

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

In the Matter of)	
)	
Amendment of the Commission's Rules)	WT Docket No. 07-250
Governing Hearing Aid-Compatible Mobile)	
Handsets)	
)	
Section 68.4(a) of the Commission's Rules)	WT Docket No. 01-309
Governing Hearing Aid Compatible Telephones)	
)	
Petition of American National Standards Institute)	
Accredited Standards Committee C63 (EMC))	
ANSI ASC C63™)	

**Comments Of The
Consumer Electronics Retailers Coalition On
Notice Of Proposed Rule Making**

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December 21, 2007

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The Consumer Electronics Retailers Coalition (“CERC”) respectfully submits these Comments on this Notice of Proposed Rulemaking with respect to DTV Consumer Education. CERC members include specialist retailers Best Buy Co., Inc., Circuit City Stores, Inc., and RadioShack Corporation; general retailers Sears Holdings (Sears and K-Mart); Target Corporation, and Wal-Mart Stores, Inc.; online retailer Amazon.com; and the North American Retailer Dealers Association (NARDA), the National Retail Federation (NRF), and the Retail Industry Leaders Association (RILA).

In this NPRM, the Commission reviewed its previous discussion as to whether it has the jurisdiction to impose demonstration requirements on independent retailers, and noted that those who commented, including CERC, replied that the Commission lacks

such jurisdiction.¹ In light of the current “open platform” approach, however, the Commission again asks:

We also seek comment on whether and how to extend our hearing aid compatibility rules, including handset deployment, information, and outreach requirements, from service providers to other entities offering handsets to consumers within an open platform environment. For example, as discussed above, the record compiled in response to the notice portion of the *Hearing Aid Compatibility Order on Reconsideration and Further Notice* did not support extending in-store testing requirements beyond retail outlets owned or operated by service providers. Considering the development of open platform networks, however, there may be a greater need for in-store testing by independent retailers or other third parties.²

CERC and its members respectfully conclude that there is nothing about the open platform environment to change their advice to the Commission in 2005 that it lacks any delegated or ancillary authority over retailer in-store practices. The purported bases for any finding of delegated or ancillary authority were discussed and found insubstantial in the 2005 filings made by CERC and RadioShack.³ CERC asks that the CERC and RadioShack filings in this respect be incorporated into the record with respect to this NPRM. As to authority over retail practices generally, and any assertion of ancillary jurisdiction, CERC addressed this issue this year in another proceeding and also requests that its filing there be made a part of the record in this proceeding.⁴

¹ *In the Matter of Section 68.4(a) of the Commission’s Rules Governing Hearing Aid-Compatible Telephones*, WT Docket No. 01-309, Second Report and Order and Notice of Proposed Rulemaking ¶ 25 (rel. Nov. 7, 2007).

² *Id.* par. 97 (footnote omitted).

³ *See, In the Matter of Section 68.4(a) of the Commission’s Rules Governing Hearing Aid Compatibility*, Order, WT Docket 01-309 (June 21, 2005); Comments of Consumer Electronics Retailers Coalition at 3 – 7; Comments of RadioShack Corporation at 4 - 11 (both Sept. 26, 2005) (the “HAC” proceeding).

⁴ *In the Matter of DTV Consumer Education Initiative*, MB Docket No. 07-148, Comments of the Consumer Electronics Retailers Coalition on Notice of Proposed Rulemaking (Sept. 17, 2007).

The courts have held that “[t]he FCC, like other federal agencies, ‘literally has no power to act ... unless and until Congress confers power upon it.’”⁵ The FCC can promulgate regulations under ancillary authority only 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.”⁶

For example, the Court of Appeals held in the *Broadcast Flag* case that FCC jurisdiction extends only to entities (including parties responsible for receivers) *engaged in communication by wire or radio*:

While the Supreme Court has described the jurisdictional powers of the FCC as ... expansive, there are limits to those powers. No case has ever permitted, and the commission has never, to our knowledge, asserted jurisdiction over an entity not engaged in “communication by wire or radio.”⁷

In the prior proceeding on this subject CERC and RadioShack concluded that the Commission’s delegated authority does not extend to retailers when they are not engaged in communication by wire or radio.⁸ As RadioShack commented:

The Communications Act authorizes the Commission to regulate licensees of radio spectrum and also grants the Commission jurisdiction to regulate providers of commercial mobile radio service (CMRS). However, there is no statutory authority to regulate an independent retailer—that is neither a licensee of spectrum nor a provider of CMRS

⁵ *American Library Ass’n v. FCC*, 406 F.3d 689, 691 (D.C. Cir. 2005) (“Broadcast Flag Opinion” citing *La. Pub. Serv. Comm’n v. FCC*, 476 U.S. 355, 374 (1986)); see also *Regents of University System of Ga. v. Carroll*, 338 U.S. 586, 597 (1950).

⁶ *Id.* at 692-93.

⁷ Broadcast Flag opinion at 702, citing *Accuracy in Media, Inc. v. FCC*, 521 F. 2d 288, 293 (D.C. Cir. 1975).

⁸ HAC proceeding, *id.*

Retailers continue to be responsive to public interest goals, objectives, and leadership as recognized and expressed by the Commission. It is not in CERC's power, however, to confer delegated or ancillary authority on the Commission. Accordingly, CERC members look forward to working with the Commission and interested parties on a voluntary basis.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Marc A. Pearl', with a stylized flourish at the end.

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