



September 30, 2011

VIA ELECTRONIC FILING

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

RE: *Ex Parte* Comment in regard to a proposed waiver process

CG Docket No. 10-213; WT Docket No. 96-198; CG Docket No. 10-145

Dear Ms. Dortch:

On Friday, September 16, 2011, 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); Mark Richert, Director of Public Policy, American Foundation for the Blind (AFB); and Andrew Phillips, Policy Attorney, National Association of the Deaf (NAD); and also Claude Stout, Executive Director, Telecommunications for the Deaf and Hard of Hearing, Inc. (TDI) and Christian Vogler, Ph.D, Co-Principal Investigator, RERC on Telecommunication Access, Director, Technology Access Program, Gallaudet University, met with Rick Kaplan, Chief, Wireless Telecommunications Bureau (WTB); Jane Jackson, Associate Bureau Chief, WTB; Elizabeth Lyle, WTB; Melissa Gidden Tye, WTB; Karen Peltz Strauss, Deputy Chief, Consumer & Governmental Affairs Bureau (CGB); Eric J. Bash, Associate Bureau Chief, Enforcement Bureau (EB); and Darryl Cooper, EB.

This outreach meeting, called by the WTB, discussed a proposed draft of rules on Advanced Communications Services (“ACS”) that will soon be on circulation. We expressed appreciation for all of the work that has been done by everyone at the FCC on ACS. However, we shared some concerns and reminded those at the meeting about the overarching purpose of the law and the need to ensure that 54 million individuals with disabilities are able to fully utilize ACS.

One outstanding concern that we expressed in this meeting is our disappointment and dismay with a proposed waiver process for products that are designed for purposes other than using Advanced Communications Services and that had been raised in the Notice of Proposed Rulemaking.¹ In the NPRM, a number of Commission inquiries centered on communications that take place in the context of video gaming consoles and other online services. We read the NPRM with the understanding that the Commission does not believe the fact that a “core” function of a device is to play games to be dispositive of the issue of whether such a device is

¹ NPRM, ¶54.

entitled to a waiver.² COAT agrees in principal that waivers should not be granted based on the nature of the device but note that the question is really whether an advanced communications service or equipment is being provided.

In our discussion with WTB staff it became clear that there is a proposal that would allow waivers to be granted automatically for two years, for good cause, if the Commission has not acted on the petition for waiver within six months. Furthermore, the basis for granting waivers, as proposed, appears to be “how the general public is using the device” and “how the product is being marketed.”

COAT has serious concerns with the proposed approach – and in fact opposes this approach -- for the following reasons:

1. 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 issue waivers upon a full and 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 (and to non-compliance), which the CVAA does not countenance and would leave consumers at tremendous, and potentially needless, risk.
2. The proposed guidance for other than ACS for waiver review in regard to other purposes for devices was proposed as (a) “how the general public is using the device” and (b) “how the product is being marketed. We believe these give too much new discretion to the Commission and are not found in the statute. That is, when considering whether accessibility for some device with ACS and other purposes is achievable or not – for purposes of accessibility, usability and compatibility -- the Commission must consider factors such as ‘the nature and cost of the steps needed to meet the requirements of this Section with respect to the specific equipment or service in question;’ and ‘the technical and economic impact on the operation of the manufacturer or provider and on the operation of the specific equipment or service in question, including on the development and deployment of new communications technologies’ and ‘the type of operations of the manufacturer or provider’ and ‘the extent to which the service provider or manufacturer in question offers accessible services or equipment containing varying degrees of functionality and features, and offered at differing price points. It is our opinion that when determining whether a waiver is valid for purposes of ‘primary purpose’ the Commission has carved out of whole cloth a brand new set of factors for achievability. It has always been COAT’s position, and we see this intent in the statute, that everything needs to be accessible “unless not achievable.” We also believe that many of these “other than primary purposes” may be accessible and usable, either elsewhere in the marketplace or in other products/services, so this guidance is lacking such obvious consideration.
3. Additionally, when considering these two factors “how the general public is using the device” and “how the product is being marketed” we would challenge the extent to which the Commission can in fact determine quantitatively and qualitatively during a six month period the scope and extent of how the general public uses a device with other purposes

² NPRM, ¶ 54.

and how it is marketed. Where and how will the Commission uncover how the general public uses such a device or service? Does the Commission intend to conduct consumer surveys on how the general public uses something? Does the Commission intend to conduct a full review and develop a record about all mainstream advertising, all online advertising, all print and retail materials for a device, and if so, will this be on a global marketing basis (that is, how a device is marketed in Europe may be quite different from how it is marketed in the United States or Africa)? Will the Commission be looking only at what the manufacturer or service provider includes in their waiver request? Again, this could be very limited and lacking in overall consideration of what information is easily available to consumers or that could be discerned by consumers who read product specification materials.

4. We can easily imagine that the Commission could be flooded with petitions for waivers and unable to review each waiver specifically on these two new bases during a 6 month period. It would thus be compelled to be in the position of granting waivers that last for two years and which are automatic, and may even be categorical across a product grouping, and for devices which indeed should and could be accessible, usable and compatible for use by people with disabilities.

In general, 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.

COAT notes how the market place is rapidly changing. More and more products/services are converging. Yesterday's news shows one such example. Apparently, Microsoft, for instance, is working with Comcast and Verizon Communications to bring TV to the software giant's Xbox 360 broadband-connected game console. This means some TV content will soon be available to Xbox users. Likewise, AT&T has offered U-verse TV customers an option to use Xboxes as set-tops since last fall.³ COAT notes, however, that current mainstream advertising for Xbox is primarily focused on 'gaming.'⁴ We doubt, therefore, that the Commission can actually review a waiver about 'primary purpose' when product and service provision are part of forward looking strategic business planning by any entities involved and when these two new 'factors' are the determinants.

³“Game On: Comcast, FiOS TV Coming to Xbox: Operators Prep Live TV, On-Demand Video Services for Microsoft Console,” by Todd Spangler in Multichannel News Online, at http://www.multichannel.com/article/474535-Game_On_Comcast_FiOS_TV_Coming_to_Xbox.php

⁴ See online ad for Xbox at <http://www.xbox.com/en-US/>. While Hulu, an online distributor of video programming is mentioned, there is no mention whatsoever of the console connecting to video programming distribution by multichannel video programming distributors.

COAT is astounded by the proposed approach to waivers in regard to 'primary purpose' and recommends it be scrapped. And based on the new approach and factors devised by the Commission, and our continuing realization that the marketplace moves quickly, we recommend a far more rigid waiver process that is only for products currently in development and that are not currently on the market and for which inability to reach achievability can be well-documented. Any such waivers should be very limited (in scope and scale) and quite temporary in nature.

Respectfully submitted on behalf of the COAT Coalition,

Jenifer Simpson

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