Before the

Federal Communications Commission

Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Sections 716 and 717 of the Communications Act of 1934, as Enacted by the Twenty-First Century Communications and Video Accessibility Act of 2010	)	CG Docket No. 10-213
	)	
Amendments to the Commission's Rules Implementing Sections 255 and 251(a)(2) of the Communications Act of 1934, as Enacted by the Telecommunications Act of 1996	)	WT Docket No. 96-198
	)	
In the Matter of Accessible Mobile Phone Options for People who are Blind, Deaf-Blind, or Have Low Vision	)	CG Docket No. 10-145
	)	

COMMENTS OF THE INFORMATION TECHNOLOGY INDUSTRY COUNCIL

April 25, 2011

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COMMENTS OF THE INFORMATION TECHNOLOGY INDUSTRY COUNCIL

The Information Technology Industry Council ("ITI") hereby responds to the above-captioned Notice of Proposed Rulemaking.[1]

I. INTRODUCTION AND SUMMARY

ITI's members are among the leading companies in the information and communications technology industry. ITI members are also among the key innovators that supply the applications, content, software, hardware, and networking equipment that form the foundation of the information economy and society that Congress sought to make accessible to people with

[1] *See In the Matter of Implementation of Sections 716 and 717 of the Communications Act of 1934, as Enacted by the Twenty-First Century Communications and Video Accessibility Act of 2010 et al.*, Notice of Proposed Rulemaking, 26 FCC Rcd 3133 (2011) ("NPRM").

disabilities in the Twenty-First Century Communications and Video Accessibility Act of 2010.[2] ITI and its members share the goal of broad accessibility to communications and video technology. Indeed, ITI members have led the development of key accessibility innovations in collaboration with assistive technology ("AT") vendors for more than 20 years. ITI members have also played a leading role in the development of accessibility frameworks and application programming interfaces ("APIs") on software platforms, and many ITI members also have developed built-in accessibility features such as text enlargement and high contrast display schemes for their software platforms. ITI commends the FCC for its thoughtful and thorough NPRM concerning means of achieving accessibility in the 21st century. ITI members look forward to a constructive dialogue with the FCC and other interested stakeholders regarding the optimal means of implementing the CVAA.

That process must be driven by the language, structure and intent of the CVAA. Read as a single, cohesive whole, the CVAA provisions that address accessibility for Advanced Communications Services ("ACS") – and, in particular, new Sections 716 and 717 of the Communications Act – evince Congress's intent to ensure that people with disabilities have meaningful choices and opportunities to participate fully in the 21st century economy and civic life without overly burdening service providers or equipment manufacturers. It is critical that the rules adopted in this proceeding strike the proper balance between accessibility and achievability.

In some cases, the rules proposed in the NPRM do strike the proper balance. Some other rules proposed in the NPRM, however, would impose too many burdens on service providers and equipment manufacturers without the prospect of delivering commensurate benefits to people

[2] Twenty-First Century Communications and Video Accessibility Act of 2010, Pub. L. No. 111-260, 124 Stat. 2751 (2010) ("CVAA" or "Accessibility Act").

with disabilities. This approach is both contrary to Congress' intent and contrary to President Obama's recent directive to federal agencies to "select, in choosing among alternative regulatory approaches, those approaches that *maximize net benefits*."[3]

In these comments, ITI proposes a comprehensive approach to implementation of the CVAA that strives to achieve this outcome, as follows.

- First, we review the commercial and regulatory environment in which ACS are developed and offered today and the implications for this environment for implementing the CVAA. In particular, ITI urges the Commission to recognize the substantial value of both accessibility solutions developed by ACS manufacturers and those developed by independent manufacturers and service providers, including providers of stand-alone AT solutions. We explain the manner in which the FCC's implementation of the CVAA, including its interpretation of the terms "achievable," "nominal cost," and "compatible," should reflect these realities. We then explain the important role that other federal accessibility requirements, in particular the rules implementing Section 255 of the Communications Act and the proposed requirements for implementing Section 508 of the Rehabilitation Act, should play in the implementation of the CVAA. Finally, we urge the Commission to implement the requirements of the CVAA over a period of time that is consistent with available technology and the manner in which ACS equipment and services are developed.

- Second, we review specific categories of equipment and services to which the CVAA implementation framework described above should apply. In so doing, we emphasize that the Commission should interpret the CVAA (1) not to apply to ACS designed primarily for enterprise customers; (2) not to apply to ACS developed by organizations for internal use, to equipment used to *provide* ACS, to equipment in the testing stage of development, or to public safety communications networks or devices; (3) to apply to electronic messaging service only to the extent that such service is designed primarily for communication between people; (4) to apply to manufacturers or service providers only to the extent that they control the design and development of the features of a piece of equipment or service; and (5) to proactively waive the requirements of the statute to classes of equipment and services as appropriate and without arbitrary, predetermined time limits on such waivers.

- Finally, we review the proposed rules governing recordkeeping and complaints and suggest some changes that would focus the complaint process more effectively on finding a satisfactory and efficient resolution of consumer complaints.

[3] *See* Exec. Order No. 13563 (Jan. 18, 2011) (emphasis added).

In sum, by modifying some of the proposed rules to account for and leverage practical considerations, existing relationships in the marketplace, and existing regulatory regimes, ITI believes that the Commission's rules can achieve Congress's goal of ensuring access for people with disabilities without undermining investment and innovation.

II. THE COMMISSION SHOULD IMPLEMENT THE CVAA IN A MANNER THAT REFLECTS AND BUILDS ON EXISTING MARKETPLACE REALITIES AND REGULATORY INITIATIVES.

The NPRM provides a helpful description of the relevant technical and policy issues that must be addressed as the Commission moves forward with implementation of the CVAA. The broader context set forth in the NPRM should be supplemented, however, in important respects, and the Commission's implementation of the CVAA should reflect those changes.

A. The CVAA Enables ACS Manufacturers and Service Providers to Use Different, and Equally Valid, Means of Achieving Accessibility, and the Commission's Rules Should Reflect the Critical Role Independent Firms Play in This Process.

In the background discussion of the NPRM, the Commission asserts that information and communications devices have evolved from being typically single-function devices into general purpose computers, with an architecture reflecting this evolution that "can be divided into at least 5 components." NPRM ¶ 15. This formulation is helpful but incomplete. First, it is important to recognize the still-substantial subset of devices and services that continue to be single-purpose. Commission policy should be sufficiently flexible to account for this reality.

Second, and more importantly, the Commission's discussion of the technology stack overlooks two key components that will necessarily be critical factors to ensuring the accessibility of advanced communications services: (1) the set of accessibility services provided by the underlying operating system (or platform), including the accessibility services support provided in web browsers; and (2) the AT that a user with a disability uses as part of an

alternative interface to the ACS, such as a Braille output alternative to the visual screen or a speech recognition alternative to the keyboard or touch screen display.

In most cases, the ACS provider, the operating system or platform, and the AT solution provider are the three critical components to achieving accessibility. Importantly, there is no single strategy that most effectively achieves accessibility in all cases. In some situations, accessibility will be advanced more effectively by an equipment manufacturer or ACS provider. In other cases, third parties specializing in AT will enable accessible ACS solutions more quickly and effectively. The FCC's rules should reflect this reality, and certainly should not require a one-size fits all approach to accessibility. The following scenarios illustrate how the multiple components interoperate on general purpose computer platforms.

- **Built-In AT.** In some cases, the best approach is for a manufacturer or ACS provider to build in accessibility. For example, Apple's iPhone utilizes an operating system known as iOS. iOS contains numerous features that make the iPhone accessible to, and usable by, people with disabilities. These features are included at no additional cost to consumers. For example, Apple has created VoiceOver, a gesture-based screen reading solution that enables individuals to interact with the iPhone without seeing the screen.[4] Apple also provides documentation and development tools to facilitate writing accessible third-party applications for iOS. Thus, the developer of a third-party ACS application can follow the accessibility guidance to design that application to take advantage of built-in AT, including VoiceOver.

- **Third-party AT available for free.** The relationship between operating systems and third-party AT developed in other contexts demonstrates the critical importance of third-party AT. For example, many UNIX and GNU/Linux systems are based on the GNOME graphical desktop, including the GNOME Accessibility Framework. This framework defines a set of accessibility services that enable third-party developers to engineer AT solutions that will function on the UNIX and GNU/Linux operating systems. As a result, multiple third-party developers have developed open source ATs available at no charge for separate download and installation by users of UNIX and GNU/Linux. Such third-party AT include the Orca screen reader, the GNOME On-Screen Keyboard, and the Dasher alternate text entry system. ACS applications on GNOME that support the GNOME accessibility services are accessible via these third-party, free assistive technologies. For example, the Ekiga VoIP application

[4] *See* Apple – Accessibility – iPhone – Vision, http://www.apple.com/accessibility/iphone/vision.html (last visited April 25, 2011).

supports the GNOME Accessibility Services, and works well with these assistive technologies

- **Third-party AT available for a fee.** Built-in and free third-party AT, however, are still only part of the solution. In certain circumstances, third party AT vendors operate in a competitive environment that warrants varying level of fee for their products. For example, Microsoft Windows provides a number of built-in accessibility features such as screen magnification and speech recognition, but Microsoft has also fostered a competitive ecosystem comprised of hundreds of third-party AT products. Windows provides an accessibility API to facilitate interoperability between applications running on Windows and AT products that utilize the API. In these circumstances, it is important to allow innovators to finance their research and development as they bring their products into market.

These scenarios highlight three ways of achieving accessibility. Each approach can yield significant consumer benefits, and the FCC's rules should not preclude future efforts based on any of the three approaches. In considering rules, the FCC should recognize that operating system providers, AT providers, and ACS providers each face limitations. In certain circumstances, the operating system provider can develop and build into its operating system an accessibility feature to address a particular segment of the disability community such as people who are visually impaired For example, this was achievable for Apple when it developed VoiceOver for iOS-based devices. But this is not achievable in all circumstances.

Where built-in AT is not achievable, the consumer is best served by rules that recognize the value of third-party AT providers, which may have greater expertise or focus on meeting a particular accessibility need. But while operating system manufacturers might encourage third parties to develop AT using the appropriate accessibility services, they have no control over the cost of the solutions to end users or whether the AT utilizes the accessibility services. The FCC should not interfere with a third-party innovator's ability to price its products in a way that allows it to recover research and development costs. In some circumstances a free AT is possible, but neither the FCC nor the operating system provider or ACS provider is in the best position to determine when that is the case.

The Commission seems to recognize these realities when it observes in the NPRM that the various components of the technology stack "may be created by a different manufacturer and sold separately." NPRM ¶ 16. As the Commission observes, "a manufacturer or provider of one component may have limited ability to know which other components are being used to deliver an advanced communications service." *Id.* The Commission concludes that "manufacturers of hardware, OS, and user interface layers may not know whether the components they produce will be used for advanced communications services in the future and for which ones." *Id.* ITI agrees with this analysis and believes that the rules adopted in this proceeding should reflect these conclusions.

Further, the Commission asserts that, "[i]n order to enable individuals with disabilities to use an advanced communications service, *all* of the components may have to support accessibility features and capabilities. Conversely, if one component does not offer a particular function, it is often impossible for another component to compensate for that omission." *Id.* ¶ 17. This is an important limitation that cannot be overcome simply by applying the CVAA requirements to every piece of hardware or software that happens to touch an advanced communications service. It is in many cases not possible to ensure that all equipment and services are compatible with all other equipment and services in the ACS ecosystem. Whatever regulations the Commission adopts in this proceeding must recognize the inherent limitations in what equipment manufacturers and service providers can achieve on their own. For example, as discussed in more detail below, the Commission should consider explicitly recognizing in its rules that each manufacturer or service provider is responsible for accessibility only to the extent that accessibility is achievable within the scope of the components that it manufactures or provides.

B. Implementation of the CVAA Should Reflect Congress' Recognition of Marketplace Realities.

The terms and structure of the CVAA reflect the existing state of technology and the roles that manufacturers of operating systems, AT providers and ACS providers can and cannot play. The statute is practical in its approach to achieving accessibility and should be implemented accordingly.

The broad structure of the accessibility mandate in the CVAA is relatively straightforward. The statute offers ACS manufacturers and service providers the option of providing accessibility with either built-in solutions or with third-party solutions available to the consumer at "nominal cost." If neither of these approaches is "achievable," then the CVAA requires that ACS manufacturers and service providers make ACS "compatible" with "existing peripheral devices or specialized customer premises equipment" that are "commonly used" by individuals with disabilities to achieve access. Again, this compatibility obligation only applies if it is "achievable." Each aspect of this structure accommodates the distinct, and often limited, role played by individual manufacturers and service providers

Section 716(j) Rule of Construction. Section 716(j) states that the CVAA "shall not be construed" to require a covered equipment manufacturer or a service provider to make every feature or function of every device or service accessible for every disability. Section 716(j) suggests that each manufacturer and service provider is reliant on the cooperation of other market participants to achieve accessibility. In the examples discussed above, even where Apple offers a built-in accessibility feature to allow the visually impaired to use ACS applications on the iPhone, accessibility cannot be achieved for third-party ACS applications by using this built-in feature unless the third-party application provider designs its offering to ensure that it meets the accessibility specifications of iOS. Similarly, even where a third-party voice ACS

application provider engineers its offering to meet the accessibility specifications of Windows, the voice application will not be accessible to the visually impaired unless appropriate AT is engineered to use the accessibility services. Section 716(j) provides the basis for the Commission to read the CVAA to ensure that, as long as a manufacturer or service provider meets its own obligations, it will not be held liable in circumstances where the other preconditions to achieve accessibility do not exist.

Achievable. The CVAA sets forth four factors that the Commission must consider equally in determining whether accessibility in a particular case is "achievable": (a) the nature and cost of steps needed with respect to specific equipment or service; (b) the technical and economic impact on the operation; (c) the type of operation at issue; and (d) the extent to which the service provider or equipment manufacturer has accessible offerings with varying degrees of features and functionality at various price points. Each of these factors implicates the practical considerations discussed above, and the Commission should make clear that it intends to include such considerations in its analysis and interpretation of these factors.

For example, each of the first two factors listed in the definition of achievable implicates the fact that it is unusual for a single party to contribute multiple aspects of any particular service or accessibility solution. The Commission's interpretation of these factors should account for this reality. Namely, manufacturers and service providers who are developing only some of the various components of an accessible ACS service should be held only to what is achievable within the scope of those components.

Furthermore, ITI agrees with the Commission that the fourth factor suggests that the effort a manufacturer or service provider has made to ensure that it has produced accessible services or equipment of varying features and functionalities at various pricing points should, at

least, "count favorably toward a determination that the company is in compliance with Section 716 for the product in question." *Id.* ¶ 75. Read in conjunction with the rule of construction outlined in Section 716(j), this factor evinces Congressional intent to not require that every feature of every service be made accessible, so long as some reasonable subset of features and services are accessible.

Finally, it may not be possible to make ACS accessible to every class of people with disabilities at this time. Achieving such accessibility could be prohibitively expensive (justifying a finding that accessibility is not achievable under the first and second factors of the statutory definition) and could require a fundamental change to the equipment or service (again, justifying a finding that accessibility is not achievable under the first and second factors of the statutory definition).[5] For example, it would be premature to adopt a performance objective requiring operability with limited cognitive skills. Indeed, this is exactly the conclusion reached by the Access Board in implementing Section 508 of the Rehabilitation Act.[6] The Commission should follow the same approach in implementing the CVAA.

Nominal cost. In offering the option to achieve accessibility via third-party AT available at "nominal cost," the statute seems to create something of a conundrum – covered entities are

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[5] ITI supports the Commission's proposal that if accessibility can only be achieved through a fundamental alteration of the device or service, it is not achievable. *See id.* ¶ 69.

[6] Ultimately, the Access Board followed the recommendation of a Federal advisory committee on this matter and did not include cognitive impairments in its Section 508 Functional Performance Criteria. *See* Telecommunications and Electronic and Information Technology Advisory Committee, *Report to the Access Board: Refreshed Accessibility Standards and Guidelines in Telecommunications and Electronic and Information Technology* §5.4 (April 2008), *available at* http://access-board.gov/sec508/refresh/report/#a54; *Americans With Disabilities Act (ADA) Accessibility Guidelines for Buildings and Facilities; Telecommunications Act Accessibility Guidelines; Electronic and Information Technology Accessibility Standards*, Advanced Notice of Proposed Rulemaking, 75 Fed. Reg. 13,457 (March 22, 2010), *available at* http://access-board.gov/sec508/refresh/notice.htm.

allowed to use third-party solutions if the cost of those solutions is "nominal," but those solutions are coming from third-parties which, by definition, the covered entities do not control. The approach proposed in the NPRM would place the entire burden on the covered manufacturer or service provider to ensure the availability of the third-party solution at nominal cost. *See* NPRM ¶ 78. This is inappropriate because the covered manufacturer or service provider could have little or no control over the price charged by the third party. In any event, as mentioned above, the definition of "achievable" requires that the Commission consider the cost of achieving accessibility with respect to the specific equipment or service at issue. Thus, requiring a manufacturer or service provider to incur substantial costs to subsidize the price of third-party AT is inappropriate and contrary to the terms of the statute.

It would be more appropriate for the Commission to recognize that a manufacturer or service provider generally cannot ensure that a third-party solution is available at nominal cost. That is the decision of the third-party AT provider. If the third party makes the AT available at no or nominal cost, the manufacturer or service provider can rely on the availability of the third-party AT to meet the accessibility requirement. If, however, no solution has been developed by a third party to meet the specifications of a particular piece of equipment or service or the third-party AT is only available for more than a nominal fee, then the Commission should enable the covered manufacturer or service provider to meet the accessibility requirement through compliance with the compatibility requirement. This approach best reflects marketplace realities and the terms of the CVAA.

Compatibility. There are three key aspects of the compatibility requirement. First, the CVAA requires only that a manufacturer or service provider ensure compatibility with "existing" peripheral devices and customer equipment. The Commission should limit the definition of

"existing" peripheral devices and customer premises equipment to those that are currently sold, rather than to include devices and equipment that might still be used but that are not currently sold. If the device is no longer sold in the marketplace, the technology has improved and superior solutions are likely available.[7]

Second, the compatibility requirement only extends to peripheral devices and customer premises equipment "commonly used . . . to achieve access." Thus, consistent with the Section 716(j) rule of construction, a manufacturer or service provider need not make its equipment or service compatible with every peripheral device or piece of customer equipment used to achieve access. It need only establish compatibility with one or more devices or pieces of equipment commonly used in the marketplace.

Third, the Commission should refrain from interpreting the term "compatible" too narrowly or placing all of the responsibility for compatibility on manufacturers and providers. The Commission should accept reasonable efforts to make services and devices compatible by using industry-wide standards, whether they are standards specifically designed for accessibility solutions, such as the emerging ISO 13066 standard for accessibility services and work being done with respect to implementation of Section 508 of the Rehabilitation Act,[8] or more general

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[7] For example, a product called Slimware Windows Bridge was an early, popular screen reader for Windows. After the founder and owner of the Slimware manufacturer died, the product was quickly overtaken by other, more innovative products. Although many people with disabilities continued to own the product after Slimware Windows Bridge was withdrawn from the market, it would have made little sense to impose accessibility requirements on the product after it was no longer offered for sale.

[8] *See generally* ISO/IEC FDIS 13066-1 – Information Technology – Interoperability with assistive technology (AT), at http://www.iso.org/iso/iso_catalogue/catalogue_tc/catalogue_detail.htm?csnumber=53770 (last visited April 25, 2011).

standards[9] that allow for compatibility of different devices, such as USB.[10] This kind of approach would give manufacturers and service providers maximum flexibility to develop new and innovative solutions to ensure that people with disabilities can access advanced communication services.

C. The Commission Should Leverage Work Done to Comply with Other Laws to Achieve Accessibility for ACS under the CVAA

The CVAA is not the sole federal statute mandating accessibility for disabled individuals to communications equipment and services. For example, Section 255 of the Communications Act,[11] Section 508 of the Rehabilitation Act,[12] the Americans with Disabilities Act, and other statutes all establish accessibility mandates. It is of critical importance that the confluence of federal mandates does not create conflicting requirements for manufacturers and service providers. Most importantly, the Commission should be careful to interpret the CVAA so that its requirements do not conflict with the standards applicable under Section 255 of the Communications Act and Section 508 of the Rehabilitation Act.

The FCC has extensive experience in implementing the accessibility requirements of Section 255 of the Communications Act. While there are differences between Section 255 and

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[9] Examples of these accessibility standards developed by the ICT industry include: UI Automation and IAccessible2 for the Microsoft Windows operating system, the GNOME Accessibility Framework for UNIX and GNU/Linux operating systems, the Java Accessibility API for the Java platform, the BlackBerry Accessibility API for BlackBerry smartphones, and the W3C WAI-ARIA specification for accessible rich Internet applications. Several of these industry standards are being further codified as ISO/IEC Technical Reports, as part of ISO/IEC 13066.

[10] *See generally* USB.org – Welcome, at http://www.usb.org/home (last visited April 25, 2011).

[11] *See* 47 U.S.C. § 255.

[12] *See* Workforce Investment Act of 1998, Pub. L. No. 105-220, 112 Stat 936 (1998) (codified at 29 U.S.C. § 794(d)).

the CVAA (e.g., the modest difference between "readily achievable" and "achievable"), Congress chose to incorporate into the CVAA the Section 255 requirement that covered manufacturers and service providers ensure that equipment and services are "accessible to and usable by individuals with disabilities." Thus, the central accessibility mandate in the CVAA is identical, word for word, to the mandate in Section 255. The logical inference is that Congress expected the FCC to use the Section 255 rules as the benchmark for implementing the accessibility mandate in the CVAA. Many of the rules proposed in the NPRM do in fact follow the Section 255 requirements. ITI supports this approach.

But while Section 255 is a critical benchmark for drafting CVAA implementation rules, the Section 255 requirements do not govern ACS. It therefore makes sense for the FCC to consider Federal accessibility mandates that do cover or propose to cover ACS. Most importantly, Section 508 of the Rehabilitation Act establishes accessibility mandates for the federal government that are broad enough to encompass ACS. In March 2010, the Access Board released comprehensive Draft Guidelines for updating the Section 508 requirements so as to cover most or all of the products encompassed by the definition of ACS in the CVAA.[13]

There are two basic reasons why it makes sense for the Commission to give careful consideration to the existing and proposed implementation of Section 508as it develops rules implementing the CVAA for ACS. First, many manufacturers and service providers covered by the CVAA sell equipment and services to the federal government and are therefore subject to the accessibility requirements of Section 508 of the Rehabilitation Act. Different accessibility standards and requirements for the same products (e.g., some implementing the CVAA and

[13] *See* United States Access Board, *Draft Information and Communication Technology (ICT) Standards and Guidelines*, (March 2010), ("Access Board Draft Guidelines"), *available at* http://www.access-board.gov/sec508/refresh/draft-rule.pdf.

others implementing Section 508) might result in dramatically higher costs for providers and manufacturers that would be passed along to consumers or Federal agencies. Conceivably, multiple versions of the same devices and services would need to be developed, and somebody would need to monitor that the different versions are being used in the appropriate contexts. In a worst case scenario, two different regulatory regimes would establish mutually exclusive requirements for the same set of consumers.[14]

Second, the Section 508 regime is a product of extensive study and input from, among others, many ITI members, other significant manufacturers and service providers, AT vendors, the disabled community and academic experts in the field of disabled accessibility. Based on this input, the U.S. Access Board has developed detailed guidelines describing what qualifies as accessible equipment and technology for purposes of procurement by Federal Agencies. There is every reason to conclude that the existing and proposed rules for implementing Section 508 are eminently sound.

At the same time, the Commission must be mindful of the material differences between Section 508 and the CVAA. For example, Section 508 states that, when Federal agencies develop, procure, maintain, or use electronic and information technology ("E&IT"), Federal employees with disabilities must be provided access to and use of information and data that is "comparable to" the access and use by Federal employees, who are not individuals with disabilities, unless implementing this requirement would impose an "undue burden" on the agency.[15] The Section 508 standard is therefore different from the requirement under the CVAA

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[14] This could be the case if, as the Commission maintains, public and private sector employees are considered end users under the CVAA. *See* NPRM, App. B., proposed § 8.4(g).

[15] *See* 29 U.S.C. § 794d(a)(1)(A).

that ACS manufacturers and service providers make their equipment and services "accessible" to people with disabilities, unless it is not "achievable" to do so.

It is also important to emphasize that compliance with Section 508 performance guidelines is *optional*, in that a manufacturer or service provider can elect, or not elect, in the course of its business to offer products for purchase by the Federal Government. By contrast, Section 716 of the CVAA is *mandatory*, where achievable, in that it reaches by its terms all providers and manufacturers of ACS or ACS products for sale in or import into the United States. ITI agrees, therefore, with the observation of AT&T, as cited in the NPRM, that "the specific functionalities and standards mandated by Section 508 [for government purchases of technology] . . . may not be appropriate in all circumstances for industry wide, mass market application contemplated by Section 716." NPRM ¶ 106.

In sum, the Commission can and should consider the rules implementing Section 508 and Access Board Draft Guidelines when designing its rules for implementing the CVAA, and it should strive to ensure that products that comply with Section 508 also meet the requirements of the CVAA. At the same time, when creating any performance objectives under Section 716 of the CVAA, the Commission should take care not to mandate standards that expand on or extend beyond those proposed by the Access Board, and it should not include any portion of the Access Board criteria where doing so would extend beyond or would be contrary to the express requirements of the CVAA.

The Section 508 "functional performance criteria" illustrate the challenge for the Commission. Those criteria were intended to establish requirements for accessibility for E&IT and telecommunications products where there are no specific technical provisions defined. The Access Board Draft Guidelines would require "access to all of the functionality," of a product or

service. This is a much broader requirement than the mandate that accessibility only be established for ACS (non-ACS components of equipment and services need not be made accessible). Any *mandatory* performance objectives established for implementing the CVAA should therefore be more narrowly defined than those established for Section 508. CVAA performance objectives need not and should not cover functions like turning on electrical power, changing consumables, initial configuration or configuration changes, set-up and maintenance, all of which are covered by the Access Board Draft Guidelines.[16] As this example, illustrates, CVAA requirements should be no more than a *subset* of the Access Board Proposed Guidelines.[17]

In light of these considerations, the optimal means of utilizing the Section 508 requirements (when implemented for ACS) in the implementation of the CVAA would be for the FCC to establish "safe harbors" corresponding with the requirements promulgated by the Access Board. Safe harbors could improve predictability and certainty, while still allowing the FCC sufficient flexibility to address any differences in the statutory language or requirements. In all events, the federal government should ensure that it does not create a regime in which manufacturers and service providers must comply with two sets of inconsistent accessibility requirements applicable to the same equipment and services.

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[16] Under Section 255, the scope of this provision is limited by U.S. statute to only information that is needed for operation and use of the telecommunications functions of the product (e.g. advanced communication services are not covered).

[17] The NPRM recognizes the potential "overlap" between the Section 716 rules and the Access Board Draft Guidelines. *See id.* ¶ 83. However, the proposed rules include some provisions that are not in synch with the Access Board Draft Guidelines. In particular, the proposed rules define "accessible" in the ways that may create confusion, duplicative requirements, or even mutually exclusive requirements vis-à-vis the Section 508 draft Functional Performance Criteria and/or the ANPRM Technical Standards. *See Access Board Draft Guidelines* §§ 201-202.

If it does establish safe harbors, the Commission could establish them based on recognized technical standards that have been developed in a consensus-based, industry-led, accredited open process.[18] Where manufacturers or service providers have followed standards that have been accepted as safe harbors, the FCC should presume that the manufacturer or service provider is in compliance with the relevant requirements of the CVAA. The Commission should encourage such developments by establishing a quick process to review and approve standards as safe harbors, with adequate opportunity for public comment, so that industry innovation is unhindered.

D. The Commission Should Adopt a Phased-In Approach to Enforcing the Rules Adopted in this Proceeding.

Finally, as it implements the provisions of the CVAA, the Commission should recognize that many of the requirements of the statute cannot be achieved overnight. The CVAA requires promulgation of implementing rules – but not enforcement of those rules – by a date certain;[19] requires the adoption of "objectives," not immediate compliance mandates;[20] and requires the Commission to provide ongoing progress reports to Congress (thereby implying that accessibility will be achieved over a number of years).[21] All of these components of the statute reflect Congress' recognition that achieving accessibility will be an ongoing process. That process, if approached pragmatically and systematically, can achieve better results for people with

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[18] Verizon's proposal to "encourage industry forums and working groups to develop accessibility standards for mobile browsers" could be facilitated by permitting such forums to petition the Commission to accept the use of such standards as a safe harbor standard that provides immunity from complaint. *See* NPRM at ¶ 144.

[19] *See* 47 U.S.C. § 716(e)(1).

[20] *See id.* § 716(e)(1)(a).

[21] *See id.* § 717(b)(1).

disabilities than a set of flash cut mandates. Accordingly, the Commission should facilitate implementation of the requirement of the CVAA by phasing in enforcement of requirements that cannot be achieved quickly.

Determining the time in which accessibility may be achieved requires consideration of a number of factors. In some situations, the requirements for providing accessibility may simply be too great to expect accessibility to be achieved by a date certain. Even where there is a realistic prospect of achieving accessibility in the foreseeable future, implementation of Section 716 may require fundamental changes in the design, development and manufacturing of covered products and services, impacting their development cycles. The time in which specific changes can be implemented will vary depending on the particular circumstances. For example, some equipment and services are far along in a lengthy development process but might not be made available for sale to the public until after the statutory deadline for adopting rules implementing the CVAA. Where this is the case, the Commission should not require that the equipment or service be made accessible immediately, but it should instead provide manufacturers and service providers a reasonable amount of time to adjust to the applicable requirements. More generally, the Commission should recognize that some products require longer development cycles than others. It is important that the timeframe for implementing accessibility reflect these development cycles. The Commission has previously permitted extended implementation periods for product and service mandates that were much more limited than those established by the CVAA.[22] A similar flexibility is warranted here.

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[22] *See, e.g.*, 47 C.F.R. § 15.119(a) (establishing a greater than 24-month implementation period for analog closed caption decoder requirements); 47 C.F.R. § 15.120(a) (establishing a greater than 14-month implementation period for program blocking technology requirements); 47 C.F.R. § 15.122(a)(1) (establishing a greater than 21-month implementation period for digital closed

III. THE COMMISSION SHOULD DEFINE THE SCOPE OF ITS IMPLEMENTING RULES IN A MANNER THAT REFLECTS THE TERMS OF THE CVAA AND CONGRESS' INTENT.

The Commission also should define the specific categories of equipment and services covered by the CVAA by following the intent of Congress and the terms of the statute. As discussed below, the Commission should interpret the CVAA as applying only to equipment and services designed primarily to provide ACS. In particular, the FCC should exclude services designed primarily for enterprise customers and other customized equipment and services from coverage of its implementing rules. The Commission should also interpret the CVAA as applying to services designed primarily to provide the functionalities listed in the definitions of "electronic messaging service" and "interoperable video conferencing services." In addition, the Commission should interpret "manufacturer" in a manner so as only to include those firms with control over the design of the equipment or service. Finally, the Commission should utilize its waiver power in a manner that prevents the application of the CVAA in circumstances in which Congress did not intend the statute to apply.

Customized equipment and services not offered to the public. Section 716(i) contains two key components. To begin with, Section 718(i) exempts "customized equipment or services" that are not offered directly to the public from the accessibility requirements of the CVAA.[23] As a practical matter, this provision means that the CVAA does not apply to ACS designed primarily for enterprise customers. This is because enterprise market equipment and services are almost always either (1) designed to be installed, configured, and/or customized by the enterprise customer's in-house IT department or a systems integrator; or (2) designed and

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caption decoder requirements); 47 C.F.R. § 15.117(i)(1)(i)-(iii) (establishing a 20- to 52-month implementation period for digital television reception capability).

[23] *See* 47 U.S.C. § 716(i).

built to the exact specifications and desires of the enterprise customer. Even products that are sold "off-the-shelf" to individual consumers may be sold to enterprise-level customers in a customized manner. ITI does not anticipate that structuring the FCC's rules in this manner would harm people with disabilities employed in such enterprises because employers would still be required to comply with their obligations under the Americans with Disabilities Act.[24] Furthermore, interpreting the CVAA in this manner would create certainty and predictability for the manufacturers and providers of such equipment and services.[25]

In the NPRM, the Commission hinted at this conclusion, citing the House Report's explanation that the Section 716(i) exemption is designed to encompass equipment and services that "are customized to the unique specifications requested by an enterprise customer."[26] Notwithstanding this legislative history, the definition of "customized equipment or services" proposed in the Appendix does not specifically refer to enterprise services. The Commission should address this shortcoming by making the enterprise exclusion explicit.

In addition, Section 716(i) expressly excludes from the CVAA customized equipment or services "that are not offered directly to the public, or to such classes of users as to be effectively

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[24] *See* NPRM ¶ 51. An enterprise customer that specifies the customization of products or services used under its control assumes responsibility for the accessibility of the implementation. In most cases where the customized equipment or services are used by the general public, the entity is responsible under the American Disabilities Act for making its facility accessible to the public.

[25] If a manufacturer produces products for enterprise customers that are not offered to the general public, then such product is outside the scope of the CVAA. This is true even if such customized product is eventually used by the general public. The enterprise customer becomes responsible for ADA compliance when such product is used by the general public, and in most cases must provide accessible solutions. For example, many schools today choose to purchase video projectors with closed caption decoders, even though such devices are not required to provide CC decoding by the FCC.

[26] *Id.* ¶ 48 (*citing* H.R. Rep. No. 111-563, at 26 (2010) ("*House Report*")).

available to the general public." The exclusion of ACS not made available to the general public has several important implications for the scope of the CVAA.

First, software and functionalities developed by organizations for internal use only are not made available to the general public. They therefore should be excluded from the coverage of the CVAA. Moreover, the statute, by its terms, applies only to advanced communications *services*, and all four of the subcategories of ACS listed in the statute are "services." A service is an offering *to others*; it is not software or a functionality developed by an entity solely for internal use. Accordingly, a system that is developed by an individual or organization and not sold to the public cannot be considered covered by the CVAA.

Second, the Commission should clarify that the CVAA does not require that people with disabilities who are employees of ACS manufacturers or service providers, working in their employee status as *providers* of ACS, be provided access to the network equipment itself. When working as employees, such individuals are not part of the target class protected by the CVAA, which are *consumers* of ACS. Accordingly, the FCC's rules should not require that ACS providers make network equipment, such as equipment and software used in data centers, accessible to people with disabilities.

Third, equipment and services still in the testing stage (e.g., beta testing) should not be considered to be offered to the general public or effectively available to the general public. The testing stage precedes a general offering to the general public. Furthermore, manufacturers and service providers should be given the flexibility to make necessary adjustments during the testing stage prior to fully incorporating accessibility technology. Otherwise, it could be necessary to establish one set of accessibility features for the beta version of a product and then a second, different set of accessibility features for the final version of the product. This redundant process

would impose significant costs and delay on manufacturers and service providers without yielding material benefits to people with disabilities.

Fourth, the Commission correctly observes in the NPRM (at ¶ 51) that public safety communications networks and devices are "equipment and services that are not offered directly the public." Rather, these are equipment and services made available to manufacturers and service providers. Thus, they should be excluded from the scope of the CVAA.

Electronic messaging service. The Commission should clarify that the term "electronic messaging service" is limited to services designed primarily to enable one person to communicate with another person via text. Equipment and services designed primarily for another purpose that include electronic messaging as an ancillary feature do not qualify as electronic messaging equipment or services. The NPRM suggests that the Commission is wary of this kind of approach, at least in the context of non-interconnected VoIP, because it is purportedly difficult to pre-determine the primary purpose of a particular piece of software or hardware. *See id.* ¶ 54. This concern, however, puts too much weight on how software or hardware *may* be used, and too little on how it is *intended* to be used. Manufacturers and service providers can control the latter, but have almost no control over the former; requiring them to account for all the possibilities would expose manufacturers and service providers to an open-ended liability under the CVAA that would likely chill investment and innovation. Thus, a service should only be classified as electronic messaging service if it is designed primarily for communication between individuals.

It follows that the Commission should adopt the view advocated by CEA, TIA, Microsoft, and others that the phrase "between individuals" in the definition of electronic messaging service, in most cases, excludes from the definition communications between

machines or communications between a person and a machine.[27] ITI recognizes, however, that a service that involves a store-forward modality in which a computer initially "receives" the message and then makes it available to a person in real-time or near real-time should be included in the definition of electronic messaging service.

Interoperable video conferencing services. The term "interoperable video conferencing services" should be defined to include only services that allow interoperation of different video platforms. The NPRM attempts to read the word "interoperable" out of the statute by separating it from "video conferencing services," as if the word has meaning outside its context.[28] This is not proper statutory interpretation. Congress meant something by attaching the word "interoperable" to "video conferencing services," and it is up to the Commission to give that meaning life. For example, "interoperable" could be defined as interoperable with video relay services or among different video conferencing services. However, merely being capable of "point-to-point" video calls to other users of the same software or hardware does not make the service "interoperable" in the plain sense of the word.[29] To be sure, interoperability between platforms is not currently achievable under the definition of that term as discussed above. But, as explained above, the terms and structure of the CVAA reflect Congress' recognition that some forms of accessibility will take time. This is an example of such a situation.

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[27] *See id.* ¶ 34 (*citing* CEA Comments at 7; TIA Comments at 7-8; Microsoft Comments at 3, n.4; ITI Comments at 4; and T-Mobile Comments at 3).

[28] *See id.* ¶ 35 ("In light of the above symmetries between the earlier and later versions of this definition, as well as the reports prepared by each chamber of Congress, we will first seek comment on the meaning of "video conferencing service" and then on the meaning of "interoperable" in this context.").

[29] *See id.* ¶ 44 (*citing* Consumer Groups Reply Comments at 4; RERC-IT Comments at 3-4).

Co-Manufacturer. The Commission should limit the meaning of the term "manufacturer" to those entities that control the design and specifications of a piece of equipment or service. The term manufacturer should not include entities that merely "offer for sale or otherwise distribute in interstate commerce" a unit of equipment or service. It would be appropriate to incorporate the concept of a "co-manufacturer," as was done in the Section 255 context, by imposing legal obligations only on the entities that have the most control over the equipment's or service's features. In the Section 255 context, the Commission stated that "[i]n appropriate circumstances . . . where an entity is otherwise extensively involved in the manufacturing process – for example, by providing product specifications – we may, as the individual circumstances warrant, deem such an entity to be a co-manufacturer of the product involved."[30] As discussed above, there are many parties involved in building advanced communication services and ensuring their accessibility, and it makes sense that each party should be responsible for its own role in the process. A manufacturer of end user equipment should only be responsible for the accessibility of software that is installed or downloaded by the user when the manufacturer is controlling the application's specifications. In this case the equipment manufacturer would be a kind of "co-manufacturer" of the software.

Importantly, the CVAA precludes holding equipment manufacturers liable for software downloaded by consumers where the equipment manufacturer does not control the specifications of the software. Establishing general platform requirements for the hardware operating system does not constitute control over an application's specifications. Likewise, "making software available for download," such as through an app store, should not make equipment manufacturers liable for the accessibility of the software. An equipment manufacturer should not

[30] *Implementation of Sections 255 and 251(a)(2) of the Communications Act of 1934, as enacted by the Telecommunications Act of 1996*, Report and Order, 16 FCC Rcd 6417 ¶ 90 (1999).

be responsible for software that it does not control, nor should developers of platform or OS software be held responsible for how product manufacturers use their software in devices. Upgrades to a product's operating system that are within the control of the equipment manufacturer should continue to support accessibility of the product. However, the equipment manufacturer should not be held responsible for the impact of an OS upgrade on third party applications.

Waivers. Section 716(h)(1) of the CVAA grants the Commission the authority, on its own motion, to waive the requirements of the CVAA for entire classes of devices or services. In the NPRM, the Commission dismisses the argument that this authority includes the ability to have certain waivers be "deemed granted" after a certain time (*see NPRM* ¶ 57) but the NPRM does not discuss the beneficial role that self-executing waivers could play. For example, in the closed captioning context, the Commission has adopted certain self-executing exemptions for classes of programming and programming providers.[31] The Commission could accomplish the same salutary effect using its authority to grant waivers on its own motion. Moreover, the Commission should not set an arbitrary *ex ante* limit on the duration of any waiver granted pursuant to Section 716(h)(1). Such a predetermined limit assumes technological progress and development in the specific context of a given waiver request, which the Commission cannot reasonably predict in the context of this rulemaking.

IV. THE RECORDKEEPING REQUIREMENTS AND COMPLAINT PROCESS SHOULD BE STREAMLINED.

Lastly, the Commission proposes rules to implement the record-keeping and complaint process requirements established in Section 717 of the CVAA. *See* NPRM ¶¶ 116 *et seq*. Generally speaking, the language in the proposed rules relating to recordkeeping comes straight

[31] *See* 47 CFR § 79.1(d).

from the language of the CVAA. Thus the primary questions involve how the Commission will interpret this language. In keeping with the general tenor and tone of the statute, as well as President Obama's recent Executive Order seeking to limit the harmful consequences of unnecessarily onerous regulation,[32] the Commission should refrain from adopting overly burdensome or detailed recordkeeping or process requirements that merely impose costs on all parties without yielding a corresponding benefit.

For example, the CVAA states that the Commission "shall keep confidential" any records it requests from covered entities as part of an investigation into a formal or informal complaint.[33] However, the implementing rules proposed in the NPRM place the burden on individual parties to request confidential treatment of such records.[34] It would be more consistent with the language of the statute for the Commission to automatically treat all documents submitted to the Commission as confidential.

ITI also has concerns with the proposed complaint process itself. In an attempt to ensure that the complaint process does not prove overly burdensome to consumers, the Commission proposed in the NPRM an informal complaint process. It is proposed that any accessibility issues be dealt with in the first instance between the consumer and the company, but the specifics of the proposal would create an unnecessarily burdensome process without corresponding benefits and may not even start through an informal setting designed to resolve the issues.

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[32] *See* Exec. Order No. 13563 (Jan. 18, 2011).

[33] 47 U.S.C. § 717(a)(5)(C).

[34] *See* NPRM, App. B., proposed rule 8.17(c) ("Requests for confidential treatment of documents or information submitted under this subsection may be filed in accordance with section 0.459 of this chapter.").

The draft regulations governing informal complaints would require that defendant manufacturers and service providers submit a potentially enormous volume of documents and information to the Commission. For example, draft Section 8.21(a)(7) would require that a defendant file along with its answer "*all documents* supporting the manufacturer's or service provider's conclusion that it was not achievable to make the product or service accessible and usable" (emphasis added). For a complex IT product or service that has undergone multiple iterations and rounds of testing, "all documents supporting" the conclusion that accessibility is not achievable could amount to hundreds or thousands of paper and electronic documents, some of which may be written in foreign languages. The burden associated with identifying and providing these documents could be very large, and it would likely cause defendants to incur significant legal expenses every time an informal complaint is filed, regardless of whether the complaint is meritorious. Further, the range of documents that must be produced along with any answer under the proposed informal complaint rules exceeds the already-considerable range of documents that manufacturers and service providers would be required to keep under the proposed record-keeping rules.

The burdensome proposal for document production under the proposed informal complaint rules is even more worrisome in light of the potentially large number of informal complaints that might be filed against a manufacturer or service provider under the CVAA. For example, according to what appears to be the most recent relevant data released by the FCC's Consumer and Government Affairs Bureau, the FCC received 226, 252, and 161 informal complaints in the first, second, and third quarters of 2009, respectively, regarding access to communications for people with disabilities.[35] It is reasonable to infer that the annual total of

[35] *See* News Release, Report on Informal Consumer Complaints Regarding Access to Communications for People with Disabilities (Sept. 8, 2009) (reporting the number of informal

informal complaints regarding accessibility filed with the FCC total between 800 and 900. Nearly all of these complaints concern the types of services covered by the CVAA, and the CVAA rules will result in a significant increase in the equipment and services governed by the FCC's disabilities access rules. Moreover, communications are becoming increasingly integral to every day life. It is therefore likely that the number of informal complaints regarding purported violations of the CVAA will be more numerous, and complex, even than the nearly 1,000 per year that the FCC appears to have received recently. Thus, under the rules proposed by the Commission for informal complaints, it is reasonable to expect that manufacturers and service providers will be required to undertake costly and burdensome document production, to be certified by an officer of the company, in a thousand or more informal complaint proceedings per year. Many of these undertakings will likely be completely unnecessary because they will be cases where (1) there is a simple misunderstanding of the nature or scope of the law; (2) the complaint has been filed against the incorrect manufacturer or service provider; or (3) the complaint could be quickly resolved informally.

Accordingly, ITI urges the Commission to modify its proposed informal complaint procedures. The Commission should not impose any document production requirements on defendants unless and until the Commission determines that a complainant has made a prima facie showing in its informal complaint that the defendant has violated the CVAA requirements.

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complaints for the first quarter of 2009), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-293274A1.doc; News Release, Report on Informal Consumer Complaints Regarding Access to Communications for People with Disabilities (Apr. 2, 2010) (reporting the number of informal complaints for the second quarter of 2009), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-297284A1.pdf; News Release, Report on Informal Consumer Complaints Regarding Access to Communications for People with Disabilities (Apr. 2, 2010) (reporting the number of informal complaints for the third quarter of 2009), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-297282A1.pdf.

If the FCC does determine that a plaintiff has made a prima facie showing, a defendant should only be required to produce those documents that the manufacturer or service provider is already required to maintain under the recordkeeping requirements of the CVAA. In this way, the complainant and the FCC will be fully informed without imposing further burdensome costs on the manufacturer or service provider. If more extensive document production is necessary or appropriate, a complainant can take advantage of the formal complaint process.

In addition, the Commission should establish pre-filing requirements for the informal complaint process. For example, the Commission could require that, prior to filing an informal complaint, a prospective complainant (1) inform the prospective defendant of the nature of the purported violation and (2) engage in good faith discussions to eliminate the purported violation. Such pre-filing requirements can be helpful to bringing disputes to resolution without involving significant Commission resources.[36] Moreover, the Commission's concern that such requirements might prove a burden to individual complainants is difficult to understand in light of the onerous process for resolving a complaint that is proposed in the NPRM.[37] The Commission's goals with respect to the complaint process should be resolving the consumer's issue, and the processes and requirements the Commission adopts should reflect that.

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[36] For example, the Commission adopted a pre-filing requirement in the common carrier context to "promote actions that could either foster the resolution of disputes prior to filing or narrow the scope of the issues to be resolved." *In re Complaint Procedures*, Report and Order, 12 FCC Rcd 22497 ¶ 38 (1997). More recently, in the Open Internet Order the Commission adopted complaint procedures that included a pre-filing notice. *See In re Preserving the Open Internet; Broadband Industry Practices*, Report and Order, 25 FCC Rcd 17905 ¶ 156 (2010). Notably, the Commission adopted these particular complaint procedures because it found them to be "streamlined." *Id.* ¶ 155.

[37] *See* NPRM ¶ 128 (declining to propose pre-filing requirements because "[w]hile we agree that such a requirement could lead to a more efficient resolution in advance of a complaint in some instances, we are also concerned that in other cases, such a requirement could prove burdensome to consumers and delay resolution of complaints").

Finally, to ensure that the problem-solving nature of the informal complaint process is not circumvented, the Commission should not allow anyone to invoke the formal complaint process without first exhausting the remedies available through the informal process, If parties can use the formal complaint process first, their positions will be more likely directed towards offensive and defensive litigation positions rather aiming for a mutually beneficial resolution.

V. CONCLUSION

ITI requests that the Commission proceed with implementing the CVAA in the manner described herein.

Respectfully submitted,

/s/Ken Salaets
Ken Salaets
Director, Global Policy

/s/Vince Jesaitis
Vince Jesaitis
Director, Government Relations

/s/Dean Garfield
Dean Garfield
President and CEO

Information Technology Industry Council
1101 K Street, N.W.
Suite 610
Washington, D.C. 20005
202-737-8888

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