

**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
	)	

**REPLY COMMENTS OF THE  
NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION**

The National Cable & Telecommunications Association (NCTA)<sup>1</sup> hereby submits these reply comments in response to the notice of proposed rulemaking issued by the Commission seeking comment on the rules that will implement the advanced communications services (ACS) provisions of the Twenty-First Century Communications and Video Accessibility Act of 2010 (CVAA).<sup>2</sup>

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<sup>1</sup> NCTA is the principal trade association for the U.S. cable industry, representing cable operators serving more than 90 percent of the nation’s cable television households and more than 200 cable program networks. The cable industry is the nation’s largest provider of broadband service after investing over \$170 billion since 1996 to build two-way interactive networks with fiber optic technology. Cable companies also provide state-of-the-art competitive voice service to more than 23 million customers.

<sup>2</sup> *Implementation of Sections 716 and 717 of the Communications Act of 1934, as Enacted by the Twenty First Century Communications and Video Accessibility Act of 2010*, CG Docket Nos. 10-213, 10-145 and WT Docket No. 96-198, Notice of Proposed Rulemaking, 26 FCC Rcd 3133 (2011) (*NPRM*); *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 47 U.S.C.) *and* *Amendment of Twenty-First Century Communications and Video Accessibility Act of 2010*, Pub. L. No. 111-265, 124 Stat. 2795 (2010) (making technical corrections to the *Twenty-First Century Communications and Video Accessibility Act of 2010* and the amendments made by that Act).

## **INTRODUCTION**

As NCTA stated in its initial comments in this proceeding, the Commission in implementing the CVAA’s ACS provisions should avoid imposing overly burdensome regulations that would disturb the balance that Congress established between promoting accessibility and preserving industry flexibility. Certain proposals filed in the initial round of this proceeding would upset these careful limits or would regulate services or providers that Congress excluded from coverage under the CVAA.

For example, some commenters suggest overly broad definitions that would impose burdensome obligations on services – such as network providers that merely transmit ACS – that fall outside of the categories subject to the CVAA.<sup>3</sup> Other commenters propose to cover under Title I of the CVAA services that Congress intended to address in Title II of the CVAA. Yet others try to sweep within the new provisions of section 716(f) services that are grandfathered under section 255. The Commission should carefully adhere to the CVAA’s provision and, for the reasons explained below, reject these proposals.

### **I. THE COMMISSION’S RULES MUST REFLECT THE LIMITATIONS ON NETWORK PROVIDER LIABILITY ESTABLISHED IN THE CVAA**

In enacting the CVAA, Congress took care to ensure that implementing the new accessibility requirements would not come at the expense of innovation and progress. It defined and limited the services that would be considered ACS subject to accessibility obligations, and it left the industry with significant flexibility to achieve those requirements.<sup>4</sup> Congress also established clear limits to ensure that owners of network facilities are not liable for the

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<sup>3</sup> CVAA § 2(a).

<sup>4</sup> *See, e.g.*, H.R. Rep. No. 111-563, at 24 (2010) (House Report) (noting that manufacturers and service providers should be afforded “as much flexibility as possible, so long as each does everything that is achievable in accordance with the achievability factors.”).

accessibility obligations of services that travel over their networks when the network operators are acting only as a conduit to the end user.<sup>5</sup> In section 2(a), Congress provided generally that an entity is free from liability under the CVAA to the extent that entity “transmits, routes, or stores in intermediate or transient storage the communications made available through the provision of advanced communications services by a third party.” Despite this limitation on liability, the Consumer Groups and RERC argue that “[a]ll elements . . . [of] the ACS value chain,” should be considered providers of an ACS service and, therefore, liable for the accessibility of that service. These commenters specifically reference providers that “possess the underlying network facilities” over which ACS may be accessed.<sup>6</sup> Such an interpretation is expressly contradicted by section 2 of the CVAA, and must be rejected.

Similarly, suggestions to expand the definition of electronic messaging service (EMS) to include services and applications that merely provide access to EMS (e.g., a broadband service) would impermissibly extend the reach of the CVAA. In their comments, the Consumer Groups argue that excluding broadband service from the definition “could exempt Internet service providers from Section 716 obligations for advanced communications services.”<sup>7</sup> That exemption, however, was precisely what Congress intended. Section 2 of the CVAA exempts entities from liability for compliance when they are acting only to transmit covered services or to provide an information location tool.<sup>8</sup> The Commission cannot adopt the Consumer Groups’

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<sup>5</sup> CVAA § 2(a); House Report at 22 (the CVAA provides “liability protection where an entity is acting as a passive conduit of communications made available through the provision of advanced communications services by a third party or where an entity is providing an information location tool through which an end user obtains access to services and information.”); *see also* CTIA Comments at 10-11; Verizon Comments at 3-4.

<sup>6</sup> Consumer Groups Comments at 5; RERC Comments at 11.

<sup>7</sup> Consumer Groups Comments at 6.

<sup>8</sup> CVAA § 2(a).

interpretation of EMS without creating an internal inconsistency in the statute, a result that runs contrary to Congress's intent and basic tenets of statutory interpretation.

## **II. THE COMMISSION SHOULD CLARIFY THE DUTY NOT TO IMPAIR OR IMPEDE ACCESSIBILITY FOR VIDEO PROGRAMMING AND NETWORK OPERATORS**

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### **A. The Commission's "Information Content" Rules Must Derive from Authority Delegated in Section 716(e)(1)(B)**

As added by Title I of the CVAA, section 716(e)(1)(B) of the Communications Act directs the Commission to adopt rules prohibiting ACS, the equipment used for ACS, and networks used to provide ACS from "impair[ing] or impeded[ing] the accessibility of information content when accessibility has been incorporated into that content for transmission through [ACS], equipment used for [ACS], or networks used to provide [ACS]." <sup>9</sup> NCTA agrees with the Consumer Electronics Association that the Commission should reject proposals to expand the reach of this provision beyond its plain terms. <sup>10</sup>

In particular, Congress was careful to limit section 716(e)(1)(B) in three ways that remove content originating from MVPDs and other video programming services from Title I of the CVAA. First, section 716(e)(1)(B) applies only to the accessibility of "information content," a term undefined in the CVAA but that elsewhere in the Communications Act is understood to mean *Internet* content, not MVPD content. <sup>11</sup> Second, section 716(e)(1)(B) applies only when accessibility has been incorporated into information content "for" the purpose of "transmission

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<sup>9</sup> 47 U.S.C. § 617(e)(1)(B).

<sup>10</sup> See Consumer Electronics Association Comments at 31-34. NCTA takes no position on the more specific points made by CEA.

<sup>11</sup> See, e.g., 47 U.S.C. § 230(f)(3) (defining "information content provider" as "any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service"); 47 C.F.R. § 54.5 (defining "Internet access" to include, *inter alia*, "introductory information content"). In contrast, an MVPD is defined as a party "who makes available for purchase, by subscribers or customers, multiple channels of *video programming*." 47 U.S.C. § 153(13) (emphasis added).

through [ACS], equipment used for [ACS], or networks used to provide [ACS].” Such a purpose is separate and apart from the incorporation of accessibility features into video programming transmitted by MVPDs and other video programming services, indicating that Congress did not intend for the latter to be covered by section 716(e)(1)(B). Finally, neither Title I of the CVAA in general, nor section 716 in particular, refers to MVPD or other video programming services – in contrast to the numerous references to such services in Title II of the CVAA. “[W]here Congress includes particular language in one section of a statute but omits it in another . . . it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.”<sup>12</sup> Here, it is reasonable to presume that Congress intended video programming issues to be addressed under Title II of that statute, which aptly is entitled “Video Programming.”<sup>13</sup>

NCTA is concerned that RERC’s proposal would expand section 716(e)(1)(B) beyond its lawful scope. For example, RERC asks the Commission to ensure 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>14</sup> It is unclear what RERC means by “captions or descriptions” or by the transfer of content from “one medium to another.” To the extent RERC is referring to “captions or descriptions” that may be present in MVPD or other video programming services, however, the Commission should decline to adopt the proposed rule for the reasons stated above, and because that issue is being or will be addressed in rulemakings launched pursuant to Title II of the CVAA. Addressing those issues now not only would subvert Congress’s intent, but also would create confusion by raising substantially the

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<sup>12</sup> *Keene Corp. v. United States*, 508 U.S. 200, 208 (1993).

<sup>13</sup> *See INS v. National Center for Immigrants’ Rights*, 502 U.S. 183, 189-90 (1991) (“the title of a statute or section can aid in resolving an ambiguity in the legislation’s text”).

<sup>14</sup> RERC Comments at 30.

same issues in separate rulemaking proceedings. The Commission can and should avoid this problem by affording section 716(e)(1)(B) the reasonable interpretation described above.

**B. The Duty Not To Impede Accessibility Should Be Limited to Intentional, Affirmative Actions By Network Providers**

We agree with CTIA that “a network operator’s duty not to impede accessibility services and technologies . . . should only apply to affirmative, deliberate, knowing actions, not passive actions.”<sup>15</sup> To the extent a service or application contains accessibility features that are not usable with an operator’s network, the network operator should not be liable under the rules for violations of the CVAA absent evidence that the network operator intentionally took steps that impeded or impaired the accessibility feature.

The Commission should reject the Consumer Groups’ argument that network providers should be required to identify and prioritize accessible services, such as VRS, over other similar types of traffic.<sup>16</sup> The Consumer Groups’ request is unmoored from any statutory language and exceeds the scope of this proceeding. Therefore, the Commission should decline to dictate the network management practices of operators in the manner suggested by the Consumer Groups.

**III. THE COMMISSION’S RULES SHOULD PROVIDE CERTAINTY REGARDING COVERED SERVICES**

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**A. The Commission Should Clearly Define “Interoperable Video Conferencing Services” In Accordance With The Statutory Language**

NCTA agrees with commenters that the Commission should define interoperable video conferencing service (IVCS) in accordance with the statutory language.<sup>17</sup> Defining IVCS as “a range of services and end user equipment” that would include any end user equipment with an interactive video capability, and would cover any “type of communication conveyed by the video

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<sup>15</sup> CTIA Comments at 29.

<sup>16</sup> Consumer Groups Comments at 22.

<sup>17</sup> See, e.g., CTIA Comments at 20-23; VON Coalition Comments at 5-6.

conferencing service” that has the capability of “real-time communications,” exceeds the bounds of the statute.<sup>18</sup> IVCS is defined in the CVAA as “a service that provides real-time video communications, including audio, to enable users to share information of the user’s choosing.”<sup>19</sup> The Commission should ensure that its rules do not include as covered IVCS any services that may tangentially offer such capability. Although the Consumer Groups argue that anything “capable of” video conferencing is covered regardless of how the service is designed and marketed,<sup>20</sup> such an approach would lead to a confusing regulatory scheme in which manufacturers and providers do not know what products and services are subject to accessibility obligations. Instead, the Commission should make clear that IVCS does not include services that only tangentially offer services similar to video conferencing services.

**B. The Commission Should Affirm That Interconnected VoIP and Multipurpose Services Are Subject to Section 255 of the Communications Act**

As NCTA stated in our initial comments, the Commission should make clear that the grandfathering provision in section 716(f) covers all telecommunications and interconnected VoIP services, including any such services that commenced service or were upgraded after enactment of the CVAA, as well as multi-purpose services that include a telecommunications or interconnected VoIP service that is subject to section 255 of the Communications Act.<sup>21</sup> Section 716(f) dictates that services or equipment subject to section 255 before enactment, including interconnected VoIP, remain subject to section 255.<sup>22</sup> Although some commenters argue that

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<sup>18</sup> *NPRM*, 26 FCC Rcd at 3147, 3149-50, ¶¶ 36, 40-42.

<sup>19</sup> 47 U.S.C. § 153(59).

<sup>20</sup> Consumer Groups Comments at 8.

<sup>21</sup> 47 U.S.C. § 617(f); 47 U.S.C. § 255; NCTA Comments at 6-9.

<sup>22</sup> 47 U.S.C. § 617(f) (Section 716 “shall not apply to any equipment or services, including interconnected VoIP service, that are subject to the requirements of section 255 on the day before the date of enactment[.]” Rather, those services and equipment “remain subject to the requirements of section 255.”).

multi-purpose devices (i.e., those that are used to provide both telecommunications and advanced communications services) should be subject to both sections 255 and 716,<sup>23</sup> this interpretation contradicts the language in section 716(f) and would needlessly create confusion, increase administrative costs, and lead to conflicts between the two sections. The resulting uncertainty would thwart innovation and accessibility for individuals with disabilities – precisely the opposite of what the CVAA was intended to achieve.

### **CONCLUSION**

The Commission should ensure that its rules implementing the CVAA preserve the balance between promoting accessibility and providing innovation-producing flexibility to service providers and manufacturers. To do so, the Commission must be mindful of the limitations on network operators' liability set forth by Congress, and should set out clear rules that provide certainty to all.

Respectfully submitted,

**/s/ Rick Chessen**

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<sup>23</sup> American Foundation for the Blind Comments at 5-6 (arguing any device that can be used for ACS is covered by section 716 alone, “regardless of whether the equipment or services can also be used for telecommunications services”); RERC Comments at 8 (arguing that section 255 going forward will apply only to equipment in which advanced telecommunications capability is not included, or that a device be subject to both standards unless “the telecommunications and messaging are integrally intertwined or merged,” in which case “the higher of the two standards” would apply).