



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:

As you undoubtedly know, last week, Representative Anna Eshoo, ranking member of the Communications and Technology Subcommittee of the House Energy and Commerce Committee, published a discussion draft of legislation intended to address some of the issues associated with retransmission consent—including blackouts of broadcast stations during negotiating impasses. Within a matter of hours, the National Association of Broadcasters (NAB) released a statement criticizing and opposing the bill.

NAB did not offer any suggestions for improving the bill or any alternative solutions to the problems for consumers that Representative Eshoo and many others think are caused by the retransmission consent law as it currently operates, including blackouts of local broadcast stations. Instead, NAB took an approach that the fictional psychiatrist Frasier Crane ascribed to his father in an episode of the NBC series, *Frasier*: “The Martin Crain approach: Better living through denial.”

Denial, of course, is a psychological defense mechanism employed by those faced with a fact that is too uncomfortable to accept. It can take three forms: *simple denial*, when the subject denies the reality of the troublesome fact; *minimization*, when the subject admits the fact is real, but denies its seriousness; or *projection*, when the subject admits the fact’s reality and seriousness, but blames someone else.

NAB’s press release about Representative Eshoo’s draft legislation was a classic example of *simple denial*—according to Mr. Smith, there is no need for legislative action because there is no such thing as a “blackout.” In his testimony before the House Judiciary Subcommittee on Courts, Intellectual Property and the Internet the day after the press release, a lawyer representing NAB demonstrated *minimization*, claiming that while blackouts do occur, they are rare and of little consequence. At the same hearing, an executive of a television station owned by Meredith Corporation gave us a good illustration of *projection* when he also admitted that blackouts do occur, but blamed them on Time Warner Cable (TWC), DISH and DirecTV. For good measure, he threw in a dash of paranoia in the form of a conspiracy theory, suggesting that the blackout of CBS owned stations on TWC systems “had been orchestrated out of a DC lobbying playbook.”

Probably we should not be surprised. Denial, in all its forms, is the preferred defense mechanism of alcoholics and other addicts everywhere, and broadcasters certainly are addicted to retrans fees (which most fritter away on anything and everything except local production of programs).

Helping NAB give up its defense mechanism, come to grips with reality and accept its own responsibility for the collateral damage that its addiction causes millions of Americans could keep us

engaged for a long time. For this session, we will tackle NAB's resort to simple denial in its statement about Representative Eshoo's bill, and leave its reliance on minimization and projection for a later date. In that statement, NAB said the following about blackouts:

Fundamentally, there is no such thing as a "black-out" of broadcast TV programming. Our programming is always on, and always available to our viewers on multiple platforms, including free to over-the-air antenna households.

Of course, the reality is much different, as Time Warner Cable subscribers, including Representative Judy Chu, a member of the House Judiciary Subcommittee on Courts, Intellectual Property and the Internet, could testify.\*

For many Americans in many parts of the country, off-air reception of broadcast signals is not a viable option because of factors like distance from the broadcast station's transmitter or obstructions such as mountains, hills and neighboring buildings. Indeed, a service like Aereo, which broadcast interests are spending millions to put out of business, could not continue as a viable business if free off-air reception were a real option in Manhattan or the other markets targeted by Aereo.

As an example, consider the location at which NAB's Chairman & CEO, Gordon H. Smith maintained a local office when he served as U.S. Senator from Oregon: 116 S. Main Street in Pendleton, Oregon. Both the FCC and TVFool.com offer tools that can be used to measure the strength of the signals of local TV stations at selected locations. According to the FCC tool, the signal strength at Mr. Smith's former office location, even assuming the use of an outdoor antenna 30 feet above ground, was only moderate for the Fox-affiliated station, weak for the ABC, CBS and NBC affiliates and non-existent for the PBS station serving the area. The TVFool tool produced the same results. Residents of Pendleton with only in-TV or set-top antennas would have even worse reception (if they had any at all).

Sticking with Mr. Smith's state of birth, consider the office in La Grande, Oregon maintained by Congressman Greg Walden, the Chairman of the House Judiciary Subcommittee on Courts, Intellectual Property and the Internet. The FCC's tool shows that there is only one broadcast station available off-air at the office's location, the local FOX affiliate, and even its signal is weak. To obtain ABC, CBS, NBC, CW or MyNetwork programming or good reception for the FOX station, a subscription to cable or satellite service is necessary. (Yet, broadcasters claim that the MVPDs who carry stations that many Americans cannot view over-the-air are somehow damaging, rather than benefitting the station owners and should compensate them, rather than the other way around.)

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\* It appears that broadcasters' cite the supposed availability of the off-air option as a public relations and lobbying tactic, and do not really want viewers to make that choice. For example, during its recent dispute with TWC, CBS ran radio ads and created a Website informing affected TWC subscribers that they have other choices for viewing CBS shows. None of the ads we heard mentioned off-air reception as a choice. Similarly, the CBS website listed switching to one of a few named pay TV companies as the only option, with not a single mention of off-air reception as an alternative. The primary reason for this omission is undoubtedly the fact that CBS collected retrans fees for TWC customers who switched to one of the named providers, but not for those who turned to over-the-air reception. Given CBS's lack of effort to publicize the off-air option, it is no wonder that during a discussion of the TWC/CBS dispute at the September 10, 2013 "STELA" hearing before the House Judiciary Committee's Subcommittee on Courts, Intellectual Property and the Internet, Representative Judy Chu (D-CA) expressed complete surprise when told that over-the-air reception might have given her access to CBS during that blackout.

Even if a strong signal is available at a particular consumer's home, the digital transition means that he or she must, first of all, have a digital ready television set or a separate converter. Next, a digital antenna is needed. In many cases, to have any hope of reliable reception, the viewer will have to mount an antenna on the rooftop, which both increases costs and may require senior citizens and others unable or unwilling to climb on the roof to hire someone to perform the installation. Apartment dwellers in big cities, of course, usually do not have the option of rooftop installation. All in all, switching to off-air reception, even when feasible, would not be cheap or easy. Moreover, based on our informal checks at retailers, many stores offering consumer electronics equipment simply do not maintain any or any significant stock of digital converters and antennas.

Switching to a competitive MVPD has its own set of issues. First of all, the cost to the consumer may be greater. In the case of cable and telephone company video customers, many have taken advantage of very attractive pricing of bundled services. Customers who combine video with Internet access and/or telephone service achieve significant savings. If a subscriber with a bundle is forced to switch to DBS to continue to view a broadcast station, he or she will lose all or a significant part of those cost savings. Some subscribers have taken advantage of low promotional rates for video service by making fixed term commitments to an MVPD, who will, justifiably, seek to recapture some of the discount if the subscriber cancels during a blackout. Besides these economic considerations, some consumers simply do not want to stick a satellite dish on the roof or the side of the house and satellite service may not be a viable choice for many apartment or condominium residents. Of course, switching from cable to DBS or *vice versa* usually requires a home service call by an installer, which may result in delay or inconvenience.

Another important fact is that many cable systems offer a "broadcast only" or "limited basic" service that costs significantly less than the expanded basic service and, more importantly for present purposes, is not offered by DBS or many telephone companies. Thus, changing to a competitive MVPD will cost senior citizens and low income households who subscribe to limited basic extra dollars that they will be hard-pressed to afford.

It is telling that Mr. Smith's list of alternatives did not include the Internet. That is probably because broadcasters involved in retransmission consent disputes with video service distributors which are also ISPs are increasingly relying on the tactic of blocking access to their Websites for the distributor's Internet customers. CBS used this trick during its recent dispute with TWC, blocking access for all of TWC's Internet customers, including those who did not subscribe to its video service. Even if the broadcaster does not block Internet, access consumers affected by a blackout will find the Internet to be an inadequate substitute. While national networks have made some content available on the Internet through their own Websites or services such as Amazon Instant Video, Hulu or Netflix, they have not made streams of many popular programs and major events available at all or on a real-time basis. In addition, many consumers do not have broadband Internet access, which is needed to enjoy online video content of any acceptable quality.

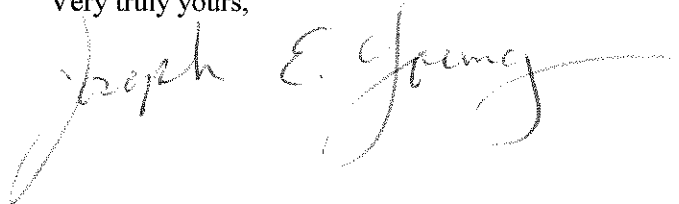
Of course, a major broadcast station owner once said that if MVPD subscribers suffer a blackout, they can always impose on their friends or hang out in bars which subscribe to a competitive MVPD's service. Exactly the sort of "solution" we have come to expect from folks who care a lot about their bottom lines and very little about the welfare of ordinary citizens. We imagine that there is a limit upon the degree to which we can continue to impose on the kindness of friends and watching TV in bars has a whole set of issues of its own.

In sum, NAB's denial that blackouts are possible ignores reality. However, because the denial represents NAB's public position on the subject of blackouts, we respectfully call upon the Commission to require NAB's members to put their money where their mouthpiece is, so to speak: The Commission should require, as part of the licensee's public service obligations or as a condition to license issuance or renewal, that before blocking carriage by any distributor willing to continue meaningful negotiations or submit deadlocked negotiations to binding arbitration, the licensee must ensure that its station's signal is available off-air to a very high percentage of households in the station's DMA, without any expense beyond the cost of an affordable in-home antenna. Given the original intent behind the creation of the retransmission consent right and NAB's own statements, broadcasters should not be permitted to force a blackout unless off-air reception is a meaningful option for most viewers within its licensed territory.

As pointed out in previous letters, we believe that the retransmission consent provisions of the Communications Act give the Commission the necessary power to protect consumers. Even if that were not the case, the Commission could institute the recommended requirement under the wholly separate statutory provisions that give it the authority to set license terms, preconditions for license grants, licensee qualifications and broadcasters' public interest obligations. The broad scope of the Commission's power and discretion under those provisions has been repeatedly demonstrated by the Commission's own actions and consistently confirmed by federal courts.

Thank you for your consideration.

Very truly yours,

A handwritten signature in cursive script, reading "Joseph E. Young". The signature is written in dark ink and is positioned below the typed name "Joseph E. Young".

cc: Priscilla Argeris, Office of Commissioner Rosenworcel (By E-Mail)  
M. Berry, Office of Commissioner Pai (By E-Mail)