Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20544

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

JOINT PETITION FOR STAY OF REPORT AND ORDER AND ORDER OF PROPOSED MODIFICATION PENDING JUDICIAL REVIEW

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ABS Global Ltd. (ABS), Empresa Argentina de Soluciones Satelitales S.A. (ARSAT), and Hispamar Satélites S.A. and Hispasat S.A. (Hispasat) (collectively, the Small Satellite Operators or SSOs)[1] request that the Federal Communications Commission stay, pending judicial review, the rules adopted on March 3, 2020 in the *Report and Order and Order of Proposed Modification* in this proceeding.[2]

INTRODUCTION

The *Order* effects a sea change in the spectrum band from 3.7 to 4.2 GHz (the C-band). Eight incumbent satellite operators, including ABS, Hispasat, and ARSAT, are authorized to use all 500 megahertz of that spectrum. The *Order* seeks to repurpose the 300 megahertz from 3.7-4.0 GHz for terrestrial wireless networks. It would do so by eliminating the right of the eight satellite licensees to operate in 3.7-4.0 GHz and auctioning that spectrum to terrestrial wireless

[1] ABS and Hispasat S.A. submitted many filings in this proceeding jointly with Claro S.A., which is not a party to the proceedings in the D.C. Circuit described below. Within this petition, we refer to ARSAT, ABS, and Hispasat as the "Small Satellite Operators" or "SSOs."

[2] *Expanding Flexible Use of the 3.7 to 4.2 GHz Band*, Report and Order and Order of Proposed Modification, 35 FCC Rcd. 2343 (2020) ("*Order*"). A summary of the *Order*, including minor modifications not relevant here in errata released March 27 and April 16, 2020, was published in the Federal Register on April 23, 2020. *See* 85 Fed. Reg. 22,804.

operators.[3] Existing satellite customers in 3.7-4.0 GHz would be transitioned to 4.0-4.2 GHz at federal expense. But satellite incumbents would not be reimbursed for the 300 megahertz they have lost, and their ability to deploy new services would be inhibited in the 200 megahertz of their license that remains.

The Commission purports to rely on 47 U.S.C. § 316 for authority to "modify" away the 300 megahertz from the incumbents' licenses without reimbursement.[4] But Section 316's text, surrounding statutory provisions, and Supreme Court, D.C. Circuit, and FCC precedent all confirm that what the Commission has done here is no mere "modification." In fact, the FCC has *never* simply erased perfectly good spectrum from an incumbent licensee without compensation, let alone taken 60% of an entire band while also restricting operations in the remaining 40%. To the contrary, the Commission has gone to great lengths to ensure that incumbents *benefit* when their spectrum is repurposed, only to surprise the incumbents here with an arbitrary new standard that cheapens the value of all FCC licenses.

At the same time the Commission refused to compensate any incumbents for their revoked spectrum rights, it provided for extraordinary payments of approximately $15 billion primarily to the SSOs' larger competitors, SES and Intelsat. While a small portion of that sum will cover transition costs, the vast majority will not. $9.7 billion in "accelerated relocation payments" will be paid to large operators on top of their costs if they "elect" to transition on a schedule that they already agreed was feasible. $1.6 to $2.5 billion will be paid in the form of

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[3] *Order* ¶¶ 22-109. To preserve a 20-megahertz guard band between new terrestrial networks and remaining satellite services, the auction will assign licenses to operate from 3.7 to 3.98 GHz. *Id.* ¶¶ 54-58.

[4] *Id.* ¶ 125.

free satellites for SES and Intelsat—satellites these companies would have launched anyway had there been no C-band transition.[5]

Dramatically cheaper alternatives would have transitioned the band while also compensating incumbents for their lost spectrum rights. Yet the *Order* summarily dismisses more economical proposals[6]—even though the transition will be federally funded. Searching to explain the FCC's largesse, observers have called the gratuitous subsidies a "bailout" package for Intelsat,[7] the world's largest satellite operator, whose 2008 leveraged buyout saddled it with so much debt that it just two days ago filed for Chapter 11 bankruptcy protection in any event. Dire though Intelsat's finances may be, the giveaway to its owners and creditors is arbitrary and unlawful—and all the more troubling now that the billions at issue will be pocketed by those who speculated in Intelsat bonds over the past several months. The billions SES will receive for clutching onto Intelsat's coattails are even less defensible. Payouts in these amounts are simply unnecessary to accomplish the agency's objectives for repurposing this spectrum.

The SSOs have challenged the *Order* in the United States Court of Appeals for the D.C. Circuit.[8] While the SSOs pursue that challenge, they seek temporary relief from the Commission. Petitioners request that the Commission grant a stay of the *Order* to prevent irreparable harm to the SSOs, and to avoid setting in motion the machinery of an unlawful auction that cannot be unwound. The SSOs will succeed on the merits before the court; they will

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5 *Id.* ¶¶ 206, 210, 211-32.

6 *See Order* ¶¶ 220-26.

7 *See*, *e.g.*, Caleb Henry, *FCC C-band plan draws mixed reaction from Congress*, SPACENEWS (Feb. 7, 2020), https://spacenews.com/fcc-c-band-plan-draws-mixed-reaction-from-congress/ (describing the remarks of Sen. John Kennedy (R-La.)).

8 Notice of Appeal, *ABS Global Ltd. v. FCC*, No. 20-1146 (D.C. Cir. filed May 1, 2020); Protective Petition for Review, *ABS Global Ltd. v. FCC*, No. 20-1147 (D.C. Cir. filed May 1, 2020).

suffer irreparable harm absent a stay; and the balance of harms and public interest strongly favors a stay.

To allow adequate time to seek a judicial stay, if necessary, Petitioners respectfully request that the Commission act on this petition by May 25, 2020. Petitioners intend to treat inaction by that date as a denial and seek relief from the D.C. Circuit.

BACKGROUND

A. The Commission's Rules Permit Authorized Operators to Transmit in the Entire 500 Megahertz of C-Band, Anywhere in the United States, Subject to Coordination Requirements.

The Commission's rules permit licensed space station operators to obtain access to operate in the entire 500 megahertz of the C-band, "exclusively at any orbital slot, but non-exclusively in terms of geographic coverage."[9] In other words, a space station must coordinate with other operators, but once it is authorized for use, it can transmit to earth stations anywhere in the contiguous United States.[10] Thus, unlike many authorizations for terrestrial service, in which a licensee is restricted to a certain geographical license area but is the sole licensee in that area for the relevant frequencies, space station operators in the C-band rely on coordination and techniques like polarization to serve their customers using the same spectrum as other licensees. The licenses convey the same rights to large providers and to more-recent entrants like the SSOs—use of the full 500 megahertz, anywhere in the contiguous United States—regardless of the number of customers the operator currently serves.

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[9] *Order* ¶ 9.

[10] *Id.*

B. The SSOs Have Invested Heavily in C-Band Satellites and Received FCC Authorizations to Serve the United States.

The life cycle of satellites designed to transmit information in the C-band is a long one, and each of the SSOs began investing time and money in launching satellites designed to serve the United States via the C-band well before this proceeding began.[11] They researched, developed, and tested their space stations. They built satellites (often using U.S. manufacturers) to U.S. specifications and launched their satellites (often using U.S. launch partners). They also obtained licenses and authorizations from the Commission to serve the U.S. market.[12] And they coordinated with other satellite operators, completed in-orbit testing, and initiated normal space operations. While they have not yet gained the large market shares of Intelsat and SES, they have business plans and launched satellites to use their full C-band authorizations to serve the United States.

C. The Commission Freezes Development of the C-Band Market to Repurpose the Spectrum for Terrestrial 5G.

The Commission's commencement of this proceeding, however, fundamentally disrupted the C-band market in the United States and prevented the SSOs from capitalizing on their investments in serving the U.S. market. Starting with the *Mid-Band NOI* in August 2017,[13] the Commission began to consider designating all or part of the C-band for terrestrial broadband. Satellite-industry contracts typically extend for many years—even longer than a decade—and the prospect that all or part of the band would no longer be available made negotiating these long-

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[11] *See* Comments of ABS, Hispasat, and Embratel Star One at 3-6, GN Docket No. 18-122 (filed Oct. 29, 2018) ("SSOs Oct. 2018 Comments") (describing the substantial investments of ABS and Hispasat in serving the U.S. and gaining satellite authorizations); *Order* ¶ 30 (describing ARSAT's authorization to operate a satellite in the C-Band).

[12] *See Order* ¶ 115.

[13] *See Expanding Flexible Use in Mid-Band Spectrum Between 3.7 and 24 GHz*, Notice of Inquiry, 32 FCC Rcd. 6373 (2017) ("*Mid-Band NOI*").

term contracts nearly impossible, particularly for operators (like the SSOs) without a long list of legacy customers. But the Commission took more formal steps to halt additional development of the C-band satellite market, and it did so with intention. To simplify the transition adopted in this *Order*, it announced a moratorium on ground station licensing in the C-band in April 2018, stopping expansion efforts dead in their tracks.[14]

ABS's satellite, ABS-3A, provides a powerful example of the impact of this proceeding on the SSOs. ABS-3A launched in March 2015, but did not reach its final orbital location until August 2015. ABS-3A is positioned near the Ivory Coast and can connect the east coast of the U.S. to many locations worldwide, giving it the ability to bridge content between the United States and global markets.[15] After lengthy negotiations, ABS reached a coordination agreement for ABS-3A with the final adjacent satellite operator in September 2016.[16] Promptly thereafter, in November 2016, ABS applied for U.S. market access and gained authority to serve the United States on April 25, 2017.[17] Within a few months, however, the FCC released its *Mid-Band NOI*, announced the freeze on C-band earth station applications,[18] and less than 15 months later proposed repurposing some or all of the C-band in a *Notice of Proposed Rulemaking*.[19] As a result of this timing, ABS's new satellite—which it built on an extended-life platform and as part

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[14] *Temporary Freeze on Applications for New or Modified Fixed Satellite Service Earth Stations and Fixed Microwave Stations in the 3.7-4.2 GHz Band*, Public Notice, 33 FCC Rcd. 3841 (Int'l Bur./Pub. Safety & Homeland Sec. Bur./Wireless Telecomm. Bur. 2018) ("*Application Freeze PN*"); *International Bureau Announces Temporary Filing Freeze on New Fixed-Satellite Service Space Station Applications in the 3.7-4.2 GHz Band*, Public Notice, 33 FCC Rcd. 6119 (Int'l Bur. 2018).

[15] *See Order* ¶ 248.

[16] *See* Letter from Scott Blake Harris, Counsel, SSOs, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 18-122, at 9 (filed Feb. 18, 2020) ("SSOs Feb. 18, 2020 Letter").

[17] *Id.*

[18] *See Application Freeze PN.*

[19] *Expanding Flexible Use of the 3.7 to 4.2 GHz Band*, Order and Notice of Proposed Rulemaking, 33 FCC Rcd. 6915 (Wireless Telecomm. Bur. 2018).

of a massive global expansion plan dependent on the satellite for U.S. connectivity—does not yet serve a U.S. customer notwithstanding the company's commercialization efforts.

Hispasat and ARSAT likewise have made significant investments in satellites affected by the *Order* and have seen their expansion efforts cut short by this proceeding. Hispasat launched its affected satellite, Amazonas-3, in 2013, and that satellite will remain in service until 2031.[20] To pay for the satellite, Hispasat initially sold most of its capacity overseas, with plans to commercialize that capacity in the United States as those initial contracts expired beginning in 2019.[21] Hispasat already serves a C-band customer on Amazonas-3 in the United States and also provides different U.S. services using other satellites (Amazonas-2 and Hispasat 30W-6) and spectrum bands.[22] Using the same successful commercial model, Hispasat expected to add a significant number of U.S customers in the C-band and generate revenues using its FCC license throughout the 2020s.[23] Similarly, ARSAT's satellite, ARSAT-2, reached orbit in September 2015, covers a significant part of the United States, already serves U.S. C-band customers, and has approximately a decade of useful life remaining.[24]

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[20] *See* SSOs Oct. 2018 Comments at 4-6; Declaration of Miguel Ángel Panduro, CEO, Hispasat, S.A. ¶ 7 (dated May 14, 2020), attached as Exhibit B ("Panduro Decl.").

[21] *See* Reply Comments of ABS, Hispasat, and Embratel Star One at 17, GN Docket No. 18-122 (filed Dec. 11, 2018) ("SSOs Dec. 2018 Reply Comments"); Reply Comments of the Small Satellite Operators at 10, GN Docket No. 18-122 (filed July 18, 2019) ("SSOs July 2019 Reply Comments"); Panduro Decl. ¶¶ 7-9.

[22] *See* Letter from Scott Blake Harris, Counsel, SSOs, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 18-122, at 1-2 (filed Feb. 14, 2020) ("SSOs Feb. 14, 2020 Letter"); SSOs Oct. 2018 Comments at 5-6 & n.7 (discussing Hispasat's "active U.S. business" in the Ku- and Ka-bands).

[23] *See* SSOs Dec. 2018 Reply Comments at 17; SSOs July 2019 Reply Comments at 10; Panduro Decl. ¶¶ 7-10.

[24] *See* Letter from Scott Blake Harris, Counsel, SSOs, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 18-122, attach. at 27 (filed Dec. 18, 2018).

D. The *Order* Unlawfully Modifies the SSOs' Licenses and Gives Away Billions of Dollars to the SSOs' Largest Competitors.

In March 2020, the Commission released the *Order*, purporting to repurpose 300 of the 500 megahertz of the C-band for 5G by auctioning the spectrum to new licensees for flexible use. To do so, the Commission simply revoked the right of existing licensees, including the SSOs, to use the spectrum from 3.7-4.0 GHz, providing no reimbursement of any kind, leaving them only 200 of the 500 megahertz they were authorized to use.[25] And within that 200 megahertz, the FCC restricted where in the United States satellite incumbents can transmit free from harmful interference from the new flexible use licensees.[26]

The Commission claimed to rely on its authority under 47 U.S.C. § 316 to "modify" licenses. Faced with Supreme Court and D.C. Circuit precedent holding that such language unambiguously does not authorize the Commission to effect a "fundamental change" to existing licenses,[27] the Commission reasoned that a change is not "fundamental" so long as the licensee can continue to offer "substantially the same service following the modification" to its "existing customers."[28] Thus, in the case of relatively new entrants like the SSOs, the Commission's reasoning is that so long as it does not "eliminat[e]" the right to transmit "entirely," any revocation of spectrum that reserves but a single channel is not a fundamental change.[29]

While the Commission refused to compensate incumbents for their lost spectrum usage rights, it did engineer extraordinary payments of approximately $15 billion to the SSOs' larger

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[25] *See*, *e.g.*, *Order* ¶ 124.

[26] *See id.* at Appendix A, Final Rules §§ 25.138(b) (new earth station registration and licensing must wait until the "transition is completed") & 27.1423(a)-(b) (adopting power limits that protect only incumbent earth stations from adjacent-band interference); *id.* ¶¶ 361, 370.

[27] *MCI*, 512 U.S. at 225; *Cmty. Television, Inc. v. FCC*, 216 F.3d 1133, 1141 (D.C. Cir. 2000); *see Cellco P'ship v. FCC*, 700 F.3d 534, 543 (D.C. Cir. 2012).

[28] *Order* ¶ 135; *see id.* ¶ 139.

[29] *Id.* ¶ 137.

competitors, chief among them SES and Intelsat. In establishing its planned auction for the forcefully vacated spectrum, the Commission ordered that the auction winners would have to pay the largest incumbents *not only* the actual costs of relocating their existing customers to the remaining 200 megahertz of spectrum, *but also* nearly $10 billion more in "accelerated relocation payments" if the incumbents opted to vacate the spectrum fully by December 2023 rather than December 2025.[30] Even though the Commission determined it had the right unilaterally to expel all incumbents from the lower 300 megahertz of the band, it justified these massive payments as a means of "incentiviz[ing]" the large space station operators to "expedite the transition" and defended the amount of the accelerated relocation payments as less than what auction winners would have been willing to pay in theoretical arms-length negotiations to accelerate the transition.[31] Oddly, the Commission's so-called "accelerated" deadline of December 2023 coincided with the timeframe the incumbents already said they could achieve.[32] The Commission also ensured that the large providers could include in their base relocation costs the expense (roughly $1.28-$2.5 billion) of replacing several aging satellites that needed replacement regardless of this proceeding.[33]

DISCUSSION

In determining whether to stay the effectiveness of one of its orders, the Commission applies the four-factor test developed by the courts. A petitioner must show that: (1) it is likely to prevail on the merits; (2) it will suffer irreparable harm if a stay is not granted; (3) other

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30 *Id.* ¶ 155.

31 *Id.* ¶ 214.

32 *See, e.g.*, Letter from Bill Tolpegin, Chief Executive Officer, C-Band Alliance, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 18-122, attach. at 6 (filed Nov. 8, 2019) (proposing "to clear 300 MHz across CONUS within 36 months" of the auction).

33 *Order* ¶¶ 199, 210.

interested parties will not be substantially harmed if the stay is granted; and (4) the public interest favors granting a stay.[34] All four factors are met here.

I. The SSOs Will Succeed on the Merits.

A. The Commission Exceeded Its Authority to "Modify" Licenses Under Section 316 of the Communications Act.

1. Eliminating the SSOs' C-Band Rights "Fundamentally Changes" the Terms of Their Licenses.

Wireless licenses—in the C-band and elsewhere—permit their holders to transmit free from harmful interference subject to certain operating conditions.[35] Under the Communications Act, the FCC may "modify" the terms of wireless licenses in the public interest.[36] The verb "'to modify' means to change moderately or in minor fashion" and has "a connotation of increment or limitation."[37] The Commission's "section 316 power to 'modif[y]' existing licenses" thus "does not enable it to fundamentally change those licenses."[38]

The *Order*, however, does far more than change the parameters of incumbent satellite operators' permissible transmissions. It eliminates entirely their right to transmit in 60% of the C-band. Even in the 40% that remains, it restricts the deployment of new services by limiting the right for satellite signals to be received free from harmful interference to a subset of existing earth stations.[39] Because the *Order* does not merely "alter" the SSOs' licenses in their "incidental or subordinate features," but rather eliminates the basic right that a license confers,

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[34] *See Amendment of Parts 73 and 76 of the Commission's Rules et al.*, Order Denying Stay Request, 4 FCC Rcd. 6476, ¶ 6 (1989) (citing *Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958); *Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843-44 (D.C. Cir. 1977)).

[35] *See Mako Comm'cns, LLC v. FCC*, 835 F.3d 146 (D.C. Cir. 2016).

[36] 47 U.S.C. § 316.

[37] *MCI Telecomms. Corp. v. AT&T*, 512 U.S. 218, 225 (1994).

[38] *Cellco*, 700 F.3d at 543.

[39] *See Order* at Appendix A, Final Rules §§ 25.138(b) & 27.1423(a)-(b); *id.* ¶¶ 361-370.

the changes wrought by the Commission are "fundamental" and are not mere "modifications."[40]

Other provisions of the Communications Act confirm that this revocation of spectrum is not a mere "modification" authorized by Section 316. *First*, the Commission's authority to *revoke* station licenses is limited to prescribed circumstances like "willful or repeated failure to operate substantially as set forth in the license" or "willful or repeated violation" of Commission rules.[41] Absent those extreme circumstances, the Commission cannot revoke spectrum use rights simply to make room for a new preferred use. *Second*, the Commission is authorized to issue flexible-use licenses—the type of licenses it intends to auction in this proceeding—only where the flexible use "would not result in harmful interference among users."[42] This limitation would be unnecessary if the Commission could simply "modify" licenses to clear incumbents any time it wished to facilitate a new flexible-use service. *Third*, the Communications Act provides a path for the Commission to follow when it needs not simply to move an incumbent licensee from one spectrum band to a functionally-equivalent band, but to encourage an incumbent to voluntarily relinquish its spectrum use rights. That path is to hold a "reverse auction" to *pay* the incumbent an economically rational amount to make room for a more valuable use.[43] While the Commission concluded that the non-exclusive-licensing regime in the C-band made a reverse auction infeasible,[44] that does not mean that the Commission could skip the task of ensuring licensees received reasonable

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40 *MCI*, 512 U.S. at 225.

41 47 U.S.C. § 312(a).

42 *Id.* § 303(y).

43 *Id.* § 309(j)(8)(G)(i)-(ii).

44 *Order* ¶ 44.

compensation for their lost spectrum use rights. Put differently, the infeasibility of a reverse auction to establish a price for licensees' C-band rights does not transform the revocation of 300 megahertz of spectrum into a mere "modification."

Consistent with this straightforward application of Section 316, past Commission decisions reallocating spectrum have either *migrated* incumbent licensees to other frequencies or *compensated* them for relinquishing their rights. The Commission has never, until now, decreased without some reasonable compensation the amount of usable spectrum available to a licensee—let alone done so blatantly to make room for a new, preferred user. When repurposing the 18 GHz band, for example, the Commission made available nearby spectrum for displaced incumbents and required the new entrants to provide "comparable replacement facilities" to use it.[45] More recently, the Commission has explained that it aims to "identif[y] replacement spectrum that is suited for the services to be relocated" and has "crafted the comparable facilities requirement to ensure that incumbents are 'no worse off' than they would be if relocation were not required."[46]

Where migration is not possible, the Commission has gone out of its way to compensate displaced incumbents, including by granting new, valuable rights and waiving otherwise-applicable rules and facilitating those incumbents' sale of the spectrum to other parties.[47] It has never simply revoked spectrum rights and told incumbents to make do with what remained.

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[45] *Redesignation of the 17.7-19.7 GHz Frequency Band et al.*, Report and Order, 15 FCC Rcd. 13,430, ¶¶ 78, 80, 82 n.167 (2000) ("*18 GHz Order*"), *aff'd Teledesic LLC v. FCC*, 275 F.3d 75, 79 (D.C. Cir. 2001).

[46] *Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands*, Order on Reconsideration and Fifth Memorandum Opinion and Order and Third Memorandum Opinion and Order and Second Report and Order, 21 FCC Rcd. 5606, ¶ 23 (2006); *see also* SSOs Feb. 18, 2020 Letter at 1 n.3.

[47] *Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, Report and Order, 29 FCC Rcd. 6567 (2014); *Use of Spectrum Bands Above 24 GHz for Mobile Radio Services,* Report and Order and Further Notice of Proposed Rulemaking, 31 FCC Rcd. 8014, ¶¶ 41-42, 86-87, 219-220 (2016)

2. The Commission's Contrary Standard Defies the Text of Section 316 and Turns the Statutory Framework on Its Head.

In the *Order*, the Commission interprets Section 316 to permit it to revoke any amount of spectrum it wishes from a licensee, so long as the "licensee can continue to provide substantially the same service" it is "currently providing" to "existing customers."[48] That standard finds no support in Section 316, in common sense, or in case law.

First, as a textual matter, Section 316 addresses modifications to "station license[s]" and the rights conferred thereby—it says nothing about current levels of service to existing customers.[49] Licenses grant the ability to transmit "energy or communications . . . by radio."[50] Whether an FCC decision makes a "'fundamental change[]' to the terms of [an] existing license[]"[51] depends on how the decision affects the *rights held* by the licensee—not the current level at which those rights are being exercised or how many customers the licensee has.

Second, the Commission's interpretation is untenable as a practical matter. Under the *Order*'s standard, the Commission could eliminate virtually (if not) *all* rights held by a licensee at any time prior to rolling out commercial service. As the Commission would have it, and as happened here, a licensee could invest hundreds of millions of dollars in a wireless network and have its license taken away, without compensation, moments after it launches its network. Yet Congress straightforwardly prohibited such arbitrary bureaucratic action elsewhere in the

("*Above 24 GHz R&O*") (giving new licenses to LMDS incumbents for free); *Service Rules for Advanced Wireless Servs. in the 2000-2020 MHz & 2180-2200 MHz Bands*, Notice of Proposed Rulemaking and Notice of Inquiry, 27 FCC Rcd. 3561, ¶ 8 (2012) ("*2 GHz Band NPRM*") (giving new terrestrial rights to satellite incumbents for free).

48 *Order* ¶¶ 129, 131, 135.

49 47 U.S.C. § 316(a)(1).

50 *Id.* § 301.

51 *Cellco*, 700 F.3d at 543 (citation omitted).

statute by limiting license revocations to cases involving bad acts.[52] While the Commission "agree[s] that eliminating an incumbent space station operator's right to transmit *entirely* would not be a modification,"[53] its keep-one-channel standard is unreasonable and arbitrary.

Third, even the cases cited in the *Order* undermine the Commission's standard. In articulating its "substantially the same service" standard, the Commission relies on *Community Television, Inc. v. FCC*, 216 F.3d 1133, 1140 (D.C. Cir. 2000).[54] *Community Television*, however, did not establish the sweeping proposition for which the Commission cites it. Rather, the court merely observed that after switching from an analog to a digital channel, broadcast licensees would be able to provide "essentially the same services"—broadcast television.[55] It in no way suggested that any modification is permissible so long as the quantity of services *currently provided* remains "the same," even if the quantity of services the licensee is *entitled to provide* reduces dramatically. Nor did the court have any occasion to address that question, as the modification at issue in the case *added* new rights to incumbent authorizations—rights that the complaining petitioners sought to *benefit from* after the FCC deemed them ineligible for the modification.[56] *Community Television* does not support the unprecedented revocation of spectrum from licensees in good standing effectuated here.

3. Ad-Hoc Policymaking Cannot Save the FCC's Arbitrary Standard.

Recognizing that its new Section 316 standard would have a disastrous impact on wireless investment, the Commission attempts to "reassure" other licensees and prospective

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52 *See* 47 U.S.C. § 312.

53 *Order* ¶ 137 (emphasis added).

54 *Id.* ¶ 129.

55 *Cmty. Television*, 216 F.3d at 1141.

56 *See id.* (licensees would also have "some flexibility to provide ancillary services as well" as their previous broadcast services).

licensees that it will apply the standard only to *satellite* licenses, not terrestrial licenses that have not yet been built out.[57] It argues, for example, that terrestrial licenses may have been secured through "competitive bidding," unlike C-band authorizations.[58] But Section 316 does not distinguish among types of licenses, or how they were secured—if the Commission can revoke spectrum through a modification just as a satellite licensee is building its business, it can do the same to any licensee.

The Commission also argues that the SSOs do not need 500 megahertz of spectrum because of their relatively few customers or the location of their satellites.[59] That, too, is irrelevant to whether Section 316 grants the power the Commission claims, because the *rights* of a licensee are no less changed by the Commission's assessment of need. But the Commission's denigration of the SSOs' business prospects is wrong in any event. As the SSOs explained, they do not rely exclusively on a traditional, purely domestic C-band business model of transporting video among points *within* the United States. Rather, their models, in which they have collectively invested billions of dollars, also seek to help U.S. companies and multinationals take content and information *into and out of* the United States.[60] As a result, the SSOs do not need to "lure" traditional U.S. C-band customers and in fact complement "fiber delivery" within the United States.[61] The Commission wholly ignored this evidence. It also ignored the impact of its own actions on the SSOs' ability to market their services: the entire

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57 *Order* ¶ 143.

58 *Id.*

59 *Id.* ¶ 139.

60 *See, e.g.*, SSOs Dec. 2018 Reply Comments; SSOs July 2019 Reply Comments at 9-10; Letter from Scott Blake Harris, Counsel, SSOs, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 18-122, at 5-6 (filed Jan. 3, 2020); Letter from Scott Blake Harris, Counsel, SSOs, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 18-122, at 8-9 (filed Jan. 28, 2020).

61 *Order* ¶ 139.

point of the moratorium enacted in 2018 was to pause further development of the band and thus simplify the transition. And it ignored that restrictions on the deployment of new services will remain in 4.0-4.2 GHz. The bottom line, however, is that Section 316 does not give the Commission the authority to evaluate the business prospects of licensees in good standing and simply revoke spectrum according to its judgment on "need."

B. Even if Section 316 Permitted the Elimination of the SSOs' Rights, the Commission Failed to Defend and Provide Fair Notice of Its New Policy Toward Spectrum Incumbents.

In past proceedings where the Commission could not migrate incumbents to new frequencies, it not only held incumbents harmless—it expanded their rights. Its unreasoned departure from that policy here was arbitrary and capricious, and also breached the agency's obligations under principles of administrative fair notice.

In the 28 GHz band, for example, the FCC granted mobile operating rights to existing incumbents without regard to their level of existing service, and even *extended* buildout deadlines to allow incumbents without substantial services to keep their licenses.[62] In the 39 GHz proceeding, incumbents that participated in the Commission's incentive auction received vouchers "sufficient to win blocks in the auction *equivalent* to their existing" spectrum holdings.[63] And in AWS-4, the Commission allowed an unbuilt licensee and a barely commercialized licensee to gain nationwide terrestrial flexible-use rights.[64] Incumbents in all these proceedings were either incentivized to accept fair value to relinquish their spectrum or put in a position where they could transfer valuable rights to other parties. And unlike the SSOs,

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[62] *Above 24 GHz R&O* at ¶¶ 41–42, 86–87, 219–20.

[63] *Use of Spectrum Bands Above 24 GHz for Mobile Radio Services*, Fourth Report and Order, 33 FCC Rcd. 12,168, ¶¶ 29, 34–35 (2018) (emphasis added).

[64] *2 GHz Band NPRM* at ¶ 8.

many of them had not invested in *any* network facilities at all, whereas the SSOs here successfully built and launched their affected satellites.[65]

The Commission refused to follow that reallocation precedent here—and to defend its extraordinary departure from it. To the extent the *Order* addresses these cases at all, it claims they provided incumbents with greater rights "in order to authorize the incumbent licensees to provide new or additional services."[66] That, however, is simply untrue. For the two largest holders of 28 GHz and 39 GHz licenses, the FCC waived buildout deadlines and settled egregious violations of construction requirements so that the incumbents could immediately sell their unused rights—for billions of dollars—to established operators.[67] The AWS-4 incumbent, DISH, likewise remained fully eligible to transfer its licenses and has yet to provide any "new or additional services" eight years later. The FCC's policy of protecting incumbents—and treating their authorizations as sacrosanct rather than "modifying" them away—offers the only explanation for the massive benefits conferred on these licensees during a repurposing.

The Commission also failed to provide fair notice to incumbent operators that it would pursue such a dramatic change to its policy in this manner. The revocation of the majority of the

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65 *See Straight Path Communications Inc.*, Order and Consent Decree, 32 FCC Rcd. 284, ¶¶ 1-2, 6 (Enforcement Bur. 2017) (resolving investigation regarding Straight Path's violation of network construction requirements); *Application of Verizon Communications Inc. and Straight Path Communications, Inc.*, Memorandum Opinion and Order, 33 FCC Rcd. 188, ¶ 1 (Wireless Telecomm. Bur. 2018) (approving sale of Straight Path's licenses to Verizon); *FiberTower Spectrum Holdings LLC et al.*, Order on Remand and Memorandum Opinion and Order, 33 FCC Rcd. 253, ¶¶ 11-12, 16 (Wireless Telecomm. Bur. 2018) (waiving FiberTower's network construction deadlines); *Application of AT&T Mobility Spectrum LLC and FiberTower Corporation for Consent to Transfer Control of 39 GHz Licenses*, Memorandum Opinion and Order, 33 FCC Rcd. 1251, ¶¶ 1-2, 28 (Wireless Telecomm. Bur. 2018) (approving FiberTower's sale of licenses to AT&T).

66 *Order* ¶ 40.

67 *See* Letter from Scott Blake Harris, Counsel, SSOs, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 18-122, at 3 & n.12 (filed Jan. 31, 2020) (citing Commission orders resolving buildout violation investigation against Straight Path and approving transfer of licenses, and waiving substantial service deadline for FiberTower and approving transfer of licenses).

SSOs' spectrum rights is a "sanction,"[68] and an agency cannot sanction a regulated party without providing fair notice.[69] Under Commission precedent, displaced incumbent operators have been compensated for relinquishing their rights in all repurposed spectrum—not just those frequencies currently in use.[70] The SSOs could not have "identif[ied], with ascertainable certainty, the standards" that the FCC would apply—*i.e.*, that they would effectively be punished for not acquiring customers quickly enough, despite meeting all applicable buildout requirements—and were therefore deprived of their rights without fair notice.[71]

C. The Commission's Multi-Billion-Dollar Giveaway to the SSOs' Competitors Was Arbitrary and Capricious.

1. The *Order* Unreasonably Granted $9.7 Billion in Federally Funded "Accelerated Relocation Payments."

Independent of the Commission's violation of Section 316, the *Order* is unlikely to survive judicial review because the Commission unreasonably allocated $9.7 billion in "accelerated relocation payments" primarily to a handful of incumbents—an unnecessary giveaway that will decrease auction proceeds going to the U.S. Treasury.

The Commission concluded in the *Order* that it could order incumbent licensees to vacate the lower 300 megahertz of the C-band and provided for several billion dollars in reimbursements for costs of relocating existing customers to the remaining spectrum.[72] The purpose of these additional "accelerated relocation payments" was to "expedite [the] relocation

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68 *See* 47 U.S.C. § 312 (license revocations penalize bad acts by a licensee).

69 *SNR Wireless LicenseCo, LLC v. FCC*, 868 F.3d 1021, 1043 (D.C. Cir. 2017).

70 *See supra* pp. 16-17.

71 *Trinity Broad. of Fla., Inc. v. FCC*, 211 F.3d 618, 628 (D.C. Cir. 2000) (quoting *Gen. Elec. Co. v. EPA*, 53 F.3d 1324, 1329 (D.C. Cir. 1995)).

72 *See Order* ¶¶ 181-83.

of incumbents."[73] But the large incumbents to which the Commission directed the bulk of those payments had already stated that they could complete the transition in 18-36 months.[74] If the Commission had the authority it asserted under Section 316 to revoke the spectrum, and had provided funds for reimbursement of actual relocation costs, there was no need for payments to "accelerate" the work—the Commission could simply order it.

Even assuming that accelerated relocation payments were appropriate in principle, the Commission's allocation of $9.7 billion that otherwise would have gone to the Treasury was unreasonable. The Commission purported to base its $9.7 billion giveaway on the amount auction participants would be *willing to pay* for incumbents to clear the spectrum early.[75] But the Commission never evaluated how much incumbent operators would be *willing to accept* to vacate the spectrum early or the actual costs of clearing sooner rather than later—it simply chose the highest value possible that was still under the "upper bound" of what new entrants would pay.[76] The Commission unreasonably refused to adopt the SSOs' proposal to either just order accelerated relocation or provide accelerated relocation payments of no more than $2.2 billion, an amount that bears at least some proportion to the actual costs of relocation (although it still would exceed by a significant margin the costs of *accelerating* relocation, which the Commission did not bother to estimate).[77] As the SSOs explained, the $2.2 billion figure would have been attractive for all incumbent operators—especially Intelsat, which is currently

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[73] *Id.* ¶ 184.

[74] Letter from Michele C. Farquhar, Counsel to the C-Band Alliance, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 17-183, GN Docket No. 18-122, at 2 (filed Nov. 19, 2018); Letter from Bill Tolpegin, Chief Executive Officer, C-Band Alliance, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 18-122, at 1 (filed Oct. 28, 2019).

[75] *Order* ¶ 216.

[76] *Id.*

[77] *See* SSOs Feb. 18, 2020 Letter at 14-15.

unprofitable, and SES, which still would have reaped far more profit than its business can generate at a return that far exceeds the 10% that it targets as a company.[78]

The Commission's approach was precisely the opposite of how Congress has permitted incentive payments for the voluntary relinquishment of spectrum to work,[79] and contrary even to the *Emerging Technologies* precedent the Commission relied upon in the *Order*.[80] Indeed, under the *Emerging Technologies* framework, incentive payments to incumbents must be proportional to the actual costs of relocation—not a significant multiple of them.[81] Unable to reconcile its approach with that precedent, the Commission incorrectly argued that the precedent did not apply where the *Commission*, rather than private negotiation, sets the incentive amounts, and that nothing restricted the size of accelerated relocation payments ordered by the Commission.[82] The Commission's reasoning got it exactly backwards. Where the Commission rather than private parties directs payments funded by the Treasury, there is even *more* reason to economize when determining the proper amount.[83] In any event, the Commission's stated objective was to mimic precisely those private negotiations permitted by its precedent.

2. The Commission Unreasonably Chose to Pay Billions More in Free Satellites.

The Commission also permitted large incumbents to seek reimbursement, as a "relocation" expense, of the cost of replacing satellites that needed replacement regardless of this

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78 *Id.*

79 *See* 47 U.S.C. § 309(j)(8)(G)(ii)(I) (directing the Commission to "determine the amount of compensation that licensees would accept in return" for relinquishing spectrum).

80 *See Teledesic*, 275 F.3d at 81 (noting that incentive payments permitted under *Emerging Technologies* should be proportional to relocation costs).

81 *Id.*

82 *Order* ¶ 224.

83 *See* SSOs Feb. 18, 2020 Letter at 12.

proceeding. The *Order* restricts reimbursements to "'[r]easonable' relocation costs"—*i.e.*, costs "necessitated by the relocation."[84] The SSOs presented evidence showing that the new satellites for which SES and Intelsat sought reimbursement would have been launched even without the relocation.[85] Rather than grapple with that evidence, the Commission simply permitted reimbursement, up to $2.5 billion, for new satellites if they "support more intensive use of the 4.0-4.2 GHz band after the transition."[86] That decision was arbitrary and capricious. The Commission never explained why a far more permissive standard for reimbursement should apply to satellites as opposed to all other expenses. And there is no limit to the unworkable standard that the Commission adopted: literally *every* C-band satellite launched into orbit would "support more intensive use of the 4.0-4.2 GHz band after the transition."

3. The Commission Pursued These Market-Distorting Payouts Despite a Lawful, Cheaper Alternative.

The Commission's giveaways to Intelsat and SES will reduce auction proceeds that could be returned to U.S. taxpayers—every dollar from auction proceeds used to "reimburse" incumbents is a dollar that does not go to the Treasury. On top of that, however, the Commission failed to consider how its unnecessary payouts of billions of dollars to some satellite operators would affect competition in the industry. Intelsat and SES received not only enormous direct infusions of cash, but also managed to receive government subsidies to replace satellites at the end of their productive lives. ABS, on the other hand, received no compensation for losing capacity on its brand-new satellite that was rendered far less valuable by the

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84 *Id.* ¶ 194.

85 *See* SSOs Feb. 18, 2020 Letter at 13-14.

86 *Order* ¶¶ 199, 210.

Commission's actions in this proceeding. Nor did Hispasat, whose satellite will last until 2031, or ARSAT, whose satellite will last until 2030 at the earliest.

It did not have to be this way. The SSOs proposed an alternative approach that would have reduced accelerated relocation payments from $9.7 billion to $2.2 billion, eliminated the $1.6-$2.5 billion in subsidies for new satellites that would have been launched regardless of the transition—and compensated all eight incumbent operators $1.2 billion total for the spectrum use rights they are relinquishing.[87]

The Commission did not seriously discuss this proposal. With respect to reducing $9.7 billion to $2.2 billion, the *Order* calls paying a lower amount an unnecessary "gamble."[88] Yet, as if it wields a blank check, the FCC never weighs the crucial importance of saving taxpayer funds, and it never contends with the SSOs' evidence—much of it financial data released by the large operators themselves—that a far lesser amount would have made the transition enormously attractive relative to the large operators' other business opportunities.[89]

With respect to the $1.2 billion in compensation for lost spectrum use rights, which would be split among all eight operators based on the rights they possess, the Commission concluded irrationally that the *Emerging Technologies* framework does not permit such reimbursement.[90] That argument is specious—the *Emerging Technologies* framework has never been used to confiscate spectrum as here, or to provide Commission-determined "accelerated relocation payments" wholly disproportionate to the costs of relocation. In any event, that framework's entire purpose is to put displaced incumbents "in positions comparable" to their

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87 *See* SSOs Feb. 18, 2020 Letter at 14-17.

88 *Order* ¶ 226.

89 *See* SSOs Feb. 18, 2020 Letter at 11-16.

90 *Order* ¶ 196.

previous position,[91] and to "reasonably protect investments" by incumbent licensees[92]—both of which are entirely consistent with providing reasonable compensation for the value of lost spectrum, and far more consistent than providing no compensation at all. Moreover, providing such compensation would be no more "speculative"[93] than the acceleration payments mandated by the *Order*. Indeed, estimates of the *actual* value of relinquished satellite spectrum were far more precise than the estimates of the *projected* value of spectrum for 5G, which formed the basis of the FCC's calculation of accelerated relocation payments.[94]

Adopting the SSOs' proposal would have been lawful, would have maximized taxpayer returns, and would have facilitated the Commission's desired 5G auction. It was arbitrary and unreasonable not to adopt it.

D. Even Assuming the Order's Payment Scheme Were Reasonable, Its Exclusion of Hispasat and ABS Was Arbitrary and Capricious.

Finally, the Commission arbitrarily excluded Hispasat and ABS from its reimbursement program.

Hispasat. Space station operators providing service to *registered* earth stations were eligible for relocation-expense reimbursements. Hispasat provided evidence that it serves several earth stations, but that customer—an evangelical church—failed to register with the Commission.[95] It was unreasonable to exclude Hispasat entirely from relocation reimbursements because of the failure of a third-party earth stations operator. The Commission's suggestion that

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91 *Id.* ¶ 27.

92 *18 GHz Order* ¶ 63.

93 *Order* ¶ 196.

94 *Compare id.* ¶ 142 *with id.* ¶ 212.

95 *Id.* ¶ 242.

Hispasat was fabricating its existing services[96] was irrational—Hispasat provided detailed, uncontradicted information in the record regarding the services.[97]

ABS. The Commission also arbitrarily excluded ABS from reimbursement for unusable transponders based on an irrational conclusion that ABS did not intend to use the satellite to provide U.S. service.[98] In reaching that conclusion, the Commission ignored record evidence that ABS's business model was to use ABS-3A, which reaches both the east coast of the U.S. and many other locations, to link the U.S. to other global markets.[99] And in relying on the absence of current U.S. customers for the satellite, the Commission ignored the disruption this proceeding caused to the just-launched satellite, including disruption to ABS's plans to build its own earth station to receive the satellite's signals.[100]

II. Petitioners Will Be Irreparably Harmed, and the Equities and Public Interest Favor a Stay.

The *Order* puts into motion a series of events that will be practically impossible to reverse once the new rules take effect, even if the SSOs prevail in court. Within weeks, eligible satellite operators will incur billions in "relocation" reimbursement commitments from the FCC, much of them payable to engineering firms, construction firms, manufacturers, and other vendors here and abroad. They will make "irrevocable" elections to vacate on the FCC's schedule that will entitle them to $9.7 billion when the work is done—payments that they will view as no less "revocable" than the elections.[101]

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96 *Id.* ¶ 243.

97 *See*, *e.g.*, SSOs Feb. 14, 2020 Letter at 1-2; *see also* Panduro Decl. ¶ 14.

98 *Order* ¶ 248.

99 *See*, *e.g.*, Letter from Scott Blake Harris, Counsel, SSOs, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 18-122, at 8-9 (filed Feb. 19, 2020).

100 *See*, *e.g.*, SSOs Dec. 2018 Reply Comments at 15.

101 *Order* ¶ 289.

Later this year, but before the appeal is decided, wireless companies will bid for 5,684 terrestrial licenses at a complex, multi-phase auction. They will reduce the amount of their bids, and thus the proceeds received by the Treasury, to account for the *Order*'s excessive payment obligations. With no clear mechanism to retract or revoke the auctioned licenses, it could be impossible to unwind the auction and conduct it again on more reasonable terms. It *certainly* will be impossible to hold a *fair* auction on the second pass, because wireless companies will reveal their confidential bidding strategies in the first go-around.

In practical terms, this means the SSOs could win every argument on appeal yet *still* lose 60% of their C-band rights without compensation, *still* lose important rights in the 40% of C-band that remains for satellite use, and *still* suffer the competitive injury of being forced to lock horns with large competitors propped up by the government. It also means that a bankrupted Intelsat might *still* hold onto its bailout package—and the Treasury might *still* get stiffed—even after the court concludes that free satellites and $9.7 billion on top of all costs are an arbitrary and capricious waste of federal resources.

Extraordinary relief is intended for extraordinary cases like this, where the circumstances make it practically "impossible . . . to compel a return to the status quo."[102] Because the harms to the SSOs and the public interest here are so significant—and the sheer force of the decision on review virtually unstoppable—the SSOs urge the FCC to grant a stay pending appeal.

A. The SSOs Will Suffer Irreparable Competitive Harm.

The *Order* provides no clear mechanism to rescind relocation or accelerated relocation payments and even suggests that the accelerated relocation compact is "irrevocable."[103] Large

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[102] *FTC v. Exxon Corp.*, 636 F.2d 1336, 1342 (D.C. Cir. 1980); *see also Consol. Gold Fields PLC v. Minorco, S.A.*, 871 F.2d 252, 261 (2d Cir. 1989), *amended*, 890 F.2d 569 (2d Cir. 1989).

[103] *Order* ¶ 289.

operators thus will claim entitlement to free satellites and $9.7 billion even after the *Order* is vacated on appeal—devastating the SSOs' ability to compete even if they prevail in court.

The satellite business is extraordinarily capital intensive.[104] Thus, "[t]o compete effectively," satellite companies "need access to financing on competitive terms"[105] or else their "cost structure" will become "unsustainable."[106] A financially disadvantaged satellite company "will be unable to price competitively and invest as needed in network upgrades and expansions, which will reduce revenue and further depress investment, contributing to a predictable downward spiral" that threatens business viability.[107]

The extent of the disadvantage here would be remarkable. The primary investment satellite companies make—procuring, launching, and insuring new satellites—would be paid for *in full* by the federal government for Intelsat and SES, the world's largest two operators. Even their interest would be reimbursed.[108] Because of the FCC's extraordinary market intervention, the "internal rate of return" (IRR) for these companies' multi-billion-dollar "network refresh" will be "*infinite*," while the IRR for the SSOs would be artificially reduced.[109] Timing aggravates the stark imbalance: because the Intelsat and SES satellite fleets are so old, they will receive free satellites "right at the time they need it most," while the SSOs, who launched their satellites more recently, will lose capacity "right at the beginning of [their] investment cycle."[110]

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[104] *See* Declaration of James B. Frownfelter, Chairman and CEO, ABS Global Ltd. ¶ 22 (dated May 14, 2020), attached as Exhibit A ("Frownfelter Decl."); Panduro Decl. ¶ 13.

[105] Frownfelter Decl. ¶ 22; Panduro Decl. ¶ 13.

[106] Frownfelter Decl. ¶ 23; Panduro Decl. ¶ 13.

[107] Frownfelter Decl. ¶ 23; Panduro Decl. ¶ 13.

[108] *See Wireless Telecommunications Bureau Seeks Comment on Preliminary Cost Category Schedule for 3.7-4.2 GHz Band Relocation Expenses*, Public Notice, DA No. 20-457, GN Docket No. 18-122, attach. at § II.C.3 (rel. Apr. 27, 2020).

[109] *See* Frownfelter Decl. ¶¶ 29-30; Panduro Decl. ¶¶ 12-13.

[110] Frownfelter Decl. ¶¶ 29-30; *see also* Panduro Decl. ¶¶ 7, 9.

Given that disparity, capital for smaller satellite companies **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]**[111] as investors "will be drawn to the 'eligible' operators, and not" the SSOs.[112] This will make the SSOs **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]**.[113] That cycle threatens **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]**[114] and will cause them to fundamentally change course as a business in the near term. This is because ABS **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]**[115] and Hispasat likewise fears that **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]** as needed to grow its business.[116]

The large operators' federally-funded war chest only compounds the problem. In addition to "free satellites," they will receive $9.7 billion above their costs, a staggering amount

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111 Frownfelter Decl. ¶ 24.

112 *Id.* ¶ 25; Panduro Decl. ¶ 13.

113 Frownfelter Decl. ¶ 24; *see also* Panduro Decl. ¶ 12.

114 Frownfelter Decl. ¶ 25; *see also* Panduro Decl. ¶¶ 10, 12-13.

115 *Id.*; *see also Washington Metro. Area Transit Comm'n*, 559 F.2d at 843 (harm that forces a business to fundamentally shift business plans is irreparable).

116 Panduro Decl. ¶ 13; *see also id.* ¶ 12.

that vastly exceeds their earning potential in the normal course of business.[117] SES will receive *12 times* its net income from *all sources worldwide,* while Intelsat and SES will receive *48 times* the revenue generated from the repurposed spectrum.[118] Backed by their windfall, Intelsat and SES will be able to "corner niche markets," like those served by the SSOs, "that previously fell outside" of their "competitive focus," and temporarily "cut prices for satellite capacity until competitors" like the SSOs "leave the business."[119] The payments also "will insulate" SES and Intelsat "from business slowdowns," advantage them "when negotiating with specialized suppliers" and customers, and allow them to pursue "strategic acquisitions that would otherwise prove impossible to fund."[120] In short, "[t]he predictable consequence" of the *Order* is that the small satellite operators will be unable "to compete for the same customers, invest in new products, equipment, and service offerings, and grow their businesses."[121]

These harms are especially significant considering what would have happened *absent* an Intelsat bailout. To restructure its business after years of debt-driven financial management, Intelsat would have explored asset sales, spin-offs, and other options that would have created opportunities for more liquid competitors.[122] While Intelsat will still go through a bankruptcy—which only makes the bailout of its creditors an even larger waste of federal resources—the billions provided by the FCC will insulate Intelsat from market forces that would have compelled a far more significant restructuring.

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117 *See* Frownfelter Decl. ¶ 31.

118 *Id.*

119 *Id.* ¶ 26.

120 *Id.*

121 Panduro Decl. ¶ 12.

122 Frownfelter Decl. ¶ 28.

B. A Stay Will Ensure an Adequate Remedy for the SSOs' Loss in Spectrum Use Rights.

Unless the FCC finds a way to revoke the *Order*'s funding commitments, resources to compensate the SSOs would be unavailable on remand—and the elimination of their spectrum rights will be irreparable *by definition*.[123]

The Commission has stated that it cannot use auction proceeds to pay any incumbents.[124] The alternative would be to require terrestrial licensees to compensate the SSOs for their spectrum, just as they will compensate the other incumbents. But that alternative, too, may prove impossible once the auction is held. At the auction, wireless companies will bid in amounts that account only for obligations specified in the *Order*. They thus may object to paying more than the *Order* specifies, on grounds that they would have bid a lower amount had they been aware of the new obligation.

Even assuming the FCC could lawfully compel additional payment, terrestrial licensees might simply decline to comply. The goal of the auction is to convince wireless companies to pay top dollar; thus, a payment requirement imposed after the auction concludes might increase the winning bidder's total obligations beyond the actual value of the spectrum. But like any rational company, wireless companies will not pay more for a license than the license is worth to their business. As a result, they might simply walk away from the licenses—while no doubt pursuing litigation of their own.

Nor would it be adequate to reinstate the SSOs' licenses on remand. In the interim, the auction will be held and will assign licenses *in the same spectrum* to wireless companies. But

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[123] *See, e.g.*, *Exxon*, 636 F.2d at 1342 (noting that injunctions are appropriate where the government cannot "compel a return to the status quo").

[124] *See Order* ¶ 52; *see also* 47 U.S.C. § 309(j)(8)(G).

wireless companies' use of the band is fundamentally incompatible because it will interfere with ground stations trying to receive satellite signals—which is why the FCC needed to *clear* the spectrum of satellite rights in the first place.[125] Thus, a license reinstated after the auction would allow the SSOs to "transmit signals in the United States – but [would] not allow [those] signals to actually be received successfully on the ground."[126] The license would be "useless" and would in no way restore the SSOs' lost spectrum use rights.[127] Even in 4.0-4.2 GHz, the Order's limited protection of satellite services from adjacent-band interference would inhibit the SSOs' ability to deploy new services for the reasons explained above.[128]

In addition to being irreparable, the harm caused by the loss of rights would be significant. The SSOs invested hundreds of millions of dollars to launch their satellites and obtain these rights, and the lost C-band capacity was critical to their global business plans.[129] Indeed, ABS alone estimates revenue losses **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]**[130] Moreover, because ABS will be unable to provide its customer base with the U.S. C-band connectivity it needs, it will both sell **[BEGIN HIGHLY CONFIDENTIAL]** [redacted]

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125 *See Order* ¶¶ 124-54.

126 Frownfelter Decl. ¶ 20.

127 *Id.*; *see also Mako*, 835 F.3d at 152 (holding that the right to operate on a "primary" basis in a band—meaning the right to operate free from interference and with the ability to cause interference—is what it means to possess "spectrum usage rights").

128 *See supra* note 26; *see also* Panduro Decl. ¶ 10; Frownfelter Decl. ¶¶ 17, 18, 20.

129 Frownfelter Decl. ¶¶ 6-12, 15-18; Panduro Decl. ¶¶ 7-10.

130 Frownfelter Decl. ¶ 15.

[redacted] **[END HIGHLY CONFIDENTIAL]**[131] Likewise, for Hispasat, lost spectrum rights means that it would have to choose between launching a new U.S. satellite at a cost of hundreds of millions of dollars or "forgo[ing] the U.S. business and revenue that was the entire point of launching AMAZONAS-3."[132] ARSAT, too, has approximately a decade of life remaining to generate U.S. revenue on its satellite. Unlike larger operators, none of the SSOs can "distribute the required capacity across several satellites to mitigate the harm."[133]

C. The Equities and Public Interest Favor a Stay.

For much the same reason, the equities and public interest strongly favor a stay. Once commitments to larger operators begin to accrue, *any* auction will result in dramatically reduced proceeds for the Treasury, leaving fewer resources to pay down our national debt or invest in priorities identified by the Congress. The Commission is spending the public's money and will be forced to consider more cost-effective methods to accomplish its goals. It should take the procedural steps necessary to ensure that a new plan actually generates the savings that taxpayers deserve.

Redoing the auction provides no solution. To be sure, the Commission could simply rescind the winning bidders' licenses under the "modification" standard adopted in the *Order*. But that arbitrary standard likely will be vacated by the court on appeal.[134] In any event, holding another auction would waste Commission resources and those of the entire wireless industry.

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131 *Id.*

132 Panduro Decl. ¶ 9.

133 *Id.*; *see also* Frownfelter Decl. ¶ 18.

134 *See supra* Section I.A.

And wireless companies will reveal confidential bidding information during the first auction, rendering any second auction fundamentally unfair.[135]

Finally, a short delay of a long, multi-year transition will not harm the public. 5G deployments in the C-band will not occur for years even under the *Order*'s own transition schedule.[136] And the Commission already has made other mid-band spectrum available to enable 5G[137] and will do so in more frequencies soon enough.[138] Thus, as the Chairman explained, it is far more "important [for the Commission] to make *the right decision*" about C-band than it is "to make a *right now* decision"[139]—which is why the Commission repeatedly extended its own timeline before adopting the *Order* after more than 19 months. The same wisdom applies no less now than it did before and warrants the stay sought in this petition.

CONCLUSION

The Commission should grant a stay of the *Order* pending judicial review.

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135 *See, e.g.*, *FTC v. Penn State Hershey Med. Ctr.*, 838 F.3d 327, 352–53 & n.11 (3d Cir. 2016).

136 *See Order* ¶¶ 168-71 (explaining that most of the spectrum will not be available until December 5, 2023 at the earliest).

137 *See Unlicensed Use of the 6 GHz Band et al.*, Report and Order and Further Notice of Proposed Rulemaking, GN Docket No. 17-183 (rel. Apr. 24, 2020); *Transforming the 2.5 GHz Band*, Report and Order, 34 FCC Rcd. 5446 (2019); *Promoting Investment in the 3550-3700 MHz Band*, Report and Order, 33 FCC Rcd. 10,598 (2018).

138 *See Facilitating Shared Use in the 3.1-3.55 GHz Band*, Notice of Proposed Rulemaking, 34 FCC Rcd. 12,662 (2019); *Use of the 5.850-5.925 GHz Band*, Notice of Proposed Rulemaking, ET Docket No. 19-138 (rel. Dec. 17, 2019).

139 *See* Ajit Pai, Chairman, FCC, Remarks at America's Communications Association Summit at 17:47-18:21 (Mar. 21, 2019) (emphasis added) (adding that it is "much more important for us to get it right, as opposed to moving very, very quickly"), https://www.c-span.org/video/?458896-1/fcc-chair-ajit-pai-addresses-americas-communications-association-summit.

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