

Executive Summary

The Blooston Rural Carriers appreciate the opportunity to refresh the record in the FCC's 2010 Review of its hearing aid compatibility ("HAC") regulations and offer these comments with the goal of reducing administrative burdens and costs of annual HAC reporting for the nation's smallest wireless service providers while at the same time ensuring that a wide array of devices with accessibility features are available to persons with hearing impairment or loss.

With the phase-in of HAC-enabled devices for the most widely-used wireless air interface technologies now complete, the Commission can safely eliminate the need for further annual HAC reporting by Tier III service providers with no risk of adverse impact to the hearing impaired. In the absence of annual reporting, Tier III service providers will remain subject to the Commission's substantive HAC Rules, including the obligations to offer their customers at least 50 percent of their models or 10 models (whichever is less) over each air interface that meet an M3 rating, and at least one-third of their models or 10 models (whichever is less) over each air interface that meet a T3 rating. Compliance with outreach obligations imposed in the Commission's Rules will serve to keep the public informed about HAC ratings and the availability of a diverse selection of HAC-enabled devices.

With respect to enforcement of the Commission's HAC Rules, the Blooston Rural Carriers urge the Commission not to apply an enhanced forfeiture policy adopted to address ongoing HAC violations by a Tier I service provider to Tier III service providers that are orders of magnitude smaller. The very real threat of enforcement action and outsized HAC fines

resulting from a typographic error, an innocent oversight or misinformation from a manufacturer or product distributor is actually leading some small carriers to consider foregoing the sale of wireless handsets. This is clearly contrary to the public interest and the Commission should not intend such a result.

The Commission should also take steps to ensure that small carriers and their customers have equal access to the latest and most advanced HAC-enabled devices by prohibiting handset exclusivity arrangements for devices that have HAC features, and by promptly adopting a Lower 700 MHz band equipment interoperability requirement so that “balkanization” of the 700 MHz band product market does not have adverse consequences for customers that are hearing impaired. Tier III service providers should be granted temporary relief from HAC requirements when they deploy new air interfaces since it is too easy to stumble into a significant fine when offering a small selection of handsets (as is typical when a Tier III carrier ramps up service) and in recognition that small carriers are at the mercy of the marketplace and can’t always guarantee availability of HAC-enabled devices when they must purchase their handsets in smaller “as needed” quantities from third-party distributors. Finally, the Commission should take other measures to alleviate HAC reporting burdens on small service providers so they can conserve their limited resources for the provision of service to new and underserved communities.

Table of Contents

I.	The FCC Should Eliminate Annual HAC Reporting for Tier III Carriers	2
II.	The Commission Must Not Apply to Small and Rural Carriers a Forfeiture Formula Designed to Punish a Nationwide Carrier.....	4
III.	The Commission Should Take Steps to Ensure that Small Carriers and their Customers Have Equal Access to the Latest HAC-Enabled Devices.....	8
IV.	Tier III Service Providers Should be Granted Relief from HAC Reporting Obligations when they Deploy New Air Interfaces.....	9
V.	The Commission Should Alternatively Eliminate Annual HAC Reporting for Service Providers that have Fewer Than 10,000 Customers and Otherwise Implement Changes to Simplify the Electronic HAC Reporting Process	11
VI.	Other Recommendations.....	12

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

In the Matter of)
)
2010 Review of Hearing Aid Compatibility) WT Docket No. 10-254
Regulations)

To: The Wireless Telecommunications Bureau

COMMENTS OF THE BLOOSTON RURAL CARRIERS

The law firm of Blooston, Mordkofsky, Dickens, Duffy & Prendergast, LLP (“Blooston”), on behalf of its clients that are rural wireless service providers (the “Blooston Rural Carriers”) and pursuant to Section 1.415 of the Commission’s Rules, respectfully submits the following comments in response to the Commission’s *Public Notice* DA 12-1745 involving a comprehensive review of the operation and effectiveness of the Commission’s wireless hearing aid compatibility (or “HAC”) policies and rules (the “*HAC 2010 Review*”).

The Blooston Rural Carriers are a diverse group of Tier III Commercial Mobile Radio Service (“CMRS”) service providers that are dedicated to providing high-quality, advanced wireless services in the smaller communities and sparsely populated expanses of rural America. Most are subsidiaries or affiliates of privately-held rural telephone companies or community-owned rural telephone cooperatives that are eligible small businesses under the Commission’s Rules, and all are equally committed to meeting the wireless service and accessibility needs of their customers. In keeping with this rural consumer-focused perspective, these comments of the Blooston Rural Carriers shall focus upon the success of the Commission’s HAC Rules in spurring the development of HAC technologies and ensuring that a wide array of devices with accessibility features are available to persons with hearing impairment or loss. Based on this high level of success, the Blooston Rural Carriers respectfully submit that it is now time to

streamline the HAC reporting rules, as discussed below. The Blooston Rural Carriers also believe the Commission should adopt more flexible enforcement policies with respect to Tier III service providers that can demonstrate substantial compliance with the Commission's HAC handset phase-in rules. In this regard, the Commission should not calculate base forfeitures for Tier III service providers, which in some cases may be startup companies serving fewer than several hundred customers, using the same \$15,000 per handset, per month, formula that it used as the basis for penalizing an established, publicly-traded Tier I nationwide carrier that serves upwards of 30 million customers. Forcing smaller carriers to pay disproportionate fines is not only unfair (because small carriers must offer the handsets that are available and affordable to them) but also jeopardizes the availability of wireless service and valuable jobs in remote communities, as HAC fines can easily lead small carriers to shut their doors.

I. The FCC Should Eliminate Annual HAC Reporting for Tier III Carriers

With the phase-in of HAC-enabled devices for the most widely-used wireless air interface technologies now complete, the Commission can safely eliminate the need for further annual HAC reporting by Tier III service providers with no risk of adverse impact to the hearing impaired. Tier III service providers will remain subject to an ongoing obligation to offer their customers at least 50 percent of their models or 10 models (whichever is less) over each air interface that meet an M3 rating, and at least one-third of their models or 10 models (whichever is less) over each air interface that meet a T3 rating. Annual HAC reports filed by Tier III carriers in recent years show that very few fail to meet these deployment benchmarks. As a result, the HAC Rules now can be adequately enforced with respect to Tier III carriers through the informal complaint process, which will allow specific consumer complaints (to the extent there are any) to be redressed quickly and directly with the supervision of the FCC's Consumer and Governmental Affairs Bureau, if the matter is not resolved through dealing with the service

provider directly.¹ Moreover, persons with hearing impairment or loss will continue to be informed about the availability of these devices through service providers' ongoing compliance with HAC labeling, web site and in-store disclosure requirements. The carrier resources currently devoted to annual HAC reporting by Tier III service providers should instead be used to improve and expand upon the quality of their advanced wireless services and rural network coverage for all consumers.

In keeping with policies that underlie the Hearing Aid Compatibility Act² and the more recent Communications Accessibility Act,³ and provided that the Commission eliminates service provider HAC reporting for Tier III carriers on a going-forward basis, the Blooston Rural Carriers would support the Commission's gradual move toward a universal (*i.e.*, 100%) compatibility requirement for digital wireless handsets, except for those rare cases where handset manufacturers have demonstrated that this is not technologically or economically feasible. Increasing the availability and supply of HAC-enabled handsets in the marketplace is best achieved in this manner because it would result in a higher percentage of HAC-enabled devices being sold by wholesale distributors and non-CMRS service provider wireless retailers that are exempt from the FCC's oversight and regulatory authority. These entities sell millions of wireless handsets to consumers annually, and while they should remain exempt from FCC regulation if they are not CMRS service providers or resellers, it would serve the public interest and persons with hearing disabilities far more effectively if the supply and selection of HAC-enabled devices throughout the product distribution chain were increased generally.

¹ The Commission has provided an online complaint form and guidance for consumers on filing a complaint with the FCC on its web site at: <http://www.fcc.gov/guides/hearing-aid-compatibility-wireless-telephones>,

² See Hearing Aid Compatibility Act, Pub. L. No. 100-394, 102 Stat. 976 (1988) (codified at 47 U.S.C. § 610 (the "HAC Act").

³ See Twenty-first Century Communications and Video Accessibility Act of 2010, Pub. L. No. 111-260, sec. 102 (2010) (to be codified as an amendment to 47 U.S.C. § 610 (the "Communications Accessibility Act").

At the same time, however, any increase in the minimum number or percentage of compatible handsets must be done at the manufacturer level only. The Blooston Rural Carriers would oppose any increase in the handset compatibility requirement if it were applied to Tier III service providers. As has been documented for the Commission, smaller carriers are at the bottom of the supply chain when it comes to obtaining HAC compliant handsets; and the manufacture of many compliant handsets with proprietary features designed for Tier I nationwide carriers *have made these handsets unusable for Tier III carriers* even if they are available for sale from a vendor. If the requirement for carriers goes from 50 percent M3/M4-rated and one-third T3/T4-rated to anything higher, the problems currently experienced by Tier III carriers will only be amplified, resulting in more unreasonable fines against these carriers for matters that are largely, if not entirely, beyond their control.

If the Commission does move toward a 100 percent compatibility requirement, again it must be done as a requirement placed on the manufacturers only, coupled with relief for the carriers from compliance and reporting obligations. The fact that 100 percent of the supply of handsets will one day be compliant should make it unnecessary for carriers to engage in preparing expensive and time-consuming compliance reporting and verification reports. If it were to adopt such a requirement, the Commission should provide a reasonable period of time for carriers to sell their non-compliant inventory and grandfather products that were manufactured before any more stringent requirement goes into effect.

II. The Commission Must Not Apply to Small and Rural Carriers a Forfeiture Formula Designed to Punish a Nationwide Carrier

In a Notice of Apparent Liability issued against a Tier I CMRS service provider this past spring,⁴ the Commission employed a revised HAC forfeiture calculus that is a significant

⁴ See, In the Matter of T-Mobile USA, Inc., *Notice of Apparent Liability for Forfeiture*, FCC 12-39,

departure from its previous "highest handset shortfall" approach (*i.e.*, resulting in a \$15,000 per handset fine, based on the month that had the greatest deficiency). The modified approach keeps the \$15,000 per handset base amount, but applies this to each month of the deficiency. Thus, a single handset deficiency by a small carrier that previously resulted in a serious \$15,000 fine may become a ruinous \$180,000 base forfeiture (*i.e.*, twelve times greater) if the oversight happened to go undetected for a full year. There are numerous and significant reasons why the approach taken against a large nationwide are not relevant to, and should not be used against, small and rural carriers.

The Blooston Rural Carriers believe that the *NAL* should not be read as creating a new HAC forfeiture policy for all carriers. Rather, it should be interpreted as a reasoned departure from existing policy to deter future noncompliance by giant nationwide carriers. In particular, at Paragraph 22 of the *NAL*, the Commission stated:

“...we find that a more nuanced base forfeiture methodology is warranted in order to more fully reflect the significance of *the violations at issue* and to better deter future noncompliance with these critical rules.” [*Emphasis added*]

The Tier I Carrier’s “violations at issue” were a failure to provide an adequate selection of HAC-enabled phones to more than 33 million customers over a two-year period, despite having total annual revenues in excess of \$21 billion, and equipment sales of more than \$2.4 billion. Tier I carriers possess the buying power to procure any desired number of wireless hearing aid-compatible handsets from equipment manufacturers, and they are large enough to influence the design, production and distribution of the handsets that it purchases. Moreover, the Commission found that the Tier I carrier in this case was aware or should have been aware of its regulatory compliance problems but did not address them for an additional year. This is very different

from a Tier III service provider whose non-compliance may have arisen from an unintentional oversight, or due to reliance on misleading or erroneous information from handset manufacturer-prepared information, a vendor or a distributor. All of these considerations aside, it is respectfully submitted that using the same base forfeiture formula for a Tier III carrier having 500 customers as used for a Tier I carrier that has 33 million customers (and is more than 50,000 times larger) is comparable to using a sledgehammer to swat a fly – it would be anything but the nuanced approach called for by the Commission, and also by simple fairness.

Footnote 59 of the *NAL* cites to the Commission’s *Forfeiture Policy Statement*, 12 FCC Rcd at 17092 - 93, Para. 8 and recognizes that the “guidelines will provide the needed measure of predictability to the process and uniformity to our administrative sanctions while retaining flexibility for the Commission to act appropriately in particular cases.” This language could appropriately be read to suggest that the method of calculating the forfeiture proposed in the *NAL* is a one-time, flexible change due to the unusual circumstances presented in that case, and that predictability can be furnished by following the existing policy and guidelines in cases that involve small carriers. In addition, the Commission finds at Paragraph 25 of the *NAL* that “it is appropriate to impose higher forfeitures *than the base amounts* on large or highly profitable entities [...] to ensure that the forfeiture serves as an effective deterrent against their future noncompliance.” (Emphasis added) Stated differently, a large forfeiture against an abundantly wealthy carrier is an appropriate vehicle to “remind” that entity of its legal obligations under the Commission’s HAC rules, and thereby encourage future compliance with those requirements, because a modest forfeiture in such a case would provide no inducement to comply in the future at all. It is also significant to note that the amount of the forfeiture proposed (while extremely large) would not have jeopardized the carrier’s financial ability to remain in business. Again, this signals that the enhanced HAC forfeiture calculus used in the *NAL* was intended as a

(hopefully) one-time measure to make the forfeiture sting a giant nationwide carrier.

The Blooston Rural Carriers do not intend to express any opinion on the merits or outcome of a Tier I carrier's enforcement proceeding. However, if the Commission intends the formula used in the *NAL* to become the new starting point for *any* HAC forfeiture calculation (or consent decree-based settlement discussion) regardless of a carrier's size, it is respectfully submitted that the public interest would not be served by such an approach. By starting the base forfeiture so high, it will be difficult if not impossible to bring it down to a reasonable level under the Commission's "mitigation" criteria so it is proportional to a small carrier's circumstances. In some instances, if the addition of a single non-HAC device to an otherwise compliant handset offering goes unnoticed by a small carrier's compliance person for a year, it could result in twin base forfeitures of \$180,000 – one because the M3 total would be put out of balance, and the other because the T3 count would be put out of balance – for a total of \$360,000. While the small carrier may be able to earn some reductions for, e.g., a good compliance record, when the base amount starts so high, the final fine will still likely have a disastrous financial impact on a small carrier trying to serve a high-cost area in a bad economy, and even in a good economy. Faced with potentially ruinous fines, small and rural carriers will have to seriously consider the alternatives such as not offering customers any handsets directly, and requiring customers to purchase handsets from independent retailers or offering roaming services only, or not providing service to remote areas at all. While offering a reasonable choice of HAC handsets is an important policy goal, it should not actually *deter* the offering of service, or *curtail* handset choices for Americans living in remote areas.

Most importantly, it is not clear that any of the existing downward adjustment criteria will be applied so as to properly recognize the difference between violations by a carrier serving

only 500 customers, versus a carrier serving tens of millions of customers. Instead, the handset shortfall multiplied by the number of months of the violation will be the same whether the carrier is a Tier I service provider or a tiny cooperative serving a few small Native American villages. The Commission must either continue to apply its “highest handset shortfall” formula to Tier III carriers, or it must establish, under one of the existing mitigation criteria (such as the “minor violation” criterion), that the base forfeiture will be reduced in proportion to the number of customers served. A carrier serving 500 customers (*i.e.*, 50,000 to 100,000 times smaller than a typical nationwide carrier) should be subject to forfeitures that are just a small fraction of the amount that a nationwide carrier must pay, not just 10 or 20 percent less. Otherwise, the Commission would be creating the “anomalous results” that it was seeking to avoid in the *NAL*.

III. The Commission Should Take Steps to Ensure that Small Carriers and their Customers Have Equal Access to the Latest HAC-Enabled Devices

The Blooston Rural Carriers note that Tier III carriers would be better positioned to provide more HAC-compliant handsets to their rural customers *if these devices were only available to them*. Evidence in the record most clearly shows that Tier III HAC compliance has been significantly hampered by the marketing practices of the handset manufacturers, which favor the Tier I and II carriers. With respect to 700 MHz band devices, which have become subject to the Commission’s HAC requirements with its recent adoption of the frequency and air interface-agnostic 2011 version of the ANSI Standard C63.19, the Commission will only improve the availability of HAC-enabled 700 MHz devices for all carriers by *promptly* adopting a Lower 700 MHz band equipment interoperability requirement. The Commission should also take the opportunity furnished by this proceeding to curtail once and for all the handset exclusivity, trademark and branding arrangements that have harmed smaller carriers.

IV. Tier III Service Providers Should be Granted Relief from HAC Reporting Obligations when they Deploy New Air Interfaces

As discussed in earlier comments in this proceeding,⁵ the Blooston Rural Carriers believe that HAC technology has evolved to the point that a compliance reporting requirement is no longer needed, especially for Tier III carriers. However, aside from this proposal, the Commission should immediately modify compliance requirements (both in terms of reporting and handset benchmarks) in those instances where a Tier III carrier implements a new air interface. If the case of CDMA devices is to be instructive (where there is almost 100% penetration of HAC functionality), this should serve as evidence that Tier III service providers are ready, willing and able to offer their customers a broad selection of HAC-enabled phones, so long as these devices are available to them, and not subject to handset exclusivity arrangements, trademark or branding features that cannot be lawfully or reasonably changed, and that aren't somehow tied down to a particular service provider's network due to proprietary software and/or firmware. The Commission should therefore consider moving away from imposing annual reporting requirements upon Tier III service providers when seeking to deploy advanced wireless services using 3G and 4G air interfaces (such as WCDMA, WiMAX and LTE) and when deploying new services using AWS and/or 700 MHz band spectrum. The Commission should instead gradually phase-in a requirement for manufacturers to ensure that 100% of all new devices have HAC functionality. Moving towards a 100% compatibility requirement for digital wireless handsets, except in instances where handset manufacturers have filed a waiver request and demonstrated that this is not technologically or economically feasible, would better accommodate the needs of small/rural service providers and their customers. Moreover, this would alleviate the need for burdensome HAC reporting by small CMRS service providers and fairly spread the cost of ensuring full device accessibility incrementally across all

service providers and consumers.

In the alternative, the Commission should consider amending the current *de minimis* rule to eliminate annual HAC reporting and regulatory compliance obligations for small entities that have average annual handset sales of less than 100 devices per month among all of their company-owned stores. Regulatory compliance and reporting / recordkeeping costs for these very small service providers are extremely high when compared to their limited revenues. Indeed, faced with the prospect of steep Commission-imposed monetary forfeitures in the event that an insufficient selection of HAC-enabled devices is available to them (a risk that is much greater when a small carrier is seeking to initiate, for example, service using a newer 3G air interface technology such as WCDMA), or monetary forfeitures that may result from an unintended reporting or recordkeeping error, a number of small rural carriers are being forced to consider whether they can continue to offer their customers the convenience of a company-owned store where they can test and choose from a selection of wireless handsets. If very small rural service providers are forced to shut their retail operations (*e.g.*, if they are driven to operate “roam only” systems or to rely solely on sales from independent retailers and the internet), rural consumers with hearing disabilities may be deprived of the ability to try and/or purchase *any* type of HAC-enabled phone in their home town. This would be contrary to the intent of the HAC Act and the Communications Accessibility Act.

As the Commission is well aware, Tier III wireless service providers typically do not have the size or the purchasing power needed to place equipment orders directly with handset manufacturers or to dictate handset features/specifications that are available through vendors that deal with small carriers (*i.e.*, third party distributors). This has led to numerous instances

⁵ See Comments of the Blooston Rural Carriers, WT Docket No. 10-254 (*filed* Feb. 14, 2011).

where small service providers have had difficulty obtaining a reliable supply and adequate selection of hearing aid-compatible handsets, as well as confusion when HAC devices obtained from third-party distributors are not consistently labeled or turn out to be “grey market” phones that may or may not have the compatibility features sought.

In closing, the Blooston Rural Carriers believe that the Commission should work through standards bodies (such as ANSI ASC C63) to encourage hearing aid compatibility standards to be incorporated into all new handset designs and emerging technologies as early as possible. It is also hoped that the Commission’s recently-adopted rule calling for manufacturers to deploy hearing aid-compatible handsets through all of their distribution channels will help to eliminate any potential gaps in the availability of compatible devices to Tier III service providers and the network of independent retailers on which many rely for the sale and marketing of their wireless products and services.

V. The Commission Should Alternatively Eliminate Annual HAC Reporting for Service Providers that have Fewer Than 10,000 Customers and Otherwise Implement Changes to Simplify the Electronic HAC Reporting Process

To the extent that the Commission believes it should retain HAC reporting for Tier III service providers, the Blooston Rural Carriers believe it should consider eliminating the annual HAC reporting obligation for service providers that serve fewer than 10,000 customers, including all affiliates. These are the very smallest of service providers and resellers, and they are not in a position to afford the costs and administrative burdens of preparing additional annual reports. As previously noted, there would be no risk of harm to the hearing impaired because information about their handset offerings would be readily available as a result of compliance with outreach obligations, and the service providers would remain subject to the other substantive HAC obligations under the Commission’s Rules,

VI. Other Recommendations

Another way that the Commission might alleviate unnecessary costs and administrative burdens on small service providers is by allowing them to submit their lists of handsets offering dates and other information as a standard ECFS filing, as the FCC previously allowed. This would give the FCC staff and the public ready access to the same exact data as provided in the current Form 655, yet do so in a manner that is easier to read and understand than a standard “fill in the blanks” format that results (in many cases) in individual HAC reports that exceed 50 pages and that are not alphabetized. Small service providers and their counsel found the Commission’s electronic HAC reporting system via ULS to be exceedingly complex and the process of manually entering a significant amount of detailed information for each wireless handset tedious and prone to typographic errors and technical problems arising since the 2012 electronic reporting form was not compatible with certain web browsers (*e.g.*, Google Chrome) and would not accept “cut and paste” of pre-typed and pre-checked blocks of text even when a compatible browser such as Windows Internet Explorer 9 was used to complete the report. The process of entering handset information has been streamlined to some degree by allowing reporting companies to import the information from their previous year’s report, but it would be a significant improvement if service providers could import/upload their data in spreadsheets or comma delimited text. To the extent the Commission decides to implement any of these suggestions, it should do so far enough in advance that small carriers and their counsel can test out the changes in the system, and so OMB approval for any new data collection can be obtained months in advance of opening the filing window.

The Blooston Rural Carriers

Advanced Communications Technology, Inc.
Cedar-Wapsie Communications, Inc.
Central Iowa Wireless, Inc.
C-M-L Telephone Cooperative Association of Meriden, Iowa
Consolidated Telcom
Copper Valley Wireless
Custer Telephone Cooperative, Inc.
FMTC Wireless, Inc.
GW Wireless, Inc.
Kennebec Telephone Company, Inc.
Lehigh Valley Cooperative Telephone Association
MAC Wireless, LLC
Manti Tele Communications Company, Inc.
Marne & Elk Horn Telephone Company
Mon-Cre Telephone Cooperative, Inc.
Nucla-Naturita Telephone Company
Premier Wireless, Inc.
Public Service Wireless
Smithville Telecom
TelAlaska Cellular, Inc.
Utah Basin Electronic Telecommunications / Strata Networks
Van Buren Wireless, Inc.
Walnut Communications, Inc.
Wapsi Wireless, LLC
Webster-Calhoun Cooperative Telephone Association
Winnebago Cooperative Telecom Association
WUE, Inc.