



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

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VIA FEDERAL EXPRESS

P. Michele Ellison
Chief of Staff
Office of Commissioner Clyburn
Federal Communications Commission
445 12th Street, NW
Washington, DC 20554

Dear Ms. Ellison:

Homer Simpson, who, like cable companies, has made a lot of money for broadcasters (who can never get enough), once came up with this plan for dealing with a looming challenge: "I'll hide under some coats and hope that, somehow, everything will work out." When it comes to the badly broken retransmission consent process, the FCC seems to be following a variation of Homer Simpson's plan, rather than making the needed repairs.

That conclusion is based on Mediacom's direct experience with the Commission under the leadership of Chairman Kevin Martin and, then, Chairman Julius Genachowski. In our view, the legacies of both are marred by years of indifference to the harm suffered by consumers because of what is clearly a broken regulatory regime. Under both Chairmen, the Commission justified its inaction by claiming that it lacks the authority to do anything more than ensure that broadcasters and distributors negotiate in good faith.

Covering itself with that cloak of powerlessness, the Commission has followed a five-step plan that Homer Simpson would be proud of:

- First, pray that shutoffs do not occur (at least in the major markets that powerful Senators and Representatives care about).
- Second, if there is a shutoff that generates heat from important people, put out a press release that says the Commission is monitoring the situation and telephone the two parties to remind them of their obligation to negotiate in good faith.
- Third, hope that, somehow, everything will work out.
- Fourth, when the distributor surrenders in the face of subscriber losses it cannot stem because it is prohibited from importing an alternative signal, do a self-congratulatory press release welcoming the settlement, even though consumers wind up paying much more without getting anything new or additional in return.
- Fifth, resume praying that another major shutoff does not occur.

Since Rocco Comisso, Mediacom's Chairman and Chief Executive Officer, first began speaking to the Commission on the issue in 2006, this plan has produced the following results:

- An increase in retransmission consent costs from virtually zero to an estimated \$3 billion a year, even though sports and other programming has been migrated from broadcast channels to pay networks and even as stations consolidate news operations and offer little or no locally produced public affairs programming. (Our recent analysis of the daily schedules of more than 130 stations found that over 38% did not offer a single minute of locally produced news or other programming.)
- The certainty that those increases will continue. SNL Kagan predicts that retransmission consent fees will reach \$6 billion annually in a few years. That estimate is probably too low. CBS has announced as its goal the quadrupling of its revenue based on retransmission consent by 2016 or 2017, from \$250 million to \$1 billion. No doubt the other broadcast station owners will follow its lead, meaning that the \$3 billion a year currently collected could possibly increase to \$12 billion, all of which will ultimately come from consumers' pockets.
- A host of blackouts of broadcast stations. In the last two weeks alone, millions of consumers in over 50 markets stretching from New York City to Honolulu have been blacked out by broadcast station owners.
- The use by broadcasters of ever more troublesome coercive tactics—for example, they have resorted to blocking access to their programs not only through TV sets, but also over the Internet. Fox pioneered this trick, and CBS has used it in its current dispute with Time Warner Cable. If history is any guide, unless the Commission puts an end to this tactic, other broadcasters will follow suit in future negotiations.
- Subversion of local interests to those of the networks and multiple station owners (which is ironic because retransmission consent was intended to advance the cause of localism).
- An explosion of station acquisitions motivated by the availability of retransmission consent money that, in the words of a top network executive, “fall[s] straight to the bottom line.” The program schedules of even more stations will be controlled by the corporate headquarters of an ever-shrinking number of big companies, whose market power will only increase as their territorial reach expands. That will lead to higher consumer prices, and also trigger a countervailing consolidation of distributors. Consumers will be hurt as competitors on both sides of the market are eliminated, resulting in higher prices, less localism, diminished diversity of viewpoints and fewer consumer choices.
- Less money available for families to spend on other needs and interests, which will negatively impact broadband penetration, especially among lower-income households.

Considering this list, it is indisputable that everything has not worked out well, and it is long past the time for the Commission to try a different plan. It is disheartening, therefore, to learn that the Commission appears to be sticking with the old one. Based on press reports about the CBS/Time Warner Cable dispute, it seems that the Commission once again is hiding under the cloak of powerlessness and doing nothing more than jawboning and warning the parties to obey the toothless rules on good faith negotiation, which are simply irrelevant when it comes to dealing with the main problems of blackouts and escalating prices.

With all due respect, we believe that the Commission's restrictive view of its authority is simply wrong, for reasons discussed at length in the filings made by Mediacom and others in the moribund retransmission consent proceeding. Indeed, former Senator Inouye, Senator Stevens and Representative Markey—the legislators most responsible for the drafting and passage of the legislation creating retransmission consent—have all written letters confirming that Congress intended the Commission to have both the power and the duty to protect consumers. Yet, the Commission stubbornly refuses to embrace that truth, despite the resulting—and regularly recurring—harm to millions of Americans.

The contrast is striking between the Commission's timidity when it comes to its authority in the retransmission consent realm and its assertiveness in other areas—for example, the Commission has found authority to act where none is apparent on the face of the statute or in the relevant legislative history in matters involving:

- net neutrality,
- terrestrial programming services,
- data roaming,
- cell phone tower siting,
- the timing of application decisions by local franchise authorities, and
- exclusive MDU contracts.

Clearly, when motivated, the Commission has not shied away from crafting a legal basis for rules it thinks are needed and then making its best case for prevailing in the inevitable judicial challenge. With rare exceptions, the courts have sustained its efforts. The fact that, in a few cases, courts have found that the Commission overshot the mark has not deterred the Commission from trying again either with respect to the same matter (*e.g.*, net neutrality) or when it felt the need to act in some other area.

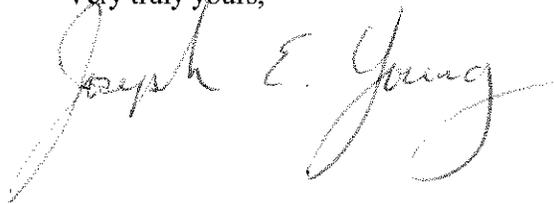
There is no excuse for the Commission not to at least try to restore a semblance of balance to the retransmission consent marketplace—there is nothing to lose if its actions are successfully challenged in court and much to gain if, as we fully expect, its authority is confirmed. The Commission's reluctance to give it a try is especially curious, given the fact that the retransmission consent process, as it operates today, causes far greater harm to consumers than demonstrably resulted from many of the other problems, real or imagined, that the Commission has been willing to take on despite standing on far shakier legal ground.

In conclusion, we urge the Commission to finally embrace the interpretation of its authority that is best from the perspective of American consumers and best serves the public policy goals that have guided communications law in this country from the beginning of federal regulation. If it continues its current posture, blackouts will keep happening and prices will keep rising at extraordinary rates. Those two results are precisely what Congress said it did not want to have happen when it created retransmission consent and exactly what it empowered and directed the Commission to prevent. The fact that some shutoffs last only a few days or weeks should not lead to the conclusion that there is no pressing need for action—as suggested above, restoration of carriage always requires the distributor to agree to higher fees, which are ultimately paid by customers. That dynamic has already driven the annual cost to consumers to \$3 billion in a short time and, unless something changes, will fuel an even more dramatic increase in a few more years.

We hope that when the history of Chairwoman Clyburn's tenure as the head of the Commission is written, it will say that she acted decisively to reverse the inherited legacy of neglect of consumers' interests in the realm of retransmission consent. There are ongoing shutoffs where much is at stake and that cannot wait for confirmation of her successor to the Chair. In terms of the long-run, we respectfully submit that it would benefit both the incoming Chairman, who will also have to wrestle with these issues, and ultimately the millions of Americans hurt by the Commission's inaction, if she ordered a comprehensive re-evaluation of the conclusion that the Commission is essentially powerless. That re-evaluation should be an interactive process involving a dialogue between the best legal minds at the Commission, in academia and in the broadcast and distributor industries.

Thank you for your time and consideration.

Very truly yours,

A handwritten signature in cursive script that reads "Joseph E. Young". The signature is written in black ink and is positioned below the typed name "Joseph E. Young".

cc: A. Hoehn-Saric, Office of Commissioner Rosenworcel
M. Berry, Office of Commissioner Pai
Members, Senate Subcommittee on Communications, Technology and the Internet
Members, House Subcommittee on Communications and Technology