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January 20, 2000

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Commissioner William E. Kennard
Chairman
Federal Communications Commission
445 12th St., S.W.
Room 8-B201H
Washington, DC 20554

Re: DTV Utah Rule Making Proceeding
MM Docket No. 99-197, RM-9573

Dear Chairman Kennard:

This letter is being written in response to the letter dated December 30, 1999 written by "DTV Utah.." This letter attempts to set the record straight respecting the apparent indifference of the DTV Utah consortium to the rights of other local broadcasters, namely KAZG(TV), *Channel 24,* Ogden, Utah. As DTV Utah knows, if the Commission accedes to the demands expressed in its December 30, 1999 letter, KAZG(TV) will be deprived of a hearing on its long-standing request of the Commission that it be allotted a channel suitable for operation from Farnsworth Peak.

On June 23, 1996, long before any agreement was reached between the DTV Utah participants, and long before the current DTV Utah rulemaking petition was filed with the FCC, KAZG filed a Petition for Rulemaking with the Commission that would allow KAZG to switch channels from Channel 24 to Channel 42 on Farnsworth Peak (the site DTV Utah seeks) and thereby solve certain serious technical problems relating to its current operation. However, late in 1996, the Commission issued its Sixth Further Notice of Proposed Rule Making issued in conjunction with Advanced Television Systems and Their Impact Upon the Existing Television Service, 7 C.R. 2085 (1996). Therein, the FCC announced that it would not accept additional applications for new NTSC stations or accept new petitions for rule making proposing to amend the existing TV Table of Allotments that were filed more than 30 days after the publication of the Further Notice in the Federal Register. Id. at 2095 ¶¶ 60-61. As the Commission also noted in the Sixth Report and Order, when summarizing its prior actions:

> We indicated that other petitions to amend the TV Table of Allotments (for example, proposing to change a station's community of license or altering the channel on which it operates, including changes in which channel allotment in a community is reserved for noncommercial educational use) could continue to be filed, but any such changes

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> to the TV Table that include a modification of a station's authorization would be conditioned on the outcome of this DTV rule making proceeding. We stated that any petitions that were on file and any rule making proceedings that were open would be addressed on a case-by-case basis, taking into account their impact on the draft DTV Table.

Sixth Report and Order, 7 C.R. 994, 1023 ¶ 104 (1997). When the DTV *Sixth Report and Order* was released, KAZG's engineer, Richard Mertz, of Cavell, Mertz & Davis, determined that the proposed Channel 42 allotment conflicted with other DTV allotments adopted by the Commission. Consequently, on July 24, 1998, KAZG modified its Petition to instead propose operation on Channel 49 at Farnsworth Peak. That channel was proposed because it is fully spaced with all other analog and DTV allotments adopted by the FCC.

Subsequent to that filing, the eight television stations constituting "DTV Utah" developed an engineering plan that would permit a joint operation from Farnsworth Peak.[1] The DTV Utah proposal conflicts with KAZG's July 24, 1998 amended Petition. Specifically, DTV Utah proposed allocating DTV Channel 48 for use by KUWB, which conflicts with KAZG's earlier-filed Channel 49 proposal. DTV Utah's proposal was placed on public notice as a *Notice of Proposed Rule Making* ("*NPRM*") on May 21, 1999. The *NPRM* did not include KAZG's proposal. Consequently, KAZG opposed the DTV Utah *NPRM*, and the KAZG Channel 49 proposal formally was refiled on July 12, 1999 as a "Counterproposal" to the DTV Utah proposal. The DTV Utah proposal, and the KAZG Counterproposal, both remain pending at the FCC.

As pointed out in Utah Communications' Petition, a grant of Utah Communications' proposal will result in a number of benefits to the public. Not the least of these benefits involves KAZG(TV) relocating to Farnsworth Peak, the same location as all other major television stations serving the central DMA. Moreover, because KAZG is a new construction permit issued after April 3, 1997, it was not eligible to be immediately assigned a DTV-paired allotment. Allocation of Channel 49 to Ogden will allow DTV conversion by KAZG on Farnsworth Peak where the other market stations intend to commence or continue DTV operations.

On October 27, 1999, Utah Communications contacted DTV Utah and proposed a solution to all of the problems identified above: namely that Utah Communications be allowed to join the DTV Utah consortium and operate on Channel 50 (in lieu of Channel 49) at the Farnsworth site.

Unfortunately, on November 3, 1999, DTV Utah rejected Utah Communication's

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[1] The DTV Utah stations would operate from Farnsworth Peak, and would occupy Channels 34 (KUTV), 36 (KULC), 38 (KSL-TV), 40 (KTVX), 42 (KUED), 44 (KBYU-TV), 46 (KJZZ-TV), and 48 (KUWB).

proposal, without specifying any engineering or other problems with the proposal. See Attachment 1.

DTV Utah's December 30, 1999 letter to the Commission encourages the Commission to take action to Utah Communications' significant disadvantage without disclosing the potentially permanent injury Utah Communications will suffer if the Commission acts as requested. In addition, DTV Utah's December 30, 1999 letter fails to disclose the significant unfairness to Utah Communications of the Commission taking action which ignores Utah Communications' procedurally superior right to seek Channel 49, or any channel which will work from Farnsworth Peak. As noted above, Utah Communications' proposal was on filed for quite some time prior to that of DTV Utah. In recounting all of its efforts to protect against conflicts with both full-service primary and low-power second stations, DTV Utah fails to explain why it did not protect the existing Utah Communications proposal *before* submitting its own proposal to the FCC. What also is significant to note is that each of DTV Utah's constituent members already have a DTV allotment, Utah Communications does not. Utah Communications' rulemaking proposal is designed to allow KAZG to better serve its service area with its NTSC signal in the short term, while ensuring that it will be able to provide meaningful DTV service to its service area in the near future. Significantly, Utah Communications seeks to commence DTV service as soon as possible, but cannot do so effectively without the ability to move its transmit site to Farnsworth Peak.

The Chairman is respectfully asked to carefully consider the material contained in DTV Utah's December 30, 1999 letter. While we believe that DTV Utah's consortium and proposal has much to recommend it, the proposal does not address the comprehensive needs of all stations seeking to provide DTV and other services in the Salt Lake City Market. In addition, as presently constituted, the DTV Utah proposal would seriously prejudice previously established procedural and other rights of KAZG(TV). This manifest unfairness is exaggerated when one considers that KAZG(TV) has made proposals to the DTV Utah consortium which would solve the DTV problems of all broadcasters in the market.

Thank you for your consideration.

Sincerely,

Dan J. Alpert
Attorney for Utah Communications, LLC (KAZG(TV))

cc: See attached service record.

ATTACHMENT 1

MEMORANDUM

To: Jonathan D. Blake, Esq.
Jennifer A. Johnson, Esq.
Kenneth E. Satten, Esq.
Harold K. McCombs, Esq.
Howard A. Topel, Esq.
Howard F. Jaeckel, Esq.
Mark W. Johnson, Esq.
Marvin J. Diamond, Esq.

From: Dan J. Alpert

Re: DTV Utah

Date: October 27, 1999

I represent Utah Communications, LLC, a/k/a KAZG, Channel 24, Ogden, Utah. As all of you doubtless know, on June 24, 1996, KAZG filed a Petition for Rulemaking that would allow KAZG to switch channels from Channel 24 to Channel 42 in order to solve certain technical problems it faces on its current channel of operation. When the DTV *Sixth Report and Order* was released, KAZG's engineer, Richard Mertz, of Cavell, Mertz & Davis, determined that the proposed Channel 42 allotment conflicted with other DTV allotments adopted by the Commission. Consequently, on July 24, 1998, KAZG modified its Petition to instead propose operation on Channel 49 at Farnsworth Peak. That channel was proposed, insofar as it was fully spaced with all other analog and DTV allotments adopted by the FCC.

Subsequent to that filing, the eight television stations constituting "DTV Utah" developed an engineering plan that would permit a joint operation from Farnsworth Peak. As I understand it, under the plan, the DTV Utah stations would operate from Farnsworth Peak, and would occupy Channels 34 (KUTV), 36 (KULC), 38 (KSL-TV), 40 (KTVX), 42 (KUED), 44 (KBYU-TV), 46 (KJZZ-TV), 48 (KUWB).

The DTV Utah proposal conflicts with KAZG's July 24, 1998 Petition. Specifically, DTV Utah proposed allocating DTV Channel 48 for use by KUWB, which conflicts with KAZG's earlier-filed Channel 49 proposal. DTV Utah's proposal was placed on public notice as a *Notice of Proposed Rule Making* ("*NPRM*") on May 21, 1999. The *NPRM* did not include KAZG's proposal. Consequently, KAZG opposed the DTV Utah *NPRM*, and the KAZG Channel 49 proposal formally was refiled on July 12, 1999 as a "Counterproposal" to the DTV Utah proposal. The DTV Utah proposal, and the KAZG Counterproposal, both remain pending at the FCC.

Utah Communications has been anxious to work out a solution to the mutual exclusivity

that exists between the two proposals, which would (1) allow both proposals to go forward quickly at the FCC; and (2) allow Utah Communications to join with DTV Utah and share in the joint transmitter operation. Cavell Mertz & Davis conducted a further engineering study, and has determined that KAZG can propose to operate instead on Channel 50, which would eliminate any conflict with the DTV Utah proposed allotments, and would allow KAZG to operate from Farnsworth Peak as a part of the joint operation.

Therefore, Utah Communications believes it would be advantageous to enter into a Joint Agreement/Proposal that would include KAZG as part of DTV Utah, and that can be submitted to the FCC to resolve this docket. Under that Agreement, KAZG would amend its rulemaking to specify Channel 50 (in lieu of Channel 49) as its new channel of operation, and would withdraw its opposition to the DTV Utah proposal. Additionally, DTV Utah would support use of the Channel 50 allotment for KAZG, and KAZG would join DTV Utah.

The only other matter that will have to addressed will be how to accommodate the proposal for an allotment of a new Channel 36 NTSC allotment to Toole, Utah, that was filed by "Toole 36, LLC," and that also still conflicts with the DTV Utah proposal. Although no specific replacement channel has been identified, the DTV Utah pleadings indicated that "there are a number of other channels in the Toole area that would meet the geographic criteria for new NTSC allotments." Reply Comments of DTV Utah at 11. Assuming that information still remains accurate, I would hope that we can easily propose that one of those other channels be proposed for allotment to Toole, Utah, which would remove that final obstacle to the approval and completion of the proceeding.

I would appreciate it if anyone can identify any potential problems this plan may present. I feel proceeding in this fashion will allow the Commission to bring the DTV rulemaking proceeding to a rapid conclusion, and will allow all of us to proceed expeditiously, avoiding the interminable delays facing all of our clients that will result given the current state of the controversy and the pleadings.

I look forward to hearing from you soon.

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November 3, 1999

BY FACSIMILE

Dan J. Alpert, Esq.
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Dear Dan:

The members of DTV Utah have had the opportunity to review the October 27, 1999, memorandum you prepared on behalf of your client Utah Communications, LLC, a/k/a KAZG, Channel 24, Ogden, Utah. In your memorandum, you propose a Joint Agreement/Proposal whereby KAZG would amend its rulemaking to specify Channel 50 (in lieu of Channel 49) and withdraw its opposition to the DTV Utah proposal and, in exchange, DTV Utah would support KAZG's proposal to use Channel 50. We have entertained this proposal, but have determined that it is not something we can move forward with at this time.

Sincerely,

Jonathan D. Blake
Jennifer A. Johnson

cc: Marvin J. Diamond, Esq.
Howard F. Jaeckel, Esq.
Harold K. McCombs, Esq.
Kenneth E. Satten, Esq.
Howard A. Topel, Esq.

CERTIFICATE OF SERVICE

I, Dan J. Alpert, hereby certify that on January 20, 2000 the foregoing document is being served by First Class Mail, postage prepaid, to the following persons:

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