

**FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

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

**COMMENTS IN RESPONSE TO THE  
FURTHER NOTICE OF PROPOSED RULEMAKING**

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by the Twenty-First Century	)	
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Act of 2010	)	
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Options for People who are Blind, Deaf-	)	
Blind, or Have Low Vision	)	

**COMMENTS IN RESPONSE TO THE  
FURTHER NOTICE OF PROPOSED RULEMAKING**

Telecommunications for the Deaf and Hard of Hearing, Inc. (“TDI”), National Association of the Deaf (“NAD”), Hearing Loss Association of America (“HLAA”), Association of Late-Deafened Adults, Inc. (“ALDA”), and Deaf and Hard of Hearing Consumer Advocacy Network (“DHHCAN”) (collectively, the “Consumer Groups”), respectfully submit these comments in response to the Federal Communications Commission’s (“FCC” or “Commission”) October 7, 2011 Further Notice of Proposed Rulemaking in the above-referenced proceedings.<sup>1</sup>

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<sup>1</sup> *In the Matter of Implementation of Section 716 and 717 of the Communications Act of 1934, as Enacted by the Twenty-First Century Communications and Video Accessibility Act of 2010, Amendments to the Commission’s Rules Implementing Sections 255 and 251(a)(2) of the Communications Act of 1934, as Enacted by the Telecommunications Act of 1996, In the Matter of Accessible Mobile Phone Options for People who are Blind, Deaf-Blind, or Have Low Vision, CG Docket Nos. 10-213 & 10-145, WT Docket No. 96-198, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 14557, FCC 11-151 (rel. Oct. 7, 2011) (“Order and FNPRM” or “FNPRM”).*

## I. INTRODUCTION AND SUMMARY

As a preliminary matter, Consumer Groups submit that the Commission’s approach in addressing the *FNPRM* issues should be consistent with the fundamental purpose of the “Twenty-First Century Communications and Video Accessibility Act of 2010”<sup>2</sup> (“CVAA”), which, as the Commission has stated, is “to ensure that the 54 million Americans with disabilities are able to fully utilize advanced communications services (“ACS”).”<sup>3</sup> In addition, the Commission should continue to recognize, rightly, that Section 716 of the CVAA *broadens* the scope of covered services and equipment beyond that covered by Section 255 of the Communications Act of 1934, as amended, and “requires a higher standard of achievement for covered entities.”<sup>4</sup> To turn this recognition into reality, the Commission should go beyond previous efforts under the Americans with Disabilities Act of 1990 (“ADA”).<sup>5</sup> Doing so is crucial to ensure that the standards under the CVAA are rigorously interpreted and enforced so that users with disabilities are able to attain and maintain access that is *functionally equivalent* to that accorded other users, not only now but in future years with equipment and services that have not yet reached the drawing board.

As discussed below, the Commission should not permanently exempt small entities from the accessibility obligations. Apart from the fact the Commission’s achievability standard

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<sup>2</sup> Twenty-First Century Communications and Video Accessibility Act of 2010, Pub. L. No. 111-260, 124 Stat. 2751 (2010) (as codified in various sections of 47 U.S.C.).

<sup>3</sup> *Order and FNPRM*, ¶ 1.

<sup>4</sup> *In the Matter of Implementation of Section 716 and 717 of the Communications Act of 1934, as Enacted by the Twenty-First Century Communications and Video Accessibility Act of 2010, Amendments to the Commission’s Rules Implementing Sections 255 and 251(a)(2) of the Communications Act of 1934, as Enacted by the Telecommunications Act of 1996, In the Matter of Accessible Mobile Phone Options for People who are Blind, Deaf-Blind, or Have Low Vision*, CG Docket Nos. 10-213 & 10-145, WT Docket No. 96-198, Notice of Proposed Rulemaking, 26 FCC Rcd 3133, FCC 11-37, ¶ 5 (rel. Mar. 3, 2011) (footnote omitted).

<sup>5</sup> Pub. L. No. 101-336, 104 Stat. 327 (1990) (codified at 42 U.S.C. §§ 12101-12213).

already provides all entities a means to seek an exemption and that no record support exists to permanently exempt all small entities from the accessibility obligations, Title III of the ADA does not support giving small business entities an exemption from these obligations.

With respect to the definition of interoperable, the Commission should interpret the term consistent with Congress' definition of it. Accordingly, the Commission need not adopt a separate definition of interoperable as it proposes. Rather, the Commission should act to assure that video conferencing services include open source or widely available protocols at the content, security, interface, and transport levels for the transmission and receipt of ACS, enabling end users that use different video conferencing services to communicate with each other just as users of wireless voice, e-mail or SMS services can communicate with each other today regardless of the provider or platform they use.

As to video mail, recording and play-back communication services, the Commission should exercise its ancillary jurisdiction to require that these services be accessible. Consumer Groups would consider the Commission's failure to assert its ancillary jurisdiction to cover these services under Section 716 as being wholly inconsistent with the Commission's prior conclusion with respect to voicemail and interactive menu services under Section 255.

In addition, the Commission should expand its definition of peripheral devices to include software and electronically mediated services and adopt "Aspirational Goal and Testable Functional Performance Criteria" as proposed by as IT and Telecom RERC.

## **II. SMALL ENTITIES SHOULD NOT BE EXEMPTED PERMANENTLY FROM THE ACCESSIBILITY RULES**

The Commission should reject any proposal 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.”<sup>6</sup> While Section 716(h)(2) states that “[t]he Commission *may* exempt small entities from the requirements of this section,”<sup>7</sup> it certainly does not require that the Commission do so even on an interim basis — and certainly does not require that it grant a permanent exemption.

The Commission’s achievability standard already provides all entities a means to seek exemption from the accessibility obligations under Section 716, if compliance is unachievable.<sup>8</sup> The Commission has made clear that “any ACS provider or ACS equipment manufacturer may demonstrate whether accessibility or compatibility with assistive technology is or is not achievable based on the four achievability factors, including ‘[t]he nature and cost of the steps needed’ and ‘[t]he technical and economic impact on the operation of the manufacturer or provider.’”<sup>9</sup> Small entities as well as large entities can avail themselves of this exemption when they are truly unable to achieve accessibility.

The record also fails to support exempting all small entities from the requirements of Section 716 and the concomitant obligations under Section 717. As the Commission recognizes, there is insufficient record support to grant all small entities a permanent and blanket exemption from these accessibility obligations. In addition, the record does not contain sufficient information demonstrating that small business as a generic group will be unreasonably burdened by having to make individual case showings of unachievability. It would be particularly inappropriate policy to adopt a screen based on number of employees, as one proposal would

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<sup>6</sup> *FNPRM*, ¶ 280

<sup>7</sup> 47 U.S.C. § 716(h)(2) (emphasis added).

<sup>8</sup> *Order and FNPRM*, ¶ 202.

<sup>9</sup> *Id.*; see also 47 U.S.C. § 716(g)(1) & (2).

have it, since more and more of the services which disabled people will need to communicate are provided on the Internet or through similar means and require very few employees to function.

Exempting all small entities is also inappropriate because these accessibility obligations do not apply to *all* small businesses throughout the United States. Rather, the accessibility obligations only apply to a discrete group of entities, *i.e.*, ACS providers or ACS manufacturers. Such entities, both large and small, know whether the ACS obligations apply to them. To the extent that in a particular instance a small business genuinely finds that a particular type of accessibility or compatibility with assistive technology is not achievable for it, it can and should make the requisite showing based on the four achievability factors when seeking an exemption from these obligations.

Importantly, and perhaps most fundamentally, Title III of the ADA does not support giving all small business entities an exemption to the accessibility obligations. Title III of the ADA expressly applies in certain instances, *i.e.*, to provide access to any place of public accommodation,<sup>10</sup> which are directly analogous to the accessibility requirements here. Because the ADA has served as a touchstone for the Commission's formulation of rules in this area,<sup>11</sup> and because the ADA does *not* exempt small businesses from Title III obligations, it follows that only a very compelling reason would justify exempting small business entities from the accessibility obligations. The record is devoid of such evidence. For these reasons, the

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<sup>10</sup> Under Title III, "No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation." 47 U.S.C. § 12182(a). Public accommodations" include most places of lodging (such as inns and hotels), recreation, transportation, education, and dining, along with stores, care providers, and places of public displays, among other things. *See* 47 U.S.C. § 12181(7).

<sup>11</sup> *Order and FNPRM*, ¶¶ 117-118, 119.

Commission should *not* exempt small ACS providers or manufacturers from the accessibility obligations.

### **III. INTEROPERABLE VIDEO CONFERENCE SERVICES SHOULD BE INTERPRETED AS DEFINED BY CONGRESS AND THE COMMISSION SHOULD FACILITATE ACCOMPLISHING SUCH INTEROPERABILITY PROMPTLY**

In the *FNPRM*, the Commission seeks comments on how to define the term “interoperable” for purposes of implementing Section 716 as the term applies to video conferencing services.<sup>12</sup> However, within the context of the interoperable video conference service definition, as it applies to ACS, Congress has *already* codified the definition of “interoperable video conferencing services,” and the Commission cannot implement its rules in a manner that limits that definition. In particular, the CVAA, 47 U.S.C. § 153 (53) states:

ADVANCED COMMUNICATIONS SERVICES.—The term

‘advanced communications services’ means—

- (A) interconnected VoIP service;
- (B) non-interconnected VoIP service;
- (C) electronic messaging service; and
- (D) *interoperable video conferencing service*.<sup>13</sup>

and further, at 47 U.S.C. § 153 (59), states:

The term ‘interoperable video conferencing service’ means a service that provides real-time video communications, including audio, to *enable users to share information of the user’s choosing*.<sup>14</sup>

The CVAA, of course, then requires that “advanced communications services” — which include interactive video conferencing — must be made accessible. To carry out Congressional intent, *the full breadth* of this definition of interoperable video conferencing service must be

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<sup>12</sup> *FNPRM*, ¶¶ 301-303.

<sup>13</sup> 47 U.S.C. § 153(53) (emphasis added).

<sup>14</sup> 47 U.S.C. § 153(59) (emphasis added).

applied in implementing Section 716. At its most basic level, to “enable users to share information of the user’s choosing” under this definition, interoperable video conferencing service is simply any service that allows users to communicate with each other via video conference in real time.

To be sure, the Commission should act to assure that video conferencing services include open source or widely available protocols at the content, security, interface, and transport levels for the transmission and receipt of ACS, enabling end users that use different video conferencing services to communicate with each other — just as users of wireless voice, e-mail or SMS services can communicate with each other today regardless of the provider or platform they use. Unless the Commission acts, video conferencing services would continue to be segmented and consumers, who want to be sure of being able to communicate with each other, would all need to obtain access to multiple, closed networks using specific equipment.

Congress has addressed, however, this limitation through the interoperable video conferencing service definition and the Commission has acknowledged what happens without interoperability.<sup>15</sup> That said, as the viewing of standard definition video programming is not dependent upon the manufacturer of the television set, ACS should not be conditioned on non-standardized protocols that restrict an end user’s ability to communicate using their preferred method of communication. Similarly, the voice communications associated with a typical telephone call that is made or received is not limited based on the type of telephone device or service used on either end of the telephone call, as the devices or services are interoperable. Thus, video phones should share or have open basic protocols to allow for communication to

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<sup>15</sup> *Order and FNPRM*, ¶ 302 (agreeing with Consumer Groups that “[w]ithout interoperability, communication networks [are] segmented and require consumers to obtain access to multiple, closed networks using particularized equipment.”) (footnote omitted).

take place regardless of their manufacturer, network equipment, operating system, or software. This is precisely what Congress envisioned by requiring that interoperable video conferencing services be made accessible. Consumer Groups believe that there are many similar products and services that evince the necessary level of interoperability required by the CVAA and they encourage the Commission to explore what common levels of data must be shared to facilitate the unrestricted communication between consumers.

Because interoperable is defined within the context of the interoperable video conferencing service definition, the Commission need not adopt a separate definition of interoperable as it proposes.<sup>16</sup> If the Commission seeks, however, to elucidate what interoperable means or otherwise create guidelines on how to determine if a video conference service is interoperable, the Consumer Groups believe that the third definition the Commission proposed (i.e., “‘interoperable’ means able to connect users among different video conferencing services including VRS”) most closely captures the intent of the interoperable video conferencing services definition.

Even so, the Commission’s proposed definition no. 3 of interoperable as being “able to connect users among different video conferencing services, including VRS” inappropriately narrows the broader statutory definition. As a result, the Commission’s proposed definition no. 3 could potentially fail to capture some services that are encompassed within the broad statutory definition which states that a video conference service is interoperable if it “enable[s] users to share information of the user’s choosing.” For this reason, the Commission’s proposed

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<sup>16</sup> The Commission proposes “interoperable” to mean: (1) “able to function inter-platform, inter-network, and inter-provider”; (2) “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) “able to connect users among different video conferencing services, including VRS.” *FNPRM*, ¶ 303.

definition no. 3 is not entirely sufficient to implement the statutory definition. As to the Commission's proposed definitions nos. 1 and 2, Consumer Groups recognize that there may be instances when the definition no. 3 is not satisfied, yet there is still interoperability. Thus, a service should be deemed interoperable if it satisfies *any one or more* of the three definitions.

As noted above, accomplishing full interoperability for all users is another important issue. In this connection, the Commission has recognized that, "Interest in and consumer demand for cross-platform, network, and provider video conferencing services and equipment continues to rise."<sup>17</sup> The Commission has also stated that interoperability among different platforms should not "hamper service providers' attempts to distinguish themselves in the marketplace and thus hinder innovation."<sup>18</sup> While the Commission urges the industry to address these issues independently, the Commission needs to be actively involved to ensure this is accomplished in a timely fashion.

Specifically, at a minimum, the Commission should facilitate discussions among stakeholders to: (a) "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"; and (b) "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"; and (c) ensure the industry "considers accessibility alongside the technical requirements and

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<sup>17</sup> *FNPRM*, ¶ 305 (footnote omitted)

<sup>18</sup> *Id.* (internal quotes and footnote omitted).

standards that may be needed to achieve interoperability so that as interoperable video conferencing services and equipment come into existence, they are also accessible.”<sup>19</sup>

#### **IV. THE COMMISSION SHOULD EXTEND ITS ANCILLARY JURISDICTION TO REQUIRE ACCESSIBILITY OVER VIDEO MAIL, RECORDING AND PLAY-BACK COMMUNICATIONS**

While the Commission has determined that non-real-time or near-real-time functions such as “video mail” do not meet the criterion of “real-time” video communications,<sup>20</sup> the Commission seeks comment as to whether it should exercise ancillary jurisdiction to require that video mail service be accessible to individuals with disabilities. Similar to the Commission’s treatment of voicemail in the context of Section 255,<sup>21</sup> Consumer Groups urge the Commission to exercise ancillary jurisdiction over video mail. In fact, Consumer Groups would consider the Commission’s failure to assert its ancillary jurisdiction to cover video mail under Section 716 as being wholly inconsistent with the Commission’s prior conclusion with respect to that service under Section 255.

Consumer Groups cannot see a qualitative difference in the rationale for why video mail is subject to Section 255, but might not be subject to Section 716. Video mail is especially important to the hearing-impaired community as its members may rely on reading lips, sign language or other non-aural communications to communicate.

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<sup>19</sup> *Id.* (internal quotes and footnotes omitted).

<sup>20</sup> *Order & FNPRM*, ¶ 51.

<sup>21</sup> *FNPRM*, ¶ 306. The Commission previously exercised its ancillary jurisdiction by extending 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).” *See Implementation of Sections 255 and 251(a)(2) of the Communications Act of 1934, as enacted by the Telecommunications Act of 1996*, WT Docket No. 96-198, Report and Order and Further Notice of Inquiry, 16 FCC Rcd 6417, ¶ 103 (1999).

Along with extending its ancillary jurisdiction to cover video mail, the Commission should also extend its ancillary jurisdiction over any other services and features available to the general population pertaining to interoperable video conferencing services, such as recording and play-back on demand, so that these features are equally accessible to deaf and/or hard of hearing individuals. The failure to ensure accessibility of these features and the related equipment that performs the functions would “undermine the accessibility and usability of interoperable video conferencing services”,<sup>22</sup> thereby placing these individuals at a significant disadvantage.

Accordingly, to avoid the disruptive effects caused by inaccessible video mail, recording and play-back services and to ensure that the implementation of Section 716 is not thwarted, the Commission should extend its ancillary jurisdiction over these services. By doing so, the Commission will ensure and facilitate accessibility and usability of services and equipment by the deaf and hard of hearing who would not otherwise have full access and use of these services. Accordingly, the Consumer Groups urge the Commission to exercise its ancillary jurisdiction such that video mail, recording and play-back video communications are governed by the accessibility requirements of Section 716.

#### **V. THE DEFINITION OF PERIPHERAL DEVICES SHOULD BE EXPANDED TO INCLUDE SOFTWARE AND ELECTRONICALLY MEDIATED SERVICES**

The Commission should expand its 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 ACS into a form accessible to people with disabilities” as the IT and Telecom RERCs propose.<sup>23</sup> While the Commission seeks further comment on the definition of “electronically mediated services” and

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<sup>22</sup> See *FNPRM*, ¶ 307.

<sup>23</sup> See *id.* ¶ 309 (citing and quoting IT and Telecom RERC Comments at 27-28) (other citations and internal quotes omitted).

while a specific definition for “electronically mediated services” has yet to be proposed, Consumer Groups support expanding the peripheral devices definition to include software or services obtainable over the Internet or through other means.<sup>24</sup> Examples of such services would include, but are not limited to, virtual or “cloud-based services” obtained through cloud computing.<sup>25</sup> Mainstream devices are capable of accessing these services and therefore, these services should be equally accessible through peripheral devices to deaf and/or hard of hearing individuals, and to accommodate the needs of people with additional mobility and vision disabilities in addition to hearing and speech disabilities.

**VI. THE COMMISSION SHOULD ADOPT IT AND TELECOM RERCs’ PROPOSED “THE ASPIRATIONAL GOAL AND TESTABLE FUNCTIONAL PERFORMANCE CRITERIA”**

The Commission seeks comment on the IT and Telecom RERCs proposed specific “Aspirational Goal and Testable Functional Performance Criteria.”<sup>26</sup> Consumer Groups support this proposal. As IT and Telecom RERCs explained, while “[t]hese criteria do not specify any particular design features or implementations,” they “do clearly and objectively state the functional performance characteristics of the end design.”<sup>27</sup> At the same time, however, “accessibility should not be defined as meeting these criteria because there will still be individuals who are not addressed by these criteria” and therefore, “the aspirational goals should continue to be what developers strive to achieve – the inclusion of all.”<sup>28</sup> That said, Consumer

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<sup>24</sup> During the Reply Comment phase, the Consumer Groups reserve the right to comment on any definitions proposed.

<sup>25</sup> Cloud computing provides, among other things, software, data access and storage resources over a network such as the Internet without requiring that the software programs be installed locally on end-user computers.

<sup>26</sup> *FNPRM*, ¶ 310 (citing IT and Telecom RERC Reply Comments at Attachment A) .

<sup>27</sup> IT and Telecom RERC Reply Comments at 5.

<sup>28</sup> *Id.* at 5-6.

Groups agree that “[t]he functional performance criteria should set the minimum accessibility standard and provide the best coverage of disability accessibility to date that is both achievable and testable.”<sup>29</sup>

Respectfully submitted,

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<sup>29</sup> *Id.* at 6.