



*Joseph E. Young,  
Senior Vice President, General Counsel & Secretary*

July 26, 2015

**VIA ECFS**

Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW  
Washington, DC 20554

Dear Ms. Dortch:

In an episode of the original *Star Trek* TV series, Mr. Spock, the staunchly logical, half-human/half Vulcan science officer of the Starship Enterprise, remarked that “Nowhere am I so desperately needed as among a shiplot of illogical humans.” Nowhere, that is, except in a roomful of broadcast industry lobbyists relying on assorted logical fallacies to defend the status quo for retransmission consent.

A case in point is the July 9, 2015 meeting between employees of the National Association of Broadcasters (NAB) and personnel of the FCC’s Media Bureau.<sup>1</sup> Here are just some of the tricks resorted to by NAB during the meeting.<sup>2</sup>

So’s Your Old Man. MVPDs assert that the retransmission consent regime is broken, with broadcasters doubling their prices every three years and relying on blackouts to get their way. Rather than debate that claim on the merits by presenting contrary evidence or substantive counter-arguments, the NAB Ex Parte Notice simply says that the FCC should not address the transgressions of broadcasters because MVPDs are far greater sinners.<sup>3</sup>

This is a classic logical fallacy often resorted to by those accused of wrongdoing. It is based on a combination of rationalization and distraction.<sup>4</sup> As a rationalization, it rests on the notion that the accused’s bad acts should be ignored or excused because the accuser has done something as bad or even worse. As a diversionary tactic, its purpose is to put the accuser on the defensive and induce him to respond to the counter-accusation, thereby shifting the focus to his own behavior, rather than that of the original accused.

---

<sup>1</sup> Ex Parte Notice of the National Association of Broadcasters, MB Docket No. 10-71, July 13, 2015 (the “NAB Ex Parte Notice”).

<sup>2</sup> Based on the account of the meeting given in the NAB Ex Parte Notice.

<sup>3</sup> NAB claimed that the impact of retransmission consent fees on consumer costs is minor while alleged MVPD practices like “dismal pay TV customer service, over-charging consumers, sky-high equipment fees and questionable billing practices” cause far greater harm. This seems to be NAB’s talking point *du jour*. The allegations, however, do not withstand close scrutiny, as we hope intend to demonstrate at a later date.

<sup>4</sup> This is one of the most common of the “red herring” category of logical fallacies and is referred to by logicians as “tu quoque,” a Latinism that roughly translates as “you, too.” .

Of course, the flaw in this kind of argument is that it does nothing to disprove the original accusation. Thus, even if NAB's allegations against MVPDs were true (which they are not), whether or not distributors are bad guys is wholly irrelevant to the truth of the charges levied by MVPDs against broadcasters. At most, that would simply mean that there are two scams, rather than only one scalawag that the FCC needs to sit in the corner.

The Devil Made Me Do It. NAB's ex parte notice says that "some in the pay TV industry appear to have developed a strategy of manufacturing retransmission consent disputes to spur the government to regulate more heavily in this arena." This is consistent with prior assertions by NAB that MVPDs are the real cause of the more than 400 retransmission-consent-related blackouts suffered by consumers in the last few years. The absurd premise underlying this claim is that poor gullible, meek and powerless station owners like CBS Corp., Disney, FOX and Sinclair Broadcast Group have been maneuvered or coerced into ordering station blackouts against their will.

This technique for avoiding accountability is the oldest of the logical fallacies, dating back to Eve in the Garden of Eden.<sup>5</sup> When something happens that brings shame or blame upon us or threatens us with undesirable consequences, we seek to absolve ourselves of responsibility by claiming that we were forced to act as we did because of coercion or unavoidable circumstances. The logical flaw in this form of argument is succinctly stated by one online source as follows: "If you . . . commit a sin, the devil did not make you do it. He may have tempted you to do it. He may have even have influenced you to do it. But he did not *make* you do it. You still had a choice."<sup>6</sup> Similarly, every large media company ordering or tolerating a blackout of its broadcast stations had a number of choices that would have allowed uninterrupted carriage without reduction of its retrans revenues.

Blame Canada and Keep An Eye On Poland. NAB does not just fault MVPDs for past blackouts, but also warns that their purported strategy of "manufacturing" blackouts as a tool for achieving political goals means that there may be an "uptick in pay TV-manufactured disputes" as the FCC launches the congressionally-mandated review of the "totality-of-the-circumstances" standard under its good-faith rule. NAB urges the FCC to "keep an eye on this trend."

Here, NAB is resorting to a propaganda technique called "scapegoating." For example, it is clear that Germany initiated war with Poland in 1939 in order to gain territory. Nazi propagandists, however, painted Poland as the aggressor. Germany called the conflict the "1939 Defensive War" and Adolf Hitler, a proponent of the "Big Lie" propaganda technique, claimed that Poland had attacked Germany and in the days leading up the invasion, made numerous allegations of provocations by Poland.<sup>7</sup> A more contemporary example can be found in the song *Blame Canada* from a 1999 animated

---

<sup>5</sup> To our knowledge, the logicians have not come up with a Latinism or other tagline for this gimmick. We could, perhaps, call it the "Geraldine Jones gambit" since "the devil made me do it" was a line frequently used by the character of that name played by Flip Wilson on his 1970's TV show.

<sup>6</sup> <http://www.gotquestions.org/the-devil-made-me-do-it.html>.

<sup>7</sup> The German invasion triggered World War II in Europe and came soon after Germany and the Soviet Union inked a non-aggression pact that partitioned Poland between the two countries. The Russian government, seeking to minimize Russia's blame for the war, recently tried to revise history by blaming Poland for starting the conflict with Germany. See M. Eckel, *Historian Blames Poland for WWII: Russia's Role Recast in Research Paper*, Associated Press, Jun. 5, 2009, [http://www.boston.com/news/world/europe/articles/2009/06/05/russian\\_military\\_historian\\_blames\\_poland\\_for\\_wwii/](http://www.boston.com/news/world/europe/articles/2009/06/05/russian_military_historian_blames_poland_for_wwii/).

film based on the Comedy Central television series *South Park*. In the song, residents of the fictional Colorado town of South Park blame their children's misbehavior on watching a Canadian-produced film, rather than their own shortcomings as parents.

When it comes to retransmission consent, the bottom line is that when an existing agreement expires, MVPDs cannot force broadcasters to withhold consent to continued carriage, but broadcasters can force MVPDs to cease carriage. The fact that a shutoff always leads to the distributor paying more and never ends with the broadcaster agreeing to reduce or even maintain its price is solid evidence as to who really instigates blackouts. It seems, therefore, that if anyone needs watching by the FCC, it's the broadcasters.

It Could Be Worse. According to NAB's ex parte notice, "nearly all retransmission consent agreements conclude in a manner seamless for consumers." NAB often uses this proposition as the springboard for a giant leap to the conclusion that because most negotiations do not result in a blackout, there is no problem requiring governmental intervention. NAB's goal is to make the existing situation appear better by comparing it to the worst case scenario.

This is another common form of logical fallacy—the notion that because something bad is not worse, it is not worthy of attention.<sup>8</sup> To see the flaw in this kind of argument, consider the fact that in 2013, there were over 214,000 driving-under-the-influence arrests in California,<sup>9</sup> but "only" 867 alcohol-impaired-driving fatalities (0.4%).<sup>10</sup> If we apply NAB's reasoning, because nearly all instances of drunk driving in the state concluded "in a seamless manner for [innocent bystanders]," crusaders against drunk driving like MADD<sup>11</sup> have "manufactured" a made-up issue. That, of course, is absurd.

Moreover, NAB's argument is based on the false proposition that blackouts are the only undesirable consequence of retransmission consent negotiations from the perspective of consumers. In the space of a few short years, retransmission consent fees have grown from essentially zero to about \$6 billion a year, and broadcasters have announced a goal of driving that figure to \$29 billion as soon as they can. It simply is not true, therefore, that consumers are not negatively impacted by retransmission consent negotiations that do not produce shutoffs.

Who's The Boss? NAB seems to think that American citizens are here to serve the FCC, rather than the other way around. It cautions the FCC against becoming more involved in the retransmission consent process because that might require it to deal with complaints and requests for help by consumers and market participants, resulting in an increase the staff's work load. Can't have that now, can we?

---

<sup>8</sup> This is a form of logical fallacy known as "relative privation."

<sup>9</sup> <http://www.statisticbrain.com/number-of-dui-arrests-per-state/>.

<sup>10</sup> Traffic Safety Facts: 2013 Data, national Highway Traffic Safety Administration, Dec. 2014, <http://www-nrd.nhtsa.dot.gov/Pubs/812102.pdf>.

<sup>11</sup> Mothers Against Drunk Driving.

Usually, it is a source of criticism and regret when a government agency evolves to the point where it is fully invested in the status quo, is more concerned with self-interest than with the public interest and prefers inertia to activism.<sup>12</sup> In its zeal for zillions, broadcasters apparently are willing to pander to the basest of bureaucratic instincts.

NAB's argument rests on the false premise that the FCC's own institutional interests and preferences are more important than those of the public. It also reflects the view that Commission personnel consider citizens who seek their help as bothersome pests, akin to swarming flies.<sup>13</sup> Thankfully, those who work at the FCC do not think that way—Gigi Sohn, Counselor to Chairman Wheeler, remarked last month that “[e]veryone I have worked with at the FCC, be they political appointees or long-time staffers, has impressed me with their desire to produce the best communications policies for the American people.”<sup>14</sup> Chairman Wheeler, himself, has referred to the FCC as a “steward” of the public interest.<sup>15</sup>

With regard to retransmission consent specifically, NAB's implication that there is something wrong with cable operators or others seeking FCC help is totally at odds with the wealth of legislative history establishing Congress's expectation that the Commission would intervene if the retransmission consent market malfunctioned and resulted in either loss by cable subscribers of local broadcast television or extortion by station owners.<sup>16</sup> Nothing in the legislative history suggests that the FCC can shirk its responsibility because of the amount or relative unpleasantness of the work involved.

\* \* \*

In conclusion, the NAB Ex Parte Letter is hardly a convincing refutation of the case made by MVPDs and various consumer and public interest organizations that the retransmission consent system, as it presently operates, is harming consumers in ways that Congress wanted to avoid and expected the Commission to prevent. Nor does it make a compelling case for continued FCC inaction.

---

<sup>12</sup> See, for example, N. Winfield, *Pope In Blistering Critique of Vatican Bureaucrats*, Associated Press, Dec. 22, 2014, [http://news.yahoo.com/pope-issues-blistering-critique-vatican-bureaucracy-111617961.html?soc\\_src=copy](http://news.yahoo.com/pope-issues-blistering-critique-vatican-bureaucracy-111617961.html?soc_src=copy); D. Andelman, *Coda: Snared in Bureaucracy*, World Policy Journal (Summer 2013), <http://www.worldpolicy.org/journal/summer2013/snared-bureaucracy>; H. Dodds, *Bureaucracy and Representative Government*, 189 *Annals of the American Academy of Political and Social Science* 165-172 (Jan. 1937).

<sup>13</sup> The NAB Ex Parte Letter warns the Commission against becoming more involved in the retransmission consent process because that will invite a host of filings that it will have to address, citing a recent Petition for Rulemaking by Mediacom as an example. Based on the data in the “Legal Filings” area of NAB's Website, in the last year, NAB has filed four petitions seeking FCC rulemaking or other action and sued the FCC once. During the same period, Mediacom filed two rulemaking petitions and did not sue the Commission even once. Based on an automated search of the FCC's Electronic Comment Filing System, during the 21<sup>st</sup> Century, NAB has made at least 1,942 filings with the Commission, while Mediacom has made 170. It seems that the flypaper referred to in the NAB Ex Parte Notice has attracted mostly flies of the NAB variety.

<sup>14</sup> G. Sohn, *Halftime at the Wheeler FCC*, Remarks to the Media Institute Communications Forum, Washington, D.C., Jun. 4, 2015, [http://transition.fcc.gov/Daily\\_Releases/Daily\\_Business/2015/db0604/DOC-333774A1.pdf](http://transition.fcc.gov/Daily_Releases/Daily_Business/2015/db0604/DOC-333774A1.pdf).

<sup>15</sup> Testimony of Thomas Wheeler, Chairman, Federal Communications Committee, Subcommittee on Communications and Technology, Committee on Energy and Commerce, U.S. House of Representatives, Dec. 12, 2013, <https://www.fcc.gov/document/chairman-wheeler-fcc-oversight-hearing-statement>.

<sup>16</sup> See Joint Reply Comments of Mediacom Communications Corporation and Cequel Communications LLC d/b/a Suddenlink Communications, MB Docket 10-71 (June 3, 2010); Reply Comments of Mediacom Communications Corporation, MB Docket 10-71 (June 27, 2011).

While the letter is almost entirely an amalgam of obvious logical fallacies and propaganda techniques, it does contain one statement that we think is true and logically flawless: “bad actors should not be rewarded with government assistance, especially when those actions come . . . at consumers’ expense.” Both sides to the debate over retransmission consent seem to agree with that principle, but we clearly disagree as to the identity of the miscreants.

Thinking about bad actors brings us full circle back to *Star Trek*, which, although often entertaining, was not always marked by acting of the caliber of *Masterpiece Theater*. One episode of the series titled *The Trouble With Tribbles* began with a single small, furry alien creature called a “tribble” trapped in the grain storage area of the Starship Enterprise. Tribbles are hermaphrodites, able to reproduce without the need for interaction with another of the species. And they are prolific, capable of producing a litter of ten every twelve hours. According to Mr. Spock’s calculations, by the end of a period of three days from the time that first lone tribble somehow found its way into the grain hold, a population of 1,771,561 tribbles was spawned.

Although retransmission consent dollars have not multiplied as rapidly as tribbles, they have grown at rates unprecedented in any other consumer-service industry of which we are aware. As Chairman Wheeler has noted, retrans fees grew by 8600 percent between 2005 and 2012. Another \$3 billion has been added to the bill since the Chairman took office. That, perhaps, is a clue as to the identity of the really bad actors in the retransmission consent melodrama from the perspective of consumers: The owners of multiple big-four network affiliates who use actual and threatened blackouts to secure extraordinary rate increases that are ultimately borne by consumers.

NAB’s agenda before the FCC is to preserve the status quo with its blackouts and exorbitant increases in consumer costs. The goal of MVPDs in seeking Commission action is to put in place mechanisms that restore some semblance of balance in negotiating leverage and thereby make it more likely that the marketplace will match Congress’s expectations—one in which blackouts are exceedingly rare and retransmission consent fees have only a de minimis impact on basic subscriber rates and where the FCC acts, when necessary, to ensure those results. If you asked consumers which side’s agenda they prefer, we have no doubt what the overwhelming answer would be.

Thank you for your consideration.

Very truly yours,  
