

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

In the Matter of )  
 )  
Customer Rebates for Undelivered Video ) MB Docket No. 24-20  
Programming During Blackouts )  
 )

NOTICE OF PROPOSED RULUEMAKING

Adopted: January 10, 2024

Released: January 17, 2024

Comment Date: [30 days after date of publication in the Federal Register]  
Reply Comment Date: [60 days after date of publication in the Federal Register]

By the Commission: Chairwoman Rosenworcel and Commissioner Starks issuing separate statements;  
Commissioners Carr and Simington dissenting and issuing separate statements.

I. INTRODUCTION

1. In this *Notice of Proposed Rulemaking*, we seek comment on whether to require cable operators and direct broadcast satellite (DBS) providers to give their subscribers rebates when those subscribers are deprived of video programming they expect to receive during programming blackouts that result from failed retransmission consent negotiations or failed non-broadcast carriage negotiations. When such blackouts occur, subscribers often pay the same monthly subscription fee for a service package that does not include all of the channels for which they signed up to receive. In other words, consumers are paying for a service that they are no longer receiving in full. This proceeding seeks comment on whether and how we should address this customer service shortcoming. We also seek comment on how the market addresses this issue currently.

II. BACKGROUND

2. The Communications Act of 1934, as amended (the Act), requires that cable operators and satellite TV providers obtain a broadcast TV station’s consent to lawfully retransmit the signal of a broadcast station to subscribers.<sup>1</sup> Commercial stations may either demand carriage pursuant to the Commission’s must carry rules or elect retransmission consent and negotiate for compensation in exchange for carriage.<sup>2</sup> If a station elects retransmission consent but is unable to reach agreement for carriage, or the parties to an existing retransmission consent agreement do not extend, renew, or revise that agreement prior to its expiration, the cable operator or DBS provider loses the right to carry the signal. The same is true if a cable operator or DBS provider cannot negotiate for carriage with a non-broadcast network. In both cases, the result is a blackout of that existing programming on the platform.<sup>3</sup> When these blackouts occur, the cable operator or DBS provider’s subscribers typically lose access to the station or network’s entire signal on the platform, including both the national and local programming provided by the broadcaster, unless and until the parties are able to reach an agreement.

<sup>1</sup> 47 U.S.C. § 325.

<sup>2</sup> *Id.* § 325(b)(3)(B).

<sup>3</sup> Federal Communications Commission, *Retransmission Consent*, <https://www.fcc.gov/media/policy/retransmission-consent> (last updated Sept. 27, 2021).

3. Over the past decade, data indicates that the number of blackouts resulting from unsuccessful retransmission consent negotiations has increased dramatically.<sup>4</sup> These blackouts often frustrate subscribers because they lose access to programming from their cable operator or DBS provider that they had previously received.<sup>5</sup> A leading cause of these disputes is disagreements over per-subscriber programming fees.<sup>6</sup> However, subscribers may not see rebates or bill reductions during the carriage dispute when the cable operator or DBS provider does not carry the broadcast TV station,<sup>7</sup> even though many cable operators and DBS providers charge a fee on subscribers' bills that purportedly pays programmers for subscriber access to the broadcast signal or network.<sup>8</sup>

### III. DISCUSSION

4. We seek comment on whether and how to require cable operators and DBS providers to give their subscribers rebates<sup>9</sup> when they blackout a channel due to a retransmission consent dispute or a

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<sup>4</sup> See Atif Zubair, *History of Retrans Deals and Signal Blackouts, 1993-2014 YTD*, Market Intelligence, S&P Capital IQ Pro (Feb. 25, 2014); Atif Zubair, *Retrans Roundup 2019*, Market Intelligence, S&P Capital IQ Pro (Jan. 21, 2020); Peter Leitzinger, *Retrans Roundup 2021*, Market Intelligence, S&P Capital IQ Pro (Jan. 28, 2022); Peter Leitzinger, *Retrans Roundup 2022*, Market Intelligence, S&P Capital IQ Pro (Feb. 7, 2023).

<sup>5</sup> See, e.g., Alex Weprin, *Disney Channels, Including ABC and ESPN, Go Dark on Charter Spectrum In Major Carriage Dispute*, The Hollywood Reporter (Aug. 31, 2023), <https://www.hollywoodreporter.com/business/business-news/espn-abc-pulled-charter-spectrum-carriage-dispute-1235579642/>; Alex Weprin, *Nexstar-Owned Stations Go Dark on DirecTV in Fresh Carriage Dispute*, The Hollywood Reporter (July 2, 2023), <https://www.hollywoodreporter.com/business/business-news/nexstar-owned-stations-pulled-directv-carriage-dispute-1235528176/>; Jon Lafayette, *Northwest Broadcasting CEO Calls Out Charter's Rutledge*, Broadcasting and Cable (Feb. 6, 2018), <https://www.nexttv.com/news/northwest-broadcasting-ceo-calls-out-charter-s-rutledge-171588>; Claire Atkinson, *CBS blackout is the latest frustration for TV viewers caught in the middle of price wars*, NBC News (July 22, 2019), <https://www.nbcnews.com/business/business-news/cbs-blackout-latest-frustration-tv-viewers-caught-middle-price-wars-n1032436>.

<sup>6</sup> Cable operators and DBS providers typically pay broadcast licensees and cable programming networks a fee that is based on the number of subscribers that receive the licensee's or network's channel. See generally 2022 *Communications Marketplace Report*, FCC 22-103 at paras. 219, 275, and 294 (rel. Dec. 30, 2022).

<sup>7</sup> Michael Petro, *Spectrum Providing Refunds for Blackout of Disney Channels*, The Buffalo News (Sept. 14, 2023), [https://buffalonews.com/business/local/western-new-york-spectrum-disney-blackout-refunds/article\\_7613a46e-5276-11ee-a852-172275f7f08b.html](https://buffalonews.com/business/local/western-new-york-spectrum-disney-blackout-refunds/article_7613a46e-5276-11ee-a852-172275f7f08b.html); David Satin, *DIRECTV Customers Affected by Nexstar Outage Can Get Bill Credit, but They Have to Sign Up; Here's How to Do It*, MSN (July 5, 2023), <https://www.msn.com/en-us/money/companies/directv-customers-affected-by-nexstar-outage-can-get-bill-credit-but-they-have-to-sign-up-here-s-how-to-do-it/ar-AA1dsBCB>; Michael Hiltzik, *Your Time Warner Cable refund for a weeklong blackout: \$4*, The Los Angeles Times (Aug. 12, 2013), <https://www.latimes.com/business/la-xpm-2013-aug-12-la-fi-mo-timewarner-20130811-story.html>; Spectrum Residential Video Service Agreement, <https://www.spectrum.com/policies/residential-video-service-agreement> (“In the event particular programming becomes unavailable, either on a temporary or permanent basis, due to a dispute between Spectrum and a third party programmer, Spectrum shall not be liable for compensation, damages (including compensatory, direct, indirect, incidental, special, punitive or consequential losses or damages), credits or refunds of fees for the missing or omitted programming. Your sole recourse in such an event shall be termination of the Video Services in accordance with the Terms of Service.”).

<sup>8</sup> See, e.g., ACA Connects Comments, MB Docket No. 23-203, at 6 (“[S]ome ACA Connects Members explicitly pass through retransmission consent fees and [regional sports network] fees as line items on subscriber bills.”); NCTA Reply, MB Docket No. 23-203, at 9 (“Itemizing broadcast TV and regional sports fees separately is not deceptive, but rather to inform consumers about the factors that affect the cost of their video service.”).

<sup>9</sup> We note that the Act uses the term “refund” in section 632(b) whereas Congress referred to “rebates or credits” when discussing outages in the legislative history of section 632(b). Compare 47 U.S.C. 552(b)(3) with H.R. REP. 102-628, at \*34. Neither the Act nor the legislative history otherwise define these terms. We note that the dictionary definitions of each terms is similar. See Merriam-Webster Dictionary, online version, <https://www.merriam-webster.com/dictionary/rebate> (defining “rebate” as “a return of a part of a payment”);

(continued....)

failed negotiation for carriage of a non-broadcast channel. In the event that we adopt such a requirement, we seek comment below on (i) how to apply the rule, (ii) whether to specify the method that cable operators and DBS providers use to offer the rebates and if so, how they should issue rebates, (iii) our authority to adopt a rebate rule, (iv) how to enforce a rebate rule, (v) the costs and benefits of such a rule, and (vi) the effects that such a rule would have on digital equity and inclusion. We also invite comment on any other proposals to ensure that subscribers are made whole when they lose access to programming that they expected to receive in exchange for paying a monthly subscription fee when they signed up for service.

5. We seek comment on this proposal at this time because, as discussed above, data indicates that the number of blackouts has increased dramatically in the last several years. Why is this? Is increased consolidation in either the broadcaster or MVPD market leading to an increase in blackouts? Has the proliferation of streaming services, including live linear streaming services (vMVPDs) impacted the amount or duration of blackouts, as these services may provide subscribers with alternative viewing options during a carriage dispute? Are broadcasters or programmers with certain categories of programming (e.g. sports) more likely to have negotiations that result in blackouts? Are there certain broadcasters or MVPDs whose negotiations result in blackouts more frequently than others? Are there proposals we should consider to incentivize both broadcasters/programmers and distributors to limit programming blackouts?<sup>10</sup>

6. *Applicability.* We seek comment on whether to require cable operators and DBS providers to provide rebates if they blackout video channels due to a retransmission consent dispute or a failed negotiation for carriage of a non-broadcast channel. Below, we seek comment on whether various provisions of the Act give us authority to require cable operators and DBS providers to give their subscribers rebates when the operator or providers ceases to carry a channel due to a retransmission consent or program carriage dispute; given that the authority upon which we base this proposal is cable and DBS-specific, are those the only entities to which this proposal should apply?<sup>11</sup> If we were to require cable operators and DBS providers to give rebates to subscribers who are deprived of programming they expected to receive, should the rule apply to any channel that is blacked out?<sup>12</sup> What if the parties never reach an agreement for carriage? Would subscribers be entitled to rebates in perpetuity and how would that be calculated? Or should the rebate end when the subscriber renews the contract if the channel is still

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<https://www.merriam-webster.com/dictionary/credit> (defining “credit” as “a deduction from an amount otherwise due”); <https://www.merriam-webster.com/dictionary/refund> (defining “refund” as “to return (money) in restitution, repayment, or balancing of accounts”). Accordingly, we tentatively conclude that Congress did not intend for there to be any legal distinction between these terms, and thus we may use these terms interchangeably, as we do throughout this notice. We seek comment on this analysis and tentative conclusion.

<sup>10</sup> While this proceeding pertains to the effects of blackouts resulting from retransmission consent negotiations, we note that this docket is not intended to seek comment on the Commission’s retransmission consent rules. Commenters that wish to propose regulations pertaining to retransmission consent should instead file in response to the Commission’s Notice of Proposed Rulemaking seeking comment on rules related to retransmission consent. *Amendment of the Commission’s Rules Related to Retransmission Consent*, MB Docket No. 10-71, Report and Order and Further Notice of Proposed Rulemaking, 29 FCC Rcd 3351 (2014). We note that the “totality of the circumstances” docket was terminated as dormant in 2020. *Termination of Certain Proceedings as Dormant*, CG Docket No. 20-158, Order, 35 FCC Rcd 10498 (2020).

<sup>11</sup> Commenters that suggest that we apply a blackout rebate requirement to non-cable or DBS entities should identify the statutory authority under which we could apply such a requirement.

<sup>12</sup> See Alex Weprin, *Weather Channel brushes off a blackout*, Politico (Feb. 6, 2014) <https://www.politico.com/media/story/2014/02/weather-channel-brushes-off-a-blackout-001667/>; David Lieberman, *The Weather Channel Returns To DirecTV*, Deadline (April 8, 2014), <https://deadline.com/2014/04/the-weather-channel-returns-directv-deal-711602/> (reporting on a nearly three month blackout of The Weather Channel on DIRECTV).

blacked out at the time of renewal? Similarly, if a subscriber initiates service during a blackout, would that subscriber be entitled to a rebate or a lower rate? Does the “good faith” negotiation requirement in section 325 of the Act confer unique status on broadcast channels that provides a basis to distinguish broadcast and broadcast-affiliated channels (that is, those channels that are owned by a company that also holds or controls broadcast licenses) from non-broadcast or independent channels?<sup>13</sup> That is, does the “good faith” negotiation requirement make an eventual carriage agreement more likely, and therefore suggest that a rebate would be temporary? If so, should this affect whether the rebate policy should apply to such entities, and why? To the extent that the existing terms of service between a cable operator or DBS provider and its subscriber specify that the cable operator or DBS provider is not liable for credits or refunds in the event that programming becomes unavailable, we seek comment on whether to deem such provisions unenforceable if we were to adopt a rebate requirement.<sup>14</sup>

7. *Rebates.* We seek comment on how cable operators and DBS providers currently handle this issue. Are there providers who currently provide subscribers with rebates or credits during a programming blackout? If so, does the provider proactively grant that rebate or credit to all subscribers affected, or is the subscriber required to affirmatively request it? How is the rebate or credit calculated? Are there providers who grant rebates or credits for the blackout of certain channels, but not of others? What are the deciding factors in such a case? Are there providers who do not grant rebates or credits during blackouts? If so, what is their rationale? How would requiring cable operators and DBS providers to provide rebates or credits change providers’ current customer service relations during a blackout?

8. We seek comment on how to calculate the rebate to which a subscriber is entitled after a channel is blacked out and what methodology should be used. Would it be reasonable to require a cable operator or DBS provider to rebate the cost that it paid to the programmer to retransmit or carry the channel prior to the carriage impasse? We understand that carriage contracts can be complex; for example, rates may depend on the number of subscribers reached and the number of bundled channels being carried,<sup>15</sup> video service providers can receive advertising time in exchange for carriage,<sup>16</sup> providers’ profits for specific channels may vary depending on the packages and bundles that they offer, and specific per-subscriber rates may be confidential. Given these complexities, are there specific nuances that we could adopt as part of a rule to ensure that subscribers are made whole when they lose access to a channel? Should we instead simply require cable operators and DBS providers to provide a rebate or credit to the consumer that in good faith approximates the value of the consumer’s access to the channel? Should the Commission specify the method for providing the rebate?

9. *Authority.* We tentatively conclude that sections 335 and 632 of the Act provide us with authority to require cable operators and DBS providers to issue a rebate to their subscribers when they blackout a channel.<sup>17</sup> The Commission has relied on this authority to propose and adopt cable customer

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<sup>13</sup> 47 U.S.C. § 325(b)(3)(C). *See also* 47 CFR § 76.65 (Commission regulation implementing section 325’s good faith negotiation requirement).

<sup>14</sup> *See* Spectrum Residential Video Service Agreement, *supra* note 7.

<sup>15</sup> *See* Petition for Declaratory Ruling That Conduct Violates 47 U.S.C. § 548, MB Docket No. 17-361 at 6-15 (filed Dec. 19, 2017), <https://www.fcc.gov/ecfs/document/1219303576562/2> (detailing complex carriage agreement terms between a regional sports network and a cable operator).

<sup>16</sup> *See* ACA Reply Comments, MB Docket No. 18-92, at n.13 (“[S]ome cable operators do derive some revenue from inserting ads into cable programming streams [but] the vast majority of their revenue comes from subscriber fees.”).

<sup>17</sup> 47 U.S.C. §§ 335, 552.

service regulations for decades,<sup>18</sup> and recently proposed to use this authority to adopt a customer service rule that would apply to DBS as well as cable.<sup>19</sup>

10. We tentatively conclude that the broad authority we have to adopt “public interest or other requirements for providing video programming”<sup>20</sup> under section 335(a) permits us to require DBS providers to give subscribers rebates for blackouts. Section 335(a) authorizes the Commission to impose on DBS providers public interest requirements for providing video programming. Although section 335(a) requires the Commission to adopt certain statutory political broadcasting requirements for DBS providers,<sup>21</sup> the statute is clear that this list is not exhaustive.<sup>22</sup> We tentatively find that requiring rebates for service interruptions due to blackouts pertains to the “provi[sion] of video programming” and is in the public interest because the proposed rule would prevent DBS subscribers from being charged for services for the period that they did not receive them. Moreover, we tentatively find that a rebate requirement would ensure that DBS subscribers are made whole when they face interruptions of service that are outside their control.<sup>23</sup> Accordingly, we tentatively conclude that we have authority under section 335(a) to apply our proposed rule to DBS providers. We seek comment on these tentative findings and conclusions. We also seek comment on whether there are alternative or additional statutes or arguments that provide a legal basis for our authority to adopt these requirements for DBS providers. For example, do we have authority under other provisions of Title III?<sup>24</sup>

11. We also seek comment on whether we have—and should exercise—ancillary authority under section 4(i) of the Act to extend our proposed rule to DBS providers and whether it is necessary to undertake this regulation for the Commission to effectively perform its responsibilities under the foregoing primary sources of statutory authority.<sup>25</sup> Applying the rebate requirement to such providers would ensure uniformity of regulation between and among cable operators (regulated under Title VI and by various state consumer protection laws and local franchising provisions) and DBS providers (under Title III), thereby preventing DBS from gaining a competitive advantage over their competitors because they will not be required to provide rebates to their subscribers for loss of service due to blackouts.

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<sup>18</sup> *Implementation of Section 8 of the Cable Television Consumer Protection and Competition Act of 1992 Consumer Protection and Customer Service*, MM Docket No. 92-263, Report and Order, 8 FCC Rcd 2892, 2895, para. 10 (1993) (*Cable Operator Customer Service R&O*) (“[W]e conclude that the Commission is required to establish baseline customer service standards on which local governments may rely to ensure that the cable systems they regulate provide an adequate level of customer service to cable subscribers.”).

<sup>19</sup> *All-In Pricing for Cable and Satellite Television Service*, Notice of Proposed Rulemaking, MB Docket No. 23-203, FCC 23-52, 2023 WL 4105426 (rel. June 20, 2023) (*All-In NPRM*).

<sup>20</sup> 47 U.S.C. § 335(a). *See also* 47 U.S.C. § 303(v) (granting the Commission “exclusive jurisdiction to regulate the provision of direct-to-home satellite services”).

<sup>21</sup> 47 U.S.C. § 335(a) (directing the Commission to apply to DBS the access to broadcast time requirement of section 312(a)(7), the use of facilities requirements of section 315, and to examine the opportunities that DBS service provides for the principle of localism under the Act).

<sup>22</sup> 47 U.S.C. § 335(a) (“Any regulations prescribed pursuant to such rulemaking shall, *at a minimum*, apply the access to broadcast time requirement of section 312(a)(7) and the use of facilities requirements of section 315 to providers of direct broadcast satellite service ...”) (emphasis added).

<sup>23</sup> *See FCC v. WNCN Listeners Guild*, 450 U.S. 582, 596 (1981) (“[T]he Commission’s judgment regarding how the public interest is best served is entitled to substantial judicial deference.”).

<sup>24</sup> *See Targeting and Eliminating Unlawful Text Messages*, Report and Order and Further Notice of Proposed Rulemaking, 2023 WL 2582658, para. 40 (2023) (noting the Commission’s authority under Sections 303(b), 307, and 316).

<sup>25</sup> 47 U.S.C. § 154(i).

12. We tentatively conclude that section 632—which directs the Commission to “establish standards by which cable operators may fulfill their customer service requirements”—grants us the authority to adopt a rebate requirement that would apply to cable operators.<sup>26</sup> Sections 632(b)(2) and (b)(3) direct the Commission to establish standards governing “outages” and “communications between the cable operator and the subscriber (including standards governing bills and refunds).”<sup>27</sup> Although the statute does not define the term “outages,” we tentatively find that Congress intended that term to apply not only to a complete system failure but to broadly cover any interruption of service under the requirements of 632(b)(2). Moreover, because our proposed rules seek to address cable operators’ billing and refund practices concerning blacked out programming, we tentatively conclude that these are customer service matters within the meaning of section 632(b)(3). We tentatively find that this interpretation is supported by the legislative history. Specifically, when Congress adopted section 632, it directed us to “provide guidelines governing the provision of rebates and credits to customers due to system failures *or other interruptions of service.*”<sup>28</sup> From a subscriber’s perspective, when a cable operator blacks out a signal over failed carriage negotiations, we tentatively find it to be an interruption of service—that is an “outage” within the meaning of (b)(2): the subscriber is paying for a service in exchange for a particular package of channels, and that particular package of channels is no longer available in full for a period of time. Regardless of whether the outage is due to a technical issue, a breakdown in retransmission consent negotiations, or for some other reason, we tentatively find that the subscriber’s service interruption may be regulated under (b)(2), and entitled to a rebate. We tentatively find that we are also authorized under (b)(3) to require the cable operator to provide a rebate to the affected subscriber for the service loss during that period. In addition, we tentatively find that we may regulate blackout-related rebates under our general authority in 632(b) to establish “customer service” standards. Although the term “customer service” is not defined in the statute, the legislative history defines the term “customer service” to mean “in general” “the direct business relation between a cable operator and a subscriber,” and goes on to explain that “customer service requirements” include requirements related to “rebates and credits to consumers.”<sup>29</sup> We tentatively conclude that the proposed rebate requirement satisfies the definition of a “customer service requirement” because billing practices governing an interruption of service, such as blackouts, involve the “direct business relation between a cable operator and a subscriber.” Furthermore, the list of topics Congress required the Commission to address in terms of customer service was not exhaustive.<sup>30</sup> We tentatively conclude that blackout-related rebates are precisely the type of customer service concerns that Congress meant to address when it enacted section 632.<sup>31</sup> Thus, we tentatively find that our proposed rules are within the statute’s grant of authority. We seek comment on this analysis.

13. We acknowledge that section 623 of the Act limits our authority to regulate rates for cable service in areas where effective competition exists,<sup>32</sup> and that nearly all cable operators now face

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<sup>26</sup> 47 U.S.C. § 552.

<sup>27</sup> 47 U.S.C. § 552(b)(3).

<sup>28</sup> House Committee on Energy and Commerce, H.R. REP. 102-628, at 105 (1992 Cable Act House Report) (emphasis added). *See also id.* at 34-37 (1992) (1992 Cable Act House Report); Senate Committee on Commerce, Science and Transportation, S. REP. 102-92, at 1, 3 (1992).

<sup>29</sup> H.R. REP. 98-934 at 79 (1984), *reprinted in* 1984 U.S.C.C.A.N. 4655, 4716.

<sup>30</sup> 47 U.S.C. § 552(b) (directing the Commission to establish customer service requirements, including three enumerated categories “at a minimum”).

<sup>31</sup> H.R. REP. 102-628, at \*34 (noting that customer service topics include “rebates and credits to consumers” and “information on billing or services”).

<sup>32</sup> Section 623 prohibits the Commission from regulation of “the rates for the provision of cable service” in franchise areas where effective competition exists. 47 U.S.C. § 543(a)(2).

effective competition and are not subject to rate regulation.<sup>33</sup> However, there is no such limitation in section 632's customer service provision.<sup>34</sup> Furthermore, the availability of other service providers offering video programming in the franchise area may provide some prospective options for subscribers, or some deterrent effect for the conduct we aim to address, but we tentatively find that does not prevent a cable operator offering services under an existing contract from charging a subscriber for a channel that carries no programming due to a business dispute that is at least somewhat within the purview of the cable operator to resolve. We tentatively conclude that a rebate requirement for interruption of service due to blackouts would not be rate regulation. The statute does not define the term "rates" or explain the meaning of the phrase "rates for the provision of cable service" for purposes of section 623. Recent court decisions distinguish prohibited rate regulations from regulations similar to the one we propose here that provide basic protections for cable customers. In *Spectrum Northeast, LLC v. Frey*,<sup>35</sup> the First Circuit upheld a Maine regulation that requires cable operators to issue prorated credits or rebates for the days remaining in a billing period after a subscriber terminates cable service.<sup>36</sup> The court determined that the federal preemption of cable rate regulation "did not extend to the regulation of termination rebates"<sup>37</sup> and concluded that the Maine law is not a law governing "rates for the provision of cable service" but rather is a "consumer protection law" that is not preempted.<sup>38</sup> The New Jersey Supreme Court also recently upheld a similar New Jersey statute.<sup>39</sup> In *Matter of Altice*, the Supreme Court of New Jersey concluded that a requirement that cable operators issue refunds for the remaining days in a billing cycle is not rate regulation because "the plain and ordinary meaning of rate regulation . . . is not so broad as to encompass all laws that affect or concern cable prices."<sup>40</sup> Both cases involved requirements that addressed cable operator charges to subscribers for services that were no longer being provided to the subscriber. Here, too, our proposed requirement would prohibit cable operators from charging subscribers for the period of time that particular programming is *not* being provided by the cable operator. That contrasts with our common understanding of rate regulation, which is when the government sets "the amount charged for a particular product . . . as defined by a particular unit of measurement in relation to the product."<sup>41</sup> Our proposal contains no limits on the amount that a cable operator may charge for a channel; rather, it would simply require the operator to rebate the amount it charges if it does not deliver the product. Accordingly, we tentatively conclude that the courts' logic in *Spectrum Northeast, LLC v. Frey* and *Matter of Altice* applies to the rebate requirements for blackouts. We seek comment on this analysis.

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<sup>33</sup> See, e.g., *NATOA v. FCC*, 862 F.3d 18 (D.C. Cir. 2017) (upholding the FCC's rebuttable presumption that cable operators are subject to effective competition under the competing provider test); *Petition for Determination of Effective Competition in 32 Massachusetts Communities and Kauai, HI*, Memorandum Opinion and Order, 34 FCC Rcd 10229 (2019), *petition for review denied*, *Mass. Dep't of Telecomms. & Cable v. FCC*, 983 F.3d 28 (1st Cir. 2020) (finding of LEC effective competition).

<sup>34</sup> 47 U.S.C. § 552.

<sup>35</sup> *Spectrum Northeast, LLC v. Frey*, 22 F.4th 287 (1st Cir. 2022), *cert denied*, 143 S.Ct. 562 (2023).

<sup>36</sup> 47 U.S.C. § 543(a)(1); Maine regulation, 30-A M.R.S.A. § 3010(1-A) ("A franchisee shall grant a subscriber a pro rata credit or rebate for the days of the monthly billing period after the cancellation of service if that subscriber requests cancellation of service 3 or more working days before the end of the monthly billing period.").

<sup>37</sup> *Spectrum Northeast*, 22 F.4th at 299-301.

<sup>38</sup> *Id.* at 303.

<sup>39</sup> N.J. Admin. Code § 14:18-3.8.

<sup>40</sup> *Alleged Failure of Altice USA, Inc., to Comply with Certain Provisions of the New Jersey Cable Television Act, N.J.S.A. 48:5A-1 et seq., and the New Jersey Administrative Code, N.J.A.C. 14:18-1.1 et seq.*, 291 A.3d 790, 798 (NJ 2023).

<sup>41</sup> *Spectrum Northeast, LLC v. Frey*, 22 F.4th at 292 (quoting Appellant's Brief).

14. We also tentatively conclude that our proposal to require rebates in the event of a blackout is consistent with Section 624(f) of the Act, which provides that “[a]ny Federal agency . . . may not impose requirements regarding the *provision* or content of cable services, except as expressly provided in this subchapter.”<sup>42</sup> As an initial matter, we tentatively conclude that our proposed rebate requirement is authorized by Section 632, as noted above. In any event, we note that courts have interpreted Section 624(f) to prohibit regulations that are based on the content of cable programming (e.g., requirements to carry or not carry certain programming).<sup>43</sup> Because the blackout rebate proposal is not content-based (that is, it does not require the cable operator to carry or not carry certain programming), we tentatively conclude it does not violate Section 624(f). We seek comment on this analysis.

15. As noted above, based on the language and structure of section 632, Congress authorized the Commission to establish customer service requirements for cable operators, and franchising authorities to adopt additional laws above and beyond the Commission’s baseline requirements.<sup>44</sup> Therefore, we tentatively find that our proposed rule for cable operators would not preempt state and local laws applied to cable operators that require rebates for blackouts or otherwise exceed the requirements we adopt in this proceeding, so long as they are not inconsistent with Commission regulations. We seek comment on this analysis.

16. *Enforcement.* The Commission shares authority over cable customer service issues under the Act: “the Commission sets baseline customer service requirements at the federal level, and state and local governments tailor more specific customer service regulations based on their communities’ needs.”<sup>45</sup> Given the bifurcated authority we share with state and local governments, we seek comment on how best to enforce a rebate rule. Do state and local authorities have adequate resources to effectively enforce these rules? If not, is the Commission best equipped to enforce a rebate requirement based on consumer complaints?<sup>46</sup> Is there a better enforcement mechanism to ensure that subscription video providers provide their subscribers with rebates or credit? Given our shared jurisdiction over cable customer service issues, we seek specific comment from State and local authorities regarding their local subscriber complaints and regulation experiences with respect to service interruptions due to blackouts. What is the most effective way to enforce a requirement applicable to DBS providers?

17. *Cost/Benefit Analysis.* We invite commenters to address the costs and benefits of requiring cable operators and DBS providers to offer rebates to their subscribers when those subscribers

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<sup>42</sup> 47 U.S.C. § 544(f) (emphasis added).

<sup>43</sup> *United Video, Inc. v. FCC*, 890 F.2d 1173, 1189 (D.C. Cir. 1989) (“the key is whether a regulation is content-based or content-neutral. . . . [I]t does not suggest a concern with regulations of cable that are not based on the content of cable programming, and do not require that particular programs or types of programs be provided.”). See also *Comcast of Maine/New Hampshire, Inc. v. Mills*, 435 F.Supp.3d 228, 235-44 (D. Maine 2019); *Storer Cable Commc'ns v. City of Montgomery, Ala.*, 806 F. Supp. 1518, 1544-46 (M.D. Ala. 1992); *Morrison v. Viacom, Inc.*, 61 Cal. Rptr.2d 544, 555-57 (Cal. Ct. App. 1997).

<sup>44</sup> 47 U.S.C. § 552. See *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as Amended by the Cable Television Consumer Protection and Competition Act of 1992*, Second Report and Order, MB Docket No. 05-311, 22 FCC Rcd 19633, 19646, para. 27 (2007) (citing 47 U.S.C. §552(d)(2) (stating that the “statute’s explicit language makes clear that Commission standards are a floor for customer service requirements, rather than a ceiling, and thus do not preclude LFAs from adopting stricter customer service requirements”).

<sup>45</sup> *All-In NPRM* at para. 11.

<sup>46</sup> We note that the Commission has always retained its enforcement authority to address “systemic abuses that undermine the statutory objectives.” *1993 Cable Consumer Protection Order*, 8 FCC Rcd at 2897, para. 19. In addition, the Commission has broad authority under the Act to enforce its rules. See 47 U.S.C. § 151 (directing the Commission to “execute and enforce the provisions of [the Communications] Act”); 47 U.S.C. § 312(b) (authorizing the Commission to order persons to cease and desist from violating any provision of the Act or the Commission’s rules); 47 U.S.C. § 503 (authorizing the Commission to assess a forfeiture penalty for failure to comply with any of the provisions of the Act, or any rule, regulation, or order issued by the Commission under this Act).



are deprived of video programming for which they paid. What are the burdens and costs of providing rebates? Would the benefits to subscribers outweigh any such costs and burdens? Are the costs and benefits different for small cable entities, and if so, should we impose different obligations on those entities? How would requiring cable operators and DBS providers to offer rebates affect carriage negotiations with broadcast stations and non-broadcast programmers? Specifically, how would this policy affect the likelihood of blackouts, the duration of blackouts if they were to occur, and the carriage fee ultimately negotiated?

18. *Digital Equity and Inclusion.* Finally, the Commission, as part of its continuing effort to advance digital equity for all,<sup>47</sup> including people of color, persons with disabilities, persons who live in rural or Tribal areas, and others who are or have been historically underserved, marginalized, or adversely affected by persistent poverty or inequality, invites comment on any equity-related considerations<sup>48</sup> and benefits (if any) that may be associated with the proposals and issues discussed herein. Specifically, we seek comment on how our proposals may promote or inhibit advances in diversity, equity, inclusion, and accessibility, as well the scope of the Commission’s relevant legal authority.

#### IV. PROCEDURAL MATTERS

19. *Ex Parte Rules—Permit-But-Disclose.* The proceeding this NPRM initiates shall be treated as a “permit-but-disclose” proceeding in accordance with the Commission’s *ex parte* rules.<sup>49</sup> Persons making *ex parte* presentations must file a copy of any written presentation or a memorandum summarizing any oral presentation within two business days after the presentation (unless a different deadline applicable to the Sunshine period applies). Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentation must (1) list all persons attending or otherwise participating in the meeting at which the *ex parte* presentation was made, and (2) summarize all data presented and arguments made during the presentation. Memoranda must contain a summary of the substance of the *ex parte* presentation and not merely a listing of the subjects discussed. More than a one or two sentence description of the views and arguments presented is generally required. If the presentation consisted in whole or in part of the presentation of data or arguments already reflected in the presenter’s written comments, memoranda or other filings in the proceeding, the presenter may provide citations to such data or arguments in his or her prior comments, memoranda, or other filings (specifying the relevant page and/or paragraph numbers where such data or arguments can be found) in lieu of summarizing them in the memorandum. Documents shown or given to Commission staff during *ex parte* meetings are deemed to be written *ex parte* presentations and must be filed consistent with section 1.1206(b) of the rules.<sup>50</sup> In proceedings governed by section 1.49(f) or for which the Commission has made available a method of electronic filing, written *ex parte* presentations and memoranda summarizing oral *ex parte* presentations, and all attachments thereto, must be filed through the electronic comment

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<sup>47</sup> Section 1 of the Communications Act of 1934 as amended provides that the FCC “regulat[es] interstate and foreign commerce in communication by wire and radio so as to make [such service] available, so far as possible, to all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex.” 47 U.S.C. § 151.

<sup>48</sup> The term “equity” is used here consistent with Executive Order 13985 as the consistent and systematic fair, just, and impartial treatment of all individuals, including individuals who belong to underserved communities that have been denied such treatment, such as Black, Latino, and Indigenous and Native American persons, Asian Americans and Pacific Islanders and other persons of color; members of religious minorities; lesbian, gay, bisexual, transgender, and queer (LGBTQ+) persons; persons with disabilities; persons who live in rural areas; and persons otherwise adversely affected by persistent poverty or inequality. See Exec. Order No. 13985, 86 Fed. Reg. 7009, Executive Order on Advancing Racial Equity and Support for Underserved Communities Through the Federal Government (January 20, 2021).

<sup>49</sup> 47 CFR §§ 1.1200 *et seq.*

<sup>50</sup> 47 CFR § 1.1206(b).

filing system available for that proceeding, and must be filed in their native format (e.g., .doc, .xml, .ppt, searchable.pdf).<sup>51</sup> Participants in this proceeding should familiarize themselves with the Commission's *ex parte* rules.

20. *Providing Accountability Through Transparency Act.* The Providing Accountability Through Transparency Act requires each agency, in providing notice of a rulemaking, to post online a brief plain-language summary of the proposed rule.<sup>52</sup> Accordingly, the Commission will publish the required summary of this Notice of Proposed Rulemaking on: <https://www.fcc.gov/proposed-rulemakings>.

21. *Filing Requirements—Comments and Replies.* Pursuant to sections 1.415 and 1.419 of the Commission's rules,<sup>53</sup> interested parties may file comments and reply comments on or before the dates indicated on the first page of this document. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS).<sup>54</sup>

- Electronic Filers: Comments may be filed electronically using the Internet by accessing the ECFS: <http://apps.fcc.gov/ecfs/>.
- Paper Filers: Parties who choose to file by paper must file an original and one copy of each filing.
- Filings can be sent by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.
  - Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9050 Junction Drive, Annapolis Junction, MD 20701.
  - U.S. Postal Service first-class, Express, and Priority mail must be addressed to 45 L Street, NE, Washington D.C. 20554.
  - Effective March 19, 2020, and until further notice, the Commission no longer accepts any hand or messenger delivered filings. This is a temporary measure taken to help protect the health and safety of individuals, and to mitigate the transmission of COVID-19.<sup>55</sup>

22. *Regulatory Flexibility Act.* The Regulatory Flexibility Act of 1980, as amended (RFA),<sup>56</sup> requires that an agency prepare a regulatory flexibility analysis for notice and comment rulemakings, unless the agency certifies that “the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities.”<sup>57</sup> Accordingly, we have prepared an Initial Regulatory Flexibility Analysis (IRFA) concerning the possible/potential impact of the rule and policy changes contained in this Notice of Proposed Rulemaking. The IRFA is attached as Appendix A. Written public comments are requested on the IRFA. Comments must have a separate and distinct heading designating them as

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<sup>51</sup> 47 CFR § 1.49(f).

<sup>52</sup> 5 U.S.C. § 553(b)(4). The Providing Accountability Through Transparency Act, Pub. L. No. 118-9 (2023), amended section 553(b) of the Administrative Procedure Act.

<sup>53</sup> See 47 CFR §§ 1.415, 1419.

<sup>54</sup> See *Electronic Filing of Documents in Rulemaking Proceedings*, 63 FR 24121 (1998).

<sup>55</sup> *FCC Announces Closure of FCC Headquarters Open Window and Change in Hand-Delivery Policy*, Public Notice, 35 FCC Rcd 2788 (2020).

<sup>56</sup> See 5 U.S.C. § 603. The RFA, 5 U.S.C. §§ 601–612, was amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

<sup>57</sup> *Id.* § 605(b).

responses to the IRFA and must be filed by the deadlines for comments on the first page of this document.

23. *Paperwork Reduction Act.* This document may contain proposed new and modified information collection requirements. The Commission, as part of its continuing effort to reduce paperwork burdens, invites the general public and the Office of Management and Budget (OMB) to comment on any information collection requirements contained in this document, as required by the Paperwork Reduction Act of 1995, Public Law 104-13. In addition, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, *see* 44 U.S.C. § 3506(c)(4), we seek specific comment on how we might further reduce the information collection burden for small business concerns with fewer than 25 employees.

24. *People with Disabilities:* To request materials in accessible formats for people with disabilities (braille, large print, electronic files, audio format), send an e-mail to [fcc504@fcc.gov](mailto:fcc504@fcc.gov) or call the Consumer & Governmental Affairs Bureau at 202-418-0530 (voice).

25. *Additional Information.* For additional information on this proceeding, contact Brendan Murray, [Brendan.Murray@fcc.gov](mailto:Brendan.Murray@fcc.gov) of the Media Bureau, Policy Division, at (202) 418-1573.

## V. ORDERING CLAUSES

26. Accordingly, **IT IS ORDERED** that, pursuant to the authority contained in sections 1, 4(i), 4(j), 303, 335(a), 632(b) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 303, 335(a), and 552(b) this Notice of Proposed Rulemaking **IS ADOPTED**.

27. **IT IS FURTHER ORDERED** that the Commission's Office of the Secretary **SHALL SEND** a copy of this Notice of Proposed Rulemaking, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch  
Secretary

## APPENDIX A

## Initial Regulatory Flexibility Act Analysis

1. As required by the Regulatory Flexibility Act of 1980, as amended (RFA),<sup>1</sup> the Federal Communications Commission (Commission) has prepared this Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on a substantial number of small entities by the policies and rule changes proposed in the *Notice of Proposed Rulemaking (Notice)*. Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments specified in the *Notice*. The Commission will send a copy of the *Notice*, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (SBA).<sup>2</sup> In addition, the *Notice* and IRFA (or summaries thereof) will be published in the Federal Register.<sup>3</sup>

**A. Need for, and Objectives of, the Proposed Rules**

2. In the *Notice*, we address whether subscriber rebates should be offered by cable operators or direct broadcast satellite (DBS) providers in instances where those operators and providers fail to agree on carriage terms with a broadcaster or programming network and, as a result of the dispute, subscribers lose access to the channels over which the parties are negotiating. At present, the resulting subscriber blackouts lead to subscribers often paying the same monthly subscription fee for a service package that does not include all of the channels that expected to receive when signing up for service. The *Notice* aims to address that customer service shortcoming, as well as address how such a rebate program could be implemented in a manner that does not create undue economic hardship to small and other entities in their efforts at compliance with the rules proposed in the *Notice*, should they be adopted.

**B. Legal Basis**

3. The proposed action is authorized pursuant to sections 1, 4(i), 4(j), 303, 335(a), and 632(b) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 303, 335(a), and 552(b).

**C. Description and Estimate of the Number of Small Entities to Which the Proposed Rules Will Apply**

4. The RFA directs agencies to provide a description of, and, where feasible, an estimate of the number of small entities that may be affected by the proposed rules, if adopted.<sup>4</sup> The RFA generally defines the term “small entity” as having the same meaning as the terms “small business,” “small organization,” and “small governmental jurisdiction.”<sup>5</sup> In addition, the term “small business” has the same meaning as the term “small business concern” under the Small Business Act (SBA).<sup>6</sup> A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field

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<sup>1</sup> 5 U.S.C. § 603. The RFA, 5 U.S.C. §§ 601-612, was amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

<sup>2</sup> 5 U.S.C. § 603(a).

<sup>3</sup> *Id.*

<sup>4</sup> *Id.* § 603(b)(3).

<sup>5</sup> *Id.* § 601(6).

<sup>6</sup> *Id.* § 601(3) (incorporating by reference the definition of “small business concern” in 15 U.S.C. § 632(a)(1)). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies “unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register.”

of operation; and (3) satisfies any additional criteria established by the SBA.<sup>7</sup> Below, we provide a description of the impacted small entities, as well as an estimate of the number of such small entities, where feasible.

5. *Cable Companies and Systems (Rate Regulation Standard)*. The Commission has developed its own small business size standards for the purpose of cable rate regulation. Under the Commission's rules, a "small cable company" is one serving 400,000 or fewer subscribers nationwide.<sup>8</sup> Based on industry data, there are about 420 cable companies in the U.S.<sup>9</sup> Of these, only seven have more than 400,000 subscribers.<sup>10</sup> In addition, under the Commission's rules, a "small system" is a cable system serving 15,000 or fewer subscribers.<sup>11</sup> Based on industry data, there are about 4,139 cable systems (headends) in the U.S.<sup>12</sup> Of these, about 639 have more than 15,000 subscribers.<sup>13</sup> Accordingly, the Commission estimates that the majority of cable companies and cable systems are small.

6. *Cable System Operators (Telecom Act Standard)*. The Communications Act of 1934, as amended, contains a size standard for a "small cable operator," which is "a cable operator that, directly or through an affiliate, serves in the aggregate fewer than one percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed \$250,000,000."<sup>14</sup> For purposes of the Telecom Act Standard, the Commission determined that a cable system operator that serves fewer than 498,000 subscribers, either directly or through affiliates, will meet the definition of a small cable operator based on the cable subscriber count established in a 2001 Public Notice.<sup>15</sup> Based on industry data, only six cable system operators have more than 498,000 subscribers.<sup>16</sup> Accordingly, the Commission estimates that the majority of cable system operators are small under this size standard. We note, however, that the Commission neither requests nor collects information on whether cable system operators are affiliated with entities whose gross annual revenues exceed \$250 million.<sup>17</sup> Therefore, we are unable at this time to estimate with greater precision the number of cable system operators that would qualify as small cable operators under the definition in the Communications Act.

7. *Direct Broadcast Satellite (DBS) Service*. DBS service is a nationally distributed subscription service that delivers video and audio programming via satellite to a small parabolic "dish"

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<sup>7</sup> 15 U.S.C. § 632.

<sup>8</sup> 47 CFR § 76.901(d).

<sup>9</sup> S&P Global Market Intelligence, S&P Capital IQ Pro, U.S. MediaCensus, *Operator Subscribers by Geography* (last visited May 26, 2022).

<sup>10</sup> S&P Global Market Intelligence, S&P Capital IQ Pro, *Top Cable MSOs 06/23Q* (last visited Sept. 27, 2023); S&P Global Market Intelligence, *Multichannel Video Subscriptions, Top 10* (April 2022).

<sup>11</sup> 47 CFR § 76.901(c).

<sup>12</sup> S&P Global Market Intelligence, S&P Capital IQ Pro, U.S. MediaCensus, *Operator Subscribers by Geography* (last visited May 26, 2022).

<sup>13</sup> S&P Global Market Intelligence, S&P Capital IQ Pro, *Top Cable MSOs 12/21Q* (last visited May 26, 2022).

<sup>14</sup> 47 U.S.C. § 543(m)(2).

<sup>15</sup> *FCC Announces Updated Subscriber Threshold for the Definition of Small Cable Operator*, Public Notice, DA 23-906 (MB rel. Sept. 27, 2023) (*Subscriber Count PN*).

<sup>16</sup> S&P Global Market Intelligence, S&P Capital IQ Pro, *Top Cable MSOs 06/23Q* (last visited Sept. 27, 2023); S&P Global Market Intelligence, *Multichannel Video Subscriptions, Top 10* (April 2022).

<sup>17</sup> The Commission does receive such information on a case-by-case basis if a cable operator appeals a local franchise authority's finding that the operator does not qualify as a small cable operator pursuant to § 76.901(e) of the Commission's rules. See 47 CFR § 76.910(b).

antenna at the subscriber's location. DBS is included in the Wired Telecommunications Carriers industry which comprises establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks.<sup>18</sup> Transmission facilities may be based on a single technology or combination of technologies.<sup>19</sup> Establishments in this industry use the wired telecommunications network facilities that they operate to provide a variety of services, such as wired telephony services, including VoIP services, wired (cable) audio and video programming distribution; and wired broadband internet services.<sup>20</sup> By exception, establishments providing satellite television distribution services using facilities and infrastructure that they operate are included in this industry.<sup>21</sup>

8. The SBA small business size standard for Wired Telecommunications Carriers classifies firms having 1,500 or fewer employees as small.<sup>22</sup> U.S. Census Bureau data for 2017 show that 3,054 firms operated in this industry for the entire year.<sup>23</sup> Of this number, 2,964 firms operated with fewer than 250 employees.<sup>24</sup> Based on this data, the majority of firms in this industry can be considered small under the SBA small business size standard. According to Commission data however, only two entities provide DBS service, DIRECTV and DISH Network, which require a great deal of capital for operation.<sup>25</sup> DIRECTV and DISH Network both exceed the SBA size standard for classification as a small business. Therefore, we must conclude based on internally developed Commission data, in general DBS service is provided only by large firms.

#### **D. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements for Small Entities**

9. The *Notice* does not specifically propose any new or modified reporting or record keeping requirements for small entities, although comments we receive in response to the *Notice* may potentially lead to new compliance requirements in the future. The *Notice* seeks comment on whether to require cable operators and DBS providers to give subscribers rebates for channels that are not provided due to a breakdown in retransmission consent negotiations. If subscriber rebates are implemented, the Commission will need to determine how small and other entities may comply with any adopted rules, what the method used to offer rebates should be, and how such rebates could be issued to their subscribers.

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<sup>18</sup> See U.S. Census Bureau, *2017 NAICS Definition, "517311 Wired Telecommunications Carriers,"* <https://www.census.gov/naics/?input=517311&year=2017&details=517311>.

<sup>19</sup> *Id.*

<sup>20</sup> See *id.* Included in this industry are: broadband Internet service providers (e.g., cable, DSL); local telephone carriers (wired); cable television distribution services; long-distance telephone carriers (wired); closed-circuit television (CCTV) services; VoIP service providers, using own operated wired telecommunications infrastructure; direct-to-home satellite system (DTH) services; telecommunications carriers (wired); satellite television distribution systems; and multichannel multipoint distribution services (MMDS).

<sup>21</sup> *Id.*

<sup>22</sup> See 13 CFR § 121.201, NAICS Code 517311 (as of 10/1/22, NAICS Code 517111).

<sup>23</sup> See U.S. Census Bureau, *2017 Economic Census of the United States, Selected Sectors: Employment Size of Firms for the U.S.: 2017*, Table ID: EC1700SIZEEMPFI, NAICS Code 517311, <https://data.census.gov/cedsci/table?y=2017&n=517311&tid=ECNSIZE2017.EC1700SIZEEMPFI&hidePreview=false>.

<sup>24</sup> *Id.* The available U.S. Census Bureau data does not provide a more precise estimate of the number of firms that meet the SBA size standard.

<sup>25</sup> See *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Eighteenth Report*, Table III.A.5, 32 FCC Rcd 568, 595 (Jan. 17, 2017).

10. In assessing the cost of compliance for small entities, at this time the Commission is not in a position to determine whether, if adopted, our proposals and the matters upon which we seek comment will require small entities to hire professionals to comply with the proposed rules in the *Notice*, and cannot quantify the operational and implementation costs of compliance with the potential rule changes discussed herein. To help the Commission more fully evaluate the cost of compliance, in the *Notice* we seek comment on the costs and benefits of these proposals. We expect the comments that we receive from the parties in the proceeding, including cost and benefit analyses, will help the Commission identify and evaluate compliance costs and burdens for small entities.

**E. Steps Taken to Minimize the Significant Economic Impact on Small Entities and Significant Alternatives Considered**

11. The RFA requires an agency to describe any significant, specifically small business, alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): “(1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance and reporting requirements under the rule for such small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for such small entities.”<sup>26</sup>

12. At this time, the Commission is not aware of any revisions or new requirements that, if adopted, would impose a significant economic impact or burdens on small entities. The *Notice* invites comment on how to accommodate entities for which compliance with the proposed rules would pose an undue hardship.

13. The Commission expects to more fully consider the economic impact and alternatives for small entities following the review of comments and costs and benefits analyses filed in response to the *Notice*. The Commission’s evaluation of this information will shape the final alternatives it considers, the final conclusions it reaches, and any final actions it ultimately takes in this proceeding to minimize any significant economic impact that may occur on small entities.

**F. Federal Rules that May Duplicate, Overlap, or Conflict with the Proposed Rules**

14. None.

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<sup>26</sup> 5 U.S.C. § 603(c)(1)-(4).

**STATEMENT OF  
CHAIRWOMAN JESSICA ROSENWORCEL**

Re: *Customer Rebates for Undelivered Video Programming During Blackouts*, MB Docket No. 24-20, Notice of Proposed Rulemaking.

You should get what you pay for. It's a simple principle. But for too many consumers, this is not happening. When they turn on the television to watch the local news, their favorite show, or the big game, the screen goes dark. Instead of the programming they were sold when they signed up for service, they get a message telling them that their cable or satellite company is in a dispute with a broadcast company and until these two battle it out, they are stuck with a blackout. It's not right. And it's happening too often, for longer periods of time.

Enough. When consumers are saddled with a blackout like this, I think they deserve a refund. They should not be asked to shell out for programming that they were promised but are unable to watch. This rulemaking is about fairness. It asks questions about how our rules can make sure consumers get what they pay for and not have to spend for service they are not getting and screens that go dark.



**DISSENTING STATEMENT OF  
COMMISSIONER BRENDAN CARR**

Re: *Customer Rebates for Undelivered Video Programming During Blackouts*, MB Docket No. 24-40, Notice of Proposed Rulemaking.

At President Biden’s urging, the FCC launched a proceeding last month to regulate certain fees (or rates) charged by cable and DBS providers—even though today those providers are far from 800 pound gorillas when it comes to the modern video marketplace. I dissented from that decision because I cannot support the Biden Administration’s inexorable march towards rate regulation and because the FCC plainly does not have the legal authority to impose those forms of rate regulation. Indeed, the FCC purported to ground the decision in a statutory provision that Congress passed to address customer service issues, like wait times on calls to service centers, not rate regulation.

Today, the FCC heads right back down this same path—proposing to impose another form of rate regulation using the agency’s limited authority to regulate customer service issues. And once again, this action comes at a time when consumer choice has never been greater and traditional MVPDs are bleeding market share to new, unregulated competitors.

I cannot support this effort. Accordingly, I dissent.

**STATEMENT OF  
COMMISSIONER GEOFFREY STARKS**

Re: *Customer Rebates for Undelivered Video Programming During Blackouts*, MB Docket No. 24-40, Notice of Proposed Rulemaking.

It's an unfortunate fact – the last several years have brought dozens of programming blackouts to tens of millions of subscribers. Let's look at some numbers. According to S&P Global, there were 24 retrans blackouts in 2019 – more than there had been in any single year before – lasting 171 days and affecting more than 20 million subscribers.<sup>1</sup> And while the number of blackouts in the last year or two may be lower, in proportion with a lower number of new agreements negotiated, the duration of those blackouts hasn't been: the four resolved blackouts that S&P clocked in 2022 lasted for 152 days.<sup>2</sup>

It's simple – the programming that customers pay for should be available when they turn on the TV. Why is that increasingly not the case? We need to dig deeper, and so I appreciate the Chairwoman and Commissioner Gomez supporting my additions to the item, which now asks for answers to the difficult questions involved here. Why have blackouts increased? How has the availability of streaming services, particularly live linear streaming services that consumers can sign up for and begin receiving immediately, impacted the amount and duration of blackouts? Are programmers with channels that have certain categories of programming – like sports – more likely to have negotiations that result in blackouts? I look forward to the record on these issues. By learning the factors that are contributing to the recent rise in blackouts, we can determine what, if any, steps we can take to limit them from the start.

I was also pleased to learn in meetings with MVPDs that many providers offer some form of rebate or credit for blackouts already, so the item now seeks to learn more about current practices in the marketplace. This information will guide us as we determine how any potential rebates should be structured.

Thanks also to the Commission staff who worked on this important item. It has my support.

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<sup>1</sup> See Atif Zubair, *History of Retrans Deals and Signal Blackouts*, 1993-2014 YTD, Market Intelligence, S&P Capital IQ Pro (Feb. 25, 2014); Atif Zubair, *Retrans Roundup 2019*, Market Intelligence, S&P Capital IQ Pro (Jan. 21, 2020). For clarity, S&P Global refers to “one blackout” as a dispute between one broadcaster and one distributor; it does not refer to the number of stations at issue. Other sources may report on a per-station basis, see Mike Farrell, “Cable Retrans Blackouts Declined Sharply in 2021, But 2022 Could See An Uptick in Disputes,” Multichannel News (Jan. 7, 2022), <https://www.nexttv.com/news/cable-retrans-blackouts-declined-sharply-in-2021-but-2022-could-see-an-uptick-in-disputes>.

<sup>2</sup> Peter Leitzinger, *Retrans Roundup 2022*, Market Intelligence, S&P Capital IQ Pro (Feb. 7, 2023).

**DISSENTING STATEMENT OF  
COMMISSIONER NATHAN SIMINGTON**

Re: *Customer Rebates for Undelivered Video Programming During Blackouts*, MB Docket No. 24-40, Notice of Proposed Rulemaking.

I dissent from this item because it, *at best*, will create zero consumer welfare (and, likely, will harm consumer welfare) while simultaneously misreading the Act. Let us treat the misreading first.

For its authority, the item relies on Sections 335(a) and 632 of the Act. Section 335(a) establishes Commission authority to create certain video programming requirements for DBS operators, and Section 632 establishes Commission authority to create customer service requirements for cable providers. Section 335(a), read in context, applies principally (though not exclusively) to provision of political broadcasting, while Section 632, read in context, applies principally to practices related to customer-facing functions of installation, maintenance, and service of cable facilities.

While the Act has play in the joints as a feature, these Sections of the Act have *nothing* to do with blackout rebates and cannot credibly be read as justifying the step the Commission takes today. It is true, and a well-established principle of law, that authorizing statutes for administrative agencies are intended to be read with some flexibility—that is the nature of Congressional delegation of certain technical rulemaking. But authorizing statutes are not enchanted bags of holding, capable of carrying every wild ambition or policy frolic. Rebates for channel blackouts are about as related to customer service requirements or political programming obligations, such as those denominated in the Act, as is what employees at cable and DBS operators wear. Is it too late to get in a casual Fridays edit?

So, okay: the tentative conclusions regarding authority contained in the NPRM are not supported by our statute, which is "illegal" with more words. But is it nevertheless a good *idea*? That is, *had* the Commission authority to undertake a rebates mandate, *should* it do so? Also no.

It will be easy to cast minority dissents on this item as representing some kind of retrograde, pro-business, anti-consumer stance straight out of the bloodless capitalist playbook. Indeed, I look forward to reading the popular tech press on just this issue. But here is my pitch to them: *this item costs consumers more and doesn't help anyone*. Had I *actually believed* that this item would *save* consumers even one thin dime, or make even one consumer whole who would not otherwise be made whole, *and* the Commission had discovered a proper and legal basis for authority, I would have voted *for* it. But that is not, at all, what is going to happen.

This item proposes to do a couple of things: it proposes to require cable and DBS providers exclusively to shoulder the financial burden of blackouts, and it asks after a methodology for calculating how blackouts will be compensated. First things first: does the requirement to rebate cable and DBS customers for a broadcast programming blackout save consumers money?

Well, of course, right? No. Why? Because broadcasters can use this new regulatory reality as a mote of leverage in retransmission consent negotiations with MVPDs. If you and I are negotiating whether you will carry my popular product in your high-traffic store, and we cannot agree on a wholesale price, consumers might raise a hue and cry that affects us both until we resolve our dispute. And we, of course, have a natural incentive to resolve our dispute: I want my product carried in your store, and you want my product on your shelves. But if I know that there will be a new rebate cost to you for every day my product is missing from your shelves that you *cannot* shift to me—well, why would I not hold out for just a bit more? You're the one who has to pay back your customers for the days my item went missing. (Yes, yes, I am losing some brand prestige and there happens to be a complicating cost for some other lost

revenues, but they are not as significant to me as extracting this higher price.) How much of the anticipated rebate can I soak up through my higher price, relative to our previously-negotiated, lower price? Well, what's preventing me from taking it all?

Let us say, further, that I distribute my product to multiple stores. Some of these stores actually *already* compensate consumers for the days in which my product goes missing as we negotiate over our wholesale pricing, in a manner that kept customers coming in the door. Oops! There goes an element of consumer choice. Now *all* stores *have* to provide rebates, and on *exactly* the same terms. But is that a good thing?

Well, what are the terms? The item has deferred suggesting a particular approach, but let us suppose that the final order will arrive at a methodology that calculates and distributes blackout rebates by subscriber count and length of blackout. That is: check the per subscriber monthly or annual cost a broadcaster charges an MVPD to carry its programming (to the fraction of MVPD system subscribers to which that particular programming is delivered), multiply it by the quantum of time of the blackout, and then distribute that amount, *pro rata*, to all subscribers affected by the blackout. I mean, is there another fair and administrable way to accomplish this that does not just manufacture numbers?

Tabling, for the moment, whether this item will force parties to violate their own nondisclosure agreements around retransmission consent pricing, let's take a worked example. A broadcaster and MVPD do not reach accord on a retransmission consent agreement, and the MVPD is forced to black out broadcast programming (during a critical moment in some sports season, no less) for two weeks. Let us assume it is a one station blackout in one market. Let us further assume, strictly for the sake of argument, that the station charged to the MVPD before the blackout, or will charge after, \$5 per subscriber per month for retransmission of its signal to that particular market. (Note that this is actually a pretty high multiple of the average, at least according to the most recent RAY BAUM cable pricing report, but we are keeping the math simple.)

So now cable subscribers in this market are entitled to a rebate for a couple of weeks—or about \$2.50—on next month's bill (or whenever). But does this rebate make anyone whole? Well, let us see. Suppose that the most desirable programming on the blacked out station were the live sports content. In fact, with the exception of local news, let us suppose that were the *only* content not available to the consumer in that market on other platforms. Well, the distribution of how strongly a consumer in that market desires that sports content is pretty bimodal, right? Some *really* wanted to see the live games they missed. Some couldn't have cared less.

Is the consumer who may not have even *noticed* the blackout made whole, or do they get a couple of bucks' worth of credit on their next bill that they didn't anticipate, don't understand, and may call about? And does the sports fan who was *deeply impacted* and *personally offended* by the blackout feel satisfied with a rebate that gives him change back from a Costco hot dog? (And, recall, this is *more* than consumers are likely to get for a time increment like this once this scheme is implemented.) And yet *this will be the new normal* as it relates to blackout rebates: a confusing, yet fairly distributed, pittance that costs money to administer, creates consumer confusion, and makes literally not one consumer psychologically whole—at the expense, to be clear, of marginally *higher* MVPD costs driven by marginally *higher* retransmission consent rates that I have every reason to expect will swamp whatever consumer welfare could have even *arguably* been contained in this item. And all of this at a time where MVPDs, shedding subscribers in video but growing in commercial relevance as internet service providers, are asking themselves whether they want to remain in the video distribution business at all.

Let me be clear: there are no innocents in the retransmission consent negotiation. Broadcasters and MVPDs alike are sophisticated actors negotiating over creation and distribution of valuable IP for

which each needs (never mind deserves) to be compensated. Public-spiritedness doesn't power antennas or bury cable. It is no sin to get paid, broadcasters produce content worth the price, and blackouts, infuriating though they are, are a feature of price discovery. But this item proposes to place a thumb on the scale with zero attendant consumer benefit on the other side of the ledger.

The Commission lacks the authority to do what this item proposes, but we shouldn't do it even if we could. I dissent.