

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

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

**REPLY COMMENTS OF PUBLIC KNOWLEDGE, CONSUMER REPORTS, AND THE
OPEN TECHNOLOGY INSTITUTE AT NEW AMERICA**

Kathleen Burke
Policy Counsel
Public Knowledge

Jonathan Walter
Fellow, acting under supervision
Public Knowledge
1818 N Street, NW
Suite 410
Washington, DC 20036

Jonathan Schwantes
Senior Policy Counsel
Consumer Reports

Michael Calabrese
Director, Wireless Future Project
Open Technology Institute at
New America

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I. INTRODUCTION & SUMMARY

Unsurprisingly, numerous broadcaster-allied commenters in this proceeding are attempting to find ways to reduce the ancillary service payments to zero. These arguments can essentially be divided into two categories: pay us for what the statute already requires us to do, or create an “incentive” for something we plan to do anyway. Proposals to allow inclusion of the cost of infrastructure as a credit against fee calculation, for example, or to eliminate fees for services that serve the public interest, ignore the fact that Congress already decided how to balance out these incentives. *Every* provider must spend money to build infrastructure. *Every* use of the public airwaves must affirmatively serve “the public interest, convenience, and necessity.”¹ Specifically, Section 336(a)(2) requires that any ancillary services the Commission’s rules authorize serve “the public interest, convenience and necessity.”²

Congress clearly intended that broadcasters bear the cost of building the infrastructure and accessing the public spectrum, just like any other provider of wireless services must do.³ As the legislative history makes clear, whereas broadcasters receive free spectrum so they can serve as trustees to their local community with free over-the-air (OTA) broadcasting (and that *viewers* should be subsidized to transition to digital television, not licensees), Congress intended

¹ See 47 U.S.C. §§307(a), 309(a), 309(k), 310(d). See also FCC, Report on Broadcast Localism and Notice of Proposed Rulemaking ¶6 (adopted Dec. 18, 2007), <https://ecfsapi.fcc.gov/file/6519841479.pdf>.

² 47 U.S.C. § 336(a)(2).

³ See 47 U.S.C. §336(b)(3) (requiring Commission to impose on ancillary services such regulations as it imposes on analogous wireless services). Furthermore Congress declined to subsidize the broadcasters transitioning to digital, despite subsidizing viewers through the set-top box coupon program. Had Congress wanted to subsidize broadcasters in offering ancillary services, it certainly could have done so. Cf. Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. 112-96, Section 6402 (authorizing broadcast incentive auction and creating broadcast relocation fund).

that services ancillary to free OTA broadcasting should be treated in the same way as other wireless service. *I.e.*, that the provider bears the cost of building the infrastructure and that any services offered must serve the public interest.

Congress instructed the FCC to treat broadcaster ancillary services in the same manner that it treats other providers of similar services,⁴ and to use auction revenues as the touchstone for determining the scope and limits of the ancillary fee.⁵ The Commission does not credit mobile licensees for the cost of meeting their build out obligations as an offset against their winning auction bids. The Commission does not waive the requirement to bid at auction if the licensee leases out capacity, or has a tower building company build out the infrastructure. Similarly, the statute does not permit the Commission to offset the cost of infrastructure or providing ancillary service, no matter how structured or who pays whom.

Public Knowledge, Consumer Reports, and the Open Technology Institute at New America (collectively the “Public Interest Commenters”) support the proposal from NCTA and ATA to conduct an economic analysis to determine the ancillary fee based on the statutory criteria and urges the FCC to consider the costs consumers will incur to upgrade. These costs could form the basis for an appropriate lower bound of the ancillary and supplementary fee.

In contrast with their eagerness to avoid paying the ancillary fee, broadcasters and their supporters argue that the current requirement to provide a single standard definition (SD) free broadcast signal adequately fulfills their statutory requirement as broadcasters to provide free OTA television to their local community. Broadcasters (and the Commission) should recall that Congress limited the initial distribution of the advanced service licenses to existing broadcasters,

⁴ 47 U.S.C. § 336(b)(3).

⁵ 47 U.S.C. § 336(e).

in recognition of the vital importance of broadcasting.⁶ With regard to the provision of ancillary services, Congress mandated both that provision of ancillary services did not relieve broadcasters of their public interest obligations,⁷ and that provision of ancillary services could not derogate existing broadcast services.⁸ Nevertheless, broadcasters urge the Commission to do effectively just that, by allowing broadcasters to eliminate HD programming in ATSC 1.0 and replace it with SD broadcasting while the simulcast requirement remains in effect. Additionally, the Commission has done nothing to enhance the public interest obligations of digital programmers since adopting the enhanced disclosure requirements in 2004,⁹ aside from mandatory enhancement of the Emergency Alert System as directed by Executive Order.¹⁰

To conclude, neither the Commission nor broadcasters write here on a blank slate. The issues discussed here are the exact same issues the Commission resolved in the first digital transition. The Commission has already made determinations that the statute requires collection of the ancillary fee *in addition* to requiring that broadcasters pay for the cost of deployment of these profit-generating non-broadcast services. Likewise, the Commission has previously determined that enhanced digital technologies require broadcasters to upgrade the manner in which they serve their local communities through enhanced free OTA broadcasting. There is no change in circumstances or technology that permits the Commission to alter the balance struck by Congress and embodied in the relevant sections of the Communications Act. The Commission

⁶ Telecommunications Act of 1996, Pub. LA. No. 104-104, 110 Stat. 56 (1996).

⁷ *Id.*

⁸ *Id.*

⁹ FCC, Report and Order, In the Matter of Standardization and Enhanced Disclosure Requirements for Television Broadcast Licensee Public Interest Obligations, MM Docket No. 00-168 (adopted Nov. 27, 2007).

¹⁰ FCC, Second Report and Order and Further Notice of Proposed Rulemaking, In the Matters of Review of the Emergency Alert System, EB Docket NO. 04-296 n. 2 (adopted May 31, 2017).

should therefore reject the arguments proffered by broadcasters in favor of reducing ancillary fees or for maintaining the outdated requirement to maintain a single SD channel – especially where a broadcaster would replace an existing HD channel.

II. THE FCC SHOULD IGNORE SUGGESTIONS THAT WOULD VIOLATE THE FCC’S STATUTORY MANDATE TO COLLECT ANCILLARY AND SUPPLEMENTARY SERVICE FEES.

The record contains numerous suggestions from broadcaster-allied commenters that would violate the FCC’s statutory mandate if adopted. These suggestions are designed to impermissibly eliminate broadcasters’ ancillary and supplementary fees. First, the FCC cannot use a fee calculation method that would nullify its obligation to collect fees on services on which it is required to collect fees under the statute. Second, broadcasters cannot use their infrastructure costs to manipulate their fee burden for providing ancillary and supplementary services, because that would violate the statute and constitute unjust enrichment. The FCC should recognize that these are tactics designed by broadcasters to avoid their obligations, and refuse to adopt policies that would run afoul of its statutory mandate.

A. The FCC Cannot Use the Method of Fee Calculation to Nullify Its Obligation to Collect Fees on Ancillary and Supplementary Services.

Many broadcaster-allied commenters have conflated the FCC’s statutory mandate to collect ancillary and supplementary fees with the statutory method for calculating the amount of these obligatory fees. In their comments, Public Media Group (“PMG”), America’s Public Television Stations and the Public Broadcasting Service (“Public Television,” collectively), and One Media, all use the method of calculation as a basis to advocate for eliminating fee collection on ancillary and supplementary services beyond those that are not excluded from the FCC’s

statutory requirement to collect fees on such services. This both violates canons of statutory construction and asks the FCC to impermissibly waive its public interest obligations.

The canons of statutory construction require the FCC to look at the statute governing the ancillary and supplementary services as a whole and avoid interpreting one provision in a way that would give duplicate or contradictory meaning to another provision.¹¹ The Supreme Court views statutory construction as a holistic endeavor.¹² Additionally, titles and subordinate language are indicators of the statute's meaning.¹³ As the Supreme Court has explained, the title of a statute and the heading of a section are “tools available for the resolution of a doubt about the meaning of a statute.”¹⁴

Here, 47 U.S.C. § 336(e)(1), titled “Services to which fees apply,” requires the FCC to collect fees from broadcasters on ancillary and supplementary services if the FCC authorizes such services.¹⁵ This section also includes language that sets the parameters for when a fee is required and when it is not. If a licensee offers ancillary services “for which payment of a subscription fee is required” or “for which the licensee directly or indirectly receives compensation from a third party,” then the FCC is *required* to collect an ancillary services fee.¹⁶ This section exclusively sets the parameters for *when* the FCC must collect a fee. Since this section provides clear parameters for what qualifies as an ancillary service subject to a fee and

¹¹ Congressional Research Service, Statutory Interpretation: General Principles and Recent Trends 4 (Sept. 24, 2014), <https://fas.org/sgp/crs/misc/97-589.pdf>.

¹² *United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988).

¹³ Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Text* 221 (2012).

¹⁴ *Almendarez-Torres v. United States*, 523 U.S. 224, 234 (1998).

¹⁵ 47 U.S.C. § 336(e)(1).

¹⁶ *Id.*

what does not, the FCC cannot look to other sections of the statute to provide an alternate set of parameters. As long as ancillary service providers are charging subscription fees to the end consumer, or broadcasters are receiving direct or indirect payment for leasing their spectrum for ancillary or supplementary uses, they *must* pay a fee.

In contrast, 47 U.S.C. § 336(e)(2), titled “Collection of fees,” sets the parameters for *how* the FCC should calculate and design the fee collection program mandated in the prior section.¹⁷ Under § 336(e)(2), the FCC is required to “design” the fee program in order to (1) “recover for the public a portion of the value of the public spectrum resource made available for such commercial use” and (2) “avoid unjust enrichment” for broadcasters.¹⁸ The FCC is also required to set the fees at an amount that “equals but does not exceed” the amount the spectrum used for ancillary and supplementary services would have raised at auction.¹⁹ While this section grants the FCC some flexibility in determining at what rate to set the ancillary and supplementary services fee, it does *not* allow the FCC to cancel out its obligation to collect such fees in the first place. Interpreting this section in a way that would contradict or nullify 47 U.S.C § 336(e)(1) violates a cornerstone of statutory construction.

Despite this express distinction, many broadcaster-allied commenters would have the FCC interpret the fee calculation method in such a way that it would essentially eliminate ancillary and supplementary fees in circumstances that expressly violate the FCC’s statutory obligation to collect such fees. For example, Public Television asks the FCC to waive ancillary and supplementary services fees “to the extent that revenues from ancillary and supplementary

¹⁷ 47 U.S.C. § 336(e)(2).

¹⁸ *Id.*

¹⁹ *Id.*

services were used to support the licensee’s non-profit public service activities” as “there is no need to ‘recover’ anything else for the public, as the revenue is already devoted to that purpose.”

²⁰ By relying on the “public recovery” factor of the fee calculation method to justify a \$0 fee, Public Television would essentially have the FCC violate its statutory mandate to collect fees. After all, 47 U.S.C. § 336(e)(1) does not provide a “supporting non-profit activities” exception to ancillary and supplementary service fees.²¹ Not even non-profit public broadcasting warrants an exception.

Moreover, PMG, proffering a similar rationale, goes even further and “urges the FCC to exempt from any fees those services and applications that provide a broad public interest benefit.”²² Not only is this an unacceptable reason to waive fees under the statutory requirements laid out in Section 336(e)(1), it makes no sense—broadcast services are *supposed* to benefit the public, as are any ancillary services.²³ It is the very reason the FCC allows broadcasters to access spectrum for free in the first place, and why Congress limited initial licenses for advanced television services to existing broadcast licensees. Giving broadcasters a “free pass” simply for fulfilling their public interest obligations would constitute unjust enrichment, the very harm the ancillary and supplementary service fees are supposed to prevent.

Finally, One Media argues that “[t]he Commission should delay imposition of the ancillary and supplementary services fee on new broadcast internet services and reconsider the

²⁰ America’s Public Television Stations and the Public Broadcasting Service, Comments on Promoting Broadcast Internet Innovation through ATSC 3.0 8 (Aug. 17, 2020).

²¹ 47 U.S.C. § 336(e)(1).

²² Public Media Group, Comments on Promoting Broadcast Internet Innovation through ATSC 3.0 7 (Aug. 17, 2020).

²³ *See* 47 U.S.C. §336(a)(2) (allowing the Commission to permit only such services “consistent with the public interest”).

fee program [as] the industry develops.”²⁴ One Media’s argument focuses on the idea that unjust enrichment cannot occur because broadcasters will likely not make a profit the first few years they provide these new services.²⁵ Again, this has no bearing on whether the FCC is required to collect a fee. Nowhere in the statutory provision governing “services to which fees apply” is there an exception for waiting until the industry develops. Once a broadcaster offers ancillary and supplementary services that an end user pays a subscription for or that a broadcaster receives payment for, the FCC *must* collect a fee. Moreover, because broadcasters received their spectrum for free, it is hard to imagine a universe in which receiving compensation or charging end users for ancillary services does not result in unjust enrichment, regardless of how new the market for such services is. Thus, delaying adopting an ancillary service fee until the market for ancillary services develops further would constitute an impermissible nullification of the FCC’s requirement to collect fees on such services.

The FCC should not follow the call of commenters who would have the FCC violate its mandate to collect ancillary and supplementary fees. Commenters that have conflated the statutory factors for calculating the *amount* of the fee with the FCC’s statutory requirement to *collect* a fee have misinterpreted the statute in order to avoid paying obligatory fees. Such tactics violate both the express terms of the statute and its underlying public interest goals for our telecommunications system.

²⁴ ONE Media 3.0, LLC., Comments on Promoting Broadcast Internet Innovation through ATSC 3.0 6 (Aug. 17, 2020).

²⁵ *Id.*

B. Broadcasters Cannot Use Infrastructure Costs to Offset or Avoid Paying Obligatory Ancillary and Supplementary Fees.

Several broadcaster-allied commenters ask the FCC to treat infrastructure costs in ways that would allow broadcasters to avoid paying ancillary or supplementary fees. These tactics fall into two categories: (1) allowing broadcasters to offset their fees with the development costs to build out an ATSC 3.0 network and (2) excluding in-kind infrastructure costs from third parties from the fee calculation in the first place. Both of these tactics violate the FCC’s statutory mandate to collect ancillary and supplementary fees and would unjustly enrich broadcasters.

The FCC cannot allow broadcasters to offset ancillary and supplementary fees with the development costs to build out an ATSC 3.0 network. BitPath asked the Commission to “allow licensees to offset 100% of capital and development costs against revenues,” arguing that “broadcasters are not unjustly enriched when they have taken in less revenue from a service than they invested to enable its provision.”²⁶ As with public interest services, build-out costs are not excluded from the “services for which fees apply” provision that exclusively governs the FCC’s fee collection requirement. It also does not fall within one of the factors that the FCC is required to use when calculating the fee amount. Thus, allowing broadcasters to off-set their fees with development and infrastructure costs violates both the fee requirement and fee calculation method provisions of the statute.

Additionally, BitPath’s argument fails to consider the ability of broadcasters to recoup their investment over time. The FCC and other commenters have discussed at length the many innovative services that ATSC 3.0 will enable. Allowing broadcasters to offset their

²⁶ BitPath, Comments on Promoting Broadcast Internet Innovation through ATSC 3.0 12 (Aug. 17, 2020).

infrastructure costs upfront, when they can reliably recuperate them over a reasonable time, provides an unjust enrichment that the statute mandates the FCC prevent.

Notably, the FCC does not give credit to other spectrum licensees for the cost of building out infrastructure. A Deloitte study found that deploying 5G in the United States “will cost approximately \$130-150 billion in fiber optic cabling alone over the next 5 to 7 years.”²⁷ Despite these costs, the C-band incentive auction is expected to generate \$10-30 billion.²⁸ Broadcasters have already received free spectrum in order to serve the public. Subsidizing their build-out costs because doing so promotes a “public benefit” essentially allows broadcasters to double-dip on that subsidy—which constitutes an unjust enrichment and is also clearly the exact opposite of what Congress intended.

Finally, the FCC should require broadcasters to pay fees on indirect compensation for their ancillary and supplementary services—including in-kind infrastructure costs. PMG asks the FCC to “make clear that capital provided to a broadcast station to build out ATSC 3.0 facilities and related infrastructure does not constitute revenue that would be subject to a fee.”²⁹ This request violates Section 336(e)(1) and would circumvent the statutory fee calculation goal of preventing broadcasters’ unjust enrichment.

²⁷ Giuseppe Macri, *Deploying 5G Will Cost at Least \$130 Billion in Fiber, Study Says*, GovTech (July 10, 2017), <https://www.govtech.com/network/Deploying-5G-Will-Cost-at-Least-130-Billion-in-Fiber-Study-Says.html>.

²⁸ Roslyn Layton, *COVID Will Not Delay The FCC’s 5G Spectrum Auction*, Forbes (Aug. 7, 2020), <https://www.forbes.com/sites/roslynlayton/2020/08/07/covid-will-not-delay-the-fccs-5g-spectrum-auction/#5d469380138b>

²⁹ Public Media Group, *Comments on Promoting Broadcast Internet Innovation through ATSC 3.0 7* (Aug. 17, 2020).

The statute governing ancillary and supplementary service program requires the FCC to assess a fee “for which the licensee directly or *indirectly* receives compensation from a third party.”³⁰ As the Commission has acknowledged in numerous contexts, compensation itself can encompass more than just cash payments, and can include indirect as well as direct compensation.³¹ Additionally, other sections of the United States Code do so broadly. For example, the Home Owners Loan Act defines compensation as “any payment of money or the provision of any other thing of current or potential value[.]...”³² Only provisions governing employee compensation limit the term “compensation” to cash remuneration, and they do so explicitly.³³

Not only does the Telecommunications Act fail to limit the term compensation to cash payments, the section applicable here also *explicitly includes* indirect compensation in addition to direct compensation. This further demonstrates Congressional intent that the FCC interpret compensation under this provision broadly, to include in-kind or other forms of indirect compensation. Thus, receiving capital to build out the infrastructure necessary for ancillary services does constitute the type of compensation the FCC is obligated to assess a fee on.

³⁰ 47 U.S.C. § 336(e)(1) (emphasis added).

³¹ See, e.g., *In re Qwest Communications Co., LLC v. Northern Valley Communications, LLC*, Order on Reconsideration, 26 FCC Rcd 14520 (2011) (“free” service still offered to the public “for a fee” -- and thus meeting requirement for telecommunications service -- where use by callers triggers reciprocal compensation payments); *Public Notice*, “Commission Reminds Broadcast Licensees, Cable Operators and Others of Requirements Applicable to Video News Releases and Seeks Comment on the Use of Video News Releases by Broadcast Licensees and Cable Operators,” 20 FCC Rcd 8593 (2005) (using prepared video news release given to licensee “for free” constitutes sponsorship because the VNR itself is thing of value given in exchange for broadcasting specific material).

³² 12 U.S.C. § 2279(b).

³³ See 45 U.S.C. § 351; 26 U.S.C. § 3231(e)(1).

This interpretation also aligns with the policy goals of the fee calculation method itself. Section 336(e)(2) asks the FCC to calculate a fee so as to avoid unjustly enriching broadcasters.³⁴ If the FCC were to exclude in-kind infrastructure costs from its fee calculation, it would encourage broadcasters to enter into deals with third parties to provide access to their spectrum in exchange for the infrastructure build-out rather than any monetary fee. As discussed earlier, broadcasters have already received *free* spectrum valued at billions of dollars. Allowing broadcasters to double-dip on the public interest subsidy they have already received by avoiding payment of ancillary and supplementary fees, constitutes the very type of unjust enrichment the Act seeks to avoid.

The FCC must avoid allowing broadcasters to manipulate their infrastructure costs in order to avoid paying obligatory ancillary and supplementary service fees. Adopting policies that allow for such manipulation violates the FCC's statutory mandate and provides an unjust enrichment for broadcasters.

III. THE FCC SHOULD PERFORM AN ECONOMIC ANALYSIS THAT INCLUDES CONSUMER UPGRADE COSTS TO DETERMINE THE ANCILLARY AND SUPPLEMENTARY SERVICES FEE.

Public Interest Groups support the calls made by the American Television Alliance (“ATVA”) and the Internet & Television Association (“NCTA”) for an economic analysis to determine an appropriate fee for ancillary and supplementary services.³⁵ As explained below, within the parameters of the statute, we also ask the FCC to account for the costs to consumers

³⁴ 47 U.S.C. § 336(e)(2).

³⁵ American Television Alliance, Comments on Promoting Broadcast Internet Innovation through ATSC 3.0 5 (Aug. 17, 2020).

for upgrading to ATSC 3.0 and exclude infrastructure costs from its economic analysis and fee calculation.

An objective economic analysis will help determine an appropriate fee that meets the statutory criteria. Congress has directed the FCC to set the ancillary and supplementary services fees at a rate that will: (1) recover for the public part of the value of spectrum that was given to broadcasters; (2) prevent unjust enrichment for broadcasters; and (3) recoup an amount that equals but does not exceed the amount that would have been recovered at auction.³⁶ An economic analysis is particularly critical given the significant amount of revenue that spectrum generates at auction. As NTCA stated, “[b]roadcast spectrum as an asset is extraordinarily valuable. The incentive auction demonstrated that 70 megahertz of it was worth nearly \$20 billion in 2017.”³⁷ As ATVA observed, “valuation questions are necessarily economic questions. One cannot take seriously the Congressional directive that fees must reflect the value of spectrum and the amount it would recover at auction without a substantial and robust economic analysis to determine such valuation.”³⁸

In addition to considering the value of the spectrum at auction, the FCC should also factor the costs to consumers to upgrade in any economic analysis it performs and the final fee calculation. The statutory criteria for calculating the fee is sufficiently broad enough to include this cost to consumers. The very first criteria for the fee calculation provides a public purpose for the fee itself; after all, it must be designed to “recover for the public.”³⁹ As Commissioner

³⁶ 47 U.S.C. § 336(e)(2).

³⁷ NCTA - The Internet & Television Association, Comments on Promoting Broadcast Internet Innovation through ATSC 3.0 5 (Aug. 17, 2020).

³⁸ American Television Alliance, Comments on Promoting Broadcast Internet Innovation through ATSC 3.0 6 (Aug. 17, 2020).

³⁹ 47 U.S.C. § 336(e)(2).

Rosenworcel stated, “[t]o see [ATSC 3.0’s] 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.”⁴⁰ Recovering fees for the public to upgrade their equipment falls within the public purpose of the fee itself and could provide a basis for establishing the lower bound for an appropriate ancillary fee.

Thus, while the Public Interest Groups support proposals for a thorough economic analysis to determine an appropriate fee, it urges the FCC to include the costs to consumers for the ATSC 3.0 upgrade. This is a critical consideration that the FCC must take into account in order to protect the public interest.

IV. THE FCC SHOULD UPDATE THE PUBLIC INTEREST REQUIREMENTS IN ACCORDANCE WITH TECHNOLOGICAL ADVANCES IN ORDER TO ENSURE THAT BROADCAST SERVICE IS NOT DEROGATED.

The Commission recognized in the NPRM that Congress has required that the provision of ancillary services avoid “derogating any advanced television services.”⁴¹ In response to this statutory requirement, the FCC has tentatively concluded that so long as television broadcasters continue to provide a single free standard-definition channel of broadcast television, they will not derogate their responsibilities by offering ancillary services.⁴²

The Commission asks “whether a broadcaster’s replacement of an HD offering with an SD offering in order to deploy ancillary and supplementary services should be deemed a

⁴⁰ Promoting Broadcast Internet Innovation Through ATSC 3.0, 85 FR 43195 at 32 (published July 16, 2020) (to be codified at 47 CFR 73), <https://docs.fcc.gov/public/attachments/FCC-20-73A1.pdf> [Hereinafter NPRM]

⁴¹ NPRM, at ¶ 31.

⁴² *Id.* at ¶ 33.

derogation of advanced television services under [its] rules.”⁴³ Some commenters, such as Pearl TV, believe the answer to this question is “no.”⁴⁴ Other commenters, such as the NCTA, believe the answer, which we agree with, is yes. The statutory language states that the “Commission shall...limit the broadcasting of ancillary or supplementary services on designated frequencies so as to avoid derogation of any advanced television services, *including high-definition broadcasts*, that the Commission may require using such frequencies.”⁴⁵ This statutory language specifically refers to “high-definition broadcasts” within the class of broadcasts that the FCC may require, indicating that Congress expected the FCC to eventually require broadcasters to fulfill their public interest requirements through a high-definition broadcast. It is important to emphasize that although SD may have qualified as “advanced” at the time of DTV transition, this standard has evolved. Today, broadcast technology not only includes SD and HD, but also UltraHD, 4K, and 8K.

There are two primary reasons why the FCC’s current proposal would violate the statute and why technological advancements dictate that the public interest requirement should be updated. First, the technological advances of ATSC 3.0 will allow broadcasters to transmit in HD more efficiently, freeing up significant amounts of spectrum capacity. Second, because consumers have come to expect HD broadcasts, allowing broadcasters to meet the public interest requirement with an SD broadcast subverts consumer expectations.

⁴³ NCTA - The Internet & Television Association, Comments on Promoting Broadcast Internet Innovation through ATSC 3.0 6 (Aug. 17, 2020).

⁴⁴ Pearl TV, Comments on Promoting Broadcast Internet Innovation through ATSC 3.0 3 (Aug. 17, 2020).

⁴⁵ 47 U.S.C. § 336(b)(2).

As the American Television Alliance (ATVA) points out, a television transmitting in ATSC 1.0 needs roughly 20 percent of its 6 MHz channel to transmit a single SD signal.⁴⁶ In contrast, a television transmitting in ATSC 3.0 needs roughly 8 percent of its 6-MHz channel to transmit a single SD signal.⁴⁷ The ATVA correctly notes that “a broadcaster devoting more than 90 percent of its capacity to something other than broadcasting can no longer maintain that its non-broadcasting service is ‘ancillary’ to anything.”⁴⁸ As technology advances, it is critical that broadcasters continue to serve the public interest, and not deviate significantly into ancillary and supplementary services. The FCC should reflect the significance of this technological advance in its proposal. To ignore it, and allow broadcasters to meet the public interest requirement through a single SD channel, would derogate primary service.

Other commenters have also stated that this kind of derogation is out of line with consumer expectations.⁴⁹ As technology has evolved, so have consumer expectations. No longer is a single SD channel sufficient when broadcasters provide such a high volume of HD offerings. Degrading from an HD signal on ATSC 1.0 to a SD signal in order to roll out ATSC 3.0 is a transparently coercive attempt to force consumers to upgrade if they want to keep receiving the HD television they have become accustomed to—creating a potential windfall for broadcasters at the expense of consumers. Transitioning to ATSC 3.0 will increase consumer costs at a time when consumers are already strapped due to the COVID-19 crisis. If the FCC were to offset consumer upgrade costs with a coupon program funded by the ancillary fees collected, as we

⁴⁶ American Television Alliance, Comments on Promoting Broadcast Internet Innovation through ATSC 3.0 3 (Aug. 17, 2020).

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ NCTA - The Internet & Television Association, Comments on Promoting Broadcast Internet Innovation through ATSC 3.0 (Aug. 17, 2020).

proposed in our comments, then allowing broadcasters to reduce their ATSC 1.0 offerings might avoid the windfall such a move will create if consumers have no affordable means to upgrade their equipment.⁵⁰ As with the fees recovered from reallocated analog spectrum during the DTV transition, the fees collected from ancillary services can cover the consumer costs incurred by the ATSC 3.0 transition.⁵¹

V. CONCLUSION

While ATSC 3.0 has much to offer, if it is implemented at the expense of the public, then the FCC and broadcasters will have failed the very purpose for which broadcasters were created and allowed to operate in the first place. We ask the FCC to ensure that it follows its statutory mandates by refusing to adopt policies concerning the ancillary and supplementary service fees that would essentially nullify the obligation of broadcasters to pay such fees. We also ask the FCC to upgrade the public interest requirements in line with the evolution of technology and as Congress intended. A single standard definition channel of television is no longer an advanced television service. The public interest must remain at the forefront of our broadcast system.

Respectfully submitted,

/s/ Kathleen Burke
Policy Counsel
Public Knowledge

/s/ Jonathan Schwantes
Senior Policy Counsel
Consumer Reports

/s/ Jonathan Walter
Fellow, acting under
supervision
Public Knowledge

/s/ Michael Calabrese
Director, Wireless Future Project
Open Technology Institute
at New America

⁵⁰ Public Knowledge, Consumer Reports, & New America's Open Technology Institute, Comments on Promoting Broadcast Internet Innovation through ATSC 3.0 7 (Aug. 17, 2020).

⁵¹ *Id.* at 8.