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ALERT

FCC Seeks Comment on Reimbursement of Expenses for LPTV/TV Translator Stations and FM Stations Impacted by the Repack

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On August 2, 2018, the Federal Communications Commission (FCC or Commission) adopted a Notice of Proposed Rulemaking (NPRM) regarding the process for reimbursing low power television (LPTV), TV translator, and FM broadcast stations for costs incurred as part of the post-incentive auction repacking process. Under the 2012 Spectrum Act, only costs incurred by full power and Class A television stations were eligible for reimbursement. In the 2018 Reimbursement Expansion Act (REA), however, Congress expanded the list of entities eligible for reimbursement and provided additional funding for this purpose.

The NPRM addresses both eligibility for reimbursement funding and the process for obtaining reimbursement funds. Comments will be due 30 days after the NPRM is published in the Federal Register. Reply Comments will be due 60 days after the NPRM is published in the Federal Register.

Below, we summarize the key elements of the NPRM, upon which the FCC seeks comment.

I. LPTV AND TV TRANSLATOR STATIONS

A. **Eligibility Criteria – LPTV/TV Translators.** The Commission interprets the REA to mean that LPTV and TV translator stations, as defined by Section 74.401 of the agency's rules, may receive reimbursement funds as long as they meet the following eligibility criteria:

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1. **Special Displacement Window.** To be eligible for reimbursement, the station must have (a) been eligible to file in the Special Displacement Window (e.g., operating on April 13, 2017), (b) filed a displacement application during the Special Displacement Window, and (c) had its application granted. The last requirement (grant of the application) is not required by the REA, however, the Commission believes it is "essential to ensure the integrity of the reimbursement program."
2. **Licensed and Transmitting.** Additionally, to be eligible for reimbursement, the REA requires that the station must have been "licensed and transmitting for at least 9 of the 12 months prior to April 13, 2017." The Commission interprets this requirement to mean that to be eligible for reimbursement funds, a station must (i) have been licensed or have had a license to cover application on file prior to April 13, 2017, and (ii) have been operating not less than 2 hours each day of the week and not less than a total of 28 hours per calendar week for 9 of the 12 months prior to April 13, 2017.

B. **Other Eligible Stations**. The Commission proposes that two other categories of LPTV/TV translator stations should be eligible for reimbursement and seeks comment on its proposal. These stations are: Early Displaced Stations and Displaced Digital Replacement Translators. Early Displaced Stations are stations that were displaced by T-Mobile prior to the Special Displacement Window. These stations were encouraged to obtain Special Temporary Authorizations for temporary facilities and file displacement applications early that were then treated as filed during the Special Displacement Window.

C. **Ineligible Stations.** The FCC tentatively concludes that new digital-to-digital replacement translator stations are not eligible for reimbursement. Although applications for these facilities were filed in the Special Displacement Window, these facilities could not have been "licensed and transmitting" pursuant to the proposed eligibility criteria as they did not exist prior to April 13, 2017. The NPRM also concludes that Class A stations that are eligible for reimbursement under the Spectrum Act may not receive reimbursements under the REA.

D. **Expenses Eligible for Reimbursement –LPTV/TV Translators.** The REA provides for reimbursement of "reasonably incurred expenses" for stations that were displaced "as a result of the reorganization of broadcast television spectrum."

1. **Displacement:** The Commission interprets this to mean that the only LPTV/TV translator stations eligible for reimbursement funds are those that were displaced as a result of either (i) the channel reassignments made in the Closing and Channel Reassignment Public Notice ("CCRPN"), or (ii) reallocation of spectrum for use by a 600 MHz Band wireless licensee or for use in the guard bands. The FCC seeks comment on whether LPTV/TV translator stations that were displaced by the two additional filing windows for expanded facilities (that closed on September 15, 2017 and November 2, 2017) should also be eligible for reimbursement.
2. **Reasonably Incurred:** The FCC tentatively concludes that the equipment and other costs necessary to build the facilities authorized in the station's Special Displacement Window application should be considered "reasonably incurred." Unlike the reimbursement criteria for full power and Class A stations, the Commission notes that the requirement to build a comparable facility is not realistic for

LPTV/TV translator stations. The NPRM proposes to allow reimbursement of both "hard" costs such as equipment and tower rigging, and "soft" expenses such as legal and engineering services, and seeks comment on this conclusion. In particular, the Commission requests comment on whether it should impose some other limitation on the facility that will be reimbursed—for example, it asks if it should only cover replacement facilities with comparable coverage to the pre-displaced facility.

3. **Equipment Upgrades/Reuse of Existing Equipment.** The Commission proposes to require that, to the extent practical, stations reuse existing equipment. Accordingly, when requesting reimbursement for new equipment, the NPRM proposes that stations justify why new equipment is needed. Similar to the procedures for full power stations, the NPRM proposes that the Commission will not reimburse the costs associated with equipment that represents an "upgrade" from existing equipment.
4. **Expenses Not Eligible for Reimbursement**
    - **Interim Facilities.** Unlike full power stations, the Commission proposes to exclude "interim facilities" from those expenses that are eligible for reimbursement.
    - **Lost Revenues.** The REA prohibits reimbursement of lost revenue costs. The Commission defines this category of expenses as "revenue that a station loses as a direct or ancillary result of the reorganization of the ... broadcast spectrum, including the repacking process..." These costs would include lost advertising revenue while the station is off the air, or costs associated with programming that cannot be aired. The Commission asks if other costs should be included in the lost revenue category.
    - **Costs to Resolve Mutually Exclusive Applications.** Also excluded from reimbursement are any expenses incurred while resolving a mutually exclusive application filed during the Special Displacement Window. The Commission interprets this prohibition to include any costs associated with reaching a settlement agreement, as well as, with an auction should the mutually exclusive applications be designated for auction.
    - **Other Sources of Funding.** The Commission tentatively concludes that if a station receives funding from another source for expenses, it may not request reimbursement for that same expense from the reimbursement fund. For example, if a certain expense has been reimbursed by T-Mobile, the station may not request a second reimbursement for that same expense from the reimbursement fund. Other sources of funding could include state or local grants. The Commission proposes to require stations to certify whether they have received funding from other sources and provide documentation of that funding and the expenses it covered.

II. FM STATIONS

A. **Eligibility Criteria - FM Stations.** The Commission tentatively concludes that "FM broadcast station" as used in the REA includes full-service FM stations and FM translator stations and seeks comment on that conclusion. The agency also asks whether LPFM stations should also be considered "FM broadcast stations" for reimbursement purposes.

1. **Licensed and Transmitting:** The Commission tentatively concludes that, to be eligible for reimbursement, an FM station must have been (1) licensed and transmitting on April 13, 2017 (the release date for the CCRPN), and (2) using facilities impacted by a repacked television station. The Commission seeks comment on this proposal.

   The agency also tentatively concludes that an FM station can experience a service disruption "as a result of the reorganization of broadcast television spectrum" either because (i) a full power or Class A television station has been reassigned to a new channel, or (ii) a full power or Class A television station relinquished spectrum usage rights in the reverse auction. The Commission proposes that only FM broadcast facilities directly impacted by repacked television station are eligible for reimbursement and invites comment on that proposal.
2. **Categories of Eligible FM Stations.** The Commission tentatively concludes that only stations that are collocated with, or adjacent or in close proximity to, a repacked television station should be eligible for reimbursement and that an FM station seeking reimbursement should be required to certify to that fact and identify the television station. The Commission seeks comment on these conclusions. The agency believes that there are only three categories of stations that will encounter any disruption of service such that they would be eligible for reimbursement:
   - **Category (1) – Stations Forced to Relocate Permanently**. The Commission proposes that this eligibility category include FM stations required either to vacate their towers or to relocate their antennas to a different level of their current towers. The Commission anticipates that there will be a very small number of FM stations, if any, in this eligibility category.
   - **Category (2) – Stations Forced to Temporarily Dismantle Equipment or Make Other Changes Not Requiring Commission Approval.** The Commission proposes that this eligibility category include FM stations required temporarily to dismount or disassemble equipment, most likely antennas, in order to accommodate work on a television antenna or a tower. The Commission anticipates there will be a very small number of FM stations in this eligibility category.
   - **Category (3) – Stations Forced to Temporarily Reduce Power or Cease Transmission on Their Primary Facility to Accommodate Antenna or Tower Modifications.** The Commission proposes that this eligibility category include FM stations that are required to reduce power or go off the air to protect workers making modifications to television facilities on a tower from RF exposure. Category (3) would include stations with no existing auxiliary facilities and stations that are unable to access auxiliary transmission facilities, as well as stations that have existing auxiliary facilities, but whose facilities do not provide substantial (80+ percent) coverage of the primary station's coverage area or population. The Commission anticipates that this category of stations will be the most numerous of eligible FM stations but is still likely to include only a limited number of FM stations.

The Commission invites comment on the scope of these categories and tentatively concludes that FM stations would be required to certify which eligibility category they satisfy. The agency proposes that if an FM broadcast station has received payment for "interim facilities," it is ineligible for any reimbursement under the

REA.

B. **Expenses Eligible for Reimbursement – FM Stations.** Pursuant to the REA, the Commission must provide reimbursement for "costs reasonably incurred by an FM broadcast station for facilities necessary for such station to reasonably minimize disruption of service as a result of the reorganization of broadcast television spectrum." The Commission seeks comment on how to define "reasonably incurred" and "to reasonably minimize disruption of service" and proposes an approach for prioritization of reimbursement to stations with a greater level of service disruption.The FCC proposes that eligible costs for Category (1) and Category (2) stations should be reimbursed in a manner similar to eligible costs for full power and Class A stations. For Category (3) stations, the agency proposes that the costs of such stations be subject to a graduated priority system and reimbursable only when the disruption of service is significant enough to make it reasonable for a station to incur costs to minimize the disruption.

1. **Replacing or Restoring Facilities – Category (1) and (2) Stations.** The Commission states that the "goal" for Category (1) stations should be to rebuild their facility to reasonably replicate the station's coverage area and population served. Thus, the agency suggests that Category (1) stations should be eligible for reimbursement for costs incurred in moving and reconstructing their current facilities at a new site or tower location, including costs of equipment, professional services such as engineering, and tower and construction work. The Commission further proposes that existing equipment be reused as appropriate and that new equipment be reimbursable if needed to reasonably replicate service and coverage area. In addition, the Commission proposes that the costs of engineering to determine what technical facilities are needed to replace existing service at a new site should be considered reimbursable expenses. The Commission seeks comment on these proposals. The Commission proposes that the "goal" for Category (2) stations should be to restore the station's existing facility. Examples of reimbursable costs could include costs of equipment, professional services such as engineering, and tower and construction work. The agency further proposes that, if sufficient funds exist in the Reimbursement Fund, Category (1) and (2) stations should be reimbursed for up to 100 percent of eligible costs and seeks comment on that proposal.
2. **Interim Facilities – Category (3) Stations.** The Commission proposes that Category (3) stations be reimbursed for the cost of constructing new auxiliary facilities or upgrading existing auxiliary facilities. Reimbursable costs could include costs of equipment, professional services such as engineering, and tower and construction work. The agency tentatively concludes that reimbursement of interim facility costs should be linked to the level of service disruption avoided by resorting to interim facilities. Specifically, the Commission proposes that the amount of broadcaster reimbursement for interim facilities should be linked to the amount of time the station is off the air due to repacking. Under this proposal, reimbursement would occur on a graduated priority system reflecting a percentage of total costs for these interim facilities. The Commission proposes to reimburse interim facilities costs only if they are needed to avoid service interruptions that would otherwise exceed ordinary construction or maintenance requirements. In addition, operating from interim facilities does not require service that is identical to the station's primary service. The Commission anticipates that the majority of

reimbursement requests will be in Category (3).

3. **Channel Change Equipment – FM Stations.** The Commission expects that no FM station will be forced to change its frequency as a result of repacking and tentatively concludes that expenses for retuning or replacing antennas or transmitters to accommodate channel changes not be eligible for reimbursement.
4. **Equipment Upgrades and Reuse of Existing Equipment.** The Commission tentatively concludes that the full power and Class A "comparable facilities" reimbursement standard cannot be applied in the same manner to FM stations in Categories (1) and (2) because the goal is to reasonably replicate the service type and area from a different location (Category (1)) or restore service using alternate equipment (Category (2)). In some cases, this can be accomplished using existing equipment or its equivalent, but in other cases this will require modified or differently configured equipment.

To the extent that a Category (1) station would propose to construct a new tower, the Commission proposes to reimburse tower construction expenses only upon a showing that no space is available on other local towers that would enable it to reasonably replicate current service.

III. Reimbursement Process

Although the proposed reimbursement process will largely follow the process the FCC used for full power and Class A stations, there are several notable changes.

The FCC is proposing to require LPTV/translator and FM stations seeking reimbursement to file a form certifying their eligibility and to provide documentation demonstrating that they meet the eligibility criteria. As with the full power and Class A reimbursement process, the Commission is contemplating the use of audits, data validations, site visits or other verifications to confirm eligibility.

Eligible LPTV/translator and FM stations would then be required to list their existing equipment and the types of costs they expect to incur, with cost estimates based on an FCC-provided cost catalog or specific estimates received. Stations that have already incurred costs at this time would be permitted to submit actual costs instead of estimates. The Commission is proposing to use its LMS system (Form 2100, Schedule 399) for submission of eligibility, information, and expenses, but it asks how to make the form simpler for the LPTV/translator and FM station reimbursement process. Licensees would use a form similar to FCC Form 1876 to submit their financial information.

As in the full power and Class A reimbursement process, the Commission will issue an initial allocation that stations can draw upon as expenses are incurred. The Commission is proposing to allocate to the Media Bureau discretion to determine the amount of the initial allocation and any subsequent allocations (including, possibly, a percentage of all eligible costs or certain fixed allocations). Although the FCC is proposing to allow the Media Bureau to determine how to prioritize costs (if needed), it is seeking comment on whether to prioritize certain costs over others.

IV. Measures to Prevent Waste, Fraud, and Abuse

The Commission is proposing to implement similar measures to prevent waste, fraud, and abuse as those implemented for full power and Class A entities, including requiring entities to document all actual expenses and to retain all relevant documents for at least 10 years after receiving final payment from the reimbursement fund. Entities submitting reimbursement requests would also be required to certify the validity and accuracy of the submission.

If you have questions about the NPRM or the reimbursement process, or if you are interested in submitting comments, please contact the Wiley Rein attorney who regularly handles your FCC matters or one of the attorneys listed on this client alert.