

**Before the
Federal Communications Commission
Washington, DC 20554**

In the Matter of)
)
Advanced Communication Provisions of the) CG Docket No. 10-213
Twenty-First Century Communications and)
Video Accessibility Act of 2010)

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

COMMENTS OF T-MOBILE USA, INC.

T-Mobile USA, Inc. (“T-Mobile”) hereby files comments in response to the Public Notice in the above-referenced proceeding.¹ The Consumer & Governmental Affairs Bureau and Wireless Telecommunications Bureaus (the “Bureaus”) have requested “public input on the meaning of key provisions in new Section 716” as well as other aspects of the Twenty-First Century Communications and Video Accessibility Act of 2010.² T-Mobile has been and remains at the forefront of new innovative internet protocol (“IP”)-based offerings, and is committed to providing all of its customers with high quality products and services and with an exemplary customer service experience.

The company welcomes the opportunity to contribute to the Bureaus’ deliberative efforts in advance of the forthcoming *Notice of Proposed Rulemaking* (“NPRM”). To that end, in these comments T-Mobile addresses issues concerning: the services subject to the Accessibility Act; the new “achievable” standard and related industry flexibility provisions; network capability

¹ 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 (CGB/WTB rel. Oct. 21, 2010) (“Public Notice”).

² See *Twenty-First Century Communications and Video Accessibility Act of 2010*, Pub. L. No. 111-260, 124 Stat. 2751 (as amended by Pub. L. No. 111-265, 124 Stat. 2795 (2010)) (“Accessibility Act”).

requirements; performance objectives; statutory waiver and exemption provisions; third party liability and proprietary technology restrictions; reporting requirements; and the scope of new internet browser accessibility requirements.

I. The Definitions of the Various Advanced Communications Services Are Limited In Scope

The Accessibility Act defines “advanced communications” as including four enumerated services: interconnected VoIP; non-interconnected VoIP; electronic messaging; and interoperable video conferencing.³ “Interconnected VoIP” is explicitly defined as having the meaning set forth in the Commission’s Part 9 rules.⁴ The Bureaus seek comment on how to treat interconnected VoIP service under Section 716 of the amended statute.⁵ New Section 716(f) of the Communications Act stipulates that such service will remain governed by Section 255, not Section 716⁶ – an interpretation that applies regardless of whether interconnected VoIP is being offered together with another advanced communications service.⁷

The definition of non-interconnected VoIP is broader, and would likely cover the types of non-interconnected VoIP services described in the Commission’s 2005 *E-911 VoIP NPRM*.⁸ A service provider’s Section 716 obligations with respect to VoIP-based services, however, apply

³ Accessibility Act § 101 (amending Section 3 of the Communications Act of 1934).

⁴ 47 U.S.C. § 153(25).

⁵ Public Notice at 5.

⁶ See 47 U.S.C. § 617(f).

⁷ See Public Notice at 5 (seeking comment on how to treat smartphones with “some functions that fall under Section 255 and others that are subject to Section 716 ...”).

⁸ See *IP-Enabled Services, E911 Requirements for IP-Enabled Service Providers*, First Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 10245, ¶ 58 (2005) (describing “a VoIP service offering that permits users generally to receive calls that originate on the PSTN and separately makes available a different offering that permits users generally to terminate calls to the PSTN [where] a user can combine those separate offerings or can use them simultaneously or in immediate succession”). Non-interconnected VoIP service includes all real-time voice communications services that either “originate from or terminate to the user’s location” and use IP and IP-capable CPE, and that do not otherwise constitute interconnected VoIP. See 47 U.S.C. § 153(36).

only to “services *offered by*” that company; the fact that a service includes an incidental VoIP component does not bring it within the statutory definition.⁹ Nothing in the Accessibility Act, moreover, extends these obligations to third party applications that utilize a service provider’s network. In addition, as discussed in more detail below, even where a VoIP-based product falls within the non-interconnected VoIP definition, there may be circumstances in which the statutory waiver and exemption provisions will apply.¹⁰ Accordingly, the Commission should not adopt a presumption that all VoIP-based products are or should be subject to Section 716’s accessibility requirements; rather, each service must be evaluated on its own merits.

With respect to the other advanced communications services, the statutory text and legislative history of the Accessibility Act provides relevant guidance that should be reflected in the scope of issues raised in the forthcoming *NPRM*. Electronic messaging, for example, is defined in terms of “real-time or near real-time” messages “between individuals,” and the legislative history clarifies that the definition is intended to cover widely-available services such as email, text messaging and instant messaging.¹¹ By contrast, third-party html-based email and web-based services that might be accessed via a mobile device, such as social networking sites, are expressly excluded.¹²

⁹ A service provider’s obligations apply to the advanced communications services “offered ... in or affecting interstate commerce ...” *See* 47 U.S.C. § 617(b)(1). As the Commission has made clear in other contexts, it “focuse[s] on the end-user’s experience” in defining a particular service offering for Communications Act purposes. *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, Declaratory Ruling, 22 FCC Rcd 5901, ¶ 20 (2007).

¹⁰ *See infra* discussion at Section V (discussing waiver provision for advanced communications services offered on incidental basis and exemption for customized equipment and services).

¹¹ 47 U.S.C. § 153(19); Twenty-First Century Communications and Video Accessibility Act of 2010, H.Rep. 111-563, at 23 (Jul. 26, 2010) (“House Report”).

¹² House Report at 23.

II. The “Achievable” Standard and “Industry Flexibility” Provisions Must Be Applied on a Company-Specific Basis and in a Manner that Realizes the Potential of New Technologies

The definition of “achievable” and the four statutory factors relevant to an achievable analysis for a given service or product underscore that Congress intended the Commission to evaluate each product or service on its own merits.¹³ The fact that a particular accessibility feature or technology might be achievable for another service provider is not relevant to a determination of whether it is achievable for T-Mobile. Each company has different technical, financial, and personnel resources, with different business models and distinct technology configurations and platforms that must be accounted for individually. The forthcoming *NPRM* should reflect the company-specific approach required by the statute.

Section 716(b)(2) enables service providers to rely on the availability of third party services and applications for its own compliance purposes, if available at “nominal cost” to consumers.¹⁴ Congress recognized that affordable third party applications have enormous potential for improving accessibility for consumers. Further, the “industry flexibility” provisions reflect Congress’s clear judgment that Section 716 should reflect a substantial departure from Section 255’s traditional accessibility-compatibility framework, which has been understood to preclude reliance on such third party products for purposes of making services and equipment “accessible.”

T-Mobile’s experience with consumers and application developers, notably through its offering of handsets and services via the Android platform, is congruent with Congress’s

¹³ See 47 U.S.C. 617(g)(1) (“nature and cost” for “the *specific service* ... in question”); *id.* § 617(g)(2) (“technical and economic impact” on operation of the “*specific service in question*”); and *id.* § 617(g)(4) (other offerings of “the service provider ... in question”) (emphasis added).

¹⁴ 47 U.S.C. § 617(b)(2).

judgment in incorporating Section 716(b)(2) into the statute. The Commission should ensure it does not interpret the term “nominal cost,” either in its forthcoming *NPRM* or in an adjudicatory context, so narrowly that it renders this provision superfluous. In this regard, the legislative history confirms that the Commission should not establish any sort of fixed “percentage or amount” in determining what is “nominal.”¹⁵ Rather, a case-by-case approach is necessary.

III. Commission Requirements Concerning Network Features, Functions, and Capabilities, and Accessibility of Information Content Must Ensure Network Security, Reliability, and Survivability

New Section 716(d) of the Communications Act requires that providers of advanced communications service not “install network features, functions or capabilities that impede accessibility.”¹⁶ The Bureaus ask if this requirement, which is similar to existing section 251(a)(2) of the Act, has “new meaning in the context of advanced communications services networks.”¹⁷ Section 716(e)(1)(B) further requires that Commission rules ensure that networks “not impair or impede the accessibility of information content when accessibility has been incorporated into that content for transmission” via advanced communications networks.¹⁸

The Commission must ensure that these provisions are not interpreted in such a manner as to compromise the Commission’s own objectives of promoting network security, reliability, and survivability in broadband networks. As an advanced communications network provider, T-Mobile will be subject to these obligations, and submits that the issue of protecting network security, reliability, and survivability in this context is appropriately addressed through industry standards bodies that can consider input from content providers and consumer groups while also

¹⁵ See House Report at 24.

¹⁶ 47 U.S.C. § 617(d).

¹⁷ See Public Notice at 4.

¹⁸ 47 U.S.C. § 617(e)(1)(B).

adequately protecting the broader critical infrastructure protection interests that are important for all network users.

IV. Performance Objectives Should Be General and Outcome-Oriented

The Bureaus seek comment on whether it should adopt accessibility “performance objectives” that are specific or general.¹⁹ The Accessibility Act itself expressly prohibits the mandated technical standards, except as safe harbors (similar to the approach Congress mandated for the Communications Assistance for Law Enforcement Act).²⁰ T-Mobile recommends the adoption of general, outcome-based performance objectives akin to the Commission’s current Part 6 rules, which are consistent with Congress’s intent.²¹

V. Other Provisions of Section 716 Are Essential to Preserving Innovation in the Wireless Services and Equipment Marketplace

The Commission’s interpretation and implementation of the provisions briefly referenced below are critical to ensuring that Congress’s objective of preserving industry innovation is met. These “other matters affecting implementation” are integral to how the Commission implements Section 716.²² T-Mobile urges the Commission to appropriately account for these matters in its upcoming NPRM.

Waiver Provisions and Customized Equipment. New Sections 716(h) and (i) of the Communications Act, respectively, allow the Commission to waive Section 716 for otherwise covered services that are “designed primarily for purposes other than using advanced communications services” and exempt customized services “not offered directly to the public”

¹⁹ See Public Notice at 4.

²⁰ See 47 U.S.C. § 617(e)(1)(D); see also 47 U.S.C. § 1006(a) (CALEA safe harbor).

²¹ See 47 C.F.R. Part 6.

²² See Public Notice at 5.

from Section 716.²³ Wireless operators use, and allow others to use, their spectrum in a myriad of ways, including innovative machine-to-machine (“M2M”) services and applications that may incidentally involve the transmission of text or voice. To the extent that such services can be deemed advanced communications service offerings in the first place, many would be outright exempt from Section 716 as customized services; and T-Mobile submits that blanket, prospective waivers would be appropriate for other service offerings where the advanced services component is incidental to the primary purpose for which the service is designed.²⁴

Rule of Construction. Section 716(j) provides that service providers are not required “to make every feature and function of every device or service accessible for every disability.”²⁵ This provision, in conjunction with Section 716(g)(4), ensures both that (1) incorporating accessibility in significant parts of various product lines, even if not on each individual product, will count favorably toward service providers’ compliance, and (2) the mere fact that accessibility is not included in a particular service does not count unfavorably toward compliance. These provisions together ensure recognition of companies’ good faith efforts and investments in their consumers’ accessibility needs.

Third Party Liability and Proprietary Technology Limitations. The provisions of Sections 2 and 3 of the Accessibility Act affect the scope of the technical solutions and remedies the Commission may impose on service providers and manufacturers throughout all of the Accessibility Act’s provisions, including Title I.²⁶ An accessibility feature that is either (1) a

²³ 47 U.S.C. §§ 617(h)-(i).

²⁴ Section 716(h) authorizes the Commission to waive Section 716’s requirements for such services “on its own motion” and “for any class of” advanced communications services. 47 U.S.C. § 617(h).

²⁵ 47 U.S.C. § 617(j).

²⁶ See Accessibility Act §§ 2(a), 3.

third party solution subject to Section 2(a) of the Accessibility Act, or (2) a proprietary technology under Section 3, cannot be imposed on a service provider and by definition is not “achievable” for Section 716(b) purposes. T-Mobile’s experience with the Android platform, which makes thousands of applications available to individual smartphone users while largely removing individual operators from the role of gatekeeper, is as an example of why Section 2(a) in particular is so critical to preserving innovation in an open access environment – innovation that may become stifled if wireless service providers were required to police new third party applications for noncompliance with accessibility requirements.

VI. Enforcement Provisions of Section 717

The enforcement provisions of Section 717 are mostly self-effectuating.²⁷ As a general matter, however, Congress’s mandate that the rules be applied with flexibility should extend to Section 717’s recordkeeping provisions.²⁸ The format in which companies maintain such records, and how they implement the various activities subject to those reporting requirements (*e.g.* consulting with individuals with disabilities and product descriptions) will vary based on the size of their communications services or manufacturing operations. The Commission should forbear from applying any uniform requirements in this regard.

VII. Accessibility for Mobile Internet Browsers

New Section 718 of the Communications Act governs accessibility for mobile handset Internet browsers and is subject to the same “achievable” standard and the “industry flexibility”

²⁷ See Public Notice at 6.

²⁸ See 47 U.S.C. § 618(a)(5).

compliance methods as those advanced communications services subject to Section 716.²⁹ T-Mobile's above comments regarding the provisions of Sections 716(b) and (g), as well as the third party liability and proprietary technology exclusions of Sections 2 and 3 of the Accessibility Act, are equally relevant here. Furthermore, Congress intended that this requirement would cover the "on-ramp" functionalities of the device and service, i.e. the Internet access service initiation and activation features – not the accessibility of the content or applications that the user accesses via the browser.³⁰

²⁹ See 47 U.S.C. §§ 619(a)-(b). Public Notice at 7 (seeking comment on interplay between sections 716 and 718).

³⁰ See 47 U.S.C. § 619(a)(2).

VIII. Conclusion

For the foregoing reasons, the Commission should frame the issues in the forthcoming *NPRM* consistent with T-Mobile's comments in a manner that both promotes the accessibility of advanced communications equipment and services for persons with disabilities, while maximizing industry's flexibility to comply with the Accessibility Act's standards in a manner that does not impede innovation and investment.

Respectfully submitted,

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