

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

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

**COMMENTS**

Cox Media Group, LLC and its parent company Cox Enterprises, Inc. (collectively “Cox”) hereby submit these comments in response to the *Notice of Proposed Rulemaking and Order* (the “*Notice*”) on how to allocate the additional repack funds made available by the Reimbursement Expansion Act.<sup>1</sup> The *Notice* focuses on funding the repack-related expenses of Low Power Television, TV translator and FM broadcast stations but the Commission’s focus should be broader. The Commission should also focus on reimbursing full-power television stations that incur expenses directly caused by the repack of another station. Now that the Commission has additional repack reimbursement funds available, the Commission must follow the requirements of the Spectrum Act and adopt rules to finally make broadcasters whole: all reasonable expenses incurred by full-power television broadcasters directly caused by the repack should be reimbursed. Doing so would be consistent with Congressional intent and the

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<sup>1</sup> *LPTV, TV Translator, and FM Broadcast Station Reimbursement; Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*; Notice of Proposed Rulemaking and Order; MB Docket Nos. 18-214 and 12-268; FCC 18-113 (rel. Aug. 3, 2018). See also *Consolidated Appropriations Act, 2018*, Pub. L. 115-141, at Division E, Title V, Section 511, 132 Stat. 348 (2018) (“*Reimbursement Expansion Act*”); *Middle Class Tax Relief and Job Creation Act of 2012*, Pub. L. No. 112-96 Sections 6402 and 6403, 126 Stat. 156 (2012) (“*Spectrum Act*”).

Commission's objective that non-participating broadcasters be treated fairly after the incentive auction.

**I. THE BROADCASTER RELOCATION FUND IS NOT FULLY REIMBURSING FULL-POWER TELEVISION STATIONS.**

Cox is a diversified media company with interests in television, radio, newspapers and digital communications services. Cox serves twenty local media markets with more than one hundred news outlets that reach over 52 million Americans weekly. Cox's TV interests span fourteen local stations, ten of which are being repacked to new channels as the result of the incentive auction. With stations originally assigned to transition phases 2, 4, 5, 6 and 7, Cox's local markets and engineering team have been working hard to purchase equipment and execute their repack transition plans.

Some of the repack expenses Cox is incurring for its station WFOX-TV in Jacksonville, Florida are not currently reimbursable but should be reimbursable. In Jacksonville, several local stations share a tower and one of those stations, public broadcaster and PBS affiliate WJCT(TV), needs to replace its top-mount antenna because of its repack channel change. When the antenna is replaced, the other stations on the tower must power down their top-mount antennas because of RF and other safety concerns. Depending on a number of variables such as weather, the condition of the tower when the tower crew begins its work, and whether the replacement equipment arrives in working order and consistent with technical specifications, this process could take several days to several weeks. To account for all scenarios, the other stations on the tower, including Cox's WFOX-TV, must either move off the tower or install side-mount antennas to carry their stations while the WJCT(TV) antenna change takes place. Going dark is not an option, especially in Florida during hurricane season, when viewers depend on the stations

the most.<sup>2</sup> If WFOX-TV were to power down for the duration of the WJCT(TV) antenna change, more than 700,000 households would lose service. This would be contrary to the Spectrum Act's intention that viewers be protected and station coverage preserved.

The current repack reimbursement rules only allow the reimbursement of expenses related to a station's own channel change.<sup>3</sup> If, however, a repacked station has a written contractual obligation to pay for expenses incurred by other stations, such as stations on a collocated tower, those expenses are reimbursable to the station with the written contractual obligation to pay.<sup>4</sup> This allows collocated stations with repack expenses to be reimbursed in situations like WFOX-TV has in Jacksonville, but only if stations have written contractual obligations to expend and receive funds on behalf of one another. Under current FCC's rules, WFOX-TV is not allowed reimbursement for the costs incurred to install a side-mount antenna because WJCT(TV) does not have a written contractual obligation to pay. WFOX-TV's agreement with the tower owner is old and does not contemplate a situation where one tower tenant must undertake construction that forces other tower tenants to cease or reduce operations – such a situation was never contemplated by the parties at the time the contract was executed many years ago.

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<sup>2</sup> The stations in Jacksonville are in repack Phase 7, which runs from 10/19/2019 through 1/17/2020. Accordingly, tower work for WJCT(TV) could happen in August or September of 2019, which is prime hurricane season in Florida.

<sup>3</sup> See, e.g., FCC, *Post-Auction Reimbursement: Broadcaster Frequently Asked Questions* at p. 11 (last updated July 24, 2018), <https://www.fcc.gov/sites/default/files/reimbursement-faqs-07242018.pdf> (“Can co-tenants sharing a tower with a repacked station . . . receive reimbursement for any expenses they incur as a result of the repacked station's transition? . . . [O]ther tenants affected by the repack generally are not eligible to be reimbursed from the TV Broadcaster Relocation Fund. An exception will be made if the repacked station has contractual obligations to pay for those types of expenses.”).

<sup>4</sup> *Id.*

WFOX-TV's situation is rare. If WFOX-TV had a current commercial contract with a large tower owner, the tower contract would require stations like WJCT(TV) to compensate other tower tenants for expenses they incur solely because of WJCT(TV)'s need to replace its own antenna. As discussed above, if WJCT(TV) had an explicit contractual obligation to reimburse the other stations on the tower for their repack expenses, those repack expenses would be reimbursable under current repack reimbursement rules. Or, if WFOX-TV had a written contractual right to force WJCT(TV) to pay, that would be reimbursable as well.<sup>5</sup> Under the current repack reimbursement rules, because WFOX-TV does not have an explicit contractual right to demand repayment of expenses it incurs due to tower work done by other tower tenants, WFOX-TV's expenses, which are directly caused by the repack of WJCT(TV), will not be reimbursed. This creates an inequitable situation where some full-power television stations can have their direct repack expenses reimbursed, whereas other stations must pay for their costs themselves, depending on when their tower leasing agreements were drafted. This cannot be the situation Congress intended.

## **II. INCONSISTENT WITH CONGRESSIONAL INTENT, THE COMMISSION KNOWINGLY ADOPTED RULES THAT DENY REIMBURSEMENT OF SOME FULL-POWER STATION REPACK EXPENSES.**

When Congress passed the Spectrum Act in 2012, the implicit agreement was that broadcasters who did not participate in the incentive auction would be made whole for their expenses. This created a challenge for the Commission when it adopted the rules for the spectrum auction in 2014 because, at that time, most parties agreed that the reimbursement funds

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<sup>5</sup> Under the current reimbursement rules, WJCT(TV), as the station causing the expense, would apply to be reimbursed for the expenses incurred by WFOX-TV and then WJCT(TV) would reimburse WFOX.

approved by Congress would be insufficient to cover station repack expenses.<sup>6</sup> Indeed, this concern was expressed by the dissenting statement of Commissioner Pai. In his dissent on the rules regarding broadcaster reimbursement, Commissioner Pai stated:

. . . the incentive auction may produce a repacking plan that will cost \$2 billion or \$3 billion to implement, with repacked broadcasters footing much of the bill. This outcome would be unfair. Broadcasters that do not participate in the incentive auction are not asking for special treatment. . . . Whereas wireless carriers will obtain beachfront spectrum for mobile broadband and participating broadcasters may receive substantial amounts of money, non-participating broadcasters are simply asking to be held harmless rather than being made losers. This is a reasonable request, and we should have granted it. Indeed, I believe that this was Congress' intent.<sup>7</sup>

The concern was echoed by Commissioner Rosenworcel in her statement on the incentive auction rules, saying “[f]airness is essential. This is especially true with regard to the treatment of broadcasters that do not participate in the auction.”<sup>8</sup> Unfortunately, Commissioner Pai and Commissioner Rosenworcel were correct – the current repack reimbursement rules do not hold stations harmless and do not treat all stations equally. Instead of making sure that non-participating broadcasters are not losers at the end of the repack process, the Commission adopted rules that fail to reimburse some legitimate broadcaster repack expenses.

When it adopted the rules for the incentive auction and repacking process in 2014, the Commission recognized that “many towers used by television stations have multiple occupants” and that “[c]hanges to the facilities of one station may affect other broadcast stations on the

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<sup>6</sup> See, e.g., Comments of the National Association of Broadcasters, *In the Matter of Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, GN Docket No. 12-268, filed Jan. 25, 2013 at 49 (“NAB Comments”) (estimating that the \$1.75B in reimbursement funding would only cover the expenses of 400 – 500 stations).

<sup>7</sup> See *In the Matter of Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, Report and Order, 29 FCC Rcd 6567 (2014) (“*Incentive Auction R&O*”), Dissenting Statement of Commissioner Pai at 5.

<sup>8</sup> *Incentive Auction R&O*, Statement of Commissioner Rosenworcel at 1.

tower if, among other things, other station antennas must be moved to accommodate the change.”<sup>9</sup> NAB and other commenters urged the Commission to use its discretionary authority to reimburse broadcasters for repack expenses caused by other stations, including repack expenses incurred by stations that were not reassigned to new channels themselves.<sup>10</sup> Pointing out that the only restriction on the Commission’s ability to reimburse stations is the Spectrum Act’s prohibition against reimbursement for lost revenues, broadcasters urged the Commission to adopt rules that would make non-participating broadcasters whole.<sup>11</sup>

The Commission, citing the lack of adequate funding, declined to make costs caused by other broadcasters reimbursable and instead limited reimbursements to a station’s own repack expenses.<sup>12</sup> This policy decision was not made because the Commission believed that all broadcaster expenses could not or should not be funded. Rather, the Commission was primarily concerned it would run out of reimbursement funds. The Commission did allow reimbursement for co-located stations with explicit contractual obligations to pay the expenses of other co-located stations, but disallowed the reimbursement of other similarly situated co-located stations who are on towers under contracts with older, inadequate contractual protections.<sup>13</sup> Ignoring the concepts of equity and fairness, the Commission failed to recognize the implied contract that is implicit in all tower leases – each tenant has the right to use the tower and if a tenant interferes with the uses of other tenants, the interfering tenant should pay. Under the concept of implied

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<sup>9</sup> *Incentive Auction R&O* at ¶602 fn. 1699.

<sup>10</sup> See *NAB Comments* at 57-58; Comments of the ABC Television Affiliates Association, CBS Television Network Affiliates Association, FBC Television Affiliates Association, and NBC Television Affiliates, *In the Matter of Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, GN Docket No. 12-268, filed Jan. 25, 2013 at 52-53.

<sup>11</sup> See, e.g., *NAB Comments* at 49.

<sup>12</sup> *Incentive Auction R&O* at ¶602.

<sup>13</sup> *Id.*

contract, WFOX-TV's relocation expenses should be seen as part of WJCT(TV)'s repacking expenses, which must be reimbursed under the Spectrum Act.

Furthermore, the Commission's decision to only allow reimbursement for expenses related to a station's own channel change arguably violates the Spectrum Act's requirement that "the Commission *shall* reimburse costs reasonably incurred by a broadcast television licensee that was reassigned" when considering costs incurred by WFOX.<sup>14</sup> Cox's WFOX-TV is a station that has been reassigned to a new post-auction channel, yet the Commission is not reimbursing some of its repack costs that will be reasonably incurred. Congress did not authorize the Commission to deny reimbursement for some reasonably incurred repack expenses, yet the Commission has done exactly that. WFOX's equipment expenses that will be incurred solely because of the WJAC channel change are not currently reimbursable expenses even though there is no question that those expenses are "reasonably incurred by a broadcast television licensee that was reassigned." There is also no question that the costs for WFOX-TV to temporarily move to a side-mount antenna are due to the repack alone, even though WFOX-TV's own channel change does not require it to change antennas.

### **III. REIMBURSEMENT OF ALL FULL-POWER STATION REPACK EXPENSES IS CONSISTENT WITH CONGRESSIONAL INTENT.**

Six years after Congress passed the Spectrum Act and a year after the Incentive Auction was completed, the Commission and the television broadcasting industry were able to produce a concrete estimate of broadcasters' repacking costs. With this additional information, Congress passed the Reimbursement Expansion Act on a bipartisan basis earlier this year. The Reimbursement Expansion Act allocates an additional \$1 billion in fiscal years 2018 and 2019

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<sup>14</sup> See *Spectrum Act* at Section 6403(b)(4)(C) (emphasis added).

for the reimbursement of repack-related expenses for full-power and Class A stations, as well as MVPDs, LPTV stations, TV translators and FM broadcasters.<sup>15</sup> The purposes of the Reimbursement Expansion Act was to ensure that broadcasters are not harmed by the repack, as had always been Congress' intent.

Now that the Commission has additional funding, it should address the concerns expressed in 2014 by Commissioners Pai and Rosenworcel that the Commission treat non-auction stations fairly. Accordingly, with the additional funding from the Reimbursement Expansion Act, the Commission should revisit its 2014 decision to disallow broadcaster repack expenses when those expenses are caused by another station. As part of this proceeding, the Commission should direct that all expenses incurred by all full-power television broadcasters that are caused by the repack be reimbursable, regardless of whether those expenses are caused by a station's own channel change or by the channel change of another station. Stations like WFOX-TV should not have to finance the repack at their own expense.

Cox urges the Commission to direct the Media Bureau and the Fund Administrator to approve the reimbursement of all repack expenses reasonably incurred by all full-power broadcasters, even when an expense is caused by the repack activities of another station. If, however, doing so raises concerns about demands on the Reimbursement Fund, at the very least the Commission should direct the Media Bureau to entertain requests for waiver of the current processing rules by stations such as WFOX-TV that can definitively demonstrate that they will be forced off the air due to the repack activities of another station. The Media Bureau can then weigh the public interest, such as continued service to 700,000 households, against the requested

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<sup>15</sup> See *Reimbursement Expansion Act*.



expense to keep the station on the air. For WFOX-TV, such an analysis would show that it would cost only pennies per household to ensure the station's coverage is preserved.

**III. THE COMMISSION SHOULD REIMBURSE ALL FULL-POWER STATION REPACK EXPENSES.**

Under the Spectrum Act, the Commission has legal authority to determine which expenses are eligible for reimbursement funding. In 2014, because of the "limited amount of money Congress made available," the Commission knowingly adopted rules that excluded legitimate broadcaster repack expenses. Now that more funding is available under the Reimbursement Expansion Act, the Commission should right this wrong. Congressional intent, and fundamental fairness, demands that broadcasters who are similarly situated be treated similarly – all full-power stations should be reimbursed for all of their reasonable repack expenses.

Respectfully submitted,

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