Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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

Consolidated Reply of Eutelsat S.A. to Opposotions to Petition for Reconsideration

Pursuant to section 1.429(g) of the Commission’s rules, Eutelsat S.A. (“Eutelsat”) hereby replies to the comments and oppositions¹ concerning its Petition for Expedited Reconsideration or Clarification² of the Commission’s Report and Order and Order of Proposed Modification (“C-band Order³”) in the above-captioned proceeding.³ The commenting Satellite Operators agree that:

the Commission should clarify, or reconsider to the extent necessary, the C-Band Order to ensure that reimbursements to C-Band satellite operators are limited only to reasonable and necessary costs related to relocation of C-Band operations to the 4.0-4.2 GHz frequency range in the contiguous United States, and that satellites constructed using reimbursed funds are dedicated to serving the United States only in the C-Band for the entirety of their useful lives.”⁴

Opponents variously suggest that it would cause delay, raises issues that are effectively moot, or does not adequately justify requested guidance and related relief, but do not persuasively refute Eutelsat’s core argument that the transition process would proceed more quickly and smoothly with the benefit of additional early from the Commission as to the limits of “reasonable” and “necessary” costs that will be eligible for reimbursement as part of the C-band transition.

² See Eutelsat S.A. Petition for Expedited Reconsideration or Clarification, GN Docket No. 18-122 (filed May 26, 2020) (“Eutelsat Petition” or “Petition”).
⁴ Comments of Satellite Operators at 1.
Accordingly, Eutelsat continues to request that the Commission clarify or, to the extent necessary, reconsider, the C-band Order as described in its Petition, in order to:

- Clarify that “reasonable” and “necessary” (i.e., eligible) satellite costs are limited to satellites operating solely in the 4.0-4.2 GHz band (and associated uplink frequencies) covering only the 48 contiguous states and the District of Columbia (“CONUS”);
- Clarify that eligible satellites must remain in position serving the CONUS for their entire useful life;
- To the extent that the Commission permits allocation of the costs of hybrid satellites, provide additional guidance to satellite operators and the Clearinghouse to ensure that C-band relocation compensation cannot be used to subsidize satellite capacity in other bands or non-CONUS service areas; and
- Ensure transparency and provide for a challenge process concerning costs submitted for reimbursement through the Clearinghouse, even if those costs fall within the Cost Catalog’s presumptively reasonable limits.

I. The Eutelsat Petition Is Procedurally Proper

A. Eutelsat’s Petition Complies with the Requirements of Section 1.429

Intelsat and SES argue in vain that Eutelsat’s Petition is somehow procedurally improper. While Intelsat argues that Eutelsat’s Petition is barred under Section 1.429(b) for impermissibly relying on “facts or arguments which have not previously been presented to the Commission,” SES argues that the Petition is barred under Section 1.429(l)(3) because it relies on arguments that have already been fully considered and rejected by the Commission. Clearly, at least one of them must be wrong and, in fact, neither argument finds its mark.

Eutelsat participated extensively in building the record on which the C-band Order is based. In those filings, Eutelsat discussed issues related to the transition process and cost eligibility at length, including proposals to determine eligible cost using various proxies.

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5 Intelsat Opposition at 3. Intelsat cites Fifth and Tenth Circuits precedents stating the black-letter rule that a reviewing court may not properly consider new arguments that were not presented to the agency below and, indeed, that a petition for reconsideration is a prerequisite to judicial review where the party seeking review relies on questions of fact or law upon which the Commission was afforded no opportunity to pass. As such, those cases are inapposite here.
6 SES Opposition at 3.
Eutelsat’s Petition is not based on “arguments that have been fully considered and rejected,” but on the policy implications of the Commission’s decision in the C-Band Order, which is the very purpose for which the Commission provides an opportunity for reconsideration.

Under Section 1.429, reconsideration is proper when, among other things, the petitioner broadly identifies a “material error, omission, or reason warranting reconsideration,” or relies on arguments that have not been “fully considered” by the Commission. That is precisely the case here. It is not clear whether the Commission fully considered and elaborated the boundaries of the “comparable facilities” standard and which costs should be treated as “reasonable” and “necessary” to the transition, specifically as they apply in the context of the C-band relocation. Of course, to the extent that the Commission did fully consider those boundaries, Eutelsat’s parallel request in its Petition that the Commission clarify the terms of its decision is not bound by any limits on petitions for reconsideration contained in Section 1.429.

B. The Issues Raised in Eutelsat’s Petition Are Not Moot

Contrary to Boeing’s arguments, the issues raised in Eutelsat’s Petition have not become moot as a result of the filing of initial Transition Plans. Satellite operators have a continuing opportunity to “make any necessary updates or resolve any deficiencies” through at least August 14, 2020, and additional Commission guidance on the issues Eutelsat’s Petition raises remains a crucial part of that process. Moreover, Boeing’s assertion regarding a competitive auction is a non sequitur. Competitive auction participants are likely to adjust their bids downward to account for expected relocation cost payments; the FCC should be at pains, therefore, to protect the American taxpayer by ensuring that those downward adjustments are no larger than necessary.

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7 47 C.F.R. § 1.429(1)(1, 3).
8 Boeing Opposition at 1.
9 47 C.F.R. § 27.1412(d).
10 Boeing Opposition at 2.
II. Reconsideration or Clarification of the Scope of “Comparable Facilities” and the Limits of “Reasonable” and “Necessary” Satellite Costs Eligible for Reimbursement Is Needed

The C-band Order directs that the winners of future terrestrial flexible use licenses in the 3.7-4.0 GHz band will pay the “reasonable” costs “necessitated by the relocation” of satellite incumbents to “comparable facilities” in the 4.0-4.2 GHz band.\textsuperscript{11} Eutelsat’s Petition requests that the Commission reconsider or clarify those terms, specifically as they relate to potentially eligible satellite infrastructure, to allow parties to make fully informed and economically efficient decisions about reimbursable costs in developing their transition plans. In particular, Eutelsat requests that the Commission clarify that only satellites which support only 4.0-4.2 GHz C-band services solely over the CONUS for their entire useful life will be eligible for reimbursement.

A. The Comments and Oppositions Demonstrate Why Additional Guidance Is Needed

The Satellite Operators agree with Eutelsat that “the Commission should clarify the C-Band Order, or reconsider it to the extent necessary to ensure that the reimbursement framework does not have anticompetitive effects on the U.S. and global satellite industry or otherwise misappropriate the money of United States consumers;”\textsuperscript{12} and should explain that, other than a footnote addressing earth station relocation costs, the C-Band Order does “not explicitly limit ‘reasonable’ costs to new satellites used to relocate existing C-Band operation to the 4.0-4.2 GHz band,” even if that appears to be the Commission’s intent, and it should therefore clarify this point.\textsuperscript{13}

Even the various oppositions to the Eutelsat Petition illustrate clearly unresolved issues that the Commission must address. Boeing argues that it will be a simple matter to allocate the costs of a hybrid satellite by comparing the cost of a satellite offering only C-band services to one that includes additional capabilities and spectrum bands.\textsuperscript{14} Intelsat engages in extended debate

\textsuperscript{11} C-band Order at §§ 183, 194.
\textsuperscript{12} Satellite Operators Comments at 3.
\textsuperscript{13} Id. at 6.
\textsuperscript{14} Boeing Opposition at 6.
with itself: first that cost allocation is available and easy to perform; then that cost allocation is unnecessary because only a hybrid satellite can be considered a reasonable replacement for an existing hybrid satellite; and then supporting cost allocation once again. SEG SES and AT&T acknowledge the lack of clarity in the *C-band Order* and, essentially, argue that the Commission should pass the difficult underlying policy issues along to the Clearinghouse to resolve. And SES candidly admits that it “has included all relocation expenses in its transition plan,” apparently without any attempt at cost allocation, as a starting position that is “subject to review and comment from other interested stakeholders.”

The *C-band Order* provides the start of a useful framework but the Commission can and should provide additional detail. More nuanced eligibility questions may well emerge in individual cases as the transition unfolds, and not all of them can be answered in advance. At a minimum, however, the Commission should provide more guidance on the satellite cost eligibility questions that Eutelsat has raised concerning the single most expensive item of infrastructure that is potentially eligible for reimbursement.

**B. The Only Satellites Eligible for Reimbursement Should Be C-Band-Only Satellites Serving Only the CONUS for the Duration of Their Useful Lives**

In the *C-band Order*, the Commission determined that “compensable relocation costs are only those that are reasonable and needed to transition existing operations in the contiguous United States out of the lower 300 megahertz of the C-band;” and that “procuring and launching

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15 *Cf.* Intelsat Opposition at 4 (“C-band payloads and non-C-band payloads can co-exist on the same satellite, with costs allocated on a reasonable basis” *with* Intelsat Opposition at 5 (“[F]unctional equivalency can be demonstrated by ‘ability to access all facilities’ in the same way before or after the transition or ‘equivalent channel capacity’ that is currently available. Clearly, this would mean the ability to replace hybrid satellites with hybrid satellites.”) *with* Intelsat Opposition at 7 (“[T]he FCC has a ready answer in the form of allocating costs for hybrid satellites so that Intelsat is reimbursed only for C-band satellite capacity that is necessary for the transition.”)).

16 SES Opposition at 5; AT&T Opposition at 2-3.

17 SES Opposition at 6.
new satellites may be reasonably necessary to complete the transition” because “[t]hese new satellites will support more intensive use of the 4.0-4.2 GHz band after the transition.”

Taken together, these statements perforce must limit the cost eligibility of new satellites to those that are needed in order to provide additional capacity in the 4.0-4.2 GHz band over the CONUS as a result of the transition. Thus, the Commission should make clear that it will not reimburse a satellite operator simply for replacing one C-band satellite – hybrid or otherwise – with another. To support “more intensive” use of the 4.0-4.2 GHz band, new satellites must be needed to provide additional capacity, either to provide dual illumination of video distribution services or accommodate other temporary customer needs during the transition, or to provide additional capacity (for example, at additional orbital locations) in the 4.0-4.2 GHz band that is necessary to continue delivering existing “same or similar” services within that band after the transition is over. In either case, the reasonable and necessary relocation cost is solely the cost of additional capacity in the 4.0-4.2 GHz band needed as a result of the transition. In no case would it be necessary or appropriate for the Commission to reimburse a satellite operator for the costs of such an additional satellite that includes capacity to serve customers in other bands, in other places, or after the need for such “surge” capacity abates.

In arguing that Eutelsat’s proposal would create inefficiencies or “double the number of satellites in the North American arc,” Intelsat and SES betray their true intent simply to use the fig leaf of C-band relocation to foist the cost of refreshing their aging North American fleets onto U.S. taxpayers. Contrary to the claims of Intelsat and SES, it is not inefficient to constrain reimbursement eligibility to the cost of additional limited purposes satellites needed to intensify

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18 *C-band Order* at ¶¶ 199, 200.
19 The exception is the distinct case described in Eutelsat’s Transition Plan of a C-band satellite whose useful life will expire before the end of the transition period, and that would not have been replaced, but for the need for that additional C-band capacity in the 4.0-4.2 GHz band as a result of the transition.
20 Intelsat Opposition at 6; SES Opposition at 15-16; *see also* Boeing Opposition at 7.
use of the 4.0-4.2 GHz band for CONUS customers, nor does it stretch the definition of “comparable facilities.” 21 The fact remains that each satellite can only serve the C-band once, and the Commission has suggested that it will not treat the costs of relocating customers to other bands as reasonable or necessary for comparable facilities. 22 By definition, one-for-one replacement of an existing satellite cannot advance the transition, expand capacity, or enable “more intensive” use of the 4.0-4.2 GHz band because both satellites would serve customers using the same spectrum.

In short, there is no evident reason why it could be deemed reasonable or necessary for a satellite operator to retire a perfectly good hybrid satellite, let alone seek reimbursement for a replacement, whether cost-allocated or otherwise. This fundamental difference among the satellite operators in their understanding of the C-band Order itself illustrates why the FCC should reconsider or clarify the standard. As the Satellite Operators correctly explain, C-band satellite operators “should not be permitted to subsidize the development, production, and launch of new hybrid systems or experimental technologies, or to strengthen their competitive position in other geographic markets or by adding other frequency bands to their offerings, by exploiting Commission-guaranteed reimbursement while competitors without legacy C-Band operations are left to raise capital and accept risk according to usual commercial practices.” 23

C. If the Commission Permits Reimbursement of Hybrid Satellite Costs, It Should Establish Allocation Criteria to Limit Eligibility to the Cost of the C-band Payload

To the extent that the Commission deems any portion of the cost of a hybrid satellite offering services in additional bands or to locations outside the CONUS eligible for reimbursement as a result of the transition, it must provide more detailed guidance on how the allocation of those costs should be performed. In its Petition, Eutelsat argued that the

21 Intelsat Opposition at 8, 12; SES Opposition at 15-16.
22 C-band Order at ¶ 201, n.539 (“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.”); Satellite Operators Comments at 6 (same).
23 Comments of Satellite Operators at 4.
Commission should reconsider or clarify that only the incremental cost of the C-band portion should be eligible, with the FCC retaining a clawback right, should the subsidized satellite be relocated to serve areas other than the CONUS during its useful life.\textsuperscript{24}

Boeing’s arguments that cost allocation will be a simple matter are disingenuous.\textsuperscript{25} As Boeing knows quite well, the aerospace industry is composed of a relatively small number of participants, and transaction volume is certainly smaller than the 800 MHz transition on which its argument is based. Moreover, commercial prices and associated contract terms are highly negotiated, limiting the utility of direct price comparisons, and industry participants generally treat that information as confidential and competitively sensitive, shrouding much of the data in secrecy.

Moreover, the Commission should not leave the Clearinghouse to determine cost allocation criteria in the first instance. While Eutelsat has no doubt that the Clearinghouse, once selected, is likely to bring substantial experience and expertise to its duties and should be able to assess the reasonableness of costs, it should not be cast in the role of policymaker with respect to establishing substantive cost allocation criteria, contrary to the arguments of AT&T and CTIA.\textsuperscript{26}

Eutelsat agrees that the Clearinghouse will fill a role analogous to that of a “special master,”\textsuperscript{27} but only the Commission is charged with achieving the delicate balance of competing interests that will best serve the broader public interest.\textsuperscript{28} This is particularly true in determining the public interest implications of translating cost allocation criteria and associated incumbent relocation policies developed for terrestrial wireless relocation to the context of C-band satellite

\begin{footnotes}
\item[24] Eutelsat Petition at 11-12.
\item[25] Boeing Opposition at 6.
\item[26] AT&T Opposition at 23; CTIA Opposition at 7-8.
\item[27] SES Opposition at 8.
\item[28] 47 U.S.C. § 151.
\end{footnotes}
services in a way that is consistent with fundamental principles of fairness and with the Commission’s intent in the *C-band Order.*

The Commission, which is accountable to the elected representatives of the American people who will ultimately bear the approved costs of the relocation, must make those decisions for the Clearinghouse to implement. To ensure that the C-band transition unfolds quickly, smoothly, and predictably, with a minimum of disputes, the Commission must therefore establish clearer and better-defined eligibility and cost allocation rules for the Clearinghouse to apply. Only by doing so in advance can the Commission create sufficient certainty for all parties.

**D. The Commission Should Require Clearinghouse Transparency**

As proposed in Eutelsat’s Petition, the Commission should require the Clearinghouse to decide cost reimbursement requests using transparent processes that allow the American public to understand what specific elements of the costs of the transition are being reimbursed. Contrary to the argument of Intelsat, this request is not based on any concern that the Clearinghouse “will be unable to fulfill its assigned duties.” Rather, it is in recognition of the benefits of public scrutiny and oversight of transactions where billions of dollars will be changing hands. Those benefits are particularly strong in this case, because the C-band transition is uniquely hampered by a lack of transparent and publicly available pricing in the aerospace sector. Thus, the Commission and the Clearinghouse should welcome the input from any other knowledgeable and experienced parties whose expertise may be of use.

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\[29\] Comments of Satellite Operators at 4; *see generally id.* at 3-11. In this connection, terrestrial wireless facilities have limited frequencies and service areas, constraining enhancements that could adversely affect competition in the context of subsidized relocation to new spectrum. In contrast, geostationary satellites can serve the entire visible Earth across many frequencies, raising the specter of anti-competitive cross-subsidization across spectrum bands, services, and national boundaries.

\[30\] Intelsat Oppositon at 11.
For the same reasons, the Commission should clarify the challenge process concerning costs submitted for reimbursement through the Clearinghouse, even if those costs fall within the Cost Catalog’s presumptively reasonable limits. Under the C-band Order, the Clearinghouse acts as the primary reviewer of costs submitted for reimbursement, and may both challenge costs on its own accord, and act as mediator of disputes. How the Clearinghouse will balance and achieve separation between those roles remains to be seen. But, only with a sufficiently transparent cost reimbursement process could parties mount meaningful challenges in the first place.

III. CONCLUSION

For the foregoing reasons, Eutelsat respectfully requests the Commission reject the opposition filings discussed herein and grant its Petition for Reconsideration or Clarification.

Respectfully Submitted,

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31 47 C.F.R. § 27.1416(a).
32 Id. § 27.1421.
CERTIFICATE OF SERVICE

I, Jennifer White, hereby certify that on July 6, 2020, a true and correct copy of the foregoing Consolidated Reply of Eutelsat S.A. to Oppositions to Petitions for Reconsideration was sent via email to the party representatives and counsel identified below:

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