

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

In the Matter of)	
)	
Amendment of the Commission’s Rules)	WT Docket No. 07-250
Governing Hearing Aid-Compatible Mobile)	
Handsets)	
)	
Petition of American National Standards)	
Institute Accredited Standards Committee C63)	
(EMC) ANSI ASC C63™)	
)	

**COMMENTS OF
CTIA – THE WIRELESS ASSOCIATION®**

CTIA – The Wireless Association® (“CTIA”)¹ hereby submits these comments in response to the Federal Communications Commission’s (“FCC” or “Commission”) June 12, 2008 *Request for Comments* in the above-referenced proceeding.² CTIA respectfully submits that any modification to Section 20.19(e) of the Commission’s rules (the *de minimis* exception)³ would not be in the public interest because the *de minimis* exception is working exactly as intended by the Commission to encourage innovation and competition while assuring consumers a wide choice of hearing aid compatible (“HAC”)

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, broadband PCS, ESMR, and AWS, as well as providers and manufacturers of wireless data services and products.

² Amendment of the Commission’s Rules Governing Hearing Aid Compatibility Telephones, Petition of American National Standards Institute Accredited Standards Committee C63 (EMC) ANSI ASC C63™, WT Docket No. 07-250, *First Report and Order*, 23 FCC Rcd. 3406, 3435 ¶73 (2008) (“*HAC First Report and Order*”); *see also*, Request for Comments, WT Docket No. 07-250, 73 Fed. Reg. 33,324 (June 12, 2008) (“*Request for Comments*”).

³ The Commission limited the scope of the public mobile services exemption to the Hearing Aid Compatibility Act of 1988 by adopting a *de minimis* exception. 47 C.F.R. § 20.19 (e).

wireless handsets. Specifically, any definition of the *de minimis* exception based on the amorphous concepts of “large business,” “handsome profits,” or “mass appeal” will risk deterring innovation and competition. In addition, any determination that the *de minimis* exception is inapplicable based on a handset’s volume and profitability of sales during the first year will not give manufacturers or mobile service providers adequate notice that HAC obligations may apply.

I. THE *DE MINIMIS* EXCEPTION IS WORKING EXACTLY AS INTENDED TO SUCCESSFULLY ENCOURAGE INNOVATION AND COMPETITION AND NO MODIFICATION IS NECESSARY.

Under the Hearing Aid Compatibility Act of 1988, the Commission may “limit” the scope of the HAC exemption for public mobile services after considering the public interest, the “adverse effect” of the exemption “on hearing-impaired individuals,” technological feasibility, and the costs of compliance to consumers.⁴ In limiting the HAC exemption, the Commission adopted a *de minimis* exception to allow any businesses, regardless of size, that offer only a small number of digital wireless handsets for sale in the United States to offer such handsets without HAC features.⁵ The Commission adopted the *de minimis* exception to promote innovation and competition from new market entrants and handsets.⁶ As manufacturers and mobile service providers expand product offerings to more than two handsets per air-interface, they may no longer

⁴ See 47 U.S.C. § 610(b)(2)(A), (C).

⁵ See In the Matter of Section 68.4(a) of the Commission’s Rules Governing Hearing Aid Compatibility Telephones, WT Docket No. 01-309, Report and Order, 18 FCC Rcd 16753, 16781 ¶ 69 (2003) (“*HAC Order*”) (adopting *de minimis* exception in recognition that HAC requirements “could have a disproportionate impact on small phone manufacturers or those that sell only a small number of digital wireless handsets”), *aff’d. on reconsideration*, 20 FCC Rcd 11221, 11225 ¶¶ 51-53 (2005) (modifying the *de minimis* exception to HAC obligations by adopting a per-air-interface interpretation) (“*HAC Order on Reconsideration*”) (emphasis added).

⁶ See *HAC Order on Reconsideration*, 20 FCC Rcd at 11225 ¶53.

claim the *de minimis* exception from complying with applicable HAC requirements and must offer a specific number of HAC handsets.

There is little support for modifying the *de minimis* exception. No party has persuasively established that the current *de minimis* exception is ineffectual. In the U.S. wireless handset market, there are at least 35 companies designing and manufacturing unique, innovative handsets from which consumers can choose.⁷ Consumers also may choose to purchase handsets from a number of sources, including large nationwide electronics stores, independent retail stores, manufacturer stores websites, online auction sites, as well as carrier retail stores and web sites.⁸ Many of these handsets offer different services, features, modes or applications that make them more accessible for certain individuals. Specifically, text-based and aural services and applications have become popular among the deaf and hard of hearing community – just as they have with the general public. In terms of smartphones and other wireless devices popular with the disability community, T-Mobile offers the HAC-compliant Sidekick LX and the Owaysys 22C, a screenless “speaking” device with features similar to those offered in other wireless handsets, such as text messaging, call history, caller ID, phonebook, and ringtones. All consumers benefit from such services and applications.

Modifying the *de minimis* exception would not serve the public interest because the *de minimis* exception has successfully struck the proper balance and provided manufacturers and mobile service providers with the regulatory certainty that has allowed them to quickly bring new handsets and features to the market and create the market

⁷ See Ex Parte Comments of CTIA – The Wireless Association in WT Docket No. 08-27 (filed March 20, 2008).

⁸ *Id.*

demand and technological solutions necessary to offer a successful HAC handset. For example, the Commission's ruling that the *de minimis* exception applied on a per air interface basis allowed Research In Motion, Ltd. ("RIM") to offer products that provided consumers – including those with disabilities – additional choices for handsets that offered innovative data services along with voice telecommunications.⁹ RIM's combined data and voice service handsets spurred competition from other handset manufacturers offering combined mobile voice and data services. Similarly, Apple has used the *de minimis* exception to introduce a spectacularly successful handset that encourages developers to create applications that use the device's innovative touch-screen interface and other features to meet the needs of the general public and persons with disabilities.¹⁰ Apple, Inc.'s iPhone also has spurred other manufacturers to offer a wide array of new touch-screen handsets themselves, including the HAC-compliant Samsung Instinct currently offered by Sprint-Nextel and the LG Voyager currently offered through Verizon Wireless.

As the Commission has noted, manufacturers with highly successful initial devices are not likely to continue to produce only two or fewer handset models, but

⁹ See *HAC Order on Reconsideration*, 20 FCC Rcd at 11225 ¶ 53 ("We agree that the *de minimis* exception could be interpreted as requiring all digital wireless carriers, service providers and handset manufacturers, regardless of size, to either enter the U.S. market with two compliant handsets or not enter the market at all. We do not intend to force RIM or any other similarly-situated digital wireless carrier, service provider or handset manufacturer to potentially either triple its product offering for the iDEN and CDMA air interfaces or withdraw its existing products from the U.S. wireless market. We find that this outcome could have the effect of retarding technological progress and limiting competition.").

¹⁰ In order to facilitate iPhone use by individuals who are deaf, hard of hearing, have a speech disability and/or hearing loss, AT&T recently announced a Text Accessibility Plan (TAP) for iPhone and iPhone 3G which provide unlimited SMS messages, unlimited data usage (email and web), \$.40 per minute pay-per-use voice and visual voicemail for individuals who qualify. See AT&T, Text Accessibility Plan (TAP) for iPhone, available at <http://www.wireless.att.com/about/disability-resources/text-accessibility-plan-for-iphone.jsp> (last visited Aug. 28, 2008).

instead can be expected to expand their product offerings in response to consumer demand for new and different features. When this occurs, the manufacturer's future handset offerings will be HAC-compliant, to the benefit of consumers both with and without hearing loss.¹¹ Therefore, the *de minimis* exception not only provides the regulatory certainty that a new market entrant or existing handset manufacturer needs to initially and quickly offer a new wireless digital handset, it also ultimately provides users with HAC compliant devices as innovative products succeed in the marketplace.

The wireless industry is keenly aware of, and continues its efforts to promote, the need to provide consumers not only with HAC handsets, but also with the information to help them choose from the many HAC handsets currently available. CTIA has worked closely with consumer and disability advocates to produce a brochure entitled "Hearing Aid Compatibility with Wireless Phones and Services" to aid in consumer education.¹² Additionally, wireless carriers, handset manufacturers and CTIA have made significant efforts to ensure that information on HAC handsets is available to the public in a timely and efficient manner online. CTIA maintains carrier and manufacturer links and other HAC information at its www.accesswireless.org website to facilitate access to information on products that meet a wide range of accessibility needs. Finally, consumers can get information and practical hands-on experience via carriers' "try before you buy" policies and existing website information.

For these reasons, CTIA believes that modifying the *de minimis* exception is not in the public interest because it has functioned successfully to spur competition and

¹¹ See *HAC First Report and Order*, 23 FCC Rcd. at 3435 ¶73.

¹² This brochure and other information is available at CTIA's www.accesswireless.org website, and CTIA also has provided this information to state and local chapters of organizations for individuals with hearing loss, as well as audiologists, to improve the access to the information for those who need it most.

innovation.¹³ Modifications to the *de minimis* exception risk harming the disability and general populations by delaying or denying the introduction of the innovative handsets the public desires and limiting the number of handset choices available to consumers, including consumers with disabilities not addressed by the HAC standard. The wireless industry has responded to HAC concerns in good faith and will continue its commitment to ensure wireless handsets are accessible to all individuals.

II. INJECTING AMORPHOUS CONCEPTS OF SIZE, PROFITABILITY AND APPEAL INTO THE *DE MINIMIS* EXCEPTION RISKS DETERRING INNOVATION AND COMPETITION FROM NEW HANDSETS OR MARKET ENTRANTS.

The Commission has asked for comment on how the terms “large business,” “handsome profits,” and “mass appeal” could be defined for application to the *de minimis* exception.¹⁴ Because these terms are so amorphous and ambiguous, and because these terms can only be applied in hindsight, well after a product has been introduced and accepted or rejected in the marketplace, they are inappropriate criteria on which to base the *de minimis* exception and will not provide the regulatory certainty required to bring new handsets to the market. For example, there are many ways to define “large business” or “handsome profits” based on overall profit of a business or profit from particular units or divisions of a business, number of employees, or total or individual assets.¹⁵ Google is a “large business” that by any measure earns “handsome profits” from its Internet search

¹³ See *HAC Order on Reconsideration*, 20 FCC Rcd at 11225 ¶53 (“We find that this outcome could have the effect of retarding technological progress and limiting competition.”)

¹⁴ *HAC First Report and Order*, 23 FCC Rcd. at 3435 ¶73; see also, *Request for Comments*, 73 Fed. Reg. at 33,325.

¹⁵ For example, Apple, Inc. as a whole may be a “large business” when compared to all consumer electronics manufacturers but Apple’s wireless handset unit may not be “large” when compared to similar units of manufacturers such as LG, Motorola, Inc., Nokia or Samsung Mobile USA. Comparatively in 2007, Motorola, Inc. had \$36 billion in sales and 66,000 employees, Apple, Inc. had \$24 billion in sales and 21,600 employees, RIM, Ltd. had \$6 billion in sales and over 8,000 employees. See, www.hoovers.com (last visited August 23, 2008).

engine, but handsets with its “Android” operating system have not yet been introduced into the marketplace and it is unclear if its innovative open platform business model will generate “handsome” or “homely” profits.¹⁶ “Mass appeal” is similarly vague depending both on the definition of “appeal” (many luxury goods appeal to a mass market, but manufacturers limit their output to create artificial scarcity and high prices that limit the availability of these goods to a select few), and the Commission’s definition of the relevant market as a narrow market (such as “smart phones with touch screens”) or the overall wireless handset market. The Commission should be reluctant to wade into these waters in an industry where technology is evolving so quickly that innovation and consumer expectations can change the relevant market during the pendency of a single proceeding.¹⁷

And even if the Commission could divine the “applicable” definitions for the terms “large business,” “handsome profit” or “mass appeal,” the uncertainty associated with such determinations would significantly impact the business decisions of potential new market entrants and risk denying the public of innovative and competitive digital wireless handsets. For example, there are many “large” consumer electronics manufacturers that operate on a global scale, but do not yet offer digital wireless handsets. When applied to the unique business models in the technology industry, onerous U.S.-specific regulatory obligations may deter these “large” manufacturers from even considering whether to introduce a wireless handset based on an established brand

¹⁶ Moreover, Google’s business model may support marketing handsets at low or no profit in order to drive high-margin Internet search engine profits, much like giving away the razor to sell more razor blades. The Commission should be very wary of creating a standard that requires it to evaluate and judge the relative profitability of adjacent markets and different business models.

¹⁷ For example, last year’s introduction of the Apple iPhone changed consumer expectations literally overnight, as did this year’s introduction of the Apple iPhone Apps Store.

into the U.S. market. Thus, any modification to the *de minimis* exception using the terms “large business,” “handsome profit,” or “mass appeal” significantly risk deterring innovative wireless handsets from ever reaching the market where they could benefit many consumers, including consumers with disabilities not addressed by the HAC standard.

III. DEFINING THE *DE MINIMIS* EXCEPTION BASED ON A HANDSET’S FIRST YEAR SALES VOLUME AND PROFITABILITY WILL NOT GIVE MANUFACTURERS OR CARRIERS ADEQUATE NOTICE THAT HAC OBLIGATIONS MAY APPLY.

The Commission has asked for comment on whether manufactures will have sufficient ability to anticipate HAC obligations to which they would be subject and plan accordingly depending on the volume and profitability of sales of a handset during the first year.¹⁸ Generally, the volume and profitability of a digital wireless handset’s initial sales is relatively unknown. It is highly unusual for such products to have the initial success of innovative handsets such as Motorola’s Razr or Apple’s iPhone and most wireless handset manufacturers do not anticipate that level of success in the initial year of a product’s sales.¹⁹ Thus, basing the *de minimis* exception on a certain level of sales and profitability, particularly when those figures will not be known until *after* the product is launched, may not provide manufacturers with adequate notice that HAC obligations will require them to retro-fit a successful handset for HAC. Additionally, HAC obligations based on anticipated levels of sales and profitability may discourage manufacturers from

¹⁸ *HAC First Report and Order*, 23 FCC Rcd. at 3435 ¶73; *see also*, *Request for Comments*, 73 Fed. Reg. at 33,325.

¹⁹ On the other hand, even if a manufacturer anticipates that a new device will be hugely successful, unanticipated competition and consumer behavior may dash these expectations when the product does not succeed in the marketplace.

bringing handsets to market quickly or in large numbers, possibly resulting in an increase in the price of appealing wireless devices, and thus harming the public interest.

While there is no question regarding the merit of HAC, absent the *de minimis* exception, it nevertheless may deter and/or delay any manufacturer initially entering or introducing a new handset to the wireless market. The *de minimis* exception has provided the necessary flexibility to introduce innovative wireless handsets into the U.S. market, while requiring manufacturers to address HAC compliance in subsequent models. The *de minimis* exception has worked well to provide consumers with a broad choice of HAC compliant wireless devices without impeding the introduction of innovative new handsets. Accordingly, the Commission should refrain from upsetting this balance by basing the *de minimis* exception on a wireless handset's ultimate success and profitability that is only ascertainable in hindsight – well after a device has been introduced and offered to consumers. Courts have long held that retroactive ratemaking is inimical to the requirements of the Communications Act;²⁰ the Commission should similarly reject the retroactive application of the HAC requirement based on a wireless handset's ultimate success or failure in the marketplace.

²⁰ See, e.g., *TRT Telecommunications Corp. v. FCC*, 857 F.2d 1535, 1547 (D.C. Cir. 1988); *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 578 n.8 (1981); *Arizona Grocery Co. v. Atchinson, Topeka & Santa Fe Ry. Co.*, 284 U.S. 370, 390 (1932).

IV. CONCLUSION

For the reasons stated above, CTIA respectfully requests that the Commission refrain from any modification to the *de minimis* exception.

Respectfully submitted,

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