BRIEF FOR RESPONDENTS

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 12-1365

BLANCA TELEPHONE COMPANY, ET AL.,

PETITIONERS,

V.

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,

RESPONDENTS.

ON PETITION FOR REVIEW OF AN ORDER OF THE
FEDERAL COMMUNICATIONS COMMISSION

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

1. Parties.

The petitioners are Blanca Telephone Company, CTC Telecom, Inc., and Farmers Cellular Telephone Company, Inc. The respondents are the Federal Communications Commission and the United States of America. All parties that appeared before the agency are referenced in the brief of petitioners.

2. Rulings under review.

Petitions for Waiver of Section 20.19 of the Commission's Rules, WT Docket No. 01-309, Memorandum Opinion and Order, 23 FCC Rcd 3352 (2008) (J.A.) and *Petitions for Waiver of Section 20.19 of the Commission's Rules*, WT Docket No. 01-309, Order on Reconsideration, 27 FCC Rcd 9814 (2012) (J.A.).

3. Related cases.

This case has not previously been before this Court or any other court. Commission counsel are unaware of any pending cases related to this one.

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GLOSSARY

APA	Administrative Procedure Act
Blanca	Blanca Telephone Co.
CDMA	Code Division Multiple Access
Commission	Federal Communications Commission
CTC	CTC Telecom, Inc.
Farmers	Farmers Cellular Telephone Company
GSM	Global System for Mobile Communications
HAC Act	The Hearing Aid Compatibility Act of 1988
OMB	Office of Management and Budget
PRA	Paperwork Reduction Act

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STATEMENT OF ISSUES PRESENTED

Three digital wireless service providers – petitioners Blanca Telephone Co. ("Blanca"), CTC Telecom, Inc. ("CTC"), and Farmers Cellular Telephone Co. ("Farmers") – challenge an order of the Federal Communications Commission ("Commission"), denying their petitions for waiver of an FCC rule requiring the providers to offer by September 18, 2006 telephone equipment that is compatible with certain types of hearing aids. *Section 68.4(a) of the Commission's Rules Governing Hearing Aid-Compatible Telephones*, Memorandum Opinion and Order, 23 FCC Rcd 3352

(2008) ("*Order*") (J.A.), *recon. denied*, 27 FCC Rcd 9814 (2012) ("*Reconsideration Order*") (J.A.). The issues before the Court are:

1. Whether the Commission reasonably denied the waivers.

2. Whether the Commission used lawful procedures in denying the waivers.

3. Whether the Commission properly concluded that the filing of an impermissible *ex parte* pleading in the administrative docket did not so taint the administrative process as to preclude denial of the waivers.

STATUTES AND REGULATIONS

Pertinent statutes and regulations are set forth in the statutory addendum to this Brief.

COUNTERSTATEMENT OF THE CASE

A. Hearing Aid Compatibility Act and Implementing Rules

The Hearing Aid Compatibility Act of 1988 ("HAC Act"), 47 U.S.C. § 610, ensures that hearing-impaired persons have reasonable access to telephone service. With enumerated exemptions (including one for wireless telephones), the HAC Act requires that all telephones manufactured or imported for use in the United States must meet technical standards for compatibility with hearing aid devices. 47 U.S.C. § 610(b)(1). The HAC Act directs the Commission periodically to "assess the appropriateness of

continuing in effect" the statutory exemptions and to "revoke or otherwise limit" any exemption if specified criteria are met. 47 U.S.C. § 610(b)(2)(B).

In 2003, the Commission modified the HAC Act's exemption for wireless telephones by requiring digital wireless telephones to be accessible to individuals with hearing aids. *See Section 68.4(a) of the Commission's Rules Governing Hearing Aid-Compatible Services*, Report and Order, 18 FCC Rcd 16752, 16757 (¶ 8) (2003) ("*2003 Rulemaking Order*"). In doing so, the Commission determined that the public interest required "extend[ing] to individuals with hearing disabilities the social, professional, and convenience benefits" offered by digital wireless service. *Id.* at 16755 (¶ 4). Moreover, given the significant number of calls to 911 for emergency services placed by digital wireless telephones, the Commission found that access to such telephones by individuals with hearing loss is "critical" to the preservation of public health and safety. *Id.*

In its *2003 Rulemaking Order*, the Commission adopted two sets of technical standards for determining whether digital wireless handsets are accessible with hearing aids or cochlear implants: (1) a standard for radio frequency interference to enable use of digital wireless telephones by persons with hearing aids operating in acoustic coupling mode, 47 C.F.R.

§ 20.19(b)(1) (2007),[1] and (2) a standard for handset production to enable use of wireless phones by persons with hearing aids operating in telecoil mode, 47 C.F.R. § 20.19(d)(2) (2007).[2] The first type of hearing aid-telephone compatibility is known as "acoustic coupling"; the second type as "inductive coupling." (The Commission amended section 20.19 effective June 6, 2008. All references in this brief are to the version in effect prior to that amendment.)

Within a specified deadline, the Commission's rules required digital wireless telephone manufacturers to make available to wireless providers – and those providers, in turn, to offer to their retail consumers – specified numbers or percentages of digital handsets per air interface that were

[1] A hearing aid that operates in acoustic coupling mode contains a microphone that "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 sound by the hearing aid speaker." *2003 Rulemaking Order*, 18 FCC Rcd at 16763 (¶ 22).

[2] A hearing aid that operates in telecoil mode works differently from one that operates in acoustic coupling mode. "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." *Id.*

compliant with each technical standard. *See* 47 C.F.R. § 20.19(c),(d) (2007).[3] As relevant here, the Commission generally required affected digital wireless service providers to make available in their retail stores at least two handset models per air interface that meet the compatibility standard for inductive coupling. *See* 47 C.F.R. § 20.19(d)(2). The Commission's rule specified that they were to do so by no later than September 18, 2006. *Id*.

The Commission also required digital wireless handset manufacturers and service providers to file reports enabling the Commission to monitor their progress in implementing the hearing aid compatibility requirements and to ascertain the date by which they became compliant. The Commission required these compliance reports to be filed on a biannual basis in the first three years of implementation and then thereafter on an annual basis through the fifth year of implementation. *See 2003 Rulemaking Order*, 18 FCC Rcd at 16787 (¶ 89).

[3] "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." *Order*, 23 FCC Rcd at 3353 n.3 (J.A.). *Order*, 23 FCC Rcd at 3353 n.3 (J.A.). Examples of air interfaces are Code Division Multiple Access ("CDMA") and Global System for Mobile Communications ("GSM"). *Id.*

B. Compliance with Section 20.19(d)(2)

A large number of digital wireless service providers, primarily "Tier III" carriers,[4] failed to meet the deadline prescribed in section 20.19(d)(2) for offering a sufficient number of handset models equipment satisfying the hearing aid compatibility standard for inductive coupling. As a result, more than one hundred service providers -- including petitioners CTC, Farmers, and Blanca – asked the FCC to waive the September 18, 2006 deadline. *See Order*, 23 FCC Rcd at 3353 (¶ 1) (J.A.). Many of the parties seeking waivers told the Commission that they had not complied with section 20.19(d)(2) "because the requisite hearing aid-compatible handsets were unavailable to them." *Order*, 23 FCC Rcd at 3355-56 (¶ 5) (J.A.). Blanca, CTC, and Farmers, however, urged the Commission to waive section 20.19(d)(2) because they could not purchase inductive coupling-compliant handsets from their existing equipment suppliers, *i.e.*, those suppliers from which they had purchased equipment previously. Blanca Waiver Petition (Sept. 18, 2006) at 2 (J.A.); CTC Waiver Petition (Sept. 18, 2006) at 2 (J.A.); Farmers Waiver Petition (Sept. 18, 2006) at 2 (J.A.).

[4] "Tier III carriers are non-nationwide wireless radio service providers with 500,000 or fewer subscribers as of the end of 2001." *Order*, 23 FCC Rcd at 3353 n.2. (J.A.).

According to their compliance reports, CTC and Farmers failed to offer two handset models that met the inductive coupling standard until March 13, 2007 and June 6, 2007, respectively. *See* CTC Report (June 7, 2007) at 2 (J.A.); Farmers Report (June 12, 2007) at 1 (J.A.).[5] On March 29, 2007, Blanca initially reported to the Commission that it had satisfied the agency's rule by offering four handset models that met the compatibility standard for inductive coupling. Blanca Report (March 29, 2007) at 2 (J.A.). But the company subsequently admitted, in a supplemental report, that it had not achieved full compliance with the inductive coupling requirement until June 20, 2007. Blanca Supplemental Report (June 21, 2007) at 2, 3 (J.A.).[6]

[5] CTC subsequently informed the Commission that its reported compliance date of March 13, 2007 "may have been a factual error[,]" because an invoice "appears to show that CTC received its second inductive coupling compliant handset . . . in January 2007." Blanca, CTC & Farmers Reconsideration Petition (Mar. 28, 2008) at 3 n.4 (J.A.)

[6] Blanca attributed its earlier, incorrect claim about compliance by March 29, 2007 to its "confusion … about the meaning of 'HAC compliance.'" *Id.* at 2 (J.A.). According to Blanca, it "had overlooked that the T-coil/inductive coupling requirement had become effective" and acknowledged that the four handsets reported in its March 29, 2007 Report as compliant as to inductive coupling actually were "acoustic coupling . . . compliant handsets." *Id.* (J.A.). Blanca told the Commission that once it "realized" it was in violation of the Commission's hearing aid compatibility rules, it "promptly ordered and received" inductive coupling-compliant equipment. *Id.* at 3 (J.A.).

C. Order on Review

On February 27, 2008, the Commission released the *Order* granting, denying, or dismissing 46 waiver petitions for extensions of the September 18, 2006 deadline to provide handsets that meet the hearing aid compatibility standard for inductive coupling. *Order*, 23 FCC Rcd 3352 (J.A.).

The Commission explained that, under its rules, an applicant for a waiver must show that (a) "the underlying purpose of the rule[] would not be served or would be frustrated by application to the instant case, and grant would be in the public interest," or (b) "in view of the unique or unusual factual circumstances, application of the rule[] would be inequitable, unduly burdensome, or contrary to the public interest, or the applicant[s] ha[ve] no reasonable alternative." *Id.* at 3356-57 (¶ 7) (J.A). *See* 47 C.F.R. § 1.925(b)(3).

The Commission held that a group of Tier III waiver applicants that had achieved full compliance with the inductive coupling compatibility requirements by January 1, 2007 had satisfied that "rigorous waiver standard[]." *Order*, 23 FCC Rcd at 3361 (¶ 15) (J.A.). The Commission explained that only very few handset models had been received and certified as compliant with the hearing aid compatibility standards for inductive coupling before August and September of 2006. *Id.* at 3357, 3362 (¶¶ 8, 16)

(J.A.). As a result, the Commission explained that carriers had "little time . . . to purchase such [models] and make them available in all company stores in time to comply" with the inductive coupling compatibility requirement – a process that "typically takes weeks or even months" after certification has occurred. *Id.* at 3362, 3383 (¶¶ 16, 75) (J.A.). Compounding that difficulty, the Commission noted, an additional eight handset models had not been certified until after that deadline had passed and thus had been unavailable to service providers on September 18, 2006. *Id.* at 3357 (¶ 8) (J.A.). Even after they had purchased inductive coupling-compliant handsets, the Commission explained, the Tier III applicants had "typically experienced significant delays in obtaining shipping commitments from their handset suppliers because handset manufacturers filled orders first for the larger Tier I and II carriers." *Id.* at 3362 (¶ 16) (J.A.).

Given these circumstances, the Commission determined that the failure of this group of Tier III carriers to offer at least two inductive coupling-compliant handset models by the September 18, 2006 deadline "could not reasonably have been avoided." *Id.* at 3361 (¶ 15) (J.A.). The Commission further concluded that the "time frames within which these carriers came into compliance" – "on or shortly before January 1, 2007" – were "reasonable under the circumstances and reflect the diligence of their efforts." *Id.* at 3362

(¶ 17) (J.A.). Indeed, the agency explained, "a Tier III carrier exercising reasonable diligence might have required this much time to resolve issues involved in identifying, testing, and ultimately selling inductive coupling-compliant handsets." *Id*. The Commission therefore granted these carriers waivers for the "modest amount of additional time [that they needed] to come into compliance with the inductive coupling compatibility requirement." *Id.* at 3361 (¶ 15) (J.A.).

In contrast, the Commission denied the more extended waivers sought by a number of other Tier III carriers, including Blanca, CTC, and Farmers, because those carriers had failed to show they had exercised sufficient diligence in seeking to obtain inductive coupling-compliant handsets. *Id.* at 3364-65 (¶ 22) (J.A.). The Commission explained, for example, that these carriers could not show sufficient diligence simply by "contact[ing] [their] existing vendors on a monthly basis." *Id.* at 3365 (¶ 22) (J.A.). The Commission pointed out that "the great majority of the Tier III carriers were able to achieve compliance within a few months of the deadline," and that Blanca, CTC, and Farmers had not presented any "unique facts or circumstances to clearly distinguish their situation from other Tier III carriers that were able to comply by January 1, 2007, or before." *Id.*

D. Reconsideration Proceedings

In an order released August 14, 2012, the Commission ruled on several petitions for reconsideration of the *Order* that had been filed by Tier III service providers that had been denied waivers of section 20.19(d)(2). *Reconsideration Order*, 27 FCC Rcd at 9814-15 (¶¶ 1-2) (J.A.). The Commission granted some of the reconsideration petitions, such as the joint petition filed by Iowa Wireless Services, LLC and other related licensees doing business as i wireless (collectively "i wireless"), and denied others, including the joint petition filed by Blanca, CTC, and Farmers. *Id.* at 9815 (¶ 2) (J.A.).

Even though i wireless had not achieved full compliance until March 22, 2007, the Commission on reconsideration determined that it had demonstrated due diligence in its efforts to obtain inductive coupling-compliant handsets and thus granted its waiver petition. The Commission pointed out, for example, that i wireless had shown, through *inter alia* regular contacts with manufacturers and distributors, that it had identified the authorized distributors for particular manufacturers, had ascertained when compliant handsets would become available from these distributors, and had purchased those handsets as soon as they were available. *Reconsideration Order*, 27 FCC Rcd at 9819 (¶ 12) (J.A.). The Commission pointed out

further that i wireless' petition, supported by a sworn declaration and affidavit, documented with detailed timelines i wireless' conscientious efforts to obtain fourteen different handset models. *Id.* *See* i wireless Reconsideration Petition (March 27, 2008) (J.A.).

In contrast, the Commission explained that Blanca, CTC, and Farmers "provide[d] very little in the way of new information to demonstrate that they [had] exercised reasonable diligence in their attempts to obtain compliant handsets." *Reconsideration Order*, 27 FCC Rcd at 9823-24 (¶ 22) (J.A.). "Regardless of how often these carriers contacted their existing vendors . . . they do not suggest that they investigated alternative suppliers, as they should have done in the exercise of reasonable diligence when their existing vendors could not satisfy their requirements." *Id.* [7]

In addition, the Commission rejected the carriers' objection that the agency had established an "alternate deadline" of January 1, 2007 "without notice." *Id.* at 9822 (¶ 19) (J.A.). To the contrary, the Commission pointed out, it had simply "granted waivers" of the clearly established September 18,

[7] The Commission found that CTC's submission of a January 25, 2007 invoice for inductive coupling-compliant equipment did not warrant the grant of a waiver. The Commission reasoned not only that CTC had failed to "provide a sworn declaration establishing the authenticity of its invoice," but also that its purported purchase of an inductive coupling-compliant handset at the end of January 2007 did not show due diligence. *Id.*

2006 deadline to carriers that had demonstrated "reasonably diligent efforts to come into compliance" with that deadline. *Id*. The Commission explained that it had inferred that those Tier III carriers that had expended the effort necessary to achieve full compliance by January 1, 2007 "were more likely to have met the standard of reasonable diligence." *Id*.

The Commission also rejected the claim that its denials of waivers were inconsistent with its grant of waivers of the acoustic coupling compatibility requirements in a prior order. *See Section 68.4(a) of the Commission's Rules Governing Hearing Aid-Compatible Telephones*, Memorandum Opinion and Order, 22 FCC Rcd 20459 (2007) ("*2007 GSM Waiver Order"*). The Commission explained that the parties in the *2007 GSM Waiver Order* reasonably, but mistakenly, thought they were compliant based upon *erroneous* information provided by their vendors. In this case, by contrast, Blanca, CTC, and Farmers had been "'*correctly* advised by their vendors that they could not be timely supplied with [hearing aid-compatible] headsets.'" *Reconsideration Order*, 27 FCC Rcd at 9823 (¶ 21) (J.A.) (quoting Blanca, CTC & Farmers Reconsideration Petition at 13 n.17 (J.A) (emphasis added).

Finally, the Commission rejected the contention that it should have granted the waivers on the basis of a "procedural violation" resulting from the

Commission's receipt of the Consolidated Opposition filed by two organizations for people with hearing loss urging that any waivers granted should not extend the deadline for compliance beyond January 1, 2007. *Id.* at 9824 (¶ 23) (J.A.). Although the Commission agreed that the Consolidated Opposition had been filed in violation of the Commission's rules, it found that Blanca, CTC, and Farmers had not suffered prejudice, since the Commission "would have reached the same result with or without consideration" of the improper filing. *Id.* at 9826 (¶ 26) (J.A.). The Commission also observed that Blanca, CTC and Farmers "had ample opportunity to discuss and address the Consolidated Opposition in several of their filings, and vacating the [*Order*] to give them a further such opportunity would serve no purpose." *Id.* at 9826 (¶ 26) (J.A.).[8]

[8] In 2008, the Commission's staff instituted monetary forfeiture proceedings against Blanca, CTC, and Farmers for their "willful and repeated" failure to comply with the Commission's inductive coupling-compatible handset deployment requirements. *In the Matter of Blanca Tel. Co*., Notice of Apparent Liability for Forfeiture, 23 FCC Rcd 9398, 9404 (¶ 13) (2008); *In the Matter of CTC Telecom, Inc.*, Notice of Apparent Liability for Forfeiture, 23 FCC Rcd 3906, 3912 (¶ 13) (2008); *In the Matter of Farmers Cellular Telephone, Inc.*, Notice of Apparent Liability for Forfeiture, 23 FCC Rcd 8622, 8628 (¶ 13) (2008). Those proceedings remain pending before the Commission and are not at issue in this case.

STANDARD OF REVIEW

Blanca, CTC, and Farmers bear a heavy burden to establish that the Order on review is "arbitrary, capricious [or] an abuse of discretion." 5 U.S.C. § 706(2)(A). Under this "highly deferential" standard, this Court presumes the validity of agency action. *E.g.*, *Nat'l Tel. Co-op. Ass'n v. FCC*, 563 F.3d 536, 541 (D.C. Cir. 2009). The Court must affirm unless the Commission failed to consider relevant factors or made a clear error in judgment. *E.g.*, *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

This Court's application of the arbitrary-and-capricious standard is particularly deferential when reviewing an agency decision declining to waive a generally applicable rule. "[R]eview of an agency's denial of a waiver" may result in reversal "only when 'the agency's reasons are so insubstantial as to render that denial an abuse of discretion.'" *Morris Commc'ns, Inc. v. FCC*, 566 F.3d 184, 188 (D.C. Cir. 2009) (quoting *BDPCS, Inc. v. FCC*, 351 F.3d 1177, 1181-82 (D.C. Cir. 2003) (citation omitted).

Blanca, CTC, and Farmers also bear a heavy burden in seeking to establish that the Commission violated the Fifth Amendment's Due Process Clause guarantee of equal protection. Where, as here, the government

"neither proceeds along suspect lines nor infringes fundamental constitutional rights," its classification "must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis" for it. *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993). *See Dixon v. District of Columbia*, 666 F.3d 1337, 1339, 1342-44 (D.C. Cir. 2011). To establish such an equal protection violation, petitioners have the "burden 'to negative every conceivable basis which might support'" the challenged action. Beach, 508 U.S. at 314 (quoting *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973)).

SUMMARY OF ARGUMENT

1. The Commission reasonably denied petitioners Blanca, CTC and Farmers waivers of the September 18, 2006 deadline for offering hearing aid-compatible digital wireless handsets because those carriers failed to show that they diligently sought to comply with the Commission's inductive coupling-compatibility equipment requirement.

Substantial record evidence shows that, even after compliant handsets became widely available in the marketplace, petitioners made little effort to obtain them: instead of identifying the vendors that offered compliant equipment and seeking out that equipment from those vendors, petitioners did nothing more than make intermittent inquiries of their existing equipment

suppliers. In light of their limited efforts, and given that they remained non-compliant longer than the many Tier III carriers that achieved full compliance by January 1, 2007, the Commission acted well within its discretion in denying petitioners' requests for more substantial extensions of time.

2. Nor was the Commission compelled to grant petitioners' waiver requests because it had granted other waiver requests that had involved different circumstances. The Commission granted waivers to a group of Tier III carriers that that came into compliance by January 1, 2007 – which neither Blanca, CTC nor Farmers did – because those carriers engaged in reasonably diligent efforts to satisfy the inductive coupling rule. The Commission granted i wireless and related carriers waivers because they had documented their conscientious efforts to identify and to procure compliant equipment. Petitioners did no such thing.

Nor are petitioners similarly situated to those who received waivers under the Commission's *2007 GSM Waiver Order*. Those persons had reasonably (albeit erroneously) believed that they were in compliance with the Commission's rule because their suppliers represented that the equipment purchased satisfied the relevant technical standard for hearing aid compatibility. In contrast, petitioners here had not obtained equipment that

they had any reason to believe complied with the Commission's inductive coupling rule.

3. The Commission's waiver decisions were also procedurally proper. The Commission was under no obligation to employ notice-and-comment rulemaking procedures to resolve the waiver petitions. Nor did it amend the September 18, 2006 compliance deadline by explaining that compliance by January 1, 2007 was evidence of reasonable diligence that might support a waiver. There was also no violation of the Paperwork Reduction Act ("PRA") when the Commission noted that CTC's late-filed invoice had not been authenticated by a sworn declaration. In any event, the Commission determined that the invoice, whether or not properly authenticated, did not show that CTC exercised due diligence in seeking to comply with the Commission's rules.

4. Finally, the fact that the Commission received an impermissible *ex parte* Consolidated Opposition to the waiver requests from two groups representing persons with hearing loss did not so taint the administrative process as to preclude the Commission from denying the waivers. Because the Consolidated Opposition was filed in the public docket, petitioners had ample opportunity to address it in the administrative proceedings. In any event, as the Commission explained, it would have reached the same result

even if the Consolidated Opposition had not been filed. Any error was therefore plainly harmless.

ARGUMENT

I. THE COMMISSION REASONABLY DENIED THE WAIVERS BECAUSE BLANCA, CTC, AND FARMERS HAD NOT SHOWN DILIGENT EFFORTS TO PROCURE AND OFFER INDUCTIVE COUPLING-COMPLIANT HANDSETS.

The Commission reasonably denied waivers to Blanca, CTC, and Farmers because the companies failed to show that they had made reasonably diligent efforts to procure and to offer to consumers inductive coupling-compliant equipment as required by the Commission's hearing aid compatibility rule. *See Order*, 23 FCC Rcd at 3364-65 (¶ 22) (J.A.); *Reconsideration Order*, 27 FCC Rcd at 9824 (¶ 22) (J.A.). On review, Blanca, CTC, and Farmers fail to satisfy their "'heavy' burden" to demonstrate that the Commission abused its discretion. *Omnipoint Corp. v. FCC*, 213 F.3d 720, 721 (D.C. Cir. 2000) (quoting *Mountain Solutions Ltd. v. FCC*, 197 F.3d 512, 517 (D.C. Cir. 1999).

Even after most other Tier III carriers were offering compliant equipment models, Blanca, CTC, and Farmers remained in violation of the Commission's inductive coupling-compatible handset deployment requirement. *Order*, 23 FCC Rcd at 3365 (¶ 22) (J.A.). As the record

evidence shows, Blanca, CTC, and Farmers sought inductive coupling-compliant equipment only from their existing vendors instead of seeking out alternative sources of compliant equipment when their vendors were unable to provide them with that equipment. *See Reconsideration Order*, 27 FCC Rcd at 9824 (¶ 22) (J.A.); Blanca Waiver Petition at 2 (J.A.); CTC Waiver Petition at 2 (J.A.); Farmers Waiver Petition at 2 (J.A.). Moreover, these carriers provided no explanation for their failure to seek out alternative suppliers. In other words, the companies chose to remain out of compliance with the requirement that they offer inductive coupling-compliant equipment until such time as they were able to procure compliant equipment from their preferred suppliers. *Id.* The Commission reasonably determined that petitioners' actions demonstrated a lack of due diligence. *Id.*

Moreover, Blanca all but admitted that its non-compliance with the Commission's rule was its own fault. As it told the Commission in its March 29, 2007 compliance report, it had completely "overlooked" that the "inductive coupling requirement had become effective" over six months earlier. Blanca Supplemental Report at 2 (J.A.). Blanca acknowledged that it made an "embarrassing" "error": it thought that it had fully complied with the Commission's hearing aid compatibility rules simply by offering equipment that complied with the *acoustic* coupling-compatibility

requirement. *Id.* at 2, 3 (J.A.). As to the separate *inductive* coupling-compatibility requirement, Blanca conceded that "the ball was . . . dropped." *Id.* at 3 (J.A.). Blanca cannot claim to have made diligent efforts to comply with the inductive coupling-compatibility requirement when, by its own admission, it did not know that this requirement existed more than six months after it became effective.

Before this Court, petitioners contend that because "the Commission did not previously require that carriers alter their established business relationships to comply with the HAC requirements," they lacked "prior notice" of this requirement. Petitioners' Brief at 33. But the Commission's rules required petitioners to offer in their retail stores two handset models that complied with the Commission's inductive coupling compatibility standards. Petitioners were on notice of that legal requirement. In order to satisfy that obligation, Blanca, CTC, and Farmers needed to take whatever steps were necessary to procure inductive coupling-compatible equipment, even if that meant purchasing such equipment from sources other than their existing vendors.

Petitioners also contend that the Commission erred in stating that "the great majority of Tier III carriers were able to achieve compliance within a few months of the deadline" (*Order*, 23 FCC Rcd at 3365 (¶ 22) (J.A.)),

because 59 percent of "Tier III carriers *seeking waiver* did not obtain compliant handsets" until after January 1, 2007. Petitioners' Brief at 24 (emphasis added).

As the Commission explained, however, petitioners' calculation "ignores those Tier III carriers that did not seek waivers[,]" *Reconsideration* Order, 27 FCC Rcd at 9822 n. 57 (J.A.) – presumably because they had been able to comply by the September 18, 2006 deadline. In any event, petitioners' dispute over whether a "majority" of Tier III carriers were in compliance with the Commission's inductive coupling rules as of January 1, 2007 is beside the point. As the Commission explained on reconsideration, the undisputable fact that a "large number" of Tier III carriers "achieved compliance on or before January 1, 2007" provides sufficient evidence that a Tier III carrier could have obtained inductive coupling-compliant equipment by that date "through reasonably diligent efforts." *Id.*

II. THE COMMISSION REASONABLY DETERMINED THAT PETITIONERS WERE NOT SIMILARLY SITUATED TO CARRIERS THAT RECEIVED WAIVERS.

Petitioners argue that the Commission erred in denying them waivers because the agency had granted waivers to three other groups of allegedly similarly situated carriers: (1) the Tier III carriers that were not compliant with the inductive coupling-compatibility requirements by the September 18,

2006 deadline but had achieved full compliance by January 1, 2007; (2) the Tier III carriers operating as "i wireless"; and (3) the Tier III carriers that had been granted waivers of the acoustic coupling requirements in the *2007 GSM Waiver Order*.

As shown below, the circumstances that justified waivers for those sets of carriers were starkly different from those presented by petitioners' waiver applications. Because petitioners' circumstances are not similar to carriers that were granted waivers, "the Commission acted reasonably in treating them differently." *Mobile Relay Assocs. v. FCC*, 457 F.3d 1, 10 n.11 (D.C. Cir. 2006).[9]

A. Petitioners Were Not Similarly Situated With The Group Of Carriers Achieving Full Compliance By January 1, 2007.

The Commission reasonably granted waivers to a group of 22 Tier III carriers that had achieved full compliance by January 1, 2007 because this group of carriers, notwithstanding their failure to meet the September 18,

[9] Petitioners fault the Commission for denying their waiver requests while granting a waiver to Kyocera, an equipment manufacturer. Petitioners' Brief at 32. Petitioners, however, do not even attempt to show that their circumstances are similar to those of Kyocera – and with good reason. In contrast to petitioners' lengthy period of non-compliance, Kyocera missed the September 18, 2006 deadline by only three days, in part attributable to "the delays that Kyocera encountered during the testing process." *Order*, 23 FCC Rcd at 3383 (¶ 75) (J.A.).

2006 deadline, had made diligent efforts to satisfy the FCC's inductive coupling handset deployment requirement. *Order*, 23 FCC Rcd at 3361-62 (¶¶ 15-17) (J.A.).

As the Commission pointed out, several circumstances prevented this group of Tier III carriers from complying with that requirement by the September 18, 2006 deadline. Very few handset models had been certified as compliant with the hearing aid compatibility standards for inductive coupling until shortly before the Commission's deadline, leaving carriers with very little time in which to procure and to make inductive coupling-compliant equipment available to consumers in their retail stores. *Order*, 23 FCC Rcd. at 3362 (¶ 16) (J.A.). Moreover, even after compliant equipment became available for purchase, Tier III carriers experienced significant delays in securing shipping commitments because the equipment manufacturers chose first to fill the orders of larger carriers. *Id.* Taking into account these factors, the Commission reasonably concluded that "the time frames within which these carriers came into compliance" – "on or shortly before January 1, 2007" – were "reasonable under the circumstances and reflect[ed] the diligence of their efforts." *Id.* at 3362 (¶17) (J.A.).

Petitioners argue that the compliance difficulties identified in the *Order* were "industry-wide," and therefore not only justified waivers for

those Tier III carriers achieving compliance by January 1, 2007, but also required the Commission to grant waivers to other Tier III carriers, including petitioners themselves, that had been non-compliant for longer periods of time. Petitioners' Brief at 29. Petitioners are mistaken. The Commission reasonably determined that compliance difficulties justified only "a modest amount of additional time," *i.e.*, up to January 1, 2007, for Tier III carriers to procure and make available inductive coupling-compliance equipment. *Order*, 23 FCC Rcd at 3361 (¶ 15) (J.A.). Petitioners point to nothing in the record showing that widespread impediments to full compliance continued after January 1, 2007 – a period during which many models of inductive coupling-compliant equipment had been certified for substantial time periods and compliant equipment generally had become widely available. To the contrary, the large number of Tier III carriers that were able to achieve full compliance by January 1, 2007 indicated that by that date widespread impediments no longer existed.

Moreover, the Commission granted waivers to the group of 22 Tier III carriers achieving full compliance by January 1, 2007 because those carriers had exercised due diligence in procuring and offering inductive coupling compliant-equipment. *Id.* at 3361-62 (¶¶ 15-16) (J.A.). Unlike those carriers, Blanca, CTC, and Farmers failed to exercise due diligence in

purchasing and offering inductive coupling compatible equipment. As the Commission explained, even after January 1, 2007, petitioners sought to purchase compliant equipment only from their existing suppliers instead of seeking out all possible sources of compliant equipment. *Id*. at 3364 (¶ 22) (J.A.); *Reconsideration Order* , 27 FCC Rcd at 9824 (¶ 22) (J.A.). Because petitioners are not similarly situated with the group of Tier III carriers achieving full compliance by January 1, 2007 either by the length of their non-compliance with the inductive coupling requirement or by the diligence of their efforts to obtain compliant equipment, it was not unlawful for the Commission to treat them differently. *See Mobile Relay Assocs.*, 457 F.3d at 10 n.11. The Commission's identification of January 1, 2007 as a relevant date for the exercise of its broad discretion to deny waivers is essentially a matter of line-drawing, as to which the Commission's discretion is equally broad. *See Nuvio Corp. v. FCC*, 473 F.3d 302, 309 (D.C. Cir. 2006) (quoting *AT&T Corp. v. FCC*, 220 F.3d 607, 627 (D.C. Cir. 2000)) ("[T]he Commission [has] 'wide discretion to determine where to draw administrative lines.'")

Petitioners also argue that the Commission improperly applied a different standard of review to the waiver petitions of the group of Tier III carriers that achieved full compliance by January 1, 2007 than it applied to

their petitions. According to petitioners, the Commission granted the waiver petitions of the former group based "upon a showing of 'sufficient diligence,'" whereas it required a more demanding "'compelling' justification from Petitioners." Petitioners' Brief at 13, 40, 42.

Petitioners are incorrect. The Commission applied the standard of review set forth in section 1.925(b)(3) of its rules to *all* the Tier III carriers seeking waivers of the inductive coupling-compatible handset deployment requirements. 47 C.F.R. § 1.925(b)(3). *See Order*, 23 FCC Rcd at 3356-57 (¶ 7) (J.A.); *Reconsideration Order*, 27 FCC Rcd at 9816, 9822 (¶¶ 4, 19) (J.A.). In applying that standard, the Commission used the same phrase – "sufficient diligence" – both in granting waivers to the group of Tier III carriers that achieved full compliance by January 1, 2007 and in denying waivers to petitioners here. *Order*, 23 FCC Rcd at 3361, 3365 (¶¶ 15, 22) (J.A.). The Commission thus did not require petitioners to satisfy a higher burden, but simply to demonstrate, like other Tier III waiver applicants, that

they had been diligent in their efforts to comply with the inductive coupling rule.[10]

B. Petitioners Were Not Similarly Situated With i Wireless.

Petitioners next argue that the Commission "treated similarly situated carriers differently" because it granted waivers to i wireless while denying waivers to petitioners. Petitioners' Brief at 12. That argument is baseless.

The Commission granted i wireless a waiver because it had "provide[d] sufficient information to show that its efforts to obtain compliant handsets . . . were . . . reasonably diligent." *Reconsideration Order*, 27 FCC Rcd at 9819 (¶ 12) (J.A.). For example, i wireless' Inventory Manager showed that he "regularly contacted manufacturers and distributors, and asked them for information regarding the availability of compliant handsets, a process that included identifying the authorized distributors for particular manufacturers, obtaining information regarding handset availability from these distributors,

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[10] Petitioners focus on a separate portion of the *Order* in which the Commission denied the waiver petitions of Rural Cellular Corporation and Virgin Mobile USA, noting that those parties had failed to submit "compelling" reasons for why they failed to offer a second compliant handset by the deadline applicable to their operations. *Order*, 23 FCC Rcd at 3382, 3383 (¶¶ 69, 72) (J.A.). Contrary to petitioners' contention, the Commission did not establish any different ("compelling") standard for resolving those waiver applications; the need for a "compelling" showing is simply an application of the "rigorous" standard, *see Order*, 23 FCC Rcd at 3361 (¶ 15) (J.A.)), that the Commission's waiver rule demands. *See* 47 C.F.R. § 1.925(b)(3).

and obtaining and testing handsets for network compatibility." *Id.* at 9819 (¶ 12) (J.A.). In addition, i wireless documented with detailed timelines its efforts to procure fourteen different handset models. *Id. See* i wireless Reconsideration Petition (J.A.).

Furthermore, unlike petitioners, i wireless had shown that its efforts to achieve full compliance were hampered by erroneous information provided by an equipment supplier. *Reconsideration Order*27 FCC Rcd at 9819 (¶ 13). (J.A.). For example, i wireless purchased a handset model based upon the suppliers' representation that the model was compliant with the Commission's inductive coupling compatibility standards. When i wireless discovered that the handset in fact was not compliant, it purchased an alternative model. However, the supplier failed to provide i wireless with the alternative model by the promised date. *Id*. at 9820 (¶ 13) (J.A).

Finally, i wireless' efforts to achieve full compliance were hampered further because its network used "GSM technology[] for which hearing aid-compatible handset availability was significantly more limited" than for

digital wireless carriers – like CTC and Blanca – using the alternative CDMA technology. *Id*. at 9822 n.59 (J.A.); *see id*. at 9820 (¶ 17) (J.A.).[11]

The diligent efforts of i wireless to obtain inductive coupling-compliant equipment stand in stark contrast with the efforts of petitioners: as the Commission explained, Blanca, CTC, and Farmers simply contacted their existing vendors without "investigat[ing] alternative suppliers as they should have done in the exercise of reasonable diligence when their existing vendors could not satisfy their requirements." *Reconsideration Order*, 27 FCC Rcd at 9824 (¶ 22 (J.A.). The Commission reasonably concluded that, even though i wireless did not become fully compliant until March 22, 2007, it had satisfied its burden to demonstrate diligent efforts to procure and to offer inductive coupling-compliant equipment.[12]

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[11] As the Commission observed, the only one of the petitioners that employed GSM technology was Farmers, which did not achieve compliance until June 6, 2007, "more than *two months after* i wireless and its related licensees." Id. at 9822 n.59 (J.A.) (emphasis added).

[12] Petitioners fault the Commission for granting what they characterize as a "tagalong[] coattail waiver" to South Slope Wireless. Petitioners' Brief at 32. The record shows, however, that South Slope Wireless participated in i wireless' bulk discount equipment program and operated its systems as an integrated part of the i wireless network. South Slope Wireless Reconsideration Petition (Mar. 27, 2008) at 14-15 (¶¶ 21-22) (J.A.). The Commission thus acted reasonably in granting South Slope Wireless a waiver on the ground that "its circumstances are indistinguishable from those of i wireless and its other associated carriers." *See Reconsideration Order*, 27 FCC Rcd at 9820 (¶ 16) (J.A.).

C. Petitioners Were Not Similarly Situated With The Carriers Granted Waivers In The *2007 GSM Waiver Order*.

Petitioners' final disparate-treatment argument focuses on the Commission's 2007 grant of waivers to carriers that had failed to timely comply with the separate acoustic coupling-compatible handset deployment requirement. *See* Petitioners Br. 33-39 (citing *2007 GSM Waiver Order*, 22 FCC Rcd 20459). Because the recipients of those waivers were not similarly situated to petitioners here, that argument likewise fails.

As the Commission explained in the *Reconsideration Order*, the waivers in the *2007 GSM Waiver Order* were based upon "unique and unusual circumstances" not present in this case. *Reconsideration Order*, 27 FCC Rcd at 9823 (¶ 21) (quoting *2007 GSM Waiver Order*, 22 FCC Rcd at 20472 (¶ 30)) (J.A.). The carriers that obtained waivers in the *2007 GSM Waiver Order* had purchased handsets that their vendors had represented were compliant with the Commission's standards for acoustic coupling. Because those carriers had "no ready means" to identify compliant handsets from the Commission's records, they had "no practical alternative" but to rely on the vendors and manufacturers for information concerning the compatibility of specific handset models. *2007 GSM Waiver Order*, 22 FCC Rcd 20472 (¶ 30). Accordingly, the Commission determined that they had **"**acted diligently

and reasonably, although erroneously, based on the information available to them." *Id.* at 20473(¶ 30).

In contrast, Blanca, CTC, and Farmers do not contend that they purchased equipment in the reasonable belief that it was compliant. CTC and Farmers did not timely obtain equipment at all, and Blanca's belief that it had obtained compliant equipment was, by its own admission, a mistake for which it was solely responsible. Blanca Supplemental Report at 3 (J.A.).

Blanca, CTC, and Farmers claim that they are similarly situated with the carriers granted waivers in the *2007 GSM Waiver Order* not because they timely obtained compliant equipment, but because they relied upon their vendors' representations that compliant equipment was unavailable. But, as the Commission emphasized, petitioners were thereby placed "on notice of their *non*-compliance." *Reconsideration Order*, 27 FCC Rcd at 9823 (¶ 21) (J.A.) (emphasis added). In contrast, the recipients of waivers in the *2007 GSM Waiver Order* "reasonably concluded, . . . based on information from [their] vendors, that they had *already achieved* compliance." *Id*. at 9823 (¶ 20) (J.A.) (emphasis added). In short, a carrier's reasonable reliance on a vendor's representation that a particular handset is compliant (as in the *2007 GSM Waiver Order*) is very different from its reliance "on a vendor that the

carrier knows cannot provide compliant handsets." *Id.* at 9823 (¶¶ 20-21) (J.A.).

Blanca, CTC, and Farmers contend that "if Petitioners' vendors were correct and no HAC compliant handsets were available," then it would have been "futile" to seek compliant equipment from other sources. Petitioners' Brief at 35. Because petitioners failed to raise that contention before the Commission, section 405(a) of the Communications Act bars petitioners from raising it on review. 47 U.S.C. § 405(a). *See Ad Hoc Telecomm. Users Comm. v. FCC*, 572 F.3d 903, 912 (D.C. Cir. 2009) ("Under 47 U.S.C. § 405(a), the FCC's "opportunity to pass" on an issue is a 'condition precedent to judicial review.'")

In any event, petitioners' newly proffered argument is undercut by the many Tier III carriers that *were* able to obtain compliant equipment when petitioners' vendors said it was unavailable and petitioners point to nothing in the record to support their view. To the contrary, in the proceedings below each of the petitioners pointed only to an inability to obtain compliant equipment "from *its* handset distributors." Blanca Waiver Petition at 2 (J.A.) (emphasis added); *accord* CTC Waiver Petition at 2 (J.A.); Farmers Waiver Petition at 2 (J.A.). *See also* Petitioners' Reconsideration Petition at 2 (claiming inability "to obtain HAC compliant handsets from their

vendors"). At no point did petitioners attempt to demonstrate that it would have been futile to obtain compliant equipment from other sources – indeed, they acknowledge that other vendors might have had "different or better information." Petitioners Brief at 35. They should have asked.

III. THE COMMISSION USED LAWFUL PROCEDURES IN ADJUDICATING PETITIONERS' WAIVER PETITIONS.

A. The Commission's Waiver Decisions Did Not Require Notice-And-Comment Rulemaking Procedures.

Petitioners argue that, in adjudicating their waiver petitions, the Commission established a January 1, 2007 compliance deadline on a retroactive basis without following the notice-and-comment rulemaking procedures required by the Administrative Procedure Act ("APA"), 5 U.S.C. § 553(b), (c). *See* Petitioners' Brief at 20. Petitioners' contention confuses the Commission's explanation of its adjudication of requests for waivers of an existing rule with the agency's adoption of a new regulation. It is well established that the APA does not require the Commission to use notice-and-comment rulemaking procedures when engaging in informal adjudications such as the waiver proceedings on review. *See Occidental Petroleum Corp. v. SEC*, 873 F.2d 325, 337 (D.C. Cir. 1989); *see also FCC v. Fox Television*

Stns., Inc., 556 U.S. 502, 529 n.8 (2009); *United States Telecom Ass'n v. FCC*, 400 F.3d 29, 34 n.9 (D.C. Cir. 2005).[13]

The only compliance deadline in this case, which was established after formal notice-and-comment rulemaking procedures, is embodied in section 20.19(d)(2). That rule required digital service providers to offer equipment that satisfied the Commission's inductive coupling–compatibility standards by September 18, 2006. 47 C.F.R. § 20.19(d)(2). Contrary to petitioners' contention (Petitioners' Brief at 12, 20-21), January 1, 2007 was not "an alternate deadline." *Reconsideration Order*, 27 FCC Rcd at 9822 (¶ 19) (J.A.). It was instead part of the framework by which the Commission explained the basis for its grant (or denial) of petitions for waiver of the September 18, 2006 deadline, which at all times remained in force and of which petitioners had ample notice and on which they had a full and fair opportunity to comment. As we have shown, a waiver adjudication is not a rulemaking proceeding requiring notice and comment.[14] *See* p. 31, *supra*. Nor does an

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[13] The APA imposes certain procedural requirements on formal trial-type adjudications generally "required by statute to be determined on the record." 5 U.S.C. § 554(a). *See* 5 U.S.C. §§ 554(b)(3), 554(c)(1), 557(c)(1), (2). The waiver proceedings below, however, were not formal adjudications. *See Occidental Petroleum Corp*, 873 F.2d 325.

[14] As the Commission emphasized, "compliance by January 1, 2007, although indicative of reasonably diligent efforts, was not conclusive." *Reconsideration Order*, 27 FCC Rcd at 9822 n.58 (J.A.). SLO Cellular, for

agency convert an adjudication into a rulemaking simply because it summarizes its reasoning – or employs a date in explaining a presumption – in the course of disposing of a number of cases. *See Nat'l Ass'n of Broadcasters v. FCC*, 569 F.3d 416, 425 (D.C. Cir. 2009).

B. The Commission Did Not Violate The Paperwork Reduction Act.

Petitioners take issue with the Commission's statement in the *Reconsideration Order* that "CTC did not provide a sworn declaration establishing the authenticity of" a late-filed invoice purporting to show that the carrier had purchased an inductive coupling-compliant handset on January 25, 2007, *see Reconsideration Order*, 27 FCC Rcd at 9824 (¶ 22) (J.A.), and suggest that the requirement to provide such a declaration would be a violation of the PRA, 44 U.S.C. §§ 3501 *et seq.* *See* Petitioners Brief at 43-45.

The PRA, which governs the "collection of information" by federal agencies, *see* 44 U.S.C. § 3507(a), has no application to CTC's claim. CTC voluntarily submitted the January 25, 2007 invoice to support its contention

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example, was denied a waiver even though it had achieved compliance by December 1, 2006. *Id*. *See also Order*, 23 FCC Rcd at 3368 (¶¶ 32, 34) (J.A.). Conversely, a number of carriers, including i wireless and its related entities, were granted waivers even though they achieved compliance after January 1, 2007. *See Reconsideration Order*, 27 FCC Rcd at 9819-20 (¶¶ 12-13) (J.A.).

that its efforts at compliance were diligent. The Commission's observation that the carrier did not submit a sworn declaration supporting the authenticity of the invoice goes only to the Commission's evaluation of the probative value of the evidence before it, a matter with which the PRA has no concern. *See Benkelman Tel. Co. v. FCC*, 220 F.3d 601, 607 (D.C. Cir. 2000) (PRA applies only to requirements to report information to agencies, and not to agency algorithm evaluating information that has been provided to it).

In any event, the Commission made clear that whether or not it had been authenticated by a sworn declaration, CTC's January 25, 2007 invoice showed only that the carrier did not request a compliant device "until the end of January," and thus, the invoice "would not support a finding of reasonably diligent efforts." *Reconsideration Order*, 27 FCC Rcd at 9824 (¶ 22) (J.A.). The Commission thus did not deny CTC's petition for a waiver because the carrier failed to authenticate the January 25, 2007 invoice.

IV. THE *EX PARTE* SUBMISSION DID NOT TAINT THE ADMINSTRATIVE PROCESS.

Lastly, petitioners contend (Brief at 45-47) that their waiver denials were infirm because the Commission received, in violation of the agency's *ex parte* rules, a Consolidated Opposition from two organizations representing people with hearing loss stating that "[a]ny waiver granted should be only for

limited time, and in no case later than January 2007." Consolidated Opposition (Nov. 6, 2006) at 13 (J.A.).[15]

A court will not reverse an agency's decision "unless 'the agency's decisionmaking process was irrevocably tainted so as to make the ultimate judgment of the agency unfair.'" *Lichoulas v. FERC*, 606 F.3d 769, 778 (D.C. Cir. 2010) (quoting *Press Broad. Co. v. FCC*, 59 F.3d 1365, 1369 (D.C. Cir. 1995)). The factors in determining whether the agency's processes were "irrevocably tainted" include "'the gravity of the *ex parte* communications; whether the contacts may have influenced the agency's ultimate decision; whether the party making the improper contacts benefited from the agency's ultimate decision; whether the contents of the communications were unknown to opposing parties, who therefore had no opportunity to respond; and whether vacation of the agency's decision and

[15] At the time the Consolidated Opposition was filed, the waiver proceeding was a "restricted proceeding" in which *ex parte* presentations (*i.e.*, presentations, if written, that are not served on all the parties to the proceeding) were prohibited. 47 C.F.R. § 1.1208. On January 18, 2007, however, the Commission's staff by Public Notice announced that the proceeding (among others) would thereafter be governed by the Commission's "permit but disclose" rule, 47 C.F.R. § 1.1206, under which *ex parte* filings are permitted if disclosed in the public docket. *See* Public Notice, 22 FCC Rcd 535 (2007) (J.A.). A number of parties, including Blanca, CTC, and Farmers, subsequently filed *ex parte* pleadings in the administrative docket. *See, e.g.*, Blanca, CTC & Farmers *Ex Parte* Supplemental Reply Comments (July 28, 2008) (J.A.).

remand for new proceedings would serve a useful purpose.'" *Freeman Eng'g Assocs. v. FCC*, 103 F.3d 169, 184 (D.C. Cir. 1997) (quoting *Prof. Air Traffic Controllers Org. v. FLRA*, 685 F.2d 547, 565(D.C. Cir. 1982)).

The record shows that the administrative process was not "irrevocably tainted," *Lichoulas*, 606 F.3d at 778, by the filing of the Consolidated Opposition in this case. Only a single *ex parte* rule violation occurred, and that violation was "inadvertent." *Reconsideration Order*, 27 FCC Rcd at 9826 n.83 (J.A.). Moreover, the Consolidated Opposition, although not served on the parties to the proceeding, was "post[ed] . . . to the correct docket, thereby making it available electronically to the petitioners." *Id.* Indeed, petitioners "had ample opportunity to discuss and address the Consolidated Opposition in several of their filings." *Id.* at 9826 (¶ 26) (J.A.). Finally, given the lack of a showing of diligence on petitioners' part, the Commission found that it "would have reached the same result with or without consideration of the Consolidated Opposition." *Id.* To be sure, the Commission's determination that a carrier was more likely to have exercised reasonable diligence if it came into compliance by January 1, 2007 "was 'consistent' with" the views expressed in the Consolidated Opposition, but, as

the Commission made clear, it did not "rel[y] on" that opposition to reach its own independent conclusion. *Id*.[16]

The "harmless error rule" in the APA "requires the party asserting error to demonstrate prejudice from the error." *Air Canada v. DOT*, 148 F.3d 1142, 1156 (D.C. Cir. 1998). *See* 5 U.S.C. § 706. The *ex parte* violation relied upon by petitioners did not affect the outcome and thus "was plainly harmless." *United States Telecom Ass'n*, 400 F.3d at 41.

[16] Petitioners fault the Commission for "ignor[ing]" that the Consolidated Opposition was untimely filed. Petitioners' Brief at 47. But once the Commission determined that the Consolidated Opposition had been filed in violation of the *ex parte* rules, *Reconsideration Order*, 27 FCC Rcd at 9825 (¶ 25) (J.A.), it had no need to consider whether to disregard the pleading on the additional ground that it had been untimely filed.

CONCLUSION

The petition for review should be denied.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BLANCA TELEPHONE COMPANY, ET AL., PETITIONERS, v. FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS.	NO. 12-1365

CERTIFICATE OF COMPLIANCE

Pursuant to the requirements of Fed. R. App. P. 32(a)(7), I hereby certify that the accompanying Brief for Respondents in the captioned case contains 8,502 words.

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STATUTORY APPENDIX

5 U.S.C. § 553
5 U.S.C. § 705

44 U.S.C. § 3507(a)

47 U.S.C. § 405
47 U.S.C. §610

47 C.F.R. § 1.925
47 C.F.R. § 20.19(c) & (d) [prior to June 6, 2008]

5 U.S.C. § 553

UNITED STATES CODE ANNOTATED
TITLE 5. GOVERNMENT ORGANIZATION AND EMPLOYEES
PART I. THE AGENCIES GENERALLY
CHAPTER 5. ADMINISTRATIVE PROCEDURE
SUBCHAPTER II. ADMINISTRATIVE PROCEDURE

§ 553. Rule making

(a) This section applies, according to the provisions thereof, except to the extent that there is involved--

(1) a military or foreign affairs function of the United States; or

(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include--

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply--

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except--

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretative rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and published with the rule.

(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

5 U.S.C. § 706

UNITED STATES CODE ANNOTATED
TITLE 5. GOVERNMENT ORGANIZATION AND EMPLOYEES
PART I. THE AGENCIES GENERALLY
CHAPTER 7. JUDICIAL REVIEW

§ 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall--

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be--

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

44 U.S.C. § 3507(a)

UNITED STATES CODE ANNOTATED
TITLE 44. PUBLIC PRINTING AND DOCUMENTS
CHAPTER 35. COORDINATION OF FEDERAL INFORMATION POLICY
SUBCHAPTER I. FEDERAL INFORMATION POLICY

§ 3507. Public information collection activities; submission to Director; approval and delegation

(a) An agency shall not conduct or sponsor the collection of information unless in advance of the adoption or revision of the collection of information--

(1) the agency has--

(A) conducted the review established under section 3506(c)(1);

(B) evaluated the public comments received under section 3506(c)(2);

(C) submitted to the Director the certification required under section 3506(c)(3), the proposed collection of information, copies of pertinent statutory authority, regulations, and other related materials as the Director may specify; and

(D) published a notice in the Federal Register--

(i) stating that the agency has made such submission; and

(ii) setting forth--

(I) a title for the collection of information;

(II) a summary of the collection of information;

(III) a brief description of the need for the information and the proposed use of the information;

(IV) a description of the likely respondents and proposed frequency of response to the collection of information;

(V) an estimate of the burden that shall result from the collection of information; and

(VI) notice that comments may be submitted to the agency and Director;

(2) the Director has approved the proposed collection of information or approval has been inferred, under the provisions of this section; and

(3) the agency has obtained from the Director a control number to be displayed upon the collection of information.

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47 U.S.C. § 405

UNITED STATES CODE ANNOTATED
TITLE 47. TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS
CHAPTER 5. WIRE OR RADIO COMMUNICATION
SUBCHAPTER IV. PROCEDURAL AND ADMINISTRATIVE PROVISIONS

§ 405. Petition for reconsideration; procedure; disposition; time of filing; additional evidence; time for disposition of petition for reconsideration of order concluding hearing or investigation; appeal of order

(a) After an order, decision, report, or action has been made or taken in any proceeding by the Commission, or by any designated authority within the Commission pursuant to a delegation under section 155(c)(1) of this title, any party thereto, or any other person aggrieved or whose interests are adversely affected thereby, may petition for reconsideration only to the authority making or taking the order, decision, report, or action; and it shall be lawful for such authority, whether it be the Commission or other authority designated under section 155(c)(1) of this title, in its discretion, to grant such a reconsideration if sufficient reason therefor be made to appear. A petition for reconsideration must be filed within thirty days from the date upon which public notice is given of the order, decision, report, or action complained of. No such application shall excuse any person from complying with or obeying any order, decision, report, or action of the Commission, or operate in any manner to stay or postpone the enforcement thereof, without the special order of the Commission. The filing of a petition for reconsideration shall not be a condition precedent to judicial review of any such order, decision, report, or action, except where the party seeking such review (1) was not a party to the proceedings resulting in such order, decision, report, or action, or (2) relies on questions of fact or law upon which the Commission, or designated authority within the Commission, has been afforded no opportunity to pass. The Commission, or designated authority within the Commission, shall enter an order, with a concise statement of the reasons therefor, denying a petition for reconsideration or

granting such petition, in whole or in part, and ordering such further proceedings as may be appropriate: *Provided,* That in any case where such petition relates to an instrument of authorization granted without a hearing, the Commission, or designated authority within the Commission, shall take such action within ninety days of the filing of such petition. Reconsiderations shall be governed by such general rules as the Commission may establish, except that no evidence other than newly discovered evidence, evidence which has become available only since the original taking of evidence, or evidence which the Commission or designated authority within the Commission believes should have been taken in the original proceeding shall be taken on any reconsideration. The time within which a petition for review must be filed in a proceeding to which section 402(a) of this title applies, or within which an appeal must be taken under section 402(b) of this title in any case, shall be computed from the date upon which the Commission gives public notice of the order, decision, report, or action complained of.

(b)(1) Within 90 days after receiving a petition for reconsideration of an order concluding a hearing under section 204(a) of this title or concluding an investigation under section 208(b) of this title, the Commission shall issue an order granting or denying such petition.

(2) Any order issued under paragraph (1) shall be a final order and may be appealed under section 402(a) of this title.

47 U.S.C. § 610

UNITED STATES CODE ANNOTATED
TITLE 47. TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS
CHAPTER 5. WIRE OR RADIO COMMUNICATION
SUBCHAPTER VI. MISCELLANEOUS PROVISIONS

§ 610. Telephone service for disabled

(a) Establishment of regulations

The Commission shall establish such regulations as are necessary to ensure reasonable access to telephone service by persons with impaired hearing.

(b)(1) Except as provided in paragraphs (2) and (3) and subsection (c), the Commission shall require that customer premises equipment described in this paragraph provide internal means for effective use with hearing aids that are designed to be compatible with telephones which meet established technical standards for hearing aid compatibility. Customer premises equipment described in this paragraph are the following:

(A) All essential telephones.

(B) All telephones manufactured in the United States (other than for export) more than one year after August 16, 1988 or imported for use in the United States more than one year after such date.

(C) All customer premises equipment used with advanced communications services 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 equivalent to a telephone, subject to the regulations prescribed by the Commission under subsection (e).

(2)(A) The regulations prescribed by the Commission under paragraph (1), shall exempt from the requirements established pursuant to subparagraphs

(B) and (C) of paragraph (1) only--

(i) telephones used with public mobile services;

(ii) telephones used with private radio services; and

(iii) secure telephones.

(iv) Redesignated (iii)

(B) The Commission shall periodically assess the appropriateness of continuing in effect the exemptions for telephones and other customer premises equipment described in subparagraph (A) of this paragraph. The Commission shall revoke or otherwise limit any such exemption if the Commission determines that--

(i) such revocation or limitation is in the public interest;

(ii) continuation of the exemption without such revocation or limitation would have an adverse effect on hearing-impaired individuals;

(iii) compliance with the requirements of subparagraph (B) or (C) of paragraph (1) is technologically feasible for the telephones to which the exemption applies; and

(iv) compliance with the requirements of subparagraph (B) or (C) of paragraph (1) would not increase costs to such an extent that the telephones to which the exemption applies could not be successfully marketed.

(C) Redesignated (B)

(3) The Commission may, upon the application of any interested person, initiate a proceeding to waive the requirements of paragraph (1)(B) of this subsection with respect to new telephones, or telephones associated with a new technology or service. The Commission shall not grant such a waiver unless the Commission determines, on the basis of evidence in the record of such proceeding, that such telephones, or such technology or service, are in the public interest, and that (A) compliance with the requirements of paragraph (1)(B) is technologically infeasible, or (B) compliance with such requirements would increase the costs of the telephones, or of the

technology or service, to such an extent that such telephones, technology, or service could not be successfully marketed. In any proceeding under this paragraph to grant a waiver from the requirements of paragraph (1)(B), the Commission shall consider the effect on hearing-impaired individuals of granting the waiver. The Commission shall periodically review and determine the continuing need for any waiver granted pursuant to this paragraph.

(4) For purposes of this subsection--

(A) the term “essential telephones” means only coin-operated telephones, telephones provided for emergency use, and other telephones frequently needed for use by persons using such hearing aids;

(B) the term “telephones used with public mobile services” means telephones and other customer premises equipment used in whole or in part with air-to-ground radiotelephone services, cellular radio telecommunications services, offshore radio, rural radio service, public land mobile telephone service, or other common carrier radio communication services covered by title 47 of the Code of Federal Regulations, or any functionally equivalent unlicensed wireless services;

(C) the term “telephones used with private radio services” means telephones and other customer premises equipment used in whole or in part with private land mobile radio services and other communications services characterized by the Commission in its rules as private radio services; and

(D) the term “secure telephones” means telephones that are approved by the United States Government for the transmission of classified or sensitive voice communications.

(c) Technical standards

The Commission shall establish or approve such technical standards as are required to enforce this section. A telephone or other customer premises equipment that is compliant with relevant technical standards developed through a public participation process and in consultation with interested consumer stakeholders (designated by the Commission for the purposes of this section) will be considered hearing aid compatible for purposes of this section, until such time as the Commission may determine otherwise. The

Commission shall consult with the public, including people with hearing loss, in establishing or approving such technical standards. The Commission may delegate this authority to an employee pursuant to section 155(c) of this title. The Commission shall remain the final arbiter as to whether the standards meet the requirements of this section.

(d) Labeling of packaging materials for equipment

The Commission shall establish such requirements for the labeling of packaging materials for equipment as are needed to provide adequate information to consumers on the compatibility between telephones and hearing aids.

(e) Costs and benefits; encouragement of use of currently available technology

In any rulemaking to implement the provisions of this section, the Commission shall specifically consider the costs and benefits to all telephone users, including persons with and without hearing loss. The Commission shall ensure that regulations adopted to implement this section encourage the use of currently available technology and do not discourage or impair the development of improved technology. In implementing the provisions of subsection (b)(1)(C), the Commission shall 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.

(f) Periodic review of regulations; retrofitting

The Commission shall periodically review the regulations established pursuant to this section. Except for coin-operated telephones and telephones provided for emergency use, the Commission may not require the retrofitting of equipment to achieve the purposes of this section.

(g) Recovery of reasonable and prudent costs

Any common carrier or connecting carrier may provide specialized terminal equipment needed by persons whose hearing, speech, vision, or mobility is impaired. The State commission may allow the carrier to recover in its tariffs

for regulated service reasonable and prudent costs not charged directly to users of such equipment.

(h) Rule of construction

Nothing in the Twenty-First Century Communications and Video Accessibility Act of 2010 shall be construed to modify the Commission's regulations set forth in section 20.19 of title 47 of the Code of Federal Regulations, as in effect on October 8, 2010.

47 C.F.R. § 1.925

CODE OF FEDERAL REGULATIONS
TITLE 47. TELECOMMUNICATION
CHAPTER I. FEDERAL COMMUNICATIONS COMMISSION
SUBCHAPTER A. GENERAL
PART 1. PRACTICE AND PROCEDURE
SUBPART F. WIRELESS RADIO SERVICES APPLICATIONS AND PROCEEDINGS
APPLICATION REQUIREMENTS AND PROCEDURES

§ 1.925 Waivers.

(a) Waiver requests generally. The Commission may waive specific requirements of the rules on its own motion or upon request. The fees for such waiver requests are set forth in § 1.1102 of this part.

(b) Procedure and format for filing waiver requests.

(1) Requests for waiver of rules associated with licenses or applications in the Wireless Radio Services must be filed on FCC Form 601, 603, or 605.

(2) Requests for waiver must contain a complete explanation as to why the waiver is desired. If the information necessary to support a waiver request is already on file, the applicant may cross-reference the specific filing where the information may be found.

(3) The Commission may grant a request for waiver if it is shown that:

(i) The underlying purpose of the rule(s) would not be served or would be frustrated by application to the instant case, and that a grant of the requested waiver would be in the public interest; or

(ii) In view of unique or unusual factual circumstances of the instant case, application of the rule(s) would be inequitable, unduly burdensome

or contrary to the public interest, or the applicant has no reasonable alternative.

(4) Applicants requiring expedited processing of their request for waiver shall clearly caption their request for waiver with the words “WAIVER--EXPEDITED ACTION REQUESTED.”

(c) Action on Waiver Requests.

(i) The Commission, in its discretion, may give public notice of the filing of a waiver request and seek comment from the public or affected parties.

(ii) Denial of a rule waiver request associated with an application renders that application defective unless it contains an alternative proposal that fully complies with the rules, in which event, the application will be processed using the alternative proposal as if the waiver had not been requested. Applications rendered defective may be dismissed without prejudice.

47 C.F.R. § 20.19(c) & (d)

CODE OF FEDERAL REGULATIONS
TITLE 47. TELECOMMUNICATION
CHAPTER I. FEDERAL COMMUNICATIONS COMMISSION
SUBCHAPTER B. COMMON CARRIER SERVICES
PART 20. COMMERCIAL MOBILE RADIO SERVICES
[CHANGED TO "COMMERCIAL MOBILE SERVICES"
EFFECTIVE JUNE 6, 2011]

Effective: May 16, 2007 to June 5, 2008

§ 20.19 Hearing aid-compatible mobile handsets.

<Text of section effective until June 6, 2008.>

* * * * *

(c) Phase-in for public mobile service handsets concerning radio frequency interference.

(1) Each manufacturer of handsets used with public mobile services for use in the United States or imported for use in the United States must:

(i) Offer to service providers at least two handset models for each air interface offered that comply with § 20.19(b)(1) by September 16, 2005; and

(ii) Ensure at least 50 percent of their handset offerings for each air interface offered comply with § 20.19(b)(1) by February 18, 2008.

(2) And each provider of public mobile radio services must:

(i)(A) Include in its handset offerings at least two handset models per air interface that comply with § 20.19(b)(1) by September 16, 2005, and make available in each retail store owned or operated by the provider all of these handset models for consumers to test in the store; or

(B) In the event a provider of public mobile radio services is using a TDMA air interface and plans to overbuild (i.e., replace) its network to employ alternative air interface(s), it must:

(1) Offer two handset models that comply with § 20.19(b)(1) by September 16, 2005, to its customers that receive service from the overbuilt (i.e., non–TDMA) portion of its network, and make available in each retail store it owns or operates all of these handset models for consumers to test in the store:

(2) Overbuild (i.e., replace) its entire network to employ alternative air interface(s), and

(3) Complete the overbuild by September 18, 2006; and

(ii) Ensure that at least 50 percent of its handset models for each air interface comply with § 20.19(b)(1) by February 18, 2008, calculated based on the total number of unique digital wireless handset models the carrier offers nationwide.

(3) Each Tier I carrier must:

(i)(A) Include in its handset offerings four digital wireless handset models per air interface or twenty-five percent of the total number of digital wireless handset models offered by the carrier nationwide (calculated based on the total number of unique digital wireless handset models the carrier offers nationwide) per air interface that comply with § 20.19(b)(1) by September 16, 2005, and make available in each retail store owned or operated by the carrier all of these handset models for consumers to test in the store; and

(B) Include in its handset offerings five digital wireless handset models per air interface or twenty-five percent of the total number of digital wireless handset models offered by the carrier nationwide (calculated based on the total number of unique digital wireless handset models the carrier offers nationwide) per air interface that comply with § 20.19(b)(1) by September 16, 2006, and make available in each retail store owned or operated by the carrier all of these handset models for consumers to test in the store; and

(ii) Ensure that at least 50 percent of their handset models for each air interface comply with § 20.19(b)(1) by February 18, 2008, calculated based on the total number of unique digital wireless phone models the carrier offers nationwide.

(d) Phase-in for public mobile service handsets concerning inductive coupling.

(1) Each manufacturer of handsets used with public mobile services for use in the United Sates or imported for use in the United States must offer to service providers at least two handset models for each air interface offered that comply with § 20.19(b)(2) by September 18, 2006.

(2) And each provider of public mobile service must include in their handset offerings at least two handset models for each air interface that comply with § 20.19(b)(2) by September 18, 2006 and make available in each retail store owned or operated by the provider all of these handset models for consumers to test in the store.

12-1365

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Blanca Telephone Co., et al., Petitioners

v.

Federal Communications Commission and the
United States of America, Respondents

CERTIFICATE OF SERVICE

I, Laurel R. Bergold, hereby certify that on March 1, 2013, I electronically filed the foregoing Brief for Respondents with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

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