



Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Implementing the Provisions of the)	CG Docket No. 10-213
Communications Act of 1934, as Enacted)	WT Docket No. 96-198
by the Twenty-First Century Communications)	CG Docket No. 10-145
and VideoAccessibility Act of 2010)	FCC 11-151

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March 14, 2012

Reply Comments of the American Council of the Blind
and the American Foundation for the Blind on Advanced Communications

INTRODUCTION

The American Council of the Blind (ACB) is a national membership organization whose purpose is to work toward independence, security, equality of opportunity, and improved quality of life for all blind and visually impaired people. Founded in 1961, ACB's members work through more than 70 state and special-interest affiliates to improve the well-being of all blind and visually impaired people by: serving as a representative national organization; elevating the social, economic and cultural levels of blind people;

improving educational and rehabilitation facilities and opportunities; cooperating with the public and private institutions and organizations concerned with blind services; encouraging and assisting all people with severely impaired vision to develop their abilities and conducting a public education program to promote greater understanding of blindness and the capabilities of people who are blind.

The American Foundation for the Blind (AFB) is the leading national nonprofit expanding possibilities for people with vision loss to which Helen Keller devoted more than four decades of her extraordinary life. AFB fulfills its mission to expand possibilities for people with vision loss of all ages through professional and lay publications, development and evaluation of mainstream and assistive technologies, research, and public policy formulation and implementation. AFB has led efforts in the vision loss community to strengthen the relevance of the Americans with Disabilities Act (ADA) and other disability civil rights regimes in the digital age.

We appreciate the opportunity to offer these brief reply comments in the above-captioned proceeding to assist the Federal Communications Commission (FCC or Commission) in the proper implementation of the Twenty-First Century Communications and Video Accessibility Act (CVAA). Before we take up the three main issues we address below, the proposed small entity exemption, interoperable video conferencing, and browser accessibility, we want to congratulate the FCC and its very capable staff for the tremendous effort made to bring the provisions of the CVAA to life. We firmly believe the CVAA's intended purpose, to affect meaningful change in industry behavior to ensure that people with disabilities do not continue to be left out of the technology revolution, will be honored by the work the Commission has done thus far. It is imperative, however, that the Commission's treatment of the matters we discuss below continues to hold the line on industry's accountability for ensuring accessibility.

Small Entity Exemption

The first point that needs to be made unequivocally is that the CVAA does not require the Commission to establish a small entity exemption. The clear language of the statute in section 716(h) (2) and its supporting legislative history gives the Commission the discretion to establish a small entity exemption. The Commission may set up such an exemption, but it is not required. There is, however, a general sense on the part of industry, as reflected throughout industry comments submitted in this proceeding, that a small entity exemption is an entitlement to which such commenters are laying claim. While we recognize that the relative bargaining power of the disability advocacy community may ultimately make the Commission's establishment of some sort of small entity exemption inevitable, such an outcome would reflect a political reality and not be based on the facts.

The facts are that the record for this docket does not support an establishment of a small entity exemption scheme. If there is such a need for a small entity exemption, why is not the record replete with comments from small entities appealing for emancipation? Surely,

if an exemption is warranted, the small entities community would be significantly more represented in the comments filed. Certainly none of the associations representing industry which have offered comment as of this writing are the leading champions of small business in America today. Where are the extensive comments from the “mom and pop” telecommunications entrepreneurs that would presumably benefit from a small entity exemption? Moreover, in the comments which have been received, what supporting documentation or evidence has been offered illustrating how small entities, however defined, would not be profitable or be able to innovate unless some sort of exemption is established?

The truth is that the record does not demonstrate that small entities face unique burdens not experienced by larger entities. When applying the four factors to determine whether accessibility is not in fact achievable in a given instance, the capacity of an entity to comply is thoroughly taken into account. The Commission should not establish a small entity exemption because of some vague notion that smaller entities will have an inherently harder time complying with the law than will larger entities. Indeed, smaller entities may be in the best position to foster innovation in accessibility. Their relative lack of organizational bureaucratic inertia and their relative agility to adjust to dynamic market forces make small entities ideal breeding grounds for inclusive (i.e., accessible) technological innovation.

As such, the use of the Small Business Administration’s criteria to define the CVAA’s category of small entities is not appropriate for two reasons. First, the use of such criteria would mean that the pool of qualifying entities would be well beyond the “guy in his garage” exemplar so frequently proffered by industry in our negotiations with them and before Congress as the entity whose entrepreneurial spirit should not be crushed by burdensome regulation. Second, all Congress has asked of the Commission, and that not in the statute but in report language, is that the Commission consult with the Small Business Administration to inform the Commission’s deliberation on the subject of a small entity exemption. The Commission has clearly fulfilled this expectation as evinced by the extensive discussion given this topic in the FNPRM. Indeed, we would argue that whatever criteria the Commission ultimately might use to define small entities, in a sense, the Small Business Administration’s criteria is the one set of criteria that is least appropriate for the Commission to turn to. If Congress had intended for such criteria to be the criteria to be used, Congress could have used the myriad opportunities in the legislative process to specifically make its will known. It did not. Rather, Congress gave the Commission the discretion to make special considerations for “small entities,” not “small businesses” or “entities who meet the Small Business Administration’s criteria for small business concerns.” Even the legislative history only encourages the Commission to review the Small Business Administration’s criteria and does not call upon the Commission either to use it or to establish the exemption per se.

In any event, in spite of the fact that the record does not justify the establishment of a small entity exemption, we fear that pressure on the Commission to establish such an exemption will be too great for the Commission to resist. In such an event, the Commission must ensure that such an exemption has several key consumer safeguards.

First, we must express our fatigue in being compelled yet again to try to fend off proposed self-executing free passes from the need to do right by people with disabilities. The CVAA is clear that accessibility is the default and inaccessibility the exception when access is not achievable. A self-executing, non-contextual exemption for small entities would make a mockery of the statutory default in favor of accessibility.

Why, for example, would it be appropriate for an entity to claim small size as a blanket defense in the context of any complaint concerning any conceivable technology? If, for example, a small company offers for sale a product or service used for advanced communications which would be accessible if only the company would add a handful of text labels to controls so that screen reader software can identify the controls, such a low-cost and readily achievable solution could nevertheless simply be ignored by the entity just because the company met some arbitrary definition of an exempted small entity. That would be an absurd result. Putting it another way, any special consideration that the Commission might give to particularly small entities must be related to a specific piece of technology or a specific discrete service that is the subject of a complaint. Of course, the four factor analysis already takes into consideration an entity's capacity when assessing the non-achievability of access.

So we again ask, what does the four factor analysis not accomplish for small entities as is? The obvious answer is that a self-executing, noncontextual exemption that frees a company from having to implement even the most minimal and least costly accessibility solutions altogether would certainly do the trick, but that too would be absurd public policy. A sound approach that balances the interests of particularly small entities with the CVAA's presumption in favor of accessibility would, in the context of a complaint, examine, on a case-by-case basis, whether even the modest expectations of the CVAA are too heavy for particularly small entities to bear. The CVAA already affords such an approach through the complaint process.

Are those who are calling for the small entity exemption asserting that some entities may be too small to be expected to explain to the Commission why they cannot comply with the CVAA and, therefore, should not have to? If that is the standard, then we would propose that any exemption that the Commission may establish should use, as the criteria for defining the entities that qualify for the exemption, an entity's lack of financial resources to retain legal counsel. Corporate indigence could certainly be an appropriate basis for freeing an entity from having to defend inaccessibility practices before the Commission.

In all seriousness, given the lack of a record justifying the establishment of an exemption, let alone a self-executing one, at this time, what we would propose is that the CVAA's four factor analysis be allowed to work as Congress intended it to work and, after a period of perhaps two years (i.e., after Fall, 2015), the Commission can reconsider the notion of some sort of small entity exemption. Given that there is no concrete basis now upon which the establishment of an exemption can be made, this discussion needs to be informed by real world experience and the kind of contextual analysis that only the complaint process can afford.

Interoperable Video Conferencing Service

With respect to interoperable video conferencing service (IVCS), the fundamental question to answer is whether the term “interoperable” was intended by Congress to have a precise technologically unique meaning or whether the term is to be read in a more general sense. This is an important question because, if some industry comments are to be believed, Congress employed a rigorous technical engineering term for the purpose of leaving no doubt that absolutely none of the video conferencing technologies in the marketplace today need to be made accessible to people with disabilities. Some commenters even go so far as to say that terms in statutes need to be given their ordinary and plain meanings, even quoting from Webster’s Dictionary, but then without blushing, proceed to explain how the term in question has very specific technical consequences. Not so ironically, the consequences, as they see it, are that they need to do nothing now to ensure video conferencing accessibility. While such argumentation might be predictable, it is both unfortunate and unpersuasive.

The truth is that the term “interoperable” was sloppily added into the legislative mix at the eleventh hour, and while we can be confident in industry’s motivation for its addition, all indications are that congressional staff, let alone Members, did not share or understand the motivation. We agree that terms in statutes need to be given their ordinary and plain meaning, and we therefore reject the notion that the term “interoperable” refers to any kind of technical specifications or protocols which, if employed, would allow one device or service to seamlessly work with any other device or service. Rather, the term “interoperable” should be read to refer to two-way, non-acynchronous video communication.

Is Apple’s FaceTime video conferencing service covered by the CVAA? Our answer is yes because FaceTime allows two-way, non-acynchronous video communication between users. The CVAA’s definition of IVCS fits FaceTime perfectly. The industry response to the question of FaceTime’s CVAA coverage is not because Apple requires that both parties involved in the video communication use FaceTime. However, nothing in the CVAA limits accessibility obligations to those entities who do not require both users to purchase such entities’ equipment or services. Indeed, the CVAA is careful, for example, to carve out certain exceptions for customized equipment, and the CVAA takes great pains to thread the regulatory needle with respect to interconnected VoIP service. Yet, in spite of the fact that the CVAA itself demonstrates how precisely terms of art can and should be defined to strike an appropriate balance, nowhere does the CVAA even hint that the video communications access obligations are so narrowly tailored as to exclude all video conferencing on the market.

In our view, IVCS refers to two-way communications regardless of whether parties at either end of the communication are using identical equipment. The key to “interoperability” is whether each party can independently initiate and terminate a video conference with another user. An example will help to illustrate our understanding of non-interoperable video conferencing. Some home webcams on the market today allow

both audio and video remote surveillance via the user's smart phone. One can envision a scenario wherein an adult care-taker of an elderly parent could conceivably maintain frequent contact throughout the day with the parent. Some of these systems allow two-way communication. This is not an example of IVCS because the equipment at home cannot independently initiate communication; the adult customer must configure both endpoints, and once configuration is achieved, the setup is a dedicated system.

The bottom line is that we dare not allow the term "interoperable" to be twisted beyond its ordinary meaning as a descriptor of two-way non-acynchronous communication so that it refers only to technologies, none of which are on the market today by industry's own admission, that are built with all necessary protocols to allow connection with any other device or service. We can easily imagine a world where, even though a robust system of universal video connectivity is in place from a technical protocols perspective, various equipment manufacturers and/or service providers would voluntarily elect to restrict the use of their products to certain groups of providers. In that case, even though the technology infrastructure would support universal video connectivity, would the mere fact that some providers choose to work with only U.S. companies, or companies owned or controlled by the same parent corporation, or for some other business reason, mean that the CVAA does not apply? No, the question of CVAA coverage turns on whether the video conferencing allows two-way, non-acynchronous communication and has nothing to do with how restricted a given device or service might be.

Browser Accessibility

Finally, as we briefly turn to the Commission's treatment of browser accessibility and the interplay of sections 716 and 718, we want to express our appreciation to the Commission for its careful recognition that the 716 advanced communications obligations have implications for browser accessibility beyond the fairly narrow requirements of 718. Section 718 was included in the CVAA specifically at the request of the vision loss community which has historically been largely shut out of mobile phone browser access altogether, whereas access to PC-based browsers is more widely enjoyed. The narrow tailoring of section 718 was done at the request of industry groups to limit the browser access requirement to mobile phones and to try to limit the scope of what access functionality a browser must possess by talking in terms of access to web browser functions only by users who are blind or visually impaired and not by those with other disabilities. However, even within the four corners of section 718, one can see clear implications beyond the vision loss community; while section 718(a) speaks in terms of vision loss, section 718(b) advises entities that they can comply with the browser access obligation by either building in access meeting the needs of people with disabilities generally or ensuring compatibility that has the same result.

Why is vision loss mentioned per se in subsection (a) but people with disabilities generally in subsection (b)? Here again, eleventh hour scrambling can explain much, but what is clear, as the Commission rightly observes in the FNPRM, Congress intended to emphasize the need to ensure browser access by individuals who are blind or visually impaired while recognizing that all people with disabilities can and should benefit from

browser accessibility. What section 718 is concerned with is the accessibility of browser functions in and of themselves and not any advanced communications which such browsers may enable. Advanced communications is the subject of section 716 and, as such, describes access obligations in broad terms having nothing to do with the specific modalities employed in the delivery of advanced communications.

Putting it more directly, if an equipment manufacturer or service provider makes one of the categories of advanced communications available to customers in a way that requires customers to launch and/or otherwise interact with a browser, the interaction with the browser must of course be made accessible. Failing to ensure access to the browser under such circumstances would thwart the user's ability to use the underlying advanced communications. If the only way a user with disabilities can make use of electronic messaging functionality offered by a company is for the user to launch and interact with a browser, the company has a section 716 obligation to ensure that all of the steps the user needs to take to engage in the electronic messaging it offers must be accessible. As always, access can be built in or ensured through compatibility, but the mere fact that controls related to electronic messaging or any other advanced communications service are in a browser or reached through a browser does not mean that the company has no responsibility to ensure that the user with disabilities gets what he or she has paid for.

The bottom line is that section 718 is an insurance policy for people with vision loss specifically against inaccessibility of mobile phone browser functionality above and beyond advanced communications services. However, as always, all people with disabilities can look both to sections 716 and 718 for protections against advanced communications inaccessibility regardless of the platform and whether or not the delivery of advanced communications is in any way dependent on a browser.

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