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September 28, 2015

Dorann Bunkin, Esq.
Federal Communications Commission
Media Bureau
445 12th Street, SW
Washington, DC 20554

Re: ET Docket No. 10-235
GN Docket No. 12-268

Dear Dorann:

Thank you for taking the time to try to respond to our questions relating to channel sharing arrangements in connection with the upcoming Incentive Auction.

As we have discussed, our client is a full-power commercial television licensee in a major DMA (the "Station"). After extensive discussions with its technical, financial and legal consultants, the Station has decided not to offer its broadcast spectrum for relinquishment (or VHF downgrade) in the Incentive Auction. Rather, it has determined that it can play a significant role in the success of the Incentive Auction by offering to serve as channel sharing host for one or more stations that wish to participate in the auction but seek to continue to deliver broadcast service to their viewers. Notably, the Station's decision not to participate in the Incentive Auction was not influenced or induced by any other licensee.

As you have explained, there is currently no FCC rule, or any discussion in the thousands of pages released by the Commission relating to the Incentive Auction, that in any way limits or restricts the ability of a host and sharee to enter into arms-length commercial channel sharing arrangements. In particular, a host and sharee are free to negotiate economic terms relating to such matters as use of host station spectrum by the sharee (including dynamic spectrum sharing arrangements), real estate occupancy (towers, transmitter sites, studios, etc.) and ongoing maintenance and improvements to technical broadcast facilities. Moreover, consideration might be structured in any manner agreed upon by the parties, including recurring monthly payments, remittance to the host of a percentage of the Incentive Auction proceeds received by the sharee, and/or a non-refundable upfront option payment by the sharee to secure spectrum capacity from the host.¹ Indeed, given that there are no current FCC restrictions on commercial channel sharing arrangements and there is no requirement to submit such agreements to the Commission, it is conceivable that binding contracts have already been

¹ Thus, for example, the Commission's August 13, 2015 FCC Incentive Auction Channel Sharing webinar stated that "the business terms of a CSA are for the parties to determine" and that "channel sharing parties may include contingent rights such as puts, calls, options, rights of first refusal, and other common rights in their CSAs." *Aug. 13, 2015 webinar, slide 11.*

executed along any of the lines described above, or that might include a multitude of other possibilities.

Notwithstanding our understandings regarding the current absence of limitations relating to commercial channel sharing arrangements (and if we have overlooked any relevant guidance, please let us know), you have advised us that certain FCC staff members have expressed concerns informally in various discussions with a handful of broadcasters. Specifically, we understand that some believe that an irrevocable upfront option payment may create a “contingent” or “conditional” channel sharing arrangement designed by the offeror to induce the host not to participate in the Incentive Auction and to somehow “game” the auction process. Apparently, the theory is that if a broadcaster pays other broadcasters not to participate in the Incentive Auction, that broadcaster might increase its chances of selection as a winning bidder and/or obtain a higher payment for relinquishment of its spectrum.

As a preliminary matter, we question the logic that appears to underlie the concerns outlined above. First, we fail to understand how a non-refundable upfront option payment results in a channel sharing arrangement that is more “contingent” or “conditional” than any other consideration formulation. Indeed, even absent any upfront payments, we would expect a rational sharee to insist on enforceable commitments from the host not to participate in the Incentive Auction, presumably with substantial financial or other penalties. Many channel sharees understandably would seek assurances from the host that the sharee will have capacity available to continue its broadcast operations before it commits to surrender its existing licensed spectrum. Moreover, it is hardly surprising that most, if not all, channel sharing arrangements would be conditional in the sense that the agreement presumably would become unenforceable if the host no longer holds the licensed broadcast spectrum contemplated at the time the channel sharing contract was executed.

Second, we doubt whether a licensee would have strong incentives to pay another broadcaster not to participate in the Incentive Auction. Because participants in a reverse auction do not directly bid against one another, any benefit from lack of involvement by other broadcasters seems highly indirect and speculative at best. Indeed, it appears equally plausible that the lack of participation by particular broadcasters would simply lead to a lower spectrum clearing target and less spectrum needed by the Commission for repacking purposes. Thus, a payment from a broadcaster to induce another broadcaster not to participate in the Incentive Auction could easily result in the opposite of the intended effect.

Third, to the extent the FCC seeks to restrict broadcasters from offering inducements for a channel sharing host not to participate in the Incentive Auction, it is not clear that a ban on upfront option payments would provide a total solution. It appears to us that other mechanisms, such as a promise to pay a substantial percentage of the sharee’s Incentive Auction proceeds (e.g., 50% or more), might be equally or more effective in creating strong incentives for a host to refrain from relinquishment of its spectrum.

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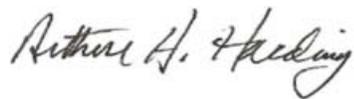
Finally, we question whether placing restrictions on the freedom of broadcasters to enter into commercial channel sharing arrangements would actually advance the intended goal of maximizing participation in the Incentive Auction. To the contrary, based on our conversations with other broadcasters in the Station's DMA, we believe that there are numerous stations that may be reluctant to participate in the Incentive Auction unless they can obtain a firm and binding commitment from a channel sharing host, prior to the auction application deadline, to provide the necessary spectrum if the sharee's spectrum relinquishment offer is accepted by the FCC.

In sum, while we continue to question the need for, or wisdom of, placing any restrictions on the freedom of broadcasters to enter into arms-length commercial channel sharing agreements, to the extent any lingering concerns remain, we suggest that they might be addressed by requiring all broadcast stations agreeing to serve as a channel sharing host to submit a declaration to the Commission containing language along the following lines:

"No part of any consideration received, or to be received, directly or indirectly by the licensee or its affiliates for use of a portion of licensee's spectrum under a channel sharing arrangement was in exchange for a commitment from the host station not to participate in the Incentive Auction. Moreover, the channel sharee did not seek to induce the host not to participate in the Incentive Auction."

Thank you again for the useful guidance provided by FCC staff throughout the Incentive Auction process. We look forward to your response to the issues outlined above.

Very truly yours,



Arthur H. Harding

AHH/kds

cc: William Lake
Howard Symons
Mary Margaret Jackson