

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	File No. EB-08-SE-116
)	NAL/Acct. No. 200832100050
SunCom Wireless, Inc.)	FRN # 0003246642
)	

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: June 4, 2008

Released: June 4, 2008

By the Chief, Enforcement Bureau:

I. INTRODUCTION

1. In this Notice of Apparent Liability for Forfeiture (“NAL”), we propose a forfeiture of sixty thousand dollars (\$60,000) against SunCom Wireless, Inc. (“SunCom”),¹ a Global System for Mobile Communications-based (“GSM-based”) Tier II carrier,² serving most of North and South Carolina, parts of the bordering states of Virginia, Tennessee and Georgia (“mainland”), and Puerto Rico and the U.S. Virgin Islands. As detailed herein, we find that SunCom apparently willfully and repeatedly violated Section 20.19(d)(2) of the Commission’s Rules (“Rules”),³ by failing to include in its digital wireless handset offerings at least two models that meet the inductive coupling standards for hearing aid compatibility by the September 18, 2006 deadline.

II. BACKGROUND

2. In the 2003 *Hearing Aid Compatibility Order*, the Commission adopted several measures to enhance the ability of individuals with hearing disabilities to access digital wireless telecommunications.⁴ The Commission established technical standards that digital wireless handsets must meet to be considered compatible with hearing aids operating in acoustic coupling and inductive coupling

¹ The Commission recently approved the transfer of control of the wireless licenses and international Section 214 authorizations held by SunCom Wireless Holdings, Inc. and its subsidiaries (including SunCom Wireless, Inc.) to T-Mobile USA, Inc. See *Applications of T-Mobile USA, Inc. and SunCom Wireless Holdings, Inc. for Consent to Transfer Control of Licenses and Authorizations and Petition for Declaratory Ruling that the Transaction is Consistent with Section 310(b)(4) of the Communications Act*, Memorandum Opinion and Order, 23 FCC Rcd 2515 (2008) (“*T-Mobile/SunCom Transfer Order*”).

² Tier II carriers are non-Nationwide wireless radio service providers with more than 500,000 subscribers as of the end of September 2001. See *Revision of the Commission’s Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems, Phase II Compliance Deadlines for Non-Nationwide CMRS Carriers*, Order to Stay, 17 FCC Rcd 14841, 14847 ¶¶ 22-23 (2002) (“*Non-Nationwide Carrier Order*”).

³ 47 C.F.R. § 20.19(d)(2).

⁴ *Section 68.4(a) of the Commission’s Rules Governing Hearing Aid-Compatible Telephones*, Report and Order, 18 FCC Rcd 16753 (2003); Erratum, 18 FCC Rcd 18047 (2003) (“*Hearing Aid Compatibility Order*”); Order on Reconsideration and Further Notice of Proposed Rulemaking, 20 FCC Rcd 11221 (2005) (“*Hearing Aid Compatibility Reconsideration Order*”). The Commission adopted these requirements for digital wireless telephones under the authority of the Hearing Aid Compatibility Act of 1988, codified at Section 710(b)(2)(C) of the Communications Act of 1934, as amended, 47 U.S.C. § 610(b)(2)(C).

(telecoil) modes.⁵ Specifically, the Commission adopted a standard for radio frequency interference (the “U3” or “M3” rating) to enable acoustic coupling between digital wireless phones and hearing aids operating in acoustic coupling mode, and a separate standard (the “U3T” or “T3” rating) to enable inductive coupling with hearing aids operating in telecoil mode.⁶ The Commission further established, for each standard, deadlines by which manufacturers and service providers were required to offer specified numbers or percentages of digital wireless handsets per air interface⁷ that are compliant with the relevant standard if they did not come under the *de minimis* exception.⁸

3. The Commission required that manufacturers and service providers begin making commercially available at least two handset models per air interface that meet the U3 or M3 rating for

⁵ See *Hearing Aid Compatibility Order*, 18 FCC Rcd at 16777 ¶ 56; 47 C.F.R. § 20.19(b)(1), (2). The *Hearing Aid Compatibility Order* described the acoustic coupling and the inductive (telecoil) coupling modes as follows:

In acoustic coupling mode, the microphone picks up surrounding sounds, desired and undesired, and converts them into electrical signals. The electrical signals are amplified as needed and then converted back into electrical signals. In telecoil mode, with the microphone turned off, the telecoil picks up the audio signal-based magnetic field generated by the voice coil of a dynamic speaker in hearing aid-compatible telephones, audio loop systems, or powered neck loops. The hearing aid converts the magnetic field into electrical signals, amplifies them as needed, and converts them back into sound via the speaker. Using a telecoil avoids the feedback that often results from putting a hearing aid up against a telephone earpiece, can help prevent exposure to over amplification, and eliminates background noise, providing improved access to the telephone.

Id. at 16763 ¶ 22.

⁶ Section 20.19(b)(1) provides that a wireless handset is deemed hearing aid-compatible for radio frequency interference if, at minimum, it receives a U3 rating as set forth in “American National Standard for Methods of Measurement of Compatibility between Wireless Communications Devices and Hearing Aids, ANSI C63.19-2001.” 47 C.F.R. § 20.19(b)(1). Section 20.19(b)(2) provides that a wireless handset is deemed hearing aid-compatible for inductive coupling if, at minimum, it receives a U3T rating as set forth in ANSI C63.19-2001. 47 C.F.R. § 20.19(b)(2). On April 25, 2005, the Commission’s Office of Engineering and Technology announced that it would also certify handsets as hearing aid-compatible based on the revised version of the standard, ANSI C63.19-2005. See *OET Clarifies Use of Revised Wireless Phone Hearing Aid Compatibility Standard Measurement Procedures and Rating Nomenclature*, Public Notice, 20 FCC Rcd 8188 (OET 2005). On June 6, 2006, the Commission’s Wireless Telecommunications Bureau and Office of Engineering and Technology announced that the Commission would also certify handsets as hearing aid-compatible based on the revised version of the standard, ANSI C63.19-2006. Thus, during the time period relevant here, applicants for certification could rely on either the 2001 version, the 2005 version, or the 2006 version of the ANSI C63.19 standard. See *Wireless Telecommunications Bureau and Office of Engineering and Technology Clarify Use of Revised Wireless Phone Hearing Aid Compatibility Standard*, Public Notice, 21 FCC Rcd 6384 (WTB/OET 2006). In addition, since the 2005 version, the ANSI C63.19 technical standard has used an “M” nomenclature for the radio frequency interference rating rather than a “U,” and a “T” nomenclature for the handset’s inductive coupling rating, rather than a “UT.” The Commission has approved the use of the “M” and “T” nomenclature and considers the M/T and U/UT nomenclatures as synonymous. See *Hearing Aid Compatibility Reconsideration Order*, 20 FCC Rcd at 11238 ¶ 33.

⁷ The term “air interface” refers to the technical protocol that ensures compatibility between mobile radio service equipment, such as handsets, and the service provider’s base stations. Currently, the leading air interfaces include Code Division Multiple Access (CDMA), Global System for Mobile Communications (GSM), Integrated Digital Enhanced Network (iDEN), Time Division Multiple Access (TDMA) and Wideband Code Division Multiple Access (WCDMA) a/k/a Universal Mobile Telecommunications System (UMTS).

⁸ See *Hearing Aid Compatibility Order*, 18 FCC Rcd at 16780; 47 C.F.R. §§ 20.19(c), (d). The *de minimis* exception provides that manufacturers or mobile service providers that offer two or fewer digital wireless handset models per air interface are exempt from the hearing aid compatibility requirements and manufacturers or service providers that offer three digital wireless handset models per air interface must offer at least one compliant model. 47 C.F.R. § 20.19(e).

radio frequency interference by September 16, 2005.⁹ The Commission also required that manufacturers and service providers make commercially available at least two handset models per air interface that meet the U3T or T3 rating for inductive coupling by September 18, 2006.¹⁰ In connection with the offer of hearing aid-compatible handset models, the Commission further required entities to label the handsets with the appropriate technical rating, and to explain the technical rating system in the owner's manual or as part of the packaging material for the handset.¹¹ In order to monitor the availability of these handsets, the Commission required manufacturers and digital wireless service providers to report every six months on efforts toward compliance with the hearing aid compatibility requirements for the first three years of implementation, and then annually thereafter through the fifth year of implementation.¹²

4. On September 15, 2006, SunCom filed a petition for waiver of Section 20.19(d)(2) of the Rules, seeking an extension of the inductive coupling-compliant handset deadline until January 18, 2007.¹³ SunCom based its waiver request on its inability, as a smaller regional carrier that lacks the bargaining leverage of Tier I carriers, to receive from suppliers timely shipments of inductive coupling-compliant handsets. On January 12, 2007, SunCom filed an amended waiver petition, seeking a further extension until April 1, 2007.¹⁴ SunCom based its amended request on Nokia's postponed shipping date for its T3-rated 6126h model, which Nokia projected would not be available to SunCom until the end of the first quarter 2007.¹⁵ In addition, SunCom indicated that it introduced a version of the Sony Ericsson ("S/E") W710 model in December 2006, which it had been told was not T3-compliant, but had recently learned that this S/E W710 model has qualified for a T-3 rating.¹⁶ Thus, SunCom stated that it did have one T3-rated handset available to consumers.¹⁷ SunCom asserted that it was working with S/E to obtain

⁹ See *Hearing Aid Compatibility Order*, 18 FCC Rcd at 16780 ¶ 65; see also 47 C.F.R. § 20.19(c).

¹⁰ See *Hearing Aid Compatibility Order*, 18 FCC Rcd at 16780; see also 47 C.F.R. § 20.19(d). In addition, on February 28, 2008, the Commission released an order that, as modified on reconsideration, among other things: (a) modifies the requirement that manufacturers and service providers ensure that 50 percent of their digital wireless handset models per air interface meet the U3/M3 (radio frequency) standard and stays enforcement of that requirement until the new rules become effective, (b) increases the obligation on manufacturers and service providers to offer handset models that meet the U3T/T3 (inductive coupling) standard, (c) allows service providers other than Tier I carriers an additional three months to meet the new handset deployment benchmarks, (d) adopts a technology "refresh" requirement for manufacturers, (e) requires service providers to offer hearing aid-compatible handsets with different levels of functionality, (f) adopts an updated version of the technical standard for measuring hearing aid compatibility, and (g) requires manufacturers and service providers to submit annual reports on an open ended basis, beginning January 15, 2009. See *Amendment of the Commission's Rules Governing Hearing Aid-Compatible Mobile Handsets*, First Report and Order, 23 FCC Rcd 3406, 3408-3411, 3418 (2008) ("*Hearing Aid Compatibility First Report and Order*"), Order on Reconsideration and Erratum, 23 FCC Rcd 7249 (2008). The effective date of the new rules is June 6, 2008. See 73 Fed. Reg. 25,566 (May 7, 2008).

¹¹ See *Hearing Aid Compatibility Order*, 18 FCC Rcd at 16785; see also 47 C.F.R. § 20.19(f).

¹² *Hearing Aid Compatibility Order*, 18 FCC Rcd at 16787; see also *Wireless Telecommunications Bureau Announces Hearing Aid Compatibility Reporting Dates for Wireless Carriers and Handset Manufacturers*, Public Notice, 19 FCC Rcd 4097 (Wireless Tel. Bur. 2004). The Commission will now require service providers to submit annual status reports beginning January 15, 2009. See *Hearing Aid Compatibility First Report and Order*, 23 FCC Rcd at 3410 ¶ 13. Manufacturers will report on January 15, 2009, and then annually beginning July 15, 2009. *Id.* at ¶¶ 13, 101.

¹³ See Waiver Petition (September 15, 2006).

¹⁴ See Amendment to Waiver Petition (January 12, 2007).

¹⁵ *Id.* at 2.

¹⁶ *Id.*

¹⁷ *Id.*

appropriate package labeling for the W710 units already in inventory.¹⁸ SunCom also stated that it was planning to acquire a third inductive coupling-compliant handset, the Motorola V3i.¹⁹

5. On March 30, 2007, SunCom filed an amended waiver petition, seeking a further extension until May 15, 2007.²⁰ SunCom explained that, in response to its further request to S/E for appropriate labeling of the W710 model, it was told that the W710 units S/E sent to SunCom in December of 2006 were not inductive coupling-compliant, and that compliant W710 models would not be shipped until the end of April 2007.²¹ SunCom made its further labeling request to S/E the last week of March 2007, approximately three months after it had received the S/E W710 handsets, and more than two months after it first represented to the Commission that it was working with S/E to obtain appropriate labeling.²²

6. In its March 2007 Waiver Amendment, SunCom also stated that it was offering the inductive coupling-compliant Nokia 6126h model in its mainland stores, and that it was offering the inductive coupling-compliant Motorola V3i model in its Puerto Rico stores.²³ SunCom further stated that it planned to offer the Nokia 6085 model (replacement for the Nokia 6126h model then offered only in its mainland stores) in all of its stores by April 2007. SunCom thus stated that it expected to achieve full compliance with the inductive coupling handset requirements by the end of April 2007.²⁴

7. On June 1, 2007, SunCom, responding to a Commission staff inquiry, stated that as of May 10, 2007, it had offered the inductive coupling-compliant S/E W710 and the Nokia 6085 handsets in its mainland stores, and the Motorola V3i handsets on its website.²⁵ SunCom further stated that it began offering the Motorola V3i handsets in its Puerto Rico stores on September 20, 2006, but that it had not yet offered a second compliant handset there. SunCom explained that it had placed an order for Nokia's 6085 model for distribution in Puerto Rico, but that on April 26, 2007 (several months after it placed the order), Nokia told it that shipment of that model had to be delayed due to the fact that SunCom requires different software for handsets sold in the Puerto Rico market.²⁶ SunCom stated that it immediately provided the software to Nokia, and that it received a shipment date of June 6, 2007. In the interim, SunCom stated that it had arranged to ship some of its mainland Nokia 6085 handsets to Puerto Rico for distribution by

¹⁸ *Id.*

¹⁹ *Id.* at 2 (referencing the model as the Motorola V3, but subsequently clarifying in its March 30, 2007 Waiver Amendment that the model was the Motorola V3i).

²⁰ See Amendment to Waiver Petition (March 30, 2007) ("March 2007 Waiver Amendment").

²¹ *Id.* at 2 (stating that S/E informed SunCom that only the W710 units shipped after March 22, 2007 were inductive coupling-compliant). See also Letter from Lee Hill, General Counsel, Sony Ericsson Mobile Communications (USA) Inc. to Marlene Dortch, Secretary, Federal Communications Commission (July 11, 2007).

²² See March 2007 Waiver Amendment at 2.

²³ *Id.* at 2-3 (only referencing the Puerto Rico, not the U.S. Virgin Islands, stores).

²⁴ *Id.* at 2, note 4.

²⁵ Notification of Substantial Compliance with Section 20.19(d)(2) and Request for Limited Waiver (June 1, 2007). Because Section 20.19(d)(2) requires that compatible handsets be available "in each retail store owned or operated by the provider ... for consumers to test," internet offerings do not count toward the hearing aid-compatible handset requirement.

²⁶ *Id.* at 2 (explaining that due to different branding, the graphics of SunCom's banner in the handsets distributed in the mainland differ from those distributed in Puerto Rico).

June 6, 2007.²⁷ SunCom therefore requested a limited waiver until June 6, 2007, with regard to its 25 stores in Puerto Rico.²⁸

8. On June 11, 2007, SunCom reported that the mainland Nokia 6085 handsets had been shipped to, and were being offered in, its Puerto Rico stores as of June 5, 2007.²⁹ SunCom reported, however, that it had learned that the version of the Motorola V3i that it had been offering was not inductive coupling-compliant.³⁰ SunCom stated after this discovery, it immediately shipped S/E W710 handsets from its mainland inventory and requested a waiver for the time it mistakenly believed that the Motorola V3i model was inductive coupling-compliant.³¹ According to SunCom, it began offering the S/E W710 compliant handsets (its second compliant model) in its Puerto Rico stores on June 8, 2007.

9. On February 27, 2008, the Commission released the *February 2008 Inductive Coupling Compatibility Waiver Order*,³² addressing individually each of 46 waiver petitions filed on behalf of a total of 90 Tier III carriers, five Tier II carriers, including SunCom, one Mobile Virtual Network Operator, and one handset manufacturer for relief from the hearing aid compatibility requirements for wireless digital telephones. The Commission found that SunCom did not demonstrate “unique or unusual circumstances, or the existence of any factor” that would warrant a waiver.³³ The Commission noted SunCom’s documented efforts to achieve, and its setbacks in achieving, compliance with Section 20.19(d)(2).³⁴ The Commission found, however, that neither SunCom’s efforts nor its setbacks justified its prolonged delays.³⁵ In so finding, the Commission noted that SunCom was not proactive regarding the Motorola V3i (it should have inquired whether it was inductive coupling-compliant, in the absence of labeling) and the S/E model W710 (it should have followed up sooner when its initial request for labeling was not satisfactorily answered).³⁶ Finally, the Commission noted that SunCom did not demonstrate the same level of diligence in the Puerto Rico market as it had in the mainland.³⁷

III. DISCUSSION

A. Failure to Offer For Sale Two Hearing Aid-Compatible Handset Models

10. Section 20.19(d)(2) of the Rules requires digital wireless service providers to begin offering for sale at least two handset models for each air interface that meet at least a T3 rating for

²⁷ *Id.*

²⁸ *Id.* at 3.

²⁹ Notification of Compliance with Section 20.19(d)(2) and Request for Limited Waiver *Nunc Pro Tunc* (June 11, 2007).

³⁰ *Id.* at 1-2. SunCom explained that, in response to a Commission staff inquiry, it contacted Motorola and learned that Motorola has issued the V3i model under two different FCC ID numbers, only one of which is T3-rated. SunCom stated that the version of the V3i model that it offered was not T3-rated. *Id.*

³¹ *Id.* at 2.

³² *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, 23 FCC Rcd 3352 (2008) (“*February 2008 Inductive Coupling Compatibility Waiver Order*”).

³³ *Id.* at 3380 ¶ 67.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

inductive coupling by September 18, 2006. SunCom admits that it did not offer for sale the required two models of inductive coupling-compliant handsets in all of its markets until June 8, 2007. Accordingly, we conclude that SunCom apparently willfully³⁸ and repeatedly³⁹ failed to comply with Section 20.19(d)(2) of the Rules.

B. Proposed Forfeiture

11. Under Section 503(b)(1)(B) of the Act, any person who is determined by the Commission to have willfully or repeatedly failed to comply with any provision of the Act or any rule, regulation, or order issued by the Commission shall be liable to the United States for a forfeiture penalty.⁴⁰ To impose such a forfeiture penalty, the Commission must issue a notice of apparent liability and the person against whom such notice has been issued must have an opportunity to show, in writing, why no such forfeiture penalty should be imposed.⁴¹ The Commission will then issue a forfeiture if it finds by a preponderance of the evidence that the person has violated the Act or a Commission rule.⁴² We conclude under this standard that SunCom is apparently liable for forfeiture for its apparent willful and repeated violation of Section 20.19(d)(2) of the Rules.

12. Under Section 503(b)(2)(B) of the Act,⁴³ we may assess a common carrier a forfeiture of up to \$130,000 for each violation, or for each day of a continuing violation up to a maximum of \$1,325,000 for a single act or failure to act. In exercising such authority, we are required to take into account “the nature, circumstances, extent, and gravity of the violation and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require.”⁴⁴

³⁸ Section 312(f)(1) of the Act defines “willful” as “the conscious and deliberate commission or omission of [any] act, irrespective of any intent to violate” the law. 47 U.S.C. § 312(f)(1). The legislative history of Section 312(f)(1) of the Act clarifies that this definition of willful applies to both Sections 312 and 503(b) of the Act, H.R. Rep. No. 97-765, 97th Cong. 2d Sess. 51 (1982), and the Commission has so interpreted the term in the Section 503(b) context. See *Southern California Broadcasting Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387, 4388 (1991), *recon. denied*, 7 FCC Rcd 3454 (1992) (“*Southern California*”).

³⁹ Section 312(f)(2) of the Act, which also applies to forfeitures assessed pursuant to Section 503(b) of the Act, provides that “[t]he term ‘repeated,’ ... means the commission or omission of such act more than once or, if such commission or omission is continuous, for more than one day.” 47 U.S.C. § 312(f)(2). See *Callais Cablevision, Inc.*, Notice of Apparent Liability for Forfeiture, 16 FCC Rcd 1359, 1362 (2001); *Southern California*, 6 FCC Rcd at 4388.

⁴⁰ 47 U.S.C. § 503(b)(1)(B); 47 C.F.R. § 1.80(a)(1).

⁴¹ 47 U.S.C. § 503(b); 47 C.F.R. § 1.80(f).

⁴² See, e.g., *SBC Communications, Inc.*, Forfeiture Order, 17 FCC Rcd 7589, 7591 (2002).

⁴³ 47 U.S.C. § 503(b)(2)(B). The Commission twice amended Section 1.80(b)(3) of the Rules, 47 C.F.R. § 1.80(b)(3), to increase the maxima forfeiture amounts, in accordance with the inflation adjustment requirements contained in the Debt Collection Improvement Act of 1996, 28 U.S.C. § 2461. See *Amendment of Section 1.80 of the Commission’s Rules and Adjustment of Forfeiture Maxima to Reflect Inflation*, Order, 15 FCC Rcd 18221 (2000) (adjusting the maximum statutory amounts from \$100,000/\$1,000,000 to \$120,000/\$1,200,000); *Amendment of Section 1.80 of the Commission’s Rules and Adjustment of Forfeiture Maxima to Reflect Inflation*, Order, 19 FCC Rcd 10945 (2004) (adjusting the maximum statutory amounts from \$120,000/\$1,200,000 to \$130,000/\$1,325,000); see also 47 C.F.R. § 1.80(c).

⁴⁴ 47 U.S.C. § 503(b)(2)(E). See also 47 C.F.R. § 1.80(b)(4), Note to paragraph (b)(4): Section II. Adjustment Criteria for Section 503 Forfeitures.

13. The Commission's *Forfeiture Policy Statement*⁴⁵ and Section 1.80 of the Rules do not establish a base forfeiture amount for violations of the hearing aid-compatible handset requirements set forth in Section 20.19 of the Rules. The fact that the *Forfeiture Policy Statement* does not specify a base amount does not indicate that no forfeiture should be imposed. The *Forfeiture Policy Statement* states that "... any omission of a specific rule violation from the ... [forfeiture guidelines] ... should not signal that the Commission considers any unlisted violation as nonexistent or unimportant."⁴⁶ The Commission retains the discretion, moreover, to depart from the *Forfeiture Policy Statement* and issue forfeitures on a case-by-case basis, under its general forfeiture authority contained in Section 503 of the Act.⁴⁷

14. In determining the appropriate forfeiture amount for violation of the hearing aid compatibility handset requirements, we take into account that these requirements serve to ensure that individuals with hearing disabilities have access to digital wireless telecommunications services. In adopting the hearing aid compatibility rules, the Commission underscored the strong and immediate need for such access, stressing that individuals with hearing impairments should not be denied the public safety and convenience benefits of digital wireless telephony.⁴⁸ Moreover, as the Commission has noted, the demand for hearing aid-compatible handsets is likely to increase with the growing reliance on wireless technology and with the increasing median age of our population.⁴⁹

15. Our recent decisions established a base forfeiture amount of \$15,000 per handset for violations of the hearing aid compatibility handset requirements.⁵⁰ In establishing this base forfeiture amount, we determined that violations of the hearing aid compatibility handset requirements warranted a significantly higher forfeiture than for violations of the labeling requirements for wireless hearing aid-compatible handsets.⁵¹ We found that a violation of the labeling requirements, while serious because it deprives hearing aid users from making informed choices, is less egregious than a violation of the handset requirements because failure to make compliant handsets available actually deprives hearing aid users

⁴⁵ See *The Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, 12 FCC Rcd 17087 (1997), *recon. denied*, 15 FCC Rcd 303 (1999) ("*Forfeiture Policy Statement*").

⁴⁶ *Forfeiture Policy Statement*, 12 FCC Rcd at 17099.

⁴⁷ *Id.*

⁴⁸ *Hearing Aid Compatibility Order*, 18 FCC Rcd at 16755.

⁴⁹ *Id.* at 16756 (noting that approximately one in ten Americans, 28 million, have some level of hearing loss, that the proportion increases with age, and that the number of those affected will likely grow as the median age increases). See also *Report on the Status of Implementation of the Commission's Hearing Aid Compatibility Requirements*, Report, 22 FCC Rcd 17709, 17719 (2007) (noting, just four years later, that the number of individuals with hearing loss in the United States was "at an all time high of 31 million – with that number expected to reach approximately 40 million at the end of this decade").

⁵⁰ See, e.g., *Iowa Wireless Services, LLC d/b/a i Wireless*, 23 FCC Rcd 4735 ¶ 12 (Enf. Bur., Spectrum Enf. Div. 2008) ("*i Wireless*"); *South Slope Cooperative Telephone Company d/b/a South Slope Wireless*, Notice of Apparent Liability for Forfeiture, 23 FCC Rcd 4706 ¶ 12 (Enf. Bur., Spectrum Enf. Div. 2008); *SLO Cellular, Inc. d/b/a Cellular One of San Luis Obispo*, Notice of Apparent Liability for Forfeiture, 23 FCC Rcd 3990 ¶ 15 (Enf. Bur., 2008); *Epic Touch Company*, Notice of Apparent Liability for Forfeiture, 23 FCC Rcd 2831, 2835 ¶¶ 10-11 (Enf. Bur., 2008) ("*EpicTouch*").

⁵¹ The Enforcement Bureau has established a base forfeiture amount of \$8,000 for violation of the labeling requirements for wireless hearing aid-compatible handsets. See, e.g., *South Central Utah Telephone Association, Inc.*, Notice of Apparent Liability for Forfeiture, 22 FCC Rcd 19251 ¶ 10 (Enf. Bur., Spectrum Enf. Div. 2007), *response pending*; *Pine Telephone Company, Inc.*, Notice of Apparent Liability for Forfeiture, 22 FCC Rcd 9205, 9210 (Enf. Bur., Spectrum Enf. Div. 2007), *consent decree ordered*, Order, 24 FCC Rcd 4495 (Enf. Bur. 2008).

from accessing digital wireless communications.⁵² We also found that the handset requirements require providers to offer at least two handset models that meet at least a T3 rating for inductive coupling, and thus determined that a proposed forfeiture for violation of these requirements should be applied on a per handset basis.

16. The record establishes that SunCom did not offer any handsets that met the T3 rating for inductive coupling by September 18, 2006. The record further establishes that SunCom did not come into compliance with the inductive coupling compatibility requirements in all of its markets until June 8, 2007. Further, while SunCom sought waivers of the September 18, 2006 deadline,⁵³ its efforts to come into compliance did not demonstrate due diligence and it did not demonstrate unique or unusual circumstances. The Commission thus denied SunCom's waiver requests.⁵⁴ Accordingly, SunCom is apparently liable for a base forfeiture of \$30,000 for failing to comply with the inductive coupling compatibility requirements in willful and repeated violation of Section 20.19(d)(2).

17. We find, however, that a substantial upward adjustment to the \$30,000 base forfeiture amount is warranted. We believe that violations of the hearing aid compatibility handset requirements by Tier II carriers are more egregious, warranting a higher forfeiture amount than that assessed against smaller Tier III carriers. Specifically, we consider that Tier II carriers' failure to timely offer compliant handsets potentially impacts and deprives more hearing aid users from accessing digital wireless communications, because of their larger subscriber base.⁵⁵ We also consider it appropriate to set the forfeiture amount at a higher level for larger entities, such as Tier II carriers, to serve as an effective deterrent against their future non-compliance with the hearing aid compatibility handset requirements.⁵⁶ And, as we have previously noted,⁵⁷ a carrier's failure to offer two handsets that meet the FCC's inductive coupling compatibility requirements is a continuing violation for purposes of determining an appropriate forfeiture.

18. At the same time, we must also consider the efforts that SunCom did make, over a period of several months, to obtain compliant handsets in both its mainland and Puerto Rico markets. As the Commission noted in denying SunCom's waiver request, SunCom documented that it made numerous contacts with manufacturers in an attempt to procure such handsets, but that a series of setbacks delayed its compliance until June 2007.⁵⁸ While these efforts are not sufficient, under all the circumstances, to excuse SunCom's extended period of noncompliance, we find that they warrant some mitigation of the proposed forfeiture. Based on all of the foregoing, we therefore propose a \$60,000 forfeiture against

⁵² See *supra* note 50.

⁵³ See *supra* notes 13-28 and accompanying text.

⁵⁴ See *supra* notes 32-37 and accompanying text.

⁵⁵ As the Commission noted, SunCom provides wireless services to more than 1.1 million subscribers, and its licenses cover nearly 15 million people in the continental United States and more than 4 million in Puerto Rico and the U.S. Virgin Islands. See *T-Mobile/SunCom Transfer Order*, 23 FCC Rcd at 2517 ¶ 5.

⁵⁶ See *Forfeiture Policy Statement*, 12 FCC Rcd at 17099 ¶24 (recognizing that forfeitures against larger and more highly profitable communications entities must be set at higher levels "for the forfeiture to be an effective deterrent" and "not merely an affordable cost of doing business").

⁵⁷ See, e.g., *i Wireless*, 23 FCC Rcd at 4735 ¶ 13; *EpicTouch*, 23 FCC Rcd at 2835-36 ¶ 12 (cautioning carriers that future enforcement actions may consider all failures to comply with the hearing aid compatibility rules, including the inductive coupling requirements, as continuing violations for purposes of calculating appropriate forfeiture amounts).

⁵⁸ *February 2008 Inductive Coupling Compatibility Waiver Order*, 23 FCC Rcd at 3380 ¶ 67.

SunCom for failing to comply with the inductive coupling compatibility requirements in apparent willful and repeated violation of Section 20.19(d)(2).⁵⁹

IV. ORDERING CLAUSES

19. Accordingly, **IT IS ORDERED** that, pursuant to Section 503(b) of the Act, and Section 1.80 of the Rules, SunCom Wireless, Inc. **IS NOTIFIED** of its **APPARENT LIABILITY FOR A FORFEITURE** in the amount of sixty thousand dollars (\$60,000) for willful and repeated violation of Section 20.19(d)(2) of the Rules.

20. **IT IS FURTHER ORDERED** that, pursuant to Section 1.80 of the Rules, within thirty days of the release date of this Notice of Apparent Liability for Forfeiture, SunCom **SHALL PAY** the full amount of the proposed forfeiture or **SHALL FILE** a written statement seeking reduction or cancellation of the proposed forfeiture.

21. Payment of the forfeiture must be made by check or similar instrument, payable to the order of the Federal Communications Commission. The payment must include the NAL/Account Number and FRN Number referenced above. Payment by check or money order may be mailed to Federal Communications Commission, P.O. Box 979088, St. Louis, MO 63197-9000. Payment by overnight mail may be sent to U.S. Bank – Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, MO 63101. Payment by wire transfer may be made to ABA Number 021030004, receiving bank TREAS/NYC, and account number 27000001. For payment by credit card, an FCC Form 159 (Remittance Advice) must be submitted. When completing the FCC Form 159, enter the NAL/Account number in block number 23A (call sign/other ID), and enter the letters “FORF” in block number 24A (payment type code). Requests for full payment under an installment plan should be sent to: Chief Financial Officer -- Financial Operations, 445 12th Street, S.W., Room 1-A625, Washington, D.C. 20554. Please contact the Financial Operations Group Help Desk at 1-877-480-3201 or Email: arinquiries@fcc.gov with any questions regarding payment procedures. SunCom will also send electronic notification on the date said payment is made to JoAnn Lucanik at joann.lucanik@fcc.gov and Ava Holly Berland at holly.berland@fcc.gov.

22. The response, if any, must be mailed to the Office of the Secretary, Federal Communications Commission, 445 12th Street, S.W., Washington, D.C. 20554, ATTN: Enforcement Bureau – Spectrum Enforcement Division, and must include the NAL/Acct. No. referenced in the caption.

23. The Commission will not consider reducing or canceling a forfeiture in response to a claim of inability to pay unless the petitioner submits: (1) federal tax returns for the most recent three-year period; (2) financial statements prepared according to generally accepted accounting practices; or (3) some other reliable and objective documentation that accurately reflects the petitioner’s current financial

⁵⁹ Under Section 503(b)(6) of the Act, 47 U.S.C. § 503(b)(6), we are prohibited from assessing a forfeiture for a violation that occurred more than a year before the issuance of a notice of apparent liability for forfeiture. Section 503(b)(6) does not, however, bar us from considering SunCom’s prior conduct in determining the appropriate forfeiture amount for violations that occurred within the one-year statutory period. *See Behringer USA, Inc.*, Notice of Apparent Liability for Forfeiture and Order, 21 FCC Rcd 1820, 1827 (2006), *forfeiture ordered*, 22 FCC Rcd 10451 (2007) (forfeiture paid); *Globcom, Inc. d/b/a Globcom Global Communications*, Notice of Apparent Liability for Forfeiture, 18 FCC Rcd 19893, 19903 (2003), *forfeiture ordered*, Forfeiture Order, 21 FCC Rcd 4710 (2006); *Roadrunner Transportation, Inc.*, Forfeiture Order, 15 FCC Rcd 9669, 9671-71 (2000); *Cate Communications Corp.*, Memorandum Opinion and Order, 60 RR 2d 1386, 1388 (1986); *Eastern Broadcasting Corp.*, Memorandum Opinion and Order, 10 FCC 2d 37, 37-38 (1967) *recon. denied*, 11 FCC 2d 193, 195 (1967). Accordingly, while we take into account the continuous nature of the violations in determining the appropriate forfeiture amount, our proposed forfeiture relates only to SunCom’s apparent violations that have occurred within the past year.

status. Any claim of inability to pay must specifically identify the basis for the claim by reference to the financial documentation submitted.

24. **IT IS FURTHER ORDERED** that a copy of this Notice of Apparent Liability for Forfeiture shall be sent by first class mail and certified mail return receipt requested to Daniel Menser, T-Mobile USA, Inc., 12920 SE 38th Street, Bellevue, WA 98006, and to Michele C. Farquhar, Hogan & Hartson, LLP, 555 13th St., NW, Washington, DC 20004-1109.

FEDERAL COMMUNICATIONS COMMISSION

Kris Anne Monteith
Chief, Enforcement Bureau