

Before the
Federal Communications Commission
Washington, D.C. 20554

Expanding the Economic and Innovation)	
Opportunities of Spectrum Through)	GN Docket No. 12-268
Incentive Auctions)	
)	
Incentive Auction Task Force and)	
Media Bureau Seek Comment on)	MB Docket No. 16-306
Post-Incentive Auction Transition)	
Scheduling Plan)	

**COMMENTS ON THE FCC'S POST-AUCTION REPACK
AND PETITION FOR RECONSIDERATION**

ION MEDIA NETWORKS

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**COMMENTS ON THE FCC’S POST-AUCTION REPACK
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ION Media Networks, Inc. (“ION”), by its attorneys, hereby files these Comments on the pending Petition for Reconsideration of the National Association of Broadcasters filed on March 17, 2017 and the still pending Petition for Reconsideration by the ABC, CBS, Fox, and NBC Network Affiliates Associations filed on September 15, 2014 and submits this Petition for Reconsideration of the FCC’s commencement of the post-auction repack of the TV spectrum.¹ The FCC should revise and clarify the current repack plan and policies in a number of important areas, as pointed out in these Comments and in the pending Petitions for Reconsideration.

I. SUMMARY AND INTRODUCTION

In the Repack Commencement PN, the FCC set in motion a plan to repack the TV broadcast spectrum to clear channels that wireless carriers acquired in Auction 1000. By taking this step, the FCC imposed on ION and all other television broadcasters a set of government

¹ See Incentive Auction Closing and Channel Reassignment Public Notice, *Public Notice*, GN Docket 12-268, *et al.*, DA 17-314 (rel. Apr. 13, 2017) (the “Repack Commencement PN”). The Repack Commencement PN has not been published in the Federal Register, but ION is filing this Petition now because the FCC’s repack deadlines already are beginning to occur.

mandates that ION and other broadcasters likely cannot fully satisfy and that, if left unchanged, may lead to a weaker over-the-air broadcast system at a time when TV broadcasting has never been more valuable to local viewers. This is not what Congress envisioned when it adopted the Spectrum Act. Rather, Congress expected the FCC to conduct an incentive auction to repurpose some broadcast spectrum while preserving full broadcast service for stations that choose to continue serving the public.² ION urges the FCC to work with broadcasters to make changes to its repack policies and procedures to avert a looming disaster for TV broadcasting and the American public.

The FCC's current repack schedule and reimbursement policies uniquely and disproportionately burden ION and other large television group owners. ION owns and operates 60 television stations and the FCC assigned 49 ION-owned or operated television stations to new channels for post-auction operations. That is nearly 80% of ION's stations, creating a technical challenge more daunting than that faced by any broadcaster of comparable size. While ION owns many television stations, it is a relatively small, independent, privately held company. The irony is that the reason so many of ION's stations need to be repacked is because ION took up the FCC's invitation to purchase under-performing high-UHF stations pursuant to the UHF Discount.³ ION then undertook a massive investment to improve those stations' service, and it built the ION network into a highly watched independent entertainment channel that is

² See Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96, §§ 6402-6405, 126 Stat. 156 (2012) (the "Spectrum Act").

³ See 2002 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, *Report and Order and Notice of Proposed Rulemaking*, 18 FCC Rcd 13620, 13846-47 (2003).

competitive with the other national networks and has a particularly large audience among over-the-air viewers and minorities.⁴

Given ION's efforts to improve the nation's over-the-air broadcasting system, the FCC must be sensitive to the burdens of rebuilding the vast majority of its stations under any circumstances. ION should be able to depend on a smooth, well-reasoned, lawful repack process that provides adequate time for construction and delivers fully adequate resources in a timely manner. Like most broadcasters, ION has sought to cooperate in a constructive way with the FCC's auction and repack process in view of Congress's directives in the Spectrum Act, and it will continue to do so.⁵ However, it is clear that the FCC's current repack plan could be a disaster for broadcasters and TV viewers, and ION is therefore compelled to request that the FCC rethink certain aspects of the repack.

An initial key problem with the current repack plan is that the Commission planned it based on unrealistic expectations of what broadcasters can achieve over the next 39 months. Consistent with the goals of the Spectrum Act, the FCC should not actually reallocate the reclaimed broadcast channels until the broadcasters that are using them have had a reasonable time to design and construct their post-auction facilities. The FCC's current 39-month overall timetable, with initial construction permits due in July of 2017 and construction deadlines as soon as November 2018, does not provide sufficient time for broadcasters to fully examine their FCC-assigned facilities, develop a sound plan for construction, and execute that plan. Instead, the limited time the Commission has given broadcasters to engineer their post-repack facilities

⁴ See Comments of ION Media Networks, Inc., GN Docket No. 13-236, filed Dec. 16, 2013, at 2-3.

⁵ See Reply Comments of ION Media Networks, GN Docket No. 12-268, filed Mar. 12, 2013 ("ION 2013 Reply Comments"; Letter from Mace Rosenstein, counsel for ION Media Networks, *et al.*, GN Docket No. 12-268, filed Fe. 6, 2015.

makes it much more likely that stations and viewers will suffer excessive interference and lost service – if the post-repack facilities can be built on time at all. If a station cannot build the assigned facilities on time, the FCC will require the station to go off the air. This plan does not serve the public interest or Congress’s goals.⁶ To execute Congress’s goal of preserving TV broadcast service properly, ION urges the FCC to either lengthen the construction periods or develop a liberal waiver standard to accommodate stations that cannot design or complete the involuntary repack according to the FCC’s assigned dates.

Preserving current levels of service from post-auction broadcasters also requires the FCC to give broadcasters more time and flexibility to deliver technical solutions for providing service to their communities. As described below, the FCC assigned to ION three stations on Channel 14 that ION likely cannot build as assigned due to interference with land mobile operations. To design technical solutions to these and other problems, the FCC should grant broadcasters additional flexibility to alter their licensed service areas.

Congress also intended that the auction and repack process would be costless to TV stations that continued broadcasting after the auction, and it gave the FCC a budget of \$1.75 billion dollars to ensure that would be the case.⁷ The existing repack plan will impose an unknown level of expense on broadcasters, and use the \$1.75 Billion Repack Fund to reimburse only some of those expenses.⁸ Indeed, early estimates indicate that the total repack costs may

⁶ See Spectrum Act at §§6402 (authorizing incentive auctions); 6403(b)(2) (requiring Commission to make “all reasonable efforts” to maintain current service of post-auction broadcasters).

⁷ See *id.* at §6403(b)(4), (d).

⁸ See Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions, *Report and Order*, 29 FCC Rcd 6567, 6830 (“*First Auction Order*”) (rejecting any limit on repack expenditures), 7041-42 (Separate Statement of Commissioner Ajit Pai dissenting from FCC rejection of \$1.75 Billion budget for repack expenses).

exceed the current fund level by \$450 million or more.⁹ This shortage will force broadcasters to cover the difference, and service to viewers consequently will suffer. ION urges to FCC to work with broadcasters, and with Congress, to remedy this situation.

Moreover, the FCC's choices for how to distribute money from the Repack Fund will impose a significant financial burden on broadcasters. The FCC's plan to distribute initially 80% of each station's approved, estimated repack costs, while withholding 20% until a later date, will require many if not most broadcasters to debt-finance purchases above the 80% initial disbursement. Broadcasters will have no assurance that they will receive reimbursement for those expenditures and will have no chance to recover any financing charges they incur. The FCC's disbursement procedures likely will guarantee that broadcasters will not receive full reimbursement for their repack expenses as Congress intended.

ION therefore asks the FCC to promptly conduct a further proceeding to redesign their reimbursement policies to ensure equitable treatment for broadcasters that furthers Congress's intention to replicate the existing service of post-auction broadcasters at no cost to TV stations. If necessary, the FCC should work with Congress to further those goals. In addition, ION advocates that the FCC adopt the individual changes to the repack plan discussed herein and in the pending Petitions for Reconsideration.

⁹ See Phil Kurz, TVN: Stations' Repack Expenses to Hit \$2B, TVNEWSCHECK, July 13, 2017, available at <http://www.tvnewscheck.com/article/105583/tvn-stations-repack-expenses-to-hit-2b>.

II. THE FCC SHOULD ADJUST ITS POLICIES TO IMPROVE THE CHANCES OF A SUCCESSFUL REPACK.

A. The FCC Must Introduce More Flexibility for Broadcasters to Change or Build Out their Repack Assignments.

1. The FCC Should Assign New Interference-Free Channels to All Broadcasters Assigned to Channel 14.

The FCC's repack model disfavored assigning stations to Channel 14 because of its unique interference challenges due to land mobile operations on that channel.¹⁰ Nonetheless, the FCC ended up assigning 32 stations to Channel 14. This includes three ION stations in the San Francisco, Phoenix, and Orlando markets, which is more Channel 14 assignments – and in larger, more populous markets – than any other broadcast group.

ION's preliminary engineering shows that building out the assigned facilities for ION's Channel 14 stations may present insurmountable obstacles. Even where broadcasters can construct the assigned facilities on Channel 14, additional expensive filtering and ongoing coordination with land mobile users is required. There is no basis for imposing these costs on ION or any other broadcaster where a successful Channel 14 build is unlikely by any date, let alone by the FCC's assigned phase deadlines. Accordingly, ION was compelled to seek a waiver of the deadline for its initial construction permits for these stations. The FCC granted the requested waivers in two of ION's markets. In the third ION is exploring technical solution to build the station on time at a high cost.

The grant of two waivers, however, does not provide ION any long-term relief in those markets; it still is required to identify a channel from which it can continue to serve its current

¹⁰ See Procedures for Competitive Bidding in Auction 1000, *Public Notice*, 30 FCC Rcd at 9101, 9105 (Med. Bur. 2015).

audience.¹¹ Of course, in major markets like San Francisco, Phoenix, and Orlando those channels are difficult, if not impossible, to find. There is an outside chance that a channel could open up due to facilities modifications of other stations in those markets, and the FCC should also seek to facilitate broadcasters to remain on their pre-repack channels, if possible. Absent that, however, ION does not see how it can construct its Channel 14 stations in a way that replicates the relied-upon service these stations provide today.

Under the FCC's current repack rules, ION's stations and others assigned to Channel 14 face the unfair choice of either constructing inferior facilities or going off the air in 39 months. Presenting broadcasters with that choice does not comport with the FCC's duty to make "all reasonable efforts" to ensure that stations are able to replicate their current service areas and population.¹²

The Commission erred when it decided to assign stations to Channel 14 despite the admitted deficiencies of that channel. To fulfill its responsibilities under the Spectrum Act, the Commission should now identify channels from which those stations can actually serve their communities. If the Commission cannot find such channels, it should permit stations assigned to Channel 14 that cannot build their assigned facilities to continue operating on their pre-auction channels until a suitable channel is available.

¹¹ ION understands that its current channel may be suitable for operations in Phoenix, which would be ION's preferred solution. ION intends to work with the FCC to confirm that this technical solution is feasible.

¹² See Spectrum Act §6403(b)(2).

2. The FCC Should Relax Its Service Contour Requirements To Give Broadcasters Additional Flexibility in Constructing Post-Auction Facilities.

The Commission's rules for initial post-auction construction permits allow broadcasters to propose facilities that deviate only slightly from the facilities the Commission assigns to each station. The initial construction permit application can propose facilities that extend a station's predicted contour up to 1% in any direction in order to address loss of service due to the new channel assignment as long as the contour extension does not cause more than *de minimis* new interference.¹³ In addition, to qualify for expedited processing, initial construction permit applications must propose facilities that cover at least 95% of the coverage contour assigned to the station by the Commission.¹⁴ This effective contour freeze significantly diminishes broadcasters' flexibility to design their post-auction facilities, and the Commission should relax it to permit greater variation from the Commission's facilities assignments.

The main problem with the FCC's contour freeze is that it makes voluntary antenna or tower relocations almost impossible. Unless a proposed new tower is in close proximity to the tower site assigned by the Commission, it is very unlikely that a broadcaster can identify any reasonable power level that will meet the Commission's standards. Even if the tower is only a short distance away, a station may have to reduce its power sufficiently to stay within the assigned contour. Doing this typically drops the coverage below the 95% population standard, rendering the relocation infeasible. ION has encountered this issue in a number of its markets.

When it adopted the effective contour freeze, the FCC rejected the more lenient standard it applied during the DTV transition of permitting contour expansions of up to 5 miles in any

¹³ See *First Auction Order*, 29 FCC Rcd at 6791-92.

¹⁴ See *id.* at 6792.

direction.¹⁵ Now that broadcasters actually are experiencing the limitations of the contour freeze, ION urges the Commission to revisit this rule. The proper standard would permit broadcasters to configure their facilities to maintain or expand their facilities to accommodate a tower relocation as long as they do not create more than *de minimis* interference to any station and do not create mutual exclusivities with other applicants. This standard would permit broadcasters to design their stations to serve their communities best without creating the kinds of processing concerns that led the FCC to adopt the freeze in the first place.

3. The FCC's Should Ease its Overly Burdensome Requirements for Obtaining a Change of Community for Channel Sharing Stations.

The Commission's current rules require stations interested in pursuing channel sharing following successful auction participation to change their community of license only if it can identify a new community of license that meets the same, or a higher, allotment priority as its current community (or the next highest priority if no community meets the same or higher priority).¹⁶ While these requirements are less burdensome than for community of license changes under normal circumstances, they remain overly burdensome in the post-auction context.

Rather than require channel sharing stations to identify a new community of license that satisfies the same allotment priority as their pre-auction community, the FCC should permit such stations to adopt the community of license of the host station. This is a simpler solution that eliminates the need and expense of the potentially complex analysis necessary to ensure compliance with the FCC's allotment priorities. Since the FCC will not reimburse these costs, the Commission should not require stations that were successful in the auction to incur them.

¹⁵ See *id.* at 6791-92.

¹⁶ See *id.* at 6748-49.

Adoption of ION's proposed solution would not harm viewers, because the same viewers will receive the sharing station's signal regardless of the community to which the sharing station is licensed.

B. The FCC Should Re-Examine Its Unrealistic Repack Timeline in Light of the Actual Auction Results.

The FCC adopted its phased 39-month repack schedule in 2014, long before the auction even began or the FCC had any idea how many television stations it would be required to repack.¹⁷ At the time and since, broadcasters repeatedly have informed the Commission that the timeframe is too short.¹⁸ Indeed, in 2015, the NAB commissioned a study showing that a repack of 1200 television stations would take more than a decade.¹⁹ Today we know that the repack will involve 1050 stations, including nearly 1000 U.S. full power and Class A stations.²⁰ Yet the Commission continues to adhere to an unchanged plan that includes requiring initial construction permits in July 2017 and final construction deadlines in November 2018 for 91 stations, including 3 ION stations. The Commission thus far has refused to consider any modifications to make the schedule more workable. While the D.C. Circuit upheld the FCC decision to adopt a 39-month repack schedule in 2015 as a general matter of policy,²¹ that court decision does not

¹⁷ See *id.* at 6580, 6833.

¹⁸ See Petition for Reconsideration of the ABC Television Affiliates Association, CBS Television Network Affiliates Association, FBC Television Affiliates Association, and NBC Television Affiliates, GN Docket No. 12-268, filed Set. 15, 2014 (the "Affiliates Associations Petition").

¹⁹ See Digital Tech Consulting, Inc., *Broadcast Spectrum Repacking Timeline, Resource Cost and Analysis Study*, October 2015 ("NAB/Digital Tech Study"); Letter from Myra Moore, president, Digital Tech Consulting, Inc. to Marlene H. Dortch, Secretary, FCC, GN Docket No. 12-268. Filed Nov. 6, 2015.

²⁰ See *Phase Assignment Closing PN*, spreadsheet available at http://data.fcc.gov/download/incentive-auctions/Transition_Files/.

²¹ See *National Association of Broadcasters v. NAB*, 789 F.3d 165 (2015).

absolve the Commission of its responsibility or ability to continue reexamining the plan to ensure that it will serve the public interest.

Faced with a mandate to rebuild 49 stations involuntarily, ION is unlikely to meet the FCC's application or construction deadlines for all of its stations. The many challenges created by the FCC's 39-month timetable – including likely shortages of equipment, qualified tower crews, and engineering expertise – make on-time construction of all these stations unlikely.

The Commission has had before it numerous proposals to make the repack timetable more workable, in furtherance of Congress's command that the FCC make "all reasonable efforts" to replicate stations' pre-auction service following the auction. Thus far, the Commission has not acted on those requests. In September 2014, the major broadcast network affiliates associations (the "Affiliates Associations") filed a Petition for Reconsideration of the FCC initial adoption of the phased 39-month repack timeline, asking the FCC to adjust its repack deadlines and provide relief for stations unable to comply.²² They petitioned the FCC to (1) delay commencement of the repack until the FCC issues 600 MHz wireless licenses; and (2) dispense with Media Bureau-assigned phase deadlines during the 39-month timeframe.²³

Finally, the Affiliates Associations asked the FCC not to force stations that cannot construct during the 39-month period to go dark. The Affiliates Associations' petition remains pending.²⁴ ION supports each of these proposals and urges the new FCC to adopt them before taking too many steps toward implanting the unworkable 39-month plan.

²² See Affiliates Associations Petition, *supra*, n.10, at 7-13.

²⁴ The FCC noted having received the Affiliates Associations Petition in its *Second Order on Reconsideration* of the *First Auction Order*, but declined to act on it, promising subsequent action on the petition in a separate order. See Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions, *Second Order on Reconsideration*, 30

More recently, NAB filed a Petition for Reconsideration of the FCC’s January 27, 2017 Public Notice establishing the actual dates for the repack phase deadlines and finalizing the application schedule for post-auction facilities.²⁵ NAB made reasonable requests for modifications to the Media Bureau’s specific repack plan. Among other requests, NAB asked that the Media Bureau should grant reasonable extensions of time if individual stations are unable to meet the deadline for construction during their assigned phase.²⁶ NAB also sensibly asked the Media Bureau to reconsider its decision to not consider future station requests for phase changes based on the actual difficulties of particular construction cases.²⁷ Since the phase assignments did not take into account station-specific construction problems, NAB’s request is frankly necessary for a rational repack that makes “all reasonable efforts” to maintain station service. The Commission also has not responded to NAB’s petition.

ION proposes that the FCC also give stations the option of transitioning to their new channels prior to their phase deadline if they are willing to operate temporarily at reduced power or to accept interference above the FCC’s normal limits. Under the current phase-assignment arrangement, the FCC requires all stations, and particularly, linked stations, to maintain a strict schedule for completing construction, testing, and commencement of operations in concert with the other stations in the market. This creates the likelihood of inefficiencies in the allocation of tower crew resources. If, for example, a station completes construction of new facilities ahead of

FCC Rcd 6746, 6818 (2015). The Commission has not addressed the Affiliate Association Petition since.

²⁵ See Petition for Reconsideration of the National Association of Broadcasters, GN Docket No. 12-268, MB Docket No. 16-306, filed Mar. 17, 2017 (the “NAB Petition”); Incentive Auction Task Force and Media Bureau Adopt a Post-Incentive Auction Transition Scheduling Plan, *Public Notice*, MB Docket No. 16-306, GN Docket No. 12-268, DA 17-107 (Jan. 27, 2017).

²⁶ See NAB Petition at 5-8.

²⁷ See *id.* at 8-10.

schedule, it will need to schedule tower crews to return at a later date to dismantle and remove the station's old facilities. These multiple site visits at the same time that other stations are trying to complete construction will cause only confusion and delay. Rather than requiring all linked stations to transition simultaneously, the FCC should give each station the option of constructing, testing, and commencing service ahead of their phase deadlines. This is a particular problem for broadcasters that may in some cases be moving from their current site to a different tower site. Stations that wish to transition early should be permitted to specify their transition plan in construction permit applications to the FCC and to operate either interim facilities on their old channel or on their new channel. ION proposes that this step only be allowed where the station's proposed pre-deadline operations would not cause new interference to other stations. At the same time, ION proposes that stations be permitted to choose to operate at reduced power or to accept reasonable amounts of interference, as determined by the FCC, from surrounding stations.

All of these proposals are eminently reasonable in light of the daunting challenges inherent in repacking nearly 1000 U.S. television stations. The FCC is fully aware that the supply of equipment manufacturers, qualified tower crews, and engineering resources is finite and unlikely to increase quickly to meet the needs of the repack.²⁸ The FCC has been informed that each construction project presents its own challenges, many of which do not materialize until the project begins.²⁹ Weather, transportation, personnel and labor issues, and coordination

²⁸ See, e.g., Widelity, Inc., Response to the Federal Communications Commission for the Broadcaster Transition Study Solicitation – FCC13R0003, DA 14-389A2, at 9-10 (Dec. 30, 2013) (“2013 Widelity Report”); Comments of the National Association of Broadcasters, GN Docket No. 12-268, at 5 (filed Nov. 26, 2014); Comments of Gatesair, Inc., GN Docket No. 12-268, at 5 (filed April 21, 2014).

²⁹ See, e.g., 2013 Widelity Report at 9-10; Comments of Gray Television, Inc., GN Docket No. 12-268, at 7 (dated Jan. 25, 2013).

with other broadcasters and other FCC licensees all play a part in potential delays. All of these things are outside broadcasters' or the Commission's control. In this environment, adherence to a rigid, unforgiving repack timetable makes no sense and endangers service to viewers.

The FCC's current repack schedule also creates the easily foreseeable consequence that suppliers of essential repack resources are encouraged to engage in price gouging. ION has experienced this in preliminary negotiations with tower owners and equipment vendors. Because the parties controlling the repack resources know that broadcasters have strictly limited time and no effective choice, the cost of these inputs is rising. Tower owners are demanding higher rents than they have previously and the cost of necessary equipment and installation is increasing as well. This only serves to make the repack more expensive and put further strains on the Commission's likely insufficient \$1.75 Billion Repack Fund. Reconsidering the 39-month timeframe and the phase deadlines would go a long way toward relieving this pricing pressure.

ION urges the FCC to adopt the reasonable and fair proposals of the Affiliates Associations, NAB, and ION. The Commission's current mandates could well prevent successful completion of the repack. The plan put into motion by the Repack Commencement PN likely will fail Congress's "all reasonable efforts" test for preserving broadcasters' pre-auction service areas and populations.

III. THE FCC MUST FIX THE REPACK REIMBURSEMENT PROCESS.

A. The FCC Should Clarify Its Reimbursement Policies for Tube Transmitters and Tower Moves.

1. The FCC Should Confirm that Replacement of Tube Transmitters with Solid State Transmitters Is Not an "Upgrade."

The FCC should clarify that certain items are fully reimbursable to ensure that stations receive full payment for repack expenses. In particular, the FCC should clarify that the Repack

Fund will cover costs for replacement of tube transmitters with solid-state transmitters and any costs associated with moving from one tower to another during the repack.

ION, like many of its contemporaries, relied on tube transmitters for deployment of DTV in the late 1990s and early 2000s. Of ION's 49 repack stations, more than 30 employ tube transmitters installed between 1997 and 2006, when tube transmitter technology was an accepted state of the art technology. The manufacturer for these transmitters has notified ION that it cannot support retuning the channels of these transmitters due to the technical difficulty and cost inherent in performing rechanneling on tube transmitters. Moreover, ION's vendors have indicated that purchasing new tube transmitters would not be a prudent expenditure for replacing the current transmitters. The FCC also has received information regarding of the difficulties of utilizing tube transmitters in the repack.³⁰

For these reasons, ION has determined that the only sustainable solution for replacing its tube transmitters is to purchase new transmitters that use solid-state technology. ION understands, however, that the FCC may consider the replacement solid-state transmitter to be an "upgrade" for which full reimbursement will not be available. Instead, ION would be eligible for reimbursement only for the amount that a new tube transmitter would cost.

This would be wrong for at least two reasons. First, tube transmitters are not generally available at this point, and ION's vendors have warned it that even if they could supply tube transmitters, the shortage of spare parts and greater likelihood of transmitter failure would make the purchase of new tube transmitters an irrational economic choice. They may be slightly less

³⁰ See, e.g., Comments on the Media Bureau Updates to Catalog of Reimbursable Costs, Hitachi Kokusai Electric Comark LLC, MB Docket No. 16-306, GN Docket No. 12-268, filed Nov. 16, 2016; Comments of Cordillera Communications, MB Docket No. 16-306, GN Docket No. 12-268, filed Nov. 14, 2016; NAB/Digital Tech Study at 27.

expensive now, but total cost of ownership would be greater over time and would endanger continuous service to viewers. The FCC should not punish ION with reduced reimbursement because it makes the right choice for its stations and viewers. Second, the FCC policy has been to offer full reimbursement for the purchase of comparable equipment, and ION's replacement of older tube transmitters with new solid-state transmitters satisfies that standard.³¹ The purchase of a solid-state transmitter is equivalent to ION's purchase of tube transmitters a decade or more ago because both represent the most economical, sustainable solutions available at the time. Consequently, the FCC should clarify that purchase of a solid-state transmitter to replace a tube transmitter will not be considered an "upgrade." Instead, such purchases should be fully reimbursable as purchases of comparable equipment.

2. The FCC Should Confirm That Costs Associated With Consumer Education and Tower Moves Are Fully Reimbursable.

The FCC should confirm that expenses for local advertising to inform viewers about the required channel change are reimbursable. ION intends to prepare and execute a multi-tiered media campaign through print, radio, television and digital media to ensure that its viewers are aware of ION's impending channel change. Without local news and with an audience that skews towards elderly, low-income and minority viewers, this advertising campaign will give ION the opportunity to provide the detailed information that its viewers need to retain their access to ION programming. These expenses should be fully reimbursable in addition to the costs of the FCC's mandated station public notices.

In addition, the FCC should confirm that tower moves associated with construction of new facilities should be fully reimbursable. ION is required to move its WPXN-TV facilities from its current New York City tower at the Empire State Building to a new site at Freedom

³¹ *First Auction Order*, 29 FCC Rcd at 6821-22.

Tower to construct its post-auction facilities. The FCC's repack cost catalog and reimbursement form, however, does not make clear which expenses associated with such moves are reimbursable and which are not. The FCC should make clear that all such expenses are fully reimbursable, including work at both the old and new tower, as well as transport of facilities between the two,. Once again, ION's rebuilding of its facilities in New York (as in all markets) is involuntary, and there is no reason ION should be required to bear any of the expenses of this mandated change.

3. The FCC Should Confirm That Top-Mount Antennas Are Not an Upgrade from Side-Mounts.

ION intends to utilize a top-mount antenna for several of its stations in lieu of replacing the current side-mount antenna. ION understands that the FCC also will consider this change to be an "upgrade" over its current side-mount facilities. As with tube/solid state transmitters, ION disputes that this type of change is an "upgrade;" rather it is an economical approach that will maintain service to viewers throughout the repack.

First, moving from a side-mount to a top-mount antenna is an economical choice. Since ION will continue to operate the station using the current side-mount antenna while it constructs the top-mount antenna associated with its post-transition facilities, ION will not need to purchase, install, or remove equipment used to operate on an interim basis during the transition. ION estimates that this will ultimately make antenna replacement at least \$100,000 - \$200,000 cheaper per station. This savings does not even include other costs associated with interim operations such as the purchase, installation, and removal of an interim transmitter, and transmission line, and the applications associated with seeking Commission approval to operate the station on an interim basis. Taking advantage of these efficiencies should not subject ION to the potential for only partial reimbursement of the costs of moving to a top-mount antenna.

Second, utilizing a top-mount antenna will allow ION to continue operating without interruption on its current channel using the side-mount antenna while ION installs the top-mount antenna. According to this plan, ION will not provide inferior interim service using auxiliary or interim facilities and viewers will not go without service while ION replaces the current side-mount antenna. This result is clearly better for viewers and serves the public's interest in continuous, full-service television.

For these reasons, the FCC should treat replacement of a side-mount antenna with a top-mount as a replacement with comparable equipment qualifying for full reimbursement.

4. The FCC Should Confirm that Transmitter Head Room is Fully Reimbursable.

A key piece of equipment that ION will need to replace to commence operations on its post-auction assigned channels is each station's transmitter. Replacement transmitters must have sufficient output power ("TPO") to ensure that a station can reach the effective radiated power ("ERP") at which the FCC permits the station to operate. For various reasons, and as further described below, ION typically has purchased transmitters with TPO that exceeds the strength required for the station to reach its maximum ERP. The broadcast industry refers to this extra TPO as "headroom." ION disagrees with the Commission's decision not to fully reimburse broadcasters for transmitters that have the same amount of headroom as their current transmitters. The decision to reimburse only a single increment of headroom is arbitrary because headroom increments are very different among transmitter manufacturers. Instead, ION submits that the cost of replicating a station's TPO headroom should be fully reimbursable because purchasing headroom is a good engineering practice that is essential to replication of a station's current facilities.

Purchasing additional headroom is sound engineering practice because headroom can provide redundancy that allows stations to avoid off-air events due to transmitter failure. ION primarily constructed its television stations without auxiliary transmission systems. Instead, ION built redundancy into its transmitters. Since transmitters are more likely to fail than the RF antenna system, requiring operation at less than full power, ION has mitigated the risk of such failures leading to time off the air by building redundancy into the transmitters through headroom. Thus, even when the transmitter cannot operate at full output, it can still generate enough power to maintain full-power operation of the associated station.

Moreover, headroom can allow stations to maintain full service in situations where other transmission equipment suffers damage. For example, a damaged antenna may force a station to commence temporary operations with a lower gain antenna requiring the additional transmitter power to obtain the authorized ERP. Since antenna problems take the longest time to replace of any part of the transmission system, a station may use its headroom to maintain full service to its community for weeks or months while repairs to or replacement of the antenna is completed. Thus, headroom is a key part of broadcasters' contingency plans in the event of antenna damage. ION has had to use the headroom in one of its markets to preserve service in this manner twice in the past year alone. Absent the headroom ION built into its transmitters, these incidents likely would have led to lengthy service outages for many viewers.

Headroom also affords expansion options at a fraction of the price of replacing the transmitter when a station identifies opportunities to maximize its facilities, which ION has performed at more than 15 of its locations since the DTV transition. Station maximization serves the public interest by expanding over-the-air service to new areas and strengthening service to viewers in the core of a station's viewing area. For these reasons, encouraging broadcasters to

maintain sufficient headroom to handle unforeseeable events or opportunities is sound policy that protects the viewing public and promotes full service television. These reasons are more than sufficient to justify the FCC in reimbursing broadcasters' replacement of transmitter headroom that they currently possess.

Nonetheless, given the FCC guidance that it will not reimburse all existing headroom, ION's initial requests for reimbursement asked for reimbursement of no more than 50% headroom for any station. That is only about half of the average headroom ION's current transmitters utilize. This reasonable request will lead to headroom reductions at 20 of ION's 49 repack stations. ION requests that the Commission reconsider its headroom decision and reimburse the costs of replicating all current headroom or, alternatively, grant reimbursement of up to 50% headroom as ION has requested in its reimbursement requests.

B. The FCC Should Reconsider Its Plan to Offer Only Partial Upfront Reimbursement

Even assuming that the FCC can secure the necessary funds for full reimbursement of broadcasters, the FCC should revisit its current plans for disbursing those funds. The FCC currently plans initially to disburse only 80% of each station's anticipated repack costs, with a subsequent disbursement of the remaining 20% at a later date.³² The FCC also has required that only station licensee may receive payments, regardless of whether the licensee directly owns the assets used for station broadcasts.³³ Moreover, the FCC has not yet disclosed the dates when it will make repack reimbursement payments.³⁴ Each of these features of the FCC's

³² *First Auction Order* at 6818-19, ¶ 614 (2014).

³³ Procedures for Submitting Financial Information Required for the Disbursement of Incentive Payments and Reimbursement Payments after the Incentive Auction Closes, *Public Notice*, 32 FCC Rcd 2003, 2020 ¶ 61 (2017) ("Payment Procedures PN").

³⁴ Incentive Auction Closing and Channel Reassignment Public Notice, *Public Notice*, 32 FCC Rcd 2786, 2816 ¶¶ 88-89.

reimbursement plans adds costs and complications to the repack, and the FCC should make the changes to the rules that ION suggests.

1. The FCC Should Disburse 100% of Reimbursement Funds on an Upfront Basis.

The FCC should reconsider its decision to provide only 80% of each station's estimated repack funds on an upfront basis. The FCC's plan to distribute initially 80% of each station's approved, estimated repack costs, while withholding 20% until a later date basically guarantees that ION and other broadcasters will be required to pay for a great deal of their repack-related equipment and services out-of-pocket. They will be required to debt-finance purchases above the 80% initial disbursement, and they will have no assurance that they will receive reimbursement for those expenditures and no chance to recover any financing charges they incur.

Congress directed the FCC to keep broadcasters financially whole through the repack process. The FCC's disbursement procedures likely will guarantee that is not the case. The FCC has no idea how much of broadcasters' repack expenses will be left unreimbursed – but every unreimbursed cost imposed on broadcasters could lead to a reduction in service to viewers.

Moreover, given that early Form 399 estimates indicate that the \$1.75 Billion Repack Fund may be insufficient to cover all of broadcasters' costs, the 80% upfront payment likely will represent significantly less than 80% of estimated costs. This will further increase the financial carrying costs of repack purchases, increasing broadcasters' unreimbursed costs. The superior approach is for the FCC to issue a single, lump-sum reimbursement that will cover as much of broadcasters' costs as possible. Then, as noted above, the FCC should approach Congress to appropriate sufficient funds to cover broadcasters' costs in excess of \$1.75 Billion.

2. The FCC Should Permit Reimbursement Funds To Be Released To Licensee Affiliates To Avoid Tax Inefficiencies.

The FCC's current requirement that only station licensees may receive Repack Fund disbursements creates tax inefficiencies that will lead to higher costs for stations and a far more expensive repack overall. The FCC should change this structure to permit payment of repack funds to a licensee's designee as long as that designee is a commonly owned affiliate.

Like many companies, ION corporate structure is such that a licensee subsidiary holds its FCC licenses in each local market, while different subsidiaries hold the operating assets for its stations (its antennas, transmitters, tower leases, etc.). Under the FCC's plan, the licensees must receive all repack disbursements. In a structure like ION's, however, those funds will have to be shifted to the affiliates that own the operating assets for each station, because that affiliate will be the one acquiring new facilities or modifying existing equipment.

The income from the Repack Fund may be taxable at some point, and the necessity of an inter-company transfer of the funds will vastly complicate the tax treatment of the repack disbursements in unpredictable ways. For example, the tax treatment of the funds could be different depending upon the state of incorporation of the licensee affiliate versus the equipment operating affiliate. In ION's case where it is operating in 33 states, sorting through these tax questions will be very difficult and expensive, and the results will be more or less arbitrary, depending on the attitudes of the IRS and dozens of different state and local taxing jurisdictions. All of these tax consequences will make it even more difficult for stations to obtain full reimbursement in the repack.

A much simpler, cheaper, and more reasonable arrangement would be for the FCC to approve disbursement of repack funds directly to a licensee affiliate designated by the licensee. This would eliminate the tax problems created by inter-company transfers without creating any

risk that repack funds will end up in the wrong hands. ION understands the FCC's desire to ensure that repack funds do not become subject to waste, fraud, or abuse.³⁵ Permitting a licensee to identify an affiliate that should receive the funds will not increase that risk or make it any more likely that repack funds will be misused.

The FCC already permits licensees to designate a third party payee for auction payments to winning bidder.³⁶ ION is requesting something much more limited. ION asks only that the FCC permit licensees to designate an affiliated company to receive repack disbursements directly to avoid the tax consequences of inter-company transfers. The FCC should be able to accomplish this change before the FCC actually begins distributing repack funds.

3. The FCC Should Eliminate Uncertainties About Timing for Reimbursement Payments.

The FCC's current repack plan does not specify dates that stations can expect to receive distributions from the Repack Fund. This uncertainty surrounding when stations will receive funds complicates the negotiation of repack-related contracts and limits ION's ability to plan the timetables for work to be completed. Like most companies, ION does not have the resources to self-fund the expenditures necessary to complete its government-mandated repack and ION is planning to wait until it receives its repack disbursements before it begins paying vendors.

To facilitate smoother coordination between stations and vendors and to facilitate planning for construction, the FCC should immediately create and publicize a schedule according to which stations will receive their repack disbursements. ION understands that the FCC will provide reimbursement funds from auction revenues, which the FCC cannot be certain

³⁵ *First Auction Order*, 29 FCC Rcd at 6825-26.

³⁶ Payment Procedures PN at 2005, ¶¶ 4-5.

it will have until they receive wireless companies' payments.³⁷ Nonetheless, the FCC has established schedules for payments by winning wireless bidders, which should create a basis for the FCC to complete a schedule of repack distributions.³⁸ Such a schedule will permit ION and other licensees to complete negotiation of critical repack-related contracts, increasing the speed and efficiency of the repack.

IV. CONCLUSION

For the foregoing reasons, ION requests that the FCC reconsider its previous decisions and grant the relief requested herein and in the pending Petitions for Reconsideration.

Respectfully submitted,

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/s/

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³⁷ See Spectrum Act §6403(d) (establishing Relocation Fund to be made up of portion of auction proceeds).

³⁸ See Repack Commencement PN, ¶ 26.