

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

In the Matter of)	
)	
Section 68.4(a) of the Commission's Rules)	WT Docket No. 01-309
Governing Hearing Aid-Compatible)	
Telephones)	

Comments of the
Consumer Electronics Retailers Coalition

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The Consumer Electronics Retailers Coalition ("CERC") hereby submits its comments in response to the Commission's Further Notice of Proposed Rulemaking in this docket.¹ CERC is a nonprofit public policy corporation focused on the concerns of consumer electronics retailers and their customers. In addition to its longstanding specialist retailer members Best Buy, Circuit City, and RadioShack, CERC Board members include general retailers Target and Wal-Mart, and the North American Retail Dealers Association ("NARDA"). The National Retail Federation ("NRF") and the Retail Industry Leaders Association ("RILA") are also CERC members.

As may be glimpsed from the range of businesses included in CERC's membership, which includes some of the smallest retailers and some of the largest,² an imposition on retailers, generally, would cover many different methods of doing business and modes of relationships with customers, product vendors, and service providers. It would differ greatly in kind and in

¹ *In the Matter of Section 68.4(a) of the Commission's Rules Governing Hearing Aid-Compatible Telephones*, WT Docket No. 01-309, Order On Reconsideration And Further Notice Of Proposed Rulemaking (Rel. June 21, 2005) ("FNPRM").

² NARDA represents thousands of regional, local, and single-location retailers, whereas RILA represents some of the largest national chains.

consequence from a requirement imposed on retail establishments that were set up exclusively to market a single family of services to consumers, through essentially one product.

CERC does not believe that the Commission has anywhere been granted the jurisdiction to impose regulations on retailers' stocking or marketing practices with respect to wireless telephones. More specifically, the Commission lacks jurisdiction to require, of independent retailers, an in-store testing regime as it has imposed on establishments that are owned and operated solely for the purpose of purveying wireless services. In this respect, arguments based on "agency," under Section 217 of the Communications Act of 1934 or generally, would be of the bootstrap variety – *creating* a duty where none exists in the business relationship of the retailer and the wireless service provider.

If the Commission did have jurisdiction, imposition of a testing requirement on independent retailers would be highly arbitrary. It is one thing to impose such a requirement, *plus* a generous return policy, on the service operator in its purpose-built establishment. Retailers, in contrast – even specialized consumer electronics retailers – sell a huge variety of goods, at vastly different price points, and rely on a well-established and more generous return policy to assure customer satisfaction.

CERC's members are sensitive to the interests and concerns of disabled or impaired Americans, and sell many products that are designed for their convenience. It has not been found necessary, by the Congress or heretofore by the Commission, to require that – apart from obligations on manufacturers -- these products be stocked or demonstrated in any particular or standardized way. To impose such a requirement would, in the long run, tend to impair the free market in the many new devices that retailers of all stripes present to the public.

I. THE COMMISSION DOES NOT HAVE LEGAL AUTHORITY TO IMPOSE A MANDATE GOVERNING RETAIL STOCKING OR SALE PRACTICES WITH RESPECT TO HANDSETS.

The Court of Appeals for the D.C. Circuit, earlier this year, confirmed that Commission regulatory authority must arise from a specific congressional grant:

The FCC, like other federal agencies, “literally has no power to act . . . unless and until Congress confers power upon it.” *La. Pub. Serv. Comm’n v. FCC*, 476 U.S. 355, 374 (1986). The Commission “has no constitutional or common law existence or authority, but only those authorities conferred upon it by Congress.” *Michigan v. EPA*, 268 F.3d 1075, 1081 (D.C. Cir. 2001). Hence, the FCC’s power to promulgate legislative regulations is limited to the scope of the authority Congress has delegated to it. *Id.* (citing *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988)).³

There is nothing in the Communications Act, or, more specifically, in the Hearing Aid Compatibility Act of 1988 (“the HAC Act”),⁴ to suggest that the Commission has the power to regulate the stocking or marketing practices of retailers with respect to wireless telephones.

A. Nothing In the Communications Act Suggests That The Commission Can Regulate The Retail Sales Of Wireless Products By Independent Retailers.

The Commission, in its FNPRM, does not cite any authority for the proposition that, apart from some theory of agency, obligations duly imposed on service providers and product manufacturers can be translated into a power to impose stocking and marketing mandates on an independent retailer. Nor is any such authority suggested in or by the CTIA Petition⁵ that the Commission cites as the source of its inquiry.⁶

In fact, there is neither authority nor precedent for the Commission to govern the merchandising, stocking, or product demonstration practices of independent retailers of wireless handsets. At best the Commission can use its authority to take a manufactured product off the

³ *American Library Ass’n v. FCC*, 406 F.3d 689, 708 (D.C. Cir. 2005).

⁴ Pub. L. No. 100-394, 102 Stat. 976 (1988), codified at 47 U.S.C. § 610.

⁵ Petition for Reconsideration and Clarification of the Cellular Telecommunications and Internet Association, WT Docket No. 01-309 (filed Oct. 20, 2003) (Corrected Version).

⁶ FNPRM par. 62.

market, and hence require that it be recalled from wholesale and retail distribution. This is a far cry from affirmatively regulating the stocking, marketing, and merchandising practices of retailers with respect to products that have *not* been recalled from commerce.

B. Nothing In The HAC Act Suggests That The Commission Can Require That Handsets Be Marketed Or Demonstrated At Retail By An Independent Retailer In Any Specific Fashion.

Again, absent some assumption or presumption based on agency, one searches the HAC Act for any indication that a power to regulate the stocking or sale of wireless handsets by independent retailers was granted by the Congress to the Commission. The HAC Act is directed explicitly at *manufacturers* of telephone equipment. The Senate Commerce Committee report accompanying the HAC Act makes clear that the purpose of the legislation is to “require almost all telephones *manufactured or imported* ... to be compatible with hearing aids.”⁷ The Committee said in a section heading of its Report that “*A law requiring all telephones manufactured or imported to be hearing aid compatible would be easier to enforce.*” It explained:

“By imposing the responsibility for hearing aid compatibility at the time of manufacture rather than the time of installation, the law draws a clear line and places the burden for compliance on a smaller, and more organized number of entities.”⁸

Clearly, then, the drafters of the HAC Act realized that given the diversity of the retail market, as noted above, the responsibility for complying with affirmative mandates should reside with manufacturers. Absent a new determination by the Congress, the Commission would be acting contrary to congressional intention by imposing a mandate on retailers.

⁷ S. Rep. No. 100-391, at 1 (1988), *reprinted in* 1988 U.S.C.C.A.N. 1345 (emphasis supplied).

⁸ *Id.* at 3 - 4.

Since the passage of the Act, the Congress and the Commission have acted consistently with this original congressional intention. To the extent that the Commission has ventured beyond the design and manufacturer of the telephones themselves, it has been pursuant only to an express, interim instruction by the Congress, with respect to “essential telephones,” that did not survive the subsequent broadening of the scope of the Act. As in the original Act, regulation of the stocking, marketing, and merchandising practices of retailers is nowhere mentioned, or even implicated, by the Congress in its ultimate version of this legislation.

C. **Nothing In Section 217 Of The Communications Act, Or In Agency Law Generally, Suggests That A Substantive Regulatory Mandate Can Be Imposed On An Independent Retailer On The Basis Of A Presumed Agency Relationship.**

Finally, the Commission notes Section 217, or agency law generally, and asks whether *this* might provide some hook to regulate the practices of independent retailers. But this approach would avail only if the concept of Section 217, and of agency generally, were stood on its head, so as to impose a mandate on an independent actor so as to *make* him the agent of another. Clearly, such an approach would extend FCC jurisdiction out to infinity.

Section 217 says simply that an *act or omission* of an officer, agent, or employee of one who is regulated shall be deemed an act or omission of the principal for *purposes of enforcement or liability*.⁹ The House¹⁰ and Senate¹¹ reports accompanying the Communications Act of 1934 explain that Section 217 is adapted or copied from the Elkins Act of 1903.¹² The Elkins Act was enacted so that railroads regulated by the Interstate Commerce Commission – not just their agents, directors, etc. -- could be held liable for violations of the Interstate Commerce Act, which

⁹ Communications Act of 1934., S. 3285, 73rd Cong. § 217 (1934).

¹⁰ H.R. Rep. No. 73-1850 (1934), at 6.

¹¹ S. Rep. No. 73-781 (1934), at 5.

¹² Pub. L. 57-708, 32 Stat. 847.

was aimed by the Congress at regulating the conduct of *these same corporations*.¹³ It closed a loophole in existing law that allowed enforcement only against natural persons.¹⁴ It was meant as a tool to do the *opposite* of what the Commission is considering using it for now: It was for enforcement against entities who were *already the specific object of the regulatory power granted by the Congress to an agency* – *not* a tool for extending the agency’s jurisdiction to include entities that the Congress did *not* instruct it to regulate.

In no sense whatever, then, were Section 217, its antecedent in interstate commerce, or any principle of agency meant to be devices for expanding regulatory jurisdiction so that anyone having a contract with a regulated entity would be hereafter regulated to the same scope and extent, and be subject to affirmative regulatory mandates.¹⁵ Such a novel, upside-down interpretation of Section 217 would provide a sharp disincentive for any independent business to maintain an ongoing relationship with any regulated business. Congress would have carefully weighed the implications of such an interference with commerce. Yet there is nothing in the legislative history of this provision or its antecedent evincing any such intent, nor is there any Commission precedent for turning this *enforcement* tool into one for the imposition of regulatory mandates. Nor have the courts ever done likewise in construing more general principles of agency.¹⁶

¹³ H.R. Rep. No. 57-3765 (1903), at 1.

¹⁴ “No penalty is aimed directly at the corporation itself by the existing law. The bill which we recommend does away with the penalty of imprisonment and provides that the violation of the law by any officer, agent, or other person acting for the corporation shall be deemed a violation by the corporation itself” *Id.*

¹⁵ Moreover, as RadioShack notes in its Comments at 11 - 13, not every relationship between a wireless service provider and an independent retailer is considered an agency relationship according to the business terms as agreed.

¹⁶ See discussion in RadioShack Comments at 11 - 14.

II. WELL ESTABLISHED RETAILER RETURN POLICIES ARE AMPLE TO PROTECT THE INTERESTS OF CONSUMERS.

The FNPRM asks in par. 65, "... [a]re there major independent retailers that do not have a two week return policy?" In fact, all of CERC's corporate members have return policies providing for a full refund for a product returned to a retail store within *twice* that period of time – 30 days, and in some cases longer. No member includes wireless telephones in those categories of products that may be subject to shorter time periods or to restocking fees. *See:*

- <http://www.bestbuy.com/site/olspage.jsp?type=page&entryURLType=&entryURLID=&categoryId=cat10004&contentId=1117177044087&id=cat12098>
- <http://www.circuitcity.com/rpsm/cat/-13414/edOid/105452/rpem/ccd/lookLearn.do>
- <http://www.radioshack.com/images/site/checkout/ShoppingPolicies.asp?hp=policies&type=ordering>
- <http://www.target.com/gp/browse.html/602-4635361-7380622?%5Fencoding=UTF8&node=1041324>
- <http://www.walmart.com/catalog/catalog.gsp?cat=120564&path=0:5436:120160:119544:120564#0>

In the competitive electronics marketplace, these generous return policies have become a standard. It would *not* be necessary to require the sort of minimum product return periods discussed in par. 65 if the Commission were found to have jurisdiction to do so. The marketplace pressures that independent retailers face – and their challenges in competing with stores owned and operated by the service providers themselves -- have already produced a result that is superior for consumers.

The Commission's finding that, for the purpose-built establishments of service providers, the opportunity to return a product was not a substitute for a demonstration period was made in the context of CTIA's more restrictive "fourteen day trial period for new services." The independent retail environment is not the same as that in a store created solely to sell a single service; the more generous return policies of independent retailers seem to reflect this fact.

Compare, e.g. --

- http://www.verizonwireless.com/b2c/globalText?textName=RETURN_POLICY&jspName=footer/returnPolicy.jsp&textName=RETURN_POLICY&jspName=footer/returnPolicy.jsp. (15 days)
- <http://www.t-mobile.com/> (20 days, 30 in California, may be subject to restocking fee)

III. CONCLUSION.

Nothing in law, policy, or precedent suggests that the Commission has jurisdiction to impose mandates governing the way that independent retailers stock or demonstrate telephone handsets that they may lawfully sell. Even if the Commission did have jurisdiction, the differences in the retail environment from, and the more liberal return policies compared to, the purpose-built stores of service providers demonstrate that any such imposition would be unwise and unnecessary.

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