

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

In the Matter of)
)
) WT Docket No. 01-309
)
Section 68.4(a) of the Commission's Rules)
Governing Hearing Aid-)
Compatible Telephones)
)
Virgin Mobile USA, LLC Petition for)
Limited Waiver of Sections)
20.19(c)(2)(i)(A) and 20.19(f))
of the Commission's Rules)
)

PETITION FOR LIMITED WAIVER

Pursuant to Sections 1.3 and 1.925 of the Commission's regulations, 47 C.F.R. §§ 1.3 and 1.925, Virgin Mobile USA, LLC ("Virgin Mobile") hereby requests a limited waiver of Sections 20.19(c)(2)(i)(A) and 20.19(f) of the Commission's rules. Virgin Mobile has worked diligently and in good faith to develop and deploy hearing aid-compatible ("HAC") handsets in accordance with the Commission's regulations. As described below, Virgin Mobile will offer two handsets by the Commission's September 16, 2005 deadline that meet the M3 performance rating under the American National Standards Institute ("ANSI") C63.19 standard as required by the Commission's rules.¹ Due to unique circumstances, however, only one of these two handsets is certified as compliant with the ANSI C63.19 M3 performance rating. Virgin Mobile, therefore, seeks a brief six month limited waiver of the Commission's September 16 deadline to

¹ See 47 C.F.R. § 20.19(b)(1)

enable Virgin Mobile's equipment manufacturer, Nokia, to obtain a grant of certification for its 2115i handset and for Nokia and Virgin Mobile to properly label the 2115i handset as compliant with the ANSI C63.19 M3 performance rating and the Commission's HAC guidelines.

For the reasons detailed below, grant of the limited waiver request described herein accords with the Commission's general waiver standard, recent Commission precedent, and the Commission's HAC policies. Virgin Mobile's limited waiver request, therefore, is consistent with the Commission's Hearing Aid-Compatibility Act of 1998 ("HAC Act") obligations to ensure "reasonable access to telephone service by persons with impaired hearing."²

I. BACKGROUND

1. Virgin Mobile Overview

Virgin Mobile began offering service in July 2002, operating in the 1900 MHz band on the Sprint PCS all digital CDMA wireless network. Offering a prepaid, pay as you go wireless service, Virgin Mobile targeted its service to a previously underserved consumer demographic: younger, lower-usage customers who generally have lower incomes than typical subscribers of postpaid wireless services. As the first U.S. wireless service designed specifically for the needs and desires of these customers, Virgin Mobile quickly reached the one million customer mark in late 2003. By early 2005, Virgin Mobile surpassed the three million customer mark – nearly six months ahead of its third anniversary.

² 47 U.S.C. § 610(a).

Virgin Mobile's customers have traditionally been unable to subscribe to wireless service because of financial constraints or inconsistent income from periodic employment during the school year, uncertain or complete lack of credit standing, or an inability to decipher the confusing array of postpaid service plans. To appeal to these customers, Virgin Mobile offers low-cost phones and does not require long-term service contracts, credit checks, or early termination penalties to obtain service. By providing a prepaid, well-priced, and simple-to-understand service offering to its targeted customer demographic, Virgin Mobile has expanded the availability of wireless services to customers not otherwise able to obtain service. Indeed, more than one-half of Virgin Mobile's customers are new to wireless service, and a substantial portion of its customers have incomes below \$35,000 per year.³ Many of these customers receive significant advantages from Virgin Mobile's service offerings, including access to mobile services, value for their money, and the ability to obtain emergency (911) services outside of their homes.

2. Hearing Aid-Compatibility Act of 1998

The HAC Act amended Section 701(b) of Communications Act of 1934 ("Communications Act") to require that, unless exempt, "(A) all essential telephones, and (B) all telephones manufactured in the United States ... or imported for use in the United States ... provide internal means for effective use with hearing aids that are designed to be compatible with telephones which meet established technical standards for hearing aid-compatibility."⁴ As enacted, the HAC Act specifically exempted certain classes of

³ See *Universal Service Reform and State Regulation of Wireless Services*, Virgin Mobile USA, LLC *ex parte* filing, CC Docket 96-45 (filed March 18, 2005).

⁴ See 47 U.S.C. § 610(b)(1).

telephone services, including mobile wireless services, from compliance with the HAC requirements. This exemption arose from Congress' determination that the secondary role of wireless services among consumers at the time made a HAC requirement premature for wireless services. To ensure that the Commission's HAC policies kept pace with technological and market developments, however, Congress granted the Commission the authority to revoke the exemption provided to mobile wireless services should the Commission eventually determine that such revocation was in the public interest.⁵

3. 2003 Commission Report and Order

In a 2003 *Report and Order*, the Commission revoked the previous exemption and extended the HAC requirements to mobile services, concluding that such action was in the public interest since it would provide hearing-impaired individuals with access to an increasingly vital service.⁶ The Commission required wireless carriers, such as Virgin Mobile, to offer two handsets that meet the M3 performance rating under the ANSI C63.19 standard on each air interface that the carrier operates by September 16, 2005. The Commission also required all wireless carriers to undertake labeling, outreach, and reporting efforts to educate the public, retail personnel, and the Commission about their HAC deployment efforts.

⁵ See 47 U.S.C. § 610(b)(2)(C).

⁶ See *In the Matter of Section 68.4(a) of the Commission's Rules Governing Hearing Aid-Compatible Telephones*, 18 FCC Rcd. 16,753 (2003) ("*Report and Order*").

II. DISCUSSION

1. Waiver Standard

The Commission's regulations provide for the waiver of any rule if "good cause" is first established.⁷ In addition, Section 1.925(b)(3) of the Commission's regulations permits the Commission to waive a rule where it is shown that:

- (i) The underlying purpose of the rule(s) would not be served or would be frustrated by the 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.
- 47 C.F.R. § 1.925(b)(3).

Consistent with these rules, the Commission also "may exercise its discretion to waive a rule where particular facts would make strict compliance inconsistent with the public interest."⁸

2. Description of Waiver Request

Since the Commission's *Report and Order* was released in August 2003, Virgin Mobile has worked diligently and in good faith to determine the steps needed to ensure that it complies with the Commission's HAC deployment requirements and deadlines. Virgin Mobile also has worked cooperatively with its handset vendors to identify, test, and deploy handsets that comply with the M3 performance rating. Virgin Mobile is fully committed to offering its customers HAC handsets as the FCC has required. Indeed, incorporation of HAC-compliant software and hardware has become a "Priority 1" requirement on all Virgin Mobile's baseline handset manufacturing specifications.

⁷ See 47 C.F.R. § 1.3.

⁸ *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990).

As of the September 16 deadline, Virgin Mobile will offer two handsets that meet the M3 performance rating: the Audiovox 8915 "Snapper" handset and the tri-mode Nokia 2115i "Shorty" handset. Because of unforeseen circumstances, however, only the Audiovox 8915 handset is certified as meeting the M3 performance rating.⁹ Nokia has yet to seek certification for the 2115i handset since it currently does not meet the M3 performance rating for both the 1900 MHz and 800 MHz bands.¹⁰ Nokia has conducted internal testing, however, that indicates that the 2115i handset does meet the M3 rating for the 1900 MHz band. In the very near future, therefore, Nokia plans to submit a request for certification (which Virgin Mobile will support) for the 2115i handset as meeting the M3 performance rating solely for operation in the 1900 MHz band.¹¹

Virgin Mobile requests a limited waiver of Sections 20.19(c)(2)(i)(A) and 20.19(f) of the Commission's rules for a period of six months. This six month limited waiver is needed to enable Nokia to obtain certification for the 2115i handset, and should

⁹ Virgin Mobile has used its best efforts to ensure that the Audiovox 8915 handset would be available for purchase on its website and through its third-party retail partners by the September 16 deadline. While the handset currently is available for purchase on Virgin Mobile's website, shipping delays have postponed the retail availability of the handset from Virgin Mobile's third-party retail partners until September 18, 2005. To the extent that the Commission determines that this minor delay in third-party retail availability of the Audiovox 8915 handset necessitates a waiver of the September 16 deadline, Virgin Mobile hereby respectfully requests such a waiver.

¹⁰ While Virgin Mobile currently offers the Nokia 2115i handset to customers, it does not market or label the handset as HAC compliant or meeting the ANSI C63.19 M3 performance rating.

¹¹ In the event that the 2115i handset does not meet an M3 rating upon submission for certification, Virgin Mobile will immediately notify the Commission and update this limited waiver request accordingly.

provide adequate time for Virgin Mobile and Nokia to properly label the 2115i handset as compliant with the ANSI C63.19 M3 performance rating.¹²

3. Virgin Mobile's Limited Waiver Accords with the Commission's Waiver Standard

As indicated above, a waiver of the Commission's rules remains warranted if good cause is shown. Since Virgin Mobile operates exclusively in the 1900 MHz band on the Sprint PCS network, the 2115i handset's current failure to meet the M3 performance rating in the 800 MHz band would not interfere with Virgin Mobile's hearing-impaired customers' use of the handset. The limited waiver requested herein will not adversely affect the interests of hearing-impaired individuals for any significant period of time since the requested waiver period is relatively brief. Grant of the limited waiver also would help to speed the deployment of an additional HAC-certified handset to Virgin Mobile's hearing-impaired customers. Finally, grant of the limited waiver request would enable Nokia to resolve the technical complexities of HAC functionality in the 800 MHz band without affecting Virgin Mobile's marketing of the 2115i handset as HAC compliant to its customers in the 1900 MHz band. Virgin Mobile asserts that these factors demonstrate good cause.

Approval of the limited waiver also would not frustrate the underlying purposes of the Commission's HAC regulations and is in the public interest since it would lead to the availability of a low-price HAC handset to Virgin Mobile customers. Virgin Mobile's lower-income, lower-usage customer demographics necessitate that the company offer

¹² In this regard, Virgin Mobile's waiver request is similar to the waiver request recently filed by T-Mobile USA, Inc. *See T-Mobile USA, Inc. Petition For Waiver of Section 20.19(c)(3) of the Commission's Rules*, WT Docket 01-309 (filed Aug. 26, 2005).

comparatively lower-priced handset models. As Virgin Mobile does not require a long-term contract, it can not subsidize phones as significantly as carriers offering postpaid plans because it can not rely on guaranteed future revenue to recover its costs. Moreover, since many Virgin Mobile customers are lower-income and use their handsets sparingly or for emergency-only purposes, they remain reluctant to spend a substantial amount for a handset. To appeal to this less-affluent, lower-usage customer base, Virgin Mobile retails only one handset above \$100 out of the eight total handsets it offers to customers; Virgin Mobile currently retails the 2115i handset for \$39.99.¹³ While manufacturers and equipment vendors have made steady progress in expanding the range of HAC handsets, these efforts have tended to focus on higher-end handsets, leaving many lower-income consumers with limited options for HAC handsets.¹⁴ Approval of Virgin Mobile's limited waiver, therefore, is in the public interest since it would provide lower-income, hearing-impaired Virgin Mobile customers with access to a low-price HAC handset.¹⁵

¹³ By comparison, Verizon Wireless currently offers 21 handsets that retail above \$100 (excluding discounts). *See* <
[http://www.verizonwireless.com/b2c/store/controller?item=phone
First&action=viewPhoneOverview&cm_re=Home%20Page-_-Personal%20Box-
_-Phones.>](http://www.verizonwireless.com/b2c/store/controller?item=phoneFirst&action=viewPhoneOverview&cm_re=Home%20Page-_-Personal%20Box-_-Phones.>) (visited Aug. 25, 2005).

¹⁴ Since many carriers focus heavily on attracting upper-income customers, manufacturers' focus on this demographic is understandable. *See Universal Service Reform and State Regulation of Wireless Services*, Virgin Mobile USA LLC *ex parte* filing, CC Docket 96-45 (filed March 18, 2005).

¹⁵ Availability of a low-price HAC handset by Virgin Mobile also fulfills the Commission's request that carriers offer at least one low-price HAC handset in their product offerings. *See Report and Order* at ¶ 70.

4. Grant of the Limited Waiver Is Consistent with Commission Precedent

Virgin Mobile's limited waiver request also is similar to the recent waiver requests of Cingular and the HAC Incubator Working Group 9 ("Working Group 9"). Cingular and Working Group 9 both requested that the Commission permit the marketing of dual-band GSM handsets as HAC compliant based solely on their meeting the M3 performance rating in the 1900 MHz band. The Commission granted the Cingular and Working Group 9 waiver requests, providing temporary relief to all entities that offer dual-band digital wireless handsets that employ a GSM interface in the 850 MHz and 1900 MHz bands.¹⁶

In its *Memorandum Opinion and Order* granting the Cingular and Working Group 9 requests, the Commission noted that granting the waiver requests was consistent with the Commission's waiver standard and furthered the public interest since it would "increase users' choices by ensuring the availability of [HAC] dual-band GSM handsets."¹⁷ The Commission further noted that the approval of the waivers would help to avoid "the unintended consequence of delaying introduction of dual-band digital wireless phones that otherwise could be used by consumers with and without hearing disabilities."¹⁸ For these same reasons, grant of Virgin Mobile's limited waiver would further the public interest and the Commission's HAC Act obligations.

¹⁶ See *In the Matter of Section 68.4(a) of the Commission's Rules Governing Hearing Aid-Compatible Telephones, Cingular Wireless LLC Petition for Waiver of Section 20.19(c)(3)(i)(A) of the Commission's Rules*, Memorandum Opinion and Order, FCC 05-166 (rel. September 8, 2005) ("*Memorandum Opinion and Order*").

¹⁷ *Id.* at ¶ 9.

¹⁸ *Id.*

5. During the Limited Waiver Period, Virgin Mobile Will Continue to Focus on the Needs of Disabled Customers

During the six month limited waiver, Virgin Mobile will work with Nokia to complete development and dissemination of information regarding the HAC functionality and features of the 2115i handset, as well as other information necessary for customers to access and use Virgin Mobile's services and features. Once the 2115i handset is certified as meeting the M3 performance rating in the 1900 MHz band, Virgin Mobile and Nokia will properly label and market the 2115i as HAC compliant in accordance with Section 20.19(f) of the Commission's regulations. Finally, Virgin Mobile will continue to report semiannually to the Commission on the status of its efforts to fulfill its HAC Act obligations and work with its manufacturers to speed the development and deployment of additional HAC handsets.

WHEREFORE, for the reasons described herein, Virgin Mobile respectfully requests a limited waiver of Sections 20.19(c)(2)(i)(A) and 20.19(f) of the Commission's rules for a period of six months.

Respectfully submitted,

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