IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

In re: ACA Connects—America's Communications Association, Petitioner.	)	No. 20-1327

OPPOSITION OF FEDERAL COMMUNICATIONS COMMISSION TO PETITION FOR WRIT OF MANDAMUS

Earlier this year, the Federal Communications Commission acted to repurpose critical, mid-band spectrum, known as the C-band, for flexible use by securing the expeditious, voluntary clearing and repacking of incumbent satellite licensees and their earth station customers from the lower 300 megahertz of the C-band to the upper 200 megahertz of the band. *Expanding Flexible Use of the 3.7 to 4.2 GHz Band*, 35 FCC Rcd 2343 (2020) (*C-Band Order*). To achieve this goal, the Commission adopted a reticulated framework involving numerous interdependent and time-sensitive steps. Each step in this carefully crafted transition process—including an auction of new flexible-use licenses for the lower 280 MHz of the C-band—is aimed at speeding deployment of 5G, the next generation of wireless connectivity, and closing the digital divide.

ACA Connects—America's Communications Association (ACA) represents some of the earth stations that must clear the 300 megahertz of reallocated spectrum and will be paid for necessary costs of relocation. But it now seeks to delay implementation of the Commission's C-band framework by requesting a stay

of the upcoming deadline for electing lump sum reimbursement of necessary relocation costs. ACA's request fails to satisfy the stringent requirements for a stay and should be denied. At bottom, ACA seeks a stay in order to extract a larger lump sum reimbursement amount to fund its members' transition from satellite delivery of video programming to fiber distribution. But the Commission made clear that the lump sum is meant to equal the expenses earth stations are likely to incur in relocating their operations to the upper 200 MHz of the C-Band, not to provide a windfall to ACA's members or cover the costs of their transition to fiber. As the FCC's Wireless Telecommunications Bureau explained, the lump sum was set at an amount that appropriately allocated the costs of certain video compression equipment to the satellite operators who are best positioned to purchase such devices. In any event, disputes over money are not a proper basis for a stay, particularly where, as here, the delay ACA seeks would adversely affect the interests of third parties and undermine the public interest in the rapid deployment of next-generation wireless services.

ACA's mandamus petition is not the first attempt by a party to delay implementation of the FCC's C-band proceeding. Less than three months ago, this Court denied a motion by small satellite operators to stay the C-band auction altogether. *See PSSI Global Services, LLC v. FCC*, No. 20-1142 (and consolidated

cases) (D.C. Cir. June 23, 2020). The Court should likewise deny ACA's request for a stay.

BACKGROUND

The C-band (the band of radio spectrum between 3.7 GHz and 4.2 GHz) "is essential for 5G buildout due to its desirable coverage, capacity, and propagation characteristics." *C-Band Order* ¶ 3. As of June 2018, however, eight satellite operators were licensed to use this spectrum, primarily for distributing programming to television and radio broadcasters and multichannel video programming distributors (MVPDs), such as cable operators, throughout the country. *Id.* ¶¶ 8, 115, 161.

In Section 605(b) of the MOBILE NOW Act, Congress directed the FCC to evaluate "the feasibility of allowing commercial wireless services, licensed or unlicensed, to use or share use of" the C-band. Pub. L. No. 115-141, Div. P, Tit. VI, § 605(b), 132 Stat. 1097, 1100 (2018). Pursuant to this mandate, the Commission initiated a rulemaking in July 2018 to solicit comment on proposals to clear all or part of the C-band for commercial wireless use. *C-Band Order* ¶¶ 15-17.

In February 2020, after reviewing extensive comments from a wide array of interested parties, the FCC acted to make the lower 280 MHz of the C-band available for terrestrial wireless use by adopting a framework that involves

"repacking existing satellite operations into the upper 200 [MHz]" of the band and "reserving a 20 [MHz] guard band." *C-Band Order* ¶ 4. "[F]lexible-use licenses" for the lower 280 MHz of the C-band will be assigned through a "Commission-administered public auction" that is scheduled to begin on December 8, 2020. *See id.* ¶ 22; Public Notice, Auction of Flexible-Use Service Licenses in the 3.7-3.98 GHz Band for Next-Generation Wireless Services, FCC 20-110 (released Aug. 7, 2020).

This spectrum reallocation will require space stations (which transmit satellite signals) and earth stations (which receive those signals) to relocate their operations to the upper 200 MHz of the C-band. The FCC determined 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," and that the parties acquiring licenses in the auction for the lower portion of the band will bear those costs. *C-Band Order* ¶ 179.

The Commission gave incumbent earth station operators a choice as to how they are compensated for their relocation costs. *C-Band Order* ¶ 202. They can be reimbursed for their actual reasonable relocation costs if they submit itemized cost data to a Relocation Payment Clearinghouse, which will review the data and disburse relocation payments to cover the earth station operators' verified reasonable costs. *Id.* ¶¶ 202, 260-63. Alternatively, to provide "flexibility" for

incumbent earth stations "to make efficient decisions that better accommodate their needs" (either to maintain operations in the upper 200 MHz of the C-band or to transition to alternative modes of service delivery), "they may accept a lump sum reimbursement for *all* of their incumbent earth stations based on the average, estimated costs of relocating" those stations. *Id.* ¶ 202. "Incumbent earth station owners that elect the lump sum payment will not be eligible to submit estimated or actual reasonable relocation costs to the Clearinghouse." *Ibid.*

The FCC directed the Wireless Telecommunications Bureau "to announce the lump sum that will be available per incumbent earth station as well as the process for electing lump sum payments." *C-Band Order* ¶ 203. The Commission stated that the Bureau "should identify lump sum amounts for various classes of earth stations … as appropriate." *Ibid.* The Commission's rules further delegate to the Bureau the task of determining "the estimated reasonable transition costs of earth station migration." 47 C.F.R. § 27.1412(e).

With the assistance of a contractor, RKF Engineering Solutions, LLC (RKF), the Bureau developed a "Preliminary Cost Catalog" containing preliminary categories and estimates of the relocation costs associated with clearing the lower 280 MHz of the C-band. The Bureau released the Preliminary Cost Catalog to the public in April 2020 and sought comment on its contents. Public Notice, Wireless Telecommunications Bureau Seeks Comment on Preliminary Cost Category

Schedule for 3.7-4.2 GHz Band Relocation Expenses, 35 FCC Rcd 4440 (2020) (*Preliminary Cost Catalog Public Notice*).

"After considering the comments received in response to the [*Preliminary Cost Catalog Public Notice*], the Bureau, with assistance from RKF, … updated the classes of earth stations and developed proposed lump sum amounts for each class of earth station." Public Notice, Wireless Telecommunications Bureau Seeks Comment on Optional Lump Sum Payments for 3.7-4.2 GHz Band Incumbent Earth Station Relocation Expenses, 35 FCC Rcd 5628, 5630 (2020) (*Lump Sum Comment Public Notice*). In developing its proposed amounts, the Bureau determined the "modifications or component replacements" that "a given type of earth station" must make "in a typical transition." *Id.* at 5631. "Depending on the type of earth station," the Bureau "input different modifications or component changes" based on the probability that such changes "would be necessary for this type of earth station transition." *Ibid.* It next used "the average cost of the range [of those changes in] the Preliminary Cost Catalog" to calculate the proposed lump sum payment for each type of earth station. *Ibid.* The Bureau then sought "additional comment" on the proposed lump sum amounts and the methodology for calculating those amounts. *Id.* at 5630-31.

On July 30, 2020, the Bureau announced its final relocation cost estimates and lump sum payment amounts, as well as the process for electing lump sum

reimbursement. Public Notice, 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, DA 20-802 (2020) (*Final Notice*). The Bureau explained that it used the expected value methodology described in the *Lump Sum Comment Public Notice* to calculate the lump sum amounts along with some "updates to the lump sum categories and amounts … in response to comments." *Id.* ¶ 16.

As relevant here, the Bureau found that the lump sum amount for incumbent earth stations operated by MVPDs should not include the cost of obtaining integrated receivers/decoders (IRDs). *Final Notice* ¶¶ 17-18. "IRDs are the hardware that enables MVPDs, broadcast affiliates, and other authorized parties to receive and decode signals transmitted by satellite operators on behalf of programmers." Comments of the Content Companies, GN Docket No. 18-122, June 15, 2020, at 2. After reviewing the record, the Bureau concluded that "satellite operators, together with programmers, must be able to select and purchase" IRDs "uniformly and on a nationwide basis—and to coordinate the technology upgrade process—to accomplish a successful transition." *Final Notice* ¶ 18.

The Bureau agreed with commenters who argued that satellite operators should be responsible for acquiring compression equipment because "they will

determine—with programmers—'which streams are compressed and how they are compressed.'" *Final Notice* n.67 (quoting AT&T July 7, 2020 *Ex Parte* at 2-3). Programmers explained that it was "critical" for the FCC to "centraliz[e] the compression upgrade process" by "[a]llocating IRD costs to programmers and satellite operators" because, "prior to delivery, IRDs will need to be configured with the operating parameters of the networks whose signals they will decode." *Id.* n.69 (quoting Content Companies and NAB June 30, 2020 *Ex Parte* at 2). Other commenters affirmed the need for nationwide coordination. *See* NCTA June 15, 2020 Comments at 12 ("choices about" deployment of compression equipment "must be made at the national level and adopted across a programmer's distribution chain"); AT&T July 7, 2020 *Ex Parte* at 2 (the process for implementing IRDs "cannot be decentralized" because "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"); *see generally Final Notice* n.69. Based on these comments, the Bureau concluded that because the selection and purchase of IRDs "are an integral part of the satellite operators' nationwide transition

process," satellite operators should bear the costs of "selecting, purchasing, and delivering" IRDs to earth stations. *Id.* ¶ 17.[1]

In addition, the Bureau excluded "outlier" costs from the lump sum amounts. *See Final Notice* ¶ 16 & n.63. When the Bureau determined that "a cost would not be incurred in a typical transition for a particular earth station class," it "excluded that cost item" from the lump sum amount for that class. *Id.* ¶ 36. For example, the Bureau declined to include the cost of "additional antennas" in the lump sum for MVPD earth stations because it did not find "sufficient evidence" to justify "including such expenses in the lump sum as part of the average, estimated costs of transitioning." *Ibid.*

The deadline for earth station operators to elect lump sum reimbursement was originally set for August 31, 2020. *Final Notice* ¶ 39. It was subsequently extended to September 14, 2020. *Expanding Flexible Use of the 3.7 to 4.2 GHz Band*, DA 20-909 (released Aug. 20, 2020) (*Deadline Extension Order*).

On August 13, 2020, ACA filed an application for Commission review of the Bureau's lump sum amount for MVPD earth stations. ACA also asked the

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[1] "In contrast," the Bureau determined that "the costs associated with physically installing" IRDs at MVPDs' earth stations "are more appropriately assigned to the earth station operator (and are thus included in the MVPD lump sum amount)." *Final Notice* ¶ 17. The Bureau explained that allowing MVPD operators "to maintain individual responsibility for installing" this equipment would enable them "to maintain control over the portion of their transition specific to their own earth stations." *Id.* ¶ 20.

agency to stay the lump sum election deadline pending a ruling on the application for review and any ensuing judicial review. On August 31, 2020, the Bureau denied ACA's request for an administrative stay. *Expanding Flexible Use of the 3.7 to 4.2 GHz Band*, DA 20-998 (released Aug. 31, 2020) (*Stay Denial Order*).

ARGUMENT

A stay may be granted under the All Writs Act, 28 U.S.C. § 1651, only if the petitioner satisfies the "well established requirements" that "apply to motions for stay pending appeal." *Reynolds Metals Co. v. FERC*, 777 F.2d 760, 762 (D.C. Cir. 1985). Thus, ACA is not entitled to the extraordinary remedy of a stay unless it demonstrates that (1) it will likely prevail on the merits, (2) its members will suffer irreparable harm without a stay, (3) a stay will not harm other parties, and (4) a stay will serve the public interest. *Nken v. Holder*, 556 U.S. 418, 434 (2009). ACA's attempt to delay the C-band relocation in order to seek a greater lump sum reimbursement amount fails to satisfy any of these prerequisites.

I. ACA Has Not Shown That It Is Likely To Prevail On The Merits

ACA challenges the Bureau's designation of lump sum amounts on two grounds. First, it argues that the Bureau improperly excluded the costs of IRDs from the lump sum amount for MVPD earth stations. Pet. 17-23. Second, it contends that the Bureau's process for setting the lump sum amounts was arbitrary and capricious. Pet. 23-29. Neither claim is likely to succeed.

A. The Bureau Reasonably Excluded The Cost Of Purchasing IRDs From The Lump Sum Amount For MVPD Earth Stations

After receiving and reviewing comments on its proposed lump sum amounts, the Bureau decided to exclude the cost of obtaining IRDs from the lump sum amount for MVPD earth stations. The record reflected that "satellite operators and programmers need to decide which equipment is needed for technology upgrades," and that "the most efficient approach to ensure a smooth transition is to assign satellite operators, in cooperation with programmers, responsibility for selecting and purchasing those upgrades as part of the satellite operators' transition." *Final Notice* ¶ 20. Based on that record, the Bureau reasonably concluded that the selection and purchase of IRDs, which "are an integral part of the satellite operators' nationwide transition process," should "be considered as part of the cost associated with the transition of satellite transponders." *Id.* ¶ 17.

At the same time, the Bureau recognized that the Commission "expect[ed]" earth stations' "relocation costs to include the cost" to "install … compression software and hardware." *See C-Band Order* ¶ 201. Consistent with the Commission's expectation, the lump sum amounts that the Bureau adopted for MVPD earth stations "include the average, estimated costs associated with installing any necessary compression-related technology upgrades" at MVPD earth station sites. *Final Notice* ¶ 17.

ACA argues that the Bureau violated Commission regulations by excluding IRD procurement costs from the MVPD lump sum. Pet. 17-23. That claim is baseless. Contrary to ACA's assertion (Pet. 17), nothing in "the plain text" of the FCC's rules prohibits the Bureau's decision.

FCC rules provide that the "lump sum payment" must be "equal to the estimated reasonable transition costs of earth station migration and filtering, *as determined by the Wireless Telecommunications Bureau*." 47 C.F.R. § 27.1412(e) (emphasis added). The rules define "earth station migration" to include "any necessary changes that allow the uninterrupted reception of service by an incumbent earth station on new frequencies in the upper portion" of the C-band, "including … the *installation* of new equipment … for technology upgrades necessary to facilitate the repack, such as compression technology." *Id.* § 27.1411(b)(4) (emphasis added).

While the rule defining "earth station migration" expressly refers to the "installation" of compression equipment, it makes no mention of the cost of purchasing such equipment. ACA maintains that the cost of obtaining IRDs falls within the definition of earth station migration because "IRDs are necessary to allow earth stations to receive 'uninterrupted reception of service' when C-Band transmissions move to more advanced compression technologies." Pet. 18. But the fact that "IRDs are installed in earth stations" and "used by earth-station

operators" (Pet. 20) does not resolve the issue of how IRD procurement costs should be allocated. It is not "necessary" for earth stations to incur the cost of obtaining IRDs if the satellite operators that select IRDs are responsible for purchasing them.

ACA notes that the FCC's "regulation does not ask who selects the [compression] equipment." Pet. 20. But the regulation also does not specify whether the cost of purchasing the equipment should be assigned to the satellite operators that select the IRDs or the earth station operators that install them. The Bureau reasonably concluded that satellite operators, who must "decide" what "equipment is needed for technology upgrades," should be responsible for purchasing any IRDs required to complete the C-band transition. *Final Notice* ¶ 20; *see also id*. n.67 ("[T]he decision to compress is made at the transponder level in concert with the programmers for whom compression is applicable") (quoting Intelsat June 24, 2020 *Ex Parte* at 2). Accordingly, the Bureau excluded IRD acquisition costs from the lump sum for MVPD earth stations. That decision fell comfortably within the Bureau's delegated authority to determine the "reasonable transition costs of earth station migration" under 47 C.F.R. § 27.1412(e); *see also C-Band Order* ¶¶ 203, 262 (delegating to the Bureau the adoption of lump sum reimbursement amounts and the approval of a schedule of reimbursable costs).

Nothing in the *C-Band Order* requires a contrary conclusion. ACA purports to find support for its position in paragraph 201 of that order, Pet. 18-19, but that paragraph—like the Commission's rules—refers only to "the *installation*" of compression equipment, not the *purchase* of such equipment. *C-Band Order* ¶ 201 (emphasis added). The Bureau reasonably found that the *C-Band Order* "does not mandate that the cost of purchasing" compression equipment "is an earth station migration cost." *Final Notice* ¶ 21.[2]

ACA also points to paragraph 210 of the *C-Band Order*, which refers to the estimated cost of "MVPD compression hardware." Pet. 19 (quoting *C-Band Order* ¶ 210). But paragraph 210 did not allocate costs between satellite operators and earth stations. Instead, it made a preliminary estimate of the total costs of relocation, in order "to provide potential bidders" in the C-band auction "with an estimate of the relocation costs that they may incur" if they obtain flexible-use licenses. *C-Band Order* ¶ 205. The fact that a particular cost might be associated

[2] This is in contrast, the Bureau explained, to "filters, which must be purchased in connection with the transition of an earth station regardless of decisions made at the satellite level." *Final Notice* ¶ 22. Thus, contrary to ACA's contention (Pet. 22), the fact that the Bureau exercised its discretion to include the costs of purchasing as well as installing filters in the lump sum reimbursement amount does not undermine the reasonableness of its determination that the purchase of IRDs is properly allocated to satellite operators. Similarly, there is no basis for ACA's claim (Pet. 20) that the Bureau's approach would effectively "convert virtually every earth-station cost into a satellite cost." Decisions to retune and repoint antennas—unlike decisions to deploy IRDs—are made on a localized basis by earth station operators. The Bureau properly allocated those costs to earth stations.

with the relocation of earth station operations for purposes of determining the magnitude of all relocation costs does not answer the question of who should pay that cost. In any event, the Commission stated that its cost estimates were "[b]ased on the [then-]current record" and were "subject to further reevaluation when we create and release the cost category schedule." *Id.* ¶ 210. The Bureau engaged in just such reevaluation when it adopted the final cost category schedule. After reviewing a more fully developed record, it reasonably found that IRD acquisition costs should be allocated to satellite operators, not earth stations. *See Final Notice* ¶¶ 17-30.

ACA complains that the Bureau's exclusion of IRD costs will undermine the ability of its members "to transition to fiber where doing so would be efficient." Pet. 19. But the lump sum reimbursement was never intended to fund the transition to fiber; indeed, the Commission specifically rejected ACA's request that it do so.

During the C-band rulemaking, ACA argued that "compensable earth station migration costs should include the costs of transitioning to … fiber, as long as it is not more expensive [than] C-band delivery by an order of magnitude." *C-Band Order* n.539 (internal quotation marks omitted). The Commission flatly rejected ACA's argument. It made clear that "lump sum payments will only be calculated for the costs of transitioning to the upper 200 [MHz]" of the C-band, and that any

"additional costs to transition to fiber" would be borne by earth station operators that elect lump sum reimbursement. *Id*. n.547.

Nor is there any basis for ACA's contention (Pet. 19) that MVPDs electing lump sum reimbursement will receive "unequal treatment" vis-à-vis incumbents that request reimbursement of their actual relocation costs. Under either reimbursement option, the allocation of costs for transitioning to the upper portion of the C-band is the same: Satellite operators will be reimbursed for the cost of purchasing IRDs, and earth station operators will be reimbursed for the cost of installing IRDs.[3]

ACA contends that by excluding IRD costs from the lump sum reimbursement, the Commission has unreasonably forgone the "efficien[cies]" that would flow from an MVPD earth station's election to use the lump sum to fund a transition to fiber. Pet. 19. But nothing prevents ACA's members from electing to receive the lump sum distribution and using that amount (as currently set by the

[3] ACA incorrectly asserts that the FCC's rules "place responsibility for purchasing" IRDs "on MVPDs electing the lump sum." Pet. 21. The rules provide that an incumbent electing lump sum reimbursement "is responsible for coordinating with the relevant space station operator as necessary and performing all relocation actions on its own." 47 C.F.R. § 27.1412(e). The relocation actions that the incumbent must perform do *not* include the purchase of IRDs, which is "part of a satellite operator's transition," not "part of an MVPD earth station transition." *Final Notice* ¶ 26. In accordance with the rules, an MVPD earth station operator electing the lump sum must coordinate with the satellite operators that are responsible for purchasing any IRDs needed for the transition. *Id*. ¶ 27.

Bureau) to fund the costs of transitioning to fiber. As ACA concedes, "[n]o one says the lump sum must cover fiber costs in full (it often may not)." Pet. 22. In any event, the Bureau reasonably pointed to the countervailing importance of enabling satellite operators "to select and purchase compression equipment uniformly and on a nationwide basis—and to coordinate the technology upgrade process—to accomplish a successful transition." *Final Notice* ¶ 18. This reasonable policy judgment regarding how best to achieve efficient spectrum reallocation is "accorded the greatest deference by a reviewing court." *Mobile Relay Assocs. v. FCC*, 457 F.3d 1, 8 (D.C. Cir. 2006) (quoting *Teledesic, LLC v. FCC*, 275 F.3d 75, 84 (D.C. Cir. 2001)).

B. The Bureau's Process For Determining Lump Sum Amounts Complied With The Administrative Procedure Act

ACA asserts that the Bureau violated the Administrative Procedure Act by (1) refusing to disclose its methodology for calculating lump sum amounts, (2) relying on "undisclosed information" obtained by a third-party consultant, and (3) making final lump sum determinations before satellite operators filed their final transition plans. Pet. 23-29. None of these claims has merit.

Methodology. When the Bureau requested comment on its methodology for calculating lump sum amounts, it described how it arrived at the proposed lump sums. "For each cost item from the Preliminary Cost Catalog," the Bureau "determined the likely number of instances various cost items would be used in an

average transition" for a class of earth stations—*i.e.*, "how many modifications or component replacements were needed for a given type of earth station in a typical transition." *Lump Sum Comment Public Notice*, 35 FCC Rcd at 5631. The Bureau then calculated the cost of those changes by using "the average cost of the range" of such changes "from the Preliminary Cost Catalog." *Ibid*. Simply put, "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." *Stay Denial Order* ¶ 20.

ACA contends that the Bureau failed to provide enough information to allow parties to comment meaningfully on the Bureau's methodology. Pet. 23-26. The record belies that claim. In response to the Bureau's request for comment, "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." *Stay Denial Order* ¶ 21. Indeed, ACA even submitted "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." *Ibid*.

ACA argues that the Bureau announced "for the first time" in the *Final Notice* that it would exclude outlier costs from its lump sum calculations. Pet. 25.

But the exclusion of outlier costs was a "logical outgrowth" of the methodology described in the *Lump Sum Comment Public Notice*. *See Agape Church, Inc. v. FCC*, 738 F.3d 397, 411 (D.C. Cir. 2013). As directed by the Commission, the Bureau made clear that it sought to identify the "average cost" of changes necessitated by "a typical transition." *Lump Sum Comment Public Notice*, 35 FCC Rcd at 5631; *see C-Band Order* ¶¶ 202-203. This Court has recognized that when agencies employ such methodologies, they may reasonably exclude outlier data that could skew their cost calculations. *See Ass'n of Oil Pipe Lines v. FERC*, 876 F.3d 336, 344 (D.C. Cir. 2017) (agency properly excluded outlying data that did not reflect "normal industry-wide cost changes"); *Bell Atl. Tel. Cos. v. FCC*, 79 F.3d 1195, 1203 (D.C. Cir. 1996) (the FCC reasonably excluded an "outlier" data point when calculating price caps for interstate access services).

Moreover, ACA clearly understood that the Bureau's calculation of typical transition costs would exclude atypical or "outlier" costs. ACA's own proposed lump sum amounts included only those costs that it expected to be "sufficiently common" in the transition—*i.e.*, costs "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." ACA Comments, May 14, 2020, Attachment at 20 (Cartesian Study); *see Stay Denial Order* ¶ 28. ACA's proposal—which itself omitted atypical costs from the lump

sum—demonstrated that ACA understood that the lump sum calculations would exclude outlier costs. Therefore, ACA cannot show that it was prejudiced by the absence of an express reference to "outliers" in the *Lump Sum Comment Public Notice*. *See United States Telecom Ass'n v. FCC*, 825 F.3d 674, 724-26 (D.C. Cir. 2016).

ACA asserts that "the Bureau offered no principled explanation" for treating new antenna costs as outliers and excluding them from the MVPD lump sum. Pet. 25. To the contrary, the Bureau reasonably explained that the record did not contain "sufficient evidence" to justify including the cost of new antennas "in the lump sum as part of the average, estimated costs of transitioning" to the upper part of the C-band. *Final Notice* ¶ 36. The Bureau cited record evidence that while new antennas may be necessary "[i]n some cases," earth stations already had antennas to receive service from new satellites "in the vast majority of cases." *Ibid*. (citing the initial transition plans of satellite operators SES and Intelsat).

ACA complains that the Bureau failed to specify its numerical "threshold" for determining that new antenna costs were not sufficiently typical to be included in the lump sum. Pet. 25 (citing *Final Notice* n.134). But the record reflected that the vast majority of earth stations do not need new antennas to complete the C-band transition. *Final Notice* ¶ 36 (citing Intelsat transition plan). Thus, even under ACA's lump sum proposal, new antenna costs would not qualify for the

lump sum. *See* Cartesian Study at 20 (costs should be excluded from the lump sum unless they occur "in approximately fifty percent … or more" of earth station transitions); *see also id*. at 21 (the lump sum for an "average" earth station transition should not include "unusual" costs that might be "necessary and reasonable expense[s] in some number of earth station relocations, and therefore reimbursable outside the lump sum context").

ACA also argues that it lacked information about the "inputs" that the Bureau used to calculate the lump sum amounts and, specifically, the probabilities the Bureau employed in calculating the lump sum amount. Pet. 23-24. But "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." *Stay Denial Order* ¶ 23; *see, e.g.*, ACA May 14, 2020 Comments (including Cartesian Study); ACA June 15, 2020 Comments; ACA June 25, 2020 *Ex Parte*. In particular, ACA's Cartesian Study based its lump sum amounts on costs that were incurred "in approximately fifty percent … or more" of MVPD earth station transitions. Cartesian Study at 20. And of course, ACA—a trade association representing more than 700 MVPDs, Pet. ix—clearly had access to information regarding the probability that certain costs would be incurred by MVPDs. Thus, ACA cannot plausibly claim that it was prejudiced by any lack of notice of the specific "inputs" used by the Bureau.

The methodology that the Bureau used to calculate the final lump sum amounts was materially "the same as described in the *Lump Sum Comment Public Notice*." *Final Notice* ¶ 16. That "methodology … did not change significantly" from the *Lump Sum Comment Public Notice* to the *Final Notice*, and ACA "had ample opportunity to criticize [the Bureau's] approach." *Solite Corp. v. EPA*, 952 F.2d 473, 485 (D.C. Cir. 1991) (per curiam). ACA may disagree with the Bureau's methodology for determining lump sum amounts, but the record refutes its claim that it lacked notice and an opportunity to comment on the methodology.

RKF. There is likewise no basis for ACA's argument (Pet. 27) that the Bureau improperly based its lump sum determinations "on undisclosed information received in undisclosed *ex parte* communications" between certain stakeholders and RKF, a third-party consultant. RKF was "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." *Stay Denial Order* ¶ 25; *see also Preliminary Cost Catalog Public Notice*, 35 FCC Rcd at 4441. The Bureau used this information to prepare a Preliminary Cost Catalog. "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." *Stay Denial Order* ¶ 25. The parties that met with RKF before release of the Preliminary Cost Catalog "were not making a

presentation on the merits"; RKF was simply "seeking cost information for its own analysis." *Ibid*. Consequently, the meetings between RKF and stakeholders were not subject to the disclosure requirements of the FCC's ex parte rules. *See* 47 C.F.R. §§ 1.1202(a), 1.1206(b).

Interested parties also had "ample opportunity" to comment on "the product of RKF's outreach." *Stay Denial Order* ¶ 26. "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." *Ibid*. Numerous 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." *Id*. ¶ 27. The APA requires nothing more. *See United States Telecom Ass'n*, 825 F.3d at 724-26.

Transition Plans. ACA argues that the Bureau based its final lump sum amounts on "incomplete data" because it announced those amounts before satellite operators submitted their final transition plans. Pet. 28-29. But satellite operators' initial transition plans, which provided detailed information "describing the necessary steps and estimated costs" of transitioning out of the lower portion of the C-Band, *C-Band Order* ¶ 302, were submitted more than a month before the final lump sum amounts were announced. Satellite operators subsequently filed

extensive comments on the Bureau's lump sum proposals. *Stay Denial Order* ¶ 24. These submissions provided the Bureau and the public with more than enough information to determine the final lump sum amounts. And the final transition plans, which were submitted to "update certain information" and to "cure any defects [identified] during the comment window," *C-Band Order* ¶ 306, "included no significant changes" with respect to satellite operators' plans "regarding the use of compression technologies." *Stay Denial Order* ¶ 24.

ACA notes that "Intelsat's final transition plan states, for the first time, that programmer ViacomCBS will be receiving compression upgrades." Pet. 29. But this was hardly a substantial change from Intelsat's initial transition plan; it simply "increas[ed] the number of customers designated for compression upgrades from 10 to 11." *Stay Denial Order* n.81. ACA has failed to show that any prejudice resulted from the Bureau's issuance of final lump sum determinations before satellite operators filed their final transition plans.

II. ACA Has Not Demonstrated Irreparable Harm

Even if ACA could demonstrate a likelihood of success on the merits—and it cannot—a stay of the lump sum election deadline is not warranted because ACA has failed to meet the "high standard for irreparable injury." *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297 (D.C. Cir. 2006).

To obtain a stay, ACA must "demonstrate that irreparable injury is *likely*" unless a stay is granted. *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 22 (2008). "Such injury must be both certain and great, actual and not theoretical, beyond remediation, and of such *imminence* that there is a clear and present need for equitable relief to prevent irreparable harm." *Mexichem Specialty Resins, Inc. v. EPA*, 787 F.3d 544, 555 (D.C. Cir. 2015) (internal quotation marks omitted). To satisfy this demanding standard, ACA "must provide proof" that irreparable harm "is certain to occur in the near future." *Wis. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985). ACA has failed to carry this heavy evidentiary burden.

ACA contends that the lump sum amount for MVPD earth stations is "grossly deficient." Pet. 29. But if ACA's members believe that the lump sum will be insufficient to cover the costs of relocating to the upper 200 MHz of the C-band, "they can choose to seek reimbursement for their actual relocation costs … rather than elect the lump sum." *Final Notice* ¶ 36. Because MVPDs that decline the lump sum would receive reimbursement for all reasonable costs incurred in transitioning to the upper portion of the C-band, they "would be in a position *at least as good* as [they are] today in their ability to receive video programming." *Stay Denial Order* ¶ 31 (internal quotation marks omitted). The availability of this option belies any claim of harm, let alone irreparable harm.

ACA further contends that by setting the lump sum reimbursement amount too low, the Bureau will force MVPD earth stations to forgo a transition to fiber. Pet. 29-30. Specifically, ACA insists that if the lump sum election deadline is not stayed, and MVPDs are "forced to make an election based on the existing lump-sum amount," MVPDs "that would otherwise elect the lump sum" and use the money to transition to fiber will instead "be forced to relocate all of their earth stations" to the upper part of the C-band. Pet. 29-30.

In the first place, ACA has not submitted a single declaration from *any* of its more than 700 members that "would otherwise elect the lump sum" but for the amount set by the Bureau. Given ACA's failure to identify a single MVPD that would suffer this alleged harm, the Court should deny ACA's stay request for failure to substantiate its alleged injury.

Even if ACA had offered proof of its alleged injury, no MVPD will be "forced" to forgo the lump sum. The choice whether to elect lump sum reimbursement or to transition away from satellite delivery to fiber is a business decision. All MVPDs are free to accept or reject the lump sum offer based on their own independent business judgment. MVPDs could elect the lump sum (even if they think it is currently too low) because they wish to preserve "the opportunity to pursue fiber upgrades" (Pet. 30), and because they believe that ACA will

ultimately obtain an increase in the lump sum (either through its application for review or in subsequent litigation).

Effectively conceding that the Bureau's action will not *force* earth stations to make any particular decision, ACA claims that "[i]f MVPDs must make an immediate, irrevocable decision whether to accept the Bureau's deficient lump-sum amount, they will *have a strong incentive* to forgo the lump-sum option and choose relocation—even if fiber would be less costly and more beneficial overall." Pet. 34 (emphasis added). That assertion makes no sense. Presumably, if fiber were less costly than satellite transmission, an economically rational MVPD would have a strong incentive to elect lump sum reimbursement and transition to fiber whatever the lump sum amount may be.

At bottom, ACA's claim of irreparable injury appears to rest on the mistaken notion that the lump sum is intended to finance a substantial part of MVPDs' transition to fiber. To the contrary, *see* pp. 15-16 *supra*, the Commission rejected ACA's position that "compensable earth station migration costs should include the costs of transitioning to … fiber, as long as it is not more expensive than C-band delivery by an order of magnitude." *C-Band Order* n.539 (internal quotation marks omitted). The Commission instead stated that "lump sum payments will only be calculated for the costs of transitioning to the upper 200 [MHz]" of the C-band, and that any "additional costs to transition to fiber" must be borne by

MVPDs electing lump sum reimbursement. *Id.* n.547. In view of these statements, MVPDs have no reasonable expectation that someone else will foot the bill for their transition to fiber, nor any entitlement to that amount.

Ultimately, any purported injury attributable to the lump sum reimbursement amount is not the sort of economic harm that qualifies as irreparable. "Recoverable monetary loss may constitute irreparable harm only where the loss threatens the very existence of the movant's business." *Wis. Gas*, 758 F.2d at 674. ACA has not alleged that an inadequate lump sum amount will drive any of its members out of business.

Instead, ACA argues that a lump sum election "putatively effects an 'irrevocable release of claims … with respect to any dispute about the amount received.'" Pet. 30 (quoting *Final Notice* ¶ 42.6). Not so. If the FCC denies ACA's application for review and declines to increase the lump sum amount for MVPDs, the release would not prevent ACA or any other aggrieved party—including MVPDs that elect lump sum reimbursement—from seeking judicial review of the Commission's decision under the APA; nor would it preclude this Court from overturning the Commission's lump sum amount determination. *See United Gas Improvement v. Callery Props., Inc.*, 382 U.S. 223, 229 (1965) (an "agency, like a court, can undo what is wrongfully done by virtue of its order."); *Verizon Tel. Cos. v. FCC*, 269 F.3d 1098, 1111 (D.C. Cir. 2001) ("[an] agency may

... retroactively correct its own legal mistakes ... when those missteps have been highlighted by the federal judiciary").

Because "adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation," *Va. Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958), ACA has failed to demonstrate irreparable harm. The Commission could ultimately grant ACA's application for review and increase the lump sum amount for MVPDs. Or if the Commission denies the application for review, ACA could seek judicial review and obtain a ruling that results in higher lump sum payments. In either case, ACA's members can be made whole in the absence of a stay.

III. A Stay Would Harm Other Parties And The Public Interest

Finally, the adverse impact on other parties, as well as the public interest in prompt deployment of next-generation wireless services in the cleared portion of the C-band, weighs decidedly against a stay in this case.

The timely completion of the lump sum election process is critical to the efficient reallocation of C-band spectrum. "[A]s they prepare to transition their operations" to the upper portion of the C-band, satellite operators "need to know" which incumbent earth stations have elected lump sum reimbursement. *Deadline Extension Order* ¶ 4. Satellite operators are responsible for relocating only those earth stations that do *not* make lump sum elections. Therefore, until lump sum

elections are made, satellite operators cannot know the full extent of their earth station relocation obligations nor determine the appropriate timetable for relocation given their accelerated relocation deadlines. In addition, MVPDs that elect lump sum reimbursement must indicate whether their earth stations "will be transitioned" to the upper 200 MHz of the C-band "or will discontinue C-band service" and transition to alternate delivery systems (including not only fiber, but other bands of spectrum). *C-Band Order* ¶ 203. Without this information, satellite operators will not know how many IRDs they must purchase to complete the relocation of MVPD earth stations. By substantially delaying lump sum elections, a stay would severely impair the ability of satellite operators to finalize their spectrum repacking plans. *See* Telesat Canada Opposition to Request for Stay, GN Docket No. 18-122, August 19, 2020, at 2-3; Intelsat Opposition to ACA Connects' Request for Stay, GN Docket No. 18-122, August 19, 2020, at 3-4.

A stay would also harm the programmers and broadcasters that depend on satellites to deliver their programming to television viewers. As content providers have made clear in their submissions to the Commission, "[d]elaying the determination of critical information for satellite operators' planning" would "increase the potential for mistakes" during the transition, including the "failure of program delivery." *See* Opposition of Discovery, Inc., et al. to Request for Stay, GN Docket No. 18-122, August 19, 2020, at 9.

By disrupting the repacking process, a stay of the election deadline would also impede the efforts of potential bidders to prepare for the upcoming C-band auction. Indeed, wireless entities intending to bid on the cleared portion of the C-band have indicated that the prospect of an indefinite delay in repacking could discourage auction participation and distort the bidding for new flexible-use licenses. *See* Opposition of CTIA to Request for Stay, GN Docket No. 18-122, August 19, 2020, at 10 (granting a stay "would inevitably complicate the auction planning and strategies of prospective bidders" by creating the potential for "delays" in completing the transition; the resulting "uncertainty could both depress auction participation and distort bidding").

In addition, a stay would hinder the ability of potential bidders to ensure that they have adequate financing to participate successfully in the C-band auction. Winning bidders in that auction must not only pay their winning bids; they must also reimburse satellite operators and earth station operators for their relocation costs. The amount of winning bidders' relocation payments will depend in large part on how many earth station operators elect lump sum payments. Without timely lump sum elections, bidders will be unable to develop accurate estimates of the relocation payments they will need to make if they win new C-band licenses.

Most importantly, a stay would thwart the public interest in a smooth and efficient reallocation of C-band spectrum to accommodate the deployment of

cutting-edge wireless services. As this Court has recognized, "the use of wireless networks in the United States is skyrocketing," and the nation "faces a major challenge to ensure that the speed, capacity, and accessibility of our wireless networks keeps pace with these demands in the years ahead." *Nat'l Ass'n of Broad. v. FCC*, 789 F.3d 165, 169 (D.C. Cir. 2015) (internal quotation marks omitted). The Commission determined that there is a pressing public need to make new spectrum available expeditiously to support the deployment of 5G wireless networks. *See, e.g.*, *C-Band Order* ¶¶ 3, 28, 154, 162, 185. "American leadership in 5G is important because 5G networks will power a digital economy of applications and services that themselves will transform our economy, boost economic growth, and improve our quality of life." *Id.* ¶ 3.

In this context, speed is essential. "[S]takeholders have repeatedly emphasized the need to make C-band spectrum available for [terrestrial wireless] use as quickly as possible." *C-Band Order* ¶ 28. And the Commission has found that "delaying the transition of this spectrum longer than necessary will have significant negative effects" on "the American consumer and American leadership in 5G." *Id.* ¶ 162. Studies have estimated that "just one year of delay in transitioning the spectrum would reduce the value of repurposing the C-band" by seven to 11 percent and reduce consumer welfare "by $15 billion." *Id.* ¶ 185 (internal quotation marks omitted).

The C-band transition "will be an enormous and complex task," *C-Band Order* ¶ 159, involving "communications and coordination among and reimbursement to thousands of satellite and earth station stakeholders." *Id.* ¶ 165. Any delay in the lump sum election process would needlessly complicate this transition, reduce the revenues that will likely be yielded by the C-band auction, and delay the deployment of vital 5G services to American consumers.

In the face of the numerous negative consequences that would result from a stay, ACA's desire for more money to subsidize member MVPDs' transition to fiber fails to justify its request for this extraordinary relief. The FCC has consistently made clear that the lump sum was not intended to provide this sort of windfall to MVPDs. The private interests of ACA's members in extracting an unwarranted increase in reimbursement cannot justify the grant of a stay that, by disrupting the C-band relocation, would severely harm the interests of the many other participants—and the public—in a smooth and speedy transition.

CONCLUSION

The petition for a writ of mandamus should be denied.

Respectfully submitted,

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September 4, 2020

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CERTIFICATE OF FILING AND SERVICE

I, James M. Carr, hereby certify that on September 4, 2020, I filed the foregoing Opposition of Federal Communications Commission to Petition for Writ of Mandamus with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit using the electronic CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

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