Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of	)	
	)	
Amendment of the Commission's Rules Governing Hearing Aid-Compatible Handsets	)	WT Docket No. 07-250
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	)	

To: The Commission

COMMENTS OF THE TELECOMMUNICATIONS INDUSTRY ASSOCIATION

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Danielle Coffey
Vice President, Government Affairs

Rebecca Schwartz
Director, Regulatory and Government Affairs

10 G Street, N.E.
Suite 550
Washington, DC 20001
(202) 346-3240

Its Attorneys

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The Telecommunications Industry Association ("TIA")[1] hereby submits comments on the Commission's *Further Notice of Proposed Rulemaking* in the above-captioned proceeding.[2] As the Commission requested, TIA has specifically addressed the implications of Section 102 of the Twenty-First Century Communications and Video Accessibility Act of 2010 (the "Accessibility Act"), which President Obama signed into law on October 8, 2010.[3] TIA supported the passage of Section 102 of the Accessibility Act, and commends the Commission for incorporating this important legislation into the early stages of this proceeding.

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[1] TIA is the leading trade association for the information and communications technology ("ICT") industry, representing companies that manufacture or supply the products and services used in global communications across all technology platforms. TIA represents its members on the full range of public policy issues affecting the ICT industry and forges consensus on industry standards. Among their numerous lines of business, TIA member companies design, produce, and deploy a wide variety of devices with the goal of making technology accessible to all Americans.

[2] *In the Matter of Amendment of the Commission's Rules Governing Hearing Aid-Compatible Mobile Handsets*, Policy Statement and Second Report and Order and Further Notice of Proposed Rulemaking, WT Docket No. 07-250, FCC 10-145 (rel. Aug. 5, 2010) ("*Policy Statement*," "*Report and Order*," or "*Further Notice,*" as applicable), *recon. pending*.

[3] *See* Twenty-First Century Communications and Video Accessibility Act of 2010, § 102, S.3304 and S.3878, Public Law Nos. 111-260 and 111-265 (2010); Public Notice, *Wireless Telecommunications Bureau Requests that Comments in Hearing Aid Compatibility Proceeding Address Effects of New Legislation*, WT Docket No. 07-250, DA 10-1936 (WTB rel. Oct. 12, 2010).

DISCUSSION

I. TIA SUPPORTS THE PRINCIPLES SET FORTH IN THE POLICY STATEMENT, ALL OF WHICH CAN BE IMPLEMENTED CONSISTENTLY WITH THE 21ST CENTURY COMMUNICATIONS AND VIDEO ACCESSIBILITY ACT

The Commission's Policy Statement sets forth the following principles to "ensure that all Americans, including Americans with hearing loss, will reap the full benefits of new technologies as they are introduced into the marketplace" and "maximize the number of accessible products for this population …:"

- "First, given that consideration of accessibility from the outset is more efficient than identifying and applying solutions retroactively, we intend for developers of new technologies to consider and plan for hearing aid compatibility at the earliest stages of the product design process;
- "Second, we will continue to account for technological feasibility and marketability as we promulgate rules pertaining to hearing aid compatibility, thereby maximizing conditions for innovation and investment; and
- "Third, we will provide industry with the ability to harness innovation to promote inclusion by allowing the necessary flexibility for developing a range of solutions to meet consumers' needs while keeping up with the rapid pace of technological advancement."[4]

These principles can – and must – be implemented consistently with Section 710 of the Communications Act, as recently amended by the Accessibility Act. The original provisions of the 1988 Hearing Aid Compatibility Act reflected a careful balancing of important policy considerations: improving the accessibility of telephones for hearing aid users, while also preserving innovation in new technologies by requiring that the Commission consider technical feasibility and product marketability principal factors when expanding the scope of its HAC rules. The Accessibility Act includes some significant expansions and clarifications of the Commission's authority under the 1988 statute, which TIA supported, but Congress nonetheless

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[4] *Policy Statement* at ¶ 18.

fundamentally *reaffirmed* the basic policy balance underlying the 1988 statute. Moreover, Congress both ratified the measured regulatory approach the Commission has taken with respect to wireless devices and services since 2003, and now applied it to advanced communications services and devices. This approach can and must continue with respect to wireless equipment as well as advanced communications services devices newly subject to section 710.

II. THE COMMISSION SHOULD EXPAND THE SCOPE OF ITS HEARING AID COMPATIBILITY RULES TO ADVANCED COMMUNICATIONS TECHNOLOGIES, GUIDED BY THE POLICY STATEMENT AND CONSISTENT WITH SECTION 710 OF THE ACT

The Commission seeks comment on a number of questions concerning the scope of its authority to impose HAC obligations on VoIP-capable handsets under section 710, as that section read prior to enactment of the Accessibility Act.[5] Congress has largely rendered many of these considerations moot through the Accessibility Act. Section 710(b)(1)(C) of the Act, as added by the Accessibility Act, now applies HAC obligations to "[a]ll customer premises equipment used with advanced communications services[6] that is designed to provide 2-way voice communication via a built-in speaker intended to be held to the ear in a manner functionally

[5] The Commission seeks comment on, among other things, potentially vexing issues such as: the scope of the term "telephone" or "telephone service" in section 710; whether "to include wireless handsets that are used for voice communications among members of the public or a substantial portion of the public, regardless of whether the services provisioned through the handset may fall beyond the currently covered category of CMRS;" and how the HAC rules should apply to handsets only partially used for such services. *Further Notice* at ¶¶ 79-83.

[6] The term "advanced communications services" is defined to include interconnected VoIP services as defined at section 9.3 of the Commission's rules, 47 C.F.R. § 9.3, as well as non-interconnected VoIP service, which are defined as a service that "(i) enables real-time voice communications that originate from or terminate to the user's location using Internet protocol or any successor protocol; and (ii) requires Internet protocol compatible customer premises equipment." 47 U.S.C. § 153(25), (36). This definition applies to wireline and wireless services alike, but as the Commission notes in the *Further Notice*, this proceeding "is limited to wireless handsets consistent with the scope of ANSI Standard C63.19" and "cordless telephones, including those commonly used in wireless PBXs, that are covered under Electronics Industries Association Recommended Standard RS-504 would remain subject to Section 68.4 of the Commission's rules and would not be affected by this proposal." *Further Notice* at ¶ 82 n.173. TIA supports the Commission's determination to leave the Part 68 rules unaffected by rules that may be adopted in this proceeding, which is unaffected by the Accessibility Act.

equivalent to a telephone, subject to" important policy considerations under new section 710(e) of the Act. These considerations include the "use [of] appropriate timetables or benchmarks to the extent necessary (1) due to technical feasibility, or (2) to ensure the marketability or availability of new technologies to users."[7] The Accessibility Act also modified the definition of "telephones used with public mobile services" to include "telephones and other customer premises equipment *used in whole or in part with* … common carrier radio communication services covered by [47 C.F.R.], or any functionally equivalent unlicensed wireless services."[8] Thus, multimode devices that incorporate traditional CMRS technology (e.g. CDMA, GSM, UMTS) remain subject to the statutory exemption at section 710(b)(2)(A)(i) of the Act. These new statutory criteria must govern the Commission's approach here.

The Accessibility Act, which TIA supports, is generally consistent with the approach proposed in paragraph 77 of the *Further Notice*, as well as the principles outlined in the Policy Statement. Specifically, the Accessibility Act fulfills the dual objectives of improving the accessibility of telephones to people who use hearing aids while maximizing the conditions for innovation and investment. In this regard, TIA supports the Commission's proposal *not* to extend its rules to certain non-interconnected systems used solely for internal communications, such as public safety or dispatch networks.[9] In the Accessibility Act, Congress expressly affirmed that "telephones used with private radio services" remain subject to the statutory exemption of section 710(b)(2)(A)(ii) as "telephones and other customer premises equipment used in whole or in part with private land mobile radio services and other communications

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[7] *See* 47 U.S.C. § 610(b)(2)(C).

[8] *See id.* § 610(b)(4)(B) (emphasis added).

[9] *See Further Notice* at ¶ 82.

services characterized by the Commission in its rules as private radio services."[10] The Commission's stated rationale for exempting these services is thus both consistent with and compelled by section 710 of the Act.[11]

The Accessibility Act also provided a clear answer to the Commission's request for "comment on how our [HAC] rules should address circumstances where voice capability may be enabled on a handset by a party other than the manufacturer, particularly where adding the new voice capability may affect operating parameters of the handset such as the frequency range, modulation type, maximum output power, or other parameters specified in the Commission's rules."[12] Section 2(a) of the Accessibility Act governs the degree to which manufacturers and service providers may be liable in these circumstances, providing that:

> [N]o person shall be liable for a violation of the requirements of [the Accessibility Act] (or the provisions of the Communications Act of 1934 that are amended or added [thereby]) with respect to … applications, services, advanced communications services, or equipment used to provide or access advanced communications services to the extent such person—(1) transmits, routes, or stores in intermediate or transient storage the communications made available through the provision of advanced communications services by a third party; or (2) provides an information location tool, such as a directory, index, reference, pointer, menu, guide, user interface, or hypertext link, through which an end user obtains access to such … applications, services, advanced communications services, or equipment used to provide or access advanced communications services.[13]

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[10] 47 U.S.C. § 610(b)(2)(A)(ii). The Commission's assertion "that the statutory definitions of 'public mobile services' and 'private radio services' refer to regulatory distinctions that are no longer reflected in the Act and our rules" has thus been addressed by the Accessibility Act.

[11] *See Further Notice* at ¶ 82.

[12] *Further Notice* at ¶ 89.

[13] Accessibility Act § 2(a). Section 2(b) provides, however, that the liability limitation does not apply insofar as such person "relies on third party applications, services, software, hardware, or equipment" for such compliance. *Id.* § 2(b).

The House Report explains that this provision "provides liability protection where an entity is acting as a passive conduit of communications made available through the provision of advanced communications services by a third party or where an entity is providing an information location tool through which an end user obtains access to services and information."[14]

The Accessibility Act thus prohibits the Commission from holding manufacturers or service providers liable for violations of section 710 of the Act resulting from the acts and omissions of third parties, including consumers who download third party VoIP products onto their handsets, and the application, software and service providers who facilitate such actions. Consistent with this basic principle, in circumstances where a party other than the manufacturer or service provider can enable VoIP capability on a handset, the manufacturer should be subject to compliance with hearing aid compatibility regulatory and testing requirements only to the extent that it affirmatively incorporates such capability on the device at the time of HAC certification. Under the Accessibility Act, the provision of an open platform that provides a user with access to multiple third party VoIP applications, software or services is not a sufficient basis for imposing liability on manufacturers. To the extent that consumers have the ability to incorporate third party VoIP products onto their handsets that affect the HAC functionality of their devices, consumer education – not new technical and testing requirements – is the appropriate mechanism for addressing such concerns.

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[14] H. Rep. No. 111-563, at 22 (2010).

III. ANY TRANSITION PERIOD FOR NEW TECHNOLOGIES SHOULD INCLUDE A LIMITED *DE MINIMIS* EXEMPTION FOR THE DISCONTINUANCE OF LEGACY HANDSETS IRRESPECTIVE OF COMPANY SIZE

The Commission "seek[s] comment on the appropriate transition period for applying [HAC] benchmarks and other requirements to lines of handsets that are outside the subset of CMRS that is currently covered by Section 20.19(a)."[15] As noted above, section 710(e) of the Act, as amended by the Accessibility Act, requires the Commission to "use appropriate timetables or benchmarks to the extent necessary (1) due to technical feasibility, or (2) to ensure the marketability or availability of new technologies to users."[16] For multimode handsets, section 710(b)(2) of the Act requires the Commission to account for these and other factors before further limiting the scope of the statutory exemption for "telephones used with public mobile services."[17] Any transition periods the Commission adopts must be consistent with these statutory mandates.

The Commission also invites "comment on … any other transition issues, either for all newly covered handsets or some subset of those handsets."[18] In order to facilitate the transition, TIA supports applying a limited form of the original *de minimis* rule, beyond the applicable two-year period, for legacy handsets as they are phased out of a company's portfolio. Such an approach will help enable manufacturers and service providers focus their product development and HAC compliance efforts on new innovative devices that consumers demand.

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[15] *Further Notice* at ¶ 93.

[16] *See* 47 U.S.C. § 610(b)(2)(C).

[17] *See id.* § 710(b)(2).

[18] *Further Notice* at ¶ 93.

The previous *de minimis* rule not only facilitated the entry of new technologies into the marketplace, but enabled manufacturers to phase out less desirable legacy technologies in a more economically rational manner. As Research In Motion ("RIM") recently explained, if a larger manufacturer or service provider is phasing out a particular air interface but still offers two or three handsets for that air interface (one of which is HAC-certified) then it is compelled (regardless of carrier or consumer demand) to either discontinue *all* of its models concurrently with the HAC model, or maintain the HAC model solely for the purposes of enabling it to continue offering the non-HAC model(s).[19] This is the case even if the manufacturer offers multiple HAC-compliant models on a new, more advanced platform. In the *Second Report and Order*, the Commission acknowledged that this situation could occur, but stated that "[i]n the event a situation arises where retaining a hearing aid-compatible offering over an air interface that is being discontinued would cause hardship to a manufacturer or service provider, and discontinuing the handset would not unduly disadvantage people with hearing loss, we would entertain a request for waiver."[20]

The use of a case-by-case waiver process that is already available under the Commission's rules, however, does not afford companies with the certainty or lead time necessary to both efficiently manage their handset offerings while remaining in compliance with their HAC obligations. Waivers are necessarily time-consuming, and inject uncertainty into product portfolio management, to the potential detriment of new product launches. The necessity of filing a waiver request in these circumstances, moreover, could effectively require the public disclosure of a carrier's or manufacturer's proprietary business plans with respect to a

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[19] *See* RIM *Ex Parte* Letter in WT Docket No. 07-250, filed July 23, 2010, Attachment at 2.

[20] *See Second Report and Order* at ¶ 58.

particular air interface or product line. The Commission should adopt an alternative approach that more effectively addresses these circumstances on a generally applicable basis.[21]

IV. THE COMMISSION SHOULD EXTEND THE "POWER DOWN" OPTION TO ALL GSM 1900 MHZ DEVICES TO PROMOTE TECHNOLOGY AND COMPETITIVE NEUTRALITY

The Commission seeks comment on whether to apply the GSM 1900 MHz "power down" option more broadly, asking (among other things) "whether to treat such handsets as hearing aid-compatible for all purposes."[22] TIA still supports examination of the technical and operational implications of the power down option, as the Commission has proposed.[23] To achieve the Commission's policies of competitive and technical neutrality and to allow for the flexibility set forth in the Policy Statement[24], however, any power down option must be available to *all* GSM 1900 MHz devices for *all* manufacturers and service providers, regardless of size, as purported in a Petition for Partial Reconsideration recently filed jointly by a group of handset manufacturers.[25]

The Commission's rationales for allowing the 2.5 dB power down option in the first place – the acknowledged technical challenges facing GSM at 1900 MHz, the "limited impact on the ability of people with hearing loss to use the affected phones" and the forthcoming changes

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[21] For example, RIM has "recommend[ed] that the Commission exempt a manufacturer's and carrier's handsets from the HAC rule in the following circumstances: If a manufacturer or service provider offers four or more handsets per air interface during a given calendar year (Year 1), in the next calendar year offers three or fewer handsets (Year 2), and in subsequent calendar years offers one or two of those remaining handsets (Years 3-onward), then during Years 3-onward the HAC rules would not apply to those handsets." RIM *Ex Parte*, Attachment at 2.

[22] *See Further Notice* at ¶ 99.

[23] *See Further Notice* at ¶ 100; *see* TIA *Ex Parte* Letter in WT Docket No. 07-250, at 2.

[24] *See* Policy Statement at 18.

[25] *See* LG Electronics MobileComm U.S.A., Inc., Motorola, Inc., Nokia Inc., Research in Motion Corp., Samsung Information Systems America, Inc., and Sony Ericsson Mobile Communications (USA) Inc., Petition for Partial Reconsideration, WT Docket No. 07-250, at 2 (filed October 8, 2010).

to the ANSI C63.19 standard – militate in favor of making the option available for *all* manufacturers and service providers as a means of achieving HAC compliance.[26] Moreover, the Commission's determination that a company may "continue to count [such a device] as a hearing aid-compatible handset *even if it increases its number of handset models operating over the GSM air interface beyond two*" further underscores that allowing all manufacturers and service providers to avail themselves of the power down option is consistent with the public interest. As with the existing power down rule, disclosure to consumers is the appropriate means of addressing the other potential implications of use of the power down option.[27]

CONCLUSION

For the foregoing reasons, the principles enunciated in the *Policy Statement* can and must be implemented consistent with Section 102 of the Accessibility Act. TIA supports expanding the scope of the HAC rules to certain devices and services consistent with the new statute, applying a limited *de minimis* exemption as part of any transition period, and extending the "power down" option to all GSM devices in the 1900 MHz band.

Respectfully submitted,

TELECOMMUNICATIONS INDUSTRY ASSOCIATION

By: ____________________

Danielle Coffey
Vice President, Government Affairs

Rebecca Schwartz
Director, Regulatory and Government Affairs

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[26] *See Report and Order* at ¶¶ 52-53.

[27] *See Report and Order* at ¶ 56.

Its Attorneys

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