Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Sections 716 and 717 of the Communications Act of 1934, as Enacted by the Twenty-First Century Communications and Video Accessibility Act of 2010	)	CG Docket No. 10-213
	)	
Opposition to Coalition of E-Reader Manufacturers' Petition for Waiver Extension of Sections 716 and 717 of the Communications Act and Part 14 of the Commission's Rules Requiring Access to Advanced Communications Services (ACS) and Equipment by People with Disabilities	)	

OPPOSITION TO PETITION FOR WAIVER EXTENSION
BY COALITION OF E-READER MANUFACTURERS

Mark A. Riccobono
President
National Federation of the Blind
200 East Wells Street
Baltimore, MD 21230

Kim Charlson
President
American Council of the Blind
2200 Wilson Boulevard, Suite 650,
Arlington, VA 22201

Carl Augusto
President
American Foundation for the Blind
2 Penn Plaza, Suite 1102
New York, NY 10121

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OPPOSITION TO PETITION FOR WAIVER EXTENSION BY COALITION OF E-READER MANUFACTURERS

I. INTRODUCTION

The National Federation of the Blind is the oldest and largest nationwide organization of blind people, with over fifty-thousand members in fifty-two affiliates. For almost a decade we have been advocating for access to digital books, advanced communications services (ACS), and countless other possibilities of technology. The Twenty-First Century Communications and Video Accessibility Act (CVAA) addresses some of this agenda by improving access to advanced communication services for people with disabilities, and we thank the Commission for its diligent work in implementing and enforcing the many facets of the law.

In 2013, the National Federation of the Blind, along with twenty-two other organizations of people with disabilities, opposed the Coalition of E-Reader Manufacturer's (Coalition) petition for waiver from the ACS accessibility requirements of the CVAA. It was our position that granting a waiver for e-readers would not serve the public interest. In 2014, we maintained that position, and once again, we are submitting these comments on behalf of ourselves, the American Council of the Blind, and the American Foundation for the Blind in opposition to the Coalition's request to extend the waiver that was granted.[1]

The central piece of the waiver standard is the question of whether compliance with ACS requirements would be inconsistent with the public interest.[2] The recurring theme in the waiver

[1] Petition for Extension of Waiver, CG Docket No. 10-213, filed September 4, 2015 (2015 Coalition Petition).
[2] *Implementation of Sections 716 and 717 of the Communications Act of 1934, as Enacted by the Twenty-First Century Communications and Video Accessibility Act of 2010; Amendments to the Commission's Rules Implementing Sections 255 and 251(a)(2) of the Communications Act of 1934, as Enacted by the Telecommunications Act of 1966; Accessible Mobile Phone Options for People who are Blind, Deaf-Blind, or Have Low Vision*, CG Docket No. 10-213, WT Docket No. 96-198, CG Docket No. 10-145, Second Report and Order, FCC No. 13-57 (2013) ¶ 5, 27*; Implementation of Sections 716 and 717 of the Communications Act of 1934, as Enacted by the Twenty-First Century Communications and Video Accessibility Act of 2010; Coalition of E-Reader*

provision and Committee report language is a goal of encouraging technological innovation. The arguments for extending the waiver fail in both of these categories. Extending the waiver will not advance the public interest, it will create a tax for people with disabilities and increase liability for entities that deploy e-readers, but are nonetheless prohibited from discriminating against people with disabilities. Similarly, extending the waiver would be inconsistent with Congress' intent for the waiver provision as a tool to promote technological innovation. The Coalition's justification is rooted in a desire to avoid the burdens of regulations, not bypass a barrier to innovation.

II. AN EXTENDED WAIVER WILL BE HARMFUL TO THE PUBLIC INTEREST

A. Disability Tax

An extended waiver will result in a "disability tax," where people with disabilities seeking an e-reader or low-cost ACS are limited to the most expensive items in the market. The Coalition claimed its members are committed to the accessibility of their "ACS-related products and to making reading accessible to people with disabilities," but the only illustrations of that commitment are the fact that e-reading apps are available "at no cost on a wide variety of accessible platforms" and that Coalition members "make multi-purpose tablets that are capable of ACS and support their use by customers with disabilities."[3] In essence, the Coalition is claiming that there is no public harm in refusing to make e-readers accessible because a "no-cost" application is available as a sufficient alternative for blind users. This claim is based on the myth that there is such a thing as a "separate-but-equal" alternative. The app itself might be "no cost," but the overall cost of accessing the app is significantly higher for blind users because they

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Manufacturers Petition for Class Waiver of Sections 716 and 717 of the Communications Act and Part 14 of the Commission's Rules Requiring Access to Advanced Communications Services (ACS) and Equipment by People with Disabilities, CG Docket No. 10-213, Order, DA 14-95 ¶ 3, 14, 19

[3] Petitions at 1-2

must first be in possession of a high-cost delivery system like a PC, multi-purpose tablet, or smartphone. There is the added layer of ensuring that such a delivery system be outfitted with an accessible platform. This financial burden amounts to a de-facto tax on users with disabilities, a tax that others can avoid by virtue of choosing to buy the cheaper, basic e-reader.

For example, a blind person seeking to read a digital book from Kobo's library and have a live chat with their librarian about said book[4,5], can download the free Kobo app on any PC, tablet, or smartphone. In order to download this app, he or she must first be in possession of one of those delivery systems. Assuming most customers only explore the newest line of products, this blind consumer can initially choose between ten tablets and three smartphones[6], ranging in price from $139-$829.[7] Upon learning of the accessibility barriers in the apps' functionality on the iOS[8] and Android[9] products, the blind user can ultimately choose from eight tablet options in order to get the "no-cost" app. Only three of those options are under $200.[10]

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[4] Ex Parte Letter from NFB et al to Marlene Dortch, Secretary, FCC (filed September 26, 2014). During the 2013 meeting of FCC and NFB et al, a live chat with a librarian was demonstrated on a Sony Reader using the library app.

[5] In August 2014, Sony closed its E-reader Store and transferred its titles and customers to Kobo. Therefore, a current Sony Reader user can 1) access a title in the Kobo library (reading), and 2) perform a live chat with a librarian (ACS). This experience is the basis for the hypothetical experience of a blind consumer seeking to do the same two things. (*See* https://us.en.kb.sony.com/app/answers/detail/a_id/45014#_Toc379288289 or http://www.engadget.com/2014/02/06/sony-to-transition-its-reader-base-to-kobo/

[6] The user could also buy a PC/download the app on their PC, but this is unlikely. It is the mobility of e-readers that makes them similar to books and attractive to users, so the app would most likely be used on a mobile device.

[7] Sony's newest tablet line, Xperia, has 3 models available for $499-$599 (*See* http://store.sony.com/xperia-tablets-android-/cat-27-catid-All-Xperia-Tablets;pgid=IoVEMjwxOidSRpmItW_YqjoU0000DjoC-MWX;sid=0ptX-yDYqMUW-XSV81o3_xDSuI9irErM58wz-awS). Kobo's tablet line, Arc, has five models available for $139-$399 (*See* http://www.kobo.com/devices/compare#tablets). Apple's tablet line, iPad has two new models, the iPad mini 4 and iPad Pro, and they are available for $399-$949. The Kobo app is also supported on smartphones with iOS or Android platforms. The newest Android phone, Nexus 6P, is available for $499-$649 (*See* https://store.google.com/product/nexus_6p) and the iPhone 6s and iPhone 6s Plus are available for $649-$949 (*See* https://www.apple.com/iphone/compare/). Kindle tablets are not included in the count because this hypothetical is for a consumer wishing to access Kobo titles.

[8] Kobo App for iPhone / iPad does not support in-app eBook purchasing (S*ee* http://www.kobo.com/apps). Purchases must be made on Kobo's website, which is not fully accessible to screen-reader users.

[9] Although the Android platform could technically be considered "accessible," it is the general opinion of the blind population and assistive technology experts that the accessibility is not intuitive, properly built-in, or fully usable. NFB is working with Google to improve its platform.

[10] The Kobo Arc is $139; the Kobo Arc 7 is $149.99; the Kobo Arc 7HD is $199.99.

Compare this experience to that of a non-disabled person seeking to do the same things. A non-disabled consumer can explore the original thirteen tablet or smartphone options, with no limitations, or he or she can buy one of the eight models of basic e-readers that offer the same titles as the app and some basic ACS, ranging in price from $59.99 to $189[11] This person has nineteen options, more than double the amount available to the blind person, and eleven of those options are under $200, as compared to the blind person's three.

This digital divide creates more than just monetary burdens, but also a convenience tax on people with disabilities. Blind people are not only relegated to a "separate but equal" app on a device that may be out of their price range, but that device may have more advanced functionality than they desire. The Coalition cites a Huffington Post article that says, "The Paperwhite is a device dedicated to reading and it is priced accordingly…The Kindle Paperwhite isn't a tablet, but that's not why you're buying it."[12,13] This quote shows that e-reader consumers presumably do not want a tablet; why would it be any different for a blind e-reader consumer? Moreover, it is the simplicity of the ACS functions that might be particularly appealing for a blind person, not just the simplicity of reading. Many blind people are still adjusting to technology and are behind the learning curve because of widespread inaccessibility. They may find the basic ACS of e-readers more user-friendly than the complicated ACS in tablets, so a simple reading device with a browser and access to some chat is exactly the product they are

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[11] *See* http://www.kobo.com/devices/compare#ereaders. In addition to the 6 Kobo e-readers, Sony's last two iterations of e-readers were the Sony PRS-T2 and the Sony PRS-T3. It is slightly unclear what is truly the "newest" and what is truly available as the Sony Store does not have any PRS-T3s, but does list PST2 at $99. The site says it has been discontinued and offers to find it in a store for interested customers. Amazon offers at PRS-T3, presumably the newer model, at $189. (*See* http://store.sony.com/search?SearchTerm=e-reader and *see* http://www.amazon.com/gp/offer-listing/B00IGEMEMY/ref=dp_olp_new?ie=UTF8&condition=new) It is possible neither of these discontinued products would be reasonable options for a consumer, but they have been included in the anecdote because they are seemingly available and their inclusion does not significantly alter the perceived market landscape.

[12] Petition at 8

[13] E-reader vs. Tablet -- Kindle FireHDX vs. iPad Mini with Retina vs. Kindle Paperwhite – Which to Buy?, Huffington Post, December 13, 2013. (http://www.huffingtonpost.com/shelly-palmer/ereader-vs-tablet--kindle_b_4439560.html)

looking for. Regardless, like the non-disabled, blind people should have the choice to buy the item that fits their needs and budget.

It is unfair to apply a "disability tax" to a population that that has an unemployment rate of over seventy percent. It is also a warped-typed of discrimination when people with disabilities are essentially charged to use the very technology that should have ensured our full participation. Even the Coalition concedes that e-reading technology offers the opportunity to give blind users "instant access to millions of titles,"[14] but it is done in the context of a petition to avoid fulfilling the promise.

It is this very stratified marketplace that the CVAA purports to resolve. The CVAA calls for the Commission to examine the extent to which a manufacturer offers accessible services or equipment at differing price points.[15] Although achievability is not part of the waiver standard, it is important to examine Congress' intent in including price points in this definition, which we believe is to increase options in the market for people with disabilities. It is critical that blind users are not relegated to a handful of outdated options, and it is equally critical we do not overcorrect this situation so blind users' options are then limited to the most expensive and advanced options.

The Coalition is indirectly admitting that this will be the outcome of a waiver when it says that compliance with ACS accessibility rules would require "fundamental changes to e-readers' hardware and software" that would "increase e-readers' cost, weight, size, and complexity."[16] In other words, making e-readers accessible would require making products that are more diverse and more expensive, something e-reader customers do not want. This circular reasoning amounts to an admission that, in order to make the reading experience for blind people

[14] Petition at 11
[15] 47 U.S.C. § 716(g).
[16] Petition at 8

the same as it is for non-disabled people, non-disabled e-reader customers would have to be inconvenienced. The heart of the CVAA is to expand the market for users with disabilities, and to grant a waiver under this justification would be the antithesis of Congress' intent and harmful to the public that is trying to radically reduce the digital divide.

B. Increased Liability

An extended waiver will perpetuate the growing amount of litigation over the use of inaccessible technology by schools, libraries, and other liable entities. Titles II and III of the Americans with Disabilities Act (ADA) and Section 504 of the Rehabilitation Act (DCL) prohibit discrimination on the basis of disability and call for entities deploying technology to only use products that are accessible to everyone.

The U.S. Departments of Justice and Education have explicitly prohibited institutions of higher education from deploying inaccessible e-readers on college campuses.[17] In the five years since this guidance was issued, over a dozen colleges and universities have faced litigation or enforcement action for deploying inaccessible technology, some specifically for using inaccessible e-readers.[18] Moreover, this problem goes beyond legal troubles for schools: an immeasurable amount of students with disabilities have faced barriers to success in their education. Data shows inaccessible technology has been a persistent problem for schools and students alike, with an unusually high number of students filing complaints with the federal government in recent years, and admissions from the higher education community that training

[17] U.S. Department of Justice, Civil Rights Division and U.S. Department of Education, Office of Civil Rights. "Joint 'Dear Colleague' Letter: Electronic Book Readers" 29 June 2010. Online at: http://www2.ed.gov/about/offices/list/ocr/letters/colleague-20100629.html

[18] The following schools have entered into settlement agreements regarding the use of e-readers and other inaccessible accessible instructional material: Case Western Reserve University, Reed College, Pace University, Arizona State University, Princeton University, the Darden School of Business at the University of Virginia, Penn State University, Florida State University, South Carolina Technical College System, University of California at Berkeley, Virtual School of Ohio, Louisiana Tech University, University of Montana, and in October 2014, the Maricopa Community College District (MCCD) and Mesa Community College. This list does not include the number of schools facing impending litigation or being invested because of complaints.

faculty, coordinating with publishers and developing a strategic plan to address the needs of students with disabilities is not happening as fast or efficiently as it should.[19] Similarly, public and research libraries are prohibited from deploying inaccessible e-readers. Consequently, library associations have made it a priority to seek out accessible e-readers and work diligently to make materials available to disabled patrons, lest they be non-compliant with civil rights laws.[20]

The Commission must take into account the legal and philosophical reasons why these entities are demanding accessible e-readers from the market, and note how harmful it will be to authorize e-reader manufacturers to disregard this demand. The market is already saturated with inaccessible e-readers, and that landscape has caused legal problems for entities that were eager to use new technology. Now that e-reading technology is not new, these entities have long bore the burden for retroactively accommodating people with disabilities, and the CVAA levels the

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[19] Report on the Advisory Commission on Accessible Instructional Material in Postsecondary Education for Students with Disabilities, published on December 6, 2011, ("testimony revealed that some students with disabilities have experienced a variety of challenges, including blocked access to educational opportunities and matriculation failure resulting from inaccessible learning materials and/or their delivery systems" and "the presence of inaccessible technology-based products and services within the postsecondary environment can create unintended and nearly impenetrable barriers"); The Department of Education's Report to the President, Helping to Ensure Equal Access To Education (2012), http://www2.ed.gov/about/reports/annual/ocr/report-to-president-2009-12.pdf, ("In the fiscal years 2009 – 2012, OCR received over sixteen-thousand one-hundred and seven disability related complaints – more than before in a four year period." Six-hundred and eighty-nine of those complaints were regarding accessibility.); *See* Government Accountability Office, Report to the Chairman, Committee on Education and Labor, House of Representatives, Higher Education and Disability Education Needs a Coordinated Approach to Improve Its Assistance to Schools in Supporting Students (October 2009), http://www.gao.gov/assets/300/297433.pdf ("some school officials said that converting course materials into accessible formats, such as electronic text or Braille, is costly and time consuming…publishers can be reluctant to make textbooks available in electronic formats, according to a 2009 report by the National Council on Disability." "Several school officials we interviewed told us that some faculty members have not had much experience teaching students with disabilities and are not yet knowledgeable about…technologies that can assist them in teaching students with disabilities" and "other school and association officials indicated the need for more guidance in specific areas, including assistive technology."); Carl Straumsheim, Stable Priorities, Unstable Times, Inside Higher Ed (October 1, 2014) https://www.insidehighered.com/news/2014/10/01/survey-shows-training-and-support-remain-top-issues-among-it-officials ("Only forty-nine percent of institutions said they have a strategic plan to make their resources accessible to students with disabilities, and eighty-one-point-one percent of respondents rated IT support for those students less than excellent. That data comes at a time when advocacy groups for students with disabilities are fighting for new guidelines that would require institutions to make their digital resources accessible.")

[20] Association of Research Libraries, Report of the ARL Joint Task Force on Services to Patrons with Disabilities published November 2, 2012. ("With born-digital texts, e-readers, and other mobile devices, research libraries should advocate for accessible solutions up front—born-accessible materials—obviating the need for resource-intensive reformatting and retrofitting. Accessibility should be a central decision factor in choosing information products and services. Such an approach will meet both mission and the law.")

playing field for manufacturers to make their products accessible without losing competition, it would be counterintuitive to extend the waiver and permanently anchor this unfortunate situation. It is very harmful to the public interest to put schools, libraries, and other entities that should be encouraged to embrace technology in a dilemma where they can either a) deploy inaccessible technology and risk litigation, b) resort to a more-expensive solution (like a tablet), or c) reject all technical/digital options. The latter option is the kind of innovation-stifling the CVAA is intended to stop, so we urge the Commission to see what broad reaching effects an extended waiver will have on the public and recognize how harmful they will be.

III. CONGRESS' INTENT FOR WAIVERS WAS TO ENCOURAGE TECHNOLOGICAL INNOVATION; INNOVATION IS NOT RELEVANT HERE

Congress authorized the Commission to find that, "to promote technological innovation the accessibility requirements need not apply."[21] This focus on technological innovation can also be found in the report language concerning small businesses and customized equipment and services. Promoting innovation is the foundation for why the waiver is available, and yet innovation is not relevant to the products in question. An examination of the history of accessibility and innovation in e-readers will show that the technology has been innovated extensively and that accessibility was easy to incorporate and indeed was, therefore the Coalition members' refusal to incorporate accessibility now is a basic matter of choice, not an outcome of innovation limitations.

Amazon, Sony and Kobo have spent years improving every single feature of e-readers, except for accessibility. The 2010 Sony PRS 350 did not have a long battery life, or Wi-Fi, or access to the public library, or access to social media, or text-to-speech. Its 2012 counterpart, the PRST2HBC, now has all of those things, except text-to-speech. The 2010 Kindle DX did not

[21] H.R. Rep. No. 111-563 at 26 (2010) Emphasis added

have a touch screen, or 3G support, or Wikipedia, or games, or text-to-speech. Its 2012 counterpart, the Kindle Paperwhite, now has all of those things, except text-to-speech. Oddly, the 2011 iterations of these products did have text-to-speech: the 2011 Kindle Touch and the Kindle Keyboard had some features that were usable by blind people, but the accessibility solutions were short-lived parts of the products' designs.

These fluctuations in accessibility were choices, not reflections of innovation. Clearly, accessibility solutions were, at some point, achievable and worthwhile additions to the design of e-readers and were incorporated without any other innovations being sacrificed; the Commission cannot safely assume that the solutions were removed as a necessary evil of continued innovation, and that reintroducing that accessibility would somehow force e-reader developers to stop innovating or discontinue manufacturing the products. This conclusion can only be reached if the Coalition provides evidence to support it.

Unfortunately, the Coalition does not provide such evidence for e-readers. Rather, the Coalition's argument that the waiver will encourage innovation is focused on other products. It states that denial of the waiver "could discourage manufacturers from offering browsers on devices that have little or nothing to do with ACS,"[22] like manufacturers of refrigerators, thermostats, and internet connected watches. Even this argument is weak because it is based on the assumption that manufacturers of refrigerators, thermostats, internet connected watches, and other devices that may have browsers could not possibly meet accessibility requirements and would surely choose failing to innovate over exploring the possibilities. The Commission should not automatically assume this is the quandary facing every developer, nor should the assumption factor into this decision. The e-reader waiver should be limited to whether this is a matter of technological innovation for e-readers, only.

[22] Petitions at 8

Furthermore, it is insulting for the Coalition to say that innovation of inaccessible products should be "celebrated" when put in the defeatist context that all manufacturers of single-purpose devices, when faced with the same choices Coalition members' have been faced with, would either make the same choices as the Coalition or choose not to innovate. Some manufacturers might not be discouraged or face a dilemma; some might actually explore making their browser accessible. If the Commission accepts this argument as justification for a waiver for e-readers, it will perpetuate the myth that accessibility and innovation are mutually exclusive and that all manufacturers function with this negative mindset.

We do not believe the waiver option exists so that any manufacturer (refrigerator, e-reader, or otherwise) can decide to discontinue accessible iterations of their products and start deploying new, inaccessible designs freely without enforcement from regulators. Reducing/avoiding accessibility is not automatically the same as encouraging innovation, and we urge the Commission to see the missing case for innovation in the Coalition's claims.

IV. CONCLUSION

The Commission's waiver standard is anchored by the preservation of the public interest, and granting an extended waiver for e-readers would be harmful to the public. It would create a tax for customers with disabilities and undermine pre-existing legal obligations for entities liable to use accessible technology. In addition, the statutory and Committee report language on the waiver provision focuses on an intent to promote technological innovation, and the Coalition's arguments fall short in showing that meeting ACS accessibility requirements would be at odds with their members' efforts to innovate.

For the reasons set forth above, the National Federation of the Blind, the American Council of the Blind, and both of our affiliates urge the Commission to reject the waiver extension for e-readers. Thank you for your time.

Respectfully submitted,

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Mark A. Riccobono
President
NATIONAL FEDERATION OF THE BLIND
(410) 659-9314

Kim Charlson
President
AMERICAN COUNCIL OF THE BLIND
(202) 467-5081

Carl Augusto
President
AMERICAN FOUNDATION FOR THE BLIND
(212) 502-7600