

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

In the Matter of)	
)	
Implementation of Sections 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
)	

**REPLY COMMENTS OF THE
NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION**

INTRODUCTION AND SUMMARY

The National Cable & Telecommunications Association (NCTA)¹ hereby responds to comments filed regarding its request that the Commission waive the recently adopted accessibility requirements for advanced communications services (ACS) as applied to set-top boxes leased by cable operators to their customers and manufactured before July 1, 2016.² The record in this proceeding demonstrates that the proposed waiver satisfies the criteria established

¹ NCTA is the principal trade association for the U.S. cable industry, representing cable operators serving more than 90 percent of the nation’s cable television households and more than 200 cable program networks. The cable industry is the nation’s largest provider of broadband service after investing over \$185 billion since 1996 to build two-way interactive networks with fiber optic technology. Cable companies also provide state-of-the-art competitive voice service to more than 23 million customers.

² National Cable & Telecommunications Association Petition for Waiver, CG Docket Nos. 10-213 and 10-145, WT Docket No. 96-198 (June 6, 2012) (NCTA Petition).

by Congress in section 716 of the Communications Act of 1934, as amended (the Act),³ and by the Commission in sections 14.5 and 1.3 of its rules⁴ because it is for a multi-purpose device with a primary purpose that is *not* ACS, it would promote technological innovation, the class of devices to which the waiver applies is carefully defined, and the waiver would be time-limited.

The primary opposition to our request was a joint submission filed by the Rehabilitation Engineering Research Center on Telecommunications Access and other organizations (collectively, RERC-TA).⁵ They argue that set-top boxes are not eligible for a waiver because they may, in the future, incorporate so many additional features that accessing cable services ceases to be their *primary* purpose, and that the length of the waiver should be no more than one year in light of the rapid pace of innovation in the video marketplace. RERC-TA correctly recognizes that the marketplace for video products and services is highly dynamic, competitive, and innovative, but it misapplies the relevant waiver standard. The simple fact is that the generations of set-top boxes that are being developed, manufactured, and deployed today and over the course of the next few years – and that are the subject of this waiver request – are or will be used primarily to access video programming. In light of the foregoing, the Commission should grant the requested waiver.

³ 47 U.S.C. §617(h).

⁴ 47 C.F.R. §§14.5 and 1.3.

⁵ RERC-TA Comments at 1. Several individual commenters also expressed concern about the accessibility of set-top boxes and, in particular, the programming guides. *See, e.g.*, Comment of Carol Francisco (“I hope someday there will be accessible remotes and talking menus. We would love to be able to enjoy television like our friends and family can do so easily.”). NCTA and its member companies appreciate these concerns, and look forward to working with the Commission and other interested parties to implement the goals of the Twenty-First Century Communications and Video Accessibility Act of 2010 (CVAA) to ensure that programming guides are accessible. *See* Second Report of the Video Programming Accessibility Advisory Committee on the Twenty-First Century Communications and Video Accessibility Act of 2010, *User Interfaces, and Video Programming Guides and Menus* (April 9, 2012) available at <http://vpaac.wikispaces.com/file/view/120409+VPAAC+User+Interfaces+and+Video+Programming+Guides+and+Menus+REPORT+AS+SUBMITTED+4-9-2012.pdf>. However, those issues are outside the scope of this waiver request.

I. SET-TOP BOXES SATISFY THE “PRIMARY PURPOSE” TEST.

As we explained in our petition, even with the addition of features that arguably qualify as ACS, “set-top boxes provided by cable operators remain devices primarily used to access video programming services and are marketed by manufacturers for this purpose.”⁶ Moreover, we noted that the touchstone of the primary purpose analysis is whether the device “*was designed to be used for advanced communications service purposes.*”⁷ Nobody in this proceeding has challenged the fact that cable set-top boxes today *have been designed* primarily for the purpose of accessing video programming services.

TIA and CEA both agreed with our assessment that set-top boxes satisfy the Commission’s “primary purpose” test. For example, CEA noted that set-top box marketing materials “demonstrate persuasively that cable operator-supplied set-top boxes are marketed primarily for non-ACS purposes.”⁸ TIA noted that “[t]he primary purpose of the set-top box is to convert video signals delivered by cable systems to consumers’ homes and transmit the converted signal to customer televisions,” and that “NCTA’s review of press coverage and manufacturer literature demonstrates these devices are marketed primarily for the reception and delivery of video programming.”⁹ Both CEA and TIA stated that incorporating new, ancillary features into set-top boxes does not change the fact that these devices were designed primarily to allow multichannel video programming distributor (MVPD) customers to access video programming services.

⁶ NCTA Petition at 2.

⁷ *Id.* at 5 (citing *Implementation of Sections 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 Nos. 10-213, 10-145, WT Docket No. 96-198, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 14557, 14634, ¶ 183 (2011) (*ACS Order*)) (emphasis added).

⁸ CEA Comments at 3.

⁹ TIA Comments at 3.

In contrast, RERC-TA mistakenly construes the primary purpose test as covering potential *future* uses for set-top boxes, not what they are or were primarily designed to do. RERC-TA asserts that our primary purpose analysis “discounts the possibility that cable services themselves are likely to undergo a significant transformation, in order to stay competitive with Internet-based providers” and argues that “as set-top boxes are designed to incorporate more features and functions, including ACS, they resemble smartphones more and more.”¹⁰ Cable set-top boxes are certainly evolving to add new and innovative features in the dynamic video marketplace, and granting the waiver will help facilitate further innovation.¹¹ But, notwithstanding this fact, the boxes subject to the waiver request are or were all designed, first and foremost, to allow cable operators’ customers to access their cable service. Because these devices have a primary purpose that is not ACS, they satisfy the Commission’s “primary purpose” test.¹²

II. THE REQUESTED WAIVER IS CAREFULLY DEFINED IN SCOPE AND SUFFICIENTLY LIMITED IN DURATION.

Consistent with the statutory requirements and the Commission’s rules, the waiver request was limited in scope and duration to a carefully-defined class of devices – *i.e.*, set-top boxes leased by cable operators to their customers – and for a limited time as determined by the lifecycle of the device – *i.e.*, until July 1, 2016. We noted that “[t]he Commission is familiar with cable operator-supplied set-top boxes and the ‘common characteristics’ that they share as a

¹⁰ RERC-TA Comments at 6.

¹¹ NCTA Petition at 7-10.

¹² Throughout its comments, RERC-TA cites to retail products as examples to support its argument that set-top boxes have co-primary purposes. *See* RERC-TA Comments at 6 (referring to “set-top boxes [that] run on the Android operating system” and “smart set-top boxes” available at Best Buy). We cannot speak to whether these retail devices satisfy the primary purpose test, but, in any case, that is irrelevant. Our waiver request is limited in scope to cable operator-supplied set-top boxes only, so examples of retail devices that incorporate additional features have no bearing on the questions presented by the instant request.

class.”¹³ With respect to the duration of the waiver, we explained that “[t]he development, manufacturing, and deployment cycle for set-top boxes typically lasts approximately six years,” such that “devices that cable operators will begin deploying to customers later this year have been in development since at least 2010, and likely will be deployed to customers until early 2016,” and the first generation of devices that will have been completely designed and developed with the ACS requirements in mind will likely reach consumers in the summer of 2016.¹⁴

Both TIA and CEA agree that our request meets both the letter and spirit of the Commission’s rules. For example, CEA notes that the waiver request is consistent with “the lifecycle approach taken in the *ACS Order*, [under which] subsequent generations of cable operator-supplied set-top boxes would not be covered by the proposed waiver.”¹⁵ And TIA says that the waiver request “properly presents the development cycle for set-top boxes”¹⁶

RERC-TA, on the other hand, argues that the duration of the waiver should be limited to one year based on the notion that lifecycles for set-top boxes may, at some point in the future, speed up.¹⁷ RERC-TA’s proposal ignores the Commission’s explicit holding that the term of the waiver should be a function of the lifecycle of the device in question.¹⁸ As we stated in our waiver petition, the current lifecycle for cable set-top boxes typically lasts approximately six

¹³ NCTA Petition at 4.

¹⁴ *Id.*

¹⁵ CEA Comments at 3.

¹⁶ TIA Comments at 3.

¹⁷ RERC-TA Comments at 8-9.

¹⁸ *ACS Order*, 26 FCC Rcd at 14639-40, ¶ 194.

years, and that is the relevant metric under the waiver standard. Whether future generations of set-top boxes may operate under a shorter lifecycle is irrelevant.¹⁹

III. GRANTING THIS WAIVER WOULD ADVANCE THE PUBLIC INTEREST BY PROMOTING TECHNOLOGICAL INNOVATION.

The waiver petition also explained how granting the requested waiver would advance the public interest because it would “enabl[e] cable operators to develop and deploy new technologies and features that will add to the diverse array of services they can deliver to their customers.”²⁰ In contrast, requiring ACS support in these devices would impede such innovation. As noted, set-top boxes are not general purpose devices and “the potential need to retrofit millions of devices to comply with the ACS requirements . . . is daunting and could significantly alter the business case for these features.”²¹ In other words, developing and deploying these innovative new features could be at least delayed – if not outright shelved – if the Commission does not grant the requested waiver.

The comments submitted by CEA and TIA, and, in particular, the economic analysis submitted by CEA in support of its own waiver request,²² drive this point home. For example, CEA noted that using the waiver process to facilitate and promote this kind of innovation “would

¹⁹ Additionally, RERC-TA’s suggestion that software updates to set-top boxes can dramatically shorten the product lifecycle is speculative at best. See RERC-TA Comments at 9 (“one hardware generation can be taken through multiple product generations and new feature sets via remote software upgrade”). To be sure, some operators have started to deploy cloud-based IP platforms that can support new applications in the latest generation of set-top boxes. See Press Release, Comcast Corp., *Comcast Begins National Launch of X1: Next-Generation Cloud Enabled Television Platform and Introduces The X1 Remote Control App* (May 21, 2012) available at <http://www.comcast.com/About/PressRelease/PressReleaseDetail.ashx?PRID=1186&SCRedirect=true>. These platforms hold enormous promise for delivering accessibility features to cable customers, but these platforms will take time to mature and become widely deployed and it would be premature to speculate on whether these platforms might have any effect on the product lifecycle of cable set-top boxes.

²⁰ NCTA Petition at 8

²¹ *Id.* at 9.

²² Letter from Julie M. Kearney, Vice President Regulatory Affairs, CEA, to Marlene H. Dortch, Secretary, FCC, CG Docket No. 10-213 (July 13, 2012) (attaching Letter from Gregory L. Rosston (Rosston Analysis)).

be consistent with Congress’s goals, as expressed in the legislative history of the CVAA.”²³

Likewise, TIA observed that grant of the waiver “would promote technological innovation, facilitate greater investment in innovative technologies, and encourage the efficient use of Commission resources.”²⁴

Additionally, some of the conclusions reached by Dr. Gregory Rosston in analyzing CEA’s waiver request are equally applicable to our waiver request. For example, Dr. Rosston notes that application of the rules to devices that are primarily designed for something other than ACS could have “the perverse effect of reducing easy access to ACS for all, including the community the rules were designed to help.”²⁵ This is because device manufacturers that are forced to incorporate accessibility would incur additional costs, causing them to raise prices or simply refrain from including the ACS in the device.²⁶ Neither result is in the public interest.

Importantly, even RERC-TA recognizes that the inclusion of these types of features into set-top boxes could lead to significant public interest benefits because it will allow cable operators to continue to compete in the marketplace.²⁷ Prematurely requiring ACS support in these devices, however, would not serve the public interest. Such an approach underestimates the significant costs and complexities involved in making these features accessible,²⁸ discounts

²³ CEA Comments at 4.

²⁴ TIA Comments at 4.

²⁵ Rosston Analysis at 7.

²⁶ *Id.* at 6.

²⁷ RERC-TA Comments at 4.

²⁸ Software upgrades certainly give cable operators the ability to add new ancillary features to some existing set-top boxes over time, but set-top boxes are primarily designed to provide access to video programming services, and, as a result, they have inherent hardware and other technical limitations that restrict the scope of new non-video features that can currently be supported. Only set-top boxes that have been designed from day one with ancillary ACS features and accessibility for those features in mind will have the necessary hardware and firmware to make those features broadly accessible. Future generations of set-top boxes are expected to have such capability.

the ability of disabled users to avail themselves of the myriad other substitute products that actually *are* intended for use with ACS,²⁹ and ignores the possibility that some of these features, even if not strictly “accessible” under the Commission’s rules, could be useful to individuals with disabilities. Most importantly, this position is at odds with the flexible, reasonable approach embodied in the CVAA. Congress included the waiver process specifically for these kinds of situations, where a time-limited waiver of the rules for a carefully defined class of devices could promote innovation and investment and advance the public interest.³⁰

CONCLUSION

In light of the foregoing, and consistent with section 716 of the Act and applicable Commission rules, the Commission should waive the ACS rules as set forth in the NCTA Waiver Petition.

Respectfully submitted,

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²⁹ In his analysis for CEA Dr. Rosston discussed how the availability of substitute, accessible devices limits the benefits to be gained from mandating accessibility on multi-purpose devices. *See* Rosston Analysis at 8 (“The benefits of accessibility for any particular type of device are limited by the availability of substitutes for that device that have accessibility. . . . If accessibility is easy (and in fact in some cases superior) on alternative ACS-capable devices, then the benefits from mandating accessibility on IP-TVs and IP-DVPs may be very low.”).

³⁰ 47 U.S.C. § 617(h).