

FCC FACT SHEET*

Electronic Annual Notice Declaratory Ruling MB Docket No. 16-126

Background: Under the Commission's rules, cable operators are required to provide their subscribers with annual notices that include certain "written information" about their products and services, including, but not limited to, the types of products and services offered, the prices for each service, and installation and service maintenance policies (*see* 47 CFR §76.1602(b)). Most cable operators distribute the annual notices in hard copy, using hundreds of millions of pages of paper annually and causing environmental waste. Representatives of the cable industry filed a Petition for Declaratory Ruling with the FCC requesting that the Commission clarify that the annual notices may be delivered to customers via electronic mail.

What the Declaratory Ruling Would Do:

- Clarify that cable operators may provide the annual notices via e-mail to a "verified e-mail address."
- Define a "verified e-mail address" as one that (1) the customer has provided to the cable operator for purposes of receiving communication, (2) the customer regularly uses to communicate with the cable operator, or (3) has been confirmed by the customer as an appropriate vehicle for the delivery of notices.
- Specify that each notice delivered via e-mail must provide customers with a telephone number to opt out of e-mail notification at any time and choose to continue to receive paper copies of the annual notices.
- Eliminate environmental waste by saving hundreds of millions of pages of paper annually.
- Reduce compliance costs for all cable operators and especially small cable operators.
- Modernize the Commission's rules to comport with updated technology and the prevalent use of e-mail communication by cable customers.

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

In the Matter of
National Cable & Telecommunications Association and American Cable Association
Petition for Declaratory Ruling
MB Docket No. 16-126

DECLARATORY RULING*

Adopted: []

Released: []

By the Commission:

I. INTRODUCTION

1. We grant to the extent described herein a petition for declaratory ruling filed by the National Cable & Telecommunications Association and the American Cable Association (NCTA/ACA or Petitioners).1 Petitioners request clarification that the "written information" that cable operators must provide to their subscribers annually pursuant to Section 76.1602(b) of the Commission's rules may be provided via electronic distribution.2 As explained more fully below, we clarify that cable operators may comply with Section 76.1602(b) by distributing the annual notices via e-mail to a verified e-mail address that includes a mechanism for customers to opt out of e-mail delivery and continue to receive paper notices.

II. BACKGROUND

2. In the Cable Television Consumer Protection and Competition Act of 1992, Congress, in order to "provide increased consumer protection," amended Section 632 of the Communications Act of 1934 to require the Commission to adopt customer service standards for cable operators.3 In Section 632(b), Congress directs the Commission to "establish standards by which cable operators may fulfill their customer service requirements" and specifies that "[s]uch standards shall include, at a minimum,

* This document has been circulated for tentative consideration by the Commission at its June 2017 open meeting. The issues referenced in this document and the Commission's ultimate resolutions of those issues remain under consideration and subject to change. This document does not constitute any official action by the Commission. However, the Chairman has determined that, in the interest of promoting the public's ability to understand the nature and scope of issues under consideration, the public interest would be served by making this document publicly available. The Commission's ex parte rules apply and presentations are subject to "permit-but-disclose" ex parte rules. See, e.g., 47 CFR §§ 1.1206, 1.1200(a). Participants in this proceeding should familiarize themselves with the Commission's ex parte rules, including the general prohibition on presentations (written and oral) on matters listed on the Sunshine Agenda, which is typically released a week prior to the Commission's meeting. See 47 CFR §§ 1.1200(a), 1.1203.

1 Petition of National Cable & Telecommunications Association and American Cable Association for Declaratory Ruling, MB Docket No. 16-126 (filed March 7, 2016) (NCTA/ACA Petition). The Media Bureau set a Comment Date of May 26, 2016 and a Reply Comment date of June 10, 2016. See Public Notice, Media Bureau Seeks Comment on Petition for Declaratory Ruling, 31 FCC Rcd 3595 (MB 2016) ("Public Notice"). The Public Notice was published in the Federal Register. See 81 FR 24050-01 (April 25, 2016) (Federal Register Notice).

2 See 47 CFR § 76.1602(b).

3 Pub. L. No. 102-385, 106 Stat. 1460 (1992); see 47 U.S.C. § 552.

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requirements governing . . . communications between the cable operator and the subscriber (including standards governing bills and refunds).”⁴

3. The Commission implemented the customer service standards required under Section 632(b) in 1993.⁵ Among other rules, the Commission adopted Section 76.1602(b), which now states that “the cable operator shall provide written information on each of the following areas at the time of installation of service, at least annually to all subscribers, and at any time upon request:

- (1) Products and services offered;
- (2) Prices and options for programming services and conditions of subscription to programming and other services;
- (3) Installation and service maintenance policies;
- (4) Instructions on how to use the cable service;
- (5) Channel positions of programming carried on the system; and
- (6) Billing and complaint procedures, including the address and telephone number of the local franchise authority's cable office.
- (7) Effective May 1, 2011, any assessed fees for rental of navigation devices and single and additional CableCARDS; and,
- (8) Effective May 1, 2011, if such provider includes equipment in the price of a bundled offer of one or more services, the fees reasonably allocable to:
 - (i) The rental of single and additional CableCARDS; and
 - (ii) The rental of operator-supplied navigation devices.”⁶

4. In its Petition, NCTA/ACA seek clarification through a declaratory ruling that the annual “written information” requirement of Section 76.1602(b) may be satisfied through either e-mail or other digital or electronic means “reasonably calculated to reach the individual subscriber.”⁷ NCTA/ACA state that “customers would be informed that they may request and receive a paper version of their Section 76.1602(b) notices” in any such electronic communications.⁸ The Media Bureau published a Public Notice seeking comment on the NCTA/ACA Petition on April 14, 2016.⁹ The Public Notice stated that Petitioners request that Section 76.1602(b) be interpreted to allow cable operators to use a

⁴ 47 U.S.C. § 552(b)(3). In addition, Section 632(b) requires the Commission to establish requirements governing “cable system hours and telephone availability” and “installations, outages, and service calls.” 47 U.S.C. § 552(b)(1), (2).

⁵ See *Implementation of Section 8 of the Cable Television Consumer Protection and Competition Act of 1992, Consumer Protection and Customer Service*, MM Docket No. 92-263, Report and Order, 8 FCC Rcd 2892 (1993) (*Customer Service Order*). In implementing its customer service rule, the Commission looked to the National Cable Television Association’s “Recommended Cable Industry Customer Service Standards” as a benchmark. See *Notice of Proposed Rule Making in MM Docket No. 92-263*, 7 FCC Rcd 8641, 8644 (1992).

⁶ 47 CFR § 76.1602(b). The rule was first located within the customer service section of our rules, 47 CFR § 76.309, but was later moved to 47 CFR § 76.1602 when the Commission streamlined the Part 76 notice requirements by putting them in a separate section. See *1998 Biennial Regulatory Review -- Streamlining of Cable Television Services Part 76 Public File And Notice Requirements*, 14 FCC Rcd 4653 (1999). See also *Implementation of Section 304 of the Telecommunications Act of 1996*, Third Report and Order and Order on Reconsideration, 26 FCC Rcd 9209 (2010).

⁷ NCTA/ACA Petition at 3-4.

⁸ *Id.*

⁹ See *supra* note 1.

“confirmed email address” to deliver the annual notices and that Petitioners would continue to make the information “available in print upon customer request.”¹⁰

5. All parties in the record support interpreting the “written information” obligation of the rule to be satisfied by e-mail delivery of the annual notices.¹¹ NCTA/ACA state that most cable operators still distribute the “written information” required by Section 76.1602(b) in hard copy, using hundreds of millions of pages of paper annually.¹² They claim that businesses and customers increasingly prefer the efficiency, effectiveness, and ease of electronic communications.¹³ NCTA/ACA further argue that, in addition to eliminating environmental waste, electronic dissemination would enhance the ease and speed with which the annual notices could be updated or corrected, resulting in customers receiving more accurate information.¹⁴ They also maintain that electronic dissemination would provide cable operators greater flexibility to match the electronic operations of online video providers and other competitors.¹⁵ Cox, Charter, Comcast, Suddenlink, US Telecom and 83 small and mid-sized cable operators¹⁶ all support the NCTA/ACA Petition. In addition to the cable operators, the National Association of Telecommunications Officers and Advisors (NATOA), the Local Government Coalition (LGC), the Minnesota Association of Community Telecommunications Administrators (MACTA),¹⁷ and the

¹⁰ Public Notice at 1; Federal Register Notice at 24050-24051.

¹¹ See Appendix, attached hereto, for a list of commenters.

¹² See NCTA/ACA Petition at 2.

¹³ *Id.* at 1.

¹⁴ *Id.* at 3.

¹⁵ *Id.*

¹⁶ Cox states that electronic dissemination would be consistent with consumer needs and expectations and allow customers to access the required information in the format of their choice. Cox Comments at 1. Cox reports that after a concerted effort towards paperless billing in early 2015, Cox’s residential subscribers opting for paperless billing have increased from 14% to 41%. *Id.* at 2. Charter asserts that allowing customers to choose to receive information electronically will ensure that subscribers have convenient and reliable access to information regarding their cable service. Charter Comments at 1. Charter would like to modernize its notice practices to benefit customers and reflect their shifting preferences. *Id.* at 2. Comcast notes that it currently provides its Section 76.1602(b) notices in hard-copy form at the time of installation (either by hand or with the shipping of a self-install kit), and annually through the mail. Comcast Comments at 1. Comcast states that it communicates electronically with millions of its customers, to disseminate and receive a wide array of information, including monthly bills, payments, information about its service offerings and outages, service upgrades and service appointments. *Id.* at 2. Suddenlink claims that electronic dissemination will help ensure that the Commission’s regulations do not impede business modernization. Suddenlink Comments at 1. Suddenlink customers routinely order and modify service levels online and about 20% pay their bills online. *Id.* at 2. US Telecom states that operators use a broad range of modern communications tools and applications to inform their subscribers about a variety of issues, including service offerings, billing information and payment options. US Telecom Comments at 2. US Telecom states that in 2014, AT&T achieved a 46.8% reduction of paper purchased for consumer billing from the 2010 baseline year as a result of paperless billing systems, a reduction of more than 18.8 million pounds of paper. US Telecom also reports that Verizon saved more than 6,556 tons of paper through its paperless billing programs, about 143,000 trees. *Id.* at 3. The 83 small and mid-sized cable operators assert that all subscribers would receive important notices in the manner that they prefer, reducing customer confusion and reducing costs, with savings that can be passed on to subscribers. 83 Small and Mid-sized Cable Operators Comments at 1.

¹⁷ NATOA’s membership includes local government officials and staff whose responsibility is to develop and administer communications policy for local governments. NATOA Reply at n. 1. The LGC is composed of the cities of Los Angeles, California; McAllen, Texas; Bay City and Livonia, Michigan; Montgomery County, Howard County, and Anne Arundel County, Maryland and the local government coalitions of TeleCommUnity (an alliance of local governments and associations) and PROTEC (a coalition of 50 Michigan communities). LGC Reply at 1.

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Intergovernmental Advisory Committee to the Federal Communications Commission (IAC) support the use of electronic distribution if consumer safeguards are in place.¹⁸

III. DISCUSSION

6. We clarify that the “written information” that cable operators must provide to their subscribers annually pursuant to Section 76.1602(b) may be provided electronically if the cable operator (1) sends the information to a verified e-mail address and (2) provides a mechanism for customers to opt out of e-mail delivery and continue to receive paper notices.¹⁹ As a legal matter, we find that permitting cable operators to comply with Section 76.1602(b) by delivering the required information via e-mail falls squarely within the language of the rule. E-mails, by their very nature, convey information in writing.²⁰ Instead of delivering the annual notices via the U.S. Mail, this same information would be delivered by electronic means (*i.e.*, via the Internet). Thus, we conclude that it is reasonable to interpret the term “written information” in Section 76.1602(b) to include information delivered by e-mail. Moreover, we find that the Petitioners have supplied persuasive policy arguments that support interpreting the “written information” requirement of Section 76.1602(b) to encompass electronic distribution to a verified e-mail address. The benefits of permitting e-mail delivery include the positive environmental aspects of saving

MACTA represents more than 100 Minnesota cities and townships in matters related to cable television. MACTA Reply at n. 1.

¹⁸ See, e.g., NATOA Reply at 2; LGC Reply at 2-3 (citing NCTA/ACA Petition at 2-3); MACTA Reply at 2; IAC Advisory Recommendation Number 2016-11, dated July 12, 2016, at 4-5. (IAC Advisory Recommendation Number 2016-11). For example, among other suggestions, these commenters support (1) enabling customers to specify the electronic contact information to be used, *see infra* para 9; (2) opt-out options that would enable customers to withdraw from electronic delivery and receive paper notices, *see infra* para. 10; (3) the use of an opt-in mechanism before customers would be switched to electronic delivery, *see infra* note 39; (4) a restriction on charging customers additional fees based on their choice of delivery means for the annual notices, *see infra* note 37; (5) a prohibition on the sale, barter or marketing use of verified e-mail addresses, *see infra* note 19; and (6) a restriction on the use of verified e-mail addresses for billing or collections absent a specific and clear authorization by subscriber; *see id.* While we agree with the first two requests on this list, we reject the other requests for the reasons discussed below. We may revisit this issue in the future if there is evidence that additional safeguards are necessary to meet the objectives of Section 632.

¹⁹ This declaratory ruling applies only to Section 76.1602(b) and does not authorize cable operators to use e-mail delivery for other purposes, such as billing and collection, marketing and sales or other notices. In addition, this declaratory ruling in no way alters any methods of communication between cable operators and local franchising authorities. LGC argues that cable operators must be prohibited from selling, bartering or using the customers’ e-mail addresses for marketing purposes, that cable operators must be prohibited from using verified e-mails for billing or collections absent a specific and clear authorization by the subscriber and that the clarification should not have a negative impact on LFA notifications contained in state or local cable franchises. LGC Reply at 6-8; *see also* IAC Advisory Recommendation Number 2016-11 at 4-5. These requests are outside the scope of this proceeding, although the uses of e-mail addresses may be restricted under other laws or regulations. NCTA/ACA maintain that cable operators’ use of e-mail addresses would remain subject to any and all applicable regulations, whether cable-specific or rules of general applicability, that restrict the improper or unauthorized use of e-mail addresses and e-mail communications and that there is no history of e-mail abuse by the cable industry that would warrant concern in this area. NCTA/ACA also assert that the relief sought would have no impact on notifications to local franchising authorities. Letter from Rick Chessen, NCTA, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 16-126, at 5 (filed July 15, 2016) (NCTA/ACA Letter).

²⁰ For example, Black’s Law Dictionary defines “written” as the “expression of ideas by letters visible to the eye.” <http://thelawdictionary.org/writing/> (last visited May 2, 2017). Similarly, Section 1001 of the Federal Rules of Evidence defines “writing” as consisting of “letters, words, numbers, or their equivalent set down in any form.” *See* Fed. R. Evid. 1001. In addition, Congress has defined “electronic communications” to include writing. *See* 18 U.S.C. § 2510, incorporated by 47 CFR § 1001 (“electronic communication means any transfer of . . . writing . . . transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic or photooptical system . . .”).

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substantial amounts of paper annually,²¹ increased efficiency²² and enabling customers to more readily access accurate information regarding their service options.²³ In addition, we note that this clarification is consistent with other Commission actions permitting electronic records in lieu of paper records.²⁴

7. We further find that Section 632(b) grants the Commission authority to establish the means by which annual notices may be delivered to subscribers and to specify consumer protections with regard to the delivery of the notices. As noted above, Section 632(b) provides the Commission with broad authority to “establish standards by which cable operators may fulfill their customer service requirements.”²⁵ Moreover, Section 632(b) does not impose any limitations on the Commission’s authority to specify the means by which cable operators may deliver notices to consumers.²⁶

8. Electronic delivery of annual notices will greatly ease the burden of complying with Section 76.1602(b) for all cable operators, including in particular small cable operators. Co-petitioner ACA is comprised of approximately 850 small and medium-sized independent operators delivering video, high-speed broadband, and phone services to small markets and rural areas across the country.²⁷ ACA members serve nearly seven million households and businesses.²⁸ Granting the NCTA/ACA Petition 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.”²⁹ The 83 Small and Mid-sized Cable Operators claim that e-mail delivery will “significantly reduce the operational costs of producing and distributing paper notices.”³⁰ Overall, our action today will enhance the ability of small entities to compete and decrease the costs of complying with Section 76.1602(b).³¹

²¹ See *supra* para. 5 and note 12 (e-mail delivery can save hundreds of millions of pages of paper annually).

²² See *supra* para. 5 (e-mail delivery would enhance ease and speed with which the annual notices could be updated).

²³ E-mail delivery will enable customers to access the notices at a time convenient to them either by viewing the information within the e-mail or if a link is provided, via the cable operator’s website. We note that our interpretation will not increase the paperwork burden on cable operators. Accordingly, the Commission plans to seek OMB approval for a non-substantial change to the rule.

²⁴ See, e.g., *Standardized and Enhanced Disclosure Requirements for Television Broadcast Licensee Public Interest Obligations*, Second Report and Order, 27 FCC Rcd 4535 (2012); *Expansion of Online Public File Obligations To Cable and Satellite TV Operators and Broadcast and Satellite Radio Licensees*, Report and Order, 31 FCC Rcd 526 (2016).

²⁵ 47 U.S.C. §552(b)(3). Although it specifies certain topics that must be addressed in the Commission’s cable customer service rules, Section 632(b) states that the standards must address these topics “at a minimum,” thereby giving the Commission broad authority to adopt consumer protections for cable subscribers. *Id.*

²⁶ Compare 47 U.S.C. §552(b) with 47 U.S.C. §552(c) (“a cable operator may provide notice of service and rate changes to subscribers using any reasonable written means at its sole discretion”). Section 632(c) was implemented by Section 76.1603 of the Commission’s rules, which governs the notice required for rate or service changes. 47 CFR § 76.1603 (“Customer service – rate and service changes”). Section 76.1602, on the other hand, implements Section 632(b) and governs the notice required at the time of installation and on an annual basis of matters such as communications regarding products and services, pricing and options, and billing and complaint procedures. 47 CFR § 76.1602(b) (“the cable operator shall provide written information on each of the following areas at the time of installation of service, at least annually to all subscribers, and at any time upon request”).

²⁷ See American Cable Association, About Us, http://www.americancable.org/about_us (last visited May 2, 2017).

²⁸ *Id.*

²⁹ NCTA/ACA Petition at 3.

³⁰ 83 Small and Mid-sized Cable Operators Comments at 1.

³¹ We note that the Commission has reported that under its small business size standard for purposes of cable rate regulation, there are approximately 650 small cable operators and approximately 3,900 small cable systems. See *January 2017 Public Inspection File Report and Order*, MB Docket No. 16-161, FCC 17-3, FRFA paras. 10-11 (rel.

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9. We agree with Petitioners that cable operators must have verified e-mail contact information for a customer in order to deliver the annual notice via e-mail.³² We find that, in the absence of a verified e-mail address, reliance on e-mail would not satisfy the directive in Section 76.1602(b) that cable operators “provide written information ... to all subscribers.”³³ The use of a verified email address will ensure that the written information is provided – *i.e.*, made available – to subscribers, as required by the rule.³⁴ In this regard, we will consider each of the following to constitute a verified e-mail address for purposes of the rule: (1) an e-mail address that the customer has provided to the cable operator (and not *vice versa*)³⁵ for purposes of receiving communication, (2) an e-mail address that the customer regularly uses to communicate with the cable operator, or (3) an e-mail address that has been confirmed by the customer as an appropriate vehicle for the delivery of notices. Petitioners proposed these criteria, they are supported by NATOA, and we find that each will provide adequate assurances that only active e-mail contact information will be used to distribute the annual notices.³⁶ By requiring the use of a verified email address, we will ensure that the annual notices have a high probability of being successfully delivered electronically to an email address that the customer actually uses, so that the written information is actually provided to the customer. If no verified e-mail contact information is available for a particular customer, cable operators must continue to deliver the annual notices via paper copies to that customer.³⁷

Jan. 31, 2017). In clarifying Section 76.1602(b), we have taken steps to minimize significant economic impact on small entities by declining to adopt more burdensome requirements for implementing e-mail delivery of the annual notices such as an opt-in mechanism which would require additional resources to implement. The requirements we impose herein were recommended by the ACA in the record and we agree with them that the two safeguards we specify, a verified e-mail address and an opt-out mechanism, will lessen their economic burden by allowing them to successfully deliver the annual notices electronically. *See* NCTA/ACA Letter at 3. These minimal safeguards appropriately balance the interests of customers against the interests of the regulated entities, including small entities.

³² NCTA/ACA Letter at 3. Petitioners state that it was not their “intention to seek approval to use simply any email address that might be associated with a customer, whether the email account is actively used or not.” *Id.*

³³ 47 CFR §76.1602(b) (emphasis added).

³⁴ The term “provide” in the rule means more than simply “send”; it requires that cable operators make available the information to subscribers. For instance, the Meriam-Webster Online Dictionary defines the term “provide” to mean “to supply or make available (something wanted or needed).” <https://www.merriam-webster.com/dictionary/provide> (last visited May 2, 2017). Dictionary.com contains a similar definition of the term “provide”: “to make available; furnish.” <http://www.dictionary.com/browse/provide> (last visited May 2, 2017).

³⁵ In other words, an e-mail address that a cable operator supplies to a customer as a courtesy when they sign up for broadband service would not qualify as a verified e-mail contact without any additional indication from the customer that (s)he actually uses that address.

³⁶ *See* NCTA/ACA Letter at 3; Letter from Stephen Traylor, Executive Director, NATOA to Marlene H. Dortch, Secretary, FCC, MB Docket No. 16-126, at 1 (filed December 9, 2016) (NATOA *Ex Parte* Letter).

³⁷ The parties disagree over whether customers need to be reminded of the obligation to keep their e-mail addresses up to date. NCTA/ACA objects to having any obligation to inform a customer to keep its electronic contact information up to date because this is something customers need to do for all of their transactions. NCTA/ACA Letter at 3-4. NATOA and MACTA support a requirement that cable operators inform customers of their obligation to keep such information up to date. *See* NATOA Reply at 2; MACTA Reply at 2. We agree with NCTA/ACA that the obligation to update any changes to their e-mail addresses would be well-known to customers using those addresses regularly for electronic communications and cable operators do not need to inform them of that obligation. However, we note that if a cable operator becomes aware that a verified e-mail address is no longer operational, it will be required to verify another address or send paper copies of the annual notices to that customer. We also find IAC’s request that there “be no extra charge” to customers based on their choice of delivery method to be outside the scope of this proceeding. *See* IAC Advisory Recommendation Number 2016-11 at 4. Because Section 76.1602(b) does not address fees associated with the delivery of the annual notices, we are unable to address this

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10. We also agree with Petitioners that, with any annual notices delivered via e-mail, customers must “be informed that they may request and receive a paper version of their Section 76.1602(b) notices” instead of e-mail delivery.³⁸ This option will afford customers the opportunity to opt out of e-mail notification at any time and choose to continue to receive paper copies of the annual notices, ensuring that customers continue to be provided information in a way that they will actually accept and receive.³⁹ Petitioners propose that e-mail notices “would identify a phone number for subscribers to request a paper copy” of their annual notices.⁴⁰ We agree with this proposal. Having a telephone opt-out option available as part of the e-mail notice will provide a readily accessible opt-out option and ensure that customers are able to opt out of e-mail delivery without using electronic means.⁴¹ The provision of a

issue within the scope of a declaratory ruling. We note, however, that the Media Bureau has previously found a similar fee to be within the scope of local regulation. *See Comcast Cable Communications, LLC*, 29 FCC Rcd 2885, 2888 (MB 2014) (“late fees, returned check fees, and other similar miscellaneous subscriber charges, are within the purview of local franchising authorities and not part of our regulatory scheme. A convenience fee charged for a particular payment method chosen by the subscriber falls into this category of miscellaneous fees. Local authorities may regulate such fees if they are permitted to under State or local consumer protection or other law.” (footnotes omitted)).

³⁸ NCTA/ACA Petition at 4. NATOA and MACTA support permitting customers to withdraw consent to electronic delivery of the notices at any time. *See* NATOA Reply at 2; MACTA Reply at 2. LGC argues that each e-mail must provide an opt-out option. LGC Reply at 6. We note that Section 76.1602(b) requires cable operators to “provide written information . . . at any time upon request.” 47 CFR § 76.1602(b).

³⁹ Several commenters argue that cable operators should be required to obtain opt-in consent before they may deliver the annual notices via e-mail. *See, e.g.*, LGC Reply at 4; MACTA Reply at 2; IAC Advisory Recommendation Number 2016-11 at 4-5. Pursuant to the Electronic Signatures in Global and National Commerce Act (E-Sign Act), information that a statute or regulation requires be provided to a consumer in writing can be delivered electronically if the sender follows all of the E-Sign Act requirements, including the requirement that a consumer “has affirmatively consented.” *See* 15 U.S.C. § 7001(c)(1). However, the E-Sign Act preserves a federal regulatory agency’s rulemaking authority, allows federal agencies to interpret the E-Sign Act with respect to a statute that it implements, and allows a federal agency to exempt a specified category or type of record from the consent requirements in the E-Sign Act “if such exemption is necessary to eliminate a substantial burden on electronic commerce and will not increase the material risk of harm to consumers.” *See* 15 U.S.C. § 7004(b), (d). Petitioners argue persuasively that it would not be workable for cable operators to attempt to receive permission from each individual customer prior to initiating electronic delivery for this particular notice asserting that “these benefits could not be achieved if cable operators were required to seek and obtain express, individualized consent from literally tens of millions of subscribers.” NCTA/ACA Letter at 3. Moreover, an opt-in mechanism does not appear to be necessary to protect consumers because the annual notices are generic in nature and do not contain confidential information specific to an individual subscriber. The information is already available in many cases on a cable operator’s or local franchising authority’s website. LGC also argues that Section 76.1602(b) e-mails should be considered “Commercial E-mails” pursuant to the Controlling the Assault of Non-Solicited Pornography And Marketing Act of 2003, 15 U.S.C. § 7701, *et seq.* (CAN-SPAM Act), or that the Commission should create a parallel set of safeguards for cable subscribers, LGC Reply at 5-6. NCTA/ACA object to deeming the electronic notices as “commercial e-mails” under the CAN-SPAM Act, which would require affirmative consent from customers before the e-mails could be sent. NCTA/ACA Letter at 4-5. Under the CAN-SPAM Act, “commercial electronic mail message” means “any electronic mail message the primary purpose of which is the commercial advertisement or promotion of a commercial product or service.” 15 U.S.C. § 7701(2)(A). Because the annual notices are part of an ongoing relationship, they are transactional in nature and the electronic communication of the annual notices would not constitute “commercial e-mail” under the CAN-SPAM Act. *See* 15 U.S.C. § 7702 (Commercial electronic mail messages do not include transactional messages). *Cf.* 47 CFR §§ 64.3100(c)(2), (8) (defining “commercial electronic mail message” and “transactional or relationship message” in the context of mobile service commercial messages).

⁴⁰ NCTA/ACA Petition at 4.

⁴¹ Several commenters request that the Commission also require cable operators to provide their customers with additional ways to opt out of e-mail delivery. LGC states that customers should not be forced to use old technology (telephone) to request materials in writing. LGC Reply at 7-8. The IAC recommends that cable operators allow

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telephone opt-out method is a minimum requirement and cable operators may choose to offer additional choices to their customers. Although we find that it is not necessary to require cable operators to provide more than one opt-out mechanism, and that a telephone opt-out would be the means most universally accessible to customers that prefer not to receive their notices electronically, we agree with LGC and IAC that other methods, such as a link that would allow customers to identify their delivery preference electronically, could also be efficient and convenient for many customers.⁴²

11. We reject Petitioners' additional request to permit electronic delivery of annual notices via other means "reasonably calculated to reach the individual customer" and limit electronic delivery at this time to e-mail.⁴³ We are concerned that Petitioners' suggested "reasonably calculated" standard is overly broad and vague, would be difficult to apply, and could create an undue risk that subscribers will not receive the required notices.⁴⁴ For example, NCTA/ACA maintain that one such "reasonably calculated" means to deliver annual notices would be to include in a subscriber's monthly bill a "link to a publicly available website where the notice applicable to a particular customer may be found...."⁴⁵ We are concerned that placing a link inside a bill could have the effect of obscuring rather than highlighting that the annual notices are not part of the regular bill.⁴⁶ In any event, because e-mail delivery will provide cable operators with the opportunity to vastly decrease their reliance on paper mailings via regular mail, we find it unnecessary to complicate the means by which cable operators may comply with the annual notice rule by approving this additional catchall standard.⁴⁷

customers to request materials in writing through an e-mail link and provide the information requested in a timely manner. IAC Advisory Recommendation Number 2016-11 at 4-5. MACTA points out that not all customers choose to subscribe to Internet/data services or can afford to do so. MACTA Reply at 2. NCTA/ACA object to a requirement for a specific method for customers to request a paper version of the notices, such as a link rather than a telephone number, as long as the option chosen by the cable company is readily available and not difficult to exercise. NCTA/ACA Letter at 4.

⁴² LGC Reply at 7-8. IAC Advisory Recommendation Number 2016-11 at 4-5.

⁴³ NCTA/ACA Letter at 6.

⁴⁴ NATOA and MACTA question whether the general use of website links or other "electronic measures" could provide all subscribers with the information required pursuant to Section 76.1602(b) and, as MACTA points out, especially those who either choose not to subscribe to Internet/data services or cannot afford to do so. NATOA Reply at 2; MACTA Reply at 2.

⁴⁵ NCTA/ACA Petition at 4. We find the inclusion of a website link to the notice itself to be reasonable when annual notices are delivered via e-mail. Website links sent via e-mail will give customers the flexibility to choose when to review the annual notices. To avoid customer confusion and inconvenience, if a website link is provided within an e-mail to access the annual notices, we expect the link to remain active until a subsequent notice supersedes it.

⁴⁶ As we noted earlier, our authorization of e-mail delivery of annual notices does not extend to billing and collections. *See supra* n. 19.

⁴⁷ Petitioners' reliance on the Commission's *Battery Backup Order* in this instance is misplaced. *See Ensuring Continuity of 911 Communications*, 30 FCC Rcd 8677, 8709 (2015). In the *Battery Backup Order*, the Commission implemented a new disclosure requirement concerning the availability of battery backup power in the event of a power outage. Although the Commission stated that the new annual disclosure could be disseminated "by any means reasonably calculated to reach the individual subscriber," the new disclosure requirement supplemented an existing one that already required providers to "[o]btain and keep a record of affirmative acknowledgement by every subscriber, both new and existing, of having received and understood the advisory. . ." *See E911 Requirements for IP-Enabled Service Providers*, 20 FCC Rcd 10245, 10272 (2005); *see also* 47 CFR § 9.5(e)(1-3) ("Specifically advise every subscriber, both new and existing, prominently and in plain language, of the circumstances under which E911 service may not be available . . ."). In this instance, there is no prior existing rule requiring an affirmative acknowledgement that information has been received and understood.

IV. ORDERING CLAUSES

12. For the reasons stated above, **IT IS ORDERED**, pursuant to section 632 of the Communications Act of 1934, as amended, 47 U.S.C. § 552, and sections 1.2 and 76.1602 of the Commission's rules, 47 CFR §§ 1.2, 76.1602, that the Petition for Declaratory Ruling filed by the National Cable & Telecommunications Association and the American Cable Association **IS GRANTED** to the extent indicated herein and **IS OTHERWISE DENIED**.

13. **IT IS FURTHER ORDERED** that this Declaratory Ruling shall be effective upon the date specified in a notice published in the Federal Register announcing Office of Management and Budget approval of the information collection requirements pursuant to the Paperwork Reduction Act.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary