

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

In the Matter of)	
)	
Tandy Corporation, Walker Equipment Company,)	
Ameriphone, Inc., and Ultratec, Inc., Request for)	NSD-L-00-17
Waiver of Volume Control Reset, 47 C.F.R.)	NSD-L-00-22
§68.317(f))	NSD-L-00-63
)	NSD-L-00-193
)	
)	

MEMORANDUM OPINION AND ORDER

Adopted: March 2, 2001

Released: March 5, 2001

By the Chief, Network Services Division:

I. INTRODUCTION

1. In this Order we address several petitions for waiver of 47 C.F.R. Section 68.317(f) of the Commission’s rules filed by the captioned petitioners. Section 68.317(f) requires that telephones with amplification greater than 18 dB (designed for persons with hearing disabilities) must reset to a volume no greater than 18 dB once the telephone is returned to an on-hook condition. Thus, under this rule, people who need higher volume telephones must turn the volume back up each time they use the telephone. The rule is designed to protect people without hearing disabilities from having their hearing damaged by a high volume. Petitioners ask that we waive section 68.317(f) so that persons with hearing disabilities can have telephones in their homes that they do not have to reset before each use. For the reasons discussed below, we grant the waiver requests subject to conditions, and we establish a streamlined waiver process for future waivers of this rule section.

II. BACKGROUND

2. *Part 68 of the Commission’s Rules.* All terminal equipment sold in the United States and connected to the public switched telephone network (PSTN) must be registered pursuant to Part 68 of the Commission’s rules.¹ Part 68 prevents harm to the PSTN by requiring that the responsible party demonstrate that its equipment conforms to Part 68 requirements. In addition, Part 68 imposes certain technical parameters to ensure that telephone receivers are compatible with hearing aid devices and that their volume can be increased to accommodate individuals with hearing disabilities. Once equipment tests show that the applicant’s device meets the Part 68 requirements, the device may be sold and connected to the PSTN in the United States.

¹ 47 C.F.R. Part 68.

3. The Commission recently streamlined Part 68 to privatize the equipment approval process and the development of most technical criteria for prevention of harm to the PSTN.² Once these new rules go into effect, the Commission will no longer directly review terminal equipment for compliance with technical criteria. Instead, manufacturers will be required to have their terminal equipment certified either by a Telecommunications Certification Body (or international equivalent), or by the Supplier's Declaration of Conformity process established in the new rules. The Commission did not, however, privatize technical and policy rules pertaining to hearing aid compatibility and volume control. Instead, these rules remain in Part 68. Thus, requests for waivers of these rules will continue to be filed with the Commission. A waiver of one or more portions of the Commission's rules, however, does not excuse a responsible party from compliance with the Commission's other requirements.³

4. *Volume Control Automatic Reset.* Section 68.317(f) provides that the maximum gain of 18 dB in the handset or headset of the telephone may be exceeded "provided that the amplified receive capability automatically resets to nominal gain when the telephone is caused to pass through a proper on-hook transition."⁴ The purpose of the automatic reset requirement is to protect individuals without a hearing disability, who may use the same telephone, from a sudden loud noise that could damage their hearing.⁵ Section 68.317(f) was adopted on June 27, 1996 and, by action of section 68.6 of the Commission's rules⁶, went into effect January 1, 2000. Prior to the effective date of section 68.317(f), telephones with volume control reset switches were available to the public and permitted under our rules. After the rule became effective, plaintiffs were no longer permitted to manufacture telephones with a control that permitted the telephone to remain at a high volume.

III. DISCUSSION

5. *Waiver Standard.* In analyzing the waiver requests, we consider established legal standards for waiver of the Commission's rules. The Commission will adhere strictly to its rules unless a party can demonstrate that "in the public interest the rule should be waived."⁷ Furthermore, the Commission may only waive a provision of its rules for "good cause shown."⁸ The party petitioning the Commission for a waiver bears the burden of showing good cause: "[a]n applicant [for a waiver] faces a high hurdle even at the starting gate."⁹ The Commission must take a "hard look" at applications for

² In the Matter of 2000 Biennial Regulatory Review of Part 68 of the Commission's Rules and Regulations, CC Docket No. 99-216, *Report and Order*, 15 FCC Rcd 24944 (2000).

³ See 47 C.F.R. § 1.3; Part 68 Waiver Request of Alameda Engineering, Inc., *Order*, 10 FCC Rcd 12135, 12139 (Com.Car.Bur. 1995) (*Alameda Order*).

⁴ 47 C.F.R. §68.317(f).

⁵ In the Matter of Access to Telecommunications Equipment and Services by Persons with Disabilities, CC Docket No. 87-124, *Report and Order*, 11 FCC Rcd 8249 (1996); In the Matter of Access to Telecommunications Equipment and Services by Persons with Disabilities, CC Docket No. 87-124, *Order on Reconsideration*, 12 FCC Rcd 10077 (1997).

⁶ 47 C.F.R. §68.6.

⁷ *FPC v. Texaco Inc.*, 377 U.S. 33, 39 (1964).

⁸ 47 C.F.R. §1.3.

⁹ *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969).

waiver¹⁰ and must consider all relevant factors when determining if good cause exists.¹¹ Finally, "[t]he agency must explain why deviation better serves the public interest, and articulate the nature of the special circumstances, to prevent discriminatory application and to put future parties on notice as to its operation."¹²

6. The test for a waiver of Part 68 is well established.¹³ We have formulated and applied a two-part test to determine the merits of a request for waiver of Part 68 rules to permit registration of non-conforming customer premises equipment (CPE or terminal equipment) (*Nortel Test*). The first prong of the test is an evaluation of the terminal equipment's benefit to the public interest, with an emphasis on the potential gain in consumer choice and value. The second prong of the test is an evaluation of the terminal equipment's potential for causing network harm.

7. The specific issues raised by the instant waiver requests are similar to those raised in previous waiver proceedings, because they require an evaluation of why the proposed deviation from the rules is in the public interest. The instant waiver requests vary in one significant respect: they affect the disability access rules in Part 68 rather than the network harm rules. Nevertheless, we find that the same two-part test will enable us to evaluate the merits of the captioned waiver requests because the regulatory policies with which we are concerned are represented by the two-prong test in both situations.

8. The proposed waiver of section 68.317(f) raises no issue of harm to the public switched telephone network. Accordingly, we do not require petitioners to make a showing that they have met the second prong of the *Nortel Test*. We consider the public interest issues raised under the first prong of the test, and evaluate the benefits and potential harms to the public interest of a reset override switch for a volume control feature offering amplification greater than 18 dB. As discussed in detail below, we conclude that the benefits to individuals with hearing disabilities outweigh the potential harms to those without hearing disabilities. Moreover, we conclude that waiver of rule section 68.317(f) will not cause harm to the PSTN. Accordingly, we grant petitioners' request for waiver, subject to the conditions listed below.

9. *Public Interest in Uninterrupted Receiver Amplification for Persons with Disabilities.* We conclude that some relief from our volume reset requirement is necessary, and will benefit, the consumers that need telephone receiver amplification greater than 18 dB. Persons with hearing disabilities would be able to tailor their telephone to their individual needs.¹⁴ Ultratec tells us that often audiologists or other professionals assist consumers with setting up their telephones, even providing programmable amplification adjustments for them.¹⁵ Such people would be able to use their telephones more effectively if

¹⁰ *Id.*

¹¹ *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971).

¹² *Northeast Cellular Telephone Company, L.P. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990).

¹³ Alcatel USA, Inc. Petition for Waiver of the Signal Power Limitations Contained in Section 68.308(e) of the Commission's Rules, File No. NSD 00-37, *Memorandum Opinion and Order*, 15 FCC Rcd 4388 (Com. Car. Bur. Network Svcs. Div. 2000) ("*Alcatel Order*").

¹⁴ Walker Equipment Petition at 2.

¹⁵ Ultratec Petition at 3.

there were an option to leave the volume control in a selected setting.¹⁶ Many of the more than 23 million people who are deaf or have hearing disabilities are elderly and have secondary disabilities that prevent proper use of a volume reset switch.¹⁷ One manufacturer commenting in this proceeding states that over ninety percent of owners of current amplified telephones that it sells are over the age of 55, and many are over 75.¹⁸ Commenters confirm that secondary disabilities come with the onset of age, so that elderly people may have trouble remembering that the amplification must be reset or they may have difficulty locating the volume control quickly enough, particularly for incoming calls.¹⁹ People with hearing loss in addition to other disabilities, such as visual, manual or cognitive, find it even more difficult to locate the volume control and set it properly each time they want to use the telephone.²⁰ Users of this special class of telephones sometimes believe that their telephone is not functioning, which results in significant inconvenience for them.²¹ Accordingly, for these individuals, there is a significant public interest benefit to both safety and quality of life in allowing them to use their telephones without a barrier hampering such use and with the same ease as people without hearing disabilities.²²

10. *Public Interest in Avoiding Hearing Damage to Persons without Hearing Disabilities.* We conclude that although hearing damage to individuals without hearing disabilities is unlikely from a single brief exposure to an amplification level greater than 18 dB from a telephone receiver, if repeated, incremental exposure to loud noises may damage hearing.²³ Accordingly, in order to “minimize the likelihood of damage to individuals with normal hearing” as set out in section 68.318(f), telephone manufacturers must take appropriate precautions. We agree with SHHH and other commenters that the safety of all consumers must be taken into account.²⁴ Although we agree that consumers can and do often educate their families and visitors about using their high-volume telephone,²⁵ we do not believe that this is necessarily sufficient in all cases to avoid cumulative damage to others’ hearing.²⁶ Individuals who do not have hearing disabilities may nevertheless suffer age- or disability-related visual, cognitive, and memory loss that would prevent them from exercising due caution with such telephones. We conclude, on weighing

¹⁶ SHHH Comments at 2.

¹⁷ Ameriphone Petition at 2.

¹⁸ Ultratec Petition at 1.

¹⁹ SHHH Comments at 2, Ultratec Petition at 1.

²⁰ SHHH Comments at 2.

²¹ Ultratec Petition at 1.

²² HITEC Comments at 1.

²³ National Institute on Deafness and other Communication Disorders (NIDCD) Health Information; Noise-Induced Hearing Loss, http://www.nih.gov/nidcd/health/pubs_hb/noise.htm.

²⁴ SHHH Comments at 2.

²⁵ Ameriphone Petition at 5-6.

²⁶ TIA informs us that manufacturers of telephones with volume set only at the 18-dB level already experience claims of injury to hearing. TIA argues that the number of such claims may increase if telephones with amplification higher than 18 dB are permitted. TIA Comments at 3.

the conflicting needs of persons with such disabilities, that high volume telephones must include easily perceived warnings that the telephone is set at a very high volume.

11. Petitioners have each developed a number of visual safety features to warn users who do not have hearing disabilities of a high amplification condition. We appreciate the concern evidenced by manufacturers trying to balance the needs of users with hearing disabilities with the safety of other users. We agree with SHHH that features of a telephone designed to exceed 18 dB receiver amplification should at a minimum have the override switch located on the telephone in such a way as to not be accessible to accidental engagement; there should be a bright indicator light prominently displayed on the front of the telephone with a printed notification of high amplification; there should be clear labeling near the override switch; and there should be a caution printed in the users' manual.²⁷ None of these features would help a visually impaired person, however. Accordingly, in addition to the foregoing, we require that manufacturers provide a warning printed in Braille that can be securely attached to the back of the handset or, if the telephone has only a headset, above the dial buttons, to indicate that a high volume setting may be engaged.

12. Based on the foregoing analyses, we conclude that granting these waiver requests subject to the conditions set out in this Order will serve the public interest by providing greater consumer choice and value without increasing the likelihood of harm to individuals without hearing disabilities. Although one commenter, TIA, expresses concern over such a waiver, it admits that the reset requirement is not essential to preventing harm. TIA argues that if we do grant the waiver request, we must ensure that adequate precautions for preventing harm are taken.²⁸ We believe that the conditions for waiver set out in this order will meet TIA's concerns.

13. *Streamlined Waiver Proceeding for 47 CFR 68.317(f)*. While we agree with SHHH that a blanket waiver is not appropriate,²⁹ we conclude that a streamlined waiver process for deciding section 68.317(f) waiver petitions is appropriate, in a similar manner as that which the Network Services Division provides for stutter dial tone and ADSL waiver petitions.³⁰ We believe that the record in this proceeding supports such a procedure because the benefit of a waiver is clear and the conditions that we impose to safeguard the general public from telephones manufactured pursuant to the waiver are specific and clearly observable.

14. In the *Alameda Order*, the Bureau invited any stutter dial tone equipment manufacturer to apply for a waiver, as long as that manufacturer was able to meet the eight performance conditions specified therein.³¹ Upon receipt of a petition containing the appropriate claims, the Bureau would issue an order granting the waiver. Thus, streamlined waivers are granted if the petitioners certify conformance with the eight performance conditions. Likewise, in this situation, manufacturers of telephones with

²⁷ SHHH Comments at 3.

²⁸ TIA Comments at 3.

²⁹ SHHH Comments at 1-2.

³⁰ *Alameda Order, supra*, 10 FCC Rcd 12135; In the Matter of Alcatel USA, Inc., Petition for Waiver of the Signal Power Limitations Contained in Section 68.308(e)(1) of the Commission's Rules, NSD L-99-81, *Memorandum Opinion and Order*, 15 FCC Rcd 4388 (Com. Car. Bur. Network Svcs. Div. 2000) (*Alcatel Order*).

³¹ *Id.*, 10 FCC Rcd at 12141, fn. 73.

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volume control over 18 dB may file a statement that their equipment meets the specific conditions required by this Order.

15. Specifically, in the future, parties seeking waiver of 68.317(f) may submit a letter to the Chief, Network Services Division, certifying that the equipment for which waiver is requested complies with the safety conditions listed in the Ordering Clauses of this Order. The waiver request must be signed by a company representative or officer responsible for its truthfulness. If the request is in order and if no other issues are present that preclude a grant, the Division will issue an order granting the waiver request. The party receiving such a waiver grant may then pursue equipment certification under the applicable Part 68 rules.

IV. ORDERING CLAUSES

16. Accordingly, pursuant to authority delegated in sections 0.91 and 0.291 of the Commission's rules, 47 C.F.R. 0.91, 0.291, and section 1.3 of the Commission's rules, 47 C.F.R. 1.3, IT IS HEREBY ORDERED that the requests for waiver of section 68.317(f) of the Commission's rules, 47 C.F.R. 68.317(f), by Tandy Corporation, Walker Equipment Company, Ameriphone, Inc., and Ultratec, Inc., ARE GRANTED to the extent discussed herein.

17. IT IS FURTHER ORDERED that the waiver requests ARE GRANTED SUBJECT TO THE FOLLOWING CONDITIONS: (1) The volume reset override switch shall be labeled as such and located on the telephone in such a way as to not be accessible to accidental engagement; (2) a bright indicator light shall be prominently displayed on the front of the telephone and shall light up when the override is engaged and the telephone is placed in an off-hook condition; (3) next to the light shall be a warning that the amplification is at a high level; (4) a caution on the use of the volume reset override switch shall be included in the users' manual; and (5) the telephone includes a warning printed in Braille that can be securely attached to the back of the handset, or, if the telephone has only a headset, above the dial buttons, to indicate that a high volume setting may be engaged.

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