

Broadcast Maximization Committee

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August 5, 2009

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

Re: **EMERGENCY REQUEST FOR FILING FREEZE**
Commencement of Rural, First-Come, First-Served,
Digital Licensing for Low Power Television and Television
Translators Beginning August 25, 2009

Dear Ms. Dortch:

The Broadcast Maximization Committee (“BMC”),¹ requests that the Commission announce immediately that during the upcoming filing period for digital low power television and television translators, announced by Public Notice of June 29, 2009 (DA 09-1487), no applications specifying Channels 5 or 6 will be accepted. These channels have been proposed for FM broadcasting in the Diversity proceeding.² In addition, it is unfair to noncommercial educational stations (“NCE”) that this spectrum is being made available for application for new television services based on the removal of analog Channel 6 full service television stations while NCE stations must continue to protect these former analog Channel 6 stations which no longer exist.

In the Diversity proceeding, BMC has filed comments and a Request for Filing Freeze on the use of Channels 5 and 6 for the digital full service television, low power television and television translator services. The purpose of this Request was to allow the Commission to consider the comprehensive plan submitted by BMC and similar plans by other commenters for the use of Channels 5 and 6 for FM broadcasting. BMC’s plan included:

¹ BMC consists of consulting engineers and other representatives of the broadcast industry and has participated in several proceedings currently before the Commission.

² *In the Matter of Promoting Diversification of Ownership in the Broadcasting Services* (MB Docket No 07-294), *Report and Order and Third Further Notice of Proposed Rule Making*, 23 FCC Rcd 5922 (2008).

- 1) allocating space for the low power FM (“LPFM”) service;
- 2) expanding the NCE service into a portion of this band; and
- 3) reallocating all AM stations to the remaining available space in this spectrum with digital transmissions only.

As BMC demonstrated, the benefits flowing from these proposals are enormous for LPFM, NCE and AM stations. In addition, the proposals will greatly enhance the Commission’s localism, diversity and digital radio initiatives as well as having environmental benefits.

On September 30, 2008, the FCC issued a Public Notice (DA 08-2150) in Auction 85 warning applicants that “in MB Docket 07-294, the Commission sought comment on a proposal by Mullaney Engineering, Inc., to reallocate TV Channels 5 and 6 for FM broadcasting. In that proceeding, the Broadcast Maximization Committee (BMC) filed a request to adopt a freeze on the filing of applications and rule making petitions to utilize television Channels 5 and 6 pending the outcome of the proceeding. BMC has also filed a request to remove MX Group 283 from Auction 85, arguing that such action is necessary to ensure that channels 5 and 6 remain available for future FM use as proposed in MB Docket 07-294. These matters are pending before the Commission. Participants should continue such research throughout the auction.”³

In view of the fact that the FCC has previously warned applicants that the use of Channels 5 and 6 may be affected by action eventually taken in MB Docket 07-294 (the Diversity proceeding), at the very least, the FCC should have included the same announcement in the June 29, 2009 Public Notice. Indeed, unlike Auction 85 where only one MX group was affected, this filing opportunity has the potential to impact many applicants. As a result of the digital transition, the spectrum for Channel 6 is widely available across the country. While it has become clear to many broadcasters that this channel (as well as all VHF channels) is not as well suited for digital operation as the UHF band, nevertheless, it is expected that many applicants will be submitting applications for this channel in the hope that they can operate the audio in an analog mode for some period of time. While beyond the immediate scope of this emergency freeze request, the Commission should rule on the legality of operating audio on Channel 6 in an analog mode when an authorization is issued to operate in a digital format. By ruling on this matter, many applicants will be in a better position to decide whether to specify Channel 6 in their application.⁴

A freeze is also necessary as a matter of fairness to NCE stations. The Media Bureau’s current policy is reflected in the Public Notice released April 1, 2009, DA

³ At paragraph 14.

⁴ In that regard, the Commission should take into account the inefficient use of 200 kHz of spectrum space for the audio when 6 MHz of Channel 6 bandwidth is requested. By reallocating Channel 6 (and 5) for FM broadcasting, many of these applicants, primarily interested in audio operations, can be accommodated within the spectrum that will be made available.

09-744, "Media Bureau Provides Guidance to NCE FM Stations Regarding Television Channel 6 Protection Requirements". That notice requires NCE FM stations to continue to protect the former analog Channel 6 stations until further notice. However LPTV and TV translator applicants are not required to protect these stations and are free to file in this upcoming filing period without considering the former analog Channel 6 stations. There does not seem to be any justification for this disparate treatment. The result is to put the future of the NCE FM band at substantial risk if numerous Channel 6 applications are filed as anticipated. The Media Bureau's policy requires all NCE stations protect Class A and LPTV stations that originate programming.⁵ This policy applies to new stations and existing stations filing for a site change or facility modification of any kind.

The April 1, 2009 Public Notice also announced that the Commission will initiate a separate proceeding to evaluate the existing NCE FM Channel 6 TV protection requirements, and seek public input on their continued viability, following the completion of the DTV transition. It is likely that new digital television stations on Channel 6 could cause interference to existing FM stations. The digital television emission mask specified in §73.622(h)(1) provides for emissions within 500 kHz of the TV channel band's edge to be only 47 dB reduced from the average transmitted power within the TV channel. This emission could easily impact nearby existing FM stations operating on Channels 201, 202, or 203 (88.1, 88.3, 88.5 MHz). The Commission evidently agrees that some interference could occur, "particularly where the FM station operates significantly below 3 kW."⁶ The Commission has not released any criteria for protection of existing FM stations by DTV operations on Channel 6, only stating that such proposals would be considered on a case-by-case basis and should contain an engineering study showing protection to FM stations. Absent a specific procedure for evaluating the potential for interference, such a "case-by-case" process will undoubtedly lead to disputes between FM and DTV stations as to whether interference might occur.

The potential impact associated with this disparate treatment is that (1) many NCE stations who have been required to maintain vertical only polarization for years, due to Channel 6 protection requirements, may find themselves unable to implement planned changes to convert to circular polarization; (2) NCE stations who may be planning to file for a facility change may be precluded from doing so due to the need to protect new Channel 6 LPTV facilities from the date that they are filed; and (3) interference from new Channel 6 LPTV stations to existing NCE service may occur as these stations configure their aural facilities in non-traditional ways not specifically

⁵ See Section 73.525 of the Commission's Rules; *Southern Nevada Educational Broadcasters*, Letter of January 13, 2009 (BPED-20081110AAD).

⁶ *Memorandum Opinion and Order on Reconsideration of the Sixth Report and Order, "Advanced Television Systems and Their Impact on the Existing Television Broadcast Service"* MM Docket 87-268, 13 FCC Rcd 7418, 7437 (1998).

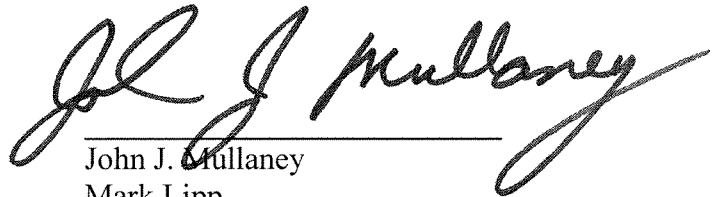
prohibited by the Commission's Rules. Unlike Auction 85 where a warning to applicants was deemed sufficient, a freeze is required in this instance because the filing of an application on Channel 6 could forever preclude a future filing by a NCE station. Only a freeze will level the playing field between similarly situated parties. Until standards are established for NCE stations to protect LPTV stations, it appears that the NCE stations will not get a chance to file. As a result, it could be argued that the NCE stations' Ashbacker⁷ rights of procedural due process are violated.

BMC has offered a comprehensive plan for the use of Channels 5 and 6 which will provide enormous benefits to NCE, LPFM and AM stations and applicants. This opportunity may be the only means to save the AM stations in a digital only world. The FCC has offered a once in a generation opportunity to use a clean slate to solicit ideas for these channels and there are other worthy proposals that have been submitted as well. BMC believes it would be short sighted if the Commission compromised this opportunity by accepting LPTV and television translators applicants for these channels.

Accordingly, BMC respectfully requests that the Commission impose a freeze on the filing of Channel 5 and 6 applications in the upcoming digital LPTV and television translator filing period commencing August 25, 2009 until the Commission considers the use of these channels for FM broadcasting.

Respectfully submitted,

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⁷ Ashbacker Radio Corporation, 326 US 327 (1945).