

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

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

**COMMENTS OF
NCTA – THE INTERNET & TELEVISION ASSOCIATION**

NCTA – The Internet & Television Association (“NCTA”)¹ submits these comments in response to the *Notice of Proposed Rulemaking* in the above-captioned proceeding, in which the Commission seeks comment on possible revisions to its rules concerning ancillary and supplementary services by broadcast television licensees.² While NCTA does not oppose broadcasters’ transition to ATSC 3.0 or the deployment of new technologies, the Commission should ensure that its rules protect the public interest by promoting regulatory parity and a level competitive playing field and by protecting cable subscribers’ service from derogation.

DISCUSSION

It has been three years since the Commission first authorized broadcasters to transmit signals using “next generation” ATSC 3.0 technology, adopting rules it designed to “afford broadcasters flexibility to deploy ATSC 3.0-based transmissions, while minimizing the impact

¹ NCTA is the principal trade association of the cable television industry in the United States, which is a leading provider of residential broadband service to U.S. households. Its members include owners and operators of cable television systems serving nearly 80 percent of the nation’s cable television customers, as well as more than 200 cable program networks. Cable service providers have invested more than \$290 billion over the last two decades to deploy and continually upgrade networks and other infrastructure—including building some of the nation’s largest Wi-Fi networks.

² *Promoting Broadcast Internet Innovation through ATSC 3.0*, Declaratory Ruling and Notice of Proposed Rulemaking, 35 FCC Rcd. 5916 (2020) (“*NPRM*”).

on, and costs to, consumers and other industry stakeholders.”³ Although there have been limited deployments of ATSC 3.0 and limited marketplace developments since then, the Commission states in the *NPRM* that broadcasters have begun to examine possibilities for other services that could be delivered over broadcast spectrum using ATSC 3.0 technologies – services collectively referred to in this proceeding as “Broadcast Internet.”⁴ In the *NPRM*, the Commission seeks comment on a number of issues related to the provision of these services, including whether to revise or clarify its ancillary and supplementary service rules. NCTA does not object to broadcasters’ transition to ATSC 3.0 or their deployment of new technologies. However, as discussed below, the Commission should take steps now to ensure that the rules governing ancillary and supplementary services – whether provided using ATSC 3.0 or 1.0 – are consistent with the statutory language and advance Congress’s and the Commission’s public interest goals.

1. The Commission Should Prohibit the Use of Retransmission Consent to Negotiate for Carriage of Broadcast Internet Services Provided by a Consortium of Broadcasters.

The Commission has recognized that joint or coordinated negotiations for retransmission consent by multiple stations in a market can harm competition and ultimately raise consumer prices. In 2014, the Commission barred joint retransmission consent negotiations between non-commonly owned top-four stations, finding that “joint negotiation gives such stations both the incentive and the ability to impose on MVPDs higher fees for retransmission consent than they otherwise could impose if the stations conducted negotiations for carriage of their signals independently.”⁵ Congress later went further, recognizing that these harms arise in joint

³ *Authorizing Permissive Use of the “Next Generation” Broadcast Television Standard*, Report and Order and Further Notice of Proposed Rulemaking, 32 FCC Rcd. 9930, ¶ 2 (2017) (“*Next Gen TV Report and Order*”).

⁴ *NPRM* ¶¶ 2, 12.

⁵ *See Amendment of the Commission’s Rules Related to Retransmission Consent*, Report and Order and Further Notice of Proposed Rulemaking, 29 FCC Rcd. 3351, ¶ 13 (2014). Indeed, the Commission “confidently

negotiations or coordination by *any* two stations in the same market and amending Section 325 of the Communications Act to prohibit joint or coordinated negotiations unless the stations are commonly owned.⁶

Under these controlling principles, a broadcaster's demand that a cable operator provide capacity on its system for a Broadcast Internet service that the broadcaster provides jointly with other non-commonly owned stations in the same market *is* joint or coordinated retransmission consent negotiations by these stations. Such a request would violate Section 325, and the Commission should so clarify. At a minimum, 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 implicates the same anti-competitive concerns as joint retransmission consent negotiations, and should similarly be prohibited.

2. Any Adjustments to the Ancillary Service Fee Must Adhere to the Statutory Criteria.

By the mid-1990s, auctions had become the preferred method for assigning exclusive rights to commercial spectrum.⁷ Nevertheless, in the 1996 Act, Congress allowed the Commission to grant broadcasters exclusive licenses for advanced television services without an auction to further the goal of enabling advanced free, over-the-air television services. To the extent that broadcasters provide *non-broadcast* services using those licenses, however, the government interest in promoting free over-the-air broadcasting no longer applied. Therefore,

conclude[d]" that "[w]ith regard to Top Four broadcasters . . . the harms from joint negotiation outstrip any efficiency benefits identified and that such negotiation on balance hurts consumers." *Id.* ¶ 10.

⁶ See 47 U.S.C. § 325(b)(3)(C)(iv) (stating that Commission regulations shall "(iv) prohibit a television broadcast station from coordinating negotiations or negotiating on a joint basis with another television broadcast station in the same local market to grant retransmission consent under this section to a multichannel video programming distributor, unless such stations are directly or indirectly under common de jure control permitted under the regulations of the Commission").

⁷ See generally Nicholas W. Allard, *The New Spectrum Auction Law*, 18 Seton Hall Legis. J. 13, 14 (1993). By contrast, the designation of certain spectrum for unlicensed services provides a shared spectrum commons, not exclusive use.

Congress directed the Commission to apply specific statutory criteria to assess an appropriate fee that would: (1) recover a portion of the value of the spectrum made available for ancillary or supplemental use; (2) avoid unjustly enriching broadcasters; and (3) recover an amount that, to the extent feasible, equals but does not exceed over the term of the license the amount that would have been recovered had such services been licensed at auction.⁸ The Commission implemented this mandate by requiring broadcasters to pay an annual fee of 5% of their gross revenues derived from ancillary or supplementary services.⁹

The Commission last considered whether to modify the ancillary service fee in November 2017. At that time, the Commission declined to make adjustments to the fee, finding that it was not yet clear which ATSC 3.0-based services would be ancillary or supplementary services under the rules or which services would be feeable, and deciding that the Commission would be in a better position to assess any modifications to the fee after any such services were implemented.¹⁰ Since then, broadcasters have suggested many possibilities for services that may be offered using ATSC 3.0 technology, but as the Commission acknowledges in the *NPRM*, very few ancillary services have actually been deployed using the existing digital television standard *or* new capabilities of ATSC 3.0.¹¹ It remains to be seen which services, if any, will come to fruition.

Any reevaluation of the annual fee must be based on the statutory requirements, including an economic study of the auction value of the relevant spectrum. The Commission asks whether the current fee should be reduced, “in order to promote the provision of new services,”¹² and

⁸ See *NPRM* ¶ 24; 47 U.S.C. § 336(e)(2).

⁹ See 47 C.F.R. § 73.624(g).

¹⁰ See *Next Gen TV Report and Order* ¶ 92.

¹¹ See *NPRM* ¶ 13.

¹² See *id.* ¶ 28.

even whether there are there “any circumstances under which it would be appropriate to set the fee at zero.”¹³ The Act provides the answer: the fee must recover an amount that, to the extent feasible, equals the amount that would have been recovered had such services been licensed at auction.¹⁴ Broadcast spectrum as an asset is extraordinarily valuable. The incentive auction demonstrated that 70 megahertz of it was worth nearly \$20 billion in 2017.¹⁵ There is no policy or legal justification to depart from the statutory standard. Nor should the Commission exclude from the gross revenue calculation the value of in-kind contributions or improvements by unaffiliated entities to the licensee’s facilities to facilitate the provision of ancillary and supplementary services.¹⁶ The statute draws no distinction between monetary and in-kind compensation, and neither should the Commission.

In the *NPRM*, the Commission expressed its “hope that the marketplace, not rules designed for different services, will ultimately decide which Broadcast Internet services are developed and supported.”¹⁷ The only way to achieve that goal is to take Congress’s statutory directive seriously and structure the ancillary and supplementary services rules in a way that promotes full and fair competition in the communications marketplace.¹⁸ As NCTA argued when the Commission initially adopted the ancillary and supplementary services fee, “a fee system that would enable broadcasters to compete on a subsidized basis with . . . alternative providers” such as cable, telephone, and wireless platforms “would defeat, rather than promote,

¹³ *See id.* ¶ 27.

¹⁴ 47 U.S.C. § 336(e)(2)(B).

¹⁵ Press Release, FCC, FCC Announces Results of World’s First Broadcast Incentive Auction (Apr. 13, 2017), <https://docs.fcc.gov/public/attachments/DOC-344397A1.pdf>.

¹⁶ *See NPRM* ¶ 29.

¹⁷ *Id.* ¶ 17.

¹⁸ *See id.* ¶ 20 n.63 (seeking comment on the Commission’s rules or policies as they relate to leases of or agreements regarding spectrum for ancillary and supplementary services).

market forces.”¹⁹ Thus, any reconsideration of the fee broadcasters pay for ancillary and supplementary services must adhere to the factors Congress set out to ensure that the fee serves rather than distorts market forces.

3. Degrading Over-The-Air Signals to Accommodate Ancillary Services Should Be Prohibited.

Congress mandated that the Commission “limit the broadcasting of ancillary or supplementary services on designated frequencies so as to avoid derogation of any advanced television services, including high definition television broadcasts, that the Commission may require using such frequencies.”²⁰ The Commission asks “whether a broadcaster’s replacement of an HD offering with an SD offering in order to deploy ancillary and supplementary services should be deemed a derogation of advanced television services under [its] rules.”²¹ The answer is yes. Broadcasters currently provide an array of programming in HD,²² which cable operators pass through to their subscribers. Replacing broadcasters’ HD offerings with SD signals in order to free up spectrum for non-broadcast services would be extremely disruptive and derogate the signal quality that cable subscribers (and over-the-air viewers) have grown to enjoy and expect.²³ Congress’s prohibition on broadcast signal derogation means that “ancillary and supplementary” services must remain just that: ancillary and supplementary to the main purpose for which broadcasters were granted rights to use the spectrum.

¹⁹ Comments of National Cable Television Association, MM Dkt. No. 97-247, at 4 (filed May 4, 1998).

²⁰ 47 U.S.C. § 336(b)(2).

²¹ *NPRM* ¶ 33.

²² *See id.*

²³ *See also* Comments of NCTA – The Internet & Television Association, GN Dkt. No. 16-142, at 10-11 (filed May 9, 2017) (discussing the importance of HD broadcast signals to cable customers and over-the-air viewers and noting that cable operators often rely on HD over-the-air transmissions in addition to fiber); Reply Comments of NCTA – The Internet & Television Association, GN Dkt. No. 16-142, at 7 (filed June 8, 2017) (noting, among other things, that consumers have invested in televisions with HD resolution capacity).

4. The Statute Provides No Exemption for “De Minimis” Ancillary and Supplementary Services.

The Commission asks whether it should exempt “de minimis” operation of ancillary or supplementary services – for example, services provided only an hour each day or no more than 48 hours a month – from rules applicable to analogous services.²⁴ The plain language of the statute permits no such exemption. The Commission is required to “apply to any other ancillary or supplementary service such of the Commission’s regulations as are applicable to the offering of analogous services by any other person[.]”²⁵ It would be contrary to the statute and Congress’s goal of ensuring regulatory parity for the Commission to grant ancillary services a regulatory exemption or other advantages that are not permitted for like services. To the extent an analogous service’s rules themselves contain exemptions for de minimis operations, broadcasters should be allowed to take advantage of these exemptions for operation of their ancillary and supplementary services.

CONCLUSION

The statute requires that the Commission’s ancillary and supplementary service rules protect the public interest. The Commission should therefore (i) clarify that a broadcaster’s use of retransmission consent to negotiate for carriage of Broadcast Internet services provided by a consortium of non-commonly owned broadcasters in the same market is prohibited by the bar on joint or coordinated retransmission consent negotiations; (ii) adhere to the statutory criteria in any reevaluation of the ancillary service fee, including by conducting an economic study of the auction value of the relevant spectrum; (iii) prohibit broadcasters from degrading HD signals in

²⁴ See *NPRM* ¶ 36.

²⁵ 47 U.S.C. § 336(b)(3).

order to accommodate ancillary and supplementary services; and (iv) fully apply to ancillary and supplementary services the rules applicable to analogous services.

Respectfully submitted,

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August 17, 2020