Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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

To: The Secretary, for forwarding to the Commission (Electronically Filed)

REPLY COMMENTS OF THE HEARING INDUSTRIES ASSOCIATION

1. The Hearing Industries Association ("HIA") hereby submits these Reply Comments in response to the Commission's Further Notice of Proposed Rule Making in the above-captioned proceeding, FCC 05-122, released June 21, 2005. HIA is the trade association of hearing aid manufacturers and represents manufacturers of some 85% of the hearing aids sold in the United States. HIA has actively participated throughout this proceeding, with the goal of ensuring that its customers who purchase hearing aids are able to use cellular telephones to the maximum extent feasible. HIA's members have significantly improved the interference immunity of their own products and have urged the Commission to require the handset manufacturing industry to meet them half-way with improvements in handset design.

2. These Reply Comments are directed against the comments filed by the Consumer Electronics Retailers Coalition and Radio Shack Corporation (together referred to as the "Retailers") which strenuously object to any rule that would require retailers not owned or controlled by Commercial Mobile Radio Service ("CMRS") providers to offer live, in-store testing of CMRS handsets before purchase by the consumer. Their arguments are based on both legal jurisdiction, which the Retailers insist the Commission does not have, and the claimed

impracticality of live, in-store testing in a multiplicity of retail environments.

3. HIA does not agree with either aspect of the Retailers' arguments. The jurisdictional argument is stretched and relies on every section of the Communications Act except the one that counts most: Section 710(a) of the Communications Act[1] states in no uncertain terms that "[t]he Commission shall establish such regulations as are necessary to ensure reasonable access to telephone service by persons with impaired hearing." Congress could not have been clearer in its intent, which is to ensure access to telephone service by persons with impaired hearing, and it could not have been clearer in directing the Commission to adopt regulations to achieve that objective. That is what the Commission did, and the Commission's action was within its authority and was consistent with the Congressional intent and directive.[2]

4. The cases cited by the Retailers where courts have held that the Commission overstepped its jurisdictional bounds are not really on point, because they did not involve the Commission's acting to fulfill an explicitly articulated Congressional intent where Congress directed that regulations be adopted. Where fulfillment of a recognized purpose is involved, the Courts have been more accommodating to the Commission. See, e.g., FCC v. Midwest Video Corp., 440 U.S. 689 (1979).

5. The Commission's jurisdiction is conferred by Section 710(a) regardless of whether independent retailers are "agents" of CMRS providers within the meaning of Section 217 of the Communications Act. Nevertheless, if Section 217 is relevant, the Commission must look at the entire picture. The vast majority of handsets are sold in a package with CMRS service, and the

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[1] 47 U.S.C. § 610(a).

[2] The Commission's finding that the exemption for public mobile service telephones in Section 710(b)(2)(A)(i) should be terminated was made long ago, in the original Report and Order in this proceeding, 18 FCC Rcd. 16753 (2003), and is no longer at issue.

favorable prices offered for handsets are tied to acceptance of a service contract with an early termination liability that approximates the amount of the subsidization of the handset price.[3] Thus independent retailers in most cases must offer and explain the terms of CMRS service options when they sell handsets. That certainly puts them in a cognizable *de facto* agency relationship with CMRS providers, at least for regulatory purposes, regardless of any exculpatory language that may appear in contracts between retailers and carriers.

6. Is very important to note that if independent retailers are exempted from any part of the hearing aid compatible ("HAC") handset rules, accomplishment of the Congressional objective will be delivered a serious blow. The Retailers do not state what percentage of handsets they sell; but with such entities as Radio Shack, Best Buy, and Circuit City involved, the percentage is surely substantial. It would be very unfortunate for hearing aid users if the Commission were to lop off this entire segment of the handset retail structure from the reach of its HAC rules. Such a result should not, and need not, be tolerated.

7. The importance of live, in-store testing should not be minimized. A 30-day return policy, no matter how liberal or unconditional, is simply not an adequate substitute, because before the customer can walk out of the store with a handset, he or she must choose a CMRS carrier and will often also choose a service plan at the retail location. But regardless of when or where a service plan is elected, the consumer is not able to test the handset until a service plan has been chosen and the handset activated, which means that the consumer has entered into a contractual relationship with the CMRS providers. Returning the handset is suddenly not so simple, because even if the retailer will take the handset back with no questions asked, the

[3] Handset prices are intimidating to most consumers without the heavy subsidization prevalent in the CMRS industry.

CMRS provider may not be as easy to deal with and will have to be approached separately in any event. In contrast, with live, in-store testing, the consumer can make the critical decision whether a particular handset is appropriate for them prior to entering into any service contract and without paying any money, incurring a credit card charge, having to pay for air time, or risking an early termination liability. These differences are significant to the consumer and cannot reasonably be ignored by the Commission.

8. In the end, the issue may boil down to the practicalities of live, in-store testing. The Retailers make much of the many different physical lay-outs of independent retail stores and the difficulties of offering live, in-store testing in some of these situations. One example they give is the kiosk in a shopping mall, where the retailer occupies very little space and may have only one employee on duty. However, CMRS providers also operate mall kiosks with one or two employees, and they seem to be able to comply with the testing requirement. If they can do it, so can independent retailers.

9. Nevertheless, HIA recognizes that some retailers do not offer live, in-store testing of any handset products at all; and for at least some of them, live, in-store testing would require a significantly different method of doing business.[4] It may be appropriate for the Commission to extend the testing requirement to retailers in steps, to make sure that there is no undue adverse impact on small businesses and that retailers are not driven away from handset products altogether. Thus at least initially, HIA would not object to a rule that required retailers that offer in-store testing of any handset to include hearing aid compatible handsets among those which

[4] HIA's counsel has observed a complete absence of any in-store testing in one branch of a large national electronics retailing chain. Counsel is also aware of at least one situation where a hearing aid user was permitted to test a handset in a retail outlet of another large chain.

may be tested. Those who offer no testing of any handset all might be exempted, at least for a period of time, while the impact of the rule on retailers who do permit testing is evaluated.

10. Hearing aid users should be protected from the risk of purchasing from retailers who do not permit testing by requiring that they be informed that live testing is available elsewhere. Probably the best way to do that would be to modify the label on HAC compatible handsets, where the ANSI rating is displayed, to include a notice along these lines: "If you wear a hearing aid, you may want to test this product before buying it. Service providers and some retailers will permit you to test this product in their stores before purchasing from them." There may be alternative ways to convey the information. HIA will not object to any reasonable proposal by retailers, as long as they clearly advise hearing aid users of the possibility of shopping elsewhere if they wish to test before buying.[5]

11. Finally, the Commission should make it very clear that any exemption for independent retailers is limited to the live, in-store testing requirement, which is the focus of their comments, and not the requirement to offer HAC compatible handsets for sale. With respect to offering compatible products, the retailers cannot ignore the Commission's jurisdiction here any more than they can ignore the requirement that the television receivers they sell have digital reception capability or be able to display closed captions.[6] Nothing requires any retailer to carry handset products at all; but if the retailer freely chooses to carry that product, then it must carry a product that complies with the Commission's requirements, so that the explicit intent of Congress is not frustrated.

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[5] It is obvious that pre-purchase testing will not be possible for products sold in catalogs or over the Internet; but a disclosure should be required in catalogs and on websites that live, in-store testing is available for those who wish to visit an appropriate retail location.

[6] *See* Sections 15.117, 15.119, and 15.122 of the Commission's Rules.

12. It took a lot of time and effort for the Commission to make the progress it has made in this proceeding in improving the ability of hearing aid wearers to use CMRS services that are an important part of every day life for a majority of Americans. There can be no backsliding. The Commission must be realistic in applying its regulations; but once a retailer makes the choice of getting into the handset business, it must offer the products that the Commission has directed be placed into the stream of commerce and must never be permitted to treat hearing aid users worse than other customers with respect to testing, product return, or other terms and conditions of handset sale.

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Respectfully submitted,

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October 25, 2005

CERTIFICATE OF SERVICE

I, Denise A. Branson, so hereby certify that I have, this 25th day of October, caused to be sent by first class United States mail, postage prepaid, copies of the foregoing "Reply Comments of the Hearing Industries Association" to the following:

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