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December 23, 2009

BY HAND DELIVERY

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

FILED/ACCEPTED
DEC 23 2009
Federal Communications Commission
Office of the Secretary

**Re: OPPOSITION TO MINORITY MEDIA &
TELECOMMUNICATIONS COUNCIL'S REQUEST FOR FILING
FREEZE AND PROCESSING FREEZE
Commencement of Rural and Nationwide, First-Come, First-Served,
Digital Licensing for Low Power Television and Television Translator
Services Beginning August 25, 2009 and July 26, 2010
DA 09-1487**

Dear Ms. Dortch:

The Association for Maximum Service Television, Inc. ("MSTV")¹ and the National Association of Broadcasters ("NAB")² oppose the "Request for Filing Freeze and Processing Freeze" ("Freeze Request") recently filed by the Minority Media & Telecommunications Council ("MMTC").³ The Freeze Request seeks two Commission actions that would not be in the public interest: (1) a freeze on accepting applications specifying channels 5 and 6 in the filing window for digital low power television ("LPTV") stations and

¹ 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.

² NAB 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.

³ See "Request for Filing Freeze and Processing Freeze" filed November 25, 2009 ("Freeze Request").

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television translators (which opens on July 26, 2010),⁴ and (2) a freeze on processing the pending applications filed for channels 5 and 6 in the rural filing window (which opened on August 25, 2009). The Commission should deny the Freeze Request. It would prevent television broadcasters from taking advantage of a unique opportunity 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, thus impairing broadcasters' ability to bring these services to the viewing public.

MMTC argues that the Commission should grant the Freeze Request "so as not to prejudice the Commission's consideration of the various proposals that have been submitted for the use of this spectrum for FM broadcasting,"⁵ and even goes so far as to argue that not granting the freeze would "violate basic due process requirements."⁶ This argument is backwards: it would not be appropriate or fair to tie television broadcasters' hands and presuppose the outcome of a possible future proceeding on the use of channels 5 and 6. The Broadcast Maximization Committee ("BMC") filed a request similar to the Freeze Request prior to the opening of the August 25, 2009 rural filing window, and the Commission appropriately declined to impose a freeze on channels 5 and 6. A similar outcome is warranted here, for the same reasons.

MMTC presents an imbalanced view of the future use of channels 5 and 6 to support its case. The Freeze Request cites as support the speculative expectations of certain parties with respect to the possibility that channels 5 and 6 could be used to expand FM radio broadcasting. However, it minimizes the reasonable expectations of the public, and television broadcasters, that the Commission would preserve these channels for television broadcasting, including for the restoration and enhancement of service through the use of LPTV/TV translator companion channels, new facilities, and modifications. Indeed, the Commission has stated 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 expected to continue to use those channels when they switch to digital operation."⁷

⁴ The filing window originally was scheduled to open on January 25, 2010, but recently was postponed until July 26, 2010. See FCC, Public Notice, *Initiation of Nationwide, First-Come, First-Served Digital Licensing for Low Power Television and TV Translator Services Postponed to July 26, 2010*, DA 09-2611 (Dec. 22, 2009).

⁵ See Freeze Request at 1.

⁶ See *id.* at 2 (citing *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1945)).

⁷ 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).

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For the dozens of stations that already filed applications in the rural filing window specifying channels 5 or 6, a decision now to freeze processing of such requests would be inequitable and harmful to the viewers that rely on these stations. Moreover, as MSTV and NAB have shown previously, expanding FM radio operations on these channels could cause harmful interference to reception of television channels throughout the VHF band.⁸ In short, it would not be in the public interest to block the beneficial use of these channels by incumbent broadcasters seeking to provide digital television service in order to facilitate a (speculative) use that may never be implemented because it could lead to additional interference on nearby television channels.

MMTC incorrectly states that a decision by the Commission not to grant the Freeze Request “would violate basic procedural due process requirements when interest has been solicited and expressed in alternative uses for the Channels 5 and 6 spectrum.”⁹ That is an erroneous reading of the limited holding in *Ashbacker*, in which the Supreme Court 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.”¹⁰ *Ashbacker* applies to cases in which there are two mutually exclusive *bona fide* applications; it does not mean that any party with a proposal to amend existing spectrum allocations can freeze Commission action or hold hostage other licensees’ ability to make modifications or otherwise use that spectrum to benefit the public, subject to a hearing at the Commission. *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).¹¹ The precedent of such an outcome could cause repeated disruptions to Commission undertakings.

⁸ *See* Opposition to Broadcast Maximization Committee’s “Emergency Request for Filing Freeze,” DA 09-1487 (Aug. 14, 2009) (“Opposition to BMC Request”), at 3.

⁹ *See* Freeze Request at 2 (citing *Ashbacker*).

¹⁰ *See Ashbacker*, 326 U.S. at 333 (1945).

¹¹ *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”).

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The proposal to expand FM radio broadcasting on channels 5 and 6, and the corollary Freeze Requests filed by BMC and MMTC, purport to foster diversity.¹² To the contrary, they actually would undermine diversity: “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.”¹³ The Commission also has noted that the “full availability of these channels for new TV stations” will be important in helping the Commission to provide for the 175 new DTV allotments provided for by Congress in 1999.¹⁴

* * *

¹² See Opposition to BMC Request at 3.

¹³ See *id.* at 3. See also MSTV’s Comments on MMTC’s Petition for Rulemaking, RM 11565, MB Docket No. 09-52, at 3-4 (Oct. 23, 2009) (“MSTV Comments”) (citing examples of diverse programming services offered by stations operating on channels 5 and 6, and observing that “[n]either these stations nor the viewers they serve should be forced to bear the burden of relocating or accepting new interference in order to accommodate an influx of radio stations”).

¹⁴ See MSTV Comments at 4.

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For the reasons stated above, the Commission should deny the Freeze Request.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, Kathryn Bowers, a secretary at the law firm of Covington & Burling LLP, do hereby certify that on this 23rd day of December, 2009, I caused a copy of the foregoing "Opposition to Minority Media & Telecommunications Council's Request for Filing Freeze and Processing Freeze" to be sent via first-class U.S. Mail, postage prepaid, to the following:

David Honig
Minority Media & Telecommunications Council
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Kathryn Bowers