

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

**In the Matter of** )  
 )  
**WUE, Inc.** )  
 )  
**Section 68.4(a) of the Commission's Rules** )  
**Governing Hearing Aid Compatible** )  
**Telephones** ) **WT Docket No. 01-309**  
 )  
**Request for Temporary Waiver, or** )  
**Temporary Stay, of** )  
**Section 20.19(c)(2)(i) of the Rules** )

**To: Chief, Wireless Telecommunications Bureau**

**PETITION FOR TEMPORARY WAIVER OR TEMPORARY STAY**

WUE, Inc. ("WUE"), by its attorneys and pursuant to Sections 1.3 and 1.925 of the Commission's Rules, hereby requests a one-year temporary waiver, or temporary stay, up to and including September 16, 2006, of the requirements contained in Section 20.19(c)(2)(i) of the Rules that WUE include in its handset offerings at least two handset models per air interface that comply with Rule Section 20.19(b)(1), and make available in each retail store owned or operated by it all of these handset models for consumers to test in the store. In support hereof, the following is shown:

**Background**

1. WUE is the licensee of Cellular Radiotelephone Service Station KNKR319, serving rural areas located in the B2 Segment of the Nevada 5 – White Pine RSA. WUE has fewer than 500,000 subscribers. As such, it is a Tier III Commercial Mobile Radio

Service (“CMRS”) provider, as defined in the Commission’s Non-Nationwide Carriers Order (Order to Stay), 17 FCC Rcd. 14841, Para. No. 22 (2002).

2. The digital portion of the cellular system employs the Code Division Multiple Access (“CDMA”) air interface. WUE markets anywhere from one to three digital wireless telephone models, depending upon their availability. These handsets are typically ones manufactured by Samsung, LG and Nokia. None of these handsets meets a U3 rating for radio frequency interference under ANSI Standard C63.19.

#### **Rule Section 20.19(c)(2)(i) Requirements**

3. Section 20.19(c)(2)(i) of the Commission’s Rules specifies that “each provider of public mobile radio service must ... [i]nclude in its handset offerings at least two handset models per air interface that comply with Section 20.19(b)(1) by September 16, 2005, and make available in each retail store owned or operated by the provider all of these handset models for consumers to test in the store ...” Rule Section 20.19(b)(1) specifies that a “wireless phone used for public mobile radio services is hearing aid compatible ... if it meets, at a minimum” a U3 rating for radio frequency interference under ANSI Standard C63.19. Thus, the rule requirement is generally applicable to all Tier III CMRS carriers. It requires WUE to offer, and to make available for in-store testing by consumers, for its CDMA digital air interface at least two Hearing Aid Compatible (“HAC”) digital wireless telephones meeting a U3 rating under ANSI Standard C63.19 for radio frequency interference by the September 16, 2005 implementation deadline. Because WUE sometimes offers more than two digital wireless

telephones for the CDMA air interface, it does not qualify all the time for the *de minimis* exception codified in Section 20.19(e)(1) of the Commission's Rules.

### **Waiver Standard**

4. The Commission has indicated generally that waiver requests of the Hearing Aid Compatible ("HAC") digital wireless handset requirements will be evaluated under the general waiver standard set forth in Sections 1.3 and 1.925 of the Rules and the standards set forth in WAIT Radio v. FCC, 418 F.2d 1153 (D.C. Cir. 1969), *appeal after remand*, 459 F.2d 1203 (D.C. Cir. 1972), *cert. denied*, 409 U.S. 1027 (1972) and Northeast Cellular Telephone Company v. FCC, 897 F.2d 1164(D.C. Cir. 1990). Hearing Aid Compatible Telephones (WT Docket No. 01-309 – Order on Reconsideration and Further Notice of Proposed Rulemaking), FCC 05-122, released June 21, 2005 at Para. No. 50 ("Order on Reconsideration").

5. Section 1.3 of the Rules states, in relevant part, that "[a]ny provision of the rules may be waived by the Commission on its own motion or on petition if good cause therefor is shown." Section 1.925(b)(3) of the Rules states that the "Commission may grant a waiver request if it is shown that: (i) [t]he underlying purpose of the rule(s) would not be served or would be frustrated by application to the instant case, and that a grant of the requested waiver would be in the public interest; or (ii) [i]n 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." Under WAIT Radio and Northeast Cellular Telephone Company, a rule waiver "may be granted in instances where the particular facts make strict compliance

inconsistent with the public interest if applied to the petitioner and when the relief requested would not undermine the policy objective of the rule in question.” Order on Reconsideration, Para. 50 n. 158.

**A Waiver Is Warranted Because Compliant Handsets Are Not Available To Small Carriers**

6. The reason in support of this waiver request is starkly simple and can be concisely stated: There are no HAC compliant digital wireless telephones available for purchase by smaller carriers, such as WUE, that meet a U3 rating under ANSI Standard C63.19 for radio frequency interference. As a result, compliance with the requirements of Section 20.19(c)(2)(i) of the Rules is an impossibility, and, therefore, a temporary waiver of the Rule’s requirements is clearly warranted.

7. In adopting the Rule Section 20.19(c)(2)(i) September 16, 2005 implementation deadline for Tier II and Tier III CMRS carriers, the Commission projected (but, obviously, could not assure) that digital wireless handsets meeting a U3 rating under ANSI Standard C63.19 for radio frequency interference would be made available by the manufacturers for purchase by smaller carriers by that date. Hearing-Aid Compatible Telephones (WT Docket No. 01-309 – Report and Order), 18 FCC Rcd. 16753 (2003). While some industry progress has been made toward developing compliant handsets, it does not appear that research and development activities have reached the point where the handset manufacturers can make the handsets commercially available to any carrier (large or small). Thus, for example, the most recent report in this Docket by The Alliance for Telecommunications Industry Solutions (“ATIS”), filed on May 17, 2005, states “that a number of recent, substantive developments have made it

difficult for handset vendors to evaluate their products for hearing aid compatibility pursuant to the C63.19 Standard;” that each “of the wireless air interface technologies (CDMA, GSM, iDEN, TDMA) has challenges to overcome in order to achieve hearing aid compatibility in accordance with the C63.19 Technical Measurement Standard;” and that the “ability to combine air interfaces as well as multiple frequency bands within a single wireless device creates tougher challenges and increases the level of complexity for achieving [Hearing Aid Compatible Wireless Devices].” See ATIS’ “Hearing Aid Compatibility Report #3,” filed May 17, 2005 at pages 3 and 7. Statements submitted by individual handset manufacturers as part of the ATIS report indicate that some have a few handset models **believed** to be compliant, but it appears that no compliant handsets have been made available commercially for purchase by any carrier, large or small.

8. Assuming for purposes of argument that some compliant digital wireless handset models are commercially available, it is nevertheless clear that none are available for purchase by WUE. Thus, once compliant handsets are being marketed commercially, it is clear that the handset manufacturers will be concentrating on meeting the needs of the larger (*i.e.*, Tier I) carriers, to the exclusion of smaller carriers.

9. Given these facts and circumstances, it seems abundantly clear that the temporary relief requested herein is warranted and in the public interest, and that good cause exists to grant the temporary waiver requested. Where the Commission’s projections of technological feasibility and commercial availability do not pan out, waiver of the requirements would appear to be particularly appropriate. Indeed, basic principles of administrative law prohibit the Commission from compelling carriers to do the impossible. See, e.g., Alliance for Cannabis Therapeutics v. DEA, 930 F.2d 936, 940

(D.C. Cir. 1991); Hughey v. JMS Development Corp., 78 F.3d 1523, 1530 (11<sup>th</sup> Cir. 1996). Furthermore, the Commission has acknowledged that Tier II and Tier III CMRS carriers “have much less ability than the nationwide CMRS carriers to obtain specific vendor commitments necessary” to deploy the equipment needed to meet regulatory requirements; that “handset vendors ... give priority to the larger, nationwide carriers;” that the deployment needs of the larger carriers create “downstream delays for Tier II and III carriers;” and, accordingly, “that there are temporary and special circumstances applicable to [Tier II and Tier III carriers] that constitute a sufficient basis to grant a stay on a limited and temporary basis” from Commission-imposed regulatory requirements. Non-Nationwide Carriers (Order to Stay), 17 FCC Rcd. 14841, Para Nos. 10 and 11 (2002). See also, FCI 900, Inc., 16 FCC Rcd. 11072 (Comm. Wir, Div., WTB 2001) (granting all 900 MHz MTA licensees an extension of the construction deadline so that they might deploy advanced digital 900 MHz systems, where the subject digital voice equipment was not commercially available in sufficient quantities in time to meet the five-year construction deadline).<sup>1</sup> WUE simply has no control over the equipment development and distribution practices of the handset manufacturers. The lack of available digital wireless handsets that meet the Commission’s HAC requirements is, quite obviously, a circumstance clearly beyond the carrier’s control. In view of the

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<sup>1</sup> Additional case precedent supports this position. See Leap Wireless International, Inc., 16 FCC Rcd. 19573 (Comm. Wir. Div., WTB (2001) (granting extension of time so that licensee might deploy “high data rate” wireless technology that was not available in time to meet the five-year construction requirement); Monet Mobile Networks, Inc., 17 FCC Rcd. 6452 (Comm. Wir. Div., WTB 2002) (granting extension of time so that licensee might deploy “high data rate” wireless technology that was not available in time to meet the five-year construction requirement); and Warren C. Havens, Mimeo DA 04-2100, adopted July 12, 2004 (granting extension of the five-year construction requirement for

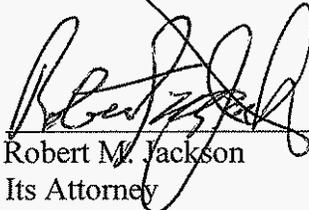
unique or unusual factual circumstances present here, application of the rule would clearly be inequitable, unduly burdensome and contrary to the public interest. In view of the fact that compliant digital wireless handsets are simply not available, WUE clearly has no reasonable alternative but to request the instant waiver.

10. WUE wishes to assure the Commission that it is committed to providing its hearing impaired subscribers with digital wireless handsets meeting a U3 rating under ANSI Standard C63.19 at the earliest practicable date, and that it will do so promptly once the handsets become generally available to Tier III carriers.

**WHEREFORE**, good cause shown, WUE requests that the instant petition be granted.

Respectfully submitted,

**WUE, Inc.**

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220 MHz licensees to allow for the use of next-generation digital technology in the band).

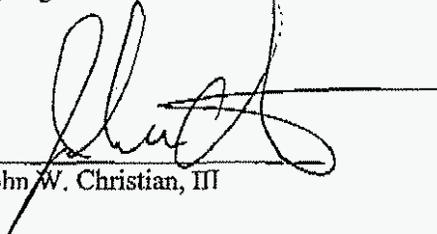
**DECLARATION UNDER PENALTY OF PERJURY**

I, John W. Christian, III, hereby state the following:

1. I am the President of WUE, Inc.

2. I have read the foregoing "Petition for Temporary Waiver or Temporary Stay." With the exception of those facts of which official notice can be taken, all facts set forth therein are true and correct to the best of my knowledge, information and belief.

I declare under penalty of perjury that the foregoing is true and correct. Executed on this 13th day of September, 2005.



John W. Christian, III