

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20005**

In the Matter of )  
 )  
Authorizing Permissive Use of the “Next ) GN Docket No. 16-142  
Generation” Broadcast Television Standard )

**Comments of Consumers Union, Public Knowledge, and  
New America’s Open Technology Institute**

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May 9, 2017

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## I. INTRODUCTION

Consumers Union<sup>1</sup>, Public Knowledge<sup>2</sup>, and the Open Technology Institute<sup>3</sup> (the Public Interest Organizations) are grateful to offer our comments on the Notice of Proposed Rulemaking (NPRM)<sup>4</sup> that, if approved, would permit broadcasters to voluntarily transition to the new ATSC 3.0 digital broadcast standard. The consumer issues are many, and we consider them below.

Americans are enjoying video content more than ever before. A report issued last year revealed American adults viewed more than 10 hours of video per day on all sorts of devices: television, tablets, computers, smartphones, DVRs, video games, and more.<sup>5</sup> Despite the diversification of platforms, free over-the-air broadcast television remains a vital player in the video marketplace. Indeed, cord-cutting has increased the popularity of over-the-air broadcasts, as millions of Americans (cord-cutters or not) rely upon these free signals to receive their local

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<sup>1</sup> Consumers Union is the public policy and advocacy division of Consumer Reports. Consumers Union works for a fair, just, and safe marketplace for all consumers and to empower consumers to protect themselves, focusing on the areas of telecommunications, health care, food and product safety, energy, and financial services, among others. Consumer Reports is the world's largest independent product-testing organization. Using its more than 50 labs, auto test center, and survey research center, the nonprofit organization rates thousands of products and services annually. Founded in 1936, Consumers Reports has over eight million subscribers to its magazine, website, and other publications.

<sup>2</sup> Public Knowledge is a nonprofit digital rights advocacy organization headquartered in Washington, D.C. Public Knowledge promotes freedom of expression, an open internet, and access to affordable communications tools and creative works. Public Knowledge also works to shape policy on behalf of the public interest.

<sup>3</sup> OTI works at the intersection of technology and policy to ensure that every community has equitable access to digital technology and its benefits. The Institute promotes universal access to communications technologies that are both open and secure, using a multidisciplinary approach that brings together advocates, researchers, organizers, and innovators.

<sup>4</sup> *Notice of Proposed Rulemaking (NPRM)*, In the Matter of In the Matter of Authorizing Permissive Use of the "Next Generation" Broadcast Television Standard, Federal Communications Commission, 82 FR 13285 (March 10, 2017) herein, "NPRM".

<sup>5</sup> Jacqueline Howard, *Americans Devote More Than 10 Hours a Day to Screen time, and Growing*, CNN (July 29, 2016), <http://www.cnn.com/2016/06/30/health/americans-screen-time-nielsen/>.

broadcast networks. Moreover, many would agree that a multichannel programming distributor (MVPD) would be hard-pressed to survive without broadcast content retransmitted through its network.

Last year, the National Association of Broadcasters (NAB), the Consumer Technology Association (CTA), the American Public Television Stations (APTS) and others (the Petitioners) petitioned the Federal Communications Commission seeking permission to voluntarily adopt the new over-the-air ATSC 3.0 broadcast standard, also known as Next-Gen TV.<sup>6</sup> The Commission's consideration of that Petition led to the Notice of Proposed Rulemaking (NPRM) we are considering today, which, among other things, would authorize the broadcaster's use of the new ATSC 3.0 standard on a voluntary basis, while still providing consumers the ATSC 1.0 signal they enjoy today over-the-air for free or through their MVPD.

To be sure, Next Gen TV could offer consumers several new benefits that broadcasters are quick to point out: even better than current HD picture quality (up to 4K Ultra-High-Definition or UHD resolution), enhanced emergency alerts that can be delivered with more precision, more targeted advertising (though some consumers may not agree this is a benefit), and delivery of the ATSC 3.0 signal to mobile devices. If realized, the Public Interest Organizations agree that many consumers would enjoy these benefits, provided the cost of acquiring the equipment to receive the signal (e.g., a new television with an ATSC 3.0 tuner or a

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<sup>6</sup> Joint Petition for Rulemaking of America's Public Television Stations, the AWARN Alliance, the Consumer Technology Association, and the National Association of Broadcasters, GN Docket No. 16-142 (filed Apr. 13, 2016), <https://www.fcc.gov/ecfs/filing/60001667342/document/60001701021> (Petition).

converter) in the future is not too high. As we often see in the free market, the success or failure of ATSC 3.0 is a gamble; we would argue its success is dependent upon whether consumers are unduly burdened or not. First and foremost, the promised benefits must actually become realized and, for consumers to adopt the technology, these benefits must exceed the costs. Therefore, consumers will play a large role in determining the future of Next Gen TV.

Regardless of all the benefits made possible by the new standard, we recognize that there will be some costs, even if the transition is voluntary. As representatives of consumers' interests, we decline to pick a side between MVPDs and broadcasters—both raise legitimate concerns and arguments that the Commission will have to resolve. Instead, our position is that Next Gen TV can and will be beneficial to consumers if implemented by the FCC in a measured and conscientious manner. Our role is to soberly assess the potential harm to consumers and the video marketplace that the new transition might cause, so the Commission can mitigate those costs through the proper use of its statutory authority.

## **II. COSTS TO CONSUMERS**

In 2009, the United States completed its first digital television transition (DTV transition) when the ATSC 1.0 digital signal replaced the decades-old analog signal. The DTV transition introduced many Americans to high-definition (HD) picture quality—something we now take for granted—on a national scale. Though the benefits enjoyed today because of the DTV transition are many, consumers endured numerous headaches, delays, and costs.<sup>7</sup> Broadcasters hope to ease

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<sup>7</sup> Jim Puzzanghera and Christi Parsons, *All-Digital TV? Please Stand By*, Los Angeles Times (January 9, 2009), <http://articles.latimes.com/2009/jan/09/business/fi-dtv9>.

the pain of the new ATSC 3.0 transition by making it voluntary. Without requirements for consumers to purchase new equipment in order to receive the existing over-the-air signal (the current ATSC 1.0 signal that will remain operational for the foreseeable future), one might reasonably conclude consumer harm will be minimal.

The Public Interest Organizations sincerely hope that is the case, and consumers who willingly choose to upgrade their hardware (at their own cost, and on their own schedule) in order to enjoy the benefits of the new 3.0 signal can do so. For the many consumers who do not choose to upgrade, they should continue to receive the 1.0 signal without degradation. We recommend that the FCC follow a simple rule as it parses the various technical and legal arguments for and against the approval of the ATSC 3.0 standard: consumers should not be worse off or involuntarily bear additional costs as a result of the transition. Applying this measuring stick to some of the consumer issues raised in the NPRM guides our analysis below.

***A. ATSC 3.0 Must Be Truly Voluntary for Consumers With No Hidden Costs, Degradation of ATSC 1.0 Signal Quality, or Loss of Coverage***

***1. ATSC 3.0 Signal Should Not Be Afforded Mandatory Carriage Rights (Regardless of Whether a Simulcasting or Multicasting Approach Is Adopted)***

The *NPRM* contemplates two ways that broadcasters may keep their ATSC 1.0 on-the-air while they develop and begin to broadcast their ATSC 3.0 signal: a licensed simulcasting or a multicasting approach, both executed by transmitting on a channel licensed to a different local station that would “host” the feed (either the existing ATSC 1.0 signal or the new, Next Gen

TV). As we understand the proposals, because the ATSC 1.0 and 3.0 signals are technically incompatible: a station cannot simultaneously host and broadcast an ATSC 1.0 *and* an ATSC 3.0 signal. Thus, some sort of sharing scheme will need to be adopted.

Regardless of which approach is taken—though we see more merit in a licensed simulcasting regime<sup>8</sup>—the Commission must ensure that mandatory carriage rights only be afforded to the ATSC 1.0 signal, and not the ATSC 3.0 signal. Fortunately, broadcasters and MVPDs seem to be in agreement on this point.<sup>9</sup>

## 2. *No Degradation of Coverage Area or Signal Quality*

There is a risk of consumer harm if and when stations begin to relocate and host each other's ATSC 1.0 signals as part of the Next Gen TV transition. As the *NPRM* correctly points out: “Even with ATSC 1.0 simulcasting, it is possible, if not likely, that some over-the-air consumers will lose ATSC 1.0 service from stations that begin transmitting in ATSC 3.0. This is because a host simulcast station will have a different service area than the Next Gen TV (originating) station.”<sup>10</sup> If we adhere to our guiding rule that no consumer should be worse off as

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<sup>8</sup> *NPRM* at ¶ 10 (“First, a licensed approach implemented via temporary channel sharing could allow noncommercial educational television (NCE) stations to serve as hosts to commercial stations’ simulcast programming. Because NCE licensees are prohibited by Section 399B of the Communications Act from broadcasting advertisements,<sup>44</sup> an NCE station would be prohibited from hosting the simulcast programming of a commercial station on a multicast stream under its NCE license. By contrast, it appears that an NCE station would be able to serve as a host to a commercial station if that commercial station is separately licensed. In addition, a licensed simulcast approach could provide certainty that the originating station (and not the host) is responsible for regulatory compliance regarding its simulcast signal, and therefore could give the Commission clear enforcement authority over the originating station in the event of a violation of our rules.”)

<sup>9</sup> *NPRM* at ¶ 16.

<sup>10</sup> *NPRM* at ¶ 12.

a result of the ATSC 3.0 transition, an over-the-air signal loss of the current digital signal (ATSC 1.0 ) that is more than *de minimus* presents a significant problem. The FCC must endeavor to avoid this result by all means possible.

*a. Coverage Area*

Towards that end, the Commission first asks: “should we require that the ATSC 1.0 simulcast signal at a minimum cover the Next Gen TV station’s entire community of license?”<sup>11</sup> The question supposes a scenario whereby Station A relocates and simulcasts its ATSC 1.0 signal to Station B—we assume in the same local market—and then upgrades its original facility to broadcast an ATSC 3.0 signal, thus becoming a Next Gen TV station serving its community of license as the 1.0 signal had done so for years.

As noted above, the simulcast station, Station B, would be geographically located elsewhere—how far away remains to be determined, but the *NPRM* correctly points out that Station B clearly has a different service area with a different range of coverage. The Public Interest Organizations strongly believe—especially if technically possible—that, at a minimum, the ATSC 1.0 simulcast signal hosted at Station B must cover Station A’s entire community license. Anything less would risk consumers losing the free, over-the-air digital signal they have been enjoying for years.

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<sup>11</sup> *Id.*



### *b. Signal Quality*

The Commission also seeks comment on what broadcasters' "incentives" are to maintain "existing service coverage or quality to viewers."<sup>12</sup> With respect to coverage area, we explain above that consumers' expectation to retain the ATSC 1.0 signal they presently receive should be incentive enough for broadcasters to maintain the coverage of the community of license they serve today, simulcasted or not. The Public Interest Organizations also believe the FCC should require it.

The broadcasters' request for "maximum flexibility" as cited by the Commission raises questions.<sup>13</sup> Will broadcasters diminish the current ATSC 1.0 signal received over-the-air by consumers in HD to standard definition (SD) if granted the "flexibility to manage the transition as effectively as possible"<sup>14</sup> by the FCC? If so, consumers are harmed in this context, especially where investments had been made to purchase a television with HD resolution capability. We do not believe this should be allowed, and the Commission should require that ATSC 1.0 signals be broadcast in HD throughout the Next Gen TV transition.

### *3. Commission Should Not Adopt an ATSC 3.0 Tuner Mandate*

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<sup>12</sup> *Id.*

<sup>13</sup> *Id.* (see footnote 58: "Broadcasters argue that they have every incentive to maintain service to current viewers, but that they need **maximum flexibility** in choosing 3.0 deployment partners." *Emphasis added.*).

<sup>14</sup> *Id.* (see footnote 58, the *NPRM* cites Petitioner's Reply at 6: "Because broadcasters are unlikely to have additional spectrum available to ease the transition, they must have flexibility to manage the transition as effectively as possible.").

The Commission “tentatively” agrees that a tuner mandate (requiring new televisions to include a receive capable of receiving an ATSC 3.0 signal) is not necessary at this time, despite the fact that television receivers manufactured for the U.S. market today cannot receive the new digital signal.<sup>15</sup> The Public Interest Organizations agree with the FCC’s conclusion, which is also shared by the Petitioners.<sup>16</sup> We further agree with the broadcasters that “consumer demand” for over-the-air Next Gen TV will better inform receiver manufacturers and broadcasters as to whether the televisions of the future should include the equivalent of an ATSC 3.0 tuner. Why saddle manufacturers and consumers with extra costs when broadcasters are under no obligation to affirmatively build out a 3.0 broadcast capability?

The *NPRM* raises an interesting question regarding HDMI ports, which could be used to attach a dongle or other equipment enabling a current television (via an HDMI port) to essentially be upgraded to receive an ATSC 3.0 signal in the future. The Commission asks: “an alternative to adopting a Next Gen TV tuner mandate would be to require that all TV receivers...have an HDMI port...”<sup>17</sup> Though we appreciate the intent of the FCC’s proposed requirement would be to “protect consumers’ investments in television receivers,”<sup>18</sup> we do not believe a future HDMI port mandate is necessary. In the past three years that *Consumer Reports* has been testing new televisions, all of them contained at least one HDMI input; in many cases, several.<sup>19</sup> A consumer would be hard-pressed to purchase a new television today and in the

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<sup>15</sup> *NPRM* at ¶ 31.

<sup>16</sup> *NPRM* at ¶¶ 31-32.

<sup>17</sup> *NPRM* at ¶ 32.

<sup>18</sup> *Id.*

<sup>19</sup> Claudio Ciacci, TV Test Program Leader, *Consumer Reports* (email communication, May 9, 2017).

future that did not have an HDMI port. Therefore, any mandate requiring an HDMI port would be redundant.

Finally, we feel the FCC need not consider an ATSC 3.0 tuner mandate or HDMI port mandate so long as consumers have access to an ATSC 1.0 signal. When and if the Commission considers discontinuance of the first generation digital signal (via a future separate rulemaking discussed below), it need not concern itself with a mandate at this time.

*4. Commission Should Consider Any Discontinuance of the ATSC 1.0 Signal Only Through a New Rulemaking*

The Commission proposes to decide in a future proceeding—ideally, a rulemaking—when to discontinue the broadcasting of an ATSC 1.0 signal (presumably through a simulcasting approach referenced above).<sup>20</sup> We affirmatively agree. Assuming the FCC approves the voluntary transition to ATSC 3.0, there exist too many variables at this time to even consider the shut-off of the current digital signal. Will simulcasting the ATSC 1.0 signal adequately preserve consumers’ access to a free over-the-air signal? Will broadcasters deliver the purported benefits of the ATSC 3.0 signal (e.g., better picture quality) and how soon will they do so? Will consumers adopt the new standard in large enough numbers to justify a permanent sunset of the ATSC 1.0 signal?

The Public Interest Organizations remind the Commission and others that the termination of the analog over-the-air signal occurred a little less than nine years ago. Consumers would best-

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<sup>20</sup> *NPRM* at ¶ 14.

served by waiting to see how the market for Next Gen TV develops before contemplating the sunset of the current DTV signal.

### 5. *Consumer Notice and Education*

The *NPRM* asks whether “broadcasters should be required to provide on-air notification to educate consumers about their transition to Next Gen TV service.”<sup>21</sup> The Public Interest Organizations strongly believe that broadcasters must be required to provide on-air notifications, both as Public Service Announcements (PSAs) and crawls aired during prime viewing times. Especially where some over-the-air consumers may lose their ATSC 1.0 signal because of simulcasting during the transition, it is crucially important affected consumers are informed of the transition, and of the steps they can take to avoid signal loss.

Information we believe the Commission should require stations to provide in the notifications include:

- **The date of the broadcast channel relocation (1.0 signal).** Once broadcasters successfully relocate their ATSC 1.0 signal to a new host station, a date certain must be determined and made available to the public. Further details regarding the new channel assignment, (e.g., its location and how best to rescan their receiver) should be provided to consumers.
- **The date of the new 3.0 signal launch.** To our knowledge, the relocation date of a 1.0 broadcast signal to a new host station does not need to coincide with a launch with a broadcaster’s new ATSC 3.0 signal. If true, and the 3.0 signal launch occurs later, consumers should be provided the date (if known) or an estimate of when the new 3.0 signal will be available.

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<sup>21</sup> *NPRM* at ¶ 32.

- **A means to determine whether a consumer will no longer receive a quality 1.0 signal over-the-air because of relocation.** If relocation of a station's ATSC 1.0 signal results in viewers losing the ability to receive it over-the-air (who previously could receive it), broadcasters in conjunction with the FCC should provide a simple way for consumers to determine whether they will be negatively affected. For those affected, consumers should be made aware of their options to receive the signal, if any. Consumer assistance could be provided over the phone or online as suggested in the NPRM.<sup>22</sup>
- **A means to determine whether a consumer will be able to receive a quality 3.0 signal over-the-air.** The Public Interest Organizations anticipate and expect the coverage area of a station's new ATSC 3.0 signal will be the same if not larger than its 1.0 signal. Similar to offering consumers assistance to determine if they will keep or lose their old digital signal, broadcasters and the FCC should be able to provide consumers information regarding their ability to receive the new 3.0 signal (assuming those consumers have the equipment to receive it).
- **Any additional equipment required to receive a quality 3.0 signal over-the-air.** We do not believe most consumers know they will need a new television with an ATSC 3.0 tuner (assuming they are available in the U.S. market for purchase in the future) or a yet to be determined converter equipment to receive an over-the-air ATSC 3.0 signal. Consumer confusion can be avoided and expectations managed by requiring notification of this fact.
- **The benefits of the 3.0 signal for consumers.** Broadcasters have touted the many consumer benefits the ATSC 3.0 transition will make possible: improved picture quality (with capabilities to broadcast up to a 4K UHD resolution), better emergency alerts capability, and the ability to receive the 3.0 signal on a mobile device, among others. We do not doubt that consumers would enjoy these benefits; however, the NPRM is unclear as to whether broadcasters will be required to incorporate any of these enhancements if they choose to voluntarily broadcast in the new 3.0 format. Where broadcasters commit to or advertise a consumer benefit (e.g., enhanced picture quality) as part of the ATSC 3.0 transition in a market, we believe consumers should be notified; to both increase consumer adoption and obligate broadcasters to fulfill their promises.

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<sup>22</sup> NPRM at ¶ 33.

Broadcasters should be required to notify consumers no later than 90 days before the ATSC 1.0 signal is shifted to another station. Though we hope the large majority of consumers will not lose their 1.0 signal because of relocation, for those that do, they will need to time to seek alternative means of receiving the lost television signal—some of which may incur financial costs. Furthermore, for those who wish to receive an available 3.0 signal, time will help them acquire the necessary technology—assuming it is available—in order to upgrade their means to receive it. In either instance, consumers should be afforded ample time to learn about the new ATSC 3.0 transition and prepare accordingly.

***B. Retransmission Consent: The FCC Must Ensure that Retransmission Consent Does Not Allow Broadcasters to Circumvent the Voluntary Approach to ATSC 3.0 Deployment***

Functioning markets and freedom of choice are essential to the health and stability of the video marketplace. Innovation stems from competitive options being offered—but not forced—upon consumers and competitors. It is essential to the continued health of the robust and ever-evolving video marketplace that the Commission take steps to ensure retransmission consent (also known as “retrans”) negotiations do not undermine the voluntary nature of ATSC 3.0 adoption for consumers and competitors.

*1. The Retransmission Consent System Can, and Has, Been Abused to Compel Carriage of Signals Other than Core Broadcast Content*

The Commission is right to ask questions about the impact of retransmission consent on the deployment of ATSC 3.0. The health of the marketplace, and the interests of consumers (the

one party without a seat at the retrans negotiating table) demand that retransmission consent issues be carefully considered in the context of this transition.

It is increasingly axiomatic that, when MVPDs and broadcast groups engage in retransmission consent negotiations, consumers end up suffering, or footing the bill, or both. Increased broadcast retransmission consent fees are passed on to consumers by MVPDs who have little choice but to accept most broadcaster demands or face crippling blackouts.<sup>23</sup> Those deals often carry with them obligations to carry programming—sometimes even programming not yet identified by the broadcast group—and the costs for both continued carriage of broadcast content and compelled carriage of affiliated non-broadcast content are passed to consumers. These costs are often conveyed in below-the-line fees, rather than outright rate increases, reducing consumer awareness and increasing costs without harming MVPD or broadcaster market positioning.<sup>24</sup> Throughout the retransmission consent process, consumers are left without a seat at the table, but must foot the bill for whatever deals industry decides upon.

In one notable example, Sinclair Broadcast Group used the retransmission consent process to force carriage of a cable channel that, over years of existence, had garnered little interest from MVPDs or consumers. In 2016, Sinclair bought the Tennis Channel, and its

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<sup>23</sup> Daniel Frankel, *DirecTV and SJJ Broadcasting Reach Retrans Deal, End 6-Station Blackout*, FierceCable (Apr. 12, 2017), <http://www.fiercecable.com/cable/directv-and-sjl-broadcasting-reach-retrans-deal-end-6-station-blackout>. See also: Diana Marszalek, *More Retrans Battles, Another Blackout*, Broadcasting & Cable (Jan. 13, 2017), <http://www.broadcastingcable.com/news/local-tv/more-retrans-battles-another-blackout/162432>, and Kevin Eck, *Retrans Blackouts Affecting NCAA Tournament Watchers*, TVSpy (Mar. 16, 2017), <http://www.adweek.com/tvspy/retrans-blackouts-affecting-ncaa-tournament-watchers/187306>.

<sup>24</sup> Jon Brodtkin, *Comcast Raises Controversial “Broadcast TV” and “Sports” Fees \$48 per Year*, Ars Technica (Dec. 12, 2016), <https://arstechnica.com/information-technology/2016/12/comcast-raises-controversial-broadcast-tv-and-sports-fees-48-per-year/>.

popularity exploded shortly thereafter. Gains of more than 7 million households were reported earlier this year,<sup>25</sup> and media reports indicate that forced bundling through retransmission consent negotiations are most likely responsible for the channel's sudden popularity. According to one report, "Sinclair had said it would pair carriage of the sports channel with retransmission consent agreements for its broadcast stations."<sup>26</sup>

Large MVPDs, and those which also own broadcast interests, also use the retransmission consent process to extract favorable terms, potentially limiting the growth or viability of competitive video services. Comcast, for example, is rumored to have fleshed out its fledgling over-the-top (OTT) service by exercising most-favored-nation clauses in many of its carriage contracts.<sup>27</sup> Comcast can only demand such favorable contract terms due to its dominant position in the video delivery marketplace, and once again, consumers are left holding the bag.

The Public Interest Organizations recognize that this is not the appropriate proceeding in which to correct these longstanding failures in the current regulatory regime and marketplace. We strongly believe, however, that examples such as these must be heeded as warnings of the harm to consumers, competitors, and the health of the marketplace that may come to pass if corporate interests are able to use the retransmission consent process to compel carriage of ATSC 3.0 signals.

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<sup>25</sup> Mike Farrell, *Tennis Channel Adds 7.8M Nielsen Homes*, Multichannel News (Mar. 14, 2017), <http://www.multichannel.com/news/sports/tennis-channel-adds-78m-nielsen-homes/411510>.

<sup>26</sup> *Id.*

<sup>27</sup> Gerry Smith, *Comcast Said to Gain Rights to Offer Online TV Nationwide*, Bloomberg (Mar. 23, 2017), <https://www.bloomberg.com/news/articles/2017-03-23/comcast-said-to-gain-rights-to-offer-web-tv-service-nationwide>.



*2. The FCC Must Ensure that ATSC 3.0 Carriage Cannot Be Mandated through Forced Bundling or Other Mechanisms Enabled by the Retransmission Consent Process*

It is of critical importance that ATSC 3.0 deployment not be permitted to make the issues discussed above even worse, or take further advantage of flawed legal systems at consumer expense and industry gain. The FCC must ensure that ATSC 3.0 signals may not be mandated through retransmission consent negotiations, and that the voluntary process sought by the broadcasters remains voluntary for all participants in the video marketplace—distributors and consumers, as well as broadcast stations and ownership groups.

Of particular concern is the threat that broadcasters may compel ATSC 3.0 carriage by withholding ATSC 1.0 signals. Consumers expect and demand access to broadcast television, and broadcasters enjoy unique spectrum rights and legal remedies to ensure their signal is made available. Those rules were put in place to protect a healthy marketplace and promote distribution of broadcast signals—not to give the broadcast industry leverage for commercial gain. The Commission must ensure that the ATSC 1.0 signal is not held hostage by broadcasters to force deployment of their voluntary ATSC 3.0 signal.

**III. A BROADCAST LICENSEE’S PRIMARY ATSC 3.0 STREAM MUST BE SUBJECT TO CURRENT, AND IDEALLY EVOLVING, PUBLIC INTEREST OBLIGATIONS**

The Public Interest Organizations fully concur with the Commission’s tentative conclusion that Next Gen TV stations are “television stations” engaged in “broadcasting” as

those terms are defined under the Act.<sup>28</sup> Accordingly, we agree that licensees transmitting in ATSC 3.0 would in all respects remain “public trustees with a responsibility to serve the ‘public interest, convenience, and necessity,’” as the Act requires.<sup>29</sup> The *NPRM* unfortunately “declines to initiate a general reexamination of broadcaster public interest obligations at this time” —as two of our organizations proposed in comments responding to the Petition last year<sup>30</sup>—instead asking if any public interest or programming rules “should not apply,” as well as several specific questions concerning enhanced emergency alert capabilities, political programming and targeted political advertising, and potential limits on services or features that require a fee.

The Public Interest Organizations continue to urge an updating of the public interest obligations prior to the authorization of any licensing authorization to broadcast solely in ATSC 3.0 and, at a minimum, a clear requirement in this proceeding that a free primary video stream must be available in ATSC 3.0 and subject to all current public interest obligations.

***A. The Scope and Substance of Broadcaster Public Interest Obligations Need to Remain Robust and Evolve Along with the Capabilities of ATSC 3.0 Technology***

In the Comments on the Petition filed by Public Knowledge, et al. last year, we noted that in resolving the outstanding 1999 Petition on DTV public interest obligations, the Martin Commission promised to revisit the obligations of TV station licensees if circumstances

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<sup>28</sup> *NPRM* at ¶¶ 63, 65, citing 47 U.S.C. § 153(6) and 47 U.S.C. § 153 (7), respectively.

<sup>29</sup> *NPRM* at ¶ 66, citing 47 U.S.C. § 307(c).

<sup>30</sup> Comments of Public Knowledge, et al., *Media Bureau Seeks Comment on Joint Petition for Rulemaking Authorizing Permissive Use of the “Next Generation TV” Broadcast Television Standard*, GN Docket No. 16-42 (May 26, 2016).

changed, and to “initiate proceedings as appropriate.”<sup>31</sup> Today, with the passage of another nine years and on the threshold of the “transformative new viewing experiences” made possible through ATSC 3.0, our groups continue to believe that the time to reexamine broadcasters’ public interest obligations has come.

ATSC 3.0 promises to allow broadcasters to reap immense new financial rewards through a variety of new business and marketing practices, including:

- (1) highly targeted advertising that tailors ads to the viewer’s gender, age, marital status, and more;
- (2) engagement advertising that allows consumers, including children, to connect directly with the advertiser for purchases of goods and services;
- (3) new monitoring tools to assess advertising performance and responder demographics to allow for further refinements of marketing practices; and
- (4) the development of novel offerings, including virtual gifts and currencies to allow viewers to connect with others in their community with the broadcasters collecting a portion of the proceeds.

ATSC 3.0, in other words, represents just the type of radical shift in broadcast technology that warrants a comprehensive examination of how broadcasters will satisfy their public interest obligations in this new environment.

Unfortunately, the *NPRM* takes a rather narrow and selective view of the potential scope and impact of ATSC 3.0 capabilities on the wider range of traditional public interest obligations, while also implicitly excluding newer and equally important potential public interests in areas

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<sup>31</sup> 2006 Quadrennial Regulatory Review – Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, Report and Order and Order on Reconsideration, 23 FCC Rcd 2010 ¶ 145 (2008).

such as privacy, which were never a concern in a one-way broadcasting world, but which soon will be. Failing to examine the broadcasters' public interest obligations more comprehensively, and sooner rather than later, may well lead to the development of technology or business practices that preclude or constrain broadcasters' obligations to the public in the future.

We will not repeat here the points raised in our comments last May in this docket responding to the Petition, except to note that we believe that ATSC 3.0—whether as an ancillary service, or as an eventual replacement for ATSC 1.0—has important public interest implications for children's and educational programming, political rules, public file disclosure, accessibility, emergency alerts, and localism more generally.<sup>32</sup>

At a minimum, we urge the Commission to state that a reexamination of the full range of public interest obligations would be relevant if, and when, the agency adopts a notice of proposed rulemaking that “propose[s] to authorize broadcasters to transmit solely in ATSC 3.0,” since it is not doing so at this time.<sup>33</sup>

***B. Broadcasters that Choose to Multicast Must Ensure the Primary Free Video Stream Subject to Full Public Interest Obligations is Available in ATSC 1.0 and ATSC 3.0***

Broadcasters received licenses for free use of the nation's most valuable spectrum in exchange for public service.<sup>34</sup> More than 80 years ago, Congress required broadcasters to serve the “public interest, convenience, and necessity” and “charged the [FCC] with the responsibility

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<sup>32</sup> *See id.* at 7-15.

<sup>33</sup> *NPRM* at ¶ 63 (“we do not propose to authorize broadcasters to transmit solely in ATSC 3.0 at this time”).

<sup>34</sup> 47 U.S.C. § 336(d).

of implementing and enforcing this public interest requirement.”<sup>35</sup> Since then, the FCC has repeatedly found that broadcasters “have a special role in serving the public” and has held that upholding the broadcast public interest obligation represents the “touchstone” of the FCC’s statutory responsibility over the public airwaves.<sup>36</sup>

Even in the internet age, television remains a “primary source of news and information to Americans and provides hours of entertainment every week,” especially for children.<sup>37</sup> Moreover, as cable television costs continue to increase, consumers have begun to migrate back to broadcast television as an alternative for securing affordable access to video programming.<sup>38</sup> If ATSC 3.0 can succeed in gaining access to smartphones and other mobile devices, there will be far greater opportunities for local news, emergency alerts, political engagement, educational content and other public interest benefits to be broadcast over-the-air and reach more viewers.

When the FCC implemented the DTV transition, it required broadcasters to air “free digital video programming service the resolution of which is comparable to or better than that of today’s services, and aired during the same time period that their analog channel is broadcasting.”<sup>39</sup> The Commission explained that “broadcast licensees and the public are on notice that existing public interest requirements continue to apply to all broadcast licensees.”<sup>40</sup>

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<sup>35</sup> 47 U.S.C. §§ 307(b), 309, 336(d); *Public Interest Obligations of TV Broadcast Licensees*, Notice of Inquiry, 14 FCC Rcd 21633, ¶ 1 (1999) (“Notice of Inquiry”).

<sup>36</sup> Notice of Inquiry ¶ 1.

<sup>37</sup> *Id.* See Lydia Saad, *TV is Americans’ Main Source of News*, GALLUP (Jul. 8, 2013), <http://www.gallup.com/poll/163412/americans-main-source-news.aspx>.

<sup>38</sup> Free, over-the-air television can enable cord-cutting when combined with over-the-top offerings available through a subscription broadband service.

<sup>39</sup> *Advanced Television Systems and Their Impact upon the Existing Television Broadcast Service*, Fifth Report and Order, 12 FCC Rcd 12809, 12820 (1997).

<sup>40</sup> *Id.* at 12830.

The Commission further recognized that “broadcasters must air programming responsive to their communities of license, comply with the statutory requirements concerning political advertising and candidate access, and provide children's educational and informational programming, among other things.”

The same is true today: the ATSC 3.0 transition does not fundamentally alter broadcasters’ public interest obligations. If consumers choose to view their local stations’ free primary video stream on mobile devices, instead of TV sets, that choice does not relieve broadcasters of their public interest obligations any more than the offering of new supplemental or ancillary services should allow broadcasters to avoid responsibility for promoting the public interest with these additional offerings over the spectrum that they have received without payment to the United States Treasury.

For all of these reasons, the Public Interest Organizations strongly support the Commission’s tentative conclusion that ATSC 3.0 stations are “television stations” engaged in “broadcasting” and, accordingly, licensees choosing to broadcast in ATSC 3.0 must “provide a free over-the-air service” to the viewers in their DTV-equivalent service area.<sup>41</sup> Moreover, our groups support the Commission’s tentative conclusion that “like all broadcast television licensees,” stations multicasting in ATSC 3.0 are “public trustees with a responsibility to serve the ‘public interest, convenience, and necessity.’”<sup>42</sup>

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<sup>41</sup> *NPRM* at ¶¶ 63-65, 47-48.

<sup>42</sup> *NPRM* at ¶ 66, citing 47 U.S.C. § 307(c).

Assuming that the Commission reaffirms this interpretation of the Communications Act—which is, we believe, the only tenable reading—we further urge the Commission to state explicitly that all public interest obligations that apply currently to the primary, free video stream in ATSC 1.0 will apply equally to the primary, free video stream broadcast in ATSC 3.0. While we recognize that local broadcast stations should be able to use spare capacity, as they do today, to offer ancillary video streams, data services and other innovations on either free or on a fee-for-service basis, there should be no licensed channel or licensee that is not being used *at a minimum* to ensure that the free primary stream—including its localized public interest content—is available to as many viewers as possible. The concept of using a parallel ATSC 3.0 free stream to expand the viewing audience—e.g., by reaching mobile devices more readily—is under that scenario an amplifier of the public interest benefits of local broadcasting.

It is heartening to see that Petitioners—and notably the National Association of Broadcasters—does not appear to disagree that stations choosing to broadcast in ATSC 3.0 should continue to be subject to at least the current public interest obligations. NAB stated in its reply comments on the Petition last June:

To be clear, broadcasters do not seek to shirk their existing public service obligations through the transition to Next Generation TV. Petitioners have made plain that their request contemplates the maintenance of public service obligations and compliance with Commission rules.<sup>43</sup>

#### **IV. BROADCAST LICENSEES MUST NOT USE ATSC 3.0 TO FORECLOSE OR REDUCE ACCESS TO THE UNLICENSED PUBLIC SPECTRUM COMMONS**

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<sup>43</sup> Petitioners' Reply Comments, *Media Bureau Seeks Comment on Joint Petition for Rulemaking Authorizing Permissive Use of the "Next Generation TV" Broadcast Television Standard*, GN Docket No. 16-42 (June 27, 2016), at 16.

As the Commission knows well, the growing demand for spectrum access to suit an ever increasing number of devices and use cases, combined with the insatiable demand of consumers and enterprise customers for wireless capacity, has changed the way in which we regard the roles of licensed and unlicensed. In less than 20 years, unlicensed spectrum has evolved from a marginal role as so-called “junk bands” to playing a unique and critical role in the wireless ecosystem for consumers, carriers and business firms in virtually every industry. Licensed and unlicensed spectrum, once considered rival technologies, are now indispensable complements.

The family of IEEE 802.11 WiFi standards and devices has proven to be an unparalleled economic boon to both the wireless and wired broadband ecosystems, generating more than \$200 billion in consumer welfare each year in the U.S. alone. Yet Wi-Fi never would have flourished without access to a substantial and predictable amount of unlicensed bandwidth in *every market* nationwide (and, increasingly, worldwide). And while the Commission’s initial *Spectrum Frontier* Order last July designated additional wide-channel unlicensed spectrum in the 60 GHz band, low-band TV White Space (TVWS) spectrum remains critical because a diverse ecosystem of both low-band and high-band spectrum is necessary to fully realize the benefits of unlicensed spectrum.

Just like mobile carriers, unlicensed users and operators need spectrum with different propagation and capacity characteristics to meet different needs. And although TV White Space typically offers limited capacity on 6 megahertz channels, the ability to extend connectivity great distances, or to penetrate an extra wall, or to bend a signal around buildings or hills, can make all the difference to rural broadband ISPs, school and business campuses utilities, agricultural



deployments, and other industrial users, including for sensing, monitoring and other emerging machine-to-machine connectivity.

We, along with leading chipmakers and other tech industry stakeholders, have steadfastly maintained that the post-incentive auction band plan must ensure at least three channels of 6 megahertz of unlicensed access in every market nationwide, especially in the most populated metro markets, to enable many emerging unlicensed use cases and the economic. Otherwise, the social and economic benefits that derive from low-band unlicensed spectrum access for broadband connectivity could be lost despite the already enormous investments of time and capital. Once there is certainty of sufficient unlicensed spectrum access nationwide, important benefits including lower barriers of entry for competition and innovation, and broad adoption of the already-developed 802.11af standard for Wi-Fi connectivity on mobile devices, as well as machine-to-machine applications (such as remote sensing and monitoring), could thrive with access to spectrum with low-band propagation characteristics.

***A. The Commission Should Clarify that ATSC 3.0 Must Not Require the Assignment of an Additional Channel of Spectrum to Any Broadcast Licensee***

Although the industry's *Petition* proposes a voluntary host station model that explicitly would not require any additional free grant of spectrum to local stations, the *NPRM* requests comment on "allowing broadcasters to use vacant in-band channels remaining in a market after the incentive auction repack to serve as temporary host facilities for ATSC 1.0 or ATSC 3.0 programming by multiple broadcasters." The Public Interest Organizations strongly oppose any consideration of additional, windfall grants of spectrum to any licensee at this time.

As we discussed above, the Public Interest Organizations support the Commission’s proposal to authorize ATSC 3.0 as an optional standard broadcasters can use “on a voluntary basis while they continue to deliver current generation ATSC 1.0 service to their communities.”<sup>44</sup> As the *NPRM* proposes, any decision about a “flash cut” transition that authorizes local station licensees to discontinue their primary over-the-air ATSC 1.0 service should be deferred to a future *NPRM* that is fully informed by experience with the voluntary ATSC 3.0 experiment.<sup>45</sup> Depending on a public interest analysis at that time, the Commission could certainly consider facilitating a flash-cut transition, where necessary, with temporary use of additional spectrum. However, any consideration of additional free spectrum grants to licensees seeking to experiment with new ATSC 3.0 services and business models is not only premature, it would also create an incentive among local stations to throw up an ATSC 3.0 signal in order to acquire additional free spectrum and further exacerbate uncertainty among unlicensed users of TVWS, including wireless microphone, rural broadband providers, utilities, agricultural and many other potential uses and users.

Constraining ATSC 3.0 to voluntary use on licensees’ current spectrum assignment (6 megahertz) is also appropriate because the public interest benefits of ATSC 3.0 remain entirely hypothetical. Industry interests have claimed for many years that broadcasting to mobile devices, such as smartphones, is efficient and would be popular. But so far neither demand nor progress is evident.

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<sup>44</sup> *NPRM* at ¶ 5, citing 47 CFR § 73.682(d).

Moreover, as the *NPRM* acknowledges, Petitioners state clearly that the transition to ATSC 3.0 would be accomplished without the need for additional spectrum.”<sup>46</sup> Petitioners’ Reply Comments last year reiterated this point, stating: “Because the transition will be accomplished without the need for additional spectrum, there should be little or no impact on TVWS users.”<sup>47</sup> As the market for ATSC 3.0 evolves—and consumer take-up rates and a path to phasing out ATSC 1.0 become more evident—the industry’s position, and ours, may change. But for now the Public Interest Organizations strongly oppose the award of an additional free channel to any station licensee or group of licensees.

***B. Voluntary ATSC 3.0 Multicasting Should be Protected Only Within a Licensee’s Current ‘DTV-Equivalent’ Service Area***

As noted above, the Public Interest Organizations support the “preservation of service” proposal in the *NPRM* that would “require Next Gen TV broadcasters to provide at least one free stream comparable to a DTV signal to ensure viewers within the ‘DTV-equivalent’ service area continue to receive programming service at the current DTV protection levels.”<sup>48</sup> As the Commission proposes, it is important that this primary ATSC 3.0 video stream should have a signal to noise threshold robust enough to cover the station’s entire current DTV community of service. We further agree that this primary video stream should have the same interference

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<sup>45</sup> See *NPRM* at ¶ 63 (“we do not propose to authorize broadcasters to transmit solely in ATSC 3.0 at this time”).

<sup>46</sup> *NPRM* at ¶ 54, note 122, citing Petitioners’ Reply at 17.

<sup>47</sup> Petitioners’ Reply Comments, *Media Bureau Seeks Comment on Joint Petition for Rulemaking Authorizing Permissive Use of the “Next Generation TV” Broadcast Television Standard*, GN Docket No. 16-42 (June 27, 2016), at 17.

<sup>48</sup> *NPRM* at ¶ 47.

protection as an ATSC 1.0 signal has today, as determined by the methodology in OET Bulletin No. 69.<sup>49</sup>

At the same time, as the *NPRM* acknowledges, broadcasters employing ATSC 3.0 are likely to transmit multiple and variable signals, some of which may extend well beyond the station's ATSC 1.0 service area (and protection contour). The *NPRM* asks whether these ancillary (and likely fee-based niche video or data streams) should be given the same interference protection as the licensee's mandatory free video content stream.

The Public Interest Organizations oppose extending the interference protection contour beyond the DTV-equivalent community of service area that corresponds to the ATSC 1.0 broadcast area corresponding to that channel. ATSC 3.0 should be protected only within its DTV-equivalent service area—and should operate on an opportunistic basis beyond that protection contour (subject, of course, to avoiding interference to adjacent market broadcasters and other licensees). Particularly when it comes to ancillary fee-for-service uses of ATSC 3.0, a station's transmission beyond its ATSC 1.0 community of service should be considered opportunistic and not create new or larger exclusion zones for either secondary broadcasters or for unlicensed microphones or TVWS devices. Indeed, Petitioners have indicated this is not their intention, stating in their Reply Comments last year that the transition to ATSC 3.0 can be accomplished without the need for additional spectrum and with “little or no impact on” unlicensed devices operating on the locally-vacant channels.<sup>50</sup>

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<sup>49</sup> *Id.* at ¶ 51.

<sup>50</sup> Petitioners' Reply Comments at 17.

To be clear, Commenters do not propose that the Commission should prioritize unlicensed TVWS use over the licensed use of the spectrum by broadcasters. At the same time, it is important to stress that broadcasters have received their free licenses for the express purpose of providing free over-the-air broadcasting to their local communities. The Commission’s interference protection rules for TVWS were designed to protect this public good because a vital, free over-the-air television system promotes the creation and availability of news and diverse viewpoints, “a governmental interest . . . of the highest order.” The interference rules were not designed to allow broadcasters to monetize their free spectrum for their private gain. In light of ongoing hostility from NAB toward public access to vacant channels (TV White Spaces), the Commission should make clear at the outset that it will reject any efforts to foreclose the spectrum commons.

## **V. CONCLUSION**

In sum, it is clear that the transition to ATSC 3.0 presents both great opportunities—for consumers to enjoy new services and broadcasters to explore novel, innovative uses for their spectrum; and, great risks—namely, that the consumer interest might not be all that important in this voluntary transition. It is incumbent upon the Commission to make sure that as this voluntary transition moves forward, consumers and competitors are not forced to bear the costs, but may transition in just as voluntary a manner as the broadcasters themselves.

In particular, consumers must be educated and informed about the transition, and the retransmission consent and must-carry regimes must not be left open as mechanisms by which a voluntary transition could turn out to be substantially more forced. Furthermore, it is critical that

broadcaster public interest obligations continue to be pursued, and that this voluntary transition does not impede use of TV White Spaces.

The transition to Next Gen TV offers a great opportunity to explore the future of broadcasting. We urge the Commission to take strong action to learn from the past and present, ensuring that the good parts of broadcasting carry on, without bringing the bad along for the ride.

Respectfully submitted,

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May 9, 2017