

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of
Waiver Requests by Clarity Media Systems, LLC,
to Operate CARS Stations at Flying J Travel
Plazas
DA 07-1946

ORDER

Adopted: July 2, 2013

Released: July 2, 2013

By the Commission:

I. INTRODUCTION

1. Clarity Media Systems, LLC (Clarity)1 has requested waivers of numerous Cable Television Relay Service (CARS) Part 78 rules2 in order to operate multichannel television distribution systems in the 2025-2110 MHz band at various Flying J travel plazas throughout the country.3 The Media Bureau rejected Clarity’s request on the grounds that granting the waivers would not serve the underlying purpose of the Part 78 rules, which is to provide for the licensing and operation of CARS stations used for transmission of signals “from the point of reception to a terminal point from which the signals are distributed to the public by cable”;4 Clarity’s proposed service posed a risk of interference to the primary users; and there appeared to be reasonable alternatives that did not require waivers.5 In light of these factors, the Bureau held that Clarity failed to demonstrate that a broad waiver in this instance would serve the public interest and denied Clarity’s waiver requests. Clarity filed an Application for Review claiming that the Media Bureau was incorrect as a matter of law and fact on each of these points and seeking

1 The parent company of Clarity is Flying J Inc. Flying J, Inc. filed for bankruptcy in December 2008. Flying J Inc., et al. Petition for Bankruptcy, Case No. 08-13384-MFW (Bankr. D. Del. filed December 22, 2008). On July 7, 2010, Flying J, Inc. issued a press release announcing that its reorganization plan had been approved, including its merger with Pilot Travel Centers of Knoxville, Tennessee, and that the corporate name will be changed from Flying J Inc. to FJ Management Inc. The travel centers will be operated under the subsidiary, Pilot Flying J, which will own and operate “more than 550 interstate travel centers and travel plazas.” See Flying J Inc. Press Release, http://www.flyingj.com/flyingjPortalWebProject/ShowDoc/BEA+Repository/flyingjPortal/flyingjDesktop/2_Comp nyBook/3_PressPage/files/pr21.

2 Clarity seeks waivers of multiple foundational CARS/Relay service rules at each of 258 Flying J Travel Plaza locations. Each location must have a separate license.

3 Clarity submitted 10 applications for CARS licenses on February 21, 2006 and an additional 248 CARS applications on January 24, 2007. Clarity’s applications each seek waiver of 47 C.F.R. §§78.1, 78.11, 78.18(a)(6), 78.36, 78.101, 78.103(e), and 78.107. Clarity also requests waiver of any rule not specifically listed for which the Commission determines that a waiver is required.

4 47 C.F.R. § 78.1.

5 Clarity Media Systems, LLC, 22 FCC Rcd 8382, 8387 (2007).

reversal of the Bureau's decision.⁶ The KlaasKids Foundation (KlaasKids) also filed an Application for Review, claiming that the Media Bureau did not adequately consider the life-saving opportunities created by the carriage of Amber Alerts in the Clarity proposal.⁷ This *Order* affirms the Media Bureau's decision to deny Clarity's request for waivers. While Clarity has presented additional engineering information and has modified its proposal to reduce the risk of interference to Broadcast Auxiliary Service (BAS) and CARS licensees since the time of the Bureau's decision,⁸ Clarity has failed to demonstrate that the expansive waiver of the Part 78 rules it seeks would serve the public interest, particularly since the service contemplated by Clarity could be offered using other spectrum for which waivers would not be required - such as unlicensed or leased spectrum, or by wire-based delivery methods that would not require spectrum licenses, as discussed below. Clarity has thus failed to satisfy the standard for waiver. We therefore deny the Applications for Review filed by Clarity and KlaasKids.

II. BACKGROUND

2. Clarity proposes to provide multichannel video service to trucks parked at Flying J truck stops throughout the country through a wireless transmission/reception system.⁹ Along with other traditional cable video programming, Clarity would provide an original "Safety, Security, and Alert channel which will be available for the continuous national posting of missing or wanted individuals and dissemination of significant public security and highway emergency information."¹⁰

3. Clarity proposes to operate its multichannel digital television distribution systems on a secondary non-interfering basis within the 2025 to 2110 MHz band. This band is allocated for BAS and is used extensively for electronic news gathering (ENG) by broadcasters and cable programmers.¹¹ The band is co-equally shared with mobile CARS stations (which are used by cable networks for ENG and other purposes).¹² The Department of Defense (DoD) and the National Aeronautics and Space Administration (NASA) also use this band.¹³

4. In July 2005, the Commission's Office of Engineering and Technology granted Clarity an experimental license (WD2XPK) to test its system at Frazier Park, California; Ogden, Utah; and North Salt Lake, Utah. Clarity conducted its experiments in September and October 2005 and submitted a 6-

⁶ Application for Review of Clarity Media Systems LLC (filed June 4, 2007) ("Clarity Application"). See *Waiver Requests by Clarity Media Systems, LLC to Operate CARS Stations at Flying J Travel Plazas*, 22 FCC Rcd 8382 (Media Bureau May 2007) ("Media Bureau Order").

⁷ Application for Review of KlaasKids Foundation (filed June 4, 2007) ("KlaasKids Application"). As discussed below, the KlaasKids Foundation supports Clarity's waiver requests because of the proposed services' potential to contribute to the Amber Alert system.

⁸ The Association for Maximum Service Television, Inc. (MSTV) claims that these modifications are improper under 47 C.F.R. § 1.115(c) ("No application for review will be granted if it relies on questions of fact or law upon which the designated authority has been afforded no opportunity to pass"). Request to Promptly Dismiss Defective Application for Review (filed September 24, 2007). We do not reach the merits of MSTV's argument because we would reach the same conclusion with respect to Clarity's waiver requests with or without consideration of these modifications. See, *infra*, n. 30. We note that MSTV characterizes the modifications to the proposed system as amendments to the applications.

⁹ Clarity Application at 3.

¹⁰ *Id.*

¹¹ See generally, *Amendment of Section 2.106 of the Commission's Rules to Allocate Spectrum at 2 Ghz for Use by the Mobile-Satellite Service*, 15 FCC Rcd 12315 (2000) ("2 GHz Reallocation").

¹² 47 C.F.R. §78.18(a)(6).

¹³ See generally *2 GHz Reallocation*, *supra* n. 11.

month progress report on December 22, 2005.¹⁴ Subsequently, on February 21, 2006, Clarity filed 10 CARS applications. Clarity filed an additional 248 applications on January 24, 2007, and amended its existing filings in order to reduce the output power of the proposed stations as an additional safeguard against interference.

5. Clarity's applications requested waivers of Part 78 of the Commission's Rules, including Sections 78.1 ("Purpose"), 78.11 ("Permissible Service"), 78.18(a)(6) ("Frequency Assignments"), 78.101 ("Power Limitations"), 78.103(e) ("Emissions and Emission Limitations"), and 78.107 ("Equipment and Installation").¹⁵ Clarity would also require a waiver of Section 78.13 ("Eligibility for License") to operate its proposed multichannel digital television distribution system.¹⁶ These rules are the foundation of the CARS service.¹⁷

6. The Media Bureau issued a *Public Notice* on August 23, 2006, seeking comment on Clarity's waiver requests.¹⁸ The opposing commenters consisted of broadcast entities, as well as NASA. Supporting the waiver request were KlaasKids Foundation, the Lost Children's Network, the Missing Children Task Force, and Clarity. Opponents questioned whether the waiver requests should have been raised in a petition for rulemaking and articulated general public interest concerns, as well as concerns about interference, arguing that grant of the requests would have profound effects on other users of the spectrum.¹⁹ Commenters supporting the waiver requests suggested that the proposed service would contribute to the Amber Alert System.²⁰

7. The Media Bureau issued an *Order* denying Clarity's waiver requests on May 3, 2007.²¹ The Bureau found that Clarity had not demonstrated sufficiently that good cause existed to waive the rules. The *Media Bureau Order* also cited Clarity's interference tests conducted under the experimental license and found that the tests were inadequate to determine whether interference would occur.²² In addition, the Bureau was not convinced that the public interest benefits cited by Clarity outweighed the cost to the public in terms of potential harmful interference to BAS, CARS, and NASA communications.²³ The *Media Bureau Order* suggested alternatives available to Clarity to provide television service at truck stops, including purchasing spectrum at auction, pursuing the use of unlicensed spectrum, installing cable at truck stops, and negotiating spectrum leases.²⁴

¹⁴ Available online through the Commission's Experimental Licensing System (ELS).

¹⁵ See 47 C.F.R. §§ 78.1, 78.11, 78.18(a)(6), 78.101, 78.103(e), 78.107.

¹⁶ Clarity did not request waiver of the eligibility rule.

¹⁷ See 47 C.F.R. § 78.13 (limiting licenses for CARS stations to certain types of entities); see also n.2.

¹⁸ There were 15 comments and six reply comments filed.

¹⁹ Media Bureau Order, 22 FCC Rcd at 8387. See also Opposition of MSTV and NAB (filed August 21, 2008) at 10.

²⁰ The Amber Alert system is a "voluntary partnership between law-enforcement agencies, broadcasters, transportation agencies, and the wireless industry to activate an urgent bulletin in the most serious child-abduction cases." <<http://www.amberalert.gov>> (visited April 5, 2010).

²¹ See *supra*, n.3.

²² *Id.* at 8385-8386.

²³ *Id.* at 8387.

²⁴ *Id.* at 8387-8388. See also Society of Broadcast Engineering, Inc. Response to Written Presentation of Clarity Media Systems, LLC, July 31, 2007 at 3 (identifying IdleAire, now IdleAir, which uses no over-the-air spectrum, as an additional possible alternative that some competing truck stops use to provide video and other services to truckers). See also <<http://www.idleair.com/>>.

8. In response to the *Media Bureau Order*, Clarity and the KlaasKids Foundation filed separate applications for review. Clarity argues in its application for review that its waiver requests would advance the underlying purpose of the CARS rules by bringing the “first television programming service to the more than 2.5 million professional long-haul truck drivers.”²⁵ Clarity’s application for review also argues that it did in fact demonstrate that there would be no harmful interference caused to BAS/ENG operations.²⁶ Clarity states that it has “exhaustively explored all of the options identified by the Bureau, and many more, and found none to be feasible” for Clarity to offer its service at a reasonable cost.²⁷ KlaasKids Foundation’s application for review states that the *Media Bureau Order*’s evaluation of the role of local television in the national Amber Alert system was flawed and that the Bureau underestimated the life-saving opportunities offered by Clarity’s proposal.²⁸ The Foundation believes that the truck-driving community could help in the rescue of missing or abducted children if the waiver requests were granted and truck drivers received the Amber Alert service.

9. The Association for Maximum Service Television (MSTV) and the National Association of Broadcasters (NAB), The American Broadcasting Company (ABC), and the Society of Broadcast Engineers (SBE) filed oppositions to the applications for review. The parties agreed with the Bureau’s decision to deny the waiver request and assert that the applications for review fail to demonstrate that the Bureau’s *Order* was defective in any way.

10. After the release of the *Media Bureau Order*, Clarity applied for and, on April 24, 2008, was granted a further experimental license under which it proposed to conduct tests with a revised design of its system. The tests were designed to measure the minimum signal level generated at the perimeter of a travel plaza where the proposed service would be provided and determine “whether Clarity’s transmission system meets the minimum desired-to-undesired (D/U) signal ratio” to protect digital ENG equipment.²⁹ Clarity performed its tests at two Flying J Travel Plazas that it deemed representative of the 258 plazas where it has applied for licenses to operate.³⁰ Clarity filed its progress report on its operation pursuant to the experimental license on July 31, 2008.³¹

11. Clarity filed a Request for Expeditious Grant of the Application for Review (Request) on August 8, 2008. The Request asserts that Clarity has demonstrated that the risk that its operation will cause harmful interference is minimal and that, in the unlikely event that harmful interference does occur, it could readily be cured in every instance.³² Clarity states that it now has refined its system and, with the

²⁵ Clarity Application at 2, 19-23.

²⁶ *Id.* at 12-19.

²⁷ Clarity Application at 24. *See also id.* at 24 n. 79 (arguing that without the waiver, Clarity would have to “bid on and win an unbelievable number of licenses around the country” in order to offer its service, something that would be “completely inimical to the objective of offering a low-cost service to its clientele”); *id.* at 23 n.77 (explaining the cost associated with wiring travel plaza parking lots); *id.* at 24 n. 80 (describing the complexities of negotiating with dozens of licensees at each location to aggregate necessary spectrum in the secondary market); Presentation of Clarity Media Systems, LLC, October 15, 2007 at 7 (stating that IdleAire’s hourly pricing model could lead to charges exceeding \$500 a month for its complete service, including idle reduction services and non-premium video services).

²⁸ KlaasKids Application.

²⁹ Progress Report to the Federal Communications Commission, Experimental Radio Service License, Call Sign: WE2XNE, July 31, 2008 at 1.

³⁰ BAS Operators did not participate in this test.

³¹ *See* Clarity Media Systems, Inc., Progress Report to the Federal Communications Commission, file No. 0692-EX-PL-2007, July 31, 2008.

³² Request Expeditious Grant at 11.

modified system configuration, has determined that it can provide an adequate quality of service with a transmitter output power of 5 mW per channel at its larger sites rather than 1 W per channel as it had originally requested.³³

12. MSTV and NAB filed an Opposition to the Request on August 21, 2008.³⁴ Clarity filed its Reply on September 3, 2008.³⁵

III. DISCUSSION

A. Waiver Standard

13. In analyzing Clarity's requests for waiver of the CARS rules, we consider established legal standards for waiver pursuant to Section 1.3 of the Commission's rules.³⁶ The Commission will adhere strictly to its rules unless a party can demonstrate that "in the public interest the rule should be waived."³⁷ Furthermore, the Commission may only waive a provision of its rules for "good cause shown."³⁸ The Commission must take a "hard look" at petitions for waiver³⁹ and consider all relevant factors when determining if good cause exists.⁴⁰ The party petitioning the Commission for a waiver bears the heavy burden of showing good cause: "[an] applicant [for a waiver] faces a high hurdle even at the starting gate."⁴¹ In addition, "[t]he agency must explain why deviation better serves the public interest, and articulate the nature of the special circumstances, to prevent discriminatory application and to put future parties on notice as to its operation."⁴² As explained in more detail below, we conclude that Clarity has

³³ *Id.* at 8.

³⁴ See Opposition of MSTV and NAB to the Request of Clarity Media Systems, LLC, August 21, 2008, at 5-9 (stating that the signal strengths described create "threshold degradation up to 30 kilometers past the fence line, based on the proper TSB-10-F methodology" (the standard used by BAS/ENG services in this band) and that the entire progress report filed by Clarity does not reflect actual operations, and is therefore unreliable).

³⁵ See Reply of Clarity Media Systems, September 3, 2008 (responding that MSTV and NAB merely show potential interference in hypothetical situations, and do not allege actual interference at any BAS/ENG receive site). Even assuming arguendo that Clarity has made significant refinements in its system and considerably reduced its power and interference potential, we do not believe that on balance grant of waiver is warranted here. The serious public interest concerns raised by grant of the instant waivers and the apparent availability of alternative delivery means, as discussed herein, tip the scale in favor of denial of Clarity's request.

³⁶ 47 C.F.R. § 1.3. In its Application for Review, Clarity states its waiver request must be considered under Section 1.925(b)(3) of the Commission's rules. See Clarity's Application for Review at 7 (citing 47 C.F.R. § 1.925(b)(3)). As the Bureau stated, however, Section 1.925(b)(3) is applicable to wireless telecommunications services, not to fixed or mobile CARS stations. See *Media Bureau Order* 22 FCC Rcd at 8384 n.21. See also *Delta Radio, Inc., Memorandum Opinion and Order*, 18 FCC Rcd 16889, 16891 ¶ 7 & n.19 (2003) (citing *Bellsouth Corporation v. FCC*, 162 F.3d 1215, 1225 n.10 (D.C. Cir. 1999))(Appropriate standard for Media Bureau). Therefore, Clarity's request for waiver should be considered under the general waiver standard set forth in section 1.3 of the Commission's rules. 47 C.F.R. § 1.3.

³⁷ *In the Matter of Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, 18 FCC Rcd 16121, 16130 (2003) (citing *FPC v. Texaco, Inc.*, 377 U.S. 33, 39 (1964))

³⁸ 47 C.F.R. § 1.3.

³⁹ *FPC v. Texaco, Inc.*, 377 U.S. 33, 39 (1964).

⁴⁰ *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971).

⁴¹ *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969).

⁴² *Northeast Cellular Telephone Company, L.P. v. FCC*, 897F.2d 1164, 1166 (D.C.Cir. 1990).

not satisfied its burden of showing that good cause exists for waiving our rules, and we affirm the Bureau's conclusion that grant of the requested waivers would not serve the public interest.⁴³

B. On Balance, Grant of the Waivers Would Not Serve the Public Interest

14. By its waiver requests, Clarity is proposing an entirely new use of the CARS band, *i.e.*, a direct-to-consumer pay wireless cable service using 84 of the available 85 frequencies in the 2025-2110 band at over 250 locations around the country, which is inconsistent with the express purpose of the CARS rules.⁴⁴ While the Commission seeks to encourage innovative uses of the spectrum, a waiver is not the appropriate vehicle⁴⁵ to effect a substantial change in the permissible use and eligibility rules for a block of spectrum, which requires a more thorough study of the spectrum, including consideration of other possible uses of the spectrum.⁴⁶ This sort of fundamental change is the province of rulemaking. As we have stated previously, “before authorizing spectrum uses, we typically first conduct a rulemaking proceeding to obtain public comment on how the band should be used and licensed.”⁴⁷ A rulemaking ensures the fair and orderly allocation of spectrum to its highest and best use and affords all interested parties an opportunity to apply for it. This framework also avoids the potential scarcity of spectrum that could result from the filing of a multitude of waiver requests from other entities seeking to engage in

⁴³ *Id.* (Commission may waive rules at any time if “particular facts would make strict compliance inconsistent with the public interest.”); *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969) (administrative waivers are a mechanism “to seek out the ‘public interest’ in particular, individualized cases.”) (subsequent history omitted). *See* 47 C.F.R. § 1.3.

⁴⁴ 47 C.F.R. § 2.106 (allocating the CARS band for TV Auxiliary Broadcasting, Cable TV Relay, and Local TV Transmission); *see also NAB Reply* at 10 n.29 (Clarity “attempts to fit a completely new service into existing service rules by waiving virtually all of the applicable rules”).

⁴⁵ Clarity Application at ii, 24; Clarity contends that under Section 7 of the Communications Act, the parties opposing waiver have the burden of demonstrating that grant of a waiver would be contrary to the public interest. Clarity *Ex Parte* (filed Oct. 19, 2007) at 9; 47 U.S.C. § 157 (“Any person or party (other than the Commission) who opposes a new technology or service proposed to be permitted under this Act shall have the burden to demonstrate that such proposal is inconsistent with the public interest.”). As noted by MSTV, wireless cable service is not a new technology or service. *See* MSTV Comment on the Interrelationship Between Clarity’s Experimental Application and the Media Bureau’s Denial of Clarity’s Waiver Requests” at 3. Moreover, Section 7 does not shift the burden of proof to the Commission, *M2Z Networks, Inc., v. FCC*, 558 F.3d 554, 561-62 (D.C. Cir. 2009), and does not alter the fact that Clarity, like any other party seeking a waiver, faces a “high hurdle.” *Northeast Cellular, supra*, 897 F.2d at 1166.

⁴⁶ In allocating spectrum for a radio service the fundamental issues are who should use it, what “eligibility” criteria are appropriate, and what uses are permissible. The applicable rules for CARS are Sections 78.13 and 78.11 of the Commission’s Rules, respectively, 47 C.F.R. §§78.11 & 78.13.

⁴⁷ *In the Matter of Applications for License and Authority to Operate in the 2155-2175 MHz Band*, 22 FCC Rcd 16563, 16569 (2007). For example, when the Commission considered licensing a new non-interfering service in the band used by Direct Broadcast Satellites, the Commission issued an NPRM regarding the service and ultimately licensed the spectrum by auction. *In the Matter of Amendment of Parts 2 and 25 of the Commission’s Rules to Permit Operation of NGSO FSS Systems Co-Frequency with GSO and Terrestrial Systems in the KU-Band Frequency Range*, 16 FCC Rcd 4096 (2000). We do not agree with Clarity, *see* Clarity Reply (filed Sept. 3, 2008) at 28-30, that our decision in *CBS Inc. Petition for Special Relief*, 87 F.C.C.2d 587, 593 (1981) contradicts this conclusion. Although Clarity does not purport to challenge the relay requirement of the CARS rules as a matter of general applicability, grant of its request and any similar requests would effect “a fundamental change in the rule” in light of Clarity’s claim that its use of the spectrum to provide service directly to end users is consistent with the rules’ purpose, which Clarity describes in broad terms. *See id.* at 593 (Waiver is inappropriate where “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 the creation of a limited exception due to particular unique circumstances or other considerations which make application of the general policy of the rule inappropriate.”).

similar or other operations.⁴⁸ In addition, unlike many other types of spectrum allocations where use, both in terms of intensity and geography, can be fairly well anticipated, spectrum use in the CARS/BAS service can fluctuate dramatically depending on the demands associated with breaking news events. Such services require rather strict protection because potential use may be unpredictable and cannot be adequately accommodated at the last minute without compromising the purpose of the service. For these reasons, awarding Clarity spectrum for free to establish a new service through a waiver process without the benefit of a full and thorough public examination of the issues and consideration of alternative uses would be inconsistent with the public interest, absent a very compelling showing that is not present here.⁴⁹

15. The *Media Bureau Order* acknowledged the potential public safety benefits of Clarity's proposal, but on the basis of the record then before it, found that they did not outweigh the Bureau's other concerns, including the possibility that Clarity's proposed service could interfere with ENG service, the likelihood that grant of the waiver would prompt similar waiver requests, and the inadequacy of Clarity's explanation of why other means of delivery—requiring no waivers—were truly impractical.⁵⁰ We are not persuaded by Clarity's argument that it needs the free use of licensed spectrum to provide its proposed service. The fact that a waiver applicant argues that its business model will only work if it can get a large block of spectrum for free does not mean that the public interest warrants a waiver.⁵¹ Moreover, the fact that other travel plaza operators are able to provide video services without the unprecedented waivers Clarity seeks strongly suggests that alternative delivery means are practical. We agree with the Bureau that, based on that record, Clarity's claimed public interest benefits do not tip the scale in favor of waiver.⁵² Nor do we believe that the technical changes to its system that Clarity has described, based on its second series of experimental tests, are sufficient to alter our view that the waivers Clarity seeks are not justified.⁵³ Even assuming, arguendo, that Clarity were correct in predicting minimal interference for

⁴⁸ See MSTV/NAB Aug. 21, 2008 Opposition at 15 (“Grant of Clarity’s Request will invite competing truck stops, campgrounds, apartment and condominium owners, hotels, retail stores, and others with an interest in acquiring free spectrum to file similar applications – both in the CARS band and others”); *Nextel Communications, Inc. Request for Waiver*, Order, 14 FCC Rcd 11678, 11691 (WTB 1999) (denying waiver based, in part, on consideration of possible future filing of similar waiver requests); *In the Matter of BellSouth’s Petition for Declaratory Ruling or, Alternatively, Request for Limited Waiver*, 6 FCC Rcd 3336, 3343 (1991) (grant of waiver would invite numerous similar requests presenting issue of broad applicability, which would be more appropriately considered through a rulemaking).

⁴⁹ See MSTV/NAB Opposition at 9. See also *Ex Parte* of CTIA (filed May 21, 2009) (the Commission is “compelled to consider allocating such spectrum rights through the competitive bidding process required by Section 309(j) of the Communications Act rather than through a non-transparent rule waiver process that simply licenses spectrum to a single party”); *Ex Parte* of Rural Telecommunications Group, Inc. (“RTC”) (filed June 1, 2009) (failure to proceed via traditional rulemaking in Clarity’s case would encourage entities to file applications for licenses on encumbered spectrum in the hope that their waiver requests will slip in under the radar screen, and would undermine the ability of small and rural companies to participate in the provision of wireless services); *Ex Parte* of MetroPCS (filed June 9, 2009) (“Clarity should not succeed in obtaining a reallocation of spectrum via a shadow application for review in a non-docketed proceeding. Any reallocation of spectrum should be conducted in an open rulemaking proceeding where all interested parties are invited to submit comments and the Commission is able to evaluate the highest and best use of particular spectrum”).

⁵⁰ 22 FCC Rcd. at 8387.

⁵¹ See MSTV/NAB Opposition at 17-18.

⁵² *Media Bureau Order*, 22 FCC Rcd at 8385-87.

⁵³ The record contains conflicting evidence regarding Clarity’s 2008 Progress Report on its second series of experimental tests, and the technical changes to its system that Clarity proposes based on those tests. See, e.g., *Ex Parte* of MSTV (filed Sept. 26, 2008); Reply of Clarity Media Systems, September 3, 2008, at 4-1. Moreover, Clarity did not use established methodology for interference determination on these frequencies. See, e.g., Response of Clarity Media Systems, LLC to November 8, 2007, Presentation of MSTV in DA 07-1946, Nov. 30, 2007; *Ex*

(continued....)

its particular uses at this time using its refined technical approach, it has still not justified the wholesale waiver of the CARS rules that it seeks. The serious public interest concerns raised by grant of the instant waivers and the apparent availability of alternative delivery means, as discussed herein, tip the scale in favor of denial of Clarity's request. We agree with the Bureau that Clarity has not demonstrated that strict application of the rules to Clarity would frustrate the rules' purpose.⁵⁴

16. Clarity claims that the Bureau failed to examine all its claimed public interest benefits and lists, in total, 17 separate public interest benefits of its service, including educational opportunities, economic benefits, and local programming.⁵⁵ Seven of the benefits relate to television service being available to an underserved community at reasonable cost.⁵⁶ Other benefits include: safety of children (via the Amber Alert system),⁵⁷ safety of the highways,⁵⁸ new investment opportunities,⁵⁹ the promotion of local television content,⁶⁰ educational opportunities,⁶¹ and improved access to spectrum.⁶²

17. The KlaasKids Foundation's application for review focuses on the potential of Clarity's proposal to assist in the rescue of missing or abducted children. KlaasKids asserts that while radio, highway signs, and radial distribution are effective tools, this novel service, which would provide information to truckers who can communicate via CB Radio to other truckers on the road to help locate and apprehend kidnappers, would create an organized first responder force.⁶³

(...continued from previous page)

Parte of MSTV (filed Nov. 8, 2007) (“ . . . contrary to Clarity's assertions, the methodology described in Telecommunications Systems Bulletin TSB-10-F, ‘Interference Criteria for Microwave Systems,’ accurately measures interference to local newsgathering services.”). Section 1.115 of the Commission's rules provides that the Commission will not grant an application for review that relies on evidence that was not presented to the designated authority. 47 C.F.R. § 1.115(c). Clarity's 2008 Progress Report was not available when the Bureau released its order and thus was not presented to the Bureau, but we are not granting Clarity's application for review, and, in the interest of administrative efficiency, we have exercised our discretion to consider the newly filed evidence.

⁵⁴ *Media Bureau Order*, 22 FCC Rcd at 8385; 47 C.F.R. § 78.1 (purpose of Part 78 is to provide for the licensing and operation of CARS stations used for transmission of signals “from the point of reception to a terminal point from which the signals are distributed to the public by cable.”); *see also Amendment of Eligibility Requirements in Part 78 Regarding 12 GHz Cable Television Relay Serv.*, 17 FCC Rcd 9930, 9945 (2002) (“Relaying video programming as part of a larger system that communicates by other means or spectrum is the principle use for CARS[.]” and this use represents the “fundamental character” of the service).

⁵⁵ *Clarity Application* at 20. To the extent Clarity's Benefit 17 is meant to suggest that Clarity has a First Amendment right to use of the spectrum, this argument was rejected by the United States Supreme Court in *NBC v. United States*, 319 U.S. 190, 226 (1943).

⁵⁶ *Clarity Application* at 20, items 1, 2, 3, 4, 10, 14, and 16.

⁵⁷ *Id.* items 5, 6, and 12.

⁵⁸ *Id.* item 9.

⁵⁹ *Id.* items 8 and 13.

⁶⁰ *Id.* item 7.

⁶¹ *Id.* item 11.

⁶² *Id.* item 15.

⁶³ *KlaasKids Foundation Application* at 3-4. We presume that radial distribution refers to a process of sending messages from a central generator through various means radiating from that hub.

18. While Clarity's intention to carry Amber Alerts on one channel of its video system, and the benefits Clarity claims would result,⁶⁴ are laudable, we do not find that they are sufficient to justify the extraordinary waivers Clarity has requested, particularly in light of the numerous other avenues for Amber Alerts to be disseminated, including road signs, radio broadcasts, and news broadcasts made by the primary users of the spectrum at issue and available to truck and other drivers ubiquitously and without charge.⁶⁵ Moreover, the improvement to the Amber Alert system that Clarity and the KlaasKids Foundation claim would result from Clarity's proposed service is speculative. Clarity proposes to provide 70 program channels, 65 by contract and 5 produced by Clarity "oriented to the needs and interests of professional drivers and public safety"⁶⁶ There is no assurance, however, that an alert would be received by its intended viewers, in light of the numerous channel options. Moreover, there is no analysis supporting Clarity's claim that its system would result in a significant incremental improvement in the effectiveness of the Amber Alert system.

19. Other potential benefits enumerated by Clarity are so general in nature as to provide no real support for the waivers its approach requires. Clarity argues, for example, that its service will, to some degree, promote making television service available to all people of the United States (Benefit No. 1) at reasonable charges (Benefit No. 4), contribute to a healthy and vibrant economy (Benefit No. 8), enhance educational opportunities (Benefit No. 11), encourage private investment in new service offerings (Benefit No. 13), and fulfill the principles of the First Amendment (Benefit No. 17). While these are admirable goals, we see no reason why wholesale waiver of our rules to permit the particular method Clarity advances is necessary to achieve them. Clarity currently provides video programming, including over-the-air broadcasting, to truck drivers in lounges at its travel plazas,⁶⁷ and truck drivers can purchase direct broadcast satellite service. In addition, Clarity provides broadband service to truck drivers in their cabs via Wi-Fi that can offer video streaming service, and Clarity's competitors offer multichannel video service to truck drivers in their cabs through other means. It is unclear what marginal increase Clarity would provide in making video service available to un-served populations (Benefit No. 2), enhance the quality of mandated driver rest periods (Benefit No. 9), provide service to the specific unserved households Clarity will serve (Benefit No. 10), provide multichannel television to unserved areas (Benefit No. 14), and cure inequities in multichannel programming distribution and reception (Benefit No. 16). Two of Clarity's stated benefits are even more tenuous. Benefit No. 3 asserts that granting the waivers will encourage the provision of new technologies and services, but multichannel video is not a new service and it has been offered in this portion of the spectrum for decades (as MMDS, now BRS),⁶⁸ so the delivery technology is not new. We also fail to see how Clarity's service will promote localism by providing television service to an itinerant community that can already receive local television over the air directly, in a lounge, or by DBS (Benefit No. 7). Lastly, while granting these waivers would improve Clarity's access to spectrum (Benefit No. 15), it would also encumber the spectrum and make it more difficult to make it available to other services, current and future, by raising the noise level, which can

⁶⁴ Of the benefits listed by Clarity, three relate to Amber Alerts—promoting safety of life and property (Benefit No. 5), saving children's lives (Benefit No. 6), and accommodating other federal policies (Benefit No. 12).

⁶⁵ See generally www.AmberAlert.gov.

⁶⁶ Clarity ex parte filed November 12, 2010, at 4.

⁶⁷ While over-the-air broadcast reception varies by location, we are persuaded that it is generally unavailable to truckers in their cabs.

⁶⁸ MMDS (Multichannel Multipoint Distribution Service) together with ITFS (Instructional Television Fixed Service) collectively were known as "wireless cable" and occupied the 2500 to 2690 MHz band. These services have now been restructured to provide greater flexibility as the Broadband Radio Service (BRS) and the Educational Broadband Service (EBS), respectively. See generally *Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands*, 19 FCC Rcd 14165 (2004).

impair BAS and would be particularly deleterious to Advanced Wireless Services (AWS), including broadband, should the Commission decide to authorize that service in all or part of this band.⁶⁹ Various proposals have been made for repurposing spectrum for wireless broadband. Most recently, CTIA—The Wireless Association has filed a white paper in the Nation Broadband Plan Docket, GN Docket No. 09-51, urging that the Commission meet its responsibility under Section 6401(b)(2)(E) of the Middle Class Tax Relief and Job Creation Act of 2012 (“Spectrum Act”) by reallocating 15 MHz of this band to commercial mobile broadband use.⁷⁰ In sum, the evidence provided does not make a compelling case for grant of the rule waivers necessary to allow Clarity to provide its proposed service in the CARS band. Clarity has failed to demonstrate that its proposed service would have sufficiently compelling public interest benefits to clear the “high hurdle” a waiver applicant faces.⁷¹

IV. CONCLUSION

20. Based on the discussion above, the relief requested by Clarity Media and the KlaasKids Foundation is denied. The decision of the staff is affirmed.

V. ORDERING CLAUSES

21. Accordingly, **IT IS ORDERED**, pursuant to Sections 1, 4(i), 5(c), and 309 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 155(c), and 309, and Sections 1.3 and 1.115 of the Commission’s Rules, 47 C.F.R. §§ 1.3 and 1.115, that Clarity and KlaasKids Applications for Review **ARE DENIED**.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

⁶⁹ See, e.g., Sprint Comments, Notice of Inquiry, GN Docket No. 09-157, Fostering Innovation and Investment in the Wireless Communications Market, at 17-8 (“When the radio environment is good and the SNR is high, the highly efficient 64 QAM modulation permits the highest data rates to be offered to the user; however, as SNR decreases, the WiMAX downlink adapts to the less efficient 16 QAM or QPSK modulation. This results in lower data rates to users.”).

⁷⁰ CTIA Letter of March 13, 2013, citing the Middle Class Relief and Job Creation Act of 2012, Pub. L. No. 112-96, 126 Stat. 156 (2012).

⁷¹ See *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (citing *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir 1969)).