

**Before the  
Federal Communications Commission  
Washington, DC 20554**

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

**COMMENTS AND INITIAL REGULATORY FLEXIBILITY ANALYSIS RESPONSE  
OF  
NTCA–THE RURAL BROADBAND ASSOCIATION**

**I. INTRODUCTION**

NTCA–The Rural Broadband Association (“NTCA”)<sup>1</sup> hereby submits these Comments in response to the Notice of Proposed Rulemaking (“NPRM”)<sup>2</sup> and Initial Regulatory Flexibility Analysis (“IRFA”)<sup>3</sup> in the above-captioned proceeding. In the NPRM, the Federal Communications Commission (the “Commission”) requests public comment on a proposal to authorize television broadcasters to use the “Next Generation” broadcast television transmission standard associated with recent work of the Advanced Television Systems Committee (“ATSC 3.0”) on a voluntary, market-driven basis, while they continue to deliver current-generation digital television (“DTV”) broadcast service, using the ATSC 1.0 standard, to viewers.<sup>4</sup>

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<sup>1</sup> NTCA represents nearly 850 independent, community-based telecommunications companies and cooperatives and more than 400 other firms that support or are themselves engaged in the provision of communications services in the most rural portions of America. All of NTCA’s service provider members are full service rural local exchange carriers (“RLECs”) and broadband providers. Approximately 75 percent serve as multichannel video programming distributors (“MVPDs”) using a variety of technologies in sparsely populated, high-cost rural markets.

<sup>2</sup> *Authorizing Permissive Use of the “Next Generation” Broadcast Television Standard*, GN Docket No. 16-142, Notice of Proposed Rulemaking, FCC 17-13 (rel. Feb. 24, 2017).

<sup>3</sup> *Id.*, IRFA, Appendix B.

<sup>4</sup> NPRM, ¶ 1.

As representatives of those who invest and innovate in high-technology solutions for the local communities they serve, NTCA understands the desire for fast action on proposals that may enable new services and allow more effective monetization of broadcasters' licensed spectrum. However, NTCA's members are small, rural MVPDs that must engage in retransmission consent negotiations with broadcasters. As such, they are concerned that without adequate protections against coercive demands in the negotiating process, they will be compelled to accommodate ATSC 3.0 signals prematurely. Therefore, the Commission should prohibit MVPD carriage of ATSC 3.0 signals through the retransmission consent regime until retransmission consent reform is accomplished.

**II. THE RECORD SHOWS THAT THERE ARE TOO MANY COSTS AND UNKNOWN FACTORS ASSOCIATED WITH THE UNFINISHED ATSC 3.0 STANDARD TO CONTEMPLATE IMPLEMENTATION BY SMALL MVPDS IN THE NEAR TERM**

The NPRM acknowledges many concerns related to the costs and burdens even large MPVDs would experience with regard to carriage of ATSC 3.0 signals. The standard is not yet complete and many practical aspects remain largely unknown.<sup>5</sup> Specifically, it is unclear what kind of equipment upgrades would be necessary (if such equipment is even commercially available), either for carriers or consumers.<sup>6</sup> Under these circumstances, it is not feasible for either regulators or businesses to perform a cost-benefit analysis. Small MVPDs should not be required to engage significant new expenses and depart from their normal upgrade cycles, or otherwise alter their operations, in order to accommodate ATSC 3.0 signals. In short, there are many practical technical, business, economic, and consumer issues that must be resolved before MVPD carriage of ATSC 3.0 signals may be practical, especially in the case of small MVPDs.

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<sup>5</sup> See, *Id.*, e.g., ¶¶ 31 – 38. There are also concerns regarding how ATSC 3.0 might impact limited bandwidth and QAM channel availability. See *ACA ex parte*, MB Docket No.16-142, fil. Feb. 13, 2017; see also *ACA ex parte*, MB Docket Nos. 15-216, 16-142, 16-41, fil. Apr. 3, 2017.

<sup>6</sup> NPRM ¶ 29, fns. 67 – 72.

### **III. THE COMMISSION SHOULD ENSURE THAT ATSC 3.0 CARRIAGE MAY NOT BE INCORPORATED INTO THE RETRANSMISSION CONSENT PROCESS FOR SMALL MVPDS UNTIL TRANSPARENCY AND MARKET FORCES CAN BE INJECTED INTO THE RETRANSMISSION CONSENT REGIME**

In an attempt to recognize the many concerns outlined above, the NPRM appropriately proposes that MVPDs should not be required to carry ATSC 3.0 signals during the period when broadcasters are voluntarily implementing ATSC 3.0 service.<sup>7</sup> Similarly, the NPRM also states that carriage of ATSC 3.0 should be “voluntary and driven by marketplace negotiations between broadcasters and MVPDs.”<sup>8</sup> While this sentiment is correct in theory, as discussed further below, the record clearly demonstrates that the phrase “marketplace negotiations” between broadcasters and small and rural MVPDs is a misnomer, as improper “take it or leave it” offers, replete with the forced tying of content, remain rampant. Outdated and skewed rules tilt the playing field in favor of broadcasters, which along with mandatory nondisclosure provisions, restrict the ability of market forces to affect the retransmission consent process. Until reform of the “good faith” rules and other aspects of the retransmission consent regime are updated to allow transparency and market forces to come into play, small and rural MVPDs should have clear recourse in the event a broadcaster seeks to impose ATSC 3.0 carriage as a condition of providing 1.0 signal.<sup>9</sup>

Encouragingly, the NPRM explicitly recognizes MVPDs’ concerns that broadcasters’ government-sanctioned leverage in the form of “retransmission consent” will enable broadcasters to coerce and compel MVPDs to carry ATSC 3.0 signals by tying ATSC 3.0 to the ATSC 1.0

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<sup>7</sup> *Id.*, ¶ 28.

<sup>8</sup> *Id.*, ¶ 35.

<sup>9</sup> Indeed, as discussed further below, given that in many cases, small MVPDs represent the *only* way a broadcast transmission of any kind reaches rural consumers – because broadcasters’ signals cannot reach those consumers on their own – it would be injury upon insult to then allow the broadcaster to force upon the MVPD the mode in which the MVPD will have the “privilege” of paying for and carrying the broadcast signal that otherwise would never have reached the consumer.

streams that are necessary to serve customers.<sup>10</sup> The NPRM appropriately asks to what extent “the retransmission consent process could be used by broadcasters to compel MVPDs, particularly smaller, MVPDs, to carry an ATSC 3.0 stream as a condition for obtaining carriage” of 1.0 signal.<sup>11</sup> The all-too-common abuse of forcing MVPDs to take unwanted content, or place it in specific tiers, in order to access content necessary to operate, is known as “forced tying.” Small and rural MVPDs, lacking economies of scale and market power, are specifically subject to forced tying, as the Commission itself has accurately recognized for the past decade.<sup>12</sup>

The NPRM subsequently asks if the Commission should prohibit MVPD carriage of ATSC 3.0 signals through the retransmission consent regime “until the ATSC Specialist Group on Conversion and Redistribution of ATSC 3.0 produces its initial report,” expected later this year.<sup>13</sup> The concept of separating the carriage of ATSC 3.0 signals from the retransmission consent process is sound and sensible. However, there is no indication of how small and rural MVPDs’ inherent lack of negotiating leverage, caused by both government rules and the absence of economies of scale, would be remedied or overcome by the release of this report. Rather, the only practical means to ensure the retransmission consent regime is not misused to coerce small providers to expend scarce resources to accommodate ATSC 3.0 signals is to prohibit ATSC 3.0 carriage provisions in retransmission consent arrangements, at least in the case of small and rural

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<sup>10</sup> NPRM, ¶ 39.

<sup>11</sup> *Id.*, ¶ 40.

<sup>12</sup> “Moreover, we note that small cable operators and MVPDs are particularly vulnerable to such tying arrangements because they do not have leverage in negotiations for programming due to their smaller subscriber bases.” *Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act: Sunset of Exclusive Contract Prohibition*, MB Docket No. 07-29, *Review of the Commission’s Program Access Rules and Examination of Program Tying Arrangements*, MB Docket No. 07-198, Report and Order and Notice of Proposed Rulemaking, FCC 07-169 (rel. Oct. 1, 2007), ¶ 120.

<sup>13</sup> NPRM, ¶ 42. *See also*, IRFA, ¶ 26.

MVPDs, until such time as broader questions regarding the interaction between MVPDs and broadcasters in this so-called “marketplace” can be examined and addressed.

**A. The Need for Transparency and Reforms To “Good Faith” and Other Retransmission Consent Rules Are Both Long Overdue and Relevant**

For at least the past 15 years, the record in various proceedings have been replete with demonstrations of how outdated retransmission consent rules, toothless “good faith” requirements,<sup>14</sup> and a lack of transparency through mandatory non-disclosure provisions with no effective access to practical recourse for small providers<sup>15</sup> have led to increased consumer blackouts,<sup>16</sup> impediments to new entrants and competition in the MVPD market, a decline in the number of small MVPDs serving high-cost rural markets,<sup>17</sup> and, given the recognized intrinsic link between video and advanced services,<sup>18</sup> increased barriers to broadband investment and deployment.<sup>19</sup> There is no need to reexamine these facts, once again, in detail here.

Unfortunately, the recitation of these persistent infirmities is relevant to this proceeding, as the fear of forced tying of ATSC 3.0 signals is not at all speculative – it risks becoming just another fact of life in the contorted, opaque “marketplace” that retransmission consent purports to be. As noted by the American Television Alliance (“ATVA”), there have already been instances of broadcasters demanding “that multiple ATVA members carry ATSC 3.0 signals

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<sup>14</sup> See, e.g., Joint Reply Comments Of The Networks For Competition And Choice Coalition – Incompas, ITTA, NTCA, And Public Knowledge – And The Open Technology Institute At New America, MB Docket No. 15-216 (fil. Jan. 14, 2016) (“Joint Replies”) at 13 – 18.

<sup>15</sup> *Id.*, at 23 – 26. See also, Comments of NTCA, MB Docket No. 16-247 (fil. Sept. 21, 2016) at 10.

<sup>16</sup> See, e.g., American Television Alliance (“ATVA”) *ex parte*, MB Docket Nos. 15-216, 10-71, 14-50, 09-182, 07-294, and 04-256 (fil. Feb. 17, 2017) at 1 – 2.

<sup>17</sup> For example, between 2008 and 2012, nearly 800 small MVPDs left the market. See Testimony of Colleen Abdoulah, Before the Senate Committee on Commerce, Science & Transportation, Jul. 24, 2012.

<sup>18</sup> *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992*, MB Docket No. 05-311, Report and Order and Further Notice of Proposed Rulemaking, FCC 06-180 (rel. Mar. 5, 2007), ¶ 62.

<sup>19</sup> Joint Replies, 13 – 18.

during recent retransmission consent negotiations. In doing so, broadcasters have explicitly sought to tie continued carriage of their ATSC 1.0 signals with carriage of the new ATSC 3.0 signals.”<sup>20</sup> Unless small MVPDs have access to effective recourse from the forced tying practices they and their customers have already suffered from for a number of years, carriage of ATSC 3.0 signals seems poised to be the next added requirement that threatens to further stifle the rural MVPD market.

This circumstance is especially concerning due to the fact that, since the digital television transition, which reduced the effective range of many over-the-air broadcast stations, an increased number of rural consumers have become reliant upon MVPDs to enjoy access to any television broadcast signals at all. Nearly one-fourth of NTCA’s members report that 90 percent or more of the customers in their service areas cannot receive any over-the-air broadcast signals, and must rely upon MVPD services in order to receive local news, weather reports, and similar benefits of local broadcasts.<sup>21</sup> As these rural residents rely on MVPDs to receive television signals of any sort, small rural MVPDs already operating on slim to negative margins should not face additional burdens, such as upgrading equipment to accommodate ATSC 3.0 signals prematurely.<sup>22</sup> Therefore, an effective mechanism must be in place that unequivocally precludes broadcasters from leveraging an already-broken retransmission consent process to demand the carriage of ATSC 3.0 signals.

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<sup>20</sup> ATVA *ex parte*, fil. March 20, 2017 at 1.

<sup>21</sup> See Comments of NTCA – the Rural Broadband Association, MB Docket No. 15-216 (filed Dec. 1, 2015), at 3.

<sup>22</sup> If one were to analogize to a ride-sharing service – in many rural areas, retransmission consent gives broadcasters a ride to a destination that they would not otherwise reach without the MVPD, except that in this so-called “market,” the “driver” MVPD must *pay the passenger* (the broadcaster) for the “privilege” of giving the broadcaster that ride. Layering atop that the ability for the broadcaster to demand ATSC 3.0 carriage would be tantamount to the rider demanding that the driver change out the car’s interior – again, all upon the driver’s nickel, underscoring the farcical nature of this “marketplace.”

#### **IV. THE COMMISSION HAS THE LEGAL AUTHORITY TO PREVENT FORCED CARRIAGE OF ATSC 3.0 SIGNALS THROUGH THE RETRANSMISSION CONSENT PROCESS**

The NPRM inquires whether prohibiting carriage of ATSC 3.0 signals through the retransmission consent process is consistent with section 325(b) or 624(f) of the Cable Act of 1992 (“Cable Act”).<sup>23</sup> In the plain text of section 325(b)(3)(A), Congress instructed the Commission “to govern the exercise by television broadcast stations of the right to grant retransmission consent.”<sup>24</sup> This language sets forth direct and unmistakable authority to the Commission to set, and if necessary revise, ground rules for a retransmission consent regime that achieves legislative goals, including increased consumer access to video programming. The authority to “govern” is of little meaning if such actions are not within the Commission’s authority.

The Commission has additional authority as part of its obligation to ensure that broadcast licensees act in furtherance of “the public interest, convenience, and necessity.”<sup>25</sup> In addition, sections 303(r) and 4(i) of the Communications Act of 1934, as amended (“the Act”), confer further authority. Section 303(r) instructs the Commission to “[m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions”<sup>26</sup> of Title III of the Act. The Commission’s authority is also elucidated in section 4(i), calling upon it to “perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its

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<sup>23</sup> NPRM, ¶ 42.

<sup>24</sup> 47 U.S.C. § 325(b)(3)(A).

<sup>25</sup> 47 U.S.C. § 309(a).

<sup>26</sup> 47 U.S.C. § 303(r). *See also*, *Cellco P’ship v. FCC*, 700 F.3d 534, 543 (D.C. Cir. 2012).

functions.”<sup>27</sup> Furthermore, the Commission has previously asserted its ancillary authority to enhance consumers’ access to programming.<sup>28</sup>

The Commission’s ability to address content provider practices that hinder broadband deployment is further buttressed by ancillary authority conveyed through section 706. This section mandates that the Commission “shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans” using a variety of means, including the utilization of “methods that remove barriers to infrastructure investment.”<sup>29</sup> Perceiving the linkage between video and broadband services, the Commission has used its ancillary authority under section 706 to modify rules related to video services, specifically in the 2007 *Local Franchising Order*,<sup>30</sup> and later the same year in the *Multiple Dwelling Unit Order*.<sup>31</sup>

Individually and collectively, these varied provisions provide ample legal authority for the Commission to prevent carriage of ATSC 3.0 signals through the retransmission consent process until good faith and other program access reforms can inject transparency and market forces into the retransmission consent regime.

## **V. THE SIGNIFICANT ALTERNATIVE EXPLORED IN THE IFRA IS INEXPLICITLY LIMITED AND SHOULD BE EXTENDED**

Finally, as the NPRM’s IRFA observes, the Regulatory Flexibility Act (“RFA”) of 1980, as amended,<sup>32</sup> conveys the authority upon the Commission to consider significant alternatives to

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<sup>27</sup> 47 U.S.C. § 154(i).

<sup>28</sup> *Review of the Commission’s Program Access Rules and Examination of Programming Tying Arrangements*, First Report and Order, FCC 10-17 (rel. Jan. 28, 2010) (relying on the Commission’s ancillary authority to establish standstill rules for program access disputes), ¶¶ 71-72.

<sup>29</sup> 47 U.S.C. § 1302(a).

<sup>30</sup> See fn. 18, *supra*.

<sup>31</sup> *Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments*, MB Docket No. 07-51, Report and Order and Further Notice of Proposed Rulemaking, FCC 07-189 (rel. Nov. 13, 2017), ¶ 47; see also ¶ 52.



its proposed approach, including different compliance requirements, timeframes or exemptions, among others.<sup>33</sup> Such mitigating measures are particularly important for small businesses that might otherwise be adversely affected by a Commission rule or ordering clause.

The IRFA notes the NPRM's examination of an alternative approach, per the RFA (among other statutes), to consider the prohibition of MVPD carriage of ATSC 3.0 signals through the outdated retransmission consent process.<sup>34</sup> However, as stated *supra*, this alternative is inexplicitly limited to an extremely short period of time, which is pending the release of a report by the ATSC Specialist Group later this year. The connection between the alternative's anticipated expiration and the release of the report is an apparent *non-sequitur*, as there is no indication in either the NPRM or the IRFA explaining how the release of a report might ameliorate the harms that small MVPDs and their consumers would encounter as a result of ATSC 3.0 carriage being accomplished through the retransmission consent reform process.

Rather than limiting the separation of ATSC 3.0 signals from the retransmission consent process until such time as the ATSC Specialist Group report is released, this separation should remain in place, at least for small MVPDs, until a broader and more thorough examination of the so-called "marketplace" created by current retransmission consent rules can be completed and necessary reforms to enable transparency and competition in a functioning marketplace can be implemented.

## VI. CONCLUSION

NTCA's members are at the forefront of innovating and investing in the high-cost, sparsely populated rural communities of which they are a vital part. Consequently, NTCA shares

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<sup>32</sup> 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. §§ 601-612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 ("SBREFA"), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

<sup>33</sup> IRFA, ¶ 24.

<sup>34</sup> *Id.*, ¶ 26.

the goals of deploying new technologies and bringing new offerings to rural consumers.

However, there have already been instances of attempts to use the retransmission consent process to forcibly tie unfinalized ATSC 3.0 signals to existing ATSC 1.0 signals, which would result in unsustainable costs for small MVPDs and their customers. Until transparency and market forces can be incorporated into the retransmission consent process through comprehensive reforms, the carriage of ATSC 3.0 signals should be separated from the retransmission consent process.

Respectfully submitted,



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