

**ALERT**

# FCC Adopts Process for Reimbursement of Expenses for LPTV/Translator Stations and FM Stations Impacted by the Repack

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On March 15, 2019, the Federal Communications Commission (FCC or Commission) issued a Report and Order establishing the process for reimbursing low power television (LPTV), TV translator, and FM broadcast stations for costs incurred as part of the post-incentive auction repacking process.

While only full power and Class A television stations were eligible for reimbursement under the 2012 Spectrum Act, Congress expanded the list of entities eligible for reimbursement in the 2018 Reimbursement Expansion Act (REA). The REA included \$1 billion in additional funds for the TV Broadcaster Reimbursement Fund (\$600 million in fiscal year 2018 and \$400 million in fiscal year 2019) and authorized the FCC to use up to \$150 million of the FY 2018 appropriation to reimburse LPTV/translator stations and up to \$50 million to reimburse FM stations. The REA did not place any restrictions on the use of the FY 2019 funds, but the FCC will prioritize the payments of such funds to first reimburse eligible full power and Class A stations before using any remaining funds to reimburse eligible LPTV/translator stations and FM stations.

The Report and Order adopts rules governing reimbursement eligibility, the procedures used to reimburse eligible entities, and measures designed to prevent waste, fraud, and abuse in the reimbursement process. Concurrent with the adoption of the Report and Order, the FCC also released a catalog of potentially reimbursable costs (the "Cost Catalog") which, similar to the catalog used for full power and Class A stations, provides a list of categories and expenses most likely to be incurred as a result of the repacking

## Authors

John M. Burgett  
Partner  
202.719.4239  
jburgett@wiley.law  
Ari Meltzer  
Partner  
202.719.7467  
ameltzer@wiley.law  
Joan Stewart  
Partner  
202.719.7438  
jstewart@wiley.law

## Practice Areas

Telecom, Media & Technology

process, as well as guidance on acceptable price ranges for potential reimbursements.

Below, we summarize the key elements of the Order. While the process adopted by the Commission largely mirrors that used for full power and Class A stations, there are several key differences, which we highlight below.

## 1. LPTV/TRANSLATOR STATIONS

### 1. Criteria for Reimbursement

1. **LPTV/Translator Station Eligibility.** LPTV/translator stations are eligible for reimbursement if they meet the following criteria:

1. **Special Displacement Window.** To be eligible for reimbursement, a station must have (i) been eligible to file an application during the Special Displacement Window, (ii) filed during that window, and (iii) had its application granted. An LPTV/translator station would have been eligible to file in the Special Displacement Window if it was operating on April 13, 2017 and it was displaced as a result of the repacking process. (¶¶ 24, 25)

If a displaced station filed in the Special Displacement Window and had its application dismissed, it may still be eligible for reimbursement if it: (i) files a subsequent displacement application after the Media Bureau has lifted the freeze on the filing of such applications; (ii) has a construction permit granted by the deadline set by the Media Bureau; and (iii) funds remain available for LPTV/translator stations in the Reimbursement Fund. (¶ 26)

2. **Licensed and Transmitting.** To be eligible for reimbursement, a station must have been “transmitting” (i.e., operating no less than 2 hours each day of the week and not less than a total of 28 hours per calendar week) for at least 9 of the 12 months prior to April 13, 2017. (¶¶ 27-29)
2. **Other Eligible Stations.** Early Displaced Stations and Displaced Analog-to-Digital Replacement Translators are also eligible for reimbursement.

1. **Early Displaced Stations.** Early Displaced Stations are stations that were displaced by T-Mobile prior to the Special Displacement Window. These stations were encouraged to obtain Special Temporary Authorizations for temporary facilities and the Commission treated these applications as if filed on the last day of the Special Displacement Window. (§ 30)
  2. **Analog-to-Digital Replacement Translators (DRTs).** DRTs displaced as a result of the repack are eligible for reimbursement, provided they meet the eligibility requirements set forth above for LPTV/translator stations. (§ 31)
  3. **Ineligible Stations.**
    1. **Digital-to-Digital Replacement Translators (DTDRTs).** Newly established DTDRTs are not eligible for reimbursement because they would not have been “licensed and transmitting” for 9 of the 12 months prior to April 13, 2017 as required by the REA. (§ 33)
    2. **Class A Television Stations.** Class A stations reimbursed under the 2012 Spectrum Act or under additional Class A funding in the REA are not eligible to receive reimbursement from funds dedicated to LPTV/translator stations. (§§ 33-37)
2. **LPTV/Translator Station Expenses Eligible for Reimbursement**
    1. **Costs Reasonably Incurred.** LPTV/translator stations and DRTs eligible for reimbursement may seek reimbursement for their expenses “reasonably incurred” as a result of their displacement. “Reasonably incurred” expenses include equipment and other costs necessary to build facilities authorized in a station’s Special Displacement Window application. (§ 38) The Order notes that the “comparable” facilities reimbursement standard adopted for repacked full power and Class A stations cannot be realistically applied to LPTV/translator stations. (§ 39)

In addition, the Order conforms that the following expenses are reimbursable:

1. **Full Service Mask Filters.** Costs for full service mask filters are reimbursable as long as they were specified in the station's Special Displacement Window application. (§ 40, 41)
2. **Translator Microwave/STL Facilities.** Reimbursement for adjustments to microwave facilities or studio transmitter links (STLs) may be appropriate in some instances and will be considered on a case-by-case basis. (§ 42)
3. **Displacement Caused by Modification Filings.** The Order confirms that costs incurred by LPTV/translator stations that were displaced solely due to modifications made by full power and Class A facilities in the filing windows for alternate channels or expanded facilities are eligible for reimbursement. (§ 43)
2. **Equipment Upgrades and Reuse of Existing Equipment.** Displaced LPTV/translator stations must justify why it is reasonable to purchase new equipment rather than reuse existing equipment. Consistent with the process for full power and Class A stations, the Commission will not reimburse the costs associated with equipment that represents an "upgrade" from existing equipment. The Order acknowledges that in some cases the FCC may reimburse stations for the cost of new equipment that includes some improved functionality, as long as such costs were reasonably incurred. For example, some stations may not be able buy new equipment precisely comparable in functionality to old equipment because of advances in technology. (§§ 44-46)
3. **Interim Facilities.** Although the Commission notes that it is unlikely that LPTV/translator stations will need to construct interim facilities as part of the displacement process, the FCC will consider reimbursement for expenses for interim facilities on a case-by-case basis. (§ 47)

### 3. Expenses Not Eligible for Reimbursement

1. **Lost Revenues.** The REA prohibits reimbursement of lost revenue costs. As for full power and Class A stations, “lost revenues” consist of “revenue that a station loses as a direct or ancillary result of the reorganization of the ... broadcast spectrum, including the repacking process...” These costs would include lost advertising revenue while the station is off the air or costs associated with programming that cannot be aired. (§ 48)
2. **Costs to Resolve Mutually Exclusive Applications.** Costs associated with resolving mutually exclusive applications filed during the Special Displacement Window are not eligible for reimbursement. This includes any costs associated with reaching a settlement agreement or costs incurred in any auction. Although the Commission will not permit reimbursement for engineering studies used to resolve mutual exclusivity, it will permit reimbursement for certain engineering costs incurred in constructing facilities that result from settlement and or coordination among applicants. (§ 49)
3. **Stations with Other Sources of Funding.** Stations that receive reimbursement from any other source may not request reimbursement for that same expense from the Reimbursement Fund. Stations are required to certify on their reimbursement submissions that they have not received, nor do they expect to receive, reimbursement from any other sources. Consistent with the approach taken with full power and Class A stations, stations must first seek reimbursement from other sources, such as an insurer or state grants, before seeking reimbursement under the REA. However, reimbursing government-owned translators is not considered a duplicative payment, and translators that are licensed to government entities are eligible for reimbursement just as any other eligible translator station. (§ 50 -53)

## 2. FM STATIONS

1. **FM Station Eligibility.** Full power FM stations, low power FM stations, and FM translator stations (collectively, “FM stations”) are eligible for reimbursement if they meet the following criteria:

1. **Licensed and Transmitting.** To be eligible for reimbursement under the REA, an FM station must have been licensed and transmitting on April 13, 2017 using facilities impacted by a repacked television station. Only costs associated with the impact at that location are eligible, and stations must show a causal link between the facilities for which reimbursement is sought and repack-related work to a full power or Class A television station. (§§ 58-59)
2. **Categories of Eligible FM Stations.** The Commission will assign eligible FM stations to one or more of three categories of service disruption and require FM stations to certify that they have not received or do not expect to receive payment from a television station or other sources for “interim facilities.” (§ 63)

The categories of service disruption are:

- **Category (1) - Stations Forced to Relocate Permanently.** This category includes FM stations required to vacate their towers or to relocate their antennas to a different level of their current towers. (§ 61)
- **Category (2) - Stations Forced to Temporarily Dismantle Equipment or Make Other Changes Not Requiring Commission Approval.** This category includes FM stations required to temporarily dismount or disassemble equipment (e.g., antennas) to accommodate work on a television antenna or a tower. This category also includes necessary equipment modifications that do not require Commission approval. (§ 61)
- **Category (3) - Stations Forced to Temporarily Reduce Power or Cease Transmission on Their Primary Facility to Accommodate Antenna or Tower Modifications.** This category includes those FM stations that are required to reduce power or go off the air to protect workers making modifications to television facilities on a tower from RF exposure. FM stations in the other categories may also qualify as Category (3) if they otherwise meet the reimbursement requirements. (§ 61)

2. **FM Station Expenses Eligible for Reimbursement.** Pursuant to the REA, the Commission must provide reimbursement for “costs reasonably incurred by an FM broadcast station for facilities necessary for such station to reasonably minimize disruption of service as a result of the reorganization of broadcast television spectrum.” (§ 65) Consistent with the treatment of LPTV/translator stations, FM stations will not be reimbursed for lost revenues. (§ 88)
  1. **Costs Eligible for Reimbursement.** The Commission will reimburse stations in Categories (1) and (2) as well as stations in Category (3) that experience more than a *de minimis* level of service disruption for up to 100 percent of eligible costs (subject to availability). (§§ 65, 66)
    1. **Replacing or Restoring Facilities – Category (1) and (2).** Category (1) and Category (2) stations are eligible for reimbursement for eligible costs similar to the reimbursements provided to full power and Class A stations. This includes costs of equipment, professional services (e.g., engineering), and tower and construction work. (§§ 67, 70)

Costs of engineering to determine what technical facilities are needed to replace existing service at a new site are reimbursable expenses. Reimbursement for the costs of STLs and related equipment also may be appropriate in certain instances, such as where FM stations incur expenses due to a change in the station’s antenna location. (§§ 67-69)
    2. **Interim Facilities – Category (3).** For the purpose of determining whether a service interruption to a Category (3) station is more than *de minimis*, the Order defines a *de minimis* disruption of service to mean “time off air for less than 24 hours, or time off air confined to the hours of 12:00 midnight and 5:00 a.m. local time.” (§ 80)
  2. **Channel Change Equipment.** The FCC does not expect any FM station will be forced to change frequency as a result of the repack; accordingly, expenses for retuning or replacing antennas or transmitters for channel changes are not eligible for reimbursement. (§ 82)

3. **Equipment Upgrades and Reuse of Existing Equipment.** Category (1) and Category (2) stations will not be held to the “comparable facilities” standard that applies to full power and Class A stations. The Commission acknowledged that FM stations trying to replicate their service type and area from a different location or trying to restore service using alternative equipment may require differently configured equipment. (§ 83)
4. **FM Stations with Other Sources of Funding.** As with LPTV/translator stations, FM stations that receive or have received reimbursement of expenses from sources of funding other than the Reimbursement Fund (e.g., collocated television stations and/or tower owners) will not receive reimbursement for those expenses from the Reimbursement Fund. Consistent with the rules for LPTV/translator stations, FM stations are required to first seek reimbursement from other sources and the stations must certify in their reimbursement submissions that they have not received, or do not expect to receive, reimbursement from other sources. (§ 85-87)

### 3. REIMBURSEMENT PROCESS

The reimbursement process for LPTV/translator stations and FM stations will closely mirror the process for full power and Class A stations, although the Commission said that it plans to “simplify and streamline the forms to be used by newly eligible entities to facilitate and expedite the reimbursement process.” (§ 106)

LPTV/translator stations and FM stations seeking reimbursement will be required to file a form certifying their eligibility (the “Eligibility Certification”) and to provide documentation demonstrating that they meet the eligibility criteria. The Commission may use audits, data validations, site visits or other verifications to confirm eligibility. (§§ 91-93)

Eligible LPTV/translator stations and FM stations will also be required to submit a form (the “Reimbursement Form”) listing their existing equipment and the estimated costs eligible for reimbursement, with cost estimates based on the Cost Catalog or specific estimates received. The Reimbursement Form will be a modified version of the reimbursement form used for full power and Class A stations in the existing program (FCC Form 2100, Schedule 399). Stations that have already incurred costs at this time will be permitted to submit actual costs instead of estimates. At a later date, the Media Bureau will release the Reimbursement Form and announce the deadline for submission of the Eligibility Certification and Reimbursement Form. (§§ 91, 94)



The Commission will require stations to use a procedure and form similar to FCC Form 1876 to submit payment instructions and provide bank account information for the reimbursement payment recipient in the CORES Incentive Auction Financial Module. (§ 104)

The Media Bureau will make an initial allocation of funds based on the circumstances and information available from submitted Reimbursement Forms. After the initial allocation of reimbursement funds, the Media Bureau may issue one or more subsequent allocation(s). (§§ 97-98) The Commission will reimburse all costs in the same manner (i.e., it will not prioritize hard costs over soft costs) to allow entities to determine how to best manage their reimbursement funds. (§ 101)

#### 4. MEASURES TO PREVENT WASTE, FRAUD, AND ABUSE

The Commission is implementing similar measures to prevent waste, fraud, and abuse as those implemented for full power and Class A entities, including requiring entities to document all actual expenses and to retain all relevant documents for at least 10 years after receiving final payment from the reimbursement fund. Entities submitting reimbursement requests will also be required to certify the validity and accuracy of the submission. The Commission will make information regarding eligibility, actual cost, and Reimbursement Fund disbursements available to the public.

If you have any questions about the reimbursement process, please contact the Wiley Rein attorney who regularly handles your FCC matters or one of the attorneys listed on this client alert.

*Kamila Benzina, a Law Clerk in Wiley Rein's Telecom, Media and Technology practice, contributed to this alert.*