

**Reply Comments of the  
American Foundation for the Blind**

**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

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The American Foundation for the Blind (AFB) is pleased to offer the following comments in reply to a variety of issues raised during the initial comment period for this docket. Our comments below are organized according to the paragraph numbering scheme of the NPRM (e.g., "P. 5:" refers to paragraph 5 of the NPRM concerning the Commission's sense of the scope of the newly created section 716 of the Communications Act), and our reply comments integrate responses to a number of arguments made by several industry groups without necessarily differentiating among such groups. We trust that this approach will be useful to the Commission as it continues to undertake the important work of proper implementation of the Twenty-First Century Communications and Video Accessibility Act (CVAA).

#### P. 5: Commission's Sense of Scope of Section 716

We applaud the Commission for affirming in no uncertain terms here that section 716 of the Communications Act covers a broader scope of services and equipment than does section 255. Considerable industry comments seek to enlist the Commission's complicity in applying section 716 to an extremely and unreasonably narrow array of technologies. We are encouraged by the Commission's recognition that section 255, important though it is, is the narrower statute and that section 716's impact will be, by definition, much more extensive and inclusive. We urge the Commission to maintain this posture throughout any final rules it adopts and to make it clear through such rules that the bulk of communications technologies both available today and in the future will be governed by section 716 rather than section 255. While Congress did enact a wall of separation between sections 255 and 716, the clear congressional intent was to expand accessibility well beyond section 255 and to revolutionize the experience of people with disabilities. The attempt by some industry groups to interpret the new law, as reflected in their comments, in a way that squeezes as much technology under the section 255 umbrella as possible is a rather transparent but cynical scheme to thwart the CVAA's potential. We note here that the strongest proponents of this tortured reading of the new law are historically the same groups that have painted the rosiest possible picture of industry's compliance with section 255 and of industry's supposed extensive record of innovation and accomplishment. Their narrow interpretation of the CVAA should be credited to the same extent that their claims of an overwhelmingly successful track record are not to be believed.

#### P. 14: Interconnected VoIP and Advanced Communications Service (ACS)

The Commission understandably indicates that interconnected VoIP services and equipment must meet accessibility expectations established under section 255 rather than section 716. However, it is imperative that the Commission make it clear in any final rules it adopts that interconnected VoIP equipment and services that can be used for electronic messaging and video conferencing, two of the other prongs of the definition of advanced communications, must satisfy the access requirements of section 716. The mere fact that a given VoIP device connects to the PSTN does not mean that there is no obligation on the device manufacturer to ensure access to the electronic messaging and video conferencing features that customers with disabilities have purchased. As further discussed below, the interplay of sections 255 and 716 must not be allowed to defeat the very reason for the CVAA's enactment.

#### P. 15-18: Architecture and Components Supporting ACS

We believe the Commission has rather succinctly and intelligently articulated the interconnection and interdependence of each of a given device's components needed to support the delivery of ACS. It is precisely this interdependence of components and operations that offers the clearest technical and practical rationale for the Commission to treat a device holistically and not to subject the device to different compliance standards for different functions that a given device provides.

#### P. 20: Definition of Manufacturer

We agree with the Commission that the definition of manufacturer developed in connection with section 255 is an appropriate definition to apply in the section 716 context. We know of no instance where the identification of a particular manufacturer has proven to be an obstacle for section 255 enforcement. Then again, since so few manufacturers have implemented readily achievable accessibility as section 255 requires, it would indeed be difficult to lodge a meritless complaint against an entity that could conceivably be considered a manufacturer; in other words, there are plenty of parties to choose from which have not lived up to expectations. If history is our guide, the Commission will need to rigorously enforce section 716 to ensure that, whomever the Commission deems to be a manufacturer for purposes of the CVAA, they are held much more accountable for compliance than manufacturers have been heretofore.

#### P. 21: Upgrades, User-Acquired Software

We believe it is elementary that product upgrades must be considered integral to the operation of a given device. Quite frequently, upgrades to devices fix so-called bugs in device functionality which are necessary to install in order for the device to operate properly. Putting it another way, upgrades are not simply enhancements to existing capabilities but are often essential to continued use. That having been said, nothing in the CVAA makes a distinction between functionality acquired at time of purchase and functionality made available to a customer at any time after purchase. Indeed, a customer more often than not has an ongoing relationship with a manufacturer which regularly makes product upgrades available. Obviously, if the purpose of a given upgrade is to offer features other than ACS, such features cannot be expected to meet section 716 requirements just as features made available at time of purchase that are not ACS would fall outside the section 716 mandates. However, it is quite common that upgrades constitute fixes and/or improvements to a device's operating system. The test for CVAA purposes is not when a device and/or its software are acquired; the test is whether a device and/or software are used for advanced communications. If so, they must meet the requirements of the CVAA. Similarly, the test for CVAA purposes is not the identity of the one who installs software, upgrades, add-on applications, or anything else; the test is whether a manufacturer is offering devices and/or software used for ACS. Let us assume that a given manufacturer offers for sale a device which must be loaded with an application available for download from a particular web site, and the device's ACS functionality is dependent upon the installation of such application. The fact that the manufacturer compels, or even merely invites, the user to visit a web site and download an application to enjoy the device's ACS capabilities is not dispositive. Putting it another way, the CVAA applies to manufacturers even when "some assembly is required."

#### P. 26-27: Resellers and Aggregators, Service Provider Networks

The process of designing, configuring, marketing, selling and activating equipment used for ACS can be likened to creating and selling a puzzle. It is not sufficient to simply

assume that at each step along the way the required pieces of the puzzle will always make it to the box. It is therefore critical that the Commission move forward with its intention to include coverage of resellers and aggregators. We recognize that responsibility for compliance with the CVAA's access requirements may have a practically different effect on resellers and aggregators who, after all, are merely dealing in ACS-ready equipment and services and are not the developers of such equipment and services. The efforts to ensure accessibility exerted by resellers may be considerably less than those of the per se manufacturers because of the relative control over the product that a reseller has. Nevertheless, resellers make choices about the equipment and services they offer, and they certainly can and should make access expectations of those businesses with which they interact. The federally supported mobile text and voice services for low income individuals program is a case in point. These services are not accessible, a particularly bitter irony given their Federal funding. Affirming the CVAA's applicability to resellers and aggregators should go a long way toward eliminating problems like these. The responsibilities of service provider networks are analogous. If they are dealing in ACS affecting interstate commerce, they are CVAA-covered providers. Should they be the subject of a complaint, they may be able to demonstrate that ensuring the accessibility of their offerings was not achievable by them. At bottom, the test is not whether resellers, aggregators or service provider networks cannot be the subject of a complaint under the CVAA; the test is the four-part analysis to determine whether accessibility was not in fact achievable.

#### P. 30: 255 Versus 716

Congress has made it clear in section 716(f) that equipment subject to section 255 prior to the CVAA's becoming law continues to be subject to section 255. We have consistently argued that neither section 255 nor section 716 speak in terms of discrete features and functions but in terms of equipment and services as a whole. Section 716 makes it plain that equipment and services used for ACS are governed by section 716's access requirements. Section 255 has never been applied to equipment and services used for ACS as defined in the CVAA with the obvious exception of interconnected VoIP which the Commission pulled within the reach of section 255 several years ago. Arguably, the Commission jumped the gun by taking such action, but since the CVAA includes interconnected VoIP within the definition of ACS, it would avail nothing for industry to challenge the Commission's interconnected VoIP report and order because if, hypothetically, the report and order establishing section 255 coverage of interconnected VoIP were to be vacated and regarded as though it never existed, the CVAA would continue to cover interconnected VoIP but apply a more rigorous compliance standard than the readily achievable standard of section 255. This scenario is moot, however, because even if one could successfully argue that the Commission exceeded its authority years ago in pulling interconnected VoIP under section 255, Congress has essentially ratified the action by the language of section 716(f) itself.

The much more important question that the Commission must answer with strength and clarity is whether the accessibility or inaccessibility of a given device or service that offers both telecommunications within the meaning of Title II of the Communications

Act and ACS should be covered by section 255, section 716, or some combination thereof. While extensive industry comment, particularly that of CTIA, seems to be urging the Commission to apply section 255 to devices offering telecommunications regardless of whether such devices also offer ACS, the Commission must reject such an approach categorically. First, if we say that section 255 alone applies to mixed function devices, does that mean that the inaccessibility of, for instance, electronic messaging offered by such devices cannot be reached at all by the Communications Act? The industry comment in this regard does not specifically argue this result, probably because the commenters would and should be embarrassed by such a naked conclusion. As a practical matter, we are aware of only one device, the Apple iPod Touch, that offers ACS-like features and which also does not offer telecommunications. Surely the Commission is not prepared to read the extensive provisions of the CVAA to apply to a precious few of devices available on the market today. Now if an alternate reading of industry comments in this area is entertained, namely a reading that portrays industry as saying that a mixed function device is to be covered by section 255 alone and that the inaccessibility of such device's ACS features is to be evaluated through section 255's readily achievable standard, such a position is equally absurd. Congress has not now said that the Communications Act Title II nondiscrimination obligations now apply to information services that have been traditionally outside the reach of Title II. Congress has said nothing of the kind. Congress has said that devices used for ACS are covered by section 716, and only devices that are not used for ACS but which were covered by section 255 prior to the CVAA remain covered by section 255.

Of course, there is another approach, one which AT&T seems to put forth most persuasively, namely an approach that seeks to apply different sections of the Communications Act to various features within a single device. While this Solomonic splitting of the difference has pragmatic appeal at first blush, it is an approach that in some ways squares least with both the letter and the spirit of the Communications Act. Neither section 255 nor section 716 speak in terms of individual features and functions but in terms of equipment and services as unities. What is perhaps equally as important, consumers interact with equipment and services as unities and not as a variety of unrelated tools that just happen to be in the tool box together. Moreover, as the Commission itself recognizes, there is an inescapable interrelationship between and among the architecture and components that comprise devices.

The Commission dare not enshrine in regulations some sort of bifurcated scheme that applies two different compliance standards to a single device when both its telecommunications and ACS features are alleged to be inaccessible. Rather, the Commission must do what the CVAA says it must do and apply the section 716 access mandates to all equipment and service used for ACS irrespective of telecommunications. Section 255 applies, as it has always applied, to telecommunications and not to ACS. Indeed, there would be no need for Congress to refer to the peculiar position of interconnected VoIP as Congress does in section 716(f) if we are to understand the law in some other way. Congress drafted section 716(f) to include the reference to interconnected VoIP precisely to communicate the bright line division between sections 255 and 716. In effect, Congress says in section 716(f) that Title II covered telephony,

including interconnected VoIP, remains subject to section 255. However, the incorporation of noninterconnected VoIP, electronic messaging, or video conferencing capacities moves the equipment or service out from under section 255 and makes it subject to section 716.

#### P. 34: Electronic Messaging Inclusive of Person-to-Person and Automated Communication

While it is true that the definition of electronic messaging speaks in terms of communication between individuals, we believe that it is an idle question for the Commission to ask about the origin of text messages a consumer with disabilities receives. For example, customers often receive text messages and/or email from their wireless provider reminding them that their bill is due and providing call and data plan balances, etc. These are automated messages pushed to consumers without human action as such. However, the Commission's rules need not try to manufacture some sort of legal distinction between the receipt of text messages of this kind and text messages received as a result of human composition and transmission. The only conceivable benefit derived from emphasizing the point that messages are to be between individuals would be the exemption of certain messaging functions or even certain messages themselves from accessibility requirements. However, such conceivable exemption is pointless. If a device's text messaging and email functions are accessible such that the user with a disability can write and send messages to another person and receive and read messages from another person, the origin of an automated text message, such as a message from one's wireless provider, is irrelevant. If the in-coming message is a text message, it will be read as a text message regardless of who sent it.

Now of course one can dream up amusing hypothetical scenarios wherein a user signs up for a real estate service which periodically sends text alerts to users along with a link to a picture of the foreclosure property that has just come on the market. Obviously, the Communications Act has nothing to say about the inaccessibility of the picture to users with vision loss. There of course would be access to any text content in the message itself, and if the device allows for accessible text messaging between individuals, the text of the in-coming message from the real estate service will be readable. The point is that, though some industry groups might see the "between individuals" qualifier as a way to limit the scope of the electronic messaging definition in some fashion, crafting such a distinction in the final rule would be virtually meaningless. In what way would it be legally significant that a user's receipt of a text message reminding the user to change the oil in the user's car is the result of an automated text transmission from the automobile rather than from the user's spouse? Presumably there could be a communication breakdown if the nonhuman generator of the message transmits something other than a text message or an email per se. But of course, that begs the question; if the thing that is sent is a text message or an email, it will be as readable or as unreadable as all text messages and emails are on devices allowing accessible electronic messaging between individuals. In our opinion, the most useful way that the Commission could read the "between individuals" language would be to envision text communication between two individuals with disabilities, e.g., vision loss. Both individuals must be able to read in-

coming messages, compose and send messages, and navigate within and among messages if they are to communicate.

#### P. 41: Video Conferencing

We want to go on record in support of the IT and Telecom RERCs that stand in opposition to TIA and which correctly recognize that webinar systems are subject to section 716 because they are not broadcast services but in fact facilitate communication between and among individuals in the form of chat, polling, and similar forms of communication.

#### P. 43: Incidental Video Functionality

We agree with the Commission's rejection of TIA's analysis and concur that the statutory definition of ACS makes no distinction between devices and services that have video conferencing capacity as their primary purpose and those which do not. The plain meaning of the CVAA is that equipment and service that can in any way be used for ACS fall within the new law's requirements. Contrary to TIA's wishful thinking, there is no exemption to which equipment and services offering so-called incidental ACS are statutorily entitled. The law does grant waiver authority to the Commission with respect to equipment and services which the Commission may deem so far removed from the notion of ACS that application of the CVAA's requirements to them would be untenable. However, such action is discretionary.

#### P. 48-50: Customized equipment

The Commission's final rules in this area must be written in a way that minimizes, to the maximum extent possible, the immense potential for mischief making by those who will want to exploit the CVAA's sensible exclusion of coverage for customized equipment. In developing its final rules, several foundational realities must be acknowledged. It is obvious that when a school purchases iPads for students and staff, for instance, the equipment cannot in any way be considered customized. Indeed, manufacturers build equipment on the largest scale they can. Thus the argument that there exists many instances of customized equipment which may be excluded from CVAA coverage is incorrect. It is also important to understand that institutions purchase equipment from the same pool of devices, and purchase services from the same offerings as non-institutional customers. To exclude from the CVAA's reach technologies that can simply be asserted to have been deployed in some narrowly defined setting poses the very real prospect of manufacturers and service providers creating dozens of artificially different distribution streams creating confusion and unnecessary complexity in the market.

However, even in those instances in which some sort of specialization has arguably occurred, if the device incorporates ACS-dependent operating systems and/or applications which, in their native form, afford or allow accessibility, then such equipment should not be excluded from CVAA coverage. This is the very area of controversy and inaccessibility with regard to the "fragmentation" taking place with

Android devices. An example is found on Motorola devices operating the Android operating system and on which users with vision loss wish to install one of the free accessibility apps or services. Were it not for the decision of Motorola to remove portions of the operating system, the device would be accessible. We believe the CVAA authorizes the Commission to implement the new law through regulations which require those devices using an operating system that can otherwise afford or allow accessibility to include the entire operating system as built.

We turn now to the specific regulatory framework we believe the Commission must use to properly implement the customization exclusion. To understand the extent to which customization should take a given product or service out from under the CVAA's access requirements, let us pose a hypothetical wherein Company X will offer a noninterconnected VoIP telephone and messaging system to corporate customers desiring extraordinary encryption and other security measures. Company X's product is essentially standard to all customers; the customization occurs when company X adds unique hardware and/or software to the system per the needs of each corporate customer.

In this scenario, the ACS technology is not customized; Company X is dealing in CVAA-covered equipment. The addition or integration of customized hardware or software to meet the security needs of this or that customer cannot in itself justify exclusion from accessibility expectations. Rather, the plain meaning of the CVAA, supported by the legislative history which the Commission notes in the NPRM, provides that excluded customized equipment must be both unique and not offered to the public generally. Systems that have not been designed in their entirety to specifications demanded by a single client are, by definition, not unique. They include hardware and/or software which were in existence prior to the client's commissioning of the unique system requirements.

Likewise, if a given system is initially designed to meet client A's unique needs, and the system manufacturer subsequently sells the same system to client B, perhaps even with some modifications similar to the security features hypothesized above, the selling of the system to a subsequent client means that the system is no longer excluded from CVAA coverage because client B has purchased equipment that is not unique in the marketplace.

It is absolutely essential for the Commission to account for these dynamics in the final rule because, if technology developed initially at the unique specifications of a client can be offered to subsequent clients but not be reachable by the CVAA to ensure access, the implications are grave. In effect, a failure to prevent this from happening opens the door to the inevitable proliferation of inaccessible technologies which were initially designed for some discrete business interest but which the market subsequently demands. Therefore, the Commission must promulgate rules in this area that provide as follows.

The Commission must be unequivocal that the question of whether the equipment or service qualifies for exclusion on the basis of customization is the Commission's determination to make within the context of the complaint process. Putting it another way, when a complaint is lodged alleging inaccessibility, a manufacturer must not simply be allowed to assert that the equipment in question falls within the customization

exclusion; the Commission must make a final determination as to whether that is in fact the case. Such determination must employ two tests.

First, has the equipment or service in question, either in its entirety or the ACS-related technology of such equipment or service, been deployed by the manufacturer or service provider in the context of more than one individual or corporate business entity? If the Commission finds that the answer is yes, the equipment or service in question is not merely meeting the unique needs of a particular business interest but is capable of meeting the needs of a variety of interests. Second, if there is only one entity to which the equipment or service has been deployed, is there documentation between such entity and the equipment manufacturer or service provider demonstrating, to the Commission's satisfaction, the customization of ACS or ACS-related hardware and/or software which departs from technology otherwise available in the market? If the Commission finds that the customization that has occurred does not substantially concern ACS or ACS-related technology but merely other features and functions of interest to the entity (e.g., security features), the equipment or service does not qualify for the exclusion.

#### P. 52-60: Waivers, Primary functions

Given that the CVAA presumes that equipment and services used for ACS are to be accessible and that departure from this default position is only permitted when, in the context of a complaint, it has been shown that access was not achievable based on the application of a rigorous four-part analysis, we urge the Commission, in the strongest possible terms, to adopt waiver criteria and processes that are not in conflict with this approach. In general, given that a presumption of compliance with the CVAA is the default, we view the initiation of any waiver proceeding to be, in essence, a complaint-like process initiated by an effected company or by the Commission itself. Thus, the Commission must apply criteria to evaluate proposed waivers that are comparable to the four factors that the Commission must use in determining, in the context of a consumer-generated complaint, that accessibility was not achievable.

Therefore, whether a waiver is sought for discrete features or functions or for equipment or services per se, the Commission must require the petitioner to answer the following questions to the Commission's satisfaction through appropriate documentation. First, in what way would the nature and cost of the steps needed to meet the CVAA's requirements with respect to the specific equipment or service in question have an unreasonably negative effect on the petitioner? Second, if the Commission were to deny the petition, what would be the technical and economic impact on the operation of the petitioner and on the operation of the specific equipment or service in question, including on the development and deployment of new communications technologies? Third, what are the distinctive characteristics of the type of operations of the petitioner which warrant the granting of the waiver? Fourth, to what extent does The petitioner currently offer accessible services or equipment containing varying degrees of functionality and features, and offered at differing price points? Only when the Commission is provided thoroughly documented answers to these queries will the Commission be able to intelligently consider a waiver petition's merits. Moreover, given that these four questions ask for

inherently contextual responses that will inevitably vary from petitioner to petitioner, the Commission must not entertain any so-called blanket waiver petitions.

Additionally, if a given manufacturer or service provider seeks a waiver from the Commission, such a waiver petition should only be considered when the equipment or services that are the subject of such petition have not as yet been deployed in the marketplace. If this precondition is not established as part of any waiver process the Commission sets up, then waivers will be sought for technology that is inaccessible by the company's own admission and which is already on the market, meaning that companies will be asking the Commission to be, as it were, an accessory after the fact in their failure to honor the CVAA's requirements. Indeed, requiring that waivers only be entertained when the equipment or service has not yet been deployed in the marketplace would serve as a significant benefit to industry. After all, if inaccessible equipment or services are first deployed in the marketplace, and the subsequently-filed waiver petition is not granted, the company would remain at tremendous risk of being found in violation of the CVAA's access requirements and exposed to potential penalties. Rather than this unfortunate outcome which would benefit no one, the waiver process should be a means open to industry by which a determination may be made in advance of deployment; doing so would best ensure that any inaccessibility can be addressed by the company prior to product launch should the waiver be denied.

Therefore, the waiver petition process has three essential aspects. First, waivers will only be considered for equipment or services that have not yet been deployed. Second, the petition must describe the specific equipment or service for which the petitioner is seeking a waiver and must acknowledge that the equipment or service identified will not be accessible if deployed; after all, there is no reason for the Commission to entertain waiver petitions concerning equipment or services that the petitioner expects in fact to be accessible. Third, the petition will be granted only if the Commission is satisfied with petitioner's responses to the four-part inquiry set forth above.

Finally with respect to the notion of a device's or service's primary function, let us suggest a hopefully illustrative hypothetical. Suppose that a manufacturer of a home exercise equipment system has teamed up with a technology industry partner to allow a user to weight train while interacting with the user's personal trainer via video conferencing. The user can lift weights without necessarily communicating with the remote personal trainer. Likewise, the user can have a video conference with the remote personal trainer, or anyone else for that matter, without doing any simultaneous exercise.

In this scenario, it would be unreasonable to suggest that the main reason why someone might purchase this home exercise system would be primarily to have video conferencing capability with friends and family. Of course not. The main reason for purchasing the system is to engage in home exercise. However, the system described in this hypothetical is clearly distinguishable from other exercise systems because this one offers functionality, i.e., video conferencing, which both enhances the value of the product as a whole and which can be used independently of other product features. This home exercise system's ACS capability is reachable by the CVAA.

Thus, when considering waiver petitions concerning equipment or services that are alleged to have a primary purpose other than ACS, the Commission should require the petitioner to demonstrate two things: first, that the product's ACS features add no more than incidental product value for the user; and second, that the ACS functionality can only be used when the other product features alleged by the petitioner to be the product's primary functions are being engaged by the user. Only if the answer to both queries is yes should the Commission consider granting a waiver. However, as above, such a waiver should only be entertained for equipment and services that have not yet been deployed.

P. 74-76: The Fourth Factor, Range of Products, 716(j)

In general, we agree with the Commission's proposed approach to applying the fourth factor in the "not achievable" analysis. We do urge the Commission to consistently refer to the application of the four-prong test in terms of its function to assess when access is indeed not achievable. The test does not assess whether access was achievable. This is not a pedantic distinction. The factors are to be used in a way that is fundamentally different from the factors used in the "readily achievable" context of section 255. For section 716 purposes, the four factors are the factors to which the target of a complaint must appeal to justify a failure to provide accessibility. They are not at all to be applied similarly to the measures of section 255's "if readily achievable" analysis which effectively cap a company's access obligations at a relatively low threshold. Indeed, the whole point of the fourth factor in the section 716 context is to reinforce the point that, even if access is not achievable with respect to the device or service that is the subject of the complaint in question, a range of options is nevertheless available from the manufacturer or provider involved.

We continue to be astonished by the exaggerated importance that any number of industry groups give section 716(j) in their comments. The fact is that section 716(j), being a rule of construction, is ultimately a rule of construction for a court to follow in the event that a company appeals to the courts for review of the Commission's action, either in terms of the Commission's rulemaking authority or in terms of the Commission's handling of a complaint. The Commission should take heart in that it is virtually impossible for the Commission to run afoul of section 716(j). Even if a given company can prove that nearly all of its products must be made accessible to consumers with all identifiable disabling conditions, the Commission is nevertheless within its authority under the CVAA because section 716(j) merely bars the application of access requirements to each and every one of the company's products. Putting it another way, for a company to successfully argue that the Commission is out of step with section 716(j), the company must prove that compliance is being required with respect to all of the company's products and that all of those products are being required to address all disabling conditions. This is in part why we also voice our support for the Commission's proposal to require some accessibility features on all devices. We believe that the ease with which audible output of menu functions and on-screen text can be achieved makes audible output a good candidate for such across-the-board treatment.

As we have urged previously before the Commission, there is an application of the fourth factor that is both reasonable on its face and about which even the most strident industry voices should not cry out in opposition. We do agree with the Commission's sense that the fourth factor is a kind of good faith examination of whether a given company is generally a good actor with regard to people with disabilities. However, we again urge the Commission to make it clear in its final rule that, at a minimum, the company in question is required to provide at least one alternative to the complainant which does two things: the alternative must not result in any additional cost to the complainant; and the alternative provides the same or greater functionality than was expected from the device or service that is the subject of the complaint. So, let us assume that a consumer files a complaint about a device that only offers one single solitary feature, electronic messaging. Let us suppose that this device can only send and receive text messages; it cannot be used for web browsing, phone calls, email, or anything else. The complainant alleges that this one-purpose device is not accessible, and the company's response is that it is indeed inaccessible. In addition to demonstrating that the first three factors justify the device's inaccessibility, the company must also show that it can offer the complainant at least one other product that offers accessible text messaging, even if that alternative product is the company's top-of-the-line product, and the alternative has been offered to the complainant at no more than the cost of the inaccessible device. Obviously, in calculating such costs, the company must ensure that the cost of the device itself and the costs of any related data or other usage fees are taken into account. While we of course would like to see a company offer a full range of products and would hope the Commission would make such an expectation clear in its final rules, we continue to feel that a company's commitment to being able to offer at least one accessible alternative to a complainant at no additional cost is an essential minimum expectation that the final rules must establish.

P. 87-90: Compatibility, Interoperability, Role and Value of Access Board Guidelines.

The purpose of the Access Board guidelines is to assist in the ranking of E&IT options with respect to their accessibility. Section 508 speaks to the process by which this ranking is conducted. The requirements under consideration for purposes of this rule making are more properly thought of as the establishment of technical threshold requirements. In order to comply with the law, equipment and services must pass across the accessibility threshold. Given this dramatically different purpose, the proposed Access Board guidelines may be useful to consider but should not be relied on as anything more than advisory material.

P. 92-94: Duty not to Impede Network Features and/or Functions

Many standards currently exist which speak to providing accessibility to ACS. By examining both the historical record and contemporary marketplace, we observe that the first successful accessibility strategies and products were developed at a time when many fewer standards existed. Despite the absence of standards at that time, successful accessibility products were brought to market. Fast forwarding to today, the development

of Apple's VoiceOver for IOS clearly indicates that sufficient standards exist to design manufacture and deploy comprehensive accessibility to ACS.

Therefore, the task before industry now is not to wait with bated breath for the Commission to pronounce upon the standards that are needed. Rather, industry can and must be expected to use existing standards to fulfill both the long-standing and more recent access obligations of the Communications Act. As accessible ACS become more commonplace, even more refined standards can and will emerge that are informed by experience and practice.

#### P. 107: Relationship of Performance Objectives to the Work of the Emergency Access Advisory Committee

The rules being proposed by the Commission in this NPRM can be thought of as the foundation on which the success of the work of the EAAC will rest. The shift from current technology to NG911 and its reliance on ACS for emergency communication imposes an additional expectation that accessibility to ACS will be both comprehensive and robust. However, the Commission will need to be diligent in ensuring that this rulemaking proceeding informs the work of the EAAC and that the EAAC's progress is both consistent with the final rules and informative as they are prepared.

#### P. 114-115: Usefulness of Prospective Guidelines

Only if the Commission believes that industry has been living in a vacuum for a generation or more would prospective guidelines be of significance. Full access to at least one major operating system today, and the ACS which it supports, demonstrates the ability of industry to observe, develop and predict the necessary requirements for accessibility. In short, Apple is the exception that proves the rule. That having been said, the concept of mandatory performance requirements and suggested techniques is a useful construct.

#### P. 134-136: Informal Complaints

Because consumer complaints constitute a major driver in fostering accessibility, the Commission must take further steps to facilitate engagement of consumers with disabilities in ensuring that the accessibility provisions of the CVAA are carried out. In particular, the Commission must take special care to ensure that enforcement provisions are constructed to facilitate consumer action. Although the Commission's proposals in paragraph 136 appear reasonable, our experience in working with consumers who are interested in filing complaints indicates that these requirements will thwart consumer action rather than assist consumers in engaging industry in accessibility efforts.

As the Commission points out in paragraph 135, several different entities may be responsible for components within a product or service used for advanced communications. In our experience, consumers frequently are unaware of the manufacturer of the products they use for communications. This is particularly true in the

wireless sector where the consumer's relationship is typically with the service provider. As a result, many consumers are not aware of or familiar with the manufacturer of the device they have acquired from the service provider. Thus, consumers may not be able to provide specifics such as name, address and contact information for the device manufacturer. If the service provider is responsible for providing the device, the consumer complaint regarding accessibility of the device should be accepted even if only the service provider is listed.

Although it is reasonable, and necessary, for consumers to provide specific information regarding inaccessibility of a particular device or service, the Commission's proposed rule includes language that will likely "chill" consumer action. The proposed rule asks consumers to include in a complaint "a complete statement of fact explaining" the violation of the Act or "all documentation that supports the complainant's contention." These are overly broad requirements to place on consumers who may consider themselves unable to fully explain the technical reasons for inaccessibility or who may believe that their complaint must be accompanied by technical or legal documentation of inaccessibility. We therefore urge the Commission to modify the proposed informal complaint procedures as follows.

First, consumers should be required merely to provide the name of the manufacturer or service provider and, if possible, city and state of the entity (or the country where the company is headquartered, in the case of an entity not incorporated in the US). Consumers may not know the name of the provider or manufacturer or may not be sure of the address. Second, the final rule should clarify that complainants are only required to describe the alleged inaccessibility issues related to a product or service in functional terms, e.g., "I can hear my phone's email menu choices, but my phone won't read my email aloud to me no matter what I do." Complainants may be encouraged to provide additional details or documentation as the complaint proceeds. Third, the rule should clarify that where the Commission finds an informal complaint to be lacking in certain details such as the correct name, address or actionable access claim, the Commission will first work with complainants to complete details in order to attempt to create a full complaint, rather than dismissing an incomplete informal complaint at the outset.

While we recognize that some aspects of the process we are recommending may create additional work for Commission staff, the experience gained from complaints filed under Section 255 indicates that consumers with disabilities have not filed excessive complaints and that consumers may need assistance in creating the proper record for Commission action. Ultimately, more complete complaints will aid the Commission in balancing the access expectations of consumers with the need for a clear set of access requirements by industry.

We also believe that we have a responsibility to consumers to point out to the Commission here that the NPRM makes repeated reference to the Commission's duty to help industry understand the law's expectations, while there is insufficient comparable reference to the Commission's duty to assist consumers in both understanding what the law can do for them and how to make use of it most effectively. We believe that the final

rule should establish a complaint navigation ombudsman function within the Commission to which consumers can turn for advice on proper form and effective content of both formal and informal complaints.

In establishing such a function within the Commission, there should be no problem answering possible industry objections that such a function puts them at a disadvantage and/or would create conflicts of interest within the Commission. The fact is that the Commission adroitly maneuvers through potential conflicts regularly through the application of a host of safeguards. Moreover, whether in the context of the Justice Department's Americans with Disabilities Act enforcement responsibilities or the role of the Client Assistance Program within the Rehabilitation Act or similar structures serving people with disabilities, advice and even advocacy provided on a consumer's behalf by an agency with oversight and/or enforcement responsibilities does not guarantee a favorable result for the consumer by any means. What such advice and advocacy does is level, at least to some extent, the profound disparities in resources, specialized knowledge, and negotiating power which clearly exist between a consumer with disability and the industries and systems which owe such consumers certain legal obligations.

#### P. 143-144: Future Mobile Phone Web Browser Requirements

Industry is most assuredly familiar with the technological solutions required to ensure accessibility of web browsing and web services. Stable, comprehensive and effective access techniques have been available on mobile devices for more than six years. Presently no fewer than 4 distinct mobile operating systems permit accessible mobile web browsing. It is important for the Commission to be aware, however, that only Apple's approach builds in access to web browsing per se and does not require the user to obtain, in several instances quite expensive, third-party solutions.

We are perplexed by the questions here and elsewhere with regard to informing entities as to their legal obligations. Presumably entities that regularly have business before the Commission and/or other agencies are aware of a host of statutory and regulatory requirements, many of them highly technical in nature, with which they must comply. There would not appear to be anything so unique about accessibility requirements to differentiate them from the other standards and requirements which the Commission has established. Thus, we believe it is appropriate for the Commission to follow its normal procedures for notification of effected entities with respect to new regulatory obligations.

It is our observation that more often than not, industry players raise their voices in a persistent call for "flexibility. And yet, at other times, it appears as if the same voices are demanding that the Commission prescribe what needs to take place. It is our experience that in those situations and for those companies who choose to follow the path of accessibility, these concerns and conflicts evaporate in the face of their organizational commitment. In the mean time, for those who have yet to follow that same path, maneuvering and foot dragging in the starting blocks is intended only to delay the sound of the starting gun.