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May 15, 2019

**VIA ECFS**

Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW  
Washington, DC 20554

**Re: *Ex Parte* Communication of ACA Connects – America’s Communications Association; *Electronic Delivery of MVPD Communications*, MB Docket No. 17-317; *Modernization of Media Regulation Initiative*, MB Docket No. 17-105**

Dear Ms. Dortch:

On May 13, 2019, Ross Lieberman, Sr. Vice President of Government Affairs for ACA Connects – America’s Communications Association (“ACA Connects”) and I met with Alexander Sanjenis, Acting Media Advisor to Chairman Pai, to discuss ACA Connects’ comments filed in response to a Public Notice<sup>1</sup> seeking comment on a proposal to amend the broadcast carriage election notice procedures submitted by the National Association of Broadcasters (“NAB”) and NCTA – The Internet and Television Association (“NCTA”).<sup>2</sup> In the meeting, we reiterated ACA Connects’ call for the Commission to take steps, at the same time that it modifies the carriage election rules, to permit cable operators to provide required notices to broadcasters electronically, using an e-mail address provided by a broadcast station in its online public inspection file. ACA Connects also discussed its support<sup>3</sup> for the NAB-NCTA

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<sup>1</sup> *Media Bureau Seeks Comment on Industry Proposal For Carriage Election Notice Modernization*, Public Notice, DA No. 18-1250, MB Docket No. 17-317 (rel. Dec. 13, 2018).

<sup>2</sup> *See generally*, Letter from Rick Kaplan, General Counsel and Executive Vice President of Legal and Regulatory Affairs, NAB, and Rick Chessen, Chief Legal Officer and Senior Vice President of Legal and Regulatory Affairs, NCTA, to Michelle Carey, Chief, Media Bureau, Federal Communications Commission, MB Docket Nos. 17-317, 17-105 (filed Dec. 7, 2018) (“NAB-NCTA Proposal”).

<sup>3</sup> As noted in our comments, ACA Connects is particularly pleased that the proposal: a) requires broadcasters to post their own carriage election contact information in their online public files; b) makes clear that cable TV systems with fewer than 1,000 subscribers would only need to post their contact information for each “Legal Name” in COALS, and encourages the Commission to modify the database so cable operators who use multiple “Legal Names” can apply their updated contact information to all of

proposal's general framework, but suggested changes to minimize the proposal's burdens for small cable operators, who would receive no material benefit from this proposal, and in fact would be faced with an entirely new regulatory obligation.

We first discussed ACA Connects' proposal to make the benefits of this proceeding reciprocal by allowing cable operators to send, via e-mail, notices that they are currently required to send to broadcast stations via certified mail. ACA Connects initially made this proposal in an *ex parte* letter<sup>4</sup> filed last October, nearly two months before NAB and NCTA submitted their proposal to amend the rules that govern broadcasters' triennial election of must-carry or retransmission consent. In that letter, and in our later comments on the NAB-NCTA proposal, we explained that under ACA Connects' proposal, the benefits that would accrue to broadcasters in allowing them to send their carriage election notices via e-mail would apply equally to cable operators. We also explained that it would be most efficient and cost effective for the Commission to modify the rules governing broadcast carriage election notices and those covering cable notices to broadcasters at the same time. The NAB-NCTA proposal will require the Commission to make technical changes to both its Online Public Inspection File and COALS databases. Whatever technical changes are necessary to accommodate cable operators providing electronic notices to broadcasters could be done in less time and at lower cost if done simultaneously with the technical changes required by the NAB-NCTA proposal.

NAB objects to ACA Connects' proposal, claiming that it is an "11<sup>th</sup> hour request"<sup>5</sup> that represents a "cynical attempt to impede the success of a proposal that [ACA Connects] previously agreed to."<sup>6</sup> This claim is baffling, since ACA Connects first presented its proposal several weeks *before* NAB and NCTA submitted their own. Moreover, ACA Connects is on

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them in one step; c) stipulates that a broadcaster who is changing its prior election but who cannot e-mail its carriage notice to any cable system in its market for any reason, or who does not receive confirmation of receipt from a cable operator, and who does not post such notice in its online public file, will be determined not to have provided notice to the cable system operator and will default to its prior election; and d) clarifies that an e-mail from a cable operator confirming receipt of an electronically delivered e-mail address is not a concession that the broadcaster station fully satisfied its notice obligation because, as the proposal states, a notice could be defective in other ways. *Media Bureau Seeks Comment on Industry Proposal For Carriage Election Notice Modernization*, MB Docket Nos. 17-317, 17-105, Comments of the American Cable Association at 3-4 (filed Mar. 18, 2019) ("ACA Connects Comments").

<sup>4</sup> Letter from Mary Lovejoy, Vice President of Regulatory Affairs, American Cable Association, to Marlene Dortch, Secretary, Federal Communications Commission, MB Docket Nos. 17-317, 17-105 (filed Oct. 16, 2018).

<sup>5</sup> *Media Bureau Seeks Comment on Industry Proposal For Carriage Election Notice Modernization*, MB Docket Nos. 17-317, 17-105, Reply Comments of the National Association of Broadcasters at 8 (filed Mar. 26, 2019) ("NAB Reply Comments").

<sup>6</sup> Additionally, if ACA Connects wanted to impede the success of the NAB-NCTA proposal, it would not have filed comments in support.

record encouraging the Commission to consider ACA Connects' proposal simultaneously with the NAB-NCTA proposal.<sup>7</sup> ACA Connects cannot now be blamed for maintaining its position, which dates back to 2018, when it was the Commission's decision not to seek comment on ACA Connects' proposal at the same time that it released its Public Notice in the Federal Register<sup>8</sup> establishing a lengthy comment cycle on the NAB-NCTA proposal.<sup>9</sup>

NAB also argues that the Commission cannot legally adopt ACA Connects' proposal without first seeking public comment via a Further Notice of Proposed Rulemaking ("FNPRM").<sup>10</sup> ACA Connects has no objection to the Commission adopting an FNPRM to seek comment on our proposal if it believes that additional notice is necessary. In fact, given that the NAB-NCTA proposal would constitute a substantive change to the default carriage election, and given that the first Notice of Proposed Rulemaking limited its discussion of broadcast carriage election notices purely to the consideration of whether to allow electronic delivery of such notices, and not to any changes to the default election,<sup>11</sup> an FNPRM that seeks comment on both proposals may well be the best way to ensure that whatever rules the Commission adopts are upheld by the courts.<sup>12</sup>

We also discussed ACA Connects' proposal to amend slightly the timeline of the NAB-NCTA proposal, which would have the new procedures go into effect for all cable operators for the 2020 carriage election cycle. ACA Connects suggests that, for the 2020 election cycle only, a broadcaster should be required to send an election notice via certified mail if it cannot find an

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<sup>7</sup> Letter from Mary Lovejoy, Vice President of Regulatory Affairs, American Cable Association, to Marlene Dortch, Secretary, Federal Communications Commission, MB Docket Nos. 17-317, 17-105 (filed Dec. 19, 2018).

<sup>8</sup> *Media Bureau Extends Comment and Reply Period for Industry Proposal On Carriage Election Modernization*, Public Notice, DA 19-25 (rel. Jan. 29, 2019).

<sup>9</sup> NAB's further suggestion that the Commission "should not reward" ACA Connects' alleged "but wait, there's more behavior by delaying the consideration and adoption of the joint proposal" is misguided. NAB Reply Comments at 9. Instead of worrying itself with whether ACA Connects' should or should not be "rewarded," the Commission should be concerned about the public's perception of the agency's fairness in seeking comment on one organization's proposal but not another's, when the proposals are nearly identical in practice and would affect the same entities, such that simultaneous consideration of the two proposals is the most logical path forward.

<sup>10</sup> NAB Reply Comments at 10.

<sup>11</sup> Under the current rules, a broadcast station that fails to send a timely broadcast carriage election notice defaults to must-carry status. Under the NAB-NCTA proposal, failure to send notice would default to whatever election the station had previously elected.

<sup>12</sup> ACA Connects noted in its reply comments to the original NPRM that any consideration of a change to the must-carry default in this proceeding would be unlawful, as the issue had not been formally noticed. *Electronic Delivery of MVPD Communications*, MB Docket Nos. 17-317, 17-105, Reply Comments of the American Cable Association at 17 (filed Mar. 5, 2018).

e-mail address for the cable operator in COALS or if it does not receive an e-mail receipt. This simple modification<sup>13</sup> to the NAB-NCTA proposal would give the smallest cable operators sufficient time to learn about and comply with the new obligation. ACA Connects has previously explained that this extended timeline is necessary to give small providers sufficient time to comply with the new rule, as even under the most optimistic timeline<sup>14</sup> for implementing this rule change, operators will likely have only a few months to comply before the August 2020 deadline contemplated in the NAB-NCTA proposal (which suggests that broadcasters be permitted to assume that all cable operator data is accurate and up-to-date 60 days before the election deadline).<sup>15</sup>

NAB argues that there is no need to provide smaller operators with additional time to comply with the new obligations because the burdens would be minimal and “it is absurd to think that businesses, even smaller ones, would not be able to add an e-mail address and phone number to a single electronic file within a few months.”<sup>16</sup> What is absurd, however, is the idea that small cable operators must take on any new regulatory obligations at all in order to reduce the burdens on broadcasters who benefit most from the current retransmission consent regime.<sup>17</sup>

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<sup>13</sup> NAB also argues that ACA Connects’ proposal would significantly complicate the 2020 election cycle. NAB Reply Comments at 7, fn. 31. The proposal is hardly complicated, and it imposes no new burdens on broadcasters. To determine whether it needs to send a certified letter, a broadcaster would simply take note of which cable operators have not posted an e-mail address in COALS and which have not sent an e-mail receipt, and send those operators a certified letter, as they are currently required to do. Under the NAB-NCTA proposal, broadcasters will still have to go to COALS to look up an operator’s e-mail address, and will still need to track which cable operators have provided a receipt and which have not. The only difference is that they will need to send certified letters to a small number of cable operators, if and only if they change their election. This is still a significant reduction of their current burdens. Additionally, if any broadcaster believes that ACA Connects’ proposed relief for small cable system operators is too complicated, ACA Connects would have no objections to also giving broadcasters the option of meeting their carriage notice requirements in 2020 by sending certified letters to all cable systems that lack online public files, regardless of whether the operator posted their e-mail address in COALS. Allowing broadcasters to do what they have been doing for nearly two decades cannot possibly be considered complicated.

<sup>14</sup> See ACA Connects Comments at 5.

<sup>15</sup> NAB also asserts that if we are concerned that our members will not learn about this new obligation in a timely manner, ACA Connects should start informing them now about the change. NAB Reply Comments at 8. ACA Connects is not in the habit of undertaking massive education campaigns to inform their members of rule changes that have not yet happened and may not happen at all. Moreover, it would be irresponsible of us to do so. Informing members of a new, potential recordkeeping obligation that a) may not go into effect, and b) cannot even be met until the FCC has updated COALS would cause significant confusion.

<sup>16</sup> NAB Reply Comments at 8.

<sup>17</sup> Carriage election is a “win-win” for broadcasters. They can elect must-carry – guaranteeing them the right to carriage on a cable system, even if their content is unpopular – or, if their content is popular, they

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Given that the Media Modernization proceeding is designed to reduce regulatory burdens, ACA Connects would be well justified to oppose outright the imposition of any new obligation (as DBS providers have done), no matter how small, or at least to request that the new changes not go into effect at all until the 2023 cycle.

Instead, ACA Connects has generally been willing to support providing significant relief to broadcasters despite the fact that doing so means imposing new requirements on its members, and only asks for relief for a small class of small cable systems. Even under ACA's proposal, burdens on broadcast stations will be significantly reduced, as most stations will not need to send any notices at all. The very few broadcasters that change their carriage election between 2017 and 2020 would not be overly burdened by sending a certified letter to a small subset of cable systems, especially since the NAB-NCTA proposal effectively eliminates most broadcasters' notice requirements (other than the requirement to post in their online public inspection file). It is beyond belief that the NAB objects to this slight modification of temporary duration.

Finally, ACA Connects explained that if the Commission, for whatever reason, ultimately retains its rules requiring broadcasters to serve DBS providers by certified mail, it should permit cable operators to choose to receive service in this manner as well. There is no reason why cable operators should be subject to changes to the carriage election rules if the Commission elects not to change them for DBS providers.

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I have filed this letter electronically pursuant to section 1.1206 of the Commission's rules.

Sincerely,



Mary C. Lovejoy

cc: Alexander Sanjenis

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can elect retransmission consent, which allows them to extract significant payments from cable operators. At present, all they have to do to take advantage of these benefits is send a certified letter.