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Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

For Retrans Fees of Only Pennies a Day, You, Too, Can Get Superficial Coverage of Sensational Crimes, Tragedy, Scandal and Gossip From Teleprompter Readers.¹

Dear Ms. Dortch:

If what's on television were always true, then, for an inconsequential sum,² you could slim down your body two sizes in two minutes, paint an entire room in less than an hour (and get perfect results every time), teach your six-month old infant to read, make millions in real estate (with no down payment), and lose weight without any effort and while eating whatever you want.

Alas, the aim of many producers of television content is not to aid, inform, enlighten or even entertain us,³ but, instead, to make money, and they are quite willing to resort to hyperbole, hokum, misdirection and spin doctoring in pursuit of that goal. The television industry has had decades in which to perfect the art of selling snake oil. We all would be prudent to keep our hands on our wallets and maintain a healthy skepticism when paid spokespeople start pitching and spinning, whether in a commercial, an infomercial or a filing with the Commission on the subject of retransmission consent like the letter to you dated December 5, 2013 from the National Association of Broadcasters (NAB). In that letter, NAB tries to discredit those who are not buying what it is selling, such as Mediacom, Time Warner Cable (TWC) and the American Cable Association.

If time and circumstances allow, we may prepare a more detailed response to the many statements in that letter that we think are false, misleading or just plain ridiculous. For now, we simply want to address the notion, found expressly and by implication throughout the letter, that the submissions to the Commission made by those of us who are not fans of the retransmission consent regime as it currently exists are pure issue advocacy, entirely without empirical support or a foundation in economic theory or even logic. The letter would also have us believe that the filings by NAB are paradigms of scholarship and shining examples of the rigorous application of the scientific method, apparently for no other reason than that some of the stuff has the name of one or another Economist-

¹ Not available from all broadcast stations. (Our analysis of the daily schedules of more than 130 stations found that over 38% did not offer a single minute of station-produced news or public affairs programming.)

² Plus shipping and handling.

³ Les Brown, an author and motivational speaker (not the Les Brown with his Band of Renown), is credited with saying that "[i]n day-to-day commerce, television is not so much interested in the business of communications as in the business of delivering audiences to advertisers. People are the merchandise, not the shows. The shows are merely the bait." See, for example, http://www.brainyquote.com/quotes/authors/l/les_brown_2.html.

For-Hire associated with it—sort of like the infomercials for miracle weight loss products that include endorsements by MDs decked out in lab coats and with stethoscopes around their necks.

We think that while the economist's papers filed by NAB are certainly dismal, they are hardly science. All of them have assorted deficiencies, flaws and problems, as is usually the case when paid consultants approach a topic with the goal of supporting a conclusion pre-ordained by the entity writing the check.

As one example of the level of scholarship characteristic of some NAB-sponsored studies, consider this statement from one of them: “[T]he competitive nature of the programming business suggests that programmers are not capable of charging higher-than-competitive license fees.”⁴ The only support given for that conclusion is the assertion that “[b]roadcast content is part of the larger market for television programming” and that a Commission report⁵ said that there were, at that time, at least 565 satellite-delivered national programming networks. It seems to us that in making that statement, the authors of the Navigant Paper either did not do their homework or chose not to turn it in.

First of all, the Navigant Paper ignores relevant economic literature finding that television content owners do have the ability to extract greater than competitive prices.⁶ The Navigant Paper does not even cite that literature, let alone try to refute its conclusions.

Moreover, the notion that there are 565 separate and distinct “national” networks that could serve as substitutes for the popular programs of a Big-Four network carried by a station that is shut off during a negotiating impasse is ridiculous on its face. A simple review of the list of programming services in the Thirteenth Annual Report leads to easily eliminating the vast majority of them from consideration as potential substitutes. For example, of the “national” networks appearing in Appendix C of the Thirteenth Annual Report:

- Over 190 were foreign-language/foreign-culture networks
- 48 were premium movie channels (e.g., Showtime, Cinemax, Encore, HBO and Starz) and their “multiplex” services
- 33 were HD duplicates of analog or SD channels or are services available only in HD, and most subscribers did not subscribe to cable HD service at the time of the Navigant Paper.
- 27 were religious, gospel music, “Christian lifestyle” and similar channels that are not likely to televise programs that would be considered good substitutes by fans of *Two and A-Half Men* or racy broadcast network shows that achieve the highest ratings
- 19 consisted of music and related channels (e.g., MTV- or VH1-related channels)

⁴ Jeffrey A. Eisenach, Navigant Economics, *Video Programming Costs and Cable TV Prices* (April 2010) (the “Navigant Paper”).

⁵ *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Thirteenth Annual Report, 47 CR 1, FCC 07-206 (2009) (the “Thirteenth Annual Report”).

⁶ See, e.g., Christopher S. Yoo, *Rethinking the Commitment to Free, Local Television*, 52 Emory L.J. 1579, 1588 (Fall 2003). Professor Yoo concluded that television programs and networks are differentiated and “[a]lthough there is some degree of substitution among programs, viewers do not regard them as perfect substitutes for one another and clearly have preferences for some programs over others [and] . . . the substitution appears to be driven more by real differences in product attributes than by spurious product differences.” *Id.* at 1633.” Among other things, “[t]he fact that the substitution among these products is imperfect allows individual firms to raise their prices without losing all of their sales to their rivals.” *Id.* at 1603. See also C. Goldfarb Congressional Research Service, *Retransmission Consent and Other Federal Rules Affecting Programmer-Distributor Negotiations: Issues for Congress* (July 9, 2007).

- 15 were adult premium services such as Playboy and Hustler
- 10 were shopping or shopping-related channels
- At least 7 no longer exist
- 5 were Spanish language
- 3 were C-Span services
- 2 were TV guide channels
- 2 were channels available only to DISH network subscribers
- 2 were the television stations of the Northern Arizona University and the University of California
- 2 were CNN clones
- 2 were horse racing channels
- One was devoted to local real estate listings
- One was all cheerleading, all the time
- One was dedicated to shows about better water management
- One showed local weather in a continuous loop
- One offered videos from research institutions
- One offered shows originally produced for public access cable channels
- One was a pay-per-view channel
- One was available exclusively on Comcast
- One was a second feed of the primary channel for different time zones
- One telecast trivia and other games via broadband over a national network to bars and restaurants

Many of the networks on the list are unavailable on most cable systems, and they describe themselves as “national” only because they would like to be nationally, rather than locally or regionally, distributed, but that dream has not been realized and is unlikely to be in the foreseeable (or even unforeseeable) future. In addition to not being widely available, many of these channels offer highly specialized programming that would not be considered by the typical viewer as a substitute for popular broadcast network shows. It is, for example, difficult to see the loyal viewers of *Dancing With the Stars* or *Family Guy* who lose access because of a retransmission consent battle being content with substituting any of the programs on Deep Dish TV, which airs programming originally produced for public access channels and intended to “challenge the suppression of awareness, the corruption of language, and the perversion of logic that characterizes so much of corporate media,” the Research Channel, which offers videos from research institutions, such as a show on whether global carbon emissions can be monitored from outer space, or the Water Channel, devoted to good water management practices.

At around the time of the Navigant Paper, the basic tier and expanded basic tier in most cable systems consisted of about 70 channels, of which approximately 20 channels were in the basic-only tier.⁷ The so-called “basic” digital tier consisted of another 40 or so channels.⁸ At that time, approximately 11% of all cable subscribers purchased basic only service, 89% subscribed to expanded basic and 53% subscribed to a digital tier.⁹ Thus, even if there were really 565 distinct national satellite-delivered networks, which there were not, 11% of subscribers had access to only 20, 89% had

⁷ *Report on Cable Industry Prices*, In the Matter of Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992; Statistical Report on Average Rates for Basic Service, Cable Programming Service, and Equipment, MM Docket 92-266, Table 6-b (rel. Jan. 16, 2009).

⁸ *Id.*, Table 7.

⁹ *Id.* at ¶18.

access to about 70 and 53% had access to as many as 110. Very few could view anything approaching 565 channels.

Of course, if the channel space occupied by a local broadcast station became vacant because of a retransmission consent dispute, then the cable company could, in theory, use the empty channel to launch an uncarried network or improve the channel position of one of the networks on a digital tier. Virtually all of the channels that are carried on digital tiers or not carried at all are niche networks, with programming that is limited in variety and appeal. There is no single digital-tier or uncarried channel that offers national sporting events or non-sports programs that appeal to the tastes characteristic of the mass audiences for broadcast television programs. Moreover, there may be contractual issues with placing any satellite-delivered network on the basic tier.¹⁰ In addition, during the recent shutoff of CBS owned-and-operated stations on Time Warner Cable systems, CBS reportedly threatened that it would never restore the stations if TWC permanently gave the stations' historical channel positions to any other programming service.

Even general entertainment networks such as USA Network, or those that also offer some professional sports, like TNT, are not good substitutes for broadcast network programming. The ratings histories of those networks, a comparison of the programs they carry at any given time with those of the Big Four networks and common sense tell us that they are extremely weak, rather than "good" substitutes for Big-Four broadcast network programming. Common sense is supported by the empirical evidence from the "natural experiments" conducted when there have been actual disruptions of service. Cable systems already carry on expanded basic all of the most popular cable networks, and those networks have been available on virtually every one of the cable systems that have suffered a blackout of broadcast stations during a negotiating deadlock. Yet, their presence has not prevented those systems from losing significant numbers of subscribers during shut-offs of Big-Four affiliated stations.

While these are important points, the really fatal flaw in the Navigant Paper's thesis that broadcasters do not have market power because there are 565 cable networks is that people watch programs and events, not networks. The Super Bowl is televised every year on one of broadcast networks with NFL contracts, and the audiences are consistently huge, regardless of which network has the broadcast rights. People tune in to watch the Super Bowl because it is the Super Bowl, not because they want to watch the "network" or the local station that carries the game this year. Cable customers do not really care which network carries their favorite sports events. When FOX outbid CBS for NFL games in 1998, CBS's premier NFL broadcasting team of John Madden and Pat Summerall simply moved to FOX. Someone tuning into the first game broadcast by FOX would not have been able to determine that it was being shown on FOX, rather than CBS without looking at the channel display, nor did any fan of the game care which network it was on. Similarly, when The Walt Disney Company moved Monday Night Football from ABC to ESPN, fans could not have cared less—they watch the game, not the network.

If I want to watch the Super Bowl (or the Orange Bowl or any other major sporting event) and the local broadcast station affiliated with the network that will be televising it announced that it will not be available on my cable system because of a retransmission consent dispute, I would take little solace from the fact that I could watch such distant substitutes as martial arts programs on Black Belt TV or reruns of past Super Bowls on ESPN Classic.

It works the same way for popular non-sports programs. If I love to watch the *Oscars* or am a rabid fan of *American Idol* on FOX, *The Big Bang Theory* on CBS, *The Blacklist* on NBC or *Modern*

¹⁰ For example, some of the expanded basic tier networks have included in their contracts provisions that say that if any satellite-delivered network not already on the basic tier is added to that tier, then those expanded-basic tier networks and others under common control must also be moved to the basic tier, effectively causing the basic tier to expand in number of channels and cost to subscribers that would make it largely indistinguishable for the expanded basic tier. These sorts of contractual provisions may also preclude movement of a network on a digital tier to the expanded basic tier.

Family on ABC, and if my cable company is told to shut off the local station that televises it, then I will be switching to DBS or a telephone company video service unless carriage is restored in short order. The programs on the other broadcast stations and cable networks that my cable system will continue to carry will not be adequate substitutes.

In sum, we think that the Navigant Paper's conclusion that market conditions preclude broadcast station owners from charging supra-competitive retrans fees is intellectual snake oil. With respect to that assertion (and others), the Navigant Paper seems to be far from the kind of exemplar of objective academic research that NAB's December 5th letter would have us believe is the case with the consultants' work product that it commissions.

NAB's efforts to belittle the filings with the Commission by retrans reformers are also easily disposed of by simply examining the record in this Docket. The comments submitted by critics of the retrans regime as it currently operates contain lots of detailed arguments supported by logic, economic theory, analysis of legislative history, publicly available facts about broadcasters and statements by their top executive officers and other source material. Indeed, Mediacom alone or in conjunction with others has filed well over a hundred pages making the case that the Commission is wrong in concluding that it lacks authority to do very much and additional pages recommending specific fixes for the problems we identify. As only one example, one filing by Mediacom on the issue of the Commission's authority is over 80 pages long and has more than 120 footnotes citing cases, law review articles, legislative history, economic literature and other source material. The fact that we do not reproduce all of the relevant citations in shorter letters we send to Commissioners and senior Staff reiterating or supplementing points made in our detailed filings is hardly the sin NAB makes it out to be.

As usual, NAB does not practice what it preaches. Its filings with the Commission, prepared statements in congressional hearings and press releases are replete with conclusory statements for which no empirical evidence or other support is cited. That is also true of the papers and reports prepared for NAB by its economists for hire. As only one possible example, in March 2009, the NAB filed with the Commission a so-called "economic study" that concludes that retrans money "ultimately benefits consumers by enriching the quantity, diversity, and quality of available programming, including local programming." Absolutely no empirical data supporting that conclusion is included in the "study." Indeed, there is not even a passing effort to identify how retrans fees collected by stations' parents are actually spent.

Mediacom, on the other hand, has submitted materials to the Commission in which we point out that retransmission consent fees are negotiated and collected by the parent companies of local stations, rather than the stations themselves, based on our and other MVPDs' experiences in negotiating hundreds of retransmission consent agreements. We argue that this is contrary to what Congress intended, citing specific statements in the legislative history. We also claim that, based on publicly available information, the parent companies of the big station groups spend the retrans money they collect on anything and everything but providing funds to their local stations for their production of more and better locally originated programming. We have backed up that claim by giving specific examples, like this one:

During 2011 and the prior two years, one of the large owners of broadcast stations collected an estimated \$250 million in retransmission-consent-related payments. During that same period, it:

- paid over \$290 million in compensation to its five most highly compensated officers, including over \$170 million to its Chief Executive Officer, and more than \$50 million to another officer;
- distributed over \$600 million in dividends to its stockholders; and
- spent over \$1 billion to repurchase shares of its own stock.

According to publicly available data, a similar story can be told about other major owners of multiple broadcast stations. As we have said before, the fact that broadcasters spend far more on executive salaries, dividends, stock buybacks and acquisitions than they collect in retransmission consent fees means that their claims that consumers should pay ever-increasing subscription fees to ensure the survival of supposedly financially strapped or endangered stations even as the stations' owners and officers are personally pocketing millions that could be used to support them are simply not credible.

Here's some more support for that proposition that we have cited in our submissions to the Commission:

- The CEO of an owner of multiple stations admitted in a conference call with analysts, that rather than being collected by local stations and spent on locally produced programming, retransmission consent fees “fall to the corporate bottom line.”
- On another occasion, speaking at a conference sponsored by an investment bank, the Chief Financial Officer of a station-group owner said that retransmission fees are all “revenue and profit” for the parent company and “significantly accretive to our margin” because “there is no cost against it”—meaning that retransmission consent dollars are not spent on local stations or programming and are simply incremental profit for the parent.
- At an investor conference, the CEO of the parent company of multiple stations predicted it will be collecting a billion dollars in retransmission consent revenue in a few years, and reiterated that “[t]his is all new-found money and it drops right to the bottom line. There's no cost. It's 100-cent dollars.”

All of the financial data and quotes we present above come from the subject companies' SEC filings and press releases, analyst reports and published news stories. We have citations for the sources of all of it, if anyone at the Commission wants them.¹¹

These are facts that we have presented before in submissions to the Commission. Rather than address them head-on, NAB pretends that they do not exist—and then berates us for not providing evidence to back up our claims about how retrans consent fees are actually spent. That is its usual approach whenever we say something factual about retrans that does not fit its narrative but that NAB cannot refute. We, on the other hand, try to approach the debate from a more intellectually honest posture. Rather than ignoring inconvenient facts or opposing viewpoints, we like to tackle them head on. For example, in the filing regarding the Commission's authority mentioned above, we set forth all of the major arguments that we have heard in support of the claims by NAB and others that the Commission lacks the authority to take a more active role in the retrans market and then do our best to counter them. NAB takes a much different approach, preferring to deny or ignore inconvenient facts or arguments.

In any event, we hope that it is apparent that NAB's December 5th letter is just another instance of spin-doctoring in the interests of preserving the right of the small number of companies that own or control the vast majority of broadcast stations to extract billions from American consumers that come with “no cost against it” in the form of spending some of that money to provide more or better locally

¹¹ We do not name the subject companies because Mediacom has been warned on several occasions that if we complain to the government about some station owners' behavior in retrans negotiations, we may find ourselves paying higher prices and getting worse contract terms than would otherwise be the case. While the subject companies in the examples given may not have made those kinds of threats, it is sometimes prudent to make our points without calling out specific station owners by name.

originated programming (or even investing in more transmitters so that off-air reception is a viable option for more Americans). As such, the letter should be read with a high degree of skepticism.

If you fall for an infomercial scam promising to effortlessly melt away your extra pounds, the only thing that will actually melt away is your money. All you will get for in return is a worthless DVD or some cheaply made device of little utility. Perhaps, you might find some consolation in the fact that you can avoid throwing good money after bad by steering clear of other products offered by the same hucksters.

The retrans scam is worse. Paying for the retrans variety of snake oil is akin to subscribing to monthly deliveries of bird droppings, which, of course, are free over-the-air in most DMAs (at least until the big media companies find a way to monetize them). To add injury to insult, retrans fees go up significantly every three years or so, although the quantity and quality of the programming available through local broadcast stations stays the same or declines and big media companies that own broadcast stations take the money they collect and spend it on executive salaries, dividends and acquisitions rather than producing more and better local programs. And, even after you figure out what a scam it all is, you have to keep paying anyway—in order to subscribe to cable service, the Commission's rules require you to buy all the local broadcast stations, whether you want one or more of them or not.

MVPDs, consumer and public interest organizations and others think that all of this is a shame, for reasons given in comments filed in this docket (complete with supporting evidence and citations). We and the others think that the Commission has the power to do something about the situation, and that its conclusion that it is powerless is wrong—again, for reasons set forth at sometimes excruciating length in those comments. Mediacom and many others have suggested very specific actions that we think the Commission should and lawfully could take to address the problems that we see.

In short, if you believe NAB's efforts to discredit the points made by those seeking retrans reform and its claim that that the submissions by NAB and its economists-for-hire are objective scholarship, then we know of some people who would be interested in speaking to you about how the Hawaii Chair can take the work out of your workout.

Thank you for your time and consideration.

Very truly yours,

A handwritten signature in black ink that reads "Joseph E. Young". The signature is written in a cursive style with a large, looping initial "J" and a long, sweeping underline.