

**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)	

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

The National Association of Broadcasters (NAB)¹ hereby responds to the Commission’s Public Notice regarding a joint proposal submitted to the FCC by NAB and NCTA – The Internet and Television Association concerning broadcaster carriage election processes.² The record reflects near-universal support for the proposal to modernize the FCC’s rules. The Commission should adopt the proposal without delay and should apply it to all carriage election notices that broadcasters must send to multichannel video programming distributors (MVPDs), including cable operators and direct broadcast satellite (DBS) providers.

¹ 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.

² See *Comment Sought on Joint NAB/NCTA Carriage Election Notice Proposal – In re: Electronic Delivery of MVPD Communications, Modernization of Media Regulation Initiative*, Public Notice, DA 18-1250 (*rel.* Dec. 13, 2018) (Public Notice); See also Letter from Rick Kaplan, General Counsel and Executive Vice President, NAB, and Rick Chessen, Chief Legal Officer, NCTA, to Marlene H. Dortch, MB Docket Nos. 17-317, 17-105 (Dec. 7, 2018) (Joint Proposal Letter).

I. THE RECORD OVERWHELMINGLY SUPPORTS ADOPTION OF THE NAB/NCTA PROPOSAL

NAB and NCTA collaborated to craft a proposal that addresses the three concerns raised by the FCC in its initial rulemaking notice about the carriage election notification requirements³: (1) minimizing the burden to broadcasters, (2) ensuring that MVPDs receive elections in a timely way and (3) providing a mechanism for broadcasters to clearly demonstrate that they met the election notice deadline.⁴ NAB's and NCTA's proposal, which would continue to obligate broadcasters to place elections in their online public files but would require a broadcaster to notify a cable operator only if the broadcaster changes its election, resolves these issues. The proposal does so without increasing burdens on any party. NAB thanks NCTA for its efforts to reach a balanced solution in this proceeding.

Nearly every commenter responding to the Public Notice supports the proposal, including commercial and non-commercial broadcasters⁵ and (to a qualified extent) small cable operators.⁶ As the broadcast commenters note, the proposal embodies a "spirit of

³ See *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) (Rulemaking Notice).

⁴ Comments of NAB, MB Docket Nos. 17-317, 17-105, at 3-11 (Feb. 15, 2018) (discussing the ways that the FCC's current rules do not address these concerns) (NAB Comments).

⁵ See Letter from Joshua N. Pila, General Counsel, Meredith Corp.'s Local Media Group, to Marlene Dortch (MB Docket No. 17-317) (Jan. 28, 2019) (Meredith Letter); Letter from John R. Feore, Counsel to ION Media Networks, Inc., to Marlene H. Dortch, Esq., MB Docket No. 17-317 (Jan. 17, 2019) (Ion Letter); Comments of Nexstar Broadcasting, Inc., MB Docket Nos. 17-317, 17-105 (Jan. 7, 2019) (Nexstar Comments); Comments of the ABC Television Affiliates Association, CBS Television Network Affiliates Association, FBC Television Affiliates Association, NBC Television Affiliates Association, CBS Corporation, 21st Century Fox, Inc., NBC Universal Media LLC, and Walt Disney Company, MB Docket No. 17-317 (Jan. 7, 2019) (Affiliates and Networks Comments).

⁶ Comments of American Cable Association, MB Docket Nos. 17-317, 17-105, at 3 (March 18, 2019) (noting its support for the "general framework" of the proposal) (ACA Comments).

cooperation”⁷ that will greatly reduce “administrative and paperwork burdens,”⁸ and take “hundreds of letters . . . to handfuls,”⁹ without imposing new burdens on any party. As NAB previously detailed, today’s rules impose significant regulatory burdens on broadcasters, yet fail to provide certainty to either broadcasters or MVPDs that notice was properly executed.¹⁰ Modernizing these rules will greatly reduce the resources that broadcasters must expend every three years and will provide greater certainty to all parties involved while not saddling MVPDs with additional burdens. As ION stated, this proposal will allow broadcasters and MVPDs to “spend less time making, checking, and disputing carriage elections and more time producing a better product for television viewers and cable consumers.”¹¹

The NAB/NCTA proposal also addresses concerns raised by several public broadcasting organizations. As these commenters noted, noncommercial educational television stations cannot elect retransmission consent, yet per the FCC’s rules they must “elect” mandatory carriage for satellite providers every three years via certified mail.¹² There is no reason to limit the proposal’s application to only commercial broadcasters, and no one in the record has suggested doing so. The FCC should allow noncommercial broadcasters to benefit from a modernized notice regime, including by no longer requiring them to “elect” mandatory carriage every three years for satellite providers.

⁷ Affiliates and Networks Comments at 2.

⁸ ION Letter at 1.

⁹ Meredith Letter at 1.

¹⁰ NAB Comments at 3-11.

¹¹ ION Letter at 1.

¹² See Comments of America’s Public Television Stations, Corporation for Public Broadcasting, and Public Broadcasting Service, MB Docket No. 17-317, at 1 (Jan. 29, 2019).

II. THE COMMISSION SHOULD, WITHOUT DELAY, ADOPT A UNIFORM APPROACH THAT APPLIES TO ALL MVPDS

No party opposes NAB/NCTA's proposal in its entirety, although three commenters take issue with various aspects of the proposal. DIRECTV and DISH argue that the proposal should apply only to cable operators,¹³ and ACA supports the general framework but has additional requests.¹⁴ The Commission should reject these arguments and untimely requests. It should adopt the proposal without delay and apply it to all MVPDs.

A. The NAB/NCTA Proposal Should Apply to All MVPDs

While the proposal speaks only to the notices broadcasters must provide to cable operators,¹⁵ the Commission should apply this proposal to all MVPDs. Having two sets of rules will only confuse the carriage election process and make it more difficult for broadcasters to ensure they have provided proper notice to all relevant MVPDs. Further, there is no sound justification for treating certain MVPDs differently.

The DBS providers speak in platitudes about how the proposal "fails to take into account the differences between cable and DBS operators," and how a system based on email notifications is unworkable for DBS.¹⁶ To be clear, in the event a broadcaster changes its election, it will be required to notify all relevant MVPDs, including DBS operators, and all broadcasters will be required to provide carriage election contact information on the first page of their public files.¹⁷ It also strains credulity for companies with market capitalizations

¹³ See Joint Comments of DIRECTV, LLC and DISH Network L.L.C. In Response to Public Notice, MB Docket No. 17-317 (Mar. 18, 2019) (DBS Comments).

¹⁴ See ACA Comments at 2.

¹⁵ As was appropriate, given that neither NAB nor NCTA represent DBS providers.

¹⁶ DBS Comments at 3, 5.

¹⁷ Joint Proposal Letter at 2.

of \$222.25 billion (AT&T, which owns DIRECTV)¹⁸ and \$14.87 billion (DISH)¹⁹ to claim that they are unable to manage one email address and one phone number.²⁰ These companies process payments via the internet totaling billions of dollars and manage customer questions through their email addresses, chat systems, Facebook pages and Twitter handles with little or no problem. NAB has every confidence these corporate giants can make an email address work properly.²¹

Perhaps to bolster their dubious claims of being overburdened, the DBS commenters further erroneously claim that NAB/NCTA's proposal "leaves many critical questions unanswered."²² For instance, the DBS operators ask, "[w]ill a broadcaster be able to change its election *at any time* after 2020, thus causing the three-year election cycles to effectively disappear?"²³ That question is nonsensical. The issue of amending the three-year election cycle has never been raised in this proceeding, and the joint proposal does not implicate that cycle. The satellite providers also ask about the role the Commission will play in

¹⁸ AT&T Inc., Yahoo! Finance, last accessed Mar. 20, 2019.

¹⁹ DISH Network Corporation, Yahoo! Finance, last accessed Mar. 20, 2019.

²⁰ It is also hard to believe that these companies' employees cannot remember to occasionally check an email's spam filter. "Even if DISH's and DIRECTV's systems were to generate an automatic acknowledgment of receipt, that does not mean that their respective personnel successfully received these emails due to corporate spam filters." DBS Comments at 6.

²¹ Even were the Commission to take these implausible concerns at face value, the DBS providers' worry about managing a large volume of emails and phone calls from broadcasters is dramatically overblown. As Nexstar indicated, broadcasters very rarely change their elections. See Nexstar Comments at 2 (noting that "most television broadcasters remain consistent in their carriage election from term to term"). A DBS provider will only receive an email if a broadcaster changes its election, and the phone number is only to be used if that broadcaster has a question after sending its email. It is highly unlikely that the DBS providers will be inundated with emails and/or phone calls.

²² DBS Comments at 8.

²³ *Id.*

“refereeing disputes between broadcasters and DBS providers over proper elections.”²⁴ As DISH well knows, the FCC already referees disputes, and it did so just last year in DISH’s favor.²⁵ Nothing about the joint proposal implicates the substantive role the FCC plays in adjudicating disputes between broadcasters and MVPDs. The FCC should not be distracted by red herring arguments that are not based on the proposal.

Finally, contrary to the DBS providers’ claims that certified mail notification to satellite providers is simple,²⁶ Meredith explained that “[t]he inefficiency of certified mail and the internal mailroom workings of the large multi-faceted DBS conglomerates adds unnecessary delay, confusion, and opportunity for gamesmanship to the process.”²⁷ As broadcasters and MVPDs alike have acknowledged, the current rules encourage broadcasters to send multiple election notices to MVPDs because of the fear of failing to properly provide notice.²⁸ By requiring each MVPD to place in its online public inspection file a single point of contact to receive election notices and to field questions, the joint proposal alleviates a real source of confusion for broadcasters and will greatly increase certainty for all parties.²⁹ Under the proposal, broadcasters will know exactly where to send their election

²⁴ *Id.*

²⁵ See *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 (rel. Jan. 23, 2018).

²⁶ See DBS Comments at 4.

²⁷ Meredith Letter at 2.

²⁸ “Broadcasters routinely send the same election to multiple addresses so that carriage elections come to MVPDs in a ‘piecemeal fashion.” NAB Comments at 6, quoting 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). AT&T also noted that it is “not uncommon” for DIRECTV to receive multiple notices from the same broadcaster. See Reply Comments of AT&T, MB Docket Nos. 17-317, 17-105, at 5 (Mar. 5, 2018).

²⁹ Even if the DBS providers’ worse fear comes true and a question remains about a broadcaster’s election, they have two options: (1) look to the broadcaster’s online public

notices. Even if they do send multiple copies (which NAB doubts), those emails will all be in the same inbox — easily searchable and sortable.

For its part, ACA argues that small cable operators should be treated the same as satellite operators.³⁰ The Commission should not retain outdated rules just because the two satellite providers are resisting change. NAB and NCTA developed a sound approach that will benefit broadcasters and all MVPDs alike. The Commission should adopt this proposal and apply it consistently across MVPDs.

B. The Proposal Should Take Effect for All Providers Beginning with the 2020 Election Cycle

ACA also argues that “small cable systems that are not required to maintain an online public inspection file” should be allowed to have until the 2023 election cycle to comply with any new rules the Commission adopts.³¹ ACA claims this is fair because the proposal “imposes new regulatory obligations on these small providers” without a corresponding benefit.³² The only new regulatory obligation for these operators, however, is to add an email address and phone number to their Cable Operations and Licensing System

inspection file for a copy of the election, or (2) turn to the FCC, which will be copied on every change of election notice. See Joint Proposal Letter at 2 and 4.

³⁰ See ACA Comments (arguing that if satellite providers maintain the certified mail requirement, cable operators should too). ACA also at one point characterizes its position as asking the FCC to “allow cable operators that prefer to continue receiving notices by certified mail to do so” in the event DBS providers continue to receive their notices by certified mail. See ACA Comments at 2 (emphasis added). NAB is completely stumped as to how ACA could consider allowing, for the first time, cable operators to choose how they receive notice, which would exponentially complicate the carriage election process and lead to many more disputes about carriage election notices.

³¹ *Id.* at 4-5. For the 2020 cycle, ACA argues that if a broadcaster cannot find an email address for a small cable operator, or if the broadcaster sends its election notice and does not receive a confirmation of receipt from a cable operator, then the broadcaster must resort to the FCC’s current rules and send a notice to the operator by certified mail. This proposal would significantly complicate the 2020 election cycle.

³² *Id.*

(COALS) profile. These operators are already required by the FCC to keep their COALS data up-to-date.³³ This change is neither burdensome nor unreasonable, and it is not a basis for delaying the applicability of reformed carriage election rules for three more years.

Under ACA's hypothetical timeline for the FCC to complete any needed updates to the COALS database by "the beginning of 2020 or beyond," ACA complains that small cable operators will have "just a few months at most to update their information in COALS."³⁴ Even assuming that ACA's speculative timeline is correct, it is absurd to think that businesses, even smaller ones, would not be able to add an email address and phone number to a single electronic file within a few months. If ACA's concern is that its small operators may not learn about any new obligation in a timely manner, nothing prohibits ACA from starting immediately to alert its members about upcoming regulatory changes. With the proposed deadline for entering updated contact information currently more than 18 months away, ACA should have plenty of time to make sure small cable operators know the rules.

C. The FCC Should Not Delay Consideration of the Proposal for the Sake of Considering ACA's 11th Hour Requests

Finally, ACA makes an 11th-hour request that the FCC "simultaneously consider" several changes related to other types of notices that cable operators must send to broadcasters via certified mail.³⁵ NAB currently takes no position on the substantive merits of ACA's proposals. Rather, NAB observes that, under the Administrative Procedure Act (APA), the Commission cannot simultaneously consider the changes ACA proposes, and it should not allow this last-minute maneuvering to further delay much-needed reform.

³³ See 47 C.F.R. § 76.1610.

³⁴ ACA Comments at 5-6.

³⁵ See *Id.* at 2, 7.

ACA's additional proposals can be characterized in one of two ways: either a cynical attempt to impede the success of a proposal that it previously agreed to and purportedly continues to support,³⁶ or an earnest but uninformed belief that the FCC can change its regulations on a whim. On the chance ACA believes the latter, NAB offers a brief explanation as to why the FCC may not consider ACA's proposals under the current Rulemaking Notice.

ACA failed to raise its additional issues with the FCC during either the broad media modernization proceeding or this narrower proceeding on electronic delivery of MVPD communications. In fact, ACA first raised these issues for the Commission's consideration on December 19, 2018, more than nine months after the reply comment deadline closed for this proceeding on March 2, 2018.³⁷ As a result of ACA being twice late to the game, the FCC did not provide any conceivable notice of ACA's brand new proposals in the current proceeding's Rulemaking Notice. Under the APA, an agency's rulemaking notice must "provide sufficient factual detail and rationale for the rule to permit interested parties to comment meaningfully."³⁸ The FCC cannot, consistent with the APA, adopt any of ACA's proposals at this time, even if it is inclined to do so. Should the FCC decide to consider ACA's

³⁶ In September 2018, NAB joined NCTA and ACA for a meeting with the Media Bureau to talk about the proposal framework. See Letter from Rick Chessen, NCTA to Marlene H. Dortch, MB Docket Nos. 17-317, 17-105 (Sept. 17, 2018). At the time, all three trade associations told the Bureau that they supported allowing broadcasters to maintain their desired status from a previous election and to provide notice to cable operators only in the case that the broadcaster was changing its election. The parties agreed to continue working through the details of that framework and to submit a fully-developed proposal to the FCC.

³⁷ See Letter from Mary C. Lovejoy, Vice President of Regulatory Affairs, American Cable Association, to Marlene H. Dortch, MB Docket Nos. 17-317, 17-105 (Dec. 19, 2018). See Public Notice, *Comment Deadlines Set for Notice of Proposed Rulemaking to Update MVPD Subscriber Notification Rules and Broadcaster Carriage Election Procedures*, MB Docket Nos. 17-317, 17-105 (Jan. 18, 2018).

³⁸ *U.S. Telecom Ass'n v. FCC*, 825 F.3d 674, 700 (D.C. Cir. 2016) (citations omitted). 5 U.S.C. § 553(b)(3) (notice must include either the "terms or substance of the proposed rule" or a "description of the subjects and issues involved").

proposals, it may only do so via a further notice of proposed rulemaking. NAB would address the merits of ACA's proposals at that time. The FCC should not reward ACA's "but wait, there's more" behavior by delaying the consideration and adoption of the joint proposal.³⁹

III. CONCLUSION

NAB greatly appreciates the efforts of NCTA to develop a joint carriage election notice proposal that will benefit broadcasters and MVPDs alike. The NAB/NCTA proposal represents an important step in modernizing rules sorely out of date in today's digital environment. NAB urges the Commission to act without delay to adopt the joint proposal for all carriage election notices that broadcasters must send.

Respectfully submitted,

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³⁹ ACA further tries to justify its untimely requests by arguing that it is only fair for cable operators to receive the benefit of email notices if broadcasters do. See ACA Comments at 8. While that argument might make sense for toddlers, NAB observes that, in this very proceeding, the FCC has already provided relief to cable operators on multiple types of subscriber communications. See *Report and Order and Further Notice of Proposed Rulemaking*, Electronic Delivery of MVPD Communications, Modernization of Media Regulation Initiative, MB Docket Nos. 17-317, 17-105 (*rel.* Nov. 16, 2018).