



Virginia Association of Broadcasters Legal Review



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Legal Memorandum

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FCC Seeks Comment on NAB-NCTA Joint Proposal to Modernize and Streamline Retrans Consent/Must Carry Election Process

The days of broadcasters tracking down addresses and sending retransmission consent/must carry election notices to MVPDs via certified mail could be numbered if the FCC adopts a [joint proposal](#) submitted earlier this month by NAB and NCTA regarding the triennial carriage election process. The FCC is now [seeking comment](#) on the joint proposal, which aims to streamline the election process and to make that process less burdensome on, and less worrisome for, broadcasters.

NAB and NCTA propose two major changes to the current carriage election process; one is substantive, and the other is procedural. First, under the proposal, a commercial TV station would only have to notify cable and satellite operators of its retrans consent/must carry election if its election status changed from the previous election cycle. Second, the proposal would eliminate the Commission’s outdated procedural requirement that broadcasters send their carriage elections via certified U.S. postal mail. Instead, NAB and NCTA propose that commercial broadcast stations be required to send carriage election notices electronically, via email. NAB and NCTA propose that their recommendations, if adopted, take effect in the next election cycle, which will be in 2020.

The joint proposal comes in response to the FCC's [Notice of Proposed Rulemaking](#) ("Notice") adopted last December that considers whether and how to update the current process under which broadcasters must make retransmission consent/must-carry elections every three years. In that Notice, the FCC recognized that which broadcasters already know: that "significant legal and financial consequences arise from the failure to make a timely election notice." A primary function of the joint proposal is to minimize the chances that a broadcaster would make such a costly mistake in the carriage election process.

Here are more details about the joint proposal:

Election Notice Only If Status Changes. As mentioned, perhaps the most foundational change proposed by NAB and NCTA is that broadcasters would only be required to send a carriage election notice to an MVPD in the event that such broadcaster is changing its election status with respect to that MVPD from its prior election. Broadcasters would no doubt welcome that shift from the FCC's current rule, which requires each broadcaster, triennially, to send a carriage election notice regardless whether the broadcaster's status changes or stays the same.

The default election with respect to cable operators is must carry, meaning that a broadcaster that fails to notify a cable operator of its retransmission consent election for a given three-year cycle (even if that failure is due to an error or inadvertent oversight) forgoes its ability to negotiate retransmission consent rates with that operator. (Recall that the default election for satellite providers, conversely, is retransmission consent.)

More granularly, the proposal recommends that if a broadcaster is changing its carriage status for all systems of a cable operator, then the broadcaster need only identify the affected DMA; if, however, the broadcaster only changes its carriage status for specific cable systems, then the broadcaster's election notice would have to identify each specific cable system for which a new carriage election applies.

Electronic Notification. In place of the current certified-mail requirement, the joint proposal recommends that commercial broadcast stations be required to send carriage election notices to a specific email address—the email address listed either in the notice recipient's online public file, or in the FCC's Cable Operations and Licensing System ("COALS") database (for those cable operators that do not have an online public file).

Because MVPDs are required to update and maintain their contact information in these online areas, the proposal suggests that broadcasters should be able to assume that such information is up to date within 60 days of an upcoming carriage election deadline. And, as a further safeguard, the proposal recommends requiring broadcasters to "cc" their carriage election emails to a specific FCC email address.

Ultimately, if a broadcaster is unable to contact the MVPD via email, the proposal would require the broadcaster to reach out to that operator or system by using the telephone number listed in either the online public file or COALS database. If that number doesn't work, then the broadcaster would only need to (1) copy the FCC's election-notice email address and (2) by the election-notice deadline, note any change of election in its online public inspection file.

In terms of reciprocal responsibilities, the proposal recommends requiring each MVPD operator's designated email address to generate a response to each broadcaster's notification email. This will let the broadcaster know whether its election notice was actually received or whether the broadcaster must pursue the telephone verification method described in the preceding paragraph. In turn, broadcasters would be required to provide to notice recipients an up-to-date email address and phone number in case the recipient has a question regarding the notice or believes the notice is otherwise defective.

The fact that the FCC is seeking comment on this specific joint proposal indicates that the Commission is giving it (or, at least, aspects of it) substantial consideration. Comments are due soon, on January 7, 2019; reply comments are due shortly thereafter, on January 17, 2019.

Reminder: Upcoming “Blue Alert” EAS Event Code Compliance Deadline

The FCC's compliance deadline for delivery of so-called “Blue Alerts” over the Emergency Alert System (“EAS”) takes effect in less than a month, on January 18, 2019. To be clear, Blue Alerts are voluntary under the FCC's rules—stations are **not** required to broadcast them; the January 18 deadline is directed to EAS equipment manufacturers who must make it possible for a broadcaster to upgrade its existing EAS equipment in order to make it capable of processing Blue Alerts if the broadcaster in fact wishes to disseminate Blue Alerts.

As we have previously reported, the FCC adopted a [Report and Order](#) (“Order”) about a year ago (in December 2017) that added a dedicated, “Blue Alert” event code (BLU) to the EAS lexicon in an effort to “advance the important public policy of protecting our nation's law enforcement officials through facilitating the apprehension of suspects who pose an imminent and credible threat to law enforcement officials and aiding search efforts to locate missing officers.” Blue Alerts are authorized in a number of states and are typically used when a law enforcement officer has sustained a serious or fatal injury and a suspect is at large.

When it adopted the Order, the Commission recognized that some time would be necessary for (1) equipment manufacturers and participating commercial mobile service providers to prepare their equipment and networks to be able to process any Blue Alerts that are sent over the EAS and the WEA (Wireless Emergency Alert system), and (2) for alert originators, EAS participants, and other stakeholders to have the necessary training and resources to deliver Blue Alerts to the public if they choose to do so.

As such, the FCC allowed for generous compliance deadlines. And, as mentioned, the Order compliance deadline of January 18, 2019, for EAS equipment manufacturers is now just weeks away. (The Order set a compliance deadline for Blue Alerts to be delivered over the WEA of July 18, 2019; we'll remind you about that as that date approaches.)

If you have any questions concerning the information discussed in this memorandum, please contact your communications counsel or any of the undersigned.

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