

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

In the Matter of	)	
	)	
Electronic Delivery of MVPD Communications	)	MB Docket No. 17-317
	)	
Modernization of Media	)	MB Docket No. 17-105
Regulation Initiative	)	

COMMENTS OF THE  
NATIONAL ASSOCIATION OF BROADCASTERS

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**I. INTRODUCTION AND SUMMARY**

The National Association of Broadcasters (NAB)<sup>1</sup> submits these comments in response to the Commission’s above-captioned Notice of Proposed Rulemaking.<sup>2</sup> While the Notice focuses primarily on Section 76’s cable operator notice requirements, NAB will limit its comments to questions about Sections 76.64 and 76.66 of the Commission’s rules governing broadcast television stations’ carriage elections.<sup>3</sup> The FCC should take this opportunity to modernize its carriage election in two ways: (1) modify the cable election default so that in the event a broadcaster fails to make a carriage election for a cable system, it defaults to retransmission consent instead of must-carry status, and (2) permit

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<sup>1</sup> NAB is a 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.

<sup>2</sup> *Electronic Delivery of MVPD Communications, Modernization of Media Regulation Initiative*, Notice of Proposed Rulemaking, MB Docket Nos. 17-317, 17-105, FCC 17-168 (rel. Dec. 14, 2017) (Notice).

<sup>3</sup> See Notice at ¶¶ 25-27.

broadcasters to satisfy the Commission’s notice requirement by placing their elections in their online public files.

The current framework requires tremendous time and financial resources from broadcasters; fails to guarantee timely receipt of notice by multichannel video programming distributors (MVPDs) or provide assurance to broadcasters that they completed notice to each MVPD in their markets; and is disconsonant with the Commission’s satellite rules. This regime is imbalanced and ineffective and can be substantially improved and streamlined in today’s digital world. Modernizing the regulations as NAB proposes will significantly minimize the burden faced by broadcasters without shifting it to MVPDs.

**II. THE FCC SHOULD UPDATE THE DEFAULT CABLE ELECTION TO RETRANSMISSION CONSENT, AND IT SHOULD PERMIT BROADCASTERS TO SATISFY THE NOTICE REQUIREMENT BY PLACING ELECTIONS IN ONLINE PUBLIC FILES**

In the Notice, the Commission said it wants to modernize election notices to “minimize the burden on broadcasters, ensure that MVPDs receive the elections in a timely way, and still provide a mechanism by which broadcasters can demonstrate that they met the election deadline with respect to specific cable operators and DBS carriers[.]”<sup>4</sup> The FCC can accomplish all of these goals by changing its rules in two ways: (1) modifying its default so that if a broadcaster fails to make a carriage election for a cable system, it defaults to retransmission consent rather than must-carry, and (2) permitting broadcasters to satisfy the Commission’s notice requirement by placing their carriage elections in online public files.

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<sup>4</sup> Notice at ¶ 26.

## A. Modernizing the FCC's Regulations Will Minimize the Burden on Broadcasters

Broadcasters face a tremendous burden of time, money and risk at both the corporate and station levels when providing notice of their carriage elections.<sup>5</sup> The Commission's own analysis of the time required by the obligation to assert carriage rights and elections indicates that broadcasters' annual burden is 14,840 hours, or 618 days.<sup>6</sup> Though a large figure, this statistic does not capture the full picture of the burden. As the State Broadcasters comments succinctly illustrated, each broadcaster must currently undertake "the time consuming and labor intensive tasks of finding the most up-to-date list of MVPDs covering the counties in the station's market, locating the current addresses for those MVPDs, separately printing and mailing the notices to each MVPD with enough lead time to ensure timely receipt, and to resend those that come back marked 'not at this address.'"<sup>7</sup>

To accomplish these tasks, station groups of various sizes report purchasing data from Nielsen and other services; hiring part-time employees or law firms to sort through the Commission's Cable Operations and Licensing System (COALS) database and cross-reference with designated market area (DMA) and cable headend locations; spending more than \$6 per certified letter; sending 2-3 letters per cable system; and incurring additional expenses to service and process their mailings. A rough estimation of these costs suggests

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<sup>5</sup> See Comments of the National Association of Broadcasters, MB Docket No. 17-105, at 22-23 (July 5, 2017) (NAB Comments).

<sup>6</sup> See Comments of CBS Corporation, The Walt Disney Company, 21st Century Fox, Inc. and Univision Communications Inc., MB Docket No. 17-105, at 11 (July 5, 2017) (Network Comments) (citing *Information Collection Being Submitted for Review and Approval to the Office of Management and Budget*, 81 Fed. Reg. 1627, 1628 (Jan. 13, 2016)).

<sup>7</sup> Joint Reply Comments of the Named State Broadcasters Associations, MB Docket No. 17-105, at 8 (Aug. 4, 2017) (State Broadcasters Comments).

many station groups are spending more than \$1,000 *per station* to complete their carriage elections. Small broadcasters of limited resources particularly suffer under this burden. At the end of that process, broadcasters are still not always confident that they have reached all MVPDs in their markets.

***Uncertainty about what MVPDs are in a given DMA.*** As the Affiliate Associations noted, “there is no central repository for the information necessary to (i) identify local cable systems and satellite providers and (ii) identify current, viable mailing addresses for those operators. Stations expend significant resources every three years identifying which cable systems serve their DMAs and which communities those cable systems serve.”<sup>8</sup> Although the Commission maintains the COALS database, COALS does not delineate by DMA, but rather by county and community. Additionally, broadcasters report that COALS includes out-of-business cable systems and out-of-date addresses for existing systems. As a result, without additional research, COALS does not provide clarity about exactly which cable systems require notice. Therefore, broadcasters either resort to avoiding COALS entirely and paying thousands of dollars for third-party data, including from Nielsen, or they expend significant company or law firm resources to compare information in COALS to other available information, including retransmission consent agreements, trade publications and local franchise authorities.

***Uncertainty about the correct address.*** Even if broadcasters are (mostly) confident that they have curated the correct list of MVPDs in their DMAs, they still suffer from uncertainty about where to send the carriage election. The Commission’s rules state that

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<sup>8</sup> Reply Comments of the ABC Television Affiliates Association, CBS Television Network Affiliates Association, and FBC Television Affiliates Association, MB Docket No. 17-105, at 10 (Aug. 4, 2017) (Affiliate Comments).

each station shall send the notice to “each cable system,” but it does not specify which address is correct.<sup>9</sup> Is the cable headend correct, or should it go to the system’s national headquarters, or to the office that accepts other communications including related to retransmission consent negotiations? In many cases, broadcasters report sending at least two to three letters per system. As commenters previously noted, “due to the difficulty in independently identifying and verifying all of the operators’ cable systems and their addresses, broadcasters are incentivized to send duplicative notices to avoid the severe consequences of making a defective retransmission consent election.”<sup>10</sup>

Broadcasters also frequently have carriage notices returned as undeliverable. As one large broadcast group reported, it receives dozens of returned letters that then require additional research and sending of additional certified letters. Another broadcaster said that it sees a range of issues, including cable operators not checking P.O. boxes, operators listing P.O. boxes as the correct address but failing to update their address after giving up the P.O. box, and changes in addresses as MVPDs are bought and sold.

***The risk of failing to provide adequate notice.*** The risk to broadcasters of failing to provide adequate notice is very significant for both retransmission consent and must-carry stations. Today, the clear majority of commercial stations elect retransmission consent, and the number is likely to increase in the future.<sup>11</sup> These stations cannot afford to lose the ability to negotiate for compensation for MVPDs’ carriage of their valuable signals. Even

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<sup>9</sup> See 47 C.F.R. § 76.64(h).

<sup>10</sup> Network Comments at 11.

<sup>11</sup> See Comments of Nexstar Broadcasting, Inc., MB Docket No. 17-105, at 17 (July 5, 2017); see also State Broadcasters Comments at 6 (“Automatically defaulting to must-carry for cable systems may have made sense when the rules were adopted, but the majority of stations today rely upon retransmission consent rather than must-carry rights.”).

must-carry stations, which under the current regime can technically rely on the cable default to must-carry, can only assert their important cable channel position rights by providing proper carriage election notice.<sup>12</sup> As a recent decision makes clear, the Commission has applied its notice procedures stringently. For example, even in instances where both parties agree that notice was received and that it otherwise conformed to applicable rules, the Commission recently found that if a broadcaster fails to send the election notice via certified mail, its election need not be honored.<sup>13</sup>

**B. Adopting NAB’s Proposal Will Also Achieve the Commission’s Second Goal of Ensuring That MVPDs Receive Elections in a Timely Way**

For the reasons discussed above, the current election system does not provide assurance to MVPDs of timely notice. Broadcasters routinely send the same election to multiple addresses so that carriage elections come to MVPDs in a “piecemeal fashion.”<sup>14</sup> Mail is delivered to different locations on different dates, and MVPDs must sort through those elections and compare notes about which elections were received and which are duplicates. Broadcasters are also frequently uncertain about whether MVPDs actually received the notice, leading to MVPDs receiving follow-up inquiries that may or may not be necessary. Allowing broadcasters to fulfill their notice obligations by placing their elections in

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<sup>12</sup> See 47 CFR § 76.57(e) (“At the time a local commercial station elections must-carry status pursuant to §76.64, such station shall notify the cable system of its choice of channel position . . . . In the event that none of these specified channel positions is available . . . the cable operator shall place the signal of such a television station on a channel of the cable system’s choice, so long as that channel is included on the basic service tier.”).

<sup>13</sup> *In the Matter of Minority Television Project, Inc. Licensee of Noncommercial Television Station KMTP, Channel \*32, San Francisco, California v. DISH Network L.L.C.*, Memorandum Opinion and Order, CSR-8946-M, MB Docket No. 17-313, at ¶¶ 3-4 (rel. Jan. 23, 2018).

<sup>14</sup> Network Comments at 11.

their online public files will provide clear, timely notice to MVPDs and eliminate questions that arise under the current rules.

***NAB's proposal does not shift a large burden to MVPDs.*** It is important to note that NAB's proposal does not shift the significant financial burden faced by broadcasters to MVPDs. Instead, the proposal eliminates that burden. The only shift that occurs under NAB's proposal is that MVPDs would access a website instead of opening a piece of mail.

Before broadcasters' public inspection files moved online, it may have been unreasonable to require MVPDs to look at broadcasters' paper public files to find election notices. At that time, there was a sound argument for why broadcasters should be required to provide written mailed notice. Now, MVPDs have universal access to the internet. As the State Broadcasters argued, requiring broadcasters to place their elections in their online public file and to send them by certified mail is "simply duplicative."<sup>15</sup>

As NAB previously noted, the FCC has taken similar steps to modify paper filing requirements in other regulatory contexts.<sup>16</sup> In fact, in this very proceeding the Commission proposes to permit cable service providers to provide Part 76 electronic notice to their consumers instead of mailed notices.<sup>17</sup> As the then-named National Cable & Telecommunications Association and the American Cable Association (ACA) previously

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<sup>15</sup> State Broadcasters Comments at 7. See 47 C.F.R. § 76.64(h) ("each television broadcast station shall place copies of all of its election statements in the station's public file, and shall send via certified mail to each cable system in the station's defined market a copy of the station's election statement with respect to that operator.).

<sup>16</sup> See NAB Comments at 22-23 (discussing stations' online public files, cable headend location reporting, the CALM Act rules and closed captioning quality rules); see also Network Comments at 12 fn.25 (describing FCC regulations allowing video programming distributors to place information online).

<sup>17</sup> Notice at ¶ 1.

noted, “businesses and customers increasingly prefer the efficiency, effectiveness, and ease of electronic communications.”<sup>18</sup>

Despite its previous stance, ACA now appears to oppose any change to the carriage election rules.<sup>19</sup> Its advocacy, however, perhaps inadvertently illustrates another benefit that NAB’s proposal would provide cable companies. As ACA explained, under the Commission’s current must-carry default, a broadcaster failing to make a timely election has a “statutory right to insist on mandatory carriage . . .”<sup>20</sup> Taking at face value ACA’s claims that its members suffer from significant capacity constraints,<sup>21</sup> any increase in must-carry stations would (allegedly) strain small providers’ resources, as they must be able to know with certainty how many broadcasters they will be required to carry. By flipping the default from must-carry to retransmission consent as NAB proposes, the Commission would alleviate ACA’s stated concern about broadcasters that fail to provide proper notice automatically burdening cable providers by their default to must-carry status. On ACA’s own terms, therefore, ACA’s members are at a greater risk under the current framework than they are under NAB’s proposal: with a retransmission consent default, ACA’s members would be able

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<sup>18</sup> State Broadcasters Comments at 7 (quoting National Cable and Telecommunications Association and American Cable Association, Petition for Declaratory Ruling at 2 (filed March 7, 2016)).

<sup>19</sup> See Reply Comments of the American Cable Association, MB Docket Nos. 17-105, *et al.*, at 15 (Aug. 4, 2017).

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

<sup>21</sup> See, e.g., Joint Reply Comments of The American Cable Association *et al.*, MB Docket No. 16-41, at 12 (Feb. 22, 2017) (bemoaning that “capacity constraints are real,” and broadcasters “enjoy[] MVPD carriage guaranteed by law—no matter how original or unwanted its product may be); Comments of American Cable Association, GN Docket N. 16-142, at iv (May 9, 2017) (“Concerns about capacity resonate with small and medium-sized MVPDs, many of whom are ‘channel locked’ and none of whom have capacity to spare.”).

to deny carriage to broadcasters if a retransmission consent agreement is not reached due to capacity constraints, rather than having to comply with a must-carry mandate.<sup>22</sup>

**C. NAB's Proposal Would Fulfill the Commission's Third Goal: Providing a Mechanism for Broadcasters to Clearly Demonstrate That They Met the Election Notice Deadline**

As the Affiliate Associations bluntly stated, under the current rules, "there is no way for a station to know with certainty if they have found and reached out to every operator."<sup>23</sup> In other words, broadcasters do not have a mechanism to clearly demonstrate that they met the election notice deadline. This is a result of the challenges described above and the fact that the current rule requires action by both the broadcaster and the MVPD: the broadcaster must send the notice, and the MVPD must complete return receipt.

When the Commission adopted these rules, it believed that certified mail was the preferred method because it would allow broadcasters to demonstrate compliance.<sup>24</sup> In practice, the system creates uncertainties. Delivery receipts are not always returned. In fact, one broadcaster reported that, in the most recent round of carriage elections not a single return receipt came back from a large MVPD, and every letter was reflected as undelivered. When the broadcaster contacted the MVPD, the MVPD assured the broadcaster that it had in fact received all of the letters. This confusion would be eliminated by allowing broadcasters to fulfill their notice obligations by placing their elections in their online public files.

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<sup>22</sup> What goes unsaid in ACA's comments is the more likely incentive for supporting the current framework: ACA would rather obligate cable operators to carry more broadcast channels for free than be required to pay for the broadcast signals they sell to their customers.

<sup>23</sup> Affiliate Association Comments at 10-11.

<sup>24</sup> See Notice at ¶ 25 (quoting *Implementation of the Satellite Home Viewer Improvement Act of 1999: Broadcast Signal Carriage Issues*, Order on Reconsideration, 16 FCC Rcd 16544, 16576, para. 65 (2001)).

Under NAB’s proposal, broadcasters would be able to demonstrate that they met the deadline as soon as their elections are posted to their online public files, providing much-needed immediate assurance. As the State Broadcasters explained, placing the elections in stations’ online public files is “instant and more reliable than depending on every broadcaster to have the most up-to-date address for every cable and satellite system serving their market, and online postings are not susceptible to getting lost in transit or delivery refusals.”<sup>25</sup>

NAB’s proposal would also increase certainty for MVPDs. Rather than wondering whether any letters were postmarked by October 1 but delayed in transit, MVPDs would be able to rely on time stamps in the FCC’s online public inspection file.

For these reasons, the Commission should not adopt AT&T’s proposal to permit broadcasters to use “express mail delivery service” instead of certified mail.<sup>26</sup> This would not address the shortcomings of the current system. Additionally, AT&T presumably is referring to “Priority Mail Express,” which starts at \$21.98 per envelope, or “Priority Mail,” which starts at \$6.35 per envelope.<sup>27</sup> Neither of these options would reduce broadcaster costs – in fact the Priority Mail Express option would cost nearly four times as much per

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<sup>25</sup> State Broadcasters Comments at 8. These concerns demonstrate the benefits of online placement over verified email addresses as the Commission tentatively proposed. See Notice at ¶ 26. When the election is placed online, broadcasters can immediately confirm whether the election posted and therefore, know whether MVPDs will have access to the election. Using verified email addresses would still require broadcasters to go through almost the entire exercise outlined above to hunt and peck for every MVPD located in their markets, and it would still lead to and double- and triple-checking that the election was received by the correct entity.

<sup>26</sup> See Reply Comments of AT&T, MB Docket No. 17-105, at 5-6 (Aug. 4, 2017).

<sup>27</sup> See USPS Postage Rates (last accessed Feb. 8, 2018) available at: <https://www.stamps.com/usps/current-postage-rates/>.

letter as certified mail– and they would still require that broadcasters jump through all the hoops to track down MVPDs and their current addresses.

**D. In Addition to Achieving the Commission’s Stated Goals, NAB’s Proposal to Modify the Cable Default Election Would Also Standardize Cable and Satellite Carriage Elections and Better Reflect Marketplace Dynamics**

The Commission’s satellite regulations already default to retransmission consent in the event a broadcaster fails to make a carriage election.<sup>28</sup> Modifying the cable regulations to a retransmission consent default would standardize cable and satellite, thereby simplifying the carriage election process and reducing the chance that a broadcaster would inadvertently violate the election rules.<sup>29</sup>

Changing the default to retransmission consent also appropriately aligns the election process with marketplace dynamics. At its core, retransmission consent allows MVPDs to retransmit broadcast signals to their subscribers in exchange for subscription fees. MVPDs have an inherent and demonstrated interest in being able to retransmit broadcast signals with as little effort and as little cost as possible.<sup>30</sup> The idea that broadcast groups must

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<sup>28</sup> 47 C.F.R. § 77.66(d)(1)(v).

<sup>29</sup> When the Commission adopted its original carriage election regulations in 1993, it noted a concern about incentivizing broadcasters to make their carriage election rather than simply relying on the default election. See 8 FCC Rcd 2965, 3002 (1993). By dramatically reducing the burden to broadcasters to make an affirmative election, NAB’s proposal to place the election in online public inspection files would help assure that broadcasters continue to make a timely affirmative election.

<sup>30</sup> In addition to objecting to the payment of compensation to broadcasters, MVPDs have also complained about the number of TV stations electing retransmission consent and the costs of negotiating with those stations. See, e.g., Comments of AT&T, MB Docket No. 15-216, at 5-6 (Dec. 1, 2015) (recalling that when MVPDs and broadcasters first started negotiating for retransmission consent agreements, negotiations “typically resulted in cable providers carrying the local broadcaster – and perhaps additional affiliated channels – for free.”); Reply Comments of Time Warner Cable Inc. (TWC), MB Docket No. 05-28, at 1, 3, 5 (Mar. 31, 2005) (complaining about the “sizable transaction costs of negotiating, concluding, and administering retransmission consent agreements with literally hundreds of broadcasters both large and small.”).

spend tens of thousands of dollars and dozens of hours every three years to more easily enable MVPDs – broadcasters’ competitors – to get stations’ signals and sell them to their customers is absurd.

### **III. THE COMMISSION HAS THE AUTHORITY TO MODIFY CARRIAGE ELECTION REGULATIONS AND TO ADOPT NAB’S PROPOSAL**

In the 1992 Cable Act, Congress directed the FCC to commence a rulemaking to establish regulations to govern broadcasters’ exercise of retransmission consent and to require that television stations every three years “make an election” between retransmission consent and must-carry.<sup>31</sup> Congress did not speak to any default election or more generally to what should happen in the event a broadcaster fails to make an election. Congress also did not speak to any notice requirement. The Commission therefore acted appropriately in 1993 when it adopted a default election and required broadcasters to provide notice to MVPDs, and it can now lawfully modify both of these regulatory requirements. NAB’s proposal does not in any way conflict with the statutory requirement that broadcasters make an election every three years but seeks only to modify the Commission’s regulations as to the details of how these elections are made.<sup>32</sup> For these reasons explained above, the Commission would be fully justified in modifying its election and notice rules.

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<sup>31</sup> See Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, §6, 106 Stat. 1482, 1482-83 (codified as amended 47 U.S.C. § 325(b)(3)(B)).

<sup>32</sup> The FCC may change its rules if it provides a “reasoned analysis” to justify the change. See *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 57 (1983). Given that the 1992 Cable Act is silent with respect to the details of carriage elections, here the only question is whether the FCC’s rules are based on a permissible construction of the 1992 Act. See *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 843 (1984). Rules implementing NAB’s proposal would meet that standard. See also *Natl Ass’n of Telcoms. Officers & Advisors v. Fed. Commun. Comm’n*, 862 F.3d 18 (D.C. Cir. 2017) (upholding FCC’s switching of a regulatory presumption in light of Congressional silence).

#### IV. CONCLUSION

NAB's proposal does not aim to shift a burden from broadcasters to MVPDs, but to recognize that the existing framework is unduly onerous for broadcasters and that a better approach is possible. For these reasons, NAB requests that the Commission modify the default cable election to retransmission consent and permit all broadcasters to satisfy their election notification requirement by placing the elections in stations' online public files.

Respectfully submitted,

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