

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”)
)
)

COMMENTS OF
THE NATIONAL ASSOCIATION OF BROADCASTERS

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February 26, 2024

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I. INTRODUCTION AND SUMMARY

The National Association of Broadcasters (NAB)¹ submits these comments regarding the FCC’s proposal to require multichannel video programming distributors (MVPDs) to notify the Commission when a broadcast signal is unavailable via an MVPD service for 24 hours or more due to a breakdown in retransmission consent negotiations. Under the proposal, such notifications would be made using a Commission-hosted database.²

For the reasons discussed below, the Commission should not adopt its proposal. First, the proposal exceeds the FCC’s very limited authority relating to retransmission consent under the Communications Act of 1934 (Act). The proposed requirements also do not fit within the FCC’s authority to regulate the customer service or public interest obligations of certain MVPDs. Moreover, because the proposed requirements do not appear to serve any discernible

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.

purpose, they would violate the Administrative Procedure Act (APA) and the Paperwork Reduction Act of 1995 (PRA). Finally, given that much of the pay TV industry's advocacy before Congress and the Commission is entirely dependent upon highlighting (i.e., generating) disputes with broadcasters, NAB anticipates that the creation of this database will, if anything, incentivize *more* retransmission consent impasses, rather than reducing them. Accordingly, we urge the Commission not to adopt the proposed reporting requirement or host the related database.

II. ADOPTION OF THE PROPOSED REPORTING REQUIREMENTS IS BEYOND THE COMMISSION'S STATUTORY AUTHORITY AND CONTRARY TO THE ADMINISTRATIVE PROCEDURE ACT

A. Section 325 of the Act Does Not Authorize Adoption of the Proposed Rule

As the Commission acknowledges in the Notice and in many other prior actions, its role with respect to retransmission consent negotiations is extremely limited. The prices, terms, and conditions of retransmission consent agreements are intended by Congress to be established through arms-length, marketplace negotiations, subject only to a requirement that both broadcasters and MVPDs negotiate in good faith. The Commission has authority to adopt rules governing good faith negotiations and adjudicate complaints of violations of those rules,³ but that is the extent of its involvement in the retransmission consent negotiation process.⁴ As the Commission has observed, in directing it to adopt rules governing good faith negotiations, Congress did not “contemplate an intrusive role for the Commission with regard to retransmission consent” or “grant the Commission authority to impose a complex and

³ Notice at ¶ 5 (discussing the FCC's good faith rules and complaint process). See *also* 47 C.F.R. § 76.65.

⁴ Notice at ¶ 6 (“Congress has not, however, authorized the Commission to require that parties resolve retransmission consent disputes with carriage agreements, or force carriage in the absence of an agreement.”).

intrusive regulatory regime” or “intend the Commission to sit in judgment of the terms of every retransmission consent agreement executed between a broadcaster and an MVPD.”⁵ The FCC’s limited role with respect to retransmission consent negotiations ensures that the resulting agreements reflect marketplace conditions and not government intervention, as Congress intended.

Because the Commission lacks authority to involve itself in retransmission consent negotiating impasses beyond adjudicating any good faith complaints that may be filed, it cannot require the parties to remain at the negotiating table, mandate arbitration, or take any other steps that would interfere with negotiations.⁶ Although MVPDs have repeatedly proposed that the Commission insert itself in retransmission consent negotiations in ways that contravene the statute, such as urging the Commission to mandate “interim” carriage during negotiating impasses, the Commission has explained unequivocally that it has no authority to take such steps.⁷

⁵ *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 ¶¶ 13, 23 (2000) (“Good Faith Order”).

⁶ NAB understands that FCC staff sometimes make inquiries of the MVPDs and broadcasters involved in a negotiation impasse resulting in a disruption in signal carriage and that parties may choose to respond to such inquiries and/or initiate updates to FCC staff. Such informal, voluntary exchanges of information have no bearing on the FCC’s authority to require specific information or updates. If anything, such Commission requests are complied with because of the FCC’s authority over many *other* aspects of broadcast operations.

⁷ Notice at n. 15, *citing Amendment of the Commission’s Rules Related to Retransmission Consent*, Notice of Proposed Rulemaking, 26 FCC Rcd 2718, 2720, ¶ 3 (2011) (“The Commission does not have the power to force broadcasters to consent to MVPD carriage of their signals nor can the Commission order binding arbitration.”); *id.* at 2728, ¶ 18 (“[R]egarding interim carriage, examination of the Act and its legislative history has convinced us that the Commission lacks authority to order carriage in the absence of a broadcaster’s consent due to a retransmission consent dispute. . . . We thus interpret section 325(b) to prevent the Commission from ordering carriage over the objection of the broadcaster, even upon a finding of a violation of the good faith negotiation requirement.”); Good Faith Order, 15

Given the very limited role Congress established for the Commission with respect to retransmission consent negotiations, the purpose of the proposed reporting requirements is unclear. The Commission cannot use the information to take any additional steps with respect to a negotiating impasse or to require the relevant parties to take any such steps. The Notice suggests that it would be “beneficial” to the Commission to have this information, but does not explain how the Commission could or would use the information.⁸ The Notice observes that members of Congress “regularly ask the Commission for information” about disruptions when they occur.⁹ But a database is not necessary to respond to such an inquiry. For example, an accurate, complete, and non-controversial response to such an inquiry would be to explain that the FCC’s only role with respect to retransmission consent, as directed by Congress, is to adopt good faith negotiation rules and adjudicate good faith complaints, and does not extend to monitoring the progress of specific negotiations or tracking stalled negotiations.¹⁰ The Notice also states that information on disruptions “would be beneficial to the Commission’s

FCC Rcd at 5471 ¶ 60 (“[W]e see no latitude for the Commission to adopt regulations permitting retransmission during good faith negotiation or while a good faith or exclusivity complaint is pending before the Commission where the broadcaster has not consented to such retransmission.”).

⁸ Notice at ¶ 11.

⁹ *Id.*

¹⁰ This suggested response is nearly identical to a written response sent to multiple members of Congress. See Letters from Chairwoman Rosenworcel to Senators Reed and Whitehouse and Representatives Cicilline and Langevin (Nov. 1, 2022). Of the 192 letters from members of Congress that have received a response from Chairwoman Rosenworcel and that are shown on the FCC’s Legislative Affairs web page, this appears to be the only response concerning a retransmission consent-related signal carriage disruption. FCC, Legislative Affairs, Chairwoman Rosenworcel’s Letters to Congress, *available at* <https://www.fcc.gov/chairwoman-rosenworcel-letters-congress> (viewed Feb. 23, 2024). NAB is also aware that on very rare occasions, Congressional letters do not receive written responses and that other Congressional inquiries may be made through less formal means than publicly available letters.

efforts to keep abreast of” their impact on viewers, local broadcasting, and MVPD service.¹¹ It is again unclear what benefit this data could possibly yield, given the FCC’s lack of authority to intervene in retransmission consent negotiations.

The proposed reporting requirements and related Commission database are not required by the statute and do not fall within the Commission’s narrow authority relating to retransmission consent negotiations. The proposal would merely gather information for the sake of having information, with no identifiable next steps for that information. Collecting and publicizing this kind of information do constitute independently valid regulatory goals. Indeed, information collection, by itself, without any identified, legally permissible, and beneficial use for that information, is not an appropriate exercise of regulatory authority and would violate the APA.¹² The proposal also would result in an information collection that violates the PRA because it is not necessary to a Commission function and has no practical utility.¹³ Accordingly, NAB urges the Commission not to adopt the reporting requirements.¹⁴

¹¹ Notice at ¶ 20.

¹² See, e.g., *Trailer Marine Transport. Corp. v. Fed. Mar. Comm’n*, 602 F.2d 379, 398 (D.C. Cir. 1979) (an agency must “establish a basis to determine the relevance of the information to agency action and the reasonableness of the agency request . . . [R]epeated assertions of a ‘need to know,’ with little more, cannot suffice.”).

¹³ The PRA requires information collections mandated by the Commission to be “necessary for the proper performance of the functions of the Commission” and for the information collected to have “practical utility.” 44 U.S.C. § 3508. The term “practical utility” is defined as “the ability of an agency to use information, particularly the capability to process such information in a timely and useful fashion.” 44 U.S.C. § 3502(11). See, e.g., Notice of Office of Management and Budget Action, OMB Control No. 3060-0568 (Jul. 7, 2008) (disapproving proposed revisions to an existing information collection due, in part, to the FCC’s failure to demonstrate the practical utility and need for an increased number of inquiries).

¹⁴ Should the Commission proceed with the reporting requirement, NAB urges the Commission not to impose a reporting requirement on broadcasters. Notice at ¶¶ 13-15. We agree that it would be less burdensome for affected MVPDs to make the proposed reports. *Id.* at ¶ 13. NAB supports allowing broadcasters to voluntarily provide information on disruptions

B. Sections 632 and 335 of the Act Do Not Authorize Adoption of the Proposed Rule

The Commission also cites Sections 632(b) and 335(a) of the Act as potential sources of authority for the reporting requirements.¹⁵ It is not clear how the proposed reporting or related database relates to cable customer service obligations or DBS public interest obligations. As the Notice observes, cable operators already are required to notify their subscribers of negotiating impasses that affect their access to programming on cable,¹⁶ thus making the proposal “unnecessarily duplicative” under the PRA, at least with regard to cable.¹⁷

Even though there would be no benefit to subscribers who may not receive a particular channel due to a specific negotiating impasse (and who in all likelihood would already be aware of that fact), the Notice suggests that the proposed regime would help *all* consumers make more informed MVPD service choices by reporting on pay TV providers’ history of retransmission consent impasses.¹⁸ It is hard to fathom that the database contemplated by the Notice would effectively serve this function, in part because it will likely contain both too

in service when or if they believe it is appropriate or necessary to correct erroneous information from an MVPD. *Id.* at ¶ 15.

¹⁵ Notice at ¶ 32 (“Under section 632(b), the Commission can adopt customer service requirements for cable operators. And, pursuant to section 335(a), the Commission has authority to impose on DBS providers public interest requirements for ‘providing video programming,’ which we tentatively conclude includes reports on video programming blackouts.”).

¹⁶ Notice at n. 30, *citing* 47 C.F.R. § 76.1603(b) (“Section 76.1603 provides that cable operators must notify their subscribers “as soon as possible” when service changes occur due to failed retransmission consent or program carriage negotiations”).

¹⁷ 44 U.S.C. § 3506(c)(3)(B) (requiring agencies to certify that information collections are “not unnecessarily duplicative of information otherwise reasonably accessible to the agency”). A non-duplicative alternative would be extending the existing cable requirement to other MVPDs.

¹⁸ Notice at ¶ 12 (“having aggregate data about blackouts may be a useful metric for consumers looking for a new MVPD service provider”).

much information and not enough. Most consumers have a choice of only three facilities-based MVPDs (DISH, DIRECTV, and a cable provider), although a few have a fourth option (such as Verizon Fios TV).¹⁹ Even though service disruptions are rare, a database with information on pay TV providers from markets all over the country would not seem to be an efficient way for a consumer to learn more about providers of MVPD service available to them.²⁰ Moreover, NAB knows of no research that suggests consumers would even look to the FCC's website, of all places, for information on choosing MVPD providers.

While the database would contain information about numerous MVPDs that aren't even available to a particular consumer, it also would be lacking relevant information, because the database would focus exclusively on disruptions involving broadcast stations and disregard all other programming disruptions. For example, perhaps some MVPDs have been involved in zero disruptions affecting broadcast stations, but are frequently involved in disputes with other program providers. An FCC database showing that an MVPD has had no broadcast disruptions could give a consumer a false impression of reliability when, in fact, some of that consumer's favorite programming appears on a regional sports network or other nonbroadcast network that has been off the MVPD's channel lineup for months. And this dubiously assumes it would ever occur to any consumer to check the FCC's website for this information.

¹⁹ *Communications Marketplace Report*, GN Docket No. 22-203, FCC 22-103, at ¶ 217 (rel. Dec. 30, 2022) (“most consumers have access to one cable MVPD and two DBS MVPDs, and some consumers additionally have access to a telephone company MVPD”).

²⁰ NAB is unsure of how the database would be organized, but if information was available on the basis of a particular Nielsen Designated Market Area, that would not be geographically granular enough for the information to be relevant. In most instances, a consumer must offer a precise address to learn whether an MVPD offers service to their home.

The proposed database does not appear relevant to any consumer-focused or other public interest objective. Accordingly, it cannot be justified under Sections 632 or 335 of the Act. As the proposed rule appears unconnected to any valid purpose, its adoption also would be arbitrary and capricious in contravention of the APA.

III. THE PROPOSED REPORTING REQUIREMENT MAY INCREASE THE LIKELIHOOD OF NEGOTIATING IMPASSES THAT LEAD TO DISRUPTIONS IN CARRIAGE

As NAB has discussed in other proceedings and as the Commission itself has observed, the pay TV industry has opposed the very concept of retransmission consent from its inception.²¹ For many years, the industry uniformly refused to provide monetary compensation for retransmission consent.²² Later, the battleground shifted to seeking regulatory and legislative change to further advantage pay TV providers in negotiations with broadcasters.²³ Pay TV's most compelling "evidence" of a need to "reform" retransmission consent laws and rules became the rare retransmission consent negotiation impasse.²⁴ The

²¹ NAB Comments, MB Docket No. 23-405 (Feb. 5, 2024) (NAB Junk Fee Comments) at 2-5; NAB Reply Comments, GN Docket No. 22-203 (Aug. 1, 2022) at 34-35; 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) (2005 SHVERA Report) at ¶ 10.

²² NAB Junk Fee Comments at 2-3; 2005 SHVERA Report at ¶ 10; GAO, *Issues related to Competition and Subscriber Rates in the Cable Television Industry*, GAO-04-8 at 43 (Oct. 2003) ("few retransmission consent agreements include cash payment for carriage of the local broadcast station").

²³ NAB Junk Fee Comments at 3-5.

²⁴ *Id.* Multiple studies examining retransmission consent impasses over the course of a decade found that interruptions in broadcast signal carriage affect a truly miniscule amount of total consumer viewing hours. See, e.g., NAB Written Ex Parte Communication, MB Docket No. 15-216 (Feb. 8, 2016), attaching Mark R. Fratrik, Ph.D., BIA Kelsey, *Updated Analysis of Carriage Interruptions on Viewing Hours: 2011-2015* (Feb. 3, 2016) (retransmission consent-related interruptions impacted, on average, only 0.01486 percent of television viewing hours annually from 2011-2015); Jeffrey A. Eisenach, *The Economics of Retransmission Consent*, Empiris, LLC (March 2009) at 39-40, attached to NAB Reply Comments, MB Docket No. 07-

pay TV industry's heavy reliance on retransmission consent disputes to bolster its regulatory and legislative strategy has created a disincentive for MVPDs to stay at the negotiating table. Because negotiations require both parties to be truly willing to reach agreement, pay TV provider cries of an "increasing" number of disputes easily became a reality of their own making.²⁵

During a retransmission consent dispute, broadcast stations face immediate financial repercussions from reductions in ratings and ad revenues while their signals are no longer carried, in addition to the absence of retransmission consent compensation from that MVPD. Yet pay TV providers involved in disputes are (at least in the short term) largely insulated from any economic harm and, instead, may reap benefits. They continue to sell programming packages to new consumers that advertise the availability of broadcast signals; continue to tack on "broadcast TV fees" to packages that are marketed as already including broadcast

269 (June 22, 2009) (interruptions from 2006-2008 affected less than one one-hundredth of one percent of annual household television viewing hours); Jeffrey A. Eisenach and Kevin W. Caves, *Retransmission Consent and Economic Welfare: A Reply to Compass Lexecon* (April 2010) at 19-20, attached to Opposition of Broadcaster Associations, MB Docket No. 10-71 (May 18, 2010) (an update to the previous study showed that interruptions affected approximately one one-hundredth of one percent of annual television viewing hours); NAB Comments, MB Docket No. 10-71 at Attachment A, Declaration of Jeffrey A. Eisenach and Kevin W. Caves at 30-31 (May 27, 2011) (share of total viewing hours affected by retransmission impasses remained approximately one one-hundredth of one percent).

²⁵ NAB Junk Fee Comments 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.").

signals;²⁶ continue to charge subscribers for programming they do not receive;²⁷ and can count on their subscribers not canceling service or switching providers because of early termination fees. A disruption may even have a positive economic effect on an MVPD because it is not paying retransmission consent fees but is still raking in “broadcast TV fees” from subscribers.²⁸

Given the pay TV industry’s ongoing strategy of seeking to make the system of retransmission consent appear “broken,” a Commission-hosted database with data on signal carriage disruptions due to retransmission consent disputes would be akin to failing to fence one’s backyard pool on a scorching summer day in a neighborhood full of children. The Commission may find that it merely has created an “attractive nuisance” that incentivizes more disruptions. To avoid increasing consumer harms, NAB urges the Commission to decline to create any additional disincentives for MVPDs to reach timely, successful retransmission consent agreements.

IV. CONCLUSION

The proposed reporting requirement is beyond the FCC’s authority and would violate both the APA and the PRA because it would not serve any discernible purpose. Moreover, the proposed Commission-hosted database may create disincentives to successful negotiations by MVPDs that believe disruptions in signal carriage advance their regulatory and legislative

²⁶ See, e.g., Letter from Rick Kaplan, NAB to Marlene Dortch, FCC, MB Docket Nos. 18-349, 22-459, 23-203, and 23-405 (Dec. 1, 2023) at Attachment D.

²⁷ See, e.g., Petition for Declaratory Ruling, Enforcement Order, and Further Relief of Crescent City, MB Docket No. 18-101 (April 4, 2018) (discussing Charter Communications’ continued billing of a monthly broadcast TV fee even while certain broadcast programming was not available to Charter subscribers).

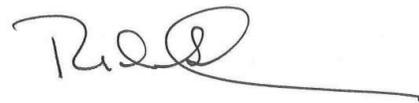
²⁸ NAB Junk Fee Comments at 5-7.

agendas, to the detriment of consumers. NAB urges the Commission not to adopt a reporting requirement or host a database concerning retransmission consent negotiations. Instead, the Commission should continue to allow the retransmission consent marketplace to function without government intervention as Congress intended.

Respectfully submitted,

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

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