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

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

To: The Commission

COMMENTS OF
OPEN TECHNOLOGY INSTITUTE AT NEW AMERICA
and PUBLIC KNOWLEDGE

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I. SUMMARY AND INTRODUCTION

Contrary to the channel-sharing framework the Commission adopted in the *Report & Order* – which incentivizes local stations to partner and use two (or more) channels more intensively – giving stations exclusive use of a second free channel would promote an inefficient use of the resource, even as it disrupts other users in the band (e.g., low power TV and unlicensed uses, including wireless microphones). A multi-billion dollar giveaway would discourage channel sharing and encourage broadcasters to grab and warehouse as much spectrum as they can, investing instead in the lobbying needed to eventually monetize the spectrum.

The broadcast industry's initial petition for rulemaking and subsequent filings expressly assured the Commission and other users of the band that no additional spectrum would be needed for the transition to ATSC 3.0. Sinclair and ONE Media started asking for access to the vacant channels only after the change in administrations. This marked a significant bait-and-switch from *NAB et al.'s* original claims that no additional spectrum would be required.

Sinclair and ONE Media have tried to dress up their request for new public subsidies by falsely claiming that exclusive use of an additional vacant channel will "ensure maximum continuity of service." Assigning local broadcasters exclusive use of additional channels is not even remotely necessary to achieve this goal. Stations are not required to simulcast every 1.0 stream; only their primary stream and only in standard definition (which requires only a fraction of the capacity of a six megahertz channel). Because the *R&O* gives stations the flexibility to downgrade their 1.0 signal from high definition (HD) to standard definition (SD) to facilitate channel sharing, there is no justification for a multi-billion dollar giveaway that simply substitutes for a capability that broadcasters have already made clear is nice but not needed.

The same broadcasting interests that advocated for the new ATSC 3.0 standard to move forward as a voluntary transition that requires no additional spectrum now apparently feel empowered to use the pretense of protecting consumers as a basis for the Commission to rationalize a multi-billion dollar windfall. The opposite is true: Awarding exclusive use of vacant TV band spectrum to full-power broadcast licensees would harm consumers by effectively foreclosing the public's unlicensed access to the vacant channels for rural broadband and other innovative services. White Spaces technology is already in use across the country and generating compelling public interest benefits. Gifting the vacant channels to broadcast licensees would halt ongoing deployments, harming consumers and particularly Americans living in rural and underserved areas who could otherwise have *both* over-the-air TV *and* broadband connectivity from an operator utilizing the unique characteristics of TV White Space channels. Our comments describe just some of the many projects deployed or planned that leverage the unique properties of low-band unlicensed spectrum to bring affordable broadband to unserved and underserved areas. Closing off unlicensed broadband deployment and wireless innovation would deepen the digital divide and undermine the robust investment that has already gone into these projects.

The Sinclair/ONE Media proposal also clearly violates the spirit, if not the letter, of the Communications Act. Section 309(j) and well-established principles of modern spectrum policy require an auction for wide-area, exclusive-use spectrum. This avoids the inevitable moral hazard and inefficient warehousing of valuable spectrum associated with government giveaways. Any comparison to the Congressionally-mandated DTV transition is inapt. Moreover, Sinclair's claim that a second channel giveaway would be "temporary" is also entirely beside the point: Without Congressional approval, there is no exemption from Section 309(j) on the basis that an incumbent would like a "temporary" doubling of their exclusive spectrum assignment.

II. THE PROPOSED SPECTRUM GIVEAWAY IS UNNECESSARY AND CONTRARY TO BROADCASTER CLAIMS USED TO GAIN FREE SPECTRUM FOR ATSC 3.0

Local broadcast stations require no additional spectrum to participate in what is for now a voluntary transition to ATSC 3.0 that is premised on the use of an already-assigned channel to continue broadcasting each station's primary stream for at least five years. Consistent with this framework, the broadcast industry's original Petition for Rulemaking and subsequent filings explicitly assured the Commission and other users of the band that no additional spectrum is needed. Having persuaded the Commission to grant the industry valuable flexibility to leverage ATSC 3.0 to experiment with new paid video offerings – and a DTV simulcast requirement that sunsets in five years – broadcasters are now emboldened to use this still-hypothetical transition as a rationale for another spectrum giveaway. The windfall they seek would subsidize the broadcast industry's attempt to compete with mobile carriers – who in recent years have paid their exclusively-licensed spectrum – but it would do nothing to protect or help the viewing public, who instead would lose the benefits of unlicensed access to the vacant channels.

In their Petition proposing almost exactly what the Commission agreed to authorize in its *Report & Order* ("*R&O*") last November, the National Association of Broadcasters ("NAB"), America's Public Television Stations ("APTS"), the AWARN Alliance, and the Consumer Technology Association ("CTA") stated unequivocally: "The Petition does not ask the Commission to give broadcasters additional spectrum to roll out Next Generation TV . . . . 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."[1] ONE Media, a subsidiary of the Sinclair Broadcast Group, similarly promised: "The deployment plan proffered in the Petition is premised on one station hosting the program content of another in recognition that *no new spectrum would be generally available for simultaneous carriage of both ATSC 1.0 and 3.0 signals*."[2]

The industry associations (NAB, et al.) that petitioned for a voluntary transition to ATSC 3.0 initially argued that the move to the new technology would require no extra spectrum and that "Next Generation TV services can be deployed within a station's existing coverage contour without causing interference to current DTV stations."[3] Later, only after a new administration and FCC majority was in place, did ONE Media and Sinclair ask the Commission to allow broadcasters to use vacant channels as "dedicated transition channels to ensure maximum continuity of service."[4]

This marked a significant bait-and-switch from *NAB et al.'s* original claims that no additional spectrum would be required. Accordingly, the Commission's 2016 NPRM did not request comment on whether or not to give broadcasters vacant channels for the transition to ATSC 3.0. The Commission only discussed TV White Spaces in two sentences in the NPRM: "In addition, white-space devices are required to protect DTV operations by operating outside of DTV contours as specified in the rules. Are any clarifications or modifications to these rules

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[1] America's Public Television Stations, AWARN Alliance, Consumer Technology Association, National Association of Broadcasters, Joint Petition for Rulemaking, *Authorization of Next Generation TV for Permissive Use as a Television Standard* (April 13, 2016), at 3 ("Joint Petition for Rulemaking").
[2] ONE Media LLC Reply Comments, *Authorizing Permissive Use of the "Next Generation" Broadcast Television Standard*, GN Docket No. 16-142 (June 27, 2016), at 5 (emphasis added). References to NPRMs, FNPRMs, Report and Orders, Comments, Reply Comments, and Ex Parte letters relate to this proceeding unless noted otherwise.
[3] Joint Petition for Rulemaking at iii.
[4] ONE Media LLC and Sinclair Broadcast Group, *Ex Parte* Letter, *Authorizing Permissive Use of the "Next Generation" Broadcast Television Standard*, GN Docket No. 16-142 (July 3, 2017) ("Sinclair *Ex Parte*"), at 2, https://ecfsapi.fcc.gov/file/10703654428510/Ex%20Parte%20Notice%20-%20ATSC%203.0%20ONE%20Media-Sinclair%20070317.pdf.

required if we authorize the ATSC 3.0 transmission standard?"[5] In a footnote, the Commission acknowledged that the petitioners themselves asserted that the transition to ATSC 3.0 would "be accomplished without the need for additional spectrum, and thus there should be 'little or no impact on' white space device users."[6] Broadcasters apparently did not expect to have any additional spectrum for the transition either, as the petitioners' reply comments in June 2016 reveal: "Because broadcasters are unlikely to have additional spectrum available to ease the transition, they must have the flexibility to manage the transition as effectively as possible."[7]

NAB, APTS, the AWARN Alliance, and CTA met with the Commission staff from the Media Bureau, Office of Engineering and Technology, Incentive Auction Task Force, and Office of General Counsel in June 2016. In the meeting, the coalition's presentation described the benefits of a voluntary ATSC 3.0 transition as, among other things: "Creating new avenues without additional spectrum" and having "little or no impact on LPTV stations" because "broadcasters are not requesting additional spectrum."[8] Sinclair and other broadcast industry interests that advocated for Next Generation TV as a voluntary transition that requires no additional spectrum now, for some mysterious reason, suddenly feel empowered to use the pretense of facilitating a "transition" and protecting consumers as a basis for the Commission to rationalize a multi-billion dollar windfall at public expense.

The *R&O* already gives broadcasters great flexibility in its requirements for channel-sharing during the initial five-year multicasting period.[9] The channel-sharing framework authorized by the Commission is completely voluntary and feasible: DTV channels today have

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[5] NPRM at ¶ 55.
[6] *Id*. at note 124; Joint Petitioners' Reply Comments at 17 ("Because the transition will be accomplished without the need for additional spectrum, there should be little or no impact on TVWS users.").
[7] Joint Petitioners' Reply Comments at 6.
[8] National Association of Broadcasters, Ex Parte Letter (June 3, 2016), https://ecfsapi.fcc.gov/file/60002091596.pdf.
[9] *Report and Order* at ¶ 22.

the capacity to simulcast multiple streams of standard definition programming, as many do. For example, WETA, the public television station for the D.C. metro area, broadcasts four streams of programming for 24 hours a day, seven days a week.[10] This suggests that under the *R&O*'s framework, an agreement among four local stations could free up the equivalent of three channels (18 megahertz!) to compete with mobile carriers in offering pay-per-view video.

Sinclair's proposed spectrum giveaway clearly has nothing to do with continued transmission of the ATSC 1.0 primary programming stream to viewers. The *R&O* does not require local TV licensees to simulcast every 1.0 stream – only their primary stream and only in standard definition (which requires only a fraction of the capacity of a six megahertz channel). Because the *R&O* gives stations the flexibility to downgrade their 1.0 signal from high definition ("HD") to standard definition ("SD") to facilitate channel sharing, there is no justification for an additional, multi-billion dollar giveaway that simply substitutes for this same capability that broadcasters have already made clear is not needed.[11] The channel sharing arrangements authorized for ATSC 3.0 already gives licensees the flexibility *both* to downgrade their current DTV signal to standard definition (which allow two *or more* stations to share a single channel to fulfill their core public interest obligation) *and* to use one or more ATSC 3.0 channels to generate new revenues with subscription or other pay-for-view services.

Sinclair and ONE Media have tried to dress up their request for new public subsidies by falsely claiming that exclusive use of an additional vacant channel will "ensure maximum continuity of service."[12] Although our groups have staunchly advocated for continuity of service throughout this proceeding, assigning local broadcasters exclusive use of additional channels is

[10] *See* WETA Channel Guide, https://weta.org/tv/channelguide.
[11] *Report and Order* at ¶ 27.
[12] *Sinclair Ex Parte* at 2. "Where vacant channels are available, the Commission should allow broadcasters to use them as dedicated transition channels to ensure maximum continuity of service." *Ibid*.

not even remotely necessary to achieve this goal. This is particularly true during the initial, voluntary five-year period. The framework established in the *R&O* posits that whether a full-power licensee chooses to channel-share or not, it will continue to broadcast its current primary DTV programming stream in at least standard definition. While it may be true that an additional spectrum grant would open more capacity for new ATSC 3.0 services (mostly pay-to-view) – and make channel sharing less necessary or burdensome – a new, additional channel assignment is not necessary to transmit a degraded SD version of the primary stream most stations are already transmitting in HD today.

If the Commission decides to give Sinclair (and, incidentally, other broadcasters) the option of taking the vacant channel spectrum bands the companies will of course choose to grab them, as they have every incentive to do so. Contrary to the channel-sharing framework adopted in the *R&O* – which incentivizes local stations to partner and use two (or more) channels more intensively – giving stations exclusive use of a second free channel would promote an inefficient use of the resource, even as it disrupts other users in the band (e.g., low power TV, unlicensed uses, including wireless microphones). A giveaway would discourage channel sharing and encourage broadcasters to grab and warehouse as much spectrum as they can, investing instead in the lobbying needed to eventually monetize the spectrum. Broadcasters that today have no interest in ATSC 3.0 would suddenly be foolish not to enter the lottery (or beauty contest) for an additional free 6 megahertz of spectrum worth potentially hundreds of billions of dollars in the largest metro markets.

Finally, even if the Commission concludes that temporary use of vacant channels would serve the public interest under certain circumstances, that decision is premature. The R&O decided that at least for the next five years, ATSC 3.0 is voluntary and, absent a waiver, local

stations must channel share and simulcast "substantially similar" programming. As the NPRM proposed and the R&O decided [check this], any decision about a "flash cut" transition that authorizes local station licensees to discontinue their primary over-the-air ATSC 1.0 service should be deferred to a future NPRM that is fully informed by experience with the voluntary ATSC 3.0 experiment. Similarly, any determination to allocate even more free spectrum to broadcasters for this purpose should be decided only as part of a future rulemaking that assesses how the market for Next Gen TV has developed, the status of the transition and if and when to discontinue the broadcasting of an ATSC 1.0 signal.

III. THE PROPOSED SPECTRUM GIVEAWAY WILL HARM CONSUMERS, PARTICULARLY IN RURAL AND UNDERSERVED AREAS

The proposal to award exclusive use of vacant TV band spectrum to full-power broadcast licensees will foreclose unlicensed access and innovation, harming consumers and especially those Americans living in rural and underserved areas who, with good policy, could have both over-the-air TV *and* broadband connectivity from an operator leveraging the unique characteristics of TV White Space channels. Even the temporary or limited repurposing of vacant TV channels on an exclusive basis to TV stations would create an entirely new wave of uncertainty that would snuff out any remaining chance that this low-band spectrum can address the rural broadband divide, as well as fuel innovation in remote sensing and other innovative applications both in rural and urban areas.

White Spaces technology is already in use across the country and generating compelling public interest benefits, including:

- **Microsoft's Rural Airband Initiative** is an ongoing project well on its way to launching at least 12 projects in 12 states this year (Arizona, Georgia, Kansas, Maine, Michigan, New York, North Dakota, South Dakota, Texas, Virginia,

Washington, and Wisconsin) that harness TV White Space to bring broadband to underserved and unserved areas by July 2018.[13] Microsoft is actively investing in the upfront capital projects needed to expand broadband coverage as it pursues the goal to get 2 million people in rural America connected to broadband by 2022.[14]

- **A Maryland and Appalachian Regional Commission initiative** to extend rural broadband access to 3,000 unserved homes and small businesses in remote areas of Garrett County using TVWS technology was declared a complete success and model effort last year by Maryland Gov. Larry Hogan.[15]

- **The Gigabit Libraries Project**, which gave grants for nine projects in 2017 to harness TV White Spaces to "support remote fixed and portable library access points at new locations in their communities."[16] The grants went to harnessing technology to support underserved libraries and communities in Lansing, MI; Otsego, MI; Marquette, MI; State College, PA; Millinocket, ME; Milledgeville, GA; Beatrice, NE; Huron, SD; and Toppenish, WA.[17]

- **A new Virginia TV White Spaces system** supported by the Mid-Atlantic Broadband Communities Corp., Microsoft, and the Virginia Tobacco Region Revitalization Commission, is addressing the homework gap by connecting thousands of students who do not have internet access to their school's networks in Charlotte and Halifax counties in Southern Virginia.[18]

- **An agribusiness TVWS project,** supported by Microsoft, that expands the use of white-spaces technologies for precision agriculture through an experimental license the Commission granted in March 2017.[19] John Deere has also supported the testing of TVWS for remote sensing and precision agriculture.

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[13] Brad Smith, "A rural broadband strategy: connecting rural America to new opportunities," Microsoft Blog (July 10, 2017), https://blogs.microsoft.com/on-the-issues/2017/07/10/rural-broadband-strategy-connecting-rural-america-new-opportunities/.

[14] *Ibid.*

[15] *See* Office of the Governor, "Governor Larry Hogan Announces Successful Rural Broadband Launch in Garrett County," Press Release (Oct. 12, 2017), http://governor.maryland.gov/2017/10/12/governor-larry-hogan-announces-successful-rural-broadband-launch-in-garrett-county/. A feasibility study by Garrett County's economic development office "concluded that a public-private partnership using fixed wireless technology (TV White Space (TVWS) and other unlicensed spectrum) is the best solution for the rugged, remote areas of Garrett County." Garrett County, Office of Economic Development, "Rural Broadband Expansion – Home," https://www.garrettcounty.org/broadband.

[16] Gigabit Libraries Network, "Winners of 'Beyond the Walls' Awards Announced," Press Release (May 9, 2017), http://giglibraries.net/BeyondTheWallsAnnouncement.

[17] *Id. See also* "Libraries TV White Space Project Wins $250,000 Grant," *Telecompetitor (Oct. 20, 2016), http://www.telecompetitor.com/libraries-tv-white-space-project-wins-250000-grant/* .

[18] Microsoft Reply Comments, GN Docket. No 16-142, June 8, 2017, at 3.

[19] *Ibid.; see also* Microsoft Corporation, Application for New or Modified Radio Station Under Part 5 of FCC Rules, File No. 0136-EX-CN-2017 (submitted Mar. 3, 2017).

- **The Air-U deployment at West Virginia University**, initiated by New America and various partners, demonstrated that TVWS can be used at low cost to extend Wi-Fi connectivity outdoors to public areas on campuses (at sprawling WVU, the 2-mile-long campus tram loop) lacking in connectivity (and too far from backhaul for conventional Wi-Fi).

These are examples of valuable broadband initiatives, most in rural areas, that have gone forward *despite* the fog of regulatory uncertainty that continues to hobble TVWS technologies and aspiring operators due to the long incentive auction process, exacerbated by the FCC's ongoing failure to complete its Vacant Channel proceeding that would ensure national markets and economies of scale for TVWS access points and integration onto standard Wi-Fi chips. The Dynamic Spectrum Alliance, among others, has urged the Commission not to allow broadcasters to foreclose the use of vacant and unlicensed TVWS channels. "Each time the cloud of uncertainty lifts over the availability of spectrum in the TVWS, there seems to be yet another proceeding that creates market uncertainty."[20] And as the Wi-Fi Alliance stated in its filing in response to the NPRM: "In the TVWS Vacant Channel NPRM, the Commission stated that prioritizing and protecting white space is critical to TVWS innovation. Allowing broadcasters to use vacant channels will therefore delay and potentially permanently impede the deployment of TVWS technologies."[21]

The Public Interest Organizations urge the Commission to remove – and not further exacerbate – the regulatory uncertainty that has been impeding the enormous potential benefits of vacant TV channels for rural and other underserved areas. Just like Wi-Fi and other unlicensed technologies in mid- and high-band spectrum, regulatory certainty of TVWS spectrum availability nationwide will spur innovative projects leveraging open access to low-

[20] Dynamic Spectrum Alliance, *Ex Parte* Letter, *Authorizing Permissive Use of the "Next Generation" Broadcast Television Standard*, GN Docket No. 16-142 (May 8, 2017), https://ecfsapi.fcc.gov/file/105081319814105/DSA%20ATSC%203.0_9May2017.pdf.
[21] Wi-Fi Alliance Comments (May 9, 2017) at 4.

band unlicensed spectrum that attract more investment and less costly gear. Since projects sponsored by Microsoft, the Appalachian Regional Commission, school districts, libraries, universities and other operators already demonstrate how the technology can be harnessed to bring connectivity to rural and other areas of need, quickly rejecting this latest spectrum grab will help to facilitate broadband use of TVWS spectrum at scale.

IV. THE PROPOSED SPECTRUM GIVEAWAY CLEARLY VIOLATES THE COMMUNICATIONS ACT, WHICH REQUIRES AN AUCTION FOR A NEW AND EXCLUSIVE ASSIGNMENT OF SPECTRUM

The Sinclair/ONE Media proposal to assign vacant TV band spectrum to selected broadcasters without an auction is not only bad policy – it also clearly violates the spirit, if not the letter, of the Communications Act. Section 309(j)(1) of the Communications Act requires that if "mutually exclusive applications are accepted for any initial license or construction permit, then … the Commission shall grant the license or permit to a qualified applicant through a system of competitive bidding that meets the requirements of this subsection."[22]

Section 309(j)(2) does include an exemption for the "initial licenses or construction permits for digital television service given to existing terrestrial broadcast licensees to replace their analog television service licenses."[23] The qualifier – "to replace their ***analog*** television service licenses" – makes it clear that Congress granted this statutory exemption *only* to the existing ATSC 1.0 station licenses that *replaced* a station's analog license (on a one-for-one basis) at the conclusion of the DTV transition in 2012.[24] This exception followed from the fact

[22] 47 U.S.C. § 309 Section (j)(1).
[23] 47 U.S.C. § 309 Section (j)(2)(B).
[24] The term "digital television service" means television service provided pursuant to the transmission standards prescribed by the Commission in section 73.682(d) of its regulations which, effective October

that Congress mandated the transition, but not the initial mechanism. It fell to broadcasters immediately following the passage of the 1996 Act to develop a set of standards and mechanisms to meet the Congressional demand to do what had never previously been done – to repack the broadcast band without terminating service to households still relying on analog tuners.

Had Congress wished to extend this privilege indefinitely for broadcasters to use for future upgrades, it would have done so. Instead Congress deliberately chose to limit this exception to the singular event of a transition from analog to digital television that Congress mandated. The Commission also adopted a DTV tuner mandate and Congress later earmarked a portion of the TV spectrum auction revenues to give consumers a coupon that covered most of the cost of an analog-to-digital converter box. In the present situation, there is no Congressional guidance, no mandate and – at least for the next five years – no risk that any viewer will lose the ability to view DTV over the air on ATSC 1.0 television tuners.

Moreover, Congress did not even create an exception for simulcast in new and old license assignments for the transition mandated by the Incentive Auction Act of 2012. If Congress did not permit broadcasters to enjoy the benefits of simultaneous broadcasting as part of the *mandatory* Incentive Auction repack, it certainly cannot be read to have made this privilege available for voluntary transitions conceived wholly by the broadcast industry. Since new assignments of exclusively-licensed spectrum in the TV band are equally subject to Section 309(j)(1), the Commission is prohibited from conferring the gift that ONE Media and Sinclair desire.[25]

11, 2011, are the "digital broadcast television (DTV) . . . standards for such transmissions set forth in ATSC A/52." *See* 47 USC § 153(56)(B).

[25] *FNPRM* at ¶ 126 ("ONE Media requests that in markets with vacant channels, the Commission should allow full power broadcasters to use the vacant channels as 'dedicated transition channels to ensure maximum continuity of service, just as it did during the transition from analog to digital.'").

The requirement to read exceptions to the auction requirement for exclusive-use licenses narrowly is supported by additional language in Section 309(j), and by subsequent Commission interpretation of Section 309(j). What broadcasters ask for here is essentially a form of "pioneer preference," a gift of free spectrum in exchange for developing new uses of the spectrum.[26] But Congress explicitly ordered the Commission both to (a) recover the value of spectrum by charging a fee based on auctions of comparable spectrum;[27] and (b) terminate the pioneer preference program by August 5, 1997.[28] In other words, even if the Commission were permitted to assign such a "pioneer preference" to broadcasters to facilitate the voluntary transition to ATSC 3.0, it could do so only after assessing a fee in accordance with the formula set forth in Section 309(j)(13)(B).

The Commission has acknowledged that "auctions are mandatory for all secondary commercial broadcast services (e.g., LPTV, FM translator and television translator services). Similarly, we find that, except for certain pending applications that are subject to Section 309(l), *our auction authority is mandatory, rather than permissive,* for all full power commercial radio and analog television stations."[29] Once the Commission completes the TV band channel relocation process it will require an auction for new television band licenses. The Sinclair and ONE Media proposal seeks to both block potential band entrants and make a mockery of the auction rules by effectively allowing all of the remaining vacant channels to be divvied up among the lucky incumbents who are seeking to use ATSC 3.0 to compete with mobile carriers that *did pay* the public for their spectrum.

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[26] *See* 47 U.S.C. §309(j)(13).
[27] 47 U.S.C. §309(j)(13)(B).
[28] 47 U.S.C. §309(j)(13)(F).
[29] *Implementation of Section 309(j) of the Communications Act—Competitive Bidding for Commercial and Instructional Television Fixed Service Licenses*, First Report and Order, FCC 98-194, 13 FCC Rcd. 15,920 (1998), at 15,923 ¶ 9 (emphasis added).

Congress – and modern spectrum policy – requires an auction for wide-area, exclusive-use spectrum in part because of the inevitable moral hazard and inefficient warehousing of valuable spectrum associated with government giveaways. The Commission's framework for authorizing a voluntary expansion of broadcast services is premised on channel-sharing arrangements. If licensees believe they can both avoid that burden *and squat on a second free channel of spectrum*, they will always choose the latter option. And, despite One Media and Sinclair's claims this gift could be "temporary," it will trigger a lobbying frenzy to make the giveaway permanent.[30] Moreover, given the limited number of vacant channels in the most valuable markets, local stations will be filing mutually exclusive applications and competing against one another to claim a windfall. Will the Commission design a "beauty contest" to decide which companies will receive this crony-capitalism windfall?

In the Spectrum Act of 2012, Congress made clear that it intended the TV White Spaces to continue to operate "in the spectrum that remains allocated for broadcast television use" after the Incentive Auction repack.[31] The balance between cellular licenses distributed by auction, spectrum use rights of remaining full power broadcasters subject to repacking, and unlicensed users of the remaining vacant TV channels, was intensely debated during the drafting of 2012 Spectrum Act. Congress struck a balance which guaranteed that remaining broadcasters would retain their existing spectrum rights and viewing area, but also sought to ensure the ongoing development of unlicensed use in the TV white spaces. It is not for the Commission to rewrite this balance simply because some broadcasters would find it profitable for the Commission to do so.

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[30] ONE Media LLC and Sinclair Broadcast Group, *Ex Parte* Letter, *Authorizing Permissive Use of the "Next Generation" Broadcast Television Standard*, GN Docket No. 16-142 (July 3, 2017) ("Sinclair & ONE Media *Ex Parte*"), at 2, https://ecfsapi.fcc.gov/file/10703654428510/Ex%20Parte%20Notice%20-%20ATSC%203.0%20ONE%20Media-Sinclair%20070317.pdf.

[31] Public Law 112-96 Section 6403(i)(2).

Finally, ONE Media's claim that a second channel giveaway would be "temporary" is entirely beside the point: There is no exemption from Section 309(j) on the basis that an incumbent would like a "temporary" doubling of their exclusive spectrum assignment. The Commission could decide after the initial five-year period that it serves the public interest to set a definitive end date for the transition. But until then, the current voluntary transition has no end date and is therefore not "temporary."

In short, there is no statutory exception for "temporary" exclusive licenses. For example, the current CBRS rules require auctions for PALs on a continuing basis at the termination of each license term, despite the fact that these licenses have definite termination dates with no expectation of renewal, making them genuinely "temporary."[32] In all cases of spectrum assignment under Section 309, the Commission is obligated to "recover[] for the public of a portion of the value of the public spectrum resource made available for commercial use, and avoidance of unjust enrichment through the methods employed to award uses of that resource."[33] Sinclair and its allies are asking for free licenses for enhanced commercial use – over and above the additional spectrum rights the Commission has provided as part of the conversion to ATSC 3.0. – while strenuously objecting to even consideration of compensating public interest obligations. It is difficult to imagine a more classic example of the unjust enrichment Congress expressly prohibited.

[32] *Report and Order and Second Further Notice of Proposed Rulemaking,* GN Docket No. 12-354 (April 17, 2015), ¶ 105.
[33] 47 U.S.C. §309(j)(3)(C).

V. THE PROPOSED SPECTRUM GIVEAWAY IS CLEARLY AIMED AT UNDERMINING UNLICENSED USE OF VACANT CHANNELS SO THAT BROADCAST LICENSEES CAN MONETIZE ALL OF THE REMAINING TV BAND

The Sinclair/ONE Media bait-and-switch proposal to use the ATSC 3.0 transition as an excuse for a multi-billion dollar spectrum giveaway is a transparent attempt to monetize the remaining TV band while they have the opportunity. Although the two-paragraph Sinclair/ONE Media proposal merely argues that vacant channels should be made available for broadcasters on a temporary basis,[34] the NAB spends several pages disparaging the use of TV White Spaces and demonizing the Commission's prior decisions favoring the technology.[35] After a three-page attack on TV White Spaces, the National Association of Broadcasters plainly states: "Rather than accept the claims of white spaces advocates that just one more regulatory favor is the key to gigabit internet service nationwide, the Commission should allow licensed users to improve their service using available spectrum in their own band."[36] In this passage and in so many other cynical tactics – for example, claiming the protection of LPTV is a reason not to reserve a single vacant channel for unlicensed use, while apparently supporting the Sinclair claims of priority to extra channels even if it forecloses LPTV) – the broadcasting lobby group telegraphs that its overarching goal is to purge the vacant TV channels of other valuable uses by the public so that the incumbent users of licensed channels, the broadcasting companies, can ultimately monetize them at public expense.

Indeed, Sinclair's spectrum giveaway proposal is entirely consistent with the NAB's longstanding and relentless efforts to undermine and ultimately cripple rural broadband and other

[34] Sinclair & ONE Media *Ex Parte* at 2, https://ecfsapi.fcc.gov/file/10703654428510/Ex%20Parte%20Notice%20-%20ATSC%203.0%20ONE%20Media-Sinclair%20070317.pdf.
[35] National Association of Broadcasters Reply Comments at 9-13 ("It is long past time for the Commission to be skeptical regarding the claims of the white spaces industry.").
[36] National Association of Broadcasters Reply Comments at 13.

beneficial unlicensed uses of TVWS channels, since widespread use of this fallow spectrum is the primary obstacle to broadcasters ultimately monetizing it. When it comes to FCC incentive auctions or other market mechanisms to determine the highest-and-best use of exclusive spectrum, the NAB's unspoken policy is: "Never again."

VI. CONCLUSION

The Commission should not authorize broadcast licensees to use vacant channels for the ATSC 3.0 transition. The broadcasters have already informed the Commission it is unnecessary, as they do not require any additional spectrum to complete the transition. The Commission wisely adopted a framework that incentivizes broadcast licensees to use their existing spectrum assignment more intensively. Awarding stations a second channel would discourage channel sharing and encourage broadcasters to grab and warehouse as much spectrum as they can, investing instead in a lobbying effort aimed at eventually monetizing the spectrum. The proposed spectrum giveaway is contrary to both the Communications Act and well-established principles of modern spectrum management. The giveaway would harm rural consumers who could otherwise gain access to broadband through ongoing projects using TV White Spaces. OTI, PK, and CU urge the Commission to swiftly reject this proposal and to move forward using the framework laid out in the *Report & Order*.

Respectfully submitted,

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