

**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 )

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**REPLY COMMENTS OF T-MOBILE USA, INC.**

T-Mobile USA, Inc. (“T-Mobile”) respectfully submits this reply to the comments filed in WT Docket No. 01-309.<sup>1</sup> T-Mobile strongly supports the Commission’s desire to provide the hearing-impaired community with wireless handsets that are hearing aid-compatible (“HAC”), and as such, has been at the forefront of efforts to provide HAC-compliant handsets. T-Mobile has chaired the technical “Incubator” (AISP.4-HAC) since its inception in 2003 – working to help develop appropriate HAC standards and to review and consider possible changes to these standards.<sup>2</sup> These cooperative efforts have resulted in significant advances in the development of HAC handsets to date. T-Mobile wants to ensure the continued expansion of hearing aid-compatible devices and their practical availability for use by American consumers.

**I. INTRODUCTION AND SUMMARY**

In the *Further Notice*, the Commission seeks comment on whether to extend the live, in-store consumer testing requirement to independent retail outlets that are not directly owned or

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<sup>1</sup> Section 68.4(a) of the Commission’s Rules Governing Hearing Aid-Compatible Telephones, Order on Reconsideration and Further Notice of Proposed Rulemaking, 20 FCC Rcd 11221 (2005) (“*Further Notice*”).

<sup>2</sup> The Incubator has included participation from interested stakeholders including representatives from the hearing-impaired community, hearing aid manufacturers, consumer advocacy groups, wireless handset manufacturers, and wireless carriers.

operated by wireless carriers or service providers.<sup>3</sup> Independent retailers, some of which are small businesses, have become increasingly important to T-Mobile and other wireless carriers in facilitating the ubiquitous distribution of wireless services and devices to all Americans. Because many independent retailers offer wireless services for a variety of carriers, these stores provide consumers with the ability to compare competing providers in a single location. By enabling consumer choice and availability, independent retailers thereby play an important role in ensuring that all providers, including smaller national wireless providers such as T-Mobile and regional wireless carriers, are better able to effectively compete with the largest national providers.

The record in this proceeding clearly demonstrates that the Commission lacks the authority to impose regulatory obligations on independent retailers. In addition, the distribution of wireless services and handsets could potentially diminish to the detriment of the hearing-impaired customer if the FCC extends its testing requirements to unaffiliated retail outlets (*i.e.*, retail outlets not owned or operated by T-Mobile). As the record shows, such outlets may be reluctant to sell wireless products that carry these requirements. The irony is this additional regulation could hurt the ability of the hearing-impaired community to gain access to HAC-compliant handsets, especially in more remote or rural locations where retail outlets such as Seven-Eleven provide greater access to wireless products generally. Accordingly, T-Mobile joins the other commenters in this proceeding and strongly urges the Commission not to extend live, in-store testing requirements to independent retailers.

## **II. THE COMMISSION LACKS AUTHORITY TO REGULATE INDEPENDENT RETAILERS.**

As courts have consistently found, the Commission's regulatory power is necessarily

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<sup>3</sup> *Further Notice* at ¶ 62.

limited to the statutory authority specifically delegated to the Commission by Congress.<sup>4</sup> Neither the HAC Act,<sup>5</sup> the Communications Act,<sup>6</sup> nor general agency principles authorize the Commission to regulate independent retailers. Consequently, T-Mobile agrees with commenters that the Commission does not possess the authority to require independent retailers to provide live, in-store consumer testing.<sup>7</sup>

**A. As the record demonstrates, the HAC Act does not authorize the Commission to regulate independent retailers.**

The HAC Act explicitly authorizes the Commission to regulate manufacturers of telephones.<sup>8</sup> Indeed, both the wording of the Act and its legislative history reflect Congress' specific intention to allow regulation of manufacturers.<sup>9</sup> By contrast, neither the Act nor accompanying legislative history reflects any intention to allow the Commission to regulate entities such as independent retailers. Under well-settled principles of statutory construction, this

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<sup>4</sup> *American Library Ass'n v. FCC*, 406 F.3d 689, 691 (D.C. Cir. 2005). *See also* *FCC v. Midwest Video Corp.*, 440 U.S. 689, 706 (1979); *Illinois Citizens Committee for Broadcasting v. FCC*, 467 F.2d 1397, 1400 (7<sup>th</sup> Cir. 1972).

<sup>5</sup> 47 U.S.C. § 610.

<sup>6</sup> 47 U.S.C. §§ 151, *et seq.*

<sup>7</sup> *Further Notice* at ¶ 62 (seeking comment on whether the FCC has the authority to require independent retailers to provide live, in-store consumer testing). *See* Comments of Cingular Wireless at 1-2; Comments of RadioShack Corporation at 4-14; Comments of the Consumer Electronics Retailers Coalition at 3-6.

<sup>8</sup> The Commission has authority to require “all telephones manufactured in the United States. . . or imported for use in the United States. . . provide internal means for effective use with hearing aids that are designed to be compatible with telephones.” 47 U.S.C. § 610(b)(1)(B).

<sup>9</sup> “The [Senate] Committee notes that the number of telephone manufacturers is much smaller than the number of hotels, motels, and hospitals alone . . . 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.” S. Rep. No. 100-391, at 4. *See* Comments of RadioShack Corporation at 8.

exclusion provides direct evidence of Congress' intentions to limit the Commission's authority to the regulation of manufacturers.<sup>10</sup>

The regulations previously imposed by the Commission pursuant to its power under the HAC Act relate to the regulation of manufacturers.<sup>11</sup> For example, the Commission issued regulations that require all landline telephones manufactured in the United States or imported into the United States to be hearing aid-compatible.<sup>12</sup> Similarly, the Commission has adopted technical standards that manufacturers must achieve in order to produce phones that will be considered hearing aid-compatible.<sup>13</sup> In no event did these regulations reach retail outlets that sold these wireless telephones. The Commission's previous actions under the HAC Act have all related to the regulation of manufacturers. Nothing in the record suggests that the Commission should now attempt to expand its power under this Act.<sup>14</sup>

**B. The Communications Act and general agency principles do not authorize the Commission to regulate independent retailers, nor do wireless providers have the ability to require retailers to provide live, in-store testing.**

The Commission similarly cannot base its claim of authority to regulate independent retailers on the Communications Act. In this area, the Act primarily grants the Commission

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<sup>10</sup> See, e.g., *Silver v. Sony Pictures Entertainment Company*, 402 F.3d 881, 885 (9<sup>th</sup> Cir. 2005) (citing *Boudette v. Barnette*, 923 F.2d 754, 756-57 (9<sup>th</sup> Cir. 2005)) (explaining that “[t]he doctrine of *expressio unius est exclusio alterius* ‘as applied to statutory interpretation creates a presumption that when a statute designates certain persons, things, or manners of operation, all omissions should be understood as exclusions’”).

<sup>11</sup> See Comments of Cingular Wireless LLC at 1; Comments of the Consumer Electronics Retailers Coalition at 4; Comments of RadioShack Corporation at 5.

<sup>12</sup> 47 C.F.R. § 68.4. See also Comments of RadioShack Corporation at 6-7.

<sup>13</sup> 47 C.F.R. §§ 68.316-17. See also Comments of RadioShack Corporation at 6.

<sup>14</sup> See Comments of RadioShack Corporation at 6 (discussing the Commission's actions relating solely to manufacturers); Comments of the Consumer Electronics Retailers Coalition at 3-4 (discussing the Commission's lack of authority with respect to independent retailers).

authority over the licensees of radio spectrum,<sup>15</sup> not entities such as independent retailers that do not provide commercial mobile radio service.<sup>16</sup>

The Commission assumes that independent retailers are agents of wireless carriers and asks whether Section 217 of the Communications Act would allow regulation of agents.<sup>17</sup> However, general agency principles dictate that a principal is only responsible for the actions of its agent where an agency relationship exists.<sup>18</sup> Thus, in order to impose regulations, the Commission would have to establish the existence of an agency relationship between an independent retailer and the wireless carrier.<sup>19</sup> However, as noted by RadioShack Corporation, its contracts with wireless carriers specifically disclaim any agency relationship with the carrier.<sup>20</sup>

This practice is consistent with T-Mobile's contractual experience with retailers. T-Mobile's contracts typically include a provision stating that the relationship established is that of independent contracting parties and specifically states that the contract does not create an agency, joint venture, partnership, franchise or an employment relationship between the parties. A T-Mobile retailer is an independent operator that has full responsibility for the management

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<sup>15</sup> 47 U.S.C. §§ 301, 332(e).

<sup>16</sup> See Comments of RadioShack Corporation at 9-10.

<sup>17</sup> *Further Notice* at ¶ 64.

<sup>18</sup> See Comments of RadioShack Corporation at 11-12.

<sup>19</sup> While contractual relationships that exist between independent retailers and wireless carriers may vary significantly from one another, this variation hardly forms a practical or consistent jurisdictional basis for Commission regulation. In fact, before imposing regulations based on an agency relationship, the Commission presumably would need to establish – on a case-by-case basis – the existence of an agency relationship. Such an unwieldy system of case-by-case analysis would simply not allow for broad regulation of independent retailers.

<sup>20</sup> See Comments of RadioShack Corporation at 11-12.

and operation of its independent business.

The Commission similarly cannot use Section 217 of the Communications Act to require wireless carriers to impose regulatory obligations on independent retailers because these carriers lack the necessary bargaining power to compel independent retailers to comply with HAC regulatory procedures. As noted above, many of the independent retailers with whom T-Mobile works provide a wide variety of products, of which wireless telephones are only a small subset. Because carriers provide only a limited percentage of a retailer's overall product line, the carriers have correspondingly limited control over the actions of these retailers. As such, many independent stores may simply cease providing wireless handsets because it is not their core business and they may want to resist being subject to such requirements, thereby unfortunately limiting consumers' access to handsets, including hearing aid-compatible handsets.

Additionally, given the significant number of retailers with which carriers conduct business, it would be virtually impossible for carriers to control the detailed workings of each store and ensure that live, in-store testing was conducted pursuant to the standards that carriers require in their own stores. Wireless providers conduct business with many different types of retailers, from national retailers to local, privately owned stores, some of which are small businesses and owned by "Mom and Pop." In addition, these retailers employ a substantial number of employees that are required to sell a wide variety of competing products. There is consequently no practical system of regulation that carriers could implement in order to ensure that all of these stores (and their employees) comply with live, in-store testing regulations.<sup>21</sup>

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<sup>21</sup> Such a requirement would be similar to broadcasters being responsible for ensuring that independent retailers' employees provide customers with accurate information regarding HDTV sets and their ability to work with broadcasters' existing transmissions.

**III. AS A MATTER OF SOUND POLICY, THE COMMISSION SHOULD NOT REQUIRE LIVE, IN-STORE TESTING BY INDEPENDENT RETAILERS.**

Even if the Commission finds that it has the authority to regulate independent retailers, it should decline to do so. A requirement of live, in-store testing by independent retailers will place a significant burden on independent retailers. Instead, as detailed below, T-Mobile believes that the return policies already used by independent retailers provide consumers with a much more effective means of determining hearing aid-compatibility with a wireless handset.

Independent retailers typically provide a broad array of products, of which wireless is a very small subset offering.<sup>22</sup> Particularly in the case of large national retailers such as Wal-Mart or Target, wireless handsets are only a small subset of the large number of electronic devices sold within each store. In addition, hearing aid-compatible handsets are extremely specialized products that are useful to only a small portion of the public – the hearing impaired community. Sales associates in these stores, however, generally need to be able to assist customers with a wide variety of product issues and thus do not have the training, expertise, or knowledge necessary to assist customers with the technical intricacies of hearing aid-compatible handsets.<sup>23</sup>

Wireless carriers would also be burdened by the imposition of these regulations on independent retailers because they would need to provide thousands of demonstration phones to these retailers. As noted by Cingular Wireless, most independent retailers do not display “live” demonstration phones because of concerns about theft. Wireless carriers have limited control over the means by which an independent retailer can secure testing handsets. The costs of

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<sup>22</sup> See Comments of the Consumer Electronics Retailers Coalition, at 1 (representing Best Buy, Circuit City, Target, Wal-Mart and others).

<sup>23</sup> See Comments of RadioShack Corporation at 16-17. (“[d]edicating one or more sales associates to in-store testing potentially is a significant burden that would impair RadioShack’s ability to serve other customers in the store”).

providing and securing working, testable handsets would therefore be significant for wireless carriers.<sup>24</sup>

To ensure sufficient signal coverage for testing, wireless providers would also need to ensure network connectivity for independent retailers. In many cases, particularly in the interior of malls or other enclosed areas, there is not an available wireless signal to allow for live testing. Ensuring the ability of customers to adequately test hearing aid-compatibility will be immensely burdensome for wireless carriers. Cingular indicated that a requirement of live, in-store testing for independent retailers would require it to ensure connectivity with an additional 14,000 locations.<sup>25</sup> T-Mobile agrees and adds that even with this connectivity, it is not certain that customers will be able to accurately and effectively test the hearing aid-compatibility of these handsets, resulting in potential customer misconceptions about the actual performance of certain handsets. For these and other reasons, commenters in this proceeding *universally* agree that live, in-store testing is not an effective or accurate means of assessing hearing aid-compatibility.<sup>26</sup>

The non-availability of in-store testing, however, does not mean that hearing-impaired consumers will be prohibited from testing handsets prior to fully committing to a particular handset and/or service provider. Indeed, most retailers provide a generous return policy.<sup>27</sup> The

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<sup>24</sup> See Comments of Cingular Wireless LLC at 3.

<sup>25</sup> See *id.* at 2.

<sup>26</sup> See *id.* at 3-4; Comments of RadioShack Corporation at 18-20; Comments of the Consumer Electronics Retailers Coalition at 7-8.

<sup>27</sup> See Comments of the Consumer Electronics Retailers Coalition at 7 (“all of CERC’s corporate members have return policies providing for a full refund for a product returned to a retail store within . . . 30 days, and in some cases longer”). See also T-Mobile Terms and Conditions of Service, available at [http://www.t-mobile.com/info/legal/terms\\_cond.asp](http://www.t-mobile.com/info/legal/terms_cond.asp) (providing customers a 14-day return period from the date of service activation); CTIA Consumer Code for Wireless Service, available at <http://www.t-mobile.com/company/CTIAconsumercode.pdf> (allowing subscribers a time period of not less

return period allows a consumer to test the telephone for hearing aid-compatibility under normal, real world conditions. This method provides a more effective means of ensuring that customers have a more realistic experience with hearing aid-compatible handsets.<sup>28</sup>

**IV. THE IMPOSITION OF LIVE, IN-STORE TESTING REQUIREMENTS ON INDEPENDENT RETAILERS COULD UNDERMINE CONSUMERS' ACCESS TO HEARING AID-COMPATIBLE TECHNOLOGIES.**

T-Mobile supports the Commission's desire to provide the hearing-impaired community with wireless handsets that are hearing aid-compatible.<sup>29</sup> If the Commission were to impose live, in-store testing requirements on independent retailers, however, T-Mobile fears that such regulation could have a detrimental effect on the availability of all handsets, including hearing aid-compatible devices. When faced with burdensome requirements associated with live, in-store testing of wireless handsets, independent retailers may determine that carrying these products is too troublesome. If forced to choose between training and hiring specialized personnel and eliminating some small subset of the store's product line, many retailers could choose to simply stop selling wireless devices. Rather than promoting the availability of hearing aid compliant devices to the public, regulation could paradoxically result in reducing the

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(Continued . . .)

than 14 days to cancel their contracts with no early termination fee).

<sup>28</sup> Commenters also noted the increased number of sales that occur over the Internet, by phone, or through catalogues. None of these sales can incorporate a live, in-store testing requirement. Customers who purchase phones through these methods, however, do receive the benefits provided by a return period, which allows the customer to test the phone under normal conditions, and therefore provides the most accurate and effective means of testing for hearing aid-compatibility. *See* Comments of RadioShack Corporation at 20-21.

<sup>29</sup> Indeed, T-Mobile has been at the forefront in the industry's efforts to facilitate the availability of wireless HAC handsets. As previously noted, T-Mobile has chaired the technical "Incubator" (AISP.4-HAC) within the Alliance for Telecommunications Industry Solutions ("ATIS") since its inception in 2003. In addition, T-Mobile is an active participant in the Incubator's Working Group – 9, which was established to explore 850 MHz and higher power challenges with regard to GSM handsets.

availability of these devices to the public.

## V. CONCLUSION

Based on the record in this proceeding, the Commission should decline to adopt regulations that would extend live, in-store testing requirements to independent retailers. Congress has not granted the Commission the authority to regulate independent retailers under either the HAC Act or the Communications Act. Even if the Commission has authority to extend regulations requiring independent retailers to provide live, in-store testing, it should decline to do so. The application of live, in-store testing requirements on independent retailers would be unduly burdensome for retailers and wireless carriers and service providers. More importantly, live, in-store testing is a less effective and accurate means of testing for hearing aid compatibility than the return period already provided by independent retailers, and could result in a chilling effect that may induce independent retailers to cease their sales of wireless devices. Consequently, T-Mobile urges the Commission to decline to extend live, in-store testing requirements to independent retailers.

Respectfully submitted,

By: /s/ *Thomas J. Sugrue*

Thomas J. Sugrue, Vice President,  
Government Affairs  
Kathleen O'Brien Ham, Managing  
Director, Federal Regulatory Affairs  
Harold Salters, Director, Federal  
Regulatory Affairs  
Shellie Blakeney, Senior Counsel, Federal  
Regulatory Affairs

T-Mobile USA, Inc.  
401 9<sup>th</sup> Street, NW  
Suite 550  
Washington, DC 20004

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