

BEFORE THE  
**FEDERAL COMMUNICATIONS COMMISSION**  
WASHINGTON, D.C.

In re Petition of:	)	
	)	MB Docket No. 17-306
Entravision Holdings, LLC	)	
	)	
For Modification of the Television Market	)	CSR-8944-A
For Station WJAL(TV), Silver Spring, Maryland	)	
	)	
Facility ID 10259	)	
	)	

To: The Secretary  
Attn: Chief, Media Bureau

**MOTION TO STRIKE**

Entravision Holdings, LLC (“Entravision”), the licensee of Television Station WJAL(TV), Channel 9, Silver Spring, Maryland (Facility ID: 10259) (“WJAL” or the “Station”), by its attorneys, hereby moves to strike<sup>1</sup> the procedurally defective and substantively meritless Comments filed in this proceeding, on December 14, 2017, by NCTA-The Internet & Television Association (“NCTA”), the trade association for the cable television industry. In support thereof, Entravision states as follows.

The pleading cycle in this proceeding was triggered by the Commission’s *Public Notice* announcing the submission of Entravision’s Petition for Special Relief against certain cable television systems owned by subsidiaries of Comcast Corporation (“Comcast”). Public Notice, Report No. 0460, released November 13, 2017. Section 76.7(b)(1) of the Commission’s Rules provides:

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<sup>1</sup> This Motion should be entertained, pursuant to Section 76.7(d), on the basis of the circumstances described herein, where NCTA has violated the Commission’s pleading requirements and done so in a manner intended to avoid the submission of a responsive pleading on Entravision’s part.

Unless otherwise directed by the Commission, interested persons may submit **comments** or **oppositions within twenty (20) days** after the date of public notice of the filing of the petition (emphasis added).

Application of Section 76.7(b)(1) set the time for filing of comments or oppositions in this proceeding as December 4, 2017 (December 3, 2017 was a Sunday). Instead of doing so, NCTA waited, without asking for consent to do so, for another 10 days, until December 14, 2017, when replies were due to be filed, in order to submit its patently late-filed Comments.

In that NCTA failed to meet the required filing deadline and lacked the required direction to make such a late filing, NCTA's Comments were procedurally defective.<sup>2</sup> In addition, by delaying the filing of the Comments until the same day that Entravision's Reply was due, NCTA sought to avoid having its arguments rebutted and thereby secure an upper hand in this proceeding. Likewise, the public interest is not disserved by the dismissal of the Comments. NCTA is an alter ego of its most significant and lucrative member, Comcast,<sup>3</sup> the party against whom the Petition is directed, and has merely provided a "me to" statement that echoes what Comcast has already had to say. Consequently, the NCTA Comments must be dismissed as not only procedural defective but done so in a manner to prejudiced the proceeding.

Should the Commission wish to consider Comments for any public interest benefit and not reject them owing to their procedural defects, the public interest is not

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<sup>2</sup> In addition, the Comments were procedurally defective as they were not served upon Entravision, thereby constituting an ex parte submission, and were not verified as required by Section 76.6(a)(4).

<sup>3</sup> Entravision questions whether NCTA is speaking for the entire cable television industry or just Comcast. In this regard, Entravision urges the Commission to take notice that Cox, which had secured a market modification involving WJAL, chose, in MB Docket No. 17-307, not to object to WJAL being returned to its market.

well served by receipt of the Comments. Simply put, the Comments do not expand the record and merely track the meritless arguments that Comcast made in its Opposition. In that NCTA's Comments are merely repetitive of the Comcast pleading, already on the record, the public interest does not benefit from their consideration and the effort by NCTA to circumvent the Commission's rules should not be countenanced.

Even assuming, *arguendo*, that the Commission concludes that there is reason for consideration of NCTA's Comments, the Comments themselves are without merit and do not provide the arguments that would necessitate the relief sought.

NCTA's arguments, as presented in its Comments, are premised on a channel sharing station not being entitled to seek must-carry treatment owing to the new coverage contour it obtains as a result of engaging in channel sharing. Somehow, NCTA concludes that a great burden will be placed on its members as a horde of broadcasters seek to conclude their channel sharing arrangements and, as a result, obtain markedly different signal contours, thereby entitling them to new and different cable carriage arrangements. This is far from what the facts provide and is not backed up by substantial evidence offered on NCTA's, despite its ability to secure such information from its industry members.

What is ignored in NCTA's arguments is that this is neither the time nor the place for arguments concerning channel sharing to be made. That time and place was when the Commission adopted rules and regulations to govern the incentive auction process, market in general and channel sharing in particular. In the channel sharing rulemaking, the Commission proposed specific policies concerning channel sharing arrangements and the MVPD carriage rights of channel sharing stations and solicited comments from

industry stakeholders and other interested parties. Based on these comments, the Commission evaluated and refined its policies before adopting them in their final and non-reviewable form. The alarmist claims that NCTA is advancing now should have been raised by NCTA at that time, before the rules became final and non-reviewable, in order to be considered and dealt with fully. In failing to make those arguments and allowing the rules containing them to be adopted and become final, NCTA waived the right to challenge them at this time.

In *Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, 29 FCC Rcd 6567 (2014), the Commission indicated that the carriage rights of spectrum sharing stations would not automatically change as a result of new channel sharing arrangements, but that a channel sharee “may seek to add communities to its market which it can now reach from its new location...” under the Commission’s traditional market modification analysis. “A station’s carriage rights will not be expanded or diminished through [the channel sharing/relocation] process, although its ability to exercise these rights may change based upon the facts of its specific channel sharing arrangement.” *Id.* at ¶ 709.

What is of significance, and neatly ignored by NCTA, is that the ability of a broadcast station to return its spectrum to the FCC, enter into a channel sharing arrangement, and then, as a sharee, to retain cable carriage rights equivalent to a sharer station was a fundamental tenet of the Commission’s adoption of its incentive auction rules. This was an intentional act on the Commission’s part and formed the basis upon which the Commission urged broadcasters, otherwise not required to participate in the

incentive auction, to do so.<sup>4</sup> While there may not be definitive evidence as to what induced parties to participate in the incentive auction, there is clear and convincing evidence that only a limited number of broadcasters who returned spectrum also decided to go dark. The option of returning spectrum and engaging in channel sharing was the preferred option as the number of channel sharing stations prove out.

What NCTA also does not detail is this is not the first time, in the recent past, that the Commission has authorized technology changes in the television broadcast industry that have had an impact on cable carriage but, in doing so, have not economically or otherwise caused any damage to the cable television industry. The first, and perhaps most important, was the digital conversion, involving analog channels migrating to the digital mode. The Commission provided that the conversion would not affect the cable carriage rights of analog stations as they transitioned to paired analog and digital stations and finally to digital-only service. As a policy matter, the Commission reasoned in the proceeding *In Service Rules for the 746-764 and 776-194 MHz Bands, and Revisions to Part 27 of the Commission's Rules*, 15 FCC Rcd 20845, 20872 (2000), that the carriage rights of exclusively digital stations would follow their analog carriage rights.

First, we wish to clarify that cable systems are ultimately obligated to accord 'must carry' rights to local broadcasters' digital signal. Existing analog stations that return their analog spectrum allocation and convert to digital are entitled to

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<sup>4</sup> In a Fact Sheet, issued on March 2, 2017, the Commission described how it promoted channel sharing to the potential broadcaster participants in the auction process:

"To encourage participation in the first-ever broadcast incentive auction, the FCC adopted rules permitting primary broadcast television licensees (full power and Class A TV stations) to share a single TV channel, giving potential bidders an option to sell their spectrum to the Commission while staying on the air."

mandatory carriage for their digital signals consistent with applicable statutory and regulatory provisions. (footnote omitted).

This policy was ratified in cases involving individual stations that were undertaking their conversions. *See, e.g., WHDT-DT, Channel 59, Stuart, Florida*, 16 FCC Rcd 2692, 2698 (2001).

The more recent instance of technology change affecting cable carriage involved the adoption of the distributed transmission service (“DTS”) by broadcasters. DTS offers broadcasters the ability to add multiple transmitter locations for their stations and, thereby, expand their coverage contours. Such an expansion of contour would appear to entitle broadcasters to an expanded market. When a broadcaster recently sought to modify its market owing to its initiation of DTS operations, not a single cable company, nor the concerned NCTA, opposed the broadcaster’s request. The Commission expanded the Station’s market based on its adoption of the new technology. *KAZN-TV Licensee, LLC*, 30 FCC Rcd 8126 (MB 2015). One is left to wonder why the adoption of DTS is harmless while channel sharing represents a game changer.

Finally, NCTA’s prediction that an army of channel-sharing stations is ready to descend on the Commission’s market modification process in order to extract undeserved must-carry rights from cable operators is groundless. NCTA makes note of two television stations that have entered into channel sharing arrangements that have resulted in their new communities of license being distant from their former ones. However, there is no mention by NCTA as to whether these stations have entered into market modification requests or that they are must-carry stations that intend to make carriage demands, as opposed to operating under retransmission consent agreements where no

market modification or must-carry request is necessary.<sup>5</sup> Even if one assumes that they intend to seek such treatment, three television stations hardly evidence a dramatic change in cable carriage demand.

Moreover, we are dealing with a finite number of television stations and limited numbers of stations returning spectrum in some, but not all, markets. As for these stations, they may enter into channel sharing arrangements, but those arrangements will, in all likelihood, involve sharer stations in the same general area. While there may be additions and subtractions, the likelihood that the additions will offset the subtractions and there will be little burden placed on any cable television system.

In sum, NCTA's Comments, despite their alarmist tone, do not offer any basis, in policy or practice, as to why the Commission should abandon, even if it could, the policies contained in the incentive auction rulemaking. WJAL stands out as a single television station whose licensee has relocated its television stations within its DMA, has spent its funds in constructing a new facility with a third-party sharer, and stands entitled to a market modification and carriage on cable television stations where it delivers a good quality signal. NCTA has provided no reason for this not to be so and, given the rules adopted by the Commission there is every reason to deny NCTA's contentions.

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<sup>5</sup> In fact, if the Commission wishes to consider NCTA's arguments, it should put NCTA to the test of identifying the number of must-carry stations in the Washington DMA and to evidence the harm that WJAL might cause by taking up spectrum on their cable systems. NCTA should not be permitted to contest channel sharing, and allege that Entravision's request will have anything but limited consequences (whether that is relevant or not), without offering evidence that it can easily secure from its own members.

WHEREFORE, the Comments filed by NCTA-The Internet & Telecommunications Association should be dismissed or, in the alternative, the arguments presented by it should be denied.

Respectfully submitted,

**ENTRAVISION HOLDINGS, LLC**

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4827-6677-4361.1



**CERTIFICATE OF SERVICE**

I, Barry A. Friedman, hereby certify that I have served on this 27th day of December, 2017, a copy of the foregoing **Motion to Strike** on the following party by first-class mail, postage pre-paid:

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