

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

In the Matter of	)	
	)	
Electronic Delivery of MVPD Communications	)	MB Docket No. 17-317
	)	
Modernization of Media Regulation Initiative	)	MB Docket No. 17-105
	)	

**COMMENTS**



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**COMMENTS**



**I. INTRODUCTION**

The American Cable Association (“ACA”) hereby submits these comments in response to the Notice of Proposed Rulemaking (“NPRM”) in the above-captioned proceeding.<sup>1</sup> As the primary trade association representing small and mid-sized cable operators, ACA is well positioned to comment in this proceeding, which is a continuation of the Commission’s laudable efforts to modernize many of its outdated media regulations.

The NPRM proposes several changes to Subpart T of Part 76 of the Commission’s rules that would allow for more efficient and effective communications between cable operators and their subscribers. ACA fully supports the Commission’s proposal to allow cable operators to

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<sup>1</sup> *Electronic Delivery of MVPD Communications; Modernization of Media Regulation Initiative*, Notice of Proposed Rulemaking, 32 FCC Rcd 10755 (2017) (“NPRM”).

deliver all required subscriber notices via e-mail, subject to the proposed consumer safeguards, and encourages the Commission to treat the electronic delivery of these notices consistently by allowing cable operators to deliver all of them to subscribers on an opt-out basis. ACA also supports the Commission's proposal to allow cable operators to respond to consumer requests or billing dispute complaints by e-mail in cases where the customer has indicated a preference for e-mail communication. Further, ACA urges the Commission to eliminate, or at least to simplify, Sections 76.1621 and 76.1622 of the rules, which have been made obsolete by advances in technology.

On the other hand, because different considerations apply, ACA urges the Commission to take a cautious approach when considering any changes to the process by which broadcast stations notify multichannel video programming distributors ("MVPDs") of their triannual carriage elections – a process that has significant legal and financial consequences. ACA believes that any new procedures must:

- Allow no uncertainty as to whether a cable operator has received timely notice of a broadcasters' election; and
- Impose no new regulatory burdens on MVPDs.

## **II. THE COMMISSION SHOULD MODERNIZE ITS SUBSCRIBER NOTICE REQUIREMENTS TO MAKE THEM MORE EFFICIENT, EFFECTIVE, AND REFLECTIVE OF THE TIMES**

ACA supports the Commission's attempts to modernize its Subpart T regulations, which require cable operators to provide subscribers with certain information about their service.<sup>2</sup> In this NPRM, the Commission offers three specific proposals regarding Subpart T. First, it proposes to "adopt a rule that would allow various types of generic written communications from

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<sup>2</sup> These notices include 47 CFR § 76.1601 (deletion and repositioning of broadcast signals); 47 CFR § 76.1602 (general customer service information); 47 CFR § 76.1603 (rate and service changes); 47 CFR § 76.1604 (charges for customer service changes); 47 CFR § 76.1618 (availability of basic tier service); 47 CFR § 76.1620 (availability of signals); 47 CFR § 76.1621 (equipment compatibility offer); and 47 CFR § 76.1622 (consumer education program on compatibility).

cable operators to subscribers to be delivered electronically, if they are sent to a verified e-mail address and the cable operator complies with certain consumer safeguards”;<sup>3</sup> second, to allow cable operators to respond to subscriber requests and complaints via e-mail when a subscriber has indicated that e-mail is their preferred communication;<sup>4</sup> and third, to eliminate Section 76.1621’s equipment compatibility offer requirement.<sup>5</sup> The NPRM also seeks comment on ways to modernize the requirement that cable operators provide a consumer education program on equipment compatibility matters.<sup>6</sup>

ACA encourages the Commission to adopt each of its proposals, and recommends that the Commission amend its Subpart T rules to reduce regulatory burdens as much as possible and to maximize the flexibility of both cable operators and their subscribers to communicate electronically.

**A. The Commission Should Allow Cable Operators to Send All Subpart T and Consumer Privacy Notices to Subscribers Electronically on an Opt-Out Basis.**

ACA supports the Commission’s proposal to adopt a rule that would allow cable operators to deliver required Subpart T subscriber notices electronically,<sup>7</sup> and encourages the Commission to treat all required notices consistently by allowing electronic delivery to subscribers on an opt-out basis.

In granting the Petition for Declaratory Ruling, filed by ACA and NCTA, to clarify that the “written information” that cable operators must provide to their subscribers pursuant to Section 76.1602(b) may be provided electronically, the Commission identified several key benefits of

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<sup>3</sup> NPRM, ¶ 6.

<sup>4</sup> *Id.*, ¶¶ 19-21.

<sup>5</sup> *Id.*, ¶ 22.

<sup>6</sup> *Id.*, ¶¶ 23-24.

<sup>7</sup> NPRM, ¶ 6. The NPRM specifically proposes to “adopt a rule that would allow various types of generic written communications from cable operators to subscribers to be delivered electronically, if they are sent to a verified e-mail address and the cable operator complies with certain consumer safeguards[.]”

electronic delivery. These included the “positive environmental aspects of saving substantial amounts of paper annually, increased efficiency, and enabling customers to more readily access accurate information regarding their service options.”<sup>8</sup> Most importantly for ACA’s members, the Commission also recognized that granting the petition would “greatly ease the burden of complying with Section 76.1602(b)(2) for all cable operators, including in particular small cable operators[,]” and “would afford small and medium independent operators, many of which have very limited resources, ‘greater flexibility to match the electronic operations of their online and other competitors.’”<sup>9</sup> By adopting the proposed rule to allow electronic delivery of the remaining subscriber notices required by Subpart T, the Commission would expand these benefits even further by eliminating the need for the delivery of annual notices via the United States Postal Service (“U.S. mail”) altogether. The record in response to the Commission’s Modernization of Media Regulation Initiative demonstrates that there is widespread industry support for any measures that would ease the substantial burden of the Commission’s subscriber notice requirements,<sup>10</sup> and, as the NPRM notes, no party in that proceeding opposed the specific request to allow electronic distribution of these notices.<sup>11</sup>

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<sup>8</sup> *National Cable & Telecommunications Association and American Cable Association, Petition for Declaratory Ruling*, Declaratory Ruling, 32 FCC Rcd 5269, ¶ 6 (2017) (“2017 Declaratory Ruling”).

<sup>9</sup> *Id.*, ¶ 8, *quoting* Petition of National Cable & Telecommunications Association and American Cable Association for Declaratory Relief, MB Docket No. 16-216 at 3 (filed March 7, 2016) (“NCTA/ACA Petition”).

<sup>10</sup> See *Modernization of Media Regulation Initiative*, MB Docket No. 17-105, Comments of NCTA at 4-5 (asking the Commission to eliminate certain outdated requirements and to evaluate where there are “more efficient, more effective, and less costly ways to [provide subscriber notices] that using mainstream technologies that consumers use more frequently than postal mail.”) (filed Jul. 5, 2017); Reply Comments of Verizon at 6 (“[E]lectronic delivery should be available for required notices to subscribers.”) (filed Aug. 4, 2017); Reply Comments of Frontier Communications Corps. at 6 (supporting reform of “outdated notice requirements that were created before companies had websites and before customers had email.”) (filed Aug. 4, 2017); Reply Comments of AT&T at 1, 4 (asking for relief from information disclosure requirements for video services and encouraging the Commission to allow electronic delivery of required privacy notices) (filed Aug. 4, 2017) (“AT&T Reply Comments”).

<sup>11</sup> NPRM, ¶ 8.

ACA members appreciate that permitting cable operators to transition to electronic delivery of notices should not increase the odds of customers not receiving notices, or result in customers' losing their right to continue receiving notices via U.S. mail. For this reason, ACA supports application of the consumer safeguards adopted in the 2017 Declaratory Ruling that allows the electronic delivery of Section 76.1602(b) subscriber notices, including the strict definition of "verified e-mail,"<sup>12</sup> and a requirement that cable operators provide a mechanism for subscribers to opt out of e-mail delivery to receive paper notices.<sup>13</sup> These safeguards have been sufficient to protect consumers' interests with respect to the delivery of notices required by Section 76.1602(b), and ACA sees no reason to deviate from that approach for the delivery of any other notices.

Although the NPRM proposes to allow wider use of electronic delivery of subscriber notices, it seeks comment on whether subscribers should be required to opt-in to electronic delivery of certain notices – specifically those that pertain to rate and service changes, charges for customer service changes, basic tier availability, and subscriber privacy.<sup>14</sup> ACA does not believe erecting such barriers around the electronic delivery of any notices, including those identified by the Commission, is warranted or in the public interest.<sup>15</sup> There is no reason to believe that paper notices delivered via U.S. mail make any greater impression on subscribers

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<sup>12</sup> Defined as: (1) and e-mail address that the subscriber has provided to the cable operator (and not *vice versa*) for purposes of receiving communication, (2) an e-mail address that the subscriber regularly uses to communicate with the cable operator, or (3) an e-mail address that has been confirmed by the subscriber as an appropriate vehicle for the delivery of notices. NPRM, ¶ 11.

<sup>13</sup> NPRM, ¶ 12.

<sup>14</sup> 47 CFR §§ 76.1603-76.1604, 76.1618; 47 U.S.C. §§ 551(a)(1), 338(i); 573(c)(1)(a).

<sup>15</sup> If the Commission is correct that electronic delivery "enabl[es] customers to more readily access accurate information," it makes little sense to impose an extra barrier to its use. 2017 Declaratory Ruling, ¶ 6.

than electronic notices that would be subject to the proposed consumer safeguards,<sup>16</sup> so there is no justification for allowing electronic delivery of certain notices only on an opt-in basis.

Moreover, subscribers benefit from a consistent approach to the delivery of electronic notices. Indeed, using an opt-in approach for some types of notices where it has not been required for others could cause confusion for consumers, some of whom may not realize they will continue receiving different notices in different ways, and others of whom may not know they need to take additional steps to receive all their notices the same way. It is also unduly burdensome for cable operators to implement and maintain two separate notice sets with different opt-in mechanisms for electronic delivery. Accordingly, the Commission should permit all notices to be delivered electronically on an opt-out basis.

Finally, the NPRM seeks comment on whether to permit cable operators to comply with Section 76.1602 and 76.1618 by “posting the written material on the cable operator’s website, in lieu of providing such notice to subscribers via U.S. mail or electronic delivery to a verified e-mail address.”<sup>17</sup> ACA believes that both consumers and cable operators would benefit from having an option that allows subscribers to access *all* required subscriber notices and information at any time via the cable operator’s website rather than sending lengthy notices to subscribers with information that can become dated, as long as cable operators inform subscribers that the notices exist and direct them to where the material can be found.<sup>18</sup> Today, consumers have become accustomed to obtaining additional information about goods or services by following links that sellers provide them or by going directly to a seller’s website on

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<sup>16</sup> As stated in a letter signed by 83 small and mid-sized cable operators, “in many cases, [subscriber notices] are thrown directly into the recycling bin.” Letter from Randy Tilk, *et al* to Marlene Dortch, Secretary, Federal Communications Commission, MB Docket No. 16-126 (filed May 26, 2016).

<sup>17</sup> NPRM, ¶ 15.

<sup>18</sup> In their 2016 Petition for Declaratory Ruling, ACA and NCTA specifically cited “the inclusion of a link to a publicly available website where the notice applicable to a particular customer may be found” as “an appropriate electronic means reasonably calculated to reach the individual subscriber.” NCTA/ACA Petition at 4.



their own initiative. Moreover, subscribers would benefit from the fact that such information could be updated by the cable operator as needed, and that it would be accessible online at any time, as this eliminates the need to save previous correspondence in the event they need to review such information later.<sup>19</sup>

In sum, the Commission should adopt its proposals to expand the use of electronic means to deliver subscriber notices required by Subpart T of the Commission's rules, subject to the proposed consumer safeguards, and should ensure that important information is most easily available to consumers by making electronic delivery "opt-out." Further, the Commission should allow operators to direct consumers to materials posted on their website, rather than include such information in the notice itself.

**B. The Commission Should Adopt Its Proposal to Allow Cable Operators to Respond to Consumer Requests and Complaints by E-mail.**

The Commission also proposes to increase operators' ability to communicate with subscribers electronically by allowing them to respond to consumer requests or billing dispute complaints by e-mail in certain circumstances.<sup>20</sup> The Commission is correct that permitting electronic communication when the consumer used email to make the request or complaint, or the consumer specifies e-mail as their preferred delivery method, will allow cable operators to respond more efficiently and effectively to requests and complaints.<sup>21</sup> It will also allow consumers to receive such communications by their preferred method. If a subscriber has indicated, either expressly or implicitly through the use of e-mail to initiate communication, that they prefer electronic communication, it makes no sense to require cable operators to respond via paper mail. Allowing cable operators to respond to consumer requests and complaints

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<sup>19</sup> Posting such information online has the added benefit of allowing potential customers to review the material prior to subscribing.

<sup>20</sup> NPRM, ¶ 19.

<sup>21</sup> NPRM, ¶ 21.

electronically under these circumstances will also extend many of the same benefits provided by the Commission's decision to allow electronic delivery of subscriber notices. As Frontier noted in the Modernization of Media Regulation Initiative, this proposal will "cut down on unnecessary paper waste and postage and remove unnecessary costs."<sup>22</sup>

**C. The Commission Should Update Other Subpart T Requirements to Reflect Dramatic Changes in Technology.**

The NPRM seeks comment on two additional potential changes to the Subpart T subscriber notice requirements – the elimination of Section 76.1621, which requires cable operators to offer and provide upon request to subscribers "special equipment that will enable the simultaneous reception of multiple signals,"<sup>23</sup> and the modernization of Section 76.1622's requirement to provide a consumer education program on equipment and signal compatibility matters. Changes in technology have made these rules obsolete, and they should therefore be eliminated.

Both rules were implemented in 1994 pursuant to Section 624A of the Communications Act,<sup>24</sup> which Congress enacted to resolve "compatibility problems that arise between the provision of cable service and current consumer electronics equipment."<sup>25</sup> These problems included "difficulties in the use of VCRs to record programming and in the operation of special features of TV receivers such as 'Picture-in-Picture.'"<sup>26</sup> As noted in the NPRM, "consumers

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<sup>22</sup> NPRM, ¶ 20, *citing Modernization of Media Regulation Initiative*, MB Docket No. 17-105, Reply Comments of Frontier Communications Corporation at 15 (filed Aug. 4, 2017).

<sup>23</sup> 47 CFR § 76.1621.

<sup>24</sup> 47 USC § 544a.

<sup>25</sup> *Implementation of Section 17 of the Cable Television Consumer Protection and Competition Act of 1992; Compatibility Between Cable Systems and Consumer Electronics Equipment*, Notice of Proposed Rulemaking, 8 FCC Rcd 8495, ¶ 3 (1993) ("1993 NPRM").

<sup>26</sup> *Id.* In Section 624A of the Communications Act, Congress found that "new and recent models of television receivers and video cassette recorders often contain premium features and functions that are disabled or inhibited because of cable scrambling, encoding, or encryption technologies and devices, including converter boxes and remote control devices required by cable operators to receive programming." 47 USC § 544a(1).

widely use digital video recorders (“DVRs”), rather than VCRs or television receivers, for recording features, and ‘picture-in-picture’ features on television,”<sup>27</sup> so the technical issues that gave rise to these requirements have dissipated. To the extent that consumers do use VCRs to record live television,<sup>28</sup> they are surely aware by now of any lingering compatibility issues and have long since obtained the equipment necessary to operate those devices to their satisfaction.

With increased competition in the pay TV market and advances in technology since the days of the VCR, the marketplace has achieved the Commission’s “primary goal” of “improv[ing] the compatibility between cable systems and consumer electronics equipment.”<sup>29</sup> ACA therefore encourages the Commission to adopt its proposal to eliminate Section 76.1621, as consumers no longer need cable operators to provide “special equipment” that will enable their recording devices to receive multiple signals.

With respect to Section 76.1622, which was promulgated pursuant to Congress’s directive that cable operators be required “to notify subscribers that they may be unable to benefit from the special functions of their televisions and video cassette recorders,”<sup>30</sup> this rule is equally unnecessary in today’s environment, and therefore should also be eliminated. In the alternative, the Commission should amend Section 76.1622 to allow cable operators greater flexibility to determine what information must be provided to subscribers, as well as how and when such information must be delivered. Substantively, Section 76.1622 goes much farther than the statutory text requires, dictating both the substance of the prescribed notices, and the times at which they must be delivered. Specifically, the Commission’s rule requires cable

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<sup>27</sup> NPRM, ¶ 22.

<sup>28</sup> As opposed to using the playback functions to view existing video cassettes.

<sup>29</sup> 1993 NPRM, ¶ 11.

<sup>30</sup> 47 USC § 544a(c)(2)(B)(i).

operators to inform their subscribers, both at the time of subscription and annually thereafter: (1) that some models of TV receivers and videocassette recorders may not be able to receive all of the channels offered by the cable system when connected directly to the cable system;<sup>31</sup> (2) that, in cases where service is received through a cable system terminal device, subscribers may not be able to use certain features and functions of their TV receivers and videocassette recorders;<sup>32</sup> and (3) that, in cases where cable system operators offer remote control capability with cable system terminal devices and other customer premises equipment, remote control units that are compatible with such equipment may be obtained from other sources, such as retail outlets.<sup>33</sup>

In contrast, Section 624A requires only that subscribers generally be notified that they may not be able to use their television receivers and VCRs: “(I) to watch a program on one channel while simultaneously using a video cassette recorder to tape a program on another channel; (II) to use a video cassette recorder to tape two consecutive programs that appear on different channels; and (III) to use advanced television picture generation and display features.”<sup>34</sup> If the Commission opts not to eliminate Section 76.1622 entirely, it can nonetheless alleviate some unnecessary regulatory burdens by adopting a single rule that tracks closely with the actual language of Section 624A. This would allow cable operators to determine how best to inform their subscribers of any potential equipment compatibility issues while still fulfilling arguably textual requirements of the statute.<sup>35</sup> Importantly, it would also advance the Commission’s goal of modernizing its notice requirements.

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<sup>31</sup> 47 CFR § (b)(1).

<sup>32</sup> 47 CFR § (b)(2).

<sup>33</sup> 47 CFR § (b)(3). This rule also requires cable operators maintain and provide a list of compatible remote controls that are commercially available.

<sup>34</sup> 47 USC § 544a(c)(2)(B)(i).

<sup>35</sup> For example, cable operators could post a general notice about equipment compatibility on their website.

**III. CHANGES TO THE MUST-CARRY ELECTION PROCESS MUST NOT ALLOW FOR ANY UNCERTAINTY REGARDING CABLE OPERATORS' RECEIPT OF BROADCASTERS' ELECTIONS NOR IMPOSE NEW BURDENS ON MVPDS.**

Finally, the Commission seeks comment on whether to revise Sections 76.64(h) and 76.66(d) of its rules to permit television broadcast stations to use a method other than certified mail to notify MVPDs of their carriage elections.<sup>36</sup> Rather than reach any tentative conclusions or propose any specific rules, the NPRM seeks comment on a variety of proposals submitted during the Media Regulation Modernization Initiative. Yet, in contrast to the consumer-facing notices described above, carriage elections have “significant legal and financial consequences”<sup>37</sup> for broadcasters and cable operators alike. Because carriage elections have different and more far-reaching consequences, different policy considerations should apply. ACA recommends that, in crafting any new rules, the Commission bear certain principles in mind.

- First, the Commission must take care that any new procedures allow for no uncertainty as to whether the cable operator has received timely notice of the broadcasters designation.
- Second, new procedures must not impose any new regulatory burdens on MVPDs.

AT&T's proposal<sup>38</sup> to allow broadcasters to use express delivery service in lieu of certified mail violates neither of these principles, and thus ACA would support it.

Other proposals mentioned in the NPRM, however, are more problematic. ACA generally supports the modernization of the Commission's media regulations, and has been vocal in promoting the use of electronic communications wherever appropriate,<sup>39</sup> including in

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<sup>36</sup> NPRM, ¶ 25.

<sup>37</sup> NPRM, ¶ 26, *citing* 47 CFR § 76.64(f)(3). Under this rule, a failure to deliver a timely carriage election notice to a cable operator means that station defaults to must carry with respect to that operator.

<sup>38</sup> AT&T Reply Comments at 5-6.

<sup>39</sup> See NCTA/ACA Petition.

these comments. As stated above, there are many benefits to electronic communications.<sup>40</sup>

Where the purpose of a particular communication is merely to provide information which, no matter how important, has no legal impact on the recipient, electronic delivery is the ideal form of communication, especially when appropriate safeguards are put in place.

Broadcast carriage elections, however, *do* have legal consequences – namely, whether and on what terms an MVPD may or must carry a broadcast signal for three years – so any changes to the existing notification procedures warrant extra scrutiny. In order to ensure against potential carriage disruptions or disputes,<sup>41</sup> the process for providing notice must not create any uncertainty with respect to whether an MVPD has received a broadcaster’s carriage election notice prior to the deadline for such notice. Allowing for alternative methods of delivery without carefully considering the ways in which those methods could fail would have negative consequences that outweigh any benefits.

For example, the Commission asks whether allowing the delivery of election notices using a “verified e-mail” address, as that term is defined for purposes of delivering cable subscriber notices, would be sufficient to ensure that the notices are received.<sup>42</sup> While this proposal, on its face, sounds reasonable, the consequences of an MVPD not receiving a carriage election notice warrant a more cautious approach. Any number of issues might result in a broadcaster’s electronic notice not being received by the MVPD in time, which may or may not be the fault of the broadcaster or cable operator. For instance, the broadcaster could send the email to the wrong address, the email could get lost or held up by the broadcaster’s or MVPD’s broadband service provider or by security or email application software used by either

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<sup>40</sup> See *supra* at 3.

<sup>41</sup> For example, if a broadcaster sends notice of its election of retransmission consent to an MVPD using an alternative means of delivery prior to the deadline, but that notice is for any reason not delivered on time, the cable operator would believe that the broadcaster has defaulted to must carry. The confusion over whether the broadcaster had complied with the notice requirement could lead to a costly retransmission consent dispute.

<sup>42</sup> NPRM, ¶ 26.

party, or there could be an unknown or unexpected power outage on either side of the delivery. With certified mail or express delivery, it is relatively simple to determine why a notice did not reach an MVPD – and thus simple to determine whether a broadcaster complied with its notice requirements. With electronic delivery, by contrast, one might never know why an e-mail intended to reach an MVPD never did so. The Commission is in no position to determine, for example, whether a failed delivery was caused by a power outage on the MVPD's side or a technical glitch on the broadcaster's side. And a regime that leads to disputes over such issues cannot be characterized as an improvement over the current one, especially in light of the fact that broadcasters who expect to receive compensation from cable operators need only send these notices once every three years.

Additionally, changes to the election procedure should impose no new burdens on the MVPDs who receive them. ACA is especially concerned with the proposal set forth by CBS, Disney, Fox, and Univision, which would allow broadcasters to post election notices online,<sup>43</sup> but would also require cable operators to take the affirmative step of seeking out a broadcaster's election. Since the must carry rules are designed to benefit broadcast stations, it would be unfair to require cable operators to take additional steps to determine which of a broadcaster's carriage rights they are electing, particularly when the MVPD has come to rely on the direct delivery of the notice. For cable operators that carry dozens or hundreds of broadcasters, the burdens of looking up election decisions for each broadcaster can be significant. Since the Commission's purpose in undertaking its Modernization of Media Regulation Initiative is to relieve regulated entities of unnecessary burdens, it should take care that, in providing relief for one segment of the communications industry, it does not create additional burdens for another.

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<sup>43</sup> *Id.*, ¶ 27, citing CBS, Disney, Fox, and Univision Comments at 11.

#### IV. CONCLUSION

For the reasons stated above, ACA encourages the Commission to adopt new rules allowing cable operators to deliver subscriber notices required by Subpart T to be delivered electronically, subject to proposed consumer safeguards; to permit cable operators to respond to consumer complaints and requests via e-mail under certain circumstances; and to take steps to modernize its rules regarding notice of equipment compatibility. ACA also urges the Commission not to make any changes to the broadcast carriage election rules without ensuring that those changes do not create increased uncertainty over whether notice was timely provided or create new burdens on MVPDs.

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