

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

In the Matter of)
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DTV Consumer Education Initiative) MB Docket No. 07-148
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**Comments Of
RadioShack Corporation**

RadioShack Corporation (“RadioShack”) by its attorneys hereby respectfully responds to the Federal Communications Commission’s (“Commission”) Notice of Proposed Rulemaking with regard to the DTV consumer education initiative (“NPRM”).¹ As a major consumer electronics retailer with approximately 4,400 stores nationwide, RadioShack is uniquely positioned to comment on the Commission’s inquiry concerning educating consumers about the impending digital television transition.

I. INTRODUCTION

RadioShack is a major consumer electronics retailer with approximately 4,400 stores owned and operated in the United States. RadioShack is proud of the training it provides its sales people and its ability to help consumers with issues affecting connectivity and access to technology in the home. With stores in both rural and urban areas and its trained sales staff, RadioShack believes it is well prepared to assist consumers as they navigate the transition to digital television in February 2009.

RadioShack has long been heavily involved in the transition from analog to digital television. As the country enters the final year of the implementation, RadioShack is aware that many consumers are still uninformed or confused regarding the transition and what it means to them.² In this regard, RadioShack is motivated by its own business objectives to play an important role in informing consumers about the transition and appreciates the opportunity to outline its efforts to help ensure that consumers are positioned to benefit when the digital transition is complete on February 17, 2009.

¹ DTV Consumer Education Initiative, MB Docket No. 07-148, *Notice of Proposed Rulemaking*, (July 30, 2007) (hereinafter “NPRM”).

² See <http://www.pts.org/news/DTVSURVEY.cfm>.

The Commission seeks comment on whether it has the jurisdiction to impose regulations on retailers in the area of consumer education. As indicated in these Comments, the Commission not only lacks jurisdiction, but imposing regulations on consumer education would also likely violate retailers' commercial free speech rights under the First Amendment. Regardless of constitutional or jurisdictional concerns, however, RadioShack believes that such mandates on retailers are unnecessary in light of the widespread efforts, as noted below, underway by retailers such as RadioShack and by other interested parties. If the Commission finds that such efforts are not sufficient it should consider creating its own plan to educate consumers directly and avoid exceeding the statutory and constitutional boundaries that apply to its actions.

II. CONSTITUTIONAL CONCERNS

Commercial speech is protected under the First Amendment.³ While commercial speech may be regulated, such regulation must reasonably fit the regulator's interests and the means chosen to achieve those interests.⁴ Regulations that are deemed excessive in their treatment of commercial speech in light of the regulator's interest in regulating the commercial speech will likely be found to violate the First Amendment if the commercial speech is truthful and non-misleading.⁵

Case law indicates that the Commission may not regulate RadioShack's consumer education materials without demonstrating that such regulations are reasonable in light of the alternatives the Commission has to achieve its goal of educating the consumer about the transition to digital television. Considering the Commission may engage in its own consumer education initiatives and may work in cooperative arrangements with private entities concerning consumer education, significant Commission restrictions or mandates over retailers' advertisements or communications to their customers would likely violate retailers' First Amendment rights.

³ *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976) (holding that consumers have an interest in the free flow of information even if it is commercial in nature).

⁴ *Board of Trustees of SUNY v. Fox*, 492 U.S. 469 (1989).

⁵ *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996) (determining that the state's prohibition on advertising the price of alcoholic beverages outside the confines of the liquor store to be unconstitutional because the state's goal of promoting temperance could be better achieved in other ways); *Central Hudson Gas v. Public Service Commission of New York*, 447 U.S. 557 (1980) (declaring that a complete ban on promotional advertising was excessive and violated the First Amendment when there were less restrictive alternatives available to the university).

Further, while a great deal of case law concerns state efforts to ban or restrict speech, it is also true that the government generally may not compel citizens to engage in speech.⁶ Indeed, the Supreme Court's case law has extended this principle to instances where private entities were merely forced to subsidize speech created by the government.⁷

Though case law regarding compelled *commercial* speech is limited, if the Commission were to impose specific consumer education mandates upon retailers requiring certain language in consumer education materials and the placement of educational material, such an imposition would likely run afoul of the Court's jurisprudence concerning compelled commercial speech. For example, in *U.S. v. United Foods, Inc.*⁸ the Court held that the Department of Agriculture's mandated subsidy imposed upon United Foods in order to produce generic advertising promoting mushroom sales violated the company's First Amendment rights. While the speech in question only concerned a commercial transaction (the sale of mushrooms) and only involved compelling United Foods to pay for a share of the advertising, the Court nonetheless determined that "First Amendment values are at serious risk if the government can compel a particular citizen...to pay special subsidies for speech on the side that it favors..."⁹

By proposing that retailers engage in specific consumer education efforts, including possibly requiring certain language to be included in consumer education materials and specifying how such materials should be presented, the Commission would be directing retailers to undertake the Commission's role in educating consumers about the digital television transition. Such a requirement would contradict the Court's holding in *United Foods*. Absent a formalized marketing structure under which RadioShack had abdicated some of its rights for the collective good,¹⁰ any Commission mandate that compels RadioShack to perform specific consumer education tasks likely violates the First Amendment.

Finally, while it is true that the government may constitutionally require advertisers to disclose specific information in their advertisements, provided the requirement is reasonably

⁶ See *Wooley v. Maynard*, 430 U.S. 705 (1977) (finding that New Hampshire's statute forcing motorists to display the state motto "Live Free or Die" on their license plates violates the First Amendment).

⁷ See e.g., *Keller v. State Bar of California*, 496 U.S. 1 (1990); *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209 (1977).

⁸ 533 U.S. 405 (2001).

⁹ *Id.* at 411.

¹⁰ See *Glickman v. Wileman Brothers & Elliot, Inc.*, 521 U.S. 457 (1997) (holding that marketing orders made by the Department of Agriculture, which assessed producers for the cost of generic advertising, did not violate producers' First Amendment rights because the producers were regulated under a comprehensive regulatory scheme of government-mandated collective action).

related to the government's interest in preventing deception of consumers,¹¹ there is no evidence here that RadioShack has engaged in deceptive advertising with regard to the digital television transition. Compelled disclosures, therefore, are unwarranted and unconstitutional.

III. JURISDICTION

RadioShack also believes that the Commission lacks the legal authority to regulate retailers of consumer electronic products. A federal agency may only assert jurisdiction if granted authority under statute. Statutory authority is found to be granted in two circumstances: 1) where it is explicit and direct or 2) where ancillary jurisdiction is provided. The Communications Act provides no express authority for the action proposed by the Commission here.

The Commission can only regulate under its ancillary authority if it can satisfy a two-part test:

First, the subject of the regulation must be covered by the Commission's general grant of jurisdiction under Title I of the Communications Act, which, as noted above, encompasses "'all interstate and foreign communication by wire or radio.'" *United States v. Southwestern Cable Co.*, 392 U.S. 157, 167 (quoting 47 U.S.C. § 152(a)). Second, the subject of the regulation must be "reasonably ancillary to the effective performance of the Commission's various responsibilities." *Id.* at 178.¹²

The U.S. Court of Appeals has noted that the Commission's jurisdiction only extends to entities engaged in communication by wire or radio¹³ and courts have determined that the Commission is restricted in its authority to regulate in areas beyond those areas conferred to it by statute.¹⁴ The Communications Act authorizes the Commission to regulate licensees of radio spectrum.¹⁵ It also provides for the regulation of interstate common carriers and cable television providers.¹⁶ RadioShack does not engage in radio transmission or common carriage, nor is it a

¹¹ *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985).

¹² *Broadcast Flag*, 406 F.3d at 692-93.

¹³ *American Library Ass'n v. FCC*, 406 F.3d 689, 692-93 (D.C. Cir. 2005) ["Broadcast Flag"].

¹⁴ *Broadcast Flag*, 406 F.3d at 691. See also *FCC v. Midwest Video Corp.*, 440 U.S. 689, 706 (1979) (stating that "[t]hough afforded wide latitude in the supervision over communications by wire, the Commission was not delegated unrestrained authority"); *Regents of the University System of Georgia v. Carroll*, 338 U.S. 586, 600 (1950); *Illinois Citizens Committee for Broadcasting v. FCC*, 467 F.2d 1397 (7th Cir. 1972).

¹⁵ 47 U.S.C. § 301.

¹⁶ *Id.* §§ 201, et seq, and 601, et seq.

provider of cable services. The Communications Act reveals no explicit grant of authority to make rules mandating certain consumer education efforts by retailers. In fact, the only definition of “retailers” in the Communications Act appears in the context of language concerning the commercial availability of cable navigation devices and does not confer regulatory authority over retailers.¹⁷ Therefore, there is no direct statutory authority to regulate an independent retailer in the manner proposed in the NPRM.¹⁸

Likewise, the Commission’s general jurisdiction over broadcasting does not provide ancillary jurisdiction over retailers of the sort necessary to support required employee training or consumer education regarding a particular product offered for sale by retailers. A grant of some authority to the Commission in a given area, such as television broadcasting, does not signify a grant of plenary authority over that area.¹⁹ As the D.C. Circuit noted in the Broadcast Flag case, the agency’s general jurisdictional grant does not encompass the regulation of consumer electronics products when those devices are not engaged in delivery of wire or radio transmission.²⁰ By extension, the Commission does not have authority, specific or ancillary, over retailers’ marketing and consumer educational efforts concerning such products.²¹ For these reasons, RadioShack believes that the Commission lacks jurisdiction to impose specific consumer education requirements on retailers.

The Commission’s proposal also fails to account for the fact that retailers have a strong incentive to educate consumers about the digital transition. Billions of dollars will be spent on new televisions, converter boxes, and ancillary equipment in connection with the transition. Retailers have every incentive to ensure that consumers buy the right products and satisfy their

¹⁷ 47 U.S.C. § 544(a).

¹⁸ The Commission’s regulation of the use of spectrum does allow it to exercise jurisdiction over retailers in certain enforcement contexts. For example, the Commission has ordered a retailer to cease selling an unlicensed product if it interferes with a licensee’s use of its spectrum. *See, e.g.,* Review of Part 15 and other Parts of the Commission’s Rules, ET Docket No. 01-278, *First Report and Order*, 17 FCC Rcd. 14063 (2002). However, that authority does not extend to the consumer education matters at issue here.

¹⁹ “[T]he [Commission’s] position in this case amounts to the bare suggestion that it possesses plenary authority to act within a given area simply because Congress has endowed it with some authority to act in that area. We categorically reject that suggestion. Agencies owe their capacity to act to the delegation of authority’ from Congress.” *Id.* at 691 (citing *Ry. Labor Executives’ Ass’n v. Nat’l Mediation Bd.*, 29 F.3d 655, 670 (D.C. Cir. 1994) (en banc)).

²⁰ *Broadcast Flag*, 406 F.3d at 700.

²¹ RadioShack notes that the Commission issued regulations requiring the labeling of analog-only products earlier in 2007. 47 C.F.R. 117(k). RadioShack and other retailers continued to cooperate with the Commission in the implementation of those regulations, even while also indicating their concerns that the Commission lacked jurisdiction.

needs. That is why even in the absence of government mandates, RadioShack has been heavily involved in the digital transition for several years.

IV. RADIOSHACK'S INVOLVEMENT IN THE DIGITAL TRANSITION EFFORT TO-DATE

RadioShack has been an active participant in the development of policy concerning the digital television transition, as well as with regard to the transition itself. RadioShack takes seriously its role in the transition and has made it clear in numerous forums its desire to assist consumers in ensuring the transition is a smooth one.

In March 2005, then-RadioShack CEO Leonard Roberts testified before the House Energy & Commerce Committee's Subcommittee on Telecommunications and the Internet regarding the digital television transition. Since that time, RadioShack has demonstrated its commitment to the digital transition and to educating and assisting consumers.²² RadioShack was also a strong advocate before Congress for the establishment of a "hard date" for the transition believing that setting such a date would be best for all television viewers.

In addition to its own efforts, RadioShack has partnered with fellow retailers (under the auspices of the Consumer Electronic Retailers Coalition (CERC)), the Consumer Electronics Association (CEA, of which RadioShack is also a member) and the Commission to develop a 2-sided card entitled "Buying a Digital Television," which contains concise definitions and summaries of options available to consumers. Both CEA and CERC, and by extension RadioShack, agreed to cooperate with the Commission in making the "tip sheet" available to sales associates of *any* interested retailer (whether or not a CERC member) and to interested customers. This "tip sheet" is also modified and updated as new developments in the transition occur. CERC has also developed a consumer guide, entitled "What You Need To Know About The February 17, 2009 'DTV Transition.'"²³ RadioShack features this consumer guide on its website.²⁴ There are numerous other steps CERC has taken to coordinate a consumer education effort on behalf of its retail members.

RadioShack and CERC have also worked closely with Congress and the National Telecommunications and Information Administration (NTIA) in the development and

²² See *Preparing Consumers for the End of the Digital Television Transition: Hearing Before the Subcomm. on Telecomm. and the Internet, House Comm. on Energy and Commerce*, 109th Cong. 28-29 (2005).

²³ The guide is available at <http://www.ceretailers.org/dtv-flyer2006.pdf>. RadioShack is also a member of the DTV Transition Coalition (Coalition).

²⁴ The guide can be found on RadioShack's website at the following address: http://www.radioshack.com/graphics/uc/rsk/ResearchLibrary/BuyersGuides/Images/DTV_Transition.pdf.

implementation of the converter box coupon subsidy program.²⁵ During NTIA's rulemaking proceeding, RadioShack demonstrated its commitment to the transition by providing insight regarding "best practices" for coupon programs and advocating that *all* consumers be eligible for coupons. Additionally, RadioShack provided NTIA guidance on how best to ensure consumers are able to request coupons, how those coupons should be distributed, and how retailers should be certified so that fraud and waste are minimized.

As NTIA begins the implementation phase of the coupon program with its vendor, RadioShack anticipates a continued leading role as an intended participant. RadioShack also notes that the coupon program includes the implementation by NTIA (with the Commission) of a consumer education plan, for which Congress provided \$5 million. RadioShack looks forward to working with NTIA on all aspects of the program, including education.

V. RADIOSHACK SUPPORTS CONTINUED EDUCATION EFFORTS BY INDUSTRY PARTICIPANTS

RadioShack applauds the announcement that the National Association of Broadcasters ("NAB") member stations will begin launching PSAs in early 2008. RadioShack believes there will be a significant benefit to consumers by beginning the PSAs before or commensurate with the coupon program. Encouraging the use of coupons *early* in 2008 will help lower the price of the box and ease the rush for boxes in 2009. RadioShack believes that the PSAs and complementary scrolls -- aired throughout the duration of the converter box coupon program and during primetime viewing hours -- will help to educate consumers about the transition and help alleviate any confusion they may have.

Additionally, RadioShack is aware that the National Cable & Telecommunications Association ("NCTA") has already begun a \$200 million PSA campaign that will run until February 2009. Such advertising will be produced and aired in English and Spanish, which RadioShack believes is an integral part of a comprehensive education effort.²⁶ According to NCTA, on-screen scrolls will also be part of the consumer education campaign. RadioShack also supports NCTA's decision to include "bill stuffers" in all cable customers' monthly bills. Such materials will provide educational messages and reminders about the transition.

The NPRM also seeks comment with regard to any steps retailers may take to ensure that consumers have access to the information and assistance they need. The notice also seeks comments as to what employee training would be appropriate.²⁷ Specifically, the NPRM

²⁵ See *e.g.*, Comments of RadioShack Corporation, In the Matter of Implementation and Administration of a Coupon Program for Digital-to-Analog Converter Boxes, available at http://www.ntia.doc.gov/otiahome/dtv/comments/dtvcoupon_comment0084.pdf.

²⁶ It should be noted that RadioShack provides bilingual training of its sales associates in stores located in areas with a large Hispanic presence. RadioShack believes such training contributes to the company's success and is a core part of the company's training process.

²⁷ NPRM ¶¶ 6, 14.

inquires whether NTIA and the Commission should establish the elements of a legally sufficient plan.²⁸ As stated above, constitutional and jurisdictional constraints preclude the Commission from mandating any specific consumer education efforts for retailers to follow. Even if the constitutional and jurisdictional issues were overcome, a one-size-fits-all approach to consumer education would be unwise, impractical and ineffective. Each retailer, including RadioShack, must take into consideration its own unique characteristics before crafting a consumer education initiative. Retailers are differentiated by store size (assuming they have a storefront at all), inventory size and type, and staff size, as well as other characteristics. The techniques RadioShack uses to train its employees in 4,400 stores will be very different from those used by a big box retailer to train its employees. Retailers have vast experience catering to consumers' needs and each retailer should be left to decide the proper consumer education efforts that best fit its unique imprint in the marketplace.

RadioShack prides itself on being able to answer consumers' questions regarding technological developments. RadioShack's main objective is to train its associates to guide customers through the choices they face, and to help them arrive at a solution that fits their needs. RadioShack has undertaken these training efforts successfully for many years and in many areas without governmental mandates and there is nothing peculiar about the transition to digital television that will suddenly undermine or defeat those proven methods. RadioShack is constantly revising and updating its training practices to meet changing technology and the DTV transition is no exception. In that vein, RadioShack will train its employees regarding the DTV transition and how it affects consumers, especially those who only receive television signals over-the-air. Additionally, RadioShack intends to produce specific online content for consumers, accessible via RadioShack's website, that will answer many of the common questions consumers have about the transition, including information about the impact of the transition on existing over-the-air analog televisions, the proper use of antennas and the use of a converter box purchased via the government's coupon program. Further, RadioShack will prominently display a link to the Commission's consumer education website, www.dtv.gov, on its website and intends to post fixed signage at each of its primary television displays in its stores. RadioShack is confident that these and additional efforts will assist educating the public about the digital television transition.

The NPRM references a recent letter from Representatives John Dingell and Ed Markey that suggests the Commission, in conjunction with NTIA, should require retailers who participate in the converter box coupon program to report in detail about their employee training and consumer information plans.²⁹ RadioShack opposes such a requirement. As noted above, the Commission lacks of jurisdiction over independent retailers. In addition, such a reporting requirement will impose significant and needless burdens on retailers who have volunteered to participate in the converter box coupon program and which, for an 18 month program, would not justify the time and cost associated with reporting. The imposition of this requirement would likely discourage participation in the program by retailers and RadioShack believes that its time

²⁸ *Id.* ¶ 14.

²⁹ *Id.* ¶ 13.

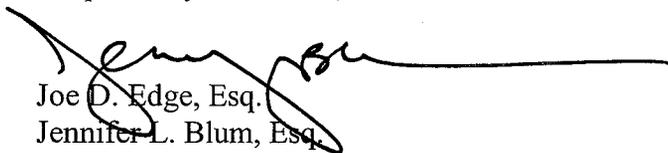
would be better spent training its employees as it knows best and devoting its efforts to educating consumers about the transition.

The NPRM also inquires whether penalties for noncompliance with consumer education efforts are appropriate.³⁰ RadioShack believes that, since retailer participation in the coupon program is voluntary and the Commission does not have jurisdiction over retailers, penalties issued by the Commission against retailers would be unlawful and that the prospect of litigating unlawful penalties would discourage retailer participation.

VI. CONCLUSION

RadioShack has proven its commitment to the digital television transition and the requisite consumer education necessary to facilitate it. RadioShack and other retailers have undertaken substantial efforts in this area without government mandates because their own economic interests are served by a smooth transition. The Commission does not have jurisdiction over retailers and any consumer education mandates imposed by the Commission would likely violate retailers' First Amendment rights. If the Commission believes that private consumer education efforts as well as those already funded in connection with the NTIA converter box program are inadequate, it should develop its own consumer education plan to fill whatever gaps it believes exists. RadioShack believes, however, that its efforts will prove beneficial to the consumer. As evidenced by its efforts to-date, RadioShack is already heavily involved in educating consumers regarding the digital television transition.

Respectfully Submitted,



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³⁰ *Id.* ¶ 14.