

Before the
Federal Communications Commission
Washington, D.C. 20554

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

REPLY COMMENTS OF
THE NATIONAL ASSOCIATION OF BROADCASTERS

March 20, 2018

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I. INTRODUCTION AND SUMMARY

The National Association of Broadcasters (NAB)¹ hereby replies to comments filed in response to the Commission’s Further Notice of Proposed Rulemaking concerning the voluntary deployment of the Next Generation TV transmission standard.² Our replies focus on two issues raised in comments – the use of vacant in-band channels to aid the transition and the appropriate standard for waivers of the Commission’s simulcasting requirement.

First, the Commission should allow television stations to use spectrum in the television band to improve television service. Encouraging stations to use vacant in-band channels, where available, is one of the most productive steps the Commission and broadcasters can take to minimize the potential for consumer disruption and help speed the transition. We object, however, to making new allowances for heretofore unproven Television White Spaces

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

² *Authorizing Permissive Use of the “Next Generation” Broadcast Television Standard*, Report and Order and Further Notice of Proposed Rulemaking, GN Docket No. 16-142, FCC 17-158 (Nov. 20, 2017) (Order & FNPRM).

(TVWS) operations. Elevating consideration of unlicensed, opportunistic operations in the band over primary licensed users would turn the very concept of Part 15 unlicensed operations on its head and represent a betrayal of commitments the Commission made when it originally authorized unlicensed operations in the television band. It would stifle broadcaster innovation in the only band available to television, while the Commission continues to make unlicensed spectrum available in numerous other bands.

Second, the Commission should adopt a flexible standard for waivers of the simulcasting requirement that will ensure that broadcasters in a variety of markets – particularly small and rural markets – have an opportunity to innovate and improve the service they offer to the public. An inflexible standard runs the risk of limiting innovations for over-the-air viewers while pay-TV providers continue to charge consumers for the improved features they desperately want to prevent broadcasters from offering for free.

II. THE COMMISSION SHOULD ALLOW BROADCASTERS TO USE VACANT IN-BAND CHANNELS DURING THE NEXT GEN TRANSITION

A. The Commission Should Not Consider Television White Spaces in Determining Whether to Allow the Use of Vacant In-Band Channels

The entire premise of the white spaces experiment has always been that unlicensed users would make opportunistic use of unoccupied channels without limiting current or future uses of the television band by television stations. The white spaces rules have always been aimed at allowing unlicensed users to use opportunistically spectrum that would otherwise lie fallow. Accordingly, white space operations have always been subject to displacement by any licensed user. In fact, under Part 15 of the Commission's rules, TV white space users have no interference protection and can be displaced at any time by other unlicensed operations – even those installed at a later date.

Commission precedent on this issue could not be clearer. In its 2008 order permitting unlicensed operations in the television band, the Commission determined that “future broadcast uses of the television band will have the right to interference protection from TV band devices.”³ When the Commission first proposed to allow unlicensed operation in the television bands, it expressly stated that the unlicensed uses it proposed were “not intended to limit future licensed use or to guarantee spectrum access rights for this band.”⁴

Microsoft and its white spaces advocates now urge the Commission to abandon its promises, guarantee spectrum access rights for unlicensed use, and expressly exclude future broadcast uses of the television band for Microsoft’s benefit. Microsoft has thus shifted from seeking to use unoccupied channels to asking the Commission to *create* unoccupied channels at the expense of innovation, preservation of service and new entry by broadcast television stations.

The Commission has a separate ongoing proceeding that will address the question of reserving channels for unlicensed use,⁵ and we urge the Commission to reject this bait and switch. In this proceeding, however, it is worth noting that nothing about the decade-long experiment with white space operations warrants doubling down on the experiment by foreclosing future broadcast uses of the television band. Eight years after the current rule

³ *Unlicensed Operation in the TV Broadcast Bands*, Second Report and Order and Memorandum Opinion and Order, 23 FCC Rcd 16807, ¶ 50 (2008).

⁴ *Additional Spectrum for Unlicensed Devices Below 900 MHz and in the 3 GHz Band*, Notice of Inquiry, 17 FCC Rcd 25632, ¶ 14 (2002).

⁵ *Amendment of Parts 15, 73 and 74 of the Commission’s Rules to Provide for the Preservation of One Vacant Channel in the UHF Television Band For Use By White Space Devices and Wireless Microphones*, Notice of Proposed Rulemaking, 30 FCC Rcd 6711 (2015).

framework was put in place, white spaces technology continues to be a myth. When the Commission originally adopted white space rules, advocates for such rules promised exciting and innovative uses, including ubiquitous high-speed internet service.⁶ To date, these services have not come close to materializing and, contrary to Microsoft's efforts to spin this failure as typical, this is by no means a normal development rate for a successful technology. Ten years after the introduction of the iPhone, Apple had sold well over a billion devices.⁷ Ten years after the initial white spaces rules, and eight years after the finalization of the current rules, there are well less than 1,000 TV white spaces devices operating in the United States (on a good day).⁸ The Microsoft Zune and the Windows Phone had vastly better track records than white spaces.

In short, nothing about the white spaces experiment to date supports foreclosing or limiting broadcaster innovation in favor of reserving additional spectrum for unlicensed devices in the TV bands. Given the tremendous efforts the Commission continues to make to open up new opportunities for unlicensed use in other bands, it should not further restrict

⁶ Anne Broache, "Google outlines proposal for 'Wi-Fi on steroids'" (April 28, 2008) ("Google on Monday said it has a plan to have American consumers from Manhattan to rural North Dakota surfing the Web on handheld gadgets at gigabits-per-second speeds by the 2009 holiday season.") available at: <http://www.cnet.com/news/google-outlines-proposal-for-wi-fi-on-steroids>.

⁷ Neil McCarthy, "Apple Has Sold 1.2 Billion iPhones Over the Past 10 Years" (June 29, 2017), available at: 5 ways the iPhone changed our lives" (June 30, 2012) available at <https://www.forbes.com/sites/niallmccarthy/2017/06/29/apple-has-sold-1-2-billion-iphones-over-the-past-10-years-infographic/#1447360342f8>.

⁸ It is impossible to ascertain how many devices are actually operating and providing service because database providers do not reflect consistent numbers of registered devices and many devices appear to be tests or erroneous registrations.

broadcasters in their own band – particularly right after concluding an auction that was expressly intended to provide a market opportunity for spectrum rights in the band.

B. The Use of Vacant Channels Could Smooth the Transition to Next Gen

Over the course of this proceeding, parties have urged the Commission to take steps to try to minimize consumer disruption during the voluntary deployment of the Next Gen standard. In particular, Public Knowledge and New America urged the Commission to adhere to a “guiding rule that no consumer should be worse off as a result of the ATSC 3.0 transition,” by imposing strict coverage requirements and imposing, for the first time, a mandate that broadcast television stations transmit in HD.⁹ Now these same parties oppose one of the single most productive steps the Commission could take to minimize consumer disruption.

The only apparent reason for this abrupt about face is Public Knowledge and New America’s imperative to advocate on behalf of their benefactor (and, in Public Knowledge’s case, board member) with respect to white spaces. Indeed, Public Knowledge and New America have contorted themselves so thoroughly on this issue that they have lost track of their own advocacy. In a style that even Jaspreet Singh Kalra¹⁰ can appreciate, Public Knowledge and New America now claim the question of whether to allow broadcasters to use vacant channels during the transition was not raised in the Commission’s Notice of Proposed Rulemaking (NPRM) regarding the voluntary deployment of Next Gen, and that the issue was only surfaced by ONE Media months after the NPRM was released. That is simply untrue. The

⁹ Comments of Consumers Union, Public Knowledge, and New America’s Open Technology Institute at 7-9, GN Docket No. 16-142 (May 9, 2017) (Public Knowledge and New America NPRM Comments).

¹⁰ Jaspreet Singh Kalra is well known for being able to rotate his head 180 degrees.

NPRM in this proceeding plainly asked, “should we consider 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?”¹¹ Indeed, Public Knowledge and New America knew this at one point, because they wrote six pages addressing this issue in their comments¹² and another six pages addressing it in their reply comments.¹³ It is unclear whether they have forgotten or have simply chosen to invent a narrative that the issue was never noticed and was only raised after the fact by ONE Media.

Regardless, the fact remains that allowing broadcasters to use vacant channels to assist in Next Gen deployments could serve an important role in minimizing disruption to consumers. As NAB has previously explained, because broadcasters will not have a second channel (as they did in nearly every case during the DTV transition) it may not always be possible to duplicate current coverage, maintain signal quality, or maintain all of a station’s existing multicasts. The ability to use vacant channels, if available, can help minimize this issue by providing broadcasters with additional capacity. Any party claiming to be concerned about consumer protection during the Next Gen deployment should support the use of vacant channels as a concrete step that may help to minimize disruption of service.

C. There Is No Legal Obstacle to Allowing Broadcasters to Use Vacant In-Band Channels

In the face of clear Commission precedent, and with no tangible track record of white spaces success, Microsoft and its advocates have been forced to develop a makeweight legal

¹¹ *Authorizing Permissive Use of the “Next Generation” Broadcast Television Standard*, Notice of Proposed Rulemaking, 32 FCC Rcd 1670, ¶ 14 (2017).

¹² Public Knowledge and New America NPRM Comments at 23-29.

¹³ Reply Comments of Consumers Union, Public Knowledge, and New America’s Open Technology Institute at 16-23, GN Docket No. 16-142 (June 8, 2017).

argument that the Commission cannot allow broadcasters to use vacant in-band channels to assist stations deploying Next Gen technology. Specifically, they assert that Section 309(j) of the Communications Act requires the Commission to auction any channels that broadcasters might temporarily use during voluntary Next Gen deployments.

As an initial matter, it is rich that Microsoft, which has dedicated a sizeable national campaign to acquiring spectrum rights in the television band for free, now claims that spectrum must be auctioned. More importantly, the argument is meritless. Section 309(j) requires the Commission to assign spectrum licenses by auction if it accepts for filing applications that are mutually exclusive.¹⁴ In reality, the Commission is extraordinarily unlikely to receive or accept mutually exclusive applications for Next Gen deployment.

First, because broadcasters will not all have access to additional channels for deployment, as they did during the DTV transition, successful deployment in virtually any market will depend on broadcaster cooperation. The degree of coordination required to ensure a successful deployment and transition in most markets will mean that in most cases broadcasters will cooperate with respect to the use of available channels if they are needed.

Second, in the unlikely event the Commission actually does receive mutually exclusive applications, it can certainly urge the applicants to resolve the issue before accepting those applications for filing. Section 309(j) provides that the Commission shall use engineering solutions, negotiation, threshold qualifications, service regulations, and other means to avoid mutual exclusivity in application and licensing proceedings if doing so would serve the public interest.¹⁵ As described above, the use of vacant, in-band channels could help minimize the

¹⁴ 49 U.S.C. § 309(j)(1).

¹⁵ 49 U.S.C. § 309(j)(6)(E).

potential for consumer disruption during Next Gen deployments. The FCC would thus certainly conclude that resolving mutual exclusivity through negotiations or other means would serve the public interest.

Moreover, in the unlikely event the FCC does receive mutually exclusive applications, and in the even less likely event it is unable to resolve those applications through any other means, *of course* the Commission could proceed with an auction as a last resort. But that remote possibility has nothing to do with this proceeding. The question before the Commission is whether or not it should allow broadcasters to use vacant in-band channels for Next Gen deployments. Microsoft and its advocates are arguing that the means by which the FCC should eventually resolve mutually exclusive applications for such use is a reason not to allow the applications in the first place. That is an illogical and unreasonable position, and the Commission should reject it.

III. THE COMMISSION SHOULD ENSURE THAT VIEWERS IN ALL MARKETS HAVE THE OPPORTUNITY TO BENEFIT FROM NEXT GEN

NAB continues to urge the Commission to ensure that the simulcasting requirement it adopted to protect viewers does not have the unintended consequence of freezing viewers in some markets in place because stations cannot find willing simulcasting partners. Viewers in small and rural markets and the stations that serve them should not be shut out from innovation that their urban counterparts can enjoy. Unfortunately, the Commission's reasonable and logical inquiry into appropriate standards for waiving the simulcasting requirement to ensure that viewers in markets of all sizes can benefit from Next Gen has generated opposition from the pay-TV lobby, which predictably has no desire to see broadcasters improve a free over-the-air service.

The American Television Alliance (ATVA) argues that the Commission should grant waivers that are as narrowly targeted as possible.¹⁶ In particular, ATVA suggests that the Commission should consider granting waivers of the coverage requirement rather than the simulcasting requirement, and should waive the simulcasting requirement only when a station has no potential partner in its market at all.¹⁷ Certainly the Commission can seek to narrowly tailor waivers where possible. But ATVA's position overlooks the possibility that a station may have one or two potential partners, but those other stations lack interest in moving forward with Next Gen at the current time. In such circumstances, the Commission should not hesitate to grant reasonable waiver requests to allow broadcasters to innovate, just like their competitors.

NCTA is slightly more direct in its comments, suggesting that “there is no need for universal broadcaster participation” at the current time and that there is no reason to waive the simulcasting requirement to allow more broadcasters to deploy Next Gen.¹⁸ NAB respectfully submits that the Commission would never seriously consider an argument that there is no need for universal carrier participation in 5G, and that the Commission should therefore feel free to allow only some carriers to deploy new services. Certainly NCTA and ATVA would never accept the proposition that only some of their members should be allowed to innovate – if, for example, the Commission determined that only some pay-TV providers

¹⁶ Comments of the American Television Alliance in Response to Further Notice, GN Docket No. 16-142 (Feb. 20, 2018) (ATVA Comments).

¹⁷ *Id.* at 10.

¹⁸ Comments of NCTA – The Internet & Television Association at 4, GN Docket No. 16-142 (Feb. 20, 2018) (NCTA Comments).

should be allowed to offer 4K services or only some companies should be allowed to offer broadband service above certain speeds.

Moreover, as NAB has repeatedly emphasized and as the Commission recognized in its order, broadcasters have strong market incentives to preserve service to the maximum extent possible where they can. In the market-based transition that broadcasters have sought and the Commission has authorized, not every station may seek to deploy Next Gen service. But that choice should be up to the stations, not their competitors or the government. The Commission should seek to encourage investment and innovation, not limit them to favor other services.

It is of course no coincidence that NCTA and ATVA members continue to move forward with 4K offerings¹⁹ while NCTA and ATVA attempt to establish roadblock after roadblock to the technology broadcasters could use to create a competitive service. Throughout this proceeding, NCTA and ATVA have tried to hamper broadcasters' ability to innovate and improve a free over-the-air service by asking the Commission to impose unduly restrictive requirements – including unreasonable coverage requirements, an unprecedented HD mandate and restrictions on market negotiations between parties concerning carriage. NCTA and ATVA lost all of those arguments and yet, undaunted, they continue to look for ways they can impede broadcast innovation. The Commission should continue to ignore these efforts.

¹⁹ See, e.g., Brendan Hesse, “DISH Network subscribers can watch college football in 4K beginning Saturday,” Digital Trends (Sept. 21, 2017) available at: <https://www.digitaltrends.com/home-theater/dish-network-4k-ncaa-college-football/>; Micah Singleton, “Verizon will start testing 4K streams on its Fios TV service,” The Verge (March 27, 2017) available at: <https://www.theverge.com/2017/3/27/15075206/verizon-4k-streams-fios-tv-trial-ses>.

Finally, NTCA expresses concern that a waiver of the local simulcasting requirement could lead to forced carriage of Next Gen signals that elect must-carry. The Commission has already determined that “a Next Gen TV broadcaster will not be able to exercise mandatory carriage rights with respect to its 3.0 signal *instead of* its 1.0 signal, nor will it have mandatory carriage rights even if its 3.0 signal is the *only* signal being broadcast.”²⁰ That is, even a broadcast station that receives a waiver of the local simulcasting requirement will not have must-carry rights. In case this language was at all ambiguous, the Commission added, “In other words, under no circumstances will we recognize mandatory carriage rights for 3.0 signals while the Commission requires local simulcasting.”²¹ The Commission’s Order is plain on this point. Accordingly, NTCA’s concerns regarding forced carriage of Next Gen signals are simply irrelevant at this time.

IV. CONCLUSION

NAB commends the Commission for the expedition it has demonstrated with respect to the Next Gen standard, moving forward from NPRM to Order in just nine months. Broadcasters are excited to begin moving forward into the future of television, and we look forward to the Commission resolving the limited number of additional questions set forth in the FNPRM quickly. The Commission can best serve viewers by encouraging broadcasters to use vacant in-band channels where available to help minimize potential consumer disruption. The Commission should also by adopt a reasonable waiver standard for its local simulcasting requirement that will ensure that viewers in small and rural markets are not shut out of the

²⁰ *Authorizing Permissive Use of the “Next Generation” Broadcast Television Standard*, Report and Order and Further Notice of Proposed Rulemaking, GN Docket No. 16-142, FCC 17-158, ¶ 67 (2017).

²¹ *Id.*

benefits of Next Gen if stations in those markets are unable to find viable simulcasting partners. We look forward to continuing to work with the Commission to resolve the limited number of outstanding issues.

Respectfully submitted,

**NATIONAL ASSOCIATION OF
BROADCASTERS**

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

Rick Kaplan
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Bruce Franca
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Robert Weller

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