

**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 ASSOCIATION OF BROADCASTERS**

The National Association of Broadcasters (NAB)¹ replies to comments submitted in response to the Commission’s Notice of Proposed Rulemaking proposing rules to permit channel sharing outside the context of the forthcoming broadcast spectrum incentive auction.² Given that broadcasters will need to make decisions regarding participation in the auction in the very near term, particularly for channel sharing bids that will require negotiations and an agreement with one or more partners, the Commission should promptly provide broadcasters with regulatory certainty concerning the future treatment of channel sharing arrangements. In particular, the Commission should adopt its proposal ensuring that

¹ The National Association of Broadcasters is a nonprofit trade association that advocates on behalf of free local radio and television stations and broadcast networks before Congress, the Federal Communications Commission and other federal agencies, and the courts.

² *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, GN Docket No. 12-268, MB Docket No. 15-137, FCC 15-67 (June 12, 2015) (NPRM).

parties in second-generation channel sharing arrangements maintain their carriage rights. The Commission should also reject proposals that would add undue complexity or expense to future channel sharing arrangements.

I. ALLOWING CHANNEL SHARING FOLLOWING THE AUCTION WILL NOT DIMINISH INCENTIVES FOR PARTICIPATION IN THE AUCTION

In their comments, both NCTA and AT&T discourage the Commission from permitting second-generation channel sharing arrangements, or channel sharing arrangements entirely outside the context of the auction, on the theory that permitting these arrangements may discourage participation in the forthcoming broadcast spectrum incentive auction.³ According to NCTA, “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.”⁴ Similarly, AT&T suggests that restricting channel sharing agreements to stations that participate in the auction may encourage participation due to the potential for cost savings through channel sharing.

NAB respectfully submits that this view fundamentally misapprehends the incentive for broadcasters to participate in the auction in the first place. Broadcasters will participate in the auction with channel sharing bids if they foresee the potential for an attractive financial return based on spectrum relinquishment by one channel sharing partner, not due to perceived incremental cost savings associated with sharing facilities. The opening bid prices and estimated high end compensation levels the Commission has published dwarf any savings

³ See Comments of the National Cable & Telecommunications Association at 3, GN Docket No. 12-268, MB Docket No. 15-137 (filed Aug. 13, 2015) (NCTA Comments) Comments of AT&T and DIRECTV at 3-5, GN Docket No. 12-268, MB Docket No. 15-137 (filed Aug. 13, 2015) (AT&T Comments).

⁴ NCTA Comments at 2.

from channel sharing. A station interested in a channel sharing arrangement would be foolish to sit on the sidelines during the auction and forgo substantial auction compensation only to enter a channel sharing agreement after the auction to save facilities costs.

In reality, if the Commission is interested in encouraging participation in the auction, it should adopt flexible channel sharing rules for second-generation and other channel sharing arrangements, as it has for auction-related agreements. This includes making clear that, as the Commission has proposed, second-generation channel sharing agreements will allow stations to maintain their carriage and retransmission consent rights. If stations feel their only workable option for maintaining these rights is to enter into *permanent* agreements, participation in the auction is likely to decrease.

II. PROMPT CONFIRMATION THAT CHANNEL SHARING STATIONS WILL MAINTAIN CARRIAGE AND RETRANSMISSION RIGHTS IS ESSENTIAL

In its comments, NAB stressed that assuring broadcasters that entering into channel sharing agreements will not affect carriage or retransmission rights will help increase participation in the forthcoming broadcast spectrum incentive auction. Stations considering entering channel sharing agreements to participate in the auction must be concerned not only with preservation of their own existing rights, but also with the ability of future channel sharing partners to preserve their rights.

NCTA asserts that the Commission lacks legal authority to preserve the carriage rights of stations that enter into channel sharing arrangements outside the context of the auction.⁵ NCTA acknowledges that the NPRM states that nothing in the Communications Act requires a television station to occupy an entire six MHz channel for carriage rights.⁶ NCTA even admits

⁵ NCTA Comments at 4.

⁶ *Id.*, fn. 7, citing NPRM at ¶ 38.

that this is “true as far as it goes,” but that it “fails to acknowledge the further limitations on cable carriage embodied in Section 614 of the Cable Act, as construed consistently with the First Amendment.”⁷ To support this position, NCTA is forced to selectively interpret relevant Commission precedent and statutory provisions in ways that do not withstand scrutiny.

First, NCTA asserts that the Act only requires cable operators to carry the primary video transmitted on a particular six MHz channel.⁸ Yet, the provision of the Act NCTA cites does not reflect that view. The relevant provision, which NCTA quotes in a footnote, actually requires a cable operator to carry the primary video “of each of the local commercial television *stations* carried on the cable system.”⁹ As much as NCTA might wish otherwise, the statute imposes a requirement to carry one primary video stream per station, not one video stream per six MHz channel. If the FCC separately licenses two stations to share a single channel, there is no reason the cable obligations to carry the primary video stream of those two stations would change.

Similarly, NCTA argues that the Commission, in interpreting the primary video requirement, restricted broadcasters to carriage of only one video stream per channel.¹⁰ That claim is also inaccurate. The Commission concluded that cable operators were only required to carry one programming stream of a digital television *station* that multicasts.¹¹ NCTA evidently hopes to muddle the picture by creating a false equivalency between a cable

⁷ NCTA Comments at 4.

⁸ *Id.*

⁹ 47 U.S.C. § 534(b)(3)(A) (emphasis added).

¹⁰ NCTA Comments at 4-5.

¹¹ *Carriage of Digital Television Broadcast Signals: Amendment to Part 76 of the Commission’s Rules, Second Report and Order and First Order on Reconsideration*, 20 FCC Rcd 4516, ¶ 33 (2005).

operator being required to carry multiple multicasting streams and a primary stream from two separately licensed stations sharing the same channel. This would ignore a key component of the Commission's justification for not requiring cable operators to carry multiple multicast streams, namely that including additional streams from the same broadcaster would not enhance the diversity of information sources available in the community.¹² Carrying the primary streams of two different broadcasters who happen to be sharing the same channel, on the other hand, serves the Commission's goals by preserving source diversity that existed in the market already.

Indeed, it is wholly unclear how the Commission's proposal to preserve the carriage rights of stations that enter into channel sharing agreements could conceivably visit any harm on MVPDs. If two stations have carriage rights before they enter into a channel sharing agreement, and they preserve carriage rights after entering the agreement – how has the burden on the MVPD increased at all?

Finally, we reiterate the urgency for the Commission to act quickly to clarify that stations entering into second-generation or other channel sharing arrangements will preserve their existing carriage and retransmission consent rights. If there is any uncertainty on this point, some stations may hesitate to bid to channel share in the auction because their fate after the initial term of a channel sharing agreement is up in the air. We urge the Commission to move promptly to provide broadcasters with greater regulatory certainty concerning the viability of second-generation and other post-auction channel sharing agreements.

¹² *Id.* at ¶ 39.

III. THE COMMISSION SHOULD REJECT AT&T'S PROPOSALS TO UNDULY COMPLICATE CHANNEL SHARING WITH PUNITIVE RULES

AT&T sets forth two proposed conditions on any future, post-auction channel sharing arrangements. First, AT&T argues that any channels that become vacant through future channel sharing agreements should no longer be eligible for broadcast use. Second, AT&T asks the Commission to force broadcasters to bear MVPDs' costs for the implementation of future channel sharing arrangements. The Commission should reject both of these proposals.

As an initial matter, it is unlikely that channel sharing agreements that bear no direct or indirect relationship to the auction will be common. The reality is that broadcasters even potentially interested in channel sharing may have a significant financial incentive to participate in the auction to receive a share of auction proceeds for spectrum relinquishment. Post-auction channel sharing arrangements are likely to be the result of auction-related agreements expiring and the parties electing to seek new partners. Certainly there are some cost savings potentially associated with channel sharing, but the real incentive for channel sharing is the auction.

For this reason, AT&T's concerns over runaway costs from a rash of channel sharing agreements bearing no relation to the auction are wholly speculative and ultimately unpersuasive. Broadcasters are acutely aware of the problems associated with viewer disruption and confusion, and have no desire to create these problems unnecessarily. They are unlikely to enter into channel sharing agreements solely to spite MVPDs or raise costs unnecessarily. MVPDs should bear their own costs associated with future channel sharing arrangements, as an ordinary cost of doing business, rather than asking broadcasters to subsidize this expense.

AT&T's request that a channel that becomes available in the broadcast band due to a channel sharing arrangement be declared unavailable for broadcasting is confusing. Following

the incentive auction, it is unlikely that a channel in the middle of the broadcast band could possibly be allocated for use by wireless carriers. Attempting to jury rig a system for adding wireless allocations in the middle of the broadcast band is technically infeasible and needlessly complex. It does not serve the public interest for that spectrum to lay fallow. Rather, such channels should remain available for use by broadcasters, including new broadcasters, or unlicensed use, consistent with the Commission's current rules.

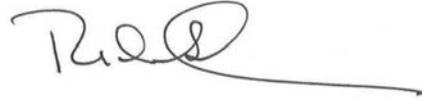
IV. CONCLUSION

The Commission has proposed a flexible set of rules for voluntary channel sharing arrangements that are associated with auction participation, as well as second-generation agreements that may replace those initial arrangements, and other future channel sharing agreements. NAB supports the Commission's proposals. We emphasize the need for prompt action on these proposals to provide potential auction participants greater confidence that channel sharing will prove a viable option in the auction. This means reassuring broadcasters that they will maintain their carriage rights in future channel sharing agreements, and that such agreements will not involve unnecessary regulatory burdens or costs.

Respectfully submitted,

**NATIONAL ASSOCIATION OF
BROADCASTERS**

1771 N Street, NW
Washington, DC 20036
(202) 429-5430

A handwritten signature in black ink, appearing to read "Rick Kaplan", with a long horizontal flourish extending to the right.

Rick Kaplan
Patrick McFadden

Bruce Franca
Robert Weller

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