

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

In the Matter of

**SLO Cellular, Inc. d/b/a Cellular One
Of San Luis Obispo & Entertainment
Unlimited**

Section 68.4(a) of the Commission's Rules) **WT Docket No. 01-309**
Governing Hearing Aid Compatible)
Handsets)

Request for Temporary Waiver, or)
Temporary Stay, of the Commission's)
HAC Rules)

To: The Commission

PETITION FOR RECONSIDERATION

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Table of Contents

	<u>Page</u>
Summary	ii
I) Denial Of Waiver Requests.....	2
II) Waiver Standard.....	5
III) Analysis In The HAC Waiver Order.....	7
IV) The TDMA Facilities.....	12

Summary

SLO Cellular, Inc. d/b/a Cellular One of San Luis Obispo (“SLO”) and Entertainment Unlimited (“EU”) request reconsideration of the Commission’s *Memorandum Opinion and Order*, WT Docket No. 01-309, FCC 08-67, released February 27, 2008 (“*HAC Waiver Order*”) insofar as it denied their requests for waivers of the Hearing Aid Compatible (“HAC”) digital wireless handset regulations codified in Rule Section 20.19 for GSM and TDMA facilities, and referred the matters to the Enforcement Bureau.

The Commission’s action did not constitute reasoned decision making; and was arbitrary, capricious and an abuse of discretion and otherwise contrary to law.

With respect to SLO’s GSM facilities, the *HAC Waiver Order* adopted a January 1, 2007 compliance date for determining which waiver requests would be granted but failed to apply that date in the case of SLO, which came into compliance on December 1, 2007 and, in addition, was diligent. The Commission criticized SLO as lacking diligence, but failed to account for the complexities of the GSM overbuild. The Commission took official notice in the case of one petitioner that compliant handsets were not available to Tier III carriers, but failed to apply this finding to the other petitioners even though the finding applied to them equally and to SLO by analogy.

With respect to SLO’s and EU’s waiver requests pertaining to the TDMA facilities, the Commission erred in determining that waiver relief cannot be granted

beyond September 18, 2006 in the case of TDMA systems; failed to acknowledge that HAC-compliant TDMA are no longer being manufactured; compelled SLO and EU to do the impossible; and was not in accord with the standards of WALT Radio and Rule Section 1.925(b)(3).

SLO and EU met the standards for securing a waiver.

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The Commission's HAC Rules)

To: The Commission

PETITION FOR RECONSIDERATION

SLO Cellular, Inc. d/b/a Cellular One of San Luis Obispo (“SLO”) and Entertainment Unlimited (“EU”) (collectively “the Petitioners”), by their attorney and pursuant to Section 405 of the Communications Act of 1934, as amended, and Section 1.106 of the Commission’s Rules, hereby request reconsideration of the Commission’s Memorandum Opinion and Order, *WT Docket No. 01-309*, FCC 08-67, released February 27, 2008 (“HAC Waiver Order”) insofar as it denied the Petitioners’ respective requests for waivers of the digital wireless handset Hearing Aid Compatibility (“HAC”) requirements codified in Rule Sections 20.19 (c)(2)(i)(A) (radiofrequency interference) and 20.19(d)(2) (inductive coupling); and of their referral to the Enforcement Bureau for their apparent violations of these Rule Sections. In support hereof, the following is shown:

I) Denial Of The Waiver Requests

1. On September 14, 2006, the Petitioners filed with the Commission their joint “Petition for Temporary Waiver or Temporary Stay” (“Petition”) requesting until September 18, 2007 to achieve compliance with the Rule Sections 20.19(d)(2) and 20.19(b)(2) requirement (which collectively set forth one regulatory requirement) that they include within their handset offerings (and make available for in-store testing by consumers) at least two HAC-compliant digital wireless handsets that meet a U3T (or M3T or T3) rating for inductive coupling under ANSI Standard C63.19. The Petitioners are Tier III Commercial Mobile Radio Service (“CMRS”) carriers who employed the Time Division Multiple Access (“TDMA”) digital air interface. The Petitioners proffered that they were marketing six digital wireless handset models manufactured by Motorola; that all were tri-mode handsets (*i.e.*, analog cellular TDMA cellular and TDMA Broadband PCS); that none of the handsets met a U3T (or T3) rating for inductive coupling under ANSI Standard C63.19; and that they were unable to acquire additional TDMA handsets from the handset vendors because such handsets were simply unavailable. (Petition, pp. 2-3). The Petitioners elaborated by stating that “[t]here are no HAC compliant digital wireless telephones using the TDMA air interface available for purchase by wireless carriers ... that meet a U3T (or M3T) rating under ANSI Standard C63.19;” and that, “[a]s a result, compliance with the requirements of Section 20.19(d)(2) of the Rules *is an impossibility.*” (Petition, pg. 5) (emphasis added). The Petitioners expressly noted that the Commission had recognized as early as 2002 that TDMA infrastructure equipment and handsets were being discontinued by the manufacturers

(citing *Digital Wireless TTY Order*, CC Docket No. 94-102, 17 FCC Rcd. 12084, Para. Nos. 12-13, and 21-22 (WTB 2002). (Petition, pg. 3). The Petitioners noted that they planned to replace the TDMA facilities with facilities using the Global System for Mobile Communications (“GSM”) air interface.

2. On November 17, 2006, SLO filed a separate “Petition for Temporary Waiver or Temporary Stay” (“Second Petition”) addressing its recently completed GSM facilities; and requesting until January 31, 2007 to meet the Rule Section 20.19(c)(2)(i) radio frequency interference requirements (U3 or M3 rating) and the Rule Section 20.19(d)(2) inductive coupling requirements (U3T or T3 rating) of the HAC regulations. The Second Petition noted that the TDMA facilities recently had been overbuilt with GSM facilities, and that the GSM facilities had been placed into commercial service on or around October 16, 2006. (Second Petition, pg. 2). SLO noted that it was marketing a total of fourteen (14) GSM handset models, one of which met a M3 rating, but that none of the handsets met a T3 rating. (Second Petition, pg. 2). However, SLO further noted that it was ordering the Motorola Model RAZR V3i and LG Model C2000, both of which meet a M3 and a T3 rating, and that it expected to receive the first shipments by the end of November 2006. (Second Petition, pg. 2). SLO stated the obvious: “Thus, the amount of time needed to achieve compliance is extremely brief.” (Second Petition, pg. 5). SLO went on to state:

The GSM overbuild project has been an extremely exacting and time consuming project for SLO because SLO is a very small carrier. The project involved numerous activities, both large and small. The level of detail required was extremely exacting. Nevertheless, the overbuild has been successfully accomplished, acceptance testing of the facilities completed, and the GSM facilities have been in commercial service since approximately October 16, 2006. While SLO successfully completed this enormous task, it inadvertently forgot to assure that it had in its inventory sufficient models of HAC-compliant GSM

handsets. This oversight should be corrected by the end of November 2006. (Second Petition, pg. 5).

3. In its "Supplement to Petition for Temporary Waiver or Temporary Stay," filed June 6, 2007, SLO reported that it achieved compliance on December 1, 2006 by offering the Motorola Model RAZR V3i (FCC ID No. IHDT56Gw1) and the LG Model C2000 (FCC ID No. BEJC2000); and that the LG Model C2000 had since been replaced by the Nokia Model 6126h (FCC ID No. PPIRM-126H).

4. In denying the waiver requests, the Commission determined that neither petition met the requirements to justify grant of a waiver. Specifically, the Commission determined that "SLO and EU have failed to demonstrate unique or unusual circumstances, or the existence of any other factor, warranting grant of the requested waivers pursuant to the Section 1.925(b)(3) standard." *HAC Waiver Order*, Para. No. 34. With respect to the TDMA facilities, the Commission held that the regulations required the GSM overbuild to be completed by September 18, 2006 and that no extensions beyond that date would be granted for any reason. *HAC Waiver Order*, Para. No. 34. With respect to the Second Petition which dealt with the GSM facilities, the Commission incorrectly stated that SLO "offers no explanation for its delay in offering compatible handset models other than 'oversight';" and determined that "SLO's inattention does not constitute extraordinary circumstances to support a waiver." *HAC Waiver Order*, Para. No. 34.

5. For the reasons stated below the Commission's decision was in error, and the determinations set forth in the *HAC Waiver Order* should be set aside. SLO should be granted the waiver requested in the Second Petition *nunc pro tunc* through December 1,

2006, and also granted the waiver sought in the September 14, 2006 Petition through December 1, 2006. EU should be granted a waiver until it has overbuilt its system with GSM facilities. SLO and EU qualify for waivers, and the Commission failed to engage in reasoned decision making when it denied the requests. The Commission's action was arbitrary, capricious and an abuse of discretion. Indeed, the Commission went so far as to treat SLO differently than similarly situated carriers.

II) Waiver Standard

6. The Commission has indicated generally that waiver requests of the 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”).

7. 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. Waivers are granted on an individualized basis; and in evaluating waiver request the Commission is obligated to take a “hard look” at the request. WAIT Radio, 418 F.2d at 1158.

8. More specifically, WAIT Radio charges the Commission with administering its responsibilities in a manner that is consistent with the public interest. That a federal agency may discharge its responsibilities by promulgating rules of general applicability which, in the overall context, establish the “public interest” for a broad range of situations, does not relieve it of an obligation to take a “hard look” and seek out the public interest in particular individualized cases. Indeed, the Commission’s right to waive its rules is not unlike an obligation in that it is a *sine qua non* to its ability to promulgate otherwise rigid rules. It is the necessary “safety valve” that makes the system work. *Id.*

9. In this case, it is clear that the Commission did not take the required “hard look” at the waiver requests and, accordingly, the “safety valve” function of the waiver process was not allowed to work. When given a hard look, the waiver requests should be granted.

III) Analysis In The HAC Waiver Order

10. With respect to SLO's Second Petition requesting a waiver for its GSM handsets, the HAC Waiver Order is notable for three reasons which demonstrate a lack of reasoned decision making on the Commission's part.

11. First, the HAC Waiver Order demonstrates on its face actual knowledge on the Commission's part that compliant handsets were not generally available to Tier III carriers either as of September 18, 2006 or for some considerable time thereafter. The Commission stated:

We note that the Commission's equipment authorization data indicates that the vast majority of the inductive coupling-compliant handset models that had been approved by the Commission prior to the September 18, 2006 compliance date *were approved in August and September of 2006*. Specifically, as of the September 18, 2006 compliance deadline, the Commission had issued inductive coupling compliance certifications covering a total of 37 handset models. Of these, only two handset models, both involving Motorola phones for use on CDMA systems, were available and certified more than two months prior to the compliance deadline. Certifications covering an additional 10 models were issued between one and two months prior to the deadline, and 25 models were based on certifications issued after August 18, 2006 (including 11 in September). Twenty (20) of these were CDMA-based handsets, 13 were GSM-based handsets, and 4 were iDEN-based handsets. Finally, certifications covering eight additional models were not issued until after the compliance deadline." HAC Waiver Order, Para. No. 8 (emphasis added).

As we noted above, the Commission's Office of Engineering and Technology received and *approved very few applications* to certify inductive coupling compatibility *until two months or less prior to the September 18, 2006 deadline*. *This left little time for carriers to purchase such phones and make them available in all company stores in time to comply with our rules*. Further, *as Tier III carriers, these petitioners typically experienced significant delays in obtaining shipping commitments from their handset suppliers* because handset manufacturers filled orders first for the larger Tier I and Tier II carriers. HAC Waiver Order, Para. No. 16 (emphasis added).

12. Given these circumstances, SLO's December 1, 2006 compliance date is entirely reasonable and consistent with the Commission's observation that the handsets were not readily available to Tier III carriers. Indeed, given the general lack of HAC-compliant handsets commercially available to Tier III carriers, SLO's ability to achieve compliance only some six weeks after its GSM facilities became operational is nothing short of remarkable.

13. Second, the HAC Waiver Order adopted a January 1, 2007 cut-off date by which carriers were required to be in compliance, and applied that standard across the board – except in the case of SLO. Carriers that achieved compliance on or prior to January 1, 2007 were granted temporary waivers, while those achieving compliance after that date were not.¹ Thus, for example, Pocket Communications achieved compliance on December 31, 2006 and was granted a waiver. In stark contrast, Centennial Communications Corp. achieved compliance on January 3, 2007 (*i.e.*, a scant three calendar days after Pocket) and was denied a waiver. HAC Waiver Order, Para. Nos. 14, 15, 60 and 61. The only apparent source of this January 1, 2007 compliance deadline was a Consolidated Opposition to the waiver requests filed on November 6, 2006 by Telecommunications for the Deaf and Hard of Hearing, Inc. (“TDI”) and the Hearing Loss Association of America (“HLAA”). HAC Waiver Order, Para. No. 6, Consolidated Opposition, pg 12 (“Specifically, the Commission should grant a temporary waiver until January 1, 2007 ...”). Indeed, the text of the HAC Waiver Order makes clear that the

¹ See, e.g., HAC Waiver Order, Para. Nos. 11 (A group of petitioners “indicate that they have come into compliance ... on or before January 1, 2007”), 15 (“... we find that [these petitioners] have exercised reasonable diligence by coming into compliance on or before January 1, 2007”), 18 and 22 (Petitioners indicating a compliance date “at some time after January 1, 2007” denied relief); 41 (“... given that most other carriers obtained two compliant handsets by January 1, 2007, we attribute [the petitioner's] inability to procure an additional compliant handset model before June 2007 to its failure to exercise due diligence”).

Consolidated Opposition was the source of the January 1, 2007 cut-off date applied by the Commission: “In particular, we note that many of the petitioners achieved compliance on or shortly before January 1, 2007.” HAC Waiver Order, Para. No. 17. Footnote 75 (found at the exact same paragraph) states that “[o]ur conclusion is also consistent with TDI’s and HLAA’s position that to the extent we grant waivers, they should not extend beyond January 1, 2007. See TDI/HLAA Joint Opposition at 12.”

14. Under the analysis contained in the HAC Waiver Order, SLO should be granted a waiver for its GSM handsets because it achieved compliance prior to January 1, 2007. SLO achieved compliance almost a full month before Pocket, and the HAC Waiver Order granted Pocket’s waiver request. (See Para. No. 12, above). Many carriers were granted waivers for the time period between December 1 and December 31, 2006² – with the notable exception of SLO. The Commission is required by law to give similar treatment to similarly situated petitioners, a principle of law that requires grant of SLO’s waiver request in this case.³ In this case, the Commission engaged in disparate treatment of similarly situated carriers, which is arbitrary and capricious and which does not constitute reasoned decision making.

15. The disparate treatment accorded SLO is even more pronounced because SLO was not subject to the HAC requirements for its GSM facilities until they became operational on or around October 16, 2006. As noted previously, SLO achieved compliance some six weeks later, *i.e.*, on December 1, 2006. In contrast, the other

² See, e.g. HAC Waiver Order, at Para. Nos. 11-17 (Advantage, compliant on December 27, 2006); (BLEW, December 1, 2006); (Brazos, December 26, 2006); (FMTC Mobile, December 27, 2006); (Nemont, December 21, 2006); (NWMC, December 15, 2006); (Peoples, December 1, 2006); and (South Central, December 27, 2006).

³ It is axiomatic that “an agency must treat similar cases in a similar manner unless it can provide a legitimate reason for failing to do so.” *Indep. Petroleum Ass’n of Am. v. Babbitt*, 92 F.3d 1248, 1258 (D.C. Cir. 1996); *Transactive Corp. v. United States*, 91 F.3d 223, 237 (D.C. Cir. 1996).

petitioners (whose requests were granted) were subject to the September 18, 2006 compliance deadline and received waivers of up to almost three and one-half months duration. It is quite obvious that six weeks is a much better track record than three and one-half months, yet the HAC Waiver Order essentially holds that three and one-half months is better than six weeks. This is clearly arbitrary, capricious and an abuse of discretion.

16. In addition, the Commission was simply wrong in finding that “oversight” was the only reason offered in support of the waiver request, or that SLO was in any way inattentive to its regulatory obligations. HAC Waiver Order, Para. No. 34. Such a finding on the Commission’s part takes SLO’s statements out of context because it does not acknowledge the complexities faced by a small carrier in constructing an overbuild system and making it operational. In reaching its conclusion, the Commission appears to have assumed that installing an overbuild system is something that occurs in the ordinary course of business. As a result, the Commission seems to have determined (albeit incorrectly) that diligence should be measured under the same standards applicable to carriers not engaged in an overbuild (with all its myriad complexities), where an oversight arguably can be deemed to have some legal significance. If this was, in fact, the Commission’s thinking, it ignored the fact that these other carriers were not dealing simultaneously with the myriad complexities of an overbuild. Paradoxically, this seems to have led the Commission to apply a more exacting standard of diligence to SLO than to the other carriers. The paradox is showcased by the fact that SLO required only six weeks to achieve compliance and was denied a waiver and not allowed to avail itself of the January 1, 2007 compliance date adopted in the HAC Waiver Order, while carriers

acting solely in the ordinary course of business were allowed to take advantage of the January 1 date and granted extensions of up to some three and one-half months. The Commission's analysis of SLO's waiver request was not supported by the evidence of record because the Second Petition made quite clear that the GSM overbuild was an enormous and complex undertaking for a small carrier such as SLO, one that involved a myriad of details, one of which was acquiring HAC-compliant handsets. Given the context of this enormous and complex process for a small carrier, which takes place out of the ordinary course of business, the delay in procuring the handsets was understandable, reasonable, and forgivable.

17. Third, in the case of a petitioner who achieved compliance on December 29, 2006, the Commission noted that the petitioner "does not describe in detail the efforts it made to verify the information it received from manufacturers regarding the handset models that it erroneously believed were compliant, and we cannot, based on this information, conclude that it was diligent in these efforts." *HAC Waiver Order*, Para. No. 38. However, in granting the requested waiver, the Commission determined that "[n]evertheless, [the petitioner] does show, consistent with those circumstances faced by many other Tier III wireless carriers and our analysis above, that even if it had been aware these handsets were not compliant, additional compliant models were not available to it as of the deadline and it could not reasonably have come into compliance at that time." *HAC Waiver Order*, Para. No. 38. Thus, the Commission took official notice of the unavailability of compliant handsets to small carriers, but did not apply the officially noticed fact to the any of the other petitioners. Had the Commission taken official notice

of the complexities of an overbuild, it would have surely granted SLO's waiver request for GSM handsets.

18. As the foregoing demonstrates, SLO was plainly diligent in its efforts to secure two HAC compliant handsets at the earliest practicable date.

IV) The TDMA Facilities

19. As noted above, in denying the joint Petition filed by SLO and EU, the Commission held in *the HAC Waiver Order* that the regulations required the GSM overbuild to be completed by September 18, 2006 and that no extensions beyond that date would be granted for any reason. This was clear error and should be reversed.

20. As noted above, there were (and are) no TDMA HAC-compliant handsets available for purchase, and compliance with the HAC requirements is simply impossible for TDMA systems. The Commission has acknowledged in the past that TDMA infrastructure equipment and handsets are no longer being manufactured.⁴ The Commission's decision that relief is somehow barred is simply inconsistent with principles of administrative law that take precedence over the Commission's regulations. The law is quite clear that the Commission cannot compel 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 (11th Cir. 1996). Simply stated, doing the impossible is precisely what the *HAC Waiver Order* compels.

21. In addition, nothing in the Commission's regulations requires a carrier to discontinue service from, and decommission, its TDMA facilities. As far as the regulations are concerned, a carrier can operate a TDMA system indefinitely. In view of

⁴ *See, e.g., Digital Wireless TTY Order*, CC Docket No. 94-102, 17 FCC Rcd. 12084, Para. Nos. 12-13, 21-22 (WTB 2002).

this consideration and the fact that HAC-compliant handsets are not available, the principles of law in the cases cited above compel the Commission to grant waiver relief until such time as the TDMA facilities are removed from service.

22. Furthermore, the Commission's determination that the HAC regulations at issue do not qualify for waiver relief because they deal with TDMA systems in operation after September 18, 2006 is inconsistent with the principles of WAIT Radio. More specifically, WAIT Radio charges the Commission with administering its responsibilities in a manner that is consistent with the public interest. That a federal agency may discharge its responsibilities by promulgating rules of general applicability which, in the overall context, establish the "public interest" for a broad range of situations, does not relieve it of an obligation to take a "hard look" and seek out the public interest in particular individualized cases. Indeed, the Commission's right to waive its rules is not unlike an obligation in that it is a *sine qua non* to its ability to promulgate otherwise rigid rules. It is the necessary "safety valve" that makes the system work. *Id.* A blanket classification of a regulation as ineligible for waiver relief does not allow the waiver process to discharge its safety valve function, and is contrary to the public interest. It is quite clear that requiring a carrier to do the impossible is both inequitable and unduly burdensome within the meaning of Rule Section 1.925(b)(3).

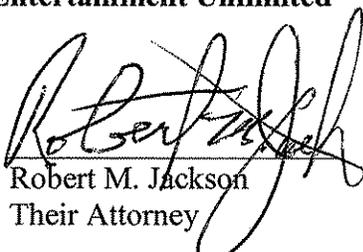
WHEREFORE, the Petitioners' request that this petition be granted; that they be granted the relief requested in Paragraph No. 5, *supra*; and that the referral to the Enforcement Bureau be rescinded.

Respectfully submitted,

**SLO Cellular, Inc. d/b/a
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