

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: December 23, 2016

Released: December 23, 2016

By the 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).1 ESA requests an 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 class waiver for video game software was granted by the Bureau on September 16, 2015, until January 1, 2017. For the reasons set forth below the Bureau grants ESA's request for a one-year extension, effective January 1, 2017, with an expiration date of December 31, 2017, subject to ESA submitting a progress report to the Bureau on June 30, 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),2 which amended the Communications Act of 1934 (the Act),3 "to help ensure that individuals with disabilities are able to fully utilize communications services and equipment and better access video programming."4 Section 716 of the Act,

1 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." Petition for Extension of Waiver of the ESA, CG Docket No. 10-213, at 1, n.3 (filed Oct. 19, 2016), https://www.fcc.gov/ecfs/filing/1019285494250 (ESA 2016 Petition).

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

3 See Title 47 of the United States Code.

4 S. Rep. No. 111-386 at 1 (2010) (Senate Report); H.R. Rep. No. 111-563 at 19 (2010) (House Report). Congress (continued....)

which was added to the Act by the CVAA, requires providers of ACS and manufacturers of equipment used for ACS to make their services and products accessible to and usable by individuals with disabilities, unless doing so is not achievable.⁵ 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.⁶ In 2011, the Commission adopted rules implementing section 716 of the Act, including associated rules implementing recordkeeping and enforcement obligations for ACS and equipment used for ACS, all of which were fully implemented by October 3, 2013.⁷

3. Pursuant to section 716(h)(1) of the Act, 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.⁸ However, 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.⁹

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.¹⁰ 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."¹¹ The Commission may also consider the manufacturer's market research and the usage trends of similar equipment or services in order to determine whether a manufacturer or provider designed the equipment or service primarily for purposes other than ACS.¹² 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

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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 telecommunications services and equipment to be accessible to and usable by individuals with disabilities).

⁵ 47 U.S.C. § 617.

⁶ 47 U.S.C. § 153(1).

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*, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 14557 (2011) (*ACS Report and Order*); *see also* 47 U.S.C. §§ 618, 619; 47 CFR §§ 14.1-14.52.

⁸ 47 U.S.C. § 617(h); *see also* 47 CFR § 14.5. As noted in the *ACS Report and Order*, "a device designed for a purpose unrelated to accessing advanced communications might also provide, on an incidental basis, access to such services," and, in such cases, "the Commission may find that to promote technological innovation the accessibility requirements need not apply." *ACS Report and Order*, 26 FCC Rcd at 14634, para. 181 (quoting House Report at 26; Senate Report at 8). An example of equipment that has a multiple primary or co-primary purpose is a smartphone that is designed for voice communications, text messaging, e-mail, web browsing, video chat, digital video recording, mobile hotspot connectivity, and several other purposes. *ACS Report and Order*, 26 FCC Rcd at 14635, para. 184. 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, paras. 19, 197.

⁹ 47 U.S.C. § 617(h)(1); 47 CFR § 14.5(a)(1).

¹⁰ *ACS Report and Order*, 26 FCC Rcd at 14634-35, paras. 182, 183, 185; *see also* 47 CFR § 14.5(a)(2).

¹¹ *ACS Report and Order*, 26 FCC Rcd at 14635, para. 185 (footnote omitted).

¹² *Id.* at 14635, para. 183.

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.¹³ 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.¹⁴

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.¹⁵ The Commission also may limit the time of the waiver's coverage, with or without a provision for renewal.¹⁶ 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.¹⁷ 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.¹⁸

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.¹⁹ 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.²⁰ For products and services already under development *after* a class waiver expires, the achievability analysis may take into consideration the developmental stage of the product and the effort and expense needed to achieve accessibility at that point in the developmental stage.²¹

III. PRIOR ESA PETITIONS

7. Prior to its current petition, ESA requested and was granted two prior waivers for gaming equipment and services. The Bureau granted ESA its first waiver in response to a petition filed in 2012.²²

¹³ *Id.* at 14636, para. 186.

¹⁴ *Id.* at 14637, para. 188 (citing 47 CFR § 1.3; *Northeast Cellular Telephone Co., L.P. v. FCC*, 897 F. 2d 1164, 1166 (D.C. Cir. 1990)).

¹⁵ *ACS Report and Order*, 26 FCC Rcd at 14639, para. 193; *see also* 47 CFR § 14.5(b).

¹⁶ *ACS Report and Order*, 26 FCC Rcd at 14638, para. 192; *see also* 47 CFR § 14.5(c).

¹⁷ *ACS Report and Order*, 26 FCC Rcd at 14639, para. 194; *see also* 47 CFR § 14.5(c)(2).

¹⁸ *ACS Report and Order*, 26 FCC Rcd at 14640, para. 195.

¹⁹ *Id.* at 14640, para. 194, *see also* 47 CFR § 14.5(c)(2).

²⁰ 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, para. 192; *see also id.* at 14609, para. 124 (“Natural opportunities to assess or reassess the achievability of accessibility may include, for example, the redesign of a product model or service, new versions of software, upgrades to existing features or functionalities, significant rebundling or unbundling of product and service packages, or any other significant modification that may require redesign.”).

²¹ *ACS Report and Order*, 26 FCC Rcd at 14640, para. 194; *see also* 47 CFR § 14.5(c)(2).

²² *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*, Order, 27 FCC Rcd 12970 (CGB 2012)

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This waiver, for a two-year period that expired on October 8, 2015, was for three classes of gaming devices and services: Class I – game consoles, both home and handheld, and their peripherals and integrated 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.²³ The Bureau granted a second waiver, in response to and as requested by ESA,²⁴ for an additional 15-month period, from October 8, 2015 to January 1, 2017, for video game software only.²⁵

8. In response to each of these petitions, 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.²⁷

9. In its first waiver grant, the Bureau noted a clear trend towards marketing the ACS features and functions of gaming equipment and services,²⁸ and recognized the increasing role that ACS was beginning to play in online gaming systems and services.²⁹ Further, the Bureau noted that, as gaming takes on an ever-present role in our society, use of online gaming systems that have ACS options may have increasing use for social integration, as well as applications in the employment and educational contexts.³⁰ Nevertheless, the Bureau ultimately determined that the majority of marketing for gaming products and services emphasized game playing.³¹ While recognizing that competing public interests were at stake, the Bureau also determined that good cause existed to waive the Commission's rules.³²

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(*CEA, NCTA, ESA Waiver Order*); see also Petition of ESA, CG Docket No. 10-213 (filed Mar. 21, 2012), <https://ecfsapi.fcc.gov/file/7021902591.pdf> (ESA 2012 Petition).

²³ *CEA, NCTA, ESA Waiver Order*, 27 FCC Rcd at 12986, 12991, paras. 33, 40 (rejecting ESA's request for an eight-year waiver for these classes of equipment and services).

²⁴ See Petition of ESA for Partial Extension of Waiver, CG Docket No. 10-213, at 1-2, 17 (filed May 22, 2015), <https://ecfsapi.fcc.gov/file/60001049004.pdf> (ESA 2015 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; 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*, Order, 30 FCC Rcd 10016 (CGB 2015) (*ESA 2015 Waiver Order*). ESA did not request an extension of the waiver previously granted by the Bureau for the other two classes of equipment: video game consoles and video game distribution platforms. As a result, the waiver of the Commission's ACS rules for these devices and platforms expired October 8, 2015. See *ESA 2015 Waiver Order*, 30 FCC Rcd at 10020, para. 10 & n.37.

²⁶ *CEA, NCTA, ESA Waiver Order*, 27 FCC Rcd at 12986-87, para. 34; *ESA 2015 Waiver Order*, 30 FCC Rcd at 10022, para. 16; see also 47 CFR § 14.5(b); *ACS Report and Order*, 26 FCC Rcd at 14639, para. 193.

²⁷ *CEA, NCTA, ESA Waiver Order*, 27 FCC Rcd at 12987, para. 35 (finding that the equipment and services were designed primarily for the purposes of enabling game play, game distribution, and playing games); *ESA 2015 Waiver Order*, 30 FCC Rcd at 10023, para. 17 (finding that video game software was designed for the primary purpose game play); see also 47 CFR § 14.5(a); *ACS Report and Order*, 26 FCC Rcd at 14634, para. 181.

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

²⁹ *CEA, NCTA, ESA Waiver Order*, 27 FCC Rcd at 12988, para. 36.

³⁰ *CEA, NCTA, ESA Waiver Order*, 27 FCC Rcd at 12990, para. 39.

³¹ *CEA, NCTA, ESA Waiver Order*, 27 FCC Rcd at 12987, para. 35.

³² *CEA, NCTA, ESA Waiver Order*, 27 FCC Rcd at 12987-88, para. 36; see also 47 CFR § 1.3; *ACS Report and Order*, 26 FCC Rcd at 14637, para. 188.

10. In 2015, the Bureau again was persuaded by ESA's claims that ACS play[ed] "only a peripheral role in video game software,"³³ and that "the role of ACS as a complement to game play [was] no more significant [in 2015] than it was in 2012."³⁴ Given the progress made in the accessibility of gaming consoles and distribution platforms, the accessibility challenges related to video game software, and the limited nature of the waiver request in both scope and time, the Bureau further concluded that good cause existed and that it was in the public interest to extend the waiver of the Commission's ACS accessibility rules solely for video game software.³⁵

IV. THE ESA 2016 PETITION

11. On October 19, 2016, ESA filed a petition for an extension of the class waiver of the Commission's ACS accessibility requirements for video game software for a period of 12 months, from January 1, 2017 to January 1, 2018, without prejudice to requests for additional extensions.³⁶ On October 31, 2016, the Bureau released a public notice seeking comments on the ESA 2016 Petition.³⁷ Comments were filed jointly by Consumer Groups,³⁸ and ESA filed a reply.³⁹

12. ESA asserts that the situation with respect to the importance of ACS functions within video game software has not changed since 2012.⁴⁰ ESA proposes that the Bureau retain the definition of the class of video game software to include "playable games on any hardware or online platform, including game applications that are built into operating system software."⁴¹ ESA also asserts that this defines the class of video game software with sufficient specificity, that this type of equipment shares enough common defining characteristics to be considered a class, and that video game software is "a clearly defined category separate from other forms of software, internet services, entertainment media, and consumer electronics."⁴²

13. According to ESA, "[v]ideo game software ... continues to be designed primarily for the purpose of game play, and not ACS."⁴³ ESA describes and provides examples of marketing materials for three video game genres (sports games, action games, and role-playing games), all of which, ESA maintains, emphasize game play and not ACS features or functions.⁴⁴

³³ ESA 2015 Petition at 1.

³⁴ ESA 2015 Petition at 4.

³⁵ *ESA 2015 Waiver Order*, 30 FCC Rcd at 10024, para. 22.

³⁶ ESA 2016 Petition; *see supra* note 1.

³⁷ *Request for Comment: Petition for Extension of Video Game Software Class Waiver of Commission's Rules for Access to Advanced Communications Services and Equipment by People with Disabilities*, Public Notice, 31 FCC Rcd 11927 (CGB 2016).

³⁸ *See* Telecommunications for the Deaf and Hard of Hearing, Inc. (TDI), the National Association of the Deaf (NAD), the Hearing Loss Association of America (HLAA), the Association of Late-Deafened Adults (ALDA), the Cerebral Palsy and Deaf Organization (CPADO), the California Coalition of Agencies Serving the Deaf and Hard of Hearing (CCASDHH), the National Association of State Agencies of the Deaf and Hard of Hearing (NASADHH), and the Deaf and Hard of Hearing Consumer Advocacy Network (DHHCAN), and the Rehabilitation Engineering Research Center on Technology for the Deaf and Hard of Hearing, Gallaudet University (DHH-RERC) Comments (Consumer Groups).

³⁹ *See* ESA Reply.

⁴⁰ ESA 2016 Petition at 3.

⁴¹ ESA 2016 Petition at 3 (citing *ESA 2015 Waiver Order*, 30 FCC Rcd at 10022, para. 16).

⁴² ESA 2016 Petition at 3.

⁴³ ESA 2016 Petition at 3.

⁴⁴ *See* ESA 2016 Petition at 4-8; Exhibit A (presenting copies and descriptions of screenshots of websites advertising (continued....))

14. ESA further reports that some members of the video game industry are actively engaged with the disability community for purposes of improving video game accessibility.⁴⁵ In addition, ESA states that the video game industry has made meaningful progress with respect to the accessibility of video game play,⁴⁶ and provides examples of such improvements.⁴⁷ ESA also touts enhanced accessibility features in video game software for the deaf and hard of hearing community and for the blind and low vision community.⁴⁸

15. Notwithstanding this progress, ESA maintains that the unique nature of video game software creates substantial technical challenges to applying ACS accessibility solutions, such as advances in assistive technologies adopted by hardware manufacturers, to video game software.⁴⁹ ESA also claims that there is a significant challenge in “using emergent technologies, such as speech-to-text.”⁵⁰ In addition, ESA suggests that the development of accessibility solutions for the gaming environment have been hindered because assistive technology developers tend to focus on technology for employment, education, and core information and communications uses, rather than video game software.⁵¹

16. Consumer Groups agree that ESA and its members have taken steps to “improve the accessibility of gaming equipment and software,”⁵² and have “work[ed] with the deaf and hard of hearing community [to] gather feedback on their products and services.”⁵³ However, Consumer Groups stress the importance of accessible ACS features and functions in video games so that “people who are deaf or hard of hearing can experience the immersive communicative, social, and cultural touchstones that video games provide on equal terms.”⁵⁴

17. In addition, Consumer Groups claim that ESA’s assertions are overly general, limited to high-level themes, do not identify specific challenges that remain, and do not lay out detailed milestones

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video game software, packaging or “box art,” and other advertising or “sell sheets”).

⁴⁵ ESA 2016 Petition at 11.

⁴⁶ ESA 2016 Petition at 8.

⁴⁷ ESA 2016 Petition at 9-10.

⁴⁸ ESA 2016 Petition at 12-17. These features include the option of using text or voice chat to communicate with other players. *Id.* at 15. In addition, enhanced accessibility features for individuals who are deaf or hard of hearing include “visual cues for detecting enemies and other in-game threats,” cinematic subtitles, and options to make in-game dialogue “color-coded for each character to more easily determine [who is] speaking.” *Id.* at 12-14. Enhanced accessibility for individuals who are blind or visually impaired includes “features ... for individuals with color vision deficiency,” and “unique sound cues specifically for blind gamers.” *Id.* at 14. Further, ESA reports that accessibility features for individuals with limited strength and reach have been added to many games, including “flexible game controls,” “adaptive difficulty,” and “controller customization ... such as auto-targeting.” *Id.* at 16-17.

⁴⁹ ESA 2016 Petition at 18 (stating that “many games effectively run in a self-contained environment that is conceptually similar to an operating system within the host hardware’s operating system”).

⁵⁰ ESA 2016 Petition at 19. Notwithstanding such challenge, ESA notes that its members are exploring whether such technologies “would provide further participation options for gamers who are hard of hearing.” ESA 2016 Petition at 19 (claiming that “Microsoft is actively pursuing speech-to-text transcription functionality ... for in-game audio chat”).

⁵¹ ESA 2016 Petition at 22, Exhibit B (Declaration of Mike Paciello) at para. 10.

⁵² Consumer Groups Comments at 1 (citing ESA 2016 Petition at 8-17).

⁵³ Consumer Groups Comments at 1 (citing *Thanks to The Paciello Group, TDI Meets with Entertainment Software Association and Sony Interactive Entertainment* (Oct. 5, 2016), <https://tdiforaccess.org/2016/10/gaming-esa-sony/>).

⁵⁴ Consumer Groups Comments at 2.

to address remaining technical challenges.⁵⁵ Consumer Groups believe ESA's request for a waiver extension should be denied unless ESA "supplements the petition with detailed, specific information on remaining challenges, progress achieved over the previous waiver period, and its members' specific plans for coming into full-compliance over the proposed [waiver period] and continuing to gather feedback from the deaf and hard of hearing community."⁵⁶ In response to Consumer Groups' claim, ESA states that it would like to provide detailed milestones; however, "given the unique characteristics of video game software, it is impossible to predict at this level of granularity when—or in some cases whether—practical and achievable accessibility solutions will become available."⁵⁷

18. Finally, ESA states that an extension of the waiver would serve the public interest because it would enable the continued exploration of ACS accessibility solutions, allow for the continued release of innovative games that utilize ACS, and encourage the development of accessible video game software.⁵⁸

V. DISCUSSION

19. We extend the class waiver from the Commission's ACS accessibility rules for video game software, defined to include playable games on any hardware or online platform, including game applications that are built into operating system software,⁵⁹ through December 31, 2017. However, as a condition of the waiver, we require ESA to submit a progress report on June 30, 2017, which is halfway through the waiver period.

20. As an initial matter, we find that, as required by the Commission's rules, this class of equipment for which ESA seeks a waiver extension is defined with sufficient specificity and shares enough common defining characteristics to be granted a class waiver.⁶⁰

21. Next, we find that video game software is capable of accessing ACS, but is nonetheless designed primarily for purposes other than the use of ACS.⁶¹ 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.⁶² The Bureau previously concluded that video game software was capable of accessing ACS, but designed primarily for playing games.⁶³ We are persuaded by ESA's claims that "video game software ... continues to emphasize game play rather than ACS functions."⁶⁴ ESA provided numerous examples of current marketing materials for sports, action, and role-playing games that emphasize game play and not ACS features or functions.⁶⁵ These and other

⁵⁵ Consumer Groups Comments at 2-3.

⁵⁶ Consumer Groups Comments at 3.

⁵⁷ ESA Reply at 6.

⁵⁸ ESA 2016 Petition at 23 (citing *ESA 2015 Waiver Order*, 30 FCC Rcd at 10025, para. 24).

⁵⁹ ESA 2016 Petition at 3; *see also ESA 2015 Waiver Order*, 30 FCC Rcd at 10022, paras. 16-17.

⁶⁰ *See* 47 CFR § 14.5(b); *ACS Report and Order*, 26 FCC Rcd at 14639, para. 193.

⁶¹ 47 CFR § 14.5(a)(1); *ACS Report and Order*, 26 FCC Rcd at 14634, para. 181.

⁶² *See supra* para. 4; 47 CFR § 14.5(a)(2)(ii); *ACS Report and Order*, 26 FCC Rcd at 14635, para. 185.

⁶³ *CEA, NCTA, ESA Waiver Order*, 27 FCC Rcd at 12987, para. 35; *see also ESA 2015 Waiver Order*, 30 FCC Rcd at 10022, para. 17.

⁶⁴ ESA 2016 Petition at 4.

⁶⁵ *See* ESA 2016 Petition at 4-8; Exhibit A. For example, the marketing website for the video game "Madden NFL 17" focuses on game play features, such as ball carrier controls, new commentators, movement, game-planning strategies, and allowing players to fast-forward to the most fun and important parts of the game, rather than the voice chat function. ESA 2016 Petition at 5; Exhibit A at 1-4. Similarly, the advertising materials for "Overwatch" a

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examples provided by ESA demonstrate that video game software marketing continues to emphasize 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.⁶⁶

22. We must next determine whether good cause exists to extend the waiver and whether granting the requested waiver is in the public interest.⁶⁷ We remain mindful of the competing public interests at stake – i.e., the ability of consumers with disabilities to use ACS to communicate with others in the video game environment – in part to compete effectively⁶⁸ – versus the gaming industry’s interest in releasing innovative games and allowing video games that have ACS to compete with other video game products.⁶⁹ 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.

23. When the Bureau granted ESA’s first waiver request in 2012, 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.”⁷⁰ 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.⁷¹ For example, ESA reported that console manufacturers had released firmware upgrades that successfully improved ACS accessibility for people with disabilities.⁷² However, ESA members were unsuccessful in eliminating accessibility barriers to the ACS features and functions in video game software and ESA requested an extension of the waiver for that one remaining class of equipment.⁷³

24. When the Bureau granted ESA’s second waiver request in 2015, ESA was hopeful that the accessibility solutions developed for video game consoles and distribution platforms would be available for use by video game publishers to make the ACS features and functions in video game software accessible.⁷⁴ While ESA reports some improvements in accessibility have been made with respect to the game playing function,⁷⁵ it appears that little progress has been made with respect to making

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team-based first-person online battle arena game, touts the large variety of characters, and new rules that promote fair play, and player ranking systems. ESA 2016 Petition at 7; Exhibit A at 14-15. The marketing materials do not highlight the voice or text chat functions. Likewise, the website for the “Gears of War 4: Ultimate Edition” video game advertises game play features, such as the types of games that can be played, characters, and bonus content such as playable maps, and does not mention the game’s voice chat features. ESA 2016 Petition at 8; Exhibit A at 19-20.

⁶⁶ 47 U.S.C. § 617(h)(1)(A) and (B); 47 CFR § 14.5(a).

⁶⁷ 47 CFR § 1.3; *ACS Report and Order*, 26 FCC Rcd at 14637, para. 188.

⁶⁸ *See supra* para. 9.

⁶⁹ ESA 2016 Petition at 17.

⁷⁰ *CEA, NCTA, ESA Waiver Order*, 27 FCC Rcd at 12989, para. 36.

⁷¹ *See supra* note 26 (stating that, in 2015, ESA did not request an extension of the waivers previously granted by the Bureau for video game consoles and video game distribution platforms); *see also ESA 2015 Waiver Order*, 30 FCC Rcd at 10023, para. 19.

⁷² *See ESA 2015 Waiver Order*, 30 FCC Rcd at 10023, para. 19.

⁷³ *See ESA 2015 Waiver Order*, 30 FCC Rcd at 10024, para. 21.

⁷⁴ *See ESA 2015 Waiver Order*, 30 FCC Rcd at 10024, para. 22.

⁷⁵ *See supra* para. 14 (describing advances made by ESA members with respect to the accessibility of video game playing functions).

the ACS functions in video game software accessible to persons with disabilities.⁷⁶ As noted above, ESA claims that this is due to challenges in re-purposing accessibility solutions developed for other environments for the video game environment.⁷⁷ ESA also claims that the use of speech-to-text technologies may be impractical or impossible in the context of a fast-paced video game played by multiple gamers who are communicating simultaneously.⁷⁸

25. The Bureau is persuaded by ESA's claims that achieving accessibility of ACS in the video game software context poses significant challenges. For example, we are persuaded by statements made in ESA's supporting declarations that there are differences between the display technologies used by video games and the displays used for other technologies to which accessibility features, such as screen readers, have been added.⁷⁹ We are also persuaded that speech-to-text and other emergent assistive technologies have limited use in video games given the current state of the technology and the unique vernacular, speed, and simultaneous usage of in-game speech communications.⁸⁰ At the same time, we recognize that some ESA members are undertaking efforts to resolve these problems through engagement with the disability community via twitter, online forums, and accessible demo spaces at conferences.⁸¹

26. Accordingly, 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 for 12 months, through December 31, 2017, to enable video game platform providers and video game publishers to continue innovating, experimenting, and exploring ACS accessibility solutions.⁸² We expect that extending the waiver for this period of time will permit the industry to continue releasing innovative games and allow video games that have ACS to compete with other video game products. At the same time, we expect that ESA will use this period to continue engaging with the disability community and work to find solutions to incorporate accessible design into its gaming software.⁸³ 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.⁸⁴

27. At the same time, the Bureau agrees with Consumer Groups' that, for the Commission and consumers to develop a better grasp of the technical challenges going forward, it would be beneficial for ESA to identify these challenges with specificity, and to lay out detailed milestones for their resolution.⁸⁵ To this end, we direct ESA to submit a progress report halfway through the waiver period, to provide the Commission with the information it needs to better assess the status of and progress made to achieving accessible ACS in video game software. This report, due on June 30, 2017, must address the following:

⁷⁶ See *supra* para. 15 (summarizing ESA's position that substantial technical challenges and other factors have hindered the development of accessibility solutions for ACS in video game software).

⁷⁷ See ESA 2016 Petition Exhibit B (Declaration of Mike Paciello) at paras. 7-8.

⁷⁸ See ESA 2015 Petition at 11-13.

⁷⁹ See ESA 2016 Petition Exhibit B (Declaration of Mike Paciello) at paras. 7-8.

⁸⁰ See ESA 2016 Petition Exhibit B (Declaration of Mike Paciello) at paras. 9(a)-(d).

⁸¹ ESA 2016 Petition at 11.

⁸² ESA 2016 Petition at 23.

⁸³ See para. 18, *supra*; see also ESA 2016 Petition at 23.

⁸⁴ 47 CFR §§ 14.20, 14.21, 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*, 26 FCC Rcd at 14607-14619, paras. 119-148.

⁸⁵ See Consumer Groups Comments at 2-3.

- (i) The extent to which ACS functionality in gaming software is advertised, announced, or marketed to consumers;⁸⁶
- (ii) The extent to which ACS functionality is designed to aid game play and the impact that removal of the ACS features would have on the video game play experience;⁸⁷
- (iii) The technical challenges that must be resolved to make ACS (voice and text chat) features on video game software accessible, with greater specificity;
- (iv) The efforts, innovations, and progress that ESA members have made toward addressing technical challenges and developing accessibility solutions in consultation with individuals with disabilities;
- (v) A list of the disability-related consumer organizations with whom ESA has consulted since the start of this waiver period; and
- (vi) ESA members' specific plans to conduct outreach and consultation with members of the disability community during the remainder of the waiver period and beyond (e.g., including focus groups, and panelists who have disabilities at ESA member-hosted conferences and summits).

28. 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.⁸⁸ 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 ACS accessibility barriers when the class waiver expires on December 31, 2017.⁸⁹

VI. ORDERING CLAUSES

29. 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 CFR §§ 0.361, 1.3 and 14.5, this Order IS ADOPTED.

30. IT IS FURTHER ORDERED that the Petition for Extension of Waiver IS GRANTED for the period of January 1, 2017 through December 31, 2017, subject to the requirement that, on June 30, 2017, the Entertainment Software Association provides a progress report to the Consumer and Governmental Affairs Bureau.

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

⁸⁶ 47 CFR § 14.20(a)(2)(ii).

⁸⁷ *ACS Report and Order*, 26 FCC Rcd at 14636, para. 186.

⁸⁸ *See supra* para. 11.

⁸⁹ *See ACS Report and Order*, 26 FCC Rcd at 14609, para. 124 (noting 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, para. 194; *see also* 47 CFR § 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 December 31, 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, para. 108.

32. 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), 844-432-2275 (videophone), or 202-418-0432 (TTY).

FEDERAL COMMUNICATIONS COMMISSION

Alison Kutler
Chief
Consumer and Governmental Affairs Bureau