ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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

FILED/ACCEPTED
MAY 1 9 2008
Federal Communications Commission
Office of the Secretary

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

RESPONSE OF CLARITY MEDIA SYSTEMS LLC TO MSTV "COMMENT ON THE INTERRELATIONSHIP BETWEEN CLARITY'S EXPERIMENTAL APPLICATION AND THE MEDIA BUREAU'S DENIAL OF CLARITY'S WAIVER REQUESTS"

On April 22, 2008, the Association for Maximum Service Television, Inc. ("MSTV") filed a pleading under the above caption titled "Comment on the Interrelationship between Clarity's Experimental Application and the Media Bureau's Denial of Clarity's Waiver Requests" ("Comment"). Despite the grandiosity of its title, MSTV's Comment is merely a rehash of the specious arguments with which it already has laden the record. As such, the Comment is cumulative, superfluous, and unworthy of expenditure of Commission resources. Nevertheless, for the record, Clarity Media Systems LLC ("Clarity") hereby responds to MSTV's sophistry.

MSTV's Comment (at 1) purports to address "a fundamental misconception that underlies...Clarity's.. .position with respect to the above two proceedings." In reality, the fundamental misconceptions are all MSTV's.

The fundamental concept regarding the interrelationship of Clarity's experimental operations and waiver requests has been clearly, logically, and correctly articulated by both the Media Bureau ("Bureau") and Office of Engineering and Technology ("OET"). In March 2005, Clarity filed its initial application for experimental authority (File No. 0046-EX-PL-2005) and three applications requesting waivers and permanent authority to operate its proposed system. In dismissing the three applications for permanent authority as premature, the Bureau noted the requirement for the waivers and stated:

> "Grant of Clarity's application would require a waiver of these rules ***based upon the results of tests performed under the Experimental License.***"[1]

After Clarity filed its report on the initial experimental operations and 10 new applications requesting waivers and permanent authority, the Media Bureau released a Public Notice inviting interested parties to file comments and reply comments.[2] Clarity's applications and supporting comments delineated numerous reasons why Clarity's proposal to bring the first affordable multichannel television programming to millions of deprived professional long-haul truck drivers serves the public interest and warrants approval. ***See*** Attachment A. When it issued its ***Order*** on Clarity's application,[3] the Bureau – as it had in the August 2006 Public Notice – correctly addressed Clarity's proposal procedurally as the valid and proper application and waiver request that it is. The Bureau held that the alleged potential for harmful interference from Clarity's system was the paramount substantive public interest factor that required denial of Clarity's waivers and applications under the Commission's established waiver criteria.

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[1] ***See Letter to Clarity Broadcasting System, LLC from Wayne T. McKee, Assistant Chief, Media Bureau, Engineering Division,*** dated September 14, 2005 (emphasis added).

[2] ***See*** Public Notice, **DA** 06-1664, ***Waiver Requests of by Clarity Media Systems, LLC to Operate CARS Stations at Flying J Travel Plazas,*** released August 23,2006 ("August 2006 Public Notice").

[3] ***Order***, **DA** 07-1946, released May 3,2007 ("***Order***").

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After Clarity filed its Application for Review demonstrating that the Order contains fundamental errors about the initial experimental operations and other matters that poison and render unsustainable the Order's interference and other findings,[4] and the Bureau convened a meeting with OET and parties to discuss the technical aspects of Clarity's proposal, Clarity filed an application (File No. 0692-EX-PL-2007) for a license to conduct further experimental operations to supplement the record on the central interference issue. In granting Clarity's application over MSTV's opposition, OET said:

> "The purpose of Clarity's application for experimental license is to investigate the potential for interference from its system to broadcast auxiliary operations, which is the central issue of its waiver request. Further, it is investigating the viability of various interference mitigation techniques. We make no findings here as to the merits of Clarity's tests. However, we find that Clarity should be afforded the opportunity to collect relevant information to make its case."[5]

In recognizing that the interrelationship between Clarity's experimental operations and waiver requests is one of direct linkage, neither the Bureau nor OET took leave of their senses as MSTV's Comment implies. To the contrary – in a case in which alleged harmful interference is the central substantive public interest objection to applications and waiver requests otherwise supported by overwhelming public interest benefits – the direct linkage is a matter of common sense, buttressed by law. The law, which is incorporated in the Commission's Rules,[6] is that an agency cannot have rules that are unwaivable.[7] The law is that evidence of field operations is the most reliable determinant of the potential for harmful interference because "[w]hatever action is taken

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[4] *See* Application for Review filed by Clarity on June 4,2007.
[5] *See* Letter from Julius P. Knapp, Chief, OET, to David Donovan, dated April 24,2008, at 1-2.
[6] *See* 47 *C.F.R.* §§1.3 and 1.925.
[7] *See, e.g.*, *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C.Cir. 1969).

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is...based on fact, not speculation."[8] OET's observation that Clarity's supplemental experimental operations portend collection of information directly "relevant" to the application and waiver proceeding could not be more practical and sound.

Contrary to MSTV's many misconceptions, mischaracterizations, and contrivances, some of which are specified below, Clarity's applications and waiver requests are ***the*** legitimate and proper procedural vehicle for implementing Clarity's critically needed proposal, are entirely consistent with and fulfill Commission spectrum policy, and do not require a rulemaking proceeding.[9] The Commission's Rules provide for grant of waivers in three circumstances: (1) where the underlying purpose of the rules is served and grant is in the public interest;" (2) where unique or unusual factual circumstances make application of the rules inequitable, unduly burdensome or contrary to the public interest.;" or **(3)** where the applicant has no reasonable alternative.[12] The applicable spectrum policy is articulated in the November 2002 Report of the Commission's expert Spectrum Policy Task Force ("SPTF"), which concluded after extensive study that "flexibility in spectrum regulation is critical to improving access to spectrum," spectrum use should not be limited "to particular services or applications so long as the user operates within the technical parameters applicable to the particular band in question," and "these technical parameters should themselves be limited to those that are necessary to define the user's RF environment in terms of maximum allowable output and required tolerance of interference."[13]

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[8] ***Diversified Communications Engineering, Inc.,*** 15 **FCC** Rcd 2547 (¶14); ***Metropolitan School District of Wayne Township, Marion County, Indiana,*** 75 **FCC** 2d 601 (1980) (¶¶7-8), ***rec. den.*** 47 RR2d 1722 (1980).
[9] ***See*** **Clarity Reply Comments in DA** 06-1664 **(predecessor to DA** 07-1946**), filed Oct.** 23,2006, **at** 4-11.
[10] 47 **C.F.R.** §1.925(b)(3)(i).
[11] 47 **C.F.R.** §1.925(b)(3)(ii).
[12] ***Id.***
[13] **SPTF Report at** 16-17.

Clarity's applications and waiver requests fit the Rules and spectrum policy like a glove. Clarity properly filed its applications in the Part 78 CARS band and service because the underlying purpose of Part 78 is to foster video programming distribution, especially provision of originated programming, on multichannel distribution systems;[14] Clarity's proposal includes significant public interest program origination and fulfills the underlying purpose; and, together with Clarity's many more overwhelming public interest benefits, Clarity therefore meets the first criterion for the waivers needed.[15] Clarity also properly filed its applications under Part 78 because, while 47 C.F.R. §78.101 allows maximum transmitter power of 20W per channel in the band for which Clarity applied, Clarity's proposal to operate as a secondary service with a tiny fraction of that power is well within the technical parameters in terms of maximum allowable output and required tolerance of interference and fulfills spectrum policy for flexible and efficient spectrum use.[16]

The law is that the application and waiver process is the procedurally proper course instead of rulemaking "unless the grounds advanced in support of waiver are such that to grant the relief requested would involve a fundamental change in the rule itself rather than creation of a limited exception due to particular unique circumstances or other

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[14] *See, CARS Notice of Proposed Rule Making,* 13 FCC 2d 731 (1968) (¶3); *In re Amendment of Part 74 of the Commission's Rules To Permit Stations Licensed in the Community Antenna Relay Service to Transmit Program Material Originated by CATV Systems,* 20 FCC 2d 422 (1969) (¶4), *aff'd MM&O*, 23 FCC 2d 169 (1970); *In the Matter of: Amendment of Eligibility Requirements in Part 78 Regarding 12 GHz Cable Television Relay Service,* 17 FCC Rcd 9930 (2002) (¶38) (affirming that the primary purpose of CARS is "video programming" and noting that its use for multichannel video such as 60 channels is appropriate).
[15] Although meeting any one waiver criterion would suffice, as discussed below, Clarity has demonstrated that it meets the other two criteria for waivers as well.
[16] In the impending supplemental experimental operations, Clarity expects to establish that it will be able to provide its service with no more than .01W per channel transmitter power, 2,000 *times below* the allowable per channel power under Part 78. At all times, Clarity's power proposal has been many multiples of order below the Part 78 allowable maximum.

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considerations which make application of the general policy of the rule inappropriate."[17] Rulemaking is warranted only when the applicant "challenges the basis for a rule rather than assuming its validity and seeking an exception from it" and requests "the rule in question to be directly reevaluated."[18]

Clarity's applications and waiver requests do not request "a fundamental change" in the rules it seeks waived, do not ask that those rules be directly reevaluated, and do not challenge the basis for those rules, the criteria for requiring a rulemaking. Rather, Clarity requests an "exception due to particular unique circumstances [and] other considerations which make application of the general policy of the rule inappropriate." It assumes the validity of the rules and their suitability to achieve the objectives that led to their promulgation. It also seeks an exception from them on the basis that grant of the waivers will advance the rules' objectives while denial of the waivers would undermine them. In short, Clarity's proposal achieves the letter of the law for an application and waiver proceeding, and meets none of the criteria for requiring a rulemaking.

Moreover, Congress has endorsed the authorization of new service and technology through the application as well as rulemaking process.[19]

The overriding misconceptions of MSTV's position throughout this proceeding, and repeated in its Comment, are its assertions that Clarity is seeking to amend the Commission's Rules and reallocate spectrum. Both assertions are mischaracterizations and totally false. Section 2.106 of the Rules allocates the 2025-2110 MHz band to TV

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[17] CBS Inc., 87 FCC 2d 587 (1981) ("*CBS*") (¶22).
[18] Id.
[19] ***See*** 47 U.S.C. §157(b) ("The Commission shall determine whether any new technology or service proposed in a petition ***or application*** is in the public interest within one year after such petition ***or application*** is filed.") (emphasis added).

Auxiliary Broadcasting under Part 74, CARS under Part 78, and Local TV Transmission under Part 101. In seeking secondary CARS licenses under Part 78 with applicable waivers of those rules, Clarity is not proposing any change in the allocations themselves. Section 2.106 after Commission action on Clarity's applications will be identical to Section 2.106 before such action. Similarly, in seeking waivers of certain CARS rules through compliance with the Commission's established waiver criteria, Clarity is not proposing any change in those rules either. They too will be the same after action on Clarity's application as they are before.[20]

Clarity's proposal arises from unique and unusual facts that render application of the rules for which waiver is sought inequitable and contrary to the public interest. The existence of a community of millions of Americans who are unable to obtain their first multichannel television programming is extremely unique and unusual. Denying the millions of Americans to whom Clarity will bring such programming this service, which most Americans typically already receive, would be grossly inequitable. Failing to effectuate the resources that Clarity's proposal will bring to the efforts to save lives of missing children and adults; to provide aid in times terrorism, natural disaster, and other public emergencies; and to fulfill numerous Congressional and Commission policies, would be decidedly against the public interest. This is precisely the particularized case that is tailor made to the application and waiver process under the CBS decision, and it fully meets the Commission's second waiver criterion.

[20] Since grant of CARS licenses to Clarity under Part 78 will be in accordance with the Table of Frequency Allocations, and Clarity will not be developing a service to be operated on frequencies other than those allocated for CARS, Section 2.102(b) does not apply and MSTV's heavy reliance on it is misplaced. See MSTV Comment at 2-3 and n. 4.

The doom and gloom that MSTV threatens will befall from favorable action on Clarity's waiver requests are entirely contrived and overblown. For example:

(i) MSTV's insinuation (Comments at 2) that "any member of the public who chooses to comment" has not had that opportunity in this proceeding is flat wrong. The Bureau's August 2006 Public Notice gave the public precisely that opportunity, including permit-but-disclose status to enable interested parties to have ongoing input to the Commission after formal comments and reply comments were filed. Lack of due process is not an issue in this case.

(ii) MSTV's hypotheses that "every new idea for a spectrum-using enterprise" could proceed by application, waiver request, and experimental operations (Comments at 2), and that incumbent users would "always" be subject to experimental operations (id. at 3) are sheer hysteria. A case in which millions of Americans lack basic broadcast television programming that has been available to other citizens for many decades is unique, unusual, and virtually impossible to re-present. This proceeding is a purple cow, unique on all of its elements, and favorable action on Clarity's waiver requests will not deprive the Commission of full independence and flexibility in determining how best to process future proposals in their circumstances. In seeking a rulemaking proceeding, MSTV wants only to add additional layers and years of process to delay and stifle the inauguration of service that is vitally needed now.

(iii) MSTV exaggerates (Comments at 2) the scope of Clarity's waiver requests ("11 rule waivers"). Many of the requests are overlapping and seek waiver of the same single element, use of a relay link to accomplish CARS' public service objectives. MSTV is simply wrong that this or any other Rule is unwaivable. Moreover, 47 C.F.R. §§925(b)(3)(i) and (ii) twice provide explicitly that requests for waiver may involve multiple "rule(s)," and the Commission has granted multiple rule waivers previously.[21]

(iv) MSTV's panic that "Clarity's approach would involve the FCC's abdicating its role of "'traffic cop' of the frequencies" (Comments at 3), is hyperbolic nonsense. First, in looking to the results of actual field operations to determine whether Clarity can co-exist with primary users on a secondary basis on the spectrum sought without material risk of harmful interference, the Commission is fulfilling its role as traffic cop of the frequencies responsibly, rationally, and consistently with precedent.[22] Second, while Clarity will honor its secondary status and cease operations should harmful interference occur,[23] the Commission will be the traffic cop that decides any disputes over such interference and orders Clarity to stop if warranted. There is no abdication.

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[21] *See, e.g., Stockholders of CBS Inc. (Transferor) and Westinghouse Electric Corporation (Transferee),* 11 FCC Rcd 3733 (¶¶2, 103-*105) (1995).*

[22] *See* n.8.

[23] Clarity is committed to shutting down its transmitters whenever ENG equipment is operating at or within the fence lines of its travel plaza transmitter sites, even though such occurrences are sparse and harmful interference has not been established. In the impending supplemental experimental operations, Clarity expects to establish that no risk of harmful interference exists beyond the fence lines of its property. Since

(v) In portraying ENG disasters that may befall from Clarity's proposal (Comment at 4 and 5(¶ii)), MSTV is putting the cart before the horse and engaging in circular reasoning. On the record of this case, where initial experimental operations conducted at 100 times the power with which Clarity will operate during the supplemental experiments produced no observations of harmful interference to ENG signals, one cannot rationally start by positing that such interference exists and leap around to the same conclusion that, hence, such interference exists. The very purpose of the supplemental experimental operations is to establish whether harmful interference from Clarity is a material risk. Upon establishment that Clarity poses no such risk, MSTV's parade of horribles vanishes.[24]

(vi) MSTV's resort to IdleAire as a reasonable alternative for Clarity's proposal (Comment at 5 n.13) is preposterous. The Order never mentions IdleAire and Clarity's Reply Comments and response to the Bureau's post-Order solicitation of IdleAire information demonstrated beyond a shadow of doubt that IdleAire is no alternative for numerous reasons, including the impossibility of it providing service at reasonable charges as Section 1 of the Act mandates.[25] As shown above (at 5), Clarity had compelling reasons to proceed with its CARS proposal, and no reasonable alternative has been shown to exist. Accordingly, Clarity also satisfies the third criterion for the grant of waivers.

In sum, the direct linkage between the supplemental experimental operations and resolution of the harmful interference question at the center of the public interest determination to be made about Clarity's applications and waiver requests is manifest.

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no technology or multichannel service at Clarity's ultra low power design has been available to the professional driver community since television began over 50 years ago, Clarity's proposal most certainly is a new " technology or service" covered in 47 U.S.C. $157. In any event, with further and conclusive proof of performance without harmful interest, the overwhelming public interests of Clarity's proposal will prevail regardless of whether Clarity or its foes bear the burden of proof.

[24] Given the revolutionary advances that Clarity's proposal promises for the recovery of missing persons and the fact that Clarity's proposal extends well beyond what current Amber Alerts offer to the recovery of all missing persons (children, adults, and Silver Alerts for the lost elderly), MSTV's copycat co-option of this issue is shameful. See Application for Review of KlaasKids Foundation, filed June 4, 2007, and Reply of KlaasKids Foundation To Oppositions To Application for Review , filed July 20, 2007. Any life lost due to the procedural delay in implementing Clarity's proposal that MSTV foments is one life too many.

[25] *See* Clarity Reply Comments at 46 n. 83; Clarity Comments on Submission of IdleAire Technologies Corporation filed in DA 07-1946 on Oct. 15,2007; 47 U.S.C. $151. Everything that Clarity has said about the urgent need for its service and the deficiencies of IdleAire has proved true. On May 12, 2008, IdleAire filed for bankruptcy. ***See*** Josh Flory, ***IdleAire IPO Off,*** knoxnews.com, May 14,2008, at http://www.knoxnews.com/news/2008/may/14/idleaire-ipo-off-assets-for-sale (last visited 5/16/08). With today's exorbitant fuel prices, the need of professional long-haul drivers for affordable service (not the $500-$600 plus monthly cost of soon–to-be defunct IdleAire) is all the more critical. Clarity's is the only system that has been developed and presented for bringing affordable multichannel television programming to the millions of professional long-haul drivers who desperately need it..

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The application and waiver process is entirely proper for Clarity's proposal and, upon confirming in the impending supplemental experimental operations the uniform absence of harmful interference observations experienced during the initial experiments, Clarity will have met each criterion for grant of the waivers. In the end, MSTV's virulent attempt to obstruct experimental operations that afford MSTV the opportunity to prove its harmful interference allegations is everything the Commission needs to know to recognize the utter emptiness of MSTV's allegations.

Respectfully submitted,

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May 19,2008

Its Counsel

ATTACHMENT A

Clarity's Public Interest Benefits

Grant of Clarity's applications will:

1. Fulfill Congressional policy in 47 U.S.C. §151 to make communications services available to "all the people" of the United States.
2. Fulfill FCC policy that providing service to unserved populations is one of the primary FCC objectives.
3. Fulfill Congressional policy in 47 U.S.C. §157 "to encourage the provision of new technologies and services to the public."
4. Fulfill Congressional policy in 47 U.S.C. §151 to make service available "at reasonable charges."
5. Fulfill Congressional policy in 47 U.S.C. §151 to make communications services available to promote "safety of life and property."
6. Fulfill national policy to save children and adults' lives in abduction and exploitation crimes, locate missing persons, and capture and punish criminals. Drivers' reception of local and national information channels will unleash a large community that is patriotic and law-enforcement-minded to assist as first-responders in individual, local and national life-threatening and emergency situations.
7. Serve FCC policy to promote localism through originated programming targeted to community needs.
8. Benefit the national interest in a healthy and vibrant economy.
9. Enhance the quality of nationally mandated driver rest periods.
10. Provide relief for Congressional concern in 17 U.S.C. $119(a)(12) to provide service to professional long-haul truck and RV drivers.
11. Enhance educational opportunities to a large population.
12. Serve the FCC's public interest mandate to accommodate other federal policies whenever possible.
13. Fulfill FCC policy to encourage private capital investment to provide new service offerings.
14. Advance Congressional and FCC policy to provide multichannel television distribution to unserved areas.
15. Improve access to spectrum in accordance with the FCC Spectrum Policy Task Force recommendation for "flexibility in spectrum regulation."
16. Cure inequities in multichannel television programming distribution and reception.
17. Fulfill the principles of the First Amendment to the United States Constitution.
18. Each and all of these benefits will be achieved without the expenditure of public funds.

CERTIFICATE OF SERVICE

I, Joan M. Trepal, a secretary at Leventhal Senter & Lerrnan PLLC, do hereby certify that on this 19th day of May, 2008, I caused a copy of the attached Response of Clarity Media Systems LLC to MSTV "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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