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

In the Matter of	)	
	)	
Cable Service Change Notifications	)	MB Docket No. 19-347
	)	
Modernization of Media Regulation Initiative	)	MB Docket No. 17-105
	)	
	)	
Amendment of the Commission's Rules Related to Retransmission Consent	)	MB Docket No. 10-71
	)	

COMMENTS

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ACA CONNECTS

COMMENTS

I. INTRODUCTION AND SUMMARY

ACA Connects hereby submits comments in response to the Notice of Proposed Rulemaking ("NPRM") issued in the above-captioned proceeding.[1] The NPRM seeks comment on updates to Sections 76.1601 and 76.1603 of the Commission's rules, which impose requirements on cable operators to notify customers and local franchising authorities ("LFAs") of service or rate changes. ACA Connects supports the Commission's adoption of these proposals, which would represent another important

[1] See *Cable Service Change Notifications* et al., Notice of Proposed Rulemaking, MB Docket No. 19-347 et al., FCC 19-132 (rel. Dec. 12, 2019).

step forward in the Commission's efforts to streamline and modernize its media regulations.

In particular, ACA Connects supports the Commission's proposal to amend Section 76.1603 to clarify that cable operators must notify customers "as soon as possible" of a programming lapse that occurs due to failure of carriage negotiations in the final 30 days of an existing contract, which is consistent with the reality of how these agreements are negotiated today. We also support streamlining the requirement regarding notice to LFAs, and in fact suggest that the Commission remove this obsolete and duplicative requirement entirely. Finally, we support the Commission's consideration of "other proposals" for modernizing the notice requirements set forth in Sections 76.1601 and 76.1603, as we believe that a broader examination of these rules is indeed warranted to determine whether the requirements remain relevant in today's competitive marketplace.

II. THE COMMISSION SHOULD ADOPT ITS PROPOSED CHANGES TO SECTION 76.1603 OF THE RULES TO CLARIFY THAT CABLE OPERATORS MUST NOTIFY SUBSCRIBERS "AS SOON AS POSSIBLE" IN THE EVENT OF A PROGRAMMING DISRUPTION THAT OCCURS DUE TO FAILURE OF CARRIAGE NEGOTIATIONS IN THE FINAL 30 DAYS OF A CONTRACT

In the NPRM, the Commission seeks comment on a commonsense proposal that addresses the reality that retransmission consent and program carriage agreements are almost invariably reached in the final 30 days of an existing contract. Under Section 76.1603 of the rules, a cable operator must notify customers 30 days in advance of a change in "programming services or channel positions" that is within its control.[2] The

[2] *See* 47 CFR § 76.1603(b).

Commission proposes amending the rule to clarify that a lapse in programming that results from failure of carriage negotiations in the final 30 days of a contract is "outside of the cable's operator control" and that notice of the lapse must be given "as soon as possible."[3] ACA Connects supports this proposal.

The NPRM suggests as a rationale for the proposal that "[a] single party to a negotiation cannot control the ultimate outcome of the negotiation."[4] Indeed, the Communications Act ("Act") establishes a legal framework for retransmission consent under which neither party is able to dictate the terms of carriage and both parties must negotiate "in good faith" towards an agreement.[5] With regard to carriage of cable programming, the Act and Commission rules establish safeguards against anti-competitive practices but do not require a cable operator to carry programming or a programmer to accept carriage.[6] In both contexts it is left to the parties to negotiate the terms of carriage, and neither party has a legal right to demand that the other party accept its preferred terms. The Commission is thus correct to suggest that the cable operator does not "control the outcome" of carriage negotiations.

Indeed, retransmission consent and program carriage negotiations are generally "tough and hard-fought" on both sides,[7] and the looming threat of a blackout is often what brings parties to the negotiating table. Carriage agreements are almost always

[3] *See* NPRM at 15 (Proposed rule Section 76.1603(b)).

[4] NPRM, ¶ 11.

[5] *See* 47 U.S.C. § 325(b)

[6] *See, e.g.*, 47 U.S.C. § 548; 47 CFR § 76.1002.

[7] *See* Letter From Elizabeth Andrion, Charter, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 17-105 at 2 (filed Feb. 6, 2018) ("Charter Letter").

renewed within days (or even hours) of their expiration, and sometimes following multiple short-term extensions. While cable operators engage in these negotiations in with the goal of reaching a final deal, they cannot predict – much less "control" – the behavior of the other party.[8] So in some cases, despite the cable operator's best efforts and requests for contract extensions, the operator is unable to secure carriage on acceptable terms and a blackout occurs.

Because such lapses in programming are unwelcome and unanticipated events, they cannot be predicted with any degree of accuracy 30 days (or any set amount of time) in advance. Consistent with this reality, the NPRM proposes amending rule section 76.1603 to affirm that cable operators must notify customers "as soon as possible" of programming disruptions that occur due to failure of carriage negotiations in the final 30 days of an existing agreement. ACA Connects supports this well-reasoned approach.

The Commission should reject the alternative idea explored in the NPRM that it require cable operators to notify customers in advance of *potential* lapses in programming that *may* occur *if* carriage negotiations fail.[9] This policy would more likely harm than empower consumers. Again, virtually *every* retransmission consent or program carriage agreement is reached at or near the expiration deadline. If cable operators were required to notify customers of the mere possibility of a programming

[8] As ACA Connects has explained, "smaller cable operators generally negotiate program carriage agreements collectively through buying groups (such as the National Cable Television Cooperative), and have increasingly negotiated retransmission consent agreements with large station groups in the same manner." *See* Letter From Brian Hurley, ACA Connects, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 19-347 et al. at 2 (filed Dec. 6, 2019); *see also* NPRM, n.23.

[9] NPRM, ¶ 12.

disruption every time an agreement or extension came within 30 days of expiring, customers would be inundated with "notices" that would mostly be false alarms. Over time they would become inured to these notices, and less likely to pay attention to other communications from their cable provider that deliver meaningful, actionable information. That is to say nothing of the considerable expense that cable operators would incur to deliver such a high volume of notices, which would be particularly burdensome for the smaller operators that ACA Connects represents. They would have no choice but to pass on their cost increases to subscribers.

Moreover, these extraneous communications could mislead customers into making decisions they later come to regret, leaving them worse off. Customers that receive these notices may incur the burden and expense of switching video providers under the belief that they will soon lose their favorite programming, only later to find (in the vast majority of cases) that a deal was reached that avoided this outcome. The potential to lose customers in this manner would also create incentives for cable operators to avoid circumstances in which these notices are required, which would increase broadcasters' and programmers' already substantial leverage over cable operators in carriage negotiations. The likely end result would be higher programming costs and, in turn, higher monthly bills for subscribers.

Furthermore, there is no practical need for a heavy-handed requirement that cable operators notify their customers every time a carriage agreement (or extension) is up for renewal. The most contentious carriage negotiations are often the subject of news reports, advertisements, and social media posts, which provide varied means of warning customers of potential programming disruptions and giving them a chance to

"make their voices heard" with their cable operator.[10] Moreover, 30 days' advance notice is unnecessary to ensure that customers have options for continuing to receive desired programming. As Charter notes, there are often alternative means of obtaining programming that is the subject of a carriage dispute, including through online apps that can be downloaded in minutes.[11]

For the foregoing reasons, the Commission should adopt its proposal that cable operators be required to notify customers "as soon as possible" of programming disruptions that result from failure of carriage negotiations in the final 30 days of an existing contract. The Commission should also give each cable operator flexibility in providing this notice by "any reasonable written means at its sole discretion," which is the statutory standard.[12] Certainly, providing this notice by means of "channel slates" as NCTA proposes would be a direct written means of notifying affected customers that should be deemed "reasonable."[13] But the Commission should be wary of intruding on cable operators' "sole discretion" to deliver these notifications by the written means they choose, given that different options may make sense in different situations, different operators may have different capabilities for providing these notices, and customer expectations are likely to evolve over time.

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[10] *See* Charter Letter at 5; *see also In re Time Warner Cable*, Order on Reconsideration, 21 FCC Rcd 9016, 9023, ¶ 20 (MB 2006). As Charter observes, "[s]ome cable operators may decide to provide advance warning even if negotiations are ongoing, but other operators may give greater weight to avoiding potential customer confusion. The advance notice rule should be sufficiently flexible to allow each operator to exercise its own business judgment regarding the potential impact of providing a premature notice or warnings."). Charter Letter at 3, n.10.

[11] Charter Letter at 5.

[12] 47 U.S.C. § 552(c).

[13] *See* NPRM, ¶ 14.

III. THE COMMISSION SHOULD TAKE FURTHER STEPS TO STREAMLINE THESE RULES

As explained below, ACA Connects supports the Commission's adoption of additional measures proposed or considered in the NPRM to modernize Sections 76.1601 and 76.1603 of its rules.

A. The Commission should remove, or at minimum streamline, the LFA notification requirement in Section 76.1603

Section 76.1603(c) requires cable operators to notify LFAs 30 days in advance of "any rate or service change."[14] The NPRM proposes modifying this rule to permit cable operators to deliver such notifications only "[u]pon the request" of the LFA.[15] ACA Connects supports taking this step, but it encourages the Commission to go further and eliminate this LFA notification requirement entirely. Though the requirement may have made sense in an era of cable rate regulation, the fact that virtually all LFAs now lack the authority to regulate cable rates means that the requirement is obsolete.[16] LFAs indeed have other means of receiving these same notifications, either through an explicit obligation in a local franchise agreement itself or through statewide franchise notice requirements, but that is all the more reason to remove this redundant and duplicative requirement from Section 76.1603.[17] It may be true that some LFAs would

[14] *See* 47 CFR § 76.1603(c).

[15] *See* NPRM at 15 (Proposed rule Section 76.1603(c)).

[16] *See Amendment to the Commission's Rules Concerning Effective Competition* et al., Report and Order, MB Docket No. 15-53 et al., 30 FCC Rcd 6574 (2015); *Petition for Determination of Effective Competition in 32 Massachusetts Communities and Kauai,* HI (HI0011), Memorandum Opinion and Order, MB Docket No. 18-323; CSR No. 8965-E, FCC 19-110 (rel. Oct. 25, 2019).

[17] *See*, *e.g.*, 220 Ill. Comp. Stat. 5/22-501(b)(5) ("Cable or video providers shall provide customers a minimum of 30 days' written notice before increasing rates or eliminating transmission of programming and shall submit the notice of any rate increase to the local unit of government in advance of distribution to customers").

need to take an affirmative step to continue receiving these notices, as the NPRM suggests,[18] but the Commission should view this as a desirable outcome. LFAs should be encouraged to periodically re-evaluate the obligations they impose on cable franchisees to determine whether and to what extent they continue to serve their intended purpose.

If the Commission does not go as far as removing the LFA notice requirement entirely from Section 76.1603, we support the rule changes proposed by the Commission to create consistent timeframes for delivering required notices to LFAs and to subscribers. Under the revisions proposed in the NPRM, notifications to both of these groups must be given 30 days in advance if the change is within the operator's control and "as soon as possible" if not.[19] Harmonizing these timeframes as the NPRM proposes will make it easier for cable operators to track and to ensure compliance with their notification obligations.

B. The Commission should adopt the proposed "technical changes" to Sections 76.1601 and 76.1603

In the NPRM, the Commission proposes "clean up" amendments to Sections 76.1601 and 76.1603 to eliminate redundancies and make the rules clearer.[20] These "minor streamlining changes"[21] will make it easier for cable operators and others to identify and understand the substantive requirements the rules impose. Accordingly, ACA Connects supports these rule changes as well.

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[18] NPRM, ¶ 17.

[19] *See id*. at 15 (Proposed rule Sections 76.1603(b) and (c)).

[20] *See id*., ¶ 18.

[21] *See id*., ¶ 2.

C. The Commission should consider adoption of "other proposals" to further streamline the rules

The NPRM asks whether the Commission should consider additional streamlining changes to Sections 76.1601 and 76.1603 proposed by commenters in the Media Modernization proceeding.[22] In general, ACA Connects appreciates the Commission's willingness to take a comprehensive look at these requirements to determine whether and to what extent they remain necessary. We also agree with other commenters that further changes to the rules are likely warranted. For instance, we agree with NCTA that the requirement that cable operators notify subscribers 30 days in advance of any significant change in the information reported in the annual subscriber notice "imposes unnecessary burdens on operators" and should be eliminated.[23]

In considering whether to adopt that proposal or otherwise streamline these rules, the Commission should take into account the evolving state of the communications marketplace. The days of the monopoly cable provider are long since passed. Cable operators now provide an array of video, broadband, voice and other services, and they face competition from each other and from a gamut of fixed, mobile and satellite communications providers, as well as over-the-top content providers. Many of these competitors are exempt from the notification obligations set forth in Sections 76.1601 and 76.1603. In today's environment, there is no rationale for imposing prescriptive notification burdens of this kind exclusively on cable providers,

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[22] *See id.,* ¶¶ 22-25.

[23] *See* Comments of NCTA—The Internet & Television Association, MB Docket No. 17-105 at 6-7 (filed July 5, 2017) ("[M]uch of this information [contained in these notices] is of little value to customers and readily available on company websites. There is no continuing need to regulate with the degree of specificity contained in this rule."); *see also* NPRM, ¶ 23.

including on small cable operators that are often far more budget-constrained than their non-cable competitors. We thus encourage the Commission to examine carefully whether the cable-specific requirements set forth in Sections 76.1601 and 76.1603 remain relevant and appropriate in the competitive landscape that exists today, and it should seek to eliminate or streamline requirements that do not meet that test.

IV. CONCLUSION

ACA Connects appreciates the opportunity to participate in this proceeding, and it encourages the Commission to take its comments into consideration.

Respectfully submitted,

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