UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

AMERICAN RADIO RELAY LEAGUE, INC.,	)	
	)	
PETITIONER	)	09-1180
	)	
V.	)	NO. 06-1343
	)	
FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA,	)	
	)	
RESPONDENTS.	)	

PETITION FOR WRIT OF MANDAMUS
TO COMPEL COMPLIANCE WITH MANDATE

The American Radio Relay League, Incorporated (Petitioner or "ARRL") hereby respectfully submits this Petition seeking a writ of mandamus against Respondent Federal Communications Commission. On April 25, 2008, this Court issued its Opinion and Judgment in this case, granting in part the Petition of The American Radio Relay League, Incorporated for review of two orders of the Respondent Federal Communications Commission promulgating rules to regulate the use of the radio spectrum by Access Broadband over Power Line (Access BPL) operators. *American Radio Relay League, Inc. v. FCC*, 524 F.3d 227 (D.C. Cir. 2008).[1] Finding that the Commission failed to satisfy the notice and comment requirements of the Administrative Procedure Act by redacting studies on which it relied in promulgating the rules, and by failing to provide a reasoned explanation for its choice of an extrapolation factor for measuring Access BPL radio frequency emissions, the Court remanded the rules to the Commission. The Court, in summary, instructed the Commission as follows: "On remand, the Commission shall

[1] The Court's Mandate was issued June 13, 2008.

afford a reasonable opportunity for public comment on the unredacted studies on which it relied in promulgating the rule, make the studies part of the rulemaking record, and provide a reasoned explanation of its choice of an extrapolation factor for Access BPL systems." (*Slip Op.* at 25).

To date, more than a year later, the Commission has neither afforded a reasonable opportunity for public comment on the unredacted studies nor provided a reasoned explanation of its choice of an extrapolation factor for Access BPL systems based on the material in the record (or proposed a new extrapolation factor).[2] In the meantime, the Access BPL rules are in place, and Access BPL operators are free to operate their systems pursuant to the Commission's 2004 Access BPL rules. Petitioner has on several occasions informally requested specific dates by which the Commission will comply with the obligations placed upon it by the Court, but the Commission has not provided a timetable for action, nor explained the inordinate delay in complying with the Court's order and mandate.

For this reason, pursuant to Rule 21 of the Federal Rules of Appellate Procedure, Petitioner requests that this Court order the Commission to comply with the terms of the Court's mandate by (1) soliciting comment on the unredacted studies placed in the rulemaking record, and (2) providing a reasoned explanation of its choice of an extrapolation factor for Access BPL systems (or issue a further notice of proposed rule making proposing a different extrapolation factor), within sixty days.

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[2] Though the Court remanded the case in part because the Commission failed to provide a reasoned justification (sufficient to show that it had "grappled with" the material in the record), for adopting a particular extrapolation factor, it offered the Commission two options on remand: (1) to justify the existing extrapolation factor based on information in the record; or (2) to propose a new extrapolation factor. (*Slip Op.* at 23).

FACTUAL BACKGROUND

On October 28, 2004, the Commission released a Report and Order, FCC 04-245 ("*Access BPL Order*") in ET Docket No. 04-37, *Amendment of Part 15 Regarding New Requirements and Measurement Guidelines for Access Broadband of Power Line Systems*, and ET Docket No. 03-104, *Carrier Current Systems, Including Broadband over Power Line Systems,* 19 FCC Rcd. 21,265 (October 28, 2004) On February 27, 2005, Petitioner timely filed a petition for reconsideration of the *Access BPL Order*. On August 3, 2006, the Commission adopted a Memorandum Opinion and Order, FCC 06-113 ("*Reconsideration Order*"), denying ARRL's petition. The *Reconsideration Order* was released August 7, 2006. On October 10, 2006, Petitioner timely filed a petition for review in this Court seeking review of both orders. This Court heard oral argument on the petition October 23, 2007; issued its Opinion April 25, 2008, and issued its mandate on June 13, 2008.

Among several grounds for seeking *vacatur* of the Access BPL rules urged by Petitioner was the fact that the Commission, despite two different Freedom of Information Act requests filed with the agency by Petitioner, had failed to disclose the entirety of five scientific studies on which the Commission admittedly relied in adopting its Access BPL rules. These studies were conducted by the Commission's Office of Engineering and Technology, and contained empirical data from Access BPL test sites, at which Access BPL emissions were measured. The Court reviewed the unredacted versions of the studies *in camera* and determined that the redacted pages included "staff summaries of test data, scientific recommendations, and test analysis and conclusions regarding the methodology used in the studies." (*Slip Op.* at 15). The Court held that

"...the challenged orders indicate that the five staff studies were never fully disclosed for comment even though they were, according to the Commission, a central source of data for its critical determinations" (*Slip Op.* at 17) and that the studies "consist of staff-prepared scientific data that the Commission's partial reliance made 'critical factual material'." (*Id.*) As well, the Court held that "(i)t would appear to be a fairly obvious proposition that studies upon which an agency relies in promulgating a rule must be made available during the rulemaking in order to afford interested persons meaningful notice and an opportunity for comment....Where, as here, an agency's determination 'is based upon a complex mix of controversial and uncommented on data and calculations' there is no APA precedent allowing an agency to cherry-pick a study on which it has chosen to rely in part." (*Slip Op.* at 15).

Therefore, with respect to the redacted scientific studies of Access BPL, the Court ordered that "[o]n remand, the Commission shall make available for notice and comment the unredacted 'technical studies and data that it has employed in reaching [its] decisions, (citations omitted) ...and shall make them part of the rulemaking record." (*Slip Op.* at 19).

By March 31, 2009, the Commission had taken no action with respect to the disclosure of the unredacted scientific studies, and had not therefore solicited public comment on the unredacted studies. Petitioner, therefore, filed a Freedom of Information Act request with the Commission[3] seeking the unredacted versions of the studies that the Court ordered be included in the rulemaking record, and about which an opportunity for comment was to be provided by the Agency. On April 28, 2009, the deadline for the

[3] This was submitted with reference to the U.S. Attorney General's March 19, 2009 memo concerning FOIA requests. See, *http://www.usdoj.gov/ag/foia-memo-march2009.pdf.*

Commission to respond to the FOIA request, the Commission's Office of Engineering and Technology responded with allegedly[4] unredacted versions of the five scientific studies and a cover letter dated April 28, 2009 (*See **Exhibit A**, attached*). The Commission's cover letter stated, with respect to the issues on remand, as follows:

> The Court's decision in the above-referenced case required the Commission to provide an opportunity for public comment on the unredacted versions of the report. The Court also remanded to the Commission for further justification of the extrapolation factor used for determining compliance with the Commission's standards for BPL systems (sic). The Commission will respond to the Court's direction separately.

On May 1, 2009, the Commission, *sub silentio*, posted the cover letter and the unredacted studies on its Electronic Comment Filing System in ET Docket 04-37. To date, no public notice of that action has been given and no further action has been taken by the Commission with respect to the provision of an opportunity for the public to comment on the unredacted studies.

The second basis for the Court's remand of the Access BPL Orders to the Commission for further proceedings was the Commission's decision to retain an extrapolation factor of 40 dB per decade as an assumption of the rate at which radiated emissions decay with distance from a power line carrying radio frequency Access BPL signals. The rate of decay of undesired radio frequency emissions at distances perpendicular to a power line determines the interference potential of those emissions to licensed radio services, and as well the power levels at which Access BPL systems may operate. The Court cited Petitioner's argument that, to confirm its choice of a 40 dB per decade of distance factor, rather than a lower distance extrapolation factor, the

[4] The release of the allegedly unredacted versions of the studies raises questions concerning certain anomalies in the dates and pagination of the documents, which Petitioner is presently attempting to clarify with the Commission, and which could be addressed by public comment on the unredacted studies.

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 found that the Commission, "(a)lthough indicating that it was confronted with a 'lack of conclusive experimental data pending large scale Access BPL deployments'" nevertheless "provided no explanation of how this circumstance justified retaining for Access BPL an extrapolation factor that was designed to accommodate technologies different in scale, signal power and frequencies used." (*Slip Op.* at 21). Furthermore, though the Commission acknowledged that "the actual extrapolation factor can be determined empirically" for carrier current systems (*Slip Op.* at 22) it offered no reasoned explanation for its dismissal of empirical data that was submitted at its invitation. Petitioner had submitted three studies published in 2005 by the by the Office of Communications in the United Kingdom (OFCOM), as well as additional analysis of its own, both of which suggested that an extrapolation factor of 20 dB per decade may be more appropriate for Access BPL. (*Id.*). However, on reconsideration, the Commission summarily dismissed the data, stating: "No new information has been submitted that would provide a convincing argument for modifying [the extrapolation factor or emission limit/distance standards at this time." *Reconsideration Order,* 21 F.C.C.R. at 9318. The Court held that, given the acknowledged critical nature of the extrapolation factor, so conclusory a statement cannot substitute for a reasoned explanation, because it did not provide "assurance that the Commission considered the relevant factors nor a discernable path to which the Court may defer." (*Slip Op.* at 22).

Thus, the Court ordered that on remand, the Commission "shall either provide a

reasoned justification for retaining an extrapolation factor of 40 dB per decade for access BPL systems sufficient to indicate that it has grappled with the 2005 studies, or adopt another factor and provide a reasoned explanation for it." (*Slip Op.* at 23). A full year later, the Commission has not complied with this Court's Opinion and Mandate in this respect, and has refused to indicate when it might comply.

ARGUMENT

I. This Court Has Jurisdiction to Enforce its Mandate.

The Court has the power to grant relief enforcing the terms of its mandates in cases that have been remanded directly to an administrative agency, including the power to compel an unreasonably delayed agency response to the Court's mandate.[5] *Potomac Electric Power Company v. Interstate Commerce Commission*, 702 F.2d 1026, 1032-33 (D.C. Cir. 1983) (appellate court has jurisdiction to determine whether agency unreasonably delayed responding to Court's earlier mandate); *City of Cleveland v. Federal Power Commission*, 561 F.2d 344, 346 (D.C. Cir. 1977) (appellate decision binds further action in litigation by agency subject to its authority, and the court "is amply armed to rectify any deviation"); *Atlantic City Elec. Co. v. FERC*, 329 F.3d 856, 858 (D.C. Cir. 2003) ("this Court has the power to enforce its mandates"). Although the issuance of a writ of mandamus "is an extraordinary remedy reserved for extraordinary circumstances[,] [a]n administrative agency's unreasonable delay presents such a circumstance because it signals the 'breakdown of regulatory processes.'" *In re American*

[5] The Court's jurisdiction arises from the All Writs Act, 28 U.S.C. § 1651(a), which provides that "the Supreme Court and all courts established by an Act of Congress may issue all writs necessary and appropriate in aid of their respective jurisdictions." *See, Telecommunications Research & Action Ctr. v. FCC*, 750 F.2d 70, 76 (D.C. Cir. 1984); *see also, Sierra Club v. Thomas*, 828 F.2d 783, 795-96 (D.C. Cir. 1987).

Rivers, 372 F.3d 413, 418 (D.C. Cir. 2004) (citations omitted). Further, this Court has long recognized that it has an interest in seeing that "an unambiguous mandate is not blatantly disregarded by parties to a court proceeding." *Int'l Ladies Garment Union v. Donovan,* 733 F.2d 920, 922 (D.C. Cir. 1984).

II. The Commission has Unreasonably Delayed Acting in Accordance with this Court's Mandate.

This case presents a clear example of unreasonable agency delay under *Telecommunications Research and Action Center v. FCC*, 750 F. 2d 70, 79-80 (D.C. Cir. 1984) ("TRAC"). No potential justification for inaction recognized in TRAC is available to the Commission in this case. TRAC provides the standards in this Circuit for determining whether agency delay warrants mandamus relief, to-wit:

> (1) the time agencies take to make decisions must be governed by a "rule of reason"; (2) where Congress has provided a timetable or other indication of the speed with which it expects the agency to proceed in the enabling statute, that statutory scheme may supply content for this rule of reason; (3) delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake; (4) the court should consider the effect of expediting delayed action on agency activities of a higher or competing priority; (5) the court should also take into account the nature and extent of the interests prejudiced by delay; and (6) the court need not "find any impropriety lurking behind agency lassitude in order to hold that agency action is 'unreasonably delayed'".

In re American Rivers, 372 F. 3d at 418 (quoting TRAC, 750 F. 2d at 80); *see also In re Bluewater Network,* 234 F. 3d 1305, 1315 (D.C. Cir. 2000). Analysis of these factors shows that the Commission has unreasonably delayed (1) providing public notice of the release of the unredacted Access BPL studies and provision of an opportunity for the public to comment on those unredacted studies; and (2) providing either a reasoned justification for retaining an extrapolation factor of 40 dB per decade for Access BPL

systems sufficient to indicate that it has grappled with the 2005 OFCOM studies, or adopt another factor and provide a reasoned explanation for it. In fact, other than the release of the unredacted studies pursuant to, and solely because of the constraint of Petitioner's Freedom of Information Act request, the Commission has done nothing at all with respect to compliance with the Court's mandate. Therefore, mandamus relief is warranted.

A. The Commission Has Not Acted Consistently with the "Rule of Reason."

No legitimate reasons justify the Commission's failure to take the two specific actions ordered by the Court within a year and two months of the release of the Court's Opinion, and within a year of the Court's Mandate. In the first instance, the Commission need merely have released the unredacted documents, issue a public notice of its having done so, and called for public comment on those unredacted studies. There is no possible reason why this routine, administrative task was not done within a month of the Court's Mandate. More than a year is patently an unreasonable amount of time to do this. As to the second obligation, to either provide a reasoned justification for the 40 dB per decade extrapolation factor for Access BPL radiated emissions, taking into account the 2005 OFCOM studies, or to or adopt another factor and provide a reasoned explanation for it, this too should not have taken the Commission a year to accomplish. The Commission presumably developed during the course of this rulemaking proceeding (which commenced six years ago in 2003 with the issuance of a *Notice of Inquiry* [6] and which was repeatedly addressed in comments received prior to the 2004 *Access BPL Order* and on reconsideration prior to the 2006 *Order on Reconsideration*) a justification for adopting the 40 dB/decade extrapolation factor. If so, in order to comply with the Court's

[6] Notice of Inquiry, *Carrier Current Systems, including Broadband over Power Line Systems* (ET Docket No. 03-104), 18 FCC Rcd. 8498 (released April 28, 2003).

Mandate, the Commission need simply have enunciated that justification *based on information then in the record*, which certainly does not require a year to accomplish. If it did not have a justification for the 40 dB/decade extrapolation factor, then it would be incumbent on the Commission to at least reopen the rulemaking proceeding and solicit further comment on a proper extrapolation factor, preparatory to adopting a different one (an option afforded the Commission on remand by the Court). This, the Commission has not done either. No interpretation of the "rule of reason" in this case justifies the Commission's inaction for more than one year in addressing either portion of the obligations on remand, pursuant to this Court's mandate. While the Communications Act of 1934 does not include deadlines for addressing rulemaking proceedings by the Commission, or Commission actions relative to court remands in rulemaking proceedings, and therefore the Act provides no guidance in this case for the application of the "rule of reason", the facts of this case establish *prima facie* that the Commission's delay violates the rule of reason and that mandamus is justified. *In re American Rivers,* 372 F. 3d at 419 held that "a reasonable time for agency action is typically counted in weeks or months, not years."

B. The Commission's Delay is Related to Human Health and Welfare.

The Commission's Access BPL rules determine the interference potential of these unlicensed, ubiquitous systems using high-frequency and very-high-frequency radio signals on unshielded, medium-voltage power lines. The extent to which the radio frequency energy from those power lines is radiated from the lines determines the extent to which it interferes with licensed radio services, including aeronautical radio, the Amateur Service, the Broadcast Service (International Broadcast and the Television

Broadcast Service) and Public Safety (and Business and Industrial) land mobile radio Services. To the extent that the Commission is unable to justify the technical assumptions underlying those rules, which are in place and have been since 2004, licensed radio services stand to suffer harmful interference. This is quite obviously a public health and welfare issue. The Commission's heretofore undisclosed findings from its own redacted studies of Access BPL systems, and its assumptions with respect to the 40 dB/decade signal decay extrapolation factor are directly related to the interference potential of Access BPL systems to these important radio communications systems. This makes the Commission's delay "less tolerable" than if Petitioner was concerned with some economic regulatory matter, according to the TRAC test.

C. There is No Effect of Expediting Delayed Action on Commission Activities of a Higher or Competing Priority.

The Commission's fundamental obligation is to prevent interference between and among communications facilities. While the Commission certainly enough has competing priorities and not unlimited staff resources, it cannot reasonably be heard (and it has not to date been heard) to assert that delay in this case was necessary in order to address other proceedings. All that was required in this case was to release certain documents which the Commission had in its possession in unredacted form; issue a public notice soliciting comment on those studies from the public; and to either explain its justification for adopting a technical standard for which it presumably had some justification, or otherwise to reopen a proceeding in an effort to develop a record by which it could justify a different standard. Nothing among those tasks could reasonably be asserted to detract significantly from other, competing Commission priorities, and no such explanation has

been offered Petition by the Commission when inquiries have been made of the agency in the year since the Commission issued its Mandate.

D. The Interests Prejudiced by the Commission's Delay are Substantial and Include Those of Proponents of Access BPL as well as Licensed Radio Services Affected by Access BPL.

As asserted above, the Aeronautical Radio Service and the Public Safety Radio Service are safety of life radio services. The Amateur Service provides emergency and disaster relief communications on an organized basis. The Television and International Broadcast services are important information dissemination services, including reporting on emergencies and disaster situations. Interference from Access BPL systems which disrupts communications in any of these services, because the Commission's rules, now in place, prove insufficient to prevent that harmful interference, is obviously extremely damaging and threatens persons and property. Furthermore, to the extent that there exists regulatory uncertainty about the interference potential of Access BPL and the parameters by which Access BPL might be permitted to operate in the future (because, for example, the assumptions concerning the extent of Access BPL signal decay at distance from overhead power lines is unknown and therefore the power levels at which those systems can operate are now unclear), those entities wishing to furnish BPL services or make use of the technology are prejudiced by the Commission's delay as well.

E. Although Petitioner Need Not Show Agency Impropriety to Make Out a Case for Mandamus, There is Ample Evidence that the Commission has Acted, and Continues to Act, Improperly.

The Commission in this case, since the beginning of the proceeding in 2003, acted in what the Commission's former Chairman himself described as the role of a "cheerleader" for Access BPL. The record in this case, as reviewed by this Court, reveals an agency that tailored its actions and analysis to achieve a predetermined outcome in the rulemaking proceedings. Information that detracted from the Commission's ability to enact the inadequate rules governing Access BPL was effectively ignored or suppressed. The delay in acting on the Court's Mandate in this case is in furtherance of this same Commission policy considerations that led to the Court's remand more than a year ago. Thus, though Petitioner need not prove "impropriety lurking behind agency lassitude in order to hold that agency action is 'unreasonably delayed'" (TRAC, 750 F. 2d at 80) such impropriety is manifest here.

III. Petitioner Has No Other Adequate Remedy.

Mandamus is proper only if "there is no other adequate remedy available to the plaintiff." *Northern States Power Co. v. DOE*, 128 F.3d 754, 758 (D.C. Cir. 1997) (Citation omitted). Because the Commission's error is its unreasonable delay in acting, there is no agency action to review and Petitioner's only avenue for relief is to seek a writ of mandamus.

IV. The Commission Should be Ordered to Comply with the Court's Mandate within Sixty Days.

Given the simplicity of the Commission's compliance with the two components of the Court's Mandate on remand and the amount of time that the Commission has already taken following the issuance of the Mandate, the Court need not be concerned with the question of how much more time is needed for the Commission to complete its tasks. Sixty days is more than enough to solicit public comment on the unredacted studies

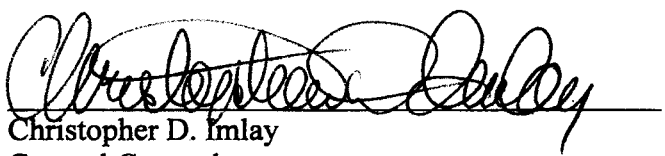
and to justify, if it can, the extrapolation factor, or to reopen the rulemaking proceeding in order to determine a different, appropriate extrapolation factor.

CONCLUSION

For the reasons set forth above, Petitioner respectfully requests that this Court issue a writ of mandamus requiring the Federal Communications Commission to comply with this Court's Opinion and Mandate within sixty days, by issuing a public notice seeking comment on the unredacted studies now in the Commission's rulemaking record; and to either provide in the rulemaking record either a reasoned justification for the Commission's adoption of a 40 dB/decade extrapolation factor or else solicit public comment on an alternative extrapolation factor.

Respectfully submitted,

AMERICAN RADIO RELAY LEAGUE, INCORPORATED



Christopher D. Imlay
General Counsel
14356 Cape May Road
Silver Spring, Maryland 20904-6011
(301) 384-5525

June 24, 2009

EXHIBIT A

Federal Communications Commission
Washington, D.C. 20554

April 28, 2009

Christopher D. Imlay
General Counsel
American Radio Relay League, Inc.
Booth, Freret, Imlay & Tepper, P.C.
14356 Cape May Road
Silver Spring, MD 20904-6011

FOIA Control No. 2009-311

Dear Mr. Imlay,

This is in reply to your letter dated March 31, 2009, in which you invoke the Freedom of Information Act (FOIA) (5 U.S.C. 552). You seek "the ***unredacted versions*** of certain documents and technical studies included in the record in redacted form in ET Docket No. 04-37 by the Office of Engineering and Technology on or about December 22, 2004." (Emphasis in original.) You further identify these records as those specified for public inspection by the D.C. Circuit Court of Appeals in its decision, *American Radio Relay League, Inc. v. FCC,* 524 F.3d 227 (D.C. Cir., 2008).

Attached are the responsive documents you request. For your information, they are being submitted simultaneously into the record of the underlying proceeding, ET Docket No. 04-37. Note that certain slide numbers and dates appear to be out of sequence, due to repeat printing of files to generate unredacted versions of pages previously redacted.

The Court's decision in the above-referenced case required the Commission to provide an opportunity for public comment on the unredacted versions of the report. The Court also remanded to the Commission for further justification of the extrapolation factor used for determining compliance with the Commission's standards for BPL systems. The Commission will respond to the Court's direction separately.

You may seek review of this disposition of your request by the Commission by filing an application for review with the Office of General Counsel within 30 days of the date of this letter. See 47 C.F.R. § 0.461(j).

Sincerely,

Julius P. Knapp
Chief,
Office of Engineering & Technology

Enclosures

CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of June 2009, I caused copies of the foregoing PETITION FOR WRIT OF MANDAMUS TO COMPEL COMPLIANCE WITH MANDATE to be served by first class mail, postage prepaid, upon the following:

Joseph R. Palmore, Esq.
Richard K. Welch, Esq.
John Edward Ingle, Esq.
C. Grey Pash, Jr., Esq.
Office of the General Counsel
Federal Communications Commission
445 12th Street, S.W. – Room 8-A741
Washington, D.C. 20554

Counsel for Respondent Federal Communications Commission

Thomas O. Barnett
Robert B. Nicholson
Robert J. Wiggers
Antitrust Division, Appellate Section
United States Department of Justice
950 Pennsylvania Avenue, N.W., Room 3224
Washington, D.C. 20530
robert.nicholson@usdoj.gov
robert.wiggers@usdoj.gov

Counsel for Respondent United States

Jane E. Mago
Ann West Bobeck
National Association of Broadcasters
1771 N Street, N.W.
Washington, D.C. 20036

Counsel for Intervenor National Association of Broadcasters

John B. Richards
Thomas B. Magee
Keller and Heckman LLP
1001 G Street, N.W. – Suite 500 West
Washington, D.C. 20001

Counsel for Intervenor Duke Energy Corp.

Mitchell Lazarus, Esq.
Harry F. Cole, Esq.
Fletcher, Heald, & Hildreth, P.C.
1300 N. 17th Street – 11th Floor
Arlington, VA 22209

Counsel for Intervenor CURRENT Technologies, Inc.

David L. Donovan
Association for Maximum
Service Television, Inc.
4100 Wisconsin Avenue, N.W.
Washington, D.C. 20016

Robert Allen Long, Jr
Covington & Burling
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

Counsel for Intervenor Assoc. For Maximum Service Television

Jill Mace Lyon
Brett Kilbourne
Utilities Telecom Council
1901 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

Counsel for Intervenor Utilities Telecom Council

George Y. Wheeler
Holland & Knight LLP
2099 Pennsylvania Avenue, N.W. – Suite 100
Washington, D.C. 20006

Council for Intervenor Ambient Corporation

James N. Horwood
Tillman L. Lay
Spiegel & McDiarmid
1333 New Hampshire Avenue, N.W.
Washington, D.C. 20036

Counsel for the City of Manassas, Virginia

Christopher D. Imlay