

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

In the Matter of )  
 )  
EXPANDING FLEXIBLE USE OF ) GN Docket No. 18-122  
THE 3.7 TO 4.2 GHZ BAND )

**REQUEST FOR STAY OF AUGUST 31 DEADLINE FOR ELECTING  
TO RECEIVE LUMP-SUM PAYMENT PENDING COMMISSION  
REVIEW OF THE FINAL COST CATEGORY NOTICE**

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**INTRODUCTION AND SUMMARY**

Pursuant to 47 C.F.R. §§ 1.41, 1.43, and 1.44(e), ACA Connects respectfully requests a stay of the deadline for earth station operators to make an election as to the lump-sum payment under the *3.7 GHz Report and Order* (“C-Band Order”),<sup>1</sup> pending resolution of ACA Connects’ concurrently filed Application for Review of the Final Cost Category Notice determining the lump-sum amount, and any ensuing judicial review.<sup>2</sup> ACA Connects further requests a decision on its Request for Stay by August 20, 2020, to allow ACA Connects to seek judicial relief to the extent necessary. If the Commission does not grant a stay pending review, ACA Connects requests that the Commission grant a 14-day stay of the deadline (until September 14) to allow it time to seek a stay from the court of appeals and to permit the court to act on such a request.

All of the relevant stay factors are amply met here. ACA Connects has a substantial case on the merits—indeed, it has a likelihood of success. In the C-Band Order, the Commission chose to “give incumbent earth station operators flexibility to replace existing earth stations with fiber” so they could “make efficient decisions that better accommodate their needs.”<sup>3</sup> To that end, the Commission directed the Wireless Telecommunications Bureau (“Bureau”) to calculate

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<sup>1</sup> *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) (“C-Band Order”).

<sup>2</sup> *Wireless Telecommunications Bureau Releases Final Cost Category Schedule for 3.7-4.2 GHz Band Relocation Expenses and Announces Process And Deadline For Lump Sum Elections*, Public Notice, DA20-802 (July 30, 2020) (“Final Cost Category Notice”).

<sup>3</sup> C-Band Order, ¶ 202.

a lump-sum payment that earth station operators could elect to receive in lieu of reimbursement for the actual costs of relocating their earth stations—*i.e.*, the cost of upgrading equipment in their earth stations to receive service from relocated C-band satellites. The Commission directed that the lump sum must encompass the cost of “*any* necessary changes that will allow the earth stations to receive C-band services on new frequencies or from new satellites once space station operators have relocated their services into the upper portion of the band.”<sup>4</sup> The Bureau, however, *excluded* from its lump sum one of the most significant items: the costs of Integrated Receiver/Decoders (“IRDs”) that multichannel video-programming distributor (“MVPD”) earth stations will require for continued C-Band reception. The Bureau instead classified those earth-station-bound IRDs as a *space station* cost. That decision departed from the plain terms of the C-Band Order. It rests on arbitrary and capricious reasoning. And it grossly distorts the choice between accepting the lump sum and accepting reimbursement for actual costs, destroying the incentive for “efficient decisions” the Commission intended.

The Bureau violated other APA requirements. It failed to properly disclose its methodology and assumptions. It relied heavily on a retained consultant that met confidentially with various undisclosed stakeholders, but denied ACA Connects’ requests for a meeting. And the Bureau imposed a schedule that forced it to determine the final lump-sum amount *before* satellite operators filed crucial transition plans bearing on that calculation.

MVPDs face irreparable harm. Absent a stay, earth station operators will, by August 31, be forced to make an “irrevocable” election on whether to take the lump-sum payment.<sup>5</sup> Because the Bureau’s lump-sum amount was improperly determined, many MVPDs likely will be forced to decline the lump-sum option, and permanently forgo the benefits of potentially more efficient fiber upgrades. A stay, meanwhile, will not injure others. Satellite operators are still finalizing

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<sup>4</sup> *Id.*, ¶201 (emphasis added).

<sup>5</sup> *Id.*, ¶202.

relocation plans and do not have any immediate need to know MVPDs' elections. Ample time remains for the Commission to review and correct the Bureau's determination. A stay, finally, would be in the public interest. The C-Band Order sought to ensure that relocation funds would be used efficiently. It encourages MVPDs to accept a lump-sum payment to upgrade facilities with fiber when that is a more efficient option than relocating earth stations for continued C-Band reception. The Bureau's inadequate lump-sum amount thwarts that incentive by systematically making *less* money available for fiber upgrades than for relocation. The inevitable result is to discourage MVPDs from pursuing fiber and its attendant public benefits, such as expanded broadband access—even where fiber upgrades cost less than relocation. Staying the election deadline now—to give the Commission an opportunity to review and correct the Bureau's determination—will also reduce the risk of future significant disruption that would occur if the Bureau's lump-sum determination were later set aside on judicial review.

### **BACKGROUND**

The relevant background is set forth in detail in ACA Connects' Application for Review ("Application") which is being filed concurrently with this stay request. *See* Application 2-9. ACA Connects represents more than 700 small and medium-sized MVPDs that provide video, voice, and broadband services in the U.S. Those MVPDs currently use C-Band spectrum, 3.7-4.2 GHz, to receive television content from programmers, and will be affected by the Commission's C-Band relocation. *See id.* 2-3. For example, because programmers will have to adopt more advanced compression methods to fit the same content into a reduced amount of spectrum, MVPDs will need to upgrade their earth stations with IRDs to allow them to receive and process the compressed signals before distributing the content to customers' homes. *Id.*

The Commission's C-Band order provides for reimbursement of the costs of relocation.<sup>6</sup>

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<sup>6</sup> *Id.*, ¶¶ 111, 201.

For “earth station operators,” like MVPDs, the C-Band Order provides for reimbursement of the “cost to migrate and filter earth stations,” “including costs to . . . install filters and compression software and hardware”—*i.e.*, IRDs.<sup>7</sup> ACA Connects encouraged the Commission to allow MVPDs to use the money that would be spent on relocation flexibly—in particular, to allow them to replace their current C-band satellite reception with fiber when that would be more economically efficient. *See* Application 3-4. ACA Connects explained that upgrading an earth station to fiber would obviate the need to purchase equipment, such as IRDs, for that earth station. *Id.* And converting to fiber would offer significant public benefits, such as facilitating upgrades to and the expansion of broadband access into rural and other underserved areas.<sup>8</sup>

The C-Band Order “agree[d]” with that approach, and gave MVPDs a “choice.”<sup>9</sup> They could either (1) receive reimbursement for actual costs relocation costs, or (2) accept a lump-sum amount “equal to the estimated reasonable transition costs of earth station migration and filtering,” which MVPDs could then use to convert some or all of their earth stations to fiber instead.<sup>10</sup> The Commission made clear that the earth station migration costs encompassed within the lump-sum amount include the costs of necessary upgrades to earth station “compression technology”—*i.e.*, IRDs.<sup>11</sup>

The C-Band Order directed the Bureau to calculate the appropriate lump-sum payment.<sup>12</sup> The Bureau enlisted a contractor, RKF Engineering Solutions, to assist with that determination. *See* Application 5-8. RKF held confidential meetings with some stakeholders. But the Bureau and RKF denied ACA Connects’ requests to meet with RKF. *Id.*, at 7.

During the notice-and-comment period, a dispute arose regarding the treatment of IRD

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<sup>7</sup> C-Band Order, ¶201; *see* Application 2-3.

<sup>8</sup> ACA Connects Nov. 19 *Ex Parte*, Attach. A, at 4, 9.

<sup>9</sup> C-Band Order, ¶202; *see also* ACA Connects Nov. 19 *Ex Parte*, Attach. A, at 9.

<sup>10</sup> 47 C.F.R. § 27.1412(e).

<sup>11</sup> 47 C.F.R. § 27.1411(b)(4).

<sup>12</sup> C-Band Order, ¶203.

costs. Programmers and others encouraged the Bureau to exclude IRD costs from the lump sum, on the theory that those costs should be attributed to programmers and satellite operators because they would make decisions about *what kinds* of IRDs would be required. *Id.*, at 8. ACA Connects explained that, under the C-Band Order, the lump sum must encompass *all* earth station changes needed for relocation. *Id.*, at 9. Because IRDs are equipment that must be installed *in earth stations* for continued C-Band reception, ACA Connects explained, they are *earth station costs* that must be included in the lump sum. *Id.*

The Bureau’s Final Cost Category Notice, however, excluded “the cost to purchase the [IRDs]” from the lump sum, and included only the cost of the labor required to install IRDs. Application 8. In the Bureau’s view, the cost of new IRDs for earth stations should be considered a *space station* cost because programmers would be making decisions about what kinds of IRDs would be required. *Id.* The Bureau also declared that programmers and satellite operators are responsible for “selecting and purchasing compression equipment for any necessary technology upgrades” for MVPDs—even for MVPDs that took the lump sum.<sup>13</sup> The Bureau admitted, however, that it could not say that programmers and satellite operators were otherwise obligated to pay for IRDs; the record would not support that conclusion.<sup>14</sup>

Aside from the IRD issue, the Bureau based its lump-sum amounts on a novel methodology where it (1) excluded “outlier” costs that did not meet a “minimum threshold of likelihood” that they would be incurred in a “typical” earth station relocation, and then (2) weighted costs found to satisfy that threshold according to the probability that they would be incurred in transitioning a particular earth station location. *Id.* The Bureau, however, did not disclose essential details of its methodology, including: the “minimum threshold” for inclusion at the first step, what costs were deemed “outliers,” what probabilities were assigned to costs that cleared the

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<sup>13</sup> Final Cost Category Notice, ¶18.

<sup>14</sup> *Id.*, ¶20.

minimum threshold, and how the Bureau determined the “likelihood” or “probability” that a particular cost would be incurred. Additionally, the Bureau relied on data from its third-party consultant’s confidential meetings with stakeholders—meetings from which ACA Connects and cable operators were excluded—and without disclosing the relevant data (even on an aggregate basis). *Id.*, at 7-8. The resulting lump sum was hundreds of thousands of dollars less per earth station than what ACA Connects had estimated would be required.<sup>15</sup> The exclusion of IRD costs alone decreased lump-sum amounts by around half. Application 8.

The Bureau’s Notice gave incumbent earth-station operators a deadline of August 31, 2020 to make their lump-sum elections.<sup>16</sup> Any operator choosing to take the lump sum must certify to “[a]n irrevocable release of claims for reimbursement for actual reasonable relocation costs” and “[a]n irrevocable release of claims against the payor and/or Commission with respect to any dispute about the amount received.”<sup>17</sup>

### **ARGUMENT**

A stay is warranted where a petitioner shows that: (1) it is likely to prevail, or has a substantial case, on the merits; (2) it will suffer irreparable harm absent a stay; (3) a stay will not injure other parties; and (4) a stay will be consistent with the public interest.<sup>18</sup> No single factor is dispositive.<sup>19</sup> Moreover, where there is a strong showing on one factor, a lesser showing is required on the other factors.<sup>20</sup> The Commission, moreover, need not decide that the Bureau

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<sup>15</sup> ACA Connects Nov. 19 *Ex Parte*, Attach. A, at 4, 9.

<sup>16</sup> Final Cost Category Notice, ¶ 39.

<sup>17</sup> *Id.*, ¶ 42.

<sup>18</sup> *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987).

<sup>19</sup> *Wash. Metro. Area Transit Comm’n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977).

<sup>20</sup> *Id.*

erred in order to grant a stay. A “substantial case on the merits, rather than . . . likely success,” can be sufficient.<sup>21</sup> Here, all four factors weigh strongly in favor of a stay.

## **I. ACA CONNECTS IS LIKELY TO PREVAIL ON THE MERITS**

As explained more thoroughly in ACA Connects’ application, the Bureau’s lump-sum determination improperly departed from the C-Band Order and regulations—and relied on a secretive process—to produce unexplained calculations that cannot be reconciled with the APA’s requirements.

### **A. The Bureau Improperly Excluded IRD Costs from the Lump-Sum Amount**

The Bureau’s exclusion of IRD costs from the lump sum defied the Commission’s clear directives. *See* Application 10-11. The C-Band Order’s implementing regulations require the lump sum to be “equal to the estimated reasonable transition *costs of earth station migration* and filtering.”<sup>22</sup> They define “earth station migration,” in turn, to encompass “*any* necessary changes that allow the uninterrupted reception of service,” including upgraded “*compression technology*.”<sup>23</sup> Such compression technology undisputedly includes IRDs, which must be installed in earth stations to allow them to receive more highly compressed C-Band signals. Application 10. The C-Band Order repeatedly identifies the costs of “compression technology” as “earth station” relocation costs—which must be included in the lump sum. Application 10-11.

The Commission’s purpose in offering MVPDs the lump-sum option confirms that IRD costs must be included in the lump sum. The Commission found that “giv[ing] incumbent earth station operators flexibility to replace existing earth stations with fiber . . . may allow them to

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<sup>21</sup> *In re Fed.-State Joint Bd. on Universal Serv.*, 20 FCC Rcd. 5167, 5168-69 ¶4 (2005) (citing *Holiday Tours, Inc.*, 559 F.2d at 843-44).

<sup>22</sup> 47 C.F.R. §27.1412(e) (emphasis added); *see* C-Band Order, ¶202 (“lump sum” must be “based on the average estimated costs of relocating all of [an MVPD’s] earth stations”).

<sup>23</sup> 47 C.F.R. §27.1411(b)(4) (emphasis added); *see* C-Band Order, ¶201.

make efficient decisions that better accommodate their needs.”<sup>24</sup> It thus gave them a choice between receiving reimbursement of actual relocation costs, or receiving a lump-sum payment “based on the *average, estimated costs of relocating* all of their incumbent earth stations.”<sup>25</sup> The idea was simple: MVPDs should be allowed to take the same amount of money that would otherwise be spent on upgrading their satellite reception (including the costs of needed IRDs), and use that money to upgrade their facilities with fiber where that approach better suits their needs. *See* Application 11-12. The Bureau’s deficient lump sum, however, creates scant incentive for MVPDs to upgrade to fiber, even when doing so would be *cheaper* than what the Clearinghouse would otherwise pay for relocation (inclusive of IRD costs). Application 16-17.

The Bureau’s justifications for excluding IRD costs are meritless. *See* Application 12-17. The Bureau deemed IRD costs to be *space station* relocation costs even though IRDs are undisputedly installed in *earth stations*. The Bureau reasoned that programmers and satellite operators would decide which IRDs to purchase. Application 12-14. Under the C-Band Order, however, who selects or purchases the IRDs is irrelevant. What matters is whether IRDs are needed to allow earth stations to receive uninterrupted service through the C-Band transition—and they unquestionably are. *Id.*

The Bureau also wrongly dismissed the Commission’s express instruction that “compression technology” (such as IRDs) is a cost of “earth station migration.”<sup>26</sup> The Bureau implausibly insisted that the Commission was referring only to the costs of *physically installing* IRDs, not the costs of purchasing them. *Id.* But that reading cannot be squared with the Order’s repeated use of the term “install[ation]” to refer to both procurement and installation costs. *Id.* And it is irrational to suggest that, while *installing* IRDs is necessary for earth station migration,

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<sup>24</sup> C-Band Order, ¶202; *see* ACA Connects Nov. 19 *Ex Parte*, Attach. A, at 9.

<sup>25</sup> C-Band Order, ¶202.

<sup>26</sup> *Id.*, ¶201; *see id.*, ¶210.

*obtaining* those same IRDs somehow is not.

Ultimately, the Bureau’s decision rests on a policy rationale that excluding IRD purchases from earth migration costs (and thus from the lump sum) strikes the “appropriate balance” and will streamline the relocation process. Application 15-16. That decision was not the Bureau’s to make. The Commission had already balanced the efficiencies and decided that costs for compression equipment, such as IRDs, should be included. As a “subordinate body,” the Bureau had no authority to “alter a policy set by the Commission itself.” *Jelks v. FCC*, 146 F.3d 878, 881 (D.C. Cir. 1998). The Bureau thus “ha[d] no authority to alter or depart” from the C-Band Order’s directive. *In re Calvary Chapel of Honolulu, Inc.*, 30 FCC Rcd 14910, 14911 n.10 (2015). The Bureau, moreover, never provided the notice that would have been required for either it or the Commission to revisit those rules. *See Clean Air Council v. Pruitt*, 862 F.3d 1, 8 (D.C. Cir. 2017). And the Bureau’s “streamlining” process is unsupported. Who *selects* the particular IRD or technology has no bearing on whether the *cost* of IRDs should be included in the lump sum, which was designed to encourage MVPDs to make efficient decisions between relocation and converting to fiber. Application 3-4, 10-11.

**B. The Bureau’s Lump-Sum Determination Process Was Arbitrary, Unreasoned, and Violated Notice-and-Comment Requirements**

The Bureau’s process for determining the lump-sum amount was arbitrary and capricious. The Bureau relied on a third-party contractor, RKF, to create the schedule of costs used to calculate the lump-sum amount. *See* Application 18-19. RKF met privately with a number of stakeholders to develop that schedule. But RKF, supported by the Bureau, refused to meet with ACA Connects, which represents more than 90% of all MVPDs and over half of all MVPD earth stations. *Id.* The Bureau, moreover, never disclosed who had met with RKF, or how information from those confidential meetings was used to produce the cost schedule—violating due process, the APA public disclosure requirements, and the Commission’s *ex parte* rules. *See*

*Home Box Office, Inc. v. FCC*, 567 F.2d 9, 57 (D.C. Cir. 1977) (reliance on undisclosed information received in *ex parte* meetings “violate[s] fundamental notions of fairness”); *Am. Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 236 (D.C. Cir. 2008); Application 19-20.

The Bureau never adequately disclosed its lump-sum methodology. The Bureau stated, in general terms, that it estimated a typical cost for relocating an earth station by first applying a “minimum threshold” figure to exclude “outlier” costs that would not likely be incurred in a typical relocation. Application 20. The Bureau then took the remaining cost categories and weighted each cost by the “probability” it would be incurred. *Id.* But the Bureau disclosed neither the “minimum threshold” for including a cost category, nor what cost categories were excluded by application of that threshold, nor the probabilities it used for costs that were included. *Id.*, at 20-21. The Bureau *denied* ACA Connects’ requests to disclose that information—making it impossible for commenters to adequately evaluate and critique the Bureau’s methodology. *Id.*, at 17.

Compounding the problem, the Bureau’s exclusion of supposed “outlier” costs was introduced for the first time in the Bureau’s final determination. Application 22-23. That exclusion is highly consequential: By disregarding some costs entirely, it threatens to artificially suppress the lump sum below the “average” relocation cost the Commission commanded the Bureau to estimate. *See id.*, at 21. But the Bureau never gave commenters an opportunity to evaluate and criticize that approach before the Bureau imposed it. *See WJG Tel. Co. v. FCC*, 675 F.2d 386, 388-89 (D.C. Cir. 1982). And the Bureau still has not explained how it decided what costs are “outliers”—or even what costs those are.

The Bureau also determined its lump-sum amounts without having reviewed crucial information from the satellite operators’ final transition plans—which are due to be filed on August 14. Application 24-25. Those plans will provide important data on earth station

relocation needs and will differ in many respects from preliminary transition plans. *Id.* Yet the Bureau arbitrarily chose to make its final lump-sum determination *without* that vital information. The Bureau’s haste also deprived stakeholders of an opportunity to explain to the Bureau how the final transition plans would affect earth station migration costs—and thus the proper amount of the lump-sum amount. *Id.*<sup>27</sup>

## II. MVPDS WILL SUFFER IRREPARABLE HARM ABSENT A STAY

ACA Connects’ members face irreparable harm if the August 31 deadline is not stayed. Under the Final Cost Category Notice, earth stations must make an irrevocable election whether to accept the lump sum by August 31, 2020.<sup>28</sup> Thus, if the Commission does not stay the deadline (or overturn the Bureau’s determination before the deadline), MVPDs will be forced to make an election based on the Bureau’s existing lump-sum amount. Because that amount is wholly inadequate, MVPDs that would otherwise elect the lump sum—which the Commission intended them to do where that would be the “more efficient option”<sup>29</sup>—will be forced to elect to relocate all of their earth stations instead. And because the lump-sum election is “irrevocable,”<sup>30</sup> MVPDs forced to decline it would permanently forgo the opportunity to pursue fiber upgrades instead. Being forced to “make irrevocable . . . decisions”—such as forgoing the lump-sum option—constitutes irreparable injury. *Mobil Corp. v. Marathon Oil Co.*, 669 F.2d 366, 369 (6th Cir. 1981).

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<sup>27</sup> Indeed, stakeholders have *never* had a full and fair opportunity to comment on the Bureau’s lump-sum proposals in light of *any* satellite transition plans. Application 22-25. The Bureau set a final comment deadline of June 15, just one business day after satellite operators’ preliminary transition plans were due. When ACA Connects requested a brief extension of the comment deadline to allow meaningful comment in light of the preliminary plans, the Bureau denied that request—while extending the preliminary transition plan deadline until *after* the comment deadline.

<sup>28</sup> Final Cost Category Notice, ¶39.

<sup>29</sup> C-Band Order, ¶202; *see also* Final Cost Category Notice, ¶19 n.71.

<sup>30</sup> C-Band Order, ¶202.

The final notice, moreover, states that electing the lump sum will result in a waiver and release of “any dispute about the amount received,”<sup>31</sup> which could preclude judicial review of the lump sum for any MVPDs that choose the lump sum nonetheless. Lost opportunities for judicial review amount to irreparable harm. *See Shays v. FEC*, 340 F. Supp. 2d 39, 48 (D.D.C. 2004).

### **III. A STAY WILL NOT INJURE OTHER PARTIES**

Granting a stay will not substantially harm any other party. While lump-sum elections will eventually set other events into motion, there is no rush for that process to begin. Notably, the C-Band Order set no deadline for the Bureau to make the lump-sum determination.<sup>32</sup>

Satellite operators, for instance, will not be substantially harmed by a stay of the Bureau’s August 31 lump-sum election deadline. They already must file their final transition plans before the lump-sum election deadline (by August 14), and so plainly do not require election data to complete those plans. Moreover, in the event the Commission agrees with ACA Connects that IRD costs should be included in the lump sum, that could encourage more MVPDs to transition some or all of their earth stations to fiber—which would reduce the ultimate burden satellite operators must shoulder in connection with relocation.

Programmers likewise will suffer no harm from a stay. The Bureau observed that programmers will make compression technology choices “uniformly and on a nationwide basis.”<sup>33</sup> Those choices thus will not depend on which specific MVPDs elect the lump sum. Many such decisions are further down the timeline in any event. For example, Intelsat’s preliminary transition plan—the only plan with a significant compression component—shows only a single programmer scheduled to undergo compression-related changes (which could entail correspond-

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<sup>31</sup> Final Cost Category Notice, ¶42.

<sup>32</sup> 47 C.F.R. §27.1419.

<sup>33</sup> Final Cost Category Notice, ¶18.

ing MVPD compression upgrades) this calendar year.<sup>34</sup> And even then, Intelsat's plan raises serious questions about whether Intelsat itself will be able to adhere to that schedule.<sup>35</sup>

In fact, granting a stay to properly determine lump-sum figures *now* will save all stakeholders from the potential future harm of having to revise or recalibrate their plans *later* if the Commission grants ACA Connects' Application for Review (or if ACA Connects prevails on judicial review of a Commission decision to not correct the Bureau's determination). Once MVPDs make elections, it will set in motion a process that likely will be complex and costly to unwind. Satellite operators will eventually need to use election information to purchase IRDs for MVPDs who do not opt to accept the lump sum.<sup>36</sup> Unless the election deadline is stayed pending review, further review proceedings could result in upending that whole delicate process. By contrast, by staying the election deadline and correcting the Bureau's errors now, the Commission could clear the way for the lump-sum issue to be finally resolved, and elections to be made, in advance of the planned December auction of flexible-use licenses for the cleared C-Band spectrum.

#### **IV. THE PUBLIC INTEREST WILL BE SERVED BY A STAY**

Staying the August 31 election deadline pending the Commission's review (and potential judicial review) would serve the public interest. The Commission offered MVPDs the option to accept a lump-sum payment to upgrade to fiber to enhance efficiency. *See* Application 12-13. The lump-sum option ensures that the relocation costs that 5G licensees—and, ultimately, their subscribers—will pay will be used in the most efficient manner. The Bureau's inadequate lump-sum amount destroys that efficiency, however, creating a strong incentive for MVPDs to opt to relocate their satellites even if upgrading to fiber would actually be cheaper. *See* Application 12-

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<sup>34</sup> Transition Plan, GN Docket No. 18-122, at 52 (filed June 19, 2020).

<sup>35</sup> *Id.*, at 48 (showing considerable remaining work on compression preparation).

<sup>36</sup> *See* 47 C.F.R. § 27.1412(d).

13. As a result, 5G licensees and their subscribers will pay more for inefficient earth station relocation, while MVPDs and *their* subscribers will lose out on potential benefits from fiber upgrades. *Id.* Those potential benefits are substantial. For example, converting MVPDs to fiber will also facilitate the upgrading of broadband access and expansion of it into underserved areas—which is why the Commission adopted the lump sum in the first place.<sup>37</sup> If lost, however, those benefits cannot easily be salvaged. Even if MVPDs are given a later opportunity to elect a lump-sum payment, opportunities to achieve cost efficiencies could be lost permanently.

At this early stage, the Commission can correct the Bureau’s lump-sum determination with minimal disruption. If the Commission declines to do so, however, ACA Connects will be forced to seek judicial review of the significant APA violations implicated by the Bureau’s decision. *See pp. 7-11, supra.* Were a court to agree with ACA Connects and reverse the Bureau’s lump-sum determination at a later date, more significant disruption to the transition could result.

### **CONCLUSION**

The Commission should stay the August 31 election deadline pending the Commission’s decision on ACA Connects’ Application for Review, and any subsequent proceedings before the Bureau and on judicial review. If the Commission does not grant a stay pending review, it should grant a limited 14-day stay of the deadline (until September 14) to allow ACA Connects time to seek a stay from the court of appeals and to permit the court to act on such a request.

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<sup>37</sup> ACA Connects Nov. 19 *Ex Parte*, Attach. A, at 4, 9.

August 13, 2020

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## Proof of Service

I hereby certify that on August 13, 2020, I caused the foregoing document to be served on the parties listed below via electronic mail and U.S. first-class mail, postage prepaid.

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