

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

In the Matter of)
)
Reporting Requirements for Commercial) MB Docket No. 23-427
Television Broadcast Station “Blackouts”)
)
)

**REPLY COMMENTS OF
THE NATIONAL ASSOCIATION OF BROADCASTERS**

The National Association of Broadcasters (NAB)¹ submits these reply comments regarding the FCC’s proposal to require multichannel video programming distributors (MVPDs) to notify the Commission when a broadcast signal is unavailable via their service for 24 hours or more due to an impasse in retransmission consent negotiations.² NAB continues to believe that adding yet another reporting requirement is not only beyond the FCC’s statutory authority, but it also will not achieve any meaningful benefits for consumers. If, however, the Commission is still intent on adopting some version of the proposed rules, it should provide consumers with a more complete picture by requiring MVPDs to report on both the limited disruptions in broadcast signal carriage on pay TV services and on all retransmission consent agreements successfully reached without any negotiating impasses. Anything short of that

¹ NAB is the nonprofit trade association that advocates on behalf of free local radio and television stations and broadcast networks before Congress, the Federal Communications Commission and other federal agencies, and the courts.

² *Reporting Requirements for Commercial Television Broadcast Station “Blackouts,”* Notice of Proposed Rulemaking, MB Docket No. 23-427, FCC 23-115 (rel. Dec. 21, 2023) (quotations added) (Notice). NAB places quotations around the word “blackout” because the term suggests that the stations are completely unavailable (as in an electrical power blackout). In fact, stations that are not available on a particular MVPD service remain available over the air and on other MVPDs.

would undoubtedly mislead consumers and others, including policymakers, as to the actual frequency of retransmission consent disputes and would provide a strong incentive for MVPDs to continue to manufacture impasses.

The record in this proceeding shows that the pay industry television almost unanimously supports the proposed reporting requirement and willingly accepts responsibility for submitting reports.³ Although NAB has cited a number of legal issues raised by the proposal,⁴ and expressed concerns that the reporting requirement and creation of a database

³ See Comments of NCTA – The Internet & Television Ass’n, MB Docket No. 23-427 (Feb. 26, 2024) (NCTA Comments); Comments of the American Television Alliance (ATVA), MB Docket No. 23-427 (Feb. 26, 2024) (ATVA Comments); Comments of Skitter, Inc., MB Docket No. 23-427 (Feb. 26, 2024) at 7 (the proposed rule “seems logical and manageable, even for a small system such as Skitter”); Letter from Michael Nilsson, Counsel to ACA Connects—America’s Communications Association (ACA) to Marlene H. Dortch, FCC Secretary, MB Docket No. 23-427 (Mar. 8, 2024) at 1 (documenting ex parte meetings where ACA discussed issues raised in comments filed by ATVA, of which it is a member). *But see* Comments of NTCA—The Rural Broadband Association (NTCA), MB Docket No. 23-427 (Feb. 26, 2024) (NTCA Comments) at 3-4 (stating that the proposed reporting requirement would provide “no information that could not be gained by turning on a station that is blacked out or with a quick internet search” and that the FCC “already has statistics” on disruptions including “how often they occur, how long they last, and the parties involved”).

⁴ Comments of NAB, MB Docket No. 23-427 (Feb. 26, 2024), at 2-8 (NAB Comments) (adopting the proposals in the Notice would violate the Communications Act of 1934 (Act), the Administrative Procedure Act (APA) and the Paperwork Reduction Act of 1995 (PRA)). Nothing in the record controverts NAB’s analyses or provides a legal or factual rationale for the proposed rule. NAB also observes that no other source of authority cited in the Notice provides a legal basis for adopting the proposal. Section 403 of the Act is inapposite and concerns the Commission’s authority to “institute an inquiry,” not adopt rules mandating ongoing reporting and the development of a public database. Notice at ¶ 31, *citing* 47 U.S.C. § 403. The Title III provisions cited by the Notice also provide no legal basis for any retransmission consent-related reporting obligations. Notice at ¶¶ 31, 33, 41, *citing* 47 U.S.C. §§ 301, 303, 307, 309 and 316. Information on the availability of broadcast signals via specific MVPDs is not relevant to the FCC’s obligations to study new and provide for experimental uses of radio frequencies and “generally encourage the larger and more effective use of radio in the public interest,” 47 U.S.C. § 303(g), or to “provide a fair, efficient, and equitable distribution” of service among states and communities. 47 U.S.C. § 307(b). Carriage of television broadcast signals by MVPDs has no relationship to the FCC’s licensing authority or any of those statutory standards. And it is well-established that the FCC’s

would promote MVPDs' interests in publicizing negotiating impasses and encourage additional disruptions in broadcast signal carriage,⁵ we understand that the overwhelming majority of pay television providers are eager to provide more information to the public about the outcomes of their negotiations with broadcasters.

If, despite questions about its statutory authority,⁶ the Commission is inclined to follow the pay TV industry's lead, the Commission should not merely adopt the proposed half-measure. For some reason, the Notice proposes that pay TV operators must only report instances where they have reached an impasse in their negotiations to retransmit broadcast stations. To truly provide the public with complete information on a basis that would allow consumers to make informed choices, the Commission, if anything, should require all MVPDs to identify the results of *all* negotiations, not just those that result in an impasse. Given that most MVPDs are already required to notify their own subscribers of an impasse and that the FCC's stated goal is to ensure that consumers have "access to easily available, accurate, and timely information" so they can "make informed decisions regarding video service," then it would be helpful for consumers to know which MVPDs consistently reach agreements with

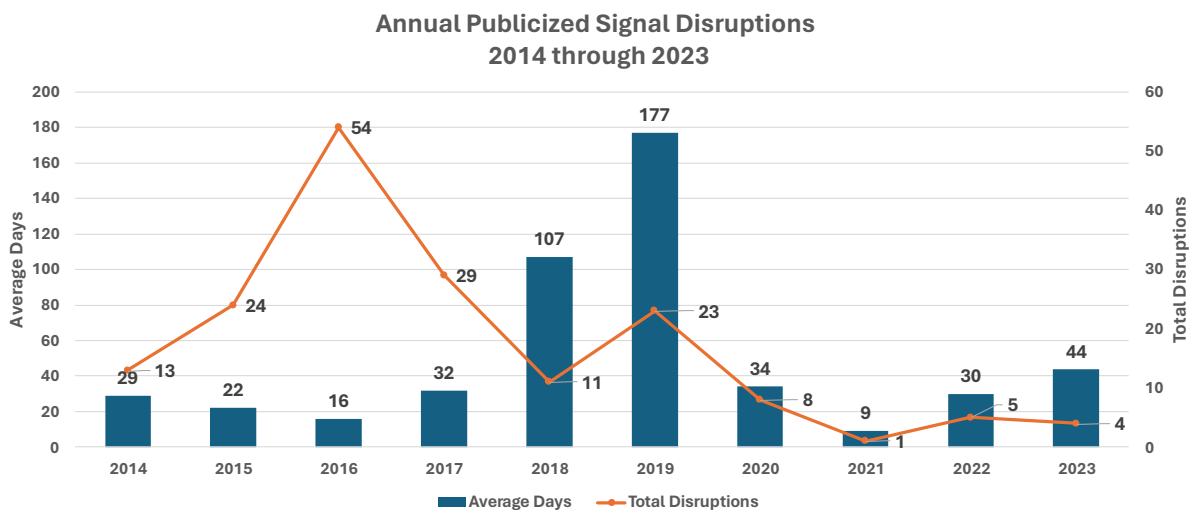
authority under Section 4(i) is ancillary, which means it must be connected to some other valid source of authority, which has not been identified in this proceeding. See, e.g., *Comcast Corp. v. FCC*, 600 F.3d 642 (D.C. Cir. 2010); *Am. Library Ass'n v. FCC*, 406 F.3d 689 (D.C. Cir. 2005). Finally, NAB observes that the FCC's proposals for mandated disclosures raise First Amendment issues, particularly given the lack of a factual predicate or a sound rationale for them. See *infra* at 4-6; NAB Comments at 4-8. Compelled disclosure requirements are subject to heightened First Amendment scrutiny. See *Americans for Prosperity Found. v. Bonta*, 141 S. Ct. 2373 (2021).

⁵ NAB Comments at 2, 8-11. Indeed, the willingness of MVPDs to accept the FCC's proposal helps prove NAB's point that the pay TV industry has incentives to engage in and publicize negotiating impasses to further their false narrative that the retransmission consent system is "broken" and needs significant "reform" in their favor.

⁶ See NAB Comments at 2-8; *supra* note 4.

broadcasters, along with those that do not. Providing complete information will, among other things, give consumers a sense of the breadth of impasses involving any one pay TV operator, rather than just offering a raw number of impasses with no context of all the deals any given provider has been able to complete.⁷

Indeed, an impasse-only reporting requirement could easily increase confusion among consumers and others, including policymakers, about how often disruptions in broadcast signal carriage actually occur. The Notice itself erroneously asserts that the number of signal carriage disruptions has “increased dramatically,”⁸ a perception perpetuated and echoed by pay TV filers.⁹ To the contrary, as shown by Kagan data in the chart, disruptions are rare, with



Annual publicized signal disruptions 2014 through year -to-date 2023										
	2014	2015	2016	2017	2018	2019	2020	2021	2022	2023
Avg. days outstanding	29	22	16	32	107	177	34	9	30	44
Total disruptions	13	24	54	29	11	23	8	1	5	4
As of December 1, 2023										
Sources: Industry data; Kagan estimates. Kagan, a part of S&P Global Market Intelligence.										
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⁷ For example, two MVPDs – DIRECTV and Dish – have been responsible for 89 percent of the limited number of retransmission consent negotiating impasses from 2017 to 2023. NAB Analysis of SNL Kagan Retransmission Databases (Dec. 2023). DIRECTV includes MVPD services provided by both AT&T U Verse and DIRECTV.

⁸ Notice at ¶ 3.

⁹ ATVA Comments at 1.

just 18 disruptions over the past four years from January 2020 – December 2023, or 4.5 disruptions per year. This is about the same frequency as was the case for the first 20 years of the retransmission consent regime according to data in the Notice (i.e., 81 disruptions over 20 years, or 4.05 disruptions per year).¹⁰ The average length of disruptions also is *not* on the rise and has varied greatly over the past ten years, with no consistent direction up or down.

Notably, the only “dramatic” increases in disruptions, whether measured by frequency or length of time, have occurred when the Commission and/or Congress actively contemplate changes to the retransmission consent regime, and the pay TV industry’s incentives to show problems with the retransmission process accordingly increase. As shown above, there were a record high number of disruptions in 2016 (54 disruptions), when the Commission, as directed by Congress in the STELA Reauthorization Act of 2014, was evaluating whether to change the totality of the circumstances test in its retransmission consent good faith rules (and ultimately determined that it would not do so).¹¹ Similarly, the average length of

¹⁰ Notice at ¶ 3. NAB also questions whether the early years of the retransmission consent regime are even a valid period of comparison to the past decade. After all, the pay TV industry for years flatly refused to pay cash compensation to broadcasters for permission to carry their signals, and even as late as the mid-2000s, broadcasters still were not earning any significant fees for MVPD carriage of their valuable signals. FCC, *Retransmission Consent and Exclusivity Rules: Report to Congress Pursuant to Section 208 of the Satellite Home Viewer Extension and Reauthorization Act of 2004* (Sept. 8, 2005) at ¶ 10. It was only with the emergence of cash compensation that the pay TV industry began to systematically lobby for changes to the retransmission consent regime and, thus, to have increased incentives to show that the regime needed “reform” by engaging in and publicizing negotiating impasses.

¹¹ See *Implementation of Section 103 of the STELA Reauthorization Act of 2014, Totality of the Circumstances Test*, Notice of Proposed Rulemaking, MB Docket No. 15-216 (rel. Sept. 2, 2015); *An Update on Our Review of the Good Faith Retransmission Consent Negotiation Rules*, FCC Blog, Chairman Tom Wheeler (Jul. 14, 2016) (concluding a statutorily mandated review of the FCC’s retransmission consent rules by stating that: “[b]ased on the staff’s careful review of the record, it is clear that more rules in this area are not what we need at this point . . . So, today I announce that we will not proceed at this time to adopt additional rules governing good faith negotiations for retransmission consent.”).

disruptions was at its highest in 2019 (an average of 177 days), when Congress was deliberating a further extension of the Satellite Television Extension and Reauthorization Act (STELAR), the periodic reauthorization of which was seized upon by the pay TV industry as a legislative vehicle to lobby for changes to retransmission consent.¹²

NAB continues to believe, moreover, that the FCC's proposal to report impasses alone would only provide redundant information already readily available via other means.¹³ Indeed, the Commission has not demonstrated, asserted, or even sought comment on whether the public lacks information about access to broadcast signals via their own MVPD services, much less that they would seek information on disruptions in broadcast signal carriage from an FCC database.

Finally, NTCA in its comments urges the Commission to require MVPDs to provide far more information as part of the proposed reporting requirement, including proposed prices, terms, and conditions of retransmission consent proposals made during negotiations and to declare invalid any nondisclosure provisions of retransmission consent.¹⁴ Clearly, the Commission has no authority to require the prices, terms, and conditions of retransmission

¹² See Comments of NAB, MB Docket No. 23-405 (Feb. 5, 2024) at 4-5, *citing* Prepared Statement of Emily Barr, President and CEO, Graham Media Group and Television Board Chair, National Association of Broadcasters, Before the U.S. Senate Committee on Commerce, Science & Transportation (Oct. 23, 2019) (“Over the past five months alone as Congress has debated [the Satellite Television Extension and Reauthorization Act (STELAR)], AT&T-DIRECTV has been involved in 10 retransmission consent impasses with broadcast groups across the country impacting more than 179 stations. (By comparison, during this same period last year, AT&T-DIRECTV was involved in only one impasse and it affected only a single station.) These anti-consumer negotiating tactics are encouraged every five years by STELAR's renewal.”).

¹³ See NAB Comments at 6-7; *see also* NTCA Comments at 3-4 (agreeing that, as proposed, the reporting requirement would provide “no information that could not be gained by turning on a station that is blacked out or with a quick internet search”).

¹⁴ NTCA Comments at 4-5.

consent proposals or agreements to be made public, or to declare provisions of privately negotiated contracts invalid by regulatory fiat. In adopting its good faith negotiation requirements, the Commission explicitly held that parties need only provide reasons for rejecting any aspect of a retransmission consent proposal, and explicitly rejected the idea of parties supplying evidence or documentation, stating that “an information sharing or discovery mechanism” would be highly problematic because broadcasters and MVPDs “are competitors and the information involved would, in most instances, be competitively sensitive.”¹⁵ Requiring the disclosure of such competitively sensitive material also would raise serious questions under the Trade Secrets Act.¹⁶ The good faith rules already require the parties to provide reasons for rejecting any aspects of a retransmission consent offer, and NTCA provides no rationale as to why enforcement of this requirement is insufficient. The Commission should not consider NTCA’s flawed proposal.

In short, the data speak for themselves: there is no “increase” in disruptions in signal carriage, eliminating the factual predicate for the proposals in the Notice. However, should the Commission move forward, NAB urges it to expand its proposals to cover the outcomes of all negotiations (subject to whatever nondisclosure provisions may apply). Only this more complete transparency would provide consumers and policymakers with an accurate and useful picture, and help the Commission avoid adopting an otherwise clearly arbitrary and capricious new requirement.

¹⁵ *Implementation of the Satellite Home Viewer Improvement Act of 1999, Retransmission Consent Issues: Good Faith Negotiation and Exclusivity*, First Report and Order, 15 FCC Rcd 5445, 5464 and n. 100 (2000).

¹⁶ See Comments of NAB, MB Docket No. 15-216 (Dec. 1, 2015) at 45-46, *citing* 18 U.S.C. § 1905; *CBS Corp. v. FCC*, 785 F.3d 699 (D.C. Cir. 2015).

Respectfully submitted,

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A handwritten signature in black ink, appearing to read "Rick Kaplan", with a long horizontal flourish extending to the right.

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