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Legal Review

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Legal Memorandum

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FCC Adopts Rules Governing Reimbursement Program for LPTV/TV Translator Stations and FM Stations Displaced by Repack

The FCC voted at its open meeting today to approve a Report and Order ("Order") (a draft of which is available here) that adopts rules for how (i) LPTV and TV translator stations (collectively, "LPTV Stations") and (ii) FM stations (i.e., full power FM, FM translator, and LPFM stations, collectively "FM Stations") will be reimbursed for costs they incur as a result of the post-incentive auction repacking of the 600 MHz spectrum band.

This Order will affect hundreds, perhaps thousands, of facilities. According to the Order, more than 2,100 LPTV Stations filed displacement applications during the FCC's 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.

Our overview of the Order is below. As of this writing, the FCC has not yet released the full text of the final Order; of course, we will let you know if the final Order differs in any material way from the draft Order. (We don't expect significant changes.)

Congress Allocated Money—and Mandated Rules. The Order marks the Commission's fulfillment of a Congressional mandate to adopt reimbursement rules for LPTV and FM Stations. The Commission is cutting it close: the deadline for it to adopt the rules is March 23, 2019. The legislation prompting the Order is called the Reimbursement Expansion Act ("REA"), and it was enacted about a year ago as part of RAY BAUM's Act of 2018.

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 that was appropriated for 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. With respect to the $400 million that was appropriated for fiscal year 2019, the FCC in the Order concludes that it can use these funds to reimburse LPTV and FM Stations, in addition to full power and Class A stations and MVPDs. The Commission will prioritize payments using that $400 million allocated to fiscal year 2019 to full power, Class A, and MVPD entities ahead of LPTV and FM Stations; so those entities (full power and Class A stations, and MVPDs) will be reimbursed before remaining fiscal year 2019 funds, if any, are used to reimburse LPTV and FM Stations.

Brief Summary of Order. Below you'll find a high-level overview of the Order, including aspects of it that apply to both LPTV and FM Stations, followed by more detailed information about the LPTV Station and FM Station reimbursement rules, respectively.

- The Order adopts a process for reimbursing certain LPTV Stations and FM Stations that is <u>substantially similar to the process currently used</u> to reimburse repacked full power and Class A TV stations and MVPDs.

- LPTV Stations and FM Stations must reuse existing equipment when possible and must provide written justification for reimbursement for new equipment.

- The REA states that the FCC may not use reimbursement funds for LPTV and FM Stations' "lost revenues." "Lost revenues" includes 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 Order identifies the types of measures that the FCC will use to protect the reimbursement funding process against waste, fraud, and abuse, including written certifications, audits, and site visits. Similar to the process used by the FCC for full power/Class A TV repack reimbursement, 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 that are eligible for reimbursement.

LPTV Station Reimbursement Rules. The FCC's reimbursement regime for LPTV Stations is quite similar to its full power/Class A TV reimbursement regime, with certain modifications designed 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 rules specific to LPTV Stations:

- 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 obtained a construction permit, and (ii) were licensed and "transmitting" for at least 9 of the 12 months prior to April 13, 2017.

- 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. Stations must provide supporting documentation, for example, program guides, electric power bills, or other evidence showing that the station was transmitting during this time.

- In terms of the costs that will be eligible for reimbursement for qualifying LPTV Stations, 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. The FCC will not prioritize "hard" costs over "soft" costs. The Order also acknowledges that displaced LPTV Stations may need to purchase equipment that is not "comparable" to their existing equipment. This "non-comparable" equipment is eligible for reimbursement if it is used to provide replacement facilities of comparable coverage.

- The Order specifically states that costs for the following are reimbursable if they were specified in the LPTV Station's granted Special Displacement Window application: full service mask filters, emission mask costs, and costs incurred by LPTV Stations that were displaced solely due to modifications made by full power and Class A facilities as a result of receiving authorization for alternate channels or expanded facilities. For translator microwave and studio transmitter link facilities, the Media Bureau will review such facilities' specific circumstances on a case-by-case basis.

- LPTV Stations that obtain funding from other sources (e.g., T-Mobile) to construct their displaced facilities are not eligible to receive reimbursement from the FCC for such facilities. (LPTV Stations must certify that they have not received reimbursement from any other source on their reimbursement submissions to the FCC.)

- The FCC thinks it is unlikely that LPTV Stations will need to construct interim facilities, but the FCC will consider reimbursement for these costs on a case-by-case basis.

- As noted, the FCC will not provide reimbursement for "lost revenues," nor will it reimburse costs related to resolving mutually exclusive displacement applications.

FM Station Reimbursement Rules. It is important to understand that the FCC's reimbursement program for FM Stations is heavily influenced by the limited size of the $50 million reimbursement pot. The FCC 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 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 Order's key points for FM Stations:

- 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 greater signal coverage than existing facilities can provide during a period of time when construction work is occurring on a collocated, repacked TV station's facilities.

- The FCC adopts three categories of FM Stations that are 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 three categories are as follows, all of which are eligible to be reimbursed <u>up to 100%</u> of the costs eligible for reimbursement:

    - **Category 1**: <u>Stations Forced to Relocate Permanently</u>. This category includes 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 FCC will reimburse <u>up to 100%</u> of the costs that are eligible for reimbursement for FM Stations in Category 1.

    - **Category 2**: <u>Stations Forced to Temporarily Dismantle Equipment or Make Other Changes Not Requiring Commission Approval</u>. This category includes 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 FCC will reimburse <u>up to 100%</u> of the costs eligible for reimbursement for FM Stations in Category 2.

    - **Category 3**: <u>Stations Forced to Temporarily Reduce Power or Cease Transmission on Their Primary Facility to Accommodate Antenna or Tower Modifications</u>. This category includes 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. In the Order, the FCC declines to adopt its previous proposal that Category 3 stations would be subject to a graduated priority system based on the significance and duration of service disruption. Therefore, Category 3 stations that experience more than a *de minimus* level of service disruption are also eligible for reimbursement for up to 100% of eligible costs. *De minimus* disruption of service is defined in the Order as "time off air for less than 24 hours or time off air confined to the hours of 12:00 midnight and 5:00 a.m. local time." The FCC anticipates that this category of FM Stations will be the most numerous of eligible FM Stations.

- If the $50 million reimbursement allocation is insufficient to fully reimburse all FM Stations in all three categories, the Media Bureau will allocate funds in the same manner among all FM Stations in all three categories (i.e., by allocating the same percentage of funds to stations in all three categories).

What's Next? The LPTV/FM Station repack reimbursement rules will become effective 30 days after they are published in the Federal Register. We'll keep you posted.

FCC Officially Moves EEO Oversight to the Enforcement Bureau

Effective today, the FCC staffers who are responsible for enforcing the Commission's equal employment opportunity ("EEO") rules have officially been moved from the Media Bureau to the Enforcement Bureau. Chairman Pai has stated that he hopes this reorganization will improve the FCC's enforcement of its EEO rules and strengthen the Commission's commitment to fighting discrimination.

As you may recall, the FCC adopted an Order ("Order") in 2018 to move its EEO audit and enforcement functions to the Enforcement Bureau. Following a series of necessary procedural steps and approvals, the Order has now been published in the Federal Register, meaning the change that shifts the audit and enforcement responsibilities associated with the Commission's EEO rules from the Media Bureau to the Enforcement Bureau becomes effective today.

A team comprised of attorneys and other professionals oversees the EEO compliance of broadcast licensees, and their work is primarily focused on periodic random audits, along with any enforcement actions arising from those audits. (Each year, the EEO team conducts such random audits of five percent of each of radio and television station employment units; the most recent batch of EEO Audit Letters was sent last month.) In addition, the team reviews the EEO filings that broadcasters must submit along with their license renewal applications, and the team also investigates EEO complaints and takes enforcement action based on those investigations.

According to the Order, there are several notable benefits to bringing the EEO team within the larger group of enforcement experts housed in the Enforcement Bureau. Among these benefits are integrating the EEO team with Enforcement Bureau staffers who have extensive experience with investigations and enforcement—and who are therefore well positioned to assist and guide EEO audit, review, and enforcement work. For now, the EEO rules themselves are not changing, but it is possible that the move will lead to more vigorous enforcement of those rules.

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

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