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October 25, 2017

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Marlene H. Dortch
Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, DC 20554

Re: ***Ex Parte*** **Communication in: MB Docket No. 15-216 (Good Faith Negotiation); MB Docket No. 10-71 (Retransmission Consent); MB Docket Nos. 14-50, 09-182, 07-294, 04-256 (Local Media Ownership); GN Docket No. 16-142 (ATSC 3.0)**

Dear Ms. Dortch:

On October 23, 2017, executives from three companies associated with the American Television Alliance met with Commissioner O'Rielly, staff from the offices of Chairman Pai and Commissioners Rosenworcel and Carr, and the Media Bureau to discuss the ATSC 3.0 transition and the local media ownership rule.[1]

Melisa Ordonez of DISH, Cliff Harris of Charter, and Chip McDonald of Cable ONE negotiate or direct the negotiation of retransmission consent issues on behalf of their companies. Between them, they negotiate hundreds of such agreements each year. They collectively have negotiated thousands of such agreements in the last decade. They and other ATVA representatives told the Commission the following:

- The only way for the ATSC 3.0 transition to be "voluntary" for MVPDs—as broadcasters have promised—is for first-time carriage of ATSC 3.0 signals to be negotiated separately.[2]

- All of the evidence available to the Commission shows that permitting top-four combinations in a single market will raise prices and increase the harm of blackouts. At a minimum, the Commission should seek further input before relaxing the top-four rule.

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1 A list of the attendees at each meeting can be found in Appendix A hereto.

2 *See* Comments of the American Television Alliance at 25, GN Docket No. 16-142 (filed May 9, 2017) ("ATVA ATSC Comments").

I. ATSC 3.0 Transition

Ms. Ordonez of DISH, Mr. Harris of Charter, and Mr. McDonald of Cable ONE each reiterated that they and other ATVA members do not seek to restrict broadcast innovation.[3] ATVA members merely wish to ensure that the transition is voluntary for all parties, and that their customers only have to pay to receive ATSC 3.0 signals if such signals have value to them.

The ATVA representatives each reported that broadcasters already seek to require carriage of ATSC 3.0 in recent retransmission consent negotiations. Both Mr. McDonald and Ms. Ordonez reported that nearly all broadcaster contract offers received in recent months have sought ATSC 3.0 carriage.

The ATVA representatives noted the unusual nature of such requests in advance of Commission rules authorizing ATSC 3.0 carriage. Of greater concern, they each noted that broadcasters have failed to provide even the most rudimentary details about what ATSC 3.0 carriage would entail. Instead, they have demanded that MVPDs carry whatever broadcasters might decide to provide them in ATSC 3.0 during the term of the contract.

At the same time, Ms. Ordonez, Mr. Harris, and Mr. McDonald each reported that they are unaware of any material consumer demand for ATSC 3.0 signals. Likewise, they are unaware of any ATSC 3.0-compliant consumer devices available in the market today. This, they argue, likely reflects the fact that broadcasters themselves do not yet know what they will do with such signals.

The ATVA representatives stated that to date, they have generally been able to reach agreements that delayed immediate carriage of ATSC 3.0. Each, however, noted that his or her company has not recently negotiated carriage renewals with some of the larger broadcast groups most closely associated with ATSC 3.0 transition. They argued that negotiations for ATSC 3.0 carriage will look very different once the Commission is no longer considering the "rules of the road." Each executive, in other words, believes that broadcasters will *insist* on ATSC 3.0 carriage once the Commission adopts ATSC 3.0 rules. They stated that they would often be unable to resist such demands in the face of potential multi-market blackouts of "marquee" events such as the NFL playoffs.

All three believe that the best way to determine the market value of ATSC 3.0—and the only way to ensure that the transition is "voluntary" in any meaningful sense of the word—is for negotiations for first-time carriage of such signals to occur separately from negotiations for renewal of existing agreements.

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[3] *Id.* at 1-2.

II. Media Ownership

The ATVA representatives each stated that, if the Commission were to eliminate the top-four prong of its local television multiple ownership rule, their subscribers would pay more to receive broadcast signals.[4] They know this because of the relatively limited set of instances in which they negotiate with duopolies today. In some cases—generally, but not always, in smaller markets—stations have obtained control of multiple "top-four" networks through combinations of non-overlapping stations, low-power stations, and multicast signals. The ATVA representatives reported that the number of such arrangements appears to be increasing.

ATVA members are concerned about any attempts to circumvent the top-four prohibition. Of more immediate relevance, however, is the fact that such arrangements provide a "natural experiment" to inform the Commission what would happen if it eliminated the "top-four" rule altogether and permitted duopolies to become the rule rather than the exception. The unanimous answer from the three executives matches the answer the Commission itself found three years ago[5]: prices will go up dramatically and the harm of blackouts will increase.

To take perhaps the most egregious example, Mr. McDonald described Cable ONE's recent negotiations with Northwest Broadcasting. Northwest Broadcasting operates individual stations in several of Cable ONE's Idaho markets. In Greenwood-Greenville, Mississippi, however, Northwest Broadcasting controls *all four* "Big Four" network affiliates.[6] Mr. McDonald described negotiations with Northwest Broadcasting in which Northwest Broadcasting refused to negotiate the Idaho stations separately from the Mississippi quadropoly. He described a month-long blackout in which Cable ONE's Mississippi viewers lost access to *all* network programming—and in which Cable ONE lost a substantial percentage of its Mississippi subscribers. And he described the results: Cable ONE now pays Northwest Broadcasting significantly higher retransmission fees than it pays any other broadcaster, including larger

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4 47 C.F.R. § 73.3555(b).

5 *See Amendment of the Commission's Rules Related to Retransmission Consent*, Report and Order and Further Notice of Proposed Rulemaking, 29 FCC Rcd. 3351 ¶ 10 (2014) ("*Joint Negotiation Order*") ("[J]oint negotiation among any two or more separately owned broadcast stations serving the same DMA will invariably tend to yield retransmission consent fees that are higher than those that would have resulted if the stations competed against each other in seeking fees."); *id.* ("With regard to Top Four broadcasters, we can confidently conclude that the harms from joint negotiation outstrip any efficiency benefits identified and that such negotiation on balance hurts consumers.").

6 As we understand it, Northwest Broadcasting owns a full-power and a low-power station in the Greenwood-Greenville market, each of which carries a second "top-four" network on a multicast feed.

station groups, station groups in larger Cable ONE markets, and station groups with stations serving more Cable ONE subscribers.

The ATVA representatives reported more generally that, where stations control more than one top-four network in a local market, they have more leverage and thus have been able to command higher fees and impose more onerous terms and conditions. Duopolies thus lead to higher prices for consumers.

The Commission reached these exact conclusions three years ago when it prohibited joint retransmission consent negotiations among non-commonly owned top-four broadcasters.[7] Congress later codified and expanded the Commission's joint negotiation rule.[8] And the Department of Justice relied on similar conclusions in requiring divestitures in the Nexstar-Media General merger.[9] We are aware of no evidence to disturb these conclusions, and the ATVA representatives provide new evidence in support of them.[10]

In such circumstances, we urge the Commission to either leave the top-four rule undisturbed or to seek further comment on the effect of local duopolies on retransmission consent prices, and the harm caused by duopoly blackouts. Such further proceedings should also

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[7] *Joint Negotiation Order* ¶¶ 10-17.

[8] STELA Reauthorization Act of 2014, Pub. L. No. 113-200, § 103(a); 47 U.S.C. § 325(b)(3)(C) (subsequent legislation requiring the Commission to "prohibit a television broadcast station from coordinating negotiations or negotiating on a joint basis with another television broadcast station in the same local market . . . to grant retransmission consent under this section to a[n MVPD], unless such stations are directly or indirectly under common de jure control permitted under the regulations of the Commission…").

[9] *See* Competitive Impact Statement at 8, *United States v. Nexstar Broad. Grp.* (D.D.C. Sept. 2, 2016) (No. 1:16-cv-01772-JDB), https://www.justice.gov/atr/casedocument/file/910661/download ("Prior to the merger, an MVPD's failure to reach a retransmission agreement with Nexstar for a broadcast television station might result in a blackout of that station and threaten some subscriber loss for the MVPD. But because the MVPD would still be able to offer programming on Media General's major network affiliates, which are at least partial substitutes for Nexstar's affiliates, many MVPD subscribers would simply switch stations instead of cancelling their MVPD subscriptions. After the merger, an MVPD negotiating with Nexstar over a retransmission agreement could be faced with the prospect of a dual blackout of major broadcast networks (or worse), a result more likely to cause the MVPD to lose subscribers and therefore to accede to Nexstar's retransmission fee demands. For these reasons, the loss of competition between the Nexstar and Media General stations in each DMA Market would likely lead to an increase in retransmission fees in those markets and, because increased retransmission fees typically are passed on to consumers, higher MVPD subscription fees.").

[10] *See* Letter from Michael Nilsson to Marlene Dortch at 5, MB Docket No. 15-216 *et al.* (filed Aug. 17, 2017) (describing standard under Administrative Procedure Act).

consider the extent to which stations have evaded the “top-four” prohibition already and whether changes to the rule are warranted to prevent such evasion.

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In accordance with the Commission’s rules, I will file one copy of this letter electronically in each of the dockets listed above.

Respectfully submitted,

Michael Nilsson
Counsel to the American Television Alliance

cc: Meeting participants

APPENDIX A

Meeting Participants

Office	Commission Participants	ATVA Participants
Commissioner O'Rielly	Commissioner O'Rielly Brooke Ericson	Cliff Harris (Charter) Elizabeth Andrion (Charter) Maureen O'Connell (Charter) Melisa Ordonez (DISH) Jeff Blum (DISH) Alison Minea (DISH) Chip McDonald (Cable ONE) Ross Lieberman (ACA) Michael Nilsson (Harris, Wiltshire & Grannis LLP)
Chairman Pai	Alison Nemeth	Elizabeth Andrion (Charter) Maureen O'Connell (Charter) Melisa Ordonez (DISH) Alison Minea (DISH) Chip McDonald (Cable ONE) Ross Lieberman (ACA) Michael Nilsson (Harris, Wiltshire & Grannis LLP)
Commissioner Carr	Nirali Patel	Cliff Harris (Charter) Elizabeth Andrion (Charter) Maureen O'Connell (Charter) Melisa Ordonez (DISH) Alison Minea (DISH) Chip McDonald (Cable ONE) Ross Lieberman (ACA) Michael Nilsson (Harris, Wiltshire & Grannis LLP)
Commissioner Rosenworcel	Kate Black Holly Saurer	Cliff Harris (Charter) Maureen O'Connell (Charter) Melisa Ordonez (DISH) Alison Minea (DISH) Chip McDonald (Cable ONE) Ross Lieberman (ACA) Michael Nilsson (Harris, Wiltshire & Grannis LLP)

Office	Commission Participants	ATVA Participants
Media Bureau	Michelle Carey Martha Heller Julie Saulnier Eugene Kiselev Mary Beth Murphy Brendan Holland Chad Guo Ben Arden Brendan Murray Steven Broeckaert Evan Baranoff John Gabrysch Julie Salovaara	Cliff Harris (Charter) Elizabeth Andrion (Charter) Maureen O'Connell (Charter) Melisa Ordonez (DISH) Alison Minea (DISH) Chip McDonald (Cable ONE) Ross Lieberman (ACA) Michael Nilsson (Harris, Wiltshire & Grannis LLP)