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May 27, 2008

VIA EMAIL AND HAND DELIVERY

Julius P. Knapp, Chief
Office of Engineering and Technology
Federal Communications Commission
445 12th Street, SW , 7th Floor
Washington, D.C. 20554

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MAY 27 2008

Federal Communications Commission
Bureau / Office

**Re: Clarity Media Systems LLC
File No. 0692-EX-PL-2007
DA 07-1946**

Dear Mr. Knapp:

Clarity Media Systems LLC ("Clarity"), by its counsel, respectfully responds to the letter to you dated May 9, 2008 ("MSTV Letter"), in which the Association for Maximum Service Television, Inc. ("MSTV") questions your letter to David Donovan, MSTV President, dated April 24, 2008 ("OET Letter"). In the OET Letter, you advised MSTV of the grant of Clarity's above-referenced application for an experimental license.

In the second and third paragraphs, the MSTV Letter summarily asserts that the OET Letter is based on information that is not in the record and conflicts with the Media Bureau's decision in DA 07-1946. MSTV's lamentations are far off base. The MSTV Letter distorts what the OET Letter says and ignores the actual record that is currently before the Commission.

According to MSTV, the OET Letter states that "[b]ased on the information before us, the proposed experimental license...is not expected to cause harmful interference." The complete sentence that OET cites actually says as follows (underscored language omitted by MSTV): "Based on the information before us, the proposed experimental license, at the locations and under the parameters set forth in the application, is not expected to cause harmful interference." The complete paragraph that MSTV cites states (underscored language omitted by MSTV):

"It is not a prerequisite to obtaining an experimental license that an applicant prove the absence of harmful interference to authorized stations in other services. Rather, experimental licenses are granted subject to the express conditions that harmful interference not be caused to authorized



services, and that transmissions must cease immediately in the event that harmful interference develops. (47 C.F.R. §§ 5.85(c), 5.111(a)(2).) Based on the information before us, the proposed experimental license, at the locations and under the parameters set forth in the application, is not expected to cause harmful interference. If harmful interference does occur from the tests at the two experimental locations, Clarity will be required to modify or cease operation to alleviate the interference.

From this, two things are readily apparent. First, the OET Letter properly recognizes that the licensee's obligation to cease transmission immediately if harmful interference occurs is a safeguard to be factored into determining whether a license for experimental operating authority should be granted.

Second, the OET Letter's reference to the proposed experimental operations "at the locations and on the parameters set forth in the application" plainly reflects an examination of the record and a reasoned determination that the prospect of harmful interference from the proposed operations is sufficiently low to be consistent with issuing the requested experimental authorization. Reviewing thoughtfully the application and those parameters, which MSTV plainly did not, one finds that:

"The maximum transmit power per channel to be tested will be 50 mW."¹
*

"For this program, Clarity intends to introduce and use a sectorized directional antenna that will concentrate radiation to only a portion of the polar circle around the headend, and substantially reduce or eliminate emissions in the remaining portions of the polar circle."²

"At each location, the sectorized directional antenna will be installed at a height above ground of 10 meters."³
* * *

"Four degrees of electrical and up to 30 degrees of mechanical beam down-tilt to direct the transmitted signal to the coverage area while, at the same time, limiting signal transmission toward the horizon," will be used.⁴

¹ Clarity Experimental Application, File No. 0692-EX-PL-2007, Exhibit 1, p.2, ¶1b.; see also, *id.*, ¶1.c. ("50mW being the maximum transmitter power per channel"); *id.*, p.4, ¶1 ("Power output per six megahertz channel will be not more than 50 mW during any phase of the testing, and will often be substantially less"); *id.*, p.6, ¶1 (Clarity will operate "at a variety of per-channel output powers from 10 mW to no more than 50 mW").

² *Id.*, p.2, ¶1.a.; see also *id.*, p.4, ¶III.A.3 ("A sectorized directional antenna will be used during testing, which will reduce the per-channel transmit output power level due to higher antenna gain, and will diminish or nearly eliminate the production of signal in most directions from the transmitter").

³ *Id.*, p.6, ¶2.

⁴ *Id.*, p.5, ¶4.c.



Moreover, the record shows that, during the initial experimental operations that Clarity conducted in 2005, no harmful interference to ENG signals was observed with Clarity's transmitter operating with an omnidirectional antenna, from 15 meters above ground, with no mechanical beam down-tilt, at power up to 1 W per channel.⁵ Where, as here, no harmful interference was observed with Clarity transmitting at power up to 20 times higher than the maximum power cap for the supplemental operations, omnidirectionally instead of directionally, from 50% greater height, and with no mechanical beam-downtilt, the OET Letter reaches the only conclusion this record realistically supports, namely, that based on the substantially lower power and "various interference mitigation techniques" that the OET Letter properly recognizes, harmful interference "is not expected from Clarity's scaled-back supplemental experimental operations."⁶

In invoking the Media Bureau's decision in DA 07-1946, MSTV continues to beat a dead horse. It is now undisputed that the linchpin of the Bureau's interference analysis is untrue. The Bureau's 2007 decision, which is the subject of Clarity's pending application for review, recited that, during Clarity's initial experimental operations in 2005, "[n]o attempt was made to actually receive a BAS signal at a fixed receive site or a mobile site (*e.g.* TV Truck) while Clarity was testing its system."⁷ Informed persons representing Clarity's opponents in the permanent licensing proceeding confirmed during an October 5, 2007, meeting convened by the Media Bureau that such attempts were made.⁸ Accordingly, the Bureau decision is plainly erroneous and *de novo* review and decision-making that recognize and weigh Clarity's experimental operations are warranted. The OET Letter explains on its face why it is not in conflict with the Bureau decision. Moreover, the Media Bureau's determination, while inaccurate, was not that Clarity's operation caused harmful interference to a BAS signal at a fixed receive site or a mobile site, but that the prospect had not been evaluated. The experimental authorization issued to Clarity in File No. 0692-EX-PL-2007 has, as one of its core objectives, to expand meticulously and systematically on the initial experimental

⁵ See Clarity Six-Month Progress Report, filed Dec. 22, 2005; Clarity Form 327 Application for Frazier Park, CA, filed Feb. 21, 2006, Ex. 1 at 32-40; Reply Comments of Clarity Media Systems, filed Oct. 23, 2006 ("Clarity Reply Comments"), at 49-55.

⁶ Since the Experimental Radio License issued, Call sign WE2XNE, explicitly states that "the licensee is hereby authorized to use and operate the radio transmitting facilities hereinafter described ***in accordance with the program of experimentation described by the licensee in its application for license***," and Clarity's application clearly set forth 50 mW per channel as the maximum power, MSTV's request (at 2) that the license be modified to specify the maximum power Clarity sought in its application is unnecessary and wasteful make-work for the Commission staff. During the supplemental experimental operations, Clarity not only will not exceed the 50 mW per channel power level the application proposes and the license permits, it anticipates that operations at only 10 mW per channel will prove viable for Clarity's system and be free of harmful interference to ENG signals.

⁷ Bureau decision at ¶10.

⁸ The Bureau's error resulted from mistaken reliance on one opponent's distortion of the initial experiments in its Comments. See Clarity Reply Comments at 57-69; Reply of Clarity Media Systems LLC to Oppositions to Application for Review, filed July 19, 2007, at 2.



operations that were conducted. Accordingly, the alleged inconsistency with the Media Bureau's 2007 decision that MSTV is decrying is not real.⁹

Lastly, MSTV's citation of *American Radio Relay League, Inc. v. FCC*, No. 06-1343, 2008 WL 1838387 (D.C. Cir. April 25, 2008) ("ARRL"), and with it MSTV's innuendo of criticism that OET may have gone outside the record to issue the OET Letter, is misplaced. In ARRL, objective evidence that the Commission relied upon extra-record material existed from evidence that the Commission redacted portions of studies on which it relied. Here, the record, which is fully available to MSTV, contains overwhelming support for the limited action taken on Clarity's experimental application. Indeed, the OET Letter expressly acknowledges the limited scope of the grant issued to Clarity and carefully stresses that no findings are being made "as to the ultimate probative value [of the experimental operations] in determining the propriety of a rule waiver or waivers based on Clarity's experiment or the resulting data that may be generated."¹⁰

Moreover, in making its accusation, MSTV ignores the real significance of the ARRL decision. First, the decision underscores the difference between "harmful interference," the standard that governs applicants like Clarity and which the OET Letter applies, and "interference" that is not significantly greater than the background noise." The difference is a great deal more than semantics, as MSTV has mischaracterized it during numerous ex parte presentations.

Even more importantly, the ARRL decision reinforces the vitality of the Commission law Clarity has cited in the Media Bureau proceeding that empirical evidence such as that obtained from actual field operations under Clarity's experimental licenses is the most significant evidence in assessing potential for harmful interference. After the petitioner in ARRL pointed out that "the Commission relied on modeling data using a method of measurement that is not based on empirical evidence derived from testing or scientific observation," the Court reversed the Commission's action because "the Commission offered no reasoned explanation for its dismissal of empirical data that was submitted at its invitation."*

In sum, in authorizing Clarity's supplemental experimental operations to obtain further empirical data to help the Commission reach an informed and accurate decision in

⁹ It also is noteworthy that (i) the Bureau decision does not mention TSB-10-F, on which MSTV relies; (ii) FCC Rules do not require use of that methodology; and (iii) Clarity has clearly demonstrated why MSTV's reliance on that standard falls short and is not dispositive of the issues here. See Response of Clarity Media Systems, LLC to November 8, 2007 Presentation of MSTV in DA 07-1946, filed Nov. 30, 2007.

¹⁰ OET Letter at 2.

¹¹ *ARRL* at 9-10. The decision refers to the "harmful interference" test 29 times.

¹² *Id.* at 21-22. *AART* supports other elements of Clarity's position also, such as the relevance to the public interest of providing service at affordable "cost to the public." *Id.* at 24.

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this case, OET has acted consonantly with the record, established law and policy, and the public interest. OET should disregard MSTV's churlish criticisms.

Respectfully submitted,

Howard A. Topel
Stephen D. Baruch
Counsel for Clarity Media Systems LLC

cc: Attached Service List

CERTIFICATE OF SERVICE

I, Veronica Edmonds, a secretary at Leventhal Senter & Lerman PLLC, do hereby certify that on this 27th day of May, 2008, I caused a copy of the foregoing letter to be sent via first-class U.S. Mail, postage prepaid, to the following:

- * Hon. Kevin J. Martin, Chairman
Michelle Carey, Legal Advisor for Media Issues
Elizabeth Andrion, Legal Advisor for Media Issues
Federal Communications Commission
445 Twelfth Street, SW – Room 8-B201
Washington, DC 20554
- * Hon. Michael J. Copps, Commissioner
Bruce L. Gottlieb, Legal Advisor
Rick Chessen, Senior Legal Advisor; Media Advisor
Federal Communications Commission
445 Twelfth Street, SW – Room 8-B115
Washington, DC 20554
- * Hon. Jonathan S. Adelstein, Commissioner
Rudy Brioché, Legal Advisor for Media Issues
Federal Communications Commission
445 Twelfth Street, SW – Room 8-A302
Washington, DC 20554
- * Hon. Deborah Taylor Tate, Commissioner
Chris Moore, Legal Advisor
Amy Blankenship, Legal Advisor
Federal Communications Commission
445 Twelfth Street, SW – Room 8-A204
Washington, DC 20554
- * Hon. Robert M. McDowell, Commissioner
Angela E. Giancarlo, Chief of Staff and Senior Legal Advisor
Cristina Pauze, Legal Advisor, Media
Federal Communications Commission
445 Twelfth Street, SW – Room 8-C302
Washington, DC 20554

* Via e-mail and hand delivery.

- * Matthew Berry, General Counsel
Federal Communications Commission
445 Twelfth Street, SW
Washington, DC 20554
- * Marilyn Sonn, Assistant General Counsel
Federal Communications Commission
445 Twelfth Street, SW
Washington, DC 20554
- * Ajit Pai, Deputy General Counsel
Federal Communications Commission
445 Twelfth Street, SW
Washington, DC 20554
- * Monica Desai, Chief
Media Bureau
Federal Communications Commission
445 Twelfth Street, SW
Washington, DC 20554
- * Roy J. Stewart
Senior Deputy Bureau Chief, Media Bureau
Federal Communications Commission
445 Twelfth Street, SW
Washington, DC 20554
- * John P. Wong
Media Bureau
Federal Communications Commission
445 Twelfth Street, SW
Washington, DC 20554
- * Wayne T. McKee, Assistant Chief,
Engineering Division, Media Bureau
Federal Communications Commission
445 Twelfth Street, SW
Washington, DC 20554
- * John Gabrysch
Media Bureau
Federal Communications Commission
445 Twelfth Street, SW
Washington, DC 20554

- * Keith Larson
Media Bureau
Federal Communications Commission
445 Twelfth Street, SW
Washington, DC 20554
- * Sarah Mahmood
Engineering Division
Media Bureau
Federal Communications Commission
445 Twelfth Street, SW
Washington, DC 20554
- * Julius Knapp, Chief
Office of Engineering and Technology
Federal Communications Commission
445 Twelfth Street, SW
Washington, DC 20554
- a Ira Keltz, Deputy Chief,
Office of Engineering and Technology
Federal Communications Commission
445 Twelfth Street, SW
Washington, DC 20554
- * Bruce Romano
Office of Engineering and Technology
Federal Communications Commission
445 Twelfth Street, SW
Washington, DC 20554
- * Alan Stillwell, Deputy Chief
Office of Engineering and Technology
Federal Communications Commission
445 Twelfth Street, SW
Washington, DC 20554
- * Ron Chase
Office of Engineering and Technology
Federal Communications Commission
445 Twelfth Street, SW
Washington, DC 20554

Jonathan D. Blake
Eve R. Pogoriler
Covington & Burling LLP
1201 Pennsylvania Avenue, NW
Washington, DC 20004-2401

David Donovan
Victor Tawil
The Association for Maximum Service
Television, Inc.
4100 Wisconsin Avenue, NW
Washington, DC 20016

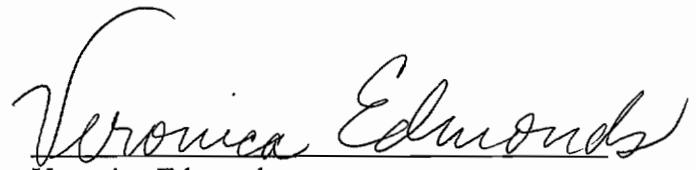
Marsha J. MacBride
Jane E. Mago
Lawrence A. Walke
Kelly Williams
The National Association of Broadcasters
1771 N Street, NW
Washington, DC 20036

Susan L. Fox
Vice President, Government Relations
The Walt Disney Company
1150 Seventeenth Street, NW, Suite 400
Washington, DC 20036

Tom W. Davidson
Natalie G. Roisman
Akin Gump Strauss Hauer & Feld LLP
1333 New Hampshire Avenue, NW
Washington, DC 20036

Mamie K. Sarver
James R. Bayes
Jake Riehm
Wiley Rein & Fielding LLP
1776 K Street, NW
Washington, DC 20006

Christopher D. Imlay
Chriss Scherer
Dane E. Ericksen
Booth, Freret, Imlay & Tepper, P.C.
14356 Cape May Road
Silver Spring, MD 20904-6011



Veronica Edmonds