

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

In the Matter of)	
)	
Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions)	GN Docket No. 12-268
)	
Channel Sharing by Full Power and Class A Stations Outside the Broadcast Television Spectrum Incentive Auction Context)	MB Docket No. 15-137
)	

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

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

DISCUSSION

The Spectrum Act encourages television broadcasters to participate in the incentive auction by granting special must-carry rights to certain television stations (“sharee” stations) that relinquish their channels at auction and share a 6 MHz channel with another television licensee. Broadcast commenters claim that the Commission can and should extend similar privileges to stations that choose *not* to participate in the auction and instead opt for channel sharing anytime in the future for their own private commercial gain. These commenters have failed to show how such an entitlement can be squared with the must-carry provisions of the Spectrum Act, the Cable Act, the First Amendment, or with sound public policy.

¹ *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) (“*Notice*”).

I. SHAREE STATIONS THAT DO NOT PARTICIPATE IN THE AUCTION SHOULD NOT BE ENTITLED TO THE SAME MUST CARRY RIGHTS AS THOSE THAT RELINQUISH THEIR SPECTRUM FOR AUCTION

Certain broadcasters argue that all television licensees, even if they do not relinquish their 6 MHz channel in connection with the auction process, should still be entitled to the same carriage benefits if and when they share channels with other licensees after the auction is completed. For example, the Expanding Opportunities for Broadcasters Coalition (“EOBC”) claims that “nothing about entering into a channel sharing arrangement changes a broadcaster’s status as a Commission licensee, with all the attendant rights and responsibilities. Just as a broadcaster sharing a channel must comply with all the Commission’s rules for stations in the same class of licensees, so too should it be entitled to the same benefits, including mandatory carriage.”² Similarly, NAB asserts that “nothing in the Communications Act requires a television station to occupy an entire 6 MHz channel for carriage rights,” and that the must carry rights provided in the Cable Act “are not subject to change by a station’s election to participate in a channel sharing arrangement, regardless of whether that agreement is entered into in the context of the incentive auction.”³ Neither of these assertions can be squared with the *limitations* on carriage contained in the Cable Act.

NCTA’s initial comments showed that the Spectrum Act granted carriage rights to sharee stations that relinquished their spectrum in the context of the auction process precisely because, absent such a grant, the must carry provisions of the Cable Act would *not* afford such rights to a second stream transmitted on another station’s channel.⁴ As the Commission has found on multiple occasions, must-carry rights are limited to carriage of a single primary video stream per

² EOBC Comments at 3-4.

³ NAB Comments at 3.

⁴ NCTA Comments at 3-7.

channel.⁵ NCTA also showed that to the extent the Act is at all ambiguous, First Amendment considerations warrant a narrow reading of the statute that does not result in mandatory carriage of two or more stations engaging in post-auction sharing of a single 6 MHz channel.⁶

A narrow reading of post-auction sharee station must-carry rights is also warranted to protect against placing impermissible carriage burdens on cable operators. Comments filed by certain broadcasters confirm that allowing post-auction channel sharing would likely multiply carriage disruptions and distortions – while failing to serve any legitimate governmental interest.

NAB, for example, urges the Commission to hold aside any television channels newly-vacated as a result of post-auction channel sharing “for television use.”⁷ Western Pacific Broadcast (“WPB”) – a station that went on-air several years after Congress announced the spectrum auction⁸ – objects to the proposal to limit must-carry rights for channel-sharing stations outside the auction to those that already had carriage rights on November 30, 2010, and proposes to open up post-auction channel sharing to any television licensee. If the Commission were to adopt these proposals, and if mandatory carriage applied to the stations engaged in sharing arrangements and to the new stations occupying the vacated channels, this would obviously expand the must carry burden of cable operators.⁹ Congress intended that channel sharing in connection with the auction must not “artificially increase the number of stations that MVPDs

⁵ *Id.* at 4-5.

⁶ *Id.* at 7-10.

⁷ NAB Comments at 3.

⁸ WPB commenced operations on October 1, 2014. WPB Comments at 1. Congress passed the Spectrum Act in February 2012.

⁹ In fact, the *Notice* provides no legal theory that would limit channel sharing to television station licensees that had a license to their own 6 MHz channel prior to becoming a sharee station. Would it be possible to become a “television licensee” without already having received a license to a different 6 MHz channel? The *Notice* does not address this possibility. However, these and other issues, such as disposition of any newly-vacated television channel, must be addressed prior to the Commission adopting any policy that would permit post-auction channel sharing outside the auction context.

are required to carry.”¹⁰ It’s hard to imagine that Congress could have intended that if stations waited until after the auction to engage in channel sharing, it would then be permissible to expand the must-carry obligations on cable. Such a ruling would turn the Spectrum Act on its head.

Broadcast commenters fail to demonstrate that any legitimate governmental interest would be served by imposing these additional obligations. They try to make the case that mandating cable carriage of channel sharee stations will somehow help the government get more spectrum back. The theory seems to be that the more flexibility a broadcaster may have in the future to find potential sharing partners, the more likely it will be to give up its 6 MHz channel for auction now. NAB, for example, asserts, without any evidence, that a potential sharee station “may be reluctant to participate in the auction in the first place” if it does not have assurance “now, before the auction begins, that it will maintain carriage and retransmission consent rights in a new or extended channel sharing agreement.”¹¹

This argument provides no justification for extending channel sharing must-carry rights to stations that choose not to participate in the auction. To the contrary, announcing – in advance of the auction – that post-auction channel sharing comes with the same privileges as auction-related sharing may have the deleterious effect of lessening the broadcasters’ sense of urgency to participate in the auction. The Spectrum Act created a framework through which television stations can relinquish their spectrum in return for payment and continue to be eligible for must-carry rights as a sharee station. There is no legal or policy reason to extend this one-time option to sharee stations outside the auction context.

¹⁰ See Notice at ¶ 44.

¹¹ NAB Comments at 4.

Finally, if the Commission decides to permit so-called “second generation” channel sharing arrangements (“CSAs”) for sharee stations that relinquished their spectrum in the auction, it must adopt certain safeguards to protect against additional burdens on cable operators. Among other things, the Commission should reject commenters’ proposals to allow second generation sharee stations to move outside their assigned community of license to other communities within the DMA¹² – or, as Venture Technologies Group proposes, under some circumstances, even in a different DMA.¹³ Adding and deleting broadcast stations from a cable channel line-up is confusing and disruptive to viewers. DMAs can span large geographic areas,¹⁴ and a sharee broadcaster might try to abandon its over-the-air viewers in one community to obtain expanded must-carry rights from a new transmitter location in a different community within the DMA. Commenters fail to articulate any legitimate reason to allow second generation sharee stations to move outside the community that they are licensed to serve. The Commission should adhere to the *Notice*’s proposal to limit second generation channel sharing to stations located in the same community of license to “advance the [Commission’s] interest in ensuring the provision of service to local communities, avoid viewer disruption, and avoid any potential impact on MVPDs that might result from community of license changes.”¹⁵

¹² EOBC Comments at 6-8 (claiming that sharee stations need “additional flexibility”).

¹³ Venture Technologies Group Comments at 4 (proposing sharing within an adjacent DMA, “provided that the existing transmitter site of the station is licensed to a site within that adjacent DMA”).

¹⁴ For example, the New York DMA includes several stations located in counties far from New York City.

¹⁵ *Notice* at ¶ 53.

CONCLUSION

The Commission should only provide mandatory carriage rights to stations that enter into channel sharing arrangements in connection with the auction as contemplated in the Spectrum Act.

Respectfully submitted,

/s/ Rick Chessen

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

August 28, 2015