



‘is not a matter of right, even if irreparable injury might otherwise result’” to the movant.<sup>3</sup> “The party requesting a stay bears the burden of showing the circumstances justify an exercise of that discretion.”<sup>4</sup> CHD’s request fails to demonstrate that the extraordinary equitable relief of a stay is warranted.

**A. CHD Has Failed to Show A Likelihood of Success on the Merits**

CHD’s arguments that aspects of the Commission’s *OTARD Report and Order* conflict with various constitutional rights and federal laws and are arbitrary and capricious under the Administrative Procedure Act are not likely to succeed on the merits. The Commission engaged in extensive legal analyses in support of its conclusions<sup>5</sup> and its findings are entitled to judicial deference.<sup>6</sup> “The scope of review under the arbitrary and capricious standard is narrow, and a court “must uphold the rule if the agency has examined the relevant considerations and articulated a satisfactory explanation for its action.”<sup>7</sup> CHD has failed to demonstrate that the Commission’s findings lack any support in the record or that the Commission failed to articulate a reasoned explanation between the facts found and the choice it made. CHD’s disagreements with the Commission’s conclusions on these matters cannot justify its request for stay. As a result, CHD’s various claims are likely to fail.

The Commission adequately considered and addressed CHD’s concerns and found that it had legal authority pursuant to various statutes to adopt the limited expansion of the OTARD

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<sup>3</sup> *Nken v. Holder*, 556 U.S. at 427 (citation omitted).

<sup>4</sup> *Id.* at 433-34.

<sup>5</sup> *Updating the Commission’s Rule for Over-the-Air Reception Devices*, WT Docket No. 19-71, Report and Order, FCC 21-10 at ¶ 23-34 (Jan. 7, 2021) (“*OTARD Report and Order*”).

<sup>6</sup> *See Chevron USA, Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984); *City of Arlington V. FCC*, 569 U.S. 290 at 296, 307 (2013) (reaffirming that “because Congress has unambiguously vested the FCC with general authority to administer the Communications Act,” courts must defer under *Chevron* to the Commission’s authoritative interpretations of the Act.)

<sup>7</sup> *FERC v. Electric Supply Ass’n*, 136 S. Ct. 760, 781 (2016).

rule to fixed wireless hub and relay antennas. After reviewing and considering the claims made specifically by CHD, the Commission rejected “arguments premised on the generalized concerns about the Commission’s RF safety limits and that incrementally revising the OTARD rule would somehow violate people’s right to bodily autonomy or their property-based right to ‘exclude’ wireless radiation emitted by third parties from their home or would violate the Americans with Disabilities Act or the Fair Housing Act by imposing radiation on individuals in their homes.”<sup>8</sup> The Commission further rejected concerns that the OTARD rule revisions will generally lead to unsafe RF exposure levels.<sup>9</sup>

CHD offers no new arguments in its motion for stay. Considering that the Commission already addressed the concerns raised by CHD, the request for stay has not met the burden of establishing a likelihood of success on the merits.<sup>10</sup>

#### **B. CHD Has Not Shown It Will Suffer Irreparable Harm**

CHD has not established that it will suffer irreparable harm from a denial of its stay request. To establish irreparable harm, the claimed injury must be: (1) “actual and not theoretical;” (2) more than mere “economic loss;” and (3) “imminent” and “likely” to occur.<sup>11</sup> Such injury must “be both certain and great,” and “beyond remediation.”<sup>12</sup> CHD has not met this

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<sup>8</sup> *OTARD Report and Order* at ¶ 34 (citing Letter from Scott McCollough, Counsel to Children’s Health Defense, WT Docket No. 19-71 at 1-2, 14-15 (filed May 19, 2020)).

<sup>9</sup> *Id.*

<sup>10</sup> *See, e.g., Expanding Flexible Use of the 3.7 to 4.2 GHz Band*, Order Denying Stay Petition, 35 FCC Rcd 5807, 5814, ¶ 16 (WTB 2020) (declining to address at length arguments already considered and rejected in the underlying order and concluding these arguments do not show a likelihood of success on the merits); *see also Unlicensed Use of the 6 GHz band*, ET Docket No. 18-295, GN Docket No. 17-183, Order Denying Petitions for Stay, DA 20-879 at ¶ 16 (OET 2020) (“Considering that the Order already addressed the concerns raised by petitioners, including mechanisms to protect against harmful interference, we conclude that the petitioners have not met their burden of establishing a likelihood of success on this issue.”).

<sup>11</sup> *Nken v. Holder*, 556 U.S. at 434-45; *see also Wis. Gas v. FERC*, 758 F.2d 699, 674 (D.C. Cir. 1985).

<sup>12</sup> *Mexichem Specialty Resins, Inc. v. EPA*, 787 F.3d 544, 555 (D.C. Cir. 2015)

showing because the harms it alleges are speculative and consist of potential economic injuries that are not severe enough to be cognizable as irreparable harm.

CHD argues that it will suffer harm because its members will face increased exposure to radiofrequency (“RF”) radiation from fixed wireless antennas that are eligible for OTARD protection under the amended rule.<sup>13</sup> The record does not provide any evidence that the deployment of installations allowed under the amended OTARD rule will cause any health-related or other harms alleged by CHD. As CHD acknowledges, the Commission explicitly considered and rejected the specific harms alleged by CHD.<sup>14</sup>

The Commission adequately considered and addressed CHD’s concerns and found that the limited expansion of the OTARD rule to fixed wireless hub and relay antennas will not cause irreparable harm. The Commission was clear that “fixed wireless hub and relay antenna manufacturers and service providers that use this equipment must continue to comply with other applicable Commission regulations, such as RF emissions requirements.”<sup>15</sup> The Commission explained that “[r]evising the OTARD rule does not change the applicability of the Commission’s radio frequency exposure requirements, and fixed wireless providers must ensure that their equipment remains within the applicable exposure limits.”<sup>16</sup>

Moreover, as stated in the *OTARD Report and Order*, the Commission recently declined to revise its RF exposure limits.<sup>17</sup> In that proceeding, the Commission found, based on an exhaustive review of the record evidence, that the existing RF emission limits “reflect the best available information concerning safe levels of RF exposure for workers and members of the

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<sup>13</sup> CHD Motion for Stay at 23-4.

<sup>14</sup> *Id.* at 22.

<sup>15</sup> *OTARD Report and Order* at ¶ 20 (citing 47 C.F.R. § 1.307(b) (RF emission limits)).

<sup>16</sup> *Id.* at ¶ 34.

<sup>17</sup> *Id.*

general public, including inputs from our sister federal agencies charged with regulating safety and health and from well-established international standards.”<sup>18</sup> In light of the fact that any fixed wireless hub or relay antenna deployed under the amended OTARD rule must comply with the Commission’s RF exposure limits, CHD’s claims that such deployments could cause harmful health effects are speculative and do not rise to the “actual and not theoretical” level required to show irreparable harm.

To the extent CHD claims its members may suffer monetary losses, “[w]here the injuries alleged are purely financial or economic, the barrier to proving irreparable injury is higher still, for it is ‘well settled that economic loss does not, in of itself, constitute irreparable harm.’”<sup>19</sup> CHD’s claims of economic injury are merely speculative and do not rise to the level of irreparable harm. Therefore, CHD’s alleged injuries fall far short of the standard required to demonstrate a likelihood of irreparable harm.

**C. A Stay Would Harm Consumers and Providers and Would Not Be in the Public Interest**

CHD has not met its burden of showing that the public interest militates in favor of a stay and that others would not be harmed by a stay. CHD incorrectly asserts that no other parties will be harmed because granting a stay would maintain the status quo and avoid potentially unnecessary costs if the rule is overturned on judicial review.<sup>20</sup> These arguments do not withstand scrutiny.

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<sup>18</sup> See *Proposed Changes in the Commission’s Rule Regarding Human Exposure to Radiofrequency Electromagnetic Fields; Reassessment of Federal Communication Commission Radiofrequency Exposure Limits and Policies*, ET Docket No. 19-226, Report and Order, Notice of Proposed Rulemaking, Memorandum Opinion and Order, 34 FCC Rcd 11687 (2019).

<sup>19</sup> *Mexichem Specialty Resins, Inc. v. EPA*, 787 F.3d at 555 (quoting *Wis. Gas*, 758 F.2d at 674).

<sup>20</sup> CHD Motion for Stay at 26.

In this proceeding, the Commission found that “[t]he record demonstrates that fixed wireless service providers face unreasonable barriers to deployment.”<sup>21</sup> The Commission held that the “record also shows that restrictions in the application of the current rule to hub and relay antennas have raised costs for fixed wireless providers, which incur excessive permitting costs.”<sup>22</sup> The Commission explained that if wireless hub and relay antennas “continue to be excluded from OTARD protection, this could prevent fixed wireless service providers from maintaining or expanding service, particularly broadband-only service, as changes in technology require more dense deployments.”<sup>23</sup> As the Commission stated, “[w]ithout this change, broadband-only fixed wireless service providers will continue to face significant hurdles to siting, perpetuating barriers to new investment and deployment.”<sup>24</sup> Thus, the status quo that CHD seeks to maintain imposes substantial unwarranted costs and substantial delays in deploying facilities that harms providers and consumers. Maintaining the status quo will not prevent these harms from occurring.

At the same time, the Commission concluded that the “updated rule will help spur the rapid deployment of fixed wireless networks needed for 5G and other fixed wireless high-speed Internet services.”<sup>25</sup> The Commission correctly noted that the updated rule “will benefit consumers by offering faster access to advanced communications services and greater competition among service providers.”<sup>26</sup> The Commission held that the updated OTARD rule provides numerous public interest benefits, including providing fixed wireless service providers

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<sup>21</sup> *OTARD Report and Order* at ¶ 13.

<sup>22</sup> *Id.* at ¶ 15.

<sup>23</sup> *Id.* at ¶ 10.

<sup>24</sup> *Id.* at ¶ 12.

<sup>25</sup> *Id.* at ¶ 11.

<sup>26</sup> *Id.*; *see also Id.* at ¶ 12 (“And it will facilitate the offering of advanced services to consumers by expanding deployment options and reducing costs for fixed wireless service providers.”).

with “greater certainty and predictability”,<sup>27</sup> “enhanced ability to deliver reliable high-speed Internet access to a greater number of unserved and underserved customers”,<sup>28</sup> and enabling consumers to access competing video programming providers.<sup>29</sup>

A stay pending review will stifle the Commission’s efforts to provide these public benefits and will impede the efforts of fixed wireless service providers to deploy hub and relay antennas in order to make more advanced wireless services available to consumers. The Commission should therefore deny the stay request because the delay that would result from CHD’s requested stay “would harm both consumers and providers of wireless services and would be contrary to public policy.”<sup>30</sup> Allowing the *OTARD Report and Order* to take effect will give fixed wireless service providers, and the consumers they serve and want to serve, greater certainty and will reduce barriers to investment caused by excessive fees and delays.

### **Conclusion**

The record demonstrates that CHD has not met any element of the four-part test for granting a stay. WISPA therefore requests that the Commission deny the request for stay.

Respectfully submitted,

**WIRELESS INTERNET SERVICE  
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<sup>27</sup> *Id.* at ¶ 16.

<sup>28</sup> *Id.* at ¶ 17.

<sup>29</sup> *Id.* at ¶ 18.

<sup>30</sup> *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, WT Docket No 17-79, WC Docket No. 17-84, Order Denying Motion for Stay, DA 18-1240 at ¶ 23(WTB 2018); *See also Unlicensed Use of the 6 GHz band*, DA 20-879 at ¶ 36, 42 (denying a stay, in part, because “a stay would harm consumers” by delaying availability of the band and “would postpone the stated benefits of the new 6 GHz rules.”).