

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, DC 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
	)	
Accessible Mobile Phone Options for People Who Are Blind, Deaf-Blind, or Have Low Vision	)	CG Docket No. 10-145
	)	

**COMMENTS OF THE ENTERTAINMENT SOFTWARE ASSOCIATION**

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**I. SUMMARY AND INTRODUCTION.**

The Entertainment Software Association (“ESA”)<sup>1</sup> submits these comments in response to the above-captioned Notice of Proposed Rulemaking (the “Notice”),<sup>2</sup> which is intended to implement the Twenty-First Century Communications and Video Accessibility Act of 2010 (the “CVAA”).<sup>3</sup> The ESA supports the CVAA’s goal of enabling individuals with disabilities to access advanced communications services (“ACS”). In drafting the CVAA, however, Congress also sought to encourage continued innovation in the marketplace.<sup>4</sup> To this end, Congress

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<sup>1</sup> The ESA is a U.S. trade association dedicated to serving companies that publish computer and video games for video game consoles, handheld devices, personal computers, and the Internet. Among other matters, the ESA developed the Entertainment Software Rating Board, which maintains the video game industry’s respected and voluntary parental ratings system. *See, e.g., Marketing Violent Entertainment to Children: A Sixth Follow-up Review of Industry Practices in the Motion Picture, Music Recording & Electronic Game Industries*, at 23-30 (FTC 2009). The ESA also has represented the video game industry in various litigation matters.

<sup>2</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*, Notice of Proposed Rulemaking, 26 FCC Rcd 3133 (2011).

<sup>3</sup> Pub. L. No. 111-260, 124 Stat. 2751 (2010) (as codified in various sections of 47 U.S.C.).

<sup>4</sup> *See* 156 Cong. Rec. H6005 (daily ed. July 26, 2010) (statement of Rep. Stearns) (“We need to encourage innovation to flourish and, my colleagues, this bill does that.”).

established express limits on the scope of the CVAA and “provide[d] the Commission with greater flexibility when it comes to enforcing the accessibility requirement, permitting the Commission to waive this requirement if, in its judgment, a device incidentally provides access to ACS or was designed primarily for another purpose.”<sup>5</sup>

Consistent with this statutory language and Congressional intent, the Commission proposed to “focus [its waiver] inquiry on determining whether [an] offering is designed primarily for purposes other than using ACS.”<sup>6</sup> The ESA supports this proposal because it properly focuses on how an offering “is designed,” rather than how a particular consumer could conceivably use a product.<sup>7</sup> To be practical, and to permit good faith compliance efforts, a manufacturer or provider must know its accessibility obligations before making a product or service available, and thus prior to any consumer use. Accordingly, waiver criteria must focus on information known to companies during the developmental and manufacturing processes.

Moreover, as required by the CVAA, the Commission should not limit its broad authority to grant multi-purpose waiver requests, including waivers for classes of equipment or services. The Commission also should set a deadline as of which a waiver petition that has not yet been acted upon is “deemed” granted so that administrative delay does not undermine the statutory purpose of such waivers, and adopt other sensible waiver procedures.

## **II. CONGRESS BALANCED MULTIPLE INTERESTS BY LIMITING THE CVAA’S SCOPE AND ESTABLISHING BROAD WAIVER AUTHORITY.**

The CVAA will require changes to thousands of individual devices and services in order to better serve individuals with disabilities.<sup>8</sup> The large number of offerings expressly subjected

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<sup>5</sup> S. Rep. No. 111-386, at 2 (2010) (“Senate Report”). *See* 47 U.S.C. §§ 617(h) (emphasis added).

<sup>6</sup> *See* Notice, 26 FCC Rcd at 3153, ¶ 53.

<sup>7</sup> *See id.* at 3154, ¶ 54.

<sup>8</sup> *Cf.* Senate Report at 1 (“Since [1996], the communications marketplace has undergone a fundamental transformation, driven by growth in broadband. Internet-based and digital technologies are now pervasive, offering innovative and exciting ways to communicate and share information.”)

to the new accessibility requirements greatly complicates reasonable implementation and enforcement of the CVAA. However, Congress did not intend to apply the CVAA to all consumer electronics and online services by also subjecting to the CVAA's requirements offerings designed primarily for non-ACS purposes or otherwise beyond the scope of the CVAA.

The specific terms of the CVAA define its intended scope. For instance, the CVAA is limited only to “equipment used for advanced communications services.”<sup>9</sup> Three of the four categories defined to be “advanced communications services” include express references to “communications,” not other purposes.<sup>10</sup> The fourth narrows the CVAA to apply only to “messages . . . between individuals,” which, by definition, excludes machine-to-machine communications or automatic software updates, as well as non-communicative functions.<sup>11</sup>

Similarly, the CVAA's express inclusion of the modifier “interoperable” limits the types of video-conferencing services subject to its requirements.<sup>12</sup> Contrary to the suggestion made by certain commenters that the inclusion of the word was meant to impose new obligations on all video-conferencing services,<sup>13</sup> the Commission cannot ignore a statutory term that limits the scope of video-conferencing services subject to the CVAA. Merely because some video-conferencing services currently lack capabilities necessary to trigger CVAA compliance does not mean that the Commission may expand the statutory definition to reach those services. In this respect, the Commission should not subject a non-interoperable video chat feature to the CVAA's accessibility requirements, especially when this feature is merely incidental to the primary purpose of a device or service.

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<sup>9</sup> See, e.g., 47 U.S.C. § 617(e)(1)(A) (emphasis added); Notice, 26 FCC Rcd at 3143, ¶ 22.

<sup>10</sup> See 47 U.S.C. §§ 153(19), (25), (27) & (36).

<sup>11</sup> See Notice, 26 FCC Rcd at 3146-47, ¶ 34.

<sup>12</sup> See 47 U.S.C. §§ 153(27).

<sup>13</sup> See Notice, 26 FCC Rcd at 3151, ¶ 44.

The CVAA also specifies when a manufacturer or provider should no longer be subject to its mandates. With sufficient effort and ingenuity, ACS functionality may be incorporated into almost any electronic device. However, as the Notice suggests, a company should be responsible only for those capabilities it creates.<sup>14</sup> Equipment with no ACS functionality should not subsequently become subject to the CVAA because a third party adds hardware or software.

In addition to these and other express limits within the text of the CVAA, the Commission must fully implement those provisions designed to carve out ancillary or incidental offerings from the CVAA's various requirements.<sup>15</sup> Innovation requires a reasonable degree of regulatory certainty, as well as a certain level of regulatory forbearance.<sup>16</sup> Companies may hesitate to introduce innovative new devices and services, or to include new features in existing products, if they cannot determine with reasonable certainty their regulatory obligations.<sup>17</sup> Although prospective guidelines may offer some assistance to the industry,<sup>18</sup> guidelines typically are backward-looking, and cannot rectify this disincentive to innovate. Without reasonable exemptions, waivers, or other regulatory forbearance for products or services with only ancillary or incidental ACS functionality, companies may be compelled to exclude ACS features in equipment or services designed and purchased primarily for other capabilities rather than face significant new costs or potentially violate ambiguous regulations.

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<sup>14</sup> See *id.* at 3143, ¶¶ 23-24.

<sup>15</sup> *Id.* at 3145-46, ¶ 32. For examples of other limits, see 47 U.S.C. § 617(j), in which Congress included a generally applicable rule of statutory construction that, even among devices or services subject to the CVAA, not "every feature or function" must be made "accessible for every disability."

<sup>16</sup> Language from the Senate and the House of Representatives underscores that the CVAA should not adversely affect innovation. See, e.g., Senate Report at 8 (noting that ". . . the Commission may find that to promote technological innovation the accessibility requirements need not apply"); H. Rep. No. 111-563, at 26 (2010) ("House Report") (same). Cf. *Video Description of Video Programming*, Report and Order, 15 FCC Rcd 15230, 15234 (2000) (forbearing from imposing video description obligations on innovative digital programming), *vacated on other grounds*, *MPAA v. FCC*, 309 F.3d 796 (D.C. Cir. 2002).

<sup>17</sup> The White House also has recognized innovation as a critical ingredient to the recovery and growth of the U.S. economy. See, e.g., Department of Commerce, Request for Comments on the Strategy for American Innovation, 76 Fed. Reg. 6395 (Feb. 4, 2011) ("The Administration's Innovation Strategy . . . explains the essential role of innovation in American prosperity, the central importance of the private sector as the engine of innovation, and the critical, targeted roles of government in supporting our innovation system.").

<sup>18</sup> See 47 U.S.C. § 716(e)(2).

Congress has agreed that such waivers or forbearance would be appropriate with respect to the CVAA. For example, the Senate Report authorizes the Commission to determine that the TRS contribution for certain ACS providers “could be zero or a de minimis amount.”<sup>19</sup> The Commission also has recognized in other contexts that overbroad regulation or enforcement, even when arguably pursuant to legislative mandates, may have effects on innovative technology that are detrimental to the public interest. For instance, the Media Bureau recently granted a waiver of one of the Commission’s Part 15 equipment regulations, which was based on the All Channel Receiver Act of 1962, because the waiver “would facilitate the introduction of television receivers with Mobile DTV tuners” and related technological innovation.<sup>20</sup> Although the equipment was subject to the relevant regulation under established Commission policies, the Media Bureau granted the waiver because it “facilitat[ed] the rapid deployment of innovative mobile DTV products and services” and because a failure to grant the waiver would have resulted in devices that were “less attractive” to consumers and “require[d] greater investment in research, development, and design of complex chipsets and MDTV products” that would delay “consumers’ access to the products by at least a year” and “increas[e] their final cost significantly.”<sup>21</sup>

The Commission’s own accessibility precedent confirms that it should exercise its broad authority to issue waivers or otherwise exclude certain products or services from the CVAA’s requirements. Pursuant to Section 713 of the Communications Act,<sup>22</sup> the Commission imposed closed captioning obligations on video programming distributors and equipment manufacturers more than a decade ago. These obligations have made countless hours of programming

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<sup>19</sup> Senate Report at 6.

<sup>20</sup> *Dell Inc. and LG Electronics USA, Inc., Request for Waiver of Section 15.117 of the Commission’s Rules*, Order, 25 FCC Rcd 9172, 9172, ¶ 1 (2010).

<sup>21</sup> *Id.* at 9176-77, ¶¶ 8, 12 (citations omitted).

<sup>22</sup> *See* 47 U.S.C. §§613(b)-(e) (2009) (“Section 713”).

accessible to persons with hearing disabilities, notwithstanding multiple waivers or exemptions (including categorical, self-implementing, and permanent exemptions), an eight-year or longer transition timeline, and sensible waiver procedures.<sup>23</sup> For the most part, these exemptions, many of which were not specifically mandated by statute, apply where additional obligations might have unforeseen consequences or a disproportionately negative impact.<sup>24</sup> The Commission also concluded that it had the authority to exclude certain programming – notably, short-form advertising – that may have been within the scope of Section 713 from the captioning requirements because this programming was largely ancillary to the primary focus of the underlying legislation, and because the “logistics” of any such requirement could outweigh the benefits.<sup>25</sup> In accordance with such precedent, the Commission should adopt similarly broad forbearance or waiver policies with respect to the CVAA.

### **III. THE CVAA DIRECTS THE FCC TO ACT ON WAIVER REQUESTS FOR EQUIPMENT OR SERVICES “DESIGNED FOR MULTIPLE PURPOSES.”**

#### **A. Waiver Eligibility Should Focus on an Offering’s Design, Not Its Speculative Use by Some Hypothetical Consumer.**

New Section 716(h) provides the Commission with broad authority to grant waivers for any feature or function of equipment used to provide or access ACS, for any class of such equipment, for any provider of ACS, or for any class of such services that is (a) capable of accessing ACS, but (b) designed primarily for purposes other than using ACS.<sup>26</sup> Consistent with

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<sup>23</sup> See 47 C.F.R. § 79.1.

<sup>24</sup> See, e.g., 47 C.F.R. § 79.1(d) (categorically exempting video programming in languages other than Spanish and English and interstitial programming not longer than 10 minutes).

<sup>25</sup> See *Closed Captioning and Video Description, Implementation of Section 305 of the Telecommunications Act of 1996 et al.*, Report and Order, 13 FCC Rcd 3272, 3345-46, ¶ 152 (1997) (“*Closed Captioning Order*”) (“We conclude that commercials of five minutes’ duration or less are not included in the definition of programming . . . [as it is] generally regarded as ancillary to the main programming content which is the focus of Section 713.”), *aff’d on reconsideration*, 13 FCC Rcd 1997 (1998).

<sup>26</sup> 47 U.S.C. § 617(h)(1).

this language, the Commission has proposed to base waiver eligibility on whether a product or service “is designed primarily for purposes other than using ACS.”<sup>27</sup>

The Commission has not indicated that these statutory terms were intended to mean anything other than what they are commonly understood to mean. “Primarily” means “chiefly” or “for the most part,” and “designed” is the past tense of the verb meaning “to create, fashion, execute, or construct according to plan.”<sup>28</sup> The CVAA’s plain language therefore demonstrates that a product or service with some ACS capability is eligible for a multi-purpose waiver so long as it was designed primarily for non-ACS purposes.

The ESA agrees with the Commission and others that waiver eligibility must evaluate the “core” purpose of a product or service.<sup>29</sup> That a product or game designed primarily for gameplay may have rehabilitative or educational uses should not disqualify that product or game from a waiver.<sup>30</sup> Under the CVAA, the Commission’s role is not to determine whether a product could potentially be used for a particular ACS purpose by an individual consumer, but to assess whether the product was “designed primarily” to deliver ACS. Accordingly, to the extent a product’s intended primary purpose is something other than ACS (*e.g.*, entertainment, education, or rehabilitation), that purpose should be sufficient to establish waiver eligibility.

The ESA recognizes that many products and services have several non-primary purposes, or no predominant or central purpose. In these cases, the only issue should be whether a product’s non-ACS purposes, as designed, are sufficiently important that its ACS capability is

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<sup>27</sup> See Notice, 26 FCC Rcd at 3153, ¶ 53.

<sup>28</sup> See <http://www.merriam-webster.com/dictionary/primarily>; <http://www.merriam-webster.com/dictionary/design> (last accessed Apr. 7, 2011).

<sup>29</sup> See Notice, 26 FCC Rcd at 3153-54, ¶ 54.

<sup>30</sup> *Id.*

not its dominant or primary purpose. To this end, the Commission should consider the following additional factors in determining an offering's primary purpose(s):<sup>31</sup>

1. Whether the ACS functionality intends to enhance another feature or purpose;
2. Whether a consumer without access to a communications network would still have reason to purchase the offering;
3. The number of features or purposes that do not involve or require ACS;
4. How a manufacturer or publisher intends to market an offering;
5. Technical factors, including the processing power or bandwidth used to deliver ACS vis-à-vis other features; and
6. Whether there are similar offerings that already have been deemed eligible for a multi-purpose waiver.

With respect to the first factor, if ACS features are subordinate or incidental to other purposes, then ACS capability clearly is not the primary purpose of a product or service. For example, a messaging capability in an online multiplayer game often serves an important role in furthering gameplay. Among other things, in-game chat assists players in coordinating strategy, obtaining helpful information, and trading virtual items to boost game performance. This context supports the conclusion that the primary purpose of the offering, as designed, is a game, not a communications service. That players may use ACS in playing a game does not change the fact that the primary element of the offering is the game itself.

The second and third factors analyze whether a consumer without access to ACS networks, or who chooses not to utilize ACS capability, would have reason to buy the product or service. Importantly, these factors do not focus on why an individual may use a product or service, which, as discussed below, should not be considered with respect to waiver eligibility. Rather, these factors focus on whether a product or service, based on its design, retains significant utility even without ACS access. For instance, handheld game devices still offer

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<sup>31</sup> See *id.* at 3153-54, ¶¶ 54-55 (discussing several of these factors).

discernible value even if they cannot access an ACS network. Moreover, neither factor depends solely on whether a product's ACS function "can be operated apart from" other aspects of the device.<sup>32</sup> That a consumer is capable of using an offering for text chats independent of any gameplay is not sufficient reason to deny a waiver when the primary purpose of the offering remains non-ACS features. Similarly, a product designed to offer ten significant non-ACS capabilities should not risk waiver eligibility simply because it has a single feature capable of independent ACS access.

The fourth and fifth factors offer objective evidence as to what a manufacturer or publisher considers the primary purpose(s) of the device or service. For instance, a marketing campaign for a new product or service is likely to focus upon the most significant or attractive aspects of an offering's design. Even though the marketing for a product or service may not be dispositive, it certainly may be relevant to the multi-purpose waiver analysis.<sup>33</sup> Technical comparisons, including processing power or bandwidth, also may illustrate the relevant importance of a particular feature to the offering's design.

Finally, in order to promote consistency among competing products or services and Commission enforcement, a manufacturer or publisher should be permitted to rely on past multi-purpose waiver precedent to establish waiver eligibility for its own product or service. As one example, because game devices and services are a part of a defined product ecosystem or category of hardware, software, and associated services, and share the common core purpose of gameplay, similar game equipment or services are likely to implicate similar waiver considerations. A factor that takes into account what the Commission has done with respect to a

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<sup>32</sup> *See id.* at 3154, ¶ 55.

<sup>33</sup> *See id.* at 3153-54, ¶ 54. Although individual ads may target a particular market segment or highlight a particular feature, the aggregate features should be considered in the determination of whether a product or service has a predominant or central purpose.

prior request from a competing home game console or an online game is, among other benefits, likely to facilitate Commission review and reduce inconsistencies in waiver determinations.

**B. Other CVAA Provisions Affirm That Waiver Eligibility Should Focus on the Design of a Product or Service.**

Multiple provisions in the CVAA demonstrate that the Commission should base waiver decisions upon information available to a manufacturer or provider, and independent of a particular individual's speculative future use. First, for a waiver request to be meaningful, compliance obligations must be known during the design phase of the product or service, not after the offering has entered the stream of commerce. As a legal matter, because the CVAA applies the moment a product is distributed into commerce, a company that subsequently learns that it must include accessibility features could be in violation of the CVAA before any consumer even uses the product.<sup>34</sup> As a practical matter, game equipment, products, and services that incorporate chat or other ancillary communications features typically do so during the design stage, which is one of the earliest stages in the multi-step development process for these products and services.<sup>35</sup> For example, with home game consoles, any significant hardware changes typically must occur no later than 18 months prior to launch if the product is to hit its launch window. Missing the projected launch window can have significant consequences. It could cause a company to forfeit being first to market with an innovative new technology or overshoot a key holiday buying season and lose out on potentially millions of dollars in early sales. As a consequence, any factors that take into account how a particular consumer actually uses an offering cannot be assessed by the manufacturer, publisher, provider, or Commission in time for a waiver to serve its intended purpose.

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<sup>34</sup> See 47 U.S.C. § 617(a) (applying requirements to equipment “manufactured after the effective date of the regulations” and “distribute[d] in interstate commerce”).

<sup>35</sup> As a general matter, a new home console system requires at least five years to go from concept to launch. A massively multiplayer online game (“MMO”) may involve several years of development before it is published, and games for home console systems may take a year or more to develop.

Second, because the CVAA expressly authorizes a manufacturer or provider to petition for a waiver, all information necessary to that waiver should be readily available to a manufacturer or provider at the time of its petition, which may need to be years before the offering is available for consumer use. Otherwise, a company could effectively be deprived of its statutory right to seek a waiver.<sup>36</sup>

Third, concentrating on an individual's use is contrary to the plain language and intent of the CVAA, which focuses on how an offering is primarily "designed," not used. That certain consumers may separately use the ACS feature of a device or service primarily designed, intended, and purchased for gameplay should not preclude waiver eligibility that, by statute, must be made available to offerings "designed primarily for purposes other than using ACS."<sup>37</sup> How a particular individual may use a product is speculative, subjective, and variable. Focusing upon an individual's use would lead to an impractical waiver standard incapable of creating clear precedent for future reliance by the Commission, manufacturers, or providers. A use that may vary from person to person, as well as from day to day, should not be the basis for a waiver that must be valid for a sufficient period of time to be meaningful.

Lastly, focusing on available, objective information is consistent with the repeated focus on the manufacturer or provider in other parts of the CVAA, including:<sup>38</sup>

- The small-entity exemption, which focuses on the company's size;
- The customized equipment or service carve-out, which focuses on items designed for specific customers, not the general public; and
- What constitutes "achievable," which addresses the nature of a product, the technical or economic impact on a manufacturer or provider, and other products offered by the manufacturer or provider.

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<sup>36</sup> See 47 U.S.C. §§ 617(h)(1) (authorizing "a manufacturer or provider" to petition for waiver).

<sup>37</sup> *Id.*

<sup>38</sup> See, e.g., 47 U.S.C. §§ 617(h)(2), (i) & (g); Notice, 26 FCC Rcd at 3152, ¶ 48 (summarizing House Report on customized-service exemption); *id.* at 3156, ¶ 61 (summarizing House Report on small-entity exemption); *id.* at 3158, ¶ 68 (summarizing statute on factors relating to "achievable").

These provisions demonstrate that Congress expected waivers to be granted, and accessibility features developed, based upon information from a manufacturer or provider. Accordingly, the Commission should determine multi-purpose waiver eligibility based on similar information.

#### **IV. A SENSIBLE APPROACH TO WAIVERS WILL PROTECT INNOVATION, CONSUMERS, AND FCC RESOURCES.**

##### **A. Multi-Purpose Waivers Will Protect Consumers and Innovation.**

The CVAA grants the Commission broad multi-purpose waiver authority in part “to promote technological innovation.”<sup>39</sup> Forward-looking waivers contribute to regulatory certainty at the critical design and investment phase, which reduces what otherwise could prove to be significant impediments to innovation.<sup>40</sup> Although the text of the CVAA is clear, its legislative history further demonstrates that Congress intended the Commission to waive the accessibility requirements “if, in its judgment, a device incidentally provides access to ACS or was designed primarily for another purpose.”<sup>41</sup> This language underscores that the Commission should not limit multi-purpose waivers only to those products or services that provide purely incidental ACS access. Congress drafted the CVAA broadly in order to authorize waivers for products or services with ACS capabilities even beyond what may be deemed incidental, so long as ACS functionality is not a product’s primary purpose.

Other considerations also support an inclusive forward-looking waiver policy. First, the risk of regulatory uncertainty could compel manufacturers of multi-purpose products to omit one or more proposed functions, and thereby hinder the development of new services.<sup>42</sup> Sound public policy should not discourage manufacturers or online service providers from including

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<sup>39</sup> *See, e.g.*, House Report at 26.

<sup>40</sup> *See, e.g.*, Notice, 26 FCC Rcd at 3283 (Statement of Chairman Genachowski) (“We approach this issue in the same spirit that we try to approach all issues: in an effort to promote predictability and reduce uncertainty; taking into account the benefits and costs of our actions and using the best, most innovative and least burdensome tools for achieving the regulatory ends set to us by Congress.”).

<sup>41</sup> Senate Report at 3 (emphasis added).

<sup>42</sup> *See, e.g., id.* at 1.

ACS options. Second, multi-purpose products or services generally are more technically complex than a single-purpose offering, and therefore face greater difficulties complying with new regulatory obligations without negatively affecting other functions. Third, because many multi-purpose products and services are marketed globally, the CVAA's requirements could impact the availability of these offerings to U.S. consumers, even though most, if not all, of these consumers desire the product or service primarily for features unrelated to ACS. Fourth, to the extent the Commission decides to view incidental ACS features as subject to the CVAA notwithstanding Commission precedent with respect to closed captioning and short-form advertising,<sup>43</sup> a broad waiver policy is the Commission's best opportunity to fulfill the CVAA's intent to limit its effects on multi-purpose products.

Finally, the Commission should not unreasonably or prematurely narrow its waiver authority during this initial stage of CVAA implementation. As noted by the Commission with respect to safe harbors, "it is too early in the implementation of CVAA to make informed judgments about whether" any sort of multi-purpose waivers, or other type of regulatory relief, should be categorically rejected.<sup>44</sup>

#### **B. Failure to Permit Class Waivers Could Overwhelm FCC Resources.**

Many consumer devices and services already access the Internet, and the relentless pace of innovation will continue. Roughly five billion devices connect to the Internet today; by 2020, that figure could hit 50 billion.<sup>45</sup> Under the CVAA, the Commission must "issue prospective guidelines" and clarify other aspects of the new accessibility regulations with respect to all

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<sup>43</sup> See *supra* note 25.

<sup>44</sup> See Notice, 26 FCC Rcd at 3175, ¶ 113.

<sup>45</sup> Compare "Internet Devices About to Pass the 5 Billion Milestone – IMS Research," *BusinessWire* (Aug. 16, 2010) (available at <http://www.businesswire.com/news/home/20100816005081/en/Internet-Connected-Devices-Pass-5-Billion-Milestone>) with Ericsson Press Release, "CEO to Shareholders: 50 billion connections 2020" (Apr. 13, 2010) (available at <http://www.ericsson.com/thecompany/press/releases/2010/04/1403231>).

covered equipment and services within relatively tight deadlines.<sup>46</sup> Because of the many differences among products and services subject to the CVAA, the Commission likely will have to develop and publish dozens, or even hundreds, of prospective guidelines. It also likely will have to consider dozens of waiver requests and complaints during its initial implementation of the CVAA, many of which may need to be decided within short timeframes.

Waivers for classes of multi-purpose devices or services will permit the Commission to focus its limited resources during the initial CVAA implementation.<sup>47</sup> By waiving regulations with respect to an eligible class of devices or services that are outside the CVAA's intended scope, the Commission would reduce the sheer number of devices and services that otherwise would require individual scrutiny. In doing so, the Commission would not compel unnecessary governmental and private expenditures in order to reach what should be identical outcomes with respect to waiver eligibility.

Class waivers also would serve the public interest by creating a level regulatory playing field among similar products or services. Individual waivers introduce additional competitive challenges because companies often seek to gain advantages through the regulatory process by, for instance, being the first to bring a particular product type to market. Through a single waiver for an entire class of products or services, competitors could simultaneously innovate and market products under identical regulatory strictures, and thereby increase competition and choice in furtherance of the public interest.

The suggestion made by some commenters that “blanket waivers are never appropriate” directly conflicts with the express statutory language, which authorizes waivers “for any class”

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<sup>46</sup> See 47 U.S.C. §617(e)(2); *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*, Order, DA 11-595, ¶ 3 (WTB, rel. Apr. 4, 2011) (“Congress mandated that the Commission promulgate regulations as necessary to implement Section 104 of the CVAA within one year of the legislation’s date of enactment – October 8, 2011.”)

<sup>47</sup> See Notice, 26 FCC Rcd at 3155-56, ¶¶ 59-60.

of equipment or services.<sup>48</sup> The suggestion also ignores the CVAA’s other categorical carve-outs, including those for small entities, customized equipment or services, and live or near-live video programming.<sup>49</sup> Further, it is contrary to the Commission’s accessibility precedent, in which the Commission categorically exempted more than a dozen types of video programming from its closed captioning regulation.<sup>50</sup>

Similarly, claims that class or other multi-purpose waivers must be time-limited have no basis in the CVAA or Commission precedent.<sup>51</sup> As with other sorts of multi-purpose waivers, the Commission should not prematurely restrict its own waiver authority, especially at this early stage of the CVAA implementation process.<sup>52</sup>

**V. THE WAIVER PROCESS MUST BE EFFICIENT AND FLEXIBLE, AND MAINTAIN APPROPRIATE PROTECTIONS.**

**A. The FCC Has Authority to Develop a Streamlined Waiver Process With a Set Deadline.**

The failure to promptly act on a waiver petition frustrates the very purpose of the requested waiver, and thus the intent of the CVAA. Untimely action inevitably would delay, and could deny, the availability of innovative new devices or services to the public, as companies decide to drop or re-shuffle features in order to avoid further regulatory issues. As a result, a multi-purpose waiver request for which the Commission has not issued a written opinion within a reasonable period should be automatically granted.

In the Notice, the Commission questions whether it has sufficient authority to “deem” a waiver granted because of, for example, an affirmative failure to act on a waiver petition within a

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<sup>48</sup> Compare *id.* at 3155, ¶ 59, with 47 U.S.C. §617(h)(1).

<sup>49</sup> See 47 U.S.C. §§ 617(h)(2), (i) & § 613(f)(2)(E).

<sup>50</sup> See, e.g., 47 C.F.R. § 79.1(d) (categorically exempting, among other forms of video programming, programming in languages other than Spanish and English and interstitial programming not longer than 10 minutes).

<sup>51</sup> See Notice, 26 FCC Rcd at 3156, ¶ 60.

<sup>52</sup> See *supra* text accompanying note 44.

particular time period.<sup>53</sup> The Commission’s actions with respect to its closed captioning requirements are again instructive. Section 713(d) authorized the Commission to exempt “programs, classes of programs, or services for which the Commission has determined that the provision of closed captioning would be economically burdensome to the provider or owner of such programming.”<sup>54</sup> Pursuant to this authority, the Commission created more than a dozen self-implementing exemptions that require no prior review by, or even notice to, the Commission.<sup>55</sup> The CVAA’s similar language for categorical waivers evidences the Commission’s authority to deem a filed waiver petition granted through inaction. If the Commission has sufficient authority to automatically grant closed captioning exemptions even without a request being made, it certainly has the authority to automatically grant a waiver for which it had a reasonable opportunity to consider a written petition.<sup>56</sup>

Extensive practical experience with closed captioning waiver requests underscores the importance of adopting a formal set-deadline or “shot clock” policy with respect to its consideration of CVAA waiver requests. According to the relevant docket for “undue burden” captioning waivers, the Commission has not issued decisions with respect to hundreds of specific captioning waiver requests, some of which were filed years ago.<sup>57</sup> This backlog may be why Congress, in the CVAA, created a mandatory six-month shot clock with respect to captioning

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<sup>53</sup> Notice, 26 FCC Rcd at 3155, ¶ 57.

<sup>54</sup> See 47 U.S.C. § 613 (2005).

<sup>55</sup> See, e.g., *Closed Captioning Order*, 13 FCC Rcd at 3342, ¶ 143.

<sup>56</sup> Similarly, the FCC deemed the mere filing of a closed captioning waiver request based upon “undue burden” to create an automatic exemption during the pendency of the request, although Section 713 did not expressly authorize it to do so at that time. The CVAA expressly incorporates this now-established policy without any suggestion that the initial FCC policy was not within its authority. See, e.g., Senate Report at 14 (regarding Section 202(c).) Because a temporary exemption pending Commission action would have no practical purpose for products and services that must either be delayed or risk costly future recalls and/or fines, a similar rationale supports a fixed end date for Commission action on multi-purpose waiver requests.

<sup>57</sup> See MB Docket No. 06-181 (available <http://fjallfoss.fcc.gov/ecfs/>) (listing hundreds of undue burden waiver requests for which no decision appears in the docket) (last accessed Apr. 22, 2011).

and video description waiver requests.<sup>58</sup> The Commission itself has considered “shot-clock” requirements in other contexts in an effort to provide regulatory certainty. For example, although not yet in effect, the Commission recently imposed a shot clock upon state and local authorities.<sup>59</sup> Here, there can be no question as to Commission authority to impose a deadline procedure because the “shot clock” would simply apply to the Commission itself, rather than third parties.

**B. The FCC Must Protect Proprietary Information and Preserve Flexibility for Multi-Purpose Waivers Petitions.**

The ESA strongly agrees with the Commission and others that parties filing for waivers be permitted to request confidential treatment.<sup>60</sup> Competitors and consumers are highly interested in the projected features or capabilities of not-yet-announced or released game industry products and services. Because these products and services depend on trade secrets and innovative technologies, there is particular value in maintaining secrecy prior to launch.

The ESA also agrees that eligible parties should be permitted to request waivers at any time, including prospectively. Nothing in the CVAA suggests that a waiver request must be submitted by a certain period in time, or that the relevant product or service must already have entered the stream of commerce. Indeed, without the ability to obtain a prospective waiver, a company would risk non-compliance despite the fact that it had reasonably concluded, based on statute, regulation or precedent, that its product or service clearly was eligible for a multi-

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<sup>58</sup> See 47 U.S.C. § 613(d)(3) (adopting a six-month period for Commission action, but not stating what happens if the Commission fails to act.)

<sup>59</sup> See *Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review and to Preempt Under Section 253 State and Local Ordinances that Classify All Wireless Siting Proposals as Requiring a Variance*, 24 FCC Rcd 13994 (2009), *recon. denied*, 5 FCC Rcd 11157 (2010), *appeal sub nom. pending*, *City of Arlington v. FCC*, \_\_\_ F.3d \_\_\_, Nos. 10-60039 & 10-60805 (5th Cir. 2011).

<sup>60</sup> See Notice, 26 FCC Rcd at 3154-55, ¶ 56.

purpose waiver.<sup>61</sup> In order to promote innovation and further the public interest, the Commission should not adopt arbitrary limitations with respect to when waivers may be requested.

## **VI. CONCLUSION.**

The ESA respectfully requests that the Commission adopt the foregoing, for the reasons set forth herein and in prior filings by the ESA in any of these dockets, which are hereby incorporated by reference.

Respectfully submitted,

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<sup>61</sup> See, e.g., *supra* text accompanying note 34.