Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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Federal Communications Commission
Office of the Secretary

In the Matter of	)	
	)	
Clarity Media Systems, LLC Application for Experimental License	))	File No. 0692-EX-PL-2007
	)	
Waiver Requests by Clarity Media Systems, LLC To Operate CARS Stations At Flying J Travel Plazas	)))	DA 07-1946

To: The Commission and to the Office of Engineering and Technology, Experimental Licensing Branch

COMMENT ON THE INTERRELATIONSHIP BETWEEN CLARITY'S EXPERIMENTAL APPLICATION AND THE MEDIA BUREAU'S DENIAL OF CLARITY'S WAIVER REQUESTS

The Association for Maximum Service Television, Inc. ("MSTV"), hereby addresses what it believes is a fundamental misconception that underlies Clarity Media System LLC's ("Clarity's") position with respect to the above two proceedings.

Clarity seems to believe, and seems to ascribe a similar belief to both the Media Bureau and OET, that proposals to use licensed spectrum for purposes other than what the FCC allocated that spectrum for can and should be evaluated on the basis of "experiments" conducted by the proponents of those new, non-conforming uses. Rulemakings are not necessary, spectrum allocation decisions are not necessary, testing by the FCC is not necessary, consideration of alternative uses is not necessary, even use of the methodology determined by the FCC as appropriate for evaluating harmful interferences to microwave operations is not necessary.[1]

[1] *E.g.*, "the interference issue in the above-numbered Clarity proceeding [DA 07-1946, *i.e.*, the CARS waiver proceeding] should be decided entirely on the technical merits revealed by the results of actual experimental (continued...)

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However, allocation decisions, as reaffirmed in the 1993 Budget Reconciliation Act, are to be made by the FCC in accordance with its determination as to what use of that spectrum optimally serves the public interest.[2] The proper way to evaluate whether to introduce different uses into that spectrum is through a mlemaking where issues of interference, sharing, preclusionary usage, and alternative uses of the spectrum can be discussed broadly, including by any member of the public who chooses to comment.

The entire concept of spectrum allocations would be undercut, the FCC's processes would be clogged, and investment in communications enterprises would be discouraged if every new idea for a spectrum-using enterprise could bypass the FCC's spectrum allocation and rulemaking processes and the proponent could simply file applications for a nationwide non-conforming use and propose an experiment that it would conduct in support of those non-conforming applications. (Clarity would need *11* rule waivers in order to operate its proposed direct-to-subscriber wireless cable service. See Attachment A.)

The Media Bureau concluded that "the underlying purpose of the Part 78 CARS rules would not be served by a grant of this request. In essence, Clarity has requested that the Commission waive the rules that form the foundation of the CARS regulatory framework."[3] Exceptions to existing allocations may be made without rulemaking proceedings "on a temporary basis only ... for projects of short duration or emergencies" and such exceptions "are not

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operations in the field." ***See*** Clarity's March **5**, 2008 ex parte notice letter. Further, Clarity has suggested that the Media Bureau and OET urged or supported this course at a meeting with MSTV on October 5. Although the undersigned did not participate in that meeting, MSTV representatives, who did attend, informed him that they did not understand that to be the position of the Media Bureau or OET.

[2] ***See*** 47 U.S.C. § 309 and Subtitle C of Pub. Law No.103-66, 107 Stat. 312 (1993).

[3] ***See*** Waiver Requests by Clarity Media Systems, LLC, Order, DA 07-1946, 22 FCC Rcd 8382, at para. 9 (2007) ("Denial Order").

intended to develop a service to be operated on frequencies other than those allocated such service."[4]

Moreover, even as to one (but only one) issue necessary to grant of Clarity's applications namely, assessment of interference, the proponent could seek to resolve it not by reference to well-recognized FCC methodologies, but on the basis of an "experiment" *conducted* by *the proponent itself*. Clarity has invited MSTV to observe the tests. But the logical implication of this approach is that incumbent users of the spectrum in question must always be vulnerable to interloper uses and that they must prove that those unauthorized users would cause interference. Indeed, Clarity's latest submission is quite explicit in claiming that the burden of proof falls on the incumbent: which of course is based on a misreading of Section 157. Wireless cable is not a "new technology or service." The Multipoint Distribution Service ("MDS")/Multichannel Multipoint Distribution Service ("MMDS") was historically used to offer wireless cable. Today, BRS/EBS spectrum continues to be used for wireless cable services and other wireless offerings. Thus, Clarity's proposed service simply is not within the scope of Section 157.[6] Clarity's proposed approach would involve the FCC's abdicating its most fundamental role, that of "traffic cop" of the frequencies[7]

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[4] *See* 47 C.F.R. § 2.102(b). *See also* 47 C.F.R. § 2.102(a) ("[e]xcept as otherwise provided in this section, the assignment of frequencies and bands of frequencies to all stations and classes of stations and the licensing and authorizing of the use of all such frequencies between 9 kHz and 400 GHz, and the actual use of such frequencies for radiocommunication or for any other purpose, including the transfer of energy by radio, shall be in accordance with the Table of Frequency Allocations in § 2.106.").

[5] *See* Clarity's April 8,2008 ex parte filing in DA 07-1946, at 4 (claiming that the "burden of proof is on Clarity's foes") under 47 U.S.C. § 157 (Section 7 of the Communications Act of 1934, as amended).

[6] In any event, for the reasons stated in these and other filings by MSTV and other broadcasters, Clarity's proposed service would not be in the public interest.

[7] *See Nat'l Broadcasting Co.* v. *U.S.*, 319 U.S. 190,215-16 (1943) (adding, "[b]ut the Act does not restrict the Commission merely to supervision of the traffic. It puts upon the Commission the burden of determining the (continued...)

The irony of this particular effort to circumvent the basic principles of spectrum allocation policy that were established in the 1934 Act and previously in the Radio Act of 1927 is that the non-conforming use proposed by Clarity doesn't begin to weigh on the same scale as the electronic newsgathering and other auxiliary services that Clarity's proposed use would jeopardize. As the Media Bureau has recognized, "the public interest is better served by ensuring that viewers are able to receive breaking local news, including natural and unnatural disasters, and coverage of live events through the services provided by the primary users of the 2025 to 2110 MHz band."[8]

The Media Bureau also noted that Clarity's use of the 2 GHz band would leave no room for broadcasters to switch to a different ENG channel if Clarity caused interference.[9] Clarity's proposal is to use all of broadcasters' ENG's frequencies to transmit 70 channels of programming, only one of which would be devoted to Amber Alert announcements. But one instance of Clarity interference could well wipe out the entire coverage of one community's fire or crime or coverage of emergencies such as the Virginia Tech shootings, or for any other matter for which ENG services are used several times a day, virtually every day of the year. Ironically, ENG coverage may from time to time provide the raw information and reporting on which Amber Alerts are based. One incident of interference to local broadcast news coverage in an important news circumstance would reinforce the need to protect these services from any interference threat. As the Media Bureau observed, providing additional methods of distributing

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composition of that traffic. The facilities of radio are not large enough to accommodate all who wish to use them. Methods must be devised for choosing from among the many who apply. And since Congress itself could not do this, it committed the task to the Commission.").

[8] Denial Order at para. 14 (2007).

[9] *See* id. at para. 12.

Amber Alerts "at the risk of interfering with broadcast station coverage that is distributing the same alerts to a much wider audience is not prudent."[10]

A few other points in closing:

(i) Clarity's proposal to achieve interference protection by inserting use of an emergency phone number is inadequate. Time is often of the essence in these news coverage incidents. Few will recognize that there is interference and be able to determine the cause. In time-sensitive situations this proposed "remedy" is inadequate.[11]

(ii) Clarity proposes use of this system at 250 truck stops. Nothing would prevent the precedent from being expanded to thousands of other truck stops and parking lots.[12]

(iii) Clarity's proposed services can already be delivered without use of the public's airwaves[13]) or by use of other frequencies.[14]

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[10] See id. at para. 14.

[11] See id. at para. 12 (pointing out that "emergency information is critical in real-time. It could take hours to determine the source of harmful interference, identify and contact a person with the skill and authority to shut down the Clarity system, successfully turn the system off, and reestablish the ENG link to the station").

[12] See id. at n.42 (observing that "the possibility that entities other than Clarity could request similar waivers would further increase interference concerns and make it even more difficult for broadcasters to determine the source of interference. Other similar service waivers could come from other chains of truck stop travel plazas, RV parks, campgrounds, etc., adding hundreds and perhaps thousands of potential new users which would further restrict viability of the 2 GHz band for ENG use.").

[13] See, *e.g.*, the IdleAir system (http:Nwww.idleaire.com), which provides 66 television channels. See also Denial Order at para. 57 (citing the availability of new mobile video options including Qualcomm's MediaFlo, Verizon's VCAST, IEEE 802.11(n), IPTV through broadband, and devices such as Apple's iPod).

[14] See Denial Order at para. 15 (ruling that "[a]mong other alternatives, Clarity could purchase spectrum at auction, pursue using unlicensed spectrum, install cable at its truck stops, or negotiate spectrum leases. Clarity cites cost and the burden of negotiations as the main reasons it is unable to pursue other options. We reject these grounds to justify waivers that have the potential to inflict harm on incumbent users.").

Clarity seeks to avoid the capital cost of acquiring rights to licensed spectrum or commissioning new equipment that would work with available licensed or unlicensed frequency bands. The public, however, should not be forced to underwrite Clarity's business plan. Even setting aside Clarity's conclusory assertions that the 5 GHz and 3.6 GHz bands are not viable alternatives, and its failure to consider the nonexclusive 2.4 GHz spectrum, Clarity has not proffered a serious explanation for its dismissal of alternatives such as the 1.7/2.1 GHz AWS space and the 2.5 GHz band (including leasing access from BRSIEBS licensees, the viability of which is proven by the fact that others already have done so in order to provide wireless cable services). It is well-settled that "the fact that an alternative within the rules would be more expensive to implement does not, by itself, render it inequitable or unduly burdensome such that a waiver is warranted." *Exelon* Generation Co., LLC, Order, 19 FCC Rcd 18078, at para. 8 (2004), citing *McDowell* Construction, (continued...)

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The Bureau's decision properly addressed all of these issues and reached the right result. If Clarity wishes to press its case further, it should file a petition for rulemaking to alter the spectrum allocation decisions for the frequencies in question. If testing is to be part of a rulemaking process, it should be conducted by the FCC and fully opened to all interested parties. But before then, a proper policy foundation must be made for the proposed allocation change, including consideration of alternative ways to provide the same service without the threats of interference to the public's television service.

Respectfully submitted,

/s/

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April 22, 2008

Order on Reconsideration, 18 FCC Rcd 1816, at para. ¶ 6 (2003) (citing Country Cousins, *Inc.*, Order, 14 FCC Rcd 19351, at para. ¶ 6 (1999)). Clarity, whose $10 billion parent company Flying J owns the truck stops at which Clarity proposes to provide its service, is and has been well-positioned to pursue these spectrum alternatives.

Attachment A

Waivers Would Undermine These Part 78 Rules and Unlawfully Reallocate the ENG Band:

Limited Purpose of CARS Licenses

- **Section 78.1.** The Part 78 rules provide for CARS licensing and operations for the purpose of "cablecasting from the point of reception to a terminal point from which the signals are distributed to the public by cable…."
- **Section 78.11(a).** CARS stations are authorized only to relay certain signals.
- **Section 78.11(f).** "[T]he bands 2025–2110 MHz, 6425–6526 MHz and 6875–7125 MHz may be used by cable network-entities only for CARS pick-up stations." Under Section 78.5, a CARS pick-up station is defined as a "land mobile CARS station used for the transmission of television signals and related communications from the scenes of events occurring at points removed from cable television studios to cable television studios or headends."
- **Section 78.11(e).** Section 78.11(f) requires the 2 GHz CARS band to be used by CARS pick-up stations. Under Section 78.11(e), CARS pick-up station licenses authorize only "the transmission of program material, and related communications necessary to the accomplishment of such transmission, from the scenes of events occurring in places other than a cable television studio or the studio of another eligible system, to the studio, headend, or transmitter of its associated cable television system or other eligible system, or to such other cable television or other eligible systems as are carrying the same program material."

Limited Eligibility for CARS licenses

- **Section 78.11(c).** CARS licenses may be issued only to eligible cable licensees, and Clarity has conceded that it is not eligible.
- **Section 78.13.** Eligibility for CARS licenses is limited to eligible cable licensees, BRS/EBS licensees and conditional licensees, and private cable operators and other multichannel video programming distributors. The latter entities are not authorized to use the 2 GHz CARS band (and Clarity cannot bootstrap its proposed service to create eligibility as an MVPD).

Explicit Prohibition on Direct-to-Viewer Video Service

- **Section 78.18.** "Use of this spectrum for direct delivery of video programs to the general public or multi-channel cable distribution is not permitted."

Requirement of Frequency Coordination

- **Section 78.36.** The Commission requires frequency coordination for both fixed and mobile stations in the 2 GHz band. See Section 78.36(c)-(d).

- **Section 78.103(e).** For licenses in the 2025-2110 MHz range, the maximum authorized bandwidth is 12 MHz. Clarity proposes to use virtually the entire 2 GHz CARS band (84 MHz), seven times the maximum authorized bandwidth. The Commission explicitly provided in Section 78.103(e) that it reserved the right to issue licenses "for less than the maximum bandwidth." The rules do not, in contrast, contemplate licenses for more than the maximum bandwidth, much less for 84 MHz. By taking up virtually the entire 2 GHz ENG spectrum, there would be no room to coordinate alternative channel use by broadcasters or Clarity in advance or in the event of interference.

Technical Rules

- **Section 78.101.** Clarity has requested a waiver of Section 78.101 ("Power Limitations").

- **Section 78.107.** Clarity has requested a waiver of this provision, which governs equipment and installation, on the grounds that it might "impede or delay acceptance, processing, and favorable action" on its applications.

CERTIFICATE OF SERVICE

I, Kathryn Bowers, a secretary at the law firm of Covington & Burling LLP, do hereby certify that on this 22nd day of April, 2008, I caused a copy of the foregoing "Comment On The Interrelationship Between Clarity's Experimental Application And The Media Bureau's Denial Of Clarity's Waiver Requests" to be sent via first-class U.S. Mail, postage prepaid, to the following:

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