

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Amendment of Parts 73 and 74 of the Commission’s Rules to Establish Rules for Digital Low Power Television and Television Translator Stations)	MB Docket No. 03-185
)	
)	
Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions)	GN Docket No. 12-268
)	
)	
Amendment of Part 15 of the Commission’s Rules To Eliminate the Analog Tuner Requirement)	ET Docket No. 14-175

**REPLY COMMENTS OF THE
NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION**

The National Cable & Telecommunications Association hereby submits its Reply Comments in the above-captioned proceeding.¹

The *Third Notice of Proposed Rulemaking* seeks comment on a number of ways to “mitigate the potential impact of the incentive auction and the repacking process on [low power television] and TV translator stations to help preserve the important services they provide.”²

While the *Third Notice* does not raise the issue of mandatory cable carriage, some commenters urge the Commission to provide low power (“LPTV”) stations with new or expanded cable

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 \$230 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 28 million customers.

² *In re Amendment of Parts 73 and 74 of the Commission’s Rules to Establish Rules for Digital Low Power Television and Television Translator Stations; Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions; Amendment of Part 15 of the Commission’s Rules to Eliminate the Analog Tuner Requirement*, Third Notice of Proposed Rulemaking, 29 FCC Rcd 12536 ¶ 1 (2014) (“*Third Notice*”).

carriage rights.³ The Commission previously rejected similar proposals to grant displaced LPTV stations additional cable carriage rights and it must do so again here.

The *Incentive Auction Order* recognized the limits of the Commission’s authority in this area.⁴ The Commission rejected the NRB’s proposal for providing displaced LPTV stations with expanded cable carriage rights at their new location or channel, finding that “neither NRB nor any other commenter maintains that such action would be within the Commission’s statutory authority and, regardless, we decline to grant carriage rights beyond those required under the Communications Act.”⁵

Commenters make no showing in this docket that the Commission has such authority, nor could they. The Cable Act provides highly limited carriage rights for low power stations, which must satisfy numerous different criteria to be “qualified” for mandatory cable carriage.⁶ And the

³ See, e.g., LPTV Spectrum Rights Coalition Comments at 10-11 (proposing that the FCC “encourage LPTV and TV Translator channel sharing with expanded MVPD must-carry rights”); National Religious Broadcasters (“NRB”) Comments at 11 (arguing that “displaced LPTV stations [should] automatically [be] granted mandatory carriage status at their new location/channel upon constructing their new facilities” and that those rights “should not be restricted by the standard criteria to be a ‘qualified low power television station’ under Section 76 of the Commission’s rules”).

⁴ See *In re Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, Report & Order, 29 FCC Rcd 6567 ¶ 667 (2014) (“*Incentive Auction Order*”); see also *In re Establishment of a Class A Television Service*, Memorandum Opinion & Order on Reconsideration, 16 FCC Rcd 8244 ¶ 37 (2001) (refusing to expand carriage rights for Class A low power stations, acknowledging that “Congress intended that Class A stations have the same *limited must carry rights as LPTV stations*...[t]o be eligible for must carry, Class A stations, like other low power stations, must comply with the Part 74 rules and the other eligibility criteria established by statute and our rules...” (emphasis supplied).

Even if there were any ambiguity about the rights of low power stations to cable carriage – which there is not – NCTA has demonstrated that First Amendment considerations provide another reason for the Commission to narrowly interpret those rights. See, e.g., NCTA Reply Comments, MB Docket No. 07-294 at 4-6. In fact, even limited low power carriage obligations raise serious constitutional problems, since the considerations for carriage of low power stations appear to embody a content-based government interest (promoting carriage of “local news and informational needs”), which would subject the requirement to the most stringent First Amendment scrutiny. See *Turner Broad. Sys. v. FCC*, 512 U. S. 622, 644, n.6 (1994) (noting that § 534(h)(2)(B) “appears to single out certain low-power broadcasters for special benefits on the basis of content”).

⁵ *Incentive Auction Order* ¶ 667.

⁶ See 47 U.S.C. § 534(h)(2). Section 614(h)(2) specifies the following qualification criteria: “(A) such station broadcasts for at least the minimum number of hours of operation required by the FCC under part 73; (B) such station meets all the obligations applicable to television broadcast stations licensed under part 73 with respect to the broadcast of non-entertainment programming, political programming, children’s programming, and equal

Spectrum Act does nothing to expand the cable carriage rights of low power stations that may choose to channel share after completion of the spectrum auction.

Rather, the Spectrum Act limits cable operators' obligations to carry shared channels post-auction. First, only certain entities – those that “voluntarily relinquish[] ... spectrum usage rights under this subsection in order to share a television channel and that possessed carriage rights under section [614] on November 30, 2010...” – are eligible for cable carriage of their shared channel at the new location.⁷ Low power stations (other than certain Class A low power stations) are ineligible to participate in the spectrum auction⁸ and therefore cannot satisfy the “voluntary relinquishment” criterion. Moreover, a low power station *without* carriage rights on November 30, 2010 could not gain carriage rights post-auction through, for example, sharing a channel with a “qualified” low power station with such carriage rights because the sharee LPTV station would lack the preexisting carriage rights necessary to assert carriage from the shared location.

The Commission also should reject the low power channel-sharing proposals advanced by the “Expanding Opportunities for Broadcasters Coalition” (“the Coalition”) that would adversely affect cable operators.⁹ The Coalition again presses for greater flexibility for channel sharers, arguing that full power or Class A stations should be able to enter into a low power

employment opportunity, and the FCC determines that the provision of such programming would address local news and informational needs which are not being adequately served by full power television stations because of the geographic distances of such full power stations from the low power station's community of license; (C) such station complies with interference regulations consistent with its secondary status under part 74; (D) such station is located no more than 35 miles from the cable headend and delivers a good quality signal to the headend; (E) the community of license of the station and franchise area of the cable system are both located outside the largest 160 metropolitan service areas and the population of the community of license did not exceed 35,000; and (F) there is no full power television station licensed to any community served by the cable system.” *Id.*

⁷ 47 U.S.C. § 1452(a)(4).

⁸ See *Incentive Auction Order* ¶ 352.

⁹ See NCTA Opposition to Petition for Reconsideration, GN Docket No. 12-268 (filed Nov. 12, 2014) (“*NCTA Opposition*”).

channel sharing arrangements post-auction and should also be able to create a “second generation” channel sharing agreement that would permit a sharee station to share with a different low power station at a later date.¹⁰ As we previously explained, these proposals should be rejected.¹¹ In particular, taking such action would confer greater cable carriage rights on sharee stations than Congress intended and would risk unfairly leaving operators with unreimbursed expenses resulting from mandatory carriage of “sharee” stations transmitting from a new shared channel.¹²

In sum, the Commission should ensure that its policies for low power television stations channel sharing reflect the strict statutory limits on cable carriage and reject the proposals discussed herein.

Respectfully submitted,

/s/ Rick Chessen

Rick Chessen
Diane B. Burstein
National Cable & Telecommunications
Association
25 Massachusetts Avenue, N.W. – Suite 100
Washington, D.C. 20001-1431
(202) 222-2445

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¹⁰ Comments of the Coalition at 5-9.

¹¹ *See NCTA Opposition* at 1-2.

¹² *See id.*