

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

In the Matter of

Authorizing Permissive Use of the “Next
Generation” Broadcast Television Standard

GN Docket No. 16-142

PETITION FOR RECONSIDERATION

The American Television Alliance (“ATVA”)¹ hereby seeks reconsideration of three aspects of the Commission’s recent *Order* permitting broadcasters to transmit in the ATSC 3.0 format.²

- **Separate negotiations.** The Commission should reconsider its decision *not* to require separate negotiations for first-time MVPD carriage of ATSC 3.0 signals. Broadcasters have already demonstrated that they will insist on such carriage otherwise—and we predict their conduct will make this clear beyond dispute.

¹ ATVA seeks to be a voice for the television viewer. Its members include large and small multichannel video programming distributors, cable programmers, and trade associations.

² 47 C.F.R. § 1.429. *Authorizing Permissive Use of the “Next Generation” Broad. Television Standard*, 32 FCC Rcd. 9930 (2017) (“*Order*”). The *Order* was published in the Federal Register on February 2, 2018. 83 Fed. Reg. 4998 (Feb. 2, 2018). Under the Commission’s rules, this Petition for Reconsideration is timely filed on or before March 5, 2018, which is the first business day after March 4—the date 30 days after Federal Register publication. *See* 47 C.F.R. §§ 1.429(d) (petition for reconsideration due within 30 days of public notice), 1.4(b)(1) (“public notice” for rulemakings is Federal Register publication), 1.4(h) (where terminal date falls on a “holiday,” pleadings are due the next day), 1.4(e)(1) (defining “holiday” to include Sunday). Unless otherwise indicated, all documents released by or filed with the Commission and referenced in these comments appear in GN Docket No. 16-142.

- **Flash-cuts for low power and translator stations.** The Commission should reconsider its decision to permit low power and translator stations to flash-cut to ATSC 3.0. It should instead rely on individual waivers where such a station cannot comply with simulcasting rules.
- **Notice for simulcasting in lower format.** The Commission should reconsider its decision to permit broadcasters to degrade their signals without warning viewers and MVPDs beforehand.

I. LEGAL STANDARD

Last Spring, the Commission confirmed that it may grant a petition for reconsideration that relies on arguments previously raised, so long as the petitioner demonstrates “material error or omission in the original order.”³ Petitioners may *also* seek reconsideration by raising “additional facts not known or not existing until after the petitioner’s last opportunity to respond.”⁴

Here, we seek reconsideration on both grounds. The first two of our requests—related to separate negotiations and low power flash cuts—concern “errors and omissions” with respect to issues we and others have raised previously in this proceeding. In both cases, we seek reconsideration in part because we believe the Commission erred in rejecting our arguments (which we hereby incorporate by reference). With respect to retransmission consent, we also

³ *Amendment of Section 73.3555(e) of the Commission’s Rules, National Television Multiple Ownership Rule*, 32 FCC Rcd. 3390 ¶ 16 (2017) (“Neither the Communications Act nor Commission rules preclude the Commission from granting petitions for reconsideration that fail to rely on new arguments. Commission precedent establishes that reconsideration is generally appropriate where the petitioner shows either a material error or omission in the original order or raises additional facts not known or not existing until after the petitioner’s last opportunity to respond.”).

⁴ *Id.*

believe that additional facts will further demonstrate the validity of the arguments we made. With respect to flash-cuts, we rely on our recent advocacy in response to the Commission's *Further Notice of Proposed Rulemaking* to explain in more detail how we believe narrow waivers can fully address the concerns raised by low power television stations. Our third request—related to notice of signal degradation—concerns language added by the Commission immediately before it issued the *Order*.⁵ This new language constitutes a “material fact” that was “not known” to ATVA until the *Order* was released.

II. ARGUMENT

A. The Commission Should Reconsider its Decision Not to Require Separate Negotiations for First-Time ATSC 3.0 Carriage.

As we have argued throughout this proceeding, if the ATSC 3.0 transition is to be truly “voluntary” for all parties, broadcasters should not obtain carriage of ATSC 3.0 signals (in which viewers may have little interest) by threatening existing television service (in which viewers have a great deal of interest).⁶ This is especially important if, as one of the transition's largest backers seemed to indicate recently, ATSC 3.0 signals turn out to be no better for television viewers than ATSC 1.0 signals are.⁷ We believe that the best and most effective way to prevent

⁵ Compare *FCC Fact Sheet: Authorizing Permissive Use of the ‘Next Generation’ Broadcast Television Standard*, FCC-CIRC1711-08 ¶ 27 (Oct. 26, 2017) with *Order* ¶ 27 n.87 (containing new language regarding notice).

⁶ Comments of the American Television Alliance at i (filed May 9, 2017) (“ATVA Comments”).

⁷ “‘Better Pictures’ Not the ‘Ultimate Best Use’ of ATSC 3.0, Says Sinclair CEO,” *Communications Daily* (Feb. 28, 2018) (“The ‘first iteration’ of 3.0 for Korean broadcasters ‘has just been focused on better resolution, better pictures, which we don’t think is the ultimate best use of that technology, and I think they’ll agree,’ said Ripley.”).

broadcasters from engaging in such conduct is to require separate negotiations for first-time carriage of ATSC 3.0 signals.⁸ We thus suggested the following formulation:

A station may agree to terms related to the initial carriage of its ATSC 3.0 signal only with an MVPD that, prior to such agreement, has at least one year remaining on a retransmission consent agreement for carriage of the station's ATSC 1.0 signal.⁹

At least initially, we based our concerns largely on a *prediction* about broadcaster behavior: without a separate-negotiation requirement, broadcasters will insist on carriage of ATSC 3.0 signals. We based this prediction on broadcasters' demonstrated conduct in other contexts, such as the "forced bundling" of unwanted programming.¹⁰ Broadcasters, in turn, both confirmed to the Commission that they would engage in such conduct¹¹ and, in a handful of cases, *actually began doing so* before the Commission released its *Order*.¹²

The Commission nonetheless concluded that it was "premature" to address retransmission consent issues.¹³ It decided instead to "allow these issues *at the outset* to be addressed through marketplace negotiations."¹⁴ Commissioner O'Rielly added that broadcaster "attempts to make this transition involuntary could violate the obligation for broadcasters to negotiate in good faith."¹⁵ He continued: "This is another issue I will be watching and the

⁸ ATVA Comments at 25.

⁹ *Id.*

¹⁰ *Id.* at 20-21.

¹¹ Reply Comments of the National Association of Broadcasters at 15 (filed June 8, 2017) ("If MVPDs find it unprofitable to resell a particular broadcaster's signal, they can stop.").

¹² Letter from Michael Nilsson to Marlene Dortch at 2 (filed Oct. 25, 2017).

¹³ *Order* ¶ 78.

¹⁴ *Id.* (emphasis added).

¹⁵ *Id.*, Statement of Commissioner O'Rielly at 117.

Commission may need to revisit as there becomes concrete examples to examine.”¹⁶

We disagree that it was “premature” for the Commission to address retransmission consent issues, and believe the record contained more than enough evidence for the Commission to act now. And we know for a fact that, already, some MVPDs have been forced to grant “ATSC 3.0 MFNs” for a technology that is not yet commercially available. We remain quite certain that additional “concrete examples” of broadcaster misbehavior will emerge and we intend to supplement the record as appropriate. If, as we expect, the weight of the evidence further confirms our predictions about how broadcasters will act, we hope the Commission will reconsider its initial decision and require separate negotiations for first-time carriage of ATSC 3.0 signals.

B. The Commission Should Reconsider its Decision to Permit Low Power and Translator Stations to Flash-Cut.

We have always taken broadcasters at their word when they described ATSC 1.0 simulcasting as necessary to avoid “disenfranchise[ing]” viewers.¹⁷ We thus agreed with the Commission when it adopted a simulcasting requirement and described it as “a critical component of the Commission’s authorization of ATSC 3.0 as a voluntary transmission standard.”¹⁸ Since all parties—including the Commission—appear to agree on the importance of simulcasting, we have never agreed with the notion of exempting low power and translator stations from this requirement. As we described, allowing low power stations to flash-cut causes

¹⁶ *Id.*

¹⁷ Reply Comments of the American Television Alliance at 2 (filed June 8, 2017); Joint Petition for Rulemaking of America’s Public Television Stations, the AWARN Alliance, the Consumer Technology Association, and the National Association of Broadcasters at 17 (filed Apr. 13, 2016).

¹⁸ *Order* ¶ 11.

exactly the same harm as does allowing full-power stations to flash cut—especially since a large and increasing number of stations maintain major-network affiliations.¹⁹

The Commission appears to agree with this assessment of the potential harm from low power flash cuts.²⁰ In the face of this now-undisputed harm, we have argued that waivers are a more appropriate tool to address any concerns that low power stations might have with simulcasting than a broad, class-based exemption.²¹ We recently elaborated on the advantages of using narrow waivers to address such concerns in response to the Commission’s *Further Notice*.²² There, we noted that the Commission traditionally grants waivers no broader than necessary to address the problem at hand.²³ We explained why narrow waivers of the simulcasting *coverage* requirement (rather than a waiver of the simulcasting requirement itself) would adequately address nearly every concern raised by broadcasters to date.²⁴ The same holds true here: narrow waivers of the simulcasting *coverage* requirement would address nearly every reason offered in the *Order* to justify exempting low power stations from the simulcast requirement altogether:

¹⁹ Letter from Michael Nilsson to Marlene H. Dortch (filed Sept. 29, 2017) (noting that there are 55 Class A and low power “big four” network affiliate stations).

²⁰ See *Order* ¶ 42 (“We recognize that permitting LPTV and TV translator stations to transition directly to ATSC 3.0 could deprive those OTA viewers without ATSC 3.0 TV sets or converter equipment of the important programming these stations provide. MVPD subscribers could also be affected if MVPDs are not prepared to carry ATSC 3.0 signals on the date of a direct transition.”). The Commission concludes, however, that permitting flash-cuts may permit low power stations to “provide innovative 3.0 programming that could help drive consumer adoption of such equipment.” *Id.* ¶ 43.

²¹ Letter from Michael Nilsson to Marlene H. Dortch at 13 (filed Sept. 21) (“[L]ow-power and Class A stations, like full power ones, can always seek waivers allowing them to flashcut.”).

²² Comments of the American Television Alliance in Response to Further Notice (filed Feb. 20, 2018) (“ATVA FNPRM Comments”).

²³ *Id.* at 6.

²⁴ *Id.* at 3-9.

- If a low power station is not located near another LPTV or TV translator station,²⁵ it can seek waiver of the coverage requirements.
- If a full-power station finds a low power station an unattractive simulcast partner because of its lower power and coverage area,²⁶ the full-power station can seek a waiver of the coverage requirements.
- If a low power station is displaced by a primary full-power and Class A station after entering into a simulcast arrangement,²⁷ and such displacement results in it being unable to comply with the coverage requirements, it could seek a waiver of the coverage requirements.

Indeed, only one concern raised in the *Order* about low power stations appears unamenable to relief through *coverage requirement* waivers—the possibility that some such stations displaced due to the post-incentive auction repacking process might be forced to build both an ATSC 1.0 and an ATSC 3.0 facility.²⁸ Even here, however, a broad *exemption* for all low power stations is not required. Rather, low power stations in this position could seek individual waivers of the simulcasting requirement, demonstrating that the additional costs they would incur outweigh the harm that flash-cutting would cause.

We thus continue to believe that narrow waivers are a better tool than a broad exemption to address the concerns of low power broadcasters, and urge the Commission to reconsider its decision to grant a broad exemption. Yet we acknowledge that this request, if granted, would increase costs and burdens on low power broadcasters at least to some extent. We thus would

²⁵ *Order* ¶ 41.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.* ¶ 44.

not object to reasonable steps to relieve such burdens for low power or translator stations unaffiliated with a Big Four network, such as presumptions in favor of waivers in certain cases, shot-clocks, and paperwork simplification.

C. The Commission Should Reconsider its Decision to Permit Stations to Degrade their Signals Without Notifying Viewers and MVPDs.

Throughout this proceeding, we have urged the Commission to require broadcasters to transmit ATSC 1.0 simulcasts in the same format and with the same picture quality in which they transmit prior to simulcasting.²⁹ The Commission declined to adopt our suggestion.³⁰

In language added immediately prior to issuing the *Order*,³¹ however, the Commission also declined to require broadcasters to *notify* viewers or MVPDs before simulcasting in degraded format or picture quality.³² More specifically, the Commission concluded that stations need not provide any information regarding format and picture quality in simulcasting applications.³³ Since the Commission’s rules “do not require HD service,” the Commission reasoned, it did not need to “consider the provision of such service as part of our review of simulcasting applications.”³⁴ Additionally, the Commission declined to require such information in broadcasters’ notifications to MVPDs³⁵ or their on-air crawls to viewers³⁶ regarding simulcasting.

²⁹ E.g., ATVA Comments at 35-37.

³⁰ *Order* ¶ 27.

³¹ See n.5, above.

³² *Order* ¶ 27 n.87.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.* ¶ 76.

³⁶ *Id.* ¶ 87.

We fail to see a basis upon which the Commission should permit a broadcaster to degrade the most basic aspect of its product without first warning its viewers. (This is especially the case where the station offers a simulcast signal in a lower format or in worse quality than its ATSC 3.0 signal.) Moreover, if broadcasters degrade their simulcast signals without telling anybody beforehand, subscribers will blame their MVPDs—and MVPDs will have to spend time and money dealing with the fallout.

It is, of course, true that the Commission does not require stations to transmit in high definition.³⁷ At least in theory, a broadcaster could switch from high definition to standard definition today without telling anybody—and no Commission rule would prevent it. Yet, in the normal course, broadcasters have wanted to transmit in high-definition and had no incentive to cease doing so. Until now, there has been no need for a consumer notice requirement relating to signal format or picture quality. In the context of simulcasting, however, broadcasters have a new and specific incentive to degrade their signals—and, indeed, have insisted throughout this proceeding that they *must* be able to do so in order for the ATSC 3.0 transition to succeed.³⁸ The ATSC 3.0 transition, in other words, constitutes a special case, and so the Commission should insist on simple notification rules corresponding to the unique circumstances presented. The alternative risks unnecessary consumer disruption and anger.

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For the reasons discussed above, the Commission should issue an order on reconsideration (1) requiring separate negotiations for first-time carriage of ATSC 3.0 signals; (2) requiring low power and translator stations to simulcast; and (3) requiring stations to provide

³⁷ Order ¶ 27.

³⁸ See *id.* (“We recognize that broadcasters may face spectrum constraints that could limit their ability to continue to provide HD programming or other enhanced formats on their 1.0 simulcast signals.”).

prior notice to viewers and MVPDs before being allowed to degrade signal format or picture quality.

Respectfully Submitted,



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