

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of )
)
Implementation of Sections 716 and 717 of the ) CG Docket No. 10-213
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

Adopted: December 26, 2017

Released: December 26, 2017

By the Acting Chief, Consumer and Governmental Affairs Bureau:

I. INTRODUCTION

1. By this Order, the Consumer and Governmental Affairs Bureau (CGB or Bureau) of the Federal Communications Commission (FCC or Commission) grants to the Entertainment Software Association (ESA) a one-year extension of its current waiver of the Commission’s accessibility requirements for advanced communications services (ACS) and equipment for video game software.1 This class waiver will expire December 31, 2018, and is conditioned on ESA’s submission of a mid-year progress report to the Bureau on July 2, 2018.

II. BACKGROUND

2. Section 716 of the Communications Act of 1934, as amended (the Act), 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.2 ACS is

1 Implementation of Sections 716 and 717 of the Communications Act of 1934, as Enacted by the Twenty-First Century Communications and Video Accessibility Act of 2010; Amendments to the Commission’s Rules Implementing Sections 255 and 251(a)(2) of the Communications Act of 1934, as Enacted by the Telecommunications Act of 1966; Accessible Mobile Phone Options for People who are Blind, Deaf-Blind, or Have Low Vision, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 14557 (2011) (ACS Report and Order); see also 47 U.S.C. §§ 617, 618. 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 of the Entertainment Software Association for Extension of Waiver at 1 n.3 (filed Oct. 27, 2017) (ESA 2017 Petition), https://www.fcc.gov/ecfs/filing/102722016691.

2 47 U.S.C. § 617. This section was added to the Communications Act by the Twenty-First Century Communications and Video Accessibility Act of 2010 (CVAA), Pub. L. No. 111-260, 124 Stat. 2751 (2010), amended by Pub. L. No. 111-265, 124 Stat. 2795 (2010) (containing technical corrections); see also 47 CFR §§ 14.1-14.52.

defined as interconnected voice over Internet protocol (VoIP) service; non-interconnected VoIP service; electronic messaging service, such as e-mail, instant messaging, and SMS text messaging; and interoperable video conferencing service.<sup>3</sup> 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.<sup>4</sup> In determining whether a waiver is warranted, the Commission's rules direct us to consider 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.<sup>5</sup> We must also consider "whether the ACS functionality or feature is suggested to consumers as a reason for purchasing, installing, downloading, or accessing the equipment or service."<sup>6</sup> In addition, we may consider the manufacturer's market research and the usage trends of similar equipment or services;<sup>7</sup> 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.<sup>8</sup> Finally, we must apply the 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.<sup>9</sup>

3. The obligation for video game software to comply with section 716 was first waived in 2012, and has been extended on two subsequent occasions.<sup>10</sup> Although the first of these waivers was for two years and for three classes of video game devices and services—consoles, distribution platforms, and

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<sup>3</sup> 47 U.S.C. § 153(1).

<sup>4</sup> 47 U.S.C. § 617(h); *see also* 47 CFR § 14.5. Multipurpose equipment or services that are designed primarily or co-primarily for ACS, do not qualify for a waiver under this provision. 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.

<sup>5</sup> *ACS Report and Order*, 26 FCC Rcd at 14634-35, paras. 182-183, 185; *see also* 47 CFR § 14.5(a)(2).

<sup>6</sup> *ACS Report and Order*, 26 FCC Rcd at 14635, para. 185.

<sup>7</sup> *Id.* at 14635, para. 183.

<sup>8</sup> *Id.* at 14636, para. 186.

<sup>9</sup> *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)).

<sup>10</sup> *See Implementation of Sections 716 and 717 of the Communications Act of 1934, as Enacted by the Twenty-First Century Communications and Video Accessibility Act of 2010; 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) (*CEA, NCTA, ESA 2012 Waiver Order*); *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*); *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, 31 FCC Rcd 13464 (CGB 2016) (*ESA 2016 Waiver Order*).

software<sup>11</sup>—the Bureau’s subsequent waiver grants were narrowed.<sup>12</sup> The most recent waiver was granted for a single year (to expire on December 31, 2017) for the class of “video game software,” and was subject to the submission of a mid-year progress report on achieving accessible ACS in the covered class of products.<sup>13</sup> ESA submitted this report on June 30, 2017.<sup>14</sup>

4. In each of the prior waiver orders, the Bureau found that the class of video game software, though capable of accessing ACS, was designed primarily for purposes related to playing games,<sup>15</sup> and further that waiving the ACS obligation for this class was in the public interest, generally because of the need to allow the video game industry to apply the knowledge gained in making ACS accessible in other contexts to the accessibility challenges presented by video game products and services,<sup>16</sup> and to allow the industry to continue releasing innovative games while it was addressing these challenges.<sup>17</sup>

### III. THE ESA 2017 PETITION

5. On October 27, 2017, ESA filed a petition for a final 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, 2018 through December 31, 2018.<sup>18</sup> On November 1, 2017, the Bureau released a public notice seeking comments on the ESA 2017 Petition.<sup>19</sup> While all commenting parties representing people with disabilities express their strong interest in ensuring the accessibility of ACS in video game software, no party actively opposes the requested extension.<sup>20</sup> For the reasons discussed below, we extend the class

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<sup>11</sup> See *CEA, NCTA, ESA 2012 Waiver Order*, 27 FCC Rcd at 12986, para. 33.

<sup>12</sup> See *ESA 2015 Waiver Order*, 30 FCC Rcd at 10020, para. 10 (granting a waiver for video game software for approximately 15 months, from October 8, 2015, to January 1, 2017).

<sup>13</sup> *ESA 2016 Waiver Order*, 31 FCC Rcd at 13472, para. 27.

<sup>14</sup> See Mid-Year Status Report of the ESA (filed June 30, 2017), <https://www.fcc.gov/ecfs/filing/10630092346778> (ESA 2017 Mid-Year Status Report).

<sup>15</sup> See *CEA, NCTA, ESA 2012 Waiver Order*, 27 FCC Rcd at 12987, para. 35; *ESA 2015 Waiver Order*, 30 FCC Rcd at 10023, para. 17; *ESA 2016 Waiver Order*, 31 FCC Rcd at 13470-71, para. 21.

<sup>16</sup> See, e.g., *CEA, NCTA, ESA 2012 Waiver Order*, 27 FCC Rcd at 12987-89, para. 36; *ESA 2015 Waiver Order*, 30 FCC Rcd at 10024, paras. 21-22.

<sup>17</sup> See *CEA, NCTA, ESA 2012 Waiver Order*, 27 FCC Rcd at 12987-89, para. 36; *ESA 2015 Waiver Order*, 30 FCC Rcd at 10025, para. 24; *ESA 2016 Waiver Order*, 31 FCC Rcd at 13472, para. 26. In the 2015 and 2016 waiver orders, the Bureau also considered the limited scope and duration of the extensions in concluding that the potential harm to consumers caused by the lack of ACS access would be minimized. *ESA 2015 Waiver Order*, 30 FCC Rcd at 10024, para. 22; *ESA 2016 Waiver Order*, 31 FCC Rcd at 13472, para. 26.

<sup>18</sup> ESA 2017 Petition at 1.

<sup>19</sup> *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, DA 17-1076 (CGB Nov. 1, 2017).

<sup>20</sup> See National Federation of the Blind Comments at 2 (NFB); 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 American Foundation for the Blind (AFB), the American Council of the Blind (ACB), 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), 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 at 1-3 (2017 Consumer Groups); The Arc of the United States Comments at 4 (The Arc).

waiver from the Commission's ACS accessibility rules for video game software through December 31, 2018, conditioned on ESA submitting a mid-year report to the Bureau on July 2, 2018. We allow this waiver based in part on ESA's assertion that this will be its final request for an extension of this waiver.<sup>21</sup>

6. First, as required by the Commission's rules,<sup>22</sup> and consistent with the Bureau's prior waiver orders,<sup>23</sup> we continue to find that the class of video game software, i.e., "playable games on any hardware or online platform, including game applications that are built into operating system software," for which ESA continues to seek a waiver, is defined with sufficient specificity and shares enough common defining characteristics to be granted a class waiver.<sup>24</sup> Accordingly, we retain this definition and affirm that all products and services within this class that are introduced into the market while the waiver is in effect will 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.<sup>25</sup>

7. Next, we are persuaded by ESA's assertions that a waiver for the class of video game software is merited because this software is capable of accessing ACS, but continues to be designed primarily for the purpose of game play rather than ACS.<sup>26</sup> ESA describes and provides examples of several marketing materials for four video game genres (sports games, action games, strategy games, and role-playing games), all of which appear to emphasize game play and not ACS features or functions.<sup>27</sup> For example, ESA points out that marketing materials and the website for the action game *Destiny 2* focus on game play, including game modes and character depictions, rather than the game's support for game chat.<sup>28</sup> Similarly, ESA explains that the marketing materials and website for the role-playing game *Final Fantasy XIV: Stormblood* lack mention of text chat, and instead focus on "descriptions of game lore, depictions of game maps, and summaries of new adventures characters can undertake."<sup>29</sup> As a third example, ESA points out that marketing materials for *Phantom Dust*, an action-strategy game, do not

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<sup>21</sup> ESA 2017 Petition at 1.

<sup>22</sup> 47 CFR § 14.5(b); *ACS Report and Order*, 26 FCC Rcd at 14639, para. 193 (clarifying that 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).

<sup>23</sup> *CEA, NCTA, ESA 2012 Waiver Order*, 27 FCC Rcd at 12986, para. 34; *ESA 2015 Waiver Order*, 30 FCC Rcd at 10022, para. 16; *ESA 2016 Waiver Order*, 31 FCC Rcd at 13470, para. 20.

<sup>24</sup> ESA 2017 Petition at 3-4 (noting that video game software is treated by other parties as a "defined class of products separate from other forms of software, internet services, and entertainment media").

<sup>25</sup> *ACS Report and Order*, 26 FCC Rcd at 14640, para. 194; *see also* 47 CFR § 14.5(c)(2). 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. 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.").

<sup>26</sup> ESA 2017 Petition at 3-4; *see also* 47 U.S.C. § 617(h)(1); 47 CFR § 14.5(a)(1).

<sup>27</sup> *See* ESA 2017 Petition at 4-8, Exhibit A (presenting copies and descriptions of screenshots of websites advertising video game software, packaging or "box art," and other advertising or "sell sheets").

<sup>28</sup> *Id.* at 5.

<sup>29</sup> *Id.* at 7.

mention voice chat as a functionality in their list of features.<sup>30</sup> ESA explains that, if mentioned at all, the marketing materials that discuss ACS in gaming software are not prominently displayed and are often only revealed in the FAQ or game mode section of the marketing materials, or offered as a generic statement for players to “communicate.”<sup>31</sup> For these reasons, we conclude that, at the present time, ACS continues not to be a primary or co-primary purpose for which video game software is designed.

8. Finally, we conclude that good cause exists to extend the waiver and that granting the final waiver extension for an additional 12 months is in the public interest.<sup>32</sup> In making this determination, 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, versus the video game industry’s interest in further exploration of ACS accessibility solutions, continued release of innovative games that utilize ACS, and the development of accessible video game software.<sup>33</sup> With respect to the former, we note that Consumer Groups stress the importance of ensuring that “people who are deaf, hard of hearing, blind, visually impaired, or DeafBlind can experience the immersive communicative, social, and cultural touchstones that video games provide on equal terms.”<sup>34</sup> Likewise, The Arc explains that people with cognitive disabilities can use online video games to overcome barriers to participating in the community by improving their “communication skills, increas[ing] their confidence to communicate with strangers, and participat[ing] in the cultural phenomena that manifests around popular online games.”<sup>35</sup> Further, as the Bureau previously noted, 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.<sup>36</sup>

9. Nevertheless, we are persuaded by ESA’s reports of ongoing “substantial technical challenges” to making ACS accessible in the video game context,<sup>37</sup> notwithstanding what ESA describes as the industry’s “real and demonstrable” progress on accessibility solutions over the past year.<sup>38</sup> Specifically, ESA maintains that the unique nature of video game software continues to create correspondingly unique technical challenges to applying ACS accessibility solutions, as well as challenges to how players use ACS in games.<sup>39</sup> ESA explains that this is because video games require highly specialized code for the simultaneous integration of physics, animation, graphics, audio, and other specialized functions that are not necessary for other forms of computer software that are capable of receiving and displaying information in a standardized, linear fashion.<sup>40</sup> Additionally, ESA points out that assistive technologies, which work with standardized user interfaces and controls, are rarely used for

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<sup>30</sup> ESA 2017 Mid-Year Status Report at 3-4.

<sup>31</sup> ESA 2017 Petition at 5, 7; *see also, e.g.*, ESA 2017 Petition at 6 (noting that, although voice chat functionality is available in the sports game *Pro Evolution Soccer 2018*, mention of this capability is buried in the “FAQ & Inquiry” section of the game’s website, rather than the website’s more prominent sections, such as “Features” and “Spec List”).

<sup>32</sup> 47 CFR § 1.3; *ACS Report and Order*, 26 FCC Rcd at 14637, para. 188.

<sup>33</sup> ESA 2017 Petition at 24-25.

<sup>34</sup> 2017 Consumer Groups Comments at 2.

<sup>35</sup> The Arc Comments at 3 (noting the increasingly important role online gaming can have for teenagers and young adults).

<sup>36</sup> *CEA, NCTA, ESA 2012 Waiver Order*, 27 FCC Rcd at 12990, para. 39.

<sup>37</sup> ESA 2017 Petition at 9.

<sup>38</sup> *Id.* at 2, 12-15.

<sup>39</sup> *Id.* at 11.

<sup>40</sup> *Id.* at 9.

video game accessibility, which rely on specialized controllers that are not typically used for common computing tasks or ACS.<sup>41</sup> Finally, as ESA notes, ACS challenges exist because of the way players use ACS in video games, in that factors such as “speech disfluency,” the use of “game-specific terms or slang,” variable sound quality, and overlapping game conversations can affect the accuracy of real-time speech-to-text transcriptions.<sup>42</sup> These ongoing accessibility challenges lead us to conclude that an extension of the waiver will serve the public interest, in that it will enable the continued exploration of solutions to resolve these challenges, while allowing for the continued release and use of innovative games that utilize ACS as a non-primary function of video game software.<sup>43</sup>

10. *Length of waiver period.* While we find that a limited, one year, waiver extension is justified at this time, we conclude that this will be the final extension of ESA’s class waiver, as ESA requests.<sup>44</sup> We reach this determination for two reasons. First, the ESA 2017 Petition and the ESA 2017 Mid-Year Status Report reveal that the landscape for accessible ACS in video game software has changed significantly since issuance of the Bureau’s first waiver grant in 2012. Specifically, ESA points to various video game manufacturers that are now able to leverage new and innovative accessibility features in gaming systems to provide accessible ACS.<sup>45</sup> For example, video game manufacturers that utilize Microsoft’s software development kit for Xbox One and Windows 10 devices now have access to real-time speech-to-text and text-to-speech transcription capabilities, which allow players to read a text transcript of other players’ spoken words and hear machine-generated audio of text typed by other players.<sup>46</sup>

11. Likewise, Nintendo recently released a free mobile application for smartphones that provides near real-time voice chat functionality for people playing its *Splatoon 2* game.<sup>47</sup> According to ESA, because this “matchmaking” feature “uses a smart device application for player-to-player communications, it can take advantage of a number of built-in accessibility resources provided natively on these platforms.”<sup>48</sup> ESA also reports that the game developer Mojang has added a text-to-speech feature for its popular game *Minecraft*, and that various other games now offer accessibility enhancements for a range of functional limitations, including those affecting a player’s vision, audio, motor control and manual dexterity.<sup>49</sup> Additionally, ESA reports that over the past year, members of the

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<sup>41</sup> *Id.* at 10.

<sup>42</sup> *Id.* at 11-12.

<sup>43</sup> *Id.* at 24-25.

<sup>44</sup> *See id.* at 1; 47 CFR § 14.5(c) (allowing time limitations to be placed on ACS waiver grants); *ACS Report and Order*, 26 FCC Rcd at 14638, para. 192 (allowing limits on the duration of any waiver, with or without a provision for renewal); NFB Comments at 2; Consumer Groups Comments at 3 (each requesting that this be the last waiver extension, if granted).

<sup>45</sup> ESA 2017 Petition at 14.

<sup>46</sup> ESA 2017 Mid-Year Status Report at 1-2, 8, 12; ESA 2017 Petition at 12-13. ESA states that “[n]ow that this development kit is available, game developers on Microsoft platforms have the ability to evaluate it and decide whether the [speech-to-text accessibility] feature would be effective in their games.” ESA 2017 Petition at 13. In fact, ESA reports that one game, *Halo Wars 2*, is currently utilizing the accessibility options available through this development kit. *Id.* at 12. ESA also reports that updates to Microsoft’s Xbox One console has made improvements in its screen reader and magnifier. *Id.* at 13.

<sup>47</sup> ESA 2017 Petition at 13-14.

<sup>48</sup> *Id.* at 14.

<sup>49</sup> *See id.* at 15-18 (discussing new accessibility options for Sony’s *MLB: The Show 2017*, Activision’s *Destiny 2*, Warner Brothers’ *Injustice 2*, and Capcom’s *Resident Evil 7*, as well as various games played on personal computers); *see also id.* at 22 (noting that accessibility updates to Blizzard Entertainment’s *World of Warcraft* game have been touted as a “shining example of . . . great accessibility” by the accessibility gaming group AbleGamers).

video game industry have been engaging regularly with the disability community to discuss accessibility solutions for gaming software.<sup>50</sup>

12. Second, consumer reliance on the ability to communicate during multiplayer online games has continued to grow.<sup>51</sup> As ESA acknowledges in its 2017 Mid-Year Status Report, “in some multiplayer games, communication contributes to the game play experience by helping coordinate activities among players online.”<sup>52</sup> The many examples of games incorporating player-to-player communication cited in ESA’s 2017 Petition further affirm the enhanced role that such communication is taking in modern video game software. These include the games *Splatoon 2*,<sup>53</sup> *Mass Effect: Andromeda*,<sup>54</sup> and *Halo Wars 2*,<sup>55</sup> each of which provides for voice chat online, and includes mention of online gaming with other players (that requires such communication) in their marketing materials and on their websites. As noted above, our ACS rules governing waivers require consideration as to whether the equipment at issue is designed to be used for ACS purposes by the general public.<sup>56</sup> As the inclusion of chat features in video games used by the general public expands, the justification for waiver from our ACS rules wanes.

13. These developments, and the accessibility progress made to date, lead us to conclude that it will not be necessary to extend this class waiver beyond the single additional year requested by ESA. Accordingly, we grant the class of video game software as defined herein,<sup>57</sup> a waiver of the Commission’s ACS accessibility obligations until December 31, 2018 without a provision for renewal.<sup>58</sup> Video game software covered by this class waiver that is introduced into the market before January 1, 2019, will be subject to the waiver for as long as it is sold.<sup>59</sup> We expect that manufacturers of such software will use

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Consumer Groups and the NFB acknowledge these strides in accessible gaming. *See* 2017 Consumer Groups Comments at 1; NFB Comments at 1.

<sup>50</sup> ESA 2017 Petition at 18-24 (reporting on accessibility events hosted by the International Game Developers Association, accessibility-related challenges for developers, outreach at the 2017 Electronic Entertainment Expo, attendance at accessibility conferences, accessible online gaming events, and other accessibility meetings and online forums to gather feedback from the disability community); *see also* *ESA 2016 Waiver Order*, 31 FCC Rcd at 13472, para. 25 (encouraging such engagement with the disability community).

<sup>51</sup> The Commission first noted this trend in 2012. *See* *CEA, NCTA, ESA 2012 Waiver Order*, 27 FCC Rcd at 12988, para. 36.

<sup>52</sup> ESA 2017 Mid-Year Status Report at 7.

<sup>53</sup> ESA 2017 Petition at 5-6 (reporting that the game’s website notes the use of voice chat when the gamer is playing online); ESA 2017 Mid-Year Status Report at 4.

<sup>54</sup> ESA 2017 Petition at 6-7 (noting that the game supports a cooperative mode for two to four people to play together, and that the game’s website urges players to “[p]lay as a team. Stick together, support each other, and communicate”); 2017 Mid-Year Status Report at 4-5.

<sup>55</sup> ESA 2017 Petition at 8 (noting that the marketing materials for this game “highlight[] . . . the ability to ‘[p]lay with or against your friends and the Xbox Live community in up to 3v3 matches”).

<sup>56</sup> *See supra* para. 2.

<sup>57</sup> *See supra* para. 6.

<sup>58</sup> *See supra* note 44.

<sup>59</sup> *See* 47 CFR § 14.5(c)(2). During the period of the waiver, we will not require such software 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. 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 14607-19, paras. 119-48.

the waiver period to work on solutions designed to eliminate ACS accessibility barriers,<sup>60</sup> and for this purpose will continue engaging with the disability community.<sup>61</sup> Upon termination of the waiver, manufacturers of video game software must comply with the Commission's ACS accessibility requirements, unless doing so is not achievable, as defined in the Commission's rules.<sup>62</sup> For products and services already under development *after* the 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.<sup>63</sup>

14. *2018 Mid-Year Report.* We condition the grant of this class waiver on the submission of one additional mid-year report, due on July 2, 2018, which shall include information about the steps taken to ensure accessible ACS on video game software for people with varying disabilities.<sup>64</sup> We require this report in response to concerns raised in the record about the lack of specificity in the first mid-year report, with respect to the industry's plans to address the remaining technical challenges associated with providing accessible ACS, as well as in response to concerns about the report's lack of detailed accessibility milestones required by the Bureau's 2016 waiver order.<sup>65</sup> Further, the report can inform both the Commission and the public about the gaming industry's progress on the remaining accessibility challenges, as well as new solutions that become available to provide accessible ACS. Accordingly, we direct such report to include, but not be limited to: (1) efforts, innovations, and progress that ESA members have made toward addressing technical challenges and developing accessibility features; (2) examples of games successfully utilizing accessibility solutions, such as real-time speech-to-text and text-to-speech transcription,<sup>66</sup> configurations to manipulate controls with limited fine motor skills, magnifiers, and screen readers; (3) a list of the disability-related consumer organizations with whom ESA has consulted since the start of this waiver period; and (4) ESA members' specific plans to conduct outreach and consultation with members of the disability community during the remainder of the waiver period and beyond.<sup>67</sup>

#### IV. ORDERING CLAUSES

15. 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), 617, and sections

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<sup>60</sup> In this regard, we note ESA's statements that extending the waiver period for one year "will provide time for game publishers to evaluate adoption of newly available [accessibility] options" and "will allow ESA member companies to continue to innovate and experiment by reducing regulatory uncertainty while development continues." ESA 2017 Petition at 25.

<sup>61</sup> *See id.* at 26-27.

<sup>62</sup> *See* 47 CFR §§ 14.1, 14.10(b).

<sup>63</sup> *ACS Report and Order*, 26 FCC Rcd at 14640, para. 194; *see also* 47 CFR § 14.5(c)(2).

<sup>64</sup> This shall include consideration of the ACS needs of people with cognitive and physical disabilities, including, but not limited to, functional limitations in hearing, vision (including colorblindness), speech, and mobility. *See, generally*, The Arc Comments at 4-5 (recommending inclusion of people with cognitive disabilities in developer research, product design, and product testing in order to become more acquainted with the accessibility and usability needs of this population).

<sup>65</sup> 2017 Consumer Comments at 3; 2017 The Arc Comments at 4 (noting that an additional report would be beneficial).

<sup>66</sup> For example, the report can note games that have successfully used the Microsoft software development kit for Xbox One and Windows 10 devices.

<sup>67</sup> This may include the use of focus groups, and panelists who have disabilities at ESA member-hosted conferences and summits.



0.361, 1.3, and 14.5 of the Commission's rules, 47 CFR §§ 0.361, 1.3, 14.5, this Order IS ADOPTED.

16. IT IS FURTHER ORDERED that the Petition of the Entertainment Software Association for Extension of Waiver IS GRANTED for the period of January 1, 2018, through December 31, 2018, without a provision for renewal as a class, and conditioned on the requirement that the Entertainment Software Association provides a mid-year report to the Consumer and Governmental Affairs Bureau on July 2, 2018.

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

18. 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](mailto: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

Patrick Webre  
Acting Chief  
Consumer and Governmental Affairs Bureau