

Wanda T. ...
ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)

Waiver Requests By Clarity Media Systems, LLC To)
Operate an Ultra Low-Power, Very Short-Range System)
in the 2025-2109 MHz Band At Flying J Travel Plazas)

DA 07-1946

To: The Secretary
For the Commission

FILED/ACCEPTED

10 2007

Federal Communications Commission
Office of the Secretary

**OPPOSITION TO "REQUEST TO PROMPTLY DISMISS DEFECTIVE
APPLICATION FOR REVIEW"**

Clarity Media Systems, LLC ("Clarity"), by its counsel, hereby opposes the "Request to Promptly Dismiss Defective Application for Review" that the Association for Maximum Service Television, Inc. ("MSTV") filed on September 24, 2007 ("Request"). MSTV's Request represents its latest attempt to evade Commission focus and decision on the critical public interest issues in this case by asking the Commission to subjugate the substantive public interest to a specious and dilatory procedural argument. Contrary to MSTV's contentions, there is nothing defective about Clarity's Application for Review ("AFR"); there is nothing defective about Clarity's *ex parte* presentation to the Commission's Office of Engineering and Technology ("OET") about which MSTV complains; and the only authority MSTV cites completely undermines its position. MSTV's Request is baseless and must be denied.

Although MSTV self-servingly calls Clarity's AFR "defective" in the title of its pleading, the pleading makes no showing that the AFR is defective. In fact, Clarity's AFR is fully compliant with the Commission's Rules. Section 1.115(b) of the Rules sets

forth the requirements for an application for review, and Clarity's AFR meets every one of those requirements.'

The real gist of MSTV's Request is, not that Clarity's AFR is defective, but that the *ex parte* letter that Clarity sent to OET on September 6, 2007,² operated to render the AFR improper because it allegedly amended Clarity's applications and supposedly violated Commission process requirements. As demonstrated below from the very case precedent on which MSTV relies, even assuming *arguendo* that all of MSTV's allegations about the Letter To OET were accurate, there is no scenario under which the correct relief would be dismissal of the AFR, on which the Commission still must act based on its public interest merits. In fact, however, none of MSTV's allegations is accurate.

Clarity's Letter To OET is an entirely proper permit-but-disclose *ex parte* presentation in this proceeding in which such presentations are permitted.³ It was properly disclosed to MSTV and the public in accordance with the Commission Rules, and did not -- indeed could not -- amend Clarity's applications. The Letter To OET arose from a meeting that Clarity representatives had with the staff of OET on August 17,

¹ MSTV has developed a pattern of using hyperbolic pleading titles to introduce groundless contentions to thwart the entry of a decision on the public interest merits in this case. Previously, MSTV filed an "Emergency Request" to terminate the frequency coordination that the Media Bureau ("Bureau") had directed Clarity to conduct. *See MSTV Emergency Request* filed April 25, 2006. As Clarity noted in its "*Opposition to Emergency Request*" filed on May 3, 2006, "inserting the word 'Emergency' in the title of a pleading does not an emergency make. MSTV has provided no factual or legal bases for its extraordinary request, and none exist." *See Opposition to Emergency Request* at 3. Subsequently, Clarity conducted the directed frequency coordination and nothing remotely close to an emergency resulted. Here, too, MSTV's labeling of Clarity's AFR "defective" in MSTV's pleading title does not make MSTV's contention true, and no factual or legal bases for its claim exist. For the record, and to close the loop, Clarity opposes any dismissal of its AFR -- not just "prompt" dismissal.

² *Ex Parte* Letter from Howard A. Topel, Counsel for Clarity, to Julius Knapp, Chief, OET, September 6, 2007 ("*Letter To OET*").

³ *See Waiver Requests by Clarity Media Systems, LLC to Operate CARS Stations at Flying J Travel Plazas*, DA 06-1664, at 1 (released August 23, 2006).

2007. In reference to Clarity's pending applications, the staff of OET at the August 17, 2007 meeting raised the subject of link budget analyses and requested Clarity to provide OET with Clarity's link budget analysis with respect to electronic news gathering ("ENG") equipment. In response to this request from OET, Clarity sent the *ex parte* Letter To OET containing the requested information. On the same day, pursuant to Section 1.1206 of the Commission Rules, Clarity also properly filed a notice and an original and one copy of this *ex parte* letter with the Commission Secretary and specifically identified this proceeding as the one in which the *ex parte* presentation was made.⁴ The Commission subsequently released a Public Notice on September 12, 2007 that gave the public, including MSTV, sufficient notice of Clarity's *ex parte* Letter To OET.⁵

The *ex parte* letter to OET was properly filed and such a letter does not require service on MSTV or the other parties to the proceeding. By definition a written *ex parte* presentation is not served on the other parties to a proceeding.⁶ This is a permit-but-disclose proceeding and Clarity's *ex parte* letter was properly disclosed.⁷ Moreover, the above-referenced **Public Notice** provided all of the parties to the proceeding with

⁴ See *Ex Parte* Letter from Stephen D. Baruch, Counsel for Clarity, to Marlene H. Dortch, September 6, 2007.

⁵ See *Ex Parte Presentations and Post-Reply Comment Period Filing in Permit-But-Disclose Proceedings*, Public Notice, 2 of 2 (Office of Secretary released September 12, 2007) ("**Public Notice**").

⁶ 47 C.F.R. § 1.1202(b)(1) (stating "Any presentation which: If written, is not served on the parties to the proceeding").

⁷ See **Public Notice** which shows that on September 6, 2007, Clarity Media Systems, LLC submitted a written *ex parte* presentation to the OET and no request was made to withhold the filed presentation from public inspection.

adequate notice.⁸ MSTV's complaint about lack of service ignores the rules of *ex parte* presentations and provides no basis whatsoever for the Commission to dismiss Clarity's AFR.⁹

MSTV's contention that Clarity's Letter To OET amended its applications and thus violated 47 C.F.R. § 1.115(c) reflects inattention to Clarity's application and is also erroneous. Clarity's applications reveal repeatedly that, while the power and transmit antenna heights that the applications proposed were worst-case maxima that Clarity would use only if necessary to provide service to drivers parked at the outer edges of the largest travel plazas, much lower power and height would be used at most of the plazas. For example, in its original applications Clarity explained, "EIRP would be the minimum amount of power necessary to carry out the service contemplated while, at the same time, preventing any potential interference to other licensees."¹⁰ Then, in its Amendments filed to submit the results of the Bureau-directed frequency coordinations, Clarity stated, "Moreover, as discussed further in the amendment, while its applications propose a maximum of 500 milliwatts instead of the successfully tested 1 watt, Clarity will operate with the minimum power that will provide satisfactory service to each truck plaza, which

⁸ MSTV's contention that even with this notice it has had no opportunity to respond to the Letter To OET is preposterous. It could have responded when it received the notice and chose to file its Request instead. It can still respond now.

⁹ In addition to being devoid of merit, MSTV's lack of service claim is hypocritical. On January 19, 2007, MSTV submitted an *ex parte* letter to the Secretary presenting a new engineering map to support its interference claim, albeit without an engineering statement and certification, and the *ex parte* letter was never served on Clarity. See *Ex Parte* Letter from Matthew S. DelNero, Counsel for MSTV, to Marlene H. Dortch, January 19, 2007. In attempting to portray itself as defender of "basic principles of administrative fairness" (Request at 3), MSTV plainly has a double standard of fairness -- one for itself and a different one for Clarity. The Commission has no such double standard. MSTV's January 19, 2007 *ex parte* letter was properly filed with the Secretary with notice to other parties given by Commission public notice as the Rules contemplate, and so too was Clarity's Letter To OET.

¹⁰ See, e.g., Application for Frazier Park, California, filed by Clarity on February 21, 2006 ("Frazier Park Application"), Exhibit 1, Attachment H, Declaration of J. Patrick Loughboro, at 2(¶7a).

typically will be only 100 milliwatts, just 1/10 of the power that has been successfully tested." As for transmit antenna height above ground, it would be "15 meters or less.""

Clarity's June 2006 Amendments continued on to delineate the specific operating parameters of Clarity's system, the *very* same parameters that are included in the Letter To OET that MSTV erroneously attacks.¹² In two places the Amendments stated, with respect to power, "Transmit power: 100milliwatts (20dBm) per radio channel is typical. Licensed transmit power per channel requested is 500milliwatts; CMS [Clarity] will operate at the minimum power necessary to provide satisfactory service which typically will not exceed 20dBm per channel."¹³ In two places the Amendments stated, with respect to transmit antenna height, "Center-Line Height Above Ground Level of transmit antenna to be up to 15meters. Actual height will be field chosen so that the peak of the radiation pattern will fall midway between the headend transmitter and the fence line of the parking plaza. The longest dimension of truck plazas between fence lines is typically 300 to 500 meters."¹⁴ And subsequently, when Clarity voluntarily amended its applications to reduce the maximum power to 200 mW per channel to be responsive to broadcaster concerns, its Amendments stated, "Moreover, as Clarity has previously submitted to the Commission, Clarity will not use more than 0.1 watt per channel power -- one-tenth of the successfully tested power -- at the vast majority of its sites."¹⁵

¹¹ See, e.g., Amendment to Frazier Park Application, filed by Clarity on June 16 2006 ("June 2006 Frazier Park Amendment"), at 4 n. 4 and 6.

¹² See, e.g., June 2006 Frazier Park Amendment at 8-9 and Appendix C, Engineering Statement of J. Patrick Loughboro in the Matter of Clarity Media Headends at Truck Plazas, Section B.

¹³ June 2006 Frazier Park Amendment at 9 and Appendix C at Section B.6.

¹⁴ June 2006 Frazier Park Amendment at 9 and Appendix C at Section B.8.f.

¹⁵ See, e.g., Amendment to Frazier Park Application, filed by Clarity on January 18, 2007, at 6 n.3.

Clarity's submission of the Letter To OET in response to OET's data request and utilizing the exact same technical parameters that its application states in a manner fully consistent with the proposal its applications make does not violate Section 1.115(c). The possibility of a condition on a grant of Clarity's applications involving a signal limitation at the fence lines in addition to or instead of a transmitter power limit was fully available to the Bureau when it issued its Order dismissing Clarity's applications on May 3, 2007.¹⁶ It is not a new question of fact or law as required to invoke Section 1.115(c).

Moreover, in relying on the Commission decision in *Applications of LifeTalk Broadcasting Ass'n*, Memorandum Opinion and Order, 13 FCC Rcd. 15179 (1998) ("*LifeTalk*"), MSTV cites authority which demonstrates that the Commission should not dismiss Clarity's AFR, but rather must consider the public interest showing Clarity has made and rule on the AFR's public interest merits. MSTV's reliance on *LifeTalk* is both factually misplaced and legally wrong.

MSTV claims that *LifeTalk* supports the proposition that an application for review must be procedurally dismissed if the applicant seeks to amend its denied applications during the review stage.¹⁷ However, as discussed above, unlike the applicant in *LifeTalk*, which filed formal amendments that sought such fundamental changes to its applications as specifying the use of different primary stations for its proposed translators to rebroadcast,¹⁸ Clarity did not seek to amend its applications, but rather responded to a request from OET for analysis based on the proposals repeatedly made in its applications.

¹⁶ Order issued by the Media Bureau on May 3, 2007 in *Waiver Requests by Clarity Media Systems, LLC to Operation [sic] CARS Stations at Flying J Travel Plazas, DA 07-1946*, slip op. (Media Bur., released May 3, 2007) ("Bureau Order").

¹⁷ *Request at 2.*

¹⁸ *LifeTalk*, 13 FCC Rcd. at 15180, ¶ 4.

Unlike the applicant in *LifeTalk*, Clarity did not make fundamental changes to its applications, and unlike MSTV's Request, the Commission did not dismiss *LifeTalk*'s applications for review for submitting a response to a Commission request. *LifeTalk* therefore is factually inapplicable.

Furthermore, as a legal proposition, the *LifeTalk* decision is crystal clear that the Commission considered the applications for review on the merits, weighed the public interest factors *LifeTalk* submitted, and denied the applications for review due to an inadequate public interest showing.¹⁹ Thus, following *LifeTalk*, the Commission here too must consider Clarity's application on the merits of its public interest showing, which is overwhelming and infinitely superior to the one in *LifeTalk*. Contrary to MSTV's casual assertions, *LifeTalk* compels full consideration and grant of Clarity's AFR and applications -- not their dismissal.²⁰

Moreover, assuming *arguendo* that the Letter To OET was inconsistent with and amended Clarity's applications, MSTV's sweeping and flawed argument regarding Commission level review of newly submitted information would still be wrong because the Commission has discretion to review information not submitted at the Bureau level and to dispose of applications for review in light of the public interest. As the Commission has declared:

¹⁹ *Id.* at 15180, ¶ 5, and 15181, ¶ 7 (the "applications for review filed by *LifeTalk* Broadcasting Association ARE HEREBY DENIED")

²⁰ What the Commission dismissed in *LifeTalk* were not the applications for review, but the amendments that had fundamentally changed the applicant's proposal. 13 FCC Rcd. at 15181, ¶7. Since, as demonstrated, Clarity's Letter To OET is an entirely proper *ex parte* presentation that provides information requested by the Commission staff and is consistent with and does not fundamentally alter Clarity's proposal, the Letter To OET is not remotely analogous to the amendments in *LifeTalk* and no basis to dismiss anything is present in the case.

...[W]here new material introduced at the Commission review level may undermine the basis of the earlier decision, the public interest in reviewing that material may outweigh the public interest in the orderly administration of the Commission's business fostered by 47 USC 155(c)(5) and 47 CFR 1.115. In such cases, the Commission may consider the new matter or issues presented on its own motion.²¹

MSTV's request to dismiss Clarity's AFR is a baseless, dilatory tactic to stall or keep the Commission away from reviewing and deciding the public interest issues in this case on the substantive record amassed. Coming as it does from a party that professes interest in "conservation of Commission's resources,"²² the irony of MSTV burdening the Commission with its specious Request and resulting pleading cycle is inescapable.²³ Unfortunately, MSTV's diversionary tactics are not free. They come with a heavy public cost, keeping millions of drivers who need television immediately staring into dark screens, delaying life-saving public safety initiatives, and much more.

The deadly serious cost of MSTV's impedance of Commission action on the merits of Clarity's proposal can be seen in the recent real-life events that occurred on Saturday, October 6, 2007. On that day William Joe Mitchell, a 46-year-old registered sex offender, was apprehended at the Flying J Truck Stop near Winchester, Virginia, after

²¹ *Duchossois Communications Co. of Maryland, Inc. (assignor) and Liberty Broadcasting of Maryland, Inc. (assignee) For Assignment of License and Sale of the Assets of Station WHFS(FM), Annapolis, Maryland*, Memorandum Opinion and Order, 10 FCC Rcd 6688,6690, ¶ 12 (1995) (internal citations omitted).

²² Request at 3.

²³ Other efforts by MSTV to delay or evade a decision on the public interest merits include its *Emergency Request* to halt frequency coordinations described above; its demand for rule making proceedings that it knows will bury Clarity's proposal in administrative process indefinitely instead of prompt and proper Commission action on legitimate and substantiated waiver requests that will serve the public interest, and its unwillingness to date to work with Clarity using responsible engineering and state-of-the-art technology that surely can provide the public with both uninterrupted ENG and Clarity's services.

a Flying J customer spotted him and reported his whereabouts to the police.²⁴ Mitchell had posed as a 24-year-old and seduced 15-year-old Alyssa Frank over the Internet to run away with him in Florida, but released her before his arrival at the Virginia plaza. Clarity has consistently emphasized to the Commission that travel plazas are often frequented by abductors on the run. While the capture of Mitchell and recovery of Alyssa are blessings and occasions for joy, the relevant questions are how many more victims could have been saved and how many more perpetrators captured during the last several years while MSTV and others were stalling Clarity's service on procedural and other diversionary grounds; and how many more could be captured and saved in the coming weeks, months, and years if Clarity's service is available to every truck driver in his or her cab and Clarity's Public Safety and Alert Channel is the default channel airing 24/7 inside each of Flying J's travel centers. The time for MSTV to stop its obstruction and to cooperate constructively to bring Clarity's service to the public is overdue.²⁵

In sum, MSTV's argument that the *ex parte* Letter To OET is an improper submission warranting dismissal of Clarity's AFR is flawed on strategic, factual, and legal levels and must be summarily rejected. Clarity has repeatedly stated throughout its filings in this proceeding that the FCC should grant its applications in light of their

²⁴ See *Police arrest registered sex offender suspected of luring teen online*, [CNN.com Mobile](#), attached as Exhibit 1.

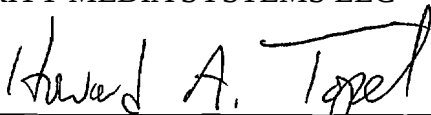
²⁵ MSTV, although not a Commission licensee itself, should remain mindful of the fact that a broadcasting license is a public trust. See *Office of Communication of United Church of Christ v. FCC*, 359 F.2d 994, 997, 1003 (D.C. Cir. 1966) ("*United Church*"). Congressman White, a sponsor of the original Radio Act that became the Communications Act in 1934, aptly articulated what this means: "The right of the public to service is superior to the right of any individual * * *. If enacted into law, the broadcasting privilege will not be a right of selfishness. It will rest upon an assurance of public interest to be served." 67 Cong. Rec. 5479 (1926) (remarks of Rep. White). Licensees' public trustee status is "subject to termination for breach of duty." *United Church, supra*, 359 F.2d at 1003.

myriad public interest benefits, just a few of which are discussed above.²⁶ Clarity's AFR is not defective in any manner. Clarity's Letter To OET does not render the AFR defective in any manner. Thus, in furtherance of proper application of the Commission's rules and the public interest, Clarity respectfully requests that the Commission should proceed to grant the Application for Review of Clarity Media Systems, LLC and deny the Association for Maximum Service Television, Inc.'s frivolous request to dismiss, promptly or otherwise, Clarity's Application for Review.

Respectfully submitted,

CLARITY MEDIA SYSTEMS LLC

By



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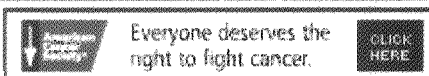
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October 10, 2007

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²⁶ See Clarity Reply Comments at 22-26. Clarity has met each of the Commission's three standards for granting waivers, when meeting only one is necessary to grant its proposal. *Id.* at 11-48.

EXHIBIT 1

**Police arrest registered sex offender suspected of luring teen online****UPDATED: 08:52 PM EDT October 06, 2007**

(CNN)

Police on Saturday arrested a registered sex offender suspected of luring a 15-year-old girl on Myspace.com, authorities said.

William Joe Mitchell was apprehended at a "The Flying J Truck Stop" just outside of Winchester, Virginia, authorities said. Virginia State Police arrested him without incident.

Detectives received a tip Saturday that he was at the truck stop, located off Interstate 81, according to the Polk County sheriff's department. Personal items belonging to the teenager were found in his car, according to the sheriff's statement.

Mitchell had allegedly been communicating with Alyssa Frank on the popular Web site Myspace.com, officials said.

Mitchell, 46, told Frank he was 24 years old, Polk County Sheriff Grady Judd told CNN. Virginia and Polk County, Florida, authorities and the U.S. Marshals Service in Tampa, Florida, were working together on the case.

Polk County Sheriff's detectives found Frank earlier this week, one day after she disappeared. She was found wandering around a Wal-Mart store in DeFuniak Springs, Florida, and had apparently been abandoned by her alleged abductor. A store employee called police after noticing the girl.

Mitchell took Frank to the store in an apparent attempt to "dump her," Judd said. Mitchell, in leaving the girl, told her not to draw attention to herself or he would kill her, Judd said in a statement. Frank is believed to have left her house in Bartow, Florida, before dawn Monday for rendezvous with Mitchell, Judd said. He then apparently took her to Alabama.

Mitchell brought her back to DeFuniak Springs, which is between Pensacola and Tallahassee on the Florida Panhandle,

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CERTIFICATE OF SERVICE

I, Joan M. Trepal, a secretary at Leventhal Senter & Lerman PLLC, do hereby certify that on this 10th day of October, 2007, I caused a copy of the attached Opposition To "Request To Promptly Dismiss Defective Application For Review" to be sent via first-class U.S. Mail, postage prepaid, to the following:

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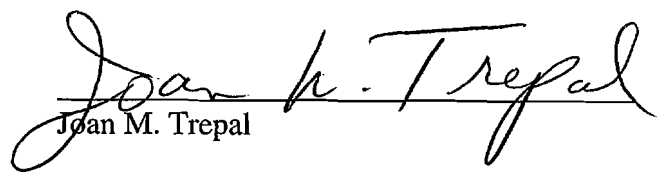
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