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July 17, 2020

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

**Re: *Ex Parte* Notice of ACA Connects – America’s Communications Association;
Expanding Flexible Use of the 3.7 to 4.2 GHz Band, GN Docket No. 18-122**

Dear Ms. Dortch:

On July 15, 2020, Matthew Polka, President & CEO of ACA Connects, Ross Lieberman and Mike Jacobs of ACA Connects, and the undersigned of MoloLamken LLP met by telephone conference with Acting General Counsel Ashley Boizelle, and Michael J. Carlson, Deborah Broderon, and David Horowitz of the Office of General Counsel, to discuss the Wireless Telecommunications Bureau’s (“Bureau”) recent *Public Notice* concerning optional lump sum payments for incumbent earth station operators as part of the implementation of the C-band transition, especially as it pertains to MVPD earth station operators.¹

In its filings and presentations to the Bureau prior to the Commission’s adoption of the *3.7 GHz Report and Order*, ACA Connects urged the Commission to adopt a C-band transition plan for MVPD earth stations that would allow MVPDs to elect fiber-based transition strategies in lieu of relocating all of their earth stations to maintain C-band reception.² In these submissions, ACA Connects explained that, for the cost of relocating every MVPD earth station, there were alternative approaches that would accommodate C-band repacking while also producing other benefits. Because reduced C-band capacity will require programmers to use more advanced compression methods, such as “HEVC,” relocating every earth station would necessitate purchasing and installing thousands of new integrated receiver/decoders (“IRDs”) at

¹ See *Wireless Telecommunications Bureau Seeks Comment on Optional Lump Sum Payments for 3.7-4.2 GHz Band Incumbent Earth Station Relocation Expenses*, Public Notice, DA 20-586 (WTB June 4, 2020) (“*Public Notice*”); see also *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) (“*3.7 GHz Report and Order*”).

² See Letter from Brian Hurley, Vice President of Regulatory Affairs, ACA Connects, to Marlene H. Dortch, Secretary, FCC, GN Docket No 18-122, at 1-2 (filed November 19, 2019) (“*ACA Connects November 19 Ex Parte*”); Comments of ACA Connects, GN Docket No. 18-122 (filed June 15, 2020) (“*ACA Connects Comments*”).

these locations to process the new signals.³ The cost of those IRDs alone would be close to half of the total cost for relocating all MVPD earth stations.

Instead of relocating every earth station, however, MVPDs could instead transition some or all of their earth stations to fiber-based technologies—eliminating the need to purchase numerous IRDs that would otherwise be required to maintain satellite reception. In one scenario, an MVPD could upgrade IRDs only in certain earth stations designated as “super headends.” The MVPD’s remaining earth stations could then be connected to the super headends by fiber. These ordinary earth stations would no longer receive programmer content via C-band, and would not need new receiving equipment such as IRDs. Alternatively, an MVPD could convert all of its earth stations into fiber-connected sites and contract with a managed video service provider like MobiTV or Vubiquity to deliver programming via fiber.⁴ Under that approach, none of the MVPD’s earth stations would receive programming directly via satellite—the video provider would receive satellite signals and transmit them to the MVPD via fiber. Therefore, no new IRDs would be required for that MVPD.⁵

The *3.7 GHz Report and Order*, issued March 3, 2020, acknowledged the proposals of ACA Connects and others to “give incumbent earth station operators flexibility to replace existing earth stations with fiber in their transition planning,”⁶ and “agree[d] that providing incumbent earth station operators [such] flexibility may allow them to make efficient decisions that better accommodate their needs.”⁷ The *3.7 GHz Report and Order* therefore gave MVPDs one of two choices. MVPDs could choose to “maintain[] satellite reception” for all their earth stations, and seek from the Clearinghouse “reimbursement for the [actual] reasonable relocation costs” incurred thereby. Alternatively, MVPDs could receive a “lump sum reimbursement for all of their incumbent earth stations” and decide for themselves how to use those funds to accommodate C-band repacking. In that case, the MVPDs would receive a lump-sum payment “based on the average, estimated costs of relocating all of their incumbent earth stations.”⁸ The Commission thus gave MVPDs the choice of upgrading every earth station with equipment capable of receiving C-band transmission from relocated satellites, or using the equivalent amount of money to convert some or all of those earth stations to fiber-connected sites that do

³ These replacements have not yet occurred, but will as part of the transition. Programmers identified as offering their programming in more advanced compression are not expected to begin offering such programming in such a way until the last year of the proposed three year transition. *See, e.g.*, Letter from Michelle V. Bryan, Secretary, Intelsat License LLC, to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 20-173, 18-122, Attach., Intelsat C-Band Clearing Transition Plan, at 48 (filed June 19, 2020).

⁴ *See* Letter from Bill Routt, President and COO, MobiTV, to Marlene H. Dortch, Secretary, FCC, GN Docket No 18-122, at 1 (filed July 13, 2020) (“MobiTV Letter”).

⁵ *Id.*

⁶ *3.7 GHz Report and Order*, ¶202 (citing, *inter alia*, ACA Connects November 19 *Ex Parte*, at 2).

⁷ *Id.*; *see* ACA Connects November 19 *Ex Parte*, Attach., at 9.

⁸ *3.7 GHz Report and Order*, ¶202.

not require such equipment. The *3.7 GHz Report and Order* further directed the Bureau “to announce the lump sum that will be available per incumbent earth station . . . for various classes of earth stations—e.g., MVPDs...”⁹

The “Content Companies,” along with Intelsat, SES, and others, have responded to the Bureau’s *Public Notice* and urged the Bureau to adopt a calculation for the lump-sum payment that excludes the costs of IRDs.¹⁰ They contend that relocation of MVPD earth stations is a process that must be done under the direction and control of programmers, not MVPDs.¹¹ “Allocating IRD costs to programmers and satellite operators,” they thus argue, “would serve the transition by centralizing the compression upgrade process and enabling the coordinated installation of the correct IRDs across distribution networks consisting of thousands of earth stations.”¹² They also claim that, under contracts between MVPDs and programmers, MVPDs can recover the cost of new IRDs from programmers.¹³ “If an electing MVPD accepts a lump sum payment but invokes a programmer’s contractual obligation to purchase necessary IRDs,” they warn, the MVPD could receive a “double recovery.”¹⁴

At the July 15 meeting, ACA Connects asserted that the plain terms of the *3.7 GHz Report and Order* required IRD costs to be included in the lump sum, and the proposal to exclude those costs could not be squared with the text, structure, or purpose of the *Order*. ACA Connects explained, moreover, that supporters of the proposal to exclude IRD costs were asking the Bureau to revisit the *3.7 GHz Report and Order*’s decision to offer MVPDs the “flexibility to replace existing earth stations with fiber”-based alternatives.¹⁵ Relying on different rationales to reach a conclusion contrary to the *3.7 GHz Report and Order* would be wholly outside the scope

⁹ *Id.*, ¶203.

¹⁰ *See* Comments of Content Companies, GN Docket No. 18-122, at 1 (filed June 15, 2020) (“Content Companies Comments”); Letter from Matthew S. DelNero, Counsel for the Content Companies, to Marlene H. Dortch, Secretary, FCC, GN Docket No 18-122, at 1-2 (filed June 30, 2020) (“Content Companies June 30 *Ex Parte*”); Letter from Matthew S. DelNero, Counsel for the Content Companies, to Marlene H. Dortch, Secretary, FCC, GN Docket No 18-122, at 2-3 (filed July 6, 2020) (“Content Companies July 6 *Ex Parte*”); Letter from Laura H. Phillips, Counsel for Intelsat, to Marlene H. Dortch, Secretary, FCC, GN Docket No 18-122, at 1 (filed June 24, 2020) (“Intelsat *Ex Parte*”); Letter from Michael P. Goggin, AT&T Services, Inc., to Marlene H. Dortch, Secretary, FCC, GN Docket No 18-122, at 1-2 (filed July 7, 2020) (“AT&T *Ex Parte*”); Letter from Brian D. Weimer, Counsel for SES, to Marlene H. Dortch, Secretary, FCC, GN Docket No 18-122, at 1 (filed July 8, 2020); Letter from Jennifer L. Oberhausen, Director, Regulatory Affairs, CTIA—The Wireless Association, to Marlene H. Dortch, Secretary, FCC, GN Docket No 18-122, at 2 (filed July 9, 2020).

¹¹ *See, e.g.*, Content Companies Comments, at 2-3; Content Companies June 30 *Ex Parte*, at 2; Content Companies July 6 *Ex Parte*, at 1-2, 4-6; AT&T *Ex Parte*, at 2.

¹² Content Companies June 30 *Ex Parte*, at 2.

¹³ Content Companies Comments, at 4.

¹⁴ *Id.*

¹⁵ *3.7 GHz Report and Order*, ¶202.

of the Bureau’s delegated authority, both generally as well as specifically under the *3.7 GHz Report and Order*.

The 3.7 GHz Report and Order Requires Inclusion of IRD Costs in the Lump-Sum Payment

ACA Connects explained that the *3.7 GHz Report and Order*, by its terms, requires IRD costs to be included in the lump sum. It requires calculating the lump-sum payment “based on the average, estimated cost of relocating all . . . earth stations” in a class of earth stations.¹⁶ “It is not in dispute,” moreover, “that technology upgrades” necessary to maintain satellite reception “would include integrated receiver/decoders (‘IRDs’) and other equipment made necessary as a result of digital services compression.”¹⁷ In other words, if all MVPD earth stations were relocated to maintain C-band reception, the cost of new IRDs for those earth stations would be a necessary cost of relocation. IRD costs are therefore part of the “estimated cost of relocating” all MVPD earth stations and should accordingly be included in the lump-sum payment.

The *3.7 GHz Report and Order*’s structure and purpose confirm that conclusion. MVPDs urged the Commission to give earth station operators flexibility to pursue alternative technology upgrade strategies if doing so would be more efficient.¹⁸ They noted that, given the costs the Clearinghouse would be covering for relocation, MVPDs should have the choice to select the most efficient and appropriate upgrade path—including options to replace satellite reception with fiber transport. The *3.7 GHz Report and Order* made a reasoned decision to give MVPDs “a choice” to take the funds that would have been spent by the Clearinghouse to upgrade all of their earth stations, and instead spend those funds “to replace existing earth stations with fiber.”¹⁹ Absent a transition to fiber, every MVPD earth station would require new IRDs.²⁰ As MobiTV explains, however, MVPDs that contract with a fiber-based video service provider like MobiTV “in place of satellite-based video delivery are not required to maintain IRDs of their own.”²¹ Accordingly, if an MVPD opts to migrate to a service like MobiTV, it will need no new IRDs. Or, an MVPD that relocates only some earth stations to maintain satellite reception, and upgrades others to fiber, can reduce its need for new IRDs.²² Either way, for an MVPD electing the lump sum, the Clearinghouse will not need to pay for the IRDs that otherwise would have been required. The premise of the *3.7 GHz Report and Order* is that those savings should be

¹⁶ *Id.*

¹⁷ *Intelsat Ex Parte*, at 1.

¹⁸ *See, e.g., ACA Connects November 19 Ex Parte*, at 1-2.

¹⁹ *3.7 GHz Report and Order*, ¶202.

²⁰ *See* Letter from Ross Lieberman, Senior Vice President of Government Affairs, ACA Connects, to Marlene H. Dortch, Secretary, FCC, GN Docket No 18-122, at 6-7 (filed July 7, 2020); *see also* Letter from Ross Lieberman, Senior Vice President of Government Affairs, ACA Connects, to Marlene H. Dortch, Secretary, FCC, GN Docket No 18-122, at 7 (filed June 25, 2020) (“ACA Connects June 25 *Ex Parte*”).

²¹ *MobiTV Letter*, at 1.

²² *3.7 GHz Report and Order*, ¶202 n.544.

made available to MVPDs as part of the lump-sum payment.²³ In other words, under the *3.7 GHz Report and Order*, whether the lump sum recipient *actually needs* IRDs is irrelevant; the lump sum, which is “in lieu” of C-band relocation cost reimbursement,²⁴ is to be based on the money that *would have* been spent to upgrade all of an operator’s earth stations.

Excluding IRDs from the lump-sum payment upends that entire design. Under that approach, an MVPD that chooses to transition all of its earth stations to fiber will save the Clearinghouse substantial sums in IRDs that will no longer be required. However, that money would not then be available to the MVPD to defray the cost of the fiber upgrade. The proposal therefore robs MVPDs of the very “flexibility” in efficiently allocating those funds that the Commission sought to provide.²⁵

The Report and Order Cannot Be Read to Allow Excluding IRD Costs Categorically

ACA Connects additionally explained that the parties proposing to exclude IRD costs from the lump-sum payment failed to show that such exclusion would be permissible given the *3.7 GHz Report and Order*’s specific requirement that the lump-sum payment cover “the average, estimated costs of relocating” all earth stations in the MVPD class to maintain satellite reception. Content Companies assert that the Bureau would have authority to exclude IRD costs from the lump-sum payment if it concludes that all IRD costs are “satellite expenses,” or that only IRD installation costs (but not IRD equipment costs) are “allocated to MVPDs.”²⁶ But for purposes of determining the lump-sum payment, it is irrelevant to which entity the IRD cost is “allocated.” The lump sum must be “based on the average, estimated costs of relocating” an MVPD’s “earth stations.” The *3.7 GHz Report and Order* thus focuses on *what the costs are for* (relocating an earth station), not *which entity* ultimately would seek reimbursement from the Clearinghouse for any given expense. Whether IRD costs are treated as “satellite expenses” or “allocated to MVPDs,” nobody denies that they are “costs of relocating . . . [an] earth station.” As an example, the Commission explained that “if the average costs of relocating an incumbent earth station is \$5,000, an incumbent earth station operator with three stations could elect to receive \$15,000.”²⁷ The *3.7 GHz Report and Order*’s example focuses on the “costs of relocating [the] earth station,” not the costs borne by the MVPD directly or the satellite operator

²³ See *id.*, ¶ 204 n.547.

²⁴ 47 CFR § 27.1412(e) (option for lump sum payment “in lieu of actual relocation costs”).

²⁵ Content Companies claim that all earth stations “must have the correct IRDs” “even if some earth stations choose to pursue a fiber replacement.” Content Companies July 6 *Ex Parte*, at 5. As MobiTV explains “it is simply not true that MVPDs that replace their earth stations with fiber-based video delivery alternatives must continue to use IRDs at their earth stations.” MobiTV Letter, at 1. Where an MVPD migrates to a video provider like MobiTV, that provider’s “platform allows MVPDs to receive video programming at their earth station locations without needing IRDs at those sites.” *Id.* Alternatively, where an MVPD migrates some of its earth stations to fiber, only the earth stations that need to continue to maintain C-band reception will require IRDs.

²⁶ Content Companies July 6 *Ex Parte*, at 5-6.

²⁷ *3.7 GHz Report and Order*, ¶ 202 n.543.

directly. That makes sense. The *3.7 GHz Report and Order* sought to enable MVPDs to use the money that the Clearinghouse would otherwise have paid to relocate earth stations to maintain satellite reception (which would include purchasing IRDs) on alternative approaches such as connecting some or all earth stations with fiber. Under that approach, it is irrelevant who seeks reimbursement for the IRDs—what matters is that, where a fiber-based upgrade strategy obviates the need to buy IRDs, the Clearinghouse will no longer bear that cost. Under the *3.7 GHz Report and Order*, those funds are instead to be included in the lump-sum payment available to MVPDs.

Regardless, even if the Content Companies were correct that whether IRD costs should be included in the lump-sum payment depends on who would seek reimbursement for them, there is nothing in the record to support categorically excluding IRD costs from the lump sum. None of the filings from supporters of that proposal provide examples of contracts that would require programmers to provide IRDs under these circumstances.²⁸ Indeed, under the contracts ACA Connects members—who represent half of all affected MVPD earth stations—have with programmers, programmers sometimes may, but are not required to, provide IRDs. And it is not at all clear that the Commission’s C-band clearing effort (which is not a voluntary technological change by the programmers) would even trigger the relevant provisions.²⁹ Moreover, even if some MVPDs could seek “double recovery” for IRD expenses, that hardly justifies making *every MVPD* ineligible to recover IRD costs, regardless of whether its contracts with its programmers permit such recovery. Insofar as the Bureau is concerned about the possibility of double recovery, it can simply require any MVPD receiving the lump sum to certify that it will not seek to recover duplicative sums under contracts.

The Justifications for Excluding IRD Costs Invite the Bureau to Exceed the Scope of the 3.7 GHz Report and Order and Are Meritless Regardless

ACA Connects observed that all of the other arguments in support of excluding IRD costs were policy arguments that invited the Bureau to revisit settled decisions, which would exceed the scope of the *3.7 GHz Report and Order*. The Content Companies and others have argued that it would be “more efficient” and would reduce transition “risks” for the Bureau to adopt a top-down process wherein programmers direct and control upgrade of IRDs for all of their affiliates.³⁰ That approach, however, is flatly incompatible with the *3.7 GHz Report and Order*. The *3.7 GHz Report and Order* gave MVPDs “a choice.” They may choose to have the satellite operators take full responsibility for all tasks involved with their transition to utilizing only the upper 200 MHz of the C-band, including covering the costs to upgrade all of their IRDs, as the Content Companies want, or they may opt “to replace existing earth stations with fiber”³¹ and undertake this transition on their own, in coordination with the satellite operators. Thus, the

²⁸ See *AT&T Ex Parte*, at 2 (contractual assignment of responsibility for payment of decoding hardware varies across C-band).

²⁹ ACA Connects Comments, at 9-10.

³⁰ Content Companies Comments, at 2-3; Content Companies July 6 *Ex Parte*, at 3-4; *Intelsat Ex Parte*, at 2-3; *AT&T Ex Parte*, at 1-2.

³¹ *3.7 GHz Report and Order*, ¶202.

Commission contemplates that MVPDs “may . . . pursue different transitions for various earth stations.”³² For those wishing to take this option, it is intended they would not to be controlled by a central authority. The Commission thus made clear that it had evaluated the relevant considerations—efficiency and flexibility versus reducing risk of delay—and had made a reasoned decision to allow MVPDs the choice of whether to relocate every earth station, or pursue fiber-based approaches. The Content Companies would have the Bureau unravel the *3.7 GHz Report and Order*’s design for purposes of discouraging MVPDs from exercising a “choice” the *3.7 GHz Report and Order* expressly sought to provide them.

As ACA Connects explained, revisiting the Commission’s decision to give MVPDs a choice to pursue fiber-based upgrades—and to apply money thereby saved on IRDs and related equipment to deploying fiber—is outside the scope of the *3.7 GHz Report and Order*.³³ The *3.7 GHz Report and Order* directed the Bureau to compute the appropriate lump-sum amount, not revisit the basic structure of the *3.7 GHz Report and Order*. And that is all that is within the scope of the delegation to the Bureau under the *3.7 GHz Report and Order*.³⁴ Were the Bureau to reach a different conclusion, based on entirely different rationales than those set forth in the *3.7 GHz Report and Order*, serious APA problems could arise.

In any event, the Content Companies’ concerns about efficiency and risks of delay in the event MVPDs pursue fiber-based approaches are misplaced. The *3.7 GHz Report and Order* capped the lump-sum payment to what it would otherwise cost to relocate the earth station to maintain satellite reception—“to ensure that incumbents have the appropriate incentive to accept the lump sum only if doing so is truly the more efficient option.”³⁵ And it required that MVPDs “that elect the lump sum payment must complete relocation consistent with the space station operator’s deadlines,” thus ensuring that no delay will result.³⁶ The Content Companies nowhere explain why those measures do not adequately address their concerns.

Likewise, the Content Companies’ speculation that MVPDs would make “[un]informed decisions” with respect to technology upgrades that would compromise programmers’ content distribution networks is specious.³⁷ MVPDs operate *receive* stations. If MVPDs fail to obtain proper equipment to receive and distribute programmers’ broadcasts, they and their customers will suffer. Therefore, MVPDs have enormous incentives to purchase compatible equipment. But even if an MVPD installed incompatible equipment in one of its earth stations, that would only impair reception for that earth station. Reception by other MVPDs would be unaffected. Content Companies’ claims of risks to entire content distribution systems are baseless.

³² *Id.*, ¶202 n.544.

³³ *See, e.g.*, ACA Connects June 25 *Ex Parte*, at 2.

³⁴ *See id.*

³⁵ *3.7 GHz Report and Order*, ¶202.

³⁶ *Id.*

³⁷ Content Companies Comments, at 3.

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In summary, the proposal to exclude IRD costs from the lump-sum payment is inconsistent with the *3.7 GHz Report and Order*. Adopting that proposal, and crediting the justifications for it set forth by the Content Companies and others, would require the Bureau to venture far outside the scope of the *3.7 GHz Report and Order*. And those justifications for the proposal are, in any event, without merit. Adopting it could invite legal challenges that could delay the transition.

Please do not hesitate to contact the undersigned with any questions.

Sincerely,

A handwritten signature in black ink, appearing to read 'Ray Hashem', written in a cursive style.

Ray Hashem
MoloLamken LLP

cc: Ashley Boizelle
Michael J. Carlson
David Horowitz
Deborah Broderon