

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

CC Docket No. 87-124

PUBLIC NOTICE

Released: November 7, 1994

**FCC ASKS FOR COMMENTS AND NOMINATIONS
FOR MEMBERSHIP REGARDING THE
ESTABLISHMENT OF AN ADVISORY COMMITTEE
TO NEGOTIATE REGULATIONS**

1. The Commission hereby seeks comment on establishing an Advisory Committee to negotiate regulations to specify the requirements for hearing aid compatible (HAC) telephones in workplaces, hospitals, certain other health care facilities, prisons, hotels and motels. The negotiations are to assist the Commission in developing regulations that, among other things, will determine whether to lift the suspension of enforcement of Sections 68.112(b)(1), (3), and (5) of the Commission's Rules, 47 C.F.R. §§ 68.112(b)(1), (3), (5). Those sections require that all telephones in all workplaces, hospitals, certain other health care facilities, prisons, hotels and motels be hearing aid compatible by May 1, 1993 for establishments with 20 or more employees and by May 1, 1994 for establishments with fewer than 20 employees. *See Access to Telecommunications Equipment and Services by the Hearing Impaired and Other Persons with Disabilities*, Report and Order, CC Docket No. 87-124, 7 FCC Rcd. 3472 (1992). The negotiating committee would be created under the Federal Advisory Committee Act (FACA), 5 U.S.C. App. 2, and the Negotiated Rulemaking Act of 1990 (NRA), Pub. L. 101-648, November 28, 1990, and would consist of representatives of the interests that will be significantly affected by these rules.

2. On April 13, 1993, the Commission suspended until further notice enforcement of the requirement adopted in 1992 that all telephones in all workplaces employing 20 or more persons be hearing aid compatible by May 1, 1993. In addition, the Commission also suspended enforcement of the requirement that all telephones in workplaces employing fewer than 20 employees be hearing aid compatible by May 1, 1994. The Commission suspended enforcement of other requirements that telephones in all hospitals, certain other health care facilities, prisons, hotels and motels be hearing aid compatible by May 1, 1993 for establishments with 20 or more employees, and by May 1, 1994 for establishments with fewer than 20 employees. The Commission suspended enforcement of the rules for these telephones only if an alternative means of signalling life-threatening situations is available in such confined settings. The Commission previously had required telephones in workplace common areas, at the work stations of employees with hearing disabilities, and in areas where emergencies might require HAC telephones to be HAC.

Shortly before the effective date of the more stringent regulations, the Commission received numerous complaints from organizations alleging an inability to meet the deadline. The complaints raised legal and practical problems with the new HAC requirements, asserting that the number of phones to be retrofitted and the cost of doing so were much greater than originally envisioned and that retrofitters were unable to meet the demand. Some stated that they would be forced to remove telephones from use altogether to avoid violating HAC requirements, raising safety concerns. Finally, many claimed that the new retrofitting requirements violated the Hearing Aid Compatibility Act of 1988, which prohibits the Commission from requiring the retrofitting of any telephones other than coin-operated telephones or those provided for emergency use.

On May 12, 1993, the Alexander Graham Bell Association (the Association) filed an Emergency Request to Reinstate Enforcement of the rules. The Association argues that the suspension of enforcement violated section 553(b)(3) of the Administrative Procedure Act. Seventeen parties filed in opposition to the petition, and six parties filed in support of the petition, which is pending before the Commission.

I. REGULATORY NEGOTIATION

3. Regulatory negotiation is a technique through which the Commission seeks to develop better regulations in a less adversarial setting. Negotiations are conducted through an Advisory Committee chartered under FACA. The goal of the Committee is to reach consensus on the language or substance of appropriate rules. If a consensus is reached, it is used as the basis of the Commission's proposal. All procedural requirements of the Administrative Procedure Act (APA) and other applicable statutes continue to apply.

4. When making a determination regarding the suitability of a proceeding for the negotiated rulemaking process, the Commission must consider whether:

- (a) there is a need for the rules to be developed;
- (b) there are a limited number of identifiable interests that will be significantly affected by the rules;
- (c) there is a reasonable likelihood that a committee can be convened with a balanced representation of persons who (1) can adequately represent the identifiable interests and (2) are willing to negotiate in good faith to reach a consensus on the proposed rules;
- (d) there is a reasonable likelihood that a committee will reach a consensus on the proposed rules within a fixed period of time;
- (e) the negotiated rulemaking procedure will not unreasonably delay the notice of proposed rulemaking and the issuance of final rules;
- (f) the agency has adequate resources and is willing to commit such resources, including technical assistance, to the committee, and
- (g) the agency will, to the maximum extent possible consistent with the legal obligations of the agency, use the consensus of the committee with respect to the proposed rules as the basis for the rules proposed by the agency for notice and comment. Negotiated Rulemaking Act Sec. 3, 5 U.S.C. Sec. 583(a).

II. SUBJECT AND SCOPE OF RULE FOR NEGOTIATED RULEMAKING

5. The Commission proposes that the regulations specifying the requirements for hearing aid compatible telephones in all workplaces, hospitals, certain other health care facilities, prisons, hotels and motels be developed through negotiation. We believe that the selection criteria listed above are met. The suspension of enforcement of the Commission's HAC regulations must be clarified, removed, or modified in a further notice of proposed rulemaking. The parties whose interests are affected are identifiable from comments filed in this proceeding. We believe that these interests can be adequately represented on a committee, and that representatives will act in good faith to reach a consensus on technical rules within a prescribed time. We believe that the negotiated rulemaking process will use public and private resources more efficiently than the submission of additional written comments. We have adequate resources to commit to this endeavor and would use the consensus report of the committee to develop proposed rules.

6. The Commission has identified the following primary issue that should be addressed in the negotiations and resolved in the proposed rules developed by the Committee:

Whether to lift the suspension of enforcement of Section 68.112(b)(1), (3), and (5) of the Commission's Rules and require that all telephones in all workplaces, hospitals, certain other health care facilities, prisons, hotels and motels be hearing aid compatible by a specific date.

If the Negotiated Rulemaking Committee is able to reach consensus on the primary issue, we ask that it propose specific rules. We ask the Committee to provide an analysis of how the benefits of these proposed regulations outweigh other options. Specifically, we ask the Committee to explain and provide:

- a definition of "telephones provided for emergency use" at the workplace, hotels, motels, and hospital facilities;
- the timeline for implementing any new requirements, including whether establishments with fewer than 20 employees should be given additional time to comply with the requirements;
- the costs and benefits of implementation;
- any other available data concerning the effects on economic growth expected to result from the implementation of the regulations;
- the impact of its recommendations on access to telecommunications services;
- an analysis of technological alternatives to HAC retrofitting; and
- an analysis of: the general applicability of HAC requirements to cellular telephony; whether telephones in airplanes, trains, automobiles and other non-traditional workplaces should be hearing aid compatible; and whether headset telephones should be hearing aid compatible.

Other issues may be included by the parties.

III. POTENTIAL INTERESTS AND PARTICIPANTS

7. The Commission has identified the following interests as those most likely to be significantly affected by the proposed rules:

- (a) individuals and organizations representing small and large businesses, government agencies, universities, hospitals, hotels, motels, and non-profit institutions;
- (b) equipment manufacturers and common carriers providing telephone service;
- (c) advocates for persons with hearing disabilities.

8. The following have tentatively been identified as potentially affected interests should the Commission proceed with a negotiated rulemaking: the Alexander Graham Bell Association; Utilities Telecommunications Counsel; the North American Telecommunications Association; the Direct Marketing Association; the National Center for Law and Deafness, Gallaudet University; Goodwill Industries of Seattle Washington; Telecommunications for the Deaf, Inc.; the United States Telephone Association; the National Association for the Deaf; Self Help for Hard of Hearing People; Southern New England Telephone Company; GTE Service Corporation; the American Speech-Language-Hearing Association; Maryland Office of People's Counsel; the New York League for the Hard of Hearing; Arizona Counsel for Hearing Impaired; the Association of Colleges and University Telecommunications Administrators; the International Telecommunications Association; the Food Marketing Institute; the American Petroleum Institute; the Tele-Communications Association; the National Retail Federation; the Newspaper Association of America; the National American Wholesale Grocers Association; the Equal Employment Advisory Council; the American Consulting Engineers Council; the New York Clearing House Association; and the Domestic Facilities Division, Common Carrier Bureau, Federal Communications Commission.

IV. FORMATION OF THE NEGOTIATING COMMITTEE

A. Procedure for Establishing an Advisory Committee

9. Under FACA, an Advisory Committee may be established only after consultation with the General Services Administration (GSA) and the filing of a charter with Congress. The Commission will prepare a charter and initiate the requisite consultation process prior to formation of the Committee and the commencement of negotiations.

B. Participants

10. The number of participants in the group is estimated to be about 20 and should not exceed 25. A greater number of participants could make it difficult to conduct efficient negotiations. Each interest will have the opportunity to be adequately represented, although this does not necessarily mean that each potentially affected entity will have its own representative. Further, we must be satisfied that the group, as a whole, reflects a proper balance and mix of interests. In this respect, we are especially interested in receiving nominations to participate from public interest advocacy groups, user groups, and educators and academics.

11. Entities that will be significantly affected by the proposed rules and that believe that their interests will not be adequately represented by any entity specified in paragraph 8 above, may apply for, or nominate another entity for, membership on the Committee. Each application for nomination must include:

- (a) the name of the applicant or nominee and a description of the interests the entity will represent,
- (b) evidence that the applicant or nominee is authorized to represent parties related to the interests the entity proposes to represent,
- (c) a written commitment that the applicant or nominee shall actively participate in good faith in the development of the rules under consideration,
- (d) the reasons that the entities specified in paragraph 8 do not adequately represent the interests of the entity submitting the application or nomination.

12. If, in response to this *Notice*, any additional entities request membership or representation in the negotiating group, the Commission will determine whether that entity should be added to the group. The Commission will make that decision based on whether the entity would be substantially affected by the rule and whether that entity is already adequately represented in the negotiating group.

C. Agenda

13. If the Commission decides to establish a negotiating committee and its charter is approved, it is anticipated that the Committee's first meeting will take place later this year, at the Commission's offices, Washington, D.C., at a room, date, and time that will be announced. At this initial meeting, the Committee will complete action on all procedural matters and establish a target date for submission of its recommendations. We expect that the target date would be no later than 45 days from the initial meeting of the Committee. We anticipate adoption of a Further Notice of Proposed Rulemaking no later than 60 days after the submission of the Committee's recommendations.

V. NEGOTIATION PROCEDURES

14. The following procedures and guidelines will apply to the Committee, if formed. These procedures may be modified, however, after reviewing the comments received in response to this *Notice* or during the negotiation process.

A. Facilitator

15. The Commission will nominate a person to serve as a neutral facilitator for the negotiations of the Committee, subject to the approval of the Committee by consensus. The facilitator will not be involved in the substantive development of the regulations. The facilitator's roles are to: (1) chair negotiating sessions; (2) help the negotiation process run smoothly; (3) assist participants in defining and reaching a consensus; and (4) manage record-keeping and minute-keeping.

B. Good Faith Negotiations

16. Since participants must be willing to negotiate in good faith, each organization -- including the Commission -- must designate a qualified individual to represent its

interests. Linda B. Dubroof, Acting Branch Chief, Domestic Facilities Division, Common Carrier Bureau, will be the Commission's representative.

C. Meetings and Compensation

17. Meetings will be held in the Washington, D.C. area at the convenience of the Committee. The Commission, if requested, will provide the facilities needed to conduct the meetings, and will provide any necessary technical support. Private sector members of the Committee will serve without government compensation or reimbursement of expenses. Private sector members will not be special government employees for any purposes whatsoever.

D. Committee Procedures

18. Under the general guidance and direction of the facilitator, and subject to any applicable legal requirements, the members will establish the procedures for committee meetings.

E. Consensus

19. The goal of the Committee is consensus. The Negotiated Rulemaking Act defines consensus as unanimous concurrence among the represented interests, although the Act permits the Committee to agree to another specified definition. In the event the Committee is unable to reach a consensus, the Committee may include in a report any other information, recommendations, or materials that the Committee considers appropriate, and any Committee member may include as an addendum to the report additional information, recommendations, or materials. Parties to the negotiation may withdraw at any time. If this happens, the remaining Committee members and the Commission will evaluate whether the Committee should continue.

F. Record of Meetings

20. Pursuant to FACA, the Committee will keep a record of all committee meetings. This record will be placed in the public docket for this rulemaking (CC Docket No. 87-124). The Commission will announce committee meetings in the Federal Register. These meetings will be open to the public.

VI. CONCLUSION

21. The Commission requests public comment on whether: (1) it should establish a Federal Advisory Committee, (2) it has properly identified the interests that are significantly affected by the key issues listed above, (3) the suggested committee membership reflects a balanced representation of these interests, and (4) regulatory negotiation is appropriate for this rulemaking.

22. Pursuant to the applicable procedures set forth in Section 4(c) of the Negotiated Rulemaking Act of 1990, 5 U.S.C. Section 584(c), interested parties may file comments and nominations for Committee membership on or before thirty days from Federal Register publication of this notice. Comments and/or nominations should be sent to the Office of the Secretary, CC Docket No. 87-124, Federal Communications Commission, Washington, D.C. 20554. Comments and nominations will be available for public inspection during regular business hours in the Commission's Reference Center, Room 239, 1919 M St., N.W., Washington, D.C. 20554.

23. For further information pertaining to the establishment of the negotiation committee and associated matters, contact John Walker, Common Carrier Bureau, 2025 M Street, N.W., Washington, D.C. 20554, (202) 634-1820 or (202) 632-0484 (TTY).

24. Action by the Commission October 31, 1994, by Public Notice (FCC 94-280) by Chairman Hundt, Commissioners Quello, Barrett, Ness, and Chong.

FEDERAL COMMUNICATIONS COMMISSION