

COVINGTON & BURLING

1201 PENNSYLVANIA AVENUE NW
WASHINGTON, DC 20004-2401
TEL 202.662.6000
FAX 202.662.6291
WWW.COV.COM

WASHINGTON
NEW YORK
SAN FRANCISCO
LONDON
BRUSSELS

July 21, 2004

FILED ELECTRONICALLY

Chairman Michael Powell
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: **Ex Parte Communication in MB Docket No. 03-15**

Dear Chairman Powell:

Arizona State Board of Regents for Arizona State University, licensee of noncommercial educational station KAET(TV), Phoenix, Arizona (16th DMA); Draper Communications, Inc., owner of commercial station WBOC-TV, Salisbury Maryland (153rd DMA); and Raycom Media, Inc., which owns or provides services to 39 commercial stations in markets ranging from Cleveland, Ohio (17th DMA), to Ottumwa, Iowa-Kirkville, Missouri (198th DMA), write to express their concern with the accelerated “use it or lose it” proposal with respect to DTV replication and maximization at issue in the above-captioned proceeding. This proposal as we understand it would force broadcasters to build out maximized facilities by a date certain or permanently disenfranchise present and prospective viewers, and lose interference protection in areas not covered by their already built-out facilities, even if they plan to move their digital operations to their analog or third channels at the end of the transition and prefer not to waste valuable resources on facilities for their digital channels that will be stranded after the transition.

Adopting a “use it or lose it” policy would harm viewers and run counter to the purposes and goals of the digital transition. One of the great promises of digital technology is its ability to allow broadcasters to expand their service areas to reach more viewers without causing harmful interference to other stations. However, when broadcasters’ service areas are permanently compromised because they cannot maximize their digital facilities by the “use it or lose it” deadline and as a result lose interference protection in areas not covered by their already built-out facilities, it is the viewers in those unserved areas—some who receive the station’s over-the-air analog signal but not its current over-the-air digital signal and others who do not receive the station’s over-the-air analog signal but would be able to receive its maximized over-the-air digital signal—who would permanently be denied over-

the-air digital service. The “use it or lose it” proposal thus has the potential to disenfranchise countless numbers of present and prospective over-the-air viewers.

Adopting a “use it or lose it” policy would also unnecessarily penalize broadcasters without advancing or otherwise benefiting the digital transition. The core problem is that the proposal would result in wasted investment by requiring stations to build out maximized facilities on their assigned digital channels, even when they plan to move their digital operations at the end of the transition, or lose the opportunity to maximize after the transition. The transition already imposes significant and often burdensome costs on stations, such as the equipment costs associated with building out digital facilities and the costs of operating both analog and digital signals during the transition. Requiring stations to build maximized or replicated facilities on what will, for stations with out-of-core digital allotments (and may for many other stations), be temporary digital channels, unnecessarily increases the costs associated with the transition, diverting limited resources that could be used to acquire DTV programming, provide multicast streams and build top quality final DTV facilities. This burden would fall particularly heavily on those stations that can least afford it, such as smaller independent and noncommercial stations even in large markets, as well as stations in small markets, by forcing them to bear unnecessary expenses in connection with the transition or forever deprive their viewers of digital service in the future.

Furthermore, this proposal is not justified by a need to drive the DTV transition and ensure digital service. It is well documented that the vast majority of stations are already covering their replicated service areas.¹ Moreover, because the Commission’s DTV tuner rules are just now going into effect, there are currently relatively few off-air DTV receivers in stations’ maximized service areas. Finally, while important to final service areas, maximization involves sending a signal beyond the “radio horizon” for UHF to reach areas beyond the core community of license. It still requires significant investment for extra cabinets for transmission and changing tower location or antenna location on the tower just to reach a few extra miles.

Forcing broadcasters to transmit digital signals at higher power levels would also unnecessarily exacerbate real-world interference between analog and digital services during the transition, causing loss of service and consumer resistance to DTV. And “use it or lose it” would undermine an orderly repacking process, as stations that intend to return to their NTSC channel after the transition may be forced to remain on their temporary DTV channels due to short-term capital requirements. Moreover, stations will be electing their final digital channels based on the power levels of surrounding stations. Changes to these levels midway through the channel election process as a result of a “use it or lose it” policy would affect the elections of surrounding stations, resulting in a need to recalculate the entire database.

¹ *MSTV/BIA*, *Reaching the Audience: An Analysis of Digital Broadcast Power and Coverage* (Oct. 2003).

July 21, 2004

Page 3

There are thus, quite simply, no public policy reasons for forcing stations to build and operate maximized facilities during the channel election and repacking process. For these reasons, we urge the Commission not to impede broadcasters' transition to digital by adopting a "use it or lose it" requirement in this proceeding.

Respectfully submitted,



Jonathan D. Blake
Amy L. Levine
*Counsel to Arizona State
Board of Regents for Arizona
State University; Draper
Communications, Inc. and
Raycom Media, Inc.*

cc: Commissioner Kathleen Abernathy
Commissioner Michael Copps
Commissioner Kevin Martin
Commissioner Jonathan Adelstein
Mr. Jon Cody
Ms. Stacy Fuller
Mr. Jordan Goldstein
Ms. Catherine Bohigian
Ms. Johanna Shelton
Mr. Ken Ferree
Mr. Rick Chessen
Ms. Eloise Gore
Ms. Marlene Dortch