

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
LPTV, TV Translator, and FM Broadcast)	MB Docket No. 18-214
Station Reimbursement)	
)	
Expanding the Economic and Innovation)	GN Docket No. 12-268
Opportunities of Spectrum Through Incentive)	
Auctions)	

**JOINT COMMENTS OF FIFTH STREET ENTERPRISES, LLC,
THE VIDEOHOUSE, INC., AND WMTM, LLC**

Fifth Street Enterprises, LLC (“Fifth Street”), licensee of Class A television station WPTG-CD, Pittsburgh, Pennsylvania (Fac. ID 272), The Videohouse, Inc. (“Videohouse”), licensee of Class A television station WOSC-CD, Pittsburgh, Pennsylvania (Fac. ID 66636), and WMTM, LLC (“WMTM”), licensee of WIAV-CD, Washington, DC (Fac. ID 168063) (together, the “Joint Commenters”), submit these comments in response to the Notice of Proposed Rulemaking in the above referenced proceedings regarding the reimbursement of certain costs incurred by low power television stations as a result of the broadcast television incentive auction (the “NPRM”).¹ The Joint Commenters appreciate the Commission’s efforts to implement the Reimbursement and Expansion Act (“REA”)² and are generally supportive of the procedures proposed in the NPRM. However, the NPRM inexplicably appears to exclude from reimbursement those limited number of low power television stations that had not filed an application for a Class A license by February 22, 2012, but subsequently obtained Class A

¹ See *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).

² See 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)).

licenses and, therefore, were provided a priority opportunity to find a new channel (the “Converted LPTV Stations”).³ The REA does not compel this result and there is no policy justification for excluding these stations. Accordingly, the FCC should ensure that these stations—like every other television station affected by the post-auction transition—are reimbursed for their reasonable costs.

I. INTRODUCTION AND SUMMARY

In his comments in support of the NPRM, Commissioner Michael O’Rielly expressed the view—shared by many—that by expanding reimbursement eligibility to low power television and TV translator (collectively, “LPTV”) stations along with FM radio stations affected by the transition, “the commitment to hold broadcasters harmless throughout the incentive auction repack process should be a firm reality.”⁴ Commissioner Brendan Carr similarly declared that the REA had fulfilled the promise that “broadcasters should be reimbursed for costs they incur in the repacking process.”⁵ And Commerce Committee Chairman Greg Walden proclaimed 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.”⁶

³ To the best of the Joint Commenters’ knowledge, WPTG-CD, WOSC-CD and WIAV-CD are the only stations that qualify as “Converted LPTV Stations.”

⁴ 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*, Notice of Proposed Rulemaking, FCC 18-113, MB Dkt. No. 18-214, GN Dkt. No. 12-268 (rel. Aug. 3, 2018).

⁵ 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).

⁶ 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-tv-station-repack-funding/>.

As currently drafted, however, the NPRM raises serious questions about whether the Commission will deliver on Congress's desire to ensure that all broadcasters are reimbursed for their costs incurred as a result of the post-auction transition. Specifically, by failing to directly and unambiguously address the status of Converted LPTV Stations—which were treated as LPTV stations for the purpose of the incentive auction, but permitted to file their displacement applications before other displaced LPTV stations—the NPRM raises the prospect that those stations will uniquely bear the financial burden of the post-auction transition. The Commission should correct this oversight in the final order and ensure that all broadcast stations are held harmless for the costs that they were forced to incur to accommodate the reallocation of 600 MHz spectrum.

II. BACKGROUND

Congress created the category of Class A television stations in the Community Broadcasters Protection Act of 1999 (the “CBPA”). In enacting the CBPA, Congress directed the Commission to issue licenses to Class A-eligible low power stations immediately where it was possible to do so. But Congress recognized that Class A eligible stations located on out-of-core channels 52 through 69 could not immediately be granted permanent Class A status on their assigned channel because of their need to relocate to an in-core channel. The CBPA directed that these designated “Class A Qualified” stations be permitted to move in core; it also directed the Commission to issue Class A licenses to Class A Qualified stations “simultaneously” upon assignment of their in-core channels. Moreover, the CBPA provided that these stations would be entitled to retain their Class A eligible status until such time as they could be granted a Class A license on their in-core channel. The Commission itself acknowledged both the will of Congress and the challenges facing Class A Qualified stations when it determined to “impose no time limit

on the filing of a Class A application by LPTV licensees operating on a channel outside the core.”⁷

Although many out of core, Class A-eligible stations were able to move to available in-core channels and were immediately issued Class A construction permits, other eligible stations, particularly in the top 30 markets, could not move immediately because of a lack of available displacement channels. Videohouse and WMTM (along with the prior licensee of WIAV-CD) have previously detailed the difficulties they encountered in obtaining Class A licenses on in-core channels for their respective stations.⁸

In the *Incentive Auction R&O*, the FCC concluded that the Spectrum Act mandated that the Commission must only protect the coverage area and population served of full power and Class A broadcast television facilities: (1) licensed as of February 22, 2012, the date of enactment of the Spectrum Act, or (2) for which an application for a license to cover was on file as of February 22, 2012.⁹ WPTG-CD, WOSC-CD and WIAV-CD filed for and obtained their Class A licenses after February 22, 2012, and therefore did not satisfy these criteria. The Commission declined to extend discretionary protection to Class A-eligible stations that were unable to file their license applications by February 22, 2012, finding that although “these stations have made investments in their facilities, we conclude that this does not outweigh the significant detrimental impact on repacking flexibility that would result from protecting them.”¹⁰ Nevertheless, in recognition that these Class A-eligible stations were entitled to greater

⁷ *Establishment of a Class A Television Service*, Report and Order, MM Docket No. 00-10 ¶ 43 (rel. Apr. 4, 2000).

⁸ See, e.g., Petition for Reconsideration of The Videohouse, Inc., *In the Matter of Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, GN Dkt. No. 12-268 (filed Sept. 14, 2014) (“Videohouse Petition”); Opposition of Asiavision, Inc., *In the Matter of Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, GN Dkt. No. 12-268 (filed Nov. 9, 2014).

⁹ See *Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, GN Docket No. 12-268, Report and Order, 29 FCC Rcd. 6567 ¶ 186 (2014) (*Incentive Auction R&O*), *aff’d*, *Nat’l Assoc. of Broadcasters, et al. v. FCC*, 789 F.3d 165 (D.C. Cir. 2015).

¹⁰ *Id.* ¶ 234.

protection than other LPTV stations, the Commission agreed to “provide them with an advanced opportunity to locate a new channel” by filing a displacement application during one of the filing opportunities for alternate channels.¹¹ The FCC further noted that, except as indicated in that paragraph, its “existing displacement rules will apply to such applications.”¹²

Videohouse timely petitioned for reconsideration of the Commission’s decision to exclude those Class A stations, like WOSC-CD, that were unable to obtain an in-core channel until after February 22, 2012.¹³ The FCC dismissed the Videohouse Petition in the Second Order on Reconsideration, where it reiterated that these Converted LPTV Stations “may file a displacement application during one of the filing opportunities for alternate channels.”¹⁴

The FCC’s approach to the Converted LPTV Stations affected not only their ability to participate in the incentive auction, but also to receive reimbursement for the costs they involuntarily incurred as a result of the post-auction transition. In the Spectrum Act, Congress allocated \$1.75 billion to reimburse the licensees of full power and Class A television stations for “costs reasonably incurred” to relocate within their existing band.¹⁵ Because the Commission determined that the Converted LPTV Stations were not “Class A television stations” under the Spectrum Act, however, they were not eligible for reimbursement from the TV Broadcaster Relocation Fund. In the REA, Congress sought to address the shortfalls of the original TV Broadcaster Relocation Fund by expanding the pool of eligible recipients of reimbursement

¹¹ *Id.*

¹² *Id.* ¶ 234 n. 726.

¹³ See Videohouse Petition.

¹⁴ *Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, Second Order on Reconsideration, 30 FCC Rcd. 6746 ¶¶ 53-61, 63 (2015) (“*Second Order on Reconsideration*”).

¹⁵ See *Middle Class Tax Relief and Job Creation Act of 2012*, Pub. L. No. 112-96, §§ 6402 (codified at 47 U.S.C. § 309(j)(8)(G)), 6403 (codified at 47 U.S.C. § 1452), 126 Stat. 156 (2012).

funding to low power television stations, TV translators, and even FM radio stations affected by the transition and that did not receive reimbursement under the Spectrum Act.¹⁶

III. ARGUMENT

A. **The Commission Should Expressly Declare That Converted LPTV Stations That Filed Displacement Applications During the First Priority Window Are Eligible for Reimbursement.**

Although Congress clearly intended to provide reimbursement to all broadcast stations that incurred costs as a result of the post-auction transition, the Commission appears to have inadvertently overlooked the small group of Converted LPTV Stations when it established the criteria for receiving reimbursement funds. The Commission recognized the special status of these Converted LPTV Stations when it provided them with the opportunity to file their displacement applications before other LPTV stations. By failing to define the term “Special Displacement Window” to include this early filing opportunity, however, the FCC could raise unnecessary questions about whether the Converted LPTV Stations are eligible for reimbursement. Neither the REA nor the Commission’s prior orders compel this result, and the Commission should correct this oversight in the final order.

1. **The FCC Has Authority Under the REA to Reimburse Converted LPTV Stations.**

Congress provided the FCC with authority to reimburse those previously out-of-core Class A television stations that filed their displacement applications in the first priority window for expenses incurred due to the repack. In the REA, Congress established three criteria for newly eligible recipients of reimbursement funds: (1) they must be “a television translator station or low power television station”; (2) they must be “eligible to file and do file an application in

¹⁶ See *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)).

the Commission’s Special Displacement Window”; and (3) their expenses must be incurred after January 2017.¹⁷ Each of these criteria apply to the Converted LPTV Stations.

First, for the purpose of reimbursement, these stations are LPTV stations. In the *Incentive Auction R&O*, the Commission concluded that these stations were not eligible for protection or reimbursement because they “remained secondary LPTV stations on February 22, 2012.”¹⁸ Nothing in the REA requires the stations to be LPTV stations at the time the expenses were incurred. Just as the Commission initially determined that stations that were licensed as Class A stations at the time of the incentive auction were, nevertheless, LPTV stations for the auction reassignment and initial reimbursement processes, it should do the same for the interrelated supplemental reimbursement process. Because the stations’ initial eligibility for reimbursement was based on their status as of February 22, 2012, their eligibility for the additional funds should be determined as of this date as well.

Second, the Commission can treat displacement applications filed by these stations in the first priority window as filed in the “Commission’s Special Displacement Window.” Congress did not define the term “Special Displacement Window” in the REA, providing the Commission with discretion to interpret this term. As of this writing, the FCC has never defined the term “Special Displacement Window” in a Commission-level order. In the *Incentive Auction R&O*, the Commission described a “displacement process” for LPTV stations “that are displaced as a result of the incentive auction or the repacking process.”¹⁹ The “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

¹⁷ REA § 511 (amending 47 U.S.C. § 1452(k)(2)).

¹⁸ See *Incentive Auction R&O* ¶ 234.

¹⁹ *Id.* ¶ 659.

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.”²⁰ 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 Converted LPTV Stations.²¹ Thus, the FCC clearly intended to include the Converted LPTV Stations in the “limited window” that would become the “Special Displacement Window.”

The Commission’s specific statements regarding the status of the Converted LPTV Stations provide further support for the notion that it intended for the first priority window to serve as an extension of the general special displacement window. In the *Incentive Auction R&O*, the Commission committed to providing the Converted LPTV Stations “with an advanced opportunity to locate a new channel,” but noted that the “existing displacement rules will apply to such applications.”²² Then, in the *Second Order on Reconsideration*, the Commission reaffirmed that it would treat the applications filed by these Class A stations as “displacement application[s],” and it was merely allowing them to file ahead of other low power television stations.²³ Indeed, 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 Converted 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.”²⁴ The FCC’s rules include no other reference to a window in which Converted LPTV Stations are eligible to file. Thus, it is

²⁰ *Id.*

²¹ *Id.* ¶ 656 & n.1824.

²² *Id.* ¶ 234 & n. 726.

²³ *Second Order on Reconsideration* ¶ 63.

²⁴ 47 C.F.R. § 73.3700(g).

evident that the term “Special Displacement Window” includes the opportunity that the Commission provided for Converted LPTV Stations to file their displacement applications during the first priority window.

2. The NPRM Creates Ambiguity Regarding the Eligibility of Converted LPTV Stations for Reimbursement.

By failing to specifically address the status of the Converted LPTV Stations, however, the FCC has left open the possibility that those stations will not be reimbursed for the costs they have incurred as a result of the post-auction transition. The NPRM does not define the term Special Displacement Window for the purpose of determining eligibility for reimbursement, describing only the criteria “to be eligible to file in the Special Displacement Window.”²⁵ Nevertheless, the NPRM could be read to limit the Special Displacement Window to the specific set of dates in which LPTV stations other than non-Converted LPTV Stations filed their displacement applications. Specifically, in support of a statement in the text about the “special filing window” and the lowercase “displacement window,” Footnote 60 states that “The Special Displacement Window was originally scheduled for April 10, 2018 to May 15, 2018 and was subsequently extended to June 1, 2018.”²⁶ Because the capitalized term Special Displacement Window is the same term used in the eligibility section, this could be read to suggest that only stations that filed applications between April 10, 2018 and May 15, 2018 are eligible for reimbursement. The NPRM’s specific discussion of a separate class of “early displaced stations” (explaining that their applications were deemed filed on the last day of the window) only contributes to the ambiguity as to the status of the Converted LPTV Stations, which it does not specifically address.²⁷

²⁵ NPRM ¶ 28.

²⁶ *Id.* ¶ 14 n.60.

²⁷ *Id.* ¶ 34.

In its discussion about Class A television licensees, meanwhile, the NPRM does not even contemplate that some Class A stations might not be eligible for reimbursement under the Spectrum Act or the REA.²⁸ The Joint Commenters agree with the FCC’s preliminary conclusion that “Class A stations reimbursed from funds for Class A stations under the Spectrum Act or the REA are not eligible for reimbursement from funds dedicated to LPTV/translator reimbursement under the REA” and vice-versa.²⁹ But the Commission should also clarify that displaced stations that were not eligible for funding under the Spectrum Act (because they were treated as LPTV stations) *are* eligible for reimbursement from funds dedicated to LPTV/translator reimbursement under the REA, without regard for whether they filed their applications during the priority filing opportunity or alongside other LPTV stations.

3. Defining “Special Displacement Window” to Include First Window Applications By Converted LPTV Stations is Consistent with Commission Policy and the Public Interest.

Not only is extending reimbursement to Converted LPTV Stations consistent with the plain language of the Commission’s prior orders, but it is also good policy. In the *Incentive Auction R&O*, the agency elected to extend the LPTV displacement window for the Converted LPTV Stations in recognition of the fact that, although these stations were LPTV stations for the purpose of the auction, they were entitled to greater priority than non-Class A LPTV stations.³⁰ It would be completely inconsistent with this rationale to allow the licensee of every displaced LPTV station to receive reimbursement *except* for the licensees of the Converted LPTV Stations.

Furthermore, any requirement that the Converted LPTV Stations must have filed displacement applications within the exact period as other LPTV stations would improperly

²⁸ *Id.* ¶ 37.

²⁹ *See id.*

³⁰ *See Incentive Auction R&O* ¶ 234.

elevate form over substance at the expense of sound public policy. While the Commission could have required the Converted LPTV Stations to file on the same dates as other LPTV stations and merely provided those applications with processing priority (just as it did for applications for new digital-to-digital replacement translators³¹), doing so would have further complicated the displacement process. The FCC has recognized the benefit of providing “a stable database for eligible LPTV/translator stations to identify and apply for available channels.”³² Had the Converted LPTV Stations filed their displacement applications simultaneously with other LPTV stations, however, other LPTV stations would not have had the benefit of a stable database, and could have found their applications mutually exclusive with those of Converted LPTV Stations. The Commission properly avoided this result and simplified the displacement process by allowing the Converted LPTV Stations to file first. To now penalize those stations to the tune of many thousands, if not millions of dollars, for the FCC’s policy decisions regarding the efficient processing of displacement applications, would be unjust and improper.

To fulfill the intent of Congress and ensure that the Converted LPTV Stations are no worse off than any other broadcast stations, the Commission should clarify that, for the purpose of eligibility for reimbursement under the REA, the term “Special Displacement Window” includes displacement applications filed by Converted LPTV Stations in the First Priority Window.

³¹ See *The Incentive Auction Task Force and Media Bureau Announce Procedures for Low Power Television, Television Translator and Replacement Translator Stations During the Post-Incentive Auction Transition*, Public Notice, 32 FCC Rcd. 3860 ¶ 15 (2017).

³² *Freeze on the Filing of Modification Applications to Be Lifted Temporarily to Permit Filing of Applications to Expand the Contours of Full Power and Class A Television Stations That Are Not Part of the Post-Incentive Auction Repack Process*, Public Notice, 32 FCC Rcd. 7643 ¶ 5 (2017).

B. The Commission Should Adopt Its Remaining Proposals for LPTV Reimbursement.

The Joint Commenters generally support the FCC's proposals and appreciate the Commission's efforts to create an efficient process to reimburse LPTV stations. Specifically, the Joint Commenters agree with the NPRM's tentative conclusions that "the equipment and other costs necessary for an eligible LPTV/translator station to construct the facilities authorized by grant of the station's Special Displacement Window application shall be considered costs 'reasonably incurred'" and that this should apply to whatever facilities are authorized by the grant of the station's Special Displacement Window application.³³ Given the limited funds available for reimbursement, the Joint Commenters agree that stations receiving reimbursement from another source should not be eligible to receive funding from the REA.³⁴

The Joint Commenters agree that the Commission should provide the Media Bureau with guidance regarding "a prioritization scheme for reimbursing eligible expenses."³⁵ Any prioritization scheme should begin by fully funding expenses for the Converted LPTV Stations. Just as the Commission recognized that these stations were entitled to priority for their displacement applications, they should also be entitled to priority for their reimbursement applications. The Converted LPTV Stations are subject to more stringent regulations than other LPTV stations, including providing at least three hours per week of locally produced programming, broadcasting children's programming, and maintaining an online public file. In recognition of these efforts, the FCC should ensure that the Converted LPTV Stations are made whole before other LPTV Stations and FM Stations. The Joint Commenters would support a

³³ *Id.* ¶¶ 40-41.

³⁴ *Id.* ¶ 47.

³⁵ *Id.* ¶ 83.

secondary list of priorities beginning with hard costs for the remaining LPTV Stations and FM Stations.

IV. CONCLUSION

For the foregoing reasons, the Commission should include in the final order a definition of the term “Special Displacement Window” that includes displacement applications filed by the Converted LPTV Stations during the first priority window. Additionally, the FCC should prioritize expenses incurred by the Converted LPTV Stations in the reimbursement process.

Respectfully submitted,

FIFTH STREET ENTERPRISES, LLC

By: _____/s/_____
Lawrence Rogow, Member
5670 Wilshire Blvd, Ste. 1620
Los Angeles, CA 90036

THE VIDEOHOUSE, INC.

By: _____/s/_____
Ronald J. Bruno, President
975 Greentree Road
Pittsburgh, PA 15220

WMTM, LLC

By: _____/s/_____
Lawrence Rogow, Member
5670 Wilshire Blvd, Ste. 1620
Los Angeles, CA 90036

Dated: September 25, 2018