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VIA ELECTRONIC FILING

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Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street SW
Washington, DC 20554

Re: Notice of Ex Parte Communications
LPTV, TV Translator, and FM Broadcast Station Reimbursement; Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions
MB Dkt. No. 18-214; GN Docket No. 12-268

Dear Ms. Dortch:

On behalf of Fifth Street Enterprises, The Videohouse, Inc., and WMTM, LLC (the “Excluded LPTV Licensees”), the undersigned and Joan Stewart met on March 4, 2019 with (1) Michael Scurato from Commissioner Starks’ office; and (2) the following staff of the Media Bureau, Incentive Auction Task Force, and Office of the General Counsel: Barbara Kreisman, Joyce Bernstein, Maria Mullarkey, Jean Kiddoo, Hillary DeNigro, and David Konczal; and on March 5, 2019 with (1) Alex Sanjenis from Chairman Pai’s office; (2) Joel Miller from Commissioner O’Rielly’s office; (3) Kate Black from Commissioner Rosenworcel’s office; and (4) Evan Swarztrauber from Commissioner Carr’s office.

The Excluded LPTV Licensees are the licensees of low power television stations that were accorded primary status as Class A television licensees after February 12, 2012 (the “Excluded LPTV Stations”). Under the draft order, these would be the only three television stations of any license status that: (i) were displaced as a result of post-incentive auction transition, (ii) operating during the 12 months prior to April 13, 2017, and (iii) timely filed applications for their post-auction facilities, but that nevertheless would not be eligible for reimbursement from funds allocated in either the Spectrum Act or the Reimbursement Extension Act (“REA”).

The representatives of the Excluded LPTV Licensees explained that, consistent with both the intent of Congress in adopting the REA¹ and of the Commission in this proceeding,² the REA

¹ Press Release, Rep. Greg Walden, Chairman, House Energy and Commerce Committee, “Chairman Walden Statement on FCC Allocating \$742M in TV Station Repack Funding” (Apr. 16, 2018), available at <https://energycommerce.house.gov/news/press-release/chairman-walden-statement-on-fcc-allocating-742m-in-tvstation-repack-funding/> (“proclaiming that Congress, in adopting the REA, was “upholding our commitment to broadcasters across the country” by “provid[ing] reimbursement for those broadcasters who were displaced after the successful incentive auctions”).

² See Statement of Commissioner Michael O’Rielly, *In the Matter of LPTV, TV Translator, and FM Broadcast Station Reimbursement Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*,

provides the Commission with authority to reimburse the Excluded LPTV Licensees for the reasonable costs they will incur due to being displaced in the post-Incentive Auction transition. The representatives urged the Commission to adopt definitions of “low power television station” and “Special Displacement Window” that are more consistent with the plain language of the REA and the intent of both Congress and the FCC to provide reimbursement to all displaced stations that timely filed applications for their post-auction facilities.

The REA provides that “the Commission shall reimburse costs reasonably incurred by a television translator station or low power television station on or after January 1, 2017, in order for such station to relocate its television service from one channel to another channel or otherwise modify its facility as a result of the reorganization of broadcast television spectrum under subsection (b). Only stations that are eligible to file and do file an application in the Commission’s Special Displacement Window are eligible to seek reimbursement under this paragraph.”³ The statute goes on to define a “low power television station” as “a low power TV station (as defined in section 74.701 of title 47, Code of Federal Regulations) that was licensed and transmitting for at least 9 of the 12 months prior to April 13, 2017. For purposes of the preceding sentence, the operation of analog and digital companion facilities may be combined.”⁴ Therefore, to be eligible for reimbursement under the REA, a station must: (1) be “a television translator station or low power television station”; (2) have been licensed and transmitting for at least 9 of the 12 months prior to April 13, 2017; (3) be “eligible to file and do file an application in the Commission’s Special Displacement Window”; and (4) have incurred expenses after January 2017.

As an initial matter, stations with Class A status are low power television stations that are subject to additional responsibilities and entitled to additional benefits. Section 74.701 of the Commission’s Rules defines a low power TV station as “[a] station authorized under the provisions of this subpart that may retransmit the programs and signals of a TV broadcast station and that may originate programming in any amount greater than 30 seconds per hour and/or operates a subscription service.”⁵ This definition is neither inclusive nor exclusive of stations with Class A status. However, Section 73.6002 of the Commission’s Rules, which sets

Notice of Proposed Rulemaking, FCC 18-113, MB Dkt. No. 18-214, GN Dkt. No. 12-268 (rel. Aug. 3, 2018) (expressing view that by expanding reimbursement, “the commitment to hold broadcasters harmless throughout the incentive auction repack process should be a firm reality”); See Statement of Commissioner Brendan Carr, *In the Matter of LPTV, TV Translator, and FM Broadcast Station Reimbursement Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, Notice of Proposed Rulemaking, FCC 18-113, MB Dkt. No. 18-214, GN Dkt. No. 12-268 (rel. Aug. 3, 2018) (declaring that the REA had fulfilled the promise that “broadcasters should be reimbursed for costs they incur in the repacking process”).

³ 47 U.S.C. § 1452(k)(1).

⁴ *Id.* § 1452(k)(5)(A).

⁵ 47 C.F.R. § 74.701.

forth the licensing requirements for Class A stations, specifies that “[a] Class A television broadcast license will only be issued to **a qualified low power television licensee**”⁶ Therefore, to be afforded Class A status under the FCC’s rules, a station must be a low power television station.

The plain text of the REA makes clear that Congress considers stations with Class A status to be low power television stations. Under the heading “Duplicative Payments Prohibited,” the REA specifically prohibits “**a low power television station that has been accorded primary status as a Class A television licensee** under section 73.6001(a) of title 47, Code of Federal Regulations” from receiving reimbursement funds from both the Spectrum Act and the REA.⁷ Thus, Congress clearly recognized that when the FCC accords a station Class A status, the station remains a low power television station. Any other interpretation of Section 1452(k)(3) would render this section superfluous and should be avoided, because a station that received reimbursement pursuant to the Spectrum Act (because it was a Class A station) could not have received reimbursement under the REA if it was not also a “low power television station.”⁸

Separate from this clear reading of the Commission’s rules and the REA, the Commission should determine the status of the Excluded LPTV Stations as of the same date it previously determined they were LPTV stations under the Spectrum Act. The REA is silent as to when a station must have been a low power television station. The only reference to a date refers to a specific period when the station must have been licensed and transmitting (“for at least 9 of the 12 months prior to April 13, 2017”), not its licensed status at that time.⁹ However, the Commission has already determined that a station’s eligibility for reimbursement should be based on its license status as of February 22, 2012,¹⁰ and there is no reason to apply a different date for reimbursements relating to the same channel reassignment process. Accordingly, the Commission should find that to qualify as a low power television station under the REA, a station must have been a low power TV station as of February 22, 2012 and have been licensed and transmitting for at least 9 of the 12 months prior to April 13, 2017.

⁶ *Id.* § 73.6002 (emphasis added).

⁷ See 46 U.S.C. § 1452(k)(3) (emphasis added).

⁸ See *Hibbs v. Winn*, 542 U.S. 88, 101 (2004) (“A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant...”); *Astoria Federal Savings & Loan Ass’n v. Solimino*, 501 U.S. 104, 112 (1991) (“But of course we construe statutes, where possible, so as to avoid rendering superfluous any parts thereof.”).

⁹ See *id.* § 1452(k)(5)(A).

¹⁰ See *Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, Report and Order, 29 FCC Rcd. 6567 ¶ 601 (2014) (“*Incentive Auction R&O*”), *aff’d*, *Nat’l Assoc. of Broadcasters, et al. v. FCC*, 789 F.3d 165 (D.C. Cir. 2015).

Second, the Commission should construe the term “Special Displacement Window” consistent with the “limited window” that the FCC described in the *Incentive Auction R&O*. Congress did not define the term “Special Displacement Window” in the REA, providing the Commission with discretion to interpret this term.¹¹ To this day, the FCC has never defined the term “Special Displacement Window” in a Commission-level order.¹² In the *Incentive Auction R&O*, however, the Commission described a “displacement process” for LPTV stations “that are displaced as a result of the incentive auction or the repacking process.”¹³ Under this “process,” a “limited window” would be “open only to operating stations that (1) are displaced by a full power or Class A television station as a result of the incentive auction or the repacking process, (2) will cause interference to or receive interference from frequencies repurposed for new, flexible use by a 600 MHz Band wireless licensee, or (3) are licensed on frequencies that will serve as part of the 600 MHz Band guard bands.”¹⁴ In discussing the scope of this section, the *Incentive Auction R&O* referred to those facilities to which the Commission declined to extend discretionary protection, which include the Excluded LPTV Stations.¹⁵ Thus, the FCC clearly intended to include the Excluded LPTV Stations in the “limited window” that would become the “Special Displacement Window.”¹⁶

Indeed, the term “Special Displacement Window” does not appear anywhere in the FCC’s Rules. However, Section 73.3700(g) of the Commission’s Rules confirms that “[l]icensees of operating low power TV and TV translator stations,” which would include the Excluded LPTV Stations, “shall be permitted to submit an application for displacement relief in a restricted filing window to be announced by the Media Bureau by public notice.”¹⁷ That the Media

¹¹ See *Nat’l Ass’n of Broadcasters v. F.C.C.*, 789 F.3d 165, 171, 183 (D.C. Cir. 2015) (explaining that “if the statute is silent or ambiguous with respect to the specific issue,” the Commission may resolve such ambiguities) (citing *Chevron, U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984); *Mako communications, LLC v. Fed. Commc’ns Comm’n*, 835 F.3d 146, 150 (D.C. Cir. 2016) (“A ‘reasonable’ explanation of how an agency’s interpretation serves the statute’s objectives is the stuff of which a ‘permissible’ construction is made.”) (quoting *Northpoint Tech., Ltd. v. FCC*, 412 F.3d 145, 151 (D.C. Cir. 2005))).

¹² Although the draft order cites to a footnote in the FCC’s 2017 Order regarding the next generation broadcast television standard, the cited footnote was part of the document that related to a further notice of proposed rulemaking, not the order itself. Moreover, the footnote did not purport to adopt any definition of the term “Special Displacement Window,” but merely acknowledged that the Special Displacement Window was part of the “39-month post-incentive auction transition.” See *Authorizing Permissive Use of the “Next Generation” Broadcast Television Standard*, Report and Order and Further Notice of Proposed Rulemaking, 32 FCC Rcd. 9930, n.370 (2017).

¹³ See *Incentive Auction R&O* ¶ 186.

¹⁴ *Id.* ¶ 659.

¹⁵ *Id.* ¶ 656 & n.1824 (citing to the section on “Facilities That Will Not Receive Discretionary Protection”).

¹⁶ To the extent any subsequent order on delegated authority adopted a more narrow definition of the term “Special Displacement Window,” this would not be binding on Congress or the Commission.

¹⁷ 47 C.F.R. § 73.3700(g).

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Bureau (consistent with the *Incentive Auction R&O*) included a priority filing opportunity within the “restricted filing window” that would come to be known as the “Special Displacement Window” does not change the fact that the Excluded LPTV Stations filed within this window, as defined in the Commission’s Rules. At the very least, given the ambiguity in the statute and the FCC’s Rules, the Commission has authority to determine the meaning of the term “Special Displacement Window.”¹⁸

Finally, the representatives of the Excluded LPTV Stations noted that interpreting the REA in a manner that includes the Excluded LPTV Stations will not open the floodgates to other parties seeking reimbursement or materially impact the distribution of reimbursement funds. While there may be other parties impacted by the post-incentive auction transition, the Excluded LPTV Stations are the only stations that were displaced as a result of the transition, were operating during the required time frame, and timely filed applications for their post-transition facilities, but that would be entirely ineligible for reimbursement.

Pursuant to Section 1.1206(b)(2) of the Commission’s Rules, a copy of the statutory and regulatory summary presented to each of the FCC participants.

Respectfully Submitted,



Ari Meltzer

¹⁸ See Note 11, *supra*.

Fifth Street Enterprises/The Videohouse, Inc./WMTM, LLC - Key Statutory/Regulatory Provisions

47 U.S.C. § 1452(k)(1) – Payment Required

From amounts made available under subsection (j)(2), the Commission shall reimburse costs reasonably incurred by a television translator station or low power television station on or after January 1, 2017, in order for such station to relocate its television service from one channel to another channel or otherwise modify its facility as a result of the reorganization of broadcast television spectrum under subsection (b). Only stations that are eligible to file and do file an application in the Commission’s Special Displacement Window are eligible to seek reimbursement under this paragraph.

- To be eligible for reimbursement, a station must meet the following four criteria: (1) they must be “a television translator station or low power television station”; (2) they must have been licensed and transmitting for at least 9 of the 12 months prior to April 13, 2017; (3) they must be “eligible to file and do file an application in the Commission’s Special Displacement Window”; and (4) their expenses must be incurred after January 2017.

47 U.S.C. § 1452(k)(5)(A) – Definitions

The term “low power television station” means a low power TV station (as defined in section 74.701 of title 47, Code of Federal Regulations) that was licensed and transmitting for at least 9 of the 12 months prior to April 13, 2017. For purposes of the preceding sentence, the operation of analog and digital companion facilities may be combined.

- Section 74.701 defines a low power TV station as “A station authorized under the provisions of this subpart that may retransmit the programs and signals of a TV broadcast station and that may originate programming in any amount greater than 30 seconds per hour and/or operates a subscription service. (See § 73.641 of part 73 of this chapter.)”
- Class A stations are, by definition, merely a subset of low power TV stations with additional rights and responsibilities. See 47 C.F.R. § 73.6002 (“A Class A television broadcast license will only be issued to **a qualified low power television licensee . . .**”).

47 U.S.C. § 1452(k)(3) – Duplicative Payments Prohibited

In the case of a **low power television station that has been accorded primary status as a Class A television licensee** under section 73.6001(a) of title 47, Code of Federal Regulations—

(A) if the licensee of such station has received reimbursement with respect to such station under subsection (b)(4)(A)(i) (including from amounts made available under subsection (j)(2)(A)(i)), or from any other source, such station may not receive reimbursement under paragraph (1); and

(B) if such station has received reimbursement under paragraph (1), the licensee of such station may not receive reimbursement with respect to such station under subsection (b)(4)(A)(i).

- This section concedes that Congress considered Class A stations to be low power television stations
- If Class A stations were not LPTV stations otherwise eligible for reimbursement under the REA, this section would be superfluous