

**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
)	

To: The Commission

COMMENTS OF MICROSOFT CORPORATION

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April 25, 2011

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The Commission’s proposals in the above-captioned Notice of Proposed Rulemaking (“NPRM”) for implementing the Twenty-First Century Communications and Video Accessibility Act of 2010 (“CVAA” or “Act”) are vital to accomplishing the goal of turning this historic legislation into practical rules that will guide industry and promote accessibility, while also encouraging innovation and not stifling technological enhancements. Microsoft Corporation (“Microsoft”) agrees with the Commission that “the communications marketplace has undergone a ‘fundamental transformation’ since Congress acted to ensure access to telecommunications services and equipment by people with disabilities as part of the Telecommunications Act of 1996,”¹ and Microsoft urges the Commission to be thoughtful and balanced as it implements the

¹ NPRM, ¶ 3.

next installment of legislation to ensure that people with disabilities can share in the benefits as communications technologies continue to evolve.

INTRODUCTION AND SUMMARY

Microsoft has long been committed to ensuring that people with disabilities can enjoy the same unfettered, meaningful access to communications technologies as other Americans. Many Microsoft products and services at various layers of the advanced communications services (“ACS”) architecture — including the Windows 7 operating system, Internet Explorer 9 web browser, and Office 2010 — have built-in accessibility features, options for user customization, and compatibility with third-party assistive technologies. Microsoft also offers products and services that make it easy for others to create accessible online content. For example, Microsoft Silverlight is an Internet browser plug-in that enables Web developers to create accessible Internet video and applications by enabling closed-caption support of high-definition streaming media.

Microsoft also supports a number of organizations globally whose goals are to improve the technology available to people with disabilities. For instance, Microsoft helped found the Accessibility Interoperability Alliance, which works collaboratively to design solutions for unresolved interoperability issues and reduce the overall cost of developing both accessible and assistive technology. Microsoft also is on the Board of the Assistive Technology Industry Association, which establishes best practices to help ensure that the best products and services are delivered to people with disabilities.

For more than two decades, Microsoft has worked closely with representatives of the disability community, nongovernmental organizations, other industry leaders, and government bodies in the U.S. and abroad to create a vibrant, healthy and accessible information and communication technology ecosystem. With respect to this proceeding, for example,

Microsoft employees currently serve on both the Emergency Access Advisory Committee and the Video Programming Accessibility Advisory Committee, which were established pursuant to the CVAA.

Based on this deep experience, Microsoft encourages the Commission to adopt workable and clear rules that achieve the important goal of increasing accessibility for people with disabilities, while also encouraging innovation and competition in the development of ACS and accessibility features. Specifically, we urge the Commission to:

1. Adhere to the statutory language of “interoperable video conferencing services” and require video conferencing services to be accessible only if and to the extent such services are designed to be interoperable by the service provider;
2. Adopt waivers that focus on the primary design of products and services that possibly could be used for non-interconnected VoIP and electronic messaging;
3. Clarify the responsibilities for manufacturers of equipment used for ACS and the providers of such services;
4. Refer to the forthcoming renewed Section 508 guidelines in adopting performance objectives;
5. Clarify the definition of “electronic messaging service”; and
6. Provide businesses at least two years to come into compliance with the Section 716 accessibility requirements.

I. THE FCC’S STATUTORY MANDATE IS TO ENABLE *ACCESSIBILITY*, NOT *INTEROPERABILITY*.

The Commission seeks comment on the meaning of the term “interoperable video conferencing services” and how the addition of the word “interoperable” should be interpreted in light of the statutory text and legislative history.²

² NPRM, ¶¶ 44–47. Microsoft agrees with TIA that the Act should not be interpreted to cover webinars, which have some interactive elements but are designed primarily for one party to broadcast information to recipients, and that the Commission should make this inapplicability explicit.

The text of the statute clearly states that with respect to “video conferencing services” the feature of “interoperability” is a prerequisite for regulation. It is *not* an invitation to the Commission to expand its authority, as some commenters have suggested, by affirmatively promoting interoperability.³ There is no supporting evidence in the legislative history for the remarkable proposition that, by adding a qualifier to a defined term, Congress intended to direct the Commission to achieve the substantive goal of requiring all video conferencing services to become interoperable.

As the Commission emphasizes in the NPRM, the Senate Report and House Report accompanying the legislation state that “the inclusion . . . of these [video conferencing] services within the scope of the requirements of this act is to ensure, in part, that individuals with disabilities are able to access and control these services” and that “such services may, by themselves, be accessibility solutions.”⁴ Even assuming the Commission had the legal authority to do so, imposing the unprecedented requirement that all video conferencing services be made interoperable would not further these goals, which suggests that an interoperability mandate was not intended. This is because non-interoperable video conferencing services do not present unique barriers to people with disabilities. *All* users of video conferencing services must choose which video conferencing service (e.g., Windows Live Messenger, Apple FaceTime, Google Video Chat, Skype) will be used prior to commencing the video conference. This legislative history is consistent with the position, however, that once technical challenges to interoperability are overcome and the services are interoperable, Congress expects that video conferencing services will be made accessible.

³ See RERC-IT Public Notice Comments, at 3–4.

⁴ See S. Rep. No. 111-386, at 6 (2010); H.R. Rep. No. 111-563, at 25 (2010).

In addition, interpreting the statute to impose a substantive interoperability requirement for video conferencing services would be inconsistent with the House Report, which states that the Commission should interpret the accessibility requirements so that “if the inclusion of a feature in a product or service results in a fundamental alteration of that service, [then] it is *per se* not achievable to include that function.”⁵ Requiring video conferencing services to become “interoperable” would require a fundamental alteration of the service because none of today’s video conferencing services is interoperable. Moreover, the CVAA does not grant the Commission authority to mandate interoperability or accessibility of video conferences services where service providers have not *designed* their video conferencing services to be interoperable with other video conferencing services. A complete technical overhaul would be required to achieve interoperability, since existing technologies do not rely on the same protocol. To require all video conferencing services to be interoperable, even though interoperability is not “achievable” under the standards set forth in the statute, directly undermines the purpose and intent of the CVAA.⁶

Notwithstanding the clear statutory text and persuasive legislative history, the Commission expresses concern in the NPRM that interpreting the Act in this manner — to require the accessibility requirements for video conferencing services to apply only if and to the extent such services become interoperable in the future — “may undermine the statute’s intent since few if any video conferencing services or equipment are ‘interoperable.’”⁷ This view

⁵ H.R. Rep. No 111-563, at 25.

⁶ *See id.* at 24; *see also* Twenty-First Century Communications and Video Accessibility Act of 2010, Pub. L. No. 111-260, § 104, 124 Stat. 2751, 2755 (2010) (to be codified at 47 U.S.C. § 617).

⁷ NPRM, ¶ 45.

cannot be accurate since Congress clearly contemplated that not all technologies or equipment will be subject to the accessibility obligations. Section 716 explicitly recognizes that, because of limitations in existing technology or other reasons, some equipment or services, or classes of equipment or services, will not be required to meet the statute’s accessibility or compatibility objectives. Under the Act, until accessibility or compatibility for such equipment and services becomes “achievable,” the offerings can continue to be provided “as is.”⁸ So relying both on a plain reading of the statute and on overall Congressional intent, the sound conclusion is that until video conferencing services become “interoperable,” video conferencing equipment and services should not be subject to the Section 716 requirements.

II. THE CVAA DICTATES THAT WAIVER DETERMINATIONS FOCUS ON THE DESIGN OF THE PRODUCT OR SERVICE.

In the NPRM, the Commission proposes to subject all products or services that meet the criteria of the statutory definition of “non-interconnected VoIP service” to the CVAA’s requirements, regardless of whether the VoIP capability is purely incidental to the core functionality of the device or service.⁹ If the Commission adopts this expansive interpretation of the CVAA’s scope, then Microsoft urges the Commission to take practical and proactive steps on its own initiative under its waiver authority to build exclusions for products and services with incidental ACS capabilities into its final rules, rather than waiting for numerous, and significantly overlapping, waivers to be filed. Where the primary purpose of a device is not ACS, the ACS feature should be deemed incidental and should not be subject to the Act’s requirements. This streamlined approach provides marketplace certainty, is efficient, and helps

⁸ 47 U.S.C. § 716(a)–(c).

⁹ NPRM, ¶ 32.

ensure that the Commission’s rules do not impose unnecessary burdens on services and devices that are not being used in connection with ACS in the manner that Congress intended. In contrast, the regulation of incidental ACS features is likely to undermine innovation and may result in the elimination of these features from future products and services, since some companies will not want to incur the additional costs associated with making the features accessible when the feature is not core to the underlying experience.

If, for some reason, the Commission is not willing to proactively include in its final rules waivers for equipment and services with incidental ACS capability, then the Commission should adopt waiver criteria that focus on the core functionalities as designed by the manufacturer or service provider, and not on other factors, such as how consumers use the products, to determine whether a waiver is appropriate for a particular piece of equipment, service, or classes of equipment or services. Specifically, when deciding whether a product or service is “primarily designed” for purposes other than using ACS, the Commission should consider, for example:

- Whether the product or service is designed to offer the public the ability to communicate with a range of persons on a variety of topics such that it provides a meaningful substitute for more traditional communications devices.
- Whether the offering is designed for a “specific class of users who are using the ACS features in support of another task” or as the primary task.¹⁰
- Aggregate marketing materials for the product or service, which provide evidence of the manufacturer or service provider’s intended design.

These factors are not exclusive, and the Entertainment Software Association’s comments contain a number of additional factors — such as whether the ACS is in support of another feature or

¹⁰ NPRM, ¶ 55.

task and the number of features that may be used in ways that do not involve or require ACS — that also are worth consideration.

In addition, no single factor should be determinative; rather, these factors should be considered as a whole to help determine whether the intent of the manufacturer or service provider — who is the entity that designed the device or service — was to primarily make the ACS available to end users or whether that capability is merely incidental to the device or service.

This design-based approach is required by the CVAA, which states clearly that the only relevant factor for a waiver determination is how the equipment or service is “primarily designed.” The CVAA grants the Commission explicit authority to waive the requirements of Section 716:

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, that . . . is *designed* for multiple purposes, but is *designed primarily* for purposes other than using advanced communications services.¹¹

Only manufacturers or service providers, and not consumers, make decisions about how equipment or a service is designed.

In addition, this approach makes good public policy because consumers often use ACS equipment or services in a number of unintended and unpredictable ways. On some occasions, these new uses involve hacking or “jailbreaking” the equipment or service or using it in an unauthorized manner. For example, after the Kinect for Microsoft’s Xbox 360 was introduced, consumer reports quickly surfaced describing how the device could be used for a

¹¹ 47 U.S.C. § 617(h) (emphasis added).

number of unintended purposes, ranging from helping improve indoor navigation for people who are visually impaired, to using Kinect to capture video in 3D, to employing the Kinect camera for multi-touch.¹² Basing waiver determinations on these unexpected consumer uses would create significant uncertainty for businesses, result in a regulatory “gotcha” as the compliance obligation would not arise until long after the development cycle has been completed, and discourage innovation in equipment and service design.

In some circumstances, a long-term or permanent general waiver may be appropriate, such as where the waiver is based on the fundamental nature of the equipment or service. For example, applying the criteria outlined above to devices that enable gaming and entertainment services (such as playing video games or watching a movie), the Commission should exclude these gaming and entertainment-related non-interconnected VoIP and electronic messaging equipment and services as a class, regardless of whether they are played on a personal computer, video game console, mobile device, or some other hardware platform. Such equipment and services clearly are not designed to give consumers the ability to communicate with a range of persons on a variety of matters. Gaming and entertainment-related VoIP and electronic messaging are intended to allow competing players to communicate about the game play as they experience it, or to comment on a movie or TV show, and are not designed to be used for more general communications purposes. This is true even if the VoIP or electronic messaging occurs outside a video game or watching a show, but using gaming equipment or

¹² See, e.g., “Project NAVI, a Kinect Hack that Helps Visually Impaired Navigate Indoors,” MEDGADGET (Mar. 18, 2011), http://www.medgadget.com/archives/2011/03/project_navi_a_kinect_hack_that_helps_visually_impaired_navigate_indoors.html; <http://www.bing.com/videos/search?q=kinect+hack&qpvt=kinect+hack&FORM=VDRE#>.

services, because the VoIP or electronic messaging feature remains incidental to the primary gaming and entertainment purposes of the equipment or service.

In addition, VoIP and electronic messaging services offered in conjunction with video games and entertainment services are designed for a “specific class of users who are using the ACS features in support of another task.” For example, in-game and entertainment-related VoIP are designed to be used by video game players and people watching movies or television shows. These individuals are using the VoIP service while performing another task — e.g., actually playing the game or watching the show. When a player uses the VoIP services offered in the game *Halo: Reach*, for example, the user’s eyes are focused on the game play on the screen and both hands are busy using the controller to maneuver the user’s character through the game sequences. The in-game VoIP service for *Halo* clearly was not designed to be used by users whose hands and visual attention would be free to sign or watch ASL, read lips, or type on a keyboard. And the gaming experience would need to be fundamentally altered in order for in-game VoIP to be made accessible. Consequently, subjecting in-game VoIP services to Section 716’s requirements would impose significant burdens on business without offering any corresponding user benefit.

Moreover, video games and associated devices typically are marketed primarily for their entertainment value, including stunning visual graphics, sophisticated plotlines, and well-known characters. For example, the game *Halo: Reach*, the latest offering in the popular Halo series, is marketed as “the first chapter chronicling the epic story of our survival” and features the popular Noble Team characters.¹³ The introduction of innovative features that

¹³ See, e.g., <http://marketplace.xbox.com/en-US/Product/Halo-Reach/66acd000-77fe-1000-9115-d8024d53085b>.

recognize a player's movements, such as Kinect for Microsoft's Xbox 360 console, have caused game publishers to develop and market video games based on their health and fitness benefits and family appeal as well. For example, *The Biggest Loser: Ultimate Workout* is marketed as bringing "a healthy lifestyle into the family living room as never before, providing new ways to play together and motivate each other through exercise, diet, stat comparisons, and light-hearted competition."¹⁴ Although both of these games have voice chat functionality, neither feature voice chat prominently in their marketing in the aggregate because the games are "designed" primarily for purposes other than using ACS. Given the nature of gaming- and entertainment-related non-interconnected VoIP and electronic messaging, granting industry a waiver for these services is appropriate.

In addition, Microsoft encourages the Commission to grant a blanket waiver for equipment and services that are used for trials and market testing because subjecting them to the Act's requirements would impose unnecessary burdens on equipment manufacturers and service providers and could have the unintended consequence of discouraging innovation.

III. THE COMMISSION SHOULD CLARIFY THE RESPONSIBILITIES FOR MANUFACTURERS OF EQUIPMENT USED FOR ACS AND THE PROVIDERS OF SUCH SERVICES.

In the NPRM, the Commission properly recognizes that a system's multi-layered architecture raises a number of regulatory and compliance questions under the CVAA.¹⁵ To help provide much needed clarity and certainty to industry, Microsoft urges the Commission to clarify that, consistent with its statutory authority, its regulations will apply only "to the extent that" a

¹⁴ See, e.g., <http://marketplace.xbox.com/en-US/Product/The-Biggest-Loser-Ultimate-Workout/66acd000-77fe-1000-9115-d80254510859>.

¹⁵ NPRM, ¶¶ 16–18.

device makes ACS available to consumers. This important formulation, which we believe is firmly rooted in the statute and the limits of Commission authority, means that although elements of a device or service may need to be accessible because they are designed to offer ACS, Section 716 does not cover all attributes of a general or multi-purpose device.¹⁶

This formulation also means that developers of operating systems and other software that are not ACS, but that are part of the system architecture, will need to collaborate with others in the ecosystem of a device based on sound business reasons, but will not be directly responsible for complying with the Act's accessibility requirements. For example, a laptop manufacturer that builds ACS into its device will need to consult with the developer of the operating system to develop this functionality, and in that way the operating system provider will be deeply involved in solving these problems and promoting innovations in accessibility, such as making an accessibility API available to the manufacturer. But the direct regulatory obligation will remain with the device manufacturer because its equipment, and not the operating system, is ACS.

In addition, Microsoft requests that the Commission clarify that equipment manufacturers and service providers are responsible for ensuring that their device or service is accessible only to the extent that it builds ACS into the device or service. Such an approach is appropriate because manufacturers and service providers do not have control over the third-party applications that are subsequently offered through application marketplaces. For example, using a laptop computer, a consumer may download an application and may communicate via a third-

¹⁶ See Twenty-First Century Communications and Video Accessibility Act of 2010, Pub. L. No. 111-260, § 104, 124 Stat. 2751, 2758 (2010) (to be codified at 47 U.S.C. § 617(j)) (“Rule of Construction.—This section 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.”).

party's ACS services. The laptop manufacturer cannot test every existing ACS application, service or piece of assistive technology equipment (much less predict what kinds of services and equipment will be introduced in the future), and cannot exercise control over these third parties. Consequently, the rules should make clear that the third-party developer has the accessibility obligation in this instance. In contrast, if the manufacturer of the laptop computer builds electronic messaging services into the computer, then the manufacturer should be responsible for ensuring that the laptop computer is accessible because it can control how the device and the ACS service function, either through product and service design or through contractual arrangements.

IV. THE PERFORMANCE OBJECTIVES SHOULD BE MEANINGFUL, WHILE ENCOURAGING INNOVATION AND COMPETITION IN ACS.

The Commission proposes to incorporate the definitions of “accessible,” “compatibility,” and “usable” from Sections 6.3 and 7.3 of its rules into the performance objectives.

Microsoft instead urges the Commission to reference the forthcoming renewed guidelines that will be released by the Architectural and Transportation Barriers Compliance Board (the “Access Board”) under Section 508 of the Rehabilitation Act. The Access Board has deep experience with accessibility and assistive technology matters, and consistency between the Section 508 guidelines and the Section 716 performance objectives is necessary because there is likely to be significant overlap between the equipment and services that will be subject to the Section 716 requirements and those that are subject to the Section 508 criteria for government procurement. Applying different definitions and rules for the Section 716 performance objectives would only result in unnecessary confusion and possibly conflicting requirements.

Therefore, Microsoft requests that the FCC refrain from creating separate performance objectives from those contained in Section 508.

In addition, the Commission should specify that ACS manufacturers or service providers can meet the compatibility requirement by using an accessibility application programming interface (“API”) compatible with the corresponding operating system to interact with assistive technologies. Microsoft believes that compatibility is best achieved when ACS equipment manufacturers, service providers, peripheral device manufacturers, and specialized customer premises equipment manufacturers all work cooperatively and with the right incentives to design and develop their products and services to be compatible. Although achieving “compatibility” requires cooperation by at least two parties, the proposed rules exert pressure only on one of them, the ACS equipment manufacturer or service provider. Assistive technology vendors are not subject to the Act’s requirements, and, therefore, are under no pressure to cooperate with ACS manufacturers and providers. To ensure that all parties have the proper incentives to develop compatible solutions on their own and to avoid any cost shifting from assistive technology vendors to ACS equipment manufacturers and service providers, the Commission should clarify that an ACS equipment manufacturer or service provider can achieve compatibility by using an appropriate accessibility API. Otherwise, ACS equipment manufacturers and service providers would be forced to bear a disproportionate cost to make their equipment and services work with a potentially unlimited number of assistive technology configurations.

V. THE DEFINITION OF “ELECTRONIC MESSAGING SERVICE” SHOULD BE CLARIFIED.

The Commission proposes to adopt the statutory definition of “electronic messaging service” to mean “a service that provides real-time or near real-time non-voice

messages in text form between individuals over communications networks.”¹⁷ Microsoft agrees with the Commission that the statutory text and legislative history mandate excluding blog posts, online publishing, and messages posted on social networking websites from this definition, since these communications are not made in real-time or near real-time.¹⁸

In addition, as explained in comments to the Commission’s Public Notice, Microsoft encourages the Commission to exclude machine-to-machine messaging, software updates, human-to-machine communications, and machine-to-human communications from the definition of “electronic messaging services” because the phrase “between individuals” in the definition precludes the application of the accessibility requirements to communications in which no human is involved.

VI. BUSINESSES SHOULD HAVE AT LEAST TWO YEARS TO COME INTO COMPLIANCE WITH THE SECTION 716 ACCESSIBILITY REQUIREMENTS.

Microsoft asks that manufacturers and service providers that are subject to the Section 716 accessibility requirements be provided, at minimum, two years to come into compliance with the Commission’s rules, and any product or service that was manufactured¹⁹ before the new rules come into effect should not be subject to the new rules unless and until there is a complete product redesign of any features covered by the Act.

This approach is consistent with Commission precedent. Given lengthy product and service development lifecycles and the effects of the holiday purchasing season, the

¹⁷ NPRM, ¶ 33.

¹⁸ *Id.*

¹⁹ For software, the date of manufacture should be the release-to-manufacturing date for the final non-beta software. For services, the date of manufacture should be the service provider’s general availability release date of the final non-beta service. For devices, the date of manufacture should be a manufacturer’s designated retail availability date for the device.

Commission on a number of occasions has been willing to provide delayed implementation periods for rules affecting consumer equipment and service offerings. For example, television manufacturers were provided approximately two years to build DTV closed captioning display functionality into their DTV devices.²⁰ Telephone manufacturers had at least one year to implement many of the Commission’s hearing aid compatibility requirements.²¹ Manufacturers would have had over a year to come into compliance with the Commission’s “broadcast flag” rules.²² And Wireless E911 location accuracy benchmarks were based on a multi-year compliance period, with the earliest benchmark not taking effect until at least one year following the effective date of the Commission’s order adopting the final rules.²³

In addition, a minimal two-year transition period provides the Commission adequate time to rule on waiver requests that will be filed once final rules are adopted. Otherwise, businesses that have pending waiver requests but that are facing looming deadlines will have to choose between undertaking costly and unnecessary steps to come into compliance, delaying the product launch, or risking enforcement actions should their waiver requests be denied.

²⁰ In the Matter of Closed Captioning Requirements for Digital Television Receivers, *Report and Order*, 15 FCC Rcd. 16788 (2000).

²¹ In the Matter of Amendment of the Commission’s Rules Governing Hearing Aid-Compatible Mobile Handsets, *Policy Statement and Second Report and Order and Further Notice of Proposed Rulemaking*, 25 FCC Rcd. 11167 (2010).

²² In the Matter of Digital Broadcast Content Protection, *Report and Order and Further Notice of Proposed Rulemaking*, 18 FCC Rcd. 23550, (2003) (requiring manufacturers to meet the Demodulator Product compliance and robustness rules commencing with the July 1, 2005 product cycle). These rules were subsequently invalidated by the D.C. Circuit Court of Appeals.

²³ In the Matter of Wireless E911 Location Accuracy Requirements, *Second Report and Order*, 25 FCC Rcd. 18909 (2010).

Although the Internet enables some manufacturers and service providers to offer consumers periodic updates that improve the consumer experience (e.g., security updates and service packs), such updates should not trigger Section 716's requirements for products and services that were offered before the new rules took effect. To require otherwise would discourage companies from providing critical security patches and service updates, which would harm all consumers, including those who are disabled.

* * *

Given Microsoft's longstanding commitment to accessibility and our knowledge of the challenges facing the industry, we hope that these comments are helpful as the Commission works to complete its implementation of the CVAA's requirements. We will continue to work with the Commission, representatives of the disability community, and other industry leaders to adopt realistic and meaningful provisions for increasing accessibility for people with disabilities.

Respectfully submitted,



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April 25, 2011