

**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)

OPPOSITION TO PETITION FOR RECONSIDERATION

The National Cable & Telecommunications Association (“NCTA”)¹ hereby submits its Opposition to the Petition for Reconsideration (“Petition”) filed by the Expanding Opportunities for Broadcasters Coalition (“Coalition”). The Petition seeks changes in the rules adopted in the *Incentive Auction Order*² that govern channel sharing by a television licensee that has relinquished its spectrum (the “sharee” station) for auction. Among other things, the Coalition seeks a rule change to (1) permit broadcasters to enter into channel sharing agreements (“CSAs”) up to one year after returning their broadcast spectrum and going off the air (and not prior to the auction, as mandated by the existing rules), and (2) authorize the creation of “second generation CSAs” that could share a different channel at a later date (and demand must carry rights from their new location).³

These proposals would introduce significant and ongoing uncertainty into an already complicated post-auction process. Providing the Coalition with the additional options it seeks would confer greater cable carriage rights on “sharee” stations than Congress intended. It could

¹ NCTA is the principal trade association for the U.S. cable industry, representing cable operators serving more than 90 percent of the nation’s cable television households and more than 200 cable program networks. The cable industry is the nation’s largest provider of broadband service after investing over \$210 billion since 1996 to build two-way interactive networks with fiber optic technology. Cable companies also provide state-of-the-art competitive voice service to more than 27 million customers.

² *In re Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, Report and Order, 29 FCC Rcd. 6567 (2014) (“*Incentive Auction Order*”).

³ Expanding Opportunities for Broadcasters Coalition Petition for Reconsideration filed in Dkt. No. 12-268 at 12 (Sept. 12, 2014) (“Coalition Petition”).

cause confusing changes for customers to cable channel line-ups and could unfairly leave cable operators at risk of incurring unreimbursed expenses from mandatory carriage of “sharee” stations transmitting from a new shared channel. The Petition, insofar as it impacts cable carriage of these stations, should be denied.

DISCUSSION

The Coalition seeks reconsideration of certain channel-sharing rules, arguing that “the FCC must make [the channel sharing option] as compelling and risk-free as possible.”⁴ However, granting broadcasters an extended time to decide whether to enter into sharing arrangements – and, as a result, pushing back the time by which a broadcaster could assert cable carriage rights from a new shared location – would unfairly impose additional risk on cable operators and their customers and would disrupt the Commission’s post-auction timetable.

The rules adopted in the *Incentive Auction Order* require that applicants proposing to relinquish their spectrum in order to share channels must enter into certain commitments with a sharing station and must apply to the Commission for approval *prior* to the incentive auction.⁵ Petitioners propose that they should be allowed “to enter into CSAs *after* agreeing to relinquish their spectrum rights”⁶ and that they be given one year after the date a licensee relinquishes its spectrum to choose to enter into a channel sharing arrangement (with a nine month deadline to file for FCC approval, if still needed).⁷ They further propose that the Commission allow channel sharees to find a different station to share with at some later date (through what they call a

⁴ Coalition Petition at 3. We do not address certain of the Petition’s other proposals to change the rules for CSAs.

⁵ *Incentive Auction Order* at ¶ 436 (requiring submission of channel sharing agreement as part of pre-auction application).

⁶ Coalition Petition at 8 (emphasis supplied).

⁷ *Id.* at 9 -10. The Coalition argues that any broadcaster relinquishing its spectrum should be free to channel share without prior FCC approval. *Id.* at 10. Requiring Commission prior approval is important to protect against a sharee gaming the channel sharing option simply in an effort to increase cable carriage.

“Second Generation CSA”), and to take their cable carriage rights with them to their new shared location.⁸

As justification for the delay, the Coalition argues that successfully negotiating a CSA is complicated and time-consuming and “under even the most optimal circumstances, this process can take several months given the complexity of the issues involved and the novelty of the concept.”⁹ But since the Petition was filed, the Commission has pushed back its timeframe – until early 2016 – for the spectrum auction.¹⁰ Therefore, licensees should now have ample opportunity to negotiate CSAs prior to the 2016 auction.

Moreover, granting the petition would contravene the Spectrum Act and would impose undue burdens on cable operators and their customers. The Commission should reject it.

A. The FCC Rules Must Maintain the Link Between Relinquishment of the Spectrum And Must Carry Channel Sharing Rights

The Coalition argues that “there is no legal impediment to allowing broadcasters to enter into CSAs after the auction.”¹¹ But there is a legal impediment to extending to broadcasters that enter into such post-auction CSAs *cable carriage* rights at their new shared locations. The plain language of the Spectrum Act ties such carriage rights to relinquishment of the spectrum, providing that “a broadcast television station that voluntarily relinquishes spectrum usage rights under this subsection *in order to share a television channel and that possessed carriage rights... on November 30, 2010*, shall have, at its shared location, the carriage rights under such section that would apply to such station at such location if it were not sharing a channel.”¹² If a

⁸ Coalition Petition at 12.

⁹ *Id.* at 7.

¹⁰ www.fcc.gov/blog-incentive-auction-progress-report (Oct. 24, 2014).

¹¹ Coalition Petition at 8.

¹² Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96 § 6403(a)(4), 126 Stat. 226 (2012) (“Spectrum Act”) (“Protection of Carriage Rights of Licensees Sharing a Channel”). *See also id.*, § 6403

broadcaster has not volunteered to participate in the auction based on an intention to channel share, the Spectrum Act by its terms does not give it carriage rights at the new shared location.

To extend carriage rights to a “second generation CSA” would be that much further removed from Congress’ limited purpose.¹³ The Spectrum Act allows only a one-time auction of television spectrum¹⁴ – and, therefore, provides only a single opportunity to enter into a channel sharing arrangement covered by the channel sharing carriage provisions of the Spectrum Act.

Moreover, Congress contemplated that a subset of television stations – those with cable carriage rights on November 30, 2010 – would *continue* to be entitled to carriage at the new shared location.¹⁵ The time-frame for channel sharing in the *Incentive Auction Order* contemplates a simultaneous relinquishment of spectrum and relocation to the new shared channel.¹⁶ But the Coalition’s proposal could apply even after the station has gone off the air.¹⁷ If there is a break in service, these stations are not entitled to assert carriage rights from the shared channel given the purpose of the Spectrum Act.

(b)(4)(A)(ii) (providing reimbursement for an MVPD to “continue to carry the signal of a broadcast television licensee... that voluntarily relinquishes spectrum usage rights [under the reverse auction] to share a television channel with another licensee...”).

¹³ See Coalition Petition at 12 (arguing that channel sharing need not be permanent and that a sharee should be able to “relinquish their licenses or find a new partner, subject to the one-year time limit to resume transmissions under Section 312(g) of the Communications Act” and that such stations “would continue to be entitled to whatever carriage rights they had on November 30, 2010, but from their new shared location.”).

¹⁴ Spectrum Act, § 6403(e).

¹⁵ See Spectrum Act, § 6403(b)(4)(A)(ii) (providing reimbursement for an MVPD to “*continue* to carry the signal of a broadcast television licensee... that voluntarily relinquishes spectrum usage rights [under the reverse auction] to share a television channel with another licensee...”).

¹⁶ *Incentive Auction Order* at ¶ 577 n. 1624 (“We expect that the termination of operations of the sharee’s pre-auction channel and transition to a shared channel will occur on the same day and thus not result in any gap in service.”).

¹⁷ *Id.* at ¶ 575 (requiring all “winning license relinquishment bidders to terminate operation on their pre-auction channels within three months of receipt of their reverse auction proceeds”).

B. Granting Undue Flexibility to Sharee Broadcasters Will Harm Cable Operators and their Customers

The concern about the lag between the conduct of the reverse auction and a firm decision to channel share is not just theoretical. Any undue delay will have a practical impact on orderly preparations for post-auction channel line-ups and will jeopardize cable operators' ability to be held harmless for reasonable expenses incurred on account of broadcaster repacking or channel sharing.

Under the rules established in the *Incentive Auction Order*, no later than three months after the Commission issues its "Channel Reassignment Public Notice," broadcast television station licensees and MVPDs "that are eligible to receive payment of relocation costs will be required to file an estimated cost form providing an estimate of their reasonably incurred relocation costs."¹⁸ If channel sharing agreements are not in sync with the reimbursement deadline, cable operators might not have notice of an obligation to carry a sharee station until months after the deadline for filing estimated costs would have passed. That could impact cable operators' ability to recoup reasonable expenses related to carrying the sharee station from its new location, contrary to Congress' directive to compensate MVPDs from the TV Broadcaster Relocation Fund to continue to carry the signal of a broadcast television licensee that "voluntarily relinquishes spectrum usage rights under subsection (a) to share a television channel with another licensee...."¹⁹ While the *Incentive Auction Order* holds out some theoretical possibility for reimbursement for unexpected expenditures,²⁰ there is no assurance that a cable

¹⁸ *Incentive Auction Order*, Appendix A, to be codified at 47 C.F.R. § 73.3700 (e)(2).

¹⁹ Spectrum Act, § 6403(b)(4)(A)(ii).

²⁰ *Incentive Auction Order* at ¶ 610 n. 1722 ("if an entity that did not file an estimated cost form becomes aware of an expense eligible for reimbursement after the three-month deadline, it may file a late estimated cost form together with an explanation of why the form could not be timely filed. The Commission will consider any late-filed forms on a case-by-case basis.").

operator would be able to obtain reimbursement should it file after the vast majority of claims to the fund have already been allocated. And since the TV Broadcaster Relocation Fund by law must transfer any unused funds by three years after completion of the forward auction,²¹ there would be no chance for reimbursement if “second generation CSAs” were to arise and their carriage resulted in new expenses several years down the road.

This is a particular concern because the *Incentive Auction Order* authorizes several channel sharing scenarios in which a station that was never carried on a particular cable system could demand carriage. For example, while Class A low power stations have extremely limited must carry rights,²² the *Incentive Auction Order* allows a full power station to share with the Class A station and demand carriage at that new shared location.²³ In that case, operators may need to purchase new receive antennas and other equipment to obtain the never-before-carried channel.²⁴ Moreover, while the rules restrict channel sharing to the same DMA in which a station was previously carried, a sharee station under certain circumstances will be able to abandon its community of license and share with a station in a wholly different community.²⁵ In that instance, a particular cable operator in the new location may not have been carrying the sharee station pre-auction. Addition of a new sharee station could necessitate operational changes and changes in channel line-ups – and could cause viewer disruptions.

²¹ Spectrum Act, § 6403(d)(4).

²² 47 U.S.C. § 534(h) (2) (defining “qualified low power station”).

²³ *Incentive Auction Order* at ¶ 706 (clarifying that “a full power sharee, whether a commercial or NCE station, that channel shares with a Class A licensee will have the same carriage rights at the channel sharing location that a non-channel sharing full power station would have at that location.”) The Class A station would not have any new carriage rights.

²⁴ See NCTA Comments, GN Docket No. 12-268 (filed Nov. 4, 2013) (describing different types of costs that cable operators may incur as a result of broadcasters’ changes in their transmissions).

²⁵ *Incentive Auction Order* at ¶ 374 (allowing channel sharing bidder (“sharee”) to change its community of license in certain cases where it cannot satisfy the community of license signal requirement operating from the host (“sharer”) transmission site).

Under the current rules, sharing stations must notify the Commission of their intent to share prior to the auction and must file their application for a license for the shared channel within three months after receiving auction proceeds.²⁶ The additional time the Coalition seeks for deciding whether or not to share runs headlong into the detailed rules governing termination of station operations established by the *Incentive Auction Order*, and is hardly analogous to the expiration of a license for failure to transmit on which the Coalition bases its one-year proposal.²⁷ The Commission has established a variety of steps that must be taken and detailed deadlines to govern the post-auction period. By three months after receiving the auction proceeds, the *Incentive Auction Order* requires a licensee to have terminated operations on a pre-auction channel and complied with the notice and cancellation provisions of Section 73.1750 of the rules.²⁸ The terminating licensee will already have notified viewers that it is going off the air.²⁹ And it already will have informed cable operators that the station will cease operations.³⁰

Providing an extended window for a license essentially to change its mind will cause significant disruptions to operators who already may have started to use the spectrum on their cable plant for purposes other than carriage of the now-defunct station. Operators may already have provided the required notice to viewers that a station will no longer be carried on the system. Forcing operators to make multiple changes to system operations to delete – and potentially then add – the same channel will cause substantial viewer confusion.

²⁶ *Incentive Auction Order*, Appendix A, to be codified at 47 C.F.R. § 73.3700 (b)(3).

²⁷ Coalition Petition at 9-10.

²⁸ *Incentive Auction Order*, Appendix A, to be codified at 47 C.F.R. § 73.3700 (b)(4).

²⁹ *Id.*, § 73.3700 (c).

³⁰ *Id.*, § 73.3700 (d).

CONCLUSION

For all these reasons – statutory and practical – the Petition for Reconsideration should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Gretchen M. Lohmann, hereby certify that on this 12th day of November, 2014, I served one copy of the foregoing Opposition to Petition for Reconsideration via electronic mail on the following party:

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