ORIGINAL

Before the
Federal Communications Commission
Washington, D.C. 20554

ACCEPTED/FILED

OCT 17 2013

Federal Communications Commission
Office of the Secretary

In re Application of	)	
	)	
Hoak Media of Panama City License, LLC	)	
	)	File No. BRCDT-20120927AKV
For License Renewal of	)	
WMBB(Facility ID No. 66398),	)	
Panama City, Florida,	)	

To: Secretary, Federal Communications Commission
Attn: Chief, Video Division, Media Bureau

OPPOSITION TO INFORMAL OBJECTION

Pursuant to the rules of the Federal Communications Commission ("FCC" or "Commission"),[1] Hoak Media of Panama City License, LLC ("Hoak"), licensee of WMBB(DT), Panama City, Florida ("WMBB"), by its attorneys, hereby submits its opposition ("Opposition") to the informal objection ("Objection") filed by Bright House Networks, LLC ("BHN"), an affiliate of Time Warner, Inc. ("Time Warner") in the above-referenced proceeding.[2] In the

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[1] *See* 47 C.F.R. §73.3587. Although the time for filing pleadings provided for in Section 1.45 of the FCC's rules is not applicable to oppositions to informal objections, *id.*, the instant opposition is being filed at the earliest possible date after the FCC resumed normal operations following the shutdown of the federal government.

[2] *See* Informal Objection of Bright House Networks, LLC (filed September 24, 2013) ("Objection"). BHN contends that it has standing to challenge the Application as a "viewer" of WMBB. This claim must be rejected because BHN is not an individual residing in WMBB's viewing area, but rather is an entity seeking to advance its business interests in retransmission consent negotiations with Hoak. *See Standing Order*, 82 F.C.C.2d at 98 (1980) ("Any *individual* may qualify as a party in interest if he alleges that he is a listener or viewer of the station in question or that he resides within the station's service area.") (emphasis added). Indeed, BHN has not demonstrated how it meets any of the criteria for an entity to establish standing in a

Objection, BHN presents no valid arguments in opposition to the application to renew the station license for WMBB ("Application"), and has failed to demonstrate that the Bureau should not grant the Application pursuant to Section 309(k) of the Communications Act of 1934, as amended ("Act").[3] Rather, the Objection is fundamentally based on BHN's disagreement in private retransmission consent negotiations regarding the value of WMBB's signal and BHN's desire that Hoak make the WMBB signal available to BHN on terms unacceptable to Hoak. As an initial matter, the Objection must be rejected because the instant license renewal proceeding is not the appropriate forum to litigate BHN's retransmission consent dispute over rates. Moreover and importantly, as demonstrated herein, the Objection is based on inaccurate factual claims that fail to present a substantial and material question of fact regarding whether WMBB has served the public interest. Accordingly, the Bureau should promptly dismiss or deny the Objection as a veiled effort by BHN to use the FCC's processes to advance its private business interests.

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license renewal proceeding, nor has it demonstrated that it will suffer any direct injury if the Application is granted. *See, e.g.*, UCC v. FCC, 359 F.2d 994 (D.C. Cir. 1965); Applications of Lester and Alice Garrison, 6 F.C.C.2d 270 ¶ 6 (1967). Indeed, grant of the Application will not result in any injury to BHN because such grant will not have any impact on the retransmission consent rates negotiated between BHN and Hoak – a matter over which the FCC has no ability under the Act to intervene. *See infra* at p. 5. Although Hoak recognizes that a party is not required to establish standing to file an informal objection, it is nevertheless inappropriate for BHN to wait to file the Objection until nearly one year *after* the Application was initially filed and over nine months after the deadline for petitions to deny has passed. In these circumstances, it is clear that BHN is attempting to use the Commission's license renewal process to leverage its own private interests in retransmission consent negotiations with Hoak.

[3] *See* 47 U.S.C. §309(k)(1) (providing that a renewal application must be granted if the Commission finds that (1) a station has served the public interest, convenience, and necessity; (2) there have been no serious violations of the Act or the FCC's rules; and (3) there have been no other violations which, taken together, constitute a pattern of abuse).

I. THE INSTANT LICENSE RENEWAL PROCEEDING IS NOT THE PROPER FORUM TO LITIGATE RETRANSMISSION CONSENT MATTERS

The Bureau should promptly dismiss or deny the Objection because it is an improper attempt by BHN to use the license renewal process to leverage its position in private retransmission consent negotiations with Hoak. Although BHN purports to raise concerns regarding the public interest, nowhere in the Objection does BHN provide any evidence that WMBB has failed to serve its viewers since WMBB was acquired by Hoak. Rather, the Objection is fundamentally based upon a private business matter, namely, a disagreement between Hoak and BHN over the value of the WMBB signal. As a result of the parties' disagreement over the appropriate rates for retransmission consent, Hoak has exercised its statutory right to not provide BHN with its consent for BHN to retransmit the signal of WMBB until such time as the parties reach agreement on the terms for such carriage. Indeed, until a retransmission consent agreement is reached between the parties, BHN does not have legal authority under the Communications Act to carry WMBB.[4] Although BHN characterizes the removal of the WMBB signal from its systems as contrary to the public interest, Hoak's request that BHN cease carriage of WMBB is, in fact, consistent with the Communications Act and the long-standing retransmission consent regime, which contemplates that broadcasters and cable

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[4] *See* 47 U.S.C. 325(b)(1)(A) ("No cable system . . . shall retransmit the signal of a broadcasting station, or any part thereof, except—(A) with the express authority of the originating station . . ."). The Commission does not have authority to require a broadcaster, such as Hoak, to permit its signal to be carried without consent. *See* Implementation of Satellite Home Viewer Improvement Act of 1999, Retransmission Consent Issues: Good Faith Negotiation and Exclusivity, First Report and Order, 15 FCC Rcd 5445, 5481 (2000) ("Good Faith Order") ("upon expiration of an MVPD's carriage rights under . . . an existing retransmission consent agreement, an MVPD may not continue carriage of a broadcaster's signal").

operators may not reach carriage agreements in all cases.[5] The Commission's renewal application review process is not the appropriate forum for adjudication of claims arising out of private retransmission consent negotiations, particularly where there is a specific FCC process to address such claims, as is the case here.[6] BHN should not be permitted to use the FCC's processes to attempt to force Hoak to accept business terms unacceptable to Hoak.[7]

Moreover, and importantly, the Bureau should summarily dismiss or deny the Objection as yet another attempt by Time Warner (this time through its affiliate, BHN) to convert an

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[5] *See* Good Faith Order, 15 FCC Rcd at 5462-63 ("Provided that the parties negotiate in good faith in accordance with the Commission's standards, failure to reach agreement does not violate Section 325(b)(3)(C)."). Indeed, a broadcaster's decision to withhold consent for the retransmission of its station's signal is fully consistent with a station's public interest obligations given that Congress fully intended for broadcasters to control the use of their signals by authorizing broadcasters to seek compensation from cable operators and other MVPDs for carriage of their signals. *See* 47 U.S.C. § 325(c). Moreover, contrary to BHN's allegations, it is clear that, notwithstanding its business dispute with BHN, Hoak is concerned with its viewers because, on October 4, 2013, Hoak provided its consent for BHN to retransmit WMBB on a temporary basis in order to provide BHN's subscribers with access to WMBB's coverage of Tropical Storm Karen, which was, at the time, expected to make landfall between Pensacola and Panama City on Saturday, October 5. *See* Declaration of Eric Van den Branden, attached at Exhibit A.

[6] *See* 47 C.F.R. §76.7; Good Faith Order, 15 FCC Rcd at 5478 (discussing procedures to file good faith negotiation complaint).

[7] Notably, BHN has made no effort to avail itself of the Commission's long-standing procedures to adjudicate claims that a party has not engaged in good faith retransmission consent negotiations. *See supra* at note 6. Nor has it alleged or attempted to demonstrate in any way that Hoak has failed to negotiate in good faith. Rather, it appears that BHN has instead chosen to raise its specious claims in the context of the instant license renewal proceeding in an apparent attempt to leverage its negotiating position with Hoak. In fact, BHN's failure to respond to WMBB's latest retransmission consent proposal submitted to BHN on September 1 and BHN's decision to file the objection instead of continuing discussions with WMBB suggests lack of good faith by BHN. *See infra* at p. 8.

application process into a rulemaking to modify the retransmission consent regime.[8] Specifically, the Objection takes aim at the retransmission consent rates proposed by Hoak for carriage of WMBB by BHN. However, the Commission lacks jurisdiction to regulate retransmission consent rates.[9] Thus, the Bureau has no authority to penalize Hoak for efforts to negotiate retransmission rates that Time Warner perceives as too high. Such would be the case if the Bureau were to deny or otherwise delay action on the Application. Accordingly, the Bureau should reject the Objection as it represents nothing more than a veiled effort by Time Warner to modify the existing rules and policies governing retransmission consent.[10]

II. THE OBJECTION FAILS TO DEMONSTRATE A SUBSTANTIAL AND MATERIAL QUESTION OF FACT THAT GRANT OF THE APPLICATION WOULD BE PRIMA FACIE INCONSISTENT WITH SECTION 309(K) OF THE ACT

Not only should the Objection be dismissed because it fails to raise issues that are the proper subject of a renewal proceeding, the Bureau should dismiss the Objection because BHN

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[8] *See, e.g.*, In re Acme TV, Inc., 26 FCC Rcd 5189, 5192 (MB 2011) ("Issues of broad applicability, such as the complaints raised by TWC regarding the retransmission consent process, are more suited to a rulemaking than to adjudication"); In re AMCE Television Licenses of Ohio, LLC, 26 FCC Rcd 5198, 5200 (MB 2011) ("despite its claims to the contrary, it is apparent that TWC's real concern is its desire for reformation of the must-carry and retransmission consent process").

[9] *See* S. Rep. No. 102-92, at 3-36 (1991), accompanying S.12, 102nd Cong. (1991) ("It is the Committee's intention to establish a marketplace for the disposition of the rights to retransmit broadcast signals; it is not the Committee's intention in this bill to dictate the outcome of the ensuing marketplace negotiations."); *see also* Good Faith Order, 15 FCC Rcd at 5450 (concluding that "Congress did not intend that the Commission should intrude in the negotiation of retransmission consent."); Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Report and Order, 8 FCC Rcd 2965, 3006 (1993) (finding that Congress did not intend for the Commission to be involved in direct regulation of retransmission consent negotiations).

[10] *See supra* at note 6. *See also*, In re Free State Communications, LLC 26 FCC Rcd 10310, 10312 (MB 2011) (denying petition based on retransmission consent matters "squarely under consideration in the Retransmission Consent Proceeding . . . .").

has failed to demonstrate a substantial and material question of fact concerning whether grant of the Application would be *prima facie* inconsistent with Section 309(k) of the Act. In reviewing an informal objection to a license renewal application, the Bureau considers whether the informal objection sets forth "properly supported allegations of fact that, if true, would establish a substantial and material question of fact" as to whether, *inter alia*, the station has served the public interest, convenience, and necessity.[11] BHN has not met this standard, as a review of the Objection demonstrates that BHN's assertions are of absolutely no merit.

In the Objection, BHN bases its allegations that Hoak has disserved its viewers on two rationales, both of which are factually inaccurate and must be dismissed. First, BHN has provided no evidence to support its claims that viewers residing in DeFuniak Springs, Chipely, Graceville, Blountstown, and Bristol, Florida cannot receive an off-air signal from WMBB.[12] Rather, it simply states – without adequate support – that these viewers are denied access to WMBB if BHN does not carry the station.[13] However, as depicted in the attached coverage map for WMBB, the digital contour of WMBB is, in fact, predicted to cover viewers residing in each of the communities referenced in the Objection, such that these viewers should be able to receive

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[11] *See, e.g.*, In re D & H Media, LLC, 28 FCC Rcd 11190, 11191 (MB 2013). *See also supra*, at note 3 (describing statutory standard for grant of a license renewal application).

[12] Interestingly, BHN's claims regarding off-air reception of WMBB are based on the use of "conventional indoor antennas", notwithstanding that the Commission's standards for reception of digital signals have historically been predicated on use of an outdoor antenna.

[13] The general declaration of Scott Horne does not provide probative and reliable evidence that viewers in these communities cannot receive WMBB via an off-air antenna, particularly since communities are well within the station's digital contour and there is no showing that Scott Horne resides in these communities or has actual personal knowledge of the availability of the WMBB signal off-air in these communities.

off-air service, even if WMBB is not carried by BHN.[14] Moreover, BHN historically has received WMBB's off-air signal at its headends in each of these communities, further demonstrating that WMBB delivers a receivable off-air signal to DeFuniak Springs, Chipely, Graceville, Blountstown, and Bristol, Florida.[15]

Second, BHN claims that Hoak has requested "extraordinary fees" in its retransmission consent negotiations with BHN must be rejected because broadcasters are statutorily permitted to seek compensation for their programming, at a rate that the broadcaster believes to be appropriate, subject only to the procedural requirement that retransmission consent negotiations be conducted in good faith.[16] In the instant case, Hoak has proposed retransmission consent rates that it believes represent the fair market value of WMBB's signal. Indeed, Hoak has reviewed all of its recent retransmission consent agreements with various cable operators in the Panama City, Florida Designated Market Area and determined that the rates proposed by Time Warner on behalf of BHN are, in fact, materially lower than the rates negotiated by Hoak over the past eighteen months.[17] While BHN may not recognize the value in the retransmission of WMBB's

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[14] See Exhibit B (depicting coverage of WMBB). Hoak has received no viewer complaints stating that WMBB cannot be received off-air, even after the date on which BHN ceased carrying the station. *See* Declaration of Terry Cole, attached at Exhibit C.

[15] *See* Declaration of Terry Cole, attached at Exhibit C.

[16] *See,* 47 C.F.R. § 76.65; Good Faith Order, 15 FCC Rcd at 5463-64(finding that the good faith standard "does not, in any way, require a broadcaster to reduce the amount of consideration it desires for carriage of its signal").

[17] *See* Declaration of Eric Van den Branden, attached as Exhibit A. Thus, it is BHN, not Hoak, that is the "outlier" with respect to retransmission consent rates. Contrary to BHN's assertions, the amount of fees previously paid by BHN is not a relevant consideration because the rates proposed by Hoak are consistent with the present market rate for cable carriage of WMBB.

signal, this does not mean that the rates proposed by Hoak are too high or above market.[18] Importantly, BHN conveniently fails to acknowledge that the FCC has no authority to regulate retransmission consent rates, which renders BHN's Objection fundamentally defective. Rather than work diligently and in a timely fashion with Hoak to negotiate a mutually-acceptable terms for the carriage of WMBB to restore the cable retransmissions of WMBB to BHN's paying subscribers, BHN has chosen to use the Commission's license renewal processes to litigate the matter. To this end, it is notable that Hoak submitted its most recent proposal to BHN on September 1, 2013 and over one month later, as of October 15, 2013, Hoak has yet to receive a response or counter offer.[19] Such a failure to respond and continue to negotiate with Hoak in good faith suggests that BHN may not be as concerned with the viewing public as it purports in the Objection.

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[18] *See, e.g.*, Good Faith Order, 15 FCC Rcd 5445 at 5467 ("Although some parties earnestly suggest . . . that broadcasters should be entitled to zero compensation in return for retransmission consent or that the forms of compensation for carriage should be otherwise limited, this seems to us precisely the judgment that Congress generally intended the parties to resolve their own interactions and through the efforts of each to advance its own economic self-interest.").

[19] *See* Declaration of Eric Van den Branden, attached as Exhibit A.

III. CONCLUSION

For the reasons set forth herein, the Bureau should promptly dismiss or deny the Objection as without merit and irrelevant to the instant proceeding.

Respectfully Submitted,

HOAK MEDIA OF PANAMA CITY LICENSE, LLC

By: _____

Tom W. Davidson, Esq.
AKIN GUMP STRAUSS HAUER & FELD LLP
1333 New Hampshire Ave., N.W.
Washington, DC 20036
(202) 887-4000

October 17, 2013

Its Attorneys

Exhibit A

DECLARATION OF ERIC VAN DEN BRANDEN

I, Eric Van den Branden, hereby declare, under the penalty of perjury, that the foregoing is true and correct, to the best of knowledge, information, and belief:

1. I am President of Hoak Media of Panama City License, LLC ("Hoak"), the licensee of commercial television station WMBB(DT), Panama City, Florida ("WMBB").

2. I am responsible for retransmission consent negotiations for Hoak. In this capacity, on behalf of Hoak, I submitted a retransmission consent proposal to Bright House Networks, LLC ("BHN") on September 1, 2013. To date, Hoak has yet to receive a response or counter offer from BHN. Nevertheless, on October 4, 2013, on behalf of Hoak, I provided consent for BHN to retransmit WMBB on a temporary basis in order to provide BHN's subscribers with access to WMBB's coverage of Tropical Storm Karen, which was, at the time, expected to make landfall between Pensacola and Panama City on Saturday, October 5.

3. I have reviewed all of Hoak's recent retransmission consent agreements with various cable operators in the Panama City, Florida Designated Market Area ("DMA") and determined that the rates proposed by Time Warner on behalf of BHN are materially lower than the rates negotiated by Hoak with these other cable operators in the DMA over the past eighteen months.

4. I have read the informal objection ("Objection") filed by BHN to the application to renew the license of WMBB. I have reviewed the reply to the Objection and, to the best of my knowledge, as to factual matters, the information set forth therein is true and accurate to the best of my knowledge and belief.

Eric Van den Branden

October 15, 2013

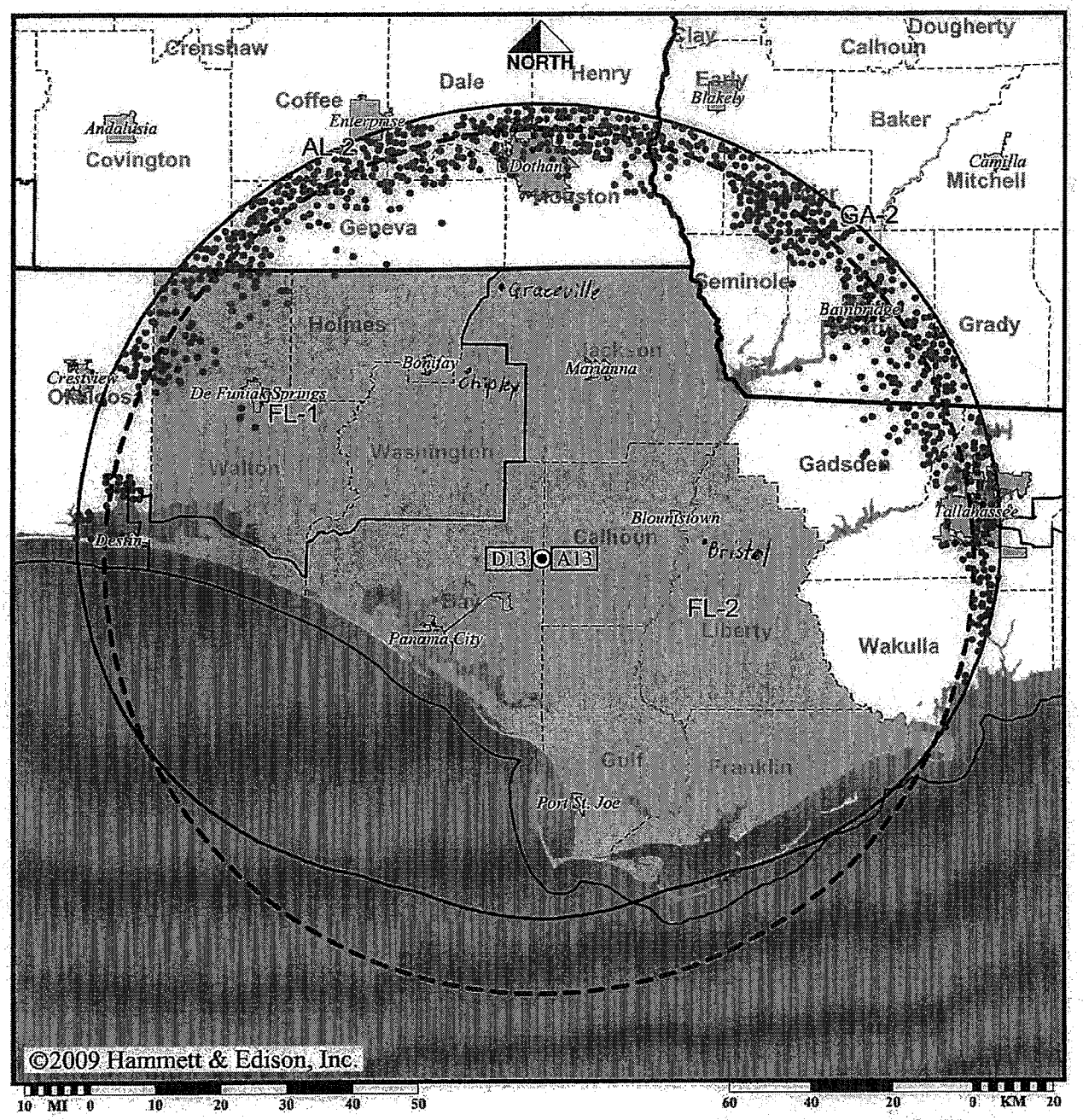
Exhibit B

TV Station WMBB • Analog Channel 13, DTV Channel 13 • Panama City, FL

Expected Operation on June 13: Granted Construction Permit

Digital CP (solid): 42.0 kW ERP at 434 m HAAT, Network: ABC
vs. Analog (dashed): 316 kW ERP at 437 m HAAT, Network: ABC

Market: Panama City, FL



● Coverage gained after DTV transition
No symbol = no change in coverage
▲ Coverage lost after DTV transition

Analog service	570,779 persons
Digital service	805,387
Analog loss	298
Digital gain	234,906
Net gain	234,608

BPCDT-20080410AAW
WMBB Digital CP

Map set 1

Exhibit C

CERTIFICATE OF SERVICE

I, Dayle Jones, of Akin Gump Strauss Hauer & Feld, LLP, certify that a copy of the foregoing Opposition to Informal Objection filed on behalf of Hoak Media of Panama City License, LLC, was served via first-class mail (except as designated) on this 17th day of October 2013, upon the following:

Arthur J. Steinhauer, Esq.
Sabin Bermant & Gould LLP
Four Times Square
New York, NY 10036

William T. Lake, Bureau Chief*
Video Division, Media Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Barbara Kreisman, Chief*
Video Division, Media Bureau
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Hossein Hashemzadeh, Deputy Chief*
Video Division, Media Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Dayle Jones

Dayle Jones

*Hand Delivery

DECLARATION OF TERRY COLE

I, Terry Cole, hereby declare, under the penalty of perjury, that the foregoing is true and correct, to the best of knowledge, information, and belief:

1. I am General Manager of commercial television station WMBB(DT), Panama City, Florida ("WMBB"), licensed to Hoak Media of Panama City License, LLC ("Hoak").

2. To the best of my knowledge, Bright House Networks, LLC ("BHN") historically has received WMBB's off-air signal at its headends in DeFuniak Springs, Chipely, Graceville, Blountstown, and Bristol, Florida. Since I have served as General Manager of WMBB, BHN has never reported to WMBB that it was unable to receive WMBB in the aforementioned communities. WMBB has not received any viewer complaints stating that WMBB cannot be received off-air, even after the date on which BHN ceased carrying station WMBB.

3. I have read the informal objection ("Objection") filed by BHN to the application to renew the license of WMBB. I have reviewed the reply to the Objection and, to the best of my knowledge, as to factual matters, the information set forth therein is true and accurate to the best of my knowledge and belief.

Terry Cole

October 15, 2013