

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

In the Matter of	)	
East Kentucky Network, LLC	)	File No. EB-09-SE-164
d/b/a Appalachian Wireless	)	NAL/Acct. No. 201032100012
	)	FRN 0001786607
	)	

**NOTICE OF APPARENT LIABILITY FOR FORFEITURE**

**Adopted: January 14, 2010**

**Released: January 14, 2010**

By the Chief, Spectrum Enforcement Division, Enforcement Bureau:

**I. INTRODUCTION**

1. In this *Notice of Apparent Liability for Forfeiture* (“NAL”), we find that East Kentucky Network, LLC d/b/a Appalachian Wireless (“East Kentucky Network”) apparently willfully violated the hearing aid compatibility status report filing requirements set forth in Section 20.19(i)(1) of the Commission’s Rules (“Rules”).<sup>1</sup> For this apparent violation, we propose a forfeiture in the amount of five thousand dollars (\$5,000).

**II. BACKGROUND**

2. In the 2003 *Hearing Aid Compatibility Order*, the Commission adopted several measures to enhance the ability of individuals with hearing disabilities to access digital wireless telecommunications.<sup>2</sup> The Commission established technical standards that digital wireless handsets must meet to be considered compatible with hearing aids operating in acoustic coupling and inductive coupling (telecoil) modes.<sup>3</sup> The Commission further established, for each standard, deadlines by which manufacturers and service providers were required to offer specified numbers or percentages of digital wireless handsets per air interface<sup>4</sup> that are compliant with the relevant standard if they did not come under the *de minimis* exception.<sup>5</sup> In February 2008, as part of a comprehensive reconsideration of the

<sup>1</sup> 47 C.F.R. § 20.19(i)(1).

<sup>2</sup> The Commission adopted these requirements for digital wireless telephones under the authority of the Hearing Aid Compatibility Act of 1988, codified at Section 710(b)(2)(C) of the Communications Act of 1934, as amended, 47 U.S.C. § 610(b)(2)(C). See *Section 68.4(a) of the Commission’s Rules Governing Hearing Aid-Compatible Telephones*, Report and Order, 18 FCC Rcd 16753, 16787 ¶ 89 (2003); Erratum, 18 FCC Rcd 18047 (2003) (“*Hearing Aid Compatibility Order*”); Order on Reconsideration and Further Notice of Proposed Rulemaking, 20 FCC Rcd 11221 (2005) (“*Hearing Aid Compatibility Reconsideration Order*”).

<sup>3</sup> See *Hearing Aid Compatibility Order*, 18 FCC Rcd at 16777 ¶ 56; 47 C.F.R. §§ 20.19(b)(1) and (2).

<sup>4</sup> 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 Dispatch Enhanced Network (“iDEN”) and Wideband Code Division Multiple Access (“WCDMA”) a/k/a Universal Mobile Telecommunications System (“UMTS”).

<sup>5</sup> See *Hearing Aid Compatibility Order*, 18 FCC Rcd at 16780 ¶ 65; 47 C.F.R. §§ 20.19(c), (d). The *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 deployment requirements, and manufacturers (continued ...)

effectiveness of the hearing aid compatibility rules, the Commission released an order that, among other things, adopted new compatible handset deployment benchmarks beginning in 2008.<sup>6</sup>

3. Of primary relevance, the Commission also adopted reporting requirements to ensure that it could monitor the availability of these handsets and to provide valuable information to the public concerning the technical testing and commercial availability of hearing aid-compatible handsets.<sup>7</sup> The Commission initially required manufacturers and digital wireless service providers to report every six months on efforts toward compliance with the hearing aid compatibility requirements for the first three years of implementation (May 17, 2004, November 17, 2004, May 17, 2005, November 17, 2005, May 17, 2006 and November 17, 2006), and then annually thereafter through the fifth year of implementation (November 19, 2007 and November 17, 2008).<sup>8</sup> In its 2008 *Hearing Aid Compatibility First Report and Order*, the Commission extended these reporting requirements with certain modifications on an open-ended basis, beginning January 15, 2009.<sup>9</sup> The Commission also made clear that these reporting requirements apply to service providers that fit within the *de minimis* exception.<sup>10</sup>

4. East Kentucky Network failed to timely file the required report for the period July 1, 2008 through December 31, 2008, filing it on October 13, 2009,<sup>11</sup> nearly nine months after the deadline of January 15, 2009. The Wireless Telecommunications Bureau (“WTB”) referred East Kentucky Network’s apparent violation of the hearing aid compatibility reporting requirements to the Enforcement Bureau for action.

5. On October 8, 2009, the Spectrum Enforcement Division of the Enforcement Bureau sent a Letter of Inquiry (“LOI”) to East Kentucky Network to investigate a potential violation of Section 20.19(i)(1) of the Rules.<sup>12</sup> East Kentucky Network responded to the LOI on October 14, 2009.<sup>13</sup> In its Response, East Kentucky Network states that it attempted to file the report on January 12, 2009, but the filing was incomplete due to administrative error by the filing attorney, who failed to attach and confirm

(Continued from previous page ...)

or mobile 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).

<sup>6</sup> See *Amendment of the Commission’s Rules Governing Hearing Aid-Compatible Mobile Handsets*, First Report and Order, 23 FCC Rcd 3406 (2008) (“*Hearing Aid Compatibility First Report and Order*”), Order on Reconsideration and Erratum, 23 FCC Rcd 7249 (2008).

<sup>7</sup> See *Hearing Compatibility First Report and Order*, 23 FCC Rcd at 3443 ¶ 91.

<sup>8</sup> *Hearing Aid Compatibility Order*, 18 FCC Rcd at 16787 ¶ 89; see also *Wireless Telecommunications Bureau Announces Hearing Aid Compatibility Reporting Dates for Wireless Carriers and Handset Manufacturers*, Public Notice, 19 FCC Rcd 4097 (Wireless Tel. Bur. 2004).

<sup>9</sup> See *Hearing Compatibility First Report and Order*, 23 FCC Rcd at 3445-46 ¶¶ 97-99.

<sup>10</sup> *Id.* at ¶ 99.

<sup>11</sup> See East Kentucky Network, LLC d/b/a Appalachian Wireless Hearing Aid Compatibility Status Report, Docket No. 07-250 (October 13, 2009).

<sup>12</sup> See Letter from Kathryn S. Berthot, Chief, Spectrum Enforcement Division, Enforcement Bureau, Federal Communications Commission, to Gerald Robbins, GM/CEO, East Kentucky Network, dba Appalachian Wireless (October 8, 2009).

<sup>13</sup> See Letter from Pamela L. Gist, Counsel for East Kentucky Network, LLC d/b/a Appalachian Wireless, to Marlene H. Dortch, Secretary, Federal Communications Commission (October 14, 2009) (“Response”).

attachment of the report.<sup>14</sup> Following receipt of the LOI, East Kentucky Network filed the report on October 13, 2009.<sup>15</sup>

### III. DISCUSSION

#### A. Failure to File Hearing Aid Compatibility Status Report

6. Section 20.19(i)(1) of the Rules requires service providers to file hearing aid compatibility status reports under the current rules initially on January 15, 2009 (covering the six month period ending December 31, 2008) and then annually beginning January 15, 2009.<sup>16</sup> These reports are necessary to enable the Commission to perform its enforcement function and evaluate whether East Kentucky Network is in compliance with Commission mandates that were adopted to facilitate the accessibility of hearing aid-compatible wireless handsets. These reports also provide valuable information to the public concerning the technical testing and commercial availability of hearing aid-compatible handsets. East Kentucky Network did not file the report covering the six month period ending December 31, 2008 until October 13, 2009, nearly nine months after the January 15, 2009 due date. Accordingly, we find that East Kentucky Network failed to timely file the hearing aid compatibility status report in apparent willful<sup>17</sup> violation of the requirements set forth in Section 20.19(i)(1) of the Rules.<sup>18</sup>

#### B. Proposed Forfeiture

7. Under Section 503(b)(1)(B) of the Act, any person who is determined by the Commission to have willfully or repeatedly failed to comply with any provision of the Act or any rule, regulation, or order issued by the Commission shall be liable to the United States for a forfeiture penalty.<sup>19</sup> To impose such a forfeiture penalty, the Commission must issue a notice of apparent liability and the person against whom such notice has been issued must have an opportunity to show, in writing, why no such forfeiture penalty should be imposed.<sup>20</sup> The Commission will then issue a forfeiture if it finds by a preponderance

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<sup>14</sup> *Id.*, at 2. East Kentucky Network acknowledges that it received a copy of the electric confirmation receipt of the filing dated January 12, 2009 from the FCC's Electronic Comment Filing System ("ECFS"), which displays the words "Number of Files Transmitted: 0," but states that it failed to notice this wording until after receipt of the Division's LOI. We note that ECFS provides detailed instructions for attaching documents to electronic filings and provides a review page which enables users to view the information they entered before submitting to ensure accuracy. ECFS also provides instructions for checking the status of filings once they are posted to ECFS. Given these instructions and safeguards, and the electronic receipt received by East Kentucky Network, we think that East Kentucky Network was on notice that it had failed to successfully transmit its hearing aid compatibility status report.

<sup>15</sup> *Id.*

<sup>16</sup> 47 C.F.R. § 20.19(i)(1).

<sup>17</sup> Section 312(f)(1) of the Act defines "willful" as "the conscious and deliberate commission or omission of [any] act, irrespective of any intent to violate" the law. 47 U.S.C. § 312(f)(1). The legislative history of Section 312(f)(1) of the Act clarifies that this definition of willful applies to both Sections 312 and 503(b) of the Act, H.R. Rep. No. 97-765, 97<sup>th</sup> Cong. 2d Sess. 51 (1982), and the Commission has so interpreted the term in the Section 503(b) context. See *Southern California Broadcasting Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387, 4388 ¶ 5 (1991), *recon. denied*, 7 FCC Rcd 3454 (1992) ("Southern California"); see also *Telrite Corporation*, Notice of Apparent Liability for Forfeiture, 23 FCC Rcd 7231, 7237 ¶ 12 (2008); *Regent USA*, Notice of Apparent Liability for Forfeiture, 22 FCC Rcd 10520, 10523 ¶ 9 (2007); *San Jose Navigation, Inc.*, Forfeiture Order 22 FCC Rcd 1040, 1042 ¶ 9 (2007).

<sup>18</sup> 47 C.F.R. § 20.19(i)(1).

<sup>19</sup> 47 U.S.C. § 503(b)(1)(B); 47 C.F.R. § 1.80(a)(1).

<sup>20</sup> 47 U.S.C. § 503(b); 47 C.F.R. § 1.80(f).

of the evidence that the person has violated the Act or a Commission rule.<sup>21</sup> We conclude under this standard that East Kentucky Network is apparently liable for forfeiture for its failure to timely file the required hearing aid compatibility status report in apparent willful violation of the requirements set forth in Section 20.19(i)(1) of the Rules.<sup>22</sup>

8. The Commission's *Forfeiture Policy Statement* and Section 1.80(b) of the Rules set a base forfeiture amount of \$3,000 for the failure to file required forms or information.<sup>23</sup> While the base forfeiture requirements are guidelines lending some predictability to the forfeiture process, the Commission retains the discretion to depart from these guidelines and issue forfeitures on a case-by-case basis, under its general forfeiture authority contained in Section 503 of the Act.<sup>24</sup> In exercising such discretion, we are required to take into account "the nature, circumstances, extent, and gravity of the violation and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require."<sup>25</sup>

9. We have exercised our discretion to set a higher base forfeiture amount for violations of the wireless hearing aid compatibility reporting requirements. In the *American Samoa Telecommunications Authority NAL*, we found that the status reports are essential to the implementation and enforcement of the hearing aid compatibility rules.<sup>26</sup> The Commission relies on these reports to provide consumers with information regarding the technical specifications and commercial availability of hearing aid-compatible digital wireless handsets and to hold the digital wireless industry accountable to the increasing number of hearing-impaired individuals.<sup>27</sup> We noted that when setting an \$8,000 base forfeiture for violations of the hearing aid-compatible handset labeling requirements, the Commission emphasized that individuals with hearing impairments could only take advantage of critically important public safety benefits of digital wireless services if they had access to accurate information regarding hearing aid compatibility features of handsets.<sup>28</sup> We also noted that the Commission has upwardly adjusted the base forfeiture when noncompliance with filing requirements interferes with the accurate administration and enforcement of Commission rules.<sup>29</sup> Because the failure to file hearing aid compatibility status reports implicates similar public safety and enforcement concerns, we exercised our discretionary authority and established a base forfeiture amount of \$6,000 for failure to file hearing aid compatibility reports.<sup>30</sup> Consistent with *ASTCA*, we will apply the same base forfeiture amount here.

<sup>21</sup> See, e.g., *SBC Communications, Inc.*, Forfeiture Order, 17 FCC Rcd 7589, 7591 ¶ 4 (2002).

<sup>22</sup> 47 C.F.R. § 20.19(i)(1).

<sup>23</sup> 47 C.F.R. § 1.80(b).

<sup>24</sup> See *Forfeiture Policy Statement*, 12 FCC Rcd at 17099 ¶ 22, 17101 ¶ 29. See also 47 C.F.R. § 1.80(b)(4) ("The Commission and its staff *may* use these guidelines in particular cases [, and] retain the discretion to issue a higher or lower forfeiture than provided in the guidelines, to issue no forfeiture at all, or to apply alternative or additional sanctions as permitted by the statute.") (*emphasis added*).

<sup>25</sup> 47 U.S.C. § 503(b)(2)(E). See also 47 C.F.R. § 1.80(b)(4), Note to paragraph (b)(4): Section II. Adjustment Criteria for Section 503 Forfeitures.

<sup>26</sup> See *American Samoa Telecommunications Authority*, Notice of Apparent Liability for Forfeiture, 23 FCC Rcd 16432 (Enf. Bur., Spectrum Enf. Div. 2008), *response pending* ("*ASTCA NAL*").

<sup>27</sup> See *ASTCA NAL*, 23 FCC Rcd at 16436-47 ¶ 10.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

10. Failure to file these reports, as is the case here, can have an adverse impact on the Commission's ability to ensure the commercial availability of hearing aid-compatible digital wireless handsets, to the detriment of consumers. We find, however, that downward adjustment from the \$6,000 base forfeiture amount to \$5,000 is warranted based on East Kentucky Network's demonstrated good faith effort in timely attempting to file the report, although unsuccessfully.<sup>31</sup> Accordingly, we propose a forfeiture of \$5,000 against East Kentucky Network for apparently willfully failing to timely file its January 15, 2009 hearing aid compatibility status report in violation of Section 20.19(i)(1) of the Rules.<sup>32</sup>

#### IV. ORDERING CLAUSES

11. Accordingly, **IT IS ORDERED** that, pursuant to Section 503(b) of the Act, and Section 1.80 of the Rules, East Kentucky Network, LLC d/b/a Appalachian Wireless **IS NOTIFIED** of its **APPARENT LIABILITY FOR A FORFEITURE** in the amount of five thousand dollars (\$5,000) for failing to file its hearing aid compatibility status report in apparent willful violation of the requirements set forth in Section 20.19(i)(1) of the Rules.<sup>33</sup>

12. **IT IS FURTHER ORDERED** that, pursuant to Section 1.80 of the Rules, within thirty days of the release date of this Notice of Apparent Liability for Forfeiture, East Kentucky Network **SHALL PAY** the full amount of the proposed forfeiture or **SHALL FILE** a written statement seeking reduction or cancellation of the proposed forfeiture.

13. Payment of the forfeiture must be made by check or similar instrument, payable to the order of the Federal Communications Commission. The payment must include the NAL/Account Number and FRN Number referenced above. Payment by check or money order may be mailed to Federal Communications Commission, P.O. Box 979088, St. Louis, MO 63197-9000. Payment by overnight mail may be sent to U.S. Bank – Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, MO 63101. Payment by wire transfer may be made to ABA Number 021030004, receiving bank TREAS/NYC, and account number 27000001. For payment by credit card, an FCC Form 159 (Remittance Advice) must be submitted. When completing the FCC Form 159, enter the NAL/Account number in block number 23A (call sign/other ID), and enter the letters "FORF" in block number 24A (payment type code). Requests for full payment under an installment plan should be sent to: Chief Financial Officer -- Financial Operations, 445 12th Street, S.W., Room 1-A625, Washington, D.C. 20554. Please contact the Financial Operations Group Help Desk at 1-877-480-3201 or Email: ARINQUIRIES@fcc.gov with any questions regarding payment procedures. East Kentucky Network will also send electronic notification on the date said payment is made to Katherine.Power@fcc.gov and Ricardo.Durham@fcc.gov.

14. The written statement seeking reduction or cancellation of the proposed forfeiture, if any, must include a detailed factual statement supported by appropriate documentation and affidavits pursuant to Sections 1.80(f)(3) and 1.16 of the Rules. The written statement must be mailed to the Office of the Secretary, Federal Communications Commission, 445 12th Street, S.W., Washington, D.C. 20554, ATTN: Enforcement Bureau – Spectrum Enforcement Division, and must include the NAL/Acct. No. referenced in the caption. The statement should also be emailed to Ricardo Durham at Ricardo.Durham@fcc.gov and Katherine Power at Katherine.Power@fcc.gov.

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<sup>31</sup> See *Praise Communications, Inc.*, Forfeiture Order, 23 FCC Rcd 9130, 9141 (Med. Bur., Audio Div. 2008) (reduction given for two "good faith" but unsuccessful attempts to file a renewal application in a timely manner); *Lazer Licenses, LLC*, Forfeiture Order, 23 FCC Rcd 2589 (Enf. Bur., West. Reg. 2008) (good faith reduction given for material timely prepared for public inspection file but misplaced).

<sup>32</sup> 47 C.F.R. § 20.19(i)(1).

<sup>33</sup> *Id.*

15. The Commission will not consider reducing or canceling a forfeiture in response to a claim of inability to pay unless the petitioner submits: (1) federal tax returns for the most recent three-year period; (2) financial statements prepared according to generally accepted accounting practices; or (3) some other reliable and objective documentation that accurately reflects the petitioner's current financial status. Any claim of inability to pay must specifically identify the basis for the claim by reference to the financial documentation submitted.

16. **IT IS FURTHER ORDERED** that a copy of this Notice of Apparent Liability for Forfeiture shall be sent by first class mail and certified mail return receipt requested to Gerald F. Robbinette, Chief Executive Officer, East Kentucky Network LLC d/b/a Appalachian Wireless, 101 Technology Trail, Ivel, Kentucky 41642, and to its counsel, Pamela L. Gist, Esquire Lukas, Nace, Gutierrez & Sachs, LLP, 1650 Tysons Blvd., Suite 1500, McLean, Virginia 22102.

FEDERAL COMMUNICATIONS COMMISSION

Kathryn S. Berthot  
Chief, Spectrum Enforcement Division  
Enforcement Bureau