

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

In the Matter of	)	
	)	
Implementation of Sections 716 and 717 of the Communications Act of 1934, As Enacted by the Twenty-First Century Communications and Video Accessibility Act of 2010	)	CG Docket No. 10-213
	)	
Amendments to the Commission's Rules Implementing Sections 255 and 251(a)(2) of the Communications Act of 1934, as Enacted by the Telecommunications Act of 1996	)	WT Docket No. 96-198
	)	
Accessible Mobile Phone Options for People Who Are Blind, Deaf-Blind, or Have Low Vision	)	CG Docket No. 10-145
	)	

**REPLY COMMENTS OF THE ENTERTAINMENT SOFTWARE ASSOCIATION**

Michael D. Warnecke  
Senior Policy Counsel  
Entertainment Software Association  
575 7<sup>th</sup> Street NW, #300  
Washington, DC 20004  
(202) 223-2400

George Y. Wheeler  
F. William LeBeau  
Leighton T. Brown  
Holland & Knight LLP  
2099 Pennsylvania Avenue, NW, Suite 100  
Washington, DC 20006  
(202) 955-3000  
*Its Attorneys*

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**I. SUMMARY AND INTRODUCTION.**

The Entertainment Software Association (“ESA”) respectfully submits these reply comments in response to comments to the above-captioned Notice of Proposed Rulemaking (“Notice”).<sup>1</sup> In addition, we respectfully request that the Commission exclude, as a class, video game offerings as part of the proposed rules implementing the Act.

The ESA supports the Commission’s efforts to implement, consistent with congressional intent, the Twenty-First Century Communications and Video Accessibility Act (the “CVAA” or the “Act”). As noted by multiple comments to this proceeding, any rules should be consistent with the following principles:

- Congress did not intend to subject multi-purpose offerings with some “advanced communications services” (“ACS”) to accessibility requirements unless the primary purpose of the offering, as designed, is to provide ACS.

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<sup>1</sup> *Implementation of Sections 716 and 717 of the Communications Act of 1934, As Enacted by the Twenty-First Century Communications and Video Accessibility Act of 2010*, Notice of Proposed Rulemaking, 26 FCC Rcd 3133 (2011). Unless otherwise noted, comments cited are to the Notice and the current proceeding. Dated comments refer to comments submitted to the public notice that was issued prior to the Notice.

- Any multi-purpose waiver should exclude equipment or a service as a whole, not simply a single feature or function of the offering. Relatedly, the Act's ACS requirements apply only to ACS functions, consistent with the Act and FCC authority.
- To the extent that the core purpose of the equipment or service, as designed, is not clear, the Commission should review relevant factors to determine the purpose for which the maker designed the offering, not how it might be hypothetically used. An obvious primary non-ACS purpose should be sufficient to qualify for a multi-purpose waiver.
- Because the Act expressly provides for class waivers, a failure to implement reasonable class waivers would be contrary to congressional intent.

Video game offerings warrant a multi-purpose class waiver. Makers of these products and services design them with a primary, core purpose – to enable gameplay. No commenters disagree on this point. While these offerings may have incidental ACS features, those features are largely in service of gameplay functionality. Of course, some video game offerings are capable of doing more than enabling gameplay, but gameplay remains the essential, mainstay function for which the publisher or console maker designed the product or service. Granting a class waiver or exclusion for video game offerings would advance important public policy interests, including fostering innovation, reducing the risk of regulatory arbitrage, and promoting administrative efficiency, all of which further the legislative intent underlying the CVAA. Numerous commenters support a waiver or other exclusion for video game offerings because the primary purpose of these offerings, as designed, is self-evident and because they are not a substitute for the advanced communications services that Congress intended to promote through the CVAA. For all these reasons, the ESA urges the Commission to exclude, within its final rules, the class of video game offerings.

The class is limited in scope. Video game offerings have well-understood characteristics. Indeed, the consumer electronics industry, the retail industry, multiple federal agencies, and consumers all recognize video game offerings as fitting within a distinct ecosystem. The proposed class, as set forth in Section III.C, is clearly defined and generally includes products

and services for which the primary purpose is the playing of video games, computer games, online games, and mobile game apps. By definition, the class excludes (i) general-purpose hardware (*e.g.*, PCs) and (ii) offerings without any ACS capabilities, as these are not subject to the ACS requirements of the CVAA.

A class waiver request for video game offerings is consistent with the CVAA, congressional intent, and comments filed in this docket. In Section II, we review congressional intent with respect to multi-purpose waiver requests, as well as the comments by numerous stakeholders on the proper scope of the CVAA and its application to the video game industry. The statutory test for whether a device or service qualifies for a class waiver depends upon three elements: (i) a defined class; (ii) offerings within the class that include ACS functionality; and (iii) the offerings have multiple purposes but have a primary purpose other than ACS functionality. In Section III, we define the proposed class in more detail and illustrate how the proposed class satisfies each element of the test. We conclude, in Section IV, with a discussion of suggested procedures that should apply to any post-rule waiver requests.

The video game industry has supported and will continue to support many voluntary measures to broaden access to video game offerings to persons with disabilities, even though such efforts may require a video game publisher to develop a separate game to respond to a particular need. Microsoft has detailed its extensive efforts to develop innovative responses to the specific concerns of persons with disabilities, including a Kinect Accessibility Summit and Roundtable. Others have worked to develop practicable solutions in a number of specific cases. Accordingly, the Commission should exclude video game offerings, as a class, from any requirements related to advanced communications under the CVAA.

## **II. CONGRESS DID NOT INTEND THE CVAA TO APPLY TO OFFERINGS FOR WHICH THE PRIMARY PURPOSE IS NOT ACS.**

### **A. Incidental ACS And Multi-Purpose Offerings for Which ACS Is Not the Primary Purpose Should Not Be Subject to New FCC Rules.**

ESA's initial comments explained that Congress did not intend the Act to have an overly broad scope and that Congress empowered the Commission to exclude incidental ACS from the scope of its rules.<sup>2</sup> Many commenters hold a similar view and thus conclude that the most efficient method to implement the CVAA "and the only approach that comports with Congressional intent – is for the rules to state clearly in advance that products and services that are designed primarily for reasons other than 'advanced communications services' but which have an incidental advanced communications functionality are excluded from the definition" of ACS.<sup>3</sup> Expressly excluding these products and services from the definition of ACS would enable the Commission to focus its efforts on those products and services that are clearly within the scope of the CVAA.<sup>4</sup> Proactive exclusions within the final rule also would reduce the need for the agency to consider, and various stakeholders to propose, waivers for products and services that most would view as being well outside the purview of the Act.<sup>5</sup>

The comments also widely agree that the Commission can fulfill the purposes of the CVAA by issuing broad waivers for multi-purpose products or services "designed primarily for purposes other than using advanced communications services."<sup>6</sup> In making a multi-purpose

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<sup>2</sup> See ESA Comments at 2-6.

<sup>3</sup> CTIA Comments at 19 ("[Congress] created a broad definition of 'advanced communications services' to ensure that the definition would capture products and services as they evolve, but left it to the Commission to narrow the scope of products and services covered by the Act, noting that in today's society, many products and services have incidental communications capabilities and might be properly excluded from coverage."). See TIA Comments at 13.

<sup>4</sup> See CEA Comments at 12; CTIA Comments at 19.

<sup>5</sup> See CTIA Comments at 17; CEA Comments at 12.

<sup>6</sup> 47 U.S.C. §716(h)(1). See TechAmerica Comments at 5 ("Congress provided the Commission a powerful tool to ensure technological innovation is not stifled and manufacturers of ACS equipment and ACS providers are not unnecessarily burdened."); AT&T Comments at 5 ("The Commission should reject calls to eviscerate the CVAA's waiver provisions and instead develop a waiver process that provides real protection for innovative products and services."); NetCoalition Comments at 6 ("This provision demonstrates Congress' view that it is not appropriate to

waiver determination, most commenters agree that Section 716(h) requires a focus on the primary purpose for which the product or service was designed, as Section 716(h) refers only to a product or service “designed primarily for purposes other than advanced communications services.”<sup>7</sup> Good public policy requires this design-focused approach. As multiple commenters noted, accessibility must be included early in the design phase, as it may severely disrupt the product/service development to include these features later in the process.<sup>8</sup> Because consumers are not involved with the product during this phase, the Commission should clarify that design should be evaluated from the manufacturer’s perspective.<sup>9</sup> Often, this determination will be straightforward; however, if an offering’s primary purpose, as designed, is not immediately clear,<sup>10</sup> the Commission should use the objective, design-based factors set forth by ESA and other commenters to make this determination.<sup>11</sup>

Conversely, speculation regarding how particular consumers conceivably could use a product or service would be bad public policy. The Commission “should not engage in speculation as to whether a service or device may be used for, *e.g.*, education, rehabilitation, or

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apply the requirements of Section 716 to an ACS, or to any feature, functionality, or equipment that is used in connection with an ACS if such ACS or equipment is not the primary functionality of a particular service or piece of equipment.”); Verizon Comments at 7; Microsoft Comments at 7; CTIA Comments at 16.

<sup>7</sup> 47 U.S.C. §617(h)(1)(A) (emphasis added). *See, e.g.*, AT&T Comments at 5; CEA Comments at 19; Voice on the Net Coalition (“VoN”) Comments at 6; Microsoft Comments at 8 (“This design-based approach is required by the CVAA, which states clearly that the only relevant factor for a waiver determination is how the equipment or service is ‘primarily designed.’”); *Conn. Nat’l Bank v. Germain*, 503 U.S. 249 (1992) (“We have stated time and again that courts must presume that a legislature says in a statute what it means.”).

<sup>8</sup> *See* CTIA Comments at 18 (“Because accessibility must be considered early in the design process or business plan to be included, in order to be meaningful, a waiver would have to be granted during the design phase.”).

<sup>9</sup> *See* Microsoft Comments at 8; CEA Comments at 19 (“A manufacturer is responsible for determining the primary design of a device.”); *id.* at 18-19 (“[t]he Commission should make clear that this ‘primary design’ question is answered from the perspective of the manufacturer.”).

<sup>10</sup> *See* ESA Comments at 7-8.

<sup>11</sup> *Id.* at 8-10. *See, e.g.*, Microsoft Comments at 7; CEA Comments at 19-20; AT&T Comments at 7; TIA Comments at 13; NetCoalition Comments at 7; TechAmerica Comments at 5. The ESA’s factors, and similar ones proposed by other commenters, *see* Microsoft Comments at 7-8, are not meant to be exclusive, which will provide the flexibility Congress intended. *See* Senate Report at 3; 47 U.S.C. §617(h).

social interaction, none of which are mentioned in the relevant statutory provisions.”<sup>12</sup> Focusing on post-marketed uses, or speculation regarding all potential uses, would deprive industry of needed certainty and discourage innovation because manufacturers might feel compelled to omit one or more potential features.<sup>13</sup> Lastly, the Commission should not base waiver determinations simply on “whether an advanced communications service or equipment is being provided,” as TDI urges.<sup>14</sup> Because the waiver provision requires some ACS capability, denying waiver eligibility to every multi-purpose product or service that has any ACS functionality would make the statutory waiver provision meaningless.<sup>15</sup>

**B. Waivers Exclude a Multi-Purpose Product or Service as a Whole, Not on a Feature by Feature Basis.**

Congress did not intend that all products and services, regardless of their primary purpose, be accessible under the Act.<sup>16</sup> Indeed, the CVAA does not apply to non-ACS functions or features even if the particular product, as a whole, might be subject to its provisions.<sup>17</sup>

Congress enacted the CVAA, which applies Section 716 by its terms only to ACS functions and

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<sup>12</sup> CEA Comments at 19; *see* ESA Comments at 7 (“Under the CVAA, the Commission’s role is not to determine whether a product could potentially be used for a particular ACS purpose by an individual consumer, but to assess whether the product was ‘designed primarily’ to deliver ACS.”); Microsoft Comments at 7; VoN Comments at 6.

<sup>13</sup> *See* ESA Comments at 12-13; Microsoft Comments at 9 (“Basing waiver determinations on these unexpected consumer uses would create significant uncertainty for businesses, result in a regulatory ‘gotcha’ as the compliance obligation would not arise until long after the development cycle has been completed, and discourage innovation in equipment and service design.”); CTIA Comments at 16; CEA Comments at 19.

<sup>14</sup> TDI Comments at 13.

<sup>15</sup> *See* AT&T Comments at 7 (“Interpreting this language in a manner that excludes from a potential waiver any device or service capable of use in advanced communications services would render the word ‘primarily’ meaningless.”); *Cafarelli v. Yancy*, 226 F.3d 492, 499 (6th Cir. 2000) (finding that a statute must not be interpreted in a manner that renders other provisions of the same statute inconsistent, meaningless or superfluous.).

<sup>16</sup> *See* Words+/Compusult Comments at 19; Onstar Comments at 5 (“The first step towards balancing our nation’s need for innovation with the need for accessibility is to limit the scope of this rulemaking to reflect the Congressional intent of the Accessibility Act.”).

<sup>17</sup> *See* CEA Comments at 20; CTIA Comments at 12; RERC-IT Comments at 18 (“[I]t would be beyond the intent of the law to include all of a device’s functions in accessibility requirements just because there was some communication functionality . . .”); CEA Comments at 8 (providing that a telecommunications carrier is treated as a common carrier only to the extent that it provides telecommunications services); *see* TIA Comments at 13.

features,<sup>18</sup> to help ensure that individuals with disabilities are able to use “communications services and equipment.”<sup>19</sup> Commission precedent (including Commission analysis of Section 255 of the Communications Act) and its scope of expertise (which traditionally focuses on means of communications) confirm this common sense conclusion.<sup>20</sup>

RERC-IT erroneously suggests that Congress intended the Commission to undertake an individual waiver analysis for every feature or function of a multi-purpose product or service.<sup>21</sup> This approach misapprehends the CVAA in at least two respects. First, a feature that lacks ACS does not require any sort of waiver whatsoever because the Act applies only to advanced communications. Second, it is evident from the Act that the focus of the waiver analysis should be the equipment or service taken as a whole and not each individual feature analyzed in isolation. Congress enacted Section 716(h) to exclude “a device [that] incidentally provides access to ACS or was designed primarily for another purpose.”<sup>22</sup> “For example, a device designed for a purpose unrelated to accessing advanced communications might also provide, on

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<sup>18</sup> See 47 U.S.C. §617(a) and (b); S. Rep. No. 111-386, at 7 (2010) (“Senate Report”); H.R. Rep. No. 111-563, at 24 (2010) (“House Report”) (noting that entities subjected to the CVAA are limited to manufacturers of equipment used for ACS and providers of ACS.); TIA Comments at 19 (Nov. 22, 2010). Other provisions of the Act compel the same interpretation, including the definitions of the particular “advanced communications services” subject to the Act. See ESA Comments at 3. Additionally, the Act’s express rule of construction – Section 716(j) – confirms this intent, requiring that the CVAA “shall not be construed” to require every covered entity “to make every feature and function of every device or service accessible for every disability.” 47 U.S.C. §617(j) (emphasis added); see VoN Comments at 15 (Nov. 22, 2010); CTIA Comments at 12; T-Mobile Comments at 8-9.

<sup>19</sup> Senate Report at 2 (emphasis added); see House Report at 19. Congress added that an increasing number of elderly Americans “will need accessible communications products and services,” and that “[a]ccess to communications devices” also is important to injured American service members. Senate Report at 2 (emphasis added) & House Report at 19-20 (emphasis added). See also TIA Comments at 7 (Nov. 22, 2010) (“[T]he provisions of section 716 for waivers and exemptions underscore that equipment and services that are designed for the purpose of ‘accessing advanced communications’ and are ‘designed for and used by members of the general public’ are Congress’ principal focus.”).

<sup>20</sup> 47 U.S.C. §255. For instance, Section 255 of the Communications Act, similar to Section 716, applies to any “manufacturer of telecommunications equipment or customer premises equipment” and to any “provider of telecommunications service.” When the Commission implemented Section 255, it concluded that “customer premises equipment is covered by section 255 only to the extent that it provides a telecommunications function.” *Implementation of Section 255 and 251(a)(2) of the Communications Act of 1934, as Enacted by the Telecommunications Act of 1996*, Report and Order and Further Notice of Inquiry, 16 FCC Rcd 6417, 6453 (1999) (emphasis added).

<sup>21</sup> RERC-IT Comments at 17.

<sup>22</sup> Senate Report at 3 (emphasis added).

an incidental basis, access to such services.”<sup>23</sup> For this reason, Section 716(h) “contemplates waivers for some multifunction devices that are not primarily designed for advanced communications . . .”<sup>24</sup> These statements confirm that the primary purpose of an offering as a whole must be considered in determining if its ACS functionalities should be excluded from the Act’s requirements.

Moreover, RERC-IT’s own example illustrates that requiring entities to request, and the Commission to consider, waivers of every feature and function would be impossible. Specifically, RERC-IT describes the ability in a game to draw in sand, which a player could incidentally use to communicate.<sup>25</sup> Such a feature cannot be the sort of advanced communications that was meant to require a waiver. Under this logic, waivers would be needed for almost every element of every game, which would compel the Commission to scrutinize millions of waiver requests.

Finally, judicious application of class waivers will promote innovation. Class exemptions or waivers are essential to the video game industry “to facilitate innovation and new product and service development.”<sup>26</sup> Regulatory uncertainty over the application of the CVAA to video game offerings may chill industry experimentation with innovative online and other initiatives. The ESA joins other commenters in strongly urging the Commission to use its

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<sup>23</sup> *Id.* at 8 (emphasis added) & House Report at 26 (emphasis added).

<sup>24</sup> 156 Cong. Rec. H7176 (daily ed. Sept. 28, 2010) (statement of Rep. Burgess) (emphasis added). As noted, the Act itself embodies this legislative history. For example, the waiver provision’s reference to “feature or function” is merely intended to reinforce the scope of the waiver. Because only features or functions “used to provide or access advanced communications services” could be arguably subject to the Act, they are the only features or functions that actually require a waiver. *See supra* at 6-7.

<sup>25</sup> *See* RERC-IT Comments at 18.

<sup>26</sup> CEA Comments at 18; *see* Verizon Comments at 9; TIA Comments at 13-14; AT&T Comments at 6; Onstar Comments at 6; Microsoft Comments at 6-7 (Nov. 22, 2010).

express statutory authority under Section 716(h) to grant prospective class waivers for products and services with primary purposes other than ACS.<sup>27</sup>

### **III. THE FCC, IN ITS RULES, SHOULD EXCLUDE VIDEO GAME OFFERINGS FROM ALL ACS-RELATED REQUIREMENTS UNDER THE ACT.**

#### **A. The CVAA Authorizes Class Waivers Based on Three Key Criteria.**

As many commenters explain, the text of the CVAA specifies that a class of equipment or services is eligible to be excluded from ACS requirements under Section 716(h) of the Act:<sup>28</sup>

The Commission shall have the authority . . . to waive the requirements of this section for . . . equipment used to provide or access advanced communications services, or for any class of such equipment . . . or for any class of such services that –

- (A) is capable of accessing an advanced communications service; and
- (B) is designed for multiple purposes, but is designed primarily for purposes other than using advanced communications services.

The Act thus establishes only three prerequisites for a class waiver. First, the Act expressly authorizes exclusions for a class of equipment or services. Although the Act does not specify how to define an individual “class,” the plain meaning of the term should require only that the class members share some pertinent common characteristic, such as a common primary purpose.<sup>29</sup> Second, members of the class must have some ACS capability, as offerings without

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<sup>27</sup> See 47 U.S.C. §617(h)(1); AT&T Comments at 6; CEA Comments at 17-18; TIA Comments at 13; VoN Comments at 7; NetCoalition Comments at 7; Onstar Comments at 6; TechAmerica Comments at 5; ITIC Comments at 26.

<sup>28</sup> See 47 U.S.C. §617(h). This provision also expressly provides the right of “any interested party,” which includes the ESA, to petition for a waiver.

<sup>29</sup> See, e.g., <http://dictionary.reference.com/browse/class> (as referenced May 13, 2011) (defining “class” as “a number of persons or things regarded as forming a group by reason of common attributes, characteristics, qualities, or traits”). In requesting a class waiver, the Commission should allow petitioners flexibility in defining the types of products and/or services that fall within a particular class, including, but not limited to, similarities in design or development, industry groupings, and competition or other evidence of substitutability among the proposed class. If the Commission concludes that an initial showing fails to adequately define the outer edges of a class, petitioners should be able to supplement and clarify their proposed class definitions.

ACS functions are not subject to the Act and do not require a waiver.<sup>30</sup> Third, the offerings must have multiple purposes, with their primary purpose, as designed, being other than ACS.<sup>31</sup>

The key issue under the Act, therefore, is whether the class of equipment or services “is designed primarily for purposes other than using advanced communications services.”<sup>32</sup>

Although the primary purpose of a class of offerings may not always be immediately clear, in many circumstances, including with respect to video game offerings, this determination is straightforward – *i.e.*, video game offerings are primarily designed to play games.

**B. Many Comments Specifically Endorse A Waiver or Other Exclusion of Video Game Equipment and Services.**

A striking number of comments agree that video game offerings merit a class waiver.<sup>33</sup> For example, the Voice on the Net Coalition explains that it “is appropriate” and “judicious” for the Commission to issue “[c]lass-based waivers” for “products not designed for ACS, such as [video] gaming products.”<sup>34</sup> The Telecommunications Industry Association concurs, noting that “Congress gave the Commission authority under Section 716(h) to grant prospective industry-wide waivers,” and stating that “such categorical waivers would provide manufacturers and industry participants with added certainty that will spur innovation in new devices that may have incidental ACS components, such as . . . gaming systems with VoIP or video capability that allow gamers to interact.”<sup>35</sup> Similarly, NetCoalition specifies “gaming service” as a service to which accessibility requirements should not apply, and encourages “general waivers for classes

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<sup>30</sup> See *supra* at 6-7. For the sake of clarity, however, a potential class should be read to exclude any similar offering that is not capable of delivering advanced communications services in a manner sufficient to trigger any accessibility requirements under the Act.

<sup>31</sup> Although this last threshold may also be viewed as having two elements, the initial question – whether each class member has multiple purposes – generally should not require a distinct showing. To the extent an offering has at least one ACS and one non-ACS purpose, it has “multiple” purposes sufficient for the Act.

<sup>32</sup> Notice at 3153, ¶¶ 52-53.

<sup>33</sup> See *id.* at 3156, ¶ 60.

<sup>34</sup> VoN Comments at 6-7

<sup>35</sup> See TIA Comments at 13-14 (emphasis added).

of products or services having incidental ACS capabilities but that have as their primary purpose services or functionality that are not otherwise under the umbrella of Section 716.”<sup>36</sup> Microsoft, long familiar with many different sorts of technologies, likewise concludes that video game offerings uniquely constitute a distinct category that warrants a class waiver because they do not provide the sort of ACS that Congress intended to regulate.<sup>37</sup>

In some circumstances, a long-term or permanent general waiver may be appropriate, such as where the waiver is based on the fundamental nature of the equipment or service. For example . . . the Commission should exclude these gaming and entertainment-related non-interconnected VoIP and electronic messaging equipment and services as a class, regardless of whether they are played on a personal computer, video game console, mobile device, or some other hardware platform. Such equipment and services clearly are not designed to give consumers the ability to communicate with a range of persons on a variety of matters.

Still other comments conclude that video game offerings, like other offerings that are not designed primarily for ACS purposes, merit a waiver or exclusion from the accessibility requirements. For example, the Consumer Electronics Association states that any offering “with a purely incidental VoIP component (*e.g.*, a gaming system)” should be excluded from the scope of the accessibility regulations.<sup>38</sup> AT&T Services adds that video game consoles are an example of the sort of equipment that merits a waiver, even if considered on a case-by-case basis.<sup>39</sup> And T-Mobile nominates “gaming or entertainment offering[s]” with incidental ACS as either outside of the CVAA or suitable for broad waivers.<sup>40</sup>

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<sup>36</sup> NetCoalition Comments at 1, 6-7. The ESA also endorses NetCoalition’s next point that, if an exclusion is granted, “it should apply equally to other obligations under the Act, such as the requirement for providers of non-interconnected VoIP service to contribute to the Telecommunications Relay Services Fund.” *Id.* at 7.

<sup>37</sup> Microsoft Comments at 9-10.

<sup>38</sup> *See* CEA Comments at 12. The ESA also agrees with the CEA that video game offerings should be not be included in TRS contributions, although the ESA believes the Commission has the necessary authority to address TRS relief as part of a class waiver as well. *See, e.g.*, ESA Comments at 5; NetCoalition Comments at 7.

<sup>39</sup> AT&T Comments at 6-7.

<sup>40</sup> T-Mobile Comments at 6.

The ESA agrees with these numerous comments regarding an exemption for video game offerings under the CVAA. These offerings have developed their own market based on a single shared primary purpose – to play games. Accordingly, many knowledgeable stakeholders have expressly singled out video game offerings as the type of equipment or service that should not be subject to accessibility requirements in light of the Act’s clear language and intent.

**C. Video Game Offerings, As a Class, Should Be Excluded from the Accessibility Requirements.**

1. Video Game Offerings Constitute a Distinct Class.

In the Notice, the Commission invites comment on whether “there [are] specific classes of services or equipment that [it] should consider waiving in [the] final rules of Section 716.”<sup>41</sup> Video game offerings represent a specific class of equipment, products, and services that should be excluded from the final rules. Video game offerings constitute a readily defined class for CVAA purposes because they all share a common objective – to play games. Such gameplay is for entertainment purposes; it generally does not have any significant direct effect outside of the game environment, in contrast to other types of software or equipment designed to facilitate a specific task in the real world (*e.g.*, writing a document, balancing a check book, or preparing a presentation). Accordingly, the class includes:

Any equipment, product, or service specific to the game industry and for which the primary purpose is to enable consumers to acquire, play, or enhance the use of video games, online games, computer games, or mobile game apps, including: (i) video game consoles, both home and portable, and their associated operating systems and user interfaces; (ii) game downloads or software, regardless of platform; and (iii) online game services, such as online services to enhance gameplay or for the distribution or play of game software.<sup>42</sup>

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<sup>41</sup> See Notice at 3156, ¶ 60.

<sup>42</sup> The proposed class does not intend to include: (i) any video game offerings without ACS capabilities; and (ii) desktops, laptops or other personal computers or general purpose mobile communications devices. Although such non-video game offerings may be suitable for a waiver in other circumstances, the ESA does not expect that these would be within the proposed class. Also, because the Notice has suggested that software is to be treated as equipment, to the extent it implicates the CVAA at all, *see* Notice at 3143, ¶ 24, the proposed exemption expressly includes software and downloads. *Cf.* Notice at 3140-41, ¶ 15.

Beyond their common purpose, these offerings share many other characteristics, including, among other items:<sup>43</sup>

- layout, configuration, and programming optimized for gameplay (including, among other matters, specialized controllers and online marketplaces targeted to the interests of gamers);
- simplified user controls that generally do not rely on textual or verbal commands;
- a dedicated trade show (E3) and trade association (the ESA);<sup>44</sup> and
- specialized retail outlets, including brick-and-mortar stores like GameStop and an Amazon.com department dedicated to this category.<sup>45</sup>

In prior proceedings, government agencies have agreed that video games (and their associated hardware and services) constitute a distinct class. For example, in the Child Safe Viewing Act proceeding, the FCC noted that “the majority of commenters” that addressed the issue thought that video games should not be grouped with other electronic media addressed in the proceeding, including wireless communications and television.<sup>46</sup> In that Report, the Commission expressly identified the following separate categories of content or platforms: Television, Wireless Devices, Audio-Only Programming, Internet, Non-Networked Devices, and Video Games.<sup>47</sup> The Federal Trade Commission also treats video games as distinct from other forms of electronic media, including music and movies, in its periodic reviews of the marketing practices used by these three distinct categories.<sup>48</sup>

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<sup>43</sup> See *infra* at 15 & n.52.

<sup>44</sup> See, e.g., <http://www.e3expo.com> (detailing upcoming Electronic Entertainment Expo and describing the ESA).

<sup>45</sup> See, e.g., [http://www.amazon.com/computer-video-games-hardware-accessories/b/ref=sa\\_menu\\_cvg10?ie=UTF8&node=468642](http://www.amazon.com/computer-video-games-hardware-accessories/b/ref=sa_menu_cvg10?ie=UTF8&node=468642); [www.Gamestop.com](http://www.Gamestop.com).

<sup>46</sup> See *Implementation of the Child Safe Viewing Act: Examination of Parental Control Technologies for Video or Audio Programming*, Report, 24 FCC Rcd 11413, 11450-51, ¶¶ 85-88 (2009) (the “CSVA Report”). In that Report, the FCC did not suggest that video games should be considered as any sort of communications service, notwithstanding the Commission’s recognition that some games had secondary “chat” features of some games.

<sup>47</sup> See *id.* at 11413-14.

<sup>48</sup> See, e.g., *Marketing Violent Entertainment to Children: A Sixth Follow-up Review of Industry Practices in the Motion Picture, Music Recording & Electronic Game Industries*, at 23-30 (FTC 2009) (available at <http://www.ftc.gov/os/2009/12/P994511violententertainment.pdf>). The Notice wondered why past agency precedent regarding video games is relevant to this proceeding. See Notice at 3154, n. 153. Among other reasons, past agency treatment of video game offerings as a distinct class provides additional compelling precedent for viewing such offerings as a class for an exemption within the rules implementing the CVAA.

Other stakeholders recognize video game offerings as a distinct class. Parties to the CSVA Report proceeding viewed video game offerings as a clear and separate category, including that they are subject to their own voluntary advertising guidelines and parental ratings system.<sup>49</sup> In the current proceeding, many comments expressly favor a class waiver or exemption for video game offerings. Even comments that may question the appropriateness of class waivers have not questioned whether video game offerings are distinct from other types of consumer electronics or services. For example, Words+/Compusult and TDI have specifically addressed “gaming” as a distinct class in discussing whether these offerings merit a waiver under the CVAA.<sup>50</sup>

## 2. ACS Is Not the Primary Purpose of Videogame Offerings.

The distinct class of video game offerings also satisfies the remaining eligibility requirements for an exemption within the rules. First, by definition, the proposed class only includes video game offerings with at least some ACS capability.<sup>51</sup> Second, while video game offerings are designed to achieve multiple purposes and functions, including parental controls, video playback capabilities, personalization, and downloading games, updates or new content, their primary – and defining – purpose is for playing (or enhancing) games, not advanced communications. Video game offerings may include ACS functionality designed to enhance or supplement gameplay, but they are not designed to serve as a substitute for other means of human-to-human communications. As just one example, console-based video game offerings commonly rely on a limited set of buttons, joysticks, or gestures for user interaction, all of which are far better suited for human-to-machine communications.

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<sup>49</sup> See CSVA Report, 24 FCC Rcd at 11450-51, ¶¶ 86-87.

<sup>50</sup> See Words+/Compusult Comments at 19; TDI Comments at 13.

<sup>51</sup> As noted, video game offerings without at least some ACS capability are not subject to the CVAA and thus should be unaffected by being outside the proposed class.

This common primary purpose defines not just the proposed class but also the entire industry in a manner that clearly distinguishes the proposed class from offerings primarily designed to provide interpersonal advanced communications – *i.e.*, offerings Congress intends to make accessible. Consumers buy games based upon their content. Because the game’s content is the focus of purchasing decisions, parents routinely rely on the Entertainment Software Rating Board’s content ratings system in deciding which games to buy for their children, even though the ratings expressly do not account for any in-game communications, because the primary purpose of the offering is the game content.<sup>52</sup> Similarly, the Commission has not referred to video games as having a significant communications component, even though such a purpose may have been relevant to questions regarding FCC authority with respect to such games.<sup>53</sup> Indeed, because video game offerings have such a clear primary purpose, the proposed class does not require an individualized analysis of the various factors proposed in this proceeding to determine its eligibility for a class waiver.<sup>54</sup>

Conversely, no party to this proceeding has demonstrated that video game offerings are primarily designed for any ACS purpose. To the extent TDI argues that video games might be subject to the CVAA, it contends that “gaming is an important facet of the social lives for many people with disabilities,” not that ACS was the primary purpose, as designed, of any video game

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<sup>52</sup> See, e.g., CSVA Report, 24 FCC Rcd at 11451, ¶ 88. Virtually all video and computer games sold at retail in the United States and Canada are rated by the Entertainment Software Rating Board (“ESRB”). Many retailers, including most major chains, have policies to only stock or sell games that carry an ESRB rating, and most console manufacturers will only permit games that have been rated by ESRB to be published for their platforms.

<sup>53</sup> See *supra* note 46; CSVA Report, 24 FCC Rcd at 11450, ¶ 86 (not suggesting that video games should be viewed as providing any sort of advanced communications service in discussing Commission jurisdiction). The FTC also treated video games as a type of entertainment, similar to movies and music, not as a form of personal communications. See *supra* note 48. That the industry characterizes video game offerings not by their ACS capabilities, but by their game-playing capabilities or genre, such as sci-fi/horror, racing, or turn-based strategy, further illustrates that video game offerings are not primarily designed for ACS purposes.

<sup>54</sup> In addition, much of the information already provided in this and other ESA submissions in this docket directly addresses how video game offerings qualify for a waiver under these factors, including whether ACS functionality intends to enhance another feature or purpose; whether a consumer without advanced communications access would still have reason to purchase the offering; how a manufacturer intends to market an offering; and technical factors. The ESA also is prepared to provide additional information regarding these factors to the extent necessary.

offering.<sup>55</sup> Also, TDI's suggestion that video game offerings should not be eligible for a waiver where ACS "is an integral factor in game play" misapprehends the correct standard.<sup>56</sup> Under the CVAA, the test is not whether ACS is integral to some other function but whether its use is the primary purpose for the equipment or service.

Similarly, RERC-IT suggests that individual consumers may use video game offerings in ways that may increase the significance of their ACS capabilities.<sup>57</sup> However, such anecdotal or speculative claims cannot obscure that the primary purpose of video game offerings, as designed, is not ACS. Without a compelling showing that the primary purpose of video game offerings, as designed, is advanced communications services, these offerings are eligible for a class exclusion within the rules.

**D. The Proposed Class Exclusion Within the Rules Is Consistent with the Intent of the Act and the Public Interest.**

The proposed exclusion as part of the Commission's Rules advances the purposes of the CVAA because it fosters innovation without excluding any offering for which the primary purpose is advanced communications. Parties familiar with technological products and services conclude that exclusion of classes of offerings, either within the rules or otherwise, as part of the current proceeding will promote innovation by eliminating uncertainty and post-rule confusion arising from overlapping waiver requests.<sup>58</sup> That is particularly true in the case of offerings like video games in which advanced communications are not an essential capability. In these cases,

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<sup>55</sup> See TDI Comments at 13.

<sup>56</sup> See *id.*

<sup>57</sup> See RERC-IT Comments at 17-18; *but see* Microsoft Comments at 9 (noting that unintended uses of Kinect by some users does not override primary purpose of video game offering).

<sup>58</sup> See, e.g., Microsoft Comments at 6-7; Verizon Comments at 9. To the extent RERC-IT argues the contrary, *see* RERC-IT Comments at 19-21, it contradicts much legislative history affirming that Congress provided the multi-purpose waiver in order to protect innovation because Congress understood that overbroad regulation would adversely affect innovation for all consumers.

manufacturers or providers may feel compelled not to include or experiment with new ACS functions that may trigger unclear regulatory obligations.

In addition to advancing innovation,<sup>59</sup> the proposed exclusion will promote the public interest by advancing competition and limiting adverse economic impacts of the proposed regulations. A class exclusion ensures that competing manufacturers, publishers, and providers within the video game ecosystem will receive equal, non-arbitrary treatment under the new rules.<sup>60</sup> This will avoid regulatory arbitrage by which one manufacturer may gain an advantage over another because of the timing of, or process relating to, Commission action on individual waivers. Moreover, an exclusion within the rules, as requested, will significantly reduce lost investment, its concomitant economic impact, and significant disruptions to consumer expectations. A number of video game offerings are well along toward their projected launch date after a multi-year design and development process. Because lengthy design cycles are not unusual in the video game industry,<sup>61</sup> development of many upcoming video game offerings began prior to the introduction of the CVAA. Upon the effective date of the proposed rules, continued manufacture or development of these offerings may be adversely impacted by uncertainty regarding the outcome of multiple, separate waiver petitions. Such an unnecessary delay also may prevent the release of products currently planned for release during the coming holiday season, in light of the October 2011 statutory deadline for the issuance of the regulations.<sup>62</sup>

Conversely, the proposed exclusion is consistent with the Act's intent to focus upon access to advanced communications services as opposed to other functions. First, as noted,

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<sup>59</sup> See ESA Comments at 5 (noting the Commission's waiver of its equipment regulations to "facilitate the rapid deployment of innovative mobile DTV products and services").

<sup>60</sup> See ESA Comments at 14; TechAmerica Comments at 5.

<sup>61</sup> See ESA Comments at 10.

<sup>62</sup> Cf. Microsoft Comments at 15-16 (noting that grandfathering has been essential to preclude consumer disruption in past cases involving equipment mandates).

video game offerings are not designed to provide (or even to substitute for) the sort of flexible advanced communications services intended to be regulated by the CVAA.<sup>63</sup> A game’s ACS features are “intended to allow competing players to communicate about the game play as they experience it;” they “are not designed to be used for more general communications purposes.”<sup>64</sup> Second, video game offerings, by definition, have limited direct effects outside of the gameplay environment. Accordingly, the accessibility of any video game ACS function is less likely to have real-world implications than other forms of advanced communications services so that the fundamental congressional concerns that propelled the Act will not be affected.<sup>65</sup>

To the extent parties argue against an exclusion for video game offerings because of the non-communicative functionalities of video games, they neglect congressional intent. Although it is not clear what the Notice means in stating that “the fact that a ‘core’ function of a device is to play games” may not be “dispositive” of whether such device “is entitled to a waiver,”<sup>66</sup> it is inconsistent with the CVAA to reject a class exemption or other waiver based on any non-communicative feature or speculative consumer use.<sup>67</sup> The purpose of the CVAA is to improve the accessibility of equipment or services for which the primary purpose is advanced communications services, not other devices that happen to have ACS features. As Compusult, a company “with over 17 years of experience in providing Assistive Technology products and services to make workplaces accessible to employees with disabilities,” and Words+, a company

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<sup>63</sup> See *id.* at 9.

<sup>64</sup> *Id.* For instance, when a player uses the ACS feature in Microsoft’s popular Halo game, “the user’s eyes are focused on the game play on the screen and both hands are busy using the controller to maneuver the user’s character through the game sequences.” Accordingly, in-game ACS “clearly was not designed to be used by users whose hands and visual attention would be free to sign or watch ASL, read lips, or type on a keyboard.” *Id.* at 10 (adding that “the gaming experience would need to be fundamentally altered in order for in-game VoIP to be made accessible. Consequently, subjecting in-game VoIP services to Section 716’s requirements would impose significant burdens on business without offering any corresponding user benefit.”).

<sup>65</sup> See *supra* at 8, 12.

<sup>66</sup> Notice at 3154, ¶ 54.

<sup>67</sup> See *supra* at 6-7.

“dedicated to ‘unlocking the person’ by improving the quality of life for people with disabilities,”<sup>68</sup> jointly explain, the CVAA was not intended to increase access to non-ACS components, such as video games.<sup>69</sup> CEA adds that non-communicative purposes of a relevant class should not subject offerings to legislation designed to regulate only ACS-focused products and services.<sup>70</sup> To deny a waiver or exemption on non-communicative grounds would force a manufacturer or provider to choose whether to even include ACS functionalities in offerings primarily designed for other purposes, which would be directly contrary to congressional intent. That an offering may have other functionalities unrelated to the legislative intent underlying the Act should not be a basis for rejecting a proposed exclusion.

The ESA has referenced several other compelling public interest benefits of the proposed class exclusion in its initial comments, including global trade considerations and technical complexity.<sup>71</sup> As noted, a class waiver for video game offerings also will reduce the sheer quantity of offerings that otherwise will require prospective guidelines.<sup>72</sup> These considerations in support of a class exemption for particular offerings outside the intended scope of accessibility legislation are not new to the Commission. The closed captioning rules, when initially

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<sup>68</sup> See <http://www.compusult.at/at-website/about-us>; <http://www.words-plus.com/website/coinfo.htm>.

<sup>69</sup> See Words+/Compusult Comments at 19. Also, to the extent the designed purpose of a game is rehabilitative or otherwise suited for particular needs, video game manufacturers have demonstrated that they will engage in voluntary efforts to make that game’s features more accessible. See, e.g., <http://www.easports.com/news/item/file/MyFootballGame> (discussing video game developed as part of specific initiative that “worked in ways to really slow down the game to accommodate different reaction speeds”). Although such efforts may not work in many cases, due to the nature of video games and consumer expectations, among other factors, video game publishers have tried to assist such efforts to broaden the accessibility of their offerings independent of any statutory requirement. See Microsoft Comments at 2-3 (detailing Microsoft’s efforts to improve accessibility more generally). For example, ESA member company Microsoft convened both an internal Kinect Accessibility Summit for its employees and a Kinect Accessibility Roundtable for global gaming accessibility experts to review and assess the Kinect for Xbox 360 prior to public sale last fall. At these day-long events, Microsoft’s Chief Accessibility Officer with Interactive Entertainment Business policy and engineering professionals demonstrated the product and led hands-on sessions followed by discussion and feedback conversations tailored to gather design and feature input from the accessibility community.

<sup>70</sup> See, e.g., CEA Comments at 11, 19 (rejecting claims that these non-ACS purposes may cause some games not to be suitable for waivers under the CVAA); ESA Comments at 3.

<sup>71</sup> See, e.g., ESA Comments at 12-14.

<sup>72</sup> See, e.g., *id.* at 14; Verizon Comments at 9; VoN Comments at 7; CEA Comments at 18.

promulgated, included thirteen self-implementing exemptions, including exemptions for types of video programming determined not to be the main focus of the relevant statutory language.<sup>73</sup>

These exclusions have served the public interest by enabling a more focused implementation of the captioning mandate, including enabling the Commission to better address classes of video programming more relevant to the goals of the underlying legislation. Video game offerings are similarly outside the primary focus of the Act and the proposed class exclusion in the rules likewise will serve the public interest.

Finally, although the ESA believes an exclusion within the rules to be most appropriate, it also understands if the Commission prefers to grant the proposed exclusion as a waiver separate from the rules, or to exclude particular categories of video game equipment and services as multiple classes, rather than as a single comprehensive exclusion.

#### **IV. MOST COMMENTERS AGREE THAT POST-RULE WAIVER REQUESTS SHOULD BE RESOLVED EXPEDITIOUSLY AND A REGULATORY PHASE-IN PERIOD IS NECESSARY.**

Although the Commission should favor class waivers because of the various public interest benefits, ESA also agrees that “[t]he grant or denial of a class waiver notwithstanding, service providers and equipment manufacturers should always have the option of applying for an individual waiver and having their petition considered on a case-by-case basis.”<sup>74</sup> Because a decision not to grant a class waiver could be based on a variety of factors, the Commission should not contradict the statutory language that expressly permits any manufacturer, service provider, or other interested party to seek a more specific waiver particular to their facts.<sup>75</sup>

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<sup>73</sup> See, e.g., ESA Comments at 6, 15.

<sup>74</sup> AT&T Comments at 6-7. (“While the CVAA contemplates the submission – and implicitly, the potential denial – of class-based waivers, it does not contemplate a ruling that an entire class of equipment is ineligible for a waiver.”).

<sup>75</sup> Moreover, the individual manufacturer or provider may not have actively participated in formulating the initial class waiver showing, so equity would require that it not be automatically excluded from waiver eligibility.

The Commission also should implement other reasonable waiver procedures. Because time is often of the essence with respect to innovation,<sup>76</sup> the Commission should impose a time limit for its consideration of waiver petitions. ESA agrees with AT&T that a specific time commitment “will appropriately balance commercial demands with the need for the Commission to have sufficient time to fully review waiver requests.”<sup>77</sup> By adopting a reasonable time limit, the Commission would provide a level of certainty needed by the industry that otherwise would be unavailable if the Commission declines to adopt prospective class waivers.<sup>78</sup> In addition, contrary to RERC-IT’s assertion, a time limit would not induce companies to delay filing waiver petitions. A company would not delay seeking a waiver because, if the Commission denied its request, the company would be at a significant disadvantage as accessibility compliance must be incorporated early in the design process. In the event the Commission declines to adopt this approach, it should, at a minimum, toll all accessibility obligations while a waiver petition remains pending.<sup>79</sup>

The Commission also must ensure that a waiver’s length is of sufficient duration to fulfill its purpose, which means each waiver must last notably longer than it takes to design, develop, and distribute the offerings subject to the waiver. The Commission therefore should reject proposals to limit all waivers to a pre-determined, arbitrary length of time.<sup>80</sup> This approach is necessary, particularly at this early stage of CVAA implementation, because of the diverse offerings with many different design and manufacturing cycles potentially subject to the accessibility requirements. The approach also is consistent with congressional intent because it

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<sup>76</sup> CEA Comments at 17; AT&T Comments at 7.

<sup>77</sup> AT&T Comments at 8 (proposing a time limit of 90 days); *see* TIA Comments at 14 (proposing a time limit of 60 days); Onstar Comments at 7 (proposing a time limit of 30 days).

<sup>78</sup> *See* TIA Comments at 14.

<sup>79</sup> *See* Onstar Comments at 7.

<sup>80</sup> *See* ITIC Comments at 26; CEA Comments at 18 (“[C]laims that waivers should be of limited duration have no basis in the statutory text.”).

would avoid unnecessary and undue burdens upon products and services not properly within the CVAA's scope.<sup>81</sup>

Lastly, and in order to limit the need for waivers during initial implementation of the Act, the Commission should phase in obligations and grandfather models of equipment and services already under development. Companies cannot comply with requirements that do not exist.<sup>82</sup> Even once companies know the extent of their new obligations, compliance cannot be achieved overnight<sup>83</sup> because the "product development cycle is such that there will be new products, equipment, and services in the pipeline whenever the new rules become effective."<sup>84</sup> The Commission, therefore, should adopt a phase-in period of at least two years,<sup>85</sup> which also would provide the Commission sufficient time to address the numerous waiver requests that undoubtedly will be filed.<sup>86</sup> Further, the accessibility requirements should not apply to products and services developed prior to the effective date of the new rules.<sup>87</sup> In other words, "any new requirements adopted pursuant to the CVAA should be entirely forward-looking and any products already developed and deployed should be grandfathered from compliance."<sup>88</sup> This phasing-in of the accessibility obligations, as well as the grandfathering of existing products and

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<sup>81</sup> See Microsoft Comments at 9.

<sup>82</sup> See Verizon Comments at 2.

<sup>83</sup> See ITIC Comments at 18 ("The CVAA requires promulgation of implementing rules – but not enforcement of those rules – by a date certain; requires the adoption of 'objectives,' not immediate compliance mandates; and requires the Commission to provide ongoing progress reports to Congress (thereby implying that accessibility will be achieved over a number of years).").

<sup>84</sup> Verizon Comments at 2.

<sup>85</sup> See Microsoft Comments at 15; Verizon Comments at 2; VoN Comments at 8.

<sup>86</sup> Microsoft Comments at 16.

<sup>87</sup> See VoN Comments at 8.

<sup>88</sup> AT&T Comments at 3.

services, would be consistent with Commission precedent and would protect ongoing product development and innovation.<sup>89</sup>

**V. CONCLUSION.**

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

Respectfully submitted,

**ENTERTAINMENT SOFTWARE ASSOCIATION**

By: /s/ F. William LeBeau

Michael D. Warnecke  
Senior Policy Counsel  
Entertainment Software Association  
575 7<sup>th</sup> Street NW, #300  
Washington, DC 20004  
(202) 223-2400

George Y. Wheeler  
F. William LeBeau  
Leighton T. Brown  
Holland & Knight LLP  
2099 Pennsylvania Avenue, NW, Suite 100  
Washington, DC 20006  
(202) 955-3000  
*Its Attorneys*

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<sup>89</sup> Also, retrofitting would be prohibitively expensive. *See id.*, Microsoft Comments at 16; ITIC Comments at 19; Verizon Comments at 2.