

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

In the Matter of

Advanced Communication Provisions of
the Twenty-First Century Communications
and Video Accessibility Act of 2010

CG Docket No. 10-213

**MICROSOFT CORP. COMMENTS ON THE ADVANCED COMMUNICATION
PROVISIONS OF THE TWENTY-FIRST CENTURY ACT**

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TABLE OF CONTENTS

I. INTRODUCTION & SUMMARY 1

II. CONGRESS FOCUSED SECTION 716 ON PRODUCTS AND SERVICES THAT HAVE ADVANCED COMMUNICATIONS CAPABILITIES AS A PRIMARY PURPOSE..... 3

A. The Commission Should Look To Core Functionality Intended by Providers and Manufacturers To Determine What Constitutes a Covered Advanced Communications Service..... 4

B. The Commission Can Use Its Waiver Authority To Waive Application Of Section 716 To Products and Services Whose Primary Function Is Not to Provide Advanced Communications Services..... 6

III. THE ACT ENCOURAGES INNOVATION BY MANDATING SIGNIFICANT FLEXIBILITY FOR MANUFACTURERS AND SERVICE PROVIDERS..... 8

A. The Language Of The Act Precludes Interpretations That Would Lock Manufacturers And Service Providers Into Particular Solutions..... 9

B. The Commission May Not Prescribe Technical Standards Or Specific Accessibility Requirements, Or Otherwise Freeze Accessibility Solutions. 11

1. The Act Prohibits Certification or Pre-Approval Requirements..... 11

2. The Commission Should Recognize that Broad Functionality Enables Access. 12

3. The Commission Should Avoid A Restrictive Definition of “Nominal.”..... 13

C. The Commission Should Use Industry-Developed Technical Standards as Safe Harbors..... 14

IV. CONCLUSION 15

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I. INTRODUCTION & SUMMARY

The Twenty-First Century Communications and Video Accessibility Act of 2010 (the “Act” or “Twenty-First Century Act”)¹ is legislative landmark in the progression of legislation to ensure that people with disabilities have access to as many of the same modern life-saving and life-enhancing communications technologies as do other Americans. As Congress recognized, over the last fifteen years, communications technologies and services have seen dramatic changes that revolutionized the way that Americans communicate with one another. It is critical that Americans with disabilities be able to participate as fully as possible in these new modes of communication and thus the Twenty-First Century Act was enacted to “ensure that individuals with disabilities are able to fully utilize communications services and equipment.”² Microsoft fully supports this objective, and has worked hard to ensure that its products are accessible and can work with accessibility solutions whenever possible.

¹ Pub. L. No. 111-260, 124 Stat. 2751 (to be codified in scattered sections of 47 U.S.C.).

² H.R. Rep. No. 111-563, at 19 (2010) (“*House Report*”).

The Act provides a clear statutory mandate for people with disabilities to have the broadest possible access to advanced communications technologies, within the limits of what is achievable. At the same time, Congress recognized the importance of enabling innovation, and therefore tailored the Act's mandates to services and equipment for which interactive advanced communications is the primary purpose. Congress likewise provided advanced communications service providers and equipment manufacturers with the flexibility to develop mass market products and to find accessibility solutions where those are achievable.³

In the *Public Notice*, the Commission has asked for comment on a number of issues. Microsoft limits its initial comments here to two particular issues: the scope of the definitions and the need for the Commission to leave manufacturers and service providers with flexible means by which they can implement accessibility solutions, where achievable. In particular, as Congress intended, the Commission should interpret the new category of "advanced communications services" to include those services that have advanced communications services as their primary purpose. If the Commission does adopt a definition that is sufficiently broad to reach video gaming products and services, the Commission should use its waiver authority to grant categorical waivers of Section 716's requirements to those services in which advanced communications services are incidental to the primary purpose of the product or service, as well as waive other provisions of Section 716 of the Act applicable to the same advanced functionalities (*e.g.*, a service or equipment that contains non-interconnected VoIP, but for which

³ *See, e.g., House Report*, at 24 ("New sections 716(a) and (b) give manufacturers and service providers a choice regarding how accessibility will be incorporated into a device or service....The Committee intends that these provisions provide that the choice of whether to build in accessibility or provide access to a third-party solution that is available at a nominal cost rests solely with the provider or the manufacturer.").

treatment as an “advanced communications service” is waived, should also be exempted from TRS contribution obligations).

Furthermore, the Commission should recognize the inherent flexibility of the Act’s other provisions and avoid other unnecessary restrictions on industry. The Act precludes interpretations that freeze solution sets and prohibits the Commission from mandating technical standards or proprietary technologies – both of which would stifle innovation, to the detriment of achieving accessibility to the fullest extent possible. Where standards are needed to serve as safe harbors, the Commission should look to industry; otherwise, it should avoid mandates, whether express or implied.

II. CONGRESS FOCUSED SECTION 716 ON PRODUCTS AND SERVICES THAT HAVE ADVANCED COMMUNICATIONS CAPABILITIES AS A PRIMARY PURPOSE.

The Act focuses Section 716’s requirements on advanced interactive voice, electronic messaging or video communications products or services that have advanced communications as a primary purpose. Both the definition of advanced communications service (which specifically delineates constituent services and thus necessarily excludes any non-delineated services) and the broad waiver authority granted to the Commission, indicate that Congress intended to give the Commission discretion to tailor Section 716’s scope or, alternatively, to waive Section 716 for those services whose primary purpose is not advanced communications.⁴ In determining what products or services are advanced communications subject to Section 716, therefore, the

⁴ Congress also included other limitations in the Act’s Section 716 definitions. For example, Congress said that “electronic messaging” means “real-time or near real-time non-voice messages between individuals....” New Section 101(19), to be codified at 47 U.S.C. § 153(19). Thus, Congress intended “electronic messaging” to include traditional two-way interactive services between persons (e.g., text messaging and e-mail) but to exclude machine-to-machine and non-real-time messaging services (e.g., alarm monitoring, blog posts, and messages posted on social networking sites). *See House Report*, at 23.

Commission should look to core functionalities that are designed and marketed by the manufacturer and service provider and thus are the principal reason why consumers purchase the product. Moreover, if the Commission determines that the definition of advanced communications includes products and services with *incidental* communications capabilities – such as video game consoles and their associated services -- it should issue blanket waivers for such products and services.

A. The Commission Should Look To Core Functionality Intended by Providers and Manufacturers To Determine What Constitutes a Covered Advanced Communications Service.

Many services may include incidental communications features, and the Commission should take care not to disincant the incidental inclusion of voice, video communication, and text messaging in new products and services. In determining which services fall within the definition of advanced communications service, including what constitutes non-interconnected VoIP, electronic messaging, and interoperable video conferencing service, the Commission should therefore look not to those incidental capabilities but instead to the core purpose and functionality of the service as intended by the manufacturer or service provider and as marketed to the consumer.⁵ To make this determination, the Commission should look to the manufacturer's or provider's marketing materials and product design, as these set the basis for the sale and purchase of the service or equipment.

Perhaps the clearest example of a product that has incidental voice communications features – but that should not fall within the definition of an advanced communications service, as a non-interconnected VoIP service/equipment, an interoperable video communications service/equipment, or an electronic messaging service/equipment – are video gaming products

⁵ See New Section 716(h)(1)(B), to be codified at 47 U.S.C. § 617(h)(1)(B).

and services that incidentally also enable users to communicate via voice, video, and text messaging. The primary purpose of these gaming platforms is entertainment, not “non-interconnected VoIP service,” “interoperable video communications service,” or “electronic messaging service.” Although gaming products and services have been expanding in their functionalities, the expansion primarily is intended to serve as a multifunctional center for a wide range of video entertainment, from gaming to viewing movies and other online content. As an incident to enrich the entertainment experience, gaming platforms and their associated online services have built-in features, such as peer-to-peer voice, that allow gamers to engage in communications while playing a game interactively with a remote partner. Those incidental features, though, should not convert the gaming products and services from gaming services to “non-interconnected VoIP services” or make the companies *providers* of “advanced communications services.”⁶

To determine a product’s or service’s primary purpose, the Commission should look at the core features of the product or service as designed and marketed by the manufacturer or service provider, and make the determination on a case-by-case basis. Any other approach would be unworkable, as manufacturers and service providers must know in advance which products or services are subject to particular regulatory obligations.

⁶ Furthermore, as a technical matter, these incidental functionalities are frequently not provided as a service but are simply peer-to-peer software applications used by the end users. The Commission has recognized that the provision of peer-to-peer software does not, in and of itself, constitute a service. *See e.g., In the Matter of Petition for Declaratory Ruling that pulver.com’s Free World Dialup is Neither Telecommunications Nor a Telecommunications Service*, Memorandum Opinion and Order, 19 FCC Rcd 3307 (2004). Thus, because the functionality is not a “service,” the software and equipment are not “used for the provision of advanced communications services.” *See* New Section 716(a)(1), to be codified at 47 U.S.C. 617(a)(1).

B. The Commission Can Use Its Waiver Authority To Waive Application Of Section 716 To Products and Services Whose Primary Function Is Not to Provide Advanced Communications Services.

If the Commission nevertheless interprets the definition of non-interconnected VoIP to reach gaming and other entertainment products or services with incidental voice or messaging features, it should then waive the application of Section 716 to those products and services. Section 716(h) expressly grants the Commission authority to waive the requirements of Section 716 for “for any feature or function of equipment used to provide or access advanced communications services, or for any class of such equipment, for any provider of advanced communications services, or for any class of such services,” when the product or service is “designed primarily for purposes other than using advanced communications.”⁷ Video gaming consoles and their associated online services, which do not have communications as their primary purpose, are just the kind of products and services Congress envisioned when it gave the Commission broad authority to grant waivers on its own motion, not only to particular equipment or services but also to entire classes of equipment or services.⁸

Notably, Congress did not restrict when such a waiver could be granted. In light of the statutory enforcement scheme and the Act’s record-keeping requirements, the Commission should interpret Section 716(h) to permit a waiver to be granted either prospectively or in response to a waiver request as a defense to a complaint. Congress plainly understood that such waivers are critical for continued technological innovation.⁹ Granting prospective categorical waivers is essential to encourage manufacturers and service providers to build communication

⁷ New Section 716(h)(1), to be codified at 47 U.S.C. § 617(h)(1).

⁸ *See House Report*, at 26.

⁹ *See id.*

features into services and equipment devices that do not have as their core purpose advanced communications. Fostering this innovation will enrich the communications choices and solutions available to all consumers, including those with disabilities, and further the goals of the Act. And there is no reason why Section 716(h) should be read to preclude categorical waivers. Nothing in its text creates such a limitation. Indeed, granting a waiver to one service or equipment, but not to similarly-situated service or equipment would not be competitively neutral, and it serves no purpose to require all similarly-situated service providers or manufacturers to seek identical relief.¹⁰

Prospective waivers are particularly important in light of the Act's recordkeeping requirements.¹¹ Without prospective waivers, innovation may be stifled if manufacturers elect not to introduce products or features because they did not from the outset anticipate that their product or service would, by virtue of incidental communications features, fall within the recordkeeping requirements of the Act. Granting prospective waivers will allow the Commission to avoid stifling innovation while encouraging manufacturers and service providers to continue developing the best possible accessibility solutions for all Americans with disabilities.

Given the complaint-driven enforcement structure of the Act, the Commission must also entertain waiver requests as a defense to a complaint. When a service provider or manufacturer

¹⁰ The Commission has not, in other contexts, required similarly-situated service providers to file "me-too" requests. For example, when the Commission preempted the application of Minnesota state telephone regulations to interconnected VoIP in response to a request from Vonage, it did not require all other nomadic interconnected VoIP providers to file "me-too" preemption petitions. *In the Matter of Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, Memorandum Opinion and Order, 19 FCC Rcd 22404 (2004).

¹¹ New Section 717(a)(5), to be codified at 47 U.S.C. § 618(a)(5).

does not seek a waiver in advance, no purpose would be served by denying it the opportunity to ask the Commission to waive Section 716 in response to a complaint. Indeed, a complaint proceeding will present particularized facts on which the Commission can base its waiver decision. And given the fact that the Commission will take at least some time to process and adjudicate Section 716(h) waiver requests, there will always be some possibility that a complaint will be brought during the pendency of the waiver request. To permit the broadest range of consistency, the Commission should grant Section 716(h) waivers whenever the asserted advanced communications capability is not the primary purpose of the service or equipment, irrespective of whether the waiver request is made in advance of product launch, after product launch but before a complaint is made or while a complaint is pending.

Finally, any such waiver should also encompass other, related provisions of the Act. For example, if the Commission finds that a particular secondary voice capability falls under the definition of non-interconnected VoIP, but should be excluded from Section 716 because its primary purpose was not the provision of advanced communications service, it would also make sense to waive the obligation to contribute to TRS for that service. As a practical matter, it will be extremely difficult in that situation to segregate the non-interconnected VoIP revenue from all other revenue from the service.

III. THE ACT ENCOURAGES INNOVATION BY MANDATING SIGNIFICANT FLEXIBILITY FOR MANUFACTURERS AND SERVICE PROVIDERS.

The Committee Report specifically says that “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.”¹² The

¹² *House Report*, at 24.

Commission must follow this Congressional direction by taking implementation steps that encourage innovation and enable the continued development of robust accessibility solutions.

A. The Language Of The Act Precludes Interpretations That Would Lock Manufacturers And Service Providers Into Particular Solutions.

The Act directs the Commission to empower industry to develop a variety of innovative accessibility solutions. Indeed, it expressly supports the use of “alternative solutions so long as they also meet the requirements of” the Act.¹³ Congress likewise indicated it wanted the Commission to avoid imposing requirements on manufacturers and service providers that would stifle their ability to innovate by, for instance, mandating technical standards.¹⁴

To ensure flexibility, Congress provided manufacturers and service providers with multiple and co-equal paths to compliance. Sections 716(a) and (b) allow manufacturers and service providers to satisfy accessibility requirements either by developing native solutions or by using third-party solutions that are available to the consumer at nominal cost.¹⁵ This means that Section 716 has no minimum quantum of native, “out-of-the-box” accessibility capability but that the service or equipment can satisfy accessibility requirements entirely through third party, nominal-cost solutions. And Section 716(c) allows manufacturers and service providers to ensure that, when third-party solutions are not available at a nominal cost, commonly used third-party peripherals, consumer-provided equipment (CPE), or other solutions are compatible (when achievable).¹⁶

¹³ *Id.* at 22.

¹⁴ New Section 716(e)(1)(D), to be codified at 47 U.S.C. § 617(e)(1)(D) (precluding the Commission from mandating technical standards except as a safe harbor if necessary to facilitate compliance).

¹⁵ *Id.* § 716(a)(2), 716(b)(2).

¹⁶ *Id.* § 716(c).

Critically, the statute also expressly *rejects* any requirement that manufacturers and service providers include every accessibility feature in every product or service. By this provision, Congress has recognized that it is appropriate for manufacturers to develop a variety of solutions for a variety of users, without incorporating every solution into every product.¹⁷ In other words, Congress ensured that companies would continue to be free to implement accessibility in the most effective and efficient way possible across a product line. Congress also gave manufacturers and service providers the choice to use native solutions or third-party solutions, and thus did not intend that manufacturers be required to build every product or service with out-of-the-box accessibility.

In evaluating whether accessibility of an advanced communications service is achievable, Section 716(g)(4) directs the Commission to take into account the “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.”¹⁸ This is, of course, quite different from the product-specific accessibility approach taken by the Commission in Section 255 and reflects the very different marketplace in which advanced communications services are offered. There is no “one size fits all” solution that meets the differing needs of consumers, who will want products with accessibility features that meet their individual needs but may not want additional features that do not enhance their access to communications. The provision instead recognizes that manufacturers and service providers can and should enable accessibility by providing consumers with a variety of solutions – and precludes a requirement that all features and functions of all products must be accessible and must be accessible in the

¹⁷ *Id.* § 716(g)(4), 716(j).

¹⁸ *Id.* § 716(g)(4).

same way.¹⁹ The Commission should avoid any interpretation of the Act that restricts that flexibility.

This flexibility accommodates a variety of business models including scenarios both in which accessibility solutions are built-in and where manufacturers create a platform for which third parties can develop competing accessibility solutions. Creating technology mandates and preferences for non-proprietary software would diminish manufacturers' and service providers' ability to create and support such platforms – and would severely restrict the ability of third parties with expertise in creating accessible technology (AT) from developing new and innovative solutions for those products.

B. The Commission May Not Prescribe Technical Standards Or Specific Accessibility Requirements, Or Otherwise Freeze Accessibility Solutions.

1. The Act Prohibits Certification or Pre-Approval Requirements.

The Commission must also avoid interpretations of the Act that serve to freeze solution sets. As noted above, the Act provides multiple paths to compliance, including:

- Partnering with third parties to develop nominal-cost compatible AT and CPE,
- Providing APIs to third parties who can develop such solutions,
- Ensuring that their products work with existing nominal-cost AT and CPE, and
- When a native solution is not achievable and a third-party solution is not achievable at nominal cost, ensuring their products are compatible with commonly used AT and CPE.²⁰

By creating these multiple paths to compliance, Congress demonstrates its preference for industry flexibility over rigid, top-down compliance mandates.

This means that the Commission should avoid requiring, for instance, any compatibility certification process or pre-release requirements. The Act permits, but does not require, “us[e]”

¹⁹ See also *id.* § 716(j).

²⁰ See *id.* § 716(a)-(c).

of third party technology that is nominally priced.²¹ And the Act’s compatibility requirement with respect to accessibility solutions that are not nominally priced does not contemplate preapproval, and therefore does not require manufacturers to seek preapproval of – or only use preapproved – third-party solutions.²² Indeed, the Committee Report specifically says, regarding these sections, that “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.”²³

2. The Commission Should Recognize that Broad Functionality Enables Access.

The Act also allows companies the flexibility to build accessibility into products in innovative ways that enable customers to structure their communications in the manner that meets their individual needs. So, for instance, where a product or service has multiple modes for providing advanced communications, each mode can be considered to provide accessibility for the other modes. Thus, if one mode is inaccessible to some users with certain disabilities, but another mode enables access to those same users, the product as a whole should be viewed as accessible and usable to those users.²⁴

One example is a multi-mode chat program with text-based instant messaging, voice messaging, and video messaging, which offers a number of accessibility solutions. Such a product could allow customers to use the program in the way that makes it most accessible to them: low-vision or blind users could use the audio mode or enable a screen reader to use text-based instant messaging; deaf or hard-of-hearing users could use the video mode for signed

²¹ *Id.* § 716(a)(2)(B), 716(b)(2)(B).

²² *See id.* § 716(a)(2)(B), 716(b)(2)(B), 716(c).

²³ *House Report*, at 24.

²⁴ *See* New Section 716(j), to be codified at 47 U.S.C. § 617(j).

communications or use the text-based instant messaging mode; low mobility users could use the video mode to communicate by videoconference. These options enable users to choose the option that best meets their needs.

3. The Commission Should Avoid A Restrictive Definition of “Nominal.”

Finally, to maintain the flexibility inherent in the Act, the Commission should adopt a definition of “nominal” that does not discourage investment and innovation. It specifically should not set a fixed dollar amount or percentage point for what is considered “nominal.”²⁵ Congressional intent is that the fee be small enough not to otherwise affect the consumer’s choice to purchase the technology,²⁶ and the Commission’s definition of that term should reflect Congressional intent while recognizing that pricing models and concerns will vary from product to product. Some solutions will be available for a one-time fee and some on a subscription model, for instance. And some products are priced higher than others based on the kind of product and the intended use.²⁷ Price points may change dramatically over time as new solutions become widely adopted and achieve economies of scale. A static definition of nominal simply could not capture the wide range of pricing considerations that may affect consumer choice.

An overly restrictive definition of “nominal” might also discourage manufacturers and service providers – and any third parties who wish to develop compatible accessibility solutions – from large-scale investment for fear of developing solutions that have a greater than “nominal”

²⁵ See *id.* § 716(a)(2)(B), 716(b)(2)(B).

²⁶ *House Report*, at 24.

²⁷ To provide a real-world example, consider a Braille display that works with a mobile handset. The nature of the technology means that such a peripheral device will naturally cost quite a bit more than a mobile phone application downloaded from an app store – perhaps even significantly more than the handset it is meant to work with. But so long as the cost of the Braille reader does not discourage a customer from purchasing it for use with a handset so that the handset is accessible, Congress would consider its price nominal.

cost. Microsoft therefore encourages the Commission to adopt a definition of nominal that includes all prices that do not substantially discourage consumer adoption.

C. The Commission Should Use Industry-Developed Technical Standards as Safe Harbors.

The Act gives the Commission authority to establish technical standards as safe harbors for manufacturers. If the Commission chooses to establish such safe harbors, they must be true safe harbors and not implicit mandates.²⁸ To the extent any safe harbor locks in particular solutions, dictates technical standards, or otherwise precludes alternative access solutions, they are prohibited by the Act.²⁹ Finally, the best source for any technical standards intended to provide safe harbors is industry itself.

²⁸ See New Section 716(e)(1)(D), to be codified at 47 U.S.C. § 617(e)(1)(D).

²⁹ See *id.*

IV. CONCLUSION

In interpreting the Act, the Commission must ensure that Americans with disabilities can access advanced communications services but at the same time balance Congress's intent that the Act provide the industry with the flexibility necessary to achieve accessibility in advanced communications products and services. It should interpret the term "advanced communications services" to focus on those products and services whose primary purpose, through design and marketing, is to provide communications capabilities, or, at minimum, use its waiver authority to exempt such services, particularly gaming products and services, from Section 716 of the Act. And in looking to the industry flexibility and compatibility provisions and in considering safe harbors, the Commission should recognize the flexibility inherent in the Act and avoid interpretations that freeze solution sets or create implicit technical mandates. Such flexibility will allow manufacturers and service providers to continue innovating to the benefit of all users, including those with disabilities.

Respectfully Submitted,

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