

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

In the Matter of:)	
)	
IT&E Overseas, Inc.)	
)	
Section 68.4(a) of the Commission's Rules)	WT Docket No. 01-309
Governing Hearing Aid-Compatible Telephones)	
)	
Petition for Waiver of Section 20.19 of the)	
Commission's Rules)	

To: The Commission

PETITION FOR RECONSIDERATION

IT&E Overseas, Inc. ("IT&E"), by its attorneys and pursuant to Section 405 of the Communications Act of 1934, as amended, and Section 1.106 of the Commission's Rules, hereby requests 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 IT&E's request for a waiver of the Rule Section 20.19(d)(2) and 20.19 (b)(2) requirement that it include within its handset offerings by September 18, 2006 at least two Hearing Aid Compatible ("HAC") digital wireless handsets which meet a U3T (or M3T) rating for inductive coupling under ANSI Standard C63.19 with respect to IT&E's GSM network; and of its referral to the Enforcement Bureau for its apparent violation of Rule Sections 20.19(d)(2) and 20.19(b)(2) (which collective set forth one regulatory requirement). In support hereof, the following is shown:

I) Denial of the Waiver Request

IT&E is a Tier III Commercial Mobile Radio Service (“CMRS”) carrier and the company operates a broadband PCS network that utilizes the Code Division Multiple Access (“CDMA”) digital air interface. On September 13, 2006, IT&E filed with the Commission a “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 that it include within its handset offerings (and make available for in-store testing by consumers) at least two HAC-compliant digital wireless handsets for each air interface that meet a U3T (or M3T) rating for inductive coupling under ANSI Standard C63.19. IT&E’s Petition noted that the Company was in the process of supplementing its CDMA network with facilities using the Global System for Mobile Communications (“GSM”) air interface, and that it anticipated initiating the first phase of its GSM network roll-out in the Fourth Quarter of 2006. (Petition at p. 2) Accordingly, because inductive coupling-compliant handsets were not available to small carriers utilizing either air interface, the Company sought an immediate waiver of the inductive coupling requirement with respect to its CDMA network, and it proactively sought a waiver for the GSM system that it planned to launch before the end of the year, out of an abundance of caution. (Petition at p. 3)

In its petition, IT&E noted that, upon information and belief, “[t]here appear to be no HAC complaint digital wireless telephones available for purchase by smaller carriers, such as IT&E, that meet a U3T (or M3T) rating under ANSI Standard C63.19 for inductive coupling.” (Petition at pp. 4-5) IT&E further noted that, even if such handsets were available, they were not available to small, Tier III carriers. (Petition at p. 5) IT&E achieved compliance with respect to

its CDMA network on December 5, 2006, by offering the Motorola RAZRV3m (FCC ID No. IHDT56FT1) and KRZR K1m (FCC ID No. IHDT56GH1) handset models.¹ The Commission recognized IT&E's diligence and granted the Company's request for waiver with respect to its CDMA network. HAC Waiver Order at ¶ 24.

With respect to its GSM network, IT&E (like many other GSM carriers) encountered far greater difficulties in identifying and obtaining inductive coupling-compliant handsets. The record in numerous proceedings addressed in the HAC Waiver Order establishes that there was a widespread shortage of inductive-coupling compliant GSM handsets in the marketplace, and that there was legitimate confusion among Tier II and Tier III carriers about the compatibility status of various handset models.² IT&E ultimately consulted what it believed to be the most reliable source for handset accessibility information – portions of the handset manufacturers' web sites where they had identified the compatibility status of their own products – and it ordered a supply of two handset models that had been represented by each manufacturer as being inductive coupling-compliant, *i.e.*, the Motorola V3i and Nokia 6126h. In preparing the GSM portion of its 2007 HAC Report, IT&E included the Motorola V3i phone and indicated that the device (bearing the FCC ID No. ITDT56EU1) was M3/T3 rated, because the Company believed in good faith that the phones it had purchased were identical to those shown as M3/T3 rated on the

¹ See "Supplement to Petition for Temporary Waiver or Temporary Stay," filed June 1, 2007 ("IT&E Supplement") at pp. 1-2.

² See, *e.g.*, Petition of Advantage Cellular Systems, Inc. at p. 1 (citing difficulties in obtaining sufficient quantities of compliant handsets prior to the compliance deadline); Petition of Mid-Tex Cellular, Ltd. at p.1 (T-rated GSM handsets "are not widely commercially available"); Petition of TMP Corporation & TMP Jacksonville, LLC d/b/a Simmetry Communications at p. 3 ("the TMP companies ultimately relied upon erroneous vendor information that the LG 1400i was T-rated."); and SunCom Wireless, Inc. Letter of June 11, 2007 at p. 1 (in which the Tier II regional carrier explained why it had a good faith belief it was in compliance with the Commission's Rules and how it had been misled about the T-coil rating for the Motorola V3i model handset manufactured under FCC ID No. IHDT56EU1).

Motorola web site. Likewise, IT&E's 2007 HAC Report explained that the Company was offering the M3/T3-rated Nokia 6126 bearing FCC ID No. PPIRM-126H.

On Monday, December 3, 2007, staff reviewing IT&E's 2007 HAC Report notified the Company's FCC counsel of an apparent error in the FCC ID number that IT&E had listed for the Motorola V3i phone. According to FCC's records, the correct FCC ID number for the Motorola V3i with M3/T3 rating was supposed to be IHDT56GW1, rather than IHDT56EU1. Prompt research by IT&E confirmed that IT&E had provided the correct FCC ID number for its supply of V3i handsets, and led to the discovery that FCC ID No. IHDT56EU1 was shared by an earlier Motorola model V3 handset that was at first T3 compliant but was now only M3-rated. Correspondence from Motorola received by IT&E's counsel on December 18, 2007, confirmed that there are two different FCC IDs used for the V3i product, and that "one has HAC compliance currently and the other had HAC compliance under waiver for a temporary period but does not meet HAC requirements."³ Publicly available sources, including Motorola's own website, listed the V3i as T3-rated, but did not specify that the rating applies only to model V3i devices bearing the FCC ID No. IHDT56GW1. Similarly, Motorola's November 2006 HAC Report listed only its M3/T3-rated version of the V3i and did not specify that certain V3i handsets that it continued to manufacture and sell were not M3/T3-rated.⁴

In denying the waiver request, the Commission stated that IT&E did not meet the requirements to justify grant of a waiver for its GSM network. Specifically, the Commission concluded that "IT&E did not provide any information in the record to explain its failure to offer

³ Email correspondence of December 18, 2007 @ 5:15 pm ET from Mary Brooner, Motorola, Inc., to Cary Mitchell of Blooston, Mordkofsky, Dickens, Duffy & Prendergast, LLP.

⁴ See Alliance for Telecommunications Industry Solutions (ATIS) Hearing Aid Compatibility Status Report #6, WT Docket No. 01-309 (*filed* Nov. 17, 2006) ("ATIS HAC Report #6").

inductive coupling-compliant handsets as of the date it initiated service on its network, much less several months thereafter.” The Commission further determined that “IT&E was remiss in not questioning the compatibility status of [the Motorola V3i] handset given its lack of required labeling. HAC Waiver Order, Para. No. 25 (emphasis added).

For the reasons stated below, the Commission’s decision was in error, and the determination set forth in the HAC Waiver Order should be set aside and IT&E granted a waiver *nunc pro tunc* through March 31, 2008. IT&E qualifies for a waiver, and the Commission failed to engage in reasoned decision making when it denied the request. The Commission’s action was arbitrary, capricious and an abuse of discretion, and treated IT&E differently than similarly situated carriers.

II) Waiver Standard

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”).

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.

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.*

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

III) The HAC Waiver Order was Arbitrary and Capricious because the Commission Failed to Take Into Account IT&E and Other Carriers' Reliance on Erroneous and/or Misleading Information Provided by a Handset Manufacturer

Grant of a waiver is appropriate in IT&E's case because of confusion over the undisclosed manufacture and sale by Motorola of two versions of its model V3i phone with different HAC capabilities. Under these unique facts and circumstances, punishing a Tier III carrier that relied on the manufacturer's published representations, and that has taken immediate steps to remedy the situation, would be unduly burdensome and contrary to the public interest. Moreover, in failing to recognize IT&E's good faith reliance on handset accessibility information published on the manufacturer's web site, the Commission's HAC Waiver Order was arbitrary and capricious, and an abuse of discretion. IT&E staff reasonably believed that all Motorola handsets branded with the V3i model number would have the same functionality and HAC immunity ratings as the manufacturer has displayed on the "Accessibility" page of its web site. Moreover, because there is no single, readily available source for wireless carriers to confirm handset immunity rating information, there was no reasonable way for IT&E to tell that the model V3i handsets marked with FCC ID IHDT56EU1 were not T3 rated. If IT&E's (and other carriers') reliance on erroneous and/or misleading information published on Motorola's web site does not alone constitute grounds for granting IT&E's waiver request, IT&E respectfully submits that this should at the very least be viewed as substantial mitigating evidence.

Upon learning of a possible discrepancy in the telecoil compatibility ratings for the Motorola V3i phone (and to avoid the possibility of any further mistake), IT&E promptly resolved its regulatory compliance status by ordering a supply of Nokia 6085 GSM handsets (FCC ID No. LJPRM-198H), which it confirmed with its distributor are M3/T3-rated. At the

same time, counsel for IT&E reviewed earlier filings by GSM carriers in WT Docket No. 01-309, and found other instances where the FCC ID for the Motorola V3i was reported as IHDT56GW1, where the FCC ID was not reported at all (suggesting it may have been inconsistent with other carriers' published reports), and where (as in IT&E's case) it was identified as "IHDT56EU1."⁵ Counsel also learned that at least one other GSM carrier had reported the very same FCC ID discrepancy involving the Motorola V3i phone in a waiver request that was filed on June 11, 2007.⁶ These discrepancies are evidence of confusion in the marketplace about the correct FCC ID and/or HAC immunity ratings for certain Motorola V3i handset models. Punishing IT&E and other carriers who reasonably relied on the manufacturer's published representations in this context would be unjust and contrary to the public interest. In similar circumstances where there is confusion in the marketplace, the Commission has granted GSM carriers extensions of the hearing-aid compatibility handset phase-in deadlines. *See* Section 64.8(a) of the Commission's Rules Governing Hearing Aid Compatible Telephones – Petitions for Waiver of Section 20.19 of the Commission's Rules, WT Docket No. 01-309, *Memorandum Opinion & Order*, FCC 07-200 (rel. November 23, 2007) at ¶3 (granting three additional months from the release date of the Order for the named GSM carriers to come into compliance with the Rules).

The Commission itself has relied on information gleaned from websites as the basis for Commission decisions. *See, e.g.*, *Sunset of the Cellular Radiotelephone Service Analog Service Requirement and Related Matters*, *Memorandum Opinion and Order*, 22 FCC Rcd 11243, 72 FR 38793 (2007) at ¶ 18 (citing to document from CTIA website as source for number of calls made

⁵ *See, e.g.*, ATIS HAC Report #6 at Attachment A - Status Report of SunCom Wireless, Inc., and Status Report of Corr Wireless (each report listing the FCC ID for the T3-rated V3i handset as "ITDT56EU1").

⁶ *See* SunCom Wireless, Inc., Request for Limited Waiver *Nunc Pro Tunc*, WT Docket No. 01-309, (filed June 11, 2007).

daily to PSAPs), at ¶ 32 (citing to OnStar website as evidence of that company’s consumer outreach efforts) and at ¶ 36 (citing ADT website as source for alarm industry facts). Indeed, the Commission’s most recent HAC order *mandates* that manufacturers place HAC compliance information on their websites, which will no doubt be relied upon by consumers and service providers alike. *See* Amendment of the Commission’s Rules Governing Hearing Aid-Compatible Mobile Handsets, *Report and Order*, 23 FCC Rcd 3406 (*rel.* February 28, 2008) at ¶ 112 (finding that website information about HAC compliance is needed “so that service providers can readily obtain such information from their manufacturer suppliers.”). The information on Motorola’s website was an unequivocal statement *in writing* by the manufacturer that the V3i phone was compliant. It did not indicate that “some models of the V3i are T3 compliant”, or give IT&E any reason to doubt the straightforward statement that the V3i was T3 compliant. Indeed, Section 4 (Consumer Outreach Efforts) of Motorola’s November 2006 HAC report advises the Commission that “[c]ategory ratings and a detailed explanation of the HAC system rating is available [...] at <http://www.motorola.com/accessibility>.” This is the very web page that IT&E relied upon in concluding that its V3i model handsets were M3/T3 rated.

IT&E further notes that, in addition to reviewing the Motorola website, it reviewed other sources of information, that supported its findings about the V3i phone. In particular, IT&E staff regularly consulted the web site and database of mobile phone technical data developed and maintained by Phone Scoop [www.phonescoop.com], an award winning consumer information and wireless industry news service, to confirm the HAC-compatibility status of various handsets that were available to Tier III carriers. Thus, IT&E had multiple written, reliable sources indicating that the V3i was T3 compliant, without differentiating on the basis of the phone’s particular FCC ID Number.

IV) The Commission Was Required To Ensure That Compliant Handsets Were Available Before Denying IT&E's Waiver Request And Making The Referral To The Enforcement Bureau

When the Commission implemented its HAC regulations codified in Rule Section 20.19(d), it did so with the express intent that both manufacturers and service providers work in tandem to make HAC compliant handsets available to the public. Specifically, Rule Section 20.19(d) states as follows:

- (1) Each manufacturer of handsets used with public mobile services for use in the United States or imported for use in the United States must offer to service providers at least two handset models for each air interface offered that comply with § 20.19(b)(2) by September 18, 2006.
- (2) *And* each provider of public mobile service must include in their handset offerings at least two handset models for each air interface that comply with § 20.19(b)(2) by September 18, 2006 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.⁷

The Commission's use of the conjunctive word "and" in Rule Section 20.19(d)(2) is not a trivial grammatical device. Rather, it makes clear that the obligations of both manufacturers and service providers are intertwined and inseparable and both must do their part to bring compliant handsets to market.

The record in the Commission's hearing aid compatibility proceeding contains abundant evidence that the Commission considered the manufacturers' participation and achievements in developing and bringing to market HAC-compliant handsets as being absolutely essential to the wireless carriers' ability to comply with Rule Section 20.19(d)(2). After all, carrier compliance can be achieved only after the HAC-compliant handsets have been developed and are available to the carriers in sufficient quantities. For example, the Commission envisioned that

⁷ 47 C.F.R. § 20.19(d)(1) and (d)(2) (emphasis added).

manufacturers would need to revise handset designs as a result of issues identified through compliance testing.⁸ The Commission also required manufacturers to, among other things, place labels on the exterior packaging containing a HAC-compliant wireless handset indicating the technical rating of the handset, and include more detailed information on the ANSI standard in either a product insert or in the wireless telephone's manual.⁹ The responsibility to produce, package, label, and test HAC-compliant handsets was wholly within the province of the manufacturers, which was a condition precedent to wireless carriers, such as IT&E, carrying out their obligations to provide those handsets to subscribers at the retail level of the distribution chain. Wireless carriers are totally and completely dependent on the handset manufacturers to fulfill their obligations under Rule Section 20.19(d)(2).

Because wireless service providers could not comply with their Rule Section 20.19(d)(2) obligations unless the manufacturers *first* complied with their Rule Section 20.19(d)(1) obligations, it was incumbent upon the Commission to determine the precise date upon which the HAC-compliant handsets became available to Tier III carriers from the manufacturers and their authorized U.S. distributors. It was insufficient for the Commission to merely rely on the date that it approved a particular handset as complying with the M3/T3 standard (as discussed in more detail below) because of the lag time between the Commission approval date and the general commercial availability of the approved handset. The wording of Rule Section 20.19(d) requires the Commission to first determine whether there was meaningful compliance with the manufacturers obligations under Rule Section 20.19(d)(1), before moving on and deciding that a carrier had violated Rule Section 20.19(d)(2).

⁸ *Section 68.4(a) of the Commission's Rules Governing Hearing Aid-Compatible Telephones*, WT Docket No. 01-309, Report and Order, 18 FCC Rcd 16753 ¶ 71 (2003).

⁹ *Section 68.4(a) of the Commission's Rules Governing Hearing Aid-Compatible Telephones*, Order on Reconsideration and Further Notice of Proposed Rulemaking, 20 FCC Rcd 11211 ¶¶ 31-36 (2005).

The HAC Waiver Order is devoid of any information demonstrating that the Commission went to the manufacturers or distributors to investigate and determine the actual date that each HAC-compliant handset was available for shipping to handset vendors and to the Tier III carriers. Rather, the Commission relied solely on information provided by the carriers themselves regarding the dates they began to offer compliant handsets. Those dates provide no information regarding when HAC-compliant handsets were actually available from manufacturers or distributors, and the Commission's inquiry provided an incentive for carriers to liberally construe when handsets were available by, for example, counting test units towards their compliance obligations. Furthermore, as discussed above and as the Commission has recognized in the past, Tier I carriers can obtain handsets directly from the manufacturer, while Tier III carriers are required to obtain handsets from authorized distributors. There may be more than one distributor that is authorized to sell a manufacturer's handsets at wholesale, and those distributors may only be authorized to sell handsets in particular areas of the country. Carriers located in different regions of the country may not have had access to compliant handsets at the same time depending on the distributor to whom they were assigned.

Without this type of information, it was impossible for the Commission to engage in reasoned decision making and determine whether it was reasonable for carriers to have deployed the handsets on the dates indicated in their respective reports. In order for the Commission to have established non-arbitrary standards for granting waivers to carriers that deployed compliant handsets after September 18, 2006, the Commission was required to first determine when those handsets actually became commercially available from the manufacturers and distributors, as required by Rule Section 20.19(d)(1), particularly when carriers relied on different means of obtaining their handsets. Otherwise, any decision by the Commission regarding a carrier's

diligence, the reasonableness of its handset deployment dates, and whether those dates merit a waiver of Rule Section 20.19(d)(2) is simply guesswork that is unsupported by the evidentiary record, and therefore reconsideration of the Commission's HAC Waiver Order is required.

V) There was a Lack of Reliable HAC Compliance Information Available to Carriers

Indeed, it should also be emphasized that no consistent and reliable information existed regarding even the existence of HAC-compliant digital wireless handsets. As the Commission has acknowledged, “the availability of information regarding hearing aid compatible handsets still suffers from serious shortcomings.”¹⁰ Specifically, carriers searching the Commission's OET database could not always obtain information regarding the HAC status for handsets offered by manufacturers because “the current rating for hearing aid compatibility may not always be clear to a consumer or service provider conducting a routine search of the database.”¹¹ It was in this difficult and confusing environment that wireless carriers such as IT&E attempted to identify and obtain HAC-compliant handsets to comply with the Commission's deadline.

VI) Analysis in the HAC Waiver Order

As a general matter, the HAC Waiver Order is notable for a number of reasons that demonstrate a lack of reasoned decision making on the Commission's part. 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:

¹⁰ Section 68.4(a) of the Commission's Rules Governing Hearing-Aid Compatible Telephones, Report on the Status of Implementation of the Commission's Hearing Aid Compatibility Requirements, 22 FCC Rcd 17709, 17740 ¶ 47 (2007).

¹¹ *Id.*

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).

Given these circumstances, the delay in IT&E's compliance is entirely reasonable and consistent with the Commission's observation that the handsets were not readily available to Tier III carriers. It has been IT&E's experience that it is far too small to have bargaining power or ability to obtain handsets directly from handset manufacturers. Its only viable option, therefore, is to work with authorized distributors (*i.e.*, secondary suppliers), and these distributors are only able to obtain handset models that the handset manufacturers have made available in sufficient quantity for distribution by third-party wholesalers. IT&E consulted with its distributors on an ongoing basis following the implementation of its GSM overbuild, only to be advised that the available T-coil compatible GSM handsets were unusable by IT&E, because they were "locked" (*i.e.*, IT&E's customers could not use them on the IT&E GSM network), were proprietary to a national carrier, or were intended for a foreign market. These problems plagued IT&E's

compliance efforts even after it was finally able to identify T-coil compliant GSM phones and to place an order. Attachment A hereto includes an example of an instance where IT&E placed an order for compliant handsets, and when the handsets were finally delivered, they were found to be locked and had to be re-ordered. As indicated by Attachment A, IT&E stridently urged its distributor to obtain the unlocked version of the handset.

IT&E is a small regional carrier in a very remote geographic location that has no involvement in the handset manufacturing, testing, packaging and/or distribution processes. The Company has tried in good faith to comply with the Commission's hearing aid compatibility requirements and grant of the requested waiver would be consistent with the Commission's goal of bringing the benefits of digital wireless telecommunications to individuals with hearing disabilities. IT&E has chosen to construct and operate an "overlay" broadband PCS network using a second air interface (which will benefit all consumers who seek to use GSM phones), and the carrier is not transitioning its operations from one air interface to another.

The HAC Waiver Order fails to address the impact of erroneous and/or misleading information that was available in the marketplace, and in some cases provided by the manufacturers themselves, about the T-coil compatibility status of certain handset models. This is the very antithesis of reasoned decision making; and clearly contravenes the requirement of WAIT Radio that waiver requests must be given a "hard look." That the Commission was faced with multiple waiver requests and a number of common issues did not relieve the Commission of its WAIT Radio obligation to give all of the circumstances surrounding IT&E's waiver request the required "hard look" so that the waiver process could perform its "safety valve" function.

The record in this proceeding clearly shows that the supply of T3-rated GSM handsets available to Tier III carriers was severely limited. In this context, the simple fact that some carriers were fortunate enough to receive a supply of compliant devices before others, or before any particular date, doesn't provide a sound basis for the FCC to conclude that all carriers were able to obtain these phones at the same time. Likewise, the Commission cannot rely on this data to find that some carriers were diligent and others were not.

In view of IT&E's efforts to obtain compliant GSM phones, and its prompt action in ordering a supply of Nokia 6085 GSM handsets immediately upon learning of the irregularity with respect to the Motorola V3i handset, IT&E submits that its compliance efforts have been reasonable and that its waiver request should be granted *nunc pro tunc*. The waiver request should have been evaluated on its individual merits with these factors squarely in mind.

As all of the facts and circumstances demonstrate, IT&E was plainly diligent in its efforts to secure two T3 (or better) rated handsets at the earliest practicable date. The problems experienced were typical of those facing small, Tier III carriers whose waiver requests were granted. Moreover, in view of the unique and unusual factual circumstances of the instant case [a Tier III carrier located in the Pacific, with more limited access to handsets and confusing information unequivocally stated on multiple websites], application of the rule(s) would be inequitable, unduly burdensome or contrary to the public interest. The particular facts make strict compliance inconsistent with the public interest if applied to the petitioner, and the relief requested would not undermine the policy objective of the rule in question. IT&E did not have any customers inquire about HAC capability during the relevant time period; and if IT&E had gotten such requests, it could have satisfied these requests using its CDMA HAC-compliant phones within a reasonable period of time.

Conclusion

Wherefore, IT&E respectfully submits that grant of its *T-Coil Petition*, and further relief extending *nunc pro tunc* until March 31, 2008, would be consistent with the public interest, convenience and necessity.

Respectfully submitted,
IT&E Overseas, Inc.

By: 

John A. Prendergast
D. Cary Mitchell
Its Attorneys

Filed: March 28, 2008

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Attachment A

IT&E Email Correspondence from June 15 – July 25, 2007
With Mr. Danny Ordonez of Wireless One Distributors

From: "Jose D. Perez" <jdperez@ite.net>
Subject: **Fw: MOT V3X and NOK 6126**
Date: March 28, 2008 10:14:36 AM GMT+10:00
To: "John M. Borlas" <jmborlas@ite.net>

----- Original Message -----

From: [Jose D. Perez](#)
To: [Danny Ordonez](#)
Sent: Wednesday, July 25, 2007 7:54 AM
Subject: Re: MOT V3X and NOK 6126

PLEASE I really need both phones and I got to have them before the end of the month.

----- Original Message -----

From: [Danny Ordonez](#)
To: [Jose D. Perez](#)
Sent: Wednesday, July 25, 2007 1:10 AM
Subject: RE: MOT V3X and NOK 6126

Joe, both models came in USED, .. and were returned to the vendor..
I can't believe I am having this much trouble, in getting these units. I am checking with another vendor to see if I can get.
Keep you posted..

----- Original Message -----

From: [Jose D. Perez](#)
To: [Danny Ordonez](#)
Sent: Tuesday, July 24, 2007 3:24 AM
Subject: Re: MOT V3X and NOK 6126

Please let me know on this!!!!!!!!!!!!!!

----- Original Message -----

From: [Danny Ordonez](#)
To: [Jose D. Perez](#)
Sent: Saturday, July 21, 2007 7:34 AM
Subject: RE: MOT V3X and NOK 6126

not yet.. still waiting for FEDEX to show up..

From: Jose D. Perez [mailto:jdperez@ite.net]
Sent: Friday, July 20, 2007 2:32 PM
To: Danny Ordonez
Subject: Re: MOT V3X and NOK 6126

Did you get these phones today???????

----- Original Message -----

From: [Jose D. Perez](#)
To: [Danny Ordonez](#)
Sent: Wednesday, July 18, 2007 6:20 AM
Subject: Re: MOT V3X and NOK 6126

I understand and if possible please ship to us on the same day you receive them after verifying that they are unlocked. Thanks.

----- Original Message -----

From: [Danny Ordonez](#)
To: [Jose D. Perez](#)
Sent: Wednesday, July 18, 2007 6:17 AM
Subject: RE: MOT V3X and NOK 6126

I will have both phones here on Friday to ship to you.
Sorry for the delay..Needed to verify that I'm getting UNLOCKED product..

From: Jose D. Perez [mailto:jdper@ite.net]
Sent: Tuesday, July 17, 2007 1:15 PM
To: Danny Ordonez
Subject: Fw: MOT V3X and NOK 6126

Please respond!!!!!!!!!!

----- Original Message -----

From: [Jose D. Perez](#)
To: [Danny Ordonez](#)
Sent: Tuesday, July 03, 2007 7:51 AM
Subject: Re: MOT V3X and NOK 6126

Danny,

We urgently need these phones. Please follow up and update me.

Joe

----- Original Message -----

From: [Danny Ordonez](#)
To: [Jose D. Perez](#)
Sent: Saturday, June 23, 2007 5:16 AM
Subject: RE: MOT V3X and NOK 6126

We keep getting locked handsets on these models. Sorry for the delay.
I will keep you posted, when we get the unlocked product.

From: Jose D. Perez [mailto:jdper@ite.net]
Sent: Friday, June 22, 2007 12:14 PM
To: Danny Ordonez
Subject: Re: MOT V3X and NOK 6126

Anything on this?

----- Original Message -----

From: [Danny Ordonez](#)
To: [Jose D. Perez](#)
Sent: Friday, June 15, 2007 2:57 AM
Subject: RE: KRZR K1m

I will keep you posted on the V3X and the NOK 6126...they arrived LOCKED and needed to reorder.

DECLARATION UNDER PENALTY OF PERJURY OF JOHN BORLAS

1. My name is John Borlas, and I am the President of IT&E Overseas, Inc., 122 West Harmon Industrial Park Road, Tamuning, Guam.
2. I hereby certify under penalty of perjury that I have reviewed the foregoing Petition for Reconsideration, and except for those matters of which the Federal Communications Commission may take official notice, or those matters attributed to other persons, the factual assertions set forth in the Petition are true and correct to the best of my knowledge.

Signed: 

Dated: March 28, 2008