

**Before the  
Federal Communications Commission  
Washington, District of Columbia 20554**

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

**COMMENTS OF ACT | THE APP ASSOCIATION**

**I. Introduction and Statement of Interest**

ACT | The App Association appreciates the opportunity to respond to the Federal Communication Commission’s Further Notice of Proposed Rulemaking (FNPRM) concerning the “Next Generation” Broadcast Television Standard (ATSC 3.0). We commend the Commission for reopening the record to seek comment on critical competition and standard essential patent (SEP) licensing issues. ACT submitted similar comments on the Commission’s 2023 Third Report and Order and Fourth Further Notice of Proposed Rulemaking in this proceeding.<sup>1</sup>

ACT represents small U.S. software and connected technology firms that develop new products across consumer and enterprise use cases, enabling the rise of the internet of things (IoT). Today, the ecosystem we represent—the app economy—is valued at \$1.8 trillion and is responsible for 6.1 million American jobs.<sup>2</sup> We work with and for our members to promote a policy environment that rewards and inspires innovation while providing resources that help

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<sup>1</sup> *Comments of ACT | The App Association re: ATSC 3.0 FNPRM*, F.C.C. (Sept. 15, 2023), <https://www.fcc.gov/ecfs/search/search-filings/filing/109150145327134>.

<sup>2</sup> ACT | THE APP ASS’N, STATE OF THE APP ECONOMY (2022), <https://actonline.org/wp-content/uploads/APP-Economy-Report-FINAL-1.pdf>

them raise capital, create jobs, and continue to build groundbreaking technology. Given the Commission’s oversight of the broadcast market, its attention to associated patent issues is paramount to protect competition and innovation.

Our members use technical standards and specifically rely on the interoperability and safety they provide, to innovate and compete. When the standards system operates transparently and in good faith, it fuels market growth and consumer choice. However, when the system is gamed, standardization processes carry significant competitive risks, as industry participants collectively select certain technologies for inclusion while excluding others.<sup>3</sup> Technologies selected for inclusion in a standard might be viewed as “winners” that are collaboratively “whitelisted” by industry participants.<sup>4</sup> Conversely, technologies that are not selected might be viewed as “losers” that are collaboratively “blacklisted.”<sup>5</sup> Accordingly, the selection of patented technologies from certain companies over others gives rise to thorny competition issues. Without proper safeguards, this power can be abused through excessive royalties, discriminatory licensing, and exclusionary

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<sup>3</sup> See e.g., *Microsoft Corp. v. Motorola, Inc.*, 795 F.3d 1024, 1030-31 (9th Cir. 2015) (standardization “creates an opportunity for companies to engage in anti-competitive behavior”); see also ETSI, ETSI Guidelines for Antitrust Compliance, §§ A-B (ETSI is “a forum in which competitors interact with each other. Therefore, the market-related rules apply to the decisions which are adopted by the Institute as a standardization body as well as with regard to the activities of Members within ETSI”; accordingly, “[t]he imposition of discriminatory and unfair conditions by the dominant company, to any categories of users, or any other company having contractual relationships with the dominant company, is abusive”), available at <http://www.etsi.org/images/files/IPR/etsi%20guidelines%20for%20antitrust%20compliance.pdf>.

<sup>4</sup> See, e.g., ETSI, ETSI Guidelines for Antitrust Compliance, §§ A-B (ETSI is “a forum in which competitors interact with each other. Therefore, the market-related rules apply to the decisions which are adopted by the Institute as a standardization body as well as with regard to the activities of Members within ETSI”; accordingly, “[t]he imposition of discriminatory and unfair conditions by the dominant company, to any categories of users, or any other company having contractual relationships with the dominant company, is abusive”), available at <http://www.etsi.org/images/files/IPR/etsi%20guidelines%20for%20antitrust%20compliance.pdf>.

<sup>5</sup> See *Broadcom Corp. v. Qualcomm Inc.*, 501 F.3d 297, 314 (3d Cir. 2007) (“standard[ization], by definition, eliminates alternative technologies”).

practices that harm competition, increase costs, and ultimately stifle the very innovation the standard seeks to promote.<sup>6</sup>

To mitigate these risks, many Standards Development Organizations (SDOs) ask members that choose to contribute their patented technologies to the standards process to declare their patented interests and to license them on Fair, Reasonable, and Non-Discriminatory (F/RAND) terms. ATSC is no exception. The F/RAND promise is meant to guarantee that any implementer can obtain the licenses necessary to compete, and to prevent anticompetitive behaviors from licensors.<sup>7</sup> As the U.S. Court of Appeals for the Ninth Circuit has recognized, the voluntary F/RAND commitment “must be construed in the public interest because it is crafted for the public interest.”<sup>8</sup> Particularly in cases where a technical standard has been mandated in regulation—as is the case with ATSC 3.0—the Commission cannot overlook its responsibility to protect against well-known SEP licensor abuses.

## **II. The Commission Must Act to Ensure F/RAND Licensing for ATSC 3.0 SEPs**

The Commission has incorporated the ATSC 3.0 standard into its regulations, meaning that the use of the standard is necessary for regulatory compliance. Patents essential to the standard

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<sup>6</sup> See, e.g., *Microsoft Corp. v. Motorola, Inc.*, 795 F.3d at 1030-31 (addressing “hold up” power of patents incorporated into standards); FTC, Brief of Amicus Curie in Support of Neither Party 3-4, *Apple Inc. v. Motorola, Inc.*, Nos. 2012-1548 et al. (Fed. Cir. Dec. 14, 2012)(“[t]he problem of patent hold-up can be particularly acute in the standard-setting context, where an entire industry may be locked into a standard that cannot be avoided without infringing or obtaining a license for numerous (sometimes thousands) of standard-essential patents.”).

<sup>7</sup> ETSI, *Intellectual Property Rights Policy*, ¶3.1 (“[T]he ETSI IPR POLICY seeks to reduce the risk to ETSI, MEMBERS, and “others applying ETSI STANDARDS . . . , that investment in the preparation, adoption and application of STANDARDS could be wasted as a result of an ESSENTIAL IPR for a STANDARD . . . being unavailable. In achieving this objective, the ETSI IPR POLICY seeks a balance between the needs of standardization for public use in the field of telecommunications and the rights of the owners of IPRs.”); ETSI, *Guidelines for Antitrust Compliance*, § B(noting that the competition interests addressed by the ETSI Policies are “aimed at allowing firms to compete on a level playing field.”).

<sup>8</sup> *Microsoft v. Motorola*, 795 F. 3d 1024, 1052 (9th Cir. 2015).

therefore become de facto requirements for market entry. The voluntary F/RAND commitments made to ATSC is therefore critical to preventing the abuse of this inherent and asymmetric advantage that a SEP holder has.

As we have noted in related proceedings, the Commission must evaluate if mandating a technical standard creates unjustifiable barriers to market entry, including through licensing the patents essential to practicing the standard.<sup>9</sup> A hands-off approach by the Commission on SEP licensing risks excluding or deterring innovators, especially small businesses, from the market, directly undermining the Commission’s goals of promoting competition and technological advancement. Extensive evidence demonstrates that ambiguities in SDO patent policies and lax enforcement routinely lead to anti-competitive conduct by SEP holders, despite their F/RAND pledges.<sup>10</sup>

The ATSC Patent Policy is clear: SEPs shall “be available to implementers on reasonable and non-discriminatory terms.”<sup>11</sup> This is a foundational F/RAND principle ensuring that any entity wishing to implement the standard—whether a chipmaker, a module manufacturer, or a finished device maker—can obtain the license or licenses it needs to use the standard while also guaranteeing a reasonable rate for the SEP holder. Yet, in practice, SEP licensors often explicitly or effectively refuse to license to entities except at the end of the device value chain. This is a direct violation of the policy’s requirement and the plain meaning of the F/RAND commitment, creating significant market inefficiencies. It concentrates licensing negotiations and royalty

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<sup>9</sup> See Letter from 11 organizations and companies to Marlene H. Dortch, Secretary, F.C.C. (Aug. 29, 2022) (<https://www.fcc.gov/ecfs/document/10829258451600/1>).

<sup>10</sup> Use of the 5.850-5.925 GHz Band, ET Docket No. 19-138; *e.g.*, Love, Brian J. and Lefouili, Yassine and Helmers, Christian and Helmers, Christian, Do Standard-Essential Patent Owners Behave Opportunistically? Evidence from U.S. District Court Dockets (February 7, 2023). Available at SSRN: <https://ssrn.com/abstract=3727085> or <http://dx.doi.org/10.2139/ssrn.3727085>.

<sup>11</sup> ADVANCED TELEVISION SYS. COMM., PATENT POLICY 1 (July 2, 1986), [https://prdatsc.wpenginepowered.com/wp-content/uploads/2023/01/B-4-2007-12-13\\_patent\\_policy\\_form\\_editable.pdf](https://prdatsc.wpenginepowered.com/wp-content/uploads/2023/01/B-4-2007-12-13_patent_policy_form_editable.pdf).

burdens on a narrow set of companies, stifling innovation and competition among upstream component and technology providers. In this way, SEP abuses directly harm the diverse ecosystem of small developers and manufacturers that ACT represents.

ACT appreciates the Commission's continued attention to this issue, and its renewed request for insights into the marketplace for ATSC 3.0 SEPs and the ability of third parties to develop products that rely upon them. In the view of ACT, while the ATSC 3.0 marketplace is showing some signs of growth, significant uncertainty persists regarding the effectiveness of the F/RAND patent licensing framework; moreover, some major players have withdrawn from the market, and this issue is standing in the way of a successful broadcast market. The Commission's intervention is necessary to ensure that departures from F/RAND commitments made per the ATSC patent policy do not harm competition and innovation in the broadcast television ecosystem.

### **III. The Commission Should Provide Clarification on F/RAND to Remedy Ambiguities and Prevent Abuse**

Noting that the Commission has a well-established precedent and clear authority to address patent licensing issues that affect the competitive landscape of technologies under its purview and to fulfill its duty to protect the public interest,<sup>12</sup> the Commission must act to clarify and

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<sup>12</sup> See *Revised Patent Procedures of the Federal Communications Commission, Public Notice*, 1961 FCC LEXIS 54 (Dec.1,1961), reprinted in *Amendment of Part 73 of the FCC's Rules and Regulations (Radio Broadcast Services) to Provide for Subscription Television Service, Further Notice of Proposed Rulemaking and Notice of Inquiry*, 3 FCC2d 1, Ap. B (1966) (subscription television technology); also see *Amendment of Part 3 of the FCC's Rules and Regulations to Permit FM Broadcast Stations to Transmit Stereophonic Programs on a Multiplex Basis*, Report and Order, Docket No. 13506 at ¶ 34 (rel. Apr. 20, 1961), available at: <http://durenberger.com/wp-content/uploads/2018/08/FMSTEREO.pdf> (noting that patent holders' commitment to grant non-exclusive licenses under any one or more of its patents at reasonable royalties for the manufacture, use, and sale of the apparatus was "consistent with the patent policies of the FCC which are designed to obviate any restraint of trade or monopolistic practices in matters coming within its cognizance" in regard to FM stereos); also see *Revision of Part 68 of the FCC's Rules to Specify Standard Plugs and Jacks*, 62 FCC2d 735,738, ¶ 8 (1976) (telephone jacks); also see *Amendment of the Commission's Rules to Establish a Single AM Radio Stereophonic Transmitting Equipment*

uphold key F/RAND principles for ATSC 3.0. Where the ATSC policy is ambiguous or unenforced, the Commission should take steps to prevent gaming of this system and provide clarity. Based on established global consensus principles (such as those reflected in CWA 95000, a set of core principles and approaches for SEP licensing developed through the CEN/CENELEC process ), we urge the Commission to reinforce the following:

- **The F/RAND Commitment Applies to All:** A holder of an SEP subject to a F/RAND commitment must license that SEP on F/RAND terms to all companies, organizations, and individuals who implement or wish to implement the standard.
- **Injunctions Available on F/RAND-Committed SEPs Only in Limited Circumstances:** Prohibitive orders, such as injunctions, should not be sought by SEP holders or allowed for F/RAND-committed SEPs except in limited circumstances (where monetary remedies are not available).
- **The F/RAND Commitment Binds Successors-in-Interest:** If a F/RAND-committed SEP is transferred, the F/RAND commitments follow the SEP in that and all subsequent transfers.
- **The F/RAND Commitment Prohibits Harmful Tying Practices of Non-Essential Patents:** While some licensees may wish to get broader licenses, a SEP holder that has made a F/RAND commitment cannot require licensees to take or grant licenses to a declared SEP that is not essential to the standard, is unenforceable, is not infringed, and/or is invalid.

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*Standard*, 8 FCC Rcd. 8216, ¶ 29 (1993) (AM broadcasting equipment); *also see Digital Audio Broadcasting Systems And Their Impact on the Terrestrial Radio Broadcast Service*, 22 FCC Rcd. 10344, 10384 ¶ 101 (2007), available at: <https://docs.fcc.gov/public/attachments/FCC-07-33A1.pdf> (digital FM radio technology); *also see Basic Service Tier Encryption*, Report and Order, 27 FCC Rcd 12786, ¶ 24 (2012) (cable encryption technology).

- **F/RAND Royalties Must Reflect the Intrinsic Value of the Invention:** A reasonable rate for a valid, infringed, and enforceable F/RAND- committed SEP should be based on the value of the actual patented invention apart from its inclusion in the standard or other factors unrelated to invention’s value.

#### **IV. Conclusion**

The transition to ATSC 3.0, with its integrated encryption and complex patent landscape, presents a clear case where Commission action is needed to uphold the public interest. We urge the Commission to use this proceeding to affirm strong, clear F/RAND principles for ATSC 3.0 SEPs. This will ensure that the promise of “NextGen TV” is realized through a vibrant, competitive, and innovative market, not stifled by gatekeeping and anticompetitive licensing practices.

Respectfully submitted,



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