

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, DC 20554

In the Matter of )  
 )  
Consumer & Governmental Affairs Bureau and )  
Wireless Telecommunications Bureau Seek ) CG Docket No. 10-213  
Comment on Advanced Communication Provisions )  
of the Twenty-First Century Communications and )  
Video Accessibility Act of 2010 )  
 )

To: Chief, Consumer & Governmental Affairs Bureau  
Chief, Wireless Telecommunications Bureau

**COMMENTS OF THE CONSUMER ELECTRONICS ASSOCIATION**

Julie Kearney  
Vice President, Regulatory Affairs  
Brian Markwalter  
Vice President, Research and Standards  
Veronica O'Connell  
Vice President, Congressional Affairs  
Bill Belt,  
Senior Director, Technology and Standards

Consumer Electronics Association  
1919 S. Eads Street  
Arlington, VA 22202

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## SUMMARY

In implementing the Accessibility Act, the Consumer Electronics Association (“CEA”) urges the Commission to follow Congress’s lead in balancing the need to ensure access by individuals with disabilities to new technologies and services with the need to preserve manufacturers’ continued ability to innovate for the benefit of all consumers. The Accessibility Act reflects important marketplace realities, including time-to-market and proprietary technology issues, industry flexibility, and a preference for performance objectives over one-size-fits-all technical standards. The Commission should adhere to this balanced statutory scheme. The Commission’s efforts here are also relevant to the video programming provisions of Title II. For devices used to provide services subject to both Titles I and II of the Accessibility Act, the regulations imposed under Title I of should not adversely affect the capabilities and marketability of devices subject to Title II (and vice versa).

***Statutory Definitions.*** Case-by-case analysis may be necessary to determine whether products are subject to the Accessibility Act, but the Commission should provide sufficient regulatory certainty as well. All interconnected VoIP services and products remain subject to section 255’s readily achievable standard. For non-interconnected VoIP service, it is notable that the Accessibility Act’s obligations apply only to the “offer” of equipment and service, not a “functionality” or “capability,” and many technologies or systems with an entirely incidental VoIP capability may not constitute an offering of non-interconnected VoIP service in the first instance. The Commission’s exemption and waiver authority will be particularly relevant to preserving innovation for non-interconnected VoIP services and devices. For electronic messaging service, Congress intended that communications between or among devices with no human involvement, and that communications to social networking and blog websites, be excluded from the definition. Finally, interoperable video conferencing services exclude products from one manufacturer that are not “interoperable” with another manufacturer’s product, and thus most nascent two-way video services and applications commercially available in the marketplace are not covered.

***Achievable Standard.*** The Commission should evaluate equally every statutory factor applicable to achievability and bear in mind Congress’s intent to account for the dynamic nature of the marketplace. The analysis focuses on “the specific equipment or service in question,” and thus the costs and burdens of incorporating an accessibility feature into a *different* product or service are not relevant. A company’s substantial financial resources alone do not render a feature achievable. A company’s status as a new market entrant is also a relevant factor. The term “reasonable effort or expense” does not include proprietary technology or third-party solutions subject to Sections 2 and 3 of the Accessibility Act, and manufacturers may not be compelled to adopt such technologies. “Achievable” is less burdensome than “undue burden,” and the “fundamental alteration” principle relevant in to section 255 is relevant under section 716 as well. Further, technical feasibility and cost remain critical considerations. Finally, Congress intended that offering accessibility features for different disabilities in different product lines counts favorably to a company’s accessibility showing.

***Industry Flexibility.*** The Commission should ensure it does not adopt any regulation that forecloses the use of any particular type of third-party application, peripheral device, software, hardware, or CPE. The Commission also may not define “nominal cost” as a set amount or set

percentage of total cost, but will need to determine it on a case-by-case basis, accounting for the nature of the device or service and the total lifetime cost, among other things. In addition, the Commission should find that a “compatible” mass market device or software may be used to achieve compatibility.

**Performance Objectives.** “Performance objectives,” like the current Part 6 rules, should be limited to general functional capabilities and should not involve specific requirements or technical standards. In contrast, the Commission could employ detailed technical standards if necessary, but only for safe harbor purposes. When completed, the Access Board guidelines may prove useful in developing performance objectives, and there may be value in eventually harmonizing them at that later date.

**Protecting Accessibility Content.** Only accessibility incorporated into “content for transmission through” the covered equipment and services is protected; this applies only where accessibility of content has been incorporated consistent with industry standards. Thus, for accessibility-incorporated content such as closed captioning, manufacturers and service providers may rely on the certainty available in appropriate industry standards to ensure their products will appropriately handle such content.

**Applications and Services.** Consistent with the third party liability limitations and other statutory provisions, each individual entity offering a covered application or service is subject to its own accessibility obligations, independent of the underlying equipment or service platform that enables a user to access the application or service.

**Technical Standards/Safe Harbors.** Technical standards can be used as safe harbors for compliance as stated in the statute, but only “if necessary,” and thus safe harbors may be used only in limited circumstances. When the Commission finds a safe harbor necessary, it should rely on consensus-based industry-led standards developed in an accredited open process.

**Other Section 716 Issues.** Where equipment is used for both telecommunications and advanced services, the “readily achievable” standard applies to the telecommunications service and the “achievable” standard applies to the advanced communications services. With respect to waiver authority, under section 716(h)(1), the Commission should waive section 716 requirements prospectively on its own motion by incorporating explicit exemptions into its rules, and in a manner that applies to classes of service providers and manufacturers. The Commission should also adopt processes and policies to ensure that individual waiver petitions of any type are reviewed and acted upon expeditiously, and that confidential information is protected. The “Rule of Construction” ensures that a manufacturer’s or service provider’s determination that a particular accessibility feature is not achievable cannot be viewed as *per se* indicia of noncompliance, and that each product and service is viewed on its own individual merits.

**Liability/Proprietary Technology/Customized Equipment.** Under Section 2(a) of the Accessibility Act, a manufacturer or service provider should not be liable for third-party applications that are loaded by the consumer and are either inaccessible or undermine the accessibility features of the device or service. Under Section 3’s prohibition against imposing proprietary technology, parties remain free to use alternative solutions” and there is no preference

for *non*-proprietary software either. Finally, the exemption for customized equipment applies to enterprise customers of wide varieties, including government and public safety, as well as commercial enterprise customers.

***Enforcement.*** With respect to section 717’s recordkeeping requirements, the Commission should allow flexibility to account for the differences in size and scope of various manufacturers and service providers. Moreover, the information in any records retained to comply with the new rules should not be viewed as *per se* evidence of a substantive violation. Moreover, Congress considered and rejected authorizing the use of cease-and-desist orders and other intrusive remedies that involve any sort of regulatory micromanagement of new technologies and their deployment, or the retrofitting of existing equipment and services.

***Mobile Internet Browsers.*** The “achievable” and “industry flexibility” provisions of sections 716 and 718 are identical. Moreover, section 718 is targeted at the “on-ramp” functionalities of the covered services and devices – *e.g.*, the device’s and service’s activation/initiation process – not the underlying content or websites made available via the service.

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**COMMENTS OF THE CONSUMER ELECTRONICS ASSOCIATION**

The Consumer Electronics Association (“CEA”) hereby responds to the Public Notice<sup>1</sup> issued by the Consumer & Government Affairs Bureau and the Wireless Telecommunications Bureau (together, the “Bureaus”) seeking comment on the advanced communications provisions of the “Twenty-First Century Communications and Video Accessibility Act of 2010” (the “Accessibility Act”).<sup>2</sup>

**I. INTRODUCTION**

CEA is the principal U.S. trade association of the consumer electronics and information technologies industries<sup>3</sup> and, as such, worked closely with various Members of Congress and

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<sup>1</sup> FCC Public Notice, *Consumer & Governmental Affairs Bureau and Wireless Telecommunications Bureau Seek Comment on Advanced Communication Provisions of the Twenty-First Century Communications And Video Accessibility Act Of 2010*, CG Docket No. 10-213, DA 10-2029 (Oct. 21, 2010) (“Public Notice”).

<sup>2</sup> Twenty-First Century Communications and Video Accessibility Act of 2010, Pub. L. No. 111-260, 124 Stat. 2751 (2010) (as codified in various sections of 47 U.S.C.). The law was enacted on October 8, 2010 (S. 3304, 111th Cong.). See also Amendment of Twenty-First Century Communications and Video Accessibility Act of 2010, Pub. L. No. 111-265, 124 Stat. 2795 (2010), also enacted on Oct. 8, 2010 to make technical corrections to the Accessibility Act and the Accessibility Act’s amendments to the Communications Act of 1934.

<sup>3</sup> CEA’s more than 2,000 member companies include the world’s leading consumer electronics manufacturers. CEA’s members design, manufacture, distribute, and sell a wide range of consumer products including television receivers and monitors, computers, computer television tuner cards, digital video recorders (“DVRs”), game devices, navigation devices, music players, telephones, radios, and products that combine a variety of these features and pair them with services.

engaged with representatives of the accessibility community during the development and passage of the Accessibility Act. While CEA had concerns that initial versions of the legislation could harm, rather than benefit, consumers and innovation, CEA and its members continued to meet regularly with representatives from the Coalition of Organizations for Accessible Technology (“COAT”) to gain a better understanding of the issues. CEA further engaged and worked with all stakeholders to help craft final legislation that emphasized twin goals of accessibility and preserving technology innovation. CEA’s contributions throughout the legislative process have had a meaningful result, as reflected in the new law.

Beyond its participation in the legislative process, CEA has been and remains engaged in regulatory and standards activities in this area. CEA has been an active participant in the FCC Consumer Advisory Committee and FCC Digital Closed Captioning and Video Description Technical Working Group and has volunteered to participate on the newly-created advisory committees created by the Accessibility Act. Even before the legislation was enacted, CEA launched a Working Group to develop standards for enhanced accessibility features in video devices,<sup>4</sup> and CEA’s members have long been engaged in the efforts of the Society of Motion Picture and Television Engineers (“SMPTE”) to enhance the availability of closed captioning – implemented in various ways through industry-led standards.<sup>5</sup>

Given CEA’s leadership in this area, CEA welcomes the opportunity in this and other proceedings to serve as a resource for the Commission as it implements the Accessibility Act. In particular, CEA seeks to contribute in these comments to the Commission’s efforts to develop the notice of proposed rulemaking required with respect to the advanced communications

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<sup>4</sup> Press Release, CEA, CEA Launches Working Group to Develop Standards for Accessibility Features in Technology Products (Aug. 9, 2010), [http://www.ce.org/Press/CurrentNews/press\\_release\\_detail.asp?id=11941](http://www.ce.org/Press/CurrentNews/press_release_detail.asp?id=11941).

<sup>5</sup> CEA has coordinated its standards projects related to traditional broadcast closed captioning with SMPTE’s similar project to enhance availability of closed captioning for broadband delivered video.

provisions of the Accessibility Act. As an overall matter, CEA urges the Commission to follow the lead of Congress in balancing the need to ensure access by individuals with disabilities to new technologies and services with the need to preserve manufacturers' continued ability to innovate for the benefit of all consumers. Indeed, the Accessibility Act's overarching statutory scheme promotes both accessibility and innovation. Throughout the legislative process, and consistent with policies advocated by CEA and others, Congress incorporated numerous provisions to ensure that the Accessibility Act's mandate reflected important marketplace realities, including time-to-market and proprietary technology issues, an explicit emphasis on industry flexibility, and a preference for performance objectives over one-size-fits-all technical standards.<sup>6</sup> Congress also provided for deference to industry-led standards efforts<sup>7</sup> and sought to ensure that implementation is targeted toward services and devices offered widely to consumers.<sup>8</sup> The Commission should adhere to this balanced statutory scheme in implementing Title I of the Accessibility Act in this proceeding.

## **II. IMPLEMENTATION OF TITLE I OF THE ACCESSIBILITY ACT MAY IMPLICATE ADDITIONAL SERVICES NOT COVERED BY THE PUBLIC NOTICE**

Although the Public Notice is limited to Title I of the Accessibility Act, the Commission should also note that its efforts here are relevant to the video programming provisions of Title II,

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<sup>6</sup> See, e.g., Accessibility Act § 104(a) (adding new Section 716(a)(2) of the Communications Act, to be codified at 47 U.S.C. § 617(a)(2)) (providing manufactures with flexibility in meeting their obligations under Section 716(a)(1)).

<sup>7</sup> See, e.g., H.R. Rep. No. 111-563, at 25 (2010) ("*House Committee Report*") ("New section 716(e)(1)(B) provides that advanced communications services and equipment may not impair or impede the accessibility of information content when accessibility has been incorporated into that content. The Committee intends that requirements of this subsection apply where the accessibility of such content has been incorporated in accordance with recognized industry standards."). The Senate version of the legislation that ultimately passed was virtually identical in most respects to the H.R. 3101 as reported by the House Commerce Committee and reflected in the *House Committee Report*.

<sup>8</sup> See Accessibility Act § 104(a) (adding new Section 716(i) of the Communications Act, to be codified at 47 U.S.C. § 617(i)) ("The provisions of this section shall not apply to customized equipment or services that are not offered directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.").

given the numerous common legal requirements and principles that apply throughout the law. For example, the requirements for equipment capabilities in Title II are based on the same “achievable” standard.<sup>9</sup> Moreover, the Commission’s interpretation and application of the scope of the liability limitations and proprietary technology provisions of sections 2 and 3 of the Accessibility Act could have direct bearing on the implementation of the video programming provisions of Title II as well.<sup>10</sup> Additionally, advanced communications services and video programming capabilities are increasingly offered together on consumer devices, and the Commission should ensure that any regulations imposed under Title I of the Accessibility Act do not adversely affect the capabilities and marketability of devices subject to Title II (and vice versa).

### **III. THE COMMISSION’S INTERPRETATION OF THE ADVANCED COMMUNICATIONS SERVICES DEFINITIONS SHOULD PROVIDE CERTAINTY REGARDING SECTION 716’S SCOPE**

Section 716 requires providers of advanced communications services and manufacturers of equipment and software used with those services to ensure that their services, equipment and software offered for sale will be accessible to and usable by individuals with disabilities, unless not achievable. Although some case-by-case analysis ultimately may be necessary for any existing or newly-developed product, the Commission should provide sufficient regulatory certainty to enable manufacturers and service providers to meaningfully determine which services, equipment, and software will be subject to any new obligations. To do so, the Commission must follow the important guidance and parameters that Congress established in the statute and throughout its legislative history with respect to (a) interconnected Voice over

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<sup>9</sup> See Accessibility Act § 203(a) (to be codified at 47 U.S.C. § 303(u)(2)(A)); § 203(b) (to be codified at 47 U.S.C. § 303(z)(1)); § 204(a) (to be codified at 47 U.S.C. § 303(aa)(1)); § 205(a) (to be codified at 47 U.S.C. § 303(bb)(1)).

<sup>10</sup> The liability limitation and proprietary technology provisions apply to the entire Accessibility Act, not just Title I. Accessibility Act §§ 2-3 (applicable to “the requirements of this Act” and “the provisions of the Communications Act of 1934 that are amended or added by this Act”).

Internet Protocol (“VoIP”) services, (b) non-interconnected VoIP services, (c) electronic messaging services, and (d) interoperable video conferencing services.

***Interconnected VoIP.*** The Commission must interpret “interconnected VoIP service” for purposes of the Accessibility Act consistent with the definition in the agency’s Part 9 rules.<sup>11</sup> The statutory definition expressly incorporates the existing rule,<sup>12</sup> and section 716(f) expressly provides that services subject to the accessibility requirements of section 255 prior to enactment remain subject to section 255.<sup>13</sup> In addition, Congress clearly intended that interconnected VoIP services initiated after October 8, 2010, the date the Accessibility Act became law, would be subject to section 255 as well; the statute uses the terms “equipment” and “services,” rather than “manufacturers” and “providers,” and thus expressly relates to the service in question, not when the equipment was manufactured or when an individual service provider began offering interconnected VoIP service.<sup>14</sup> Thus, the requirements of section 255 of the Accessibility Act should apply to any interconnected VoIP service that meets the existing definitions of such service. Any interpretation that subjects competing interconnected VoIP providers to different standards would raise significant issues of competitive parity.

***Non-interconnected VoIP.*** It is particularly important that the Commission interpret “non-interconnected VoIP service” for purposes of the Accessibility Act on the basis of how the service is offered to the consumer.<sup>15</sup> Although the Accessibility Act definition of “non-

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<sup>11</sup> See *Public Notice* at 2, 5.

<sup>12</sup> Accessibility Act § 101(1) (to be codified as 47 U.S.C. § 153(25)) (“The term ‘interconnected VoIP service’ has the meaning given such term under section 9.3 of title 47, Code of Federal Regulations, as such section may be amended from time to time.”).

<sup>13</sup> Accessibility Act § 104(a) (adding new Section 716(f), to be codified at 47 U.S.C. § 617(f)). As the Public Notice notes, “the Commission’s rules already define interconnected VoIP service . . . .” *Public Notice* at 2.

<sup>14</sup> See Accessibility Act § 104(a) (adding new Section 716(f), to be codified at 47 U.S.C. § 617(f)).

<sup>15</sup> See *Public Notice* at 2.

interconnected VoIP” is much broader than the “interconnected VoIP,”<sup>16</sup> Congress clearly did not intend that every device or service with VoIP capability or otherwise falling within the definition ultimately would be subject to the “achievable” standard.<sup>17</sup> Some case-by-base interpretation inevitably will be necessary. As a threshold matter, the Accessibility Act’s obligations in general apply only to the “offer” of equipment and service, not a “functionality” or “capability.”<sup>18</sup> Many technologies or systems with an entirely incidental VoIP capability would not constitute an offering of non-interconnected VoIP service in the first instance.<sup>19</sup> Moreover, Congress expressly envisioned that exemptions and waivers would be needed to preserve innovation and flexibility, and CEA anticipates that many non-interconnected VoIP applications will warrant exemptions from section 716.<sup>20</sup>

***Electronic Messaging Service.*** The Commission should interpret “electronic messaging service” for purposes of the Accessibility Act to cover real or near-real time communications between individuals, such as email, text messaging and instant messaging.<sup>21</sup> The statutory definition of “electronic messaging service” was modified during the legislative process to expressly apply to “real-time or near real-time non-voice messages in text form between

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<sup>16</sup> See Accessibility Act § 101(1) (to be codified as 47 U.S.C. § 153(36)) (“The term ‘non-interconnected VoIP service’ (A) means a service that (i) enables real-time voice communications that originate from or terminate to the user’s location using Internet protocol or any successor protocol; and (ii) requires Internet protocol compatible customer premises equipment; and (B) does not include any service that is an interconnected VoIP service.”).

<sup>17</sup> See Accessibility Act § 104(a) (adding new Sections 716(h)(1) (waivers) and 716(i) (exemption for custom equipment and services) of the Communications Act, to be codified at 47 U.S.C. § 617(h)(1), (i)).

<sup>18</sup> Accessibility Act § 104(a) (adding new Section 716(a)(1) and (b)(1), to be codified at 47 U.S.C. § 617(a)(1), (b)(1)).

<sup>19</sup> The Commission evaluates the Communications Act’s service definitions based on the manner in which the service is offered to the end user. See *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, GN Docket No. 00-185, CS Docket No. 02-52, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd. 4798, ¶¶ 40-41 (2002), *aff’d sub. nom. NCTA v. Brand X Internet Services*, 545 U.S. 967 (2005).

<sup>20</sup> See, e.g., Accessibility Act § 104(a) (adding new Section 716(h)(1) of the Communications Act, to be codified at 47 U.S.C. § 617(h)(1)) (providing the Commission with the authority to waive the requirements under Section 716).

<sup>21</sup> See *Public Notice* at 2.

individuals.”<sup>22</sup> By its terms, the narrowed definition ensures that text-based services used for communications between or among human beings are covered. By using the word “individual” in the electronic messaging definition, Congress intended that communications between or among devices with no human involvement should be precluded from regulation. The House Committee Report, which confirms that the focus of this definition is “more traditional, two-way, interactive services such as text messaging, instant messaging, and electronic mail, rather than on communications such as blog posts, online publishing, or messages posted on social networking websites.”<sup>23</sup>

***Interoperable Video Conferencing Service.*** The Commission must interpret “interoperable video conferencing service” for purposes of the Accessibility Act to apply only to those services that are genuinely interoperable.<sup>24</sup> First, “interoperable” video conferencing services – by nature and by definition – exclude services that are not “interoperable.”<sup>25</sup> VRS equipment is one potential example that might meet the “interoperable” definition given that the Commission already requires such capability. Products that are only capable of communicating with like products from the same manufacturer are not “interoperable” with other manufacturers’

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<sup>22</sup> Compare Accessibility Act § 101 (to be codified as 47 U.S.C. § 153(19)) (defining the term as “a service that provides real-time or near real-time non-voice messages in text form between individuals over communications networks”) with H.R. 3101, 111th Cong. § 101 (as introduced in the House, on June 26, 2009) (defining the term more broadly as “a service that provides non-voice messages in text form between persons”).

<sup>23</sup> *House Committee Report* at 23.

<sup>24</sup> See *Public Notice* at 2. Accessibility Act § 101(1) (to be codified as 47 U.S.C. § 153(27)) (“The term ‘interoperable video conferencing service’ means a service that provides real-time video communications, including audio, to enable users to share information of the user’s choosing.”). The term “interoperable” was added to the definition at the House Energy and Commerce Committee markup. The Public Notice also seeks comment on “the extent to which equipment used by people with disabilities for point-to-point video communications and video relay services should be considered equipment used for ‘interoperable video conferencing service.’” *Public Notice* at 2.

<sup>25</sup> See, e.g., *Bailey v. United States*, 516 U.S. 137, 146 (1995) (“We assume that Congress used two terms because it intended each term to have a particular, nonsuperfluous meaning.”); *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (“It is a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.”); *Hernstadt v. FCC*, 677 F.2d 893, 902 n.22 (D.C. Cir. 1980) (“Congress is presumed to be cognizant of, and legislate against the background of, existing interpretations of law.”).

products and are necessarily excluded from the definition.<sup>26</sup> For this reason, most nascent two-way video services and applications commercially available in the marketplace have not yet reached true interoperability and are not covered by the statute. In addition, the service must “enable *users* to share information,” underscoring Congress’s intent that principally unidirectional communications (*e.g.*, real time web-based seminars or events) not be covered by the Accessibility Act.<sup>27</sup> Finally, the House Committee Report clarified that the focus of the new law is accessibility to “access and control these services,” *i.e.*, the activation/initiation of a video communications session, not the accessibility of the content or the communication itself.<sup>28</sup>

#### **IV. THE “ACHIEVABLE” STANDARD**

##### **A. In Making an Achievability Determination, the Commission Must Focus on the Specific Equipment or Service in Question and Weigh Each Factor Equally.**

The Accessibility Act creates a new term, “achievable,” to measure compliance with the statute’s accessibility requirements. To preserve opportunities for innovation and new market participants while ensuring accessibility, the Commission should evaluate equally every statutory factor applicable to achievability and bear in mind Congress’s intent to account for the dynamic nature of the market that produces the services and products subject to the law.

The definition of “achievable” is “with reasonable effort or expense” and includes four factors: (1) “nature and cost of the steps needed to meet the requirements of this section with respect to the *specific equipment or service in question*[;]” (2) “technical and economic impact on the operation of the manufacturer or provider and on the operation of the specific equipment

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<sup>26</sup> Microsoft’s Point-to-Point product is a good example of such a nascent service. Moreover, as discussed above with respect to non-interconnected VoIP services, products with a video component are not necessarily service “offerings” subject to section 716.

<sup>27</sup> *House Committee Report* at 23 (emphasis added).

<sup>28</sup> *Id.* (“The Committee notes that such services may, by themselves, be accessibility solutions. The inclusion, however, of these services within the scope of the requirements of this act is to ensure, in part, that individuals with disabilities are able to access and control these services.”).

or service in question, including on the development and deployment of new communications technologies[;]” (3) “type of operations of the manufacturer or provider[;]” and (4) “extent to which the service provider or manufacturer in question offers accessible services or equipment containing varying degrees of functionality and features, and offered at differing price points.”<sup>29</sup> As emphasized above, the definition appropriately requires the Commission to focus on “the specific equipment or service in question,” and thus the costs and burdens of incorporating an accessibility feature into a *different* product or service are not relevant, consistent with Congress’s recognition that one-size-fits-all regulation is not appropriate.

Congress also intended that “the Commission weigh each factor equally when making an achievability determination.”<sup>30</sup> Importantly, the “existence of substantial financial resources does not, by itself, trigger a finding of achievability.”<sup>31</sup> New section 716(g)(3) provides that a company’s status as a new market entrant is a relevant factor,<sup>32</sup> requiring that the Commission “consider whether the entity offering the product or service has a history of offering advanced communication services or equipment or whether the entity has just begun to do so.”<sup>33</sup>

The Commission must also view the term “achievable” in the context of the liability limitation and “no proprietary technology” provisions at sections 2 and 3 of the Accessibility Act. As discussed above, these provisions respectively exempt manufacturers and service providers from liability for the services and products of third parties, and prohibit the imposition

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<sup>29</sup> Accessibility Act § 104(a) (adding new Section 716(g) of the Communications Act, to be codified at 47 U.S.C. § 617(g)) (emphasis added).

<sup>30</sup> *House Committee Report* at 25.

<sup>31</sup> *Id.*

<sup>32</sup> See Accessibility Act § 104(a) (adding new Section 716(g)(3) of the Communications Act, to be codified at 47 U.S.C. § 617(g)(3)) (“In determining whether the requirements of a provision are achievable, the Commission shall consider the following factors: . . . The type of operations of the manufacturer or provider.”); see also *House Committee Report* at 25 (“New section 716(g)(3) requires the Commission to consider the financial resources of the manufacturer or provider.”).

<sup>33</sup> *House Committee Report* at 25-26.

of proprietary technologies.<sup>34</sup> Thus, the term “reasonable effort or expense,” by definition, does not include proprietary technology or third-party solutions, and manufacturers and service providers may not be compelled to adopt such technologies to make their products and services accessible.

Moreover, the “achievable” standard is less burdensome than the “undue burden” standard that derived from the Americans with Disabilities Act (“ADA”) but was removed from earlier versions of the legislation.<sup>35</sup> As a related matter, the “fundamental alteration” principle relevant in the section 255 context remains relevant in determining whether accessibility is achievable under section 716.<sup>36</sup> Moreover, in defining “reasonable effort and expense,”<sup>37</sup> technical feasibility and cost remain critical considerations. The Commission should also consider these factors in the context of both the individual product price points and market segmentation.<sup>38</sup> Finally, Congress understood that the IT industry is dynamic and that there are time-to-market and other sensitive economic considerations, and for that reason, significantly modified and adapted the factors used in the ADA and section 255 for section 716. These considerations must be reflected in the “achievable” analysis as discussed in the legislative history.

With respect to the “varying degrees of functionality and features” and “price points” at section 716(g)(4), Congress viewed the Commission’s hearing aid compatibility rules as a model

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<sup>34</sup> Accessibility Act §§ 2-3; *see also Public Notice* at 6 (seeking comment on sections 2 and 3).

<sup>35</sup> *See* H.R. 3101, 111th Cong. § 104(a) (as introduced in the House, on June 26, 2009).

<sup>36</sup> *House Committee Report* at 24-25 (“[T]he Committee intends that the Commission interpret the accessibility requirements in this provision in the same way as it did for section 255, such that if the inclusion of a feature in a product or service results in a fundamental alteration of that service or product, it is *per se* not achievable to include that feature.”).

<sup>37</sup> *See Public Notice* at 3.

<sup>38</sup> For example, it would not be appropriate for the Commission to compare a \$400 smart phone marketed by a wireless carrier with a \$50 VoIP phone sold through retail channels.

to guide the Commission’s application of this fourth factor.<sup>39</sup> When viewed in this context, and in light of the Rule of Construction at section 716(j) expressly clarifying that not each individual product or service must be accessible for all disabilities, Congress clearly intended that offering accessibility features for different disabilities in different product lines *but not necessarily in every product or for every feature within a product* counts favorably to a company’s accessibility showing.<sup>40</sup> The fact that Congress intended that this factor be afforded equal weight to the others underscores its importance in the statutory scheme. Section 716(g)(4) thus rewards manufacturers and service providers who invest in accessibility, while also ensuring that those facing legitimate resource or technical constraints are not penalized.

**B. The Commission Must Afford Industry Maximum Flexibility in Meeting the Accessibility Act Achievable Requirements.**

Recognizing the significant changes in technology and the potential of the marketplace to improve accessibility in innovative ways, Congress incorporated a fundamental change into the traditional approach to “accessibility” under section 255 and the relationship between accessibility and compatibility.<sup>41</sup> The House Committee Report emphasizes that: “For each of these obligations, the Committee intends that the Commission afford manufacturers and service providers as much flexibility as possible, so long as each does everything that is achievable in accordance with the achievability factors.”<sup>42</sup> In the Public Notice, the Bureaus seek comment on “industry flexibility,” including the appropriate extent of reliance on third-party applications, peripheral devices, software, hardware, or customer premises equipment (“CPE”) as well as the

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<sup>39</sup> See *House Committee Report* at 26 (“The Committee intends that the Commission interpret this factor in a similar manner to the way it has implemented its hearing aid compatibility rules.”).

<sup>40</sup> See Accessibility Act § 104(a) (adding new Section 716(j) of the Communications Act, to be codified at 47 U.S.C. § 617(j)) (“This section shall not be construed to require a manufacturer of equipment used for advanced communications or a provider of advanced communications services to make every feature and function of every device or service accessible for every disability.”).

<sup>41</sup> Compare Accessibility Act § 104(a) (adding new Section 716(a)-(c) of the Communications Act, to be codified at 47 U.S.C. § 617(a)-(c)) with 47 U.S.C. § 255(b)-(d).

<sup>42</sup> *House Committee Report* at 24.

definition of “nominal cost” for any of these.<sup>43</sup> In implementing Congress’s intent to preserve flexibility, the Commission should thus ensure it does not adopt any regulation that would foreclose the use of any particular type of third-party application, peripheral device, software, hardware, or CPE. The Commission also may not define “nominal cost” as a set amount or set percentage of total cost, but will need to determine “nominal cost” on a case-by-case basis accounting for the nature of the device or service and the total lifetime cost, among other things.<sup>44</sup>

As a related matter, the Commission should find that a “compatible” mass market device or software may be used to achieve compatibility.<sup>45</sup> There is no statutory provision that would preclude such an approach. The question of whether accessibility may be achieved through compatible devices and software also relates to the “nominal cost” issue. If a technology is not available at “nominal cost,” use of a compatible device or software still might facilitate the usability of the underlying technology, albeit at a higher cost. The fact that a product that facilitates compatibility might not fall within the “nominal cost” category should not preclude such product from being used to achieve section 716 compliance for compatibility purposes. Indeed, although the cost of some mass market products may be more than “nominal,” such costs may still be far less than many specialized CPE or peripheral device products. Moreover, allowing the use of such mass market equipment/software is effectively required by section 716’s overarching flexibility mandate.<sup>46</sup>

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<sup>43</sup> See *Public Notice* at 3.

<sup>44</sup> See *id.*

<sup>45</sup> See Accessibility Act § 104(a) (adding new Section 716(c) of the Communications Act, to be codified at 47 U.S.C. § 617(c)) (“Whenever the requirements of subsections (a) or (b) are not achievable, a manufacturer or provider shall ensure that its equipment or service is compatible with existing peripheral devices or specialized customer premises equipment commonly used by individuals with disabilities to achieve access, unless the requirement of this subsection is not achievable.”).

<sup>46</sup> See Accessibility Act § 104(a) (adding new Section 716(a)(2), (b)(2), (c) of the Communications Act, to be codified at 47 U.S.C. § 617(a)(2), (b)(2), (c)).

**V. PERFORMANCE OBJECTIVES FOR ACCESSIBILITY ACT PURPOSES ARE GENERAL FUNCTIONAL CAPABILITIES SUCH AS THOSE IN THE COMMISSION’S PART 6 RULES**

New section 716 provides that “the Commission shall . . . include performance objectives to ensure the accessibility, usability, and compatibility of advanced communications services and the equipment used for advanced communications services by individuals with disabilities ....”<sup>47</sup> Such “performance objectives” should be limited to general functional capabilities and should not involve specific requirements or technical standards.<sup>48</sup> As an example, the Commission should look to its Part 6 rules and the Access Board’s existing section 255 guidelines, are examples of the type of performance objectives that reflect what Congress intended. In contrast, the Commission could employ detailed technical standards if necessary, but only for safe harbor purposes.<sup>49</sup>

In developing performance objectives, the Commission should not rely on the current version of the Access Board’s draft guidelines that are cited in the Public Notice at this time.<sup>50</sup> These guidelines are still very much a work in progress.<sup>51</sup> Moreover, the requirements of section 508 of the Rehabilitation Act in particular are procurement requirements akin to a buyer’s specification, and they serve a fundamentally different purpose than binding obligations under the Commission’s rules. When completed, though, the Access Board guidelines may prove

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<sup>47</sup> Accessibility Act § 104(a) (adding new Section 716(e)(1)(A) of the Communications Act, to be codified at 47 U.S.C. § 617(e)(1)(A)).

<sup>48</sup> See *Public Notice* at 4 (“We seek comment on performance objectives, including the extent to which these objectives should be specific or general.”).

<sup>49</sup> The Commission should generally consider requests from industry or other stakeholders that the Commission adopt a particular technical standard as a safe harbor, subject to appropriate notice and opportunity for comment. The Commission has generally undertaken this approach in CALEA implementation, which has generally proven successful.

<sup>50</sup> See *Public Notice* at 4 (seeking comment on the usefulness of the draft standards and guidelines on Section 508 of the Rehabilitation Act, released for comment by the Access Board in March 2010).

<sup>51</sup> The Notice of Proposed Rulemaking in the Access Board’s proceeding has not been released. See Architectural and Transportation Barriers Compliance Board, Advance NPRM, 75 Fed. Reg. 13,457 (Mar. 22, 2010).

useful in developing performance objectives, and there may be value in eventually harmonizing them at that time.

**VI. THE PROTECTION AFFORDED TO INFORMATION CONTENT UNDER SECTION 716(E)(1)(B) SHOULD BE LIMITED TO SUCH INDUSTRY-STANDARDIZED CONTENT AS CLOSED CAPTIONING.**

New section 716(e)(1)(B) requires that advance communications services and equipment “not impair or impede the accessibility of information content when accessibility has been incorporated into that content *for transmission through*” such services or equipment.<sup>52</sup> The Public Notice seeks comment on how to implement this requirement and the types and nature of information content that should be addressed.<sup>53</sup> Congress expected that only certain content would be entitled to this protection. By its terms, only accessibility incorporated into “content for transmission through” the covered equipment and services is protected. The legislative history explains that the “requirements of this subsection would apply where the accessibility of such content has been incorporated in accordance with recognized industry standards.”<sup>54</sup>

Thus, for accessibility-incorporated content such as closed captioning, Congress recognized that manufacturers and service providers are entitled to rely on the certainty available in appropriate industry standards to ensure their products will appropriately handle such content. Manufacturers and service providers are not engaged in the process of creating content or embedding accessibility content (such as captioning or video description). Consistent with the legislation’s liability limitations, it is critical that manufacturers and service providers be deemed liable for only the products and services they control.<sup>55</sup> Congress reiterated this policy in

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<sup>52</sup> Accessibility Act § 104(a) (adding new Section 716(e)(1)(B) of the Communications Act, to be codified at 47 U.S.C. § 617(e)(1)(B)) (emphasis added).

<sup>53</sup> *Public Notice* at 4.

<sup>54</sup> *House Committee Report* at 25.

<sup>55</sup> *See* Accessibility Act § 2.

section 716(e)(1)(B)’s text and legislative history. The Commission should thus limit manufacturers’ responsibility to content that is compliant with appropriate standards.

## **VII. COVERED APPLICATIONS/SERVICES, SAFE HARBOR TECHNICAL STANDARDS**

*Applications or Services.* The determination of who is a “provider of applications or services” will necessarily depend on how the statutory definitions for covered services apply to a particular application or service on a case-by-case basis.<sup>56</sup> Manufacturers and service providers are liable with respect to third party products, however, only to the extent that they offer them to consumers themselves or seek to rely on those products for their own compliance purposes. Consistent with the third party liability limitations and other statutory provisions, each individual entity offering a covered application or service is subject to its own accessibility obligations independent of the underlying equipment or service platform that enables a user to access the application or service.

*Technical Standards/Safe Harbors.* The statute itself expressly provides that technical standards can be used as safe harbors for compliance as stated in the statute, but only “if necessary . . . .”<sup>57</sup> Congress thus intended that the safe harbors be used only in limited circumstances.<sup>58</sup> When the Commission finds a safe harbor necessary, it should rely on consensus-based industry-led standards developed in an accredited open process, consistent with the approach taken in the CALEA context. By using the term “safe harbor,” Congress intended to insulate device manufacturers or service providers from potential liability when utilizing an

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<sup>56</sup> See Accessibility Act § 104(a) (adding new Section 716(e)(1)(C) of the Communications Act, to be codified at 47 U.S.C. § 617(e)(1)(C)) (“[T]he Commission shall . . . determine the obligations under this section of manufacturers, service providers, and providers of applications or services accessed over service provider networks . . .”).

<sup>57</sup> Accessibility Act § 104(a) (adding new Section 716(e)(1)(D) of the Communications Act, to be codified at 47 U.S.C. § 617(e)(1)(D)) (“[T]he Commission shall . . . not mandate technical standards, except that the Commission may adopt technical standards as a safe harbor for such compliance if necessary to facilitate the manufacturers’ and service providers’ compliance with sections (a) through (c).”).

<sup>58</sup> For example, a standard may help to promote accessibility by facilitating interoperability between services and user devices.

approved technical standard, and also to permit the use of alternative equivalent means of achieving the same result. Thus, the Commission should deem a product or service *per se* compliant for the disability in question when a public safe harbor standard is employed. For the reasons discussed above, however, it is premature for the Commission to rely on the proposed Access Board guidelines cited in the *Public Notice* to aid in the establishment of safe harbor technical standards.<sup>59</sup>

## VIII. OTHER SECTION 716 ISSUES

### A. **Where Multiple Services Are Available Through a Single Device, the Commission Must Apply Section 255 to Telecommunications Services and Interconnected VoIP, and Section 716 to Advanced Services**

As the Bureaus noted in the Public Notice, implementation of the Accessibility Act raises the question of how to treat equipment that is used to provide both telecommunications services (subject to section 255) and advanced communications services (subject to the new Accessibility Act).<sup>60</sup> Consistent with established precedent, where equipment is used for both telecommunications and advanced services, the “readily achievable” standard applies to the telecommunications service and the “achievable” standard applies to the advanced communications services. This interpretation comports with how the Commission has applied the Communications Act generally, including section 255 – *i.e.*, a telecommunications carrier is treated as a telecommunications carrier only insofar as it is providing telecommunications services.<sup>61</sup> The Public Notice specifically raises the question of how to treat interconnected

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<sup>59</sup> CEA notes that the Access Board itself does not purport to create or adopt technical standards, but instead relies on publicly available technical standards where applicable. *See* United States Access Board, Draft Information and Communication Technology (ICT) Standards and Guidelines, at 13-16, 26-29 (Mar. 2010), *available at* <http://www.access-board.gov/sec508/refresh/draft-rule.pdf>.

<sup>60</sup> *See Public Notice* at 5.

<sup>61</sup> *See* 47 U.S.C. § 153(51) (telecommunications carrier is “treated as a common carrier under this Act *only to the extent that it is engaged in providing telecommunications services . . .*”) (emphasis added); *Implementation of Sections 255 and 251(a)(2) of the Communications Act of 1934, as Enacted by the Telecommunications Act of 1996*,

VoIP service, which now is covered by both section 255 and new section 716. As discussed previously, interconnected VoIP service remains subject to section 255, and the regulatory classification of the service does not somehow become “contaminated” by virtue of its being offered in conjunction with an advanced communications service.<sup>62</sup>

**B. To Protect Innovation, the Commission Should Use its Waiver Authority to Incorporate Explicit Exemptions in the Rules.**

The Commission is expressly authorized either “on its own motion or in response to” a specific petition “to waive the requirements of this section” for otherwise covered equipment or services designed primarily for other purposes.<sup>63</sup> The Commission’s timely exercise of its discretion here will be critical to whether implementation of the Accessibility Act fulfills Congress’s innovation policy objectives. Section 716(h)(1) targets equipment that can be used for a covered service on an incidental basis. To preserve innovation, the Commission should waive these requirements prospectively on its own motion by incorporating explicit exemptions into its rules, and in a manner that applies to classes of service providers and manufacturers. Otherwise, companies will potentially be compelled to telegraph their product releases in individualized waiver petitions in advance of product launch in a manner that adversely affects competition.

In addition, the Commission “may exempt small entities from the requirements of this section.”<sup>64</sup> The Commission is directed to consult with the Small Business Administration (“SBA”) in this regard, thus indicating that the SBA definitions of “small business” are

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WT Docket No. 96-198, Report and Order and Further Notice Of Inquiry, 16 FCC Rcd 6417, ¶¶ 78-79, 87-88 (1999) (“1999 Section 255 Order”).

<sup>62</sup> 47 U.S.C. § 255(c) (“A provider of telecommunications service shall ensure that the service is accessible to and usable by individuals with disabilities, if readily achievable.”).

<sup>63</sup> Accessibility Act § 104(a) (adding new Section 716(h)(1) of the Communications Act, to be codified at 47 U.S.C. § 617(h)(1)).

<sup>64</sup> Accessibility Act, § 104(a) (adding new Section 716(h)(2) of the Communications Act, to be codified at 47 U.S.C. § 617(h)(2)).

appropriate starting points for Commission consideration and adoption.<sup>65</sup> Moreover, limits on a company’s “legal, financial, or technical” capability are relevant factors to consider for an exemption in all events.<sup>66</sup>

In all events, the Commission should also adopt processes and policies to ensure that individual waiver petitions of any type are reviewed and acted upon expeditiously, given the important time-to-market considerations that Congress understood. The Commission should also ensure confidential treatment of such requests be liberally granted given the competitive nature of the marketplace. In cases where a case-by-case analysis is necessary, the Commission should consider, among other things, whether the service or device competes with a service or device that is clearly covered by the Act, and whether the service or device is marketed as a service or device used for communication between individuals.<sup>67</sup>

**C. To Ensure Consistency Between New Accessibility Act Implementing Rules and Commission Precedent Regarding Section 255, the Commission Should Determine Compliance for Each Product and Service on its Own Merits.**

The “Rule of Construction” at new section 716(j) provides a critical clarification for industry and potential complainants concerning a manufacturer’s or service provider’s section 716 obligations.<sup>68</sup> It ensures that a manufacturer’s or service provider’s determination that a particular accessibility feature is not achievable cannot be viewed as a *per se* indicia of noncompliance, and that each product and service is to be viewed on its own individual merits.

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<sup>65</sup> *House Committee Report* at 26 (“[T]he Committee expects that the Commission will consult with the Small Business Administration when developing an appropriate definition of ‘small entity.’”).

<sup>66</sup> *See id.*

<sup>67</sup> *See* Accessibility Act § 104(a) (adding new Section 716(h)(1)(B) of the Communications Act, to be codified at 47 U.S.C. § 617(h)(1)(B)) (“designed primarily for purposes other than using advanced communications services”); *see also House Committee Report* at 26 (“New section 716(h) provides the Commission with the flexibility to waive the accessibility requirements for any feature or function of a device that is capable of accessing advanced communication services but is, in the judgment of the Commission, designed primarily for purposes other than accessing advanced communications.”).

<sup>68</sup> Accessibility Act § 104(a) (adding new Section 716(j) of the Communications Act, to be codified at 47 U.S.C. § 617(j)) (“This section shall not be construed to require a manufacturer of equipment used for advanced communications or a provider of advanced communications services to make every feature and function of every device or service accessible for every disability.”).

The Bureaus specifically inquire whether section 716(j) is consistent with the Commission’s determination in the *1999 Section 255 Order* rejecting a product line approach. This earlier decision would arguably not be consistent with this provision, at least insofar as that earlier decision may have been interpreted as effectively requiring that each product or service be accessible for all disabilities.<sup>69</sup> Section 716(j) also ensures that the fourth prong of the “achievable” definition 716(g)(4) is not undermined and that a manufacturer’s or service provider’s making accessibility features across a range of product lines will count favorably toward an “achievable” showing.<sup>70</sup> Finally, CEA notes that, this provision does not let a company “off the hook” in any way, as a company’s efforts are still measured against the factors of the “achievable” standard.

#### **D. Other Issues**

***Limitations on Liability.*** The liability limitations of section 2 of the Accessibility Act apply comprehensively to those services and equipment functionalities and capabilities that enable a user to access the services, applications, content and other products offered by third parties. These limitations apply throughout all of the Accessibility Act, not just section 716, and impose affirmative limits on the Commission’s application of the achievable standard. The Commission must ensure that manufacturer and service provider obligations under section 716, as well as its individual enforcement actions, are consistent with section 2. In that regard, a manufacturer or service provider should not be liable for third-party applications that are loaded

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<sup>69</sup> See *1999 Section 255 Order* ¶¶ 49-50.

<sup>70</sup> Accessibility Act § 104(a) (adding new Section 716(g)(4) of the Communications Act, to be codified at 47 U.S.C. § 617(g)(4)) (“[T]he Commission shall consider ... [t]he extent to which the service provider or manufacturer in question offers accessible services or equipment containing varying degrees of functionality and features, and offered at differing price points.”).

by the consumer and are either inaccessible or undermine the accessibility features of the device or service.<sup>71</sup>

***Prohibition Against Proprietary Technology.*** This statutory provision is largely self-explanatory and also imposes an affirmative limit on the Commission’s application of the achievable standard.<sup>72</sup> The legislative history confirms Congress’s intent that the Commission may “not mandate the use or incorporation of such technology, to the exclusion of other solutions.”<sup>73</sup> Moreover, “[w]hile the Commission may indicate that incorporation of a particular technology in specific instances will be sufficient to meet an entity’s responsibilities under this Act, . . . parties remain free to use alternative solutions” and there is no preference for non-proprietary software either.<sup>74</sup>

***Exclusion of Customized Equipment.*** This provision reflects Congress’s intent that the Commission’s regulations target products that are widely available to consumers and thus establishes a critical limit on the scope of the achievable requirement.<sup>75</sup> While the legislative history indicates that Congress viewed this as a “narrow exemption,” it is also nonetheless critical for Congress’s overarching regulatory scheme.<sup>76</sup> The legislative history “recognize[d] that some equipment and services are customized to the unique specifications requested by an enterprise customer” and that companies need the flexibility to be able to provide “specialized

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<sup>71</sup> See Accessibility Act § 2 (“Limitation on Liability”).

<sup>72</sup> Accessibility Act § 3 (“No action taken by the Federal Communications Commission to implement this Act or any amendment made by this Act shall mandate the use or incorporation of proprietary technology.”).

<sup>73</sup> *House Committee Report* at 22.

<sup>74</sup> *Id.* Note that the legislative history’s statement that “[i]t is also the intention of the Committee to express a preference for open source software or any other technology” in context should be viewed as missing the word “not” before “the intention.” *See id.*

<sup>75</sup> Accessibility Act § 104(a) (adding new Section 716(i) of the Communications Act, to be codified at 47 U.S.C. § 617(i)) (“The provisions of this section shall not apply to customized equipment or services that are not offered directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.”).

<sup>76</sup> *House Committee Report* at 26.

and sometimes innovative equipment to provide their services efficiently.”<sup>77</sup> This principle applies to enterprise customers of wide varieties, including government, and public safety, as well as commercial enterprise customers.

## **IX. REQUIREMENTS OF SECTION 717 - ENFORCEMENT AND RECORDKEEPING OBLIGATIONS**

**Records.** New section 717 of the Communications Act requires manufacturers and service providers to maintain records of efforts taken to implement requirements under the new law.<sup>78</sup> The statute specifies certain aspects of the record-keeping rules. As a general rule, in implementing these requirements the Commission should provide flexibility to account for the differences in size and scope of various manufacturers and service providers. Moreover, the information in any records retained to comply with the new rules should not be viewed as *per se* evidence of a substantive violation. In this regard, to meet the requirement to document efforts to consult with individuals with disabilities,<sup>79</sup> the Commission should allow records of participation in accredited standards development organizations to count toward a company’s compliance, as well as its outreach to individuals with disabilities either directly or indirectly through standards development organizations. Smaller entities may be unable to meaningfully engage in such efforts, however, so such activities cannot be viewed as mandatory. The description of accessibility features and compatibility with equipment used by individuals with disabilities included in the records could also generally reflect information provided to the

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<sup>77</sup> *Id.*

<sup>78</sup> See *Public Notice* at 6.

<sup>79</sup> Accessibility Act § 104(a) (adding new Section 717(a)(5)(A)(i) of the Communications Act, to be codified at 47 U.S.C. § 618(a)(5)(A)(i)). Congress considered but ultimately rejected an approach based on the Commission’s highly detailed and granular HAC reporting requirements.

clearinghouse over time to avoid conflicting and unnecessarily duplicative information collection.<sup>80</sup>

**Enforcement Procedures.** Section 717’s new enforcement procedures are largely detailed in the statutory text.<sup>81</sup> It is nonetheless significant that Congress considered and rejected authorizing the use of cease-and-desist orders and other intrusive remedies that involve any sort of regulatory micromanagement of new technologies and their deployment.<sup>82</sup> In this regard as well, the Accessibility Act’s legislative history indicates that Congress clearly understood that the Commission must exercise any remedial authority selectively and carefully, particularly for consumer and wireless devices, clarifying that “the Commission shall provide [service providers and manufacturers] a reasonable time to bring the service or equipment at issue into compliance . . . [and should not] require retrofitting of such equipment that is already in the market.”<sup>83</sup>

## **X. REQUIREMENTS OF SECTION 718 - INTERNET BROWSERS BUILT INTO TELEPHONES USED WITH PUBLIC MOBILE SERVICES**

The Bureaus ask in the Public Notice whether section 718 should affect the Commission’s interpretation and implementation of section 716.<sup>84</sup> The language in both sections is virtually identical, and should be applied consistently and with maximum flexibility as confirmed by the Committee Report.<sup>85</sup> Moreover, section 718, when viewed in light of the section 2 liability limitation provision, is clearly targeted at the “on-ramp” functionalities of the

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<sup>80</sup> Compare Accessibility Act § 104(a) (adding new Section 717(a)(5)(A)(ii)-(iii) of the Communications Act, to be codified at 47 U.S.C. § 618(a)(5)(A)(ii)-(iii)) with Accessibility Act § 104(a) (adding new Section 717(d) of the Communications Act, to be codified at 47 U.S.C. § 618(d)) (“[T]he Commission shall . . . establish a clearinghouse of information on the availability of accessible products and services and accessibility solutions required under sections 255, 716, and 718.”).

<sup>81</sup> Accessibility Act, § 104(a) (adding new Section 717(a) of the Communications Act, to be codified at 47 U.S.C. § 618(a)).

<sup>82</sup> Compare H.R. 3101, 111th Cong. § 104(a) (as introduced in the House, on June 26, 2009) with Accessibility Act, § 104(a).

<sup>83</sup> *House Committee Report* at 26.

<sup>84</sup> See *Public Notice* at 6.

<sup>85</sup> Compare Accessibility Act § 104(a) (adding new Section 718(b) of the Communications Act, to be codified at 47 U.S.C. § 619(b)) with Accessibility Act § 104(a) (adding new Section 716(a)(2) and (b)(2) of the Communications Act, to be codified at 47 U.S.C. § 617(a)(2), (b)(2)).

covered services and devices – *e.g.*, the device’s and service’s activation/initiation process – not the underlying content or websites made available via the service.<sup>86</sup>

## **XI. CONCLUSION**

CEA welcomes the opportunity to serve as a resource for the Commission as it implements the Accessibility Act and urges the Commission to follow Congress’s lead in balancing the twin goals of promoting accessibility and preserving continued innovation.

Respectfully submitted,

**CONSUMER ELECTRONICS ASSOCIATION**

By: /s/ Julie Kearney  
Julie Kearney  
Vice President, Regulatory Affairs

Brian Markwalter  
Vice President, Research and Standards  
Veronica O’Connell  
Vice President, Congressional Affairs  
Bill Belt,  
Senior Director, Technology and Standards

Consumer Electronics Association  
1919 S. Eads Street  
Arlington, VA 22202  
Tel: (703) 907-7644

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<sup>86</sup> See Accessibility Act § 2 (limiting liability to only those services and equipment controlled by the provider).