



September 10, 2013

**Via ECFS**

Ms. Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW  
Washington, DC 20554

Re: *Accessibility of User Interfaces, and Video Programming Guides and Menus*, MB  
Docket No. 12-108; Written *Ex Parte* Presentation

Dear Ms. Dortch:

DISH Network L.L.C. and EchoStar Technologies L.L.C. submit this letter in response to the September 3, 2013 letter filed by the American Foundation for the Blind (“AFB Letter”).<sup>1</sup> Specifically, we address statements made in the AFB Letter regarding the standard for asserting the “achievability” defense in response to a complaint alleging a violation of Section 204 or 205 of the Twenty-First Century Communications and Video Accessibility Act of 2010 (“CVAA”).<sup>2</sup>

In the *Notice*, the Commission proposed to adopt an approach to “achievability” that is “informed by the analysis in the *ACS Order*.”<sup>3</sup> The AFB Letter strays too far afield in suggesting that a manufacturer can prevail in a complaint only if it can demonstrate that it makes an array of accessible options available at varying price points and that each of the other achievability factors is satisfied.<sup>4</sup> In contrast, the *ACS Order* states that “covered entities generally need not consider what is achievable with respect to every product, so long as the entity offers consumers with the full range of disabilities meaningful choices through a range of accessible products with varying degrees of functionality and features, at differing price points.”<sup>5</sup> Moreover, if the entity is attempting to demonstrate that accessibility is not achievable, the *ACS Order* provides only that the Commission will weigh each of the four achievability factors equally, not that

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<sup>1</sup> Letter from Mark Richert, American Foundation for the Blind, to Marlene Dortch, FCC, MB Docket No. 12-108, at 2 (Sept. 3, 2013) (“AFB Letter”).

<sup>2</sup> Pub. L. No. 111-260, §§ 204-05, 124 Stat. 2751, 2773-76 (2010) (“CVAA”). *See also* Amendment of Twenty-First Century Communications and Video Accessibility Act of 2010, Pub. L. No. 111-265, 124 Stat. 2795 (2010).

<sup>3</sup> *Accessibility of User Interfaces, and Video Programming Guides and Menus*, Notice of Proposed Rulemaking, 28 FCC Rcd 8506, 8523 ¶ 39 (2013) (“*Notice*”) (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*, 26 FCC Rcd 14557, 14610-19, ¶¶ 127-148 (2011) (“*ACS Order*”).

<sup>4</sup> *See* AFB Letter at 2.

<sup>5</sup> *ACS Order*, 26 FCC Rcd at 14617, ¶ 142.

entities must satisfy all four of the factors to prevail.<sup>6</sup> The Commission should reject the approach to “achievability” proposed in the AFB Letter to the extent it is inconsistent with the analysis in the *ACS Order*,<sup>7</sup> because such approach would establish a higher threshold than is appropriate under the CVAA and would create uncertainty for entities who must comply with the regulations.

Further, requiring an entity to conduct an achievability analysis for every one of its products, even though the entity already offers an appropriate selection of accessible devices, would not afford entities flexibility as contemplated in the CVAA<sup>8</sup> and could potentially discourage innovation. Instead, the Commission should allow covered entities to determine in a commercially reasonable manner how to ensure that an appropriate selection of accessible navigation devices is available to blind and visually impaired individuals.<sup>9</sup> This approach would be consistent with the Commission’s implementation of product functionality requirements in other accessibility proceedings both implementing and pre-dating enactment of the CVAA.<sup>10</sup>

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<sup>6</sup> See *id.* at 14610-19, ¶¶ 127-148; see also *Notice*, 28 FCC Rcd at 8522, ¶ 39 (“As the Commission has done in other contexts implementing the CVAA, we tentatively conclude that we will weigh each of the four factors equally and evaluate achievability on a case-by-case basis.”).

<sup>7</sup> Unlike the rules adopted in the *ACS Order*, the focus of the rules promulgated in this proceeding is access by blind and visually impaired individuals.

<sup>8</sup> See CVAA § 205(b)(5) (directing the Commission to permit the entity providing the navigation device maximum flexibility in the selection of the required mechanism for activating closed captioning); *id.* § 204(c) (permitting entities to comply with the accessibility requirements through “alternate means”).

<sup>9</sup> Letter from Alison Minea and Hadass Kogan, DISH Network, and John Card II, EchoStar Technologies, to Marlene Dortch, FCC, MB Docket No. 12-108, at 4 (filed Aug. 21, 2013).

<sup>10</sup> See *id.*; see also *ACS Order*, 26 FCC Rcd at 14618, ¶ 145 (declining to require covered entities to include a fully accessible option in each class of devices they offer); *Amendment of the Commission’s Rules Governing Hearing Aid-Compatible Mobile Handsets et al.*, First Report and Order, 23 FCC Rcd 3406, 3426, ¶ 51 (2008) (affording covered entities flexibility to define their product levels for purposes of offering compliant handsets with differing levels of functionality).

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Pursuant to Section 1.1206 of the Commission's rules,<sup>11</sup> this *ex parte* submission is being filed for inclusion in the public record of the above-referenced proceeding.

Respectfully submitted,

/s/ Alison A. Minea

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<sup>11</sup> 47 C.F. R. § 1.1206.