

d. Formal Complaints

269. *Background.* Section 717 states that aggrieved parties may use our more formal adjudicative procedures to pursue accessibility claims against manufacturers or service providers for violations of Sections 255, 716, and 718.⁷¹³ Section 717 further directs the Commission to establish regulations that facilitate the filing of such formal claims.⁷¹⁴ In the *Accessibility NPRM*, the Commission proposed rules for filing and resolving formal complaints alleging a violation of Section 255, 716, or 718 of the Act and the Commission rules implementing those sections.⁷¹⁵ In particular, the Commission proposed to require aggrieved parties to follow the Commission's existing formal complaint procedures, as modified in the proposed rules.⁷¹⁶

270. *Discussion.* We adopt the rules the Commission proposed in the *Accessibility NPRM*. Specifically, we require both complainants and defendants to: (1) certify in their respective complaints and answers that they attempted in good faith to settle the dispute before the complaint was filed with the Commission; and (2) submit detailed factual and legal support, accompanied by affidavits and documentation, for their respective positions in the initial complaint and answer. The rules also place strict limits on the availability of discovery and subsequent pleading opportunities to present and defend against claims of misconduct.⁷¹⁷

271. We decline to adopt a rule requiring an informal complaint to be filed prior to the filing of a formal complaint.⁷¹⁸ As with the informal complaint process, we do not want to place any unnecessary barriers in the way of those who choose to use the formal complaint process. In this regard, we agree with commenters that to require a party to file an informal complaint as a prerequisite for filing a formal complaint would create an unnecessary obstacle to complainants.⁷¹⁹ Such a prerequisite is not required in any other Commission complaint process and is inconsistent with the CVAA.⁷²⁰ For these reasons, we decline to require that an informal complaint be filed prior to the filing of a formal complaint.

272. We disagree with commenters that argue that the formal complaint rules will impose a burden on consumers.⁷²¹ Our rules follow the CVAA in providing complainants with

⁷¹³ 47 U.S.C. § 618(a)(3)(A).

⁷¹⁴ 47 U.S.C. § 618(a).

⁷¹⁵ *Accessibility NPRM*, 26 FCC Rcd at 3200, Appendix B (setting forth proposed new rules 47 C.F.R. §§ 14.30-14.52 – 8.37 entitled “Subpart D – Recordkeeping, Consumer Dispute Assistance, and Enforcement”). These proposed rules were based in part on Commission formal complaint rules governing other subject matters. See 47 C.F.R. §§ 1.720 – 1.736.

⁷¹⁶ *Accessibility NPRM*, 26 FCC Rcd at 3187, ¶ 141.

⁷¹⁷ See Appendix B, §§ 14.38-14.52.

⁷¹⁸ ITI Comments at 31 (arguing that the filing of an informal complaint should be a prerequisite to filing a formal complaint).

⁷¹⁹ See IT and Telecom RERCs Comments at 42 (such a requirement would “further inhibit the formal complaint process”).

⁷²⁰ See 47 U.S.C. § 618(a)(3)(A) (“Any person alleging a violation of section 255, . . . [716, or 718] by a manufacturer or provider of service subject to such sections may file a formal or informal complaint with the Commission.”).

⁷²¹ Words+ and Compusult Comments at 34 (filing a formal complaint and conducting discovery are cost prohibitive and require hiring legal counsel).

two options for filing complaints alleging accessibility violations. We believe the formal complaint process we adopt today is no more burdensome than necessary given the complexities inherent in litigation generally and is in line with our other formal complaint processes. Like the Commission's other formal complaint processes, the accessibility formal complaint rules allow parties an opportunity to establish their case through the filing of briefs, answers, replies, and supporting documentation; and allow access to useful information through discovery.

273. If a complainant feels that the formal complaint process is too burdensome or complex, the rules we adopt today provide the option to file an informal complaint that is less complex, less costly, and is intended to be pursued without representation by counsel.⁷²² While complainants may see advantages and disadvantages with either of the processes depending on the specifics of their circumstances, both options provide viable means for seeking redress for what a complainant believes is a violation of our rules. Moreover, we believe that potential complainants are in the best position to determine which complaint process and associated remedies (formal or informal) serve their particular needs.

274. We adopt the Commission's proposal in the *Accessibility NPRM* to no longer place formal accessibility complaints on the Accelerated Docket.⁷²³ Twelve years before the CVAA was enacted, in the *Section 255 Report and Order*, the Commission found that the Accelerated Docket rules were appropriate for handling expedited consideration of consumer Section 255 formal complaints.⁷²⁴ In the CVAA, Congress mandated expedited consideration of informal complaints by requiring a Commission Order within 180 days after the date on which a complaint is filed.⁷²⁵ As discussed in *Informal Complaints*, Section III.E.2.c, *supra*,⁷²⁶ we have carefully designed an informal complaint process that will place a minimal burden on complainants, enable both parties to present their cases fully, and require a Commission order within 180 days. We believe that this consumer-friendly, informal complaint process addresses our concerns that consumer complaints be resolved in a timely manner and provides an adequate substitute for formal Accelerated Docket complaints. In addition, given the "accelerated" or 180-day resolution time-frame for informal complaints, we believe that retaining an "Accelerated Docket" for formal complaints is no longer necessary and, in fact, may impose an unnecessary restriction on the formal complaint process where, as discussed above, the process involves, among other things, filing of briefs, responses, replies, and discovery. Therefore we decline to adopt the Accelerated Docket rules for Section 255, 716, and 718 formal complaints.

e. Remedies and Sanctions

275. *Background.* In the *Accessibility NPRM*, the Commission also invited comment on what remedies and other sanctions should apply for violations of Sections 255, 716, or 718.⁷²⁷

⁷²² For example, there is no filing fee associated with filing an informal complaint and the filing can be done by the average consumer. In contrast, there is a filing fee associated with the formal complaint process and, in general, parties are represented by counsel.

⁷²³ See *Accessibility NPRM*, 26 FCC Rcd at 3186, ¶ 141 n.411; 47 C.F.R. § 1.730 (permitting a complainant to seek authorization from the Enforcement Bureau for placement on the bureau's accelerated docket under certain narrow circumstances).

⁷²⁴ *Section 255 Report and Order*, 16 FCC Rcd at 6475-76, ¶¶ 143-146.

⁷²⁵ 47 U.S.C. § 618(a)(3)(B).

⁷²⁶ See *Informal Complaints*, Section III.E.2.c, *supra*.

⁷²⁷ *Accessibility NPRM*, 26 FCC Rcd at 3183, ¶ 132.

If the Commission finds a violation of Section 255, 716, or 718, Section 717(a)(3)(B) authorizes us to direct a manufacturer to bring the next generation of its equipment or device, and a service provider to bring its service, into compliance within a “reasonable time.”⁷²⁸ Further, Section 718(c) contemplates that we continue to use our Section 503 remedies, as modified by the CVAA, to allow assessment of forfeitures of up to \$100,000 per violation for each day of a continuing violation, with the maximum amount for a continuing violation set at \$1 million, for violations of the Act.⁷²⁹

276. *Discussion.* We intend to adjudicate each informal and formal complaint on its merits and will employ the full range of sanctions and remedies available to us under the Act in enforcing Sections 255, 716, or 718.⁷³⁰ Thus, we agree with commenters that the Commission should craft targeted remedies on a case-by-case basis, depending on the record of the Commission’s own investigation or a complaint proceeding.⁷³¹ For this same reason, while we agree with consumer groups that the Commission should act quickly and that time periods should be as short as practicable to ensure that consumers obtain accessible equipment or services in a timely manner,⁷³² without the particular facts of a product or service in front of us, we cannot at this time decide what a “reasonable time” for compliance should be. Nevertheless, as the Commission gains more familiarity with services, equipment, and devices through its own investigations and resolution of complaints, our enforcement orders will begin to establish precedent of consistent injunctive relief, periods of compliance, and other sanctions authorized by the Act.

277. We disagree with AT&T’s contention that the *Accessibility NPRM*’s proposed formal complaint rules exceed the authority granted the Commission under the CVAA.⁷³³ We further disagree with AT&T’s specific argument that the Commission does not have authority to adopt proposed rule section 8.25, which provides that “a complaint against a common carrier may seek *damages*.”⁷³⁴ As discussed above,⁷³⁵ we designed the formal complaint rules to address potential violations of Section 255, 716, or 718. In the *Section 255 Report and Order*, the Commission decided that a complainant could obtain damages for a Section 255 violation from a common carrier under Section 207.⁷³⁶ We agree, however, with AT&T that CVAA services that

⁷²⁸ 47 U.S.C. § 618(a)(3)(B)(i).

⁷²⁹ See 47 U.S.C. § 619(c).

⁷³⁰ See *Section 255 Report and Order*, 16 FCC Rcd at 6645, ¶ 115.

⁷³¹ See CEA Comments at 43 (Commission should take into account a product’s lifecycle and other market realities); TIA Comments at 29 (remedies should be flexible); CEA Reply Comments at 22. We have already concluded that retrofitting equipment is not an appropriate remedy. See *Accessibility NPRM*, 26 FCC Rcd at 3183, ¶ 133 (citing Senate and House Reports); CEA Comments at 47 (agreeing with that conclusion). But see UC Reply Comments at 16 (the Commission should order retrofitting).

⁷³² See IT and Telecom RERCs Comments at 42 (“if too much time is afforded, the product or service may be obsolete by the time it is brought into compliance”); Words+ Comments at 38 (the time for compliance should be no more than 18 months). CEA argues that the starting point for a reasonable period of time should be 18 months for equipment and 12 months for services. CEA Comments at 47.

⁷³³ AT&T Comments at 18.

⁷³⁴ AT&T Comments at 18 n.31 (arguing that the CVAA does not provide a right for damages).

⁷³⁵ See *Formal Complaints*, Section III.E.2.d, *supra*.

constitute information services and are not offered on a common carrier basis would not be subject to the damages provision of Section 207.⁷³⁷

278. Neither the CVAA nor the Act addresses permitting prevailing parties to recover attorney's fees and costs in formal or informal complaint proceedings.⁷³⁸ The Commission cannot award attorney's fees or costs in a Section 208 formal complaint proceeding or in any other proceeding absent express statutory authority.⁷³⁹ We hope that a majority of consumer issues can be resolved through the dispute assistance process and thereby alleviate the need for consumers to file a complaint at all. We also note that consumers need not incur any attorney's fees by providing the Commission with information that allows the Commission to, on its own motion, launch its own independent investigation, including but not limited to a Letter of Inquiry, into potential violations by a covered entity. Any party that would like to provide the Commission with information indicating that a covered entity's product or service is not in

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⁷³⁶ See Section 255 Report and Order, 16 FCC Rcd at 6464, ¶ 113. See also 47 U.S.C. § 207 (providing for the recovery of damages caused by a common carrier). The Commission rejected a similar argument that AT&T makes here that Section 255's preclusion of a private court right of action somehow limits the remedies that the Commission may award under the Communications Act. See *id.*; AT&T Comments at 18 (arguing that the CVAA's preclusion of a private right of action limits the Commission's ability to award damages).

⁷³⁷ See AT&T Comments at 18.

⁷³⁸ The IT and Telecom RERCs argue that parties should be awarded attorney's fees and costs. IT and Telecom RERCs Comments at 40. *But see* CEA Reply Comments at 20 (disagreeing that the Commission has such authority); CTIA Reply Comments at 27.

⁷³⁹ *Turner v. FCC*, 514 F.2d 1354 (1975) (affirming the Commission's decision not to grant attorney's fees on the grounds that the Commission cannot do so without "clear statutory power" directly on point); *AT&T Co. v. United Artists Payphone Corp.*, 852 F. Supp. 221 (holding that the Commission has no authority to grant attorney's fees under 47 U.S.C. § 206), *aff'd*, 39 F.3d 411 (1994); *Station Holdings, Inc. v. Mills Fleet Farm, Inc.*, Order, 18 FCC Rcd 12787 ¶ 13 (EB TCD 2003) (in a formal complaint proceeding, neither the Communications Act nor the Commission's rules authorizes attorney's fees); *Implementation of the Telecommunications Act of 1996: Amendment of Rules Governing Procedures to Be Followed When Formal Complaints are Filed Against Common Carriers*, Report and Order, 12 FCC Rcd 22497 ¶ 130 (1997) (the Commission has no authority to award costs, including attorney's fees, in the context of a formal complaint proceeding); *Implementation of the Telecommunications Act of 1996: Amendment of Rules Governing Procedures to Be Followed When Formal Complaints are Filed Against Common Carriers*, Notice of Proposed Rulemaking, 111 FCC Rcd 20823 (1997) (same); *Erdman Tech. Corp. v. US Sprint Comm. Co.*, Memorandum Opinion and Order, 11 FCC Rcd 6339 ¶ 20 (CCB 1996) (same); *Electric Plant Board v. Turner Cable Network Sales, Inc.*, Memorandum Opinion and Order, 9 FCC Rcd 4855 ¶¶ 25-26 (CSB 1994) (in a program access complaint proceeding, citing *Turner v. FCC*, "absent an express grant of authority" under Title V of the Communications Act of 1934, as amended, or the 1992 Cable Act, the Commission has no authority to award attorney's fees); *Pan American Satellite Corp. v. Communications Satellite Corp.*, Memorandum Opinion and Order, 8 FCC Rcd 4502 ¶ 16 (CCB 1993) (in a formal complaint proceeding, the Commission had no authority to award attorney's fees); *Allnet Comm. Services, Inc. v. New York Telephone Co.*, Memorandum Opinion and Order, 8 FCC Rcd 3087 ¶ 36 (1993) (the Commission has no authority to award attorney's fees or costs in a 47 U.S.C. § 208 complaint proceeding); *Amendment of Rules Governing Procedures to Be Followed When Formal Complaints Are Filed Against Common Carriers*, Report and Order, 8 FCC Rcd 2614 ¶ 69 n.71 (1993) (47 U.S.C. § 206 provides attorney's fees in court actions, but not in Commission proceedings); *Comark Cable Fund III v. Northwestern Indiana CATV, Inc.*, Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture, 100 FCC.2d 1244 ¶ 31 n.51 (1985) (in a 47 U.S.C. § 208 proceeding, the Commission has no authority to impose attorney's fees).

compliance with the Commission's rules may do so, without filing a complaint, by e-mailing or telephoning the Enforcement Bureau.

IV. FURTHER NOTICE OF PROPOSED RULEMAKING

A. Small Entity Exemption

279. As we explained in the accompanying *Report and Order*, Section 716(h)(2) of the Act authorizes the Commission to exempt small entities from the requirements of Section 716, and as an effect, the concomitant obligations of Section 717.⁷⁴⁰ The exemption relieves from Section 716 small entities that may lack the legal, technical, or financial ability to incorporate accessibility features, conduct an achievability analysis, or comply with the Section 717 recordkeeping and certification requirements.⁷⁴¹ In the accompanying *Report and Order*, we found the record insufficient to adopt a permanent exemption or to adopt the criteria to be used to determine which small entities to exempt.⁷⁴² Instead, we exercised our authority to temporarily exempt all manufacturers of ACS equipment and providers of ACS that are small business concerns under applicable SBA rules and size standards.⁷⁴³ The temporary exemption will expire on the earlier of: (1) the effective date of small entity exemption rules adopted pursuant to the *Further Notice of Proposed Rulemaking*; or (2) October 8, 2013.

280. We first seek comment on whether to permanently exempt from the obligations of Section 716, manufacturers of ACS equipment and providers of ACS that qualify as small business concerns under the SBA's rules and size standards and, if so whether to utilize the size standards for the primary industry in which they are engaged under the SBA's rules. The SBA criteria were established for the purpose of determining eligibility for SBA small business loans. Are these same criteria appropriate for the purpose of relieving covered entities from the obligations associated with achievability analyses, recordkeeping, and certifications? If these size criteria are not appropriate for a permanent exemption, what are the appropriate size criteria? Are there other criteria that should form the basis of a permanent exemption?

281. As explained in the *Report and Order*, small business concerns under the SBA's rules must meet the SBA size standard for six-digit NAICS codes for the industry in which the concern is primarily engaged.⁷⁴⁴ To determine an entity's primary industry, the SBA "considers the distribution of receipts, employees and costs of doing business among the different industries in which business operations occurred for the most recently completed fiscal year. SBA may also consider other factors, such as the distribution of patents, contract awards, and assets."⁷⁴⁵ We seek comment on the applicability of this rule for the permanent small entity exemption.

282. We seek comment on the applicability of the SBA definition of "business

⁷⁴⁰ 47 U.S.C. § 617(h)(2). See Exemptions for Small Entities – Temporary Exemption of Section 716 Requirements, Section III.C.3, *supra*.

⁷⁴¹ See Exemptions for Small Entities – Temporary Exemption of Section 716 Requirements, Section III.C.3, *supra*.

⁷⁴² See para. 204, *supra*.

⁷⁴³ See chart at para. 207, *supra*; 13 C.F.R. §§ 121.101 – 121.201.

⁷⁴⁴ See para. 207, *supra*.

⁷⁴⁵ 13 C.F.R. § 121.107.

concern.”⁷⁴⁶ Under SBA’s rules, a business concern is an “entity organized for profit, with a place of business located in the United States, and which operates primarily within the United States or which makes a significant contribution to the U.S. economy through payment of taxes or use of American products, materials or labor.”⁷⁴⁷ We also seek comment on the applicability of other SBA rules for determining whether a business qualifies as a small business concern, including rules for determining annual receipts or employees and affiliation between businesses.⁷⁴⁸

283. We also seek comment on alternative size standards that the Commission has adopted in other contexts. In establishing eligibility for spectrum bidding credits, the Commission has adopted alternative size standards for “very small” and “small” businesses.⁷⁴⁹ The Commission has defined “very small” businesses for these purposes as entities that, along with affiliates, have average gross revenues over the three preceding years of either \$3 million or less, or \$15 million or less, depending on the service.⁷⁵⁰ The Commission has defined “small” businesses in this context as entities that, along with affiliates, have average gross revenues over the three preceding years of either \$15 million or less, or \$40 million or less, depending on the service.⁷⁵¹ The Commission has also adopted detailed rules for determining affiliation between an entity claiming to be a small business and other entities.⁷⁵² Finally, in at least one instance, the Commission defined a small business in the spectrum auction context as an entity that, along with its affiliates, has \$6 million or less in net worth and no more than \$2 million in annual profits (after federal income tax and excluding carry over losses) each year for the previous two years.⁷⁵³ We seek comment on whether these alternatives -- in whole, in part, or in combination -- should form the basis for a permanent small entity exemption from the requirements of Section 716.

284. The Commission has also used different size standards to define small cable companies and small cable systems, and the Act includes a definition of small cable system operators. The Commission has defined small cable companies as a cable company serving

⁷⁴⁶ To be a small business concern, entities must meet the definition and requirements of a “business concern” as established by the SBA. See 13 C.F.R. § 121.105.

⁷⁴⁷ 13 C.F.R. § 121.105(a)(1).

⁷⁴⁸ See 13 C.F.R. §§ 121.103, 121.104, 121.106.

⁷⁴⁹ See 47 C.F.R. § 1.2110(f)(2).

⁷⁵⁰ See 47 C.F.R. § 90.912(b) (defining very small business for 800 MHz SMR spectrum licenses as entities, together with affiliates, with average gross revenue over the preceding three years not to exceed \$3 million); 47 C.F.R. § 24.720(b) (defining very small business for PCS Block F spectrum licenses as entities, together with affiliates, with average gross revenue over the preceding three years not to exceed \$15 million). See Section C.3.a & d of the accompanying FRFA for a full listing of the Commission’s use of these size standards.

⁷⁵¹ See 47 C.F.R. § 90.912(b) (defining small business for 800 MHz SMR spectrum licenses as entities, together with affiliates, with average gross revenue over the preceding three years not to exceed \$15 million); 47 C.F.R. § 24.720(b) (defining small business for PCS Block F spectrum licenses as entities, together with affiliates, with average gross revenue over the preceding three years not to exceed \$40 million). See Section C.3.a & d of the accompanying FRFA for a full listing of the Commission’s use of these size standards.

⁷⁵² 47 C.F.R. § 1.2110(b).

⁷⁵³ *Implementation of Section 309(j) of the Communications Act – Competitive Bidding*, PP Docket No. 93-253, Fourth Report and Order, 9 FCC Rcd 2330 (1994).

400,000 or fewer subscribers nationwide,⁷⁵⁴ and small cable systems as a cable system serving 15,000 or fewer subscribers.⁷⁵⁵ The Act defines small cable system operators as “a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1 percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed \$250,000,000.”⁷⁵⁶ We seek comment on whether these alternatives – in whole, in part, or in combination – should form the basis for a permanent small entity exemption from the requirements of Section 716.

285. In addition, we seek comment on any other criteria that might form all or part of a permanent small entity exemption. For example, the SBA primarily uses two measures to determine business size -- the maximum number of employees or maximum annual receipts of a business concern – but it has also applied other measures that represent the magnitude of operations of a business within an industry, including “total assets” held by an entity and the “net worth” and “net income” for an entity. Does an exemption based on some criterion other than employee count or revenues better meet Congressional intent? Commenters are encouraged to explain fully any alternative – including the alternative of adopting no exemption for small entities -- and to specifically support any alternative criteria proffered, including by demonstrating the anticipated impact on consumers and small entities.

286. We also seek comment on whether to limit the exemption to only the equipment or service that is designed while an entity meets the requirements of any small business exemption we may adopt. If an entity offers for sale a new version, update or other iteration of the equipment or service, we seek comment on whether the update automatically should be covered by the exemption or whether the exemption should turn on whether the entity was still capable of meeting the exemption during the design phase of the new version, iteration, or update.

287. We seek comment on whether to make a permanent small entity exemption self-executing. If self-executing, entities would be able to raise the exemption during an enforcement proceeding but would otherwise not be required to formally seek the exemption before the Commission. In this scenario, the entity seeking the exemption would be required to determine on its own whether it qualifies as a small business concern.

288. We seek comment on the impact of a permanent exemption on providers of ACS, manufacturers of ACS equipment, and consumers. What percentage of, or which non-interconnected VoIP providers, wireline or wireless service providers, electronic messaging providers, and ACS equipment manufacturers would qualify as small business concerns under each size standard? Conversely, what percentage of or which providers of ACS or manufactures of equipment used for ACS are not small business concerns under each size standard? For each ACS and ACS equipment market segment, what percentage of the market is served by entities that are not exempt using each size standard?

289. We seek comment on the compliance costs that ACS providers and ACS equipment manufacturers would incur absent a permanent exemption. What would the costs be for compliance with Section 716 and Section 717 across different providers of ACS and ACS

⁷⁵⁴ 47 C.F.R. § 76.901(e). The Commission determined that this size standard equates approximately to a size standard of \$100 million or less in annual revenues. *Implementation of Sections of the 1992 Cable Act: Rate Regulation*, Sixth Report and Order and Eleventh Order on Reconsideration, 10 FCC Rcd 7393, 7408 (1995).

⁷⁵⁵ 47 C.F.R. § 76.901(c).

⁷⁵⁶ 47 U.S.C. § 543(m)(2).

equipment manufacturers if we decline to adopt any permanent exemption or decline to make the temporary exemption permanent? In particular, what are the costs of conducting an achievability analysis, recordkeeping, and providing certifications?

290. We seek comment generally on the impact of a small business exemption on consumers. Are there ACS or ACS equipment that may significantly benefit people with disabilities that are provided or manufactured by entities that might be exempt? If so, what are the services or equipment or the types of services or equipment, and how would the exemption impact people with disabilities? Would a permanent exemption disproportionately impact people with disabilities in rural areas versus urban or suburban areas? How would a permanent exemption impact people with disabilities living on tribal lands? To what extent would a permanent exemption impact the ability of people with disabilities to access new ACS innovations or ACS equipment innovations? Will a permanent exemption have a greater impact on the accessibility of some segments of ACS or ACS equipment than others?

291. We intend to monitor the impact of any exemption, including whether it is promoting innovation as Congress intended or whether it is having unanticipated negative consequences on accessibility of ACS. While we propose not to time limit any exemption, we retain the ability to modify or repeal the exemption if doing so would serve the public interest and is consistent with Congressional intent.⁷⁵⁷ We seek comment on these proposals.

B. Section 718 Implementation

292. Under Section 718, a mobile phone manufacturer that includes a browser, or a mobile phone service provider that arranges for a browser to be included on a mobile phone, must ensure that the browser functions are accessible to and usable by individuals who are blind or have a visual impairment, unless doing so is not achievable.⁷⁵⁸ Congress provided that the effective date for these requirements is three years after the enactment of the CVAA, *i.e.*, October 8, 2013.

293. In enacting Section 718,⁷⁵⁹ we believe that Congress carved out an exception to Section 716 and delayed the effective date to address a special class of browsers for a specific subset of the disabilities community because of the unique challenges of achieving non-visually accessible solutions in a mobile phone and the relative youth of accessible development for mobile platforms. This technical complexity arises because three accessibility technologies, often developed by different parties, must be synchronized effectively together for a browser to be accessible to a blind user of a mobile phone: (1) an accessibility API⁷⁶⁰ of the operating system;

⁷⁵⁷ Several commenters argue for a time-limited exemption for small entities. *See* Wireless RERC Comments at 5 (“[O]ne year seems appropriate with a reapplication process that requires a stronger burden for renewal.”); ACB Reply Comments at 23-24 (“[W]aivers for covered small entities in question [should] only be granted for a term whose length shall not exceed more than 12 months.”). As long as an entity remains a small entity under our proposed rules, they will be exempt from compliance. However, we will monitor the exemption to ensure it meets Congress’s intent.

⁷⁵⁸ *See* 47 U.S.C. § 619(a). *See also* House Report at 27 (“The Committee also intends that the service provider and the manufacturer are each only subject to these provisions with respect to a browser that such service provider or manufacturer directs or specifies to be included in the device.”)

⁷⁵⁹ *See* 47 U.S.C. § 619.

⁷⁶⁰ An Application Programming Interface (API) is software that an application program uses to request and carry out lower-level services performed by the operating system of a computer or telephone. *See* Harry Newton, *Newton’s Telecom Dictionary*, 68 (CMP Books, 20th ed. 2004).

(2) the implementation of that API by the browser; and (3) its implementation by a screen reader. Because non-visual accessibility is generally the most technically challenging form of accessibility to accomplish,⁷⁶¹ an accessibility API is needed to render the underlying meaning of key elements of a graphical user interface in an alternate, non-visual form, such as synthetic speech or refreshable Braille. For example, while Microsoft has developed Microsoft Active Accessibility (MSAA), the dominant accessibility API on Windows desktop computers, it has not yet defined and deployed an accessibility API for the current Windows phone platform that can be utilized by browser and screen reader developers for that platform.⁷⁶² Even after an API becomes available, a significant process of coordination, testing, and refinement is needed to ensure that the browser/server and screen reader/client components can interact in a comprehensive and robust manner.

294. Additional lead-time must also be built-in as this kind of technical development and coordination is needed on each mobile platform. Present technological trends have resulted in relatively short generations of mobile platforms, each benefiting from increasing miniaturization of hardware components and increased bandwidth for transmitting data to and from the cloud. Experimentation and innovation with new ways of maximizing the productivity of mobile platforms, given these technological trends, has made accessibility coordination difficult. Finally, additional challenges are presented by the technical limitations posed by mobile platforms (lower memory capacity, low-bandwidth constraints, smaller screens) coupled with the fact that web content often has to be specially formatted to run on mobile platforms.⁷⁶³

295. In the context of discussing the development of accessible mobile phone options for persons who are blind, deaf-blind, or have low vision, the industry has acknowledged the technological shortcomings in the ability of both hardware and software to incorporate accessibility features in mobile phones. Specifically, TIA has indicated that “[not] all mobile devices can support the additional fundamental components needed to provide a full screen reader feature; there may be limitations in the software platform or limitations in the accompanying hardware, e.g., processing power, memory limitations.”⁷⁶⁴ TIA also indicated that more advanced

⁷⁶¹ Non-visual accessibility for mobile browsers typically involves the coordination of several components, as discussed above. See also W3C Web Accessibility Initiative, ESSENTIAL COMPONENTS OF WEB ACCESSIBILITY, <http://www.w3.org/WAI/intro/components.php> (last visited Aug. 17, 2011). Making the necessary changes is thus likely to be more difficult. See BARBARA VAN SCHEWICK, INTERNET ARCHITECTURE AND INNOVATION 117 (2010) (“In general, the costs of changing an architecture rise with the number and complexity of architectural components involved in the change.”); cf. LEN BASS ET AL., SOFTWARE ARCHITECTURE IN PRACTICE 82 (1998) (explaining that sometimes a simple change across more components may be easier to implement than a complex change across fewer components). In addition to these higher costs of implementation (development, testing, and documentation), coordination and adaptation costs are higher across firm boundaries and rise with the greater number of firms involved. See VAN SCHEWICK at 117, 127, 131-36.

⁷⁶² See Paul Schroeder and Darren Burton, *Microsoft Backtracks on Accessibility in New Mobile Operating System, Commits to Accessibility in Future Windows Phone Platform*, 11 ACCESSWORLD, no. 8, Dec. 2010, available at <http://www.afb.org/afbpres/pub.asp?DocID=aw110802>.

⁷⁶³ Concurrent with the passage of the CVAA has been the rapid increase in, and highly competitive development of, the number of mobile browser offerings in the market place and their hardware and software are significantly different from desktop browsers and each other, even within phones from the same manufacturer. See http://www.pcworld.com/article/230885/attack_of_the_mobile_browsers.html.

⁷⁶⁴ See TIA Comments to the July Public Notice in CG Docket 10-145, at 9.

accessibility features are not easily integrated and require the development of specific software codes for each feature on each device. Sprint, however, asserts that over time, mobile phones will eventually evolve like personal computers have, from “out-of-the-box” systems to today’s dynamic, highly customizable systems, as mobile device performance metrics such as processing speed, power, and memory capacity improve.⁷⁶⁵ In short, as mobile device technologies continue to evolve over time, corresponding improvements in hardware and software will improve accessibility in the future.

296. We seek comment on our proposed clarification that Congress added Section 718 as an exception to the general coverage of Internet browsers as software subject to the requirements of Section 716 for Internet browsers built in or installed on mobile phones used by individuals who are blind or have a visual impairment because of the unique challenges associated with achieving mobile access for this particular community. We also seek comment on the best way(s) to implement Section 718, so as to afford affected manufacturers and service providers the opportunity to provide input at the outset, as well as to make the necessary arrangements to achieve compliance by the time the provisions go into effect.⁷⁶⁶

297. We seek further comment on Code Factory's recommendation that manufacturers and operating system developers develop an accessibility API to foster the incorporation of screen readers into mobile platforms across different phones, which would render the web browser and other mobile phone functions accessible to individuals who are blind or visually impaired.⁷⁶⁷ Would an accessibility API simplify the process for developing accessible screen readers for mobile phones and if so, should there be a separate API for each operating system that supports a browser? Is there a standard-setting body to develop such APIs or would such a process have to be driven by the manufacturers of mobile operating system software? What are the technical challenges, for both software developers and manufacturers, involved in developing an accessibility API?

298. What are the specific technical challenges involved in developing screen reader software applications for each mobile platform (*e.g.*, iPhone, Android, Windows Mobile)? What security questions are raised by the use of screen readers? Are there specific security risks posed to operating systems by the presence of screen readers? What types of technical support/customer service will mobile phone operators need to provide to ensure initial and continued accessibility in browsers that are built into mobile phones? Are there steps the Commission could take to facilitate effective, efficient, and achievable accessibility solutions?

299. We seek to better understand these technical complexities and how we can encourage effective collaboration among the service providers, and the manufacturers of end user devices, the operating system, the browser, screen readers and other stakeholders. We particularly welcome input on how the Commission can facilitate the development of solutions to the technical challenges associated with ensuring access to Internet browsers in mobile phones.

⁷⁶⁵ See Sprint Comments to the July Public Notice in CG Docket 10-145, at 2.

⁷⁶⁶ See Verizon Comments at 7-8 (suggesting that access to electronic messaging services via a web browser is insufficient to trigger accessibility requirements for the device manufacturer). This issue is related to and was raised in the context of whether services and applications providing access to an electronic messaging service, such as a broadband platform that provides an end user access to a web-based e-mail service, are covered under the Act. *Accessibility NPRM*, 26 FCC Rcd at 3147, ¶ 34. Because browsers may be used to access multiple forms of advanced communications services, we address the obligations of manufacturers with respect to browsers here.

⁷⁶⁷ Code Factory Reply Comments to *October Public Notice* at 1-3.

300. With respect to equipment and services covered by Section 716, the accompanying *Report and Order* gradually phases in obligations of covered entities with full compliance required on October 8, 2013 in order to encourage covered entities to implement accessibility features early in product development cycles, to take into account the complexity of these regulations, and to temper our regulations' effect on previously unregulated entities. We found this approach to be consistent with Commission precedent where we have utilized phase-in periods in similarly complex rulemakings.⁷⁶⁸ As we have stated above, we believe that Congress drafted Section 718 as a separate provision from Section 716 to emphasize the importance of ensuring access to mobile browsers for people who are blind or visually impaired because of the unique technical challenges associated with ensuring effective interaction between browsers and screen readers operating over a mobile platform. Given these complex technical issues, we seek comment on what steps we should take to ensure that the mobile phone industry will be prepared to implement accessibility features when Section 718 becomes effective on October 8, 2013.

C. Interoperable Video Conferencing Services

1. Meaning of Interoperable

301. In the *Accessibility NPRM*, the Commission asked how to define “interoperable” in a manner that is faithful to both the statutory language and the broader purposes of the CVAA, to ensure that “such services may, by themselves, be accessibility solutions” and “that individuals with disabilities are able to access and control these services” as Congress intended.⁷⁶⁹ Many commenters appear to consider “inter-platform, inter-network, and inter-provider” as requisite characteristics of interoperability.⁷⁷⁰ ITI suggests that “interoperability between platforms is not currently achievable,” but that Congress recognized that some forms of accessibility will take time and that “[t]his is an example of such a situation.”⁷⁷¹ We are concerned that this proposed definition would exclude virtually all existing video conferencing services and equipment from the accessibility requirements of Section 716, which we believe would be contrary to

⁷⁶⁸ See CEA Reply Comments at 4, (citing *Closed Captioning Requirements for Digital Television Receivers*, Report and Order, 15 FCC Rcd 16788, 16807 ¶ 56 (2000); *Wireless E911 Location Accuracy Requirements*, Report and Order, 22 FCC Rcd 20105, 20112 ¶ 17 (2007), *voluntarily vacated*, *Rural Cellular Ass'n v. FCC*, 2008 U.S. App. LEXIS 19889 (D.C. Cir. Sept. 17, 2008)); ITI Comments at 19, (citing 47 C.F.R. § 15.119(a); 47 C.F.R. § 15.120(a); 47 C.F.R. § 15.122(a)(1); 47 C.F.R. § 15.117(i)(1)(i)-(iii)); CEA *Ex Parte* in CG Docket No. 10-213 at 2 (citing *Technical Requirements to Enable Blocking of Video Programming based on Program Ratings*, Report and Order, 13 FCC Rcd 11248, 11257 ¶ 23 (1998); *Implementation of Section 304 of the Telecommunications Act of 1996*, Report and Order, 13 FCC Rcd 14775, 14803 ¶ 69 (1998); *Hearing Aid Compatibility R&O*, 18 FCC Rcd 16780 ¶ 65).

⁷⁶⁹ *Accessibility NPRM*, 26 FCC Rcd at 3151, ¶ 46, citing Senate Report at 6, House Report at 25.

⁷⁷⁰ See CEA Comments at 14-15; CTIA Comments at 22-23; ESA Comments at 3; ITI Comments at 24; Microsoft Comments at 6; TechAmerica Comments at 4-5; TIA Comments at 11. See also Letter from Danielle Coffey, Vice President, Telecommunications Industry Association, to Marlene H. Dortch, Secretary, FCC, CG Docket No. 10-213, at 1 (filed Aug. 10, 2011) (“TIA August 10 *Ex Parte*”) (asserting that this understanding of “interoperable” is reflected in Commission rules and precedent and consistent with the IEEE definition of “interoperable” as the “ability of a system or a product to work with other products without special effort on the part of the consumer”).

⁷⁷¹ ITI Comments at 24. *But see* Letter from Andrew S. Phillips, Counsel to National Association of the Deaf, on behalf of the Coalition of Organizations for Accessible Technology (“COAT”), to Marlene H. Dortch, Secretary, FCC, CG Docket No. 10-213, at 2 (filed Sept. 27, 2011) (“COAT Sept. 27 *Ex Parte*”) (urging that “interoperable” “not be defined in a way that will leave this part of the law moot or make it easy for the industry to deliberately make its products non-interoperable”).

Congressional intent.⁷⁷²

302. We believe that interoperability is a characteristic of usability for many individuals who are deaf or hard of hearing and for whom video conferencing services are, by themselves, accessibility solutions.⁷⁷³ We also agree with Consumer Groups that “[w]ithout interoperability, communication networks [are] segmented and require consumers to obtain access to multiple, closed networks using particularized equipment.”⁷⁷⁴ For example, video relay service (“VRS”) equipment users must obtain and use other video conferencing services and equipment to engage in real-time video communication with non-VRS-equipment users. In addition to possibly defining “interoperable” as “inter-platform, inter-network, and inter-provider,” ITI also suggests that the term “interoperable” could be defined as “interoperable with [VRS] or among different video conferencing services.”⁷⁷⁵ As an alternative, the IT and Telecom RERCs suggest that a system that publishes its standard and allows other manufacturers or service providers to build products or services to work with it should be considered interoperable.⁷⁷⁶

303. Accordingly, we seek comment on the following alternative definitions of “interoperable” in the context of video conferencing services and equipment used for those services: (1) “interoperable” means able to function inter-platform, inter-network, and inter-provider; (2) “interoperable” means having published or otherwise agreed-upon standards that allow for manufacturers or service providers to develop products or services that operate with other equipment or services operating pursuant to the standards; or (3) “interoperable” means able to connect users among different video conferencing services, including VRS.

304. We seek comment on each of the above proposed definitions of “interoperable.” Should only one of the proposed definitions be adopted, and should we reject the other two

⁷⁷² See para. 46, *supra*, noting that earlier versions of the legislation did not include the word “interoperable” in the definition of the term “advanced communications services” and that the definition of “interoperable video conferencing services” in the enacted legislation is identical to the definition of “video conferencing services” found in earlier versions. Further, both the Senate Report regarding “interoperable video conferencing services” and the House Report regarding “video conferencing services” are identical and state that “[t]he inclusion . . . of these services within the scope of the requirements of this act is to ensure, in part, that individuals with disabilities are able to access and control these services” and that “such services may, by themselves, be accessibility solutions.” *Id.*, citing Senate Report at 6, House Report at 25.

⁷⁷³ See *Accessibility NPRM*, 26 FCC Rcd at 3151, ¶ 46, citing Senate Report at 6, House Report at 25. For example, in addition to using real-time video communications when communicating in sign language through VRS and point-to-point with other sign language users, real-time video communications provide many deaf and hard of hearing individuals with access to visual communication cues that aid in speech reading.

⁷⁷⁴ Consumer Groups Comments at 11. For example, our TRS rules permit only deaf, hard of hearing, deaf-blind, or speech disabled individuals who communicate in sign language to obtain VRS video conferencing services and equipment. See *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities; E911 Requirements for IP-Enabled Service Providers*, CG Docket No. 03-123, WC Docket No. 05-196, Second Report and Order and Order on Reconsideration, 24 FCC Rcd 791, 807-808, ¶ 34 (2008). As a result, interoperable video conferencing services are available between VRS users, but not between VRS users and others.

⁷⁷⁵ See ITI Comments at 24; IT and Telecom RERCs Comments at 14-15 (suggesting that the interoperability requirements for VRS may be more than what should be required to qualify as “interoperable” under the CVAA).

⁷⁷⁶ See IT and Telecom RERCs Comments at 16.

definitions, or should we adopt multiple definitions and find that video conferencing services are interoperable as long as any one of the three definitions is satisfied? In other words, should we consider the three proposed definitions as three alternative tests for interoperability? In regard to the first alternative – “inter-platform, inter-network, and inter-provider” – we seek comment on the extent to which video conferencing services or equipment must be different or distinct to qualify under this definition. In regard to the second alternative, when does a standard determine interoperability? Is publication by a standards-setting body enough, even if only one manufacturer or service provider follows that standard? If a manufacturer or service provider publishes a standard and invites others to utilize it, is that enough to establish interoperability? If not, is interoperability established as soon as a second manufacturer or service provider utilizes the standard? If not, what is enough to establish interoperability? If two or more manufacturers or service providers agree to a standard without publication, is interoperability established? If not, is interoperability established if they invite others to receive a private copy of the standards, but do not publish the standards for public consumption? If video conferencing services can be used to communicate with public safety answering points, does that establish interoperability? If not, what else must be done to establish interoperability? Does the ability to connect to VRS make a video conferencing service “interoperable” or “accessible” or both? If users of different video conferencing services, including VRS, can communicate with each other, does that establish interoperability, even if there are no set standards? If communications among different services is not enough, what then is enough to establish interoperability?

305. Interest in and consumer demand for cross-platform, network, and provider video conferencing services and equipment continues to rise.⁷⁷⁷ We do not believe that interoperability among different platforms will “hamper service providers’ attempts to distinguish themselves in the marketplace and thus hinder innovation.”⁷⁷⁸ While we consider this matter more fully in this *Further Notice*, we urge industry “to develop standards for interoperability between video conferencing services as it has done for text messaging, picture and video exchange among carriers operating on different technologies and equipment.”⁷⁷⁹ We also urge industry, consumers, and other stakeholders to identify performance objectives that may be necessary to ensure that “such services may, by themselves, be accessibility solutions” and “that individuals with disabilities are able to access and control these services” as Congress intended.⁷⁸⁰ In other words, what does “accessible to and usable by individuals with disabilities” mean in the context of interoperable video conferencing services and equipment? Are accessibility performance and

⁷⁷⁷ See Mark Milian, “Why Apple, Google, Microsoft won’t streamline video chat,” CNN, May 16, 2011, available at <http://www.cnn.com/2011/TECH/mobile/05/16/video.chat.standard/> (visited June 15, 2011). See also Stephen Lawson, “Polycom, carriers to tie videoconferencing systems” (article about the new Open Visual Communications Consortium (OVCC), spearheaded by Polycom with Verizon, AT&T, and others as members), Network World, June 1, 2011, available at <http://www.networkworld.com/news/2011/060111-polycom-carriers-to-tie-videoconferencing.html> (visited June 15, 2011). See also Brian Stelter, “Comcast to Offer Customers Skype Video Calls on Their TVs,” New York Times, June 13, 2011, available at http://www.nytimes.com/2011/06/14/business/media/14comcast.html?_r=1&ref=todayspaper (visited June 13, 2011). See also TIA August 10 *Ex Parte* at 2-3 (describing the substantial progress and “efforts [] underway on multiple fronts in the quest to bring interoperable video conferencing to consumers”).

⁷⁷⁸ T-Mobile Comments at 7.

⁷⁷⁹ Verizon Comments at 9.

⁷⁸⁰ *Accessibility NPRM*, 26 FCC Rcd at 3151, ¶ 46, citing Senate Report at 6, House Report at 25.

other objectives different for “interoperable” video conferencing services?⁷⁸¹ Notwithstanding existing obligations under the Act, we propose that industry considers accessibility alongside the technical requirements and standards that may be needed to achieve interoperability so that as interoperable video conferencing services and equipment come into existence, they are also accessible.⁷⁸²

2. Coverage of Video Mail

306. In the *Accessibility NPRM*, the Commission sought comment on whether services that otherwise meet the definition of interoperable video conferencing services but that also provide non-real-time or near real-time functions (such as “video mail”) are covered and subject to the requirements of Section 716.⁷⁸³ If such functions are not covered, the Commission asked whether it should, similar to what it did in the Section 255 context, assert its ancillary jurisdiction to cover video mail.⁷⁸⁴

307. We agree with commenters that non-real-time or near-real-time features or functions of a video conferencing service, such as video mail, do not meet the definition of “real-time” video communications.⁷⁸⁵ Nonetheless, we do not have a sufficient record as to whether we should exercise our ancillary jurisdiction to require that a video mail service be accessible to individuals with disabilities when provided along with a video conferencing service as we did in the context of Section 255 in regard to voice mail, and we now seek comment on this issue.⁷⁸⁶

⁷⁸¹ For example, does accessibility for individuals who are deaf or hard of hearing include being enabled to connect with an interoperable video conferencing service call through a relay service other than VRS? How can we ensure that video conferencing services and equipment are accessible to people with other disabilities, such as people who are blind or have low vision, or people with mobility, dexterity, cognitive, or intellectual disabilities?

⁷⁸² Interoperable video conferencing services and equipment, when offered by providers and manufacturers, must be accessible to and usable by individuals with disabilities, as required by Section 716, and such providers and manufacturers are subject to the recordkeeping and annual certification requirements of Section 717 starting on the effective date of these rules.

⁷⁸³ *Accessibility NPRM*, 26 FCC Rcd at 3149-50, ¶ 42.

⁷⁸⁴ Specifically, the Commission employed its ancillary jurisdiction to extend the scope of Section 255 to both voice mail and interactive menu services under Part 7 of the Commission's rules because “the failure to ensure accessibility of voicemail and interactive menu services, and the related equipment that performs these functions, would [have] seriously undermined the accessibility and usability of telecommunications services required by sections 255 and 251(a)(2).” *Accessibility NPRM*, 26 FCC Rcd at 3150, ¶ 42, citing *Section 255 Report and Order*, 16 FCC Rcd at 6455-6462, ¶¶ 93-108 (the Commission relied on an assertion of ancillary jurisdiction to achieve its policy objective of ensuring accessibility and usability for persons with disabilities in extending the requirements of Section 255 to two information services, voicemail and interactive menu service, that it found critical to making telecommunications services and equipment accessible and usable).

⁷⁸⁵ See, e.g., CEA Comments at 15-16; CTIA Comments at 21; NCTA Reply Comments at 6-7; Verizon Comments at 9. As a technical matter, “video mail” may not be “real-time” communication, but, as a practical matter, if an interoperable video conferencing service and equipment is accessible, the video mail feature or function will likely also be accessible.

⁷⁸⁶ See note 784, *supra*. See also CEA Comments at 15-16 (consideration of video mail is premature); CTIA Comments at 21 (asserting that the definition precludes the exercise of our ancillary jurisdiction). But see Consumer Groups Comments at 9 (urging us to exercise our ancillary jurisdiction to require accessibility).

The record is also insufficient to decide whether our ancillary jurisdiction extends to require other features or functions provided along with a video conferencing service, such as recording and playing back video communications on demand, to be accessible, and we seek comment on this issue as well.⁷⁸⁷ Do we have other sources of direct authority, besides Section 716, to require that video mail and other features, such as recording and playing back video communications, are accessible to individuals with disabilities? Would the failure to ensure accessibility of video mail and the related equipment that performs these functions undermine the accessibility and usability of interoperable video conferencing services? Similarly, would the failure to ensure accessibility of recording and playing back video communications on demand and the related equipment that performs these functions undermine the accessibility and usability of interoperable video conferencing services?

D. Accessibility of Information Content

308. Section 716(e)(1)(B) of the Act requires the Commission to promulgate regulations providing that advanced communications services and the equipment and networks used with these services may not impair or impede the accessibility of information content when accessibility has been incorporated into that content for transmission through such services, equipment or networks. In the accompanying *Report and Order*, we adopt this broad rule, incorporating the text of Section 716(e)(1)(B), as proposed in the *Accessibility NPRM*.⁷⁸⁸ Here, we seek comment on the IT and Telecom RERCs' suggestion that we interpret the phrase "may not impair or impede the accessibility of information content"⁷⁸⁹ to include the concepts set forth below. An excerpt of the IT and Telecom RERCs' proposal regarding how we should interpret and apply our accessibility of information content guidelines is provided in Appendix F, including the following recommendations that covered entities:⁷⁹⁰

- shall not install equipment or features that can't or don't support accessibility information;
- shall not configure network equipment such that it would block or discard accessibility information;
- shall display any accessibility related information that is present in an industry recognized standard format;
- shall not block users from substituting accessible versions of content; and
- shall not prevent the incorporation or passing along of accessibility related information.

E. Electronically Mediated Services

309. In the accompanying *Report and Order*, we declined to expand our definition of peripheral devices to mean "devices employed in connection with equipment covered by this part, including software and electronically mediated services, to translate, enhance, or otherwise transform advanced communications services into a form accessible to people with disabilities"

⁷⁸⁷ See IT and Telecom RERCs Comments at 12 (asserting that "if a person with a disability is unable to attend a live videoconference, that person should not lose the ability to access it through a later download or streaming, if non-disabled participants can access it later").

⁷⁸⁸ 47 U.S.C. § 617(e)(1)(B); *Accessibility NPRM*, 26 FCC Rcd at 3197, Appendix B: Proposed Rules.

⁷⁸⁹ 47 U.S.C. § 617(e)(1)(B).

⁷⁹⁰ IT and Telecom RERCs June 17 *Ex Parte* at 2.

as the IT and Telecom RERCs propose).⁷⁹¹ Because the record is insufficient, we seek further comment on the IT and Telecom RERCs' proposal and on the definition of "electronically mediated services." We also seek comment on the extent to which electronically mediated services are covered under Section 716 and how they can be used to transform ACS into an accessible form.⁷⁹²

F. Performance Objectives

310. Section 716(e)(1)(A) of the Act provides that in prescribing regulations for this section, the Commission shall "include performance objectives to ensure the accessibility, usability, and compatibility of advanced communications services and the equipment used for advanced communications services by individuals with disabilities."⁷⁹³ In the *Accessibility NPRM*, the Commission sought comment on how to make its performance standards testable, concrete, and enforceable.⁷⁹⁴ In the accompanying *Report and Order*, we incorporated into the performance objectives the definitions of accessible,⁷⁹⁵ compatibility,⁷⁹⁶ and usable,⁷⁹⁷ in sections 6.3 and 7.3 of the Commission's rules. In their Reply Comments, however, the IT and Telecom RERCs argued that, instead of relying on our Part 6 requirements, the Commission's performance objectives should include testable criteria.⁷⁹⁸ The IT and Telecom RERCs proposed specific "Aspirational Goal and Testable Functional Performance Criteria"⁷⁹⁹ in their Reply Comments, set forth in Appendix G. We seek comment on those criteria.⁸⁰⁰

⁷⁹¹ IT and Telecom RERCs Comments at 27-28 (emphasis added). See *Accessibility NPRM*, 26 FCC Rcd at 3196, Subpart B – Definitions, § 8.4(r).

⁷⁹² IT and Telecom RERCs Comments at 27-28.

⁷⁹³ 47 U.S.C. § 716(e)(1)(A).

⁷⁹⁴ *Accessibility NPRM*, 26 FCC Rcd at 3172, ¶ 105.

⁷⁹⁵ See 47 C.F.R. § 6.3(a) which provides that "input, control, and mechanical functions shall be locatable, identifiable, and operable" as follows:

- Operable without vision
- Operable with low vision and limited or no hearing
- Operable with little or no color perception
- Operable without hearing
- Operable with limited manual dexterity
- Operable with limited reach or strength
- Operable without time-dependent controls
- Operable without speech
- Operable with limited cognitive skills

⁷⁹⁶ 47 C.F.R. § 6.3(b)(1)-(4).

⁷⁹⁷ 47 C.F.R. § 6.3(l). Section 6.3(l) provides that "usable" "mean[s] that individuals with disabilities have access to the full functionality and documentation for the product, including instructions, product information (including accessible feature information), documentation, and technical support functionally equivalent to that provided to individuals without disabilities."

⁷⁹⁸ IT and Telecom RERCs Reply Comments at 5, Attachment A.

⁷⁹⁹ See *infra* Appendix G.

⁸⁰⁰ IT and Telecom RERCs Reply Comments at Attachment A.

G. Safe Harbors

311. As explained in the accompanying *Report and Order*, we decline at this time to adopt technical standards as safe harbors.⁸⁰¹ However, we recognize the importance of the various components in the ACS architecture working together to achieve accessibility and seek comment on whether certain safe harbor technical standards can further this goal.⁸⁰²

312. Specifically, we seek comment on whether, as ITI proposes, ACS manufacturers can ensure compliance with the Act “by programmatically exposing the ACS user interface using one or more established APIs and specifications which support the applicable provisions in ISO/IEC 13066-1:2011.”⁸⁰³ Other standards may also form the basis of a safe harbor for compliance with Section 716, including the “W3C/WAI Web Content Accessibility Guidelines, Version 2.0 and Section 508 of the Rehabilitation Act of 1973, as amended.”⁸⁰⁴ We seek comment on the use of these standards, and any others, as safe harbors for compliance with Section 716.

313. For the purpose of keeping safe harbors up-to-date with technology and ensuring ongoing compliance with the Act, we seek comment on whether “it should be the responsibility of the appropriate manufacturer or standards body to inform the Commission when new, relevant APIs and specifications are made available to the market that meet the . . . standard.”⁸⁰⁵ If we decide to adopt a safe harbor based on recognized industry standards, we seek comment on how the industry, consumers, and the Commission can verify compliance with the standard. Should entities be required to self-certify compliance with a safe harbor? Is there a standard for which consumers can easily test compliance with an accessible tool? What are the compliance costs for ACS manufacturers and service providers of the Commission adopting safe harbor technical standards based on recognized industry standards? Will adopting safe harbor technical standards based on recognized industry standards reduce compliance costs for ACS manufacturers and service providers?

314. We recognize tension may exist between the relatively slow standards setting process and the rapid pace of technological innovation.⁸⁰⁶ How should the Commission account for the possibility that the continued development of a standard on which a safe harbor is based may be outpaced by technology? Should we for purposes of determining compliance with a safe harbor apply only safe harbors that were recognized industry standards at the time of the design phase for the equipment or service in question? Is there another time period in the development of the equipment or service that is more appropriate?

H. Section 718 Recordkeeping and Enforcement

315. *Background.* In the *Accessibility NPRM*, the Commission invited comment on recordkeeping requirements for Section 718 covered entities.⁸⁰⁷ The Commission noted that

⁸⁰¹ Safe Harbors, Section III.D.2, *supra*.

⁸⁰² See *Manufacturers of Equipment Used for Advanced Communications Services*, Section III.A.2, *supra*.

⁸⁰³ ITI August 9 *Ex Parte* at 2.

⁸⁰⁴ Letter from Ken J. Salaets, Director, Information Technology Industry Council, to Marlene H. Dortch, Secretary, FCC, CG Docket No. 10-213, at 2 (filed Aug. 29, 2011).

⁸⁰⁵ ITI August 9 *Ex Parte* at 2.

⁸⁰⁶ See RERC-IT Reply Comments to *October Public Notice* at 7.

⁸⁰⁷ *Accessibility NPRM*, 26 FCC Rcd at 3177-80, ¶¶ 117-123.

recordkeeping requirements for Section 718 entities would be considered further in light of comments on general Section 718 implementation.⁸⁰⁸ The Commission also sought comment on informal complaint,⁸⁰⁹ formal complaint,⁸¹⁰ and other general requirements for complaints alleging violations of Section 718 and the Commission's implementing rules.⁸¹¹

316. *Discussion.* In the *Report and Order* accompanying this *Further Notice*, we adopt the same recordkeeping and complaint procedures for Section 718 covered entities that we adopt for Section 716 covered entities.⁸¹² Specifically, we adopt recordkeeping requirements for Section 718 covered entities that go into effect one year after the effective date of the rules adopted in the accompanying *Report and Order*.⁸¹³ We also adopt informal complaint and formal complaint procedures as well as other general requirements for complaints filed against Section 718 covered entities for violations of Section 718 and the Commission's implementing rules.⁸¹⁴ These complaint procedures go into effect for Section 718 covered entities on October 8, 2013, three years after the CVAA was enacted.⁸¹⁵

317. In this *Further Notice*, we seek comment on the implementation of Section 718 specifically. In this section, we invite comment on whether the Section 718 recordkeeping requirements, which we adopt in the accompanying *Report and Order*, should be retained or altered in light of the record developed in response to this *Further Notice* on Section 718. We ask that parties suggesting changes to the rules provide an assessment of the relative costs and benefits associated with (1) the rule they wish to see changed and (2) the alternative that they propose.

V. PROCEDURAL MATTERS

A. *Ex Parte* Rules – Permit-But-Disclose

318. The proceeding shall be treated as a "permit-but-disclose" proceeding in accordance with the Commission's *ex parte* rules.⁸¹⁶ Persons making *ex parte* presentations must file a copy of any written presentation or a memorandum summarizing any oral presentation within two business days after the presentation (unless a different deadline applicable to the Sunshine period applies). Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentation must (1) list all persons attending or otherwise participating in the meeting at which the *ex parte* presentation was made, and (2) summarize all

⁸⁰⁸ See *Accessibility NPRM*, 26 FCC Rcd at 3178, ¶ 121 n.353.

⁸⁰⁹ *Accessibility NPRM*, 26 FCC Rcd at 3184-86, ¶¶ 134-140.

⁸¹⁰ *Accessibility NPRM*, 26 FCC Rcd at 3186-87, ¶¶ 141-142.

⁸¹¹ *Accessibility NPRM*, 26 FCC Rcd at 3181-84, ¶¶ 128-133.

⁸¹² See *Accessibility Report and Order*, Section 717 Recordkeeping and Enforcement, Section III.E *supra*.

⁸¹³ See *Accessibility Report and Order*, Recordkeeping, Section III.E.1, *supra*.

⁸¹⁴ See *Accessibility Report and Order*, Section 717 Recordkeeping and Enforcement, Section III.E, *supra*.

⁸¹⁵ See 47 U.S.C. § 619 note ("EFFECTIVE DATE FOR SECTION 718. - Section 718 of the Commissions Act of 1934 . . . shall take effect 3 years after the date of enactment of this Act.").

⁸¹⁶ 47 C.F.R. §§ 1.1200 *et seq.*

data presented and arguments made during the presentation. If the presentation consisted in whole or in part of the presentation of data or arguments already reflected in the presenter's written comments, memoranda or other filings in the proceeding, the presenter may provide citations to such data or arguments in his or her prior comments, memoranda, or other filings (specifying the relevant page and/or paragraph numbers where such data or arguments can be found) in lieu of summarizing them in the memorandum. Documents shown or given to Commission staff during *ex parte* meetings are deemed to be written *ex parte* presentations and must be filed consistent with rule 1.1206(b). In proceedings governed by rule 1.49(f) or for which the Commission has made available a method of electronic filing, written *ex parte* presentations and memoranda summarizing oral *ex parte* presentations, and all attachments thereto, must be filed through the electronic comment filing system available for that proceeding, and must be filed in their native format (e.g., .doc, .xml, .ppt, searchable .pdf). Participants in this proceeding should familiarize themselves with the Commission's *ex parte* rules.

B. Comment Filing Procedures

319. Pursuant to sections 1.415 and 1.419 of the Commission's rules, 47 CFR §§ 1.415, 1.419, interested parties may file comments and reply comments on or before the dates indicated on the first page of this document. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS). See *Electronic Filing of Documents in Rulemaking Proceedings*, 63 FR 24121 (1998).

- Electronic Filers: Comments may be filed electronically using the Internet by accessing the ECFS: <http://fjallfoss.fcc.gov/ecfs2/>.
- Paper Filers: Parties who choose to file by paper must file an original and one copy of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number.

Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

- All hand-delivered or messenger-delivered paper filings for the Commission's Secretary must be delivered to FCC Headquarters at 445 12th St., SW, Room TW-A325, Washington, DC 20554. The filing hours are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes and boxes must be disposed of before entering the building.
- Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.
- U.S. Postal Service first-class, Express, and Priority mail must be addressed to 445 12th Street, SW, Washington DC 20554.

320. People with Disabilities: To request materials in accessible formats for people with disabilities (Braille, large print, electronic files, audio format), send an e-mail to fcc504@fcc.gov or call the Consumer & Governmental Affairs Bureau at 202-418-0530 (voice), 202-418-0432 (tty).

C. Final Regulatory Flexibility Analysis

321. The Regulatory Flexibility Act (RFA)⁸¹⁷ requires that an agency prepare a regulatory flexibility analysis for notice and comment rulemakings, unless the agency certifies that “the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities.”⁸¹⁸ Accordingly, we have prepared a Final Regulatory Flexibility Analysis concerning the possible impact of the rule changes contained in the *Report and Order* on small entities. The Final Regulatory Flexibility Analysis is set forth in Appendix D.

D. Final Paperwork Reduction Analysis

322. This document contains new information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13. It will be submitted to the Office of Management and Budget (OMB) for review under Section 3507(d) of the PRA. OMB, the general public, and other federal agencies are invited to comment on the new information collection requirements contained in this proceeding. In addition, we note that pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, *see* 44 U.S.C. 3506(c)(4), we previously sought specific comment on how the Commission might further reduce the information collection burden for small business concerns with fewer than 25 employees.

323. In this proceeding, we adopt new recordkeeping rules that provide clear guidance to covered entities on the records they must keep to demonstrate compliance with our new rules. We require covered entities to keep the three categories of records set forth in Section 717(a)(5)(A).⁸¹⁹ We also require annual certification by a corporate officer that the company is keeping the required records. We have assessed the effects of these rules and find that any burden on small businesses will be minimal because we have adopted the minimum recordkeeping requirements that allow covered entities to keep records in any format they wish. This approach takes into account the variances in covered entities (*e.g.*, size, experience with the Commission), recordkeeping methods, and products and services covered by the CVAA. Furthermore, this approach provides the greatest flexibility to small businesses and minimizes the impact that the statutorily mandated requirements impose on small businesses. Correspondingly, we considered and rejected the alternative of imposing a specific format or one-size-fits-all system for recordkeeping that could potentially impose greater burdens on small businesses. Moreover, the certification requirement is possibly less burdensome on small businesses than large, as it merely requires certification from an officer that the necessary records were kept over the previous year; this is presumably a less resource intensive certification for smaller entities. Finally, we adopt a requirement that consumers must file a “Request for Dispute Assistance” with the Consumer and Governmental Affairs’ Disability Rights Office as a prerequisite to filing an informal complaint with the Enforcement Bureau. This information request is beneficial because it will trigger Commission involvement before a complaint is filed and will benefit both consumers and industry by helping to clarify the accessibility needs of consumers. It will also encourage settlement discussions between the parties in an effort to resolve accessibility issues without the expenditure of time and resources in the informal complaint process. We also note that we have temporarily exempted small entities from the rules we have adopted herein while we

⁸¹⁷ *See* 5 U.S.C. § 601–612. The RFA has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

⁸¹⁸ 5 U.S.C. § 605(b).

⁸¹⁹ 47 U.S.C. § 618(a)(5)(A)(i)-(iii).

consider, in the *Further Notice*, whether we should grant a permanent exemption, and what criteria should be associated with such an exemption.

E. Initial Regulatory Flexibility Analysis

324. As required by the Regulatory Flexibility Act of 1980 (RFA),⁸²⁰ the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on small entities of the policies and rules proposed in the *Further Notice of Proposed Rulemaking*. The analysis is found in Appendix E. We request written public comment on the analysis. Comments must be filed in accordance with the same deadlines as comments filed in response to the *Further Notice* and must have a separate and distinct heading designating them as responses to the IRFA. The Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, will send a copy of this *CVAA Further Notice*, including the IRFA, to the Chief Counsel for Advocacy of the Small Business Administration.

F. Initial Paperwork Reduction Analysis

325. The *Further Notice of Proposed Rule Making* contains proposed new or modified information collection requirements. The Commission, as part of its continuing effort to reduce paperwork burdens, invites the general public and the Office of Management and Budget (OMB) to comment on the information collection requirements contained in this document, as required by the Paperwork Reduction Act of 1995, Public Law 104-13. Public and agency comments are due 60 days after the date of publication in the Federal Register. Comments should address: (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology. In addition, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, *see* 44 U.S.C. § 3506(c)(4), we seek specific comment on how we might "further reduce the information collection burden for small business concerns with fewer than 25 employees." We note that we have described impacts that might affect small businesses, which includes most businesses with fewer than 25 employees, in the IRFA in Appendix E, *infra*.

G. Further Information

326. For further information, please contact Rosaline Crawford, Consumer and Governmental Affairs Bureau, at 202-418-2075 or rosaline.crawford@fcc.gov; Brian Regan, Wireless Telecommunications Bureau, at 202-418-2849 or brian.regan@fcc.gov; or Janet Sievert, Enforcement Bureau, at 202-418-1362 or janet.sievert@fcc.gov.

VI. ORDERING CLAUSES

327. Accordingly, IT IS ORDERED that pursuant to Sections 1-4, 255, 303(r), 403, 503, 716, 717, and 718 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-154, 255, 303(r), 403, 503, 617, 618, and 619, this *Report and Order* IS HEREBY ADOPTED.

328. IT IS FURTHER ORDERED that Parts 1, 6 and 7 of the Commission's Rules, 47 C.F.R. Parts 1, 6, and 7, ARE AMENDED, and new Part 14 of the Commission's Rules, 47 C.F.R. Part 14 IS ADDED as specified in Appendix B, effective 30 days after publication of the

⁸²⁰ *See* 5 U.S.C. § 603.

Report and Order in the *Federal Register*, except for the provisions in section 14.17, which contain an information collection that is subject to OMB approval.⁸²¹

329. IT IS FURTHER ORDERED that the information collection contained in this *Report and Order* WILL BECOME EFFECTIVE following approval by the Office of Management and Budget. The Commission will publish a document at a later date establishing the effective date.

330. IT IS FURTHER ORDERED that, pursuant to the authority of Sections 1-4, 255, 303(r), 403, 503, 716, 717, and 718 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-154, 255, 303(r), 403, 503, 617, 618, and 619, this *Further Notice of Proposed Rulemaking* IS HEREBY ADOPTED.

331. IT IS FURTHER ORDERED that pursuant to applicable procedures set forth in sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. §§ 1.415, 1.419, interested parties may file comments on this *Further Notice of Proposed Rulemaking* on or before 45 days after publication of the *Further Notice of Proposed Rulemaking* in the *Federal Register* and reply comments on or before 75 days after publication in the *Federal Register*.

332. IT IS FURTHER ORDERED that the Commission's Consumer Information Bureau, Reference Information Center, SHALL SEND a copy of the *Report and Order* and *Further Notice of Proposed Rulemaking*, including the Final Regulatory Flexibility Analysis and Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION



Marlene H. Dortch
Secretary

⁸²¹ See 5 U.S.C. § 553(d)(3) (“[t]he required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except . . . as otherwise provided by the agency for good cause found and published with the rule”); see also 47 C.F.R. §§ 1.103(a), 1.427(b).

APPENDIX A

List of Commenters

(CG Docket No. 10-213)

This is a list of parties who filed comments and reply comments within the designated comment periods in the proceeding. The complete record in this proceeding is available in the Electronic Comment Filing System located at <http://www.fcc.gov/cgb/ecfs/>.

Comments

Advanced Communication Provisions of The Twenty-First Century Communications and Video Accessibility Act of 2010, CG Docket No. 10-213, Notice of Proposed Rulemaking, 26 FCC Rcd 3133 (2011).

Abbreviation**Commenter**

	Adaptivation, Inc. ¹
AFB	American Foundation for the Blind
AT&T	AT&T Services, Inc.
ATIS	Alliance for Telecommunications Industry Solutions
	Blooston Rural Carriers
CEA	Consumer Electronics Association
Convo	Convo Communications, LLC
Consumer Groups	National Association of the Deaf (NAD), <i>et al.</i>
CSD	Communication Service for the Deaf, Inc.
CTIA	CTIA-The Wireless Association
Eipper	William Eipper
ESA	Entertainment Software Association
IT and Telecom RERCs	Rehabilitation Engineering Research Centers on Universal Interface & Information Technology Access (RERC-IT) and Telecommunications Access (RERC-TA) ²
ITI	Information Technology Industry Council
Microsoft	Microsoft Corp.
Motorola	Motorola Solutions, Inc.
NCTA	National Cable & Telecommunications Association
NetCoalition	NetCoalition
NTCA	National Telecommunications Cooperative Association
OnStar	OnStar, LLC
Railey	Larry Railey
Sorenson	Sorenson Communications, Inc.
TIA	Telecommunications Industry Association
Time Warner	Time Warner Cable, Inc.
T-Mobile	T-Mobile USA, Inc.

¹ Jonathan Eckrich is the filer of record.

² Gregg C. Vanderheiden is the filer of record.

Verizon
VON Coalition
Vonage
Wireless RERC
Words+ and Compusult

Verizon and Verizon Wireless
Voice on the Net Coalition
Vonage Holdings Corporation
Wireless RERC
Words+, Inc. and Compusult Systems, Inc.³

³ Jeffrey A. Dahlen is the filer of record.

<u>Abbreviation</u>	<u>Reply Commenter</u>
AAPD	American Association of People with Disabilities
AbleLink	AbleLink Technologies ⁴
Adaptive Solutions	Adaptive Solutions ⁵
ACB	American Council of the Blind
AFB	American Foundation for the Blind ⁶
ATIS	Alliance for Telecommunications Industry Solutions
CEA	Consumer Electronics Association
	Code Factory
Coleman Institute and Samuelson-Glushko TLPC	Coleman Institute and Samuelson-Glushko Tech Law and Policy Clinic ⁷
Compusult	Compusult Limited ⁸
Consumer Groups	National Association of the Deaf (NAD), <i>et al.</i>
CSD	Communication Service for the Deaf, Inc.
CSDVRS	CSDVRS, LLC
CTIA	CTIA-The Wireless Association
ESA	Entertainment Software Association
Garris	Yvonne Garris
Google	Google Inc.
Green	Gillian Green
Hamilton and Purple	Hamilton Relay, Inc. and Purple Communications, Inc.
IT and Telecom RERCs	Rehabilitation Engineering Research Centers on Universal Interface & Information Technology Access (RERC-IT) and Telecommunications Access (RERC-TA) ⁹
Kolesar	Ron Kolesar
Lingraphicare	Lingraphicare America, Inc. ¹⁰
NFB	National Federation of the Blind
Nintendo	Nintendo of America, Inc.
O'Rourke	John O'Rourke
Point-and-Read	Point-and-Read, Inc. ¹¹
Potter	Kurt Potter
Wireless RERC	Rehabilitation Engineering Research Center for Wireless Technologies ¹²

⁴ Joan Cunningham is the filer of record.

⁵ Sherion J. Hollingsworth is the filer of record.

⁶ Mark D. Richert is the filer of record.

⁷ Angela Tse is the filer of record.

⁸ Paul Mitten is the filer of record.

⁹ The IT and Telecom RERCs are the filers of record.

¹⁰ Andrew Gomory is the filer of record.

¹¹ Benjamin Slotznick is the filer of record.

¹² Wireless RERC is the filer of record.

Sandefur
Verizon
Vonage

RJ Sandefur
Verizon and Verizon Wireless
Vonage Holdings Corporation