

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

In the Matter of)	
)	
Expanding the Economic and Innovation)	GN Docket No. 12-268
Opportunities of Spectrum Through Incentive)	
Auctions)	

DECLARATORY RULING

Adopted: April 15, 2016

Released: April 18, 2016

By the Commission:

I. INTRODUCTION

1. In this Declaratory Ruling, we determine that the Spectrum Act’s reimbursement mandate encompasses “costs reasonably incurred” prior to the close of the auction that otherwise are eligible for reimbursement.¹ We take this action in order to remove uncertainty regarding the eligibility of expenses incurred before and during the auction for reimbursement.² Of course, only stations that ultimately are reassigned to a new channel in their pre-auction band in the repacking process will be eligible for reimbursement of such expenses, which will be subject to the same reimbursement process as post-auction expenses. By allowing broadcasters to get a jump start on the relocation process, this Ruling will promote a rapid, non-disruptive transition following the broadcast television spectrum incentive auction.³

II. BACKGROUND

2. The Spectrum Act requires the Commission to reimburse broadcast television licensees and multichannel video programming distributors (MVPDs), respectively, for “costs reasonably incurred” in relocating to new channels assigned in the repacking process and in order to continue to carry the signals of stations relocating to new channels.⁴ Reimbursements must be made from the \$1.75 billion TV Broadcaster Relocation Fund (Fund) within three years of completion of the forward auction.⁵

3. In the *Incentive Auction R&O*, the Commission established a process that requires eligible entities seeking reimbursement to provide an estimate of their eligible costs following the close of the forward auction and the release of the *Channel Reassignment PN*.⁶ The Media Bureau (Bureau) will

¹ Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96, § 6403(b)(4) (codified at 47 U.S.C. § 1452), 126 Stat. 156 (2012) (Spectrum Act). See *Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, Report and Order, 29 FCC Rcd 6567, 6822, para. 623 (2014) (*Incentive Auction R&O*).

² See 47 CFR § 1.2(a) (FCC may, *inter alia*, on its own motion issue a declaratory ruling removing uncertainty).

³ See *Incentive Auction R&O*, 29 FCC Rcd at 6573, para. 11 (identifying goal of a post-auction transition that is “as rapid as possible without causing unnecessary disruption.”), 6815, para. 605 (reimbursement process must be “prompt and efficient in light of the three-year statutory deadline for issuing reimbursements”).

⁴ 47 U.S.C. § 1452(b)(4)(A)(i), (ii).

⁵ See 47 U.S.C. §§ 309(j)(8)(G)(iii)(I)-(II), 1452(b)(4)(D), (d).

⁶ See *Incentive Auction R&O*, 29 FCC Rcd at 6815, para. 607. Eligible broadcasters will estimate the costs they expect to reasonably incur to change channels, and eligible MVPDs will estimate the costs they expect to reasonably incur to accommodate new channel assignments. *Id.* at 6817-18, para. 611.

review the estimates based on a Catalog of Eligible Expenses.⁷ The Catalog provides guidance regarding the kinds and amounts of expenses that will be reimbursed, but “[a]ll claimed expenses are subject to review by the Media Bureau to ensure that each expense is reasonable.”⁸ After reviewing cost estimates, the Bureau will allocate funds to each eligible entity, and reimbursement will be available from the allocated funds as expenses are incurred.⁹ Prior to the end of the three-year reimbursement period, eligible entities will be required to provide information regarding their actual and remaining estimated costs and will be issued a final allocation, if appropriate, to cover the remainder of their eligible costs.¹⁰

4. We did not address in the *Incentive Auction R&O* whether pre-auction expenses are eligible for reimbursement. We did state that “[w]e interpret the Spectrum Act’s mandate to reimburse ‘costs reasonably incurred’ to require that we reimburse costs that are reasonable to provide facilities comparable to those that a broadcaster or MVPD had prior to the auction that are reasonably replaced or modified following the auction, as a result of the repacking process, in order to allow the broadcaster to operate on a new channel or to allow the MVPD to carry the signal of a broadcaster on a new channel.”¹¹

5. Interested parties have asked for clarification whether expenses incurred before the auction closes and the repacking results are announced are eligible for reimbursement, explaining that uncertainty regarding this issue discourages advance work that could be performed to expedite the post-auction transition for stations that are reassigned to new channels. On November 9, 2015, for example, the American Tower Corporation asked for “a Commission statement that if an expense would be eligible for reimbursement if it were incurred during the 39-month repack period, that same expense also would be eligible for reimbursement if the work was started or completed prior to the commencement of the 39-month repack period.”¹² Resolution of this issue, it states, would enable it to “perform pre-repack work such as tower mapping and structural analysis starting now.”¹³ Other parties have made similar requests for clarification.¹⁴

⁷ *Id.*; see *Media Bureau Finalizes Reimbursement Form for Submission to OMB and Adopts Catalog of Expenses*, Public Notice, DA 15-1328 (Oct. 30, 2015) (*Reimbursement Public Notice*).

⁸ *Incentive Auction R&O*, 29 FCC Rcd at 6821, para. 622; see *id.* at 6817-18 para. 611. See also *Reimbursement Public Notice* at 1 (“As the Commission has explained, the catalog of expenses is not intended to be a definitive list of all reimbursable expenses. Rather, it is a means of facilitating the reimbursement process of claiming reimbursement by setting forth categories of expenses that are most likely to be commonly incurred by relocated broadcasters and MVPDs.”).

⁹ *Id.* at 6815-16 para. 607; *Reimbursement Public Notice* at 3-4. Any time an eligible entity requests reimbursement from its allocated funds, it must also submit actual cost documentation. *Reimbursement Public Notice* at 4.

¹⁰ *Incentive Auction R&O*, 29 FCC Rcd at 6815-16, para. 607.

¹¹ *Id.* at 6822, para. 623.

¹² Letter from Timothy J. Cooney, Counsel for American Tower Corporation, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 12-268 (filed Nov 9, 2015), at 2 (*ATC Ex Parte*). The “39-month repack period” refers to the post-auction transition period beginning with the release of the *Channel Reassignment Public Notice* and ending with the deadline for all television stations that are assigned to new channels in the repacking process to vacate their pre-auction channels. See *Incentive Auction R&O*, 29 FCC Rcd at 6782 para. 525.

¹³ *ATC Ex Parte* at 1-2.

¹⁴ See Letter from Paul J. Feldman, Counsel for Empire State Realty Trust, Inc., to Marlene H. Dortch, Secretary, FCC, GN Docket No. 12-268 (filed Feb. 2, 2016), at 1 (stating that numerous broadcasters are located on top of the Empire State Building, some of which are anticipated to be reassigned to new channels in the repacking process, and that clarification of whether pre-auction expenses are eligible for reimbursement if a broadcaster is reassigned in the repacking would allow preparatory work now, such as reinforcing towers, that in turn would facilitate the post-auction transition); Letter from Steve Sharkey, Vice President, Government Affairs Technology and Engineering Policy, T-Mobile USA, Inc., to Marlene H. Dortch, Secretary, FCC, GN Docket No. 12-268 (filed Feb. 17, 2016), Attachment at 47 (“the FCC should clarify that preplanning expenses are reimbursable. Clarifying that broadcasters

(continued...)

III. DISCUSSION

6. We interpret the statutory reimbursement mandate to include “costs reasonably incurred” before and during the auction that otherwise are eligible for reimbursement. Section 1452(b)(4)(A) defines which entities are eligible for reimbursement (*e.g.*, “a broadcast television licensee that was reassigned” in the repacking process) and what expenses are eligible (*e.g.*, “costs reasonably incurred ... in order for the licensee to relocate its television service from one channel to the other”).¹⁵ Although the statute imposes a deadline on when the Commission makes reimbursements,¹⁶ it contains no temporal restriction on when expenses are incurred or when facilities are modified or replaced. Accordingly, we interpret the statute to cover pre-auction expenses that otherwise are eligible for reimbursement.¹⁷

7. In addition to being consistent with the statutory language, treating pre-auction expenses as eligible for reimbursement is consistent with the statutory purpose of repurposing UHF spectrum for new licensed uses, which will be facilitated by a rapid, non-disruptive transition. As interested parties have explained, making pre-auction expenses eligible for reimbursement will encourage performance of potentially reimbursable work before completion of the auction, providing a head start on what we have recognized will be a “complex and challenging” 39-month transition process for broadcasters.¹⁸

8. Only stations that ultimately are reassigned to a new channel in their pre-auction band in the repacking process will be eligible for reimbursement of expenses incurred before and during the auction, which will be subject to the same reimbursement process as post-auction expenses. As indicated above, we are not expanding the types or amounts of expenses eligible for reimbursement.¹⁹ Eligibility for reimbursement will be based on the guidance set forth in the Catalog of Eligible Expenses and the Bureau’s case-by-case determinations of whether particular expenses qualify for reimbursement.²⁰ There is no guarantee of reimbursement of pre-auction expenses.²¹ As ATC explains, “[i]f an expense is incurred prior to the 39-month repack period, but it turns out that the expense is not eligible for reimbursement (for example, if a TV station incurs a repacking planning expense but its bid to go off air is accepted or if a TV station is not repacked), that expense would be incurred at the station’s own risk and would not be reimbursed.”²² Likewise, if an expense is incurred prior to completion of the auction, but the Bureau determines that it was not “reasonably incurred ... in order for the licensee to relocate its

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are eligible to receive reimbursement for their preplanning costs even though they are incurred prior to the close of the auction would encourage stations to begin these initial planning steps.”).

¹⁵ 47 U.S.C. § 1452(b)(4)(A).

¹⁶ *See id.* at § 1452(b)(4)(D) (“The Commission shall make all reimbursements required by subparagraph (A) not later than the date that is 3 years after the completion of the forward auction under subsection (c)(1).”).

¹⁷ *Incentive Auction R&O*, 29 FCC Rcd at 6822, para. 623. *See* 47 U.S.C. § 1452(b)(4)(A). In the discussion that follows, we use the term “pre-auction expenses” to refer to expenses incurred prior to the release of the *Channel Reassignment PN* announcing the results of the incentive auction and the repacking process.

¹⁸ *Incentive Auction R&O*, 29 FCC Rcd at 6788, para. 539. *See ATC Ex Parte* at 1-2 (“... Other advantages of allowing potentially reimbursable work to begin before the 39-month repack period are that tower prep work will free up tower engineering and construction support resources during the 39-month repacking period”).

¹⁹ *See ATC Ex Parte* at 2 (“ATC is asking only for a Commission statement that if an expense would be eligible for reimbursement if it were incurred during the 39-month repack period, that same expense also would be eligible for reimbursement if the work was started or completed prior to the commencement of the 39-month repack period.”).

²⁰ *IA R&O*, 29 FCC Rcd at 6821, para. 622 (“The appropriate scope of ‘costs reasonably incurred’ necessarily will have to be decided on a case-by-case basis.... All claimed expenses are subject to review by the Media Bureau to ensure that each expense is reasonable.”); *see* 47 CFR § 73.3700(e)(7).

²¹ *See IA R&O*, 29 FCC Rcd at 6821, para. 622.

²² *ATC Ex Parte* at 2. *See Incentive Auction R&O*, 29 FCC Rcd at 6814, para. 602 (“Stations that are not reassigned to a new channel will not be eligible for reimbursement.”).

television service from one channel to the other,”²³ then, like any other expense subject to such a determination, it would not be reimbursed.²⁴

IV. ORDERING CLAUSES

9. **IT IS ORDERED**, pursuant to the authority found in Section 6403(b) of the Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96, 126 Stat. 156, 47 U.S.C. § 1452(b), and section 1.2 of the Commission’s rules, 47 C.F.R. § 1.2, the *Declaratory Ruling IS ADOPTED*.

10. **IT IS FURTHER ORDERED** that the Declaratory Ruling adopted herein shall be effective upon release.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

²³ 47 U.S.C. § 1452(b)(4)(A)(i).

²⁴ Because we are interpreting the statute to authorize reimbursement of pre-auction expenses, notice-and-comment procedures are not required to implement our action. *See, e.g., Chisholm v. FCC*, 538 F.2d 349, 364-65 (D.C. Cir. 1976) (FCC acted properly in interpreting equal time provisions of Communications Act of 1934 via declaratory order rather than through notice and comment rule making). *See also Perez v. Mortgage Bankers Ass’n*, 135 S.Ct. 1199, 1206 (2015) (“Because an agency is not required to use notice-and-comment procedures to issue an initial interpretive rule, it is also not required to use those procedures when it amends or repeals that interpretive rule.”). Pursuant to the *Incentive Auction R&O*, 29 FCC Rcd at 6812 para. 599 and 6820 para. 619, the Media Bureau has delegated authority to make any modifications necessary to the rules or the associated forms in order to implement our action.