AFB American Foundation® for the Blind
Expanding possibilities for people with vision loss

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September 28, 2011

VIA ELECTRONIC FILING

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

RE: Notice of *Ex Parte* Meeting
CG Docket No. 10-213; WT Docket No. 96-198; CG Docket No. 10-145

Dear Ms. Dortch:

On Monday, September 26, 2011, Mark Richert, Director, Public Policy, American Foundation for the Blind (AFB), met with senior staff of Commissioner Clyburn's office to discuss the above-captioned proceedings. This meeting was part of a meeting requested by the Coalition of Organizations for Accessible Technology (COAT), represented by, Jenifer Simpson, Senior Director for Government Affairs, American Association of People with Disabilities (AAPD); Eric Bridges, Director of Advocacy and Governmental Affairs, American Council of the Blind (ACB); and Andrew Phillips, Policy Attorney, National Association of the Deaf (NAD). Matters raised by COAT at this meeting are being memorialized in a separate filing. The purpose of this letter is to describe points raised by AFB during the meeting and to provide further input on AFB's specific concerns about components we understand will be part of the Commission's upcoming report and order.

First, we are concerned about the apparent intent of the Commission to require immediate compliance with the advanced communications service accessibility requirements but to establish a two-year period for delay of action on complaints. We fear that this bifurcated approach will be confusing to consumers and result in a weakened commitment to accessibility of equipment and services covered under the Twenty-first Century Communications and Video Accessibility Act (CVAA). We believe that it is imperative that both industry and consumers have a firm date after which all parties can rely on consistent treatment of complaints by the Commission and after which there is no doubt about how the CVAA will be enforced. We propose that the report and order require full compliance one year from the date of publication of such rules in the Federal Register and that complaints be accepted and acted upon beginning on that date. Since the CVAA included several provisions designed to accommodate industry flexibility, in particular the analysis of the "not achievable" test and industry's ability to choose between built-in accessibility or compatibility with third party solutions, we find a one-year phase-in period for the rules to be more than fair and reasonable. This is particularly true given

that the upcoming rules are not going to prescribe specific technical requirements but will rather, as the CVAA provides, simply require basic functional expectations, namely access through built-in or third party solutions. Industry has already had a full year of notice about what these functional expectations are and the standards that the Commission will use to assess when accessibility is indeed not achievable. This means that, even if a two-year product cycle is conceded, establishing the effective date of the rules one year from date of publication will effectively give industry the full two years they apparently are seeking.

With respect to waivers, we reiterate our concern that waivers only be considered for equipment and service that have not yet been introduced in the marketplace. If the Commission decides to consider requests for waivers for a device or service already introduced in the market, the Commission could find itself complicit in the petitioner's failure to ensure accessibility by granting a waiver after the fact. This result is of no value either to consumers or to industry. If the Commission denies the waiver petition, the equipment or service for which the waiver was sought will continue to be inaccessible, and the petitioner would be exposed to possible enforcement through the complaint process. We therefore call on the Commission to clarify that it will only accept waiver petitions for equipment or services that the petitioner has not yet deployed in the market so that, should the petition be denied, the petitioner has the opportunity to remediate the accessibility problems.

We also oppose an automatic two-year grant of waivers pursuant to the Commission's failure to act on a waiver request within six-months. We are concerned that this provision provides industry with an opportunity to bury the Commission in waiver petitions and burden limited staff resources for the purpose of gaming such an automatic waiver process. Furthermore, the CVAA does not in any way establish entitlement to waivers under any circumstances; waivers are discretionary and must continue to be treated as such. The Commission should establish one of two approaches with respect to the handling of waiver petitions. The Commission should take all time necessary to investigate the merits of such petitions and only waive compliance upon a final determination of the petition. Alternatively, if the Commission truly believes that it can handle whatever volume of waiver petitions industry may elect to pursue in a structure that expects a six-month turn-around time on each waiver petition, then the Commission should impose such a six-month deadline on itself for each petition after which time the petition is automatically dismissed without prejudice to refile. To allow an automatic waiver period is to establish entitlement to waiver, which the CVAA does not countenance and would leave consumers at tremendous, and potentially needless, risk.

Finally, regarding the likely treatment of software by the upcoming rules, we continue to be concerned that reading stand-alone software out of the CVAA's requirements in section 716(a) without a crystal clear statement of the applicability of section 716(b) to software-dependent services will do significant harm to consumers with respect to access to vast array of advanced communications services. If a software package, such as Skype, falls within the access mandate of 716(b), as we have been repeatedly assured that it does under the Commission's intended approach, the Commission should also be careful to spell out in no uncertain terms that pier-to-pier, point-to-point advanced communications services, including those that use stand-alone software to afford such services, will be expected to meet 716(b)'s expectations. It may be extremely useful for the Commission to append a list of illustrative examples of services currently on the market which the Commission sees as squarely within the 716(b) requirements. Such a list of examples, however, must only be affirmative, i.e., the list must not include examples that are per se excluded from coverage because doing so will only invite

future argument that newly deployed inaccessible services are merely analogous to the examples of excluded services.

In any event, the Commission's report and order should, at a minimum, be clear that services used for advanced communications, such as non-interconnected VoIP, electronic messaging and video conferencing, regardless of the modality chosen by industry to deliver such services, such as hard wiring, cloud computing, mobile apps, conventional software programs, or any other modality, must be accessible unless doing so is not achievable. The rules need to be clear that a service for purposes of 716(b) is the function being sought by the consumer, namely non-interconnected VoIP, electronic messaging, and/or video conferencing, and has nothing to do with the method chosen by a provider to provide such service.

Respectfully submitted,

Paul W. Schroeder
Vice President, Programs and Policy

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Director, Public Policy