

**Before the
Federal Communications Commission
Washington, DC 20054**

In the Matter of)	
)	
Advanced Communications Provisions of the)	CG Docket No. 10-213
Twenty-First Century Communications and)	
Video Accessibility Act)	

COMMENTS OF AT&T, INC.

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TABLE OF CONTENTS

I. INTRODUCTION AND SUMMARY.....1

II. DISCUSSION3

A. Section 255 Coverage Precludes Section 716 Coverage.....3

B. Access Board Guidelines Should Remain Guidelines.6

C. Reasonably Achievable vs. Achievable.....7

D. Compatibility for Mass Market Devices..8

E. Section 716 is not a Common Carrier Obligation...9

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AT&T Inc. (“AT&T”) files these Comments in response to the Public Notice (“*Notice*”) released by the Federal Communications Commission (the “Commission”) pertaining to the provisions of the Twenty-First Century Communications and Video Accessibility Act of 2010¹ (the “21st Century Accessibility Act” or the “Act”) that relate to advanced communications services (“ACS”).²

I. INTRODUCTION AND SUMMARY

On October 8, 2010, President Obama signed into law the 21st Century Accessibility Act, which is designed to ensure that individuals with disabilities have access to emerging Internet Protocol-based communication and video technologies that are not covered by the accessibility obligations of Section 255 of the Communications Act (“Section 255”).³ As the President remarked, “The 21st Century Communications and Video Accessibility Act will make it easier

¹ Twenty-First Century Communications and Video Accessibility Act, S.3304 (P.L. 111-260) (2010), as amended by S. 3828 (P.L. 111-265) (2010) (“21st Century Accessibility Act”).

² Advanced Communications Provisions of the Twenty-First Century Communications and Video Accessibility Act, CG Docket No. 10-213, *Public Notice* (rel. Oct. 21, 2010) (“*Notice*”).

³ Communications Act of 1934, as amended, (“Communications Act”) §255, 47 U.S.C. §255.

for people who are deaf, blind or live with a visual impairment to do what many of us take for granted -- from navigating a TV or DVD menu to sending an email on a smart phone.”⁴ Section 104 of the Act, which adds new Sections 716, 717, and 718 to the Communications Act, imposes obligations to make advanced communications services (“ACS”)⁵ and web browsers on mobile devices accessible where achievable.⁶ Specifically, Section 716 requires manufacturers of equipment used for ACS, including software, and providers of ACS to make the equipment and services accessible to the extent achievable.⁷ Section 716 also charges the Commission with developing rules that are necessary to implement the statutory mandates of the Act pertaining to the accessibility of ACS⁸ and issuing guidelines to assist equipment manufacturers and providers regarding Section 716 requirements.⁹ In the *Notice*, the Commission initiates the rulemaking process by seeking comment on issues regarding the interpretation and implementation of Section 104 of the Act, including Section 716 as it relates to ACS.

Section 716 reflects the reality that ACS is delivered in a complex Internet ecosystem that involves a wide range of entities not regulated under Title II. Accessibility obligations must be

⁴ *Press Release, Remarks by the President at the Signing of the 21st Century Communications and Video Accessibility Act of 2010* (Oct. 8, 2010), *available at* <http://www.whitehouse.gov/the-press-office/2010/10/08/remarks-president-signing-21st-century-communications-and-video-accessib>.

⁵ The 21st Century Accessibility Act defines ACS as interconnected voice over Internet Protocol (“VoIP”) service, non-interconnected VoIP service, electronic messaging service, and interoperable video conferencing service. 21st Century Accessibility Act, §101.

⁶ 21st Century Accessibility Act, §104.

⁷ Communications Act §716, 47 U.S.C. §617.

⁸ *Id.* at §716(e)(1), 47 U.S.C. §617(e)(1).

⁹ *Id.* at §716(e)(2), 47 U.S.C. §617(e)(2).

shared by all entities in that ecosystem for consumers to have an accessible experience. Section 716 is not a Title II common carrier obligation, but an obligation that applies to all entities manufacturing equipment used for ACS and all providers of ACS. However, Section 716 is not applicable to these manufacturers and providers to the extent that there is a preexisting Section 255 obligation. Thus, Section 716 and Section 255 are mutually exclusive.

Whether equipment or ACS is accessible under Section 716 should be a fact based, case-by-case analysis, similar to Section 255. In adopting Section 716 regulations and guidelines that would assist equipment manufacturers and providers in making this determination, the Commission should retain the dependency on specific facts and circumstances it established in its implementation of section 255. One of the factors that may be used to demonstrate accessibility under Section 716 is compliance with Section 508 Guidelines, though the Commission should not adopt the Section 508 Guidelines as a safe harbor. The Commission should ensure that any regulations and guidelines it adopts in this docket do not conflict with the Section 508 Guidelines. If Section 716 accessibility is not achievable, a manufacturer or provider must still ensure that the equipment or service it offers remains compatible with existing peripheral equipment or specialized customer premises equipment commonly used by persons with disabilities to achieve access, including mass market devices that might also be used by persons without a disability.

II. DISCUSSION

A. Section 255 Coverage Precludes Section 716 Coverage.

Section 716 requires manufacturers of equipment and software used for ACS and providers of ACS to ensure that their equipment and services are accessible to and usable by

persons with disabilities, unless not achievable.¹⁰ By definition, ACS means interconnected VoIP service, non-interconnected VoIP service, electronic messaging service, and interoperable videoconferencing service.¹¹ Nevertheless, as Section 716(f) explains, Section 716 applies only to ACS that is not already subject to Section 255:

The requirements of this section shall not apply to any equipment or services, including interconnected VoIP service, that are subject to the requirements of section 255 on the day before the date of enactment of the Twenty-First Century Communications and Video Accessibility Act of 2010. Such services and equipment shall remain subject to the requirements of section 255.¹²

Thus, any equipment or service that was subject to Section 255 on October 7, 2010, even equipment used for ACS and service that arguably falls within the definition of ACS, is **not** subject to Section 716. For example, interconnected VoIP,¹³ voicemail,¹⁴ and interactive menu service,¹⁵ which the Commission has subjected to Section 255 via ancillary jurisdiction, remains subject to Section 255 and is not subject to Section 716. In the *Notice*, the Commission

¹⁰ *Id.* at §716(a)(1), 47 U.S.C. §617(a)(1).

¹¹ 21st Century Accessibility Act, §101, to be codified as 47 U.S.C. §153(53).

¹² Communications Act §716(f), 47 U.S.C. §617(f).

¹³ IP-Enabled Services, Implementation of Sections 255 and 251(a)(2) of The Communications Act of 1934, as enacted by the Telecommunications Act of 1996: Access to Telecommunications Service, Telecommunications Equipment and Customer Premises Equipment by Persons with Disabilities, Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities, The Use of N11 Codes and Other Abbreviated Dialing Arrangements, WC Docket No. 04-36, WT Docket No. 96-198, CG Docket No. 03-123, CC Docket No. 92-105, *Report and Order*, ¶16 (June 15, 2007) (“2007 VoIP Order”).

¹⁴ Implementation of Sections 255 and 251(a)(2) of the Communications Act of 1934, as enacted by the Telecommunications Act of 1996, Access to Telecommunications Service, Telecommunications Equipment and Customer Premises Equipment by Persons with Disabilities, WT Docket No. 96-198, *Report and Order and Further Notice of Inquiry*, ¶93 (Sept. 29, 1999) (“1999 Report and Order”).

¹⁵ *Id.*

describes interconnected VoIP service as “now . . . covered by Sections 255 and 716.”¹⁶ To the contrary, interconnected VoIP service is not covered by both Sections 255 and 716, as the explicit language of Section 716(f) precludes that result, despite the inclusion of interconnected VoIP service in the definition of ACS. Interconnected VoIP service is subject to Section 255, not to Section 716.

The *Notice* also asks to what extent multi-purpose devices—devices with multiple capabilities, some subject to Section 255, some subject to Section 716, and some potentially outside the scope of either provision—should be subject to the readily achievable standard of Section 255 or the achievable standard of Section 716.¹⁷ In the *1999 Report and Order*, the Commission, faced with the applicability of Section 255 to devices providing telecommunications service functions and non-telecommunications functions, concluded that Section 255 applies “only to the extent that it provides a telecommunications function.”¹⁸ This approach effectively advanced the goals of Section 255 without dampening the design and development of multi-purpose devices (e.g. smart phones) that are so popular today. The Commission should continue this approach and subject multi-purpose devices to Section 255 to the extent that the device provides a service that is already subject to Section 255 and apply Section 716 solely to the extent that the device provides ACS that is not otherwise subject to Section 255. That is the explicit direction of Section 716 and should be incorporated into any regulations and guidelines adopted in this docket. Doing otherwise would not only be wholly inconsistent with the Commission’s Section 255 *1999 Report and Order*, but would also create a

¹⁶ *Notice* at Sec. III, ¶1.

¹⁷ *Id.*

¹⁸ *1999 Report and Order* at ¶87.

substantial amount of confusion as to the applicability of Section 716 and its otherwise potential conflict with Section 255.

B. Access Board Guidelines Should Remain Guidelines.

The *Notice* solicits input on the extent to which the Section 508 Guidelines should impact the Commission's interpretation of Section 716, including the possible use of technical standards in the Section 508 Guidelines as a safe harbor.¹⁹ The Access Board's work in adopting, and recent efforts to update, the Section 508 Guidelines has done much to advance both industry and consumer group thinking on how to resolve access barriers to the use of new technology and maximize the potential use of such new technology for persons with disabilities. However, there are fundamental differences between Section 508 and Section 716. Section 508 mandates certain accessibility criteria only for government purchases of technology (unless the purchase is an undue burden) whereas Section 716 is design oriented, requiring all manufacturers of equipment used for ACS and all providers of ACS to consider accessibility in product design and build-in accessibility where achievable. Section 508 allows service providers and equipment manufacturers to evaluate whether they can economically meet the standards in Section 508 and to choose whether or not to participate in the government market. It is based in part on the idea that the development of accessible technology can be advanced by the incentives of the government market but is fundamentally a choice for manufacturers and providers. As a result, the specific functionalities and standards mandated by Section 508, which may not be achievable to adopt through the consumer market, may not be appropriate in all circumstances for industry wide, mass market application contemplated by Section 716.

¹⁹ *Notice* at ¶¶6, 8.

For that reason, even updated Section 508 Guidelines should continue to be recognized as guidelines only and not be mandated or adopted by the Commission as a Section 716 safe harbor. Adopting Section 508 as a safe harbor for accessibility under Section 716 would make the Section 508 Guidelines the *de facto* standard and deny manufacturers and service providers the design flexibility to make ACS accessible sufficient to comply with Section 716, as manufacturers and providers gravitate toward the standard for certainty. If Congress had intended such a result, it would have expressly mandated it in the statute.

Of course, developments that take place in the government market can and should influence what is available in the general market place. To that extent, a service provider or manufacturer meeting the Section 508 Guidelines for accessibility should be able to utilize Section 508 compliance as a factor to demonstrate that its equipment or service is accessible under Section 716. This is consistent with the process under Section 255 and the process contemplated by Congress for Section 716—that the determination of compliance with Section 716 remains a case-by-case approach. To ensure that manufacturers of equipment used for ACS and for providers of ACS have the option to demonstrate Section 508 compliance as a factor in determining Section 716 accessibility of their equipment and service, the Commission should avoid adopting any regulations and guidelines in this docket that might conflict with updated Section 508 Guidelines.

C. Readily Achievable vs. Achievable.

Section 716 imposes an obligation on manufacturers and service providers to make equipment and service used for ACS accessible unless it is “not achievable.”²⁰ Similarly, Section 718 requires accessibility of Internet browsers on mobile devices to persons who are

²⁰ Communications Act §716(a)(1), 47 U.S.C. §617(a)(1).

blind or have visual impairment unless it is “not achievable.”²¹ The Commission inquires as to how this “achievable” standard compares to the “readily achievable” standard in Section 255.

Notwithstanding differences in the factors assessed under the “achievable” standard and the “readily achievable” standard, both standards should be fact-based, flexible and applied on a case-by-case basis. In the *1999 Report and Order*, the Commission, relying on precedent under the Americans with Disabilities Act (“ADA”),²² emphasized that a Section 255 “readily achievable” determination depends on a “wide range of factors,” and, should be based on a flexible, case-by-case analysis because individual facts and circumstances that affect accessibility will vary.²³ The same reasoning applies to a Section 716 “achievable” determination. Section 716 provides a list of factors that must be considered to determine what is “achievable.”²⁴ Consequently, it is statutorily mandated that the “achievable” standard requires a fact-based, flexible, case-by-case analysis based on those factors in Section 716. The Commission should follow the express statutory language and ADA and Section 255 precedent and adopt the same interpretation of “achievable” under Sections 716 and 718 as it adopted of “readily achievable” under Section 255—what is achievable must be determined on a case-by-case basis based on specific facts and circumstances.

D. Compatibility for Mass Market Devices.

If Section 716 accessibility is not achievable, manufacturers and service providers must ensure that their equipment and services are compatible with existing peripheral devices or

²¹ Communications Act §718(a), 47 U.S.C. §619(a).

²² Americans with Disabilities Act of 1990, Pub. L. No.101-336, 104 Stat. 327.

²³ *1999 Report and Order*, at ¶47.

²⁴ Communications Act §716(g), 47 U.S.C. §617(g).

specialized customer premises equipment commonly used by persons with disabilities to achieve access, unless that is not achievable.²⁵ This obligation should extend to mass market devices that provide a means to accessibility so as not to limit the alternatives available to consumers with disabilities. Mass market devices may offer the best option for consumers with disabilities to make equipment or service accessible, often at the best price. Those consumers should not be forced to forego the benefits of a device at a reasonable price merely because it may also be used in the mass market by persons without disabilities.

E. Section 716 is not a Common Carrier Obligation.

While Section 716 may apply to common carriers that offer ACS, Section 716 should not be interpreted as a Title II common carrier requirement *per se*. Rather, Section 716 applies to all entities manufacturing equipment used for ACS and all providers of ACS. The reach of Section 716 reflects the reality that ACS is delivered in a complex Internet environment from a wide range of entities not regulated under Title II and that accessibility obligations must be shared by all entities in that ecosystem for consumers to have an accessible experience. This concept is written into Section 716 in multiple ways. First, Section 716 is located in Title VII of the Communications Act, not in Title II. Second, Section 716(b)(1) extends to “a provider,” not just to common carriers. Third, Section 716(d), which is similar to Section 251(a)(2) of the Communications Act, was added to insure that each ACS provider, not just common carriers already subject to Section 251(a)(2), has a duty to not install network features, functions or capabilities that impede accessibility.²⁶ It is also consistent with the Commission’s application

²⁵ Communications Act §716(c), 47 U.S.C. §617(c).

²⁶ In the *Notice*, the Commission asks whether the meaning of Section 716(d) differs from the meaning of Section 251(a)(2) in the context of ACS networks. AT&T submits that the duty to

of Section 255 to providers of voicemail, interactive menus, and interconnected VoIP, even if they are not common carriers.²⁷ AT&T encourages the Commission to build on its efforts and plan for and conduct significant outreach with the various sectors of the Internet ecosystem that are not traditionally involved in its operation, such as application/software developers, operating system developers, and non-common carrier providers of advanced services to ensure that they are aware of the obligations of Section 716.

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Respectfully submitted,

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not install network features, functions or capabilities that impede accessibility applies in the same manner to telecommunications services and ACS.

²⁷ 1999 Report and Order at ¶99; 2007 VoIP Report and Order at ¶19.