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December 27, 2010

## **BY ELECTRONIC FILING**

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

**Re: Written Ex Parte Communication  
ET Docket Nos. 04-186 and 02-380; GN Docket No. 09-51**

Dear Ms. Dortch:

The Association for Maximum Service Television, Inc. (“MSTV”) and the National Association of Broadcasters (“NAB”) file this letter in response to the letter filed on December 14, 2010 in the above-referenced dockets requesting that the Commission “on its own motion” reconsider several requirements adopted in the *Second Memorandum Opinion and Order* in the white spaces proceeding.<sup>1</sup> The Letter seeks to make an end-run on the requirements of the rule concerning petitions for reconsideration, and it should not be granted.

Section 1.108 of the Commission’s rules provides that the Commission “may, on its own motion, set aside any action made or taken by it within 30 days from the date of public notice of such action.”<sup>2</sup> The rule provides for Commission action *sue sponte*. As the Commission has recognized, “[t]hat rule does not provide for the submission of pleadings.”<sup>3</sup> The

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<sup>1</sup> See Letter to Julius Knapp, Chief, Office of Engineering and Technology, FCC, from the Wireless Internet Service Providers Association; Motorola, Inc.; Spectrum Bridge, Inc.; Comsearch; Carlson Wireless Technologies, Inc.; and the Federation of Internet Solution Providers of the Americas (December 14, 2010) (the “Letter”).

<sup>2</sup> 47 C.F.R. § 1.108.

<sup>3</sup> *Applications of GTE Satellite Corp. for Authorization to Modify Construction Permits for Three Domestic Satellite Earth Stations*, Memorandum Opinion and Order, 50 FCC 2d 778, para. 4 (1975) (dismissing request for reconsideration pursuant to § 1.108).

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appropriate means for submitting a request for reconsideration of a rulemaking proceeding is through a petition for reconsideration submitted pursuant to § 1.429.

The Letter is an attempt to evade the requirements of § 1.429. It notes that, if the Commission were to grant the rule changes sought in the Letter, “it would save us time and expense in preparing and filing petitions for reconsideration.”<sup>4</sup> While that may be true, it also would be improper and unfair to other parties interested in this proceeding. Section 1.429, the appropriate avenue for seeking the changes sought in the Letter, protects important interests. It provides that, when a petition “is timely filed in proper form,” the Commission will place a public notice of its filing in the Federal Register and provide the public with an opportunity to file oppositions and replies.<sup>5</sup>

Action by the Commission on the Letter by January 5, as requested in the Letter, would deprive the public of its right to notice and comment on the rule changes sought on the Letter. Those changes are significant. And, although the Letter claims that its proposal “is not controversial,”<sup>6</sup> there is simply no way to know whether the proposal is controversial—or in the public interest—until interested parties have had an opportunity for notice and comment. Permitting evasion of § 1.429 in order to save parties “time and expense” also would set a dangerous precedent. Considerations of time and expense apply in virtually every FCC proceeding. Section 1.429 would be undermined completely if the Letter’s appeal to saving “time and expense” prevails here.

Moreover, it is not clear that the Commission may make substantive amendments to previously adopted rules under § 1.108, at least without providing notice and comment. Section 1.108 has been read to apply to “setting aside” (voiding) prior action, but not modifying it substantively.<sup>7</sup> The Commission has proposed revising § 1.108 to provide that “[w]hen acting on its own motion under this section, the Commission may take any action it could take in acting

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<sup>4</sup> Letter at 5.

<sup>5</sup> 47 C.F.R. § 1.429(e)-(f). Petitions for reconsideration are subject to other requirements as well. For example, in cases where a petition “relies on facts which have not previously been presented to the Commission,” the Commission will consider granting it only in certain limited circumstances.

<sup>6</sup> Letter at 5.

<sup>7</sup> See *Sprint Corp. v. FCC*, 315 F.3d 369, 375 (D.C. Cir. 2003) (substantive modification of rule not within scope of § 1.108); *Virgin Islands Telephone Corp. v. FCC*, 444 F.3d 666, 671-2 (D.C. Cir. 2006) (noting that “‘Set aside’ usually means ‘vacate’” and citing definitions of “set aside” as “to annul or vacate” and “vacating; no other meaning is apparent.”).

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on a petition for reconsideration....”<sup>8</sup> To date, it has not adopted this rule amendment. Nor would such a provision exempt Commission action from the requirements of the Administrative Procedure Act.<sup>9</sup>

MSTV and NAB therefore respectfully request that the Commission either treat the Letter as a petition for reconsideration (subject to all of the requirements in § 1.429, including but not limited to notice and comment), or require the Letter’s signatories to file a petition or petitions for reconsideration by January 5, 2011.

MSTV and NAB have advocated throughout this proceeding to protect the interests of broadcasters and the interests of the public, which relies on the critical services that broadcasters provide. The changes sought in the Letter, such as replacing references to antenna height above ground level with references to antenna height above average terrain, and replacing the table in § 15.715(a) with a table based on distance separation criteria, are significant. The Letter states that “fixed wireless broadband service would be enabled in large areas of the country that are precluded from receiving service under the current rules” if the proposed rule changes are implemented.<sup>10</sup> It also argues that the proposal “strikes a better balance between the interests of fixed wireless operators and those of TV broadcasters.”<sup>11</sup> Any changes to the white spaces rules that would expand unlicensed white space operations at the expense of the public’s broadcasting service would not be in the public interest and should not be implemented.

MSTV and NAB reserve the right to respond in more detail to the substantive elements of the Letter.

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<sup>8</sup> *Amendment of Certain of the Commission’s Part 1 Rules of Practice and Procedure and Part 0 Rules of Commission Organization*, Notice of Proposed Rulemaking, GC Docket No. 10-44, 25 FCC Rcd 2430, 2445 (rel. February 22, 2010).

<sup>9</sup> *See Consumer Energy Counsel of America, et al., v. FERC*, 673 F.2d 425, 434 (D.C. Cir. 1982) (“The Commission is free, however, on its own motion *and pursuant to the notice and comment requirements of the Administrative Procedure Act* (“APA”), to consider amending the Phase II rule or changing its effective date”) (emphasis added); *Sprint Corp.*, 315 F.3d at 374-377.

<sup>10</sup> Letter at 3.

<sup>11</sup> *Id.* at 5.

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Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Jennifer A. Johnson", is written over a horizontal line.

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