

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

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In the Matter of)	
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Amendment of the Commission's Rules Governing)	WT Docket No. 07-250
Hearing Aid-Compatible Mobile Handsets)	
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COMMENTS OF METROPCS COMMUNICATIONS, INC.

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TABLE OF CONTENTS

I.	INTRODUCTION AND SUMMARY.....	1
II.	THE COMMISSION LACKS THE AUTHORITY TO REQUIRE DEVICES THAT ARE NOT INTERCONNECTED WITH THE PSTN TO BE HEARING AID COMPATIBLE, AND A REQUIREMENT THAT MANUFACTURERS AND SERVICE PROVIDERS ENSURE DEVICES ARE HEARING AID COMPATIBLE WITH ALL VOICE APPLICATIONS WOULD BE DIFFICULT, IF NOT IMPOSSIBLE TO IMPLEMENT	4
III.	THE COMMISSION LACKS THE AUTHORITY TO REGULATE IN-STORE TESTING BY THIRD PARTY RETAILERS AND THE COMMISSION’S INTEREST IN PROMOTING COMPETITION AND INNOVATION DISFAVORS SUCH REGULATIONS.....	8
IV.	CONCLUSION.....	13

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MetroPCS Communications, Inc. (“MetroPCS”),¹ by its attorneys, hereby respectfully submits its comments on the *Further Notice of Proposed Rulemaking* (“*FNPRM*”) in the above captioned proceeding.² The following is respectfully shown:

I. INTRODUCTION AND SUMMARY

MetroPCS supports and applauds the Commission’s continuing efforts to ensure that consumers with disabilities, including hearing loss, are able to participate in the wireless revolution. MetroPCS takes its hearing-aid compatibility obligations very seriously and, in fact, goes above and beyond the Commission’s regulations in providing a wide variety of mobile handsets and support for those with hearing loss.³ This is not only due to good corporate

¹ For purposes of these Comments, the term “MetroPCS” refers to MetroPCS Communications, Inc. and all of its FCC-licensed subsidiaries.

² *Amendment of the Commission’s Rules Governing Hearing Aid-Compatible Mobile Handsets*, in WT Docket No. 07-250 (August 5, 2010) (“*FNPRM*”).

³ See MetroPCS Communications Inc. Hearing Aid Compatibility Status Report (FCC Form 655) (filed January 12, 2010).

citizenship, but also due to the fact that MetroPCS has found that the market demands such handsets. However, the Commission should proceed with caution when considering whether to expand the obligations related to hearing-aid compatibility. In the *FNPRM*, the Commission proposes to significantly expand its hearing aid compatibility rules. MetroPCS particularly is concerned with three of these proposed rule changes. First, the Commission proposes to extend its rules to devices that are not interconnected with the PSTN and that do not provide traditional telephone voice services. The *FNPRM* also seeks comment on a proposal to require all manufacturers and service providers to ensure hearing aid compatibility of their devices with all voice applications that could be installed onto their phones by end-users. Finally, the Commission considers applying its in-store testing requirements to third party retailers.

MetroPCS believes that the Commission is overreaching its statutory authority by applying hearing aid compatibility requirements to devices not interconnected with the PSTN. The Hearing Aid Compatibility Act (the “HAC Act”) specifically directs the Commission to require hearing aid compatibility of “telephones” and “telephones services.” To interpret the term “telephone” to apply to any voice communication device, even those which never access the public switched telephone network, would extend the reach of the HAC Act beyond congressional intent. Furthermore, such requirements may subject primarily data-only devices, which are not designed or intended to be operated as voice handsets, to hearing aid compatibility requirements, because the end-user could download a voice communication application on a data device. The Commission should not apply such restrictive rules to data-only devices while they are still in their developmental nascency.

Next, manufacturers and service providers should not, and in fact cannot, comply with a rule requiring that they ensure all devices are hearing aid compatible with all voice applications.

In today's age of open operating systems, such as Android, and the open marketplace, there are no controls over the applications. There are simply too many voice applications available for download onto devices, and there are many more voice applications that will be developed and released after such devices are on the market. The applications market has generated hundreds of thousands of "apps." By adopting additional rules and regulations to the creation of such applications, the Commission will stifle innovation, and in fact impede the progress being made by such applications. The costs and burden to manufacturers and service providers to review each application that could potentially have a voice function would potentially cripple the wide successful market for applications. Further, since smartphones are in their nascency, such a requirement will stifle innovation and development. Ensuring compatibility should be the job of the user. In this age of the Internet, potential purchasers can get information on devices from a variety of sources, including the carrier and other users. These sources may include whether a device works with a particular application. In fact, applications are rated in many instances by users and users that cannot use a particular application in a device can, and do, disclose it to others. This free marketplace of ideas is much better than trying to ensure that a manufacturer or service provider tests every application prior to such application being proven in the market.

Finally, MetroPCS contends that the Commission has no statutory authority to regulate the actions of third party vendors in relation to in-store testing, and it certainly has no authority to regulate return and refund policies of third party vendors. Small, rural and mid-tier carriers rely more heavily on third party vendors to connect with consumers than do the large national carriers, and, if the Commission targets these retailers with unnecessary increased regulations, many of them will be unable to them and may simply discontinue those sales. Indeed, requiring

in-store testing would likely lead to the loss of competitive opportunities for small, rural and mid-tier carriers and a more dominant foothold by the large national carriers.

II. THE COMMISSION LACKS THE AUTHORITY TO REQUIRE DEVICES THAT ARE NOT INTERCONNECTED WITH THE PSTN TO BE HEARING AID COMPATIBLE, AND A REQUIREMENT THAT MANUFACTURERS AND SERVICE PROVIDERS ENSURE DEVICES ARE HEARING AID COMPATIBLE WITH ALL VOICE APPLICATIONS WOULD BE DIFFICULT, IF NOT IMPOSSIBLE TO IMPLEMENT

The Commission acknowledges that Congress, in the HAC Act, only granted the Commission to require hearing aid compatibility for telephones and telephone services: “The Hearing Aid Compatibility Act directs the Commission to establish regulations to ensure reasonable access by persons with hearing loss to ‘telephone service.’”⁴ However, the *FNPRM* then seeks comment on the Commission’s proposals to extend its rules to “all otherwise covered handsets that are used for voice communication with members of the public or a substantial portion of the public, including those that may not be interconnected with the public switched telephone network but can access another network that is open to members of the public.”⁵ Furthermore, the *FNPRM* seeks comment on whether to mandate “procedures for a manufacturer to test the hearing aid compatibility of voice functions that are not initially installed into the phone but may be enabled, for example, by the installation of a software program that affects the circumstances under which the transmitter operates.”⁶ The Commission does not have the authority to expand the requirement of the HAC Act to non-PSTN devices. To do so would be to

⁴ *FNPRM* at ¶ 79.

⁵ *Id.* at ¶ 83. This language appears to try and reach devices which connect solely to the Internet and are used to provide voice communications, like Skype devices. This would be a significant expansion of authority toward trying to regulate devices used in connection with the Internet.

⁶ *Id.* at ¶ 89.

redefine the concept of a “telephone” and to cause its rules, including other rules which use the term telephone and telephone service, to apply potentially to anything that could conceivably be used for any type of communication at all—clearly not what was intended by Congress by its use of a specific term, “telephone,” in the HAC Act. Indeed, this could allow the Commission to begin regulating certain aspects of the public Internet.⁷ Furthermore, to ask manufacturers and service providers to ensure hearing aid compatibility with every potential application on the market would impose a potentially insurmountable economic and operational burden upon manufacturers and service carriers – and potentially cripple the market for mobile applications.

The Commission’s proposal to expand its hearing aid compatibility rules to apply even to services that do not touch the PSTN is unsupported. The HAC specifically notes that the Commission has authority in this area over “telephones” and “telephone service.” Although those terms are not defined, an expansion of these terms to include the Internet could be challenged.

Under the Commission’s proposal, if a carrier offers a device that is designed and marketed purely for information services to only access the Internet and download applications, such a device would still fall under the Commission’s interpretation of “telephone” because a subscriber could download an application for online chatting, such as Skype or another instant messenger service and such a device could be connected to a “public” network.” MetroPCS is concerned that “public network” could mean the public Internet. These applications allow for voice communications, and thus would meet the *FNPRM*’s threshold for “telephone service,” even though they are not interconnected with the PSTN. In addition, devices which are designed

⁷ For example, the following sections of the Communications Act use the term “telephone” or “telephone service”. *See, e.g.*, Sections 153(48), 227, 228, 272, 274, 332 (through the definition of telephone toll services), 652, 653, etc.

for voice but designed to be used other than with the PSTN would also fall within the Commission's proposed definition. Thus, under the definition used by the Commission, companies which provide only Internet access would be deemed a "telephone service" provider. This result is a striking departure from the Commission's prior opposition to defining Internet access service as a telephone service. Such a definitional shift could impact broader proceedings such as net neutrality and others where the Commission has not taken such a broad view. Moreover, such data-only services are in their nascency, and requiring hearing aid compatibility now will slow down technological progress. Manufacturers should not be weighed down or restricted by potentially crippling regulations in their efforts to provide new and innovative services to the public as a whole.

Furthermore, it is fundamentally wrong to require manufacturers and service providers to be responsible for voice capabilities that are activated by the user but that are not part of the handset, such as Skype or other applications over the handset. This requirement would pose a seemingly unanswerable question: How can an equipment manufacturer or a service provider test a handset to ensure that it is hearing aid compatible with every voice application that may conceivably be devised? This is especially true in the age of Android phones, the iPhone, and other smartphone devices. More than 300,000 applications are available on the iPhone alone,⁸ and a portion of them include voice services. The Google Android app store has available approximately 150,000 applications,⁹ and the Blackberry RIM app store has more than 10,000.¹⁰

⁸ *Apple Reaches Milestone: 300,000 Applications Available in App Store*, ZIPHONE NEWS, Oct. 19, 2010, available at <http://news.ziphone.org/tech/apple/apple-reaches-milestone-300000-applications-available-in-app-store-1232174.html>.

⁹ *See Accumulated Number of Application and Games in the Android Market*, Android Market Statistics, AndroLib.com (last visited October 21, 2010).

Moreover, because Android is an open platform, it is increasingly easy to create applications that may have some voice capabilities. Further, Android applications can be developed and “side loaded” in the handset without going through the Android marketplace. (This is also the case with many applications for other operating systems.) It would be difficult, if not impossible, for a manufacturer or carrier to test each application even if was aware of each one that existed at the time of launch. Since testing requires time and application development is dynamic, it is not clear how a manufacturer or service provider could test and certify for all applications that exist at the time of launch. Indeed, if such a regulation was passed, the likely effect is that the innovation and deployment of such applications would be greatly slowed, as manufacturers and/or service carriers would have to establish procedures to examine each new application available to determine whether or not it has voice capability and may be hearing aid compatible, or lead to a degradation in existing hearing aid compatibility of a device. It also could lead to a closed application environment where applications need to be certified before they are made available. While the Apple model is such a closed environment, the Android one is not. MetroPCS believes that the open model represented by Android is the future for applications development and the proposed rules may deter such open development efforts.

In such a user-driven market with such individualized control over the actual services used, it should be the responsibility of the user, not the manufacturer or the service provider, to ensure that the applications being placed by the user onto the handset do not interfere with its hearing aid compatibility. In this context, the user has more information and is better positioned to take on that role than the service provider or the manufacturer. The user is the one installing

¹⁰ Stuart Dredge, *RIM passes 10,000 apps on BlackBerry App World*, MOBILE ENTERTAINMENT NEWS, Sept. 8, 2010, available at <http://www.mobile-ent.biz/news/38555/RIM-passes-10000-apps-on-BlackBerry-App-World>.

and setting up such applications on their handsets, and they can and should test each application to make sure that such application is compatible to their needs. Further, since application stores typically have reviews, users will be able to determine in advance what other users found with respect to the device and its capabilities. And, clearly, the user-driven marketplace is working. A simple search for “hearing aid” in Apple’s iTunes app store returns numerous hits for applications for individuals with hearing loss. Such options demonstrate that the market is working for the development of application for those with hearing loss, and the Commission should not slow down or eliminate innovation with additional and unnecessary regulations. Finally, software loaded by individuals is fundamentally different than software deployed as part of the core of the handset, which means that such software would likely not result in a situation where the user has a completely non-working handset. The user typically can uninstall the offending software and return the hearing aid compatibility to the device.¹¹

III. THE COMMISSION LACKS THE AUTHORITY TO REGULATE IN-STORE TESTING BY THIRD PARTY RETAILERS AND THE COMMISSION’S INTEREST IN PROMOTING COMPETITION AND INNOVATION DISFAVORS SUCH REGULATIONS

The *FNPRM* seeks comment also on the extension of in-store testing requirements to retail outlets not owned or operated by service providers.¹² The *FNPRM* also seeks comment on whether the Commission “should require independent retailers to allow a customer with hearing loss to return a handset without penalty, either instead of or in addition to an in-store testing requirement.”¹³ The Commission lacks the authority to extend its in-store testing requirements

¹¹ MetroPCS also is concerned that another approach is to make application developers here to ensure compatibility. This too would deter development of new applications and stifle innovation.

¹² *FNPRM* at ¶¶ 94-98.

¹³ *Id.* at ¶ 96.

to retail outlets not owned or operated by a service operator. Neither the Act nor the HAC Act grants the Commission such authority, and Congress did not intend such a result. In addition, such a rule would pose significant practical difficulties and will severely limit both the availability of devices in many communities and innovation in the device marketplace generally.

The *FNPRM* asks whether the HAC Act itself grants the Commission the authority to promulgate such rules, under its mandate to “‘establish such regulations as are necessary’ to ensure access to telephone service by persons with hearing loss.”¹⁴ However, the HAC Act does not provide a grant to the Commission of independent authority over independent retailers. Under the HAC Act, the Commission may “require that all essential telephones and all telephones *manufactured* in the United States...or imported for use in the United States...provide internal means for effective use with hearing aids.”¹⁵ Indeed, Congress’ intent was clearly for the Commission to focus primarily on the manufacture of such devices. This is supported by the legislative history as well: “*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.*”¹⁶ Thus, it was Congress’ clear intent to only require manufacturers to have this obligation – not independent third retailers.

Further, the Commission does not have ancillary or independent authority over third party retailers. The *FNPRM* asks whether the Act grants the Commission authority over third party retailers. The Act gives the Commission general jurisdiction over entities “engaged in providing ‘services,’” including “all instrumentalities, facilities, apparatus, and

¹⁴ *Id.* at ¶ 98 (citing 47 U.S.C. § 302a(b)).

¹⁵ 47 U.S.C. § 610(b)(1) (emphasis added).

¹⁶ S. REP. NO. 100-391, at 4 (1988) (emphasis added).

services...incidental to...transmission.”¹⁷ While a device such as a handset may be subject to the Commission’s rules, the sale of that device by an entity completely unrelated to the devices functioning as a part of the transmission process is not, especially when such sale is not the part of a requirement to receive service. As the Consumer Electronics Retailers Coalition pointed out in 2007 when the Commission last proposed such an extension of its hearing aid compatibility rule to third party retailers, “the Commission’s delegated authority does not extend to retailers when they are not engaged in communication by wire or radio.”¹⁸ To say that such a step is incidental would open the door to regulation of every actor that touches the device at all, from the trucks that transport them to the retailers to individuals who sell their personal devices second-hand.

In addition, the *FNPRM* points to the Commission’s grant of authority under Section 302(a) of the Act, which empowers the Commission to “make reasonable regulations...governing the interference potential of handsets which in their operation are capable off emitting radio frequency energy...in sufficient degree to cause harmful interference to radio communications.”¹⁹ Section 302 also authorizes the Commission to ensure that “[n]o person shall...sell, offer for sale,..., or use devices, which fail to comply with regulations promulgated pursuant to this section.”²⁰ Again, this section has no applicability to the third party retailers. First, this section pertains to interference with other frequencies, not with devices’ capacity to enhance functionality, such as through better use with hearing aid equipment. Under

¹⁷ 47 U.S.C. § 153(33).

¹⁸ Comments of the Consumer Electronics Retailers Coalition, *Amendment of the Commission’s Rules Governing Hearing Aid-Compatible Mobile Handsets*, in WT Docket No. 07-250 (filed Dec. 21, 2007).

¹⁹ 47 U.S.C. § 302a(a).

²⁰ 47 U.S.C. § 302a(b).

this section, the Commission could regulate whether a device interfered with radio communication, but not whether a retailer makes testing available. Second, this section aims to prevent such interfering devices from reaching the market at all, something that should be accomplished long before devices are put in the hands of third parties.

And, certainly none of the statutory provisions mentioned in the *NPRM* indicate any sort of authority over third party retailers' purchase agreements with their customers. Nowhere does the Commission point to any grant of authority governing the manner in which those retailers may contract with their customers regarding return policies. If the Commission does not have the authority to impose testing requirements in these stores, then certainly it does not have the authority to interfere with retailers' contractual agreements with customers. Such regulation would only decrease the likelihood that such retailers – which are becoming major players in the selling of devices to a wide array of demographics – would be willing to continue selling such devices to the public.

Additionally, third party retailers are not in the best position to do what is proposed. RadioShack, Best Buy, Target, and Wal-Mart cannot be expected to keep on staff employees with specific expertise over all telecommunications issues or to have a whole range of handsets which are hearing aid compatible. Third party retailers usually do not specialize in only the sale of these devices, and surely they cannot be expected to increase their overhead costs to allow for such a plan. This is especially true given the substantial employee turnover that retail providers generally have. The training alone could cost hundreds of thousands of dollars and the time expended could be as significant. In addition, retailers prefer to sell only those models in which they can get the fastest turn on their inventory. Since requests for hearing aid compatible phones will not be a volume business, third party retailers – especially ones where sale of handsets is not

an important part of their business – may decide to forego selling handsets rather than stock inventory that does not sell or involve the additional training of employees. Rather, it should be sufficient that the third-party retailer have such phones available and be able to direct customers to the particular service provider’s location when a request is made for hearing aid compatible handsets.

Indeed, to ask such third-party retailers to do so would have only one logical result: many third party retailers would cease to sell the latest devices – or cut back on the number of mobile providers they deal with – because it would become cost-prohibitive to keep up and comply with Commission regulations. As RadioShack noted in their 2005 hearing aid compatibility comments, “[p]roviding live, in-store testing in a kiosk environment would significantly increase the amount of time spent on those transactions, with an effect on the efficiency and benefits of kiosk sales and overall customer service.”²¹ The Commission would cause the rapid cessation of deployment of next generation telecommunications devices, including—and especially—smartphones, in areas that rely on smaller, third party retail stores to locate and distribute new technologies. This is especially problematic given that smartphones are an increasing part of the device landscape.

Furthermore, rural, small and mid-tier carriers more heavily rely on third party retailers for the distribution of their product than do the largest national carriers. The imposition of such requirements could further limit the rural, small and mid-tier carriers’ ability to compete. For instance, many of the big-box retailers offer numerous types of phones from an array of

²¹ Comments of RadioShack Corporation, *Section 68.4(a) of the Commission’s Rules Governing Hearing Aid Compatibility*, in WT Docket No. 01-309 (filed Sept. 26, 2005).

carriers.²² Forcing a big-box retailer to have in-store testing for each phone offered by each service provider could limit the number of service provider's phones offered by that big-box retailer or limit the services which can offer phones. In that instance, it is most likely that the third-party retailer will eliminate the smaller or regional competitors from their sale selection – such as MetroPCS – and maintain the sale of large national carriers' phones and services, further concentrating the wireless market and reducing or eliminating consumer choice in some areas. The Commission should not adopt rules and regulations that would increase the already significant advantages that the larger carriers have over the smaller carriers.

IV. CONCLUSION

The preceding having been shown, MetroPCS urges the Commission not to expand the scope of its hearing aid compatibility regulations. To begin with, the Commission does not have the statutory authority under the HAC Act or the Communications Act to apply its rules to non-interconnected voice services or to third party retailers. Furthermore, many of the devices to which it proposes expanding its rules are still in their nascency, and such unnecessary regulations will likely slow, or even entirely halt, innovation. These devices allow consumers to design their own device experience, and, accordingly, those consumers are in the best position to ensure the hearing aid compatibility of their devices. And, as for in-store testing requirements for third party vendors, Commission action would surely dissuade independent retailers from participating in the market at all, resulting in fewer opportunities for small, rural and mid-tier carriers to

²² For instance, Best Buy website lists hundreds of phones available for purchase. *See* Mobile Phones: Cell Phone, Mobile Phone, Smartphone, BEST BUY, <http://www.bestbuy.com/site/Mobile-Cell-Phones/Cell-Phones/abcat0801000.c?id=abcat0801000> (last visited Oct. 21, 2010). And Wal-Mart offers services from at least 10 carriers. *See* Cell Phones, Prepaid, Plans and Accessories, WALMART.COM, <http://www.walmart.com/cp/cell-phones-accessories/542371> (last visited Oct. 18, 2010).

connect with consumers and promoting the continued dominance of the large national carriers. All this being true, MetroPCS encourages the Commission to resist regulating these matters at this time and allow the market and consumers to decide in which direction the technology develops.

Respectfully submitted,

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