DISSENTING STATEMENT OF
COMMISSIONER NATHAN SIMINGTON

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