Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Use of the 5.850-5.925 GHz Band	)	ET Docket No. 19-138
	)	
To: The Commission		

OPPOSITION TO PETITION FOR STAY
OF
PUBLC KNOWLEDGE AND
NEW AMERICA'S OPEN TECHNOLOGY INSTITUTE

Public Knowledge and the New America's Open Technology Institute file this opposition to the emergency stay request of the Amateur Radio Emergency Data Network (AREDN)[1] of the *Report and Order* in the above captioned proceeding.[2] Because AREDN's Petition for to Stay is unlikely to succeed on the merits, because AREDN cannot point to any irreparable harm requiring a stay, and because the public interest strongly favors permitting unlicensed use in the band as soon as possible, the Commission should deny the request.

ARGUMENT

I. AREDN FAILS TO MEET THE STANDARD FOR A STAY.

To require a stay of the Commission's order, AREDN must show the following: (1) a strong likelihood of success on the merits; (2) that it will suffer irreparable harm if the FCC does

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[1] AREDN, Petition for Stay, *In the Matter of Use of the 5.850-5.925 GHz Band*, ET Docket 19-138 (filed May 3, 2021), https://ecfsapi.fcc.gov/file/1050284110294/AREDN%20petition%20for%20stay.pdf [hereinafter Petition to Stay].

[2] F.C.C., First Report and Order, *In re Use of the 5.850-5.920 GHz Band*, ET Docket No. 19-138, *Further Notice of Proposed Rulemaking, and Order of Proposed Modification*, 35 FCC Rcd 13440 (2020) [hereinafter Report and Order].

not stay the Order; (3) that other parties will not suffer substantial injury as a consequence of issuance of a stay; and (4) that the public interest favors grant of a stay.[3] Here, AREDN fails to make the required showing for three of the four factors. Accordingly, the FCC should deny the request for a stay.

A. AREDN Is Unlikely to Succeed on the Merits

AREDN essentially repeats arguments the Commission rejected in its *Report and Order.* Specifically, AREDN argues that the FCC is required to yield to the judgment of the Secretary of Transportation with regard to implementation of the Intelligent Transportation Systems. This includes the Secretary of Transportation's judgment on the necessary spectrum, the appropriate spectrum band, and specific technical rules governing ITS. As the Commission found in the *Report and Order*, this significantly misreads both the statutory language and the history of the ITS.[4]

It is well settled that Congress vested in the FCC, and in the FCC alone, control over the nation's public airwaves.[5] Congress reflected this exclusive control in the statutory language addressing spectrum allocation for ITS. As explained by the *Report and Order*, Congress directed the FCC to ***consider*** allocating spectrum for ITS in ***consultation*** with the Secretary of Transportation.[6] Furthermore, the Commission, not the Secretary of Transportation, has consistently set licensing rules for bands allocated for ITS.[7] With regard to the 5.9 GHz band in

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[3] F.C.C., Order Denying Petition for Stay*, In re Unlicensed Use of the 6 GHz Band*, ET Docket No. 18-295, *Expanding Flexible Use of Mid-Band Spectrum between 3.7 GHz and 24 GHz*, GN Docket No. 17-183*,* 35 FCC Rcd 8739 at ¶ 8 (OET 2020) ("6 GHz Stay Order").
[4] Report & Order, *supra* note 2, at 13486-13490.
[5] *See* FCC v. Nextwave Personal Communications, Inc., 200 F.3d 43, 53-54 (2nd Cir. 1999).
[6] Report and Order, 35 FCC Rcd at 13489-90 at ¶ 123.
[7] *Amendment of the Commission's Rules Regarding Dedicated Short Range Communications Services in the 5.850- 5.925 GHz Band (5.9 Band); Amendment of Parts 2 and 90 of the Commission's Rules to Allocate the 5.850-5.925 GHz Band to the Mobile Service for Dedicated*

particular, the Commission, not the Secretary of Transportation, established the technical standards and uses for the band.[8] Only after the FCC established the relevant licensing scheme and the rules for the band, could the Secretary of Transportation issue its directives in a manner consistent with the rules set by the FCC for ITS spectrum use.

Nor did Congress explicitly limit application of the FCC's rulemaking authority or license modification authority in the Transportation Equity Act (TEA).[9] Nothing in the language of the TEA remotely suggests that Congress intended to limit the power of the Commission to adopt new rules for a band allocated for ITS, or from modifying licenses already distributed. To use an Administrative Law Cliché, "Congress does not hide elephants in mouse holes."[10] Had Congress intended to subordinate the FCC's traditional exclusive authority over non-federal spectrum to the Secretary of Transportation, it would have done so.

In short, AREDN has it backwards. The authority of the Secretary of Transportation to mandate safety equipment for vehicles does not extend into the subject matter jurisdiction of a sister agency. To the contrary, only after the FCC has authorized spectrum access for ITS, based on its traditional public interest analysis, may the Secretary of Transportation make suitable rules

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Short Range Communications of Intelligent Transportation Services, ET Docket No. 98-95, *Report and Order*, 19 FCC Rcd 2458 (2003); *Amendment of Parts 2 and 90 of the Commission's Rules to Allocate the 5.850-5.925 GHz Band to the Mobile Service for Dedicated Short Range Communications of Intelligent Transportation Services*, Report and Order, ET Docket No. 98-95, 14 FCC Rcd 18221 (1999).

[8] *See* Report and Order, *supra* note 1; Press Release, F.C.C., FCC Modernizes 5.9 GHz Band for Wi-Fi and Auto Safety, (Nov. 18, 2020), https://docs.fcc.gov/public/attachments/DOC-368228A1.pdf.

[9] Transportation Equity Act for the 21st Century, Pub. L.105-178, § 5206(f), 112 Stat. 107 (1998) ("TEA").

[10] *See* Whitman v. American Trucking Ass'ns, 531 U.S. 457, 468 (2001).

under its own jurisdictional authority. Because the FCC's actions were entirely lawful under the Communications Act, AREDN has failed to show a likelihood of success on the merits.

B. AREDN Fails to Show Irreparable Harm

AREDN maintains that its systems will suffer harmful interference from both unlicensed operation in the reclaimed portion of the 5.9 GHz band, and from operation of C-2VX in the remaining 30 MHz allocated to ITS.[11] A party seeking a stay cannot claim irreparable harm on mere speculation.[12] As the party seeking a stay, AREDN bears the burden of showing that the Commission erred in its analysis. AREDN does not submit any new engineering analysis to bolster its conclusions. This alone is fatal to its showing of irreparable harm.

Here, the FCC's engineers have determined that operation of Part 15 devices under the rules authorized by the *Report and Order*, including any future issuance of Special Temporary Authority for outdoor use, will not result in harmful interference to licensed services. Indeed, the Commission has already issued numerous STAs to WISPs to augment their provision of broadband. No licensees opposed these STAs, and no licensee has reported any incidents of harmful interference resulting from these STAs. The Commission has also determined that C-2VX operation does not create increased risk to other licensed services. Without any evidence suggesting harmful interference, AREDN's claim of irreparable harm cannot stand.

Additionally, all licensed services are adequately protected from unlicensed services under the Commission's Part 15 rules, which require that any Part 15 devices that interfere with any licensed service must abate the interference.[13] The FCC held that this and other mitigation

[11] Petition to Stay, *supra* note 1, at 6-7.
[12] Va. Petroleum Jobbers Asso. v. Fed. Power Com., 259 F.2d 921, 925 (1958).
[13] *See, e.g.*, 47 CFR §§ 15.257, 15.403, and 15.517

measures—such as limiting operation to indoor use—are sufficient to defeat an allegation of irreparable harm.[14] When the time comes, AREDN is entitled to challenge any STA application that it can show poses a real risk of harmful interference to its members.[15]

In short, AREDN fails to show evidence that the *Report and Order* will lead to any incidents of harmful interference to the operations of its members, let alone sufficient evidence to warrant a finding of irreparable harm. The Stay Request therefore fails on this prong as well.

C. The Public Interest Strongly Favors Permitting Unlicensed Access as Soon as Possible.

Even without AREDN's failure to demonstrate any harm, the public interest in granting unlicensed spectrum access weighs against granting the stay request. The Commission provided a detailed description of the need for additional spectrum for unlicensed access, and the specific value of the 45 MHz of 5.9 GHz spectrum reallocated in the *Report and Order*.[16] Part of the anticipated benefit to the public is the speed with which parties could deploy new equipment and services based on the adjacency of the 5.8 GHz U-NII-3 band and the newly opened 6 GHz band.[17]

AREDN challenges the FCC's determination with regard to the demand for gigabit Wi-Fi. As an initial matter, AREDN is wrong about the value of gigabit Wi-Fi. As the number of high-speed connections to the home grows, Wi-Fi must keep pace. This last year demonstrated that home connections must support multiple devices engaged in high-bandwidth, low-latency applications simultaneously. In a world where every member of a household may need to work

[14] Report and Order, *supra* note 2, at ¶¶ 60-85.
[15] *See* 47 CFR § 1.939.
[16] Report and Order, *supra* note 2, at ¶¶ 14-21.
[17] *Id.* at ¶¶ 22-25.

or learn from home at the same time, the need for increased Wi-Fi capacity is obvious and irrefutable.

Furthermore, the FCC did not rely solely on the need for gigabit Wi-Fi in finding the public interest supported reallocation. The FCC specifically noted the increasing congestion issues as demand for Wi-Fi and unlicensed access generally has skyrocketed—a factor the FCC has found highly relevant since it first proposed permitting unlicensed spectrum in 5.9 GHz.[18] Additionally, the FCC found that permitting unlicensed access to 45 MHz of spectrum would significantly enhance rural Wi-Fi.[19] AREDN challenges none of these findings.

Finally, even AREDN concedes that the Commission must plan for future demand as well as current demand. But AREDN does not explain how the FCC may allocate needed spectrum more easily at some future date. Nor does AREDN explain how some future allocation could offset the advantages identified by the Commission of allocating this 45 MHz of spectrum contiguous to both the U-NII-3 and the 6 GHz bands. In other words, even if AREDN were correct that members of the public do not need gigabit Wi-Fi today (which it is not), AREDN does not explain how the FCC may grant a stay without negating the public interest benefits the Commission identified.

CONCLUSION

AREDN has failed to meet the high standard required for grant of a stay of a Commission order. Based on the Petition for Stay, AREDN is unlikely to succeed on the merits. AREDN has failed to show that it will suffer irreparable harm, and the public interest benefits identified by the Commission in the *Report and Order* weigh heavily against grant of the stay request.

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[18] F.C.C., Notice of Proposed Rulemaking, *In the Matter of Use of the 5.850-5.925 GHz Band*, at ¶¶ 13-15 (rel. Dec. 17, 2019), https://ecfsapi.fcc.gov/file/1217200308588/FCC-19-129A1.pdf.
[19] Report and Order, *supra* note 2, at ¶¶ 27-28.

WHEREFORE, the FCC should deny the stay request of AREDN.

Respectfully submitted,

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**Admitted to the Bar under D.C. App. R. 46-A (Emergency Examination Waiver)*

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing *Opposition to Petition for Stay* has been served upon the following via electronic means on May 10, 2021 to AREDN through their Counsel:

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