Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of	)	
	)	
Consumer & Governmental Affairs Bureau and	)	CG Docket No. 10-213
Wireless Telecommunications Bureau Seek	)	
Comment on Advanced Communication	)	
Provisions of the Twenty-First Century	)	
Communications and Video Accessibility Act	)	
of 2010	)	
	)	

To: Chief, Consumer & Governmental Affairs Bureau and
Chief, Wireless Telecommunications Bureau

COMMENTS OF THE TELECOMMUNICATIONS INDUSTRY ASSOCIATION

TELECOMMUNICATIONS INDUSTRY ASSOCIATION

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SUMMARY

The Twenty-First Century Communications and Video Accessibility Act of 2010 ("Accessibility Act") promotes the continued availability of accessible technology without hampering the technological innovation that is the hallmark of the information and communications technology ("ICT") industry. TIA's leadership and experience in standards development enables it to provide the Commission with an important perspective as the agency implements the Accessibility Act.

Congress intended that the Commission promote accessibility through a flexible regulatory approach that targets widely-available consumer products. With the Accessibility Act, Congress expected the Commission to craft a regulatory regime that has a more rigorous standard than section 255, but also allows industry greater flexibility than section 255.

Section 716 imposes obligations on manufacturers and service providers to the extent they offer products or services that fall within the advanced communications services definitions, including interconnected VoIP, non-interconnected VoIP, electronic messaging, and interoperable video conferencing service. The Accessibility Act defines interconnected VoIP exclusively in reference to the Commission's Part 9 definition. Congress provided a much broader definition of non-interconnected VoIP, but the mere inclusion of VoIP capability does not render it a "stand-alone" non-interconnected VoIP offering subject to Section 716 obligations. Congress defined electronic messaging with the express limitation of "real-time or near real-time" and "between individuals." Accordingly, the definition excludes text-based transmissions such as blog postings and "Tweets." The definition of interoperable video conferencing service implies a two-way service that is limited to inter-platform, inter-network and inter-provider communications. Most two-way video applications and services are nascent and not yet interoperable.

Congress intended that industry be afforded maximum flexibility in meeting the "achievable" standard. The first factor requires the Commission to focus on the nature and cost of achieving accessibility in the specific equipment or service in question, rather than looking at similar or competing products. Similar to the first factor, the second factor requires the Commission to consider the technical and economic impact of requiring accessibility on the operations of the specific equipment or service in question, rather than looking at the impact on similar or competing products as a proxy. The third factor requires the Commission to consider the type of operations of the manufacturer or service provider, including whether it is a new entrant. The last factor requires the Commission to consider the varying degrees of functionality and features offered at differing prices points, recognizing that there is no "one-size-fits-all" solution to accessibility.

Industry flexibility is also provided by allowing compliance through built-in features or through the use of nominal-cost third party applications or equipment. When determining what constitutes nominal cost, Congress intended that the Commission not fix a specific percentage or amount but rather determine "nominal cost" on a product-by-product and consumer-by-consumer basis.

The Commission should also view the compatibility requirement with industry flexibility and innovative third-party products in mind. No statutory basis exists for limiting the term

"devices commonly used by persons with disabilities to achieve access" to specialized equipment.

The Commission should establish reasonable, outcome-oriented performance objectives and may adopt safe harbor rules based on industry-developed technical standards. The performance objectives are akin to outcome-oriented provisions of the Part 6 rules and are not technical standards. The Commission's authority to adopt safe harbor technical standards is limited to where "necessary." Any such safe harbor should only use voluntary, consensus-based, and open industry standards.

The "other matters affecting implementation of Section 716 are critical components of the statutory scheme. For example, the Accessibility Act and Section 255 may both apply to the same smart phone model or other multi-mode device. Congress also intended that Section 255's "readily achievable" standard continue to apply to interconnected VoIP devices. To provide certainty and protect technological innovation, the Commission should incorporate prospective waivers for appropriate classes of equipment and services into its rules and adopt streamlined processes for waiver petitions. The rule of construction reinforces that the Commission should evaluate each individual product and service on its own merits. In addition, the liability limitation and prohibition against proprietary technology provisions are critical and directly affect the implementation of Section 716, as they provisions expressly limit the scope of the "achievable" standard.

The Commission should implement the Section 717 recordkeeping requirements in a manner that provides industry flexibility and avoids any unnecessary burden. These requirements will affect businesses small and large with different business models and resources and should not discourage market entry or result in excessive and unnecessary administrative costs.

The Section 718 mobile internet browser accessibility obligations should be interpreted consistent with Section 716. Providing flexibility to industry will encourage the availability of third party applications and services that may be particularly helpful to individuals with disabilities. In addition, manufacturers are not liable for the accessibility of content or services that are made available to the user by the inclusion of a browser on the manufacturers' product.

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To: Chief, Consumer & Governmental Affairs Bureau and
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COMMENTS OF THE TELECOMMUNICATIONS INDUSTRY ASSOCIATION

The Telecommunications Industry Association ("TIA")[1] hereby submits comments on the October 21, 2010 *Public Notice* in the above-captioned proceeding seeking comment on various issues concerning key provisions of Title I of the Twenty-First Century Communications and Video Accessibility Act of 2010 (the "Accessibility Act").[2] TIA supported the passage of the

[1] TIA is the leading trade association for the information and communications technology ("ICT") industry, representing companies that manufacture or supply the products and services used in global communications across all technology platforms. TIA represents its members on the full range of public policy issues affecting the ICT industry and forges consensus on industry standards. Among their numerous lines of business, TIA member companies design, produce, and deploy a wide variety of devices with the goal of making technology accessible to all Americans.

[2] *Consumer & Governmental Affairs Bureau and Wireless Telecommunications Bureau Seek Comment on Advanced Communication Provisions of the Twenty-First Century Communications and Video Accessibility Act of 2010*, Public Notice, CG Docket No. 10-213, DA 10-2029 (CGB/WTB rel. Oct. 21, 2010) ("Public Notice"). For ease of reference, the corresponding section of the Public Notice is referenced in the headings throughout TIA's comments.

Accessibility Act, and commends the Bureaus for initiating this proceeding this important legislation into the early stages of this proceeding.[3]

INTRODUCTION

TIA and many of its members worked closely with consumer groups, legislators and other trade associations to help ensure that the Accessibility Act met the dual goals of continued availability of accessible technology without hampering the technological innovation that is the hallmark of America's ICT industry. TIA's long and established experience in standards development enables it to provide the Commission with important perspective as the agency implements Title I of the Accessibility Act. In that regard, TIA has a long history of working closely with the Hearing Loss Association of America and Gallaudet University to develop accessibility-related standards, including the TIA-1083 standard that reduces noise and interference in digital cordless phones when used by people with T-Coil-equipped hearing aids or Cochlear implants. The standard has been updated to apply to newer technologies with digital interfaces, including Voice over Internet Protocol (VoIP), Wi-Fi, Bluetooth®, and USB, underscoring TIA's commitment to ensuring that accessibility solutions remain relevant to emerging technologies.

TIA's successful involvement in standards development, and its member companies' extensive experience in developing and deploying accessible technologies – most recently evident in the area of wireless hearing aid compatibility – demonstrate how a flexible approach to the incorporation of new technologies, including accessibility features, can be achieved in a manner consistent with innovation in the ICT sector. Congress and President Obama embraced

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[3] *See* Twenty-First Century Communications and Video Accessibility Act of 2010, Pub. L. No. 111-260, 124 Stat. 2751, as amended in Pub. L. No. 111-265, 124 Stat. 2795 (2010).

this very approach in Title I the Accessibility Act, and in its forthcoming rulemaking proceeding in this docket the Commission should ensure that section 716 is implemented consistent with Congress's objectives.

DISCUSSION

I. CONGRESS INTENDED THAT THE COMMISSION PROMOTE ACCESSIBILITY THROUGH A FLEXIBLE REGULATORY APPROACH TARGETED AT THOSE CONSUMER PRODUCTS WIDELY AVAILABLE IN THE MARKETPLACE

The main objective of the Public Notice "is to solicit public input on the meaning of key provisions of new Section 716," which establishes new accessibility requirements for the "advanced communications services" defined in the Accessibility Act.[4] Two principal policy objectives are evident throughout the statute and its legislative history: promoting the development and availability of accessible advanced communications services and equipment; and preserving technological innovation. As the legislative history explains, to achieve these twin objectives Congress "intend[ed] that the Commission afford manufacturers and service providers as much flexibility as possible, so long as each does everything that is achievable" in accordance with the statute.[5]

Congress expected that the end result of the Commission's forthcoming rulemaking would reflect a carefully-crafted regulatory regime that departs significantly from section 255 in important ways. As discussed below, section 716 imposes an "achievable" standard for advanced communications services and equipment that is more rigorous than section 255's "readily achievable" standard. Unlike section 255, however, which incorporated the Americans

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[4] Public Notice at 2.

[5] *See Twenty-First Century Communications and Video Accessibility Act of 2010,* H. Rep. No. 111-563, at 24 (2010) ("House Report").

with Disabilities Act ("ADA") readily achievable standard provisions whole cloth,[6] Congress took deliberate steps to shape the "achievable" standard in important ways to better reflect the marketplace realities facing ICT equipment manufacturers and service providers. Congress also incorporated a policy of affording industry flexibility in achieving flexibility through means not available under section 255, such as prohibiting the imposition of proprietary technologies, the use of performance objectives rather than standards, permitting reliance on third-party applications, giving the Commission *sua sponte* authority to waive section 716's provisions for products that only incidentally fall within the statute, and exemptions for small entities and enterprise customers.

Thus, as discussed in more detail below, the outcome of the Commission's forthcoming rulemaking proceeding most consistent with section 716 is a regime of accessibility regulations and enforcement that (1) is appropriately focused on widely available products and services that are used and offered for individual communications, and (2) promotes accessibility for individual consumers with disabilities through the availability of diverse classes of products.

II. MANUFACTURERS AND SERVICE PROVIDERS ARE SUBJECT TO SECTION 716 INSOFAR AS THEY OFFER PRODUCTS OR SERVICES FALLING WITHIN THE ADVANCED COMMUNICATIONS SERVICES DEFINITIONS (§ II.1)

The Bureaus seek comment on the statutory definitions of the four "advanced communications services" that are subject to various provisions of the Accessibility Act.[7] In all cases, service providers are subject to section 716 only insofar as they are offering those services to consumers, and manufacturers are necessarily subject to section 716 only to the extent that

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[6] *See* 47 U.S.C. § 255(a)(2) (cross-referencing the readily achievable requirements of the ADA).

[7] Public Notice at 2; Accessibility Act § 101 (codified at 47 U.S.C. § 153(1)).

they are offering those products to the public or otherwise making them commercially available. This interpretation is consistent with the Commission's treatment of services defined in Section 3 of the Communications Act,[8] and for manufacturers is compelled by section 716(a), which defines a manufacturer's obligations in terms of equipment and software it "offers for sale or otherwise distributes in interstate commerce …."[9] For manufacturers, the definitions and obligations thus apply to products based on how the manufacturer itself produces them and offers them for sale to end users based on the functions made available and the consumer's perception.[10] In evaluating whether a service or product is subject to section 716 in the first instance, the purpose for which it is offered to the end user is thus of primary importance.[11] The scope of the services and equipment covered by each of the four individual definitions is also subject to additional important limitations, as discussed below.

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[8] *See* 47 U.S.C. § 153(51).

[9] Section 716(a)(1) (codified at 47 U.S.C. § 617(a)(1)).

[10] *See Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, Internet Over Cable Declaratory Ruling, Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, 17 FCC Rcd 4798, ¶ 35 (2002) (each statutory definition of service "rests on the function that is made available") ("*Cable Modem Declaratory Ruling*"), *aff'd sub. nom. National Cable Telecoms. Ass'n v. Brand X Internet Svcs.*, 545 U.S. 967 988-91 (2005) (upholding Commission's determination that "offering" is based on end user's perception of the service).

[11] As discussed *infra*, this interpretation is also consistent with the Accessibility Act's third party liability limitations. Services and equipment that provide a broadband connection do not entail the offering of a third party's interconnected or non-interconnected VoIP service that utilizes that connection.

A. Interconnected VoIP and Non-Interconnected VoIP

The statutory definition of interconnected VoIP is defined exclusively in reference to the Commission's definition of that term at section 9.3 of its rules,[12] so the Commission cannot depart from that definition for Accessibility Act purposes.[13] While "non-interconnected VoIP" is defined more broadly, [14] the mere presence of a VoIP capability in a particular product or service does not render it a "stand alone" interconnected VoIP offering subject to the Accessibility Act. Just as the provision of broadband Internet access does not necessarily include a stand-alone offering of telecommunications service, the provision of a gaming system or other information service with an incidental VoIP capability does not necessarily entail a non-interconnected VoIP offering.[15] TIA thus submits that for many offerings with a purely incidental VoIP component (e.g. gaming systems or private internal enterprise systems), from the consumer's perspective there is no stand-alone non-interconnected VoIP offering and that such products are thus not subject to the Accessibility Act in the first instance.[16]

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[12] *See* 47 U.S.C. § 153(25) (defined in reference to 47 C.F.R. § 9.3 "as such section may be amended from time to time").

[13] *See* Public Notice at 5 (seeking comment "on how to treat interconnected VoIP service").

[14] *See* 47 U.S.C. § 153(36).

[15] *See Cable Modem Declaratory Ruling* at ¶ 39; *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853 ¶ 16 (2005), *aff'd Time Warner Telecom, Inc. v. FCC*, 507 F.3d 205 (3d Cir 2007); *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, Declaratory Ruling, 22 FCC Rcd 5901, ¶ 21 (2007).

[16] Otherwise, gaming systems and other applications with a purely incidental VoIP component could potentially become subject to TRS Fund contribution requirements, even if the Commission might find some other basis for exempting such systems from 716. *See* Accessibility Act § 103(b) (to be codified at 47 U.S.C. § 616) (applying TRS Fund contribution requirements to "each provider of non-interconnected VoIP service").

Moreover, even insofar as particular non-interconnected VoIP products or applications fall within the scope of the definition, the provisions of section 716 providing for waivers and exemptions underscore that equipment and services that are designed for the purpose of "accessing advanced communications" and are "designed for and used by members of the general public" are Congress's principal focus.[17] In all events, the Commission should ensure that it applies the waiver and exemption provisions of sections 716(h) and (i) in a manner that meaningfully effects Congress's intent, including with respect to non-interconnected VoIP services.

B. Electronic Messaging

Electronic messaging is defined as "a service that provides real-time or near real-time non-voice messages in text form between individuals over communications networks."[18] The "real-time or near real-time" and "between individuals" modifiers expressly limit the term to services that include both transmission and receipt of text that can be addressed to recipients as selected by the sender. Thus, text-based transmissions that are intended for publication purposes, such as blog postings, and "Tweets," are exempt. The legislative history affirms this interpretation, clarifying that Congress's concerns were "focus[ed] on more traditional, two-way, interactive services such as text messaging, instant messaging, and electronic mail, rather than on communications such as blog posts, online publishing, or messages posted on social networking websites."[19] Further, the phrase "between individuals" clarifies that this definition is meant to

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[17] *See* House Report at 26.

[18] 47 U.S.C. § 153(19).

[19] House Report at 23. The definition as enacted was modified significantly from earlier version of the legislation as introduced, which covered "non-voice messages in text form between
(continued on next page)

cover communication between human beings and not it was not the intent of Congress to capture device-to-device communications, such as automatic software updates. Moreover, consistent with the Accessibility Act's third party liability provisions, and the intended scope of the definition, services and applications that merely provide access to an electronic messaging service, such as a broadband platform that provides an end user with access to an HTML-based e-mail service, are not covered.

C. Interoperable Video Conferencing Service

Interoperable video conferencing service is defined as "a service that provides real-time video communications, including audio, to enable users to share information of the user's choosing …."[20] A service that enables "users to share information" necessarily implies a two-way service, not a broadcast-style "webinar" video. Moreover, the term "interoperable" is particularly significant, as it is uniformly understood to entail inter-platform, inter-network and inter-provider communications.[21] Two-way video applications and services are nascent, and

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persons over communications networks." *See* H.R. 3101, 111th Congress, § 101(1) (as introduced June 26, 2009).

[20] 47 U.S.C. § 153(27).

[21] *See* 47 C.F.R. § 90.7 (defining "interoperable" in the public safety wireless context as "An essential communication link within public safety and public service wireless communications systems which permits units from two or more different entities to interact with one another and to exchange information according to a prescribed method in order to achieve predictable results."); *Telecommunications Relay Services for Individuals with Hearing and Speech Disabilities*, CG Docket No. 03-123, Declaratory Ruling and Further Notice of Proposed Rulemaking, 21 FCC Rcd 5442 (May 9, 2006) (imposing interoperability obligation such that "All VRS consumers should be able to place a VRS call through any of the VRS providers' service, and all VRS providers should be able to receive calls from, and make calls to, any VRS consumer."); *see also* 47 C.F.R. § 51.325(b) (defining "interoperability" as "the ability of two or more facilities, or networks, to be connected, to exchange information, and to use the information that has been exchanged."). Congress necessarily had this history in mind. *See Sweet Home Chapter of Communities For a Great Oregon v. Babbitt v. Babbitt*, 17 F.3d 1463,
(continued on next page)

often entail the provision a video connection that is incidental to a particular service provider's product. Thus, with the possible exception of more mature products such as Video Relay Service ("VRS") equipment, which is already subject to an express interoperability mandate,[22] such services and products are generally not yet genuinely interoperable. Moreover, for the reasons discussed above, those products that offer a video connection that is incidental to the principal purpose and nature of the end user offering fall outside the definition as well.[23]

III. THE "ACHIEVABLE" STANDARD REQUIRES PRODUCT-SPECIFIC EVALUATION AND AFFORDS MANUFACTURERS FLEXIBILITY TO ACCOUNT FOR THE WIDE MARKETPLACE OF ACCESSIBILITY SOLUTIONS (SEC. II, PAR. 2)

Congress's intent that industry have maximum flexibility in achieving compliance with section 716 is most clearly manifest in the factors used to determine whether accessibility is "achievable," as well as the manner in which manufacturers and service providers may comply with that obligation. Both aspects of the achievable standard are discussed in more detail below.

A. The Factors Relevant to an Achievability Determination Are Tailored to Prod Manufacturers and Service Providers to Incorporate Accessibility into their Products While Preserving Innovation in the ICT Marketplace (§ II.2)

The Bureaus "seek comment on how best to provide further guidance on" the achievable standard, defined as "with reasonable effort or expense."[24] How the standard applies to a given product will necessarily be a case-by-case, fact-driven exercise, but the statutory language and

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1471 (D.C. Cir. 1994) (Congress presumed to be cognizant of and legislate against background of existing agency interpretation of law), *rev'd on other grounds*, 515 U.S. 687 (1995).

[22] *See Public Notice* at 2 ("seek[ing] comment on the extent to which equipment used by people with disabilities for point-to-point video relay services should be considered equipment used for 'interoperable video conferencing services.'").

[23] *See supra* at §II.A.

[24] Public Notice at 3.

legislative history provide some important parameters. The legislative history provides that the Commission must "weigh each factor equally when making an achievability determination."[25] Thus, the four statutory factors must be evaluated as a whole; a particular factor that militates against a finding of achievability may not be discounted in relation to a factor that leans the other direction (and vice-versa). Additional considerations relevant to each of the four factors follow below.

1. Nature and Cost (New Section 716(g)(1))

Section 716(g)(1)'s requirement that the nature and cost of achieving accessibility relate exclusively "to the specific equipment or service in question" recognizes that the costs and burdens of incorporating an accessibility feature into a competing or ostensibly similar product are not necessarily relevant to the product in question. Similarly, the accessibility features in a manufacturer's or service provider's other offerings do not necessarily have bearing on whether the feature is achievable in the new product. This product-specific approach reflects how companies evaluate and design their new offerings, and ensures that the Commission's analysis of individual products remains appropriately focused on the equipment and services that are subject to the Accessibility Act.

Moreover, while the achievable standard is not identical to its section 255 counterpart, the Commission's consideration of "nature and costs" in that context can nonetheless provide some instructive guidance here. For example, the technical feasibility of an accessibility feature will be every bit as relevant under section 716(g)(1).[26] The legislative history also confirms that,

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[25] House Report at 25.

[26] *See In the Matter of Implementation of Sections 255 and 251(a)(2) of the Communications Act of 1934, as Enacted by the Telecommunications Act of 1996; Access to Telecommunications*
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as with section 255, features that "fundamentally would alter the product" are *per se* not achievable.[27]

2. Technical and economic impact on operations (New Section 716(g)(2))

In applying this factor, the Commission must consider the impact of requiring accessibility on the "operation of the *specific* equipment or service in question," and also "on the development and deployment of new communications technologies."[28] Thus, similar to the nature and cost factor, the Commission may not look to the impact of an accessibility feature on a different or competing product or service as a proxy for the impact on the product or service in question. The costs and business viability of a product will necessarily affect a device's technical specifications, including specifications related to accessibility, and this factor accommodates these economic considerations where warranted. In extreme cases, where the cost of making a device or service accessible would render it uncompetitive in the marketplace (as evidenced, for example, by such costs as a appropriate percentage of the prior year revenues or similar proxy), the resulting expense could be *prima facie* not "reasonable" under the achievable definition.

Finally, the explicit requirement that the Commission account for new communications technologies underscores Congress's understanding that new entrants may not initially have the resources to timely incorporate particular accessibility features into their products. In these

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Service, Telecommunications Equipment and Customer Premises Equipment by Persons with Disabilities, Report and Order and Further Notice of Inquiry, 14 FCC Rcd. 6417, 6444-45 ¶¶ 61-64 (1999)("*Section 255 Order*").

[27] *See* House Report at 24-25; *Section 255 Order,* 14 FCC Rcd. at 6444.

[28] 47 U.S.C. § 617(g)(2) (emphasis added).

circumstances, Congress intended that application of the achievable standard not adversely affect the timely introduction of new technologies and services, particularly where time-to-market considerations are critical to the competitiveness and economic viability of a product.

3. Type of operations (New Section 716(g)(3))

The legislative history explains that, under this third factor, in evaluating "[t]he type of operations" the Commission should consider whether the entity offering the product or service "has a history of offering advanced communications services or equipment or whether the entity has just begun to do so."[29] Thus, a company's status as a comparatively new market entrant in the advanced communications marketplace, regardless of what other products it offers, must be accounted for in assessing whether a particular accessibility feature is achievable for that company.

4. Varying degrees of functionality and features, and offered at differing price points (New Section 716(g)(3))

The extent to which a company "offers accessible services or equipment containing varying degrees of functionality and features, and offered at differing price points" is another notable refinement of the existing section 255 approach that reflects Congress's sensitivity to the realities of the ICT marketplace.[30] In section 716(g)(4), as well as the Rule of Construction at section 716(j), Congress recognized that there is no "one-size-fits-all" solution to accessibility and that while a certain product or service may meet the accessibility demands of one consumer, it will not necessarily meet those of another consumer with a different disability. Section 716(g)(4) instead reflects Congress's intent that the Commission's regulations and enforcement

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[29] 47 U.S.C. § 617(g)(3); House Report at 25-26.

[30] 47 U.S.C. § 617(g)(4).

should seek to give individuals with disabilities meaningful choices in accessible products, and to reward those companies who provide such choices.

The Accessibility Act's legislative history explains further that the Commission is to "interpret this factor in a similar manner to the way it has implemented its hearing aid compatibility rules."[31] Recognizing that new technologies can create unique technology-specific challenges, in its HAC rules the Commission requires that manufacturers and service providers ensure that a minimum number of handsets they offer are HAC-certified.[32] While Section 716's case-by-case, product-specific approach is not amenable to the fixed number or percentage approach the Commission has employed in the HAC context, section 716(g)(4) requires that a company's good faith efforts to incorporate an accessibility feature in different products within multiple product lines count favorably in an achievable analysis for the product in question. This approach appropriately rewards companies that make substantial investments in accessible products for broad classes of consumers with broad classes of disabilities, while allowing flexibility to account for marketplace realities.

B. The Achievable Standard Better Reflects Marketplace Realities than the Readily Achievable Standard

The Bureaus seek comment on how the "achievable" standard compares with section 255's "readily achievable" standard.[33] Section 716's achievable standard for advanced communications services and equipment, although a rigorous standard, better reflects marketplace realities than the "readily achievable" standard through the updated factors, as

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[31] House Report at 26.

[32] *See* 47 C.F.R. §§ 20.19(c), (e).

[33] *See* Public Notice at 3.

described in more detail above. Importantly, however, Congress express rejected the even more stringent "undue burden" standard.[34] Thus, the Commission may not embrace an interpretation of "achievable" tantamount to that higher threshold.

C. The Accessibility Act Requires that the Commission Accommodate the Use of Third Party Applications, Services and Equipment in Promoting Accessibility (Sec. II, par. 3)

The Accessibility Act's perhaps most innovative departure from section 255's readily achievable factors is the "Industry Flexibility" provisions at section 716(a)(2) and (b)(2), which permit manufacturers and service providers to comply with the new achievable requirements through built-in features or through the use of "third party applications, peripheral devices, software, hardware, or [CPE] that is available to the consumer at nominal cost …."[35] Given Congress's maximum flexibility, the Commission should in no way prejudge the "type of third party applications, peripheral devices, software, hardware, or CPE might be acceptable for this purpose" but must instead permit the use of both widely available as well as specialized third party applications, devices and services.[36] This will promote competition among third parties, leading to increased innovation and decreased costs for consumers, manufacturers and service providers alike.

The Bureaus specifically "seek comment on the definition of 'nominal cost'" in this context.[37] The legislative history importantly clarifies that Congress did not "prescribe a

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[34] *Compare* H.R. 3101, § 104(a) (as introduced June 26, 2009) (defining "undue burden" as "significant difficulty or expense").

[35] 47 U.S.C. §§ 617(a)(2), (b)(2).

[36] *See* Public Notice at 3 (seeking comment on "what type of third party [products] might be acceptable for this purpose").

[37] Public Notice at 3.

percentage or amount for the purpose of defining what constitutes a nominal fee" but that it 'should be small enough so as to generally not be a factor in the consumer's decision to acquire a product or service that the consumer otherwise desires."[38] This, in turn, requires a product-by-product and customer-by-customer analysis that reflects factors, such as the cost of the third party product relative to the cost of the product and underlying advanced communications service at issue,[39] and, the overall service package, including the extent to which otherwise costly features are being subsidized,[40] to name a few. Moreover, the Commission needs to evaluate the term in light of Congress's intention to clearly depart from the traditional accessibility-compatibility framework of section 255 and not interpret the term "nominal cost" in a manner that renders the third party solution option superfluous.[41]

Industry flexibility and innovative third party products are just as relevant to section 716's compatibility requirements. The Bureaus seek comment on whether the term "'devices commonly used by persons with disabilities to achieve access' … is limited to specialized equipment or could include mass market devices and software. There is no statutory basis for

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[38] House Report at 24.

[39] For example, a particular third party accessibility solution with a one-time cost that exceeds "nominal" for a basic wireless handset and service plan, may clearly be nominal in the context of a service plan that includes high-end smartphone handsets with robust application download capabilities, unlimited voice minutes, and high volume data usage.

[40] For example, where a service provider offers a $600.00 handset to customers at a subsidized $100.00 retail price, but subject to a minimum term contract of monthly billed charges, whether the cost of a particular third party solution is "nominal" must be viewed in the context of the handset's true cost and the overall service package.

[41] Given the option of a downloadable third party accessibility application that is somewhat more expensive than other downloadable applications but far less expensive than an extremely expensive specialized CPE or peripheral device, the costs of the former may still be "small enough so as to generally not be a factor in the consumer's decision to acquire a product or service."

limiting the term to specialized equipment. In interpreting this same language in section 255, the Commission previously recognized that "what is 'commonly used' by consumers may change rapidly as technology evolves."[42] There is now an increasing recognition that mainstream products can have enormous benefit for individuals with disabilities.[43] The development and availability of specialized services such as mobile CART, as well as third party applications that are designed specifically for accessibility purposes, should of course be encouraged.[44] For Accessibility Act purposes, however, the key issue is whether the technology improves the usability of advanced communications services and equipment – not the narrow purpose for which it was originally designed. The proverbial "curb cuts" of the ADA work both directions under the Accessibility Act: accessibility features may prove to have commercial appeal beyond individuals with disabilities, and a product or service designed for wider commercial availability may have particular benefits for individuals with particular disabilities. Congress recognized that third party applications have enormous potential in this regard, and the Commission should not apply its terms in a manner that undermines that potential.

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[42] *See Section 255 Order*, 14 FCC Rcd. at 6435 ¶ 36.

[43] The Access Board's new Draft Guidelines currently under consideration define "Assistive Technology" to include, in relevant part, "traditional assistive technology hardware and software *along with mainstream technology used for assistive purposes* …." *See* U.S. Access Board, *Draft Information and Communication Technology Standards and Guidelines*, at 9 (rel. Mar. 2010) (emphasis added).

IV. PERFORMANCE OBJECTIVES AND STANDARDS

A. The Commission Should Establish Reasonable, Outcome-Oriented Performance Objectives (Sec. II, par. 6)

The Bureaus seek comment on whether performance objectives "should be specific or general."[45] The Accessibility Act expressly distinguishes between performance requirements on one hand and standards on the other – a distinction which for that matter, is evident throughout the Commission's rules. Performance objectives are akin to the outcome-oriented provisions of the Commission's Part 6 rules that facilitate multiple practical means of implementation and compliance. Technical standards, in contrast, are typically "build-to" requirements that dictate the internal function and capabilities of a device or service, such as the ANSI C63.19 standard codified in the Commission's hearing aid compatibility rules, and the AMPS standard formerly imposed on cellular operators.[46] The approach of the Commission's rules at 47 C.F.R. Part 6 is appropriate for now, particularly given the time constraints imposed by the statute, and the Commission can revisit those provisions after the Access Board completes its update of the related section 255 guidelines.[47] Such performance objectives, coupled with nonbinding guidance required under section 716(e)(2) and akin to those appended to the Access Board's

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[45] *See* Public Notice at 4.

[46] *See* 47 C.F.R. § 20.19(b) (HAC); *id.* § 22.901(b) (cellular AMPS standard).

[47] TIA submits that while high-level harmonization with the Access Board's section 508 and 255 provisions can have benefits, that proceeding is ongoing and section 508 also includes certain reporting and other procedural requirements related to the development of new guidelines and standards that are inapplicable beyond section 508 itself. *See* 29 U.S.C. § 794d(a).

original section 255 guidelines,[48] should be tailored to provide industry with clear outcome-oriented guidance.

B. The Commission May Adopt Safe Harbor Rules Based on Industry-Developed Technical Standards (Sec. II, par. 8)

The Commission has authority to adopt technical standards as safe harbors for compliance, but only where "necessary" and never in lieu of the more general performance objectives.[49] Technical standards can be an effective tool to ensure consistency and transparency in the application and enforcement of regulatory requirements when used as a safe harbor. TIA encourages the use of voluntary, consensus-based, and open industry standards, such as TIA 1083, to be used by the Commission to guarantee safe harbor compliance. In all instances, standards should be vetted through a public comment process. Indeed, the Access Board itself will not cite to an industry standard as a compliance method except in these circumstances.

Section 107 of the Communications Assistance for Law Enforcement Act ("CALEA") provides an effective model in this regard.[50] Section 107(a)(2) of CALEA allows for carriers and manufacturers to be found in compliance with the Act if the entity "is in compliance with publicly available technical requirements or standards adopted by an industry association or standard-setting organization, or by the Commission …."[51] TIA's J-STD-025 technical standard was employed for this purpose, and expanded upon at law enforcement's request after the

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[48] *See* Architectural and Transportation Barriers Compliance Board, *Telecommunications Act Accessibility Guidelines*, 63 Fed. Reg. 5608, 5633-41 (Feb. 3, 1998). While the House Report discusses Commission-published guidance as a basis for this rule, it seems likely that the Committee was referencing the Access Board's guidance instead. *See* House Report at 25.

[49] 47 U.S.C. § 617(e)(1).

[50] *See* 47 U.S.C. § 1006.

[51] *Id.* § 1006(a)(2).

opportunity for a full notice-and-comment rulemaking proceeding.[52] CALEA thus provides a good example of how safe harbors for entities found to be in compliance with publicly-available technical standards can provide both market certainty while meaningfully achieving important public policy objectives.

V. THE "OTHER MATTERS AFFECTING IMPLEMENTATION OF SECTION 716" ARE CRITICAL COMPONENTS OF THE STATUTORY SCHEME (§ III)

The statutory provisions described in the Public Notice as "other matters"[53] are fundamental to Congress's objective of preserving innovation while promoting accessibility. If applied consistent with Congress's intent, section 716's accessibility requirements will be properly targeted at commercial devices and services primarily offered for the purpose of providing advanced communications services, and that are widely available to individual consumers.

A. The Accessibility Act and Section 255 May Both Apply to Smart Phones and Other Multi-Mode Devices (§ III.1)

The Bureaus ask "to what extent should smart phones that have voice, text and video capability … be subject to the readily achievable standard of Section 255 or the achievable standard of Section 716?"[54] The answer is evident from the statute and the Commission's precedents: section 255, by its terms, applies to telecommunications services and CPE functions used for such services; and section 716, by its terms, applies to advanced communications services and the equipment used for such services. The Commission may not modify these

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[52] 47 C.F.R. §§ 1.20006(a)-(b); *Communications Assistance for Law Enforcement Act,* Third Report and Order, 14 FCC Rcd 16794 (1999).

[53] Public Notice at 5.

[54] Public Notice at 5.

statutory definitions, and the fact that a device may be used for both services does not render the telecommunications services an advanced communications service, or vice-versa.[55]

The Bureaus also ask "how to treat interconnected VoIP service, which now is covered by Sections 255 and 716."[56] Section 716(f) provides that "[t]he requirements of this section shall not apply to any equipment or services, including interconnected VoIP service, that are subject to the requirements of section 255" prior to enactment, but instead "[s]uch services and equipment shall remain subject to the requirements of section 255."[57] While the inclusion of interconnected VoIP in the definition of "advanced communications service" has implications for other purposes, such as the HAC provisions of section 102 of the Accessibility Act, Congress clearly intended that section 255's readily achievable standard would continue to apply to such services.

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[55] The Commission squarely addressed this situation in its *Section 255 Order*, finding that "[a]n entity that provides both telecommunications and non-telecommunications services … is subject to section 255 only to the extent that it provides a telecommunications service" and "equipment … used to originate, route or terminate telecommunications is covered, even if the equipment is capable of providing non-telecommunications functions." *See Section 255 Order*, 14 FCC Rcd. at 6450 ¶ 80 and 6453 ¶ 87. The same rationale applies with equal force to other services defined in section 3 of the Communications Act, such as advanced communications services. There may be instances in which the menus and navigation tools for the advanced communications and telecommunications components of a device are integrated such that the same accessibility features could apply to and improve the accessibility of both. This is a fact-specific question of how the applicable standard (achievable versus readily achievable) applies to a particular product, however, not a question of how the service is to be defined for purposes of section 716.

[56] Public Notice at 5.

[57] An alternative interpretation would result in different interconnected VoIP providers and manufacturers being subject to disparate regulatory obligations, which would raise significant issues of competitive and technology neutrality.

B. The Commission Should Incorporate Waivers for Appropriate Classes of Service Into Its Rules and Adopt Streamlined Processes for Waiver Petitions (§ III.2)

The Bureaus seek comment on the factors that are relevant to the waiver provisions of section 716(h),[58] and on "any specific classes of equipment or services that warrant categorical waivers."[59] As noted above, many products with VoIP or other advanced service capabilities such as gaming systems might not be deemed as a service offering for Communications Act and section 716 purposes. To the extent that other products are not *per se* excluded from the Accessibility Act's scope, they might nonetheless be appropriate candidates for categorical waivers incorporated into the Commission's rules. Section 716(h) authorizes the Commission to waive the accessibility requirements "on its own motion" with respect to classes of equipment and services, and incorporating generally applicable waivers into its rules is consistent with this authority and would provide industry with added certainty.

There is no exhaustive list of the appropriate waiver factors for consideration, but for multi-purpose devices subject to section 716(h)(1)(A), the legislative history explains that "a device designed for a purpose unrelated to accessing advanced communications might also provide, on an incidental basis, access to such services."[60] With respect to smaller entities subject to section 716(h)(1)(B), Congress intended that the Commission consult with the SBA in

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[58] The Commission may waive accessibility requirements "on its own motion or in response to an" individual petition "for any feature or function of equipment … or for any class of such equipment" that "is capable of accessing an advanced communications service and "is designed for multiple purposes, but is designed primarily for purposes other than using advanced communications services." *See* 47 U.S.C. § 617(h).

[59] Public Notice at 5.

[60] *See* House Report at 26.

this regard in defining a "small entity," but also expressly understood that "legal, financial, or technical capability" issues would all be relevant factors.[61]

To the extent that individual waiver petitions are required in order to invoke section 716(h), the Commission's processes for handling such requests should be constructed to afford companies the maximum amount of pre-launch lead time and certainty. There is a significant risk that a waiver process could undermine the business case for providing accessible advanced communications services if it does not ensure that requests are timely adjudicated and that confidential information is protected. Given the time-to-market sensitivities of which Congress was aware, the Commission should incorporate an automatic grant date for waiver requests.[62] At minimum, the Commission should employ another mechanism that provides assurance that if the Commission fails to timely act on a good faith waiver request, the company in question will be able to initiate the product or service without penalty, and incorporate accessibility features in a reasonable time frame prospectively.[63]

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[61] *See* House Report at 26.

[62] Section 69.3 of the rules provides that for companies involved in mergers or acquisitions seeking waivers to allow more than 50,000 common lines reenter the NECA common line pool, waiver requests are *automatically* granted after 60 days in part to "offer[] an important planning horizon for the involved LECs." *See* 47 C.F.R. § 69.3(g)(3); *Amendment of Part 69 of the Commission's Rules Relating to the Common Line Pool Status of Local Exchange Carriers Involved in Mergers or Acquisitions*, 5 FCC Rcd 231, ¶ 33 (1989). The same rationale is even more relevant here, where time-to-market considerations are even more critical in these highly competitive services and equipment markets.

[63] The Commission has previously utilized such an approach in other contexts. *See DTV Channel Election Issues – Compliance with the July 1, 2006 Replication/Maximization Interference Protection Deadline; Stations Seeking Extension of the Deadline*, Public Notice, 21 FCC Rcd 6540 (MB 2006) ("The filing of a request to waive the replication/maximization interference protection deadline will toll automatically the deadline pending consideration of the request."); *CALEA Section 103 Compliance and Section 107(c)(2) Petitions*, Public Notice, 15 FCC Rcd 7482 (CCB 2000) (granting petitioners provisional, two-year extensions of CALEA compliance deadline pending Commission action on the merits of the individual petitions).

C. The Rule of Construction Reiterates the Need for Case-by-Case Determination of Accessibility Capabilities (§ III.3)

Like section 716(g)(4), new section 716(j) reflects Congress's understanding that when each individual product and service is reviewed on its own merits under the achievability factors, accessibility obligations might not apply across each individual product in an entire product line. Where incorporating accessibility features for a particular disability in a particular product or across an entire product lines or is not achievable, section 716(j) further underscores that this fact may not be viewed as any sort of *per se* indicator of noncompliance or otherwise be viewed unfavorably in an enforcement context. An alternative approach would impose significant burdens and uncertainty in device manufacturers' product design and development and delay the introduction of new technologies.

D. Sections 2 and 3 of the Accessibility Act Are Critical to Congress's Overall Statutory Scheme (§ III.4)

The Bureaus inquire whether the third party liability limitations and prohibition against proprietary technology in sections 2 and 3 of the Accessibility Act, respectively, "should affect implementation of Section 716."[64] These provisions directly affect implementation of section 716 by imposing explicit limits on the scope of the "achievable" standard. By definition, accessibility features that fall under either section are not "achievable" and cannot be mandated in a rulemaking or enforcement context. As TIA has discussed throughout these comments, the third party liability limitations instruct how and to what extent the Commission may apply section 716's provisions in the first instance. These provisions are equally relevant to section 717's enforcement provisions in terms of both liability not including particular accessibility

[64] *See* Public Notice at 6.

features and how the Commission exercises its remedial authority.[65] With respect to section 2 in particular, it is important that the Commission's rules clearly reflect that third party application and service providers may have obligations that apply independent of the equipment and services that consumers use in order to access those third party products. With respect to section 3 in particular, the Act bars the Commission from mandating the use or incorporation of proprietary technology but does not reflect a preference for non-proprietary technology. This section simply protects those subject to the Act from being penalized for lack of access to proprietary technology.

VI. THE COMMISSION SHOULD ALLOW INDUSTRY FLEXIBILITY AND AVOID UNNECESSARILY BURDENSOME SECTION 717 RECORDKEEPING REQUIREMENTS (§ IV)

The Bureaus seek comment on "the types of records that should be maintained for each of" the categories of information enumerated in section 717(a)(5).[66] Manufacturers, service providers, and other entities the Commission may subject to section 716 will come in numerous sizes and will have different business models and resources. The reporting requirements should not be so burdensome as to discourage market entry or result in excessive and unnecessary administrative costs. In that regard, the Commission could provide some non-exhaustive guidance concerning the type of information that would be responsive to the statutory recordkeeping criteria, but it should not preclude a manufacturer or service provider from utilizing particular format or data point. In this regard as well, the information to be gathered via

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[65] *See* 47 U.S.C. § 503(b)(2)(F) (imposing new maximum forfeiture penalty for section 255, 716 or 718 violations); *id.* § 618(a)(3)(B)(i) (giving Commission discretion to require "next generation of the equipment or device" be compliant "within a reasonable time …").

[66] *See* Public Notice at 6.

the forthcoming clearinghouse might also be used to provide industry with some guidance concerning information that would be responsive to the recordkeeping requirements.

VII. MOBILE INTERNET BROWSER ACCESSIBILITY OBLIGATIONS UNDER SECTION 718 SHOULD BE INTERPRETED CONSISTENT WITH THE SECTION 716 FLEXIBILITY REQUIREMENTS (§ V)

Section 718 of the Act imposes accessibility requirements on handsets with Internet browsers.[67] By its terms, section 718 is generally subject to the same "achievable" and "industry flexibility standard as products and services that are subject to section 716. The requirements should thus be interpreted and implemented in the same manner, on a case-by-case basis and subject to the various factors and parameters discussed above.[68] The availability of affordable third party applications and services in section 718(b)'s industry flexibility provisions may be particular helpful for individuals with disabilities.

Screen browser technologies used for Internet browsing particularly underscore the need for flexible interpretation of the "nominal cost" provision. For example, even though such technologies are not required for *desktop* PCs, [69] section 718 would potentially require them for mobile devices where "achievable." Some manufacturers, however, may face substantially higher licensing fees for technologies like screen reader applications that, in turn, cannot as easily be absorbed into the retail cost of a product. As a result, for many manufacturers the upfront one-time costs of screen reader technologies remain more expensive than those of a

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[67] *See* 47 U.S.C. § 619(a).

[68] *See supra* at §3.

[69] Section 718 is limited to telephones used with public mobile services, and, therefore, does not encompass computers, such as laptops or desktops. However, it is important to note that most manufacturers do not have existing proprietary computer technology that provides access to individuals who are blind or have low vision, such as screen readers and text-to-speech engines, which they are able to leverage on a mobile device, as Apple was able to do with the iPhone.

typical third party application or service. Such costs may be a fraction, however, of the overall cost of the device and service over time and thus still "small enough so as to generally not be a factor in the consumer's decision to acquire" the device.[70]

TIA also notes that, consistent with the third party liability requirements, service providers and manufacturers should only be liable to the extent that such service provider or manufacturer arranged for the inclusion of a browser at the time the product was produced. As a related matter, under section 718 manufacturers are not liable for the accessibility of content or services that are made available to the user by the inclusion of a browser on the manufacturers' product.

CONCLUSION

For the foregoing reasons, the Commission's implementation of the advanced communications provisions of the Accessibility Act should incorporate Congress's dual objectives of promoting the accessibility of new communications technologies for persons with disabilities, while preserving the innovation that makes such new technologies desirable for all consumers.

Respectfully submitted,

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[70] *See* House Report at 24.

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