

**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	)	

**APPLICATION FOR REVIEW OF THE PUBLIC NOTICE OF THE  
WIRELESS TELECOMMUNICATIONS BUREAU SETTING  
LUMP-SUM PAYMENT AMOUNTS**

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**INTRODUCTION AND SUMMARY**

Pursuant to 47 U.S.C. § 155(c)(4), ACA Connects respectfully seeks review of the Final Cost Category Notice issued by the Wireless Telecommunications Bureau (“Bureau”) on July 30, 2020.<sup>1</sup> The Bureau’s notice sets the lump-sum payment that multichannel video programming distributors (“MVPDs”) can elect to receive in lieu of reimbursement for actual earth station relocation costs under the Commission’s *3.7 GHz Report and Order* (“C-Band Order”).<sup>2</sup>

The Commission’s C-Band Order requires the lump sum to include the estimated cost of “*any* necessary changes that will allow the earth stations to receive C-Band services on new frequencies or from new satellites” after C-Band relocation.<sup>3</sup> The Bureau’s lump-sum determination violated that directive by *excluding* the cost of integrated receivers/decoders (“IRDs”) that earth stations undisputedly will require to continue receiving C-Band service. The Bureau’s lump-sum determination was also arbitrary and capricious and involved prejudicial procedural error. The Bureau refused to disclose the methodology and assumptions underlying its calculations. It relied on a third-party contractor that conducted secret meetings with undis-

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<sup>1</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, DA 20-802 (WTB July 30, 2020) (“Final Cost Category Notice”).

<sup>2</sup> *Expanding Flexible Use of the 3.7 to 4.2 GHz Band, Report and Order and Order of Proposed Modification*, Report and Order, 35 FCC Rcd 2343 (2020) (“C-Band Order”).

<sup>3</sup> *Id.*, ¶201 (defining earth station migration costs) (emphasis added); *id.*, ¶202 (specifying that lump sum must include earth station migration costs); 47 C.F.R. §§ 27.1411(b)(4), 27.1412(e).

closed stakeholders while refusing ACA Connects' meeting requests. And the Bureau issued its final determination weeks *before* satellite operators were required to file final transition plans detailing what changes earth stations would have to make in response to satellite relocation. The Commission should review the Bureau's determination pursuant to 47 C.F.R. § 1.115(b)(2)(i) & (v), correct the Bureau's errors, and direct it to issue a new, properly supported determination.

## **BACKGROUND**

### **I. THE COMMISSION'S C-BAND ORDER**

#### **A. Current C-Band Use By Multichannel Video Programming Distributors**

ACA Connects represents more than 700 small and medium-sized MVPDs throughout the United States. MVPDs currently receive television content using C-Band spectrum, 3.7-4.2 GHz.<sup>4</sup> Programmers beam signals containing programs to satellites, which then beam the signals down to MVPD earth stations. Because the signal earth stations receive is encoded and compressed, MVPDs use compression equipment known as IRDs to process the signal into a form usable by customer set-top boxes, before distributing it to customers via cable or fiber.<sup>5</sup>

#### **B. C-Band Relocation**

The Commission's C-Band Order addressed relocation of C-Band services. To make part of the band available for new uses like 5G, current C-Band users must relocate services that use the lower 300 MHz of the band (3.7-4.0 GHz) to the upper portion (4.0-4.2 GHz). Relocation will impose significant costs. Programmers must adopt advanced compression technology to fit the same number of channels into less spectrum.<sup>6</sup> MVPDs' earth stations, in turn, will need new IRDs capable of processing signals that use those new compression technologies.<sup>7</sup> Earth stations

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<sup>4</sup> Letter from Brian Hurley, ACA Connects to Marlene H. Dortch, Secretary, FCC, GN Docket No. 18-122 (filed November 19, 2019) ("ACA Connects November 19 *Ex Parte*"), Attach., at 9.

<sup>5</sup> *Id.*, Attach., at 19.

<sup>6</sup> *Id.*, ¶¶ 32, 209 & ¶ 209 n.565.

<sup>7</sup> *Id.*, ¶ 209 & n.565.

will also need new antenna filters to block out interference from the 3.7-4.0 GHz frequencies that will be used for other purposes.<sup>8</sup> Satellite operators, meanwhile, will require new satellites that can handle the same services using less spectrum.<sup>9</sup>

The C-Band Order and implementing regulations provide that new licensees will pay, via a neutral Clearinghouse, “the reasonable relocation costs of incumbent space station and incumbent earth station operators who are required to clear the lower 300 megahertz of the C-band.”<sup>10</sup> For “earth station operators,” relocation includes “earth station migration,” defined as “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,” and “earth station filtering” (*i.e.*, preventing interference from lower C-Band frequencies).<sup>11</sup> Earth station relocation costs thus encompass “the cost to migrate and filter earth stations, including costs to retune, re-point, and install new antennas and install filters and compression software and hardware”—*i.e.*, IRDs.<sup>12</sup> The order estimates “earth station costs” of \$1-2 billion for “repacking transponders, filter installing, re-pointing earth station dishes, and antenna feeding,” and \$500-520 million for “MVPD compression hardware”—*i.e.*, IRDs.<sup>13</sup>

### C. The Lump-Sum Option for MVPD Earth Station Operators

ACA Connects has consistently urged that MVPD earth station operators should be given flexibility in transitioning their facilities. It noted that relocating every MVPD earth station—upgrading equipment such as filters and IRDs to receive more highly compressed signals, at different frequencies, from different satellites—would involve significant costs. For many

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<sup>8</sup> *Id.*, ¶157.

<sup>9</sup> *Id.*, ¶199.

<sup>10</sup> *Id.*, ¶¶111, 117.

<sup>11</sup> *Id.*, ¶201.

<sup>12</sup> *Id.*; *see id.* (reasonable costs include “installation of new equipment or software at earth station[s]” for “technology upgrades necessary to facilitate the repack”—*i.e.*, packing signals from 500 MHz to 200 MHz—such as upgrades related to “compression technology or modulation”).

<sup>13</sup> *Id.*, ¶210 & n.565.

MVPDs, it would be more efficient to transition some or all of their earth stations to fiber instead.<sup>14</sup> For example, an MVPD could relocate only certain earth stations to continue to receive content via satellite. The relocated earth stations could then be connected to, and deliver content to, the MVPD’s other earth stations via fiber. Because those other stations would no longer receive satellite signals, they would not need new equipment such as filters and IRDs.<sup>15</sup>

The Commission “agree[d] that providing incumbent earth station operators flexibility may allow them to make efficient decisions that better accommodate their needs.”<sup>16</sup> It thus gave MVPDs a “choice”: “accept reimbursement for the reasonable relocation costs by maintaining satellite reception, or instead “accept a lump sum payment for *all* of their incumbent earth stations based on the average, estimated costs of relocating all of their incumbent earth stations.”<sup>17</sup> In other words, an MVPD may choose to upgrade every earth station with the equipment needed to maintain C-band reception and seek reimbursement from the Clearinghouse. **Or** the MVPD may take a flexible approach and use the same amount of money to convert some or all of its earth stations to fiber-connected sites that do not require such equipment.<sup>18</sup> The Order’s implementing regulations specify that the lump sum must be “equal to the estimated reasonable transition costs of earth station migration and filtering.”<sup>19</sup>

#### **D. Satellite Operator Transition Plans**

Migrating satellites to the upper portion of C-Band “must be coordinated with the earth station transition process to ensure that earth stations are able to receive existing C-band services

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<sup>14</sup> 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).

<sup>15</sup> *Id.* Alternatively, an MVPD could upgrade all earth stations to fiber and contract with a managed video provider such as MobiTV or Vubiquity. In that case, **none** of the MVPD’s earth stations would require relocation—and none would require new filters or IRDs.

<sup>16</sup> C-Band Order, ¶202; see also ACA Connects November 19 *Ex Parte*, Attach. A, at 9.

<sup>17</sup> C-Band Order, ¶202.

<sup>18</sup> *Id.*

<sup>19</sup> 47 C.F.R. §27.1412(e).

during and after the transition.”<sup>20</sup> Accordingly, the Commission directed each satellite operator to prepare a transition plan “that describes the actions that must be taken to clear transponders on space stations and to migrate and filter earth stations.”<sup>21</sup> Preliminary transition plans were filed June 19, 2020. Satellite operators must file final transition plans—which “must make any necessary updates or resolve any deficiencies” in their preliminary plans—by August 14, 2020.<sup>22</sup>

## **II. BUREAU PROCEEDINGS REGARDING THE LUMP-SUM AMOUNT**

The C-Band Order directed the “Bureau to announce the lump sum that will be available per incumbent earth station,” and to “identify lump sum amounts for various classes of earth stations,” including “MVPDs.”<sup>23</sup> The Bureau retained a third-party consultant, RKF Engineering Solutions LLC, to assist it with that task.

### **A. The Cost Catalog Public Notice and Comments**

The Bureau released the Cost Catalog Public Notice on April 27, 2020, seeking comment on the costs to be included in the lump sum.<sup>24</sup> That notice attached a preliminary Cost Catalog prepared by RKF, which had “conducted confidential interviews with a broad range of stakeholders” to advise the Bureau and develop the cost schedule.<sup>25</sup>

ACA Connects urged that the Cost Catalog overlooked the significant costs MVPD earth stations would incur in replacing their IRDs, and provided an alternative cost estimate.<sup>26</sup> It indicated that its calculations were based on the best available information, but that it would need

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<sup>20</sup> C-Band Order, ¶ 199.

<sup>21</sup> 47 C.F.R. § 27.1412(d).

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

<sup>23</sup> C-Band Order, ¶ 203.

<sup>24</sup> *Wireless Telecommunications Bureau Seeks Comment on Preliminary Cost Category Schedule for 3.7-4.2 GHz Band Relocation Expenses*, Public Notice, DA 20-457 (WTB April 27, 2020) (“Cost Catalog Public Notice”).

<sup>25</sup> *Id.*, at 2.

<sup>26</sup> Comments of ACA Connects, GN Docket No. 18-122 (filed May 14, 2020), Attach., at 27 (“ACA Connects Comments”). ACA Connects also provided a detailed cost schedule in support.

to review and incorporate forthcoming data from the transition plans of the satellite operators.<sup>27</sup>

## **B. The Bureau’s Lump Sum Payments Public Notice and Denial of ACA Connects’ Requests to Meet with RKF**

The Bureau issued its Lump Sum Payments Public Notice on June 4, 2020, proposing lump-sum amounts for each earth station class (including MVPDs), developed “with assistance from RKF.”<sup>28</sup> Despite inviting comment on the methodology for determining the lump sum, the notice did not explain how proposed amounts were calculated. It stated that the Bureau had calculated the lump sum for each class by “determin[ing] the likely number of instances various cost items would be used in an average transition for that earth station class” and “input[ting] different modifications or component changes” “[d]epending on the type of earth station.”<sup>29</sup> But it did not disclose the Bureau’s inputs or assumptions—*e.g.*, *which* cost items it assigned to each class and *which* “modifications or component changes” it applied. ACA Connects asked the Bureau to disclose its methodology and assumptions to allow stakeholders to comment meaningfully.<sup>30</sup> The Bureau denied that request.<sup>31</sup>

ACA Connects asked for a meeting with RKF, which the Bureau denied.<sup>32</sup>

ACA Connects also sought additional time to file comments. The Bureau set a comment deadline of June 15—just one business day after satellite operators’ preliminary transition plans

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<sup>27</sup> *Id.*, at 7-9, 18.

<sup>28</sup> *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, at 3 (WTB June 4, 2020) (“Lump Sum Payments Public Notice”).

<sup>29</sup> *Id.*, at 4.

<sup>30</sup> See ACA Connects and NCTA Joint Request for Extension of Time and To Disclose Lump Sum Assumptions and Methodology, GN Docket No. 18-122, at 4-5 (“Extension Request”) (filed June 9, 2020); The Church of Jesus Christ of Latter-day Saints Lump Sum Public Notice Extension Request, GN Docket No. 18-122 (filed June 10, 2020) (“LDS Extension Request”).

<sup>31</sup> *Order*, DA 20-622 (WTB June 12, 2020) ¶ 7.

<sup>32</sup> Letter from Ross Lieberman, Senior Vice President of Government Affairs, ACA Connects, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 18-122, at 5 (filed June 25, 2020) (“ACA Connects June 25 *Ex Parte*”); Letter from Ross Lieberman, Senior Vice President of Government Affairs, ACA Connects, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 18-122, at 3 (filed June 30, 2020) (“ACA Connects June 30 *Ex Parte*”).

were due on June 12.<sup>33</sup> That would provide scant time to evaluate the Bureau’s lump-sum proposals in light of the transition plans, which would provide “critical information . . . regarding what will be necessary in the transition of each earth station class.”<sup>34</sup> The Bureau denied ACA Connects’ extension request.<sup>35</sup> At the same time, it extended the satellite operators’ deadline to file their preliminary plans until June 19—*after* the comment deadline.<sup>36</sup>

The Lump Sum Payments Public Notice stated that the proposed lump sum included the cost of new IRDs.<sup>37</sup> That was proper, ACA Connects observed, because IRDs would be required for MVPDs to receive signals using new compression technology.<sup>38</sup> But ACA Connects explained that the Bureau’s opaque methodology made it impossible to determine what other costs were included, or how costs were discounted.<sup>39</sup> Programmers and others urged the Bureau to exclude IRD costs, because relocation of MVPD earth stations would have to be done under the direction of programmers to ensure use of compatible IRDs.<sup>40</sup> ACA Connects responded that

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<sup>33</sup> Lump Sum Payments Public Notice, at 1 (requiring comments to be filed 7 days after Federal Register publication); 85 Fed. Reg. 35,086 (June 8, 2020).

<sup>34</sup> Extension Request, at 4.

<sup>35</sup> Order, DA 20-622 (WTB June 12, 2020).

<sup>36</sup> Order, DA 20-621 (WTB June 12, 2020).

<sup>37</sup> Lump Sum Payments Public Notice, at 3-4.

<sup>38</sup> 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 4-5, Attach., at 9 (filed July 21, 2020).

<sup>39</sup> Comments of ACA Connects, GN Docket No. 18-122, at 7 (filed June 15, 2020) (“ACA June 15 Comments”).

<sup>40</sup> See, e.g., 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 1-2 (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,

the C-Band Order’s text, structure, and purpose required the lump sum to include *all* earth station relocation costs—including the cost of new IRDs.<sup>41</sup>

### C. The Bureau’s Final Cost Category Notice

The Bureau issued its “Final Cost Category Notice” on July 30, announcing the final lump-sum amounts for each earth station class. The Bureau declared that the lump-sum amounts for MVPD earth stations “do not include the cost to purchase the integrated receivers/decoders” earth stations would require to receive signals using new compression technology.<sup>42</sup> Only the cost of *installing* the IRDs would be included.<sup>43</sup> The Bureau reasoned that, because “selection and purchase of compression equipment” such as IRDs was “an integral part of the satellite operators’ nationwide transition process,” purchase of the IRDs “should be considered as part of the cost associated with the transition of satellite transponders.”<sup>44</sup> The Bureau charged satellite operators, “in cooperation with programmers,” with “selecting and purchasing compression equipment for any necessary technology upgrades”—even for MVPDs that took the lump sum.<sup>45</sup>

The Bureau also changed its methodology. For the first time, it excluded “outlier” costs not meeting a “minimum threshold of likelihood” that they “would be incurred in a typical transition.”<sup>46</sup> It did not disclose the “minimum threshold” it used or what costs it deemed “outliers.”

The final notice shrank the lump-sum payment dramatically. Exclusion of IRD purchase costs alone, ACA Connects estimated, would cut the lump-sum payment approximately in half,

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Director, Regulatory Affairs, CTIA—The Wireless Association, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 18-122, at 2 (filed July 9, 2020).

<sup>41</sup> Letter from Ray Hashem, Counsel for ACA Connects, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 18-122, at 2-3 (filed July 17, 2020).

<sup>42</sup> Final Cost Category Notice, ¶17.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*, ¶18.

<sup>46</sup> *Id.*, ¶16.

or by about \$280,000 per MVPD earth station.<sup>47</sup> The Bureau announced that MVPDs must elect whether to accept the lump-sum payment no later than August 31, 2020.<sup>48</sup>

## ARGUMENT

### I. THE BUREAU IMPROPERLY EXCLUDED IRD COSTS FROM THE LUMP-SUM AMOUNT

#### A. The C-Band Order and Regulations Require Inclusion of IRD Costs in the Lump-Sum Amount

1. The Commission’s C-Band Order and implementing regulations plainly require IRD costs to be included in the earth station lump-sum amount. The regulations specify that the lump-sum payment must be “equal to the estimated reasonable transition costs of earth station migration and filtering.”<sup>49</sup> “[E]arth station migration,” in turn, is defined to include “*any* necessary changes that allow the uninterrupted reception of service by an incumbent earth station on new frequencies in the upper portion of the band, including, but not limited to . . . the installation of new equipment or software at earth station uplink and/or downlink locations for customers identified for technology upgrades necessary to facilitate the repack, such as *compression technology* or modulation.”<sup>50</sup> It is undisputed that “integrated receivers/decoders” are “compression equipment” necessary—indeed, “integral”—to allow earth stations to receive uninterrupted service on the relocated C-Band frequencies.<sup>51</sup> It was error for the Bureau to deviate from the regulations’ command and exclude IRD costs from the lump-sum payment.<sup>52</sup>

The C-Band Order likewise makes clear that IRD costs are earth station relocation costs that must be included in the lump-sum amount. It recognizes two categories of relocation costs:

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<sup>47</sup> Letter from Ross Lieberman, Senior Vice President of Government Affairs, ACA Connects, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 18-122 (filed July 21, 2020), Attach., at 9

<sup>48</sup> Final Cost Category Notice, ¶ 39.

<sup>49</sup> 47 C.F.R. § 27.1412(e).

<sup>50</sup> 47 C.F.R. § 27.1411(b)(4) (emphasis added); *see* C-Band Order, ¶ 201.

<sup>51</sup> Final Cost Category Notice, ¶ 17; *see id.*, ¶ 18 (same).

<sup>52</sup> *See Ariz. Grocery Co. v. Atchison, T. & S. F. Ry. Co.*, 284 U.S. 370, 389 (1932); *Way of Life Television Network, Inc. v. FCC*, 593 F.2d 1356, 1359 (D.C. Cir. 1979) (“an agency’s failure to follow its own regulations is fatal to the deviant action”).

those for “space station[s],” and those for “earth station[s].”<sup>53</sup> Space station relocation costs relate to satellite operators’ physical plant and to satellites’ reception and transmission of signals.<sup>54</sup> Earth station relocation costs, by contrast, relate to earth station operators’ physical plant and to earth stations’ reception of signals: “retun[ing] and repoint[ing] antennas”; “passband filters . . . installed on all existing earth stations to . . . prevent harmful interference from new flexible-use operations”; and “installation of new equipment or software *at earth station uplink and/or downlink locations . . . such as compression technology.*”<sup>55</sup> IRDs are compression technology physically installed in MVPD earth stations: they are part of earth stations’ physical plant and are used for earth stations’ reception of signals. The C-Band Order nowhere suggests that purchasing IRDs for use in *earth stations* could be *space station* relocation costs. To the contrary, the Commission “expect[ed]” earth station “relocation costs to include the cost to . . . install filters and *compression software and hardware.*”<sup>56</sup> It specifically included “MVPD compression hardware” in its estimate of “earth station costs.”<sup>57</sup>

2. The purpose motivating the lump-sum option confirms that IRD costs are properly included. ACA Connects had urged the Commission to give MVPDs flexibility to pursue alternative upgrade strategies where doing so would be more efficient than relocating earth stations.<sup>58</sup> Relocating would require every MVPD earth station to obtain new IRDs—and would require the Clearinghouse to pay for those IRDs.<sup>59</sup> In many cases, it would be more efficient for

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<sup>53</sup> C-Band Order, ¶ 111.

<sup>54</sup> *Id.*, ¶ 199 (“procuring and launching new satellites”; “consolidat[ing] TT&C sites”; “installation of additional antennas” and “procurement of new real estate” for such sites; and “install[ation of] compression and modulation equipment at [satellite operators’] terrestrial facilities”).

<sup>55</sup> *Id.*, ¶ 201 (emphasis added).

<sup>56</sup> *Id.* (emphasis added).

<sup>57</sup> *Id.*, ¶ 210.

<sup>58</sup> *See, e.g.*, ACA Connects November 19 *Ex Parte*, at 1-2.

<sup>59</sup> *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);

an MVPD to use the same amount of money to replace some or all of its earth stations' satellite reception with fiber—which the MVPD could use not only to receive television programming, but also to upgrade existing broadband services or expand them into underserved areas.<sup>60</sup>

The Commission “agree[d]” that “giv[ing] incumbent earth station operators flexibility to replace existing earth stations with fiber . . . may allow them to make efficient decisions that better accommodate their needs.”<sup>61</sup> It thus provided MVPDs with a “choice”: (1) relocate earth stations and have the Clearinghouse reimburse actual “reasonable relocation costs” incurred in “maintaining satellite reception,” or (2) “accept a lump sum reimbursement . . . based on the average, estimated costs of relocating all of their incumbent earth stations.”<sup>62</sup> To encourage MVPDs to pick “the more efficient option,”<sup>63</sup> the Commission directed that the lump sum must be “*equal* to the estimated reasonable transition costs of earth station migration and filtering.”<sup>64</sup> In other words, the lump sum should equal the average costs that the Clearinghouse would pay when an MVPD chooses to upgrade all of its facilities to continue receiving C-Band service.<sup>65</sup> That makes sense: If an MVPD can transition its facilities to fiber—which offers benefits beyond merely clearing the lower portion of the C-Band—using the same amount of money that the Clearinghouse would have to pay to relocate that MVPD’s earth stations, it would be inefficient to spend that money on relocation. Excluding IRD costs from the lump sum, however, subverts that logic. By systematically making *less* money available for fiber than for relocation, it discourages MVPDs from pursuing that option even when fiber would actually be *cheaper* than relocation.<sup>66</sup> It is hard to imagine a more inefficient result.

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<sup>60</sup> ACA Connects November 19 *Ex Parte*, at 1-2.

<sup>61</sup> C-Band Order, ¶202; *see* ACA Connects November 19 *Ex Parte*, Attach., at 9.

<sup>62</sup> C-Band Order, ¶202.

<sup>63</sup> *Id.*

<sup>64</sup> 47 C.F.R. § 27.1412(e) (emphasis added).

<sup>65</sup> 47 C.F.R. § 27.1418(b)(2).

<sup>66</sup> A simplified example illustrates this. If the average cost of earth station relocation is

## B. The Bureau’s Reasons for Excluding IRDs from the Lump Sum Lack Merit

As a “subordinate body,” the Bureau “cannot alter a policy set by the Commission itself.”<sup>67</sup> The Bureau is therefore “bound by the decisions . . . set forth by the Commission and has no authority to alter or depart from Commission” directives.<sup>68</sup> Nonetheless, the Bureau decided the lump-sum payment should *not* include “the cost to purchase the integrated receivers/decoders.”<sup>69</sup> In the Bureau’s view, purchase of IRDs should be considered a *space station* cost—not an earth station cost—because “selection and purchase of compression equipment . . . are an integral part of the satellite operators’ nationwide transition process.”<sup>70</sup> Only “costs associated with *physically installing* the compression equipment at the earth station site,” the Bureau decreed, would be considered earth station costs.<sup>71</sup>

1. The Bureau’s classification of equipment used in *earth stations* as a *space station* cost defies the C-Band Order and common sense. *First*, the Bureau asked the wrong question. Under the C-Band Order, the lump sum must be set “equal” to the estimated cost of “earth station migration and filtering”—which are broadly defined to encompass “*any* necessary changes that allow the uninterrupted reception of service by an *incumbent earth station* on new frequencies in the upper portion of the [C-]band.”<sup>72</sup> The question thus is not *who is responsible* for selecting which IRDs to purchase. The question is whether purchasing new IRDs *is*

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\$500,000, including \$300,000 in IRD costs, the Bureau would set the lump sum at \$200,000 (by excluding IRD costs). But that leads to inefficient results. Consider an MVPD that could convert to fiber for \$400,000—less than the \$500,000 cost of relocation. Excluding IRD costs from the lump sum gives the MVPD a strong disincentive to move to fiber, because taking the lump sum (\$200,000) would leave it \$200,000 short. By choosing to accept full relocation costs instead, it remains whole—but it and its customers lose the advantages of fiber and the Clearinghouse does not save a dime.

<sup>67</sup> *Jelks v. FCC*, 146 F.3d 878, 881 (D.C. Cir. 1998).

<sup>68</sup> *In re Calvary Chapel of Honolulu*, 30 FCC Rcd 14910, 14911 n.10 (2015).

<sup>69</sup> Final Cost Category Notice, ¶17.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* (emphasis added).

<sup>72</sup> 47 C.F.R. §§ 27.1411(b)(3), 27.1412(e) (emphasis added).

*necessary to allow earth stations* to receive uninterrupted service through the C-Band transition. It plainly is: Without new IRDs, earth stations will be unable to process the more highly compressed signals necessitated by the reduction in available C-Band spectrum. The cost of new IRDs—no less than the cost of installing them—thus is an earth station migration cost that must be included in the lump sum, regardless of who is responsible for purchasing them.

*Second*, even on its own terms, the Bureau’s rationale makes no sense. The Bureau asserted that IRD upgrades “are an integral part of the *satellite operators*’ nationwide transition process.”<sup>73</sup> But it admitted that IRD “technology choice[s]” actually “must . . . be made by *the programmer*.”<sup>74</sup> Compression technology is installed at earth station “uplink” (programmer) and “downlink” (MVPD) locations—programmers and MVPDs thus coordinate IRD selection.<sup>75</sup> Satellite operators are not involved. Nor have satellite operators ever been responsible for selecting and purchasing IRDs. While the parties disputed whether programmers or MVPDs are generally responsible for selecting and purchasing IRDs under current practice, no one suggested that *satellite operators* ever chose or paid for IRDs.<sup>76</sup> The Bureau seems to have deemed IRDs to be “satellite operator costs” because the C-Band Order does not recognize a category of “programmer costs.” But that is because the cost of IRDs installed at earth stations is properly considered an “earth station” cost—a category the C-Band Order expressly recognizes and defines to include compression equipment like IRDs. At bottom, the Bureau’s reasoning for allocating IRD expenses to satellite operators was circular: It deemed IRD costs to be satellite operator costs because it decreed that “satellite operators . . . will be responsible for selecting [and] purchasing” IRDs—even though they never have been before.<sup>77</sup>

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<sup>73</sup> Final Cost Category Notice, ¶17 (emphasis added).

<sup>74</sup> *Id.*, ¶17 n.67 (emphasis added).

<sup>75</sup> C-Band Order, ¶201.

<sup>76</sup> Final Cost Category Notice, ¶20 & n.74.

<sup>77</sup> Final Cost Category Notice, ¶17.

The Bureau also failed to distinguish IRDs from other undisputed earth station costs that depend on satellite operator decisions. For example, MVPDs must “retune, repoint, and install new antennas” based on the number and location of operators’ new satellites.<sup>78</sup> Under the Bureau’s logic, those would be deemed satellite costs. But the C-Band Order plainly considers them earth station costs (and the Bureau itself included them in the lump sum). Indeed, the Bureau’s logic with respect to IRDs, if applied consistently, would implausibly convert **all** earth station costs into space station costs, because satellite operators will typically be responsible for “**all** the tasks necessary to migrate any incumbent earth station that receives or sends signals” to its satellites.<sup>79</sup> But the Commission took a different approach: It identified a distinct class of earth station costs and commanded they be included in the lump sum.<sup>80</sup>

The C-Band Order, moreover, created an “exception” to satellite operators’ blanket responsibility when earth station operators “choose to opt out of the formal relocation process by taking the lump sum relocation payment.”<sup>81</sup> In that case, the satellite operator is **not** responsible for earth station relocation—instead, the earth station operator is responsible for “performing **all** relocation actions **on its own**.”<sup>82</sup> That provision plainly assigns earth station operators that elect the lump sum responsibility for purchasing all equipment needed for relocation, including IRDs. It is thus particularly appropriate to include IRD costs in the lump sum. Yet the Bureau decreed

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<sup>78</sup> C-Band Order, ¶201. The Bureau excluded new antennas from the lump sum because it found they “would not be incurred in a typical transition,” but did not dispute that, if needed, new antennas would be earth station, not satellite operator, costs. Final Cost Category Notice, ¶36.

<sup>79</sup> C-Band Order, ¶292 (emphasis added). That responsibility applies when a satellite operator elects accelerated relocation, which all major satellite operators have done. *See Wireless Telecommunications Bureau Announces Accelerated Clearing in the 3.7-4.2 GHz Band*, Public Notice, DA 20-578 (WTB June 1, 2020).

<sup>80</sup> C-Band Order, ¶¶201-202.

<sup>81</sup> C-Band Order, ¶293 & ¶293 n.684 (MVPD electing lump sum “must inform the appropriate incumbent space station operator(s) that relocation services will not be necessary”).

<sup>82</sup> *Id.*, ¶293 (emphasis added).

that such costs remain the satellite operator’s responsibility nonetheless.<sup>83</sup> That improperly rewrote the C-Band Order and exceeded the Bureau’s delegated authority.

Even more nonsensical is the Bureau’s objection that, under ACA Connects’ approach, “the cost of new satellite acquisitions would also have to be included in the lump sum.”<sup>84</sup> The lump sum is limited to the costs of *earth station* migration and filtering; it does not include the cost of relocating *space stations*. IRDs are equipment that *earth stations*, not space stations, require for continued C-Band service, and that *earth stations* own and operate. The Bureau’s failure to appreciate that distinction underscores its departure from reasoned decisionmaking.

2. The Bureau conceded that the C-Band Order declares that earth station migration includes “the *installation* of new equipment or software’ at earth station locations,” including “‘compression technology’” like IRDs.<sup>85</sup> According to the Bureau, however, that means only that the *physical labor of installing* IRDs—but not their *purchase*—counts as an earth station cost.<sup>86</sup> But the order consistently uses “install” and “installation” to mean “purchase and install.” For example, it states that earth station relocation costs include the cost to “*install* filters and compression software and hardware.”<sup>87</sup> The order does not refer specifically to “purchasing” filters—but the Bureau correctly recognized that the order considers purchasing filters (not just installing them) to be an earth station cost, and included both costs in the lump sum.<sup>88</sup> The same must be true for the compression technology the order addresses *in the very same sentence*.

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<sup>83</sup> Final Cost Category Notice, ¶18.

<sup>84</sup> *Id.*, ¶23.

<sup>85</sup> *Id.*, ¶21.

<sup>86</sup> *Id.*

<sup>87</sup> C-Band Order, ¶201.

<sup>88</sup> Final Cost Category Notice, ¶22. Similar examples abound. When addressing space station relocation costs, the order discusses “installation of additional antennas” at consolidated TT&C sites and the “need to install compression and modulation equipment at [satellite operators’] terrestrial facilities.” C-Band Order, ¶199. Those references plainly encompass *purchasing* that equipment, even though the order does not expressly mention it.

3. The Bureau worried that earth stations might buy IRDs incompatible with programmers' chosen compression technology.<sup>89</sup> But there is no basis to think MVPDs would purchase incompatible equipment. Even when MVPDs purchase their own IRDs, they necessarily coordinate with programmers regarding "what IRD devices MVPDs may utilize."<sup>90</sup> That makes sense: MVPDs receive signals that originate with programmers. An MVPD that bought incompatible equipment would be unable to receive and deliver content to its customers. No rational MVPD would do that to itself.

The C-Band Order provides additional safeguards. When an MVPD elects the lump sum and "perform[s] all relocation actions on its own," it "must coordinate any such transition with [space station] operators to avoid any disruption in the distribution of video and radio programming."<sup>91</sup> That express coordination obligation—not arbitrary exclusion of certain equipment from the lump sum—is how the Commission chose to ensure that proper equipment is used. The Bureau was not free to disregard that decision and seek its own "appropriate balance."<sup>92</sup>

4. The Bureau's exclusion of IRD costs betrays the economic premise for the lump-sum option: that MVPDs should be allowed to take the *same* amount of money that would otherwise be spent relocating their earth stations, and use that money to transition to fiber where doing so would be efficient. By carving out a dominant relocation cost, the Bureau's approach ensures that the amounts available under the two options are *not* equal.<sup>93</sup> The Bureau's response is a non sequitur. It asserts that "the lump sum was never intended to fully fund the cost of converting to fiber."<sup>94</sup> But ACA Connects does not seek a lump-sum payment that "fully fund[s]" the cost of fiber in every case. It seeks a lump sum consistent with the Commission's directives,

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<sup>89</sup> Final Cost Category Notice, ¶ 18 & ¶ 18 n.69.

<sup>90</sup> ACA June 15 Comments, at 9 n.23.

<sup>91</sup> C-Band Order, ¶ 293 & ¶ 293 n.684.

<sup>92</sup> Final Cost Category Notice, ¶ 20; *see* p. 12, *supra*.

<sup>93</sup> *See* pp. 10-11, *supra*.

<sup>94</sup> Final Cost Category Notice, ¶ 24.

that is “equal” to the estimated cost of earth station relocation and gives MVPDs the “flexibility” to transition to fiber where doing so makes economic sense.<sup>95</sup> The Bureau’s overriding of the Commission’s judgment defies the Administrative Procedure Act. The Bureau was not delegated such authority and never provided notice that the C-Band Order’s basic rationales would be revisited.<sup>96</sup>

## **II. THE BUREAU’S LUMP-SUM DETERMINATION PROCESS WAS ARBITRARY, UNREASONED, AND VIOLATED NOTICE-AND-COMMENT REQUIREMENTS**

### **A. The Bureau’s Third-Party Consultant Improperly Held Private Meetings with Some Stakeholders While Excluding Others**

At each step of the proceedings, the Bureau relied on third-party contractor RKF. RKF assisted with developing a cost category schedule, determining lump-sum amounts, and deciding which expenses that incumbents are likely to incur in a typical transition.<sup>97</sup> RKF relied on “confidential,” *ex parte* “interviews with a broad range of stakeholders, including satellite operators, earth station operators, Fixed Service licensees, and vendors.”<sup>98</sup> The Bureau has not disclosed which stakeholders were awarded audiences with RKF or what they discussed.

ACA Connects repeatedly asked to meet with RKF, explaining that it represented “more than 90 percent of all MVPDs” and “more than one half of MVPD earth stations in operation,” and thus was “especially-well positioned” to provide insight “on the relocation expenses of an ‘average’ MVPD earth station.”<sup>99</sup> A meeting would also help parties understand “the substantial gulf between ACA Connects’ and the Bureau’s estimated appropriate lump-sum amount for

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<sup>95</sup> C-Band Order, ¶202; 47 C.F.R. § 27.1412(e).

<sup>96</sup> See *In re Calvary*, 30 FCC Rcd at 14911 n.10 (“rules delegate authority to the . . . Bureau to implement” the order, “not make Commission policy”); *In re TRT Telecomms. Corp.*, 77 F.C.C.2d 845, 848 ¶ 7 (1980) (Bureau decision must rest on “sound interpretation” of Commission regulations); *Clean Air Council v. Pruitt*, 862 F.3d 1, 8 (D.C. Cir. 2017).

<sup>97</sup> See Cost Catalog Public Notice, at 2; Lump Sum Payments Public Notice, at 3; Final Cost Category Notice, ¶9.

<sup>98</sup> Cost Catalog Public Notice, at 2.

<sup>99</sup> See ACA Connects June 25 *Ex Parte*, at 5.

MVPD earth stations.”<sup>100</sup> But ACA Connects’ requests were repeatedly denied.<sup>101</sup>

Allowing some stakeholders to meet with RKF, while denying ACA Connects the same benefit, created grossly unequal access to information and decisionmakers, and violated due process.<sup>102</sup> The Bureau’s failure to disclose *who* met with RKF and *what* they discussed compounded the error. Despite RKF’s concededly significant role of collecting information on behalf of the Bureau, nothing was disclosed about RKF’s private conversations with stakeholders, or about RKF’s subsequent communications with the Bureau. The Bureau cannot receive such information from third parties without the appropriate disclosures.<sup>103</sup> Nor can the Bureau rely on that information without publicly disclosing it and allowing interested parties “to focus on the information relied on by the agency and to point out where that information is erroneous or where the agency may be drawing improper conclusions from it.”<sup>104</sup> The Bureau failed to justify why *some* stakeholders were granted audiences but others were not. And RKF’s failure to meet with ACA Connects—or any of the individual small and medium-sized MVPDs it represents—deprived RKF and the Bureau of critical perspective.

## **B. The Bureau Improperly Refused To Disclose Its Methodology**

As the D.C. Circuit has explained, an “agency commits serious procedural error when it fails to reveal portions of the technical basis for a proposed rule in time to allow for meaningful commentary.”<sup>105</sup> The Bureau did precisely that here.

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<sup>100</sup> *Id.*

<sup>101</sup> *Id.*; see ACA Connects June 30 *Ex Parte*, at 3.

<sup>102</sup> See *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 15 (D.C. Cir. 1977) (reliance on undisclosed information received in *ex parte* meetings “violate[s] fundamental notions of fairness”).

<sup>103</sup> See 47 C.F.R. §§ 1.1200-1.1216; *Home Box Office*, 567 F.2d at 57.

<sup>104</sup> *Am. Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 236 (D.C. Cir. 2008) (nondisclosure of staff reports improper).

<sup>105</sup> *Owner-Operator Indep. Drivers Ass’n v. Fed. Motor Carrier Safety Admin.*, 494 F.3d 188, 199 (D.C. Cir. 2007). That is particularly true when the information is derived from *ex parte* communications. See *U.S. Lines, Inc. v. Fed. Mar. Comm’n*, 584 F.2d 519, 534 (D.C. Cir. 1978).

1. The Bureau appears to have determined its lump-sum figures by (1) excluding as an “outlier” any cost that does not “meet[] a minimum threshold of likelihood that it would be incurred in a typical transition”; and (2) for costs passing that threshold, multiplying the average estimated cost “by the probability that the particular antenna type or class of earth station is likely to incur” that expense.<sup>106</sup> For both steps, the Bureau failed to disclose crucial information. It did not disclose what “minimum threshold of likelihood” it applied to deem a cost item “typical” versus an “outlier.” It did not disclose what cost items it found to meet that threshold. It did not disclose what “probability” it assigned each item at the second step. And it did not disclose *how* it determined the probability that a particular cost item would be incurred. Instead of showing its work, the Bureau simply announced its conclusion as a single, lump-sum number (e.g., \$16,997 per registered antenna for Receive-Only Earth Station (ES) Single-feed Antenna).<sup>107</sup>

In “informal rulemaking, at least the most critical factual material that is used to support the agency’s position on review must have been made public in the proceeding and exposed to refutation.”<sup>108</sup> Here, the centerpiece of the Bureau’s methodology was weighting particular costs based on the predicted likelihood that those costs will be incurred for a particular earth station transition. But “it is impossible to discern *what costs* were weighted . . . and at *what percentages*”—leaving “little basis for comment,” much less refutation.<sup>109</sup> ACA Connects repeatedly asked the Bureau to further disclose its methodology, as did others.<sup>110</sup> But the Bureau refused,<sup>111</sup>

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<sup>106</sup> Final Cost Category Notice, ¶16.

<sup>107</sup> In the case of MVPDs, there are two numbers: the relevant base lump sum and the “Additional Lump Sum Payment for MVPD Earth Stations.” Neither number in the Final Cost Catalog is broken down in any way. Final Cost Catalog, at 19, Table III-E-1.

<sup>108</sup> *Ass’n of Data Processing Serv. Orgs., Inc. v. Bd. of Governors, Fed. Rsrv. Sys.*, 745 F.2d 677, 684 (D.C. Cir. 1984).

<sup>109</sup> ACA June 15 Comments, at 7-8 (emphases added).

<sup>110</sup> See Extension Request, at 2 (asking Bureau to disclose the “methodology by which it arrived at the proposed lump sum amounts and the assumptions that it used, which would also enable the parties to provide more focused comments addressing the Bureau’s inquiries.”); Letter from Ross Lieberman, Senior Vice President of Government Affairs, ACA Connects, to Marlene H. Dortch,

pointing back to its previous, insufficient notices.<sup>112</sup> That was improper. The Commission should direct the Bureau to fully disclose its methodology—including the cost items assigned to each class, the weights assigned to each cost item, and the basis for those determinations—to ensure proper public vetting of this critical issue.

2. The first step of the Bureau’s approach—its so-called “outlier” determination—is particularly problematic. The Bureau did not mention that step in any public notice before the Final Cost Category Notice, depriving interested parties of an opportunity to critique it. Even now it is unclear what the step entails. The Bureau did not disclose the “minimum threshold of likelihood” or level of generality it applied, or identify which costs are “outliers.”<sup>113</sup>

The few glimpses the Bureau gave into its approach reveal its flawed reasoning. ACA Connects and others had urged that replacement and additional antennas would be “necessary for MVPD earth stations to point to new orbital slots with the launch of new satellites.”<sup>114</sup> But the Bureau deemed that cost an “outlier,” and excluded it from its calculations, based on vague statements from satellite operators that new antennas would be necessary “[i]n some cases,” but not “the vast majority of cases.”<sup>115</sup> The Bureau stated that antenna costs “did not meet the initial threshold for inclusion in the lump sum,” but never disclosed what the threshold *is*.<sup>116</sup> Nor

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Secretary, FCC, GN Docket No. 18-122, at 2 (filed July 1, 2020) (“ACA Connects further expressed concerns about the lack of transparency associated with, and justifications for, the *Public Notice*’s proposals.”); LDS Extension Request.

<sup>111</sup> Final Cost Category Notice, ¶ 16 n.64 (describing rejected requests by various parties for further disclosure of methodology).

<sup>112</sup> *Expanding Flexible Use of the 3.7 to 4.2 GHz Band*, GN Docket No. 18-122, Order, DA 20-622, ¶ 7 (WTB June 12, 2020).

<sup>113</sup> The Bureau also did not explain the level of generality at which it conducted its “typicality” assessment. It is unclear, for example, whether it evaluated the likelihood of having to install *any* filter or the likelihood of having to install a *specific kind* of filter. The more narrowly the Bureau conducted that inquiry, the more likely it is that a particular cost would fail to cross the (undisclosed) typicality “threshold” and be excluded entirely as an “outlier.”

<sup>114</sup> Final Cost Category Notice, ¶ 36.

<sup>115</sup> *Id.*, ¶ 36 & ¶ 36 n.134.

<sup>116</sup> *Id.*, ¶ 36 n.134.

is that threshold apparent. At one point the notice suggests the “threshold” for inclusion may be north of 30%.<sup>117</sup> Elsewhere it suggests that costs with only a 5% likelihood of occurrence are included.<sup>118</sup> The Bureau thus appears to have applied wildly inconsistent and arbitrary standards. That is impermissible: “an agency may not pluck a number out of thin air when it promulgates rules in which percentage terms play a critical role.”<sup>119</sup>

Moreover, if the Bureau categorically excluded every cost with less than a 30% (or some other percentage) likelihood of occurring—and then discounted all remaining costs by their predicted probability—the result would be an artificially low figure that defies the Commission’s directive to calculate the *average* cost of relocation. There are likely other problems with the Bureau’s methodology, but there is no way of knowing for sure.

### C. The Bureau Abruptly Tied Reimbursement to Registered Antennas

The Bureau, for the first time, created a “per earth station antenna” regime for both reimbursement and the lump-sum payment. It declared that “lump sum base payments . . . [would be] calculated *per antenna* rather than per earth station,” and “only those antennas” previously registered with the Commission “count as a unit towards the calculation of reimbursable expenses.”<sup>120</sup> It then announced lump sums for various kinds of antennas, applying identical amounts regardless of earth station class. That flouts the Commission’s directives. The C-Band regulations direct the “Bureau [to] announce a lump sum . . . available *per each incumbent earth station*”—not per antenna.<sup>121</sup> And they direct the Bureau to “identify lump sum amounts for various classes of earth stations,” such as “MVPDs” and “gateway[s]”—not classes of antennas.<sup>122</sup>

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<sup>117</sup> Final Cost Category Notice, ¶36 n.128 (excluding costs sought for “30% of transitions”).

<sup>118</sup> *Id.*, ¶16 n.63.

<sup>119</sup> *WJG Tel. Co. v. F.C.C.*, 675 F.2d 386, 388-89 (D.C. Cir. 1982).

<sup>120</sup> Final Cost Category Notice, ¶6.

<sup>121</sup> 47 C.F.R. § 27.1419 (emphasis added).

<sup>122</sup> C-Band Order, ¶203.

The Bureau pointed to §27.1411(b)(5), which states that “[a] passband filter must be installed at the site of each incumbent earth station.” Because filters are installed on antennas, it reasoned, the phrase “‘incumbent earth station’ refers to an individual antenna.”<sup>123</sup> But that is implausible in the extreme—the regulations define “incumbent earth station” in terms of the Commission’s general definition of “earth station”—which has nothing to do with antennas.<sup>124</sup> And the Bureau’s assertion that its antenna-based approach subsumed all relevant differences between earth station classes<sup>125</sup> only underscores that it disregarded its mandate to compute different lump sums for different earth station classes.

The Bureau failed to give proper notice, moreover, that it would tie reimbursement and the lump sum to registered antennas. Each notice referred to per-earth-station calculations.<sup>126</sup> The Bureau nonetheless claimed it had *always* treated antennas as the basic unit. But its sole citation was to the Lump Sum Payments Public Notice (at 4-5), which expressly uses a “per Earth Station” approach. It uses the word “antenna” only once in text and once in a footnote, neither time for a per-antenna calculation. The lack of notice was also highly prejudicial. MVPD earth station operators had no notice that the precise antenna configuration listed in their registrations—which serve to identify “earth stations” entitled to be “protected from interference”—would be used to determine payments.<sup>127</sup> And the registration system is “no longer accept[ing]” new applications.<sup>128</sup> The Bureau’s reliance on those details for payment eligibility undermines the Commission’s stated purpose of ensuring existing C-band users “are made whole.”<sup>129</sup>

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<sup>123</sup> Final Cost Category Notice, ¶6 n.18.

<sup>124</sup> 47 C.F.R. § 27.1411(b)(3); *see id.*, § 25.115.

<sup>125</sup> Final Cost Category Notice, ¶¶32-33.

<sup>126</sup> Cost Category Public Notice, at 2-3 (“lump sum amount for each class of earth station”); Lump Sum Payments Public Notice, at 5 (estimating “Lump Sum Payments per Earth Station”); *see* ACA June 15 Comments, at 7.

<sup>127</sup> 47 C.F.R. § 25.138(c).

<sup>128</sup> *See* 47 C.F.R. § 25.138(a); C-Band Order § 116.

<sup>129</sup> C-Band Order, ¶38.

### III. THE BUREAU IMPROPERLY ISSUED ITS FINAL LUMP-SUM DETERMINATIONS BEFORE RECEIVING FINAL TRANSITION PLANS

The Bureau’s lump-sum determinations are arbitrarily and capriciously based on satellite operators’ incomplete preliminary Transition Plans, rather than final Transition Plans.

The C-Band Order recognizes that satellite operators’ transition decisions will have a significant, if not determinative, effect on what earth stations must do to continue receiving transmissions from relocated satellites.<sup>130</sup> The order thus requires satellite operators to submit Transition Plans detailing “the actions that must be taken to clear transponders on space stations and *to migrate and filter earth stations.*”<sup>131</sup> The C-Band Order set swift deadlines for satellite operators to submit their plans, with preliminary plans due June 12, 2020 (though the Bureau delayed that deadline until June 19) and final plans—which “must make any necessary updates or resolve any deficiencies” in the preliminary plans—due August 14, 2020.<sup>132</sup>

The Bureau, however, rushed out its earth station lump-sum determinations *before* receiving those plans. It issued its initial lump-sum proposals before preliminary satellite Transition Plans were even filed, and set the comment deadline days after those plans were due.<sup>133</sup> When ACA Connects requested a modest extension so that comments could properly take the preliminary plans into account, the Bureau denied that request—while *extending* the deadline for the preliminary Transition Plans until *after* the comment deadline.<sup>134</sup> The Bureau similarly refused requests that it “hold off on finalizing the Cost Catalog until *after* the space station operators submit their final Transition Plans by August 14, 2020, and the Bureau and the public have had time to review the details and provide further comment.”<sup>135</sup> Instead, it issued its final

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<sup>130</sup> *Id.*, ¶¶ 292-293 & ¶ 293 n.684.

<sup>131</sup> 47 C.F.R. § 27.1412(d) (emphasis added).

<sup>132</sup> 47 C.F.R. § 27.1412(d).

<sup>133</sup> Extension Request, at 4.

<sup>134</sup> Order, DA 20-622 (WTB June 12, 2020); Order, DA 20-621 (WTB June 12, 2020).

<sup>135</sup> *See, e.g.*, ACA Connects Comments, at 7.

lump-sum determination on July 30, 2020—more than two weeks before final Transition Plans are due. In doing so, the Bureau arbitrarily eliminated a crucial source of information for carrying out the role the Commission assigned it.<sup>136</sup>

The Bureau forced itself to rely on incomplete, preliminary plans. For example, the Final Cost Category Notice expressly relied on Intelsat’s preliminary Transition Plan to conclude that certain antenna costs should be excluded from the lump-sum calculation.<sup>137</sup> But Intelsat’s preliminary plan stated that it was *unable* to provide the required “number and location of earth stations antennas . . . that will need to be transitioned to the upper 200 megahertz” and “will require retuning and/or repointing in order to receive content on new transponder frequencies post-transition.”<sup>138</sup> The Bureau could not reach a reasoned decision about antenna costs with such deficient information about antenna needs.

The preliminary Transition Plans are also subject to change. SES’s Transition Plan remains disputed. On August 6—*after* the Bureau issued its final lump-sum determinations—Viacom objected that SES should be using more compression solutions contemplated by SES’s preliminary plan.<sup>139</sup> If SES changes its transition strategy in response, that will undoubtedly affect how MVPDs that receive SES’s transmissions must effect their own transitions. Similar disputes—*e.g.*, about deployment of backup satellites MVPDs would have to accommodate—abound.<sup>140</sup> With so much uncertain and in flux, the Bureau could not have made a fully in-

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<sup>136</sup> *See id.* (“As the lump sum is to represent the ‘average, estimated costs’ of relocating incumbent earth stations in each earth station category ultimately designated by the Bureau, having a full schedule of the various cost types [as provided by the final Transition Plans] (and the associated presumptively reasonable cost ranges) that may be involved over the universe of impacted earth stations is vital.”).

<sup>137</sup> Final Cost Category Notice, ¶36 & ¶36 n.132.

<sup>138</sup> Intelsat Transition Plan, at 47.

<sup>139</sup> Letter from Viacom to Marlene H. Dortch, Secretary, FCC, GN Docket No. 18-122 (filed August 6, 2020).

<sup>140</sup> Intelsat has maintained that backup satellites are necessary to the transition despite pushback from the Bureau. Letter from Intelsat to Marlene H. Dortch, Secretary, FCC, GN Docket No. 18-

formed decision about what earth station migration will entail, much less how much it will cost.

The Bureau's haste also deprived stakeholders of vital information they could have used to evaluate and critique the Bureau's lump-sum proposals. The final comment period closed before the *preliminary* Transition Plans were submitted, and the final lump-sum determinations were issued without knowing what the *final* plans will say. And while final plans will be filed by the time earth station operators must make their lump-sum *elections*,<sup>141</sup> that is no substitute for being able to offer informed comments *before* the lump-sum amounts were set in stone.

The Bureau's haste cannot be justified by any directive from the C-Band Order. The Order specified tight deadlines for preliminary and final satellite operator Transition Plans. But it imposed no such deadline for the lump-sum determination. And it certainly did not direct the Bureau to rush out a lump-sum figure based on incomplete information.<sup>142</sup>

### CONCLUSION

The Commission should vacate the July 30 Bureau notice and direct the Bureau to reach a proper determination of the lump-sum amount that includes the cost of purchasing IRDs and that accords with proper process.

August 13, 2020

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122 (filed August 4, 2020). Including backup satellites (or not) in the final plan could impact the antennas required to facilitate Intelsat's implementation scheme or further compression needs (if backup space must be freed up from existing satellites), potentially affecting lump sums.

<sup>141</sup> Final Cost Category Notice, ¶ 17 n.65 (emphasis added).

<sup>142</sup> C-Band Order, ¶ 203.

## 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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