

**Before the
Federal Communications Commission
Washington, DC**

In the Matter of)	
)	
Entertainment Software Association)	
Petition for Waivers of 47 C.F.R. §§ 14.1)	CG Docket No. 10-213
<i>et. seq.</i>)	
)	
In the Matter of)	
)	
Consumer Electronics Association)	
Petition for Waiver)	
)	
Implementation of Sections 716 and 717)	
of the Communications Act of 1934, as)	
Enacted by the Twenty-First Century)	CG Docket No. 10-213
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)	WT Docket No. 96-198
Telecommunications Act of 1996)	
)	
In the Matter of Accessible Mobile Phone)	
Options for People who are Blind, Deaf-)	CG Docket No. 10-145
Blind, or Have Low Vision)	

**Reply Comments of the
American Council of the Blind**

Introduction

The American Council of the Blind (ACB) is pleased to submit these reply comments on the Petitions submitted by the Entertainment Software Association and the Consumer Electronics Association regarding class waivers to certain devices and software based on the Advance Communication Services (ACS) rules published by the Federal Communications Commission (FCC). These ACS rules published by the Commission are designed to implement the 21st Century Communications and Video Accessibility Act (CVAA), which was signed by President Obama on October 8, 2010. The ESA wishes to ask for a class I waiver for three categories of devices and services that it considers to have the primary purpose of gaming—a waiver to last for at least eight years. Similarly, the CEA wishes to have IP-TVs and iP-DVPs waived from ACS requirements for all models of such devices manufactured until the end of 2016. The American Council of the Blind strongly opposes both waiver requests.

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.

Consistent with our mission, these comments reflect the views of our membership in the matter of gaming devices and services as well as television devices used by our members to obtain content, view content, and generally participate in entertainment activities. We first address the petition by the Entertainment Software Association (ESA) and the comments by supporters of this petitioner and then turn to the petition submitted by the Consumer Electronics Association. As will be noted in our comments, ACB strongly opposes efforts by both of these petitioners to narrow market choices, stifle innovation, and generally restrict the ability of blind, visually impaired, or deaf-blind persons to participate in entertainment activities independently.

FCC's *ACS Order* established a threshold test for granting waivers from the ACS requirements, consistent with congressional intent: Waivers should be granted upon a showing that the service or equipment is (i) capable of accessing ACS; and (ii) designed for multiple purposes, and primarily for purposes other than using ACS. In evaluating the "primary purpose" of the equipment or service, the FCC will consider (i) whether the manufacturer designed the offering primarily to be used for ACS by the general public or for another primary reason; and (ii) whether the manufacturer or provider marketed the equipment or service primarily for its ACS features or functions. In addition, the *ACS Order* identified two other potential factors: whether ACS supports another feature, purpose, or task; and what impact removal of the ACS feature would have on the "primary purpose" of the equipment or service.

Primary Purpose

As in the past, ACB must address the distinction made by many industry commenters regarding what is termed "primary purpose" of a device or service. We ask the FCC to put to rest, for once and for all, the crux of this argument.

It is always argued that because of the nature of a device, the FCC must consider its primary purpose before determining the features when applying ACS rules. We consider this argument to be specious and frivolous. A device or software manufacturer determines the features of a particular product based on marketability and competition—a fact which ESA has very conveniently forgotten while filing this petition. This fact not only implies that the manufacturer must consider a feature's impact prior to implementing it, but it also implies that competition plays a significant role in determining the features of a particular device or software. As a result, we conclude that what ESA and other industry members consider primary purpose for a class of devices, software, or network is nothing more than a myth—a piece of fiction maintained for the

purpose of classifying such class of devices, software, or network. Ultimately, it is not the industry which determines the features but consumers. Features are developed and maintained based on what the market will legitimately consider to be important. To argue that a feature is either incidental or subordinate clearly belies the fact that it exists because a user finds it to be important.

To further the idea that a user actually determines what he/she considers to be important—i.e., the primary purpose of a device, software, or network, we turn now to the clear and unequivocal evidence that the class of devices, software, and networks that ESA wishes to have exempted from ACS rules are far more than gaming devices. Over the last few years, the manufacturers of these devices and software themselves have steadily incorporated entertainment features that are other than gaming. The exhibits supplied by ESA itself, contrary to their original purpose, more than suggest that the marketing departments at ESA’s member companies do not agree with the Association’s stands. The advertisements show without a doubt the changing nature of the industry. Rather than highlight the incidental and secondary nature of entertainment features other than gaming as ESA hopes, these illustrations do the exact opposite—namely, they highlight the fact that these features exist.

As suggested by reputable press outlets which cover ESA members, the features that the Association considers to be “secondary” are rather important. A cursory look at some Article examples below will illustrate the evidence of this fact. Since these outlets are in the business of informing their readers regarding the importance of product highlights and features, they carry some authority. FCC does not have to rely on ESA as a soul source of information.

This article (<http://phys.org/news/2012-06-video-game-consoles-non-gaming-features.html>) describes a range of non-gaming features provided by current consoles and declares consoles to be “media machines” and “Entertainment platforms.”

This article (<http://arstechnica.com/gaming/2012/06/leaked-document-points-to-299-xbox-720-for-2013/>) references DVR as part of this future console slated to be manufactured by Microsoft along with access to cloud servers for entertainment content besides games.

Sony’s cross-platform

http://www.xbitlabs.com/news/multimedia/display/20120608144523_Sony_Announces_Cross_Platform_Features_for_PlayStation_3_and_PlayStation_Vita.html features include entertainment content and self-generated content.

This article (<http://www.ibtimes.com/articles/353485/20120618/xbox-live-vs-playstation-network-2012-plus.htm>) provides a comparison of online services provided by X-Box and PS3, including streaming music, videos, etc.

This link to a podcast (<http://www.cbc.ca/podcasting/includes/bandwidth.xml>) on Wii U becoming part of the entertainment hub business, provides clear evidence of the changing nature of the business.

Nintendo (<http://www.latimes.com/entertainment/envelope/cotown/la-et-ct-e3-nintendo-20120605,0,857680.story>) has deals for streaming content on the new WiiU. Nintendo is far behind X-Box and PS3 but attempting to compete with its counterparts.

Making X-box (http://www.mercurynews.com/business/ci_20780484/microsoft-touts-new-features-xbox-360-e3-smartglass-halo) into an entertainment hub, which can also use IE, is a high priority for Microsoft.

ZdNet (http://news.cnet.com/8301-17938_105-57454722-1/why-we-believe-most-of-the-massive-xbox-roadmap-rumor/) analyzes the future of the X-box console and many features beyond gaming.

This article (<http://www.usatoday.com/tech/news/story/2011-12-06/holiday-tech-gifts-home-entertainment-systems/51679660/1>), intended to reach the most consumers, provides details on variety of options to access entertainment content via consoles.

This final illustration (http://blog.nielsen.com/nielsenwire/online_mobile/game-consoles-edge-closer-to-serving-as-entertainment-hubs/) from 2010 by a reputable source of important consumer data provides the most telling story about consoles and entertainment other than gaming.

In conclusion to the discussion about the so-called “primary purpose” argument suggested by ESA, we must summarize the following facts:

1. The primary purpose is not determined by ESA or the member company but by the consumer purchasing the device or service.
2. The changing nature of the market, as suggested by ESA’s marketing material as well as the press that covers the entertainment industry, indicates the clear nature of what consoles and their networks are capable of doing and what such devices and services are intended to do. Simply put, these devices and services are no longer only meant for gaming.
3. The entertainment industry is no longer in a position to argue that the devices and services which they wish to have exempted are primarily intended for gaming. Even if such were the case, to the person using the device or service, the purpose is to use the service as he/she wishes and not as told to do so by the industry.
4. If the devices and services that the Entertainment industry wishes to have covered by the waivers could be considered to have a primary purpose, the primary purpose is surely providing multiple types of entertainment and not games. Games could have been the primary purpose several years ago but that is no longer the case.

Economic Considerations

In passing the CVAA, Congress sought to promote innovative solutions for increasing the accessibility of “advanced communications services” (“ACS”) without discouraging other innovation. To achieve that goal, it authorized the FCC to grant class waivers for multipurpose offerings that have some ACS capabilities but were designed primarily for other purposes. The

discussion above clearly suggests the spurious nature of the “primary purpose” for “game” devices and services argument as provided by ESA. The Commission should reject the argument solely based on the discussion above. However let us consider additional points.

The multipurpose waiver provision underscores that the legislative motivations for the CVAA were to broaden accessibility to services primarily used for general communications on issues that would directly affect their economic well-being or real-world circumstances. For example, the Senate Report expressly noted that, among other reasons, the CVAA was needed because the “economic disparity” faced by persons with disabilities “may increase” if “certain current and emerging technologies are not accessible to the disabled community.” The Report further stated that the multipurpose waiver was intended so that CVAA requirements may be waived for products or services that “incidentally provide[] access to ACS or [were] designed primarily for another purpose.”

The economic and real-world implications are some of the most important ones that we can consider. In this case, the failure of imagination on ESA’s part has led it to make two fundamental assumptions, which are neither correct nor founded based on real evidence. The first of these, as implied in the descriptions provided to the illustrations and exhibits in the Association’s filings, mistakenly suggests that blind, visually impaired, or deaf-blind people do not consume entertainment content—gaming or otherwise. As is clear by the consumers responding to this proceeding, such is not the case. We will attribute the industry’s assumption as mere ignorance and not a deliberate attempt to minimize the abilities of these consumers. In fact, the popularity of accessible games, the desire to view videos with (or without) audio description—as illustrated by wanting accessibility to Netflix and Hulu+, and the mere fact of this vehement response to the petition should prove, once and for all, that we desire accessibility in the strongest terms. For too long the industry has taken this market for granted.

The second assumption, which is related to the first one, implies that blind people do not own nor plan to own consoles or related services. Once again, to the contrary, people who are blind, visually impaired or deaf-blind live and interact with families and friends who own and pay for such devices and services. As a matter of fact, as primary household members, many blind or visually impaired people continue to pay for devices and services that the entertainment industry provides. The inability of industry to incorporate accessibility features for entertainment and other ACS features means that these families have to rely on and pay for additional devices and services to obtain entertainment content, making a real economic impact. This is clearly against the intent that Congress discussed in its report.

Once again, we urge the FCC to reject this line of argument as based on incorrect assumptions and a clear lack of understanding of the market consisting of people with disabilities.

Classes of Waivers

The Entertainment Software Association requests that the FCC grant a categorical waiver to three interdependent classes of devices and networks; and, further, that it is necessary that waivers be granted to each—since devices and services fall into multiple classes. We must disagree. As has been stated, we do not recognize the “primary” nature of gaming as a distinct network category. As

such devices, networks, and services incorporate entertainment features more and more, the market and the technical nature of such devices and services show capabilities that are other than games. As such, providing a categorical waiver means that no service developed for, carried on the network of, or accessed on a device or utilizing the network covered by the waiver can be accessible for the term of the waiver. The entertainment industry would have blind or visually impaired people without access to entertainment on multiple devices for many years to come. This is a disguised attempt to seek a blank waiver for a significant number of devices that are on the market today and will come on the market as a result of emerging entertainment features.

“Good Cause”

In its petition, the ESA states: “there is good cause to grant the industry’s waiver requests because doing so would further the public interest by promoting innovation in the marketplace and by conserving the Commission’s limited resources.” There are two inherent concerns that we must address in this statement.

As we have done so before, through this proceeding and others related to implementation of the CVAA, we must reiterate our belief regarding innovation. It is distinctly different than the one proposed by the industry. Industry believes that asking their members and companies to implement features and services to make their products accessible is somehow stifling innovation. This is rather illogical and contrary to how innovation works. Engineers and experts would agree that attempting to work out solutions to challenging technical and policy problems is considered to be innovation. As a result, innovation implies a willingness to solve problems, accessibility or otherwise. Not wishing to solve accessibility problems posed before them, industry members, rather than innovating, are stifling innovation. Industry attempts to paint accessibility requirements as anything but a strong desire to spur innovation is patently untrue.

Secondly, the petition for multi-class waivers is suggested to be beneficial to the FCC. We are quite concerned about the tone that this line of thinking and suggestion attempts to portray. Giving ESA the benefit of the doubt, we will not misconstrue this suggestion as warning to the FCC about pending waiver requests for individual devices and services. While we do admit that considering class based waivers will save FCC significant time and resources, we must argue against such waivers. The harm that these class waivers will must outweigh any thought of saving time and resources.

Waiver Time

Since consoles and similar devices are believed to have a life cycle of 5 to 10 years—ESA argues, the Commission should grant a waiver of no less than 8 years for these devices and services. Yet, the evidence and the arguments provided by ESA in the petition itself argues against the excessive length of this waiver request. It is more than clear that the industry, since the release of its current generation of consoles has not stood still. The discussion above illustrates that, if anything, changes have come fast in the past few years. Nothing in the petition or market analysis suggests that innovation or changes are about to slow down. In fact, if the current thinking on technological change is to be believed, we must understand that the change spurred by content consumption patterns is going to accelerate. Eight years is not only an extremely long time for a waiver, but quite unreasonable.

Recent plans for X-Box have been discovered and discussed in the press. (See the discussion above.) Likewise, other console makers will be introducing their products in the coming years. It is understandable that the FCC should apply Waivers to current generation of devices but there is nothing preventing the industry from creating accessibility features in their next generation of devices. The entertainment industry is not about to wait for eight years before innovating. Nor will all the updates be hardware based. There should be nothing preventing the industry from applying accessibility related changes to their current developments and upcoming generations. The waiver request is simply unreasonable.

IP-TVs and IP-DVPs

As it is evident that The Consumer Electronics Association (CEA) has utilized arguments very much similar to the ESA in requesting its waivers, ACB stipulates that the arguments above apply in this matter as well. As such, the following is a brief summary of the discussion opposing CEA's waiver request. WE believe that the arguments we have made above, in fact and in circumstance, will suffice for both cases.

- ✓ While the CEA considers the primary purpose of IP-TVs and iP-DVPs to be nothing more than viewing videos, this is far from the truth.
- ✓ The inclusion of ACS features in these devices suggests that there is a market demand or competitive pressures that are allowing the manufacturers to include such features.
- ✓ Multitudinous features require the user to interact with ACS. Such features must be accessible.
- ✓ A brief search of marketing and press material suggests that ACS services on the devices that CEA wishes to have waived are, in fact, important.
- ✓ The request to provide a categorical waiver for IP-TVs and IP-DVPs manufactured by the end of 2016 is unreasonable as:
 - ✓ Market conditions are changing rapidly.
 - ✓ New models of these products are released every year with increasing ACS capabilities.
 - ✓ Users would have to wait for another four to six years to obtain any level of accessibility unless the CEA determines that another Waiver request is warranted.
 - ✓ Accessible devices are already on the market in other countries and territories with ACS features.
 - ✓ Software updates can make updating and implementing accessibility easier and more flexible.
 - ✓ The CEA proposes to stifle accessibility innovation until at least 2016 if not longer.

Respectfully submitted,

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