

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

In the Matter of)	
)	
Section 68.4 of the Commission's Rules)	WT Docket No. 01-309
Governing Hearing Aid-Compatible)	
Telephones)	
)	
Petition for Waiver of)	
Section 20.19(c)(2)(i)(B)(1) of the)	
Commission's Rules)	

**Petition for Limited Waiver
of Section 20.19(c)(2)(i)(B)(1) of the Commission's Rules**

C.T. Cube, L.P. dba West Central Wireless (“CT Cube”), by its attorneys and pursuant to Sections 1.3 and 1.925 of the Rules and Regulations of the Federal Communications Commission (FCC or Commission),¹ hereby requests a limited and temporary waiver of Section 20.19(c)(2)(i)(B)(1) of the Commission's rules.² CT Cube has overbuilt much of its TDMA network with the GSM air interface and continues to provide service over its TDMA network to its customers who have not upgraded to GSM phones. CT Cube is fully committed to ensuring access to digital wireless services by individuals with hearing loss. However, because GSM hearing aid compatible (HAC) handsets that meet a U3 rating under the current C63.19 standard are not commercially available,³ or available in sufficient quantity to allow CT Cube to obtain them prior to September 16, 2005, CT Cube is compelled to seek a waiver of the FCC's requirement that CT Cube offer in the GSM portion of its network at least two handsets meeting a U3 or higher

¹ 47 C.F.R. §§ 1.3 and 1.925.

² 47 C.F.R. §§ 20.19(c)(2)(i)(A); 20.19(c)(2)(i)(B)(1)

³ With manufacturers scrambling to get handsets certified as HAC compliant during these last hours leading up to the September 16, 2005 deadline, CT Cube recognizes the possibility that certain GSM handsets may be certified as HAC compliant prior to the September 16, 2005 deadline. However, as of September 14, 2005, when this pleading was prepared, no GSM handsets were certified as HAC compliant.

interference rating and CT Cube respectfully requests a six month extension of the September 16, 2005 deadline.⁴ However, to the extent that GSM U3 rated handsets become commercially available to CT Cube in sufficient quantity, CT Cube will offer at least two GSM handset models that meet a U3 or higher interference rating as soon as possible. Grant of the instant waiver request is consistent with the public interest as outlined below.

I. CT Cube Is Unable to Meet the FCC’s September 16, 2005 HAC Handset Availability Deadline Due to Factors Outside of Its Control

Section 20.19(c)(2)(i)(B) of the Commission’s rules requires that “[i]n the event a provider of public mobile radio services is using a TDMA air interface and plans to overbuild (*i.e.*, replace) its network to employ alternative air interface(s), it must: (1) offer two handset models that comply with § 20.19(b)(1) by September 16, 2005, to its customers that receive service from the overbuilt (*i.e.*, non-TDMA) portion of its network, and make available in each retail store it owns or operates all of these handset models for consumers to test in the store, (2) overbuild (*i.e.*, replace) its entire network to employ alternative air interface(s), and (3) complete the overbuild by September 18, 2006.”⁵

CT Cube has almost completed its GSM overbuild and anticipates that it will comply with Sections 20.19(c)(2)(i)(B)(2) and (3) of the Commission’s rules well before the Commission’s overbuild deadline. However, for the reasons discussed herein, CT Cube will not be able to comply with Section 20.19(c)(2)(i)(B)(1).

As the Commission is well aware, manufacturers have had great difficulty in manufacturing GSM wireless handsets that meet the Commission’s HAC requirements on both the 850 MHz and 1900 MHz bands. In fact, Cingular, T-Mobile and the Alliance for Telecommunications Industry Solutions Hearing Aid Compatibility Incubator Working Group 9 have all indicated in filings with

⁴ *Id.*

⁵ 47 C.F.R. § 20.19(c)(2)(i)(B).

the Commission that hearing aid compatibility in the 850 MHz band is currently technologically infeasible.⁶ T-Mobile and Cingular, the two nationwide GSM carriers, have indicated that without relief from the Commission compliance with the Commission's September 16, 2005 benchmark would be impossible. In response to some of these filings,⁷ on September 8, 2005 the FCC adopted temporary limited relief which allows, until August 1, 2006, manufacturers and wireless carriers to base the HAC compliance rating of dual-mode GSM handsets on their operation in the 1900 MHz band only.⁸ While the relief addresses CT Cube's inability to obtain handsets that meet the FCC's HAC requirements while operating in the 850 MHz band, the September 8 waiver order does not address the availability of handsets that are HAC compliant at 1900 MHz. Accordingly, and as discussed below, CT Cube requires a waiver of the Commission's September 16, 2005 HAC benchmark.

CT Cube has worked and will continue to work diligently with handset manufacturers and distributors to try and obtain handsets that meet the Commission's technical standards set forth in Section 20.19(b) of its rules. As CT Cube reported in each of its HAC Reports, CT Cube has inquired with handset manufacturers regarding the availability of GSM HAC compliant handsets.⁹ As of September 14, 2005, no GSM wireless handset had been certified and authorized as HAC compliant by the Telecommunications Certification Body (TCB) and the FCC's Office of

⁶ Cingular Wireless LLC Petition for Waiver of Section 20.19(c)(3)(i)(A) of the Commission's Rules, WT Docket 01-309 (filed August 5, 2005) ("*Cingular Petition*"); T-Mobile USA, Inc. Petition for Waiver, WT Docket No. 01-309, (filed August 26, 2005) ("*T-Mobile Petition*"); Letter from Thomas Goode, counsel to ATIS and Presentation of the HAC Incubator Working Group 9, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 01-309 (filed August 1, 2005).

⁷ The Commission has yet to rule on the *T-Mobile Petition*. T-Mobile has requested an additional 60 days to deploy all four of the requisite HAC handsets.

⁸ Section 68.4(a) of the Commission's Rules Governing Hearing Aid-Compatible Telephones, *Memorandum Opinion and Order*, WT Docket No. 01-309 (released September 8, 2005).

⁹ CT Cube has contacted the following handset manufacturers concerning HAC-compliant handset availability: Audiovox, Kyocera, LG, Motorola, Nokia, Panasonic, Samsung, Siemens and Sony Ericson.

Engineering and Technology (OET), even under the relaxed standard.¹⁰ In CT Cube's most recent discussions with Motorola and Nokia, CT Cube has been informed that each manufacturer anticipates that two of their handsets will be certified HAC compliant, but they are unsure whether this will occur prior to the September 16, 2005 deadline.¹¹ Moreover, the handsets that Motorola and Nokia *think* will be HAC compliant are very new to market and are not currently in CT Cube's wireless handset inventory. As discussed in more detail below, manufacturer delay in identifying HAC compliant handsets, the anticipated distributor-associated delays in delivery of HAC compliant handsets, when and if they become available, and the need for CT Cube to test HAC compliant handsets on its network, will prevent CT Cube from meeting its September 16, 2005 HAC deadline.

When Congress enacted the HAC Act in 1988 it required that telephones provide an internal means for effective use with hearing aids.¹² Initially, wireless handsets were exempt from the HAC Act, but the Commission was authorized to revoke or limit any exemption if, among other things, compliance became "technologically feasible for the telephones to which the exemption applies."¹³ In 2003, the FCC decided to lift the wireless handset exemption and set forth specific benchmarks with respect to the manufacture and sale of hearing aid compatible handsets.¹⁴ Specifically, the Commission set a September 16, 2005 deadline for manufacturers to "offer to service providers at least two handset models for each air interface that comply with §20.19(b)(1)..." and for non-Tier I

¹⁰ FCC Office of Engineering and Technology Equipment Authorization General Search Page, September 12, 2005 <https://gullfoss2.fcc.gov/prod/oet/cf/eas/reports/GenericSearch.cfm>.

¹¹ No other manufacturer that has responded to CT Cube's inquiries has indicated whether they will have a HAC compliant handset available for sale prior to the September 16, 2005 deadline.

¹² Hearing Aid Compatibility Act of 1988, Pub. L. 100-394, § 3(a), 102 Stat. 976 (1988).

¹³ *Id.*

¹⁴ See Section 68.4(a) of the Commission's Rules Governing Hearing Aid-Compatible Telephones, Report and Order, WT Docket No. 01-309, 18 FCC Rcd 16753 (2003) ("HAC Order").

service providers¹⁵ to “[i]nclude in their handset offerings at least two handset models per air interface that comply with 20.19(b)(1)...”¹⁶ As discussed above, the Commission subsequently amended its rules to give TDMA carriers transitioning to an alternate air interface additional time until September 18, 2006 in which to comply, but required that such carriers still offer by September 16, 2005 two HAC compliant handsets in the non-TDMA portion of their service area. In establishing a September 16, 2005 deadline for *both* manufacturers and all wireless providers to make available HAC compliant handsets, the Commission reasoned that “two years is an appropriate period of time to allow for manufacturers to produce and label digital wireless phones which comply with the U3 level for reduced emissions and for service providers to begin offering them to consumers.”¹⁷

As detailed in CT Cube’s HAC Reports on file in this docket, CT Cube has worked diligently since the Commission announced the modification to the exemption for wireless phones in 2003 to ensure that it would meet the Commission’s HAC benchmarks. CT Cube has not only worked with handset distributors, but has also made repeated contact with handset manufacturers to try and determine when GSM wireless handsets would be available that meet all of the Commission’s benchmarks. However, despite these efforts, CT Cube is merely a purchaser and not a manufacturer of wireless handsets and therefore has little to no ability to affect the availability of HAC handsets from manufacturers.

Even Cingular Wireless, the nation’s largest wireless carrier, acknowledges that it “has only the ability to indirectly affect the availability of HAC phones from vendors.”¹⁸ Likewise, T-Mobile,

¹⁵ Tier I service providers are subject to a more stringent standard. By September 16, 2005, such carriers must make available to consumers, per air interface, four U3-rated handsets, or twenty-five percent of the total number of handsets they offer nationwide. 47 C.F.R. § 20.19(c)(3).

¹⁶ 47 C.F.R. § 20.19(c). §20.19(b)(1) states that a wireless phone needs to meet the U3 standard.

¹⁷ See *HAC Order* at ¶ 71.

¹⁸ *Cingular Petition* at 18.

the other GSM nationwide carrier, states that it will need an additional 60 days to obtain, test and deploy HAC compliant GSM handsets.¹⁹ As a small carrier with considerably less market clout than nationwide carriers like Cingular Wireless and T-Mobile, CT Cube is given low priority by wireless handset vendors in fulfilling wireless handset orders.²⁰ As a result, CT Cube will not be able to even begin its own GSM network testing until after Cingular and T-Mobile's GSM HAC compliant handset orders are filled.

The lack of certifications of GSM HAC compliant handsets at this late date indicates that many manufacturers may not meet the September 16, 2005 deadline. This conclusion is consistent with information that CT Cube has obtained from handset manufacturers, handset distributors and the OET website. Although the Commission has relaxed the HAC rating standard for GSM handsets, manufacturers still need to identify handsets that they believe will achieve a U3 rating at 1900 MHz, obtain certification from the TCB and obtain final authorization from the OET. Even if manufacturers were to immediately indicate which of their handsets are certified and approved as HAC compliant, CT Cube, at this late date, would not have sufficient time to meet the September 16, 2005 deadline except in the unlikely event that CT Cube has two such handsets in its current inventory.²¹ Since CT Cube does not have the market power to purchase handsets directly from the handset manufacturer, even after identifying which handsets are HAC compliant, CT Cube will need to check with handset distributors to see when those distributors will be able to obtain the particular handset in sufficient quantity to supply CT Cube. Based on CT Cube's previous

¹⁹ *T-Mobile Petition at 2. See also* Reply of T-Mobile USA, Inc., WT-Docket No. 01-309 (filed September 8, 2005).

²⁰ *See* Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems, Phase II Compliance Deadlines for Non-Nationwide Carriers, CC Docket No. 94-102, *Order to Stay*, 17 FCC Rcd 14841, 14848 ¶¶ 17-21 (2002).

²¹ As discussed above, the only handsets that manufacturers CT Cube has contacted have indicated *may* become HAC compliant and available prior to September 16, 2005 are not currently in CT Cube's inventory.

experiences with delays in the availability and delivery of wireless handsets, it can take up to four months after handsets first become available for CT Cube to receive delivery. With the demand for HAC compliant handsets and Tier I carriers competing for wireless handsets to meet their FCC benchmark of four HAC compliant handsets, CT Cube does not realistically expect delivery of HAC handsets until three to four months after the handsets first appear on the market. In fact, Cingular and T-Mobile are anticipating delays between the availability of equipment and delivery and testing and T-Mobile has indicated that it will not be able to meet the Commission's benchmark.²² Finally, even after CT Cube is able to obtain GSM HAC compliant handsets from its distributor, CT Cube will still need to test the handset to ensure that the handset works on CT Cube's network – a process that can take one to two weeks – prior to making the HAC handsets available for sale.

III. CT Cube Satisfies the Relevant Standards for Waiver of the Commission's Rules

Under Section 1.3 of its rules, the Commission may waive any provision of its rules if good cause is shown.²³ The Commission must take a "hard look"²⁴ and then decide if such a waiver is in the public interest.²⁵ The Commission has previously recognized that waiver grant is in the public interest where, as here, compliance with a particular regulation is dependent on the availability of equipment from manufacturers.²⁶ In the FCC's *Fourth Memorandum Opinion and Order* ("E911 Fourth MO&O"), the Commission recognized that there would be instances when "technology-

²² See, e.g., *Cingular Petition* at 30; *T-Mobile Petition* at 8-9.

²³ 47 C.F.R. § 1.3.

²⁴ *Wait Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969).

²⁵ *Northeast Cellular Telephone Company, L.P., et al v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990).

²⁶ See, e.g., *Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems*, CC Docket No. 94-102, *Fourth Memorandum Opinion and Order*, 15 FCC Rcd 17442 (2000) ("E911 Fourth MO&O"); *Telephone Number Portability, Petitions for Extension of the Deployment Schedule for Long-Term Database Methods for Local Number Portability, Phase II*, 13 FCC Rcd 9564 (1998); *Policies and Rules Concerning Operator Service Providers*, 5 FCC Rcd 4630 (1990).

related issues” or “exceptional circumstances” would cause a delay in a wireless carrier’s ability to meet a FCC benchmark. Such recognition is consistent with the Commission’s acknowledgement that “bringing a new product to market requires manufacturers to undertake a time-consuming series of complex steps.”²⁷ Manufacturers, although racing to meet the FCC’s mandate, have yet to overcome the technological complexities of limiting interference at 850 MHz in order to make HAC handsets available in time for carriers to meet the FCC’s deadlines. Even under the Commission’s relaxed GSM interference rating standard, manufacturers will either miss the Commission’s September 16, 2005 deadline or will only identify which GSM handsets are HAC compliant mere hours prior to the deadline. For the reasons discussed in more detail above, CT Cube will not have sufficient time to obtain and test on its network the newly HAC certified handsets. Therefore, the requested waiver is consistent with the Commission’s recognition that compliance deadlines should be linked to the availability of manufacturer equipment.²⁸

Section 1.925(b)(3) of the Commission’s rules sets out the general standards for determining when a waiver should be granted in Wireless Telecommunications Bureau proceedings:

The Commission may grant a request for waiver if it is shown that:

- (i) The 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) In 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.²⁹

²⁷ GARMIN International, Inc., *Order on Reconsideration*, DA 01-851 at ¶ 5.

²⁸ *See, e.g., Implementation of Section 17 of the Cable Television Consumer Protection and Competition Act of 1992; Compatibility Between Cable Systems and Consumer Electronics Equipment*, 9 FCC Rcd 1981 ¶¶ 76-77 (1994) (modifying a proposed compliance deadline to account for the unavailability of necessary equipment).

²⁹ 47 C.F.R. § 1.925(b)(3).

Under both of these standards, grant of the requested waiver is warranted. Application of the Section 20.19(c)(2)(i)(A) handset deadline to CT Cube would be inequitable in light of the lack of availability of HAC compliant handsets, a factor outside of CT Cube's control. The unavailability of such handsets leaves CT Cube with no reasonable alternative but to seek a waiver.

Grant of the requested waiver is consistent with both the public interest and the underlying purpose of the Commission's HAC benchmarks set forth in Section 20.19. In setting a September 16, 2005 deadline for both manufacturers and carriers, the FCC anticipated that two years would be sufficient time for manufacturers to research, manufacture and test HAC compliant handsets and for carriers to obtain those handsets. As discussed herein, it is now clear that the HAC compliant handsets required to meet the September 16, 2005 deadline will not be made available to CT Cube in time to allow CT Cube to meet this deadline. A temporary limited waiver of Section 20.19(c)(2)(i)(B)(1) is entirely consistent with the underlying purpose of the establishment of the September 16, 2005 deadline.

III. Conclusion

CT Cube requests a six month waiver of the FCC's September 16, 2005 deadline to include in its handset offerings at least two handset models per air interface. CT Cube's timetable for compliance is based on its experiences and contacts with manufacturers and distributors and publicly available information regarding handset availability. Based upon its own inquiries, CT Cube can not determine when manufacturers will make HAC compliant handsets available to Tier I carriers, who always get first priority. However, assuming that manufacturers make HAC compliant handsets available to Tier I carriers shortly after September 16, 2005 and factoring in the four month timeframe for CT Cube to obtain the handsets from its distributor and two weeks for testing, CT Cube does not expect to be capable of selling and activating such handsets prior to March 2006. While CT Cube hopes to begin selling and activating HAC compliant handsets prior

to March 2006, CT Cube has no firm basis to believe that it will have the necessary handsets prior to this time. Accordingly, CT Cube requests that the deadline for CT Cube to include in its handset offerings at least two HAC compliant GSM handsets be extended to March 16, 2006. In the interim, CT Cube will continue to seek out handsets for it to offer to its subscribers that meet or exceed the Commission's HAC benchmarks, as it has done since 2003.

Although CT Cube has had very little interest in the purchase of wireless handsets by hearing impaired individuals, CT Cube has undertaken to educate anyone who inquires regarding the Commission's HAC benchmarks and will continue to do so. Throughout the waiver period CT Cube will continue to work with hearing impaired individuals to ensure a means of utilizing its handsets. For example, CT Cube will continue to make available external device solutions such as loop sets for T-coil users. Finally, CT Cube will comply with the Commission's *Memorandum Opinion and Order*, including the submission of a report to the Commission on or by November 17, 2005 to update the Commission on CT Cube's efforts to obtain HAC compliant handsets.

Based on the foregoing, CT Cube respectfully requests that the Commission grant CT Cube a temporary waiver of Section 20.19(c)(2)(i)(B)(1) of its rules as set forth herein.

Respectfully submitted,

C.T. CUBE, L.P.

By: _____ /s/

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Dated: September 16, 2005

DECLARATION OF KIM TUMLINSON

I, Kim Tumlinson, do hereby declare under penalty of perjury the following:

1. I am the Business Operations Manager of C.T. Cube, L.P. dba West Central Wireless
2. I have read the foregoing "Petition for Limited Waiver of Section 20.19(c)(2)(i)(B)(1) of the Commission's Rules". I have personal knowledge of the facts set forth therein and believe them to be true and correct.



Kim Tumlinson

9-14-05

Date