

**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)	

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

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SUMMARY

The oppositions fail to explain away the fatal deficiencies in the Bureau's lump-sum determination. They avoid the text of the governing regulations, which make clear that IRD costs are earth-station costs that must be included in the lump sum. They fail to justify the Bureau's refusal to disclose thresholds and discount factors critical to its lump-sum calculation, or the Bureau's reliance on undisclosed *ex parte* meetings between its contractor RKF and undisclosed stakeholders. And they overlook material impacts from the Bureau decision to issue the lump-sum determination without the benefit of satellite operators' final transition plans. The Application for Review should be granted.

ARGUMENT

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

The Commission’s regulations require the lump sum to be “equal to the estimated reasonable transition costs of earth station migration and filtering,” which must include “*any* necessary changes that allow the uninterrupted reception of [C-Band] service by an incumbent earth station”—including “installation of . . . compression technology” “at earth station[s].”¹ No one disputes that IRDs are “compression technology” installed at earth stations, and that they are “necessary” for MVPDs to receive uninterrupted C-Band service.² Nor does anyone dispute that the Bureau was therefore required to include in the lump sum the cost of physically installing IRDs. The Bureau’s and oppositions’ insistence that the cost of *purchasing* IRDs can be excluded from the lump sum nonetheless is utterly illogical. If (as everyone agrees) *physically installing IRDs* is necessary for MVPD earth stations’ uninterrupted C-Band reception, then *procuring the very same IRDs* is also necessary for MVPD earth stations’ uninterrupted C-Band reception. IRD purchase costs must be included under the regulations’ plain terms.

The Bureau’s and oppositions’ resort to wordplay—insisting that “installation” of compression equipment means only physically installing equipment—is nonsense.³ They ignore that the order and regulations use “install” to include *both* purchase and physical installation—and that the Bureau itself interpreted the term that way when addressing other equipment included in the lump sum. Application, at 15. No one explains how the word “installation” can encompass purchase of some equipment but exclude purchase of other equipment *within a single sentence*. *Id.* And regardless of how “installation” is parsed, earth-station migration costs are “not limited to” installation—what matters is whether a cost is “necessary” to allow earth-station

¹ 47 C.F.R. §§ 27.1411(b)(4), 27.1412(e) (emphasis added); see Application, at 9.

² Stay Denial, ¶ 12; Content Cos. Opp., at 2-4; CTIA Opp., at 6; Intelsat Opp., at 3-4; SES Opp., at 3-4. Verizon does not address the governing regulatory provision, while Intelsat misquotes it.

³ See, e.g., Stay Denial, ¶ 8; Content Cos. Opp., at i, 3; CTIA Opp., at 3, 5; Intelsat Opp., at 4-5.

reception after transition.⁴ Purchasing IRDs unquestionably is.

The assertion that IRD “selection and purchase” is “part of the satellite operators’ . . . transition process”⁵ is likewise inadequate. That is not the test, and for good reason. Virtually *all* required earth-station changes depend on satellite operators’ transition plans. Repointing and retuning antennas depends on the orbital slots and transmission frequencies satellite operators adopt. Yet those antenna costs plainly count as earth-station costs. Application, at 14. Whether costs are “earth station” or “space station” costs instead depends on whether they relate to earth stations’ or space stations’ physical plant. Application, at 9-10. The only compression equipment the order recognizes as a space station cost is “compression . . . equipment *at their [space-station operators’]* terrestrial facilities.”⁶ And in defending the Bureau’s “assignment” of IRD purchases to space stations, no one even tries to reconcile that pronouncement with the C-Band Order’s directive that, upon choosing the lump sum, *earth stations* must “perform[] *all* relocation actions” (whether purchasing IRDs or pursuing an alternative) “*on [their] own.*”⁷

The oppositions invoke the Bureau’s “delegated authority” and “discretion.”⁸ The Bureau has no discretion to defy regulations. “[A]n agency’s failure to follow its own regulations is fatal.” *Way of Life Television Network, Inc. v. FCC*, 593 F.2d 1356, 1359 (D.C. Cir. 1979).

Unable to rebut ACA Connects’ arguments, the Bureau and oppositions mischaracterize them. Contrary to their repeated claims,⁹ “ACA Connects does not seek a lump-sum payment that ‘fully fund[s]’ the cost of fiber in every case.” Application, at 16. ACA Connects seeks

⁴ 47 C.F.R. § 27.1411(b)(4).

⁵ Content Cos. Opp., at 2-3; *see* CTIA Opp., at 5; Intelsat Opp., at 5-6; Verizon Opp., at 4.

⁶ C-Band Order, ¶ 199 (emphasis added). The frivolous assertion that ACA Connects’ reading of the regulations “proves too much” because it would deem *new satellites* to be earth-station costs, *see* Content Cos. Op., at 6; Intelsat Opp., at 2; CTIA Opp., at 8 n.22, likewise fails. The C-Band Order clearly identifies new satellites as space-station costs.

⁷ C-Band Order, ¶ 293 (emphasis added).

⁸ *See, e.g.,* Stay Denial, ¶ 13; Verizon Opp., at 3; SES Opp., at 2, 4; CTIA Opp., at 6.

⁹ Stay Denial, ¶ 16; SES Opp., at 3; Content Cos. Opp., at 4-5; CTIA Opp., at 8-9.

only the lump sum guaranteed by the Commission’s regulations: one that is “*equal to*” the estimated cost of *relocation* so as to afford MVPDs the *same* amount of money as would be spent for relocation. *Id.*, at 10-11. The Bureau’s determination defies “the clear intent expressed in the Commission’s *C-Band Order* that the relocation program be technology neutral.”¹⁰

II. THE BUREAU’S LUMP-SUM DETERMINATION PROCESS VIOLATED THE APA

A. Despite asserting the Bureau’s methodology was disclosed,¹¹ none of the oppositions can answer fundamental questions: What was the “minimum threshold of likelihood” used to exclude supposed “outlier” costs? What costs were so excluded? By what percentage “probability” did the Bureau discount included costs? Those should be easy questions; they go to the heart of the calculation. But no one answers them because the Bureau refused to disclose critical information. The Bureau’s calculations cannot be reproduced. Nor can one discern whether the Bureau reasonably applied record facts to reach a reasonable result. Agencies cannot thwart scrutiny—and judicial review—of their decisions by hiding how they were made.¹²

CTIA insists the “outlier” determinations were “reasonable,”¹³ but cannot say what costs were excluded or what the threshold was. As ACA Connects pointed out, some costs affecting 30% of earth stations were excluded as outliers, while some affecting only 5% were included. Application, at 20-21. No opposition *mentions* that inconsistency, much less defends it. Given that “percentage terms play a critical role” in its decision, the Bureau had to provide a reasoned explanation for the percentages it used.¹⁴ It gave none.¹⁵ It did not even disclose the percentages.

¹⁰ CenturyLink Comments, at 2.

¹¹ See, e.g., Content Cos. Opp., at 12; SES Opp., at 6-7; Verizon Opp., at 6; Stay Denial, ¶7.

¹² See *Flyers Rights Educ. Fund, Inc. v. FAA*, 864 F.3d 738, 746-47 (D.C. Cir. 2017). Verizon remarks that the APA’s requirement to disclose information “does not extend to all data.” Verizon Opp., at 6. ACA Connects is not asking for “all data”—it seeks “the most critical factual material that is used to support the agency’s position.” *Ass’n of Data Processing Serv. Orgs., Inc. v. Bd. of Governors*, 745 F.2d 677, 684 (D.C. Cir. 1984); see Application, at 19.

¹³ CTIA Opp., at 11.

¹⁴ *WJG Tel. Co. v. FCC*, 675 F.2d 386, 388-89 (D.C. Cir. 1982).

B. Efforts to dismiss RKF's secret meetings with undisclosed stakeholders misunderstand RKF's role.¹⁶ RKF did not just develop a preliminary cost catalog; it participated in determining which costs "incumbents are likely to incur in a typical transition" and "calculating the lump sum payment amounts" themselves.¹⁷ Those judgments went to the core of the Bureau's decision, which was based on the predicted likelihood various costs would be incurred. It was improper for the Bureau to rely on undisclosed information RKF received from undisclosed persons. The assertion that parties with whom RKF secretly met "were not making a presentation on the merits"¹⁸ is nonsense. This docket (GN Docket No. 18-122) was active when those parties were contacted. It blinks reality to suggest they failed to understand how the information they gave could affect the lump-sum determination. Even if RKF did not have to meet with everyone, the Bureau gave no good explanation for refusing a meeting to ACA Connects, which represents **90%** of MVPDs.¹⁹ Later meetings with the Bureau were no substitute, because ACA Connects *still* never learned what information RKF gathered (via *ex parte* disclosures or by meeting with RKF itself), and so could not tell the Bureau whether the information was accurate.

C. The oppositions all but ignore the Bureau's decision to base the lump sum on reg-

¹⁵ That ACA Connects proposed excluding some costs, Stay Denial, ¶28, illustrates the Bureau's lack of transparency. ACA made clear it included costs "occurring in approximately fifty percent (50%) of cases or more," *id.*, while the Bureau has never said what threshold *it* applied. ACA Connects counted the full value of costs it included—while the Bureau discounted the costs it included by some again-undisclosed percentage. It is possible to reproduce ACA Connects' lump-sum calculation; it is impossible to reproduce the Bureau's.

¹⁶ *See, e.g.*, SES Opp., at 6-7 (insisting on RKF's "limited role").

¹⁷ Final Cost Category Notice ¶¶4, 9.

¹⁸ Stay Denial, ¶25.

¹⁹ ACA Connects is not arguing the Bureau cannot use third-party contractors—only that it cannot use third parties to meet selectively with some stakeholders or to evade disclosure requirements. Invocations of the Media Bureau's use of third-party consultant Widelity to develop a price catalog in another matter miss the mark. *See, e.g.*, Content Cos. Opp., at 11; Stay Denial, ¶25 n.83. RKF's role went far beyond developing a price catalog. And Widelity did not selectively refuse to meet with ACA. Besides, even if the cases were comparable, a flawed process does not become lawful just because it has been done before.

istered antennas instead of “per each incumbent earth station,” as the regulations require.²⁰ The Content Companies assert that was the “only logical interpretation” of the C-Band Order, which “discuss[es] antenna-specific relocation costs such as passband filters as being ‘installed at the site of each incumbent earth station.’”²¹ But the regulations expressly define “incumbent earth station” using the general definition of “earth station,” which is not defined by antenna type.²²

III. THE BUREAU IMPROPERLY REFUSED TO CONSIDER FINAL TRANSITION PLANS

Even if the C-Band Order did not expressly mandate that the lump-sum determination be made after submission of final transition plans, the Bureau had to give a reasoned explanation for refusing to consider final plans. It offered none. It asserted that *earth-station operators* could consider final plans before making their lump-sum *elections*—but never explained why *it* should not consider final plans before making its lump-sum *determination*.²³

The prejudice is plain. New compression under Intelsat’s final plan alone could increase installation costs by thousands of dollars per earth station. *See* Windbreak Comments, at 3-4. A few thousand dollars may not seem “material[.]” or “significant” to Intelsat or the Bureau,²⁴ but to small local MVPDs like many ACA Connects members, it is hardly pocket change.

CONCLUSION

The Application for Review should be granted.

September 8, 2020

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²⁰ *See* Application, at 21-22.

²¹ Content Cos. Opp., at 13 (citing C-Band Order ¶193).

²² 47 C.F.R. § 27.1411(b)(3); *see id.*, § 25.115.

²³ Comments and *ex partes predating* the final transition plans, Stay Denial, ¶24, could not substitute for the plans themselves, which committed operators in a way mere comments did not.

²⁴ Intelsat Opp., at 9; Stay Denial, ¶24.

Proof of Service

I hereby certify that on September 8, 2020, I caused the foregoing document to be served on the parties listed below via electronic mail.

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