

Authorizing Permissive Use of “Next Generation” Broadcast Television Standard) MB Docket No. 16-142

I. INTRODUCTION AND SUMMARY

¹ NTCA represents more than 800 independent, community-based telecommunications companies. All NTCA members are full service local exchange carriers and broadband providers, and many of its members provide wireless, cable, satellite, and long distance and other competitive services to their communities.

² WTA – Advocates for Rural Broadband is a national trade association representing more than 340 rural telecommunications providers offering voice, broadband and video services in rural America. WTA members serve some of the most rural and hard-to-serve communities in the country and are providers of last resort to those communities.

³ Petition for Reconsideration of the American Television Alliance (“ATVA”), MB Docket No. 16-142 (fil. Mar. 5, 2018); Petition for Reconsideration of NCTA – The Internet & Television Association (“NCTA”), MB Docket No. 16-142 (fil. Mar. 5, 2018).

⁴ Authorizing Permissive Use of “Next Generation” Broadcast Television Standard, MB Docket No. 16-142, Report and Order and Further Notice of Proposed Rulemaking, FCC 17-158 (rel. Nov. 20, 2017) (“*ASTC 3.0 Report and Order*”).

By way of background, the Rural Associations’ advocacy in this proceeding stems from concerns that broadcasters’ government-sanctioned leverage in the form of “retransmission consent” will enable broadcasters to compel small, rural Multichannel Video Programming Distributors (“MVPDs”) to carry ATSC 3.0 signals. Based on the Rural Associations’ experience, such harm can hardly be considered “speculative.” As the Rural Associations have repeatedly noted,⁵ the all-too-common abuse of forcing MVPDs to take unwanted content, or place it in specific tiers, in order to access content necessary to operate (known as “forced tying or tiering”) imposes unnecessary costs on small and rural MVPDs that drives up end-users’ rates. Such practices, along with the substantial increases in retransmission consent fees⁶ (both concerns that the Commission has long decided not to address), have driven dramatic increases in rural consumer prices for video services, and has even caused several smaller MVPDs to exit or consider exiting the market. Based on this history of broadcasters’ abuse of the retransmission consent process, the Rural Associations justifiably sought, and still seek, protections for rural consumers to ensure that carriage of ATSC 3.0 signals is indeed “voluntary.”

II. THE RURAL ASSOCIATIONS AGREE WITH THE PETITIONERS THAT, WITHOUT PROPER PROTECTIONS, RETRANSMISSION CONSENT NEGOTIATIONS CAN AND WILL BE USED TO FORCE AN INVOLUNTARY TRANSITION

The Rural Associations agree with the Petitioners that the Commission should reconsider its decision not to order that ATSC 1.0 and 3.0 signals be negotiated separately. It is hardly speculative based upon prior history to conclude that broadcasters will soon require carriage of

⁵ Comments of NTCA, MB Docket No. 15-158 (fil. Aug 21, 2015); Comments of NTCA, MB Docket No. 14-16 (fil. Mar. 21, 2014); Comments of WTA – Advocates for Rural Broadband, MB Docket No. 15-158 (fil. Aug. 21, 2015); Comments of WTA – Advocates for Rural Broadband, MB Docket No. 17-214 (fil. Oct. 10, 2017).

⁶ Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992, MM Docket No. 92-266, ¶ 40 (rel. Feb. 8, 2018) (finding that “[a]verage annual retransmission consent fees calculated on a per subscriber basis increased by about one-third” in just one year”).

an ATSC 3.0 signal as a condition of rural MVPDs' access to ATSC 1.0 signals. Indeed, members are already reporting that they have experienced demands for carriage of ATSC 3.0 signals through broad language that requires carriage of any "compliant ATSC standard."

Strengthening broadcasters' leverage over small, rural MVPDs is the fact that there is no true "market" for access to broadcasters' content. Rather, there is only a demand that must be met for the MVPD to air the programming desired by its customers, and unfortunately, this broken market is the creature of antiquated regulation rather than market forces. For one, the Rural Associations' MVPD members are prohibited from choosing from multiple sellers in the marketplace; the Commission's Designated Market Area ("DMA") rules artificially restrict MVPDs' ability to buy similar content from more than one network affiliate. In the absence of such restrictions, if content from one affiliate in a DMA is too high (or, in this case, if the in-market affiliate is utilizing its leverage to compel ATSC 3.0 carriage as the price for continued access to "must have" content), small MVPDs would at least have some ability to purchase comparable content from another DMA. Yet that remedy is not available today. Instead, if a small MVPD wants to purchase content available to the entire nation, it may only do so through the local network affiliate in the related DMA – artificially driving up the cost of the content by virtue of government fiat to preserve a monopoly market. Similarly, if the local network affiliate decides to transition to the ATSC 3.0 signal and demands carriage from rural MVPDs, these MVPDs will have no choice but to carry the new signal, an extremely costly proposition, or not carry the station's programming at all – an unsustainable position for a small, rural MVPD.

These are not just hollow assertions, but realities of the marketplace. Several members of the Rural Associations have noted the unreasonable demands made by broadcasters that prove that retransmission consent negotiations are negotiations-in-name-only. For example, a member

of both Rural Associations states that the company faces an increase of 73% in just one month from \$8.53 per subscriber per month to \$14.65 per subscriber per month.⁷ In similar fashion, Sinclair has used its unbalanced bargaining power to force carriage of the Tennis Channel by many rural MVPDs even though there is a dearth of demand for such content. In consideration of these one-sided developments, there is little evidence that rural MVPDs have the ability to reject any broadcaster demand, including future ATSC 3.0 carriage. However, unlike other demands, a forced transition may result in an immediate exit from the video marketplace due to extreme financial factors. This is because the standard is not backwards compatible and will likely require a costly upgrade of entire video delivery platforms. Further, since the new 3.0 signals may have a reduced signal propagation, some MVPDs may incur the substantial expense of repositioning a head-end. It is naïve to assert that ATSC 3.0 carriage is “no different than any of the contractual terms that broadcast and cable operators negotiate over regularly.”⁸ No other contract provision, however unfair or unreasonable, is so costly that it may, by itself, result in the MVPD’s exit from the video marketplace.

Also critical to this discussion is the fact that a significant number of rural MVPDs’ customers cannot receive any over-the-air broadcast signals.⁹ Thus the assumption that rural consumers frustrated by ever-increasing bills from their MVPDs (bills that are likely to increase if small MVPDs are forced to prematurely incur the costs of accommodating the new 3.0 standard) can simply throw up “rabbit ears” to receive local news, weather reports, and similar

⁷ Mike Farrell, ACA Members Believe Retrans Fees Will Rise 88% by 2020, Multichannel, Feb. 12, 2018, available at <https://www.multichannel.com/news/aca-members-believe-retrans-fees-will-rise-88-2020-418199>.

⁸ Opposition to Petition for Reconsideration of Pearl TV, MB Docket No. 16-142 (fil. Apr. 12, 2018), p. 3.

⁹ NTCA and Incompass 2015 Video Competition Survey, p. 2. http://www.ntca.org/images/stories/Documents/Advocacy/SurveyReports/NTCA_2015VideoCompetitionSurvey.pdf.

benefits of local broadcasts is misplaced.¹⁰ To the contrary, the new 3.0 standard with its reduced propagation signals will result in even fewer rural consumers being able to access signals over the air. As these rural residents rely on MVPDs to receive video signals of any sort, small rural MVPDs already operating on near zero or in many cases negative margins may be faced with the additional burdens of upgrading equipment to accommodate ATSC 3.0 signals prematurely. Rural consumers are dependent on the Rural Associations' members for affordable access to news, weather, and national content. Therefore, an effective mechanism must be in place that unequivocally precludes broadcasters from leveraging an already-broken retransmission consent process to demand the carriage of ATSC 3.0 signals.

All of this is not meant to simply rehash prior arguments, as broadcaster interests assert with respect to the Petitions.¹¹ To the contrary, the Rural Associations seek herein to highlight that while the Commission noted in the *ASTC 3.0 Report and Order* that MVPDs are under no statutory duty to carry ASTC 3.0 signals, it relied entirely upon marketplace negotiations to resolve any problems. Yet it is those "marketplace negotiations" that are the problem; rural MVPDs are consistently on the losing end of "negotiations" with broadcasters.

The Commission goes no further in its Report and Order than to cite to the "good faith" negotiating standard as a protection for small MVPDs and their subscribers.¹² Despite this standard, in place for several years, the Commission is aware that the retransmission consent complaint process is time consuming and expensive, with rural MVPDs hampered by mandatory

¹⁰ Mimi Pickering, *Speak Your Piece: The Digital TV Doldrums*, The Daily Yonder, April 22, 2009, <http://www.dailyyonder.com/speak-your-piece-digital-tv-doldrums/2009/04/22/2075/>.

¹¹ See Opposition to Petitions for Reconsideration, National Association of Broadcasters, MB Docket No. 16-142 (fil. Apr. 13, 2018); Opposition to Petitions for Reconsideration, ONE Media, LLC. MB Docket No. 16-142 (fil. Apr. 13, 2018).

¹² *ASTC 3.0 Report and Order*, ¶ 78.

non-disclosure provisions that prevent MVPDs from revealing the contract rates, terms and conditions that are in dispute. In failing to make clear that negotiations for 1.0 and 3.0 signals should proceed separately, and that “ASTC signal tying” is a *per se* violation of the good faith negotiating standard, the Commission utterly ignored the broken nature of the retransmission consent process with respect to broadcasters and the small, rural MVPDs that are often at their mercy.

III. THE RURAL ASSOCIATIONS AGREE WITH NCTA THAT THE COMMISSION’S 5 YEAR SIMULCASTING REQUIREMENT IS ARBITRARY

In its Petition for Reconsideration, NCTA argued that the Commission should reconsider its decision to set an arbitrary five-year timeline under which programming “aired on the ATSC 1.0 simulcast channel must be ‘substantially similar’ to that of the primary video stream on the ATSC 3.0 channel.”¹³ As the Commission stated, this provision is necessary to “help ensure that viewers do not lose access to the broadcast programming they receive today, while still providing flexibility for broadcasters to innovate and experiment with new, innovative programming features using Next Gen TV technology.”¹⁴ The Rural Associations share NCTA’s concerns that the Commission lacked an adequate record to set the five-year “substantially similar” timeline, especially when the Commission decided not to set a deadline for the requirement that broadcasters continue to simulcast the 1.0 channel. Under the approach the Commission took, a broadcaster could comply with the rule to simulcast the 1.0 signal yet in five years degrade the value of that signal by no longer ensuring that the consumer receives substantially similar programming.

¹³ NCTA, p. 4.

¹⁴ ATSC 3.0 Report and Order, ¶ 22.

NCTA correctly outlines the issues arising out of the deployment of the new 3.0 standard, including the general unavailability of the equipment necessary to transmit and view the signal. With so much still unknown about the future deployment, including whether MVPDs will be able accept 3.0 signals, it makes little sense to set such a five-year deadline for the “substantially similar” rule especially when there is no statutory requirement or a clearly defined benefit to do so. Rather, the Commission should continue to monitor the deployment and consider the “substantially similar” and ATSC 1.0 simulcasting requirements together (and the Order already sets up a process to monitor the simulcasting rule based on market developments rather than setting an arbitrary deadline). This way, the Commission may ensure that no consumers still using the 1.0 channel after 5 years are needlessly left without adequate service during the transition.

IV. CONCLUSION

For all of the reasons discussed above, the Commission should make clear that negotiations for 1.0 and 3.0 signals must proceed separately, and that “ASTC signal tying” is a *per se* violation of the good faith negotiating standard. The Commission should also continue to monitor the deployment and consider the “substantially similar” and ATSC 1.0 simulcasting requirements together and abolish the arbitrary five-year sunset on the former.

DRAFT

Respectfully submitted,



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