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September 14, 2010

BY ELECTRONIC FILING

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, NW
Washington, DC 20554

Re: Notice of Ex Parte Communication
ET Docket Nos. 04-186 and 02-380

Dear Ms. Dortch:

On Monday, September 13, 2010, Mr. David Donovan, for the Association for Maximum Service Television, Inc. (MSTV); Ms. Jane Mago for the National Association of Broadcasters (NAB); and Mr. Jonathan Blake on behalf of both organizations, met with Mr. Austin Schlick, General Counsel for the Commission; Mr. David Horowitz, from the Office of General Counsel (OGC); Ms. Geraldine Matisse, Chief of the Policy & Rules Division of the Office of Engineering and Technology (OET); and Mr. Steven Speath, of the International Bureau, to discuss white spaces issues in the above two proceedings, both of which are subject to petitions for reconsideration. Those petitions are currently scheduled for resolution by the Commission at its September 23 open meeting.

MSTV and NAB presented the follow points:

Ms. Marlene H. Dortch

September 14, 2010

Page 2

1. The white spaces rules (to be decided by the full Commission on September 23) and the requirements concerning the geolocation/database functions (to be decided by OET some time in the future) are integrally related and of similar importance. If the Commission eliminates the spectrum sensing requirement (as some commenters have urged and MSTV and NAB have opposed, as has the U.S. Army),¹ the geolocation/database functions become even more important because both the white spaces rules and the operational requirements need to incorporate compensating adjustments to make up for the loss of the interference protections that sensing provided. The new white spaces rules should not go into effect while the other key part of the regulatory framework (the geolocation/database requirements) is still undefined. Significant uncertainty will exist over how the white spaces rules, when taken together with OET's yet-to-be determined operational requirements for the geolocation/database functions, will adequately protect the public from interference to television broadcast and newsgathering operations.

¹ See September 13 letter in this proceeding from the U.S. Army ("We urge that the Commission adhere to its decision that spectrum sensing is a necessary component of the regulations and a valuable adjunct to the geolocation/database requirement. The two together are essential in achieving the Commission's stated goal of avoiding harmful interference to the licensed incumbent services operating in these bands.").

2. It may be argued that, because white spaces devices cannot begin to operate until a geolocation/database system is in place, there is no harm in allowing the new white spaces rules to become effective immediately. But the same fact makes clear that there would be no practical harm in linking the effective date of the new rules to final adoption of the requirements for the geolocation/database functions. In addition, there are important positive reasons for the Commission to link the effective date of the white spaces rules to finalization of the operational requirements for the geolocation/database functions. Because the two regulatory regimes are so closely entwined, the Commission should reserve for itself the flexibility to adjust its white spaces rules if issues emerge from the process of OET's adopting requirements for the geolocation/database operations that call for such adjustments. It will be important to ensure that the rules mesh to provide adequate interference protection.

3. In yesterday's meeting, MSTV and NAB cited several examples of issues before OET that are not mere implementation, administrative or housekeeping issues. A powerful example (not mentioned yesterday) is how OET will handle the provisions that it is apparently considering to establish venues for use by wireless microphones, so that stations' and networks' newsgathering

will not be compromised by the operations of unlicensed devices within those venues.²

4. These are issues of paramount public policy and consumer importance. They are not merely administrative details to be decided at some time in the future. It should also be clear that the public must have an opportunity to comment. Moreover, considerable harm could occur if these provisions reach the Commission only after OET has adopted these requirements and they have gone into effect. Indeed, the comments filed in response to the FCC's Public Notice for selecting a database administrator were submitted at a time when the FCC was requiring both sensing and geolocation. At a minimum this record must be refreshed to reflect the FCC's current approach, which is substantially different.
5. For reasons of good government and for legal reasons (to avoid the risk that its decision-making will be adjudged to have been arbitrary and capricious and to have violated the notice and comment requirements of the

² Other issues with a significant impact on underlying policy objectives and incumbents' interference rights include how (and how quickly) data will be synchronized if there are multiple databases; how and by what methods (*e.g.*, interfaces, protocols) TV band devices will communicate with the database (and do so properly); and the security methods used to ensure that unauthorized parties cannot access or alter the database or otherwise corrupt the operation of the database system in performing its intended functions.

Ms. Marlene H. Dortch
September 14, 2010
Page 5

Administrative Procedure Act), the Commission should not implement its new white spaces rules until: (a) OET has disclosed the details concerning the requirements for the database/geolocation functions; (b) the public has had an opportunity to comment on these requirements;³ and (c) the Commission has reviewed the proposed OET requirements and public comments on them and has approved them and has considered whether any appropriate changes should be made to its white spaces rules.

6. A meaningful opportunity for public review and comment on the database/geolocation requirements will serve the interests of an open administrative process and will help refine the geolocation/database requirements before they take effect. And Commission review of the geolocation/database requirements in advance of the effective date of the white spaces rules is desirable so that the Commission may determine whether to make adjustments to certain aspects of its white spaces rules in light of the geolocation/database requirements.

³ MSTV and NAB pointed out that opportunity for public comment need not be a full rulemaking process, citing the FCC's putting out the digital TV standard and the digital television table of allocations as examples of more expedited procedures for inviting to invite public comment.

COVINGTON & BURLING LLP

Ms. Marlene H. Dortch
September 14, 2010
Page 6

Please call the undersigned or Jonathan Blake if there are questions about the above summary or if additional information is desired.

Respectfully submitted,



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