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
	)	
Coalition of E-Reader Manufacturers' Petition for Class Waiver of Sections 716 and 717 of the Communications Act and Part 14 of the Commission's Rules Requiring Access to Advanced Communications Services (ACS) and Equipment by People with Disabilities	)	

ORDER

Adopted: January 28, 2014 **Released: January 28, 2014**

By the Acting Chief, Consumer and Governmental Affairs Bureau:

I. INTRODUCTION

1. The Consumer and Governmental Affairs Bureau (CGB) of the Federal Communications Commission (FCC or Commission) grants a waiver from the Commission's advanced communications services (ACS) accessibility rules[1] to a distinct, narrow class of e-readers.[2] Although capable of accessing ACS (such as e-mail), we conclude that this narrow class of e-readers is designed primarily for reading text-based digital works, not for ACS. Given the swift pace at which technologies are evolving and the expanding role of ACS in electronic devices, the waiver will expire on January 28, 2015.

II. BACKGROUND

2. On October 8, 2010, President Obama signed the Twenty-First Century Communications and Video Accessibility Act of 2010 (CVAA) into law.[3] One year later, on October 7, 2011, the Commission adopted a Report and Order implementing section 716 of the Act,[4] which was added by the

[1] 47 C.F.R. Part 14.

[2] CGB takes this action pursuant to its delegated authority. *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 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 1966; Accessible Mobile Phone Options for People who are Blind, Deaf-Blind, or Have Low Vision*, CG Docket No. 10-213, WT Docket No. 96-198, CG Docket No. 10-145, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 14557, 14566, 14640-14641, ¶¶ 19, 197 (2011) (*ACS Report and Order*) (delegating to CGB the authority to act upon all waiver requests).

[3] Pub. L. No. 111-260, 124 Stat. 2751 (2010), *amended by* Pub. L. No. 111-265, 124 Stat. 2795 (2010) (making technical corrections).

[4] 47 U.S.C. § 617.

CVAA and has required ACS and equipment used for ACS[5] to be accessible to and usable by individuals with disabilities, if achievable, since October 8, 2013.[6] The Commission also adopted rules to implement the recordkeeping and enforcement provisions of section 717 of the Act,[7] which apply to entities that are subject to sections 255, 716, and 718 of the Act.[8]

3. Pursuant to section 716(h)(1) of the Act,[9] the Commission may grant waivers of the ACS requirements for multipurpose equipment or services or classes of multipurpose equipment or services that are capable of accessing ACS, but are nonetheless designed primarily for purposes other than using ACS.[10] In instances where equipment and services may have multiple primary or co-primary purposes, waivers may not be warranted.[11] In conducting a waiver analysis, the rules provide for a case-by-case examination of whether the equipment is marketed for its ACS features or functions.[12] In order to make this determination, the Commission must consider "whether the ACS functionality or feature is suggested to consumers as a reason for purchasing, installing, downloading, or accessing the equipment or service."[13] The Commission may also consider the manufacturer's market research and the usage trends of similar equipment or services in order to determine whether a manufacturer or provider designed the equipment or service primarily for purposes other than ACS.[14] The following factors may be relevant to a primary purpose waiver determination: whether the ACS functionality is designed to be operable outside of other functions or aids other functions; the impact that the removal of the ACS feature has on the primary purpose for which the equipment or services is claimed to be designed; and an examination of waivers for similar products or services.[15] In addition to considering these various factors when examining a waiver request, the Commission must utilize its general waiver standard, which requires

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[5] ACS is defined as interconnected voice over Internet protocol (VoIP) service; non-interconnected VoIP service; electronic messaging service, such as e-mail, instant messaging, and SMS text messaging; and interoperable video conferencing service. 47 U.S.C. § 153(1); 47 C.F.R. § 14.10(c).

[6] *ACS Report and Order*, 26 FCC Rcd 14557. *See also* 47 C.F.R. § 14.20. Specifically, the ACS rules apply to models or versions of products and services that are introduced into the market or upgraded on or after October 8, 2013. *ACS Report and Order*, 26 FCC Rcd at 14609, ¶¶ 124-125.

[7] 47 U.S.C. § 618.

[8] 47 U.S.C. §§ 255, 617 and 619. *See ACS Report and Order*, 26 FCC Rcd at 14650-14677, ¶¶ 219-278.

[9] 47 U.S.C. § 617(h).

[10] *ACS Report and Order*, 26 FCC Rcd at 14634, ¶ 181. *See also* 47 C.F.R. § 14.5.

[11] *ACS Report and Order*, 26 FCC Rcd at 14635, ¶ 184 (offering as an example of equipment or services that have multiple primary or co-primary purposes, smartphones that are designed for voice communications, text messaging, e-mail, web browsing, video chat, digital video recording, mobile hotspot connectivity, and several other purposes). In other words, multipurpose equipment or services that are capable of accessing ACS and are designed primarily or co-primarily for ACS, do not qualify for a waiver under this provision. 47 U.S.C. § 617(h)(1); 47 C.F.R. § 14.5(a)(1). A product or service may have co-primary purposes when it contains multiple features and functions. Conversely, as noted in the *ACS Report and Order*, the House and Senate Reports explain that "a device designed for a purpose unrelated to accessing advanced communications might also provide, on an incidental basis, access to such services. In this case, the Commission may find that to promote technological innovation the accessibility requirements need not apply." *ACS Report and Order*, 26 FCC Rcd at 14634, ¶ 181, *citing* H.R. Rep. No. 111-563 at 26 (2010) (House Report); S. Rep. No. 111-386 at 8 (2010) (Senate Report).

[12] *ACS Report and Order*, 26 FCC Rcd at 14634, 14640, ¶¶ 182, 196. *See also* 47 C.F.R. § 14.5(a)(2)(ii).

[13] *ACS Report and Order*, 26 FCC Rcd at 14635, ¶ 185 (footnote omitted).

[14] *ACS Report and Order*, 26 FCC Rcd at 14635, ¶ 183.

[15] *ACS Report and Order*, 26 FCC Rcd at 14636, ¶186.

good cause to waive the rules, and a showing that the particular facts of the petition make compliance with the relevant requirements inconsistent with the public interest.[16]

4. The Commission may entertain a waiver for equipment and services individually or as a class, and may limit the time of its coverage, with or without a provision for renewal.[17] The Commission will exercise its authority to grant class waivers, which apply to more than one piece of equipment or more than one service, in instances in which classes are carefully defined and the equipment or services share common defining characteristics.[18] In addition, the Commission will examine the extent to which the petitioner has explained in detail the expected lifecycle of the equipment or services that are part of the class.[19] Substantial upgrades are considered new products or services for the purpose of this waiver analysis.[20] For products and services already under development *after* a class waiver expires, the achievability analysis may take into consideration the developmental stage of the product and the effort and expense needed to achieve accessibility at that point in the developmental stage.[21] To the extent a petitioner seeks a class waiver for multiple generations of similar equipment and services, the Commission will examine the justification for the waiver extending through the lifecycle of each discrete generation.[22] The Commission will take a careful look at industry developments to determine whether any extensions are justified.

5. All products and services covered by a class waiver that are introduced into the market while the waiver is in effect will ordinarily be subject to the waiver for the duration of the life of those particular products or services – *i.e.*, for as long as those particular products or services are sold.[23] For example, if a particular model covered by a class waiver were introduced to the public on the day before the expiration of the waiver period, then all products of that particular model that are sold from that point forward would be covered by the waiver.[24]

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[16] *ACS Report and Order*, 26 FCC Rcd at 14637, ¶ 188, *citing* 47 C.F.R. § 1.3; *Northeast Cellular Telephone Co., L.P. v. FCC*, 897 F. 2d 1164, 1166 (D.C. Cir. 1990) (*citing WAIT Radio v. FCC*, 418 F. 2d 1153, 1159 (D.C. Cir. 1969).

[17] *ACS Report and Order*, 26 FCC Rcd at 14638-39, ¶ 192. *See also* 47 C.F.R. § 14.5(c).

[18] *ACS Report and Order*, 26 FCC Rcd at 14639, ¶ 193. *See also* 47 C.F.R. § 14.5(b).

[19] *ACS Report and Order*, 26 FCC Rcd at 14639-40, ¶ 194. *See also* 47 C.F.R. § 14.5(c)(2).

[20] *ACS Report and Order*, 26 FCC Rcd at 14639, ¶ 192. *See also id*. at 14609, ¶ 124 ("Natural opportunities to assess or reassess the achievability of accessibility may include, for example, the redesign of a product model or service, new versions of software, upgrades to existing features or functionalities, significant rebundling or unbundling of product and service packages, or any other significant modification that may require redesign.").

[21] *ACS Report and Order*, 26 FCC Rcd at 14640, ¶ 194. *See also* 47 C.F.R. § 14.5(c)(2).

[22] *ACS Report and Order*, 26 FCC Rcd at 14640, ¶ 195.

[23] *ACS Report and Order*, 26 FCC Rcd at 14640, ¶ 194. *See also* 47 C.F.R. § 14.5(c)(2).

[24] A new waiver would be required if a substantial upgrade is made that changes the nature of the product or service. *See ACS Report and Order,* 26 FCC Rcd at 14639, ¶ 192. *See also 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, CEA, NCTA, ESA, Petitions for Class Waivers of Sections 716 and 717 of the Communications Act and Part 14 of the Commission's Rules Requiring Access to Advanced Communications Services (ACS) and Equipment by People with Disabilities*, Order, 27 FCC Rcd 12970, 12973, ¶ 5 (2012) (*CEA/NCTA/ESA Waiver Order*).

III. THE COALITION PETITION

6. *Background.* On May 16, 2013, a Coalition of E-Reader Manufacturers (the Coalition)[25] filed a request for a waiver of the ACS requirements contained in sections 716 and 717 of the Act,[26] and Part 14 of the Commission's rules,[27] for a narrow class of e-readers.[28] The Coalition later supplemented its Petition on July 17, 2013.[29] On August 1, 2013, the Commission released a Public Notice seeking comment on the Coalition Petition.[30] On October 22, 2013, the Commission granted a temporary waiver for the requested class of equipment until January 28, 2014, to enable the Commission to evaluate the merits of the waiver request and to determine whether a grant or denial would be consistent with the Commission's rules.[31]

7. The Coalition requests a permanent waiver of the accessibility requirements for equipment used for ACS for a single class of e-readers that it states are mobile electronic devices "designed, marketed and used primarily for the purpose of reading text-based digital documents, including e-books and periodicals."[32] The Coalition explains that tablets and other general purpose devices, such as personal computers, that are designed, marketed and used routinely to engage in online ACS activities, such as e-mail, instant messaging, VoIP, and video conferencing, would not be covered by the waiver, if granted.[33] To distinguish the class of e-readers that would be subject to the waiver from such general purpose devices, the Coalition proposes that the waiver apply only to devices that have the following features:

(1) The device has no LCD screen.

(2) The device has no camera.

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[25] Petition for Waiver, CG Docket No. 10-213, filed May 16, 2013 (Coalition Petition). The Coalition consists of Amazon.com, Inc., Kobo Inc., and Sony Electronics Inc.

[26] 47 U.S.C. §§ 617 and 618.

[27] 47 C.F.R. §§ 14.1 *et seq*.

[28] *See, generally,* Coalition Petition.

[29] Letter from Gerald J. Waldron, Counsel for Amazon.com, Inc.; Kobo Inc.; and Sony Electronics Inc., to Marlene Dortch, Secretary, FCC (July 17, 2013) (Coalition July 17 *Ex Parte* Letter).

[30] *Request for Comment: Petition for Class Waiver of Commission's Rules for Access to Advanced Communications Services and equipment by People with Disabilities,* CG Docket 10-213, Public Notice, 28 FCC Rcd 11147 (CGB 2013).

[31] *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/Coalition of E-Reader Manufacturers Petition for Class Waiver, et al.,* CG Docket No. 10-213, 28 FCC Rcd 14598 (October 22, 2013) (*Temporary Waiver Order*).

[32] Coalition Petition at 2; *see also id.* at 12, n.41 (seeking a waiver "that extends across multiple generations"). The Coalition offers the following as examples of e-readers that would fall into the waived class: the Amazon Kindle E-Reader, the Sony Reader, and the Kobo Glo. *Id.* at 3. *See also* Reply Comments of Coalition of E-Reader Manufacturers at 9-11 (September 30, 2013) (Coalition Reply Comments); Letter from Gerald J. Waldron, Counsel for Amazon.com, Inc.; Kobo Inc.; and Sony Electronics Inc., to Marlene Dortch, Secretary, FCC, at 3 (Sept. 20, 2013) (Coalition Sept. 20 *Ex Parte* Letter); Letter from Gerald J. Waldron, Counsel for Amazon.com, Inc.; Kobo Inc.; and Sony Electronics Inc., to Marlene Dortch, Secretary, FCC, at 1 (Nov. 29, 2013) (Coalition Nov. 29 *Ex Parte* Letter).

[33] *See* Coalition July 17 *Ex Parte* Letter at 1-2. The Coalition offers the following as examples of e-readers that would fall outside of the waived class: the Amazon Kindle E-Reader Fire, the Sony Xperia Tablet Z, and the Kobo Arc. Coalition Reply Comments at 2.

(3) The device is not offered or shipped to consumers with built-in email, IM, VoIP or other similar ACS client applications and the device manufacturer does not develop ACS applications for their respective device.

(4) The device is marketed to consumers as a reading device and promotional material about the devices does not tout the capability to access ACS.[34]

The Coalition clarifies, however, that "[a]n e-reader subject to the proposed waiver may include a browser and social media applications."[35]

8. The Coalition further explains that the class of e-readers for which it seeks a waiver can be distinguished by features that it shares: screens that are optimized for reading;[36] low power consumption and extremely long battery life to facilitate long periods of reading; navigation that places reading features front and center, including easy acquisition of e-publications; and features designed around reading, such as highlighting, bookmarking, and lookup features.[37] The Coalition also notes features that these devices consistently do not offer, but which are more common to tablets and other general purpose electronic devices: color screens; screens with fast refresh rates for interaction and extensive typing; cameras; high capacity storage; and higher powered processors for graphics.[38] Further, according to the Coalition, "e-readers typically do not possess microphones or quality speakers,"[39] nor can most generate audio output or record audio input.[40] In support of its assertions that e-readers are not marketed for their ability to access ACS, the Coalition points to various webpage listings for basic e-readers that do not mention or describe ACS functions.[41] Finally, the Coalition reports industry data indicating that only a very small percentage (less than seven percent) of e-reader users launch their browsers to access ACS from their e-readers or for any other purpose.[42]

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[34] Coalition July 17 *Ex Parte* Letter at 1-2.

[35] Coalition July 17 *Ex Parte* Letter at 2, n.1.

[36] The Coalition explains that these e-readers typically use electronic ink screens that are designed to prevent glare, including in direct sunlight, and "minimize eye strain during extended reading sessions." Coalition Petition at 2-3.

[37] Coalition Petition at 2-5.

[38] Coalition Petition at 6-7.

[39] Coalition Petition at 6.

[40] Coalition Petition at 7. The Coalition acknowledges that before tablets were introduced to the market, certain e-readers provided audio output. However, it adds that after the introduction of tablets, "industry focused e-readers even more on the primary purpose of accessing text-based communication, for instance by removing audio because consumers who desire devices designed for multimedia use purchase tablets." Coalition Sept. 20 *Ex Parte* Letter at 2.

[41] *See, e.g.*, Letter from Gerald J. Waldron, Counsel for Amazon.com, Inc.; Kobo Inc.; and Sony Electronics Inc., to Marlene Dortch, Secretary, FCC, at 1, n.1 (Sept. 30, 2013) (Coalition Sept. 30 *Ex Parte* Letter)(citing to recent online advertisements for the Kindle Paperwhite indicating that "it is a device that is optimized for the single function of reading, in contrast to tablets"). *See also* Coalition Petition at 7; Coalition Reply Comments at 5-6.

[42] Coalition Sept. 20 *Ex Parte* Letter at 1; Coalition Nov. 29 *Ex Parte* Letter at 3-4. The Coalition reports that in surveys conducted over a one-week period in November 2012 and October 2013, one Coalition member examined anonymous random samples of more than 120,000 active e-reader devices and found that less than seven percent of the users of these devices had launched their browsers. Coalition Nov. 29 *Ex Parte* Letter at 3-4. According to the Coalition, the average time the browser was left open was between 45 seconds and three minutes. *Id.* at 4. The Coalition notes that it is not able to determine what portion of these individuals used their browsers to access ACS, but claims that the brief usage pattern is consistent with "brief look ups on Wikipedia, visiting links from within books, or other reading-related users, not with regular use for ACS." *Id.*

9. Although the Coalition acknowledges that e-readers allow consumers to use ACS – for example, "to access e-mail on e-readers through the on-device browser"[43] – it claims that browsers on e-readers are stripped down and rudimentary,[44] in contrast to the "elegant and intuitive interfaces for reading" provided on such devices.[45] In further support of its position that basic e-readers are not designed for regular ACS use, the Coalition claims that such devices do not contain any apps that enable two-way communication, such as electronic messaging services (*e.g.*, e-mail and instant messaging), VoIP, and video conferencing.[46]

10. The Coalition further asserts that it can satisfy the Commission's general waiver standard that good cause exists and granting a waiver would not be inconsistent with the public interest.[47] Specifically, it claims that considerable hardware and software redesigns would be necessary to make the ACS features accessible, which would not only increase the ongoing engineering, hardware and licensing costs of these devices, but fundamentally alter its nature, causing it to be far more similar to a general purpose tablet in design, features, cost, and battery life.[48] This, the Coalition argues, would lead to the "loss of distinctive products" that "would harm the reading public" and inhibit e-reader innovation.[49] The Coalition also suggests that granting a waiver would not substantially benefit persons with disabilities, because the limited abilities of browsers on these devices means that the ACS experience on e-readers would still be poor, even if made accessible.[50] Finally, the Coalition claims that not providing accessibility on basic e-readers would not harm consumers because there are many other accessible and better ACS alternatives to basic e-readers, such as applications that have ACS capabilities on mobile phones, tablets, and personal computers, which generally must comply with the CVAA.[51]

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[43] Coalition Sept. 20 *Ex Parte* Letter at 1.

[44] Coalition Petition at 7.

[45] Coalition Nov. 29 *Ex Parte* Letter at 3. The Coalition explains that the purpose of having browsers on basic e-readers is "to facilitate simple browsing activities directly related to reading, such as reading hyperlinks that are inserted into e-books and periodicals, looking up information in an online dictionary or other online information sources like Wikipedia, or accessing WiFi at locations such as hotels that require use of a Web-based interface to commence usage." Coalition Petition at 7. Coalition members demonstrated the manner in which browsers are launched on basic e-readers to Commission staff on September 18, 2013. *See* Coalition Sept. 20 *Ex Parte* Letter at 1 (stating that while it is possible to access e-mail on e-readers through the browser, the devices are designed primarily for accessing text-based digital works, not for using ACS).

[46] Coalition Petition at 7; Coalition Sept. 20 *Ex Parte* Letter at 2.

[47] Coalition Petition at 8-12. *See* 47 C.F.R. §1.3; *ACS Report and Order*, 26 FCC Rcd at 14637, ¶ 188.

[48] Coalition Petition at 8-11. For example, the Coalition claims that it would be necessary to add speakers, more powerful processors, faster refresh screens, and to revise the software interface. Making all of these changes, the Coalition, argues, could render single purpose e-reader devices redundant. For example, they claim that the higher power consumption needed to support a faster refresh rate for interaction activities, such as e-mail, would make such consumption on par with that of a tablet, compared to the lower power consumption in basic e-readers that permits a longer battery life, a key selling point of these simpler devices. *Id.* at 9.

[49] Coalition Petition at 10. *See also* Reply Comments of Digital Media Association at 2-3 (September 13, 2013) (supporting the Coalition's waiver request as necessary to ensure that e-readers can continue to service a specific need).

[50] Coalition Petition at 10-11.

[51] Coalition Petition at 11.

11. A group of 23 consumer and consumer-related organizations (Consumer Groups),[52] other organizations,[53] and numerous individuals[54] filed comments in opposition to the Coalition Petition. Consumer Groups maintain that ACS is a critical function that facilitates the primary purpose of basic e-readers (*i.e.*, reading) and, therefore, ACS serves a co-primary purpose on these devices.[55] They claim that the ACS features of e-readers, including the ability to access books on the Internet through web browsers, the ability to connect with others, and to share and discuss content with friends over social media,[56] are the very features that set e-readers apart from print books,[57] and that the existence of these functionalities on these devices show that "the Coalition members intend for users to access these functions as part of their [reading] experience."[58] In particular, Consumer Groups claim "the ease at which the chats can be conducted, and the popularity of chat use in today's culture" support their claim that these ACS features constitute a co-primary purpose of e-readers.[59] Consumer Groups also assert that Coalition members market ACS functionality as a desirable feature of their e-readers, and cite to webpage listings that advertise the sharing, social networking, and web browser features of basic e-readers.[60] Likewise, the Association of Research Libraries (ARL) and the American Library Association (ALA)

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[52] *See* Comments of National Federation of the Blind, American Council of the Blind, National Association of the Deaf, Everyone Reading, National Council for Learning Disabilities, American Association of People with Disabilities, The National Council on Independent Living, World Blind Union, DAISY Consortium, Center for Accessible Technology, Telecommunications for the Deaf and Hard of Hearing, Inc., Disability Rights Education and Defense Fund, Disability Rights Advocates, Association on Higher Education and Disability, The Smith-Kettlewell Video Description Research and Development Center, Center for Applied Special Technology, National Disability Rights Network, Lighthouse for the Blind and Visually Impaired, University of Wisconsin Rehabilitation Engineering Research Center on Telecommunications Access, Gallaudet University Technology Access Program, Beneficient Technology, Inc., Association of Assistive Technology Act Programs, and Disability Rights Oregon (September 3, 2013) (Consumer Groups Comments).

[53] *See, e.g.*, Comments of Disability Rights New Jersey (August 22, 2013); Comments of Minnesota State Council on Disability (August 28, 2013); Comments of IDEAL Group, Inc. (September 1, 2013) (IDEAL Group Comments); Comments of the US Policy Council of the Association for Computing Machinery (September 3, 2013) (USACM Comments); Reply Comments of Association of Research Libraries (September 13, 2013) (ARL Reply Comments).

[54] Most of the 148 individuals who filed comments in this proceeding address the general lack of access to the reading features on basic e-readers and their need as individuals with print disabilities to be able to access digital text and books, rather than their ability to use ACS on these devices. *See*, *e.g.*, Comments of Albert Elia (September 3, 2013) (Elia Comments); Comments of Colleen Roth (September 3, 2013); Comments of Seema Agnihotri (September 3, 2013).

[55] Consumer Groups Comments at 7-8; ("Every type of ACS found on e-readers, including Wi-Fi access, web browsing/built-in browsing, and social media is intended to enhance the user's experience with the device.").

[56] Consumer Groups Comments at 9 (asserting that all of the models in the requested class "have social media features to allow users to send messages and other information").

[57] *See*, *e.g.*, Consumer Groups Comments at 9 (concluding that "[t]he ability to buy books with the touch of a button and share information with friends instantaneously is the fundamental difference between reading a print book and reading an electronic book"). *See also* Comments of Linda Halm at 1 (September 3, 2013).

[58] Consumer Groups Comments at 10.

[59] Letter from John G. Pare, Jr., National Federation of the Blind *et al.* to Marlene Dortch, Secretary, FCC, at 3 (Sept. 26, 2013) (NFB Sept. 26 *Ex Parte* Letter); Consumer Groups Comments at 9.

[60] Consumer Groups Comments at 5, 10-12. For example, Consumer Groups point out that the webpage for the Kobo Touch indicates that "Kobo Reading Life lets you . . . connect with your Facebook friends," and that you can "share your latest reads with your Facebook friends." *Id.* at 11. *See also* Comments of Daniel J. Burke at 2 (September 3, 2013).

refer to Kindle user guides that teach purchasers how to use a Kindle to communicate by e-mail as evidence that electronic messaging is a co-primary purpose of this device.[61]

12. Consumer Groups contend that the browsers included in e-readers are neither incidental nor rudimentary, but rather intentionally installed to enhance the reading experience.[62] For support, they claim that the ability of the devices to pull and save digital content from the Internet confirms that their browsers are "fast and user friendly" and encourage ACS use.[63] Consumer Groups further criticize as unverified Coalition data that indicates only a small percentage of e-reader owners use the browser,[64] and offer their own data to the contrary obtained through a recent survey conducted by a Washington College of Law clinic.[65]

13. Finally, Consumer Groups dispute the Coalition's claim that the failure to make e-readers accessible would be consistent with the public interest.[66] As an initial matter, Consumer Groups state that the failure to make basic e-readers accessible would perpetuate barriers to e-readers for people (and particularly students) with print disabilities in educational and other settings.[67] In this regard, they claim that granting a waiver would undermine other federal nondiscrimination laws that direct educational institutions not to use electronic book readers or other technologies that are not accessible to people who are blind or visually impaired.[68] Consumer Groups also dismiss arguments of the Coalition

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[61] *Letter Sent on Behalf of Association of Research Libraries and American Library Association* at 2 (December 6, 2013) (ARL/ALA Dec. 6 *Ex Parte* Letter*)* (adding that e-reader users can share digital content either in a private message to a distinct recipient or to a group of individuals).

[62] Consumer Groups Comments at 8-10 (noting that a browser is not incidental to the purpose of an e-reader because it is used to purchase or borrow books from the library, allows the use of Wi-Fi, and allows for connections over social media to share books or passages with friends). *See also, e.g.*, Elia Comments at 1 (claiming that e-readers have advanced communications services because of "[t]heir ability to connect to the world wide web, send and receive e-mail through a browser . . .").

[63] Consumer Groups Comments at 11-12.

[64] NFB Sept. 26 *Ex Parte* Letter at 3.

[65] ARL/ALA Dec. 6 *Ex Parte* Letter at 4-5 and Appendix I. According to ARL and ALA, the results of a survey of 131 users of electronic devices, conducted by the Glushko-Samuelson Intellectual Property Law Clinic of the Washington College of Law, proves that users of e-readers utilize basic e-readers for e-mail, online chats, and similar ACS functions.

[66] Consumer Groups Comments at 14-20.

[67] Consumer Groups Comments at 15 ("The conversion from print to digital books provides a unique opportunity to expand the circle of participation for users with all disabilities. Print is inherently inaccessible to the blind and other persons with print disabilities, but accessible digital content allows people with print disabilities to transform into a mainstream user. This opportunity eliminates barriers to books, education, and communication for people with disabilities . . ..").

[68] Consumer Groups Comments at 17 (citing the Americans with Disabilities Act (42 U.S.C. §§ 12101 *et seq.*), Section 504 of the Rehabilitation Act (29 U.S.C. § 794), and guidance from the U.S. Department of Justice and the U.S. Department of Education). According to Consumer Groups, Coalition members target school districts and postsecondary institutions as large purchasers of their inaccessible e-readers, resulting in reduced accessibility for students with print disabilities. Consumer Groups Comments at 17-18. *See also* Comments of the American Library Association at 2 (September 3, 2013) (ALA Comments) (suggesting that providing equitable access for people with disabilities to library facilities is required by the Rehabilitation Act and that any action to limit access to reading materials to people with print disabilities is discriminatory); ARL Reply Comments at 1-6 (arguing that accessible e-readers help ensure compliance with disability civil rights laws by postsecondary and other educational institutions); Letter from Larra Clark, Director, Program on Networks, American Library Association, to Marlene (continued….)

that incorporating ACS features would fundamentally alter basic e-readers, and thereby destroy the uniqueness of this class of equipment. Specifically, consumers point to earlier, discontinued e-reader models that incorporated accessible features, despite having similar weight, design, and battery life to newer products that do not have these features.[69] Rather than destroy the uniqueness of e-readers, Consumer Groups maintain that reinstating these features would simply make these devices accessible.[70] Finally, in response to the Coalition's assertion that other accessible alternatives to basic e-readers are available, Consumer Groups assert that having to purchase costlier devices, such as tablets and smartphones, with "many more features than they would want to use, just to be able to read digital books" would result in a "disability tax" and a "'separate but equal' standard of access that is inconsistent with the spirit of the CVAA."[71]

14. *Discussion*. We grant a waiver from the Commission's ACS rules for the class of "basic e-readers," as defined herein,[72] until January 28, 2015. We limit the term of the waiver to one year from the expiration of the temporary waiver,[73] rather than grant the Coalition's request for an indefinite waiver. We believe that, given the swift pace at which e-reader and tablet technologies are evolving and the expanding role of ACS in electronic devices, granting a waiver beyond this period is outweighed by the public interest and congressional intent to ensure that Americans with disabilities have access to advanced communications technologies.

15. First, we find, under the framework of the *ACS Report and Order*, that the class of e-reader equipment for which the Coalition seeks a waiver is defined with sufficient specificity and that the devices in this class share enough common characteristics to be granted a class waiver.[74] We refer to this class as "basic e-readers" to distinguish it from a broader class of devices, such as tablets, that have e-reader functions or features but are more commonly marketed and used for purposes associated with ACS. Such general purpose devices that are designed, marketed, and used to engage in ACS, such as electronic messaging (*e.g.*, e-mail and instant messaging), VoIP, or video conferencing, are not included within this waived class.[75] Specifically, consistent with the Coalition's description,[76] for purposes of this

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Dortch, Secretary, FCC, at 1-3 (Nov. 7, 2013) (stating that accessible e-readers would help libraries that offer e-readers to patrons comply with disability civil rights law).

[69] Consumer Groups Comments at 15. Consumer Groups explain that Amazon outfitted some Kindle e-readers with text-to-speech functionality beginning in 2009, but discontinued even that "rudimentary accessibility" in 2012, with the introduction of Kindle Paperwhite, which has no audio output. Consumer Groups Comments at 15-16. On September 24, 2013, representatives of the NFB demonstrated to Commission staff the text-to-speech functionality on an older Kindle model that had enabled blind users to navigate menus, listen to books, and purchase books, and noted that these capabilities are no longer available on newer Kindle basic e-readers. NFB Sept. 26 *Ex Parte* Letter at 4. *See also*, *e.g.*, Comments of Cindy Lou Ray at 1 (September 3, 2013) (Ray Comments) ("They did proudly proclaim that if you were driving your car, you could listen to your books rather than visually read them . . .."); Elia Comments at 2 ("E-Readers almost universally included headphone jacks until the most recent versions . . .."); Comments of Sameer Doshi (September 3, 2013) (Doshi Comments); USACM Comments at 2.

[70] Consumer Groups Comments at 16.

[71] Consumer Groups Comments at 18. *See also* NFB Sept. 26 *Ex Parte* Letter at 5; Comments of Raymond Halverson at 1 (September 3, 2013) (Halverson Comments).

[72] *See* ¶ 15, *infra*.

[73] *Temporary Waiver Order*, 28 FCC Rcd at 14599, ¶ 1. The temporary waiver was granted on October 22, 2013, and expires on January 28, 2014. *Id.*

[74] *See* 47 C.F.R. § 14.5(b). *See also ACS Report and Order*, 26 FCC Rcd at 14639, ¶ 193.

[75] See Coalition July 17 *Ex Parte* Letter at 1; Letter from Gerald J. Waldron, Counsel for Amazon.com, Inc.; Kobo Inc.; and Sony Electronics Inc., to Marlene Dortch, Secretary, FCC, at 1 (July 10, 2013) (Coalition July 10 *Ex Parte*
(continued….)

class waiver, we define the class of basic e-readers to include any mobile electronic device that is capable of accessing ACS, designed primarily for the purpose of reading text-based digital works, such as books and periodicals, and meets each of the following requirements:

(1) The device has no LCD screen, but rather utilizes a screen that is designed to optimize reading.[77]

(2) The device has no camera.[78]

(3) The device is not offered or shipped to consumers with built-in ACS client applications and the device manufacturer does not develop ACS applications for its respective device, but the device may be offered or shipped to consumers with a browser and social media applications.[79]

(4) The device is marketed to consumers as a reading device and promotional material about the device does not tout the capability to access ACS.

16. Next, we must consider whether basic e-readers are designed primarily or co-primarily for ACS. After a review of the record, we find that basic e-readers are capable of accessing ACS, are designed for multiple purposes, and that consumers do utilize them for ACS, but, at present, we find that they are designed primarily for the purpose of reading, which makes such devices eligible for waiver under section 716(h)(1)(A) and (B) of the Act and section 14.5(a) of the Commission's rules.[80] To begin with, we consider the design of these devices. The current relatively slow refresh screen rates,[81] the absence of apps for integrated e-mail clients,[82] the inability of basic e-readers to display video for any purpose, including video conferencing,[83] and the lack of high powered processors[84] on these devices

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Letter); Letter from Gerald J. Waldron, Counsel for Amazon.com, Inc.; Kobo Inc.; and Sony Electronics Inc., to Marlene Dortch, Secretary, FCC, at 1 (July 15, 2013) (Coalition July 15 *Ex Parte* Letter).

[76] *See* Coalition July 17 *Ex Parte* Letter at 1-2. *See also* ¶ 7, *supra*.

[77] The Coalition explains that "e-readers include electronic ink screens optimized for reading (including in direct sunlight) and designed to minimize eye strain during extended reading sessions." Coalition Petition at 2-3. Consumer Groups oppose including the absence of an LCD screen as a defining characteristic of the waived class because LCD screens could "easily become obsolete," thereby including under the waiver whatever newer screen technology that replaces these screens. Consumer Groups Comments at 13-14; *see also* USACM Comments at 1. To address the concerns of Consumer Groups, we have added qualifying language to the LCD screen limitation proposed by the Coalition, to make clear that screens on devices within the waived class must be optimized for reading. Additionally, we remind all parties that devices must meet *all* requirements of the definition to fall within the waiver. We will continue to monitor screen technology on these devices during the period of this one-year waiver and, if necessary, re-evaluate and re-define the definitional class if a renewal of the waiver is requested.

[78] A camera is included among these four criteria as a means of distinguishing basic e-readers from more complex devices, such as tablets. *See* Coalition July 17 *Ex Parte* Letter at 2, n.2.

[79] We have allowed the class to include devices that have browsers and social media applications, as proposed by the Coalition because, as discussed below, the mere existence of these features does not mean that ACS used over these applications is a primary or co-primary purpose of the devices in which they are included. Coalition July 17 *Ex Parte* Letter at 2, n.1. *See* ¶¶ 17-18, *infra*, for further discussion of these features.

[80] 47 U.S.C. § 617(h)(1)(A) and (B); 47 C.F.R. § 14.5(a).

[81] Coalition Petition at 7.

[82] *Id.*; Coalition Nov. 29 *Ex Parte* Letter at 2.

[83] Coalition Petition at 7.

[84] Coalition Nov. 29 *Ex Parte* Letter at 6; Coalition Petition at 6-7.

support a finding that these devices at this time are not designed for ACS.[85]

17. Although all parties to this proceeding agree that browsers included on basic e-reader devices are capable of accessing ACS, such as electronic messaging services,[86] and are subject to the accessibility requirements of the CVAA,[87] we are persuaded by petitioners that the primary purpose of basic e-readers at this time is to access text-based digital works and perform tasks associated with reading, such as looking up words and concepts in online dictionaries and other sources, accessing Wi-Fi to download books, and posting information on social media websites.[88] The competing public interests at stake – *i.e.,* the ability of consumers with disabilities to use ACS via basic e-readers, versus the e-reader industry's interest in preserving a unique product – make consideration of this petition a close call, similar to that presented by the ESA gaming system waiver request.[89] However, the mere inclusion of web browsers on these devices or the fact that they provide access to ACS, including ACS available on some social media websites,[90] or even that "Internet access is a basic functionality of e-readers that is integral to their use and popularity"[91] is not sufficient to reach a determination that ACS is a primary or co-primary purpose of these devices. Using a browser to post information to a social media website (*e.g.,* Facebook), look up information on the web, access Wi-Fi, or purchase or download an e-book is not evidence of

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[85] Conversely, screens that are optimized for long periods of reading without glare, front and center navigation features specifically designed for book acquisition, and built-in reading tools, such as highlighting, bookmarking and look-up features, all suggest that the primary purpose of these devices is for reading text-based digital works. Coalition Petition at 4; Coalition July 10 *Ex Parte* Letter at 1; Coalition July 15 *Ex Parte* Letter at 1. We also note that Commission staff witnessed demonstrations by Coalition representatives and Consumer Group representatives on how to access ACS via the browsers on several basic e-readers. *See* Coalition Sept. 20 *Ex Parte* Letter at 1; Coalition Nov. 29 *Ex Parte* Letter at 1, n.1; NFB Sept. 26 *Ex Parte* Letter at 1-2. Although these demonstrations illustrated the ability to access electronic messaging services on these devices, generally such access was achieved indirectly through websites, and required several steps, in contrast to the one-touch, single-step access generally available for accessing e-mail clients on tablets and other general purpose ACS-enabled devices. The roundabout path that users must travel to access these services on basic e-readers serves as an additional indication that their design is not intended for general e-mail and other ACS purposes.

[86] Coalition July 10 *Ex Parte* Letter at 1; Coalition July 15 *Ex Parte* Letter at 1; Consumer Groups Comments at 5, 10-14; Coalition Sept. 30 *Ex Parte* Letter at 1. Electronic messaging service covered by section 716 of the Act is defined as a service "that provides real-time or near real-time non-voice messages in text form between individuals over communications networks." 47 U.S.C. § 153(19); 47 C.F.R. § 14.10(i).

[87] *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 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 1966; Accessible Mobile Phone Options for People who are Blind, Deaf-Blind, or Have Low Vision*, CG Docket No. 10-213, WT Docket No. 96-198, CG Docket No. 10-145, Second Report and Order, 28 FCC Rcd 5957 (2013) (*Second Report and Order*) (affirming, in part, that Internet browsers used for ACS, when installed by ACS equipment manufacturers or provided by ACS service providers, are software subject to section 716 of the Act).

[88] See Coalition Petition at 7; Reply Comments of The Internet Association at 2 (September 13, 2013) (The Internet Association Reply Comments). Accordingly, we agree with the Coalition that, at this time, the removal of the ACS functions would not impact the primary purpose of basic e-readers, which is reading. *See generally* Coalition Nov 29 *Ex Parte* Letter at 4. We disagree with commenters who assert that ACS is a critical function that facilitates reading. *See* ¶ 11, *supra*.

[89] *See CEA/NCTA/ESA Waiver Order,* 27 FCC 12987-89, ¶ 36.

[90] ARL Reply Comments at 5.

[91] ALA Comments at 1.

ACS; nor does it support a finding that ACS is a primary or co-primary purpose of these devices.[92] Rather, we must look to whether the browser is designed, marketed, and used for ACS, such as electronic messaging services, in order to determine whether basic e-readers have ACS as one of their primary or co-primary purposes.

18. As noted above, among the factors used to determine whether ACS is a primary or co-primary purpose of a device is the extent to which the ACS functionality is advertised, announced, or marketed to consumers as a reason for purchasing, installing, downloading, or accessing the equipment or service.[93] Contrary to the assertions of some commenters,[94] an independent review of the manufacturer marketing materials for these devices further supports a finding that their primary purpose is for reading, rather than for ACS.[95] The Coalition, in arguing against ACS as a primary or co-primary function of e-readers, further points to industry data showing that less than seven percent of users launch their e-reader browsers for any purpose,[96] as well as the fact that many Americans have both tablets and basic e-readers,

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[92] *See* Consumer Groups Comments at 5, 7-10; IDEAL Group Comments at 1-2; ALA Comments at 1-2, noting that browsers on basic e-readers have these capabilities. As the Commission previously noted, an electronic messaging service includes "more traditional, two-way interactive services such as text messaging, instant messaging, and electronic mail, *rather than . . . blog posts, online publishing, or messages posted on social networking websites*." *ACS Report and Order*, 26 FCC Rcd at 14574, ¶ 43, *quoting* Senate Report at 6; House Report at 23 (emphasis added). *See also* Coalition Reply Comments at 3; The Internet Association Reply Comments at 2-3 (emphasizing that, although basic e-readers have browsers, the definition of ACS does not include Wi-Fi access, posting to a social media site, or purchases made through a browser); Comments of Consumer Electronics Association at 3-4 (September 13, 2013) (arguing that the mere use of an e-reader's browser to buy books or download newspapers does not constitute ACS); Letter from Gina G. Woodworth, Vice President, Public Policy and Government Affairs, The Internet Association, to Marlene Dortch, Secretary, FCC (Dec. 20, 2013).

[93] *ACS Report and Order*, 26 FCC Rcd at 14635, ¶ 185. *See also CEA/NCTA/ESA Waiver Order,* 27 FCC Rcd at 12987, ¶ 35.

[94] *See* ¶ 11, *supra* (noting webpage listings that advertise the sharing, social networking, and web browser features of basic e-readers).

[95] Information provided on the product listings for the Kindle E-Reader and the Kobo Aura HD focuses primarily on ways to facilitate reading on these devices. For example, the Amazon website states that its electronic ink screen "looks and reads like real paper," notes that the device is "lighter than a paperback," explains that its battery life allows one "to read for up to a month on a single charge," touts the ability to "read as easily in bright sunlight as in your living room," and states, "[u]nlike tablet screens, Kindle has no glare." The website goes on to inform consumers that they can find a book [wirelessly] and start reading in seconds," and stresses the fact that the device has "Adjustable Text Sizes, Font Choices." http://www.amazon.com/gp/product/B007HCCNJU (last visited January 10, 2014). Similarly, the Kobo website announces its "immersive reading experience," a "breakthrough front-light that's perfect for reading," the ability to "customiz[e] your reading experience" with a selection of font styles and sizes, and the ability to "enjoy reading up to two months of uninterrupted reading on a single charge." http://www.kobo.com/koboaurahd (last visited January 10, 2014). Although the Amazon website also suggests to potential purchasers that they will be able to share their passion for books with others, these references appear to be focused primarily on the ability to post passages to social networks such as Facebook and Twitter, rather than to carry on conversations about books. *See also* Coalition Petition at 4-5; Coalition Nov. 29 *Ex Parte* Letter at 2.

[96] *See* ¶ 8, *supra.* For a number of reasons, we do not find the ARL/ALA survey findings on e-reader ACS use, which attempt to counter this data, persuasive. *See* ARL/ALA Dec. 6 *Ex Parte* Letter at 4-5 and Appendix I. First, we are concerned that respondents to the consumer survey may have been biased in their responses because the survey's introduction instructed participants to "[p]lease take a moment to complete this short survey and help ensure that individuals with disabilities have equal access to emerging technologies." ARL/ALA Dec. 6 *Ex Parte* Letter at Appendix I. In addition, the survey failed to define "basic" e-readers versus "electronic devices" that are used for reading, and to clearly distinguish between using social media apps to post information (a non-ACS feature) and using these apps to conduct interactive communication (an ACS feature). *See id.* Such failures put into question ARL/ALA's conclusion that the "survey findings underscore the important role that the ability to (continued….)

presumably to use the latter primarily for reading activities.[97] We have carefully considered these arguments in determining whether ACS is a primary or co-primary purpose on e-readers, and believe that the availability of social media apps on these devices that are capable of providing two-way interactive ACS between individuals, such as chat functions that are covered by Section 716 of the Act, make this a close call.[98] However, given the current design, marketing, and general use of these devices discussed herein and above,[99] we are unconvinced that using the chat function of social media apps is a primary or co-primary function of basic e-readers at this time.[100] For all of the above reasons, we are persuaded that access to ACS is not, at this time, a primary or co-primary purpose of basic e-readers but rather serves an incidental purpose on these devices.[101]

19. Finally, we agree that the Coalition has demonstrated good cause to waive the rules for the class of basic e-readers, and that, at this time, a one-year waiver would be in the public interest.[102] We recognize and acknowledge the critical purpose of the CVAA to ensure that Americans with disabilities have the capability to use ACS to communicate with others. As Congress explained, the benefits of modern communications technologies "have profoundly altered our everyday lives . . . allowing mobile access to the Internet and a diverse menu of applications and services."[103] Though many advances have

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communicate with others plays in purchasing decisions and use of [basic e-reader] devices." ARL/ALA Dec. 6 *Ex Parte* Letter at 4.

[97] Coalition Petition at 9 (noting that a November 2012 Pew study revealed that 11 percent of Americans own both an e-reader and a tablet).

[98] As the Commission previously found, electronic messaging includes two-way interactive services, such as text messaging, instant messaging, and electronic mail, even when such services are provided through social networking or related sites. *CEA/NCTA/ESA Waiver Order,* 27 FCC Rcd at 12991, n.178. There is disagreement in the record of this proceeding about the extent to which individuals can use chat features available through social media apps on basic e-readers. *See* Coalition Sept. 30 *Ex Parte* Letter at 1 ("Pre-installed Facebook features can be used only for non-ACS social sharing concerning electronic publications, consistent with e-readers' primary purpose. Make no mistake: the only method to access ACS on an e-reader is via the limited browser."); *contra* NFB Sept. 26 *Ex Parte* Letter at 1-2 (claiming that Facebook chats can be accomplished easily on basic e-readers). Even assuming that social media apps included on these devices allow users to access chat and other electronic messaging features, for the reasons discussed above, we conclude that such ACS capabilities are not a primary or co-primary purpose of these devices.

[99] *See* ¶¶ 16-18; nn.92-93, *supra*.

[100] We acknowledge that some basic e-readers assign unique e-mail addresses to users for the purpose of distributing documents. For example, Kindle e-readers offer a "Whispercast" feature, which permits a user to send Kindle content to user groups. *See* https://whispercast.amazon.com/info/whispercast-features (last visited January 10, 2014). Similarly, the "Send to Kindle" feature permits users and their approved contacts to send documents to themselves and each other via e-mail addresses assigned to their registered Kindle devices, Kindle reading applications, and their Kindle library in the Amazon cloud. *See* http://www.amazon.com/gp/sendtokindle/email (last visited January 10, 2014). Other features enable users to share notes and quotes on social media sites and see passages frequently highlighted by other readers. *See* http://www.amazon.com/Kindle-Papershite-3G/dp/B007OZNUCE (last visited January 10, 2014) and http://www.kobo.com/readinglife (last visited January 10, 2014). As noted below, during the limited period of this waiver, we will assess the extent to which these e-mailing functions and other electronic messaging features capable on these devices evolve to facilitate interactive ACS between individuals, and specifically, whether they result in ACS taking on a co-primary purpose of these devices.

[101] The Senate and House Reports state that "a device designed for a purpose unrelated to accessing advanced communications might also provide, on an incidental basis, access to such services." Senate Report at 8; House Report at 26.

[102] 47 C.F.R. § 1.3. *See also ACS Report and Order*, 26 FCC Rcd at 14637, ¶ 188.

[103] Senate Report at 1; House Report at 19.

improved the communications capabilities of persons with disabilities, Congress noted that "the extraordinary benefits of these technological advances are often still not accessible to individuals with disabilities."[104] The primary concern of consumers in this proceeding, however, as evidenced by their various filings, seems to focus far more on their interest in accessing text-based digital works on basic e-readers and the consequent harm that the denial of such access poses to educational institutions, libraries, and their students and patrons, than on the ability to access the ACS features of these devices.[105] We are very sensitive to these concerns, understand the need to provide access to text-based digital works, recognize the importance to the community of people with disabilities of being able to access text in an audio format, and acknowledge that some ACS is also text based. We further note that, while the ability of basic e-readers to provide access to the *reading features for text-based digital works* on these devices falls outside the CVAA's ACS accessibility mandates, these concerns do bear on the extent to which a waiver would be in the public interest. Because we have determined that ACS is not currently a primary or co-primary purpose of basic e-readers and that ACS usage now appears to be relatively small, we do not believe that waiving the mandate to provide accessible ACS will have a significant impact on the ability of consumers with disabilities or the general public to have access to ACS at this time.[106] However, we are concerned that a lengthy or permanent waiver might negatively impact consumers with disabilities in the future with respect to their ability to access ACS and therefore limit the duration of this waiver to one year.[107]

20. In granting the waiver, we recognize the Coalition's concern regarding the preservation of basic e-readers as a niche product that is devoted to accessing text-based digital works.[108] According to the Coalition, in order to incorporate ACS accessibility into basic e-readers at this time, manufacturers would have to so alter the nature and functions of these devices that they would become tablets and effectively reverse an industry trend to distinguish between basic e-readers that are designed primarily for reading on the one hand, and more general purpose tablets that have reading as only one of their primary purposes on the other.[109] The Coalition has stated that making ACS accessible on e-readers would require re-engineering operating systems that prioritize battery life, increasing screen refresh rates, and revising the display and user interfaces to support accessibility features – all of which would essentially convert a

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[104] Senate Report at 2; House Report at 19.

[105] *See*, *e.g.*, Consumer Groups Comments at 15-17; ARL Reply Comments at 1-6; Comments of Carol Castellano, Director of Programs, National Organization of Parents of Blind Children at 1-2 (September 3, 2013); ALA Comments at 2-3; Halverson Comments at 1; Comments of Andrew Wai at 2 (September 3, 2013).

[106] The Coalition points out that the efforts of e-reader manufacturers to achieve compliance with the CVAA's ACS mandates that went into effect October 8, 2013, have resulted in a variety of alternatives for consumers needing ACS access (as well as reading access) on tablets, computers, smartphones, and other multipurpose Internet-enabled mobile devices. *See* Coalition Petition at 11; Coalition Nov. 29 *Ex Parte* Letter at 5-6. Generally, we do not believe that an examination of whether accessible alternatives can provide a meaningful substitute adds significantly to the waiver analysis, which focuses on an examination of whether the equipment in question is designed primarily for purposes other than using ACS. *See ACS Report and Order*, 26 FCC Rcd at 14636, ¶ 187. Moreover, we remain concerned that such alternatives do not provide equivalency in features or price to a basic e-reader. *See* Consumer Groups Comments at 18.

[107] *See infra,* at ¶¶ 24-25.

[108] *See* Coalition Petition at 8-10.

[109] *See* Coalition Sept. 20 *Ex Parte* Letter at 2 (explaining that, after tablets were introduced, industry sought to distinguish e-readers in the market by focusing their design even more on the primary purpose of reading).

basic e-reader into a tablet.[110] We find, however, that the rapid pace of evolution of the technology involved substantially undercuts these Coalition concerns.[111]

21. We emphasize that our conclusions in this order are not intended to express a judgment about the feasibility of incorporating accessibility features for the purpose of enabling reading by people with disabilities on basic e-reader devices. Indeed, while Consumers Groups suggest that earlier models of basic e-readers provided accessibility features, such as audio output, without altering their weight and battery life,[112] the extent to which these earlier models *provided access to ACS* remains unclear. A consumer demonstration for Commission staff illustrated text-to-speech functionality on earlier devices that permitted users to navigate through menus, buy and listen to books, but not to access ACS features.[113] Moreover, the fact that it was possible to incorporate such features into some of these nascent models fails to acknowledge the evolution of e-reader devices, which began as a single class of devices, all of which offered rudimentary connections with the Internet, but which since, has branched off into two types of devices: basic e-readers that are optimized for and primarily used for reading (and therefore include features such as low power consumption, extremely long battery life, and navigation that places reading features front and center); and multipurpose devices that have various ACS capabilities and must be accessible to people with disabilities under the CVAA. We believe that, for the next year, given that subsequent technical and marketplace developments have replaced the early e-reader models with two new types of devices, and absent a finding that ACS is at this time a primary or co-primary function of the devices, good cause exists to waive the Commission's ACS rules for the class of basic e-readers for the purpose of preserving basic e-readers as a niche product that is primarily designed for reading.[114] We

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[110] *See* Coalition Petition at 8-10; ¶ 10, *supra;* Coalition Nov. 29 *Ex Parte* Letter at 5. We note that the extent to which the inclusion of accessibility features on a device would result in a fundamental alteration of the device is part of the achievability analysis, which generally compares a covered entity's resources with the costs and feasibility of incorporating accessibility features. 47 C.F.R. § 14.10(b); *see also ACS Report and Order*, 26 FCC Rcd at 14607-14619, ¶¶ 119-148. While such analysis is not generally a consideration for purposes of determining whether ACS is a primary purpose of a product, in the instant case, as part of our public interest analysis, we consider whether the alterations needed would be so fundamental as to prevent the product from being offered to the public in its original form.

[111] *See, e.g.*, Moore's Law at http://www.intel.com/content/www/us/en/history/museum-gordon-moore-law.html (last visited January 24, 2014) (observing that, over the history of computing hardware, the number of transistors on integrated circuits doubles approximately every two years). *See also* http://www.biznology.com/2013/11/are-marketers-underestimating-the-pace-of-technological-change/ (last visited January 24, 2014); http://www.extremetech.com/extreme/174477-at-long-last-new-lithium-battery-tech-actually-arrives-on-the-market-and-might-already-be-in-your-smartphone (last visited January 24, 2014).

[112] Consumer Groups Comments at 16; NFB Sept. 26 *Ex Parte* Letter at 4, Ray Comments at 1; Elia Comments at 2; Doshi Comments; USACM Comments at 2. *See also* ¶ 13, *supra.*

[113] NFB Sept. 26 *Ex Parte* Letter at 4.

[114] We note that the Coalition, in several of its pleadings, argues that Congress intended the Commission to apply the waiver provision in order to promote innovation. *See, e.g.,* Coalition Petition at 10; Coalition Sept. 30 *Ex Parte* Letter at 3. Although we agree on the need to allow production of basic e-reader devices that provide access to ACS on an incidental basis, as is the case here, we disagree that the need to incorporate accessibility features in these and other devices would, in and of itself, impede innovation. As we have previously noted, often the need to provide accessibility features results in innovations that are used by not only people with disabilities, but by the general public. Such was the case, for example, with talking caller ID systems, which enable people who are blind to ascertain the identities of incoming callers, but which also are used by sighted people seeking to enjoy dinner without getting up from the table to answer a call, as well as closed captioning, which enable people with and without hearing loss to watch television in noisy places, such as bars and exercise facilities. *See CEA/NCTA/ESA Waiver Order,* 27 FCC Rcd at 12991-92, ¶ 40, n.184.

anticipate, however, that rapid advances in battery and computing technology may very well resolve the Coalition's concerns.[115]

22. *Duration of Waiver.* The Coalition urges the Commission to grant an indefinite waiver for the class of basic e-readers, arguing that the narrow definition of the class makes it self-containing.[116] Specifically, the Coalition insists that only devices that meet the requirements of the class will ever be subject to the waiver, and that "[i]f e-readers in the future add features and capabilities that cause them to resemble tablets with full and readily available ACS functionality," the waiver for those devices would expire on its own terms.[117] The Consumer Groups ask the Commission to limit the waiver to one year, if granted.[118]

23. Since their introduction into the marketplace about six years ago and even very recently, e-readers have evolved at a rapid pace, becoming sleeker, lighter, easier to read, and less expensive with larger capacities and wireless capabilities.[119] The rapid changes in both e-reader and ACS technologies,[120] as well as the expanding importance of ACS technologies in the daily lives of all Americans,[121] argue against granting a permanent waiver at this time. It is difficult to predict, for example, the extent to which, over the next few years, e-readers that currently fall into the protected class will evolve to include greater ACS capabilities or the extent to which new accessibility solutions for ACS will be developed to facilitate the inclusion of accessibility features on basic e-readers without fundamentally altering these niche products.

24. While, as noted above, we are persuaded that e-reader manufacturers are not designing or promoting these products for their ACS features at the present time, if ACS features on the next generation of these devices are featured more prominently and, for example, begin to be utilized regularly in education, employment, and as a tool of social integration,[122] it is conceivable that mobile

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[115] *See supra,* n.117.

[116] Coalition Sept. 30 *Ex Parte* Letter at 5.

[117] Coalition July 15 *Ex Parte* Letter at 1. *See also* Coalition Sept. 30 *Ex Parte* Letter at 3; Coalition Petition at 12, n.41. For example, the Coalition suggests that if electronic ink screens begin to be used on multi-purpose devices that include a camera, or ACS is marketed on these devices, the existing class definition would make sure that these devices do not receive a waiver. Coalition Sept. 20 *Ex Parte* Letter at 3. The Coalition adds that convergence of basic e-readers with other classes of devices with ACS as a co-primary purpose is unlikely. *See* Coalition Petition at 11-12; Coalition Sept. 20 *Ex Parte* Letter at 3. The Coalition cites to the ongoing waiver from the Commission's closed captioning rules that was granted to digital still cameras and consumer video cameras. Coalition Sept. 20 *Ex Parte* Letter at 3.

[118] NFB Sept. 26 *Ex Parte* Letter at 5.

[119] *See* http://www.udibod.com/about-e-readers/ (last visited January 10, 2014); http://www.marsdd.com/2013/01/09/sizing-up-trends-in-the-evolution-of-e-reading/ (last visited January 10, 2014); http://online.wsj.com/news/articles/SB10001424127887323874204578219834160573010 (last visited January 10, 2014).

[120] For example, as the Consumer Groups note, changes in the type of screen technologies used on these devices could result in basic e-readers becoming more similar to tablets than they are now. Consumer Groups Comments at 13.

[121] While only seven percent of current basic e-reader users were found to access browsers on these devices, it is very possible that this number will grow and that individuals will increasingly use such browsers for ACS functions in the coming years, given the pervasiveness of ACS in American society.

[122] *See*, *e.g.*, http://goodereader.com/blog/electronic-readers/should-e-readers-embrace-social-media-more (last visited January 10, 2014); http://socialmediatoday.com/heyangelo/1934851/chat-apps-could-ignite-true-engagement (last visited January 10, 2014).

communication in the online e-reader environment may become a co-primary purpose of basic e-reader devices.[123] Because basic e-reader devices already provide some ACS capabilities,[124] and because of the challenge of predicting with any degree of accuracy the technological trends in an industry that continues to evolve at an extraordinary pace, we agree with the NFB that it is difficult at this time to confirm the "Coalition's prediction that e-readers will continue to be devices distinct from tablets, or how educational institutions or libraries may require ACS usage in e-readers."[125] Given the evidence that has been presented to the Commission of the utility of the ACS available in these devices,[126] and our concern about the harm to consumers with disabilities that might result from the denial of access to ACS should ACS develop into a primary or co-primary function on these devices, we find that granting a waiver for basic e-readers for an indefinite period would be contrary to the public interest.[127]

25. In defining the waiver period for the class of basic e-readers, we consider the products' lifecycle – the time it takes for a product to be developed and initially introduced in the market.[128] The Coalition reports that the lifecycle of the class of basic e-readers, from drawing board to marketplace, is approximately two years.[129] However, the Commission finds that the Coalition does not provide sufficient substantiation for its claim.[130] While important technologic breakthroughs may require several years of development,[131] the smaller incremental improvements seen in most product releases do not appear to take that long.[132] Moreover, Consumer Groups claim that Coalition members have released a

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[123] For example, NFB points to reading systems specifically marketed for educational purposes, such as Vital Source Bookshelf and Coursemart, which encourage students to share notes directly with other classmates, and content management systems such as Blackboard, which it says allow students to participate in discussion groups and connect with their instructors. NFB Sept. 26 *Ex Parte* Letter at 4. *See also* ARL/ALA Dec. 6 *Ex Parte* Letter at 2-4 (noting that there are currently 1.19 billion active monthly users of Facebook in the U.S., and the important role that social media has come to play in providing point-to-point communication).

[124] For example, the demonstration provided by the Consumer Groups showed users logging into Facebook and conducting real time communications through the Sony Reader and Kindle Paperwhite. NFB Sept. 26 *Ex Parte* Letter at 1-2.

[125] NFB Sept. 26 *Ex Parte* Letter at 5.

[126] *See, e.g.*, NFB Sept. 26 *Ex Parte* Letter at 1-2.

[127] *See generally CEA/NCTA/ESA Waiver Order,* 27 FCC Rcd at 12990-91, ¶ 39.

[128] *See CEA/NCTA/ESA Waiver Order,* 27 FCC Rcd at 12989-90, ¶ 38.

[129] Coalition Sept. 30 *Ex Parte* Letter at 3, n.6; Coalition Reply Comments at 11.

[130] The Coalition cites confidentiality of development times to explain its lack of substantiation for its stated lifecycle. Coalition Reply Comments at 12, n.38. While the Commission recognizes that the class waiver petitioners need not disclose specific confidential strategic information, the lack of supportive evidence must be weighed against contravening evidence. *See ACS Report and Order,* 26 FCC Rcd at 14641, ¶ 199,

[131] For example, changes to screen technology may require several years to develop. *See, e.g.*, http://reviews.cnet.com/8301-18438_7-57592886-82/heres-the-flexible-e-ink-screen-that-could-be-in-the-2014-kindle/ (last visited January 24, 2014). *See also* Coalition Reply Comments at 12.

[132] The Kindle Paperwhite, for example, was reportedly in development for a matter of months rather than years. *See, e.g.*, Michael Kozlowski, "Review of the Amazon Kindle Paperwhite," (Oct. 18, 2012) at http://goodereader.com/blog/electronic-readers/review-of-the-amazon-kindle-paperwhite (last visited January 24, 2014) ("The company has been actively developing their new Paperwhite for over six months and it will hit the USA market on October 26th."). This shorter development period is mirrored in Kindle's actions this year, as it has planned release of its new generation Paperwhite approximately six months following its last Paperwhite release. *See* http://tech.firstpost.com/news-analysis/next-gen-amazon-kindle-paperwhite-with-330ppi-display-reportedly-coming-in-2014-108481.html (last visited January 24, 2014); http://in.finance.yahoo.com/news/future-kindle-

(continued….)

new generation of e-readers every year since 2010.[133] We find this credible. The Commission notes that, while the period of time a product is in use by consumers is not determinative of the length of the product lifecycle,[134] the spacing of product releases can certainly be evidence of the time it takes for a product to be developed and introduced in the market. The Commission therefore finds that the lifecycle of the class of basic e-readers is one year, and grants a limited duration class waiver until January 28, 2015.[135] We believe that limiting the waiver period to one year will serve the public interest by balancing the interest of the Coalition's members in preserving a unique product and the interest of consumers with disabilities to access ACS in the event that basic e-readers come to include ACS as a co-primary purpose.

26. The action we take herein is without prejudice to the Coalition requesting an extension of the waiver period. During the waiver period, we will not require manufacturers of the equipment covered by the waiver to comply with the obligations of section 14.20, the performance objectives of section 14.21, and the recordkeeping obligations of section 14.31 of the Commission's rules.[136] However, to the extent that future generations of basic e-readers evolve to provide ACS as one of their primary functions, we expect manufacturers of basic e-readers to consider accessible design early during the development stages of the such products, so that accessible features can be incorporated when the class waiver expires on January 28, 2015.[137]

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paperwhite-feature-300ppi-100824676.html (last visited January 24, 2014) (November 2013 announcement of development of product to be released in spring 2014); http://techcrunch.com/2013/11/24/amazons-next-kindle-paperwhite-to-feature-300ppi-screen-better-typography-arrive-early-next-year/ (last visited January 24, 2014) (same).

[133] Consumer Groups Comments at 12-13. *See also* http://en.wikipedia.org/wiki/Amazon_Kindle (last visited January 24, 2014) (detailing Amazon releases of new generation Kindles on an annual basis).

[134] *See, e.g.*, *CEA/NCTA/ESA Waiver Order,* 27 FCC Rcd at 12989, ¶ 38 ("in defining the waiver period . . . we only consider the time it takes for a product to be developed and initially introduced in the market, and not the period of time it is deployed.").

[135] Previously, the Commission granted waivers from its ACS rules for two years for other types of multipurpose equipment that had ACS functionality. *See CEA/NCTA/ESA Waiver Order,* 27 FCC Rcd 12970. However, the Commission does not always link its waiver duration to claimed product lifecycles. Manufacturers of some of the equipment covered by those previous waivers cited much longer development cycles than the two years permitted by the waivers. ESA, for example, stated that it required five to seven years for video game development, but was granted a two-year waiver. *CEA/NCTA/ESA Waiver Order,* 27 FCC Rcd at 12990, ¶ 39. NCTA cited a two- to three-year development cycle, but was also only granted a two-year waiver. *CEA/NCTA/ESA Waiver Order,* 27 FCC Rcd at 12980-81, ¶ 20.

[136] 47 C.F.R. §§ 14.20, 14.21, 14.31. The waiver of these rules also includes a waiver of the obligation to conduct an achievability analysis for the waived products during the period of the waiver. *See ACS Report and Order*, 27 FCC Rcd at 14607-14619, ¶¶ 119-148. *See also CEA/NCTA/ESA Waiver Order,* 27 FCC Rcd at 12976-77, 12980, 12988-89, ¶¶ 11, 19, 36.

[137] In other words, a manufacturer of e-readers is expected to conducted accessibility planning as early as possible during the design process (including achievability analyses, as necessary) during the period of the class waiver for models that the manufacturer plans to introduce after January 28, 2015, as these models would not be subject to the waiver. *ACS Report and Order*, 26 FCC Rcd at 14602, ¶ 108; s*ee also id.* at 14609, ¶ 124 ("we believe in many instances, accessibility is more likely to be achievable if covered entities consider accessibility issues early in the development cycle"). We recognize, however, that the achievability analysis conducted for products and services already under development at the time when the class waiver expires may take into consideration the developmental stage of those products or services and the effort and expense needed to achieve accessibility at that point in their development. *See ACS Report and Order*, 26 FCC Rcd at 14640, ¶ 194. *See also* 47 C.F.R. § 14.5(c)(2). ,.

IV. ORDERING CLAUSES

27. Accordingly, IT IS ORDERED that, pursuant to the authority contained in sections 4(i), 4(j) and 716 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), (j) and 617, and sections 0.361, 1.3 and 14.5 of the Commission's Rules, 47 C.F.R. §§ 0.361, 1.3 and 14.5, this Order IS ADOPTED.

28. IT IS FURTHER ORDERED that the Coalition Petition IS GRANTED to the extent discussed above and IS OTHERWISE DENIED.

29. IT IS FURTHER ORDERED that this Order SHALL BE EFFECTIVE upon release.

30. To request materials in accessible formats for people with disabilities (Braille, large print, electronic files, audio format), send an e-mail to fcc504@fcc.gov or call the Consumer and Governmental Affairs Bureau at 202-418-0530 (voice), 202-418-0432 (TTY).

FEDERAL COMMUNICATIONS COMMISSION

Kris Anne Monteith
Acting Chief
Consumer and Governmental Affairs Bureau