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FCC Mail Room

Office of General Counsel
 Attention: *Ex parte* complaints
 Federal Communications Commission
 445 12th Street, S.W.,
 Washington, D.C. 20554

Dear Sirs,

In accordance with the provisions of §1.1214 of the Commission's Rules I am advising you of an apparent violation of the *ex parte* rules. The filing in question involves Docket 04-186, a proceeding to which I am a party, having first filed in this proceeding on September 2, 2004 (ECFS address: http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6516482949.)

In a way I would like to apologize for repeatedly pointing out apparent *ex parte* violations by the same party. But since my first letter to you on October 13, 2006 pointing out 16 apparent violations by this party in various proceedings it appears that you have never even sent them a warning letter. (Although you did adjudicate the issues I raised concerning their vague August 8, 2007 filing in which I agreed with their explanation that it was compliant.) In this letter, I am notifying you about 3 different MSTV filings in the past 2 months that appear to violate *ex parte* rules. I note that my January 25, 2008 letter to you on their November 15, 2007 filing is still unresolved.

Case 1. On February 8, 2008 David Donovan, president of the Association for Maximum Service Television, Inc. filed an *ex parte* notice in Docket 04-186, "TV Whitespace". The ECFS address of this notification is: http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6519840325. The notice concerned a meeting that took place on February 5, 2008 and appears to be in violation of §1.1206(b)(1) that requires that *ex parte* filings be made "no later than the next business day after the presentation".

It is clear now that MSTV's usual defense for their repeated late filings is exploiting ambiguities in the rules about whether the filing is needed at all if no new information is presented. However, that will be difficult in this case since attached to the February 8 filing was a detailed presentation made at the February 5 meeting, see http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6519840326. While this attachment included material on pages 1-13 that was previously in the record of this proceeding, pages 14-28 are a February 5, 2008 dated presentation entitled "White Spaces Update" that does not appear to have been placed in the record earlier.

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Case 2. Three days later, on February 11, 2008 Mr. Donovan filed another *ex parte* notice that was timely. The ECFS address of this notification is: http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6519840633 . The contents of the second notice raises questions of compliance with §1.1206(b)(2) that states "More than a one or two sentence description of the views and arguments is generally required." This is further explained in the October 11, 2000 Public Notice which states,

The summaries must describe the substance of the new data or arguments and not merely list the subjects discussed. Generally, more than a one or two sentence description is required. Where there is ambiguity about whether data or arguments are already in the public record, the spirit of our rules would counsel parties to briefly summarize the matters discussed at the meeting. (Emphasis added.)

After discussing who attended the meeting this filing states,

"OET's testing of white space devices was discussed and in particular MSTV's October 15, 2007 letter to Mr. Julius Knapp on this subject."

Note that this "discussion of views and arguments" is one sentence. Was the discussion limited solely to the contents of a letter sent 3 months earlier? When the filing says "in particular" does it mean that only the points made in the October 15, 2007 letter were discussed and no additional points? The letter is ambiguous on that point. Frankly, the Commission's rules on this issue are also ambiguous - as I have pointed out previously. The February 11, 2008 letter may well be in a regulatory "gray zone" under present rules. But I doubt if it complies with the spirit of your office's October 11, 2000 Public Notice.

Case 3. Finally on March 31, 2008 Jonathan Blake of Covington & Burling LLP filed on behalf of MSTV an *ex parte* notification in the same docket describing a meeting on March 27, 2008. (ECFS addresses: http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6519869684 While this filing appears to comply with §1.1206(b)(2), it clearly was late filed and thus appears to violate §1.1206(b)(1). The attachment to this filing, ECFS address http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6519869685, apparently contains new specific information so it would appear that MSTV can not use its usual defense that the filing was not needed in the first place.

In general there is very high compliance with *ex parte* requirements in FCC rulemakings by most parties appearing before the Commission. But for some reason MSTV has been an exception to this pattern of high compliance even though the other major broadcast trade association, NAB, is scrupulous in its compliance. Since MSTV is a well funded organization staffed by FCC veterans and represented by prominent law firms, this pattern of repeated apparent violations is puzzling.

If your office is not interested in the explicit §1.1216 sanctions for this type of matter may I suggest the following measures if you agree that there have been repeated violations here:

- a warning letter to MSTV and outside counsel involved in such filings,
- a consent agreement with them on future compliance, and
- quarterly public reporting of all their *ex parte* contact for the next 2 years with FCC including the dates of the meeting, the dates of filing, and the URL of the filed notices so your office and the public can readily confirm ongoing compliance.

Sincerely,

A handwritten signature in black ink, appearing to read "Michael J. Marcus", followed by a long horizontal line extending to the right.

Michael J. Marcus, Sc.D., F-IEEE
Director