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Legal Memorandum

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# Comments Mixed on Commission Proposal to Permit FM Booster Stations to Air Specified Amounts of Geo-Targeted Content

Broadcasters thus far appear divided on the merits to and potential risks arising from a [Notice of Proposed Rulemaking](https://docs.fcc.gov/public/attachments/FCC-20-166A1.pdf) (the “Notice”) in which the Commission has proposed allowing radio broadcasters to use FM booster stations to air geo-targeted content—independent of their primary stations—in certain limited circumstances. The first round of comments submitted in response to the Notice ranged from full-on support for the proposal, to suggested modifications to the proposal, to full-on disagreement with the proposal; taken together, the comments signal varying levels of concern with the potential effects that the FCC’s proposal could have on radio advertising rates, interference, and the FM noise floor.

*Background*. FM booster stations were first authorized in 1970 as a low power secondary service designed to address FM station signal loss that can occur within a primary FM station’s authorized service contour. Under current FCC rules, FM booster stations may only be licensed to the licensee of the primary station; must operate on the same frequency as the primary station; are limited to rebroadcasting the signal of the primary station (i.e., booster stations may not transmit original content); and are not permitted to cause adjacent-channel interference to other primary services or previously authorized secondary stations.

Fast forward half a century to the end of 2020, when the FCC issued the Notice seeking comment on whether to make changes to the foregoing rules in order to “enable FM broadcasters to use FM booster stations to air geo-targeted content (e.g., news, weather, and advertisements) independent of the signals of [the] primary station within different portions of the primary station’s protected service contour for a limited period of time during the broadcast hour.” The Notice was issued in response to a Petition for Rulemaking (the “Petition”) submitted by GeoBroadcast Solutions LLC—a company that has developed a product with the trademarked name “ZoneCasting,” which purportedly allows FM broadcasters to use FM booster stations to air geo-targeted content. The Commission sought stakeholder comment on the claims made in the Petition—including the claim that any interference resulting from ZoneCasting would be minimal—as well as whether the Notice’s proposals would be beneficial for broadcasters and the public if adopted.

*Commenters’ Responses Thus Far*. Although the majority of commenters supported the underlying Petition, comments in response to the FCC’s Notice were substantially more mixed. Perhaps most notably, NAB—who supported the Petition—filed comments that “strongly oppose[] revising the booster rule.” Among the various concerns raised by commenters, NAB and multiple smaller broadcasters noted that geo-targeting could “undermine the industry’s fundamental business model” by allowing advertisers to cherry-pick the areas to which they advertise, thus causing advertising rates to fall and disadvantaging smaller stations serving sub-markets “or even neighborhoods within the larger market” that advertisers might not be willing to pay to reach. Other commenters worried that increased booster deployment could lead to harmful interference and an increased FM noise floor (i.e., the base-level of unwanted noise/white noise/static that tends to increase as more radiators are deployed). At the same time, however, many smaller broadcasters filed comments in favor of the Notice’s proposals, arguing that geo-targeted broadcasting would be useful in combating competition from internet advertising and could help smaller stations and minority broadcasters provide more community-specific content.

Reply comments on the Notice are due March 12, 2021.

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# DTS/SFN Rules to be Modified to Accommodate Defined Amount of Spillover and Increase Transmitter Placement Flexibility

The Commission has adopted a [Report and Order](https://docs.fcc.gov/public/attachments/FCC-21-21A1.pdf) (the “Order”) “modestly easing limitations” on transmitter deployment for distributed transmission systems (“DTSs,” also known as single frequency networks, or “SFNs”) and providing additional clarity regarding certain aspects of the FCC’s DTS rules. Of particular note, the Order (1) redefines—and, in so doing, slightly liberalizes—the permissible amount of spillover beyond a station’s authorized service area that a DTS transmitter may cause; and (2) removes the requirement that Class A, LPTV, and TV translator stations apply for experimental authorization when seeking to deploy DTS. The Order hopes these actions will help to “unlock the potential of DTS at this crucial time when many stations are considering migrating to the next generation broadcast television standard (ATSC 3.0)” (i.e., “NextGen TV”).

*Background*. DTS networks permit digital television (“DTV”) stations to address signal loss throughout the station’s authorized service area by deploying two or more DTS transmission sites within the station’s service area, all of which broadcast using the same RF channel and are synchronized to manage self-interference. DTS networks therefore allow broadcasters to avoid signal-reach limitations that might result from operating a single transmitter site and to augment the primary station’s signal by deploying additional transmitters that operate on the same RF channel throughout the station’s authorized service area (as compared to, for example, operating television translators on different RF channels than the main facility).

Although there are currently fewer than two-dozen active DTS stations, NAB and others have argued—most notably in a 2019 Petition for Rulemaking (the “Petition”)—for various DTS rule changes that could help spur DTS deployment. Among other requested rule changes, the 2019 Petition targeted the current DTS rules’ prohibition on DTS deployment that would result in an extension of coverage beyond the station’s authorized service area by more than a “minimal amount,” arguing that such an uncertain and strict standard has inhibited DTS employment. The Petition further argued that the DTS rules are ripe for reconsideration and modification, given that signal and system characteristics of ATSC 3.0 make DTS deployment more efficient and economical for NextGen TV broadcasters and, therefore, DTSs would be more apt for broadcaster use going forward if the current regulatory uncertainties and limitations are removed.

*What the Order Does*. The Order follows up on an April 2020 Notice of Proposed Rulemaking (issued in response to the 2019 Petition) and adopts rule changes that—once they take effect—are intended to slightly relax and clarify certain existing FCC rules governing DTS deployment. At the same time, the Order attempts to balance those liberalizing rule changes against the concerns of LPTV stations, TV translator stations, and other spectrum users (including those deploying broadband white space devices).

The Order will update the DTS rules to accommodate increased permissible spillover limits (i.e., greater than the existing “minimal amount” standard) beyond a station’s authorized service contour, but with the caveat that the station’s area of interference protection will remain the same (i.e., DTS signals will continue to receive no interference protection in spillover areas). Specifically, once the new rules announced in the Order take effect, permissible spillover will be defined as follows: “for UHF stations, the 41 dBu F(50,50) contour for each DTS transmitter must remain fully within the 41 dBu F(50,50) contour for the overall reference facility;” and “for Low VHF and High VHF stations, the corresponding dBu values will be 28 dBu and 36 dBu, respectively.” According to the Order, the Commission “expect[s] that our revised rule, given the contour it applies, is a reasonable approach that will not have a significant impact on authorized secondary licensees or unduly limit entry of new secondary licensees” such as LPTV or TV translator stations.

The Order also takes steps to “ease the way for Class A, LPTV, and television translator stations . . . to pursue DTS operations” by streamlining the future DTS licensing process for such stations. Specifically, the Order will remove the current requirement for such stations to apply for DTS facilities on an experimental basis prior to operation, and instead will permit such stations to deploy DTS facilities so long as those facilities meet the following conditions: “first, DTS transmitters must be located within the authorized F(50,90) contour for the station, and second, the F(50,50) contour of each DTS must be contained within the station’s F(50,50) contour based on currently authorized technical parameters (as opposed to an authorized service area drawn according to a Table of Distances).”

The rules still must go through various additional regulatory steps before taking effect. We will continue to monitor the rules’ progression through the regulatory system and keep you apprised of important future developments.

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# Commission Clarifies Treatment of Ancillary and Supplementary Services Fees in Context of ATSC 3.0 Deployment, Grants NCE Stations Leeway

With ATSC 3.0 deployment continuing across the nation, the Commission adopted a [Report and Order](https://docs.fcc.gov/public/attachments/FCC-20-181A1.pdf) (the “Order”) in December (which was published in the *Federal Register* this week) addressing multiple issues related to the deployment of ATSC 3.0 and the accompanying opportunity for the delivery of IP-based ancillary and supplementary services using those new, “NextGen TV” signals. Most notably, the Order (1) clarifies how ancillary and supplementary services fees will be calculated in the context of ATSC 3.0 station arrangements and (2) grants non-commercial educational television licensees (“NCE”) leeway in providing such ancillary and supplementary services. The clarifications and rules set out in the Order are currently set to take effect on March 25, 2021.

*Background*. As you know, back in 2017 the Commission adopted rules designed to permit TV broadcasters to implement the “NextGen” ATSC 3.0 transmission standard on a voluntary, market-driven basis. As compared to the existing ATSC 1.0 standard, one of several advantages ATSC 3.0 signals enjoy is greater spectral capacity, which permits higher quality video and audio transmissions, greater programming choices, and “broadcast internet” offerings that leverage ATSC 3.0’s IP-based standard. As summarized in the Order, such “broadcast internet” offerings can include innovative services that are ancillary or supplementary to traditional broadcast offerings, such as facilitating needs for telemedicine or smart agriculture devices and providing software and cybersecurity updates to other internet-connected devices.

Under federal law and current FCC rules, broadcasters must pay a fee to the extent they use the digital television (“DTV”) spectrum to provide ancillary and supplementary services (1) “for which the payment of a subscription fee is required in order to receive such services,” or (2) “for which the licensee directly or indirectly receives compensation from a third party in return for transmitting material furnished by such a third party (other than commercial advertisements used to support broadcasting for which a subscription fee is not required).” Federal law requires the Commission to adjust the ancillary and supplementary services fee amount “from time to time” in order to ensure that the fees adequately compensate the public for the value of the spectrum being used for such ancillary and supplementary services. The fee is currently set at 5% of gross revenue received by the broadcaster deploying the ancillary and supplementary services.

*What the Order Primarily Does – and Why It’s Important to Broadcasters*. Although the Order addresses multiple issues related to the deployment of ATSC 3.0 and the accompanying opportunity for the delivery of IP-based ancillary and supplementary services, the primary items of which broadcasters should take note relate to (1) how such fees are calculated and (2) the relevant fee amount for NCE broadcasters. As to the first item, the Order makes clear that fees owed by broadcasters should be calculated based on the gross revenues received by the broadcaster, rather than revenue received by a spectrum lessee (i.e., an entity that is leasing part of the broadcaster’s licensed spectrum for its own use). Importantly, however, when a spectrum lessee is affiliated with a broadcaster, the amount of gross revenue “received by the broadcaster” will be calculated to include a share of the lessee’s gross revenue that is proportional to the licensee’s stake in the lessee. (So, for example, if Broadcaster A leases part of its spectrum to Lessee Z, and if Broadcaster A owns 25% of Lessee Z, then the gross revenue “received by the broadcaster” will be calculated to include both the gross revenue received directly by Broadcaster A and 25% of the gross revenue received by Lessee Z.)

As to the second item (that is, the relevant ancillary and supplementary fee amount for NCE broadcasters), although the Order retains the current 5% fee for commercial broadcasters, the Order adopts a lower, 2.5% fee amount for NCE broadcasters when those broadcasters provide nonprofit, noncommercial, and educational ancillary and supplementary services (also termed “primary” services by the Order). By contrast, in certain circumstances, NCE broadcasters may also provide ancillary and supplementary services that are not“primary,” nonprofit, noncommercial, and educational—including commercial services; such “non-primary” services are subject to the standard commercial fee of 5% of gross revenues. Put differently, the applicable fee amount for ancillary and supplementary services provided by NCE broadcasters will vary based on the type/classification of the ancillary and supplementary service.

Note, too, that NCE broadcasters are also limited in the amount of “non-primary” ancillary and supplementary services they may provide. The Order specifies that each NCE station must dedicate the substantial majority (a term which the Order expressly declines to define “at this time”) of its 6 MHz channel capacity to a combination of free, over-the-air nonprofit, noncommercial, educational, television broadcast services and any nonprofit, noncommercial, educational ancillary and supplementary services the station chooses to provide. The Order also clarifies that when NCE broadcasters provide “donor exclusive” ancillary and supplementary services that are nominal in value in return for contributions, the Commission will not treat such contributions as “subscription fees” under the ancillary and supplementary services rules. Although the Order does not draw a precise line as to when “donor exclusive” ancillary and supplementary services will satisfy the foregoing exception, the Order suggests that its intent is to create an ancillary and supplementary services analogue to “e.g., coffee mugs [and] tote bags.”

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As noted above, the Order address multiple other issues related to the deployment of ATSC 3.0 and the accompanying opportunity for the delivery of IP-based ancillary and supplementary services. We encourage you to consult your communications counsel with any questions as to whether or how the Order addresses your unique factual circumstance.

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# Repack Status Update; LPTV and TV Translator Repack Reimbursement Allocation Increased to 92.5 Percent of Verified Estimates

A [Public Notice](https://docs.fcc.gov/public/attachments/DA-21-22A1.pdf) (the “Notice”) recently released by the FCC’s Incentive Auction Task Force and Media Bureau (the “Bureau”) provides an update on the status of the spectrum repack, as well as an announcement that LPTV and TV translator stations seeking reimbursement for repack-related expenses may soon receive up to 92.5% of their currently verified estimated costs. The 92.5% allocation amount reflects an increase from the prior, 85% allocation amount for LPTV and TV translator stations, and it places such stations on parity with the reimbursement allocation percentages for all other entities affected by the repack.

*Repack Background and Status Update*. As broadcasters are well aware, it’s been a long road since the spectrum repack began in earnest in April 2017, when the FCC announced the results of the Incentive Auction and the beginning of the transition period. The final, “Phase 10” transition completion date passed back in July 2020, marking the endpoint for repacked stations to transition to their post-auction channels.

According to the Notice, all repacked stations have now vacated their pre-auction channels. Additionally, as of January 4, 2021, over 95 percent of those repacked stations are operating on their final facilities; 41 stations are still operating pursuant to special temporary authority while they continue to pursue completion of their final facilities. Many of the approximately 2,000 LPTV and TV translator stations that were granted construction permits in light of their displacement in the “rebanding” and repacking process continue to work to meet their construction permit deadlines.

*Reimbursement Background and Status Update*. As we have previously written, Congress provided $2.75 billion to reimburse certain costs associated with the post-Incentive Auction transition. In order to qualify for such funds, LPTV and TV translator stations—just like full-power and Class A television stations—had to certify to the Bureau that they meet required eligibility criteria and provide documentation or other evidence to support that certification.

According to the Notice, as of early January 2021, the Bureau has included in the reimbursement fund 873 LPTV/Translator stations, 89 FM stations, 181 MVPDs, and 957 repacked full power and Class A television stations. Across those entities, the total of all verified reimbursement estimates was over $2.19 billion, the total allocation was over $2.021 billion, over $1.437 billion had been forwarded to U.S. Treasury for payment, and more than $55 million in invoices were at various stages of the Commission’s review process. All told, the Bureau has received more than 93,000 reimbursement invoices in more than 31,000 separate submissions.

*LPTV and TV Translator Reimbursement Allocation Increase*. In late 2019 and early 2020, the Bureau received 947 LPTV and TV translator station filings for reimbursement, approved 844 for reimbursement, and made an initial allocation of approximately $87 million—i.e., 85% of those stations’ verified cost estimates. The Bureau determined at the time that 85% was an appropriate allocation percentage in light of concerns that LPTV and TV translator stations’ verified reimbursement estimates could continue to rise.

The Bureau has now had “roughly 10 months of experience” since it made the initial 85% allocation to such stations; enough time, according to the Notice, for the Bureau to become comfortable with increasing the allocation amount to 92.5% of LPTV and TV translator stations’ verified reimbursement estimates. In particular, although the number of LPTV and TV translator stations approved for reimbursement has increased to 873, the Notice states that “estimated cost figures for the overall LPTV/Translator category have decreased.” The new allocation percentage brings LPTV and TV translators in line with all other entities participating in reimbursement, and brings the total reimbursement allocation across all entities to more than $2.028 billion.

According to the Notice, when the FCC issues its allocation increase to the account for each individual LPTV and TV translator station, the designated reimbursement representative for that station will receive a direct e-mail communication from the Bureau describing the precise allocation adjustment. After that email communication is received by the station’s designated reimbursement representative, the station’s individual allocations will be available for viewing in the “Auction Payments” component of the Commission Registration System’s (“CORES”) Incentive Auction Financial Module.

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*Tim Nelson, Editor*

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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.

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