Virginia Association of Broadcasters Legal Review

Brooks, Pierce, McLendon, Humphrey & Leonard, LLP
Counsel to VAB • (919) 839-0300

250 West Main Street, Suite 100
Charlottesville, VA 22902 • (434) 977-3716

August 8, 2018

Legal Memorandum

FCC Proposes Rules for Reimbursement Program for LPTV/TX Stations and FM Stations Displaced by Repack

As expected, last week the FCC adopted a Notice of Proposed Rulemaking and Order ("Notice"), that proposes rules for how (i) LPTV and TV translator stations (collectively, "LPTV Stations") and (ii) FM stations (i.e., full power FM, FM translator, and, possibly, LPFM stations, collectively "FM Stations") should be reimbursed for costs they incur as a result of the post-incentive auction transition of the 600 MHz spectrum band.

You may recall that we reported last month on a draft version of the Notice. While much of the Notice mirrors the initial draft, the Commission did, in fact, make several significant changes to the draft, which are reflected in the adopted Notice. Those changes are incorporated into our summary of the Notice below.

Money—and a Mandate—from Congress. The Notice marks an important step in the Commission's fulfillment of a Congressional mandate to adopt reimbursement rules for LPTV and FM Stations. The legislation prompting the Notice is called the Reimbursement Expansion Act ("REA"), enacted as part of RAY BAUM's Act of 2018 back in March.

The REA appropriates a total of $1 billion in additional funds to the Broadcaster Relocation Fund, with $600 million in fiscal year 2018 and the remaining $400 million in fiscal year 2019. Of the $600 million appropriated in fiscal year 2018, the REA authorizes the FCC to use up to $150 million for LPTV Station reimbursement and up to $50 million for FM Station reimbursement; up to $350 million is designated for full power and Class A station and MVPD reimbursement, and up to $50 million is to be spent on efforts to educate the public about the repack. The REA requires the FCC to adopt rules regarding LPTV Station and FM reimbursement by March 23, 2019.

This proceeding will affect hundreds, perhaps thousands, of facilities. According to the Notice, more than 2,100 LPTV Stations filed displacement applications during the FCC's recent Special Displacement Window, while nearly 500 FM Stations may feel operational effects as a result of repacked full power/Class A TV station construction activities.

Brief Summary of Notice and Order. Below you'll find a high-level overview of the Notice, followed by more detailed information about the proposals for LPTV Station and FM Station reimbursement, respectively.

- The FCC is proposing a mechanism for reimbursing the newly eligible entities—that is, certain LPTV Stations and FM Stations—that is substantially similar to the process currently used to reimburse repacked full power and Class A TV stations.

- The FCC seeks comment on how to interpret the REA with respect to the $400 million that is appropriated for fiscal year 2019. The Notice calls attention to ambiguity in the REA's language and asks whether the $400 million is only available to reimburse eligible full power and Class A television stations (and MVPDs), or whether any of those dollars may be used to reimburse LPTV and FM Stations (and/or fund consumer education efforts). If some of the $400 million can be used to reimburse LPTV and FM Stations, the Notice seeks comment on how the FCC should prioritize spending it. Note: questions regarding the $400 million appropriated for fiscal year 2019 money were not asked in the draft Notice and appeared for the first time in the Notice itself.

- The FCC tentatively concludes that LPTV Stations are eligible for reimbursement only if (i) they filed a displacement application during the Special Displacement Window (which closed on June 1, 2018) and ultimately obtain a construction permit, and (ii) were licensed and transmitting for at least 9 of the 12 months prior to April 13, 2017 (as required by the REA).

- The FCC tentatively concludes that LPTV Stations and FM Stations must reuse existing equipment when possible and must provide written justification for reimbursement for new equipment.

- The FCC tentatively concludes that both full power FM stations and FM translators that were licensed and transmitting on April 13, 2017, using the facilities impacted by a repacked television station, are eligible for reimbursement.

- The Notice proposes that the FM Station reimbursement program will include FM Station licensees that incur costs because they must (i) permanently relocate, (ii) temporarily or permanently modify their facilities, or (iii) purchase or modify auxiliary facilities to provide service to at least 80% of their primary station's coverage area or population during a period of time when construction work is occurring on a collocated, repacked TV station's facilities.

- The Notice identifies the types of measures—including written certifications, audits, and site visits—that the FCC will use to protect the reimbursement funding process against waste, fraud, and abuse. Similar to the process used by the FCC for full power/Class A TV repack reimbursement, the Notice proposes that each LPTV Station and FM Station seeking reimbursement will be required to file multiple forms with the FCC to provide banking information, certify that the station meets the applicable reimbursement eligibility criteria, provide information regarding the station's current broadcasting equipment, and provide an estimate of the station's costs eligible for reimbursement.

- In the Order, the FCC directs the Media Bureau to engage a contractor to assist in the reimbursement process and the administration of the reimbursement fund for eligible LPTV Stations and FM Stations. (Contractors have been assisting the FCC with the full power/Class A TV reimbursement process.)

- The Order directs the Media Bureau to make determinations regarding eligible costs and the reimbursement process, such as calculating the amount of allocations to eligible entities and seeking comment on a Catalog of Eligible Expenses (like the one used for the full power/Class A TV reimbursement process but revised to be relevant for the reimbursement of eligible LPTV Stations and FM Stations).

LPTV Station Reimbursement Rules Proposals. The FCC's proposal for the reimbursement regime for LPTV Stations is quite similar to its full power/Class A TV reimbursement regime, with certain modifications in order to foster efficiency and to account for the nature of LPTV Stations, the language of the REA, and the amount of available funds. Here are some of the highlights of the FCC's proposals for LPTV Stations:

- The Notice tentatively concludes that LPTV Stations are eligible for reimbursement only if (i) they filed an application during the Special Displacement Window (which closed on June 1, 2018) and ultimately obtain a construction permit, and (ii) were licensed and "transmitting" for at least 9 of the 12 months prior to April 13, 2017.

- The FCC proposes that in order to be considered "transmitting," LPTV Stations seeking reimbursement must have been operating not less than 2 hours in 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. The FCC seeks comment on whether it should verify that an LPTV Station was "transmitting" during and for the requisite periods of time (and if so, how). In addition to requiring stations to certify that they meet the "transmitting" criteria, the Notice asks whether the FCC should require stations to provide evidence, "such as documentation of the programming aired by the station during the period of time in question, electric power bills, or other evidence showing that the station was transmitting during this time period."

- In terms of the costs that will be eligible for reimbursement for qualifying LPTV Stations, the FCC tentatively concludes that the equipment and other costs for an LPTV Station to construct the facilities authorized by the displacement construction permit will be considered "reasonably incurred" and, therefore, reimbursable (this approach is similar to the full power/Class A TV repack reimbursement program). Such eligible costs would include "hard" costs such as new equipment and tower rigging, and "soft" costs such as engineering and legal fees, although the Notice proposes to direct the Media Bureau to prioritize payment of certain "hard" costs over "soft" costs if necessary due to the limited amount of money ($150 million) available for LPTV Station reimbursement. The Notice also acknowledges that displaced LPTV Stations may need to purchase equipment that is not "comparable" to their existing equipment. The FCC seeks comment on the extent to which such "non-comparable" equipment should be eligible for reimbursement if it is used to "provide replacement facilities of comparable coverage."

- In a change from the draft Notice, the FCC seeks comment on whether LPTV Stations that obtain funding from other sources (e.g., T-Mobile) to construct their displaced facilities should receive reimbursement from the FCC for such facilities. (In the draft Notice, the FCC had tentatively concluded that such LPTV Stations could not receive such reimbursement.) The FCC seeks comment on how to address the interplay between reimbursement funding that LPTV Stations may have received from third-parties (e.g., from private companies, state government grants, etc.) and the additional reimbursement funds authorized by the REA.

- The FCC proposes to require LPTV Stations to reuse equipment where possible, and it proposes to not provide reimbursement for equipment "upgrades."

- The FCC proposes to provide no reimbursement for LPTV Stations to construct interim facilities, and the FCC proposes (as required by the REA) not to provide reimbursement for "lost revenues" or for costs related to resolving mutually exclusive displacement applications.

FM Station Reimbursement Rules Proposals. It is important to understand that the FCC's proposed reimbursement program for FM Stations is heavily influenced by the limited size of the $50 million reimbursement pot. The Notice recognizes that $50 million may be insufficient to provide full reimbursement to all FM Stations that are affected by the full power/Class A TV repack. As a result, the Notice makes clear that the FCC believes that some amount of disruption to FM Stations during the repack should be considered "reasonable" and, as such, should not trigger any reimbursement funding. Here are a few of the Notice's key points for FM Stations:

- The FCC proposes to adopt (and seeks comment on) three categories of FM Stations that would be eligible for reimbursement. For all three categories, in order to be eligible, an FM Station must have been licensed and transmitting on April 13, 2017, using the facilities impacted by a repacked TV station. The Notice indicates that the FCC has identified a pool of fewer than 500 full power FM stations that could potentially be included in these three proposed categories, which are described below:

    - **Category 1**: Stations Forced to Relocate Permanently. This proposed category would include FM Stations required either (i) to vacate their towers (which results in costs to construct facilities at a different site), or (ii) to relocate their antennas to a different level on their current towers. Either change would modify the station's transmissions and would thus require prior FCC approval (in the form of a construction permit). The Notice suggests that "there will be a very small number of FM Stations if any in this eligibility category." The FCC proposes to reimburse up to 100% of the costs that are eligible for reimbursement for FM Stations in Category 1.

- **Category 2**: Stations Forced to Temporarily Dismantle Equipment or Make Other Changes Not Requiring Commission Approval. This proposed category would include FM Stations (i) required to temporarily dismount or disassemble equipment—most likely antennas—in order to accommodate work on a repacked TV station's antenna and/or tower, (ii) required to physically move their transmitter to accommodate new TV transmission equipment, or (iii) that need to undertake other types of necessary equipment modifications that do not require FCC approval. The Notice observes that the FCC anticipates "there will be a very small number of FM Stations in this eligibility category." The FCC proposes to reimburse up to 100% of the costs eligible for reimbursement for FM Stations in Category 2.

- **Category 3**: Stations Forced to Temporarily Reduce Power or Cease Transmission on Their Primary Facility to Accommodate Antenna or Tower Modifications. This proposed category would include FM Stations that are required to reduce power or go off the air to protect tower workers from RF exposure while they are making modifications to repacked TV facilities. The length of time during which such an FM Station would have to reduce power or cease transmissions could range from hours to weeks or even months. As discussed below, the FCC seeks comment on a proposed graduated reimbursement system depending on the length of time that stations have to operate at reduced power or cease transmissions. Such stations could incur costs in building or modifying auxiliary facilities to permit FM broadcast service to continue during this period. Category 3 would include stations with no existing auxiliary facilities and stations that are unable to access auxiliary transmission facilities. Category 3 would also include stations that have existing auxiliary facilities that provide less than 80% coverage of the primary station's coverage area or population. According to the Notice, the FCC anticipates that this category of FM Stations "will be the most numerous of eligible FM Stations but is still likely to include only a limited number of FM Stations." Note that FM Stations in other eligibility categories could also qualify under Category 3 if they otherwise meet the reimbursement requirements.

- As mentioned above, for Category 3 stations, the FCC seeks comment on the following proposed "graduated priority system of reimbursement" for interim facility expenses for FM Stations. Here's the proposal:

  - Stations Off-Air for Less Than 24 Hours, or Off-Air Only During Hours from 10 p.m. – 6 a.m. Local Time, or Less Than Five Non-Peak Broadcast Hours Per Day: The FCC proposes that such off-air periods should be considered a *de minimis* disruption of service that is not eligible for any reimbursement.

  - Stations Off-Air for Longer Periods of Time: The Notice seeks comment on a proposal that FM Stations that are off-air for longer periods of time be reimbursed on a graduated scale. According to the Notice, such FM Stations would be reimbursed for eligible costs reasonably incurred to construct new auxiliary facilities, to upgrade existing auxiliary facilities to cover 80% of the covered area and/or population of the existing facility, or to build interim facilities for eligible secondary services as follows:

    - <u>Stations Off-Air for 24 Hours to 10 Days</u> would be reimbursed <u>up to 50%</u> of eligible costs.
    - <u>Stations Off-Air for 11 Days to 30 Days</u> would be reimbursed <u>up to 75%</u> of eligible costs.
    - <u>Stations Off-Air for More than 30 Days</u> would be reimbursed <u>up to 100%</u> of eligible costs.

  - The Notice seems comment on the above proposal and also on the larger issue of whether reimbursing FM Stations on a graduated scale is in the public interest.

  - <u>Additional Percentages Available?</u> The Notice observes that additional reimbursement percentages might be available if, after making all the payments for interim facilities and other eligible expenses, there is sufficient money to pay a higher reimbursement percentage.

  - <u>Other Proposals?</u> The Notice also asks those who disagree with the FCC's proposed reimbursement scheme to provide alternative proposals that would help ensure that the Commission allocates the limited funds available in a fair and equitable manner across all affected FM Stations.

- The FCC seeks comment on the off-air time benchmarks set forth above and asks whether they should be adjusted upward or downward. In particular, the Notice queries whether time off-air during nighttime and early morning hours should be considered *de minimis* and, if not, what level of reimbursement for use of auxiliary facilities should be allowed for such stations to provide interim nighttime service.

- The REA states that the FCC may not use reimbursement funds for FM Stations' "lost revenues." As such, the FCC proposes to define the term "lost revenues" and to exclude them from its reimbursement calculus. The FCC proposes to define "lost revenues" to include loss of advertising revenues while a station is off the air while implementing either replacement or interim facilities, as well as refunds a station is required to make for payments for airtime as a result of being off the air while implementing a facility change. The Notice seeks comment on this proposal and asks whether any other cost categories should be included in the definition of "lost revenues."

Next Steps for Affected Stations? Affected stations may wish to determine the implications of the proposed reimbursement rules, and may wish to consider filing comments in the proceeding. Comments on the Notice will be due 30 days after it is published in the Federal Register, and reply comments will be due 60 days following publication. As of August 8, the Notice has not yet been published in the Federal Register.

If you have any questions concerning the information discussed in this memorandum, please contact your communications counsel or any of the undersigned.

Tim Nelson, Editor

BROOKS, PIERCE, McLENDON,
HUMPHREY & LEONARD, L.L.P.

Mark J. Prak
Marcus W. Trathen
David Kushner
Coe W. Ramsey
Charles F. Marshall
Stephen Hartzell
Julia C. Ambrose
Elizabeth E. Spainhour
J. Benjamin Davis
Timothy G. Nelson
Amanda M. Whorton
