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

In the Matter of)
)
Draft Publication 772105)
Interpretation of Section 15.103(d))
Of the Commission's Rules)

COMMENTS OF THE ASSOCIATION OF HOME APPLIANCE MANUFACTURERS

The Association of Home Appliance Manufacturers (“AHAM”), pursuant to the invitation extended by the Commission’s Office of Engineering and Technology, Laboratory Division (“OET”) on April 27, 2012,^{1/} submits these comments in response to the proposed classification of certain appliances as exempt from the technical standards and other requirements of Part 15 of the Commission’s rules. While AHAM appreciates OET’s attempt to provide guidance to the public, the FCC’s regulations and associated decisions make clear that all household appliances that contain digital devices are exempt from Part 15 rules. Accordingly, OET should set aside its proposed and previous clarifications of Section 15.103(d) of the rules.

I. INTRODUCTION

The Association of Home Appliance Manufacturers (AHAM) represents manufacturers of major, portable and floor care home appliances, and suppliers to the industry.^{2/} AHAM’s

^{1/} See Federal Communications Commission, Office of Engineering and Technology, Knowledge Database Publication No. 772105 (April 27, 2012) (“2012 Draft Guidance”).

^{2/} Major appliances manufactured by AHAM members include refrigerators/freezers, clothes washers and dryers, kitchen ranges and ovens (gas and electric), microwave ovens, room air conditioners and dishwashers.

membership includes over 150 companies throughout the world. In the U.S., AHAM members employ tens of thousands of people and produce more than 95% of the household appliances shipped for sale. The factory shipment value of these products is more than \$30 billion annually. The home appliance industry, through its products and innovation, is essential to U.S. consumer lifestyle, health, safety and convenience. Through its technology, employees and productivity, the industry contributes significantly to U.S. jobs and economic security. Home appliances also are a success story in terms of energy efficiency and environmental protection. New appliances often represent the most effective choice a consumer can make to reduce home energy use and costs.

The Draft Guidance would modify previous guidance OET issued on November 19, 2009, in which it categorized several appliances as exempt or not-exempt under Section 15.103(d) of the rules.^{3/} The Draft Guidance would add to the list of non-exempt devices power tools, cordless multi-tools and battery operated tools. AHAM opposes the Draft Guidance because, like the 2009 Guidance, it impermissibly goes outside the scope of the rules governing appliances with digital devices. Accordingly, OET should take this opportunity to set aside the 2009 Guidance and not adopt the Draft Guidance. Because AHAM's members manufacture and sell the products that are the subject of the OET's Draft Guidance, AHAM is pleased to have an opportunity to submit the following comments.

II. DISCUSSION

A. OET's Proposal to Distinguish Between Appliances Is Contrary to Precedent.

While the informal process that OET uses to offer guidance to the public—posting questions and later answers, on the FCC's website—is valuable, in this case the proposed and

^{3/} See Federal Communications Commission, Office of Engineering and Technology, Knowledge Database Publication No. 772105 (Nov. 19, 2009) (“2009 Guidance”).

existing guidance contradict precedent and must be set aside. The predecessor to the rule that OET now proposes to interpret was first adopted in a proceeding initiated to address radiofrequency (“RF”) emissions from personal computers (which it described at the time as “computing devices”).^{4/} The rules that the FCC initially adopted in that proceeding included many other digital devices which would have been subject to FCC regulation, including the FCC’s equipment authorization rules. As a result, in a 1980 Order on Reconsideration, the FCC decided to exempt some devices: “on reconsideration, we find that additional information may be useful to further assess the impact of the new rules on electronics in automobiles, industrial control systems, and microprocessors and other digital devices used in home appliances.”^{5/} With respect to the exemption for home appliances, the FCC stated:

Home appliances are included in the above list [of exempted devices] for several reasons, even though a specific exemption was not requested [by the petitions for reconsideration]. First, regulations to control interference from home appliances to radio communications is a massive undertaking. Moreover, it should include all home appliances – not only those appliances that incorporate digital components for control purposes. We see no reason to treat appliances that simply use digital circuitry in lieu of more traditional electromechanical circuitry differently. Second, emissions from home appliances have some unique characteristics that may require special test procedures requiring additional investigations. Third, the cost benefit of such regulation will need further assessment, due to the vastness of the appliance market. The same considerations also apply to the automotive electronics and industrial control systems.^{6/}

^{4/} See *Amendment of Part 15 to Redefine and Clarify the Rules Governing Restricted Radiation Devices and Low Power Communication Devices*, First Report and Order, 79 FCC 2d 28, ¶ 2 (1979) (“*1979 First Report and Order*”) (adopting regulations “to reduce the interference potential of electronic computing equipment”); *Amendment of Part 15 to Redefine and Clarify the Rules Governing Restricted Radiation Devices and Low Power Communication Devices*, Order Granting in Part Reconsideration of First Report and Order, 79 FCC 2d 67, ¶ 6 (1980) (“*1980 Order on Reconsideration*”) (noting that the *1979 First Report and Order* “was restricted to computing devices” and defining such devices as “a specific class of restricted radiation device that generates RF energy and uses digital techniques and may radiate RF energy as an undesired byproduct”). Computing devices were a subset of what the FCC referred to as “restricted radiation devices.” In 1989, the FCC replaced the term “restricted radiation devices” with two new categories of devices: intentional radiators and unintentional radiators. See *Revision of Part 15 of the Rules Regarding the Operation of Radio Frequency Devices without an Individual License*, First Report and Order, 4 FCC Rcd 3493, ¶ 16 (1989) (“*1989 Order*”).

^{5/} *1980 Order on Reconsideration* ¶ 54.

^{6/} *1980 Order on Reconsideration* ¶ 55.

In 1980, therefore, the Commission did not intend to distinguish among appliances with digital devices that might be exempt from regulation. To the contrary, the Commission recognized the vastness of the home appliance market and recognized that without further assessment, it could not make meaningful distinctions.^{7/}

Now the 2009 Guidance and the Draft Guidance distinguish between appliances, exactly what the FCC said it could not do in 1980 without further evaluation. The distinction between, for example, trash compactors (which the FCC would consider exempt appliances) and paper shredders (which the FCC would consider non-exempt appliances) is precisely the type of decision the FCC said it could not make in 1980 without a further proceeding. Despite its desire to clarify the rules, OET cannot take action under delegated authority that is contrary to action the FCC itself took. As the Court of Appeals for the DC Circuit has explained, “a subordinate body . . . cannot alter a policy set by the Commission itself.”^{8/} Because the FCC said it could not categorize appliances, OET cannot do so either. Accordingly, OET should set aside its 2009 Guidance and Draft Guidance.

B. The Proposed Clarification Is Not a Permissible Interpretation Under the Administrative Procedure Act.

AHAM recognizes that OET may, consistent with the Administrative Procedure Act (“APA”), interpret its rules consistent with past decisions, without adhering to notice and

^{7/} See *1980 Order on Reconsideration* ¶ 55. In 1989, the Commission, in addition to redefining “restricted radiation devices,” revised and reorganized Part 15 of its rules. The FCC’s *1989 Order* imported the exemptions from the FCC’s *1980 Order on Reconsideration* originally intended for computing devices, including the appliance exemption, into the new Section 15.103. The Commission did so without any meaningful discussion of or substantive changes to the exemptions. See *1989 Order* at Appendix B.

^{8/} See *Jelks v. FCC*, 146 F.3d 878, 881 (D.C. Cir. 1998), *cert. denied*, 119 S. Ct. 1045 (1999); see also *Continental Cellular*, Memorandum Opinion and Order, 6 FCC Rcd 6834, ¶ 13, n.25 (1991) (“The Commission is not bound to apply a decision issued on delegated authority that is contrary to the Commission’s Rules.”).

comment procedures.^{9/} But the 2009 Guidance and the Draft Guidance go too far. OET cannot interpret the FCC’s regulations in a manner that undermines or is inconsistent with those regulations.^{10/} A decision that would substantively alter the Commission’s rules, such as a decision to change the broad scope of the Section 15.103 appliance exemption, would trigger the obligation to initiate a notice and comment rulemaking under the APA.^{11/}

The FCC may clarify its rules under the APA. Indeed, in 1993, OET issued Bulletin No. 62, addressing the rules governing digital devices (the successor term to “computing devices”).^{12/} Bulletin No. 62 adheres more closely to the type of interpretation permitted by the APA without a rulemaking proceeding. There, OET described the exemption as follows:

Digital devices used EXCLUSIVELY in appliances. “Appliances” are devices that are designed to heat, cool or move something by converting electrical energy into heat or motion. Examples of appliances include vacuum cleaners, toasters, air conditioners and clothes dryers. Examples of things that are NOT appliances include lights, telephones, home security systems, exercise bicycles and clock radios. Devices that use radio

^{9/} See *Cost-Based Terminating Compensation for CMRS Providers; Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Calling Party Pays Service Offering in the Commercial Mobile Radio Services*, Order, 18 FCC Rcd 18441, ¶ 22 (2003) (“2003 CMRS Order”) (“The requirements of notice and opportunity to comment do not apply to interpretive rules – rules that do ‘not contain new substance but merely express the agency’s understanding’ of a statute.”); *C.F. Communications Corp. v. Century Telephone of Wisconsin, Inc., et al.*, Memorandum Opinion and Order, 10 FCC Rcd 9775, ¶ 11 (1995) (“The courts have repeatedly recognized the authority of agencies to interpret their own rules.”) (citing *Udall v. Tallman*, 380 U.S. 1, 16-17 (1965)).

^{10/} See *Universal Service Contribution Methodology, Federal-State Joint Board on Universal Service; Petitions for Reconsideration and Clarification of the InterCall Order; Global Conference Partners, A+ Conference Ltd., Free Conferencing Corporation, and The Conference Group*, Order on Reconsideration, 27 FCC Rcd 898, ¶ 15 (2012) (“The Commission may interpret its own rules *consistent with* existing regulations, without initiating a new rulemaking proceeding.”) (*emphasis added*); *2003 CMRS Order* ¶ 23 (“[A] new APA rulemaking is required only if an agency adopts[s] a new position inconsistent with any of the [agency’s] existing regulations.”) (internal quotations omitted).

^{11/} See *Sprint Corp. v. FCC*, 315 F.3d 369, 374 (D.C. Cir. 2003) (“Whereas a clarification may be embodied in an interpretive rule that is exempt from notice and comment requirements, new rules that work substantive changes in prior regulations are subject to the APA’s procedures.”) (internal citations omitted).

^{12/} See FCC Office of Engineering and Technology, *Understanding the FCC Regulations for Computers and Other Digital Devices*, OET Bulletin No. 62 (Dec. 1993) (“Bulletin No. 62”).

frequency energy to do the actual heating, cooling or moving, such as microwave ovens, are subject to technical standards in Part 18 of the FCC rules.^{13/}

This attempt to *define* appliances differs from the FCC's current proposal, which would *distinguish between* appliances.

Bulletin No. 62 provides a broad outline of what the FCC considers an “appliance” under its rules as well as *examples* of devices that would be considered (or not considered) appliances.^{14/} Because the list of appliances is illustrative and not exhaustive, appliance manufacturers could reasonably rely on the broad definition of devices that are designed to “heat, cool, or move” something to determine whether their devices are exempt under Section 15.103(d) of the rules. Importantly, Bulletin No. 62 does not attempt to distinguish between appliances that are exempt and not exempt, thereby altering the Commission's rules exempting *all* appliances. For example, it does not state that vacuum cleaners, which are appliances, are exempt whereas toasters, which are also appliances, are not exempt. The 2009 Guidance and the Draft Guidance, in contrast, go beyond Bulletin No. 62 by distinguishing between appliances. They acknowledge that all the devices they cover are “appliances” and attempt to assert that some appliances, such as electrical machines intended for household tasks, are covered by the exemption in Section 15.103, while others, such as appliances that contain “other ancillary functions,” are not.^{15/}

While an attempt to define a vague term in the FCC's rules is permissible under the APA,^{16/} any attempt to accomplish by interpretation something that the agency declined to do by

^{13/} Bulletin No. 62 at 7.

^{14/} See Bulletin No. 62 at 7.

^{15/} See 2012 Draft Guidance; 2009 Guidance.

^{16/} As the D.C. Circuit has clarified, interpretive rulings are properly used to clarify the original meaning and application of an agency's substantive rules. See *Sprint Corp.*, 315 F.3d at 373-74; 2003 CMRS

rule is not. In this case, the FCC may reasonably interpret the term “appliance” to determine the scope of Section 15.103(b) of the rules as it did in Bulletin No. 62. However, once defined, all appliances would have to be covered by the rule under the Commission’s 1980 decision in this matter.

C. There Is No Basis for the Distinctions OET Proposes.

Nevertheless, both the 2009 Guidance and the Draft Guidance attempt to distinguish between appliances without sound policy or engineering bases and should be re-evaluated. The purpose of including as unintentional radiators devices that have digital microprocessors and similar components is to ensure that they do not cause harmful interference. There is no evidence that *any* appliances with digital devices cause RF interference. Moreover, there is no evidence that different types of appliances cause different levels of RF interference (using the example above, that paper shredders cause more RF interference than trash compactors). Thus, the OET’s guidance documents are without justification, absent any evidence that home appliances represent a source of RF interference, subjecting them to testing and other obligations under Part 15 of the FCC’s rules, and simply add costs and delay to the production and distribution of those products, which may result in higher prices and slower delivery to consumers.^{17/}

Only after appropriate analyses can the Commission properly establish objective criteria to determine the appliances that should be subject to the testing procedures and other regulations under Part 15 of the rules. The current OET approach—to address the appliances that should be

Order ¶ 23 (“The D.C. Circuit has repeatedly held that interpretive rulings are properly used to clarify the original meaning and application of an agency’s substantive rules.”).

^{17/} Even though the guidance that OET has provided and proposes to provide are not regulations adopted by the FCC, appliance manufacturers and third parties rely on that guidance to avoid the possibility of potential FCC enforcement action.

subject to the Part 15 rules on an *ad hoc* basis without complete technical analysis—is not in the public interest.

III. CONCLUSION

For the foregoing reasons, OET should set aside its proposed and previous clarifications of Section 15.103(d) of the rules. They improperly revise the scope of devices covered under the Section 15.103(d) exemption, contrary to the FCC’s past decisions, and violate the procedures in the APA. Furthermore, they are unsupported by the facts. To allow these guidance documents to remain in full force and effect would result in the imposition of unnecessary delay and compliance costs on the manufacturing industry to the detriment of consumers and the public interest.

Respectfully submitted,

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