

October 20, 2017

**VIA ECFS**

Ms. Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW  
Washington, DC 20554

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

Dear Ms. Dortch:

As the Commission moves toward a decision in the above-captioned docket, Charter Communications, Inc. (“Charter”) urges the Commission to take the necessary steps to ensure a voluntary transition to the ATSC 3.0 broadcast standard that delivers the greatest benefit to consumers, including the tens of millions of MVPD subscribers. As detailed below, the Commission can ensure the voluntary nature of the transition by adopting safeguards so that the cost of the transition, and potential disruption it could cause, does not fall on the customers of MVPDs. By taking these steps and ensuring that MVPDs’ adoption of ATSC 3.0 is truly voluntary, the Commission can make certain that consumers continue to receive broadcasts of the same content and quality during and after the transition as they currently enjoy today.

As the Commission knows, a critical feature of the ATSC 3.0 standard is that it is not backwards compatible—that is, it is not capable of being received by existing subscriber set-top boxes, televisions, or indoor antennas. Thus, were the Commission to permit broadcasters to immediately switch, or transition too quickly, from ATSC 1.0 to ATSC 3.0 transmission, countless subscribers would be at risk of losing access to the programming that they currently receive either over-the-air or through an MVPD. To prevent this from occurring, the Commission proposes requiring broadcasters to simulcast ATSC 1.0 signals as “guests” on separate “host” facilities for an indeterminate period.<sup>1</sup> MVPDs would carry such

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<sup>1</sup> *Authorizing Permissive Use of the “Next Generation” Broad. Television Standard*, Notice of Proposed Rulemaking, 32 FCC Rcd 1670, 1683 ¶ 27 (2017) (“*Notice*”) (“If we approve a voluntary, market-driven transition to ATSC 3.0 that implements a simulcast approach, we propose that the Commission decide in a future proceeding when it would be appropriate for broadcasters to stop simulcasting in ATSC 1.0.”); *id.* ¶ 9 (describing “host stations”).

simulcasts under existing retransmission consent agreements and must-carry elections.<sup>2</sup> MVPDs would have the option to carry new ATSC 3.0 signals if they negotiate new retransmission consent agreements allowing them to do so.<sup>3</sup>

As ATVA has detailed, the transition to ATSC 3.0 could impose real costs on MVPDs and their subscribers, without clearly defined benefits.<sup>4</sup> First, MVPDs would incur substantial costs to upgrade their facilities to be able to receive and process ATSC 1.0 simulcasts from new “host” stations. Critically, these are costs that MVPDs would not be able to avoid, as they would be statutorily obligated to carry the ATSC 1.0 simulcasts of those qualifying stations electing must carry.<sup>5</sup> MVPDs also would have to purchase new equipment (e.g., new receivers, new transcoders, and demultiplexers), much of which does not yet exist, to be able to receive and process ATSC 3.0 signals. And, if broadcasters have their way, MVPDs would have to pay new, and potentially substantial, per-subscriber royalties in order to do so. Moreover, if broadcasters choose to transmit in higher-resolution formats, MVPDs would be forced to devote additional capacity to carrying ATSC 3.0, which will necessarily limit the bandwidth available for other programming and services, such as broadband.

A key principle underpinning the Commission’s proposed “voluntary” transition is that MVPDs should not be forced to carry ATSC 3.0 streams before it is economically desirable or technologically feasible for them to do so.<sup>6</sup> Broadcasters purport to agree with this principle, but Charter is concerned that broadcasters will use their tremendous leverage in retransmission consent negotiations to compel MVPDs to carry ATSC 3.0, absent Commission action to prevent such self-interested behavior. Indeed, broadcasters such as Sinclair regularly use such leverage to condition retransmission

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<sup>2</sup> *Id.* at 1683 ¶ 28 (“We propose that MVPDs must continue to carry broadcasters’ ATSC 1.0 signals, pursuant to their statutory mandatory carriage obligations, and that MVPDs will 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> *Id.* at 1689-90 ¶ 39 (“The Petitioners contemplate that, at some future time, MVPDs will want to negotiate for carriage of ATSC 3.0 signals via retransmission consent so that MVPDs can offer their customers the improved service and new features associated with ATSC 3.0 service.”).

<sup>4</sup> Comments of the American Television Alliance, GN Docket No. 16-142, at 6-18 (May 9, 2017) (“ATVA Comments”).

<sup>5</sup> 47 U.S.C. § 534(a) (providing that “[e]ach cable operator shall carry, on the cable system of that operator, the signals of local commercial television stations . . . as provided by this section”); *id.* § 534(c) (setting forth must-carry rights of low-power stations, including Class A stations, on cable systems); *id.* § 535(a) (providing that “each cable operator of a cable system shall carry the signals of qualified noncommercial educational television stations in accordance with the provisions of this section”); *id.* § 338(a)(1) (“[e]ach satellite carrier providing . . . secondary transmissions to subscribers located within the local market of a television broadcast station of a primary transmission made by that station shall carry upon request the signals of all television broadcast stations located within that local market . . .”).

<sup>6</sup> Notice, 32 FCC Red at 1723, Statement of Commissioner O’Rielly (emphasizing that the ATSC 3.0 transition should be “completely voluntary for all participants—broadcasters, distributors, and consumers alike”).

consent for desired programming on an MVPD agreeing to carry unwanted content,<sup>7</sup> and have shown an increasing willingness to “blackout” programming to MVPDs that do not succumb to their unilateral demands.<sup>8</sup> There is every reason to think they will engage in similar tactics to force MVPDs to carry ATSC 3.0 signals that MVPDs neither want nor are able to carry.

To prevent broadcasters from compelling carriage of ATSC 3.0 signals by threatening or conditioning existing ATSC 1.0 service, the Commission should, as ATVA has urged, “require broadcasters to negotiate initial carriage of ATSC 3.0 signals *separately* from the continued carriage of ATSC 1.0 signals.”<sup>9</sup> Such a requirement “would permit MVPDs to negotiate ATSC 3.0 carriage based on the ATSC 3.0 signals’ own potential value, rather than out of fear of losing continued ATSC 1.0 carriage.”<sup>10</sup> Relatedly, the Commission should prohibit broadcasters from relying on boilerplate language in existing retransmission consent agreements regarding the nature of the “signal” to be carried and the manner in which MVPDs are to carry it to require ATSC 3.0 carriage, as such boilerplate existed long before ATSC 3.0 became a possibility.

The Commission should also reject NAB’s proposal to allow a station that obtains a waiver of the ATSC 1.0 simulcasting requirement to instead elect must carry for its ATSC 3.0 feed provided it “arrange[s] for delivery of its signal to any MVPDs required to carry the station’s signal in a format the MVPD is capable of receiving.”<sup>11</sup> Such proposal blatantly flouts the Commission’s stated intention not to address must carry in this proceeding and it would, if adopted, constitute an unconstitutional expansion of statutory must carry obligations.

Likewise, the Commission should ensure that ATSC 1.0 simulcasting does not become an opportunity for a station to alter its existing carriage rights. To prevent such an outcome, the Commission should prohibit a broadcaster from relocating to a host station in a different DMA; only permit a guest station to simulcast on a host station deemed significantly viewed in *each* of the

<sup>7</sup> See Comments of the American Television Alliance, MB Docket No. 15-216, at 24-27 (Dec. 1, 2015); see also *DISH Network, L.L.C. v. Sinclair Broadcast Group, Inc.*, Verified Amended and Restated Retransmission Complaint and Request for Preliminary Injunctive Relief, MB Docket No. 12-1, at ii, 9 (Aug. 26, 2015).

<sup>8</sup> Ben Munson, *Sinclair Channels Including Tennis Channel Dropping from Frontier*, FIERCECABLE (Dec. 21, 2016), <http://www.fiercecable.com/broadcasting/sinclair-channels-including-tennis-channel-dropping-from-frontier> (citing a statement from Frontier claiming that Sinclair was “insisting on . . . the inclusion of channels that our customers do not want”); Mike Farrell, *Grid-Blocked*, MULTICHANNEL NEWS (Jan. 16, 2017), <http://www.multichannel.com/grid-blocked/410200> (“Tribune’s stations went dark to Dish Network subscribers last year, in part because Tribune insisted on including carriage of WGN America in the negotiations.”).

<sup>9</sup> ATVA Comments at 25.

<sup>10</sup> *Id.* at 27.

<sup>11</sup> Letter from Patrick McFadden, Associate General Counsel, NAB, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 16-142, at 4 (Sept. 8, 2017).

counties where the guest station itself qualifies for such treatment under existing rules; and set network nonduplication and syndicated exclusivity protections for ATSC 1.0 simulcasts according to the station's pre-transition facilities.<sup>12</sup> Furthermore, while Charter does not oppose stations using multicasting to host another station's ATSC 1.0 simulcast, the Commission should decline to authorize such an arrangement if doing so would create additional must carry obligations—e.g., by triggering a most-favored nation clause in a third station's retransmission consent contract.<sup>13</sup>

Charter also urges the Commission to take a variety of complementary actions to ensure the transition is truly voluntary and provides the greatest benefit to over-the-air and MVPD viewers:

*First*, to prevent broadcasters from degrading picture quality or reducing content on their ATSC 1.0 simulcasts—whether to accommodate host station bandwidth constraints or deliberately to force MVPD carriage of ATSC 3.0—the Commission should require broadcasters to transmit ATSC 1.0 simulcasts in the same format and picture quality that they employ today, including continuing to broadcast high definition broadcast streams in HD format, and to stream identical content.<sup>14</sup> Furthermore, the Commission should not allow stations that choose to transmit multiple ATSC 3.0 programming streams to evade the simulcast requirement by purposefully choosing less popular programming for ATSC 1.0 simulcasting rather than the “guest” station's primary stream. The Commission should also put in place certain procedural protections for MVPDs and consumers, such as a requirement that broadcasters provide notice well in advance of when they begin simulcasting, to give MVPDs sufficient time to prepare; and a requirement that, in the event of a loss of service or signal degradation, the station provide clear and conspicuous on-screen notification explaining that its transition to ATSC 3.0 is the source of the issue.

*Second*, to prevent MVPDs, and ultimately their customers, from having to bear the cost of a transition they did not ask for, the Commission should require broadcasters to reimburse MVPDs for the additional costs of carrying ATSC 1.0 simulcasts, which as noted above, they would be obligated to carry.

*Third*, to prevent viewers and MVPDs from losing access to over-the-air signals as a result of ATSC 1.0 signal relocations, the Commission should encourage simulcasts on existing facilities, prohibit simulcasting arrangements from reducing a stations' covered populations by more than a certain *de minimus* percentage, and ensure continued coverage to headends and receive facilities. As

<sup>12</sup> ATVA Comments at 40-44.

<sup>13</sup> See Reply Comments of ATVA, GN Docket No. 16-142, at 16-20 (June 8, 2017).

<sup>14</sup> Charter acknowledges that some ATSC 3.0 content and features may not be replicable in ATSC 1.0, and agrees that any simulcasting requirement should not preclude broadcasters from offering such content or features through ATSC 3.0. However, such an exception to the simulcasting requirement should apply only to those content or features that cannot be transmitted and not to the transmission as a whole.

ATVA has demonstrated, simply requiring broadcasters to serve “a substantially similar community of license” is not sufficient, as the two stations may serve the same community of license, yet have drastically different service contours.<sup>15</sup>

*Fourth*, the Commission should not allow low-power and Class A stations to “flash-cut” from ATSC 1.0 to ATSC 3.0. Such an option is guaranteed to cause viewers and MVPDs to lose access to relied-upon programming, including from the “big four” networks that often utilize LPTV stations for distribution, particularly in smaller markets.<sup>16</sup> There is no evidence to suggest that low-power and Class A stations will be left out of the transition if they are required to simulcast like all other stations.

Authority to implement the foregoing protections may be found in numerous provisions of the Communications Act. With respect to the separate-negotiation requirement, Section 325 requires the Commission to “establish regulations to govern the exercise by television broadcast stations of the right to grant retransmission consent.”<sup>17</sup> The broadcasters do not dispute that Section 325 allows the Commission to specify the process by which retransmission consent is negotiated, but instead attempt to recast ATVA’s separate-negotiation proposal as a “substantive” intervention into retransmission consent negotiations.<sup>18</sup> Charter struggles to understand how this can be so given that ATVA’s proposal says nothing about the substance of such negotiations, nor does it dictate any result. But even if this were true, the Commission plainly has the legal authority to address “substance” in retransmission consent negotiations implicating ATSC 3.0, so long as it finds that doing so would serve the public interest.<sup>19</sup>

In any case, the Commission need not rely on the retransmission consent statute alone to require broadcasters to separately negotiate for ATSC 3.0 carriage. As set forth in detail in ATVA’s August 21, 2017 *ex parte*, numerous other provisions of the Communications Act grant the Commission broad authority to adopt a new transmission standard and to condition that standard as necessary to ensure that it serves the public interest, including, either individually or in combination: Sections 303(g), 303(b),

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<sup>15</sup> ATVA Comments at 31-32. Indeed, the Commission should also demand, in return for granting broadcasters use of the public spectrum, that broadcaster use ATSC 3.0 to *extend* over-the-air signals to customer who are currently unserved due to terrain-limited propagation conditions.

<sup>16</sup> See Letter from Michael Nilsson, Counsel to ATVA, to Marlene H. Dortch, Secretary, FCC (Sept. 29, 2017) (noting that there are 55 low power or Class A stations affiliated with the “big four” ABC, CBS, FOX, and NBC networks, according to SNL Kagan).

<sup>17</sup> 47 U.S.C. § 325(b)(3)(A).

<sup>18</sup> Reply Comments of Sinclair Broadcast Group, GN Docket No. 16-142, at 8 (June 8, 2017).

<sup>19</sup> 47 U.S.C. § 325(b)(3)(A), (b)(3)(C)(ii); *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (upholding new subject-matter restrictions for broadcasting, noting that “it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency *believes* it to be better”)



307(b), 336, 316, and the Commission's authority to waive the requirement to transmit in ATSC 1.0 and to condition any such waiver as necessary to further the public interest.<sup>20</sup>

Aside from taking actions to prevent broadcasters from abusing their leverage in retransmission consent negotiations to force MVPD ATSC 3.0 carriage, and to protect against service losses and signal degradation, a few miscellaneous issues raised in the proceeding warrant the Commission's attention. To start, the Commission should, as it did when adopting the ATSC 1.0 standard, impose a requirement that broadcasters who own patents in the ATSC 3.0 standard license such patents at "reasonable and nondiscriminatory" ("RAND") royalties to prevent them from "extract[ing] supracompetitive royalties from the industry participants."<sup>21</sup> The RAND requirement should extend to licensing of the H.265 encoding standard, and the Commission should make clear that charging MVPDs per-subscriber retransmission royalties for the H.265 encoding standard on top of the retransmission consent fees that MVPDs already pay would be "unreasonable."

Additionally, the Commission should readjust the fee that broadcasters must remit to the treasury for "ancillary and supplementary" non-broadcast services.<sup>22</sup> Such an adjustment is plainly warranted—indeed, it is statutorily required<sup>23</sup>—to reflect the dramatic increase in the value of spectrum licenses as reflected in the auctions held in the 18 years since the Commission last set the fee.<sup>24</sup> Revision of the fee is also appropriate in view of the potentially highly lucrative use of broadcast frequencies for broadband and other interactive services that ATSC 3.0 will allegedly make possible.<sup>25</sup>

Finally, the Commission also should consider whether interactive television services offered through ATSC 3.0 constitute "broadcasting." As defined in the Communications Act,

<sup>20</sup> Letter from Michael Nilsson, Counsel to ATVA, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 16-142, at 4-11 (Aug. 21, 2017).

<sup>21</sup> *Broadcom Corp. v. Qualcomm Inc.*, 501 F.3d 297, 310 (3d Cir. 2007).

<sup>22</sup> 47 U.S.C. § 336(e)(1).

<sup>23</sup> *Id.* § 336(e)(2)(B)-(C) (linking said fee to "the amount that would have been recovered" pursuant to spectrum auctions and requiring the Commission to adjust the fee "from time to time in order to continue to comply with the requirements of this paragraph").

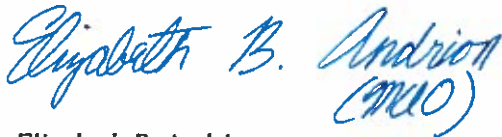
<sup>24</sup> *Fees for Ancillary or Supplementary Use of Digital Television Spectrum Pursuant to Section 336(e)(1) of the Telecomm. Act of 1996*, 14 FCC Rcd 19,931 (1999) (affirming on reconsideration 5 percent figure).

<sup>25</sup> Sinclair Broadcast Group, Inc., Nexstar Media Group and Sinclair Broadcast Group Establish Consortium to Promote Broadcast Spectrum Aggregation, Innovation and Monetization, PR NEWswire (Mar. 15, 2017), <http://www.prnewswire.com/news-releases/nexstar-media-group-and-sinclair-broadcast-group-establish-consortium-to-promote-broadcast-spectrum-aggregation-innovation-and-monetization-300424026.html> (announcing the establishment of a consortium to, among other things, "promote innovation and develop and explore products and services associated with ATSC 3.0 and monetization opportunities such as spectrum utilization, virtual MVPD platforms, multicast channels, automotive applications, single frequency networks and wireless data applications, among others").

“broadcasting” is the “dissemination of radio communications intended to be received by the public, directly or by the intermediary of relay stations.”<sup>26</sup> Here, broadcasters have indicated that they might use ATSC 3.0 to deliver individualized content to viewers, such as targeted advertising or local sports broadcasts, using distinct transmission paths. Should they do so, “it may no longer be possible to say that any particular ‘communication’ is intended to be received by ‘the public.’”<sup>27</sup> If the Commission determines—as Charter believes it must—that such interactive television services are not “broadcasting,” then the Commission should clarify that broadcasters may not compel MVPDs to carry such non-broadcasting services as a condition of granting ATSC 3.0 retransmission consent.

Charter appreciates the Commission’s attention to these comments. Please direct any questions to the undersigned.

Sincerely,



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<sup>26</sup> 47 U.S.C. § 153(7).

<sup>27</sup> ATVA Comments at 50.