

BEFORE THE  
**Federal Communications Commission**  
WASHINGTON, D.C. 20554

In the Matter of )  
 )  
Petition for Rulemaking to Amend ) RM - 11752  
the Commission's Rules To Promote )  
Expanded Free Access To Local Broadcast )  
Television Stations Via Over-the-Air Reception, )  
Internet Streaming, or Other Means )

**REPLY OF MEDIACOM COMMUNICATIONS CORPORATION**

**MEDIACOM COMMUNICATIONS  
CORPORATION**

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## SUMMARY

Despite collecting billions of dollars in retransmission consent fees, local broadcast stations still do not provide a viewable signal to significant portions of their markets. Mediacom filed a Petition for Rulemaking proposing that the Commission create an incentive for local broadcasters to expand the reach of their free television service by conditioning a broadcast television station's license renewal on the station certifying that it will not terminate an MVPD's carriage upon expiration of a retransmission consent agreement if the station is not accessible via over-the-air reception or Internet streaming to at least 90 percent of the homes in its local market served by the MVPD. The broadcast industry, as it typically does whenever anyone suggests that the Commission consider changes in its rules that place the public interest above the broadcasters' private interests, has gone ballistic, leveling a barrage of ad hominem attacks at Mediacom that are unrelated to the substance of the Petition, providing an example of the broadcasters' strategy of policymaking through intimidation.

The Commission should not be distracted by the broadcasters' attacks on Mediacom and its motives. Mediacom's goal has been to get policymakers to respond to the growing dissatisfaction of consumers fed up with being subjected to blackouts and ever-rising video costs because of content owners' and broadcast stations' insatiable hunger for dollars. To this end, Mediacom's longstanding offer – to freeze its published rates for its most popular video service tiers (limited and expanded basic) for two years if the owners of the broadcast channels and cable networks on those tiers likewise agree to freeze the fees they charge for their content – still stands.

The real question facing the Commission is not whether and how expanding the availability of free broadcast service would impact Mediacom, but whether and how its

implementation would serve the public interest. The broadcasters have no answers to this question – only misrepresentations and excuses. It takes real chutzpah for the broadcasters to express (unfounded) concerns that Mediacom’s proposal could increase cable prices and force consumers to purchase bigger program bundles when it is the major broadcast networks and big station groups that have led the way in driving up the cost of the basic tier and forcing carriage of unwanted channels. Moreover, the broadcasters’ claims about the migration of programming from broadcast to cable do not withstand scrutiny. First, local broadcasters have never been the ones primarily bidding for programming against cable networks – that has been the national broadcast networks. Second, when programming is moved from local affiliates to cable networks, it is typically at the initiative of the broadcast network’s parent corporation that also own the cable network to which the programming is migrated. The broadcasters’ claims about the impact of Mediacom’s Petition on the networks ability to obtain programming are particularly misplaced, given that the legislative history of the 1992 Act makes it clear that Congress never intended retransmission consent to be a vehicle for national broadcast networks to subsidize the acquisition of content.

What is most telling about the broadcasters’ oppositions to Mediacom’s Petition is that they do not (nor could they) deny that they have failed to make their service universally available. The broadcasters, attempting to shift attention away from their own misplaced priorities, blame everything from the DTV transition (which occurred over six years ago) to the spectrum auction (which was not authorized until 2013) to their lack of streaming rights (which is a subject that the requested proceeding can and should explore).

Finally, the Commission has ample authority to consider the revisions to its rules proposed in Mediacom’s Petition. The broadcasters’ focus their legal objections on Section 325

of the Act, which they contend bars the Commission from making any changes in its rules that would impact the current retransmission consent regime. That argument is wrong. But more importantly, the Commission need not rely on Section 325 to take the actions proposed by Mediacom. The Communications Act grants the Commission “broad authority to regulate the broadcast medium as the public interest requires,” including “wide discretion in granting, revoking, conditioning, and extending licenses in furtherance of the public interest.” The proposal carries out Sections 303(g), 303(h), 303(r), and 4(i) of the Act by encouraging more effective use of radio in the public interest, ensuring that signals are actually available to consumers within the service zones established for broadcast stations, and helping to provide a “fair, efficient, and equitable distribution” of broadcast service.

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**REPLY OF MEDIACOM COMMUNICATIONS CORPORATION**

Pursuant to Section 1.1405(b) of the Commission’s rules,<sup>1</sup> Mediacom Communications Corporation (“Mediacom”) hereby submits its reply to comments submitted in opposition to the above-referenced Petition for Rulemaking (“Petition”).

**INTRODUCTION**

The Petition is based on the proposition that despite collecting billions of dollars in retransmission consent fees from the public, broadcast stations still do not provide a viewable signal to significant portions of their markets. The broadcasters’ sadly predictable response to Mediacom having pointed out this undeniable fact is to attack Mediacom and the rest of the cable industry for a variety of alleged sins unrelated to the issue raised by the Petition.<sup>2</sup> When they finally do get to the point, the broadcasters do not attempt to either disprove Mediacom’s assertion about the limited availability of over-the-air reception or rebut Mediacom’s case that its proposed solution would be in the public interest. Instead, they offer a litany of excuses for why

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<sup>1</sup> 47 C.F.R. § 1.401(a).

<sup>2</sup> See, e.g., Opposition of the National Association of Broadcasters, *Petition for Rulemaking to Amend the Commission’s Rules Governing Practices of Video Programming Vendors*, RM-11752 (filed Aug. 14, 2015) (“Comments of NAB”) at 10-13; Comments of Nexstar Broadcasting, Inc., *Petition for Rulemaking to Amend the Commission’s Rules Governing Practices of Video Programming Vendors*, RM-11752 (filed Aug. 14, 2015) (“Comments of Nexstar”) at 9-10.

the Commission can't (not why it shouldn't) take steps to fulfill Congress's goal of a "universally available" free television service.<sup>3</sup>

The Commission should not be distracted by the broadcasters' ad hominem attacks, diversionary tactics, and excuses. Indeed, the very stridency and pure nastiness of the broadcasters' opposition confirms the need for Commission action. If it were true that broadcast television really is available to "anyone with an antenna,"<sup>4</sup> station owners would have no reason to oppose the Petition or would simply seek its dismissal by presenting data proving that there is near-universal off-air availability. They have not presented that data because it does not exist. Universal access to free broadcast television is far from a reality.

Mediacom's proposal would result in more widespread availability of reliable off-air reception. Aside from furthering Congress's goals, this could produce a number of benefits for consumers. For example, it could save money for senior citizens and low-income households in reception-impaired areas that today are forced to subscribe to a pay TV service to view broadcast TV. It could have several positive effects on the broken market for retransmission consent. As everyone understands (but only broadcasters publicly deny),<sup>5</sup> under current market conditions, the retransmission consent regime no longer serves the public interest and the broadcasters' tired arguments defending it are no longer working. The proposals put forward in the Petition would

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<sup>3</sup> Opposition of Local Broadcasters' Coalition, *Petition for Rulemaking to Amend the Commission's Rules Governing Practices of Video Programming Vendors*, RM-11752 (filed Aug. 14, 2015) ("Comments of Local Broadcasters") at 4-10; Comments of NAB at 2-5; Comments of Nexstar at 4-7.

<sup>4</sup> Comments of Local Broadcasters at 3.

<sup>5</sup> Some broadcasters do, however, admit that there are significant problems with the current regime. *E.g.*, Comments of Block Communications, Inc., *Petition for Rulemaking to Amend the Commission's Rules to Promote Expanded Free Access to Local Broadcast Television Stations Via Over-the-Air Reception, Internet Streaming, Or Other Means*, RM-11752 (filed Aug. 14, 2015) at 1 ("[Mediacom's] petition is just the latest in a long series of marketplace signals to the FCC that the retransmission consent system is badly broken and in need of reform.").

give local viewers greater options if and when retransmission consent negotiations reach an impasse, as they have in over 400 instances during the past few years.<sup>6</sup>

The proposals might also help restore the balance of bargaining power that Congress thought was necessary for retransmission consent negotiations to produce outcomes that were fair to both parties and, more importantly, good for American consumers. Similarly, the launch of over-the-top (“OTT”) video services would be facilitated, based on press reports that a major hold-up has been the need to obtain consent to carry broadcast content. If the vast majority of consumers enjoyed reliable over-the-air reception, the need to include broadcast programming in OTT services would be far less compelling.

## DISCUSSION

### **I. The Broadcasters’ Oppositions Offer Attacks and Excuses in Place of Reasoned Analysis.**

True to form, the broadcasters’ “arguments” in opposition to Mediacom’s Petition consist of non-responsive attacks on MVPDs, misrepresentations of the proposed rule and the status quo, and excuses for their failure to live up to the promises they made in exchange for use of the public airwaves.

#### **A. The Broadcasters’ Attacks on MVPDs are Not Responsive to the Petition.**

As they have time and again, broadcasters fall back on their first line of defense to any proposal that might cut into their retransmission consent leverage, which is to level a barrage of unrelated attacks on those proposing the changes. The substance of these attacks – that cable provides poor customer service,<sup>7</sup> that cable charges too much,<sup>8</sup> that cable is too big<sup>9</sup> – have

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<sup>6</sup> See *American Television Alliance Demands Media General End Outrageous TV Blackout*, American Television Alliance (July 15, 2015), available at <http://www.americantelevisionalliance.org/american-television-alliance-demands-media-general-end-outrageous-tv-blackout/>. (“Since 2010, millions of Americans have seen dark screens instead of their favorite channels due to at least 455 broadcaster blackouts.”).

<sup>7</sup> Comments of NAB at 8-10.

nothing to do with the substance of Mediacom’s Petition and thus offer no reason to not proceed with the requested rulemaking. Rather, they are simply an attempt to deter policymaking through intimidation.

Mediacom addressed this “So’s Your Old Man” form of advocacy in a recent letter to the Commission, a copy of which is attached.<sup>10</sup> It comes as little surprise that the broadcasting industry apparently believes that bullying its opponents can deter them from seeking necessary reforms to a broken regime. Broadcasters have quite a bit of experience with such tactics – for example, broadcasters’ force unreasonable and unsupportable retransmission consent deals onto small and medium sized MVPDs and then crow about how 99 percent of retransmission consent agreements are completed without a shutdown.<sup>11</sup>

**B. The Broadcasters’ Attacks Misrepresent Mediacom’s Proposal and Its Impact on the Television Marketplace.**

When not attacking Mediacom and the cable industry in general, the broadcasters engage in another of their favorite tactics: misrepresenting proposals with which they disagree and mischaracterizing the effect of those proposals.

1. The Oppositions Misrepresent the Proposal’s Public Interest Benefits.

The broadcasters allege that Mediacom is a part of “big cable” and that its Petition is an attempt to help the rich get richer.<sup>12</sup> Mediacom, however, is not in any sense “big cable,”

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<sup>8</sup> Comments of Nexstar at 9-10.

<sup>9</sup> Comments of NAB at 13.

<sup>10</sup> Appendix A, at 1-2 (“This is a classic logical fallacy often resorted to by those accused of wrongdoing... Of course, the flaw in this kind of argument is that it does nothing to disprove the original accusation.”).

<sup>11</sup> *See, Id.* at 3 (“This is another common form of logical fallacy—the notion that because something bad is not worse, it is not worthy of attention... If we apply NAB’s reasoning, because nearly all instances of drunk driving in [California] concluded ‘in a seamless manner for [innocent bystanders],’ crusaders against drunk driving like MADD have ‘manufactured’ a made-up issue. That, of course, is absurd.”)

<sup>12</sup> NAB Comments at ii-iii, 13; Comments of Local Broadcasters at 1.

particularly when it goes up against the major broadcast networks and the ever-growing station group behemoths.<sup>13</sup> Because Mediacom serves primarily small towns and mid-sized cities, its subscribers represent only a small part of each market served by the large station owners with which Mediacom engages in retransmission consent renewal negotiations. Thus, a blackout ordinarily will have negligible impact on the station owner but a much greater impact on Mediacom. Broadcasters take full advantage of this market reality. For example, in one renewal negotiation, the station owner emphasized that a blackout would bankrupt Mediacom without noticeably impacting the broadcaster because the stations involved reached about 50% of Mediacom's customers, but those customers represented less than 3% of the broadcaster's revenues. The effort by opponents to the Petition to include Mediacom in the "big cable" club is yet another example of the penchant of some representatives of broadcasters to misrepresent the facts. It also proves what MVPDs know quite well from experience: what broadcasters say in private, where their goal is to coerce acceptance of exorbitant price increases and one-sided terms, is radically different from what they say in public, where their agenda is to fool regulators, legislators, and the public into thinking that retransmission consent negotiations occur in a "free market" in which each side has comparable leverage.

Moreover, Mediacom's proposal is not, as the broadcasters suggest, a backdoor attempt at improving MVPDs' bottom lines.<sup>14</sup> To the contrary, the proposal may in fact be detrimental to MVPDs' bottom lines – greater availability of over-the-air programming will both encourage

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<sup>13</sup> The irony of NAB complaining about merger-fueled consolidation in the cable industry cannot be lost on the Commission. At a time when the current ownership limits seem to have little impact in preventing groups like Sinclair or Media General from adding stations, the broadcasters want the Commission to further relax those rules. And as for cable consolidation, the largest cable operator is Comcast, which also happens to be a broadcast network and station owner. Which probably explains why, despite its current expressions of alarm at "big cable," NAB did not oppose Comcast's merger with NBCU or Comcast's subsequent proposal to acquire Time Warner Cable.

<sup>14</sup> NAB Comments at ii-iii, 13; Comments of Local Broadcasters at 1.

more cord cutting and create opportunities for competing online or over-the-air services that are not subject to must carry requirements.

Driven by an insatiable hunger for more and more dollars, and viewing their obligation to serve the public interest as primarily an anachronism, broadcasters naturally have a hard time accepting that someone seeking relief at the Commission might be motivated by something other than pure greed. The reality, however, is that for well over a decade, Mediacom's goal in its video business has been to avoid raising subscriber charges for video programming.<sup>15</sup> Mediacom does not gain from video price increases, since it simply passes the additional revenues through to the broadcasters and network owners. Quite simply, Mediacom's proposal is motivated by the desire to do something to respond to the unhappiness of our customers subjected to blackouts and ever-rising video costs because of content owners' and broadcast stations' pricing practices.

And despite NAB's claims that Mediacom has not guaranteed that any possible cost savings from the rule change would be passed on to consumers, Mediacom has for many years offered to freeze its published rates for its most popular video service tiers (limited and expanded basic) for two years if the owners of the broadcast channels and cable networks on those tiers likewise agree to freeze the fees they charge for their content.<sup>16</sup> That offer still stands. If

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<sup>15</sup> See Tom Wheeler, *Protecting Television Viewers by Protecting Competition*, Federal Communications Commission (Mar. 6, 2014), <https://www.fcc.gov/blog/protecting-television-consumers-protecting-competition>; Broadcast Investor Deals & Finance: Retrans projections update: \$10.3B by 2021, SNL KAGAN, June 30, 2015 (noting that Retransmission consent fees grew 8,600% between 2005 and 2012).

<sup>16</sup> See, e.g., Rocco B. Commisso, Letter to United States Senate, Commerce, Science and Transportation Committee, July 20, 2012.

broadcasters are genuinely concerned about consumer rates,<sup>17</sup> they should take Mediacom up on this offer.<sup>18</sup>

In fact, this entire debate over Mediacom's motives is simply another distraction created by the broadcasters that has little to do with the merits of the Petition. The real question is not whether the proposal under discussion would benefit Mediacom, but whether its implementation would be in the public interest. If the answer to that question is in the affirmative, then Mediacom's motives, and the fact that it might incidentally benefit from the proposed rule change, are irrelevant. And it is clear that Mediacom's proposal is in the public interest.

The broadcasters have not proven the contrary in their opposing comments. As noted in the Petition, Congress's goal in creating the right to retransmission consent was to ensure universal availability of "free" over-the-air broadcasting.<sup>19</sup> This goal is fundamental to the social compact between the government and broadcast licensees that grants broadcasters use of the

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<sup>17</sup> See, e.g., Reply Comments of the National Association of Broadcasters, *Amendment to the Commission's Rules Concerning Effective Competition*, Notice of Proposed Rulemaking, FCC 15-30, MB Docket No. 15-53 (filed Apr. 20, 2015) at 9 (expressing concern for "ensuring that consumers do not pay unreasonable rates" for cable service.).

<sup>18</sup> Nexstar claims that Mediacom forces subscribers to purchase sports and other unwanted channels to obtain broadcast channels. Nexstar Comments at 9-10. This is both wrong and dishonest. It is wrong because Mediacom offers a basic tier of almost exclusively broadcast, without the necessity of buying any sports-related network or other channel included in the expanded basic tier. It is dishonest because it is the owners of broadcast and non-broadcast programming that force MVPDs to sell packages that include unwanted and unwatched channels to subscribers. Mediacom and other MVPDs have previously described how tier placement mandates, penetration minimums, and other tactics effectively require MVPDs to force subscribers in to paying for channels they do not want. See, e.g., Mediacom Communications Corporation, *Petition for Rulemaking to Amend the Commission's Rules Governing Practices of Video Programming Vendors*, RM 11728 (filed July 21, 2014); *Id.*, Comments of TDS at 4-5; *Id.*, Comments of Hargray at 5-6; Cablevision Systems Corporation, Letter to M. Dortch, *Amendment to the Commission's Rules Related to Retransmission Consent*, MB Docket No. 10-71 (July 31, 2015) at 3-4; *DISH Network L.L.C. v. Sinclair Broadcast Group, Inc.*, MB Docket No. 12-1, Verified Retransmission Complaint and Request for Preliminary Injunctive Relief (filed Aug. 15, 2015) at 6-10; *Buckeye Cablevision v. Sinclair Broadcast Group, Inc.*, MB Docket No. 14-33, CSR No. 8874-C, Complaint (filed Feb. 18, 2014) at 9, 18-19.

<sup>19</sup> *In re Broadcast Localism*, Report and Notice of Proposed Rulemaking, 23 FCC Rcd 1324, ¶ 6 (2008).

public airwaves.<sup>20</sup> But there are now large areas within broadcasters' DMAs that are not reached by those broadcasters' signals, whether directly, through translators, or through other ancillary services that could extend the signal. The individuals that would benefit most from the rule proposed by Mediacom are those with homes in these unserved areas. They would have the opportunity to enjoy that benefit whether or not there was a retransmission consent-related blackout. In other words, the proposal would be good for consumers independently of any consideration related to retransmission consent negotiations or disputes.

2. The Oppositions Misrepresent the Effects of Mediacom's Proposal on the Availability of Programming on Local Broadcast Stations.

The broadcasters' oppositions also misrepresent the likely effects of Mediacom's proposals for incentivizing local broadcasters to expand the areas within which their programming can be received for free. The Local Broadcasters' Coalition attacks the Petition by arguing, in effect, that expanding the public's access to free television service – the service broadcasters are licensed to provide – would cause retransmission consent revenue to drop, making it impossible for the major broadcast networks to outbid cable networks for programming and result in migration away from “free” television of programming that has been traditionally available over-the-air.<sup>21</sup> There are numerous flaws in this line of argument.<sup>22</sup>

First, the claim that Mediacom's proposals would cause programming to migrate from broadcast to cable completely ignores the fact that even as retransmission consent revenues have increased and the broadcast networks' demands for a share of those revenues in the form of

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<sup>20</sup> *Id.*; Comments of Public Knowledge, *Petition for Rulemaking to Amend the Commission's Rules Governing Practices of Video Programming Vendors*, RM-11752 (filed Aug. 14, 2015) (“Comments of Public Knowledge”) at 4-9.

<sup>21</sup> Comments of Local Broadcasters at 4-11.

<sup>22</sup> Of course, from the perspective of a viewer in a reception-impaired area, even if a show or event is on broadcast television it is really “on cable” because it cannot be watched without a pay TV subscription.

“reverse compensation” have grown, the migration from broadcast to cable has continued and accelerated. For example, in 2011 retransmission consent fees hit \$1.46 billion.<sup>23</sup> It was also in 2011 that Turner joined with CBS in securing the rights to the NCAA basketball tournament, an agreement that led two years later to the “historic” announcement that, starting in 2014 and running through 2024, the Final Four – traditionally a marquee broadcast event – would in whole or in part be available exclusively on cable on an alternating year basis.<sup>24</sup> Similarly, in 2012 ESPN (jointly with the NFL Network) struck its current twelve-year deal to present the College Football playoff, which went into effect just last year.<sup>25</sup>

Second, it has never been local stations that bid against cable networks for programming. Rather, it is the national broadcast networks that bid for the sorts of programming that the Local Broadcasters claim will migrate to cable. In many instances, those networks acquire programming that has never appeared on broadcast television and use it as the basis for creating new non-broadcast networks. Or these broadcast networks migrate programming that they previously aired on their over-the-air affiliates to commonly-owned cable networks. It is entirely the common parent’s decision to put it on their own cable network rather than their own broadcast network – for example, the decision to move *Monday Night Football* from the ABC broadcast network to ESPN was made by The Walt Disney Company, which owns a majority of both, and, as noted above, CBS participated in the decision to move the Final Four games of the

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<sup>23</sup> *Broadcast Investor: Deals & Finance*, SNL Kagan, November 25, 2011.

<sup>24</sup> Ben Klayman, *NCAA Signs \$10.8 Billion Basketball Tourney TV Deal*, REUTERS, Apr. 22, 2010, available at <http://www.reuters.com/article/2010/04/22/us-basketball-ncaa-cbturner-idUSTRE63L4FP20100422>.

<sup>25</sup> Jerry Hinnen, *ESPN Reaches 12-Year Deal To Air College Football Playoffs*, CBS SPORTS, Nov. 21, 2012, available at <http://www.cbssports.com/collegefootball/eye-on-college-football/21083689/espn-reaches-12year-deal-to-air-college-football-playoffs>.

NCAA basketball tournament from broadcast to cable.<sup>26</sup> The migration of sports from broadcast to cable reflects the hard-headed decision by the handful of giant media companies that control both the national broadcast networks and the most popular cable channels that such a shift will increase total parent company revenues, and that decision has not been altered even as retransmission consent revenues have grown to record numbers. So the notion that a decrease in retransmission consent funds would initiate that migration is simply a red herring.

Moreover, an argument that if Mediacom's proposal were adopted, the national networks' share of retransmission consent fees might be inadequate to allow them to pursue their national business agendas is totally at odds with congressional intent. In creating the retransmission consent right in 1992, Congress sought ensure that the "system of free broadcasting remain vibrant and not be replaced by a system that requires consumers to pay for television service."<sup>27</sup> It expected that retransmission consent fees would be collected by local stations and invested by them in producing more and better local programming and not passed onto the national networks for purchasing national network programming or any other network purpose.<sup>28</sup> Indeed, at that time, networks paid affiliates to air their programming<sup>29</sup> and Congress hoped to supplement the local station's revenue stream with modest retransmission consent

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<sup>26</sup> Leonard Shapiro and Mark Maske, *'Monday Night Football' Changes the Channel*, WASH. POST, Apr. 19, 2005, at A01.

<sup>27</sup> S. Rep. No. 102-92, at 36 (1991).

<sup>28</sup> See, e.g., 38 Cong. Rec. H6491 (July 23, 1992) (Statement of Rep. Callahan) ("The right to retransmission consent . . . is a local right. This is not, as some allege, a network bailout for Dan Rather or Jay Leno. Networks are not a party to these negotiations, except in those few instances where they own local stations themselves."); 138 Cong. Rec. H6493 (July 23, 1992) (Statement of Rep. Chandler). See also 183 Cong. Rec. S14603 (Sept. 22, 1992) (Statement of Sen. Bradley).

<sup>29</sup> See Richard Greenfield, *The Disequilibrium of Power: How Retransmission Consent Went So Wrong, and How to Fix It*, ALL THINGS DIGITAL, Aug. 27, 2013, <http://allthingsd.com/20130827/the-disequilibrium-of-power-how-retransmission-consent-went-so-wrong-and-how-to-fix-it/>.

fees.<sup>30</sup> It is indicative of how far afield the current video marketplace has wandered from the marketplace envisioned by the sponsors of the 1992 Cable Act that the broadcasters proudly declare in their oppositions to Mediacom's Petition that it is retransmission consent fees that make it possible for the broadcast industry to pay for the programming that networks deliver through their local affiliates.<sup>31</sup>

That the networks were not supposed to have any role in the retransmission consent regime was a fact understood by Congress and by those advocating for retransmission consent.<sup>32</sup> Yet, today the networks dominate the retransmission consent process by demanding payments from their local affiliates and setting the terms on which those affiliates can and cannot grant consent.<sup>33</sup> The broadcasters feign outrage in their oppositions at Mediacom for writing that retransmission consent has not preserved free TV, it has converted it into fee TV. But the statements about broadcasting being no more did not originate with Mediacom. They originated with broadcast network executives.<sup>34</sup>

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<sup>30</sup> See, e.g., Reply Comments Of Mediacom Communications Corporation, *Amendment to the Commission's Rules Related to Retransmission Consent*, MB Docket No. 10-71 (filed June 27, 2011) at 52-55, citing 138 Cong. Rec. H6487 (July 23, 1992) (statement of Rep. Holloway).

<sup>31</sup> Comments of Local broadcasters at 7-8.

<sup>32</sup> E.g., 138 Cong. Rec. S562-63 (Jan. 29, 1992); 38 Cong. Rec. H6491 (July 23, 1992) (Statement of Rep. Callahan); 138 Cong. Rec. H6493 (July 23, 1992) (Statement of Rep. Chandler). See also *Amendment of the Commission's Rules Related to Retransmission Consent*, Notice of Proposed Rulemaking, MB Docket No. 10-71, FCC 11-13 (rel. Mar. 3, 2011) at ¶ 22; Joint Comments Of Mediacom Communications Corporation, Cequel Communications LLC D/B/A Suddenlink Communications, and Insight Communications Company, Inc., *Amendment to the Commission's Rules Related to Retransmission Consent*, MB Docket No. 10-71 (filed May 27, 2011) at 7-8 (citing to comments by NAB).

<sup>33</sup> See, e.g., Joint Comments Of Mediacom Communications Corporation, Cequel Communications LLC D/B/A Suddenlink Communications, and Insight Communications Company, Inc., *Amendment to the Commission's Rules Related to Retransmission Consent*, MB Docket No. 10-71 (filed May 27, 2011) at 7-12; Joe Flint, *Fox Seeks a Share of Retransmission Fees; the Network Wants Some of the Money Affiliates Get from Cable Operators*, L.A. TIMES, Feb. 12, 2011, at B3.

<sup>34</sup> John Eggerton, *Moonves 'Broadcasters' Comment Draws Fire From ATVA*, Broadcasting & Cable (May 28, 2015) ("We're programmers. The term 'broadcasting' doesn't mean anything anymore.").

Of course, Congress never expected that retransmission consent fees would add significantly to the cost of pay TV, and certainly never intended retransmission consent to lead to a market where more people are forced to pay – and pay more – for what Congress wanted to be a broadly “free” service.<sup>35</sup> However, as pointed out in the Petition, retransmission consent fees increased by 8,600 percent between 2005 and 2012, increasing the cost of “free” TV for the 90% of Americans who rely on MVPDs for service while padding the bottom-line of the broadcasters’ parent companies.<sup>36</sup> And even as programming has migrated from broadcast to cable and broadcast ratings have declined relative to cable networks, thereby reducing the value of broadcasting, the price of retransmission consent has not reflected that reduction in value – just the opposite: it has continued to increase unabated. This is more evidence that the market for retransmission consent is a “failed” rather than a “free” one.

Finally, broadcasters always claim that retransmission consent fees are used in ways that are beneficial to consumers, but they never present any facts or figures to prove those assertions. There is no evidence that the portion of retransmission consent fees paid to the networks are actually used for the purposes alleged by the broadcasters, or that the portion retained by station owners is reinvested in local stations to increase the quantity or quality of locally originated programs or some other purpose that benefits local viewers. In fact, the available evidence indicates that the networks and corporate parents’ of local stations use retransmission consent

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<http://www.broadcastingcable.com/news/washington/moonves-broadcasters-comment-draws-fire-atva/141264>;  
Petition at 4.

<sup>35</sup> 138 Cong. Rec. S14600 (Sept. 22, 1992) (statement of Sen. Fowler) (“the sponsors of this legislation do not intend for any costs associated with this legislation ... to be passed on to the consumer”); 183 Cong. Rec. S14603 (Sept. 22, 1992) (Statement of Sen. Bradley).

<sup>36</sup> Petition at 4; See Tom Wheeler, *Protecting Television Viewers by Protecting Competition*, Federal Communications Commission (Mar. 6, 2014), <https://www.fcc.gov/blog/protecting-television-consumers-protecting-competition>.

money to acquire additional stations, pay exorbitant executive salaries, fund dividends or stock repurchases, or acquire or support unrelated businesses. Mediacom urges the Commission to ignore broadcaster claims about how retransmission consent revenues are used when those claims are not backed up with hard data from objective sources.

**C. The Broadcasters' Excuses For Not Offering a Universally Available Free Service Cannot Withstand Scrutiny.**

The broadcasters' comments sweepingly claim that anyone with an antenna can receive service.<sup>37</sup> And indeed, if broadcasters did actually serve the vast majority of viewers in the DMAs in which they operate, broadcasters would have no reason to oppose Mediacom's proposal. But instead of providing evidence that they provide such universal service, the broadcasters provide excuses for why they do not.

*The Digital Transition.* The broadcasters place significant blame for their lack of universal coverage on the digital transition – a transition that occurred over six years ago.<sup>38</sup> NAB cites to a 2009 Commission finding that some of the “loss areas are a result of unavoidable engineering changes” due to the DTV transition and claims that the industry has made strides in extending service to cover those areas.<sup>39</sup> But merely restoring broadcast coverage to what it was in the analog era is not what Congress had in mind when it set a goal of a “universally available” free over-the-air television service.<sup>40</sup> The inability of millions of viewers to access broadcast service over-the-air is not some new problem created by the digital transition. It is a problem

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<sup>37</sup> Comments of Local Broadcasters at 3.

<sup>38</sup> Comments of NAB at 2-4; Comments of Nexstar at 5-7.

<sup>39</sup> Comments of NAB at 3.

<sup>40</sup> For example, NAB highlights that 80 percent of mainly rural translators have been converted to support digital transmissions, without any recognition that all of the efforts it touts are merely aimed at replicating pre-DTV coverage areas, rather than expanding coverage into unserved and underserved areas within each broadcasters' DMA. Comments of NAB at 4.

that is as old as the broadcast industry and one of the principal reasons that the cable television industry came into being – to provide consumers with programming that they wanted to watch but that broadcasters weren't delivering to them.

*The Incentive Auction.* The broadcasters' oppositions also complain that station service areas are effectively frozen by the FCC due to the incentive auction and associated limitations on license modifications.<sup>41</sup> However, the incentive auction was not authorized, and the freeze on license modifications was not adopted, until 2013<sup>42</sup> and yet the broadcasters offer no suggestion that they were making efforts to reach previously unserved or underserved areas prior to that time. In fact, broadcasters consistently have relied more and more heavily on retransmission by MVPDs to reach viewers, to the detriment of the public's access to free over-the-air broadcasting.

*The Difficulty of Obtaining Streaming Rights.* The Local Broadcasters' Coalition bemoans the difficulty of obtaining the necessary intellectual property licenses for why they do not stream content online to reach the unserved areas of their DMAs.<sup>43</sup> But broadcast stations could at least begin with streaming the locally-oriented news, sports, public affairs, and entertainment programming that distinguishes broadcasting from other video services and that the local stations or their parent companies own. In fact, several broadcasters, including stations owned by each of the four members of the Local Broadcasters' Coalition, already stream their

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<sup>41</sup> Comments of NAB at 4-5; Comments of Local Broadcasters at 2; Comments of Nexstar at 6-7.

<sup>42</sup> See *Media Bureau Announces Limitations on the Filing and Processing of Full-Power and Class A Television Station Modification Applications, Effective Immediately, and Reminds Stations of Spectrum Act Preservation Mandate*, Public Notice, DA 13-618 (rel. Apr. 5, 2013).

<sup>43</sup> Comments of Local Broadcasters at 3.

news programming.<sup>44</sup> With regard to streaming network programming, the national networks are increasingly making their content available over the Internet.<sup>45</sup> Accordingly, if local stations made their own programs more readily available online, consumers in reception-impaired areas would have a viable option to pay TV service for viewing their favorite local and national broadcast programs. Moreover, under the present system, broadcast station owners have no incentive to seek streaming rights from the national networks when they negotiate affiliation agreements. One of the purposes of the proposed rulemaking is to examine the possibility of shifting incentives in ways that result in consumers having more options for viewing broadcast content.

## **II. The Broadcasters' Legal Objections are Without Merit.**

As they have for years, the broadcasters believe that their “ace card” is the argument that Congress has expressly denied the Commission the authority to make meaningful changes in its rules in order to address the breakdown in the retransmission consent regime.<sup>46</sup> Mediacom has demonstrated on numerous occasions that the broadcasters’ simply are wrong and the broadcasters have yet to offer a coherent rebuttal of Mediacom’s analysis.<sup>47</sup> Moreover, in light of recent actions by the Commission<sup>48</sup> and Congress,<sup>49</sup> it is clear that the broadcasters can no

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<sup>44</sup> See, e.g., WAVE, <http://www.wave3.com/>; WFSB, <http://www.wfsb.com/>; KKTU, <http://www.kktv.com/>; KRON, <http://kron4.com/>.

<sup>45</sup> See, e.g., <http://www.cbs.com/>; <http://www.hulu.com/>.

<sup>46</sup> Comments of NAB at 6-8; Comments of Local Broadcasters at 2; Comments of Nexstar at 2-3.

<sup>47</sup> See, e.g., Joint Reply Comments Of Mediacom Communications Corporation And Cequel Communications LLC D/B/A Suddenlink Communications, MB Docket No. 10-71 (filed June 3, 2010) at 32-46. See also Reply Comments of Insight Communications Company, Inc., MB Docket No. 10-71 (filed June 3, 2010) at 6-7.

<sup>48</sup> E.g., *Amendment to the Commission's Rules Concerning Effective Competition*, Report and Order, MB Docket No. 15-53 (rel. June 3, 2015).

<sup>49</sup> STELA Reauthorization Act of 2014, Sec. 103(c) is an express mandate from Congress to the FCC to review its standards for determining whether retransmission consent negotiations are being conducted in good faith – an action

longer simply hide behind their claims that the FCC's hands are tied from taking any actions that might have an impact on the current retransmission consent regime.

In any event, as is clear from the Petition, the proposals put forward by Mediacom for incentivizing broadcasters to expand the availability of their signals to unserved or underserved portions of their markets are not based on the Commission's authority over retransmission consent. Rather, they are based on the Communications Act's grant to the Commission of "broad authority to regulate the broadcast medium as the public interest requires,"<sup>50</sup> including "wide discretion in granting, revoking, conditioning, and extending licenses in furtherance of the public interest."<sup>51</sup> In particular, Section 303(r) of the Act empowers the Commission, "as the public interest, convenience, and necessity requires," to "make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of [the] Act."<sup>52</sup> Section 303(g) directs the Commission to "generally encourage the larger and more effective use of radio in the public interest"<sup>53</sup> and Section 303(h) acknowledges the Commission's authority "to establish areas or zones to be served by any station."<sup>54</sup> And Section 4(i) of the Act permits the adoption of the proposed rule as it is reasonably related to the Commission's responsibility to "provid[e] a widely dispersed radio and television service" with a "fair, efficient, and equitable distribution" of service among the

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that carries with it the implicit understanding that the Commission has the authority needed to make changes in its rules where needed to ensure retransmission consent serves the public interest.

<sup>50</sup> *Violent Television Programming and Its Impact on Children*, Notice of Inquiry, 19 FCC Rcd 14394, ¶ 24 (2004).

<sup>51</sup> *Ellis v. Tribune TV Co.*, 443 F. 3d 71, 73 (2d Cir. 2006).

<sup>52</sup> 47 U.S.C. § 303(r).

<sup>53</sup> *Id.* at § 303(g).

<sup>54</sup> *Id.* at § 303(h).

“several States and communities.”<sup>55</sup> Any and all of these sources are sufficient authority for the Commission to take the actions proposed in Mediacom’s Petition.<sup>56</sup>

Finally, it bears repeating one more time: this is a Petition for Rulemaking. To the extent the broadcasters argue that the proposals in the Petition would conflict with current rules, the answer is simple: if there are rules that stand in the way of the FCC’s ability to adopt measures to incentivize broadcasters to fulfill Congress’s goal of “universally available” free over-the-air-television service, or to otherwise promote such availability, the Commission can and should consider making such changes to those rules as are necessary.

### CONCLUSION

In the 1990s TV series *Seinfeld*, the central character, Jerry, hated Newman, a mailman living in the same building in Manhattan. In one episode, Newman had the opportunity to be promoted and transferred to Hawaii, but his chances were in jeopardy because of an ankle injury that prevented him from working. Eager to rid himself of someone he detested, Jerry volunteered to fill in for Newman and deliver the mail along his route, but the plan went awry when the Postal Service discovered the deception. Newman angrily berated Jerry for the fundamental mistake of being too good at the job, explaining that “[t]oo many people got their mail. Close to 80%. Nobody's ever cracked the 50% barrier.” When Jerry explains that all he did was try his best, Newman responds by saying, “Exactly. You’re a disgrace to the uniform.”

The broadcasters approach their public responsibilities in much the same way that Newman performed his job. If too many people can get their broadcast television over the air,

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<sup>55</sup> *United States v. Southwestern Cable Co.*, *supra*, 392 U.S. at 173-74; *see also American Library Ass’n v. FCC*, 406 F. 3d 689, 691-91 (D.C. Cir. 2005).

<sup>56</sup> One of those actions, largely ignored by the broadcasters’ oppositions, would involve the modification of the Commission’s rules to facilitate the construction of non-profit community antennas that would extend the reach of the station’s transmission into unserved areas of the DMA.

then station owners are going to miss out on their equivalent of a transfer to Hawaii, namely retransmission consent billions that, in the words of one parent company of multiple stations, “fall to the corporate bottom line.” One of the retransmission consent system’s many flaws is the fact that it creates irresistible incentives for stations to keep closer to the “50% barrier” than the 90% level of off-air availability that Mediacom’s Petition contends the Commission should set as the minimum target. The more widely available over-the-air reception becomes, the less money corporate station owners have to fund acquisitions, unrelated businesses, stock buy-backs and executive compensation – which are the primary uses made of retransmission consent fees, rather than investments in the quantity, quality, and free availability of local programming. The disgrace in this situation is that broadcasters have enjoyed free use of public spectrum worth hundreds of billions and a windfall of retransmission consent revenues far in excess of anything Congress intended while avoiding their end of the bargain.

Mediacom’s proposal for the initiation of a rulemaking to consider proposals for incentivizing broadcasters to reach more viewers with their free service would help correct this distorted state of affairs and should be enthusiastically supported by all champions of over-the-air broadcasting. The FCC, which Congress expected and required by law to be one of those champions, should act promptly to both increase access to free over-the-air local broadcasting and reduce the cost of broadcast programming for all Americans.

Respectfully submitted,

**MEDIACOM COMMUNICATIONS CORPORATION**

By: /s/ Seth A. Davidson

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August 31, 2015

## CERTIFICATE OF SERVICE

I, Ari Z. Moskowitz, Associate Attorney at Mintz Levin Cohn Ferris Glovsky and Popeo PC, do hereby certify that a copy of the foregoing **Reply of Mediacom Communications Corporation** was served on the following by first class mail, postage prepaid, this 31st day of August, 2015:

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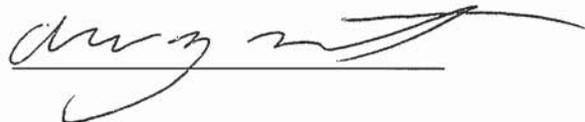
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# APPENDIX A



*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.

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<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 scamps, 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

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<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?

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<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.

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<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,  
