

**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)	

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

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I. INTRODUCTION AND SUMMARY

Consumers Union¹, Public Knowledge² and the Open Technology Institute at New America³ appreciate the opportunity to offer our reply comments on the Notice of Proposed Rulemaking (NPRM)⁴ that, if approved, would permit broadcasters to voluntarily transition to the new ATSC 3.0 digital broadcast standard.

We read with interest and some concern the comments filed in this proceeding by a variety of stakeholders. To believe the arguments of the broadcasters, little if any regulatory approval by the Federal Communications Commission (FCC) is needed beyond permission to proceed with the ATSC 3.0 (or Next Gen TV) transition. Rather, their comments repeatedly request “flexibility” to deploy ATSC 3.0, and that “market forces” will suffice to ensuring consumers are not harmed in the process.⁵ Consumers are being asked to take a leap of faith without the benefit of a regulatory safety net.

¹ 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.

² 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.

³ OTI and its Wireless Future Project works at the intersection of technology and policy to ensure that every community has equitable access to digital technology and its benefits. OTI promotes more open, fast and affordable wireless broadband connectivity and, more generally, universal access to communications technologies that are both open and secure, using a multidisciplinary approach that brings together advocates, researchers, organizers, and innovators.

⁴ *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*”.

⁵ Comments 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 May 9, 2017) (“Comments of Petitioners”) at 1.

We do not doubt that the new ATSC 3.0 standard will offer many benefits to consumers—we stated this in our comments and do so again now. We agree with the comments filed by the original Petitioners (the National Association of Broadcasters, America’s Public Television Stations, the AWARN Alliance and the Consumer Technology Association) that the Next Gen TV standard potentially offers “compelling public interest benefits, including stunning video and more immersive audio, as well as the opportunity for revolutionary features that will significantly enhance the viewing experience.”⁶ But achieving those benefits should not come at the expense of consumers should the transition to ATSC 3.0 be approved by the Commission without adoption of appropriate, common sense safeguards. Our reply comments focus on the following five issues:

First, there is strong support for our view that the Commission should ensure that any authorization of ATSC 3.0 will not result in either degraded picture quality or a substantial loss in coverage area for consumers who continue to rely on ATSC 1.0 signals to receive the broadcast licensee’s free, primary stream over-the-air (OTA). The record strongly supports the position that consumers must not be made worse off or involuntarily bear additional costs as a result of the transition. We do not assume that a permanent transition to ATSC 3.0 won’t result in some consumer cost or disruption. At the same time, our groups urge the Commission to ensure that any involuntary costs or loss of service is minimal—and not simply grant maximum flexibility to the broadcasters to proceed as they see fit.

Second, our groups agree with the concerns raised by a broad array of commenters regarding the potential for retransmission consent negotiations and compelled ATSC 3.0 carriage

⁶ *Id.* at 3.

to undermine the voluntary transition, thus imposing costs on competitors and consumers. The record demonstrates that the existing rules for retransmission consent are already being used to compel carriage in direct contradiction to what has been billed a voluntary transition. We concur with commenters who suggest that if the Commission authorizes ATSC 3.0, it should in tandem update its good faith rules to provide that it is a *per se* violation of the duty to negotiate in good faith to tie or condition carriage of a broadcast licensee's ATSC 1.0 signal with all or part of its ATSC 3.0 signal.

Third, our groups agree with high-tech industry commenters strongly opposing any consideration of additional grants of spectrum, potentially worth billions of dollars, to any licensee at this time for ATSC 3.0 transmissions. If local broadcast stations need additional, exclusively-licensed spectrum to optimize their business model for ATSC 3.0, then they should participate in an auction or access secondary markets, like any other wireless company, or use vacant channels in their market on an unlicensed basis, like any other company or the general public. A failure to explicitly foreclose the ability of broadcast licensees to use ATSC 3.0 to acquire exclusive rights to an additional 6 megahertz of spectrum would also exacerbate uncertainty among unlicensed users of TV white spaces, including wireless microphones, rural broadband providers, utilities, agricultural applications, and many other current and potential uses and benefits of unlicensed access to this unique low-band spectrum resource. Broadcast licensees must not be allowed to use ATSC 3.0 as the pretext for a spectrum windfall at public expense that also undermines the long-promised nationwide availability of TV White Spaces for rural broadband and other innovative new uses. We also agree with wireless industry commenters that the Commission should ensure that any authorization of ATSC 3.0 adds no

additional delay to the 39-month incentive auction repacking process in the 600 MHz band.

Fourth, the ATSC 3.0 transition does not fundamentally alter broadcasters' public interest obligations. We urge the Commission to clarify that as consumers transition from today's TVs, with tuners that receive only ATSC 1.0 signals, to future devices that receive only ATSC 3.0 signals, stations must be required to simulcast their primary and free over-the-air video stream and maintain all the current public interest obligations regardless of the standard that a viewer's device uses to receive that content. If the Commission is authorizing ATSC 3.0 as part of a permanent transition away from ATSC 1.0, then duplication of broadcasters' primary stream in ATSC 3.0 is necessary to protect consumers and fulfill the most basic public interest obligation to their community of service.

Finally, the Commission should consider what privacy issues might arise with the future implementation of ATSC 3.0. Advanced capabilities such as targeted advertising and the potential collection of personally identifiable information necessitate consumer protection. In similar instances, consumer data (e.g., viewing habits, personally identifiable information, etc.) is guarded by the Communications Act, notably in Section 631. As part of this proceeding, the Commission should consider what privacy safeguards should apply to broadcasters if they collect and use consumer data for advertising purposes in the future, as made possible by the new ATSC 3.0 standard.

II. ATSC 3.0 MUST NOT REDUCE THE SIGNAL QUALITY OR COVERAGE AREA OF THE CURRENT PRIMARY ATSC 1.0 VIDEO STREAM

There is strong support for our view that the Commission should ensure that any authorization of ATSC 3.0 will not result in either degraded picture quality or a substantial loss

in coverage area for consumers who continue to rely on ATSC 1.0 signals to receive the broadcast licensee's free, primary stream over-the-air (OTA). We very much concur with DISH Network, Verizon, the American Television Alliance (ATVA), and other commenters that it "is not in the public interest for consumers to suffer a loss in coverage or quality of service."⁷

To be sure, OTA consumers still exist. In fact, the record indicates that a growing share of U.S. television households, particularly younger adults, are relying on OTA reception to access local television stations as they "cut the cord" to reduce costs and/or increase their overall access to quality content by relying more heavily on over-the-top video offerings.⁸ Univision points out in their comments that "Hispanic households are much more likely than the national average to watch *only* OTA television," and that the share of total viewership OTA on the Univision network affiliate in Houston is 50 percent and 60 percent in Phoenix.⁹ OTA consumers remain important in significant numbers and they must be protected during the ATSC 3.0 transition.

With respect to signal quality, our groups agree with other commenters urging the Commission to require that where a broadcaster's current ATSC 1.0 signal is delivered in high definition (HD), it should continue to be broadcast in HD throughout the Next Gen TV

⁷ Comments of DISH Network L.L.C., GN Docket No. 16-142 (filed May 9, 2017) ("Comments of DISH Network"), at 10; *id.* ("In order to safeguard both MVPD and OTA consumers, the Commission must require that broadcasters maintain the signal quality and coverage area of their current ATSC 1.0 signal at all times."); *accord* Comments of Verizon, GN Docket No. 16-142 (filed May 9, 2017) ("Comments of Verizon"), at 3; Comments of the American Television Alliance, GN Docket No. 16-142 (filed May 9, 2017) ("Comments of ATVA"), at 30.

⁸ Deborah McAdams, *Survey: 17 Percent of U.S. Households are OTA-Only*, TV Technology (Jul. 13, 2016), available at <http://www.tvtechnology.com/news/0002/17-percent-of-us-households-areotaonly/278987> (showing that 17% of U.S. television households relied on OTA in 2016, up from 15% in 2015, and concluding this "statistically significant increase" may provide "further proof that the cord-cutting/cord-never phenomenon is accelerating").

⁹ Comments of Univision Communications Inc., GN Docket No. 16-142 (filed May 9, 2017) (Comments of Univision"), at 2.

transition.¹⁰ Verizon asserts the “Commission should. . . [r]equire broadcasters to transmit the simulcast in ATSC 1.0 in the same format (i.e., high definition) as the pre-transition signal and with the same programming as its ATSC 3.0 signal.”¹¹ For an over-the-air consumer who currently enjoys a HD signal, degrading that signal to standard definition as part of the transition will be immediately noticeable and inferior. Moreover, the harm to that consumer could extend beyond subpar picture quality. For example, if she purchased a television capable of receiving and displaying an HD picture over-the air (perhaps she’s a cord-cutter or cannot afford cable or satellite service), that investment has been diminished. She then would be forced to accept the lower picture quality, subscribe to a multichannel video programming distributor (MVPD) service for a fee, or pay for a new television or converter capable of receiving the new ATSC 3.0 signal. We believe this could be avoided if the Commission requires that current ATSC 1.0 transmissions broadcast in HD remain so throughout the transition and for the foreseeable future.

Unfortunately, the broadcasters take a decidedly different view. Despite reassurances that they have every incentive to maintain picture quality to satisfy consumers’ expectations,¹² none have committed to maintain their ATSC 1.0 signal in HD if given permission to transition to Next Gen TV. While we do not disagree that technical constraints could make broadcasting the ATSC 1.0 signal in HD challenging, some comments suggest that granting broadcast licensees complete “flexibility will permit them to do the very thing we initially feared: that is, to degrade the current ATSC 1.0 signal to standard definition. For example, the Petitioners correctly point out “existing rules require only that a broadcaster provide a single, over-the-air standard definition for free. Thus, under the current rules, a broadcaster that is transmitting in higher than

¹⁰ Comments of DISH Network at 6; Comments of Verizon at 3.

¹¹ Comments of Verizon at 3.

¹² Comments of Petitioners at 7.

standard definition is already ‘permitted’ to broadcast in a lower definition format that one it uses today.”¹³ This excerpt suggests to us that broadcasters want to maintain the choice to broadcast in a lower standard, despite choosing not to do so today. Though legally correct, this is the sort of flexibility that will lead to consumer harm in the form of degraded signal quality.

If broadcasters, as some state, have every incentive to keep consumers happy by continuing current HD service, then a simple rule confirming the status quo—i.e., over-the-air signals broadcast in high definition—should not be onerous or unwelcome. We can appreciate that as the transition progresses and more stations are simulcasting (or multicasting depending upon the FCC’s judgment) *and* the adoption of ATSC 3.0 is widespread, technical constraints may demand some degradation and the Commission should revisit the issue at that time. What we cannot agree with is *carte blanche* permission for broadcasters to do so at the outset, where OTA consumers (a small, but growing number of viewers¹⁴) would be clearly harmed should their picture revert to that of twenty years ago. If constrained only by market forces, we also fear broadcasters may determine the harm (in the form of poorer signal quality) to a relatively small number of OTA consumers—estimated to represent 17 percent of television viewers¹⁵—is an acceptable cost to bear as part of the transition to ATSC 3.0. We respectfully disagree, and urge the Commission to take measures to prevent this outcome.

With respect to geographic coverage and consumers losing access to their current ATSC 1.0 service, we are pleased to see strong support in the record for the position that “consumers must be protected from *any* loss of service that could result from a broadcaster’s decision to use

¹³ *Id.*

¹⁴ Comments of DISH Network at 7.

¹⁵ *Id.*

ATSC 3.0.”¹⁶ For example, ATVA’s comments suggest the Commission “should require stations that simulcast on other stations’ host facilities to meet a population coverage standard derived from that employed in the incentive auction to minimize service reduction due to repacks.”¹⁷ The entire public policy premise of the government giving local broadcast licensees a free exclusive license to six megahertz of premium spectrum is to serve its community of license. After many years of receiving their local station DTV signals free over-the-air, viewing households should not be faced with losing access—with the only recourse being an expensive subscription TV service many cannot afford—for the sake of facilitating a business model for selling ancillary ATSC 3.0 features and services that those stranded households may or may not ever be able to receive.

III. THE RECORD REINFORCES THE NEED FOR COMMISSION ACTION TO PREVENT CONSUMER AND COMPETITIVE HARM ARISING THROUGH RETRANSMISSION CONSENT NEGOTIATIONS

Despite assertions from broadcasters that the transition will be voluntary and market-driven, substantial concern exists among a broad array of commenters regarding the potential for retransmission consent negotiations and compelled ATSC 3.0 carriage to undermine the voluntary transition, thus imposing costs on competitors and consumers. We disagree with commenters who assert that “existing retransmission consent rules can remain in place and ecosystem participants can make their decisions based upon those rules.”¹⁸ As the record demonstrates, the existing rules for retransmission consent are already being used to compel

¹⁶ *Id.* at 10.

¹⁷ Comments of ATVA at 30.

¹⁸ Comments of Meredith Corporation, GN Docket No. 16-142 (filed May 9, 2017) (“Comments of Meredith Corporation”), at 4.

carriage in direct contradiction to the promised “voluntary” transition. And despite the assertions of the Petitioners, retransmission consent is not “simply irrelevant in this proceeding.”¹⁹ Indeed, some of NAB’s own members have already begun using retransmission consent negotiations to coerce carriage of ATSC 3.0 signals, as documented in this proceeding. Retransmission consent already hurts consumers and the marketplace, allowing broadcasters “to impose double-digit fee increases year after year and to deny programming to pay TV consumers through signal blackouts when negotiations fail.”²⁰

Accordingly, it is imperative that the Commission act to protect the health of the video marketplace and ensure that neither consumers nor competitors are forced to bear the burden of this voluntary transition. We concur with commenters who suggest that if the Commission authorizes ATSC 3.0, it should in tandem update its good faith rules to provide that it is a *per se* violation of the duty to negotiate in good faith to tie or condition carriage of a broadcast licensee’s ATSC 1.0 signal with all or part of its ATSC 3.0 signal.²¹

A. The Record Documents Broadcaster Efforts to Compel Carriage of ATSC 3.0, Demonstrating Willingness to Exercise Market Power Without Regard for Consumer and Competitive Impact

The record before the Commission in this proceeding demonstrates efforts already undertaken by broadcasters to wield the retransmission consent system as a tool to compel carriage of ATSC 3.0, in complete disregard of claims that this transition is truly voluntary. As Melisa Ordonez of DISH Network wrote: “broadcasters began introducing the issue of ATSC 3.0

¹⁹ Comments of Petitioners at 17.

²⁰ Comments of Verizon at 9.

²¹ See, e.g., Comments of DISH Network at 5-6; Comments of Verizon at 8; Comments of the American Cable Association at 18.

carriage in retransmission consent negotiations with DISH around September 2016.”²² In these negotiations, broadcasters “sought to tie consent for DISH’s carriage of a broadcaster’s ATSC 1.0 signal to a requirement that DISH carry its 3.0 signal.”²³ These are not negotiations limited to small broadcasters: “In total, these three broadcast groups have introduced the concept of requiring carriage of their yet-to-be authorized ATSC 3.0 signal during negotiations for consent to carry the 1.0 signal for more than sixty Big-4 local broadcast stations throughout the country.”²⁴ This behavior directly contradicts broadcaster assertions that “carriage of Next-Gen signals will not be mandatory” and that “issues related to retransmission consent negotiations are simply irrelevant in this proceeding.”²⁵

Forced carriage of ancillary content is not new, either. As ATVA notes in its comments, the reach of the Tennis Channel rapidly expanded, even in the face of contractions in the video marketplace, thanks to the leverage exerted through retransmission consent negotiations. That expansion immediately followed the Tennis Channel’s acquisition by Sinclair Broadcasting and the exercise of clauses in Sinclair retransmission consent contracts to compel carriage of a channel that wasn’t even named at the time those contracts were negotiated. This exercise of raw market power and abuse of the retransmission consent system is precisely the sort of behavior that concerns commenters in this proceeding. Unfortunately, broadcasters have already started going down this path to force carriage of ATSC 3.0 signals as well.

In addition to the declaration proffered by DISH Network, ATVA documents further instances of broadcasters attempting to compel ATSC 3.0 carriage through retransmission

²² Declaration of Melisa Ordonez, attached to Comments of DISH Network.

²³ *Id.*

²⁴ *Id.*

²⁵ Comments of Petitioners at 17.

consent, and even to expand carriage beyond traditional broadcast services. A March 20th letter from Mike Chappel notes that “broadcasters have demanded that MVPDs carry the entire 6 MHz of allotted ATSC 3.0 spectrum—no matter what service the broadcaster chooses to deploy using that spectrum. These demands, by their terms, contemplate carriage of non-broadcast services.”²⁶

These broadcast industry practices also underscore a harsh truth about the retransmission consent system: contrary to Congressional intent, its core purpose has evolved into a mechanism that allows broadcasters to successfully demand and obtain carriage of unrelated channels or services, or to extract rent from MVPDs and consumers in exchange for access to broadcast content. The must-carry and retransmission consent regime exists to ensure broadcasters have access to carriage—and that the general public has access to local broadcast content. As this record demonstrates, broadcaster use of retransmission consent has expanded beyond its original purposes. Without Commission action, the ATSC 3.0 transition will simply provide broadcasters with another avenue to compel expansion, regardless of market forces, and at the expense of consumers and competitors. Furthermore, under this scenario, broadcasters could ensure that this transition is only voluntary for holders of broadcast licenses—no one else might have much of a choice.

B. The Commission Must Act to Prevent Harm to the Marketplace

It is clear the risk of compelled carriage of ATSC 3.0 is real, despite broadcaster assertions to the contrary. Accordingly, the Commission must act to prevent harm to consumers and competitors, and to ensure that this transition is truly voluntary and market-driven. We agree with Verizon that “carriage of ATSC 3.0 transmissions will not be a choice for MVPDs if the

²⁶ *Ex Parte* Letter from the American Television Alliance, MB Docket No. 16-142 (Mar. 20, 2017).

Commission permits broadcasters to use their leverage in lopsided retransmission consent negotiations to compel carriage of ATSC 3.0 signals before consumer demand and market circumstances warrant.”²⁷ We agree with the American Cable Association (ACA) that “the Commission cannot allow stations to obtain ATSC 3.0 carriage...before it even authorizes stations to offer such signals.”²⁸

The risk of harm is particularly apparent for small MVPDs as well. We share WTA’s concern that forced carriage via retransmission consent “would be likely to further accelerate the exodus of small MVPDs from the video marketplace.”²⁹ NTCA goes further, arguing that “the Commission should prohibit MVPD carriage of ATSC 3.0 signals through the retransmission consent regime until retransmission consent reform is accomplished.”³⁰ We agree that “unless small MVPDs have access to effective recourse from the forced tying practices they and their customers have already suffered from for a number of years, carriage of ATSC 3.0 signals seems poised to be the next added requirement that threatens to further stifle the rural MVPD market.”³¹ Furthermore, failure to address the retransmission consent issue will undermine efforts to ensure that costs of this voluntary transition are not forced upon consumers or competitors. As WTA notes, “costs associated with a broadcast station’s voluntary transition to ATSC 3.0 should be borne by local broadcast stations...not small rural MVPDs and their customers.”³² These concerns are well-founded, and apply to all MVPDs, but are particularly troublesome for small

²⁷ Comments of Verizon at 2.

²⁸ Comments of American Cable Association, GN Docket No. 16-142 (filed May 9, 2017) (Comments of American Cable Association”), at 13.

²⁹ Comments of WTA—Advocates for Rural Broadband, GN Docket No. 16-142 (filed May 9, 2017) (“Comments of WTA”), at 2.

³⁰ Comments of NTCA—The Rural Broadband Association, GN Docket No. 16-142 (filed May 9, 2017) (Comments of NTCA”), at 2.

³¹ *Id.* at 6.

³² Comments of WTA at 6.

and rural MVPDs which lack the market power to even begin to push back on broadcaster demands.

It is critical that the Commission act to prevent these harms to the video marketplace during this voluntary transition. The Commission must ensure that broadcasters cannot compel carriage of ATSC 3.0 during ATSC 1.0 retransmission consent negotiations, and must confirm that broadcasters cannot utilize language they have already inserted in existing retransmission consent agreements to bypass this voluntary transition and compel carriage. As the ACA warns, “broadcasters have already demonstrated their ability to coerce even large MVPDs by raising prices and forcing carriage of little-desired programming. They will surely exercise this ability with respect to their ATSC 3.0 signals.”³³ The Commission must intervene.

C. Reform to the "Good-Faith Rule" Provides an Appropriate Mechanism to Avoid Harmful Business Practices.

The Commission can and should ensure that the retransmission consent regime does not allow broadcasters to force carriage of ATSC 3.0 signals. We agree with commenters such as Verizon who suggest that “the Commission should adopt rules to ensure that the ‘voluntary, market-driven’ transition broadcasters proposed is just that: voluntary on the part of all industry participants and market-driven based on consumer demand.”³⁴

As discussed by numerous commenters, reform to the retransmission consent regime, and in particular to its “good-faith rule,” is long overdue. While this is not the correct proceeding to pursue a complete reform of this process, the Commission can and should act here to ensure that retransmission consent negotiations do not turn this voluntary transition into an exercise in rent-

³³ Comments of American Cable Association at 10.

³⁴ Comments of Verizon at 8.

seeking and cost-shifting. Targeted reforms, such as ensuring that broadcasters may not condition ATSC 1.0 carriage on future carriage of ATSC 3.0, and confirming that broadcasters cannot use existing contract language to compel ATSC 3.0 carriage, are appropriate in this instance. We support DISH Network’s proposal to “update [the Commission’s] good faith rule to provide that it is a *per se* violation of the duty to negotiate in good faith for a broadcaster to tie or condition carriage of its ATSC 1.0 signal with its ATSC 3.0 signal.”³⁵ This narrow, focused approach will ensure that the problems already inherent in the retransmission consent regime do not expand right alongside broadcasting as this voluntary transition moves forward.

IV. ATSC 3.0 MUST NOT BECOME THE PRETEXT FOR A SPECTRUM GIVEAWAY TO BROADCASTERS OR TO FORECLOSE PUBLIC ACCESS TO THE UNLICENSED VACANT CHANNELS

One revelation in the comments filed by the Petitioners is the request for authorization of ATSC 3.0 is at least partly—if not primarily—motivated by yet another broadcast industry grab for a free spectrum windfall at public expense.³⁶ We agree with a diverse group of high-tech commenters in strongly opposing any consideration of additional grants of spectrum, potentially worth billions of dollars, to any licensee at this time for ATSC 3.0 transmissions.

It is clear that ATSC 3.0 is an attempt to compete head-to-head with mobile broadband ISPs which acquired their spectrum at auction. If local broadcast stations need additional, exclusively-licensed spectrum to optimize their business model for ATSC 3.0, then they should

³⁵ Comments of DISH Network at 6.

³⁶ Comments of Petitioners at 10-11 (“[A]llowing broadcasters to use vacant in-band channels, subject to FCC approval and for the duration of the transition, could further help reduce viewer disruption. Such action would encourage innovation and help protect viewers while also maximizing the efficient use of scarce spectrum resources.”).

participate in an auction or access secondary markets, like any other wireless company, or use vacant channels in their market on an unlicensed basis, like any other company or the general public. Broadcasters are already operating on spectrum they received at no cost in order to offer a service that actually requires an ever-smaller share of the 6 megahertz of spectrum they were granted for analog broadcasting. The broadcast industry offers no plausible public interest reason why it's over-the-top video distribution business should be given an *additional* public subsidy and advantage over competing wireless companies and services.

We also agree with a number of commenters that voluntary ATSC 3.0 multicasting should be protected only within a licensee's current "DTV-equivalent" service area.³⁷ The Commission should ensure that the transition is voluntary, that the 600 MHz band channel repacking schedule suffers no additional delay, and that broadcasters are not allowed to use ATSC 3.0 as the pretext for a spectrum windfall at public expense that undermines the long-promised nationwide availability of TV White Spaces (TVWS) for rural broadband and other innovative new uses.

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

We strongly oppose the comments of the Petitioners (NAB, et al.), Raycom, Univision, and the AWARN Alliance regarding the use of TVWS.³⁸ If the Commission in a future proceeding decides to authorize a "flash cut" transition, we would not be opposed to a public interest analysis at that time that considers the need for temporary use of additional spectrum to

³⁷ See, e.g., Comments of Microsoft Corporation, GN Docket 16-142 (filed May 9, 2017) ("Comments of Microsoft"), at 5.

³⁸ See Comments of Petitioners at 10; Comments of the AWARN Alliance, GN Docket No. 16-142 (filed May 9, 2017) ("Comments of AWARN Alliance"), at 5; Comments of Raycom, GN Docket No. 16-142 (filed May 9, 2017) ("Comments of Raycom") at 5; Comments of Univision at 9.

minimize consumer disruption. However, any presumption of additional free spectrum grants to licensees now would create perverse incentives for broadcasters to transmit ATSC 3.0 signals for the sole purpose of staking a claim to more free spectrum that would otherwise be used to facilitate the unlicensed innovation and broadband or, alternatively, reallocated and auctioned to other parties.

A failure to explicitly foreclose the ability of broadcast licensees to use ATSC 3.0 to acquire exclusive rights to an additional 6 megahertz of spectrum would also exacerbate uncertainty among unlicensed users of TV white spaces, including wireless microphones, rural broadband providers, utilities, agricultural applications, and many other current and potential uses and benefits of unlicensed access to this unique low-band spectrum resource. While broadcasters argue further grants of spectrum would increase efficiency, we agree with the large number of high-tech companies commenting -- including Microsoft, the Wi-Fi Alliance and the Dynamic Spectrum Alliance -- who point out that increasing regulatory certainty will allow this unlicensed ecosystem to flourish.³⁹

Broadcasters can implement ATSC 3.0 technology through an approach that minimizes viewer disruption using their existing spectrum allocations. There is no need to allow the use of TV white spaces to “further help reduce viewer disruption.”⁴⁰ Contrary to the comments of the Petitioners (NAB et al.) and Univision, use of these airwaves for ATSC 3.0 would discourage innovation for current applications as well as developing fields of wireless technologies.⁴¹ If

³⁹ See Comments of Microsoft at 5; Comments of Wi-Fi Alliance, GN Docket No. 16-142 (filed May 9, 2017) (“Comments of Wi-Fi Alliance”), at 2; Comments of Dynamic Spectrum Alliance, GN Docket No. 16-142 (filed May 8, 2017) (“Comments of DSA”), at 2.

⁴⁰ Comments of Petitioners at 11.

⁴¹ See Comments of Petitioners at 11 (“Nevertheless, allowing broadcasters to use vacant in-band channels, subject to FCC approval and for the duration of the transition, could further help reduce viewer

broadcasters truly wanted to “maximiz[e] the efficient use of scarce spectrum resources,” they would use their existing grants of spectrum to implement ATSC 3.0, which they suggest is entirely feasible.

Ironically, Petitioners assert that the “government should favor market forces,” but then suggest a giveaway to their industry rather than by auctioning exclusive rights to additional spectrum for use by broadcasters for ATSC 3.0 purposes.⁴² The Commission should explicitly state that there will be no assignment of additional spectrum to broadcasters for the voluntary ATSC 3.0 transition. There is no legal precedent for uncompensated allocation of the nation’s spectrum resources following the Commission’s implementation of incentive auctions. If the ATSC 3.0 transition is successful, television broadcasters will not be substantially different than the wireless carriers with whom they wish to compete with IP-enabled content. Wireless carriers, however, compensated the U.S. Treasury for their spectrum allocations. At a minimum, the Commission should wait until observations are made regarding this voluntary transition at which point another NPRM proceeding might be appropriate.

We agree with the comments of Microsoft, the Dynamic Spectrum Alliance, and the Wi-Fi Alliance that the Commission should adopt rules that advance the overall regulatory certainty, innovation, and economic investment in the band. The Commission decided to “create certainty for the unlicensed industry” and promote “greater innovation in new devices and services.”⁴³ We strongly agree with Microsoft that significant amounts of investments and planning regarding

disruption. Such action would encourage innovation and help protect viewers while also maximizing the efficient use of scarce spectrum resources.”); Comments of Univision at 9 (“By allowing to use vacant channels to deploy ATSC 3.0 transmission where possible, the Commission would facilitating efficiency and innovation.”).

⁴² Comments of Petitioners at 5.

⁴³ See *Incentive Auction Report and Order*, ¶ 264.

post-auction white-space availability will be deterred if the Commission injects uncertainty into the marketplace by allowing select broadcast licensees to have exclusive or protected use of TVWS for ATSC 1.0 or 3.0 purposes.⁴⁴ As the Wi-Fi Alliance points out, any use of TVWS bands for ATSC on a licensed basis “will exacerbate the likely scarcity of spectrum for unlicensed operations.”⁴⁵ Furthermore, any additional uncertainty “may irreparably damage the potential success of white space use in the television bands.”⁴⁶ We agree with Microsoft’s comments that approval of the use of the white spaces for ATSC 1.0 or 3.0 simulcasts would be a “setback for both licensed and unlicensed stakeholders in the Incentive Auction process, and slow the deployment of wireless broadband Internet access.”⁴⁷

B. ATSC 3.0 Must Not Disrupt or Delay Other Services in the TV or 600 MHz Bands

The comments filed in this proceeding reinforce the widely-supported view that any authorization of ATSC 3.0 should not diminish or create uncertainty around unlicensed access to at least three channels of 6 megahertz in every local market nationwide.⁴⁸ We agree with Microsoft, the Wi-Fi Alliance and the Dynamic Spectrum Alliance that the Commission should ensure there are at least three usable channels in every market, and in doing so, the Commission will spur investment and innovation.⁴⁹

The growing demand for spectrum parallels the economic growth created by its complementary licensed and unlicensed use. This growth will only be realized with the

⁴⁴ See Comments of Microsoft at 6 (“[T]his will also cause issues with providing certainty regarding post-auction white-spaces availability to permit investment and planning. . . . Regulatory uncertainty has been the primary impediment to new investment in white-spaces technologies.”).

⁴⁵ Comments of Wi-Fi Alliance at 4.

⁴⁶ *Id.* at 5.

⁴⁷ Comments of Microsoft at 5.

⁴⁸ Comments of Consumers Union, Public Knowledge, and New America’s Open Technology Institute, GN Docket No. 16-142 (filed May 9, 2017), at 25.

⁴⁹ Comments of DSA at 1; Comments of Microsoft at 5; Comments of Wi-Fi Alliance at 2.

Commission’s infusion of regulatory certainty into the ATSC 3.0 transition process. The Commission can best optimize TV band spectrum for innovation, job creation, consumer welfare and economic growth more broadly only by ensuring continued public access to a substantial number of 6 megahertz blocks of *unlicensed* TVWS spectrum in *every* local market nationwide. Public access to a minimum of three unlicensed 6 megahertz channels in every market nationwide is essential to spurring investment and achieving the enormous public interest benefits of incorporating low-band WiFi in personal/portable devices.

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 at least \$200 billion in consumer welfare each year in the U.S. alone.⁵⁰ 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).

As the Commission stated in the *Incentive Auction NPRM*, by ensuring that a substantial amount of unlicensed spectrum “will be available on a nationwide basis,” the Commission “will help to create certainty for the unlicensed industry and promote greater innovation in new services, including increased access for broadband services across the country.”⁵¹ And while the Commission has proposed opening access to additional unlicensed spectrum in the upper 5 GHz

⁵⁰ Raul Katz, *Assessment of the Economic Value of Unlicensed Spectrum in the United States*, Telecom Advisory Services, (2014), available at <https://goo.gl/Oqmh3>; see also Consumer Technology Association, *Unlicensed Spectrum and the American Economy* (2014) (estimating unlicensed spectrum generates \$62 billion annually in incremental retail device sales in the U.S. alone), available at <https://goo.gl/uHkACm>; Paul Milgrom, Jonathan Levin, and Assaf Eilat, The Case for Unlicensed Spectrum, at 19 (October 2011) (estimating the economic value of the share of mobile data traffic carried by Wi-Fi to be at least \$25 billion annually), available at <http://web.stanford.edu/~jdlevin/Papers/UnlicensedSpectrum.pdf>.

⁵¹ *In the Matter of Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, Notice of Proposed Rulemaking, FCC 12-118, Docket No. 12-268, at ¶ 239 (rel. Oct. 2, 2012).

band, the 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. Shared public access to a bare minimum of three 6 megahertz channels in every market nationwide remains essential to achieving the enormous public interest benefits of making low-band Wi-Fi over TVWS available in personal/portable devices.

As Microsoft points out, a sufficient amount of spectrum must be available in every market for investors to fully support a white-space device ecosystem.⁵² The news, entertainment, and public services that broadcasters provide are important. Nonetheless, the Commission should ensure that the promising development of the Internet of Things and other platforms and applications is allowed. As the Wi-Fi Alliance asserts, there must be sufficient spectrum available in every market nationwide to support a robust business case for an unlicensed device ecosystem in low-band TV spectrum.⁵³ We agree with the Dynamic Spectrum Alliance that given the more limited amount of spectrum available in major markets generally, it is critical for consumers and the wireless ecosystem as a whole that the Commission does not “effectively lock in VHF and UHF channel assignments and the band plan for decades to come.”⁵⁴

Finally, our groups join with commenters, including T-Mobile and CTIA, in urging the Commission to ensure that any authorization of ATSC 3.0 must not be allowed to delay the 39-month incentive auction repacking process in the 600 MHz band.⁵⁵ Our groups agree with

⁵² Comments of Microsoft at 6.

⁵³ Comments of Wi-Fi Alliance at 2.

⁵⁴ Comments of DSA at 2.

⁵⁵ See Comments of T-Mobile, Inc., GN Docket No. 16-142 (filed May 9, 2017) (“Comments of T-Mobile”), at 3-4 (“T-Mobile appreciates and agrees with the Commission’s assertion that any ATSC 3.0 deployment must not ‘negatively affect the post-incentive auction transition process’”); Comments of CTIA, GN Docket No. 16-142 (filed May 9, 2017) (“Comments of CTIA”), at 9-10 (“Establishment and deployment of a new broadcast television standard . . . should not compromise the timeline of the

mobile industry commenters that any delay in the repacking schedule would interfere with deployment schedules in the 600 MHz spectrum and postpone valuable connectivity benefits to consumers.⁵⁶ Moreover, we agree with CTIA that broadcast licensees should be responsible for any costs associated with ATSC 3.0 equipment that are beyond the costs directly associated with channel relocation based on current technology.⁵⁷ As CTIA states, “[t]he Spectrum Act did not contemplate the reimbursement of technology transition expenses -- neither did the Commission during any stage of the implementation process.”⁵⁸

V. BROADCASTERS MUST CONTINUE TO MEET THEIR CURRENT PUBLIC INTEREST OBLIGATIONS, INCLUDING ON THE ATSC 3.0 PRIMARY STREAM

Local broadcast stations received licenses to use the spectrum, at no cost, in exchange for public service.⁵⁹ As the NPRM confirmed, the ATSC 3.0 transition does not fundamentally alter broadcasters’ public interest obligations.⁶⁰ We firmly disagree with the Petitioners’ contrary claim that public interest obligations should apply only to residual ATSC 1.0 primary streams and not to the primary, simulcast ATSC 3.0 signal.⁶¹ Although the Commission is declining to

repacking process, the post-repacking 600 MHz frequency environment, or adherence to the clear directives of the Communications Act”).

⁵⁶ Comments of T-Mobile at 4; *id.* at 6-7 (“While there may be significant public interest benefits that will result from ATSC 3.0 deployment, the Commission should also consider the importance of introducing wireless services in the 600 MHz band.”).

⁵⁷ Comments of CTIA at 2.

⁵⁸ *Id.* at 4-5.

⁵⁹ 47 U.S.C. § 336(d). 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. *Public Interest Obligations of TV Broadcast Licensees*, Notice of Inquiry, 14 FCC Rcd 21633, ¶ 1 (1999).

⁶⁰ NPRM at ¶ 66 (stating that Next Gen TV stations, “like all broadcast television licensees . . . would be public trustees with a responsibility to service ‘the public interest, convenience, and necessity’”) (quoting 47 U.S.C. § 307(c)).

⁶¹ Comments of Petitioners at 18-19.

do a “full review” of public interest obligations at this time,⁶² preserving the baseline of current obligations remains vitally important.

The record demonstrates general support for this principle. For example, AT&T’s comments correctly state that “broadcasters must satisfy certain public interest obligations—most notably, the requirement to use the public airwaves to contribute to localism and diversity in their communities.”⁶³ We further agree with CTIA that in Section 336 of the Act, “Congress directed the Commission to adopt a regulatory framework for broadcasters’ provision of ancillary or supplementary services to ensure that these services are consistent with the public interest and do not diminish broadcast television services.”⁶⁴

Most fundamentally, we urge the Commission to clarify that as consumers transition from today’s TVs, with tuners that receive only ATSC 1.0 signals, to future devices that receive only ATSC 3.0 signals, stations must be required to simulcast their primary and free over-the-air video stream and maintain all of the current public interest obligations regardless of the standard that a viewer’s device uses to receive that content. The record demonstrates the additional capabilities of ATSC 3.0 technology in areas such as alert systems and closed captioning.⁶⁵ As

⁶² NPRM at ¶ 68.

⁶³ Comments of AT&T Services, Inc., GN Docket No. 16-142 (filed May 9, 2017) (“Comments of AT&T”), at 10 (“While the spectrum efficiencies unlocked by the ATSC 3.0 transmission standard should enable broadcasters to pursue these complementary goals in tandem, the Commission should adopt baseline requirements to protect consumers.”); *see also* Comments of Petitioners at 18 (“We support the Commission’s conclusion that there is no need to, and no basis for, re-examining broadcasters’ public service obligations as part of this proceeding.”).

⁶⁴ Comments of CTIA at 7 (quoting 47 U.S.C. § 336(a)(2); 47 U.S.C. § 336(b)(2)); *see also* Advanced Television Systems and Their Impact upon the Existing Television Broadcast Service, Fifth Report and Order, 12 FCC Rcd 12809, ¶ 29 (1997) (whereby the FCC established rules allowing broadcasters to use their DTV capacity to provide ancillary or supplementary services that “do not interfere with the required free service.”).

⁶⁵ Comments of Meredith Corporation at 4; Comments of Raycom at 2 (“Broadcasters will be able to deploy these new services in addition to those that are required by regulation to provide a more fulsome, capable system for the benefit of the public”).

our previous comments have proposed, the Commission should also examine whether public interest obligations should evolve with these improved technologies.⁶⁶

A. The Scope and Substance of Broadcaster Public Interest Obligations Need to Remain Robust Regardless of the Type of Transition Adopted

The record reflects varying approaches for implementing the ATSC 3.0 standard. The Commission should clarify whether it is authorizing a permanent transition away from ATSC 1.0 reception, or merely authorizing the voluntary flexibility of broadcast licensees to experiment with Next Gen TV by transmitting their primary and/or additional ancillary streams in the new ATSC 3.0 format from a separate channel. As the ATVA noted, broadcasters seek the “unlimited ability to allocate the potential benefits” of ATSC 3.0 transmissions,⁶⁷ but without any clear obligation to ensure their free primary OTA content is available to every television household regardless of whether their tuner can receive ATSC 1.0, ATSC 3.0, or both. Without an explicit extension of public interest obligations to ATSC 3.0 transmissions, broadcasters also would not have any legal obligation to offer enhanced services that would benefit the public, such as enhanced captioning services, rather than their own bottom line.

If the Commission is authorizing ATSC 3.0 as part of a permanent transition away from ATSC 1.0, then duplication of broadcasters’ primary stream in 3.0 is necessary to protect consumers and fulfill the most basic public interest obligation to their community of service. As consumers purchase ATSC 3.0-enabled devices, they will lose the ability to receive 1.0 signals. The Commission must remain cognizant of the fact that just a decade ago, when consumers with

⁶⁶ See Comments of Public Knowledge, Common Cause, and Open Technology Institute at New America, GN Docket No. 16-142 (filed May 26, 2016), at 4.

⁶⁷ Comments of ATVA at 4 (“As proposed, broadcasters would have almost unlimited ability to allocate the potential benefits of ATSC 3.0 transmissions. They could choose to improve over-the-air television service. They could (but do not have to) offer better pictures and sound. They could (but do not have to) offer better emergency alert services.”).

old analog TVs faced the potential loss of local OTA signals, Congress went to great lengths to ensure no household would lose access to core local programming because they could not afford a new DTV-ready television. Congress used a portion of the 700 MHz auction revenues to finance a consumer converter box subsidy, and facilitated a consumer education campaign, thereby ensuring that the DTV transition would not strand consumers who could not afford to, or chose not to, purchase a new DTV-ready television. Likewise, today the rights of consumers to the important programming that enabled broadcasters to utilize this spectrum should not and does not end just because of the advancement of broadcast technology.

Contrary to the argument made by the Petitioners (NAB, et al.), awarding a separate and obligation-free license for simulcasting would not “follow the rules set forth in the FCC’s channel sharing rules.”⁶⁸ The incentive auction’s option to channel share is a false analogy. Stations that agreed to channel share prior to the incentive auction had a single license and identical set of public interest obligations before and after the auction. The post-auction license—for 3 megahertz—had exactly the same obligations as the previous license to use 6 megahertz. And local stations choosing to channel share certainly were not issued a new license free from the obligation to offer a primary, free programming stream to the general public. Simulcasting arrangements for ATSC 3.0 should not be awarded as a new, separate license—and particularly not a cost-free license that is also free of public interest obligations.

B. We Fully Support the Overwhelming Agreement to Foster and Protect Public Benefits Derived from Broadcaster Public Interest Obligations

We fully support AT&T’s proposal to require broadcasters to file their simulcast

⁶⁸ Comments of Petitioners at 11.

agreements with the Commission.⁶⁹ As noted in our previous comments, we agree that broadcasters must satisfy the requirement to use the public airwaves to contribute to localism and diversity in their communities.”⁷⁰ This obligation has always included transparency and accountability to local communities. Accordingly, local stations voluntarily choosing to benefit from ATSC simulcast agreements should make them public through the FCC’s Public Inspection Files. As the Commission’s website explains: The Commission first adopted rules requiring broadcast stations to keep a public file more than 40 years ago and certain political programming files have been public for nearly 75 years.⁷¹ Further, we agree with AT&T in that the Commission should require broadcasters to make their simulcast agreements available to in-market MVPDs.”⁷²

We also fully support the argument made by Telecommunications for the Deaf and Hard of Hearing, et al., that broadcasters who undertake ATSC 3.0 transmissions must continue to comply with current obligations for ATSC 1.0 transmissions, such as captioning rules, and ensure that at least their free primary stream in ATSC 3.0 also complies with the rules.⁷³ The Commission should do whatever it can to shield consumers from any costs arising from technical

⁶⁹ Comments of AT&T at 24 (“AT&T supports the NPRM’s proposal to require broadcasters to file their simulcast agreements with the Commission. Simulcast agreements will include important information regarding the manner in which each broadcaster’s ATSC 1.0 signal will be transmitted. As such, review of the terms of simulcast agreements will be critical to confirm whether broadcasters are living up to their ATSC 1.0 service requirements and thus satisfying their broader public interest obligations.”).

⁷⁰ Comments of AT&T at 10.

⁷¹ Federal Communications Commission, Public Inspection Files.

⁷² Comments of AT&T at 10.

⁷³ Comments of Telecommunications for the Deaf and Hard of Hearing, Inc. (TDI), National Association of the Deaf (NAD), Hearing Loss Association of America (HLAA), Association of Late-Deafened Adults (ALDA), Cerebral Palsy and Deaf Organization (CPADO), California Coalition of Agencies Serving the Deaf and Hard of Hearing (CCASDHH), National Association of State Agencies of the Deaf and Hard of Hearing (NASADHH), Deaf and Hard of Hearing Consumer Advocacy Network (DHHCAN), and Rehabilitation Engineering Research Center on Technology for the Deaf and Hard of Hearing, Gallaudet University (DHH-RERC), GN Docket No. 16-142 (filed May 9, 2017) (“Comments of Telecommunications for the Deaf and Hard of Hearing, et al.”), at 2.

difficulties associated with new ATSC 3.0 equipment or maintenance of ATSC 1.0 equipment.⁷⁴

VI. THE COMMISSION SHOULD DETERMINE WHAT PRIVACY RULES WILL APPLY TO NEW ATSC 3.0 SERVICES IF NECESSARY

One of the touted benefits of the new ATSC 3.0 signal is the ability of broadcasters to deliver targeted advertising to consumers. Meredith Corporation (a local broadcasting group with 17 television stations) cites advertising as something Next Gen TV will allow them offer,⁷⁵ and NAB President Gordon Smith made the following statement in advance of the 2017 NAB Show: “The NextGen TV Hub in the Grand Lobby will showcase the many ways that ATSC 3.0 will transform television, with new capabilities for broadcasters and programmers like over-the-air addressable advertising and audience measurement.”⁷⁶

Presumably, the new capabilities of the ATSC 3.0 signal will permit broadcasters to learn what consumers are watching and where they are located, among other things. No matter what model of advertising broadcasters may choose to pursue in the future, consumers must be assured that *any* of the data collected, retained, and used by broadcasters—especially personally identifiable information—will be protected. They should also be given a choice whether that data is collected and how it is used. What privacy protections govern broadcasters should they engage in addressable advertising in the future? We believe this question is worthy of consideration by the Commission and answered as part of this proceeding.

In a similar context, cable operators are subject to Section 631 of the Communications

⁷⁴ *Id.* at 2-3 (“The Commission should make clear that it will presumptively deny waivers of the captioning rules related to costs or technical difficulties associated with new ATSC 3.0 equipment or maintaining ATSC 1.0 equipment.”).

⁷⁵ Comments of Meredith Corporation at 1.

⁷⁶ National Association of Broadcasters, *NextGen TV Hub to Showcase Benefits of New Broadcast TV Standard at 2017 NAB Show*, Press release (2017), available at <http://www.nab.org/documents/newsroom/pressRelease.asp?id=4113>.

Act,⁷⁷ which dictates what cable operators can and cannot do with consumer data, whether it is viewing habits or personally identifiable information. The law also requires cable operators to “take such actions as are necessary to prevent unauthorized access to such information by a person other than the subscriber or cable operator.”⁷⁸ In an age where data breaches have become sadly too common, we encourage the Commission to explore what elements of Section 631 should apply to broadcasters should they engage in the collection of consumer data to be used for advertising purposes.

VII. CONCLUSION

We remain optimistic that the voluntary roll-out of ATSC 3.0 broadcasts will deliver new programming, new ways for consumers to access video content, and additional choice and competition with respect to over-the-top video delivery. At the same time, we join a diverse array of other stakeholders in this proceeding in urging the Commission to ensure that ATSC 3.0 does not impose additional costs on consumers or other companies, and that broadcast stations adopting ATSC 3.0 continue to meet their fundamental public interest obligations, which must begin with ensuring a primary free stream of content that can be received by all viewers, whether or not they acquire devices with ATSC 3.0 connectivity. If the Commission ensures that any transition to ATSC 3.0 occurs in-channel, without the need for an additional spectrum windfall for broadcasters, and without sacrificing any of the existing public interest obligations inherent in the public trustee doctrine, the introduction of this new technology will benefit consumers and the industry alike.

⁷⁷ 47 U.S.C. § 551.

⁷⁸ 47 U.S.C. § 551(c)(1).

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