

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
	)	
In the Matter of Accessible Mobile Phone Options for People who are Blind, Deaf-Blind, or Have Low Vision	)	CG Docket No. 10-145
	)	

REPLY COMMENTS OF  
THE CONSUMER ELECTRONICS ASSOCIATION

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## SUMMARY

The record in this proceeding fully confirms that in implementing the Twenty-First Century Communications and Video Accessibility Act (“CVAA”), the Commission must adhere to Congress’s directive to balance the accessibility of advanced communications services (“ACS”) with service providers’ and manufacturers’ continued ability to innovate. Notwithstanding this clear legislative approach, some commenters seek to use the regulatory process to promote accessibility at the cost of – not in harmony with – preserving innovation. The Commission should reject such proposals. Indeed, to best meet the fast-approaching statutory deadline for implementation, the Commission should ensure that the new regulations are well within its authority as provided by the CVAA. As discussed in detail in CEA’s initial comments and by numerous other commenters, although the Commission is charged with implementing the CVAA and necessarily has some discretion in this regard, it may not act in a manner that exceeds the scope of the statute or Congress’s intent.

As summarized below, these reply comments first emphasize the need for a transitional period before enforcement of the new rules begins. CEA then focuses on addressing specific proposals in the record that (i) seek to sacrifice innovation in the name of accessibility, and/or (ii) have no basis in the CVAA or legislative history.

*Phase-in Period.* The Commission should provide a transitional phase-in period of at least 24 months after the effective date of the new rules before commencing enforcement actions. This phase-in period will enable covered entities to come into compliance with the Commission’s final rules. The Commission has provided similar phase-in periods when industry has been faced with comparable levels of technical complexity and lengthy design cycles. Such a phase-in period would help provide a more orderly and efficient transition to the new rules, among other things providing the Commission time to address waiver requests filed in response to the final rules.

*Definitions/Scope.* Contrary to some suggestions in the record, the Commission should ensure that the scope of covered products, services, and entities is consistent with Congress’s intent. Specifically, the Commission should reject the overly inclusive interpretation of the ACS definitions suggested by some commenters.

- *Interconnected VoIP Services.* The requirements of Section 255 should apply to any interconnected VoIP service that meets the existing definition of such a service. For multi-purpose devices and services, there is no merit to the suggestion that once a service or device includes ACS beyond interconnected VoIP, the entire service or device becomes subject to Section 716.
- *Non-Interconnected VoIP Services.* The Commission should make clear that the definition of ACS, including the definition of non-interconnected VoIP service, does not include cases where the “offered service” includes a purely incidental ACS component.
- *Electronic Messaging Services (“EMS”).* Because the definition of EMS includes the limiting terms “between individuals,” the Commission should exclude communications such as machine-to-machine and human-to-machine from the requirements of the CVAA.

Consistent with the legislative history, the Commission should also exclude messaging functionality on social media platforms.

- *Interoperable Video Conferencing Services.* The Commission should interpret the modifier “interoperable” as Congress intended: to limit the scope of video conferencing services covered by the CVAA. Moreover, the CVAA’s prohibition against mandating technical standards prevents the Commission from adopting performance objectives that would mandate interoperability among video conferencing services or more broadly among all ACS.

*Exemptions/Waivers.* To faithfully implement Congress’s intent to balance accessibility and innovation, the Commission must avoid narrowly construing the exemption and waiver provisions of the CVAA. The “Customized Equipment or Services” exemption should not be limited by the type of enterprise customer or by how the customized product is used. In developing the implementing rules for the waiver process, the Commission should focus on the plain language of the statute and the legislative history and not disfavor “class” waivers or pre-determine waiver duration. The Commission should not impose onerous application and reporting obligations on companies qualifying under the small entities exemption.

*Achievability and Other Implementing Regulations.* Commenters largely agree that the Commission should not stray from the plain language of the CVAA and the legislative history as it develops implementing regulations.

- The record shows that the Commission should only consider the factors specified in the statute when making an achievability determination.
- Contrary to suggestions by some commenters, the CVAA and legislative history are clear that the Commission must not prefer built-in to third-party accessibility solutions.
- A covered entity’s duty to not impede or impair the accessibility of information content only applies when accessibility has been incorporated using recognized industry standards, and any suggestion to expand this duty should be rejected.
- The Access Board’s Draft Guidelines are inappropriate for incorporation into the Commission’s final rules at this time. The Draft Guidelines are far from final and are meant as procurement guidelines rather than mandatory industry-wide rules.
- The Commission should incorporate the CVAA’s limitation on liability for third-party applications into its rules to provide covered entities with the clarity and certainty that are necessary to facilitate open platforms and innovation.

*Recordkeeping/Enforcement.* Commenters generally support implementation of the recordkeeping and enforcement requirements in a way that provides covered entities with flexibility, avoids undue burdens on them, and increases the likelihood of rapidly resolving consumer accessibility issues.

- Consistent with Congress’s intent, the Commission should not make the recordkeeping requirements overly burdensome, unnecessarily expensive, or repetitive.
- Contrary to the suggestions of some commenters, the Commission should develop an informal complaint process that facilitates resolution and minimizes the cost for all parties. More specifically, the record supports including a pre-filing notice requirement, extending the answer period from 20 to 40 days, and streamlining the proposed answer content requirements.

*Mobile Browsers.* The Commission must reject suggestions to expand the accessibility requirements for mobile browsers. The plain language of Section 718 only provides the Commission with the authority to implement rules to require accessibility of mobile Internet browsers for those individuals that are blind or have a visual impairment. In addition, the record supports the conclusion that the Commission should interpret and eventually apply the requirements of Section 718 consistent with the case-by-case achievability analysis and flexibility requirements of Section 716.

The Commission is required to implement the CVAA in a manner that balances increased accessibility with promoting innovation, and commenters overwhelmingly support this approach. Where commenters’ suggestions veer from Congress’s intent, the Commission should reject such suggestions as outside the scope of and/or inconsistent with its authority. In short, the Commission should follow Congress’s flexible, practical roadmap that is based on marketplace realities and will ensure that *all* consumers benefit from implementation of the CVAA.

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REPLY COMMENTS OF THE CONSUMER  
ELECTRONICS ASSOCIATION

The Consumer Electronics Association (“CEA”) hereby submits these reply comments in response to the Notice of Proposed Rulemaking (“NPRM”) issued in the above-captioned proceedings.<sup>1</sup>

**I. INTRODUCTION**

As discussed at length in CEA’s initial comments, the Twenty-First Century Communications and Video Accessibility Act (“CVAA”)<sup>2</sup> requires the Commission to balance

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<sup>1</sup> 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”).

<sup>2</sup> Twenty-First Century Communications and Video Accessibility Act of 2010, Pub. L. No. 111-260, 124 Stat. 2751 (2010) (as codified in various sections of Title 47 of the United States Code). The law was enacted on October 8, 2010 (S. 3304, 111th Cong.). See also Amendment of Twenty-First Century Communications and Video Accessibility Act of 2010, Pub. L. No. 111-265, 124 Stat. 2795 (2010), also enacted on Oct. 8, 2010, to make technical corrections to the CVAA and the CVAA’s amendments to the Communications Act of 1934, as amended (the “Act”).

the need to ensure access to advanced communications services (“ACS”) by individuals with disabilities with the need to preserve manufacturers’ and service providers’ continued ability to innovate for the benefit of all consumers. Notwithstanding this clear legislative guidance, however, some commenters seek to use the regulatory process to promote accessibility at the cost of – not in harmony with – preserving innovation. The Commission should reject such proposals when crafting rules to implement new Sections 716 and 717 of the Communications Act of 1934, as amended (the “Act”). Indeed, to best meet the fast-approaching statutory deadline for adopting rules,<sup>3</sup> the Commission should ensure that its implementing regulations are well within its authority as provided by the CVAA.

Although the Commission is charged with implementing the CVAA and necessarily has some discretion in this regard, it may not act in a manner that exceeds the scope of the statute or Congress’s intent. For example, one commenter would have the Commission mandate interoperability across all forms of ACS, including but not limited to “interoperable video conferencing services.”<sup>4</sup> Such an overreaching requirement has no basis in the CVAA or its legislative history. Rather, the Commission should interpret the modifier “interoperable” as Congress intended: to limit the scope of the video conferencing services subject to the requirements of the CVAA, as discussed in more detail below.<sup>5</sup>

CEA’s initial comments discussed the Commission’s proposed implementing regulations at length, and such discussion is not repeated here. Rather, these reply comments first emphasize

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<sup>3</sup> The CVAA requires the Commission to adopt implementing rules by October 8, 2011. *See* 47 U.S.C. § 617(e)(1).

<sup>4</sup> *See* Comments in Response to *NPRM* of Telecommunications for the Deaf and Hard of Hearing *et al.* (“Consumer Groups”), CG Docket Nos. 10-213, 10-145, WT Docket No. 96-198, at 7-9, 11 (filed Apr. 25, 2011). In these reply comments, all comments filed on or about April 25, 2011, in this proceeding are short-cited by name of party.

<sup>5</sup> *Infra* Section III.A.

the need for a transitional period before enforcement of the new rules begins (a “phase-in period”) in order to allow covered entities to come into compliance with those rules. The reply comments then focus on addressing specific proposals in the record that (i) seek to sacrifice innovation in the name of accessibility, and/or (ii) have no basis in the CVAA or legislative history.

## **II. AN INITIAL PHASE-IN PERIOD IS NEEDED TO PROVIDE COVERED ENTITIES TIME TO COMPLY WITH THE COMMISSION’S FINAL RULES.**

CEA urges the Commission to adopt a transition or phase-in period of at least 24 months after the effective date of the new rules before commencing enforcement. The CVAA only requires the Commission to “promulgate” implementing regulations within one year of the date of enactment.<sup>6</sup> Nowhere does the CVAA require covered entities to comply instantly, upon rule promulgation, or require the Commission to immediately enforce such rules. Of course, it would be impossible for covered products and services to fully comply with the rules at the moment of adoption, when the covered entities first find out exactly what the new rules are.

As discussed below, even a short phase-in period of several months would be insufficient and unprecedented for regulations of the type and scope contemplated here. Sections 716(a)(1), (b)(1), and (e)(1)(C) provide the Commission with the needed flexibility to craft an appropriate phase-in period.<sup>7</sup> Moreover, the CVAA’s requirement that the Commission provide Congress with ongoing progress reports regarding accessibility compliance demonstrates Congress’s understanding that full compliance will be reached gradually, over a period of time.<sup>8</sup>

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<sup>6</sup> 47 U.S.C. § 617(e)(1).

<sup>7</sup> *Id.* § 617(a)(1), (b)(1), (e)(1)(C).

<sup>8</sup> *See id.* § 618(b)(1). “New Section 717(b) requires the Commission to issue a report to Congress every two years assessing the level of compliance with the requirements of [the CVAA] . . . .” H.R. Rep. No. 111-563, at 27 (2010) (“*House Committee Report*”); S. Rep. No. 111-386, at 9 (2010) (“*Senate Committee Report*”).

As the record shows, a phase-in period of at least 24 months is both appropriate<sup>9</sup> and comparable to other phase-ins that the Commission has adopted for consumer electronics equipment. The Commission has long recognized the need for phase-in periods when it adopts new rules that require complex technical solutions to be incorporated into an equipment development cycle. For instance, the Commission provided television manufacturers with 24 months to incorporate new technical requirements for the display of closed captions on digital television (“DTV”) receivers.<sup>10</sup> Television manufacturers were faced with substantial technical complexity in redesigning television receivers to comply with the new requirements as well as lengthy television design cycles.<sup>11</sup> Similarly, the Commission initially provided wireless carriers and handset manufacturers with five years to achieve compliance with certain E911 location accuracy requirements.<sup>12</sup> The complexities and design cycle challenges for covered entities under the CVAA require a similar phase-in period.

Moreover, the proposed phase-in period will facilitate a more efficient transition to the new rules. Besides recognizing the design and development cycle that manufacturers and service providers face when bringing ACS devices and services to market, a 24-month phase-in period would provide the Commission time to address waiver requests filed in response to the final rules, allowing time for a determination before compliance is required. Without a phase-in period, covered entities may be forced to remove from the market products that are at risk of

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<sup>9</sup> See, e.g., Microsoft at 15-16; Verizon and Verizon Wireless at 2; VON Coalition at 8.

<sup>10</sup> *Closed Captioning Requirements for Digital Television Receivers*, Report and Order, 15 FCC Rcd 16788, 16807 ¶ 56 (2000).

<sup>11</sup> See *id.*

<sup>12</sup> See *Wireless E911 Location Accuracy Requirements*, Report and Order, 22 FCC Rcd 20105, 20112 ¶ 17 (2007), *voluntarily vacated*, *Rural Cellular Ass’n v. FCC*, 2008 U.S. App. LEXIS 19889 (D.C. Cir. Sept. 17, 2008).

being considered non-compliant, leading to interruptions in product availability that would cause harm to consumers and covered entities alike.

In addition, the Commission should clarify that any products or services developed and deployed prior to the promulgation of the final rules are exempt from compliance with Sections 716 and 717.<sup>13</sup> To require compliance from products developed prior to the promulgation of final rules would be contrary to Congress’s intent to avoid “retrofitting.”<sup>14</sup> Similarly, so-called “beta” or “in development” versions of software and products should not be subject to enforcement actions under the new rules. The manufacturer has not finalized the design or completed development of “beta” versions for widespread consumer use. Enforcement actions against these products and services during development would only increase costs and slow innovation – including innovation in providing accessibility solutions – without providing any countervailing benefit to the disability community.<sup>15</sup>

### **III. THE SCOPE OF COVERED PRODUCTS, SERVICES, AND ENTITIES MUST BE CONSISTENT WITH CONGRESS’S INTENT.**

#### **A. The Commission Should Refrain from Adopting the Overly Inclusive Interpretation of ACS Suggested by Some Commenters.**

*Interconnected VoIP Service.* Consistent with Section 716(f), the requirements of Section 255 of the Act should apply to any interconnected VoIP service that meets the existing definition of such a service.<sup>16</sup> For multi-purpose devices and services, there is no merit to the suggestion that once a service or device includes ACS beyond interconnected VoIP, the entire

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<sup>13</sup> See, e.g., VON Coalition at 8; Microsoft at 15. This exemption should also apply when the Commission implements regulations under Section 718.

<sup>14</sup> See *Senate Committee Report* at 9; *House Committee Report* at 26.

<sup>15</sup> See, e.g., ITI at 22-23; OnStar at 8.

<sup>16</sup> See 47 U.S.C. § 617(f).

service or device becomes subject to Section 716.<sup>17</sup> Both industry and other advocates largely agree that the Commission should apply Section 255 “to the extent that the device provides a service that is already subject to Section 255 and apply Section 716 solely to the extent that the device provides ACS that is not otherwise subject to Section 255.”<sup>18</sup>

***Non-Interconnected VoIP Service.*** The Commission should make clear that the definition of ACS, including the definition of non-interconnected VoIP service, does not include those services where the “offered service” only includes a purely incidental ACS component.<sup>19</sup> The suggestion that covered entities could simply “attach” the VoIP component to a “larger” product to avoid the requirements of the CVAA<sup>20</sup> demonstrates a fundamental misunderstanding of the CVAA and the marketplace. The CVAA requirements apply to the “offer[.]” of non-interconnected VoIP service or other ACS.<sup>21</sup> If a non-interconnected VoIP functionality is only an incidental part of a service being offered to consumers, that functionality fails to meet the definition of a non-interconnected VoIP *service*, as CEA discussed in its initial comments.<sup>22</sup> In addition, whether a manufacturer “intended” to include VoIP functionality should not be dispositive as to the separate issue of whether the VoIP functionality is purely incidental.<sup>23</sup> Rather, as CEA discussed, the Commission should determine whether a service is included

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<sup>17</sup> See AFB at 6.

<sup>18</sup> *NPRM* ¶ 30 (internal quotation omitted); see, e.g., RERC-IT at 8; AT&T at 4; Verizon and Verizon Wireless at 6; T-Mobile at 5-6.

<sup>19</sup> See, e.g., CTIA at 15; TIA at 9.

<sup>20</sup> RERC-IT at 10.

<sup>21</sup> 47 U.S.C. § 617(a)(1), (b)(1).

<sup>22</sup> See CEA at 11-12. RERC-IT’s claim that an entity might seek to avoid the requirements of the CVAA by attaching an ACS product to a “larger” non-ACS product is unreasonable, because there is likely no market for such a contrived product. See RERC-IT at 10.

<sup>23</sup> See CEA at 11-12; RERC-IT at 10.

within the definition of “non-interconnected VoIP service” based on how that service is “offered” to consumers.<sup>24</sup> Moreover, the Commission should carefully limit the definitional scope of “non-interconnected VoIP service” as well as the other categories of ACS to help minimize the burden on industry and the Commission associated with processing waiver requests for such services pursuant to Section 716(h)(1).<sup>25</sup>

***Electronic Messaging Service (“EMS”).*** The Commission should reject the suggestions of some commenters that seek to increase the scope of the EMS definition to include services that feature communications between machines or between humans and machines.<sup>26</sup> The Commission must give meaning to the limiting terms “between individuals” as it determines the definitional scope of EMS.<sup>27</sup> To do so, the definition must exclude communications not between individuals, such as machine-to-machine and human-to-machine communications.<sup>28</sup>

In particular, the Commission should reject the suggestion that messaging functionality within a social media platform is EMS.<sup>29</sup> The legislative history from both houses of Congress is clear: Congress intended to exclude “messages posted on social networking websites.”<sup>30</sup> The

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<sup>24</sup> See CEA at 11; see, e.g., CTIA at 19; T-Mobile at 6.

<sup>25</sup> 47 U.S.C. § 617(h)(1).

<sup>26</sup> See RERC-IT at 11; Words+, Inc. at 13.

<sup>27</sup> 47 U.S.C. § 153(19).

<sup>28</sup> See, e.g., AT&T at 5; ITI at 23-24; Microsoft at 15; T-Mobile at 7.

<sup>29</sup> See Wireless RERC at 3.

<sup>30</sup> *Senate Committee Report* at 6; *House Committee Report* at 23. Moreover, even if considered EMS, such messaging functionality is typically provided through third-party applications, and the Commission should confirm that the third-party application provider would bear the responsibility to make such functionality accessible rather than the device manufacturer or underlying network service provider. See, e.g., Verizon and Verizon Wireless at 7-8; TIA at 10; T-Mobile at 7.

Commission should follow this express guidance and clarify in its rules that messaging functionality within a social media platform does not constitute EMS.

***Interoperable Video Conferencing Services.*** Any suggestion that the Commission has the authority to mandate interoperability among video conferencing services, and more broadly among all ACS,<sup>31</sup> is without a basis in the CVAA or its legislative history.<sup>32</sup> The Commission should treat the insertion of the modifier “interoperable” in the definition of “interoperable video conferencing service” as Congress intended: to limit the scope of video conferencing services covered by the CVAA.<sup>33</sup> As one research commenter recognizes, “[m]andating full interoperability between all providers of video conference solutions can be an unreasonable burden on the market and therefore can have the potential to stifle innovation.”<sup>34</sup>

Moreover, the CVAA’s prohibition against mandating technical standards prevents the Commission from mandating interoperability among video conferencing services.<sup>35</sup> Section 3 of the CVAA further prohibits the Commission from “mandat[ing] the use or incorporation of proprietary technology.”<sup>36</sup> Any suggestion that the Commission may mandate interoperability among video conferencing services, or more broadly among ACS,<sup>37</sup> violates these prohibitions.

The Commission may not evade these prohibitions through performance objectives that require interoperability or the use of specific technologies or techniques. One supporter of

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<sup>31</sup> See Consumer Groups at 9-10.

<sup>32</sup> See, e.g., Microsoft at 4-6; T-Mobile at 7.

<sup>33</sup> See, e.g., CTIA at 20-22; ESA at 3; ITI at 24; TechAmerica at 4-5; TIA at 11; VON Coalition at 5.

<sup>34</sup> Wireless RERC at 9.

<sup>35</sup> 47 U.S.C. § 617(e)(1)(D) (“[T]he Commission shall . . . not mandate technical standards . . . .”); see, e.g., NetCoalition at 2; TIA at 12 n.38; Verizon and Verizon Wireless at 11.

<sup>36</sup> CVAA § 3.

<sup>37</sup> See, e.g., Consumer Groups at 10.

mandatory video conferencing interoperability recognizes this dilemma, but nonetheless suggests that the Commission mandate an interoperability standard.<sup>38</sup> However, the plain language of the CVAA provides the Commission with no authority to exempt interoperability standards from the statutory prohibition against mandating technical standards.<sup>39</sup>

In addition, based on the plain language of the statute, the Commission does not have the authority to expand the definition of “interoperable video conferencing services” to include non-real time services such as video mail.<sup>40</sup> Specifically, video voice mail is not a “real-time video communication[,]”<sup>41</sup> as required by the definition, and the Commission should not consider it ACS for purposes of the CVAA.<sup>42</sup> Calls for the Commission to exercise its ancillary authority in order to bring video mail within the ambit of the CVAA<sup>43</sup> are inappropriate where Congress so clearly and specifically defined and limited the scope of services to be covered.<sup>44</sup>

**B. The “Customized Equipment or Services” Exemption Should Not Be Limited By the Type of Enterprise Customer or By How the Customized Product is Used.**

The Commission’s implementing regulations should not narrow the application of the “Customized Equipment or Services” exemption beyond the plain language of the statute.

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<sup>38</sup> See RERC-IT at 34 (The only exception . . . is in the area of interoperability. It is not possible or reasonable to require that things be interoperable and then not specify common transport/interconnection format.”).

<sup>39</sup> See 47 U.S.C. § 617(e)(1)(D). Although RERC-IT proposes a mandatory common interoperability standard for real-time text, *see* RERC-IT at 35-36, the Commission has no authority to impose such a mandate.

<sup>40</sup> See 47 U.S.C. §153(27).

<sup>41</sup> See *id.*

<sup>42</sup> See, e.g., Verizon and Verizon Wireless at 9.

<sup>43</sup> See Consumer Groups at 8-9.

<sup>44</sup> See, e.g., CTIA at 21 nn.63-64.

Contrary to the suggestion of some commenters,<sup>45</sup> the Commission should not refrain from applying the exemption in the case of public institution customers or where customizations are made available indirectly to the public through employers, schools, or other institutions.<sup>46</sup> The exemption applies to “customized equipment or services that are not offered directly to the public, or to such classes of users as to be effectively available directly to the public . . . .”<sup>47</sup> The statute does not limit the application of the exemption when the customer is a public institution such as a school or government agency or when the customized product may be made indirectly available to the public. Moreover, as the record shows, application of this exemption to all enterprise customers, including public institutions, does not otherwise alter those employers’ obligations under the Americans with Disabilities Act.<sup>48</sup>

**C. In Developing the Waiver Process, the Commission Should Focus on the Plain Language of the Statute.**

Congress expressly added Section 716’s waiver provision so that the Commission would have the authority to reinforce the balance between ensuring accessibility and promoting innovation.<sup>49</sup> However, the suggestions of at least one commenter would so narrowly construe the Commission’s waiver authority as to effectively negate it.<sup>50</sup> The Commission should instead implement the waiver provisions in a manner true to the plain language of the CVAA and the legislative history. Specifically, the Commission should focus the waiver analysis, as Congress

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<sup>45</sup> See, e.g., Consumer Groups at 12; RERC-IT at 16-17; Words+, Inc. at 17.

<sup>46</sup> See, e.g., CTIA at 23.

<sup>47</sup> 47 U.S.C. § 617(i).

<sup>48</sup> See, e.g., ITI at 21; Motorola at 4.

<sup>49</sup> “[A] device designed for a purpose unrelated to accessing advanced communications might also provide, on an incidental basis, access to such services. In this case, the Commission may find that to promote technological innovation the accessibility requirements need not apply.” *House Committee Report* at 26; *Senate Committee Report* at 8.

<sup>50</sup> See RERC-IT at 10, 17-18.

intended, on whether a multi-purpose product “is designed primarily for purposes other than using advanced communications services.”<sup>51</sup> A more restrictive reading of the waiver provision is not supported by the CVAA itself or by the legislative history.

The Commission should also reject arguments that class waivers should be prohibited or disfavored or that all waivers should have a single fixed duration and be “reviewed annually.”<sup>52</sup> The CVAA expressly authorizes “class” waivers,<sup>53</sup> and the Commission should not disfavor such waivers. Fixed duration waivers that have to be reviewed annually would provide an unworkable waiver process that is unduly burdensome for both waiver recipients and the Commission alike. Rather, the Commission should use its waiver authority, as Congress intended, to facilitate innovation and to avoid acting as a gatekeeper for new technologies.

**D. The Commission Should Refrain From Imposing Onerous Application and Reporting Obligations to Qualify under the Small Entities Exemption.**

The CVAA’s exemption for small companies demonstrates Congress’s intent to minimize the statute’s burden on small businesses and to promote the pace of technological innovation.<sup>54</sup> The suggestion that small companies be limited to a mere one-year exemption with a “stronger renewal burden”<sup>55</sup> is contrary to Congressional intent. Moreover, the suggested approach is also inconsistent with the Administration’s goal of minimizing regulatory burdens, especially on small businesses.<sup>56</sup> The Commission should consult with the Small Business Administration

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<sup>51</sup> 47 U.S.C. § 617(h)(1)(B).

<sup>52</sup> RERC-IT at 19.

<sup>53</sup> 47 U.S.C. § 617(h)(1).

<sup>54</sup> *House Committee Report* at 26.

<sup>55</sup> *See* Wireless RERC at 5.

<sup>56</sup> Presidential Documents, Memorandum on Regulatory Flexibility, Small Business, and Job Creation, 76 Fed. Reg. 3827, 3827 (Jan. 21, 2011), <http://edocket.access.gpo.gov/2011/pdf/2011->

when defining “small entity” and consider as relevant factors the limits on a company’s “legal, financial, or technical capability.”<sup>57</sup>

**IV. THE RECORD REINFORCES THAT THE COMMISSION SHOULD NOT STRAY BEYOND THE PLAIN LANGUAGE OF THE CVAA AND THE LEGISLATIVE HISTORY.**

**A. The Commission Should Only Consider the Factors Specified in the Statute When Making an Achievability Determination.**

When determining whether accessibility for ACS is “achievable,” the Commission should only consider the four factors provided in the statute, giving each equal weight.<sup>58</sup> The Commission should not adopt suggestions in the record that distort the four-factor test. Thus, there is no legislative support for the claim that Congress intended a “presumption” that accessibility is achievable for all covered products and services.<sup>59</sup> Similarly, the CVAA does not provide that a covered entity must meet a “clear and convincing” standard for each of the four factors.<sup>60</sup> Rather, the Commission is only required to “consider” the four statutory factors when determining whether accessibility is “achievable.”<sup>61</sup>

In applying the statutory factors, the Commission should evaluate whether accessibility is achievable without relying on comparisons to competitors or competing products.<sup>62</sup> The statutory factors are framed in terms of the “specific equipment or service in question” and the

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1387.pdf (“My Administration is firmly committed to eliminating excessive and unjustified burdens on small businesses, and to ensuring that regulations are designed with careful consideration of their effects, including their cumulative effects, on small businesses.”).

<sup>57</sup> *House Committee Report* at 26.

<sup>58</sup> *See, e.g.*, ITI at 9; TIA at 15; Verizon and Verizon Wireless at 10; T-Mobile at 9.

<sup>59</sup> *See* AFB at 8-9.

<sup>60</sup> *Id.* at 9.

<sup>61</sup> 47 U.S.C. § 617(g).

<sup>62</sup> *See, e.g.*, T-Mobile at 9-10; TIA at 16; Verizon and Verizon Wireless at 11.

“service provider or manufacturer in question” and not industry-wide surveys or product comparisons.<sup>63</sup>

The Commission should refrain from incorporating mandatory accessibility features into its rules. Such an approach is not supported by the statute’s achievability provision, which requires a case-by-case determination of the accessibility features that are achievable for each product.<sup>64</sup> Incorporating mandatory accessibility features also is inconsistent with Section 716’s rule of construction, which prevents the Commission from requiring a covered entity to make every device or service accessible for every disability.<sup>65</sup> Furthermore, a wide cross-section of commenters recognizes that such mandatory accessibility features would quickly be outdated.<sup>66</sup>

The Commission should reject ACB’s suggestion that the Commission divide devices into classes and require that at least one from each class is fully accessible.<sup>67</sup> Such an approach would require the Commission to define or categorize the markets or product lines for ACS products and services in a manner not even hinted at, let alone authorized, by the CVAA. In fact, supporters of ACB’s suggestion<sup>68</sup> fail to recognize that, under the CVAA’s case-by-case achievability analysis,<sup>69</sup> the CVAA effectively bars the Commission from taking such an approach. The record demonstrates that even if the Commission had the needed authority, such a classification system would be unmanageable.<sup>70</sup>

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<sup>63</sup> See 47 U.S.C. § 617(g)(1)-(4).

<sup>64</sup> *Id.* § 617(g).

<sup>65</sup> *Id.* § 617(j).

<sup>66</sup> See, e.g., RERC-IT at 24; CTIA at 25-26.

<sup>67</sup> *NPRM* ¶ 76.

<sup>68</sup> RERC-IT at 24-25.

<sup>69</sup> See 47 U.S.C. § 617(g).

<sup>70</sup> TIA at 18.

**B. The Commission Must Not Prefer Built-In to Third-Party Accessibility Solutions.**

The Commission should reject suggestions that it limit the use of third-party solutions, by, for example, adopting a requirement that the operation of the third-party solution be “not more burdensome” than a built-in solution, or by adopting requirements that have the effect of converting a third-party solution into a built-in solution.<sup>71</sup> Such suggestions fail to recognize the plain language of the CVAA and Congress’s intent to provide industry with flexibility. The statute is clear; a covered entity may fulfill its accessibility obligation through either a built-in solution or a nominal-cost third-party solution.<sup>72</sup>

Because Congress did not provide a preference for built-in solutions over nominal-cost third-party solutions in the CVAA, neither should the Commission’s implementing rules. Moreover, Congress intended that “the Commission afford manufacturers and service providers as much flexibility as possible . . . .”<sup>73</sup> Any limitations on using third-party solutions beyond those set forth in the statutory text would contravene Congress’s intent to provide covered entities with maximum flexibility to meet the accessibility requirements of Section 716.

Similarly, to require manufactures to support a third-party solution for the entire life of the product<sup>74</sup> would impermissibly disfavor the use of third-party solutions.<sup>75</sup> Such a requirement would misapprehend the realities of the marketplace. A manufacturer typically provides only a limited warranty on a device, and support for accessibility solutions should be

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<sup>71</sup> *See, e.g.*, Consumer Groups at 19; RERC-IT at 26.

<sup>72</sup> 47 U.S.C. § 617(a)(2), (b)(2).

<sup>73</sup> *House Committee Report* at 24. The Commission should also provide covered entities with maximum flexibility when meeting the nominal cost requirement for third-party solutions.

<sup>74</sup> *See* Consumer Groups at 19.

<sup>75</sup> *See* TIA at 21-22.

for a similar period. The life of the product often extends well beyond the warranty period. Requiring a covered entity to support a third-party solution for the life of the product will increase the cost of accessibility, and may lead to the conclusion that no accessibility solution is achievable, undermining the goal of increasing accessibility.<sup>76</sup>

The record also addressed the requirement that third-party accessibility solutions must be available at “nominal cost.”<sup>77</sup> Nominal cost should be determined objectively on a case-by-case basis, considering the nature of the service or product as well as its total lifetime cost.<sup>78</sup> The assertion that “nominal cost” should be determined subjectively from the perspective of the individual purchaser is unworkable.<sup>79</sup>

The Commission should not mandate the development of standard accessibility application programming interfaces (“APIs”) or software development kits (“SDKs”). This is an area where the market already works successfully. Marketplace demands will drive continued improvement in the descriptions of the accessibility interfaces within APIs and SDKs as well as increased manufacturer guidance for the development of accessible user interfaces.<sup>80</sup> The

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<sup>76</sup> It is possible that a covered entity may rely on a third-party solution for accessibility, and that a user-downloaded application may also rely on the same third-party solution for accessibility. In the event that the developer of a user-installed application relies on the third-party accessibility solution, the developer is responsible for maintaining its application’s compatibility with the solution, if it is achievable to do so.

<sup>77</sup> 47 U.S.C. § 617(a)(2)(B), (b)(2)(B); *see, e.g.*, CTIA at 28; T-Mobile at 10-11; TIA at 20; Verizon and Verizon Wireless at 12.

<sup>78</sup> *See, e.g.*, CTIA at 28.

<sup>79</sup> *See* RERC-IT at 25 (“What is ‘nominal’ to an industry decision maker, or even to a person in the general market for an ACS product, will be greater than what is “nominal” for a person with a disability . . .”).

<sup>80</sup> CEA therefore disagrees with the Words+, Inc. suggestion that the Commission *require* covered entities to provide descriptions of accessibility interfaces within SDKs. *See* Words+, Inc. at 9-10.

Commission’s forthcoming clearinghouse initiative and other forums may further help distribute information on accessibility APIs and/or SDKs.<sup>81</sup>

**C. The Prohibition Against Impeding or Impairing the Accessibility of Information Content Only Applies When Accessibility Has Been Incorporated Using Recognized Industry Standards.**

CEA’s initial comments discussed at length Section 716(e)(1)(B), which establishes a duty for covered entities not to impede or impair the accessibility of information content.<sup>82</sup> The legislative history explains that, pursuant to Section 716(e)(1)(B), a device or service cannot be expected to protect the accessibility of information content unless that accessibility has been provided “in accordance with recognized industry standards.”<sup>83</sup> CEA recommended that the Commission reject a proposal by RERC-IT regarding the accessibility of information content.<sup>84</sup> In the initial comment round, RERC-IT modified its proposal, the first part of which now proposes that “the accessibility information (e.g., captions or descriptions) are not stripped off when information is transitioned from one medium to another using industry standards.”<sup>85</sup> RERC-IT also further explained the second part of its proposal, a requirement that parallel and associated media channels are not disconnected or blocked, and the third part, a requirement that consumers be able to combine text, video, and audio streaming from different origins.<sup>86</sup> The modification and further explanations do not remedy the fatal flaws in RERC-IT’s proposal,<sup>87</sup>

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<sup>81</sup> See 47 U.S.C. § 618(d); see, e.g., TIA at 18-19.

<sup>82</sup> See CEA at 32-34.

<sup>83</sup> *Senate Committee Report* at 8; *House Committee Report* at 25.

<sup>84</sup> CEA at 32-34.

<sup>85</sup> RERC-IT at 31 (emphasis in original).

<sup>86</sup> See *id.*

<sup>87</sup> For instance, RERC-IT provides the example of a movie and separate audio track in support of the third part of its proposal, RERC-IT at 31, but such an example is irrelevant because the delivery of such content would not qualify as ACS.

and the Commission should still reject the proposal in its entirety. As detailed in CEA’s initial comments,<sup>88</sup> there is no logical or legal support for incorporating RERC-IT’s proposal into the Commission’s rules.

**D. The Commission Should Incorporate the CVAA’s Limitation on Liability for Third-Party Applications into Its Rules.**

Section 2(a) exempts from liability under the CVAA any person to the extent such person “transmits, routes, or stores in intermediate or transient storage the communications made available through the provision of [ACS] by a third party” or “provides an information location tool . . . through which an end user obtains access to such . . . [ACS or ACS equipment].”<sup>89</sup> The Commission should expressly incorporate this liability limitation into its rules to preclude device manufacturers from being held liable for software downloaded by consumers, where a third party controls the specification of the downloaded software.<sup>90</sup> In other words, the Commission’s final rules should hold the developer of any “third-party applications” – including applications available through an app store – *solely* responsible for the accessibility of the software they develop.<sup>91</sup> The incorporation of such a liability limitation will provide covered entities with the clarity and certainty necessary to continue to offer open platforms, enabling and facilitating continued innovation.

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<sup>88</sup> CEA at 32-34.

<sup>89</sup> CVAA § 2(a).

<sup>90</sup> *See, e.g.*, Verizon and Verizon Wireless at 3-4; TIA at 7; T-Mobile at 13-14; *but see* RERC-IT at 4-7.

<sup>91</sup> More generally, Section 2(a) of the CVAA precludes holding a platform provider liable for the accessibility of ACS provided by a third party using that platform. *See, e.g.*, Verizon and Verizon Wireless at 7-8.

**E. The Access Board’s Draft Guidelines Are Inappropriate for Incorporation Into the Commission’s Final Rules.**

In light of the Commission’s pressing statutory deadline to promulgate rules for Sections 716 and 717, the Commission should not seek to incorporate the Access Board’s Draft Guidelines<sup>92</sup> into its rules at this time. Although CEA recognizes the Access Board’s diligence and expertise in the accessibility area, its Draft Guidelines are far from final and are meant as procurement guidelines rather than mandatory industry-wide rules.<sup>93</sup> Rather, once the Access Board finalizes its guidelines, the Commission should review those guidelines and evaluate whether and to what extent to harmonize its rules with the final Access Board guidelines.<sup>94</sup> Moreover, the record demonstrates that the Draft Guidelines are not sufficiently clear to implement the CVAA and do not provide covered entities with the level of flexibility contemplated under the CVAA.<sup>95</sup>

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<sup>92</sup> United States Access Board, *Draft Information and Communication Technology (ICT) Standards and Guidelines* (Mar. 2010) (“Draft Guidelines”), available at <http://www.access-board.gov/sec508/refresh/draft-rule.pdf>.

<sup>93</sup> See TechAmerica at 9 (“Reliance on the Section 508 Guidelines would be imprudent. The Section 508 Guidelines remain in draft form, cover a wider scope than the CVAA, and do not apply to commercial products sold to the general public.”); ITI at 16 (“[C]ompliance with Section 508 performance guidelines is *optional*, in that a manufacturer or service provider can elect, or not elect, in the course of its business to offer products for purchase by the Federal Government. By contrast, Section 716 of the CVAA is *mandatory*, where achievable, in that it reaches by its terms all providers and manufacturers of ACS or ACS products for sale in or import into the United States.” (emphasis in original)).

<sup>94</sup> See, e.g., TIA at 33.

<sup>95</sup> See CTIA at 30; TIA at 31-32.

**V. COMMENTERS SUPPORT IMPLEMENTATION OF THE RECORDKEEPING AND ENFORCEMENT REQUIREMENTS IN A WAY THAT PROVIDES COVERED ENTITIES WITH FLEXIBILITY AND AVOIDS UNDUE BURDEN.**

**A. Recordkeeping Requirements Should Not Be Overly Burdensome, Unnecessarily Expensive, or Repetitive.**

Commenters generally agree that the Commission should provide covered entities with flexibility in how they implement Section 717's recordkeeping requirements.<sup>96</sup> This flexibility will enable covered entities to incorporate these requirements into existing systems, helping to control the regulatory burden of such requirements.

However, the Commission should not transform the recordkeeping requirements into "reporting" obligations.<sup>97</sup> The CVAA does not provide the Commission with authority to impose reporting obligations. In addition, the Commission should refrain from expanding the types of information for which records must be kept beyond those specified in Section 717.<sup>98</sup> The Commission also should reject, as unreasonable and unworkable, any suggestion that the required records be "immediately producible."<sup>99</sup> Rather, covered entities should be provided a reasonable amount of time to produce requested records as contemplated by the Commission.<sup>100</sup> The production of requested records may require gathering a substantial volume of documents from one or more internal business units as well as third-parties and may also require translating the records from a foreign language.

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<sup>96</sup> See, e.g., AT&T at 12; CTIA at 31; ITI at 27; T-Mobile at 14; TIA at 24-25; Verizon and Verizon Wireless at 13-14. Consistent with providing such flexibility, the Commission should refrain from specifying the level of detail necessary to meet the recordkeeping requirements. See AFB at 9.

<sup>97</sup> CTIA at 31.

<sup>98</sup> 47 U.S.C. § 618(a)(5)(A)(i)-(iii).

<sup>99</sup> See RERC-IT at 40.

<sup>100</sup> See NPRM ¶ 123 ("[I]f a record (that the Commission requires be produced after receipt of a complaint) is not readily available, the covered entity must provide it no later than the date of its response to the complaint.").

**B. The Complaint Process Should Facilitate Resolution and Minimize the Cost for All Parties.**

In developing a complaint process under Section 717, the Commission should focus on Congress's intent to ensure that consumers have access to ACS while minimizing regulatory burdens on covered entities, including increased costs that will have to be passed on to all consumers. Thus, the Commission should recast the complaint process in order to focus more on resolving consumers' specific accessibility concerns and less on conducting general inquiries into covered entities' accessibility protocols and practices.

As an initial matter, the CVAA does not provide the Commission with the authority to award a complainant damages or attorneys' fees as suggested by one commenter.<sup>101</sup> Congress's intent was to provide the Commission with the authority to issue a remedial order to require a covered entity "to bring the service or equipment at issue into compliance."<sup>102</sup>

*Pre-Filing Notice.* CEA agrees with numerous other commenters that a potential complainant should be required to first contact the covered entity before filing a complaint.<sup>103</sup> Such a pre-filing notice provides the complainant and covered entity an opportunity to communicate and likely resolve potential complaints before involving the Commission, which benefits consumers, industry, and the Commission alike. A requirement to contact the covered entity before filing would increase the likelihood that the potential complainant will get his or

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<sup>101</sup> See RERC-IT at 41. The Commission may only award damages where Congress has expressly provided such authority. See, e.g., 47 U.S.C. § 206. Similarly, "[t]he Commission has consistently held that in the absence of specific statutory authorization, it lacks the authority to require one party to pay another party's costs in litigation before it." *Improving Public Safety Communications in the 800 MHz Band*, Second Memorandum Opinion and Order, 22 FCC Rcd 10467, 10485 ¶ 49 (2007).

<sup>102</sup> *House Committee Report* at 26; *Senate Committee Report* at 9. In addition, the Commission has the authority to take enforcement actions for violations of Sections 255, 716, and 718 and issue forfeiture penalties. See 47 U.S.C. § 618(a); *id.* § 503(b)(2)(F).

<sup>103</sup> See, e.g., CTIA at 31-32; Verizon and Verizon Wireless at 14; ITI at 30.

her concern addressed speedily. A pre-filing notice requirement would not be an obstacle to filing a complaint with the Commission. If the covered entity cannot readily resolve the issue, potential complainants would be free to then file a complaint with the Commission.

***Informal Complaint Procedure.*** Commenters convincingly demonstrate that the proposed informal complaint process imposes unreasonable burdens on parties without furthering the resolution of consumer complaints.<sup>104</sup> The record supports streamlining the answer content requirements to focus narrowly on (i) whether the device or service is accessible and (ii) if not accessible, whether accessibility is achievable.<sup>105</sup> Moreover, commenters make compelling arguments that the 20-day answer period is inadequate, and generally agree that a 40-day or similar period for an answer is a more realistic and reasonable answer period that will not jeopardize the Commission's ability to resolve complaints in a timely way.<sup>106</sup>

In addition, the Commission should refrain from allowing complainants to remain anonymous, as suggested by one commenter.<sup>107</sup> Anonymity would only increase the time and cost of resolving complaints by inhibiting a defendant's ability to communicate with the complainant. Similarly, the Commission should encourage full disclosure of a complainant's disability to enable the covered entity to better understand and address the individual needs of the complainant.<sup>108</sup>

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<sup>104</sup> See, e.g., AT&T at 15; CTIA at 35-36; Verizon and Verizon Wireless at 14-16; T-Mobile at 15.

<sup>105</sup> See, e.g., TIA at 25-29; CTIA at 36-39.

<sup>106</sup> See, e.g., TIA at 26; AT&T at 17; CTIA at 40.

<sup>107</sup> See RERC-IT at 42.

<sup>108</sup> See Words+, Inc. at 36.

The record supports the Commission’s conclusion that it must exercise any remedial authority selectively and carefully.<sup>109</sup> The record also supports that a reasonable timeframe for compliance should be determined based on a case-by-case analysis<sup>110</sup> and that an 18-month period is a reasonable starting point when determining a timeframe for compliance.<sup>111</sup> Moreover, CEA would welcome the 90-day period to comment on any proposed remedial action as suggested by Words+, Inc.<sup>112</sup>

**VI. THE PLAIN LANGUAGE OF SECTION 718 ONLY REQUIRES THE ACCESSIBILITY OF MOBILE INTERNET BROWSERS FOR THOSE INDIVIDUALS THAT ARE BLIND OR HAVE A VISUAL IMPAIRMENT.**

Contrary to the suggestion of one commenter,<sup>113</sup> the Commission lacks the statutory authority to extend the mobile Internet browser accessibility requirements beyond individuals who are blind or have a visual impairment. Section 718 only requires that “the manufacturer or provider shall ensure that the functions of the included browser (including the ability to launch the browser) are accessible to and usable by individuals who are blind or have a visual impairment, unless doing so is not achievable . . . .”<sup>114</sup> No statutory basis exists to support any suggestion that the Commission may expand this requirement beyond providing accessibility to the blind or visually impaired.

In addition, the record supports the conclusion that the Commission should interpret and eventually apply the requirements of Section 718 consistent with the flexibility requirements of

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<sup>109</sup> Verizon and Verizon Wireless at 16.

<sup>110</sup> *Id.*

<sup>111</sup> *See* Words+, Inc. at 38.

<sup>112</sup> *Id.*

<sup>113</sup> Words+, Inc. at 39.

<sup>114</sup> 47 U.S.C. § 619(a).

Section 716.<sup>115</sup> Section 718 includes the same “achievable” and industry flexibility standards as set forth in Section 716.<sup>116</sup> Thus, the Commission should apply the same case-by-case achievability analysis when applying Section 718. The record also supports the conclusion that the Section 718 requirements were intended to only cover the “on-ramp” functionalities of the device and service and not the accessibility of the content or applications that the user accesses via the browser.<sup>117</sup>

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<sup>115</sup> TIA at 34.

<sup>116</sup> Compare 47 U.S.C. § 617(a)-(b) with 47 U.S.C. § 619.

<sup>117</sup> See, e.g., T-Mobile at 16; TIA at 35.

## VII. CONCLUSION

As detailed above and in CEA's initial comments, the Commission should (i) ensure that its implementing regulations are well within its authority as provided by the CVAA and (ii) reject any proposal that seeks to promote accessibility at the cost of – not in harmony with – preserving innovation.

Respectfully submitted,

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