

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of

Authorizing Permissive Use of the “Next
Generation” Broadcast Television Standard

GN Docket No. 16-142

**COMMENTS OF THE AMERICAN TELEVISION ALLIANCE
IN RESPONSE TO FURTHER NOTICE**

The American Television Alliance (“ATVA”)¹ responds to the Commission’s further notice of proposed rulemaking (“*Further Notice*”) concerning two issues related to ATSC 1.0 simulcasting.²

- **Waivers to and exemptions from simulcasting.** We have always believed that the Commission should grant waivers where appropriate to stations that cannot comply with the simulcasting rules. Such waivers, however, should be no broader than necessary to address the problem at hand, because simulcasting is needed to avoid “either forcing viewers to acquire new equipment or depriving them of television service.”³ Narrow waivers of the simulcasting *coverage requirement* should address nearly every concern

¹ ATVA seeks to be a voice for the television viewer. Its members include large and small multichannel video programming distributors, cable programmers, and trade associations.

² *Authorizing Permissive Use of the “Next Generation” Broad. Television Standard*, 32 FCC Rcd. 9930, ¶¶ 121-145 (2017). We refer to Parts I-III of item as the “*Order*” and Part IV as the “*Further Notice*.” Unless otherwise indicated, all documents released by or filed with the Commission and referenced in these comments appear in GN Docket No. 16-142.

³ *Order* ¶ 16.

raised by broadcasters to date. Where this is so, the Commission should not consider waiving the *simulcasting requirement itself*—much less a categorical exemption from simulcasting.

- **Significantly viewed status during simulcasting.** We continue to believe the Commission should maintain the *status quo* to avoid needless consumer disruption, among other things.

I. RELIEF TO THE SIMULCAST REQUIREMENT SHOULD ADDRESS DEMONSTRATED BROADCASTER CONCERNS.

This past November, the Commission authorized broadcasters to transmit in the ATSC 3.0 format on a “voluntary” basis. In doing so, it promulgated two limitations relevant to these comments. One is a broad *simulcast requirement*, under which broadcasters must air a simulcast of their ATSC 3.0 transmissions in the current, ATSC 1.0 format.⁴ The second is a narrower *coverage requirement*, which specifies the geographic areas simulcast signals must reach.⁵

In the *Further Notice*, the Commission asked a series of questions about when and how these requirements should apply. Specifically, it asked whether it should *exempt* certain classes of stations from the simulcast requirement altogether,⁶ when it should *waive* the simulcast requirement in individual cases,⁷ and when it should *waive* the coverage requirement in individual cases.⁸

⁴ Order ¶¶ 12-21.

⁵ *Id.* ¶¶ 29-39.

⁶ *Id.* ¶ 125.

⁷ *Id.* ¶ 123.

⁸ *Id.* ¶ 124.

We agree that waivers can be an appropriate tool to address broadcaster concerns in specific cases, but also believe that simulcasting remains imperative to prevent harm to the public. Accordingly, the Commission should tailor relief narrowly to the problems presented:

1. It should waive the *coverage requirement* where appropriate.
2. It should waive the more general *simulcast requirement* only rarely—and only where more specific waivers would prove insufficient.
3. It should not exempt any class of stations from the simulcasting requirement.

A. The Commission Should Grant Waivers of the Coverage Requirement Where Appropriate.

Any discussion of simulcasting waivers must begin with a simple proposition: simulcasting is “a critical component of the Commission’s authorization of ATSC 3.0 as a voluntary transmission standard.”⁹ The Commission found that “local simulcasting is essential to the deployment of Next Gen TV service on a voluntary, market-driven basis for all stakeholders.”¹⁰ It cited broadcast petitioners themselves for the proposition that “local simulcasting will permit uninterrupted service to continue as the American public embraces Next Generation TV reception equipment.”¹¹ And it reemphasized that “simulcasting is necessary because ATSC 3.0 service is not backward-compatible with existing TV sets or receivers, which have only ATSC 1.0 and analog tuners. . . . [so] consumers will not be able to view ATSC 3.0 transmissions on their existing televisions without additional equipment.”¹²

⁹ *Id.* ¶ 11.

¹⁰ *Id.* ¶ 15.

¹¹ *Id.*

¹² *Id.*

These conclusions support a reasonable, narrow approach to waivers, especially in light of the status of the ATSC 3.0 transition. The *Order* itself became effective only twenty days ago. The first ATSC 3.0 compliant equipment may not be available to the public for two years.¹³ Ultra HD content remains mostly unavailable.¹⁴ Broadcasters have yet to agree on a strategy for introducing ATSC 3.0 signals.¹⁵ And we have yet to see data from the “model market” in which broadcasters propose to “figure out the technology and how to deploy it.”¹⁶

Of course, there may eventually come a day when simulcasting is no longer needed. The Commission suggested as much when it stated that the duration of the requirement would be determined by such measures as “the rollout of 3.0 service by television broadcasters, the

¹³ Amy Maclean, *ATSC 3.0: Broadcasters Tout Standard’s Power Ahead of Full Implementation*, Cablefax Daily (Jan. 18, 2018), <http://www.cablefax.com/distribution/atsc-3-0-broadcasters-tout-standards-power-ahead-of-full-implementation> (“The first [ATSC 3.0-compliant] sets and DVRs are expected to arrive in 2020.”); *see also* Kris Wouk, *What’s ATSC 3.0? All you need to know about the next era in broadcast TV*, Digital Trends (Feb. 1, 2018), <https://www.digitaltrends.com/home-theater/atsc-3-0-ota-broadcast-standard-4k-dolby-atmos/3/> (“TVs, DVRs, and converter boxes with support for ATSC 3.0 will trickle out slowly at first, with early adopters likely able to start watching ATSC 3.0 signals by 2020. For the rest of us, it might be a while...In addition, there is always the possibility that something else may come along and replace ATSC 3.0 before it gains a foothold.... Assuming it does take over, the adoption of ATSC 3.0 will likely be a slow one.”).

¹⁴ Geoffrey Morrison, *ATSC 3.0: What you need to know about the future of broadcast television*, CNET (May 11, 2016), <https://www.cnet.com/news/atsc-3-0-what-you-need-to-know-about-the-future-of-broadcast-television/> (“While Ultra HD TVs have come fast and furious, 4K content has not... Notably, there is almost no cable or satellite 4K content, and absolutely no over-the-air broadcasts.”).

¹⁵ Glen Dickson, *Disparate Views of the Future of ATSC 3.0*, TVNewsCheck: TVN Tech (Oct. 19, 2017), <http://www.tvnewscheck.com/article/108231/disparate-views-of-the-future-of-atsc-30>. (“[B]roadcasters appear to be no closer to a consensus on the first business model to roll out for the next-gen system....[O]ne side advocated an initial rollout of 4K Ultra-HD programming followed by a gradual move into targeted advertising. Another faction touted the near-term potential of a nationwide datacasting business that will first seek B-to-B customers like auto makers and content delivery networks.”).

¹⁶ Martyn Williams, *What is NextGen TV and when will it launch?* TechHive (Dec. 13, 2017), <https://www.techhive.com/article/3238869/smart-tv/what-is-next-gen-tv-and-when-will-it-launch.html>.

penetration of ATSC 3.0–ready TV sets and other converter equipment, and the extent to which MVPDs have deployed 3.0 equipment.”¹⁷ This generally reflects the approach taken by Congress at a similar point in the DTV transition, in which—at NAB’s urging—it allowed broadcasters to continue transmitting analog signals in markets where the transition had not yet sufficiently progressed, based on specific and measureable variables.¹⁸ Under any of these measures, however, the transition to ATSC 3.0 has yet to begin.

At the same time, some broadcasters (including PBS) have demonstrated that they may not always be able to comply with every aspect of the simulcast requirement.¹⁹ PBS, in particular, suggests that its Member Stations may be unable to find simulcasting partners because of where they are located.²⁰ Thus, the Commission has stated that it will waive the simulcasting requirement where necessary, and seeks comment on when it should do so.²¹

We agree with the general proposition that waivers are an appropriate tool for resolving simulcasting problems in specific cases—and have stated so repeatedly throughout this

¹⁷ *Order* ¶ 14.

¹⁸ Balanced Budget Act of 1997, Pub. L. No. 105-33, 111 Stat. 251, § 30003, <https://www.gpo.gov/fdsys/pkg/PLAW-105publ33/html/PLAW-105publ33.htm> (extending analog cutoff deadline in markets in which broadcasters were not transmitting in digital, where consumer equipment was not sufficiently available, or where MVPDs were not carrying specified numbers of digital channels).

¹⁹ *E.g.*, Letter from Talia Rosen to Marlene Dortch at 2 (filed Jan. 12, 2018) (“PBS *ex parte*”).

²⁰ *Id.*; *see also* PBS Member Stations, PBS.org, <http://www.pbs.org/about/about-pbs/stations/> (“PBS is a private, nonprofit corporation whose members are America’s public TV stations -- noncommercial, educational licensees that operate 350 PBS member stations and serve all 50 states, Puerto Rico, U.S. Virgin Islands, Guam and American Samoa.”).

²¹ *Further Notice* ¶ 123.

proceeding.²² The question, then, is how to administer such waivers without disrupting the most “critical component” of the ATSC 3.0 transition.

The answer is for the Commission to maintain its traditional approach to waivers:

*“Petitions for waiver should be targeted as narrowly as possible to achieve the desired end.”*²³

That is, waivers should be “specific, focused and limited in scope” rather than “broad” and

“generalized.”²⁴ For present purposes, if a station cannot comply with the coverage requirement,

²² Letter from Michael Nilsson to Marlene Dortch at 7 (filed Nov. 3, 2017) (“The draft order also expresses concerns about ‘spectrum constraints that could limit [stations’] ability to continue to provide HD programming.’ Yet the draft offers no evidence to suggest that this will prove the rule rather than the exception. Such concerns are thus better addressed on a case-by-case basis through waivers.”); *id.* (“All we ask is that stations *not degrade their existing* format or picture quality as part of the ATSC 3.0 transition—at least not without seeking an FCC waiver due to extenuating circumstances.”); *id.* at 8 (“As for LPTV stations without simulcast partners, or with good cause to become an ‘ATSC 3.0 lighthouse,’ here again a waiver is the better approach.”); Letter from Michael Nilsson to Marlene Dortch at 7 (filed Sept. 21, 2017) (“In the event that a station were unable to obtain ATSC 1.0 rights—and broadcasters have nowhere explained why this might be so—a better approach would be for the station to seek a waiver of the simulcasting requirement, explaining why it was unable to obtain the rights in question.”); *id.* at 13 (“And low-power and Class A stations, like full power ones, can always seek waivers allowing them to flash-cut.”); Reply Comments of the American Television Alliance at 14 n.63 (filed June 8, 2017) (“If, however, a broadcaster were unable to obtain [simulcasting] rights after diligent effort, it could seek a waiver of the simulcasting requirement.”); Comments of the American Television Alliance at 33 (filed May 9, 2017) (proposing to prohibit simulcast arrangements that would reduce the station’s population by more than 0.5 percent, “absent a waiver.”).

²³ *Preemption of Local Zoning Regulation of Satellite Earth Stations in the Matter of Implementation of Section 207 of the Telecomms. Act of 1996*, 11 FCC Rcd. 19276, ¶ 55 (1996) (emphasis added); *see also, e.g., WAIT Radio v. FCC*, 418 F.2d 1153, 1157 n.9 (D.C. Cir. 1969) (“The agency is not bound to process in depth what are only generalized pleas, a requirement that would condemn it to divert resources of time and personnel to hollow claims. The applicant for waiver must articulate a specific pleading, and adduce concrete support, preferably documentary.”); *see also Telecomms. Relay Servs. and Speech-to-Speech Servs. for Individuals with Hearing and Speech Disabilities*, 28 FCC Rcd. 12218, ¶ 7 (2013) (“Therefore, in order to grant appropriate relief while avoiding any unnecessary weakening of this important rule for a substantial period of time, we will condition the waiver granted to [petitioner] in order to target relief narrowly on the problem as defined.”).

²⁴ *Revision of Commission’s Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Sys.*, 15 FCC Rcd. 17442, ¶ 44 (2000) (“In those particular cases where waivers may be justified, however, broad, generalized waivers should not be necessary and will not be granted. Rather, we expect waiver requests to be specific, focused and limited in scope, and with a clear path to full compliance.”).

it should seek a narrow waiver of that coverage requirement rather than a broader waiver of the simulcasting requirement itself.²⁵

The traditional, narrow approach to waivers would enable the Commission to address essentially every concern that broadcasters have raised to date:

- PBS has suggested: “[Noncommercial stations] would have unique, and often prohibitive, challenges in finding a transition partner with which to simulcast [because t]he facilities of public stations have developed over decades to be geographically separate from other broadcasters and not situated centrally in Designated Market Areas.”²⁶ If a station is located too far away from other stations to find a transition partner that complies with the coverage requirement, it can seek a waiver of the coverage requirement so that it may select a transition partner located further away.
- The Commission has similarly suggested that “Class A and NCE stations could also face more difficulty than commercial full power stations face when seeking a local simulcasting partner.”²⁷ Assuming that the “difficulty” in finding a local simulcasting partner relates to the Commission’s coverage requirement, a station can seek waiver of those rules.

²⁵ See *Further Notice* ¶ 123 (“Should we have different levels of scrutiny for waiver requests depending on whether the petition seeks to transition directly as opposed to simulcast from a facility that will not cover its community of license?”). The principle of requiring narrow waivers should apply more generally. Thus, for example, if a station cannot comply with the “substantial similarity” requirement, it should seek a waiver of that requirement, not the broader simulcasting requirement itself. See *Order* ¶ 22 (setting forth substantial similarity requirement).

²⁶ *PBS ex parte* at 2; *id.* at 5-7 (containing contour maps); see also Letter from Ann West Bobeck to Marlene Dortch at 1-2 (filed Oct. 13, 2017) (“Public Television estimates there are well over one hundred stations that could not share facilities *should the Commission establish a ‘substantially similar’ contour requirement.*”) (emphasis added).

²⁷ *Further Notice* ¶ 125.

- The Commission has suggested that Class A and NCE stations may not be able to become “lighthouse” stations under the current rules.²⁸ Here again, we assume this means that such stations cannot become lighthouse stations because they are located too far away from their potential partners—a situation that could be remedied through narrowly tailored waivers of the coverage requirement.

A narrow approach to waivers would also permit the Commission to more readily focus on the factors described in the *Further Notice*. There the Commission asks a variety of questions related both to the harm caused by a waiver and to the manner in which a station can remedy such harm.²⁹ If a station proposes *not to simulcast at all*, we find it difficult to imagine that it would be able to mitigate the harm sufficiently to show “good cause” for such a waiver.³⁰ Where a station proposes to simulcast other than in strict compliance with the coverage requirements, by contrast, the Commission can weigh the *degree* of proposed non-compliance against the proposed remediation. It can, in other words, employ a sliding scale in processing narrow coverage waivers.

Suppose, for example, a station licensed in Washington, D.C. seeks a waiver of the requirement that its simulcasting partner’s signal fully cover the city. The Commission should

²⁸ *Id.* ¶¶ 124-25.

²⁹ *Further Notice* ¶¶ 123-24.

³⁰ *See* 47 C.F.R. § 1.3; *see also* *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969) (“The agency’s discretion to proceed in difficult areas through general rules is intimately linked to the existence of a safety valve procedure for consideration of an application for exemption based on special circumstances”); *Northeast Cellular Tel. Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (holding that a waiver is appropriate only if special circumstances warrant a deviation from the general rule and such deviation will serve the public interest, and specifying that the Commission “must explain why deviation better serves the public interest and articulate the nature of the special circumstances to prevent discriminatory application and to put future parties on notice as to its operation.”).

be more inclined to grant such a waiver if the partner’s signal partially covers the city than if it does not at all.³¹ Likewise, it should be more inclined to grant such a waiver if the partner’s signal contour overlaps in part with that of the station. At the same time, the Commission should be more inclined to grant such a waiver if the applicant proposes steps to mitigate the harm—such as providing “free or low cost ATSC 3.0 converters”³² or by ensuring that the MVPDs that carry the station can receive the simulcast signal. And it should be more inclined to grant such a waiver if it protects substantially all of a station’s viewers, rather than just those in the largest population centers. The Commission should take all of these factors, and others, into account on a holistic basis. Thus, for example, the *less* that a proposed simulcasting partner overlaps with a station’s signal contour, the *more* important it would be for a station to mitigate the harm (and *vice versa*).

We also believe that a narrow approach to waivers should be easier to administer and thus more quickly resolved in individual cases. Thus, we would not object to efforts to streamline narrowly crafted coverage waiver requests, including placing a “shot-clock” on such requests. We would not oppose presumptions in favor of such waiver requests in certain circumstances, such as where the proposed coverage shortfall is *de minimis*. Nor would we oppose measures to reduce filing or other procedural burdens on smaller or noncommercial broadcasters.

³¹ See *Further Notice* ¶ 123 (“For stations that seek to simulcast from a facility that will not cover its community of license, should a factor be how far the host location is from the petitioner’s community of license?”).

³² *Id.* ¶ 124.

B. The Commission Should Waive the Simulcast Requirement Only Rarely.

For reasons discussed above, we believe that the Commission should grant broad waivers of the simulcast requirement only rarely—and then only when narrower waivers would not suffice. Thus, the Commission’s proposed approach to *simulcast* waivers should instead be its approach to narrow *coverage* waivers:

We are inclined to consider favorably requests for waiver of our local simulcasting requirement where the Next Gen TV station can demonstrate that it has no viable local simulcasting partner in its market and where the station agrees to make reasonable efforts to preserve 1.0 service to existing viewers in its community of license and/or otherwise minimize the impact on such viewers (for example, by providing free or low cost ATSC 3.0 converters to viewers).³³

As we understand it, a station would have no “viable” local simulcasting partner because no such partner would comply with the coverage rules—and should thus seek a narrow waiver of those rules. Only where a station cannot find another simulcasting partner anywhere in the market should it seek permission not to simulcast at all.

C. The Commission Should Not Exempt Classes of Stations from the Simulcast Requirement.

If broad *waivers* of the simulcasting requirement go beyond the concerns raised by broadcasters, a class-based *exemption* of the simulcasting requirement would be more problematic still.³⁴ The principal justification proffered for a class-based exemption—that noncommercial and Class A stations “uniquely” may be unable to find “viable” simulcast partners—suggests an inability to comply with the coverage requirements, not the broader simulcasting requirement itself.

³³ Order ¶ 46.

³⁴ Further Notice ¶ 125.

We are aware of no other plausible justification for a broad class-based exemption of the simulcasting requirement. No party has claimed, for example, that simulcasting is less important to viewers of noncommercial or Class A stations than it is for viewers of full-power, commercial stations. PBS's advocacy would suggest that its programming is *more* important to viewers than those of other stations,³⁵ and many Class A stations are network affiliates.³⁶ PBS suggests that non-commercial stations have purer motives than commercial stations in deciding whether or not to simulcast.³⁷ This may or may not be so. But it does not explain why PBS affiliates cannot rely on narrow waivers where necessary—or why a PBS affiliate's decision to cease simulcasting would not harm its viewers.

In addition, the Commission just 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.”³⁸ The FCC determined (among other things), that requiring such carriage would “substantially increase the burdens on [cable operators'] free speech.”³⁹ Thus, were the Commission to grant noncommercial stations an exemption from the simulcast requirement, it would eliminate such stations' carriage rights.

³⁵ PBS *ex parte* at 1.

³⁶ Order ¶ 45 n.131.

³⁷ PBS *ex parte* at 2 (“The simulcast mandate is unnecessary for NCE stations because they will, by their very nature and non-profit mission, continue to broadcast whatever is in the best interests of their local community.”).

³⁸ Order ¶ 67 (emphasis in original); *see also id.* (“In other words, under no circumstances will we recognize mandatory carriage rights for 3.0 signals while the Commission requires local simulcasting.”).

³⁹ *Id.* ¶ 67 n.188.

II. THE COMMISSION SHOULD MAINTAIN THE *STATUS QUO* WITH RESPECT TO SIGNIFICANTLY VIEWED STATIONS.

The Commission tentatively concludes that “the significantly viewed status of a Next Gen TV station should not change if it moves its 1.0 simulcast channel to a temporary host facility.”⁴⁰ We agree. As we explained in our initial comments, changing a station’s significantly viewed status during the transition to ATSC 3.0 would cause needless consumer disruption and frustration. Suppose, for example, that WTTG (Fox’s Washington, D.C. affiliate) decides to simulcast from a host that is not significantly viewed in Anne Arundel County, which is assigned to the Baltimore DMA. If the Commission determined simulcast rights based on the host (rather than WTTG itself), Anne Arundel County MVPD subscribers would lose Redskins games on WTTG. And it would not be any comfort to Anne Arundel County viewers that WTTG’s host might subsequently file its own application to become significantly viewed there. No party believes that such an outcome is required or desirable. Accordingly, the Commission should preserve the *status quo*.

CONCLUSION

Throughout this proceeding, we have suggested that stations can address problems with simulcasting in specific cases through waivers. In order to protect the public, however, such waivers should be crafted no more broadly than necessary to address the problem presented.

⁴⁰ *Further Notice* ¶ 129.

Respectfully Submitted,



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