

**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)	

Reply Comments Of The
Consumer Electronics Retailers Coalition On
Further Notice Of Proposed Rulemaking

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November 22, 2010

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The Consumer Electronics Retailers Coalition (“CERC”) respectfully submits these Reply Comments on this Further Notice of Proposed Rulemaking with respect to the Commission’s Rules Governing Hearing Aid-Compatible Mobile Handsets.¹

CERC’s Comments, and prior Comments by CERC and RadioShack in 2007 and 2005, recounted that the Commission has never been given or claimed direct or ancillary authority to impose an in-store testing requirement on independent retailers.² The legislative history of the Hearing Aid Compatibility Act of 1988 shows clearly that Congress intended the Commission to focus, instead, on the obligations of manufacturers.³ Of the twelve Comments now submitted in response to this FNPRM, eleven do not endorse any in-store testing requirement, or suggest that there is any new basis for one. Indeed, three groups of service providers join CERC in *opposing* any such

¹ *In the Matter of Amendment of the Commission’s Rules Governing Hearing Aid-Compatible Mobile Handsets*, WT Dkt. No. 07-250, Policy Statement and Second Report and Order and Further Notice of Proposed Rulemaking (rel. Aug. 5, 2010) (“FNPRM”).

² CERC October 25 Comments; CERC 2005 Comments at 3-6; RadioShack 2005 Comments at 4-11; CERC 2007 Comments at 1-3.

³ Pub. L. No. 100-394, 102 Stat. 976 (1988), codified at 47 U.S.C. § 610.

requirement. They explain that such a requirement would be *harmful to their customers*, their small business retail partners, and to their own small businesses as independent service providers.⁴

The one filing that support such an imposition⁵ does not, despite the Commission's explicit request for some new factual or legal basis, muster a single fact or circumstance, or a single citation to law or precedent, that has not been previously considered by the Commission and found insufficient. Thus, the record in this proceeding does not support any such imposition. It would be arbitrary and capricious, as well as beyond the Commission's authority, for the FCC to add any such obligation to its regulations.

I. **Nothing Has Been Added To The Record To Support Any Finding Of FCC Authority To Require In-Store Testing By Retailers.**

In its FNPRM the Commission asks whether some circumstance may have changed *since its last finding* with respect to independent retailers and in-store testing:

95. Discussion. We seek further, more targeted comment on whether the in-store testing requirement should be extended to some or all retail outlets other than those owned or operated by service providers. Given the growth of new channels of distribution, extension of the in-store testing requirement would help to ensure that consumers have the information they need to choose a handset that will operate correctly with their hearing aid or cochlear implant.

Now that twelve Comments have been received, the record remains devoid of *any* evidence of a “new channels” of distribution of HCA products that could justify a testing imposition on independent retailers. The industry still consists of specialist retailers, general retailers, and on-line retailers that may also be specialist and general retailers.

⁴ Blooston Rural Carriers Comments at 6-8; MetroPCS Communications Comments at 8-13; Rural Telecommunications Group Comments at 5-6.

⁵ Hearing Industries Association (“HIA”) Comments at 6-7.

Phones continue to be sold by the largest and smallest of independent retailers in each category. As is shown below, nothing has changed with respect to the generous return policies of these retailers, which continue to make both the imposition of testing and return policies redundant, hence inefficient. The only fact of record that is “new” is the new evidence that such an imposition would harm consumers and small business.

II. Service Providers That Rely On Independent Retailers Believe An In-Store Testing Requirement Would Harm Rather Than Help Their Customers.

The Comments of The Blooston Rural Carriers, MetroPCS Communications, and The Rural Telecommunications Group provide new information that a retail in-store testing obligation in fact would harm significant groups of consumers and small businesses.

According to the twenty rural retail carriers comprising the Blooston group, independent service providers tend to be small businesses that rely on other small businesses – independent retailers – for their distribution of devices, so as to enable them to serve local consumers (and compete with larger carriers). The Blooston group warns:

“The extension of HAC in-store testing requirements (and the prospect of FCC enforcement/fines) to these entities will provide a significant disincentive to “mom and pop” businesses and individuals that may sell only a small handful of wireless devices each month, but that taken together may represent a significant amount of a small carrier’s new business. ... [C]onsumers in rural areas (both hearing impaired and not) would almost certainly have diminished access to wireless products and services, since fewer retailers will choose to offer wireless handsets if this makes them subject to FCC regulation.”⁶

These carriers note – as CERC member RadioShack has noted with respect to the small-footprint stores of RadioShack and its franchisees – that such a requirement would particularly stress stores that have limited shelf and inventory space and only a few

⁶ Blooston Rural Carriers Comments at 7.

employees present in the store at any given time. Hence, as the Blooston carriers point out, for those stores that do continue to carry the service providers' phones, service to customers for other products would also be impaired. The adverse impact thus would extend to small business consumer electronics retailers generally (and hence their customers), as to their decision to carry phones in the first place, and as to their level of overall consumer service if they do.⁷

MetroPCS, on behalf of its subsidiary service providers, made much the same points as to the impact on rural service providers and small business retailers.⁸ Additionally, MetroPCS pointed out – as has CERC – that the burdens on independent sales and consumer service would also extend to larger retailers, including specialist CERC members such as Best Buy and RadioShack, and to non-specialist members such as Target and Wal-Mart.⁹ In the expert opinion of MetroPCS, “[t]he training alone could cost hundreds of thousands of dollars and the time expended could be as significant,” and there would likely be, as in the case of small business retailers, an adverse effect on carriage and stocking of some or all models.¹⁰

Another service provider group, the Rural Telecommunications Group, provides further record evidence that a new testing requirement for independent retailers would “chill sales in informal retail locations such as kiosks.”¹¹ It observes that “independent retailers play a valuable role in selling inventory and that such ‘informal’ retail locations should not be subject to the same stringent HAC requirements as providers as long as consumers are made aware that they can get ‘full service’ HAC expertise and options at

⁷ *Id.* at 8.

⁸ MetroPCS Communications Comments at 12-13.

⁹ *Id.* at 11.

¹⁰ *Id.* at 11-12.

¹¹ Rural Telecommunications Group Comments at 5.

provider-based retail operations.”¹²

III. **No New Legal Basis Or Argument Has Been Offered To Support Commission Authority Over Retail Sales Practices.**

The other Comments as now received by the Commission illustrate that CERC was correct in observing in its own Comments that nothing significant has changed since the FCC last concluded that it lacks authority or direction from the Congress to impose a testing requirement on independent retailers. Of the twelve Comments submitted, only one argues – with no supporting evidence – that the Commission has such authority. That argument is *not* based on citation to any new circumstance or precedent.

The Comments of the HIA – which, despite its inclusive name, does not purport to represent a single service provider or retailer – merely repeat, rather than document, the question posed by the Commission: are there new circumstances that would support a conclusion that congressional authority has been delegated to the FCC? In answer, the HIA simply reformulates the question as an assertion: “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.”¹³

¹² *Id.* As the Commission lacks authority to impose a testing requirement, so would it lack authority to impose such a notification condition on retailers in lieu of such a requirement. However, CERC and its members have an officially recognized record of cooperating with the Commission on a voluntary basis, as in the transition to Digital Television, and would be pleased to work with the Commission on a voluntarily basis in developing and promoting public education material.

¹³ HIA Comments at 7 (emphasis added).

In its own Comments, CERC observed that in posing the “enmeshed” metaphor the Commission was not itself pointing to any new fact of record, because nothing had changed since 2007 in the practice of retailers facilitating the provision of carriers’ service contracts to consumers; nor had the relevance of this facilitation to testing been demonstrated. Nor had any analytic justification, beyond a new metaphor, been offered so as to justify a departure from the legislative history and the well-settled interpretation of the HAC Act.¹⁴ HIA, in simply repeating the metaphor employed in the FCC’s question, supplies no new answer. Nor does the HIA even purport to point to any new or newly relevant precedent. Rather, HIA asserts, to the contrary: “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 [the HAC ACT].”¹⁵

Thus, far from providing any new facts or authority, the only commenter in favor of an FCC claim of authority cites no new facts, disclaims any new authority, and simply asserts that grounds previously shown to be insufficient should now be deemed sufficient. The development of the law has been in the opposite direction. As CERC has pointed out, 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

¹⁴ CERC October 25 Comments at 8.

¹⁵ HIA Comments at 6.

permitted, and the commission has never, to our knowledge, asserted jurisdiction over an entity not engaged in “communication by wire or radio.”¹⁶

In the prior proceedings on this subject CERC and RadioShack argued successfully that the Commission’s delegated authority does not extend to retailers when they are not engaged in communication by wire or radio.¹⁷ 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 CMRS¹⁸

In CERC’s Comments on the “enmeshed” metaphor, CERC observed that offering this formulation as evidence that retailers are newly “engaged” in communication by wire or radio does nothing to enhance the record or support Commission jurisdiction. CERC pointed out that a legal doctrine that would convert sales to services would extend equally to any manufacturer or seller of vehicles or appliances with built-in interactive communications abilities. As a stretch of the Commission’s ancillary jurisdiction it could not possibly survive the logic or rationale of the *Broadcast Flag* Opinion.

As to the argument, repeated but not newly documented by HIA, that the Commission need look no further than the HAC itself, CERC reiterated in its Comments that the HAC Act reached beyond manufacturers *only* to the extent necessary to assure *landline access*. Unlike a personal, portable wireless phone, a landline phone may be furnished for use by a number of users. There was a reason for the Congress to be

¹⁶ *Am. Library Ass’n v. FCC*, 406 F.3d 689, 702 (D.C. Cir. 2005) (“Broadcast Flag Opinion”), citing *Accuracy in Media, Inc. v. FCC*, 521 F. 2d 288, 293 (D.C. Cir. 1975).

¹⁷ HAC proceeding, *id.*

¹⁸ RadioShack 2005 Comments at 9-10.

concerned with the manner in which such phones were furnished or made available to users with hearing impairments. This consideration is absent when a consumer has the option of picking a phone for her exclusive use, and returning any phone that, in the first month of use, is not satisfactory. Otherwise, as RadioShack recounted at p. 8 of its 2005 Comments, that law was drafted so as to *centralize rather than disperse* responsibility and accountability, and to draw a *clear* line of responsibility. This was emphasized in the Senate Report:

The 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.¹⁹

IV. Conclusion

The Commission's request for any support for potential theories to justify an assertion of jurisdiction over independent retailers, so as to impose testing obligations, has attracted credible and specific opposition from both service providers and retailers, but no additional support based in new facts or precedent. There remains no justification for such an assertion, and the record now demonstrates that it would harm consumers and small businesses. However, CERC shares the interest of the Commission and of all other parties to this proceeding in serving consumers in a constructive manner and will be pleased to work with the Commission and its staff, toward continued consumer education and service, on a voluntary basis.

¹⁹ S. Rep. No. 100-391, at 4 (1988) (emphasis added).

Respectfully submitted,

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