

**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  
NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION**

**INTRODUCTION**

The National Cable & Telecommunications Association (NCTA) hereby responds to the notice of proposed rulemaking in the above-captioned proceedings concerning the implementation of sections 716 and 717 of the Communications Act of 1934, as amended (the Act), as added by the Twenty-First Century Communications and Video Accessibility Act of 2010 (CVAA).<sup>1</sup> NCTA is the principal trade association for the U.S. cable industry, representing

---

<sup>1</sup> *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 Nos. 10-213, 10-145 and WT Docket No. 96-198, Notice of Proposed Rulemaking, FCC 11-37 (rel. Mar. 3, 2011) (*NPRM*); *Twenty-First Century Communications and Video Accessibility Act of 2010*, Pub. L. No. 111-260, 124 Stat. 2751 (2010) (as codified in various sections of 47 U.S.C.) *and* *Amendment of Twenty-First Century Communications and Video Accessibility Act of 2010*, Pub. L. No. 111-265, 124 Stat. 2795 (2010) (making technical corrections to the *Twenty-First Century Communications and Video Accessibility Act of 2010* and the amendments made by that Act).

cable operators serving more than 90 percent of the nation's cable television households and more than 200 cable program networks. The cable industry is the nation's largest provider of broadband service after investing over \$170 billion since 1996 to build two-way interactive networks with fiber optic technology. Cable companies also provide state-of-the-art competitive voice service to more than 23 million customers.

Cable industry representatives are actively involved in ensuring that the needs of our customers with disabilities are addressed. Today, our voice offerings comply with the accessibility requirements of section 255 of the Communications Act,<sup>2</sup> and cable operators contribute to the Telecommunications Relay Service Fund.<sup>3</sup> Our video programming is closed captioned in accordance with the Commission's rules. Moreover, the cable industry worked closely with members of Congress and the disability community prior to the passage of the CVAA. For example, NCTA Executive Vice President James Assey testified before Congress concerning the CVAA.<sup>4</sup> NCTA also participated in discussions with disability access organizations, including the Coalition of Organizations for Accessible Technology, concerning the CVAA.

The cable industry is eager to work with all stakeholders to ensure effective and workable accessibility solutions for advanced communications services (ACS) as required by the CVAA. Achieving this important goal will require a pragmatic, flexible approach that encourages

---

<sup>2</sup> 47 U.S.C. § 255.

<sup>3</sup> 47 U.S.C. § 225; 47 C.F.R. § 64.601 *et seq.*

<sup>4</sup> *H.R. 3101, the Twenty-First Century Communications and Video Accessibility Act of 2009: Before the Subcomm. on Commc'ns, Tech., and the Internet, H. Comm. on Energy and Commerce, 111<sup>th</sup> Cong. (2010)* (statement of James M. Assey, Exec. Vice President, NCTA), available at <http://democrats.energycommerce.house.gov/documents/20100610/Assey.Testimony.2010.06.10.pdf>.

manufacturers and service providers to identify efficient and innovative solutions that take into account what the Commission refers to as a “complex Internet ecosystem.”<sup>5</sup>

In these comments, NCTA focuses on two important issues raised in the *NPRM*. First, while the Commission should adopt clear obligations to promote access for individuals with disabilities, those obligations should not be so rigid as to hamper innovation. Section 716 expressly grants “flexibility” to manufacturers and service providers.<sup>6</sup> Consistent with this statutory mandate, the Commission should adopt implementing rules that preserve the flexibility of manufacturers and service providers to innovate and develop Internet Protocol (IP)-based communications services and accessibility features that will afford individuals with disabilities greater participation in our society and economy. Second, the Commission should interpret the “grandfather clause” in section 716(f) in a pragmatic way that honors its plain meaning while also encouraging innovation.<sup>7</sup> In particular, all interconnected voice over IP (VoIP) services, regardless of when they were first offered to the public, should be subject solely to section 255, as should any multi-purpose service or device that includes interconnected VoIP service.<sup>8</sup> By ensuring that such services are covered by a uniform accessibility regime, this approach will allow covered entities to focus on research and development without the need to juggle the disparate demands of sections 255 and section 716 for each new product.

---

<sup>5</sup> *NPRM*, FCC 11-37 at ¶ 14.

<sup>6</sup> 47 U.S.C. § 617(a)(2), (b)(2), & (h).

<sup>7</sup> 47 U.S.C. § 617(f).

<sup>8</sup> 47 U.S.C. § 255.

**I. THE COMMISSION SHOULD GIVE INDUSTRY FLEXIBILITY TO INNOVATE FOR THE BENEFIT OF INDIVIDUALS WITH DISABILITIES**

The CVAA emphasizes the need to provide industry “flexibility” in implementing the new accessibility requirements for ACS.<sup>9</sup> As the House Report concerning the CVAA states, Congress intended that the Commission, in establishing rules implementing section 716, “afford manufacturers and service providers as much flexibility as possible, so long as each does everything that is achievable in accordance with the achievability factors.”<sup>10</sup> The CVAA’s legislative history explains how flexibility encourages innovation, which in turn promotes greater accessibility for disabled Americans. During the floor debates concerning the CVAA, Representative Cliff Stearns described how innovative devices such as the iPad had already promoted disability access without any government mandate, and emphasized the need for the Commission to preserve the flexibility manufacturers and service providers need to innovate:

The FCC should remember, when they come asking for comments, when they have responses, and they have an advisory committee that’s all involved with this, the key for the FCC is for them to be flexible in their response so that industry, like Apple did with the iPad, has the flexibility to develop the most sound and comprehensive ways to help our disabled today.<sup>11</sup>

In the *NPRM*, the Commission correctly recognizes the need for flexible approaches in implementing a number of aspects of the CVAA. For example, in interpreting the “industry flexibility” provisions of sections 716(a)(2) and (b)(2), the Commission concludes that “the statutory language and legislative history preclude us from preferring built-in accessibility over third party accessibility solutions, as some consumer commenters urge us to do.”<sup>12</sup> The

---

<sup>9</sup> See 47 U.S.C. § 617(a)(2) & (b)(2) (mandating “industry flexibility”); 47 U.S.C. § 617(h) (mandating “Commission flexibility” in granting certain waivers and exemptions from the requirements of section 716).

<sup>10</sup> H.R. Rep. No. 111-563, at 24 (2010) (House Report).

<sup>11</sup> 156 Cong. Rec. H6006 (July 26, 2010).

<sup>12</sup> *NPRM*, FCC 11-37 at ¶ 77 (citing, *inter alia*, House Report at 24).

Commission further notes in the *NPRM* that, consistent with the CVAA’s legislative history, the Commission should promote maximum flexibility in applying the four statutory “achievability” factors,<sup>13</sup> and recognizes that an assessment of what is achievable should be “fact-based, flexible, and applied on a case-by-case basis,” provided that flexibility is not so paramount that “accessibility is never achieved.”<sup>14</sup>

NCTA urges the Commission to take a flexible, pragmatic approach in the final rules it adopts to implement the CVAA. This flexibility is particularly important in defining when an accessibility requirement is “achievable” under the four factors set forth in section 716(g). These factors require the Commission to take into account the nature and cost of the steps necessary to meet the requirement, the technical and economic impact of meeting the requirement, the type of operations involved, and the extent to which the manufacturer or provider offers accessible services or equipment with varying functionality and features at different price points.<sup>15</sup>

In applying these factors and all other aspects of section 716 of the Act, the Commission must keep in mind section 716(j) of the Act, which mandates an overarching principle of flexibility:

(j) Rule of Construction – [Section 716] shall not be construed to require a manufacturer of equipment used for advanced communications or a provider of advanced communications services to make every feature and function of every device or service accessible for every disability.<sup>16</sup>

Under the plain language of this statutory provision, manufacturers and service providers must have the flexibility to incorporate accessibility features in some *but not all* devices and services. Moreover, section 716(j) and the achievability factors make clear that there will be

---

<sup>13</sup> *NPRM*, FCC 11-37 at ¶ 69 (quoting House Report at 24).

<sup>14</sup> *NPRM*, FCC 11-37 at ¶ 69 (quoting AT&T Comments at 8; NFB Reply Comments at 6).

<sup>15</sup> 47 U.S.C. § 617(g).

<sup>16</sup> 47 U.S.C. § 617(j).

circumstances in which a covered entity should not be required to make a service or device accessible to “every disability.” For example, making a service accessible to every disability may impose substantial costs or technical complications, or require a fundamental alteration of a service. Such circumstances may particularly arise when a new service or device is first offered, or when a company launches an upgraded version of an existing service. Such initial innovations and early launches often start with the offering of a single model.<sup>17</sup> Indeed, the more groundbreaking a new service, the more likely it is that a company may want to test consumers’ reactions for some time before launching a range of similar products or lines that perform different functions at varied price points.

The Commission should ensure that manufacturers and service providers continue to have the flexibility to innovate, even though it may mean that not all devices and services are accessible to all disabilities. As both the statutory language and legislative history of section 716 recognize, the flexibility to innovate is not only critically important for all American consumers, it will also benefit individuals with disabilities by enhancing accessibility to next generation technologies and services.

## **II. THE COMMISSION SHOULD FIND THAT ALL INTERCONNECTED VOIP SERVICES ARE SUBJECT SOLELY TO SECTION 255, AS ARE ANY MULTI-PURPOSE PRODUCTS THAT INCLUDE INTERCONNECTED VOIP**

In the *NPRM* the Commission seeks comment on the scope of coverage of section 716 of the Act. As the Commission states, “Section 716 of the Act covers a broad array of manufacturers of equipment and providers of services that are not covered under Section 255.”<sup>18</sup> Section 255 imposes accessibility requirements on providers of telecommunications services and

---

<sup>17</sup> For instance, when Amazon released the Kindle in November 2007, only one model was available. See News Release, Amazon.com, Introducing Amazon Kindle (Nov. 19, 2007), available at <http://phx.corporate-ir.net/phoenix.zhtml?c=176060&p=irol-newsArticle&ID=1079388>.

<sup>18</sup> *NPRM*, FCC 11-37 at ¶ 14.

interconnected VoIP as well as manufacturers of equipment used for such services.<sup>19</sup> The CVAA recognizes that services subject to section 255 should not also be subject to section 716, and therefore sets forth a grandfathering provision in section 716(f):

Services and Equipment Subject to Section 255 – The requirements of this section shall not apply to any equipment or services, including interconnected VoIP service, that are subject to the requirements of section 255 on the day before the date of enactment of the [CVAA]. Such services and equipment shall remain subject to the requirements of section 255.<sup>20</sup>

The Commission should interpret this grandfathering provision broadly to cover all telecommunications and interconnected VoIP services, including any such services that commenced service or were upgraded after enactment of the CVAA as well as multi-purpose services that include a telecommunications or interconnected VoIP service that is subject to section 255. NCTA agrees with the statement in the *NPRM* that section 716(f)'s grandfathering "language clearly provides that interconnected VoIP equipment and services shall remain subject to Section 255."<sup>21</sup> NCTA also agrees with AT&T's proposal (as quoted in the *NPRM*) that the Commission should subject multi-purpose devices to section 255 and apply section 716 solely to the extent that the device provides ACS that is not otherwise subject to section 255.<sup>22</sup>

This interpretation of section 716(f)'s grandfathering provision is supported by the plain language of the statute. Section 716(f) grandfathers the entire category of "interconnected VoIP service," suggesting that any particular offering (past, present, or future) that meets the definition of interconnected VoIP must remain subject solely to section 255. Moreover, the provision's use of the present tense "are" (grandfathering services "that *are* subject to the requirements of

---

<sup>19</sup> 47 U.S.C. §255(b)-(c); 47 C.F.R. § 6.1.

<sup>20</sup> 47 U.S.C. § 617(f).

<sup>21</sup> *NPRM*, FCC 11-37 at ¶ 30.

<sup>22</sup> *Id.* (quoting AT&T Comments at 5).

section 255”), rather than the past tense “were” (grandfathering services “that *were* subject to the requirements of section 255”) is significant. Under the federal Dictionary Act, “[i]n determining the meaning of any Act of Congress, unless the context indicates otherwise, . . . words used in the present tense include the future as well as the present.”<sup>23</sup> Congress’s use of the present tense “are” thus confirms that telecommunications and interconnected VoIP services offered in the present (*i.e.*, as of the date of enactment of the CVAA) *as well as such services offered in the future* (*i.e.*, after enactment of the CVAA) are grandfathered and remain subject to section 255’s requirements. Congress intended for any type of interconnected VoIP service, regardless of when it was first designed, developed, or offered, or when it is upgraded or modified, to be subject solely to section 255 and not section 716.<sup>24</sup> This reading is compelled by the statutory language and would also be easy to administer, avoiding the cumbersome, if not impossible, task of determining whether an interconnected VoIP service was first developed or offered before the enactment of the CVAA or whether the addition of new features or functions to existing interconnected VoIP service somehow converts it into a “new” service offered after the date of enactment.<sup>25</sup>

---

<sup>23</sup> 1 U.S.C. § 1. In its proposed rules, the Commission changed the tense from the present to the past. *See NPRM*, FCC 11-37 at App. B, proposed § 8.2(d) (“The requirements of this part shall not apply to any equipment or services, including interconnected VoIP service, that *were* subject to the requirements of section 255 . . . .”) (emphasis added). The Commission should reinstate the statutory term “are” in this rule.

<sup>24</sup> The fact that section 716(f)’s grandfathering provision exempts all interconnected VoIP services from section 716’s requirements does not render superfluous the inclusion of “interconnected VoIP” service in the CVAA’s definition of ACS. Congress added the definition of ACS to section 3 of the Act, which sets forth definitions of general applicability that pertain to all parts of the Act. In so doing, Congress signaled that, although under section 716(f) the term “advanced communications services” effectively does not include interconnected VoIP for purposes of applying the accessibility requirements of section 716, the term would include interconnected VoIP in any other section of the Act now in effect or to be adopted in the future. For example, the limitation on liability provisions in section 2 of the CVAA apply to all types of ACS, including interconnected VoIP service. CVAA, Pub. L. No. 111-260, § 2(a), 124 Stat. 2751(2010).

<sup>25</sup> For instance, the implementing rules of section 255 apply to the design and development of interconnected VoIP services. 47 C.F.R. § 6.5(a) & 6.7. The date on which a particular interconnected VoIP service was first “designed” or “developed” may often be difficult to ascertain.

Similarly, if a multi-purpose service or device is subject to section 255 to any extent, the entire service or device should be subject solely to section 255 and not to section 716. For instance, if an interconnected VoIP service is bundled with another type of ACS as a single offering, the entire offering should be subject solely to section 255. Implementing a mixed regime, in which multi-purpose products were potentially subject to both section 255 and section 716, would needlessly create confusion, increase administrative costs, and lead to conflicts between the two sections. The resulting uncertainty would thwart innovation to the detriment of individuals with disabilities. The Commission should avoid this result by applying section 255 to the multi-purpose service.

### **CONCLUSION**

For the foregoing reasons, the Commission should (i) interpret sections 716 and 717 in a manner that preserves the flexibility of manufacturers and service providers to continue to innovate for the benefit of individuals with disabilities; and (ii) find that section 255 exclusively governs all interconnected VoIP services and any multi-purpose service that includes interconnected VoIP.

Respectfully submitted,

**/s/ Rick Chessen**

Rick Chessen  
Diane B. Burstein  
Steven F. Morris  
Jennifer K. McKee  
National Cable &  
Telecommunications Association  
25 Massachusetts Avenue, NW – Suite 100  
Washington, DC 20001-143

April 25, 2011