

In the Matter of)
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Electronic Delivery of MVPD Communications) MB Docket No. 17-317
To: The Commission

On February 15, 2018, Charter Communications, Inc. (“Charter”) submitted letter comments in this docket urging the Commission to use what Charter characterized (at 1) as an “opportunity” presented by this rulemaking to “clarify” that portion of 47 C.F.R. § 76.1603(b) which imposes advance notice requirements applicable to cable operator changes in cable rates, programming services, or channel positions.¹ Charter’s comments address issues that fall completely outside the boundaries of this proceeding.² Charter’s comments should accordingly be excluded from consideration by the Commission.

¹ Charter's comments also ask the Commission to eliminate 47 C.F.R. §§ 76.1603(c) and (d). The analysis set forth below applies equally to that Charter request, as it too is beyond the scope of this proceeding.

² The Notice of Proposed Rulemaking in this docket “teed up” for comment proposals that would allow cable operators to deliver written communications to subscribers and other consumers electronically and that would update and modernize procedures by which television broadcasters make their triennial must carry/retransmission consent elections vis-à-vis MVPDs.

Notably, footnote 2 of Charter’s comments concedes the Commission’s “stated intent to address proposals to eliminate or revise these [Rule 76.1603(b)] requirements in a ‘subsequent proceeding.’”³ In other words, by its own admission, Charter has elected to try to use this proceeding as a vehicle to press for changes to an existing Commission rule that the Commission has explicitly excluded from the scope of this proceeding. Charter’s effort in this regard is wasted. It is well established in law that a commenter may not expand the scope of a federal agency rulemaking proceeding as Charter attempts to do here.

A bedrock principle of administrative law applicable to agency rulemakings like the one at hand is that stakeholders must have advance notice and opportunity to comment on regulatory requirements an agency seeks to impose or alter before any such imposition or alteration may take effect.⁴ The Administrative Procedure Act,⁵ Commission rulings,⁶ and judicial precedent,⁷ all uniformly so demand. The Court put it succinctly in *United Mine Workers*:

³ See *In re Electronic Delivery of MVPD Communications*, Notice of Proposed Rulemaking, 32 FCC Rcd 10755, 10765 ¶ 22 n. 70 (2017) and NCTA Comments and Frontier Reply Comments in MB Docket No. 17-105 cited therein.

⁴ The deep irony of the fact that Charter here seeks changes in cable operator *advance notice* regulatory requirements, in a proceeding where the FCC has given no *advance notice* that the rule targeted by Charter is under review, should not be lost on the Commission.

⁵ 5 U.S.C. § 553(b)(3) (federal agencies must publish “either the terms or substance of the proposed rule or a description of the subjects and issues involved.”); *id.* § 553(c) (“[a]fter notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments....”).

⁶ See, e.g., *In the Matter of Amendment of Parts 2 and 87 of Commission’s Rules to Permit the Aviation Services to Use Frequencies in the 136-137 MHz Band*, Report and Order, 5 FCC Rcd 3954, 3957 (1990) (recognizing that the Commission may not consider issues outside the scope of the proceeding in question); see also *In the Matter of Amendment of Part 94 of the Commission’s Rules to Permit Private Video Distribution Systems of Video Entertainment Access to the 18 GHz Band*, 6 FCC Rcd 1270, n. 20 (1991) (declining to address a suggestion outside the scope of the proceeding in question).

⁷ See, e.g., *Council Tree Communications, Inc. v. FCC*, 619 F.3d 235 (3rd Cir. 2010); *Int’l Union, United Mine Workers v. Mine Safety & Health Admin.*, 407 F.3d 1250 (D.C. Cir. 2005).

Notice requirements are designed (1) to ensure that agency regulations are tested via exposure to diverse public comment, (2) to ensure fairness to affected parties, and (3) to give affected parties an opportunity to develop evidence in the record to support their objections to the rule and thereby enhance the quality of judicial review. While an agency may promulgate final rules that differ from the proposed rule, a final rule is a logical outgrowth of a proposed rule only if interested parties should have anticipated that the change was possible, and thus reasonably should have filed their comments on the subject during the notice-and-comment period[.]⁸

Here, there can be no doubt that Charter's comments breach these fundamental principles. By Charter's own admission, the Commission expressly *excluded* the substance of Rule 76.1603 from the scope of this docket. Therefore, Charter's comments addressing Rule 76.1603's merits should themselves be excluded from consideration in this proceeding.

Respectfully submitted,

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⁸ *United Mine Workers*, 407 F.3d at 1259-60.