

Federal Communications Commission

FCC 01-141

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

2001 MAY -1 P 3: 29

In the Matter of)
)
1998 Biennial Regulatory Review --)
Amendment of Parts 2, 25 and 68 of the)
Commission's Rules to Further Streamline)
the Equipment Authorization Process for)
Radio Frequency Equipment, Modify the)
Equipment Authorization Process for)
Telephone Terminal Equipment, Implement)
Mutual Recognition Agreements and Begin)
Implementation of the Global Mobile Personal)
Communications by Satellite (GMPCS))
Arrangements)

GEN Docket 98-68

MEMORANDUM OPINION AND ORDER

Adopted: April 24, 2001

Released: April 30, 2001

By the Commission:

I. INTRODUCTION

1. In the *Report and Order* in this proceeding, we established a process through which private sector organizations could be designated to approve radio frequency devices and telephone terminal equipment in essentially the same manner as the Commission.¹ These organizations are called Telecommunication Certification Bodies (TCBs). The rules we adopted specify the criteria that an organization must meet to be eligible for designation as a TCB, the designation procedure, the scope of responsibility of TCBs, and the requirements that TCBs must follow after issuing equipment approvals. Motorola, Inc. (Motorola) filed a petition requesting a clarification of the confidentiality of applications filed with TCBs.² By this action, we clarify the confidentiality requirements in Parts 2 and 68 of the rules that TCBs must follow in certifying radio frequency devices and telephone terminal equipment as compliant with the Commission's rules.

¹ See *1998 Biennial Regulatory Review -- Amendment of Parts 2, 25 and 68 of the Commission's Rules to Further Streamline the Equipment Authorization Process for Radio Frequency Equipment, Modify the Equipment Authorization Process for Telephone Terminal Equipment, Implement Mutual Recognition Agreements and Begin Implementation of the Global Mobile Personal Communications by Satellite (GMPCS) Arrangements*, GEN Docket 98-68, *Report and Order*, 13 FCC Rcd 24687 (1999).

² Motorola's petition was a timely petition for reconsideration. See 47 C.F.R. § 1.429. The petition requested clarification of 47 C.F.R. § 2.962(g)(4). This section was originally designated as Section 2.962(f)(4) in the *Report and Order*. When the rules were published in the Federal Register, it was re-designated as Section 2.962(g)(4). See 64 FR 4984 (1999).

II. DISCUSSION

2. Equipment authorization applications and related materials are not routinely available for public inspection prior to the effective date of the authorization.³ Upon grant of an application, the application file is routinely available for public inspection. However, the party filing an application for equipment authorization may request that the Commission hold certain exhibits confidential.⁴ Those exhibits for which confidentiality have been requested and granted are not routinely available for public inspection even after grant of the application. The factors that the Commission considers in determining whether to grant confidentiality include, among others, whether the material contains information that is commercial, financial, privileged or a trade secret, and whether disclosure of the information could result in substantial competitive harm.⁵

3. When the requirements for TCBs were established, one of the rules adopted states that, upon request from the Commission, a TCB shall provide a copy of an application file to the Commission accompanied by a request for confidentiality for any information that qualifies as trade secrets.⁶ This requirement is intended to ensure the appropriate handling of materials filed with a TCB that are not routinely available for public inspection. Just as similar materials filed with the Commission are not routinely available for public inspection, TCBs are obligated to safeguard the confidentiality of information obtained in the course of their certification activities.⁷

4. In its petition, Motorola requests that we clarify Section 2.962(g)(4) of the rules regarding the handling of confidential information by TCBs.⁸ Specifically, Motorola is concerned about the use of the term "trade secrets" in this section to identify confidential materials. It states that this term as construed by the courts refers to a process that a business does not disclose publicly.⁹ Thus, it contends, this wording of the rule provides less protection to material included with applications filed with TCBs than those filed with the Commission.¹⁰ It believes that the rules for TCBs we adopted in this proceeding should refer more broadly to "material that qualifies for confidential treatment under the Commission's rules" rather than to "trade secrets."¹¹

³ See 47 C.F.R. §§ 0.457(d)(1)(ii).

⁴ See 47 C.F.R. §§ 0.457(d)(1)(ii) and 0.459.

⁵ See 47 C.F.R. § 0.459(b).

⁶ See 47 C.F.R. § 2.962(g)(4). See also *Report and Order* at ¶¶ 28 and 42.

⁷ See *Report and Order* at ¶ 23. See also International Organization for Standardization (ISO) / International Electrotechnical Commission (IEC) Guide 65 (1996), *General requirements for bodies operating product certification systems*, Clause 4.10.

⁸ See 47 C.F.R. § 2.962(g)(4).

⁹ See Motorola petition at 2.

¹⁰ See Motorola petition at 3.

¹¹ *Id.*

5 Motorola is correct that our rules permit material besides trade secrets to be held as confidential. We find that its recommended change to the rules we adopted in this proceeding more clearly reflects the intent of the rules, which is to ensure that applications processed by TCBs are treated in the same manner as applications processed by the Commission.¹² We are therefore adopting this change. Motorola only specifically requested that we change Section 2.962(g)(4) of the rules, which applies to the authorization of radio frequency devices by TCBs. However, on our own motion we are also making this change to Section 68.162(g)(4) of the rules which applies to authorization of telephone terminal equipment by TCBs because the same confidentiality requirements that apply to radio frequency devices apply to telephone terminal equipment. This change will ensure consistent treatment of applications for both types of equipment.

III. PROCEDURAL INFORMATION

6 *Final Regulatory Flexibility Certification.* The Regulatory Flexibility Act of 1980, as amended (RFA),¹³ requires that a regulatory flexibility analysis be prepared for rulemaking proceedings, unless the agency certifies that "the rule will not have a significant economic impact on a substantial number of small entities."¹⁴ The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."¹⁵ In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.¹⁶ A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration.

7 The *Report and Order* established a process through which private sector organizations could be designated to approve radio frequency devices and telephone terminal equipment. These TCBs were required under the *Report and Order* to keep "trade secret" information confidential. A Final Regulatory Flexibility Analysis was incorporated in the *Report and Order*.¹⁷ Following publication of the *Report and Order*, Motorola filed its petition seeking clarification of the confidentiality of applications filed

¹² See *Report and Order* at ¶¶ 14, 17 and 32.

¹³ The RFA, see 5 U.S.C. § 601 *et. seq.*, has been amended by the Contract With America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996) (CWAAA). Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).

¹⁴ 5 U.S.C. § 605(b).

¹⁵ 5 U.S.C. § 601(6).

¹⁶ 5 U.S.C. § 601(3) (incorporating by reference the definition of "small business concern" in the Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register."

¹⁷ 13 FCC Red 24737 (1999).

with TCBs. In this *Memorandum Opinion and Order* we are amending the rules to indicate that confidentiality should apply to “any material that qualifies for confidential treatment under the Commission’s Rules.”

8. This amendment to the rules will affect the 15 to 20 TCBs in operation; and it is the Commission’s belief that most of the TCBs are small businesses. Most applications filed with TCBs do not require that any information be held confidential. Where material does require confidential treatment it is predominantly because the materials are “trade secrets.” Systems for determining and storing “trade secrets” are already in place. The small amount of additional material required to be stored because it is “material considered to be confidential by the Commission” is insignificant. Therefore, we expect that the increased burden on TCBs caused by this amendment is nominal and does not rise to the level of a “significant economic burden.” Therefore, we certify that the amendments included in this *Memorandum Opinion and Order* will not have a significant economic impact on a substantial number of small entities.

9. The Commission will send a copy of the *Memorandum Opinion and Order*, including a copy of this final certification, in a report to Congress pursuant to the Small Business Regulatory Enforcement Fairness Act of 1996.¹⁸ In addition, the *Memorandum Opinion and Order* and this certification will be sent to the Chief Counsel for Advocacy of the Small Business Administration, and will be published in the Federal Register.¹⁹

IV. ORDERING CLAUSE

10. Accordingly, IT IS ORDERED that the petition for clarification filed by Motorola IS GRANTED as indicated herein. IT IS FURTHER ORDERED that Parts 2 and 68 of the Commission’s Rules ARE AMENDED as specified in the attached Appendix, effective 30 days after publication in the Federal Register. This action is authorized by Sections 4(i), 303(f), 303(g) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154(i), 303(f), 303(g) and 303(r).

¹⁸ See 5 U.S.C. § 801(a)(1)(A).

¹⁹ See 5 U.S.C. § 605(b).

11. IT IS FURTHER ORDERED that the Commission's Consumer Information Bureau, Reference Information Center, SHALL SEND a copy of the *Memorandum Opinion and Order*, including the Final Regulatory Flexibility Certification, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

A handwritten signature in black ink, reading "Magalie Roman Salas". The signature is written in a cursive style with a large initial "M".

Magalie Roman Salas
Secretary

**Appendix
Final Rules**

Part 2 of Title 47 of the Code of Federal Regulations is amended as follows:

1. The authority citation for Part 2 continues to read as follows:

AUTHORITY: 47 U.S.C. 154, 302a, 303 and 336, unless otherwise noted.

2. Section 2.962 is amended by revising paragraph (g)(4) to read as follows:

Section 2.962 Requirements for Telecommunication Certification Bodies

* * * * *

(g) * * *

(4) Where concerns arise, the TCB shall provide a copy of the application file to the Commission within 30 calendar days of a request for the file made by the Commission to the TCB and the manufacturer. Where appropriate, the file should be accompanied by a request for confidentiality for any material that may qualify for confidential treatment under the Commission's Rules. If the application file is not provided within 30 calendar days, a statement shall be provided to the Commission as to why it cannot be provided.

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Part 68 of Title 47 of the Code of Federal Regulations is amended as follows:

3. The authority citation for Part 68 continues to read as follows:

AUTHORITY: 47 U.S.C. 154, 303.

4. Section 68.162 is amended by revising paragraph (g)(4) to read as follows:

Section 68.162 Requirements for Telecommunication Certification Bodies

* * * * *

(g) * * *

(4) Where concerns arise, the TCB shall provide a copy of the application file to the Commission within 30 calendar days of a request for the file made by the Commission to the TCB and the manufacturer. Where appropriate, the file should be accompanied by a request for confidentiality for any material that may qualify for confidential treatment under the Commission's Rules. If the application file is not provided within 30 calendar days, a statement shall be provided to the Commission as to why it cannot be provided.

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