

**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
)	

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

The National Cable & Telecommunications Association (“NCTA”) submits these comments in response to the Federal Communications Commission’s Fourth Notice of Proposed Rulemaking (“FNPRM”) in the above-captioned proceeding.¹

INTRODUCTION

The FNPRM seeks comment on several issues relating to post-auction channel sharing between “primary” (full power and Class A) and “secondary” (LPTV and TV translator) stations (what it calls “primary-secondary sharing”) as well as between secondary stations (“secondary-secondary sharing”). These brief comments address issues raised in the FNPRM about MVPD

¹ *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 Party 15 of the Commission’s Rules to Eliminate the Analog Tuner Requirement*, Third Report & Order and Fourth Notice of Proposed Rulemaking, MB Dkt. No. 03-185, GN Dkt. No. 12-268, & ET Dkt. No. 14-175, FCC No. 15-175 (rel. Dec. 17, 2015) (“*Third Report and Order*” or “*FNPRM*”).

carriage obligations in cases where a low power station vacates its over-the-air channel to enter into an arrangement to share another station's spectrum (either low power or full power).

The Third Report and Order “reject[ed] proposals that would afford LPTV and TV translator stations more expansive cable carriage rights than those provided in the Communications Act.”² The Commission must continue to adhere to that approach as it considers the sharing questions raised in this FNPRM. Low power stations that give up their over-the-air spectrum outside the auction context in order to channel share are not eligible for the special channel sharing carriage rights that Congress provided in connection with the spectrum auction. Rather, such “sharees” would be subject to the same “primary video” limitation as any other multicast stream – multicast streams that have no cable carriage rights under the Communications Act.

DISCUSSION

The FNPRM proposes to adopt “the same approach to MVPD carriage for both primary-secondary and secondary-secondary sharing as we proposed in the *Primary-Primary Channel Sharing NPRM...*”³ Thus, the FNPRM would grant cable carriage rights to low power “sharee” stations outside the auction context, even though only a small subset of low power stations – certain Class A stations – are even eligible to participate in the auction.⁴ Building on the flawed logic of the still-pending “*Primary-Primary Channel Sharing NPRM,*” the FNPRM states that a “secondary station that shares with a primary or secondary sharer station, and a primary station

² Third Report and Order ¶ 57. Congress granted low power stations very limited must-carry rights in the 1992 Cable Act. To be eligible for carriage, among other things, a low power station's community of license and the cable system must be located outside the largest 160 Metropolitan Statistical Areas; the population of the community of license cannot exceed 35,000 people; and there cannot be a full power television station licensed to any community within the county or political subdivision served by the cable system. 47 U.S.C. § 534(h)(2) (definition of “qualified low power station”).

³ FNPRM ¶ 86.

⁴ See Third Report and Order at ¶ 20, n. 55 (“LPTV and TV translator stations are not authorized to submit channel sharing bids or otherwise participate in the incentive auction.”).

that shares with a secondary sharer station, has the same satellite and cable carriage rights under the Communications Act on their new shared channels that the station would have at the shared location if it was not channel sharing”⁵ and that such rights would be extended “regardless of whether they possessed carriage rights or were operating on a non-shared channel prior to entering into a sharing agreement.”⁶ This proposal cannot be squared with the must carry provisions of the Spectrum Act or Communications Act.

The special channel sharing must carry rights granted in the Spectrum Act were intended to maximize the amount of spectrum recaptured by the government for auction, while minimizing the costs and carriage impacts on cable operators. To avoid increasing carriage burdens, Congress extended those special sharing carriage privileges to a limited class of stations – those that “voluntarily relinquish[] 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... on November 30, 2010.”⁷ And to minimize financial burdens that might be imposed on cable operators from broadcasters sharing a channel, Congress provided for compensation to cable operators to cover any such costs.⁸ Outside the auction context, as *NCTA’s Primary-Primary Channel Sharing Comments* show, the Communications Act carriage provisions would govern. And, as the Commission has consistently recognized,

⁵ *Id.*

⁶ *Id.*

⁷ Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96, §§ 6403(a)(4) (as codified at 47 U.S.C. § 1452(a)(4)) (“*Spectrum Act*”).

⁸ *Id.* § 6403(b)(4) (Commission required to reimburse costs MVPDs reasonably incur to continue to carry the signal of a broadcast television licensee that “voluntarily relinquishes spectrum usage rights ... to share a television channel with another licensee....”).

those provisions require cable operators to carry *only a single program stream* – the “primary video” – per eligible 6 MHz television channel.⁹

The FNPRM proposal suffers from the same flaws that NCTA identified in the *Primary-Primary Channel Sharing NPRM*¹⁰ – and more. By selectively applying carriage provisions from the Spectrum Act to a situation Congress never contemplated, it would unlawfully expand carriage rights. Low power stations for the most part are ineligible to participate in the broadcast incentive auction¹¹ and few have cable carriage rights. It strains credulity that the Commission has authority to provide low power stations that elect to channel share *outside* the aegis of the Spectrum Act the same auction-related must carry sharing rights as full power stations that do. Providing such rights would not serve the purpose of the auction,¹² and would run counter to Congress’ intent to hold cable operators harmless from auction-related channel sharing.

The FNPRM compounds the potential unfairness to cable operators by proposing to “permit secondary stations to become sharees regardless of whether they possessed carriage rights or were operating on a non-shared channel prior to entering into a sharing agreement.”¹³ The only justification the FNPRM proffers is “the relatively small number of unbuilt LPTV stations that would meet the criteria for obtaining cable carriage....”¹⁴ But the Spectrum Act expressly limits special sharing carriage rights to the universe of television stations that

⁹ NCTA Comments filed in GN Dkt. No. 12-268 & MB Dkt. No. 15-137 at 4-5 (Aug. 13, 2015) (“*NCTA Comments*”).

¹⁰ *Id.*

¹¹ See *Innovation in the Broadcast Television Bands: Allocations, Channel Sharing and Improvements to VHF*, Report and Order 27 FCC Rcd 4616 at ¶ 20 (2012) (“Because the Spectrum Act limits participation in the reverse auction required by section 6403(a)(1) to only full power and Class A stations, low power stations would not be eligible to propose sharing a channel in conjunction with the incentive auction.”).

¹² NCTA Comments at 3-4.

¹³ FNPRM ¶ 86. The FNPRM specifically “propose[s] to not reimburse the costs imposed on MVPDs as a result of [Channel Sharing Arrangements] between secondary stations or between primary and secondary stations.”

¹⁴ *Id.*

“possessed carriage rights ... on November 30, 2010.” The reason for this date certain was to ensure that cable operators’ carriage burdens did not expand as a result of Congress’ inclusion of a limited station sharing provision.¹⁵ As we stated previously, “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.”¹⁶ Nothing in the FNPRM provides any authority for the Commission to expand carriage obligations in this manner.

In any event, the FNPRM provides no reason to believe that the number of additional streams of low power programming that could claim new carriage rights in fact would be “relatively small.” Just as in the case of post-auction channel sharing for full power stations, there is no assurance that the spectrum vacated by a station that opts to channel share post-auction will not be occupied by a new low power station.¹⁷ And nothing in the FNPRM suggests that low power sharees could not expand carriage burdens by moving to a new low power station that might have such carriage rights.¹⁸

Either scenario could further expand the must-carry obligations of cable operators beyond Congress’ intent and in a manner that would raise serious First Amendment problems.¹⁹ Must carry rules constrain cable operators’ protected editorial discretion. The Supreme Court narrowly held that the must-carry provisions of Section 614 survived intermediate First

¹⁵ See generally *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 ¶ 43 (2015).

¹⁶ NCTA Reply Comments at 4.

¹⁷ See Third Report and Order ¶¶ 20-43 (permitting channel sharing by low power stations not displaced by repacking caused by the auction).

¹⁸ See Third Report and Order ¶¶ 33-34 (allowing relocation in order to channel share within 30 miles as a general rule and outside 30 miles under certain circumstances).

¹⁹ NCTA Comments at 7-10.

Amendment scrutiny by serving “important government interests” identified by Congress without “burdening substantially more speech than is necessary to further that interest.”²⁰ As NCTA’s Comments showed, the bases for that decision have been seriously eroded over the ensuing decades. *Any* rules that *expanded* cable operators’ must carry burdens would almost certainly fail to survive First Amendment scrutiny.

Expanded must carry rights for *low power stations* would be on *particularly* shaky grounds. The Supreme Court viewed with skepticism even the limited low power carriage rights granted under section 614,²¹ noting that the conditions for carriage appear to be content-based, which would subject the requirement to strict scrutiny. Under the circumstances, adopting rules to give additional carriage rights to low power channel sharees would be unlikely to pass First Amendment muster, whether examined under intermediate or strict scrutiny. As NCTA previously explained in commenting on full power station post-auction sharing, “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.”²² This reasoning applies equally here.

²⁰ *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180, 213-214 (1997).

²¹ *Turner Broadcasting System, Inc. v. FCC*. 512 U.S. 622, 643 n. 6 (1994).

²² *Id.* at 10.

CONCLUSION

For all these reasons, the Commission should not require cable carriage of sharee low power station broadcast streams.

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

February 22, 2016