would serve the public interest by allowing the Commission to revise the Bureau’s decision regarding the lump sum payments in a manner that will encourage more MVPDs to convert to fiber, thereby providing for a more efficient transition and avoiding more significant disruption if the Commission or the court were to reverse the Bureau’s decision at a later date.<sup>126</sup> ACA’s argument, however, is based on a presumption that the Commission or court will decide in its favor, which it has not shown is likely.<sup>127</sup> The Commission’s primary goal in adopting the *3.7 GHz Report and Order* was not to ensure that as many incumbent earth stations as possible would choose to transition their services to fiber.<sup>128</sup> In adopting provisions for a lump sum payment to incumbent earth stations in lieu of reimbursement for their actual relocation costs, but limiting the lump sum amount to the costs the earth station operator would have incurred to stay in the C-band, the Commission sought to ensure that incumbents have the incentive to accept the lump sum “only if doing so is truly the more efficient option.”<sup>129</sup> Contrary to ACA’s claim, the Commission stated explicitly that, in adopting rules for the transition of the C-band, it sought “to make this valuable spectrum resource available for new terrestrial wireless uses as quickly as possible, while also preserving the continued operation of existing FSS services during and after the transition.”<sup>130</sup>

39. Delaying the lump sum election would create uncertainty for potential bidders, compromise the overall transition of FSS services to the upper 200 megahertz of the C-band, and could ultimately delay the availability of critical 5G wireless services to the American public.<sup>131</sup> The cost of such delay and disruption would undoubtedly be enormous. For instance, economists estimated that one

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<sup>124</sup> See *Auction of Flexible-Use Service Licenses in the 3.7-3.98 GHz Band for Next-Generation Wireless Services; Notice and Filing Requirements, Minimum Opening Bids, Upfront Payments, and Other Procedures for Auction 107; Bidding in Auction 107 Scheduled to Begin December 8, 2020*, AU Docket No. 20-25, Public Notice, FCC 20-110, at 5-6, para. 11 (rel. Aug. 7, 2020).

<sup>125</sup> CTIA notes that, in contrast to earth station operators that do not elect the lump sum and will therefore have their costs reimbursed gradually as they are incurred throughout the transition process, because the lump sum payments are fixed, winning licensees will likely owe those amounts in the first tranche of payments upon receiving their licenses. These timing differences, CTIA argues, “directly affect potential bidders, who need to assess when payments will be owed, not merely how much those payments are, in order to budget their capital expenditures for securing C-band spectrum and to determine whether and when they will need to seek outside financing.” CTIA Opposition at 10-11.

<sup>126</sup> Stay Request at 13-14; see also RCN Comments at 3-4.

<sup>127</sup> See Telesat Opposition at 3 (arguing that ACA’s public interest argument is speculative and based on theoretical harms).

<sup>128</sup> Verizon Opposition at 4.

<sup>129</sup> *3.7 GHz Report and Order*, 35 FCC Rcd at 2427, para. 202.

<sup>130</sup> *Id.* at 2353, para. 20; Telesat Opposition at 3 (“There is an overriding public interest in clearing and repacking the C-band expeditiously and deploying 5G services rapidly.”); Intelsat Opposition at 9-10; SES Opposition at 10 (“The American public has a vital interest in the deployment of next-generation 5G wireless services ‘as quickly as possible.’”) (internal citations omitted).

<sup>131</sup> Content Companies Opposition at 8-10; AT&T Opposition at 8; CTIA Opposition at 12-15; Intelsat Opposition at 9-10; SES Opposition at 9 (“The net result is either electing incumbent earth stations may lose their service or the lower portion of the C-band will not be cleared by December 5, 2023.”); Verizon Opposition at 3 (“[A]ny delay in repurposing C-band spectrum will impose substantial harms on U.S. consumers and the U.S. 5G ecosystem.”).

year of delay in transitioning the C-band spectrum would reduce the spectrum's value between 7% and 11%, and reduce consumer welfare by \$15 billion.<sup>132</sup> The Commission estimated the total amount that new licensees would willingly pay to accelerate relocation at \$10.52 billion.<sup>133</sup> Delay also could cost hundreds of millions of dollars in lost revenues for the U.S. Treasury.<sup>134</sup> We agree with CTIA, which points out that lack of clarity about satellite operators' transition obligations and bidder uncertainty could "undermine the value of spectrum, depress auction participation, and distort bidding, risking that spectrum does not end up being acquired by those who value it the most—undermining a critical policy objective underlying an auction and limiting auction revenue."<sup>135</sup> We therefore find that ACA's Stay Request would not serve the public interest.

#### IV. ORDERING CLAUSES

40. ACCORDINGLY, IT IS ORDERED, that, pursuant to sections 1, 4(i), 4(j), 5, and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 155, 303(r), and the authority delegated pursuant to sections 0.131 and 0.331 of the Commission's rules, 47 CFR §§ 0.131, 0.331, this Order Denying Stay Petition in GN Docket No. 18-122 and IB Docket No. 20-205 is ADOPTED.

41. IT IS FURTHER ORDERED that the August 13, 2020 Request for Stay of ACA Connects – America's Cable Association, is DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donald Stockdale  
Chief  
Wireless Telecommunications Bureau

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<sup>132</sup> *3.7 GHz Report and Order*, 35 FCC Rcd at 2417-18, para. 185; *see id.* at 2420-21, para. 190; *see also id.* at 2410, para. 162 (citing estimate that delay would result in permanent losses of "about \$50 billion or more per year in consumer surplus").

<sup>133</sup> *Id.* at 2433, para. 218.

<sup>134</sup> *See id.* at 2433, para. 219 & n.580.

<sup>135</sup> CTIA Opposition at 13.