

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

FILED/ACCEPTED

OCT 23 2006

Federal Communications Commission
Office of the Secretary

In the Matter of)
)
Waiver Requests by Clarity Media) DA 06-1664
Systems, LLC to Operate "CARS" Stations)
at Flying J Travel Plazas located at or near:)
)
Frazier Park, CA, North Salt Lake, UT,)
Ogden, UT, Rapid City, SD, Blacksburg, SC,)
Waco, TX, Carmel Church, VA, Fairview, TN,)
Graham, NC and St Lucie, FL)

To: The Commission

**JOINT REPLY COMMENTS OF
THE ASSOCIATION FOR MAXIMUM SERVICE TELEVISION, INC. AND
THE NATIONAL ASSOCIATION OF BROADCASTERS**

The Association for Maximum Service Television, Inc. ("MSTV")¹ and the National Association of Broadcasters ("NAB")² write in response to the comments filed in connection with the above-referenced applications and waiver requests of Clarity Media Systems, LLC ("Clarity").³ As the record in this proceeding demonstrates, there is no legal or technical basis by which the Commission could grant a cable television relay service ("CARS") license to Clarity. Clarity's proposed wireless video service would compromise local

¹ 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.

² 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.

³ *Waiver Requests by Clarity Media Systems, LLC to Operate CARS Stations at Flying J Travel Plazas*, Public Notice, DA 06-1664 ("Clarity Public Notice") (rel. Aug. 23, 2006).

broadcasters' ability to provide coverage of emergencies and other breaking news events and would make a mockery of the Commission's rules.

As the Commission has recognized, the 2 GHz BAS is "a critical part of the broadcasting system by which information and entertainment is provided to the American public."⁴ All members of the public – including Clarity/Flying J's customers – rely on this service, and the Commission should protect it by promptly denying Clarity's applications and waiver requests.

I. TO PROTECT BAS OPERATIONS AND THE PUBLIC THAT RELIES ON THEM, THE COMMISSION SHOULD PROMPTLY DISMISS CLARITY'S APPLICATIONS AND WAIVER REQUESTS.

Commenters representing the concerns of at least twenty local television stations, eight station groups and three broadcast trade associations have demonstrated that Clarity's proposed service would interfere with incumbent ENG operations that permit live, on-the-scene coverage of breaking news events.⁵ Because of this serious risk of interference to local ENG

⁴ *Improving Public Safety Communications in the 800 MHz Band*, Report and Order, 19 FCC Rcd 14969 ("800 MHz Report and Order"), 15095 ¶ 250 (2004).

⁵ *See, e.g.*, Opposition of Centex Television Ltd. Partnership at 8 ("Centex Opposition") (observing that "any increase in the noise floor or potential for interference could mean the difference between providing viewers in the Waco Market with coverage of a breaking news event, or not"); Comments of Lincoln Financial Media Company at 3-4 (noting that Clarity's proposed operations at Carmel Church could "impair WWBT's ability to cover accidents, traffic problems, or other emergencies that may occur on the heavily-traveled interstate" and that Clarity's proposed operations at Blacksburg likewise could "impair WBTV(TV)'s ability to conduct important ENG operations along the highway or to cover events in Blacksburg itself"); McGraw-Hill Opposition at 2 (pointing out that KERO-TV provides live coverage of breaking news near the Frazier Park site weekly, including coverage of the wildfires common to that area, and that Clarity's service would interfere with this potentially life-saving reporting); Meredith Opposition at 1 ("Clarity's new video service at truck stops in Fairview, Tennessee and Blacksburg, South Carolina would harm Meredith's licensed operations in the Nashville and Greenville-Spartanburg markets"); Comments of the Dispatch Broadcast Group ("Dispatch Comments") at 4 (stating that ability of WBNS-TV and WTHR(TV) to cover breaking news in Columbus and Indianapolis would be harmed).

operations, flaws in Clarity's interference tests, and the impracticality of Clarity's proposed shut-down procedures, the Commission should deny Clarity's requests for CARS licenses.⁶

First, Clarity's service will interfere with local ENG operations not only whenever a local station attempts to cover a newsworthy event in areas adjacent to one of Clarity's transmitters,⁷ but also whenever one of Clarity's transmitters stands in the "line-of-sight" between a mobile ENG truck and the receiving station. This problem is comprehensively documented in the engineering analysis submitted by the ABC Television Network *et al.* ("ABC"), which shows that the line-of-sight issue will affect ENG operations within a *sixty kilometer* radius of any Clarity site. As Red River Broadcast Co., LLC ("Red River") notes, Clarity's wireless video service will thus create "black holes" in the ability of broadcasters to cover breaking news.⁸ The interference potential of Clarity's service is particularly troubling in light of its planned use of 84 MHz of the band for its service, thereby dominating virtually all of the spectrum intended for broadcasters' 2 GHz BAS operations.⁹

Second, the interference analysis used to support Clarity's waiver requests is fundamentally flawed. As MSTV and NAB explained in their initial comments, Clarity understated the level of undesirable emissions its service would create, failed to follow the established desired-to-undesired ("D/U") ratios for protection of microwave links, and failed to

⁶ Notably, of the three brief filings in support of Clarity's proposal, none disputed that Clarity's system would cause harmful interference to local broadcasters' BAS operations.

⁷ Interference in the area directly adjacent to a Flying J/Clarity truck stop should not be overlooked. As Red River Broadcast Co., LLC ("Red River") notes, "Local highway chases, crime investigations, severe weather situations and public interest stories may well occur in the vicinity of a Flying J truck stop." Red River Comments at 5.

⁸ *Id.* at 2.

⁹ See Dispatch Comments at 4.

account for the high magnitude reflections likely to arise from the reflective surfaces that would surround its transmitters (e.g., paved surfaces and the trucks and RV's themselves).¹⁰ Also, Clarity's failure to consider interference it will cause to *digital* ENG operations is flawed, given that all 2 GHz BAS operations will soon migrate to a new digital band plan.¹¹

Adding to the unreliability of its analysis, Clarity has "cherry picked" test sites that will likely under-represent the scope of interference to be caused by Clarity's service at the hundreds of other Flying J truck stops nationwide.¹² As ABC writes, "While Clarity has obviously selected its initial ten locations carefully so that it can rely on some terrain shielding to mitigate interference to any BAS receive sites, it is likely that far more of its truck stops are located where Clarity's proposed transmitting antenna would be line of sight to BAS receive antennas."¹³ Grant of the waiver requests and applications would not be prudent in light of these and other serious technical flaws in Clarity's interference studies.

Third, Clarity's proposed "commitment" to address interference after it occurs would do little to prevent loss of news coverage. Centex Television Ltd. Partnership ("Centex") explains that "[b]y the time a television station could demonstrate conclusively that Flying J's broadcast service affected an ENG transmission, the moment would be over, the news would be

¹⁰ See Joint Comments and Petition to Deny of MSTV and NAB ("MSTV/NAB Comments") at 3.

¹¹ As MSTV and NAB noted in their initial comments, the 2 GHz reconfiguration process must be completed in less than one year (by September 2007), and Clarity's proposed service could disrupt this process as well as the related 800 MHz relocation and rebanding process. *Id.* at 6-7.

¹² Comments of ABC Holding Company, Inc. *et al.*, DA 06-1664 (filed Sept. 22, 2006) ("ABC Comments"), at 3.

¹³ *Id.* at 12.

lost, and the mobile unit would have long since moved to another location.”¹⁴ Clarity’s empty promise to fix the problem after the damage has been done provides no basis upon which to grant its multiple waiver requests.

II. GRANT OF A CARS LICENSE FOR CLARITY’S DIRECT-TO-CONSUMER, MULTICHANNEL VIDEO SERVICE WOULD BE UNLAWFUL

A. Clarity’s Service Is Fundamentally Different From a CARS Service.

Clarity is not proposing a CARS service. It is proposing a direct-to-consumer, multichannel video programming (“MVPD”) service that “would turn the very purpose of CARS licenses on its head.”¹⁵ 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 the public.¹⁶ CARS is “not used to provide service or relay signals directly to subscribers,”¹⁷ which is precisely what Clarity seeks to do.

Given that Clarity’s proposed service would not be an intermediate link in a system but rather a direct-to-consumer MVPD, grant of its myriad waiver requests would constitute a constructive amendment of the Table of Allocations and Part 78.¹⁸ As discussed in

¹⁴ Centex Opposition at 8. *See also* Red River Comments at 5 (“[S]hould interference occur, broadcasters can ill-afford delays in shutting down the interfering multichannel video system.”).

¹⁵ McGraw-Hill Opposition at 6; Meredith Opposition at 5.

¹⁶ 47 C.F.R. § 78.1.

¹⁷ *Amendment of Eligibility Requirements in Part 78 Regarding 12 GHz Cable Television Relay Service*, Report and Order, 17 FCC Rcd 9930, 9932 (2002). *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).

¹⁸ 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.

MSTV and NAB's initial comments, outside of a notice-and-comment rulemaking such action would be unlawful.¹⁹

The Commission has been "especially reluctant" to grant a waiver when to do so would "invite numerous other waiver requests which, if granted, would effectively circumvent the Commission's rulemaking function."²⁰ Yet Clarity has acknowledged that the above-referenced ten applications are merely the first wave of some 250 waiver requests it intends to submit to outfit every Flying J truck stop in the country with its direct-to-consumer wireless video service.²¹ The Commission does not, and should not, "tolerate evisceration of a rule by waivers," and it should therefore deny Clarity's multiple waiver requests.²²

B. Clarity Has Fallen Far Short of the Commission's Waiver Standard.

Even if it were legal for Clarity to substantively amend the Table of Allocations by waiver, Clarity has fallen far short of the Commission's waiver standard, which sets a "high hurdle"²³ requiring the applicant to show that either (a) the underlying purpose of the CARS rules would be frustrated by application of the rules to Clarity *and* waiver would service the

¹⁹ See MSTV/NAB Comments at 9-10 (citing 47 C.F.R. § 2.102(a) for the proposition that exceptions to the Table of Allocations may be made on a temporary basis only and not to establish a "service"). Clarity, by its own admission seeks to establish a "new ... multichannel digital television distribution system" in the 2 GHz band. See Exhibit 1 to Clarity's lead application ("Clarity Application") at 1. See also ABC Comments at 5 ("It is well established that a party cannot use the adjudicatory process to modify a rule to expand the scope of an authorized service") (citations omitted).

²⁰ See *Nextel Communications Inc. Request for Waiver*, Order, 14 FCC Rcd 11678 (denying Nextel's request to use PLMRS Business channels for commercial SMR use) (quotation omitted).

²¹ See Clarity Application at 2 (noting that Clarity seeks to deploy its wireless video service "at more than 250 locations spread along the nation's interstate highways").

²² See *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969).

²³ *Id.*

public interest, or (b) that there are “unique circumstances” which would make application of the rules “inequitable, unduly burdensome, or contrary to the public interest.”²⁴ Clarity fails to meet that rigorous standard.

First, it is Clarity’s proposed operation as a “CARS” licensee, rather than application of the rules, that would offend and frustrate the basic purpose of the CARS rules.²⁵ As noted above, the CARS rules are intended only to authorize *relay* signals, while also ensuring that all licensees in the band “can operate in an environment in which the potential for interference is minimized.”²⁶ In direct conflict with this purpose, Clarity would operate a direct-to-consumer video 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.

Second, Clarity presents no “unique circumstances” or “inequities” to justify a waiver; in fact, Clarity has numerous alternatives by which it could launch a new wireless video service. As detailed in MSTV and NAB’s initial comments, Clarity could obtain access to an abundance of spectrum at auction, in the secondary marketplace (including on a geographically partitioned basis) and/or via unlicensed use.²⁷ 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

²⁴ See 47 C.F.R. § 1.925(b)(3)(i)-(ii).

²⁵ Tellingly, Clarity seeks as a waiver of Section 78.1, which sets out the “purpose” of the CARS rules. See Clarity Application at 41 n. 44.

²⁶ See, e.g., *Revisions to Broadcast Auxiliary Service Rules in Part 74 and Conforming Technical Rules*, 16 FCC Rcd. 10556, 10556 ¶ 3 (2001).

²⁷ See MSTV/NAB Comments at 15-19.

[Clarity's situation] inequitable or unduly burdensome such that a waiver is warranted."²⁸

MSTV and NAB accordingly agree with McGraw-Hill that "[w]ith no unique circumstances that would render application of the rules inequitable, and a great number of reasonable alternatives available, Clarity's waiver requests cannot meet the Commission's standards."²⁹

Even if Clarity did not have before it so many alternative sources of spectrum, Clarity has failed to demonstrate a convincing need for its wireless video service, particularly in light of the harm that service would cause to critical newsgathering operations. As Dispatch Broadcast Group notes, there is no apparent connection between Clarity's proposed, fee-based wireless video service and the trucking industry's legitimate labor concerns.³⁰ Moreover, Clarity's claims that truck drivers will be "unserved" without access to Clarity's service is unclear, given the range of "in-cab" television service options available on the market.³¹

It also bears mention that grant of Clarity's application would not serve Clarity's alleged intent to disseminate information about abducted children, including via the Amber Alert program. Along with radio, local television is *the* primary distribution means for Amber Alerts, which are credited with saving the lives of over 300 children nationwide. When a child is

²⁸ *Exelon Generation Company, LLC*, Order, 19 FCC Rcd 18078 (2004).

²⁹ McGraw-Hill Opposition at 8.

³⁰ Dispatch Comments at 5 ("There is no plausible basis, economic or otherwise, to believe that the provision of a new, wireless, pay-cable service will have, at the very best, even the most minimal impact on the recruitment of new truck drivers"). Also, Clarity's unscientific "survey" showing an alleged "need" for its service among the trucking community is of questionable value. See Driver Petitions In Support of Proposal of Clarity Media Systems, LLC (filed Sept. 21, 2006), at entries 205, 606, 768, 834, 860, 1006, 1307, 1420, 1425 1943, 1968, 2078, 2170, 2171, 2517, 2526, and 2923 (reporting "votes" in favor of Clarity's service from Flying J customers such as "there is no mandate on in cab tv except that it is," "ljim," "gang," "first last," "djdavidj," "M. NJNMIO," "na," "robert hsjjksl;k;lw;," "gghhh," "kjjk," "d," "park n view," "jesse byrd" and "jesse byrd," "", "m," and "not interested").

³¹ See SBE Comments at 3-4 (pointing out other in-cab service options).

reported abducted, local television stations deliver Amber Alerts and associated coverage of the incident to the public.³² By interfering with the newsgathering activities of local television stations, Clarity's proposal could undermine this successful partnership between television stations and the law enforcement community.

C. New Licenses for Commercial Spectrum Use Must Be Auctioned.

In its application, Clarity candidly admits the motivation for its waiver requests: to avoid the "cost involved in auction licensing."³³ Surely, many other entities, such as wireless entrants participating in the recent AWS auction and television broadcasters participating in the recent auction of eleven full-power construction permits, would also have preferred to obtain their licenses for free. But since adopting Section 309(j) of the Communications Act over thirteen years ago, Congress has made clear that new licenses for commercial uses of the spectrum must be auctioned. Thus, contrary to Clarity's desire to get free spectrum for its "new technology and service"³⁴ – a label that undermines Clarity's attempt to force its proposed service into the well-established definition and purpose of a CARS service – Clarity cannot lawfully obtain a license to 2 GHz spectrum outside of the auction process.³⁵

³² These actions have been credited with savings lives on many occasions. *See, e.g.,* Janese Heavin, *Back-to-back Missing Children Found: Amber Alerts' Rare in Boone County*, June 16, 2006 ("Sgt. Mike Stubbs of the sheriff's department said the mother of one of [the abducted teenager's] friends saw the Amber Alert on television and caller her son to tell him"); *Activation, Resolution of Amber Alert in Milwaukee*, US State News, Feb. 7, 2006 ("the abductor called police herself when she saw the Amber Alert on television.").

³³ Clarity Application at 27.

³⁴ *Id.* at 4.

³⁵ As Centex notes, grant of the waivers would deprive "the Commission and the public of the possibility of generating revenue from competing applicants." Centex Opposition at 8.

CONCLUSION

In accordance with the comprehensive record established in this proceeding, MSTV and NAB respectfully reiterate their request that the Commission deny the applications and waiver requests of Clarity.

Respectfully submitted,



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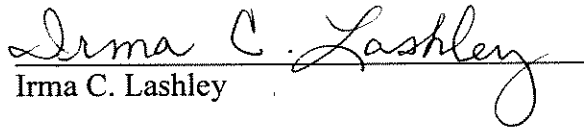
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CERTIFICATE OF SERVICE

I, Irma C. Lashley, a secretary at the law firm of Covington & Burling LLP, do hereby certify that on this 23rd day of October, 2006, I caused a copy of the foregoing "Joint Reply Comments" to be sent via first-class U.S. Mail, postage prepaid, to the following:

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