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August 14, 2009

## **BY HAND DELIVERY**

Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 Twelfth Street, S.W.  
Washington, D.C. 20554

FILED/ACCEPTED

AUG 13 2009

Federal Communications Commission  
Office of the Secretary

**Re: Opposition to Broadcast Maximization Committee's  
"Emergency Request for Filing Freeze"  
Commencement of Rural, First-Come, First-Served,  
Digital Licensing for Low Power Television and  
Television Translators Beginning August 25, 2009  
DA 09-1487**

Dear Ms. Dortch:

The Association for Maximum Service Television, Inc. ("MSTV")<sup>1</sup> and the National Association of Broadcasters (NAB)<sup>2</sup> oppose the "Emergency Request for Filing Freeze" recently filed by the Broadcast Maximization Committee.<sup>3</sup> The Freeze Request seeks a Commission announcement that it will not accept applications specifying channels 5 or 6 in the above-referenced proceeding. This digital low-power proceeding provides a unique opportunity for broadcasters to apply for digital companion channels for incumbent analog LPTV/TV translator facilities, to apply for new digital-only LPTV/TV translator facilities, and to make major changes to existing facilities. A freeze on applications specifying channels 5 or 6 would impair broadcasters' ability to bring these services to the public. A freeze could seriously

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<sup>1</sup> MSTV is a nonprofit trade association of local broadcast television stations committed to achieving and maintaining the highest technical quality for the local broadcast system.

<sup>2</sup> The National Association of Broadcasters is a nonprofit trade association that advocates on behalf of free local radio and television stations and also broadcast networks before Congress, the Federal Communications Commission and other federal agencies, and the Courts.

<sup>3</sup> See "Emergency Request for Filing Freeze" filed August 5, 2009 ("Freeze Request").

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compromise broadcasters' efforts to address well documented VHF reception problems. A freeze would not be in the public interest and would be unfair. Accordingly, the Commission should deny the Freeze Request.

The Freeze Request essentially presupposes the outcome of a possible future proceeding regarding channels 5 and 6. Now is the time to provide television broadcasters with flexibility in the uses of channels 5 and 6, not to tie their hands.<sup>4</sup> Post-transition experience shows that the television stations operating on these channels must be able to adjust their facilities—including through the use of LPTV/TV translator stations—in order to accommodate reception shortfalls and avoid depriving viewers of the free, over-the-air television service that they received before June 12, 2009. The problems with reception of digital television in the VHF band have been well-documented.<sup>5</sup> These challenges call for creativity and flexibility on the part of broadcasters and the Commission. The Freeze Request would instead impose a rigid and hasty constraint, precluding broadcasters from using a significant spectrum resource in their efforts to restore pre-transition levels of service to viewers. Needless to say, it also would prevent television broadcasters from enhancing the service that they are able to provide to the public.

The Freeze Request makes much of the speculative expectations of some who are seeking additional spectrum for radio services, but it ignores the well-settled expectations of television broadcasters and the public that these channels would remain available for LPTV/TV translator companion channels, new facilities, and major changes. The Commission has already observed that “[m]aintaining channels 5 and 6 for TV service will also protect the service of the many Class A, low power TV, and TV translator stations that use the low VHF channels and are

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<sup>4</sup> As MSTV and NAB have documented, the proposal that BMC submitted in the Diversity proceeding would disenfranchise a huge number of television viewers – ten stations alone would lose over 100,000 viewers each, with one station losing 3 million viewers. See “Response to BMC’s Freeze Request Filed at the Reply Deadline,” MB Docket No. 07-294 *et al.* (Sept. 18, 2008). BMC’s proposed “replacement channels” for stations currently operating on channels 5 and 6 would result in increased interference and smaller service areas. The recent experience with Channel 6 in Philadelphia provides ample evidence of the problems confronting television stations in the digital age. The engineering analysis submitted with MSTV and NAB’s Diversity filing showed that “[t]his proposal will lead to a loss of DTV service in dozens of television markets. Accordingly, the proposal, and BMC’s attempt to impose a freeze on any channel 5 and 6 applications and modifications, is inconsistent with the public interest.” See *id.* at Attachment, p. 1 (further noting that WPVI-TV, the Philadelphia station, would lose 3,073,883 viewers).

<sup>5</sup> See, e.g., Glen Dickson, “DTV: A Few Tweaks Left,” *Broadcasting & Cable* (June 20, 2009) (noting that “many of these stations were received reliably on their former UHF assignments but are now hard for viewers to find, even for those with an adequate UHF/VHF antenna”).

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expected to continue to use those channels when they switch to digital operation.”<sup>6</sup> Moreover, a freeze would deprive the LPTV/TV translator stations currently operating on channels 5 and 6 of the ability to “flash cut” to digital operations. It would be discriminatory and inequitable to treat these stations differently. The expenses arising out of the need to find a new channel could be prohibitive for a number of LPTV/TV translator stations, which would in turn harm these stations’ viewers.

Further, although the BMC contends that its proposal would foster diversity and localism in radio broadcasting, the Commission should recognize that it would undermine diversity by restricting options for television broadcasting. A significant number of the LPTV/TV translator stations currently broadcasting on channels 5 and 6 are new entrants, small business entities, and/or serving unique, underserved markets. The Commission should not force these stations, or other LPTV/TV translator stations seeking to build new digital facilities on channels 5 and 6, to give up these opportunities. Indeed, BMC provides no valid explanation as to why one of the primary vehicles for promoting diversity in the television industry should be cast aside.

As noted above, there have been well-documented problems with digital television reception in the VHF band. Reception problems have occurred in the low VHF band (channels 2-6) and as well as the high VHF band (channels 7-13). A common complaint among viewers has been that they can receive some, but not all, digital high VHF channels. It is entirely possible that one potential source for these reception difficulties is harmonic interference from FM signals. Noted TV Engineer Charles Rhodes has observed the potential for such harmonic frequency modulated interference from radio stations on most high VHF channels.<sup>7</sup>

Given this uncertainty regarding reception, the Commission should be extremely cautious when considering adding additional radio stations on TV channels 5 and 6. Adding radio stations on these channels could create additional harmonic interference problems for digital TV channels operating on channels 7-13. On the other hand, when properly engineered, use of these channels for digital LPTV and digital translator fill-in services may pose no such interference problem. The Commission should not take administrative steps to block a use of the

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<sup>6</sup> See *Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service*, Memorandum Opinion and Order on Reconsideration of the Seventh Report and Order, MB Docket No. 87-268 23 FCC Rcd 4220, at n.73 (2008) (emphasis added).

<sup>7</sup> Rhodes, Charles, “Testing for DTV Interference,” 32-33, *TV Technology* (June 10, 2009). Take, for example, radio station “A” operating on 88.5 MHz and radio station “B” operating on 107.3 MHz in the same market. The second harmonic for radio station “A” may create interference to TV channel 7, the second harmonic of the radio station “B” could create interference with Channel 13 and taken together radio stations “A” and “B” could create a problem for TV channel 10.

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spectrum that we know will provide additional DTV service and not cause interference. In this regard, the FCC should not block such a valuable use of these channels in order to facilitate potential radio operations that, in the end, may lead to additional interference on VHF channels 7-13. A more efficient and wiser use of these available channels would be to use them to improve TV service.

Although it purports to further the interests of fairness, the Freeze Request does not provide television broadcasters with sufficient time to study alternatives. The filing window for parties proposing service in rural areas is scheduled to open very soon (on August 25, 2009). Licensees planning to file in this window presumably have already completed, or will soon complete, their engineering studies and related efforts (such as negotiating interference consent agreements). Forcing these parties to start the process over again, based on speculation as to how a future Commission proceeding might turn out, would be unfair.

The Freeze Request is incorrect in its assertion that “it could be argued that the NCE stations’ Ashbacker rights of procedural due process” would be violated if the Commission were to decline to grant the freeze. In *Ashbacker Radio Corp. v. FCC*, the Supreme Court observed that “Congress has granted applicants a right to a hearing on their applications for station licenses” and held that “where two bona fide applications are mutually exclusive the grant of one without a hearing to both deprives the loser of the opportunity which Congress chose to give him.”<sup>8</sup> *Ashbacker* applies narrowly to circumstances involving mutually exclusive applications; it simply does not apply here. See, e.g., *Reuters Ltd. v. FCC*, 781 F.2d 946, 951 (D.C. Cir. 1986) (“*Ashbacker*’s teaching applies not to prospective applicants, but *only to parties whose applications have been declared mutually exclusive*. That foundational requirement—mutually exclusive applications—is not met here”) (emphasis in original).<sup>9</sup>

Finally, BMC argues that television stations operating on TV channel 6 should not be permitted to operate analog audio on these channels.<sup>10</sup> Prior to the DTV transition, it was

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<sup>8</sup> 326 U.S. 327, 333 (1945).

<sup>9</sup> See also *Processing of Pending Space Station Applications in The Domestic Fixed-Satellite Service*, Memorandum Opinion and Order, 93 F.C.C.2d 832, at para. 13 (1983) (“to invoke *Ashbacker* or *Kessler* GSAT would have to demonstrate that its applications are mutually exclusive with those we have granted today”); *Northpoint Tech. Ltd. v. FCC*, 414 F.3d 61, 74 (D.C. Cir. 2005) (“Northpoint argues that since both NGSO-FSS and MVDDS licensees sought to use the same spectrum at the same time, *Ashbacker* dictates that ‘the FCC [can] not grant one [competing application] while setting the other for a comparative hearing.’ ... This argument is also off the mark.... The NGSO-FSS and MVDDS licenses are two different kinds of licenses, for reasons to be explained momentarily, and need not be considered together”).

<sup>10</sup> *Freeze Request* at 2.

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possible to receive the audio of television stations operating on TV channel 6 on most FM radios. Indeed, many consumers viewed this as an important service, especially during emergencies, as local television stations would often provide 24-hour news coverage. Of course, this capability is essentially eliminated with the transition to digital by full service television stations. It also will be eliminated in cases where digital LPTV and digital translator stations are used to fill in or expand digital television service. BMC offers no evidence that LPTV or translators plan to build channel 6 facilities simply to continue to provide an analog audio service. Indeed, such a strategy seems unwise, as the FCC seeks to create a deadline transitioning LPTV and translator stations from analog to digital. In any event, as BMC acknowledges, this issue is irrelevant to the Freeze Request.<sup>11</sup>

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For the reasons set forth above, MSTV and NAB respectfully request that the Commission deny the Freeze Request.

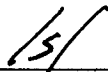
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<sup>11</sup> *Id.*

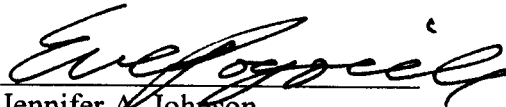
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Respectfully submitted,

  
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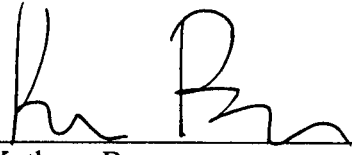
  
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August 14, 2009

**CERTIFICATE OF SERVICE**

I, Kathryn Bowers, a secretary at the law firm of Covington & Burling LLP, do hereby certify that on this 14th day of August, 2009, I caused a copy of the foregoing "Opposition to Broadcast Maximization Committee's 'Emergency Request for Filing Freeze'" to be sent via first-class U.S. Mail, postage prepaid, to the following:

Broadcast Maximization Committee  
9049 Shady Grove Court  
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Kathryn Bowers