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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

18 July 2000

By Messenger

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Re: ET Docket No. 99-231

Gentlemen:

A number of you have asked for an analysis of FCC precedent regarding rules changes and the protection afforded to Part 15 devices. We have attached a brief analysis of this issue, and have also responded to a recent *ex parte* filed by Proxim. This analysis is being filed on behalf of Apple Computer, Cisco Systems, Dell Computer, Ericsson, Intermec Technologies, Intersil, LinCom, Lucent Technologies, Nokia, Symbol Technologies, Texas Instruments, 3Com, and Wayport.

Sincerely yours,

Scott Blake Harris

Attachment

cc: Magalie R. Salas, Secretary (w/Attachment)

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But, in *ex parte* meetings, some members of the Commission's staff have suggested that Part 15 rules can be changed without regard to the impact on existing unlicensed devices – and that they need not consider the evidence of harmful interference that permeates the record. This view is simply wrong and, if adopted, would constitute a major policy reversal by the Commission. Such a policy U-turn would be unwise, unwarranted, and, in this case, unlawful.

I. The Commission Has Always Considered Whether Changes to Its Rules Would Cause Harmful Interference to Part 15 Devices

The unlicensed use of valuable radio spectrum is only now beginning to realize its true potential. As the Commission recognized in 1995,

[s]ince modifying our rules to provide for enhanced Part 15 operations, a large number of equipment manufacturers and entrepreneurial companies have developed radio devices and implemented radio systems employing spread-spectrum technology In addition to the enormous benefits to both businesses and consumers that will result from the continued growth in the use of the Part 15 industry, ***our nation's economy also benefits due to the continued development of these new, advanced radio technologies by American companies.***³

As a result, manufacturers and consumers have invested over a billion dollars in Part 15 technologies in the 2.4 GHz band over the past few years alone.

Part 15 unlicensed devices may not interfere with authorized services and must accept interference received from such services operating within authorized parameters.⁴ ***But this does not mean – and has never meant -- that the Commission lightly changes its rules so as to increase interference into Part 15 devices.***

In proposing its rule change, HomeRF itself conceded this point, recognizing the “fundamental principle . . . that Part 15 applications should not cause harmful interference to other users of the band, in this case, other Part 15 users as well.”⁵ Yet some within the Commission have argued that the Commission can ignore the impact of rule changes upon existing Part 15 operations – a position that conflicts with both Commission precedent and sound public policy.

³ *Amendment of Part 90 of the Commission's Rules to Adopt Regulations for Automatic Vehicle Monitoring Systems*, Report and Order, 10 FCC Rcd. 4695, 4699-700 (1995)(emphasis added), Order on Reconsideration, 11 FCC Rcd. 16905 (1996).

⁴ See 47 C.F.R. § 15.5.

⁵ Letter from Ben Manny, Chairman of HomeRF, to Dale Hatfield, dated November 11, 1998 at p. 2 (“HomeRF Letter”).

For example, in 1996, the Commission rejected an almost identical proposal by Symbol Technologies to change the Part 15 rules solely on the grounds of its “serious concerns that implementing [the] requested changes could result in severe increases in the potential for harmful interference both to the authorized radio services and *to other Part 15 devices operating in these bands*.”⁶

Indeed, the Commission’s concern for Part 15 devices is such that it has, on occasion, adopted rules that limit the operations of *licensed services* that might otherwise cause harmful interference. For example, in the Location Monitoring Service (“LMS”) proceeding, the Commission considered licensing LMS systems in the 900 MHz band in which Part 15 devices were already operating.⁷ However, recognizing that LMS systems and Part 15 devices “will all play an important role in providing valuable services to the American public in coming years,” the Commission devised a band plan “that attempts to accommodate all of these users’ requirements.”⁸ Specifically, *the Commission decided (1) to condition LMS licenses “on the licensee’s ability to demonstrate through actual field tests that their systems do not cause unacceptable levels of interference to Part 15 devices;”* and (2) to create a safe harbor definition for unlicensed operations that would be deemed not to cause harmful interference to LMS systems in the band.⁹

As the Commission reiterated in affirming these rules on reconsideration:

the Commission seeks to ensure not only that Part 15 operators refrain from causing harmful interference to LMS systems, but also *that LMS systems are not operated in such a manner as to degrade, obstruct or interrupt Part 15 devices* to such an extent that Part 15 operations will be negatively affected.¹⁰

Nor was the LMS proceeding an isolated case. Rather, the Commission has repeatedly indicated that the impact that proposed rules may have on the operation of Part 15 devices is an important factor in its decision-making process. For example, it has:

⁶ *Amendment of Parts 2 and 15 of the Commission’s Rules Regarding Spread Spectrum Transmitters*, 11 FCC Rcd. 3068, 3072 (1996) (emphasis added)(“Symbol”). The Commission reaffirmed its rejection of the Symbol proposal in the final Report and Order adopted in that proceeding. *See Amendment of Parts 2 and 15 of the Commission’s Rules Regarding Spread Spectrum Transmitters*, 12 FCC Rcd. 7488, 7519 (1997).

⁷ *Amendment of Part 90 of the Commission’s Rules to Adopt Regulations for Automatic Vehicle Monitoring Systems*, Report and Order, 10 FCC Rcd. 4695 (1995), Order on Reconsideration, 11 FCC Rcd. 16905 (1996).

⁸ *Id.* at 4701.

⁹ *Id.* at 4714-15, 4736-37.

¹⁰ *Amendment of Part 90 of the Commission’s Rules to Adopt Regulations for Automatic Vehicle Monitoring Systems*, Order on Reconsideration, 11 FCC Rcd. at 16912 (emphasis added).

- provided additional interference protection for unlicensed vehicle radar collision avoidance systems in the 76-77 GHz band by suspending authorization for amateur station transmissions in that band;¹¹
- solicited comments regarding methods available to minimize interference between proposed amateur station operations and existing Part 15 operations;¹² and
- solicited comments regarding methods of protecting “a growing number of unlicensed Part 15 devices” from interference by Fixed and Mobile services.¹³

Simply put, there is an unbroken line of Commission precedent rejecting the view, now being advanced by some within the Commission, that the Commission can change its rules without concern about whether such changes will cause interference to Part 15 devices.

II. It Would Be Unwise and Procedurally Improper for the Commission Now to Abandon Its Policy of Protecting Part 15 Devices.

As unlicensed devices have progressed from interesting novelties to important communications pathways, the protection of these devices against unnecessary rules changes has become correspondingly more important, not less important. The Commission’s own cases illustrate not only the growing importance of unlicensed operations, but also the need for certainty if manufacturers and service providers are to invest the huge sums necessary to put unlicensed spectrum to productive use. By ensuring that rule changes to accommodate new licensed and unlicensed technologies do not cause harmful interference to existing unlicensed technologies, the Commission creates the continuity and confidence required to encourage long-term investments. Departing from this policy would seriously undermine the potential for development of unlicensed services – not only in the 2.4 GHz band, but also in the U-NII band and elsewhere.

As unwise as such a change would be as a matter of Commission policy, it would also be highly suspect as a matter of procedure. The *HomeRF NPRM* was based on the assumption that the proposed rule changes would not cause harmful interference. The Commission did not propose, therefore, to depart from its policy of considering the impact of proposed rules upon existing Part 15 technologies. Nor did the Commission, in any way, suggest that such a departure might be appropriate. Accordingly, any final

¹¹ *Amendment of Parts 2, 15, and 97 of the Commission’s Rules to Permit Use of Radio Frequencies Above 40 GHz for New Radio Applications*, Third Report and Order, 13 FCC Rcd. 15074 (1998).

¹² *Amendment of the Amateur Service Rules to Provide for Greater Use of Spread Spectrum Communication Technologies*, Notice of Proposed Rule Making, 12 FCC Rcd. 2591 (1997).

¹³ *Allocation of Spectrum Below 5 GHz Transferred from Federal Government Use*, 9 FCC Rcd. 6779 (1995).

action made in derogation of that policy would be procedurally infirm as a violation of the notice and comment requirements of Section 553 of the Administrative Procedure Act.¹⁴

III. The Attempt to Distinguish the Symbol Precedent is a Desperate Failure

Just four years ago, the Commission rejected a proposal by Symbol Technologies to amend the Part 15 rules – a proposal almost identical to that made by HomeRF – based on the interference to licensed and unlicensed devices that would result from the rule changes.

On 10 July 2000, counsel for a HomeRF supporter attempted to distinguish that precedent.¹⁵ Significantly, *that letter does not take issue with the proposition -- so clearly established in Symbol -- that the Commission should protect Part 15 devices from interference that might be caused by proposed rule changes.* The attempt to distinguish *Symbol* fails for other reasons as well.

First, although we agree that the record in this proceeding “contains vast amounts of detailed technical analyses and measurements of the interference potential of WBFH from both supporters and opponents alike,”¹⁶ to our knowledge the staff has not conducted its own independent evaluation of these studies. That is because the staff has concluded that rule changes can be made regardless of the interference that may result to other Part 15 devices. If it performed such analyses, the staff would reach the same conclusion it reached in 1996. The minor differences between the Symbol proposal and the HomeRF proposal are simply insufficient to address the interference concerns that killed the Symbol proposal. The laws of physics, in this area at least, have not changed in the last four years. The bottom line, however, is that the Commission cannot avoid the interference issue and walk away from its consistent policy of assessing the impact of rule changes upon existing Part 15 devices without notice and without a principled basis for doing so.

Second, HomeRF’s claim to represent a broad industry consensus is patently erroneous and legally irrelevant. The *ex parte* letter perpetuates the HomeRF shell game, which it

¹⁴ See 47 U.S.C. § 553; *Reeder v. FCC*, 865 F.2d 1298, 1304 (D.C. Cir. 1989)(*per curiam*)(finding a violation of the APA’s notice and comment requirements where notice did not indicate that the FCC was planning to abandon a long-standing policy in that proceeding). Moreover, because the assumption upon which the *HomeRF NPRM* was based (lack of interference) is fundamentally different from the finding that would underlie any departure from established policy (harmful interference), such a departure could not be deemed a “logical outgrowth” of the proposed rule. See, e.g., *Shell Oil Co. v. EPA*, 950 F.2d 741, 751-52 (D.C. Cir. 1991)(final rules for treatment of hazardous waste were not a logical outgrowth of original proposal where, “[r]ather than presuming that these processes would achieve their goals, the [final] rule assumes their failure”).

¹⁵ See Letter to Peter A. Tenhula from Henry Goldberg, dated July 10, 2000.

¹⁶ *Id.* at p. 2.

began with its rulemaking request, of overstating industry support for its proposal.¹⁷ Indeed, many companies whom HomeRF listed as supporters felt compelled to take the extraordinary step of contacting the FCC to deny they supported the proposal.¹⁸ And in its *ex parte*, HomeRF claims strong support from AT&T – which in fact supports the WECA compromise that HomeRF rejected.¹⁹ It is quite absurd to suggest that there is a broad industry “consensus” supporting the HomeRF proposal.

Most importantly, that five companies rather than one – or whatever – support a proposal is irrelevant. The Commission rejected the Symbol proposal not because it lacked support (in fact the record reflects Symbol had support in 1996),²⁰ but because it would have caused harmful interference to other Part 15 devices. The same analysis should lead to the same result in this proceeding.

Conclusion

The Commission’s policy on rule changes affecting Part 15 devices is quite clear. It has always considered whether such changes would cause harmful interference to Part 15 devices. When it has determined that harmful interference to Part 15 devices would be caused; it has either rejected the proposed change entirely or taken the steps necessary to mitigate the interference. To suggest that the evidence of interference in the record of this proceeding can be cast aside, simply because the interference would be harmful to unlicensed devices, would be an exercise in revisionist history as well as a grievous legal and policy blunder.

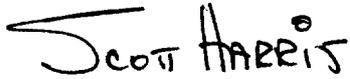
¹⁷ See HomeRF Letter at p. 1 and Attachment 1.

¹⁸ See comments filed by Cisco Systems, Inc. (Oct. 4, 1999); Nortel Networks Inc. (Oct. 4, 1999); Aironet Wireless Communications, Inc. (Oct. 4, 1999); Symbol Technologies, Inc. (Oct. 4, 1999); Samsung Electro-Mechanics Co. (Oct. 4, 1999); Microsoft Corporation (Nov. 19, 1999); and Silicon Wave, Inc. (Dec. 17, 1999).

¹⁹ See letter from Charles Nagel, AT&T CTO, to the Hon. William E. Kennard (June 26, 2000).

²⁰ See *Amendment of Parts 2 and 15 of the Commission’s Rules Regarding Spread Spectrum Transmitters*, 12 FCC Rcd. at 7519.

Respectfully Submitted,

A handwritten signature in black ink that reads "SCOTT HARRIS". The signature is written in a cursive style with a large, sweeping initial "S".

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On Behalf of:

Apple Computer, Inc.
Cisco Systems, Inc.
Dell Computer Corporation
Ericsson, Inc.
Intermec Technologies Corporation
Intersil Corporation
LinCom Corporation

Lucent Technologies, Inc.
Nokia Corporation
Symbol Technologies, Inc.
Texas Instruments, Inc.
3Com, Inc.
Wayport, Inc.