

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

In the Matter of:

Preemption of State and Local
Distracted Driving Laws

RM- 11833

To: The Chief, Wireless
Telecommunications Bureau

The Chief, Public Safety and
Homeland Security Bureau

COMMENTS

I hereby submit my Comments in the above captioned proceeding.

Background and Authority to Regulate

Congress clearly directed that the Federal Communications Commission is to have *sole regulatory authority over wireless communications* within the United States, its Possessions, Territories, Tribal Nations and Local Governments (SPTLGs). While SPTLGs have, collectively, a valid interest in the safe operation of motor vehicles, any restriction on operation of wireless devices can therefore only lawfully occur when and where authority has been delegated by the Commission.¹

There has been, without question, an *explosive* increase in the use of handheld, two-way cellular and PCS devices with interactive touch screen text technology. So much so that users can be observed anywhere in society, literally ‘transfixed’ upon screens, unaware of activities and

¹ 47USC 151 et. seq., *The Communications Act of 1934*.

events in their vicinity, including during the operation of motor vehicles. So much of an “epidemic” that rightfully, states have placed restrictions on use of such screens while operating a motor vehicle. There has been little objection or controversy over such distracted driving regulation, since it is intuitively obvious that one cannot drive safely unless at all times visually observing the road directly in front and to the sides of his or her vehicle.

At the same time, auto manufacturers are replacing what were knob controls on the dash of vehicles with large, illuminated touch screens that require a momentary glance and touch to adjust things like cabin temperature, or other functions. Apparently, use of such screens and the momentary glances necessary to see and select while vehicles are in motion is of little concern to regulators. And, our personal vehicle, for example, limits the entrance of text to only when the vehicle is at rest and not moving. All other touch functions are enabled continuously while in motion. So that a driver can glance over and reach and touch momentarily to set or adjust a setting.²

In the interest of safe driving, promulgation of regulations has occurred in such haste in some SPTLGs as to have not adequately clarified the description of cellular and PCS handsets and have resulted in those restrictions being applied to all vehicular two-way mobile radio equipment.³ For example, the simple and safe act of reaching to pick up a microphone, or handheld radio, containing only simple push buttons, has been included in prohibitions or has been interpreted to be so in the field by law enforcement officers.⁴ *A glance to reach and grasp a microphone is certainly no more distractive than touching a touch screen built into a vehicular dash to adjust cabin climate controls.*

Such regulatory over reach has had and will continue to have a chilling effect on the use of all types of mobile two-way radios in vehicles. It goes without saying that historically, business and personal use of such equipment has proved useful and necessary in the conduct of ordinary business; and in personal and recreational uses; and to assist during local, regional and national emergencies.

Therefore, as the Petitioner says, there is a strong need for regulation to clarify and strongly express Commission Pre-emption authority. And, to create a means of defense for two-way radio users across all services against regulatory over reach by SPTLGs.

² Fiat-Chrysler Dodge Durango and Jeep models from 2016 through 2019.

³ Certain states have banned use of even two-way microphones while a vehicle is in operation.

⁴ Only limited mobile radio exceptions in several states that have distracted driving laws.

Proposed Rule

The instant Petition only includes mobile stations in the Personal, Commercial and Amateur Services. In actuality, protection is needed across even more services. Aviation and Maritime need inclusion as well, since ground or land based mobile stations are often used in those services for coordination purposes.⁵ Therefore, I propose expanding the scope of the Petition.⁶ As such, any rule should be codified and placed such that it would collectively include all of the services to avoid repetitious coding for each individual service.

Existing Part 1, Practice and Procedure, Subpart S, preempts restrictions on reception of several consumer services and fixed wireless two-way services. By expanding its scope to include wireless two-way mobile services, a new regulation could be written and placed within the same Subpart S so as to fulfill the need for an efficient rule, covering all of the above five services.

A Practical and Economical Defense Needed

If an individual were to be cited for using a two-way radio, the cost of attempting to defend in a court of competent jurisdiction would be likely deemed too expensive, and therefore, the individual most likely would capitulate, pay a fine and cease using the radio equipment. And, at some point would ultimately remove the radio equipment from his or her vehicle(s), since unable to use it without prosecution. A practical and simple means is needed to obtain the assistance of the Commission in defense against such actions, such as is now codified and exists at 47CFR§1.4000 et. seq.; the “Over the Air Receiving Device” (OTARD) Rule.

For example, assistance from the Commission in the form of Declaratory Rulings such that the result could potentially *quash or strike down* any rule, law, regulation or restriction used by an SPTLG to prosecute an individual or individuals for simply using a microphone or hand held radio while operating a vehicle. Suggested text is included in the Appendix to my Comments.

⁵ See FCC-16-119 at 27. 47CFR§87.237 Multicomm Stations

⁶ 47 CFR Part 80 Maritime Services, Part 87 Aviation Services, Part 90 Land Mobile Service, Part 95 Personal Radio Service, and Part 97 Amateur Radio Service

Summary and Conclusions

As the Petitioner presents, there are abuses by SPTLGs that are likely resulting in suppression of use of mobile radio equipment. The simple act of reaching for a microphone with one hand, at most a one to two second distraction, is *not even in the same league* as looking at a cellular or PCS device screen and texting or scrolling while operating a motor vehicle. It was not the Petitioner's intent, nor is it mine to effect reasonable restrictions already in place that prohibit texting or cell phone use while driving.

I ask that the Commission accept my Comments and proceed to a Rulemaking Proceeding at the earliest possible date in order to address the effects of regulatory ambiguity that are at the heart of the Petition.

Respectfully Submitted,

/s/

W. Lee McVey, PE Ret.
W6EM PG-12-19879
Life Senior Member, IEEE
3 Squires Glenn Lane
Leeds, AL 35094-4564
April 22, 2019

Appendix

Suggested Modifications or Additions to Commission Rules and Regulations

The title of Part 1, Subpart “S” shall be modified so as to include mobile wireless communications as follows. Suggested additions or changes to the Subpart are italicized and underlined:

Subpart S—Preemption of Restrictions That “Impair” the Ability To Receive Television Broadcast Signals, Direct Broadcast Satellite Services, or Multichannel Multipoint Distribution Services or the Ability To Receive or Transmit Fixed *or Mobile* Wireless Communications Signals

1.4500 Restrictions impairing the ability to receive or transmit, control or use mobile wireless communications signals.

(a) Any restriction, including but not limited to any rule, law, regulation or restriction that impairs the installation, control, use, or adjustment of mobile radio service equipment, including associated accessories and antennas in an aircraft, vessel, or motor vehicle is prohibited. This is meant to include two-way mobile radio equipment in the Maritime Service, the Aviation Service, the Business and Public Safety Radio Service, the Personal Radio Service, and the Amateur Service. It is not meant to include wireless Cellular or PCS telecommunications devices or services. And, the definition at 47.CFR§1.4000(a)(2) does not apply to mobile wireless services cited in this section.

(b) SPTLGs may apply to the Commission for a Waiver of this section under Sec. 1.3 of this chapter. Waiver requests must comply with the procedures in paragraphs (d) and (f) of this section and will be put on Public Notice. The Commission may grant a Waiver upon a showing by the applicant of concerns of a highly specialized or unusual nature. No Petition for Waiver shall be considered unless it specifies the restriction at issue. Waivers granted in accordance with this section shall not apply to restrictions amended or enacted after the Waiver is granted. Any responsive pleadings must be served on all parties and filed within 30 days after release of a Public Notice that such Petition has been filed. Any Replies must be filed within 15 days thereafter.

(c) Interested persons may petition the Commission for a Declaratory Ruling under Sec. 1.2 of this Chapter, or a court of competent jurisdiction, to determine whether a particular law, regulation, rule or ordinance is permissible or prohibited under this section. Petitions to the Commission must comply with

the procedures in paragraphs (d) and (f) of this section and will be put on Public Notice. Any responsive pleadings in a Commission proceeding must be served on all parties and filed within 30 days after release of a Public Notice that such Petition has been filed. Any Replies in a Commission proceeding must be served on all parties and filed within 15 days thereafter.

(d) Copies of Petitions for Declaratory Rulings and Waivers must be served on interested parties, including parties against whom the petitioner seeks to enforce the restriction or parties whose restrictions the petitioner seeks to prohibit. A certificate of service stating on whom the petition was served must be filed with the Petition. In addition, in a Commission proceeding brought by an SPTG, constructive notice of the proceeding must be given to the citizens under the government's jurisdiction.

(e) In any proceeding regarding the scope or interpretation of any provision of this section, the burden of demonstrating that a particular governmental restriction complies with this section and does not impair the operation, control, installation, maintenance, or use of mobile radio equipment shall be on the governmental entity that seeks to impose or maintain the restriction.

(f) All allegations of fact contained in Petitions and related pleadings before the Commission must be supported by affidavit of a person or persons with actual knowledge thereof. An original and two copies of all Petitions and pleadings should be addressed to the Secretary, Federal Communications Commission, 445 12th Street, SW, Washington, DC 20554. Copies of the petitions and related pleadings will be available for public inspection in the Reference Information Center, Consumer and Governmental Affairs Bureau, Federal Communications Commission, 445 12th Street, SW, Washington, DC 20554. Copies will be available for purchase from the Commission's contract copy center, and the Commission decisions will be available on the Internet.