

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 )

**SECOND REPORT AND ORDER AND ORDER ON RECONSIDERATION**

**Adopted: June 3, 2020**

**Released: June 16, 2020**

By the Commission: Commissioner O’Rielly issuing a statement; Commissioner Rosenworcel approving in part, dissenting in part, and issuing a statement; Commissioner Starks concurring in part, dissenting in part, and issuing a statement.

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**I. INTRODUCTION**

1. In this Second Report and Order and Order on Reconsideration, we resolve the pending issues in this proceeding that authorized broadcasters to use the “Next Generation” broadcast television (Next Gen TV) transmission standard. First, we address the three issues raised in the Further Notice of

Proposed Rulemaking that was issued in conjunction with the *Next Gen TV Report and Order*.<sup>1</sup> Specifically, we provide additional guidance to broadcasters deploying Next Gen TV that wish to receive a waiver of our local simulcasting rules, decline to permit at this time the use of vacant broadcast channels for purposes of Next Gen TV deployment, and clarify the “significantly viewed” status of Next Gen TV stations. Second, we dismiss and, on alternative and independent grounds, deny the two petitions for reconsideration of the *Next Gen TV Report and Order*.<sup>2</sup>

## II. BACKGROUND

2. In the *Next Gen TV Report and Order*, the Commission authorized television broadcasters to use the Next Gen TV transmission standard, also called “ATSC 3.0” or “3.0,” on a voluntary, market-driven basis.<sup>3</sup> ATSC 3.0 is the TV transmission standard developed by the Advanced Television Systems Committee as the world’s first Internet Protocol (IP)-based broadcast transmission platform.<sup>4</sup> The Commission determined in the *Next Gen TV Report and Order* that broadcasters deploying ATSC 3.0 generally must continue to deliver current-generation digital television (DTV) service, using the ATSC 1.0 transmission standard, also called “ATSC 1.0” or “1.0,” to their viewers through local simulcasting. Specifically, the Commission required full power and Class A television stations (Class A TV) deploying ATSC 3.0 service to simulcast the primary video programming stream of their ATSC 3.0 channels in an ATSC 1.0 format.<sup>5</sup>

3. In the *Next Gen TV Report and Order*, the Commission determined that the local simulcasting requirement is crucial to the deployment of Next Gen TV service in order to minimize viewer disruption. This is because the Next Gen TV standard is not backward-compatible with existing TV sets or receivers, which have only ATSC 1.0 and analog tuners.<sup>6</sup> This means that consumers will not be able to view ATSC 3.0 transmissions on their existing televisions without additional equipment. Thus, it is critical that Next Gen TV broadcasters continue to provide service using the current ATSC 1.0 standard to deliver DTV service while the marketplace adopts devices compatible with the new 3.0 transmission standard in order to avoid either forcing viewers to acquire new equipment or depriving them of television service.<sup>7</sup> Because a TV station cannot, as a technical matter, simultaneously broadcast in both 1.0 and 3.0 format from the same facility on the same physical channel, local simulcasting will be effectuated through voluntary partnerships that broadcasters seeking to provide Next Gen TV service

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<sup>1</sup> See *Authorizing Permissive Use of the “Next Generation” Broadcast Television Standard*, Report and Order and Further Notice of Proposed Rulemaking, 32 FCC Rcd 9930 (2017) (*Next Gen TV Report and Order and Further Notice*).

<sup>2</sup> American Television Alliance (ATVA) Petition for Reconsideration (filed Mar. 5, 2018) (ATVA Petition); NCTA - The Internet & Television Association (NCTA) Petition for Reconsideration (filed Mar. 5, 2018) (NCTA Petition).

<sup>3</sup> *Id.*

<sup>4</sup> ATSC 3.0 merges the capabilities of over-the-air (OTA) broadcasting with the broadband viewing and information delivery methods of the Internet, using the same 6 MHz channels presently allocated for digital television service. This new TV transmission standard promises to allow broadcasters to innovate, improve service, and use their spectrum more efficiently. It also has the potential to enable broadcasters to provide consumers with an enhanced, more immersive and higher quality television viewing experience on both home and mobile screens. In addition, ATSC 3.0 will allow broadcasters to offer enhanced public safety capabilities, such as geo-targeting of emergency alerts to tailor information to particular communities and emergency alerting capable of waking up sleeping devices to warn consumers of imminent emergencies, and advanced accessibility options.

<sup>5</sup> 47 CFR §§ 73.3801(b), 73.6029(b). Low power television and TV translator stations (LPTV/translator) are exempt, as a class, from the local simulcasting requirement and may transition directly from 1.0 to 3.0 service without simulcasting. *Id.* § 74.782(c). See *infra* MO&O, section IV.A.3 (affirming exemption).

<sup>6</sup> *Next Gen TV Report and Order*, 32 FCC Rcd at 9939, para. 15.

<sup>7</sup> *Id.* at 9939, paras. 15-16.

enter into with other broadcasters in their local markets. A Next Gen TV broadcaster must partner with another television station (*i.e.*, a temporary “host” station) in its local market to either: (1) air an ATSC 3.0 channel at the temporary host’s facility, while using its original facility to continue to provide an ATSC 1.0 simulcast channel, or (2) air an ATSC 1.0 simulcast channel at the temporary host’s facility, while converting its original facility to the ATSC 3.0 standard in order to provide a 3.0 channel.<sup>8</sup>

4. The Commission established a process for considering applications to deploy ATSC 3.0 service, which included, among other requirements, establishing coverage requirements for a Next Gen TV station’s ATSC 1.0 simulcast signal.<sup>9</sup> The Commission’s ATSC 1.0 simulcast coverage requirement sought to minimize disruption to viewers resulting from the voluntary deployment of ATSC 3.0 by recognizing that if a station moves its ATSC 1.0 signal to a partner simulcast host station with a different transmitter location, some existing over-the-air (OTA) viewers may no longer be able to receive the 1.0 signal.<sup>10</sup> Among other obligations, the Commission required the Next Gen TV station to select a partner 1.0 simulcast host station that is assigned to its same designated market area (DMA) and from which it would continue to provide ATSC 1.0 simulcast service to its entire community of license.<sup>11</sup>

5. While the Commission’s rules require that full power and Class A TV stations that convert their existing facility to ATSC 3.0 provide an ATSC 1.0 simulcast signal that covers a station’s entire community of license, the Commission recognized that in certain circumstances such an arrangement may not be viable. Accordingly, the Commission established a waiver standard for the ATSC 1.0 simulcast requirement in order to facilitate the voluntary deployment of ATSC 3.0 service.<sup>12</sup> Specifically, the Commission stated that it would favor requests for waiver of the obligation to provide ATSC 1.0 simulcast service if the station can demonstrate both that: (1) it has “no viable local simulcasting partner” in its market; and (2) it will “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).”<sup>13</sup> The Commission stated that

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<sup>8</sup> *Id.* at 9937, para. 12. In either case, a Next Gen TV broadcaster must simulcast the primary video programming stream of its ATSC 3.0 channel in an ATSC 1.0 format, so that viewers will continue to receive ATSC 1.0 service. *Id.*

<sup>9</sup> *Id.* at 9945-46, paras. 29-31. A Next Gen TV broadcaster must file an application and obtain Commission approval before a 1.0 simulcast channel or a 3.0 channel aired on a partner host station can go on the air, or before an existing 1.0 station can convert to 3.0 operation or back to 1.0 operation. *Id.* at 9939, para. 48.

<sup>10</sup> *Id.* at 9946, para. 30 (“By requiring stations to continue to provide an ATSC 1.0 signal that covers their current community of license and encouraging them to keep coverage loss to 5% or less of the population currently receiving a 1.0 signal over the air, we will limit the number of current viewers and MVPD headends that will lose access to the OTA 1.0 signal as a result of local simulcasting.”).

<sup>11</sup> *Id.* at 9945-46, paras. 29-31. *See* 47 CFR § 73.3801(c). Because Class A TV stations do not have a community of license, the Commission established a coverage requirement based on contour overlap and mileage. *Next Gen TV Report and Order*, 32 FCC Rcd at 9946-47, para. 32. *See* 47 CFR § 73.6029(c). Some stations may not be formally assigned by Nielsen to DMAs. As stated in the *Next Gen TV Report and Order*, “we will consider stations that are not assigned to a DMA by Nielsen to be assigned to the DMA in which they are located.” *Next Gen TV Report and Order*, 32 FCC Rcd at 9946, n.93.

<sup>12</sup> 47 CFR § 73.3801(c). The Commission may waive its rules if good cause is shown. *See id.* § 1.3.

<sup>13</sup> *Next Gen TV Report and Order*, 32 FCC Rcd at 9953, para. 46. Separately, the Commission stated that it would consider any loss of 1.0 simulcast service resulting from the simulcast arrangement in determining whether to grant the application to deploy 3.0 service. *Id.* at 9946, para. 29. In this regard, the Commission established a presumption that it would favor grant of an application demonstrating that the station would provide ATSC 1.0 simulcast service to at least 95 percent of the predicted population within the station’s original noise limited service contour (NLSC) and afford “expedited processing” to such applications. *Id.* *See also* 47 CFR § 73.3801(f)(5)-(6), 73.6029(f)(5)-(6). A Next Gen TV applicant whose ATSC 1.0 simulcast signal will not satisfy this 95 percent threshold (“non-expedited applicant”) must provide a more robust public interest showing with its application and  
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it would consider waiver requests from full power and Class A TV stations to transition directly from ATSC 1.0 to ATSC 3.0 service on the station's existing facility without providing an ATSC 1.0 simulcast service at all.<sup>14</sup> Alternatively, a station may request a waiver of the ATSC 1.0 simulcast requirement so it can air an ATSC 1.0 simulcast signal from a partner simulcast host that does not cover all or a portion of the station's community of license or can provide only a lower signal threshold over the station's community of license than that required by the rules.<sup>15</sup>

6. In the *Next Gen TV Further Notice*, the Commission sought comment on three topics relating to local simulcasting rules.<sup>16</sup> First, it sought further comment on issues related to waivers of, and exemptions from, the local simulcasting requirement. Specifically, the Commission sought comment on whether further guidance should be provided about the circumstances in which it would grant such a waiver, including how to define whether a station has "no viable local simulcasting partner" and whether a station has taken "reasonable efforts to preserve service and/or minimize impact on viewers."<sup>17</sup> Second, the Commission sought further comment on whether to let full power broadcasters use channels in the television broadcast band that are vacant to facilitate the transition to ATSC 3.0. Third, the Commission tentatively concluded that local simulcasting should not change the "significantly viewed status" of a Next Gen TV station for purposes of determining MVPD carriage and sought comment on that conclusion.<sup>18</sup>

7. The Commission received 19 comments and eight reply comments in response to the *Next Gen TV Further Notice*.<sup>19</sup> Broadcaster commenters again urged the Commission to continue to provide broadcasters with "flexibility" to facilitate their deployment of ATSC 3.0 service,<sup>20</sup> such as through waivers of, and/or additional exemptions from, the local simulcasting rules<sup>21</sup> and by permitting

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will be considered on a case-by-case basis. *Next Gen TV Report and Order*, 32 FCC Rcd at 9947-48, para. 34. This case-by-case showing is not at issue in this Order.

<sup>14</sup> *Next Gen TV Report and Order*, 32 FCC Rcd at 9953, para. 46. The Commission explained in the *Next Gen TV Report and Order* that it would not be inclined to consider favorably requests to change community of license solely to enable simulcasting. *Id.* at n.134.

<sup>15</sup> See 47 CFR § 73.625. Thus, a station may seek a waiver to either provide no 1.0 simulcast service to its community of license or partial 1.0 simulcast service to its community of license. In both situations, a waiver of the community of license coverage requirement in section 73.3801(c) of our rules is required and the waiver standard set forth in the *Next Gen TV Report and Order* applies. 47 CFR § 73.3801(c).

<sup>16</sup> See *Next Gen TV Further Notice*, 32 FCC Rcd at 9989, para. 121.

<sup>17</sup> *Id.* at 9989-90, paras. 123-24.

<sup>18</sup> *Id.*

<sup>19</sup> We list the commenters and reply commenters to the *Next Gen TV Further Notice* in Appendix A. All of the filings made in this docket are available to the public online via the Commission's Electronic Comment Filing System (ECFS) at <https://www.fcc.gov/ecfs/>.

<sup>20</sup> See, e.g., ONE Media Comments at 2 (urging the Commission to give broadcasters "the maximum flexibility with minimum oversight to develop the world's first Internet Protocol (IP)-based broadcast transmission platforms that will provide new competition for the delivery of digital content"); NAB Comments at 2 (urging the Commission "to continue to take a flexible and balanced approach that allows broadcasters across the country to improve the unparalleled free, over the air service they provide to consumers"); Pearl TV Comments at 1 (urging the Commission to "take actions to facilitate the implementation of ATSC 3.0 so that consumers can reap its benefits more quickly and pervasively").

<sup>21</sup> See, e.g., NAB Comments at 2 (stating that "the Commission should make clear that its standards for waiving the local simulcasting requirement will allow stations across the country to move forward with Next Gen deployments if they choose," and that "[t]he local simulcasting requirement is intended to minimize consumer disruption during this deployment, but it should not serve as a barrier that freezes viewers in small and rural markets in place and prevents them from enjoying the benefits of technological advances"); Pearl TV Comments at 2 (stating that "[t]he

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broadcasters to temporarily use vacant channels.<sup>22</sup> Meanwhile, MVPD commenters urged the Commission to exercise restraint in issuing waivers of, or granting additional exemptions from, the local simulcasting rules.<sup>23</sup> And public interest groups, white space proponents, and NCTA opposed the use of vacant channels as temporary transition channels by broadcasters.<sup>24</sup>

8. The Commission also received two petitions for reconsideration of the *Next Gen TV Report and Order*: one filed by the American Television Alliance (ATVA) and the other filed by NCTA – The Internet & Television Association (NCTA).<sup>25</sup> NCTA and ATVA seek reconsideration of various aspects of the local simulcasting rules, as well as the Commission’s decisions concerning voluntary carriage of ATSC 3.0 signals through retransmission consent, patent licensing, and the sunset of the A/322 standard.<sup>26</sup> We received eight oppositions to these petitions and three replies to the oppositions.<sup>27</sup>

### III. SECOND REPORT AND ORDER

9. In this Second Report and Order, we provide guidance on how Commission staff will evaluate petitions for waiver of our local simulcasting rules. In addition, we decline at this time to permit broadcasters to use vacant in-band channels for purposes of voluntary ATSC 3.0 deployment. Finally, we adopt the Commission’s tentative conclusion that the “significantly viewed” status of a Next Gen TV station will not change if it moves its ATSC 1.0 simulcast channel to a host facility.

#### A. Local Simulcasting Waivers and Exemptions

10. We affirm and clarify the local simulcasting waiver standard adopted in the *Next Gen TV Report and Order*.<sup>28</sup> As explained below, we will presume that a station satisfies the first element of our waiver standard, which is that it has no “viable simulcasting partner,” if it has fewer than three potential simulcasting partners within its DMA that can cover its entire community of license. To satisfy the

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simulcasting structure the Commission has adopted can be made more realistic and useful by the adoption of a waiver process that addresses some of the real-world issues that will confront broadcasters in the near term so that more stations can bring the benefits of Next Gen TV to their viewers”); PTV Comments at 6-11 (seeking an exemption or, alternatively, a presumptive waiver process for public television stations); PMC Comments at 2 (seeking an exemption for NCE stations); SBCCD Comments at 7 (seeking an exemption or, alternatively, a presumptive waiver for NCE stations); WatchTV Comments at 1 (urging the Commission to exempt Class A stations).

<sup>22</sup> See, e.g., NAB Comments at 5-8; ONE Media Comments at 5-8; Pearl TV Comments at 3-4; Meredith Comments at 2; PTV Comments at 12-14; SBCCD Comments at 7-9.

<sup>23</sup> See ATVA Comments at 3-11 (urging the Commission to allow only narrowly-tailored waivers of the local simulcasting coverage rules and opposing broad waivers of and exemptions from the local simulcasting rules); NCTA Comments at 4-5 (opposing waivers of or exemptions to the local simulcasting rules); NTCA Comments at 5 (arguing that “any waiver of [the local simulcasting] requirement must take into account the effects on the consumers served by this protection, including the impacts on the services they buy from MVPDs that carry the signals in question”).

<sup>24</sup> See OTI and PK Comments at 2; Microsoft Comments at 1; DSA Comments at 1; NCTA Comments at 6-7.

<sup>25</sup> American Television Alliance (ATVA) Petition for Reconsideration (filed Mar. 5, 2018) (ATVA Petition); NCTA – The Internet & Television Association (NCTA) Petition for Reconsideration (filed Mar. 5, 2018) (NCTA Petition).

<sup>26</sup> See *infra* para. 40.

<sup>27</sup> The following parties filed oppositions to one or both of the petitions: The Advanced Television Broadcasting Alliance (the Alliance), Edge Spectrum Inc. (ESI), HC2 Broadcasting Inc. (HC2), Meredith, NAB, ONE Media, Pearl TV, and PTV. ATVA, NCTA, and NTCA filed replies to the oppositions. All of the filings made in this docket are available to the public online via the Commission’s Electronic Comment Filing System (ECFS) at <https://www.fcc.gov/ecfs/>.

<sup>28</sup> See *infra* note 44.

second part of our waiver standard, which is to provide “reasonable efforts to preserve 1.0 service,” we will look favorably on waiver applicants that take steps to ensure their viewers have the ability to continue watching the station. For example, waiver applicants may provide, upon request, free or low-cost ATSC 3.0 converter devices to over-the-air viewers within the station’s community of license who otherwise no longer would be able to receive the station’s 1.0 signal over the air as a result of the station’s conversion to ATSC 3.0.<sup>29</sup> Stations choosing to provide such devices will be expected to inform viewers about the availability of such free or low-cost ATSC 3.0 converter devices and how to request or obtain such equipment. In addition, we decline to adopt a blanket exemption from the local simulcasting requirement for noncommercial educational (NCE) or Class A TV stations, preferring instead to rely on our waiver standard to afford these stations with any additional flexibility. Finally, we clarify that the Bureau has delegated authority to consider requests for waivers of the local simulcasting requirement and, consistent with the timing for reviewing non-expedited applications seeking authorization to deploy ATSC 3.0, the Bureau generally will process applications with waiver requests within 60 business days after giving public notice of the waiver request.<sup>30</sup> Waiver requests that comply with the criteria as explained in this Order will be viewed favorably.

11. We recognize that some stations, such as public television and other NCE stations, Class A TV stations, and stations in small markets or in rural, remote, and isolated areas, may face unique challenges in securing local simulcasting partners.<sup>31</sup> We seek to provide such stations with greater flexibility to deploy ATSC 3.0 service, provided they take steps to protect their viewers from the potential loss of ATSC 1.0 service resulting from a waiver. With these principles in mind, we provide, below, additional guidance on the waiver standard adopted in the *Next Gen TV Report and Order*.

#### 1. “No Viable Local Simulcasting Partner”

12. With respect to the first prong of our waiver test, we will presume that a full power Next Gen TV station has “no viable local simulcasting partner” if it has fewer than three (*i.e.*, zero to two) *potential* full power simulcasting partners in the same DMA that can cover its entire community of license. If a full power station seeking a waiver is found to have fewer than three full power stations in its DMA that can meet the local simulcasting coverage requirements in section 73.3801(c), then the station will receive a presumption that it meets the “no viable local simulcasting partner” prong of the waiver standard.<sup>32</sup> On the other hand, we will presume that full power stations with at least three potential

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<sup>29</sup> Generally, we expect that a station seeking a waiver of the community of license coverage requirement (*see* 47 CFR §§ 73.3801(c), 73.6029(c)) will not be able to satisfy the standard for expedited processing, which requires a station to provide ATSC 1.0 simulcast service to at least 95 percent of the predicted population within the station’s original noise limited service contour (NLSC) (*see* 47 CFR §§ 73.3801(f)(5), 73.6029(f)(5)). Thus, we remind prospective waiver applicants that a station that needs a waiver of the community of license coverage requirement will also need to make the showing required for non-expedited applications (*see* 47 CFR §§ 73.3801(f)(6)(iii), 73.6029(f)(6)(iii)) established by the *Next Gen TV Report and Order*, which includes providing information about what steps, if any, the station plans to take to minimize the impact of the service loss *Next Gen TV Report and Order*, 32 FCC Red at 9947-48, para. 34. Accordingly, as a practical matter, we expect that a station choosing to provide ATSC 3.0 converter devices as a means to minimize the impact of not simulcasting on viewers will choose to provide such devices throughout its entire NLSC.

<sup>30</sup> *See Next Gen TV Report and Order*, 32 FCC Red at 9948, para. 34.

<sup>31</sup> *Next Gen TV Report and Order*, 32 FCC Red at 9953, para. 47. The Commission observed, for example, that “public television stations are often not sited based on DMA boundaries because many statewide networks licensed to state agencies or commissions are required to serve their entire state regardless of cross-state DMA boundaries.” *Id.* (citing PTV). The Commission also recognized that, as the implementation of Next Gen TV progresses and more stations convert to ATSC 3.0, it may become increasingly difficult for broadcasters to find suitable partners for local simulcasting. *Id.*

<sup>32</sup> Commission staff estimates that, initially, about 8 percent of NCE stations and about 5 percent of commercial stations will be able to meet this threshold. This estimate was determined using LMS data. Staff calculated NLSCs using TVStudy for stations remaining on-air following the Incentive Auction. For each station under the test, the

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simulcast partners have viable simulcasting partners and, thus, are not eligible for a waiver of section 73.3801(c), absent compelling circumstances.

13. We adopt this criteria based on the proposals of several commenters, including the National Association of Broadcasters (NAB) and the joint comments of Public Broadcasting Service (PBS), Corporation for Public Broadcasting (CPB), and America’s Public Television Stations (APTS), collectively “PTV.”<sup>33</sup> Adopting this presumption will provide stakeholders increased predictability regarding what stations may be eligible for a waiver.<sup>34</sup> In adopting a threshold of fewer than three potential partners, we recognize that not all stations will have an interest in serving as a 1.0 simulcast host, and we avoid the need for a broadcast station to demonstrate individually to the Commission that no station is willing to be its simulcast partner.<sup>35</sup> We also find that the threshold of fewer than three potential simulcasting partners will provide transitioning stations with a reasonable opportunity to find suitable simulcast partners.<sup>36</sup> At the same time, the threshold will generally limit waiver relief to stations in rural, remote, and isolated areas – those stations that we believe will face the most significant challenges in finding local simulcasting partners.<sup>37</sup> Consistent with NAB’s proposal, we will consider only full power stations in our calculation of available 1.0 simulcast partners in considering a waiver request submitted by a full power station, because Class A TV and LPTV stations do not cover comparable service areas and LPTV stations constitute a secondary service that does not receive the same interference protection afforded to full power stations.<sup>38</sup>

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boundaries of the community of license were determined by matching the community to a Census Place or Census Designated Place. The number of viable sharing partners was determined by counting the number of other stations in the same DMA as the station under the test whose NLSC completely covered the boundaries of the community of license.

<sup>33</sup> See NAB Comments at 4; PTV Comments at 11 (urging the Commission “to take a pragmatic approach, with a threshold of at least three potential simulcasting partners to ensure that stations have the ability to fairly negotiate with a potential simulcast host”). See *infra* note 78 (explaining that PTV’s viability approach for waivers was a suggested alternative approach if the Commission rejected its request for an exemption for public television stations from the simulcasting requirement).

<sup>34</sup> See NAB Comments at 4.

<sup>35</sup> See NAB Comments at 4 (“The Commission must account for the willingness of other stations to serve as simulcast partners in evaluating waiver requests.”); ONE Media Comments at 4 (“The Commission should not engage in qualitative market-by-market evaluations of simulcasting plans ....”).

<sup>36</sup> We agree with NAB’s reasoning that “[i]f there are only one or two other stations in a market, a station that is eager to move forward now to improve its service may be unable to find a willing negotiating partner. If there are at least three other full power stations in the market, however, a transitioning station would be assured of having at least some possibility of moving forward even if one or two of those stations was not interested in a partnership at the time.” NAB Comments at 4.

<sup>37</sup> The record shows that stations in rural, remote, and isolated areas most merit a waiver of the local simulcasting requirement. See, e.g., PTV Comments at 7 (“Public television stations have unique, and often prohibitive, challenges in finding a transition partner with which to simulcast—particularly those stations in rural, remote, and isolated communities. While commercial broadcasters tend to be clustered together, the facilities of public stations have developed over decades to be geographically separate from these broadcasters and not situated centrally in DMAs.”); Pearl TV Comments at 2 (predicting that inability to find a suitable simulcasting partner is “especially likely ... in a rural or small market”); NAB Comments at 3 (opining that “the Commission should not set a waiver standard so high that viewers in small or rural markets are shut out of the Next Gen transition”).

<sup>38</sup> See NAB Comments at 5. We also note that a review of available data by Commission staff suggests that limiting potential partners to only full power stations (*i.e.*, excluding Class A TV stations) resulted in only a very slight increase in the number of full power stations that would be able to demonstrate “no viable local simulcasting partner.” See *supra* note 30 for methodology used by staff. As discussed below, stations seeking a waiver should

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14. We prefer the threshold approach of fewer than three potential partners to ONE Media's certification proposal, which would allow a station simply to certify "that it has contacted all technically viable prospective partners and been rejected, or has not been able to make sufficient progress in negotiations, despite good faith efforts to do so."<sup>39</sup> We find that our objective approach is more administratively efficient as it is readily demonstrable. Thus, we reject the certification proposal as an overly subjective standard that could provide opportunities for stations to overuse or abuse the waiver process. We note that the objective threshold approach also avoids having the Commission "engage in qualitative market-by-market evaluations of simulcasting plans," which was a key concern of ONE Media.<sup>40</sup> Given the difficulties associated with persuading another station in the DMA to relinquish its multicast capabilities to permit a competing station to deploy ATSC 3.0 by using the host station's facilities for its ATSC 1.0 simulcast, and the challenges associated with negotiating the terms of an agreement to do so, we believe the record demonstrates that it is unlikely for a station to be able to reach such an agreement with only one or two candidates available to do so. For the reasons stated above, we believe that this bright line test appropriately balances the likelihood of availability with the need to avoid a large number of subjective evaluations of how diligent the prospective ATSC 3.0 licensee has been in seeking out such arrangements.

15. With respect to Class A TV stations, we will presume that a Class A TV station has "no viable local simulcasting partner" if it has fewer than three *potential* Class A TV simulcasting partners in the same DMA that: (1) can provide overlap to its protected contour (47 CFR § 73.6010(c)); and (2) are not more than 30 miles from the reference coordinates of the transitioning station's existing antenna location.<sup>41</sup> This is the same contour overlap standard that we apply in our rule specifying permissible simulcast partners for Class A stations seeking to provide ATSC 3.0 service. We recognize that many Class A TV stations will be able to satisfy this prong of our waiver standard, because few markets have three or more Class A stations. However, we find that it is appropriate to create a lower bar for this class of stations to make a showing under this prong as they likely face many of the same challenges in finding a suitable simulcasting partner as do LPTV stations.<sup>42</sup> We will not consider LPTV/translator stations in our calculation of available 1.0 simulcast partners for Class A TV stations because they are secondary services that do not receive the same interference protection afforded to Class A TV stations. Nevertheless, Class A TV stations may choose to partner with LPTV/translator stations as a means to mitigate the harm to viewers, and we encourage Class A TV stations to do so.<sup>43</sup>

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have an incentive to partner with Class A TV or other full power stations to provide partial simulcast coverage as a means to minimize the impact on viewers.

<sup>39</sup> ONE Media Comments at n.9.

<sup>40</sup> *Id.* at 4.

<sup>41</sup> In other words, if a station seeking a waiver to transition to ATSC 3.0 has only between zero and two stations in its market that can meet the Commission's local simulcasting coverage requirements in 47 CFR § 73.6029(c), then the station will receive a presumption that it meets the "no viable local simulcasting partner" prong of the waiver standard. Commission staff estimates that, initially, about 71 percent of Class A stations will be able to meet this threshold. *See supra* note 30 for methodology used by staff.

<sup>42</sup> For example, like LPTV stations, Class A TV stations may not be attractive simulcast partners for full power stations because of their lower power and coverage area, as well as their frequent financial constraints. *See infra* paras. 51-52. We note that, in any event, Class A TV stations would still need to comply with the second prong of our waiver standard.

<sup>43</sup> In addition, we note that, under our rules, LPTV/translator stations are allowed to transition directly to 3.0 without simulcasting. *See* 47 CFR § 74.782(c).



## 2. “Reasonable Efforts” to Preserve Service

16. In addition to demonstrating that a station lacks a viable partner, successful waiver applicants must commit to take certain affirmative steps to satisfy the second prong of our waiver test, by demonstrating that it is making “reasonable efforts” to preserve 1.0 service and minimize impact on viewers.<sup>44</sup> It is critical that stations seeking a waiver of the simulcasting requirement can still achieve the purpose of our simulcasting rule – ensuring that viewers can continue to watch their channels during the transition period – through some alternate means, in order to serve viewers that can no longer receive the station over-the-air as a result of a station’s conversion to ATSC 3.0.

17. The only alternative to local simulcasting raised or discussed in the record that is consistent with the purpose of the rule is for waiver applicants to provide free or low-cost ATSC 3.0 converter devices to affected over-the-air viewers.<sup>45</sup> We believe that providing free or low-cost 3.0 converter devices could help ensure that viewers in a station’s coverage area can continue to watch a station over-the-air. Below, in an effort to provide greater predictability to prospective waiver applicants, we provide more detail about our expectations in this regard. We note, however, that we will consider other alternatives offered by waiver applicants on a case-by-case basis, provided the waiver applicant can demonstrate that such proposals would achieve the purpose of our local simulcasting rule.

18. We will look favorably on a waiver applicant choosing to provide ATSC 3.0 converter devices at no cost or low cost to over-the-air households located within its community of license which will no longer receive the station’s ATSC 1.0 signal as a means to minimize the impact of not simulcasting on viewers.<sup>46</sup> Although such equipment distribution is not a requirement to obtain a waiver, we find that this method provides one way to ensure that any disruption to viewers is minimized to the fullest extent possible. In order for us to evaluate this prong of our waiver standard, we expect waiver applicants will explain in detail their plans for providing converter devices to eligible viewers, including: (1) what types of devices they intend to provide; (2) the cost, if any, that eligible viewers will be required

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<sup>44</sup> In the *Next Gen TV Report and Order*, the Commission decided that it would favor requests for waiver of the obligation to provide ATSC 1.0 simulcast service if the station can demonstrate both that: (1) it has “no viable local simulcasting partner” in its market; and (2) it will “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).” *Next Gen TV Report and Order*, 32 FCC Rcd at 9953, para. 46.

<sup>45</sup> See *Next Gen TV Further Notice*, 32 FCC Rcd at 9989, para. 122. See also, e.g., PTV Comments at 11-12.

<sup>46</sup> See *supra* note 29. We agree with PTV that “[i]n situations where a station does simulcast ATSC 1.0 programming to part of its community, it should only be expected to provide free or low-cost converters to viewers unable to receive the ATSC 1.0 signal.” PTV Comments at 11-12. In addition, we disagree with ATVA to the extent it contends that a waiver applicant must simulcast to part of its community of license in order to be eligible for a waiver. See ATVA Comments at 8-9 (stating that “[i]f 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,” and also stating that “the Commission should be more inclined to grant such a waiver if the partner’s signal partially covers the city than if it does not at all”). We do not require a waiver applicant to simulcast to part of its community of license, but we find that a waiver applicant that chooses to simulcast to part of its community of license will have mitigated the harm to those viewers in such area that receives the simulcast signal. For example, a waiver applicant may mitigate harm to viewers by simulcasting to part of its community of license and providing ATSC 3.0 converters to those areas not reached by the partial simulcast, or it may mitigate harm to viewers by providing ATSC 3.0 converters to its entire community of license. We note that ATVA does appear to agree that the harm to viewers can be mitigated by providing free or low-cost ATSC 3.0 converter devices to viewers, which we expect waiver applicants will do to satisfy the second prong of our waiver test. See ATVA Comments at 9 (“[T]he 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’ 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.”).

to pay in order to receive the device; (3) how the applicant intends to inform viewers of the need for, and availability of, devices; and (4) how viewers will be able to request and obtain the device. The Bureau will consider a waiver applicant's plan for providing ATSC 3.0 converters to affected viewers on a case-by-case basis based on the unique circumstances confronting the applicant.

19. To provide greater predictability to applicants that chose to voluntarily provide ATSC 3.0 converters, the Bureau will look favorably on a plan in which the waiver applicant would provide affected over-the-air households,<sup>47</sup> upon request, with one ATSC 3.0 converter at no cost.<sup>48</sup> To the extent waiver applicants choose to charge a low cost to consumers for devices, we will consider the particular circumstances surrounding this charge, as well as the amount of the charge, on a case-by-case basis. A waiver applicant choosing to provide ATSC 3.0 converter devices would be expected to agree to provide an ATSC 3.0 converter upon request to each affected over-the-air household for as long as it operates pursuant to the waiver. A waiver applicant choosing to provide ATSC 3.0 converter devices would also be expected to inform viewers how they can obtain an ATSC 3.0 converter from the station<sup>49</sup> We note that some waiver applicants choosing to provide ATSC 3.0 converter devices may opt to partner with equipment manufacturers, retailers, and even other broadcasters in their local markets in order to provide the free or low-cost ATSC 3.0 converters. While nothing precludes waiver applicants from partnering with third parties to establish their ATSC 3.0 converter programs, we remind applicants that they remain ultimately responsible for complying with any commitments made as part of their waiver requests. Finally, we remind waiver applicants that a station that transitions directly to ATSC 3.0 must air daily Public Service Announcements (PSAs) or crawls every day for 30 days prior to the date that it will terminate ATSC 1.0 operations.<sup>50</sup>

20. Broadcasters contend that, while the Commission should look favorably on waiver applicants that offer to provide free or low-cost ATSC 3.0 converters to viewers in their coverage area, the Commission should not require broadcasters to provide free or low-cost ATSC 3.0 converters to viewers as a condition for a waiver of the local simulcasting requirements.<sup>51</sup> NAB asserts that requiring waiver applicants to provide ATSC 3.0 converters "would risk adding unreasonable costs" on broadcasters, and ONE Media similarly contends that "such a costly requirement might deter innovation in some markets without corresponding benefits."<sup>52</sup> As stated above, we do not *require* waiver applicants to provide ATSC 3.0 converter devices and will consider alternative proposals that would achieve the purpose of the local simulcasting rule. There were, however, no such alternatives mentioned in the record. The Commission authorized the deployment of ATSC 3.0 service in a manner that is voluntary for all stakeholders.<sup>53</sup> We find it unreasonable for consumers to bear significant expense for these devices or to be left without service in the event devices are not readily available in the marketplace when a station wishes to deploy ATSC 3.0 service. Broadcasters seeking waiver of the simulcasting requirement

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<sup>47</sup> "Affected over-the-air households" are households exclusively receiving television broadcast stations over the air with an antenna. This definition does not include households that subscribe to cable or satellite service.

<sup>48</sup> See *infra* para. 28 (delegating authority to the Media Bureau to review waivers).

<sup>49</sup> For example, as part of this notice, we expect stations choosing to provide ATSC 3.0 converter devices will provide information on their websites about how viewers can request and obtain any free or low-cost ATSC 3.0 converter devices that may be offered.

<sup>50</sup> See 47 CFR §§ 73.3801(g), 73.6029(g). Waiver applicants must provide all pertinent information to viewers in their PSAs or crawls, including information about how viewers can request and obtain any free or low-cost ATSC 3.0 converter devices to the extent such devices are offered.

<sup>51</sup> NAB Comments at 5; ONE Media Comments at 5.

<sup>52</sup> *Id.*

<sup>53</sup> See *Next Gen TV Further Notice*, 32 FCC Rcd at 9939, paras. 15-16.

must demonstrate that they have taken steps to minimize any disruption to consumers.<sup>54</sup> Broadcasters have stated in the record that they expect 20 different television models from three manufacturers, to be available with built-in ATSC 3.0 tuners as well as other types of conversion equipment, such as adapters and gateway devices, by the end of 2020.<sup>55</sup> To the extent this comes to pass, we expect broadcasters will have adequate access to ATSC 3.0 converter devices and other equipment so that they can provide such equipment to their viewers in support of any simulcasting waiver requests.

21. We reject NCTA's argument that it is premature for us to consider waivers of the local simulcasting requirement.<sup>56</sup> Because our waiver standard targets relief to stations in rural, remote, and isolated areas and requires applicants to make "reasonable efforts" to preserve 1.0 service and minimize impact on viewers, we disagree with NCTA that our waiver standard will undermine the purpose of the local simulcasting rule.<sup>57</sup> We find that viewers in small and rural markets should have an opportunity to enjoy the benefits of ATSC 3.0 service as quickly as practicable and that stations lacking a simulcast partner that wish to innovate and invest in ATSC 3.0 technology should be afforded an opportunity to do so.<sup>58</sup>

22. NTCA – The Rural Broadband Association (NTCA) also expressed concern that were the Commission to waive simulcasting requirements, broadcasters may try to enforce their mandatory carriage rights with respect to their ATSC 3.0 signals, potentially imposing significant costs on cable operators.<sup>59</sup> We clarify that stations that receive a waiver of the local simulcasting rule are not allowed to assert mandatory carriage rights for their ATSC 3.0 signals. In the *Next Gen TV Report and Order*, the Commission stated 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

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<sup>54</sup> *Id.*

<sup>55</sup> See Letter from Patrick McFadden, Associate General Counsel, NAB, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 16-142, at 1 (Jan. 27, 2020). NAB explains on its website that consumers will not necessarily need to buy a new TV set to take advantage of Next Gen TV service. NAB states: "Just as devices like Chromecast, Roku and Apple TV have emerged to bring new digital features to existing television sets, gateways and adapters will be available to unleash Next Gen TV on your existing set." <https://www.nab.org/innovation/nextgentv.asp>. We disagree with ONE Media's further assertion that we should not require a waiver applicant to provide ATSC 3.0 converter devices if it is "in a market that is already well-penetrated with ATSC 3.0 devices and [has] arranged for all MVPDs to carry its signal." ONE Media Comments at 5. If most viewers in a market already have ATSC 3.0 devices, then it should not be overly burdensome for waiver applicants to provide ATSC 3.0 converters to the remaining few viewers in the market that do not. Further, carriage on all MVPDs in a market does not mean that all viewers would have access to the Next Gen TV station's signal unless they are a subscriber to MVPD service. Requiring that a viewer subscribe to an MVPD service in order to retain access to a station's free over-the-air signal would unreasonably shift the burden of what is supposed to be a voluntary transition onto viewers.

<sup>56</sup> NCTA Comments at 3-4 (stating that "[s]imulcasting waivers should not be granted – and the standards for granting such waivers should not be developed – until a later stage in the deployment of ATSC 3.0 signals").

<sup>57</sup> We also find that our targeted waiver approach addresses ATVA's concerns that waivers will not be sufficiently narrow to address situations where stations cannot comply with the simulcasting rules. ATVA Comments at 1 (stating that "the Commission should grant waivers where appropriate to stations that cannot comply with the simulcasting rules," but that such waivers "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'").

<sup>58</sup> See PTV Reply at 3 (explaining that "[d]elayed implementation of simulcast exemptions and waivers would hinder [broadcaster innovation] efforts and would disproportionately impact underserved viewers in rural areas (where simulcasting partnerships may be precluded by geography), further exacerbating the nation's digital divide"). See also, e.g., NAB Reply at 10 ("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.").

<sup>59</sup> NTCA Comments at 2-3.

if its 3.0 signal is the only signal being broadcast. In other words, under no circumstances will we recognize mandatory carriage rights for 3.0 signals while the Commission requires local simulcasting.”<sup>60</sup> We clarify that the reference to “while the Commission requires local simulcasting” was intended to refer to the time period during which the general simulcasting rule remains in effect and was not meant to confer ATSC 3.0 carriage rights to stations excused from the general rule. At this time, there are no mandatory carriage rights for ATSC 3.0 signals.

23. In addition, NTCA expresses concern that stations which are granted waivers and elect retransmission consent can and likely would shift the costs of carrying ATSC 3.0 signals onto small and rural MVPDs.<sup>61</sup> More specifically, NTCA avers that, because small and rural MVPDs generally rely on receiving broadcast signals over-the-air at their headend (as fiber is generally not an option), these MVPDs would have to upgrade their equipment to receive the signal of a 3.0 station that is not simulcasting in order to continue to carry the station. NTCA claims that, in such situations, broadcasters will have little incentive to share in the cost of such upgrades.<sup>62</sup> NTCA maintains that, when considering a waiver request, the Bureau should consider the impact on MVPDs and their subscribers,<sup>63</sup> particularly in situations in which such subscribers cannot receive any over-the-air broadcast signals and rely solely on MVPD service to receive a station.<sup>64</sup> The Commission rejected suggestions that it should intervene in the retransmission consent process vis-à-vis ATSC 3.0 signals in the *Next Gen TV Report and Order*, and in so doing, it decided that it was premature to consider arguments that Next Gen TV broadcasters could use the retransmission consent process to compel carriage of ATSC 3.0 signals before consumer demand and market circumstances warrant.<sup>65</sup> Nevertheless, we expect waiver stations that are granted waivers of the simulcasting requirements will actively coordinate and work cooperatively and in good faith with all affected MVPDs to help ensure that MVPD subscribers can continue to watch the station.

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<sup>60</sup> *Next Gen TV Report and Order*, 32 FCC Rcd at 9961, para. 67.

<sup>61</sup> NTCA Comments at 3 (contending that “small rural MVPDs already operating on slim to negative margins and their subscribers should not face additional burdens, such as upgrading equipment to accommodate ATSC 3.0 prematurely”).

<sup>62</sup> See NTCA Comments at 3-4 (“Most broadcasters are likely to elect retransmission consent, as it is a significant source of revenue for broadcasters and broadcast content is still considered ‘must carry’ content by the vast majority of MVPDs, especially for those with subscribers who cannot receive content over the air (like many in rural areas). MVPDs and their subscribers may be forced to pay for the privilege of receiving ‘free’ broadcast content and for the new equipment necessary to receive it – and ironically to do so in areas where the content would not reach the consumer at all absent the MVPD’s carriage for the broadcaster.”).

<sup>63</sup> NTCA Comments at 5 (“The Commission is requiring simulcasting to protect consumers from a premature, broadcaster-driven conversion to ATSC 3.0. For that reason, any waiver of this requirement must take into account the effects on the consumers served by this protection, including the impacts on the services they buy from MVPDs that carry the signals in question.”). NTCA states a Commission’s waiver determination should include consideration of the following factors: “(1) the associated costs to the local MVPD(s) and its subscribers; (2) the number of MVPD subscribers who cannot receive the broadcast station free over the air; and (3) whether or not the applicant volunteers to provide MVPDs and their subscribers with free equipment, or to otherwise subsidize the costs that ensue from grant of the waiver.” *Id.*

<sup>64</sup> According to NTCA, “[n]early one-fourth of NTCA’s members report that 90 percent or more of the customers in their service areas cannot receive any over-the-air broadcast signals, and must rely upon MVPD services to receive local news, weather reports, and similar benefits of local broadcasts.” NTCA Comments at 3. Therefore, NTCA observes that “[a]n offer of free or low-cost 3.0 converters would ... impart no benefit whatsoever to a significant number of rural subscribers.” *Id.*

<sup>65</sup> *Next Gen TV Report and Order*, 32 FCC Rcd at 9970, para. 78. In the Order on Reconsideration, below, we affirm this finding. See *infra* para. 59.

### 3. No Additional Simulcast Exemptions

24. We conclude that it is not necessary and would not serve the public interest to grant exemptions to any additional classes of stations at this time.<sup>66</sup> In the *Next Gen TV Further Notice*, the Commission sought comment on whether to exempt NCE and/or Class A TV stations as a class from the local simulcasting requirement.<sup>67</sup> Given the flexibility afforded by our waiver standard, we decline to give NCE and Class A TV stations a class-based exemption from our local simulcasting requirement, as we did for LPTV/translator stations.<sup>68</sup>

25. As an initial matter, unlike LPTV/translator stations, NCE and Class A TV stations are considered primary under the Commission's rules.<sup>69</sup> Primary television stations (primary stations) are treated differently from secondary television stations (secondary stations) in many respects under the rules. Among other things, primary stations are afforded interference protection from other services and, in contrast to secondary services like LPTV/translators, are not subject to displacement by other primary licensees.<sup>70</sup> In addition, primary stations tend to carry programming more relied upon by viewers.<sup>71</sup> Consequently, if we were to afford NCE, Class A TV, or any other class of primary station a blanket exemption of the local simulcasting rule, the potential adverse impact caused by service loss would be inherently greater than it is for secondary classes of stations. We therefore find it appropriate to afford NCE and Class A TV stations less flexibility than secondary stations with respect to local simulcasting obligations.

26. In advocating for a blanket exemption from the local simulcasting rules, public television commenters emphasize that they are particularly likely to lack viable simulcasting partners because they often are not sited near other stations in the market.<sup>72</sup> We find that our waiver standard, which is based on a proposal supported by PTV,<sup>73</sup> adequately addresses this concern by providing that any station that lacks

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<sup>66</sup> In the *Next Gen TV Report and Order*, we exempted LPTV/translator stations from our local simulcasting requirement and will allow these stations to transition directly to 3.0 service. *Next Gen TV Report and Order*, 32 FCC Rcd at 9950-53, paras. 40-45. We affirm this decision below in the MO&O. See *infra* para. 52 (section IV.A.3).

<sup>67</sup> *Next Gen TV Further Notice*, 32 FCC Rcd at 9990, para. 125.

<sup>68</sup> In this regard, we agree with ATVA that our targeted waiver approach is more appropriate than a class-based exemption. ATVA Comments at 10-11 (stating that PBS “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”).

<sup>69</sup> See 47 CFR § 73.6001(c).

<sup>70</sup> See 47 CFR §§ 73.612, 73.613. See also 47 CFR § 74.703. We note that secondary stations also do not have principal community coverage obligations.

<sup>71</sup> For example, we note that Class A TV stations are required to broadcast a minimum of 18 hours per day and provide an average of at least three hours per week of locally-produced programming each quarter. See 47 U.S.C. § 336(f)(1)(A)(ii); 47 CFR § 73.6001(b).

<sup>72</sup> PTV Comments at 7 (stating that “[p]ublic television stations have unique, and often prohibitive, challenges in finding a transition partner with which to simulcast – particularly those stations in rural, remote, and isolated communities”); PMC Comments at 3 (“[M]any public television stations are located in rural areas outside of populated [DMAs] where no host station would be available to provide substantial coverage of an NCE station’s community of license. For these stations, flash-cutting to Next Gen TV may be the only practical solution.”); PTV Reply at 4 (“PTV is not requesting an exemption to simulcasting so that stations can immediately flash cut to ATSC 3.0. PTV is requesting an exemption so that those stations lacking a simulcast partner can begin carefully planning for an eventual ATSC 3.0 rollout on a market-by-market basis, and each deployment will be inherently dependent on whether local conditions support a transition in a given community.”). See also SBCCD Comments at 3.

<sup>73</sup> Although PTV would prefer an exemption for public television stations, it indicated that it would support, in the alternative, a presumptive waiver for such stations. PTV Comments at 11.

fewer than three potential partners presumptively satisfies the “no viable local simulcasting partner” prong of our waiver test. We find that our waiver standard will provide targeted relief to NCE stations in rural or other isolated areas without risking the loss of television service on which viewers currently rely. PTV also contends that the Public Broadcasting Act of 1967 (PBA) creates a statutory mandate for PTV stations “to provide service to ‘all citizens of the United States,’ particularly ‘unserved and underserved audiences’” and, therefore, public television stations do not need a simulcasting requirement because the PBA will ensure that public television stations “will only transition to the ATSC 3.0 standard after ensuring that their viewers will not be left behind.”<sup>74</sup> However, the sections of the PBA cited by PTV are not statutory mandates that are binding on public television stations, but rather a Congressional declaration of policy, and, in fact, we find that our waiver standard will buttress this Congressional statement of policy by ensuring that waivers are granted only in appropriate circumstances and that reasonable efforts will be made to prevent loss of public television service. We do not, however, find the Congressional statement of policy in the PBA to be a rationale for providing additional regulatory relief to NCE stations.<sup>75</sup>

27. Likewise, we find the waiver approach is more appropriate for Class A TV stations than a class-based exemption. WatchTV states that the Commission should exempt Class A TV stations “because most of the rationale behind the [simulcast requirement] does not apply to Class A (TV) stations.”<sup>76</sup> We acknowledge that Class A TV stations—unlike most other primary stations—are not generally carried by MVPDs,<sup>77</sup> and thus their only way to access viewers is via over-the-air reception. Although we recognize they have incentives to maintain ATSC 1.0 service without a mandate,<sup>78</sup> we disagree with WatchTV that these marketplace incentives justify a class-based exemption for Class A TV stations.<sup>79</sup> By virtue of their status, Class A TV stations are required to provide locally-produced programming that is relied upon by viewers.<sup>80</sup> We are reluctant to allow Class A TV stations to stop providing such service in ATSC 1.0 without a public interest showing. Thus, while most Class A TV waiver applicants will presumptively meet the first prong of the waiver standard, Class A TV waiver applicants will be required under the second prong of the waiver standard to minimize the impact on viewers, ensuring that viewers can maintain access to the locally-produced programming offered by these stations.<sup>81</sup>

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<sup>74</sup> PTV Comments at 8 (citing 47 U.S.C. § 396(a)(6), (7)). *See also* PMC Comments at 3 (stating “it is already the independent mandate of public television licensees both to provide continuity of access to their viewers and to provide service in the best interests of their communities”).

<sup>75</sup> PTV also argues that “public television stations have a strong financial incentive for ensuring that viewers are able to continue receiving their broadcast signals” because “public television stations rely on direct financial support from viewers.” PTV Comments at 8. We also do not find this argument grounds for additional regulatory relief to public television stations. Our goal is to ensure viewers are protected during the transition to ATSC 3.0 service. We see no reason to treat viewers of full power public television stations differently from other full power stations.

<sup>76</sup> WatchTV Comments at 1.

<sup>77</sup> *Id.* at 2 (“Except in markets below the top 160 and in counties with no full power service, Class A stations have no MVPD carriage rights; and most of them (including all of WatchTV’s stations) do not enjoy MVPD carriage.”).

<sup>78</sup> *Id.* (stating that Class A TV stations “rely on over-the air signals to reach virtually all of their viewers” and, therefore, “have a strong motivation to avoid doing anything that would cut off any of their over-the-air viewers.”).

<sup>79</sup> *Id.* at 1 (stating that “the Commission can rely on strong private marketplace incentives to motivate Class A stations to provide ways to reach their viewers without any need for regulatory intervention.”).

<sup>80</sup> *See* 47 U.S.C. § 336(f)(1)(A)(ii); 47 CFR § 73.6001(b).

<sup>81</sup> We note that WatchTV has indicated its ability to provide low-cost 3.0 devices to viewers, suggesting that the waiver standard would not prove too onerous for Class A stations. WatchTV Comments at 3 (“WatchTV

(continued....)

#### 4. Waiver Processing

28. We clarify that the Media Bureau has delegated authority to consider requests for waiver of the local simulcasting requirement and that waiver requests should be made when filing a Next Gen TV license application.<sup>82</sup> Consistent with the timing for reviewing non-expedited applications seeking authorization to deploy ATSC 3.0,<sup>83</sup> we expect the Bureau will process applications with waiver requests within 60 business days after giving public notice of the waiver request.<sup>84</sup> Some broadcaster commenters have requested much faster processing times for waiver requests,<sup>85</sup> but such timeframes would provide staff insufficient time to verify that deviation from the established rule is warranted and in the public interest. So long as information provided by waiver applicants is complete, we expect staff will be able to process the applications within the 60 business-day time period.

##### B. Temporary Use of Vacant Channels

29. We decline to adopt new rules at this time to authorize full power broadcast licensees to use available or vacant channels in the television band for purposes of their voluntary ATSC 3.0 deployment. The Commission declined to authorize such use in the *Next Gen TV Report and Order*, but sought additional comment on this issue in the *Next Gen TV Further Notice*.<sup>86</sup> In particular, the Commission sought comment on ONE Media's request that, in markets where such vacant channels are available, the Commission should allow full power broadcasters to use these channels as "dedicated transition channels to ensure maximum continuity of service, just as it did during the transition from analog to digital."<sup>87</sup> In support of this proposal, ONE Media and other broadcaster commenters argue that allowing Next Gen broadcasters to use vacant channels would facilitate the transition to ATSC 3.0 and "minimize consumer disruption and preserve service to viewers."<sup>88</sup> They contend that television band spectrum is reserved for licensed broadcast use and that existing broadcasters should be given priority to use vacant channels as temporary transition channels in the band.<sup>89</sup>

(Continued from previous page) \_\_\_\_\_

contemplates being able to acquire dongles for as little as \$10 in quantity, so that a station may sell them for a nominal amount or even simply give them away to viewers as a promotion.”).

<sup>82</sup> 47 CFR §§ 0.61(h), 0.283. See Pearl TV Comments at 3; Meredith Comments at 1 (each stating that the Commission should delegate authority to the Bureau for faster action on waiver requests).

<sup>83</sup> As explained in note 13, *supra*, a non-expedited applicant refers to a Next Gen TV station whose application does not propose to provide ATSC 1.0 simulcast service to at least 95 percent of the predicted population within the station's original noise limited service contour (NLSC) and, thus, would not qualify for "expedited processing" for its application. A non-expedited applicant must provide a more robust public interest showing with its application and will be considered on a case-by-case basis. Next Gen TV Report and Order, 32 FCC Rcd at 9947-48, para. 34.

<sup>84</sup> See *Next Gen TV Report and Order*, 32 FCC Rcd at 9948, para. 34 (“We expect generally to process applications that do not qualify for expedited processing within 60 business days after we give notice of the filing of the application in the Daily Digest.”).

<sup>85</sup> See, e.g., Meredith Comments at 2 (suggesting 30 days); PTV Comments at 12 (suggesting 15 business days).

<sup>86</sup> *Next Gen TV Further Notice*, 32 FCC Rcd at 9990-92, paras. 126-28; *Next Gen TV Report and Order*, 32 FCC Rcd at 9958, para. 60.

<sup>87</sup> *Next Gen TV Further Notice*, 32 FCC Rcd at 9990-91, para. 126 (quoting ONE Media Comments (dated May 9, 2017) at 13).

<sup>88</sup> ONE Media Comments at 6; NAB Comments at 6. See also Pearl TV Comments at 3-4; PTV Comments at 12; Meredith Comments at 2; SBCCD Comments at 7.

<sup>89</sup> See, e.g., ONE Media Comments at 6; NAB Comments at 6; Pearl TV Comments at 4. In addition to priority over unlicensed uses, ONE Media advocates giving existing broadcasters priority over applicants for new television station licenses as well as over secondary users, including displacement applications of LPTV and TV translator stations. ONE Media Comments at 6.

30. We find that it is premature to consider allowing broadcasters to use vacant channels as temporary transition channels to deploy ATSC 3.0 service.<sup>90</sup> At this time, deployment of ATSC 3.0 service is voluntary, and there is no certainty if or when it will replace ATSC 1.0 service; rather, it will be adopted by stakeholders based on marketplace considerations. For this reason, we reject ONE Media's comparison to the DTV transition in which a second channel was provided to most broadcasters in order to accomplish a mandatory transition from analog to digital service.<sup>91</sup> We also agree with MVPD providers, wireless microphone interests, and proponents of white space devices that authorizing widespread use of vacant channels as dedicated transition channels would be inconsistent with the premise of the broadcasters' Next Gen TV Petition, which stated that local simulcasting would be the "core of the voluntary, market-driven implementation of ATSC 3.0" and that no additional spectrum would be needed for the voluntary deployment of ATSC 3.0 service.<sup>92</sup> Further, the fact that no additional spectrum would be required for the voluntary use of ATSC 3.0 was a key consideration in the *Next Gen TV Report and Order*.<sup>93</sup> Allowing widespread use of vacant channels as transition channels would likely discourage reliance on local simulcasting arrangements, which are intended to accomplish the voluntary deployment of ATSC 3.0 service in a spectrally efficient manner.<sup>94</sup>

31. Moreover, any benefits of allowing broadcasters to use vacant channels as temporary transition channels appear outweighed by the costs to other stakeholders. Broadcasters maintain that vacant channel use may be particularly helpful to stations in rural, remote, and isolated areas.<sup>95</sup> However, such broadcasters already have significant flexibility in complying with our local simulcasting rules by virtue of the waiver standard.<sup>96</sup> Further, we are skeptical that rural, remote, and isolated broadcasters would even want to incur the costs of constructing and operating a second facility on a vacant channel.<sup>97</sup> Instead, such broadcasters may find partnering with LPTV/translator stations, which are exempt from the simulcasting requirement, to be a more affordable and practical option for their initial deployment of ATSC 3.0 service.

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<sup>90</sup> See, e.g., Public Interest Organizations Comments at 1.

<sup>91</sup> See, e.g., DSA Comments at 6 ("The transition from analog to digital television was required by law, and despite several delays, the transition from analog to digital television for full-service stations had an end date. Here, the transition from ATSC 1.0 to ATSC 3.0 for full-service stations is voluntary and currently does not have an end date.").

<sup>92</sup> See Joint Petition for Rulemaking of America's Public Television Stations, the AWARN Alliance, the Consumer Technology Association, and the National Association of Broadcasters, GN Docket No. 16-142, at 17-18 (filed Apr. 13, 2016), <https://www.fcc.gov/ecfs/filing/60001667342/document/60001701021> (Next Gen TV Petition). The Next Gen TV Petition stated that it "does not ask the Commission to give broadcasters additional spectrum to roll out Next Generation TV and does not seek any changes to the current DTV standard. Instead, broadcasters will use market-based solutions to introduce this enhanced capability on existing spectrum while not disenfranchising viewers using ATSC 1.0 equipment, and consumer electronics manufacturers will implement the new standard in response to market demands rather than regulatory mandates." *Id.* at 3. See also, e.g., NCTA Comments at 6; DSA Comments at 4-5; Microsoft Comments at 3; Open Technology Institute at New America and Public Knowledge Comments at 4-5; Sennheiser Comments at 3-4; Shure Comments at 1-2.

<sup>93</sup> See *Next Gen TV Report and Order*, 32 FCC Red at 9939, para. 15.

<sup>94</sup> See Public Interest Organizations Reply at 2 (explaining that local simulcasting "promotes spectrum efficiency by giving local stations an incentive to partner and use two (or more) channels more intensively," and that "[i]n contrast, offering stations exclusive use of a second free channel would promote an inefficient use of the resource").

<sup>95</sup> See, e.g., ONE Media Comments at 6.

<sup>96</sup> See *supra*, e.g., at para 11.

<sup>97</sup> See, e.g., PTV Comments at 12 (cautioning that the use of vacant channels by rural, remote, and isolated public television stations "will have limited use in practice given that vacant in-band channels are not universally available or affordable").



32. In addition, we are not persuaded that the benefits of allowing broadcasters to use vacant channels as temporary transition channels outweigh the potential costs and harms to other stakeholders that operate in the band. Authorizing widespread use of vacant channels by broadcasters could have a significant adverse impact on these other stakeholders. First, permitting vacant channel use at this time, even for only 3.0 service, could have negative effects on the incentive auction reorganization of spectrum (repacking). The resources needed to use vacant channels for such purposes could strain resources needed to support the construction of facilities on channels assigned in the post-incentive auction repacking, including transitioning stations and stations moving from interim to permanent facilities post-transition.<sup>98</sup> Second, permitting widespread vacant channel use could adversely impact LPTV and TV translator stations,<sup>99</sup> particularly those displaced by the post-Incentive Auction repacking process that are currently receiving federal funds to modify or construct new facilities on channels for which they hold construction permits.<sup>100</sup> Although we recognize that full power stations are primary and LPTV and TV translator stations are not, during this repacking transition we strive to be good stewards in overseeing efficient use of federal reimbursement funds. By opting not to allow full power vacant channel use at this time, we reduce the potential of inefficiently allocated reimbursement expenses to relocating LPTV stations by further displacing those stations already receiving federal funds. Finally, permitting widespread vacant channel use for ATSC 1.0 simulcasting could impose costs on an MVPD that may need to receive a signal from a new ATSC 1.0 facility that it does not currently carry. To the extent broadcasters were to move from one vacant channel to another, MVPDs could incur such expenses multiple times with respect to a single station.<sup>101</sup>

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<sup>98</sup> See *Incentive Auction Task Force and Media Bureau Remind Repacked Stations of Certain Post-Auction Transition Requirements and Deadlines*, Public Notice, 33 FCC Rcd 8240, 8242-43, para. 7 (2018).

<sup>99</sup> See WatchTV Comments at 4. See also Microsoft Comments at 8.

<sup>100</sup> LPTV/translator stations were not eligible to participate in the Broadcast Incentive Auction number 1000, were not protected in the repacking process, and were initially not eligible for reimbursement from the TV Broadcast Relocation Fund (the “Fund”). The Commission took a number of steps to mitigate the impact of the auction and repacking process on LPTV/translator stations. One such step included holding a special filing window from April 10, to June 1, 2018 to offer operating LPTV/translator stations that were displaced an opportunity to select a new channel. Prior to opening the window, the Commission released a channel study to help LPTV/translator stations identify potential new channels in the repacked TV band. More than 2,000 LPTV/translator stations received displacement construction permits to relocate to alternative channels. See *LPTV, TV Translator, and FM Broadcast Station Reimbursement; Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, MB Docket No. 18-214 and GN Docket No. 12-268, Notice of Proposed Rulemaking and Order, 33 FCC Rcd 7855, 7862-63, paras. 14-15 (2018) (describing rules and procedures to mitigate impact on LPTV/TV translators). In 2018 Congress appropriated funds including not more than \$150 million for LPTV/translator stations to relocate or modify their facilities pursuant to construction permits granted in the special displacement window. See Consolidated Appropriations Act 2018, Pub. L. No. 115-141, at Division E, Title V, § 511, 132 Stat. 348 (2018) (codified at 47 U.S.C. § 1452(j)-(n)). After adopting rules to implement reimbursement of LPTV/translator stations, a window was opened from August 15 to November 14, 2019 for LPTV/translator stations seeking reimbursement from the Fund. On December 9, 2019, a public notice announced that the Commission received eligibility certification and cost estimate submissions from 947 LPTV/translator stations who seek reimbursement of their relocation costs and such filings are currently under review. *Initial Allocation for FM Stations from TV Broadcaster Relocation Fund and Report on the Status of the Post-Incentive Auction Transition, the Reimbursement Program, and the Consumer Education Program*, MB Docket No. 16-306, GN Docket No. 12-268, Public Notice, DA 19-1246, para. 12 (IATF & MB, Dec. 9, 2019).

<sup>101</sup> NCTA Comments at 6-7. We recognize that parties supporting use of vacant channels for unlicensed white space operations and wireless microphone operations also expressed concern about the potential adverse impact on such uses. See NTCA Comments at 6; DSA Reply Comments at 6-7; Wi-Fi Alliance Comments at 1, 3-6. In response, broadcasters contend that white space use should yield to broadcast operations in the television band. See NAB Comments at 6-7; PTV Reply at 6-7; NAB Reply at 2-5; One Media Reply at 5-8. Because we decline on other grounds to adopt the proposal to allow full power vacant channel use, we do not address that issue here.

33. Accordingly, we decline to allow the use of vacant channels for the ATSC 3.0 transition at this time. If warranted by market conditions in the future, we may revisit the need for permitting broadcasters to use vacant channels as transition channels.

**C. “Significantly Viewed” Status of Next Gen TV Stations**

34. We adopt our tentative conclusion that the significantly viewed status of a Next Gen TV station should not change if it moves its ATSC 1.0 simulcast channel to a temporary host facility.<sup>102</sup> All commenters on this issue support this conclusion.<sup>103</sup> Accordingly, a commercial television station that relocates its ATSC 1.0 simulcast channel cannot seek to gain significantly viewed status in new communities or counties and such station cannot lose significantly viewed status in communities or counties for which it qualified prior to the move of its ATSC 1.0 simulcast channel.

35. Significantly viewed stations are commercial television stations that the Commission has determined have “significant” over-the-air (*i.e.*, non-cable and non-satellite) viewing and are thus treated as local stations in certain respects with regard to a particular community in another television market.<sup>104</sup> Significantly viewed status allows the significantly viewed station to be (1) carried by a satellite carrier in such community in the other market;<sup>105</sup> (2) carried in such community by cable and satellite operators at the reduced copyright payment applicable to local (in-market) stations;<sup>106</sup> and (3) exempt in such community from another station’s assertion of its network non-duplication or syndicated exclusivity rights.<sup>107</sup> A station that varies its signal strength or changes its location as a result of moving its ATSC 1.0 signal to a simulcast partner may raise the question of how this change affects its status as “significantly viewed” in a certain community or county under sections 76.5(i) and 76.54 of our rules.<sup>108</sup>

36. We agree with MVPDs and broadcasters that we should maintain the status quo in the significantly viewed context with respect to ATSC 1.0 simulcast signals and thereby avoid disruptions to the carriage obligations of MVPDs and the carriage rights of broadcasters, and note that no commenter opposes this approach.<sup>109</sup> Any changes in significantly viewed status due to local simulcasting would be

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<sup>102</sup> *Next Gen TV Further Notice*, 32 FCC Rcd at 9992-94, paras. 129-31.

<sup>103</sup> See ATVA Comments at 12; Meredith Comments at 2-3; NAB Comments at 2-3; NCTA Comments at 7; Pearl Comments at 4.

<sup>104</sup> See 47 CFR §§ 76.5(i), 76.54. The Significantly Viewed Stations List is maintained on Commission’s website at <https://transition.fcc.gov/mb/significantlyviewedstations061817.pdf>. We note that the Commission recently adopted a Notice of Proposed Rulemaking that seeks comment on whether to update the methodology for determining whether a television broadcast station is “significantly viewed” in a community outside of its local market. See *Significantly Viewed Stations; Modernization of Media Regulation Initiative*, MB Docket Nos. 20-73 and 17-105, Notice of Proposed Rulemaking, FCC 20-41 (rel. Mar. 31, 2020).

<sup>105</sup> See 47 U.S.C. § 340. Significantly viewed status is an exception to the “no distant where local” requirement which prohibits satellite carriage of distant (out-of-market) stations. See 47 U.S.C. § 339(a)(2); 17 U.S.C. § 119(a)(3).

<sup>106</sup> See 17 U.S.C. § 122(a)(2).

<sup>107</sup> See 47 CFR §§ 76.92(f) and 76.106(a) (significantly viewed exception to cable network nonduplication and syndicated exclusivity for cable); 47 CFR §§ 76.122(j) and 76.123(k) (significantly viewed exception to satellite network nonduplication and syndicated exclusivity for satellite).

<sup>108</sup> See 47 CFR §§ 76.5(i), 76.54.

<sup>109</sup> See ATVA Comments at 12 (“[C]hanging a station’s significantly viewed status during the transition to ATSC 3.0 would cause needless consumer disruption and frustration.”); NCTA Comments at 7 (“To rule otherwise would unnecessarily create significant disruption of the carriage obligations of cable systems and the carriage rights of broadcasters at the time of the move of the 1.0 signal – and again whenever simulcasting ends and carriage rights revert to the 3.0 signal.”); Meredith Comments at 2-3 (“Given the temporary nature of the transition to ATSC 3.0, the Commission should not at this time disturb any current Significantly Viewed status as a result of efforts made

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temporary,<sup>110</sup> and our approach will avoid disruptions to cable and satellite television viewers who have come to rely on such signals.<sup>111</sup> This approach will not impose added mandatory carriage burdens on MVPDs and avoids burdening MVPDs with numerous changes to their carriage obligations. We note that significantly viewed status does not confer mandatory carriage rights to the station, but rather only allows carriage of the station via retransmission consent.<sup>112</sup> Thus, maintaining the status quo with respect to eligibility for significantly viewed carriage presents no mandatory carriage burdens on MVPDs.<sup>113</sup> We also conclude that expansion of eligibility for significantly viewed carriage due to the relocation of the ATSC 1.0 simulcast signal would not be consistent with the purpose of local simulcasting, which is intended to serve the goal of maintaining existing television service to viewers within the station's original coverage area, not expanding service into new areas.

37. Although our approach here differs from how we addressed this issue in the channel sharing context, we find that it is appropriate to treat significantly viewed status differently in these two contexts. In the *Incentive Auction Report and Order*, the Commission found that because significantly viewed status is largely a function of signal availability, a station moving to a new channel should lose its status at the relinquished location.<sup>114</sup> But unlike in the channel sharing context, Next Gen TV broadcasters are not relinquishing their original channel. While they are relocating their ATSC 1.0 signal to a simulcast partner, they will continue to operate on their existing channel in ATSC 3.0 and will ultimately return to operating solely on their existing channel when the local simulcasting period ends. Moreover, a Next Gen TV broadcaster will continue to reach the communities or counties in which it is significantly viewed with an ATSC 3.0 over-the-air signal during the period in which it is simulcasting.

#### IV. ORDER ON RECONSIDERATION

38. In this Order on Reconsideration, we dismiss and, on alternative and independent grounds, deny the NCTA and ATVA petitions for reconsideration.<sup>115</sup> NCTA and ATVA seek

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during the ATSC 3.0 transition.”); Pearl Comments at 4 (“Any change made during this period that may impact a station’s significantly viewed status would be temporary, and the Commission should not make changes to the significantly viewed list based on purely temporary changes.”); NAB Comments at 2-3.

<sup>110</sup> See *Next Gen TV Report and Order*, 32 FCC Rcd at 9938, para. 14 (“The Commission intends that the local simulcasting requirement be temporary.”).

<sup>111</sup> See ATVA Comments at 12 (“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.”).

<sup>112</sup> See, e.g., 47 U.S.C. § 340(d).

<sup>113</sup> We recognize that broadcasters would not soon be able to demonstrate “significant viewing” (see 47 CFR §§ 76.5(i), 76.54(b)) with their 3.0 signals, but expect they will eventually be able to do so once Next Gen TV service takes hold in the marketplace.

<sup>114</sup> *Incentive Auction R&O*, 29 FCC Rcd at 6860, para. 711.

<sup>115</sup> Pursuant to Commission policy, petitions for reconsideration are not to be used merely to reargue points previously advanced and rejected. See *M&M Communications, Inc.*, Memorandum Opinion and Order, 2 FCC Rcd 5100, para. 7 (1987). See also 47 CFR § 1.429(l)(3) (providing for dismissal of a petition for reconsideration that plainly does not warrant consideration by the Commission, for example, “if the petition rel[ies] on arguments that have been fully considered and rejected by the Commission within the same proceeding”); *Connect America Fund*, WC Docket No. 10-90, Sixth Order on Reconsideration and Memorandum Opinion and Order, 28 FCC Rcd 2572, 2573, para. 3 (2013) (*Connect America Fund*). Rather, the Commission may grant a petition for reconsideration that relies on arguments previously raised, provided the petitioner demonstrates “material error or omission in the

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reconsideration of various aspects of the local simulcasting rules, as well as the Commission's decisions concerning voluntary carriage of ATSC 3.0 signals through retransmission consent, patent licensing, and the sunset of the A/322 standard.<sup>116</sup> All of the requests raised in the petitions have been considered and rejected already by the Commission in the underlying order.<sup>117</sup> As discussed below, the NCTA and ATVA petitions repeat issues that commenters, including NCTA and ATVA, raised earlier in the proceeding, and that we fully considered and rejected in the *Next Gen TV Report and Order*. Further, we disagree that these petitions raise any errors or omissions that warrant reconsideration.<sup>118</sup>

#### A. Retention of Sunset Dates

##### 1. Sunset of "Substantially Similar" Requirement

39. We dismiss and, on alternative and independent grounds, deny NCTA's request to reconsider the five-year sunset of the "substantially similar" requirement. While we retain the July 17,

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original order." *Amendment of Section 73.3555(e) of the Commission's Rules, National Television Multiple Ownership Rule*, Order on Reconsideration, 32 FCC Rcd 3390, 3396-97, para. 16 (2017). Petitioners may also seek reconsideration by raising "additional facts not known or not existing until after the petitioner's last opportunity to respond." *Id.* Pursuant to section 1.429(b) of the Commission's rules, a petition for reconsideration that relies on facts or arguments not previously presented to the Commission will be granted only under the following circumstances: (1) the facts or arguments relied on relate to events that have occurred or circumstances that have changed since the last opportunity to present such matters to the Commission; (2) the facts or arguments relied on were unknown to petitioner until after his last opportunity to present them to the Commission, and the petitioner could not through the exercise of ordinary diligence have learned of the facts or arguments in question prior to such opportunity; or (3) the Commission determines that consideration of the facts or arguments relied on is required in the public interest. 47 CFR § 1.429(b).

<sup>116</sup> Specifically, ATVA seeks reconsideration of three issues, including: (1) the Commission's rejection of ATVA's proposal to require separate negotiations for first-time carriage of ATSC 3.0 signals (ATVA Petition at 3); (2) the Commission's exemption from the simulcasting requirement for low power and TV translator stations (*Id.* at 5); and (3) the Commission's decision not to require stations to provide prior notice to viewers and MVPDs before changing their signal formats on their ATSC 1.0 simulcasts (*Id.* at 8). NCTA seeks reconsideration of five issues, including: (1) the Commission's decision to sunset after five years the "substantially similar" requirement (NCTA Petition at 3); (2) the Commission's decision to sunset after five years the requirement that a Next Gen TV broadcaster's primary video programming stream adheres to the ATSC A/322 standard (*Id.* at 6, note 14); (3) the Commission's decision not to require Next Gen TV broadcasters to simulcast ATSC 1.0 signals in high definition (HD) format to the extent they are currently broadcasting such signals in HD (*Id.* at 7); (4) the Commission's decision not to prohibit broadcasters from using retransmission consent negotiations to obtain carriage of their ATSC 3.0 signals by withholding the ATSC 1.0 signal (*Id.* at 8); and (5) the Commission's decision not to require that patents relevant to the ATSC 3.0 standard must be licensed on a reasonable and non-discriminatory (RAND) basis (*Id.* at 10).

<sup>117</sup> See *Next Gen TV Report and Order*, 32 FCC Rcd at 9942-43, para. 22, n.77 (substantially similar sunset decision); at 9944-45, paras. 27-28, n.87 (HD format decisions); at 9950-53, paras. 40-45 (LPTV/TV translator exemption decision); at 9969-70, paras. 77-78 (retransmission consent decisions); at 9981, n.300 (patent licensing decision); at 9980-81, paras. 100-101 (A/322 standard sunset decision). See also, e.g., NAB Opposition at 1 (arguing that the Petitions merely repeat arguments the Commission has already thoroughly considered and rejected based on an ample record); Pearl TV Opposition at 2-3 (same); ONE Media Opposition at 1 (same).

<sup>118</sup> As discussed *supra* at note 115, the Bureau has the authority to dismiss petitions for reconsideration that "fail to identify any material error, omission, or reason warranting reconsideration," or which "rely on arguments that have been fully considered and rejected by the Commission within the same proceeding." *Amendment of Certain of the Commission's Part 1 Rules of Practice and Procedure and Part 0 Rules of Commission Organization*, Report and Order, 26 FCC Rcd 1594 (2011); 47 CFR § 1.429(l)(3). Because we also address the petitions on the merits, we have no occasion to rely on that delegation of authority here.

2023 sunset date for this rule, approximately one year before the requirement is set to expire, we will seek comment on whether it should be extended based on marketplace conditions at that time.<sup>119</sup>

40. In the *Next Gen TV Report and Order*, the Commission required that the programming aired on a Next Gen TV station's ATSC 1.0 simulcast channel be "substantially similar" to that of the primary video programming stream on the ATSC 3.0 channel.<sup>120</sup> As the Commission explained, the programming must be the same, except for programming features that are based on the enhanced capabilities of ATSC 3.0, advertisements, and promotions for upcoming programs. The Commission stated that this approach "will help ensure that viewers do not lose access to the broadcast programming they receive today, while still providing flexibility for broadcasters to innovate and experiment with new, innovative programming features using Next Gen TV technology."<sup>121</sup> The Commission decided, however, that the substantially similar requirement would sunset five years from its effective date absent further action by the Commission to extend it. In this regard, the Commission concluded that, while "[substantially similar] requirement is necessary in the early stages of ATSC 3.0 deployment, it could unnecessarily impede Next Gen TV programming innovations as the deployment of ATSC 3.0 progresses."<sup>122</sup> The Commission further stated that it "intend[ed] to monitor the ATSC 3.0 marketplace," and would "extend the substantially similar requirement if necessary."<sup>123</sup> The substantially similar rule took effect July 17, 2018, so it will expire on July 17, 2023, unless extended by the Commission.<sup>124</sup>

41. In its petition, NCTA repeats its and other commenters' earlier opposition in this proceeding to an automatic sunset of the substantially similar requirement.<sup>125</sup> NCTA contends that the Commission's decision to sunset the substantially similar requirement was "arbitrary" and "has no basis in the record."<sup>126</sup> NCTA further asserts that, "[g]iven the current state of the marketplace, the rational

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<sup>119</sup> We note that, while the Commission stated that the "substantially similar" requirement would expire five years after its effective date, the Commission had inadvertently omitted to codify the sunset date in the rule. *Compare Next Gen TV Report and Order*, 32 FCC Rcd at 9942-43, para. 22 with 47 CFR §§ 73.3801(b)(1), 73.6029(b)(1), 74.782(b)(1). We take this opportunity to correct this oversight and amend our rules to reflect the sunset date. *See* Appendix B (amendments to 47 CFR §§ 73.3801(b)(1), 73.6029(b)(1), and 74.782(b)(1)).

<sup>120</sup> *Next Gen TV Report and Order*, 32 FCC Rcd at 9942-43, para. 22.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> The local simulcasting rules, sections 73.3801, 73.6029, and 74.782, took effect on July 17, 2018. *Next Gen TV Rules Receive OMB Approval*, GN Docket No. 16-142, Public Notice, 33 FCC Rcd 6747 (MB 2018).

<sup>125</sup> *Next Gen TV Report and Order*, 32 FCC Rcd at 9942-43, para. 22, n.77. *See also* Letter from Rick Chessen, Senior Vice President, NCTA to Marlene H. Dortch, Secretary, FCC, GN Docket No. 16-142, at 3 (filed Nov. 8, 2017) (urging that "the Commission require robust simulcasting requirements during the transition period – requirements that should not at this time have any arbitrary expiration date and should be maintained until the Commission affirmatively determines in a future proceeding that they should be lifted").

<sup>126</sup> NCTA Petition at 5. NCTA claims in its reply to oppositions that "the Commission did not seek comment on the notion that the [substantially similar] requirement would sunset five years after its adoption." NCTA Reply to Opposition at 2. In the *Next Gen TV NPRM*, the Commission sought comment on whether "a 'simulcast' means a stream with identical content to the video programming aired on the originating station's primary ATSC 3.0 stream" and further asked "[i]f the simulcast content will not be identical to the originating station's primary video programming stream, ... explain the reasons for any deviations in content and/or format (*i.e.*, high definition (HD) versus SD) and the impact of such deviations on television viewers and the regulatory implications." *Authorizing Permissive Use of the "Next Generation" Broadcast Television Standard*, GN Docket No. 16-142, Notice of Proposed Rulemaking, 32 FCC Rcd 1670, 1676-77, para. 11 (2017) (*Next Gen TV NPRM*). In response, broadcasters opposed an identical content requirement. *See, e.g.*, NAB Comments (dated May 9, 2017) at 5. Persuaded by broadcasters' comments, the Commission opted against an identical content requirement and instead established the "substantially similar" requirement and determined that such requirement appeared necessary only in (continued....)

policy would be for the Commission to monitor the roll-out of ATSC 3.0 and maintain the substantially similar requirement until the use of ATSC 3.0 is further along” before “determin[ing] the appropriate sunset.”<sup>127</sup>

42. The Commission fully considered this issue in the *Next Gen TV Report and Order* and decided to establish a sunset for the substantially similar requirement.<sup>128</sup> Because NCTA repeats arguments that have already been considered, we dismiss NCTA’s Petition on this issue.<sup>129</sup> On alternative and independent grounds, we deny NCTA’s Petition on this issue because we disagree that the Commission erred. We continue to believe a sunset date is appropriate and, thus, affirm the decision in the *Next Gen TV Report and Order*. We reject NCTA’s request that we should either delay establishing a sunset for the substantially similar requirement or retain it indefinitely.<sup>130</sup> As explained in the *Next Gen TV Report and Order*, without an expiration date, this rule could become stale and impede the very Next Gen TV programming innovations that we seek to promote by authorizing the deployment of ATSC 3.0.<sup>131</sup> In any event, we note that only the “substantially similar” requirement will expire and not the requirement to broadcast in 1.0, so viewers will not lose access to ATSC 1.0 signals. Thus, contrary to NCTA’s suggestion,<sup>132</sup> consumers will not need to invest in 3.0 technology before they are ready. We also agree with Pearl TV that broadcasters understand their communities and have strong market incentives to be responsive to their needs, both to those viewers seeking the enhancements of ATSC 3.0 service and those choosing to continue watching in ATSC 1.0 format.<sup>133</sup> Therefore, we expect broadcasters will use any additional flexibility resulting from the rule’s eventual sunset to offer innovative programming on their ATSC 3.0 signals, rather than to “diminish[] the quality of the content on their ATSC 1.0 simulcast signal,” as NCTA fears.<sup>134</sup>

43. While we acknowledge that there have been limited marketplace developments since the *Next Gen TV Report and Order* was released in November 2017,<sup>135</sup> given the dynamic nature of the broadcast and consumer electronics industries, we find a better approach is to defer a decision regarding any extension until the year prior to the current sunset. We find this approach to be particularly sound given that it accounts for unanticipated events, such as the novel coronavirus (COVID-19), whose impact

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the early stages of ATSC 3.0 deployment. We find that the NPRM provided adequate notice that the Commission was considering whether (or not) to require identical content and the length of time any such requirement might be necessary.

<sup>127</sup> NCTA Reply to Opposition at 2 (noting that “[i]nitial tests for ATSC 3.0 signals are just beginning and consumer equipment to receive ATSC 3.0 signals is not available”).

<sup>128</sup> *Next Gen TV Report and Order*, 32 FCC Rcd at 9943, para. 22.

<sup>129</sup> 47 C.F.R. § 1.429(l)(3) (providing for dismissal of petition for reconsideration when it “rel[ies] on arguments that have been fully considered and rejected by the Commission within the same proceeding”); *Connect America Fund*, 28 FCC Rcd at 2573, para. 3.

<sup>130</sup> NCTA Petition at 6 (“The Commission should establish this sunset date in the same proceeding that it has already committed to launch regarding when and whether to end the simulcast signal requirement. At that time, it can evaluate the many factors relevant to the continuing need for both requirements.”).

<sup>131</sup> *Next Gen TV Report and Order*, 32 FCC Rcd at 9942-43, para. 22.

<sup>132</sup> NCTA Petition at 5 (“The Report and Order offers no reason to expect that consumers, who have just purchased new ATSC 1.0 television sets by the tens of millions, will be ready to make the investments necessary to acquire ATSC 3.0-ready equipment in such a short amount of time.”).

<sup>133</sup> Pearl TV Opposition at 4-5.

<sup>134</sup> NCTA Petition at 4.

<sup>135</sup> See Letter from Rick Chessen, Senior Vice President, NCTA, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 16-142, at 1 (filed Oct. 25, 2019).

we are unable to discern at this time. We note, prior to the recent pandemic, the industry expected that many stations would begin broadcasting in ATSC 3.0 this year.<sup>136</sup> According to NAB and Pearl TV, broadcasters intended to launch ATSC 3.0 service in 61 markets in 2020.<sup>137</sup> It is not clear whether these plans remain intact.<sup>138</sup> Moreover, although consumer reception equipment is not currently commercially available, the industry has represented that such equipment will be available to consumers in the fourth quarter of this year.<sup>139</sup> Again, we do not know whether this target holds true today. Thus, we will continue to monitor the ATSC 3.0 marketplace and, when we get closer to the sunset date, we will initiate a proceeding to determine whether it is necessary to extend the substantially similar requirement.<sup>140</sup>

## 2. ATSC A/322 Standard Sunset

44. We dismiss and, on alternative and independent grounds, deny NCTA's request to reconsider the five-year sunset of the requirement that broadcasters' primary free over-the-air Next Gen TV video programming streams adhere to the ATSC A/322 standard.<sup>141</sup> While we retain the March 6, 2023, sunset for this rule, approximately one year before the rule is set to expire we will seek comment on whether it should be extended based on marketplace conditions at that time.<sup>142</sup>

45. In the *Next Gen TV Report and Order*, the Commission incorporated two parts of the ATSC 3.0 "physical layer" standard into the rules: (1) ATSC A/321:2016 "System Discovery & Signaling" (A/321), which is the standard used to communicate the RF signal type that the ATSC 3.0 signal will use, and (2) A/322:2017 "Physical Layer Protocol" (A/322), which is the standard that defines the waveforms that ATSC 3.0 signals may take. With respect to the A/322 standard, the Commission applied the standard only to a Next Gen TV station's primary free over-the-air video programming stream and incorporated it by reference into the rules for a period of five years, unless the Commission extends the requirement via rulemaking.<sup>143</sup> The Commission decided that it was not appropriate at the time "to require broadcasters to adhere to A/322 indefinitely," explaining that "the ATSC 3.0 standard could

<sup>136</sup> See Letter from Patrick McFadden, Associate General Counsel, NAB, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 16-142, at 1 (Jan. 27, 2020); Letter from Gerard J. Waldron, Counsel to Pearl TV, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 16-142, at 1-2 (filed Sept. 9, 2019).

<sup>137</sup> See *id.*

<sup>138</sup> That is, we do not know the extent to which the pandemic has affected broadcasters' plans for ATSC 3.0 deployment.

<sup>139</sup> See Letter from Patrick McFadden, Associate General Counsel, NAB, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 16-142, at 1 (Jan. 27, 2020); Letter from Gerard J. Waldron, Counsel to Pearl TV, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 16-142, at 1-2 (filed Sept. 9, 2019).

<sup>140</sup> See *Next Gen TV Report and Order*, 32 FCC Rcd at 9942-43, para. 22.

<sup>141</sup> NCTA contends in its petition that the Commission's requirement to comply with the A/322 standard "arbitrarily lifts ... after five years." NCTA Petition at 6, note 14. See also Letter from Rick Chessen, Senior Vice President, NCTA, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 16-142, at 1 (filed Oct. 25, 2019) (stating that "NCTA reiterated that the Commission should revisit the arbitrary five-year nationwide sunset of the 'substantially similar' requirement for simulcast ATSC 1.0 signals, as well as the required use of the A/322 standard"). Moreover, NCTA's argument that there have been limited marketplace developments since 2017 applies equally to the A/322 standard sunset.

<sup>142</sup> The amendments to 47 CFR § 73.682(f), including the incorporation of the A/322 standard, took effect on March 5, 2018, *i.e.*, 30 days after the rule's publication in the Federal Register. See *Media Bureau Announces Next Gen TV Order Published in Federal Register*, GN Docket No. 16-142, Public Notice, 33 FCC Rcd 113 (MB 2018); *Next Gen TV Report and Order*, 32 FCC Rcd at 9980-81, para. 100. We note that the rule incorrectly reflects a sunset date of February 2, 2023, instead of March 6, 2023, which date is five years from the effective date of the rule (pushed to the next business day). We take this opportunity to correct this mistake and amend 47 CFR § 73.682(f) of the rules to reflect the true sunset date. See Appendix B (amendment to 47 CFR § 73.682(f)).

<sup>143</sup> See *Next Gen TV Report and Order*, 32 FCC Rcd at 9978, 9979-81, paras. 95, 98, 101.

evolve, and stagnant Commission rules could prevent broadcasters from taking advantage of that evolution.”<sup>144</sup> In establishing a sunset for A/322 compliance, the Commission sought to “balance [its] goals of protecting consumers while promoting innovation.”<sup>145</sup>

46. In its petition, NCTA repeats its and other commenters’ earlier argument that we should incorporate the A/322 standard into our rules without a sunset date.<sup>146</sup> NCTA claimed that the Commission’s decision to sunset compliance with the A/322 standard was arbitrary.<sup>147</sup> NCTA restated the Commission’s recognition that “device manufacturers and MVPDs may not be able to reliably predict what signal modulation a broadcast is using unless broadcasters are required to follow A/322”<sup>148</sup> and asserted that the Commission “offer[ed] no compelling reason to believe that the need for that certainty will vanish in 2023.”<sup>149</sup>

47. The Commission fully considered this issue in the *Next Gen TV Report and Order* and decided to require compliance with the A/322 standard only for a transitional period, after which the requirement will sunset absent Commission action to extend it.<sup>150</sup> Because NCTA repeats arguments that have already been considered, we dismiss NCTA’s Petition on this issue.<sup>151</sup> On alternative and independent grounds, we deny NCTA’s Petition on this issue because we disagree that the Commission erred. Thus, we affirm the decision in the *Next Gen TV Report and Order*. We reject NCTA’s claim that the Commission’s decision to sunset compliance with the A/322 standard was arbitrary. In establishing a sunset for A/322 compliance, the Commission sought to balance the competing goals raised in the record of providing certainty to device manufacturers, MVPDs, and consumers while promoting broadcaster innovation.<sup>152</sup> The Commission determined five years struck the right balance at the time to ensure stations had “a reasonable opportunity to implement Next Gen TV broadcasting” before the A/322 requirement sunsets.<sup>153</sup> We expect that once broadcasters begin to implement the ATSC 3.0 standard in compliance with A/322, it will establish a measure of certainty for device manufacturers and MVPDs. Although device manufacturers, MVPDs, and consumers may want continued certainty, we think at some point the rule must sunset to allow for broadcast innovation outside of the A/322 standard. Even when the rule sunsets, as a practical matter, broadcasters will have to coordinate with device manufacturers and MVPDs if they want to deviate from A/322 to ensure their broadcasts can be received and viewed on devices and MVPD systems. We also note that broadcasters have no incentive to change their

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<sup>144</sup> *Id.* at 9980, para. 100.

<sup>145</sup> *Id.* at 9979-80, para. 98 (concluding that “requiring Next Gen TV broadcasters to adhere to A/322 for an appropriate transitional period, and only on their primary video programming stream, appropriately addresses the concerns raised in the record and will best serve the public interest”).

<sup>146</sup> *See, e.g.*, NCTA Comments to NPRM at 15 (dated May 9, 2017); LG Reply Comments to NPRM at 8 (dated June 8, 2017).

<sup>147</sup> NCTA Petition at 6, note 14.

<sup>148</sup> *See Next Gen TV Report and Order*, 32 FCC Rcd at 9980, para. 99.

<sup>149</sup> NCTA Petition at 6, note 14.

<sup>150</sup> *Next Gen TV Report and Order*, 32 FCC Rcd at 9980-81, para. 100.

<sup>151</sup> 47 CFR § 1.429(l)(3) (providing for dismissal of petition for reconsideration when it “rel[ies] on arguments that have been fully considered and rejected by the Commission within the same proceeding”); *Connect America Fund*, 28 FCC Rcd at 2573, para. 3.

<sup>152</sup> *See Next Gen TV Report and Order*, 32 FCC Rcd at 9980-81, paras. 100-101. The *Next Gen TV Report and Order* explained the Commission’s intent to “establish a period of certainty for manufacturers, MVPDs, and consumers that will prevent broadcasting standards from splintering and will speed the overall adoption of ATSC 3.0.” *Id.* at 9981, para. 101.

<sup>153</sup> *Id.*



implementation of ATSC 3.0 in a way that would render existing consumer equipment obsolete. Finally, consistent with our decision above concerning the “substantially similar” sunset, we will wait to consider the state of the marketplace a year before the rule sunsets to determine whether there is any need to extend it.

#### **B. High Definition (HD) Service and Notice to Viewers**

48. We dismiss and, on alternative and independent grounds, deny NCTA’s request to require broadcasters to simulcast ATSC 1.0 signals in high definition (HD) format to the extent they are currently broadcasting such signals in HD.<sup>154</sup> We also dismiss and, on alternative and independent grounds, deny ATVA’s request to require a station to provide prior notice to viewers and MVPDs before changing its signal format or picture quality.<sup>155</sup>

49. In its petition, NCTA repeats its earlier request in this proceeding to require Next Gen TV broadcasters that are currently broadcasting in HD to continue to provide HD service on 1.0 simulcast signals.<sup>156</sup> NCTA asserts that the Commission erred in not doing so and by instead relying on broadcasters’ marketplace incentives.<sup>157</sup> Specifically, NCTA contends that the Commission’s acknowledgement in the *Next Gen TV Report and Order* that “stations may have less capacity for HD programming” because of local simulcasting partnerships “undermines [the Commission’s] conclusion that a rule is unnecessary because broadcasters have ‘market-based incentives’ to continue to provide HD programming on the ATSC 1.0 signal.”<sup>158</sup> NCTA further contends that the *Next Gen TV Report and Order* “does not acknowledge the harms to consumers identified in [NCTA’s] comments, much less explain why they are outweighed by a broadcaster’s voluntary experimentation with ATSC 3.0.”<sup>159</sup>

50. The Commission fully considered this issue in the *Next Gen TV Report and Order* and decided not to require Next Gen TV broadcasters that are currently broadcasting in HD to continue to

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<sup>154</sup> NCTA Petition 7-8. In the *Next Gen TV Report and Order*, the Commission declined to adopt a new rule requiring broadcasters to simulcast ATSC 1.0 signals in HD format. *Next Gen TV Report and Order*, 32 FCC Rcd at 9944-45, paras. 27-28. The Commission observed that, when commencing ATSC 3.0 service, “broadcasters may face spectrum constraints that could limit their ability to continue to provide HD programming or other enhanced formats on their 1.0 simulcast signals.” *Id.* at 9944, para. 27. The Commission recognized that “if broadcasters that currently transmit in HD switch to standard definition (SD) in order to deploy ATSC 3.0 service, consumers may not receive HD signals,” but decided to “rely on broadcasters’ market-based incentives” to provide HD service “rather than mandating a specific format for simulcast channels.” *Id.* Moreover, the Commission observed that “[o]ur existing rules do not require broadcasters to provide their signals in HD.” *Id.* at 9944, para. 27. For the same reasons, the Commission also declined to require broadcasters that choose to convert their ATSC 1.0 simulcast signal from HD to SD, or otherwise change the quality of the signal, to deliver a higher resolution signal to MVPDs. In addition, the Commission declined “to require stations to disclose any planned change in signal quality as part of their simulcasting application or to permit the Commission to review and approve such changes.” *Id.* at 9944, n.87. NCTA Petition 7-8.

<sup>155</sup> ATVA Petition at 8-9.

<sup>156</sup> See NCTA Reply Comments to NPRM at 7 (dated June 8, 2017).

<sup>157</sup> NCTA Petition at 7-8. NCTA states that “[b]ecause a high definition (HD) ATSC 1.0 signal consumes more bandwidth than a standard definition ATSC 1.0 signal, there is reason to fear that broadcasters launching an ATSC 3.0 signal will have strong incentives to degrade their over-the-air HD ATSC 1.0 signal so that more streams can be squeezed into another 6 MHz channel.” *Id.* at 7.

<sup>158</sup> NCTA Petition at 7, n.17 (quoting *Next Gen TV Report and Order*, 32 FCC Rcd at 9944, para. 27).

<sup>159</sup> *Id.* at 2-3. NCTA asserts that “if a broadcaster has voluntarily chosen to transmit its 1.0 signal in HD, it should not be allowed to downgrade that signal to SD at least in the initial phases of launching a 3.0 signal” because “[s]uch downgrading would deprive viewers of the programming to which they have become accustomed and would force them and MVPDs to incur costs to recapture the HD quality that they have come to expect.” NCTA Reply to Opposition at 3.

provide HD service on 1.0 simulcast signals.<sup>160</sup> Because NCTA repeats arguments that have already been considered, we dismiss NCTA's Petition on this issue.<sup>161</sup> On alternative and independent grounds, we deny NCTA's Petition on this issue because we disagree that the Commission erred. Thus, we affirm the decision in the *Next Gen TV Report and Order*. As explained in the *Next Gen TV Report and Order*, the Commission's existing rules do not require broadcasters to provide their signals in HD<sup>162</sup> and they can change format at any time.<sup>163</sup> We acknowledge that a broadcaster seeking to meet its community's demands for ATSC 3.0 service (including 4K or Ultra High Definition format) may choose to deploy ATSC 3.0 service, even if that means it will be able to air an ATSC 1.0 simulcast signal only in SD format. We also recognize that this may mean that consumers who want to continue to receive HD programming will need to purchase a 3.0 converter device.<sup>164</sup> However, we find such decisions would be a response to competitive marketplace conditions, not contrary to them. We agree with NAB that "broadcasters have strong market incentives to maintain HD service to the maximum extent possible."<sup>165</sup> Broadcasters that choose to deploy 3.0 service even though they will only be able to simulcast an ATSC 1.0 signal in SD will likely be doing so to meet consumer demands for 4K/UHD service and other enhancements, and we believe that broadcasters should have the flexibility to innovate and respond to marketplace demands.<sup>166</sup> We agree with broadcasters that mandating HD format for 1.0 simulcasts could hamper the deployment of 3.0 service to communities in which there is significant market demand for such service.<sup>167</sup> We thus decline to substitute our own judgment for that of local television stations that best know their communities' needs. Accordingly, we remain unpersuaded that new rules are needed to mandate HD service on simulcasts.

51. In its Petition, ATVA asks the Commission to reconsider its decision not to require stations to provide prior notice to viewers and MVPDs before changing their signal formats on their 1.0 simulcasts.<sup>168</sup> The Commission fully considered this issue in the *Next Gen TV Report and Order* and decided not to require stations to provide such notice.<sup>169</sup> Because ATVA repeats arguments that have

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<sup>160</sup> *Next Gen TV Report and Order*, 32 FCC Rcd at 9944-45, paras. 27-28.

<sup>161</sup> 47 C.F.R. § 1.429(l)(3) (providing for dismissal of petition for reconsideration when it "rel[ies] on arguments that have been fully considered and rejected by the Commission within the same proceeding"); *Connect America Fund*, 28 FCC Rcd at 2573, para. 3.

<sup>162</sup> *Next Gen TV Report and Order*, 32 FCC Rcd at 9944, para. 27.

<sup>163</sup> Although NCTA seeks the *status quo* for broadcasters currently broadcasting in HD, *see* NCTA Reply to Opposition at 3, the *status quo* includes the right to change format at any time.

<sup>164</sup> *Id.* at 3 ("Such downgrading [of format from HD to SD] would deprive viewers of the programming to which they have become accustomed and would force them and MVPDs to incur costs to recapture the HD quality that they have come to expect.").

<sup>165</sup> NAB Opposition at 3.

<sup>166</sup> As Pearl TV explains, "[l]ocal stations will consider the types of technology their viewers have and their viewers' appetite for various options as they weigh the trade-offs of different deployment approaches." Pearl TV Opposition at 4.

<sup>167</sup> *See, e.g.*, PTV Opposition at 3 ("[A]ny new ATSC 1.0 transmission requirement (for HD or multicast) would seriously jeopardize the voluntary adoption of ATSC 3.0 and its attendant public service benefits. Due to technical constraints, there is simply insufficient capacity for broadcasters to transmit all HD and multicast channels while sharing facilities, either on a shared ATSC 1.0 facility or a shared ATSC 3.0 facility."). *See also Next Gen TV Report and Order*, 32 FCC Rcd at 9944, n.90.

<sup>168</sup> We note that this issue was raised by another commenter in this proceeding. *See* Letter from Michael Calabrese, Director, Open Technology Institute, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 16-142, at 2 (dated Nov. 8, 2017).

<sup>169</sup> *See Next Gen TV Report and Order*, 32 FCC Rcd at 9944, n.87.

already been considered, we dismiss ATVA's Petition on this issue.<sup>170</sup> We also reject ATVA's argument that its request involves a new fact that justifies reconsideration.<sup>171</sup> ATVA contends that the Commission's decision not to require prior notice in this regard "constitutes a 'material fact' that was 'not known' to ATVA until the Order was released" because the draft order the Commission circulated a few weeks before it adopted the final Order would have required broadcasters to provide such notice.<sup>172</sup> We disagree. A draft order the Commission circulates before adopting a final order is not binding. We agree with NAB that "ATVA's suggestion that any changes from the draft to the final order serve as a basis for reconsideration would be an unworkable standard that would greatly burden the Commission and its staff."<sup>173</sup> Given that another commenter was able to make the argument in favor of a notice requirement for HD service,<sup>174</sup> we see no reason ATVA could not have done so as well.<sup>175</sup>

52. On alternative and independent grounds, we deny ATVA's Petition on this issue and affirm our findings on this issue in the *Next Gen TV Report and Order*.<sup>176</sup> As discussed in the *Next Gen TV Report and Order*,<sup>177</sup> broadcasters may have legitimate market incentives to deploy 3.0 service even though they will only be able to simulcast in SD. In these situations, viewers will continue to receive 1.0 service in SD, as is required by our rules,<sup>178</sup> so we see no need for notice requirements like those mandated for stations that relocate their ATSC 1.0 signals.<sup>179</sup> Instead, we will rely on broadcasters' market incentives to inform viewers how they can receive Next Gen TV service enhancements. To the extent MVPDs are concerned, there is nothing to prevent them from providing notice to their subscribers that a station's channel is no longer being provided in HD as a result of the broadcasters' decision to deploy 3.0 service.

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<sup>170</sup> 47 C.F.R. § 1.429(l)(3) (providing for dismissal of petition for reconsideration when it "rel[ies] on arguments that have been fully considered and rejected by the Commission within the same proceeding"); *Connect America Fund*, 28 FCC Rcd at 2573, para. 3.

<sup>171</sup> ATVA Petition at 3 (citing *Amendment of Section 73.3555(e) of the Commission's Rules, National Television Multiple Ownership Rule*, Order on Reconsideration, 32 FCC Rcd 3390, 3396-97, para. 16 (2017) ("Commission precedent establishes that reconsideration is generally appropriate where the petitioner . . . raises additional facts not known or not existing until after the petitioner's last opportunity to respond.")).

<sup>172</sup> ATVA Petition at 3.

<sup>173</sup> NAB Opposition at 4.

<sup>174</sup> See Letter from Michael Calabrese, Director, Open Technology Institute, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 16-142, at 2 (dated Nov. 8, 2017).

<sup>175</sup> See *Next Gen TV Report and Order*, 32 FCC Rcd at 9944, n.87.

<sup>176</sup> *Id.*

<sup>177</sup> *Next Gen TV Report and Order*, 32 FCC Rcd at 9944, para. 27 (recognizing that "broadcasters may face spectrum constraints that could limit their ability to continue to provide HD programming or other enhanced formats on their 1.0 simulcast signals").

<sup>178</sup> See 47 CFR § 73.624(b).

<sup>179</sup> *Next Gen TV Report and Order*, 32 FCC Rcd at 9975, para. 87. We note that there is nothing in our rules that prohibits stations changing their signal format without notice. Indeed, ATVA concedes as much. See ATVA Opposition at 9 ("At least in theory, a broadcaster could switch from high definition to standard definition today without telling anybody—and no Commission rule would prevent it."). ATVA contends that the ATSC 3.0 transition represents a special case in which broadcasters may have an incentive to degrade their signals. *Id.* We are not persuaded and see no reliable record evidence to suggest that broadcasters are likely to change signal formats in the manner that ATVA suggests.

### C. LPTV/Translator Exemption

53. We dismiss and, on alternative and independent grounds deny, ATVA's request that the Commission reconsider its decision in the *Next Gen TV Report and Order* to exempt LPTV and TV translator (LPTV/translator) stations from the local simulcasting requirement.<sup>180</sup>

54. In its Petition, ATVA repeats its earlier opposition to permitting LPTV/translator stations to transition directly to ATSC 3.0<sup>181</sup> and contends that this decision constituted "material error."<sup>182</sup> The Commission fully considered this issue in the *Next Gen TV Report and Order* and, based on the record, decided to exempt such stations from the local simulcasting requirement.<sup>183</sup> Because ATVA repeats arguments that have already been considered, we dismiss ATVA's Petition on this issue.<sup>184</sup> On alternative and independent grounds, we deny ATVA's Petition on this issue because we disagree that the Commission erred in this regard and affirm the decision in the *Next Gen TV Report and Order*. In addition, we reject ATVA's contention that the Commission should adopt a waiver approach for LPTV/translator stations instead of maintaining a blanket exemption.<sup>185</sup> We continue to believe that a class-based exemption from the simulcast requirement for LPTV/translator stations is more appropriate in this situation than the waiver approach suggested by ATVA. As ATVA concedes, a waiver process for LPTV/translator stations would be an inefficient and burdensome means of providing widespread relief to LPTV/translator stations.<sup>186</sup> Such a process would slow deployment of 3.0 service to the public, and, ultimately, is unnecessary because we can rely on market incentives to protect viewers against significant LPTV/translator service loss.

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<sup>180</sup> ATVA Petition at 5-8. *See also*, e.g., Alliance Comments at 2; ESI Comments at 9; HC2 Comments at 10; NAB Comments at 4-5. In the *Next Gen TV Report and Order*, the Commission explained that LPTV/translator stations would face unique challenges in finding a simulcast partner, in particular, "because of their lower power and coverage area" and also because of their secondary service status. *Next Gen TV Report and Order*, 32 FCC Rcd at 9950, para. 41. Although the Commission recognized that permitting LPTV/translator stations to transition directly may cause some consumer disruption, in light of the unique circumstances faced by LPTV/translator stations, the Commission concluded that "providing these stations with the option to transition directly will best ensure that they are able to deploy ATSC 3.0 technology." *Id.* at 9951, para. 42. The Commission also stated that exempting LPTV/translator stations "will have the added benefit of allowing these stations to serve as 'lighthouse' stations, thereby providing an ATSC 3.0 host option for other full power, Class A, LPTV, and TV translator stations that wish to partner with them." *Id.* at 9951, para. 43. The Commission reasoned that LPTV stations could "serve an important role in market-wide simulcast arrangements by permitting other stations to experiment with 3.0 service while maintaining ATSC 1.0 service on their existing facility." *Id.* *See also* HC2 Opposition at 9. Finally, the Commission concluded that an exemption would ensure that analog LPTV/translator stations and stations that have been displaced due to the post-incentive auction repacking process are not forced to build both an ATSC 1.0 and an ATSC 3.0 facility. *Next Gen TV Report and Order*, 32 FCC Rcd at 9951, para. 44. ATVA Petition at 5-8. *See also*, e.g., Alliance Comments at 2; ESI Comments at 9; HC2 Comments at 10; NAB Comments at 4-5.

<sup>181</sup> ATVA Comments to NPRM at 44-45 (dated May 9, 2017).

<sup>182</sup> ATVA Reply to Oppositions at 2. ATVA argues that "allowing low power stations to flash-cut causes exactly the same harm as does allowing full power stations to flash cut – especially since a large and increasing number of stations maintain major-network affiliations." ATVA Petition at 5-6.

<sup>183</sup> *See* 47 CFR § 1.429(l)(3).

<sup>184</sup> 47 CFR § 1.429(l)(3) (providing for dismissal of petition for reconsideration when it "rel[ies] on arguments that have been fully considered and rejected by the Commission within the same proceeding"); *Connect America Fund*, 28 FCC Rcd at 2573, para. 3.

<sup>185</sup> ATVA Petition at 5-6.

<sup>186</sup> *See id.* at 7.

55. In any case, ATVA appears to be primarily concerned with precluding direct transitions by LPTV/translator stations that are affiliated with a Big-4 network (*i.e.*, ABC, CBS, FOX, NBC).<sup>187</sup> According to staff review of S&P data on February 19, 2020, only about 2.5 percent of LPTV stations are affiliated with a Big-4 network.<sup>188</sup> We agree with LPTV/translator commenters that requiring thousands of simulcast waiver requests because of a limited number of Big-4 affiliated LPTV/translator stations that might choose to transition directly to ATSC 3.0 would be inefficient and unnecessarily burdensome for both LPTV/translator stations as a whole and Commission staff who would need to process potentially thousands of such requests.<sup>189</sup> Moreover, even if some of these Big-4 network affiliated stations have greater viewership and resources than unaffiliated LPTV/translator stations, it still would be the exception rather than the rule that an LPTV/translator station would both be able to find a suitable simulcast partner and to afford simulcasting.<sup>190</sup> We agree with LPTV/translator commenters that LPTV/translator stations affiliated with a Big-4 network will have strong market incentives to maintain 1.0 service because of their reliance on advertising revenues.<sup>191</sup> Consequently, we agree with the LPTV/translator groups that “[o]ut of necessity these few LPTV/translator stations [affiliated with top four networks] will simulcast voluntarily if and when they transition to ATSC 3.0,”<sup>192</sup> a consideration that lends further support to our prior conclusion that a class-based exemption for LPTV/translator stations is more appropriate than a waiver process.

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<sup>187</sup> ATVA acknowledges that a waiver process would “increase costs and burdens on low power broadcasters at least to some extent” and therefore states that it would “not object to reasonable steps to relieve such burdens for LPTV/translator stations unaffiliated with a Big Four network, such as presumptions in favor of waivers in certain cases, shot-clocks, and paperwork simplification.” ATVA Petition at 7-8. We note that ATVA previously argued in its reply comments and an *ex parte* to the *Next Gen TV NPRM* that it took “no position” on whether the simulcast requirement should apply to an LPTV/translator or Class A TV station, if such station “is not carried by any MVPD, is not required to be carried by any MVPD under the must-carry statute, and remains unaffiliated with any network.” See Letter from Michael Nilsson, Counsel to the ATVA, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 16-142, at 12-13 (filed Sept. 21, 2017) (ATVA Sept. 21, 2017 *Ex Parte* Letter); ATVA Reply Comments to NPRM (dated June 8, 2017) at 6, n.27.

<sup>188</sup> According to staff review of S&P data on February 19, 2020, about 46 of the 1,892 LPTV stations are affiliated with a Big-4 network. See S&P Global Market Intelligence - Broadcast Station Database; FCC News Release, Broadcast Station Totals as of December 31, 2019 (rel. Jan. 3, 2020). We note that this data is consistent with the data provided by ATVA, which stated, based on its review of 2017 SNL Kagan data, that about 55 LPTV and Class A stations were affiliated with a Big-4 network in September 2017. See Letter from Michael Nilsson, Counsel to the ATVA, to Marlene Dortch, Secretary, FCC, at 2 (filed Sept. 29, 2017) (cited in ATVA Petition at 6, n.19). (As we do not exempt Class A stations, we did not include the 14 of 387 Class A stations affiliated with a Big-4 network in our total.) We note that the *Next Gen TV Report and Order* incorrectly indicated that there were 258 LPTV stations in September 2017. *Next Gen TV Report and Order*, 32 FCC Rcd at 9952, n.131. In fact, there were 1,964 LPTV stations in September 2017. See FCC News Release, Broadcast Station Totals as of September 30, 2017 (rel. Oct. 2, 2020).

<sup>189</sup> Alliance Opposition at 4. See also ESI Opposition at 4 (“Requiring thousands of simulcast waiver petitions for LPTV to address the circumstances of a small percent of them would be non-sensical, particularly when free market forces are as strong as they are here.”).

<sup>190</sup> See *supra* paras. 49-50; *Next Gen TV Report and Order*, 32 FCC Rcd at 9950, para. 41. This is because LPTV/translator stations generally serve rural, remote, and isolated areas that are not served by other stations. Indeed, as PTV points out, such is the nature and purpose of TV translators. PTV Opposition at 3-4 (“Because of their regulatory purpose and nature (TV translators are used to retransmit service to areas which do not receive direct reception of television stations because of distance or terrain), virtually all TV translators face unique challenges with simulcasting and locating a simulcasting partner.”).

<sup>191</sup> See, e.g., Alliance Opposition at 4.

<sup>192</sup> *Id.*

56. Finally, we also agree with LPTV/translator commenters that LPTV/translator stations would better serve their role as initial 3.0 hosts for full power stations if they were immediately available through an exemption, rather than having to request a waiver prior to becoming available to serve as 3.0 hosts.<sup>193</sup> Indeed, Alliance points out that the costs and uncertainty of a waiver process would not only slow 3.0 deployment, but also potentially dissuade LPTV/translator stations from seeking such relief.<sup>194</sup>

#### D. Retransmission Consent Issues

57. We dismiss and, on alternative and independent grounds deny, the requests by ATVA and NCTA to adopt new rules related to the voluntary carriage of 3.0 signals through retransmission consent.<sup>195</sup> Specifically, ATVA repeats its request to require separate negotiations for first-time carriage of ATSC 3.0 signals, and NCTA repeats its request to prohibit broadcasters from using retransmission consent negotiations to obtain carriage of their ATSC 3.0 signals by withholding the ATSC 1.0 signal.<sup>196</sup>

58. ATVA and NCTA merely repeat their earlier concerns that Next Gen TV broadcasters could use the retransmission consent process to compel carriage of 3.0 signals before consumer demand and market circumstances warrant.<sup>197</sup> ATVA contends that it was a “material error” for the Commission not to require separate negotiations for first-time MVPD carriage of ATSC 3.0 signals.<sup>198</sup> NCTA contends that it “makes no sense” for the Commission to have concluded that it is premature to address any issues that may arise with respect to the voluntary carriage of ATSC 3.0 signals, saying MVPDs are at risk now of having to “prematurely invest in ATSC 3.0 technology.”<sup>199</sup> ATVA also disagrees with the Commission that it is premature to address such issues, citing some examples it previously provided in the proceeding where broadcasters have already begun to seek bundling arrangements in contract negotiations.<sup>200</sup>

59. The Commission fully considered this issue in the *Next Gen TV Report and Order* and declined to adopt new rules related to the voluntary carriage of 3.0 signals through retransmission

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<sup>193</sup> HC2 Opposition at 7. *See also* Pearl TV Opposition at 5 (stating that the LPTV exemption “will promote the deployment of ATSC 3.0 for all stations, because rather than limiting them from participating in ATSC 3.0 altogether, it instead makes them excellent candidates for early transition as so-called ‘lighthouse stations’”).

<sup>194</sup> Alliance Opposition at 4.

<sup>195</sup> In the *Next Gen TV Report and Order*, the Commission declined to adopt any new rules regarding retransmission consent in this proceeding. *Next Gen TV Report and Order*, 32 FCC Rcd at 9969-70, paras. 77-78. The Commission found that it was “premature to address any issues that may arise with respect to the voluntary carriage of ATSC 3.0 signals before broadcasters begin transmitting in this new voluntary standard” and concluding that retransmission consent issues should be addressed at the outset through marketplace negotiations. *Id.* at 9970, para. 78.

<sup>196</sup> ATVA Petition at 3-5; NCTA Petition at 8-10.

<sup>197</sup> *See Next Gen TV Report and Order*, 32 FCC Rcd at 9969, para. 77. *See also* ATVA Comments to NPRM at ii-iii (dated May 9, 2017); NCTA Reply Comments to NPRM at 13-14 (dated June 8, 2017).

<sup>198</sup> ATVA Reply to Oppositions at 2.

<sup>199</sup> NCTA Petition at 9-10 (“It is precisely at the earliest stages of the deployment of ATSC 3.0 – when the future of the new standard remains uncertain and the risk of prematurely investing in and deploying technology to receive and retransmit ATSC 3.0 signals is highest – that forced carriage of the new signal is most harmful and costly to MVPDs.”). NCTA cites as evidence concerns raised by WTA – Advocates for Rural Broadband (WTA), which observed that “some [of its] members are already seeing language that requires small MVPDs to retransmit ‘any ATSC compliant standard.’” NCTA Reply to Oppositions at 4 (citing Letter from Bill Durdach, Director of Government Affairs, WTA – Advocates for Rural Broadband, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 16-142, at 2 (dated Apr. 12, 2018).

<sup>200</sup> ATVA Petition at 4, n.12 (citing Letter from Michael Nilsson, Counsel to the ATVA, to Marlene Dortch, Secretary, FCC, at 2 (dated Oct. 25, 2017).

consent. We agree with NAB that “NCTA and ATVA offer nothing more in their petitions than a summary of their previous arguments.”<sup>201</sup> Because NCTA and ATVA repeat arguments that have already been considered, we dismiss their Petitions on this issue.<sup>202</sup> On alternative and independent grounds, we deny the NCTA and ATVA Petitions on this issue because we disagree that the Commission erred in this regard and affirm the decision in the *Next Gen TV Report and Order*. We continue to believe that it is premature to address any issues that may arise with respect to the voluntary carriage of ATSC 3.0 signals before broadcasters begin widespread transmission in this new voluntary standard. 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 this record for us to adopt rules of general applicability. To the extent a cable operator or satellite carrier believes that the Commission’s retransmission consent rules have been violated, they may file a complaint.

#### E. Patent Issue

60. We dismiss and, on alternative and independent grounds deny, NCTA’s request to reconsider the Commission’s decision in the *Next Gen TV Report and Order* not to require that patents relevant to the ATSC 3.0 standard must be licensed on a reasonable and non-discriminatory (RAND) basis.<sup>203</sup> The Commission fully considered this issue in the *Next Gen TV Report and Order* and rejected requests for such a requirement.<sup>204</sup> Because NCTA’s arguments have already been considered, we dismiss their Petitions on this issue.<sup>205</sup>

61. On alternative and independent grounds, we deny NCTA’s Petitions on this issue and affirm the decision in the *Next Gen TV Report and Order*. We disagree with NCTA’s contention that the Commission’s decision not to require RAND licensing for standards-essential patents is inconsistent with the Commission’s decision approving the current DTV standard, ATSC 1.0.<sup>206</sup> Although we do not believe that different approaches in the two contexts would necessarily be a cause for reconsideration, especially because ATSC 3.0 is voluntary at this time, we agree with NAB and ONE Media that the decision is consistent with the Commission’s decision in the DTV context.<sup>207</sup> In the order adopting the ATSC 1.0 standard for digital television broadcasting, the Commission stated that it did not believe that

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<sup>201</sup> NAB Opposition at 6.

<sup>202</sup> 47 CFR § 1.429(l)(3) (providing for dismissal of petition for reconsideration when it “rel[ies] on arguments that have been fully considered and rejected by the Commission within the same proceeding”); *Connect America Fund*, 28 FCC Rcd at 2573, para. 3.

<sup>203</sup> NCTA Petition 10-11. NCTA repeats its earlier request in this proceeding for the Commission to require RAND licensing. See NCTA Comments to NPRM at 23 (dated May 9, 2017).

<sup>204</sup> See 47 CFR § 1.429(l)(3). In the *Next Gen TV Report and Order*, the Commission observed that the ATSC, which set the ATSC 3.0 standard, “requires patent owners to disclose that they hold [relevant] patents and to commit to licensing them on fair, reasonable and non-discriminatory (‘RAND’) terms.” See *Next Gen TV Report and Order*, 32 FCC Rcd at 9981, n.300 (quoting Pearl TV Comments dated May 9, 2017 at 11). See also ATSC’s Patent Policy, Doc. B/04 at [https://www.atsc.org/wp-content/uploads/2018/02/B-4-2007-12-13\\_patent\\_policy\\_form\\_editable.pdf](https://www.atsc.org/wp-content/uploads/2018/02/B-4-2007-12-13_patent_policy_form_editable.pdf) (or alternatively at <https://www.atsc.org/policies/policy-documents/>). The Commission decided that “[w]ith no evidence of patent licensing issues, . . . it is premature to impose regulations on the private licensing marketplace.” See *Next Gen TV Report and Order*, 32 FCC Rcd at 9981, n.300. The *Next Gen TV Report and Order* also stated that the Commission will “monitor how the marketplace handles patent royalties for essential patents.” *Id.*

<sup>205</sup> 47 CFR § 1.429(l)(3) (providing for dismissal of petition for reconsideration when it “rel[ies] on arguments that have been fully considered and rejected by the Commission within the same proceeding”); *Connect America Fund*, 28 FCC Rcd at 2573, para. 3.

<sup>206</sup> NCTA Petition at 10-11.

<sup>207</sup> See NAB Opposition at 6-7; ONE Media Opposition at 6-7.

licensing of the patents for the ATSC standard would impede the development of DTV products.<sup>208</sup> The Commission also stated that the adoption of the standard was “premised” on “reasonable and non-discriminatory” licensing, but determined that Commission rules were not necessary.<sup>209</sup> The Commission emphasized that if a problem with patent licensing arises and is brought to the Commission’s attention, it would “consider it and take appropriate action.”<sup>210</sup> Similarly, in the *Next Gen TV Report and Order*, the Commission observed that the ATSC requires a commitment to RAND licensing and stated that it would “monitor how the marketplace handles patent royalties for essential patents.”<sup>211</sup> Thus, we find the two decisions are consistent.

## V. PROCEDURAL MATTERS

62. *Final Regulatory Flexibility Act Analysis.* As required by the Regulatory Flexibility Act of 1980 (RFA),<sup>212</sup> the Commission has prepared a Final Regulatory Flexibility Analysis (FRFA) addressing the actions taken in the Second Report and Order. The FRFA is attached as Appendix C. We note that this FRFA addresses only the matters considered in the Second Report and Order portion of the Second Report and Order and Order on Reconsideration. No FRFA is necessary for the Order on Reconsideration portion. The only rule revisions adopted in the Order on Reconsideration are made to accurately reflect the sunset dates adopted in the 2017 Order.<sup>213</sup> Because these rule changes are editorial and non-substantive, we find good cause to conclude that notice and comment are unnecessary for their adoption.<sup>214</sup> Because these revisions do not require notice and comment, the Regulatory Flexibility Act does not apply to these changes.<sup>215</sup> We also note that a FRFA adopting these sunset dates was included with the 2017 Order.<sup>216</sup>

63. *Final Paperwork Reduction Act Analysis.* This document does not contain new or modified information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA).<sup>217</sup> In addition, therefore, it does not contain any new or modified information collection burden for small business concerns with fewer than 25 employees, pursuant to the Small Business Paperwork Relief Act of 2002 (SBPRA).<sup>218</sup>

64. *Congressional Review Act.* The Commission has determined, and the Administrator of the Office of Information and Regulatory Affairs, Office of Management and Budget, concurs that this rule is “non-major” under the Congressional Review Act, 5 U.S.C. § 804(2). The Commission will send

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<sup>208</sup> *Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service*, MM Docket No. 87-268, Fourth Report and Order, 11 FCC Rcd 17771, 17794, paras. 54-55 (1996).

<sup>209</sup> *Id.*

<sup>210</sup> *Id.*

<sup>211</sup> *Id.* See NAB Opposition at 6-7.

<sup>212</sup> See 5 U.S.C. § 603. The RFA, see 5 U.S.C. § 601, *et seq.*, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 847 (1996). The SBREFA was enacted as Title II of the Contract with America Advancement Act of 1996 (CWAAA).

<sup>213</sup> See *Next Gen TV Report and Order*, 32 FCC Rcd at 9942-43, 9980-81, paras. 22, 100.

<sup>214</sup> See 5 U.S.C. § 553(b)(B).

<sup>215</sup> 5 U.S.C. § 601 *et seq.* See *id.* § 601(2).

<sup>216</sup> See *Next Gen TV Report and Order*, 32 FCC Rcd at 10016-30, Appendix C.

<sup>217</sup> The Paperwork Reduction Act of 1995 (PRA), Pub. L. No. 104-13, 109 Stat. 163 (1995) (codified in Chapter 35 of title 44 U.S.C.).

<sup>218</sup> The Small Business Paperwork Relief Act of 2002 (SBPRA), Pub. L. No. 107-198, 116 Stat. 729 (2002) (codified in Chapter 35 of title 44 U.S.C.). See 44 U.S.C. § 3506(c)(4).



a copy of the Order to Congress and the Government Accountability Office pursuant to 5 U.S.C. § 801(a)(1)(A).

65. *Additional Information.* For additional information, contact Evan Baranoff, Evan.Baranoff@fcc.gov, of the Media Bureau, Policy Division, (202) 418-7142. Direct press inquiries to Janice Wise at (202) 418-8165.

## VI. ORDERING CLAUSES

66. **IT IS ORDERED**, pursuant to the authority found in Sections 1, 4, 7, 301, 303, 307, 308, 309, 316, 319, 325(b), 336, 338, 399b, 403, 534, and 535 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154, 157, 301, 303, 307, 308, 309, 316, 319, 325(b), 336, 338, 399b, 403, 534, and 535, this Second Report and Order and Order on Reconsideration **IS HEREBY ADOPTED**, effective thirty (30) days after the date of publication in the *Federal Register*.

67. **IT IS FURTHER ORDERED** that the Commission's Rules **ARE HEREBY AMENDED** as set forth in Appendix B and **WILL BECOME EFFECTIVE** 30 days after publication in the Federal Register.

68. **IT IS FURTHER ORDERED** that pursuant to Sections 4(i) and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 405, and Section 1.429 of the Commission's rules, 47 CFR § 1.429, NCTA's and ATVA's Petitions for Reconsideration are **DISMISSED** and, on alternative and independent grounds, **DENIED**.

69. **IT IS FURTHER ORDERED** that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, **SHALL SEND** a copy of this Second Report and Order and Order on Reconsideration, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

70. **IT IS FURTHER ORDERED** that the Commission **SHALL SEND** a copy of this Second Report and Order and Order on Reconsideration in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act, *see* 5 U.S.C. § 801(a)(1)(A).

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch  
Secretary

**APPENDIX A****List of Commenters and Reply Commenters****A. List of Commenters**

1. American Television Alliance (ATVA)
2. CP Communications, LLC
3. Dynamic Spectrum Alliance (DSA)
4. Meredith Corporation (Meredith)
5. Microsoft Corporation (Microsoft)
6. National Association of Broadcasters (NAB)
7. NCTA – The Internet & Television Association (NCTA)
8. NTCA – The Rural Broadband Association (NTCA)
9. ONE Media, LLC (ONE Media)
10. Open Technology Institute (OTI) and Public Knowledge (PK), collectively “public interest organizations”
11. Pearl TV (Pearl)
12. Public Broadcasting Service (PBS), Corporation for Public Broadcasting (CPB), America's Public Television Stations (APTS), collectively “PTV”
13. Public Media Company (PMC)
14. Rolando Bettancourt, Marvin A. Sirbu
15. San Bernardino Community College District (SBCCD)
16. Sennheiser Electronic Corporation (Sennheiser)
17. Shure Incorporated (Shure)
18. WatchTV, Inc. (WatchTV)
19. Wi-Fi Alliance

**B. List of Reply Commenters**

1. DSA
2. Microsoft
3. NAB
4. NCTA
5. ONE Media
6. Consumers Union (CU), OTI and PK
7. Pearl
8. PTV
9. PTV and America’s Public Television Stations (APTS)

APPENDIX B

Final Rules

Part 73 of Title 47 of the Code of Federal Regulations (CFR) is amended as follows:

PART 73– Radio Broadcast Services

1. The authority citation for Part 73 continues to read as follows:

Authority: 47 U.S.C. 154, 155, 301, 303, 307, 309, 310, 334, 336, and 339.

2. Section 73.682 is amended in paragraph (f)(2) by removing the date “February 2, 2023” and adding in its place “March 6, 2023”.

3. Amend §73.3801(b) by adding a new paragraph (3) to read as follows:

§ 73.3801 Full Power Television Simulcasting During the ATSC 3.0 (Next Gen TV) Transition

\* \* \* \* \*

(b) \* \* \*

(3) The “substantially similar” requirement in paragraph (b)(1) will sunset on July 17, 2023.

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4. Amend § 73.6029(b) by adding a new paragraph (3) to read as follows:

§ 73.6029 Class A Television Simulcasting During the ATSC 3.0 (Next Gen TV) Transition

\* \* \* \* \*

(b) \* \* \*

(3) The “substantially similar” requirement in paragraph (b)(1) will sunset on July 17, 2023.

\* \* \* \* \*

Part 74 of Title 47 of the Code of Federal Regulations (CFR) is amended as follows:

PART 74 – EXPERIMENTAL RADIO, AUXILIARY, SPECIAL BROADCAST AND OTHER PROGRAM DISTRIBUTIONAL SERVICES

5. The authority for part 74 continues to read as follows:

AUTHORITY: 47 U.S.C. 154, 302a, 303, 307, 309, 310, 336, and 554.

6. Amend § 74.782 (b) by adding a new paragraph (3) to read as follows:

**§ 74.782 Low Power Television and TV Translator Simulcasting During the ATSC 3.0 (Next Gen TV) Transition**

\* \* \* \* \*

(b) \* \* \*

(3) The “substantially similar” requirement in paragraph (b)(1) will sunset on July 17, 2023.

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## APPENDIX C

Final Regulatory Flexibility Analysis (FRFA) for the *Second Report and Order*

1. As required by the Regulatory Flexibility Act of 1980 (RFA),<sup>1</sup> as amended, an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the Further Notice of Proposed Rulemaking in this proceeding.<sup>2</sup> The Federal Communications Commission (Commission) sought written public comment on the proposals in the FNPRM, including comment on the IRFA. The Commission received no comments in response to the IRFA. This present Final Regulatory Flexibility Analysis (FRFA) conforms to the RFA.<sup>3</sup>

**A. Need for, and Objectives of, the *Second Report and Order***

2. In the first *Next Gen TV Report and Order*, the Commission authorized television broadcasters to use the Next Gen TV transmission standard, also called “ATSC 3.0” or “3.0,” on a voluntary, market-driven basis. ATSC 3.0 is the new TV transmission standard developed by the Advanced Television Systems Committee as the world’s first Internet Protocol (IP)-based broadcast transmission platform. The Commission determined in the *Next Gen TV Report and Order* that broadcasters that deploy ATSC 3.0 generally must continue to deliver current-generation digital television (DTV) service, using the ATSC 1.0 transmission standard, also called “ATSC 1.0” or “1.0,” to their viewers through local simulcasting. Specifically, the Commission required full power and Class A TV stations deploying ATSC 3.0 service to simulcast the primary video programming stream of their ATSC 3.0 channel in an ATSC 1.0 format.

3. The Commission determined in the *Next Gen TV Report and Order* that the local simulcasting requirement is crucial to the deployment of Next Gen TV service in order to minimize viewer disruption. This is because the Next Gen TV standard is not backward-compatible with existing TV sets or receivers, which have only ATSC 1.0 and analog tuners. This means that consumers will not be able to view ATSC 3.0 transmissions on their existing televisions without additional equipment. Thus, it is critical that Next Gen TV broadcasters continue to provide service using the current ATSC 1.0 standard to deliver DTV service while the marketplace adopts devices compatible with the new 3.0 transmission standard in order to avoid either forcing viewers to acquire new equipment or depriving them of television service. Because a TV station cannot, as a technical matter, broadcast in both 1.0 and 3.0 format from the same facility, local simulcasting will be effectuated through voluntary partnerships that broadcasters that wish to provide Next Gen TV service must enter into with other broadcasters in their local markets. Next Gen TV broadcasters must partner with another television station (i.e., a temporary “host” station) in their local market to either: (1) air an ATSC 3.0 channel at the temporary host’s facility, while using their original facility to continue to provide an ATSC 1.0 simulcast channel, or (2) air an ATSC 1.0 simulcast channel at the temporary host’s facility, while converting their original facility to the ATSC 3.0 standard in order to provide a 3.0 channel.

4. The Commission in the *Next Gen TV Report and Order* established a process for considering applications to deploy ATSC 3.0 service, which included, among other requirements, establishing coverage requirements for a Next Gen TV station’s ATSC 1.0 simulcast signal. The

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<sup>1</sup> See 5 U.S.C. § 603. The RFA, see 5 U.S.C. §§ 601-612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996). The SBREFA was enacted as Title II of the Contract With America Advancement Act of 1996 (CWAAA).

<sup>2</sup> *Authorizing Permissive Use of the “Next Generation” Broadcast Television Standard*, Report and Order and Further Notice of Proposed Rulemaking, 32 FCC Rcd 9930, 10031, Appendix D (2017) (*Next Gen TV Report and Order and Further Notice*).

<sup>3</sup> See 5 U.S.C. § 604.

Commission's ATSC 1.0 simulcast coverage requirement sought to minimize disruption to viewers resulting from the voluntary deployment of ATSC 3.0 by recognizing that if a station moves its ATSC 1.0 signal to a partner simulcast host station with a different transmitter location, some existing over-the-air (OTA) viewers may no longer be able to receive the 1.0 signal. Among other obligations, the Commission required the Next Gen TV station to select a partner 1.0 simulcast host station that is assigned to its same DMA and from which it would continue to provide ATSC 1.0 simulcast service to its entire community of license.

5. While the Commission's rules require that all full power and Class A TV stations that convert their existing facility to ATSC 3.0 are required to provide an ATSC 1.0 simulcast signal that covers a station's entire community of license, the Commission recognized that in certain circumstances such an arrangement may not be viable and in order to facilitate the voluntary deployment of ATSC 3.0 service established a waiver standard for the ATSC 1.0 simulcast requirement. Specifically, the Commission stated that it would favor requests for waiver of the obligation to provide ATSC 1.0 simulcast service if the station can demonstrate both that (1) it has "no viable local simulcasting partner" in its market; and (2) it will "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)." Specifically, the Commission stated it would consider waiver requests from full power and Class A TV stations to transition directly from ATSC 1.0 to ATSC 3.0 service on the station's existing facility without providing an ATSC 1.0 simulcast service at all. Alternatively, a station may request a waiver of the ATSC 1.0 simulcast requirement so it could air an ATSC 1.0 simulcast signal from a partner simulcast host that does not cover all or a portion of the station's community of license or can provide only a lower signal threshold over the station's community of license than that required by the rules.

6. In the *Next Gen TV Further Notice*, the Commission sought comment on three topics relating to local simulcasting rules. First, it sought further comment on issues related to waivers of, and exemptions from, the local simulcasting requirement. In particular, the Commission sought comment on whether further guidance should be provided about the circumstances in which it would grant such a waiver, including how to define whether a station has "no viable local simulcasting partner" and whether a station has taken "reasonable efforts to preserve service and/or minimize impact on viewers." Second, the *Next Gen TV Further Notice* sought further comment on whether to let full power broadcasters use channels in the television broadcast band that are vacant to facilitate the transition to ATSC 3.0. Third, it tentatively concluded that local simulcasting should not change the "significantly viewed status" of a Next Gen TV station for purposes of determining MVPD carriage.

7. In the Second Report and Order, we address the three issues raised in the *Next Gen TV Further Notice*. First, we provide guidance on how Commission staff will evaluate petitions for waiver of our local simulcasting rules. Second, we decline at this time to permit broadcasters to use vacant in-band channels for purposes of voluntary ATSC 3.0 deployment. Third, we adopt our tentative conclusion that the significantly viewed status of a Next Gen TV station should not change if it moves its ATSC 1.0 simulcast channel to a host facility.

**B. Summary of Significant Issues Raised by Public Comments in Response to the IRFA**

8. There were no comments filed that specifically addressed the rules and policies proposed in the IRFA.

**C. Response to Comments by the Chief Counsel for Advocacy of the Small Business Administration**

9. Pursuant to the Small Business Jobs Act of 2010, which amended the RFA, the Commission is required to respond to any comments filed by the Chief Counsel for Advocacy of the

Small Business Administration (SBA), and to provide a detailed statement of any change made to the proposed rules as a result of those comments.<sup>4</sup>

10. The Chief Counsel did not file any comments in response to the proposed rules in this proceeding.

**D. Description and Estimate of the Number of Small Entities To Which the Proposed Rules Will Apply**

11. The RFA directs agencies to provide a description of, and where feasible, an estimate of the number of small entities that may be affected by the rules adopted herein.<sup>5</sup> The RFA generally defines the term “small entity” as having the same meaning as the terms “small business,” “small organization,” and “small governmental jurisdiction.”<sup>6</sup> In addition, the term “small business” has the same meaning as the term “small business concern” under the Small Business Act.<sup>7</sup> A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.<sup>8</sup> Below, we provide a description of such small entities, as well as an estimate of the number of such small entities, where feasible.

12. Television Broadcasting. This Economic Census category “comprises establishments primarily engaged in broadcasting images together with sound.”<sup>9</sup> These establishments operate television broadcast studios and facilities for the programming and transmission of programs to the public.<sup>10</sup> These establishments also produce or transmit visual programming to affiliated broadcast television stations, which in turn broadcast the programs to the public on a predetermined schedule. Programming may originate in their own studio, from an affiliated network, or from external sources. The SBA has created the following small business size standard for such businesses: those having \$38.5 million or less in annual receipts.<sup>11</sup> The 2012 Economic Census reports that 751 firms in this category operated in that year. Of this number, 656 had annual receipts of \$25 million or less, 25 had annual receipts between \$24,999,999 and \$50 million, and 70 had annual receipts of \$50 million or more.<sup>12</sup> Based on this data, we therefore estimate that the majority of commercial television broadcasters are small entities under the applicable SBA size standard.

13. The Commission has estimated the number of licensed full power commercial television stations to be 1,374.<sup>13</sup> The Commission does not routinely collect revenues data from TV broadcast

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<sup>4</sup> 5 U.S.C. § 604(a)(3).

<sup>5</sup> 5 U.S.C. § 603(b)(3).

<sup>6</sup> *Id.* § 601(6).

<sup>7</sup> *Id.* § 601(3) (incorporating by reference the definition of “small-business concern” in 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies “unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register.” 5 U.S.C. § 601(3).

<sup>8</sup> 15 U.S.C. § 632.

<sup>9</sup> U.S. Census Bureau, 2017 NAICS Definitions, “515120 Television Broadcasting,” <https://www.census.gov/cgi-bin/sssd/naics/naicsrch?input=515120&search=2017+NAICS+Search&search=2017>.

<sup>10</sup> *Id.*

<sup>11</sup> 13 CFR § 121.201; 2012 NAICS Code 515120.

<sup>12</sup> U.S. Census Bureau, Table No. EC1251SSSZ4, *Information: Subject Series - Establishment and Firm Size: Receipts Size of Firms for the United States: 2012* (515120 Television Broadcasting), [https://factfinder.census.gov/bkmk/table/1.0/en/ECN/2012\\_US/51SSSZ4/naics-515120](https://factfinder.census.gov/bkmk/table/1.0/en/ECN/2012_US/51SSSZ4/naics-515120).

<sup>13</sup> See FCC News Release, Broadcast Station Totals as of December 31, 2019 (rel. Jan. 3, 2020) (*Broadcast Station Totals*).

licensees. However, we estimate that about 1,252 stations had revenues of \$38.5 million or less, according to Commission staff review of the BIA Kelsey Inc. Media Access Pro Television Database (BIA) on November 1, 2019. Therefore, we estimate that the majority of these licensees qualify as small entities under the SBA definition. In addition, the Commission has estimated the number of licensed noncommercial educational (NCE) television stations to be 388.<sup>14</sup> These stations are non-profit, and therefore considered to be small entities.<sup>15</sup> There are also 387 Class A TV stations, 1,892 low power TV (LPTV) stations, and 3,621 TV translator stations.<sup>16</sup> Given the nature of these services, we will presume that each of these types of entities qualify as small entities under the above SBA small business size standard.

14. We note, however, that in assessing whether a business concern qualifies as “small” under the above definition, business (control) affiliations<sup>17</sup> must be included. Our estimate, therefore, likely overstates the number of small entities that might be affected by our action because the revenue figure on which it is based does not include or aggregate revenues from affiliated companies. In addition, another element of the definition of “small business” requires that an entity not be dominant in its field of operation. We are unable at this time to define or quantify the criteria that would establish whether a specific television broadcast station is dominant in its field of operation. Accordingly, the estimate of small businesses to which rules may apply does not exclude any television station from the definition of a small business on this basis and is therefore possibly over-inclusive. Also, as noted above, an additional element of the definition of “small business” is that the entity must be independently owned and operated. The Commission notes that it is difficult at times to assess these criteria in the context of media entities and its estimates of small businesses to which they apply may be over-inclusive to this extent.

15. Wired Telecommunications Carriers. The U.S. Census Bureau defines this industry as “establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired communications networks. Transmission facilities may be based on a single technology or a combination of technologies. Establishments in this industry use the wired telecommunications network facilities that they operate to provide a variety of services, such as wired telephony services, including VoIP services, wired (cable) audio and video programming distribution, and wired broadband internet services. By exception, establishments providing satellite television distribution services using facilities and infrastructure that they operate are included in this industry.”<sup>18</sup> The SBA has developed a small business size standard for Wired Telecommunications Carriers, which consists of all such companies having 1,500 or fewer employees.<sup>19</sup> Census data for 2012 shows that there were 3,117 firms that operated that year. Of this total, 3,083 operated with fewer than 1,000 employees.<sup>20</sup> Thus, under this size standard, the majority of firms in this industry can be considered small.

16. Cable Companies and Systems (Rate Regulation). The Commission has developed its own small business size standards for the purpose of cable rate regulation. Under the Commission’s rules, a “small cable company” is one serving 400,000 or fewer subscribers nationwide.<sup>21</sup> Cable

<sup>14</sup> See *Broadcast Station Totals*.

<sup>15</sup> See generally 5 U.S.C. § 601(4), (6).

<sup>16</sup> See *Broadcast Station Totals*.

<sup>17</sup> “[Business concerns] are affiliates of each other when one concern controls or has the power to control the other, or a third party or parties controls or has the power to control both.” 13 CFR § 121.103(a)(1).

<sup>18</sup> <http://www.census.gov/cgi-bin/sssd/naics/naicsrch>.

<sup>19</sup> See 13 CFR § 120.201, NAICS Code 517110.

<sup>20</sup> [http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN\\_2012\\_US\\_51SSS2&prodType=table](http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2012_US_51SSS2&prodType=table).

<sup>21</sup> 47 CFR § 76.901(e).



companies may operate one or more cable systems. Industry data indicate that there are about 835 active cable companies (operators) in the United States.<sup>22</sup> Of this total, all but five cable operators nationwide are small under the 400,000-subscriber size standard.<sup>23</sup> In addition, under the Commission's rate regulation rules, a "small system" is a cable system serving 15,000 or fewer subscribers.<sup>24</sup> Industry data indicate that there are about 4,392 cable systems (headends), of which about 3,690 systems have 15,000 or fewer subscribers.<sup>25</sup> Thus, under this standard as well, we estimate that most cable systems are small entities.

17. Cable System Operators (Telecom Act Standard). The Communications Act also contains a size standard for small cable system operators, which is "a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1 percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed \$250,000,000."<sup>26</sup> There are approximately 52,403,705 cable video subscribers in the United States today.<sup>27</sup> Accordingly, an operator serving fewer than 524,037 subscribers shall be deemed a small operator if its annual revenues, when combined with the total annual revenues of all its affiliates, do not exceed \$250 million in the aggregate.<sup>28</sup> Based on available data, we find that all but five incumbent cable operators are small entities under this size standard.<sup>29</sup> We note that the Commission neither requests nor collects information on whether cable system operators are affiliated with entities whose gross annual revenues exceed \$250 million.<sup>30</sup> Although it seems certain that some of these cable system operators are affiliated with entities whose gross annual revenues exceed \$250 million, we are unable at this time to estimate with greater precision the number of cable system operators that would qualify as small cable operators under the definition in the Communications Act.

18. Direct Broadcast Satellite ("DBS") Service. DBS Service is a nationally distributed subscription service that delivers video and audio programming via satellite to a small parabolic "dish" antenna at the subscriber's location. DBS is now included in SBA's economic census category "Wired Telecommunications Carriers." The Wired Telecommunications Carriers industry is defined in paragraph 6, *supra*. By exception, establishments providing satellite television distribution services using facilities and infrastructure that they operate are included in this industry.<sup>31</sup> The SBA determines that a wireline business is small if it has fewer than 1,500 employees.<sup>32</sup> Census data for 2012 indicate that 3,117 wireline firms were operational during that year. Of that number, 3,083 operated with fewer than 1,000

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<sup>22</sup> S&P Market Intelligence – MediaCensus data, Q2 2019.

<sup>23</sup> See SNL KAGAN at <https://www.snl.com/Interactivex/TopCableMSOs.aspx>.

<sup>24</sup> 47 CFR § 76.901(c).

<sup>25</sup> S&P Market Intelligence – MediaCensus data, Q2 2019. The Commission no longer collects subscribership data from cable systems. See *FCC Form 325 Data Collection*, MB Docket Nos. 17-290, 17-105, Report and Order, 33 FCC Rcd 9252 (2018).

<sup>26</sup> 47 CFR § 76.901 (f) and notes ff. 1, 2, and 3.

<sup>27</sup> See SNL KAGAN at [www.snl.com/interactivex/MultichannelIndustryBenchmarks.aspx](http://www.snl.com/interactivex/MultichannelIndustryBenchmarks.aspx).

<sup>28</sup> 47 CFR § 76.901(f) and notes ff. 1, 2, and 3.

<sup>29</sup> See SNL KAGAN at <https://www.snl.com/Interactivex/TopCableMSOs.aspx>.

<sup>30</sup> The Commission does receive such information on a case-by-case basis if a cable operator appeals a local franchise authority's finding that the operator does not qualify as a small cable operator pursuant to section 76.901(f) of the Commission's rules. See 47 CFR § 76.901(f).

<sup>31</sup> <http://www.census.gov/cgi-bin/sssd/naics/naicsrch>.

<sup>32</sup> NAICS code 517110; 13 CFR § 121.201.

employees.<sup>33</sup> Based on that data, we conclude that the majority of wireline firms are small under the applicable standard. However, based on more recent data developed internally by the FCC, currently only two entities provide DBS service, which requires a great deal of capital for operation: DIRECTV and DISH Network.<sup>34</sup> Accordingly, we must conclude that internally developed FCC data are persuasive that in general DBS service is provided only by large firms.

19. Satellite Master Antenna Television (SMATV) Systems, also known as Private Cable Operators (PCOs). SMATV systems or PCOs are video distribution facilities that use closed transmission paths without using any public right-of-way. They acquire video programming and distribute it via terrestrial wiring in urban and suburban multiple dwelling units such as apartments and condominiums, and commercial multiple tenant units such as hotels and office buildings. SMATV systems or PCOs are now included in the SBA's broad economic census category, Wired Telecommunications Carriers,<sup>35</sup> which was developed for small wireline businesses. The SBA has developed a small business size standard for Wired Telecommunications Carriers, which consists of all such companies having 1,500 or fewer employees.<sup>36</sup> Census data for 2012 shows that there were 3,117 firms that operated that year. Of this total, 3,083 operated with fewer than 1,000 employees.<sup>37</sup> Thus, under this size standard, the majority of firms in this industry can be considered small.

20. Home Satellite Dish (HSD) Service. HSD or the large dish segment of the satellite industry is the original satellite-to-home service offered to consumers, and involves the home reception of signals transmitted by satellites operating generally in the C-band frequency. Unlike DBS, which uses small dishes, HSD antennas are between four and eight feet in diameter and can receive a wide range of unscrambled (free) programming and scrambled programming purchased from program packagers that are licensed to facilitate subscribers' receipt of video programming. Because HSD provides subscription services, HSD falls within the SBA-recognized definition of Wired Telecommunications Carriers.<sup>38</sup> The SBA has developed a small business size standard for Wired Telecommunications Carriers, which consists of all such companies having 1,500 or fewer employees.<sup>39</sup> Census data for 2012 shows that there were 3,117 firms that operated that year. Of this total, 3,083 operated with fewer than 1,000 employees.<sup>40</sup> Thus, under this size standard, the majority of firms in this industry can be considered small.

21. Open Video Services. The open video system (OVS) framework was established in 1996, and is one of four statutorily recognized options for the provision of video programming services

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<sup>33</sup>[http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN\\_2012\\_US\\_51SSZ5&prodType=table](http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2012_US_51SSZ5&prodType=table).

<sup>34</sup> See *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Fifteenth Report, 28 FCC Rcd 10496, 10507, para. 27 (2013). As of June 2012, DIRECTV is the largest DBS operator and the second largest MVPD in the United States, serving 19.9 million subscribers. DISH Network is the second largest DBS operator and the third largest MVPD operator, serving 14 million subscribers. *Id.* at 10507, 10546, paras. 27, 110-11.

<sup>35</sup> This category is defined in paragraph 6, *supra*.

<sup>36</sup> See 13 CFR § 120.201, NAICS Code 517110.

<sup>37</sup>[http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN\\_2012\\_US\\_51SSZ2&prodType=table](http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2012_US_51SSZ2&prodType=table).

<sup>38</sup> This category is defined in paragraph 6, *supra*.

<sup>39</sup> See 13 CFR § 120.201, NAICS Code 517110.

<sup>40</sup>[http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN\\_2012\\_US\\_51SSZ2&prodType=table](http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2012_US_51SSZ2&prodType=table).

by local exchange carriers.<sup>41</sup> The OVS framework provides opportunities for the distribution of video programming other than through cable systems. Because OVS operators provide subscription services,<sup>42</sup> OVS falls within the SBA small business size standard covering cable services, which is Wired Telecommunications Carriers.<sup>43</sup> The SBA has developed a small business size standard for Wired Telecommunications Carriers, which consists of all such companies having 1,500 or fewer employees.<sup>44</sup> Census data for 2012 shows that there were 3,117 firms that operated that year. Of this total, 3,083 operated with fewer than 1,000 employees.<sup>45</sup> Thus, under this size standard, the majority of firms in this industry can be considered small. In addition, we note that the Commission has certified some OVS operators, with some now providing service.<sup>46</sup> Broadband service providers (BSPs) are currently the only significant holders of OVS certifications or local OVS franchises.<sup>47</sup> The Commission does not have financial or employment information regarding the entities authorized to provide OVS, some of which may not yet be operational. Thus, again, at least some of the OVS operators may qualify as small entities.

22. Wireless Cable Systems – Broadband Radio Service and Educational Broadband Service. Wireless cable systems use the Broadband Radio Service (BRS)<sup>48</sup> and Educational Broadband Service (EBS)<sup>49</sup> to transmit video programming to subscribers. In connection with the 1996 BRS auction, the Commission established a small business size standard as an entity that had annual average gross revenues of no more than \$40 million in the previous three calendar years.<sup>50</sup> The BRS auctions resulted in 67 successful bidders obtaining licensing opportunities for 493 Basic Trading Areas (BTAs). Of the 67 auction winners, 61 met the definition of a small business. BRS also includes licensees of stations authorized prior to the auction. At this time, we estimate that of the 61 small business BRS auction winners, 48 remain small business licensees. In addition to the 48 small businesses that hold BTA authorizations, there are approximately 392 incumbent BRS licensees that are considered small entities.<sup>51</sup> After adding the number of small business auction licensees to the number of incumbent licensees not already counted, we find that there are currently approximately 440 BRS licensees that are defined as small businesses under either the SBA or the Commission's rules. In 2009, the Commission conducted

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<sup>41</sup> 47 U.S.C. § 571(a)(3)-(4). See *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Thirteenth Annual Report, 24 FCC Rcd 542, 606, para. 135 (2009) (*13<sup>th</sup> Annual Competition Report*).

<sup>42</sup> See 47 U.S.C. § 573.

<sup>43</sup> This category is defined in paragraph 6, *supra*.

<sup>44</sup> See 13 CFR § 120.201, NAICS Code 517110.

<sup>45</sup> [http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN\\_2012\\_US\\_51SSSZ2&prodType=table](http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2012_US_51SSSZ2&prodType=table).

<sup>46</sup> A list of OVS certifications may be found at <https://www.fcc.gov/general/current-filings-certification-open-video-systems#block-menu-block-4>.

<sup>47</sup> See *13<sup>th</sup> Annual Competition Report*, 24 FCC Rcd at 606-07, para. 135. BSPs are newer businesses that are building state-of-the-art, facilities-based networks to provide video, voice, and data services over a single network.

<sup>48</sup> BRS was previously referred to as Multipoint Distribution Service (MDS) and Multichannel Multipoint Distribution Service (MMDS). See *Amendment of Parts 21 and 74 of the Commission's Rules with Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service and Implementation of Section 309(j) of the Communications Act—Competitive Bidding*, Report and Order, 10 FCC Rcd 9589, 9593, para. 7 (1995).

<sup>49</sup> EBS was previously referred to as the Instructional Television Fixed Service (ITFS). See *id.*

<sup>50</sup> 47 CFR § 21.961(b)(1).

<sup>51</sup> 47 U.S.C. § 309(j). Hundreds of stations were licensed to incumbent MDS licensees prior to implementation of Section 309(j) of the Communications Act of 1934, 47 U.S.C. § 309(j). For these pre-auction licenses, the applicable standard is SBA's small business size standard of 1,500 or fewer employees.

Auction 86, the sale of 78 licenses in the BRS areas.<sup>52</sup> The Commission offered three levels of bidding credits: (i) a bidder with attributed average annual gross revenues that exceed \$15 million and do not exceed \$40 million for the preceding three years (small business) received a 15 percent discount on its winning bid; (ii) a bidder with attributed average annual gross revenues that exceed \$3 million and do not exceed \$15 million for the preceding three years (very small business) received a 25 percent discount on its winning bid; and (iii) a bidder with attributed average annual gross revenues that do not exceed \$3 million for the preceding three years (entrepreneur) received a 35 percent discount on its winning bid.<sup>53</sup> Auction 86 concluded in 2009 with the sale of 61 licenses.<sup>54</sup> Of the 10 winning bidders, two bidders that claimed small business status won four licenses; one bidder that claimed very small business status won three licenses; and two bidders that claimed entrepreneur status won six licenses.

23. In addition, the SBA's placement of Cable Television Distribution Services in the category of Wired Telecommunications Carriers is applicable to cable-based Educational Broadcasting Services. Since 2007, these services have been defined within the broad economic census category of Wired Telecommunications Carriers, which was developed for small wireline businesses. This category is defined in paragraph 6, *supra*. The SBA has developed a small business size standard for Wired Telecommunications Carriers, which consists of all such companies having 1,500 or fewer employees.<sup>55</sup> Census data for 2012 shows that there were 3,117 firms that operated that year. Of this total, 3,083 operated with fewer than 1,000 employees.<sup>56</sup> Thus, under this size standard, the majority of firms in this industry can be considered small. In addition to Census data, the Commission's internal records indicate that as of September 2012, there are 2,241 active EBS licenses.<sup>57</sup> The Commission estimates that of these 2,241 licenses, the majority are held by non-profit educational institutions and school districts, which are by statute defined as small businesses.<sup>58</sup>

24. Incumbent Local Exchange Carriers (ILECs) and Small Incumbent Local Exchange Carriers. Neither the Commission nor the SBA has developed a small business size standard specifically for incumbent local exchange services. ILECs and small ILECs are included in the SBA's economic census category, Wired Telecommunications Carriers.<sup>59</sup> The SBA has developed a small business size standard for Wired Telecommunications Carriers, which consists of all such companies having 1,500 or fewer employees.<sup>60</sup> Census data for 2012 shows that there were 3,117 firms that operated that year. Of

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<sup>52</sup> *Auction of Broadband Radio Service (BRS) Licenses, Scheduled for October 27, 2009, Notice and Filing Requirements, Minimum Opening Bids, Upfront Payments, and Other Procedures for Auction 86*, Public Notice, 24 FCC Rcd 8277 (2009).

<sup>53</sup> *Id.* at 8296.

<sup>54</sup> *Auction of Broadband Radio Service Licenses Closes, Winning Bidders Announced for Auction 86, Down Payments Due November 23, 2009, Final Payments Due December 8, 2009, Ten-Day Petition to Deny Period*, Public Notice, 24 FCC Rcd 13572 (2009).

<sup>55</sup> See 13 CFR § 120.201, NAICS Code 517110.

<sup>56</sup> [http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN\\_2012\\_US\\_51SSZ2&prodType=table](http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2012_US_51SSZ2&prodType=table).

<sup>57</sup> <http://wireless2.fcc.gov/UlsApp/UlsSearch/results.jsp>.

<sup>58</sup> The term "small entity" within SBREFA applies to small organizations (non-profits) and to small governmental jurisdictions (cities, counties, towns, townships, villages, school districts, and special districts with populations of less than 50,000). 5 U.S.C. §§ 601(4)-(6).

<sup>59</sup> This category is defined in paragraph 6, *supra*.

<sup>60</sup> See 13 CFR § 120.201, NAICS Code 517110.

this total, 3,083 operated with fewer than 1,000 employees.<sup>61</sup> Thus, under this size standard, the majority of firms in this industry can be considered small.

25. Competitive Local Exchange Carriers (CLECs), Competitive Access Providers (CAPs), Shared-Tenant Service Providers, and Other Local Service Providers. Neither the Commission nor the SBA has developed a small business size standard specifically for these service providers. These entities are included in the SBA's economic census category, Wired Telecommunications Carriers.<sup>62</sup> The SBA has developed a small business size standard for Wired Telecommunications Carriers, which consists of all such companies having 1,500 or fewer employees.<sup>63</sup> Census data for 2012 shows that there were 3,117 firms that operated that year. Of this total, 3,083 operated with fewer than 1,000 employees.<sup>64</sup> Thus, under this size standard, the majority of firms in this industry can be considered small.

26. Radio and Television Broadcasting and Wireless Communications Equipment Manufacturing. This industry comprises establishments primarily engaged in manufacturing radio and television broadcast and wireless communications equipment. Examples of products made by these establishments are: transmitting and receiving antennas, cable television equipment, GPS equipment, pagers, cellular phones, mobile communications equipment, and radio and television studio and broadcasting equipment.<sup>65</sup> The Small Business Administration has established a size standard for this industry of 750 employees or less.<sup>66</sup> Census data for 2012 show that 841 establishments operated in this industry in that year. Of that number, 819 establishments operated with less than 500 employees.<sup>67</sup> Based on this data, we conclude that a majority of manufacturers in this industry are small.

27. Audio and Video Equipment Manufacturing. This industry comprises establishments primarily engaged in manufacturing electronic audio and video equipment for home entertainment, motor vehicles, and public address and musical instrument amplification. Examples of products made by these establishments are video cassette recorders, televisions, stereo equipment, speaker systems, household-type video cameras, jukeboxes, and amplifiers for musical instruments and public address systems.<sup>68</sup> The SBA has established a size standard for this industry, in which all firms with 750 employees or less are small.<sup>69</sup> According to U.S. Census data for 2012, 466 audio and video equipment manufacturers were operational in that year. Of that number, 465 operated with fewer than 500 employees.<sup>70</sup> Based on this Census data and the associated size standard, we conclude that the majority of such manufacturers are small.

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<sup>61</sup>[http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN\\_2012\\_US\\_51SSSZ2&prodType=table](http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2012_US_51SSSZ2&prodType=table).

<sup>62</sup> That category is defined in paragraph 6, *supra*.

<sup>63</sup> See 13 CFR § 120.201, NAICS Code 517110.

<sup>64</sup>[http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN\\_2012\\_US\\_51SSSZ2&prodType=table](http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2012_US_51SSSZ2&prodType=table).

<sup>65</sup> <https://www.census.gov/cgi-bin/sssd/naics/naicsrch>.

<sup>66</sup> 13 CFR § 121.201, NAICS Code 334220

<sup>67</sup>[http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN\\_2012\\_US\\_31SG2&prodType=table](http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2012_US_31SG2&prodType=table).

<sup>68</sup> <http://www.census.gov/cgi-bin/sssd/naics/naicsrch>.

<sup>69</sup> 13 CFR 121.201, NAICS Code 334310.

<sup>70</sup>[http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN\\_2007\\_US\\_31SG3&prodType=table](http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2007_US_31SG3&prodType=table).

**E. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements**

28. The Second Report and Order imposes no new reporting, recordkeeping or other compliance requirements beyond those already established in the first *Next Gen TV Report and Order*.

**F. Steps Taken to Minimize Significant Economic Impact on Small Entities and Significant Alternatives Considered**

29. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): “(1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance and reporting requirements under the rule for such small entities; (3) the use of performance rather than design standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.”<sup>71</sup>

30. As an initial matter, the decision to deploy ATSC 3.0 service is a voluntary choice for each broadcaster. For this reason, broadcasters, including small entities, do not need to undertake any costs or burdens associated with providing ATSC 3.0 service unless they choose to do so.

31. *Local Simulcasting Waivers.* The first *Next Gen TV Report and Order* established a waiver standard for the local simulcast requirement.<sup>72</sup> Specifically, the Commission stated that it would favor requests for waiver of the obligation to provide ATSC 1.0 simulcast service if the station can demonstrate both that (1) it has “no viable local simulcasting partner” in its market; and (2) it will “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).” The Second Report and Order provides additional guidance on how Commission staff will evaluate requests for waiver of the local simulcasting rules.<sup>73</sup> The waiver process provides broadcast television stations, including small entities, with an alternative means of deploying ATSC 3.0 service in a manner that would still achieve the purpose of the local simulcasting requirement. The Second Report and Order clarifies but does not adopt any new rules with respect to the waiver standard. By clarifying the circumstances in which a waiver request might be granted, the Commission is seeking to provide predictability to broadcasters, including small entities, which should reduce costs for broadcasters contemplating seeking waivers. In the Second Report and Order, the Commission considered whether to exempt noncommercial educational (NCE) TV stations and Class A TV stations from the local simulcasting requirement. The Commission decided against affording an exemption for these entities, preferring instead to rely on the waiver standard to afford these stations with any additional flexibility.

32. *Temporary Use of Vacant Channels.* In the Second Report and Order, the Commission declined to adopt new rules to allow full power broadcasters to use vacant channels in the television broadcast band as transition channels in order to facilitate the deployment to ATSC 3.0 service. Accordingly, the Second Report and Order does not create or change rules in this regard.

33. *Significantly Viewed Status of Next Gen TV Stations.* In the Second Report and Order, the Commission decided that the significantly viewed status of a Next Gen TV station should not change if it moves its ATSC 1.0 simulcast channel to a temporary host facility. Under this proposal, a commercial television station that relocates its 1.0 simulcast channel could not seek to gain significantly viewed status in new communities or counties and such station could not lose significantly viewed status in communities or counties for which it qualified prior to the move of its 1.0 simulcast channel. By

<sup>71</sup> 5 U.S.C. § 603(c)(1)-(c)(4).

<sup>72</sup> See *supra* Section A. of this FRFA.

<sup>73</sup> 47 C.F.R. §§ 73.3801, 73.6029, 74.782.

maintaining the status quo in the significantly viewed context with respect to ATSC 1.0 simulcast signals, the Commission avoids complications and disruptions to MVPDs and broadcasters, including small entities. The Commission reasoned that any changes in significantly viewed status due to local simulcasting would be temporary, and this approach will avoid disruptions to cable and satellite television viewers who have come to rely on such signals. This approach will not impose new mandatory carriage burdens on MVPDs and avoids burdening MVPDs with numerous changes to their carriage obligations.

**G. Report to Congress**

34. The Commission will send a copy of the Second Report and Order, including this FRFA, in a report to be sent to Congress pursuant to the Congressional Review Act.<sup>74</sup> In addition, the Commission will send a copy of the Second Report and Order, including this FRFA, to the Chief Counsel for Advocacy of the SBA. The Order and FRFA (or summaries thereof) will also be published in the Federal Register.<sup>75</sup>

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<sup>74</sup> See 5 U.S.C. § 801(a)(1)(A).

<sup>75</sup> See *id.* § 604(b).

**STATEMENT OF  
COMMISSIONER MICHAEL O'RIELLY**

Re: *Authorizing Permissive Use of the "Next Generation" Broadcast Television Standard*, MB Docket No. 16-142.

From the outset of this proceeding, I have identified four key principles that must guide our effort to facilitate NextGen TV: keep the process consumer-driven, market-centered, flexible, and voluntary. By and large, the Commission has remained faithful to these points, and the same holds true as we consider the Second Report and Order to clean up some of the remaining issues, specifically, simulcast waivers, vacant channels, and technology standards.

First, today's item makes determinations regarding simulcasting 1.0 signals and the waiver process for stations that have difficulty meeting this requirement, particularly in smaller markets. Rather than choosing an arbitrary threshold and a bright line test, I would have preferred to establish a process by which stations could self-certify that no viable potential partners exist, with the opportunity for competitors or consumers to challenge such certifications. The Commission allows for such a process in plenty of other contexts, and I don't see why it couldn't be used here. As I and others have stated over the last few years, avoiding interruption of service for viewers is a preeminent, if not existential, consideration for any local broadcaster that is venturing to deploy the new standard, and placing the responsibility on broadcasters to accurately certify their efforts makes sense in this context. Nonetheless, it is possible that the presumption in favor of meeting the first prong of the waiver test, based on having fewer than three available potential partners, will at least suffice to grant applications where needed for stations in smaller markets. The item also appropriately emphasizes the expectation that waiver requests will be processed within 60 days of the Bureau providing public notice of the request. While I always support the quickest turnaround possible, this seems to be a fair landing spot, assuming it is treated as a ceiling and not a target.

Second, I agree with the decision in this item declining at this time to allow for the use of vacant channels during the transition period. This is clearly a premature matter that can be examined later, if absolutely necessary. Without completely closing the door depending on the circumstances presented, I would prefer that interested broadcasters deploy NextGen TV without the need of an additional broadcast channel. Full power stations absolutely remain primary licensees in the band, and after all the work that has gone into the repack, distributed transmission systems, and other related matters, any additional changes should not be made in haste. For example, with the support of my colleagues, especially Chairman Pai and Commissioner Rosenworcel, I have led efforts to facilitate TV white spaces (TVWS) technology and the benefits it can offer, including bringing wireless broadband to unserved rural markets. Therefore, throughout the NextGen TV transition, any changes to the broadcast band need to be mindful of possible effects on TVWS. Furthermore, in declining to allow the use of vacant channels, we avoid imposing costs related to LPTV and TV translators or multichannel video programming distributors.

Finally, without restating my specific concerns with regard to embedding the ATSC A/322 standard in our regulations, I would highlight that this decision has created a feedback loop, requiring the Commission to continue to reevaluate the sunset over and over, as we do here in response to commenters. My preference across the board is to avoid incorporating specific technologies into our rules at all costs, to avoid the problems we're currently confronting in the wireless context.

This journey has taken many turns over the past three years, and the possibility of even more markets lighting up 3.0 signals by the end of the year is exciting, especially given the current challenges facing broadcasters and the entire economy, for that matter. While manufacturers continue to work on producing equipment that will allow consumers to receive the new signals, it is encouraging to see money



being invested in the infrastructure as we await the market's determination of which applications will carry the day.

**STATEMENT OF  
COMMISSIONER JESSICA ROSENWORCEL,  
APPROVING IN PART, DISSENTING IN PART**

Re: *Authorizing Permissive Use of the “Next Generation” Broadcast Television Standard*, MB  
Docket No. 16-142.

It was roughly three years ago that the Federal Communications Commission gave the green light for a new television standard known as ATSC 3.0. For most consumers this new technology sounded like a few letters and numbers that wouldn't even make the evening news. But for those of us who remember the effort to transition to digital television, driving this new standard forward was a big deal.

That's because the benefits that this new technology promises are significant. ATSC 3.0 has the potential to deliver Ultra High Definition picture quality and immersive audio, advanced emergency alerts, and interactive services. It could mean real innovation in broadcasting—on par with new services that have emerged on so many of the other screens around us.

But as this standard develops, we need to address how consumers will navigate this transition, just as was done with the digital television transition more than a decade ago. It's important to not lose sight of this because ATSC 3.0 is not compatible with current television devices. That means to see its benefits we will all need to replace our television sets or buy new equipment. That's an expensive problem we need to address because saddling consumers with big costs in this transition is not right.

With this in mind, I think today's effort to revisit this standard gets some things right but others wrong, namely when our actions are likely to raise costs for consumers.

To this end, I am pleased that the agency has declined to authorize the use of vacant channels in the television band for voluntary ATSC 3.0 deployment. By doing so, these channels can be used for white spaces technology and help bring broadband to households that are among the hardest to reach and most difficult to connect. I also am pleased that today's decision affirms that a channel's significantly viewed status does not change as they transition to this new standard and concludes that stations that receive waivers of our simulcasting rules cannot assert mandatory carriage for their new ATSC 3.0 signals. These are sensible outcomes under the law.

Other aspects of today's decision show less regard for consumer disruption. By retaining permission to sunset the existing standard in 2023, the agency is setting a day by which households nationwide could have to replace their televisions in order to continue to watch broadcast programming. That means the FCC is planning to make consumers shoulder the cost of this transition—and that's not right.

But it is not the only way the agency could raise costs for consumers. Today's decision fails to require that patents relevant to the ATSC 3.0 standard are licensed on a reasonable and nondiscriminatory basis. This is a departure from past practice. When the agency adopted the ATSC 1.0 standard, reasonable and nondiscriminatory terms were a part of the package. By failing to follow history here, FCC is conferring special status on those who hold key patents without requiring fair terms in exchange. That means the agency is authorizing billions for essential patent holders that will be paid for by consumers who will need to purchase ATSC 3.0 equipment just to continue to watch television. Again, this is not right.

There remains a lot to be excited about with the next television standard. Innovations are coming our way that could benefit every consumer who counts on this screen for news, entertainment, and more.

But several of our decisions today could also mean that consumers are unnecessarily burdened with too much of the cost. I approve in part and dissent in part as a result.

**STATEMENT OF  
COMMISSIONER GEOFFREY STARKS,  
CONCURRING IN PART, DISSENTING IN PART**

Re: *Authorizing Permissive Use of the “Next Generation” Broadcast Television Standard*, MB  
Docket No. 16-142.

I continue to support the Commission’s recognition that the ATSC 3.0 broadcasting standard is key to achieving the technological transformation to next generation television (Next Gen TV), which holds the promise of improved video and audio quality, personalization, and user interactivity—including targeted ads and neighborhood-specific weather reporting. This item advances that progression by adopting measures that will help protect consumers and non-broadcaster users of television band spectrum from loss or disruption of service. Those measures include clarification of the local simulcasting waiver standards regarding what constitutes a viable local simulcasting partner, and declining to exempt additional classes of stations from the waiver requirement, thus requiring all primary stations to demonstrate that a local simulcasting waiver is in the public interest. Additionally, the decision not to authorize full power broadcasters to use available or vacant TV band channels for voluntary ATSC 3.0 deployment will help ensure that other existing and valuable users of TV band spectrum, including wireless microphones and white spaces devices, do not experience harmful interference. I likewise appreciate that the Commission commits to revisit market conditions before allowing the requirement to provide a “substantially similar” ATSC 1.0 simulcast channel to expire in 2023, although I would have favored no sunset of this requirement at all. I concur with the majority.

There is one aspect of the waiver standard that I cannot support because, as clarified, it could result in viewers losing the ability to receive over-the-air TV channels that are not simulcast. The waiver standard requires “reasonable efforts to preserve 1.0 service,” and the majority explains that under this prong the Commission will “look favorably” at a broadcaster’s plan that would provide over-the-air households with one free ATSC 3.0 converter. That is insufficient; the Commission should mandate, as a condition of waiver, that broadcasters provide a free converter to any requesting over-the-air household. It is certainly “reasonable” to expect broadcasters voluntarily rolling out ATSC 3.0 service without a simulcast channel to provide the same protection to over-the-air households that the Commission provided for the DTV transition. Moreover, the order makes no attempt to justify this decision with a cost/benefit analysis of the potential burden to broadcasters versus the benefit to over-the-air viewers who would otherwise be cut off from their signal, an oversight that seems to occur as often as before we had an Office of Economics and Analytics.

This order also fails to adequately address concerns raised about the costs that would be incurred by small and rural multichannel video programming distributors (MVPDs) to upgrade their facilities to accommodate ATSC 3.0 signals if a simulcast waiver is granted. The “expectation” that broadcasters will work cooperatively and in good faith with MVPDs to ensure that their customers retain access to broadcast signals provides little assurance that MVPDs will have the resources and bargaining power to maintain current levels of service to their customers.

Additionally, the majority declines to reconsider a decision not to require signals currently broadcast in HD over ATSC 1.0 to be simulcast in HD. This could disadvantage viewers who currently get HD signals, and has the potential to significantly downgrade over-the-air viewing for those who cannot afford to transition to ATSC 3.0 programming. Likewise, because there is no requirement to alert viewers before changing signal format or quality, those who will lose HD programming may not be made aware until after the change occurs.

The majority also doubles down on the Commission’s prior refusal to require patents necessary to the provision of ATSC 3.0 programming to be licensed on a reasonable and non-discriminatory (RAND)

basis. Not only is this inconsistent with past Commission decisions to require RAND pricing and terms for patents needed for the DTV transition<sup>1</sup> and for DTS technology,<sup>2</sup> among other services; in this case, a single broadcaster holds the essential ATSC 3.0 patents and thus can set pricing and terms for any other broadcaster seeking to transition. This relinquishment of authority to monitor licensing practices is akin to signing off on unrestrained pricing and marketing that could preclude smaller broadcasters that lack bargaining power from offering Next Gen TV services.

Finally, this item notably omits any discussion (or mention) of consumer privacy. Given how close we appear to be to the provisioning of ATSC 3.0 services, soon these concerns will no longer be theoretical. The enhanced features made possible with Next Gen TV will rely heavily on consumer data that will be collected by broadcasters and device manufacturers. That detailed information about consumer viewing habits can be sold to advertisers and other third parties. It is naïve to believe that broadcasters will resolve all the issues involving what data is being collected, how it is being used, and how to keep data secure without any direction or a mandate from the Commission. Our continued failure to address the privacy implications of ATSC 3.0 data collection is a severe oversight that could cause widespread harm to consumers.

There also is a mountain of evidence about the inherent dangers of algorithmic bias in the types of artificial intelligence systems that will be used to translate consumer data into targeted ads that will be accessible on fixed and mobile devices. The rollout of Next Gen TV is imminent, and we can no longer afford to ignore our public interest mandate as it relates to the protection of data privacy and security. Consumers deserve clarity and assurances about their rights and how their data will be used *before* Next Gen TV is deployed.

For the foregoing reasons, I dissent. My thanks to the Media Bureau and other staff for your work on this item.

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<sup>1</sup> See *Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service*, Fourth Report and Order, 11 FCC Rcd 17771, 17794, paras. 54-55 (1996).

<sup>2</sup> See *Digital Television Distributed Transmission System Technologies*, Report and Order, 23 FCC Rcd 16731, 16760, para. 51 (2008) (“the essential patents to employ the synchronization technology used in DTS should be licensed on a [RAND] basis”).