

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

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

**COMMENTS OF  
ITTA – THE VOICE OF AMERICA’S BROADBAND PROVIDERS**

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**COMMENTS OF  
ITTA – THE VOICE OF AMERICA’S BROADBAND PROVIDERS**

ITTA – The Voice of America’s Broadband Providers (ITTA) hereby submits its comments in response to the Commission’s Notice of Proposed Rulemaking to authorize television broadcasters to use the “Next Generation,” ATSC 3.0 transmission standard on a voluntary basis while they continue to deliver current-generation, ATSC 1.0 standard digital television service to their viewers.<sup>1</sup>

**I. INTRODUCTION AND SUMMARY**

ITTA’s members provide a variety of communications services to subscribers in predominantly rural areas in 43 states. In addition to voice and high-speed data offerings, all ITTA members provide video service to subscribers utilizing a variety of distribution platforms, including IPTV networks, coaxial cable systems, fiber infrastructure, and hybrid fiber-coaxial cable. Collectively, ITTA members currently serve fewer than one million video subscribers across the United States. In the vast majority of these markets, ITTA members are new entrant multichannel video programming distributors (MVPDs) that compete head-to-head against DBS

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<sup>1</sup>*Authorizing Permissive Use of the “Next Generation” Broadcast Television Standard*, Notice of Proposed Rulemaking, 32 FCC Rcd 1670 (2017) (NPRM).

providers, at least one (and in some cases, two or three) incumbent cable operators, and online video providers, such as Netflix, Hulu, Amazon Video, Apple TV, and others.

ITTA members have, in recent years, become a growing presence in the video distribution market because consumers have increasingly come to value the ability to subscribe to a suite of services that includes video programming bundled with data, voice, and other services. Entering the video market as the third, fourth, or fifth competitor, however, has not been an easy task. Continuing regulatory uncertainty, such as the Commission's lack of action in the retransmission consent good faith proceeding, combined with challenges associated with the local franchising process and entrenched barriers to marketplace entry, have placed smaller and new entrant MVPDs at a competitive disadvantage relative to their larger counterparts.

ITTA supports the *NPRM*'s proposal that MVPDs not be required to carry broadcasters' ATSC 3.0 signals during the period when broadcasters are voluntarily implementing ATSC 3.0 service. The Commission has authority to adopt this approach under the Communications Act of 1934, as amended (Act), as well as Commission precedent. However, the Commission must adopt appropriate safeguards to ensure that broadcasters, through the retransmission consent process, do not effectively eviscerate the non-mandatory nature of MVPD carriage of ATSC 3.0 signals. Moreover, the Commission should ensure that MVPDs are made whole where they would otherwise lose a broadcaster's ATSC 1.0 signal as a result of the deployment of ATSC 3.0 service.

## **II. MVPDS SHOULD NOT BE REQUIRED TO CARRY BROADCASTERS' ATSC 3.0 SIGNALS DURING THE VOLUNTARY ATSC 3.0 IMPLEMENTATION PERIOD**

The *NPRM* proposes to authorize ATSC 3.0 as an optional transmission standard that can be used by television licensees on a voluntary basis while they continue to deliver current-

generation ATSC 1.0 service.<sup>2</sup> It further proposes that MVPDs must continue to carry broadcasters' ATSC 1.0 signals pursuant to their statutory mandatory carriage obligations, but that MVPDs not be required to carry broadcasters' ATSC 3.0 signals during the period when broadcasters are voluntarily implementing ATSC 3.0 service.<sup>3</sup> These proposals are supported by the petitioners that initiated this proceeding, led by broadcasters, as well as by MVPDs that commented on the petition for rulemaking.<sup>4</sup>

ITTA likewise supports these proposals. MVPDs are not currently capable of receiving and retransmitting ATSC 3.0 signals. Moreover, standards-setting work on the new 3.0 standard is not yet complete – importantly, including the development of recommended standards for MVPD carriage of ATSC 3.0 signals. Thus, the potentially significant costs and burdens associated with MVPD carriage of ATSC 3.0 signals remain unknown. Such costs and burdens could include new or modified MVPD equipment for receiving and retransmitting ATSC 3.0 signals, consumer set-top boxes, and the need to devote additional bandwidth for ATSC 3.0.<sup>5</sup>

The *NPRM* confirms that “ATSC 3.0 service is not backward-compatible with existing TV sets/receivers (which have only ATSC 1.0 and analog tuners). This means that consumers will need to buy new TV sets or converter equipment to receive ATSC 3.0 service.”<sup>6</sup> It also cites “the current uncertainty about how MVPDs would carry ATSC 3.0 signals as a technical matter,”<sup>7</sup> and recognizes that “ATSC 3.0 signals could occupy more bandwidth than ATSC 1.0

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<sup>2</sup> *See id.* at 1674, para. 5.

<sup>3</sup> *See id.* at 1683, para. 28.

<sup>4</sup> *See id.* at 1685, para. 31.

<sup>5</sup> *See id.* at 1683-84, para. 29.

<sup>6</sup> *Id.* at 1676, para. 9.

<sup>7</sup> *Id.* at 1688, para. 36.

signals.”<sup>8</sup> In light of all these factors, particularly the unknown but potentially substantial costs and burdens that would be imposed on MVPDs and their subscribers alike, the public interest dictates that MVPDs not be required to carry broadcasters’ ATSC 3.0 signals during the period when broadcasters are voluntarily implementing ATSC 3.0 service.

The *NPRM* also seeks comment on the legal basis for according carriage rights in this manner,<sup>9</sup> focusing on two alternative approaches for how broadcasters could simulcast both ATSC 3.0 and ATSC 1.0 service to viewers without the need for an additional allocation of spectrum to broadcasters.<sup>10</sup> Under a “licensed” approach, two stations that have a reciprocal simulcast arrangement would each have licenses for their ATSC 1.0 and 3.0 streams, but the Commission would accord mandatory carriage rights only to the ATSC 1.0 stream for each station.<sup>11</sup> According to the Commission, this approach would be consistent with prior Commission proposals in the channel sharing context and precedent established in the DTV transition.<sup>12</sup> Under a “multicast” approach, another station in the market would broadcast the subject station’s ATSC 1.0 simulcast stream as one of its multicast streams.<sup>13</sup>

At a minimum, the Commission may find a legal basis for the licensed approach pursuant to the same authorities underlying its DTV transition precedent. As the *NPRM* recounts, in that context, where broadcasters were simulcasting analog and digital signals, the Commission

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<sup>8</sup> *Id.* at 1687, para. 35.

<sup>9</sup> *See, e.g., id.* at 1683, 1685, paras. 28, 31.

<sup>10</sup> The *NPRM* notes that DTV stations cannot broadcast in both ATSC 3.0 and ATSC 1.0 from the same facility, necessitating broadcasters to partner with other stations in the market in order to simulcast in both transmission standards. *See id.* at 1676, para. 9 n.30.

<sup>11</sup> *See id.* at 1685, para. 32.

<sup>12</sup> *See id.*

<sup>13</sup> *See id.* at 1687, para. 34.

decided that analog signals would have mandatory carriage rights during the DTV transition, but that digital signals would not.<sup>14</sup>

In addition, under both approaches, the ATSC 1.0 and 3.0 signals are being transmitted from different “stations.” Both Section 614 of the Act,<sup>15</sup> pertaining to cable carriage of local commercial television signals, and Section 615 of the Act,<sup>16</sup> pertaining to cable carriage of noncommercial educational television, contain provisions stipulating that signal duplication is not required. Section 614(b)(5) provides that “a cable operator shall not be required to carry the signal of any local commercial television station that substantially duplicates the signal of another local commercial television station which is carried on its cable system, or to carry the signals of more than one local commercial television station affiliated with a particular broadcast network. . . .”<sup>17</sup> Similarly, Section 615(e) provides that a “cable operator of a cable system with a capacity of more than 36 useable activated channels which is required to carry the signals of three qualified local noncommercial educational television stations shall not be required to carry the signals of additional such stations the programming of which substantially duplicates the programming broadcast by another qualified local noncommercial educational television station requesting carriage.”<sup>18</sup> Under either approach, these provisions may provide a further basis to enable the Commission to adopt requirements to implement its proposal that MVPDs must continue to carry broadcasters’ ATSC 1.0 signals pursuant to their statutory mandatory carriage

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<sup>14</sup> See *id.* at 1686, para. 32 (citing *Carriage of Digital Television Broadcast Signals: Amendment to Part 76 of the Commission’s Rules, Second Report and Order and First Order on Reconsideration*, 20 FCC Rcd 4516 (2005) (*DTV Must-Carry Second R&O*)).

<sup>15</sup> 47 U.S.C. § 534.

<sup>16</sup> *Id.* § 535.

<sup>17</sup> *Id.* § 534(b)(5).

<sup>18</sup> *Id.* § 535(e).

obligations but not carry broadcasters' ATSC 3.0 signals during the voluntary ATSC 3.0 implementation period.

As the Commission found in the *DTV Must-Carry Second R&O*, “must carry is narrowly tailored to preserve the multiplicity of broadcast stations for households that do not subscribe to cable.”<sup>19</sup> There, the Commission concluded that “the burden that mandatory dual carriage places on cable operators’ speech appears to be greater than is necessary to achieve the interests that must carry was meant to serve.”<sup>20</sup> This same calculus applies here. In light of the technical uncertainties associated with MVPD carriage of ATSC 3.0 signals, the substantial additional costs that are likely to be associated with it, and the greater bandwidth needs of ATSC 3.0, along with the voluntary nature of any broadcaster choosing to broadcast an additional signal in ATSC 3.0 format at this juncture, the Commission may find in the statute and its precedent legal authority to accord carriage rights in the manner it proposes in the *NPRM*.

### **III. THE COMMISSION SHOULD ADOPT SAFEGUARDS TO ENSURE THAT THE RETRANSMISSION CONSENT PROCESS IS NOT ABUSED TO *DE FACTO* IMPOSE MANDATORY MVPD CARRIAGE OF ATSC 3.0 SIGNALS**

To ITTA members, the single most significant issue that they face in the delivery of their video programming is the marketplace distortions caused by the outdated retransmission consent regime. Simply stated, this regime has failed to keep pace with developments in the video distribution marketplace, and has created an unlevel playing field in which broadcasters have all of the bargaining leverage when dealing with small and new entrant MVPDs.

Such marketplace distortions are reflected not only in soaring retransmission consent fees, but also in other negotiating trends. ITTA members commonly encounter and are forced to

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<sup>19</sup> *DTV Must-Carry Second R&O*, 20 FCC Rcd at 4524, para. 15 (citing *Turner Broadcasting Systems, Inc. v. FCC*, 520 U.S. 180, 218 (1997)).

<sup>20</sup> *Id.*



accept program tying, where retransmission of broadcast stations is conditioned upon carriage of less popular multicast channels or affiliated non-broadcast content. ITTA members have been forced by one broadcaster, for example, to agree to carry its new, unlaunched, non-broadcast programming (if and when it is ready to launch) in order to secure retransmission consent for its broadcast programming. Large and vertically-integrated programmers routinely tie access to must-have programming, including non-replicable sports programming, to their other less attractive programming. Without access to must-have programming, subscribers will defect to the competition. Once a customer switches to another provider, it is difficult (if not impossible) to win back the customer. ITTA member companies, with their smaller customer bases, cannot absorb such subscriber defections and have no choice but to accede to increased content fees and unreasonable terms in order to remain in the market.

Compounding this litany of problems with the retransmission consent regime is the Commission's inaction in the rulemaking proceeding mandated by Congress to examine reforms to it. Not only has regulatory reform been halted,<sup>21</sup> but the existing retransmission consent complaint process is not a feasible avenue for relief for smaller and new entrant MVPDs. Besides being prohibitively costly and time consuming, the ability to pursue regulatory relief is hampered by mandatory non-disclosure provisions typically found in retransmission consent negotiations and agreements. These provisions prohibit MVPDs from revealing the contract

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<sup>21</sup> See FCC Chairman Tom Wheeler, *An Update on Our Review of the Good Faith Retransmission Consent Negotiation Rules*, FCC Blog (July 14, 2016, 10:37 AM), <https://www.fcc.gov/news-events/blog/2016/07/14/update-our-review-good-faith-retransmission-consent-negotiation-rules> (announcing that Commission would not “at this time” adopt additional rules governing good faith negotiations for retransmission consent, and instead would rely on the complaint and enforcement processes to address allegations of bad faith in retransmission consent negotiations).

rates, terms and conditions that are subject to dispute. This lack of transparency has become a valuable tool in the broadcasters' arsenal to silence smaller MVPDs.

Against this backdrop, there is concern that broadcasters may seize upon the retransmission consent process to compel MVPDs to upgrade their equipment before they are ready to do so in order to carry ATSC 3.0 signals.<sup>22</sup> The NPRM seeks comment on these concerns, "including whether and/or how the good faith rules concerning retransmission consent should and/or could be applied and/or adapted to address them."<sup>23</sup> It also seeks comment on to what extent, if any, the retransmission process could be used by broadcasters to compel MVPDs, particularly smaller MVPDs, to carry an ATSC 3.0 stream as a condition for obtaining carriage of an ATSC 1.0 feed.<sup>24</sup>

Unfortunately, real-world MVPD experiences are already evincing that concerns about broadcaster abuse of the retransmission consent process to compel MVPD carriage of ATSC 3.0 streams are not merely speculative. A recent *ex parte* communication by the American Television Alliance (ATVA) is instructive:

[M]ultiple broadcasters have already demanded that multiple ATVA members carry ATSC 3.0 signals during recent retransmission consent negotiations. In doing so, broadcasters have explicitly sought to tie continued carriage of their ATSC 1.0 signals with carriage of the new ATSC 3.0 signals. In some cases, broadcasters have demanded that MVPDs carry the entire 6MHz of the allotted ATSC 3.0 spectrum—no matter what service the broadcaster chooses to deploy using that spectrum. These demands, by their terms, contemplate carriage of non-broadcast services.<sup>25</sup>

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<sup>22</sup> See *NPRM*, 32 FCC Rcd at 1689, para. 39.

<sup>23</sup> *Id.* at 1690, para. 39.

<sup>24</sup> See *id.* at para. 40.

<sup>25</sup> Letter from Mike Chappell, Executive Director, ATVA, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 16-142, at 1 (filed Mar. 20, 2017).

Without Commission action to prohibit broadcaster manipulation of the retransmission consent process in this manner, smaller and new-entrant MVPD carriage of ATSC 3.0 signals threatens to become a *de facto* requirement, in contravention of the *NPRM*'s proposal that it not be. Therefore, ITTA suggests three actions the Commission could take in this proceeding, pursuant to the Act's good faith retransmission consent negotiation provisions,<sup>26</sup> in order to address broadcaster abuse of the retransmission consent process to compel MVPD carriage of ATSC 3.0 streams.

First, the Commission could establish a mechanism where, upon complaint by an MVPD, the Commission subpoenas the subject retransmission consent agreement and any documents related to the negotiation thereof, under an appropriate protective order.<sup>27</sup> This would help to overcome the non-disclosure provisions commonly found in retransmission consent agreements which hamper MVPDs' ability to prosecute complaints against broadcasters under the good faith negotiation rules.

Second, the Commission could adopt a rule that tying carriage of an ATSC 3.0 stream to any other term or condition in a retransmission consent negotiation establishes a *prima facie* case under the "totality of the circumstances" test if an MVPD brings a complaint of violation of the good faith negotiation rules. Such a presumption, shifting the burden of proof to the respondent broadcaster that the negotiation did not violate the duty to negotiate in good faith,<sup>28</sup> is warranted in light of all the disincentives MVPDs currently have, as discussed above, to carry

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<sup>26</sup> See 47 U.S.C. § 325(b)(1), (3)(C).

<sup>27</sup> See *id.* § 409 (e)-(g), (m) (Commission subpoena powers related to matters under its investigation).

<sup>28</sup> *Contra* 47 CFR § 76.65(d) (burden of proof is on the complainant in any complaint of violation of the good faith standard).

ATSC 3.0 streams. If, nevertheless, an MVPD chooses to negotiate for carriage of an ATSC 3.0 stream, there would be no reason for it to initiate a complaint that such carriage violates the good faith negotiation rules. In addition, such a presumption would not be tantamount to prohibiting MVPD carriage of ATSC 3.0 streams through retransmission consent negotiations;<sup>29</sup> there is no reason to place artificial market constraints on such carriage if an MVPD actually seeks to carry an ATSC 3.0 signal, or is willing to bargain to do so in the course of retransmission consent negotiations.

Third, the Commission could establish “rocket docket” procedures for the handling of complaints of violation of the good faith negotiation rules in these circumstances.<sup>30</sup> ITTA’s suggested rule establishing a prima facie case under the “totality of the circumstances” test should help with accelerated dispute resolution procedures. Moreover, such procedures would at least somewhat help smaller and new-entrant MVPDs overcome the cost and time hindrances to filing with the Commission complaints of violation of the good faith negotiation rules.

#### **IV. MVPDS SHOULD BE MADE WHOLE IF THEY LOSE A STATION’S SIGNAL AS A RESULT OF THE STATION DEPLOYING ATSC 3.0 SERVICE**

The *NPRM* also seeks comment on how, if at all, the Commission should address situations in which a small or rural MVPD that receives a broadcast station over-the-air prior to deployment of ATSC 3.0 service can no longer do so during or after such deployment.<sup>31</sup> In this scenario, the MVPD has lost the ATSC 1.0 signal for which it bargained via a retransmission

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<sup>29</sup> *But see NPRM*, 32 FCC Rcd at 1691, para. 42 (seeking comment on whether the Commission should consider prohibiting MVPD carriage of ATSC 3.0 signals through retransmission consent negotiations until technical standards for such carriage are further developed).

<sup>30</sup> *Cf., e.g.*, 47 CFR § 1.730 (Accelerated Docket for formal complaint proceedings filed against common carriers pursuant to Section 208 of the Act, 47 U.S.C. § 208).

<sup>31</sup> *See NPRM*, 32 FCC Rcd at 1690, para. 40.

consent agreement. Where this occurs, the fundamental principle should be that the Commission will facilitate an adequate replacement for the lost signal. Either as a condition to the new license under the “licensed” approach, the modified license under the “multicast” approach,<sup>32</sup> or the Special Temporary Authority (STA),<sup>33</sup> the Commission should require the broadcaster to ensure that the MVPD still receives a “good quality” signal. This could involve, for instance, any combination of engineering modifications to the broadcaster’s station, the broadcaster paying the MVPD to upgrade its receive antennas, or the broadcaster delivering the ATSC 1.0 signal to the MVPD headend via some alternate means, such as fiber or microwave, at the broadcaster’s sole expense.<sup>34</sup>

## V. CONCLUSION

In sum, while ATSC 3.0 holds promise for innovation in the public interest, its relative early stage of development renders it premature for required implementation by broadcasters, let alone MVPDs. Requiring MVPDs to carry ATSC 3.0 signals at this juncture would impose substantial costs and burdens on MVPDs and their subscribers alike. The Commission thus should adopt the *NPRM*’s proposal not to require such carriage by MVPDs as standards development remains ongoing. Moreover, during this development and transition period,

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<sup>32</sup> ITTA recognizes that the Commission touts as a potential benefit of the “multicast” approach that simulcast arrangements pursuant to it could be implemented without additional licensing. *See id.* at 1679, para. 19. Should the Commission adopt this approach and not subject the station multicasting ATSC 1.0 signals to apply for a minor modification to its license, then it can so condition the modified license of the station that will be transmitting ATSC 3.0 signals. *See id.* (conversion of the broadcaster’s current facility to operate in ATSC 3.0 will require additional licensing).

<sup>33</sup> *See id.* at 1680-81, para. 22 (seeking comment on whether to authorize simulcasting through grants of STAs).

<sup>34</sup> *See id.* at 1689, para. 38 (seeking comment on how broadcasters will deliver their signals to MVPDs if their ATSC 1.0 simulcasts do not deliver a good quality signal to the headend).

MVPDs should continue to enjoy the full benefits of the retransmission consent agreements for which they bargained, but should not be effectively coerced into carrying ATSC 3.0 signals when negotiating new retransmission consent agreements or the renewal of existing ones.

Respectfully submitted,

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