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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

FILED/ACCEPTED
FEB 12 2008
Federal Communications Commission
Office of the Secretary

In the Matter of)
)
Section 68.4(a) of the Commission's Rules)
Governing Hearing Aid Compatible)
Telephones) WT Docket No. 01-309
)
Petition for Waiver of Section 20.19(d)(2) of the)
Rules)
)

ORIGINAL

PETITION FOR WAIVER

NE Colorado Cellular, Inc. dba Viaero Wireless ("Viaero"), by its attorneys and pursuant to Section 1.3 and 1.925 of the Commission's rules, hereby requests a t waiver of the requirements in Section 20.19(d)(2) of the Commission's rules that Viaero include in its handset offerings at least two (2) handset models per air interface that comply with Section 20.19(b)(2) of the Commission's rules, and make available in each retail store owned or operated by it all of these handset models for consumers to test in the store. Because two (2) handset models with a U3T rating that would operate on Viaero's network were not available to Viaero, it respectfully requests a waiver *nunc pro tunc* of the September 18, 2006 deadline through March 12, 2007.¹

¹ On August 27, 2007, Viaero submitted a response to inquiries from the Spectrum Enforcement Division of the Enforcement Bureau regarding compliance with Section 20.19(b)(2) of the Commission's rules (*see* File No. EB-07-SE-270). In its response, Viaero requested a waiver *nunc pro tunc* of Section 20.19(b)(2) from September 18, 2006 to March 12, 2007.

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Rule Section 20.19(d)(2) Requirements

Section 20.19(d)(2) of the Commission's Rules specifies, "each provider of public mobile radio service must...[i]nclude in its handset offerings at least two handset models per 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 UT3 rating for radio frequency interference under ANSI Standard C63.19. Thus, the requirement is generally applicable to all Tier III CMRS carriers. The rule requires Viaero to offer, and to make available for in-store testing by consumers, for each of its digital air interface at least two handsets with a U3T rating by the September 18, 2006 implementation deadline.

Discussion

The Commission has indicated generally that waiver requests of the Hearing Aid Compatible ("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, released June 21, 2005 at Para. No. 50 ("Order on Reconsideration").

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 therefore 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 rules(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.

Viaero is a small, wireless carrier that operates a GSM 1900 MHz system in rural parts of Colorado and Nebraska. As a small, rural wireless carrier, Viaero is dependent on the availability of compliant handsets from its vendors. Given the limited supply of such handsets that are compatible with its GSM network, Viaero was unable to offer two handsets that comply with the requirements for inductive coupling specified in Section 20.19(b)(2) by September 18, 2006. As the Commission has recognized, wireless carriers are largely dependent on the availability of equipment from manufacturers with respect to equipment-related deadlines.² This is particularly

² See *In the Matter of Section 68.4(a) of the Commission's Rules Governing Hearing Aid-Compatible Telephones, T-Mobile USA, Inc. Petition for Waiver of Section 20.19(c)(3) of the Commission's Rules, Memorandum Opinion and Order*, 20 FCC Rcd 15147, para 7 (2005); see also *Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems: Phase II Compliance Deadlines for Non-Nationwide CMRS Carriers, Order to Stay*, 17 FCC Rcd 14,841, paras 11-13, 17 (2002).

the case for small carriers. In this instance, handset manufacturers were delayed in obtaining the necessary certifications to comply with the T-coil requirement and initial production of these handsets usually went to the large, nationwide wireless carriers.

Specifically, with respect to the Motorola V3i (FCC ID # IHDT56GW1), Viaero placed a purchase order as soon as it was practically possible, but did not commence offering this handset for sale to its subscribers on October 18, 2006. With respect to the Nokia 6126H (FCC ID # PPIRM-126H), delivery of these handsets was delayed and Viaero did not commence offering this handset for sale on March 12, 2007.³ Therefore, despite best efforts, the only handsets Viaero found that complied with the requirements for inductive coupling specified in Section 20.19(b)(2) *and* was compatible with its GSM network was the Motorola V3i and the Nokia 6126H, which were not available to them until October 24, 2006 and January 19, 2007, respectively.

Based on the foregoing, the circumstances associated with Viaero's efforts to meet the requirements set forth in Section 20.19(d)(2) presented obstacles beyond its control. In view of the unique and unusual circumstances described herein, Viaero has no reasonable alternative but to request a waiver of Section 20.19(d)(2) of the Commission's rules.

³ Viaero currently offers a third compliant handset: Sony Ericksson W580 (FCC ID # PY7A1052041).

Conclusion

For the reasons stated above, Viaero seeks a waiver of Section 20.19(d)(2) from September 18, 2006 through March 12, 2007. Accordingly, grant of the instant waiver request is consistent with the public interest, convenience and necessity.

Respectfully Submitted,

NE COLORADO CELLULAR, INC.



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Its Attorney

February 12, 2008

DECLARATION OF MICHAEL FELICISSIMO

I, Michael Felicissimo, declare under penalty of perjury that the foregoing is true and correct.

1. I am the Executive Vice President of NE Colorado Cellular, Inc. dba Viaero Wireless.
2. I am familiar with the facts contained herein, and I verify that those facts are true and correct in all material respects, to the best of my knowledge and belief, except those facts which are subject to official notice by the Commission.



Michael Felicissimo
January 11, 2008