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August 23, 2007

BY HAND DELIVERY

Marlene H. Dortch
Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

Re: Request to Uphold Denial of 257 Applications and Related Waiver Requests of Clarity Media Systems, LLC (DA 07-1946)

Dear Ms. Dortch:

The Association for Maximum Service Television, Inc. (“MSTV”) writes to reiterate its support for the Media Bureau’s denial of the 257 applications and related waiver requests of Clarity Media Systems, LLC (“Clarity”).¹ By allowing the Bureau’s well-reasoned decision to stand, the Commission will protect the electronic newsgathering (“ENG”) operations of local television stations, broadcast networks, and cable networks. Particularly in light of Clarity’s refusal to pursue less harmful alternatives for its wireless cable service – as demonstrated by its cursory treatment of the 5 GHz option – the Commission should promptly deny Clarity’s Application for Review (“AFR”).

Clarity’s Service Will Disrupt News Coverage. The Bureau rightly concluded that Clarity’s cable service would interfere with ENG services, which are essential to the coverage of local emergencies and other on-the-scene news events. Although Clarity’s filings in opposition to the Bureau are long on rhetoric (*e.g.*, accusing it of issuing a “shockingly unbalanced” decision),² they do not and cannot contradict the Bureau’s findings. To cite just a few of the facts underpinning the Bureau’s conclusion that Clarity’s service poses unacceptable risks:

¹ See *Waiver Requests by Clarity Media Systems, LLC to Operate CARS Stations at Flying J Travel Plazas*, Order, DA 07-1946, 22 FCC Rcd. 8382 (2007) (“*Order*”).

² See *Application for Review of Clarity Media Systems LLC*, at ii, June 4, 2007 (“*Clarity AFR*”).

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- Clarity has acknowledged as recently as July 16 that its wireless cable service would be “always on, 100% of the time” in the ENG band.³ The ENG band is not suitable for such a fixed, always-on operation. It certainly cannot sustain such operation on every channel at 257 sites throughout the country. As the National Cable & Telecommunications Association (“NCTA”) has explained, the full-time use of every ENG channel “would simply ensure that, in certain locations, a significant swath of spectrum is *never* available for use, even if late-breaking news occurs in or near those locations.”⁴
- Clarity’s continued reliance on its proposed commitment to setup a hotline to address interference after the fact would do little to prevent loss of news coverage. An affected news team may be miles away from one of Clarity’s sites when the interference occurs. They will have no way of promptly identifying Clarity’s operation as the source of the problem, and may initially assume the cause to be an equipment malfunction or some other issue. By the time the news team concludes that Clarity may be the problem and places the call to initiate a shutdown at the travel plaza, “the moment would be over and the news would be lost.”⁵ Clarity thus misses the point in arguing that its hotline operator would not require the broadcaster to demonstrate its wireless cable service to be the source of interference.⁶
- Clarity’s self-styled “tests” of its proposed wireless cable service at just three sites provide no assurance that it could protect ENG services.⁷ Clarity failed to provide received signal level measurements for any BAS receive sites – a failure it inexplicably blames on the Office of Engineering and Technology (“OET”) and Bureau.⁸ Also, despite the Commission-mandated transition of ENG operations from analog to digital, Clarity did not bother to test interference to digital ENG receivers.⁹

Grant of CARS Licenses to Clarity Would Undermine the Commission’s Rules. As explained more fully in the Joint Opposition of MSTV and the National Association of

³ Letter from Howard A. Topel, Counsel to Clarity Media to Marlene H. Dortch, Secretary, FCC, Att. at 1, July 16, 2007 (“*Clarity 5 GHz Letter*”).

⁴ Reply Comments of NCTA, at 3, Oct. 23, 2006 (emphasis in original).

⁵ Opposition of Centex Television Ltd Partnership, at 8, Sept. 22, 2006.

⁶ See, e.g., Reply of Clarity Media Systems LLC to Oppositions to Applications for Review, at 2, July 19, 2007 (“*Clarity Reply*”).

⁷ In this letter, MSTV cites just a few of the interference concerns with Clarity’s proposed service. The record contains myriad other examples. See, e.g., Comments of ABC Holding Company, Inc., *et al.*, Sept. 22, 2006 (attaching engineering analysis of duTreil, Lundin & Rackley, Inc.).

⁸ See Order at ¶ 10; *Clarity AFR* at 13-14.

⁹ Again, Clarity blames OET and “ENG operators” for this obvious shortcoming in its tests. See *Clarity AFR* at 14.

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Broadcasters (“NAB”) to Clarity’s AFR, the Bureau’s decision reflects a fundamental problem with Clarity’s requests: a CARS license, at its core, allows cable *relay* services. In the Commission’s words, a CARS license is “not used to provide service or relay signals directly to subscribers,” as Clarity proposes.¹⁰ Waiver of this foundational requirement would be akin to granting a noncommercial broadcast license to a top-40 radio station.

Simply put, Clarity has fallen far short of the “high hurdle” set by the Commission’s waiver standard.¹¹ Its effort to shirk this burden by reliance on Section 7 of the Communications Act is misplaced.¹² That section provides only that “[a]ny person or party (other than the Commission) who opposes a new technology or service” shall have the burden to demonstrate that the proposal is inconsistent with the public interest.¹³ There is nothing “new” about a direct-to-consumer wireless cable service, and the waiver burden remains with Clarity.¹⁴

Clarity Should Use Less Harmful Alternatives for its Service. Clarity’s refusal to pursue less harmful alternatives warrants prompt denial of its AFR. To cite just one example, on July 6, the Bureau released an Order granting Clarity a 45-day extension of the deadline for filing replies so that it could explore use of the 5 GHz U-NII band.¹⁵ Just six business days later, Clarity filed a letter declaring the 5 GHz band “incompatible” with its service.¹⁶ No real testing could be conducted in such a short timeframe.

Clarity also fails to cite a reasonable justification for its refusal to pursue the 5 GHz band. It explains, for example, that “operation [in the CARS band] on even a secondary basis provides some regulatory protection against future spectrum uses,” in contrast to the unlicensed U-NII band.¹⁷ It also notes an inability of its existing transmission system to “comply with any IEEE

¹⁰ *Amendment of Eligibility Requirements in Part 78 Regarding 12 GHz Cable Television Relay Service*, Report and Order, 17 FCC Rcd 9930, 9932 ¶ 4 (2002).

¹¹ *See WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969).

¹² *See, e.g., Clarity Reply* at 4.

¹³ *See* Section 7 of the Communications Act of 1934, as amended; 47 U.S.C. § 157.

¹⁴ *See, e.g., Wireless Broadcasting Systems of Sacramento, Inc.*, Petition for Declaratory Ruling, 12 FCC Rcd 19746, 19748 ¶ 5 (1997) (describing multichannel multipoint distribution and similar services “which use microwave frequencies to transmit video programming to subscribers [and] commonly are referred to as wireless cable systems”).

¹⁵ *See Application for Review of Waiver Requests by Clarity Media Systems, LLC*, Order, DA 07-1946 (July 6, 2007).

¹⁶ *Clarity 5 GHz Letter* at 2.

¹⁷ *Id.* at 4.

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... standard” used in the 5 GHz band.¹⁸ If Clarity does not wish to accept the risks of unlicensed operation at 5 GHz, or obtain equipment compatible with that band, it is free to pursue access to licensed spectrum through lawful means. Indeed, it could participate in the auction of 700 MHz spectrum scheduled for this January, perhaps in partnership with an entity that would use areas of the licenses not occupied by Clarity’s transmissions.¹⁹ But Clarity’s desire to avoid the costs of these business decisions does not justify its waiver requests.

Sincerely,

A handwritten signature in black ink that reads "Matthew S. DelNero". The signature is written in a cursive, flowing style.

Matthew S. DelNero

cc: Howard A. Topel, counsel to Clarity Media Systems LLC

¹⁸ Apparently for the same economic reasons, Clarity summarily dismisses the option of operating in the 3.6 GHz band, which the Commission recently opened for nonexclusive use. *See* Clarity Reply at 5.

¹⁹ Clarity has thus far eschewed auctions because of the “cost involved.” *See* Waiver Applications of Clarity Media Systems LLC, Lead Application at 27, Feb. 21, 2006. The desire to avoid this capital cost does not justify Clarity’s waiver requests. *See, e.g., Exelon Generation Company, LLC*, Order, 19 FCC Rcd 18078, 18082 ¶ 8 (2004) (“[T]he 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.”).