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

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In the Matter of)
)
Section 68.4(a) of the Commission's Rules)
Governing Hearing Aid-Compatible Telephones)
)
Petition of NEP Cellcorp, Inc. for Waiver of)
Section 20.19 of the Commission's Rules)
)
)

FEDERAL COMMUNICATIONS COMMISSION

WT Docket No. 01-309

MEMORANDUM OPINION AND ORDER

Adopted: December 30, 2008

Released: December 31, 2008

By the Acting Chief, Wireless Telecommunications Bureau:

I. INTRODUCTION

1. In this Memorandum Opinion and Order, we address a petition filed on March 21, 2008, by NEP Cellcorp, Inc., a Tier III carrier,¹ that requests a waiver of the handset deployment requirement set forth in Section 20.19(d)(2) of the Commission's rules.² At the times relevant to this petition,³ Section 20.19(d)(2) provided that, by September 18, 2006, each mobile service provider subject to that provision had to offer at least two wireless telephone handset models per digital air interface⁴ that were certified as meeting, at a minimum, the "U3T" or "T3" rating for inductive coupling under the American National Standards Institute (ANSI).⁵

¹ Tier III carriers are non-nationwide wireless radio service providers with 500,000 or fewer subscribers as of the end of 2001. See 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 14841, 14847 ¶¶ 22-24 (2002).

² 47 C.F.R. § 20.19(d)(2).

³ On February 28, 2008, the Commission released an order making several revisions to Section 20.19 going forward, including new inductive coupling-capable handset deployment requirements under Section 20.19(d)(2). See Amendment of the Commission's Rules Governing Hearing Aid-Compatible Mobile Handsets, WT Docket No. 07-250, *First Report and Order*, 23 FCC Rcd 3406 (2008) (*2008 Hearing Aid Compatibility First Report and Order*); *Order on Reconsideration and Erratum*, 23 FCC Rcd 7249 (2008).

⁴ The term "air interface" refers to the technical protocol that ensures compatibility between mobile radio service equipment, such as handsets, and the service provider's base stations. Currently, the leading air interfaces include Code Division Multiple Access (CDMA), Global System for Mobile Communications (GSM), Integrated Digital Enhanced Network (iDEN), and Time Division Multiple Access (TDMA).

⁵ Specifically, Section 20.19(d)(2) provided that each provider of public mobile service had to include in its handset offerings at least two handset models for each air interface offered that complied with Section 20.19(b)(2) by September 18, 2006. 47 C.F.R. § 20.19(d)(2). Section 20.19(b)(2) provided that a wireless handset was deemed hearing aid-compatible for inductive coupling if, at minimum, it received a U3T rating (the equivalent of a T3 rating (continued....))

2. After careful consideration of the record before us, and for the reasons set forth below, we deny the relief requested by the petitioner. Consistent with the Commission's decisions in its *Inductive Coupling Capability Waivers Order*, which addressed other petitions for waiver of the same requirement,⁶ we conclude that granting a waiver to this service provider would be inconsistent with the Commission's goal of ensuring the expeditious introduction of hearing aid-compatible digital wireless handsets.⁷

II. BACKGROUND

3. The Hearing Aid Compatibility Rules. In the *Hearing Aid Compatibility Order* issued in 2003, the Commission adopted several measures to enhance the ability of the deaf and hard of hearing community to access digital wireless telecommunications.⁸ Among other actions, the Commission established technical standards that digital wireless handsets must meet to be considered hearing aid-compatible. These included a standard for radio frequency interference (the "U3" or "M3" rating) that would enable acoustic coupling between digital wireless phones and hearing aids operating in acoustic coupling (a.k.a. microphone) mode, and a separate standard (the "U3T" or "T3" rating) for handset production of an audio signal-based magnetic field to enable inductive coupling with hearing aids operating in telecoil mode.⁹ The Commission further established, for each standard, deadlines by which

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under current terminology) "as set forth in the standard document ANSI C63.19-2001[,] 'American National Standard for Methods of Measurement of Compatibility between Wireless Communications Devices and Hearing Aids.'" 47 C.F.R. § 20.19(b)(2). On April 25, 2005, the Commission's Office of Engineering and Technology announced that it would also certify handsets as hearing aid-compatible based on the revised version of the standard, ANSI C63.19-2005. See OET Clarifies Use of Revised Wireless Phone Hearing Aid Compatibility Standard Measurement Procedures and Rating Nomenclature, *Public Notice*, 20 FCC Rcd 8188 (OET 2005). On June 6, 2006, the Commission's Wireless Telecommunications Bureau and Office of Engineering and Technology announced that the Commission would also certify handsets as hearing aid-compatible based on the revised version of the standard, ANSI C63.19-2006. Thus, at the times relevant to this petition, applicants for certification could rely on either the 2001 version, the 2005 version, or the 2006 version of the ANSI C63.19 standard. See Wireless Telecommunications Bureau and Office of Engineering and Technology Clarify Use of Revised Wireless Phone Hearing Aid Compatibility Standard, *Public Notice*, 21 FCC Rcd 6384 (WTB/OET 2006). See also *2008 Hearing Aid Compatibility First Report and Order*, 23 FCC Rcd at 3437-3440 ¶¶ 77-83 (amending Section 20.19(b)(2) to phase in use of the 2007 version of the standard).

⁶ In the Matter of Section 68.4(a) of the Commission's Rules Governing Hearing Aid-Compatible Telephones, Petitions for Waiver of Section 20.19 of the Commission's Rules, WT Docket No. 01-309, *Memorandum Opinion and Order*, 23 FCC Rcd 3352 (2008) (*Inductive Coupling Capability Waivers Order*), petitions for reconsideration pending; see also In the Matter of Section 68.4(a) of the Commission's Rules Governing Hearing Aid-Compatible Telephones, Petitions of Alaska DigiTel, LLC, Edge Wireless Licenses, LLC, and NE Colorado Cellular, Inc. for Waiver of Section 20.19 of the Commission's Rules, WT Docket No. 01-309, *Memorandum Opinion and Order*, 23 FCC Rcd 4532 (WTB 2008) (denying three additional petitions for waiver).

⁷ See 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, WT Docket No. 01-309, *Memorandum Opinion and Order*, 20 FCC Rcd 15147, 15151 ¶ 8 (2005).

⁸ Section 68.4(a) of the Commission's Rules Governing Hearing Aid-Compatible Telephones, WT Docket No. 01-309, *Report and Order*, 18 FCC Rcd 16753 (2003); *erratum*, 18 FCC Rcd 18047 (2003) (*Hearing Aid Compatibility Order*).

⁹ The *Hearing Aid Compatibility Order* described the acoustic coupling and telecoil modes as follows:

In acoustic coupling mode, the microphone picks up surrounding sounds, desired and undesired, and converts them into electrical signals. The electrical signals are amplified as needed and then converted back into sound by the hearing aid speaker. In telecoil mode, with the microphone turned off, the telecoil picks up the audio signal-based magnetic field generated by the voice coil of a dynamic speaker in hearing
(continued....)

service providers and manufacturers were required to offer specified numbers or percentages of digital handsets per air interface compliant with the relevant standard if they did not come under the *de minimis* exception.¹⁰ Manufacturers were required to offer to service providers, and service providers were required to make available in each retail store that they own or operate, at least two handsets that met, at a minimum, the U3T or T3 rating for inductive coupling by September 18, 2006.¹¹ The Commission also required service providers to label hearing aid-compatible handsets with the appropriate technical rating, and to explain the technical rating system in the owner's manual or as part of the packaging material for the handset.¹²

4. On February 27, 2008, the Commission released the *Inductive Coupling Capability Waivers Order*, which addressed 46 waiver petitions requesting relief from the September 18, 2006 deadline to provide at least two handset models with inductive coupling capability for each air interface being offered. In the *Inductive Coupling Capability Waivers Order*, the Commission granted waiver requests to those petitioners that demonstrated sufficient diligence in seeking compliant handsets prior to the compliance deadline and in subsequently coming into compliance within a reasonable period.¹³ The Commission denied waiver requests to the petitioners that failed to show such diligence in achieving compliance.¹⁴

5. The NEP Cellcorp Petition. NEP Cellcorp, a small Tier III GSM carrier that initiated service to rural parts of Pennsylvania on February 1, 2007, filed a petition on March 21, 2008, requesting a

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aid-compatible telephones, audio loop systems, or powered neck loops. The hearing aid converts the magnetic field into electrical signals, amplifies them as needed, and converts them back into sound via the speaker. Using a telecoil avoids the feedback that often results from putting a hearing aid up against a telephone earpiece, can help prevent exposure to over amplification, and eliminates background noise, providing improved access to the telephone.

Hearing Aid Compatibility Order, 18 FCC Rcd at 16763 ¶ 22.

¹⁰ See *Hearing Aid Compatibility Order*, 18 FCC Rcd at 16780 ¶ 65; 47 C.F.R. § 20.19(e). Section 20.19(e), entitled "*De minimis exception*," provides that manufacturers or mobile service providers that offer two or fewer digital wireless handset models per air interface are exempt from the hearing aid compatibility requirements, and manufacturers or service providers that offer three digital wireless handset models per air interface must offer at least one compliant model. 47 C.F.R. § 20.19(e).

¹¹ 47 C.F.R. § 20.19(d). The 2001 version of ANSI Standard C63.19, which the Commission adopted in the *Hearing Aid Compatibility Order*, used a "U" nomenclature for RF interference reduction and a "UT" nomenclature for inductive coupling. The 2006 version of this standard substituted the terms "M" and "T," respectively. In obtaining certification, manufacturers were permitted to rely on either of these standards or an intermediate 2005 draft revision. See Wireless Telecommunications Bureau and Office of Engineering and Technology Clarify Use of Revised Wireless Phone Hearing Aid Compatibility Standard, *Public Notice*, 21 FCC Rcd 6384 (WTB/OET 2006).

¹² See *Hearing Aid Compatibility Order*, 18 FCC Rcd at 16785 ¶¶ 83, 85-86. See also 47 C.F.R. § 20.19(f). In addition, to ensure that the rating information was actually conveyed to consumers prior to purchase, the Commission required digital wireless service providers to ensure that the U-rating of the handsets is available to such consumers at the point-of-sale, whether through display of the label, separate literature, or other means. See *Hearing Aid Compatibility Order*, 18 FCC Rcd at 16785 ¶ 87.

¹³ See, e.g., *Inductive Coupling Capability Waivers Order*, 23 FCC Rcd at 3358-3362 ¶¶ 11-17. In reaching this decision, the Commission noted that it had issued inductive coupling compliance certifications covering a total of 20 CDMA-based handset models and 13 GSM-based handset models prior to the September 18, 2006 compliance deadline. *Id.* at 3357 ¶ 8.

¹⁴ See, e.g., *id.* at 3362-3365 ¶¶ 18-22.

temporary waiver, *nunc pro tunc*, of Section 20.19(d)(2) of the Commission's rules for the period February 1, 2007, through January 11, 2008. NEP Cellcorp explains that in its November 2007 Hearing Aid Compatibility Report it "mistakenly, albeit in good faith," reported that it was fully compliant with the hearing aid compatibility requirements codified in Section 20.19 of the Commission's Rules.¹⁵ NEP Cellcorp indicates that it failed to distinguish between acoustic coupling compliance and inductive coupling compliance.¹⁶ The distinction between the two different types of hearing aid compatibility did not become apparent to it until counsel for NEP Cellcorp received a Notice of Apparent Liability for Forfeiture, dated January 3, 2008, for another client.¹⁷ NEP Cellcorp offered its first handset approved for inductive coupling capability, the Motorola model V3i handset (FCC ID IHDT56GW1), upon initiation of operation on February 1, 2007.¹⁸ NEP Cellcorp offered its second handset approved for inductive coupling capability, the Motorola model V8 handset (FCC ID IHDT56HZ1) on January 11, 2008, very shortly after becoming aware of its error in interpreting its hearing aid compatibility compliance responsibilities. NEP Cellcorp notes that upon learning that it was not in compliance with the Commission's hearing aid compatibility requirements, it voluntarily notified the Commission of this fact as well as the actions it had taken to correct the problem.¹⁹

III. DISCUSSION

6. Pursuant to Section 1.925(b)(3) of the Commission's rules, the Commission may grant a request for waiver if the underlying purpose of the rule(s) would not be served or would be frustrated by application to the instant case, and grant would be in the public interest, or, in view of unique or unusual factual circumstances, application of the rule(s) would be inequitable, unduly burdensome, or contrary to the public interest, or the applicant has no reasonable alternative.²⁰ In considering the instant waiver request, we are mindful of our obligation fairly to determine whether the public interest would be served by granting a petitioner an exception to a rule of general applicability. It is well established that a party seeking a waiver "must plead with particularity the facts and circumstances which warrant such action."²¹ If our hard look at a waiver request reveals only inadequate, conflicting, and inconsistent information, then our inquiry need go no further because the petitioner has failed in its obligation to plead with particularity the facts and circumstances warranting its requested relief.²²

7. The petition being considered in this Memorandum Opinion and Order contains presentations and arguments similar to those already considered by the Commission in its disposition of the 46 waiver petitions in the *Inductive Coupling Capability Waivers Order*. We conclude, consistent with the reasoning in that Order, that NEP Cellcorp does not meet the requisite conditions to justify grant of a

¹⁵ NEP Cellcorp Petition at 1.

¹⁶ *Id.*

¹⁷ *Id.* at 2. See also South Canaan Cellular Communications Company, L.P., *Notice of Apparent Liability for Forfeiture*, 23 FCC Rcd 20 (EB 2008).

¹⁸ NEP Cellcorp Petition at 2.

¹⁹ *Id.*

²⁰ See 47 C.F.R. § 1.925(b)(3). See also *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); *Northeast Cellular Tel. Co. v. FCC*, 897 F.2d 1164 (D.C. Cir. 1990); 47 C.F.R. § 1.3.

²¹ *Rio Grande Family Radio Fellowship, Inc. v. FCC*, 406 F.2d 664 (D.C. Cir. 1968).

²² *Inductive Coupling Capability Waivers Order*, 23 FCC Rcd at 3356-3357 ¶ 7.

waiver pursuant to the Section 1.925(b)(3) standard. NEP Cellcorp began operations on February 1, 2007, more than four months after the requirement for deployment of inductive-coupling capable handsets went in to effect. Eight months later it reported itself to be in compliance with Section 20.19, apparently without noticing that Section 20.19(d) clearly states a specific requirement regarding inductive coupling-capable handsets that is separate from the requirements for acoustic coupling-compatible devices. Finally, after eleven months of noncompliant operations, it realized and corrected its mistake. It voluntarily reported its noncompliance to the Commission, and also petitioned for waiver of the rules to cover that period of noncompliance.

8. We find that NEP Cellcorp has presented no unique facts or circumstances that would justify its failure to comply with the inductive coupling capability requirement. Specifically, it fails to provide evidence that it exercised sufficient diligence to understand its hearing aid compatibility obligations as set forth in the Commission's rules. Failure to understand the Commission's rules is not an acceptable justification to support a request for waiver of those rules. We find that grant of a waiver under these circumstances would frustrate the underlying purpose of the hearing aid compatibility rules and would not serve the public interest. We therefore deny the waiver petition of NEP Cellcorp, and refer its apparent violation of the inductive coupling-capable handset requirement to the Commission's Enforcement Bureau.

IV. CONCLUSION

9. We deny the petition for waiver of Section 20.19(d)(2) of the Commission's rules filed by NEP Cellcorp, Inc. Although NEP Cellcorp is now in compliance with the hearing aid compatibility rules for inductive coupling, the measures taken by this provider, as described in its petition for waiver, do not satisfy the Commission's criteria for waiver of the applicable hearing aid compatibility requirement. Accordingly, we find that NEP Cellcorp's failure to meet this important requirement should be addressed through the enforcement process.

V. ORDERING CLAUSES

10. Pursuant to Sections 1 and 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), and pursuant to Sections 0.131, 0.331, and 1.925 of the Commission's rules, 47 C.F.R. §§ 0.131, 0.331, 1.925, this Memorandum Opinion and Order IS ADOPTED.

11. IT IS FURTHER ORDERED, pursuant to Sections 1 and 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), and Sections 0.131, 0.331, and 1.925 of the Commission's rules, 47 C.F.R. §§ 0.131, 0.331, 1.925, that the Petition for Waiver, filed March 21, 2008, by NEP Cellcorp, Inc., IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

James D. Schlichting
Acting Chief, Wireless Telecommunications Bureau