

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

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

**REPLY COMMENTS OF CONSUMER GROUPS AND TELECOM-RERC IN  
RESPONSE TO FURTHER NOTICE OF PROPOSED RULEMAKING**

**National Association of the Deaf  
Telecommunication-RERC  
Telecommunications for the Deaf and Hard of Hearing, Inc.  
Deaf and Hard of Hearing Consumer Advocacy Network  
Association of Late-Deafened Adults, Inc.  
Hearing Loss Association of America  
California Coalition of Agencies Serving the Deaf and Hard of Hearing**

The National Association of the Deaf (NAD), Telecommunication RERC (Gallaudet Univ. and Univ. of Wisconsin), Telecommunications for the Deaf and Hard of Hearing, Inc. (TDI), Deaf and Hard of Hearing Consumer Advocacy Network (DHHCAN), Association of Late-Deafened Adults, Inc. (ALDA), Hearing Loss Association of America (HLAA) and the California Coalition of Agencies Serving the Deaf and Hard of Hearing (CCASDHH) (collectively, the “Consumer Groups and Telecom-RERC”), respectfully submit these reply 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>

Congress found that since 1996, the last time the communications laws were updated to provide access to communications devices by people with disabilities, the communications marketplace has undergone a fundamental transformation, driven by the growth in broadband and Internet-based and digital technologies. “Through increased mobility and the use of data, the benefits of modern technology have profoundly altered our everyday lives, streamlining tasks and allowing mobile access to the Internet and a diverse menu of applications and services. . . . Nevertheless, the extraordinary benefits of these technological advances are often still not accessible to individuals with disabilities.”<sup>2</sup> Against this backdrop, the “Twenty-First Century Communications and Video Programming Act of 2010,” was enacted “to help ensure that individuals with disabilities are able to fully utilize communications services and equipment and better access video programming.”<sup>3</sup> It is in this light that we must consider the questions and recommendations made in this FNPRM.

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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 Dkt. No. 10-213 & 10-145, WT Dkt No. 96-198, Report and Order and Further Notice of Proposed Rulemaking, FCC 11-151 (rel. Oct. 7, 2011) (“*Order and FNPRM*” or “*FNPRM*”).

<sup>2</sup> H.R. Rep. No. 111-563, “Background and Need for Legislation, at 19 (2010) (“House Report”)

<sup>3</sup> *Id.*

**I. IF A SMALL BUSINESS ENTITY EXEMPTION IS CREATED, IT MUST BE NARROW AND LIMITED IN SCOPE**

Some commenters in this proceeding have asserted that the Commission should make a permanent exemption for small business entities from the obligations of Section 716.<sup>4</sup> We believe this is unnecessary because the Commission’s achievability standard already provides all entities, including small businesses, the means to seek exemption from the accessibility obligations under 716 should compliance be unachievable for them.<sup>5</sup> The record also fails to support exempting all small entities from the requirements of Section 716. If the Commission determines that such an exemption is warranted, the Consumer Groups and Telecom-RERC strongly urge the Commission to make this exemption temporary and subject to periodic assessments rather than permanent.

Further, if the Commission decides to create an exemption, it must be narrow and limited in scope. Section 716 doesn’t require the exemption in the first place. Moreover, the legislative history cautions the Commission to approach any possible exemption with caution.<sup>6</sup> The House Report, explaining the possible need for this exemption recognizes that some small entities may not have “the legal, financial, or technical capability to incorporate accessibility features.”<sup>7</sup> Thus if an exemption is created for small entities, the exemption must focus on whether the entity has the legal, financial, or technical capability to incorporate accessibility features.

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<sup>4</sup> See, e.g., CEA and CTIA comments.

<sup>5</sup> See Consumer Groups Comments at 4.

<sup>6</sup> Section 716(h)(2) of the 21st Century Communications and Video Accessibility Act, Pub. L. No. 111-260, 124 Stat. 2751 (2010) (“CVAA”).

<sup>7</sup> See House Report at 26.

Most small business products are built with subsystems or products produced by large companies. Many small businesses simply distribute and support unmodified products manufactured by large companies. If an exemption is provided it should focus on products (or portions of bundles) that are specifically designed and manufactured by the small entities to prevent large companies from “laundering” inaccessible products through small exempt entities eligible .

A. SBA Size Standards or Other Similar Standards Should Not Be the Model.

While the House Report directs the Commission to consult with the Small Business Administration (SBA) should it choose to adopt a small business exemption, it by no means instructs ---nor even encourages--- the Commission to adopt the SBA size standards for this possible exemption.<sup>8</sup> Instead, the Commission should independently evaluate the entity’s legal, financial, or technical capacity with respect to incorporating accessibility features. The SBA size standards were designed to determine loan eligibility and were never meant to govern regulatory burden compliance.

If the Commission were to adopt the SBA size standards for the small entity exemption, it would seriously hinder the accessibility goals of Section 716 by exempting a substantial proportion of entities providing Advanced Communications Services (“ACS”). For instance, under the SBA Small Business Size Standards, a Wireless Telecommunications Carrier with up to 1500 employees qualifies as a small business.<sup>9</sup> Using the SBA size standard, the Clearwire Corporation, which has over 6 million subscribers, would probably be categorized as a small entity since it has about 1,258

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<sup>8</sup> *Id.*

<sup>9</sup> SBA: Table of Small Business Size Standards Matched to North American Industry Classification System Codes, Effective November 5, 2010. [http://www.sba.gov/sites/default/files/Size\\_Standards\\_Table.pdf](http://www.sba.gov/sites/default/files/Size_Standards_Table.pdf).

employees.<sup>10</sup> Congress cannot have intended for such a wireless telecommunications carrier with over 6 million subscribers to be automatically exempt from 716 without demonstrating any inability to satisfy the Section 716 achievability test. The Clearwire Corporation is not the only example of the possible consequences of following the SBA business size standards; many leading companies providing ACS are small technology companies. Additionally, many small wireless carriers provide services in rural areas or tribal lands; thus any automatic exemption for small entities would deny access to ACS to *all* people with disabilities living in these areas would be unable to access the ACS.

B. If an Exemption is Created, It Should Mirror Other Disability-related Exemptions.

The Consumer Groups and Telecom-RERC acknowledge that there may be rare situations where an entity is so small and has such limited resources that it might be burdensome to show that complying with the accessibility standards is unachievable. We envision examples where a technology company is truly a small enterprise with a dozen or fewer employees. Thus we encourage the Commission to consider other disability related regulatory burden exemptions as a model for a possible small entity exemption. For instance, employers are exempt from Title I of the Americans with Disabilities Act if they have fewer than 15 employees.<sup>11</sup> Or, under the Telecommunications Act of 1996, a provider of video programming or program owner may be granted an exemption from television closed captioning requirements upon a showing that the requirements would be

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<sup>10</sup> Clearwire Corporation, <http://en.wikipedia.org/wiki/Clearwire> (retrieved 3/8/2012); US Wireless Communications Service Providers, [http://en.wikipedia.org/wiki/List\\_of\\_United\\_States\\_wireless\\_communications\\_service\\_providers](http://en.wikipedia.org/wiki/List_of_United_States_wireless_communications_service_providers) (retrieved 3/8/2012).

<sup>11</sup> See 42 U.S.C. §§ 12111–12117

economically burdensome.<sup>12</sup> These exemptions more closely mirror the kind of exemption that should be extended under Section 716, if any.

C. Such an Exemption Should Apply for Only as Long as the Entity Qualifies.

No entity that qualifies for such an exemption should be allowed to remain exempt on a permanent basis, particularly since any such entity could grow larger and have significant resources at some point in the future. This also applies to products designed by such an entity during the time it was exempt and later retrofitted or upgraded at a time the entity was not exempt. The Consumer Groups and Telecom-RERC do not want to see new versions or modified versions of inaccessible products entering the stream of commerce after an entity is no longer exempt. If an entity that previously qualified for a small entity exemption believes that it cannot make subsequent versions, updates or other iterations of a previously exempt equipment or service accessible, then the achievability test should be used as it should for any other non-small entity. The Commission should not go beyond the statutory language and create new exempt categories.

D. A Small Entity Exemption Should Not be Self-Executing.

We disagree with the recommendation from CTIA and CEA that a permanent small entity exemption should be self-executing.<sup>13</sup> CTIA and CEA do not cite any precedent for allowing a self-executing exemption. Moreover, a self-executing exemption would be contrary to public policy as it would shift the burden of oversight from the entities to consumers, especially those with disabilities, as well as the

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<sup>12</sup> Pub. L. No. 416, ch. 652, 48 Stat. 1064 (1934) (codified as amended at 47 U.S.C. 613(d)(3)) and amended by Section 202(c) of the CVAA.

<sup>13</sup> CTIA Comments at 22 and CEA comments at 4.

Commission. It will be extremely difficult for consumers to be aware of which entities claim to qualify for this exemption and even more difficult to determine whether such claims are valid. We need exemption requests to be placed on public notice so that they can be appropriately scrutinized. Small entities are in the best position to provide information about their businesses and whether they qualify for the exemption.

Ultimately, if a small entity exemption is offered, it should be for entities with no chance at all of satisfying the achievability test. By adopting the SBA size standards or other similar standards, the Commission will leave millions of Americans with disabilities unable to utilize ACS. The small entity exemption, if created, should be the rare exception and not the norm. Congress already provided the standard with an achievability test and a small entity exemption, if created, should conform to this standard. Under no circumstances should the exemption apply to products created by companies that are not small businesses but only sold, rented, provided, or operated by small businesses.

## **II. INTERPRETATIONS OF INTEROPERABILITY REQUIREMENTS SHOULD BE BROAD TO ACCOMPLISH GOAL**

The Consumer Groups and Telecom-RERC contend that requests to narrowly interpret the interoperability requirements under the CVAA are unwarranted and counter to the purpose of the CVAA. Instead, “interoperable video conferencing service” should be read in light of the fundamental purpose of the CVAA, which, as the Commission rightfully states, is to “ensure that 54 million Americans with disabilities are able to fully

utilize advanced communications services.”<sup>14</sup> We encourage the Commission to adopt the more inclusive recommendations set forth by the Consumer Groups and Telecom-RERC in our initial FNPRM comments.<sup>15</sup> The Commission should also reject any recommendations to create a “separate but equal” system for interoperable video conferencing services where only those interoperable video conferencing services that use a common platform are subject to the accessibility rules. While it is hopeful that all interoperable video conferencing services will one day be linked together through a system similar to the PSTN, there is no certainty that this is the path that the industry will take. Instead, we must make sure that people with disabilities are able to access the vast majority of interoperable video conferencing services as soon as possible in order to bridge the digital divide between people with disabilities and the mainstream.

Further, video teleconferencing systems (a subset of interoperable video conferencing services) are not meant to interoperate directly with each other any more than audio-teleconferencing systems are meant to interoperate with each other. For example, when a host selects an audio-teleconference system for a call and all people joining the conference call must call that single bridge. The audio teleconferencing system interoperates with the devices people are using to call in, but isn’t expected to interoperate with another call bridge. It is the same with IP video teleconferencing. A host selects a particular video teleconferencing system and everyone “calls” or “logs” into that one system. The system interoperates the callers’ devices (projecting a web or other client as needed) but the system or any of its components would never be expected

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<sup>14</sup> See Implementation of Sections 716 and 717 of the Communications Act of 1934, as Enacted by the Twenty-First Century Video and Communications and Video Accessibility Act of 2010, Notice of Proposed Rulemaking, 26 FCC Rcd 3133, 314y, at 2. (2011)(“NPRM”)

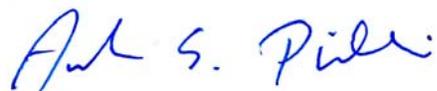
<sup>15</sup> See Consumer Groups comments and Telecom-RERC comments.

to interoperate with a competitor's video teleconferencing system. In short, audio teleconferencing systems do not interoperate with each other and requiring that IP video teleconferencing systems interoperate with each other in order to be 'interoperable' makes no sense – and is counter to how teleconferencing systems (audio or video) are used. These systems interoperate with the devices that people call in on. Thus the FCC should judge video teleconferencing systems to be interoperable if they interoperate with different devices and software (computers, mobile devices with that teleconferencing app, etc.) that callers use. And interoperating with several different devices should be sufficient.

### **III. INNOVATION**

Consumers constantly hear that accessibility prevents innovation. However, this is not true as accessibility spurs innovation by encouraging designers to reexamine fundamental aspects of user interfaces and experiences. Many accessibility features benefit not only people with disabilities but are often used by those who would not consider themselves to have a disability. Moreover, many usability features in products are drawn from accessibility innovations.

Respectfully submitted,



Andrew S. Phillips, Esq.  
Policy Attorney  
National Association of the Deaf  
8630 Fenton Street, Suite 820  
Silver Spring, MD 20910

Gregg C. Vanderheiden, Ph.D.,  
Principal Investigator, RERC-IT  
Co-Principal Investigator, RERC-TA  
Director, Trace R&D center  
University of Wisconsin – Madison  
1550 Engineering Drive, 2107 ECB  
Madison, WI 53706-1609

Claude L. Stout  
Executive Director  
Telecommunications for the  
Deaf and Hard of Hearing, Inc.  
8630 Fenton Street, Suite 604  
Silver Spring, MD 20910

Christian Vogler, Ph.D.,  
Co-Principal Investigator, RERC-TA  
Director, Technology Access Program  
Gallaudet University  
800 Florida Ave., N.E., SLCC 1116  
Washington, DC 20002

Cheryl Heppner  
Vice Chair  
Deaf and Hard of Hearing Consumer  
Advocacy Network  
3951 Pender Drive, Suite 130  
Fairfax, VA 22010

Brenda Battat  
Executive Director  
Hearing Loss Association of America  
7910 Woodmont Avenue, Suite 1200  
Bethesda, MD 20814

Brenda Estes  
President  
Association of Late-Deafened Adults, Inc.  
8038 MacIntosh Lane, Suite #2  
Rockford, IL 61107

Sheri A. Farinha  
Vice Chair  
California Coalition of Agencies Serving  
the Deaf and Hard of Hearing, Inc.  
4708 Roseville Rd, Ste 111  
North Highlands, CA 95660

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