wiley

ALERT

FCC Provides Broadcasters with More Channel Sharing Flexibility; Seeks Comment on Non-Auction Related Sharing Agreements

June 15, 2015

On June 12, 2015, the Federal Communications Commission (FCC or Commission) released new rules designed to make it easier for broadcast television stations to enter into channel sharing agreements before or after the upcoming broadcast television incentive auction. The Commission also sought comments on how channel sharing agreements should operate outside of the auction context.

In the First Order on Reconsideration, the FCC largely granted a Petition for Reconsideration filed by the Expanding Opportunities for Broadcasters Coalition (EOBC). The Petition asked the Commission to: (1) permit parties to channel sharing agreements to negotiate for common contractual rights, such as puts, calls, options, and rights of first refusal; (2) allow broadcasters to enter into channel sharing agreements before or after the auction; (3) permit parties to channel sharing agreements to define the term of those agreements; and (4) delete rules that would have permitted the FCC to assign replacement channel sharing partners to a station that loses its original partner. In the accompanying Notice of Proposed Rulemaking (NPRM), the Commission seeks comment on whether and how to accommodate channel sharing not directly related to the incentive auction.

Revised Channel Sharing Rules

Inclusion of Contractual Rights in Sharing Agreements – In the July 2014 Incentive Auction Report and Order (the Report and Order), the FCC indicated that it would apply the reversionary interest rule to

Authors

Richard J. Bodorff
Senior Counsel
202.719.3145
rbodorff@wiley.law

Jessica N. Rosenthal
Partner
202.719.7478
jrosenthal@wiley.law

Ari Meltzer
Partner
202.719.7467
ameltzer@wiley.law

Practice Areas

Media

Telecom, Media & Technology

channel sharing agreements. Under that rule, a seller is prohibited from retaining an interest in a license that it sells or requiring automatic reassignment of the license in the future. In the Reconsideration Order, the Commission agreed with the EOBC that: "The reversionary interest rule does not necessarily apply to a CSA, because a CSA does not involve the transfer of a license from one sharing partner to another. In addition, CSA provisions for contingent interests in the licenses involved in a CSA would not violate the reversionary interest rule absent grant of a prohibited security interest." Thus, the FCC expressly stated that channel sharing agreements may include provisions for "contingent rights such as puts, calls, options, rights of first refusal, and other common rights" subject to applicable Commission rules and policies.

Post-Auction Channel Sharing Agreements – Originally, parties to a channel sharing agreement would have had to enter into an agreement before the auction and file that agreement with the FCC. Under the new rules, stations may enter into channel sharing agreements after the auction. There are, however, several important caveats.

First, to channel share after the auction, stations will need to indicate in their pre-auction applications "that they have a present intent to find a channel sharing partner after the auction." This is purely a procedural requirement; it is not a binding commitment and will not affect a station's auction outcome. Thus, all stations registering for the auction should consider making this election.

Second, the exemption to the prohibition on certain communications during the auction will only apply to stations that filed their channel sharing agreements with the Commission before the auction. This may provide a strong incentive for stations to enter into agreements in advance.

Finally, stations will be required to execute and implement post-auction channel sharing agreements before the deadline for relinquishing their spectrum. This deadline could occur as soon as five months after the auction is complete. Thus, stations may have limited time to negotiate *and implement* complex channel sharing agreements after the auction (including providing the required notice to consumers and MVPDs).

Duration of Channel Sharing Agreements – In the Report and Order, the FCC proposed to designate a station's channel sharing status in the table of allotments, effectively making the arrangement permanent. In the Reconsideration Order, the Commission determined that it would instead denote the sharing arrangement on the stations' licenses, thereby making it easier for stations to enter into agreements for a limited duration.

Termination of Channel Sharing Agreements –The Report and Order provided that, if the license of a channel sharing station was revoked, the rights to the terminated portion of the shared channel would revert to the Commission for reassignment. In the Reconsideration Order, the Commission modified its rules to allow the parties to address what happens if a party's license is revoked for any reason. The FCC expressly stated that it "will not select a sharing partner." Rather, the spectrum rights could revert back to the remaining partner if the parties so agree.

The Commission provided for one limited exception: if a sharing partner is a noncommercial educational station operating on a reserved channel, its portion of the shared channel would continue to be reserved for NCE-only use even if the NCE station relinquishes its license.

Procedural Issues – The Reconsideration Order addressed two additional procedural issues relating to channel sharing.

First, the Commission indicated that, before the auction, it will review channel sharing agreements solely to confirm that the parties qualify for the exception to the FCC's anti-collusion rules. Only after the auction will the Commission review the substance of channel sharing agreements, and even then, only to ensure that they comply with the agency's operating rules and policies. Stations must file applications attaching their channel sharing agreements at least 60 days prior to the date by which they must implement the sharing agreement. In the case of post-auction agreements, this means that a station would have to file its sharing application within one month of receiving its auction proceeds.

Second, the Commission clarified that where a channel sharing agreement involved multiple parties, all parties to the agreement may communicate during the auction under the exception to the anti-collusion rule. However, the FCC indicated that it will address the issue of stations entering into multiple, contingent agreements "in a forthcoming decision."

Notice of Proposed Rulemaking

In the accompanying NPRM, the FCC sought comment regarding the procedures for non-auction related channel sharing agreements, which include so-called "second generation" agreements for stations whose auction-related agreements ended. As proposed, these agreements would only be available to full power and Class A stations. The Commission is considering whether to permit LPTV channel sharing agreements in a separate proceeding.

The Commission proposes to provide parties to non-auction related channel sharing agreements with the same carriage rights from their shared channel that they would have had were they not sharing. Stations would only be eligible for mandatory carriage if they: (1) possessed carriage rights through an auction-related channel sharing agreement or (2) were operating on their own non-shared channel immediately prior to entering into the channel sharing agreement. Thus, new stations that immediately began channel sharing would not be entitled to must carry.

An important proposed restriction on non-auction related channel sharing agreements is that, unlike in the auction context, sharee stations would be prohibited from changing their community of license. This could limit the availability of channel sharing partners both for stations entering into a sharing agreement for the first time and for stations whose auction-related channel sharing agreements expired. As an alternative to this approach, the FCC asks how it would evaluate requests to change a station's community of license in order to channel share.

MVPDs would not be entitled to reimbursement for any costs related to carriage of stations entering into non-auction related sharing agreements.

Comments on the NPRM are due within 30 days of publication in the Federal Register. Reply Comments will be due 15 days later.

Wiley Rein has experience with all aspects of channel sharing, including advising clients regarding channel sharing partnerships and negotiating and drafting channel sharing agreements. If you are interested in channel sharing or in filing comments in response to the NPRM, please contact the Wiley Rein attorney who regularly handles your FCC matters or one of the following attorneys:

Richard J. Bodorff

Eric W. DeSilva

Jessica N. Rosenthal

Ari Meltzer