International
Center for
Law & Economics

Reply Comments of the International Center for Law & Economics, Customer Rebates for Undelivered Video Programming During Blackouts

MB Docket No. 24-20

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Authored by:

Eric Fruits (Senior Scholar, International Center for Law & Economics)

Ben Sperry (Senior Scholar, International Center for Law & Economics)

Kristian Stout (Director of Innovation Policy, International Center for Law & Economics)

Geoffrey A. Manne (President and Founder, International Center for Law & Economics)

I. Introduction

The International Center for Law & Economics ("ICLE") thanks the Federal Communications Commission ("FCC" or "the Commission") for the opportunity to offer reply comments to this notice of proposed rulemaking ("NPRM"), as the Commission proposes to require cable operators and direct-broadcast satellite (DBS) providers to grant their subscribers rebates when those subscribers are deprived of video programming they expected to receive during programming blackouts that resulted from failed retransmission-consent negotiations or failed non-broadcast carriage negotiations.[1]

As noted in the NPRM, the Communications Act of 1934 requires that cable operators and satellite-TV providers obtain a broadcast TV station's consent in order to lawfully retransmit that station's signal to subscribers. Commercial stations or networks may either (1) demand carriage pursuant to the Commission's must-carry rules or (2) elect for carriage consent and negotiate for compensation in exchange for carriage. If a channel elects for retransmission consent but is unable to reach agreement for carriage, the cable operator or DBS provider loses the right to carry that signal. As a result, the cable operator or DBS provider's subscribers typically lose access entirely to the channel's signal unless and until the parties are able to reach an agreement, a situation that is often described as a "blackout."

Blackouts tend to generate eye-catching headlines and often annoy affected consumers.[2] This annoyance is amplified when consumers don't receive a rebate for the loss of signal, especially when they believe that they are merely bystanders in the dispute between the cable operator or DBS provider and the channel.[3] The Commission appears to echo theses concerns, concluding that its proposed rebate mandate would ensure "subscribers are made whole when they face interruptions of service that are outside their control" and would prevent subscribers "from being charged for services for the period that they did not receive them."[4]

This framing, however, oversimplifies retransmission-consent negotiations and mischaracterizes consumers' agency in subscribing to and using multichannel-video-programming distributors ("MVPDs"). Moreover, there are numerous questions raised by the NPRM regarding the proposal's feasibility, including how to identify which consumers would qualify for rebates, how those rebates would be calculated, and how they would be distributed. Several comments

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[1] *Notice of Proposed Rulemaking, In the Matter of Customer Rebates for Undelivered Video Programming During Blackouts*, MB Docket No. 24-20 (Jan. 17, 2024), *available at* https://docs.fcc.gov/public/attachments/FCC-24-2A1.pdf [hereinafter "NPRM"], at para. 1.

[2] *See id.* at n. 5, 7.

[3] Eric Fruits, *Blackout Rebates: Tipping the Scales at the FCC*, TRUTH ON THE MARKET (Mar. 6, 2024), https://truthonthemarket.com/2024/03/06/blackout-rebates-tipping-the-scales-at-the-fcc.

[4] NPRM, *supra* note 1 at para. 10.

submitted in this proceeding suggest that any implementation of this proposal would be arbitrary and unfair to cable operators, DBS providers, and consumers. In particular:

- Blackouts result from a temporary or permanent failure to reach an agreement in negotiations between channels *and* either cable operators or DBS providers. The Commission's proposal explicitly and unfairly assigns liability for blackouts to the cable operator or DBS provider. As a result, the proposal would provide channels with additional negotiating leverage relative to the status quo. Smaller cable operators may be especially disadvantaged.
- Each consumer is unique in how much they value a particular channel and how much they would be economically harmed by a blackout. For example, in the event of a cable or DBS blackout, some consumers can receive the programming via an over-the-air antenna or a streaming platform and would suffer close to no economic harm. Other consumers may assign no value to the blacked-out channel's programming and would likewise suffer no harm.
- Complexities and confidentiality in programming contracts would make it impossible to accurately or fairly calculate the price or cost associated with any given channel over some set period of time. For example, cable operators and DBS providers typically sell bundles of channels, not *a la carte* offerings, making it impossible to calculate an appropriate rebate for one specific channel or set of channels.
- Even if it were possible to calculate an appropriate rebate, any mandated rebate based on such calculations would constitute prohibited rate regulation.

These reply comments respond to many of the issues raised in comments on this matter. We conclude that the Commission is proposing a set of unworkable and arbitrary rules. Even if rebates could be reasonably and fairly calculated, the amount of such rebates would likely be only a few dollars and may be as little as a few pennies. In such cases, the enormous cost to the Commission, cable operators, and DBS providers would be many times greater than the amount of rebates provided to consumers. It would be a much better use of the FCC's and MVPD providers' resources to abandon this rulemaking process and refrain from mandating rebates for programming blackouts.

II. Who Is to Blame for Blackouts?

As discussed above, it appears the FCC's view is that consumers who experience blackouts are mere bystanders in a dispute, as the Commission invokes "consumer protection" and "customer service" as justifications for the proposed rules mandating rebates.[5] If we believe both that consumers are bystanders and that they are harmed by blackouts, then it is crucial to

[5] NPRM, *supra* note 1 at para. 13 (proposed rules "provide basic protections for cable customers") and ¶ 7 ("How would requiring cable operators and DBS providers to provide rebates or credits change providers' current customer service relations during a blackout?").

identify the parties to whom blame should be assigned for those blackouts. A key principle of the law & economics approach is that the party better-positioned to avoid the blackout should bear more—or, in some cases, *all*—of its costs.[6]

In comments submitted by Dish Network, William Zarakas and Jeremy Verlinda note that: "Programming fees are established through bilateral negotiations between content providers and MVPDs, and depend in large part on the relative bargaining position of the two sides."[7] This comment illustrates the obvious but important fact that both content providers *and* MVPD operators must reach agreement and, in any given negotiation, either side may have more bargaining power. Because of this reality, it is impossible to draw general conclusions about which party will be the least-cost avoider of blackouts, as borne out in the submitted comments.

On the one hand, the ATVA argues that programmers are the cause of blackouts: "Blackouts happen *to* cable and satellite providers and their subscribers."[8] NTCA supports this claim and reports that "[s]mall providers lack negotiating power in retransmission consent discussions."[9] On the other hand, the NAB claims the "leading cause of such disruptions" is "the pay TV industry's desire to use consumers as pawns to push for a change in law" and that MVPDs have a "strategy of creating negotiating impasses" in order to obtain a policy change.[10] Writing in *Truth on the Market*, Eric Fruits concludes:

> With the wide range of programming and delivery options, it's probably unwise to generalize who has the greater bargaining power in the current system. But if one had to choose, it seems that networks and, to a lesser extent, local broadcasters are in a slightly superior position. They have the right to choose must carry or

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[6] This is known as the "least-cost avoider" or "cheapest-cost avoider" principle. *See* Harold Demsetz, *When Does the Rule of Liability Matter?*, 1 J. LEGAL STUD. 13, 28 (1972); *see generally* Ronald Coase, *The Problem of Social Cost*, 3 J. L. & ECON. 1 (1960).

[7] *Comments of DISH Network LLC*, MB Docket No. 24-20 (Mar. 8, 2024), https://www.fcc.gov/ecfs/document/1030975783920/1 [hereinafter "DISH Comments"], Exhibit 1, *Declaration of William Zarakas & Jeremy Verlinda* [hereinafter "Zarakas & Verlinda"] at ¶ 8.

[8] *Comments of the American Television Alliance*, MB Docket No. 24-20 (Mar. 8, 2024), https://www.fcc.gov/ecfs/document/103082522212825/1 [hereinafter "ATVA Comments"] at i and 2 ("*Broadcasters and programmers* cause blackouts. This is, of course, true as a legal matter, as cable and satellite providers cannot lawfully deliver programming to subscribers without the permission of the rightsholder. It makes no sense to say that a cable or satellite provider has 'blacked out' programming by failing to obtain permission to carry it. A programmer 'blacks out' programming by declining to grant such permission.").

[9] *Comments of NTCA–The Rural Broadband Association*, MB Docket No. 24-20 (Mar. 8, 2024), https://www.fcc.gov/ecfs/document/10308589412414/1 [hereinafter "NTCA Comments"] at 2.

[10] *Comments of the National Association of Broadcasters*, MB Docket No. 24-20 (Mar. 8, 2024), https://www.fcc.gov/ecfs/document/1030894019700/1 [hereinafter "NAB Comments"] at 4-5.

retransmission and, in some cases, have alternative outlets (such as streaming) to distribute their programming.[11]

Peer-reviewed published research by Eun-A Park, Rob Frieden, and Krishna Jayakar attempts to identify the "predictors" of blackouts using a database of nearly 400 retransmission agreements executed between 2011 and 2018.[12] The authors identify three factors associated with more blackouts and longer blackouts:

1. Cable, satellite, and other MVPDs with larger customer bases are associated with more frequent and longer blackouts;
2. Multi-station broadcaster groups with network affiliations are associated with more frequent but shorter blackouts; and
3. The National Football League ("NFL") season (*e.g.*, "must see" real-time programming) has no significant relationship with blackout frequency, but when blackouts occur during the season, they are significantly shorter.

The simplistic takeaway is both that everyone is to blame, and no one is to blame. Ultimately, Park and her co-authors conclude that "the statistical analysis is not able to identify the parties or the tactics responsible for blackouts."[13] Based on this research, it is not clear which parties in given negotiations are more likely to be the least-cost avoider of blackouts.

Nevertheless, the Commission's proposal explicitly assigns liability for blackouts to cable operators and DBS providers.[14] Under the proposed rules, not only would cable operators and DBS providers suffer financial consequences, but they also would be made to face reputational harms stemming from a federal agency suggesting the fault for *any* retransmission-consent or carriage-agreement blackouts falls squarely on their shoulders.

Such reputational damage is almost certain to increase subscriber churn and impose additional subscriber-acquisition and retention costs on cable operators and DBS providers.[15] In comments on the Commission's proposed rules for cable-operator and DBS-provider billing

[11] Fruits, *supra* note 3.

[12] Eun-A Park, Rob Frieden, & Krishna Jayakar, *Factors Affecting the Frequency and Length of Blackouts in Retransmission Consent Negotiations: A Quantitative Analysis*, 22 INT'L. J. MEDIA MGMT. 117 (2020).

[13] *Id.* at 131.

[14] NPRM, *supra* note 1 at paras. 4, 6 ("We seek comment on whether and how to require cable operators and DBS providers to give their subscribers rebates when *they* blackout a channel due to a retransmission consent dispute or a failed negotiation for carriage of a non-broadcast channel."); *id.* at para. 9 ("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.") [emphasis added].

[15] *See* Zarakas & Verlinda *supra* note 7 at para. 14 (blackouts are costly "in the form of lost subscribers and higher incidence of retention rebates").

practices, ICLE reported that these costs are substantial and that, in addition to these costs, churn increases the uncertainty of cable-operator and DBS-provider revenues and profits.[16]

III. Consumers Are Not Bystanders

As noted earlier in these comments, the Commission's proposal appears to be rooted in the belief that, when consumers experience a blackout, they are mere bystanders in a dispute between channels and cable operators or DBS providers. The Commission further seems to believe that the full force of the federal government is needed for these consumers to be "made whole."[17] The implication is that consumers lack the foresight to anticipate the possibility of blackouts or the ability to respond to blackouts when they occur.

As the NPRM notes, subscribers are often informed of the risk of blackouts—and their consequences—in their service agreements with cable operators or DBS providers.[18] This is supported in ATVA's comments:

> Cable and satellite carriers make this quite clear in the contracts they offer subscribers—existing contracts which the Commission seeks to abrogate here. This language also makes clear that cable and satellite operators can and do change the programming offered in those bundles from time to time. … Cable and satellite providers add and subtract programming from their offerings to consumers frequently, and subscription agreements do not promise that all channels in a particular tier will be carried in perpetuity, let alone (with limited exception) assign a specific value to particular programming.[19]

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[16] *Comments of the International Center for Law & Economics*, MB Docket No. 23-405 (Feb. 5, 2024), https://www.fcc.gov/ecfs/document/10204246609086/1 at 9-10 ("In its latest quarterly report to the Securities and Exchange Commission, DISH Network reported that it incurs 'significant upfront costs to acquire Pay-TV' subscribers, amounting to subscriber acquisition costs of $1,065 per new DISH TV subscriber. The company also reported that it incurs 'significant' costs to retain existing subscribers. These retention costs include upgrading and installing equipment, as well as free programming and promotional pricing, 'in exchange for a contractual commitment to receive service for a minimum term.'")

[17] *See* NPRM, *supra* note 1 at paras. 4, 8, 10 (using "make whole" language)

[18] *See id.* at n. 7, citing Spectrum 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.") and para. 6 ("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.")

[19] ATVA Comments, *supra* note 8 at 11.

The NPRM asks, "if a subscriber initiates service during a blackout, would that subscriber be entitled to a rebate or a lower rate?"[20] The question implicitly acknowledges that, for these subscribers, blackouts are not just a possibility, but a certainty. Yet they nonetheless enter into such agreements, knowing they may not be compensated for the interruption of service.

Many cable operators and DBS providers do offer credits[21] or other accommodations[22] to requesting subscribers affected by a blackout. In addition, many consumers have a number of options to circumvent a blackout by obtaining the programming elsewhere. Comments in this proceeding indicate that these options include the use of over-the-air antennas[23] or streaming services.[24] Given the many alternatives available in so many cases, it is unlikely that a blackout would deprive these consumers of the desired programming and any economic harm to them would be *de minimis*.

If cable or DBS blackouts are (or become) widespread or pernicious, consumers also have the ability to terminate service and switch providers, including by switching to streaming options. This is demonstrated by the well-known and widespread phenomenon of "cord cutting." ATVA's comments note that, in the third quarter of 2023, nearly one million subscribers

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[20] NPRM, *supra* note 1 at para. 6.

[21] *See* ATVA Comments, *supra* note 8 at 3 ("The Commission seeks information on the extent to which MVPDs grant rebates today. The answer is that, in today's competitive marketplace, many ATVA members provide credits, with significant variations both among providers and among classes of subscribers served by individual providers. This, in turn, suggests that cable and satellite companies already address the issues identified by the Commission, but in a more nuanced and individualized manner than proposed in the *Notice*."). *See also id.* at 5-6 (reporting DIRECTV provides credits to existing customers and makes the offer of credits easy to find online or via customer service representatives). *See also id.* at 7 (reporting DIRECTV and DISH provide credits to requesting subscribers and Verizon compensates subscribers "in certain circumstances").

[22] *See* Zarakas & Verlinda, *supra* note 7 at para. 21 ("DISH provides certain offers to requesting customers in the case of programming blackouts, which may include a $5 per month credit, a free over-the-air antenna for big 4 local channel blackouts, or temporary free programming upgrades for cable network blackouts.").

[23] *See id.* at para. 21.

[24] *See* ATVA Comments, *supra* note 8 at 4 ("If Disney blacks out ESPN on a cable system, for example, subscribers still have many ways to get ESPN. This includes both traditional competitors to cable (which are losing subscribers) and a wide array of online video providers (which are gaining subscribers)."); *Comments of Verizon*, MB Docket No. 24-20 (Mar. 8, 2024), https://www.fcc.gov/ecfs/document/10308316105453/1 [hereinafter "Verizon Comments"] at 12 ("In today's competitive marketplace, consumers have many options for viewing broadcasters' content in the event of a blackout — they can switch among MVPDs, or forgo MVPD services altogether and watch on a streaming platform or over the air. And when a subscriber switches or cancels service, it is extremely costly for video providers to win them back."); DISH Comments, *supra* note 7 at 7 ("[L]ocal network stations have also been able to use another lever: the phenomenal success of over-the-top video streaming and the emergence of several online video distributors ('OVDs'), some of which have begun incorporating local broadcast stations in their offerings."); *Comments of the New York State Public Service Commission*, MB Docket 24-20 (Mar. 8, 2024), https://www.fcc.gov/ecfs/document/10308156370046/1 [hereinafter "NYPSC Comments"] at 2 (identifying streaming services and Internet Protocol Television (IPTV) providers such as YouTube TV, Sling, and DirecTV Stream as available alternatives).

canceled their traditional linear-television service, with just under 55% of occupied households now subscribing, the lowest share since 1989.[25] NYPSC concludes that, if the current trend of cord-cutting continues, "any final rules adopted here could become obsolete over time."[26]

Due in part to cord cutting, ATVA reported that last year "several cable television companies either had already shut down their television services or were in the process of doing so."[27] NTCA reports that nearly 40% of surveyed rural providers indicated they are not likely to continue service or already have plans to discontinue service, with many of them blaming the "difficulty negotiating retransmission consent agreements."[28]

The fact that so many consumers are switching to alternatives to cable and DBS is a clear demonstration that they have the opportunity and ability obtain programming from a wide range of competitive providers. This places them in the driver's seat, rather than suffering as helpless bystanders. It is telling that neither the NPRM nor any of the comments submitted to date offer any estimate of the cost to consumers associated with blackouts from retransmission-consent or carriage negotiations. This is likely because any costs are literally incalculable (*i.e.*, impossible to calculate) or so small as to discourage any efforts at estimation. In either case, the Commission's proposal to mandate and enforce blackout rebates looks to be a costly and time-consuming exercise that would yield little to no noticeable consumer benefits.

IV. Mandatory Rebates Will Increase Programmer Bargaining Power and Increase Prices to Cable and DBS Subscribers

A common theme of comments submitted in this matter is that the proposed rules would "place a thumb on the scale" in favor of channels relative to cable operators and DBS providers.[29] Without delving deeply into the esoteric details of bargaining theory, the comments identify two key factors that have, over time, improved programmers' bargaining position relative to cable operators and DBS providers:

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[25] *See* ATVA Comments, *supra* note 8 at 4.

[26] NYPSC Comments, *supra* note 24 at 2.

[27] ATVA Comments, *supra* note 8 at 4-5.

[28] NTCA Comments, *supra* note 9 at 3; *see* Luke Bouma, *Another Cable TV Company Announces It Will Shut Down Its TV Service Because of "Extreme Price Increases from Programmers,"* CORD CUTTERS NEWS (Dec. 10, 2023), https://cordcuttersnews.com/another-cable-tv-company-announces-it-will-shut-down-its-tv-service-because-of-extreme-price-increases-from-programmers (reporting the announced shutdown of DUO Broadband's cable TV and streaming TV services because of increased programming fees, affecting several Kentucky counties).

[29] ATVA Comments, *supra* note 8 at note 15; DISH Comments, *supra* note 7 at 3, 8; NAB Comments, *supra* note 10 at 5; *Comments of NCTA–The Internet & Television Alliance*, MB Docket No. 24-20 (Mar. 8, 2024), https://www.fcc.gov/ecfs/document/1030958439598/1 [hereinafter "NCTA Comments"] at 2, 11.

1. Increased competition among MVPD providers, which has reduced cable and DBS bargaining power;[30] and
2. Consolidation in the broadcast industry, which has increased programmer bargaining power.[31]

The Commission's proposed rules are intended and designed to impose an additional cost on cable operators and DBS providers who do not reach an agreement with stations and networks, thereby diminishing the providers' relative bargaining position. As profit-maximizing enterprises, it would be reasonable to expect stations and networks to exploit this additional bargaining power to extract higher retransmission fees or other concessions.

Jeffrey Eisenach notes that the first "significant" retransmission agreement to involve monetary compensation from a cable provider to a broadcaster occurred in 2005.[32] By 2008, retransmission fees totaled \$500 million, according to *Variety*.[33] By 2020, S&P Global reported that annual retransmission fees were approximately \$12 billion.[34] This represents an average annual increase of 30% between 2008 and 2020. This is in line with Zarakas & Verlinda's estimate that retransmission fees charged by local network stations have increased at annual growth rates of 9.8% to 61.0% since 2009.[35] According to information reported by the Pew Research Center, revenues from retransmission fees for local stations now nearly equal those stations' advertising revenues (Figure 1).

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[30] *See* ATVA Comments, *supra* note 8 at n. 19 ("With more distributors, programmers 'lose less' if they fail to reach agreement with any individual cable or satellite provider."); Zarakas & Verlinda, *supra* note 7 at para. 6 ("This bargaining power has been further exacerbated by the increase in the number of distribution platforms coming from the growth of online video distributors. The bargaining leverage of cable networks has also received a boost from the proliferation of distribution platforms."); *id.* at para. 13 ("Growth of OVDs has reduced MVPD bargaining leverage").

[31] *See* DISH Comments, *supra* note 7 at 6 ("For one thing, the consolidation of the broadcast industry over the last ten years has exacerbated the imbalance further. This consolidation, fueled itself by the broadcasters' interest in ever-steeper retransmission price increases, has effectively been a game of "and then there were none," with small independent groups of two or three stations progressively vanishing from the picture."); Zarakas & Verlinda, *supra* note 7 at para. 6 (concluding consolidation among local networks is associated with increased retransmission fees).

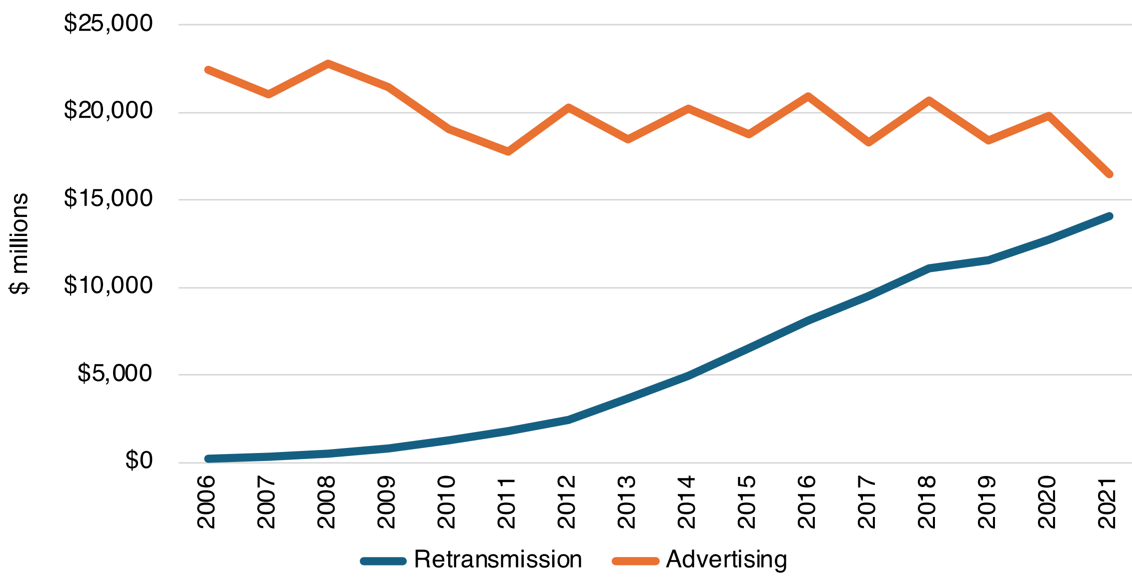
[32] *See* Jeffrey A. Eisenach, *The Economics of Retransmission Consent*, at 9 n.22 (Empiris LLC, Mar. 2009), *available at* https://nab.org/documents/resources/050809EconofRetransConsentEmpiris.pdf.

[33] *See* Robert Marich, *TV Faces Blackout Blues*, VARIETY (Dec. 10, 2011), https://variety.com/2011/tv/news/tv-faces-blackout-blues-1118047261.

[34] *See Economics of Broadcast TV Retransmission Revenue 2020*, S&P GLOBAL MKT. INTELLIGENCE (2020), https://www.spglobal.com/marketintelligence/en/news-insights/blog/economics-of-broadcast-tv-retransmission-revenue-2020.

[35] *Cf.* Zarakas & Verlinda, *supra* note 7 at para. 6.

FIGURE 1: Retransmission Fee and Advertising Revenue for Local TV



SOURCE: Pew Research Center[36]

Dish Network indicated that programmers have been engaged in an "aggressive campaign of imposing steep retransmission and carriage price increases on MVPDs."[37] Simultaneous with these steep increases in retransmission fees, networks began imposing "reverse transmission compensation" on their affiliates.[38] Previously, networks paid local affiliates for airtime in order to run network advertisements during their programming. The new arrangements have reversed that flow of compensation, such that affiliates are now expected to compensate the networks, as explained in *Variety*:

> Station owners also face increased pressure to secure top fees for their retrans rights because their Big Four network partners now demand that affiliate stations fork over a portion of their retrans windfall to help them pay for pricey franchises like the NFL, "American Idol" and high-end scripted series.[39]

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[36] *Retransmission Fee Revenue for U.S. Local TV Stations*, PEW RESEARCH CENTER (Jul. 2022), https://www.pewresearch.org/journalism/chart/sotnm-local-tv-u-s-local-tv-station-retransmission-fee-revenue; *Advertising Revenue for Local TV*, PEW RESEARCH CENTER (Jul. 13, 2021), https://www.pewresearch.org/journalism/chart/sotnm-local-tv-advertising-revenue-for-local-tv.

[37] DISH Comments, *supra* note 7 at 4.

[38] Park, *et al.*, *supra* note 12 at 118 ("With stations receiving more retransmission compensation, a new phenomenon has also emerged since the 2010s: reverse retransmission revenues, whereby networks receive a portion of their affiliates and owned-and-operated stations' retransmission revenues. As retransmission fees have become more important to television stations, broadcast networks and MVPDs, negotiations over contract terms and fees have become more contentious and protracted.").

[39] Marich, *supra* note 33.

Dish Network concludes: "While MVPDs and OVDs compete aggressively with each other, the programming price increases will likely be passed through to consumers despite that competition. The reason is that all MVPDs will face the same programming price increase."[40] NCTA further notes that increased programming costs are "borne by the cable operator or passed onto the consumer."[41]

The most recent research cited in the comments reports that MVPDs pass through approximately 100% of retransmission-fee increases in the form of higher subscription prices.[42] Aaron Heresco and Stephanie Figueroa provided examples of how increased retransmission fees are passed on to subscribers:

> On the other side of the simplified ESPN transaction are MVPD ranging from global conglomerates like Spectrum/Time Warner to small local or independent cable carriers. These MVPD pay ESPN $7.21/subscriber/month for the right to carry/transmit ESPN content to subscribing households. MVPD, with a keen eye on profits and shareholder value, pass through the costs to consumers (irrespective of if subscribers actually watch ESPN or any other network) in the form of increased monthly cable bills. Not only does this suggest that the "free lunch" of TV programming isn't free, it also indicates that the dynamic of revenue generation via viewership is changing. As another example, consider the case of the Weather Channel, which in 2014 asked for a $.01 increase in retransmission fees despite a 20% drop in ratings (Sahagian 2014). Viewers may demand access to the channel in case of weather emergencies but may only tune in to the channel a handful of times per year. Nonetheless, the demand for access to channels drive up retransmission revenue even if the day-to-day or week-to-week ratings are weak.[43]

In some cases, however, increased retransmission fees cannot be passed on in the form of higher subscription prices. As we noted above, NTCA reports that nearly 40% of surveyed rural providers indicated they are unlikely to continue service or already have plans to discontinue service, with many of them blaming the "difficulty negotiating retransmission consent agreements."[44] The Commission's proposed rules would not only lead to higher prices for consumers, but they may also reduce MVPD options for some consumers, as cable operators exit the industry.

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[40] DISH Comments, *supra* note 7 at 11.

[41] NCTA Comments, *supra* note 29 at 2.

[42] *See* Zarakas & Verlinda *supra* note 7 at para. 15 (*citing* George S. Ford, *A Retrospective Analysis of Vertical Mergers in Multichannel Video Programming Distribution Markets: The Comcast-NBCU Merger*, PHOENIX CTR. FOR ADVANCED L. & ECON. PUB. POL'Y STUDIES (Dec. 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3138713).

[43] Aaron Heresco & Stephanie Figueroa, *Over the Top: Retransmission Fees and New Commodities in the U.S. Television Industry*, 29 DEMOCRATIC COMMUNIQUÉ 19, 36 (2020).

[44] NTCA Comments, *supra* note 9 at 3.

V. Proposed Rebate Mandate Would be Arbitrary and Unworkable

The NPRM asks for comments on how to implement the proposed rebate mandate. In doing so, the NPRM identifies numerous factors that illustrate the arbitrary and unworkable nature of the Commission's proposal:[45]

- Should cable operators and DBS providers be required to pay *rebates* or provide *credits*?
- Should rebates apply to *any* channel that is blacked out?
- What if the parties *never* reach an agreement for carriage? For example, should subscribers be entitled to rebates in *perpetuity*?
- How should rebates be calculated when terms of the retransmission-consent agreements are *confidential*?
- Should the rebate be based on the *cost* that the cable operator or DBS provider paid to the programmer to retransmit or carry the channel *prior* to the carriage impasse?
- How should rebates account for *bundling*?
- If a subscriber *initiates* or *renews* a contract during a blackout, should the subscriber receive a rebate?
- Should the Commission deem *unenforceable* service agreements that explicitly specify that the cable operator or DBS provider is not liable for credits or refunds if programming becomes unavailable? Should *existing* service agreements be *abrogated*?
- How should rebates account for (*e.g.*) advertising time as a component of the retransmission-consent agreement?

As we note above, when blackouts occur, many cable operators and DBS providers offer credits or other accommodations to requesting subscribers affected by a blackout.[46] The NPRM "tentatively concludes" there is no legal distinction between "rebates," "refunds," and "credits."[47] If the Commission approves rules mandating rebates in the event of blackouts, the rules should be sufficiently flexible to allow credits or other accommodations—such as providing over-the-air antennas or programming upgrades—to satisfy the rules.

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[45] NPRM, *supra* note 1 at paras. 6-8.

[46] *See supra* notes 21-22 and accompanying text.

[47] NPRM, *supra* note 1 at n. 9.

The NPRM asks whether the proposed rebate rules should apply to *any* channel that is blacked out,[48] citing to news stories regarding The Weather Channel.[49] The NPRM provides no context for these citations, but the cited articles suggest that The Weather Channel is of minimal value to most consumers. The channel had 105,000 primetime viewers in February 2024, which was slightly less than PopTV and slightly more than Disney Junior and VH1.[50] The *Deadline* article cited in the NPRM indicates that The Weather Channel averages 13 cents per-subscriber per-month across pay-TV systems.[51] Much of the channel's content is freely available on its website (weather.com) and app, and similar weather content is freely available across numerous sources and media.

The NPRM's singling out of the Weather Channel highlights several flaws with the Commission's proposal. The channel has low viewership, numerous competing substitutes for content, and is relatively low-cost. During a blackout, few subscribers would notice. Even fewer would suffer any harm and, if they did, the harm would be about 13 cents a month. It seems a waste of valuable resources to impose a complex regulatory regime to "make consumers whole" to the tune of pennies a month.

The NPRM asks whether the Commission should require rebates if the parties *never* reach a carriage agreement and, if so, whether those rebates should be provided in perpetuity.[52] NCTA points out that it would be impossible for any regulator to determine whether any particular blackout is the result of a negotiation impasse or business decision by the cable operator or DBS provider to no longer carry the channel.[53] For example, a channel may be dropped because of changes to the programming available on the channel.[54] Indeed, the programming offered at the beginning of a retransmission-consent agreement may be very different from the content provided at the time of renegotiation.[55] Moreover, it would be impossible to know

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[48] *See id.* at para. 6.

[49] *See id.* at n.12 (*citing* 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-weatherchannel-returns-directv-deal-711602.

[50] *See U.S. Television Networks*, USTVDB (retrieved Mar. 28, 2024), https://ustvdb.com/networks.

[51] *See* Lieberman, *supra* note 49.

[52] *See* NPRM, *supra* note 1 at para. 6.

[53] *See* NCTA Comments, *supra* note 29 at 5.

[54] *See id.* at 3; *see also* Lieberman, *supra* note 49 (indicating that carriage consent agreement ending a blackout of The Weather Channel on DIRECTV required The Weather Channel to cut its reality programming by half on weekdays).

[55] *See* Alex Weprin & Lesley Goldberg, *What's Next for Freeform After Being Dropped by Charter*, HOLLYWOOD REPORTER (Dec. 14, 2023), https://www.hollywoodreporter.com/tv/tv-news/freeform-disney-charter-hulu-1235589827 (reporting that Freeform is a Disney-owned cable channel that currently caters to younger women; the channel began as a spinoff of the Christian Broadcasting Network, was subsequently rebranded as The Family Channel, then Fox Family Channel, and then ABC Family, before rebranding as Freeform).

with any certainty whether any carriage termination is temporary or permanent.[56] Verizon is correct to call this inquiry "absurd,"[57] as it proposes a "Hotel California" approach to carriage agreements, in which cable operators and DBS providers can check out, but they can never leave.

To illustrate the challenges of calculating a reasonable and economically coherent rebate, Dish Network offered a hypothetical set of three options for carriage of a local station and the Tennis Channel, both owned by Sinclair.[58]

1. $4 for the local station on a tier serving all subscribers, no carriage of Tennis Channel;
2. $2 for the local station and $2 for the Tennis Channel, both on tiers serving all subscribers; or
3. $2 for the local station on a tier serving all subscribers and $4 for the Tennis Channel on a tier serving 50% of subscribers.

In this hypothetical, the cable operator or DBS provider is indifferent to the details of how the package is priced. Similarly, consumers are indifferent to the pricing details of the agreement. Under the Commission's proposal, however, these details become critical to how a rebate would be calculated. In the event of a Tennis Channel blackout, either no subscriber would receive a rebate, every subscriber would receive a $2 rebate, or half of all subscribers would receive a $4 rebate—with the amount of rebate depending on how the agreement's pricing was structured.

Dish Network's hypothetical demonstrates another consequence of the Commission's proposal: the easiest way to avoid the risk of paying a rebate is to forgo carrying the channel. The hypothetical assumes a cable operator "does not particularly want to carry" the Tennis Channel, but is willing to do so in exchange for an agreement with Sinclair for the local station.[59] Under the Commission's proposed rules, the risk of incurring the cost of providing rebates introduces another incentive to eschew carriage of the Tennis Channel.

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[56] *See* NCTA Comments, *supra* note 29 at 5.

[57] Verizon Comments, *supra* note 24 at 13 ("Also, as the Commission points out, 'What if the parties never reach an agreement for carriage? Would subscribers be entitled to rebates in perpetuity and how would that be calculated?' The absurdity of these questions underscores the absurdity of the proposed regulation.")

[58] *See* DISH Comments, *supra* note 7 at 13.

[59] *Id.*; *see also id.* at 22 ("Broadcasters increasingly demand that an MVPD agree to carry other broadcast stations or cable networks as a condition of obtaining retransmission consent for the broadcaster's primary signal, without giving a real economic alternative to carrying just the primary signal(s).")

One reason Dish Network presented a hypothetical instead of an "actual" example is because, as noted in several comments, carriage agreements are subject to confidentiality provisions.[60] Separate and apart from the impossibility of allocating a rebate across the various terms of an agreement, even if the terms were known, such an exercise would require abrogating these confidentiality agreements between the negotiating parties.

The NPRM asks whether it would 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.[61] The NPRM cites *Spectrum Northeast LLC v. Frey*, a case involving early-termination fees in which the 1st U.S. Circuit Court of Appeals stated that "[a] termination event ends cable service, and a rebate on termination falls outside the 'provision of cable service.'"[62] In the NPRM, the Commission "tentatively conclude[s] that the courts' logic" in *Spectrum Northeast* "applies to the rebate requirement for blackouts."[63]

If the Commission accepts the court's logic that a termination event ends service on the consumer side, then it would be reasonable to conclude that the end of a retransmission or carriage agreement similarly ends service. To base a rebate on a prior agreement would mean basing the rebate on a fiction—an agreement that does not exist.

To illustrate, consider Dish Network's hypothetical. Assume the initial agreement is Option 2 ($2 for the local station and $2 for the Tennis Channel, both on tiers serving all subscribers). The negotiations stall, leading to a blackout. Assume the parties eventually agree to Option 1, in which the Tennis Channel is no longer carried. Would subscribers be due a rebate for a channel that is no longer carried? Or, if the parties instead agree to Option 3 ($2 for the local station on a tier serving all subscribers and $4 for the Tennis Channel on a tier serving 50% of subscribers), would all subscribers be due a $2 rebate for the Tennis Channel, or would half of subscribers be due a $4 rebate? There is no "good" answer because any answer is necessarily arbitrary and devoid of economic logic.

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[60] ATVA Comments, *supra* note 8 at 13 ("here is the additional complication that cable and satellite companies generally agree to confidentiality provisions with broadcasters and programmers—typically at the insistence of the broadcaster or programmer"); DISH Comments, *supra* note 7 at 21 (reporting broadcasters and programmers "insist" on confidentiality); NCTA Comments, *supra* note 29 at 6 ("It also bears emphasis that this approach would necessarily publicly expose per- subscriber rates and other highly confidential business information, and that the contracts between the parties prohibit disclosure of this and other information that each find competitively sensitive.").

[61] NPRM, *supra* note 1 at para. 8.

[62] *Spectrum Northeast, LLC v. Frey*, 22 F.4th 287, 293 (1st Cir. 2022), *cert denied*, 143 S. Ct. 562 (2023); *see also In the Matter of Promoting Competition in the American Economy: Cable Operator and DBS Provider Billing Practices*, MB Docket No. 23-405, at n. 55 (Jan. 5, 2024), *available at* https://docs.fcc.gov/public/attachments/DOC-398660A1.pdf.

[63] NPRM, *supra* note 1 at para. 13.

As noted above, many retransmission and carriage agreements involve “bundles” of programming,[64] as well as “a wide range of pricing and non-pricing terms.”[65] Moreover, ATVA reports that subscribers purchase bundled programming, rather than individual channels, and that consumers are well-aware of bundling when they enter into service agreements with cable operators and DBS providers.[66] NCTA reports that bundling complicates the already-complex challenge of allocating costs across specific channels over specific periods of time.[67] Thus, any attempt to do so with an eye toward mandating rebates during blackouts is likewise arbitrary and devoid of economic logic.

In summary, the Commission is proposing a set of unworkable and arbitrary rules to distribute rebates to consumers during programming blackouts. Even if such rebates could be reasonably and fairly calculated, the sums involved would likely be only a few dollars, and may be as little as a few pennies. In these cases, the enormous costs to the Commission, cable operators, and DBS providers would be many times greater than the rebates provided to consumers. It would be a much better use of the FCC’s and MVPD providers’ resources to abandon this rulemaking process and refrain from mandating rebates for programming blackouts.

[64] *See supra* note 59 and accompanying text for an example of a bundle.

[65] NCTA Comments, *supra* note 29 at 6.

[66] ATVA Comments, *supra* note 8 at 11.

[67] NCTA Comments, *supra* note 29 at 6.