

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554

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Federal Communications Commission  
Office of the Secretary

In the Matter of )  
)  
Waiver Requests by Clarity Media ) DA 06-1664  
Systems, LLC to Operate 258 Wireless Cable )  
Stations in the 2 GHz Spectrum Reserved for )  
CARS and BAS Services )

To: The Commission

**JOINT OPPOSITION TO APPLICATIONS FOR REVIEW**

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June 19, 2007

## SUMMARY

The Media Bureau appropriately dismissed Clarity's 258 applications and related waiver requests to operate a wireless cable service under the guise of a cable television relay service ("CARS") license. As over thirty local television stations, nine station groups, three broadcast trade associations, and the National Cable & Telecommunications Association have documented, Clarity's wireless cable service would disrupt the electronic newsgathering ("ENG") services that bring live, on-the-scene coverage of emergency situations (including child abductions) and other newsworthy events to the public. Simply put, the public's need for potentially life-saving news coverage must come before Clarity's desire to obtain free access to licensed spectrum for a wireless cable service. MSTV and NAB accordingly urge the Commission to let the Bureau's reasoned decision stand.

In its Application for Review, Clarity ignores evidence concerning the serious risk of interference to local ENG operations and the impracticality of its proposed shut-down procedures. As multiple engineering analyses have demonstrated, Clarity's wireless cable service will cast a wide net of interference for miles beyond the immediate perimeter of its 258 travel plazas and will overwhelm incumbent operations on every 2 GHz ENG channel. In light of this substantial zone of interference, Clarity's "commitment" to address interference after it occurs will rarely mitigate the harm. By the time a news team is able to determine that Clarity's wireless transmissions may be the source of interference and place the call to Clarity to shut down the offending transmissions, the moment would be over and the news would be lost.

The Bureau is also right that to grant Clarity's requests would be to inappropriately "waive the rules that form the foundation of the CARS regulatory framework." A request to use 258 cable television *relay* licenses for a direct-to-viewer service that is decidedly *non-relay* challenges the very basis for the CARS rules and could only be considered

in the rulemaking process. Such an extraordinary waiver would be particularly inappropriate in light of the numerous alternatives by which Clarity could launch its wireless cable service, such as through use of unlicensed spectrum at 5 GHz and secondary markets transactions. Clarity's decision to forgo such alternatives or to hastily dismiss them cannot justify waiver requests that would undermine the public's access to breaking news coverage.

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**JOINT OPPOSITION TO APPLICATIONS FOR REVIEW**

The Association for Maximum Service Television, Inc. (“MSTV”)<sup>1</sup> and the National Association of Broadcasters (“NAB”)<sup>2</sup> file this Opposition to the Applications for Review (“AFR”) of Clarity Media Systems, LLC (“Clarity”) and the KlaasKids Foundation.<sup>3</sup> The Media Bureau appropriately dismissed Clarity’s 258 applications and related waiver requests to operate a wireless cable service under the guise of a cable television relay service (“CARS”) license.<sup>4</sup> The Bureau based its decision on the extensive record in this proceeding, in which over thirty local television stations, nine station groups, three broadcast trade associations, the National Cable & Telecommunications Association (“NCTA”), and NASA documented the public interest harms that would result from grant of Clarity’s requests.

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<sup>1</sup> MSTV is a nonprofit trade association of local broadcast television stations committed to achieving and maintaining the highest technical quality for the local broadcast system.

<sup>2</sup> NAB is a nonprofit trade association that advocates on behalf of more than 8,300 free, local radio and television stations and also broadcast networks before Congress, the Federal Communications Commission, the Courts, and other federal agencies.

<sup>3</sup> See Application for Review of Clarity Media Systems LLC, DA 07-1946, June 4, 2007 (“Clarity AFR”); Application for Review of KlaasKids Foundation, DA 07-1946, June 4, 2007 (“AFR of KlaasKids Foundation”).

<sup>4</sup> See *Waiver Requests By Clarity Media Systems, LLC To Operate CARS Stations At Flying J Travel Plazas*, Order, DA 07-1946, May 3, 2007 (“Order”).

In demanding that the Commission allow it to operate a nationwide wireless cable in the 2 GHz band despite the evidence of interference that such operation would create, Clarity's AFR fails to recognize the critical role of electronic newsgathering ("ENG") services in bringing live, on-the-scene coverage of emergency situations (including child abductions) and other breaking news events to the public. The Commission, which has recognized the 2 GHz BAS to be "a critical part of the broadcasting system by which information and entertainment is provided to the American public,"<sup>5</sup> should accordingly let the Bureau's decision stand. Simply put, the public's need for potentially life-saving news coverage must come before Clarity's desire to obtain free access to licensed spectrum for a wireless cable service.

**I. IN DISMISSING CLARITY'S MULTIPLE WAIVER REQUESTS, THE BUREAU PRESERVED THE ABILITY OF LOCAL BROADCASTERS AND NETWORKS TO DELIVER BREAKING NEWS COVERAGE TO THE PUBLIC.**

**A. The Record Demonstrates that Clarity's Wireless Cable Service Will Interfere with ENG Operations.**

The comprehensive record in this proceeding led the Bureau to the right conclusion: if given the many waivers and CARS licenses it requests, Clarity's system *will* interfere with the ENG operations that permit local television stations as well as cable and broadcast networks to deliver live, on-the-scene coverage of breaking news events to the public. Although Clarity's AFR is long on rhetoric (*e.g.*, accusing the Bureau of "rattling off the whims of its media regulates"<sup>6</sup>), it fails to address the technical evidence concerning the serious risk of interference to local ENG operations and the impracticality of Clarity's proposed shut-down procedures.

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<sup>5</sup> *Improving Public Safety Communications in the 800 MHz Band*, Report and Order, 19 FCC Rcd 14969, 15095 ¶ 250 (2004).

<sup>6</sup> Clarity AFR at 5.

First, concerned ENG users have demonstrated that Clarity's service will cast a wide net of interference for miles beyond the immediate perimeter of its 258 travel plazas. These interference patterns will disrupt stations' attempt to cover a newsworthy event not only when an ENG receive site is located in areas adjacent to one of Clarity's transmitters, but also whenever one of Clarity's transmitters stands in the "line-of-sight" between a mobile ENG truck and the receiving station.

Clarity's interference problem is comprehensively documented in the engineering analysis of du Treil, Lundin & Rackley, Inc. ("du Treil"), submitted by the ABC Television Network *et al.* ("ABC").<sup>7</sup> The du Treil analysis shows that "[i]n every instance in which a Clarity transmitter is located within *60 kilometers* of an ENG receive site, a significant degradation in the performance of the ENG receive antennas will occur regardless of the orientation of the antenna."<sup>8</sup> Moreover, at 10 kilometers from an ENG receive site, Clarity will produce a signal 3,000 times the level required to avoid interference. MSTV has documented this concern as well via the engineering analysis of Cohen, Dippell and Everist, P.C., which demonstrates that Clarity's wireless cable service will create "black holes" in the ability of broadcasters to cover breaking news.<sup>9</sup> Such analyses highlight the fallacy of Clarity's supposition that its proposed, 200 milliwatts per-channel transmitter should not do much harm to ENG operations.

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<sup>7</sup> Comments of ABC Holding Company, Inc. *et al.*, Sept. 22, 2006 ("ABC Comments").

<sup>8</sup> *Id.* at 13.

<sup>9</sup> *See, e.g.*, Letter from MSTV to Marlene H. Dortch, Secretary, FCC, March 6, 2007 (attaching map calculating the zone of interference from Clarity's proposed wireless cable site in Salt Lake City to BAS receive antennae even under a "best case" scenario).

Second, the interference potential of Clarity's service is yet more troubling in light of its plan to continuously use every channel within the 2 GHz BAS band. The Bureau is right that the across-the-board occupation of the 2 GHz band would "leav[e] broadcasters no room to switch [ENG] channels if they experience unidentifiable interference on one or more channels."<sup>10</sup> As NCTA explains, this full-time use of every ENG channel "would simply ensure that, in certain locations, a significant swatch of spectrum is *never* available for use, even if late-breaking news occurs in or near those locations."<sup>11</sup> There is no room for a "permanent squatter" like Clarity.<sup>12</sup>

Third, as the Bureau notes, Clarity's demonstrations of its proposed wireless cable service in just three sites out of the 258 planned do not provide any assurance that ENG operations will be protected.<sup>13</sup> The Society of Broadcast Engineers ("SBE"), which attended the demonstrations, has submitted considerable evidence to this effect.<sup>14</sup> For example, SBE confirms that no ENG transmissions were received or attempted to be received by a fixed or mobile ENG site as part of Clarity's demonstrations. Instead, the demonstrations merely compared Clarity's transmissions to nearby readings of the noise floor. Neither Clarity's AFR nor the photographs of the demonstrations that Clarity submitted earlier in this proceeding dispute this important aspect of SBE's account.<sup>15</sup>

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<sup>10</sup> Order at ¶ 12.

<sup>11</sup> Reply Comments of NCTA at 3, Oct. 23, 2006 (emphasis in original).

<sup>12</sup> *Id.* See also Comments of Dispatch Broadcast Group at 4, Sept. 25, 2006.

<sup>13</sup> Order at ¶ 10.

<sup>14</sup> See, e.g., Comments of the Society of Broadcast Engineers at 4-9, Sept. 22, 2006.

<sup>15</sup> See Clarity AFR at 13 (noting that Clarity's reply comments "provides *photographs* depicting the testing to fixed receive sites and the BAS TV Trucks parked right next to Clarity's (continued...)

Moreover, Clarity refused to provide received signal level measurements at any of the BAS receive sites located near its demonstrations. Curiously, it blames this serious shortcoming in its applications on the Commission and its Office of Engineering and Technology (“OET”) and Media Bureau, which Clarity appears to believe should have outlined for it which variables to test and record.<sup>16</sup> As the waiver applicant, however, it is Clarity’s obligation to design, implement and document tests to demonstrate whether its service can protect the ENG operations which the public relies upon for breaking and other news coverage.

Clarity similarly attempts to shirk responsibility for other shortcomings in its demonstrations, as illustrated in its reaction to the Bureau’s concern that Clarity did not examine interference effects on digital ENG operations. Even though all ENG operations will soon be transitioned to digital, Clarity calls the Bureau’s concern “mystifying” because OET did not affirmatively “instruct[]” Clarity to undertake such tests when it granted Clarity’s experimental license application. Of course, it was not the responsibility of the Bureau or OET to “instruct” Clarity on how to design its tests.<sup>17</sup> In any event, Clarity should not have been surprised by the Bureau’s concern. Throughout this proceeding, MSTV and NAB have repeatedly critiqued Clarity’s failure to consider interference it will cause to digital ENG operations.<sup>18</sup>

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transmitters” but failing to acknowledge that no ENG transmission was received while Clarity operated its wireless cable service) (emphasis in original).

<sup>16</sup> *Id.* at 13-14 (“No such requirement was stated when OET granted Clarity’s experimental license or when the Bureau dismissed without prejudice Clarity’s initial three applications for CARS licenses as premature”).

<sup>17</sup> *Id.* at 14.

<sup>18</sup> *See, e.g.*, Comments of MSTV and NAB at 4. In their comments, MSTV and NAB also submitted an engineering analysis prepared by Cohen, Dippell & Everist, P.C. which concluded that Clarity’s operations would cause interference to digital ENG operations as well. *Id.* at App.

Fourth, Clarity’s proposed “commitment” to address interference after it occurs would do little to prevent loss of news coverage. MSTV and NAB concur with NCTA that “ENG services need to clear spectrum *at the moment* of the news event ... [and] simply do not have time to identify the interfering source, contact the appropriate parties and then request cessation of the interfering signal.”<sup>19</sup> By the time the news team is able to determine that Clarity’s wireless cable transmissions may be the source of interference and place the call to Clarity to shut down the offending transmissions, “the moment would be over and the news would be lost”<sup>20</sup> As the Bureau explains, “because of the tight timeframes and changing physical environments in which ENG services operate, they have an extremely limited ability to remedy any interference problems that may arise.”<sup>21</sup>

Clarity misses the point with its assertion that shutdown would occur promptly upon receipt of a phone call to a hotline.<sup>22</sup> Even assuming that Clarity could ensure such a timeline, it is important to bear in mind that interference would occur to the ENG receive site within a sixty kilometer radius. Thus, it is unreasonable to expect that a broadcast engineer’s first instinct will be to call the Clarity shut-down number. Unless Clarity suggests that broadcasters, networks and cable operators should execute the shutdown procedures as a matter of routine practice before initiating an ENG transmission, the protocol is of little use.

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<sup>19</sup> Reply Comments of NCTA at 3 (emphasis added).

<sup>20</sup> Opposition of Centex Television Ltd Partnership at 8, Sept. 22, 2006.

<sup>21</sup> Order at ¶ 12.

<sup>22</sup> See AFR at 17-19.

**B. By Interfering with ENG Operations, Clarity’s Wireless Cable Service Will Disrupt Breaking News Coverage of Emergency and Other Situations.**

By dismissing Clarity’s multiple waiver requests, the Bureau preserved the right of the public to receive live, on-the-scene news coverage of emergencies and other important events. All members of the public – including Clarity/Flying J’s customers in the transportation sector – rely on this service. The following statements of just a few of the commenters opposing Clarity’s waiver requests speak to the importance of upholding access to ENG services:

“HBI is particularly concerned with interference [from Clarity] in its coverage of emergency weather events. Many of HBI’s stations are situated in cold weather states such as Minnesota and upstate New York. HBI staff have witnessed repeatedly that timely coverage of icy road conditions saves lives, and ENG remote trucks fill a vital role in news coverage of emergency weather events.”

– Hubbard Broadcasting, Inc. (HBI), licensee of KAAL(TV), Austin, MN, KSTP-TV, Minneapolis, MN and 11 other full-power stations

Clarity’s proposed operations could “impair WWBT’s ability to cover accidents, traffic problems, or other emergencies that may occur on the heavily-traveled interstate.”

– Lincoln Media Financial Company, licensee of WWBT, Richmond, VA, WBTV, Charlotte, NC and WCSC, Charleston, SC

“The 2 GHz ENG spectrum in Indianapolis and Columbus is already heavily utilized ... Overlaying a new wireless cable service that will transmit 70 hours of digital television programming using 84 out of the 85 MHz of ENG spectrum will make a difficult situation even worse.”

– Dispatch Broadcast Group, licensee of WTHR, Indianapolis, IN and WBNS, Columbus, OH

“Clarity’s ‘Trucker TV’ proposal ... would disrupt [coverage of wildfires] even some 45 kilometers from the truck stop.”

– McGraw-Hill, licensee of KERO-TV, Bakersfield, CA and three other full-power stations

ENG coverage also plays a critical role in disseminating information about abducted children, including via the Amber Alert program. When a child abduction occurs, ENG enables news stories and coverage which serve as the basis for the Amber Alerts that go to

all media. Such coverage includes pictures of the missing child or children. Thus, regardless of the medium – broadcast television, cable TV, radio, text messages – through which an individual ultimately receives the Amber Alert, the ENG operations of television stations and networks are key to its distribution. The AFR of KlaasKids Foundation, which focuses on the question of the relative importance of TV vs. radio in the ultimate delivery of Amber Alerts to the public, is therefore off point.<sup>23</sup> As the Bureau concluded, any marginal assistance which Clarity’s proposed wireless cable service may provide in disseminating information about missing persons would be dwarfed by the harm it could cause to the overall Amber Alert system.

## **II. CLARITY HAS FALLEN FAR SHORT OF THE COMMISSION’S WAIVER STANDARD.**

### **A. Clarity’s Applications Challenge the Fundamental Purpose of a CARS License.**

The Bureau’s decision reflects a fundamental problem with Clarity’s request: it asks, in essence, “that the Commission waive the rules that form the foundation of the CARS regulatory framework.”<sup>24</sup> Clarity is not proposing a CARS service. It is proposing a direct-to-subscriber, wireless cable service that “would turn the very purpose of CARS licenses on its head.”<sup>25</sup> The fundamental purpose of the CARS service is to relay signals from the operator’s point of reception to a terminal point, from which the operator can then distribute the signals to

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<sup>23</sup> AFR of KlaasKids Foundation at 5.

<sup>24</sup> *Id.* at ¶ 9.

<sup>25</sup> McGraw-Hill Opposition at 6; Meredith Opposition at 5.

the public.<sup>26</sup> Indeed, a 2002 Order cited in Clarity’s AFR expressly states that CARS is “not used to provide service or relay signals directly to subscribers.”<sup>27</sup>

Clarity’s AFR, in complaining that the Bureau makes a “tautological error” in refusing to give a cable relay license to a non-relay service, misconstrues the principle that waivers should not be denied simply “on the ground that there would be a violation in the absence of the waiver sought.”<sup>28</sup> A waiver, by definition, is designed to relax some part of a rule – for example by allowing a device to operate at higher than authorized power levels or moving a construction deadline due to some unavoidable delay. In these circumstances, a licensee seeks a mere modicum of flexibility. Waivers are not, however, meant to fundamentally alter the nature of the license issued, as Clarity asks the Commission to do to the CARS service in its AFR.

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<sup>26</sup> 47 C.F.R. § 78.1. *See also 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*, 13 FCC 2d 731 ¶ 3 (1968).

<sup>27</sup> *Amendment of Eligibility Requirements in Part 78 Regarding 12 GHz Cable Television Relay Service*, Report and Order, 17 FCC Rcd 9930, 9932 ¶ 4 (2002) (“2002 CARS Order”). By notice-and-comment rulemaking, the 2002 CARS Order made CARS licenses in the 12 GHz band available to non-cable MVPDs and retained the requirement that the relaying of non-video services such as voice and data in a relay license be ancillary to the relaying of video programming. In maintaining the requirement that video be the primary service relayed, the Commission stated, “Relaying video programming as part of a larger system that communicates by other means or spectrum is the principle use for CARS,” and it clarified that its NPRM “did not propose ... to change the fundamental character of the [CARS] service.” *Id.* at 9945 ¶ 39. Rather, explained the Commission, “the NPRM sought comment solely on expansion of the types of users eligible for CARS within the existing parameters.” *Id.* In fact, the 2002 CARS Order reaffirms the principle that a CARS license can only be used for relay purposes. In light of these clear statements by the Commission as to the nature and purpose of the 2002 CARS Order, there is no merit to Clarity’s claim that the order somehow supports its waiver requests to use CARS licenses for a direct-to-subscriber video service. *See* Clarity AFR at 9-10 (arguing that in finding that a CARS license can only authorize a relay service, “The Bureau ignored Clarity’s reminder ... that the Commission recently affirmed that the primary purpose of CARS is ‘video programming’ and noted that the use of CARS for multichannel video such as 60 channels is appropriate”).

<sup>28</sup> Clarity AFR at 9, *citing WAIT Radio v. FCC*, 418 F.2d 1153, 1158 (D.C. Cir. 1969).

In taking the “relay” out of the cable television relay service, Clarity’s waiver request would be akin to a mobile satellite services (“MSS”) licensee requesting, in an application for ancillary terrestrial component (“ATC”) authority, a permanent waiver of the requirement that it build and operate a satellite. The Commission would reject such a waiver request, of course, because it would gut the fundamental, *ancillary* nature of the terrestrial component. In effect, such a waiver would impermissibly transform a mobile satellite service into a terrestrial PCS service, all by waiver. Likewise, a license designated for cable television *relay* service cannot be transformed into a wireless cable service by waiver. Grant of such a waiver request – particularly for 258 sites throughout the country – in effect would amend the Table of Allocations and Part 78 of the Commission’s rules by allowing a new service in the 2 GHz band.<sup>29</sup> When the Commission does allocate a band for an entirely new service, it does so by rulemaking – as occurred, for example, when the Commission reallocated part of the MSS band for terrestrial Advanced Wireless Services licensees.<sup>30</sup> Given that its proposed wireless cable service is directly contrary to the CARS allocation, the Bureau rightly refused to grant Clarity’s waiver request.

The Commission has made clear that “[a] waiver petition which challenges the basis for a rule, rather than assuming its validity and seeking an exception therefrom, generally

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<sup>29</sup> MSTV and NAB agree with ABC that “[a]ny proposal that attempts to fit a completely new service into existing service rules by waiving virtually all of the applicable rules (except, conveniently, those permitting access to the spectrum at no cost) should immediately raise a red flag for the Commission.” *See* ABC Comments at 5.

<sup>30</sup> *See Amendment of Part 2 of the Commission’s Rules to Allocate Spectrum Below 3 GHz for Mobile and Fixed Services to Support the Introduction of New Advanced Wireless Services, Including Third Generation Wireless Systems*, Third Report and Order, Third Notice of Proposed Rulemaking and Second Memorandum Opinion and Order, ET Docket No. 00-258 *et al.*, 18 FCC Rcd 2223, 2238 ¶ 28 (2003).

ought to be considered through a rulemaking process which permits the rule in question to be directly reevaluated.”<sup>31</sup> Given its challenge to the fundamental basis for a CARS license, Clarity’s reliance on a 1982 Commission decision to waive the rule prohibiting ownership of cable systems by national television networks is misplaced.<sup>32</sup> There, CBS sought a limited waiver of the rule to allow it to deliver a cable television service to a very small number of subscribers – specifically, one tenth of one percent of the nation’s television householders – as a “test bed” for technological and programming innovations.<sup>33</sup> It did not ask for wholesale waiver of the ownership rule so that it could enter the cable business on a grand scale. Clarity’s application, in contrast, does not seek waiver of the relay requirement for some ancillary purpose; rather, it intends to deliver, at 258 sites throughout the country, a direct-to-subscriber wireless cable service.

**B. Because of the Interference It Would Create, Clarity’s Wireless Cable Service Cannot Qualify for a Waiver of the CARS Rules.**

The harmful interference that Clarity’s service would generate provides further basis for denial of its waiver request, as it makes impossible any finding that Clarity has met the “high hurdle” by which it must show that the underlying purpose of the CARS rules would be frustrated by application of the rules to Clarity *and* that waiver would service the public interest.<sup>34</sup> A fundamental purpose of the CARS rules is to ensure that all licensed services in the 2 GHz band “can operate in an environment in which the potential for interference is

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<sup>31</sup> *Applications of Telecom Services Inc.*, Order on Reconsideration, 16 FCC Rcd 18623, 18626-627 ¶ 9 (2001), *citing CBS Inc. Petition for Special Relief*, Memorandum Opinion and Order, 87 FCC 2d 587, 593 ¶ 22 (1981).

<sup>32</sup> *See* Clarity AFR at 24 n. 80.

<sup>33</sup> *CBS Inc.*, 87 FCC 2d at 593 ¶ 23.

<sup>34</sup> *WAIT Radio*, 418 F.2d at 1159; 47 C.F.R. § 1.925(b)(i).

minimized.”<sup>35</sup> In direct conflict with this purpose, Clarity would operate a direct-to-subscriber cable service while precluding reliable use of the band by incumbent licensees, to the detriment of the public’s interest in receiving the on-the-scene news coverage made possible by broadcasters’ ENG operations.

Allowing Clarity to undermine the purpose of the CARS rules and the public’s interest in receiving breaking news coverage would be particularly inappropriate in light of the numerous alternatives by which Clarity could launch its wireless cable service.<sup>36</sup> The Bureau cites, among other options, the purchasing of spectrum at auction, use of unlicensed spectrum, or negotiation of spectrum licenses in the secondary marketplace.<sup>37</sup> Clarity’s outright refusal to pursue these options is unjustified. For example, it has dismissed auctions because of the “cost involved”<sup>38</sup> and has stated that it knows of no viable possibilities to use unlicensed spectrum because in meetings with the Commission “none were identified” for it.<sup>39</sup> Clarity has not, however, explained with any specificity why the vast amounts of spectrum allocated to unlicensed use at 5 GHz could not serve its needs, nor has it even acknowledged the option of building its wireless cable service in the 3650-3700 MHz band, which the Commission recently

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<sup>35</sup> See, e.g., *Revisions to Broadcast Auxiliary Service Rules in Part 74 and Conforming Technical Rules*, 16 FCC Rcd. 10556, 10556 ¶ 3 (2001).

<sup>36</sup> As a result, Clarity cannot qualify for a waiver under the second test of Section 1.1925, which allows a waiver only in the presence of “unique circumstances” that would make application of the rules “inequitable, unduly burdensome, or contrary to the public interest.” 47 C.F.R. § 1.1925(b)(3)(ii).

<sup>37</sup> Order at ¶ 15.

<sup>38</sup> Waiver Applications of Clarity Media Systems LLC, Lead Application at 27, Feb. 21, 2006.

<sup>39</sup> Clarity AFR at 23.

reaffirmed for nonexclusive use.<sup>40</sup> There is also no evidence that Clarity has even attempted to purchase access to licensed spectrum from BRS or EBS users.

One could speculate that Clarity wishes to use preexisting wireless cable equipment designed for the nearby BRS/EBS (formerly ITFS/MMDS) spectrum, but as with Clarity's desire to avoid the cost of auctions, the fact that some of these alternatives might be more expensive to implement, as compared to free access to the 2 GHz band, does not "render [Clarity's situation] inequitable or unduly burdensome such that a waiver is warranted."<sup>41</sup>

Clarity's waiver requests are similar to those rejected by the Commission in the *Exelon* matter. There, the Commission declined to grant the request of Exelon, a nuclear power plant operator, to be treated by waiver as though it were an Automated Maritime Telecommunications System ("AMTS") licensee, even though its eligibility was limited to that of a Industrial/Business Pool station. Disputing Exelon's conclusory assertion that it "ha[d] no feasible alternatives" to waiver of the AMTS rules, the Commission noted that Exelon could meet its business goals (in Exelon's case, the attainment of co-primary rather than secondary status in the 217-220 MHz spectrum) by "obtain[ing] additional spectrum rights ... through spectrum leasing, or through partitioning" or at auction.<sup>42</sup> The Commission also observed that other frequency bands (in Exelon's case, 1.4 GHz, 450-470 MHz, and 4.9 GHz) were available

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<sup>40</sup> See *Wireless Operations in the 3650-3700 MHz Band*, Memorandum Opinion and Order, ET Docket No. 04-151, WT Docket No. 05-96, at ¶ 1 (rel. June 7, 2007) (affirming the decision to allocate the entire 3650-3700 MHz band for nonexclusive use "to create a spectrum environment that will encourage multiple entrants and stimulate the expansion of broadband service to rural and under served areas").

<sup>41</sup> *Exelon Generation Company, LLC*, Order, 19 FCC Rcd 18078 (2004).

<sup>42</sup> *Id.* at 18081 ¶ 6-7.

for its proposed uses.<sup>43</sup> Like the applicant in *Exelon*, Clarity and its parent company, Flying J, have access to multiple alternatives outside of the waiver process.<sup>44</sup>

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<sup>43</sup> *Id.* at 18082 ¶ 8 (“Exelon also fails to explain why it must operate on 217-220 MHz frequencies.”).

<sup>44</sup> It appears that 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. If spectrum or related equipment costs make it difficult for Clarity to reap a profit from its wireless cable service, it may nevertheless find the service to be worth launching as an enticement for transportation professionals to more frequently visit Clarity’s travel plazas.

CONCLUSION

In accordance with the comprehensive record established in this proceeding, MSTV and NAB respectfully request that the Commission uphold the Bureau's decision to deny the applications and waiver requests of Clarity.

Respectfully submitted,



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June 19, 2007


**CERTIFICATE OF SERVICE**

I, Ralph Fritz, a secretary at the law firm of Covington & Burling LLP, do hereby certify that on this 19th day of June, 2007, I caused a copy of the foregoing "Opposition to Application for Review" to be sent via first-class U.S. Mail, postage prepaid, to the following:

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