



July 25, 2018

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: Notice of Ex Parte Communication, MB Docket Nos. 18-214, 17-289; GN Docket No. 12-268

Dear Ms. Dortch:

On July 23, Rick Kaplan, Erin Dozier and the undersigned, all of the National Association of Broadcasters (NAB) met with Evan Swarztrauber of Commissioner Carr's office. On July 24, Rick Kaplan, Erin Dozier and the undersigned had separate meetings with Alison Nemeth and Kevin Costello of Chairman Pai's office, Brooke Ericson and Emily Carditz of Commissioner O'Rielly's office and Kate Black of Commissioner Rosenworcel's office. Erin Dozier also had a separate telephone conference with Sarah Whitesell of the Media Bureau. During these meetings, NAB discussed the Commission's draft Notice of Proposed Rulemaking and Order concerning the reimbursement of Low Power Television, TV translator and FM radio stations for expenses associated with repacking.¹ NAB also discussed the Commission's draft Report and Order concerning an incubator program to foster new entry and diversity in the broadcast industry.²

¹ *LPTV, TV Translator, and FM Broadcast Station Reimbursement*, Draft Notice of Proposed Rulemaking and Order, MB Docket No. 18-214, GN Docket No. 12-268, FCC-CIRC1808-5 (circulated July 12, 2018) (Draft NPRM).

² *Rules and Policies to Promote New Entry and Ownership Diversity in the Broadcasting Services*, Draft Report and Order, MB Docket No. 17-189, FCC-CIRC1808-6 (circulated July 12, 2018) (Draft Order). The telephone conference with Ms. Whitesell concerned only the Draft Order.

Repacking Reimbursement

NAB explained that the draft NPRM adopts, without discussion, a phantom reading of the Reimbursement Expansion Act (REA or Act)³ that imposes an impermissible limitation on the Commission's authority to distribute the funds Congress made available for FM stations, among others. Specifically, the draft states:

The REA limits the payments to LPTV, TV translator, and FM stations, as well as the consumer education payments, to the amounts set forth [for fiscal year 2018]; the \$400 million appropriated in fiscal year 2019 will be available to reimburse eligible full power and Class A stations and MVPDs for costs reasonably incurred in the repacking process, consistent with the reimbursement mandate in the Spectrum Act.⁴

Thus, the draft NPRM asserts that the Commission has authority only to reimburse FM stations up to \$50 million from funds appropriated for Fiscal Year 2018 and no ability to fund anything beyond that for FM stations from Fiscal Year 2019 funds.⁵

This interpretation of the Act is plainly incorrect. Congress simply did not impose the restriction on Fiscal Year 2019 funds that the draft NPRM describes. Nowhere does the REA state that the Fiscal Year 2019 funds can only be spent on full power TV stations, nor is there any language in the statute that prohibits the FCC from spending Fiscal Year 2019 funds on qualifying FM stations. The REA merely enumerates the maximum expenditures for each type of service (and for consumer education) for Fiscal Year 2018.

Evidence of Congress's desire to give the FCC flexibility with Fiscal Year 2019 funds can be found in its Fiscal Year 2018 delineations. For example, section 511(j)(2)(A)(iii) states that funds "shall be available to the Commission to make . . . payments" to FM stations, "*including* not more than \$50,000,000 . . . from funds made available" for Fiscal Year 2018 (i.e., \$600 million).⁶ By using the word "including," Congress signaled that there could be other payments made to FM stations; payments that could only come from Fiscal Year 2019 appropriations. In addition, in section 511(j)(2)(C)(iii), which concerns permissible payments

³ Consolidated Appropriations Act, 2018, Pub. L. 115-141, at Division E, Title V, § 511, 132 Stat. 348 (2018) (codified at 47 U.S.C. § 1452(j)-(n)).

⁴ Draft NPRM at ¶ 5.

⁵ *Id.* at ¶ 5, n. 30.

⁶ 47 U.S.C. § 1452(j)(2)(A)(iii) (emphasis added).

to FM stations after April 13, 2020, the Act refers to “[a]mounts made available to the TV Broadcaster Relocation Fund by paragraph (1)” and does not suggest that such payments to FM stations are limited to only subsection A (i.e., Fiscal Year 2018) of that paragraph.⁷

The view espoused in the draft NPRM would also have difficulty explaining how *any* service has access to Fiscal Year 2019 funds. Full power TV stations are expressly limited to \$350,000,000 in Fiscal Year 2018 funds, much like FM stations are capped at \$50 million in Fiscal Year 2018 funds. What language in the REA dictates that FM stations have no access to Fiscal Year 2019 funds, but somehow full power TV does? NAB cannot locate any such exception for full power TV. Under the draft NPRM’s approach, Congress appropriated \$400 million in Fiscal Year 2019 for no one’s use. Obviously, this interpretation is untenable.

An accurate reading of the statute compels the conclusion that Congress specified funding levels from Fiscal Year 2018 funds, but also provided the FCC with discretion as to how to allocate Fiscal 2019 funds. Unless corrected, the draft NPRM sets the stage for the possibility that FM stations may not be fully reimbursed for reasonable expenses necessary to maintain service but that the Commission may return to the Treasury funds not expended for other purposes – an outcome that would ill-serve the public interest and undoubtedly would result in litigation.

The draft NPRM’s misreading of the REA also leads to a potentially flawed proposal on how to process FM station reimbursements. Because the draft NPRM assumed that the FCC only has access to \$50 million in funds for radio (and perhaps that \$50 million will not be enough), the draft NPRM proposes a payment structure that presupposes a depleted fund for FM stations. The draft describes a scheme in which only those who have the most time-consuming repacking challenges get fully reimbursed. Apart from the faulty assumption of limited funds, NAB questioned why only those stations whose repack-related issues take longer to resolve should be made whole. It is unclear why the length of time a station experiences issues is a proxy for what percentage of its reasonable costs it should recover.

Rather than detail one proposal correlating the length of time of a station’s challenges with percentage of costs reimbursed, the Commission should offer multiple options for reimbursement for the industry to assess. For example, if the Commission believes it will have finite resources that may not be enough to fully compensate FM stations, why would it not adopt the TV model employed earlier in the proceeding, where each station recoups 80 or 90 percent of its costs at the outset, and then they true-up at the end of the process? NAB is not suggesting this is necessarily the correct approach; merely that the NPRM should outline multiple possibilities for reimbursement.

⁷ 47 U.S.C. § 1452(j)(2)(C)(iii)

Finally, NAB noted that, in its 2014 Incentive Auction Framework Order, the Commission concluded that, even if it had authority to reimburse non-repacked broadcasters, it would not do so out of concern that the fund could be exhausted.⁸ NAB suggested that the Commission should take this opportunity to consider whether the availability of additional funding warrants a different conclusion with respect to the FCC's authority to reimburse non-repacked broadcasters.

Incubator Program

NAB expressed support for the draft incubator order, which generally strikes an appropriate balance between the flexibility needed to attract program participants and the structure needed to ensure that the program engenders public trust. Along these lines, NAB observes that the draft order would allow incubating entities that qualify for a waiver benefit to use that waiver in the same market where the incubating relationship took place, or a comparable market.⁹ NAB urges the Commission to retain the definition of "comparable" in the draft order, rather than the more restrictive formulation of "comparable" proposed by members of the Advisory Committee on Diversity and Digital Empowerment in a recent ex parte meeting.¹⁰ We believe that limiting the exercise of a reward waiver to markets within five market sizes of the incubation market is unduly restrictive and would inhibit participation by potential incubating broadcasters.

NAB again emphasized the value of making the incubator program available as a path for entry into both the radio and television industries.¹¹ NAB believes there are qualified

⁸ *Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, Report and Order, 29 FCC Rcd 6567, ¶ 602 (2014).

⁹ Draft Order at ¶ 66 (permitting a reward waiver to be used in a different market so long as the chosen market and the incubated market fall within the same market size tier and the number of independent owners of full-service, commercial and noncommercial radio stations in the chosen market is no fewer than the number of such owners that were in the incubation market at the time the parties submitted their incubation proposal to the Commission).

¹⁰ Letter from David Honig on behalf of Mr. Honig, Diane Sutter, James Winston, and DuJuan McCoy to Marlene H. Dortch, MB Docket Nos. 17-289 et al. (Jul. 21, 2018) (proposing that a comparable market should be no more than five Nielsen Audio Market Rank sizes removed in either direction from the incubated station's market).

¹¹ See NAB Comments in MB Docket Nos. 17-289 et al. (March 9, 2018) at 7, 8, 13, 14 (discussing application of the program to both radio and television); NAB Reply Comments in MB Docket Nos. 17-289 et al. (April 9, 2018) at 6-7 (discussing potential incentives for television broadcasters to participate); Letter to Marlene H. Dortch, FCC Secretary, from Rick

executives of diverse backgrounds who would like to own radio and television stations,¹² and several commenters have endorsed inclusion of television stations in the program.¹³ Should the Commission decline to include television stations in the incubator program at the time it adopts the draft order, we urge the Commission to concurrently adopt a further notice of proposed rulemaking that will examine whether to expand the program to the television industry. Alternatively, the order could commit to examining expansion of the incubator program to the television industry within a specified timeframe.

Finally, the draft order states that reward waivers will remain in effect so long as the incubating entity owns the station acquired pursuant to the waiver, and that the combination cannot be transferred (except as part of an in-market station swap).¹⁴ NAB continues to support full transferability of a reward waiver.¹⁵ There is a value to being able to assign or transfer a broadcast station combination as a combination—a value inures to the *seller*. We continue to believe that incubating broadcasters need strong incentives to counterbalance their investment of significant financial and other resources in the incubated entity. The ability to freely assign or transfer a combination formed through use of a reward waiver should be one of those incentives.

Kaplan of NAB, MB Docket Nos. 17-289 et al. (April 25, 2018) at 4-5 (urging the FCC to find that an incubating station presumptively qualifies for a waiver of the TV rule's top-four restriction because of the significant public interest benefits of incubating a new entrant).

¹² Letter to Marlene H. Dortch, FCC Secretary, from Erin L. Dozier of NAB regarding meeting of DuJuan McCoy of Bayou City Broadcasting, LLC, MB Docket Nos. 17-289 et al. (June 7, 2018) at 2-3.

¹³ See, e.g., Comments of the Federal Communications Commission's Advisory Committee on Diversity and Digital Empowerment: A Proposal For An Incubator Program, MB Docket No. 17-289 (April 1, 2018) at 46; Letter to Marlene H. Dortch, Secretary, FCC from Mark Fratrik of BIA Capital Strategies, LLC and BIA Advisory Services, MB Docket No. 17-289 (June 11, 2018); Letter to Marlene H. Dortch, Secretary, FCC from Lyle Banks of WGCL-TV, MB Docket No. 17-289 (June 6, 2018); Letter to Marlene H. Dortch, Secretary, FCC from W. Lawrence Patrick, Managing Partner, Patrick Communications, MB Docket No. 17-289 (June 4, 2018); Letter to Marlene H. Dortch, Secretary, FCC from DuJuan McCoy, President and CEO, Bayou City Broadcasting, LLC (May 22, 2018); Letter from Diane Sutter, President/CEO, ShootingStar Broadcasting, MB Docket No. 17-289 (May 18, 2018); Reply Comments of Gray Television, Inc., MB Docket No. 17-289 (April 9, 2018); Reply Comments of Meredith Corporation, MB Docket No. 17-289 (April 9, 2018).

¹⁴ Draft Order at 63-64.

¹⁵ NAB Comments at 13, n.32.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "Patrick McFadden", with a long horizontal flourish extending to the right.

Patrick McFadden
Associate General Counsel,
National Association of Broadcasters

cc: Alison Nemeth
Evan Swarztrauber
Brooke Ericson
Kate Black
Sarah Whitesell
Kevin Costello
Emily Carditz