October 23, 2020

Legal Memorandum

*In this issue, please find information about*

|  |  |
| --- | --- |
| *Headlines:* | [FCC Establishes Firm Deadlines by Which Eligible Stations Affected by Spectrum Repack Must Submit Reimbursement Invoices](#_Apparent_Violations_of)  [FCC Announces 2021 Filing Window for New NCE FM Station Applications; Proposes Limits on Number of Applications](#_FCC_Announces_2021_1)  [2020 Annual Children’s Programming Report Form Now Available](#_2020_Annual_Children’s)  **Commission’s October 27, 2020, Open Meeting Preview:**  \* [Draft Report and Order Looks to Expand Video/Audio Description Requirements to DMAs 61–100 Over Next Four Year](#_Draft_Report_and)s  \* [Draft Report and Order Would Expand Unlicensed Operations in TV White Spaces; Addresses Some Broadcaster Interference Concern](#_Draft_Report_and_1)s  \* [Draft Report and Order Set to Permit AM Stations to Voluntarily Transition to All-Digital Operations](#_Draft_Report_and_2) |

# FCC Establishes Firm Deadlines by Which Eligible Stations Affected by Spectrum Repack Must Submit Reimbursement Invoices

Looking ahead to late 2021 and 2022, the FCC recently issued a [Public Notice](https://docs.fcc.gov/public/attachments/DA-20-1171A1.pdf) (the “Notice”) establishing firm deadlines by which eligible broadcasters affected by the now-concluded spectrum repack must submit all remaining reimbursement invoices and other documentation. The deadlines vary based on stations’ assigned transition Phases, as well as by type of broadcast service, as follows:

* **October 8, 2021:** Deadline for final reimbursement submissions from repacked stations assigned completion dates in Phases 1–5.
* **March 22, 2022:** Deadline for final reimbursement submissions from repacked stations assigned completion dates in Phases 6–10.
* **September 5, 2022:** Deadline for final reimbursement submissions from FM, LPTV, and translator stations, as well as others.

The deadlines are calibrated to try and provide FCC staff sufficient time to process requests prior to the deadline for reimbursement that is required by statute: on July 3, **2023**, any unobligated amounts currently earmarked for reimbursement will be released and deposited into the U.S. Treasury.

*Repack Background*. It’s hard to believe that nearly 8 years have passed since Congress authorized the spectrum repack back in 2012. As broadcasters know, after the FCC conducted its incentive auction for repacked broadcast spectrum, the Commission assigned to-be-repacked broadcasters to one of ten “Phases” during which they would transition to their new frequencies and facilities. The final Phase (Phase 10) transition deadline recently passed, on July 3, 2020.

All told, 987 full-power and Class A TV stations were repacked throughout the process, all of which have now vacated their pre-auction channels and over 92% of which have begun operating on their final facilities. The FCC granted special temporary authority and revised construction permit deadlines (to continue pursuing completion of their final facilities) to the 76 stations not yet operating on such final facilities.

More than 2,000 LPTV and TV translator stations were also displaced as a result of the repack, and some FM stations whose antennas are collocated on or near a tower supporting a repacked TV station antenna have incurred costs due to the new spectrum assignments. By July 13, 2021, LPTV and TV translator stations must complete their digital transition and cease analog operations. July 13, 2021, also serves as the deadline for licensees of eligible full power television stations to file for digital-to-digital replacement translator (“DTDRT”) service to recover lost digital service area that resulted from the repack.

*Reimbursement Background*. The Commission is required to reimburse broadcast television licensees for “costs reasonably incurred” in relocating to new channels assigned in the post-auction repacking process. Congress allocated $2.75 billion for reimbursement (the “Reimbursement Fund”) and to subsidize education efforts for over-the-air television viewers. As of this writing, the FCC has announced the issuance of three allocations of the Reimbursement Fund to repacked full-power and Class A television stations, totaling $1.808 billion. The first allocation was announced in October 2017; the second was announced in April 2018; and the third was announced in February 2019.  As of the announcement of the third allocation, eligible stations (commercial and noncommercial) had been provided access to approximately 92.5% of their estimated expenses. FM stations have also received an initial allocation, in December 2019, of approximately $17.2 million. LPTV and TV translator stations have seen an initial reimbursement allocation as well; the first allocation—of more than $87 million—was made in March 2020. As of September 29, 2020, the total of all verified estimates in the Reimbursement Fund was more than $2.177 billion; the total allocation was more than $2.016 billion; more than $1.323 billion had been forwarded to the U.S. Treasury for payment; and more than $78 million in invoices were at various stages of the review process.

*Reimbursement Process Going Forward and Filing Deadlines*. According to the Notice, the FCC anticipates that the number of reimbursement requests will continue to increase over the coming years, as eligible broadcasters incur expenses and submit invoices and other supporting documentation for reimbursement. Indeed, thus far only 8 entities have completed the interim procedures necessary to “close out” their books and accounts in the Reimbursement Fund. The Commission and Relocation Fund Administrator continue to review submissions for reasonableness and eligibility and, if approved, forward them to the U.S. treasury for payment.

Consequently, the Notice establishes the deadlines set forth in the bullet points above well in advance to ensure adequate time for review and processing of all reimbursement requests. Nonetheless, the Notice emphasizes that **broadcasters should submit reimbursement requests and initiate close out procedures “as early as possible”**. Expenses are reimbursable when incurred, and therefore can be submitted even while final construction remains ongoing. The Notice also indicates that the Commission does “not anticipate a need to grant extensions of the assigned deadlines” for reimbursement, and will only consider extension requests by entities with a first or second deadline assignment to be moved to the second or third deadline. Moreover, extension requests will only be granted in extreme circumstances outside of the entity’s control, such as local zoning or a “force majeure” event.

Finally, each broadcaster seeking reimbursement must remember to retain all documentation relating to reimbursement for a period ending 10 years after the date on which the broadcaster receives final payment from the Reimbursement Fund. All reimbursement submissions are subject to Commission review to prevent waste, fraud, and abuse, and therefore all broadcasters seeking reimbursement may be selected for audits, data validations, and site visits at any time—i.e., before or after a station has received reimbursement.

We will continue to monitor the status of the repack reimbursement landscape and keep you apprised of any significant developments.

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

# FCC Announces 2021 Filing Window for New NCE FM Station Applications; Proposes Limits on Number of Applications

By recent [Public Notice](https://docs.fcc.gov/public/attachments/FCC-20-145A1.pdf) (the “Notice”), the FCC has announced that an application filing window for new non-commercial educational (“NCE”) FM stations in the reserved band (i.e., channels 201–220) will be opened sometime in 2021. The Notice directs the Media Bureau to issue a future Public Notice announcing “the specific dates of the 2021 window” and, in the meantime, seeks comment on the tentative conclusion that parties seeking to apply for new NCE FM stations in the reserved band should be limited to a maximum of 10 applications during the forthcoming filing window.

Regarding that proposed limit of 10 applications per party, the Notice explains that the same application cap was imposed during the NCE filing window in October 2007; the Commission believes the cap was beneficial then—and would be beneficial again now. Among other things, the Notice tentatively concludes that the cap: helps to restrict the number of mutually exclusive applications; allows the Commission to process and grant “thousands of applications to a wide range of local diverse applicants” at a more expeditious rate than would be possible without the application cap; and deters mass “speculative” filings. However, the Notice seeks comment on those conclusions and the proposed 10-application limit in general, including whether the limit should be increased or decreased. (As currently proposed, the 10-application limit would apply such that no party to an application could hold attributable interests in more than a total of 10 applications filed in the window, and that any applications filed in excess of 10 would be dismissed.)

Comments on the proposed application limit will be due 15 days after the Notice is published in the *Federal Register*, with reply comments due 25 days after such publication.

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

# 2020 Annual Children’s Programming Report Form Now Available; Filing Deadline **February 1, 2021**

The Media Bureau has [announced](https://docs.fcc.gov/public/attachments/DA-20-1130A1.pdf) that the Children’s Television Programming Report form for the 2020 reporting period is now available in the FCC’s licensing and management system (“LMS”). The 2020 report, which will be the first full annual report filed under the Commission’s new Children’s Television Programming Rules, is due to be filed by February 1, 2021. (The Commission’s new rules technically require the report to be filed by January 30, 2021; however, because January 30, 2021, is a Saturday, the filing deadline for the 2020 report is extended to the next business day.)

The 2020 report will cover compliance from January 1, 2020, to December 31, 2020. Although broadcasters will be unable to actually file the 2020 report until January 1, 2021, the form’s early availability in LMS provides licensees with the opportunity to begin preparing their 2020 report now to help prevent a last-minute rush in the new calendar year. Again, this and all future Children’s Television Programming Reports **will cover an entire year’s worth of programming and compliance**, and thus will likely take substantially longer to complete than the prior, quarterly reports. With that in mind, the Media Bureau has indicated that in future years the reporting form will be made available in LMS much earlier—on the first day of the calendar year the report will cover. So, if all goes according to the Commission’s plan, licensees will be able to access next year’s 2021 Children’s Television Programming Report on January 1, 2021, and fill-in and save their progress completing the form throughout the year.

We encourage you to begin addressing your 2020 Children’s Television Programming Report soon. Should you have any further questions regarding how this first full annual report applies to your particular factual circumstance, you may wish to consult with your Communications Counsel or the Association Hotline.

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

# Draft Report and Order Looks to Expand Video/Audio Description Requirements to DMAs 61–100 Over Next Four Years

The Commission may soon expand the scope of its current video/audio description requirements to an additional 10 designated market areas (“DMAs”) per year for the next four years, according to a [Draft Report and Order](https://docs.fcc.gov/public/attachments/DOC-367362A1.pdf) (the “Draft R&O”) set to be considered at the Commission’s October 27, 2020, Open Meeting. If adopted, the Draft R&O also would modernize the terminology used in the Commission’s rules by replacing “video description” with the term “audio description” (but, for now, we’ll continue to use the term “video description”).

*Background*. The FCC’s video description rules for television stations have been in effect for several years. “Video description” is the term given for the audio-narrated descriptions of important visual elements in a television program inserted into natural pauses between a program’s dialogue. The video description rules apply to all television stations, including low power television stations, subject to any exceptions and exemptions that are otherwise applicable. Among the key provisions of the rules, the Commission currently requires certain television broadcast stations—those affiliated with the top-four commercial television broadcast networks and located in the top 60 television markets—to provide 50 hours of audio-described programming per calendar quarter during prime time or on children’s programming, as well as an additional 37.5 hours of audio-described programming per calendar quarter at any time between 6 a.m. and midnight.

Pursuant to federal statute, the FCC has been charged with monitoring the progress, costs, and benefits of video description deployment, including potential expansion to additional DMAs. As a result of that ongoing review, as we’ve previously reported, in April 2020 the Commission issued a [Notice of Proposed Rulemaking](https://docs.fcc.gov/public/attachments/FCC-20-55A1.pdf) (the “Notice”) seeking comment on expanding the current video description requirements to DMAs 61–100, and any costs and benefits associated with such expansion. According to the Draft R&O, no commenter opposed such an expansion.

*What the Draft R&O Would Do*. If adopted, some of the most important changes the Draft R&O would implement include the following:

* The expanded video description requirements would be phased in at a rate of 10 additional DMAs per year for four years, beginning on the later of January 1, 2021, or the effective date of the Commission’s final, adopted order. Once completed, the expansion would cover more than an additional 4.22 million television households.
* The Commission would defer until 2023 any decision as to whether to continue expanding the video description requirements to an additional 10 DMAs per year beyond DMA 100, subject to a future determination regarding the reasonableness of the costs associated with such further expansion.
* The Commission would revise all of its current rules to use the term “audio description” rather than “video description,” thus harmonizing the Commission’s terminology with that used by nearly all other federal agencies and various other entities and industry members. Notably, several industry members—including NAB—had proposed the terminological change to “audio description” as far back as 2011.

Because the Draft R&O has not yet been formally adopted by the Commission, certain specifics may change before the proposals are adopted. Accordingly, we will provide you with a more fulsome treatment of the Commission’s video description rule changes when and if they are adopted, after the Commission’s October Open Meeting.

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

# Draft Report and Order Would Expand Unlicensed Operations in TV White Spaces; Addresses Some Broadcaster Interference Concerns

One of the current items set for consideration at the Commission’s October 27, 2020, Open Meeting is a [Draft Report and Order](https://docs.fcc.gov/public/attachments/DOC-367358A1.pdf) (the “Draft R&O”) that, if adopted, would significantly expand the coverage area for unlicensed white space devices operating in the TV bands. Although the current version of the Draft R&O walks back some of the more-concerning proposals initially outlined in a March 2020 [Notice of Proposed Rulemaking](https://docs.fcc.gov/public/attachments/FCC-20-17A1.pdf) (the “Notice”), the Draft R&O is still of significant interest to broadcasters, as the FCC’s proposed increases in power and antenna height necessary to expand the coverage of such unlicensed white space operations have the potential to cause harmful interference to existing broadcast operations.

*Background*. White space devices operate in unused portions of the TV bands (so-called “white spaces”), and generally provide wireless services such as broadband. The Commission’s current rules require such devices to operate at relatively low power (10 watts) and at antenna heights that do not exceed 30 meters above ground (or, for fixed white space devices that operate in “less congested” areas, no more than 100 meters above ground) and do not exceed 250 meters height above average terrain (“HAAT”). However, for years Microsoft and others have argued to the Commission that the current restrictions on unlicensed white space operations make it difficult to provide cost-effective broadband services to underserved areas, including parts of rural America. As part of its advocacy, in May 2019 Microsoft filed a petition for rulemaking with the FCC, seeking to initiate a proceeding that would, ultimately, lead to greater flexibility in white space operations; Microsoft’s petition gave rise to the March 2020 Notice underlying the Draft R&O.

*What the Draft R&O Would Do*. The Draft R&O, if adopted, would generally create more flexible rules and permit expanded white space operations in the TV bands up to Channel 35, with the goal of spurring the provision of “affordable broadband service to rural and unserved communities t[o] help close the digital divide.” Notably, however, the Draft R&O also attempts to account for certain concerns raised by broadcasters in response to the Notice, with the stated intent of striking a balance sufficient to “protect[] broadcast television stations in the band from harmful interference.”

Because the Draft R&O is currently still just that—a draft—we will provide additional analysis if and when the draft is adopted and released in its final form. However, for now, some of the most important aspects of the Draft R&O include the following:

* For fixed white space devices operating in “less congested” geographic areas (that is, in “areas where at least half the television channels in the band of operation are not in use”), the maximum permissible power would be increased from 10 watts to 16 watts and the maximum permissible antenna HAAT would be increased from 250 meters to 500 meters.
* The maximum permissible power would be increased for mobile white space operations within geo-fenced areas and “less congested” areas, subject to the requirements (1) that such white space devices’ locations be checked at least once every 60 seconds while in operation (unless in “sleep” mode) and (2) that geo-fenced operations comply with the minimum required separation distances from protected services at all locations within a geo-fenced area.
* To accommodate the foregoing increases to authorized power and antenna heights, the minimum required separation distances between white space devices operating at higher powers or HAATs and protected services in the TV bands will also be increased, in line with NAB-supported proposals set forth in the Notice.
* New coordination procedures would be required whenever a party wishes to operate a fixed white space device at a HAAT greater than 250 meters, including by notifying potentially affected TV stations of the geographic coordinates of the white space device, relevant technical parameters of the proposed deployment, and contact information for the entity proposing the operations. Such notification would have to be provided at least four calendar days in advance of the date on which the proposed operations would commence (a 2-day increase from the Notice’s proposed procedures).
* The Draft R&O would decline to adopt the Notice’s proposal to change the methodology used to protect authorized services within the TV bands.

Additionally, the Draft R&O several times emphasizes that parties “operating white spaces devices on an unlicensed basis have an ongoing obligation under the rules to cease operation if harmful interference occurs to any authorized service.” In line with that emphasis—and as a significant potential “win” for broadcasters—the Draft R&O would “at this time” decline to increase the maximum permissible power for white space devices operating inside the protected contour of adjacent channel TV stations. That issue was a particular point of emphasis for NAB; NAB submitted comments opposing Microsoft’s proposal to increase the maximum permissible power for such operations and disputing Microsoft’s analysis of the potential for interference that would be created under the proposal. Nonetheless, the Draft R&O squarely leaves the issue on the table for potential future proceedings, stating that: “We encourage Microsoft and other parties to continue studies and white space device and TV receiver testing to determine whether or how we can permit higher power for white space devices without causing harmful interference to TV reception.” We’ll keep you posted.

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

# Draft Report and Order Set to Permit AM Stations to Voluntarily Transition to All-Digital Operations

In what could be welcome news for AM broadcasters, the Commission is currently set to consider a [Draft Report and Order](https://docs.fcc.gov/public/attachments/DOC-367361A1.pdf) (the “Draft R&O”) that—if adopted—would provide AM broadcasters the opportunity to voluntarily transition to all-digital broadcasting. The Draft R&O follows a November 2019 [Notice of Proposed Rulemaking](https://docs.fcc.gov/public/attachments/FCC-19-123A1.pdf) (the “Notice”) addressing the issue, and marks the latest action taken in furtherance of the FCC’s ongoing AM Revitalization proceeding. As indicated in the Draft R&O, the Commission appears to believe that enabling “all-digital service represents a significant and perhaps singular opportunity to preserve the AM service for future listeners.”

As proposed in the Notice, the Draft R&O would permit AM broadcasters to voluntarily transition to all-digital broadcasting—that is, each AM broadcaster would be able to determine for itself whether or not to transition to all-digital broadcasting. According to the Draft R&O and comments submitted in support of the Notice, all-digital AM broadcasting has the potential to: reach more listeners with better audio quality, and to therefore increase format choices (for example, music programming would become more viable for AM stations); improve power usage and spectrum efficiency; provide more reliable signals; and possibly enable future multicasting of separate AM audio sub-channels. (Thus far, many of those potential benefits appear to have been borne out in at least one instance: in the case of the experimental operation of an all-digital station in Maryland pursuant to special temporary authorization, all-digital AM operation significantly improved station audio quality, signal robustness, and daytime coverage, and the experimental operation likely contributed to the station moving from unranked status to obtaining a Nielsen ranking in its market.)

Although the Draft R&O acknowledges that some “consumer disruption” could occur when an AM station voluntarily elects to transition to all-digital service, it leaves it to each AM broadcaster to determine whether such consumer disruption is acceptable. Put differently: “Because radio advertising revenues are almost exclusively based on audience size, broadcasters have a compelling incentive to reach as many listeners as possible and to minimize any loss of listeners through a change in transmission technology by waiting until a significant portion of those consumers can receive the station digitally.” On that same point, the Draft R&O notes that potential transitions are likely to be eased by the fact that more than 2800 AM stations currently utilize a cross-service FM translator to augment their AM signal delivery.

The Draft R&O contains additional information regarding the anticipated costs for various categories of AM stations to transition to all-digital operation, various operational and technical rules, and required notification procedures for AM stations that voluntarily transition to all-digital operations, among other things. However, because the Draft R&O still may undergo changes prior to Commission consideration at the October 27, 2020, Open Meeting, we will wait until the Draft R&O is finalized to provide you with a full-scale treatment of those additional issues.

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

*Tim Nelson, Editor*

[BROOKS, PIERCE, McLENDON,](http://www.brookspierce.com/)

[HUMPHREY & LEONARD, L.L.P.](http://www.brookspierce.com/)

[Mark J. Prak](mailto:mprak@brookspierce.com)   
[Marcus W. Trathen](mailto:mtrathen@brookspierce.com)  
[David Kushner](mailto:dkushner@brookspierce.com)  
[Coe W. Ramsey](mailto:cramsey@brookspierce.com)  
[Stephen Hartzell](mailto:shartzell@brookspierce.com)

[Julia C. Ambrose](mailto:jambrose@brookspierce.com)

[Elizabeth E. Spainhour](mailto:espainhour@brookspierce.com)

[J. Benjamin Davis](mailto:bdavis@brookspierce.com)

[Timothy G. Nelson](mailto:tnelson@brookspierce.com)

[Patrick Cross](mailto:pcross@brookspierce.com)

**\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_**

This Legal Review should in no way be construed as legal advice or a legal opinion on any specific set of facts or circumstances. Therefore, you should consult with legal counsel concerning any specific set of facts or circumstances.

**\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_**

© 2020 Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P.