

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
ENTERTAINMENT SOFTWARE
ASSOCIATION
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 and
Equipment by People with Disabilities

CG Docket No. 10-213

ORDER

Adopted: September 16, 2015

Released: September 16, 2015

By the Acting Chief, Consumer and Governmental Affairs Bureau:

I. INTRODUCTION

1. In this Order, the Consumer and Governmental Affairs Bureau (CGB or Bureau) of the Federal Communications Commission (FCC or Commission) addresses a petition filed by the Entertainment Software Association (ESA). ESA requests a partial extension of the class waiver of the Commission's accessibility requirements for advanced communications services (ACS) and equipment for one class of equipment – video game software. The current class waiver for video game software, granted by the Bureau in October 2012, will expire on October 8, 2015. For the reasons set forth below, the Bureau grants ESA's request for a partial extension of the class waiver for video game software until January 1, 2017.

II. BACKGROUND

2. On October 8, 2010, President Obama signed into law the Twenty-First Century Communications and Video Accessibility Act of 2010 (CVAA), which amended the Communications Act of 1934 (Act), "to help ensure that individuals with disabilities are able to fully utilize communications services and equipment and better access video programming." Section 716, which was added to the Act by the CVAA, requires providers of ACS and manufacturers of equipment used for ACS

1 Pub. L. No. 111-260, 124 Stat. 2751 (2010), amended by Pub. L. No. 111-265, 124 Stat. 2795 (2010) (containing technical corrections).

2 See Title 47 of the United States Code.

3 S. Rep. No. 111-386 at 1 (2010) (Senate Report); H.R. Rep. No. 111-563 at 19 (2010) (House Report). Congress also noted that the communications marketplace had undergone a "fundamental transformation" since it enacted section 255 of the Act in 1996. Senate Report at 1; House Report at 19. See also 47 U.S.C. § 255 (requiring access to telecommunications services and equipment).

to make their services and products accessible to and usable by individuals with disabilities unless doing so is not achievable.⁴ The CVAA defines ACS 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.⁵ The Commission adopted rules implementing section 716 of the Act, as well as rules implementing the CVAA's recordkeeping and enforcement obligations for ACS and ACS equipment,⁶ in October 2011.⁷ These rules were phased in over a two-year period ending October 8, 2013.⁸

3. Pursuant to section 716(h)(1) of the Act,⁹ the Commission may grant waivers of the ACS accessibility 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 the use of ACS.¹⁰ In instances where equipment and services may have multiple primary or co-primary purposes, waivers may not be warranted, depending on the circumstances.¹¹

4. In conducting a waiver analysis, the Commission's rules provide for a case-by-case examination of whether the equipment is designed to be used for ACS purposes by the general public and whether and how the ACS features or functions are advertised, announced, or marketed.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

⁴ 47 U.S.C. § 617.

⁵ 47 U.S.C. § 153(1).

⁶ 47 U.S.C. § 618.

⁷ *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 1996; 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 (2011) (*ACS Report and Order*).

⁸ *ACS Report and Order*, 26 FCC Rcd at 14601-14605, ¶¶ 105-113. See also 47 C.F.R. §§ 14.1-14.21 (applying the ACS accessibility rules to models or versions of products and services that are introduced or upgraded on or after October 8, 2013); 47 C.F.R. §§ 14.30-14.52 (implementing recordkeeping and enforcement obligations).

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. The Commission delegated to CGB the authority to act upon all such waiver requests. *ACS Report and Order*, 26 FCC Rcd at 14566, 14640-41, ¶¶ 19, 197.

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 (quoting House Report at 26; Senate Report at 8).

¹² *ACS Report and Order*, 26 FCC Rcd at 14634-35, ¶¶ 182, 183, 185. See also 47 C.F.R. § 14.5(a)(2).

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

the equipment or service primarily for purposes other than ACS.¹⁴ Furthermore, 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 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

5. The Commission may entertain a waiver for equipment and services individually or as a class. A waiver may apply to more than one piece of equipment or more than one service, so long as the class is carefully defined and the equipment or services in the class share common defining characteristics.¹⁷ The Commission also may limit the time of the waiver's coverage, with or without a provision for renewal.¹⁸ As part of this determination, 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 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.²⁰

6. 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.²¹ For example, if a particular model covered by a class waiver were to be 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.²² 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.²³

III. THE ESA 2012 PETITION

7. In May 2012, ESA requested an eight-year waiver for three classes of gaming devices and services: Class I – game consoles, both home and handheld, and their peripherals and integrated

¹⁴ *Id.* at 14635, ¶ 183.

¹⁵ *Id.* at 14636, ¶ 186.

¹⁶ *Id.* 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)).

¹⁷ *ACS Report and Order*, 26 FCC Rcd at 14639, ¶ 193. *See also* 47 C.F.R. § 14.5(b).

¹⁸ *ACS Report and Order*, 26 FCC Rcd at 14638, ¶ 192. *See also* 47 C.F.R. § 14.5(c).

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

²⁰ *ACS Report and Order*, 26 FCC Rcd at 14640, ¶ 195.

²¹ *Id.* at 14640, ¶ 194. *See also* 47 C.F.R. § 14.5(c)(2).

²² Substantial upgrades are considered new products or services for the purpose of this waiver analysis and 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 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.”).

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

online networks; Class II – game distribution and online game play services that distribute game software or enable online game play across a network, regardless of the device from which it is accessed; and Class III – game software used for game play.²⁴ On October 15, 2012, the Bureau granted the ESA 2012 Petition for a two-year period, beginning October 8, 2013 and ending October 8, 2015.²⁵

8. In addressing the ESA 2012 Petition, the Bureau determined that the classes of equipment and services for which ESA sought a waiver were defined with sufficient specificity and that the equipment and services in each class shared enough common defining characteristics to be considered a class.²⁶ Further, the Bureau determined that each class of equipment and services was capable of accessing ACS, but designed primarily for purposes other than using ACS, namely enabling game play, game distribution, and playing games.²⁷ Although the Bureau noted a “clear trend towards marketing the ACS features and functions of gaming equipment and services,” it determined that, “currently, most of the marketing for these products and services emphasize[d] game playing.”²⁸ Finally, the Bureau determined that, while good cause existed at that time to waive the Commission’s rules, competing public interests were at stake that made consideration of the ESA’s waiver requests a closer call than similar waivers granted to CEA and NCTA, where the inclusion of ACS in those covered products and services was not yet as prevalent.²⁹

9. The Bureau specifically recognized “the increasing role that ACS is beginning to play in online gaming systems and services – both with respect to the ability to compete effectively, and with respect to engaging in communications that are unrelated to game play.”³⁰ Further, the Bureau believed that, “as gaming takes on an ever-present role in our society, use of online gaming systems that have ACS options may have increasing applications in the employment and educational contexts, as well as becoming a tool of social integration.”³¹ As a result, and considering the time it takes for a product to be developed and initially introduced in the market, the Bureau granted ESA’s waiver request for a period of two years.³² The Bureau stated that, “[g]iven the dynamism of the electronic software industry, should ESA seek to renew or extend the class waivers granted herein, it may be necessary for ESA to define with greater specificity the classes of equipment and services under consideration at that time.”³³ The Bureau

²⁴ See Petition of the Entertainment Software Association, CG Docket No. 10-213, filed March 21, 2012, at 4, 21-22, 27, 34 (ESA 2012 Petition).

²⁵ *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; Consumer Electronics Association; National Cable & Telecommunications Association; Entertainment Software Association; 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*, CG Docket 10-213, Order, 27 FCC Rcd 12970, 12986, 12991, ¶¶ 33, 40 (CGB 2012) (*CEA, NCTA, ESA Waiver Order*). Two years was measured from the *ACS Report and Order* implementation date of October 8, 2013. See *ACS Report and Order*, 26 FCC Rcd at 14601-14605, ¶¶ 107-112.

²⁶ *CEA, NCTA, ESA Waiver Order*, 27 FCC Rcd at 12986-87, ¶ 34. See also 47 C.F.R. § 14.5(b); *ACS Report and Order*, 26 FCC Rcd at 14639, ¶ 193.

²⁷ *CEA, NCTA, ESA Waiver Order*, 27 FCC Rcd at 12987, ¶ 35. See also 47 C.F.R. § 14.5(a); *ACS Report and Order*, 26 FCC Rcd at 14634, ¶ 181.

²⁸ *CEA, NCTA, ESA Waiver Order*, 27 FCC Rcd at 12987, ¶ 35.

²⁹ *Id.*, 27 FCC Rcd at 12987-88, ¶ 36. See also 47 C.F.R. § 1.3; *ACS Report and Order*, 26 FCC Rcd at 14637, ¶ 188.

³⁰ *CEA, NCTA, ESA Waiver Order*, 27 FCC Rcd at 12988, ¶ 36 (footnotes omitted).

³¹ *Id.*, 27 FCC Rcd at 12990, ¶ 39 (footnotes omitted).

³² *Id.*, 27 FCC Rcd at 12989-90, 12991-92, ¶¶ 38, 40.

³³ *Id.*, 27 FCC Rcd at 12992, ¶ 41.

also noted that “the Commission’s analysis of any future requests to extend the waivers [can] be informed not only by the evidence specific to game products and services, but more generally by the development of accessibility features throughout ACS industries.”³⁴ In this respect, the Bureau believed that, during the waiver period, gaming equipment manufacturers and service providers would benefit from and be able to utilize the experience gained in making ACS accessible in other contexts.³⁵

IV. THE ESA 2015 PETITION

10. On May 22, 2015, ESA filed a petition for a partial extension of the class waiver of the Commission’s ACS accessibility requirements for one class of equipment – video game software – for a period of just under 15 months, from October 8, 2015 to January 1, 2017, without prejudice to requests for additional extensions.³⁶ ESA did not request an extension of the waivers previously granted by the Bureau for the other two classes of equipment: video game consoles; and video game distribution platforms.³⁷ On June 9, 2015, the Bureau placed the ESA 2015 Petition on public notice.³⁸ No comments or reply comments were filed.

11. ESA asserts that it has defined the class of “video game software” with sufficient specificity and that this type of equipment shares enough common defining characteristics to be considered a class.³⁹ According to ESA, video game software means “playable games on any hardware or online platform . . . includ[ing] game applications that are built into operating system software.”⁴⁰ ESA further explains that video game software is “a clearly defined category separate from other forms of software, Internet services, entertainment media, and consumer electronics.”⁴¹

12. ESA also asserts that video game software that is capable of accessing ACS is designed primarily for purposes other than using ACS, namely game play.⁴² In support of this assertion, ESA

³⁴ *Id.*, 27 FCC Rcd at 12992, ¶ 40, n.185 (suggesting that the 2014 CVAA biennial report to Congress would include a review of the development of accessibility features and functions in new ACS products and services).

³⁵ *Id.*, 27 FCC Rcd at 12988, ¶ 36.

³⁶ Petition of the Entertainment Software Association for Partial Extension of Waiver, CG Docket No. 10-213, filed May 22, 2015 (ESA 2015 Petition) at 1-2, 17. ESA describes itself as “the U.S. association exclusively dedicated to serving the business and public affairs needs of companies that publish computer and video games for video game consoles, handheld devices, personal computers, and the Internet.” *Id.* at 1, n.1.

³⁷ *Id.* at 1. As a result, the waivers of the Commission’s ACS rules for covered video game consoles and video game distribution platforms will expire October 8, 2015.

³⁸ *Request for Comment; Petition for Partial Extension of Class Waiver of Commission’s Rules for Access to Advanced Communications Services and Equipment by People with Disabilities*, CG Docket No. 10-213, Public Notice, 30 FCC Rcd 6141 (CGB 2012) (*ESA 2015 Petition Public Notice*).

³⁹ ESA 2015 Petition at 6.

⁴⁰ *Id.* at 6.

⁴¹ *Id.* at 6.

⁴² *Id.* at 6. ESA also notes that, even when video game software is capable of accessing ACS, “many gamers opt not to engage in communications for reasons unrelated to accessibility,” such as to enjoy the game in “story mode,” to complete the game in the fastest time possible, to avoid conversations with strangers, or because they do not have or prefer not to use the necessary peripheral devices (e.g., headset and microphone). *Id.* at 10-11. However, ESA offers no data to support this assertion. While the Commission may consider the usage trends of equipment in determining whether a manufacturer designed equipment primarily for purposes other than ACS, assertions about such trends must be supported by more than anecdotal evidence. *See, e.g., 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 of Sections 716 and 717 of the Communications Act and Part 14 of the Commission’s Rules Requiring Access to Advanced Communications Services and Equipment (ACS) by People with Disabilities*, CG Docket. No. 10-213, 30 FCC Rcd 396, 407, ¶ 24

(continued....)

describes and provides examples of marketing materials for three video game genres (action games, sports games, and role-playing games), all of which, ESA maintains, emphasize game play and not ACS features or functions.⁴³ According to ESA, “ACS still plays only a peripheral role in video game software,”⁴⁴ and “video game software continues to be designed primarily for the purpose of game play, and not for providing ACS.”⁴⁵ ESA asserts that “the role of ACS as a complement to game play is no more significant today than it was in 2012.”⁴⁶

13. According to ESA, while “the video game industry has rapidly evolved to incorporate technological advances . . . [that] have enabled new features to facilitate game play for individuals with disabilities,” this evolution has not impacted the ACS features and functions in video games.⁴⁷ Contrary to the Bureau’s expectations in 2012,⁴⁸ ESA maintains that the gaming industry has not yet been able to benefit from and utilize the experience gained in making ACS accessible in other contexts.⁴⁹ The reason for this, ESA states, is that “[v]ideo games present dramatic technical challenges and a unique – and difficult – environment in which to deliver accessibility solutions.”⁵⁰ Among other things, ESA describes these challenges to include the fast paced nature of the gaming environment and the frequent involvement of multiple gamers communicating simultaneously during gaming chat sessions,⁵¹ which can make the use of speech-to-text technologies impractical or impossible.⁵² ESA also asserts that, because video games make use of specialized hardware and specialized software application program interfaces (APIs), accessibility solutions developed for other environments cannot be re-used in the video game environment.⁵³ For example, on-screen text cannot be accessed readily by screen readers due to differences in the display technologies used by video games.⁵⁴

14. In addition, ESA identifies other factors that have hindered the development of accessibility solutions for the gaming environment. For example, ESA claims assistive technology developers tend to focus on technology in employment, education, and core communications contexts, rather than the video game market, which has a short product life cycle.⁵⁵ Further, because of the variability of text and voice chat features within games and their implementation, “there is no one

(Continued from previous page) _____

(CGB 2015) (citing studies that had been conducted by the petitioners to support their argument that the low usage of browsers for any purpose, including ACS, demonstrated that ACS was not a primary or co-primary function of basic e-readers).

⁴³ See ESA 2015 Petition at 6-11, Appendix A (presenting copies and descriptions of screenshots of websites advertising video game software, packaging or “box art,” and other advertising or “sell sheets”).

⁴⁴ *Id.* at 1.

⁴⁵ *Id.* at 11.

⁴⁶ *Id.* at 4.

⁴⁷ *Id.* at 4. See also *id.* at 16 (describing an increase from 50 to 350 games with accessibility features and improved accessibility in game consoles since 2012).

⁴⁸ See ¶ 9, *supra*.

⁴⁹ ESA 2015 Petition at 11.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.* at 12-13.

⁵³ *Id.* at 12, Appendix B (Declaration of Mike Paciello) at ¶ 5.

⁵⁴ *Id.* at 12, Declaration of Mike Paciello at ¶ 5(d).

⁵⁵ *Id.* at 13-14, Declaration of Mike Paciello at ¶¶ 5(e), 6-7.

solution that can be rapidly deployed to address chat accessibility across the broad spectrum of games.”⁵⁶ Nonetheless, “ESA anticipates that as platforms develop accessibility solutions for the ACS systems that they may offer, these features may be available for reuse by game publishers, and could help inform other solutions to publishers for in-game ACS.”⁵⁷

15. Finally, ESA states that extending the waiver for video games would continue to serve the public interest because it would permit the industry to continue releasing innovative games and allow video games that have ACS to compete with other video game products.⁵⁸ In addition, ESA claims that granting a waiver extension will enable platform providers and video game publishers “to continue jointly exploring novel accessibility solutions – including solutions that will facilitate access to ACS – in video game products and services.”⁵⁹

V. DISCUSSION

16. We extend the class waiver from the Commission’s ACS accessibility rules for video game software that is capable of ACS, but designed primary for the purpose of game play, until January 1, 2017. As an initial matter, we agree that, as required by the *ACS Report and Order*, the class of equipment for which ESA seeks a waiver extension – video game software – is defined with sufficient specificity and shares enough common defining characteristics to be granted a class waiver.⁶⁰ Specifically, for purpose of this class waiver, we define video game software to include playable games on any hardware or online platform, including game applications that are built into operating system software.⁶¹

17. Next, we consider whether video game software is capable of accessing ACS but is nonetheless designed primarily for purposes other than the use of ACS.⁶² As noted above, among the factors used to determine whether ACS is a primary or co-primary use in video game software 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 software.⁶³ The Bureau previously concluded that video game software was capable of accessing ACS, but designed primarily for playing games.⁶⁴ We are persuaded by ESA’s claims that “ACS still plays only a peripheral role in video game software,”⁶⁵ and “the role of ACS as a complement to game play is no more significant today than it was in 2012.”⁶⁶ ESA provides examples of current marketing materials for action, sports, and role-playing games that emphasize game play and not ACS features or functions.⁶⁷ For example, the marketing website for the video game “Call of Duty: Advanced Warfare” focuses on game play features such as characters,

⁵⁶ *Id.* at 13.

⁵⁷ *Id.* at 5. *See also id.* at 14.

⁵⁸ *Id.* at 15 (citing *CEA, NCTA, ESA Waiver Order*, 27 FCC Rcd at 12988-89, ¶ 36).

⁵⁹ *Id.* at 4. *See also id.* at 15.

⁶⁰ *See* 47 C.F.R. § 14.5(b); *ACS Report and Order*, 26 FCC Rcd at 14639, ¶ 193.

⁶¹ ESA 2015 Petition at 6. *See also* ¶ 11, *supra*.

⁶² *ACS Report and Order*, 26 FCC Rcd at 14634, ¶ 181. *See also* 47 C.F.R. § 14.5.

⁶³ *ACS Report and Order*, 26 FCC Rcd at 14635, ¶ 185.

⁶⁴ *CEA, NCTA, ESA Waiver Order*, 27 FCC Rcd at 12987, ¶ 35.

⁶⁵ ESA 2015 Petition at 1.

⁶⁶ *Id.* at 4.

⁶⁷ *See id.* at 6-11, Appendix A.

movement, tools, and weapons, rather than the voice chat function.⁶⁸ Similarly, the “features” section of the website for “FIFA 15,” a soccer simulation game, touts the emotional intensity of the characters and does not mention the voice chat function.⁶⁹ Likewise, the website for the “Diablo III” video game advertises game play features, such as the types of characters that can be played in the game, and does not mention the game’s text or voice chat features.⁷⁰ These and other examples provided by ESA demonstrate that video game software marketing currently emphasizes game playing, not ACS. Accordingly, we find that the equipment defined by this class is capable of accessing ACS, but, at present, is designed primarily for the purpose of game play, which meets the waiver criteria of section 716(h)(1)(A) and (B) of the Act and section 14.5(a) of the Commission’s rules.⁷¹

18. We must next determine whether good cause exists to extend the waiver and that granting the requested waiver is in the public interest.⁷² We remain mindful of the competing public interests at stake – *i.e.*, the ability of consumers with disabilities to use ACS to both communicate with others in the video game environment to compete effectively and to engage in communication that is unrelated to game play,⁷³ versus the gaming industry’s interest in releasing innovative games and allowing video games that have ACS to compete with other video game products.⁷⁴ After reviewing the record, we conclude that good cause exists and granting the limited extension requested by ESA is in the public interest at this time.

19. When the Bureau granted ESA’s first waiver request, it concluded that gaming equipment manufacturers and service providers would “benefit from and utilize the experience gained in making ACS accessible in other contexts, to develop and implement ACS accessibility in the equipment and services that are subject to the class waiver in a more efficient and cost-effective manner.”⁷⁵ This approach appears to have been successful for two of the three classes of gaming equipment and services for which ESA previously received waivers: video game consoles and video game distribution platforms.⁷⁶ For example, ESA reports that console manufacturers have released firmware upgrades that have successfully improved ACS accessibility for people with disabilities.⁷⁷

20. The record demonstrates, however, that eliminating accessibility barriers to the ACS features and functions in video game software remains challenging.⁷⁸ For example, ESA asserts that the use of speech-to-text technologies may be impractical or impossible in the context of a fast-paced video

⁶⁸ *Id.* at 7 (citing Call of Duty: Advanced Warfare Game Home Page, Activision Publishing, Inc., <https://www.callofduty.com/advancedwarfare/game> and <https://www.callofduty.com/advancedwarfare/mp>).

⁶⁹ *Id.* at 9, Appendix A at 2 (citing FIFA 15 Game features Page, Electronic arts, Inc., <https://www.easports.com/fifa/features>).

⁷⁰ *Id.* at 9-10, Appendix A at 8 (citing Diablo III Game Home Page, Blizzard Entertainment, Inc., <http://us.battle.net/d3/en/console/>).

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

⁷² See ¶ 4, *supra* (citing 47 C.F.R. § 1.3; ACS Report and Order, 26 FCC Rcd at 14637, ¶ 188).

⁷³ See ¶ 9, *supra*.

⁷⁴ See CEA, NCTA, ESA Waiver Order, 27 FCC Rcd at 12988-89, ¶ 36.

⁷⁵ *Id.*, 27 FCC Rcd at 12989, ¶ 36.

⁷⁶ See ¶ 10, *supra* (noting that ESA did not request an extension of the waivers previously granted by the Bureau for video game consoles and video game distribution platforms).

⁷⁷ ESA 2015 Petition at 16. By way of illustration, ESA notes that a recent PlayStation 4 update includes a screen-reader for messages received through the console’s text-chat feature and for console menus, as well as the ability to adjust the size and contrast of on-screen text. *Id.* at 16-17.

⁷⁸ See ¶¶ 13-14, *supra*.

game played by multiple gamers who are communicating simultaneously.⁷⁹ Similarly, ESA claims that accessibility solutions developed for other environments, such as screen readers, cannot always be re-purposed for the video game environment due to differences in the display technologies used by video games.⁸⁰ In addition, according to ESA, a single solution across the spectrum of video games may not be possible because of the variability of text and voice chat features within the games and their implementation.⁸¹

21. ESA states that the modest waiver request it now makes – solely for the class of gaming software, for a period of less than 15 months, in contrast to its original waiver request of eight years for three classes of gaming equipment and services⁸² – is necessary to enable the industry to leverage the progress already made with respect to incorporating ACS accessibility into gaming consoles and at the platform level.⁸³ We are persuaded by ESA’s assertions that the accessibility challenges that continue to exist for the ACS features on gaming software warrant a short waiver for an additional period of time. Specifically, we agree with ESA that the increased availability of accessible console and platform-level ACS features is likely to help game developers and publishers address their ACS compliance obligations if such additional time is granted to achieve such compliance.⁸⁴ We further agree that “[t]he greater economies of scale associated with game consoles . . . may spur further innovation in assistive technologies” that can help achieve accessible ACS features in the gaming software that use those consoles.⁸⁵ As ESA notes, taking this cooperative approach can provide an attractive entry point for assistive technology developers.⁸⁶

22. Moreover, the limited nature of ESA’s waiver request – in both scope and time – minimizes the potential harm that the lack of access to ACS in video games will present to individuals with disabilities. That there were no comments opposing ESA’s extension request further suggests that any potential harm to consumers in granting the waiver would be minimal. On balance then, we believe that the circumstances presented weigh in favor of extending the waiver for the additional period of time requested by ESA. Accordingly, we conclude that good cause exists and that it is in the public interest to extend the waiver of the Commission’s ACS accessibility rules for video game software, to enable video game platform providers and video game publishers to build upon the accessibility solutions that have been developed by other segments of the gaming industry. Like ESA, we are hopeful that the accessibility solutions developed for video game consoles and distribution platforms, and the ACS they may offer, will be available for use by video game publishers to make the ACS features and functions in their games accessible to individuals with disabilities.⁸⁷

23. Finally, with respect to the duration of a waiver, we consider the expected lifecycle of the class of video game software.⁸⁸ Although ESA previously described the development cycle for video games as five to seven years,⁸⁹ in its 2015 petition, ESA refers to the “especially short product life cycle”

⁷⁹ ESA 2015 Petition at 11-13.

⁸⁰ *Id.* at 12, Declaration of Mike Paciello at ¶ 5.

⁸¹ *Id.* at 13.

⁸² See ¶¶ 7, 10, *supra*.

⁸³ ESA 2015 Petition at 15.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.* at 13-15, Declaration of Mike Paciello at ¶¶ 5(e), 6-7. See also ¶ 14, *supra*.

⁸⁷ See ¶ 14, *supra*.

⁸⁸ See ¶ 5, *supra*.

⁸⁹ ESA 2012 Petition at 19.

of video games.⁹⁰ Notwithstanding this unexplained discrepancy, as noted above, ESA seeks a waiver only until January 1, 2017, which is less than 15 months more than its current waiver.⁹¹

24. We find that it is both reasonable and in the public interest to grant ESA's request to extend the waiver of the Commission's ACS accessibility rules until January 1, 2017, to enable video game platform providers and video game publishers to continue exploring ACS accessibility solutions. We expect that extending the waiver for this period of time will permit the industry to continue releasing innovative games, allow video games that have ACS to compete with other video game products, and encourage the gaming industry to incorporate accessibility designed to benefit people with disabilities.⁹² During the period of the waiver, we will not require video game software 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.⁹³

25. The action we take herein is without prejudice to ESA exercising its right to come back to the Commission at a later time to request another extension of the waiver.⁹⁴ However, manufacturers or providers of video game software will be expected to plan for accessibility during the waiver period and to consider accessible design early during the development stages of the next generation of video games to better enable them to eliminate accessibility barriers when the class waiver expires on January 1, 2017.⁹⁵ The Commission will take a careful look at industry developments to determine whether any further extension, if requested, is justified.⁹⁶

VI. ORDERING CLAUSES

26. 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.

27. IT IS FURTHER ORDERED that the Petition of the Entertainment Software Association for Partial Extension of Waiver IS GRANTED.

⁹⁰ Specifically, ESA states that the product life cycle of video game software is "especially short . . . compared with software whose core purpose is facilitating communications." *Id.* at 13.

⁹¹ See ¶¶ 10, 16, *supra*.

⁹² See ¶ 15, *supra*. See also ESA 2015 Petition at 4, 15 (citing *CEA, NCTA, ESA Waiver Order*, 27 FCC Rcd at 12989, ¶ 36).

⁹³ 47 C.F.R. §§ 14.20, 14.21 and 14.31. The waiver of these rules also includes a waiver of the obligation to conduct an achievability analysis during the period of the waiver. See *ACS Report and Order*, 27 FCC Rcd at 14607-14619, ¶¶ 119-148.

⁹⁴ See ¶ 16, *supra*.

⁹⁵ See *ACS Report and Order*, 26 FCC Rcd at 14609, ¶ 124 (wherein the Commission noted that "in many instances, accessibility is more likely to be achievable if covered entities consider accessibility issues early in the development cycle"). We recognize 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 the developmental stage. See *id.*, 26 FCC Rcd at 14640, ¶ 194. See also 47 C.F.R. § 14.5(c)(2). However, if a manufacturer or provider of video game software attempts to demonstrate, in response to an enforcement action, that accessibility is not achievable for software introduced after January 1, 2017, the manufacturer or provider would also need to demonstrate that it has conducted accessibility planning throughout the time period of the class waiver, as early as possible during the design process for the video game software. *ACS Report and Order*, 26 FCC Rcd at 14602, ¶ 108.

⁹⁶ *CEA, NCTA, ESA Waiver Order*, 27 FCC Rcd at 12973, ¶ 4.

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

29. 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

Alison Kutler
Acting Chief
Consumer and Governmental Affairs Bureau