

**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

**COMMENTS OF THE AMERICAN TELEVISION ALLIANCE**

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## SUMMARY

The American Television Alliance supports the idea of “permissionless innovation” behind the proposed transition to the ATSC 3.0 broadcast standard. Broadcasters should be free to improve and augment the free television service they have offered for decades. Permissionless innovation allows all providers—including both broadcasters and MVPDs—to better serve their customers.

Yet television stations do not operate in a vacuum. They transmit their signals as part of a complex ecosystem with many other participants, including the multichannel video programming distributors who deliver television signals to the vast majority of broadcast viewers. As it proceeds with the proposed ATSC 3.0 transition, the Commission should seek to understand how it might affect others in this ecosystem and the viewers who depend on them. In doing so, the Commission should keep two overriding goals in mind.

First, the proposed transition must, in the words of Commissioner O’Rielly, be “completely voluntary for all participants—broadcasters, distributors, and consumers alike.” Broadcasters should not obtain MVPD 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). The simplest way to prevent a broadcaster from conditioning carriage of ATSC 1.0 signals on initial carriage of ATSC 3.0 signals is to require separate negotiations of the two.

Second, broadcast innovation must not harm others. Broadcasters should not degrade the service they provide viewers (including MVPD viewers) today. Nor should they burden others with the costs of a transition that primarily benefits them, or prevent others from offering their own innovative services.

Each of the issues discussed below relates to one or both of these key concepts.

**I. Introduction: Benefits and burdens of the proposed transition.** Broadcasters propose to give themselves complete flexibility in how they use their spectrum. They have made no commitments so far about the services and functionalities they will offer through ATSC 3.0. They could, in other words, allocate the benefits of the proposed transition however they choose. A broadcaster could, for example, improve its over-the-air television service by offering better pictures, more robust emergency alerts, and differentiated content, all free of charge. It could instead choose to lease most of its spectrum to wireless carriers, to offer targeted advertising or its own audience measurement service, or to offer its own fee-based service. Or it could provide some combination of these services.

MVPDs, by contrast, would have little flexibility in avoiding costs generated by broadcast innovations. Some of these costs relate to reception and processing of ATSC 1.0 simulcasts delivered from a new location. MVPDs could not avoid such simulcast-related costs because, in many cases, regulation or contracts require them to carry simulcasts (but make no provision for the additional costs necessary to do so). Other costs relate to ATSC 3.0 transmissions. These include a variety of equipment-related costs, patent royalties, and potential capacity burdens.

**II. The Commission should prevent broadcasters from compelling carriage of ATSC 3.0 signals.** An MVPD might be willing to shoulder costs of initial ATSC 3.0 carriage on a truly voluntary basis—that is, if it determined that the benefits outweighed the costs. Yet ATSC 3.0 carriage negotiated under the Commission’s existing retransmission consent rules would be anything but voluntary. Rather, broadcasters could compel MVPD carriage of unwanted ATSC 3.0 signals by threatening to withhold their ATSC 1.0 signals. We know this, in part, because this is how broadcasters compel carriage of unwanted *programming* today.

(This explains the Tennis Channel’s sudden increased carriage by MVPDs in the year since Sinclair purchased it.)

The Commission should prohibit such compulsion here. The best, most easily enforceable way to achieve this is to require broadcasters to negotiate initial carriage of ATSC 3.0 signals separately from continued carriage of ATSC 1.0 signals. We would formulate such a requirement as follows:

**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.**

Similar considerations apply to existing agreements. Despite broadcaster assurances to the contrary, ATVA members report that broadcasters have already sought (and, in at least one case, obtained) ATSC 3.0 carriage by threatening to withhold ATSC 1.0 signals. And longstanding boilerplate in some existing agreements could be read in isolation to require ATSC 3.0 carriage—even though no MVPD could reasonably have anticipated such a requirement. The Commission should ensure that agreements entered into before it even authorizes ATSC 3.0 transmissions do not require carriage of such signals.

**III. The Commission should protect viewers from service loss and signal degradation during simulcasts.** Broadcasters propose a simulcasting requirement during the transition to ATSC 3.0. Under this proposed rule, stations would transmit ATSC 1.0 simulcasts indefinitely. If stations simulcast on *other* stations’ “host” facilities, some viewers and MVPDS who receive ATSC 1.0 signals over-the-air today will not continue to do so. Broadcasters may also degrade ATSC 1.0 simulcast picture quality to *all* over-the-air-viewers, as some have begun to suggest they might do in order to “encourage” ATSC 3.0 adoption. While we do not object to

the idea of ATSC 1.0 simulcasting, the simulcasting requirement should more fully protect continuity of service for over-the-air and MVPD viewers alike. Thus:

- The Commission should ensure that ATSC 1.0 simulcasting does not reduce signal coverage or quality by:
  - Encouraging broadcasters to simulcast over their existing facilities.
  - Imposing coverage requirements for those who cannot simulcast over existing facilities.
  - Prohibiting simulcasts from reducing picture quality or decreasing the resolution of the service provided today.
  - Requiring simulcasts to offer the same content as ATSC 3.0 transmissions.
  - Requiring broadcasters to notify the public both about simulcasting plans and about changes in service.
- The Commission should require both must-carry and retransmission consent broadcasters to reimburse MVPDs for costs generated by ATSC 1.0 simulcasts.
- The Commission should ensure that ATSC 1.0 simulcasts do not change MVPD carriage rights or obligations (by, for example, changing the station’s “local market” or the counties in which it is “significantly viewed”).
- The Commission should *not* permit low-power stations to “flash cut” to ATSC 3.0.

**IV. Other issues.** The Commission should address three additional issues raised by the proposed transition to ATSC 3.0:

- As it did during the DTV transition, it should require that patent-holders in the ATSC 3.0 standard and related standards agree to reasonable and nondiscriminatory (or “RAND”) pricing—and make clear that *it* will enforce such commitments.

- It should update the fees broadcasters pay to offer “ancillary and supplementary” services, in light of 20 years of additional auction data.
- It should specify whether there is a point at which the offering of differentiated television content to individual viewers no longer constitutes “broadcasting” in order to avoid adverse consequences down the road.

**V. The Commission has legal authority to adopt ATVA’s proposals.** Section 325 of the Communications Act gives the Commission authority to adopt our proposed “separation” requirement. In addition, numerous other Communications Act provisions authorize the Commission to condition the use of a new broadcast standard—including conditioning such use on compliance with each of our proposals.

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The American Television Alliance (“ATVA”)<sup>1</sup> provides its comments on the proposed “voluntary” transition to the ATSC 3.0 standard.<sup>2</sup> ATVA members support the idea of allowing broadcasters to engage in “permissionless innovation.”<sup>3</sup> Broadcasters should be free to improve or augment the free, over-the-air service they have provided for decades.<sup>4</sup> Permissionless

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<sup>1</sup> 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. ATVA members bring varied perspectives to a number of issues facing the Commission. They all agree, however, that abuse of the retransmission consent system harms consumers. A list of ATVA members can be found in Appendix A, attached.

<sup>2</sup> *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.

<sup>3</sup> See, e.g., *Oversight of the Fed. Commc’ns Comm’n: Hearing Before the S. Comm. on Commerce, Science, and Transp.*, 115th Cong., Testimony of FCC Chairman Ajit Pai at 3 (Mar. 8, 2017), [http://www.tellusventure.com/downloads/fcc/2017/pai\\_testimony\\_senate\\_8mar2017.pdf](http://www.tellusventure.com/downloads/fcc/2017/pai_testimony_senate_8mar2017.pdf) (citing desirability of permissionless innovation); Commissioner Michael O’Rielly, Keynote Address at the Annual Broadcast Television Conference of the Advanced Television Systems Committee at 2 (May 11, 2016), [https://apps.fcc.gov/edocs\\_public/attachmatch/DOC-339330A1.pdf](https://apps.fcc.gov/edocs_public/attachmatch/DOC-339330A1.pdf) (same).

<sup>4</sup> *Remarks by Gordon Smith at MMTC Broadband and Social Justice Summit*, NATIONAL ASSOCIATION OF BROADCASTERS (Jan. 21, 2016), <http://www.nab.org/documents/newsroom/pressRelease.asp?id=3870> (“Because it is always available for free over-the-air, broadcasting plays a

innovation allows all providers—including both broadcasters and multichannel video programming distributors (“MVPDs”) alike—to better serve their customers.<sup>5</sup>

Yet television stations do not operate in a vacuum. To the contrary, they operate in a complex ecosystem with many other participants, including the MVPDs that deliver television signals to the vast majority of broadcast viewers.<sup>6</sup> As the Commission considers a proposed transition that will affect these other participants, it should keep two goals in mind:

- First, the proposed transition must remain, in the words of Commissioner O’Rielly “completely voluntary for all participants—broadcasters, distributors, and consumers alike.”<sup>7</sup>
- Second, broadcast innovation must not harm viewers or others in the ecosystem.

The balance of these comments<sup>8</sup> relate to one or both of these goals. They proceed as follows:

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critical role for all Americans, especially those who are traditionally underserved. That concept is pretty remarkable when you think about it. Frankly, if it weren’t for the existence of free, over-the-air TV, we likely wouldn’t be able to muster the political will here in Washington to create it. Emerging services today are all rated, metered or littered with overage charges. But fortunately for the American people, our world-class free, local broadcast television industry is not a fantasy. It’s our reality, and American communities thrive with access to it. We should be working together to make this irreplaceable, inimitable service one that is thriving and prosperous in the future.”).

<sup>5</sup> ATVA members have stated this repeatedly with respect to their own operations. *See, e.g.*, Bob Quinn, *Regulation over Innovation...Again?*, AT&T PUBLIC POLICY BLOG (May 6, 2016), <https://www.attpublicpolicy.com/fcc/regulation-over-innovationagain/> (AT&T on set-top boxes); Letter from American Cable Association, Competitive Carriers Association, Consumer Technology Association, CTIA, Internet Commerce Coalition, National Cable & Telecommunications Association, and U.S. Telecom Association, to Tom Wheeler, FCC Chairman (Feb. 11, 2016), <https://www.publicknowledge.org/assets/uploads/blog/021116-privacy-letter.pdf> (letter from ISPs, including ATVA members, on privacy rules).

<sup>6</sup> The National Association of Broadcasters estimates that 17 percent of U.S. households are “broadcast only,” meaning that they do not receive broadcast signals through an MVPD. Comments of the National Association of Broadcasters, MB Docket No. 16-247, at 3 (filed Sept. 21, 2016).

<sup>7</sup> *Notice*, 32 FCC Rcd. at 1723, Statement of Commissioner O’Rielly.

<sup>8</sup> These comments refer to facts about retransmission consent agreements and negotiations between broadcasters and ATVA members. The programming agreements entered into between ATVA members and broadcasters contain stringent confidentiality provisions. *See CBS Corp. v. FCC*, 785

- **Part I** describes the ATSC 3.0 transition, including some of the benefits that would flow to broadcasters and the costs that would flow to MVPDs and their subscribers.
- **Part II** explains concerns about the proposal for broadcasters to negotiate MVPD carriage of ATSC 3.0 signals through the retransmission consent process. In order to ensure that carriage of ATSC 3.0 signals remains truly “voluntary,” the Commission should prohibit broadcasters from obtaining such carriage by threatening to withhold ATSC 1.0 signals. The most practical way to accomplish this is to require separate negotiations for ATSC 3.0 signals.
- **Part III** discusses how ATSC 1.0 simulcasts could harm the public, including MVPD subscribers, and suggests ways to minimize such harm.
- **Part IV** suggests that the Commission address issues related to patent royalties, “ancillary and supplementary services” fees, and the definition of “broadcasting.”
- **Part V** describes the Commission’s ample authority to protect MVPD viewers during any transition to ATSC 3.0.

**I. INTRODUCTION: COSTS AND BENEFITS OF THE PROPOSED ATSC 3.0 TRANSITION.**

The proposed transition to ATSC 3.0 would offer broadcasters new flexibility in the way that they have operated for decades. To gain this flexibility, broadcasters would have to simulcast ATSC 1.0 signals as “guests” on separate “host” facilities for an indeterminate period.<sup>9</sup>

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F.3d 699 (D.C. Cir. 2015). ATVA 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.

<sup>9</sup> *Notice* ¶ 27 (“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”).

MVPDs would carry such simulcasts under existing retransmission consent agreements and must-carry elections.<sup>10</sup> MVPDs *could* carry new ATSC 3.0 signals if they negotiate new retransmission consent agreements allowing them to do so.<sup>11</sup>

**A. Benefits for Broadcasters.**

As proposed, broadcasters would have almost unlimited ability to allocate the potential benefits of ATSC 3.0 transmissions. They could choose to improve over-the-air television service. They could (but do not have to) offer better pictures and sound.<sup>12</sup> They could (but do not have to) offer better emergency alert services.<sup>13</sup> They could (but do not have to) improve over-the-air reception by filling “holes” in their service areas, expanding their service areas, or improving reception by indoor antennas.<sup>14</sup> They could (but do not have to) offer more localized content other than advertising.<sup>15</sup>

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As discussed in Part I.B.1, below, broadcasters may also be able to simulcast ATSC 1.0 signals on existing facilities and move ATSC 3.0 signals to new facilities.

<sup>10</sup> *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.”).

<sup>11</sup> *Id.* ¶ 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>12</sup> *Id.* ¶ 4 (describing “such as UHD picture and immersive audio”); *id.* ¶ 4 n.9 (describing characteristics of “ultraHD” and “immersive audio”).

<sup>13</sup> *Id.* ¶ 1 (describing an emergency alert system service capable of waking up sleeping devices to warn consumers of imminent emergencies). Developing such functionality appears quite challenging. As we understand it, broadcasters would have to install additional cell-like networks in order to “turn on” all television sets in their service areas. Even so, televisions would need much larger antennas (as long as 18 inches) to receive such instructions from VHF stations. And the technology for MVPDs to pass through such commands does not yet exist.

<sup>14</sup> *Notice* ¶ 1 (describing ATSC 3.0 as having “the potential to greatly improve broadcast signal reception, particularly on mobile devices and television receivers without outdoor antennas”).

<sup>15</sup> *Id.* (referring to “more localized programming content”); Jerry Fritz, *Next-Gen Broadcasting: What’s In It For You?*, TV NEWSCHECK (Mar. 19, 2015), <http://www.tvnewscheck.com/article/83850/>

Broadcasters could also choose to change their television offerings in other ways. They could, for example, bypass third-party ratings services, for which they now have to pay.<sup>16</sup> Or they could provide more targeted advertising.<sup>17</sup>

Broadcasters could even choose to do things completely unrelated to broadcasting with the vast majority of their spectrum. They could, for example, provide commercial wireless service (or lease it to others who would do so),<sup>18</sup> or offer automotive services, banking services, or home security services.<sup>19</sup> Such non-broadcast services could be fee-based. Some of them

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nextgen-broadcasting-whats-in-it-for-you/page/1 (describing localized news content provided by stations in local markets overlapping multiple states) (“Fritz Article”).

<sup>16</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> (“With the proper technology and data gathering methodologies, Nexstar and Sinclair expect to capture significant and meaningful information relating to consumers’ actual viewing and consumption behaviors. As a result, broadcasters will no longer have to rely on expensive third party measurement services with small sample sizes and unverified results.”) (“Sinclair Article”).

<sup>17</sup> Fritz Article.

<sup>18</sup> Sinclair Article (“The consortium will 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.”).

<sup>19</sup> *Id.* See also *Next-Gen TV Hub To Showcase Benefits Of New Broadcast TV Standard At 2017 NAB Show*, ADVANCED TELEVISION SYSTEMS COMMITTEE (Mar. 22, 2017), [http://atsc.org/news-release/next-gen-tv-hub-showcase-benefits-new-broadcast-tv-standard-2017-nab-show/#.WNKblW\\_yuUI](http://atsc.org/news-release/next-gen-tv-hub-showcase-benefits-new-broadcast-tv-standard-2017-nab-show/#.WNKblW_yuUI) (“‘Cars are essentially giant connected devices, and the connected automobile of the future could easily become a NextGen receiver, with broadcasters planning transmitter and tower improvements that will insure easy reception in a moving vehicle and deep inside buildings,’ said Mark Aitken from Sinclair Broadcast Group.”); Letter from America’s Public Television Stations to Marlene Dortch, GN Docket No. 16-142, at Attachment (filed Aug. 10, 2016) (“Public Television is eager to embrace the non-broadband datacasting opportunities that Next Gen presents to enhance the public services we offer.”). As a ONE Media executive put it, “[f]rom optional automobile services (like real-time navigation system map/traffic updates) to distance learning to real estate to e-books distribution to localized weather alerts to health care notifications to critical public safety apps to digital outdoor signage supply, [ATSC 3.0 allows] a myriad of services awaiting exploitation.” Fritz Article.

could, in time, become more financially important to broadcasters than the “free, over-the-air” service for which their spectrum was originally intended.

## **B. Burdens for MVPDs.**

The transition to ATSC 3.0 would create real costs for MVPDs and their subscribers. These include costs related to the carriage of both ATSC 1.0 simulcasts and ATSC 3.0 transmissions. (Of course, at the end of the transition—whenever that may be—many stations would have to move their ATSC 1.0 simulcasts or ATSC 3.0 signals *again*, imposing a second round of costs on MVPDs.)

### ***1. Costs of Carrying Simulcast ATSC 1.0 Signals.***

As we understand the petition that prompted the *Notice*, a station would keep its *ATSC 3.0* signals on its current facilities. It would place *ATSC 1.0 simulcasts* on another station’s host facilities.<sup>20</sup> The *Notice*, however, also seems to suggest that the opposite could be true: a station could keep its *ATSC 1.0 simulcasts* on its existing facilities and move its *ATSC 3.0* signals to a host station.<sup>21</sup>

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<sup>20</sup> Petition at 17 (referring to broadcasters “arranging for the simulcast of that signal in the current DTV standard on another broadcast facility serving a substantially similar community of license”); *see also* *Notice* ¶ 9 (“Specifically, under the Petition’s local simulcasting proposal, each television broadcaster choosing to broadcast its signal in ATSC 3.0 format from its current facility will arrange for another television station (i.e., a ‘host’ station) in its local television market to ‘simulcast’ its video programming in ATSC 1.0 format in order to mitigate disruption to over-the-air viewers.”).

<sup>21</sup> *Notice* ¶ 16 (“For example, a Next Gen TV broadcaster might choose to deploy ATSC 3.0 service by converting its current facility to broadcast in ATSC 3.0 and obtaining a temporary channel sharing license to share a host station’s channel during a potential Next Gen TV transition period in order to broadcast its simulcast in ATSC 1.0 (from the host’s facility). Similarly, a Next Gen TV broadcaster might choose to deploy ATSC 3.0 service by continuing to broadcast in ATSC 1.0 from its existing facility and obtaining a temporary channel sharing license to share a host station’s channel during a potential Next Gen TV transition period in order to broadcast its simulcast in ATSC 3.0 (from the host’s facility).”).

If ATSC 1.0 simulcasts move to other host facilities, MVPD carriage of them would generate substantial costs.<sup>22</sup> Before describing those costs, it is worth noting that costs *from simulcast carriage* would be anything but “voluntary.”<sup>23</sup> MVPDs must assume them or face legal jeopardy. The Communications Act requires MVPDs to carry qualified stations electing must carry.<sup>24</sup> And, of course, the Act contains no provisions for reimbursement of MVPD costs when stations change their facilities in order to simulcast.<sup>25</sup> Likewise, most retransmission consent agreements obligate MVPDs to carry a station’s signals during the agreement’s term. Here again, most such agreements contain no provisions to reimburse MVPDs when stations switch facilities in order to simulcast.

a) *Costs Associated with the Reception and Processing of ATSC 1.0 Simulcasts Regardless of the Manner of Delivery.*

MVPDs would incur costs to receive and process ATSC 1.0 simulcasts regardless of the means by which they receive such signals. These could include the following, among other costs:

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<sup>22</sup> The Commission has quantified similar costs in its repack proceeding. We use those figures where possible, here, notwithstanding the differences between the repack (in which stations are not expected to change facilities) and the ATSC 3.0 simulcast (in which they will).

<sup>23</sup> *Contra* Letter from Rick Kaplan to Marlene Dortch, at 2 (filed Dec. 8, 2016) (“Just as simulcasting of broadcaster signals will protect viewers, so too will it protect those MVPDs that receive signals over the air and elect not to carry Next Generation TV signals.”) (“NAB Dec. 8 Letter”).

<sup>24</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>25</sup> If a must-carry station can no longer deliver a good quality signal, the MVPD need no longer carry it.

- **New receivers.** Under the broadcasters’ proposal, a single “host” station could transmit multiple HD feeds—its own, and up to two simulcast feeds. Some ATSC 1.0 receivers, however, only provide one HD video output per physical channel.<sup>26</sup> In order to retransmit multiple ATSC 1.0 simulcasts from a single host facility, MVPDs using one-output receivers today would need to obtain new ones. The Commission has estimated that the cost of new receivers ranges from \$300 to \$3,500 per station.<sup>27</sup> With more than 4,100 television stations in the United States,<sup>28</sup> these costs can add up quickly for many MVPDs.
- **Demultiplexers.** If an MVPD were to receive multiple streams from a single host station, it might need demultiplexers to separate the streams from one another. A simple demultiplexer used in such a scenario now costs between \$2,500 and \$7,500 per device.
- **Storage costs.** If an MVPD required new equipment to receive ATSC 3.0 simulcasts, it may need to obtain additional physical space in its headend or local receive facility for such equipment. The cost of such space varies from market to market, and even from provider to provider.

b) *Costs Associated with Over-the-Air Reception Of Simulcast Signals.*

MVPDs would incur other costs to receive simulcast signals over-the-air. These could include the following, among other costs:

- **Engineering studies.** An MVPD would need to conduct engineering studies to determine what changes to its facilities, if any, would be needed to carry a station’s ATSC 1.0 simulcast. According to Commission estimates, this would cost \$1,500 to \$3,500 per study.<sup>29</sup>
- **New antennas.** An MVPD may need to invest in a new antenna to better receive an over-the-air signal delivered from a new host facility. This could cost anywhere from \$1,500 to \$6,000, depending on the type of antenna required.<sup>30</sup>

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<sup>26</sup> Comments of American Cable Association at 15 (filed May 26, 2016).

<sup>27</sup> *Incentive Auction Task Force and Media Bureau Finalize Catalog of Reimbursement Expenses*, 32 FCC Rcd. 1199, 1223 App. § III (2017) (“*Reimbursement Catalog*”).

<sup>28</sup> See *Broadcast Station Totals as of March 31, 2017*, [https://apps.fcc.gov/edocs\\_public/attachmatch/DOC-344256A1.pdf](https://apps.fcc.gov/edocs_public/attachmatch/DOC-344256A1.pdf) (including low power and Class A stations).

<sup>29</sup> *Reimbursement Catalog*, 32 FCC Rcd. at 1223.

<sup>30</sup> *Id.* New antennas could be needed for each broadcast tower.



- **Tower upgrades.** An MVPD may need to conduct a structural study of an existing tower to ensure that it can support new antennas. This, according to the Commission, would cost between \$1,500 and \$5,500.<sup>31</sup> If the study were to find that the tower must be reinforced, this, of course, would require significant additional expense.

There is no guarantee that simulcast stations will not change hosts in the future. Thus, such costs could be incurred again and again.

c) *Costs Associated With Reception of Signals Delivered by Other Means.*

As discussed in more detail below,<sup>32</sup> stations that deliver signals to MVPDs over-the-air today may or may not be able to deliver ATSC 1.0 simulcasts in this manner. If a station cannot deliver a “good-quality” over-the-air signal, then the parties need to arrange for reception by other means.<sup>33</sup> There are at least two means by which MVPDs could receive ATSC 1.0 simulcast signals.

- **Fiber feeds.** Some MVPDs have sufficient fiber connectivity to receive ATSC 1.0 simulcast signals today. For those that do not, the cost of such connectivity depends on many factors.<sup>34</sup> In urban and suburban markets, MVPDs often have a choice of facilities-based providers that can provision 50-100 Mbps Ethernet circuits over fiber, which would be needed to transport ATSC 1.0 signals. The cost of these circuits is approximately \$2,000-\$3,000 per month plus a minimal non-recurring charge for a long term contract. When a dedicated video capable service is used, the monthly reoccurring costs typically exceed \$3,000-\$4,000 per month and can be greater if the circuit crosses a Local Access and Transport Area. When a dedicated fiber strand or entire cable is

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<sup>31</sup> *Id.*

<sup>32</sup> *See* Part III.A.1, below.

<sup>33</sup> This reception method assumes the ATSC 3.0 broadcast and the ATSC 1.0 simulcast streams are indeed identical.

<sup>34</sup> MVPDs can receive reimbursements for “the use of alternative distribution methods” where over-the-air reception is no longer possible. *See* Widely, Inc., *Response to the Federal Communications Commission for the Broadcaster Transition Study Solicitation – FCC13R0003* at 35-36 (Dec. 30, 2013), <https://www.fcc.gov/sites/default/files/Widely%20Report.pdf>; *Reimbursement Catalog* ¶¶ 5-6 & n.26 (clarifying, at NAB’s urging, that alternative means of signal delivery, such as fiber, would be reimbursable if necessary for an MVPD “to continue to carry the signal of a station that has changed channels”).

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 dedicated fiber connection may need to travel one to five miles and cost on average between \$25,000 and \$50,000 per mile. If new fiber must be deployed in urban areas, the costs would likely be greater.<sup>35</sup>

- **ATSC 3.0 signals.** In theory, broadcasters could deliver *ATSC 3.0* signals to MVPDs, who would then receive them and transcode them, potentially including downconversion.<sup>36</sup> This would subject the MVPDs to all of the costs associated with *ATSC 3.0* carriage, described below,<sup>37</sup> as well as any additional costs for the equipment necessary to perform such processing.

## 2. *Costs and Burdens of Carrying ATSC 3.0 Signals.*

*ATSC 3.0* changes virtually everything about over-the-air television signals. It changes the physical layer modulation from 8VSB to orthogonal frequency division multiplexing.<sup>38</sup> It replaces MPEG-2 video encoding with H.265.<sup>39</sup> It also replaces the existing AC-3 audio encoding with AC-4.<sup>40</sup> This means that, in addition to the costs for simulcast carriage described above, *ATSC 3.0* carriage would entail entirely new categories of costs and burdens. These include new patent royalties and the increased capacity consumed by such signals.

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<sup>35</sup> One ATVA member suggests that costs of underground fiber can total as high as \$80,000 per mile, or even more in the densest urban areas.

<sup>36</sup> This was the first issue discussed by the ATSC “retransmission” subgroup. *Technology Group 3*, ADVANCED TELEVISION SYSTEMS COMMITTEE (last accessed Mar. 31, 2017), <http://atsc.org/subcommittees/technology-group-3/>.

<sup>37</sup> See Part I.B.2, below.

<sup>38</sup> Meintel, Sgrignoli, & Wallace, LLC, *A Report To The Federal Communications Commission Regarding Laboratory Testing of Recent Consumer DTV Receivers With Respect To ATSC 1.0 and ATSC 3.0 DTV Interference* (April 8, 2016), attached to Petition as Attachment B.

<sup>39</sup> *ATSC Candidate Standard: Video (A/341)*, ADVANCED TELEVISION SYSTEMS COMMITTEE (Dec. 23, 2015), <http://atsc.org/wp-content/uploads/2015/12/S34-168r3-Video.pdf>.

<sup>40</sup> *ATSC Candidate Standard: A/342 Part 2, AC-4 System*, ADVANCED TELEVISION SYSTEMS COMMITTEE (May 3, 2016), <http://atsc.org/wp-content/uploads/2016/05/A342S34-188r3-Audio-Standard-Part-2.pdf>.

Unlike the costs associated with ATSC 1.0 simulcasts, MVPDs cannot yet quantify the costs associated with ATSC 3.0 carriage. Much of the necessary equipment does not yet exist. Uncertainty remains about patent royalties. And capacity burdens depend largely on stations' future decisions about how they will use their spectrum. This means that MVPDs, unlike broadcasters, cannot have taxpayers help reimburse all or some of their costs through the fund established for the incentive auction repack.<sup>41</sup>

a) *Costs Associated With Reception and Processing of ATSC 3.0 Signals Regardless of Manner of Delivery.*

MVPDs would incur some costs to receive and process ATSC 3.0 signals regardless of how stations deliver them. These could include the following, among other costs:

- **New receivers.** Because ATSC 3.0 replaces 8VSB modulation with orthogonal frequency division multiplexing, new receivers would be needed. We are not aware of any such receivers that are commercially available today.
- **New transcoders.** Existing equipment cannot transcode H.265 video streams. MVPDs would thus have to acquire equipment to do so. It may be possible to combine such decoders with ATSC 3.0 receivers. We are not aware any such equipment that is commercially available today.
- **Demultiplexers.** MVPDs may have to separate out multiple streams of programming from a single ATSC 3.0 station, which would require demultiplexers. MVPDs may also

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<sup>41</sup> Broadcasters have made no secret of their desire to have *their own* costs associated with the ATSC 3.0 transition reimbursed from the incentive auction reimbursement fund. *See, e.g.,* Fritz Article (“Moving to the next-gen standard in conjunction with the repack of the broadcast band must become part of our national policy. It makes absolutely no sense commercially or from a public policy perspective to make broadcasters change antennas, towers and transmitters twice when it can be easily done once. There is \$1.75 billion set aside in the Incentive Auction to do just that.”). While this fund is ostensibly not to be used for the ATSC 3.0 transition, it can be used for “dual-use” equipment that can be used for ATSC 1.0 and 3.0 transmissions. *See Notice* ¶ 78 (recognizing that “replacement equipment eligible for reimbursement from the Reimbursement Fund necessarily may include improved functionality” but noting that the Commission does not “anticipate providing reimbursement for new, optional features in equipment unless the station or MVPD documents that the feature is already present in the equipment that is being replaced.”) (internal quotations omitted). Broadcasters could also save money by using antenna crews already working on the repack to install ATSC 3.0 equipment. Since most MVPD equipment related to ATSC 3.0 reception does not yet exist, MVPDs will be unable to use auction reimbursement funds for this purpose.

have to separate out *broadcast* material intended for retransmission from *non-broadcast* material not intended for retransmission. This may require the use of demultiplexers, although we are unaware of any existing technology that could separate broadcast from non-broadcast material.

- **Other equipment.** Broadcasters electing retransmission consent may demand that MVPDs pass through new and changing ATSC 3.0 features to their subscribers. Suppose, for example, that a station chooses to implement EAS-related “television wake-up” functionality. Were an MVPD required to pass through this functionality, it would have to obtain new equipment in order to do so. Likewise, to the extent an MVPD were required to pass through a station’s interactive services, it would need equipment to enable traffic back to the station from the subscriber, possibly requiring redesign of the network connections between the MVPD and the station. Here again, we are not aware of equipment that performs such functions that is commercially available today.

b) *Costs Associated with Over-the-Air Reception Of ATSC 3.0 Signals.*

MVPDs would incur additional costs to receive ATSC 3.0 signals over-the-air. Among other costs, these could include the following:

- **Engineering studies and tower upgrades.** Just as MVPDs would have to conduct engineering studies and tower upgrades to support over-the-air reception of new simulcast signals, they may have to do so in order to support over-the-air reception of new ATSC 3.0 signals, depending on how such signals are configured.
- **New demodulators.** Demodulators capable of converting ATSC 1.0 are incapable of converting ATSC 3.0 signals to a bitstream. MVPDs would have to purchase additional demodulators to accommodate such reception.

c) *Costs Associated With Reception of ATSC 3.0 Signals Delivered By Other Means.*

As with simulcast signals, some ATSC 3.0 signals may not reach cable headends or satellite local receive facilities. Indeed, if the Commission gives broadcasters the flexibility they seek, broadcasters could *choose* to configure their ATSC 3.0 signals in a manner that does not reach MVPDs—and could change such choices in real-time. In such case, MVPDs could be required to obtain such signals via fiber, at costs described above.

d) *Patent Royalties*

ATSC 3.0, like ATSC 1.0, relies on patented technologies. Equipment used to receive ATSC 3.0 signals is subject to patent royalties, just as equipment used to receive ATSC 1.0 signals is. If MVPDs had to purchase new equipment for ATSC 3.0 carriage, they would have to pay such royalties as part of the purchase price—just as they would if they purchased new ATSC 1.0 equipment.<sup>42</sup>

The proposed transition, however, also contemplates new *per-subscriber* patent royalties for MVPDs. ATSC 3.0 employs the new H.265 encoding standard, which incorporates a number of patented technologies with differing licensing requirements. Although it appears that broadcasters may benefit from a blanket license covering their use of this technology,<sup>43</sup> H.265 patent-holders have announced their intention to charge new, and potentially substantial, per-subscriber royalties for “subscription-based” services.<sup>44</sup> No such royalty schemes apply to ATSC 1.0 retransmissions.

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<sup>42</sup> A company affiliated with Sinclair Broadcasting—perhaps the most prominent proponent of the ATSC transition—holds patents in the ATSC 3.0 transmission standard. ONE Media, LLC, *ATSC Disclosure Statement and Licensing Declaration*, ADVANCED TELEVISION SYSTEMS COMMITTEE (2015), [http://atsc.org/wp-content/uploads/2015/12/One\\_Media\\_ATSC\\_Patent\\_Disclosure\\_121415.pdf](http://atsc.org/wp-content/uploads/2015/12/One_Media_ATSC_Patent_Disclosure_121415.pdf); ONE Media, SINCLAIR BROADCAST GROUP (last accessed Mar. 31, 2017), <http://sbg.net/one-media/>; Doug Halonen, *Billions Of \$ At Stake In ATSC Next-Gen Effort*, TV NEWSCHECK (Feb. 18, 2015), [http://www.tvnewscheck.com/article/83062/billions-of--at-stake-in-atsc-nextgen-effort?utm\\_source=NetNewsCheck-rss&utm\\_medium=latest-news-feed&utm\\_campaign=latest-news-feed-Billions-Of-At-Stake-In-ATSC-Next-Gen-Effort&utm\\_reader=feedly](http://www.tvnewscheck.com/article/83062/billions-of--at-stake-in-atsc-nextgen-effort?utm_source=NetNewsCheck-rss&utm_medium=latest-news-feed&utm_campaign=latest-news-feed-Billions-Of-At-Stake-In-ATSC-Next-Gen-Effort&utm_reader=feedly).

<sup>43</sup> *Licensing Rates and Structure*, HEVCADVANCE (last accessed Mar. 31, 2017), <http://epdf.hevcadvance.com/pdf/embed?hash=45b481aa5e22256d59fb6de7f22f03cb#1>; Greg Rutz, *The Cost of Codecs: Royalty-Bearing Video Compression Standards and the Road that Lies Ahead*, CABLELABS (Feb. 1, 2016), <http://www.cablelabs.com/the-cost-ofcodecs-royalty-bearing-video-compression-standards-and-the-road-that-lies-ahead/>.

<sup>44</sup> *Id.*

e) *Capacity Burdens*

Carriage of ATSC 3.0 would also impose costs on MVPDs in terms of the additional capacity required if broadcasters choose to transmit in higher-resolution formats.<sup>45</sup> As discussed above,<sup>46</sup> broadcasters could transmit ATSC 3.0 signals in formats ranging from standard definition to 4K Ultra High Definition (and, potentially, future higher-resolution formats as broadcasters update their standard).<sup>47</sup> Assuming broadcasters choose to do so, MVPD carriage of such signals would consume additional capacity both because the new higher-resolution formats would consume more bandwidth than the old formats and because they would have to carry two sets of signals.<sup>48</sup> This would prove a real burden for all MVPDs, but it would particularly harm satellite carriers and small cable system operators.

**Additional bandwidth.** To begin with, a broadcaster's higher-resolution signal may consume significantly more capacity than its HD signals. Today, ATVA members can devote

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<sup>45</sup> See Letter from Michael Nilsson and Paul Caritj to Marlene Dortch (filed Feb. 8, 2017) (letter on behalf of the American Cable Association describing capacity concerns in detail).

<sup>46</sup> See Part I.A, above.

<sup>47</sup> See Notice ¶ 4 n.9 (“‘Ultra HD’ or ‘UHD’ has higher resolutions (more pixels) for a more realistic picture and color quality than HDTV. Currently, UHD comes in resolutions of 4K (2160p) with 8.3 megapixels or four times as many as full HD (1080p) and now 8K (4320p) with 33.2 megapixels or 16 times as many as full HD.”) (internal citations omitted).

<sup>48</sup> 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). If NAB's legal argument were correct (and it is not) the proposed transition to ATSC 3.0 would be much *more* problematic than it already is, as it would render unlawful any negotiated relief from the capacity burdens placed on MVPDs by ATSC 3.0 carriage.

anywhere from 4 to 19 Mbps to carry a single HD feed, depending both on how the broadcaster configures its feed and how the MVPD treats it. Higher-resolution formats such as 4K, however, can contain four times the information as HD signals or more.<sup>49</sup> One broadcaster indicates that such transmissions could consume 20 Mbps or more, despite improvements in broadcast compression.<sup>50</sup> Broadcasters would have the option to consume much more bandwidth if they chose to do so. Last summer, for example, a broadcaster appears to have transmitted a 4K channel at a bitrate as high as 34 Mbps during an ATSC 3.0 test broadcast.<sup>51</sup> ATVA members that have participated in the ATSC retransmission subgroup suggest a maximum potential bitrate per station of closer to 50 Mbps.

MVPDs, moreover, would have less ability to mitigate the effects on their own systems of broadcasters' increased bandwidth consumption. Today, some cable operators and both satellite carriers re-encode MPEG-2 broadcast streams using MPEG-4 in order to save capacity without compromising image quality. So much of the capacity savings that broadcasters expect to achieve by using H.265 has already been captured by MVPDs using efficient MPEG-4 codecs.

**Dual carriage.** If MVPDs carry new higher-resolution signals, such carriage would be in addition to simulcast ATSC 1.0 or transcoded ATSC 3.0 signals for the foreseeable future. Until all of an MVPD's subscribers own televisions, set-top boxes, or other equipment capable of processing such signals, it would have to continue carrying either ATSC 1.0 or downconverted

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<sup>49</sup> *Television Technology Consumer Definitions*, CONSUMER TECHNOLOGY ASSOCIATION, <https://www.cta.tech/cta/media/Membership/PDFs/Video-Technology-Consumer-Definitions.pdf>.

<sup>50</sup> See Louis Libin, Senior Director New Technology, Sinclair Broadcast Group, "The Promise of the Next Generation Broadcast Standard, And More!" at 50 (2015), <http://www.sbe24.org/WBA-SBE-Shows/archives/Clinic2015/Libin-2015.pdf> (suggesting that "Super-4k – HEVC" will consume between 18 and 30 Mbps).

<sup>51</sup> See Grayson Logue, *WRAL Unveils Next-Generation Broadcast Technology*, THE NEWS & OBSERVER (June 29, 2016), <http://www.newsobserver.com/news/business/article86753697.html>.

ATSC 3.0 signals to ensure that all of its subscribers could view the broadcaster’s programming. Indeed, the MVPD would have to continue such dual carriage even after broadcasters stop simulcasting in ATSC 1.0. This is the fundamental tradeoff of launching non-backwards compatible standards: It occurred when switching from SD to HD, it will occur when switching from HD to 4K, and it may occur if broadcasters switch to even higher-resolution formats thereafter.<sup>52</sup>

We do not discuss here whether such dual carriage would be required under the statutory obligation for cable operators to make must-carry television stations “viewable” to all subscribers. We note only that any such requirement would raise constitutional issues—as might any ATSC 3.0 carriage requirement resulting in additional capacity burdens.<sup>53</sup> In a plurality decision upholding the must-carry statute, the Supreme Court described the government interest at play as preventing the *complete failure* of stations not carried by cable operators.<sup>54</sup> It described the “modest” harm at issue for cable operators as limiting the number of channels over which they “exercise unfettered control.”<sup>55</sup> The balance of government interest and free-speech harms would surely produce a different outcome here. No station will fail by declining to transition to ATSC 3.0. And the government’s interest in preserving a diversity of media voices

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<sup>52</sup> After the broadcasters completed their digital transition, MVPDs had to “dual carry” or “dual illuminate” broadcast signals in multiple formats in order to ensure continuity of service to subscribers with legacy equipment. Many MVPDs still do so.

<sup>53</sup> 47 U.S.C. § 534(b)(7); *Carriage of Digital Television Broad. Signals: Amendment to Part 76 of the Comm’ns Rules*, 27 FCC Rcd. 1713, ¶ 1 (2012).

<sup>54</sup> *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 208 (1997) (“The harm Congress feared was that stations dropped or denied carriage would be at a ‘serious risk of financial difficulty,’ and would ‘deteriorate to a substantial degree or fail altogether[.]’”) (internal citations omitted).

<sup>55</sup> *Id.* at 214 (also describing harms to cable programmers).



may look different in light of the spectacular growth in online content. Depending on the outcome of this proceeding, the burdens on MVPDs might restrict a great deal of speech indeed.

**Effect of additional capacity burdens, particularly on satellite and small cable systems.** Taken together, dual carriage and increased bandwidth dramatically increase the capacity that an MVPD must devote to broadcast signals. This is a meaningful burden for *any* MVPD. No MVPD has unlimited bandwidth. Every MVPD has to make sometimes painful choices about how to allocate bandwidth among competing programmers and between video and other services, such as broadband, that their subscribers desire. Extra bandwidth consumed by broadcasters invariably means less bandwidth available for other programming and services even for higher-capacity MVPDs. If MVPDs must upgrade their systems to make room for the extra bandwidth consumed by broadcasters, their subscribers will ultimately bear at least some of the costs of such upgrades.

Capacity issues create a particularly difficult burden for two classes of MVPDs: satellite carriers and small cable system operators. Satellite carriers reuse frequencies many times, using “spot beams” to deliver local broadcast signals to different markets throughout the country. Each spot beam covers specific local markets. Satellite carriers allocate bandwidth to each spot beam based on the expected number of local channels to be carried in the local markets in question. Spot beams are fixed; satellite carriers cannot repoint or adjust them once the satellite is in orbit.<sup>56</sup> To the extent their spot beams are full or nearly full, satellite carriers cannot add

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<sup>56</sup> The Commission has noted the “serious technical difficulties” faced by satellite carriers in retransmitting the signals of thousands of local broadcast stations throughout the country. It has found that “the capacity used for local channels is separate from the capacity used for national channels and the two are generally not interchangeable.” It noted that, if faced with onerous carriage requirements, satellite carriers might be “forced to drop other programming, including broadcast stations now carried in HD pursuant to retransmission consent, in order to free capacity,” or might be

ATSC 3.0 signals in higher-resolution formats and remain in compliance with their statutory “carry-one, carry-all” obligations.<sup>57</sup>

Capacity burdens also harm small cable system operators. Many small cable systems do not have “spare” capacity to devote to carriage of additional signals in higher-resolution formats. Some offer video only and are completely “channel locked.” Others devote every channel not used for video to high-speed Internet service.<sup>58</sup> ATSC 3.0 carriage will present such systems with a Hobson’s choice: drop existing programming (independent programming, more likely than not<sup>59</sup>) or reduce broadband performance. Neither is acceptable.<sup>60</sup>

## **II. THE COMMISSION SHOULD ADOPT RETRANSMISSION CONSENT-RELATED REMEDIES IF IT IS TO RELY ON “VOLUNTARY” NEGOTIATIONS FOR ATSC 3.0 CARRIAGE.**

Broadcasters question the relevance of the costs described above because, in their view, the transition to ATSC 3.0 will be “voluntary” for MVPDs.<sup>61</sup> Broadcasters assert that MVPDs

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“inhibited from adding new local-into-local markets.” *Carriage of Digital Television Broad. Signals: Amendment to Part 76 of the Comm’ns Rules*; 23 FCC Rcd. 5351, ¶¶ 8-11 (2008).

<sup>57</sup> 47 U.S.C. § 338(a)(1).

<sup>58</sup> See Comments of the American Cable Association, MB Docket No. 16-41, at 8 (filed Mar. 30, 2016) (“ACA Diversity NOI Comments”). To the extent small cable operators can afford to upgrade their system to provide additional bandwidth, moreover, their customers invariably demand that they devote this additional capacity to improved broadband rather than broadcast television. In other contexts, the National Association of Broadcasters has suggested that this is somehow an illegitimate choice. See, e.g., Comments of the National Association of Broadcasters, MB Docket No. 16-41, at 6 (filed Jan. 26, 2017) (suggesting that small cable operator concerns about capacity reflect an “unwillingness to invest in their pay TV businesses, rather than true capacity limits”). Yet many small cable operators already face zero or negative video margins. ACA Diversity NOI Comments at 5-6. It is not a rational “choice” to make investments that one knows will lose money.

<sup>59</sup> See Letter from Michael Fletcher *et al.* to Marlene Dortch (filed Feb. 16, 2017) (letter from independent programmers concerned about the impact of ATSC 3.0 increased bandwidth on independent programmers).

<sup>60</sup> ACA Diversity NOI Comments at 8.

<sup>61</sup> E.g., Letter from Rick Kaplan to Marlene Dortch, at 1 (filed Dec. 14, 2016) (noting MVPD concerns, and responding that the proposal “would not require MVPDs to carry the Next Gen signal” because

will not incur any costs associated with the transition unless they decide that they *want* to do so.<sup>62</sup> In their view, if broadcasters seek carriage of ATSC 3.0 signals, MVPDs can simply decline such demands in the “rough and tumble of the marketplace.”<sup>63</sup>

As we have explained, this cannot be true with costs associated with simulcasts, which MVPDs are obligated to carry.<sup>64</sup> Even with respect to ATSC 3.0 signal carriage, however, such claims cannot be squared with reality. As discussed below, the best way for the Commission to ensure that ATSC 3.0 carriage is truly “voluntary” is to require broadcasters to negotiate separately for such carriage.

**A. Broadcasters Could Compel Carriage of ATSC 3.0 Signals.**

Broadcasters claim that they cannot compel MVPDs to do anything in retransmission consent negotiations—and certainly could not compel ATSC 3.0 carriage.<sup>65</sup> If this were really so, broadcasters would readily agree to conditioning ATSC 3.0 carriage in a way to prevent such compulsion. They have yet to do so. This is because broadcasters have tremendous leverage in retransmission consent negotiations today against all MVPDs—leverage caused, at least in part, by laws and regulations that favor broadcasters. We have no doubt that they would use this leverage to compel carriage of ATSC 3.0.

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“MVPDs can satisfy their carriage obligations by carrying a station’s signal transmitted using the current standard” and arguing that concerns about retransmission consent are irrelevant to the proposal).

<sup>62</sup> *E.g.*, NAB Dec. 8 Letter (“If MVPDs elect to carry Next Generation TV signals, there may be associated costs, but that choice will theirs.”).

<sup>63</sup> Letter from CBS Corp. to Marlene Dortch, MB Docket No. 15-216 (filed Feb. 10, 2016).

<sup>64</sup> *See* Part I.B.1, above.

<sup>65</sup> *Notice* ¶ 39; *see also, e.g.*, Letter from Rebecca Hanson to Marlene Dortch (filed Feb. 17, 2017) (“It strains credulity that any broadcaster could require an MVPD to overhaul its distribution system . . . in the context of a retransmission consent negotiation.”) (“Sinclair Feb. 17 Letter”).

The most obvious evidence of broadcasters' leverage is the price increases they can command from MVPDs.<sup>66</sup> SNL Kagan reported that retransmission consent prices increased another 20 percent last year alone.<sup>67</sup> This comes after annual average increases of 40 percent over the prior three years.<sup>68</sup> This represents a 172 percent increase in the last four years across all MVPDs.<sup>69</sup> As Mediacom recently put it, such increases have proven “unresponsive to cord-cutting, audience losses, NFL ratings declines, the Great Recession and other events that would normally be expected, in competitive markets, to drive prices down or at least keep them stable.”<sup>70</sup>

We also know that broadcasters can compel carriage of an unwanted *format* because they routinely compel carriage of unwanted *content*. A little more than a year ago, ATVA described the common broadcaster practice of “forced bundling,” including the tying of unwanted

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<sup>66</sup> Notice ¶ 39 (describing broadcaster arguments that they lack leverage against larger distributors).

<sup>67</sup> David Lieberman, *Retransmission Payments Will Leap 51% to \$11.6B By 2022: Forecast*, DEADLINE (June 29, 2016), <http://deadline.com/2016/06/retransmission-consent-payments-increase-forecast-snl-kagan-1201781097/>.

<sup>68</sup> *Retrans Projections Update: \$11.6B by 2022*, SNL KAGAN (July 2016) (on file with authors) (estimating total retransmission consent revenues of \$1 billion in 2012, \$1.5 billion in 2013 (a 50 percent annual increase), \$1.9 billion in 2014 (a 34 percent annual increase), \$2.4 billion in 2015 (a 32 percent annual increase), and \$2.95 billion in 2016 (a 20 percent annual increase)).

<sup>69</sup> This increase has occurred notwithstanding industry consolidation that broadcasters claim disadvantages them in such negotiations. Comments of the National Association of Broadcasters, MB Docket No. 15-216, at 15-16 (filed Dec. 1, 2015) (citing MVPD consolidation). This, perhaps, is due to *broadcaster* consolidation during that period. See, e.g., *Media General, Inc. and Nexstar Media Group, Inc.*, DA 17-23, MB Docket No. 16-57, 32 FCC Rcd. 183 (Media Bur. rel. Jan 11, 2017) (approving merger of station groups); Todd Frankel and Brian Fung, *Fox Reportedly in Talks to Join Bidding for Tribune's TV Stations*, THE WASHINGTON POST (May 1, 2017), <http://wapo.st/2pQve1N>.

<sup>70</sup> Letter from Joseph Young to Marlene Dortch, at 6 (filed Mar. 30, 2017). Continues Mediacom: “These are not results that could, under any stretch of the imagination, occur in a competitive market in which buyers and sellers have even roughly equal bargaining power and sellers are restrained in raising prices by fear of losing customers to a competitor.” *Id.*

programming with must-have network programming.<sup>71</sup> ATVA and others even described one broadcasters' forced bundling of a "network to be named later."<sup>72</sup>

In the intervening year-and-a-half, even more evidence has emerged of broadcasters' ability to condition carriage of their signals on the carriage of unwanted content. The most prominent recent example of this is the sudden "popularity" of the Tennis Channel. For years, the Tennis Channel was an independent cable channel of modest interest to some MVPDs.<sup>73</sup> It usually obtained carriage, if at all, on less popular sports tiers.<sup>74</sup> MVPDs routinely rejected its attempts to obtain broader carriage because their subscribers lacked sufficient interest in the channel.<sup>75</sup> The Tennis Channel's distribution strategy changed in March 2016, when Sinclair purchased it. Since then, press reports indicate that MVPDs added the Tennis Channel in more

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<sup>71</sup> Comments of the American Television Alliance at 24-27 (filed Dec. 1, 2015) ("ATVA Good Faith Comments"); *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 (filed Aug. 26, 2015).

<sup>72</sup> ATVA Good Faith Comments at 25.

<sup>73</sup> *Comcast Cable Commc'ns, LLC v. FCC*, 717 F.3d 982, 984–85 (D.C. Cir. 2013) (describing Tennis Channel's attempts to gain carriage on broader tiers).

<sup>74</sup> *See, e.g., The Tennis Channel, Inc., v. Comcast Cable Commc'ns, LLC*, Prehearing Submission of Defendant Comcast Cable Communications, LLC, MB Docket No. 10-204, at 18 (filed Apr. 15, 2011) (discussing Comcast's internal views in the desirability of Tennis Channel), <https://ecfsapi.fcc.gov/file/7021238296.pdf>.

<sup>75</sup> *Comcast v. FCC*, 717 F.3d at 986 ("After Tennis proposed the broader distribution of its content on Comcast's network, Comcast executives surveyed employees in various geographic divisions to gauge interest in the proposal. The executive in charge of the northern division reported that there was '[n]o interest whatsoever' in moving Tennis to a broader distribution, because there had never been 'a request or a complaint to move Tennis Channel to a more available tier.' Perhaps more telling is the natural experiment conducted in Comcast's southern division. There Comcast had in 2007 or 2008 acquired a distribution network from another MVPD that had distributed Tennis more broadly than did Comcast. When Comcast repositioned Tennis to the sports tier (a 'negative repo' in MVPD lingo), thereby making it available to Comcast's general subscribers only for an additional fee, not one customer complained about the change.") (internal citations omitted).

than 7.8 million homes.<sup>76</sup> The Tennis Channel now expects to grow from 36 million homes prior to Sinclair’s ownership to 60 million homes by next year—primarily on digital basic or its equivalent.<sup>77</sup>

Media reports suggest that the Tennis Channel’s carriage gains stem entirely from Sinclair’s conditioning carriage of its broadcast network affiliates on broad-tier carriage of the Tennis Channel.<sup>78</sup> ATVA members can confirm these reports. Indeed, we are aware of no ATVA-member agreement with Sinclair since March 2016 that did not include carriage of the Tennis Channel on digital basic or its equivalent. As we have reported previously, numerous agreements entered into with Sinclair by ATVA members *before* March 2016 contained a requirement to carry a “network to be named later”—which ultimately became the Tennis Channel.

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<sup>76</sup> Mike Farrell, *Tennis Channel Adds 7.8M Nielsen Homes*, MULTICHANNEL NEWS (Mar. 14, 2017), <http://www.multichannel.com/news/sports/tennis-channel-adds-78m-nielsen-homes/411510>; *see also* Mike Farrell, *Sinclair Bullish on Tennis Channel Distribution*, MULTICHANNEL NEWS (Aug. 3, 2016), <http://www.multichannel.com/news/networks/sinclair-bullish-tennis-channel-distribution/406854>. Additional carriage may allow the Tennis Channel to become “Nielsen rated” for the first time, a status accompanied by increased advertising rates. *Id.*

<sup>77</sup> Daniel Kaplan and John Ourand, *Sinclair Secures More Tennis Channel Homes*, SPORTSBUSINESS DAILY (Aug. 29, 2016), <http://www.sportsbusinessdaily.com/Journal/Issues/2016/08/29/Media/Tennis-Channel.aspx?>

<sup>78</sup> *Id.* (“Thanks to its slate of local broadcast channels — Sinclair operates 164 television stations in 79 markets — Sinclair was able to increase Tennis Channel’s distribution during retransmission consent negotiations.”); Mike Farrell, *Grid-Blocked*, MULTICHANNEL NEWS (Jan. 16, 2017), <http://www.multichannel.com/grid-blocked/410200> (“Other spats are expected as Sinclair, one of the more aggressive broadcasters on the retrans front, begins to bundle Tennis Channel, purchased in March of 2016, into future negotiations.”) (“Farrell Jan. 16 Article”); Simon Applebaum, *For Sinclair, Acquisition of Tennis Channel is Game, Set, Match*, MEDIAVILLAGE (Dec. 21, 2016), <https://www.mediavillage.com/article/for-sinclair-acquisition-of-tennis-channel-is-game-set-match/> (“As part of its negotiations for retransmission consent of its stations, Sinclair was able to move the needle on Tennis Channel’s distribution with key cable operators like Comcast, DirecTV, AT&T U-verse, Verizon FiOS, Suddenlink, Mediacom and Cable One.”).

Nor have we found evidence that the Tennis Channel’s increased carriage stems from anything other than a raw exercise of Sinclair’s retransmission consent leverage. Sinclair did not obtain expanded Tennis Channel coverage from ATVA members by offering something of value in exchange.<sup>79</sup> Rather, ATVA members report that Sinclair presented carriage of the Tennis Channel as a *fait accompli* at the start of retransmission consent negotiations.<sup>80</sup> Sinclair never, for example, characterized an offer as providing a “discount” on retransmission consent rates in order to gain carriage of the Tennis Channel. ATVA members also report that the rate they pay Sinclair does not reflect a discount when compared with the rates paid to other broadcasters under contemporaneously negotiated agreements.

We have every reason to believe that broadcasters would negotiate for carriage of their ATSC 3.0 signals in exactly the manner that Sinclair negotiates for carriage of the Tennis Channel. In light of the costs and burdens discussed above, the harm could be even greater.

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<sup>79</sup> *Contra* Comments of National Association of Broadcasters, MB Docket No. 15-216, at 53 (filed Dec. 1, 2015) (bundling can reduce blackouts by “open[ing] up other avenues” for agreement); Letter from Rick Kaplan to Marlene Dortch, MB Docket No. 15-216, at 2 (filed Mar. 14, 2016) (“Even [restrictions on bundling] that may seem innocuous often reduce the flexibility of the parties to reach a mutually acceptable deal. For example, NAB noted that restricting the ability of broadcasters to negotiate for carriage of additional channels would limit a broadcaster’s ability to accommodate an *MVPD’s request for a lower price point in favor of additional capacity*. A restriction of this sort will thus increase the upward pressure on price.”) (emphasis added); Letter from Rebecca Hanson to Marlene Dortch, MB Docket 15-216, at 4 (filed Mar. 15, 2016) (“The flexibility provided by combinations of cash and non-cash consideration play a vital role in increasing the likelihood of arriving at retransmission consent agreements expeditiously and without service impasses. If the FCC were to adopt [ATVA’s proposal] . . . then the FCC would be effectively reducing retransmission negotiations to purely cash transactions.”).

<sup>80</sup> *See* Letter from Michael Nilsson to Marlene Dortch, MB Docket No. 15-216, at 3-7 (filed Mar. 25, 2016) (suggesting “yellow flags” of conduct that could indicate coercive bargaining).

## **B. ATSC 3.0 Carriage Negotiations Could Lead to More ATSC 1.0 Blackouts.**

Even if one believed broadcasters when they say they could not compel carriage of ATSC 3.0 signals, the introduction of ATSC 3.0 carriage into ATSC 1.0 negotiations could also greatly complicate what are already contentious negotiations. This, in turn, would lead to more blackouts—when broadcasters have already blacked out nearly 22 million Americans this year alone.<sup>81</sup>

Today, retransmission consent negotiations at least usually *start* from the same place—one in which broadcasters want carriage and MVPDs want to carry them.<sup>82</sup> Of course, the parties' incentives may not be fully aligned—such as, for example, when a broadcaster seeks to bundle “must-have” broadcast signals with other programming that MVPDs do not wish to carry. In recent months, such bundling has been cited as a factor in several blackouts, including Sinclair's blackout of Frontier,<sup>83</sup> and Tribune's blackout of DISH.<sup>84</sup>

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<sup>81</sup> See, Blackout List 2010-2017, AMERICAN TELEVISION ALLIANCE <http://www.americantelevisionalliance.org/wp-content/uploads/2017/05/Copy-of-Retrans-Blackouts-04.25.171.xlsx> (last accessed May 4, 2017). ATVA's counsel calculated this number by adding SNL Kagan subscriber estimates for affected MVPDs in the markets blacked out since New Year's Day, then controlling for “duplicates” in which two or more broadcasters blacked out the same MVPD in the same market. We then multiplied this number by 2.5 to estimate the number of *people* affected. *More Than Half the Homes in U.S. Have Three or More TVs*, THE NIELSEN COMPANY (July 20, 2009), <http://www.nielsen.com/us/en/insights/news/2009/more-than-half-the-homes-in-us-have-three-or-more-tvs.html> (2.5 people per television household).

<sup>82</sup> See Kevin M. Murphy, *Economic Analysis of the Impact of the Proposed Comcast/NBCU Transaction on the Cost to MVPDs of Obtaining Access to NBCU Programming* ¶ 9 *et seq.* (June 21, 2010), attached as Exhibit A to Comments of DIRECTV, Inc., MB Docket No. 10-56 (filed June 21, 2010) (describing potential gains from trade in retransmission consent agreements).

<sup>83</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”).

<sup>84</sup> Farrell Jan. 16 Article (“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.”).



The proposed transition to ATSC 3.0 would potentially increase the misalignment of incentives between the parties, making already difficult negotiations even worse. As described above, many broadcasters will want MVPDs to carry their ATSC 3.0 signals, and many MVPDs will not want or be able to carry them.<sup>85</sup> The lack of common interest among broadcasters and MVPDs regarding ATSC 3.0 carriage would introduce a new set of issues into the negotiating process, increasing the prospect of blackouts in a marketplace where there are too many blackouts already.

**C. The Commission Should Prevent Compelled Carriage by Requiring Initial ATSC 3.0 Negotiations to be Conducted Separately.**

If the transition is to be truly “voluntary” for all parties—as broadcasters say it will be—broadcasters must not be allowed to compel carriage of ATSC 3.0 signals by threatening or conditioning existing ATSC 1.0 service. We think the best way to implement such a prohibition is to do so structurally: rather than attempting to identify when negotiation crosses the line into compulsion, the Commission should simply require broadcasters to negotiate initial<sup>86</sup> carriage of ATSC 3.0 signals *separately* from the continued carriage of ATSC 1.0 signals. We would formulate this requirement as follows:

**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.**

This formulation would prohibit a station from executing an agreement for initial ATSC 3.0 carriage with an MVPD if the two are parties to a prior retransmission consent agreement with

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<sup>85</sup> See Part I.B.2, above.

<sup>86</sup> Once an MVPD carries ATSC 3.0 signals for the first time on a truly “voluntary” basis, there should be less need for continued separation.

less than one year left in its term. Thus, for example, if Broadcaster X and MVPD Y are parties to an existing retransmission consent agreement that expires on May 1, 2019, the two can execute an agreement with terms related to ATSC 3.0 carriage only until May 1, 2018. If Broadcaster X wishes to negotiate any aspect of ATSC 3.0 carriage with MVPD Y after May 1, 2018, it must first grant a separate extension of its existing ATSC 1.0 carriage agreement.

We intend for the phrase “terms related to the initial carriage of ATSC 3.0 signals” to encompass terms and conditions in an ATSC 1.0 agreement that depend *in any way* on carriage or non-carriage of ATSC 3.0. Thus, for example, during the period covered by our proposed restriction:

- Broadcaster X could not threaten to pull its ATSC 1.0 signal from, or refuse to negotiate with, MVPD Y to secure MVPD Y’s agreement to carry ATSC 3.0 signals. In other words, the broadcaster could not withhold or threaten to withhold its ATSC 1.0 signal during initial negotiations for carriage of ATSC 3.0. Since Broadcaster X could not lawfully sign an agreement for ATSC 3.0 carriage during the last year of an ATSC 1.0 agreement, it would have no way of enforcing such a threat.
- For similar reasons, Broadcaster X could not withhold or threaten to withhold its ATSC 1.0 signal during initial negotiations for ATSC 3.0 carriage. Under our proposed formulation, Broadcaster X could only *engage* in such negotiations if MVPD Y *already* had rights to carry the ATSC 1.0 signal.
- Broadcaster X could not agree with MVPD Y, for example, to a \$20.00 monthly fee for standalone ATSC 1.0 carriage that drops to \$1.00 per month if the MVPD later agrees to carry ATSC 3.0 signals.

- Broadcaster X could not agree with MVPD Y to a \$1.00 monthly fee for standalone ATSC 1.0 carriage that increases to \$20.00 per month if the parties do not agree to ATSC 3.0 carriage within a specified period.
- Broadcaster X could not agree with MVPD Y to a provision allowing it to terminate its ATSC 1.0 deal early unless the parties agree to ATSC 3.0 carriage within a specified period.

Our formulation—which the Commission could promulgate either as a new “good faith” provision or as a condition of a station’s ATSC 3.0 authorization—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>87</sup> If an MVPD thought its subscribers would value the particular services offered on ATSC 3.0 signals at then-current prices,<sup>88</sup> it could seek to carry them. If, on the other hand, an MVPD thought its subscribers would not value those services, or if the signals consumed more bandwidth than the MVPD had available, or if carriage of those services would preclude the MVPD from offering its own innovative services (such as high-resolution service in a different format), the MVPD could decline to offer them—without risking its existing service. Such refusal might, of course, entail some risk for the MVPD, as its competitors might seek to win subscribers by retransmitting the station’s ATSC 3.0 signals. Yet this is exactly the sort of risk that anybody “voluntarily” considering whether to offer a new service should have to consider.

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<sup>87</sup> Our formulation has the added benefit of preventing ATSC 3.0 negotiations from adding complexity to ATSC 1.0 negotiations, as discussed in Part II.B, above.

<sup>88</sup> To our knowledge, broadcasters never sought to charge MVPDs carrying analog signals additional fees to carry digital signals. We would not expect broadcasters to seek to charge MVPDs carrying ATSC 1.0 signals separate fees to carry signals in ATSC 3.0 format.

**D. The Commission Should Ensure that Agreements Entered Into Prior to Any Order Here Do Not Require Carriage of ATSC 3.0 Signals.**

Broadcasters claim that the retransmission consent market works perfectly and that the Commission thus should not consider such issues here.<sup>89</sup> Broadcasters also make a *procedural* claim—namely, that it is too early for the Commission to consider retransmission consent issues related to ATSC 3.0 carriage. Sinclair, for example, argues that the Commission should ignore such issues in this rulemaking because “MVPDs are technically incapable of retransmitting Next Generation TV.”<sup>90</sup> Sinclair also urges the Commission to ignore carriage issues in part “because no request to mandate the carriage of Next Gen TV by MVPDs has been made.”<sup>91</sup>

Broadcasters, however, *have* “requested” ATSC 3.0 carriage from multiple ATVA members. In at least one case that has come to our attention, a broadcaster has done more than request such carriage. It did exactly what we fear broadcasters will do in the future—it refused to consider continued carriage of its ATSC 1.0 signals without language requiring carriage of ATSC 3.0 signals. In other cases, broadcasters have demanded that ATVA members carry the entire 6 MHz of the allotted ATSC 3.0 spectrum—no matter what service the broadcaster chooses to deploy using that spectrum. To the extent broadcasters intend to use some of their spectrum for non-broadcast services, such demands would create undefined and unknown requirements for MVPDs. MVPDs should not have to carry (whether through must-carry or

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<sup>89</sup> *E.g.*, Comments of Nexstar Broadcasting, Inc., MB Docket No. 15-216, at 8 (filed Dec. 1, 2016) (describing retransmission consent as “one of the great public policy accomplishments of the last twenty-five years”).

<sup>90</sup> Letter from Rebecca Hanson to Marlene Dortch, at 1 (filed Dec. 13, 2016).

<sup>91</sup> Sinclair Feb. 17 Letter at 1.

retransmission consent) or otherwise participate in a broadcaster’s automotive, banking, or home security services.

Of equal concern is a possibility described by ATVA member the American Cable Association (“ACA”) in comments to be filed today—that boilerplate in existing agreements could be read as requiring ATSC 3.0 carriage.<sup>92</sup> As ACA explains, many retransmission consent agreements contain boilerplate language regarding the nature of the “Signal” to be carried and the manner in which MVPDs are to carry it. In some cases, such boilerplate existed long before anybody considered the possibility of ATSC 3.0 carriage. In isolation, however, some of this language can be read as requiring such carriage.

The Commission should find neither possibility acceptable as part of a truly “voluntary” transition. If the Commission is going to prohibit broadcasters from compelling carriage of ATSC 3.0 signals (as we think it should), we see no reason to except broadcasters engaging in such compulsion *now* from this prohibition. And the Commission certainly should not allow broadcasters to claim that MVPDs that never had any reason to contemplate ATSC 3.0 carriage unwittingly agreed to such carriage when they agreed to decades-old boilerplate. A truly “voluntary” transition means one in which MVPDs freely agree—or choose to decline—ATSC 3.0 carriage only *after* the Commission authorizes such carriage.

### **III. THE COMMISSION SHOULD ENSURE THAT THE TRANSITION TO ATSC 3.0 DOES NOT HARM OVER-THE-AIR OR MVPD VIEWERS.**

ATVA’s concerns with an ATSC 3.0 transition go beyond the circumstances in which its members might be required to carry a broadcaster’s *new* signals. Rather, the process by which broadcasters will continue to simulcast their *existing* signals in ATSC 1.0 raises almost as many

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<sup>92</sup> Comments of the American Cable Association (filed May 9, 2017).

questions. Below, we discuss: (a) issues related to loss of service and picture quality; (b) broadcaster reimbursement of MVPD costs; (c) local carriage issues; and (d) particular concerns about low-power stations “flash-cutting” to ATSC 3.0 transmissions.

**A. The Commission Should Protect Viewers from Loss of Service and Picture Degradation Caused by ATSC 1.0 Simulcasting.**

The Commission proposes an ATSC 1.0 simulcast requirement “to ensure that viewers maintain access to the station.”<sup>93</sup> As the Commission has recognized, such simulcasting is necessary to avoid loss of service because “consumers will need to buy new TV sets or converter equipment to receive ATSC 3.0 service.”<sup>94</sup> Yet broadcasters may not have sufficient incentives to provide all viewers and MVPDs with ATSC 1.0 simulcast signals in the quality that they receive today.<sup>95</sup>

These issues are naturally of critical importance to over-the-air viewers. They are also important to MVPDs who rely on over-the-air delivery as the primary or backup means of receiving broadcast signals.<sup>96</sup> Many ATVA members rely on over-the-air delivery of the broadcast signal for more than half of the stations they retransmit. And all ATVA members rely on over-the-air delivery for redundancy. Of course, broadcasters can and do provide their signals to MVPDs by other means, including by fiber. The Communications Act requires must-carry

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<sup>93</sup> Notice ¶ 11.

<sup>94</sup> *Id.* ¶ 9.

<sup>95</sup> *Id.* ¶ 24 (seeking comment on broadcaster incentives).

<sup>96</sup> Moreover, as broadcasters continue to raise prices and black out their signals, MVPD *subscribers* increasingly rely on over-the-air signals to receive broadcast content and rely on MVPDs for other content and services.

stations to assume responsibility for such delivery.<sup>97</sup> For retransmission consent stations, the Act leaves allocation of such responsibility to the parties.<sup>98</sup> In ATVA’s experience, its members sometimes pay for the cost of such delivery—which is why many MVPDs rely on over-the-air delivery.

***1. Signal Coverage.***

The Commission should prevent consumers and MVPDs from losing access to over-the-air signals altogether. It now proposes to allow ATSC 1.0 simulcasts so long as they “serv[e] a substantially similar community of license.”<sup>99</sup> Under this standard, however, the relocation of a station’s ATSC 1.0 signal from its own facilities to another broadcaster’s host facilities could result in a significant reduction or change in the station’s coverage area—harming both over-the-air viewers and MVPD subscribers alike.

For example, take two stations in the Beckley-Bluefield, West Virginia Designated Market Area (“DMA”)—WOAY (an ABC affiliate) and WVVA (an NBC affiliate). Suppose that WOAY decides to simulcast in ATSC 1.0 as a guest on WVVA’s tower. As set forth in Figure 1, below, WOAY’s simulcast would still cover Oak Hill, its community of license. Yet viewers and MVPD headends north of Oak Hill, including all of Charleston, would lose over-the-air access.

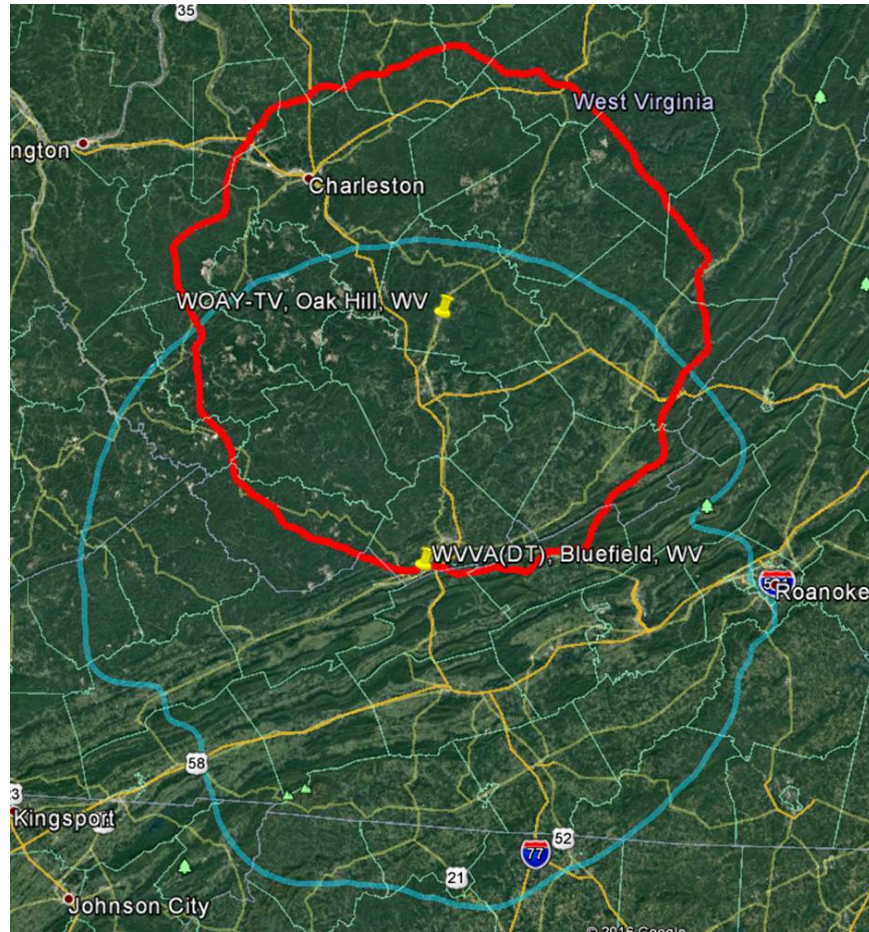
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<sup>97</sup> *Implementation of the Cable Television Consumer Prot. & Competition Act of 1992 Broad. Signal Carriage Issues*, 8 FCC Rcd. 2965, ¶ 104 (1993) (“*Must Carry Order*”); see also 47 C.F.R. § 76.55(c)(3); *id.* § 76.66(g).

<sup>98</sup> *Must Carry Order* ¶ 104.

<sup>99</sup> *Notice* ¶ 23.

**Figure 1: Coverage of Two Stations in the Beckley-Bluefield DMA**



Problems with signal coverage could increase as the transition to ATSC 3.0 carriage progresses, as stations transitioning later might have fewer acceptable choices for potential hosts. Rural over-the-air viewers and MVPDs are, of course, most likely to lose service, because they are more likely to be located on the periphery of broadcast areas.

In order to minimize harm from signal loss, the Commission should take the following actions:



a) *The Commission Should Encourage Simulcasts on Existing Facilities.*

As discussed above,<sup>100</sup> some broadcasters could choose to simulcast ATSC 1.0 signals on existing facilities and move their ATSC 3.0 simulcasts to host stations.<sup>101</sup> The Commission should consider ways to encourage such “existing-facility” configurations.

b) *The Commission Should Minimize Over-the-Air Signal Population Loss for Stations That Cannot Simulcast Over Their Existing Facilities.*

The Commission should require stations that simulcast on other stations’ host facilities to meet a population coverage standard derived from that employed in the incentive auction to minimize service reduction due to repacks. Under such a standard, no simulcasting arrangement could reduce the station’s population by more than 0.5 percent,<sup>102</sup> absent a waiver.<sup>103</sup> Although the Commission selected this value to, in part, satisfy Congress’s mandate to “make all

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<sup>100</sup> See Part I.B.1, above.

<sup>101</sup> Notice ¶ 16.

<sup>102</sup> The *Incentive Auction Order* achieved this figure in a different manner than we propose here. There, the Commission “preserve[d] service to the same specific viewers for each eligible station” from *the station’s own* reassignment—meaning that a station could not be reassigned in a manner that would reduce its own population coverage at all. But the Commission *also* provided that, “no individual channel reassignment, considered alone, will reduce *another station’s* population . . . by more than 0.5 percent.” *Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, 29 FCC Rcd. 6567, ¶ 179 (2014) (emphasis added) (“*Incentive Auction Order*”). Here, interference to another station’s operations is not an issue because stations will presumably simulcast from facilities that are already transmitting today—meaning simulcasts would likely not interfere with other stations’ population coverage. Yet the basic approach of an overall 0.5 percent limitation strikes us as a reasonable way of granting broadcasters flexibility while preserving as much station coverage as possible.

<sup>103</sup> Generally, the Commission may waive its rules if good cause is shown. 47 C.F.R. § 1.3. The Commission may exercise its discretion to waive a rule where the particular facts make strict compliance inconsistent with the public interest. *Northeast Cellular Tel. Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990). We would expect the Commission not to grant such waivers where a broadcaster has the ability to simulcast in HD format and non-degraded picture quality but chooses not to do so.

reasonable efforts”<sup>104</sup> to preserve stations’ populations served, the Commission also explained that this approach was necessary to “avoid[] unnecessary disruption to broadcasters and consumers.”<sup>105</sup>

Broadcasters may argue that this standard is too restrictive. If so, they will have to reconcile such arguments with their prior advocacy. For example, in the incentive auction, broadcasters rejected a population-coverage alternative proposed by the Commission that would have allowed coverage of new households to offset losses elsewhere. Broadcasters called the Commission’s proposal “perverse,”<sup>106</sup> “bad for viewers,”<sup>107</sup> and “devastating,” “[g]iven that broadcasters take seriously their obligations to serve their local communities.”<sup>108</sup> To broadcasters, “the proper approach is to provide each broadcaster with the same coverage and same population that it now serves without any reduction in coverage or population.”<sup>109</sup> Indeed, NAB excoriated the Commission for having decided “merely to ‘give it the old college try,’ and too bad viewers are left in the dark after the auction.”<sup>110</sup> Surely similar concerns apply here, where the choice to simulcast in the first place stems entirely from a business decision by the broadcaster.

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<sup>104</sup> *Middle Class Tax Relief and Job Creation Act of 2012*, Pub. L. No. 112-96, § 6403(b)(2), 126 Stat. 156, 226 (2012) (“Spectrum Act”).

<sup>105</sup> *Incentive Auction Order* ¶ 6.

<sup>106</sup> Comments of the National Association of Broadcasters, GN Docket No. 12-268, at 24 (filed Jan. 25, 2013) (“NAB 2013 Comments”).

<sup>107</sup> *Id.* at 26.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.* at 20.

<sup>110</sup> Comments of the National Association of Broadcasters, GN Docket No. 12-268, at i (filed Nov. 12, 2014). Broadcasters also noted that, because the 0.5 percent limit applied only to *individual* channel reassignments, it did not account for the additional aggregate effect of neighboring channel reassignments. They argued, therefore, for a supplemental aggregate impairment limit of 1 percent. NAB 2013 Comments at 20-21.

c) *The Commission Should Ensure Coverage to Headends and Receive Facilities.*

Even under our proposed population coverage standards, broadcast simulcasting could still harm MVPDs if the ATSC 1.0 simulcast signals no longer reach an MVPD's headend or local receive facility. The Commission should require any broadcaster that simulcasts from another's facilities to first certify to the Commission that it provides a "good quality" signal over-the-air to all MVPDs that rely on over-the-air delivery prior to the transition. Stations that cannot make such a certification should assume responsibility (including full financial responsibility) for delivery of the signal by alternate means—including signal redundancy. Such a requirement should apply to both must-carry and retransmission consent stations, and should apply even if an existing retransmission consent agreement allocates responsibility for such delivery differently.

**2. *Picture Quality.***

The Commission should also protect viewers (including MVPD viewers) from any degradation in simulcast picture quality. Broadcasters may face incentives to degrade picture quality, yet the Commission has proposed no rules to protect the public from such degradation.<sup>111</sup>

Incentives to degrade picture quality stem, in part, from physics. Host stations have only a limited amount of bandwidth for their simulcast guests. And individual hosts may need or desire to accommodate multiple guests. ATSC 1.0 simulcasting stations may need to downgrade their transmissions from HD to SD in order to "fit" on a host's facilities. Here again, such

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<sup>111</sup> Notice ¶ 24 (seeking comment on picture quality).

incentives become even more pronounced later in the transition, as later-transitioning stations might be the second, third, or even later guest on their desired host station.

These incentives could affect picture quality even for broadcasters nominally simulcasting in HD. We understand that some hosts intend to transmit three HD feeds simultaneously. If so, each such feed would be limited to less than 6.5 Mbps in capacity. In a high motion broadcast such as a sporting event, transmitting with such limited bandwidth would degrade visual clarity in the signal. Additionally, darker sections of the image would end up with visible “blocks” (often referred to as “macroblocking”). Images with text on them would be illegible with any motion in the background.

Broadcasters may also have less benign motives to degrade picture quality. Some ATVA members have been led to understand that stations may degrade their simulcasts *deliberately* in order to “encourage” MVPD carriage of their ATSC 3.0 signals.

To be clear, ATVA does not believe that broadcasters must transmit in any particular format or with any particular level of picture quality as a general matter. We do believe, however, that broadcasters should not *change* their format or *reduce* picture quality just because they choose to transition to ATSC 3.0. Accordingly, the Commission should require broadcasters to transmit ATSC 1.0 simulcasts in the same format and picture quality that they employ today, absent a waiver. With respect to “picture quality,” the Commission could require stations to transmit at the same or higher average bandwidth at which they transmit today.<sup>112</sup> Alternatively, broadcasters who choose to degrade their over-the-air signals could accept

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<sup>112</sup> The Commission could achieve similar results by limiting any single simulcast host from transmitting more than two HD signals.

responsibility for providing a non-degraded signal to MVPDs, such as by fiber feed, as described above.

### 3. *Content.*

The Commission “assumes” that the broadcasters’ simulcast proposal is just that—a requirement to transmit “a stream with identical content to the video programming aired on the originating station’s primary ATSC 3.0 stream.”<sup>113</sup> We make the same assumption, and are aware of no basis by which a broadcaster might reasonably comply with a simulcasting requirement with something other than “identical content.” The Commission’s rules should make this an explicit requirement.

### 4. *Procedural Issues.*

As demonstrated above, substantive rules are necessary to protect over-the-air and MVPD viewers from harm during the simulcast. Equally important are robust *procedural* requirements. To begin with, broadcasters should provide notice directly to MVPDs well in advance of when they begin simulcasting.<sup>114</sup> The 60 days proposed by the Petition will not be sufficient for MVPDs to prepare for simulcasting.<sup>115</sup> Nor will the 90-day period specified in the repack rules.<sup>116</sup> A significantly longer period will be required, in part because many of the simulcast transitions will occur *during* the repack.

Once the transition to simulcasting actually occurs, the substantive proposals described above should protect viewers from service loss and signal degradation. If, however, an ATSC

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<sup>113</sup> *Notice* ¶ 11.

<sup>114</sup> *Id.* ¶ 37.

<sup>115</sup> *Id.*

<sup>116</sup> *Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, 32 FCC Rcd. 2637, ¶ 51 (2017) (“*Post Auction Channel-Sharing Order*”).

1.0 simulcast nonetheless causes a loss of service or signal degradation, the station should provide clear and conspicuous on-screen notifications explaining that its voluntary transition to ATSC 3.0 has caused the issue.<sup>117</sup> It should provide such on-screen notice periodically both prior to the transition and thereafter, and should include the station’s contact information for consumer complaints. Such on-screen notices would help ensure that subscribers do not blame MVPDs for issues caused by broadcasters. They would also reduce the resources MVPDs would have to devote to answering complaints about these issues.

The Commission should likewise require broadcasters to file their simulcast agreements—and any substantial modifications thereof—with the Commission for approval.<sup>118</sup> This is precisely the approach that the Commission adopted in the channel sharing context, where the Commission retained the ability to review channel-sharing agreements in order to “consider any loss in service,”<sup>119</sup> noting that “[p]ursuant to its mandate under section 307(b), the Commission disfavors modifications of a station’s facilities that would result in a loss of service.”<sup>120</sup>

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<sup>117</sup> See, e.g., *Incentive Auction Closing and Channel Reassignment Public Notice*, DA 17-314, MB Docket No. 16-306, ¶ 83 (rel. Apr. 13, 2017); *Incentive Auction Task Force and Media Bureau Announce Procedures for the Post-Incentive Auction Broad. Transition*, 32 FCC Rcd. 858, ¶¶ 71-72 (2017).

<sup>118</sup> *Notice* ¶ 13 (“We seek comment on whether to require simulcasting agreements to be filed with the Commission, as proposed by the Petition.”). One reason is for the Commission to require such filing is to confirm that stations meet any requirements regarding picture quality or coverage adopted in this proceeding. Another reason is to deal with the intersection of channel sharing and ATSC 3.0. Suppose for example, that a station is a “guest” on a channel sharing “host.” If the “host” decides to switch to ATSC 3.0, does the guest station have to do so as well? Or must they find another host? Such matters may or may not be governed in channel sharing agreements—and it is critical for MVPDs affected by such changes to be aware of, and have the opportunity to comment on, such agreements.

<sup>119</sup> *Post Auction Channel-Sharing Order* ¶ 33.

<sup>120</sup> *Id.* ¶ 33 n.111.

**B. The Commission Should Require Broadcasters to Reimburse MVPDs for Costs Incurred to Receive and Transmit Simulcasts.**

The proposals described immediately above will help mitigate the harm broadcasters could cause MVPDs and their viewers due to loss of service or picture degradation. As described in Part I, however, even stations that deliver their simulcasts to MVPDs without interruption and with pristine quality would still impose costs simply because their signals emanate from new host facilities.<sup>121</sup> And, again, MVPDs would have to incur those costs to comply with their legal obligations.

Additional costs are, of course, a significant burden for any MVPD. As ATVA has demonstrated, moreover, these costs are ultimately borne by MVPD subscribers.<sup>122</sup> Any firm's quality-adjusted retail pricing reflects its input costs in one way or another. The Commission cannot simply assume that MVPDs will "eat" such cost increases out of their margins. Incurring such costs would prove especially problematic for smaller and less capitalized MVPDs. As the Commission has recognized in the context of HD carriage requirements (in response to a joint proposal by ACA and NAB), such operators have limited resources to purchase new equipment.<sup>123</sup>

Broadcasters, not MVPDs, should accept responsibility for these costs. In planning the post-incentive auction repack, the Commission recognized the unfairness of forcing MVPDs to pay for engineering changes necessitated by an auction that they did not ask for and that would

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<sup>121</sup> Again, broadcasters that simulcast from *existing* facilities will not cause these costs, so the Commission should do everything it can to encourage stations to do so.

<sup>122</sup> ATVA Good Faith Comments at 21.

<sup>123</sup> *Carriage of Digital Television Broad. Signals: Amendment to Part 76 of the Comm'n's Rules*, 30 FCC Rcd. 6653 (2015).

not benefit them.<sup>124</sup> As discussed above, the Commission therefore identified a variety of reimbursable costs that an MVPD might incur to maintain carriage of a repacked broadcast station—specifically including fiber or other delivery where the repack made it impossible for MVPDs to rely on over-the-air signals.<sup>125</sup> This reasoning should apply equally to the ATSC 3.0 transition. Just as with the incentive auction, MVPDs should not have to pay for a new broadcast transmission standard that they did not ask for and which will not benefit them. Of course, in the auction context, MVPDs will receive compensation indirectly from broadcasters and forward auction participants in the form of auction proceeds, while there are no such proceeds here.<sup>126</sup> Yet the basic point remains the same—if broadcasters want a transition to ATSC 3.0, they should pay for it.

**C. The Commission Should Ensure that Simulcasting Does Not Modify Broadcast Carriage Rights.**

We discuss above the effects of ATSC 1.0 simulcasting on an MVPD's *physical* ability to carry a station. Here, we discuss several *legal* issues related to such simulcasting. In our view, ATSC 1.0 simulcasting should neither reduce an MVPD's legal ability to carry any station nor

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<sup>124</sup> *Incentive Auction Order* ¶¶ 603-604.

<sup>125</sup> See Part I.B & n.34, above. These included RF engineering studies, retuning or replacing receive antennas, tower studies and/or tower upgrades, tower crews or riggers, retuning the receiver at the head end, new receiver equipment, and the use of alternative distribution methods where over-the-air reception is no longer possible.

<sup>126</sup> Although, in the incentive auction, these expenses were paid out of a separate repack fund, and not directly from broadcasters, the structure of the auction ensured that broadcasters and wireless licensees paid these expenses indirectly. The Spectrum Act and the Commission's incentive auction rules required that forward auction proceeds exceeded reverse auction proceeds sought by broadcasters by an amount sufficient to pay certain costs, including relocation costs subject to reimbursement. *Incentive Auction Order* ¶ 26 & n.47. Thus, relocation expenses had to be offset by some combination of lower reverse auction bids by broadcasters and higher forward auction bids by wireless licensees.



create additional legal obligations to do so.<sup>127</sup> Below, we discuss three ways in which ATSC 1.0 simulcasting could affect carriage rights and obligations if the Commission does not act.<sup>128</sup>

**1. Local Markets.**

The Commission should permit stations to simulcast only on hosts assigned to the same DMA. In the incentive auction context, the Commission permitted channel-sharing bids “provided that they would not require changes in a station’s community of license or [DMA]”<sup>129</sup> As the Commission noted there, “[b]ecause satellite and cable carriage rights on a particular MVPD system generally depend on the station’s DMA, prohibiting moves that would result in a change of DMA will minimize the potential impact of channel sharing on MVPDs.”<sup>130</sup> We see no reason for the Commission to conclude otherwise here.

**2. “Significantly Viewed” Status.**

The Commission should also prohibit simulcasts that reduce a station’s eligibility for “significantly viewed” carriage. Here, the Commission should *not* adopt the approach it took to channel sharing. There, the Commission noted that significantly viewed status (which permits

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<sup>127</sup> Notice ¶ 33 (seeking comment on “the implications of mandatory carriage rights following the ATSC 1.0 simulcast to a new location, especially in situations involving a significant shift in the ATSC 1.0 coverage area or change in transmitter location or community of license”).

<sup>128</sup> Permitting an ATSC 1.0 signal to move to a different local market could trigger additional copyright royalties as well. See 17 U.S.C. § 111(f)(4) (definition of “local service area of a primary transmitter”).

<sup>129</sup> *Incentive Auction Order* ¶ 372. The Commission also prohibited “a channel sharing bid in the reverse auction that would cause a media ownership rule violation by a party to the channel sharing arrangement based on the rules and facts as they exist at the time of filing of the pre-auction application.” *Id.* ¶ 374 n.1111. It should institute a similar rule here.

<sup>130</sup> *Id.* ¶ 377.

MVPDs to carry otherwise distant signals as if they were local<sup>131</sup>) is based on *over-the-air* viewership.<sup>132</sup> It found:

Because significantly viewed status is largely a function of signal availability, once a full power commercial station is permitted to move in order to channel share, or to modify the shape or strength of its over-the-air signal, it will lose its status as ‘significantly viewed’ in those counties and communities it can no longer reach with its over-the-air signal, and it will have to apply for such status in counties or communities it will be able to reach with the new scope of its signal.<sup>133</sup>

Such an outcome may have been acceptable in the channel-sharing context, where relatively few stations (and even fewer network affiliates) were expected to participate. It cannot be acceptable here, where *every* station could eventually simulcast. Suppose, for example, that WTTG (Fox’s Washington DC affiliate) decides to simulcast from a host that is *not* significantly viewed in Anne Arundel County, which is assigned to the Baltimore DMA. Under the channel-sharing approach, Anne Arundel County MVPD subscribers would lose Redskins games on WTTG because of that decision. And it would not be any comfort to Anne Arundel County viewers that WTTG’s host might subsequently file its own application to become significantly viewed there.

The Commission could address this issue in at least two ways.<sup>134</sup> It could require stations with significantly viewed status to simulcast over their own facilities. Or it could permit them to

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<sup>131</sup> See, e.g., *Implementation of the Satellite Home Viewer Extension and Reauthorization Act of 2004*, 20 FCC Rcd. 17278, ¶ 3 (2005); 47 C.F.R. §§ 76.92(f), 76.106(a) (significantly viewed exception to cable network nonduplication and syndicated exclusivity for cable); *id.* §§ 76.122(j), 76.123(k) (significantly viewed exception to satellite network nonduplication and syndicated exclusivity for satellite).

<sup>132</sup> *Incentive Auction Order* ¶ 711.

<sup>133</sup> *Id.* ATSC 1.0 simulcasting could also expand a station’s significantly viewed status.

<sup>134</sup> We do not know whether the Commission could address this issue by modifying its significantly viewed rules. Among other concerns, the statutory copyright license permitting satellite carriers to

simulcast only on a host station deemed significantly viewed in *each* of the counties where the station itself qualifies for such treatment under existing rules.

### 3. *Exclusivity Rules.*

The Commission should also prevent ATSC 1.0 simulcasting from altering the “zones of protection” that any station has under the Commission’s geographic exclusivity rules. Here again, the Commission’s approach should differ from its approach to channel sharing. Both the network nonduplication and syndicated exclusivity rules permit broadcast stations to assert exclusivity rights within certain specified geographic zones.<sup>135</sup> In the channel-sharing context, the Commission simply noted that channel sharing could modify such zones.<sup>136</sup>

From ATVA’s perspective, ATSC 1.0 simulcasting should result in no change to the scope of these protections. The Commission should thus set network nonduplication and syndicated exclusivity protections for ATSC 1.0 simulcasts based on the station’s pre-transition facilities. Alternatively, the Commission could require simulcasting stations to waive any network nonduplication or syndicated exclusivity protections in new areas, at least with respect

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offer broadcast stations in significantly viewed areas applies only to areas “in which the signal has been determined by the Federal Communications Commission to be significantly viewed in such community, *pursuant to the rules, regulations, and authorizations of the Federal Communications Commission in effect on April 15, 1976*, applicable to determining with respect to a cable system whether signals are significantly viewed in a community.” 17 U.S.C. § 122(a)(2) (emphasis added).

<sup>135</sup> The “geographic zone” in which a station can assert network nonduplication rights is set in a station’s network affiliation agreement, but its size is limited by the rules depending on the station’s market. *See* Note to 47 C.F.R. § 76.92. For a station in one of the top 100 television markets, the zone of protection may not exceed 35 miles from the reference point of its community of license. *See id.* (citing 47 C.F.R. § 73.658(m)); *see also* 47 C.F.R. § 76.51 (listing the major or top 100 television markets). The zone of protection for a smaller market television station extends 55 miles from its community reference point. *See* Note to 47 C.F.R. § 76.92; *see also* Note to 47 C.F.R. § 76.101 (citing 47 C.F.R. § 73.658(m)). Unlike the network nonduplication rules, there is no difference in the zone of protection between smaller and larger market stations under the syndicated exclusivity rules, which extend 35 miles from the station’s community of license. 47 C.F.R. § 76.5(ii).

<sup>136</sup> *Incentive Auction Order* ¶ 710.

to MVPDs who commit not to import out-of-market signals in areas where the station had such rights from its prior transmission facilities.

**D. The Commission Should Not Allow Low-Power Stations to “Flash-Cut” to ATSC 3.0.**

Although the *Notice* proposes to allow full-power broadcasters to transition to ATSC 3.0 gradually, it also raises the possibility that low-power and Class A stations might be allowed to “flash-cut” from ATSC 1.0 to ATSC 3.0.<sup>137</sup> The Commission should reject this option, however, as it is unnecessary for the industry-wide transition and will certainly harm over-the-air and MVPD viewers.

To begin with, we do not know if the problem the Commission attempts to solve with this proposal is a real one. The Commission posits that, because *low-power and Class A stations themselves cannot host*, they will themselves be unable to find hosts for their own simulcasts.<sup>138</sup> This, however, seems to assume that all host-guest relationships will be “bilateral”—in other words, that every host of a simulcast guest will itself be an ATSC 3.0 guest on the other station’s host.<sup>139</sup> We do not know if this will prove so. It seems at least possible that some stations could

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<sup>137</sup> *Notice* ¶ 26.

<sup>138</sup> *Id.* (“For example, LPTV and Class A stations may find it difficult to host a full power originating station because they must operate at lower power levels and may not be able to adequately prevent loss of service of the full power originating station’s ATSC 1.0 simulcast signal. We seek comment on whether and how an LPTV station can be a host simulcast station for a full power originating station given its power limitations and secondary status. Because of difficulties they may face in serving as hosts for full power originating stations, we seek comment on whether to allow LPTV/Class A stations the option to deploy ATSC 3.0 service without simulcasting (*i.e.*, ‘flash-cut’ to ATSC 3.0).”).

<sup>139</sup> *Id.* ¶ 16 (“For example, a Next Gen TV broadcaster might choose to deploy ATSC 3.0 service by converting its current facility to broadcast in ATSC 3.0 and obtaining a temporary channel sharing license to share a host station’s channel during a potential Next Gen TV transition period in order to broadcast its simulcast in ATSC 1.0 (from the host’s facility). Similarly, a Next Gen TV broadcaster might choose to deploy ATSC 3.0 service by continuing to broadcast in ATSC 1.0 from its existing facility and obtaining a temporary channel sharing license to share a host station’s channel during a

choose to host other stations' simulcasts, perhaps in exchange for compensation, without themselves seeking to transmit in ATSC 3.0. In such case, any shortcomings that low-power or Class A stations might have as potential *hosts* should not hinder them from becoming *guests*.

In any event, permitting low-power and Class A stations to “flash-cut” will harm viewers and MVPDs. Some low-power and Class A stations carry programming viewers have come to rely upon. Some, such as WBMA-LD in Birmingham, are even “Big Four” network affiliates.<sup>140</sup> If such stations were to flash-cut from ATSC 1.0 to ATSC 3.0 before the broader transition process is complete, their over-the-air viewers would immediately lose access to the programming they enjoy. And MVPDs might not be prepared to carry ATSC 3.0 signals on the date of such flash cut, meaning their viewers would lose access as well.

Broadcasters proposed a simulcasting requirement to prevent just these sorts of outcomes. We see no basis to permit any station to evade this requirement.

#### **IV. OTHER ISSUES.**

##### **A. The Commission Should Prevent Patent Abuse.**

As discussed above, numerous parties—including the broadcasters perhaps most associated with the proposed transition—hold patents in the ATSC 3.0 standard, which broadcasters seek to eventually make the sole broadcasting standard. As it has done many times in the past, the Commission should ensure that patent holders do not take advantage of the special status conferred upon them by government action.

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potential Next Gen TV transition period in order to broadcast its simulcast in ATSC 3.0 (from the host's facility).”)

<sup>140</sup> *ABC 33/40 News*, SINCLAIR BROADCAST GROUP, INC., <http://abc3340.com/>.

When it incorporates a broadcast standard into its rules, the Commission implicitly prohibits use of other standards. The Commission, in other words, acts as a standard-setting organization. As courts have repeatedly explained, when such an organization adopts a standard, it generally must impose a requirement to license such patents at “reasonable and nondiscriminatory” (or “RAND”) royalties to prevent the owners of essential patents from “extract[ing] supracompetitive royalties from the industry participants.”<sup>141</sup> The reason for requiring RAND is straightforward: when a standard-setting organization adopts a standard, the value of the patents essential to that standard is “significantly enhanced.”<sup>142</sup> Without a RAND requirement, patent holders are able to capture this added value by charging “supracompetitive royalties,”<sup>143</sup> a scenario known as an “anticompetitive patent hold-up.”<sup>144</sup> Thus, when a standard-setting organization fails to impose RAND licensing requirements, patent holders collect a windfall, while consumers pay higher prices.<sup>145</sup>

This is why, in adopting the ATSC 1.0 standard, the Commission explicitly adopted a RAND requirement. In doing so, it stated that patents “would have to be licensed ... on reasonable and nondiscriminatory terms” and that it “intended to condition selection of a DTV system on such commitments.”<sup>146</sup> While it declined to establish “specific terms” for patent

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<sup>141</sup> *Broadcom Corp. v. Qualcomm Inc.*, 501 F.3d 297, 310 (3d Cir. 2007).

<sup>142</sup> *Id.* at 314.

<sup>143</sup> *Id.* at 310.

<sup>144</sup> *Id.* at 313.

<sup>145</sup> *Id.* (holding that a false promise made to a standard setting organization that a patent holder will license on RAND terms is actionable anticompetitive conduct under the antitrust laws when other requirements of those laws are satisfied).

<sup>146</sup> *Advanced Television Sys. and Their Impact Upon the Existing Television Broad. Serv.*, 11 FCC Rcd. 17771, ¶ 54 (1996).

licensing, it “reiterate[d]” that “adoption of th[e ATSC] standard is premised on reasonable and nondiscriminatory licensing of relevant patents” and promised that, “if a future problem is brought to our attention, we will consider it and take appropriate action.”<sup>147</sup> Even in instances where the Commission declined to adopt a specific technology standard—for example, when setting rules on the use of distributed transmission systems for DTV service—the Commission still expected that “licensing of the patents for DTS technology will be on RAND terms” and promised again to address any future issues.<sup>148</sup> The Commission has imposed similar requirements across a number of technologies over the years.<sup>149</sup>

No less is required here. Indeed, more is arguably required, both because of the Commission’s history with television-related patents and because of the particular way in which broadcasters have formulated their request for rule changes. First, the Commission should both clearly impose RAND requirements and state clearly that *it* will play a role in enforcing RAND pricing, rather than leaving such enforcement to the courts. After the DTV transition, some parties claimed that the Commission either never required RAND pricing in the first place or that it lacked jurisdiction to enforce such pricing.<sup>150</sup> The Commission should avoid such confusion

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<sup>147</sup> *Id.* ¶¶ 54-55.

<sup>148</sup> See *Digital Television Distributed Transmission System Technologies*, 23 FCC Rcd. 16731, ¶ 51 (2008).

<sup>149</sup> See *Amendment of Part 3 of the Commission’s Rules and Regulations to Permit FM Broadcast Stations to Transmit Stereophonic Programs on a Multiplex Basis*, Docket No. 13506 at ¶ 34 (rel. Apr. 20, 1961), <http://www.durenberger.com/documents/FMSTEREO.pdf> (FM Standard); *Amendment of the Comm’ns Rules to Establish a Single AM Radio Stereophonic Transmitting Equipment Standard*, 8 FCC Rcd. 8216, ¶ 29 (1993) (AM Radio standard); *Revision of Part 68 of the Comm’ns Rules to Specify Standard Plugs and Jacks for the Connection of Tel. Equipment to the Nationwide Tel. Network*, 62 F.C.C. 2d 735, ¶ 8 (1976) (telephone jacks).

<sup>150</sup> See Reply Comments of the Coalition United to Terminate Financial Abuses of the Television Transition, MB Docket No. 09-23, at 18-26 (filed Jan. 2, 2009).

by requiring RAND pricing<sup>151</sup> and plainly conditioning adoption of the ATSC 3.0 standard on RAND commitments.<sup>152</sup>

Second, the Commission should require RAND pricing not only for the physical-layer ATSC 3.0 standards that broadcasters seek to incorporate, but for all patents essential to use those standards. These should specifically include the H.265 encoding standard—one for which we have found no evidence of RAND commitments.

Third, the Commission should clarify that charging MVPDs per-subscriber retransmission royalties for the H.265 encoding standard would violate the RAND obligation—especially if broadcasters themselves receive a cost-free blanket license to transmit such signals themselves.<sup>153</sup> MVPDs already compensate broadcasters handsomely for the right to retransmit broadcast signals, through a process mandated by statute.<sup>154</sup> Broadcasters, presumably, use these funds to pay any royalties *they* owe to patent holders in the standard they employ. It would be “unreasonable” for patent holders in a new broadcast standard to impose a brand new class of

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<sup>151</sup> 47 U.S.C. § 336(b)(1) (granting the Commission authority to designate the “technology or method . . . for the provision of advanced television services”); *see also id.* § 303(b) (authorizing the Commission to “[p]rescribe the nature of the service to be rendered by each class of licensed stations and each station within any class”).

<sup>152</sup> *See, e.g., Petition of Home Owners Long Distance, Inc.*, 14 FCC Rcd. 17139, ¶ 18 n.47 (1999) (explaining that “[t]he Commission often relies on and incorporates into its orders carrier representations” and noting that if a party fails to comply with these voluntary commitments, it risks “enforcement action”) (citing numerous cases); *id.* ¶ 18 n.45 (accepting party’s voluntary commitments based on Commission’s authority under 47 U.S.C. § 154(i), (j)); *NYNEX Corp. and Bell Atlantic Corp.*, 12 FCC Rcd. 19985, ¶ 191 (1997) (accepting voluntary commitments made by parties to a merger, conditioning FCC approval of a license transfer on these commitments, and noting that violation of these commitments could lead to enforcement action including forfeitures); *AT&T Inc. and BellSouth Corp.*, 22 FCC Rcd. 5662, App. F (2007) (accepting “certain voluntary commitments” made by the parties and noting that “all conditions and commitments . . . are enforceable by the FCC”).

<sup>153</sup> *See* Part I.B.2.d, above.

<sup>154</sup> 47 U.S.C. § 325(b).



royalties on MVPDs. And it would surely be “discriminatory” for patent holders to do so while not imposing royalties on broadcasters—including broadcasters who themselves own related ATSC 3.0 patents.

**B. The Commission Should Re-Adjust the Fees Required for “Ancillary and Supplementary” Non-Broadcast Services.**

Broadcasters have described a number of non-broadcast services they may offer after the transition to ATSC 3.0.<sup>155</sup> In order to offer “ancillary and supplementary” non-broadcast services, broadcasters must remit to the treasury five percent of revenues from subscriptions and certain third-party revenues.<sup>156</sup> The statute requires the Commission to set this percentage based on the value the spectrum used for such services would have at auction, in order to: (1) recover for the public a portion of the value of the public spectrum, (2) avoid unjust enrichment of the broadcasters, and (3) recover for the public an amount that equals the amount that would have been recovered at auction.<sup>157</sup> The Commission is required to adjust this fee from “time to time,” but last set the fee eighteen years ago.<sup>158</sup> Auction valuations have changed dramatically in that

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<sup>155</sup> See Part I.A, above.

<sup>156</sup> 47 U.S.C. § 336(e)(1) (requiring the Commission to collect annual fees from broadcasters engaged in “ancillary or supplementary services on a designated frequency—(A) for which the payment of a subscription fee is required in order to receive such services, or (B) for which the licensee directly or indirectly receives compensation from a third party in return for transmitting material furnished by such a third party (other than commercial advertisements used to support broadcasting for which a subscription fee is not required”).

<sup>157</sup> *Id.* § 336(e)(2)(B)-(C) (requiring the Commission to adjust said fee “from time to time in order to continue to comply with the requirements of this paragraph”).

<sup>158</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. 19931 (1999) (affirming on reconsideration 5 percent figure).

time—as has the Commission’s access to data related to such valuations.<sup>159</sup> Whether or not it moves forward with the ATSC 3.0 transition, the Commission should consider whether its five percent figure remains consistent with the statutory directive.

**C. The Commission Should Consider Whether Interactive Television Services Offered Via ATSC 3.0 Remain “Broadcasting.”**

Broadcasters have also described the possibility of modifying their free, over-the-air television service to include two-way, interactive services (including targeted advertising and localized content) to individual viewers.<sup>160</sup> If such services ultimately involve delivery of individualized content to different viewers, the Commission will find itself having to consider whether they constitute “broadcasting.”

The Communications Act defines “broadcasting” as the “dissemination of radio communications intended to be received by the public, directly or by the intermediary of relay stations.”<sup>161</sup> If a service involves differentiated communications between a station and individual viewers, it may no longer be possible to say that any particular “communication” is intended to be received “by the public.” For example, subscription services are considered “non-broadcast” because they are intended to be received by only a subset of the public.<sup>162</sup> In an analogous context, a provider is not considered a common carrier where it makes “individualized

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<sup>159</sup> *FCC Announces Results of World’s First Incentive Auction*, 2017 WL 1364706 (rel. Apr. 13, 2017) (“At \$19.8 billion in gross revenue for 70 MHz of spectrum, the incentive auction is among the highest grossing auctions ever conducted by the FCC.”).

<sup>160</sup> See Part I.A, above.

<sup>161</sup> 47 U.S.C. § 153(7).

<sup>162</sup> For example, subscription services are considered “non-broadcast” because they are intended to be received by only a subset of the public. See *Subscription Video Servs.*, 2 FCC Rcd. 1001 (1987), *aff’d. sub nom. Nat’l Ass’n for Better Broad. v. FCC*, 849 F.2d 665 (D.C. Cir. 1988); *Subscription Video Servs.*, 4 FCC Rcd. 4948 (1989); *MCI Telecomms. Corp.*, 11 FCC Rcd. 16275 (Int’l Bur. 1996); *Application of MCI Telecomms. Corp.*, 14 FCC Rcd. 11077 (1999).

decisions, in particular cases,” rather than holding itself out to “to serve the public indiscriminately.”<sup>163</sup> Likewise, Internet TV provider Aereo claimed (ultimately without success) that it did not engage in “public performances” of broadcast signals when it delivered *the same signals* to all of its viewers using (allegedly) individualized transmission paths.<sup>164</sup> Here, the possibility exists that broadcasters might offer *different* content to viewers using individualized transmission paths.

At some point, ATSC 3.0 television offerings may become so individualized that they no longer constitute “broadcasting” as the Act defines that term. This, in turn, could lead to any number of potential adverse consequences for broadcasters and MVPDs alike.<sup>165</sup> The Commission may wish to consider exactly where that point lies sooner rather than later in order to avoid uncertainty for broadcasters, MVPDs, and others.

**V. THE COMMISSION HAS AUTHORITY TO PROTECT MVPD VIEWERS DURING ANY ATSC 3.0 TRANSITION.**

The Commission possesses ample legal authority to protect MVPD subscribers during any transition to ATSC 3.0. Section 325 of the Communications Act gives the Commission authority to prevent broadcasters from compelling ATSC 3.0 carriage by threatening to withhold ATSC 1.0 signals. A series of other provisions grants the Commission authority to craft changes in the broadcast standard and the obligation to place conditions on such changes to protect

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<sup>163</sup> See *Verizon v. FCC*, 740 F.3d 623, 651 (D.C. Cir. 2014).

<sup>164</sup> *Am. Broad. Companies, Inc. v. Aereo, Inc.*, 134 S. Ct. 2498 (2014).

<sup>165</sup> For example, the statutory copyright licenses applicable to cable and satellite carriers appear to apply by their terms to broadcast television stations. 17 U.S.C. § 111 (cable operators); 17 U.S.C. § 122 (satellite carriers).

viewers. These provisions authorize the Commission to adopt each of ATVA’s suggestions, including those related to retransmission consent.

**A. Section 325 of the Act Grants the Commission Authority to Address Retransmission Consent Issues Related to ATSC 3.0 Carriage.**

ATVA’s prior advocacy discusses at some length the Commission’s authority and obligation to regulate retransmission consent negotiations.<sup>166</sup> Among other sources of authority described therein, Section 325(b) of the Communications Act requires the Commission to “establish regulations to govern the exercise by television broadcast stations of the right to grant retransmission consent[.]”<sup>167</sup> In doing so, the Commission must consider “the impact that the grant of retransmission consent by television stations may have on the rates for the basic service tier.”<sup>168</sup>

Broadcasters and MVPDs have long debated the Commission’s ability both to address the substance of retransmission consent negotiations and to impose a variety of remedies.<sup>169</sup> As we have shown previously, the Commission possesses such authority—including over the substance of retransmission consent agreements. ATVA’s “separate negotiation” request, however, relates only to the negotiating *process*, not the substance of offers. The Commission has always recognized process as falling squarely within its jurisdiction.<sup>170</sup>

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<sup>166</sup> *E.g.*, ATVA Good Faith Comments at 51-59, Letter from Michael Nilsson to Marlene Dortch, MB Docket No. 15-216 (filed Mar. 15, 2016) (discussing a wide range of legal authority permitting the Commission to regulate retransmission consent negotiations).

<sup>167</sup> 47 U.S.C. § 325(b)(3)(A).

<sup>168</sup> *Id.* The Commission must also ensure that its regulations do not conflict with its obligation to ensure that rates for the basic service tier are reasonable. *Id.*

<sup>169</sup> *See, e.g., Implementation of the Satellite Home Viewer Improvement Act of 1999*, 15 FCC Rcd. 5445, ¶¶ 13-23 (2000) (describing the debate between broadcasters and MVPDs).

<sup>170</sup> *Id.* ¶ 39 (“Congress intended that the Commission should enforce the *process* of good faith negotiation.”) (emphasis added).

**B. Other Provisions of the Act Grant the Commission Authority to Promulgate and Condition Changes in the Broadcast Standard.**

More broadly, numerous statutory provisions grant the Commission both the authority to craft a new broadcast standard and the obligation to condition the use of that standard to ensure that it serves the public interest. These include the following:

- **Section 303(g).** Section 303(g) authorizes and obligates the Commission to “encourage the larger and more effective use of radio in the public interest.” The Commission has recognized that section 303(g) “endows the Commission with ‘expansive powers’ and a ‘comprehensive mandate’” to encourage more efficient spectrum use.<sup>171</sup>
- **Section 307(b).** Section 307(b) requires the Commission “to provide a fair, efficient, and equitable distribution” of broadcast service. Section 307(b) gives the Commission “broad discretion . . . to determine the public interest” and to take actions that serve that interest.<sup>172</sup> Like section 303(g), section 307(b) is an independent mandate for the Commission to act.<sup>173</sup> Under this provision, the Commission “strongly” disfavors loss of broadcast service.<sup>174</sup> Thus, the provision would allow the Commission to regulate use of the new standard as suggested by ATVA to prevent such loss.
- **Section 303(b).** Section 303(b) directs the Commission to “prescribe the nature of the service to be rendered” by radio licensees, including broadcasters. The Commission is

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<sup>171</sup> *Amendment of Part 11 of the Comm’n’s Rules Regarding the Emergency Alert System*, Notice of Proposed Rulemaking, 31 FCC Rcd 594, ¶ 186 n.315 (2016) (quoting *Nat’l Broad. Co. v. United States*, 319 U.S. 190, 219 (1943)).

<sup>172</sup> *Winter Park Comm’ns, Inc. v. FCC*, 873 F.2d 347, 352 (D.C. Cir. 1989).

<sup>173</sup> *Policies to Promote Rural Radio Serv. and to Streamline Allotment and Assignment Procedures*, 25 FCC Rcd. 1583, ¶¶ 8, 12 (2010) (describing section 307(b)’s “mandate”).

<sup>174</sup> *Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, 27 FCC Rcd. 12357, ¶ 48 n.88 (2012).

thus empowered to “‘define[] the form’ that the ‘service must take for those who seek a license to offer it.’”<sup>175</sup> Each of ATVA’s proposals relates to “the form” that broadcasting in ATSC 3.0 “must take.”

- **Section 336(b)(1).** Section 336(b)(1) empowers the Commission to designate “the technology or method . . . for the provision of advanced television services.” Broadcasts made using the ATSC 3.0 standard are “advanced television services.”<sup>176</sup> ATVA’s proposals all relate to the “technology or method” for the “provision” of such service.

Individually and collectively, these provisions permit—indeed, they require—the Commission to implement the ATSC 3.0 standard in a manner that it believes best serves the public interest.<sup>177</sup> They give the Commission authority to adopt each of ATVA’s suggestions.

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<sup>175</sup> *Amendments to Part 4 of the Comm’n’s Rules Concerning Disruptions to Commc’ns*, 31 FCC Rcd. 5817, ¶ 204 (2016) (quoting *Cellco P’ship v. FCC*, 700 F.3d 534, 543 (D.C. Cir. 2012)).

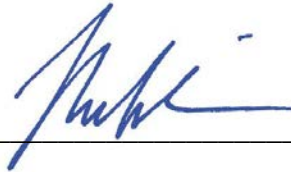
<sup>176</sup> The Communications Act defines “advanced television services” as “television services provided using digital or other advanced technology.” 47 U.S.C. § 336(i)(1). The Commission has employed a similarly broad definition. See *Advanced Television Sys. and Their Impact Upon the Existing Television Broad. Serv.*, 7 FCC Rcd 6924, ¶ 1 n.1 (1992) (advanced television services “refers to any television technology that provides improved audio and video quality or enhances the current television broadcast system”).

<sup>177</sup> See, e.g., *FCC v. WNCN Listeners Guild et al.*, 450 U.S. 582, 596 (1981) (“[T]he Commission’s judgment regarding how the public interest is best served is entitled to substantial judicial deference.”); *Carriage of Digital Television Broad. Signals: Amendment to Part 76 of the Comm’n’s Rules*, 16 FCC Rcd. 2598 (2001) (defining what carriage rights cable operators must afford to digital signals and how broadcasters may exercise those rights); *Carriage of Digital Television Broad. Signals: Amendment to Part 76 of the Comm’n’s Rules*, 23 FCC Rcd. 14254 (2008) (creating an HD carriage exemption for small cable operators); *DTV Consumer Education Initiative*, 23 FCC Rcd. 4134, ¶ 41 (2008) (imposing public notice requirements on broadcasters, MVPDs, and equipment manufacturers because they “serve[d] the public interest,” even though some commenters “object[ed] that the Commission d[id] not have statutory authority” to do so).

## CONCLUSION

ATVA does not object to the proposed transition to ATSC 3.0—so long as it remains truly “voluntary” for all parties and so long as it does not harm others. The Commission should meet these two goals by adopting each of the proposals contained in these comments.

Respectfully Submitted,



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## **APPENDIX A**

### **ATVA Members**

The Africa Channel  
Altice USA  
American Cable Association  
American Public Power Association (APPA)  
AT&T  
Bend Broadband/TDS  
CenturyLink  
Charter Communications  
Comporium  
Discovery Communications  
DISH Network  
Eastern Rural Telecom Association  
GMC  
Metrocast  
Independent Telephone and Telecommunications Alliance  
MCTV  
Mediacom Communications  
Midcontinent Communications  
New America Foundation  
NTCA—The Rural Broadband Association  
Outdoor Channel  
Parents Television Council  
Retirement Living TV  
Rural Independent Competitive Alliance  
NUVOtv  
Starz Entertainment  
USTelecom  
Verizon  
Wave Broadband and Astound Broadband