

**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 T-MOBILE USA, INC.

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COMMENTS OF T-MOBILE USA, INC.

T-Mobile respectfully submits comments on the above-captioned comprehensive notice of proposed rulemaking (the “NPRM”)¹ seeking to implement Sections 716 and 717 of the Communications Act of 1934, as amended (the “Act”).² These sections were added to the Act by Title I of the Twenty-First Century Communications and Video Accessibility Act of 2010 (the “CVAA”).³

¹ See *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) (“NPRM”).

² See 47 U.S.C. §§ 617, 618.

³ See *Twenty-First Century Communications and Video Accessibility Act of 2010*, Pub. L. No. 111-260, 124 Stat. 2751 (as amended by Pub. L. No. 111-265, 124 Stat. 2795 (2010)) (“CVAA”).

SUMMARY AND INTRODUCTION

Development of accessible solutions for products and services is occurring at a rapid pace. As the Commission implements the CVAA provisions, it should work to expand accessibility of products and services while promoting investment and market innovation. In these comments, T-Mobile endeavors to promote both of these objectives.

Section 716 requires providers of “advanced communications services” (“ACS”) and manufacturers of equipment used for ACS to make their services and products accessible to people with disabilities “if doing so is achievable.”⁴ Section 717 establishes related recordkeeping and enforcement requirements.⁵ These sections, and other provisions of the CVAA, also expressly provide covered service providers and manufacturers flexibility in complying with their provisions. This flexibility is designed to permit industry to continue to develop innovative forms of ACS while achieving accessibility.

T-Mobile understands the urgency with which the Commission is approaching this proceeding. The CVAA requires the Commission to adopt rules implementing Sections 716 and 717 by October 8, 2011,⁶ and as the Commission recognizes, the accessibility of ACS is an important policy goal.⁷ However, providing industry with flexibility to comply with these sections is also consistent with the CVAA and will help promote innovation and the growth and deployment of mobile broadband services for all Americans, another important policy goal.

⁴ See *Twenty-First Century Communications and Video Accessibility Act of 2010*, S. Rep. 111-386 at 7 (2010) (“Senate Report”).

⁵ See 47 U.S.C. § 618.

⁶ See *id.* § 617(e)(1).

⁷ See NPRM, 26 FCC Rcd at 3135.

Therefore, these comments discuss how the Commission’s implementation of Section 716 should accommodate flexibility and business innovation while promoting accessibility. To this end, the Commission should affirm that its definitions, especially of the various forms of ACS, are limited in scope. Section 716’s rule of construction – which provides that service providers are not required “to make every feature and function of every device or service accessible for every disability” – should be applied consistently. Separately, the “achievability” standard must be applied on a company-specific basis, and the Commission should permit third-party solutions as stated in the CVAA.

In addition, rules implementing Section 716, especially Sections 716(d) and (e)(1)(b), must ensure network security, reliability, and survivability. Performance objectives should be general and outcome-oriented. The new rules should provide that mainstream devices and software are among the peripheral devices used for accessibility solutions. And, the new rules must preserve the CVAA’s third-party liability and proprietary technology limitations. The Commission should uphold flexibility in administering the recordkeeping and enforcement provisions of Section 717. Lastly, industry forums and working groups should take the near-term lead in addressing accessibility for mobile internet browsers.

T-Mobile is committed to providing all of its customers with the latest high-quality products and services and with an outstanding customer service experience.⁸ As a leader in the

⁸ For example, earlier this year, T-Mobile received the highest ranking in the J.D. Power and Associates 2011 Wireless Customer Care Performance Study. *See* Press Release, J.D. Power and Assoc., *Interaction with Agents May Significantly Elevate Satisfaction with the Wireless Customer Care Experience: T-Mobile Ranks Highest In Wireless Customer Care Performance for Second Consecutive Time* (Feb. 3, 2011), available at <http://businesscenter.jdpower.com/news/pressrelease.aspx?ID=2011010>. Two weeks later, T-Mobile was recognized for achieving excellence in customer satisfaction in the J.D. Power and
(continued on next page)

mobile wireless industry, particularly with regard to providing new and innovative Internet Protocol (“IP”)-based offerings, T-Mobile is dedicated to continue offering solutions that meet its customers’ multiple communications needs.⁹

DISCUSSION

I. THE COMMISSION’S IMPLEMENTATION OF SECTION 716 MUST ACCOMMODATE FLEXIBILITY AS WELL AS ACCESSIBILITY

A. The Commission Should Affirm That Its Definitions, Especially Of the Various Advanced Communications Services, Are Limited in Scope

When defining terms for implementing Sections 716 and 717, the Commission should stay well within the limits set by the language and legislative history of the CVAA. As an initial matter, the limitation-of-liability provisions in Section 2(a) of the CVAA¹⁰ preclude service providers like T-Mobile from being responsible for the accessibility of third-party services and applications. This limitation is both logical and extremely important to mobile service providers that offer smartphones, tablets and a range of services as well as access to downloads and apps from third parties.

Moreover, service providers like T-Mobile should not be considered “manufacturers” for purposes of Section 716. Although T-Mobile works closely with its vendors, including

Associates Wireless Retail Satisfaction Study. *See* Press Release, J.D. Power and Assoc., *Spending Sufficient Time Explaining Mobile Device Operation Is Critical to Higher Satisfaction with the Wireless Retail Sales Process: T-Mobile Ranks Highest in Wireless Retail Sales Satisfaction for the Fourth Consecutive Time* (Feb. 17, 2011), available at <http://businesscenter.jdpower.com/news/pressrelease.aspx?ID=2011016>.

⁹ For example, T-Mobile now offers the Sidekick 4G, a Hearing Aid-Compatible (“HAC”) handset that runs on the Android platform. The Android platform itself provides many features to aid accessibility, such as multiple screen reader options that are useful for subscribers with disabilities.

¹⁰ *See* CVAA § 2(a).

manufacturers of handsets and network equipment, it does not “make or produce” products and cannot be reasonably considered a manufacturer, for purposes of Section 255 or otherwise.

Rather, T-Mobile provides mobile voice and broadband services to its customers. It is important that the Commission draw a bright line between “providers of ACS” and “manufacturers” in its regulations to provide regulatory certainty and avoid unduly burdening industry participants. As the NPRM proposes, one means of doing this is for the Commission to define “manufacturer” for purposes of Section 716 as it has for purposes of Section 255 of the Act – that is, as “an entity that makes or produces a product.”¹¹

The CVAA defines ACS as including four services: interconnected VoIP; non-interconnected VoIP; electronic messaging; and interoperable video conferencing.¹² The Commission should not adopt a presumption that all VoIP-based products are or should be subject to Section 716’s accessibility requirements. Rather, each service must be evaluated on its own merits.

“Interconnected VoIP” is expressly defined in the CVAA as having the meaning set forth in Part 9 of the Commission’s rules,¹³ and Section 716(f) states that this service will remain governed by Section 255 of the Act, not Section 716.¹⁴ T-Mobile agrees, as referenced in the NPRM, that when a device has multiple purposes, the Commission should subject the device to Section 255 to the extent that the device provides a service – such as interconnected VoIP – that already is subject to Section 255, and should apply Section 716 only to the extent that the device

¹¹ See NPRM, 26 FCC Rcd at 3142-43; 47 C.F.R. § 6.3(f).

¹² CVAA § 101 (amending Section 3 of the Act); 47 U.S.C. § 153(1).

¹³ 47 U.S.C. § 153(25).

¹⁴ See *id.* § 617(f).

provides ACS, and is not otherwise subject to Section 255.¹⁵ Because this approach implements Section 716(f) in a practical manner, T-Mobile supports its application.

With respect to “Non-Interconnected VoIP,” T-Mobile believes the Commission should avoid interpreting the statutory definition overly broadly.¹⁶ A service provider’s Section 716 obligations with respect to ACS, including VoIP-based services, apply only to “services *offered*” by that company;¹⁷ the fact that a service (such as a gaming or entertainment offering) includes an incidental VoIP component does not bring it within the statutory definition, because the service provider is not *offering* VoIP to the public. Further, the Commission should refine the NPRM’s analysis of this issue by focusing on the service actually offered by a company to end users. Nothing in the CVAA, moreover, extends a service provider’s obligations to third party applications – including VoIP offerings or apps – that utilize the service provider’s network.

Even if the Commission does not alter its view of non-interconnected VoIP, T-Mobile supports the grant of waivers to broad categories of services that may contain a non-interconnected VoIP element.¹⁸ When a VoIP-based product falls within the non-interconnected VoIP definition, as evidenced in the preceding paragraph, there likely will be circumstances in which Section 716’s statutory waiver and exemption provisions will apply.

¹⁵ See NPRM, 26 FCC Rcd at 3145 (citing comments of AT&T, CG Docket No. 10-213 at 5 (Nov. 22, 2010)).

¹⁶ See 47 U.S.C. § 153(36).

¹⁷ See *id.* § 617(b)(1) (emphasis added).

¹⁸ See NPRM, 26 FCC Rcd at 3145-46, 3155.

The CVAA defines “Electronic Messaging Service” in terms of “real-time or near real-time” messages “*between individuals*.”¹⁹ The definition is intended to cover widely-available services such as email, text messaging and instant messaging. The Commission should acknowledge the importance of the phrase “between individuals” in the definition, as it precludes machine-to-machine (“M2M”) communications as well as communications between a human and a machine or program. As the legislative history shows, third-party html-based email and web-based services, such as social networking sites, that might be accessed via a mobile device but are not offered by the underlying internet service provider, are expressly excluded from the “electronic messaging service” definition.²⁰

The Commission should not construe the statutory definition of “Interoperable Video Conferencing Service”²¹ to mandate (or authorize the Commission to mandate) that providers offer a video conferencing service that is interoperable among different platforms. The NPRM appears to consider such a mandate in the guise of performance objectives for interoperable video conferencing service.²² There is no support for such a mandate in the CVAA or its legislative history. Requiring entities to provide some form of “interoperable” video conferencing services would be *ultra vires* of the CVAA and the Communications Act. Moreover, mandating interoperability among different platforms would hamper service providers’ attempts to distinguish themselves in the marketplace and thus hinder innovation.

¹⁹ See 47 U.S.C. § 153(19) (emphasis added).

²⁰ See *Twenty-First Century Communications and Video Accessibility Act of 2010*, H. Rep. 111-563 at 23 (2010) (“House Report”).

²¹ See 47 U.S.C. § 153(27).

²² See NPRM, 26 FCC Rcd at 3153-56.

Because of the great diversity of services that might nominally fall into the four ACS definitions, the Commission should maintain a flexible regime for waivers and exemptions to ensure services that the Act does not intend to cover are inadvertently included. This is especially important in the case of customized services and equipment. Section 716(h) allows the Commission to waive Section 716, on its own motion or in response to a petition by a service provider or manufacturer, for otherwise covered services that are “designed primarily for purposes other than using [ACS]”; Section 716(i) exempts customized services “not offered directly to the public” from the substantive requirements of Section 716.²³

To keep the Commission from inadvertently preventing innovative services and technologies from getting to market, it should be prepared to grant prospective and/or blanket waivers, particularly for service offerings where the ACS component is incidental to the primary purpose for which the service is designed.²⁴ Many mobile services are telephonic and not ACS offerings in the first place (including services that would be exempt from Section 716 as customized services). In cases where a service may fall within the ACS definition as a technical matter, the Commission should use its waiver authority liberally in order to promote service innovation as various forms of technology transition to becoming more IP-based.

B. Section 716’s Rule of Construction Should Be Applied Consistently

Section 716’s overall rule of construction is found in Section 716(j), which provides that service providers are *not* required “to make every feature and function of every device or service

²³ See 47 U.S.C. §§ 617(h), (i).

²⁴ See NPRM, 26 FCC Rcd at 3153-56; see also *supra* at 6.

accessible for every disability.”²⁵ In addition, and as discussed below, Section 716(g) describes the factors to be considered in determining whether the requirements of Section 716 are “achievable.”²⁶

The Commission should keep these provisions in mind when considering service providers’ compliance with Section 716. Doing so will help ensure greater certainty with regard to business and service development and also recognize the realities of consumer demand in complex competitive markets. These provisions ensure that incorporating accessibility in significant parts of various types of services, even if not on each individual service, will count favorably toward service providers’ compliance. Moreover, under the rule of construction, the mere fact that accessibility is not included in a particular service does not count unfavorably toward a service provider’s compliance with Section 716. Together, these provisions require the Commission, when evaluating compliance, to recognize companies’ good faith efforts and investments in their consumers’ accessibility needs.

C. The “Achievability” Standard Must Be Applied On A Company-Specific Basis, and the Commission Should Permit Third-Party Solutions As Stated In the CVAA

The NPRM recognizes that Congress intended the Commission to evaluate each service or product on a case-by-case basis.²⁷ As proposed in the NPRM, in evaluating issues of achievability, the Commission should consider *only* the factors specified in Section 716(g) regarding achievability.²⁸ In applying those factors, however, the Commission should not seek

²⁵ 47 U.S.C. § 617(j).

²⁶ *Id.* § 617(g).

²⁷ *See* NPRM, 26 FCC Rcd at 3158-59.

²⁸ *See id.* at 3159.

to determine whether a particular accessibility feature or technology is achievable for T-Mobile (or any other given company) based on whether it is achievable for another. The factors regarding achievability to be considered in Section 716(g) are defined in terms of “the specific equipment or service in question” and the “service provider or manufacturer in question,”²⁹ not in terms of a comparison among competitors or competing products. Each service provider has different technical, financial, and personnel resources, with different business models and distinct technology configurations and platforms that must be considered individually.

Closely related to whether accessibility is achievable, the “industry flexibility” provisions of Section 716(b)(2) expressly permit service providers to rely on the availability of third party services and applications for their own compliance purposes, if available at “nominal cost” to consumers.³⁰

T-Mobile’s experience, especially through its offering of services via handsets using the Android platform, bears out the wisdom of Congress’s judgment in Section 716(b)(2). Numerous third-party applications, including those available on Android, help people with disabilities access T-Mobile’s services. While the costs of these solutions vary, one approach would be to consider these costs compared to the overall cost of mobile service.

Based on this, the Commission should not interpret the term “nominal cost” so narrowly that it negates this provision. For example, the cost of a screen reader for a tablet may be nominal if it is small compared to the overall cost of mobile broadband service for the life of the

²⁹ See 47 U.S.C. § 617(g)(1)-(4).

³⁰ *Id.* § 617(b)(2).

product. Although the NPRM raises the factor of “burden to customers,”³¹ the Commission should not write this factor into its final rules. The “nominal cost” standard is the only factor permitted to be considered in Section 716(b)(2). In this regard, the legislative history confirms that the Commission should not establish any sort of fixed “percentage or amount” in determining what is “nominal.”³²

As the NPRM acknowledges, the CVAA precludes the Commission from preferring built-in accessibility over third-party accessibility solutions.³³ However, the NPRM raises several issues about implementing the third-party solutions expressly permitted in Section 716(b)(2) that, if adopted, would require third-party solutions to be so tightly integrated into a service or product that the solutions would essentially be built into the service, contrary to the plain language of Section 716(b)(2).³⁴ Thus, for example, the Commission’s rules should expressly permit providers to rely on after-market sales and simple installation of third-party solutions in order to satisfy accessibility requirements. Otherwise the flexibility mandate of Section 716(b)(2) effectively would be nullified.

D. Rules Implementing Section 716 Must Ensure Network Security, Reliability, and Survivability

When implementing Section 716, the Commission must avoid actions that could inadvertently compromise network security, reliability, and survivability. In particular, Section 716(d) requires that ACS providers not “install network features, functions or capabilities that

³¹ See NPRM, 26 FCC Rcd at 3164.

³² See *id.* at 3163, House Report at 24.

³³ See NPRM, 26 FCC Rcd at 3162-63.

³⁴ See *id.* at 3164.

impede accessibility.”³⁵ Section 716(e)(1)(B) requires that Commission rules ensure that networks “not impair or impede the accessibility of information content when accessibility has been incorporated into that content for transmission” via advanced communications networks.³⁶

T-Mobile agrees with the Commission and the CVAA about the benefits of providing accessible ACS to all Americans. However, these provisions should be interpreted so as not to compromise the Commission’s objectives of promoting network security, reliability, and survivability in broadband networks. A careful balance is necessary for the Commission, as well as service providers and manufacturers, to realize successfully all these policy goals. Further, T-Mobile believes that protecting network security, reliability, and survivability while assuring accessibility as required in the CVAA is best addressed through industry standards bodies, and encourages the Commission to defer to those efforts.

E. Performance Objectives Should be General and Outcome-Oriented

The Commission should adopt the general, outcome-based performance objectives proposed in the NPRM, which are akin to those in the Commission’s current Part 6 rules.³⁷ More specific performance objectives could detract from reaching the goals of Section 716 by limiting the flexibility of service providers, contrary to the CVAA.

T-Mobile agrees that specific functionalities and standards mandated by Section 508 for government purchase of technology are not appropriate performance objectives for mass market,

³⁵ 47 U.S.C. § 617(d).

³⁶ *Id.* § 617(e)(1)(B).

³⁷ *See* NPRM, 26 FCC Rcd at 3171-72.

consumer-oriented ACS.³⁸ Nor should the Commission incorporate the Access Board’s tentative proposals at present, as the Access Board’s process is not yet complete.

F. Mainstream Devices and Software Are Among the Peripheral Devices Used for Accessibility Solutions

Section 716(c) provides that when accessibility is not achievable either by building in access features or using third-party accessibility solutions, a service provider must “ensure that its equipment or service is compatible with existing peripheral devices or specialized customer premises equipment commonly used by individuals with disabilities to achieve access,” unless that is not achievable.³⁹ T-Mobile agrees with the NPRM that such peripheral devices can and should include mainstream devices and software.⁴⁰ In T-Mobile’s experience, widely available headsets and Bluetooth technology are examples of such peripherals, and in fact constitute a thriving ecosystem that can work with services to provide accessibility solutions.

G. The New Rules Must Preserve the CVAA’s Third-Party Liability and Proprietary Technology Limitations

Section 2(a) of the CVAA limits service providers’ liability for third-party provision of ACS,⁴¹ while Section 3 limits the Commission’s authority to require accessibility solutions using proprietary technology.⁴² Together, these provisions encourage innovation by restricting the scope of the technical solutions and remedies that the Commission may impose on service providers and manufacturers. The new rules should reflect these limits. T-Mobile’s experience

³⁸ *See id.* at 3172.

³⁹ *See* 47 U.S.C. § 617(c).

⁴⁰ *See* NPRM, 26 FCC Rcd at 3167.

⁴¹ *See* CVAA § 2(a).

⁴² *See id.* § 3.

with Android, which makes thousands of applications available to individual smartphone users and removes service providers from the role of gatekeeper, shows why these provisions, and especially Section 2(a), are so critical to preserving innovation in an open access environment.

In particular, an accessibility feature that is a third-party solution subject to Section 2(a), or a proprietary technology under Section 3, cannot be imposed on a service provider and by definition is not “achievable” for Section 716(b) purposes. The Commission should scrupulously observe this limitation. Based on Sections 2(a) and 3, wireless service providers should not be required to police new third party applications for noncompliance with accessibility requirements.

II. THE COMMISSION SHOULD ADMINISTER FLEXIBLY THE RECORDKEEPING AND ENFORCEMENT PROVISIONS OF SECTION 717

A. Recordkeeping

The CVAA’s mandate that the new rules be applied with flexibility extends to Section 717’s recordkeeping provisions. Contrary to the characterization in the NPRM,⁴³ Section 717 wisely does not require “uniform” – that is, identical – record keeping among products, services, or industry participants, and the Commission should not adopt such a requirement. The format in which service providers maintain such records for the various activities subject to those reporting requirements (*e.g.*, consulting with individuals with disabilities and product descriptions) will vary based on the complexity of their operations and services. As an initial matter, the Commission should mandate the retention only of the specific types of information listed in Section 717(a)(5)(A)(i)-(iii).⁴⁴ This information specified in the statute is adequate to

⁴³ See NPRM, 26 FCC Rcd at 3177.

⁴⁴ 47 U.S.C. § 618(a)(5)(A)(i)-(iii).

address most types of accessibility concerns without posing an undue burden on covered entities. Because the CVAA expressly declines to adopt reporting requirements, there is no basis for the Commission to institute mandatory reporting.

B. Enforcement

T-Mobile supports the content requirements that the Commission proposes for informal complaints⁴⁵ but proposes that the Commission further require complainants to describe with specificity the disability that prompts the complaint and the relief requested.

Given the complex technical issues that many complaints will entail, the proposed default 20-day answer period is compressed,⁴⁶ highlighting the need for complaints to provide meaningful content. Commission staff should consider good-faith requests for extensions of time to respond to an informal complaint.

The proposed content requirements for answers are overbroad and appear to be designed to subject a defendant to a general investigation of its accessibility compliance, rather than to successfully resolve an informal complaint. The content requirements should be modified to focus more on the facts of the specific complaint and less on the question – which may not even arise under the complaint – of whether a product or service is “accessible” under the Act. Factor (6) in particular appears to presume that the product or service at issue is not “accessible and usable.”⁴⁷ The fact that a device or service does not include a particular feature does not and should not preclude a finding of accessibility. Nor should defendants have to provide documentation without strong protections for confidential or proprietary information.

⁴⁵ See NPRM, 26 FCC Rcd at 3183.

⁴⁶ See *id.* at 3184.

⁴⁷ See *id.*

III. INDUSTRY FORUMS AND WORKING GROUPS SHOULD TAKE THE NEAR-TERM LEAD REGARDING MOBILE INTERNET BROWSERS

Section 718⁴⁸ governs accessibility for mobile handset Internet browsers and is subject to the same “achievable” standard and the “industry flexibility” compliance methods as those advanced communications services subject to Section 716. The CVAA intends this requirement to cover the “on-ramp” functionalities of the device and service, *i.e.*, the Internet access service initiation and activation features controlled by its providers, not the accessibility of the content or applications that the user accesses via the browser.⁴⁹ T-Mobile supports Verizon’s proposal to have industry forums and working groups develop standards for mobile browsers.⁵⁰

CONCLUSION

The Commission should adopt rules implementing Sections 716 and 717 of the Act that incorporate the flexibility for service providers specifically provided in those sections and related sections of the CVAA.

Respectfully submitted,

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⁴⁸ 47 U.S.C. § 619(a).

⁴⁹ *See* CVAA §2 (limiting liability under the CVAA only to those services controlled by the provider).

⁵⁰ *See* NPRM, 26 FCC Rcd at 3186.