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VIA ELECTRONIC FILING

October 29, 2008

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

Re: Written Ex Parte Presentation; ET Dkt Nos. 04-186 and 02-380

Dear Ms. Dortch:

The Association for Maximum Service Television, Inc. (“MSTV”)¹ in Attachment A summarizes its understanding of the chronology surrounding the peer review and public release of the 400-page report released by the Office of Engineering and Technology (OET) (the “OET Phase II Report”).

The attached chronology raises serious questions regarding the process of evaluating the OET Phase II Report, which will underpin the rules adopted in this proceeding.² These questions are especially troubling given the FCC’s decision not to place the OET Phase II Report out for public comment and to place this on the FCC’s meeting agenda for November 4th.

Traditional FCC practice requires that when technical documents are published, the peer review analysis as well as the accompanying response by OET to that analysis be placed in the record. This procedure was followed when the OET Phase I Report FCC was published on July 31, 2007.

¹ MSTV is a nonprofit trade association of local broadcast television stations committed to achieving and maintaining the highest technical quality for the local broadcast system.

² *Evaluation of the Performance of Prototype TV-Band White Spaces Devices: Phase II*, FCC/OET 08-TR-1005 (rel. Oct. 15, 2008) (“OET Phase II Report”).

This procedure was not followed in the most recent OET Phase II Report. Based on the information just released on October 28, 2008, by OET, in response to questions from Chairman Dingell, the record now shows:

- **September 11, 2008:** The Office of Engineering and Technology requests peer review from the Wireless Bureau and the Enforcement Bureau. The letter requesting review states: “*We plan to publish the report and invite public comment in the same manner as the Phase I Report.*”³
- **October 1, 2008:** The report is apparently prepared, but not yet published. (It is not published for nearly a month, until October 28, 2008.) That version of the report is put out within the Commission for peer review, but it is not known whether that version contains the core conclusion in the first paragraph of the OET Phase II Report, i.e., that the burden of the “proof of concept” has been met.
- **October 15, 2008:** Chairman Martin announces key components of the proposed decision to the press and states that the proposed decision will be placed on the November 4, 2008, open meeting agenda. The proposed decision is circulated to Commissioners. Simultaneously, the OET Phase II Report is released but no public comment is solicited. The peer review report is not published and, as of the date of release of the OET Phase II Report, there is no OET response to the peer review report.
- **October 28, 2008:** The peer review is published and placed in the FCC record. OET prepares its response to the peer review analysis.⁴ In contrast, the peer review for the OET Phase I Report was published at the same time as the OET Phase I report itself.

These procedural problems give rise to several important questions. Was the draft of the Phase II Report that was the subject of the peer review on October 1, 2008, the same Phase II Report that was released to the public on October 15, 2008? Specifically, were there any changes made, especially in the conclusions contained in the Report? If such changes were made, the peer review could not have addressed the conclusions on which the proposed rule is apparently based.

The peer review conclusions summarized in the response to Chairman Dingell addressed the quality of the testing. They did not address the quality of the conclusions or whether the conclusions were supported by or consistent with the test findings. They also did not address data from the testing that may have been omitted from the report,

³ Memorandum from Julius Knapp Chief Office of Engineering and Technology, to Jim Schlichting and George Dillon, Phase II Study, at 1, September 11, 2008.

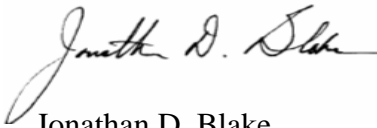
⁴ Julius Knapp, Chief Office of Engineering and Technology, Peer Review of Prototype TV White Space Device Phase II Study, October 28, 2008.

some of which we have documented previously.⁵ And they did not address whether the data from the testing, those in the Phase II Report and those not included in the Phase II Report, support the proposed new rules, which have not been disclosed to the public.

* * * * *

Given the importance of this issue to millions of Americans, we hope that the FCC will not compromise its prior policy of conducting an open proceeding. The chronology shows that traditional peer review procedures were not fully complied with and that OET's original intention to seek public comment on the Phase II Report was abandoned. In addition, it is not clear whether the conclusions contained in the Phase II Report published on October 15, 2008, were contained in the Phase II Report analyzed in accordance with the required peer review between September 11 and October 1, 2008. Accordingly, MSTV and NAB's Emergency Request should be granted.⁶

Sincerely,



Jonathan D. Blake

⁵ See, e.g., Letter from Jonathan D. Blake, Covington & Burling LLP to Marlene H. Dortch, FCC, at 2, October 28, 2008 (attaching a copy of test data of Motorola geolocation-equipped device, which was omitted from OET Phase II Report).

⁶ See Emergency Request, ET Dkt Nos. 04-186 and 02-380 (Oct. 17, 2008).

Attachment A

Chronology of FCC Process Shows Serious Defects for FCC White Spaces Interference Assessments

Date	Action
October 5, 2007	FCC issues report announcing plan for laboratory and field testing of “prototype” devices. Prior to this announcement, FCC had conducted “Phase I” analyses that were published, peer reviewed, and subjected to full public comment.
January 17, 2008	FCC releases initial test plan
July 10, 2008	FCC announces four-week testing schedule. Laboratory and field tests follow
September 11, 2008	Observing that “[u]nder the Information Improvement Act, OMB requires that influential scientific assessments be subject to peer review to enhance the quality and credibility of the government’s scientific information,” FCC requests internal peer review. <u>FCC tells peer reviewers, incorrectly:</u> “ <u>We plan to publish the report and invite public comment</u> in the same manner as the Phase I Report. The information we glean from the tests <u>and comments</u> will be used along with other information in the record of the TV white spaces in making final decisions in this matter.”
October 1, 2008	Peer review panel completes its review of the report on testing, which is 400 pages and described by FCC as “voluminous and complex,” after 20 days
October 15, 2008	Chairman Martin sets Nov. 4 for Commission to adopt white spaces rules, <u>announces that FCC will side with white space proponents on proposed technical parameters</u> FCC releases report on testing — <u>does not seek or allow time for public comment, contrary to its assertions to the peer reviewers</u>
October 24, 2008	House Commerce Chairman Dingell send letter to FCC Chairman Martin asking about peer review process; seeks “accountability”
October 28, 2008	FCC Chairman Martin responds to Chairman Dingell’s inquiry; FCC releases the Oct. 1, 2008 peer review report and responds to report
November 4, 2008	FCC intends to adopt rules for white spaces devices <u>without the benefit of public comment on tests, contrary to its assertions to peer reviewers</u>