

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

In the Matter of)
)
Lucent Technologies, Inc.) File No. NSD-L-99-49
)
Petition for Waiver of the Volume Control)
Requirement Contained in 47 C.F.R. 68.6)
of the Commission's Rules)

ORDER

Adopted: December 21, 1999

Released: December 23, 1999

By the Chief, Network Services Division, Common Carrier Bureau:

I. INTRODUCTION

1. On May 21, 1999, Lucent Technologies Inc. (Lucent) petitioned the Commission for a waiver of the volume control requirement contained in 47 C.F.R. § 68.6 concerning its Explosive Atmosphere (EA) telephone. This section of the Commission's Rules requires all telephones to have volume control in accordance with the technical provisions in 47 C.F.R. § 68.317 as of January 1, 2000. Lucent states that its EA telephone is compliant with all other relevant portions of 47 C.F.R. Part 68 and that it will not cause harm to the public switched telephone network ("PSTN"). On June 23, 1999, the Commission issued a public notice seeking comments on this petition.¹ No responsive pleadings were filed. For the reasons discussed below, we grant Lucent's Petition for Waiver, subject to the conditions contained in this Order.

¹ Lucent Technologies, Inc., Files Petition for Waiver; Public Comment Invited, File No. NSD-L-99-49, *Public Notice*, DA 99-1232, released June 23, 1999.

II. BACKGROUND

2. Lucent describes the EA telephone (model no. 2520B-003) as a highly specialized telephone for use in areas with explosive or combustible vapors. Its housing is made of a cast aluminum alloy and is designed to prevent any spark that may be caused within the phone from coming into contact with gas or vapors that are in the atmosphere surrounding the phone. The internal wiring must be put through special conduits for use in explosive atmospheres. Lucent claims that its EA telephone is the only one manufactured that can be used in an explosive area where a telephone must be located farther than 1000 feet from a non-explosive environment. Lucent states that it sells approximately 100 - 125 units each year.

3. All terminal equipment sold in the United States for connection to the public switched telephone network (PSTN) must be registered with the Commission pursuant to Part 68 of its rules.² To be manufactured in the U.S., or to be imported, any product that is subject to Commission registration or approval must comply with Part 68.³ Thus, the EA telephone must comply with, and be registered under, Part 68 of the Commission's rules before distribution, installation, or use.

4. The volume control requirements of Part 68 specify that, by January 2000, all wireline telephones manufactured in or imported to the U.S. must include a means for raising the loudness of the reception. These requirements were added to the Part 68 rules in 1996⁴ pursuant to the Hearing Aid Compatibility Act of 1988.⁵ Originally, the rules required compliance by November 1, 1998. In 1997, the deadline for compliance was extended to January 1, 2000.⁶

5. To ensure compliance, the Part 68 registration program requires testing of customer premises equipment (CPE) to demonstrate that it conforms to technical requirements.⁷ Equipment suppliers seeking to register their products submit application materials and test results to the Commission. If the application is complete and the test results show that the equipment complies

² 47 C.F.R. § 68.2.

³ 19 U.S.C. § 3109.

⁴ Access to Telecommunications Equipment and Services by Persons with Disabilities, *Report and Order*, 11 FCC Rcd 8249 (1996).

⁵ 47 U.S.C. § 610

⁶ Access to Telecommunications Equipment and Services by Persons with Disabilities, *Order on Reconsideration*, 12 FCC Rcd 10077 (1997).

⁷ See FCC Form 730, Application Guide, Revision C - 273 (March 1997).

with Part 68 of the Commission's rules, the Commission "registers" the equipment, assigning a "registration number" to be permanently marked on each unit. Part 68 registration indicates that the device may be manufactured or imported, and may be sold and connected to the PSTN.

III. DISCUSSION

6. In support of its waiver request, Lucent states that while the EA telephone is hearing aid compatible, Lucent has been unsuccessful in its attempts to add volume control to the handset and housing. Lucent states that all such modifications have compromised the telephone's seals, allowing vapors or gases to enter through the thumbwheel or button volume control and making the unit unsafe for use in an explosive atmosphere.

7. Lucent further argues that the EA telephone benefits the public interest in the use of the PSTN in highly unusual settings containing explosive atmospheres. The only similar competing phone, Lucent asserts, requires additional equipment within 1,000 feet that cannot be within the explosive atmosphere. Lucent states that the EA telephone conforms to all other requirements of Part 68 of the Commission's rules.

8. Lucent states that its EA telephone, although not new, continues to offer unique telecommunications access for workers in certain hazardous environments. Our analysis will evaluate this claim and balance it against the specific mandate of the HAC Act to serve consumers with hearing disabilities.

9. In analyzing Lucent's Petition, we consider the well established legal standard 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."⁸ Furthermore, the Commission will only waive a provision of its rules for good cause.⁹ The Commission takes a "hard look" at applications for waiver¹⁰ and considers all relevant factors when determining if good cause exists.¹¹ The party petitioning the Commission for a waiver bears the heavy burden of showing good cause: "[a]n applicant [for a waiver] faces a high hurdle even at the starting gate."¹² In addition, "[t]he agency must explain why deviation better serves the public interest, and articulate the nature

⁸ *FPC v. Texaco Inc.*, 377 U.S. 33, 39 (1964).

⁹ 47 C.F.R. § 1.3.

¹⁰ *Id.*

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

¹² *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969).

of the special circumstances, to prevent discriminatory application and to put future parties on notice as to its operation."¹³ Finally, a waiver of one or more portions of the Commission's rules does not excuse an applicant from compliance with the Commission's other requirements.¹⁴

10. We find, as a threshold matter, that Lucent's EA telephone serves the public interest by permitting qualified workers to use telecommunications services through the PSTN in explosive environments where such communications may make a critical difference to safe, effective work and will allow calls for help if emergencies arise. Accordingly, the issue before us is whether the EA telephone may no longer be manufactured in its present form because that form cannot permit a volume control.

11. We first consider the consequences of requiring a volume control feature that Lucent has certified would undermine the EA telephone's safety. Presumably, either Lucent would no longer produce the EA telephone at all or it would make a modified version available without the same safety assurance. In either case, consumers would lose the option of a safe phone in certain explosive conditions.

12. Next, we consider the possibility that the use of unmodified EA telephones will harm people whom the HAC volume control requirements were intended to benefit. We believe that given the small number of EA telephones sold each year and the rare circumstances in which they are used, this frequency is likely to be slight. Accordingly, we conclude that the public interest in allowing continued availability of the EA telephone outweighs its present inaccessibility to individuals who need volume control. Thus, we find that Lucent has met the required burden of showing good cause for its waiver request.

13. Since the date of Lucent's filing, the Commission has adopted rules to implement Section 255 of the Communications Act, intended by Congress to provide access to telecommunications by persons with disabilities.¹⁵ These rules require manufacturers of customer premises equipment to incorporate accessibility features, if readily achievable, at every natural point in the product development process. Revisions to the design of the EA telephone would, we believe, be subject to this mandate. Accordingly, if the EA telephone is modified, or if it becomes "readily achievable" to include a volume control device over time, Lucent must renew this waiver request if it is not planning to add volume control in a revised model.

¹³ *Northeast Cellular Telephone Company, L.P. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990).

¹⁴ See 47 C.F.R. § 1.3; Part 68 Waiver Request of Alameda Engineering, Inc., et al., Order, 10 FCC Rcd 12135 (Com. Car. Bur. 1995) (Alameda Order).

¹⁵ Implementation of Section 255 and 251(a)(2) of the Communications Act of 1934, As enacted by the Telecommunications Act of 1996- Access to Telecommunications Service, Telecommunications Equipment and Customer Premises Equipment by Persons with Disabilities, WT Docket No. 96-198, *Report and Order and Further Notice of Inquiry*, FCC 99-181, released September 29, 1999.

14. We further require that Lucent indicate a lack of volume control support in the product literature of the EA telephone, and reference this Commission waiver should consumers desire further information.

15. In summary, we conclude that Petitioners have shown good cause for granting this Petition, and that grant of this petition will not result in harm to the PSTN. We emphasize the conditions for grant of this waiver.

ORDERING CLAUSE

16. Accordingly, IT IS HEREBY ORDERED, 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, that Lucent Technologies, Inc.'s Petition for Waiver of Section 68.6 of the Rules, 47 C.F.R. § 68.6 IS GRANTED subject to the conditions stated herein.

FEDERAL COMMUNICATIONS COMMISSION

L. Charles Keller
Chief, Network Services Division
Common Carrier Bureau