

**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
NTCA–THE RURAL BROADBAND ASSOCIATION**

NTCA–The Rural Broadband Association (“NTCA”)¹ hereby submits these comments in connection with the Notice of Proposed Rulemaking (“NPRM”) released by the Federal Communications Commission (“Commission”) in the above-captioned proceeding.² NTCA appreciates and shares the desire that the Commission and the public receive prompt and accurate information about disruptions involving broadcast stations transmission. However, as proposed, the proposals would foist yet another regulatory burden on the smallest MVPD providers who struggle to continue to provide service in the face of staggering cost increases to help deliver that content for the broadcasters, and the proposals would also fail to collect sufficient information to be of value to the Commission or the public as to the root causes of the disruption. If the Commission moves forward with a blackout reporting obligation, in the interest

¹ NTCA–The Rural Broadband Association represents approximately 850 independent, community-based companies and cooperatives that provide advanced communications services in rural America and more than 400 other firms that support or are themselves engaged in the provision of such services.

² *Reporting Requirements for Commercial Television Broadcast Station Blackouts*, Notice of Proposed Rulemaking, MB Docket No. 23-47, FCC 23-108 (Rel. Dec. 14, 2023). (“NPRM”)

of complete transparency, it should collect information not just about the fact of a blackout, but also permit MVPDs to supply information about the circumstances of a blackout.

I. SMALL MVPDS ARE STRUGGLING TO STAY IN THE MARKET, LARGELY DUE TO INCREASING RETRANSMISSION CONSENT COSTS

Small MVPD providers who serve rural consumers are struggling to continue to provide video service. A recent NTCA survey found that 18% of current video providers who responded to the survey are not very likely to continue to offer service and another 11% reported that they already have plans to discontinue service.³ The vast majority of responding companies who reported having plans to discontinue, or are considering discontinuing, video service cite increased programming costs as the reason, and nearly six in 10 specifically cite difficulty negotiating retransmission consent agreements. This is particularly troubling for the rural consumers served by NTCA's members considering that most NTCA members serve many consumers who do not have access to an over the air broadcast signal – meaning the MVPD is *helping* the broadcaster reach customers it would otherwise not reach and *paying* the broadcaster for the “privilege” of doing so. Indeed, more than one quarter of survey respondents indicated that 50% *or more* of their service area households cannot receive an over the air broadcast signal⁴ and must rely on their local video providers for local news, weather and sports.

Retransmission consent agreements are a primary driver of MVPD costs. The fees paid to broadcasters have increased exponentially year over year. Survey respondents indicated that in

³ See, NTCA – The Rural Broadband Association, Broadband/Internet Availability Survey Report, p.27 (Dec. 2023) available at: <https://www.ntca.org/sites/default/files/documents/2023-12/2023%20Broadband%20Survey%20Report%20FINAL.pdf>

⁴ *Id.* at 27.

just the last two years, fees paid to broadcasters increased by an average of nearly \$150,000. While that amount could be a rounding error for a large company, it represents about 25% to 40% of total operating expenditures for small MVPDs.⁵

Various behaviors and strategies employed by content providers and broadcasters make it particularly difficult for small rural carriers to offer content in competitive retails packages that reflect what their subscribers want and can afford. Forced tying and tiering are combined with last minute, “take it or leave it” offers and the threat to withhold “must have” content during the re-negotiation process. These and mandatory non-disclosure provisions in contracts that obscure the market value of content force the smaller provider to accept terms that are unacceptable.

II. NTCA SUPPORTS FULL TRANSPARENCY INTO RESTRANSMISSION CONSENT NEGOTIATIONS

NTCA has long advocated for full transparency into the video marketplace⁶ and agrees that the Commission and the public should “receive prompt and accurate information about critical MVPD service disruptions . . . when they occur.”⁷ However, the Commission’s proposal to require MVPDs to merely report the fact of a blackout within 48 hours offers no information that could not be gained by turning on a station that is blacked out or with a quick internet search. The Commission already has statistics about blackouts – including how often they occur, how long they last, and the parties involved.⁸ Forcing small MVPDs to provide the facts of the “where and when” of a blackout imposes a reporting burden without any useful context. It does

⁵ *Id.* at 29.

⁶ *See, e.g.*, Comments of NTCA – The Rural Broadband Association, The Status of Competition in the Market for the Delivery of Video Programming, MB Docket No. 17-214 (Oct. 10, 2017).

⁷ NPRM, ¶ 1

⁸ *See, e.g.*, NPRM ¶¶ 3-4.

not provide “the Commission, Congress, or the public with timely or specific information regarding service disruptions.”⁹ More useful than data about “which MVPD service providers – as well as broadcast affiliates – have a stronger history of blackouts,” would be information about *why* any blackout arises. In particular, consumers and the Commission alike would benefit from knowing that the blackout related to proposed cost increases and the magnitude of those, as well as the other stations that a MVPD may be required to provide in addition to the station that the MVPD has asked to carry on behalf of consumers.

Mandatory non-disclosure agreements demanded by broadcasters in contracts for programming prohibit MVPDs from disclosing the rates they pay, the scale of increases, undesirable content they are being forced to take and pay for, or any other contract terms and conditions, even to policymakers. They also prevent MVPDs from learning the true market value of video content, as MVPDs cannot confirm the price at which programming is being offered to them is even roughly comparable to what other buyers in the marketplace are paying for the same content. Their ability to negotiate fair and reasonable terms is compromised, and more importantly, they are prohibited from being transparent with regulators or consumers.

If the Commission is going to require small MVPDs to report the fact of a blackout, it should also declare nondisclosure provisions null and void under such circumstances as a change of law, and thereby permit the MVPD to report: (1) when the retransmission consent contract was offered, (2) the price demanded, (3) the amount of the price increase year over year, (4) the content that is tied to the broadcast station the MVPD desires, (5) the timing of threats to withhold content relative to “must have” content (*i.e.*, a major sporting event, awards show or

⁹ NPRM ¶ 9 (citations omitted).

season ending episode) and (6) any other factual information that would inform the policy makers and the public about the negotiation and the dispute that resulted in a blackout. Of course, broadcasters should have the opportunity to dispute alleged errors or omissions in the MVPD report.

III. THE COMMISSION HAS THE AUTHORITY TO OVERRIDE NONDISCLOSURE AGREEMENTS IN BROADCAST CONTRACTS

In the plain text of section 325(b)(3)(A) of the Cable Act of 1992 (“Cable Act”), Congress instructed the Commission “to govern the exercise by television broadcast stations of the right to grant retransmission consent.”¹⁰ This language sets forth direct and unmistakable authority to the Commission to set, and, if necessary, revise, ground rules for a retransmission consent regime that will enable broadcasters and programmers to receive fair payment for their material, in a manner consistent with other legislative goals, including increased consumer access to video programming. The authority to “govern” is of little meaning if such actions are not within the Commission’s authority. Moreover, Section 325 also instructed the Commission to account for “the impact that the grant of retransmission consent by television stations may have on the rates for the basic service tier...” while ensuring that the retransmission consent regime does not conflict with the need “to ensure that the rates for the basic service tier are reasonable.”¹¹ In short, the text of section 325 is explicit in its direction to Commission to protect the public interest with respect to broadcasters’ grant of retransmission consent rights to MVPDs.

¹⁰ 47 U.S.C. § 325(b)(3)(A).

¹¹ *Id.*

The Commission has additional authority as part of its obligation to ensure that broadcast licensees act in furtherance of “the public interest, convenience, and necessity.”¹² Behaviors that prevent MVPDs from providing consumers with signals that are broadcast over the public airwaves under reasonable terms and conditions, and that lead to blackouts, are clearly contrary to the public interest.

The Commission holds further ancillary authority under sections 303(r) and 4(i) of the Act. Section 303(r) instructs the Commission to “[m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions”¹³ of Title III of the Act. The Commission’s authority is also elucidated in section 4(i), calling upon it to “perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions.”¹⁴ Furthermore, the Commission has previously asserted its ancillary authority to enhance consumers’ access to programming.¹⁵ If the Commission is interested in “obtain[ing] critical information needed to monitor ongoing blackout situations that could result in the filing of a retransmission consent complaint,”¹⁶ the Commission should permit the filing of more information than the existence of a blackout.

¹² 47 U.S.C. § 309(a)

¹³ 47 U.S.C. § 303(r). See also, *Cellco P’ship v. FCC*, 700 F.3d 534, 543 (D.C. Cir. 2012).

¹⁴ 47 U.S.C. § 154(i).

¹⁵ Review of the Commission’s Program Access Rules and Examination of Programming Tying Arrangements, First Report and Order, 25 FCC Rcd 746 ¶¶ 71-72 (2010) (“2010 Program Access Order”) (relying on the Commission’s ancillary authority to establish standstill rules for program access disputes).

¹⁶ NPRM ¶30.

IV. CONCLUSION

In this instance NTCA agrees that “[c]onsumer access to clear, easy-to-understand, and accurate information is central to a well-functioning marketplace that encourages competition, innovation, low prices, and high-quality services. The same information empowers consumers to choose services that best meet their needs and matches their budgets and ensures that they are not surprised by unexpected charges or service quality that falls short of their expectations.”¹⁷ If the Commission will require blackout reporting, it should permit MVPDs to also disclose the circumstances surrounding the blackout.

Respectfully submitted,



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¹⁷ NPRM, ¶ 32, citing *Empowering Broadband Consumers Through Transparency*, CG Docket No. 22-2, 2022 WL 17100958, Report and Order and Further Notice of Proposed Rulemaking, FCC 22-86, at 1, para. 1 (Nov. 17, 2022).