Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Amendment of the Commission's Rules	)	WT Docket No. 07-250
Governing Hearing Aid-Compatible Mobile	)	
Handsets	)	

To: The Commission

PETITION FOR CLARIFICATION OR RECONSIDERATION

The Enterprise Wireless Alliance ("EWA" or "Alliance"), in accordance with Section 1.429(a) of the Federal Communications Commission ("FCC" or "Commission") rules and regulations, respectfully requests clarification or reconsideration of newly modified FCC Rule Section 20.19(a)(1)(i) defining the service providers that are required to offer hearing aid-compatible ("HAC") mobile handsets.[1] The modification adopted by the FCC arguably would require all operators of 800 MHz and 900 MHz Specialized Mobile Radio ("SMR") digital systems to offer HAC-compliant mobile devices. This would expand the requirement to include, seemingly inadvertently, a category of licensees whose systems were deliberately exempted under the previous rule. The inclusion of these systems is not consistent with the public interest considerations underlying the rule change adopted and is not supported by the statutory analysis required when revoking an exemption.[2] The Alliance urges the Commission to clarify or reconsider the language of Section 20.19(a)(1)(i) to retain the exemption of two-way radio systems that should not be subject to HAC equipment requirements.

[1] Amendment of the Commission's Rules Governing Hearing Aid-Compatible Mobile Handsets, *Fourth Report and Order*, WT Docket No. 07-250, 81 FR 173 (rel. Nov. 20, 2015) ("R&O").
[2] 47 U.S.C. § 610(b)(2)(B).

I INTRODUCTION

EWA is a national trade association representing business enterprises, wireless sales and service providers, hardware and software system vendors, and technology manufacturers. Members of the Alliance hold FCC authorizations to operate SMR systems in the 800 and 900 MHz bands regulated under Part 90 of the FCC rules that would be impacted by the recent rule change.

EWA supports the FCC's effort to "expand the scope of these [HAC] rules to cover the emerging wireless technologies of today and tomorrow."[3] It appreciates that the previous version of Rule Section 20.19(a)(1)(i) failed to capture services provided to the public over newer IP-based and video programming technologies. However, the revised language potentially captures digital 800/900 MHz SMR systems that are not used by the general consumer public. The great majority of these licensees hold site- and frequency-specific FCC authorizations for a small number of narrowband channels, on which they allow business enterprise and governmental entities to transmit communications among fleets of employees as they conduct their day-to-day business. The handsets (and mobiles) on these systems are not designed to be used as telephones, are not capable of accessing the Public Switched Network ("PSN"), and are not purchased in the consumer marketplace for telecommunications devices. These systems were exempted from the HAC requirement under the previous rule, because they are fundamentally dissimilar from networks whose hand-held devices are intended to be used by the public as telephones. For the reasons discussed below, the new rule should be clarified or modified to retain that exemption.

[3] R&O at ¶ 2.

II CLARIFICATION/RECONSIDERATION REQUEST

A. The Previous HAC Rule Did Not Apply to Most 800/900 MHz SMR Licensees

The FCC modified its HAC rules in 2003 when it had become apparent that the wireless phones used in cellular and cellular-like systems were becoming substitutes for, rather than complementary to, wireline telephones.[4] In that proceeding, it determined that wireless systems commonly referred to as "covered CMRS" systems would be subject to the HAC obligation; that is, those that offered "real-time, two-way switched voice service that is interconnected with the public switched network, and utilize an in-network switching facility which enables the provider to reuse frequencies and accomplish seamless handoffs of subscriber calls."[5] It noted that this same definition was used to identify carriers subject to E911 obligations (47 C.F.R. § 20.18(a)) and local number portability requirements (47 C.F.R. § 52.21(d)).[6]

The covered CMRS definition was developed, at least in large part, to distinguish from two-way dispatch systems operated by most SMR licensees, the cellular-like system operated by Sprint Corporation (then Nextel Communications, Inc.) ("Sprint") using 800/900 MHz SMR spectrum, and the very small number of other SMR licensees such as Southern Communications Services, Inc. d/b/a Southern LINC ("Southern") that also operated on these channels in a cellular system configuration. Because the Sprint and Southern systems were and are the functional equivalent of cellular networks, albeit serving specialized enterprise users as well as the general public, regulatory symmetry demanded that they be subject to comparable requirements.

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[4] *See* In the Matter of Section 68.4(a) of the Commission's Rules Governing Hearing Aid-Compatible Telephones, WT Docket No. 01-309, *Report and Order*, 18 FCC Rcd 16753 at ¶ 26-27 (2003).
[5] *Id*. at ¶ 26.
[6] *Id*. at n. 78. Those rules still rely on the covered CMRS definition, although the definition is now subsection (d), not (c), in Rule Section 52.21.

By contrast, the great majority of 800/900 MHz SMR licensees other than Sprint and Southern did not then and do not now meet the covered CMRS definition. Very few, likely none, offer any connection with the PSN. They cannot compete for that business with ubiquitous consumer-oriented CMRS networks. Instead, they serve a niche, specialized portion of the wireless marketplace. They typically use no more than a handful of 25 kHz or 12.5 kHz bandwidth channels to provide the base station infrastructure through which personnel in small businesses and governmental entities communicate with co-workers in performing their jobs. Their customers would be exempt from the HAC requirement if their fleets were large enough to justify investing in their own infrastructure, as they then would be classified as private or public safety licensees.[7] Instead, local SMRs invest in the base station facilities through which these fleets operate, thereby providing a spectrum- and cost-efficient vehicle for addressing their needs. The previous rule recognized that these systems do not offer the functional equivalent of a cellular network and used a service provider definition that reflected this distinction.

B. The Modified HAC Rule Arguably Applies to All 800/900 MHz SMR Licensees Using Digital Equipment

The modified Rule Section 20.19(a)(1)(i) replaces the covered CMRS definition of service providers subject to the HAC requirement with a significantly broader one. The new definition is intended to capture advanced technology systems used by consumers to transmit real-time voice communications with one another, without necessarily accessing the PSN and without utilizing a network that conforms to the covered CMRS definition. EWA agrees that the previous definition needed updating. It was drafted in a different time to meet a limited universe of systems capable of serving the consumer marketplace, which universe now includes a much more diverse variety of telephone-like service offerings available to the public.

[7] R&O at ¶ 40.

However, the new definition does not only reach forward to capture systems serving the general public that could not have been anticipated when the covered CMRS terminology was adopted, but could be interpreted to reach back and encompass systems that are not used by consumers and do not provide telephone-like functionality. The HAC requirement now applies to providers of digital terrestrial mobile service in the 698 MHz - 6 GHz band, which service enables two-way, real-time voice communications "among members of the public or a substantial portion of the public." 800/900 MHz SMR licensees that have converted their systems from legacy analog to digital technology unquestionably provide terrestrial mobile service that permits two-way, real-time voice communications. That is the essence of the two-way dispatch radio capability they offer. The issue is whether the FCC evaluates these systems for HAC-compliance purposes based on the service they **actually** offer, or on the fact that Rule Section 90.603(c) **permits** them to make service available to individuals and federal government agencies, as well as public safety and business/industrial entities. If the test is to which types of entities service actually is provided, the Alliance does not believe that any SMR operator other than Sprint and Southern would be viewed as enabling service among the public or a substantial portion thereof. If the determination is based on the universe of customers that hypothetically could be served on an SMR system, then all digital SMR licensees have become subject to HAC requirements.

C. Expanding the HAC Rules to Cover Emerging Wireless Technologies Used by the Public Does Not Require Inclusion of Traditional, Non-Cellularized SMR Systems

In their Comments in the recent stage of this proceeding, the Land Mobile Communications Council ("LMCC") and Motorola Solutions, Inc. ("MSI") both explained the difference between the two-way radios used by public safety and enterprise entities for work-based communications and devices that function like telephones and are used by the public. The

LMCC explained that such entities operate "closed-loop" systems that are not available to or accessed by members of the public, but only by employees or agents of the system operator.[8] It noted that the devices aren't referred to as phones or even as handsets, but as radios, two-way radios, or mobile/portable radios.[9] It described the fact that these radios typically are not used when held to the ear, but in front of the user's face or even hanging from an appendage like a belt.[10]

Motorola, as well as the LMCC, explained that these radios are not marketed or sold to individual consumers and cannot be purchased at retail.[11] They are bought by a business or a governmental entity that needs to equip its personnel with the capability for private, internal communications. It can be assumed that, like the rest of the American public, virtually every such employee also has a personal device that is used to communicate with the public at large and that includes telephone functionality. However, those devices are distinct from the ones used by private fleets.

The Commission accepted that reasoning and exempted public safety and private enterprise networks from the HAC requirement, stating the following:

> …our decisions to lift the exemption for devices used with some wireless services, and particularly our determination that doing so is in the public interest, have been based in part on our findings that these devices and services have become part of the mass market for communications. Generally, handsets for network services such as public safety or private enterprise networks are designed for a specialized market with a limited set of users. Based on the record before us, there is little evidence on the extent that these specialized public safety and private enterprise devices would satisfy the criteria of technical feasibility and marketability.[12]

[8] LMCC Reply Comments at 3 (filed Feb. 20, 2015).
[9] *Id*.
[10] *Id*. at 4; see also Motorola Comments at 5 (filed Feb. 5, 2015).
[11] *Id* at 4; LMCC Reply Comments at 4.
[12] R&O at ¶ 40.

The networks and devices that the FCC has exempted under that analysis are literally identical to those that operate on the typical SMR system. Vendors that sell 800/900 MHz equipment for use in private, two-way dispatch operations do not design radios specifically for use on SMR systems. Their radios are designed to be used by governmental and enterprise users whether they install their own infrastructure because of the size of their fleet, or an operational or coverage requirement, and thereby are classified as public safety or private enterprise networks, or instead choose to use infrastructure provided by an SMR operator. In fact, extending the HAC requirement to all digital SMR systems would have the anomalous result of exempting larger fleets, while imposing the obligation on smaller businesses and government entities using the same equipment for precisely the same type of operation.

If the FCC intends to revoke the previous exemption for non-cellularized SMR systems, it is required by statute to conduct the analysis set out in 47 U.S.C. § 610(b)(2)(B). It must determine that (1) revoking the exemption serves the public interest; (2) continuing the exemption would have an adverse effect on a person with hearing loss; (3) compliance with the HAC requirements is technologically feasible; and (4) compliance would not increase equipment costs to such an extent that the "telephones" could not be marketed successfully. No such analysis has been undertaken. For the reasons described herein, EWA submits that neither the first nor the second criteria would be met should that analysis be conducted. The Alliance also has serious concerns that the fourth criterion could be satisfied or that it even is applicable as these radios are not "telephones."[13]

[13] One equipment vendor has advised EWA that HAC compliance would require redesigning their portable radios, including potentially reducing their output power. If a power reduction is needed, existing system designs would need to be reviewed and possibly modified to add infrastructure, since reducing the portable's talk-back range could affect system coverage.

D. The FCC Should Clarify that HAC Obligations Are Based on Actual Rather than Permissible Service Offerings or Amend Rule Section 20.19(a)(1)(i) to Include Only 800/900 MHz SMR Systems That Meet the 800 MHz High Density Cellular System Definition in Rule Section 90.7

The Commission has experience distinguishing between functionally different types of SMR systems. As discussed above, it previously used the covered CMRS definition to identify service providers that would and would not be subject to HAC requirements. It continues to rely on that language for E911 and local number portability purposes. EWA appreciates why the definition no longer captures even today's advanced wireless technologies, much less those that may be developed in the future, and supports the FCC's effort to ensure that systems used by the public for telephone functionality are HAC-compliant. However, for the reasons described above, non-cellular SMR systems do not serve that marketplace, even though the FCC rules governing SMR eligibility give them the theoretical authority to do so. They do not have the capacity, the coverage or the functionality to compete with consumer-oriented offerings. Indeed, they do not market or sell to the public, which is well-served by the many – and growing – services that provide two-way, real-time voice communications.

The FCC could resolve this issue by clarifying that 800/900 SMR systems do not fall within the new HAC service provider definition if they offer service only to business enterprise and governmental entities for work-related operations, and not to consumers. This would ensure that Sprint and Southern, as well as any other SMR that elects in the future to provide service to the general public, would be subject to the obligation.

Alternatively, the Commission could amend Rule Section 20.19(a)(1)(i) to include a definition that already applies in the 800 MHz band. The FCC has recognized the distinction between types of SMR systems by adopting an 800 MHz High Density Cellular System definition that could apply equally to SMR service in the 900 MHz band. That definition defines

SMR systems that may operate only on spectrum assigned for Enhanced SMR ("ESMR") use, and is designed to distinguish between systems with cellular-like characteristics and those that function like the public safety and private enterprise systems that operate on neighboring channels. The language in Rule Section 20.19(a)(1)(i) could be modified to add at the end:

> …except 800 and 900 MHz SMR providers whose operations do not meet the definition of 800 MHz High Density Cellular Systems in Rule Section 90.7.

This approach would provide a bright-line test that already is used by the FCC for differentiating between SMR systems that serve the general public and those that work with governmental and business fleets.

III CONCLUSION

The modified Rule Section 20.19(a)(1)(i) could be read to have revoked the HAC-compliance exemption for 800/900 MHz SMR systems that do not operate in a cellular-like configuration and do not offer service to the public without the analysis required under 47 U.S.C. § 610(b)(2)(B). EWA urges the FCC to clarify or amend the rule consistent with the recommendations herein.

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