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WRITER'S DIRECT DIAL

July 20, 2011

Via Hand Delivery

Federal Communications Commission  
Consumer & Governmental Affairs Bureau  
Disability Rights Office  
Attn: Susan L. Kimmel, Deputy Chief  
445 12<sup>th</sup> Street SW  
Washington, DC 20554

Re: Official Notice of Informal Complaint, dated June 13, 2011  
File No. 11-C00297663 (SK) (Mitchell) (KTEN-TV)

Dear Ms. Kimmel:

This firm is counsel to Channel 49 Acquisition Corporation, licensee of Television Station KTEN, Ada, Oklahoma ("KTEN").

This letter responds to the informal complaint submitted to the Federal Communications Commission ("FCC") by Mr. James Mitchell pursuant to Section 713 of the Communications Act, 47 U.S.C. § 613, and Section 79.2 of the FCC's Rules, 47 C.F.R. § 79.2. This complaint has been assigned File No. 11-C00297663 by your office. KTEN received notice of Mr. Mitchell's complaint by Notice of Informal Complaint dated June 13, 2011, from the FCC's Consumer & Governmental Affairs Bureau's Disability Rights Office (the "Notice").<sup>1</sup> Pursuant to email correspondence dated July 6, 2011, from you to KTEN's undersigned legal counsel, the time for responding to the Notice was graciously extended to July 21, 2011; thus, this response is timely filed.

<sup>1</sup> Pursuant to the directive in the Notice, correspondence acknowledging the Station's receipt of the Complaint was sent via email and Certified U.S. Mail, Return Receipt Requested, to Mr. Mitchell.

Mr. Mitchell's complaint, which references a time and date of 4:30 p.m. on April 14, 2011, reads as follows:

"Tornado warning was in the area. turned on TV and KTEN did not have captions provided. went on KTEN's facebook page to complain about it and they implied that they did not have to provide captions and that scroll of info on bottom of screen is good enough."

Through email correspondence with the complainant Jimmy Mitchell, KTEN determined that Mr. Mitchell was watching KTEN's 10.1 primary channel on the day in question. *See* Declaration of Craig Marrs ("Marrs Declaration"), ¶ 4.

KTEN is licensed to Ada, Oklahoma, which is in the Sherman-Ada Designated Market Area ("DMA"), which is ranked as the 161<sup>st</sup> DMA by Nielsen.<sup>2</sup> As such, KTEN is permitted to, and does, use the electronic newsroom captioning technique for its newscasts. *See* Marrs Declaration, ¶ 3; *see generally* 47 C.F.R. § 79.1(e)(3). During times of severe weather, KTEN's normal protocol has been to run a crawl across the bottom of the screen in order to provide relevant emergency information in a visual form. *See* Marrs Declaration, ¶ 4. The Commission has specifically observed that providing emergency information in a crawl may satisfy a station's obligation to provide visually any emergency information that is provided aurally. *See, e.g., Reminder Regarding Video Programming Distributors' Obligation to Make Emergency Information Accessible to Persons with Hearing or Vision Disabilities*, Public Notice, DA 11-1070 (June 17, 2011), at 2 ("Commission rules require that emergency information provided in the audio portion of the programming be made accessible using closed captioning *or* other methods of visual presentation, including open captioning, crawls or scrolls that appear on the screen.").

In investigating the Notice, KTEN discovered that the device used to record all station programming on a daily basis was not functioning properly on April 14, 2011, and, as a result, complete recordings of the day's programming are not available. Through KTEN's diligent efforts, however, General Manager Craig Marrs was able to locate his own personal recording<sup>3</sup> of KTEN's Channel 10.1 for the time periods that correspond to the Station's daily newscasts, which included some program material from Channel 10.1 that is relatively close to the 4:30 p.m. time period referenced in the Notice. *See* Marrs Declaration, ¶ 4. The program material provided on the enclosed DVD begins at approximately 4:57 p.m. because KTEN airs, on its 10.1 primary channel, a daily 5 p.m. newscast. The segment on the DVD accompanying this response begins and ends abruptly because the Station was in "wall-to-wall" coverage of that day's weather event and, as noted above, Mr. Marrs' recorder is set only to record during the regularly scheduled newscasts. *See* Marrs Declaration, ¶ 4. KTEN does not have recordings

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<sup>2</sup> A list of Nielsen DMA rankings for 2010-2011 is available at the following URL address: [http://www.tvb.org/media/file/Nielsen\\_2010\\_2011\\_DMA\\_RANKS.pdf](http://www.tvb.org/media/file/Nielsen_2010_2011_DMA_RANKS.pdf).

<sup>3</sup> Mr. Marrs has a personal recorder scheduled to record KTEN during the timeslots of the Station's regularly scheduled newscasts.

from 4:30 p.m. on April 14 for its Channel 10.1 because no newscast was regularly scheduled for that time. *See* Marrs Declaration, ¶ 4.

During its April 14 storm coverage, KTEN followed its usual protocol, which included running a crawl to cover emergency information regarding the weather event. *See* Marrs Declaration, ¶¶ 3, 4. KTEN's April 14 storm coverage also included a graphics-heavy weather presentation, utilizing color-coded maps that identified by name relevant roads, towns, cities, and counties and tracked the storm, including the time and location of the storm's progress and path,<sup>4</sup> and a conspicuous graphic in the lower left corner of the screen that identified the existence of storm warnings and a second map identifying the counties subject to the warnings (the "Lower Left Map"). *See* DVD; Marrs Declaration, ¶ 4. Another, perhaps less technical (but no less effective), tool typically used by KTEN, and in fact used by KTEN on April 14, is the meteorologist's own arm and hand motions over the weather map showing the directionality of the storm's progress. For example, as the enclosed video material shows, the meteorologist made arm and hand motions that clearly showed the trajectory of the storm and its anticipated path towards various cities identified visually by name on the map. *See* DVD; Marrs Declaration, ¶ 4.

In addition to the crawl that appears multiple times during the recorded material, it is evident in the recording that the weather graphics used by KTEN were dynamic and changed as the conditions changed. *See* DVD. For example, when the specific counties highlighted in the Lower Left Map were subject to a tornado warning, the words "Tornado Warning" appeared in a red color above the Lower Left Map, while the Lower Left Map clearly highlighted the counties subject to the warning. Then, when the tornado warning was downgraded to a tornado watch, the Lower Left Map graphic changed, and the words "Tornado Watch" appeared in a blue color above the Lower Left Map, while the Lower Left Map conspicuously highlighted the relevant counties. Subsequently, when another tornado warning was issued, the graphic again changed to reflect the new warning, and the words "Tornado Warning" again appeared in red above the Lower Left Map. *See* DVD. Similarly, there are numerous instances where KTEN's meteorologist was discussing the path of the storm and set the large weather map into motion to show the storm's progress towards particular locales. *See* DVD.

It warrants observation that the Station's weather coverage on April 14 also provided a great deal of non-emergency information. As is evident on the enclosed DVD, KTEN's on-air talent spent time not only discussing the track of the storm, but also making common-sense and routine weather and non-weather observations as well as discussing how viewers could interact with the Station and provide user-generated content on KTEN's page on Facebook. *See* DVD. In that regard, the nature of most of the information in KTEN's April 14 broadcast on the enclosed recording was categorically different than in cases where stations have been found to be in violation of the emergency access rule, such as the *Washington Tornado Cases*.<sup>5</sup> In those

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<sup>4</sup> One example of such visual information was a blue box graphic containing the following information about the storm: "Moving: NE at 30 mph 5:08PM Fitzhugh."

<sup>5</sup> *ACC Licensee, Inc. Licensee of WJLA-TV*, Notice of Apparent Liability, 20 FCC Red 9832 (2005) ("*WJLA-TV*"); *NBC Telemundo License Co. Licensee of WRC-TV*, Notice of Apparent Liability,

cases, the “critical information” about the emergency that was not provided visually were action items by which the station told viewers to take certain actions in order to directly protect their health and safety in the face of a tornado potentially touching down in their area. More specifically, in *WJLA-TV*, an anchor had advised viewers “to take cover in their homes, go to the basement or an interior room, and cover themselves with blankets and quilts.”<sup>6</sup> Similarly, in *WRC-TV*, the station advised viewers “to get away from their windows, and go to an interior room, such as a bathroom or closet” and to “get away from windows and go to a bathroom or basement when they observe high winds.”<sup>7</sup> Finally, in *WTTG*, the anchor “told viewers in the Frederick and Hagerstown, Maryland areas that they should take cover, go to the lowest level of their house, and stay close to the floor” and also “told viewers located in Lovettsville, Leesburg, and Lucketts, Virginia, to take cover, go to the lowest level of their house, and go to an interior room.”<sup>8</sup> In contrast, the enclosed DVD shows that KTEN did not provide any such specific directions aurally to viewers, though KTEN’s crawl contained some precautionary information and KTEN’s anchors suggested in general terms that viewers “take your tornado precautions.” *See DVD.*

The enclosed DVD recording reveals that the weather coverage provided routine storm information that thunder, lightning, and rain were occurring, information about the location of the KTEN storm tracker (Kris Hair) and availability of Kris Hair’s live-streaming video on the KTEN website, information about the fact that there were *no* current tornado touchdowns, routine information about cloud and visibility information, and commonsense observations about things such as the possibility of hail. *See DVD.* While much of this information was also provided visually (for example, virtually all aural discussions of visibility were accompanied by live images depicting visibility in certain locations), none of it comprised “emergency information” or the “critical details” of an emergency. Instead, many periods of the weathercast were more like a general news report about certain routine and commonsense aspects of a weather event that viewers in the Sherman-Ada market are familiar with because of the number of similar storms that occur annually in that area. *See Marris Declaration*, ¶ 4. Indeed, the anchor’s observation a couple of minutes into the recording that there was “no need to panic in this situation but certainly just be aware of your, uh, surroundings” suggests that the weather event, generally, was not of an emergency or life-threatening nature. *See DVD.*

In short, to the extent that emergency information about the path of the storm was provided aurally, it was also provided, repeatedly, visually. *See DVD.* Individually and in the aggregate the various visual display tools used by KTEN in the enclosed recording displayed graphic information that unequivocally provided information visually about the location and direction of the movement of the storm that was being discussed by the meteorologist. On that ground, KTEN believes that it substantially complied with the letter and spirit of the emergency access rule. Nevertheless, in the wake of the comments made by Mr. Mitchell on KTEN’s page

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20 FCC Rcd 9839 (2005) (“*WRC-TV*”); *Fox Television Stations, Inc. Licensee of WTTG(TV)*, 20 FCC Rcd 9847 (2005) (“*WTTG*”) (collectively, the “*Washington Tornado Cases*”).

<sup>6</sup> *WJLA-TV*, ¶ 8.

<sup>7</sup> *WRC-TV*, ¶ 8.

<sup>8</sup> *WTTG*, ¶ 8.

on Facebook (referenced in Mr. Mitchell's complaint), and then again in the wake of receipt of the Notice, KTEN has begun internal discussions regarding the feasibility of retaining a closed captioning provider to supply KTEN with emergency closed captioning services during extended news coverage of weather events instead of relying on a crawl and a graphic-intensive weather presentation. *See* Marris Declaration, ¶ 3. At the same time, KTEN has already revised its internal protocols to provide more robust service to deaf and hard of hearing viewers—namely, starting with the next severe weather coverage, station staff will experiment with generating summaries of information to feed through the teleprompter so that they show on viewers' television screens in the closed captioning field. At this juncture KTEN has not definitively determined whether any additional action is feasible—and KTEN believes, in any event, that its current protocols satisfy the Commission's emergency access requirements—but KTEN wishes to make clear that it is continually open to and looking for ways to improve its service to the public, including the hard of hearing segments of the community. *See* Marris Declaration, ¶ 3.

KTEN takes very seriously its closed captioning and emergency access obligations and service to the public, and KTEN strives to achieve a high level of satisfaction for all its viewers. KTEN's "above-and-beyond" approach to closed captioning is reflected, perhaps most saliently, in the fact that the Station provides closed captioning of its early morning newscasts even though they begin airing at a time (5:00 a.m.) that would otherwise be exempt. *See* 47 C.F.R. § 79.1(d)(5) (exempting programming aired between 2 a.m. and 6 a.m. from the closed captioning requirements). *See* Marris Declaration, ¶ 3.

This Response is supported by the Declaration of Craig Marris, General Manager of KTEN, and the Certification of David A. Hanna, President of Channel 49 Acquisition Corporation, who has indicated that he has reviewed this letter in his capacity as an officer of the licensee and that to the best of his knowledge and belief, and in reliance on the Declaration of Craig Marris, the information herein is true and correct.

In light of the information provided above, which demonstrates KTEN's efforts to provide emergency information to its viewers, KTEN respectfully requests that the complaint be dismissed and no further action be taken against KTEN. Should you have any further questions regarding the above-referenced complaint, please do not hesitate to contact the undersigned.

Sincerely,

BROOKS, PIERCE, McLENDON,  
HUMPHREY & LEONARD, L.L.P.



Stephen Hartzell  
*Counsel to Channel 49 Acquisition Corporation*

Enclosures

cc: Sherita Kennedy, FCC (via email)  
Susan L. Kimmel, FCC (via email)  
Mr. James Mitchell (via email and First Class U.S. Mail)

Susan L. Kimmel, Deputy Chief  
July 20, 2011  
Page 6

bcc: Craig Marrs  
Tiffany Humphrey  
Gerald Walsh

Craig: Please be sure a copy of this letter is placed in the public inspection file in the "FCC Investigations and Complaints" section along with a copy of the Notice of Informal Complaint.

## DECLARATION OF CRAIG MARRS

1. My name is Craig Marrs. I am over the age of eighteen, and I am competent to testify to the matters set forth in this declaration. Unless and except as specifically stated otherwise, I have personal knowledge of all the facts stated herein. I have reviewed the foregoing correspondence from Stephen Hartzell in response to the June 13, 2011, Notice of Informal Complaint ("Notice"), and I hereby verify the truth and accuracy of the information contained therein.

2. I am and have been at all relevant times the General Manager of Television Station KTEN, Ada, Oklahoma, which is in the Sherman, TX-Ada, Oklahoma, DMA. I have reviewed the Notice, and I am familiar with its contents.

3. As a television station in the 161<sup>st</sup> DMA, KTEN is permitted to, and does, use electronic newsroom closed captioning during its newscasts, including during its 5 a.m. daily newscast, even though the Commission's closed captioning rules generally do not require closed captioning at 5 a.m. This type of closed captioning leaves unscripted material uncaptioned. When KTEN covers a weather event, such as that which occurred on April 14, 2011, the station relies on a combination of a crawl, weather graphics, maps, and meteorologist motions and gestures to present visually any emergency information that is provided aurally. It is my understanding that for stations such as KTEN that are permitted to routinely use electronic newsroom captioning, the FCC has approved using crawls and other methods of visual presentation to present emergency information that is provided aurally. It is my understanding that the use of closed captions for a station such as KTEN is not required for the presentation of emergency information. We believe our current practices meet, and our performance on April 14 met, the requirements and the spirit of the FCC's emergency access rule. Nevertheless, as a result of Mr. Mitchell's comments, we are considering the feasibility of using an emergency closed captioning service, and we have already revised our internal protocols in a way that should result in an extra measure of service—namely, beginning with the next severe weather coverage, station staff will experiment with generating summaries of information to feed through the teleprompter so that they show on viewers' television screens in the closed captioning field. Whether or to what extent this proves feasible remains to be seen. Indeed, KTEN is always interested in constructive suggestions as to how to improve service to all segments of our viewing community, including, of course, viewers who are hard of hearing or deaf.

4. On April 14, 2011, KTEN covered a weather event and used its typical protocol to present emergency information, including weather graphics and multiple crawls. When KTEN received the Notice and began investigating, it was discovered that the station's recording equipment was not functioning properly on April 14 and, as a result, the station does not have recordings of all programming that aired on April 14. Nonetheless, since I personally record all of the station's newscasts, I was able to find some recordings of KTEN from April 14 in my own set of recordings. My recorder is set to record only during the time periods of KTEN's regularly scheduled newscasts, which is why the material submitted on the enclosed DVD begins and ends abruptly. The Notice references 4:30 p.m. on April 14 as the time at which Mr. Mitchell was watching KTEN. I corresponded by email with Mr. Mitchell and determined from that exchange that Mr. Mitchell was watching KTEN's Channel 10.1. On April 14, I recorded Channel 10.1 at

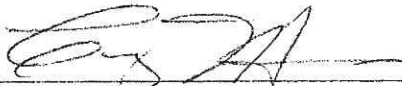
5 p.m., which is the time of its regularly scheduled 5 p.m. newscast. Neither the station nor I have a recording of Channel 10.1 at 4:30 p.m. However, as the recording at 5 p.m. (start time is actually 4:57 p.m.) shows, the station was already covering a weather event at the time the 5 p.m. news would have started. The recording submitted with KTEN's response shows that the station did, in fact, at 5 p.m. and again later during the recording, have a crawl airing that visually provided emergency information. In addition, it is evident that the weather map, graphics, city names, and meteorologist's gestures also effectively communicated the storm path, storm watches and warnings and other emergency information to viewers. Finally, interwoven into the weathercast were many periods where more general information was provided about certain routine and commonsense aspects of the weather event with which viewers in KTEN's market are familiar because the type of storm being covered on April 14 occurs with great regularity.

**[signature appears on following page]**



The undersigned, under penalty of perjury, declares the foregoing to be true, complete, and correct to the best of his personal knowledge.

This, the 20th day of July, 2011:

A handwritten signature in black ink, appearing to read 'Craig Marrs', written over a horizontal line.

Craig Marrs  
General Manager, KTEN

**CERTIFICATION OF LICENSEE**

I, David A. Hanna, hereby declare, under penalty of perjury, as follows:


1. I am greater than eighteen years of age and am competent to make this Declaration and Certification. I am President of Channel 49 Acquisition Corporation, licensee of KTEN, Ada, Oklahoma ("KTEN"). I have held this position at all relevant times.

2. My signature below indicates, under penalty of perjury, that I have reviewed the Notice of Informal Complaint dated June 13, 2011 ("Notice"), and I am familiar with its contents, I have reviewed the foregoing correspondence from Stephen Hartzell in response to the Notice, and, to the best of my knowledge, information, and belief, I hereby verify the truth and accuracy of the information contained therein. To the extent that I am or was not personally involved in particular aspects of the station's operations or investigation of the emergency access issue that is the basis of the Notice, I am relying on the statements made in the Declaration of Craig Marrs, which I have reviewed and with which I am familiar.

**[signature appears on following page]**

The undersigned, under penalty of perjury, declares the foregoing to be true, complete, and correct to the best of his personal knowledge.

This, the 20th day of July, 2011.

By:   
\_\_\_\_\_  
David A. Hanna  
President, Channel 49 Acquisition Corporation