

**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

**EX PARTE SUPPLEMENTAL REPLY COMMENTS REGARDING
PETITIONS FOR RECONSIDERATION**

**BLANCA TELEPHONE COMPANY
CTC TELECOM, INC.
FARMERS CELLULAR TELEPHONE, INC.**

**Timothy E. Welch, Esq.
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July 28, 2008

CTC Telecom, Inc. (“CTC”), Blanca Telephone Company (“Blanca”), and Farmers Cellular Telephone, Inc. (“FCTI”), 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 provide supplemental reply comments regarding the HAC waiver denial petitions for reconsideration discussed in the *Public Notice*, DA 08-1087 (released May 7, 2008) (“*Public Notice*”). The Commission has determined that *ex parte* communications are permitted in this proceeding. See *Public Notice*, 22 FCC Rcd. 535 (WTB 2007). In reply thereto, the following is respectfully submitted:

1) Petitioners’ May 22, 2008, *Comments Regarding Petitions for Reconsideration*, at 2-3 and 4-6, informed the Commission that the November 6, 2006, *Consolidated Opposition* filed by Telecommunications for the Deaf, Inc. and the Hearing Loss Association of America (“Joint Filers”) violated the *ex parte* rules by failing to serve a copy of their *Consolidated Opposition* upon Petitioners. Petitioners served a copy of their May 22, 2008, *Comments* upon the Commission’s General Counsel as required by 47 C.F.R. § 1.1214. Petitioners also served a copy of their May 22, 2008, *Comments* upon counsel to the Joint Filers to provide them an opportunity to respond. However, the Joint Filers did not respond to Petitioners’ *Comments*.

2) The Office of General Counsel’s June 16, 2008, letter to counsel for the Joint Filers the (copy attached) directed that the Joint Filers should respond to the allegation that they violated the *ex parte* rules within 14 calendar days, that is, by June 30, 2008 . The Joint Filers did not respond within 14 days as directed by the Office of General Counsel, instead they requested an extension of time after the 14 days had lapsed, due to a stated failure to receive the Office of

General Counsel's June 16, 2008, letter. Petitioners did not object to the requested extension and on July 22, 2008, the Joint Filers filed their response ("*Response*"). A copy of the Joint Filers' *Response* is attached to this submission.

3) The Joint Filers argue that the Commission should excuse their *ex parte* violation because it was "unintended." *Response*, at 1. The "intent" of the *ex parte* violator is not pertinent to determining whether an impermissible presentation was made, however, the Commission might examine intent to determine whether sanctions are appropriate. *See Pepper Schultz*, 4 FCC Rcd 6393, 6403 (Rev Bd. 1989), rev. denied, 5 FCC Rcd 3273 [67 RR 2d 1498] (1990) cited in *Rainbow Broadcasting Company*, 9 FCC Rcd. 2389 n. 31 (FCC 1994). The facts of the case and Joint Filers' arguments do not demonstrate that the Joint Filers' state of mind should be considered to be a mitigating factor.¹

4) The Joint Filers claim that Petitioners had "constructive notice" of the filing the *Consolidate Opposition. Response*, at 2. Of course, the *ex parte* rules in effect at the time the Joint Filers made their prohibited *ex parte* presentation clearly required service of the *Consolidated Opposition* upon Petitioners. At that time Petitioners had not been given any notice that they needed to monitor the relevant docket and they had not been provided notice that the *ex parte* rules had been relaxed and "constructive notice" cannot serve as a mitigating factor

¹ Joint Filers would like to receive a pass on their rule violation. However, Joint Filers do not comment upon Petitioners' discussion that the Joint Filers have argued to the Commission that "the Commission must adhere strictly to its rules unless a party can demonstrate that in the public interest the rule should be waived." Petitioners' May 22, 2008, *Comments*, ¶4. Petitioners' difficulty in complying with the HAC handset rules stemmed from their inability to obtain the necessary handsets from third parties; the Joint Filers' compliance failure was purely a function of their own failure to follow clearly written rules which prohibit *ex parte* presentations in waiver proceedings. The Joint Filers have failed to explain why the rules must be applied strictly against Petitioners, but not at all against the Joint Filers, and their comments that their rule violations should be excused are clearly self-serving.

regarding the Joint Filers' intent at the time they filed. Joint Filers' "constructive notice" argument tends to show that Joint Filers are grasping for an excuse, however, "constructive notice" cannot excuse or mitigate their rule violation.

5) The Joint Filers disclose that they engaged in other prohibited *ex parte* presentations when they recite that

prior to filing the Consolidated Opposition, TDI and HLAA and their counsel spoke to Commission staff several times regarding the waiver petitions and expressed the intent of TDI and HLAA to file oppositions. At no time did the staff advise that the proceeding was restricted.

Response, at 2-3. The fact that the Joint Filers engaged in other, and until now previously unreported, *ex parte* violations, does not support the Joint Filers' contention that their collective "intent" should serve as a mitigating consideration regarding their *ex parte* violations. The Joint Filers admit to multiple *ex parte* violations but there is still no record of when these discussions occurred, who participated in the discussions, although it may be presumed that the discussions were with members of the Commission's professional staff, nor has the substance of these *ex parte* discussions been documented. Moreover, the Joint Filers have the *ex parte* notification issue completely backwards, it is not the staff's responsibility to advise the Joint Filers that the proceeding was restricted, it was the Joint Filers' responsibility to advise the staff that the proceeding was restricted. *See Rainbow Broadcasting Company*, 9 FCC Rcd. 2389 ¶ 35 (FCC 1994) The rules could not be more plainly written that waiver proceedings are restricted proceedings and that *ex parte* presentations are prohibited. *See* 47 C.F.R. § 1.1208 which classifies "all waiver proceedings" as restricted. The Joint Filers completely fail to explain why in the face of this clearly written rule they proceeded to contact the staff orally, and then in writing, to make presentations in a restricted waiver proceeding. The Joint Filers argument that it was the

staff's responsibility to ensure that the Joint Filers complied with the *ex parte* rules puts the shoe on the wrong foot and does not serve to mitigate the Joint Filers' *multiple ex parte* violations.

6) The Joint Filers also seek to mitigate their multiple *ex parte* violations by noting that subsequent to the filing of their *Consolidated Opposition* the Commission changed the *ex parte* status of the waiver requests to permit-but-disclose. *Response*, at 3. First, there is nothing in the Commission's January 18, 2007, *Public Notice*, DA 07-102, which even remotely suggests that previously made *ex parte* presentations were sanctified. In fact, the *Public Notice* specifically states that the relaxed *ex parte* rules were "effective today." The fact that the Commission subsequently relaxed the *ex parte* rules does not serve as a mitigating factor regarding the Joint Filers' intent at the time they filed their *Consolidated Opposition*. Plainly stated the Joint Filers did not know in November 2006 that the Commission would ever relax the *ex parte* rules, therefore, the fact that the Commission did relax the rules cannot server as a mitigating consideration.

7) Second, the Joint Filers are seriously conflicted. As discussed above, the Joint Filers blame, albeit improperly, the staff for not advising them that the HAC waiver proceedings were restricted. However, even if one could assume that the Joint Filers were unaware of the clear prohibition against making *ex parte* presentations in waiver proceedings, the Joint Filers certainly became aware of the prohibition when the staff released the January 18, 2007, *Public Notice*, DA 07-102 which relaxed the *ex parte* rules. Certainly at that time the Joint Filers knew that the HAC waiver proceedings had been previously restricted and that their *ex parte* presentations were prohibited. At that time the Joint Filers should have immediately attempted to ameliorate their *ex parte* violations. But what did the Joint Filers do upon the release of the January 18, 2007, *Public*

Notice, DA 07-102? The Joint Filers did absolutely nothing. The Joint Filers took no action to try to remedy what they had done. The Joint Filers let the Commission proceed to a decision in the HAC waiver proceeding without contacting anyone about the multiple *ex parte* violations so that the HAC waiver filers might have an opportunity to respond prior to the time that the Commission acted. The fact that the Commission relaxed the *ex parte* rules after the Joint Filers had filed their *Consolidated Opposition*, does not serve to mitigate the Joint Filers rule violation. To the contrary, the Joint Filers' failure to attempt to rectify their *ex parte* violations after the release the January 18, 2007, *Public Notice*, DA 07-102, demonstrates that the Joint Filers were not proceeding in good faith.

8) The Joint Filers argue that their *Consolidated Opposition* did not influence the Commission's HAC waiver decision. *Response*, at 2. The Joint Filers' argument is preposterous. The Joint Filers' suggestion that opposition comments filed in waiver proceedings do not matter because the Commission ultimately based its decisions upon legal requirements renders the *ex parte* rules completely meaningless. The Commission's decisions are *always* presumed to be legally correct in the first instance, even if upon later review they are found to be legally or factually deficient and the fact that the Commission announced that the HAC waiver requests were being denied based upon its reading of the facts and the law at the time the decision is made in no way prejudices determinations which might be made in subsequent review proceedings.

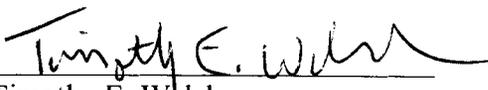
9) The *Consolidated Opposition* plainly goes to the merits of the HAC waiver requests and the Commission granted the relief demanded by the Joint Filers. Absent the Joint Filers' concern the Commission could have, for example, granted the waiver requests by concluding that the Petitioners' inability to obtain HAC compliant was a circumstance beyond their control, or

determined that compliance after some date subsequent to Joint Filers' designated January 1, 2007, deadline was appropriate. However, in response to the Joint Filers' comments, the Commission selected January 1, 2007, as the previously unannounced drop dead deadline and imposed the previously unarticulated requirement that carriers had to change their vendor relationships in order to obtain a wavier grant. It seems reasonable to conclude that because the Joint Filers obtained relief illegally, that an appropriate remedy would be to grant the HAC wavier requests, especially where it does not appear that any person was denied a HAC compliant handset.

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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Respectfully Submitted,



Timothy E. Welch

July 28, 2008



Federal Communications Commission
Washington, D.C. 20554

June 16, 2008

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Re: Allegation of ex parte violation re WT
Docket No. 01-309

Dear Counsel:

The Office of General Counsel has received the attached pleading, filed by Timothy E. Welch, Esq., on behalf of Blanca Telephone Company, CTC Telecom, Inc., and Farmers Cellular Telephone, Inc. (Petitioners), which alleges, at footnote 4, that the "Consolidated Opposition of Telecommunica[t]ions for the Deaf and Hard of Hearing, Inc. and Hearing Loss Association of America to Requests for Waiver of Commission Rule 20.19(d)(2)," filed November 6, 2006, (also attached) violated the ex parte rules because it was not served on the Petitioners. *See* 47 C.F.R. § 1.1208 (Restricted proceedings). Please address your response to Mr. Welch's allegations to me within 14 calendar days and serve it on Mr. Welch.

Sincerely yours,

A handwritten signature in black ink that reads "Joel Kaufman".

Joel Kaufman
Associate General Counsel and
Chief, Administrative Law Division
Office of General Counsel

cc:

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Page 2

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Wireless Telecommunications Bureau
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Attn: Joseph Levin

Attachments

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July 22, 2008

**VIA HAND DELIVERY
AND ELECTRONIC MAIL**

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JUL 22 2008

Federal Communications Commission
Bureau / Office

Joel Kaufman, Esq.
Associate General Counsel and
Chief, Administrative Law Division
Office of General Counsel
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

Re: Allegation of Ex Parte Violation re WT Docket No. 01-309

Dear Mr. Kaufman:

Telecommunications for the Deaf, Inc. and the Hearing Loss Association of America (“TDI and HLAA”), through their undersigned counsel, respond to your letter dated June 16, 2008, regarding alleged violations of the Commission’s *ex parte* rules made by Blanca Telephone Company, CTC Telecom, Inc., and Farmers Cellular Telephone, Inc. (“Petitioners”). The alleged violations purportedly occurred in November 2006 in connection with the filing by TDI and HLAA of a Consolidated Opposition to the requests by Petitioners for waivers of the Commission’s rules requiring wireless carriers to provide hearing aid compatible handsets by September 18, 2006.¹ While TDI and HLAA sincerely regret any unintended violation of the Commission’s *ex parte* rules that may have occurred, they submit that the Petitioners were not prejudiced thereby and that the Commission’s actions with respect to the Petitioner’s waiver requests were consistent with the Commission’s rules and prior practice. The Commission therefore should reject Petitioners’ attempt to evade responsibility for their failure to meet the Commission’s hearing aid compatibility rules.

TDI and HLAA submit that the Commission should reject Petitioners’ claims that they were prejudiced by the Consolidated Opposition. Although the

¹ See Section 68.4(a) of the Commission’s Rules Governing Hearing Aid Compatible Telephones Requests for Temporary Waiver, or Temporary Stay, of Section 20.19(d)(2) of the Commission’s Rules, Consolidated Opposition of Telecommunications for the Deaf and Hard of Hearing, Inc. and Hearing Loss Association of America to Requests for Waiver of Commission Rule 20.19(d)(2), WT Docket No. 01-309 (filed Nov. 6, 2006) (“Consolidated Opposition”).

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Consolidated Opposition was noted in the “Background” section of the Commission’s order denying Petitioners’ waiver requests,² the Commission did not rely on the Consolidated Opposition in reaching its conclusions. Rather, the Commission evaluated the Petitioners’ waiver requests on their merits and found them wanting.³ Notably, the Consolidated Opposition is not even alluded to in the portion of the HAC Waiver Order that addresses Petitioners’ waiver requests. Further, the Commission’s conclusions in the HAC Waiver Order, including the decision to refer Petitioners to the Enforcement Bureau, are consistent with past Commission treatment of similar waiver requests.⁴ Therefore, Petitioners’ claims that they were prejudiced by the Consolidated Opposition and that the Commission’s actions were improper are without merit and should be rejected.

TDI and HLAA also reject Petitioners’ insinuation that the Consolidated Opposition was made “behind closed doors” in an attempt to prevent Petitioners from responding to the filing. The Consolidated Opposition was filed in the public docket via the Commission’s Electronic Comment Filing System (a copy of the ECFS confirmation sheet is attached) and was therefore available for public review, including to Petitioners. Petitioners therefore had constructive notice of the Consolidated Opposition and had ample opportunity to respond.

With respect to Petitioners’ assertion that TDI and HLAA violated the Commission’s *ex parte* rules in filing the Consolidated Opposition, TDI and HLAA realize now that the Petitioners’ waiver filings were considered restricted, and they regret any inadvertent violation of the Commission’s rules. However, prior to filing the Consolidated Opposition, TDI and HLAA and their counsel spoke to Commission staff several times regarding the waiver petitions and expressed the intent of TDI and HLAA to file oppositions. At no time did staff

² See 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, WT Docket No. 01-309, ¶ 6 (rel. Feb. 27, 2008) (“HAC Waiver Order”).

³ See *id.* ¶¶ 18-22. In rejecting Petitioners’ waiver requests, the Commission stated that the waivers were not justified because “none of these petitioners meet the requirements to justify granting a waiver pursuant to the Section 1.925(b)(3) standard.” ... “[E]ach of these petitioners failed to provide evidence that it 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.”

⁴ See 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, WT Docket No. 01-309 (rel. Apr. 11, 2007) (granting some waiver petitions, denying some waiver petitions, and referring some petitioners to the Enforcement Bureau in a manner remarkably similar to those Commission decisions in the 2008 Order).

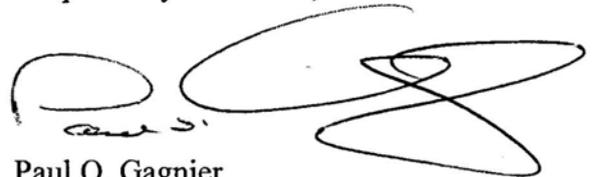
Joel Kaufman, Esq.
July 22, 2008
Page 3

advise that the proceeding was restricted. In addition, the waiver petitions were filed under and made publicly available in WT Docket No. 01-309, which is the general docket for implementation of the Commission's hearing aid compatibility rules. TDI and HLAA had previously filed comments in that docket, which concerned policy issues of direct concern to the memberships of TDI and HLAA. As the result of their discussions with Commission staff and their long participation in the hearing aid compatibility docket, TDI and HLAA assumed that the Commission was accepting comments on the waiver filings. TDI and HLAA regret that mistaken assumption; however, Petitioners were not harmed and Petitioners' request that the Commission impose sanctions on TDI and HLAA is unnecessary and vindictive.

TDI and HLAA also note that, shortly following the filing of the Consolidated Opposition, the Commission changed the waiver proceeding to permit-but-disclose and acknowledged that "these petitions implicate broadly applicable policy issues." Clearly, the Commission changed the categorization of the proceeding because it believed that public input on these issues was in the public interest.⁵

Please date-stamp the extra copy of this extension request and return it in the enclosed self-addressed, stamped envelope. Should you have any questions regarding this request, please contact the undersigned.

Respectfully submitted,



Paul O. Gagnier
Jeffrey R. Strenkowski

Counsel for TDI and HLAA

cc: Joseph Levin (FCC, via email)
David Senzel (FCC, via email)
Timothy Welch (Hill and Welch, via U.S. Mail and email)

⁵ See Public Notice, *Modification of Ex Parte Status of Pending Petitions for Waiver of Hearing Aid Compatibility Requirements*, DA 07-102 (rel. Jan. 18, 2007).

CERTIFICATE OF SERVICE

I hereby certify that I have this 28th day of July 2008 mailed a copy of the forgoing *Ex Parte Supplemental Reply Comments Regarding Petitions for Reconsideration* by First Class United States Mail, postage prepaid, to the following:

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