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September 9, 2011

Ms. Marlene Dortch
Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

Re: *Ex parte meeting on CG No. 10-213, WT No. 96-198, CG No. 10-145; CG No. 11-47*

Dear Ms. Dortch:

On September 7, 2011, Microsoft Vice President of Trustworthy Computing Scott Charney, Paula Boyd of Microsoft, and the undersigned met separately with Dave Grimaldi, Chief of Staff and Media Legal Advisor to Commissioner Clyburn; Commissioner McDowell and Angela E. Giancarlo, Chief of Staff and Senior Legal Advisor on Wireless and International Issues; and with Margaret McCarthy, Wireline Policy Advisor to Commissioner Copps. On September 8, 2011, the same individuals met with Amy Levine, Senior Counsel and Legal Advisor to Chairman Genachowski and Jessica Almond of the Chairman's office. The purpose of the meetings was to discuss the Commission's implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010 ("CVAA").

During the course of its meetings with Mr. Grimaldi, Ms. McCarthy, and Ms. Levine and Ms. Almond, the parties raised the following issues:

Scope of Section 716: First, the parties discussed the scope of Section 716(a) and (b). We explained that under this formulation, the Commission's authority under Section 716(a) extends only to a "manufacturer of equipment." Developers of freestanding software and software such as an operating system that is built into a device are not directly captured by this provision. Nonetheless, manufacturers of the equipment will be responsible for ensuring that all components both hardware and software work together to deliver the appropriate accessibility solution.

Additionally, the parties discussed the importance of the phrase "used for" in Section 716(a). At some level of analysis, a computer's power cord or its CPU are "used for" ACS, yet it is clear that Congress did not intend the CVAA to reach so broadly. To ensure an appropriate scope of Section 716(a), the parties urged the Commission to clarify that the phrase "used for" signifies that Section 716(a) applies only to equipment that by itself can be used to access an

ACS without substantial additional technology. This formulation provides the Commission with appropriately robust, but targeted authority to ensure that when consumers buy equipment for ACS use, they will enjoy access to ACS.

With respect to Section 716(b), the parties explained that whereas Section 716(a) is aimed at manufacturers of equipment, Section 716(b) focuses on providers of ACS. The parties noted that ACS by its very nature must include software and like manufacturers regulated under Section 716(a), providers of ACS will be responsible for ensuring that the services they offer users contain the appropriate accessibility solution. The parties emphasized that Section 716(a) and (b) on their face give the Commission extensive and unprecedented authority to pursue manufacturers of devices and providers of ACS, and that an overly broad reading of Section 716(a) is not necessary. And as an interpretative matter, the parties pointed out that an overly broad reading of Section 716(a) to encompass all software that is in any way “used for” ACS would make Section 716(b) superfluous, and that cannot be a fair reading of the statute.

In our meeting with the Chairman’s office, we also discussed how the CVAA relates to Section 255, which was added by the Telecommunications Act of 1996. The statutory language of Section 255 only references “a manufacturer of telecommunications equipment or consumer premises equipment” and “a provider of telecommunications service.” The Commission, based on a reference to software in the definition of “telecommunications equipment,” has written its Section 255 rules to reach a developer of software “integral to the” operation of a narrow set of equipment: telecommunications equipment and customer premises equipment.¹ Even though the Commission reached software developers under Section 255, it bears emphasis that these provisions cover a small slice of software “integral” to a narrow class of equipment. There is nothing in the statutory language of Section 716(a) that grants the FCC authority to pursue the manufacturers of component parts or developers of software such as an operating system when it is included as a software component in equipment used for ACS or sold separately as a standalone good. The parties explained that the Commission can certainly accomplish Congress’s bi-partisan goal to extend and expand the accessibility of communications products and services by staying within the statutory bounds of CVAA.

Telecommunications Relay Services (TRS) Fund: The parties also expressed support for the views set forth by the Voice on the Net Coalition with respect to the TRS obligations of non-interconnected VoIP service providers. The parties stated that non-interconnected VoIP services offered for free to consumers, such as advertising-supported services, should not be subject to a TRS contribution since they do not receive revenue directly from the consumer and that this

¹ *Implementation of Sections 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, WT Dkt. No. 96-168, 16 FCC Rcd 6417, at ¶ 12 (rel. Sept. 29, 1999); *see also IP-Enabled Services*, Report and Order, WC Dkt. No. 04-36, WT Dkt. No. 96-168, CG Dkt. No. 03-123, CC Dkt. No. 92-105, 22 FCC Rcd 11275 at ¶ 20 n.87 (rel. June 15, 2007).

outcome is consistent with the statutory language and legislative history.² Moreover, requiring such contributions could force innovators out of the emerging and valuable market for free-of-charge non-interconnected VoIP service.

The parties urged that the TRS contribution obligations of non-interconnected VoIP service providers must be limited to revenues directly attributable to interstate, end user, non-interconnected VoIP revenues. When companies are required to contribute to the TRS fund with respect to non-interconnected VoIP service, the Commission should permit such companies to calculate and self-certify the appropriate portion of their revenues attributable to their interstate, end user, non-interconnected VoIP service. Companies should not be obligated to apply a rigid formula. However, to further avoid undue administrative burdens on companies, the Commission should permit (but not require) non-interconnected VoIP providers the option of filing pursuant to a safe harbor that would allow them to pay TRS fees on a predetermined portion of their applicable revenues.

Lastly, the parties asked the Commission to limit its focus to non-interconnected VoIP services which are principally designed as communications tools since this approach would be “consistent and comparable” to the services that are captured today as dictated by Section 715 of CVAA. They also urged the Commission to provide a two year timeframe after the adoption of the rule to allow industry to come into compliance before the rules take effect. This would allow industry to put in place the appropriate billing and accounting systems necessary to manage payment of the new fee.

Gaming Devices: Microsoft reiterated its support for the waiver for video game products and online game services requested by the Entertainment Software Association. Video games are marketed and purchased for entertainment, not as communications tools. As we previously stated, video gaming products and services are among the “clearest example[s]” of products and services that make incidental use of voice, video, or text communications features, and accordingly are what Congress envisioned when it gave the Commission broad waiver authority.³

During the course of our meeting with Commissioner McDowell and Ms. Giancarlo, the parties discussed the issues summarized above, and in addition discussed the following issue:

Interoperable Video Conferencing: The parties explained that the definition of “interoperable video conferencing service” in Section 101 of the CVAA gives the Commission

² Congress directed the Commission to take into account “whether such services are offered free to the public” when establishing contribution requirements for non-interconnected VoIP providers. S. Rep. No. 111-386, at 6 (2010); H.R. Rep. No. 111-563, at 23 (2010).

³ See Comments of Microsoft Corp., CG Docket No. 10-213, at 4-6 (submitted Nov. 22, 2010).

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authority to regulate that service when it exists, and so the provision should be seen as Congress “future-proofing” the statute; however, the service category does not exist today because no video conferencing service is currently interoperable. The parties emphasized that the Commission may not read “interoperable” out of the statute by seeking to regulate any video conferencing services in which one user may talk to another user of the same service (in other words, every video conferencing service).⁴ Both the Communications Act⁵ and Commission regulations⁶ use the term “interoperable” to mean interoperable *between or across systems*, and the parties explained that the Commission may not depart from that established definition.

* * *

Please contact me directly if you have any questions.

Sincerely,

/s/ Gerard J. Waldron

Gerard J. Waldron
Counsel to Microsoft Corp.

cc: Commissioner Robert M. McDowell
Ms. Angela E. Giancarlo
Mr. Dave Grimaldi
Ms. Amy Levine
Ms. Margaret McCarthy
Ms. Jessica Almond

⁴ See *Hibbs v. Winn*, 542 U.S. 88, 101 (2004) (“A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant[.]”).

⁵ See 47 U.S.C. 230(f)(1) (“The term ‘Internet’ means the international computer network of both Federal and non-Federal *interoperable* packet switched data networks.”) (emphasis added); 47 U.S.C. 251(c)(5) (“[E]ach incumbent local exchange carrier has the . . . duty to provide reasonable public notice of changes in the information necessary for the transmission and routing of services using that local exchange carrier's facilities or networks, as well as of any other changes that would affect the *interoperability* of those facilities and networks.”) (emphasis added).

⁶ See, e.g., 47 C.F.R. § 51.325(b) (“[I]nteroperability means the ability of two or more facilities, or networks, to be connected, to exchange information, and to use the information that has been exchanged.”); 47 C.F.R. § 90.179(j) (“On the Interoperability Channels in the 700 MHz Public Safety Band . . . , hand-held and vehicular units operated by any licensee . . . may communicate with or through land stations without further authorization and without a sharing agreement.”).