

communications features, and that, if they are deemed even to be covered by the Act, that they are just the types of products and services “Congress envisioned when it gave the Commission broad authority to grant waivers.”⁴ The Telecommunications Industry Association concurred that “gaming systems” are examples of services that likely should be outside the application of the Act.⁵ Many comments, including those of CEA, CTIA and T-Mobile, also generally agreed that equipment or services that make incidental use of ACS should not be subject to the Act.⁶ This immediate and broad consensus among commenters underscores that Congress did not intend to subject video and online gaming products and services to the Act.

II. MULTIPLE PURPOSE WAIVERS SHOULD NOT BE UNREASONABLY CONSTRAINED

Congress, through the explicit language of the Act, stated that the FCC has authority to waive the application of the Act to “any class” of equipment or service that “is capable of accessing an advanced communications service” and “is designed for multiple purposes, but is designed primarily for purposes other than using advanced communications services.”⁷

Notwithstanding such clear language, at least one commenter recommends that the FCC should not exempt any category of devices or services from the scope of the Act.⁸ The comment did not address the Act's specific language authorizing such categorical waivers, but expresses concern

⁴ Comments of Microsoft Corp., CG Docket No. 10-213, at 4-6 (submitted Nov. 22, 2010).

⁵ See Comments of Telecommunications Industry Association, CG Docket 10-213, at 6, 21 (submitted Nov. 22, 2010).

⁶ See, e.g., Comments of the Consumer Electronics Association at 6; Comments of CTIA—The Wireless Association, CG Docket No. 10-213, at 5 (submitted Nov. 22, 2010); Comments of T-Mobile, CG Docket No. 10-213, at 7 (submitted Nov. 22, 2010).

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

⁸ Comments of American Association of People with Disabilities, CG Docket No. 10-213, at 5 (submitted Nov. 30, 2010) (“AAPD recommends the Commission strive to find a narrow range of factors relevant to these waiver determinations and not a priori determine that there are specific classes of equipment or services that warrant categorical waivers.”).

that the field may be “rapidly changing.”⁹ However, one key reason that Congress established a waiver for multiple purpose devices or services, including the express language regarding a waiver for a class of devices or services, was to promote technological change.¹⁰

Fear of inadvertently triggering the Act may cause some companies to hold off from adding innovative communication features into products and services for which the primary purpose is not the ACS capability. Categorical waivers would help address this risk.

In addition to being consistent with clear congressional intent, consideration of a waiver for a class or category of devices or services also will have significant practical benefits. First, a request for a waiver for a class of products or services should conserve the resources of the FCC, which, through a single proceeding, thus may avoid the need to process multiple similar waiver requests. Second, a waiver for a class of products or services is more likely to result in a level playing field for manufacturers or providers who are competing to sell the same type of product or service.¹¹ A waiver for an entire class of device or service should result in the Commission responding to similarly situated competitors simultaneously, which should limit the risk that the FCC might unintentionally advantage one competitor among a broader group.

Another commenter called upon the FCC to grant waivers only for “technical impracticability” and with “time limitations,”¹² but did not explain how either is consistent with the stated congressional intent that multiple-purpose waivers were intended: (i) to offer relief

⁹ *Id.*

¹⁰ See House Report No. 111-563, Twenty-First Century Communications and Video Accessibility Act of 2010, 111th Cong., 2^d Sess. 26 (July 26, 2010) (“[T]he Commission may find that to promote technological innovation the accessibility requirements need not apply.”)

¹¹ See, e.g. Microsoft Comments at 7; CEA Comments at 17.

¹² Comments of Gregg C. Vanderheiden, Director, RERC on Universal Interface and Information Technology Access, CG Docket 10-213, at 9. One other commenter also notes in passing that waivers should not be “permanent” without specifying a clear basis, other than the commenter’s caution, for such a conclusion. AAPD Comments at 5-6.

from the Act's general mandates, which only apply to the extent they would be "achievable;" and (ii) to "promote technological innovation." The Commission should be reluctant to impose constraints on waiver requests that otherwise satisfy the terms of the Act.

III. CONSIDERATION OF WAIVER REQUESTS SHOULD BE CONFIDENTIAL, FLEXIBLE, AND TIMELY

The FCC should implement the waiver process in a manner that will not hinder or impair innovation. We agree with suggestions that the waiver process should incorporate protections for confidential information and that the FCC should process waiver requests in an expeditious manner.¹³ It would be appropriate for the FCC to establish a deadline for Commission action on a multiple-purpose waiver request, after which time the waiver is automatically granted if not otherwise acted upon, and during which time the waiver request is deemed to be as if granted until the Commission takes final action on the request. In addition, waiver requests should be able to be filed at any time — including, as multiple commenters have noted, prospectively — which will help the potential innovator to determine whether to move forward with certain features of a new product or service.¹⁴

Respectfully submitted,

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¹³ See TIA Comments at 22; CEA Comments at 18.

¹⁴ See, e.g., Microsoft Comments at 6-8; Voice on the Net Comments at 13; CEA Comments at 17.