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PUBLIC VERSION

March 27, 2008

VIA HAND DELIVERY

Marlene H. Dortch, Secretary
Federal Communications Commission
Office of the Secretary
c/o Natek, Inc.
236 Massachusetts Avenue, N.E.
Suite 110
Washington, DC 20002

FILED/ACCEPTED

MAR 27 2008

Federal Communications Commission
Office of the SecretaryPUBLIC VERSION

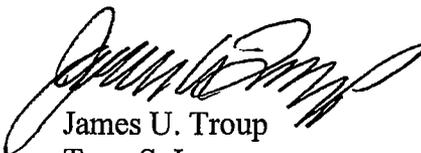
Re: **Petition for Reconsideration of Iowa Wireless Services, LLC d/b/a i wireless
WT Docket No. 01-309**

Dear Ms. Dortch:

On behalf of Iowa Wireless Services, LLC d/b/a i wireless ("i wireless") transmitted herewith are an original and four (4) copies of the public version of i wireless's Petition for Reconsideration of the Commission's *HAC Waiver Order*¹ in which the Commission denied i wireless's Petition for Waiver of Section 20.19(d)(2) of the Commission's Rules, and referred i wireless to the Enforcement Bureau for further action. A copy of the confidential version of this filing is being submitted contemporaneously under separate cover.

Please date-stamp and return the extra copy of this letter. Should you have any questions with respect to this matter, please do not hesitate to contact the undersigned.

Respectfully submitted,



James U. Troup

Tony S. Lee

Counsel for Iowa Wireless Services, LLC d/b/a i wireless

Enclosures

¹ Section 68.4(a) of the Commission's Rules Governing Hearing Aid-Compatible Telephones; Petitions for Waiver of Section 20.19 of the Commission's Rules, Memorandum Opinion and Order, FCC 08-67, WT Docket No. 01-309 (rel. Feb. 27, 2008) ("*HAC Waiver Order*").

No. of Copies rec'd 044
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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Office of the Secretary

In the Matter of)
)
Section 68.4(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

PETITION FOR RECONSIDERATION OF I WIRELESS

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March 27, 2008

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SUMMARY

On February 27, 2008, the FCC issued its *HAC Waiver Order* denying, among others, i wireless's Petition for Waiver of Section 20.19(d)(2) of the Commission's Rules requiring wireless carriers to deploy hearing aid compatible ("HAC") handsets by September 18, 2006. The FCC determined that i wireless did not demonstrate diligence in its efforts to obtain HAC handsets by the Commission's deadline, particularly, when other similarly situated carriers were apparently able to obtain compliant handsets much earlier.

i wireless petitions the Commission to reconsider its denial of i wireless's Petition for Waiver because, contrary to its decision, i wireless did in fact diligently attempt to procure compliant handsets as soon as possible well before the FCC's deadline. i wireless proactively and persistently contacted handset manufacturers and their authorized U.S. distributors to procure compliant handsets. As a Tier III carrier, i wireless could not obtain many of the GSM handsets identified by the FCC as HAC compliant because they were available on an exclusive basis to large carriers, or they were incompatible with i wireless's network. i wireless identified the HAC compliant handsets it could use, requested sample units for testing and validation, and accelerated its deployment schedule to bring those handsets to market as quickly as possible.

Reconsideration is further warranted because the FCC granted the waiver petitions of several carriers that relied on the same HAC handsets as i wireless, and in particular, the Nokia 6126h. Although those carriers reported having the Nokia 6126h for sale at retail in 2006, i wireless has confirmed that that handset was not available from Nokia's authorized U.S. distributor until March 2007. i wireless ordered and deployed the Nokia 6126h as soon as it was available in March 2007, and it was impossible for i wireless to obtain the Nokia 6126h any sooner.

Moreover, Section 20.19(d) requires both manufacturers and wireless carriers to work in tandem to comply with the Commission's September 18, 2006 implementation deadline. The availability of handsets from equipment manufacturers was a condition precedent to the service providers' ability to comply with Section 20.19(d)(2). Accordingly, the FCC was required to first determine the actual date that handsets were available from manufacturers and distributors in order to determine whether it was appropriate to grant or deny waivers to carriers.

Finally, it would be arbitrary and capricious for the FCC to deny i wireless's Petition for Waiver when it used the same handsets that other carriers deployed that were granted waivers, particularly when the Nokia 6126h was unavailable to any Tier III carriers in 2006.

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

In the Matter of)
)
Section 68.4(a) of the Commission's Rules) WT Docket No. 01-309
Governing Hearing Aid-Compatible Telephones)
)
Petitions for Waiver of Section 20.19 of the)
Commission's Rules)
_____)

PETITION FOR RECONSIDERATION OF I WIRELESS

Iowa Wireless Services, LLC d/b/a i wireless ("i wireless"), by its undersigned attorneys, and pursuant to Section 1.106 of the Commission's Rules,¹ files this Petition for Reconsideration of the FCC's February 27, 2008 *HAC Waiver Order*² in which it denied i wireless's request for waiver of Section 20.19(d)(2) of the Commission's Rules,³ and referred the company's "apparent violations" to the Enforcement Bureau for potential action. Reconsideration is warranted because the Commission's finding that i wireless failed to demonstrate diligence in taking action to comply with the Section 20.19(d)(2) is incorrect.

As further detailed below,⁴ contrary to the Commission's determination, over the course of several months, i wireless diligently worked to obtain hearing aid compatible ("HAC") handsets. Specifically, i wireless proactively and persistently engaged handset vendors and

¹ 47 C.F.R. § 1.106.

² *Section 68.4(a) of the Commission's Rules Governing Hearing Aid-Compatible Telephones; Petitions for Waiver of Section 20.19 of the Commission's Rules*, Memorandum Opinion and Order, FCC 08-67, WT Docket No. 01-309 (rel. Feb. 27, 2008) ("*HAC Waiver Order*").

³ 47 C.F.R. §§ 20.19(d)(2).

⁴ Certain portions of this Petition have been designated "confidential" because the information discussed therein may be subject to a non-disclosure agreement, or may contain commercially sensitive communications. A separate Request for Confidential Treatment pursuant to Section 0.459 of the Commission's Rules, 47 C.F.R. § 0.459, is being submitted separately in this proceeding. A "Public Version" of this filing is being submitted concurrently with the Commission.

authorized U.S. distributors in an attempt to procure several different HAC handsets before the Commission's September 18, 2006 compliance deadline. During that period, there was a lot of confusing and conflicting information distributed by the handset manufacturers and distributors regarding the handsets' capabilities and compliance with meeting the T3 rating requirement, which contributed to i wireless's difficulties in obtaining HAC handsets.

Moreover, it was impossible for i wireless to comply with the September 18, 2006 deadline to offer two HAC handsets because the Nokia 6126h handsets that i wireless began offering on March 22, 2007, were unavailable from Nokia's authorized U.S. distributor until earlier that same month. Indeed, it appears that other Tier III carriers granted waivers for the same HAC handsets that i wireless offered may have provided the FCC with erroneous or misleading information regarding the Nokia 6126h handsets they allegedly procured, which merits Commission investigation into the accuracy of the representations made in the reports and responses to FCC inquiries on compliance with Section 20.19 of the Commission's Rules.

I. BACKGROUND

By way of background, i wireless is a Tier III GSM PCS licensee providing service in Iowa and western Illinois. As the FCC is aware, Section 20.19(d)(2) of the Commission's Rules requires that mobile service providers offer at least two wireless telephone handset models per digital air interface that are certified as meeting at least a T3 by September 18, 2006.⁵ On September 19, 2006, i wireless, on behalf of itself and 37 related licensees,⁶ filed a Petition for

⁵ See 47 C.F.R. §§ 20.19(b)(2) and 20.19(d)(2).

⁶ i wireless's related licensees are as follows: Andrew Telephone Company, Barnes City Telephone Company, Benton Linn Wireless, Bernard Communications, Brooklyn Mutual Telecommunications Coop., Casey Cable Co., Cedar County PCS, LLC, Cedar-Wapsie Communications, Inc., Central Iowa Wireless, Central Scott Telephone Co., Center Junction Telephone Co., Clear Lake Independent Telephone Co., Cooperative Telephone Company, Corn Belt Telephone Co., D.C. Communications, Dumont Wireless, FWC Communications, Kalona Cooperative Telephone Co., MAC Wireless, Mill Valley Wireless, Modern Cooperative Telephone, Montezuma

Waiver of Section 20.19(d)(2) of the Commission's Rules because, despite its best efforts, the company had not been able to obtain any HAC handsets from its vendors. In its Petition, i wireless informed the Commission that it had taken steps to procure the Motorola V3i handset, which is compliant with the M3/T3 standard; however, at that time, it had not been able to identify a second GSM M3/T3 compliant handset.

On June 13, 2007, the Commission issued questions via e-mail to various carriers, including i wireless, that had requested a waiver of Section 20.19(d)(2) to determine the HAC handsets offered, and the dates carriers came into compliance with Section 20.19(d)(2). i wireless filed its response on June 28, 2007, and notified the Commission that it was carrying the Motorola V3i (FCC ID No. 1HDT56GW1) and the Nokia 6126h (FCC ID No. PPIRM-126H), and that it began offering both handsets by March 22, 2007. As discussed below, i wireless began offering the Motorola V3i much earlier than the March 22, 2007 date. Specifically, i wireless made the Motorola V3i available on October 17, 2006, and it launched the Nokia 6126h on March 22, 2007, which was shortly after that handset became available to i wireless from Nokia's authorized U.S. distributor, Brightpoint.⁷

On February 27, 2008, the Commission released its *HAC Waiver Order* in which it addressed 46 waiver petitions that sought extensions of the September 18, 2006 deadline to provide handsets that met the T3 standard. With respect to i wireless's Petition, the Commission concluded that, among other things, i wireless failed to demonstrate the diligence, unique or

(continued from previous page)

Mutual Telephone Company, Northeast Iowa Telephone Company, Olin Telephone Co., OmniTel Communications, Onslow Cooperative Telephone Association, Ogden Telephone Company, Radcliffe Telephone Co., Rockwell Cooperative Telephone Assn., Rolling Hills Communications, SEI Wireless, Sharon Telephone Company, Southeast Wireless, Ventura Telephone Co., Wapsi Wireless, LLC, Wellman Telephone Cooperative Association, and Winnebago Cooperative Telephone Association.

⁷ Carriers are required to obtain handsets from the manufacturers or authorized distributors, and not offer devices that are obtained from "grey-market" or unauthorized sources.

unusual circumstances, or any other factor that would warrant a grant of the requested waiver, and that it failed to demonstrate its need for an extension when it allegedly took most similarly situated carriers much less time.⁸

i wireless now brings this Petition to request reconsideration of the decision denying its request for waiver, and the decision to refer this matter to the Enforcement Bureau.

II. DISCUSSION

A. Standard of Review

Pursuant to Section 1.106 of the Commission's Rules, parties may petition for reconsideration of final Commission actions.⁹ Reconsideration is appropriate where the petitioner either shows a material error or omission in the original order or raises additional facts not known or existing until after the petitioner's last opportunity to present such matters.¹⁰ In this case, reconsideration is warranted because the Commission erroneously determined that i wireless failed to demonstrate diligence, and there are new additional facts that the Commission did not have the opportunity to consider in reaching its decision to deny i wireless's Petition for Waiver.

As further detailed below, contrary to the Commission's findings, i wireless worked very diligently over the course of several months to attempt to secure HAC handsets to comply with the September 18, 2006 deadline. However, delays and misinformation from handset manufacturers and distributors, and a lack of availability of compliant units prevented i wireless

⁸ *HAC Waiver Order* at ¶ 44.

⁹ 47 C.F.R. § 1.106.

¹⁰ See 47 C.F.R. § 1.106(c)(1); *GTE Corporation, Transferor, and Bell Atlantic Corporation, Transferee, Order on Reconsideration*, 18 FCC.Rcd. 24871, 73 ¶ 5 (2003) (*GTE-Bell Atlantic Order on Recon.*) (citing *Applications of WWIZ, Inc.*, Memorandum Opinion and Order, 37 FCC 685, 686 (1964), *aff'd sub nom. Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 967 (1966)).

from timely obtaining the Nokia 6126h, and i wireless deployed that handset as soon as it could, which was March 22, 2007. Moreover, it appears that the FCC relied on inaccurate or misleading information submitted by other Tier III carriers when it concluded that i wireless failed to demonstrate that it needed an extension of time because it supposedly “took most similarly situated carriers much less time.”¹¹ i wireless has clear and reliable information that those other Tier III carriers could not have deployed the Nokia 6126h in the timeframes reported to the Commission as that handset was not available to Tier III carriers from Nokia’s authorized U.S. distributors until March 2007.

B. i wireless Has Worked Diligently to Procure HAC Handsets From Authorized U.S. Distributors

It is i wireless’s understanding that large Tier I carriers, such as Cingular (now AT&T), Verizon, and Sprint can quickly obtain the latest, and often customized, handsets directly from equipment manufacturers.¹² As a Tier III carrier, i wireless does not have the capability to influence the production and distribution timetables of handset manufacturers, such as Motorola and Nokia.¹³ Small Tier III carriers do not have sufficient purchasing power to buy handsets directly from the manufacturers, and instead, they must procure them from authorized U.S. distributors.¹⁴ Those distributors are often unable to make certain handsets available quickly to Tier III carriers if manufacturers have given priority to Tier I carriers, as was the case for HAC handsets.¹⁵

¹¹ *HAC Waiver Order* at ¶ 44.

¹² *See Affidavit of Phillip Luebke* ¶ 3, attached hereto (“Luebke Aff.”).

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

In its *HAC Waiver Order*, the Commission determined that i wireless did not diligently seek HAC handsets in order to comply with the September 18, 2006 deadline set forth in Section 20.19(d)(2). However, that conclusion is incorrect. In Appendix D to the *HAC Waiver Order*, the Commission identified 14 GSM compatible handsets that were approved as of the November 2006 compliance status reports filed by wireless carriers.¹⁶ Those handsets are as follows:

<u>Manufacturer</u>	<u>Model</u>	<u>FCC ID</u>	<u>Date Approved</u>
LG	C2000	BEJC2000	7/26/06
	CG300	BEJCG300	7/27/06
	CU400	BEJCU400	9/6/06
Motorola	V3e	IHDT56GL1	7/27/06
	V3i	IHDT56GW1	8/3/06
Nokia	6126h	PPIRM-126H	9/5/06
	6133h	PPIRM-126H	9/5/06
	6085	LJPRM-198H	10/4/06
RIM	8705	L6ARBH40GW	8/16/06
	8705g	L6ARBH40GW	8/16/06
Samsung	SGH-407T	A3LSGHD407	9/15/06
	SGH-ZX20	A3LSGHZX20	9/15/06
Sony Ericsson	W712a	PY7AF042011	9/15/06
Sony Ericsson	Z712a	PY7AF042012	9/18/06

Before i wireless can make a wireless handset available at retail to its subscribers, each phone must be tested to ensure that it is compatible with i wireless's GSM network, that its RF performance, construction, and form factor meets certain minimum criteria, and that the phone can be reliably deployed and activated by sales agents at the point of sale.¹⁷ i wireless generally obtains test units directly from the manufacturer, and the company's standard testing process usually takes approximately two months to complete.¹⁸ Once i wireless determines that a phone is acceptable for deployment, i wireless will place an order with the manufacturer's authorized U.S. distributor, and it takes approximately two to four weeks for the first shipment to arrive at

¹⁶ *HAC Waiver Order*, Appendix D.

¹⁷ Luebke Aff. ¶ 4.

¹⁸ *Id.*

i wireless's warehouse.¹⁹ In light of the fact that many of the GSM phones on the FCC's list of approved handsets were approved approximately 30 days before the September 18, 2006 deadline, with four of the phones approved on or just before the deadline, i wireless accelerated its testing program to identify, test, order, and distribute HAC compliant phones as soon as possible.²⁰

The LG models – C2000, CG300, and CU400 – were Cingular (AT&T) models, and generic versions of the CG300 and CU400 handsets were not made available to smaller carriers.²¹ It is i wireless's understanding that the "C" in the model number indicates that the LG phones were models exclusive to Cingular (AT&T).²² i wireless is aware that LG did produce the LG2000 phone, which apparently was a generic version of the LG C2000. However, the LG2000 was not listed by the FCC as meeting the T3 rating. i wireless tested the LG2000 in July and August 2006, and rejected it due in part to its understanding at the time that the LG2000 did not meet the T3 rating.²³ Indeed, the packaging of the LG2000 test unit that i wireless received stated that it only had an M3 rating, and that it did not have a T3 rating.²⁴

It is i wireless's understanding that the Motorola V3e was an HAC handset that was not made available to the regional carrier channel.²⁵ Its sister model, the Motorola V3i, however,

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.* ¶ 6.

²² *Id.*

²³ *Id.*

²⁴ See Exhibit A for a picture of the box of the LG2000 test unit with labeling indicating that it only had an M3 rating.

²⁵ Luebke Aff. ¶ 7.

was made available to Tier III carriers, and i wireless tested and launched that handset on October 16, 2006, with retail availability the next day on October 17, 2006.²⁶

With regard to the Nokia GSM phones that were approved as meeting the T3 rating, i wireless deployed the Nokia 6126h on March 22, 2007, shortly after that phone became available from Nokia's authorized U.S. distributor, Brightpoint, in March 2007.²⁷ It is i wireless's understanding that the Nokia 6133h was not available to Tier III carriers as that was a T-Mobile exclusive version of the phone.²⁸ i wireless received test samples of the Nokia 6085 on February 2, 2007.²⁹ However, that phone did not become commercially available until March 15, 2007, which was after i wireless had already ordered the two phones it deployed to comply with its HAC handset obligations,³⁰ thus obviating the need for the Nokia 6085 for i wireless to meet its hearing aid compatibility obligations.³¹

The RIM phones are Blackberry units with e-mail capability.³² i wireless does not have the infrastructure in place to support RIM/Blackberry units.³³ Moreover, a carrier must also have an agreement with RIM in order to enable subscribers to use the RIM/Blackberry units, and

²⁶ *Id.*

²⁷ Luebke Aff. ¶ 8.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ In the *HAC Waiver Order*, the Commission faulted i wireless for not stating why it listed the Nokia 6061 as hearing aid-compatible in its November 2006 Status Report, and for not providing additional information as to whether, or if so, why it believed that this handset was hearing aid-compatible. *HAC Waiver Order* at ¶ 44. i wireless listed the Nokia 6061 as being a HAC phone based on information that it received from Nokia. Indeed, other carriers were similarly confused regarding the status of the Nokia 6061 as a T3 rated phone. *See, e.g.,* Letter to Marlene Dortch from Mid-Tex Cellular, Ltd., WT Docket No. 01-309 (filed Feb. 22, 2007) (reporting that Mid-Tex Cellular had learned that the FCC had certified the Nokia 6061 as GSM HAC compliant on October 20, 2005). However, Nokia subsequently informed i wireless that the Nokia 6061 was not HAC compliant, and i wireless decided to order the Nokia 6126h as its second HAC handset.

³² Luebke Aff. ¶ 9.

³³ *Id.*

i wireless does not have such an agreement in place.³⁴ Therefore, the use of the RIM handsets was not an option for i wireless to meet the HAC requirement in Section 20.19(d)(2).³⁵

It is i wireless's understanding that the Samsung SGH-ZX20 was a Cingular (AT&T) exclusive unit, and i wireless is not aware of a generic version being made available.³⁶ Similarly, Cingular (AT&T) carried the Samsung SGH-D407 which has the same FCC ID as the Samsung SGH-407T.³⁷ However, i wireless is not aware that the Samsung SGH-407T was ever put into production or made available to Tier III carriers.³⁸

The Sony Ericsson W712a and Z712a handsets were generally available to the smaller carriers.³⁹ However, at the time i wireless was attempting to find a source for those units, they were not available from Sony Ericsson's authorized U.S. distributor, Brightpoint.⁴⁰ Rather, they were only available through a company called HITEC, which only sold handsets to customers at retail.⁴¹ Moreover, during the period that i wireless was attempting to secure HAC handsets to comply with Section 20.19(d)(2), i wireless requested test units from the manufacturers so that it could put them through the testing and validation process described above. i wireless did not receive any samples of the Sony Ericsson W712a or Z712a units for testing, despite having made several requests.⁴² The unavailability of any test samples, the lack of any experience or relationship with HITEC, including the establishment of lines of credit, account representatives,

³⁴ *Id.*

³⁵ *Id.*

³⁶ Luebke Aff. ¶ 10.

³⁷ *Id.*

³⁸ *Id.*

³⁹ Luebke Aff. ¶ 11.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

and ordering and delivery procedures, and the unavailability of the Sony Ericsson phones from wholesale vendors contributed to i wireless's decision to go forward with procuring the Nokia 6126h as its second HAC compliant handset.⁴³

i wireless's difficulties in obtaining HAC compliant phones were compounded by the fact that only five of the fourteen phones listed by the FCC as HAC compliant were compatible with i wireless's network. Specifically, the only GSM HAC compliant handsets released to Tier III carriers during the time i wireless was searching for HAC compliant handsets and that were compatible with i wireless's GSM system are as follows: Motorola V3i (IHDT56GL1), Nokia 6126h (PPIRM-126H), Nokia 6085 (LJPRM-198H), Sony Ericsson W712a (PY7AF042011), and Sony Ericsson Z712a (PY7AF042012). As discussed above, the FCC did not list the LG2000 as one of the GSM HAC handsets, and i wireless received conflicting information from the manufacturer regarding whether the LG2000 was HAC compliant. It was not until i wireless had selected the Motorola V3i and the Nokia 6126h that i wireless received credible information that the LG2000 was an HAC compliant phone.

There was a lot of confusion among the equipment manufacturers, distributors, and even the FCC regarding which handsets were compliant with the T3 rating. For example, as part of its inquiry to i wireless made on June 12, 2007, the FCC provided a list of "T-Coil Approved Handsets for GSM," which listed the Sony Ericsson W710 (PY7AF052041) as being T3 compliant. According to Sony Ericsson, the W710 is not HAC compliant. The lack of consistent and reliable information regarding whether phones were HAC compliant was further compounded by the fact that, as the Commission has acknowledged, "the availability of

⁴³ *Id.*

information regarding hearing aid compatible handsets still suffers from serious shortcomings.”⁴⁴

Specifically, carriers searching the FCC’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.”⁴⁵ It was in this difficult and confusing environment that i wireless attempted to obtain HAC handsets to comply with the Commission’s deadline.

Below is a timeline outlining the efforts i wireless took to identify and procure two compliant GSM HAC compliant handsets compatible with i wireless’s network:

Timelines For Each HAC Compliant Handset Considered by i wireless⁴⁶

Motorola V3i

- 4/17/06 [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL]
- 6/30/06 Received two Motorola V3i test units
- 7/26/06 Tested and approved the Motorola V3i in 27 days on an expedited basis, which is less than half of i wireless’ standard testing and approval period for new handsets
- 7/31/06 [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL]
- 8/21/06 Placed purchase order for Motorola V3i handsets
- 9/13/06 [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL]
- 9/18/06 FCC deadline to carry at least two handsets rated T3 or T4 for compatibility with T-coils
- 9/19/06 i wireless submitted waiver request to the FCC

⁴⁴ 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).

⁴⁵ *Id.*

⁴⁶ Luebke Aff. ¶ 12. As noted in Mr. Luebke’s Affidavit, this is not an exhaustive timeline as there were many other communications between i wireless and the manufacturers/distributors. This timeline only contains significant events to demonstrate that i wireless’s efforts to identify and procure compliant handsets began well before the FCC’s September 2006 deadline, and also to show the timing of the availability of the handsets.

10/12/06 Received first shipment of Motorola V3i handsets at i wireless's warehouse.
10/16/06 Launched the Motorola V3i

Nokia 6126h

7/19/06 [BEGIN CONFIDENTIAL] [REDACTED]
[REDACTED] [END CONFIDENTIAL]
7/26/06 i wireless received two Nokia 6126 (non-HAC) test handsets
9/18/06 FCC deadline to carry at least two handsets rated T3 or T4 for compatibility with T-coils
9/19/06 i wireless submitted waiver request to the FCC
10/10/06 i wireless requested 6126h test units
10/17/06 i wireless requested 6126h test units a second time
11/15/06 Received one Nokia 6126h test handset
1/25/07 [BEGIN CONFIDENTIAL] [REDACTED]
[REDACTED] [END CONFIDENTIAL]
March 07 Nokia 6126h became available from Nokia's authorized U.S. distributor, Brightpoint
3/13/07 Placed purchase order for Nokia 6126h handsets, pending approval
3/15/07 i wireless approved the Nokia 6126h
3/21/07 Received first shipment of Nokia 6126h handsets at i wireless's warehouse
3/21/07 Launched Nokia 6126h

LG2000

6/19/06 [BEGIN CONFIDENTIAL] [REDACTED]
[REDACTED] [END CONFIDENTIAL]
7/13/06 i wireless noted that the LG2000 is rated M3 only, and not T3
7/17/06 Received approval from the i wireless Network Operations Center
8/1/06
9/18/06 FCC deadline to carry at least two handsets rated T3 or T4 for compatibility with T-coils
9/19/06 i wireless submitted waiver request to the FCC
9/22/06 Confused about the differences between the LG2000 v. the LG C2000 (which the FCC approved for HAC), i wireless decided not to implement the LG2000 as its second HAC-compliant phone, and instead, decided to pursue the Nokia 6126h

Sony Ericsson W712a and Z712a⁴⁷

- 8/4/06 Received Sony Ericsson Z710i (non-HAC compliant handset) test unit
8/10/06 Received Sony Ericsson Z710i and W710i (both non-HAC-compliant handset) test units
8/8/06 [BEGIN CONFIDENTIAL] [REDACTED]
[REDACTED] [END CONFIDENTIAL]
9/19/06 i wireless submitted waiver request to the FCC
9/22/06 [BEGIN CONFIDENTIAL] [REDACTED]
[REDACTED] [END CONFIDENTIAL]
10/2/06 [BEGIN CONFIDENTIAL] [REDACTED]
[REDACTED] [END CONFIDENTIAL]
11/9/06 i wireless approved the Sony Ericsson W710i
4/4/07 i wireless launched Sony Ericsson W710i. i wireless never received the HAC compliant handsets for testing.

Nokia 6085

- 9/18/06 FCC deadline to carry at least two handsets rated T3 or T4 for compatibility with T-coils
9/19/06 i wireless submitted waiver request
12/4/06 Added the Nokia 6085 to portfolio consideration as "full" HAC compliant
1/24/07 [BEGIN CONFIDENTIAL] [REDACTED]
[REDACTED] [END CONFIDENTIAL]
2/2/07 Received two Nokia 6085 test units from Nokia
3/3/07 Removed from testing – rejected by Sales & Marketing
3/15/07 Nokia 6085 became available; however, the availability of the Nokia 6126h obviated the need for the Nokia 6085 for HAC compliance purposes
12/20/07 Sales & Marketing put the Nokia 6085 back on i wireless's road map
2/21/08 i wireless approved the Nokia 6085
2/29/08 Placed purchase order for the Nokia 6085

As shown above, i wireless diligently attempted to obtain HAC compliant handsets as quickly as possible in order to comply with Section 20.19(d)(2). i wireless actively engaged handset manufacturers and distributors over a period of months leading up to the filing of its

⁴⁷ i wireless never received any HAC compliant samples of the Sony Ericsson handsets for testing, despite making requests for such handsets.

Petition for Waiver, and it expended significant time and effort to accelerate its testing, validation, and distribution processes to quickly launch HAC compliant phones as soon as practicable. i wireless made the Motorola V3i available in a timeframe similar to that of other GSM carriers that were granted a waiver of Section 20.19(d)(2), and it ordered and received the Nokia 6126h from Nokia's authorized U.S. distributor as soon as that handset was available to Tier III carriers. i wireless could not have received the Nokia 6126h any sooner than it did because the phone was simply not available until March 2007.

As further detailed below in Section C, it appears that the FCC may have been misinformed or misled by carriers granted waivers to deploy the Motorola V3i and the Nokia 6126h after September 18, 2006. In particular, the information submitted to the Commission regarding the availability of the Nokia 6126h in 2006 may not have been accurate or correct, which also warrants Commission reconsideration of its denial of i wireless's Petition for Waiver.

C. The Nokia 6126h was not Available to Tier III Carriers in 2006, and i wireless Deployed That Handset as Soon as it was Available

In its *HAC Waiver Order*, the Commission stated that i wireless "failed to demonstrate its need for an extension for over six months to come into full compliance . . . when it took most similarly situated carriers much less time"⁴⁸ due to those carriers' ability to obtain both the Motorola V3i and the Nokia 6126h towards the end of 2006. However, it appears that the Commission's conclusions regarding the compliance date of carriers using both those phones to meet their HAC handset obligations were based on incomplete or inaccurate information. While the Motorola V3i was available in October 2006, and i wireless deployed that phone on October 17, 2006, the Nokia 6126h was not available until March 2007.

⁴⁸ *HAC Waiver Order* at ¶ 44.

During the period that i wireless was searching for and testing M3/T3-rated handsets to comply with the Commission's September 18, 2006 deadline, i wireless determined that it should deploy the Nokia 6126h because it was the only unit other than the Motorola V3i that i wireless had been able to confirm that was HAC compliant, and that was likely to be available within a reasonable time after the September 18, 2006 deadline.⁴⁹ It was i wireless's understanding at that time that Nokia would be adding hearing aid compatibility to the Nokia 6126h by the end of 2006.⁵⁰ However, Nokia's projection was incorrect, and the addition of HAC functionality was delayed.⁵¹ It is i wireless's further understanding that the only company authorized to distribute Nokia handsets in the U.S. on a wholesale basis to smaller carriers like i wireless was Brightpoint.⁵² The Nokia 6126h was not available for distribution to carriers by Brightpoint until March 2007.⁵³

In order to confirm its understanding in 2006 and the early part of 2007 that the Nokia 6126h was not available from Brightpoint until March 2007, [BEGIN CONFIDENTIAL]

[REDACTED]

⁴⁹ Luebke Aff. ¶ 13.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL]

⁵⁵ [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] [END CONFIDENTIAL]

i wireless can only speculate as to the reason why carriers deploying the Nokia 6126h reported that they had that handset available for purchase at retail in 2006 when Nokia's authorized U.S. distributor did not even have it available for wholesale until March 2007. i wireless received a single test sample of the Nokia 6126h directly from Nokia on November 15, 2006, and it is possible that carriers receiving a test unit in November reported that unit as satisfying their Section 20.19(d)(2) obligations. It is also possible that, given the confusion surrounding which phones satisfied the FCC's M3/T3-rating requirements, carriers mistook the Nokia 6126, which is not HAC compliant, for the Nokia 6126h, and erroneously reported having the Nokia 6126h when they actually had the non-compliant Nokia 6126.⁵⁸

Regardless of the reason those carriers reported having the Nokia 6126h in 2006, in light of [BEGIN CONFIDENTIAL] [REDACTED]

[REDACTED] [END

CONFIDENTIAL], i wireless submits that reconsideration of the *HAC Waiver Order* and grant of its Petition for Waiver is warranted because it ordered the phone as soon as it became aware

⁵⁶ [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL]

⁵⁷ [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL]

⁵⁸ Other Tier III carriers granted waivers pursuant to the *HAC Waiver Order* became compliant by deploying, in addition to the Motorola V3i, the LG C2000. As discussed above, it is i wireless's understanding that the LG C2000 is exclusive to carriers affiliated with Cingular (AT&T), and it is unclear how carriers not affiliated with Cingular (AT&T) obtained the LG C2000 through legitimate channels. It is possible that those carriers actually deployed the LG2000, which was not listed by the FCC as being an HAC compliant handset, rather than the LG C2000.

that the Nokia 6126h was available from Brightpoint, and i wireless made the phone available at retail as soon as possible by launching the phone on the same day that i wireless received the first shipment at its warehouse.

The information [BEGIN CONFIDENTIAL] [REDACTED]

[REDACTED] [END CONFIDENTIAL] raises serious questions regarding the truth and veracity of the reports and responses to FCC staff data requests filed by carriers concerning their deployment of the Nokia 6126h to comply with the Commission's rules. i wireless submits that the Commission should require each carrier granted waivers on the basis that they had the Nokia 6126h to submit under penalty of perjury copies of their wholesale purchase orders and packing slips, including serial numbers, of the Nokia 6126h phones that they claim they had available at retail in 2006 to demonstrate that those phones were actually available during that time.

D. The Commission Was Required to Ensure that Compliant Handsets Were Available Before Denying i wireless's Waiver and Referring it to the Enforcement Bureau

When the Commission implemented its HAC rules at 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, 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.⁵⁹

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

The Commission's use of the conjunctive "and" in 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 hearing aid compatibility proceeding contains abundant evidence that the FCC considered the manufacturers' participation absolutely essential to the wireless carriers' ability to comply with Section 20.19(d)(2). For example, the Commission envisioned that manufacturers would need to revise handset designs as a result of issues identified through compliance testing.⁶⁰ The FCC also required manufacturers to, among other things, place labels on the exterior packaging containing a wireless handset indicating the technical rating of the wireless handset, and include more detailed information on the ANSI standard in either a product insert or in the wireless telephone's manual.⁶¹ 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 i wireless, carrying out their obligations to provide those handsets to subscribers at retail. Wireless carriers are completely dependent on the handset manufacturers to fulfill their obligations under Section 20.19(d)(2).

Because wireless service providers could not comply with their Section 20.19(d)(2) obligations unless the manufacturers *first* complied with their Section 20.19(d)(1) obligations, it was incumbent upon the FCC to determine the precise date that handsets became available to

⁶⁰ 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).

⁶¹ 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).

Tier III carriers from the manufacturers' 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 because of the lag time between the FCC approval date and the general commercial availability of the approved phone. The wording of Section 20.19(d) requires the Commission to first determine whether there was compliance with Section 20.19(d)(1), before moving on and deciding that i wireless had violated Section 20.19(d)(2).

The *HAC Waiver Order* is devoid of any information that the FCC went to the manufacturers or distributors to investigate the actual date each HAC compliant handset was available for shipping to vendors and carriers. Rather, the FCC relied on information from the carriers themselves regarding the dates they began to offer compliant phones. Those dates provide no information regarding when HAC compliant handsets were actually available from manufacturers or distributors, and the FCC'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, 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 handsets at the same time depending on the distributor to whom they were assigned.

Without this type of information, it was impossible for the FCC to determine whether it was reasonable for a carrier to have deployed the handsets on the dates indicated in its 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 FCC must have first determined when those handsets actually became available from the manufacturers and distributors as required by Section 20.19(d)(1), particularly when carriers relied on different means of obtaining their handsets. Otherwise, any decision by the FCC regarding a carrier's diligence, the reasonableness of its handset deployment dates, and whether those dates merit a waiver of 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.

E. The Commission Must Treat i wireless in the Same Manner as Other Carriers That Received a Waiver

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."⁶² "If an agency treats similarly situated parties differently, its action is arbitrary and capricious in violation of the [Administrative Procedures Act]."⁶³ The Commission acts arbitrarily and capriciously where it "decid[es] a case one way today and a substantially similar case another way tomorrow".⁶⁴

In this case, i wireless has demonstrated with conclusive and compelling evidence from [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] that the Nokia 6126h was not available to Tier III carriers from Nokia's authorized U.S. distributor until March 2007. i wireless obtained the Nokia 6126h at the earliest opportunity from Brightpoint, and it was not possible to procure that handset from legitimate sources any earlier. It would be inequitable, and arbitrary and capricious for the Commission to deny i wireless's Petition for Waiver when it granted petitions filed by other carriers that also

⁶² *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).

⁶³ *Bracco Diagnostics, Inc. v. Shalala*, 963 F. Supp. 20, 27-28 (D.D.C. 1997) (citations omitted).

⁶⁴ *Doubleday Broad. Co. v. FCC*, 655 F.2d 417 (D.C. Cir. 1981).

deployed the Nokia 6126h to comply with the Commission's September 18, 2006 deadline, particularly when i wireless has shown that that handset was not available until March 2007.

Moreover, it was impossible for i wireless to comply with the FCC's deadline any earlier than March 2007. Although the Commission has no obligation to consider every factor regarding compliance with its rules, it must consider all "relevant factors," including whether it was impossible to comply with the FCC's rules, when enforcing its regulations.⁶⁵ i wireless's use of the GSM air interface, its status as a Tier III carrier without access to models exclusive to large carriers, its lack of support of RIM/Blackberry phones, the limited selection of available compatible models, and the unavailability of the Nokia 6126h from Brightpoint until March 2007, are all relevant factors for the Commission to consider in determining whether it was impossible for i wireless to comply with the FCC's rules, and whether it should grant the instant Petition for Reconsideration.

To turn a blind eye to those factors and deny i wireless's Petition for Reconsideration, while permitting the waivers granted to other carriers for purportedly deploying the Nokia 6126h in 2006 to stand, would be arbitrary and capricious. This is particularly true when it was impossible for i wireless or other Tier III carriers to obtain the Nokia 6126h any earlier than March 2007, and it appears that other carriers have provided the FCC with erroneous information that has misled the Commission into reaching incorrect conclusions in its *HAC Waiver Order*.

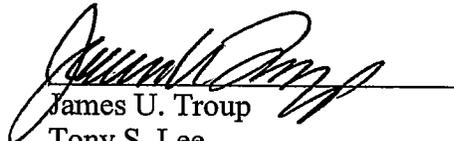
III. CONCLUSION

i wireless diligently, proactively, and persistently engaged handset vendors and authorized U.S. distributors in an attempt to procure several different HAC handsets before the Commission's September 18, 2006 compliance deadline. The Nokia 6126h, which i wireless and

⁶⁵ See, e.g., *City of New York v. FCC*, 814 F.2d 720, 727-28 (D.C. Cir 1987).

other Tier III carriers used as their second HAC compatible handset to comply with the FCC's rules, was not available until March 2007. i wireless procured and distributed that handset to its retail customers as soon as possible, and it accelerated its handset testing and approval procedures to ensure that the Nokia 6126h would be deployed without any unnecessary delay. Accordingly, i wireless requests that the Commission grant its Petition for Reconsideration, grant its Petition for Waiver of Section 20.19(d)(2), reverse its decision to refer i wireless to the Enforcement Bureau, and, to the extent necessary, require Tier III carriers that were granted waivers based on their deployment of the Nokia 6126h in 2006 to provide documentation, including, but not limited to, packing slips with serial numbers, that they placed wholesale orders and received those handsets for sale at retail to comply Section 20.19(d)(2).

Respectfully submitted,



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Date: March 27, 2008