

**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)	
)	
Channel Sharing by Full Power and Class A)	MB Docket No. 15-137
Stations Outside the Broadcast Television)	
Spectrum Incentive Auction Context)	

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

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TABLE OF CONTENTS

INTRODUCTION1

I. THE SPECTRUM ACT CHANNEL SHARING REQUIREMENTS ARE LIMITED TO SHARING LINKED TO THE AUCTION.....3

II. SOUND PUBLIC POLICY COMPELS A LIMIT ON CARRIAGE OF CHANNEL SHARING BROADCASTERS10

CONCLUSION.....12

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The National Cable & Telecommunications Association (“NCTA”)¹ hereby submits its Comments in the above-captioned proceeding.²

INTRODUCTION

When Congress, in the Spectrum Act, directed the Commission to implement a “reverse auction” for the purpose of recapturing and repurposing spectrum currently used by television broadcasters, it enacted a number of procedures, guidelines, and requirements for the implementation of such auctions. One of those provisions, designed to maximize the amount of recaptured spectrum, authorizes television stations that relinquish their channels at auction to share spectrum on a single 6 MHz channel with another licensed television station while

¹ NCTA is the principal trade association for the U.S. cable industry, representing cable operators serving more than 80 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 approximately 30 million customers.

² *See In re Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions; Channel Sharing by Full Power and Class A Stations Outside the Broadcast Television Spectrum Incentive Auction Context*, First Order on Reconsideration and Notice of Proposed Rulemaking, 30 FCC Rcd 6668 (2015) (“First Order on Reconsideration” or “Notice”).

retaining certain rights and responsibilities of broadcast licensees.³ In particular, such stations would retain their “must-carry” status – notwithstanding the provisions of Section 614 of the Communications Act and the Commission’s determinations that only one “primary video” signal on a 6 MHz channel is entitled to mandatory carriage by cable systems.

The Commission has adopted rules in this proceeding implementing these auction-related provisions for channel sharing. The *Notice* now proposes that these provisions should similarly apply to television stations that do *not* participate in the incentive auction but choose to relinquish their channels *after* the auction.⁴ But the reasons why Congress authorized channel sharing with continued must-carry rights for broadcast stations that relinquished their channels in connection with the auction do not apply to post-auction channel sharing. Nor would the statute (or the Constitution) permit the extension of multiple must-carry rights to stations that choose to share a channel outside the context of the auction.

Most significantly, post-auction sharing will not result in spectrum being returned to the government for reassignment, but instead will leave spectrum available for additional broadcast stations. This means, first of all, that the government has no reason to seek to induce stations to relinquish their spectrum through channel sharing after the auction. Indeed, offering stations an opportunity to share channels and retain must-carry rights after the auction has been completed may have the perverse effect of inducing stations to refrain from participating in the auction, so that the government does not recapture spectrum that might otherwise have been relinquished. Moreover, to the extent that channels relinquished after the auction may be available for use by new broadcast stations – instead of being recaptured and reallocated by the government for

³ See Pub. L. No. 112-96, § 6403(a)(2)(C) (codified at 47 U.S.C. § 1452(a)(2)(C)) (“Spectrum Act”).

⁴ Notice of Proposed Rulemaking at ¶ 30 (“we propose to authorize non-auction-related CSAs without regard to their relationship to incentive auction-related CSAs”).

wireless use – extending must-carry rights to channel sharers will add to the carriage obligations of cable operators in direct contravention of Congressional and Commission policy and the First Amendment.

The *Notice* fails to explore any of these issues. Divorced from any public interest in obtaining return of the spectrum, the proposed rules set up an opportunity rife with possibilities that will subvert the purposes of the auction while impermissibly burdening cable operators and their customers. The Commission has no legitimate basis for extending its channel sharing rules for auction participants to post-auction sharing arrangements. At the very least, the Commission should hold off on consideration of post-auction sharing until it has considerably more experience with channel sharing in connection with the auction. Only then will the Commission and commenters have an appreciation of the full range of policies and rules implicated by such action.

I. THE SPECTRUM ACT CHANNEL SHARING REQUIREMENTS ARE LIMITED TO SHARING LINKED TO THE AUCTION

In an effort to induce television stations to relinquish spectrum for the upcoming auction, the Spectrum Act provides special treatment of stations that channel share. Specifically,

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 under section 338, 614, or 615 of the Communications Act of 1934 (47 U.S.C. 338; 534; 535) 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.⁵

The *Notice* tentatively concludes that stations that “elect to channel share *outside* the aegis of the Spectrum Act” are entitled to the same cable carriage benefits.⁶ But such an extension of mandatory carriage rights would be at odds with both the Spectrum Act and the

⁵ Spectrum Act § 6403(a)(4) (as codified in 47 U.S.C. § 1452 (a)(4)) (emphasis added).

⁶ Notice of Proposed Rulemaking at ¶ 33 (emphasis added).

specific must-carry provisions of the Communications Act. Indeed, the Spectrum Act granted such rights specifically to those stations that relinquished their spectrum in the context of the Act's auction process because, absent such a grant, the must-carry provisions of the Act would not afford such rights. Under those provisions, must-carry rights are not available to more than one video stream transmitted on a single channel.

The *Notice* states that “nothing in the Communications Act requires a station to occupy the entire six megahertz channel in order to be eligible for must-carry rights; rather, the station must simply be a licensee eligible for carriage under the applicable provisions of the Communications Act.”⁷ While true as far as it goes, this analysis fails to acknowledge the further limitations on cable carriage embodied in Section 614 of the Cable Act, as construed consistently with the First Amendment. While a licensee need not utilize its entire 6 MHz to transmit a single over-the-air television stream to be entitled to carriage, it does not follow that a cable operator must carry everything else that is transmitted on that channel. To the contrary, the must-carry provisions of the Act provide that operators are only required to carry the “primary video” that a local commercial television station transmits on the channel.⁸

When, as a result of the transition to digital broadcasting, it became feasible to transmit multiple streams of television programming over a single 6 MHz channel, the Commission interpreted the “primary video” limitation to mean that cable operators would only be required to

⁷ *Id.* at ¶ 38.

⁸ 47 U.S.C. § 534(b)(3)(A). (“A cable operator shall carry in its entirety ... the primary video, accompanying audio, and line 21 closed caption transmission of each of the local commercial television stations carried on the cable system and, to the extent technically feasible, program-related material carried in the vertical blanking interval or on subcarriers. Retransmission of other material in the vertical blanking interval or other non-program-related material (including teletext and other subscription and advertiser-supported information services) shall be at the discretion of the cable operator.”).

carry *one* such stream of programming on the channel licensed to a broadcaster.⁹ This primary video restriction is not limited to multiple streams of the broadcaster's own programming but also applies where a broadcaster leases a portion of its 6 MHz channel to an unaffiliated entity for the provision of one or more separate streams of programming.¹⁰

Separated from the special rights granted in connection with the spectrum auction, a broadcaster that gives up its spectrum to transmit television programming using a portion of another broadcaster's 6 MHz channel would have no greater carriage rights than those of the other broadcaster's multicast streams or the streams provided by a lessee of the broadcaster's multicast capacity. The only apparent difference is that the "sharee" broadcaster giving up its spectrum has been licensed by the Commission – but that should not trump the primary video limitation if it chooses, post-auction, to operate on another broadcaster's 6 MHz channel. Once it relinquishes that channel and shares another licensed broadcaster's channel, it becomes indistinguishable from other multicast streams for purposes of the primary video limitation.

Cable operators are only required to carry the primary video of "the local commercial television stations carried on the cable system," and the definition of "a local commercial television station" is inextricably tied to its assignment to a 6 MHz channel. Section 614 defines a "local commercial television station," for purposes of that section, as any commercial full power station "licensed and operating on *a channel regularly assigned to its community* by the

⁹ See *In re Carriage of Digital Television Broadcast Signals; Amendments to Part 76 of the Commission's Rules; Implementation of the Satellite Home Viewer Improvement Act of 1999: Local Broadcast Signal Carriage Issues, Application of Network Non-Duplication, Syndicated Exclusivity and Sports Blackout Rules to Satellite Retransmission of Broadcast Signals*, First Report and Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd 2598, 2620-21 (2001) ("First Report and Order"); *In re Carriage of Digital Television Broadcast Signals: Amendments to Part 76 of the Commission's Rules*, Second Report and Order and First Order on Reconsideration, 20 FCC Rcd 4516, 4531-4538 (2005).

¹⁰ See First Report and Order, 16 FCC Rcd at 2622 (citing to legislative history that exempts from mandatory carriage uses such as "secondary uses of the broadcast transmission, including the lease or sale of time on subcarriers or the vertical blanking interval for the creation or distribution of material by persons or entities other than the broadcast licensee").

Commission...”¹¹ A “channel” by definition is 6 MHz wide.¹² And the Commission has made clear that, for purposes of the Table of Allotments, 6 MHz channel assignments are indivisible.¹³ Even when shared, there are no assignments of discrete, divided portions of the channel to each sharing entity.¹⁴

In other words, the only thing that even arguably distinguishes channel sharing by two existing licensees and the leasing of capacity on an existing licensee’s channel by another third-party is the grant of licenses, in the former case, to *both* entities sharing the channel – even though the license for one of those entities was originally associated with a *different* 6 MHz channel assignment. If the Commission could circumvent the primary video limitation on must-carry obligations simply by separately licensing each separate stream of programming on a 6 MHz channel allocation, the limitation would be meaningless and boundless. The more reasonable interpretation, to which the Commission has consistently adhered, is that there is only one must-carry station per channel – which is why Congress had to specifically provide that, in the limited context of the auction process, a station that relinquished its channel to share capacity on another licensee’s “regularly assigned” channel would retain its previous must-carry status.

Even then, Congress imposed the additional limitation that only stations that had must-carry rights as of November 30, 2010 would be entitled to bring those rights with them if they chose to relinquish their channels in the auction and engage in channel sharing. As the Commission has recognized, Congress sought with this proviso to ensure that channel sharing

¹¹ 47 U.S.C. § 534(h)(1)(A) (definition of “local commercial television station”) (emphasis supplied).

¹² See, e.g., 47 C.F.R. § 73.624(a) (digital television broadcast stations are “assigned channels 6 MHz wide”); *id.*, § 73.601 (“TV broadcast, low power TV and TV translator stations are assigned channels 6 MHz wide, designated as set for the § 73.603(a) [Table of Allotments].”).

¹³ First Order on Reconsideration, 30 FCC Rcd at ¶ 24.

¹⁴ See Sharing Report and Order 27 FCC Rcd at 4624. Moreover, if one of the entities were to relinquish its license, “its spectrum usage rights (but not its license) may revert to the remaining sharing partners if the partners so agree.” First Order on Reconsideration, 30 FCC Rcd at ¶ 25.

resulting from the auction process does not “artificially increase the number of stations that MVPDs are required to carry.”¹⁵ While such auction-related channel sharing might not normally result in such expanded must-carry obligations to the extent that the spectrum relinquished in the auction will be reallocated by the government for non-broadcast use, post-auction channel sharing could have very different implications – none of which are acknowledged in the *Notice*.

For example, if a broadcaster vacates its assigned channel post-auction to share another broadcast station’s channel, what becomes of the vacated channel? There is no provision in the Spectrum Act for the recapture and repurposing of broadcast channels after the one-time auction.¹⁶ Would the vacated channel be available for licensing to a new broadcast television station, and, if so, would *both* the original station (now transmitting on a shared channel) *and* the new station have must-carry rights?

If, in any of these or other scenarios, the result would be to expand the must-carry obligations of cable operators, this would not only conflict with Congress’s deliberate effort to prevent any such expansion in the context of the auction process but would raise serious First Amendment problems. That the must-carry provisions of the Communications Act constrain the protected editorial discretion of cable operators and raise serious First Amendment questions has never been in doubt. In *Turner Broadcasting*,¹⁷ the Supreme Court narrowly upheld those provisions against a facial challenge, holding, first, that the provisions should be subjected to “intermediate” rather than “strict” First Amendment scrutiny, and, second, that they survived such scrutiny because they “advance[d] important governmental interests unrelated to the

¹⁵ Notice of Proposed Rulemaking at ¶ 43.

¹⁶ Spectrum Act § 6403(e) (as codified at 47 U.S.C. § 1452 (e)) (prohibiting FCC from completing more than one reverse auction or more than one “reorganization of the broadcast television spectrum under subsection (b)).”

¹⁷ *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 (1994) (“Turner I”); *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180 (1997) (“Turner II”).

suppression of free speech and d[id] not burden substantially more speech than necessary to further those interests.”¹⁸ Today, 20 years after that decision, the bases for that decision have been seriously eroded. It is dubious that the rules could still survive a facial challenge, much less that rules that *added* to the existing must-carry burdens of cable operators would be permissible.

The Court’s decision to apply intermediate scrutiny rather than the more stringent strict scrutiny that would apply if the government required *newspapers* to carry content against their will was based on what the Court perceived as a cable operator’s “bottleneck” control of broadcast stations’ access to households that received television via a subscription service rather than over the air. But whatever bottleneck was present in the early 1990s no longer exists.¹⁹ First of all, cable now faces an array of competitors that both in number and in market share has eliminated any ability that a cable operator might have had to squelch a broadcaster’s ability to survive and continue to serve over-the-air viewers. Incumbent cable operators now face competition from the two national DBS providers (which were just getting off the ground in 1994) as well as from local telephone companies (which, until 1996, were prohibited from offering video programming in their telephone service areas). And cable’s share of MVPD customers has declined from 97% at the time of the *Turner* decision in 1994 to only 53% today.

Second, the Supreme Court based its decision to reject strict scrutiny on the finding that

[w]hen an individual subscribes to cable, the physical connection between the television set and the cable network gives the cable operator bottleneck, or gatekeeper, control over most (if not all) of the television programming that is channeled into the subscriber’s home. Hence, simply by virtue of its ownership of the essential pathway for cable speech, a cable operator can prevent its subscribers from obtaining access to programming it chooses to exclude. A cable

¹⁸ *Turner II*, 520 U.S. at 189 (citing *United States v. O’Brien*, 391 U.S. 367, 377 (1968)).

¹⁹ See *Comcast Corp. v. FCC*, 579 F.3d 1, 8 (D.C. Cir. 2009) (“Cable operators ... no longer have the bottleneck power over programming that concerned the Congress in 1992.”).

operator, unlike speakers in other media, can thus silence the voice of competing speakers with a mere flick of the switch.²⁰

But this technological bottleneck has disappeared, too. Today, virtually all television sets are equipped with multiple inputs that enable customers to connect cable, DBS, Internet-enabled devices, *and* an over-the-air digital broadcast antenna and select from among such multiple sources with “a mere flick of the switch” on a remote control.²¹

While it is therefore likely that the next challenge to any must-carry restrictions will be subjected to strict scrutiny – which will almost certainly preclude the rules’ survival – it is no longer likely that the rules can survive even intermediate scrutiny. That’s because the government itself seems no longer committed to the “important governmental interest” of preserving the availability of over-the-air broadcasters, upon which the Court’s decision rested. Indeed, the governmental interest underlying the Spectrum Act and the Commission’s incentive auction is to encourage a substantial number of broadcasters to cease over-the-air broadcasting and relinquish their spectrum to the government for other more important uses. If Congress is now seeking to encourage broadcasters to abandon their over the air service, it will be hard to persuade a court that the interest articulated by Congress 23 years ago is still sufficiently important.

In any event, any rules that the Commission adopted in this proceeding that had the effect of *expanding* cable operators’ existing must-carry obligations would almost surely fail to survive

²⁰ *Turner I*, 512 U.S. at 656.

²¹ Moreover, the Court’s explanation of what constitutes a content-based versus content-neutral requirement has also changed. The Supreme Court recently held that any law that regulates speech based on its *subject matter* is content-based and requires strict scrutiny. *Reed v. Town of Gilbert*, No. 13-502, 2015 U.S. LEXIS 4061*12 (U.S. June 18, 2015) (clarifying that “a speech regulation targeted at specific subject matter is content based even if it does not discriminate among viewpoints within that subject matter”).

intermediate scrutiny.²² Whatever level of broadcasting remains at the conclusion of the auction presumably satisfies the governmental interest in preserving over-the-air broadcasting. The notion that, as the result of a process aimed at persuading broadcasters to curtail their over-the-air service, cable operators might be required not only to continue carrying existing stations that choose to share channels but also *additional* stations that might be licensed to spectrum abandoned by those stations makes no sense as a matter of policy or as a matter of First Amendment law. For all these reasons, the Commission should construe its authority under the Spectrum Act and the must-carry provisions of the Communications Act in a manner that avoids these serious constitutional problems by not extending must-carry rights to stations that choose to vacate their channels and engage in channel sharing after, and outside the context of, the auction.

II. SOUND PUBLIC POLICY COMPELS A LIMIT ON CARRIAGE OF CHANNEL SHARING BROADCASTERS

Even if the law could be construed and interpreted to allow the post-auction extension of must-carry rights to channel sharing arrangements, establishing such rights prior to the auction would frustrate the very purposes of the Spectrum Act. By permitting licensees that contribute their spectrum for auction to retain must-carry rights at their shared location, Congress intended to provide an *inducement* for broadcast stations to participate in the auction. As the Commission explained in authorizing channel sharing, “these new channel sharing rules will facilitate the recovery of underutilized television channels for flexible use in a manner that meets consumer

²² Cf. *Carriage of Digital Television Broadcast Signals: Amendment to Part 76 of the Commission’s Rules*, Fifth Report & Order, 27 FCC Rcd. 6529, ¶ 11 (2012) (recognizing that compelled carriage of broadcast stations in both digital and analog formats would present serious First Amendment concerns), *pet. for review denied*, *Agape Church, Inc. v. FCC*, 738 F.3d 397 (D.C. Cir. 2013); *see also id.* at 413-15 (Kavanaugh, J., concurring) (elaborating on infirmity of must-carry requirements in today’s video distribution marketplace).

and business needs by enabling broadcasters to relinquish spectrum while continuing to maintain broadcast television service.”²³

No similar benefits accrue from channel sharing once the spectrum auction has been concluded. While broadcasters might achieve cost savings from giving up their spectrum and channel sharing,²⁴ there is no evidence that any such cost savings would redound to the benefit of the viewing public. Certainly the U.S. Treasury will not benefit from a broadcaster vacating its 6 MHz channel. Nor does the *Notice* provide any reason to believe that channel sharing post-auction will “promote spectral efficiency.”²⁵ In fact, nothing in the *Notice* suggests that the government will reclaim spectrum vacated by stations that decide to share channels outside the context of the auction.

Meanwhile, even apart from any additional must-carry obligations that might, as described above, result from post-auction sharing, the burdens of channel sharing on cable operators are potentially much greater post-auction than pursuant to the auction. Among other things, cable operators are entitled to be compensated for any costs that they incur as a result of channel sharing for auction purposes. But post-auction, there will be no reimbursement funds available if channel sharing were to impose new costs.

But the most obvious problem that would result from authorizing post-auction channel sharing with must-carry rights at this time is that it would create precisely the wrong incentives for broadcasters. Congress’s purpose in creating a time-limited grant of must-carry rights for stations that chose to relinquish their channels in the auction was to encourage and induce

²³ Sharing Report and Order at ¶ 9.

²⁴ See Notice of Proposed Rulemaking at ¶ 31 (speculating that channel sharing will help broadcasters reduce operating costs and could provide them with additional net income to strengthen operations and improve programming services).

²⁵ *Id.*

participation in the auction. Letting stations know that they will have the same channel sharing and must-carry options *after* the option only serves to undermine what Congress sought to achieve. Even if there were no other legal or policy impediments to such post-auction channel sharing privileges – and, as noted, there are many – now would hardly seem the time to be creating and defining the scope of such privileges. If the Commission insists on asking the question now whether channel sharing with must-carry rights will exist post-auction, the only answer consistent with Congress’s goal of inducing stations to participate in the auction – and the answer that the Commission should give – is no.

CONCLUSION

For the foregoing reasons, the Commission should not grant must-carry rights to stations that channel share outside the context of the spectrum auction.

Respectfully submitted,

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