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

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Federal Communications Commission
Office of the Secretary

In the Matter of)
)
Petition for Declaratory Ruling Regarding the)
Unlawful Sale and Use of Cellular Jammers)
and Wireless Boosters and Repeaters)
)
_____)

WT Docket No. ____

PETITION FOR DECLARATORY RULING OF CTIA – THE WIRELESS ASSOCIATION®

CTIA – THE WIRELESS ASSOCIATION®
1400 16th Street, NW, Suite 600
Washington, D.C. 20036
(202) 785-0081

Michael F. Altschul
Senior Vice President & General Counsel

Christopher Guttman-McCabe
Vice President, Regulatory Affairs

Paul W. Garnett
Assistant Vice President, Regulatory Affairs

Its Attorneys

Submitted: November 2, 2007

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I. INTRODUCTION AND SUMMARY

The public safety role of commercial wireless services is well known to the American public and a matter of record with policymakers in Congress and at the FCC. Over 240 million subscribers now use mobile wireless services and increasingly rely on their mobile wireless services for personal safety. As the recent California wildfires and other examples demonstrate, the public safety community also is increasingly looking to commercial wireless networks to provide critical communications during natural and manmade disasters.

Unfortunately, the reliability of all wireless communications – both commercial and public safety communications in bands adjacent to CMRS frequencies – is now at risk of being severely undermined by the marketing and use of devices that transmit radio signals on frequencies that are licensed for commercial wireless services. While the Communications Act and the Commission’s rules prohibit intentional interference with wireless communications, the FCC recently has received requests to operate or liberalize the use of jamming equipment that fail to acknowledge the potential resulting harms – including denying the public and a broad range of first responders access to reliable wireless communications in emergency situations.

Similarly, businesses and individuals increasingly engage in the “self-help” practice of installing and operating wireless boosters and repeaters in an uncontrolled and uncoordinated fashion.

While this practice may improve signal reception for the operator of the unauthorized equipment, it does so at the expense of surrounding users, who suffer reduced quality of service and impairment of access to the public safety benefits of commercial wireless service. To address these concerns, the Commission immediately should issue a declaratory ruling that:

- (1) **The sale and use of cellular jammers – with the exception of sales to and use by the federal government – is unlawful; and**
- (2) **The unauthorized sale and use of wireless boosters and repeaters is unlawful.**

In addition, the FCC should reject the recent petitions seeking authorization to sell and use jamming equipment in contravention of the Communications Act and the Commission’s rules. The GEO Group’s Petition for Forbearance should be denied on procedural and substantive grounds. CellAntenna Corp.’s Petition for Rulemaking should be dismissed because it conflicts with federal law and is not in the public interest.

II. THE UBIQUITOUS AVAILABILITY OF COMMERCIAL WIRELESS SERVICE PROMOTES PUBLIC SAFETY AND SERVES THE PUBLIC INTEREST

The ubiquitous availability of commercial wireless networks providing voice and data communications to the public on a decentralized basis is critical to public safety. While the mission of the commercial wireless industry is primarily commercial – the provision of wireless voice and data services for personal and business communications, entertainment and recreation – the industry has a significant role in ensuring the safety of the American public. Congress and the Commission have repeatedly recognized this role. And the use of commercial wireless services by ordinary Americans to provide life-saving emergency response is a daily

occurrence.¹

As detailed below, Congress and the Commission repeatedly have recognized the critical role of commercial wireless in promoting public safety and the reliance of the public on wireless services in times of crisis and emergency. Leading voices in telecommunications policy making across the political spectrum frequently have remarked upon the fundamental public safety role of commercial wireless services.²

¹ For example, in November 2006, Jennifer Green was kidnapped by her ex-husband, his brother and a friend the day after she finalized her divorce. After sending a text message to her boyfriend, authorities were able to pinpoint her location, identify the vehicle, stop the car, and arrest the men involved within just a few hours. Similarly, 71-year-old Ira Sully was kidnapped by a thief one evening and placed in the trunk of his own car. He dialed 911 and explained the situation to police. Within ten minutes, police tracked the car down and safely recovered Mr. Sully. Kidnappings are not the only situations in which wireless services have been instrumental in providing life-saving emergency response. One morning, high school student Brandy Petty was riding the bus to school in North Carolina when she saw a man on a motorcycle crash and dialed 911 using her cell phone. Authorities were able to quickly respond, saving the motorcyclist's life. In another situation, Susan Moss and her friend Irene were taking a woodland hike in Wisconsin when Irene fell over a fallen tree. Ms. Moss immediately dialed 911 on her cell phone. Within 20 minutes, paramedics arrived and discovered that Irene had suffered a lacerated liver. After receiving proper critical care, Irene made a full recovery. *See, e.g., VITA Wireless Samaritan Awardees, CTIA The Wireless Foundation, <http://www.wirelessfoundation.com/VITA/awardees.cfm> (last visited Oct. 1, 2007).* These are only a few of the many situations in which wireless services have literally saved lives.

² Remarks by Commissioner Kevin J. Martin, Federal Communications Commission, to NENA's 911 Critical Issues Forum, Washington, D.C. (Feb. 24, 2003); *Wireless E911 Location Accuracy Requirements; Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems; Association of Public-Safety Communications Officials-International, Inc. Request for Declaratory Ruling; 911 Requirements for IP-Enabled Service Providers*, PS Docket No. 07-114, FCC 07-166, Report and Order, Statement of Chairman Martin (Sept. 11, 2007); *Wireless E911 Location Accuracy Requirements; Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems; Association of Public-Safety Communications Officials-International, Inc. Request for Declaratory Ruling; 911 Requirements for IP-Enabled Service Providers*, PS Docket No. 07-114, FCC 07-166, Report and Order, Statement of Commissioner Copps (Sept. 11, 2007); Remarks of Jonathan S. Adelstein, Commissioner, Federal Communications Commission, APCO International and Project LOCATE Wireless Deployment Challenges and Realities Symposium, Arlington, Virginia (Nov. 15, 2004); Statement of Commissioner Tate, *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993 Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services*, Eleventh Report, WT Docket No. 06-17 (2006), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-06-142A1.pdf ("*Eleventh CMRS*

But policymakers have gone beyond words in acknowledging the importance of commercial wireless to public safety. They have identified significant public safety-related functions in recognition of the ubiquitous availability of wireless communications and the American public's reliance on wireless in their day-to-day lives. These obligations include:

- **E911.** The Commission has explained in its E911 proceedings that “[w]ireless phones can be a vital, life-saving way to call for assistance in emergency situations. Indeed, the ability to reach 911 in an emergency is one of the most important reasons Americans give for purchasing wireless phones.”³ Further, the Commission has noted that “[w]hen carriers are incapable of transmitting such location information to the [Public Safety Answering Point], emergency response may be delayed and, in some cases, may be impossible until another source of location information is provided.”⁴
- **Priority Access Service (“PAS”).** The Commission has recognized that “Federal, State and local government public safety organizations are increasingly using CMRS systems.”⁵ Specifically, some “Federal Government entities

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Report”); Wireless E911 Location Accuracy Requirements; Revision of the Commission’s Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems; Association of Public-Safety Communications Officials-International, Inc. Request for Declaratory Ruling; 911 Requirements for IP-Enabled Service Providers, PS Docket No. 07-114, FCC 07-166, Report and Order, Statement of Commissioner McDowell (Sept. 11, 2007); “NTIA Head Clears the Air for U.S.,” Interview with John Kneuer, Wireless Wave (Winter 2007), available at <http://policycouncil.nationaljournal.com/NR/rdonlyres/EA0CCAF5-B017-4FCA-892C-E86E935A2178/36403/KneuerArticle.pdf>; Statement of Senator Daniel K. Inouye, Hearing: Voice over Internet Protocol (VoIP) and the Future of 9-1-1 Services (April 10, 2007); Press Release of Senator Ted Stevens, “Stevens Calls for Improved E911 Services for Rural America (April 10, 2007); Statement of Representative John Dingell, Hearing: Issues in Emergency Communications: A Legislative Hearing on H. 3403, the 911 Modernization and Public Safety Act of 2007 (Sept. 19, 2007); Statement of Representative Fred Upton, Hearing: Issues in Emergency Communications: A Legislative Hearing on H. 3403, the 911 Modernization and Public Safety Act of 2007 (Sept. 19, 2007).

³ *Revision of the Commission's Rules To Ensure Compatibility with Enhanced 911 Emergency Calling Systems*, Third Report and Order, 14 FCC Rcd 17388, ¶ 1 (1999).

⁴ *In the Matter of Wireless E911 Location Accuracy Requirements; Revision of the Commission’s Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems; Association of Public-Safety Communications Officials-International, Inc. Request for Declaratory Ruling; 911 Requirements for IP-Enabled Service Providers*, Notice of Proposed Rulemaking, PS Docket No. 07-114, FCC 07-108, ¶ 5 (2007).

⁵ *The Development of Operational, Technical and Spectrum Requirements For Meeting Federal, State and Local Public Safety Agency Communication Requirements Through the Year*

stress[ed] that there is a growing need to use commercial services rather than dedicated private systems for their wireless communications needs, due to the potential for lower costs of commercial services.”⁶ Accordingly, the Commission concluded that “[National Security and Emergency Preparedness] personnel need the ability to receive priority access when using commercial wireless services during emergencies” in which wireless networks are seriously burdened with heavy traffic.⁷

- **Emergency Alert Service (“EAS”).** In its EAS proceeding, the Commission acknowledged that “[w]ireless products are becoming an equal to television and radio as an avenue to reach the American public quickly and efficiently.”⁸

In light of the importance of commercial wireless services to the American public, the Commission is careful to weigh the impact on public safety when imposing new requirements on wireless carriers. In the 700 MHz proceeding, for example, the Commission imposed new “open access” obligations on the 700 MHz C-Block, but emphasized when doing so that the new obligations would “not override wireless service providers’ obligations to ensure that their networks and devices comply with applicable regulatory requirements” such as E911.⁹ Similarly, when requiring wireless local number portability, the Commission ensured continuity of E911 service during a port.¹⁰

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2010; Establishment of Rules and Requirements For Priority Access Service, Second Report and Order, 15 FCC Rcd 16720, ¶ 10 (2000).

⁶ *Id.*

⁷ *Id.* at ¶ 11.

⁸ *Review of the Emergency Alert System, First Report and Order and Further Notice of Proposed Rulemaking, 20 FCC Rcd 18625, ¶ 69 (2005).*

⁹ *In the Matter of Service Rules for the 698-746, 747-762 and 777-792 MHz Bands, Second Report and Order, WT Docket No. 06-150, ¶ 226 (2007).*

¹⁰ *See, e.g., Telephone Number Portability, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 8352, ¶ 50 (1996)* (“The public interest also requires that service provider portability not impair the provision of network capabilities that are important to public safety, such as emergency services and intercept capabilities”).

Yet despite the FCC's repeated statements and actions to protect the integrity of both commercial and public safety communications, some parties are quick to put their private interests ahead of wireless services' critically important public safety role. Requests by cell jammers for FCC authority to disrupt and degrade commercial wireless communications with impunity and without licensee notification or control completely discounts the public safety benefits of wireless. Not only is the impact on commercial wireless – including blocking or degrading E911, PAS and, in the future, EAS functionality – not *weighed* in these requests, it is not even *mentioned*. Similarly, there is no mention of how public safety communications on adjacent channels could also be impaired. The “self-help,” uncontrolled and uncoordinated use of wireless repeaters and boosters likewise impairs commercial wireless service and erodes public safety. Businesses and individuals that continue to install and operate such unauthorized equipment act in reckless disregard of the public safety impact of their conduct.

III. THE COMMISSION SHOULD DECLARE THAT THE SALE AND USE OF CELLULAR JAMMING EQUIPMENT – EXCEPT SALE TO AND USE BY THE FEDERAL GOVERNMENT – IS UNLAWFUL

While the Communications Act permits the blocking of commercial wireless communications, it strictly limits the conditions under which jamming may occur. The strict limits reflect Congress's acknowledgment that, on balance, the public interest in widespread access to reliable wireless communications exceeds the harms that may result if such wireless services were misused. Jamming, by and large, is a crude, overly broad remedy to the problems it seeks to address, and gives rise to greater harms – particularly by denying both the public and a broad variety of first responders with critically important access to the public safety benefits of wireless. Commission action is necessary to clarify the strict restraints on jamming activity in light of GEO Group's request to authorize crude jamming solutions to address the misuse of wireless communications where narrower solutions are available and CellAntenna's proposal to

allow more widespread, routine sale, and use of jamming equipment.¹¹

A group of interrelated statutory and regulatory provisions relating to devices with the potential to cause harmful interference with wireless services set the boundaries for lawful and unlawful use of jamming equipment. Section 333 of the Communications Act explicitly states that “[n]o person shall willfully or maliciously interfere with or cause interference to any radio communications of any station licensed or authorized by or under this Act.”¹² Section 302 provides the Commission with the tools for enforcing Section 333. Section 302(a) authorizes the Commission to adopt regulations to control the interference potential of radio frequency devices.¹³ Section 302(b), in turn, prohibits the manufacture, import and sale of equipment which does not comply with the interference control regulations promulgated under Section 302(a).¹⁴

The FCC has exercised its power under Section 302(a) to adopt regulations specifying when potentially interfering devices may be sold and used. Section 2.803 prohibits the sale or use of equipment not certified by the FCC.¹⁵ In addition, it prohibits the sale or use of devices

¹¹ Commission enforcement efforts, such as the November 1, 2007 Citation issued to Basic Home Shopping, are helpful, but after the fact individual enforcement actions are not a substitute for the requested declaratory ruling. *See* Letter from Kathryn S. Berthot, Enforcement Bureau, FCC, to Curtis King, Basic Home Shopping, File no. EB-06-SE-222, Citation, DA 07-4449 (Nov. 1, 2007).

¹² 47 U.S.C. § 333.

¹³ 47 U.S.C. § 302(a) (stating that “[t]he Commission may, consistent with the public interest, convenience, and necessity, make reasonable regulations governing the interference potential of devices which in their operation are capable of emitting radio frequency energy by radiation, conduction, or other means in sufficient degree to cause harmful interference to radio communications.”).

¹⁴ 47 U.S.C. § 302(b) (“[n]o person shall manufacture, import, sell, offer for sale, or ship devices or home electronic equipment and systems, or use devices, which fail to comply with regulations promulgated pursuant to this section.”).

¹⁵ 47 C.F.R. § 2.803(a) (providing that “no person shall sell or lease, or offer for sale or

that cannot be certified by the Commission.¹⁶ In other words, if the operation of a device would violate the Communications Act or the Commission's rules, such a device is not eligible for certification.¹⁷ The only exception to these requirements is that – pursuant to Section 2.807 – Section 2.803's requirement that equipment be certified as not interfering prior to use or sale does not apply to the federal government.¹⁸ However, consistent with the comprehensive system of controls on potentially interfering devices created by the Communications Act and the Commission's rules, even this exception does not apply once equipment has been disposed of by the federal government.¹⁹

The application of these authorities to cell jamming equipment is straight forward. Wireless jammers are designed to block or “jam” all wireless communications within a given frequency range. Relying on Section 333 of the Communications Act, the FCC has found that “[t]he intentional use of jammers is considered ‘malicious interference,’ which is strictly

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lease (including advertising for sale or lease), or import, ship, or distribute for the purpose of selling or leasing or offering for sale or lease, any radio frequency device unless . . . such device has been authorized by the Commission.”).

¹⁶ *Id.* at § 2.803(g) (providing that radio frequency devices that could not be authorized or legally operated under the rules “shall not be operated, advertised, displayed, offered for sale or lease, sold or leased, or otherwise marketed.”).

¹⁷ *See* Letter from Kathryn Berthot, Enforcement Bureau, FCC, to Shaker Hassan, Grand Trades Co., File No. EB-05-SE-059, Citation, DA 05-1622, 4 (June 9, 2005) (citing 47 C.F.R. § 2.803(g) for the proposition that a “device such as a jammer which intentionally interferes with radio communications is not eligible for certification”).

¹⁸ *See* 47 C.F.R. § 2.807 (“As provided by Section 302(c) of the Communications Act of 1934, as amended, § 2.803 shall not be applicable to . . . Radiofrequency devices for use by the Government of the United States or any agency thereof.”)

¹⁹ *Id.* (“this exception shall not be applicable to any device after it has been disposed of by such Government or agency”).

prohibited by the Communications Act of 1934, as amended, and by FCC rules.”²⁰ As a result, wireless jammers are not eligible for certification by the FCC and the sale or use of such devices – excluding sale to and use by the federal government – is prohibited by the plain language of the Communications Act.

The Enforcement Bureau has reaffirmed this policy. In 2005, the Enforcement Bureau released a Public Notice stating that “the marketing, sale, or operation of [jamming equipment] is unlawful” and that “[a]nyone involved with such activities may be subject to forfeitures, fines or even criminal prosecution.”²¹ In reiterating this prohibition, the Enforcement Bureau relied on Sections 302 and 333 of the Communications Act.²² The Enforcement Bureau also has not hesitated to enforce these requirements. For example, in June 2005, the Enforcement Bureau issued an official citation to Grand Trades Co. for marketing wireless device jammers in the United States, concluding that Grand Trades “violated Section 302(b) of the Act and Section 2.803(a) of the Rules by marketing in the United States the nine unauthorized radio frequency devices.”²³

Despite this clear law and the FCC’s repeated reiteration that the use and marketing of intentionally interfering equipment is prohibited, cellular jammers continue to be prevalent

²⁰ *FCC Regulates Radar Transmitters, But Not Radar Detectors*, Public Notice, 58 Rad. Reg. 2d 1107 (Aug. 1, 1985).

²¹ *Sale or Use of Transmitters Designed to Prevent, Jam or Interfere with Cell Phone Communications is Prohibited in the United States*, Public Notice, DA 05-1776 (June 27, 2005) (“2005 Cell Jammer PN”).

²² *Id.*

²³ Letter from Kathryn S. Berthot, Enforcement Bureau, FCC, to Curtis King, Basic Home Shopping, File no. EB-06-SE-222, Citation, DA 07-4449 (Nov. 1, 2007). *See also*, Letter from Kathryn Berthot, Enforcement Bureau, FCC, to Shaker Hassan, Grand Trades Co., File No. EB-05-SE-059, Citation, DA 05-1622, 4 (June 9, 2005).

throughout the United States. Indeed, in the face of these recent and clear statements of Commission policy, the agency has received multiple requests to authorize the increased use of jammers outside existing controls.²⁴ Accordingly, the time has come for a declaration that the existing policy remains in effect and that violations will be prosecuted.

* * * * *

Accordingly, the Commission should affirmatively declare that the sale and use of cellular jammers – with the exception of sales to and use by the federal government – is unlawful.

IV. THE COMMISSION SHOULD DECLARE THAT THE UNAUTHORIZED SALE AND USE OF WIRELESS REPEATERS AND BOOSTERS IS UNLAWFUL

Wireless repeaters and boosters may lawfully be sold and used, but only under the controlled conditions specified in the Communications Act and the Commission’s rules. In this respect, such equipment is no different than other products – such as firearms or pharmaceuticals – that may be used legally but only under controlled conditions. As described in CTIA’s White Paper on wireless repeaters, businesses and individuals nationwide have been installing unauthorized wireless repeaters and signal boosters to optimize coverage in their homes, cars, boats and offices at the expense of other users.²⁵ This equipment is typically poorly manufactured and likely to interfere with licensed radio communications.²⁶ The harmful effects of such equipment have been documented as a matter of Commission record.²⁷ Commission

²⁴ See *infra* Sections VI and VII.

²⁵ See CTIA—The Wireless Association®, White Paper on Wireless Repeaters (filed with the Commission, May 1, 2006) (“CTIA White Paper”), appended hereto as Attachment 1.

²⁶ By their very nature, repeaters and signal boosters, regardless of the quality of their design and/or manufacture, trade a private benefit to a single user against the public harm to other users.

²⁷ See Comments of Verizon Wireless in the Skype Proceeding, RM-11361, at 34-35 (Apr.

action is necessary to clarify that the mere presence of such equipment in the stream of commerce for *some* lawful purpose does not mean that wireless repeaters and boosters may be made generally available to the public for *any* purpose.

The sale and use of wireless repeaters by non-licensees are prohibited when: (1) such sale and use are unauthorized; and (2) such activity gives rise to intentional interference. While wireless repeaters and boosters may lawfully be sold and operated, such lawful use requires licensee consent. In addition, the sale and use of unauthorized boosters and repeaters gives rise to harmful interference which may be presumed intentional under Section 333 of the Act.

The use and sale of wireless boosters and repeaters without licensee consent is unauthorized and, hence, prohibited. As a threshold matter, the Act and the Commission's rules require a license prior to operation of radiofrequency equipment on licensed spectrum.²⁸ A CMRS provider is also the licensee of all transmitting devices operating within its licensed frequency band and geographic area. A subscriber's authority to operate a handset stems directly from the "authorization held by the licensee providing service to them," but this authorization extends only to "end user units," not base station units or other transmitters.²⁹ Other sections of the Commission's rules also demonstrate that the authority to use non-end user transmitter units

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30, 2007) (documenting a 2006 incident in which an individual in New York City, without carrier authorization, installed a wireless repeater that negatively impacted service in nearly 200 surrounding cell sites within the New York Metropolitan area, resulting in tens of thousands of blocked voice and data sessions).

²⁸ 47 U.S.C. § 301 ("No person shall use or operate any apparatus for the transmission of energy or communications or signals by radio . . . except under and in accordance with this Act and with a license in that behalf granted under the provisions of this Act"); *see also* 47 C.F.R. § 1.903 (requiring a license for Wireless Radio Service stations); 47 C.F.R. § 22.3 (requiring a valid license to operate stations in the Public Mobile Services).

²⁹ 47 C.F.R. § 22.3(b).

remains exclusively with the licensee and not with subscribers.³⁰

The Commission may prohibit the unauthorized sale of wireless boosters and repeaters based on lack of licensee consent alone. The “self-help,” unauthorized and uncoordinated use of wireless boosters and repeaters contrasts sharply with authorized sale and use. The key distinction is whether the vendor or operator of such equipment has obtained the licensee authorization that the FCC’s rules require.³¹ The sale or use of wireless boosters and repeaters is authorized (1) in the case of a sale, when the sale is made to a licensee or someone authorized by a licensee to operate such equipment; and (2) in the case of operation, when the equipment is operated by a licensee or someone authorized by the licensee to operate such equipment. All other use is unauthorized.

In addition, the agency may – on two grounds – presume that the unauthorized sale or operation of wireless boosters or repeaters involves intentional interference in violation of Section 333. First, perhaps the most fundamental requirement in the Communications Act is Section 301 which requires that the Commission authorize, by issuing a license, any use of the radio spectrum.³² The corollary to Section 301 is that operating without a license is the most

³⁰ For example, both the cellular and PCS rules give a licensee “blanket” authority to operate a variety of transmitters – including booster and repeaters – within its licensed service area and frequency range. *See* 47 C.F.R. §§ 22.165, 24.11(b). This authority does not extend to subscribers. *See Revision of Part 22 of the Commission’s Rules Governing the Public Mobile Services*, Report and Order, 9 FCC Rcd 6513, ¶ 22 (1994). Similarly, licensees may operate in-building radiation systems without prior notice or authorization. *See* 47 C.F.R. § 22.383 (“Licensees may install and operate in-building radiation systems without applying for authorization or notifying the FCC, provided that the locations of the in-building radiation systems are within the protected service area of the licensee’s authorized transmitter(s) on the same channel or channel block”). Subscribers have no such authority.

³¹ *See supra* n. 28-30.

³² 47 U.S.C. § 301 (“No person shall use or operate any apparatus for the transmission of energy or communications or signals by radio . . . except under and in accordance with this Act and with a license in that behalf granted under the provisions of this Act”).

serious offense and subject to the harshest penalties, including revocation of other licenses and debarment from holding FCC licenses in the future.³³ The unauthorized use of wireless boosters and repeaters is a species of operation without a license. Just as a broadcast radio operator that erects a tower and commences transmission without obtaining a license would be subject to enforcement based on an intent to interfere, even in the absence of bad intent or actual interference, so too must operators of unauthorized boosters and repeaters. Unauthorized sale of boosters and repeaters, in turn, serves only to facilitate unauthorized operation. There is no public interest benefit in protecting such activity.

Second, because individual intent is often difficult to ascertain, intent may be presumed in the case of reckless disregard for readily ascertainable facts.³⁴ Some level of knowledge regarding the need for an FCC license to operate equipment using the radio spectrum must be presumed or the Act would be rendered unenforceable. Repeaters and boosters are network infrastructure useful only to an end-user that has a relationship with a carrier and a device

³³ See, e.g., *Ruggiero v. Federal Communications Commission*, 317 F.3d 239 (D.C. Cir. 2003) (Tatel, dissenting) (“as this Court and the Commission repeatedly emphasize . . . broadcasting without a license is a serious offense. Severe penalties, including fines, forfeitures, and even imprisonment, have long existed for unlicensed broadcasting.”); *Ramax Printing Service Partner*, Decision, 69 FCC 2d 1785 (1978) (revoking a CB radio license for operating in unauthorized frequencies).

³⁴ See, e.g., *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, n. 12 (1976) (noting that in “certain areas of the law recklessness is considered to be a form of intentional conduct for purposes of imposing liability for some act”); *McGinty v. New York*, 193 F.3d 64, 69 (2d Cir. 1999) (holding that to prove a willful violation of the Age Discrimination in Employment Act, evidence of “reckless disregard” is an alternative to evidence of actual knowledge); *Saba v. Compagnie Nationale Air France*, 78 F.3d 664, 667 (D.C. Cir. 1996) (holding that “reckless disregard” is equivalent to “willful misconduct” for purposes of liability under the Warsaw Convention); *Ottmann v. Hanger Orthopedic Group, Inc.*, 252 F.3d 338, 343 (4th Cir. 2003) (noting that in securities fraud cases, the Courts of Appeals have consistently held that a showing of recklessness is sufficient to constitute scienter, *i.e.*, the “intent to deceive, manipulate, or defraud”); *A.E. Staley Manufacturing Co. v. Secretary of Labor*, 295 F.3d 1341, 1351-1353 (D.C. Cir. 2002) (holding that to prove a “willful violation” of the Occupational Safety and Health Act, evidence of “plain indifference” is an alternative to evidence of actual knowledge).

operating on a network that would benefit from improved reception. Accordingly, the end-user should be aware that the network owner exists. To proceed with installation of network equipment without making further inquiry with the network owner indicates a reckless disregard from which intent to interfere may be presumed.

Likewise, in the case of a sale, vendors of radio frequency emitting equipment are required to seek FCC certification and subject to sanction for the failure to do so.³⁵ If vendors are required to exercise the minimal diligence required to determine that their equipment requires FCC certification, they should also be required to inquire whether their clients are eligible to purchase them. Failure to inquire whether a potential client holds an FCC license, which may be determined by a search of the FCC's Universal Licensing System ("ULS") database, reflects a reckless disregard from which intent may be presumed.

* * * * *

Accordingly, the Commission should affirmatively declare that the unauthorized sale and use of wireless boosters and repeaters is unlawful.

³⁵ See, e.g., 47 C.F.R. § 2.803 (prohibiting the sale or lease of any device that is capable of emitting radiofrequency energy unless it has been certified by the Commission, except in limited circumstances); 47 C.F.R. § 2.901 ("the rules governing the service may require that such equipment be verified by the manufacturer or importer, be authorized under a Declaration of Conformity, or receive an equipment authorization from the Commission by one of the following procedures: certification or registration"); 47 C.F.R. § 22.377 ("transmitters used in the Public Mobile Services, including those used with signal boosters, in-building radiation systems and cellular repeaters, must be certificated for use in the radio services regulated under this part"); 47 C.F.R. § 90.203 ("each transmitter utilized for operation under this part [*i.e.*, private land mobile radio services] and each transmitter marketed as set forth in § 2.803 of this chapter must be of a type which has been certificated for use under this part"); 47 U.S.C. § 503(b)(1) ("Any person who is determined by the Commission . . . to have— . . . willfully or repeatedly failed to comply with . . . any rule, regulation, or order issued by the Commission . . . shall be liable to the United States for a forfeiture penalty"); *Vitec Group Communications Limited*, Memorandum Opinion and Order, DA 07-1760 (Apr. 20, 2007) (denying reconsideration of a forfeiture that was imposed on Vitec for failure to obtain the requisite equipment certification).

V. THE GEO GROUP'S PETITION FOR FORBEARANCE SHOULD BE DENIED ON PROCEDURAL AND SUBSTANTIVE GROUNDS

GEO Group's ("GEO") Petition for Forbearance ("GEO Petition") to allow the use of equipment to jam wireless communications in correctional facilities should be denied. The relief that GEO requests cannot be granted through a Petition for Forbearance. Moreover, even if GEO's Forbearance Petition conformed to the procedural requirements of Section 10 of the Communications Act – which it does not – GEO's Petition fails to satisfy any of the substantive requirements for forbearance.

GEO's Petition suffers multiple procedural defects and may be dismissed on that basis alone. As an initial matter, GEO is not eligible for forbearance relief. Section 10(c) of the Communications Act only allows "telecommunications carrier[s to] submit a petition to the Commission requesting that the Commission exercise the authority granted under this section."³⁶ In addition, the Act limits the FCC's authority to forbearance from applying regulations to a "telecommunications carrier or telecommunications service."³⁷ GEO is not a telecommunications carrier nor purports to represent telecommunications carriers, but rather is a private operator of correctional facilities. And the blocking of wireless communications is not itself a telecommunications service. As a result, GEO is not eligible for Section 10 forbearance relief.

Moreover, GEO's Petition does not seek forbearance but rather requests that the Commission modify the Communications Act. Specifically, GEO asks that the Commission "forbear from enforcement of the federal government limitation such that state and local governments may similarly interfere with radio communications at correctional facilities and

³⁶ 47 U.S.C. § 160(c).

³⁷ 47 U.S.C. § 160(a).

jails.”³⁸

But even if GEO’s Forbearance Petition conformed to the procedural requirements of Section 10 – which it does not – GEO’s Petition fails to make the three part substantive showing required for forbearance to be granted.³⁹ In requesting that the Commission forbear from enforcing the federal government exception to the Communications Act’s prohibition on the use of jammers, GEO ignores the significant impact its request will have on CMRS subscribers located in close proximity to correctional facilities. Grant of GEO’s request would significantly degrade the quality of service offered to such CMRS subscribers and impair their access to public safety functionality – like E911. Moreover, it would needlessly risk interfering with public safety communication on adjacent channels. For this reason, grant of GEO’s request would result in (1) unjust and unreasonable discrimination against CMRS subscribers proximate to the correctional facilities where GEO proposes to jam wireless communications; (2) significant injury to consumers; and (3) harm to the public interest.

First, contrary to GEO’s assertions, forbearance would result in unjust and unreasonable discrimination against CMRS subscribers living in close proximity to the correctional facilities where GEO proposes to operate wireless jamming equipment. GEO claims that grant of its request “will have no impact on the charges, practices, classifications or regulations governing cell phone service . . . [because] cell phone usage is not permissible by inmate populations at

³⁸ GEO Petition at i. If, as requested, the Commission forbore from an *exception* to Section 302’s certification requirements, the Act would become more *restrictive*, not less so. Properly construed, grant of the requested relief would prohibit the federal government from utilizing jammers, not authorize use by GEO’s state and local government clients. Instead, CTIA understands that GEO is asking that the Commission amend Section 302 of the Communications Act to expand the exceptions to Section 302 – a power that resides only in Congress.

³⁹ 47 U.S.C. § 160(a).

virtually any Federal, state or local correctional facility or jail in the nation.”⁴⁰ But GEO ignores the impact that jamming will have on lawful CMRS subscribers either *inside* or *outside* of correctional facilities, in particular, the degradation of service and potential blocking of access to emergency services. GEO’s statement that “[i]t has no intention of utilizing devices which would interfere with cell phone reception at any locations other than the premises where correctional facilities and jails are located”⁴¹ demonstrates a fundamental misunderstanding of how wireless communications work. The interference impact of operating jamming equipment would extend beyond the facility to which the jamming is directed to adjacent areas, regardless of how GEO attempts to limit its reach. Phrased in terms of Section 10’s requirements, GEO’s jamming proposal would result in an unreasonably discriminatory practice that prioritizes GEO’s preferred use of the spectrum over lawful subscribers.

Second, forbearance would harm consumers. GEO claims that the use of jammers is necessary to prevent inmates from using cell phones to conduct unlawful activities or intimidate and harass the public.⁴² Once again, however, GEO ignores the impact that its request will have on lawful CMRS use either inside or in areas surrounding correctional facilities. Forbearance from these regulations would interfere with the ability of consumers to lawfully utilize wireless services for which they have contracted and paid. Although this fact alone demonstrates that forbearance would harm consumers, additional harm could result in emergencies from the impairment of 911 service.

Moreover, GEO’s concern with the use of wireless communications in prison facilities

⁴⁰ GEO Petition at 8.

⁴¹ *Id.* at 5.

⁴² *Id.* at 11-12.

may be addressed by alternative means. GEO suggests these alternatives are inadequate, but does not explain why.⁴³ To the contrary, correctional facilities – by their very virtue – tightly control their population’s access to a broad range of products and substances, and will have to continue to do so regardless of the use of jammers. GEO believes jamming is more efficient or less costly than these alternatives, but it reaches this conclusion only by failing to ascribe any weight to the interest of lawful CMRS subscribers in areas adjacent to correctional facilities to have access to reliable wireless communications, including in emergencies. In addition, GEO’s proposed jamming would impair the ability of correctional facility employees to make wireless calls.

Third, forbearance would not serve the public interest. As detailed above, the use of jammers in state and local correctional facilities would impair the availability of commercial wireless voice and data communications to users who are not subject to the restrictions imposed by correctional institutions. Uninterrupted provision of such service, however, is critical to public safety and serves the public interest. Accordingly, the FCC should dismiss GEO’s Petition with prejudice and reiterate that the use of jammers is prohibited in all situations except those specifically exempted by statute.

VI. CELLANTENNA CORP.’S PETITION FOR RULEMAKING SHOULD BE DISMISSED BECAUSE IT CONFLICTS WITH FEDERAL LAW AND IS NOT IN THE PUBLIC INTEREST

The Commission should dismiss CellAntenna’s Petition to sell, and state and local governments to use, jamming equipment because it fails to state a claim upon which relief may

⁴³ See, e.g., GEO Petition, Attachment 1, ¶ 6 (noting that “[a]ll individuals requesting admittance to the [prison] facility or the visitation area are subject to a pat-down search of their person, an inspection of belongings, and a metal scan search. All detainees are required to submit to a pat-down search when visiting with their family members, friends, attorneys, paralegals, etc. prior to the start of the visit.”).

be granted and, with respect to those elements of the Petition that are properly pled, fails on its merits. Most of the authorities cited by CellAntenna do not permit the Commission to grant the requested relief. In order to be entitled to relief under Section 7 of the Act, a Petitioner must purport to be making “new technologies or services” available “to the public.”⁴⁴ CellAntenna satisfies neither criterion. Likewise, the sections of the Homeland Security Act of 2002 (“HSA”) cited by CellAntenna afford no basis for relief.⁴⁵ The provisions are procedural in nature, pose no conflict with the Communications Act, and may be fully discharged without granting the relief CellAntenna seeks. Finally, CellAntenna’s Fourteenth Amendment/substantive due process challenge lacks merit. The restriction on the manufacture and sale of devices that cause harmful interference to radio communications, contained in Section 302 of the Communications Act and Section 2.803 of the FCC’s rules, is rationally related to a lawful government purpose – allowing interference-free radio communications. Accordingly, pursuant to Section 1.401(e) of the Commission’s rules, CellAntenna’s Petition should be dismissed.⁴⁶

First, even if Section 7 of the Communications Act afforded a basis for the relief CellAntenna seeks – which it does not – CellAntenna does not even attempt to establish the facts that would entitle it to relief.⁴⁷ As an initial matter, as CTIA has argued elsewhere, Section 7 is a

⁴⁴ 47 U.S.C. § 157(a).

⁴⁵ See CellAntenna Petition, 5-7.

⁴⁶ See 47 C.F.R. § 1.401(e) (“Petitions which are . . . frivolous, or which plainly do not warrant consideration by the Commission may be denied or dismissed without prejudice to the petitioner.”).

⁴⁷ See CellAntenna Petition, 9 (citing Section 7 as grounds for relief). CellAntenna also cites Section 303 of the Communications Act as grounds for relief, but does not develop the claim. Instead, it cites the preamble to Section 303 – rather than one of the subsections enumerating the agency’s powers – for the proposition that Section 303 establishes a public interest standard. *Id.*

“broad policy statement” rather than an “affirmative obligation with which the Commission must comply.”⁴⁸ Pursuant to this provision, the FCC “consider[s] whether an applicant will offer new and/or novel services using newer technologies and whether such offerings will be in the public interest.”⁴⁹

Nevertheless, if Section 7 empowered the Commission to award affirmative relief, CellAntenna fails to demonstrate that it is warranted in this instance. The plain language states that: “It shall be the policy of the United States to encourage the provision of *new* technologies and services to *the public*.”⁵⁰ The service CellAntenna offers – jamming of radio communications – dates back to World War I. Even CellAntenna’s own service is not new, given that CellAntenna currently sells jamming equipment to the federal government but seeks to offer such equipment to state and local governments as well. CellAntenna’s Petition also contains no representation that its technology is new, but the fact that other manufacturers – such as GEO Group – offer functionally similar products suggests that it is not.⁵¹

Likewise, CellAntenna’s Petition does not satisfy a second criteria of Section 7 – that the purportedly new technology or service be offered to “the public.” Again, CellAntenna does not

⁴⁸ Reply of CTIA – The Wireless Association®, WT Docket Nos. 07-16, 07-30 (filed Apr. 3, 2007), 12-13 (“M2Z Reply”) (citing *Alenco Commc’ns, Inc. v. FCC*, 201 F.3d 608, 615 n.3 (5th Cir. 2000); and *Amendment of Parts 2, 25 and 87 of the Commission’s Rules to Implement Decisions from World Radiocommunication Conferences Concerning Frequency Bands Between 28 MHz and 36 GHz and to Otherwise Update the Rules in this Frequency Range*, Order on Reconsideration, 21 FCC Rcd 5492, ¶ 15 (2006)).

⁴⁹ M2Z Reply at 13.

⁵⁰ 47 U.S.C. § 157 (emphasis added).

⁵¹ See *Applications for License and Authority to Operate in the 2155-2175 MHz Band*, Order, FCC 07-161, ¶ 16 (rel. Aug. 31, 2007) (noting that if an applicant seeking relief under Section 7 on the basis of offering a “new” technology or service were entitled to relief, applicants professing to offer the same service would also be entitled to relief).

seek to offer its jamming equipment— which is marketed for use by public safety agencies – to the general public. Rather, it is seeking to expand the market of eligible public safety purchasers from the federal government to state and local governments. Because CellAntenna does not (and should not) contemplate marketing its product to the public, it is not entitled to Section 7 relief.

Second, nothing in the Homeland Security Act of 2002 requires the FCC to authorize state and local authorities to purchase and use CellAntenna’s cell jamming equipment. In support of its claim that the HSA preempts Sections 333 and 302 of the Communications Act,⁵² Cell Antenna cites four HSA provisions: Sections 101 (mission of the office of Homeland Security), 102 (obligation of the DHS Secretary to coordinate with state and local government agencies), 302 (responsibilities of the Under Secretary for Science and Technology) and 801 (duties of the Office of State and Local Government Coordination). As the subject matter of these provisions suggests, they are procedural in nature. Far from preempting the Communications Act, none of these provisions mention the Act, the FCC, or cell jamming equipment. All of these provisions may be discharged by DHS without granting any of the relief CellAntenna seeks and, accordingly, the HSA and the Communications Act must be construed as not in conflict.⁵³

The HSA provisions cited by CellAntenna speak to the relationship between DHS and

⁵² See CellAntenna Petition, 8 (“CellAntenna respectfully contends that the regulatory power of the Commission over antiterrorism weapons and technology, such as RF jammers, has been supplanted by the Department of Homeland Security pursuant to the direct mandate of the United States Congress.”).

⁵³ See *Hammontree v. National Labor Relations Board*, 925 F.2d 1486, 1496 (D.C. Cir. 1991) (finding that under “[e]stablished and familiar principles of statutory construction . . . courts are obligated to construe statutes harmoniously whenever possible” (citing Singer, *Sutherland Statutory Construction* § 53.01 (4th ed. 1984))).

state and local governments, and are not in conflict with the Communications Act. Reading the statute in the manner CellAntenna urges, the HSA still provides no basis for preempting Sections 333 and 302 of the Communications Act or authorizing the sale of cell jammers to state and local governments. CellAntenna reads the HSA as requiring DHS to:

- “improve the safety and effectiveness of law enforcement technology and improve access to such technology by Federal, State, and local law enforcement”;
- “coordinat[e] with State and local government . . . agencies . . . to ensure adequate planning, equipment [and] training . . .”;
- “establish[] a system for transferring homeland security development or technologies to Federal, State, local government . . . entities”; and
- “provide State and local government with regular information, research and technical support to assist local efforts at securing the homeland.”

DHS may discharge all of these generalized duties without authorizing the sale of CellAntenna’s jamming equipment to local law enforcement and without impinging on the FCC’s jurisdiction.

Even where the HSA specifically discusses “technologies to disable terrorist devices,” it offers no support for CellAntenna’s requested relief. The duty the HSA imposes on DHS is:

- “[t]o carry out research, development, testing, evaluation, and cost-benefit analyses in fields that would improve the safety, effectiveness, and efficiency of law enforcement technologies used by Federal, State, and local law enforcement . . . including . . . equipment for particular use in counterterrorism, including devices and technologies to disable terrorist devices.”

Essentially, the duty is to conduct research and analysis about the “safety, effectiveness and efficiency” of certain technologies. CellAntenna’s Petition does not say whether DHS has conducted such a review of its cell jamming equipment, and the duty created by the HSA is general enough that it appears DHS would not be required to do so. But even were DHS to conduct such an analysis, the HSA would not require it to make CellAntenna’s equipment available to state and local governments, particularly where the Communications Act forbids it.

Third, Section 302 of the Communications Act and Section 2.803 of the FCC’s rules are rationally related to a lawful government purpose and, hence, withstand scrutiny under the

Fourteenth Amendment. CellAntenna argues that limiting the sale of cell jamming equipment to the federal government is unconstitutional under a Fourteenth Amendment substantive due process analysis.⁵⁴ However, the challenged provisions easily satisfy the applicable standard. “[U]nder . . . substantive due process jurisprudence, a statute or regulation will be upheld as long as it is rationally related to a lawful governmental purpose and is not unlawfully arbitrary or discriminatory.”⁵⁵ The case law makes clear that this rational-basis test “is not a rigorous standard”⁵⁶ and that “[t]he test is generally easily met.”⁵⁷ The test is to determine “if any set of facts may be reasonably conceived to justify [the regulation].”⁵⁸ Indeed, “[e]ven if the court is convinced that the political branch has made an improvident, ill-advised or unnecessary decision, it must uphold the act if it bears a rational relation to a legitimate government purpose.”⁵⁹

Section 302 of the Communications Act and Section 2.803 of the Commission’s rules are rationally related to the government’s interest in promoting interference-free radio communications. Section 1 of the Communication’s Act makes clear the government’s interest in promoting radio communications free of interference. It states that that the FCC is created:

[f]or the purpose of regulating interstate . . . commerce in communication by wire and radio so as to make available . . . to all the people of the United States . . . a rapid and efficient Nation-wide and world-wide wire and radio communication service.⁶⁰

Section 302 and rule 2.803 promote the availability of a “rapid and efficient Nation-wide and

⁵⁴ See CellAntenna Petition, 9 (“the Commission has created an unconstitutional and unreasonable classification by determining that counterterrorism technology in the form of RF jamming equipment may be acquired only by the Federal government.”).

⁵⁵ *United States v. Plummer*, 221 F.3d 1298, 1308-1309 (11th Cir. 2000).

⁵⁶ *Id.* at 1309.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ 47 U.S.C. § 151.

world-wide wire and radio communication service” by preventing the uncontrolled introduction of devices disruptive to radio communications into the stream of commerce.

Moreover, Section 302’s limited exception for the federal government is not “unlawfully arbitrary or discriminatory.” To the extent Section 302 involves discrimination among potential purchasers of equipment that interferes with radio communications, it is not unlawful. The exception arises from the express language of a duly enacted federal law. In addition, the limited nature of the exception is well founded. Limiting the sale and use of intentionally interfering radio equipment to the federal government increases the prospect of coordination with commercial wireless licensees before such equipment is used, and reduces the overall likelihood and frequency of jamming activity. Reducing jamming activity, in turn, diminishes the prospect of interference with or degradation of legitimate signals not targeted by jamming devices. In addition, it prevents a single state or local law enforcement agency, no matter how well intentioned, from interfering with other law enforcement agencies’ wireless communications. Accordingly, dismissal of CellAntenna’s Petition will advance the public’s interest in the delivery of wireless communications without degradation or interruption.

VII. CONCLUSION

For the foregoing reasons, CTIA respectfully requests that the Commission issue a declaratory ruling clarifying that:

- (1) The sale and use of cellular jammers – with the exception of sales to and use by the federal government – is unlawful; and
- (3) The unauthorized sale and use of wireless boosters and repeaters is unlawful.

In addition, the Commission should deny GEO's Petition for Forbearance and dismiss CellAntenna Corp.'s Petition for Rulemaking.

Respectfully submitted,

By: /s/ Paul Garnett

Paul W. Garnett
Assistant Vice President, Regulatory Affairs

Michael F. Altschul
Senior Vice President & General Counsel

Christopher Guttman-McCabe
Vice President, Regulatory Affairs

CTIA – The Wireless Association®
1400 16th Street NW
Suite 600
Washington, DC 20036
202.785.0081

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