

October 9, 2012

**VIA ELECTRONIC FILING**

Marlene H. Dortch, Secretary  
Federal Communications Commission  
445 12th Street, S.W.  
Washington, DC 20554

RE: Notice of *Ex Parte* Meeting  
**CG Docket No. 10-213; MB Docket No. 11-154**

Dear Ms. Dortch:

On Thursday, October 4, 2012, Jim House of the Telecommunications for the Deaf and Hard of Hearing, Inc. (TDI), Dr. Christian Vogler of the Technology Access Program (TAP) at Gallaudet University, Blake Reid and Jessica Lee of the Institute for Public Representation (IPR) at Georgetown Law, and Andrew Phillips of the National Association for the Deaf (NAD) (collectively, “the Consumer Groups and TAP”) met with General Counsel Sean Lev, Joel Kaufman, and Suzanne Tetreault of the Office of General Counsel (OGC), Steven Broeckaert, Jeffrey Neumann, Diana Sokolow of the Media Bureau, Karen Strauss, Deputy Chief, Consumers and Governmental Affairs Bureau (CGB), and Rosaline Crawford and Eliot Greenwald of the CGB Disability Rights Office to discuss the Entertainment Software Association’s (ESA) petition for waiver from advanced communications services (“ACS”) requirements<sup>1</sup> as well as the petition of the Consumer Electronics Association (“CEA”) for reconsideration of the IP Captioning Order.<sup>2</sup>

**The ESA ACS Waiver Petition**

The Consumer Groups and TAP explained that video games and gaming systems are increasingly being used primarily for communication and that it would be an injustice to grant the ESA’s extremely broad waiver request. The Twenty-First Century Communications and Accessibility Act of 2010 (CVAA) contains no language that suggests any intention by Congress to exclude video games from the advanced communications services (ACS) rules. Instead, Congress explained that a vital purpose of the CVAA is to ensure that individuals with disabilities have access to emerging Internet Protocol-based communication.<sup>3</sup> Surely, if Congress intended to exempt such a large category of products/services, there would be express

<sup>1</sup> Entertainment Software Association Petition for Waiver, CG Docket No. 10-213 (filed March 21, 2012) (“*ESA Petition for Waiver*”).

<sup>2</sup> Consumer Electronics Association Petition for Reconsideration, MB Docket No. 11-154 (filed Apr. 30, 2012) (“*CEA Petition for Reconsideration*”).

<sup>3</sup> See 47 U.S.C. § 255; S. Rep. No. 111–386, at 1 (2010) (“Senate Report”); H.R. Rep. No. 111-563, at 1 (2010) (“House Report”).

language indicating such exemption. In fact, upon denying the ESA's request to exempt "video game offerings" from the ACS rules during the ACS rulemaking process, the Commission explained that "if Congress had intended to exempt services or equipment, it would have done so explicitly."<sup>4</sup> Instead, in an attempt to avoid following the rules under the CVAA, the ESA is misusing the CVAA's limited primary purpose waiver provision to collectively exclude people with disabilities from game play.

The Consumer Groups and TAP encouraged the Commission to consider Commissioner Copps's statement in the ACS R&O cautioning against granting waiver requests in an area where the exception could swallow the rule.<sup>5</sup> Commissioner Copps noted that the convergence of multiple services into single electronic devices is now the norm and actually used gaming devices as an example as they increasingly have functionality that looks like ACS.<sup>6</sup> He stressed that when considering these waiver requests, the Commission needs to be mindful of Congress' intent that people with disabilities have access to new technologies and services.<sup>7</sup>

The Consumer Groups and TAP explained that ACS is without doubt a co-primary purpose in numerous games and gaming platforms. We also discussed our August 28th ex parte filing where we provided examples of video games and gaming systems where ACS is clearly a co-primary purpose.<sup>8</sup> Unfortunately, the ESA has not provided specific examples to support their petition. To grant such a broad waiver for "game play" would blatantly include many games and gaming platforms where ACS is a co-primary purpose, and would unfairly leave many of these inaccessible to users with disabilities.

The Consumer Groups and TAP were asked about specific situations where games and gaming systems were designed to be used for ACS. We explained that many games and gaming systems have VoIP based telecommunications as well as text based communications that are intended to be used for everyday communication. For instance, Dr. Vogler explained that while he was a graduate student, he and many of his classmates would play games together in the computer lab and more than half of the time they would use these gaming platforms to discuss their research via text based communication. We also mentioned a study which found that players using communication tools in multiplayer games were far more likely to use them for social conversation ("socio-emotional" topics) rather than simply talking about how to play the game ("task content").<sup>9</sup> We believe that the use of games and gaming systems for social purposes has only increased given the advances in ACS functionalities offered to gaming users.

---

<sup>4</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*, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 14557, Note #537 (2011) ("Order").

<sup>5</sup> Order at Statement of Commissioner Michael J. Copps.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> See RERC-TA Notice of *Ex Parte* Communication in CG Docket No. 10-213 (Aug 28, 2012), <http://apps.fcc.gov/ecfs/document/view?id=7022008367> ("*RERC Ex Parte*").

<sup>9</sup> Jorge Peña and Jeffrey T. Hancock, An Analysis of Socioemotional and Task Communication in Online Multiplayer Video Games, *Communication Research February 2006* 33: 92-109.

As discussed in our August 28th *ex parte*,<sup>10</sup> our research shows that this communicative use is not incidental to gaming, but rather an intended function of video games, services, and consoles, evidenced by the variety of games and gaming systems being marketed for their ACS components. In fact, modern games and gaming platforms with IP based multi-player components don't just include ACS components which are being used for everyday communication, but are specifically designed and marketed as a communication medium.

The Consumer Groups and TAP responded to industry concerns over making ACS components in games/gaming systems accessible, reminding the Commission that the CVAA's achievability test is the appropriate vehicle by which to ensure that the provision of communication access to people with disabilities would not be overly burdensome for the industry. We offered a hypothetical example of a game centering on voice communication via VoIP between players that could also integrate text messaging functionality to allow deaf and hard of hearing users to communicate with each other and other users. We noted, however, that it is not the role of consumers to specify precisely how developers should facilitate accessibility in their communications technologies, but that universal design principles should guide the industry in developing accessibility solutions that fit their products.

The Consumer Groups and TAP also discussed section 716(h) of the CVAA and pointed to Congress's explanation of where a primary purpose exception might be used – “a device designed for a purpose unrelated to accessing advanced communications might also provide, on incidental basis, access to such services.”<sup>11</sup> This language demonstrates that Congress intended to set a very high bar for primary purpose waivers. The ESA cannot reasonably contend that every game and gaming system that includes ACS functionality was designed for a purpose wholly unrelated to ACS and that such use is merely incidental.

The Consumer Groups and TAP noted that it is incumbent upon the ESA to make recommendations and provide supporting examples that distinguish between gaming products and services that include ACS as a primary purpose and those that include ACS only incidentally. Thus far, the ESA has not provided substantive examples to support their petition for waiver, resting on the tautological conclusion that “video gaming” products are inherently not designed for ACS purposes simply because they are not labeled as such. We noted several examples of where ACS functionality is not incidental and is at least a co-primary purpose. We would be happy to evaluate specific examples presented by the ESA if it were to provide them. But it cannot be incumbent on the public or the Commission to prove that ACS functionality built into every video gaming product and service is a primary purpose of the product or service rather than an incidental function. The ESA is in a better position to identify appropriately narrow classes that clearly do not extend to products in which ACS was clearly intended to be a primary or co-primary purpose. Such waiver petitions must be supported with examples of the common products that would fall within the scope of the waivers.

Moreover, the Consumer Groups and TAP expressed deep concern with the lengths of the ESA's waiver requests – eight years or more with the possibility of renewal for all three classes. The ESA is essentially asking for a permanent waiver, implying that they have no plans to ever

---

<sup>10</sup> *RERC Ex Parte*.

<sup>11</sup> Senate Report at 8; House Report at 26.

make ACS functionality in video gaming products and services accessible. Eight years is an eternity in the world of advanced communications technology and the ESA's proposed three classes would cover an unimaginable scope of video gaming products and services, potentially ensuring that the next critical multi-function "convergence" device with built-in ACS features will be inaccessible to tens of millions of Americans simply because it can be conceptualized as a "video game." The designed-for and marketed-for purposes of convergence products continuously change even after the devices are released, thanks to groundbreaking software updates. For example, when the iPhone first came out, nobody imagined that native third-party applications would become its "killer feature." In fact, Apple initially intended the iPhone to allow only web applications using the browser,<sup>12</sup> and Apple CEO Steve Jobs initially resisted allowing native third-party applications.<sup>13</sup> Today, in contrast, arguably the availability of third-party apps, including numerous multiplayer video games with ACS functionality, is what drives iPhone sales. We cannot even begin to imagine how many more video gaming products and services will be designed primarily for ACS purposes in the near future—much less the next eight years.

Ultimately, if the ESA feels that it is too burdensome to provide access to ACS in individual products or services, it should make a case under the achievability test. The primary purpose test should only allow for rare exceptions to the ACS rules where the products share common characteristics that guarantee that the included ACS functionality is only incidental. To allow product makers to use the primary purpose test to exempt such broad categories would be at odds with Congress's intent in enacting the CVAA and permit the exemption to swallow the rule.

### **The CEA IP Captioning Petition for Reconsideration**

The Consumer Groups and TAP also raised concerns with the CEA's petition for reconsideration of the IP Captioning Order.<sup>14</sup> We stressed that the Commission correctly determined the scope of apparatuses that fall under the CVAA in the order. Any apparatus that is capable of video playback is necessarily designed for playback of video programming. The term "video programming" as opposed to "video" merely distinguishes based on qualitative aspects of a video. Thus designed-for and capable-of should be treated the same. We noted that CEA's concerns appeared to be strictly related to digital cameras and camcorders and could be more appropriately addressed in the context of an individualized waiver petition specifically describing why the unique characteristics of the video programming players that CEA's members include on such devices make integrating closed captioning functionality unwarranted.

We also discussed removable media players and the need to make sure that these players can support closed captions. The inability to view closed captions included on disc-based movies poses a serious problem for deaf and hard of hearing people. We noted the Commission's conclusion in the IP captioning order that the Subtitles for the Deaf and Hard of Hearing ("SDH") sometimes supported by removable media players are not an adequate substitute for

---

<sup>12</sup> iPhone to Support Third-Party Web 2.0 Applications. Online: <http://www.apple.com/pr/library/2007/06/11iPhone-to-Support-Third-Party-Web-2-0-Applications.html>.

<sup>13</sup> Steve Jobs resisted third-party apps on iPhone, biography reveals. Online: <http://www.guardian.co.uk/technology/appsblog/2011/oct/24/steve-jobs-apps-iphone>.

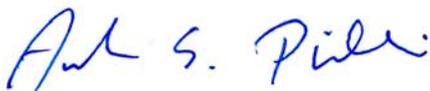
<sup>14</sup> *CEA Petition for Reconsideration*.

closed captions.<sup>15</sup> Closed captions permit users to adjust font, size, color and other features that are critically important to deaf and hard of hearing individuals who also have vision impairments to be able to view captions. These controls are the equivalent of being able to adjust volume, bass, or treble on one's television, and are unavailable for SDH. We also noted that many DVDs, especially from the late 1990s and early 2000s include closed captions and these closed captions cannot be utilized on an HDMI connected player that does not have its own closed captioning decoder.

Finally, we noted that many Blu-ray players also support the playback of IP-delivered programming from services like Netflix or Hulu and must support closed captioning for video delivered via those services. Congress cannot have intended the absurd result that a video would be accessible through the provision of closed captions when delivered via IP to a consumer's Blu-ray player, but that the very same player would prevent the very same consumer from viewing the same movie with the same closed captions simply because the video is distributed on a Blu-ray disc. The CVAA plainly intends that all devices capable of video playback be equipped with closed captioning functionality, and we urged the Commission to reject CEA's petition accordingly.

We appreciated the opportunity to meet with OGC, MB, CGB and the Disability Rights Office to discuss these important issues.

Respectfully submitted,



Andrew S. Phillips, Esq.  
Policy Counsel

cc: Sean Lev (OGC)  
Joel Kaufman (OGC)  
Suzanne Tetreault (OGC)  
Steven Broeckaert (MB)  
Jeffrey Neumann (MB)  
Diana Sokolow (MB)  
Karen Strauss (CGB)  
Rosaline Crawford (CGB/DRO)  
Eliot Greenwald (CGB/DRO)

---

<sup>15</sup> See Closed Captioning of Internet Protocol-Delivered Video Programming: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010, MB Docket No. 11-154, 27 FCC Rcd. 787, 851, ¶ 100 (Jan. 13, 2012) ("*IP Captioning Order*").