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March 24, 2006

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VIA ECFS

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

Re: **MB Docket No. 05-317**
KMTV-DT, Omaha, NE (Facility ID No. 35190)
RESPONSE TO OPPOSITION OF ECHOSTAR SATELLITE L.L.C.
TELEVISION STATION SECTION 339(a)(2)(D)(vii) WAIVER REQUEST

Dear Ms. Dortch:

Emmis Television License, LLC (“Emmis”), licensee of KMTV-DT, Omaha, Nebraska, by its attorneys, hereby submits this reply (“Reply”) to the Opposition of EchoStar Satellite L.L.C. (“Opposition”) to Emmis’s request for a six-month waiver of the April 30, 2006 digital testing implementation date.¹ The Opposition asserts that Emmis failed to demonstrate a substantial decrease in its digital signal coverage and provided no evidence that use of a side-mounted antenna is “necessary and unremediable.” EchoStar further asserts that the true reason for use of a side-mounted antenna is Emmis’s unwillingness to spend the money to top-mount the antenna – an “impermissible financial exigency.” As explained below, the Media Bureau should reject the Opposition because the KMTV waiver request precisely meets the requirements for a waiver of digital testing pursuant to the Satellite Home Viewer Extension and Reauthorization Act of 2004 (“SHVERA”).

EchoStar is plainly wrong in each of its claims. First, the loss of service at KMTV is “substantial.” SHVERA requires, in relevant part, that a station’s use of a side-mounted antenna result in a “substantial decrease” in signal coverage area, to qualify for a digital waiver. The engineering attached to the Opposition does not

¹ The instant Reply is filed pursuant to the FCC’s *Public Notice* setting March 24, 2006 as the reply deadline. See Extension of Time to File Responses to Opposition to TV Station Requests for Waiver of Digital Testing Pursuant to the Satellite Home Viewer Extension and Reauthorization Act of 2004, DA 06-579, *Public Notice*, (rel. Mar. 17, 2006).

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include an analysis of the decrease in coverage at KMTV. The attached statement of Robert D. Culver, Emmis's consulting engineer does and demonstrates a service loss of over 14,000 people.² Clearly, 14,000+ people is a "substantial" number.

Second, EchoStar claims Emmis failed to prove that side-mounting the antenna is "necessary and unremediable." Understandably, EchoStar fails to explain how it is possible to put two antennas in the same physical space at the top of the tower. Instead it attempts to foist blame on Emmis for not devising "an alternative method of providing full digital service."³ In fact, Emmis has done everything physically possible to provide digital service to the maximum number of digital viewers KMTV is authorized to serve, without causing a loss of analog service.⁴ It has constructed the full 1000 kW facilities and has requested Special Temporary Authority to operate those facilities.⁵ Other than the final top-mounting of the antenna, the maximized digital facility is fully built out.

EchoStar's third argument is, in effect, that Emmis side-mounted the KMTV digital antenna in order to save money, which EchoStar characterizes as an "impermissible financial exigency" that cannot be the basis for a SHVERA testing waiver. As

² See Attachment A.

³ The Opposition does not specify "alternatives" KMTV should have considered (e.g. using a separate tower or different orientation.) as it does in opposing several other stations' waiver requests. Nevertheless, with respect to the implication that other alternatives were available and should have been considered for KMTV, Emmis notes and agrees with the argument expressed by Hearst-Argyle Stations, Inc. in its reply on behalf of several of its stations. See Consolidated Reply of Hearst-Argyle Stations, Inc., Ohio/Oklahoma Hearst-Argyle Television, Inc., WAPT Hearst-Argyle Television, Inc., and WPBF-TV Company to the Opposition of EchoStar Satellite L.L.C. (Jan. 17, 2006). "There is no basis in the statute for EchoStar's assertion that the "clear and convincing" standard [set forth in the statute] means that a digital station must now justify its decisions for using a side-mounted antenna by explaining its rejection of other, theoretical transmission facilities." *Id.*, at 3.

⁴ Such loss of service would be an unavoidable result of lowering the analog antenna to accommodate the digital antenna in the top-mount position. The Commission has refused to approve relatively limited amounts of service losses. See, e.g., Letter from W. Kenneth Ferree, Media Bureau Chief, Federal Communications Commission, to Barry A. Friedman, Counsel, KJLA, LLC, DA 05-343 (Feb. 9, 2005) (refusal to approve loss of .25% of station's measured over-the-air service population).

⁵ See File No. BDSTA-20050616ABL.

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stated above, the unavailability of the tower top is not a "financial exigency," but it is an unremediable circumstance necessitating use of a side-mounted antenna, which results in a substantial loss of service. These facts precisely meet SHVERA's requirement for a digital testing waiver.

For the above reasons, Emmis respectfully requests that the Bureau deny the Opposition and grant the digital testing waiver requested for KMTV.

Sincerely,

A handwritten signature in black ink that reads "Marnie K. Sarver". The signature is written in a cursive style with a large initial "M".

Marnie K. Sarver

Enc. Attachment A – Engineering Statement of Robert D. Culver, P.E.

cc: Nazifa Sawez, Esq. (PDF by Email)
David K. Moskowitz, Esq. (by First Class Mail)

**ENGINEERING STATEMENT RE;
KMTV-DT POPULATION SERVICE
BPCDT 1000KW 768M AMSL
BMDSTA 1000KW 736M AMSL
OMAHA, NEBRASKA**

INTRODUCTION

This engineering statement is presented on behalf of Television Station KMTV-DT, channel 45, at Omaha, Nebraska. KMTV has Construction Permit (CP) and Special Temporary Authorization (STA) facilities as titled above. This statement presents the result of calculated population service from those two facilities. All data contained in this statement has been calculated in accordance with the FCC Rules and stated policy.

POPULATION ESTIMATION

The population predicted to receive KMTV-DT service has been calculated by use of the FCC DTV analysis software described in FCC OET Bulletin 69. KMTV-DT STA uses the same antenna type, omnidirectional pattern and ERP as authorized in its full facility Construction Permit with the exception that it is side mounted 32 meters below the CP antenna height. The UHF channel 45 DTV noise limited service threshold of 41dBu was used with calculations based on the default FCC prediction method and a grid size of two kilometers square. The calculated year 2000 census population values are reported below.

<u>Facility</u>	<u>Noise Limited Population</u>
C.P.	1,233,377
S.T.A.	1,218,841
Difference	- 14,536

CONCLUSION

The KMTV-DT 41 dBu STA signal is presently predicted to reach 14,536 fewer people than it will with the predicted full C.P. facility.

Respectfully Submitted,

by Robert D. Culver

Robert D. Culver, P.E.
Md. Reg. No. 19672

March, 2006