

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

In the Matter of)
Application of ACA Connects – America’s) GN Docket No. 18-122
Communications Association for Review of the)
Public Notice of the Wireless Telecommunications)
Bureau Setting Lump-Sum Payment Amounts)

MEMORANDUM OPINION AND ORDER

Adopted: November 18, 2020

Released: November 19, 2020

By the Commission:

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I. INTRODUCTION

1. The Commission has before it an Application for Review¹ filed by ACA Connects— America’s Communications Association (ACA) seeking review of the Final Cost Catalog Public Notice adopted by the Wireless Telecommunications Bureau (Bureau) on July 30, 2020.² We find that ACA has failed to establish grounds to overturn the Bureau’s decision and therefore affirm the Bureau’s determinations contained in the Final Cost Catalog Public Notice.

¹ 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).

² 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, 35 FCC Rcd 7967 (WTB 2020) (Final Cost Catalog Public Notice); see also 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). ACA also filed a Request for Stay of the deadlines contained in the Final Cost Catalog Public Notice, pending resolution of this Application for Review of and any ensuing judicial review. 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). The Bureau denied the Stay Request on August 31, 2020. Request of ACA for Stay of August 31 Deadline for Electing to Receive Lump-Sum Payment, GN Docket Nos. 18-122, 20-173, Order, DA 20-998 (WTB Aug. 31, 2020) (Stay Denial Order).

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 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).³ The *3.7 GHz Report and Order* established that new 3.7 GHz Service licensees would reimburse the reasonable relocation costs of eligible Fixed Satellite Service (FSS) space station operators, incumbent FSS earth station operators, and incumbent Fixed Service licensees (collectively, incumbents) to transition out of the band.⁴ 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 Bureau to establish a cost category schedule of the types of expenses that incumbents are likely to incur.⁵ 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.⁶ 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.⁷ 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.⁸

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.⁹ The *3.7 GHz Report and*

³ *3.7 GHz Report and Order*, 35 FCC Rcd at 2345, para. 4.

⁴ *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.

⁵ *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).

⁶ *Id.* at 2446, para. 255.

⁷ *Id.* at 2448, para. 262; 47 CFR § 27.1416(a).

⁸ *See id.* at 2447-48, paras. 260-62.

⁹ *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”).

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 identify lump sum amounts for various classes of earth stations as appropriate.¹⁰

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,¹¹ and it conducted confidential interviews with a broad range of stakeholders, including satellite operators, earth station operators, Fixed Service licensees, and vendors.¹²

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.¹³ The Commission received extensive comments in response to this *Preliminary Cost Catalog 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.¹⁴ After review of the record, the Bureau issued a *Lump Sum Comment 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.¹⁵ 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 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.¹⁶ The Bureau also 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.¹⁷

6. After considering the comments in response to the *Preliminary Cost Catalog Public Notice* and the *Lump Sum Comment Public Notice*,¹⁸ on July 31, 2020, the Bureau released the *Final Cost*

¹⁰ See *id.* at 2428, para. 203.

¹¹ See *3.7 GHz Report and Order*, 35 FCC Rcd at 2428-30, 2465-66, paras. 206-10, 326-27.

¹² 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*).

¹³ *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*).

¹⁴ See *Final Cost Catalog Public Notice*, 35 FCC Rcd at 7972-75, paras. 9-13.

¹⁵ *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*).

¹⁶ 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.”).

¹⁷ See *id.* at 5631-32.

¹⁸ 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 (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.¹⁹

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.²⁰ 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.²¹ 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.²² While the methodology for calculating lump sum amounts generally remained the same as described in the *Lump Sum Comment Public Notice*, updates to the lump sum categories and amounts were made in response to comments on the *Lump Sum Comment Public Notice*.

8. One such 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 receiver/decoder or transcoder equipment for those technology upgrades.²³ After review of the record, the Bureau found that the selection and purchase of compression equipment for these technology upgrades are an integral part of the satellite operators' nationwide transition process and, as such, they should be considered as part of the

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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 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).

¹⁹ 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).

²⁰ See *id.* at 10; *Lump Sum Comment Public Notice* at 4.

²¹ For example, for purposes of the base lump sum calculations, the Bureau estimated 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.

²² See *Final Cost Catalog Public Notice*, 35 FCC Rcd at 7976, para. 16.

²³ *Id.* at 11-21, paras. 17-30. This reflected a change from the approach to technology upgrades for which the Bureau 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.

cost associated with the transition of satellite transponders.²⁴ 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.²⁵ 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 technology upgrade installation costs such as labor, cabling, and any ancillary equipment necessary to complete the installation of the compression equipment provided by the satellite operators.

9. On August 13, 2020, ACA filed the instant Application for Review, arguing that the Bureau erred by excluding the cost of integrated receiver/decoder equipment from the MVPD lump sum amount and that the Bureau's lump sum determination process was arbitrary, unreasoned, and violated notice-and-comment requirements.²⁶ ACA also concurrently filed a Request for Stay of the August 31, 2020 deadline for earth station operators to make lump sum elections, pending resolution of the Application for Review and any ensuing judicial review.²⁷

10. The Bureau subsequently 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*.²⁸ Specifically, the Bureau waived the lump sum

²⁴ *Final Cost Catalog Public Notice*, 35 FCC Rcd at 7977-78, para. 17 (citing Letter from Laura H. Phillips, Counsel to Intelsat, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 18-122, 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, GN Docket No. 18-122, 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, GN Docket No. 18-122, at 1 (filed July 27, 2020) (Intelsat July 27, 2020 *Ex Parte*) (quotations omitted)).

²⁵ *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).

²⁶ Application for Review at 1-2. Seven commenters filed in opposition to the Application for Review, and one commenter filed in support. *See* Opposition of AT&T to ACA Application for Review, GN Docket No. 18-122 (filed Aug. 28, 2020) (AT&T Opposition); Comments of CenturyLink, Inc., in Support of ACA Application for Review, GN Docket No. 18-122 (filed Aug. 28, 2020) (CenturyLink Comments); Opposition of Discovery Inc., FOX Corporation, The Walt Disney Company, and ViacomCBS Inc. (collectively, the Content Companies) to ACA Application for Review, GN Docket No. 18-122 (filed Aug. 28, 2020) (Content Companies Opposition); Opposition of CTIA to ACA Application for Review, GN Docket No. 18-122 (filed Aug. 28, 2020) (CTIA Opposition); Opposition of Intelsat License LLC (Intelsat) to ACA Application for Review, GN Docket No. 18-122 (filed Aug. 28, 2020) (Intelsat Opposition); Opposition of National Association of Broadcasters (NAB) to ACA Application for Review, GN Docket No. 18-122 (filed Aug. 28, 2020) (NAB Opposition); Opposition of SES Americom, Inc. (SES) to ACA Application for Review, GN Docket No. 18-122 (SES Opposition); Opposition of Verizon to ACA Application for Review, GN Docket No. 18-122 (Verizon Opposition).

²⁷ *See generally* Stay Request.

²⁸ 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).

election deadline in section 27.1419 of the Commission's rules to extend the filing deadline to September 14, 2020.²⁹

11. On August 27, 2020, ACA filed a petition for writ of mandamus in the D.C. Circuit requesting a stay of the extended September 14, 2020 lump sum election deadline pending our decision on the Application for Review and any ensuing judicial review.³⁰ On August 31, 2020, the Bureau denied ACA's Stay Request, finding ACA had failed to meet the required showing to warrant such relief.³¹ The D.C. Circuit denied ACA's petition for writ of mandamus on September 14, 2020.³² In the order denying ACA's mandamus petition, the court declared that it was "not persuaded" by ACA's arguments that the Bureau "was required by regulation to include certain costs for purchasing decoders when determining a lump sum amount," or that "the process the Bureau used to ultimately determine that lump sum amount was arbitrary and capricious."³³

III. DISCUSSION

12. We find that the *Final Cost Catalog Public Notice* was consistent with the directives and policy goals of the *3.7 GHz Report and Order* and implementing rules, was compliant with the procedural requirements of the Administrative Procedure Act and the Commission's *ex parte* rules, and was based on ample evidence that supports its factual findings. ACA has failed to provide any evidence that the Commission's approach for providing such reimbursement—as fleshed out by the Bureau in the challenged *Final Cost Catalog Public Notice*—will not result in the payment of these reasonable costs, or that this approach does not function as an integral part of the overall process that the Commission designed to ensure a smooth transition that would make this valuable spectrum resource available to the public as quickly as possible.³⁴ We therefore affirm the Bureau's decision and deny the Application for Review.

²⁹ 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 Engineers's request for an extension was made on independent grounds from those advanced by ACA and addressed herein. *See* 47 CFR § 1.3. The Bureau nevertheless found, as a practical matter, that ACA's alternate request for relief in the form of a 14-day stay was mooted by the Bureau's extension of the lump sum election deadline until September 14, 2020. *See Stay Denial Order* at n.29. 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 would 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).

³⁰ Petition for Writ of Mandamus, *In re ACA Connects – America's Communications Association*, No. 20-1327 (D.C. Cir. filed Aug. 27, 2020) (Mandamus Petition). The Commission filed in opposition to the Mandamus Petition. *See* Opposition of Federal Communications Commission to Petition for Writ of Mandamus, *In re ACA Connects – America's Communications Association*, No. 20-1327 (D.C. Cir. filed Sept. 4, 2020).

³¹ *Stay Denial Order* at 5, para. 10.

³² *In re ACA Connects – America's Communications Ass'n*, No. 20-1327 (D.C. Cir. Sept. 14, 2020) (per curiam).

³³ *Ibid.*

³⁴ *See, e.g.*, NAB Opposition at 2 (arguing that the Application for Review is simply the latest iteration of a long string of attempts by ACA throughout this proceeding to "devis[e] ways to line its members' pockets at the expense of other parties to the proceeding and the Commission's goal for repurposing spectrum); *see also* AT&T Opposition at 3 (ACA's Application for Review "is actually about grossly distorting the Commission's determination to permit earth stations operators to utilize transition payments to help fund a technology conversion of their distribution plant, changing that option from one with no additional costs to 3.7 GHz licensees to one with huge additional costs and no concomitant promotion of the preeminent policy goal of effecting a fast, fair, and seamless transition."); Content Companies Opposition at 2 (ACA's criticisms of the Bureau's decision "lack any support, legal or otherwise, and

(continued....)

A. Integrated Receiver/Decoder Equipment Costs are Rightfully Attributed to Space Station Incumbents

13. We reject ACA's argument that the Bureau improperly excluded the cost of integrated receiver/decoder equipment from the lump sum amount.³⁵ Contrary to ACA's claim that the *3.7 GHz Report and Order* required inclusion of such costs in the lump sum payment, we affirm the Bureau's finding, based on an extensive record, that the cost of integrated receiver/decoder equipment is not part of the "average, estimated costs" that incumbent earth stations owners are likely to incur as part of the transition.³⁶

14. ACA cites sections 27.1412(e) and 27.1411(b)(4) of the Commission's rules to support its argument that the *3.7 GHz Report and Order* and implementing regulations "plainly require [integrated receiver/decoder equipment] costs to be included in the earth station lump-sum amount."³⁷ Section 27.1412(e) establishes the lump sum payment option for incumbent earth station operators and directs the Bureau to determine the amount "equal to the estimated reasonable transition costs of earth station migration and filtering."³⁸ "Earth station migration" is defined in section 27.1411(b)(4) as "any necessary changes that allow the uninterrupted reception of service by an incumbent earth station on new frequencies in the upper portion of the band, including . . . the *installation* of new equipment or software at earth station uplink and/or downlink locations for customers identified for technology upgrades necessary to facilitate the repack, *such as compression technology* or modulation."³⁹ ACA argues that, because it is "undisputed that integrated receivers/decoders are compression equipment necessary . . . to allow earth stations to receive uninterrupted service on the relocated C-band frequencies," the Bureau erred in excluding integrated receiver/decoder equipment costs from the lump sum amount.⁴⁰

15. Despite its purported reliance on the text of the Commission's directives in establishing the lump sum amount, ACA ignores the plain language of both the *3.7 GHz Report and Order* and associated rules.⁴¹ The Commission stated only that earth station migration may "require the *installation*

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are nothing more than last-ditch attempts to artificially inflate the lump sum payments. These arguments, which prioritize maximizing the lump sum over ensuring a spectrally efficient, lawful, and timely transition of fixed satellite services to the upper 200 MHz, should be rejected."); CTIA Opposition at 4 ("ACA's goal is transparent: to maximize the amount of funds available to its members, which they could use to transition to fiber (no IRD equipment is required in a transition to fiber)—or to profit from their election by transitioning themselves for less than the lump sum payment."); Verizon Opposition at 1 (ACA seeks to "convert this vital spectrum proceeding into a fiber subsidy plan for its members, or at least maximize their opportunity to profit from the relocation.").

³⁵ Application for Review at 9-17; *see also* ACA Reply in Support of Application for Review, GN Docket No. 18-122, at 1-3 (filed Sept. 8, 2020) (ACA Reply).

³⁶ Application for Review at 9-12; *but see Final Cost Catalog Public Notice*, 35 FCC Rcd at 7977-87, paras. 17-30; *3.7 GHz Report and Order*, 35 FCC Rcd at 2428, para. 203.

³⁷ Application for Review at 9; *see also* ACA Reply at 1-2.

³⁸ 47 CFR § 27.1412(e).

³⁹ *Id.* § 27.1411(b)(4) (emphasis added).

⁴⁰ Application for Review at 9 (also citing *3.7 GHz Report and Order*, 35 FCC Rcd at 2426-27, para. 111 ("[W]e expect relocation costs to include the cost to migrate and filter earth stations, including costs to retune, repaint, and install new antennas and install filters and compression software and hardware.")); *see also* CenturyLink Comments at 3.

⁴¹ *See* AT&T Opposition at 3 ("ACA's argument [about] the failure to include integrated receiver/decoder costs in the lump sum rests on a flawed reading of the [*3.7 GHz Report and Order*]."); Content Companies Opposition at 3 (ACA's "tortured reading of the rules quickly falls apart when properly contextualized with the surrounding language."); CTIA Opposition at 7; Intelsat Opposition at 3; SES Opposition at 3-4; Verizon Opposition at 2 ("ACA misreads the [*3.7 GHz Report and Order*] in asserting that [integrated receiver/decoder] purchase costs must be included in the lump sum amount available to earth stations.").

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.”⁴² 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 a migration cost that the earth stations would be required to bear.⁴³ The Commission granted broad authority to the Bureau to make determinations about the appropriate and reasonable costs to be included in the lump sum amount.⁴⁴ The Bureau found that the costs of purchasing integrated receiver/decoder equipment “are more appropriately tied to the satellite operators’ transition, in coordination with programmers,” based on extensive record evidence from a broad range of stakeholders that the decision to implement technology upgrades is the responsibility of space station operators (and their programmer customers) and that the selection and purchase of compression equipment must be made uniformly and on a nationwide basis in order to meet accelerated transition deadlines.⁴⁵ Consistent with the plain language of section 27.1411(b)(4), however, the Bureau included in the MVPD lump sum

⁴² *3.7 GHz Report and Order*, 35 FCC Rcd at 2426, para. 201 (emphasis added).

⁴³ *Id.*

⁴⁴ *Id.* at 2428, 2448, paras. 203 (directing the Bureau “to identify amounts for various classes of earth stations—e.g., MVPDs, non MVPDs, gateway sites—as appropriate”), 262 (directing the Bureau “to make further determinations related to reimbursable costs, as necessary, throughout the transition process”) (emphasis added); *see also* CTIA Opposition at 6; SES Opposition at 3.

⁴⁵ *Final Cost Catalog Public Notice*, 35 FCC Rcd at 7977-87, paras. 17-30; *see also* 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, GN Docket No. 18-122, at 2 (filed June 30, 2020) (“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.”); Letter from Matthew S. DelNero, Counsel to Content Companies, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 18-122, at 3-4 (filed July 6, 2020) (Content Companies July 6, 2020 *Ex Parte*) (“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.

amount the cost of installing compression equipment.⁴⁶ The Bureau's decision to allocate equipment costs to satellite operators and installation costs to earth station operators was not only consistent with the text of the *3.7 GHz Report and Order*, but also firmly aligned with our stated goal of avoiding the disruption of service for FSS operations in the C-band.⁴⁷

16. ACA's argument that the underlying purpose of the lump sum payment "confirms that [integrated receiver/decoder equipment] costs are properly included" in the lump sum amount is equally unavailing.⁴⁸ ACA misstates the Commission's purpose in establishing the lump sum option as intending to provide a means of funding incumbent earth stations' transition to fiber.⁴⁹ We have already rejected ACA's arguments that the lump sum option should be designed to encourage and fully fund transitions to fiber.⁵⁰ We were clear in the *3.7 GHz Report and Order* 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.⁵¹ Thus, in determining whether the Bureau's decision was consistent with the Commission's intent when it established the lump sum option, the relevant consideration is whether the lump sum payment includes the reasonable costs likely to be incurred by *incumbent earth station operators* in order

⁴⁶ 47 CFR § 27.1411(b)(4); *Final Cost Catalog Public Notice*, 35 FCC Rcd at 7981-82, para. 21; Content Companies Opposition at 3-4; CTIA Opposition at 7; Verizon Opposition at 2.

⁴⁷ See, e.g., *3.7 GHz Report and Order*, 35 FCC Rcd at 2410, para. 161 (indicating that it is in the public interest to ensure that FSS operations in the C-band are not disrupted); see also Content Companies July 6, 2020 *Ex Parte* at 6-7 (noting that the goal of the C-band proceeding is to ensure that the public interest is served by ensuring that FSS services currently provided in the 3.7-4.2 GHz band are able to continue uninterrupted); Content Companies Opposition at 2 (The Bureau "properly recognized the compelling policy justifications for excluding [integrated receiver/decoder] equipment costs from the lump sum, as the alternative would needlessly delay the C-band transition and undermine the stability of the Nation's video distribution networks."); Intelsat Opposition at 4-5.

⁴⁸ Application for Review at 10; see also CenturyLink Comments at 4.

⁴⁹ ACA has made this argument several times during this proceeding. Application for Review at 10-11, 16-17; Stay Request at 1, 7-8; Letter from Ross Lieberman, Senior Vice President of Government Affairs, ACA, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 18-122, at 3 (filed July 6, 2020) (ACA July 6, 2020 *Ex Parte*); Letter from Ray Hashem, MoloLamken LLP, Counsel to ACA, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 18-122, at 4-5 (filed July 17, 2020) (ACA July 17, 2020 *Ex Parte*); but see ACA Reply at 2-3 (arguing ACA does not seek a lump sum payment that fully funds the cost of fiber, but merely one that is "technology neutral" (citing CenturyLink Comments at 2)). The Bureau provided a detailed description of how ACA has misquoted the *3.7 GHz Report and Order* in its denial of the same arguments in ACA's Stay Request. *Stay Denial Order* at 7-9, paras. 14-16; see also Content Companies Opposition at 4 ("ACA misleadingly suggests that the sole purpose of the lump sum payment is to fund fiber deployments that will eliminate the need for earth station relocation."); Intelsat Opposition at 4 (arguing "there is no validity to ACA's assertions that the Report and Order was designed to encourage or subsidize any widespread migration to fiber as part of the C-band transition").

⁵⁰ *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[in]ting, retuning, and replacing antennas, and installing filters and compression hardware)."); see also Content Companies Opposition at 5; CTIA Opposition at 8-9.

⁵¹ *3.7 GHz Report and Order*, 35 FCC Rcd at 2426, n.539; Intelsat Opposition at 3 ("ACA misreads the Report and Order's directive that provides "incumbent earth stations flexibility" to choose their preferred path of transition, instead to be an absolute guarantee that its MVPD members must receive sufficient funding to underwrite the full cost of moving to fiber. But the FCC made no such guarantee."); SES Opposition at 4 (ACA "provides no evidence showing that the Commission intended to prioritize incumbent earth station operators' 'flexibility' over its own goals of efficient, expedited C-[b]and clearing and the 'rapid introduction' of 5G wireless services." (citations omitted)).

to transition their existing services to the upper portion of the band.⁵² We find that the Bureau's lump sum determination falls squarely within our clearly stated goals.⁵³

17. Finally, we reject ACA's argument that the Bureau's decision to exclude integrated receiver/decoder equipment costs from the lump sum amount lacked merit.⁵⁴ ACA argues that, contrary to the Bureau's approach in determining whether the lump sum amount must include a given cost item, the appropriate question is not who is responsible for selecting and purchasing the equipment, but whether a given cost is "necessary to allow earth stations to receive uninterrupted service through the C-Band transition."⁵⁵ ACA contends that the cost of compression equipment must be included in the lump sum amount, since at least some MVPDs will require such equipment in order to transition to the upper portion of the band. ACA further argues that, even if inclusion of compression equipment costs is determined based on the entity responsible for selecting and purchasing the equipment, the Bureau nevertheless erred by attributing such expenses to satellite operators because programmers are responsible for making those purchases.⁵⁶

18. ACA's interpretation of the lump sum amount as appropriately including any and all costs necessary to allow an incumbent earth station to transition its services to the upper portion of the band has no basis in the text of the *3.7 GHz Report and Order*, nor does it further our stated goals for the lump sum option.⁵⁷ The purpose of the lump sum amount was to provide earth station operators the choice to opt out of the administrative process of seeking reimbursement for their actual relocation costs, and instead to assume responsibility for transitioning their services to the upper 200 megahertz or some alternative delivery mechanism in exchange for a lump sum payment.⁵⁸ To accomplish that goal, we directed that the lump sum amount must be equal to the average, estimated costs of that transition for which the earth station is assuming responsibility.⁵⁹ In other words, the amount must be equal to the costs

⁵² We note that ACA's advocacy in this proceeding has consistently served the purpose of increasing the amount of payments to its members, regardless of whether such payments are directly tied to transitioning to the upper 200 megahertz of the band. *See, e.g.*, Letter from Pantelis Michalopoulos, Steptoe, Counsel for ACA Connects, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 18-122, at 6 (filed Feb. 18, 2020) (asking the Commission to include in the lump sum payment the cost of migrating to fiber, so long as fiber is not more expensive than C-band migration "by an order of magnitude"); Letter from Pantelis Michalopoulos, Counsel, ACA Connects, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 18-122, at 4 (filed Dec. 26, 2019) (arguing earth station operators should receive incentive payments for meeting relocation milestones); Letter from Ross Lieberman, Counsel to ACA Connects, Alexi Maltas, Counsel to CCA, and Elizabeth Andriou, Counsel to Charter, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 18-122 (filed July 2, 2019) (ACA Connects Coalition Proposal) (urging the Commission to adopt a transition mechanism that would pay for the costs of relocating all C-band MVPDs to fiber networks).

⁵³ Content Companies Opposition at 4 (nothing that, contrary to ACA's argument that the Bureau's decision undermines the purpose of the lump sum option, "a broad coalition of stakeholders in this proceeding have explained at length how diverting IRD costs to the lump sum would undermine the goal of a timely, spectrally efficient transition"); CTIA Opposition at 4-5.

⁵⁴ Application for Review at 12-17.

⁵⁵ *Id.* at 12-13.

⁵⁶ *Id.* at 13-16.

⁵⁷ AT&T Opposition at 4 (arguing ACA's attempt to deem integrated receiver/decoder equipment costs as MVPD costs is "counterfactual"); Content Companies Opposition at 6 (ACA's logic "goes too far and subverts the [3.7 GHz Report and Order's] clear separation of earth station and space station costs."); CTIA Opposition at 8 (ACA's argument is "meritless" and "has no foundation" in the *3.7 GHz Report and Order*).

⁵⁸ *3.7 GHz Report and Order*, 35 FCC Rcd at 2427, para. 202.

⁵⁹ Intelsat Opposition at 4 (arguing the Bureau correctly relied "on direction from the Report and Order that reimbursable costs would only include the *costs incurred by the earth station operator*, which would not include the IRD purchase cost" (emphasis in original)).

that the *earth station operator* is likely to incur in its transition—those expenses for which the earth station operator otherwise would have sought reimbursement from the Clearinghouse in the absence of a lump sum option.⁶⁰ Thus, the Bureau’s inclusion of cost items in the lump sum amount only where earth station operators will be the entity responsible for incurring them is wholly consistent with the directives of the *3.7 GHz Report and Order*.⁶¹ ACA is incorrect to the extent it maintains that the amounts available under the two reimbursement options are “not equal.”⁶² 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 compression equipment, and earth station operators will be reimbursed for the cost of installing compression equipment.

19. In challenging the rationale of the Bureau’s decision to deem compression equipment costs as satellite operator costs, ACA relies on misleading quotations and ignores the breadth of evidence supporting the Bureau’s determination. ACA argues that it “makes no sense” to classify integrated receiver/decoder equipment costs as belonging to satellite operators because programmers and MVPDs are responsible for selecting and purchasing such equipment.⁶³ ACA claims that the Bureau “admitted that [integrated receiver/decoder] ‘technology choices’ actually ‘must . . . be made by the programmer.’”⁶⁴ In fact, this quotation comes from an *ex parte* filing that the Bureau cited in a footnote of the *Final Cost Catalog Public Notice*, and the Bureau made no such statement in its own rationale for deeming compression equipment as a satellite operator cost. Contrary to ACA’s claim, the Bureau concluded, and we agree, that “satellite operators, *in cooperation with programmers*, will be responsible for selecting, purchasing, and delivering the necessary compression equipment to respective earth stations.”⁶⁵ This finding is based on extensive evidence in the record on the need for satellite operators, in cooperation with programmers, to select and purchase compression equipment uniformly and on a nationwide basis in order to accomplish a successful transition on the accelerated timelines anticipated here.⁶⁶ Consistent

⁶⁰ We agree with the Bureau’s statement that, taken to its logical conclusion, ACA’s argument would mean that the cost of new satellites should also be included in the lump sum amount. See *Final Cost Catalog Public Notice*, 35 FCC Rcd at 7983-84, para. 23; see also Verizon Opposition at 4 (“ACA’s argument proves too much . . .”).

⁶¹ AT&T Opposition at 5 (The *3.7 GHz Report and Order* “provides the Bureau with clear flexibility ‘to make further determinations related to reimbursable costs, as necessary, throughout the transition process.’ And the decision to allocate IRD costs to satellite operators—who must make the upgrade decision and decide which IRDs are to be implemented in conjunction with their programmer customers—is a rational exercise of that discretion.”).

⁶² Application for Review at 16.

⁶³ *Id.* at 13.

⁶⁴ *Id.* at 13 (citing *Final Cost Catalog Public Notice*, 35 FCC Rcd at 7977, n.67) (emphasis omitted).

⁶⁵ *Final Cost Catalog Public Notice*, 35 FCC Rcd at 7977, para. 17 (emphasis added).

⁶⁶ *Id.* at 7978, para. 18 & n.69 (citing Letter from Matthew S. DelNero, Counsel to Content Companies, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 18-122, at 4-5 (filed July 24, 2020) (Content Companies July 24, 2020 *Ex Parte*); Letter from Laura H. Phillips, Counsel to Intelsat, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 18-122, at 2-3 (filed June 24, 2020) (Intelsat June 24, 2020 *Ex Parte*) (explaining that “Intelsat envisions that the necessary IRDs and related equipment would be procured centrally” rather than by individual MVPDs and that “there is no reason to include IRD costs in any lump sum amount”); Letter from Laura H. Phillips, Counsel to Intelsat, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 18-122, at 3 (filed May 26, 2020) (Intelsat May 26, 2020 *Ex Parte*) (“[I]f a programmer were to decide to employ compression technology today, that programmer would select its compression equipment and deliver that equipment to its affiliates, who would be obligated to install it pursuant to their affiliate agreements with the programmer. There is no reason for the FCC to alter this long-standing process.”); Content Companies July 6, 2020 *Ex Parte* at 4 (“In prior transitions, programmers have coordinated bulk purchases of IRDs . . . to not only secure a lower per-unit price, but also to ensure that these sellers have sufficient notice to provide the large number of IRDs needed. Equipment manufacturers and vendors likely will not, without adequate notice, have on hand the number of IRDs necessary to meet the aggregate demand of thousands of independent earth station purchase orders. The failure of a decentralized upgrade process to account for this supply-side reality illustrates the potential for such decentralization to delay and disrupt the C-band

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with our primary goals in adopting the *3.7 GHz Report and Order*—to make valuable C-band spectrum 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—and bolstered by overwhelming record support, the Bureau correctly excluded integrated receiver/decoder equipment costs from the lump sum amount.⁶⁷

20. ACA also argues that the Bureau failed to distinguish the cost of integrated receiver/decoder equipment from other earth station costs dependent on satellite operator decisions that were nevertheless included in the lump sum amount. For example, ACA points to the fact that MVPDs must retune, repoint, and install new antennas based on satellite operators' decisions to launch new satellites or transition services to new frequencies, and argues that the Bureau's rationale would logically exclude such costs from the lump sum amount as well. Contrary to ACA's claim, however, the Bureau provided ample explanation and reasoning for this distinct treatment. As ACA notes, while the *3.7 GHz Report and Order* assigned satellite operators responsibility for performing all earth station migration actions necessary to transition incumbent earth station operations to the upper 200 megahertz, earth station operators that elect the lump sum payment are responsible for performing all relocation actions on their own.⁶⁸ The difference between the purchase of integrated receiver/decoder equipment and all other earth station transition actions, however, is that, since the selection and purchase of such equipment is an essential element of the satellite transition, satellite operators and their programmer customers will be responsible for selecting and purchasing compression equipment for a given incumbent earth station *irrespective* of whether the earth station operator elects the lump sum.⁶⁹ The Bureau applied this standard consistently by including the costs to *install* integrated receivers/decoders in the lump sum amount, since earth station operators that elect the lump sum *would* be responsible for installing any necessary

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transition.”); Content Companies June 15, 2020 Comments at 2-4 (explaining that the “preliminary Cost Catalog appropriately described the purchase and distribution of IRDs as a satellite and programmer expense” because the “IRD upgrade process . . . requires careful management and coordination by programmers and their satellite operator vendors,” which could be undermined if the Bureau includes integrated receiver/decoder costs in the lump sum payment); AT&T July 7, 2020 *Ex Parte* at 2-3 (“Recognizing that the satellite companies will determine, in conjunction with the programmers, which streams are compressed and how they are compressed, the acquisition of compatible IRDs must be left in their hands, regardless of how responsibility for installing the upgrades is ultimately apportioned.”); *see also* Content Companies Opposition at 8 (“Ensuring a centralized [integrated receiver/decoder] upgrade process by excluding the cost of this equipment from the lump sum also aligns with the [*3.7 GHz Report and Order*]’s emphasis on prudence and efficiency in transition expenditures.”).

⁶⁷ *3.7 GHz Report and Order*, 35 FCC Rcd at 2353, para. 20; *Final Cost Catalog Public Notice*, 35 FCC Rcd at 7981, para. 20 (“[T]he record reflects 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.”); Content Companies Opposition at 6 (“[T]he Bureau’s decision not to include IRD equipment costs in the lump sum was not only justified by the record, but also legally compelled by the text of the [*3.7 GHz Report and Order*]”); CTIA Opposition at 5; Intelsat Opposition at 5 (in reaching its decision, “the Bureau correctly relied on established industry practice for implementing technology upgrades”); SES Opposition at 5; Verizon Opposition at 3-4.

⁶⁸ *3.7 GHz Report and Order*, 35 FCC Rcd at 2427, 2455, paras. 202, 293; Application for Review at 14.

⁶⁹ Content Companies Opposition at 8 (“Whereas recognizing that IRD costs as a space station expense properly preserves this industry practice, shifting IRD equipment costs into the lump sum available to MVPDs would upend the industry norm, ushering in a free-for-all in which individual earth stations would each manage their own independent upgrade timelines.”); SES Opposition at 5 (“[W]hether incumbent earth stations are able to select and purchase compatible equipment is not the controlling factor in the Bureau’s analysis – in choosing to exclude [integrated receivers/decoders] from the lump sum amounts, the Bureau adopted ‘the most efficient approach’ to ensure timely clearing, consistent with the [*3.7 GHz Report and Order*]”); Verizon Opposition at 3 (“[I]nstallation costs are distinct from equipment purchase costs that are dictated by the technology choices made by satellite operators in conjunction with their content programming customers.”).

equipment.⁷⁰ The mere fact that ACA disagrees with the overwhelming record evidence underpinning the Bureau's decision here does not mean that no such distinction exists.

21. We reject ACA's assertion that the *3.7 GHz Report and Order* "consistently uses 'install' and 'installation' to mean 'purchase and install.'" ⁷¹ While the *3.7 GHz Report and Order* specified that the costs of installing certain equipment were part of earth station migration costs, it did not specify how the costs of purchasing such equipment should be allocated. The Bureau reasonably determined that it was appropriate to assign the cost of purchasing compression equipment to satellite operators because such purchases must be coordinated by satellite operators and programmers at the national level. Unlike compression equipment, filters "must be purchased in connection with the transition of an earth station regardless of decisions made at the satellite level."⁷² Therefore, the Bureau properly assigned the costs of both purchasing and installing filters to earth station operators.

22. The Bureau's decision to exclude integrated receiver/decoder equipment costs from the MVPD lump sum amount was grounded in the plain language of the *3.7 GHz Report and Order*, our stated purpose in establishing the lump sum payment option, and our broader policy goals of ensuring a smooth, efficient, and rapid transition of C-band spectrum. The *Final Cost Catalog Public Notice* provides exhaustive analysis and rationale for the Bureau's decisions, based on targeted and detailed feedback from a broad range of stakeholders demonstrating that the allocation of integrated receiver/decoder equipment costs to satellite operators "is both consistent with industry practice and necessary to ensure there are no disruptions to the C-band transition process and the nation's video distribution ecosystem."⁷³ We therefore reject ACA's argument that the Bureau erred by excluding the costs of integrated receiver/decoder equipment from the MVPD lump sum amount.

B. The Lump-Sum Determination Process was Procedurally Sound

23. We likewise reject ACA's argument that the Bureau's lump-sum determination process was arbitrary, unreasoned, and violated notice-and-comment requirements. ACA argues that the Bureau wrongly relied on a third-party consultant that improperly held confidential meetings with only certain stakeholders.⁷⁴ ACA further suggests that the Bureau improperly failed to disclose its methodology for determining lump sum amounts.⁷⁵ Finally, ACA maintains that the Bureau failed to give proper notice of its decision to determine reimbursement on a per-antenna basis.⁷⁶

24. *First*, the Bureau's engagement of RKF to consult and assist with the development of the *Final Cost Catalog Public Notice* was fully compliant with the Administrative Procedure Act and the Commission's *ex parte* rules.⁷⁷ ACA claims that RKF "repeatedly denied" its requests for a meeting.⁷⁸

⁷⁰ Intelsat Opposition at 7 (ACA's arguments entirely overlook the record "that evidenced substantial concerns about the potential for delay, ordering of incorrect equipment and additional expenses associated with making thousands of individualized purchasing decisions at the earth-station level, all of which would increase the likelihood that programmers undergoing compression would experience service disruption."); SES Opposition at 5 ("[W]hile ACA's proposal may be better for its members' narrow interests, its piecemeal approach would compromise 'a smooth transition.'").

⁷¹ See Application for Review at 15.

⁷² *Final Cost Catalog Public Notice*, 35 FCC Rcd at 7982, para. 22.

⁷³ Content Companies Opposition at 6-7 (citing supporting arguments by NAB, AT&T, Intelsat, and other stakeholders).

⁷⁴ Application for Review at 17-18; ACA Reply at 4.

⁷⁵ Application for Review at 18-21; ACA Reply at 3.

⁷⁶ Application for Review at 21-23; ACA Reply at 4-5.

⁷⁷ AT&T Opposition at 6 ("The Bureau's use of RKF fell well within ordinary and lawful bounds."); SES Opposition at 6 (ACA's assertions regarding the Bureau's determination process "are meritless and contradicted by

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ACA argues that “[a]llowing some stakeholders to meet with RKF, while denying ACA Connects the same benefit, created grossly unequal access to information and decisionmakers, and violated due process.”⁷⁹ ACA contends that the Bureau’s lack of disclosure regarding the participants and content of RKF’s meetings further compounded the error and violated the disclosure requirements of the Commission’s *ex parte* rules.⁸⁰

25. 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.⁸¹ 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 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, along with other stakeholders. Significantly, after release of the Preliminary Cost Catalog, which initiated the notice-and-comment proceeding on that issue, RKF did not hold *any* meetings with incumbents or other stakeholders.⁸² Thus, communications between RKF and the parties that RKF contacted in seeking cost information for its own analysis prior to release of the *Preliminary Cost Catalog Public Notice* were for the purpose of developing an initial proposal, not “directed to the merits or outcome of a proceeding.”⁸³ Nor was RKF making an *ex parte* presentation when it conveyed the findings contained in

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the record.”); Verizon Opposition at 5 (“[R]elying on a contractor to help gather facts and information is within the usual course of agency operation.”).

⁷⁸ Application for Review at 18.

⁷⁹ *Id.* at 17-18.

⁸⁰ *Id.* at 18.

⁸¹ 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; Intelsat Opposition at 8.

⁸² AT&T Opposition at 6-7 (“RKF’s output was subject to public notice and comment and, in fact, the [Final Cost Catalog Public 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.”); SES Opposition at 6.

⁸³ 47 CFR § 1.1202(a) (defining *presentation* for purposes of the Commission’s *ex parte* rules). ACA argues that parties meeting with RKF prior to the Bureau’s issuance of the *Preliminary Cost Catalog Public Notice* were making improper *ex parte* presentations on the merits of the ultimate determination of lump-sum amounts that the Bureau was charged with establishing for the Cost Catalog, given that GN Docket No. 18-122 was still an open, docketed rulemaking proceeding. See ACA Reply at 4. While it is true that that docket was open, the Commission had not yet made any proposals on the formulation of a Cost Catalog. Rather, the Commission had simply directed the Bureau to take on the responsibility of adopting a Cost Catalog—a process that the Bureau later formally launched by proposing and seeking public comment on a Cost Catalog in its *Preliminary Cost Catalog Public Notice*. See *3.7 GHz Report and Order*, 35 FCC Rcd at 2428, 2448, paras. 203 and 262 (directing the Bureau to develop a lump sum and a cost category schedule); *Preliminary Cost Catalog Public Notice*, 35 FCC Rcd 4440. Prior to the launch of the Bureau’s Cost Catalog proceeding, any *ex parte* communications about what might go into the Cost Catalog—including any responses to RKF’s outreach to certain stakeholders that it conducted as part of its role as a contractor to develop initial cost estimates—related, at most, to the question of what the Bureau should propose and, much like *ex parte* contacts in response to an agency’s notice of inquiry that might precede an actual rule proposal, do not qualify as *ex parte* presentations subject to public disclosure requirements. See, e.g., 47 CFR

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the cost catalog in accordance with its contractual obligations.⁸⁴ We agree with NAB’s statement that, “it is unclear why RKF’s failure to interview ACA is of any practical or legal import.”⁸⁵ In fact, the record in this proceeding reflects 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*.⁸⁶ 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.⁸⁷

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 line item 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.⁸⁸ 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.⁸⁹

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§§ 1.1202(a) (defining a “presentation” as “a communication directed to merits or outcome of a proceeding”) and 1.1204(b) (presentations made to the Commission as part of a notice of inquiry proceeding are not subject to the *ex parte* rules); cf. *Amendment of Subpart h, Part 1 of the Commission’s Rules & Regulations Concerning Ex Parte Commc’ns & Presentations in Comm’n Proceedings*, Notice of Proposed Rulemaking, FCC 86-284, 1986 WL 292050, at *11 (July 9, 1986) (noting that “inquiry proceedings are primarily designed for preliminary fact-gathering and are not intended as final vehicles for regulatory change,” and thus “application of *ex parte* constraints would hinder unnecessarily Commission efforts to obtain information from the public”). By contrast, when the Bureau issued the *Preliminary Cost Catalog Public Notice* seeking comment on a proposed Cost Catalog, it properly required disclosures of any *ex parte* presentations, as required by the rules. See *Preliminary Cost Catalog Public Notice*, 35 FCC Rcd at 4442-43 (“This proceeding shall be treated as a “permit-but-disclose” proceeding in accordance with the Commission’s *ex parte* rules.”).

⁸⁴ Content Companies Opposition at 10 (ACA’s arguments “demonstrate a fundamental misunderstanding of the Bureau’s decision-making process and greatly overstate RKF’s role in these proceedings.”); Intelsat Opposition at 8 (“ACA fundamentally and mistakenly asserts that the process should have been akin to a full-blown ratemaking rulemaking, which is wrong under both the Administrative Procedure Act and the tenets of the Report and Order.”).

⁸⁵ NAB Opposition at 4; see also Verizon Opposition at 5 (“It is immaterial that ACA did not meet with RKF—ACA had ample opportunity to express its views to the decision makers.”).

⁸⁶ See GN Docket No. 18-122; see also CTIA Opposition at 10 (The fact that RKF did not meet with ACA “raises no APA issue” because “[n]o party was denied the opportunity to present data and arguments on the lump sum payments.”); SES Opposition at 6 (“ACA can hardly argue that the Bureau or RKF were ‘deprived’ of its perspective . . .”).

⁸⁷ NAB Opposition at 5 (“Setting aside ACA’s heartbreak over not being individually consulted in the development of the first iteration of the cost catalog, it is plain that ACA has been afforded and has taken advantage of ample opportunities to make known its views regarding the composition and amount of lump sum payments.”).

⁸⁸ Content Companies Opposition at 11 (“It was this public comment period and the resulting stakeholder input—not any assistance provided by RKF—that informed the Bureau’s decision concerning the allocation of IRD equipment costs, and the *Final Cost [Catalog] Public Notice* makes this abundantly clear.”); NAB Opposition at 4-5.

⁸⁹ 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

(continued....)

27. While ACA fails to identify any specific prejudicial harm that resulted from the Bureau's engagement of RKF—an element required for claims alleging Administrative Procedures Act violations⁹⁰—we nevertheless find that RKF's role in providing preliminary estimated cost ranges was immaterial to any such prejudicial harm that ACA might claim its members suffered as a result of the Bureau's decisions. The methodology used to calculate the 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 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*.⁹¹ Indeed, in the *Final Cost Catalog Public Notice*, the Bureau amended the lump sum amounts based on commenter feedback, such as increasing base lump sum amounts to account for certain costs that were not previously included and 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.⁹² With respect to the exclusion of integrated receiver/decoder equipment costs from the lump sum amount, the Bureau provided its 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*.⁹³ There is therefore no support for the claim that the Bureau arbitrarily and capriciously relied on information provided by RKF to reach the decisions that ACA asks us to overturn.

28. *Second*, the Bureau provided ample information and opportunity for ACA and all other commenters to evaluate and critique its proposed methodology for determining lump sum amounts.⁹⁴ ACA argues that the Bureau improperly failed to disclose the individual cost items that were included in each lump sum amount, the weighting assigned to each cost based on the probability that a particular

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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 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”).

⁹⁰ See 5 U.S.C. § 706 (providing that “due account shall be taken of the rule of prejudicial error”); *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)).

⁹¹ 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.”).

⁹² See *Final Cost Catalog Public Notice*, 35 FCC Rcd at 7988-91, paras. 34-38 (providing an exhaustive list of updates to lump sum amounts the Bureau did, and did not, make).

⁹³ See *id.* at 7977-87, paras. 17-30.

⁹⁴ CTIA Opposition at 10-11.

antenna type or earth station class is likely to incur that expense, or its methodology for determining those probabilities.⁹⁵

29. ACA's argument that the Bureau failed to adequately 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.⁹⁶ 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."⁹⁷ The Bureau went above and beyond its obligations in this respect by seeking 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 the Preliminary Cost Catalog (a comment deadline which was later extended at the request of ACA).⁹⁸ Then on June 4, 2020, in response to filings by ACA and other MVPD earth station operators requesting an additional opportunity for comment on the proposed lump sum amounts in the *Preliminary Cost Catalog Public Notice*, the Bureau issued the *Lump Sum Comment Public Notice* in which it provided additional details about the proposed lump sum categories and amounts and established yet another comment window for interested parties to make further filings.⁹⁹

30. 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.¹⁰⁰ 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

⁹⁵ Application for Review at 19.

⁹⁶ Content Companies Opposition at 10 ("The Bureau's decision is based expressly and entirely on the record before it, which was developed over two rounds of comments from the public," during which time "ACA Connects had every opportunity to weigh in.").

⁹⁷ *3.7 GHz Report and Order*, 35 FCC Rcd at 2428, para. 203.

⁹⁸ 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.

⁹⁹ 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 yet another request by ACA and NCTA to extend the comment deadline by six days, until June 22, 2020. See *ACA and NCTA Joint Request for Extension of Time and to Disclose Lump Sum Assumption and Methodology*, GN Docket No. 18-122, Order Denying Extension Request, 35 FCC Rcd 5869 (WTB 2020) (*Lump Sum Comment Extension Denial Order*); ACA and NCTA, Joint Request for Extension of Time and to Disclose Lump Sum Assumption and Methodology Lump Sum Comment Extension Request, GN Docket No. 18-122, at 3-4 (filed June 9, 2020). 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. See also AT&T Opposition at 7-8 (pointing out that the Bureau already addressed ACA's request for additional disclosures in the *Lump Sum Comment Extension Denial Order* and arguing that "[i]f ACA wished to challenge the Bureau's alleged lack of due disclosures, it should have timely sought reconsideration of the [*Lump Sum Comment Extension Denial Order*] over a month ago, rather than piling those objections onto" its Application for Review); Content Companies Opposition at 12-13.

¹⁰⁰ 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.").

methods of addressing technology upgrade needs in the lump sum payment.¹⁰¹ 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.¹⁰²

31. Despite the Bureau's provision of another opportunity for comment in response to the *Lump Sum Comment Public Notice*, ACA, along with NCTA, filed 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."¹⁰³ The Bureau responded to this request in its denial of the extension request,¹⁰⁴ in the *Final Cost Catalog Public Notice*,¹⁰⁵ and—most recently—in the *Stay Denial Order*, explaining that it had, in fact, disclosed such assumptions and methodology:

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 targeted feedback on the appropriate probabilities and costs that should be used as inputs for such a calculation.¹⁰⁶

In rejecting the same arguments contained in ACA's Stay Request as those it makes here, the Bureau provided numerous examples of commenters, including ACA, providing specific and detailed feedback on the probability that costs would be incurred in an average earth station transition.¹⁰⁷

32. The record demonstrates that ACA (and all other commenters) were able to "adequately evaluate and critique the Bureau's methodology."¹⁰⁸ 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.¹⁰⁹ 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 both ACA members and non-members.¹¹⁰ ACA used the information in these

¹⁰¹ See *id.* at 5631-32.

¹⁰² See *id.* at 5632.

¹⁰³ 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).

¹⁰⁴ *Lump Sum Comment Extension Denial Order*, 35 FCC Rcd at 5871, para. 7.

¹⁰⁵ *Final Cost Catalog Public Notice*, 35 FCC Rcd at 7976-77, nn.64, 65.

¹⁰⁶ *Stay Denial Order* at 10, para. 20.

¹⁰⁷ *Id.* at 10-13, paras. 20-23.

¹⁰⁸ Stay Request at 10.

¹⁰⁹ 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, GN Docket No. 18-122, at 2 (filed June 25, 2020) (ACA June 25, 2020 *Ex Parte*).

¹¹⁰ See ACA May 14, 2020 Comments, Attach. (Cartesian: C-Band Transition Cost Assessment; hereinafter, Cartesian Study); ACA June 15, 2020 Comments (relying on Cartesian Study and including an attachment of supplemental inputs produced by Cartesian).

filings to support 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.¹¹¹

33. ACA next argues that the Bureau failed to provide adequate notice of its decision to exclude costs that would not likely be incurred in a typical relocation.¹¹² We disagree. Consistent with our 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 clearly indicated 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.”¹¹³ 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.”¹¹⁴ In the face of its own advocacy regarding what the appropriate standard for determining “outlier” costs might be, we cannot credit ACA’s claim that it lacked notice that such costs would be excluded from the lump sum amount.¹¹⁵

34. 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 does it mean that the Bureau failed to consider alternate methodologies advanced in the record. The requirement to make public the information used to support an agency’s position “does not extend to all data.”¹¹⁶ 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 arguments, it did so based on sound reasoning with extensive support in the record.¹¹⁷ 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

¹¹¹ ACA June 15, 2020 Comments at 15-18 (citing Cartesian Study at 20-25).

¹¹² Application for Review at 20-21; *see also* AT&T Opposition at 8 (“ACA’s attempt to morph a common-sense observation into a controversial policy decision is baseless.”).

¹¹³ *Lump Sum Comment Public Notice* at 4; AT&T Opposition at 8 (the Bureau’s decision “simply reflects rational and sound logic”); CTIA Opposition at 11.

¹¹⁴ Cartesian Study at 20.

¹¹⁵ CTIA Opposition at 11 (“ACA’s real complaint is that excluding outlier costs reduced the lump sum amounts—meaning its members would get less than they otherwise might and would be less likely to be able to profit from the clearing process.”).

¹¹⁶ *See Association of Data Processing Service Organizations, Inc. v. Board of Governors of Federal Reserve System*, 745 F.2d 677, 684 (D.C. Cir. 1984); *see also* CTIA Opposition at 11 (“The APA requires agencies to demonstrate that their decision was based on an informed review of the record and to provide a sufficient explanation as to how they reached that decision. The Bureau did that.”); Verizon Opposition at 6 (arguing the Bureau provided “more than adequate data in this process”).

¹¹⁷ *See, e.g., Final Cost Catalog Public Notice*, 35 FCC Red at 7988-89, para. 34 (updating lump sum amounts to include additional costs identified by ACA); *see also id.* at 7970, 7972-73, 7976-77, 7980-83, 7985-90, nn.18, 33, 34, 37, 64, 65, 74-76, 80, 85-92, 109, 112, 116-22, 124, and 131 (citing filings made by ACA during the Bureau’s consideration of estimated transition costs and lump sum amounts); Content Companies Opposition at 2 (the Bureau “made a well-reasoned decision that appropriately considered both the comprehensive record in this proceeding and important policy considerations that serve the public interest”); CTIA Opposition at 3 (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).

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.¹¹⁸

35. Even if we were to find that the Bureau erred in failing to disclose in the record details regarding RKF's methodology and underlying data, which we do not, ACA has failed to establish that it suffered any prejudice as a result of this purported error.¹¹⁹ ACA does not 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.¹²⁰ The granular detail provided in the Cartesian Study regarding average costs and the probability that such costs will be incurred demonstrates that ACA was capable of evaluating the underlying inputs of the Bureau's methodology.¹²¹ For example, in developing its recommendations to include the technology upgrade costs 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.¹²² This analysis demonstrates that, as a representative of "more than 700 small and medium-sized MVPDs throughout the United States," ACA had the tools and industry expertise to readily evaluate the Bureau's proposed amounts and underlying methodology.¹²³ 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 and the Bureau responded to each of ACA's arguments in turn in the *Final Cost Catalog Public Notice*.¹²⁴ ACA therefore fails to establish any prejudice resulting from the Bureau's failure to put this information in the record.

36. *Finally*, the Bureau gave proper notice of its decision to determine reimbursement on a per-antenna basis. ACA argues that in the *Final Cost Catalog Public Notice*, the Bureau, for the first time, determined that reimbursement and lump sum payments would be calculated on a per-antenna basis, rather than per-earth station site.¹²⁵ ACA argues that this alleged lack of notice was "highly prejudicial" because MVPD earth station operators "had no notice that the precise antenna configuration listed in their registrations—which serve to identify 'earth stations' entitled to be 'protected from interference'—would be used to determine payments."¹²⁶

¹¹⁸ Content Companies Opposition at 9-11; CTIA Opposition at 10-11.

¹¹⁹ *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)); Intelsat Opposition at 8 (ACA's "empty rhetoric fails to demonstrate that ACA was in any way prejudiced by the open process the Bureau used.").

¹²⁰ ACA June 15, 2020 Comments (relying on Cartesian Study based on characteristics occurring in 50% or more MVPD earth stations).

¹²¹ See generally Cartesian Study.

¹²² *Id.* at 24-25.

¹²³ Application for Review at 2.

¹²⁴ 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*; see also, *Final Cost Catalog Public Notice*, 35 FCC Red at 7970, 7972-73, 7976-77, 7980-83, 7985-90, paras. 6, 10-11, 16, 20-24, 28-34, 36 & nn.18, 33, 34, 37, 64, 65, 74-76, 80, 85-92, 109, 112, 116-22, 124, and 131.

¹²⁵ Application for Review at 21-23.

¹²⁶ *Id.* at 22.

37. We stated, however, in the *3.7 GHz Report and Order* that “in order to qualify for reimbursement, any antenna at an incumbent earth station must also have been operational and registered in IBFS as of the relevant dates required by the Freeze and 90-Day Earth Station Filing Window Public Notice.”¹²⁷ Consistent with this directive, the Bureau proposed base lump sum amounts on a per-antenna basis in the *Lump Sum Comment Public Notice*.¹²⁸ While the Bureau made certain updates to the lump sum amounts in response to commenter feedback, the *Final Cost Catalog Public Notice* maintained the same per-antenna approach as the Bureau proposed in the *Lump Sum Comment Public Notice*.¹²⁹ This approach, which the Bureau applied consistently throughout this proceeding, is also necessitated by the practical realities of relocation cost reimbursement. Indeed, calculation of reimbursement on a per-unit basis is the only logical approach—costs will be incurred for a particular unit, and therefore must be reimbursed according to the number of units for which that cost was incurred.¹³⁰ ACA’s claims that antenna registrations related only to interference protection and not relocation cost reimbursement is directly contradicted by the *3.7 GHz Report and Order*, the procedural history leading up to the *Final Cost Catalog Public Notice*, and common sense.

38. We also reject the claim that reimbursement of relocation costs on a per-antenna, rather than per-site, basis prejudices ACA’s members. As ACA itself represented in its comments, MVPD earth stations typically have multiple antennas at a given site, and calculation of the lump sum amount on a per-site basis, without regard to the number of antennas at that site, could result in ACA’s members receiving only a single reimbursement for a cost they had to incur in multiples at a given site.¹³¹ In its initial comments in response to the *Lump Sum Comment Public Notice*, ACA argued that a per-site approach was more consistent with the Commission’s directives to calculate lump sums based on the “average” costs of relocation and proposed MVPD lump sum amounts that presumed a specific number of antennas and other necessary changes per site, regardless of factual realities.¹³² The Bureau’s decision to reject ACA’s per-site proposal and maintain the per-antenna approach proposed in the *Lump Sum Comment Public Notice* was supported by evidence in the record that reimbursement on a per-antenna basis would most effectively address the average costs of earth station transitions.¹³³ While different than ACA’s

¹²⁷ *3.7 GHz Report and Order*, 35 FCC Rcd at 2426, n.539.

¹²⁸ See *Lump Sum Comment Public Notice*, 35 FCC Rcd at 5632 (providing a table of base lump sum amounts on a per-antenna basis according to the characteristics of various types of antennas (e.g., single-feed, multi-feed)).

¹²⁹ See *Final Cost Catalog Public Notice*, 35 FCC Rcd at 7987, n.117 (“While the Lump Sum Table in the Cost Catalog clarifies that the base lump sum payments are per antenna, we note that this terminology update is not a change in our approach from the *Lump Sum Comment Public Notice*.”).

¹³⁰ Content Companies Opposition at 13.

¹³¹ ACA June 15, 2020 Comments at 7 (raising concern that the *Lump Sum Comment Public Notice* was “vague with respect to the definitions of the proposed base lump sum categories, and whether they should apply on a per antenna or per earth station basis”).

¹³² ACA June 15, 2020 Comments at 8 and Attach. at VI (“Base MVPD Amount”); see also ACA June 15, 2020 Comments at 7-8, 15-16 (arguing lump sum amounts should be calculated on a per-site basis); ACA July 6, 2020 *Ex Parte* at 2 (arguing the Bureau’s proposal to reimburse technology upgrade costs on a per-antenna basis was improper); but cf. Letter from Ross Lieberman, Senior Vice President of Government Affairs, ACA, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 18-122, at 1-3 (filed July 7, 2020) (ACA July 7, 2020 *Ex Parte*) (repeating its position that calculating costs on a per-antenna basis is an inappropriate method, but arguing that if the Bureau is to maintain its per-unit methodology, it should calculate costs per-beam rather than per-antenna); Letter from Ross Lieberman, Senior Vice President of Government Affairs, ACA, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 18-122, at 3-5 (filed July 21, 2020) (ACA July 21, 2020 *Ex Parte*) (proposing MVPD lump sum amount that assumes five beams received at each earth station site, requiring 17 integrated receiver/decoder replacements and three spares per earth station).

¹³³ See *Final Cost Catalog Public Notice*, 35 FCC Rcd at 7987-88, paras. 31, 32 (stating that calculating lump sums per antenna “addresses MVPD operators’ concerns that they typically incur higher costs because they have more

(continued....)

desired outcome, the Bureau's clarification of a common sense point in response to ACA's attempt to increase the MVPD lump sum amount cannot rationally be deemed a prejudicial decision lacking notice.

39. In sum, ACA has failed to provide support or convincing arguments for its claims that any of the Bureau's determinations regarding the lump sums were wrongly decided, arbitrary or capricious, or otherwise violated the requirements of the APA. Absent legitimate demonstrations that the Bureau violated notice-and-comment requirements, disregarded factual evidence, or contradicted the Commission's directives, ACA's mere dissatisfaction with the outcome does not warrant overturning the Bureau's decisions.

C. The Bureau Was Not Required to Tie Release of the *Final Cost Catalog Public Notice to Satellite Operators' Final Transition Plans*

40. Lastly, there is no support for ACA's contention that the Bureau arbitrarily and capriciously based its lump-sum determinations on satellite operators' "incomplete preliminary Transition Plans, rather than final Transition Plans."¹³⁴ As an initial matter, ACA's argument is based on the erroneous premise that satellite operators' Transition Plans—final or otherwise—are a prerequisite for determining lump sum amounts.¹³⁵ Nothing in the *3.7 GHz Report and Order* required the Bureau to wait to announce lump sum amounts until after Transition Plans were finalized; indeed nothing in the *3.7 GHz Report and Order* even required the Bureau to *seek comment on* the lump sum payments before announcing its final determination.¹³⁶

41. Moreover, ACA's assertion that the Bureau's decision to finalize the lump sum amounts before the submission of final Transition Plans constituted a rush to judgment that deprived ACA of the opportunity to provide meaningful comment is not supported by the facts. 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, 2020.¹³⁷ Although ACA argues that the final Transition Plans "will have a significant, if not determinative, effect on what earth stations must do to continue receiving transmissions from relocated satellites," it provides no reason as to why that information could not also have been provided through the comments filed in response to the *Preliminary*

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antennas than non-MVPD operators") & n.118 (citing NCTA May 14, 2020 Comments at 27 (suggesting that paying a lump sum cost per facility or call sign instead of per antenna "would significantly underrepresent the average costs for actually transitioning such facilities"); Cox May 14, 2020 Comments at 4-5 & n.10 (asking that lump sum payments be calculated on a per antenna basis, rather than on a per call sign basis, to better address average costs, and noting that the *3.7 GHz Report and Order* suggests that reimbursement qualification should be made on a per antenna basis)).

¹³⁴ Application for Review at 23-25.

¹³⁵ Verizon Opposition at 6 ("[T]he existence of individualized final Transition Plans is not a prerequisite to determining average relocation costs."); Content Companies Opposition at 13; AT&T Opposition at n.6; Intelsat Opposition at 8-9; SES Opposition at 8 ("[F]inal transition plans are not alone determinative in calculating the 'average, estimated costs of' relocation, especially in light of the Bureau's discretion to establish lump sum amounts 'as appropriate.'").

¹³⁶ *3.7 GHz Report and Order*, 35 FCC Rcd at 2428, para. 203; CTIA Opposition at 11. ACA argues that even if the *3.7 GHz Report and Order* did not require the Bureau to wait to finalize lump sums until after final Transition Plans were submitted, the Bureau was required to "give a reasoned explanation for refusing to consider final plans." ACA Reply at 5. The Bureau did just that on several occasions in response to ACA's requests for delay. See *Lump Sum Comment Public Notice*, 35 FCC Rcd at 5630, n.13; *Lump Sum Comment Extension Denial Order*, 35 FCC Rcd at 5870; *Final Cost Catalog Public Notice*, 35 FCC Rcd at 7977, n.65.

¹³⁷ 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).

Cost Catalog Public Notice and the *Lump Sum Comment Public Notice*.¹³⁸ 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 by those parties regarding their earth station migration plans and their need to select and purchase compression equipment uniformly and on a nationwide basis.¹³⁹ ACA argues that the Bureau deprived stakeholders of an opportunity to critique the Bureau's lump sum proposals, noting that the final comment period in response to the *Lump Sum Comment Public Notice* closed before the initial Transition Plans were submitted.¹⁴⁰ Despite this alleged inability to provide informed comment based on the contents of initial Transition Plans, ACA nevertheless made nine separate filings in this proceeding in the 41 days between the deadline for filing initial Transition Plans and the Bureau's release of the *Final Cost Catalog Public Notice*.¹⁴¹

42. ACA argues that the Bureau wrongfully relied on Intelsat's initial Transition Plan to conclude that certain antenna costs should be excluded from the lump sum payments, and points to the fact that Intelsat did not have complete data on all its associated earth stations such that it could accurately assess the needs for those costs.¹⁴² First, rather than relying solely, as ACA suggests, on satellite operators' Transition Plans for this finding, the Bureau found that there was insufficient evidence presented by *any* party to form the basis for including such costs in the lump sum amount.¹⁴³ In excluding antenna replacement costs from the lump sum amount, the Bureau also considered the filings of MVPD commenters that argued such costs would be necessary in certain instances and found that, "[w]hile replacement or additional antennas may be needed in some cases to transition an earth station, we have not seen sufficient evidence that supports including such expenses in the lump sum as part of the average, estimated costs of transitioning."¹⁴⁴ Second, ACA fails to establish that this or any other information was fundamentally changed in the final Transition Plans such that the Bureau's reliance on initial Transition Plans resulted in prejudicial error.¹⁴⁵ Indeed, contrary to ACA's predictions, the final Transition Plans

¹³⁸ Application for Review at 23.

¹³⁹ See *Final Cost Catalog Public Notice*, 35 FCC Rcd at 7978-81, 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); CTIA Opposition at 12; Intelsat Opposition at 8-9; SES Opposition at 8.

¹⁴⁰ Application for Review at 23.

¹⁴¹ See ACA June 25, 2020 *Ex Parte*; Letter from Ross Lieberman, Senior Vice President of Government Affairs, ACA, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 18-122 (filed June 30, 2020); Letter from Ross Lieberman, Senior Vice President of Government Affairs, ACA, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 18-122 (filed July 1, 2020); Letter from Ross Lieberman, Senior Vice President of Government Affairs, ACA, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 18-122 (filed July 6, 2020); ACA July 7, 2020 *Ex Parte*; ACA July 17, 2020 *Ex Parte*; ACA July 21, 2020 *Ex Parte*; Letter from Ross Lieberman, Senior Vice President of Government Affairs, ACA, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 18-122 (filed July 27, 2020); Letter from Ross Lieberman, Senior Vice President of Government Affairs, ACA, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 18-122 (filed July 29, 2020).

¹⁴² *Id.* at 24.

¹⁴³ See *Final Cost Catalog Public Notice*, 35 FCC Rcd at 7990, para. 36.

¹⁴⁴ *Id.*

¹⁴⁵ See 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 29 (filed Aug. 14, 2020) (Intelsat Final Transition Plan) (making no change to its assessment that replacement antennas would only be needed "[i]n some cases"). While final Transition Plans were due the day after ACA filed the instant Application for Review, ACA's Reply to Oppositions was not due until September 8, 2020—over three weeks after final Transition Plans were submitted. Nevertheless, ACA's Reply to Oppositions identifies no new or

(continued....)

submitted on August 14, 2020 included no significant changes to incumbent space station operators' plans regarding the use of compression technologies or any other earth station modification.¹⁴⁶

43. Contrary to ACA's claims, our 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 elect the lump sum option.¹⁴⁷ In adopting rules for the transition of the C-band, we 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."¹⁴⁸ In adopting provisions for a lump sum payment to incumbent earth stations in lieu of reimbursement for their actual relocation costs, we recognized the potential benefits of allowing earth station operators to assume responsibility for their own transition where it is efficient to do so but emphasized the need to ensure the lump sum election process does not compromise space station operators' ability to meet the transition deadlines.¹⁴⁹ 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.¹⁵⁰ 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.

IV. ORDERING CLAUSES

44. Accordingly, IT IS ORDERED, pursuant to sections 1, 4(i), and 5(c) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), and 155(c), and section 1.115 of the Commission's rules, 47 CFR § 1.115, that this order IS ADOPTED.

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different information contained in the final Transition Plans that should have influenced the Bureau's decision. See ACA Reply at 5.

¹⁴⁶ Contrary to ACA's concern that SES would adopt additional compression technology in response to requests from a programmer customer that it do so, see Application for Review at 24-25, SES's final Transition Plan included no additional use of compression technology. 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 including additional use of compression technology would increase the overall cost and complexity of its transition). Other final Transition Plans also included no significant changes. See Intelsat Final Transition Plan, Attach. at 14 (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).

¹⁴⁷ Verizon Opposition at 4.

¹⁴⁸ *3.7 GHz Report and Order*, 35 FCC Red at 2353, para. 20.

¹⁴⁹ *Id.* at 2427-28, para. 202 ("[W]e require the decision to accept a lump sum reimbursement to be irrevocable—by accepting the lump sum, the incumbent takes on the risk that the lump sum will be insufficient to cover all its relocation costs—to ensure that incumbents have the appropriate incentive to accept the lump sum only if doing so is truly the more efficient option."), n.547 (rejecting a request to extend the lump sum election deadline in light of the accelerated deadlines established by the transition).

¹⁵⁰ Verizon Opposition at 7-8.

45. IT IS FURTHER ORDERED that the Application for Review filed by ACA Connects—America’s Communications Association, IS DENIED.

46. IT IS FURTHER ORDERED that, pursuant to section 1.103(a) of the Commission’s rules, 47 CFR § 1.103(a), this order SHALL BE EFFECTIVE upon release.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary