Before the
Federal Communications Commission
Washington, D.C. 20554

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

COMMENTS

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SUMMARY

The American Cable Association is part of the American Television Alliance and helped draft ATVA's comments filed today. We support each of ATVA's suggestions for ensuring both that the broadcasters' proposed transition to ATSC 3.0 is truly "voluntary" for all parties and that the transition causes no harm to others in the video ecosystem. We write separately to explain how the problems identified by ATVA cause particular harm to ACA's small- and medium-size cable operators. ACA members spend more than larger MVPDs to provide service on a per subscriber basis. They have less resources to bring to bear than larger MVPDs. And they face greater capacity constraints than large MVPDs. For them, the transition to ATSC 3.0 presents particular challenges and, in some cases, requires particularized solutions.

I. Concerns about ATSC 1.0 Simulcasting.

A. Cost. ATVA describes a variety of costs that multichannel video programming distributors will incur to receive and deliver ATSC 1.0 simulcasts—and explains why MVPDs will assume such costs *involuntarily*. Costs associated with ATSC 1.0 simulcasts will prove especially problematic for small MVPDs. Such costs will relate to a video business that is increasingly unprofitable for small MVPDs. And such costs will preclude small MVPDs from investing in broadband—a service critical to their long-term survival (and one that increasingly subsidizes small-MVPD video services). The Commission should require broadcasters to reimburse small MVPDs for costs incurred to receive and transmit ATSC 1.0 simulcasts, even if it chooses not to do so for larger MVPDs.

B. Format and Picture Quality. ATVA explains why broadcasters will face incentives to provide ATSC 1.0 simulcasts in lower format or with worse picture quality than they provide today. ATVA also notes that broadcasters may *deliberately* do so to "encourage" MVPDs to carry ATSC 3.0 signals. Picture quality is a particular concern for small MVPDs, which are more likely to rely on off-air delivery than larger MVPDs, and which have less resources with which to obtain ATSC 1.0 signals in non-degraded format via "alternate means" such as fiber or DBS transport. The Commission should adopt ATVA's proposal to require ATSC 1.0 simulcasts to be in the same format and with the same picture quality as today's transmissions.

C. Signal Coverage. Under the broadcasters' proposal, stations may choose to transmit ATSC 1.0 simulcasts from other stations' facilities. ATVA explains why simulcasts from other facilities may not reach MVPD headends and how this will harm MVPDs that rely exclusively on off-air delivery. Here again, this particularly harms small MVPDs—and especially *rural* small MVPDs, who are more likely to lose service, and for whom the costs of obtaining alternate delivery can be substantial (and, in some cases, prohibitive). The Commission should adopt ATVA's suggestions to address this problem:

- Encouraging stations to simulcast ATSC 1.0 signals from their own facilities. Specifically, stations should be required to demonstrate that they have made "reasonable efforts" to do so before they can simulcast from other host facilities.
- Requiring stations simulcasting from other facilities to reach the headends of all MVPDs relying on off-air delivery today (or assume financial responsibility for alternate delivery).

- Limiting population loss for signals simulcasting from other facilities.

II. Concerns about ATSC 3.0 Signals.

A. Coerced Carriage of ATSC 3.0 Signals. ATVA explains that broadcasters who coerce carriage of unwanted programming today will surely coerce carriage of ATSC 3.0 signals in the future. Small MVPDs, of course, are even more susceptible to such coercion than large MVPDs. Indeed, evidence suggests that such coercion has already occurred. Equally troubling, longstanding language in *existing* agreements could be read to require ATSC 3.0 carriage—even where such language dates from years before anybody had heard of ATSC 3.0. The Commission should thus adopt ATVA's "separation" proposal for small MVPDs even if it does not do so for large ones. And it should prohibit broadcasters from enforcing clauses requiring ATSC 3.0 carriage in retransmission consent agreements entered into prior the effective date of any Order in this proceeding.

B. Capacity. ATVA explains how ATSC 3.0 carriage will increase capacity demands on MVPDs—both because ATSC 3.0 signals will consume more capacity than ATSC 1.0 signals and because MVPDs will have to carry *both* sets of signals indefinitely. Concerns about capacity resonate with small and medium-sized MVPDs, many of whom are "channel locked" and none of whom have capacity to spare. While ATVA's "separate negotiation" proposal will provide some protection to such systems, the Commission should go further. It should reject once and for all broadcaster claims that negotiating parties cannot lawfully agree to carriage of broadcast signals in a manner that relieves capacity burdens. And it should prohibit stations from demanding carriage in formats that MVPDs do not yet carry.

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COMMENTS

The American Cable Association ("ACA")[1] hereby comments on proposed rule changes that would allow television broadcasters to transmit in a new format, ATSC 3.0.[2] ACA is part of the American Television Alliance ("ATVA") and helped ATVA draft

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[1] ACA represents more than 700 small- and medium-sized cable operators, incumbent telephone companies, and municipal utilities. ACA members offer broadband, video, and voice services. These providers offer service to homes and businesses in smaller communities and rural areas, as well as in urban and suburban areas by overbuilding other providers. These providers pass nearly 19 million homes in all 50 states and many U.S. territories, and serve about 7 million locations. More than half of ACA's members serve fewer than 1,000 subscribers each.

[2] *See Authorizing Permissive Use of the "Next Generation" Broad. Television Standard*, 32 FCC Rcd. 1670 (2017) ("*Notice*"); *see also* Joint Petition for Rulemaking of America's Public Television Stations, the AWARN Alliance, the Consumer Technology Association, and the National Association of Broadcasters (filed Apr. 13, 2016) ("Petition"). Unless otherwise indicated, all documents released by or filed with the Commission and referenced in these comments appear in GN Docket No. 16-142. "ATSC" stands for "Advanced Television Systems Committee."

comments filed today.[3] ACA supports each of the proposals in ATVA's comments and urges the Commission to adopt them. We provide supplemental comments to highlight the particular concerns that the proposed transition raises for ACA's small and rural cable operator members, in response to the Commission's request for comment about how the transition would affect such entities.[4] As set forth below, we urge the Commission to take additional actions to protect such operators and their subscribers.[5]

I. THE COMMISSION SHOULD PROTECT SMALL AND RURAL MVPDS FROM BURDENS ASSOCIATED WITH ATSC 1.0 SIMULCASTS.

A. The Commission Should Provide Relief to Small MVPDs from the Costs of Simulcasts.

ATVA's comments describe in some detail the wide variety of new costs that multichannel video programming distributors ("MVPDs") would incur to carry ATSC 1.0 simulcasts when such simulcasts come from new "host" facilities.[6] These include costs to receive and process ATSC 1.0 simulcast signals regardless of how they are delivered (such as new receivers), costs to receive such signals over-the-air (such as new antennas), and costs to receive such signals by other means (such as fiber delivery and DBS "transport" service). As ATVA observes, MVPDs will incur simulcast-related costs

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[3] *See* Comments of the American Television Alliance (filed May 9, 2017) ("ATVA Comments").

[4] *See Notice* ¶ 40 (seeking comment "on whether small, rural, and capacity-constrained MVPDs would face unique circumstances with regard to the voluntary provision of ATSC 3.0 that we should consider in this proceeding").

[5] These comments refer to facts about retransmission consent agreements and negotiations between broadcasters and ACA members. The programming agreements entered into between ACA members and broadcasters contain stringent confidentiality provisions. *See CBS Corp. v. FCC*, 785 F.3d 699 (D.C. Cir. 2015). ACA members can, however, document each of the factual claims made in this submission, and would be pleased to do so if ordered by the Commission and under an appropriate protective order.

[6] ATVA Comments at Part I.B.

involuntarily because must-carry elections and existing retransmission consent agreements require them to carry simulcasts.[7]

These costs would be especially difficult for small MVPDs to bear. Small MVPDs have fewer resources to absorb simulcast-related costs than do other MVPDs. They also, by definition, have fewer subscribers across which to amortize such costs. As ACA has described, many small MVPDs already find it difficult to maintain a profitable "video service."[8] They have thus focused their investments on broadband, a line of business they see as the key to their long-term survival.[9] Indeed, some small MVPDs find themselves having to subsidize their video services through broadband revenues. Every dollar that a small MVPD must spend on ATSC 1.0 simulcasts—simulcasts that, by definition, will merely replace the service subscribers already receive today—cannot

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[7] *Id.*

[8] Comments of the American Cable Association, MB Docket No. 16-41, at 8 filed Mar. 30, 2016) ("ACA Diversity Comments").

[9] Many small MVPDs see a brighter future in providing only *broadband* service and letting customers obtain video without an MVPD intermediary, either over-the-air (in the case of broadcasting) or online. Letter from Thomas Cohen to Marlene Dortch, MB Docket No. 16-42, CS Docket No. 97-80 (filed Aug. 25, 2016) ("ACA STB Letter"). ACA noted that the cost of content for small cable operator members continued to increase at 10 percent annually while they limited retail rate increases to 4 percent annually. As a result, video margins had declined from 2012 to 2015 from 22 percent to 13 percent. In addition, cord-cutting had reduced the number of pay-TV subscribers for smaller MVPDs by about 6 percent annually. *Id.* Despite these trends and the growth of online video in recent years, small MVPDs will have to maintain their existing video business for some time, both because many existing customers demand such service and because programmers have not yet made sufficient programming available online. American Cable Association, "High and Increasing Video Programming Fees Threaten Broadband Deployment" at 17-18 (Apr. 2015), *attached to* Comments of the American Cable Association, MB Docket No. 15-158 (filed Aug. 21, 2015). For these MVPDs, the important thing is that the Commission not make things worse by enabling broadcasters to force them to spend money on the video business in a way that they believe will not make this service more attractive to their customers.

be spent on the *broadband* infrastructure that (among other things) helps keep its video businesses afloat.[10]

Broadcasters should not be permitted to burden small MVPDs with costs that run counter to what the marketplace requires of them. The Commission has provided relief to small MVPDs where, as here, rule changes might otherwise require equipment upgrades.[11] It should do so here, and protect small MVPDs from having to absorb costs associated with ATSC 1.0 simulcasting. Accordingly, the Commission should adopt ATVA's suggestion that broadcasters reimburse MVPDs for their simulcast-related

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[10] ACA STB Letter at 2-3 (describing investments in network plant upgrades, online provider caching programs, and set-top boxes that enable subscribers to access online content).

[11] For example, in its *User Interface Order*, the Commission delayed the compliance deadline for certain accessibility rules for MVPDs with 400,000 or fewer subscribers and for systems with 20,000 or fewer subscribers not associated with an MVPD serving more than 10 percent of all MVPD subscribers. *Accessibility of User Interfaces, and Video Programming Guides and Menus*, 28 FCC Rcd. 17330, ¶ 114 (2013). In determining how best to ensure the compatibility of third party devices in the *Basic Tier Encryption Report and Order*, the Commission refrained from requiring that smaller MVPDs deliver their programming streams in a way that enabled IP-based third party devices to work. Instead, the Commission accepted a commitment from the six largest NCTA member companies to implement a supplemental solution to provide basic service tier access to third party-provided, IP-enabled devices. *Basic Serv. Tier Encryption*, 27 FCC Rcd. 12786, ¶ 20 (2012). Similarly, while the Commission did not exempt MVPDs with fewer than 400,000 subscribers from basic commercial loudness mandates adopted pursuant to the CALM Act, it did refrain from requiring them to purchase specific equipment necessary to conduct spot testing unless and until it finds a pattern and practice of complaints concerning commercial loudness. *Implementation of the Commercial Advertisement Loudness Mitigation (CALM) Act*, 26 FCC Rcd. 17222, ¶ 37 (2011). Likewise, in its initial orders implementing the integration ban, the Commission declined to apply the ban to the then-nascent satellite industry, in part because it was "reluctant to implement a rule that could disrupt an evolving market that is already offering consumers the benefits that derive from competition." *Implementation of Section 304 of the Telecomms. Act of 1996*, 13 FCC Rcd. 14775, ¶ 64 (1998). It then employed similar reasoning when it exempted operators using devices employing only an analog conditional access mechanism. *Implementation of Section 304 of the Telecomms. Act of 1996*, 14 FCC Rcd. 7596, ¶ 1 (1999).

costs, as set forth in the repack reimbursement catalog.[12] The Commission should require broadcasters to reimburse small MVPDs even if it chooses not to require such reimbursement for larger ones. Or it should develop an alternative means of offsetting such costs.

B. The Commission Should Protect Small MVPDs from Signal Degradation.

ATVA's comments also describe concerns that broadcasters will degrade the quality of their over-the-air signals.[13] As ATVA noted, stations may face incentives to offer simulcasts in a lower quality format than their transmissions today (*e.g.*, standard definition rather than high definition). Even if a station simulcasts in the same nominal format, it may compromise picture quality, which would be especially noticeable during broadcasts of sporting events. Broadcasters may change format or degrade picture quality because of crowding on "host" facilities. In addition, ATVA members have been led to understand that broadcasters might *deliberately* seek to degrade their own simulcasts to promote early adoption of ATSC 3.0 signals.[14] Either way, signal degradation will harm MVPDs relying exclusively on off-air delivery of broadcast signals. MVPDs that receive signals through alternate means (such as fiber), by contrast, could avoid such harm if stations were to provide non-degraded versions of their signals.

Signal degradation raises special concerns for small MVPDs for two reasons. First, small MVPDs are, for historic and other reasons, more likely to rely exclusively on

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[12] ATVA Comments at Part III.B; *see also Incentive Auction Task Force and Media Bureau Finalize Catalog of Reimbursement Expenses*, 32 FCC Rcd. 1199, 1223 App. § III (2017).

[13] ATVA Comments at Part III.A.2.

[14] *Id.*

off-air delivery than their larger counterparts. Second, small MVPDs are less able to afford to mitigate signal quality issues by obtaining delivery through alternate means. Each of the methods by which a small MVPD could obtain broadcast signals other than over-the-air requires significant expenditures.

- Fiber delivery is expensive. When MVPDs have a choice of facilities-based providers that will lease 50-100 Mbps Ethernet circuits over fiber, the cost of these circuits is approximately $2,000-$3,000 per month under a long term contract. When a new dedicated fiber strand or entire cable is needed (because, for example, no circuits are available to lease), the cost of obtaining the fiber connection depends on many factors, including the distance between the MVPD and the nearest interconnection point and the terrain. For instance, in most rural areas, a new dedicated fiber connection may need to travel one to five miles and cost on average between $25,000 and $50,000 per mile.
- DBS transport can be equally expensive. The cost of such transport varies based on the MVPD's subscriber size and the number of signals transported, but can amount to tens of thousands of dollars per month or more.
- Downconversion of ATSC 3.0 signals will be expensive. In theory, a small cable operator could obtain a station's ATSC 1.0 simulcast by purchasing equipment to receive the station's ATSC 3.0 signal off air and purchasing other equipment to downconvert that signal.[15] Some of this equipment is not yet commercially available, however, and these upgrades promise to be costly.

[15] *See* ATVA Comments Part I.B.

Larger MVPDs may be able to afford to incur such costs. For reasons described above, however, smaller ones have far less resources with which to do so—and more compelling priorities on which to devote the resources they do have.

The Commission should thus adopt ATVA's proposal to require simulcasts to be in the same format and with the same picture quality that the station employs prior to simulcasting. As ATVA suggests, the Commission could require stations to transmit at the same or higher average bandwidth at which they transmit today.[16] Alternatively, broadcasters who choose to degrade their over-the-air signals could accept responsibility for providing a non-degraded signal to MVPDs.

C. The Commission Should Protect Small and Rural MVPDs from Loss of Signal Coverage.

ATVA's comments question whether and how MVPDs receiving ATSC 1.0 signals over the air today will receive ATSC 1.0 simulcasts—at least when such simulcasts come from new "host" facilities.[17] As proposed, ATSC 1.0 simulcasts need not cover broadcasters' existing service contour—they need only provide services to a "substantially similar" community of license.[18] Thus, any variation between the contour of an existing signal and that of an ATSC 1.0 simulcast could result in the MVPD losing access to its off-air signal. Here again, this threatens to harm any MVPD relying exclusively on off-air delivery.

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[16] The Commission could ensure broadcasters have the technical means of offering a robust signal by limiting any single simulcast host from transmitting more than two HD signals.

[17] Simulcasts from *existing* facilities do not raise these concerns.

[18] *Notice* ¶ 23.

Such concerns resonate with small MVPDs. As discussed above, small MVPDs are more likely to rely exclusively on off-air delivery. And small MVPDs are often located in rural areas on the edges of an existing service contour, and are thus more likely to lose service. Likewise, broadcasters will more often ignore small MVPDs when making decisions about simulcast signal coverage. A broadcaster considering two potential simulcast "hosts," for example, might choose a host charging lower fees over one that charges slightly higher fees but covers more territory in rural areas—even if that means no longer delivering a signal to a small and rural MVPD's headend. And small MVPDs in rural areas are even less able to mitigate costs through fiber delivery than their small urban counterparts. They are less likely to be located in an area with multiple providers of 50-100 Mbps Ethernet circuits over fiber—and, consequently, more likely to be located in areas where a dedicated fiber strand or entire cable must be deployed. They thus must pay more for fiber transport, both on an absolute basis and on a per-subscriber basis.[19]

Accordingly, the Commission should adopt each of ATVA's proposed simulcast signal carriage requirements. (Below, we offer some additional clarification or details to those suggestions):

1. ATVA suggests that the Commission should "encourage" broadcasters to simulcast from their existing facilities and transmit in *ATSC 3.0* from hosts instead. We think it should *expect* stations to do so. Indeed, the Commission

[19] Small MVPDs in rural areas thus might rely instead on DBS transport or ATSC 3.0 downconversion (assuming the ATSC 3.0 signals can be received off air) if such services prove less costly than fiber transport. As discussed above, however, these means of delivery are expensive in their own rights.

should require stations to demonstrate that they have made "reasonable efforts" to simulcast from existing facilities before permitting them to simulcast from host facilities.[20] We would expect such a showing to demonstrate that an ATSC 3.0 hosting arrangement was unavailable, or substantially technically inferior to a corresponding ATSC 1.0 hosting arrangement—not merely that ATSC 1.0 simulcasting from existing facilities would be more expensive.

2. For stations that transmit ATSC 1.0 simulcasts from new host facilities, the Commission should require such simulcasts to reach the headends of all MVPDs that rely on off-air delivery today. Stations that cannot meet this requirement should assume responsibility, including financial responsibility, for the delivery of such signals through alternate means such as fiber, DBS transport, or ATSC 3.0 downconversion.
3. In addition, for stations that transmit ATSC 1.0 simulcasts from host facilities, the Commission should limit reductions in the population served by simulcasting to 0.5 percent, absent a waiver.

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[20] The Commission has used the "reasonable efforts" standard before. In the Spectrum Act, Congress required the Commission to make "all reasonable efforts" to preserve population coverage. *Middle Class Tax Relief and Job Creation Act of 2012*, Pub. L. No. 112-96, § 6403(b)(2), 126 Stat. 156, 226 (2012). Likewise, the Commission may waive its local ownership upon a showing "that the in-market buyer is the only entity ready, willing, and able to operate the station, that sale to an out-of-market applicant would result in an artificially depressed price, and that the waiver applicant does not already directly or indirectly own, operate, or control interest in two television stations within the relevant DMA." Note 7 to 47 C.F.R. § 73.3555. One way to make such a showing is to "provide an affidavit from an independent broker affirming that active and serious efforts have been made to sell the permit, and that no reasonable offer from an entity outside the market has been received." *Id.*; *see also Fireweed Commc'ns LLC, Gray Television Licensee, LLC*, 31 FCC Rcd. 6997 (2016) (discussing the "reasonable offer" standard).

II. THE COMMISSION SHOULD PROTECT SMALL MVPDS FROM BURDENS ASSOCIATED WITH CARRIAGE OF ATSC 3.0 SIGNALS.

A. The Commission Should Protect Small MVPDs from Coerced Carriage of ATSC 3.0 Signals.

ATVA's comments describe the likelihood that broadcasters will coerce MVPDs into carrying ATSC 3.0 signals.[21] As ATVA explains, broadcasters have already demonstrated their ability to coerce even large MVPDs by raising prices and forcing carriage of little-desired programming. They will surely exercise this ability with respect to their ATSC 3.0 signals.

Of course, if broadcasters can coerce *large* MVPDs, they have even more power to coerce *small* MVPDs. The calculus here is familiar: a broadcaster does not need small MVPD carriage to reach the majority of its audience, while the small MVPD needs the broadcaster in order to provide "must-have" programming to its subscribers (and avoid losing them to larger competitors). Even if it really were "comical" to think that a broadcaster could "force" a large MVPD acquiesce to its demands (and it is not),[22] broadcaster leverage over *small* MVPDs should at this point be beyond dispute. The Commission should thus adopt ATVA's "separate negotiation" requirement for small MVPDs even if it chooses not to do so for larger ones. Specifically: "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."[23]

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[21] ATVA Comments at Part II.

[22] Letter from Rick Kaplan to Marlene Dortch at 2 (filed Dec. 14, 2016).

[23] ATVA Comments at Part II.C. In the event that an MVPD could no longer receive the broadcaster's simulcast ATSC 1.0 signal, our proposal is not intended to prohibit a

Two other problems related to retransmission consent remain to be addressed. First, as ATVA describes, some broadcasters have already explicitly demanded carriage of ATSC 3.0 signals as the price of renewing ATSC 1.0 agreements.[24] We are aware of one small cable operator that could not reach a carriage deal without agreeing to such demands. This is a particular problem for ACA members, most of whose retransmission consent agreements expire at the end of this year. In light of ATVA's proposal for separate negotiations, broadcasters may have particular incentive to "beat the clock" with MVPDs by coercing ATSC 3.0 carriage before the Commission promulgates such a rule. If the Commission seeks to protect MVPDs from coerced carriage of ATSC 3.0 signals (as we think it should), it should extend such protection to the coercion that may have already occurred, or will occur prior to the effective date of an Order.

Second, broadcasters may also claim that language in *existing* ATSC 1.0 agreements, often negotiated years ago, now mandates ATSC 3.0 carriage. Indeed, numerous ACA members report that their existing contracts contain provisions that could be read as requiring such 3.0 carriage—even though they never mention terms such as "ATSC 3.0" or "NextGen TV." Examples include the following:

- A broad definition of "Signal," such as the entire digital signal broadcast of each station or station's digital broadcast signal.
- Provisions prohibiting the "material degradation" of signals that define the term broadly or otherwise requiring carriage:

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broadcaster from agreeing to permit an MVPD to receive and downconvert an ATSC 3.0 signal for the purpose of delivering an ATSC 1.0 simulcast.

[24] *Id.* at Part II.D.

- In the same ATSC technical format as originally broadcast, without downconversion, and without reducing the bitrate of the signal as received from a station.
- In a manner entirely unaltered from that broadcast by the station, in original form, or in the same technical format as broadcast.
- In a form compliant with ATSC standards or any successors or replacement thereto.
- In a manner that ensures the technical integrity of each signal as broadcast.

Each such provision could be read in isolation as requiring ATSC 3.0 carriage.[25] For example, ATSC 3.0 signals come from "stations;" ATSC 3.0 signals are "digital signals broadcast by" such stations; ATSC 3.0 signals are compliant with "successor" or "replacement" ATSC standards, *etc*.

We do not claim that broadcasters have insisted on these provisions over the years hoping that, someday, they would compel ATSC 3.0 carriage. We *do* know, however, that no ACA member agreed to this language anticipating that it might require such carriage—nor should they have reasonably expected it to do so. And we feel confident predicting that at least some broadcasters will cite this ambiguous language to insist that small MVPDs carry ATSC 3.0 signals. We feel equally confident predicting that many small MVPDs will not be able to afford to defend against resulting legal

[25] Of course, these agreements may have other provisions that could be read as limiting carriage to ATSC 1.0.

claims and will end up acquiescing to legal threats regardless of the underlying merits of such claims.

The Commission has described the transition to ATSC 3.0 as *voluntary*; one in which MVPDs may "*at some future time* . . . want to negotiate for carriage of ATSC 3.0 signals via retransmission consent[.]"[26] If this is really how things are supposed to work, the Commission cannot allow stations to obtain ATSC 3.0 carriage—whether through coercion or by virtue of ambiguous language—before it even authorizes stations to *offer* such signals. The Commission should thus prohibit broadcasters from enforcing clauses requiring ATSC 3.0 carriage in retransmission consent agreements entered into prior to Federal Register publication of any Order in this proceeding.[27]

B. The Commission Should Protect Capacity-Constrained MVPDs from Capacity Burdens Associated with ATSC 3.0 Carriage.

ATVA's comments describe the capacity burdens caused by MVPD carriage of ATSC 3.0 signals in formats greater than high-definition, such as 4K.[28] An earlier ACA

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[26] *Notice* ¶ 39 (emphasis added); *see also id.* ¶ 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.").

[27] The Commission has done this in the past where the public interest so required. *See, e.g.*, *Exclusive Serv. Contracts for Provision of Video Servs. in Multiple Dwelling Units and Other Real Estate Developments*, 22 FCC Rcd. 20235, ¶ 35 (2007) (prohibiting enforcement of certain existing exclusive contracts); *id.* ¶ 55 (observing that "that the law affords [the Commission] wide authority to prohibit the enforcement of such clauses where, as here, the public interest so requires"); *Nat'l Cable & Telecomms. Ass'n v. FCC*, 567 F.3d 659, 671 (D.C. Cir. 2009) (upholding prohibition on exclusive agreements, in part, because "the Commission did expressly consider the relative benefits and burdens of applying its rule to existing contracts and, after extensive analysis, concluded that banning enforcement of existing contracts was essential").

[28] ATVA Comments at Part I.B.2.e.

letter describes the problem in additional detail.[29] As ATVA describes, all MVPDs will eventually have to contend with the burdens of such capacity demands. And if the law *requires* carriage in such formats—either because of must-carry rules, or because the Commission adopts NAB's view that parties cannot lawfully agree to any "material degradation" in retransmission consent agreements[30]—these capacity burdens would take on constitutional dimensions.[31]

While capacity burdens will challenge all MVPDs, they will fall especially hard on capacity-constrained systems. Capacity-constrained MVPDs, almost by definition, cannot add additional broadcast programming without removing other programming. This basic fact of life has been true for years.[32] Today, however, broadcasters and other large programmers bundle more prolifically than they ever have before, forcing

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[29] Letter from Michael Nilsson and Paul Caritj to Marlene Dortch (filed Feb. 8, 2017) (describing capacity concerns) ("ACA Capacity Letter").

[30] NAB has taken the position that retransmission consent stations *cannot lawfully agree* with MVPDs for carriage of their signals in a format other than that transmitted over the air. *See, e.g.*, Comments of the National Association of Broadcasters, CS Docket No. 98-120, at 5 n.14 (filed Apr. 16, 2015) (arguing that Section 614's prohibition on "material degradation" applies "to all local commercial television stations carried by a cable system, and not just to must-carry stations"). This argument ignores (among other things) another statutory provision, Section 325(b)(4), which provides that, for a station electing retransmission consent, "the provisions of [Section 614] shall not apply to the carriage of the signal of such station by such cable system." 47 U.S.C. § 325(b)(4). *See* Reply Comments of the American Cable Association, CS Docket No. 98-120, at 10 n.33 (filed Apr. 27, 2015) (discussing additional authority).

[31] ATVA Comments at Part I.B.2.e (citing debate in dual-carriage proceeding).

[32] *See, e.g.*, *Carriage of Digital Television Broad. Signals: Amendments to Part 76 of the Comm'ns Rules*, 20 FCC Rcd. 4516, ¶ 41 (2005) ("We thus find it a reasonable construction of the must-carry provisions of the Act, on the record before us and in light of the Supreme Court's precedent, not to require cable operators to designate capacity or 'shelf space' for multicasting programming streams at the expense of other competing interests."); *id.* ¶ 19 (finding no important government interest related to the widespread dissemination of information from dual must-carry requirements, where the record reflected that dual carriage "would allow a single broadcaster to use up to 12 MHz of cable capacity," thus preventing cable carriage).

capacity-constrained MVPDs to fill up their systems with (often unwanted) programming to obtain the handful of channels their subscribers want.[33] As one ACA member with a relatively low-capacity system described it: "It's zero sum now. Anything we add, we have to take something away."[34] Indeed, even moderate-bandwidth systems can easily become capacity constrained when faced with the bundling obligations of broadcasters and other large programmers.[35]

As ACA has noted, moreover, if capacity-constrained MVPDs must remove other programming to make room for higher-resolution broadcast signals, "independent programmers would likely be the first to go."[36] After all, independent programmers have less leverage to renew their carriage agreements than do large broadcast groups and other conglomerates.[37] Much as a small MVPD might want to preserve the independent programming it offers today, it may become economically untenable for it to do so. Independent programmers themselves recognize this: eight of them wrote the

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[33] ACA Diversity Comments at 14-15 (explaining how a small cable operator who wants to get the must-have programming from nine of the largest media groups—Disney/ESPN, Fox, Comcast/NBCU, Turner, Viacom, AETN, AMC, Discovery, and Scripps—through the National Cable Television Cooperative buying group must carry 65 channels at a minimum in order to do so).

[34] Joint Comments of the American Cable Association *et al.*, MB Docket No. 16-41, at 4 (filed Jan. 26, 2017). This has been true for as long as the Commission imposed must-carry requirements. Sixteen years ago, for example, the Commission considered broadcast requests for a "dual carriage" requirement in light of the DTV transition. Even then, broadcasters refused to consider "the fact that virtually all cable system downstream capacity is and will be occupied by existing and new uses for non-video-broadcast applications, for national and regional cable program networks, and for near-video-on-demand pay-per-view (NVOD/PPV), video-on-demand (VOD), and HDTV services." PDS Consulting, "Cable TV System Capacity," at iii (Oct. 2001), *attached to* Letter from Daniel Brenner to Michael Powell, CS Docket No. 98-120 (filed Oct. 16, 2001).

[35] ACA Diversity Comments at 18-19.

[36] ACA Capacity Letter at 7.

[37] *Id.* at 6.

Commission to express their concern on this very issue.[38] As they wrote, "[s]uch an outcome should concern anyone interested in preserving the diversity of media voices available to the viewing public."[39]

More importantly, ATSC 3.0 carriage will eat into the broadband offerings of capacity-constrained MVPDs—with all of the negative consequences discussed above.[40] Broadcasters suggest that this is not a problem. Indeed, they argue that that the mere fact MVPDs offer broadband service at all suggests that they are not really capacity constrained in the first place.[41] As broadcasters see the world, MVPDs should devote *all* of their capacity to video service, with broadcast stations being first in line.[42] This "me first" approach, however, conflicts with important public policy prerogatives. Promoting broadband is one of Congress' and Chairman Pai's most important goals,[43]

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[38] Letter from Robert Patison *et al.* to Marlene Dortch (filed Feb. 16, 2017).

[39] *Id.* at 2.

[40] *See* Part I.A, above.

[41] Comments of the National Association of Broadcasters, MB Docket No. 16-41, at 6 ("Even assuming *arguendo* that some smaller MVPDs have less capacity for carrying video programming, such constraints may stem from an unwillingness to invest in their pay TV businesses, rather than true capacity limits.").

[42] *Id.*

[43] Remarks of FCC Commissioner Ajit Pai at the Brandery, "A Digital Empowerment Agenda," at 2-3 (Sept. 13, 2016), https://apps.fcc.gov/edocs_public/attachmatch/DOC-341210A1.pdf; Remarks of FCC Chairman Ajit Pai at the Federal Communications Commission (Jan. 24, 2017), https://apps.fcc.gov/edocs_public/attachmatch/DOC-343184A1.pdf; Letter from Co-Chairs of House Rural Broadband Caucus and Colleagues to President Donald Trump (Jan. 30, 2017), http://welch.house.gov/sites/welch.house.gov/files/Telecom%202017.01.30%20Letter%20to%20Pres%20Trump%20re.%20broadband_0.pdf (urging the President to invest in infrastructure to improve broadband connectivity for rural America); *Klobuchar, Capito, King, Heitkamp, Boozman Lead 48 Senators in Urging President Trump to Include Broadband in Any Infrastructure Initiative*, WEBSITE OF SENATOR AMY KLOBUCHAR (Jan. 31, 2017), https://www.klobuchar.senate.gov/public/index.cfm/2017/1/klobuchar-capito-king-heitkamp-boozman-lead-48-senators-in-urging-president-trump-to-include-broadband-in-any-infrastructure-initiative (joining House colleagues in

and the Commission has recognized the importance of online video to expanding consumers' viewing options.[44] And again, for *small* MVPDs, broadband service is both an economic imperative and, increasingly, the economic vehicle that permits the continued provision of traditional video service.[45]

The Commission has repeatedly provided relief to MVPDs facing capacity squeezes. For example, for six years the Commission exempted certain small cable system operators from the requirement to carry HD signals under the "material degradation" provisions of the must-carry rules. [46] It later adopted a permanent exemption.[47] Likewise, the Commission provided a multi-year phase-in for satellite carriers to comply with the "HD carry-one, carry all" requirement because of their unique capacity concerns.[48] The Commission should likewise prevent broadcasters from

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urging the President to include funds to improve broadband access in infrastructure initiatives).

[44] Remarks of FCC Commissioner Ajit Pai at the Churchill Club at 1-2 (July 17, 2015), https://apps.fcc.gov/edocs_public/attachmatch/DOC-334437A1.pdf.

[45] *See* Part I.A., above.

[46] *Carriage of Digital Television Broad. Signals: Amendment to Part 76 of the Comm'ns Rules*, 27 FCC Rcd. 6529, ¶¶ 19-23 (2012) (renewing exemption for small cable systems with 2,500 or fewer subscribers that are not affiliated with a cable operator serving more than 10 percent of all MVPD subscribers, and those with an activated channel capacity of 552 MHz or less, and noting that "[t]he record shows that a significant number of small systems with financial or channel capacity constraints continue to rely on the HD carriage exemption and require additional time to come into compliance in a cost-effective way).

[47] In 2015, the Commission adopted a joint proposal by ACA and NAB to modify the exemption by (among other things) amending the definition small cable systems and eliminating the exemption once a small cable system offers any programming in HD. *Carriage of Digital Television Broad. Signals: Amendment to Part 76 of the Comm'ns Rules*, 30 FCC Rcd. 6653, App. B ¶ 4 (2015) (redefining "small cable systems" as those (i) serving 1,500 (rather than 2,500) or fewer subscribers, and not affiliated with a cable operator serving more than 2 percent (rather than 10 percent) of all MVPD subscribers, or (ii) having an activated channel capacity of 552 MHz or less).

[48] *Carriage of Digital Television Broad. Signals: Amendment to Part 76 of the Comm'ns Rules*, 23 FCC Rcd. 5351, ¶¶ 7-11 (2008).

coercing channel-locked or capacity-constrained MVPDs from carrying higher-resolution ATSC 3.0 signals. ATVA's proposed separation requirements would help. Yet more is needed.

At a bare minimum, the Commission should confirm that parties *can* agree to carriage of ATSC 3.0 signals in formats that small MVPDs can actually carry. That is, it should reject NAB's prior contention that the "material degradation" provisions in the must-carry statute prohibit negotiating parties to agree to carriage in other formats.

We think the Commission should go further and prohibit stations from demanding carriage in formats that MVPDs do not yet carry. Specifically, the Commission should prohibit broadcasters from demanding that MVPDs carry ATSC 3.0 signals in any given format (*e.g.*, 4K) on any system in which the MVPD does not already carry programming in the same or higher-resolution format. The Commission could institute this prohibition either as a new *per se* violation of its good-faith rules,[49] or could condition a station's license to transmit in ATSC 3.0 format on compliance with this prohibition.[50]

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ACA supports ATVA's suggestions to mitigate the potential harm of the proposed ATSC 3.0 transition. ACA members, however, are particularly susceptible to such harm. The Commission should recognize this reality and adopt both ATVA's proposals and the additional safeguards suggested here.

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[49] 47 C.F.R. § 76.65(b)(1).

[50] *See* ATVA Comments at Part V.

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