

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

In the Matter of:)
)
Promoting Broadcast Internet Innovation through) MB Docket No. 20-145
ATSC 3.0)
)

**REPLY COMMENTS OF
THE NATIONAL ASSOCIATION OF BROADCASTERS**

I. INTRODUCTION AND SUMMARY

The National Association of Broadcasters (NAB)¹ hereby replies to comments in response to the Commission’s Notice of Proposed Rulemaking on potential changes to Commission rules to encourage innovation in “Broadcast Internet” services.²

NAB urges the Commission to reject the efforts of the cable lobby to relitigate the Commission’s refusal to adopt heightened regulatory mandates on broadcasters in the Commission’s order approving the voluntary use of the ATSC 3.0 transmission standard. Having twice failed to impose unnecessary and unwarranted burdens on broadcasters in a ham-fisted attempt to stifle competition, the cable lobby is now back for a third bite at the apple. Their arguments have not improved with repetition, and the Commission should promptly dismiss them.

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 *Promoting Broadcast Internet Innovation Through ATSC 3.0*, Declaratory Ruling and Notice of Proposed Rulemaking, MB Docket No. 20-145, FCC 20-73 (June 9, 2020) (NPRM).

Similarly, NAB urges the Commission to reject the unnecessary and complex subsidy scheme advanced by various interest groups in this proceeding that would use ancillary services fees to fund the purchase of consumer ATSC 3.0 equipment. These same interest groups have never demonstrated any care or concern for television viewers, as evidenced in part by their noticeable absence during the broadcast incentive auction and repacking process. Apparently, consumers were not important to these groups during that very challenging process.

These proposals for heightened regulatory mandates and additional service fees are both cynical and unnecessary. As with nearly every other industry under the Commission's purview, innovation is best unleashed when the government assists rather than hinders experimentation. It bears repeating that, unlike nearly every other spectrum-based service, broadcasters are not seeking additional spectrum to make this transition, and indeed following the broadcast incentive auction have *less*.

II. THE COMMISSION SHOULD REJECT THE CABLE LOBBY'S ONGOING EFFORTS AT REGULATORY ARBITRAGE

Throughout the original ATSC 3.0 rulemaking proceeding, the cable lobby focused its advocacy efforts on how best to secure regulatory advantages and undermine broadcasters' efforts to enhance their ability to offer competitive services. The Commission has twice rejected these arguments. Unfortunately, it now must do so a third time.

First, in its typically Pavlovian response to any regulatory issue involving broadcasting, NCTA leads off with a discussion of retransmission consent. In particular, NCTA urges the

Commission to prohibit the use of retransmission consent negotiations by broadcasters to somehow force cable companies to carry Broadcast Internet services.³

NCTA similarly asked the Commission to prohibit broadcasters from using retransmission consent negotiations to “coerce” cable companies to carry ATSC 3.0 services during the Next Gen TV rulemaking. Then, as now, NCTA asked the Commission to take anticipatory action to prohibit a harm that had not yet materialized and for which there was accordingly no evidentiary basis for Commission action.⁴ The Commission soundly rejected this request, concluding that it was “premature to address any issues that may arise with respect to the voluntary carriage of ATSC 3.0 signals.”⁵

Unsatisfied with this plain answer, NCTA sought reconsideration of the Commission’s order, contending that it “makes no sense” for the Commission to have concluded that applying a regulatory solution to a problem that had yet to materialize was premature.⁶ Aside from the hilarity of the cable industry making the exact opposite argument from what it decried during the open internet proceeding for years, the Commission rejected the novel “makes no sense” doctrine as a legal theory that would warrant reconsideration, stating that it had “fully considered this issue in the *Next Gen TV Report and Order* and declined to adopt

³ Comments of NCTA – The Internet & Television Association at 2-3, MB Docket No. 20-145 (August 17, 2020) (NCTA Comments).

⁴ Comments of NCTA – The Internet & Television Association at 20-21, GN Docket No. 16-142 (May 9, 2017) (NCTA NPRM Comments); Reply Comments of NCTA – The Internet & Television Association at 13-14, GN Docket No. 16-142 (June 8, 2017) (NCTA NPRM Reply Comments).

⁵ *Authorizing Permissive Use of the “Next Generation” Broadcast Television Standard*, Report and Order and Further Notice of Proposed Rulemaking, 32 FCC Rcd 9930, ¶ 78 (2017) (Next Gen TV Order).

⁶ Petition for Reconsideration of NCTA – The Internet & Television Association at 9, GN Docket No. 16-142 (March 5, 2018) (NCTA Petition for Reconsideration).

new rules related to the voluntary carriage of 3.0 signals through retransmission consent.”⁷ The Commission further noted that: “Determining whether our retransmission consent rules have been violated in the context of a particular negotiation is inherently a fact-specific inquiry. There is no basis in the record for us to adopt rules of general applicability.”⁸

Not content to take no, twice, for an answer, NCTA is once more asking the Commission to adopt anticipatory rules in the absence of any actual facts. NCTA specifically asks the Commission to prohibit a broadcaster’s “use of retransmission consent to acquire capacity on a cable system for a Broadcast Internet service provided by a consortium of non-commonly owned broadcasters.”⁹ Once again, there is no basis for NCTA’s proposal beyond a desire to attempt to secure some regulatory advantage regarding retransmission consent negotiations in any proceeding that includes the word “broadcast.” We urge the Commission to reject, now for the third time, NCTA’s efforts to impose restraints on negotiations in the absence of any demonstration of real-world market failure.

Second, NCTA and its pseudonym ATVA again urge the Commission to use this proceeding to impose a new HD mandate on broadcasters.¹⁰ Just as with NCTA’s retransmission consent argument, this is now the third time the cable lobby has asked the Commission to impose this new mandate on broadcasters.¹¹ Then, as now, the cable lobby

⁷ *Authorizing Permissive Use of the “Next Generation” Broadcast Television Standard*, Second Report and Order and Order on Reconsideration, 35 FCC Rcd 6793, ¶ 59 (2020).

⁸ *Id.*

⁹ Comments of NCTA – The Internet & Television Association at 3, MB Docket No. 20-145 (August 17, 2020) (NCTA Comments).

¹⁰ NCTA Comments at 6; Comments of the American Television Alliance at 1-4, MB Docket No. 20-145 (August 17, 2020) (ATVA Comments).

¹¹ See NCTA NPRM Comments at 11; NCTA NPRM Reply Comments at 7; NCTA Petition for Reconsideration at 7-8; Comments of the American Television Alliance at 35-36, GN Docket

feigned concern over potential harm to consumers from merciless broadcasters degrading service for no reason.

In reality, of course, broadcasters are going out of their way to preserve service to the maximum extent possible during the voluntary transition to ATSC 3.0, and opportunities for improved television service remain the primary driver of the transition. The Commission correctly rejected the cable lobby's arguments, noting that its existing rules did not require broadcasters to transmit in HD, that broadcasters were permitted to change format at any time, and broadcasters have strong market incentives to maintain HD service to the maximum extent possible.¹²

Nothing in the marketplace has transpired that should change the Commission's conclusions in this regard, and the Commission should not entertain this effort to sneak in a backdoor HD mandate by imposing new requirements on broadcasters that eventually choose to experiment with Broadcast Internet services. Treating every advance in broadcast technology as an opportunity to reconsider and raise the substantial regulatory requirements and public interest obligations broadcasters hold is a great way to ensure that broadcasters do not innovate. We urge the Commission not to hamper innovation by imposing new and unwarranted regulatory burdens.

Third, NCTA and ATVA ask the Commission to raise the ancillary service fee on broadcasters. While they cloak their arguments in the guise of policy, their motive is plain – they wish to saddle innovative new services with higher regulatory fees to stifle potential competition for the broadband services their members currently provide.

No. 16-142 (May 9, 2017); Reply Comments of the American Television Alliance at 35-36, GN Docket No. 16-142 (June 8, 2017).

¹² Next Gen TV Order at ¶¶ 27-28.

ATVA, for example, counts among its members DISH and AT&T. While the cable lobby likes to claim that broadcasters received their spectrum for free (despite the fact that the vast majority of broadcasters paid for their stations – *including for the spectrum on which they operate* – in acquiring them from a previous party), ATVA conveniently ignores the fact that the first satellite DBS licenses as well as the first cellular licenses, their predecessor mobile phone licenses, and associated backhaul microwave licenses were awarded for free as well. If ATVA truly believes that any spectrum that was not legally subject to auction when it was first licensed should be subject to heightened fees, then ATVA's members who received non-auctioned FCC licenses should have to pay the same fee.

There is no basis to raise the ancillary services fee at this time, particularly not to protect ATVA and NCTA members from even the potential of competition from services that have yet to be deployed. We urge the Commission to reject these requests.

III. THE COMMISSION SHOULD NOT ADOPT A COMPLEX AND UNNECESSARY SUBSIDY PROGRAM

Public Knowledge, Consumer Reports, and New America's Open Technology Institute (the Interest Groups) ask the Commission to collect ancillary service fees on broadcasters in order to off-set costs for consumers who need to upgrade their equipment as part of the transition to ATSC 3.0.¹³ We urge the Commission not to further explore this proposal that would tax broadcasters based on services that do not yet exist to subsidize the purchase of consumer equipment that is not yet necessary. It is particularly suspect in light of the fact that none of these groups has evidenced any concern for television consumers in recent memory.

¹³ Comments of Public Knowledge, Consumer Reports, and New America's Open Technology Institute at 6-8, MB Docket No. 20-145 (August 17, 2020) (Interest Group Comments).

When broadcasters, together with the consumer technology industry, approached the Commission seeking authorization for broadcasters to use the ATSC 3.0 transmission standard, they expressly sought a voluntary transition that would not rely on subsidies or mandates.¹⁴ To accomplish this goal, the petitioners sought, and the Commission granted, rules that provided for a voluntary transition that would protect viewers who rely on ATSC 1.0 signals through a simulcasting requirement.¹⁵ The Commission provided that this simulcasting requirement would last at least five years, and stated it would monitor the marketplace and extend the requirement if necessary.¹⁶ The Interest Group proposal is thus a solution to a problem that has not and may never materialize, and one for which the Commission already has available tools.

As broadcasters have started launching ATSC 3.0 service, they have remained focused on how best to preserve as much service as possible – including not only the requirement to simulcast their primary stream but also how to preserve as many of their multicast streams as possible. While the potential Broadcast Internet applications that ATSC 3.0 creates are certainly interesting, they remain largely theoretical at this point. Stifling this new technology with a complex program for which there is no demonstrated need is precisely the wrong approach to fostering innovation.

If the Interest Groups were serious about assisting the ATSC 3.0 transition and improving service to consumers, they would wholeheartedly support regulatory actions the

¹⁴ Joint Petition for Rulemaking of America’s Public Television Stations, AWARN Alliance, Consumer Technology Association, and the National Association of Broadcasters at 3, 14, GN Docket No. 16-142 (April 13, 2016).

¹⁵ *Id.* at 17-18; Next Gen TV Order at ¶ 12.

¹⁶ Next Gen TV Order at ¶ 22.

Commission could take to facilitate the transition and ease the potential for consumer disruption, including the use of vacant television channels by transitioning broadcasters. Instead, they have chosen to focus their energies on a legally questionable theory that the FCC may independently implement a tax and subsidy program. We urge the Commission to dismiss this proposal.

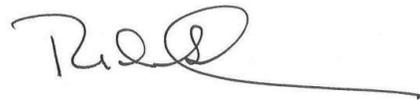
IV. CONCLUSION

NAB again urges the Commission to move expeditiously to conclude this proceeding without adding regulatory hurdles for broadcasters seeking to leverage technological innovation for new opportunities to serve the public.

Respectfully submitted,

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