



Virginia Association of Broadcasters Legal Review



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Legal Memorandum

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Deadline: FCC Channel Sharing Webinar on August 13 at 3 pm Eastern Time

To learn more about the FCC's television channel sharing rules—including the spectrum auction bidding process for licensees interested in channel sharing—stations may wish to attend an FCC webinar on **August 13 at 3 pm Eastern Time**. The webinar is scheduled to last one hour and will cover the following topics:

- The revised channel sharing rules
- The bidding process for licensees interested in channel sharing
- The post auction licensing process

To join the webinar at 3 pm Eastern Time on August 13:

1. Visit the following URL address:

<https://fceevents.webex.com/fceevents/onstage/g.php?MTID=e4052e7079427e42aca0196ef2b365d34>

2. Enter your name and email address
 3. Enter the meeting password: Fcc123
 4. Click on “Join”
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Developments: Television Channel Sharing Rules Reformulated by FCC in Response to Broadcaster Concerns

Responding to a Petition filed by the Expanding Opportunities for Broadcasters Coalition, the FCC has released an Order which reformulates the initial spectrum auction-related television channel sharing rules established in 2012. According to the FCC, the new rules will increase flexibility, certainty and expand transaction options for the creation of channel sharing agreements (“CSAs”) by and between full power and Class A television stations in the context of the spectrum auction. In addition, the FCC has released a Notice of Proposed Rulemaking (the “Notice”), discussed below, which proposes rules to govern television channel sharing in a non-auction context.

Post-Auction CSAs for Winning Bidders. Changing course from the channel sharing rules adopted previously, the Commission will now allow winning bidders that relinquish their spectrum usage rights to enter into CSAs *after* the completion of the incentive auction, with certain conditions. The conditions are as follows:

1. The stations must indicate in their pre-auction applications that they have a present intent to find a channel sharing partner after the auction; and
2. They must execute and implement their CSAs by the date on which they would otherwise be required to relinquish their licenses (i.e., within three months of receiving its share of the auction proceeds).

Application of the “Reversionary Interest” Rule. In its recent Order, the Commission clarified that broadcasters entering CSAs, including CSAs which grant options, puts, calls, rights of first refusal and other common contingent interests, do not violate the FCC’s “reversionary interest” rule. (In a nutshell, the reversionary interest rule precludes the seller of a broadcast station from retaining an interest in the FCC license it sells and prohibits a licensee from granting another party an automatic reversionary interest, such as a security interest, in its FCC license.)

Carriage Rights. Parties to post-auction CSAs will be entitled to the same carriage rights as parties to pre-auction CSAs. However, the present intent of the licensee that voluntarily relinquishes rights in order to channel share must be indicated on its pre-auction application. Reflecting this information on the pre-auction application does not bind the licensee to participate in a CSA.

Communications Before and During the Incentive Auction. All parties to pre-auction CSAs are excepted from the rule that otherwise prohibits broadcasters from communicating with each other about their bids and bidding strategies before and during the incentive auction. To secure this exception, broadcasters must submit executed CSAs with their *pre-auction* applications. Broadcasters that do not enter into a pre-auction CSA but do ultimately enter into a post-auction

CSA are prohibited from communicating with each other about their bids and bidding strategies before and during the incentive auction.

Pre-Auction Application Requirements. Stations that do not enter into a CSA prior to the auction but who are interested in channel sharing in the context of the spectrum auction must take certain steps prior to the auction in order to preserve certain rights. Such stations must indicate in their pre-auction application that they have the present intention to find a channel sharing partner after the auction. A failure to indicate such a “present intention” to channel share in the pre-auction application may result in the station’s inability to enter into a post-auction CSA and may compromise the station’s must carry rights from a new, shared location. Significantly, however, the FCC has made clear that reflecting a present intent to channel share in the pre-auction application does not irreparably bind the station to become a channel-sharing station.

Operations After the Auction. Generally, a spectrum auction winning license relinquishment bidder must cease operations within three months after receiving its share of the auction proceeds. Such a bidder will no longer hold a license after the license relinquishment deadline. However, if a winning bidder has entered a pre-auction CSA or enters into a post-auction CSA, several obligations must be met. The sharee station must file a “minor change” application for a construction permit at least 60 days prior to the date by which it must implement the CSA, and the minor change application must specify the same technical facilities as the sharer station and include a copy of the CSA. After the grant of the application, each party to the CSA must file a license application respectively. Parties to CSAs must also notify MVPDs and consumers of the sharing arrangement.

Term of Channel Sharing Agreements. In the recent Order, the FCC has reconsidered the permanent nature of CSAs and the implications for the Table of Allotments: CSAs will not be permanent in nature and shared channels will not be designated as shared in the Table of Allotments. Instead, broadcasters may choose the length of their CSAs, a circumstance which, the Commission stated, will provide flexibility and “meet broadcasters’ individualized programming and economic needs.” The shared channel status will be indicated on each sharing station’s license.

What Happens If a Sharing Station’s License Terminates? Television broadcasters are not comfortable sharing their channel with just anybody. Under the channel sharing rules originally adopted by the FCC, if a channel-sharing station were to voluntarily relinquish its license, or if the license were to be revoked or not successfully renewed, the terminated portion of the shared channel would revert to the FCC for reassignment. The FCC has now modified that approach and adopted rules that will allow broadcasters to choose their channel-sharing partners. The new rules allow channel sharing parties to develop CSA terms that address what would happen if a sharing party’s license is terminated for any reason; for example, the spectrum usage rights could revert to the remaining sharing partner if the parties include such terms in the CSA. And, if only one sharing partner remains, the licensee will be required to apply to modify its license to a non-shared status. (In this situation, a noncommercial reserved channel would continue to be reserved only for its intended use. In other words, if the sharing partner is a noncommercial educational station operating on a reserved channel, that portion of the channel must continue to be reserved for noncommercial use.)

[FCC Review of Channel Sharing Agreements](#). In the Order, the FCC has stated that it will not question the business judgment of the parties to a CSA. Pre-auction CSAs submitted with the auction application will be reviewed by the FCC only to confirm that the parties qualify for the exception to the prohibition on communications between broadcasters relating to auction bids and strategy, and the FCC will accept the applicant's certification that the CSA complies with the channel sharing operating rules. Post-auction review of CSAs by the FCC will consist of making a determination whether the CSAs (both pre-auction CSAs and post-auction CSAs) meet the requirements adopted by the Commission to ensure compliance with CSA operating rules and policies. The Commission reiterated that the CSA will only be reviewed to assure that it contains "the required provisions and that any terms beyond those related to sharing of bitstream and related technical facilities comport with our general rules and policies regarding licensee agreements."

[Proposed Rules for Television Channel Sharing Arrangements Outside the Context of the Incentive Auction](#). The FCC is now proposing to authorize channel sharing for full power and Class A television stations outside the context of the incentive auction. To that end, the FCC has released a Notice of Proposed Rulemaking (the "Notice") seeking comment on a number of issues. In the Notice, the FCC observes that the proposed expansion of television channel sharing has the potential to encourage auction participation, reduce operating costs, provide broadcasters with additional net income, and promote spectral efficiency. The rules proposed for television channel sharing outside the context of the incentive auction are largely identical to the rules that have been adopted for channel sharing within the context of the auction, and the FCC seeks comment on virtually every aspect of the proposed rules. (One way in which the proposed rules deviate from the current rules for channel sharing is that neither broadcaster costs nor MVPD costs associated with non-auction channel sharing would be eligible for reimbursement from the Spectrum Act's reimbursement fund.)

Thus, for example, the Notice proposes that non-auction CSAs include several provisions, much the same as auction-related CSAs. The FCC seeks comment on whether to mandate that all CSAs contain provisions governing the following matters:

- Terms addressing the events whereby a channel sharing partner exits the market by terminating its license through relinquishment, revocation, or cancellation;
- Access to facilities, including whether each licensee will have unrestrained access to the shared transmission facilities;
- Allocation of bandwidth within the shared channel;
- Operation, maintenance, repair and modification of facilities, including a list of all relevant equipment;
- A description of each party's financial obligations;
- Relevant notice provisions;
- Termination or transfer/assignment of rights to the shared channel, including the ability of a new licensee to assume the existing CSA.

By the same token, the Notice indicates that the proposed rules would allow stations flexibility to tailor their agreements to meet the programming and economic needs of the parties to the CSA.

The FCC is also proposing to require:

- That each full power and Class A station to a CSA continue to be licensed separately and, accordingly, that each station maintain its own call sign and be separately accountable for complying with the rules and policies of the FCC;
- That all stations involved in channel sharing be allocated spectrum usage rights sufficient to ensure at least enough capacity to operate one standard definition (SD) programming stream at all times;
- That all stations be licensed for 6 MHz, i.e., the entire channel capacity; and
- That the stations be allowed to determine the manner in which the capacity is divided among the parties to the CSA (but subject to the requirement that each party be allocated the minimum SD capacity)
- That carriage rights of parties to CSAs be protected as follows:
 - A sharee station participating in a CSA that moves to a different frequency (the sharer station) remain entitled to must carry rights, but at the new shared location.
 - Each station participating in a CSA continue to be entitled to must-carry rights for a single primary video stream.

More generally, the FCC also seeks comment on the following issues:

- Whether authorizing channel sharing by television stations outside the context of the auction will serve the public interest.
- Whether the Commission has authority to adopt channel sharing rules.
- Whether the FCC's MVPD carriage proposals for stations that are parties to non-auction CSAs are appropriate and whether there are alternative approaches that would address concerns that channel sharing not be used as a means to artificially increase the number of stations that MVPDs are required to carry.
- Whether there should be a minimum term established for non-auction CSAs and, if so, what the duration of that term should be.
- Whether stations should have three years in which to complete construction relating to the implementation of non-auction CSAs and, if not three years, what the amount of time should be.
- How to evaluate the request of a sharee station to change its community of license in order to channel share.

[Other Considerations: the Potential Effect of Network Affiliation Agreements.](#) Television broadcasters interested in channel sharing (whether incentive auction-related or outside the context of the incentive auction) may need to evaluate their options in light of their network affiliation agreements. Indeed, channel sharing agreements may not be a practical option for some stations because some network affiliation agreements include specific bandwidth requirements for the local affiliated station. Where an agreement specifies a high bandwidth requirement, there may be little bandwidth left in the 6 MHz channel for a potential sharing partner to use. Thus, the specific provisions of each station's network affiliation agreement may go a long way to determining the channel sharing options for each station.

Due Dates for Comments to the Notice. Comments on the FCC’s proposed television channel sharing rules are due August 13, 2015, and reply comments are due August 28, 2015.

Developments: Cable Operator Asks FCC to Adopt New Retransmission Consent Blackout Rule; FCC Seeks Input

The FCC is seeking feedback on cable operator Mediacom’s recently filed petition that asks the FCC to change its retransmission consent rules to condition a TV station’s license renewal on the station’s commitment to certain restrictions on blackouts.

Specifically, Mediacom is proposing a new rule requiring that a TV station’s license renewal would be conditioned on the station’s certification that it will not terminate an MVPD’s carriage of the station’s signal upon the expiration of a retransmission consent agreement if the station is not accessible via over-the-air reception or Internet streaming to at least 90% of homes in the local market served by the MVPD, provided the MVPD is still actively negotiating with the broadcaster.

Mediacom filed its [petition](#) (the “Petition”) earlier this month. The Petition contends many broadcast stations do not transmit a viewable signal to significant portions of their local markets, including portions of those markets that are within the stations’ interference-protected zones of service, and it makes the inflammatory allegation that the “broadcast industry’s commitment to free, over-the-air service is dying[.]” Mediacom argues that “for the past few decades, the broadcast industry has done exceedingly little to expand the free availability of local television stations to in-market viewers.”

According to Mediacom’s Petition, current market dynamics do not incentivize broadcasters to increase the number of viewers receiving free local television service; rather, the more viewers that are dependent on an MVPD to receive local stations, the more leverage broadcasters have in retransmission consent negotiations. Mediacom argues that “free” TV has “morphed into ‘fee’ TV” as retransmission consent revenues have grown in recent years. If anything, the Petition states, broadcasters purportedly have a strong incentive to decrease the number of viewers who can receive over-the-air reception, because (1) more over-the-air viewers means fewer MVPD subscribers and therefore less retransmission consent revenues, and (2) in retransmission consent renewal negotiations, the threat of a blackout to the MVPD’s subscribers is a “far less effective tool for pressuring the MVPD to accede to the broadcaster’s demands if the station’s signals are readily available off-air.” In Mediacom’s view, “[s]imply put, viewers residing in a station’s local market do not benefit from locally-oriented broadcast programming when they cannot view it because they have no free access to the station’s signal and either cannot afford to receive the station via a pay-TV service or are blocked from receiving it from their chosen pay-TV service due to a retransmission consent shutdown.”

Mediacom suggests that its proposed rule would encourage local broadcast stations to find ways to increase the number of viewers within their local markets who have free access to the broadcasters’ signals (via over-the-air reception, Internet streaming, or otherwise). The

proposed rule would thus supposedly serve the public interest and benefit viewers by encouraging broadcasters to expand viewers' access to free signals.

In addition to the Petition, Mediacom's CEO separately wrote a [letter](#) to Chairman Wheeler, voicing frustration with the Commission's perceived lack of action regarding escalating retransmission consent fees and blackouts imposed during negotiation impasses. The letter accused the Commission of pursuing a "strategy of malign neglect" on these issues and argued that the Commission's refusal to get involved in specific MVPD-broadcaster "disputes combined with an unwillingness to adopt corrective regulations adds up to a do-nothing policy."

The Commission issued a [public notice](#) asking for statements by August 14, 2015, either opposing or supporting the Petition. Whether the Commission will ultimately institute a formal rulemaking proceeding remains to be seen.

If you have any questions concerning the information discussed in this memorandum, please contact your communications counsel or any of the undersigned.

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