



Consumer Electronics Association
1919 South Eads Street
Arlington, VA
22202 USA
(866) 858-1555 toll free
(703) 907-7600 main
(703) 907-7601 fax
www.CE.org

Via Electronic Filing

September 7, 2012

Marlene H. Dortch
Secretary
Federal Communications Commission
445 Twelfth St., S.W.
Washington, DC 20554

*Re: Written Ex Parte Submission – CEA Response to Supplement to Opposition –
CG Docket Nos. 10-213 and 10-145; WT Docket No. 96-198*

Dear Ms. Dortch:

The Consumer Electronics Association (“CEA”), by the undersigned, hereby submits this *ex parte* communication to address the “Supplement to Opposition” regarding CEA’s pending limited petition for waiver (“CEA Waiver Petition”)¹ filed by the Rehabilitation Engineering Center on Telecommunications Access, *et al.* (“RERC-TA”) on August 28, 2012, in the above-referenced dockets (“Supplement”).² For the reasons discussed below, the Commission should dismiss the Supplement’s arguments and grant the CEA Waiver Petition expeditiously.

¹ CEA, Petition for Waiver, CG Docket Nos. 10-213 and 10-145, WT Docket No. 96-198 (filed Mar. 22, 2012) (“CEA Waiver Petition”). The CEA Waiver Petition, which was filed on March 22, 2012, requests a limited waiver of the rules governing Advanced Communications Services (“ACS”) for Internet-Protocol (“IP”)-enabled televisions (“IP-TVs”) and IP-enabled digital video players (“IP-DVPs”) manufactured before July 1, 2016.

² RERC-TA, Telecommunications for the Deaf and Hard of Hearing, Inc., and National Association of the Deaf, Supplement to Opposition, CG Docket Nos. 10-213 and 10-145, WT Docket No. 96-198 (filed Aug. 28, 2012) (“Supplement”).

Overview

As CEA previously has shown, the CEA Waiver Petition satisfies the Commission’s specific waiver rules for ACS as well as its general waiver standard, and that petition should be granted expeditiously.³ In particular, the CEA Waiver Petition demonstrates that, rather than the provision of ACS, the primary purpose of the IP-TVs and IP-DVPs subject to the waiver request is the “rendering and/or display of video content, principally full-length, professional-quality video programming.”⁴ The overwhelming bulk of the functionality on these devices, whether available through pre-installed or user-downloaded and installed applications (“apps”), cannot conceivably be classified as ACS.⁵

Thus, the Supplement fails in its argument that IP-TVs and set-top boxes (“STBs”), a form of IP-DVP, have the provision of ACS as a primary or “co-primary” purpose.⁶ The Commission should dismiss the claims raised in the Supplement. Specifically, as discussed herein:

- Merely marketing an ACS feature on a device does not mean that the feature is a primary purpose of the device;
- The primary purpose of IP-TVs and STBs is the rendering and/or display of video content; and
- The examples provided in the Supplement do not accurately describe the primary purpose of IP-TVs and STBs.

The Supplement therefore offers no basis on which the Commission can deny the CEA Waiver Petition.

Merely Marketing an ACS Feature on a Device Does Not Mean that the Feature is a Primary Purpose of the Device

There is no evidence to suggest that the Commission intended the term “primary purpose” to describe every functionality of a device, no matter how tangential, that may be listed in marketing materials. The Commission’s waiver analysis considers how products are marketed in determining their primary purpose,⁷ but the *ACS Order* does **not**

³ See CEA Waiver Petition; see also CEA Reply Comments Regarding Petition for Waiver, CG Docket No. 10-213 (filed June 25, 2012) (“CEA Reply”).

⁴ CEA Waiver Petition at 2-3; see *id.* at 8-10 (discussing primary purposes of IP-TVs) and 15-16 (discussing primary purposes of IP-DVPs).

⁵ See *id.* at 2-3.

⁶ See Supplement at 6-13.

⁷ See *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*

establish, or even contemplate, a *per se* rule (as the Supplement appears to assume) that if a capability or app is marketed as one of many features of a device, then its offering must be a primary or co-primary purpose of that device. A device, such as an IP-TV or an IP-DVP, that is connected to the Internet will often come with many apps preloaded, some of which may be ACS. Manufacturers market all of these preloaded apps in order to make them more attractive and useful to the public.

In addition to being unsupported by the rules, it would be unsound public policy for the Commission to restrict waiver grants only to ACS functionalities that are not marketed at all by covered entities, because such a restriction would hinder broad public acceptance of ACS features on multi-purpose devices. As the record shows, it is important for IP-TVs and IP-DVPs, which are themselves nascent devices, to offer some forms of ACS to gauge consumer demand for these services on these devices.⁸ But if these services are not included in marketing materials, then consumers will not know about these capabilities, losing the social gains of having ACS broadly available.⁹ Especially when ACS functionalities are only beginning to be offered on IP-TVs and IP-DVPs, rejection of the requested waiver based on the Supplement's mere listing of marketing materials that mention ACS-like functions will chill the availability of ACS to all Americans.¹⁰

2010, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 14557, 14635 ¶ 185 (2011) (“*ACS Order*”).

⁸ See CEA Waiver Petition at 4-5.

⁹ See Analysis by Gregory L. Rosston regarding the CEA Petition for Waiver, at 7, attached to Letter from Julie Kearney, Vice President, Regulatory Affairs, CEA, to Marlene H. Dortch, Secretary, FCC, CG Docket No. 10-213 (filed July 13, 2012) (“[C]omplying with the rules by denying everyone the ability to purchase a set with ACS pre-installed could have high social costs. Instead of increasing accessibility to ACS, the rule might instead have the perverse effect of reducing easy access to ACS for all, including the community the rules were designed to help.”).

¹⁰ In the *ACS Order*, the Commission expressly rejected a suggestion that “[w]aivers should not be provided to an intentional communication function built into a larger non-communication product, but only to non-communication functions that could incidentally be used to communicate,” noting that to even be eligible for a waiver, the equipment “must include a communication function.” *ACS Order*, 26 FCC Rcd at 14636-37, n.504. ACS features, to the extent they are marketed by manufacturers, clearly are “intentional” communications functions. But, as the *ACS Order* held, this is not grounds for denying a waiver.

The CEA Waiver Petition Demonstrates that the Primary Purpose of IP-TVs and STBs is the Rendering and/or Display of Video Content

IP-TVs: The CEA Waiver Petition explains that although IP-TVs allow consumers to access and use ACS, their primary purpose, as designed and marketed, is to passively display video content, rather than to provide ACS.¹¹

As CEA has demonstrated,¹² the marketing materials and other statements of IP-TV manufacturers emphasize the enhanced access to *video content* provided by IP-TVs. For instance, Samsung’s “roster of popular apps” for its IP-TVs focuses on video content.¹³ Panasonic highlights that its most popular IP-TV apps are overwhelmingly video related, including Netflix, YouTube, Hulu Plus, and Amazon Video.¹⁴

Similarly, in discussing its commitment to the “connected TV movement,” LG first emphasizes providing access to “premium content from providers like Netflix, Hulu Plus, VUDU and others” as well as expanding access to new content options such as “a one-stop-shop for 3D content (via the 3D Zone).”¹⁵ Sony’s statements regarding its IP-TVs

¹¹ See 47 U.S.C. § 617(h)(1)(B); 47 C.F.R. § 14.5(a)(1)(ii).

¹² See CEA Waiver Petition at 8-9.

¹³ These apps include “AOL HD, CNBC Real-Time, Comcast Xfinity, ESPN ScoreCenter, Hulu Plus, MLB.TV, MTV Music Meter, NBA Game Time, Netflix, NHL Gamecenter, TIME TV, The Broadway Channel, Verizon Flex View and Wall Street Journal Live.” See Press Release, Samsung, Samsung Apps Becomes Preferred Smart TV Platform for Consumer, Content Providers and Developers (Jan. 9, 2012), http://www.samsung.com/us/news/newsPreviewRead.do?news_seq=20079 (“Samsung Smart TV Press Release”).

¹⁴ See, e.g., *VIERA Connect Apps Navigator – Popular Apps*, PANASONIC, http://panasonic.net/avc/viera/global/connect_apps/popularapps/1/ (last visited Sept. 7, 2012).

¹⁵ See Press Release, LG, LG Unveils Future of Home Entertainment With Innovative 2012 HDTV Line (Jan. 9, 2012), <http://www.lg.com/us/press-release/lg-unveils-future-of-home-entertainment-with-innovative-2012-hdtv-line> (“LG Press Release”); *Discover LG Smart TVs*, LG, <http://www.lg.com/us/tv-audio-video/discoverlgtvs/smarttv/index.jsp> (last visited Sept. 7, 2012).

also focus on video content.¹⁶ Similarly, Mitsubishi emphasizes “StreamTV,” which provides access to “high-def and 3D movies from VUDU.”¹⁷

The CEA Waiver Petition shows that in addition to their primary purpose of accessing video content, IP-TVs allow users to access and use ACS,¹⁸ including various forms of VoIP and electronic messaging services. Users are able to access these ACS features and functions through apps that are either pre-installed or downloaded and installed by the user.¹⁹

IP-DVPs: Similar to IP-TVs, the CEA Waiver Petition shows that the primary purpose of IP-DVPs (which include STBs) is to render and play back video content, rather than to provide access to ACS.²⁰ Marketing materials related to IP-DVPs emphasize that the focus of these devices is to improve the playback and rendering of video content to the television, whether from locally stored video content (*e.g.*, a Blu-ray disc or hard drive), by way of a video streaming app such as Netflix,²¹ or as provided by a pay television service.

¹⁶ Sony emphasizes “Sony Portal,” featuring “Video Unlimited” streaming service, which includes an “on-demand catalog of over 80,000 blockbuster movies and favorite TV shows” as well as apps for Netflix, Hulu Plus, Amazon Video, and YouTube. *See* Press Release, Sony, Sony’s New Bravia® TVs Offer Something for Everyone – Starting With the Most Vivid HDTV Picture Ever (Jan. 9, 2012), http://news.sel.sony.com/en/press_room/consumer/television/release/61371.html.

¹⁷ Press Release, Mitsubishi, Mitsubishi Electric Visual Solutions America Introduces 2011 Line-Up Featuring Massive 92-Inch 3D Home Cinema TV, at 3 (June 1, 2011), http://www.mitsubishi-tv.com/asset/file/press_release/MEVSA-2011TelevisionLine-Up.pdf.

¹⁸ *See* 47 U.S.C. § 617(h)(1)(A); 47 C.F.R. § 14.5(a)(1)(i).

¹⁹ *See, e.g.*, LG Press Release, *supra* note 15 (enhancing “the user Web browsing experience by incorporating HTML 5 and Flash”); *Discover Smart TV: Limitless Content*, LG, <http://www.lg.com/us/tv-audio-video/discoverlgtvs/smarttv/limitless-content.jsp> (last visited Sept. 7, 2012) (“LG Limitless Content”) (discussing the ability to connect with friends and family through apps such as Facebook); *VIERA® 42” Class ST30 Series Plasma HDTV with 3D (41.6” Diag.)*, PANASONIC, <http://shop.panasonic.com/shop/model/TC-P42ST30> (last visited Sept. 7, 2012) (mentioning, in addition to video programming access, access to ACS-like features); Samsung Smart TV Press Release, *supra* note 13 (discussing enhanced web browser functionality and ACS-like features).

²⁰ *See* 47 U.S.C. § 617(h)(1)(B); 47 C.F.R. § 14.5(a)(1)(ii).

²¹ *See, e.g.*, *Panasonic DMP-BD77 Blu-ray Player*, PANASONIC, <http://shop.panasonic.com/shop/model/DMP-BD77> (last visited Sept. 7, 2012) (“Panasonic DMP-BD77 Blu-ray Player”) (providing access to Netflix, CinemaNow, and VUDU to enable streaming of “movies, shows and other content”); Samsung, *3D Blu-ray*

In addition to their primary purpose of accessing video content, IP-DVPs are capable of providing users with access to ACS,²² including various forms of VoIP and electronic messaging services. Users are able to access ACS through apps either pre-installed or downloaded and installed by the user.²³ However, like IP-TVs, the Internet connectivity of IP-DVPs is primarily focused on enabling and improving the playback and rendering of video content through such Internet-based services as Netflix, YouTube, and Hulu Plus,²⁴ or the delivery of video-on-demand content from a pay television service such as DIRECTV.²⁵ Therefore, the requested class waiver satisfies the requirements of Section 716 of the Act and Section 14.5 of the Commission's rules.

The Examples Provided in the Supplement Do Not Describe the Primary Purpose of IP-TVs and STBs

The Supplement offers examples to support its "primary purpose" claim, but these examples fail to recognize that ACS apps represent a tiny fraction of the apps available over these devices and that the primary purpose of such devices remains the rendering and/or display of video content.

For example, in arguing that ACS is a co-primary purpose of IP-TVs, the Supplement cites an article that uses ACS functionality as a criterion to rank IP-TVs.²⁶ This article,

Disc™ Player (BD-D7500), SAMSUNG, <http://www.samsung.com/us/video/blu-ray-dvd/BD-D7500/ZA> (last visited Sept. 7, 2012) ("Samsung 3D Blu-ray Player") ("Samsung Smart Blu-ray Players allow you to easily search for movies, TV shows, explore Samsung apps and find many other types of new interactive content."); *Streaming Player*, SONY, <http://store.sony.com/webapp/wcs/stores/servlet/ProductDisplay?catalogId=10551&storeId=10151&langId=-1&productId=8198552921666382666> (last visited Sept. 7, 2012) ("Enjoy instant access to thousands of hit movies, TV shows, music choices, and online videos.").

²² See 47 U.S.C. § 617(h)(1)(A); 47 C.F.R. § 14.5(a)(1)(i).

²³ See, e.g., Panasonic DMP-BD77 Blu-ray Player, *supra* note 21 (providing access to an application platform which allows downloads that can provide ACS); Samsung 3D Blu-ray Player, *supra* note 21; *3D Blu-ray Disc Player*, SONY, <http://store.sony.com/webapp/wcs/stores/servlet/ProductDisplay?catalogId=10551&storeId=10151&langId=-1&productId=8198552921666291826> (last visited Mar. 19, 2012).

²⁴ See, e.g., *Model Guide for Samsung Apps, Blu-ray & DVD Players, BD-D7500*, SAMSUNG, <http://www.samsung.com/us/appstore/samsungappscompatibilityguide/BD-D7500/ZA> (last visited Sept. 7, 2012); LG Limitless Content, *supra* note 19.

²⁵ See, e.g., *DIRECTV On Demand*, DIRECTV, http://www.directv.com/DTVAPP/content/technology/on_demand (last visited Sept. 7, 2012).

²⁶ Supplement at 7.

however, does not represent the intentions or even the views of manufacturers, as it was written by a third party and appears on a third-party website. Moreover, the Supplement fails to note that the article also uses non-ACS features as criteria in ranking IP-TVs, such as the varied music and video streaming capabilities of the products ranked.²⁷

Similarly, the Supplement claims that consumers are increasingly using connected TVs to access ACS.²⁸ However, the webpage cited for this proposition in the Supplement actually indicates overwhelmingly that consumers use connected TVs to view video content.²⁹ The Supplement states that TV hardware is being designed for accessing ACS functionality.³⁰ However, the article cited in the Supplement to support this proposition focuses mainly on the video and music streaming capabilities of IP-TVs and even states that the reason for the QWERTY keyboard on the remotes for some IP-TVs is to enable the user to search and browse media content.³¹

The Supplement states that the offerings of Skype and other ACS providers that enable consumers to integrate ACS into TVs and Blu-Ray players demonstrate that ACS has become a primary purpose of such devices.³² However, the intentions of Skype and other ACS providers not affiliated with device manufacturers are irrelevant to the primary purpose determination for IP-TVs and IP-DVPs. The fact that Skype, a service provider, offers on its website information about the equipment needed to use its service on a TV screen more reasonably indicates that the TV was not initially designed for Skype.

Citing Yahoo! Connected TV, the Supplement also argues that Internet providers are offering ACS features for use on smart TVs in conjunction with video and television content and that this indicates that ACS is now a co-primary purpose of these IP-TVs.³³ Again, the Supplement fails to note the many non-ACS applications advertised, including Amazon, Blockbuster, CNBC, Tune-In Radio, NASA TV, Fandango, Revision 3, Twit,

²⁷ Jamie Carter, *Best Internet TV Platforms Compared*, TECHRADAR (Feb. 3, 2011), <http://www.techradar.com/news/television/best-internet-tv-platforms-compared-925680/page:1#articleContent>.

²⁸ Supplement at 7.

²⁹ Ryan W. Neal, *Infographic: We Want Our Connected TV*, BUSINESS 2 COMMUNITY (Aug. 14, 2012), <http://www.business2community.com/entertainment/infographic-we-want-our-connected-tv-0251627>.

³⁰ Supplement at 7.

³¹ Clint DeBoer, *Samsung Smart TV Video Review with the LED 8000 Series*, AUDIOHOLICS (Nov. 12, 2011), <http://www.audioholics.com/reviews/televisions/flat-panels/samsung-smart-tv-video-8000>.

³² Supplement at 8.

³³ *Id.*

Yahoo! News, Pandora, USA Today, Ebay, Showtime, Flickr, and CBS apps.³⁴ This demonstrates *not* that ACS is a co-primary purpose of Yahoo! Connected TVs, but that ACS is among the many applications available to users of the service.

In addition:

- Marketing by Best Buy, a consumer electronics retailer, is irrelevant to the question of the primary purpose of a device.³⁵ Even if Best Buy prominently describes ACS features in its guide on STBs (which it does not), Best Buy's statements do not meet the *ACS Order* standard, which requires consideration from the manufacturer's perspective.³⁶ In any event, the Supplement fails to note that Best Buy describes multiple capabilities of STBs in its guide, most of which (such as streaming movies from Netflix, CinemaNow, Hulu Plus, and other services; streaming music using Pandora; watching videos on YouTube; viewing photos on Flickr; and obtaining fantasy sports info and providing access to news, weather, and sports) are focused on the delivery of video content.³⁷
- The "Google Android STB" cited in the Supplement³⁸ is an "unbrand," apparently manufactured by Shenzhen Kimdecent Technology Ltd ("Kimdecent").³⁹ Information about this STB does not appear on the Kimdecent website, but an STB with similar characteristics is listed on that website, and its primary purpose is patently to play video.⁴⁰

³⁴ See *Yahoo! Connected TV: Movies, Shows, Internet On Demand*, YAHOO! (last visited Sept. 7, 2012), <http://connectedtv.yahoo.com/services/tv-widgets/>.

³⁵ Supplement at 7.

³⁶ See *ACS Order*, 26 FCC Rcd at 14634-35 ¶ 183.

³⁷ *What kind of content can I get?*, *Smart Set-Top Boxes*, BEST BUY, <http://www.bestbuy.com/site/Electronics-Promotions/Smart+Settop+Boxes/pcmcat275100050012.c?id=pcmcat275100050012> (last visited Sept. 7, 2012).

³⁸ Supplement at 6.

³⁹ *Buy Google Android 4.0 iCS Smart TV set top box 1080P HD Video Player*, ALIEXPRESS.COM, http://www.aliexpress.com/store/product/Google-Android-4-0-iCS-Smart-TV-set-top-box-1080P-HD-Video-Player/803232_494687309.html (last visited Sept. 7, 2012).

⁴⁰ See *Android 4.0 TV Box Internet TV player Cortex A9 CPU_Kimdecent*, KIMDECENT (last visited Sept. 7, 2012), <http://www.kimdecent.com/tvbox/49.html>. As discussed above, information not originating from the manufacturer is not dispositive of a device's primary purpose. However, the "Google Android STB" is described on the webpage cited by the Supplement as an "HD Video Player," providing some indication that playing videos is its primary purpose. Moreover, the first four specific apps mentioned in

- As Panasonic itself has stated in this proceeding, Panasonic IP-TVs are intended primarily for the provision of video content.⁴¹ This includes the ability to display high-definition and three-dimensional content, as well as the products' capability to display photos, provide access to news, weather, and sports information, and deliver traditional video programming.⁴² The promotional materials cited in the Supplement regarding ACS features do not include the manufacturer's website.⁴³
- Samsung Smart TVs⁴⁴ are intended for viewing traditional video programming and also support multiple streaming video and music applications, news and information applications, and photo-sharing applications.⁴⁵ The mere presence of a video camera on some Samsung TVs does not make the "primary purpose" of those TVs the provision of ACS.⁴⁶ The fact that Samsung advertises the ability to install apps, including Hulu Plus, AccuWeather.com, MLB.com, and others that cannot remotely be considered ACS, does not make the provision of ACS a primary purpose of the device. Nor does the capability of one model of Smart TV to receive updates more frequently than every three years indicate that the *typical*

the cited description are "YouTube, Hulu, Internet Radio, etc. Online video Playing," all of which are video- or entertainment-related and none of which is an ACS. Other features of this device include non-ACS applications for photo-sharing and viewing e-Books and PDF documents. *See supra* note 39.

⁴¹ *See* Comments of Panasonic, CG Docket No. 10-213, at 5, 6 (filed June 14, 2012).

⁴² *See* *Panasonic VIERA TC-P42ST30 42-Inch 1080p 3D Plasma HDTV*, AMAZON, http://www.amazon.com/Panasonic-VIERA-TC-P42ST30-42-Inch-Plasma/dp/B004M8SBPW/ref=dp_ob_title_ce (last visited Sept. 7, 2012); *Panasonic VIERA TC-L47WT50 47-Inch 1080p 240Hz 3D Full HD IPS LED-LCD TV*, AMAZON, <http://www.amazon.com/Panasonic-VIERA-TC-L47WT50-47-Inch-LED-LCD/dp/B00752RAWW/> (last visited Sept. 7, 2012); *Panasonic TC-P42ST30 – VIERA® 42" Class ST30 Series Plasma HDTV with 3D (41.6" Diag.) – Overview*, PANASONIC, <http://shop.panasonic.com/shop/model/TC-P42ST30?t=overview> (last visited Sept. 7, 2012); *Panasonic TC-L47WT50 – NEW! SMART VIERA® 47" Class WT50 Series Full HD 3D LED HDTV (46.9" Diag.) - Overview*, PANASONIC, <http://shop.panasonic.com/shop/model/TC-L47WT50> (last visited Sept. 7, 2012).

⁴³ Supplement at 8-9.

⁴⁴ *Id.* at 10-11.

⁴⁵ *Interactive Smart TV with Face Recognition*, SAMSUNG, <http://www.samsung.com/us/2012-smart-tv/> (last visited Sept. 7, 2012).

⁴⁶ Even if this camera is used for "video chat," as termed in the Supplement, it is far from clear that such a chat would be considered the form of ACS known as "interoperable video conferencing service," the definition of which is the subject of a pending rulemaking. *See ACS Order*, 26 FCC Rcd at 14684-88 ¶¶ 301-307.

product lifecycle is any more than the three years described in the CEA Waiver Petition.⁴⁷

- The Sony Internet TV cited in the Supplement⁴⁸ supports many applications for viewing Internet television and film content and browsing the web, in addition to its primary purpose of supporting traditional video programming.⁴⁹ Any ACS features advertised by Sony do not represent a primary purpose of the device.

Pursuant to Section 1.1206 of the Commission's rules,⁵⁰ this letter is being electronically filed with your office. Please let the undersigned know if you have any questions regarding this filing.

Respectfully submitted,

/s/ **Julie M. Kearney**

Julie M. Kearney

Vice President, Regulatory Affairs

⁴⁷ See Supplement at 12. As discussed in the CEA Waiver Petition at 7, the *ACS Order* provides that the product lifecycle for waiver purposes includes the development phase, See *ACS Order*, 26 FCC Rcd at 14638 ¶ 191, as well as the period of time in which the product is offered and marketed. Moreover, the upgrades to which the Supplement refers will not be available until 2013 and, once available, will not be offered for all Samsung TV models.

⁴⁸ Supplement at 12.

⁴⁹ See *id.* at 10-11.

⁵⁰ 47 C.F.R. § 1.1206.