September 12, 2013

VIA ELECTRONIC FILING

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

ERRATUM

Re: Opposition to Petition for Reconsideration
ET Docket No. 13-84
WT Docket No. 03-137

Dear Ms. Dortch

CTIA-The Wireless Association® ("CTIA") hereby submits this Erratum filing of its Opposition to Petition for Reconsideration in the above-captioned proceedings. CTIA is making this filing because the original opposition was submitted with an editing error to an erroneously underlined sentence. The remaining body text of CTIA's opposition remains unchanged.

Respectfully submitted,

/s/ Michael F. Altschul

Michael F. Altschul
Senior Vice President & General Counsel

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

In the Matter of	)	
	)	
Reassessment of Federal Communications Commission Radiofrequency Exposure Limits and Policies	)	ET Docket No. 13-84
	)	
Proposed Changes in the Commission's Rules Regarding Human Exposure to Radiofrequency Electromagnetic Fields	)	ET Docket No. 03-137

OPPOSITION OF CTIA – THE WIRELESS ASSOCIATION®

I. INTRODUCTION AND SUMMARY

CTIA – The Wireless Association®[1] respectfully submits this response to the Petition for Reconsideration of the Commission's *First Report and Order, Further Notice of Proposed Rule Making and Notice of Inquiry* ("First R&O") filed by the American Association for Justice ("AAJ")[2] in the above-captioned proceeding.[3] In its Petition, the AAJ opposes the

[1] CTIA – The Wireless Association® is the international organization of the wireless communications industry for both wireless carriers and manufacturers. Membership in the organization covers Commercial Mobile Radio Service ("CMRS") providers and manufacturers, including cellular, Advanced Wireless Service, 700 MHz, broadband PCS, and ESMR, as well as providers and manufacturers of wireless data services and products.

[2] Petition for Reconsideration of the American Association for Justice, ET Docket No. 03-137 (filed Jul. 1, 2013) [hereinafter Petition]. For more than 65 years, the American Association for Justice, also known as the Association of Trial Lawyers of America (ATLA®), has supported plaintiff trial lawyers—as the collective voice of the trial bar on Capitol Hill and in courthouses across the nation. *See* http://www.justice.org/cps/rde/xchg/justice/hs.xsl/default.htm.

[3] Reassessment of Federal Communications Commission Radiofrequency Exposure Limits and Policies, Proposed Changes in the Commission's Rules Regarding Human Exposure to Radiofrequency Electromagnetic Fields, *First Report & Order, Further Notice of Proposed Rulemaking, Notice of Inquiry,* ET Docket Nos. 13-84, 03-137 (rel. Mar. 29, 2013) [hereinafter *R&O*].

Commission's reclassification of the outer ear ("pinna") as an extremity included in the list of exceptions from the localized SAR limits in Section 2.1093(d)(2) of the Commission's rules. Unlike the Trial Lawyers, CTIA strongly supports the Commission's decision in the First R&O to classify the pinna as an extremity based on the expert determinations of the FDA and of the IEEE, and the Commission's conclusion that this specification has no practical effect on human exposure to RF energy permitted by the FCC's rules. Because the Commission's inclusion of the pinna with the ankles, wrists, feet, and hands for purposes of RF exposure compliance was properly guided by the recommendations of federal agencies and organizations with expertise in measuring RF exposure and evaluating its environmental effects, CTIA urges the Commission to reject the Petition for Reconsideration filed by the AAJ.

II. DISCUSSION

As a threshold matter, the AAJ was not a "party" to this proceeding prior to filing its Petition for Reconsideration. Section 1.106(b)(1) of the Commission's rules specify that

> If the petition [for reconsideration] is filed by a person who is not a party to the proceeding, it shall state with particularity the manner in which the person's interests are adversely affected by the action taken, and shall show good reason why it was not possible for him to participate in the earlier stages of the proceeding.

47 CFR 1.106(b)(1). Not only does the Petition fail to "state with particularity" the manner in which the interests of the members of the Trial Lawyers' Bar are adversely affected by a decision the Commission has determined will have no practical effect on human exposure to RF energy, it is silent on this issue. Similarly, the Petition is silent on the reason why the AAJ, then known as the ATLA, was not able to participate in the earlier stages of this proceeding.

But more importantly, on the merits, the Petition mischaracterizes the Commission's Order, misstates the appropriate standard of review, and is mistaken on the effects of the Commission's decision.

A. Classification of the Pinna as an Extremity

In the challenged portion of the First R&O that amended Section 1.1310(b) of the rules to subject the pinna to the same RF exposure limit applicable to hands, wrists, feet, and ankles,[4] the Commission classified the pinna as an "extremity" excepted from the localized SAR limits in Section 2.1093(d)(2) of the Commission's rules.[5] As the First R&O recites, an accredited standards setting organization, the IEEE,[6] initiated deliberations to consider classifying the pinna as an extremity. The IEEE subsequently revised IEEE Standards C95.1b-2004 and C95.1-2005 to characterize the pinna as an extremity.[7] Moreover, the U.S. Food and Drug Administration ("FDA") commented that the resulting "increase in allowable power deposition [due to treating the pinna as an extremity] will not be significant enough to cause concern."[8] Based on this record, the Commission stated that:

> We conclude that classification of the pinna as an extremity is supported by the expert determinations of the FDA and of the IEEE, will have no practical impact on the amount of human exposure to RF radiation, and is therefore appropriate. The FDA in particular has statutory responsibility to carry out a program designed to protect public health and safety from electronic product radiation and we therefore place heavy reliance on its public health and safety determinations. As a standard-setting body that thoroughly

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[4] *R&O*, *supra* note 3, app. b, para. 3(b), at 109. 47 C.F.R. § 1.1310 (2013).

[5] *R&O*, *supra* note 3, paras. 42-50, at 17-19.

[6] The Institute of Electrical and Electronic Engineers (IEEE) is a non-profit entity with members from government, industry, and the academy. As the FCC has found, the IEEE is "composed of leading experts" and there is "no other comparable group of experts with which to consult or upon which to rely." *EMR Network Petition for Inquiry to Consider Amendment of Parts 1 and 2 Regarding Environmental Effects of Radiofrequency Radiation*, 18 FCC Rcd. 16822, 16826 (2003). The FCC's reliance on the IEEE RF exposure standards has been affirmed by two appellate courts. *See Cellular Phone Taskforce v. FCC*, 205 F.3d 82, 90 (2d Cir. 2000); *EMR Network v. FCC*, 391 F.3d 269 (D.C. Cir. 2004).

[7] *R&O*, *supra* note 3, para. 44, at 17; *see also*, Inst. of Elec. & Elec. Eng'rs, *C95.1-2005 - IEEE Standard for Safety Levels with Respect to Human Exposure to Radio Frequency Electromagnetic Fields, 3 kHz to 300 GHz* (2006).

[8] *See* FDA Comments at 1.

> reviewed the relevant research, the IEEE has made a similar determination based upon its technical expertise in the measurement of human exposure to RF radiation.

First R & O, para. 48 (footnotes omitted).

As the Commission explained, classification of the pinna is only relevant to evaluation of localized SAR and not Maximum Possible Exposure ("MPE").[10] Significantly, the Commission noted that "this specification has no practical effect on human exposure. ... The same devices that were approved before will continue to be approved, and the same devices that could not receive approval before this specification will not receive approval after this specification."[11] This simple fact rebuts the Trial Lawyers' claim that amended section 1.13.10 of the Commission's rules "creates a regime that is less safe than when the standard was first set...."[12]

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[10] *R&O*, *supra* note 3, para. 44, at 17. The MPE limits were derived under the assumption of whole body exposure, and control of localized SAR is implicit in their derivation; *see also* , Robert F. Cleveland, Jr., et al., FCC Office of Eng'g & Tech., *OET Bulletin 65: Evaluating Compliance with FCC Guidelines for Human Exposure to Radiofrequency Electromagnetic Fields* (97-01 ed. 1997), *available at* http://transition.fcc.gov/Bureaus/Engineering_Technology/Documents/bulletins/oet65/oet65.pdf.

[11] *R&O*, *supra* note 3, para. 49, at 19.

[12] Petition, *supra* note 2, at 1. The Petition also argues that the FCC should not rely on 2006 IEEE determinations since phones have changed. *Id.* at 4. But this argument misses the point. What is relevant is not whether phones have changed but rather has the tissue of the pinna changed since 2006 in a way that invalidates the allowable power deposition. The Petition also implies that the state of the science may have changed since 2006. *Id.* While CTIA addresses the state of the science at length in its September 3, 2013 Comments in response to the *Notice of Inquiry* in this proceeding, (available at http://apps.fcc.gov/ecfs/document/view?id=7520941701) the National Cancer Institute states without equivocation: "Although there have been some concerns that radiofrequency energy from cell phones held closely to the head may affect the brain and other tissues, to date there is no evidence from studies of cells, animals, or humans that radiofrequency energy can cause cancer." *Cell Phones & Cancer Risk*, National Cancer Institute, http://www.cancer.gov/cancertopics/factsheet/Risk/cellphones (last visited Aug. 6, 2013).

B. Standard of Review

The Petition asserts that the appropriate legal standard for reviewing the Commission's decision to subject the pinna to the same RF exposure limit applicable to hands, wrists, feet, and ankles is the "consideration of costs" analysis set forth in *Chamber of Commerce v. Securities and Exchange Commission.*[13] Because the "consideration of costs" test is conducted under the Investment Company Act of 1940,[14] which exists to regulate funds that engage primarily in investing, reinvesting, and trading in securities, it is inapposite. In contrast, Congress has directed the FCC to adopt uniform federal RF standards that strike "an appropriate balance" between "adequate safeguards of the public health" and "speed[y] deployment * * * of competitive wireless telecommunications services.".[15] As the Court of Appeals explained in *Cellular Phone Taskforce v FCC*[16] :

> The argument that the FCC should create greater safety margins in its guidelines to account for uncertain data is a policy question, not a legal one. As a policy matter, an agency confronted with scientific uncertainty has some leeway to resolve that uncertainty by means of more regulation or less. ... The FCC concluded that requiring exposure to be kept as low as reasonably achievable in the face of scientific uncertainty would be inconsistent with its mandate to "balance between the need to protect the public and workers from exposure to potentially harmful RF electromagnetic fields and the requirement that industry be allowed to provide telecommunications services to the public in the most efficient and practical manner possible." This policy conclusion is neither irrational, arbitrary nor capricious and we decline to disturb it.

Cellular Phone Taskforce, 205 F.3d at 90-92.

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[13] *Chamber of Commerce v. SEC*, 412 F.3d 133 (D.C. Cir. 2005).

[14] 15 U.S.C. §§ 80a-1.

[15] H.R. Rep. No. 104-204, pt. 1, at 94-95 (1995). Accordingly, the Commission has a responsibility to "provide a proper balance between the need to protect the public and workers from exposure to potentially harmful RF electromagnetic fields and the requirement that industry be allowed to provide telecommunications services to the public in the most efficient and practical manner possible." Second Memorandum Opinion and Order and Notice of Proposed Rule Making, ET Docket No. 93-62, 12 FCC Rcd. 13494 (1997).

[16] *Cellular Task Force*, 205 F.3d.

C. Alleged "Costs" of the Rule

As noted above, the Investment Company Act's "consideration of costs" test is irrelevant to this proceeding. Moreover, as further explained above, the Commission's conclusion that the change in the rule will have no impact on the types of devices certified is well-founded in the science, and undercuts completely any argument that this change will impose new "costs" that the Commission must consider.

Nonetheless, the Petition argues that the Commission must take into account "the latency period between cell phone usage and the presentation of symptoms attributable to radiation as well as the disparate impact of radiation on children."[17] However, according to the experts in these fields, there is nothing in the current state of the science for the Commission to consider.

1. Latency

The Petition references the "long" latency period of brain cancer based on exposure to *ionizing* radiation.[18] However, as the FDA notes, "[t]he biological effects of radiofrequency energy should not be confused with the effects from other types of electromagnetic energy."[19] While radiofrequency (RF) energy is a form of electromagnetic radiation, electromagnetic radiation can be categorized into two types: ionizing (e.g., x-rays, radon, and cosmic rays) and non-ionizing (e.g., radiofrequency and extremely low-frequency or power frequency). As the NCI states, "[e]xposure to ionizing radiation ... is known to increase the risk of cancer. However, although many studies have examined the potential health effects of non-ionizing

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[17] Petition, *supra* note 2, at 5.

[18] *Id.* at 6 nn.11-12.

[19] *Do Cell Phones Pose a Health Hazard*, FDA (Aug. 8, 2012), http://www.fda.gov/radiation-emittingproducts/radiationemittingproductsandprocedures/homebusinessandentertainment/cellphones/ucm116282.htm.

radiation from radar, microwave ovens, and other sources, there is currently no consistent evidence that non-ionizing radiation increases cancer risk."[20]

Moreover, even without conflating the effects of ionizing and non-ionizing electromagnetic energy, it is simply wrong to state that "survivors of the atomic bombs that fell at the end of World War II did not demonstrate any increased rate of malignant cancers of the brain until four decades later."[21] As Scott Woolley, a contributing editor at Fortune.com. reported,

> Claims that survivors "experienced no increase at all in brain cancer until four decades after the war's end," ... are wrong on multiple levels. Local tumor registries only began in 1958, so of course there are no records of tumors in the first 13 years after the bombing. Once the data began to be collected, an abnormal number of brain tumors quickly became visible. ... Dale Preston, a leading expert in radiation induced cancers, says there's no sign of a "sudden spike of risk" in any of his research on cancer in bomb survivors.[22]

2. Disparate Effects of Radiation on Children

The Petition also claims that "studies indicate that radiation *may* have a disparate impact on the youngest cell phone users."[23] But here again, the Petition provides no evidence of adverse health effects to *any* users of cell phones from RF exposure, including children and teenagers.

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[20] *Cell Phones & Cancer Risk*, National Cancer Institute, http://www.cancer.gov/cancertopics/factsheet/Risk/cellphones (last visited Aug. 6, 2013); *see also*, fn. 10 supra. ("Although there have been some concerns that radiofrequency energy from cell phones held closely to the head may affect the brain and other tissues, to date there is no evidence from studies of cells, animals, or humans that radiofrequency energy can cause cancer.") Id.

[21] Petition, *supra* note 2, at 6 (citation omitted).

[22] Scott Woolley, *Good news, mobile phone users*, CNN Money (July 28, 2011), http://tech.fortune.cnn.com/2011/07/28/good-news-mobile-phone-users/; Dale L. Preston et al., *Tumors of the Nervous System and Pituitary Gland Associated With Atomic Bomb Radiation Exposure* (2002), *available at* http://jnci.oxfordjournals.org/content/94/20/1555.full#ref-20.

[23] Petition at 5 (emphasis added).

In response to the NOI, CTIA has addressed how the Commission's current emissions standards protect and are appropriate for children.[24]

As noted in CTIA's comments, the Commission's 1996 and 1997 RF Orders determined that its standards "represented the best scientific thought" on the limits necessary to protect all members of the public, including children. Research into this area has continued and has confirmed that existing standards are safe for children. The UK Health Protection Agency Advisory Group on Non-Ionizing Radiation concluded in a comprehensive 2012 review and evaluation of the science that, "although a substantial amount of research has been conducted in this area, there is no convincing evidence that RF field exposure below guideline levels causes health effects in . . . children."[25] In addition, in its Fact Sheet on the issue of wireless devices and health concerns, the Commission states that, with respect to children, "currently no scientific evidence establishes a causal link between wireless device use and cancer or other illnesses."[26] The FDA has also concluded that "[t]he scientific evidence does not show a danger to any users of cell phones from RF exposure, including children and teenagers."[27]

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[24] *See* Reassessment of Federal Communications Commission Radiofrequency Exposure Limites and Policies, Proposed Changes in the Commission's Rule Regarding Human Exposure to Radiofrequency Electromagnetic Fields, *Comments of CTIA – The Wireless Association®*, ET Docket Nos. 13-84, 03-137, at 26 (rel. Sept. 3, 2013).

[25] Advisory Group on Non-ionising Radiation, *Health Effects from Radiofrequency Electromagnetic Fields* 4 (2012). Significantly, this report applied the ICNIRP and IEEE's 2.0 W/kg SAR standard (a more permissive standard than the current U.S. standard) and still found that cell phones were safe.

[26] *See* Guide to *Wireless Devices and Health Concerns*, FCC, http://www.fcc.gov/guides/wireless-devices-and-health-concerns (last visited Aug. 6, 2013).

[27] *See FDA Children and Cell Phones*, FDA, http://www.fda.gov/radiation-emittingproducts/radiationemittingproductsandprocedures/homebusinessandentertainment/cellphones/ucm116331.htm (last visited Aug. 6, 2013).

CONCLUSION

Gertrude Stein's famous quip about her home town of Oakland, CA comes to mind in summarizing the Trial Lawyers' Petition: "there's no there there."[28] In the Commission's own words, classification of the pinna as an extremity "has no practical effect on human exposure. … The same devices that were approved before will continue to be approved, and the same devices that could not receive approval before this specification will not receive approval after this specification." Moreover, the Commission should be guided by the National Cancer Institute's finding (supported by other expert organizations) that "… to date there is no evidence from studies of cells, animals, or humans that radiofrequency energy can cause cancer." Because the Commission's inclusion of the pinnae with the ankles, wrists, feet, and hands for purposes of RF exposure compliance was properly guided by the recommendations of federal agencies and organizations with expertise in measuring RF exposure and evaluating its environmental effects, CTIA urges the Commission to reject the Petition for Reconsideration filed by the AAJ.

Respectfully submitted,

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September 11, 2013

[28] Gertrude Stein, *Everybody's Autobiography* 298 (1937).

CERTIFICATE OF SERVICE

I hereby certify, on behalf of CTIA-The Wireless Association® that on this 11th day of September, 2013, I caused a true and accurate copy of the foregoing Opposition to the Petition for Reconsideration to be served on the following persons by first class U.S. mail, postage prepaid or electronic mail:

Via first class U.S. mail:

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