

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

In the Matter of)
)
TETRA Association’s Request for) ET Docket No. 09-234
Waiver of Parts 90.209, 90.210, and 2.1043.)
)

To: The Commission

COMMENTS OF HARRIS CORPORATION

This filing is submitted on behalf of Harris Corporation (“Harris”) before the Federal Communications Commission (“Commission”) in response to the Commission’s Public Notice¹ seeking comment on the TETRA Association’s (“the Association”) Request for Waiver² (“Waiver Petition”) of Parts 2 and 90 of the Commission’s rules in order to allow Terrestrial Trunked Radio (“TETRA”) technology to be used in the United States. Harris is an international communications and information technology company serving government and commercial markets in more than 150 countries. Harris is a leading technology developer and manufacturer of mission-critical wireless communications for the public safety communications market. Through the acquisition of Tyco Electronics Wireless Systems Division—formerly known as M/A-COM—Harris Corporation has strengthened its place as a leader in the public safety market. Harris’ new Public Safety and Professional Communications Business Unit has a total of 120 years of experience in communications technology with more than 400 critical

¹ See Office of Engineering and Technology Declares the TETRA Association’s Request for a Waiver of Parts 90.209, 90.210 and 2.1043 to be a “Permit-But-Disclose” Proceeding for Ex Parte Purposes and Requests Comment, *Public Notice*, ET Docket No. 09-234, DA 09-2633 (rel. Dec. 24, 2009).

² See TETRA Association, Request for Waiver of Sections 90.209, 90.210, and 2.1043, ET Docket No 09-234 (filed Nov. 20, 2009) (“TETRA Waiver Request”).

communications systems deployed world-wide. Harris has revolutionized public safety communications through the deployment of end-to-end Internet Protocol (“IP”) based land mobile radio systems for mission critical communications, including IP based 6.25 kHz-equivalent efficient public safety solutions in the 700 MHz band. As a pioneer in the development of IP based networks for private radio and broadband applications, Harris supplies industry-leading brands such as VIDA Broadband™, EDACS®, OpenSky®, NetworkFirst™, and Provoice™. In addition, Harris now offers first responders full-spectrum multiband products for joint public safety operations on the local, state, and federal levels: the Harris Unity XG-100 and RF-1033M. Harris is also an active member of numerous standards and technical committees including the TR-8 Mobile and Personal Private Radio Committee of the Telecommunications Industry Association.

Harris opposes the Association’s request for a blanket waiver of Parts 2 and 90 of the Commission’s rules to permit the use of TETRA technology in the United States. The Association has presented insufficient evidence demonstrating that TETRA technology will not cause harmful interference to existing land mobile radio (“LMR”) systems. Not only does the Association’s request fail to meet the necessary standard for granting a waiver of the Commission’s rules, it also violates the rulemaking provisions of the Administrative Procedures Act. As a result, the Association should withdraw its blanket waiver request, and instead submit a Petition for Rulemaking requesting the Commission to examine how current bandwidth requirements and emission mask rules can be modified to ensure the safe use of TETRA technology in the United States. A rulemaking is the appropriate process to consider the content of the Association’s waiver request. A rulemaking proceeding will allow the Commission and industry parties to establish suitable requirements to ensure TETRA technology can coexist with

current technologies. If the Association does not withdraw its Waiver Petition, the Commission should deny it.

I. There Is Insufficient Evidence Demonstrating That The Use of TETRA Technology Will Not Result In Harmful Interference To Existing LMR Technologies.

The Association fails to adequately demonstrate that the use of TETRA technology will not cause harmful interference to existing LMR technologies. The Association's Waiver Petition relies on largely unsubstantiated claims that TETRA technology can coexist with other LMR technology without causing harmful interference. Moreover, as the Commission continues to evaluate how to deploy a nationwide, interoperable public safety network, no evaluation of how TETRA technology may inhibit interoperability has been undertaken by the Commission in the 700 MHz proceeding or by the Association in its Waiver Petition.

In its Waiver Petition, the Association does not entirely refute that interference to other part 90 operations may occur. In fact, one can infer from the Association's statements that there still stands a risk for harmful interference.³ The Association acknowledges that TETRA technology "marginally fails"⁴ to meet the Commission's occupied bandwidth requirements and "comes close but does not meet"⁵ Part 90 emission mask requirements. Both 'marginal' compliance and 'coming close' to compliance is directly akin to noncompliance and may lead to potential harmful interference to existing LMR technology.

³ "A waiver would pose *very little risk* of interference to other part 90 operations..." (*emphasis added*). *Id.*, at 9.

⁴ *Id.*, at 3.

⁵ *Id.*, at 5.

II. The Association’s Request Does Not Meet the Threshold Requirements for Granting a Waiver of the Commission’s Rules.

An applicant seeking a waiver under the Commission’s waiver process faces a “high hurdle”⁶ and must plead with “particularity the facts and circumstances which warrant such action.”⁷ A successful request for waiver of the Commission’s rules must meet one of two tests.⁸ The Association fails to meet either of the tests for granting a waiver of the Commission’s rules.

First, the Association does not demonstrate how the underlying purpose of Part 2 or Part 90 rules would not be served or would be frustrated without a waiver. The interference that may be caused by TETRA technology is largely unknown due to a lack of sufficient testing. The Commission has adopted specific bandwidth, emission mask, and certification rules, as a result of extensive data and testing, in order to prevent interference amongst different technologies. Granting the Association’s blanket waiver request would be ill advised. Failing to enforce Part 2 and Part 90 as currently enacted would frustrate and fail to serve the underlying purpose of the Commission’s existing rules.

Second, the public interest benefits of TETRA alleged by the Association are based on broad, unsubstantiated assertions as to the needs and desires of public safety entities within the United States. For example, the Association states its request is based on a “demonstrable *need*

⁶ WAIT Radio v. FCC, 413 F.2d 1153, 1157 (D.C. Cir. 1969), *aff’d*, 459 F.2d 1203 (1973), *cert. denied*, 409 U.S. 1027 (1972).

⁷ Id., *citing* Rio Grande Radio Fellowship Inc. v. FCC, 406 F.2d 664, 666 (1968).

⁸ “The Commission may grant a request for waiver if it is shown that: (i) the underlying purpose of the rule(s) would not be served or would be frustrated by application to the instate case, and that a grant of the requested waiver would be in the public interest; or (ii) in 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.” 47 C.F.R. § 1.925(b)(3)(2008).

in the United States for use of the TETRA standard,”⁹ and would “[give] users of the technology enhanced capabilities greatly *need[ed]* by public and private mobile radio users” (*emphasis added*).¹⁰ The Association also claims that “a waiver will facilitate more *efficient* and enhanced performance”¹¹ and “would effectuate the Commission’s policies favoring prudent and *efficient* use of spectrum” (*emphasis added*).¹² However, at no point in the waiver request does the Association illustrate public safety’s ‘*need*’ for TETRA technology or how it will be more ‘*efficient*’ than existing, compliant technologies currently being used within the United States.

Alternatively, there is no evidence that application of the rule(s) would be inequitable, unduly burdensome, contrary to the public interest, or that those seeking to use TETRA technology have no reasonable alternative.¹³ There are several alternatives to the Association’s Waiver Petition that would not pose the same risk of interference to existing LMR systems used by first responders. Not only can manufacturers of TETRA technology seek a waiver on an individual basis, but TETRA technology could be modified to comply with Part 90 rules. The Association and manufacturers of TETRA technology could also submit a Petition for Rulemaking to the Commission in order to more fully study how TETRA technology and existing LMR systems can coexist, and examine how to potentially modify existing Commission rules to permit the use of TETRA technology without causing harmful interference.

⁹ TETRA Waiver Request, *supra* note 2, at 1.

¹⁰ *Id.*, at 8.

¹¹ *Id.*, at 9.

¹² *Id.*, at 8.

¹³ 47 C.F.R. § 1.925(b)(3)(ii).

III. A Rulemaking Proceeding Is the Appropriate Manner for the Commission to Consider Whether To Permit the Use of TETRA Technology.

A rulemaking proceeding is the appropriate process by which the Commission should consider whether to permit the use of TETRA technology in the United States. The Association's Waiver Petition, which seeks to provide a technology-wide waiver for an unlimited number of manufacturers, is so broad that granting it would circumvent the Commission's rulemaking process. Commission action granting a waiver in this circumstance could be viewed as an "agency statement of general or particular applicability and future effect"¹⁴ and a violation of the rulemaking provision of the Administrative Procedures Act.¹⁵ Harris also notes the potential procedural defects of the Association's Waiver Petition raised by other commenters in this proceeding, most notably a lack of standing.¹⁶

Although federal agencies are provided "substantial discretion as to whether to proceed by rulemaking or adjudication,"¹⁷ there is a federal judicial preference for the rulemaking process when an agency develops new policies—as would occur as a result of granting the Waiver Petition at issue.¹⁸ This judicial preference is based on the premise that the rulemaking provisions of the Administrative Procedures Act were "designed to assure fairness and mature

¹⁴ 5 U.S.C. § 551(4) (2007).

¹⁵ 5 U.S.C. §553 (2007).

¹⁶ Comments of Skybridge Spectrum Foundation Environmental LLC, Verde Systems LLC Telesaurus Holdings GB LLC, and Intelligent Transportation & Monitoring Wireless LLC, In the Matter of TETRA Association's Request for Waiver of Parts 90.209, 90.210, and 2.1043, ET Docket No. 09-254, p. 7-9 (filed Dec. 15, 2009) (contending that the Association lacks standing because it does not own, control or manufacture TETRA technology).

¹⁷ FCC v. National Citizens Com. For Broadcasting, 436 U.S. 775, 808 n. 29 (1978); *see also* SEC v. Chenery Corp., 332 U.S. 194, 202-203 (1947) (nothing that "the choice made between proceeding by general rule or by individual, *ad hoc* litigation" is based on the "informed discretion" of administrative agencies).

¹⁸ *See generally* National Petroleum Refiners Assoc. v. FTC, 482 F.2d 672, 681-683 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 951 (1974) (discussing the benefits of the rulemaking process over adjudication and the judicial trend favoring the rulemaking process when developing new agency policy); *see also* SEC v. Chenery Corp., 332 U.S. at 202 (stating that when an administrative agency has the ability to act by rulemaking the agency has "less reason to rely upon *ad hoc* adjudication to formulate new standards of conduct").

consideration of rules of general application.”¹⁹ The Commission itself has noted this judicial preference for rulemaking and acknowledged the principle behind this preference.

[A] rulemaking or other open proceeding would be a ‘better, fairer, and more effective method’ of implementing a new policy than would the granting of individual waivers. We believe issues such as these have far-reaching implications and should be addressed in a rulemaking proceeding in the first instance instead of in an adjudication or waiver proceeding.... The rulemaking approach is accorded judicial preference when an agency develops new policies. This preference is based on the principle that a rulemaking under the Administrative Procedure Act’s provisions for notice and broad public participation assures fairness, the opportunity to develop the record and mature consideration.²⁰

Furthermore, the Commission has determined that when evaluating a waiver request it is “axiomatic”²¹ that the Commission does not “eviscerate a rule by waiver.”²² Given federal courts preference for the rulemaking process when developing new policy, and the Commission’s commitment to this concept, the Association should withdraw its Waiver Petition and instead submit a Petition for Rulemaking. Should the Association fail to withdraw its Waiver Petition, the Association’s request should be denied by the Commission.

As part of any rulemaking process initiated by the Commission on permitting the use of TETRA technology in the United States Harris encourages the Commission to evaluate the feasibility of establishing a TETRA emissions mask and identify the pertinent bands where the use of such technology would be safe. Furthermore, any rulemaking process must include a detailed study of the potential co-existence (*i.e.* interference impacts) of the proposed TETRA Mask-certified equipment with other currently established masks and bands. The process must

¹⁹ NLRB v. Wyman Gordon Co., 394 U.S. 759, 764 (1969).

²⁰ Amendment of Parts 2 and 25 of the Commission’s Rules to Permit Operation of NGSO FSS Systems Co-Frequency with GSO and Terrestrial Systems in the Ku-Band Frequency Range, Memorandum Opinion and Order and Second Report and Order, 17 FCC Rcd 9614, 9699, ¶ 218 (rel. May 23, 2002) (internal citations omitted), *aff’d*, Northpoint Tech., Ltd. v. FCC, 414 F.3d 61 (DC Cir. 2005).

²¹ Id.

²² Id.

