

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

In the Matter of)
)
Texas RSA 15B2 Limited Partnership)
d/b/a Five Star Wireless)
)
Section 68.4(a) of the Commission’s Rules)
Governing Hearing Aid Compatible)
Telephones) **WT Docket No. 01-309**
)
Request for Temporary Waiver, or)
Temporary Stay, of)
Section 20.19(d)(2) of the Rules)

To: Chief, Wireless Telecommunications Bureau

PETITION FOR TEMPORARY WAIVER OR TEMPORARY STAY

Texas RSA 15B2 Limited Partnership d/b/a Five Star Wireless (“Five Star”), by its attorneys and pursuant to Sections 1.3 and 1.925 of the Commission’s Rules, hereby requests a temporary waiver, or temporary stay, *nunc pro tunc* from September 18, 2006 through December 29, 2006, of the requirements contained in Section 20.19(d)(2) of the Rules that Five Star include in its handset offerings at least two handset models per air interface that comply with Rule Section 20.19(b)(2), and make available in each retail store owned or operated by it all of these handset models for consumers to test in the store. In support hereof, the following is shown:

Background

1. Five Star is the licensee of Cellular Radiotelephone Service Station KNKN691, the Frequency Block B cellular system serving the Texas 15(B2) – Concho Rural Service Area. Five Star has fewer than 500,000 subscribers. As such, it is a Tier

III Commercial Mobile Radio Service (“CMRS”) provider, as defined in the Commission’s Non-Nationwide Carriers Order (Order to Stay), 17 FCC Rcd. 14841, Para. No. 22 (2002).

2. The digital portion of the cellular system employs the Time Division Multiple Access (“TDMA”) and Code Division Multiple Access (“CDMA”) air interfaces. Five Star has overbuilt its TDMA facilities with a replacement CDMA facilities which are in commercial service and, as a result, TDMA-only handsets are no longer being activated on the cellular system. Instead, all current activations are a mix of CDMA-only and dual mode CDMA/analog. Five Star is in the process of transferring its TDMA customers to the CDMA facilities and, when the transition is complete, the TDMA facilities will be deactivated.

3. As of September 18, 2006, Five Star marketed approximately seventeen digital wireless telephone models. Of these, the Motorola Models V710, V262, V265, V323 and RAZR V3c and the Nokia Model 6015i met a U3 (or M3) rating for radio frequency interference under ANSI Standard C63.19. At that time, it was believed (based upon information received from the handset manufacturers) that three of these models also met a U3T (or M3T) rating under the standard for inductive coupling, *i.e.*, the Motorola Models V710 and RAZR V3c and Nokia Model 6015i.¹ However, Five Star recently discovered that only one of these three (*i.e.*, the Motorola RAZR V3c; FCC ID No. IHDT56FT1) met a U3T (or M3T) rating. Five Star began activating this handset on its system on May 1, 2006, *i.e.*, some four and one-half months prior to the September 18, 2006 compliance deadline. Upon information and belief, the Motorola RAZR V3c was

the only Hearing Aid Compatible (“HAC”) handset meeting the Commission’s HAC inductive coupling requirements that was available as of September 18, 2006 for purchase by small carriers, such as Five Star. Thus, as of September 18, 2006 and as a result of the general unavailability of compliant handsets, Five Star offered only one handset model that met a U3T (or M3T) rating for inductive coupling under ANSI Standard C63.19 – thus leaving it one short of the two compliant handsets required by the Commission’s Rules as of that date.

4. On December 29, 2006, Five Star began activating a second compliant handset model, the Motorola Model K1m [FCC ID No. IHDT56GH1].

Rule Section 20.19(d)(2) Requirements

5. Section 20.19(d)(2) of the Commission’s Rules specifies that “each provider of public mobile service must ... [i]nclude in their handset offerings at least two handset models for each air interface that comply with Section 20.19(b)(2) by September 18, 2006, and make available in each retail store owned or operated by the provider all of these handset models for consumers to test in the store ...” Rule Section 20.19(b)(2) specifies that a “wireless phone used for public mobile radio services is hearing aid compatible ... if it meets, at a minimum” a U3T (or M3T) rating for inductive coupling under ANSI Standard C63.19. Thus, the rule requirement is generally applicable to all Tier III CMRS carriers. It required Five Star to offer, and to make available for in-store testing by consumers, for its CDMA digital air interfaces at least two HAC digital wireless telephones meeting a U3T (or M3T) rating under ANSI Standard C63.19 for

¹ See also, Five Star’s “Sixth Semi-Annual Report,” filed November 14, 2006 in WT Docket No. 01-309, which also listed these three handsets as HAC-compliant for inductive coupling. This further confirms

inductive coupling by the September 18, 2006 implementation deadline. Because Five Star offers more than two digital wireless telephones for the CDMA air interface, it does not qualify for the *de minimis* exception codified in Section 20.19(e)(1) of the Commission's Rules.

Waiver Standard

6. The Commission has indicated generally that waiver requests of the HAC digital wireless handset requirements will be evaluated under the general waiver standard set forth in Sections 1.3 and 1.925 of the Rules and the standards set forth in WAIT Radio v. FCC, 418 F.2d 1153 (D.C. Cir. 1969), *appeal after remand*, 459 F.2d 1203 (D.C. Cir. 1972), *cert. denied*, 409 U.S. 1027 (1972) and Northeast Cellular Telephone Company v. FCC, 897 F.2d 1164(D.C. Cir. 1990). Hearing Aid Compatible Telephones (WT Docket No. 01-309 – Order on Reconsideration and Further Notice of Proposed Rulemaking), FCC 05-122, 36 CR 190 (rel. June 21, 2005) at Para. No. 50 (“Order on Reconsideration”).

7. Section 1.3 of the Rules states, in relevant part, that “[a]ny provision of the rules may be waived by the Commission on its own motion or on petition if good cause therefor is shown.” Section 1.925(b)(3) of the Rules states that the “Commission may grant a waiver request if it is shown that: (i) [t]he underlying purpose of the rule(s) would not be served or would be frustrated by application to the instant case, and that a grant of the requested waiver would be in the public interest; or (ii) [i]n view of unique or unusual factual circumstances of the instant case, application of the rule(s) would be inequitable, unduly burdensome or contrary to the public interest, or the applicant has no reasonable

alternative.” Under WAIT Radio and Northeast Cellular Telephone Company, a rule waiver “may be granted in instances where the particular facts make strict compliance inconsistent with the public interest if applied to the petitioner and when the relief requested would not undermine the policy objective of the rule in question.” Order on Reconsideration, Para. 50 n. 158.

A Waiver Is Warranted Because Sufficient Compliant Handset Models Were Not Available To Small Carriers

8. The reason in support of this waiver request is starkly simple and can be concisely stated: It appears that there was only one HAC-compliant digital wireless telephone model available for purchase by small carriers, such as Five Star, as of September 18, 2006 that met a U3T (or M3T) rating for inductive coupling under ANSI Standard C63.19. As a result, full compliance with the requirements of Section 20.19(d) of the Rules was an impossibility, and, therefore, a temporary waiver or temporary stay for the time period September 18, 2006 through December 29, 2006 is clearly warranted.

9. At this juncture, it should be emphasized that Five Star genuinely believed, based on information received from handset manufacturers, that it was marketing three compliant handsets as of the September 18, 2006 compliance deadline. As a result and through no fault of its own, Five Star inadvertently failed to achieve full compliance with the requirements of Section 20.19(d)(2) of the Rules by the implementation deadline, even though it fully intended to do so. Indeed, if Five Star had known prior to September 18, 2006 that it was marketing only one compliant handset model, it would have requested a temporary waiver or temporary stay at that time. Case precedent indicates that the waiver request would have been granted *nunc pro tunc* for the time period

September 18 through December 29, 2006. See Petitions for Waiver of Section 20.19 of the Commission's Rules, Memorandum Opinion and Order, WT Docket No. 01-309, FCC 07-51, released April 11, 2007 (granting temporary relief from the Rule Section 20.19(C)(2)(i) HAC requirements regarding radio frequency interference).

10. In adopting the Rule Section 20.19(d)(2) September 18, 2006 implementation deadline for Tier II and Tier III CMRS carriers, the Commission projected (but, obviously, could not assure) that a sufficient number of models of digital wireless handsets meeting a U3T (or M3T) rating for inductive coupling under ANSI Standard C63.19 would be made available by the manufacturers for purchase by smaller carriers by that date. Hearing-Aid Compatible Telephones (WT Docket No. 01-309 – Report and Order), 18 FCC Rcd. 16753 (2003). However, this projection did not come to pass because it appears that the Motorola Model RAZR V3c was the only compliant handset model available to small carriers, such as Five Star, as of the implementation deadline.

11. Assuming for purposes of argument that more-than-one compliant digital wireless handset model was commercially available for the CDMA air interface in mid-September of 2006, it is nevertheless clear that a sufficient number of models were not available for purchase by smaller carriers such as Five Star. Thus, once more than one compliant handset model for the CDMA air interface was being marketed commercially, it was clear that the handset manufacturers would be concentrating on meeting the needs of the larger (*i.e.*, Tier I) carriers, to the exclusion of smaller carriers.

12. Given these facts and circumstances, it seems abundantly clear that the temporary relief requested herein is warranted and in the public interest, and that good cause exists to grant the temporary waiver requested. Where the Commission's

projections of technological feasibility and commercial availability do not pan out, waiver of the requirements would appear to be particularly appropriate. Indeed, basic principles of administrative law prohibit the Commission from compelling carriers to do the impossible. *See, e.g., Alliance for Cannabis Therapeutics v. DEA*, 930 F.2d 936, 940 (D.C. Cir. 1991); *Hughey v. JMS Development Corp.*, 78 F.3d 1523, 1530 (11th Cir. 1996). Furthermore, the Commission has acknowledged that Tier II and Tier III CMRS carriers “have much less ability than the nationwide CMRS carriers to obtain specific vendor commitments necessary” to deploy the equipment needed to meet regulatory requirements; that “handset vendors ... give priority to the larger, nationwide carriers;” that the deployment needs of the larger carriers create “downstream delays for Tier II and III carriers;” and, accordingly, “that there are temporary and special circumstances applicable to [Tier II and Tier III carriers] that constitute a sufficient basis to grant a stay on a limited and temporary basis” from Commission-imposed regulatory requirements. Non-Nationwide Carriers (Order to Stay), 17 FCC Rcd. 14841, Para Nos. 10 and 11 (2002). *See also, FCI 900, Inc.*, 16 FCC Rcd. 11072 (Comm. Wir, Div., WTB 2001) (granting all 900 MHz MTA licensees an extension of the construction deadline so that they might deploy advanced digital 900 MHz systems, where the subject digital voice equipment was not commercially available in sufficient quantities in time to meet the five-year construction deadline).² Five Star simply had no control over the equipment

² Additional case precedent supports this position. *See Leap Wireless International, Inc.*, 16 FCC Rcd. 19573 (Comm. Wir. Div., WTB (2001) (granting extension of time so that licensee might deploy “high data rate” wireless technology that was not available in time to meet the five-year construction requirement); *Monet Mobile Networks, Inc.*, 17 FCC Rcd. 6452 (Comm. Wir. Div., WTB 2002) (granting extension of time so that licensee might deploy “high data rate” wireless technology that was not available in time to meet the five-year construction requirement); and *Warren C. Havens*, Mimeo DA 04-2100,

development, manufacturing and distribution practices of the handset manufacturers. The lack of sufficient, available digital wireless handset models for the CDMA air interface in mid-September of 2006 that met the Commission's HAC requirements for inductive coupling was, quite obviously, a circumstance clearly beyond the carrier's control. In view of the unique or unusual factual circumstances present here, application of the rule would clearly be inequitable, unduly burdensome and contrary to the public interest. In view of the fact only one compliant digital wireless handset model was available (at least for purchase by smaller carriers) as of that date, Five Star clearly has no reasonable alternative but to request the instant waiver.

13. It should also be emphasized that, as noted above, case precedent dictates that the Commission should grant the instant request for temporary relief *nunc pro tunc* for the time period September 18 through December 29, 2006. In Petitions for Waiver of Section 20.19 of the Commission's Rules, Memorandum Opinion and Order, WT Docket No. 01-309, FCC 07-51, released April 11, 2007, the Commission granted Tier III carriers temporary relief from the Rule Section 20.19(c)(2)(i) HAC requirements (which addresses the radio frequency interference requirement) on the grounds that compliant handset models were not available by the applicable compliance deadline. The same grounds exist here.

14. Five Star wishes to emphasize that it has always been fully committed to providing its hearing-impaired subscribers with at least two models of digital wireless handsets meeting a U3T (or M3T) rating under ANSI Standard C63.19 for the CDMA air

adopted July 12, 2004 (granting extension of the five-year construction requirement for 220 MHz licensees to allow for the use of next-generation digital technology in the band).

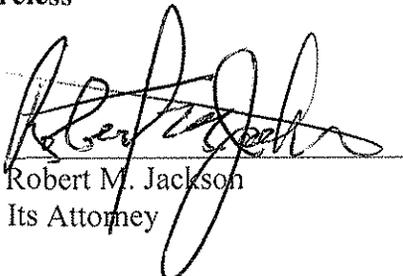
interface at the earliest practicable date, and that it did do so promptly once the handsets became generally available to Tier III carriers. In this regard, Five Star wishes to emphasize that it was partially compliant with the Commission's requirements on September 18, 2006 because it had been marketing the one handset model available to it that met a U3T (or M3T) rating for inductive coupling under ANSI standard C63.19 since May 1, 2006; and that it achieved full compliance a mere three and one-half months later (on December 29, 2006) once additional compliant handset models became available.

WHEREFORE, good cause shown, Five Star requests that the instant petition be granted.

Respectfully submitted,

**Texas RSA 15B2 Limited
Partnership d/b/a Five Star
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By: 

Robert M. Jackson
Its Attorney

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DECLARATION UNDER PENALTY OF PERJURY

I, W. G. (Bill) Stacy, hereby state the following:

1. I am the General Manager of Texas RSA 15B2 Limited Partnership d/b/a Five Star Wireless.

2. I have read the foregoing "Petition for Temporary Waiver or Temporary Stay." With the exception of those facts of which official notice can be taken, all facts set forth therein are true and correct to the best of my knowledge, information and belief.

I declare under penalty of perjury that the foregoing is true and correct. Executed on this 18 day of June, 2007.



W. G. (Bill) Stacy