



I. ***The Commission’s Proposed Definition of “Telephone” Properly Reflects the Statutory Purpose of the Hearing Aid Compatibility Requirements.***

3. In the NPRM, the Commission proposes a definition of “telephone” to encompass “anything that is commonly understood to be a telephone or to provide telephone service,” as that understanding may evolve over time, regardless of regulatory classifications used elsewhere in the Communications Act. This definition would include multi-use devices as well as wireless handsets that are used for voice communications among members of the public or a substantial portion of the public. This approach, which focuses on functionality rather than regulatory classification, is in proper harmony with the legislative intent of the Telecommunications for the Disabled Act and the Hearing Aid Compatibility Act.<sup>2</sup>

4. While neither of these statutes formally defines the term “telephone service,” their legislative history more than adequately describes what it is. Specifically, telephone service is that which enables individuals to “participate as self-sustaining employees” and “safely travel from State to State with equal access to airports, hotels, restaurants, and other places of public accommodation.”<sup>3</sup> It is “pervasive . . . both in commercial transaction and personal contacts.”<sup>4</sup> It is the “telecommunications media on which modern life has grown so dependent.”<sup>5</sup> This description clearly encompasses today’s newer forms of communications.

5. The Commission’s proposed definition is capable of evolving and is therefore consistent with the clear expectation by Congress that telephone technology would change over

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<sup>2</sup> The Telecommunications for the Disabled Act of 1982, Pub. L. No. 97-410, 96 Stat. 2043 (1982) created a new Section 710 of the Communications Act of 1934 (47 U.S.C. 610) (“Telecommunications Act”); The Hearing Aid Compatibility Act of 1988, Pub. L. No. 100-394, 102 Stat. 976, amended Subsection (b) of Section 710.

<sup>3</sup> Telecommunications Act, H.R. No. 97-888, p. 4 (1982) (“House Report”).

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

time and that protections for the hearing-impaired should be preserved during such changes.<sup>6</sup> The legislative history states that “[t]he purpose of the reported bill is not to freeze technology, but rather to ensure that all persons enjoy the benefits of technological improvements in the telephone network, whether or not they are disabled.”<sup>7</sup> Therefore, the proposed definition is a logical expression of the statutory purpose and would avoid the statute being unintentionally eviscerated by the mere passage of time.

## II. *The Commission Is Not Authorized to Create New Exempted Services.*

6. Using the proposed definition of “telephone,” the Commission proposes to include within its HAC rules all customer equipment “used to provide wireless voice communications over any type of network among members of the public or a substantial portion of the public via a built-in speaker where the equipment is typically held to the ear,” including equipment that is not legally classified as CMRS.<sup>8</sup> It then asks whether the four statutory criteria for lifting the CMRS exemption are met with respect to such services. The Commission should not pursue this question, because the statute limits the Commission’s authority to exempt telecommunications devices from HAC requirements.

7. By the explicit language of Section 710, the Commission is not authorized to expand the range of exempted services beyond public mobile services (“CMRS”), private radio service (“PMRS”), cordless telephones, and secure telephones. The Commission is simply not at liberty to exempt additional service categories as technology develops and then consider whether or not to revoke such exemption using the CMRS (or any other) criteria. Congress drew the line

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<sup>6</sup> For example, Congress envisioned that operator assistance might, in the future, be replaced with a video terminal. *Id.* at 5.

<sup>7</sup> House Report, *supra* note 3, at 5.

<sup>8</sup> NPRM, ¶¶ 77-80.

in 1988. The original exemptions were clearly delineated and intended to temporarily give certain existing industries some growing room before meeting the new requirements.<sup>9</sup> By their terms, they apply only to the “initial regulations prescribed by the Commission.”

8. Furthermore, even if the Commission had the authorization to do so, an automatic exemption of new technologies until they reached some nebulous stage of market maturity would seriously threaten the effectiveness of HAC requirements. Treating non-CMRS wireless telephones as an exempted service would undermine both Congress’ intent that “to the fullest extent made possible by technology and medical science, hearing-impaired persons should have equal access to the national telecommunications network”<sup>10</sup> and the Commission’s Policy Statement goal of “continuing access to the most advanced and innovative technologies as science and markets develop.”<sup>11</sup> Neither of these objectives will be met if the Commission adopts an approach whereby emerging technologies first reach a certain undefined level of market success, undergo a rulemaking, and then belatedly seek design solutions to comply with the HAC requirements. Such an approach would impair the letter and spirit of the HAC rules, create enforcement issues, and generate recurring waves of pushback from manufacturers, retailers, and service providers. Moreover, in light of the short life of so many products in a rapidly changing telecommunications world, many products could approach the end of their life cycle without ever being subject to HAC requirements. The effective and efficient approach, as the Commission has noted, is that telephone developers should assume from the start that new

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<sup>9</sup> The statute itself provides for the cordless telephone exemption to expire after three years, without any analysis. The Commission must revoke or otherwise limit the remaining exemptions if the statutory criteria were met. In the *Hearing Aid Compatibility Order*, 18 FCC Rcd 16753 (2003), the Commission partially revoked the exemption for CMRS.

<sup>10</sup> 47 U.S.C. § 610, n.1.

<sup>11</sup> NPRM at ¶ 18.

devices are covered, so that they will consider HAC at the initial design phase and not end up begging for mercy when they find out afterwards that their design is hostile to HAC.

9. If the Commission determines that a particular new technology should be permitted to develop without imposing HAC requirements at the design stage, the correct standard is provided in Section 710(b)(3). This provision allows the Commission to waive the HAC requirements “with respect to new telephones, or telephones associated with a new technology or service” upon a finding that that compliance would be either technologically infeasible or would raise costs to such an extent that the telephones could not be successfully marketed.<sup>12</sup> But to fulfill the intent of the statute, a demonstration of technical infeasibility or cost should be based on an attempt to comply during the initial design phase and not be based on hardship that arises from neglect of the issue during initial design. In other words, companies should be permitted to apply for waivers only in circumstances where the HAC rules would substantially impede technological development or marketability *after* demonstrating that a *bona fide* attempt was made during the design phase to ensure HAC, complete with engineering details.

10. The foregoing interpretation is consistent with the recently-enacted Twenty-First Century Communications and Video Accessibility Act of 2010, which requires HAC compliance except where “not achievable.”<sup>13</sup> The term “achievable” is defined by the statute as “with reasonable effort and expense.” The later that HAC is introduced into the design process, the more effort and expense are likely to be required to comply. Therefore, any kind of automatic waiver for new equipment could enlarge the number of cases where effort and expense become significant—defeating the intent of Congress to achieve HAC in more situations, not fewer.

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<sup>12</sup> 47 U.S.C. § 610(b)(3).

<sup>13</sup> Twenty-First Century Communications and Video Accessibility Act of 2010, Pub. L. No. 111-260 (Oct. 2010), § 104 (“Accessibility Act”).

III. *The Commission has a Clear and Independent Mandate to Regulate Retailers to Provide In-Store Testing.*

11. As the telecommunications industry grows, and legislators and regulators seek to promote competition, an increasing number of end-user devices are likely to be sold at retail separately from the telecommunications service with which they are used. This growing retail segment cannot be exempted from in-store testing rules without putting persons with hearing disabilities at a disadvantage that will grow over time.

12. In-store testing is an invaluable consumer tool for correctly selecting an appropriate handset that will function with a particular hearing aid. The Commission does not need Sections 151, 152, or 153 of the Communications Act to require independent retailers to provide in-store testing, nor any sort of auxiliary or derived authority therefrom. Rather, it has a separate and clearly defined mandate that stems directly from Sections 710(a) of the Communications Act, as amended by the Telecommunications for the Disabled Act of 1982.<sup>14</sup> This authority is unequivocal: “[t]he Commission shall establish such regulations as are necessary to ensure reasonable access to telephone service by persons with impaired hearing.” Reasonable access means access wherever access occurs, or else it will become less reasonable over time. Just as the Commission defined “essential telephones” to impose HAC requirements on hospitals, hotels, and employers,<sup>15</sup> it is not constrained to exercise its Section 710(a) mandate with respect only to entities already regulated under other parts of the Act. Therefore, it can require independent retailers to provide in-store testing to ensure reasonable access to telephone service by persons with impaired hearing.

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<sup>14</sup> 47 U.S.C. § 610(a).

<sup>15</sup> 47 C.F.R. § 68.112.

13. The fundamental Congressional objective would be dealt a serious blow if independent retailers were exempted from the HAC rules. As noted above, a large number of handsets are sold through such stores, and competition will be increased by increasing the independent retail segment. Most handsets are sold in a package with CMRS service, whether purchased from a carrier or an independent retailer; so retailers are economically and contractually enmeshed with manufacturers and service providers. There is no principled basis for applying HAC rules to one set of retailers and not another, and the practical result—lopping off an entire segment of the handset retail structure from the reach of the HAC rules—should not be tolerated. Such a result would unnecessarily, if not unlawfully, disadvantage hearing aid wearers.

14. Because most handsets are sold packaged with CMRS service, even a liberal or unconditional return policy on a handset is not an adequate substitute for the option of walking out of the store with a demonstrably functional handset. A hearing aid user will not know whether a particular handset will work for him or her until selecting a service contract, activating the phone, and dialing a number. With live, in-store testing, the consumer can make this critical decision without paying any money, incurring a credit card charge, paying for air time, or risking an early termination liability. These differences are significant to the consumer and cannot reasonably be ignored by the Commission. Persons with hearing disabilities should have the same shopping tools as persons with full hearing.

#### IV. *Additional Provisions*

14. *Non-interconnected handsets.* Disabled workers should not be excluded from jobs involving non-interconnected telephones, particularly given the vast size and sophistication of some non-interconnected networks, particularly those operated by major corporations which are significant employers. The Commission should ensure that these networks are accessible to disabled workers, in keeping with the recently-enacted Twenty-First Century Communications and Video Accessibility Act of 2010, which requires the Commission to impose HAC rules on both interconnected and non-interconnected VoIP.<sup>16</sup>

15. *Wired VoIP.* The Commission's proposal to extend the scope of the HAC rules beyond CMRS to other types of wireless networks and devices does not appear to address the status of wired VoIP. Many VoIP phones, both at home and at work, are not wireless. Such phones clearly fall within the Commission's proposed definition of "telephone" and fall within the scope of the Twenty-First Century Communications and Video Accessibility Act of 2010. Wired VoIP and cordless VoIP connected to WiFi are increasingly prevalent in the workplace and the home; therefore, they must clearly and explicitly be made subject to the HAC rules absent what is an unlikely showing that compliance is truly infeasible.<sup>17</sup>

16. *Multi-use devices.* The Commission clearly has authority to regulate telephones that also serve other functions to the extent necessary to "ensure access to telephone service by persons with hearing loss." The Commission's general HAC authority is discussed in Section III (on in-store testing). HIA cautions against the possibility that the HAC rules could be

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<sup>16</sup> Accessibility Act, *supra* note 13, § 101.

<sup>17</sup> There is no reason why the earpiece of a VoIP telephone needs to be designed any differently from the earpiece of a conventional wireline telephone, so claims of infeasibility should be suspect.

circumvented by selling multi-use devices that do not include voice capability initially, but have the potential to have voice capability activated or installed later. If the hearing aid compatibility cannot be tested at the time of purchasing the device, equal access for persons with hearing disabilities required that HAC must be ensured at the time of sale or installation of a voice feature, except where a device is clearly “designed for purposes other than using advanced communications services.”<sup>18</sup>

17. *Power reduction as a solution.* HIA observes that achieving HAC compliance through a 50% power reduction in 2G legacy GSM handsets will degrade performance and automatically put hearing aid wearers at a disadvantage in completing calls. Flexible solutions to HAC are desirable as a general concept but should not degrade performance. Furthermore, if a power reduction is needed for HAC, then presumably full power 911 calls will cause interference to the caller’s hearing aid and interfere with reporting the emergency. Therefore, the power reduction solution should be permitted only where there is no alternative, and a clear warning should be placed on any handsets that rely on power reduction to achieve HAC.

18. *Transition period.* Any rules require some transition to avoid putting manufacturers in default without dereliction on their part. However, the Commission should be mindful of how many new products are introduced into the mobile communications market, the short useful life of most of these products, and the frequency with which users replace their equipment. The transition period should thus be no longer than the minimum amount of time needed for a new product design cycle and should not permit modifications of any currently compliant models that would put those models out of compliance.

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<sup>18</sup> Accessibility Act, *supra* note 13, § 104.

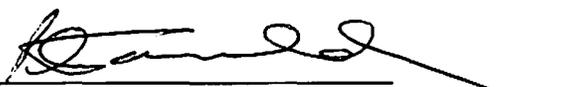
## Conclusion

19. The Policy Statement contains goals which, if not actually conflicting, are in tension. On one hand, the Commission recognizes the efficiency and speed of planning for HAC at the early stages of development. On the other hand, it wishes to take technological feasibility and marketability into account. Finally, it resolves to be flexible in accepting a range of industry solutions. While these are all laudable goals, much of the necessary balancing in this respect has been made by Congress. When it required all telephones to be hearing aid compatible, Congress provided limited exceptions and an explicit waiver standard. Future technologies generally were not exempted, even temporarily, without a waiver. By correctly recognizing VoIP and other technologies as “telephones” the Commission can draw new technologies into this regime and can impose adoption timelines and other regulations. It cannot, however, fundamentally revise the statutory scheme and the public interest balance already implicit in it.

20. Accordingly, the Commission should adopt rules in this proceeding which maintain a clear focus on advancing hearing aid compatibility, encompassing all voice-enabled devices held to the ear, and holding exemptions and grace periods to the minimum absolutely necessary to avoid stifling the development of new products by those who demonstrate that they have made a *bona fide* effort to achieve HAC throughout the design process.

Fletcher, Heald & Hildreth, P.L.C.  
1300 N. 17<sup>th</sup> St., 11<sup>th</sup> Floor  
Arlington, VA 22209-3801  
Tel. 703-812-0404/0478  
Fax 703-812-0486

Respectfully submitted,

  
Peter Tannenwald

  
Christine E. Goepf<sup>19</sup>  
Counsel for the Hearing Industries Association

October 25, 2010

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<sup>19</sup> Admitted in Massachusetts and the District of Columbia only.