

April 5, 2013

Ms. Marlene Dortch
Secretary
Federal Communications Commission
445 12 Street, SW
Washington, DC 20554

Re: CG Docket No. 10-145 (Implementation of CVAA -- Section 718)

On April 4, Paula Boyd and Alex Li of Microsoft Corporation and the undersigned met with Karen Peltz Strauss and Rosaline Crawford of the Consumer and Government Affairs Bureau and Walter Johnston and James Miller of the Office of Engineering and Technology. In addition, Ms. Boyd and the undersigned met on April 4 with Lyle Elder of Chairman Genachowski's office; and Matthew Berry, chief of staff to Commissioner Pai; and on April 5 we met with Alex Hoehn-Saric of Commissioner Rosenworcel's office. During the meetings we discussed mobile browsers and how they interact with websites, emphasizing that browsers are not conduits that simply pass through the content of a website. We also discussed the statutory construction of Section 718 which does not give the Commission direct authority over mobile browsers.

First, we highlighted that in some instances websites or website features are blocked for all users. In the context of discussing how browsers interact with websites, we explained that a browser is a software application that enables users to access, retrieve and view or render web content. When a user points a browser at a website, the browser goes to the website and identifies the markup language and other features of the website. Most browsers can recognize the content and features of most websites. But there are always gaps, because all browsers have limitations in the type of web content that they can render, and in that case the website feature is *not* enabled. These gaps can affect all consumers and do not uniquely disenfranchise persons with disabilities. For example, some browsers do not work with Flash, which results in the browser's inability to render the website for all users not just disabled users; and browsers at times will block access by all users to a website for security reasons.

Second, we noted that websites employ multiple solutions to enable access by disabled consumers. These solutions are based on final standards and draft standards and vary in their implementations of these standards. Given the lack of a standardized solution for enabling accessible websites, browsers will have gaps in incorporating all solutions. These gaps, for example, can result when browser developers focusing on the customer experience pursue a new accessibility solution rather than continuing to maintain a solution that is declining in consumer interest and use. Requiring a browser to incorporate all solutions is likely to require more

memory, processing capability and battery life in the device. Browsers and websites are in a constant state of flux, such that updating the browser to render every new website feature has been a never-ending process, and that is likely to continue. We concluded this discussion by emphasizing these points: (i) the lack of a standardized web solution creates an insurmountable challenge; (ii) if a website feature cannot be read, then the browser cannot enable the feature; and (iii) such exclusion of access to web content does not uniquely disenfranchise any person with disabilities because people without disabilities would also fail to access the same website content.

In addition, we explained that because there is no precise and universal standard for website developers to enable accessible solutions, the experience between a browser and a website is, and will be, very different than what the Commission encountered in implementing the closed captioning requirement in which video programming distributors could rely on a format developed by the Society for Motion Pictures and Television Engineers (“SMPTE”). Browsers cannot solve the problem of websites using many varieties of solutions.

We then turned to a discussion of the Commission’s legal authority over browsers. In Section 718 of the CVAA, Congress gave the FCC express authority to reach manufacturers and carriers which install or provide browsers on smartphones. Section 718 did not confer Commission jurisdiction over browsers and it makes clear that manufacturers and providers are not required to make website content accessible.¹ We emphasized that due to the nature of how browsers operate, the Commission should not impose an obligation to render or pass-through all accessibility features of a website. Many valid and customer-centric reasons drive browsers to not render or enable all website features. Similarly, imposing an obligation to not impair, impede, interfere with or “do no harm” to website features also would be ill advised, since if a browser is not rendering Flash or Java in its presentation of the website to the user, to cite an example, it could be interpreted as “impeding or impairing or harming” that feature of the website.

We also explained that it is no answer to say that a “do no harm” requirement includes a “not achievable” element. First, not achievable is a defense to a complaint, and the Commission should not impose obligations that it knows in advance cannot be met due to the inherent and immutable technical nature of how a system operates. Second, for any particular website feature, establishing whether it is or is not achievable would be a tremendous burden for Commission staff and a browser company, and ignores that of necessity browser engineers view the entire

¹ During our April 5 meeting, we also made the point that a free-standing browser is not an advanced communications service (“ACS”) nor is it equipment used in connection with ACS. Accordingly, the Commission’s sole authority to pursue the accessibility of browsers resides in Section 718, and as noted in that context Commission authority is limited to manufacturers and wireless providers. For this reason, the provisions in Section 716(e)(1)(B) are inapplicable to free-standing browsers.

COVINGTON

COVINGTON & BURLING LLP

sweep of the web with the knowledge that making all the features and capabilities on all websites available to be rendered at one time is currently not possible.

We urge the Commission to adopt the proposed rules set forth in the Further Notice in the above-captioned proceeding, which for convenience is attached. The Commission should not use the Order to expand upon the four corners of the statute Congress wrote. We further ask the Commission to recognize in the Order that browsers cannot make up for the lack of standardized website solutions for accessibility; the end result of this non-standard ecosystem is that all browsers will not be able to render all the varieties of accessible solutions used by website developers. Finally, we further recommend that the Commission make clear in the Order that a browser that operates in a manner that does not uniquely disenfranchise persons with disabilities is consistent with the Commission's rules.

Please direct any questions to the undersigned.

Sincerely,



Gerard J. Waldron

cc: Lyle Elder
Matthew Berry
Alex Hoehn-Saric
Karen Peltz Strauss
Rosaline Crawford
Walter Jacobson
James Miller

Proposed Rule Implementing Sec. 718 of the CVAA (from Appendix C)

§ 14.60 Internet Browsers built into Mobile Phones.

(a) Accessibility- If a manufacturer of a telephone used with public mobile services (as such term is defined in Section 710(b)(4)(B) of the Act) includes an Internet browser in such telephone, or if a provider of mobile service arranges for the inclusion of a browser in telephones to sell to customers, the manufacturer or provider shall ensure that the functions of the included browser (including the ability to launch the browser) are accessible to and usable by individuals who are blind or have a visual impairment, unless doing so is not achievable, except that this subpart shall not impose any requirement on such manufacturer or provider--

(1) to make accessible or usable any Internet browser other than a browser that such manufacturer or provider includes or arranges to include in the telephone; or

(2) to make Internet content, applications, or services accessible or usable (other than enabling individuals with disabilities to use an included browser to access such content, applications, or services).

(b) Industry Flexibility- A manufacturer or provider may satisfy the requirements of this subpart with respect to such telephone or services by--

(1) ensuring that the telephone or services that such manufacture or provider offers is accessible to and usable by individuals with disabilities without the use of third party applications, peripheral devices, software, hardware, or customer premises equipment; or

(2) using third party applications, peripheral devices, software, hardware, or customer premises equipment that is available to the consumer at nominal cost and that individuals with disabilities can access.