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BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554

In the Matter of	)	
	)	WT Docket No. 01-309
Section 20.19 of the Commission's Rules	)	
Governing Hearing Aid-Compatible Telephones	)	FCC 08-67

To: The Secretary

PETITION FOR RECONSIDERATION  
CTC TELECOM, INC.  
BLANCA TELEPHONE COMPANY  
FARMERS CELLULAR TELEPHONE, INC.  
*et al.*

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## SUMMARY

The Commission's *Memorandum Opinion and Order* (FCC 08-67) is procedurally flawed in several respects. The Commission cannot establish a compliance date in the past and hold carriers to that date. The Commission must provide explicit notice if it wants carriers to comply by a date certain. The *Memorandum Opinion and Order* (FCC 08-67) provides that diligence is presumptively established by a carrier which complied with the inductive coupling requirement by January 1, 2007. Compliance after that previously unannounced date brought an unannounced heightened scrutiny to the HAC compliance deadline waiver requests. The Commission failed to follow APA requirements when it adopted January 1, 2007, as a filing date rule. While the Commission faults the Tier III carriers who were denied a waiver for not changing their vendor relationships, the Commission did not previously require any such change and, in fact, the Commission gave instructions to change vendors to another group of Tier III carriers on a going forward basis *after* the Petitioners in this case had already complied with the inductive coupling requirement. There are several instances in which the Commission treated similarly situated carriers differently. The Commission failed to explain its departure from a policy which leniently granted HAC waiver requests to one which required a waiver requestor to demonstrate a compelling reason to justify the waiver. CTC has attached two invoices to this petition and requests that the Commission determine whether those handsets demonstrate CTC's compliance with the inductive coupling requirements and determine that CTC should receive a waiver *nunc pro tunc*. Blanca notes that the *Memorandum Opinion and Order* (FCC 08-67) overlooks the fact that Blanca reported that it had one inductive coupling compliant handset in stock as of September 22, 2006.

CTC Telecom, Inc. (“CTC”), Blanca Telephone Company (“Blanca”), and Farmers Cellular Telephone, Inc. (“FCTI”), digital wireless service providers, by their attorney, on behalf of themselves and the other Tier III carriers treated as class by the Commission in the Commission’s February 27, 2008, *Memorandum Opinion and Order* (FCC 08-67) (collectively, “Petitioners”) hereby seek reconsideration of that order which denied Petitioners’ requests for waiver of 47 C.F.R. § 20.19(d)(2) which required Petitioners to stock two handset models which satisfied the Commission’s inductive coupling standard found at 47 C.F.R. § 20.19(b)(2) by September 18, 2006. In support whereof, the following is respectfully submitted:

### **BACKGROUND**

1) CTC is a Tier III carrier which operates PCS Station WPQP438 in rural Idaho which serves approximately 355 subscribers. CTC’s PCS license authorizes CTC to serve Adams County (3,476 persons/1,370 square miles) and Boise County (6,670 persons/1,907 square miles). The combined population of these two counties is 10,146 persons and the population density is a scant 3.1 persons per square mile. Blanca is a Tier III carrier which operates cellular Stations KNKQ427 & KNKR288 in rural Colorado which serves 281 subscribers. Blanca’s licenses authorize service in Costilla County (3,663 persons/1,230 square miles) and Conejos County (8,400 persons/1,291 square miles). The combined population of these two counties is 12,063 and the population density is a scant 4.79 persons per square mile.<sup>1</sup> FCTI is a Tier III carrier which operates cellular Station KNKN960 and PCS Station WPYX472 in rural Alabama which serves 8,575 subscribers. FCTI’s licenses authorize service in Cherokee County (23,988 persons/600 square miles); DeKalb County (64,452 persons/ 779 square miles); Jackson County (53,926 persons/1,127 square miles); and Marshall County (82,231 persons/623 square miles).

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<sup>1</sup> The population and area figures were taken from the 2000 U.S. Census.

The combined population of these four counties is 224,597 and the population density is 71.8 persons per square mile. The Commission considers a population density of less than 100 persons per square mile to constitute a rural market area.<sup>2</sup>

2) In 2003 the Commission adopted rules requiring Tier III digital carriers to offer at least two HAC compliant handsets to its retail customers. *Report and Order*, FCC 03-168, 18 FCC Rcd. 16753 (FCC 2003). Tier III digital carriers who offered more than two handset models were required to offer two handsets which met the acoustic coupling standard by September 16, 2005. 47 C.F.R. §§ 20.19(c)(1)(i); 20.19(b)(1). CTC, Blanca, and FCTI satisfied this requirement. Tier III digital carriers who offered more than two handset models were further required to offer two handsets which met the inductive coupling standard by September 18, 2006. 47 C.F.R. §§ 20.19(d)(2); 20.19(b)(2).<sup>3</sup>

3) On September 18, 2006, CTC, Blanca, and Farmers separately requested waiver of §20.19(d)(2) because of a circumstance beyond their control, i.e., they were unable to obtain HAC compliant handsets from their vendors. On April 2, 2007, nearly one year before the Commission denied the waiver requests, CTC reported to the Commission that it had obtained HAC compliant handsets. On June 7, 2007, at the staff's request, CTC reported that it obtained

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<sup>2</sup> See *Facilitating the Provision of Spectrum-Based Service to Rural Areas and Promoting Opportunities for Rural Telephone Companies to Provide Spectrum-Based Services*, WT Docket No. 02-381, 2000 Biennial Regulatory Review *Spectrum Aggregation Limits For Commercial Mobile Radio Services*, WT Docket No. 01-14, *Increasing Flexibility To Promote Access to and the Efficient and Intensive Use of Spectrum and the Widespread Deployment of Wireless Services, and To Facilitate Capital Formation*, WT Docket No. 03-202, *Report and Order and Further Notice of Proposed Rulemaking*, 19 FCC Rcd 19078 ¶ 11 (FCC 2004) (defining "rural area" in the wireless services as those counties with a population density of 100 people per square mile or less, based upon the most recently available Census data).

<sup>3</sup> The Commission also imposed a semi-annual reporting requirement upon carriers to "assist us in monitoring the progress of implementation, and they will provide valuable information to the public concerning compatible handsets." *Report and Order*, FCC 03-168, ¶ 89. To minimize the "burden" of this reporting requirement the Commission permitted reporters to file jointly. *Id.*

HAC compliant handsets as of March 13, 2007.<sup>4</sup> As of April 2, 2007, and to date, CTC has not received any customer requests for a HAC compliant handset.<sup>5</sup> On June 21, 2007, Blanca reported that it had obtained one inductive coupling compliant handset on September 22, 2006 and a second handset in June 2007.<sup>6</sup> As of June 21, 2007, and to date, Blanca has not received any customer requests for a HAC compliant handset.<sup>7</sup> On June 12, 2007, FCTI reported that it was fully compliant with the HAC requirements as of June 6, 2007.<sup>8</sup> To date Farmers has not received any customer requests for a HAC compliant handset.

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<sup>4</sup> This may have been a factual error on CTC's part. Attached hereto are copies of invoices which appear to show that CTC obtained its first inductive coupling compliant handset from its vendor CellStar, Ltd., in July 2006, prior to the September 18, 2006 inductive coupling compliance deadline (Motorola V3c). The second invoice attached hereto appears to show that CTC received its second inductive coupling compliant handset from its vendor Brightpoint, in January 2007 (Kyocera K132). CTC regrets this apparent factual error, but notes that the Commission has permitted others to correct information in their reports. *See e.g., Memorandum Opinion and Order* (FCC 08-67), ¶¶ 50-51. Because CTC is not aware of a data base against which it can compare these models, CTC requests that the Commission determine whether the handsets listed on the attached invoices are inductive coupling compliant and, if they are, that CTC be granted a waiver *nunc pro tunc*.

<sup>5</sup> *See* CTC's April 2, 2007 Report.

<sup>6</sup> *See* Blanca's June 21, 2007 Supplemental Report, ¶ 3. The subject *Memorandum Opinion and Order* (FCC 08-67) does not discuss that Blanca had one inductive coupling compliant handset in stock prior to January 1, 2007. *But see Notice of Apparent Liability*, DA 08-603, ¶ 23 released March 20, 2008 (a handset obtained after September 18, 2006, and before January 1, 2007 would be subject to a forfeiture but for the statute of limitations). It appears that Blanca will not receive credit for having obtained a compliant handset as of September 22, 2006, even if the Commission is unable to assess a forfeiture for that "violation." The *Memorandum Opinion and Order* (FCC 08-67) does not explain why a carrier which obtained a compliant handset prior to January 1, 2007 is not entitled to a finding of partial compliance for that handset in light of the carrier's "diligence" in obtaining that handset where a carrier which obtained two HAC compliant handsets between September 17, 2006, and January 1, 2007, received a finding of full compliance.

<sup>7</sup> *See* Blanca's June 21, 2007 Supplemental Report, ¶ 7.

<sup>8</sup> *See* FCTI's June 12, 2007, Supplement, ¶ 7.

4) The *Memorandum Opinion and Order* (FCC 08-67), ¶ 22 determined that Petitioners did not qualify for waiver of the inductive coupling requirement pursuant to 47 C.F.R.

¶ 1.925(b)(3)<sup>9</sup> because they failed to demonstrate that they

exercised sufficient diligence in seeking inductive coupling-compliant handsets not only before, but within a reasonable period of time after the September 18, 2006 compliance deadline. These petitioners do not present any unique facts or circumstances to clearly distinguish their situation from other Tier III carriers that were able to comply by January 1, 2007, or before. Given that the great majority of the Tier III carriers were able to achieve compliance within a few months of the deadline, we do not consider it sufficient effort after this time frame simply to contact one's existing vendors on a monthly basis, or to limit one's efforts to testing those existing vendors' handsets for system compatibility. We further find it immaterial whether a carrier has actually received requests for hearing aid-compatible handsets, since the purpose of the hearing aid compatibility rules is to ensure that such handsets will be available in a timely manner when a customer needs them. (Footnotes omitted).

On March 28, 2008 the Commission issued a *Notice of Apparent Liability for Forfeiture* (DA 08-535) which seeks to assess a \$30,000 forfeiture against CTC.<sup>10</sup> Assuming that each of the 52 (fifty-two) Tier III carriers which were denied waivers receives similar forfeiture notices, it appears that the Commission could eventually seek up to \$1.56 million in total forfeitures from rural carriers as a class.<sup>11</sup> Because the Commission included CTC, Blanca, and FCTI in the class

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<sup>9</sup> § 1.925(b)(3) provides that "The Commission may grant a request for waiver if it is shown that: (i) The underlying purpose of the rule(s) would not be served or would be frustrated by application to the instant case, and that a grant of the requested waiver would be in the public interest; or (ii) In view of unique or unusual factual circumstances of the instant case, application of the rule(s) would be inequitable, unduly burdensome or contrary to the public interest, or the applicant has no reasonable alternative."

<sup>10</sup> While the introduction to the *Notice of Apparent Liability* states that CTC "apparently willfully and repeatedly violated" the HAC compliance requirement, DA 08-535, ¶ 1, the *Notice of Apparent Liability* at ¶¶ 6, 13, for example, correctly states that the Commission's *Memorandum and Opinion and Order* (FCC 08-67) made a number of findings which led to waiver denial. The *Memorandum and Opinion and Order* (FCC 08-67) is not interlocutory regarding waiver denial and it is appropriate to seek reconsideration of the *Memorandum and Opinion and Order* (FCC 08-67).

<sup>11</sup> It is noted that some carriers will receive reduced apparent liability notices, or even no notices, if the statute of limitations has run for a handset obtained after September 18, 2006. See *Notice of Apparent Liability*, DA 08-603, ¶ 23 released March 20, 2008. Also, it may be assumed

of Tier III carriers which were denied waivers, CTC, Blanca, and FCTI requests that all carriers in the class receive the relief requested in this *Petition*.

#### **LACK OF NOTICE REGARDING THE JANUARY 1, 2007 COMPLIANCE DEADLINE**

5) Prior to the release of the *Memorandum Opinion and Order* (FCC 08-67) the Commission did not previously provide notice that January 1, 2007, would serve either as a drop dead date for obtaining a waiver of the inductive coupling HAC requirement or the date after which a more substantial showing of compliance effort would be required. Case law is clear that when the Commission denies a Federal benefit “full and explicit” prior notice of the requirement must be provided to the applicant seeking the Federal benefit. *Salazar v. FCC*, 778 F.2d 869, 871-72 (D.C.Cir. 1985) (parties before the FCC are entitled to “full and explicit notice”). Instantly, there was no prior notice that compliance by January 1, 2007 would be the measuring stick against which waiver requests would be judged. The Commission selected January 1, 2007 *after* Petitioners had reported full compliance because “other Tier III carriers [ ] were able to comply by January 1, 2007.” Petitioners could not know on September 18, 2006, or thereafter, that “other Tier III carriers” would be “able to comply by January 1, 2007” and there was no notice that Petitioners would have to comply by January 1, 2007, or that the Commission would judge their waiver requests with an eye toward when a “great majority” of carriers would become compliant.

6) Moreover, in *Memorandum Opinion and Order*, FCC 07-200, 22 FCC Rcd. 20459 (FCC 2007), released in November 2007, *after* Petitioners had achieved and reported HAC compliance, the Commission provided various Tier III carriers with a further extension of the

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that if a carrier had one compliant handset in stock prior to September 18, 2006, no forfeiture would be assessed for that handset. Thus, the figure provided above expresses the largest forfeiture potential and does not represent how much the Commission will assess in forfeitures.

acoustic coupling HAC requirement, an extension totalling nearly 2.5 years, and the Commission provided those carriers with a date in future by which compliance was to be achieved.<sup>12</sup> The Commission has failed to explain why the carriers at issue in the *Memorandum Opinion and Order* (FCC 07-200) were provided with a future HAC compliance deadline while Petitioners were provided with an already lapsed date by which HAC compliance was required. The Commission is required to treat similarly situated parties similarly and it failed to do so. *Green Country Mobilephone, Inc. v. FCC*, 765 F2d 235 (DC Cir 1985); *Melody Music, Inc. v. FCC*, 345 F2d 730 (DC Cir 1965).

**THE SELECTION OF JANUARY 1, 2007 AS THE COMPLIANCE DEADLINE  
VIOLATES THE APA AND IS ARBITRARY**

7) The Commission's selection of January 1, 2007, as the compliance date establishes a rule without first proceeding through the required notice and comment rule making procedures. The Administrative Procedure Act requires that the Commission adopt rules in notice and comment rule making proceedings. The Commission cannot, on the fly, promulgate a rule specifying a compliance date in the past and then fault Petitioners for failing to comply as of that date. Because the Commission failed to follow APA procedures in adopting its rule, the rule is invalid and the imposition of a non-existent compliance deadline is arbitrary and capricious.

8) The Commission's selection of January 1, 2007, as the drop dead date, or the date upon which Petitioners' waiver requests would receive a heightened level of scrutiny compared to other Tier III carriers who obtained waivers, was completely arbitrary. The Commission's

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<sup>12</sup> The Commission considers it appropriate to compare inductive coupling waiver requests to acoustic coupling waiver requests. See *Memorandum Opinion and Order* (FCC 08-67), n. 75. The Commission has not explained that the group of hearing impaired persons who rely upon inductive coupling technology are entitled to more rigid enforcement compared to the group of hearing impaired persons who rely upon acoustic coupling technology. Even if an explanation were forthcoming, it would come too late to be of use to parties who filed inductive coupling waivers requests approximately 1.5 years ago.

reasoning indicates that had a sufficient number of carriers not obtained the required HAC compliant handsets until, for example, July 31, 2007, then the Commission would have extended the compliance deadline to that date. The Commission's reliance upon the unknown actions of other carriers to determine Petitioners' compliance deadline ensured that there was nothing against which Petitioners could measure their compliance progress and the Commission's conclusion that Petitioners failed to meet the January 1, 2007, compliance deadline announced in the *Memorandum Opinion and Order* (FCC 08-67) is arbitrary.

9) The Commission's conclusion that "the great majority of the Tier III carriers were able to achieve compliance within a few months of the deadline" is not supported by the record. The universe of Tier III carriers seeking waiver of the inductive coupling requirement is found in Appendix B of the *Memorandum Opinion and Order* (FCC 08-67). Undersigned counsel's count disclosed that exactly 100 waiver petitioners are listed in Appendix B as "Petitioners" seeking waiver of the inductive coupling requirement. **Of these 100 Petitioners, 52 were denied waiver requests.**<sup>13</sup> The Commission's conclusion that "the great majority of the Tier III carriers were able to achieve compliance within a few months of the deadline" is plainly wrong because 52% of the Petitioners overall, and 59% of the Tier III carriers in particular, seeking a waiver did not achieve compliance until after the belatedly imposed January 1, 2007 deadline.

10) To the extent that the Commission might be referring to the entire universe of Tier III carriers when it references "the great majority of the Tier III carriers," a group which would include carriers who complied by the September 18, 2006, deadline and carriers which did not

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<sup>13</sup> Of the 100 Petitioners, 10 are not Tier III carriers and 2 of the Tier III carriers did not require a waiver because they offer fewer than 3 handsets. Thus, there were 88 Tier III carriers seeking inductive coupling waivers and 52 of those carriers, 59%, did not obtain compliant handsets until after January 1, 2007. Accordingly, the "great majority" of Tier III carriers seeking waiver did not obtain compliant handsets until **after** the January 1, 2007, deadline established in the *Memorandum Opinion and Order* (FCC 08-67).

comply but which look like they did simply because they did not file a waiver request, the Commission's sub-textual reliance is irrational.<sup>14</sup> The question is not whether there are carriers which had vendors who could help them comply by the September 18, 2006 deadline. The question is what to do when carriers could not comply with deadline because their vendors lacked the necessary equipment; comparing carriers which faced difficulty to those who did not compares two unrelated groups. Moreover, if a large number of Tier III carriers complied by the September 18, 2006, compliance deadline then the Commission's selection of January 1, 2007 as the critical compliance deadline remains arbitrary because the "great majority" of Tier III carriers who were seeking waiver were not compliant as of January 1, 2007, and the date of January 1, 2007, holds no particular significance. The Commission implicitly recognizes the inequity of relying upon carriers who complied by the September 18, 2006 deadline by selecting, albeit arbitrarily, a subsequent compliance deadline of January 1, 2007.

**THE EMPLOYMENT OF HEIGHTENED SCRUTINY TO POST-JANUARY 1,  
2007, COMPLIANT WAIVER PETITIONERS IS ARBITRARY**

11) The Commission determined that the waiver receiving carriers demonstrated "reasonable diligence" in complying in light of the "similarity in timing" of compliance "on or shortly before January 1, 2007," *Memorandum Opinion and Order* (FCC 08-67), ¶ 17, "by the great majority of Tier III carriers." *Memorandum Opinion and Order* (FCC 08-67), ¶ 22. The Commission did not determine that "reasonable diligence" is determined by examining how often the waiver receiving carriers contacted their vendors nor upon how many vendors the waiver receiving carriers contacted. Nevertheless, Tier III carriers which obtained HAC compliant handsets after January 1, 2007, were required to satisfy a previously unarticulated

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<sup>14</sup> If the Commission intends to rely upon the universe of Tier III carriers who complied by the September 18, 2006, compliance deadline, then the Commission should clarify how many Tier III carriers were in compliance by that date.

“compelling rational” standard, *Memorandum Opinion and Order* (FCC 08-67) ¶ 72, under which contacting “one’s existing vendors on a monthly basis, or to limit one’s efforts to testing those existing vendors’ handsets” was insufficient. *Memorandum Opinion and Order* (FCC 08-67) ¶ 22. The Commission previously determined that carriers demonstrated the “diligence” necessary to obtain a HAC compliance waiver if they acted “based upon the information before them” provided by vendors because there was no other information source. *Memorandum Opinion and Order*, FCC 07-200, 22 FCC Rcd. 20459 ¶ 30 (FCC 2007). The new waiver eligibility policy is unreasoned because the Commission has failed to explain why it has changed its waiver granting policy from one which required “diligence” to one which requires “reasonable diligence” by January 1, 2007, to one which requires a “compelling rational” for waivers sought beyond a randomly selected time in the past, i.e., January 1, 2007. *Communications and Control, Inc. v FCC*, 374 F.3d 1329, 1335-36 (D.C. Cir. 2004) citing *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. at 57 (“[a]n agency changing its course must supply a reasoned analysis”); see also *Tilak Ramaprakash v. FAA*, 346 F.3d 1121, 1125 (D.C. Cir. 2003) quoting *CBS v. FCC*, 454 F.2d 1018, 1027 (D.C. Cir. 1971) (“an agency’s failure to come to grips with conflicting precedent constitutes ‘an inexcusable departure from the essential requirement of reasoned decision making’”).

12) The Commission’s conclusion that carriers had to contact their vendors more often than monthly, *Memorandum Opinion and Order* (FCC 08-67) ¶ 22, is not supported by the record.<sup>15</sup> The *Memorandum Opinion and Order* (FCC 08-67) fails to discuss the frequency with

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<sup>15</sup> The *Memorandum Opinion and Order* (FCC 08-67) overlooks the fact that FCTI reported that FCTI would usually contact its vendors “weekly or every other week.” See FCTI’s June 12, 2007 *Supplement*, ¶ 6. CTC reported that it would sometimes check with its vendor “at least monthly, sometimes more often.” See CTC’s June 7, 2007, *Report*, ¶ 4. Checking with vendors more frequently than monthly did not result in any faster compliance for these carriers; the Commission incorrectly concluded that their contacts were limited to monthly ones.

which waiver receiving carriers contacted their vendors and fails to explain why monthly contact is an insufficient frequency. The Commission never specified a shorter contact period nor any contact period for that matter. A carrier making monthly contact would know, on a monthly basis, when a compliant handset model became available. One month periodicity is a reasonable contact period because “it typically takes weeks or even months for wireless service providers to introduce newly available handsets onto their networks.” *Memorandum Opinion and Order* (FCC 08-67) ¶ 75. “Weeks or months” would include a period of longer than 4 weeks and a monthly contact would be reasonable compared to the amount of time it takes to introduce the handset onto a radio network.

13) Unlike Petitioners, the Tier III carriers involved in the November 2007 *Memorandum Opinion and Order* (FCC 07-200) were not criticized for not having changed their vendor relationships at some point in the past. Those Tier III carriers were instructed, on a going forward basis, that if their “usual vendors cannot supply appropriate handset models, [they] will make the necessary arrangements with other vendors.” *Memorandum Opinion and Order* (FCC 07-200), ¶ 31. Petitioners, on the other hand, were never provided with this instruction; they were instead criticized for not having altered their vendor relationships prior to issuance of the Commission’s order without any prior notice and despite the fact that they had already reported compliance with the HAC requirement. The *Memorandum Opinion and Order* (FCC 08-67) fails to explain why one group of Tier III carriers received instructions “on a going forward basis,” *Memorandum Opinion and Order* (FCC 07-200) ¶ 33, while Petitioners did not receive similar going forward instructions. The Commission is required to treat similarly situated parties similarly and it failed to do so. *Green Country Mobilephone, Inc. v. FCC*, 765 F2d 235 (DC Cir 1985); *Melody Music, Inc. v. FCC*, 345 F2d 730 (DC Cir 1965).

## **THE COMMISSION PREVIOUSLY PERMITTED RELIANCE UPON EXISTING VENDOR RELATIONSHIPS**

14) While the Commission faults Petitioners for relying upon their “existing vendors” rather than making new vendor relationships, *Memorandum Opinion and Order* (FCC 08-67), ¶ 22, the Commission did not previously require that carriers alter their established business relationships in order to comply with the HAC requirements. Once again, the Commission imposes a rule without first conducting and concluding a notice and comment rule making proceeding required by the Administrative Procedure Act.

15) The *Memorandum Opinion and Order*, ¶¶ 15-17, does not discuss that the Tier III carriers which obtained waivers obtained those waivers because they altered either their vendor relationships or the manner in which they ordered equipment. Those Tier III carriers which obtained waivers obtained them because the Commission found that for Tier III carriers: 1) HAC compliant handsets were scarce because not many compliant handsets were authorized as of September 18, 2006, and 2) the availability of HAC compliant handsets to Tier III carriers is limited by the manufacturer supply programs which call for Tier I and Tier II carriers to be supplied before Tier III carriers.

16) The same justifications which the Commission used to grant HAC compliance waivers to other Tier III carriers were raised by CTC, Blanca, and FCTI, yet the Commission discounted this information merely because Petitioners complied after January 1, 2007. See CTC’s June 7, 2007, *Report*, ¶ 4; Blanca’s September 18, 2006, *Report and Request for Waiver*, Section II; FCTI’s June 12, 2007, *Supplement*, ¶¶ 4, 7. The Commission is required to treat similarly situated parties similarly and it failed to do so. *Green Country Mobilephone, Inc. v. FCC*, 765 F2d 235 (DC Cir 1985); *Melody Music, Inc. v. FCC*, 345 F2d 730 (DC Cir 1965). The only difference between the carriers which obtained waivers, and those which did not, was the

Commission's previously unarticulated selection of January 1, 2007, as the HAC compliance deadline. However, the Commission's reliance upon an arbitrarily selected compliance date does not draw a rational class distinction and Petitioners are entitled to a waiver because the Commission must treat similarly situated parties similarly. *Green Country Mobilephone, Inc. v. FCC*, 765 F2d 235 (DC Cir 1985). 17) In November 2007, prior to the release of the subject *Memorandum Opinion and Order* (FCC 08-67), and after Petitioners had filed their waiver request and after Petitioners had reported compliance with the inductive coupling requirement, the Commission determined that "full compliance" with the HAC rules is sufficient if compliance is achieved by February 23, 2008. See *Memorandum Opinion and Order*, FCC 07-200, 22 FCC Rcd. 20459 (FCC 2007). In the November 2007 *MO&O* (FCC 07-200) the Commission determined that

While we expect carriers to perform due diligence in identifying hearing aid-compatible handsets, we also acknowledge that, because there is currently no ready means for third parties to identify compliant handsets from the Commission's records, carriers have no practical alternative but to rely on manufacturers and vendors to identify which compliant handsets they are offering.

*Memorandum Opinion and Order*, FCC 07-200, 22 FCC Rcd. 20459 ¶ 30 (FCC 2007).

18) Accordingly, after the time that Petitioners filed their HAC waiver requests, and after the time that Petitioners submitted full compliance information to the Commission, the Commission acknowledged that Tier III carriers had no "ready means" to identify HAC compliant handsets from the Commission's records.<sup>16</sup> *Memorandum Opinion and Order*, FCC

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<sup>16</sup> Indeed, CTC's attached invoices show that CTC was confused about which handsets were compliant. Moreover, Blanca's June 21, 2007 *Supplemental Report* indicates that Blanca was confused about its HAC handsets. FCTI is a carrier included in FCC 07-200 and had already received waiver to February 23, 2008, based, in part, on confusion. The *Memorandum Opinion and Order* (FCC 08-67) does not explain why carrier confusion in FCC 07-200 was excusable, but earlier carrier confusion in FCC 08-67 was not excusable. The Commission failed to treat similar Tier III carriers similarly.

07-200, 22 FCC Rcd. 20459 ¶ 30 (FCC 2007). The Tier III carriers in FCC 07-200 were excused because their existing vendors had given them bad HAC compliance information and those carriers received a total of approximately 29 (twenty-nine) months worth of HAC compliance extensions from September 16, 2005 to February 23, 2008. The *Memorandum Opinion and Order* (FCC 08-67) fails to explain why one group of Tier III carriers is entitled to a 29+ month HAC extension while the availability of a waiver to another group of Tier III carriers, Petitioners, was limited to approximately 3.5 months from September 18, 2006 to January 1, 2007.<sup>17</sup> Moreover, the *Memorandum Opinion and Order* (FCC 08-67) does not explain why Petitioners are not entitled to a February 23, 2008 compliance deadline where Petitioners had “no practical alternative but to rely on manufacturers and vendors to identify which compliant handsets they are offering.” Petitioners are entitled to a waiver under the “no reasonable alternative” prong of § 1.925(b)(3)(ii) because Petitioners, like the carriers in the November 2007 *Memorandum Opinion and Order*, had no practical alternative to relying upon their vendors. That said, the Tier III carriers which received waivers in the subject *Memorandum Opinion and Order* (FCC 08-67) were not required to demonstrate that they had no reasonable alternative and imposing that additional requirement upon Petitioners treats them differently for no rational reason. *Green Country Mobilephone, Inc. v. FCC*, 765 F2d 235 (DC Cir 1985); *Melody Music, Inc. v. FCC*, 345 F2d 730 (DC Cir 1965).

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<sup>17</sup> The carriers in *Memorandum Opinion and Order* (FCC 07-200) received erroneous information from their vendors regarding HAC compliance which apparently caused them to be non-compliant. Petitioners were correctly advised by their vendors that they could not be timely supplied with HAC compliant handsets. The Commission has not explained why a carrier which receives bad information about handset capability from its vendor is entitled to a HAC compliance extension of nearly 2.5 years while a carrier which receives good information about the unavailability of HAC compliant handsets from its vendor is entitled to a HAC compliance extension of no more than 3.5 months.

19) As a final matter, the Commission has failed to justify its policy shift from one which was accommodating to HAC waiver requests, granting one group of Tier III carriers waiver extensions amounting to nearly 2.5 years, to a policy in which the Commission finds “you’re too late” for a large number of other carriers by retroactive selection of an already lapsed compliance deadline. The failure to explain departures from prior practice renders the *Memorandum Opinion and Order* (FCC 08-67) unreasoned. *Communications and Control, Inc. v FCC*, 374 F.3d 1329, 1335-36 (D.C. Cir. 2004) citing *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. at 57 (“[a]n agency changing its course must supply a reasoned analysis”); see also *Tilak Ramaprakash v. FAA*, 346 F.3d 1121, 1125 (D.C. Cir. 2003) quoting *CBS v. FCC*, 454 F.2d 1018, 1027 (D.C. Cir. 1971) (“an agency’s failure to come to grips with conflicting precedent constitutes ‘an inexcusable departure from the essential requirement of reasoned decision making’”).

WHEREFORE, in view of the information presented herein, it is respectfully submitted that the determination that Petitioners were not entitled to a waiver should be reconsidered.

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March 27, 2008

Respectfully Submitted,  
PETITIONERS

  
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Timothy E. Welch

**CTC'S JULY 2006 & JANUARY 2007 INVOICES**



**PACKING LIST**  
 601 S. Royal Lane  
 Coppell, TX 75019  
 1-800-622-9110



SALES ORDER NO.	12526550-001 SO
DOCUMENT DATE	07/19/06
PAGE NO.	
BRANCH/PLANT	CARROLLTON
CUSTOMER NO.	21265
SALESPERSON	ALASJ 00241850

**B** CTC TELECOM, INC  
**I** 130 SUPERIOR STREET  
**L** P.O. BOX 69  
**L** CAMBRIDGE ID 83610  
**T**  
**O**

**S** CTC TELECOM, INC  
**H** 130 SUPERIOR STREET  
**I** P.O. BOX 69  
**P** CAMBRIDGE ID 83610  
**T**  
**O**

DATE SHIPPED	CUSTOMER ORDER NO.	F.O.B.	U/A	SHIPPING INSTRUCTIONS
7/19/06	21265			Deliver Economy PPD&ADD

LN	DESCRIPTION	ITEM NUMBER	UM	SHIPPED	B/O	UNIT PRICE	EXTENDED AMOUNT
3	MOT HHP CDMA V3C GENERIC 88504GHBPA SERIAL# 02701756889 02708649463	143585	EA	2		289.00	578.00 UPC: 723755885042
10	FREIGHT Freight	FRT	EA	1		9.22	9.22 UPC: 0000000000000000
11	INSURANCE	INS	EA	1		1.02	1.02 UPC: 0000000000000000

TERMS Net 30	COPY CODE P	TOTAL 588.24
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THIS SALE IS SUBJECT TO ALL THE TERMS AND CONDITIONS APPEARING ON THE REVERSE SIDE HEREOF. ACCEPTANCE OF ANY OF THE CORRESPONDING GOODS CONSTITUTES AGREEMENT TO ALL OF SUCH TERMS AND CONDITIONS.

MERCHANDISE CANNOT BE RETURNED WITHOUT OUR PRIOR AUTHORIZATION  
 Any shortages or discrepancies concerning this order must be reported to CellStar, Ltd. within 3 days.

Warehouse: Brightpoint  
501 AIRTECH PARKWAY  
PLAINFIELD IN 46168

Date Ordered: 2007-01-25  
Date Shipped: 2007-01-25  
FOB Point: ORIGIN  
Terms: NET 30  
Freight Terms: Bill Shipper  
Ship Via:  
Tracking Number: 074347323946949

ORDER

Customer Number: 282591  
Customer PO Number: 21317  
Order #: 18818800  
Container/Tag: C10032884

ACCOUNT

Ship To:  
CTC TELECOM INC  
DBA SNAKE RIVER PCS  
130 SUPERIOR ST  
CAMBRIDGE ID 83610 US

ITEM

Seq	Shipped	Description	Price	
			Unit	Extended
1	8	Kyo Kx16 Misty Silver W/li Ion Batt.ac C KX16/FULF	135.00	810.00
03404650057		* 03401711946		
03401712000		03402757330		
		* 03401711961		03401711960
2	4	Kyo Kx160 Dark Silver W/li Ion Batt.ac C KX160/FULF	175.00	700.00
03412420711		03412466723		
		03412422577		03412422619
3	2	K132 Shadow Mouse K132/FULF	89.00	178.00
03409378029		03409377864		
5	2	Kyo Kx12 Ptt Phn W/li Ion Bat. Ac Chgr. KX12PTT/FULF	185.00	370.00
03408087651		03408087655		

Merchandise Total: 2,058.00  
Tax: 0.00  
Freight: 17.53  
Total: 2,075.54