

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)
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)
In the Matter of Accessible Mobile Phone Options)
for People who are Blind, Deaf-Blind, or Have)
Low Vision)

NOTICE OF PROPOSED RULEMAKING

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TABLE OF CONTENTS

Heading Paragraph #
I. INTRODUCTION AND OVERVIEW 1
II. BACKGROUND..... 7
III. STATUTORY DEFINITIONS..... 14
A. Scope of Coverage 14
1. Background..... 14
2. Manufacturers of Equipment Used for Advanced Communications Services 19
3. Providers of Advanced Communications Services..... 25
4. Advanced Communications Services 28
a. Interconnected VoIP Service 29
b. Non-interconnected VoIP Service 31
c. Electronic Messaging Service..... 33
d. Interoperable Video Conferencing Service..... 35
5. Customized Equipment or Services..... 48
6. Waivers for Services or Equipment Designed for Purposes other than Using ACS 52
7. Exemptions for Small Entities..... 61
B. Nature of Statutory Requirements..... 67
1. Achievable Standard..... 67
a. General Approach 67

b. Specific Factors.....	71
(i) Nature and Cost of Steps Needed with Respect to Specific Equipment or Service.....	71
(ii) Technical and Economic Impact on the Operation	72
(iii) Type of Operations.....	73
(iv) Extent to which Offering Has Varied Functions, Features, and Prices	74
2. Industry Flexibility	77
3. Accessible to and Usable by.....	81
4. Disability	84
5. Compatibility.....	85
6. Network Features.....	91
7. Accessibility of Information Content	95
IV. IMPLEMENTATION REQUIREMENTS.....	99
A. Obligations.....	99
1. Manufacturers and Service Providers.....	100
2. Providers of Applications or Services Accessed over Service Provider Networks.....	103
B. Performance Objectives	104
V. INDUSTRY GUIDANCE	112
A. Safe Harbors.....	112
B. Prospective Guidelines.....	114
VI. SECTION 717 RECORDKEEPING AND ENFORCEMENT	116
A. Overview.....	116
B. Recordkeeping	117
C. Enforcement.....	124
1. Background.....	124
a. Enforcement of Section 255.....	125
b. Section 717 Enforcement Requirements.....	126
2. General Requirements	128
3. Informal Complaints.....	134
4. Formal Complaints	141
VII. SECTION 718 INTERNET BROWSERS BUILT INTO TELEPHONES USED WITH PUBLIC MOBILE SERVICES.....	143
VIII. PROCEDURAL MATTERS	145
A. Regulatory Flexibility Act	145
B. Paperwork Reduction Act of 1995.....	146
C. Comment Filing Procedures.....	147
IX. ORDERING CLAUSES.....	149
Appendix A: List of Commenters	
Appendix B: Proposed Rules	
Appendix C: Initial Regulatory Flexibility Analysis	
Appendix D: Text of Senate Bill 3304 and Senate Bill 3828 as Enacted Into Law	

I. INTRODUCTION AND OVERVIEW

1. With this Notice of Proposed Rulemaking (“NPRM”), we initiate a proceeding to update the Commission's rules to ensure that the 54 million individuals with disabilities¹ are able to fully utilize advanced communications services and equipment and networks used for such services. This NPRM

¹ Matthew W. Brault, Current Population Reports 3, *Americans with Disabilities: 2005*, (Dec. 2008) (“2005 Census Report”), <http://www.census.gov/prod/2008pubs/p70-117.pdf>.

proposes to adopt rules that implement provisions in Section 104 of the “Twenty-First Century Communications and Video Accessibility Act of 2010” (hereinafter referred to as the “CVAA”), the most significant piece of accessibility legislation since the passage of the Americans with Disabilities Act (“ADA”) in 1990.²

2. In explaining the need for the CVAA, Congress noted that the communications marketplace has undergone a “fundamental transformation” since Congress acted to ensure access to telecommunications services and equipment by people with disabilities as part of the Telecommunications Act of 1996.³ Specifically, Congress stated that since it added Section 255 to the Communications Act of 1934, as amended (hereinafter referred to as “the Communications Act” or “the Act”), “Internet-based and digital technologies . . . driven by growth in broadband . . . are now pervasive, offering innovative and exciting ways to communicate and share information.”⁴ Congress found, however, that people with disabilities often have not shared in the benefits of this rapid technological advancement and that they face disproportionately higher rates of unemployment and poverty than those without disabilities.⁵ Recent surveys confirmed this finding, showing a gap of 38 percentage points in the rates of employment of working-age people with disabilities and those without disabilities (21% v. 59%)⁶ and a gap of 27 percentage points in the rates of Internet access (54% v. 81%).⁷

3. These trends are even more troubling when one considers the pace at which the communications marketplace is changing and how we as a society are becoming more dependent on such technologies to succeed in the workplace and to manage our daily lives. Statistics show, for example, that more than ever, Americans rely on their mobile phones for much more than phone service.⁸ Increasingly,

² Twenty-First Century Communications and Video Accessibility Act of 2010, Pub. L. No. 111-260, 124 Stat. 2751 (2010) (as codified in various sections of 47 U.S.C.). The law was enacted on October 8, 2010 (S. 3304, 111th Cong.). See also Amendment of Twenty-First Century Communications and Video Accessibility Act of 2010, Pub. L. No. 111-265, 124 Stat. 2795 (2010), also enacted on October 8, 2010 (S. 3828, 111th Cong.) to make technical corrections to the Twenty-First Century Communications and Video Accessibility Act of 2010 and the amendments made by that Act. S. 3304 and S. 3828, the provisions as enacted into law, are attached in Appendix D. Hereinafter, all references to the CVAA will be to the CVAA as codified in the Communications Act of 1934, as amended, unless otherwise indicated.

³ See 47 U.S.C. § 255; S. Rep. No. 111-386, at 1 (2010) (“Senate Report”); H.R. Rep. No. 111-563, at 19 (2010) (“House Report”).

⁴ See Senate Report at 1; House Report at 19.

⁵ See Senate Report at 1-2; House Report at 19.

⁶ See National Organization on Disability and the Kessler Foundation, *2010 Gap Survey of Americans with Disabilities* (July 26, 2010), available at <http://www.2010disabilitysurveys.org/indexold.html>.

⁷ See Susannah Fox, Pew Internet, *Americans living with disability and their technology profile*, (Jan. 21, 2011), <http://www.pewinternet.org/Reports/2011/Disability.aspx>. Additionally, this article shows that “43% of Americans say that people who do not have broadband at home are at a major disadvantage when it comes to finding out about job opportunities or learning career skills.” *Id.*

⁸ Aaron Smith, Pew Internet, *Mobile Access 2010*, (July 7, 2010), available at <http://www.pewinternet.org/Reports/2010/Mobile-Access-2010.aspx>. The Pew Report states that “40% of adults use the Internet, email or instant messaging on a mobile phone (up from the 32% of Americans who did this in 2009)” and that “mobile data applications have grown more popular over the last year.” *Id.* It shows that the usage of “non-voice data applications” has grown dramatically in the last year as the percentages have risen for people who use their phones for such things, among others, as checking the Internet, taking pictures, and sending text messages, instant messages, and e-mail and also states, “[o]f the eight mobile data applications we asked about in both 2009 and 2010, all showed statistically significant year-to-year growth.” *Id.*

wireless handsets have evolved into multi-media devices capable of accessing the Internet, sending e-mails or text messages, downloading music, and viewing streaming video programming that can, for example, enable distance education and telemedicine. As described in the National Broadband Plan,⁹ one of the Commission's most important policy objectives is the rapid deployment of and universal access to broadband services for all Americans across the country, because broadband technology can stimulate economic growth and provide opportunity for all Americans. To that end, the recommendations in the National Broadband Plan were consistent with the objectives set forth in the CVAA.¹⁰ This law will bring existing communication laws protecting people with disabilities in line with 21st-century technologies by ensuring that people with disabilities are not left behind and that they will be able to share fully in the economic, social, and civic benefits of broadband.

4. This NPRM seeks comment on the way in which we should implement the requirements of Sections 716 and 717, which were added by Section 104 of Title I of the CVAA. The statute requires the Commission to adopt rules within one year of enactment.¹¹ Section 716 requires that providers of "advanced communications services" (or "ACS") and manufacturers of equipment used for ACS make their services and products accessible to people with disabilities, unless it is not achievable to do so.¹² The CVAA provides flexibility to the industry by allowing covered entities to comply with Section 716 by either building access features into their equipment or services¹³ or relying on third party applications, peripheral devices, software, hardware, or customer premises equipment (or "CPE") that is available to individuals with disabilities at nominal cost.¹⁴ If such compliance is not achievable, covered entities must ensure that their equipment and services are compatible with "existing peripheral devices or specialized customer premises equipment" commonly used by persons with disabilities to achieve access, unless it is not achievable to do so.¹⁵ Section 717 requires that the Commission establish new recordkeeping and enforcement procedures for manufacturers and providers subject to Section 255 and Section 716.¹⁶ Appendix D contains the full text of the CVAA as enacted.

5. While Section 255 of the Act will be the starting point for our implementation of these sections, our proposed approach reflects several important differences between Section 255 and Section 716. First, Section 716 covers a broader scope of services and related equipment than Section 255.¹⁷ In addition, relative to Section 255, Section 716 requires a higher standard of achievement for covered entities¹⁸ but also allows for greater flexibility in how to accomplish these requirements.¹⁹ In the NPRM,

(Continued from previous page) _____

⁹ Federal Communications Commission, *Connecting America: The National Broadband Plan* (rel. Mar. 16, 2010) ("National Broadband Plan" or "NBP"), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-296935A1.pdf.

¹⁰ National Broadband Plan at Recommendation 9.10.

¹¹ See 47 U.S.C. § 617(e)(1).

¹² See 47 U.S.C. § 617(a)(1), (b)(1).

¹³ See 47 U.S.C. §§ 617(a)(2)(A) and (b)(2)(A).

¹⁴ See 47 U.S.C. §§ 617(a)(2)(B) and (b)(2)(B).

¹⁵ See 47 U.S.C. § 617(c).

¹⁶ See 47 U.S.C. § 618(a). The Section 717 requirements also apply to manufacturers and providers subject to Section 718, which provides for the accessibility of mobile phone browsers and is effective three years after enactment of the CVAA. See discussion *infra* at Section VI.

¹⁷ Compare 47 U.S.C. § 255 to 47 U.S.C. § 617. See discussion *infra* at paras. 14, 19-47.

¹⁸ See 47 U.S.C. § 617(g), see also discussion *infra* at para. 67.

¹⁹ See 47 U.S.C. §§ 617(a)(2)(A) and (b)(2)(A), see also 47 U.S.C. § 617(j).

we propose to adopt a new rule part to implement Sections 716 and 717 and to amend the Section 255 rules to incorporate any relevant definitional changes in Section 716 and establish the new recordkeeping and enforcement procedures set forth in Section 717. The regulatory oversight we propose in this proceeding is not intended to prejudge the scope of the Commission's authority in other proceedings that derive from different statutory grants of authority.

6. The NPRM also seeks comment on Section 718,²⁰ which is effective three years after the date of enactment of the CVAA and requires manufacturers and service providers to make Internet browsers built into mobile phones accessible to people who are blind or have visual impairments. Specifically, the NPRM seeks input on what steps the Commission and stakeholders can take to ensure that manufacturers and service providers can meet their obligations when Section 718 goes into effect in 2013.

II. BACKGROUND

7. Section 255 of the Act, which was added by the Telecommunications Act of 1996, requires manufacturers of telecommunications equipment and providers of telecommunications services to ensure that their equipment and services are accessible to and usable by people with disabilities, if readily achievable.²¹ When the accessibility requirements of Section 255 are not readily achievable, manufacturers and service providers must ensure compatibility with existing peripheral devices or specialized CPE commonly used by individuals with disabilities, if readily achievable.²² A related provision in Section 251(a)(2) of the Act prohibits a telecommunications carrier from installing network features, functions or capabilities that do not comply with the guidelines and standards established pursuant to Section 255.²³

8. Section 255 directed the United States Access Board ("Access Board")²⁴ to work with the Commission to establish guidelines for the accessibility of telecommunications equipment and CPE within 18 months of enactment.²⁵ In June 1996, the Access Board convened the Telecommunications Access Advisory Committee (TAAC), a federal advisory committee consisting of consumer, industry, and government stakeholders, for this purpose. The TAAC delivered its final report to the Access Board in January 1997,²⁶ which the Access Board then used to develop its Section 255 guidelines.²⁷ In September 1999, the Commission adopted a Report and Order adding Parts 6 and 7 to its rules to implement Section

²⁰ 47 U.S.C. § 619.

²¹ See 47 U.S.C. §§ 255(b) and (c).

²² See 47 U.S.C. §§ 255(b) and (c).

²³ 47 U.S.C. § 251(a)(2).

²⁴ The Access Board is "an independent Federal agency devoted to accessibility for people with disabilities [which] . . . develops and maintains design criteria for the built environment, transit vehicles, telecommunications equipment, and for electronic and information technology." United States Access Board, *About the U.S. Access Board*, <http://www.access-board.gov/about.htm> (last visited February 18, 2011).

²⁵ 47 U.S.C. § 255(e).

²⁶ Telecommunications Access Advisory Committee, *Access to Telecommunications Equipment and Customer Premises Equipment by Individuals with Disabilities, Final Report* (Jan. 1997), ("TAAC Report"), <http://www.access-board.gov/telecomm/commrept/taacrp.htm#1.1> (last visited January 18, 2011).

²⁷ *Telecommunications Act Accessibility Guidelines*, 36 C.F.R. §§ 1193 et. seq., <http://www.access-board.gov/telecomm/rule.htm> (last visited January 18, 2011). The Access Board has a continuing obligation to update these guidelines periodically.

255,²⁸ in large part incorporating the Access Board's guidelines for telecommunications equipment and customer premises equipment ("CPE").²⁹ In addition to drawing heavily on these guidelines for its Section 255 rules on telecommunications equipment and CPE (in Part 6 of its rules), the Commission utilized the general principles contained in these guidelines to outline the general obligations of telecommunications service providers.³⁰ In Part 7 of these rules, the Commission also used its ancillary jurisdiction to adopt rules relating to voicemail and interactive voice response providers and equipment manufacturers.³¹ In 2007, the Commission extended its Section 255 accessibility rules to interconnected Voice over Internet Protocol ("VoIP") service providers and equipment manufacturers.³²

9. The rules adopted to implement Section 255 require that where readily achievable, manufacturers and service providers must evaluate the accessibility, usability, and compatibility features of covered services and equipment; incorporate such evaluation throughout product design, development, and fabrication, as early and consistently as possible; and identify barriers to accessibility and usability as part of the product design and development process.³³ The rules also provide that where readily achievable, manufacturers and service providers must ensure that product and service information and documentation provided to customers is accessible to customers with disabilities.³⁴ In addition, under the rules, equipment manufacturers must "pass through cross-manufacturer, non-proprietary, industry-standard codes, translation protocols, formats or other information necessary to provide telecommunications in an accessible format," where "readily achievable."³⁵ The rules also contain an

²⁸ See *Implementation of Sections 255 and 251(a)(2) of the Communications Act of 1934, as enacted by the Telecommunications Act of 1996*, WT Docket No. 96-198, Report and Order and Further Notice of Inquiry, 16 FCC Rcd 6417 (1999) ("*Section 255 Report and Order*").

²⁹ *Section 255 Report and Order*, 16 FCC Rcd at 6422, ¶¶ 9-10.

³⁰ 47 C.F.R. § 6.5. Section 6.5 of the Commission's rules requires a manufacturer of telecommunications equipment or CPE to ensure that the equipment is designed, developed and fabricated so that the telecommunications functions of the equipment are accessible to and usable by individuals with disabilities, if readily achievable. *Id.* See also 47 C.F.R. § 7.5.

³¹ 47 C.F.R. §§ 7.1 *et. seq.*

³² *In the matters of IP-Enabled Services; Implementation of Sections 255 and 251(a)(2) of the Communications Act of 1934, as Enacted by the Telecommunications Act of 1996: Access to Telecommunications Service, Telecommunications Equipment and Customer Premises Equipment by Persons with Disabilities; Telecommunications Relay Services and Speech-to-Speech Services for Individuals With Hearing and Speech Disabilities; The Use of N11 Codes and Other Abbreviated Dialing Arrangements*, WC Docket No. 04-36, WT Docket No. 96-198, CG Docket No. 03-123, CC Docket No. 92-105, Report and Order, 22 FCC Rcd 11275 (2007).

³³ 47 C.F.R. § 6.7; *Section 255 Report and Order*, 16 FCC Rcd at 6423, ¶ 16. Section 6.7 of the Commission's rules requires covered entities to (1) evaluate the accessibility, usability, and compatibility of equipment and telecommunications services and incorporate this evaluation throughout the product design stage, development, and fabrication, as early and consistently as possible, (2) identify barriers to accessibility and usability as part of this product design and development process, and (3) in developing such a process, consider such factors as covered entities deem appropriate, including market research, product testing, working cooperatively with disability-related organizations, and testing unproven access solutions. 47 C.F.R. § 6.7. See also 47 C.F.R. § 7.7.

³⁴ 47 C.F.R. § 6.11(a); *Section 255 Report and Order*, 16 FCC Rcd at 6430, ¶ 23. Section 6.11 of the Commission's rules requires covered entities to ensure access to information and documentation they provide to their customers, if readily achievable. Such information and documentation would include user guides, bills, installation guides for end user installable devices, and product support communications (including as needed in alternate formats), call centers and customer support at no extra cost, regarding both the product generally and the accessibility features of the product. In developing training programs, covered entities are encouraged to consider topics on accessibility requirements, means of communicating with individuals with disabilities, commonly used adaptive technology, designing for accessibility, and solutions for accessibility and compatibility. 47 C.F.R. § 6.11. See also 47 C.F.R. § 7.11.

³⁵ 47 C.F.R. § 6.9; see also 47 C.F.R. § 7.9.

informal complaint procedure by which manufacturers and service providers must attempt to resolve the complainant's concerns and respond to the Commission within 30 days.³⁶

10. In 2006, the Access Board initiated a review of its accessibility guidelines for telecommunications equipment and CPE covered under Section 255 and its standards for electronic and information technology covered under Section 508 of the Rehabilitation Act.³⁷ Under Section 508, federal agencies must “develop, procure, maintain, and use” electronic and information technologies that are accessible to people with disabilities, unless doing so would cause an undue burden.³⁸ The goal of this review was to bring the Section 255 and Section 508 guidelines and standards up to date and to harmonize them with each other and international accessibility standards. Again, the Access Board established an advisory board of interested stakeholders for this purpose, and in April 2008, the Telecommunications and Electronic and Information Technology Advisory Committee (“TEITAC”) issued its final report, containing a set of recommended updates to these guidelines and standards.³⁹ In March 2010, the Access Board released for public comment draft information and communication technology (“ICT”) guidelines and standards,⁴⁰ which were based on these stakeholder recommendations.

11. During the spring of 2010, the Consumer and Governmental Affairs Bureau (“CGB”) and the Wireless Telecommunications Bureau (“WTB”) (“the Bureaus”) held two workshops to explore the telecommunications access needs of people with disabilities, along with solutions to address these barriers. At the first of these, held on May 13, 2010, the Commission received feedback on expanding disability access to wireless telecommunications; at the second, held on June 15, 2010, young adults who are deaf-blind discussed the barriers they experience in accessing telecommunications and in obtaining information about accessible technologies.⁴¹

12. Building on those workshops, on July 19, 2010, the Bureaus issued a Public Notice (“*July Public Notice*”) in CG Docket No. 10-145 expressing the concerns “that people who are blind or have other vision disabilities have few accessible and affordable wireless phone options”⁴² and “that many wireless technologies may not be compatible with Braille displays needed by individuals who are deaf-blind.”⁴³ The *July Public Notice* sought comment on, among other things, the barriers faced by these populations, the cost and feasibility of technical solutions, and the actions that the agency should take to address the current lack of access. The Bureaus received over 200 submissions in the record from consumers, consumer groups, trade associations, and individual companies, many of whom provided details about the lack of access to basic and smart phones. While staff continues to consider the steps the agency should take to address those concerns, we have incorporated the record from the *July Public Notice* into the record of this proceeding because the record in CG Docket No. 10-145 is particularly

³⁶ 47 C.F.R. §§ 6.16-6.20. *Section 255 Report and Order*, 16 FCC Rcd at 6468, ¶ 126.

³⁷ Workforce Investment Act of 1998, Pub. L. No. 105-220, 112 Stat 936 (1998) (codified at 29 U.S.C. § 794(d)) (“*Rehabilitation Act*”). The current Section 508 Electronic and Information Technology Accessibility Standards that were the subject of this review are codified at 36 C.F.R. Part 1194, see <http://www.access-board.gov/sec508/standards.htm>.

³⁸ See *Rehabilitation Act* at Section 508(a)(1)(A).

³⁹ See <http://www.access-board.gov/sec508/refresh/report/#a1>.

⁴⁰ United States Access Board, *Draft Information and Communication Technology (ICT) Standards and Guidelines*, (March 2010), (“Access Board Draft Guidelines”), <http://www.access-board.gov/sec508/refresh/draft-rule.pdf>.

⁴¹ Meeting summary available at <http://fjallfoss.fcc.gov/ecfs/document/view?id=7020511584>.

⁴² *Wireless Telecommunications Bureau and Consumer and Governmental Affairs Bureau Seek Comment on Accessible Mobile Phone Options for People Who Are Blind, Deaf-Blind, or Have Low Vision*, CG Docket No. 10-145, DA 10-1324, Public Notice, 25 FCC Rcd 9228 (2010).

⁴³ *Id.*

relevant and may inform our understanding of the issues raised here, including the difficulties that people with disabilities face in finding accessible products and getting the technical and customer support that they need in today's marketplace.

13. On October 21, 2010, CGB and WTB issued a Public Notice (“October Public Notice”) seeking input on key provisions in Sections 716, 717, and 718 of the Communications Act, as amended by the CVAA.⁴⁴ The Bureaus received 24 comments and 25 reply comments, which have helped to shape the development of this NPRM.

III. STATUTORY DEFINITIONS

A. Scope of Coverage

1. Background

14. Section 716 of the Act covers a broad array of manufacturers of equipment and providers of services that are not covered under Section 255. As discussed in more detail *infra* paras.19-47, the requirements of Section 716 apply to the manufacturers of equipment used for non-interconnected VoIP services, electronic messaging services, and interoperable video conferencing services (all of which are “advanced communications services” as defined in Section 3(1) of the Act⁴⁵) and the providers of those services. We agree with AT&T’s statement that “Section 716 reflects the reality that ACS is delivered in a complex Internet ecosystem”⁴⁶ and that “[a]ccessibility obligations must be shared by all entities in that ecosystem for consumers to have an accessible experience.”⁴⁷ We discuss the evolution of the “complex Internet ecosystem” below and seek further comment on how we should interpret Section 716 requirements, in light of this evolution and the statute’s broader purposes of ensuring that ACS and equipment used for ACS is accessible to and usable by people with disabilities.

15. Since Section 255 was first enacted, communication technology has changed significantly, both in terms of its usage of the Internet and packet-switched networks instead of circuit-switched networks and in its common architecture.⁴⁸ In many cases, communication devices had a single function and were created by a single manufacturer and often closely tied to a specific communication service or network. As the fixed and mobile Internet has evolved, mass-market communication devices are now often general-purpose computers or devices such as smart phones incorporating aspects of general-purpose computers, with an architecture reflecting the evolution of computer technology. This architecture has been common for personal computers since the 1980s, but has more recently also made its way into mobile devices such as smart phones and tablets, and into entertainment devices such as game consoles and set-top boxes.⁴⁹ In all of these cases, systems can be divided into at least five components

⁴⁴ See Consumer and Government Affairs Bureau and Wireless Telecommunications Bureau Seek Comment on Advanced Communication Provisions of the Twenty-First Century Communications and Video Accessibility Act of 2010, CG Docket No. 10-213, DA 10-2029, Public Notice, at 2 (citing Pub. L. No. 111-260, § 101(1)), released October 21, 2010) (“October Public Notice”).

⁴⁵ 47 U.S.C. § 153(1). Although interconnected VoIP service also constitutes an advanced communications service under Section 3(1), such service is subject to Section 255 of the Act and thus need not comply with the requirements of Section 716. See 47 U.S.C. § 617(f).

⁴⁶ AT&T Comments at 2.

⁴⁷ AT&T Comments at 2-3.

⁴⁸ See Kaveh Pahlavan & Prashant Krishnamurthy, Networking Fundamentals: Wide, Local, & Personal Area Communications 23-25 (John Wiley and Sons Ltd. 2009).

⁴⁹ *Id.* at 21-23. See also <http://www.qualcomm.com/documents/files/evolution-toward-multimode-future.pdf>, at 3, 8-9.

that can be pictured, roughly, as layers, with the hardware at the bottom and the application and services at the top:

- Hardware (commonly referred to as the “device”): Every advanced communications service relies on hardware with general-purpose computing functionality. It typically includes a computing component (“CPU”), several kinds of memory, one or more network interfaces (cellular, IEEE 802.11 “WiFi,” Ethernet, Bluetooth, etc.), built-in peripherals such as keyboards and displays, and both generic and dedicated-purpose interfaces to external peripherals. A common example of a generic interface is a USB interface, as it can support just about any input or output technology, from audio to keyboards and cameras. A dedicated-purpose interface can only support one media type, such as audio.
- Operating system (“OS”): The OS manages the system resources enumerated above and provides common functionality, such as network protocols, to applications. Almost all devices with a CPU have an OS.⁵⁰
- User interface layer: Most modern devices have a separate user interface (“UI”) layer upon which almost all applications rely to create their graphical user interface. Currently, the OS and user interface layer are typically provided as a package and are often referred to collectively as the OS,⁵¹ but this is not always the case. For example, at least one common OS allows users to replace the user interface layer.⁵² In many cases, web browsers are considered to be part of the UI layer although they themselves are also an application.
- Application (commonly referred to as an “app”⁵³): Software is used to implement the actual advanced communications functionality. The software may be embedded into the device and non-removable,⁵⁴ installed by the system integrator or user, or reside in the cloud.⁵⁵
- Network services: Advanced communication applications, such as VoIP, rely on network services⁵⁶ to interconnect users. These networks perform many functions, ranging from user authentication and authorization to call routing and media storage.⁵⁷ In many cases, such network

⁵⁰ See William Stallings, *Operating Systems, Internals and Design Principles*, 51-55 (Pearson and Prentice Hall 2009); Abraham Silberschatz, Peter B. Galvin & Greg Gagne, *Operating System Concepts*, 3-5 (Wiley 8th ed. 2008).

⁵¹ William Stallings, *Operating Systems, Internals and Design Principles*, 51, 84-86 (Pearson and Prentice Hall 2009).

⁵² See Technofunction, *Separation of the GUI and Linux Kernel*, (March 25, 2010), <http://www.technofunction.com/2010/03/separation-of-the-gui-and-linux-kernel/>.

⁵³ For example, mobile applications for iPhone can be downloaded by accessing <http://www.apple.com/iphone/features/app-store.html>. Similarly, many computer software applications can be purchased and downloaded via an Internet access.

⁵⁴ See Media Phone by Intel Corporation. <http://edc.intel.com/Applications/Embedded-Connected-Devices/>.

⁵⁵ Cloud computing is a model for enabling convenient, on-demand network access to a shared pool of configurable computing resources (e.g., networks, servers, storage, applications, and services) that can be rapidly provisioned and released with minimal management effort or service provider interaction. Peter Mell and Tim Grance, *The NIST Definition of Cloud Computing*, Version 15, 10-7-09, National Institute of Standards and Technology, Information Technology Laboratory, <http://csrc.nist.gov/groups/SNS/cloud-computing/index.html> (last visited February 18, 2011).

⁵⁶ The term “network services” is used here to indicate distributed functionality in the context of a computing architecture.

⁵⁷ The networks may also provide the advanced communication applications. For next generation network architecture and a comparison to legacy networks see http://www.itu.int/ITU-D/asp/CMS/Events/2010/NGN-Philippines/S3-NGN_architecture.pdf. For mobile network architecture see Harri Holma and Antti Toskala, *LTE for UMTS OFDMA and SC-FDMA Based Radio Access 46* (Wiley 2009) (summary available at <http://onlinelibrary.wiley.com/book/10.1002/9780470745489>).

services simply route the call signaling information and do not touch the actual media exchanged. In these cases, the service itself may not know or care what kind of media (audio, video, text) is exchanged between communicating end systems. In other cases, the network services may perform more than transport functions and offer video, voice, and other data capabilities.⁵⁸

While the particulars of the above components have evolved, the basic architecture has remained stable for several decades and there are no obvious successors under development in the research community. Thus, it appears reasonably safe to assume that this division will continue for the immediate future, although we note that the components listed above overlap with each other.

16. Because each of the above components may be created by a different manufacturer and sold separately, this division has three major consequences. First, a manufacturer or provider of one component may have limited ability to know which other components are being used to deliver an advanced communications service. For example, a PC- and web-based collaboration service can run on most personal computers, using an almost infinite set of combinations of hardware, operating systems, and web browsers. Second, components of the service can change over time. Users can often upgrade their hardware, OS, or application, without consulting with the manufacturer or provider of the other components. Third, the accessibility features of each component are likely to evolve over time. Manufacturers of hardware, OS, and user interface layers may not know whether the components they produce will be used for advanced communications services in the future and for which ones.

17. In order to enable individuals with disabilities to use an advanced communications service, *all* of the components may have to support accessibility features and capabilities. Conversely, if one component does not offer a particular function, it is often impossible for another component to compensate for that omission. For example, only the hardware component can support an audio jack or a connection to an external Braille device, while only the OS and user interface layer can enable screen readers. In addition, it should be noted that while upper layers cannot make up for the lack of accessibility features at the lower layers, they can impede their use. For example, an application could render text in such a way that screen readers or Braille devices cannot function, e.g., to protect content against extraction as part of digital rights management functionality. While this environment complicates the ability to implement capabilities that support people with disabilities, we also recognize that these challenges are inherent in the design of any mass-market application or hardware device. At the same time, we recognize that this environment also has the potential to provide new solutions for people with disabilities which were not previously possible.

18. We seek comment on whether the above description accurately reflects the basic architecture and components involved in the delivery of ACS. Below, we seek comment on how we should interpret the statute's directives, in light of the architecture and components discussed above.

2. Manufacturers of Equipment Used for Advanced Communications Services

19. Section 716(a) of the Act provides that, with respect to equipment manufactured after the effective date of applicable regulations established by the Commission and subject to those regulations, the accessibility obligations apply to a "manufacturer of equipment used for advanced communications services, including end user equipment, network equipment, and software . . . that such manufacturer offers for sale or otherwise distributes in interstate commerce."⁵⁹

20. We first seek comment on the meaning of the term "manufacturer." We note that in our

⁵⁸ The network features may provide priority transmissions for latency sensitive applications, such as video and audio, over e-mail, for example.

⁵⁹ See 47 U.S.C. § 617(a)(1). With regard to the "achievable" standard, see Section III.B.1 *infra*.

Section 255 rules we define “manufacturer” as “an entity that makes or produces a product.”⁶⁰ In the *Section 255 Report and Order*, we found that “[t]his definition puts responsibility on those who have direct control over the products produced, and provides a ready point of contact for consumers and the Commission in getting answers to accessibility questions and resolving complaints.”⁶¹ We propose to adopt the same definition of “manufacturer” in our Section 716 rules and seek comment on this proposal.

21. We also seek comment on the meaning of “end user equipment,” “network equipment,” and “software,” as those terms are used in Section 716(a). We propose to define “end user equipment” as including hardware as described above; “software” includes the OS, the user interface layer, and applications, as described above, that are installed or embedded in the end user equipment by the manufacturer of the end user equipment or by the user; and “network equipment” includes equipment used for network services, as described above. We seek comment on whether upgrades to the software (OS, user interfaces, or applications) by manufacturers are encompassed in these definitions. We also seek comment on whether there are any circumstances in which a manufacturer of end user equipment would be responsible for the accessibility of software that is installed or downloaded by the user. In particular, we seek comment on commenters’ assertions that the limitations on liability in Section 2(a) of the CVAA generally preclude manufacturers from being liable for third party applications that are installed or downloaded by the consumer.⁶²

22. In addition, we seek comment on the meaning of the phrase “used for advanced communications services” in Section 716(a), for the purposes of determining a manufacturer’s obligations under this section.⁶³ As a general matter, must equipment subject to Section 716(a) be capable of offering ACS on a standalone basis or merely support ACS in some way? If the former, then how should this standard be applied, for example, to Internet-enabled ACS intended to run on separately distributed general computing platforms?

23. We also seek comment on the meaning of “offers for sale or otherwise distributes in interstate commerce” by “such manufacturer.”⁶⁴ Hardware, as described above, commonly meets this definition. We seek comment on whether other components that are used for advanced communications services are offered for sale or otherwise distributed in interstate commerce by the manufacturer when installed or embedded by the manufacturer. We propose to treat generally the act of a manufacturer’s making software available for download as a form of distribution. We seek comment, however, for purposes of the CVAA, on what should constitute making software available for download.

24. We propose to hold manufacturers of end user equipment responsible for the accessibility of their products, including the software, such as the OS, the user interface layer, and the applications that they install. We also propose to find manufacturers of software used for advanced communications services that is offered for sale or otherwise distributed in interstate commerce by such manufacturers and that is downloaded or installed by the user as being covered by Section 716(a).

⁶⁰ 47 C.F.R. § 6.3(f).

⁶¹ *Section 255 Report and Order*, 16 FCC Rcd at 6454, ¶ 90.

⁶² See CEA Comments at 15 and 19-20, CTIA Reply Comments at 15, Motorola Comments at 6-7. Section 2(a) of the CVAA provides that the requirements of the CVAA do not apply to any person who “transmits, routes, or stores in intermediate or transient storage the communications made available through the provision of [ACS] by a third party” or who “provides an information location tool, such as a directory, index, reference, pointer, menu, guide, user interface, or hypertext link, through which an end user obtains access to such video programming, online content, applications, services, [ACS], or equipment used to provide or access [ACS].” See Pub. L. No. 111-260, Section 2(a). These limitations on liability do not apply “to any person who relies on third party applications, services, software, hardware, or equipment to comply with the requirements of the [CVAA].” *Id.* at Section 2(b).

⁶³ 47 U.S.C. § 617(a)(1).

⁶⁴ 47 U.S.C. § 617(a)(1).

3. Providers of Advanced Communications Services

25. Section 716(b)(1) of the Act provides that, with respect to service providers, after the effective date of applicable regulations established by the Commission and subject to those regulations, a “provider of advanced communications services shall ensure that such services offered by such provider in or affecting interstate commerce are accessible to and usable by individuals with disabilities,” unless these requirements are “not achievable.”⁶⁵

26. In the *Section 255 Report and Order*, the Commission found that providers of telecommunications services include resellers and aggregators.⁶⁶ The Commission's decision was based on its interpretation of the statutory definition of “telecommunications carrier” as defined in Section 3(51) of the Act. Specifically, the Commission noted that “[section 3(51)] states that a ‘telecommunications carrier’ means any ‘provider of telecommunications services’ with the exception of aggregators, thus indicating that a ‘provider of telecommunications services’ would otherwise include aggregators.”⁶⁷ While the CVAA does not provide similar guidance with respect to the definition of “provider” of ACS, we believe that the general principle that the Commission adopted in the *Section 255 Report and Order* – that “Congress intended to use the term “provider” broadly . . . to include all entities that make telecommunications services available” – has applicability here.⁶⁸ Accordingly, we propose to find providers of ACS to include all entities that make ACS available in or affecting interstate commerce, including resellers and aggregators. We seek comment on this proposal.

27. We also seek comment on additional issues relating to the meaning of “providers of advanced communications services.”⁶⁹ We propose to find such providers to include entities that provide ACS over their own networks as well as providers of applications or services accessed (*i.e.*, downloaded and run) by users over other service providers’ networks, as long as these providers make advanced communications services available in or affecting interstate commerce. We also seek comment on whether there are any circumstances in which a service provider would be responsible for the accessibility of third party services and applications or whether the liability provisions in Section 2(a) of the CVAA⁷⁰ would generally preclude such a result.⁷¹ We seek comment on these proposed approaches and on whether the fact that we are required under Section 716(e)(1)(C) to “determine the obligations under this section of manufacturers, service providers, and providers of applications or services accessed over service provider networks”⁷² should have any bearing on how we interpret the meaning of providers of ACS. Specifically, we seek comment on the meaning of “providers of applications or services accessed over service provider networks” and how this term differs from “providers of advanced communications services.”⁷³ Finally, we also seek comment on the meaning of “in or affecting interstate commerce.”⁷⁴ Are there any circumstances in which advanced communications services that are downloaded or run by the user would not meet this definition?

⁶⁵ See 47 U.S.C. § 617(b)(1).

⁶⁶ *Section 255 Report and Order*, 16 FCC Rcd at 6450, ¶ 80.

⁶⁷ 47 U.S.C. § 153(51).

⁶⁸ *Section 255 Report and Order*, 16 FCC Rcd at 6450, ¶ 80.

⁶⁹ 47 U.S.C. § 617(b)(1).

⁷⁰ See Pub. L. No. 111-260, Section 2.

⁷¹ See CEA Comments at 15 and 19-20; CTIA Reply Comments at 15; Motorola Comments at 6-7.

⁷² 47 U.S.C. § 617(e)(1)(C).

⁷³ 47 U.S.C. § 617(b)(1).

⁷⁴ 47 U.S.C. § 617(b)(1).

4. Advanced Communications Services

28. Section 3(1) of the Act defines “advanced communications services” to mean (A) interconnected VoIP service; (B) non-interconnected VoIP service; (C) electronic messaging service; and (D) interoperable video conferencing service.⁷⁵ That provision sets forth definitions for each of these terms.⁷⁶

a. Interconnected VoIP Service

29. Section 3(25) of the Act, as added by the CVAA, provides that the term “interconnected VoIP service” has the meaning given in section 9.3 of the Commission's rules, as such section may be amended.⁷⁷ Section 9.3, in turn, defines interconnected VoIP as a service that (1) enables real-time, two-way voice communications; (2) requires a broadband connection from the user's location; (3) requires Internet protocol-compatible CPE; and (4) permits users generally to receive calls that originate on the public switched telephone network (“PSTN”) and to terminate calls to the PSTN.⁷⁸ We propose to continue to define interconnected VoIP in accordance with section 9.3 of the Commission's rules. We seek comment on this proposal.

30. Section 716(f) of the Act provides that “the requirements of this section shall not apply to any equipment or services, including interconnected VoIP service, that are subject to the requirements of Section 255 on the day before the date of enactment of the Twenty-First Century Communications and Video Accessibility Act of 2010.”⁷⁹ In the *October Public Notice*, the Bureau sought comment on how to address the accessibility obligations of equipment that is used to provide both telecommunications and advanced communications services and how to treat interconnected VoIP.⁸⁰ As some commenters noted,⁸¹ this language clearly provides that interconnected VoIP equipment and services shall remain subject to Section 255. In its comments, AT&T states that “the Commission should subject multi-purpose devices to Section 255 to the extent that the device provides a service that is already subject to Section 255 and apply Section 716 solely to the extent that the device provides ACS that is not otherwise subject to Section 255.”⁸² We seek comment on AT&T's interpretation and also seek comment on alternative interpretations of Section 716(f).

b. Non-interconnected VoIP Service

31. Section 3(36) of the Act, as added by the CVAA, states that the term “non-interconnected VoIP service” means a service that “(i) enables real-time voice communications that originate from or terminate to the user's location using Internet protocol or any successor protocol; and (ii) requires Internet protocol compatible customer premises equipment” and that “does not include any service that is an interconnected VoIP service.”⁸³ We propose to define “non-interconnected VoIP service” in our rules in the same way and seek comment on this proposal.

32. TIA asserts that “offerings with a purely incidental VoIP component (e.g., gaming systems or private internal enterprise systems) . . . are . . . not subject to the Accessibility Act in the first

⁷⁵ 47 U.S.C. § 153(1).

⁷⁶ See 47 U.S.C. §§ 153(19), (25), (27), (36).

⁷⁷ 47 U.S.C. § 153(25). 47 C.F.R. § 9.3.

⁷⁸ 47 C.F.R. § 9.3.

⁷⁹ See 47 U.S.C. § 617(f).

⁸⁰ *October Public Notice* at 2-5.

⁸¹ See Verizon Comments at 2; Vonage Comments at 2-3; Vonage Reply Comments at 2; CTIA Comments at 7.

⁸² AT&T Comments at 5.

⁸³ 47 U.S.C. § 153(36).

instance.”⁸⁴ We propose to treat any offering that meets the criteria of the statutory definition set forth above as a “non-interconnected VoIP service,” and note that the statutory definition of non-interconnected VoIP does not exclude offerings with a purely incidental VoIP component. We seek comment on this proposal. We also note that, as discussed below, the statute allows the Commission to waive the requirements of Section 716 for equipment or services “designed primarily for purposes other than using advanced communications service.”⁸⁵ In addition, as discussed below, Section 716(i) provides that the requirements of this Section do not apply to “customized equipment or services that are not offered directly to the public.”⁸⁶

c. Electronic Messaging Service

33. Section 3(19) of the Act, as added by the CVAA, states that the term “electronic messaging service” “means a service that provides real-time or near real-time non-voice messages in text form between individuals over communications networks.”⁸⁷ In accordance with this definition, we propose to define this term in the Commission’s rules as “a service that provides real-time or near real-time non-voice messages in text form between individuals over communications networks.”⁸⁸ Consistent with language of the Senate and House Reports, we also propose that electronic messaging service includes “more traditional, two-way interactive services such as text messaging, instant messaging, and electronic mail, rather than . . . blog posts, online publishing, or messages posted on social networking websites.”⁸⁹ We seek comment on these proposed definitions. For reasons similar to those discussed below in the section on interoperable video conferencing services at paragraph 35, *infra*, we believe that Internet protocol relay (“IP Relay”)⁹⁰ services that otherwise fit the definition of “electronic messaging services” are services subject to the requirements of Section 716.

34. We also seek comment on the assertion of several commenters that the phrase “between individuals” in the above definition precludes the application of the accessibility requirements to

⁸⁴ TIA Comments at 6, citing *Cable Modem Declaratory Ruling* at ¶ 39; *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853, ¶ 16 (2005), *aff’d* *Time Warner Telecom, Inc. v. FCC*, 507 F.3d 205 (3d Cir. 2007); *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, Declaratory Ruling, 22 FCC Rcd 5901, ¶ 21 (2007) (broadband Internet access does not necessarily include a stand-alone offering of telecommunication service). See also Microsoft Comments at 4-6; CEA Comments at i; VON Coalition Comments at 9-10; ESA Comments at 1, 3-4, and 8-10; ESA Reply Comments at 1-2; CTIA Comments at 5-6; T-Mobile Comments at 2-3 and 6-7.

⁸⁵ See 47 U.S.C. § 617(h).

⁸⁶ See 47 U.S.C. § 617(i).

⁸⁷ 47 U.S.C. § 153(19).

⁸⁸ Senate Report at 18.

⁸⁹ Senate Report at 9; House Report at 23.

⁹⁰ IP Relay is a form of telecommunications relay services (“TRS”) under Section 225 of the Act that enables individuals who are deaf or hard of hearing or who have a speech disability to communicate over distances with voice telephone users through a remotely located “communications assistant” (“CA”). IP Relay users connect to the IP Relay center via the Internet by using a computer or other web-based device. The CA then relays the conversation between the parties – in text with the deaf or hard of hearing individual (the “text leg”), and by voice with the telephone user (the “telephone leg”). Voice telephone users can also initiate IP Relay calls by simply dialing the telephone number of the person who uses text. The call is then automatically connected to a CA, who then relays the conversation. See Consumer and Governmental Affairs Bureau, FCC Consumer Facts, *IP Relay Service* at <http://www.fcc.gov/cgb/consumerfacts/iprelay.html> (last updated May 6, 2010). In the vast majority of cases, IP Relay calls are between deaf and hard of hearing persons and persons who are hearing. The CVAA, however, expands the definition of TRS to allow IP Relay conversations also to take place with persons who may also have a hearing or speech disability but who use other forms of TRS. Pub. L. No. 111-260, § 103.

communications in which no human is involved, such as automatic software updates or other device-to-device or machine-to-machine communications.⁹¹ In addition, we seek comment on TIA's assertion that "services and applications that merely provide access to an electronic messaging service, such as a broadband platform that provides an end user access to an HTML-based e-mail service, are not covered."⁹²

d. Interoperable Video Conferencing Service

35. Section 3(1) of the Act, as added by the CVAA, defines the term "advanced communications services" to include "interoperable video conferencing service," which, in turn, is defined in Section 3(27) as "a service that provides real-time video communications, including audio, to enable users to share information of the user's choosing."⁹³ We note that while earlier versions of the legislation did not include the word "interoperable" in the definition of the term "advanced communications services," the definition of "interoperable video conferencing services" in the enacted legislation is identical to the definition of "video conferencing services" found in earlier versions.⁹⁴ In addition, language in the Senate Report regarding "interoperable video conferencing services" is identical to language in the House Report regarding "video conferencing services."⁹⁵ Both the Senate Report and the House Report state, for example, that "[t]he inclusion . . . of these services within the scope of the requirements of this act is to ensure, in part, that individuals with disabilities are able to access and control these services"⁹⁶ and that "such services may, by themselves, be accessibility solutions."⁹⁷ In light of the above symmetries between the earlier and later versions of this definition, as well as the reports prepared by each chamber of Congress, we will first seek comment on the meaning of "video conferencing service" and then on the meaning of "interoperable" in this context.

i. Video Conferencing Service

36. We first seek comment on what services meet the statutory definition of "providing . . . real-time video communications, including audio, to enable users to share information of the user's choosing" and what end user equipment, network equipment, and software are used for these services. We propose to classify a range of services and end user equipment under this statutory definition, including, but not limited to, videophones and software applications used for conversation between and among users. Such end user equipment includes smart phones and computers with the capability of using interactive video, text and audio conferencing applications such as the Apple iPhone 4.0, Motorola Droid X and computers and videophones such as ASUS Skype, Grandstream, Ojo, and Polycom. Examples of video conferencing software applications include, for example, Google Voice & Video Chat, ooVoo, AOL Instant Message ("AIM") Chat, WebEx, and Skype. We seek comment on this proposal.

37. We also seek comment on whether video relay services ("VRS") meet the above definition. VRS is a form of TRS under Section 225 of the Act that enables individuals who are deaf or

⁹¹ CEA Comments at 7; TIA Comments at 7-8; Microsoft Comments at 3, n.4; ITI Comments at 4; and T-Mobile Comments at 3. Unlike person-to-person or person-to-machine interactions, machine-to-machine interactions are processes where the communications occur solely between two or more machines. For example, blood pressure measurement devices attached to a wireless modem can transmit information to another modem attached to a medical center server that collects information on patients. No human intervention is involved as these systems operate automatically.

⁹² TIA Comments at 8.

⁹³ 47 U.S.C. § 153(1), (27), *see also* Pub. L. No. 111-260, § 101(1) (amending Section 3 of the Act).

⁹⁴ *See* S. 3304 and H.R. 3101.

⁹⁵ *See* Senate Report at 18 and House Report at 38.

⁹⁶ *See* Senate Report at 6 and House Report at 25.

⁹⁷ *Id.*

hard of hearing and who use American Sign Language to communicate over distances with voice telephone users through a remotely located sign language interpreter called a CA.⁹⁸ The person who is deaf or hard of hearing makes a VRS call using video equipment (a television or a computer with a video camera device) that connects such individual with the CA over a broadband connection. The CA then relays the conversation between the parties – in sign language with the VRS user (the “video leg”), and by voice with the telephone user (the “telephone leg”).⁹⁹ Voice telephone users can also initiate VRS calls by simply dialing the telephone number of the person who uses sign language. The call is then automatically connected to a CA, who then relays the conversation.¹⁰⁰

38. Commenters disagree about whether the CVAA covers the video conferencing service and equipment used in the provision of VRS. Sorenson cites to the legislative history and submits that “Section 716 was intended to cover mass market services and equipment (such as personal computers and smart phones) that have not been designed for use by people with disabilities, not services and equipment (such as VRS and point-to-point) that have been designed specifically to be accessible to and usable by persons with disabilities.”¹⁰¹ Consumer Groups¹⁰² disagree, stating that “VRS equipment and [video conferencing] services . . . should be made accessible in accordance with the Accessibility Act, if achievable.”¹⁰³ Sorenson also asserts that the phrase “including audio” in the definition suggests the exclusion of VRS “video conferencing service” or equipment.¹⁰⁴ Consumer Groups reject Sorenson’s assertion because widely distributed VRS equipment includes audio functions that “benefit users who engage in voice carryover (‘VCO’) and hearing carryover (‘HCO’).”¹⁰⁵

39. We agree with Consumer Groups and believe that the “video leg” of a VRS call meets the statutory definition of “provid[ing] . . . real-time video communications, including audio, to enable users to share information of the user’s choosing.”¹⁰⁶ Just as a voice telephone user uses telecommunications services and equipment to communicate with the VRS CA (the “telephone leg” of a VRS call), we

⁹⁸ See Consumer and Governmental Affairs Bureau, FCC Consumer Facts, *Video Relay Services*, available at <http://www.fcc.gov/cgb/consumerfacts/videorelay.html> (last updated May 6, 2010).

⁹⁹ *Id.*

¹⁰⁰ In the vast majority of cases, VRS calls are between deaf and hard of hearing persons who use sign language and persons who are hearing. However, the CVAA expands the definition of TRS to allow VRS conversations to also take place with persons who may also have a hearing or speech disability but who use other forms of TRS. Pub. L. No. 111-260, § 103.

¹⁰¹ Sorenson Comments at 2, *citing* the House Report at 19.

¹⁰² Consumer Groups is a coalition consisting of the National Association of the Deaf (“NAD”), Telecommunications for the Deaf and Hard of Hearing, Inc. (“TDI”), Hearing Loss Association of America (“HLAA”), Association of Late-Deafened Adults (“ALDA”), American Association of the Deaf-Blind (“AADB”), Deaf and Hard of Hearing Consumer Advocacy Network (“DHHCAN”), and California Coalition of Agencies Serving the Deaf and Hard of Hearing (“CCASDHH”). See Consumer Group Comments at 1.

¹⁰³ Consumer Group Reply Comments at 6.

¹⁰⁴ Sorenson Comments at 3-4.

¹⁰⁵ Consumer Groups Reply Comments at 6-7. Voice Carry Over (“VCO”) is a “type of TRS that allows a person with a hearing disability, but who wants to use his or her own voice, to speak directly to the called party and receive responses in text from the CA.” Hearing Carry Over (“HCO”) is a “type of TRS that allows a person with a speech disability, but who wants to use his/her own hearing, to listen to the called party and type his/her part of the conversation on a TTY.” See Consumer and Governmental Affairs Bureau, FCC Consumer Facts, *Telecommunications Relay Services*, available at <http://www.fcc.gov/cgb/consumerfacts/trs.html> (last updated May 7, 2010).

¹⁰⁶ 47 U.S.C. 153(27) (providing definition of “interoperable video conferencing service”).

propose to find that a VRS consumer uses video conferencing services and equipment to communicate with the VRS CA (the “video leg” of a VRS call). We find nothing in the statute or the legislative history to suggest that providers of video conferencing services and manufacturers of equipment used for VRS who otherwise are covered under the CVAA should be excluded from its requirements simply because their services are a kind of TRS provided pursuant to Section 225 of the Act. While VRS equipment and services are specifically designed for people who are deaf or hard of hearing and use sign language, they are not necessarily designed for those who have additional disabilities as well (*e.g.*, individuals who are deaf and have low vision, a mobility, or dexterity disability). We do not believe this interpretation will in any way diminish or change the obligations of VRS providers that are contained in Part 64 of the Commission's rules.¹⁰⁷ We seek further comment on this issue and on whether such an interpretation would create any difficulties or conflicts in our implementation of the VRS program.

40. We note that consumers who are deaf or hard of hearing also use video equipment distributed by VRS providers for point-to-point calls with other users of this equipment. We believe that such point-to-point calling also meets the CVAA's statutory definition of “providing . . . real-time video communications, including audio, to enable users to share information of the user's choosing,” and seek comment on this analysis.

41. We also seek further comment on whether webinars¹⁰⁸ are a covered service. TIA states that “a service that enables users to share information necessarily implies a two-way service, not a broadcast-style webinar video.”¹⁰⁹ The IT and Telecom RERCs disagree, however, asserting that webinar systems should be subject to Section 716 because these systems are “not designed to broadcast information but rather to provide user interaction in the form of chat, voting, and hand-raising, etc.”¹¹⁰

42. Next, we seek comment on Consumer Groups' assertion that “the scope of the [CVAA] should not be limited by the type of communication conveyed by the video conferencing service (*i.e.*, uni-, bi-, or multi-directional), but by the fact that the service is *capable* of providing real-time communications that enable users to share information.”¹¹¹ Consumer Groups suggest, for example, that the fact that “video conferencing services may be used to leave a ‘video mail’ (similar to a ‘voice mail’) message,” does not preclude the service's coverage under the CVAA.¹¹² Consistent with our seeking comment on how to treat multi-purpose devices at para. 30, *supra*, we seek comment on Consumer Groups' suggestion. We also seek comment more generally on whether services that otherwise meet the definition of “provid[ing]. . . real-time video communications, including audio, to enable users to share information of the user's choosing” but that also provide non-real time functions (such as video mail) are

¹⁰⁷ Part 64 lays out mandatory minimum standards for VRS providers, including requirements for a minimum speed of answer, emergency call handling requirements, and mandates for ten-digit numbering. See 47 C.F.R. §§ 64.604 *et. seq.* These various obligations will remain untouched by this proceeding and will not be subject to the achievability standard discussed below. See *infra* at Section III.B.1.

¹⁰⁸ Short for “Web-based seminar,” a Webinar is a presentation, lecture, workshop or seminar that is transmitted over the Web. A key feature of a Webinar is its interactive elements -- the ability to give, receive and discuss information. Contrast this definition with a Webcast, in which the data transmission is one way and does not allow interaction between the presenter and the audience. Webopedia, *Webinar*, (last visited Feb. 7, 2011), <http://www.webopedia.com/TERM/W/Webinar.html>. See also <http://www.asme.org/Education/Courses/Webinars/Webinar.cfm>

¹⁰⁹ TIA Comments at 8. See also Verizon Comments at 3 and VON Coalition Comments at 11.

¹¹⁰ IT and Telecom RERCs Reply Comments at 4 (adding that, while conceivable that webinar systems “could be used in a one-way communication scenario, they are designed specifically to allow two-way information transfer and are most often used in this fashion”).

¹¹¹ Consumer Groups Reply Comments at 5 (emphasis in the original).

¹¹² *Id.*

covered under the CVAA.¹¹³ If so, are the non-real-time functions or near-real-time functions of such a service (such as video mail) subject to the requirements of Section 716? If such functions are not covered, should we, similar to what we did in the Section 255 context, assert our ancillary jurisdiction to cover video mail?¹¹⁴ Specifically, the Commission employed its ancillary jurisdiction to extend the scope of Section 255 to both voice mail and interactive menu services under Part 7 of the Commission's rules because “the failure to ensure accessibility of voicemail and interactive menu services, and the related equipment that performs these functions, would [have] seriously undermined the accessibility and usability of telecommunications services required by sections 255 and 251(a)(2).”¹¹⁵ Similarly, we seek comment on whether the exclusion of video mail from our rules governing Section 716 would hinder our ability to ensure the accessibility and usability of advanced communications services.

43. TIA also asserts, similar to the argument that it made with respect to the scope of VoIP services covered under the CVAA, that “products that offer a video connection that is incidental to the principal purpose and nature of the end user offering fall outside the definition as well.”¹¹⁶ We believe the same analysis that we propose to apply to the scope of non-interconnected VoIP should apply here.¹¹⁷ We therefore propose to classify any offering that meets the criteria of the statutory definition set forth above as a “video conferencing service” and note that the statutory definition does not exclude “products that offer a video connection that is incidental to the principal purpose and nature of the end user offering.” Again, we note that this issue may be relevant to our waiver authority set forth in Section 716(h), discussed *infra* at paras. 52-60, or the exclusion of customized equipment or services pursuant to Section 716(i).¹¹⁸ We seek comment on this proposed classification.

ii. Interoperable

44. We seek further comment on the meaning of “interoperable” in the term “interoperable video conferencing service,” again noting the symmetries of the definition and interpretation of this term in the various drafts of the CVAA and the legislative history of this law. Commenters appear to be divided on the significance of this term. ITI asserts that the inclusion of the modifier “interoperable” after earlier versions of the legislation did not include the word “strongly suggests that Congress consciously decided to target only a subset of all video conferencing services.”¹¹⁹ TIA urges an interpretation of the word “interoperable” to mean that a video conferencing service must operate “inter-platform, inter-network, and inter-provider” before it is subject to the accessibility provisions of the CVAA.¹²⁰ Similarly, CEA concludes that “most nascent two-way video services and applications commercially available in the marketplace have not yet reached true interoperability and are not covered

¹¹³ 47 U.S.C. § 153(27) (providing definition of “interoperable video conferencing service”).

¹¹⁴ See *Section 255 Report and Order*, 16 FCC Rcd at 6455-6462, ¶¶ 93-108 (The Commission relied on an assertion of ancillary jurisdiction to achieve its policy objective of ensuring accessibility and usability for persons with disabilities in extending the requirements of Section 255 to two information services, voicemail and interactive menu service, that it found critical to making telecommunications services and equipment accessible and usable).

¹¹⁵ See *Section 255 Report and Order*, 16 FCC Rcd at 6459, ¶ 103.

¹¹⁶ TIA Comments at 9.

¹¹⁷ See para. 32, *supra* (proposing to classify any offering that meets the criteria of the statutory definition of “non-interconnected VoIP” as “non-interconnected VoIP” and noting that the statutory definition does not exclude offerings with a purely incidental VoIP component).

¹¹⁸ 47 U.S.C. § 617(i).

¹¹⁹ ITI Comments at 3; see also TIA Comments at 8-9; CEA Comments at 7-8; and VON Coalition Comments at 11-12.

¹²⁰ TIA Comments at 8.

by the statute.”¹²¹ However, Consumer Groups believe that “interoperable” should be interpreted to achieve a broad application of the requirements of the CVAA.¹²² Similarly, the RERC-IT urges that the inclusion of the word “interoperable” suggests a broad application of the CVAA so that “all video conferencing services are covered and that they should be made interoperable.”¹²³ Other commenters express concerns about the current lack of interoperability of video conferencing services, *i.e.*, that consumers are not able to make point-to-point calls using different video conferencing programs.¹²⁴

45. We are concerned that limiting coverage of this provision to only currently available video conferencing services that are “inter-platform, inter-network, and inter-provider” may undermine the statute’s intent to the extent the definition results in little or no video conferencing service or equipment being “interoperable.” We note that “video conferencing service” in the legislative history and “interoperable video conferencing service” in the statute have the exact same definition.

46. We seek comment on how to define “interoperable” in a manner that is faithful to both the statutory language and the broader purposes of the CVAA. Specifically, we seek comment on how the Commission should define interoperable video conferencing services within the scope of covered services to ensure that “such services may, by themselves, be accessibility solutions”¹²⁵ and “that individuals with disabilities are able to access and control these services”¹²⁶ as Congress intended. For example, which characteristics of video conferencing services and equipment, including software, should determine “interoperability”?

47. The Commission requires VRS services and equipment to be “interoperable” for the provision of VRS under Section 225 of the Act.¹²⁷ The Commission also requires video conferencing services and equipment used for point-to-point calls between VRS equipment users to be “interoperable”¹²⁸ under the authority of ancillary jurisdiction.¹²⁹ These interoperability requirements pertain only to VRS providers and equipment used by registered VRS users for VRS and point-to-point communications and do not require interoperability among VRS and other platforms, networks, or providers. Consumer Groups assert that even these limited requirements represent “a model of interoperable video conferencing services and equipment [that should be] emulated by other manufacturers and service providers.”¹³⁰ We seek comment on whether how we define interoperability in

¹²¹ CEA Comments at 8.

¹²² Consumer Groups Reply Comments at 4.

¹²³ RERC-IT Comments at 3-4.

¹²⁴ *See e.g.*, Convo Comments at 3, noting, for example, that a consumer using Yahoo Messenger cannot connect with a consumer using Adobe Flash. *See also* Consumer Groups Comments at 2-3.

¹²⁵ *Id.*

¹²⁶ Senate Report at 6; House Report at 25.

¹²⁷ “All VRS consumers should be able to place a VRS call through any of the VRS providers’ service, and all VRS providers should be able to receive calls from, and make calls to, any VRS consumer.” *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, CG Docket No. 03-123, Declaratory Ruling and Further Notice of Proposed Rulemaking, 21 FCC Rcd 5442 (2006) at ¶ 1.

¹²⁸ *Telecommunications Relay Services and Speech-to-Speech Services for Individuals With Hearing and Speech Disabilities*, CG Docket No. 03-123 and CC Docket No. 98-67; *E911 Requirements for IP-Enhanced Service Providers*, WC Docket No. 05-196, Second Report and Order and Order on Reconsideration, 24 FCC Rcd 791, 820 ¶ 65 (2008).

¹²⁹ The Commission recognizes that point-to-point calls between video relay service (VRS) users are not TRS as defined in Section 225, but “requiring that [VRS] providers facilitate point-to-point communications between persons with hearing or speech disabilities is reasonably ancillary to the Commission’s responsibilities in several parts of the Act – sections 225, 255, and 1.” *Id.* at 821, ¶ 66.

¹³⁰ Consumer Groups Reply Comments at 6.

the context of VRS should have any bearing on how we define “interoperable” in the term “interoperable video conferencing service.”

5. Customized Equipment or Services

48. Section 716(i) states that the provisions of this Section “shall not apply to customized equipment or services that are not offered directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.”¹³¹ While the Senate Report did not discuss this provision, the House Report explains that Section 716(i) is a “narrow exemption” that encompasses “equipment and services [that] are customized to the unique specifications requested by an enterprise customer.”¹³² It goes on to state that this provision “permit[s] manufacturers and service providers to respond to requests from businesses that require specialized and sometimes innovative equipment to provide their services efficiently”¹³³ and is “not intended to create an exemption for equipment and services designed for and used by members of the general public.”¹³⁴

49. Several other commenters urge us to find that manufacturers and service providers are subject to Section 716 only to the extent that they are offering their equipment and services directly to the public.¹³⁵ In contrast, the RERC-IT urges us to “carefully limit the exception for customized equipment and services” and to cover equipment and services that have been customized in “minor ways” and “that are made available to the public indirectly through employers, schools, or other institutions.”¹³⁶ The RERC-IT also urges that we define “public” in this context to “include public institutions, such as educational institutions and government agencies.”¹³⁷

50. We believe that the guidance offered by the House Report evinces Congress’s intent that Section 716(i) be narrow in scope and applicable only to customized equipment and services offered to business or other enterprise customers, rather than to equipment and services “used by members of the general public.”¹³⁸ We seek comment on this analysis, as well as on the extent to which the equipment and services used by private institutions but made available to the public, such as communications equipment and services used by libraries and schools, should be covered by the CVAA. More specifically, we seek comment on what additional guidance by the Commission is needed to define equipment and services that are “used by members of the general public.”¹³⁹ Finally, we seek comment on the extent to which Section 716 covers products and services that are offered to the general public, but which have been customized in minor ways to meet the needs of private entities.

51. Consistent with Motorola’s assertions, we propose to find Section 716’s definition of advanced communications services not to extend to public safety communications networks and devices and find that these networks and devices are “equipment and services that are not offered directly to the public.”¹⁴⁰ We agree that the Commission’s recent proposal not to apply its hearing aid compatibility

¹³¹ See 47 U.S.C. § 617(i).

¹³² House Report at 26.

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ CTIA Comments at 5; TIA Comments at 4-5; Motorola Comments at 6; and CTIA Reply Comments at 4.

¹³⁶ RERC-IT Comments at 9.

¹³⁷ RERC-IT Comments at 10.

¹³⁸ House Report at 26.

¹³⁹ *Id.*

¹⁴⁰ Motorola Comments at 4-6; 47 U.S.C. § 617(i).

requirements to public safety equipment is instructive here.¹⁴¹ We note, however, that employers still have obligations under the Americans with Disabilities Act, and agree with CSD that “to the extent possible, public safety systems should be designed to accommodate the needs of deaf [and] hard-of-hearing employees and employees with other disabilities.”¹⁴² We seek comment on this analysis.

6. Waivers for Services or Equipment Designed for Purposes other than Using ACS

52. Section 716(h)(1) of the Act states:

The Commission shall have the authority, on its own motion or in response to a petition by a manufacturer or provider of [ACS] or any interested party, to waive the requirements of [Section 716] for any feature or function of equipment used to provide or access [ACS], or for any class of such equipment, for any provider of [ACS], or for any class of such services that —

(A) is capable of accessing an [ACS]; and

(B) is designed for multiple purposes but is designed primarily for purposes other than using [ACS].¹⁴³

We note that, in making waiver decisions, the Commission generally considers whether special circumstances exist that warrant deviation from the general rule, and whether the waiver will serve the public interest.¹⁴⁴ In the *October Public Notice*, the Bureaus asked what factors would be relevant to determining whether a product or service is eligible for a waiver and whether there are any specific classes of products or services that warrant the establishment of a categorical or blanket waiver.¹⁴⁵

53. Both the Senate and House Reports state that Section 716(h) “provides the Commission with the flexibility to waive the accessibility requirements for any feature or function of a device that is capable of accessing advanced communications services but is, in the judgment of the Commission, designed primarily for purposes other than accessing advanced communications.”¹⁴⁶ Consistent with the statutory language and legislative history, we propose to focus our inquiry on determining whether the offering is designed primarily for purposes other than using ACS.¹⁴⁷

54. In making our waiver assessment, Microsoft urges that we consider the “core features of the product or service as designed and marketed,”¹⁴⁸ and states that “[v]ideo gaming consoles and their associated online services, which do not have communications as their primary purpose, are just the kind of products and services that Congress envisioned when it gave the Commission broad authority to grant

¹⁴¹ Motorola Comments at 4-6. See also *Amendment of the Commission’s Rules Governing Hearing Aid-Compatible Mobile Handsets*, WT Docket No. 07-250, Policy Statement and Second Report and Order and Further Notice of Proposed Rulemaking, 25 FCC Rcd 11167, 11195 ¶ 82 (2010) (Consistent with distinctions drawn in past, the Commission proposed not to extend hearing aid compatibility rules to certain non-interconnected systems used solely for internal communications, such as public safety or dispatch networks).

¹⁴² CSD Reply Comments at 4.

¹⁴³ 47 U.S.C. § 617(h).

¹⁴⁴ *Northeast Cellular Telephone Co., L.P. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (citing *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969)); see also 47 C.F.R. § 1.3.

¹⁴⁵ See *October Public Notice* at 5.

¹⁴⁶ House Report at 26; Senate Report at 8.

¹⁴⁷ 47 U.S.C. § 617(h)(1)(B).

¹⁴⁸ Microsoft Comments at 5.

waivers.”¹⁴⁹ ESA agrees that we ought to consider how products are designed and marketed in considering whether a waiver is applicable,¹⁵⁰ and asserts that the accessibility provisions in Section 716 should not apply to gaming products.¹⁵¹ While we agree with commenters that the “core” function of an offering is an issue relevant to our analysis, we also agree with the IT and Telecom RERCs’s suggestion that the “primary feature of a multi-feature device or service [may] vary from person to person.”¹⁵² Furthermore, we do not believe the fact that a “core” function of a device is to play games to be dispositive of the issue of whether such device is entitled to waiver under Section 716(h). As the IT and Telecom RERCs note, “[g]aming is used for education, rehabilitation, and social interaction [and] . . . should not be exempted simply because the basic feature is a game.”¹⁵³ We seek comment on this analysis. We also seek comment on AFB’s contentions that “how [a product] is marketed” and “[how] most people think of the device” should not be relevant to our analysis; rather, “[t]he issue is whether the advanced communications features and functions can be operated apart from the device’s [primary] functions.”¹⁵⁴

55. ESA also suggests that *why* consumers access the gaming products is an important consideration: “Consumers do not play an online game, [for example], as a means of accessing chat – a consumer in search of a general purpose messaging service will find simpler, more direct alternatives than navigating through the various features of a gaming device or online game service.”¹⁵⁵ We seek comment on this assertion and on whether how consumers actually use the communications component of a multi-purpose device or service is relevant to our assessment of the primary purpose for which a device or service was designed. In addition, we seek comment on ESA’s proposal that we consider as part of our waiver determination whether the offering is designed for a “specific class of users who are using the ACS features in support of another task.”¹⁵⁶

56. We also seek comment on the process that we should adopt for determining whether to waive the requirements of Section 716 and specifically on the extent to which we need to adopt any procedures to ensure that such process is efficient and effective. Alternatively, we seek comment on whether we should handle waivers as we have in the normal course pursuant to Section 1.3 of the Commission’s rules.¹⁵⁷ We agree with commenters who state that we should “incorporate protections for

¹⁴⁹ *Id.* at 6.

¹⁵⁰ ESA Comments at 8-9.

¹⁵¹ ESA Comments at 1, 3-4, 6-10; ESA Reply Comments at 1-2. *See also* Microsoft Comments at 4-6; CEA Comments at i; VON Coalition Comments at 9-10; TIA Comments at 6-7 and 21; and T-Mobile Comments at 2-3 and 6-7.

¹⁵² IT and Telecom RERCs Reply Comments at 9.

¹⁵³ IT and Telecom RERCs Reply Comments at 10. Relatedly, we do not think the fact that “the Federal Trade Commission . . . has routinely treated video games as distinct from other forms of electronic media . . . in its periodic reviews of [their] marketing practices” is relevant to our analysis of how to interpret Section 716(h), as ESA suggests. ESA Comments at 5.

¹⁵⁴ AFB Reply Comments at 10.

¹⁵⁵ ESA Comments at 4.

¹⁵⁶ ESA Comments at 8-9. We also find no support in the statutory language or legislative history for VON Coalition’s contention that we should consider “whether other similar equipment or services are generally available (at comparable prices) that are accessible by individuals with disabilities” and thus believe that it should not be part of our waiver analysis. *See* VON Coalition Comments at 13.

¹⁵⁷ *See* 47 C.F.R. § 1.3 (“Any provision of the [Commission’s rules] may be waived by the Commission on its own motion or on petition if good cause therefore is shown.”). Any interested party may file a request for waiver of the Commission’s rules provided the party complies with the filing procedures and the appropriate format requirements set forth in its rules. *See, e.g.*, 47 C.F.R. § 1.925 (describing specific procedure and format for filing waiver requests of the Wireless Radio Service rules regarding licenses and applications).

confidential information”¹⁵⁸ and propose that parties seeking waivers be able to request confidential treatment of information pursuant to Section 0.459 of the Commission’s rules.¹⁵⁹ At the same time, we agree with AAPD that, to the extent possible, the process should be “transparent and public,”¹⁶⁰ and propose to seek comment on any waiver petition that we receive pursuant to Section 716(h). We seek comment on these proposals.

57. We also recognize the need, after appropriate consideration, for making waiver determinations in an “expeditious manner,”¹⁶¹ although we propose not to “incorporate an automatic grant date for waiver requests” as TIA urges.¹⁶² We note that TIA requests that “if the Commission fails to timely act on a good faith waiver request, the company in question [should] be able to initiate the product or service without penalty, and incorporate accessibility features in a reasonable time frame prospectively.”¹⁶³ Given that such a “deemed granted” provision is not contemplated by the statute, we do not intend to propose the framework outlined by TIA.¹⁶⁴ We seek comment on this analysis.

58. In addition, in light of the fact that, as the NFB observes, “[t]echnology is ever changing and the ‘primary purpose’ of multi-purpose products is always evolving,”¹⁶⁵ we seek comment on AAPD’s assertion that “there should be no permanent waivers.”¹⁶⁶ Should waivers be temporary, and, if so, what should the duration of the waivers be? If we decide that waivers should only be temporary, should we establish a process for renewing waivers, and, if so, should the factors we consider for renewal vary from the factors we consider for the original waiver grant?

59. We also seek comment on whether we should consider waivers for a “class” of services or equipment under this section and what specific showing is needed to justify such waivers. Several commenters suggest that we should grant blanket waivers in order to support innovation and competition.¹⁶⁷ For example, Microsoft states that “[g]ranted prospective categorical waivers is essential to encourage manufacturers and service providers to build communication features into services and equipment devices that do not have as their core purpose advanced communications . . . [f]ostering this innovation will enrich the communications choices and solutions available to all consumers, including those with disabilities.”¹⁶⁸ In contrast, many consumer commenters suggest that blanket waivers are never appropriate, given rapid technological advancement and the belief that “much accessibility and usability will be accomplished through software and related changes.”¹⁶⁹

60. We seek further comment on the specific factors that we should consider in determining whether a particular “class” of services or equipment should be granted a waiver. How can we determine what services or equipment are similarly situated enough to be designated a “class”? Is it possible to

¹⁵⁸ ESA Reply Comments at 4; *see also* TIA Comments at 22 and CEA Comments at 17.

¹⁵⁹ 47 C.F.R. § 0.459.

¹⁶⁰ AAPD Reply Comments at 6; *see also* AFB Reply Comments at 9.

¹⁶¹ ESA Reply Comments at 4.

¹⁶² TIA Comments at 22; *see also* ESA Reply Comments at 4.

¹⁶³ *Id.*

¹⁶⁴ *See e.g.*, 47 U.S.C. § 160(c) (providing that any petition for forbearance shall be “deemed granted” if the Commission does not deny the petition).

¹⁶⁵ NFB Reply Comments at 3.

¹⁶⁶ AAPD Reply Comments at 6.

¹⁶⁷ CEA Comments at ii and 17; ESA Reply Comments at 2-3; and Microsoft Comments at 7.

¹⁶⁸ Microsoft Comments at 7; *see also* CEA Comments at 17 and ESA Reply Comments at 3.

¹⁶⁹ AAPD Comments at 5; *see also* AFB Reply Comments at 9 and ACB Reply Comments at 24.

structure a blanket waiver in such a way as to address consumers' concerns that any such waiver could quickly become outdated? Are there specific classes of services or equipment that we should consider waiving in our final rules on Section 716? If we do decide to grant waivers for an entire class of services or equipment, should such waivers be permanent or temporary? We note, for example, while ACB opposes blanket waivers, it recommends that if the Commission does grant them, that it limit the term to 12 months.¹⁷⁰ As discussed above (for individual waivers), should we establish a renewal and/or revocation process for categorical waivers?

7. Exemptions for Small Entities

61. Section 716(h)(2) states that “the Commission may exempt small entities from the requirements of this section.”¹⁷¹ While the Senate Report did not discuss this provision, the House Report notes that under this section, the Commission may “waive the accessibility requirements for certain small businesses and entrepreneurial organizations” because they “may not have the legal, financial, or technical capability to incorporate accessibility features.”¹⁷² Otherwise, the Report notes, the “application of these requirements in this limited case may slow the pace of technological innovation.”¹⁷³ It also states that “the Commission is best suited to evaluate and determine which entities may qualify for this exemption,” and that it expects we will consult with the Small Business Administration (“SBA”) when defining the small entities to be exempted.¹⁷⁴

62. NTCA asks the Commission to exercise its authority under Section 716(h)(2) to exempt small businesses from Section 716 and to define “small businesses,” as such term is defined in the Regulatory Flexibility Act, thereby enabling small, rural local exchange carriers (“RLECs”) and their affiliates to deploy and offer ACS “without facing outsized or unachievable regulatory burdens.”¹⁷⁵ Similarly, Blooston Rural Carriers request that small RLECs, RLEC affiliates, and other similarly situated small entities be exempted under Section 716(h)(2) from both Section 716 and the related enforcement and recordkeeping requirements of Section 717. In the alternative, they request that the Commission adopt “streamlined procedures and simplified criteria” that make “appropriate waivers reasonably available to qualifying entities in a timely, predictable, and economically reasonable manner.”¹⁷⁶

63. Consumer Groups, however, urge that “[i]ndividuals with disabilities should not be denied accessible advanced communications equipment and services simply because they happen to live in underserved or rural areas,”¹⁷⁷ and assert that “RLECs can ensure their own compliance with the [CVAA] through contracts with larger providers and mass market vendors . . . who must also comply with the [CVAA].”¹⁷⁸ ACB opposes small entity waivers “without such entities having done due diligence on whether or not product accessibility is ‘achievable’ . . . [contending] a case-by-case approach to granting waivers would better serve the needs of consumers.”¹⁷⁹ Moreover, ACB recommends that, if the Commission grants categorical waivers for small entities, any such waivers only be granted for a year

¹⁷⁰ ACB Reply Comments at 24.

¹⁷¹ 47 U.S.C. § 617(h)(2).

¹⁷² House Report at 26. In particular, the Report recognizes “the importance of small and entrepreneurial innovators and the significant value they add to the economy.” *Id.*

¹⁷³ House Report at 26.

¹⁷⁴ *Id.*

¹⁷⁵ NTCA Comments at 3, 4.

¹⁷⁶ Blooston Rural Carriers Comments at 1-2.

¹⁷⁷ Consumer Group Reply Comments at 10.

¹⁷⁸ *Id.*

¹⁷⁹ ACB Reply Comments at 25.

or less, subject to renewal at the Commission's discretion.¹⁸⁰ Similarly, AAPD urges the Commission to utilize caution when reviewing circumstances that would allow small entities an exemption from these requirements. AAPD does not favor "permanent exemptions or waivers."¹⁸¹

64. In considering the proper scope of possible exemptions from the provisions of Section 716 for small entities, we note that other provisions of that section also recognize the need to consider the circumstances of such entities in applying the accessibility requirements. As discussed in Section III.B.1 *infra*, Section 716 provides that service providers and manufacturers must meet the accessibility requirements of Section 716 "unless [those requirements] are not achievable."¹⁸² Section 716(g) defines "achievable" as "with reasonable effort or expense," and requires the Commission to consider four factors in determining whether meeting a requirement of Section 716 is "achievable."¹⁸³ Two of those four factors necessarily incorporate consideration of the size and capabilities of an entity: "[t]he technical and economic impact on the operation of the manufacturer or provider and on the operation of the specific equipment or service in question, including on the development and deployment of new communications technologies;"¹⁸⁴ and "[t]he type of operations of the manufacturer or provider."¹⁸⁵

65. The discretionary authority to exempt one or more groups of small entities in Section 716(h)(2) supplements the protections that are built into the Section 716(g) achievability analysis with an additional tool to ensure that our rules do not unduly burden such entities. We acknowledge that certain small entities may lack the legal, financial, or technical capability to incorporate the accessibility features required by the CVAA,¹⁸⁶ and that in certain instances this may warrant an exemption from our accessibility requirements for certain small entities that provide ACS as well as some of those small entities that manufacture equipment used for ACS.¹⁸⁷ According to Blooston Rural Carriers, "very small and highly localized entities [may] lack the size, resources or purchasing power to influence" the design, features, and structure of ACS or equipment used for ACS.¹⁸⁸ At the same time, however, we agree with consumers that any such exemptions should be carefully tailored to ensure that individuals with disabilities are not denied access to advanced communications equipment and services in rural and other underserved areas.

66. In light of these competing concerns, we seek comment on whether we should exercise our exemption authority, and if so, how we should structure the exemption. For example, should we base the exemption on the number of employees or the annual revenues of the entity or a combination of the two? Are there other criteria that we should consider? We also seek input on the impact of any exemption that commenters urge us to make. In particular, we request information on the percentage of manufacturers and service providers that would be exempted from our Section 716 requirements for any specific criteria proposed. We also seek comment on the percentage of equipment (including software) and services in the ACS marketplace that would be exempted from the requirements of Section 716 if we

¹⁸⁰ ACB Reply Comments at 25.

¹⁸¹ AAPD Reply Comments at 5-6 (adding that the process for obtaining waivers and exemptions should be "transparent and public").

¹⁸² 47 U.S.C. § 617(a)(1) and (b)(1).

¹⁸³ 47 U.S.C. § 617(g).

¹⁸⁴ 47 U.S.C. § 617(g)(2).

¹⁸⁵ 47 U.S.C. § 617(g)(3).

¹⁸⁶ See House Report at 26.

¹⁸⁷ See discussion *supra* Sections III.A.2-3, regarding the meaning of the terms "manufacturer" and "provider of advanced communications services."

¹⁸⁸ Blooston Rural Carriers Comments at 1-2.

exempted entities based these proposed criteria. In addition, we seek comment on how use of any recommended criteria would affect the availability of ACS and equipment used for ACS, especially in rural and underserved areas. Finally, if we adopt criteria to exempt small entities, should we consider limiting the time period of any exemption that may be granted under these criteria? We also propose to review periodically any bases that we adopt for granting exemptions to small entities to ensure that they reflect the current state of the industry.

B. Nature of Statutory Requirements

1. Achievable Standard

a. General Approach

67. Service providers and manufacturers must meet the accessibility requirements of Section 716 “unless [those requirements] are not achievable.”¹⁸⁹ Section 716(g) of the Act defines the term “achievable” to mean “with reasonable effort or expense, as determined by the Commission.”¹⁹⁰ As noted *supra* at paragraph 5 and note 18, Section 716 requires a higher standard of achievement than Section 255. Under Section 255, covered entities must ensure the accessibility of their products if it is “readily achievable” to do so, which the statute defines by cross-reference to the ADA to mean “easily accomplishable and able to be carried out without much difficulty or expense.”¹⁹¹

68. Specifically, Section 716(g) requires the Commission to consider the following factors in making determinations about what “constitutes reasonable effort or expense”:

(1) the nature and cost of the steps needed to meet the requirements of this [S]ection with respect to the specific equipment or service in question; (2) the technical and economic impact on the operation of the manufacturer or provider and on the operation of the specific equipment or service in question, including on the development and deployment of new communications technologies; (3) the type of operations of the manufacturer or provider; and (4) the extent to which the service provider or manufacturer in question offers accessible services or equipment containing varying degrees of functionality and features, and offered at differing price points.¹⁹²

69. We seek comment on each of these factors. At the outset, we note that the Senate and House Reports state that we should “weigh each factor equally when making an achievability determination.”¹⁹³ The House Report also states that in implementing Section 716, the Commission should “afford manufacturers and service providers as much flexibility as possible, so long as each does everything that is achievable in accordance with the achievability factors.”¹⁹⁴ Consistent with this legislative history, we generally agree with AT&T that an assessment of what is achievable should be “fact-based, flexible, and applied on a case-by-case basis,”¹⁹⁵ but also agree with NFB that flexibility should not be so paramount that “accessibility is never achieved.”¹⁹⁶ The House Report also states that “the Commission [should] interpret the accessibility requirements in this provision the same way as it did

¹⁸⁹ See 47 U.S.C. §§ 617(a)(1) and (b)(1).

¹⁹⁰ See 47 U.S.C. § 617(g).

¹⁹¹ See 47 U.S.C. § 255(a)(2) and 42 U.S.C. § 12181(9).

¹⁹² See 47 U.S.C. § 617(g).

¹⁹³ Senate Report at 8; House Report at 25.

¹⁹⁴ House Report at 24.

¹⁹⁵ AT&T Comments at 8; *see also* TIA Comments at 9; Consumer Groups Reply Comments at 12; and ACB Reply Comments at 7.

¹⁹⁶ NFB Reply Comments at 6.

for [S]ection 255, such that if the inclusion of a feature in a product or service results in a fundamental alteration of that service that it is *per se* not achievable to include that function.”¹⁹⁷ Accordingly, we agree with commenters who urge us to interpret the achievability requirements consistent with this directive.¹⁹⁸ We seek comment on this analysis.

70. We also seek comment on whether or to what extent we have the discretion to weigh other factors not specified in the statute in making an achievability determination. ITI urges us to do so, and specifically asks us to consider “how the lack of economies of scale and scope can sometimes hinder the development and deployment of accessibility solutions.”¹⁹⁹ We note that Congress specifically set forth in Section 716 the factors that we must consider in determining whether accessibility is achievable,²⁰⁰ and directed us to weigh these factors equally.²⁰¹ In light of the statute and this legislative history, we propose to only consider the factors enumerated in the statute in making our achievability determinations. We would note, however, that we propose to construe the factors broadly and weigh any relevant considerations in determining their meaning. We believe, for example, that the “lack of economies of scale and scope” could be a relevant consideration in determining the meaning of the second factor, “the technical and economic impact on the operation of the manufacturer or provider and on the operation of the specific equipment or service in question, including on the development and deployment of new communications technologies.”²⁰² We seek comment on this analysis.

b. Specific Factors

(i) Nature and Cost of Steps Needed with Respect to Specific Equipment or Service

71. Section 716(g)(1) of the Act states that in determining whether the statutory requirements are achievable, the Commission must consider “[t]he nature and cost of the steps needed to meet the requirements of [716(g)] with respect to the specific equipment or service in question.”²⁰³ The Senate Report requires the Commission to consider “the nature and cost of the steps needed to make the specific equipment or service in question accessible” and states that “[t]he Committee intends for the Commission to consider how such steps, if required, would impact the specific equipment or service in question.”²⁰⁴ The House Report reiterates the need for the Commission to focus on the “specific product or service in question” when conducting this analysis.²⁰⁵ TIA and T-Mobile contend that in determining whether accessibility is achievable for the product at issue, the Commission should not consider the accessibility of a competing product.²⁰⁶ NFB disagrees, and offers as an example, the need to take into consideration the ability of one company to provide “cost effective text-to-speech applications . . . that make the interface of a touch-screen wireless phone fully accessible to a blind user” because such capability demonstrates that “[t]he lack of accessible options in the marketplace for blind consumers is clearly not

¹⁹⁷ House Report at 25. In the *Section 255 Report and Order*, the Commission found that in order to be a fundamental alteration, the feature must “alter the product substantially or materially.” See *Section 255 Report and Order*, 16 FCC Rcd at 6444, ¶¶ 61-62.

¹⁹⁸ CTIA Comments at 8; CEA Comments at 9-10.

¹⁹⁹ ITI Comments at 7.

²⁰⁰ 47 U.S.C. § 617(g).

²⁰¹ House Report at 25; Senate Report at 8.

²⁰² 47 U.S.C. 617(g)(2).

²⁰³ 47 U.S.C. § 617(g)(1).

²⁰⁴ Senate Report at 8.

²⁰⁵ House Report at 25.

²⁰⁶ TIA Comments at 10; T-Mobile Comments at 4.

due to a lack of accessible technology.”²⁰⁷ We believe that it is appropriate for us to consider whether accessibility has been achieved by competing products, but agree with T-Mobile that, in doing so, we must also consider the unique circumstances of each covered entity.²⁰⁸ We seek comments on this analysis and also seek comment on whether we should define this standard with more specificity in order to make sure that our standards are fully enforceable. We further request input on ACB’s suggestion that we consider the totality of the steps that a company needs to take in our achievability analysis, as well as the need to compare the cost of making a product accessible with the organization’s entire budget.²⁰⁹

(ii) Technical and Economic Impact on the Operation

72. The second factor in determining whether compliance with Section 716 is “achievable” requires the Commission to consider the “technical and economic impact of making a product or service accessible on the operation of the manufacturer or provider, and on the operation of the specific equipment or service in question, including on the development and deployment of new communications technologies.”²¹⁰ We seek comment on how we should assess this factor and how our analysis should take into account the development and deployment of new communications technologies.

(iii) Type of Operations

73. The third factor in determining whether compliance with Section 716 is “achievable” requires the Commission to consider “[t]he type of operations of the manufacturer or provider.”²¹¹ The Senate and House Reports state that this factor permits “the Commission to consider whether the entity offering the product or service has a history of offering advanced communications services or equipment or whether the entity has just begun to do so.”²¹² TIA asserts that “a company’s status as a comparatively new market entrant in the advanced communications marketplace, regardless of what other products it offers, must be accounted for in assessing whether a particular accessibility feature is achievable.”²¹³ We seek comment on the extent to which we should consider an entity’s status as a new entrant in the ACS market in conducting our achievability analysis. How should a manufacturer or service provider’s recent entry into this market affect our analysis if such entity has significant resources or otherwise appears capable of achieving accessibility? What other criteria should we use in assessing this factor as part of our achievability analysis?

(iv) Extent to which Offering Has Varied Functions, Features, and Prices

74. The fourth factor in determining whether compliance with Section 716 is “achievable” requires the Commission to consider “[t]he extent to which the service provider or manufacturer in question offers accessible services or equipment containing varying degrees of functionality and features, and offered at differing price points.”²¹⁴ The Senate and House Reports state that “the Commission

²⁰⁷ NFB Reply Comments at 7.

²⁰⁸ T-Mobile argues that “[e]ach company has different technical, financial, and personnel resources, with different business models and distinct technology configurations and platforms that must be accounted for individually.” T-Mobile Comments at 4.

²⁰⁹ ACB Reply Comments at 10. ACB asserts that under this factor, “in order to prove that accessibility . . . is ‘not achievable,’ an organization must show [that] . . . the totality of the steps it needs to take are extraordinary; and . . . the cost for making this one product accessible, when compared to the organization’s entire budget, is extraordinary.”

²¹⁰ 47 U.S.C. § 617(g)(2). *See* Senate Report at 8, *see also* House Report at 25.

²¹¹ 47 U.S.C. § 617(g)(3).

²¹² Senate Report at 8; House Report at 25-26.

²¹³ TIA Comments at 12.

²¹⁴ 47 U.S.C. § 716(g)(4). *See also* Senate Report at 8; House Report at 26.

[should] interpret this factor in a similar manner to the way that it has implemented its hearing aid compatibility rules.”²¹⁵ The Commission’s rules governing hearing aid compatibility (“HAC”) obligations for wireless devices require manufacturers and service providers to ensure that a range of phones comply with the HAC standards. Specifically, those rules direct such companies to ensure that hearing aid users be able to select “from a variety of compliant handset models with varying features and prices.”²¹⁶

75. Several industry commenters read Congress’s directive to incorporate this criteria into the achievability analysis, in conjunction with the legislative history and Section 716(j),²¹⁷ as an outright rejection of the finding in the *Section 255 Report and Order* to require covered entities to consider the accessibility of every product.²¹⁸ On the other hand, the RERC-IT states that “if every function of a particular device can achievably be made accessible to every disability, every function should be made accessible.”²¹⁹ We question whether any of these proposed interpretations appropriately take into account the more balanced approach contemplated by Congress, which gives equal weight to each of the four achievability factors and applies them on a flexible, case-by-case basis. We do, however, generally agree with TIA that this factor should be interpreted to “give individuals with disabilities meaningful choices in accessible products, and to reward those companies who provide such choices.”²²⁰ While Section 716’s flexible approach is not amenable to the fixed number or percentage approach the Commission has employed in the HAC context, Section 716(g)(4) seems to require that where a company has made a good faith effort to incorporate accessibility features in different products across multiple product lines, this should count favorably toward a determination that the company is in compliance with Section 716 for the product in question. Where companies offer a range of accessible products that perform different functions at varied price points, consumers with disabilities will have a range of devices from which to make their purchases. In those instances, so long as other criteria under the achievability analysis are met, a company charged with having an inaccessible product might not have to make that specific product accessible. This approach would appropriately reward companies that make substantial investments in accessible products, while allowing flexibility to account for marketplace realities.²²¹

76. Accordingly, we seek comment on whether covered entities generally should not have to consider what is achievable with respect to every product, if the entity offers consumers with the full range of disabilities meaningful choices through a range of accessible products with varying degrees of functionality and features, at differing price points. At the same time, we also seek comment on whether there are some accessibility features that are so important or easy to include (like a “nib” on the 5 key)²²²

²¹⁵ House Report at 26; Senate Report at 8.

²¹⁶ *Amendment of the Commission’s Rules Governing Hearing Aid-Compatible Mobile Handsets, Petition of American National Standards Institute Accredited Standards Committee C63*, WT Docket No. 07-250, First Report and Order, 23 FCC Rcd 3406, 3426 ¶ 51 (2008). The rules also require that manufacturers meet a “product refresh” mandate that requires the inclusion of hearing aid compatibility in some of their new models each year. *Id.* at 3425, ¶ 48. The Commission explained that this rule, together with the requirement for service providers to offer handset models with different functionality levels, was designed to ensure that consumers would have access to HAC handsets “with the newest features, as well as more economical models.” *Id.* at 3425, ¶ 47.

²¹⁷ Section 716(j) provides that “[t]his section shall not be construed to require a manufacturer of equipment used for advanced communications or a provider of advanced communications services to make every feature and function of every device or service accessible for every disability.” 47 U.S.C. § 617(j).

²¹⁸ *See, e.g.*, VON Coalition Comments at 15; *see also* ITI Comments at 6.

²¹⁹ RERC-IT Comments at 9.

²²⁰ TIA Comments at 12-13.

²²¹ *Id.* at 13.

²²² To help individuals who are visually impaired locate the keys on a standard number pad arrangement, the 5-key dial pad has a raised nib or projecting point that provides a tactilely discernible home key.

that they should be deployed on every product, unless it is not achievable to do so. If so, we seek comment on whether we should identify in our rules some of these specific accessibility features that are currently available, to provide clarity on what accessibility features should be universally deployed, if achievable. We further express our general belief that Section 716(j), *supra* note 217, does not preclude our identifying “easy” accessibility features that must be included on every product, if achievable. While the Senate Report did not address this specific provision, our belief is confirmed by the House Report, which states that the Commission’s approach to Section 255 is consistent with Section 716(j).²²³ Finally, we seek comment on whether we should define with more specificity the meaning of “varying degrees of functionality and features” and “differing price points.” In particular, we seek comment on ACB’s assertion that “[i]t is essential that manufacturers and service providers make available a range of devices that fit various price ranges along with corresponding accessible features . . . this may be accomplished by dividing devices into classes and making certain that each class has at least one option that is fully accessible.”²²⁴

2. Industry Flexibility

77. Sections 716(a)(2) and (b)(2) of the Act provide manufacturers and service providers, respectively, flexibility on how to ensure compliance with the accessibility requirements of the CVAA.²²⁵ Specifically, a manufacturer or service provider may comply with these requirements either by building accessibility features into the equipment or service or “by relying on third party applications, peripheral devices, software, hardware, or [CPE] that is available to consumers at nominal cost and that can be accessed by people with disabilities.”²²⁶ While the Senate Report did not discuss these provisions, the House Report makes clear that the choice between these two options “rests solely with the provider or manufacturer.”²²⁷ We believe that the statutory language and legislative history preclude us from preferring built-in accessibility over third party accessibility solutions, as some consumer commenters urge us to do.²²⁸ We acknowledge the integral role that universal design has played in ensuring that mainstream products and services are accessible to people with disabilities, and we believe that universal design will continue to play an important role in providing accessibility to people with disabilities. We believe, however, that the industry flexibility provisions of the CVAA reflect the fact that there are new ways to meet the needs of people with disabilities that were not envisioned when Congress passed Section 255, which relied primarily on universal design principles.²²⁹ With new and innovative technologies, in some cases personalized services and products may now be able to more efficiently and effectively meet individual needs than products built to perform in the same way for every person. Sometimes called “auto-personalization,” where available, this allows devices to adapt to individual needs based on the user’s preferences, according to the device’s capabilities. In a growing and increasingly mobile computing environment, for example, consumers may be able to set their preferences so that the interfaces on a device or the content produced by that device automatically become accessible for that

²²³ See House Report at 24.

²²⁴ ACB Reply Comments at 13.

²²⁵ 47 U.S.C. § 617(a)(2), (b)(2).

²²⁶ 47 U.S.C. § 617(a)(2), (b)(2).

²²⁷ House Report at 24.

²²⁸ RERC-IT Comments at 5; NFB Reply Comments at 8; ACB Reply Comments at 14; and AAPD Reply Comments at 3-4.

²²⁹ See *Section 255 Report and Order*, 16 FCC Rcd at 6441, ¶ 50, n.138 (*citing* Pub. L. No. 105-394, Section 3(a)(17), November 13, 1998 (Assistive Technology Act of 1998), which defines “universal design” as “a concept or philosophy for designing products and services that are usable by people with the widest possible range of functional capabilities, which include products and services that are directly usable (without requiring assistive technologies), and products and services that are made usable with assistive technologies”). 29 U.S.C. § 3003(a)(17).

individual's disability needs.

78. We do, however, seek comment on what actions we should take to ensure that third party accessibility solutions meet the needs of consumers in a manner comparable to solutions that are built into the equipment. First, we seek comment on the meaning of the requirement that the third party accessibility solutions “must be available to the consumer at nominal cost.”²³⁰ Some commenters assert that “nominal cost” cannot be a static definition or constitute a set amount or percentage of total cost, but rather should be determined on a case-by-case basis.²³¹ In contrast, the RERC-IT, noting that people with disabilities are “poor at alarming rates,”²³² urges the Commission to limit “nominal cost” to one percent (1%) of the total cost of the device or service, or the total cost of the device plus service, as applicable.²³³ AFB notes further that ongoing costs to keep third party software and hardware up to date and in good working order should be included, such that the total cost to the consumer cannot be more than nominal.²³⁴ While Congress did not prescribe a percentage or amount, it did intend that any fee for third-party software or hardware accessibility solutions be “small enough so as to generally not be a factor in the consumer’s decision to acquire a product or service that the consumer otherwise desires.”²³⁵ We propose to adopt this definition of “nominal cost” and seek comment on this proposed definition. We are concerned, however, that this definition, by itself, might not ensure that the cost of accessibility for the consumer is truly nominal, and we seek comment on whether we need to provide further guidance on the issue.

79. We believe that manufacturers and service providers can rely on a range of third party solutions, subject to the requirements that we discuss further below, including the use of third party applications, peripheral devices, software, hardware, and CPE. We propose to adopt the following definitions of these potential third party accessibility solutions:

- (a) “applications” means “computer software designed to perform or to help the user perform a specific task or specific tasks, such as communicating by voice, electronic text messaging, or video conferencing”;
- (b) “peripheral devices” means “devices employed in connection with equipment covered by this [proceeding] to translate, enhance, or otherwise transfer advanced communications services into a form accessible to individuals with disabilities”;
- (c) “software” means “computer programs, procedures, rules, and related data and documentation that direct the use and operation of a computer or a related device and instruct it to perform a given task or function”;
- (d) “hardware” means “a tangible communications device, equipment, or physical component of communications technology, including peripheral devices, such as a smart phone, a laptop computer, a desktop computer, a screen, a keyboard, a speaker, or an amplifier”;
- (e) “customer premises equipment” means “equipment employed on the premises of a person (other than a carrier) to originate, route, or terminate telecommunications.”

We seek comment on these definitions and whether they are sufficiently inclusive of third party solutions available to manufacturers and service providers.

²³⁰ 47 U.S.C. §§ 617(a)(2)(B) and 617(b)(2)(B).

²³¹ CEA Comments at 12; Microsoft Comments at 13-14; TIA Comments at 15; VON Coalition Comments at 16.

²³² RERC-IT Comments at 6.

²³³ *Id.*

²³⁴ *See* AFB Reply Comments at 5.

²³⁵ House Report at 24.

80. Second, we seek comment on the requirement that individuals with disabilities must be able to “access” the third-party solutions. Specifically, we seek comment on ACB’s assertions that the third party solutions (i) “cannot be an after-market sale for which the user must perform additional steps to obtain;” (ii) “must be fully operable by a person with a disability without having to turn to people without disabilities in order to perform setup or maintenance;” and (iii) “must be fully documented and supported.”²³⁶ We believe that for covered entities to meet the “access” requirement of this provision, they must ensure that the third party solution not be more burdensome to a consumer than a built-in solution. In that vein, should a service provider or manufacturer relying on third party solutions be responsible for finding and installing the solution, and supporting the solution over the life of the product?²³⁷ We seek comment on this analysis, on what a company must do to achieve such parity with built-in solutions, and on whether it is necessary to require that covered entities bundle the third party solutions with its products in order to meet the requirements of the statute.

3. Accessible to and Usable by

81. Under Sections 716(a) and (b) of the Act, covered service providers and equipment manufacturers must make their products “accessible to and usable by” people with disabilities, unless it is not achievable.²³⁸ In this section, we seek comment on the extent to which we should continue to define “accessible to and usable by” as we have for our implementation of Section 255, which requires telecommunications service providers and equipment manufacturers to make their products “accessible to and usable by” people with disabilities, if readily achievable.

82. In the *Section 255 Report and Order*, the Commission adopted a definition of “accessible” in section 6.3(a) of the Commission’s rules which incorporated the functional definition of this term from the Access Board guidelines and includes various input, control, and mechanical functions, output, display, and control functions.²³⁹ The *Section 255 Report and Order* also adopted a definition of

²³⁶ ACB Reply Comments at 14.

²³⁷ Adaptive communication solutions are often not available with mainstream products and finding these solutions often has been difficult for people with disabilities in the past.

²³⁸ 47 U.S.C. §§ 617(a) and (b).

²³⁹ See 47 C.F.R. § 6.3(a) which provides that “input, control, and mechanical functions shall be locatable, identifiable, and operable” as follows:

- Operable without vision
- Operable with low vision and limited or no hearing
- Operable with little or no color perception
- Operable without hearing
- Operable with limited manual dexterity
- Operable with limited reach or strength
- Operable without time-dependent controls
- Operable without speech
- Operable with limited cognitive skills

The output, display and control functions listed by the Access Board at 36 C.F.R. § 1193.43 are:

- Availability of visual information
- Availability of visual information for low vision users
- Access to moving text
- Availability of auditory information
- Availability of auditory information for people who are hard of hearing
- Prevention of visually-induced seizures
- Availability of auditory cutoff
- Non-interference with hearing technologies
- Hearing aid coupling

“usable” in section 6.3 that incorporated the Access Board’s definition of this term. Specifically, section 6.3(l) provides that “usable” “mean[s] that individuals with disabilities have access to the full functionality and documentation for the product, including instructions, product information (including accessible feature information), documentation, and technical support functionally equivalent to that provided to individuals without disabilities.”²⁴⁰

83. We seek comment on whether we should adopt these definitions for purposes of Section 716 or whether we should take this opportunity to make changes to these definitions that would apply to both our Section 255 rules and our Section 716 rules based on the Access Board Draft Guidelines that were released for public comment in March 2010.²⁴¹ While we note that there is a great deal of overlap between Section 255’s definition of “accessible” and the Access Board’s proposed updated functional criteria for ICT, there are some differences. To the extent that there are differences between these definitions and criteria, should we work to reconcile those differences? For example, the Section 255 rules address cognitive disabilities whereas the draft ICT guidelines do not, and the draft ICT guidelines address photosensitive seizures, whereas the Section 255 rules do not. In addition, we note that the Access Board Draft Guidelines on “usability” are broader and more detailed than the Section 255 rules. The Access Board Draft Guidelines, for example, cover training²⁴² and alternate methods of communication.²⁴³

4. Disability

84. Section 3(18) of the Act states that the term “disability” has the meaning given such term under Section 3 of the ADA.²⁴⁴ The ADA defines “disability” as with respect to an individual: “(A) a physical or mental impairment that substantially limits one or more major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment . . .”²⁴⁵ Our current rules incorporate this definition of disability, and we propose to use that definition in our Section 716 rules.²⁴⁶

5. Compatibility

85. Under Section 716(c) of the Act, whenever accessibility is not achievable either by building in access features or using third party accessibility solutions as set forth in Sections 716(a) and (b), a manufacturer or service provider must “ensure that its equipment or service is compatible with existing peripheral devices or specialized customer premises equipment commonly used by individuals with disabilities to achieve access,” unless that is not achievable.²⁴⁷ Section 255 contains a similar compatibility requirement for telecommunications service providers and manufacturers if it is readily achievable to do so, in cases where built-in accessibility is not readily achievable.

86. Our Section 255 rules define peripheral devices to mean “devices employed in connection with equipment covered by this part to translate, enhance or otherwise transform

²⁴⁰ 47 C.F.R. § 6.3(l).

²⁴¹ See United States Access Board, *Draft Information and Communication Technology (ICT) Standards and Guidelines*, (Mar. 17, 2010) (“Access Board Draft Guidelines”).

²⁴² Access Board Draft Guidelines at C104.2.

²⁴³ *Id.* at C104.3.

²⁴⁴ 47 U.S.C. § 153(18).

²⁴⁵ 42 U.S.C. § 12102(1).

²⁴⁶ 47 C.F.R. § 6.3(d); see also *Section 255 Report and Order*, 16 FCC Rcd at 6428-6429, ¶¶ 18-20. We note that while Congress amended the ADA in 2008 to clarify the definition of disability, it did not modify the definition that we propose to use here. See ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat 3553 (2008).

²⁴⁷ See 47 U.S.C. § 617(c).

telecommunications into a form accessible to individuals with disabilities.”²⁴⁸ We stated in the *Section 255 Report and Order* that these might include “audio amplifiers, ring signal lights, some TTYs, refreshable Braille translators, [and] text-to-speech synthesizers.”²⁴⁹ Our Section 255 rules define specialized CPE as customer premises equipment that is commonly used by individuals with disabilities to achieve access.²⁵⁰

87. For purposes of Section 716, we propose to define peripheral devices to mean “devices employed in connection with equipment, including software, covered under this part to translate, enhance, or otherwise transform advanced communications services into a form accessible to individuals with disabilities.” This definition is based on our Section 255 definition, with some refinements to reflect the statutory language in Section 716. We also propose to define specialized CPE, as we do in our Section 255 rules, as “customer premises equipment which is commonly used by individuals with disabilities to achieve access.”²⁵¹ We agree with the vast majority of commenters that peripheral devices can include mainstream devices and software,²⁵² as long as they can be used to “translate, enhance, or otherwise transform advanced communications services into a form accessible to individuals with disabilities” and the devices and software are “commonly used by individuals with disabilities to achieve access.” As we found in the *Section 255 Report and Order*, we do not believe that it would be feasible for the Commission to maintain a list of peripheral devices and specialized CPE commonly used by individuals with disabilities, given how quickly technology is evolving.²⁵³ For the same reason, we also believe that covered entities do not have a duty to maintain a list of all peripheral devices and specialized CPE used by people with disabilities. We do believe, however, that covered entities have an ongoing duty to consider how to make their products compatible with the software and hardware components and devices that people with disabilities use to achieve access and to include this information in their records required under Section 717(a)(5).²⁵⁴ We seek comment on these proposed definitions.

88. We also seek additional comment on what should be required to ensure compatibility in the context of advanced communications services. Under our Section 255 rules, we use four criteria for determining compatibility: (i) external access to all information and control mechanisms; (ii) existence of a connection point for external audio processing devices; (iii) TTY connectability; and (iv) TTY signal compatibility.²⁵⁵ We seek comment on whether the four criteria listed above remain relevant in the context of advanced communications services. For example, we understand that a sizeable majority of consumers who previously relied on TTYs for communication are transitioning to more mainstream forms of text and video communications. If we want to encourage an efficient transition, should we phase out the third and fourth criteria as compatibility components in our Section 716 rules? Should we phase out the criteria from our Section 255 rules as well? If so, should we ensure that these requirements are

²⁴⁸ 47 C.F.R. §§ 6.3(g) and 7.3(g).

²⁴⁹ *Section 255 Report and Order*, 16 FCC Rcd at 6433, ¶ 32.

²⁵⁰ 47 C.F.R. §§ 6.3(i) and 7.3(i).

²⁵¹ See 47 C.F.R. §§ 6.3(c) and 7.3(c).

²⁵² See AAPD Reply Comments at 4; ACB Reply Comments at 18; AT&T Comments at 9; AbleLink Reply Comments at 1; Adaptive Solutions Reply Comments at 1; CEA Comments at 12; CTIA Reply Comments at 14; CompuSult Reply Comments at 1; IT and Telecom RERCs Reply Comments at 6; Point-and-Read Comments at 1; RERC-IT Comments at 6; TIA Comments at 15-16; Wireless RERC Reply Comments at 4; and Words+ Comments at 2.

²⁵³ *Section 255 Report and Order*, 16 FCC Rcd at 6435, ¶ 36.

²⁵⁴ See 47 U.S.C. § 618(a)(5). As noted *infra* para. 117, under Section 717(a)(5)(iii), covered entities are required to maintain “information about the compatibility of [their] products and services with peripheral devices or specialized [CPE] commonly used by individuals with disabilities to achieve access.”

²⁵⁵ 47 C.F.R. § 6.3.

phased out only after alternative forms of communication, such as real-time text, are in place?²⁵⁶

89. While the Access Board Draft Guidelines address compatibility primarily with content providers in mind,²⁵⁷ they may still be helpful in defining what “compatible” should mean as we update our accessibility rules. The Access Board Draft Guidelines define compatibility to be the “interaction between assistive technology, other applications, content, and the platform,”²⁵⁸ as well as the preservation of accessibility in alternate formats.²⁵⁹ We seek further comment on whether and how we should use the Access Board Draft Guidelines to help us define compatibility for purposes of Section 716.

90. We also seek comment on whether we should adopt additional criteria for determining compatibility under Section 716 and Section 255. The Access Board Draft Guidelines note that accessibility programming interfaces (“APIs”) enable interoperability with assistive technology.²⁶⁰ Code Factory explains, for example, that it is better able to develop a screen reader application if “manufacturers and operating system developers develop an Accessibility API, which is essentially a layer between the device user interface and the screen reader that can be used to pull information that must be spoken to the user.”²⁶¹ The Access Board Draft Guidelines direct platforms, applications, and interactive content to comply with World Wide Web Consortium’s Web Content Accessibility Guidelines (WCAG) 2.0 Level AA Success Criteria and Conformance Requirements²⁶² or to comply with specific accessibility criteria in Chapter 4 of the Access Board Draft Guidelines.²⁶³ Are there aspects of the WCAG guidelines or Access Board criteria that we should incorporate into our definition of compatibility? We also seek comment on the status of industry development of APIs and whether incorporating criteria related to APIs into our definition of compatibility could promote the development of APIs.

6. Network Features

91. Under Section 716(d) of the Act, “[e]ach provider of advanced communications services has the duty not to install network features, functions, or capabilities that impede accessibility or usability.”²⁶⁴ In the *October Public Notice*, the Bureaus sought comment on how this provision compares to a similar provision in Section 251(a)(2) of the Act (relating to Section 255) and whether the requirement has a different meaning in the context of advanced communications services networks.²⁶⁵

92. We agree with commenters who generally believe that this duty not to impede accessibility is comparable to the duty set forth in Section 251(a)(2) of the Act.²⁶⁶ We propose that our

²⁵⁶ We note that elsewhere in the CVAA, the Commission is directed to establish an advisory committee whose task is, in part, to consider “[t]he possible phase out of the use of current-generation TTY technology to the extent that this technology is replaced with more effective and efficient technologies and methods to enable access to emergency services by individuals with disabilities.” Pub. L. No. 111-260, § 106(c)(6).

²⁵⁷ See Access Board Draft Guidelines at 49-51.

²⁵⁸ See Access Board Draft Guidelines at 49-51.

²⁵⁹ See Access Board Draft Guidelines at 33.

²⁶⁰ See Access Board Draft Guidelines at 11 and 25.

²⁶¹ Code Factory Reply Comments at 1.

²⁶² This document was written by the World Wide Web Consortium’s Web Content Accessibility Initiative to explain how to make web content accessible to people with disabilities. See <http://www.w3.org/TR/WCAG20>.

²⁶³ See Access Board Draft Guidelines at 38.

²⁶⁴ See 47 U.S.C. § 617(d).

²⁶⁵ *October Public Notice* at 4.

²⁶⁶ AAPD Reply Comments at 4; AFB Reply Comments at 5; and Verizon Comments at 5.

rules should include the requirements set forth in Section 716(d), just as our Section 255 rules reflect the language in Section 251(a)(2). We also agree with Verizon and AAPD, who stress that Section 716(d) applies to a much broader range of providers, and seek comment on how we can best reach out to newly covered entities and ensure that they are aware of their new responsibilities.²⁶⁷

93. We note that both the Senate and House Reports state that the obligations imposed by Section 716(d) “apply where the accessibility or usability of advanced communications services were incorporated in accordance with recognized industry standards.”²⁶⁸ CTIA states that until the Commission identifies and requires the use of industry-recognized standards, it should “refrain from enforcing these obligations on network providers.”²⁶⁹ We seek comment on CTIA's assertion and on what industry standards currently exist that can be used to incorporate accessibility or usability in advanced communications services. We also seek comment on what, if any, industry standards *should* be developed to incorporate accessibility or usability in advanced communications services and how these standards should be developed.

94. In addition, we seek comment on assertions by the RERC-IT that our rules should prohibit “passive inaction or setting of options . . . that impede access.”²⁷⁰ We also seek comment on AFB’s statement that under this provision “digital rights management or network security features or functions must . . . be installed so as not to impede accessibility.”²⁷¹ Finally, we seek comment on CTIA’s assertion that “any rules seeking to limit the incorporation of any network features or functions recognize the need for covered entities to manage all network traffic, including advanced communications services.”²⁷²

7. Accessibility of Information Content

95. Section 716(e)(1)(B) of the Act states that the Commission’s regulations shall “provide that advanced communications services, the equipment used for advanced communications services, and networks used to provide [such services] may not impair or impede the accessibility of information content when accessibility has been incorporated into that content for transmission through [such services, equipment or networks].”²⁷³ In the *October Public Notice*, the Bureaus sought comment on how this provision should be implemented and the types and nature of information content that should be addressed.²⁷⁴ We note that the legislative history of the CVAA makes clear that the requirements apply “where the accessibility of such content has been incorporated in accordance with recognized industry standards.”²⁷⁵ Echoing comments regarding duties relating to network features, functions, and capabilities, several commenters stress the importance of developing industry-recognized standards to ensure the delivery of information content.²⁷⁶

96. We seek further comment on what these standards should be and how they should be developed and reflected in the Commission's rules, subject to the limitation on mandating technical

²⁶⁷ AAPD Reply Comments at 5 and Verizon Comments at 5.

²⁶⁸ Senate Report at 8; House Report at 25.

²⁶⁹ CTIA Comments at 15.

²⁷⁰ RERC-IT Comments at 6; *see also* ACB Reply Comments at 18.

²⁷¹ AFB Comments at 6.

²⁷² CTIA Comments at 16; *see also* T-Mobile Comments at 5.

²⁷³ 47 U.S.C. § 617(e)(1)(B).

²⁷⁴ *October Public Notice* at 4.

²⁷⁵ Senate Report at 8; House Report at 25.

²⁷⁶ CTIA Reply Comments at 16; T-Mobile Comments at 5; CEA Comments at 14.

standards in Section 716(1)(D). In particular, we seek comment on the RERC-IT proposal that our regulations need to ensure that (i) “the accessibility information (*e.g.*, captions or descriptions) are not stripped off when information is transitioned from one medium to another;”²⁷⁷ (ii) “parallel and associated media channels are not disconnected or blocked;”²⁷⁸ and (iii) “consumers . . . have the ability to combine text, video, and audio streaming from different origins.”²⁷⁹ We also seek comment on how we can best ensure that encryption and other security measures do not thwart accessibility,²⁸⁰ while at the same time ensuring that we “promot[e] network security, reliability, and survivability in broadband networks.”²⁸¹

97. We also note that the Access Board Draft Guidelines require content, which includes “information and sensory experience communicated to the user and encoding that defines the structure, presentation, and interactions associated with those elements” to be accessible.²⁸² The Draft Guidelines provide text, images, sounds, videos, controls, and animations as examples of content and encourage, as a best practice, the maximization of compatibility of content with existing and future technologies, including assistive technology.²⁸³ The Draft Guidelines also require user interfaces and their functions to be accessible.²⁸⁴ For example, under these Draft Guidelines, advanced communications services, equipment, and networks cannot strip captions that make content accessible to people who are deaf or hard of hearing from content that provides closed captioning. We seek comment on whether all or some of these Draft Guidelines would be appropriate for industry-recognized standards or inclusion in the Commission's rules.

98. Finally, we agree with CEA that, consistent with the legislation’s liability limitations,²⁸⁵ manufacturers and service providers are not liable for content or embedded accessibility content (such as captioning or video description) that they do not create or control.²⁸⁶ We seek comment on this assessment.

IV. IMPLEMENTATION REQUIREMENTS

A. Obligations

99. Section 716(e)(1)(C) of the Act requires the Commission to “determine the obligations . . . of manufacturers, service providers, and providers of applications or services accessed over service provider networks.”²⁸⁷ Below, we seek comment and make proposals relating to the obligations of manufacturers and service providers and ask further questions about the obligations of providers of applications or services accessed over service provider networks.²⁸⁸

²⁷⁷ RERC-IT Comments at 7.

²⁷⁸ *Id.*

²⁷⁹ *Id.*

²⁸⁰ ACB Reply Comments at 19.

²⁸¹ T-Mobile Comments at 5.

²⁸² *See* Access Board Draft Guidelines at 49.

²⁸³ *See* Access Board Draft Guidelines at 49.

²⁸⁴ Access Board Draft Guidelines at 50-51.

²⁸⁵ As discussed *supra* para. 21 (and text accompanying note. 62) and para. 27, Section 2 of the CVAA provides a limitation on liability for a violation of the requirements of the CVAA.

²⁸⁶ CEA Comments at 14.

²⁸⁷ 47 U.S.C. § 617(e)(1)(C).

²⁸⁸ 47 U.S.C. § 617(e)(1)(C).

1. Manufacturers and Service Providers

100. With respect to equipment manufacturers and service providers of ACS, we propose to adopt general obligations that mirror the language of the statute, similar to the approach taken in sections 6.5 and 7.5 of our Section 255 rules. Specifically, we propose that the Commission's rules set forth the following “General Obligations:”

- With respect to equipment manufactured after the effective date of the regulations, a manufacturer of equipment used for advanced communications services, including end user equipment, network equipment, and software, must ensure that the equipment and software that such manufacturer offers for sale or otherwise distributes in interstate commerce shall be accessible to and usable by individuals with disabilities, unless such requirements are not achievable.²⁸⁹
- With respect to services provided after the effective date of the regulations, a provider of advanced communications services must ensure that services offered by such provider in or affecting interstate commerce are accessible to and usable by individuals with disabilities, unless such requirements are not achievable.²⁹⁰
- If accessibility is not achievable either by building it in or by using third party accessibility solutions, then a manufacturer or service provider shall ensure that its equipment or service is compatible with existing peripheral devices or specialized customer premises equipment commonly used by individuals with disabilities to achieve access unless such compatibility is not achievable.²⁹¹
- Providers of advanced communications services shall not install network features, functions, or capabilities that impede accessibility or usability.²⁹²
- Advanced communications services and the equipment and networks used to provide such services may not impair or impede the accessibility of information content when accessibility has been incorporated into that content for transmission through such services, equipment or networks.²⁹³

101. In addition, we propose to adopt requirements similar to those in our Section 255 rules regarding product design, development, and evaluation (sections 6.7 and 7.7); information pass through (sections 6.9 and 7.9); and information, documentation and training (sections 6.11 and 7.11), modified to reflect the statutory requirements of Section 716. Consistent with the *Section 255 Report and Order*, we find that adoption of the functional approach reflected in such requirements will provide clear guidance to covered entities regarding their obligation to ensure accessibility and usability.²⁹⁴ The full text of these proposed rules is found in Appendix B, *infra*, but some key requirements of these proposed rules include the following:

- Manufacturers and service providers must consider performance objectives at the design stage as early and as consistently as possible and must implement such evaluation to the extent that it is achievable.²⁹⁵

²⁸⁹ See discussion *supra* paras. 19-24.

²⁹⁰ See discussion *supra* paras. 25-27.

²⁹¹ See discussion *supra* paras. 67-76, 85-90.

²⁹² See discussion *supra* paras. 91-94.

²⁹³ See discussion *supra* paras. 95-98.

²⁹⁴ See *Section 255 Report and Order*, 16 FCC Rcd at 6429-6432, ¶¶ 21-30.

²⁹⁵ See discussion *supra* para. 9 and text accompanying note 33.

- Manufacturers and service providers must identify barriers to accessibility and usability as part of such evaluation.²⁹⁶
- Equipment used for advanced communications services, including end user equipment, network equipment, and software must pass through cross-manufacturer, nonproprietary, industry-standard codes, translation protocols, formats or other information necessary to provide advanced communications services in an accessible format, if achievable. Signal compression technologies shall not remove information needed for access or shall restore it upon decompression.²⁹⁷
- Such information and documentation includes user guides, bills, installation guides for end user devices, and product support communications, in alternate formats, as needed. The requirement to provide access to information also includes ensuring that individuals with disabilities can access, at no extra cost, call centers and customer support regarding both the product generally and the accessibility features of the product.²⁹⁸

102. We seek comment on these proposed obligations for equipment manufacturers and service providers of ACS. In particular, we seek comment on whether we should adopt additional obligations or make modifications to our proposals.

2. Providers of Applications or Services Accessed over Service Provider Networks

103. We also seek comment on what, if any, obligations we should impose on “providers of applications or services accessed over service provider networks.”²⁹⁹ Are there any requirements that we should impose on these providers in order to ensure that the statutory mandates of Section 716 are carried out? We also seek comment on the meaning of “accessed over service provider networks.” How does this apply to applications and services that are downloaded and then run as either native or web applications on the device? How does this apply to applications and services accessed through cloud computing?³⁰⁰

B. Performance Objectives

104. Section 716(e)(1)(A) of the Act provides that in prescribing regulations for this section, the Commission shall “include performance objectives to ensure the accessibility, usability, and compatibility of advanced communications services and the equipment used for advanced communications services by individuals with disabilities.”³⁰¹ In the *October Public Notice*, the Bureau sought comment on how to interpret this provision, including the extent to which these objectives should be specific or general.³⁰² The *October Public Notice* also sought comment on the usefulness of the Access Board's March 2010 draft standards and guidelines on Section 508 of the Rehabilitation Act.³⁰³

105. We agree with the broad range of commenters who stress the importance of having performance objectives that would clearly define the outcome needed to be achieved without specifying

²⁹⁶ See discussion *supra* para. 9 and text accompanying note 33.

²⁹⁷ See discussion *supra* para. 9.

²⁹⁸ See discussion *supra* para. 9 and text accompanying note 34.

²⁹⁹ See 47 U.S.C. § 617(e)(1)(C).

³⁰⁰ See *supra* note 55.

³⁰¹ 47 U.S.C. § 716(e)(1)(A).

³⁰² *October Public Notice* at 4.

³⁰³ *Id.*

how these ends should be accomplished.³⁰⁴ More specifically, we agree with those commenters who suggest that we incorporate into the performance objectives the outcome-oriented definitions of “accessible,” “compatibility,” and “usable” from Sections 6.3 and 7.3 of the Commission's rules,³⁰⁵ set forth in Appendix B. We propose to adopt these definitions as performance objectives subject to any changes that we make to these definitions as part of this proceeding.³⁰⁶ We also agree with the IT and Telecom RERCs that “performance standards must . . . be testable, concrete, and enforceable”³⁰⁷ and seek further comment about how we can accomplish these objectives. We disagree with ITI’s suggestion that performance objectives be merely “aspirational.”³⁰⁸

106. We seek additional comment on whether to adopt more specific performance objectives, and on the procedures and timelines that we should use to develop these objectives. While as a general matter it may be desirable to harmonize the Commission's rules with the Access Board Guidelines after the Access Board finalizes its Guidelines,³⁰⁹ we seek comment on what parts of the Access Board Draft Guidelines may be useful to us if we develop specific performance objectives in the interim.³¹⁰ We also seek comment on AT&T’s assertion that “the specific functionalities and standards mandated by Section 508 [for government purchases of technology] . . . may not be appropriate in all circumstances for industry wide, mass market application contemplated by Section 716.”³¹¹ In which instances would the Access Board standards not be appropriate for mass market application? In which areas might they be particularly instructive?

107. We also propose to update our performance objectives, as appropriate, after the Emergency Access Advisory Committee (“EAAC”), which was established pursuant to Section 106 of the CVAA,³¹² provides its recommendations to the Commission in December 2011.³¹³ The EAAC, among other things, is considering “what actions are necessary as part of the migration to a national Internet protocol-enabled network to achieve reliable, interoperable communication transmitted over such network that will ensure access to emergency services by individuals with disabilities.”³¹⁴ We express our general belief that achieving reliable, interoperable communication over IP-enabled networks will have applicability outside the emergency access context and may be relevant to developing performance objectives under Section 716 for advanced communications services and equipment used for these services.³¹⁵ We note as well that the Access Board Draft Guidelines contain a proposal for real time text

³⁰⁴ See, e.g., ITI Comments at 9; RERC-IT Comments at 7; Google Reply Comments at 6; CTIA Reply Comments at 8; and ACB Reply Comments at 5.

³⁰⁵ See, e.g., TIA Comments at 17; CEA Comments at 13; and T-Mobile Comments at 6; see also 47 C.F.R. §§ 6.3 and 7.3.

³⁰⁶ See Section III.B, *supra*, where we seek comment on how we should update the definitions of accessible, compatibility, and usable in our Part 6 and Part 7 rules.

³⁰⁷ IT and Telecom RERCs Reply Comments at 7.

³⁰⁸ ITI Comments at 9.

³⁰⁹ See TIA Comments at 17; CEA Comments at 13.

³¹⁰ See discussion *infra* Section III.A.4.d on interoperable video conferencing services; see also ACB Reply Comments at 6-7.

³¹¹ AT&T Comments at 6; see also CEA Comments at 13 and CTIA Comments at 12.

³¹² Pub. L. No. 111-260, § 106. The Emergency Access Advisory Committee held its first meeting on January 14, 2011.

³¹³ See Pub. L. No. 111-260, § 106(c)(1).

³¹⁴ Pub. L. No. 111-260, § 106(c)(1).

³¹⁵ See also National Broadband Plan, Chapter 9, Adoption and Utilization, Recommendation 9.10 (recommending, among other things, that the FCC open a proceeding to implement a standard for reliable and interoperable real-time (continued....))

requirements for hardware and software whenever real-time voice is supported,³¹⁶ further supporting the need to move forward with the recommendation in our National Broadband Plan to consider a standard for reliable and interoperable real-time text any time that VoIP is available and supported.³¹⁷

108. With respect to interoperable video conferencing services,³¹⁸ we seek input on what performance objectives or rules need to be established to ensure that, where achievable, interoperable video conferencing services and equipment are accessible to and usable by individuals with disabilities (such as individuals who are blind, have a visual impairment, have limited manual dexterity, or who are deaf, hard of hearing, or deaf-blind). We also seek comment on whether and to what extent we have the authority to adopt industry-wide performance objectives that would set objectives for covered entities collectively. We recognize, for example, that no single entity working alone can ensure that video conferencing services (or other advanced communications services) are interoperable. If we were to interpret Section 716 to require interoperability among all video conferencing services, what industry-wide performance objectives are needed to achieve and ensure such interoperability so that consumers are able to make point-to-point calls using different video conferencing services and equipment? We also seek comments on what performance objectives are needed to address concerns expressed by consumers about the general inability of current video conferencing services to connect to VRS in a manner that achieves functional equivalency with conventional voice telephone services.³¹⁹ In this regard, Consumer Groups urge that mainstream video conferencing equipment and services be required to “comply with standards, such as requisite resolution and frame-rate, to support real-time video conferencing used for VRS, remote video interpreting, and point-to-point communication.”³²⁰ We note that the Access Board Draft Guidelines on Section 508 propose that products used to transmit video conversations provide sufficient quality and fluidity for real-time video conversation in which at least one party is using a visual method of communication, such as sign language.³²¹

109. It appears that video conferencing equipment now available off-the-shelf to the general public does not match the capabilities of proprietary equipment offered by VRS providers in other ways as well. First, although our VRS rules require ten-digit numbering capability on VRS-provided video equipment – to enable the owners of such equipment to make point-to-point calls to one another – this capability does not presently exist in video conferencing equipment such as off-the-shelf videophones.³²² Consumer Groups urge that the North American Numbering Plan (“NANP”) ten-digit telephone number system be “adopted and/or adapted by [mainstream] video conferencing equipment and service providers to make their systems interoperable with other systems and users, including VRS users.”³²³ Finally, we note that, while not yet universal, Consumer Groups envision multipoint control unit (MCU) capability in video conferencing services when VRS is provided so that all parties to the call can see the VRS

(Continued from previous page) _____
text any time that Voice over Internet Protocol is available and supported) and Access Board Draft Guidelines at 80-81 (providing for real-time text requirements for hardware and software whenever real-time voice is supported.)

³¹⁶ Access Board Draft Guidelines at 80-81.

³¹⁷ See National Broadband Plan, Chapter 9, Adoption and Utilization, Recommendation 9.10.

³¹⁸ See *supra* Section III.A.4.d.

³¹⁹ See also Consumer Groups Comments at 4-5, noting the desirability of enabling the delivery of captioned telephone and captioned conference relay services to make the audible voice communication component of a video conferencing service accessible. See also Convo Comments at 7; RERC-IT Comments at 4; and CSD Reply Comments at 2.

³²⁰ Consumer Groups Reply Comments at 8.

³²¹ Draft Access Board Draft Guidelines at 86 (Advisory 905.3 on Video Communication Quality).

³²² 47 C.F.R. § 64.611(e).

³²³ Consumer Groups Reply Comments at 3.

communications assistant and each other simultaneously.³²⁴ We therefore seek comment on performance objectives for mainstream interoperable video conferencing services and equipment to address multiple video conferencing needs by people with disabilities, including the need for point-to-point calls where at least one party is using a visual method of communication, such as sign language; for functionally equivalent VRS; for multi-party conferencing via MCUs; for ten-digit numbering (or an alternative means of identifying and contacting one another); for effective emergency access; and for the delivery of video remote interpreting services.

110. We also seek comment on whether industry or the Commission should establish a working group of diverse stakeholders to address the interoperability issues relating to video conferencing services and equipment.³²⁵ If so, should the goals be focused on ensuring interoperability among the largest service providers and equipment manufacturers? How can we ensure that new entrants and software application developers would be fully represented in such a process? We ask commenters to set forth in detail the goals of such a group, which stakeholders should be included, the specific issues that such a working group should consider, and a timeline for completion of its work. We further ask whether such group should be part of the Commission's Consumer Advisory Committee, or be a standalone entity. Finally, we seek comment on what industry efforts are ongoing to address interoperability challenges and the degree to which such efforts have been effective.³²⁶

111. Finally, we note that the comments to the *October Public Notice* contain relatively little discussion of "electronic messaging services" and "non-interconnected VoIP services." We seek further comment about the specific accessibility concerns relating to these services and whether we should adopt specific performance objectives to address these concerns. We also seek comment on whether it would be appropriate to establish a working group of diverse stakeholders to provide recommendations related to such performance objectives.

V. INDUSTRY GUIDANCE

A. Safe Harbors

112. Section 716(e)(1)(D) of the Act provides that the Commission "shall . . . not mandate technical standards, except that the Commission may adopt technical standards as a safe harbor for such compliance if necessary to facilitate the manufacturers' and service providers' compliance" with the accessibility and compatibility requirements in Section 716.³²⁷ In the *October Public Notice*, we sought comment on whether we should adopt safe harbor technical standards.³²⁸

113. The vast majority of commenters oppose establishing technical standards as safe harbors.³²⁹ CTIA and AT&T assert that safe harbors will result in *de facto* standards being imposed that will limit the flexibility of covered entities seeking to provide accessibility.³³⁰ The IT and Telecom

³²⁴ See Consumer Groups Comments at 3-4; Consumer Groups Reply Comments at 2.

³²⁵ See Convo Comments at 8; Consumer Groups Reply Comments at 8; and Google Reply Comments at 7.

³²⁶ See, e.g., the Unified Communication Interoperability Forum, <http://www.ucif.org/>. The Unified Communications Interoperability Forum (UCIF) is an alliance dedicated to enabling standards-based, inter-vendor unified communications (UC) interoperability. The founding members are HP, Juniper Networks, Microsoft, Logitech/LifeSize Communications, and Polycom.

³²⁷ 47 C.F.R. § 617(e)(1)(D).

³²⁸ *October Public Notice* at 4-5.

³²⁹ CTIA Comments at 11-12; CTIA Reply Comments at 5; AT&T Comments at 7; CEA Comments at ii and 15; RERC-IT Comments at 8; IT and Telecom RERCs Reply Comments at 7; ACB Reply Comments at 22; AFB Reply Comment at 7.

³³⁰ CTIA Comments at 11; AT&T Comments at 7.

RERCs state that the Commission's rules should not include safe harbors because “technology, including accessibility technology, will develop faster than law can keep up.”³³¹ AFB asserts that it is too early in the CVAA’s implementation “to make informed judgments . . . about whether and which safe harbors should be available.”³³² While ITI supports safe harbors, noting they provide clarity and predictability, it warns against using safe harbors “to establish implicit mandates [that] . . . lock in particular solutions.”³³³ In light of the concerns raised in the record, we agree with AFB that it is too early in the implementation of the CVAA to make informed judgments about whether safe harbor technical standards should be established.³³⁴ Therefore, we propose not to adopt any technical standards as safe harbors at this time.³³⁵ We seek comment on this proposal.

B. Prospective Guidelines

114. Section 716(e)(2) of the Act requires the Commission to issue prospective guidelines concerning the new accessibility requirements.³³⁶ While the Senate Report did not discuss this provision, the House Report notes that such guidance “makes it easier for industry to gauge what is necessary to fulfill the requirements” by providing industry with “as much certainty as possible regarding how the Commission will determine compliance with any new obligations.”³³⁷

115. We agree with CTIA that the prospective guidelines that we adopt must be clear and understandable and provide service providers and manufacturers as much flexibility as possible, so long as achievable accessibility requirements are satisfied.³³⁸ We seek comment on a proposal by the RERC-IT, endorsed by ACB, that we use “an approach to the guidelines similar to that used by the World Wide Web Consortium’s Web Content Accessibility Guidelines (WCAG),³³⁹ which provide mandatory performance-based standards and non-mandatory technology-specific techniques for meeting them.”³⁴⁰ We also seek comment on whether any parts of the Access Board’s Draft Guidelines on Section 508 should be adopted as prospective guidelines.³⁴¹ In addition, we seek comment on the process that should be used to develop prospective guidelines and to ensure that a diverse and broadly-based group of stakeholders participate in such an effort. Should the Commission, for example, establish a consumer-industry advisory group to prepare these?

³³¹ IT and Telecom RERCs Reply Comments at 7.

³³² AFB Reply Comments at 7. ACB urges that if the Commission establishes safe harbors, it provide a framework for assessing these standards. ACB Reply Comments at 21-22.

³³³ ITI Comments at 10.

³³⁴ AFB Reply Comment at 7.

³³⁵ *See, e.g.*, CEA Comments at 15 and Microsoft Comments at 3.

³³⁶ 47 U.S.C. § 617(e)(2).

³³⁷ *See* House Report at 25.

³³⁸ CTIA Comments at 8-11. Both the RERC-IT and IT and Telecom RERCs suggest that prospective guidelines should be based on outcomes that must be achieved while permitting flexible approaches to that outcome. RERC-IT Comments at 7; IT and Telecom RERCs Reply Comments at 7.

³³⁹ *See supra* note 262.

³⁴⁰ RERC-IT Comments at 8; ACB Reply Comments at 22.

³⁴¹ We note that some in industry have expressed concern about incorporating parts of the Access Board Draft Guidelines as prospective guidelines. *See, e.g.*, CTIA Comments at 12, finding that the Access Board Draft Guidelines were “insufficiently clear to provide useful guidance” and “did not offer manufacturers and providers sufficient technological flexibility to enable a seamless transition from traditional devices to IP-based technologies.”

VI. SECTION 717 RECORDKEEPING AND ENFORCEMENT

A. Overview

116. Section 717(a) requires the Commission to establish new recordkeeping and enforcement procedures for “manufacturers and providers subject to [Sections 255, 716, and 718.]”³⁴² In the *October Public Notice*, the Bureaus sought comment on these requirements, including the types of records that should be maintained and the possible enforcement procedures that should be imposed.³⁴³ We will discuss the recordkeeping and enforcement requirements in further detail below, including a proposal to amend the existing Section 255 rules and to add a new rule subpart to implement the requirements of Section 717. For purposes of our discussion below, we propose to apply the Section 717 requirements to manufacturers of equipment used for telecommunications services, interconnected VoIP, voicemail and interactive menu services subject to Section 255 of the Act; manufacturers of equipment used for ACS subject to Section 716; and manufacturers of telephones used with public mobile services which include an Internet browser, subject to Section 718. We also propose to apply the Section 717 requirements to providers of telecommunications services, interconnected VoIP services, voicemail or interactive menu services subject to Section 255 of the Act; providers of ACS subject to Section 716; and providers of mobile services who arrange for the inclusion of a browser in telephones, subject to Section 718.³⁴⁴ Finally, we reiterate our proposal to subject providers of applications and services that can be used for ACS and that can be accessed (*i.e.*, downloaded or run) by users over other service provider networks to the requirements of Section 716 and thus by extension cover them under Section 717.³⁴⁵ We seek comment on these proposals.

B. Recordkeeping

117. Beginning one year after the effective date of regulations promulgated pursuant to Section 716(e), each manufacturer and provider subject to Sections 255, 716, and 718 must maintain, in the ordinary course of business and for a reasonable period, records of the efforts taken by such manufacturer or provider to implement Sections 255, 716, and 718, including: (1) information about the manufacturer's or provider's efforts to consult with individuals with disabilities; (2) descriptions of the accessibility features of its products and services; and (3) information about the compatibility of such products and services with peripheral devices or specialized customer premise equipment commonly used by individuals with disabilities to achieve access.³⁴⁶ Section 717 also requires an officer of a manufacturer or provider to submit to the Commission an annual certification that records are being kept in accordance with this provision.³⁴⁷ Section 717 also states that “[a]fter the filing of a formal or informal complaint against a manufacturer or provider, the Commission may request, and shall keep confidential, a copy of the records maintained by such manufacturer or provider pursuant to [this Section] that are directly relevant to the equipment or service that is the subject of such complaint.”³⁴⁸ We seek comment on how to implement these statutory requirements and solicit specific input below.

118. Some commenters urge the Commission to refrain from making the recordkeeping requirements overly burdensome, unnecessarily expensive, or repetitive of the information required by

³⁴² 47 U.S.C. § 618(a).

³⁴³ See *October Public Notice* at 6.

³⁴⁴ As noted *infra* at Section VII., Section 718 does not go into effect until October 2013.

³⁴⁵ See discussion *supra* at Section III.A.3.

³⁴⁶ 47 U.S.C. § 618(a)(5)(A).

³⁴⁷ 47 U.S.C. § 618(a)(5)(B).

³⁴⁸ 47 U.S.C. § 618(a)(5)(C).

existing reports.³⁴⁹ Motorola notes that it and some covered entities already publicly provide some of the information required by Section 717, including information regarding accessibility features, consultations with individuals with disabilities, and compatibility with third party peripherals submitted in existing Commission reports, such as those required for compliance with our HAC rules.³⁵⁰ CEA also states that “outreach to individuals with disabilities either directly or indirectly through standards development organizations”³⁵¹ should be sufficient to demonstrate a company’s compliance with Section 717’s requirement to document efforts to consult with individuals with disabilities. Additionally, CEA points out that some of the required information may be reflected in information provided to the clearinghouse that will be established under the CVAA.³⁵²

119. We note, however, that Section 717 requires the Commission to establish uniform recordkeeping and enforcement procedures for entities subject to Sections 255, 716, and 718.³⁵³ While some of these records that Section 717 requires to be kept and, potentially, produced may be available publicly (in other reports or submissions made to the Commission or Bureau or in information submitted to a clearinghouse), most of the information required by this section is not required in existing Commission reports and it is not clear to what extent this will be available in public information.³⁵⁴

120. While we agree that we should avoid imposing excessive burdens or requiring the same information multiple times, we also seek to ensure that specific and relevant records required by the statute are appropriately maintained by manufacturers and providers. In light of the range of potential complaints that may be filed against covered entities under the CVAA and Section 255, we seek comment on how the Commission should effectively implement Section 717’s recordkeeping requirements without imposing excessive burden or expense on covered entities or requiring multiple submissions of the same records to the Commission.

121. Section 717 appears to give the Commission the discretion to expand the recordkeeping requirements beyond the three categories specifically set forth in subsection (a)(5)(A) to “records of the efforts taken by such manufacturer or provider to implement” these Sections.³⁵⁵ We seek comment on whether the Commission should require covered entities to maintain and, potentially, produce records to demonstrate their compliance with the provisions of Section 255 and similarly structured requirements in Section 716.³⁵⁶ We also seek comment on what constitutes a “reasonable time period” during which

³⁴⁹ See ATIS, on behalf of AISP.4-HAC, Reply Comments at 3-4; TIA Comments at 24.

³⁵⁰ See Motorola Comments at 9-10 and 47 C.F.R. § 20.19. See also ATIS Reply Comments at 3.

³⁵¹ CEA Comments at 21.

³⁵² See CEA Comments at 21-22. The CVAA requires the Commission, in consultation with the Architectural and Transportation Barriers Compliance Board, the National Telecommunications and Information Administration, trade associations, and organizations representing individuals with disabilities, to establish a clearinghouse of information on the availability of accessible products and services and accessibility solutions required under Sections 255, 716, and 718 within one year of the CVAA’s enactment. Pub. L. No. 111-260 § 717(d).

³⁵³ See 47 U.S.C. § 617(a)(5). Section 718 is required to be implemented three (3) years after the enactment of the CVAA, which is two (2) years after the date on which the rules we seek comment on here must be implemented. We therefore postpone our consideration of whether covered entities should be required to keep records of their compliance with Section 718 of the Act, which covers Internet browsers built into telephones used with public mobile services, and what types of records those might be until we seek comment more broadly on the implementation of Section 718 in the Commission's rules. See 47 U.S.C. § 618 and 47 U.S.C. § 619 Note.

³⁵⁴ The only other reporting obligation relevant to the obligations under this Section is contained in our HAC rules, which require information about only one of the many access features required by the CVAA. See 47 C.F.R. § 20.19.

³⁵⁵ 47 U.S.C. § 618(a)(5).

³⁵⁶ See *supra* Section IV. and paras. 117, 119.

covered entities will be required to maintain these records. Should we require covered entities to create and maintain records showing their compliance with the general obligation requirements as well as the requirements of product design, development, and evaluation, information pass through, and information, documentation, and training?³⁵⁷ For example, should we require covered entities to create and maintain records demonstrating the process they have used to assess whether it is achievable to make particular products and services accessible and usable by persons with disabilities? What kinds of records would be sufficient to demonstrate such compliance? We also seek comment on whether the Commission should require these or any other types of records to demonstrate covered entities' compliance with Section 255.

122. Many comments on the recordkeeping requirement request that the Commission adopt a flexible approach to Section 717's recordkeeping requirement that recognizes the differences in size and scope of covered entities and their communications services or manufacturing operations, instead of requiring a specific form of documentation.³⁵⁸ Verizon recommends that the Alliance for Telecommunications Industry Solutions (ATIS) or a similar organization develop a standard recordkeeping form that could be used to satisfy this requirement.³⁵⁹ While ATIS, on behalf of AISP.4-HAC, expresses a preference for flexible recordkeeping requirements, ATIS also supports Verizon's suggestion that industry and consumers should work together to develop a mutually agreeable form in the event the Commission decides to adopt a standardized approach.³⁶⁰ CTIA specifically requests that the Commission allow records to be kept electronically.³⁶¹ TIA suggests that the Commission should "provide some non-exclusive guidance concerning the type of information that would be responsive to the statutory recordkeeping criteria" without precluding flexibility in the form in which those records may be kept.³⁶² We seek comment on these recommendations.

123. We recognize that Section 717 applies to a broad range of entities that have widely ranging business models and modes of operation. Therefore, consistent with some commenters' suggestions, we propose that we should not mandate any one form in which records must be kept in order to comply with Section 717. We also propose that if a record (that the Commission requires be produced after receipt of a complaint) is not readily available, the covered entity must provide it no later than the date of its response to the complaint.³⁶³ We seek comment on these proposals and on whether there is any reason for the Commission to mandate a standard form of recordkeeping to comply with Section 717(a)(5) or to require covered entities to submit publicly available records or those the Commission already has in another report or submission. While we cannot predict what the nature of consumers' complaints will be or provide specific guidance as to what information will be responsive to those complaints, we propose, as discussed more fully below, to require each response to a filed complaint to sufficiently describe how each record submitted is relevant to the complaint and the alleged violation, and how the provided record establishes the covered entity's compliance with the Act. Finally, given that the statute provides that recordkeeping requirements do not take effect until one year after the effective date of regulations promulgated pursuant to Section 716(e), we seek comment regarding whether, and if so, in what fashion, the Commission should address this transition period, particularly for the purposes of

³⁵⁷ See 47 C.F.R. §§ 6.5, 6.7, 6.9, and 6.11. See also *supra* Section IV. and paras. 117, 119.

³⁵⁸ See ATIS, on behalf of AISP.4-HAC Reply Comments at 4; CEA Comments at iii and 21; T-Mobile Comments at 8; CTIA Comments at 18.

³⁵⁹ Verizon Comments at 6-7.

³⁶⁰ ATIS, on behalf of AISP.4-HAC Reply Comments at 4; Verizon Comments at 6-7.

³⁶¹ See CTIA Comments at 18.

³⁶² TIA Comments at 24.

³⁶³ 47 U.S.C. § 618(a)(5)(C).

enforcement.³⁶⁴

C. Enforcement

1. Background

124. Section 717 requires the Commission to adopt rules that facilitate the filing of formal and informal complaints that allege a violation of Section 255, 716, or 718 and to establish procedures for enforcement actions by the Commission with respect to such violations, within one year of enactment of the law.³⁶⁵ In this section, we seek comment on specific procedures to implement these requirements and propose rules to consolidate the existing enforcement provisions for Section 255 with the newly proposed enforcement rules for alleged violations of Sections 716 and 718.

a. Enforcement of Section 255

125. In the rules adopted in the *Section 255 Report and Order*, the Commission provided form and content requirements for informal and formal complaints alleging a violation of Section 255, as well as review and disposition procedures.³⁶⁶ In particular, the Commission established specific elements to be included in any informal complaint alleging a violation of Section 255 of the Act as well as the form and content for answers to such complaints.³⁶⁷ These rules provide that if the Commission determines that an informal complaint has been satisfied based on the defendant's answer, or from other communications with the parties, the Commission may, at its discretion, consider the informal complaint closed, without providing a response to the complainant or defendant.³⁶⁸ Additionally, the Commission may close the informal complaint if it determines that no further action is necessary based on the complaint and answer, and will then duly inform the complainant and the defendant of the reasons therefor.³⁶⁹ If, however, the Commission, based on the pleadings, determines that a material and substantial question remains as to a defendant's compliance with the Section 255 requirements and the Commission's implementing rules, the Commission may conduct further investigation or proceedings as necessary to determine whether the defendant has violated any legal requirements, as well as whether any remedial actions and/or sanctions

³⁶⁴ In particular, the failure to create and maintain some type of compliance documentation could have implications in enforcement proceedings wherein covered entities may be called upon to refute claims of noncompliance. *See* Enforcement Section *infra* Section VI.C.

³⁶⁵ 47 U.S.C. § 618(a).

³⁶⁶ *See* 47 C.F.R. §§ 6.15 to 6.23. Formal complaints may be filed in the form and manner prescribed under Sections 1.720 – 1.736 of the Commission's rules. 47 C.F.R. § 6.21.

³⁶⁷ 47 C.F.R. § 6.17(a), (b)(1)-(7). An informal complaint must include (1) the name and address of the complainant; (2) the name and address of the manufacturer or provider against whom the complaint is made; (3) a full description of the telecommunications equipment, CPE or telecommunications service about which the complaint is made; (4) the date(s) on which the complainant purchased or used the telecommunications equipment or service that is the subject of the complaint; (5) a complete statement of facts, including supporting documentation, demonstrating why the telecommunications service or equipment is not accessible or useable by a person with disabilities; (6) the relief sought; and (7) the preferred method of response to the complaint. Section 7.19 provides that answers to informal complaints must (1) be prepared in the format requested by the complainant; (2) describe any actions that the defendant has taken or proposes to take to satisfy the complaint; (3) advise the complainant and the Commission of the nature of the defense(s) claimed; (4) respond specifically to all material allegations of the complainant; and (5) provide any other information or materials specified by the Commission as relevant to its consideration of the complaint. 47 C.F.R. § 7.19.

³⁶⁸ 47 C.F.R. § 6.20(a). In all other cases, the Commission must inform the parties of its review and disposition of a complaint filed.

³⁶⁹ 47 C.F.R. § 6.20(b). If unsatisfied with the defendant's response and Commission staff decision to terminate the complaint, the complainant can file a formal complaint. 47 C.F.R. §§ 6.20(b), 6.22.

are warranted.³⁷⁰ If the Commission determines that a defendant has failed to comply with Section 255 and its implementing rules, the Commission can order such remedial action or sanctions as are authorized by the Act and the rules, as it deems appropriate.³⁷¹ Aside from its complaint procedures, the Commission may, on its own motion, conduct inquiries and initiate proceedings as necessary to enforce the relevant requirements.³⁷²

b. Section 717 Enforcement Requirements

126. As discussed above, Section 717 requires the Commission within one year after the date of enactment of the CVAA to establish regulations that facilitate the filing of formal and informal complaints that allege a violation of Section 255, 716, or 718, and to establish procedures for enforcement actions.

127. Specifically, the CVAA requires the Commission to establish separate and identifiable electronic, telephonic, and physical receptacles for the receipt of complaints filed under Section 255, 716, or 718³⁷³ as well as establish a process for filing and receiving formal or informal complaints.³⁷⁴ Further, the CVAA requires the Commission to investigate the allegations in an informal complaint and, within 180 days after the date on which such complaint was filed with the Commission, issue an order concluding the investigation and provide an explanation for its conclusion, unless such complaint is resolved before such time.³⁷⁵ If the Commission determines that a violation has occurred, the Commission may, in the order or in a subsequent order, direct the manufacturer or service provider to bring the service, or in the case of a manufacturer, the next generation of the equipment or device, into compliance with requirements of those Sections within a reasonable time established by the Commission in its order.³⁷⁶ If a determination is made that a violation has not occurred, the Commission must provide the basis for such determination.³⁷⁷ The statute also provides that before the Commission makes a determination, the party that is the subject of the complaint shall have a reasonable opportunity to respond to such complaint, and may include in its response any factors that are relevant to such determination.³⁷⁸ Before issuing a final order, the Commission is required to provide the responding party a reasonable opportunity to comment on any proposed remedial action.³⁷⁹

2. General Requirements

128. *Pre-Filing Notice.* We seek comment on whether the Commission should require potential complainants to first notify the defendant manufacturer or provider that it intends to file a complaint based on an alleged violation of one or more provisions of Section 255, 716, or 718. We note that some parties have suggested that such a pre-filing notice can potentially foster greater communication

³⁷⁰ 47 C.F.R. § 6.20(c).

³⁷¹ 47 C.F.R. § 6.20(d).

³⁷² 47 C.F.R. § 6.23.

³⁷³ 47 U.S.C. § 618(a)(2).

³⁷⁴ 47 U.S.C. § 618(a)(1). The statute also provides that the Commission may not charge a fee to an individual who files such a complaint.

³⁷⁵ 47 U.S.C. § 618(a)(3)(B). Any such order must also include a determination whether any violation occurred. *Id.*

³⁷⁶ 47 U.S.C. § 618(a)(3)(B)(i).

³⁷⁷ 47 U.S.C. § 618(a)(3)(B)(ii). The Commission may also consolidate for investigation and resolution complaints alleging substantially the same violation. 47 U.S.C. § 618(a)(3)(C).

³⁷⁸ 47 U.S.C. § 618(a)(4).

³⁷⁹ *Id.*

among parties.³⁸⁰ While we agree that such a requirement could lead to a more efficient resolution in advance of a complaint in some instances, we are also concerned that in other cases, such a requirement could prove burdensome to consumers and delay resolution of complaints. In the *Section 255 Report and Order*, consistent with an Access Board recommendation, we encouraged consumers to express their concerns informally to the manufacturer or service provider before filing a complaint with the Commission.³⁸¹ We declined, however, to adopt a rule requiring consumers to contact manufacturers and service providers before they could file a complaint with the Commission, finding that our informal complaint process is “geared toward cooperative efforts.”³⁸² We seek comment on whether such an approach is sufficient or whether a specific requirement is necessary. To the extent that commenters advocate that we require that consumers notify manufacturers or providers before they file a complaint, we seek comment on specific safeguards that we should adopt to ensure that this requirement does not prove onerous to the consumers.

129. *Receipt and Filing of Complaints.* We seek comment on how the Commission should establish separate and identifiable electronic, telephonic, and physical receptacles for the receipt of complaints, both formal and informal. We note that the Commission’s Disability Rights Office has already established a new phone number [202-418-2517(V) / 202-418-2922 (TTY)] and email address (dro@fcc.gov) for this purpose. We also note that currently, informal complaints alleging a violation of Section 255 may be transmitted to the Commission via any reasonable means, e.g., letter, facsimile transmission, telephone (voice/TRS/TTY), Internet e-mail, audio-cassette recording, and Braille. We propose to retain these vehicles as means for transmission and receipt of informal complaints by the Commission under Sections 255, 716, and 718 and ask commenters to consider whether additional methods are necessary to meet this statutory requirement. Similarly, as discussed more fully below, we seek comment on the extent to which we should retain or revise our current requirements under Section 255 governing formal complaints that are filed for alleged violations by manufacturers and providers under Sections 255, as well as Sections 716 and 718, in the future. At present, these procedures are consistent with sections 1.720–1.736 of the Commission’s rules. If we make changes to facilitate the filing of informal complaints, but continue to apply our procedures for formal complaints largely in their current form to the new ACS sections (as well as maintain these procedures for Section 255), will this be enough to fulfill Congress’s intent to facilitate the filing of complaints under these sections? We note that since our Section 255 rules went into effect in 1999, the Commission has received only three formal complaints alleging violations of that Section.³⁸³

130. *Standing to File.* We received comments requesting that the Commission establish “reasonable” standing requirements.³⁸⁴ We note that the CVAA allows “any person alleging a violation” of the CVAA or the implementing rules to file a formal or informal complaint under Section 255, 716, or 718.³⁸⁵ Given that there is no standing requirement under these Sections, and there is no standing requirement under either Section 208 of the Act and our existing complaint rules,³⁸⁶ we decline to propose

³⁸⁰ CTIA Comments at 17.

³⁸¹ *Section 255 Report and Order*, 16 FCC Rcd at 6466, ¶ 119.

³⁸² *Id.*

³⁸³ See *Dr. Bonnie O'Day v. Cellco Partnership d/b/a Verizon Wireless, Motion To Dismiss With Prejudice*, EB-03-TC-F-001, *Order*, 19 FCC Rcd 17477 (2004); *Frank Winsor Burbank and Barbara Gail Burbank v. OnStar Corporation*, EB-03-TC-F-001, *Order*, 19 FCC Rcd 16652 (2004); and *Dr. Bonnie O'Day v. Audiovox Communications Corporation*, EB-03-TC-F-004, *Order*, 19 FCC Rcd 14 (2004).

³⁸⁴ Verizon Comments at 6.

³⁸⁵ 47 U.S.C. § 618(a)(3)(A).

³⁸⁶ See 47 U.S.C. § 208(a). This Section, applicable to complaints against common carriers, specifically states that “no complaint shall at any time be dismissed because of the absence of direct damage to the complainant” and (continued....)

a standing requirement and believe the minimum content requirements we propose *infra* in Sections VI.C.3 and VI.C.4 will effectively deter frivolous complaint filings.

131. *Sua sponte actions by the Commission.* As noted above, the Commission’s implementing rules for Section 255 explicitly state that the agency may, on its own motion, conduct inquiries and proceedings as necessary to enforce the requirements of its implementing rules and that Section of the Act.³⁸⁷ We intend for the Commission and its staff to continue to investigate and take action on our own motion when compliance issues or problems involving Sections 255, 716, and 718 come to our attention through an accessibility-related complaint or otherwise. Rather than establishing specific guidelines for initiating investigations and other enforcement actions on the Commission’s own motion, we propose to continue to follow existing protocols, and use procedures that in the opinion of the Commission best serve the purposes of Commission- and staff-initiated inquiries and proceedings.³⁸⁸ We seek comment on this approach.

132. *Remedies and Sanctions.* We seek comment on what remedies and other sanctions the Commission should consider for violations found to have occurred under Section 255, 716, or 718. As a preliminary matter, as noted above, we observe that Section 717(a)(3)(B) specifically authorizes the Commission to impose as a remedy for any violation an order directing a manufacturer to bring the next generation of its equipment or device, and a service provider to bring its service, into compliance within a reasonable period of time. We also observe that Section 718(c) envisions that we will continue to use our existing enforcement authority under Section 503 of the Act, but specifically adds that (subject to Section 503(b)(5)) manufacturers and service providers subject to the requirements of Sections 255, 716, and 718 are liable for forfeitures of up to \$100,000 per violation or each day of a continuing violation, with the maximum amount for a continuing violation set at \$1 million.³⁸⁹ We intend to use these statutorily directed remedies and sanctions as well as other remedies and sanctions authorized in the Act. We propose a change to section 1.80 of the Commission’s rules in Appendix B *infra* to reflect the modifications of section 718(c) to the Act.³⁹⁰

133. We seek comment on whether there are additional remedies that the Commission should consider when a violation is determined to have occurred. The Senate and House Reports make clear that we should not consider remedies that require retrofitting of equipment,³⁹¹ and accordingly, we agree with CEA that we should not employ those remedies for violations of these provisions.³⁹² We also note that AFB suggests that when a complaint is filed and a given product is not accessible, but the company nevertheless offers an array of accessible options, “the Commission should require the company to demonstrate that it can offer the complainant at least one other of its products that satisfies the [CVAA’s] requirements and that would provide the complainant at least the same features and level of functionality as the product that is the subject of the complaint” and at a comparable cost to the inaccessible product.³⁹³ While we agree that this may be a potential defense, we clarify that the issue of whether a subject entity satisfies its accessibility obligations is a fact-specific determination that will be decided in the context of a

(Continued from previous page) _____
generally authorizes the filing of a complaint by “any person” claiming that a carrier has violated a provision of the Act or the Commission’s rules. *See also* 47 U.S.C. § 153(39) (“[t]he term ‘person’ includes ‘an individual, partnership, association, joint-stock company, trust, or corporation’”).

³⁸⁷ 47 C.F.R. § 6.23; *see supra* para. 125.

³⁸⁸ *See* 47 C.F.R. § 6.23.

³⁸⁹ *See* 47 U.S.C. § 619(c).

³⁹⁰ *See* 47 C.F.R. § 1.80; *see also* 47 U.S.C. § 503(b) and 47 U.S.C. § 618(c).

³⁹¹ Senate Report at 9; House Report at 26.

³⁹² CEA Comments at iii, 22.

³⁹³ AFB Reply Comments at 4.

complaint proceeding based on the record. More specifically, we believe our determination about what is achievable must take into account all four factors enumerated under Section 716(g), not just the fourth factor that considers “the extent to which the service provider or manufacturer in question offers accessible services or equipment containing varying degrees of functionality and features, and offered at differing price points.”³⁹⁴

3. Informal Complaints

134. As described above, within one year after the date of enactment of the CVAA, the Commission is required to establish regulations that facilitate the filing of an informal complaint that alleges a violation of Section 255, 716, or 718, as well as establish procedures for enforcement actions by the Commission for any violations.

135. We note that commenters suggest that any enforcement procedures should provide clarity regarding culpability, given that a product or service may potentially involve several different entities such as a device manufacturer, a broadband provider, or an application developer.³⁹⁵ We acknowledge that it may be difficult for a consumer to determine where the responsibility of one covered entity ends and another begins. We seek comment on what additional procedures the Commission might adopt to clarify which entity is “culpable” for noncompliance and further ask to what extent the Commission should be available to assist consumers in determining which entities are appropriately targeted by specific complaints? We also seek comment on what additional elements should be included in complaints that are filed under these sections, beyond what is proposed below.

136. We propose the following minimum requirements that complainants should include in their informal complaints, which are consistent with Section 255 requirements as well as existing enforcement rules that have been adopted in other contexts.³⁹⁶ Specifically, we propose to include the following in any informal complaint: (1) the name, address, email address and telephone number of the complainant, and the manufacturer or service provider defendant against whom the complaint is made; (2) a complete statement of facts explaining why the complainant contends that the defendant manufacturer or provider is in violation of Section 255, 716, or 718, including details regarding the service or equipment and the relief requested, and all documentation that supports the complainant’s contention; (3) the date or dates on which the complainant or person on whose behalf the complaint is being filed either purchased, acquired, or used (or attempted to purchase, acquire, or use) the equipment or service about which the complaint is being made; (4) the complainant’s preferred format or method of response to the complaint by the Commission and defendant (e.g., letter, facsimile transmission, telephone (voice/TRS/TTY), Internet email, audio-cassette recording, Braille; or some other method that will best accommodate the complainant’s disability); and (5) any other information that is required by the Commission’s accessibility complaint form. We seek comment on this proposal and request parties to consider what additional or modified requirements are necessary. Complaints that do not satisfy the pleading requirements will be dismissed without prejudice to refile.³⁹⁷

137. We also recognize that the CVAA’s recordkeeping requirements will allow the Commission to obtain records of the efforts taken by manufacturers or providers to implement Sections 255, 716, and 718 and the Commission may use these records as necessary to determine whether a covered entity has complied with its legal obligations. Additionally, consistent with our Section 255 rules, we propose to maintain our current rule that the Commission will promptly forward any informal

³⁹⁴ See 47 U.S.C. § 617(g)(4).

³⁹⁵ VON Coalition Comments at 9.

³⁹⁶ See, e.g., 47 C.F.R. § 76.1302.

³⁹⁷ The CVAA requirement for the Commission to issue an order (within 180 days of the filing of the complaint) concluding an investigation that is triggered by informal complaint, will be tied to the Commission’s receipt of a complaint that satisfies its pleading requirements.

complaint meeting the appropriate filing requirements to each defendant named or determined to be implicated by the complaint.³⁹⁸ Also consistent with our approach taken in our Section 255 rules, we propose to require manufacturers and service providers to establish points of contact for complaints and inquiries under Section 255, 716, or 718.³⁹⁹ We continue to believe that this requirement will facilitate the ability of consumers to contact manufacturers and service providers directly about accessibility issues or concerns and ensure prompt and effective service of complaints on defendant manufacturers and service providers by Commission staff. We seek comment on this proposal.

138. As discussed above, the CVAA provides a party that is the subject of a complaint a reasonable opportunity to respond to such a complaint.⁴⁰⁰ Consistent with this requirement, we propose that answers to informal complaints must: (1) be filed with the Commission and served on the complainant within twenty days of service of the complaint, unless the Commission or its staff specifies another time period; (2) respond specifically to each material allegation in the complaint; (3) set forth the steps taken by the manufacturer or service provider to make the product or service accessible and usable; (4) set forth the procedures and processes used by the manufacturer or service provider to evaluate whether it was achievable to make the product or service accessible and usable; (5) set forth the names, titles, and responsibilities of each decisionmaker in the evaluation process; (6) set forth the manufacturer's basis for determining that it was not achievable to make the product or service accessible and usable; (7) provide all documents supporting the manufacturer's or service provider's conclusion that it was not achievable to make the product or service accessible and usable; (8) include a certification by an officer of the manufacturer or service provider that it was not achievable to make the product or service accessible and usable; (9) set forth any claimed defenses; (10) set forth any remedial actions already taken or proposed alternative relief without any prejudice to any denials or defenses raised; (11) provide any other information or materials specified by the Commission as relevant to its consideration of the complaint; and (12) be prepared or formatted in the manner requested by the Commission and the complainant, unless otherwise permitted by the Commission for good cause shown.⁴⁰¹ We seek comment on this proposal. We further propose that within ten (10) days after service of an answer, unless otherwise directed by the Commission, the complainant may file and serve a reply, which shall be responsive to matters contained in the answer and shall not contain new matters. We seek comment on this proposal as well. Given the statutory requirement for the Commission to issue an order concluding an investigation of an informal complaint within 180 days of the filing of the complaint, are there other pleading requirements we should impose, and, if so, what should these be?

139. As noted above, the CVAA requires the Commission to issue an order that finds whether a violation has occurred within the time limits required by the Act, and to provide an explanation for its conclusion. Also, as we have noted, the statute provides that if the Commission determines that a violation has occurred, the Commission may direct the manufacturer or service provider to bring the service, or in the case of a manufacturer, the next generation of the equipment or device, into compliance with requirements of those Sections within a reasonable time established by the Commission in its order.⁴⁰² In addition, as also previously mentioned, before issuing a final order, the Commission is required to provide the responding party a reasonable opportunity to comment on any proposed remedial action.⁴⁰³ We would further note that the CVAA authorizes the Commission to direct manufacturers and service providers of ACS to bring their equipment and services into compliance either in the order

³⁹⁸ 47 C.F.R. § 6.18(a).

³⁹⁹ 47 C.F.R. § 6.18(b).

⁴⁰⁰ 47 U.S.C. § 618(a)(4).

⁴⁰¹ See *supra* para. 129 (*Receipt and Filing of Complaints*).

⁴⁰² 47 U.S.C. § 618(a)(3)(B)(i).

⁴⁰³ *Id.*

concluding an investigation based on an informal complaint or “in a subsequent order.”⁴⁰⁴ Recognizing the importance of the rapid implementation of remedies to achieving the CVAA’s broader goals, however, we will endeavor to issue a determination regarding remedies within 180 days after an informal complaint is filed, or shortly thereafter in a subsequent order, whenever feasible.⁴⁰⁵ We seek comment on this approach.

140. We recognize that the Commission must exercise any remedial authority selectively and carefully, based on legislative history, particularly for consumer and wireless devices, clarifying that “the Commission shall provide [service providers and manufacturers] a reasonable time to bring the service or equipment at issue into compliance . . . [and should not] require retrofitting of such equipment that is already in the market.”⁴⁰⁶ We seek comment on what we should consider a reasonable time in which to bring inaccessible devices or services into compliance and how best to impose compliance in this context consistent with our proposals for remedies and sanctions discussed above. We also seek input on what constitutes “reasonable opportunity” to comment on any proposed remedial action.

4. Formal Complaints

141. *Applicability of Sections 1.720 – 1.736.* In addition to allowing aggrieved parties an opportunity to file informal complaints, Section 717 states that such parties may use our more formal adjudicative procedures to pursue accessibility claims against manufacturers or service providers under Sections 255, 716, and 718. This Section further directs the Commission to establish regulations that facilitate the filing of such formal claims. To date, Section 255 claims have been subject to the procedures laid out in sections 1.720 - 1.736 of the Commission's rules.⁴⁰⁷ Under these rules, both complainants and defendants are required to (1) certify in their respective complaints and answers that they attempted in good faith to settle the dispute before the complaint was filed with the Commission; and (2) submit detailed, factual and legal support, accompanied by affidavits and documentation, for their respective positions in the initial complaint and answer.⁴⁰⁸ The rules also place strict limits on the availability of discovery and subsequent pleading opportunities to present and defend against claims of misconduct.⁴⁰⁹ Additionally, the rules include additional procedural and pleading requirements designed to expedite resolution of any formal complaint.⁴¹⁰ We propose to require aggrieved parties to follow our existing formal complaint procedures, as modified in our proposed rules.⁴¹¹ We seek comment on whether we should consider additional modifications to these rules in order to facilitate the filing of such formal complaints.

⁴⁰⁴ *Id.*

⁴⁰⁵ The Commission must, however, conclude the investigation and include a determination whether any violation occurred within 180 days. *See id.*

⁴⁰⁶ Senate Report at 9 (noting that in those instances where consumer and wireless devices have a relatively short life cycle in the marketplace, “the Committee does not expect the Commission to require retrofitting of such equipment that is already in the market”).

⁴⁰⁷ 47 C.F.R. §§ 1.720 – 1.736. *See also* 47 C.F.R. § 6.21.

⁴⁰⁸ 47 C.F.R. § 1.721.

⁴⁰⁹ 47 C.F.R. § 1.729.

⁴¹⁰ 47 C.F.R. § 1.730.

⁴¹¹ These modifications include deleting references to provisions that are not relevant to consumer-filed complaints in the accessibility context (e.g., provisions relating to complaints filed under Section 271 of the Act), as well as to “rocket docket” procedures. Because the CVAA requires the Commission to address informal complaints within 180 days of filing, and because our accelerated docket procedures were designed to adjudicate disputes between carriers that satisfy certain criteria, we are inclined not to extend these procedures to formal complaints in the accessibility context.

142. Additionally, we propose not to require parties to obtain Commission approval in order to file a formal complaint; we also propose not to require parties to invoke our informal complaint processes as a prerequisite to filing a formal complaint.⁴¹² No such requirements exist in the statute or our formal complaint rules and we find no basis in the existing record to conclude that such requirements are needed for complaints filed under Section 255, 716, or 718. We seek comment on this proposal and ask parties to describe whether there are any circumstances that warrant such requirements.

VII. SECTION 718 INTERNET BROWSERS BUILT INTO TELEPHONES USED WITH PUBLIC MOBILE SERVICES.

143. We seek further comment on the upcoming obligations imposed by Section 718, which generally provides that “[i]f a manufacturer of a telephone used with public mobile services . . . includes an Internet browser in such telephone, or if a provider of mobile service arranges for the inclusion of a browser in telephones to sell to customers, the manufacturer or provider shall ensure that the functions of the included browser (including the ability to launch the browser) are accessible to and usable by individuals who are blind or have a visual impairment, unless doing so is not achievable.”⁴¹³

144. While Section 718’s requirements will not take effect for three years, we agree with ACB that the accessibility of mobile web access technologies is critical⁴¹⁴ and seek comment on the best way(s) to implement Section 718, so as to afford affected manufacturers and service providers an opportunity to provide input at the outset, as well as to make the necessary arrangements to achieve compliance by the time the provisions go into effect. We would particularly welcome input on how the Commission can best inform and assist covered entities on the means by which they can meet their obligation to provide access to Internet browsers in mobile phones. Specifically, we seek comment on Verizon’s proposal that we “encourage industry forums and working groups to develop accessibility standards for mobile browsers” because a “cooperative effort” will be needed to ensure compliance.⁴¹⁵ To what extent should the Commission help to facilitate this discussion, for example through an advisory committee or a working group that is part of the Commission’s Consumer Advisory Committee? We also seek comment on Code Factory’s recommendation that manufacturers and operating system developers develop an accessibility API to foster the incorporation of screen readers into mobile platforms across different phones, which would render the web browser and other mobile phone functions accessible to individuals who are blind or visually impaired.⁴¹⁶

VIII. PROCEDURAL MATTERS

A. Regulatory Flexibility Act

145. Pursuant to the Regulatory Flexibility Act of 1980, as amended (RFA),⁴¹⁷ the Initial Regulatory Flexibility Analysis (IRFA) for the Notice of Proposed Rulemaking is set forth in Appendix C.

B. Paperwork Reduction Act of 1995

146. *Initial Paperwork Reduction Analysis.* The *Notice of Proposed Rule Making* contains proposed new or modified information collection requirements. The Commission, as part of its continuing effort to reduce paperwork burdens, invites the general public and the Office of Management

⁴¹² See, e.g., CTIA Comments at 17.

⁴¹³ See 47 U.S.C. § 619(a).

⁴¹⁴ ACB Reply Comments at 29-30.

⁴¹⁵ Verizon Comments at 7.

⁴¹⁶ Code Factory Reply Comments at 1-3; see also discussion *supra* para. 90.

⁴¹⁷ See 5 U.S.C. § 604.

and Budget (OMB) to comment on the information collection requirements contained in this document, as required by the Paperwork Reduction Act of 1995, Public Law 104-13. Public and agency comments are due 60 days after the date of publication in the Federal Register. Comments should address: (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology. In addition, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, *see* 44 U.S.C. § 3506(c)(4), we seek specific comment on how we might "further reduce the information collection burden for small business concerns with fewer than 25 employees." We note that we have described impacts that might affect small businesses, which includes most businesses with fewer than 25 employees, in the IRFA in Appendix C, *infra*.

C. Comment Filing Procedures

147. Pursuant to sections 1.415 and 1.419 of the Commission's rules, 47 CFR §§ 1.415, 1.419, interested parties may file comments and reply comments on or before the dates indicated on the first page of this document. Comments may be filed using: (1) the Commission's Electronic Comment Filing System (ECFS), (2) the Federal Government's eRulemaking Portal, or (3) by filing paper copies. See *Electronic Filing of Documents in Rulemaking Proceedings*, 63 FR 24121 (1998).

- Electronic Filers: Comments may be filed electronically using the Internet by accessing the ECFS: <http://fjallfoss.fcc.gov/ecfs2/> or the Federal eRulemaking Portal: <http://www.regulations.gov>.
- Paper Filers: Parties who choose to file by paper must file an original and four copies of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number.

Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

- All hand-delivered or messenger-delivered paper filings for the Commission's Secretary must be delivered to FCC Headquarters at 445 12th St., SW, Room TW-A325, Washington, DC 20554. The filing hours are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building.
- Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.
- U.S. Postal Service first-class, Express, and Priority mail must be addressed to 445 12th Street, SW, Washington DC 20554.

148. People with Disabilities: 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 & Governmental Affairs Bureau at 202-418-0530 (voice), 202-418-0432 (tty).

IX. ORDERING CLAUSES

149. Accordingly, IT IS ORDERED that pursuant to Sections 1-4, 255, 303(r), 403, 503, 716, 717, and 718 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-154, 255, 303(r), 403,

503, 617, 618, and 619 this NOTICE OF PROPOSED RULEMAKING in CG Docket No. 10-145, WT Docket No. 96-198, and CG Docket No. 10-213 is ADOPTED.

150. IT IS FURTHER ORDERED that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this NOTICE OF PROPOSED RULEMAKING, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

APPENDIX A

List of Commenters

(CG Docket No. 10-213)

This is a list of parties who filed comments and reply comments within the designated comment periods in the proceeding. The complete record in this proceeding is available in the Electronic Comment Filing System located at <http://www.fcc.gov/cgb/ecfs/>.

Comments

Advanced Communication Provisions of The Twenty-First Century Communications and Video Accessibility Act of 2010, CG Docket No. 10-213, Public Notice, 25 FCC Rcd 14589 (2010).

Commenter**Abbreviation**

AT&T Services, Inc.	AT&T
Blooston Rural Carriers	Blooston Rural Carriers
Communication Service For The Deaf, Inc.	CSD
Consumer Electronics Association	CEA
Convo Communications LLC	Convo
CTIA-The Wireless Association	CTIA
William Eipper	Eipper
Entertainment Software Association	ESA
Information Technology Industry Council	ITI
Microsoft Corp.	Microsoft
Motorola Inc.	Motorola
National Association of the Deaf (NAD), <i>et al.</i>	Consumer Groups
National Telecommunications Cooperative Association	NTCA
Larry Railey	Railey
Rehabilitation Engineering Research Center on Universal Interface and Information Technology Access ⁴¹⁸	RERC-IT
Sorenson Communications, Inc.	Sorenson
Telecommunications Industry Association	TIA
T-Mobile USA, Inc.	T-Mobile
Verizon and Verizon Wireless	Verizon
Voice on the Net Coalition	VON Coalition
Vonage Holdings Corporation	Vonage
Words+, Inc. ⁴¹⁹	Words+

⁴¹⁸ Gregg C. Vanderheiden is the filer of record.

⁴¹⁹ Jeffrey A. Dahlen is the filer of record.

Reply Comments

<u>Reply Comments</u>	<u>Abbreviation</u>
AbleLink Technologies ⁴²⁰	AbleLink
Adaptive Solutions ⁴²¹	Adaptive Solutions
Alliance for Telecommunications Industry Solutions	ATIS
American Association of People with Disabilities	AAPD
American Council of the Blind	ACB
American Foundation for the Blind on Advanced Communications ⁴²²	AFB
Code Factory	Code Factory
Communication Service For The Deaf, Inc.	CSD
Compusult Limited ⁴²³	Compusult
CTIA-The Wireless Association	CTIA
Entertainment Software Association	ESA
Yvonne Garris	Garris
Google Inc	Google
Ron Kolesar	Kolesar
Lingraphicare America, Inc. (Andrew Gomory is the filer of record)	Lingraphicare
National Association of the Deaf (NAD), <i>et al.</i>	Consumer Groups
National Federation of the Blind	NFB
John O'Rourke	O'Rourke
Point-and-Read, Inc. ⁴²⁴	Point-and-Read
Kurt Potter	Potter
Purple Communications	Purple
Rehabilitation Engineering Research Center for Wireless Technologies ⁴²⁵	Wireless RERC
Rehabilitation Engineering Research Centers on Universal Interface & Information Technology Access (RERC-IT) and Telecommunications Access (RERC-TA) ⁴²⁶	IT and Telecom RERCs
RJ Sandefur	Sandefur
Vonage Holdings Corporation	Vonage

⁴²⁰ Joan Cunningham is the filer of record.

⁴²¹ Sherion J. Hollingsworth is the filer of record.

⁴²² Mark D. Richert is the filer of record.

⁴²³ Paul Mitten is the filer of record.

⁴²⁴ Benjamin Slotznick is the filer of record.

⁴²⁵ Wireless RERC is the filer of record.

⁴²⁶ IT and Telecom RERCs are the filers of record.

APPENDIX B

Proposed Rules

The Federal Communications Commission proposes to amend Parts 1, 6 and 7 and add new Part 8 of Title 47 of the Code of Federal Regulations as follows:**Part 1 of Title 47 of the Code of Federal Regulations is amended as follows:**

1. The authority citation for Part 1 reads as follows:

AUTHORITY: 15 U.S.C. 79 *et seq.*; 47 U.S.C. 151, 154, 160, 201, 225, 303, 617 and 618.

2. The Federal Communications Commission proposes to amend § 1.80 by redesignating paragraphs (b)(3), (b)(4), and (b)(5) as paragraphs (b)(4), (b)(5) and (b)(6) and by adding new paragraph(b)(3) and revising newly redesignated paragraph (b)(4) to read as follows:

§ 1.80 Forfeiture Proceedings

* * * * *

(b) * * *

(3) If the violator is a manufacturer or service provider subject to the requirements of section 255, 716 or 718 of the Communications Act, and is determined by the Commission to have violated any such requirement, the manufacturer or service provider shall be liable to the United States for a forfeiture penalty of not more than \$100,000 for each violation or each day of a continuing violation, except that the amount assessed for any continuing violation shall not exceed a total of \$1,000,000 for any single act or failure to act.

(4) In any case not covered in paragraphs (b)(1), (b)(2), or (b)(3) of this section, the amount of any forfeiture penalty determined under this section shall not exceed \$16,000 for each violation or each day of a continuing violation, except that the amount assessed for any continuing violation shall not exceed a total of \$112,500 for any single act or failure to act described in paragraph (a) of this section.

* * * * *

Part 6 of Title 47 of the Code of Federal Regulations is amended as follows:

3. The authority citation for Part 6 reads as follows:

AUTHORITY: 47 U.S.C. 151-154, 251, 255, 303(r), 617, 618.

4. The Federal Communications Commission proposes amending Part 6 by removing Subpart D – Enforcement.

Part 7 of Title 47 of the Code of Federal Regulations is amended as follows:

5. The authority citation for Part 7 reads as follows:

AUTHORITY: 47 U.S.C. 151, 154(i), 154(j), 208, 255, 617, 618.

6. The Federal Communications Commission proposes amending Part 7 by removing Subpart D – Enforcement.

Title 47 of the Code of Federal Regulations is amended by adding the following new Part 8:**PART 8 - ACCESS TO ADVANCED COMMUNICATIONS SERVICES AND EQUIPMENT BY PEOPLE WITH DISABILITIES****Subpart A – Scope**

§ 8.1 Applicability

§ 8.2 Exclusions

§ 8.3 Waivers – Multi-purpose Services and Equipment.

Subpart B – Definitions

§ 8.4 Definitions

Subpart C – Implementation Requirements – What must Covered Entities Do?

§ 8.5 Obligations

§ 8.6 Performance Objectives

Subpart D - Recordkeeping and Enforcement

§ 8.16 Generally

§ 8.17 Recordkeeping

§ 8.18 Informal or formal complaints

§ 8.19 Informal complaints; form and content

§ 8.20 Procedure; designation of agents for service

§ 8.21 Answers and Replies to informal complaints

§ 8.22 Review and disposition of informal complaints.

§ 8.23 General pleading requirements.

§ 8.24 Format and content of formal complaints.

§ 8.25 Damages.

§ 8.26 Joinder of complainants and causes of action.

§ 8.27 Answers.

§ 8.28 Cross-complaints and counterclaims.

§ 8.29 Replies.

§ 8.30 Motions.

§ 8.31 Formal complaints not stating a cause of action; defective pleadings.

§ 8.32 Discovery.

§ 8.33 Confidentiality of information produced or exchanged by the parties.

§ 8.34 Other required written submissions.

§ 8.35 Status conference.

§ 8.36 Specifications as to pleadings, briefs, and other documents; subscription.

§ 8.37 Copies; service; separate filings against multiple defendants.

AUTHORITY: 47 U.S.C. 151-154, 255, 303, 403, 503, 617, 618 unless otherwise noted.

Subpart A – Scope

§ 8.1 Applicability.

Subject to the exclusions described in this part, the rules in this part apply to:

- (a) Any provider of advanced communications services, as that term is defined in this part, offering such services in or affecting interstate commerce;
- (b) Any manufacturer of equipment used for advanced communications services, including but not limited to end user equipment, network equipment, and software, that such manufacturer offers for sale or otherwise distributes in interstate commerce.

§ 8.2 Exclusions.

- (a) Subject to the exception in paragraph (c) of this section, no person shall be subject to the requirements of the rules in this part with respect to advanced communications services or the equipment used to provide or access such services to the extent such person transmits, routes, or stores in intermediate or transient storage the communications made available through the provision of advanced communications services by a third party.
- (b) Subject to the exception in paragraph (c) of this section, no person shall be subject to the requirements of the rules in this part with respect to advanced communications services or the equipment used to provide or access such services to the extent such person provides an information location tool, such as a directory, index, reference, pointer, menu, guide, user interface, or hypertext link, through which an end user obtains access to such video programming, online content, applications, services, advanced communications services, or equipment used to provide or access advanced communications services.
- (c) The exclusions in paragraphs (a) and (b) of this section shall not apply to any person who relies on third party applications, services, software, hardware, or equipment to comply with the requirements of this part with respect to the provision of advanced communications services or the manufacture of equipment used to provide such services.
- (d) The requirements of this part shall not apply to any equipment or services, including interconnected VoIP service, that were subject to the requirements of section 255 of the Act on October 7, 2010, which remain subject to section 255 of the Act, as amended, and subject to the rules in parts 6 and 7 of this chapter, as amended.
- (e) None of the rules in this part shall apply to customized equipment or services that are not offered directly to the public regardless of the facilities used. Also, none of the rules in this part shall apply to customized equipment or services that are not offered to such classes of users as to be effectively available to the public regardless of the facilities used. However, this paragraph shall not be construed to create an exemption for equipment or for services designed for and used by members of the general public.

§ 8.3 Waivers.

Multi-purpose Services and Equipment.

(a) **Manufacturer.** On its own motion or in response to a petition by a manufacturer of equipment used to provide or access advanced communications service or by any interested party, the Commission may waive the requirements of this part for a feature or function of equipment used to provide or access advanced communications services, or for any class of such equipment that

- (1) Is capable of accessing advanced communications services and;
- (2) Is designed for multiple purposes, but is designed primarily for purposes other than providing or accessing advanced communications services.

(b) **Service Provider.** On its own motion or in response to a petition by a provider of advanced communications services or by any interested party, the Commission may waive the requirements of this part for a feature or function of equipment used to provide or access advanced communications services, or for any class of such equipment that

- (1) is capable of accessing advanced communications services and;
- (2) is designed for multiple purposes, but is designed primarily for purposes other than providing or accessing advanced communications services.

Subpart B – Definitions

§ 8.4 Definitions

(a) The term *accessible* shall have the meaning provided in § 8.6(b).

(b) The term *achievable* shall mean with reasonable effort or expense, as determined by the Commission. In making such a determination, the Commission shall consider:

(i) The nature and cost of the steps needed to meet the requirements of Section 716 of the Act and this part with respect to the specific equipment or service in question, such that if accessibility to and usability by individuals with disabilities can be achieved only by a fundamental alteration to the specific equipment or service in question, then such accessibility and usability is not achievable;

(ii) The technical and economic impact on the operation of the manufacturer or provider and on the operation of the specific equipment or service in question, including on the development and deployment of new communications technologies;

(iii) The type and operations of the manufacturer or provider; and

(iv) The extent to which the service provider or manufacturer in question offers accessible services or equipment containing varying degrees of functionality and features, and offered at differing price points.

(c) The term *advanced communications services* shall mean:

- (1) Interconnected VoIP service, as that term is defined in this section;

- (2) Non-interconnected VoIP service, as that term is defined in this section;
- (3) Electronic messaging service, as that term is defined in this section; and
- (4) Interoperable video conferencing service, as that term is defined in this section.
- (d) The term *application* shall mean software designed to perform or to help the user perform a specific task or specific tasks, such as communicating by voice, electronic text messaging, or video conferencing.
- (e) The term *compatible* shall have the meaning provided in § 8.6(d).
- (f) The term *customer premises equipment* shall mean equipment employed on the premises of a person (other than a carrier) to originate, route, or terminate telecommunications.
- (g) The term *customized equipment or services* shall mean equipment and services that are customized to unique specifications requested by a consumer and not otherwise available to the general public, including public safety networks and devices, but shall not apply to equipment distributed to and services used by public or private sector employees, including public safety employees.
- (h) The term *disability* shall mean a physical or mental impairment that substantially limits one or more of the major life activities of an individual; a record of such an impairment; or being regarded as having such an impairment.
- (i) The term *electronic messaging service* means a service that provides real-time or near real-time non-voice messages in text form between individuals over communications networks.
- (j) The term *end user equipment* shall mean equipment designed for consumer use, including equipment designed for use by individuals with disabilities.
- (k) The term *hardware* shall mean a tangible communications device, equipment, or physical component of communications technology, including peripheral devices, such as a smart phone, a laptop computer, a desk top computer, a screen, a keyboard, a speaker, or an amplifier.
- (l) The term *interconnected VoIP service* shall have the same meaning as in § 9.3 of this chapter.
- (m) An *interoperable video conferencing service* means a service that provides real-time video communications, including audio, to enable users to share information of the user's choosing.
- (n) The term *manufacturer* shall mean an entity that makes or produces a product, including equipment used for advanced communications services, including end user equipment, network equipment, and software.
- (o) The term *network equipment* shall mean equipment facilitating the use of a computer network, including routers, network interface cards, networking cables, modems, and other related hardware.
- (p) The term *nominal cost* in regard to accessibility and usability solutions shall mean small enough so as to generally not be a factor in the consumer's decision to acquire a product or service that the consumer otherwise desires.
- (q) A *non-interconnected VoIP service* is a service that:

- (a) Enables real-time voice communications that originate from or terminate to the user's location using Internet protocol or any successor protocol; and
- (b) Requires Internet protocol-compatible customer premises equipment (CPE); and
- (c) Is not an interconnected VoIP service.

(r) The term *peripheral devices* shall mean devices employed in connection with equipment, including software, covered by this part to translate, enhance, or otherwise transform advanced communications services into a form accessible to individuals with disabilities.

(s) The term *proprietary technology* shall mean hardware, software, and services such as devices, Internet service, and software applications, that are unique and legally owned, or for which a copyright or license is held, by an entity that does not offer such technology free or on an open source basis.

(t) The term *service provider* shall mean a provider of advanced communications services that are offered in or affecting interstate commerce, including a provider of applications and services that can be used for advanced communications services and that can be accessed (*i.e.*, downloaded or run) by users over a service provider's network.

(u) The term *software* shall mean computer programs, procedures, rules, and related data and documentation that direct the use and operation of a computer or related device and instruct it to perform a given task or function.

(v) The term *specialized customer premises equipment* shall mean customer premise equipment which is commonly used by individuals with disabilities to achieve access.

(w) The term *usable* shall have the meaning provided in § 8.6(c) of this part.

Subpart C – Implementation Requirements – What must Covered Entities Do?

§ 8.5 Obligations

(a) General Obligations

(1) With respect to equipment manufactured after the effective date of the regulations, a manufacturer of equipment used for advanced communications services, including end user equipment, network equipment, and software, must ensure that the equipment and software that such manufacturer offers for sale or otherwise distributes in interstate commerce shall be accessible to and usable by individuals with disabilities, unless such requirements are not achievable.

(2) With respect to services provided after the effective date of the regulations, a provider of advanced communications services must ensure that services offered by such provider in or affecting interstate commerce are accessible to and usable by individuals with disabilities, unless such requirements are not achievable.

(3) If accessibility is not achievable either by building it in or by using third party accessibility solutions, then a manufacturer or service provider shall ensure that its equipment or service is compatible with existing peripheral devices or specialized customer premises equipment.

(4) Providers of advanced communications services shall not install network features, functions, or capabilities that impede accessibility or usability.

(5) Advanced communications services and the equipment and networks used with these services may not impair or impede the accessibility of information content when accessibility has been incorporated into that content for transmission through such services, equipment or networks.

(b) Product design, development, and evaluation

(1) Manufacturers and service providers must consider performance objectives set forth in section 8.7 at the design stage as early and as consistently as possible and must implement such evaluation to the extent that it is achievable.

(2) Manufacturers and service providers must identify barriers to accessibility and usability as part of such evaluation.

(c) Information Pass Through

Equipment used for advanced communications services, including end user equipment, network equipment, and software must pass through cross-manufacturer, nonproprietary, industry-standard codes, translation protocols, formats or other information necessary to provide advanced communications services in an accessible format, if achievable. Signal compression technologies shall not remove information needed for access or shall restore it upon decompression.

(d) Information, documentation, and training

Manufacturers and service providers must ensure access to information and documentation they provide to customers, if achievable. Such information and documentation includes user guides, bills, installation guides for end user devices, and product support communications, in alternate formats, as needed. The requirement to provide access to information also includes ensuring that individuals with disabilities can access, at no extra cost, call centers and customer support regarding both the product generally and the accessibility features of the product.

§ 8.6 Performance Objectives

(a) Generally – Manufacturers and service providers shall ensure that equipment and services covered by this part are accessible, usable, and compatible as those terms are defined in paragraphs (b) through (d) of this section.

(b) Accessible – The term *accessible* shall mean that:

(1) Input, control, and mechanical functions shall be locatable, identifiable, and operable in accordance with each of the following, assessed independently:

(i) Operable without vision. Provide at least one mode that does not require user vision.

(ii) Operable with low vision and limited or no hearing. Provide at least one mode that permits operation by users with visual acuity between 20/70 and 20/200, without relying on audio output.

(iii) Operable with little or no color perception. Provide at least one mode that does not

require user color perception.

(iv) Operable without hearing. Provide at least one mode that does not require user auditory perception.

(v) Operable with limited manual dexterity. Provide at least one mode that does not require user fine motor control or simultaneous actions.

(vi) Operable with limited reach and strength. Provide at least one mode that is operable with user limited reach and strength.

(vii) Operable with a Prosthetic Device. Controls shall be operable without requiring body contact or close body proximity.

(viii) Operable without time-dependent controls. Provide at least one mode that does not require a response time or allows response time to be by-passed or adjusted by the user over a wide range.

(ix) Operable without speech. Provide at least one mode that does not require user speech.

(x) Operable with limited cognitive skills. Provide at least one mode that minimizes the cognitive, memory, language, and learning skills required of the user.

(2) All information necessary to operate and use the product, including but not limited to, text, static or dynamic images, icons, labels, sounds, or incidental operating cues, [shall] comply with each of the following, assessed independently:

(i) Availability of visual information. Provide visual information through at least one mode in auditory form.

(ii) Availability of visual information for low vision users. Provide visual information through at least one mode to users with visual acuity between 20/70 and 20/200 without relying on audio.

(iii) Access to moving text. Provide moving text in at least one static presentation mode at the option of the user.

(iv) Availability of auditory information. Provide auditory information through at least one mode in visual form and, where appropriate, in tactile form.

(v) Availability of auditory information for people who are hard of hearing. Provide audio or acoustic information, including any auditory feedback tones that are important for the use of the product, through at least one mode in enhanced auditory fashion (i.e., increased amplification, increased signal-to-noise ratio, or combination).

(vi) Prevention of visually-induced seizures. Visual displays and indicators shall minimize visual flicker that might induce seizures in people with photosensitive epilepsy.

(vii) Availability of audio cutoff. Where a product delivers audio output through an external speaker, provide an industry standard connector for headphones or personal listening devices (e.g., phone-like handset or earcup) which cuts off the speaker(s) when used.

(viii) Non-interference with hearing technologies. Reduce interference to hearing

technologies (including hearing aids, cochlear implants, and assistive listening devices) to the lowest possible level that allows a user to utilize the product.

(ix) Hearing aid coupling. Where a product delivers output by an audio transducer which is normally held up to the ear, provide a means for effective wireless coupling to hearing aids.

(c) Usable: The term *usable* shall mean that individuals with disabilities have access to the full functionality and documentation for the product, including instructions, product information (including accessible feature information), documentation and technical support functionally equivalent to that provided to individuals without disabilities.

(d) Compatible: The term *compatible* shall mean compatible with peripheral devices and specialized customer premises equipment, and in compliance with the following provisions, as applicable:

(1) External electronic access to all information and control mechanisms. Information needed for the operation of products (including output, alerts, icons, on-line help, and documentation) shall be available in a standard electronic text format on a cross-industry standard port and all input to and control of a product shall allow for real time operation by electronic text input into a cross-industry standard external port and in cross-industry standard format. The cross-industry standard port shall not require manipulation of a connector by the user.

(2) Connection point for external audio processing devices. Products providing auditory output shall provide the auditory signal at a standard signal level through an industry standard connector.

(3) TTY connectability. Products that provide a function allowing voice communication and which do not themselves provide a TTY functionality shall provide a standard non-acoustic connection point for TTYs. It shall also be possible for the user to easily turn any microphone on and off to allow the user to intermix speech with TTY use.

(4) TTY signal compatibility. Products, including those providing voice communication functionality, shall support use of all cross-manufacturer non-proprietary standard signals used by TTYs.

Subpart D - Recordkeeping and Enforcement

§ 8.16 Generally

(a) The rules in this subpart regarding recordkeeping and enforcement are applicable to all manufacturers and service providers that are subject to the requirements of sections 255, 716, and 718 of the Act.

(b) The requirements set forth in § 8.17 of this subpart shall be effective one year after the effective date of the rules in this part.

(c) The requirements set forth in §§ 8.18 through 8.37 of this subpart shall be effective on or before October 8, 2011.

§ 8.17 Recordkeeping

(a) Each manufacturer and service provider subject to section 255, 716, or 718 of the Act, must maintain, in the ordinary course of business and for a reasonable period, records of the efforts taken by such manufacturer or provider to implement sections 255, 716, and 718, as applicable, including:

(i) information about the manufacturer's or service provider's efforts to consult with individuals with disabilities;

(ii) descriptions of the accessibility features of its products and services; and

(iii) information about the compatibility of its products and services with peripheral devices or specialized customer premise equipment commonly used by individuals with disabilities to achieve access.

(b) An officer of each manufacturer and service provider subject to section 255, 716, or 718 of the Act, must sign and file an annual compliance certificate with the Commission. The officer must state in the certificate that he or she has personal knowledge that the manufacturer or service provider has established operating procedures that are adequate to ensure compliance with the rules in this subpart and that records are being kept in accordance with this section. The certificate shall identify the agent designated for service pursuant to section 8.20(b) of this subpart and provide contact information for this agent.

(c) Upon the service of a complaint, formal or informal, on a manufacturer or service provider under this section, a copy of the records maintained by the manufacturer or service provider that are directly relevant to the equipment or service that is the subject of the complaint shall be provided to the Commission in accordance with section 8.21(a) of this subpart. Requests for confidential treatment of documents or information submitted under this subsection may be filed in accordance with section 0.459 of this chapter.

(d) In response to a filed formal or informal complaint, a manufacturer or service provider may, instead of providing a duplicate document, record or other information directly related to the equipment or service that is the subject of the complaint, direct the Commission to documents or records already in the Commission's possession by providing sufficient specificity for Commission staff to locate the relevant record or document or portion thereof, including **[title of proceeding or report, date, page/para. #s, etc.]**.

§ 8.18 Informal or formal complaints

Complaints against manufacturers or service providers, as defined under this subpart, for alleged violations of this subpart may be either informal or formal.

§ 8.19 Informal complaints; form and content

(a) An informal complaint alleging a violation of section 255, 716 or 718 of the Act or this chapter may be transmitted to the Commission via any reasonable means, e.g., letter, facsimile transmission, telephone (202-418-2517 (voice); 202-418-2922 (TTY)), Internet-email (dro@fcc.gov), audio-cassette recording, and Braille.

(b) An informal complaint shall include:

- (1) The name, address, e-mail address, and telephone number of the complainant;
- (2) The name and address of the manufacturer or service provider defendant against whom the complaint is made;

- (3) The date or dates on which the complainant or person on whose behalf the complaint is being filed either purchased, acquired, or used or attempted to purchase, acquire, or use the equipment or service about which the complaint is being made;
- (4) A complete statement of fact explaining why the complainant contends that the defendant manufacturer or provider is in violation of section 255, 716 or 718 of the Act or this chapter, including details regarding the service or equipment and the relief requested, and all documentation that supports the complainant's contention;
- (5) The complainant's preferred format or method of response to the complaint by the Commission and defendant (e.g., letter, facsimile transmission, telephone (voice/TRS/TTY), Internet email, audio-cassette recording, Braille; or some other method that will best accommodate the complainant's disability, if any; and
- (6) Any other information that is required by the Commission's accessibility complaint form.

§ 8.20 Procedure; designation of agents for service

- (a) The Commission shall promptly forward any informal complaint meeting the requirements of § 8.19 of this subpart to each manufacturer and service provider named in or determined by the staff to be implicated by the complaint.
- (b) To ensure prompt and effective service of informal and formal complaints filed under this subpart, every manufacturer and service provider subject to the requirements of section 255, 716, or 718 of the Act and this subpart, shall designate an agent, and may designate additional agents if it so chooses, upon whom service may be made of all notices, inquiries, orders, decisions, and other pronouncements of the Commission in any matter before the Commission. Such designation shall include, for the manufacturer or the service provider, a name or department designation, business address, telephone number, and, if available TTY number, facsimile number, and Internet e-mail address.

§ 8.21 Answers and replies to informal complaints

- (a) Any manufacturer or service provider to whom an informal complaint is directed by the Commission under this subpart shall file and serve an answer. The answer shall:
 - (1) Be filed with the Commission and served on the complainant within twenty days of service of the complaint, unless the Commission or its staff specifies another time period;
 - (2) Respond specifically to each material allegation in the complaint;
 - (3) Set forth the steps taken by the manufacturer or service provider to make the product or service accessible and usable;
 - (4) Set forth the procedures and processes used by the manufacturer or service provider to evaluate whether it was achievable to make the product or service accessible and usable;
 - (5) Set forth the names, titles, and responsibilities of each decision maker in the evaluation process;
 - (6) Set forth the manufacturer's basis for determining that it was not achievable to make the product or service accessible and usable;
 - (7) Provide all documents supporting the manufacturer's or service provider's conclusion that it was not achievable to make the product or service accessible and usable;
 - (8) Include a certification by an officer of the manufacturer or service provider that it was not achievable to make the product or service accessible and usable;
 - (9) Set forth any claimed defenses;

- (10) Set forth any remedial actions already taken or proposed alternative relief without any prejudice to any denials or defenses raised;
 - (11) Provide any other information or materials specified by the Commission as relevant to its consideration of the complaint; and
 - (12) Must be prepared or formatted in the manner requested by the Commission and the complainant, unless otherwise permitted by the Commission for good cause shown.
- (b) The complainant may file and serve a reply. The reply shall:
- (1) Be served on the Commission and the complainant within ten days after service of answer, unless otherwise directed by the Commission;
 - (2) Be responsive to matters contained in the answer and shall not contain new matters.

§ 8.22 Review and disposition of informal complaints.

- (a) The Commission will investigate the allegations in any informal complaint filed that satisfies the requirements of section 8.18(b) of this subpart, and, within 180 days after the date on which such complaint was filed with the Commission, issue an order finding whether the manufacturer or service provider that is the subject of the complaint violated section 255, 716, or 718 of the Act, or the Commission's implementing rules, and provide a basis therefor, unless such complaint is resolved before that time.
- (b) If the Commission determines in an order issued pursuant to paragraph (a) that the manufacturer or service provider violated section 255, 716, or 718 of the Act, or the Commission's implementing rules, the Commission may, in such order, or in a subsequent order:
 - (1) Direct the manufacturer or service provider to bring the service, or in the case of a manufacturer, the next generation of the equipment or device, into compliance with the requirements of section 255, 716, or 718 of the Act, and the Commission's rules, within a reasonable period of time; and
 - (2) Take such other enforcement action as the Commission is authorized and as it deems appropriate.
- (c) Any manufacturer or service provider that is the subject of an order issued pursuant to paragraph (b)(1) shall have a reasonable opportunity, as established by the Commission, to comment on the Commission's proposed remedial action before the Commission issues a final order with respect to that action.

§ 8.23 General pleading requirements.

Formal complaint proceedings are generally resolved on a written record consisting of a complaint, answer, and joint statement of stipulated facts, disputed facts and key legal issues, along with all associated affidavits, exhibits and other attachments. Commission proceedings may also require or permit other written submissions such as briefs, written interrogatories, and other supplementary documents or pleadings.

- (a) Pleadings must be clear, concise, and explicit. All matters concerning a claim, defense or requested remedy, including damages, should be pleaded fully and with specificity.
- (b) Pleadings must contain facts which, if true, are sufficient to constitute a violation of the Act or Commission order or regulation, or a defense to such alleged violation.
- (c) Facts must be supported by relevant documentation or affidavit.
- (d) Legal arguments must be supported by appropriate judicial, Commission, or statutory authority.
- (e) Opposing authorities must be distinguished.
- (f) Copies must be provided of all non-Commission authorities relied upon which are not routinely available in national reporting systems, such as unpublished decisions or slip opinions of courts or administrative agencies.
- (g) Parties are responsible for the continuing accuracy and completeness of all information and supporting authority furnished in a pending complaint proceeding. Information submitted, as well as relevant legal authorities, must be current and updated as necessary and in a timely manner at any time before a decision is rendered on the merits of the complaint.
- (h) All statements purporting to summarize or explain Commission orders or policies must cite, in standard legal form, the Commission ruling upon which such statements are based.
- (i) Pleadings shall identify the name, address, telephone number, and facsimile transmission number for either the filing party's attorney or, where a party is not represented by an attorney, the filing party.

§ 8.24 Format and content of formal complaints.

- (a) Subject to paragraph (e) of this section governing supplemental complaints filed pursuant to § 8.25 of this subpart, a formal complaint shall contain:
 - (1) The name of each complainant and defendant;
 - (2) The occupation, address and telephone number of each complainant and, to the extent known, each defendant;
 - (3) The name, address, and telephone number of complainant's attorney, if represented by counsel;
 - (4) Citation to the section of the Communications Act and/or order and/or regulation of the Commission alleged to have been violated.
 - (5) A complete statement of facts which, if proven true, would constitute such a violation. All material facts must be supported, pursuant to the requirements of § 8.30(c) of this subpart and paragraph (a)(11) of this section, by relevant affidavits and documentation, including copies of relevant written agreements, offers, counter-offers, denials, or other related correspondence. The statement of facts shall include a detailed explanation of the manner and time period in which a defendant has allegedly violated the Act, Commission order, or Commission rule in question, including a full identification or description of the communications, transmissions, services, or other carrier conduct complained of and the nature of any injury allegedly sustained by the complainant. Assertions based on information and belief are expressly prohibited unless made in good faith and

accompanied by an affidavit explaining the basis for the plaintiff's belief and why the complainant could not reasonably ascertain the facts from the defendant or any other source;

(6) Proposed findings of fact, conclusions of law, and legal analysis relevant to the claims and arguments set forth in the complaint;

(7) The relief sought, including recovery of damages and the amount of damages claimed, if known;

(8) Certification that the complainant has, in good faith, discussed or attempted to discuss the possibility of settlement with each defendant prior to the filing of the formal complaint. Such certification shall include a statement that, prior to the filing of the complaint, the complainant mailed a certified letter outlining the allegations that form the basis of the complaint it anticipated filing with the Commission to the defendant carrier or one of the defendant's registered agents for service of process that invited a response within a reasonable period of time and a brief summary of all additional steps taken to resolve the dispute prior to the filing of the formal complaint. If no additional steps were taken, such certificate shall state the reason(s) why the complainant believed such steps would be fruitless;

(9) Whether a separate action has been filed with the Commission, any court, or other government agency that is based on the same claim or same set of facts, in whole or in part, or whether the complaint seeks prospective relief identical to the relief proposed or at issue in a notice-and-comment proceeding that is concurrently before the Commission;

(10) An information designation containing:

(i) The name, address, and position of each individual believed to have firsthand knowledge of the facts alleged with particularity in the complaint, along with a description of the facts within any such individual's knowledge;

(ii) A description of all documents, data compilations and tangible things in the complainant's possession, custody, or control, that are relevant to the facts alleged with particularity in the complaint. Such description shall include for each document:

(A) The date it was prepared, mailed, transmitted, or otherwise disseminated;

(B) The author, preparer, or other source;

(C) The recipient(s) or intended recipient(s);

(D) Its physical location; and

(E) A description of its relevance to the matters contained in the complaint; and

(iii) A complete description of the manner in which the complainant identified all persons with information and designated all documents, data compilations and tangible things as being relevant to the dispute, including, but not limited to, identifying the individual(s) that conducted the information search and the criteria used to identify such persons, documents, data compilations, tangible things, and information;

(11) Copies of all affidavits, documents, data compilations and tangible things in the complainant's possession, custody, or control, upon which the complainant relies or intends to rely to support the facts alleged and legal arguments made in the complaint;

(12) A completed Formal Complaint Intake Form;

(13) A declaration, under penalty of perjury, by the complainant or complainant's counsel describing the amount, method, and the complainant's 10-digit FCC Registration Number, if any;

(14) A certificate of service; and

(15) A FCC Registration Number is required under part 1, subpart W. Submission of a complaint without the FCC Registration Number as required by part 1, subpart W will result in dismissal of the complaint.

(b) The following format may be used in cases to which it is applicable, with such modifications as the circumstances may render necessary:

Before the Federal Communications Commission, Washington, DC 20554

In the matter of

Complainant,

v.

Defendant.

File No. (To be inserted by the Enforcement Bureau)

Complaint

To: The Commission.

The complainant (here insert full name of each complainant and, if a corporation, the corporate title of such complainant) shows that:

1. (Here state post office address, and telephone number of each complainant).
2. (Here insert the name, and, to the extent known, address and telephone number of defendants).
3. (Here insert fully and clearly the specific act or thing complained of, together with such facts as are necessary to give a full understanding of the matter, including relevant legal and documentary support).

Wherefore, complainant asks (here state specifically the relief desired).

(Date)

(Name of each complainant)

(Name, address, and telephone number of attorney, if any)

(c) The complainant may petition the staff, pursuant to § 1.3, for a waiver of any of the requirements of this section. Such waiver may be granted for good cause shown.

(d) Supplemental complaints.

(1) Supplemental complaints filed pursuant to § 8.25 shall conform to the requirements set out in this section and § 8.23 of this subpart, except that the requirements in §§ 8.23(b), 8.24 (a)(4), (a)(5), (a)(8), (a)(9), (a)(12), and (a)(13) of this subpart shall not apply to such supplemental complaints;

(2) In addition, supplemental complaints filed pursuant to § 8.25 of this subpart shall contain a complete statement of facts which, if proven true, would support complainant's calculation of damages for each category of damages for which recovery is sought. All material facts must be supported, pursuant to the requirements of § 8.23(c) of this subpart and paragraph (a)(11) of this section, by relevant affidavits and other documentation. The statement of facts shall include a detailed explanation of the matters relied upon, including a full identification or description of the communications, transmissions, services, or other matters relevant to the calculation of damages and the nature of any injury allegedly sustained by the complainant. Assertions based on information and belief are expressly prohibited unless made in good faith and accompanied by an affidavit explaining the basis for the complainant's belief and why the complainant could not reasonably ascertain the facts from the defendant or any other source;

(3) Supplemental complaints filed pursuant to § 8.25 of this subpart shall contain a certification that the complainant has, in good faith, discussed or attempted to discuss the possibility of settlement with respect to damages for which recovery is sought with each defendant prior to the filing of the supplemental complaint. Such certification shall include a statement that, no later than 30 days after the release of the liability order, the complainant mailed a certified letter to the primary individual who represented the defendant carrier during the initial complaint proceeding outlining the allegations that form the basis of the supplemental complaint it anticipates filing with the Commission and inviting a response from the carrier within a reasonable period of time. The certification shall also contain a brief summary of all additional steps taken to resolve the dispute prior to the filing of the supplemental complaint. If no additional steps were taken, such certification shall state the reason(s) why the complainant believed such steps would be fruitless.

§ 8.25 Damages.

(a) A complaint against a common carrier may seek damages. If a complainant wishes to recover damages, the complaint must contain a clear and unequivocal request for damages.

(b) If a complainant wishes a determination of damages to be made in the same proceeding as the determinations of liability and prospective relief, the complaint must contain the allegations and information required by paragraph (h) of this section.

(c) Notwithstanding paragraph (b) of this section, in any proceeding to which no statutory deadline applies, if the Commission decides that a determination of damages would best be made in a proceeding that is separate from and subsequent to the proceeding in which the determinations of liability and prospective relief are made, the Commission may at any time order that the initial proceeding will determine only liability and prospective relief, and that a separate, subsequent proceeding initiated in accordance with paragraph (e) of this section will determine damages.

(d) If a complainant wishes a determination of damages to be made in a proceeding that is separate from and subsequent to the proceeding in which the determinations of liability and prospective relief are made, the complainant must:

- (1) Comply with paragraph (a) of this section, and
 - (2) State clearly and unequivocally that the complainant wishes a determination of damages to be made in a proceeding that is separate from and subsequent to the proceeding in which the determinations of liability and prospective relief will be made.
- (e) If a complainant proceeds pursuant to paragraph (d) of this section, or if the Commission invokes its authority under paragraph (c) of this section, the complainant may initiate a separate proceeding to obtain a determination of damages by filing a supplemental complaint that complies with § 8.24(d) of this subpart and paragraph (h) of this section within sixty days after public notice (as defined in § 1.4(b) of this chapter) of a decision that contains a finding of liability on the merits of the original complaint.
- (f) If a complainant files a supplemental complaint for damages in accordance with paragraph (e) of this section, the supplemental complaint shall be deemed, for statutory limitations purposes, to relate back to the date of the original complaint.
- (g) Where a complainant chooses to seek the recovery of damages upon a supplemental complaint in accordance with the requirements of paragraph (e) of this section, the Commission will resolve the separate, preceding liability complaint within any applicable complaint resolution deadlines contained in the Act.
- (h) In all cases in which recovery of damages is sought, it shall be the responsibility of the complainant to include, within either the complaint or supplemental complaint for damages filed in accordance with paragraph (e) of this section, either:
- (1) A computation of each and every category of damages for which recovery is sought, along with an identification of all relevant documents and materials or such other evidence to be used by the complainant to determine the amount of such damages; or
 - (2) An explanation of:
 - (i) The information not in the possession of the complaining party that is necessary to develop a detailed computation of damages;
 - (ii) Why such information is unavailable to the complaining party;
 - (iii) The factual basis the complainant has for believing that such evidence of damages exists;
 - (iv) A detailed outline of the methodology that would be used to create a computation of damages with such evidence.
- (i) Where a complainant files a supplemental complaint for damages in accordance with paragraph (e) of this section, the following procedures may apply:
- (1) Issues concerning the amount, if any, of damages may be either designated by the Enforcement Bureau for hearing before, or, if the parties agree, submitted for mediation to, a Commission Administrative Law Judge. Such Administrative Law Judge shall be chosen in the following manner:
 - (i) By agreement of the parties and the Chief Administrative Law Judge; or
 - (ii) In the absence of such agreement, the Chief Administrative Law Judge shall designate the Administrative Law Judge.

(2) The Commission may, in its discretion, order the defendant either to post a bond for, or deposit into an interest bearing escrow account, a sum equal to the amount of damages which the Commission finds, upon preliminary investigation, is likely to be ordered after the issue of damages is fully litigated, or some lesser sum which may be appropriate, provided the Commission finds that the grant of this relief is favored on balance upon consideration of the following factors:

- (i) The complainant's potential irreparable injury in the absence of such deposit;
- (ii) The extent to which damages can be accurately calculated;
- (iii) The balance of the hardships between the complainant and the defendant; and
- (iv) Whether public interest considerations favor the posting of the bond or ordering of the deposit.

(3) The Commission may, in its discretion, suspend ongoing damages proceedings for fourteen days, to provide the parties with a time within which to pursue settlement negotiations and/or alternative dispute resolution procedures.

(4) The Commission may, in its discretion, end adjudication of damages with a determination of the sufficiency of a damages computation method or formula. No such method or formula shall contain a provision to offset any claim of the defendant against the complainant. The parties shall negotiate in good faith to reach an agreement on the exact amount of damages pursuant to the Commission-mandated method or formula. Within thirty days of the release date of the damages order, parties shall submit jointly to the Commission either:

- (i) A statement detailing the parties' agreement as to the amount of damages;
 - (ii) A statement that the parties are continuing to negotiate in good faith and a request that the parties be given an extension of time to continue negotiations; or
 - (iii) A statement detailing the bases for the continuing dispute and the reasons why no agreement can be reached.
- (j) Except where otherwise indicated, the rules governing initial formal complaint proceedings govern supplemental formal complaint proceedings, as well.

§ 8.26 Joinder of complainants and causes of action.

- (a) Two or more complainants may join in one complaint if their respective causes of action are against the same defendant and concern substantially the same facts and alleged violation of the Communications Act.
- (b) Two or more grounds of complaint involving the same principle, subject, or statement of facts may be included in one complaint, but should be separately stated and numbered.

§ 8.27 Answers.

- (a) Any defendant upon whom copy of a formal complaint is served shall answer such complaint in the manner prescribed under this section within twenty days of service of the formal complaint by the

complainant, unless otherwise directed by the Commission.

(b) The answer shall advise the complainant and the Commission fully and completely of the nature of any defense, and shall respond specifically to all material allegations of the complaint. Every effort shall be made to narrow the issues in the answer. The defendant shall state concisely its defense to each claim asserted, admit or deny the averments on which the complainant relies, and state in detail the basis for admitting or denying such averment. General denials are prohibited. Denials based on information and belief are expressly prohibited unless made in good faith and accompanied by an affidavit explaining the basis for the defendant's belief and why the defendant could not reasonably ascertain the facts from the complainant or any other source. If the defendant is without knowledge or information sufficient to form a belief as to the truth of an averment, the defendant shall so state and this has the effect of a denial. When a defendant intends in good faith to deny only part of an averment, the defendant shall specify so much of it as is true and shall deny only the remainder. The defendant may deny the allegations of the complaint as specific denials of either designated averments or paragraphs.

(c) The answer shall contain proposed findings of fact, conclusions of law, and legal analysis relevant to the claims and arguments set forth in the answer.

(d) Averments in a complaint or supplemental complaint filed pursuant to § 8.25 of this subpart are deemed to be admitted when not denied in the answer.

(e) Affirmative defenses to allegations contained in the complaint shall be specifically captioned as such and presented separately from any denials made in accordance with paragraph (c) of this section.

(f) The answer shall include an information designation containing:

(1) The name, address, and position of each individual believed to have firsthand knowledge of the facts alleged with particularity in the answer, along with a description of the facts within any such individual's knowledge;

(2) A description of all documents, data compilations and tangible things in the defendant's possession, custody, or control, that are relevant to the facts alleged with particularity in the answer. Such description shall include for each document:

(i) The date it was prepared, mailed, transmitted, or otherwise disseminated;

(ii) The author, preparer, or other source;

(iii) The recipient(s) or intended recipient(s);

(iv) Its physical location; and

(v) A description of its relevance to the matters in dispute.

(3) A complete description of the manner in which the defendant identified all persons with information and designated all documents, data compilations and tangible things as being relevant to the dispute, including, but not limited to, identifying the individual(s) that conducted the information search and the criteria used to identify such persons, documents, data compilations, tangible things, and information.

(g) The answer shall attach copies of all affidavits, documents, data compilations and tangible things in

the defendant's possession, custody, or control, upon which the defendant relies or intends to rely to support the facts alleged and legal arguments made in the answer.

(h) The answer shall contain certification that the defendant has, in good faith, discussed or attempted to discuss, the possibility of settlement with the complainant prior to the filing of the formal complaint. Such certification shall include a brief summary of all steps taken to resolve the dispute prior to the filing of the formal complaint. If no such steps were taken, such certificate shall state the reason(s) why the defendant believed such steps would be fruitless;

(i) The defendant may petition the staff, pursuant to § 1.3 of this chapter, for a waiver of any of the requirements of this section. Such waiver may be granted for good cause shown.

§ 8.28 Cross-complaints and counterclaims.

Cross-complaints seeking any relief within the jurisdiction of the Commission against any party (complainant or defendant) to that proceeding are expressly prohibited. Any claim that might otherwise meet the requirements of a cross-complaint may be filed as a separate complaint in accordance with §§ 8.23 through 8.37 of this subpart. For purposes of this subpart, the term “cross-complaint” shall include counterclaims.

§ 8.29 Replies.

(a) Within three days after service of an answer containing affirmative defenses presented in accordance with the requirements of § 8.27(e) of this subpart, a complainant may file and serve a reply containing statements of relevant, material facts and legal arguments that shall be responsive to only those specific factual allegations and legal arguments made by the defendant in support of its affirmative defenses. Replies which contain other allegations or arguments will not be accepted or considered by the Commission.

(b) Failure to reply to an affirmative defense shall be deemed an admission of such affirmative defense and of any facts supporting such affirmative defense that are not specifically contradicted in the complaint.

(c) The reply shall contain proposed findings of fact, conclusions of law, and legal analysis relevant to the claims and arguments set forth in the reply.

(d) The reply shall include an information designation containing:

(1) The name, address and position of each individual believed to have firsthand knowledge about the facts alleged with particularity in the reply, along with a description of the facts within any such individual's knowledge.

(2) A description of all documents, data compilations and tangible things in the complainant's possession, custody, or control that are relevant to the facts alleged with particularity in the reply. Such description shall include for each document:

(i) The date prepared, mailed, transmitted, or otherwise disseminated;

(ii) The author, preparer, or other source;

(iii) The recipient(s) or intended recipient(s);

(iv) Its physical location; and

(v) A description of its relevance to the matters in dispute.

(3) A complete description of the manner in which the complainant identified all persons with information and designated all documents, data compilations and tangible things as being relevant to the dispute, including, but not limited to, identifying the individual(s) that conducted the information search and the criteria used to identify such persons, documents, data compilations, tangible things, and information;

(e) The reply shall attach copies of all affidavits, documents, data compilations and tangible things in the complainant's possession, custody, or control upon which the complainant relies or intends to rely to support the facts alleged and legal arguments made in the reply.

(f) The complainant may petition the staff, pursuant to § 1.3 of this chapter, for a waiver of any of the requirements of this section. Such waiver may be granted for good cause shown.

§ 8.30 Motions.

(a) A request to the Commission for an order shall be by written motion, stating with particularity the grounds and authority therefor, and setting forth the relief or order sought.

(b) All dispositive motions shall contain proposed findings of fact and conclusions of law, with supporting legal analysis, relevant to the contents of the pleading. Motions to compel discovery must contain a certification by the moving party that a good faith attempt to resolve the dispute was made prior to filing the motion. All facts relied upon in motions must be supported by documentation or affidavits pursuant to the requirements of § 8.23(c) of this subpart, except for those facts of which official notice may be taken.

(c) The moving party shall provide a proposed order for adoption, which appropriately incorporates the basis therefor, including proposed findings of fact and conclusions of law relevant to the pleading. The proposed order shall be clearly marked as a "Proposed Order." The proposed order shall be submitted both as a hard copy and on computer disk in accordance with the requirements of § 8.36(d) of this subpart. Where appropriate, the proposed order format should conform to that of a reported FCC order.

(d) Oppositions to any motion shall be accompanied by a proposed order for adoption, which appropriately incorporates the basis therefor, including proposed findings of fact and conclusions of law relevant to the pleading. The proposed order shall be clearly captioned as a "Proposed Order." The proposed order shall be submitted both as a hard copy and on computer disk in accordance with the requirements of § 8.36(d) of this subpart. Where appropriate, the proposed order format should conform to that of a reported FCC order.

(e) Oppositions to motions may be filed and served within five business days after the motion is filed and served and not after. Oppositions shall be limited to the specific issues and allegations contained in such motion; when a motion is incorporated in an answer to a complaint, the opposition to such motion shall not address any issues presented in the answer that are not also specifically raised in the motion. Failure to oppose any motion may constitute grounds for granting of the motion.

- (f) No reply may be filed to an opposition to a motion.
- (g) Motions seeking an order that the allegations in the complaint be made more definite and certain are prohibited.
- (h) Amendments or supplements to complaints to add new claims or requests for relief are prohibited. Parties are responsible, however, for the continuing accuracy and completeness of all information and supporting authority furnished in a pending complaint proceeding as required under § 8.23(g) of this subpart.

§ 8.31 Formal complaints not stating a cause of action; defective pleadings.

- (a) Any document purporting to be a formal complaint which does not state a cause of action under the Communications Act or a Commission rule or order will be dismissed. In such case, any amendment or supplement to such document will be considered a new filing which must be made within the statutory periods of limitations of actions contained in section 415 of the Communications Act.
- (b) Any other pleading filed in a formal complaint proceeding not in conformity with the requirements of the applicable rules in this part may be deemed defective. In such case the Commission may strike the pleading or request that specified defects be corrected and that proper pleadings be filed with the Commission and served on all parties within a prescribed time as a condition to being made a part of the record in the proceeding.

§ 8.32 Discovery.

- (a) A complainant may file with the Commission and serve on a defendant, concurrently with its complaint, a request for up to ten written interrogatories. A defendant may file with the Commission and serve on a complainant, during the period starting with the service of the complaint and ending with the service of its answer, a request for up to ten written interrogatories. A complainant may file with the Commission and serve on a defendant, within three calendar days of service of the defendant's answer, a request for up to five written interrogatories. Subparts of any interrogatory will be counted as separate interrogatories for purposes of compliance with this limit. Requests for interrogatories filed and served pursuant to this procedure may be used to seek discovery of any non-privileged matter that is relevant to the material facts in dispute in the pending proceeding, provided, however, that requests for interrogatories filed and served by a complainant after service of the defendant's answer shall be limited in scope to specific factual allegations made by the defendant in support of its affirmative defenses. This procedure may not be employed for the purpose of delay, harassment or obtaining information that is beyond the scope of permissible inquiry related to the material facts in dispute in the pending proceeding.
- (b) Requests for interrogatories filed and served pursuant to paragraph (a) of this section shall contain a listing of the interrogatories requested and an explanation of why the information sought in each interrogatory is both necessary to the resolution of the dispute and not available from any other source.
- (c) A responding party shall file with the Commission and serve on the propounding party any opposition and objections to the requests for interrogatories as follows:
 - (1) By the defendant, within ten calendar days of service of the requests for interrogatories served simultaneously with the complaint and within five calendar days of the requests for interrogatories served following service of the answer;

(2) By the complainant, within five calendar days of service of the requests for interrogatories; and

(3) In no event less than three calendar days prior to the initial status conference as provided for in § 8.35(a) of this subpart.

(d) Commission staff will consider the requests for interrogatories, properly filed and served pursuant to paragraph (a) of this section, along with any objections or oppositions thereto, properly filed and served pursuant to paragraph (b) of this section, at the initial status conference, as provided for in § 8.35(a)(5) of this subpart, and at that time determine the interrogatories, if any, to which parties shall respond, and set the schedule of such response.

(e) The interrogatories ordered to be answered pursuant to paragraph (d) of this section are to be answered separately and fully in writing under oath or affirmation by the party served, or if such party is a public or private corporation or partnership or association, by any officer or agent who shall furnish such information as is available to the party. The answers shall be signed by the person making them. The answers shall be filed with the Commission and served on the propounding party.

(f) A propounding party asserting that a responding party has provided an inadequate or insufficient response to a Commission-ordered discovery request may file a motion to compel within ten days of the service of such response, or as otherwise directed by Commission staff, pursuant to the requirements of § 8.30 of this subpart.

(g) The Commission may, in its discretion, require parties to provide documents to the Commission in a scanned or other electronic format that provides:

(1) Indexing by useful identifying information about the documents; and

(2) Technology that allows staff to annotate the index so as to make the format an efficient means of reviewing the documents.

(h) The Commission may allow additional discovery, including, but not limited to, document production, depositions and/or additional interrogatories. In its discretion, the Commission may modify the scope, means and scheduling of discovery in light of the needs of a particular case and the requirements of applicable statutory deadlines.

§ 8.33 Confidentiality of information produced or exchanged by the parties.

(a) Any materials generated in the course of a formal complaint proceeding may be designated as proprietary by that party if the party believes in good faith that the materials fall within an exemption to disclosure contained in the Freedom of Information Act (FOIA), 5 U.S.C. 552(b)(1) through (9). Any party asserting confidentiality for such materials shall so indicate by clearly marking each page, or portion thereof, for which a proprietary designation is claimed. If a proprietary designation is challenged, the party claiming confidentiality shall have the burden of demonstrating, by a preponderance of the evidence, that the material designated as proprietary falls under the standards for nondisclosure enunciated in the FOIA.

(b) Materials marked as proprietary may be disclosed solely to the following persons, only for use in prosecuting or defending a party to the complaint action, and only to the extent necessary to assist in the prosecution or defense of the case:

- (1) Counsel of record representing the parties in the complaint action and any support personnel employed by such attorneys;
- (2) Officers or employees of the opposing party who are named by the opposing party as being directly involved in the prosecution or defense of the case;
- (3) Consultants or expert witnesses retained by the parties;
- (4) The Commission and its staff; and
- (5) Court reporters and stenographers in accordance with the terms and conditions of this section.

(c) These individuals shall not disclose information designated as proprietary to any person who is not authorized under this section to receive such information, and shall not use the information in any activity or function other than the prosecution or defense in the case before the Commission. Each individual who is provided access to the information shall sign a notarized statement affirmatively stating that the individual has personally reviewed the Commission's rules and understands the limitations they impose on the signing party.

(d) No copies of materials marked proprietary may be made except copies to be used by persons designated in paragraph (b) of this section. Each party shall maintain a log recording the number of copies made of all proprietary material and the persons to whom the copies have been provided.

(e) Upon termination of a formal complaint proceeding, including all appeals and petitions, all originals and reproductions of any proprietary materials, along with the log recording persons who received copies of such materials, shall be provided to the producing party. In addition, upon final termination of the complaint proceeding, any notes or other work product derived in whole or in part from the proprietary materials of an opposing or third party shall be destroyed.

§ 8.34 Other required written submissions.

(a) The Commission may, in its discretion, or upon a party's motion showing good cause, require the parties to file briefs summarizing the facts and issues presented in the pleadings and other record evidence.

(b) Unless otherwise directed by the Commission, all briefs shall include all legal and factual claims and defenses previously set forth in the complaint, answer, or any other pleading submitted in the proceeding. Claims and defenses previously made but not reflected in the briefs will be deemed abandoned. The Commission may, in its discretion, limit the scope of any briefs to certain subjects or issues. A party shall attach to its brief copies of all documents, data compilations, tangible things, and affidavits upon which such party relies or intends to rely to support the facts alleged and legal arguments made in its brief and such brief shall contain a full explanation of how each attachment is relevant to the issues and matters in dispute. All such attachments to a brief shall be documents, data compilations or tangible things, or affidavits made by persons, that were identified by any party in its information designations filed pursuant to §§ 8.24(a)(10)(i), (a)(10)(ii), 8.27(f)(1), (f)(2), and 8.29(d)(1), (d)(2) of this subpart. Any other supporting documentation or affidavits that is attached to a brief must be accompanied by a full explanation of the relevance of such materials and why such materials were not identified in the information designations. These briefs shall contain the proposed findings of fact and conclusions of law which the filing party is urging the Commission to adopt, with specific citation to the record, and supporting relevant authority and analysis.

(c) In cases in which discovery is not conducted, absent an order by the Commission that briefs be filed, parties may not submit briefs. If the Commission does authorize the filing of briefs in cases in which discovery is not conducted, briefs shall be filed concurrently by both the complainant and defendant at such time as designated by the Commission staff and in accordance with the provisions of this section.

(d) In cases in which discovery is conducted, briefs shall be filed concurrently by both the complainant and defendant at such time designated by the Commission staff.

(e) Briefs containing information which is claimed by an opposing or third party to be proprietary under § 8.33 of this subpart shall be submitted to the Commission in confidence pursuant to the requirements of § 0.459 of this chapter and clearly marked "Not for Public Inspection." An edited version removing all proprietary data shall also be filed with the Commission for inclusion in the public file. Edited versions shall be filed within five days from the date the unedited brief is submitted, and served on opposing parties.

(f) Initial briefs shall be no longer than twenty-five pages. Reply briefs shall be no longer than ten pages. Either on its own motion or upon proper motion by a party, the Commission staff may establish other page limits for briefs.

(g) The Commission may require the parties to submit any additional information it deems appropriate for a full, fair, and expeditious resolution of the proceeding, including affidavits and exhibits.

(h) The parties shall submit a joint statement of stipulated facts, disputed facts, and key legal issues no later than two business days prior to the initial status conference, scheduled in accordance with the provisions of § 8.35(a) of this subpart.

§ 8.35 Status conference.

(a) In any complaint proceeding, the Commission may, in its discretion, direct the attorneys and/or the parties to appear before it for a status conference. Unless otherwise ordered by the Commission, an initial status conference shall take place, at the time and place designated by the Commission staff, ten business days after the date the answer is due to be filed. A status conference may include discussion of:

- (1) Simplification or narrowing of the issues;
- (2) The necessity for or desirability of additional pleadings or evidentiary submissions;
- (3) Obtaining admissions of fact or stipulations between the parties as to any or all of the matters in controversy;
- (4) Settlement of all or some of the matters in controversy by agreement of the parties;
- (5) Whether discovery is necessary and, if so, the scope, type and schedule for such discovery;
- (6) The schedule for the remainder of the case and the dates for any further status conferences; and
- (7) Such other matters that may aid in the disposition of the complaint.

(b)(1) Parties shall meet and confer prior to the initial status conference to discuss:

- (i) Settlement prospects;
 - (ii) Discovery;
 - (iii) Issues in dispute;
 - (iv) Schedules for pleadings;
 - (v) Joint statement of stipulated facts, disputed facts, and key legal issues; and
- (2) Parties shall submit a joint statement of all proposals agreed to and disputes remaining as a result of such meeting to Commission staff at least two business days prior to the scheduled initial status conference.
- (c) In addition to the initial status conference referenced in paragraph (a) of this section, any party may also request that a conference be held at any time after the complaint has been filed.
- (d) During a status conference, the Commission staff may issue oral rulings pertaining to a variety of interlocutory matters relevant to the conduct of a formal complaint proceeding including, inter alia, procedural matters, discovery, and the submission of briefs or other evidentiary materials.
- (e) Parties may make, upon written notice to the Commission and all attending parties at least three business days prior to the status conference, an audio recording of the Commission staff's summary of its oral rulings. Alternatively, upon agreement among all attending parties and written notice to the Commission at least three business days prior to the status conference, the parties may make an audio recording of, or use a stenographer to transcribe, the oral presentations and exchanges between and among the participating parties, insofar as such communications are "on-the-record" as determined by the Commission staff, as well as the Commission staff's summary of its oral rulings. A complete transcript of any audio recording or stenographic transcription shall be filed with the Commission as part of the record, pursuant to the provisions of paragraph (f)(2) of this section. The parties shall make all necessary arrangements for the use of a stenographer and the cost of transcription, absent agreement to the contrary, will be shared equally by all parties that agree to make the record of the status conference.
- (f) The parties in attendance, unless otherwise directed, shall either:
- (1) Submit a joint proposed order memorializing the oral rulings made during the conference to the Commission by 5:30 pm, Eastern Time, on the business day following the date of the status conference, or as otherwise directed by Commission staff. In the event the parties in attendance cannot reach agreement as to the rulings that were made, the joint proposed order shall include the rulings on which the parties agree, and each party's alternative proposed rulings for those rulings on which they cannot agree. Commission staff will review and make revisions, if necessary, prior to signing and filing the submission as part of the record. The proposed order shall be submitted both as hard copy and on computer disk in accordance with the requirements of § 8.36(d) of this subpart; or
 - (2) Pursuant to the requirements of paragraph (e) of this section, submit to the Commission by 5:30 pm., Eastern Time, on the third business day following the status conference or as otherwise directed by Commission staff either:
 - (i) A transcript of the audio recording of the Commission staff's summary of its oral rulings;
 - (ii) A transcript of the audio recording of the oral presentations and exchanges between and among

the participating parties, insofar as such communications are “on-the-record” as determined by the Commission staff, and the Commission staff’s summary of its oral rulings; or

(iii) A stenographic transcript of the oral presentations and exchanges between and among the participating parties, insofar as such communications are “on-the-record” as determined by the Commission staff, and the Commission staff’s summary of its oral rulings.

(g) Status conferences will be scheduled by the Commission staff at such time and place as it may designate to be conducted in person or by telephone conference call.

(h) The failure of any attorney or party, following reasonable notice, to appear at a scheduled conference will be deemed a waiver by that party and will not preclude the Commission staff from conferring with those parties and/or counsel present.

§ 8.36 Specifications as to pleadings, briefs, and other documents; subscription.

(a) All papers filed in any formal complaint proceeding must be drawn in conformity with the requirements of §§ 1.49 and 1.50 of this chapter.

(b) All averments of claims or defenses in complaints and answers shall be made in numbered paragraphs. The contents of each paragraph shall be limited as far as practicable to a statement of a single set of circumstances. Each claim founded on a separate transaction or occurrence and each affirmative defense shall be separately stated to facilitate the clear presentation of the matters set forth.

(c) The original of all pleadings and other submissions filed by any party shall be signed by the party, or by the party’s attorney. The signing party shall include in the document his or her address, telephone number, facsimile number and the date on which the document was signed. Copies should be conformed to the original. Unless specifically required by rule or statute, pleadings need not be verified. The signature of an attorney or party shall be a certificate that the attorney or party has read the pleading, motion, or other paper; that to the best of his or her knowledge, information, and belief formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and that it is not interposed solely for purposes of delay or for any other improper purpose.

(d) All proposed orders shall be submitted both as hard copies and on computer disk formatted to be compatible with the Commission’s computer system and using the Commission’s current word processing software. Each disk should be submitted in “read only” mode. Each disk should be clearly labeled with the party’s name, proceeding, type of pleading, and date of submission. Each disk should be accompanied by a cover letter. Parties who have submitted copies of tariffs or reports with their hard copies need not include such tariffs or reports on the disk. Upon showing of good cause, the Commission may waive the requirements of this paragraph.

§ 8.37 Copies; service; separate filings against multiple defendants.

(a) Complaints may generally be brought against only one named defendant; such actions may not be brought against multiple defendants unless the defendants are commonly owned or controlled, are alleged to have acted in concert, are alleged to be jointly liable to complainant, or the complaint concerns common questions of law or fact. Complaints may, however, be consolidated by the Commission for disposition.

(b) The complainant shall file an original copy of the complaint and, on the same day:

(1) File three copies of the complaint with the Office of the Commission Secretary;

(2) Serve two copies on the Enforcement Bureau;

and

(3) If a complaint is addressed against multiple defendants, file three copies of the complaint with the Office of the Commission Secretary for each additional defendant.

(c) Generally, a separate file is set up for each defendant. An original plus two copies shall be filed of all pleadings and documents, other than the complaint, for each file number assigned.

(d) The complainant shall serve the complaint by hand delivery on either the named defendant or one of the named defendant's registered agents for service of process on the same date that the complaint is filed with the Commission in accordance with the requirements of paragraph (b) of this section.

(e) Upon receipt of the complaint by the Commission, the Commission shall promptly send, by facsimile transmission to each defendant named in the complaint, notice of the filing of the complaint. The Commission shall send, by regular U.S. mail delivery, to each defendant named in the complaint, a copy of the complaint. The Commission shall additionally send, by regular U.S. mail to all parties, a schedule detailing the date the answer will be due and the date, time and location of the initial status conference.

(f) All subsequent pleadings and briefs filed in any formal complaint proceeding, as well as all letters, documents or other written submissions, shall be served by the filing party on the attorney of record for each party to the proceeding, or, where a party is not represented by an attorney, each party to the proceeding either by hand delivery, overnight delivery, or by facsimile transmission followed by regular U.S. mail delivery, together with a proof of such service in accordance with the requirements of § 1.47(g) of this chapter. Service is deemed effective as follows:

(1) Service by hand delivery that is delivered to the office of the recipient by 5:30 pm, local time of the recipient, on a business day will be deemed served that day. Service by hand delivery that is delivered to the office of the recipient after 5:30 pm, local time of the recipient, on a business day will be deemed served on the following business day;

(2) Service by overnight delivery will be deemed served the business day following the day it is accepted for overnight delivery by a reputable overnight delivery service such as, or comparable to, the US Postal Service Express Mail, United Parcel Service or Federal Express; or

(3) Service by facsimile transmission that is fully transmitted to the office of the recipient by 5:30 pm, local time of the recipient, on a business day will be deemed served that day. Service by facsimile transmission that is fully transmitted to the office of the recipient after 5:30 pm, local time of the recipient, on a business day will be deemed served on the following business day.

(g) Supplemental complaint proceedings. Supplemental complaints filed pursuant to § 8.25 of this subpart shall conform to the requirements set out in this section, except that the complainant need not submit a filing fee, and the complainant may effect service pursuant to paragraph (f) of this section rather than paragraph (d) of this section numerals.

APPENDIX C

Initial Regulatory Flexibility Analysis

1. As required by the Regulatory Flexibility Act of 1980, as amended (“RFA”),¹ the Commission has prepared this present Initial Regulatory Flexibility Analysis (“IRFA”) of the possible significant economic impact on a substantial number of small entities that might result from adoption of the rules proposed in the Notice of Proposed Rulemaking (“NPRM”). Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the applicable deadlines for initial comments, or reply comments, as specified in the NPRM. The Commission will send a copy of the NPRM, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (“SBA”).² In addition, the NPRM and this IRFA (or summaries thereof) will be published in the Federal Register.³

A. Need for, and Objectives of, the Proposed Rules

2. The purpose of these proposed rules is to implement Congress’ mandate that people with disabilities have access to advanced communications services and equipment. Specifically, these rules are proposed to implement Sections 716 and 717 of the Communications Act of 1934, as amended, which were added by the “Twenty-First Century Communications and Video Accessibility Act of 2010” (“CVAA”).⁴ Given the fundamental role that advanced communications services have come to play in today’s world, the Commission believes that the CVAA represents the most significant governmental action for people with disabilities since the passage of the Americans with Disabilities Act of 1990 (“ADA”).⁵ The inability to access communications equipment and services can be life-threatening in emergency situations, can severely limit educational and employment opportunities, and can otherwise interfere with full participation in business, family, social, and other activities. Many of these proposals build on our rules implementing Section 255 of the Communications Act,⁶ which was added by the Telecommunications Act of 1996 and provides for the accessibility of telecommunications services and equipment.

3. The NPRM makes proposals to implement the requirements of Section 716, which requires that providers of advanced communications services and manufacturers of equipment used for such services make their products accessible to people with disabilities, unless it is not achievable to do so. It also proposes rules relating to Section 717, which requires the Commission to establish new recordkeeping and enforcement procedures for manufacturers and providers subject to Section 716 and Section 255.

4. The Commission proposes that manufacturers and service providers comply with the requirements of Section 716 either by building accessibility features into their equipment or service or by relying on third party applications or other accessibility solutions.⁷ The Commission also proposes that if it is not achievable for manufacturers and service providers to make their products accessible to people

¹ See 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. §§ 601-12, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, 110 Stat. 857 (1996).

² See 5 U.S.C. § 603(a).

³ *Id.*

⁴ Pub. L. No. 111-260, § 104.

⁵ Pub. L. No. 101-336, 104 Stat. 327 (1990) (codified at 42 U.S.C. §§ 12101-12213).

⁶ 47 U.S.C. § 255.

⁷ See NPRM at paras. 4, 77-80, 100.

with disabilities, then they must make their products compatible with specialized devices commonly used by people with disabilities.⁸

5. Furthermore, the Commission proposes that manufacturers and service providers consider performance objectives at the design stage as early and consistently as possible and implement such evaluation to the extent that it is achievable.⁹ The Commission proposes to incorporate into its performance objectives the outcome-oriented definitions of “accessible,” “compatibility,” and “usable” contained in its rules regarding the accessibility of telecommunications services and equipment.¹⁰ It seeks comment on whether it should adopt more specific performance objectives and the procedures and timelines that it should use to develop these objectives.¹¹

6. The Commission also proposes to issue prospective guidelines concerning the new accessibility requirements.¹² In addition, the Commission seeks comment on its proposal not to adopt any technical standards as safe harbors at this time.¹³

7. The Commission proposes that the accessibility requirements generally should apply to a wide range of manufacturers and service providers, including applications developers and providers of applications or services downloaded and run by users over service providers’ networks.¹⁴ It proposes, however, to consider exemptions for small entities and, if one or more such exemptions is adopted, further proposes to consider various criteria in setting standards for such exemptions.¹⁵ The Commission also proposes to consider waivers, both individual and blanket, for offerings which are designed for multiple purposes but are designed primarily for purposes other than using advanced communications services.¹⁶

8. The Commission proposes to define “achievable” to mean “with reasonable effort and expense.”¹⁷ In making determination about what is achievable under Section 716, the Commission proposes to consider the following four factors and give them equal weight:

- “The nature and cost of the steps needed to meet the requirements of this section with respect to the specific equipment or service in question;”
- “The technical and economic impact on the operation of the manufacturer or provider and on the operation of the specific equipment or service in question . . .;”
- “The type of operations of the manufacturer or provider;” and
- “The extent to which the service provider or manufacturer in question offers accessible services or equipment containing varying degrees of functionality and features, and

⁸ *Id.* at para. 85-90, 100.

⁹ *Id.* at para. 101.

¹⁰ *Id.* at para. 105 (*citing* Sections 6.3 and 7.3 of the Commission’s rules, 47 C.F.R. §§ 6.3 and 7.3).

¹¹ *Id.* at para. 106.

¹² *Id.* at paras. 114 -115.

¹³ *Id.* at paras. 112-113.

¹⁴ *Id.* at paras. 19-47.

¹⁵ *Id.* at para. 66.

¹⁶ *Id.* at paras. 52-60.

¹⁷ *Id.* at paras. 67-69.

offered at differing price points.”¹⁸

9. The Commission proposes procedures to facilitate the filing of complaints¹⁹ and proposes a 180-day deadline to issue an order resolving informal complaints concerning the accessibility of products.²⁰ In addition, the Commission proposes that manufacturers and providers subject to Section 716 and Section 255 maintain records of the (1) efforts to consult with people with disabilities; (2) accessibility features of their products; and (3) compatibility of their products with specialized devices.²¹

10. Moreover, in light of the range of potential complaints that may be filed against covered entities (including small entities) under the CVAA and Section 255, the NPRM seeks comment on how we should effectively implement Section 717’s recordkeeping requirements without imposing excessive burden or expense on covered entities or requiring multiple submissions of the same records to the Commission.²² The NPRM seeks input on what constitutes a “reasonable time period” during which covered entities will be required to maintain these records.²³

11. The NPRM also recognizes the variety of business models and operations of entities covered under its proposed rules and, therefore, proposes that the Commission not mandate any one form in which records must be kept in order to comply with Section 717.²⁴ The NPRM, however, seeks comment on whether there is any reason for the Commission to mandate a standard form of recordkeeping to comply with Section 717(a)(5) or to require covered entities to submit publicly available records or to re-submit records that the Commission already has received through a separate submission.²⁵ Finally, given that the statute provides that these mandatory recordkeeping requirements do not take effect until one year after the effective date of regulations promulgated by the Commission pursuant to Section 716(e), the NPRM seeks input regarding whether, and if so, in what fashion, the Commission should address this transition period, particularly for the purposes of enforcement.²⁶

B. Legal Basis

12. The legal basis for any action that may be taken pursuant to the NPRM is contained in Sections 1-4, 255, 303(r), 403, 503, 716, 717, 718 of the Communications Act of 1934, as Amended, 47 U.S.C. §§ 151-154, 255, 303(r), 403, 503, 617, 618, 619.

C. Description and Estimate of the Number of Small Entities to Which the Proposed Rules May Apply

13. The RFA directs agencies to provide a description of, and where feasible, an estimate of the number of small entities that face possible significant economic impact by the adoption of proposed rules.²⁷ The RFA generally defines the term “small entity” as having the same meaning as the terms

¹⁸ *Id.* at paras. 68-76.

¹⁹ *Id.* at paras. 126-133.

²⁰ *Id.* at paras. 136-139

²¹ *Id.* at para. 117.

²² *Id.* at para. 120.

²³ *Id.* at para. 121.

²⁴ *Id.* at para. 123.

²⁵ *Id.*

²⁶ *Id.*

²⁷ 5 U.S.C. § 604(a)(3).

“small business,” “small organization,” and “small governmental jurisdiction.”²⁸ In addition, the term “small business” has the same meaning as the term “small business concern” under the Small Business Act.²⁹ A “small business concern” is one that: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.³⁰

14. To assist the Commission in analyzing the total number of small entities potentially affected by the rules proposed in the NPRM, we ask commenters to estimate the number of small entities that may be affected by those rules. To assist in assessing the nature and number of small entities that face possible significant economic impact by adoption of our proposed rules, we seek comment on the industry categories below and our estimates of the entities in each category that can, under relevant SBA standards or standards previously approved by the SBA for small businesses, be classified as small. Where a commenter proposes an exemption from the requirements of Section 716, we also seek estimates from that commenter on the number of small entities in each category that would be exempted from compliance with Section 716 under the proposed exemption, the percentage of market share for the service or product that would be exempted, and the economic impact, if any, on those entities that are not covered by the proposed exemption. While the NPRM and this IRFA seek comment on whether and how the Commission should exempt small entities from the requirements of Section 716 for the purposes of building a record on that issue, we will assume, for the narrow purpose of including a thorough regulatory impact analysis in this IRFA, that no such exemptions will be provided.

15. We divide the remainder of this section into three parts. In the first two, we identify those equipment manufacturers and those service providers that will be subject to our proposed rules and the industry categories within which they are classified. Within each category where possible, we estimate the total number of establishments or firms and the number of small entities (or the percentage) among them that face possible significant economic impact under the rules proposed in the NPRM.³¹ In the third part, we identify additional industry categories in which small entities face possible significant economic impact by the adoption of those proposed rules. In the third part, as in the first two parts, we estimate, where possible, the number of establishments or firms and the number of small entities (or the percentages) that would face such possible impact by adoption of our proposed rules.

16. *Small Businesses.* Nationwide, there are a total of approximately 29.6 million small businesses, according to the SBA.³²

²⁸ 5 U.S.C. § 601(6).

²⁹ 5 U.S.C. § 601(3) (incorporating by reference the definition of “small business concern” in the Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies “unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register.”

³⁰ 15 U.S.C. § 632.

³¹ Where possible, we provide Census data on the number of “firms” in a given industrial category but, where that data is not available, we provide data on the number of “establishments.” The number of “establishments” is a less helpful indicator of the number of businesses in a given category than the number of “firms,” because the latter term takes into account the concept of common ownership or control. Each single physical location counts as an “establishment,” even though several “establishments” may be owned or controlled by one “firm.” Thus, the data given in a category for “establishments” may reflect an inflated number of businesses in that category, including an inflated number of small businesses.

³² See SBA, Office of Advocacy, “Frequently Asked Questions,” <http://www.sba.gov/advocacy/7495/8425> (last visited Feb. 28, 2011).

1. Equipment Manufacturers

a. Manufacturers of Equipment to Provide VoIP

17. Entities manufacturing equipment used to provide interconnected Voice Over Internet Protocol (“VoIP”), non-interconnected VoIP, or both are generally found in one of two Census Bureau categories, “Electronic Computer Manufacturing”³³ or “Telephone Apparatus Manufacturing.”³⁴ While we recognize, as noted in the NPRM,³⁵ that the manufacturers of equipment used to provide interconnected VoIP will continue to be regulated under Section 255 rather than under Section 716, we include here an analysis of the possible significant economic impact of our proposed rules on manufacturers of equipment used to provide both interconnected and non-interconnected VoIP because it was not possible to separate available data on these two manufacturing categories for VoIP equipment. In light of this situation, our estimates below are in all likelihood overstating the number of small entities that manufacture equipment used to provide interconnected VoIP and which are subject to our proposed Section 716 rules. However, in the absence of more accurate data, we present these figures to provide as thorough an analysis of the impact on small entities as we can at this time, with the understanding that we will modify our analysis as more accurate data becomes available in this proceeding.

18. *Electronic Computer Manufacturing.* The Census Bureau defines this category to include “. . . establishments primarily engaged in manufacturing and/or assembling electronic computers, such as mainframes, personal computers, workstations, laptops, and computer servers. Computers can be analog, digital, or hybrid . . . The manufacture of computers includes the assembly or integration of processors, coprocessors, memory, storage, and input/output devices into a user-programmable final product.”³⁶

19. In this category, the SBA has deemed an electronic computer manufacturing business to be small if it has fewer than 1,000 employees.³⁷ For this category of manufacturers, Census data for 2007, which supersedes similar data from the 2002 Census, show that there were 421 such establishments that operated that year.³⁸ Of those 421 establishments, 384 (approximately 91%) had fewer than 100 employees and only 37 had 100 employees or more, thus, while we cannot provide a more precise estimate, it is clear that a great majority of these establishments would be deemed small under the applicable SBA size standard.³⁹ Accordingly, the majority of establishments in this category can be considered small under that standard. On this basis, we estimate that approximately 91% or more of the manufacturers of equipment used to provide VoIP in this category are small and, thus, face possible significant economic impact from adoption of the rules proposed in the NPRM.

20. *Telephone Apparatus Manufacturing.* The Census Bureau defines this category to comprise “. . . establishments primarily engaged in manufacturing wire telephone and data communications equipment. These products may be standalone or board-level components of a larger system. Examples of products made by these establishments are central office switching equipment,

³³ U.S. Census Bureau, 2007 NAICS Definitions, “334111 Electronic Computer Manufacturing”; <http://www.census.gov/cgi-bin/sssd/naics/naicsrch?code=334111&search=2007%20NAICS%20Search>.

³⁴ U.S. Census Bureau, 2007 NAICS Definitions, “334210 Telephone Apparatus Manufacturing”; <http://www.census.gov/naics/2007/def/ND334210.HTM>.

³⁵ See NPRM at para.30.

³⁶ U.S. Census Bureau, 2007 NAICS Definitions, “334111 Electronic Computer Manufacturing”; <http://www.census.gov/cgi-bin/sssd/naics/naicsrch?code=334111&search=2007%20NAICS%20Search>.

³⁷ 13 C.F.R. § 121.201, NAICS Code 334111.

³⁸ S. Census Bureau, American FactFinder, 2007 Economic Census, Industry Series, Industry Statistics by Employment Size, NAICS code 334111 (rel. Nov. 16, 2010); <http://factfinder.census.gov>.

³⁹ *Id.*

cordless telephones (except cellular), PBX equipment, telephones, telephone answering machines, LAN modems, multi-user modems, and other data communications equipment, such as bridges, routers, and gateways.”⁴⁰

21. In this category, the SBA has deemed a telephone apparatus manufacturing business to be small if it has fewer than 1,000 employees.⁴¹ For this category of manufacturers, Census data for 2007, which supersede similar data from the 2002 Census, show that there were 398 such establishments that operated that year.⁴² Of those 398 establishments, 393 (approximately 99%) had fewer than 1,000 employees and, thus, would be deemed small under the applicable SBA size standard.⁴³ Accordingly, the majority of establishments in this category can be considered small under that standard. On this basis, the Commission continues to estimate that approximately 99% or more of the manufacturers of equipment used to provide VoIP in this category are small and, thus, face possible significant economic impact from adoption of the rules proposed in the NPRM.

b. Manufacturers of Equipment to Provide Electronic Messaging

22. Entities that manufacture equipment (other than software) used to provide electronic messaging services are generally found in one of three Census Bureau categories: “Radio and Television Broadcasting and Wireless Communications Equipment Manufacturing,” “Electronic Computer Manufacturing,” or “Telephone Apparatus Manufacturing.”

23. *Radio and Television Broadcasting and Wireless Communications Equipment Manufacturing.* The Census Bureau defines this category as follows: “This industry comprises establishments primarily engaged in manufacturing radio and television broadcast and wireless communications equipment. Examples of products made by these establishments are: “transmitting and receiving antennas, cable television equipment, GPS equipment, pagers, cellular phones, mobile communications equipment, and radio and television studio and broadcasting equipment.”⁴⁴

24. In this category, the SBA has deemed a business manufacturing radio and television broadcasting equipment, wireless communications equipment, or both, to be small if it has fewer than 750 employees.⁴⁵ For this category of manufacturers, Census data for 2007, which supersede similar data from the 2002 Census, show that there were 398 such establishments that operated that year.⁴⁶ Of those 398 establishments, 393 (approximately 99%) had fewer than 1,000 employees and 912 (approximately 97%) had fewer than 500 employees. Between these two figures, the Commission estimates that about 915 establishments (approximately 97%) had fewer than 750 employees and, thus, would be considered small under the applicable SBA size standard. Accordingly, the majority of establishments in this category can be considered small under that standard. On this basis, Commission estimates that approximately 97% or more of the manufacturers of equipment used to provide electronic messaging services in this category are small and, thus, face possible significant economic impact from adoption of

⁴⁰ U.S. Census Bureau, 2007 NAICS Definitions, “334210 Telephone Apparatus Manufacturing”; <http://www.census.gov/naics/2007/def/ND334210.HTM>.

⁴¹ 13 C.F.R. § 121.201, NAICS Code 334210.

⁴² U.S. Census Bureau, American FactFinder, 2007 Economic Census, Industry Series, Industry Statistics by Employment Size, NAICS code 334111 (rel. Nov. 16, 2010); <http://factfinder.census.gov>.

⁴³ *Id.*

⁴⁴ U.S. Census Bureau, 2007 NAICS Definitions, “334220 Radio and Television Broadcasting and Wireless Communications Equipment”; <http://www.census.gov/econ/industry/def/d334220.htm>.

⁴⁵ 13 C.F.R. § 121.201, NAICS Code 334220.

⁴⁶ U.S. Census Bureau, American FactFinder, 2007 Economic Census, Industry Series, Industry Statistics by Employment Size, NAICS code 334220 (rel. Nov. 16, 2010); <http://factfinder.census.gov>.

the rules proposed in the NPRM.

25. *Electronic Computer Manufacturing.* The Census Bureau defines this category, as noted above, to include “. . . establishments primarily engaged in manufacturing and/or assembling electronic computers, such as mainframes, personal computers, workstations, laptops, and computer servers. Computers can be analog, digital, or hybrid . . . The manufacture of computers includes the assembly or integration of processors, coprocessors, memory, storage, and input/output devices into a user-programmable final product.”⁴⁷

26. In this category, as noted above, the SBA has deemed an electronic computer manufacturing business to be small if it has fewer than 1,000 employees.⁴⁸ For this category of manufacturers, Census data for 2007, which supersede similar data from the 2002 Census, show that there were 421 such establishments that operated that year.⁴⁹ Of those 421 establishments, 384 (approximately 91%) had fewer than 100 employees and 37 had 100 employees or more, thus, while we cannot provide a more precise estimate, it is clear that a great majority of these establishments would be deemed small under the applicable SBA size standard.⁵⁰ Accordingly, the majority of establishments in this category can be considered small under that standard. On this basis, we estimate that approximately 91% or more of the manufacturers of equipment used to provide electronic messaging services in this category are small and, thus, face possible significant economic impact from adoption of the rules proposed in the NPRM.

27. *Telephone Apparatus Manufacturing.* The Census Bureau, as noted above, defines this category to comprise “. . . establishments primarily engaged in manufacturing wire telephone and data communications equipment. These products may be stand alone or board-level components of a larger system. Examples of products made by these establishments are central office switching equipment, cordless telephones (except cellular), PBX equipment, telephones, telephone answering machines, LAN modems, multi-user modems, and other data communications equipment, such as bridges, routers, and gateways.”⁵¹

28. In this category, as noted above, the SBA has deemed a telephone apparatus manufacturing business to be small if it has fewer than 1,000 employees.⁵² For this category of manufacturers, Census data for 2007, which supersede similar data from the 2002 Census, show that there were 398 such establishments that operated that year.⁵³ Of those 398 establishments, 393 (approximately 99%) had fewer than 1,000 employees and, thus, would be deemed small under the applicable SBA size standard.⁵⁴ Accordingly, the majority of establishments in this category can be considered small under that standard. On this basis, the Commission estimates that approximately 99% or more of the manufacturers of equipment used to provide electronic messaging services in this category are small and,

⁴⁷ U.S. Census Bureau, 2007 NAICS Definitions, “334111 Electronic Computer Manufacturing”; <http://www.census.gov/cgi-bin/sssd/naics/naicsrch?code=334111&search=2007%20NAICS%20Search>.

⁴⁸ 13 C.F.R. § 121.201, NAICS Code 334111.

⁴⁹ S. Census Bureau, American FactFinder, 2007 Economic Census, Industry Series, Industry Statistics by Employment Size, NAICS code 334111 (rel. Nov. 16, 2010); <http://factfinder.census.gov>.

⁵⁰ *Id.*

⁵¹ U.S. Census Bureau, 2007 NAICS Definitions, “334210 Telephone Apparatus Manufacturing”; <http://www.census.gov/naics/2007/def/ND334210.HTM>.

⁵² 13 C.F.R. § 121.201, NAICS Code 334210.

⁵³ S. Census Bureau, American FactFinder, 2007 Economic Census, Industry Series, Industry Statistics by Employment Size, NAICS code 334111 (rel. Nov. 16, 2010); <http://factfinder.census.gov>.

⁵⁴ *Id.*

thus, face possible significant economic impact from adoption of the rules proposed in the NPRM.

c. Manufacturers of Equipment to Provide Interoperable Video Conferencing Services

29. Entities that manufacture equipment used to provide interoperable and other video conferencing services are generally found in the Census Bureau category: “Other Communications Equipment Manufacturing.” The Census Bureau defines this category to include: “. . . establishments primarily engaged in manufacturing communications equipment (except telephone apparatus, and radio and television broadcast, and wireless communications equipment).”⁵⁵

30. *Other Communications Equipment Manufacturing.* In this category, the SBA has deemed a business manufacturing other communications equipment to be small if it has fewer than 750 employees.⁵⁶ For this category of manufacturers, Census data for 2007, which supersede similar data from the 2002 Census, show that there were 452 such establishments that operated that year.⁵⁷ Of those 452 establishments, all 452 (100 %) had fewer than 1,000 employees and 448 of those 452 (approximately 99%) had fewer than 500 employees.⁵⁸ Between these two figures, the Commission estimates that about 450 establishments (approximately 99.6%) had fewer than 750 employees and, thus, would be considered small under the applicable SBA size standard. Accordingly, the majority of establishments in this category can be considered small under that standard. On this basis, Commission estimates that approximately 99.6% or more of the manufacturers of equipment used to provide interoperable and other video conferencing services are small and, thus, face possible significant economic impact from adoption of the rules proposed in the NPRM.

d. Manufacturers of Software

31. Entities that publish software used to provide interconnected VoIP, non-interconnected VoIP, electronic messaging services, or interoperable video conferencing services are found in the Census Bureau category “Software Publishers.”

32. *Software Publishers.* The Census Bureau defines this category to include “. . . establishments primarily engaged in computer software publishing or publishing and reproduction. Establishments in this industry carry out operations necessary for producing and distributing computer software, such as designing, providing documentation, assisting in installation, and providing support services to software purchasers. These establishments may design, develop, and publish, or publish only.”⁵⁹

33. In this category, the SBA has deemed a publisher of software (or manufacturer of software under the CVAA) to be small if it has \$25 million or less in average annual receipts.⁶⁰ For this category of manufacturers, Census data for 2007, which supersede similar data from the 2002 Census,

⁵⁵ U.S. Census Bureau, 2007 NAICS Definitions, “334290

Other communications equipment manufacturing;” <http://www.census.gov/econ/industry/def/d334290.htm>

⁵⁶ 13 C.F.R. § 121.201, NAICS Code 334220.

⁵⁷ U.S. Census Bureau, American FactFinder, 2007 Economic Census, Industry Series, Industry Statistics by Employment Size, NAICS code 334290 (rel. Nov. 16, 2010); <http://factfinder.census.gov>.

⁵⁸ *Id.*

⁵⁹ U.S. Census Bureau, 2007 NAICS Definitions, “511210 Software Publishers;” <http://www.census.gov/econ/industry/def/d511210.htm>

⁶⁰ 13 C.F.R. § 121.201, NAICS Code 511210.

show that there were 5,313 such firms that operated that year.⁶¹ Of those 5,313 firms, 4,956 (approximately 93%) had \$25 million or less in average annual receipts and, thus, would be deemed small under the applicable SBA size standard.⁶² Accordingly, the majority of establishments in this category can be considered small under that standard. On this basis, Commission estimates that approximately 93% or more of the manufacturers of software used to provide interconnected VoIP, non-interconnected VoIP, electronic messaging services, and interoperable video conferencing services in this category are small and, thus, face possible significant economic impact from adoption of the rules proposed in the NPRM.

2. Service Providers

a. Providers of VoIP

34. Entities that provide interconnected or non-interconnected VoIP or both are generally found in one of two Census Bureau categories, “Wired Telecommunications Carriers” or “All Other Telecommunications.”

35. *Wired Telecommunications Carriers.* The Census Bureau defines this category as follows: “This industry comprises establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or a combination of technologies. Establishments in this industry use the wired telecommunications network facilities that they operate to provide a variety of services, such as wired telephony services, including VoIP services; wired (cable) audio and video programming distribution; and wired broadband Internet services. By exception, establishments providing satellite television distribution services using facilities and infrastructure that they operate are included in this industry.”⁶³

36. In this category, the SBA has deemed a wired telecommunications carrier to be small if it has fewer than 1,500 employees.⁶⁴ For this category of carriers, Census data for 2007, which supersedes similar data from the 2002 Census, shows 3,188 firms in this category.⁶⁵ Of these 3,188 firms, only 44 (approximately 1%) had 1,000 or more employees.⁶⁶ While we could not find precise Census data on the number of firms in the group with fewer than 1,500 employees, it is clear that at least the 3,188 firms with fewer than 1,000 employees would be in that group. Thus, at least 3,144 of these 3,188 firms (approximately 99%) had fewer than 1,500 employees. Accordingly, the Commission estimates that at least 3,144 (approximately 99%) had fewer than 1,500 employees and thus, would be considered small under the applicable SBA size standard. On this basis, the Commission estimates that approximately 99% or more of the providers of interconnected VoIP, non-interconnected VoIP, or both in this category are small and, thus, face possible significant economic impact from adoption of the rules proposed in the NPRM.⁶⁷

⁶¹ U.S. Census Bureau, American FactFinder, 2007 Economic Census, Industry Series, Industry Statistics by Employment Size, NAICS code 511210 (rel. Nov. 19, 2010); <http://factfinder.census.gov>.

⁶² *Id.*

⁶³ U.S. Census Bureau, 2007 NAICS Definitions, “517110 Wired Telecommunications Carriers”; <http://www.census.gov/econ/industry/def/d517110.htm>

⁶⁴ 13 C.F.R. § 121.201, NAICS Code 517110.

⁶⁵ U.S. Census Bureau, American FactFinder, 2007 Economic Census, Industry Series, Industry Statistics by Employment Size, NAICS code 517110 (rel. Nov. 19, 2010); <http://factfinder.census.gov>.

⁶⁶ *Id.*

⁶⁷ As noted in paragraph 17 above with regard to the distinction between manufacturers of equipment used to (continued....)

37. *All Other Telecommunications.* Under the 2007 U.S. Census definition of firms included in the category “All Other Telecommunications (NAICS Code 517919)” comprises “establishments primarily engaged in providing specialized telecommunications services, such as satellite tracking, communications telemetry, and radar station operation. This industry also includes establishments primarily engaged in providing satellite terminal stations and associated facilities connected with one or more terrestrial systems and capable of transmitting telecommunications to, and receiving telecommunications from, satellite systems. Establishments providing Internet services or voice over Internet protocol (VoIP) services via client-supplied telecommunications connections are also included in this industry.”⁶⁸

38. In this category, the SBA has deemed a provider of “all other telecommunications” services to be small if it has \$25 million or less in average annual receipts.⁶⁹ For this category of service providers, Census data for 2007, which supersede similar data from the 2002 Census, show that there were 2,383 such firms that operated that year.⁷⁰ Of those 2,383 firms, 2,346 (approximately 98%) had \$25 million or less in average annual receipts and, thus, would be deemed small under the applicable SBA size standard. Accordingly, the majority of establishments in this category can be considered small under that standard. On this basis, Commission estimates that approximately 98% or more of the providers of interconnected VoIP, non-interconnected VoIP, or both in this category are small and, thus, face possible significant economic impact from adoption of the rules proposed in the NPRM.⁷¹

b. Providers of Electronic Messaging Services

39. Entities that provide electronic messaging services are generally found in one of the following Census Bureau categories, “Wireless Telecommunications Carriers (except Satellites),” “Wired Telecommunications,” or “Internet Publishing and Broadcasting and Web Search Portals.”

40. *Wireless Telecommunications Carriers (except Satellites).* The Census Bureau defines this category to include “. . . establishments engaged in operating and maintaining switching and transmission facilities to provide communications via the airwaves. Establishments in this industry have spectrum licenses and provide services using that spectrum, such as cellular phone services, paging services, wireless Internet access, and wireless video services.”⁷²

41. In this category, the SBA has deemed a wireless telecommunications carrier to be small if it has fewer than 1,500 employees.⁷³ For this category of carriers, Census data for 2007, which supersede

(Continued from previous page) _____

provide inter-connected VoIP and manufactures of equipment to provide non-interconnected VoIP, our estimates of the number of the number of providers of non-interconnected VoIP (and the number of small entities within that group) are in all likelihood overstated because we could not draw in the data a distinction between such providers and those who provide interconnected VoIP. However, in the absence of more accurate data, we present these figures to provide as thorough an analysis of the impact on small entities as we can at this time, with the understanding that we will modify our analysis as more accurate data becomes available in this proceeding.

⁶⁸ <http://www.census.gov/cgi-bin/sssd/naics/naicsrch?code=517919&search=2007%20NAICS%20Search>

⁶⁹ 13 C.F.R. § 121.201, NAICS Code 517919.

⁷⁰ U.S. Census Bureau, American FactFinder, 2007 Economic Census, Industry Series, Industry Statistics by Employment Size, NAICS code 517919 (rel. Nov. 19, 2010); <http://factfinder.census.gov>.

⁷¹ See discussion *supra* note 67, regarding possible overestimation of firms and small entities providing non-interconnected VoIP services.

⁷² U.S. Census Bureau, 2007 NAICS Definitions, “Wireless Telecommunications Carriers (Except Satellites)”;
<http://www.census.gov/econ/industry/def/d517210.htm>

⁷³ 13 C.F.R. § 121.201, NAICS Code 517210.

similar data from the 2002 Census, shows 1,383 firms in this category.⁷⁴ Of these 1,383 firms, only 15 (approximately 1%) had 1,000 or more employees.⁷⁵ While there is no precise Census data on the number of firms the group with fewer than 1,500 employees, it is clear that at least the 1,368 firms with fewer than 1,000 employees would be found in that group. Thus, at least 1,368 of these 1,383 firms (approximately 99%) had fewer than 1,500 employees. Accordingly, the Commission estimates that at least 1,368 (approximately 99%) had fewer than 1,500 employees and, thus, would be considered small under the applicable SBA size standard. On this basis, Commission estimates that approximately 99% or more of the providers of electronic messaging services in this category are small and, thus, face possible significant economic impact from adoption of the rules proposed in the NPRM.

42. *Wired Telecommunications Carriers.* For the 2007 US Census definition of firms included in the category, “Wired Telecommunications Carriers (NAICS Code 517110),” see paragraph 35 above.

43. In this category, the SBA has deemed a wired telecommunications carrier to be small if it has fewer than 1,500 employees.⁷⁶ For this category of carriers, Census data for 2007, which supersede similar data from the 2002 Census, shows 3,188 firms in this category.⁷⁷ Of these 3,188 firms, only 44 (approximately 1%) had 1,000 or more employees.⁷⁸ While we could not find precise Census data on the number of firms in the group with fewer than 1,500 employees, it is clear that at least the 3,188 firms with fewer than 1,000 employees would be in that group. Thus, at least 3,144 of these 3,188 firms (approximately 99%) had fewer than 1,500 employees. Accordingly, the Commission estimates that of these 3,188 at least 3,144 (approximately 99%) had fewer than 1,500 employees and, thus, would be considered small under the applicable SBA size standard. On this basis, the Commission estimates that approximately 99% or more of the providers of electronic messaging services in this category are small and, thus, face possible significant economic impact from adoption of the rules proposed in the NPRM.

44. *Internet Publishing and Broadcasting and Web Search Portals.* The Census Bureau defines this category to include “. . . establishments primarily engaged in 1) publishing and/or broadcasting content on the Internet exclusively or 2) operating Web sites that use a search engine to generate and maintain extensive databases of Internet addresses and content in an easily searchable format (and known as Web search portals). The publishing and broadcasting establishments in this industry do not provide traditional (non-Internet) versions of the content that they publish or broadcast. They provide textual, audio, and/or video content of general or specific interest on the Internet exclusively. Establishments known as Web search portals often provide additional Internet services, such as e-mail, connections to other web sites, auctions, news, and other limited content, and serve as a home base for Internet users.”

45. In this category, the SBA has deemed an Internet publisher or Internet broadcaster or the provider of a web search portal on the Internet to be small if it has fewer than 500 employees.⁷⁹ For this category of manufacturers, Census data for 2007, which supersede similar data from the 2002 Census,

⁷⁴ U.S. Census Bureau, American FactFinder, 2007 Economic Census, Industry Series, Industry Statistics by Employment Size, NAICS code 57210 (rel. Nov. 19, 2010); <http://factfinder.census.gov>.

⁷⁵ *Id.*

⁷⁶ 13 C.F.R. § 121.201, NAICS Code 517110.

⁷⁷ U.S. Census Bureau, American FactFinder, 2007 Economic Census, Industry Series, Industry Statistics by Employment Size, NAICS code 517110 (rel. Nov. 19, 2010); <http://factfinder.census.gov>.

⁷⁸ *Id.*

⁷⁹ 13 C.F.R. § 121.201, NAICS Code 519130.

show that there were 2,705 such firms that operated that year.⁸⁰ Of those 2,705 firms, 2,682 (approximately 99%) had fewer than 500 employees and, thus, would be deemed small under the applicable SBA size standard.⁸¹ Accordingly, the majority of establishments in this category can be considered small under that standard. On this basis, Commission estimates that approximately 99% or more of the providers of electronic messaging services in this category are small and, thus, face possible significant economic impact from adoption of the rules proposed in the NPRM.

c. Providers of Interoperable Video Conferencing Services

46. Entities that provide interoperable video conferencing services are found in the Census Bureau Category “All Other Telecommunications.”

47. *All Other Telecommunications.* For the 2007 US Census definition of firms included in the category, “All Other Telecommunications (NAICS Code 517919),” see paragraph 37 above.

48. In this category, the SBA has deemed a provider of “all other telecommunications” services to be small if it has \$25 million or less in average annual receipts.⁸² For this category of service providers, Census data for 2007, which supersede similar data from the 2002 Census, show that there were 2,383 such firms that operated that year.⁸³ Of those 2,383 firms, 2,346 (approximately 98%) had \$25 million or less in average annual receipts and, thus, would be deemed small under the applicable SBA size standard. Accordingly, the majority of establishments in this category can be considered small under that standard. On this basis, Commission estimates that approximately 98% or more of the providers of interoperable video conferencing services are small and, thus, face possible significant economic impact from adoption of the rules proposed in the NPRM.

3. Additional Industry Categories.

a. Certain Wireless Carriers and Service Providers

49. *Cellular Licensees.* The SBA has developed a small business size standard for small businesses in the category “Wireless Telecommunications Carriers (except satellite).”⁸⁴ Under that SBA category, a business is small if it has 1,500 or fewer employees.⁸⁵ The census category of “Cellular and Other Wireless Telecommunications” is no longer used and has been superseded by the larger category “Wireless Telecommunications Carriers (except satellite).” The Census Bureau defines this larger category to include “. . . establishments engaged in operating and maintaining switching and transmission facilities to provide communications via the airwaves. Establishments in this industry have spectrum licenses and provide services using that spectrum, such as cellular phone services, paging services, wireless Internet access, and wireless video services.”⁸⁶

50. In this category, the SBA has deemed a wireless telecommunications carrier to be small if it has fewer than 1,500 employees.⁸⁷ For this category of carriers, Census data for 2007, which supersede

⁸⁰ U.S. Census Bureau, American FactFinder, 2007 Economic Census, Industry Series, Industry Statistics by Employment Size, NAICS code 519130 (rel. Nov. 19, 2010); <http://factfinder.census.gov>.

⁸¹ *Id.*

⁸² 13 C.F.R. § 121.201, NAICS Code 517919.

⁸³ U.S. Census Bureau, American FactFinder, 2007 Economic Census, Industry Series, Industry Statistics by Employment Size, NAICS code 517919 (rel. Nov. 19, 2010); <http://factfinder.census.gov>.

⁸⁴ 13 C.F.R. § 121.201, North American Industry Classification System (NAICS) code 517210.

⁸⁵ *Id.*

⁸⁶ U.S. Census Bureau, 2007 NAICS Definitions, “Wireless Telecommunications Carriers (Except Satellites);” <http://www.census.gov/econ/industry/def/d517210.htm>

⁸⁷ 13 C.F.R. § 121.201, NAICS Code 517210.

similar data from the 2002 Census, shows 1,383 firms in this category.⁸⁸ Of these 1,383 firms, only 15 (approximately 1%) had 1,000 or more employees.⁸⁹ While there is no precise Census data on the number of firms the group with fewer than 1,500 employees, it is clear that at least the 1,368 firms with fewer than 1,000 employees would be found in that group. Thus, at least 1,368 of these 1,383 firms (approximately 99%) had fewer than 1,500 employees. Accordingly, the Commission estimates that at least 1,368 (approximately 99%) had fewer than 1,500 employees and, thus, would be considered small under the applicable SBA size standard. On this basis, Commission estimates that approximately 99% or more of the providers of electronic messaging services in this category are small and, thus, face possible significant economic impact from adoption of the rules proposed in the NPRM.

51. *Specialized Mobile Radio.* The Commission awards “small entity” bidding credits in auctions for Specialized Mobile Radio (SMR) geographic area licenses in the 800 MHz and 900 MHz bands to firms that had revenues of no more than \$15 million in each of the three previous calendar years.⁹⁰ The Commission awards “very small entity” bidding credits to firms that had revenues of no more than \$3 million in each of the three previous calendar years.⁹¹ The SBA has approved these small business size standards for the 900 MHz Service.⁹² The Commission has held auctions for geographic area licenses in the 800 MHz and 900 MHz bands. The 900 MHz SMR auction began on December 5, 1995, and closed on April 15, 1996. Sixty bidders claiming that they qualified as small businesses under the \$15 million size standard won 263 geographic area licenses in the 900 MHz SMR band. The 800 MHz SMR auction for the upper 200 channels began on October 28, 1997, and was completed on December 8, 1997. Ten bidders claiming that they qualified as small businesses under the \$15 million size standard won 38 geographic area licenses for the upper 200 channels in the 800 MHz SMR band.⁹³ A second auction for the 800 MHz band was held on January 10, 2002 and closed on January 17, 2002 and included 23 licenses. One bidder claiming small business status won five licenses.⁹⁴

52. The auction of the 1,053 800 MHz SMR geographic area licenses for the General Category channels began on August 16, 2000, and was completed on September 1, 2000. Eleven bidders that won 108 geographic area licenses for the General Category channels in the 800 MHz SMR band qualified as small businesses under the \$15 million size standard. In an auction completed on December 5, 2000, a total of 2,800 Economic Area licenses in the lower 80 channels of the 800 MHz SMR service were sold. Of the 22 winning bidders, 19 claimed “small business” status and won 129 licenses. Thus, combining all three auctions, 40 winning bidders for geographic licenses in the 800 MHz SMR band claimed status as small business.

53. In addition, there are numerous incumbent site-by-site SMR licensees and licensees with extended implementation authorizations in the 800 and 900 MHz bands. The Commission does not know how many firms provide 800 MHz or 900 MHz geographic area SMR services pursuant to extended implementation authorizations, nor how many of these providers have annual revenues of no more than \$15 million. One firm has over \$15 million in revenues. In addition, we do not know how many of these

⁸⁸ U.S. Census Bureau, American FactFinder, 2007 Economic Census, Industry Series, Industry Statistics by Employment Size, NAICS code 517210 (rel. Nov. 19, 2010); <http://factfinder.census.gov>.

⁸⁹ *Id.*

⁹⁰ 47 C.F.R. § 90.814(b)(1).

⁹¹ *Id.*

⁹² See Letter from Aida Alvarez, Administrator, Small Business Administration, to Thomas Sugrue, Chief, Wireless Telecommunications Bureau, Federal Communications Commission, dated August 10, 1999.

⁹³ See “Correction to Public Notice DA 96-586 ‘FCC Announces Winning Bidders in the Auction of 1020 Licenses to Provide 900 MHz SMR in Major Trading Areas,’” *Public Notice*, 18 FCC Rcd 18367 (WTB 1996).

⁹⁴ See “Multi-Radio Service Auction Closes,” *Public Notice*, 17 FCC Rcd 1446 (WTB 2002).

firms have 1,500 or fewer employees. The Commission assumes, for purposes of this analysis, that all of the remaining existing extended implementation authorizations are held by small entities.

54. *Advanced Wireless Services.* In 2008, the Commission conducted the auction of Advanced Wireless Services (“AWS”) licenses.⁹⁵ This auction, which was designated as Auction 78, offered 35 licenses in the AWS 1710-1755 MHz and 2110-2155 MHz bands (“AWS-1”). The AWS-1 licenses were licenses for which there were no winning bids in Auction 66. That same year, the Commission completed Auction 78. A bidder with attributed average annual gross revenues that exceeded \$15 million and did not exceed \$40 million for the preceding three years (“small business”) received a 15 percent discount on its winning bid. A bidder with attributed average annual gross revenues that did not exceed \$15 million for the preceding three years (“very small business”) received a 25 percent discount on its winning bid. A bidder that had a combined total assets of less than \$500 million and combined gross revenues of less than \$125 million in each of the last two years qualified for entrepreneur status.⁹⁶ Four winning bidders that identified themselves as very small businesses won 17 licenses.⁹⁷ Three of the winning bidders that identified themselves as small business won five licenses. Additionally, one other winning bidder that qualified for entrepreneur status won 2 licenses.

55. *700 MHz Band Commercial Licensees.* There is 80 megahertz of non-Guard Band spectrum in the 700 MHz Band that is designated for commercial use: 698-757, 758-763, 776-787, and 788-793 MHz Bands. With one exception, the Commission adopted criteria for defining two groups of small businesses for purposes of determining their eligibility for bidding credits at auction. These two categories are: (1) “small business,” which is defined as an entity with attributed average annual gross revenues that exceed \$15 million and do not exceed \$40 million for the preceding three years; and (2) “very small business,” which is defined as an entity with attributed average annual gross revenues that do not exceed \$15 million for the preceding three years.⁹⁸ In Block C of the Lower 700 MHz Band (710-716 MHz and 740-746 MHz), which was licensed on the basis of 734 Cellular Market Areas, the Commission adopted a third criterion for determining eligibility for bidding credits: an “entrepreneur,” which is defined as an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than \$3 million for the preceding three years.⁹⁹ The SBA has approved these small size standards.¹⁰⁰

56. An auction of 740 licenses for Blocks C (710-716 MHz and 740-746 MHz) and D (716-722 MHz) of the Lower 700 MHz Band commenced on August 27, 2002, and closed on September 18, 2002. Of the 740 licenses available for auction, 484 licenses were sold to 102 winning bidders. Seventy-two of the winning bidders claimed small business, very small business, or entrepreneur status and won a total of 329 licenses.¹⁰¹ A second auction commenced on May 28, 2003, and closed on June 13, 2003,

⁹⁵ See AWS-1 and Broadband PCS Procedures Public Notice, 23 FCC Rcd 7496. Auction 78 also included an auction of Broadband PCS licenses.

⁹⁶ *Id.* at 7521-22.

⁹⁷ See “Auction of AWS-1 and Broadband PCS Licenses Closes, Winning Bidders Announced for Auction 78, Down Payments Due September 9, 2008, FCC Forms 601 and 602 Due September 9, 2008, Final Payments Due September 23, 2008, Ten-Day Petition to Deny Period”, *Public Notice*, 23 FCC Rcd 12749 (2008).

⁹⁸ See Auction of 700 MHz Band Licenses Scheduled for Jan. 24, 2008, AU Docket No. 07-157, *Notice and Filing Requirements, Minimum Opening Bids, Reserve Prices, Upfront Payments, and Other Procedures for Auctions 73 and 76*, DA 07-4171 at ¶ 70 (WTB rel. Oct. 5, 2007); Reallocation and Service Rules for the 698-746 MHz Spectrum Band (Television Channels 52-59), *Report and Order*, 17 FCC Rcd 1022, 1087-88 (2002).

⁹⁹ *Id.* at 1088.

¹⁰⁰ See Letter from Aida Alvarez, Administrator, Small Business Administration, to Thomas Sugrue, Chief, Wireless Telecommunications Bureau, Federal Communications Commission, dated August 10, 1999.

¹⁰¹ See “Lower 700 MHz Band Auction Closes,” *Public Notice*, 17 FCC Rcd 17272 (WTB 2002).

and included 256 licenses: five EAG licenses and 251 CMA licenses.¹⁰² Seventeen winning bidders claimed small or very small business status and won 60 licenses, and nine winning bidders claimed entrepreneur status and won 154 licenses.¹⁰³

57. The remaining 62 megahertz of commercial spectrum was auctioned on January 24 through March 18, 2008. As explained above, bidding credits for all of these licenses were available to “small businesses” and “very small businesses.” Auction 73 concluded with 1090 provisionally winning bids covering 1091 licenses and totaling \$19,592,420,000. The provisionally winning bids for the A, B, C, and E Block licenses exceeded the aggregate reserve prices for those blocks. The provisionally winning bid for the D Block license, however, did not meet the applicable reserve price and thus did not become a winning bid. Approximately 55 small businesses had winning bids.¹⁰⁴ Currently, the 10 remaining megahertz associated with the D block have not yet been assigned.¹⁰⁵

58. *Offshore Radiotelephone Service.* This service operates on several UHF television broadcast channels that are not used for television broadcasting in the coastal areas of states bordering the Gulf of Mexico. There are presently approximately 55 licensees in this service. The Commission is unable to estimate at this time the number of licensees that would qualify as small under the SBA’s small business size standard for the category of Wireless Telecommunications Carriers (except Satellite). Under that SBA small business size standard, a business is small if it has 1,500 or fewer employees. Census data for 2007, which supersede data from the 2002 Census, show that there were 1,383 firms that operated that year. Of those 1,383, 1,368 had fewer than 100 employees, and 15 firms had more than 100 employees. Thus under this category and the associated small business size standard, the majority of firms can be considered small.

59. *Government Transfer Bands.* The Commission adopted small business size standards for the unpaired 1390-1392 MHz, 1670-1675 MHz, and the paired 1392-1395 MHz and 1432-1435 MHz bands.¹⁰⁶ Specifically, with respect to these bands, the Commission defined an entity with average annual gross revenues for the three preceding years not exceeding \$40 million as a “small business,” and an entity with average annual gross revenues for the three preceding years not exceeding \$15 million as a “very small business.”¹⁰⁷ SBA has approved these small business size standards for the aforementioned bands.¹⁰⁸ Correspondingly, the Commission adopted a bidding credit of 15 percent for “small businesses”

¹⁰² See “Lower 700 MHz Band Auction Closes,” *Public Notice*, 18 FCC Rcd 11873 (WTB 2003).

¹⁰³ *Id.*

¹⁰⁴ See “Auction of 700 MHz Band Licenses Closes,” *Public Notice*, 23 FCC Rcd 4572 (WTB 2008).

¹⁰⁵ See fcc.gov website at http://wireless.fcc.gov/auctions/default.htm?job=auction_summary&id=73.

¹⁰⁶ See Amendments to Parts 1, 2, 27 and 90 of the Commission’s Rules to License Services in the 216-220 MHz, 1390-1395 MHz, 1427-1429 MHz, 1429-1432 MHz, 1432-1435 MHz, 1670-1675 MHz, and 2385-2390 MHz Government Transfer Bands, 17 FCC Rcd 9980 (2002).

¹⁰⁷ See Reallocation of the 216-220 MHz, 1390-1395 MHz, 1427-1429 MHz, 1429-1432 MHz, 1432-1435 MHz, 1670-1675 MHz, and 2385-2390 MHz Government Transfer Bands, WT Docket No. 02-8, *Notice of Proposed Rulemaking*, 17 FCC Rcd 2500, 2550-51 ¶¶ 144-146 (2002). To be consistent with the size standard of “very small business” proposed for the 1427-1432 MHz band for those entities with average gross revenues for the three preceding years not exceeding \$3 million, the *Service Rules Notice* proposed to use the terms “entrepreneur” and “small business” to define entities with average gross revenues for the three preceding years not exceeding \$40 million and \$15 million, respectively. Because the Commission is not adopting small business size standards for the 1427-1432 MHz band, it instead uses the terms “small business” and “very small business” to define entities with average gross revenues for the three preceding years not exceeding \$40 million and \$15 million, respectively.

¹⁰⁸ See Letter from Hector V. Barreto, Administrator, Small Business Administration, to Margaret W. Wiener, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, Federal Communications Commission, dated Jan. 18, 2002.

and a bidding credit of 25 percent for “very small businesses.”¹⁰⁹ This bidding credit structure was found to have been consistent with the Commission’s schedule of bidding credits, which may be found at section 1.2110(f)(2) of the Commission’s rules.¹¹⁰ The Commission found that these two definitions will provide a variety of businesses seeking to provide a variety of services with opportunities to participate in the auction of licenses for this spectrum and will afford such licensees, who may have varying capital costs, substantial flexibility for the provision of services.¹¹¹ The Commission noted that it had long recognized that bidding preferences for qualifying bidders provide such bidders with an opportunity to compete successfully against large, well-financed entities.¹¹² The Commission also noted that it had found that the use of tiered or graduated small business definitions is useful in furthering its mandate under Section 309(j) of the Act to promote opportunities for and disseminate licenses to a wide variety of applicants.¹¹³ An auction for one license in the 1670-1674 MHz band commenced on April 30, 2003 and closed the same day. One license was awarded. The winning bidder was not a small entity.

b. Certain Equipment Manufacturers and Stores

60. *Part 15 Handset Manufacturers.* Manufacturers of unlicensed wireless handsets may also become subject to requirements in this proceeding for their handsets used to provide VoIP applications. The Commission has not developed a definition of small entities applicable to unlicensed communications handset manufacturers. Therefore, we will utilize the SBA definition applicable to Radio and Television Broadcasting and Wireless Communications Equipment Manufacturing. The Census Bureau defines this category as follows: “This industry comprises establishments primarily engaged in manufacturing radio and television broadcast and wireless communications equipment. Examples of products made by these establishments are: transmitting and receiving antennas, cable television equipment, GPS equipment, pagers, cellular phones, mobile communications equipment, and radio and television studio and broadcasting equipment.”¹¹⁴ The SBA has developed a small business size standard for Radio and Television Broadcasting and Wireless Communications Equipment Manufacturing, which is: all such firms having 750 or fewer employees.¹¹⁵ According to Census Bureau data for 2002, there were a total of 1,041 establishments in this category that operated for the entire

¹⁰⁹ Such bidding credits are codified for the unpaired 1390-1392 MHz, paired 1392-1395 MHz, and the paired 1432-1435 MHz bands in 47 C.F.R. § 27.807. Such bidding credits are codified for the unpaired 1670-1675 MHz band in 47 C.F.R. § 27.906.

¹¹⁰ In the *Part 1 Third Report and Order*, the Commission adopted a standard schedule of bidding credits, the levels of which were developed based on its auction experience. *Part 1 Third Report and Order*, 13 FCC Rcd at 403-04 ¶ 47; see also 47 C.F.R. § 1.2110(f)(2).

¹¹¹ See *Service Rules Notice*, 17 FCC Rcd at 2550-51 ¶ 145.

¹¹² See, e.g., Revision of Part 22 and Part 90 of the Commission’s Rules to Facilitate Future Development of Paging Systems; Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, WT Docket No. 96-18, PR Docket No. 93-253, *Memorandum Opinion and Order on Reconsideration and Third Report and Order*, 14 FCC Rcd 10030, 10091 ¶ 112 (1999).

¹¹³ 47 U.S.C. § 309(j)(3)(B), (4)(C)-(D). The Commission will also not adopt special preferences for entities owned by minorities or women, and rural telephone companies. The Commission did not receive any comments on this issue, and it does not have an adequate record to support such special provisions under the current standards of judicial review. See *Adarand Constructors v. Peña*, 515 U.S. 200 (1995) (requiring a strict scrutiny standard of review for government mandated race-conscious measures); *United States v. Virginia*, 518 U.S. 515 (1996) (applying an intermediate standard of review to a state program based on gender classification).

¹¹⁴ U.S. Census Bureau, 2002 NAICS Definitions, “334220 Radio and Television Broadcasting and Wireless Communications Equipment Manufacturing”; <http://www.census.gov/epcd/naics02/def/NDEF334.HTM#N3342>.

¹¹⁵ 13 C.F.R. § 121.201, NAICS code 334220.

year.¹¹⁶ Of this total, 1,010 had employment of under 500, and an additional 13 had employment of 500 to 999.¹¹⁷ Thus, under this size standard, the majority of firms can be considered small.

61. *Radio and Television Broadcasting and Wireless Communications Equipment Manufacturing.* The Census Bureau defines this category as follows: “This industry comprises establishments primarily engaged in manufacturing radio and television broadcast and wireless communications equipment. Examples of products made by these establishments are: transmitting and receiving antennas, cable television equipment, GPS equipment, pagers, cellular phones, mobile communications equipment, and radio and television studio and broadcasting equipment.” The SBA has developed a small business size standard for firms in this category, which is: all such firms having 750 or fewer employees.¹¹⁸ According to Census Bureau data for 2007, there were a total of 919 firms in this category that operated for the entire year. Of this total, 777 had less than 100 employees, and an additional 148 had over 100 employees. Thus, while we can provide a more precise estimate, under this size standard, the large majority of these firms can be considered small.

62. *Radio, Television, and Other Electronics Stores.* The Census Bureau defines this economic census category as follows: “This U.S. industry comprises: (1) establishments known as consumer electronics stores primarily engaged in retailing a general line of new consumer-type electronic products; (2) establishments specializing in retailing a single line of consumer-type electronic products (except computers); or (3) establishments primarily engaged in retailing these new electronic products in combination with repair services.”¹¹⁹ The SBA has developed a small business size standard for Radio, Television, and Other Electronics Stores, which is: all such firms having \$9 million or less in annual receipts.¹²⁰ According to Census Bureau data for 2007, there were 18,291 firms in this category that operated for the entire year.¹²¹ Of this total, 17,369 firms had annual sales of under \$5 million, and 533 firms had sales of \$5 million or more but less than \$10 million.¹²² Thus, the majority of firms in this category can be considered small.

c. Wireline Carriers and Service Providers

63. *Incumbent Local Exchange Carriers (Incumbent LECs).* Neither the Commission nor the SBA has developed a small business size standard specifically for incumbent local exchange services. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.¹²³ Census Bureau data for 2007, which now supersede data from the 2002 Census, show that there were 3,188 firms in this category that operated for the entire year. Of this total, 3,144 had employment of 999 or fewer, and 44 firms had employment of 1000 or more. According to Commission

¹¹⁶ U.S. Census Bureau, American FactFinder, 2002 Economic Census, Industry Series, Industry Statistics by Employment Size, NAICS code 334220 (rel. May 26, 2005); <http://factfinder.census.gov>. In this category, the Census breaks out data for firms or companies only to give the total number for 2002, which was 929.

¹¹⁷ *Id.* An additional 18 establishments had employment of 1,000 or more.

¹¹⁸ 13 C.F.R. § 121.201, NAICS code 334220.

¹¹⁹ U.S. Census Bureau, 2002 NAICS Definitions, “443112 Radio, Television, and Other Electronics Stores”; <http://www.census.gov/epcd/naics02/def/NDEF443.HTM>.

¹²⁰ 13 C.F.R. § 121.201, NAICS code 443112.

¹²¹ U.S. Census Bureau, 2002 Economic Census, Industry Series: Retail Trade, Table 4, Sales Size of Firms for the United States: 2002, NAICS code 443112 (issued Nov. 2005).

¹²² *Id.* An additional 123 firms had annual sales of \$10 million or more. As a measure of small business prevalence, the data on annual sales are roughly equivalent to what one would expect from data on annual receipts.

¹²³ 13 C.F.R. § 121.201, NAICS code 517110.

data, 1,307 carriers reported that they were incumbent local exchange service providers.¹²⁴ Of these 1,307 carriers, an estimated 1,006 have 1,500 or fewer employees and 301 have more than 1,500 employees.¹²⁵ Consequently, the Commission estimates that most providers of local exchange service are small entities that may be affected by the rules proposed in the NPRM. Thus under this category, the majority of these incumbent local exchange service providers can be considered small.¹²⁶

64. *Competitive Local Exchange Carriers (Competitive LECs), Competitive Access Providers (CAPs), Shared-Tenant Service Providers, and Other Local Service Providers.* Neither the Commission nor the SBA has developed a small business size standard specifically for these service providers. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.¹²⁷ Census Bureau data for 2007, which now supersede data from the 2002 Census, show that there were 3,188 firms in this category that operated for the entire year. Of this total, 3,144 had employment of 999 or fewer, and 44 firms had had employment of 1,000 employees or more. Thus under this category and the associated small business size standard, the majority of these Competitive LECs, CAPs, Shared-Tenant Service Providers, and Other Local Service Providers can be considered small entities.¹²⁸ According to Commission data, 1,442 carriers reported that they were engaged in the provision of either competitive local exchange services or competitive access provider services.¹²⁹ Of these 1,442 carriers, an estimated 1,256 have 1,500 or fewer employees and 186 have more than 1,500 employees.¹³⁰ In addition, 17 carriers have reported that they are Shared-Tenant Service Providers, and all 17 are estimated to have 1,500 or fewer employees.¹³¹ In addition, 72 carriers have reported that they are Other Local Service Providers.¹³² Of the 72, seventy have 1,500 or fewer employees and two have more than 1,500 employees.¹³³ Consequently, the Commission estimates that most providers of competitive local exchange service, competitive access providers, Shared-Tenant Service Providers, and Other Local Service Providers are small entities that may be affected by rules adopted pursuant to the NPRM.

65. *Interexchange Carriers.* Neither the Commission nor the SBA has developed a small business size standard specifically for providers of interexchange services. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.¹³⁴ Census Bureau data for 2007, which now supersede data from the 2002 Census, show that there were 3,188 firms in this category that operated for the entire year. Of this total, 3,144 had employment of 999 or fewer, and 44 firms had had employment of 1,000 employees or more. Thus under this category and the associated small business size

¹²⁴ See *Trends in Telephone Service*, Federal Communications Commission, Wireline Competition Bureau, Industry Analysis and Technology Division at Table 5.3 (Sept. 2010) (*Trends in Telephone Service*).

¹²⁵ See *id.*

¹²⁶ See http://factfinder.census.gov/servlet/IBQTable?_bm=y&-fds_name=EC0700A1&-geo_id=&-skip=600&-ds_name=EC0751SSSZ5&-lang=en.

¹²⁷ 13 C.F.R. § 121.201, NAICS code 517110.

¹²⁸ See http://factfinder.census.gov/servlet/IBQTable?_bm=y&-fds_name=EC0700A1&-geo_id=&-skip=600&-ds_name=EC0751SSSZ5&-lang=en

¹²⁹ See *Trends in Telephone Service* at Table 5.3.

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ 13 C.F.R. § 121.201, NAICS code 517110.

standard, the majority of these Interexchange carriers can be considered small entities.¹³⁵ According to Commission data, 359 companies reported that their primary telecommunications service activity was the provision of interexchange services.¹³⁶ Of these 359 companies, an estimated 317 have 1,500 or fewer employees and 42 have more than 1,500 employees.¹³⁷ Consequently, the Commission estimates that the majority of interexchange service providers are small entities that may be affected by rules adopted pursuant to the NPRM.

66. *Operator Service Providers (OSPs)*. Neither the Commission nor the SBA has developed a small business size standard specifically for operator service providers. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.¹³⁸ Census Bureau data for 2007, which now supersede data from the 2002 Census, show that there were 3,188 firms in this category that operated for the entire year. Of this total, 3,144 had employment of 999 or fewer, and 44 firms had had employment of 1,000 employees or more. Thus under this category and the associated small business size standard, the majority of these Interexchange carriers can be considered small entities.¹³⁹ According to Commission data, 33 carriers have reported that they are engaged in the provision of operator services. Of these, an estimated 31 have 1,500 or fewer employees and 2 have more than 1,500 employees.¹⁴⁰ Consequently, the Commission estimates that the majority of OSPs are small entities that may be affected by our proposed rules.

67. *Local Resellers*. The SBA has developed a small business size standard for the category of Telecommunications Resellers. Under that size standard, such a business is small if it has 1,500 or fewer employees.¹⁴¹ Census data for 2007 show that 1,523 firms provided resale services during that year. Of that number, 1,522 operated with fewer than 1000 employees and one operated with more than 1,000.¹⁴² Thus under this category and the associated small business size standard, the majority of these local resellers can be considered small entities. According to Commission data, 213 carriers have reported that they are engaged in the provision of local resale services.¹⁴³ Of these, an estimated 211 have 1,500 or fewer employees and two have more than 1,500 employees.¹⁴⁴ Consequently, the Commission estimates that the majority of local resellers are small entities that may be affected by rules adopted pursuant to the Notice.

68. *Toll Resellers*. The SBA has developed a small business size standard for the category of Telecommunications Resellers. Under that size standard, such a business is small if it has 1,500 or fewer

¹³⁵ See http://factfinder.census.gov/servlet/IBQTable?_bm=y&-fds_name=EC0700A1&-geo_id=&-skip=600&-ds_name=EC0751SSSZ5&-lang=en

¹³⁶ See *Trends in Telephone Service* at Table 5.3.

¹³⁷ *Id.*

¹³⁸ 13 C.F.R. § 121.201, NAICS code 517110.

¹³⁹ See http://factfinder.census.gov/servlet/IBQTable?_bm=y&-fds_name=EC0700A1&-geo_id=&-skip=600&-ds_name=EC0751SSSZ5&-lang=en

¹⁴⁰ TRENDS IN TELEPHONE SERVICE, tbl. 5.3.

¹⁴¹ 13 C.F.R. § 121.201, NAICS code 517911.

¹⁴² http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-skip=800&-ds_name=EC0751SSSZ5&-lang=en

¹⁴³ See *Trends in Telephone Service* at Table 5.3.

¹⁴⁴ *Id.*

employees.¹⁴⁵ Census data for 2007 show that 1,523 firms provided resale services during that year. Of that number, 1,522 operated with fewer than 1000 employees and one operated with more than 1,000.¹⁴⁶ Thus under this category and the associated small business size standard, the majority of these resellers can be considered small entities. According to Commission data,¹⁴⁷ 881 carriers have reported that they are engaged in the provision of toll resale services. Of these, an estimated 857 have 1,500 or fewer employees and 24 have more than 1,500 employees. Consequently, the Commission estimates that the majority of toll resellers are small entities that may be affected by our proposed rules.

69. *Payphone Service Providers (PSPs)*. Neither the Commission nor the SBA has developed a small business size standard specifically for payphone services providers. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.¹⁴⁸ Census Bureau data for 2007, which now supersede data from the 2002 Census, show that there were 3,188 firms in this category that operated for the entire year. Of this total, 3,144 had employment of 999 or fewer, and 44 firms had had employment of 1,000 employees or more. Thus under this category and the associated small business size standard, the majority of these PSPs can be considered small entities.¹⁴⁹ According to Commission data,¹⁵⁰ 657 carriers have reported that they are engaged in the provision of payphone services. Of these, an estimated 653 have 1,500 or fewer employees and four have more than 1,500 employees. Consequently, the Commission estimates that the majority of payphone service providers are small entities that may be affected by our action.

70. *Prepaid Calling Card Providers*. Neither the Commission nor the SBA has developed a small business size standard specifically for prepaid calling card providers. The appropriate size standard under SBA rules is for the category Telecommunications Resellers. Under that size standard, such a business is small if it has 1,500 or fewer employees.¹⁵¹ Census data for 2007 show that 1,523 firms provided resale services during that year. Of that number, 1,522 operated with fewer than 1000 employees and one operated with more than 1,000.¹⁵² Thus under this category and the associated small business size standard, the majority of these prepaid calling card providers can be considered small entities. According to Commission data, 193 carriers have reported that they are engaged in the provision of prepaid calling cards.¹⁵³ Of these, all 193 have 1,500 or fewer employees and none have more than 1,500 employees.¹⁵⁴ Consequently, the Commission estimates that the majority of prepaid calling card providers are small entities that may be affected by rules adopted pursuant to the Notice.

¹⁴⁵ 13 C.F.R. § 121.201, NAICS code 517911.

¹⁴⁶ http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-_skip=800&-ds_name=EC0751SSSZ5&-_lang=en

¹⁴⁷ TRENDS IN TELEPHONE SERVICE, tbl. 5.3.

¹⁴⁸ 13 C.F.R. § 121.201, NAICS code 517110.

¹⁴⁹ See http://factfinder.census.gov/servlet/IBQTable?_bm=y&-fds_name=EC0700A1&-geo_id=&-_skip=600&-ds_name=EC0751SSSZ5&-_lang=en

¹⁵⁰ TRENDS IN TELEPHONE SERVICE, tbl. 5.3.

¹⁵¹ 13 C.F.R. § 121.201, NAICS code 517911.

¹⁵² http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-_skip=800&-ds_name=EC0751SSSZ5&-_lang=en

¹⁵³ See *Trends in Telephone Service* at Table 5.3.

¹⁵⁴ *Id.*

71. *800 and 800-Like Service Subscribers.*¹⁵⁵ Neither the Commission nor the SBA has developed a small business size standard specifically for 800 and 800-like service (“toll free”) subscribers. The appropriate size standard under SBA rules is for the category Telecommunications Resellers. Under that size standard, such a business is small if it has 1,500 or fewer employees.¹⁵⁶ Census data for 2007 show that 1,523 firms provided resale services during that year. Of that number, 1,522 operated with fewer than 1000 employees and one operated with more than 1,000.¹⁵⁷ Thus under this category and the associated small business size standard, the majority of resellers in this classification can be considered small entities. To focus specifically on the number of subscribers than on those firms which make subscription service available, the most reliable source of information regarding the number of these service subscribers appears to be data the Commission collects on the 800, 888, 877, and 866 numbers in use.¹⁵⁸ According to our data for September 2009, the number of 800 numbers assigned was 7,860,000; the number of 888 numbers assigned was 5,888,687; the number of 877 numbers assigned was 4, 721,866; and the number of 866 numbers assigned was 7, 867,736. The Commission does not have data specifying the number of these subscribers that are not independently owned and operated or have more than 1,500 employees, and thus are unable at this time to estimate with greater precision the number of toll free subscribers that would qualify as small businesses under the SBA size standard. Consequently, the Commission estimates that there are 7,860,000 or fewer small entity 800 subscribers; 5,888,687 or fewer small entity 888 subscribers; 4,721,866 or fewer small entity 877 subscribers; and 7,867,736 or fewer small entity 866 subscribers.

d. Wireless Carriers and Service Providers

72. Below, for those services where licenses are subject to auctions, the Commission notes that, as a general matter, the number of winning bidders that qualify as small businesses at the close of a given auction does not necessarily represent the number of small businesses currently in service. Also, the Commission does not generally track subsequent business size unless, in the context of assignments or transfers, unjust enrichment issues are implicated.

73. *Wireless Telecommunications Carriers (except Satellite).* Since 2007, the Census Bureau has placed wireless firms within this new, broad, economic census category.¹⁵⁹ Prior to that time, such firms were within the now-superseded categories of “Paging” and “Cellular and Other Wireless Telecommunications.”¹⁶⁰ Under the present and prior categories, the SBA has deemed a wireless business to be small if it has 1,500 or fewer employees.¹⁶¹ For the category of Wireless Telecommunications Carriers (except Satellite), Census data for 2007, which supersede data from the 2002 Census, show that there were 1,383 firms that operated that year.¹⁶² Of those 1,383, 1,368 had

¹⁵⁵ We include all toll-free number subscribers in this category, including those for 888 numbers.

¹⁵⁶ 13 C.F.R. § 121.201, NAICS code 517911.

¹⁵⁷ http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-_skip=800&-ds_name=EC0751SSSZ5&-_lang=en

¹⁵⁸ *Trends in Telephone Service* at Tables 18.4, 18.5, 18.6, 18.7.

¹⁵⁹ U.S. Census Bureau, 2007 NAICS Definitions, “517210 Wireless Telecommunications Categories (Except Satellite)”; <http://www.census.gov/naics/2007/def/ND517210.HTM#N517210>.

¹⁶⁰ U.S. Census Bureau, 2002 NAICS Definitions, “517211 Paging”; <http://www.census.gov/epcd/naics02/def/NDEF517.HTM>; U.S. Census Bureau, 2002 NAICS Definitions, “517212 Cellular and Other Wireless Telecommunications”; <http://www.census.gov/epcd/naics02/def/NDEF517.HTM>.

¹⁶¹ 13 C.F.R. § 121.201, NAICS code 517210 (2007 NAICS). The now-superseded, pre-2007 C.F.R. citations were 13 C.F.R. § 121.201, NAICS codes 517211 and 517212 (referring to the 2002 NAICS).

¹⁶² U.S. Census Bureau, 2007 Economic Census, Sector 51, 2007 NAICS code 517210 (rel. Oct. 20, 2009), http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-fds_name=EC0700A1&-_skip=700&- (continued....)

fewer than 100 employees, and 15 firms had more than 100 employees. Thus under this category and the associated small business size standard, the majority of firms can be considered small. Similarly, according to Commission data, 413 carriers reported that they were engaged in the provision of wireless telephony, including cellular service, Personal Communications Service (PCS), and Specialized Mobile Radio (SMR) Telephony services.¹⁶³ Of these, an estimated 261 have 1,500 or fewer employees and 152 have more than 1,500 employees.¹⁶⁴ Consequently, the Commission estimates that approximately half or more of these firms can be considered small. Thus, using available data, we estimate that the majority of wireless firms can be considered small.

74. *Wireless Communications Services.* This service can be used for fixed, mobile, radiolocation, and digital audio broadcasting satellite uses. The Commission defined “small business” for the wireless communications services (WCS) auction as an entity with average gross revenues of \$40 million for each of the three preceding years, and a “very small business” as an entity with average gross revenues of \$15 million for each of the three preceding years.¹⁶⁵ The SBA has approved these definitions.¹⁶⁶ The Commission auctioned geographic area licenses in the WCS service. In the auction, which commenced on April 15, 1997 and closed on April 25, 1997, seven bidders won 31 licenses that qualified as very small business entities, and one bidder won one license that qualified as a small business entity.

75. *Common Carrier Paging.* The SBA considers paging to be a wireless telecommunications service and classifies it under the industry classification Wireless Telecommunications Carriers (except satellite). Under that classification, the applicable size standard is that a business is small if it has 1,500 or fewer employees. For the general category of Wireless Telecommunications Carriers (except Satellite), Census data for 2007, which supersede data from the 2002 Census, show that there were 1,383 firms that operated that year.¹⁶⁷ Of those 1,383, 1,368 had fewer than 100 employees, and 15 firms had more than 100 employees. Thus under this category and the associated small business size standard, the majority of firms can be considered small.¹⁶⁸ The 2007 census also contains data for the specific category of “Paging” “that is classified under the seven-number NAICS code 5172101.”¹⁶⁹ According to Commission data, 291 carriers have reported that they are engaged in Paging or Messaging Service. Of these, an estimated 289 have 1,500 or fewer employees, and 2 have more than 1,500 employees.¹⁷⁰ Consequently, the Commission estimates that the majority of

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ds_name=EC0751SSSZ5&-_lang=en.

¹⁶³ See *Trends in Telephone Service* at Table 5.3.

¹⁶⁴ *Id.*

¹⁶⁵ *Amendment of the Commission’s Rules to Establish Part 27, the Wireless Communications Service (WCS)*, GN Docket No. 96-228, Report and Order, 12 FCC Rcd 10785, 10879, para. 194 (1997).

¹⁶⁶ See Letter from Aida Alvarez, Administrator, SBA, to Amy Zoslov, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, FCC (filed Dec. 2, 1998) (*Alvarez Letter 1998*).

¹⁶⁷ U.S. Census Bureau, 2007 Economic Census, Sector 51, 2007 NAICS code 517210 (rel. Oct. 20, 2009), http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-fds_name=EC0700A1&-skip=700&-ds_name=EC0751SSSZ5&-_lang=en.

¹⁶⁸ 13 C.F.R. § 121.201, NAICS code 517210.

¹⁶⁹ http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-skip=700&-ds_name=EC0751SSSZ5&-_lang=en In this specific category, there were 248 firms that operated for the entire year in 2007. Of that number 247 operated with fewer than 100 employees and one (1) operated with more than 1000 employees. Based on this classification and the associated size standard, the majority of paging firms must be considered small.

¹⁷⁰ See *Trends in Telephone Service* at Table 5.3.

paging providers are small entities that may be affected by our action. In addition, in the *220 MHz Third Report and Order*, the Commission developed a small business size standard for “small businesses” and “very small businesses” for purposes of determining their eligibility for special provisions such as bidding credits and installment payments.¹⁷¹ A “small business” is an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding \$15 million for the preceding three years. Additionally, a “very small business” is an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than \$3 million for the preceding three years.¹⁷² The SBA has approved these small business size standards.¹⁷³ An auction of Metropolitan Economic Area licenses commenced on February 24, 2000, and closed on March 2, 2000.¹⁷⁴ Of the 985 licenses auctioned, 440 were sold. Fifty-seven companies claiming small business status won.

76. *Wireless Telephony.* Wireless telephony includes cellular, personal communications services, and specialized mobile radio telephony carriers. As noted, the SBA has developed a small business size standard for Wireless Telecommunications Carriers (except Satellite).¹⁷⁵ Under the SBA small business size standard, a business is small if it has 1,500 or fewer employees.¹⁷⁶ Census data for 2007, which supersede data from the 2002 Census, show that there were 1,383 firms that operated that year.¹⁷⁷ Of those 1,383, 1,368 had fewer than 100 employees, and 15 firms had more than 100 employees. Thus under this category and the associated small business size standard, the majority of firms can be considered small. According to Trends in Telephone Service data, 434 carriers reported that they were engaged in wireless telephony.¹⁷⁸ Of these, an estimated 222 have 1,500 or fewer employees and 212 have more than 1,500 employees.¹⁷⁹ Therefore, approximately half of these entities can be considered small. Similarly, according to Commission data, 413 carriers reported that they were engaged in the provision of wireless telephony, including cellular service, Personal Communications Service (PCS), and Specialized Mobile Radio (SMR) Telephony services.¹⁸⁰ Of these, an estimated 261 have 1,500 or fewer employees and 152 have more than 1,500 employees.¹⁸¹ Consequently, the Commission estimates that approximately half or more of these firms can be considered small. Thus, using available data, we estimate that the majority of wireless firms can be considered small.

¹⁷¹ *Amendment of Part 90 of the Commission’s Rules to Provide for the Use of the 220-222 MHz Band by the Private Land Mobile Radio Service*, PR Docket No. 89-552, GN Docket No. 93-252, PP Docket No. 93-253, Third Report and Order and Fifth Notice of Proposed Rulemaking, 12 FCC Rcd 10943, 11068-70, paras. 291-295 (1997) (“*220 MHz Third Report and Order*”).

¹⁷² See Letter to Amy Zoslov, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, FCC, from A. Alvarez, Administrator, SBA (Dec. 2, 1998).

¹⁷³ *Revision of Part 22 and Part 90 of the Commission’s Rules to Facilitate Future Development of Paging Systems*, WT Docket No. 96-18, PR Docket No. 93-253, Memorandum Opinion and Order on Reconsideration and Third Report and Order, 14 FCC Rcd 10030, paras. 98-107 (1999).

¹⁷⁴ *Id.* at 10085, para. 98.

¹⁷⁵ 13 C.F.R. § 121.201, NAICS code 517210.

¹⁷⁶ *Id.*

¹⁷⁷ U.S. Census Bureau, 2007 Economic Census, Sector 51, 2007 NAICS code 517210 (rel. Oct. 20, 2009), http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-fds_name=EC0700A1&-_skip=700&-ds_name=EC0751SSSZ5&-_lang=en.

¹⁷⁸ TRENDS IN TELEPHONE SERVICE, tbl. 5.3.

¹⁷⁹ *Id.*

¹⁸⁰ See *Trends in Telephone Service* at Table 5.3.

¹⁸¹ See *id.*

77. *Broadband Personal Communications Service.* The broadband personal communications services (PCS) spectrum is divided into six frequency blocks designated A through F, and the Commission has held auctions for each block. The Commission initially defined a “small business” for C- and F-Block licenses as an entity that has average gross revenues of \$40 million or less in the three previous calendar years.¹⁸² For F-Block licenses, an additional small business size standard for “very small business” was added and is defined as an entity that, together with its affiliates, has average gross revenues of not more than \$15 million for the preceding three calendar years.¹⁸³ These small business size standards, in the context of broadband PCS auctions, have been approved by the SBA.¹⁸⁴ No small businesses within the SBA-approved small business size standards bid successfully for licenses in Blocks A and B. There were 90 winning bidders that claimed small business status in the first two C-Block auctions. A total of 93 bidders that claimed small business status won approximately 40 percent of the 1,479 licenses in the first auction for the D, E, and F Blocks.¹⁸⁵ On April 15, 1999, the Commission completed the reauction of 347 C-, D-, E-, and F-Block licenses in Auction No. 22.¹⁸⁶ Of the 57 winning bidders in that auction, 48 claimed small business status and won 277 licenses.

78. On January 26, 2001, the Commission completed the auction of 422 C and F Block Broadband PCS licenses in Auction No. 35. Of the 35 winning bidders in that auction, 29 claimed small business status.¹⁸⁷ Subsequent events concerning Auction 35, including judicial and agency determinations, resulted in a total of 163 C and F Block licenses being available for grant. On February 15, 2005, the Commission completed an auction of 242 C-, D-, E-, and F-Block licenses in Auction No. 58. Of the 24 winning bidders in that auction, 16 claimed small business status and won 156 licenses.¹⁸⁸ On May 21, 2007, the Commission completed an auction of 33 licenses in the A, C, and F Blocks in Auction No. 71.¹⁸⁹ Of the 12 winning bidders in that auction, five claimed small business status and won 18 licenses.¹⁹⁰ On August 20, 2008, the Commission completed the auction of 20 C-, D-, E-, and F-Block

¹⁸² See *Amendment of Parts 20 and 24 of the Commission’s Rules – Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap; Amendment of the Commission’s Cellular/PCS Cross-Ownership Rule*; WT Docket No. 96-59, GN Docket No. 90-314, Report and Order, 11 FCC Rcd 7824, 7850–52, paras. 57–60 (1996) (“*PCS Report and Order*”); see also 47 C.F.R. § 24.720(b).

¹⁸³ See *PCS Report and Order*, 11 FCC Rcd at 7852, para. 60.

¹⁸⁴ See *Alvarez Letter 1998*.

¹⁸⁵ See *Broadband PCS, D, E and F Block Auction Closes*, Public Notice, Doc. No. 89838 (rel. Jan. 14, 1997).

¹⁸⁶ See *C, D, E, and F Block Broadband PCS Auction Closes*, Public Notice, 14 FCC Rcd 6688 (WTB 1999). Before Auction No. 22, the Commission established a very small standard for the C Block to match the standard used for F Block. *Amendment of the Commission’s Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees*, WT Docket No. 97-82, Fourth Report and Order, 13 FCC Rcd 15743, 15768, para. 46 (1998).

¹⁸⁷ See *C and F Block Broadband PCS Auction Closes; Winning Bidders Announced*, Public Notice, 16 FCC Rcd 2339 (2001).

¹⁸⁸ See *Broadband PCS Spectrum Auction Closes; Winning Bidders Announced for Auction No. 58*, Public Notice, 20 FCC Rcd 3703 (2005).

¹⁸⁹ See *Auction of Broadband PCS Spectrum Licenses Closes; Winning Bidders Announced for Auction No. 71*, Public Notice, 22 FCC Rcd 9247 (2007).

¹⁹⁰ *Id.*

Broadband PCS licenses in Auction No. 78.¹⁹¹ Of the eight winning bidders for Broadband PCS licenses in that auction, six claimed small business status and won 14 licenses.¹⁹²

79. *Narrowband Personal Communications Services.* To date, two auctions of narrowband personal communications services (PCS) licenses have been conducted. For purposes of the two auctions that have already been held, “small businesses” were entities with average gross revenues for the prior three calendar years of \$40 million or less. Through these auctions, the Commission has awarded a total of 41 licenses, out of which 11 were obtained by small businesses. To ensure meaningful participation of small business entities in future auctions, the Commission has adopted a two-tiered small business size standard in the *Narrowband PCS Second Report and Order*.¹⁹³ A “small business” is an entity that, together with affiliates and controlling interests, has average gross revenues for the three preceding years of not more than \$40 million. A “very small business” is an entity that, together with affiliates and controlling interests, has average gross revenues for the three preceding years of not more than \$15 million. The SBA has approved these small business size standards.¹⁹⁴

80. *220 MHz Radio Service – Phase I Licensees.* The 220 MHz service has both Phase I and Phase II licenses. Phase I licensing was conducted by lotteries in 1992 and 1993. There are approximately 1,515 such non-nationwide licensees and four nationwide licensees currently authorized to operate in the 220 MHz band. The Commission has not developed a small business size standard for small entities specifically applicable to such incumbent 220 MHz Phase I licensees. To estimate the number of such licensees that are small businesses, the Commission applies the small business size standard under the SBA rules applicable. The SBA has deemed a wireless business to be small if it has 1,500 or fewer employees.¹⁹⁵ For this service, the SBA uses the category of Wireless Telecommunications Carriers (except Satellite). Census data for 2007, which supersede data from the 2002 Census, show that there were 1,383 firms that operated that year.¹⁹⁶ Of those 1,383, 1,368 had fewer than 100 employees, and 15 firms had more than 100 employees. Thus under this category and the associated small business size standard, the majority of firms can be considered small.

81. *220 MHz Radio Service – Phase II Licensees.* The 220 MHz service has both Phase I and Phase II licenses. The Phase II 220 MHz service is a new service, and is subject to spectrum auctions. In the *220 MHz Third Report and Order*, the Commission adopted a small business size standard for “small” and “very small” businesses for purposes of determining their eligibility for special provisions such as bidding credits and installment payments.¹⁹⁷ This small business size standard

¹⁹¹ See *Auction of AWS-1 and Broadband PCS Licenses Closes; Winning Bidders Announced for Auction 78*, Public Notice, 23 FCC Rcd 12749 (WTB 2008).

¹⁹² *Id.*

¹⁹³ *Amendment of the Commission’s Rules to Establish New Personal Communications Services, Narrowband PCS*, GEN Docket No. 90-314, ET Docket No. 92-100, PP Docket No. 93-253, Second Report and Order and Second Further Notice of Proposed Rulemaking, 15 FCC Rcd 10456 (2000) (“*Narrowband PCS Second Report and Order*”).

¹⁹⁴ See Letter to Amy Zoslov, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, FCC, from Aida Alvarez, Administrator, SBA (Dec. 2, 1998).

¹⁹⁵ 13 C.F.R. § 121.201, NAICS code 517210 (2007 NAICS). The now-superseded, pre-2007 C.F.R. citations were 13 C.F.R. § 121.201, NAICS codes 517211 and 517212 (referring to the 2002 NAICS).

¹⁹⁶ U.S. Census Bureau, 2007 Economic Census, Sector 51, 2007 NAICS code 517210 (rel. Oct. 20, 2009), http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-fds_name=EC0700A1&-_skip=700&-ds_name=EC0751SSSZ5&-_lang=en.

¹⁹⁷ *220 MHz Third Report and Order*, 12 FCC Rcd at 11068-70, at paras. 291-95.

indicates that a “small business” is an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding \$15 million for the preceding three years.¹⁹⁸ A “very small business” is an entity that, together with its affiliates and controlling principals, has average gross revenues that do not exceed \$3 million for the preceding three years. The SBA has approved these small business size standards.¹⁹⁹ Auctions of Phase II licenses commenced on September 15, 1998, and closed on October 22, 1998.²⁰⁰ In the first auction, 908 licenses were auctioned in three different-sized geographic areas: three nationwide licenses, 30 Regional Economic Area Group (EAG) Licenses, and 875 Economic Area (EA) Licenses. Of the 908 licenses auctioned, 693 were sold. Thirty-nine small businesses won licenses in the first 220 MHz auction. The second auction included 225 licenses: 216 EA licenses and 9 EAG licenses. Fourteen companies claiming small business status won 158 licenses.²⁰¹

82. *800 MHz and 900 MHz Specialized Mobile Radio Licenses.* The Commission awards small business bidding credits in auctions for Specialized Mobile Radio (“SMR”) geographic area licenses in the 800 MHz and 900 MHz bands to entities that had revenues of no more than \$15 million in each of the three previous calendar years.²⁰² The Commission awards very small business bidding credits to entities that had revenues of no more than \$3 million in each of the three previous calendar years.²⁰³ The SBA has approved these small business size standards for the 800 MHz and 900 MHz SMR Services.²⁰⁴ The Commission has held auctions for geographic area licenses in the 800 MHz and 900 MHz bands. The 900 MHz SMR auction was completed in 1996.²⁰⁵ Sixty bidders claiming that they qualified as small businesses under the \$15 million size standard won 263 geographic area licenses in the 900 MHz SMR band.²⁰⁶ The 800 MHz SMR auction for the upper 200 channels was conducted in 1997. Ten bidders claiming that they qualified as small businesses under the \$15 million size standard won 38 geographic area licenses for the upper 200 channels in the 800 MHz SMR band.²⁰⁷ A second auction for the 800 MHz band was conducted in 2002 and included 23 BEA licenses. One bidder claiming small business status won five licenses.²⁰⁸

83. The auction of the 1,053 800 MHz SMR geographic area licenses for the General Category channels was conducted in 2000. Eleven bidders won 108 geographic area licenses for the General Category channels in the 800 MHz SMR band qualified as small businesses under the \$15

¹⁹⁸ *Id.* at 11068-70, para. 291.

¹⁹⁹ See letter to D. Phythyon, Chief, Wireless Telecommunications Bureau, FCC, from Aida Alvarez, Administrator, SBA (Jan. 6, 1998).

²⁰⁰ See generally *220 MHz Service Auction Closes*, Public Notice, 14 FCC Rcd 605 (1998).

²⁰¹ *Phase II 220 MHz Service Spectrum Auction Closes*, Public Notice, 14 FCC Rcd 11218 (1999).

²⁰² 47 C.F.R. §§ 90.810, 90.814(b), 90.912.

²⁰³ 47 C.F.R. §§ 90.810, 90.814(b), 90.912.

²⁰⁴ See *Alvarez Letter 1999*.

²⁰⁵ “FCC Announces Winning Bidders in the Auction of 1,020 Licenses to Provide 900 MHz SMR in Major Trading Areas: Down Payments due April 22, 1996, FCC Form 600s due April 29, 1996,” *Public Notice*, 11 FCC Rcd 18599 (WTB 1996).

²⁰⁶ *Id.*

²⁰⁷ See “Correction to Public Notice DA 96-586 ‘FCC Announces Winning Bidders in the Auction of 1020 Licenses to Provide 900 MHz SMR in Major Trading Areas,’” *Public Notice*, 11 FCC Rcd 18,637 (WTB 1996).

²⁰⁸ See “Multi-Radio Service Auction Closes,” *Public Notice*, 17 FCC Rcd 1446 (WTB 2002).

million size standard.²⁰⁹ In an auction completed in 2000, a total of 2,800 Economic Area licenses in the lower 80 channels of the 800 MHz SMR service were awarded.²¹⁰ Of the 22 winning bidders, 19 claimed small business status and won 129 licenses. Thus, combining all three auctions, 40 winning bidders for geographic licenses in the 800 MHz SMR band claimed status as small business.

84. In addition, there are numerous incumbent site-by-site SMR licensees and licensees with extended implementation authorizations in the 800 and 900 MHz bands. We do not know how many firms provide 800 MHz or 900 MHz geographic area SMR pursuant to extended implementation authorizations, nor how many of these providers have annual revenues of no more than \$15 million. One firm has over \$15 million in revenues. In addition, we do not know how many of these firms have 1,500 or fewer employees.²¹¹ We assume, for purposes of this analysis, that all of the remaining existing extended implementation authorizations are held by small entities, as that small business size standard is approved by the SBA.

85. *700 MHz Guard Band Licensees.* In 2000, in the 700 MHz Guard Band Order, the Commission adopted size standards for “small businesses” and “very small businesses” for purposes of determining their eligibility for special provisions such as bidding credits and installment payments.²¹² A small business in this service is an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding \$40 million for the preceding three years.²¹³ Additionally, a very small business is an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than \$15 million for the preceding three years.²¹⁴ SBA approval of these definitions is not required.²¹⁵ An auction of 52 Major Economic Area licenses commenced on September 6, 2000, and closed on September 21, 2000.²¹⁶ Of the 104 licenses auctioned, 96 licenses were sold to nine bidders. Five of these bidders were small businesses that won a total of 26 licenses. A second auction of 700 MHz Guard Band licenses commenced on February 13, 2001, and closed on February 21, 2001. All eight of the licenses auctioned were sold to three bidders. One of these bidders was a small business that won a total of two licenses.²¹⁷

86. *Air-Ground Radiotelephone Service.* The Commission has previously used the SBA’s small business size standard applicable to Wireless Telecommunications Carriers (except Satellite), *i.e.*, an entity employing no more than 1,500 persons.²¹⁸ There are approximately 100 licensees in the Air-

²⁰⁹ See “800 MHz Specialized Mobile Radio (SMR) Service General Category (851-854 MHz) and Upper Band (861-865 MHz) Auction Closes; Winning Bidders Announced,” *Public Notice*, 15 FCC Rcd 17162 (WTB 2000).

²¹⁰ See, “800 MHz SMR Service Lower 80 Channels Auction Closes; Winning Bidders Announced,” *Public Notice*, 16 FCC Rcd 1736 (WTB 2000).

²¹¹ See generally 13 C.F.R. § 121.201, NAICS code 517210.

²¹² See *Service Rules for the 746–764 MHz Bands, and Revisions to Part 27 of the Commission’s Rules*, WT Docket No. 99-168, Second Report and Order, 15 FCC Rcd 5299 (2000) (*746–764 MHz Band Second Report and Order*).

²¹³ See *746–764 MHz Band Second Report and Order*, 15 FCC Rcd at 5343, para. 108.

²¹⁴ *Id.*

²¹⁵ See *id.* at 5343, para. 108 n.246 (for the 746–764 MHz and 776–794 MHz bands, the Commission is exempt from 15 U.S.C. § 632, which requires Federal agencies to obtain SBA approval before adopting small business size standards).

²¹⁶ See *700 MHz Guard Bands Auction Closes: Winning Bidders Announced*, Public Notice, 15 FCC Rcd 18026 (WTB 2000).

²¹⁷ See *700 MHz Guard Bands Auction Closes: Winning Bidders Announced*, Public Notice, 16 FCC Rcd 4590 (WTB 2001).

²¹⁸ 13 C.F.R. § 121.201, NAICS codes 517210.

Ground Radiotelephone Service, and under that definition, the Commission estimates that almost all of them qualify as small entities under the SBA definition. For purposes of assigning Air-Ground Radiotelephone Service licenses through competitive bidding, the Commission has defined “small business” as an entity that, together with controlling interests and affiliates, has average annual gross revenues for the preceding three years not exceeding \$40 million.²¹⁹ A “very small business” is defined as an entity that, together with controlling interests and affiliates, has average annual gross revenues for the preceding three years not exceeding \$15 million.²²⁰ These definitions were approved by the SBA.²²¹ In May 2006, the Commission completed an auction of nationwide commercial Air-Ground Radiotelephone Service licenses in the 800 MHz band (Auction No. 65). On June 2, 2006, the auction closed with two winning bidders winning two Air-Ground Radiotelephone Services licenses. Neither of the winning bidders claimed small business status.

87. *Rural Radiotelephone Service.* The Commission has not adopted a size standard for small businesses specific to the Rural Radiotelephone Service.²²² A significant subset of the Rural Radiotelephone Service is the Basic Exchange Telephone Radio System (BETRS).²²³ For purposes of its analysis of the Rural Radiotelephone Service, the Commission uses the SBA small business size standard for the category Wireless Telecommunications Carriers (except satellite),” which is 1,500 or fewer employees.²²⁴ Census data for 2007, which supersede data from the 2002 Census, show that there were 1,383 firms that operated that year.²²⁵ Of those 1,383, 1,368 had fewer than 100 employees, and 15 firms had more than 100 employees. Thus under this category and the associated small business size standard, the majority of firms in the Rural Radiotelephone Service can be considered small.

88. *Aviation and Marine Radio Services.* Small businesses in the aviation and marine radio services use a very high frequency (VHF) marine or aircraft radio and, as appropriate, an emergency position-indicating radio beacon (and/or radar) or an emergency locator transmitter. The Commission has not developed a small business size standard specifically applicable to these small businesses. For purposes of this analysis, the Commission uses the SBA small business size standard for the category Wireless Telecommunications Carriers (except satellite),” which is 1,500 or fewer employees.²²⁶ Census data for 2007, which supersede data from the 2002 Census, show that there were 1,383 firms that operated that year.²²⁷ Of those 1,383, 1,368 had fewer than 100 employees, and 15 firms had more than 100

²¹⁹ *Amendment of Part 22 of the Commission’s Rules to Benefit the Consumers of Air-Ground Telecommunications Services, Biennial Regulatory Review—Amendment of Parts 1, 22, and 90 of the Commission’s Rules, Amendment of Parts 1 and 22 of the Commission’s Rules to Adopt Competitive Bidding Rules for Commercial and General Aviation Air-Ground Radiotelephone Service*, WT Docket Nos. 03-103, 05-42, Order on Reconsideration and Report and Order, 20 FCC Rcd 19663, paras. 28–42 (2005).

²²⁰ *Id.*

²²¹ See Letter from Hector V. Barreto, Administrator, SBA, to Gary D. Michaels, Deputy Chief, Auctions and Spectrum Access Division, Wireless Telecommunications Bureau, FCC (filed Sept. 19, 2005).

²²² The service is defined in section 22.99 of the Commission’s Rules, 47 C.F.R. § 22.99.

²²³ BETRS is defined in sections 22.757 and 22.759 of the Commission’s Rules, 47 C.F.R. §§ 22.757 and 22.759.

²²⁴ 13 C.F.R. § 121.201, NAICS code 517210.

²²⁵ U.S. Census Bureau, 2007 Economic Census, Sector 51, 2007 NAICS code 517210 (rel. Oct. 20, 2009), http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-fds_name=EC0700A1&-_skip=700&-ds_name=EC0751SSSZ5&-_lang=en.

²²⁶ 13 C.F.R. § 121.201, NAICS code 517210.

²²⁷ U.S. Census Bureau, 2007 Economic Census, Sector 51, 2007 NAICS code 517210 (rel. Oct. 20, 2009), http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-fds_name=EC0700A1&-_skip=700&- (continued....)

employees. Thus under this category and the associated small business size standard, the majority of firms can be considered small.

89. *Fixed Microwave Services.* Microwave services include common carrier,²²⁸ private-operational fixed,²²⁹ and broadcast auxiliary radio services.²³⁰ They also include the Local Multipoint Distribution Service (LMDS),²³¹ the Digital Electronic Message Service (DEMS),²³² and the 24 GHz Service,²³³ where licensees can choose between common carrier and non-common carrier status.²³⁴ The Commission has not yet defined a small business with respect to microwave services. For purposes of this IRFA, the Commission will use the SBA's definition applicable to Wireless Telecommunications Carriers (except satellite)—*i.e.*, an entity with no more than 1,500 persons is considered small.²³⁵ For the category of Wireless Telecommunications Carriers (except Satellite), Census data for 2007, which supersede data from the 2002 Census, show that there were 1,383 firms that operated that year.²³⁶ Of those 1,383, 1,368 had fewer than 100 employees, and 15 firms had more than 100 employees. Thus under this category and the associated small business size standard, the majority of firms can be considered small. The Commission notes that the number of firms does not necessarily track the number of licensees. The Commission estimates that virtually all of the Fixed Microwave licensees (excluding broadcast auxiliary licensees) would qualify as small entities under the SBA definition.

90. *Offshore Radiotelephone Service.* This service operates on several UHF television broadcast channels that are not used for television broadcasting in the coastal areas of states bordering the Gulf of Mexico.²³⁷ There are presently approximately 55 licensees in this service. The Commission is unable to estimate at this time the number of licensees that would qualify as small under the SBA's small business size standard for the category of Wireless Telecommunications Carriers (except Satellite). Under that standard.²³⁸ Under that SBA small business size standard, a business is small if it has 1,500 or fewer employees.²³⁹ Census data for 2007, which supersede data from the 2002 Census, show that there

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²²⁸ See 47 C.F.R. Part 101, Subparts C and I.

²²⁹ See 47 C.F.R. Part 101, Subparts C and H.

²³⁰ Auxiliary Microwave Service is governed by Part 74 of Title 47 of the Commission's Rules. See 47 C.F.R. Part 74. Available to licensees of broadcast stations and to broadcast and cable network entities, broadcast auxiliary microwave stations are used for relaying broadcast television signals from the studio to the transmitter, or between two points such as a main studio and an auxiliary studio. The service also includes mobile TV pickups, which relay signals from a remote location back to the studio.

²³¹ See 47 C.F.R. Part 101, Subpart L.

²³² See 47 C.F.R. Part 101, Subpart G.

²³³ See *id.*

²³⁴ See 47 C.F.R. §§ 101.533, 101.1017.

²³⁵ 13 C.F.R. § 121.201, NAICS code 517210.

²³⁶ U.S. Census Bureau, 2007 Economic Census, Sector 51, 2007 NAICS code 517210 (rel. Oct. 20, 2009), http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-fds_name=EC0700A1&-_skip=700&-ds_name=EC0751SSSZ5&-_lang=en.

²³⁷ This service is governed by Subpart I of Part 22 of the Commission's Rules. See 47 C.F.R. §§ 22.1001-22.1037.

²³⁸ 13 C.F.R. § 121.201, NAICS code 517210.

²³⁹ *Id.*

were 1,383 firms that operated that year.²⁴⁰ Of those 1,383, 1,368 had fewer than 100 employees, and 15 firms had more than 100 employees. Thus under this category and the associated small business size standard, the majority of firms can be considered small.

91. *39 GHz Service.* The Commission created a special small business size standard for 39 GHz licenses – an entity that has average gross revenues of \$40 million or less in the three previous calendar years.²⁴¹ An additional size standard for “very small business” is: an entity that, together with affiliates, has average gross revenues of not more than \$15 million for the preceding three calendar years.²⁴² The SBA has approved these small business size standards.²⁴³ The auction of the 2,173 39 GHz licenses began on April 12, 2000 and closed on May 8, 2000. The 18 bidders who claimed small business status won 849 licenses. Consequently, the Commission estimates that 18 or fewer 39 GHz licensees are small entities that may be affected by our action.

92. *Wireless Cable Systems. Broadband Radio Service and Educational Broadband Service.* Broadband Radio Service systems, previously referred to as Multipoint Distribution Service (MDS) and Multichannel Multipoint Distribution Service (MMDS) systems, and “wireless cable,” transmit video programming to subscribers and provide two-way high speed data operations using the microwave frequencies of the Broadband Radio Service (BRS) and Educational Broadband Service (EBS) (previously referred to as the Instructional Television Fixed Service (ITFS)).²⁴⁴ In connection with the 1996 BRS auction, the Commission established a small business size standard as an entity that had annual average gross revenues of no more than \$40 million in the previous three calendar years.²⁴⁵ The BRS auctions resulted in 67 successful bidders obtaining licensing opportunities for 493 Basic Trading Areas (BTAs). Of the 67 auction winners, 61 met the definition of a small business. BRS also includes licensees of stations authorized prior to the auction. At this time, we estimate that of the 61 small business BRS auction winners, 48 remain small business licensees. In addition to the 48 small businesses that hold BTA authorizations, there are approximately 392 incumbent BRS licensees that are considered small entities.²⁴⁶ After adding the number of small business auction licensees to the number of incumbent licensees not already counted, we find that there are currently approximately 440 BRS licensees that are defined as small businesses under either the SBA or the Commission’s rules. In 2009, the Commission

²⁴⁰ U.S. Census Bureau, 2007 Economic Census, Sector 51, 2007 NAICS code 517210 (rel. Oct. 20, 2009), http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-fds_name=EC0700A1&-_skip=700&-ds_name=EC0751SSSZ5&-_lang=en.

²⁴¹ See *Amendment of the Commission’s Rules Regarding the 37.0-38.6 GHz and 38.6-40.0 GHz Bands*, ET Docket No. 95-183, PP Docket No. 93-253, Report and Order, 12 FCC Rcd 18600 (1998).

²⁴² *Id.*

²⁴³ See Letter to Kathleen O’Brien Ham, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, FCC, from Aida Alvarez, Administrator, SBA (Feb. 4, 1998).

²⁴⁴ *Amendment of Parts 21 and 74 of the Commission’s Rules with Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service and Implementation of Section 309(j) of the Communications Act—Competitive Bidding*, MM Docket No. 94-131, PP Docket No. 93-253, Report and Order, 10 FCC Rcd 9589, 9593, para. 7 (1995).

²⁴⁵ 47 C.F.R. § 21.961(b)(1).

²⁴⁶ 47 U.S.C. § 309(j). Hundreds of stations were licensed to incumbent MDS licensees prior to implementation of Section 309(j) of the Communications Act of 1934, 47 U.S.C. § 309(j). For these pre-auction licenses, the applicable standard is SBA’s small business size standard of 1500 or fewer employees.

conducted Auction 86, the sale of 78 licenses in the BRS areas.²⁴⁷ The Commission offered three levels of bidding credits: (i) a bidder with attributed average annual gross revenues that exceed \$15 million and do not exceed \$40 million for the preceding three years (small business) will receive a 15 percent discount on its winning bid; (ii) a bidder with attributed average annual gross revenues that exceed \$3 million and do not exceed \$15 million for the preceding three years (very small business) will receive a 25 percent discount on its winning bid; and (iii) a bidder with attributed average annual gross revenues that do not exceed \$3 million for the preceding three years (entrepreneur) will receive a 35 percent discount on its winning bid.²⁴⁸ Auction 86 concluded in 2009 with the sale of 61 licenses.²⁴⁹ Of the ten winning bidders, two bidders that claimed small business status won 4 licenses; one bidder that claimed very small business status won three licenses; and two bidders that claimed entrepreneur status won six licenses.

93. In addition, the SBA's Cable Television Distribution Services small business size standard is applicable to EBS. There are presently 2,032 EBS licensees. All but 100 of these licenses are held by educational institutions. Educational institutions are included in this analysis as small entities.²⁵⁰ Thus, we estimate that at least 1,932 licensees are small businesses. Since 2007, Cable Television Distribution Services have been defined within the broad economic census category of Wired Telecommunications Carriers; that category is defined as follows: "This industry comprises establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or a combination of technologies."²⁵¹ For these services, the Commission uses the SBA small business size standard for the category "Wireless Telecommunications Carriers (except satellite)," which is 1,500 or fewer employees.²⁵² To gauge small business prevalence for these cable services we must, however, use the most current census data. Census data for 2007, which supersede data from the 2002 Census, show that there were 1,383 firms that operated that year.²⁵³ Of those 1,383, 1,368 had fewer than 100 employees, and 15 firms had more than 100 employees. Thus under this category and the associated small business size standard, the majority of firms can be considered small. The Commission notes that the Census' use the classifications "firms" does not track the number of "licenses".

²⁴⁷ *Auction of Broadband Radio Service (BRS) Licenses, Scheduled for October 27, 2009, Notice and Filing Requirements, Minimum Opening Bids, Upfront Payments, and Other Procedures for Auction 86*, Public Notice, 24 FCC Rcd 8277 (2009).

²⁴⁸ *Id.* at 8296.

²⁴⁹ *Auction of Broadband Radio Service Licenses Closes, Winning Bidders Announced for Auction 86, Down Payments Due November 23, 2009, Final Payments Due December 8, 2009, Ten-Day Petition to Deny Period*, Public Notice, 24 FCC Rcd 13572 (2009).

²⁵⁰ The term "small entity" within SBREFA applies to small organizations (nonprofits) and to small governmental jurisdictions (cities, counties, towns, townships, villages, school districts, and special districts with populations of less than 50,000). 5 U.S.C. §§ 601(4)–(6). We do not collect annual revenue data on EBS licensees.

²⁵¹ U.S. Census Bureau, 2007 NAICS Definitions, "517110 Wired Telecommunications Carriers," (partial definition), www.census.gov/naics/2007/def/ND517110.HTM#N517110.

²⁵² 13 C.F.R. § 121.201, NAICS code 517210.

²⁵³ U.S. Census Bureau, 2007 Economic Census, Sector 51, 2007 NAICS code 517210 (rel. Oct. 20, 2009), http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-fds_name=EC0700A1&-_skip=700&-ds_name=EC0751SSSZ5&-_lang=en.

94. In the 1998 and 1999 LMDS auctions,²⁵⁴ the Commission defined a small business as an entity that has annual average gross revenues of less than \$40 million in the previous three calendar years.²⁵⁵ Moreover, the Commission added an additional classification for a “very small business,” which was defined as an entity that had annual average gross revenues of less than \$15 million in the previous three calendar years.²⁵⁶ These definitions of “small business” and “very small business” in the context of the LMDS auctions have been approved by the SBA.²⁵⁷ In the first LMDS auction, 104 bidders won 864 licenses. Of the 104 auction winners, 93 claimed status as small or very small businesses. In the LMDS re-auction, 40 bidders won 161 licenses. Based on this information, the Commission believes that the number of small LMDS licenses will include the 93 winning bidders in the first auction and the 40 winning bidders in the re-auction, for a total of 133 small entity LMDS providers as defined by the SBA and the Commission’s auction rules.

95. *218-219 MHz Service.* The first auction of 218-219 MHz spectrum resulted in 170 entities winning licenses for 594 Metropolitan Statistical Area (MSA) licenses. Of the 594 licenses, 557 were won by entities qualifying as a small business. For that auction, the small business size standard was an entity that, together with its affiliates, has no more than a \$6 million net worth and, after federal income taxes (excluding any carry over losses), has no more than \$2 million in annual profits each year for the previous two years.²⁵⁸ In the *218-219 MHz Report and Order and Memorandum Opinion and Order*, the Commission established a small business size standard for a “small business” as an entity that, together with its affiliates and persons or entities that hold interests in such an entity and their affiliates, has average annual gross revenues not to exceed \$15 million for the preceding three years.²⁵⁹ A “very small business” is defined as an entity that, together with its affiliates and persons or entities that hold interests in such an entity and its affiliates, has average annual gross revenues not to exceed \$3 million for the preceding three years.²⁶⁰ These size standards will be used in future auctions of 218-219 MHz spectrum.

96. *24 GHz – Incumbent Licensees.* This analysis may affect incumbent licensees who were relocated to the 24 GHz band from the 18 GHz band, and applicants who wish to provide services in the 24 GHz band. For this service, the Commission uses the SBA small business size standard for the category “Wireless Telecommunications Carriers (except satellite),” which is 1,500 or fewer employees.²⁶¹ To gauge small business prevalence for these cable services we must, however, use the most current census data. Census data for 2007, which supersede data from the 2002 Census, show that there were 1,383 firms that operated that year.²⁶² Of those 1,383, 1,368 had fewer than 100 employees,

²⁵⁴ The Commission has held two LMDS auctions: Auction 17 and Auction 23. Auction No. 17, the first LMDS auction, began on February 18, 1998, and closed on March 25, 1998. (104 bidders won 864 licenses.) Auction No. 23, the LMDS re-auction, began on April 27, 1999, and closed on May 12, 1999. (40 bidders won 161 licenses.)

²⁵⁵ See *LMDS Order*, 12 FCC Rcd at 12545.

²⁵⁶ *Id.*

²⁵⁷ See Letter to Daniel Phythyon, Chief, Wireless Telecommunications Bureau (FCC) from A. Alvarez, Administrator, SBA (January 6, 1998).

²⁵⁸ *Implementation of Section 309(j) of the Communications Act – Competitive Bidding*, PP Docket No. 93-253, Fourth Report and Order, 9 FCC Rcd 2330 (1994).

²⁵⁹ *Amendment of Part 95 of the Commission’s Rules to Provide Regulatory Flexibility in the 218-219 MHz Service*, WT Docket No. 98-169, Report and Order and Memorandum Opinion and Order, 15 FCC Rcd 1497 (1999)(“*218-219 MHz Report and Order and Memorandum Opinion and Order*”).

²⁶⁰ *Id.*

²⁶¹ 13 C.F.R. § 121.201, NAICS code 517210.

²⁶² U.S. Census Bureau, 2007 Economic Census, Sector 51, 2007 NAICS code 517210 (rel. Oct. 20, 2009), (continued....)

and 15 firms had more than 100 employees. Thus under this category and the associated small business size standard, the majority of firms can be considered small. The Commission notes that the Census' use of the classifications "firms" does not track the number of "licenses". The Commission believes that there are only two licensees in the 24 GHz band that were relocated from the 18 GHz band, Teligent²⁶³ and TRW, Inc. It is our understanding that Teligent and its related companies have less than 1,500 employees, though this may change in the future. TRW is not a small entity. Thus, only one incumbent licensee in the 24 GHz band is a small business entity.

97. *24 GHz – Future Licensees.* With respect to new applicants in the 24 GHz band, the small business size standard for "small business" is an entity that, together with controlling interests and affiliates, has average annual gross revenues for the three preceding years not in excess of \$15 million.²⁶⁴ "Very small business" in the 24 GHz band is an entity that, together with controlling interests and affiliates, has average gross revenues not exceeding \$3 million for the preceding three years.²⁶⁵ The SBA has approved these small business size standards.²⁶⁶ These size standards will apply to the future auction, if held.

98. *Satellite Telecommunications Providers.* Two economic census categories address the satellite industry. The first category has a small business size standard of \$15 million or less in average annual receipts, under SBA rules.²⁶⁷ The second has a size standard of \$25 million or less in annual receipts.²⁶⁸

99. The category of Satellite Telecommunications "comprises establishments primarily engaged in providing telecommunications services to other establishments in the telecommunications and broadcasting industries by forwarding and receiving communications signals via a system of satellites or reselling satellite telecommunications."²⁶⁹ Census Bureau data for 2007 show that 512 Satellite Telecommunications firms that operated for that entire year.²⁷⁰ Of this total, 464 firms had annual receipts of under \$10 million, and 18 firms had receipts of \$10 million to \$24,999,999.²⁷¹ Consequently,

(Continued from previous page) _____

http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-fds_name=EC0700A1&-_skip=700&-ds_name=EC0751SSSZ5&-_lang=en.

²⁶³ Teligent acquired the DEMS licenses of FirstMark, the only licensee other than TRW in the 24 GHz band whose license has been modified to require relocation to the 24 GHz band.

²⁶⁴ *Amendments to Parts 1, 2, 87 and 101 of the Commission's Rules to License Fixed Services at 24 GHz*, WT Docket No. 99-327, Report and Order, 15 FCC Rcd 16934, 16967 at para. 77 (2000); *see also* 47 C.F.R. § 101.538(a)(2).

²⁶⁵ *Amendments to Parts 1, 2, 87 and 101 of the Commission's Rules to License Fixed Services at 24 GHz*, WT Docket No. 99-327, Report and Order, 15 FCC Rcd 16934, 16967 at para. 77 (2000); *see also* 47 C.F.R. § 101.538(a)(1).

²⁶⁶ *See* Letter to Margaret W. Wiener, Deputy Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, FCC, from Gary M. Jackson, Assistant Administrator, SBA (July 28, 2000).

²⁶⁷ 13 C.F.R. § 121.201, NAICS code 517410.

²⁶⁸ 13 C.F.R. § 121.201, NAICS code 517919.

²⁶⁹ U.S. Census Bureau, 2007 NAICS Definitions, "517410 Satellite Telecommunications," .

²⁷⁰ *See* http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-_skip=900&-ds_name=EC0751SSSZ4&-_lang=en.

²⁷¹ . http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-_skip=900&-ds_name=EC0751SSSZ4&-_lang=en

the Commission estimates that the majority of Satellite Telecommunications firms are small entities that might be affected by our action.

100. The second category, i.e. “All Other Telecommunications” comprises “establishments primarily engaged in providing specialized telecommunications services, such as satellite tracking, communications telemetry, and radar station operation. This industry also includes establishments primarily engaged in providing satellite terminal stations and associated facilities connected with one or more terrestrial systems and capable of transmitting telecommunications to, and receiving telecommunications from, satellite systems. Establishments providing Internet services or voice over Internet protocol (VoIP) services via client-supplied telecommunications connections are also included in this industry.”²⁷² For this category, Census Bureau data for 2007 show that there were a total of 2,383 firms that operated for the entire year.²⁷³ Of this total, 2,347 firms had annual receipts of under \$25 million and 12 firms had annual receipts of \$25 million to \$49, 999,999.²⁷⁴ Consequently, the Commission estimates that the majority of All Other Telecommunications firms are small entities that might be affected by our action.

e. Cable and OVS Operators

101. Because section 706 requires us to monitor the deployment of broadband regardless of technology or transmission media employed, the Commission anticipates that some broadband service providers may not provide telephone service. Accordingly, the Commission describes below other types of firms that may provide broadband services, including cable companies, MDS providers, and utilities, among others.

102. *Cable and Other Program Distributors.* Since 2007, these services have been defined within the broad economic census category of Wired Telecommunications Carriers; that category is defined as follows: “This industry comprises establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or a combination of technologies.”²⁷⁵ The SBA has developed a small business size standard for this category, which is: all such firms having 1,500 or fewer employees. Census data for 2007, which supersede data from the 2002 Census, show that there were 1,383 firms that operated that year.²⁷⁶ Of those 1,383, 1,368 had fewer than 100 employees, and 15 firms had more than 100 employees. Thus under this category and the associated small business size standard, the majority of such firms can be considered small.

103. *Cable Companies and Systems.* The Commission has also developed its own small business size standards, for the purpose of cable rate regulation. Under the Commission’s rules, a “small

²⁷² <http://www.census.gov/cgi-bin/sssd/naics/naicsrch?code=517919&search=2007%20NAICS%20Search>

²⁷³ http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-_skip=900&-ds_name=EC0751SSSZ4&-_lang=en .

²⁷⁴ http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-_skip=900&-ds_name=EC0751SSSZ4&-_lang=en .

²⁷⁵ U.S. Census Bureau, 2007 NAICS Definitions, “517110 Wired Telecommunications Carriers,” (partial definition), <http://www.census.gov/naics/2007/def/ND517110.HTM#N517110> (last visited Oct. 21, 2009).

²⁷⁶ U.S. Census Bureau, 2007 Economic Census, Sector 51, 2007 NAICS code 517210 (rel. Oct. 20, 2009), http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-ds_name=EC0700A1&-_skip=700&-ds_name=EC0751SSSZ5&-_lang=en.

cable company” is one serving 400,000 or fewer subscribers, nationwide.²⁷⁷ Industry data indicate that, of 1,076 cable operators nationwide, all but eleven are small under this size standard.²⁷⁸ In addition, under the Commission’s rules, a “small system” is a cable system serving 15,000 or fewer subscribers.²⁷⁹ Industry data indicate that, of 7,208 systems nationwide, 6,139 systems have under 10,000 subscribers, and an additional 379 systems have 10,000–19,999 subscribers.²⁸⁰ Thus, under this second size standard, most cable systems are small.

104. *Cable System Operators.* The Communications Act of 1934, as amended, also contains a size standard for small cable system operators, which is “a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1 percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed \$250,000,000.”²⁸¹ The Commission has determined that an operator serving fewer than 677,000 subscribers shall be deemed a small operator, if its annual revenues, when combined with the total annual revenues of all its affiliates, do not exceed \$250 million in the aggregate.²⁸² Industry data indicate that, of 1,076 cable operators nationwide, all but ten are small under this size standard.²⁸³ We note that the Commission neither requests nor collects information on whether cable system operators are affiliated with entities whose gross annual revenues exceed \$250 million,²⁸⁴ and therefore we are unable to estimate more accurately the number of cable system operators that would qualify as small under this size standard.

105. *Open Video Services.* Open Video Service (OVS) systems provide subscription services.²⁸⁵ The open video system (“OVS”) framework was established in 1996, and is one of four statutorily recognized options for the provision of video programming services by local exchange carriers.²⁸⁶ The OVS framework provides opportunities for the distribution of video programming other than through cable systems. Because OVS operators provide subscription services,²⁸⁷ OVS falls within the SBA small business size standard covering cable services, which is “Wired Telecommunications

²⁷⁷ 47 C.F.R. § 76.901(e). The Commission determined that this size standard equates approximately to a size standard of \$100 million or less in annual revenues. *Implementation of Sections of the 1992 Cable Act: Rate Regulation*, Sixth Report and Order and Eleventh Order on Reconsideration, 10 FCC Rcd 7393, 7408 (1995).

²⁷⁸ See BROADCASTING & CABLE YEARBOOK 2006, at A-8, C-2 (Harry A. Jessell ed., 2005) (data current as of June 30, 2005); TELEVISION & CABLE FACTBOOK 2006, at D-805 to D-1857 (Albert Warren ed., 2005).

²⁷⁹ 47 C.F.R. § 76.901(c).

²⁸⁰ TELEVISION & CABLE FACTBOOK 2006, at F-2 (Albert Warren ed., 2005) (data current as of Oct. 2005). The data do not include 718 systems for which classifying data were not available.

²⁸¹ 47 U.S.C. § 543(m)(2); see 47 C.F.R. § 76.901(f) & nn. 1–3.

²⁸² 47 C.F.R. § 76.901(f); see Public Notice, *FCC Announces New Subscriber Count for the Definition of Small Cable Operator*, 16 FCC Rcd 2225 (Cable Services Bureau 2001).

²⁸³ See BROADCASTING & CABLE YEARBOOK 2006, at A-8, C-2 (Harry A. Jessell ed., 2005) (data current as of June 30, 2005); TELEVISION & CABLE FACTBOOK 2006, at D-805 to D-1857 (Albert Warren ed., 2005).

²⁸⁴ The Commission does receive such information on a case-by-case basis if a cable operator appeals a local franchise authority’s finding that the operator does not qualify as a small cable operator pursuant to § 76.901(f) of the Commission’s rules. See 47 C.F.R. § 76.909(b).

²⁸⁵ See 47 U.S.C. § 573.

²⁸⁶ 47 U.S.C. § 571(a)(3)-(4). See *13th Annual Report*, 24 FCC Rcd at 606, ¶ 135.

²⁸⁷ See 47 U.S.C. § 573.

Carriers.”²⁸⁸ The SBA has developed a small business size standard for this category, which is: all such firms having 1,500 or fewer employees. To gauge small business prevalence for the OVS service, the Commission relies on data currently available from the U.S. Census for the year 2007. According to that source, there were 3,188 firms that in 2007 were Wired Telecommunications Carriers. Of these, 3,144 operated with less than 1,000 employees, and 44 operated with more than 1,000 employees. However, as to the latter 44 there is no data available that shows how many operated with more than 1,500 employees. Based on this data, the majority of these firms can be considered small.²⁸⁹ In addition, we note that the Commission has certified some OVS operators, with some now providing service.²⁹⁰ Broadband service providers (“BSPs”) are currently the only significant holders of OVS certifications or local OVS franchises.²⁹¹ The Commission does not have financial or employment information regarding the entities authorized to provide OVS, some of which may not yet be operational. Thus, at least some of the OVS operators may qualify as small entities. The Commission further notes that it has certified approximately 45 OVS operators to serve 75 areas, and some of these are currently providing service.²⁹² Affiliates of Residential Communications Network, Inc. (RCN) received approval to operate OVS systems in New York City, Boston, Washington, D.C., and other areas. RCN has sufficient revenues to assure that they do not qualify as a small business entity. Little financial information is available for the other entities that are authorized to provide OVS and are not yet operational. Given that some entities authorized to provide OVS service have not yet begun to generate revenues, the Commission concludes that up to 44 OVS operators (those remaining) might qualify as small businesses that may be affected by the rules and policies adopted herein.

f. Internet Service Providers, Web Portals and Other Information Services

106. *Internet Service Providers, Web Portals and Other Information Services.* In 2007, the SBA recognized two new small business, economic census categories. They are (1) Internet Publishing and Broadcasting and Web Search Portals,²⁹³ and (2) All Other Information Services.²⁹⁴

107. *Internet Service Providers.* The 2007 Economic Census places these firms, whose services might include voice over Internet protocol (VoIP), in either of two categories, depending on whether the service is provided over the provider’s own telecommunications facilities (e.g., cable and DSL ISPs), or over client-supplied telecommunications connections (e.g., dial-up ISPs). The former are within the category of Wired Telecommunications Carriers,²⁹⁵ which has an SBA small business size standard of 1,500 or fewer employees.²⁹⁶ These are also labeled “broadband.” The latter are within the

²⁸⁸ U.S. Census Bureau, 2007 NAICS Definitions, “517110 Wired Telecommunications Carriers”; <http://www.census.gov/naics/2007/def/ND517110.HTM#N517110>.

²⁸⁹ See http://factfinder.census.gov/servlet/IBQTable?_bm=y&-fds_name=EC0700A1&-geo_id=&-skip=600&-ds_name=EC0751SSSZ5&-_lang=en.

²⁹⁰ A list of OVS certifications may be found at <http://www.fcc.gov/mb/ovs/csovscer.html>.

²⁹¹ See *13th Annual Report*, 24 FCC Rcd at 606-07, ¶ 135. BSPs are newer firms that are building state-of-the-art, facilities-based networks to provide video, voice, and data services over a single network.

²⁹² See <http://www.fcc.gov/mb/ovs/csovscer.html> (current as of February 2007).

²⁹³ 13 C.F.R. § 121.201, NAICS code 519130 (establishing a \$500,000 revenue ceiling).

²⁹⁴ 13 C.F.R. § 121.201, NAICS code 519190 (establishing a \$6.5 million revenue ceiling).

²⁹⁵ U.S. Census Bureau, 2007 NAICS Definitions, “517110 Wired Telecommunications Carriers”; <http://www.census.gov/naics/2007/def/ND517110.HTM#N517110>.

²⁹⁶ 13 C.F.R. § 121.201, NAICS code 517110.

category of All Other Telecommunications,²⁹⁷ which has a size standard of annual receipts of \$25 million or less.²⁹⁸ These are labeled non-broadband.

108. The most current Economic Census data for all such firms are 2007 data, which are detailed specifically for ISPs within the categories above. For the first category, the data show that 396 firms operated for the entire year, of which 159 had nine or fewer employees.²⁹⁹ For the second category, the data show that 1,682 firms operated for the entire year.³⁰⁰ Of those, 1,675 had annual receipts below \$25 million per year, and an additional two had receipts of between \$25 million and \$ 49,999,999. Consequently, we estimate that the majority of ISP firms are small entities.

109. *Internet Publishing and Broadcasting and Web Search Portals.* This industry comprises establishments primarily engaged in 1) publishing and/or broadcasting content on the Internet exclusively or 2) operating Web sites that use a search engine to generate and maintain extensive databases of Internet addresses and content in an easily searchable format (and known as Web search portals). The publishing and broadcasting establishments in this industry do not provide traditional (non-Internet) versions of the content that they publish or broadcast. They provide textual, audio, and/or video content of general or specific interest on the Internet exclusively. Establishments known as Web search portals often provide additional Internet services, such as e-mail, connections to other web sites, auctions, news, and other limited content, and serve as a home base for Internet users.³⁰¹ The SBA has developed a small business size standard for this category; that size standard is fewer than 500 employees.³⁰² Thus, a firm in this category with less than 500 employees is considered a small business.³⁰³ According to Census Bureau data for 2007, there were 2,705 firms that provided one or more of these services for that entire year. Of these, 2,682 operated with less than 500 employees and 13 operated with 500 to 999 employees.³⁰⁴ Consequently, we estimate the majority of these firms are small entities that may be affected by our proposed actions.

110. *Data Processing, Hosting, and Related Services.* This industry comprises establishments primarily engaged in providing infrastructure for hosting or data processing services. These establishments may provide specialized hosting activities, such as web hosting, streaming services or application hosting; provide application service provisioning; or may provide general time-share mainframe facilities to clients. Data processing establishments provide complete processing and specialized reports from data supplied by clients or provide automated data processing and data entry services.³⁰⁵ The SBA has developed a small business size standard for this category; that size standard is

²⁹⁷ U.S. Census Bureau, 2007 NAICS Definitions, “517919 All Other Telecommunications”; <http://www.census.gov/naics/2007/def/ND517919.HTM#N517919>.

²⁹⁸ 13 C.F.R. § 121.201, NAICS code 517919 (updated for inflation in 2008).

²⁹⁹ U.S. Census Bureau, 2007 Economic Census, Subject Series: Information, “Establishment and Firm Size,” NAICS code 5171103 (rel. Nov. 19, 2010) (employment size). The data show only two categories within the whole: the categories for 1-4 employees and for 5-9 employees.

³⁰⁰ U.S. Census Bureau, 2007 Economic Census, Subject Series: Information, “Establishment and Firm Size,” NAICS code 5179191 (rel. Nov. 19, 2010) (receipts size).

³⁰¹ <http://www.census.gov/cgi-bin/sssd/naics/naicsrch?code=519130&search=2007%20NAICS%20Search>

³⁰² http://www.sba.gov/sites/default/files/Size_Standards_Table.pdf

³⁰³ 13 C.F.R. § 121.201, NAICS code 519130.

³⁰⁴ http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-_skip=1000&-ds_name=EC0751SSSZ5&-_lang=en.

³⁰⁵ U.S. Census Bureau, 2007 NAICS Definitions, “518210 Data Processing, Hosting, and Related Services”; <http://www.census.gov/naics/2007/def/ND518210.HTM#N518210>.

\$25 million or less in average annual receipts.³⁰⁶ According to Census Bureau data for 2007, there were 8,060 firms in this category that operated for the entire year.³⁰⁷ Of these, 6,726 had annual receipts of under \$25 million, and 155 had receipts between \$25 million and \$49,999,999 million.³⁰⁸ Consequently, we estimate that the majority of these firms are small entities that may be affected by our proposed actions.

111. *All Other Information Services.* “This industry comprises establishments primarily engaged in providing other information services (except new syndicates and libraries and archives).”³⁰⁹ Our action pertains to interconnected VoIP services, which could be provided by entities that provide other services such as email, online gaming, web browsing, video conferencing, instant messaging, and other, similar IP-enabled services. The SBA has developed a small business size standard for this category; that size standard is \$7.0 million or less in average annual receipts.³¹⁰ According to Census Bureau data for 2007, there were 367 firms in this category that operated for the entire year.³¹¹ Of these, 334 had annual receipts of under \$5 million, and an additional 11 firms had receipts of between \$5 million and \$9,999,999.³¹² Consequently, we estimate that the majority of these firms are small entities that may be affected by our action.

D. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements

112. We summarize below the requirements in the NPRM and proposed rules regarding compliance with Sections 716 and 717, including recordkeeping and reporting obligations. Additional information on each of these requirements can be found in the NPRM.

113. *Recordkeeping.* The NPRM proposes, beginning one year after the effective date of regulations promulgated by the Commission pursuant to Section 716(e), to require that each manufacturer of equipment (including software) used to provide ACS and each provider of such services subject to Sections 255, 716, and 718, not exempted under rules proposed in that NPRM, maintain, in the ordinary course of business and for a reasonable period, certain records.³¹³ These records are to document the efforts taken by such manufacturer or service provider to implement Sections 255, 716, and 718, including: (1) information about the manufacturer's or provider's efforts to consult with individuals with disabilities; (2) descriptions of the accessibility features of its products and services; and (3) information about the compatibility of such products and services with peripheral devices or specialized customer

³⁰⁶ 13 C.F.R. § 121.201, NAICS code 518210.

³⁰⁷ http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-skip=1000&-ds_name=EC0751SSSZ4&-lang=en.

³⁰⁸ http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-skip=1000&-ds_name=EC0751SSSZ4&-lang=en

³⁰⁹ U.S. Census Bureau, “2002 NAICS Definitions: 519190 All Other Information Services”; <http://www.census.gov/epcd/naics02/def/NDEF519.HTM>.

³¹⁰ 13 C.F.R. § 121.201, NAICS code 519190. See also http://www.sba.gov/sites/default/files/Size_Standards_Table.pdf

³¹¹ http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-skip=1200&-ds_name=EC0751SSSZ4&-lang=en

³¹² http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-skip=1100&-ds_name=EC0751SSSZ4&-lang=en

³¹³ See NPRM at paras. 117-123.

premise equipment commonly used by individuals with disabilities to achieve access.³¹⁴

114. *Reporting Obligations.* The CVAA and the Commission's proposed rules require that an officer of each manufacturer of equipment (including software) used to provide ACS and an officer of each provider of such services submit to the Commission an annual certificate that records are being kept in accordance with the above recordkeeping requirements, unless such manufacturer or provider has been exempted from compliance with Section 716 under applicable rules.³¹⁵

115. *Costs of Compliance.* Because of the diverse manufacturers of equipment used to provide ACS and diverse providers of ACS that may be subject to Section 716, the possible exemption of certain small entities from compliance with that Section, the multiple general and entity-specific factors used in determining, whether for a given manufacturer (or service provider) accessibility for a particular item of ACS equipment (or a particular service) is achievable, and the various provisions of Section 716 and the proposed rules on when and to what extent accessibility must be incorporated into a given item of ACS equipment or service, it is difficult to estimate the costs of compliance for those small entities that may not be covered by an exemption or waiver, should the Commission choose to adopt any such exemptions or waivers. Accordingly, the NPRM seeks comment on the costs of compliance with these proposed rules.³¹⁶

E. Steps Taken to Minimize Significant Economic Impact on Small Entities and Significant Alternatives Considered

116. The RFA requires an agency to describe any significant alternatives that it has considered in developing its approach, which may include the following four alternatives (among others): “(1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance and reporting requirements under the rule for such small entities; (3) the use of performance rather than design standards; and (4) an exemption from coverage of the rule, or any part thereof, for such small entities.”³¹⁷

117. In addition to the factors in the RFA identified above, the achievability factors in the CVAA also serve to mitigate adverse impacts and reduce burdens on small entities. In the NPRM, the Commission proposes to make determinations about what is achievable by giving four factors equal weight.³¹⁸ Two of these factors take into account the resources available to covered entities and may have a direct impact on small entities and the obligations they face under the CVAA: the second factor, the technical and economic impact on the operation of the manufacturer or provider and on the operation of the specific equipment or service in question, and the third factor, the type of operations of the manufacturer or provider. In addition, consideration of the first factor (the nature and cost of the steps needed to meet the requirements with respect to the specific equipment or service in question) and the fourth factor (the extent to which the service provider or manufacturer in question offers accessibility services or equipment containing varying degrees of functionality and features, and offered at different price points) would benefit all entities subject to Section 716, including small entities.

118. The Commission proposes not to consider additional factors and only to consider the factors enumerated in the statute, in light of legislative history directing the Commission to weigh the

³¹⁴ See NPRM at para. 117 (*citing* 47 U.S.C. § 618(a)(5)(i) – (iii)).

³¹⁵ See NPRM at para. 117 (*citing* 47 U.S.C. § 618(a)(5)(B)).

³¹⁶ See NPRM at paras. 68-69, 71.

³¹⁷ 5 U.S.C. § 603(c)(1)-(c)(4).

³¹⁸ Para. 8 of this IRFA, *supra*, lists these four factors.

factors equally. While adoption of this proposal would prevent the Commission from considering additional factors that may benefit small entities, it would also require that the Commission consider only the factors listed above, which clearly serve to reduce the burden on small entities. The Commission does, however, seek comment on whether it might have the discretion to weigh other factors not specified in the statute.³¹⁹ In addition, the Commission proposes to construe the factors broadly and to weigh any relevant considerations in determining their meaning.³²⁰

119. The Commission also proposes to consider exemptions from Section 716 for small entities and, if one or more such exemptions were adopted, further proposes to consider various criteria in setting standards for such exemptions.³²¹ The Commission could have proposed not to exercise its discretionary authority to exempt small entities or could have proposed one or more specific size standards for any such exemptions but determined that it was necessary to build a more complete factual record on what factors it should consider in making this determination. Specifically, before making a specific proposal, the Commission seeks to understand the impact any such proposal would have on small entities, the marketplace of ACS services and equipment, and on people with disabilities.

120. In addition, the Commission proposes consideration of specific performance objectives and seeks comment on alternative ways to develop procedures and timelines to develop these objectives.³²² Such alternatives could be structured to reduce the burdens on small entities of compliance with Section 716.

121. The Commission also proposes not to adopt technical standards as safe harbors at this time. It determined that it needed to develop a more complete record on this issue before taking action.³²³

122. Finally, the Commission does not propose separate recordkeeping and reporting obligations for small entities. The Commission, however, has proposed that it will not mandate any one form in which records must be kept, to take into account that covered entities have a variety of business models and modes of operation.³²⁴

F. Federal Rules that May Duplicate, Overlap, or Conflict with Proposed Rules

123. Section 255(e) of the Communications Act, as amended, 47 U.S.C. § 255(e), directs the United States Access Board (Access Board) to develop equipment accessibility guidelines “in conjunction with” the Commission, and periodically to review and update those guidelines. We view the Board’s current guidelines as well as its draft guidelines³²⁵ as starting points for our interpretation and implementation of Sections 716 and 717 of the Communications Act, as amended, 47 U.S.C. §§ 617, 618, as well as Section 255, but because they do not currently cover ACS or equipment used to provide or access ACS, we must necessarily adapt these guidelines in our comprehensive implementation scheme. As such, it is our tentative view that our proposed rules do not overlap, duplicate, or conflict with either Access Board Final Rules,³²⁶ or (if later adopted) the Access Board Draft Guidelines.

³¹⁹ See NPRM at para. 70.

³²⁰ *Id.*

³²¹ *Id.* at para. 66.

³²² *Id.* at paras. 106-111.

³²³ *Id.* at paras. 112-113.

³²⁴ *Id.* at para. 123.

³²⁵ United States Access Board, *Draft Information and Communication Technology (ICT) Standards and Guidelines*, (March 2010), (“Access Board Draft Guidelines”), <http://www.access-board.gov/sec508/refresh/draft-rule.pdf>

³²⁶ See Part 1193 of the Access Board Rules, 36 C.F.R. Part 1193

APPENDIX D

Text of Senate Bill 3304 and Senate Bill 3828 as Enacted Into Law

Bill Text
111th Congress (2009-2010)
S.3304.ENR

S.3304

Twenty-First Century Communications and Video Accessibility Act of 2010 (Enrolled Bill
[Final as Passed Both House and Senate] - ENR)

SEC. 101. DEFINITIONS.

Section 3 of the Communications Act of 1934 (47 U.S.C. 153) is amended--

(1) by adding at the end the following new paragraphs:

`(53) ADVANCED COMMUNICATIONS SERVICES- The term `advanced communications services' means--

- `(A) interconnected VoIP service;
- `(B) non-interconnected VoIP service;
- `(C) electronic messaging service; and
- `(D) interoperable video conferencing service.

`(54) CONSUMER GENERATED MEDIA- The term `consumer generated media' means content created and made available by consumers to online websites and services on the Internet, including video, audio, and multimedia content.

`(55) DISABILITY- The term `disability' has the meaning given such term under section 3 of the Americans with Disabilities Act of 1990 (42 U.S.C. 12102).

`(56) ELECTRONIC MESSAGING SERVICE- The term `electronic messaging service' means a service that provides real-time or near real-time non-voice messages in text form between individuals over communications networks.

`(57) INTERCONNECTED VOIP SERVICE- The term `interconnected VoIP service' has the meaning given such term under section 9.3 of title 47, Code of Federal Regulations, as such section may be amended from time to time.

`(58) NON-INTERCONNECTED VOIP SERVICE- The term `non-interconnected VoIP service'--

`(A) means a service that--

- `(i) enables real-time voice communications that originate from or terminate to the user's location using Internet protocol or any successor protocol; and
- `(ii) requires Internet protocol compatible customer premises equipment; and

`(B) does not include any service that is an interconnected VoIP service.

`(59) INTEROPERABLE VIDEO CONFERENCING SERVICE- The term `interoperable video conferencing service' means a service that provides real-time video communications, including audio, to enable users to share information of the user's choosing.'; and

(2) by reordering paragraphs (1) through (52) and the paragraphs added by paragraph (1) of this section in alphabetical order based on the headings of such paragraphs and renumbering such paragraphs as so reordered.

SEC. 102. HEARING AID COMPATIBILITY.

(a) Compatibility Requirements-

(1) TELEPHONE SERVICE FOR THE DISABLED- Section 710(b)(1) of the Communications Act of 1934 (47 U.S.C. 610(b)(1)) is amended to read as follows:

(b)(1) Except as provided in paragraphs (2) and (3) and subsection (c), the Commission shall require that customer premises equipment described in this paragraph provide internal means for effective use with hearing aids that are designed to be compatible with telephones which meet established technical standards for hearing aid compatibility.

Customer premises equipment described in this paragraph are the following:

(A) All essential telephones.

(B) All telephones manufactured in the United States (other than for export) more than one year after the date of enactment of the Hearing Aid Compatibility Act of 1988 or imported for use in the United States more than one year after such date.

(C) All customer premises equipment used with advanced communications services that is designed to provide 2-way voice communication via a built-in speaker intended to be held to the ear in a manner functionally equivalent to a telephone, subject to the regulations prescribed by the Commission under subsection (e).'

(2) ADDITIONAL AMENDMENTS- Section 710(b) of the Communications Act of 1934 (47 U.S.C. 610(b)) is further amended--

(A) in paragraph (2)--

(i) in subparagraph (A)--

(I) in the matter preceding clause (i)--

(aa) by striking 'initial';

(bb) by striking 'of this subsection after the date of enactment of the Hearing Aid Compatibility Act of 1988'; and

(cc) by striking 'paragraph (1)(B) of this subsection' and inserting 'subparagraphs (B) and (C) of paragraph (1)';

(II) by inserting 'and' at the end of clause (ii);

(III) by striking clause (iii); and

(IV) by redesignating clause (iv) as clause (iii);

(ii) by striking subparagraph (B) and redesignating subparagraph (C) as subparagraph (B); and

(iii) in subparagraph (B) (as so redesignated)--

(I) by striking the first sentence and inserting 'The

Commission shall periodically assess the appropriateness of continuing in effect the exemptions for telephones and other customer premises equipment described in subparagraph (A) of this paragraph.'; and

(II) in each of clauses (iii) and (iv), by striking 'paragraph (1)(B)' and inserting 'subparagraph (B) or (C) of paragraph (1)';

- (B) in paragraph (4)(B)--
- (i) by striking `public mobile' and inserting `telephones used with public mobile';
 - (ii) by inserting `telephones and other customer premises equipment used in whole or in part with' after `means';
 - (iii) by striking `and' after `public land mobile telephone service,' and inserting `or';
 - (iv) by striking `part 22 of'; and
 - (v) by inserting after `Regulations' the following: `, or any functionally equivalent unlicensed wireless services'; and
- (C) in paragraph (4)(C)--
- (i) by striking `term `private radio services' and inserting `term `telephones used with private radio services'; and
 - (ii) by inserting `telephones and other customer premises equipment used in whole or in part with' after `means'.

(b) Technical Standards- Section 710(c) of the Communications Act of 1934 (47 U.S.C. 610(c)) is amended by adding at the end the following: `A telephone or other customer premises equipment that is compliant with relevant technical standards developed through a public participation process and in consultation with interested consumer stakeholders (designated by the Commission for the purposes of this section) will be considered hearing aid compatible for purposes of this section, until such time as the Commission may determine otherwise. The Commission shall consult with the public, including people with hearing loss, in establishing or approving such technical standards. The Commission may delegate this authority to an employee pursuant to section 5(c). The Commission shall remain the final arbiter as to whether the standards meet the requirements of this section.'.

(c) Rulemaking- Section 710(e) of the Communications Act of 1934 (47 U.S.C. 610(e)) is amended--

- (1) by striking `impairments' and inserting `loss'; and
- (2) by adding at the end the following sentence: `In implementing the provisions of subsection (b)(1)(C), the Commission shall use appropriate timetables or benchmarks to the extent necessary (1) due to technical feasibility, or (2) to ensure the marketability or availability of new technologies to users.'.

(d) Rule of Construction- Section 710(h) of the Communications Act of 1934 (47 U.S.C. 610(h)) is amended to read as follows:

`(h) Rule of Construction- Nothing in the Twenty-First Century Communications and Video Accessibility Act of 2010 shall be construed to modify the Commission's regulations set forth in section 20.19 of title 47 of the Code of Federal Regulations, as in effect on the date of enactment of such Act.'.

SEC. 103. RELAY SERVICES.

(a) Definition- Paragraph (3) of section 225(a) of the Communications Act of 1934 (47 U.S.C. 225(a)(3)) is amended to read as follows:

- `(3) TELECOMMUNICATIONS RELAY SERVICES- The term `telecommunications relay services' means telephone transmission services that provide the ability for an individual who is deaf, hard of hearing, deaf-blind, or who has a speech disability to engage in communication by wire or radio with one or more individuals, in a manner that is functionally equivalent to the ability of a hearing individual who does not have a speech disability to communicate using voice communication services by wire or radio.'.

(b) Internet Protocol-based Relay Services- Title VII of such Act (47 U.S.C. 601 et seq.)

is amended by adding at the end the following new section:

SEC. 715. INTERNET PROTOCOL-BASED RELAY SERVICES.

Within one year after the date of enactment of the Twenty-First Century Communications and Video Accessibility Act of 2010, each interconnected VoIP service provider and each provider of non-interconnected VoIP service shall participate in and contribute to the Telecommunications Relay Services Fund established in section 64.604(c)(5)(iii) of title 47, Code of Federal Regulations, as in effect on the date of enactment of such Act, in a manner prescribed by the Commission by regulation to provide for obligations of such providers that are consistent with and comparable to the obligations of other contributors to such Fund.'

SEC. 104. ACCESS TO ADVANCED COMMUNICATIONS SERVICES AND EQUIPMENT.

(a) Title VII Amendment- Title VII of the Communications Act of 1934 (47 U.S.C. 601 et seq.), as amended by section 103, is further amended by adding at the end the following new sections:

SEC. 716. ACCESS TO ADVANCED COMMUNICATIONS SERVICES AND EQUIPMENT.

(a) Manufacturing-

(1) In general- With respect to equipment manufactured after the effective date of the regulations established pursuant to subsection (e), and subject to those regulations, a manufacturer of equipment used for advanced communications services, including end user equipment, network equipment, and software, shall ensure that the equipment and software that such manufacturer offers for sale or otherwise distributes in interstate commerce shall be accessible to and usable by individuals with disabilities, unless the requirements of this subsection are not achievable.

(2) Industry flexibility- A manufacturer of equipment may satisfy the requirements of paragraph (1) with respect to such equipment by--

(A) ensuring that the equipment that such manufacturer offers is accessible to and usable by individuals with disabilities without the use of third party applications, peripheral devices, software, hardware, or customer premises equipment; or

(B) if such manufacturer chooses, using third party applications, peripheral devices, software, hardware, or customer premises equipment that is available to the consumer at nominal cost and that individuals with disabilities can access.

(b) Service Providers-

(1) In general- With respect to services provided after the effective date of the regulations established pursuant to subsection (e), and subject to those regulations, a provider of advanced communications services shall ensure that such services offered by such provider in or affecting interstate commerce are accessible to and usable by individuals with disabilities, unless the requirements of this subsection are not achievable.

(2) Industry flexibility- A provider of services may satisfy the requirements of paragraph (1) with respect to such services by--

(A) ensuring that the services that such provider offers are accessible to and usable by individuals with disabilities without the use of third party applications, peripheral devices, software, hardware, or customer

premises equipment; or

`(B) if such provider chooses, using third party applications, peripheral devices, software, hardware, or customer premises equipment that is available to the consumer at nominal cost and that individuals with disabilities can access.

`(c) Compatibility- Whenever the requirements of subsections (a) or (b) are not achievable, a manufacturer or provider shall ensure that its equipment or service is compatible with existing peripheral devices or specialized customer premises equipment commonly used by individuals with disabilities to achieve access, unless the requirement of this subsection is not achievable.

`(d) Network Features, Functions, and Capabilities- Each provider of advanced communications services has the duty not to install network features, functions, or capabilities that do not impede accessibility or usability.

`(e) Regulations-

`(1) In general- Within one year after the date of enactment of the Twenty-First Century Communications and Video Accessibility Act of 2010, the Commission shall promulgate such regulations as are necessary to implement this section. In prescribing the regulations, the Commission shall--

`(A) include performance objectives to ensure the accessibility, usability, and compatibility of advanced communications services and the equipment used for advanced communications services by individuals with disabilities;

`(B) provide that advanced communications services, the equipment used for advanced communications services, and networks used to provide advanced communications services may not impair or impede the accessibility of information content when accessibility has been incorporated into that content for transmission through advanced communications services, equipment used for advanced communications services, or networks used to provide advanced communications services;

`(C) determine the obligations under this section of manufacturers, service providers, and providers of applications or services accessed over service provider networks; and

`(D) not mandate technical standards, except that the Commission may adopt technical standards as a safe harbor for such compliance if necessary to facilitate the manufacturers' and service providers' compliance with sections (a) through (c).

`(2) Prospective guidelines- The Commission shall issue prospective guidelines for a manufacturer or provider regarding the requirements of this section.

`(f) Services and Equipment Subject to Section 255- The requirements of this section shall not apply to any equipment or services, including interconnected VoIP service, that are subject to the requirements of section 255 on the day before the date of enactment of the Twenty-First Century Communications and Video Accessibility Act of 2010. Such services and equipment shall remain subject to the requirements of section 255.

`(g) Achievable Defined- For purposes of this section and section 718, the term 'achievable' means with reasonable effort or expense, as determined by the Commission. In determining whether the requirements of a provision are achievable, the Commission shall consider the following factors:

`(1) The nature and cost of the steps needed to meet the requirements of this section with respect to the specific equipment or service in question.

`(2) The technical and economic impact on the operation of the manufacturer or

provider and on the operation of the specific equipment or service in question, including on the development and deployment of new communications technologies.

`(3) The type of operations of the manufacturer or provider.

`(4) The extent to which the service provider or manufacturer in question offers accessible services or equipment containing varying degrees of functionality and features, and offered at differing price points.

`(h) Commission Flexibility-

`(1) Waiver- The Commission shall have the authority, on its own motion or in response to a petition by a manufacturer or provider of advanced communications services or any interested party, to waive the requirements of this section for any feature or function of equipment used to provide or access advanced communications services, or for any class of such equipment, for any provider of advanced communications services, or for any class of such services, that--

`(A) is capable of accessing an advanced communications service; and

`(B) is designed for multiple purposes, but is designed primarily for purposes other than using advanced communications services.

`(2) Small entity exemption- The Commission may exempt small entities from the requirements of this section.

`(i) Customized Equipment or Services- The provisions of this section shall not apply to customized equipment or services that are not offered directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.

`(j) Rule of Construction- This section shall not be construed to require a manufacturer of equipment used for advanced communications or a provider of advanced communications services to make every feature and function of every device or service accessible for every disability.

`SEC. 717. ENFORCEMENT AND RECORDKEEPING OBLIGATIONS.

`(a) Complaint and Enforcement Procedures- Within one year after the date of enactment of the Twenty-First Century Communications and Video Accessibility Act of 2010, the Commission shall establish regulations that facilitate the filing of formal and informal complaints that allege a violation of section 255, 716, or 718, establish procedures for enforcement actions by the Commission with respect to such violations, and implement the recordkeeping obligations of paragraph (5) for manufacturers and providers subject to such sections. Such regulations shall include the following provisions:

`(1) NO FEE- The Commission shall not charge any fee to an individual who files a complaint alleging a violation of section 255, 716, or 718.

`(2) RECEIPT OF COMPLAINTS- The Commission shall establish separate and identifiable electronic, telephonic, and physical receptacles for the receipt of complaints filed under section 255, 716, or 718.

`(3) COMPLAINTS TO THE COMMISSION-

`(A) IN GENERAL- Any person alleging a violation of section 255, 716, or 718 by a manufacturer of equipment or provider of service subject to such sections may file a formal or informal complaint with the Commission.

`(B) INVESTIGATION OF INFORMAL COMPLAINT- The Commission shall investigate the allegations in an informal complaint and, within 180 days after the date on which such complaint was filed with the Commission, issue an order concluding the investigation, unless

such complaint is resolved before such time. The order shall include a determination whether any violation occurred.

`(i) If the Commission determines that a violation has occurred, the Commission may, in the order issued under this subparagraph or in a subsequent order, direct the manufacturer or service provider to bring the service, or in the case of a manufacturer, the next generation of the equipment or device, into compliance with requirements of those sections within a reasonable time established by the Commission in its order.

`(ii) NO VIOLATION- If a determination is made that a violation has not occurred, the Commission shall provide the basis for such determination.

`(C) CONSOLIDATION OF COMPLAINTS- The Commission may consolidate for investigation and resolution complaints alleging substantially the same violation.

`(4) OPPORTUNITY TO RESPOND- Before the Commission makes a determination pursuant to paragraph (3), the party that is the subject of the complaint shall have a reasonable opportunity to respond to such complaint, and may include in such response any factors that are relevant to such determination. Before issuing a final order under paragraph (3)(B)(i), the Commission shall provide such party a reasonable opportunity to comment on any proposed remedial action.

`(5) RECORDKEEPING- (A) Beginning one year after the effective date of regulations promulgated pursuant to section 716(e), each manufacturer and provider subject to sections 255, 716, and 718 shall maintain, in the ordinary course of business and for a reasonable period, records of the efforts taken by such manufacturer or provider to implement sections 255, 716, and 718, including the following:

`(i) Information about the manufacturer's or provider's efforts to consult with individuals with disabilities.

`(ii) Descriptions of the accessibility features of its products and services.

`(iii) Information about the compatibility of such products and services with peripheral devices or specialized customer premise equipment commonly used by individuals with disabilities to achieve access.

`(B) An officer of a manufacturer or provider shall submit to the Commission an annual certification that records are being kept in accordance with subparagraph (A).

`(C) After the filing of a formal or informal complaint against a manufacturer or provider in the manner prescribed in paragraph (3), the Commission may request, and shall keep confidential, a copy of the records maintained by such manufacturer or provider pursuant to subparagraph (A) of this paragraph that are directly relevant to the equipment or service that is the subject of such complaint.

`(6) FAILURE TO ACT- If the Commission fails to carry out any of its responsibilities to act upon a complaint in the manner prescribed in paragraph (3), the person that filed such complaint may bring an action in the nature of mandamus in the United States Court of Appeals for the District of Columbia to compel the Commission to carry out any such responsibility.

`(7) COMMISSION JURISDICTION- The limitations of section 255(f) shall apply to any claim that alleges a violation of section 255, 716, or 718. Nothing in

this paragraph affects or limits any action for mandamus under paragraph (6) or any appeal pursuant to section 402(b)(10).

`(8) PRIVATE RESOLUTIONS OF COMPLAINTS- Nothing in the Commission's rules or this Act shall be construed to preclude a person who files a complaint and a manufacturer or provider from resolving a formal or informal complaint prior to the Commission's final determination in a complaint proceeding. In the event of such a resolution, the parties shall jointly request dismissal of the complaint and the Commission shall grant such request.

`(b) Reports to Congress-

`(1) IN GENERAL- Every two years after the date of enactment of the Twenty-First Century Communications and Video Accessibility Act of 2010, the Commission shall submit to the Committee on Commerce, Science, and Transportation of the Senate and the Committee on Energy and Commerce of the House of Representatives a report that includes the following:

`(A) An assessment of the level of compliance with sections 255, 716, and 718.

`(B) An evaluation of the extent to which any accessibility barriers still exist with respect to new communications technologies.

`(C) The number and nature of complaints received pursuant to subsection (a) during the two years that are the subject of the report.

`(D) A description of the actions taken to resolve such complaints under this section, including forfeiture penalties assessed.

`(E) The length of time that was taken by the Commission to resolve each such complaint.

`(F) The number, status, nature, and outcome of any actions for mandamus filed pursuant to subsection (a)(6) and the number, status, nature, and outcome of any appeals filed pursuant to section 402(b)(10).

`(G) An assessment of the effect of the requirements of this section on the development and deployment of new communications technologies.

`(2) PUBLIC COMMENT REQUIRED- The Commission shall seek public comment on its tentative findings prior to submission to the Committees of the report under this subsection.

`(c) Comptroller General Enforcement Study-

`(1) IN GENERAL- The Comptroller General shall conduct a study to consider and evaluate the following:

`(A) The Commission's compliance with the requirements of this section, including the Commission's level of compliance with the deadlines established under and pursuant to this section and deadlines for acting on complaints pursuant to subsection (a).

`(B) Whether the enforcement actions taken by the Commission pursuant to this section have been appropriate and effective in ensuring compliance with this section.

`(C) Whether the enforcement provisions under this section are adequate to ensure compliance with this section.

`(D) Whether, and to what extent (if any), the requirements of this section have an effect on the development and deployment of new communications technologies.

`(2) REPORT- Not later than 5 years after the date of enactment of the Twenty-First Century Communications and Video Accessibility Act of 2010, the Comptroller General shall submit to the Committee on Commerce, Science, and Transportation of the Senate and the Committee on Energy and Commerce of the

House of Representatives a report on the results of the study required by paragraph (1), with recommendations for how the enforcement process and measures under this section may be modified or improved.

(d) Clearinghouse- Within one year after the date of enactment of the Twenty-First Century Communications and Video Accessibility Act of 2010, the Commission shall, in consultation with the Architectural and Transportation Barriers Compliance Board, the National Telecommunications and Information Administration, trade associations, and organizations representing individuals with disabilities, establish a clearinghouse of information on the availability of accessible products and services and accessibility solutions required under sections 255, 716, and 718. Such information shall be made publicly available on the Commission's website and by other means, and shall include an annually updated list of products and services with access features.

(e) Outreach and Education- Upon establishment of the clearinghouse of information required under subsection (d), the Commission, in coordination with the National Telecommunications and Information Administration, shall conduct an informational and educational program designed to inform the public about the availability of the clearinghouse and the protections and remedies available under sections 255, 716, and 718.

SEC. 718. INTERNET BROWSERS BUILT INTO TELEPHONES USED WITH PUBLIC MOBILE SERVICES.

(a) Accessibility- If a manufacturer of a telephone used with public mobile services (as such term is defined in section 710(b)(4)(B)) includes an Internet browser in such telephone, or if a provider of mobile service arranges for the inclusion of a browser in telephones to sell to customers, the manufacturer or provider shall ensure that the functions of the included browser (including the ability to launch the browser) are accessible to and usable by individuals who are blind or have a visual impairment, unless doing so is not achievable, except that this subsection shall not impose any requirement on such manufacturer or provider--

(1) to make accessible or usable any Internet browser other than a browser that such manufacturer or provider includes or arranges to include in the telephone; or

(2) to make Internet content, applications, or services accessible or usable (other than enabling individuals with disabilities to use an included browser to access such content, applications, or services).

(b) Industry Flexibility- A manufacturer or provider may satisfy the requirements of subsection (a) with respect to such telephone or services by--

(1) ensuring that the telephone or services that such manufacture or provider offers is accessible to and usable by individuals with disabilities without the use of third party applications, peripheral devices, software, hardware, or customer premises equipment; or

(2) using third party applications, peripheral devices, software, hardware, or customer premises equipment that is available to the consumer at nominal cost and that individuals with disabilities can access.'

(b) Effective Date for Section 718- Section 718 of the Communications Act of 1934, as added by subsection (a), shall take effect 3 years after the date of enactment of this Act.

(c) Title V Amendments- Section 503(b)(2) of such Act (47 U.S.C. 503(b)(2)) is amended by adding after subparagraph (E) the following:

(F) Subject to paragraph (5) of this section, if the violator is a manufacturer or service provider subject to the requirements of section 255, 716, or 718, and is determined by the Commission to have violated any such requirement, the manufacturer or provider shall be liable to the United States for a forfeiture

penalty of not more than \$100,000 for each violation or each day of a continuing violation, except that the amount assessed for any continuing violation shall not exceed a total of \$1,000,000 for any single act or failure to act.'

(d) Review of Commission Determinations- Section 402(b) of such Act (47 U.S.C. 402(b)) is amended by adding the following new paragraph:

`(10) By any person who is aggrieved or whose interests are adversely affected by a determination made by the Commission under section 717(a)(3).'

SEC. 105. RELAY SERVICES FOR DEAF-BLIND INDIVIDUALS.

Title VII of the Communications Act of 1934, as amended by section 104, is further amended by adding at the end the following:

SEC. 719. RELAY SERVICES FOR DEAF-BLIND INDIVIDUALS.

`(a) IN GENERAL- Within 6 months after the date of enactment of the Equal Access to 21st Century Communications Act, the Commission shall establish rules that define as eligible for relay service support those programs that are approved by the Commission for the distribution of specialized customer premises equipment designed to make telecommunications service, Internet access service, and advanced communications, including interexchange services and advanced telecommunications and information services, accessible by individuals who are deaf-blind.

`(b) INDIVIDUALS WHO ARE DEAF-BLIND DEFINED- For purposes of this subsection, the term 'individuals who are deaf-blind' has the same meaning given such term in the Helen Keller National Center Act, as amended by the Rehabilitation Act Amendments of 1992 (29 U.S.C. 1905(2)).

`(c) ANNUAL AMOUNT- The total amount of support the Commission may provide from its interstate relay fund for any fiscal year may not exceed \$10,000,000.'

SEC. 106. EMERGENCY ACCESS ADVISORY COMMITTEE.

(a) Establishment- For the purpose of achieving equal access to emergency services by individuals with disabilities, as a part of the migration to a national Internet protocol-enabled emergency network, not later than 60 days after the date of enactment of this Act, the Chairman of the Commission shall establish an advisory committee, to be known as the Emergency Access Advisory Committee (referred to in this section as the 'Advisory Committee').

(b) Membership- As soon as practicable after the date of enactment of this Act, the Chairman of the Commission shall appoint the members of the Advisory Committee, ensuring a balance between individuals with disabilities and other stakeholders, and shall designate two such members as the co-chairs of the Committee. Members of the Advisory Committee shall be selected from the following groups:

(1) STATE AND LOCAL GOVERNMENT AND EMERGENCY RESPONDER REPRESENTATIVES- Representatives of State and local governments and representatives of emergency response providers, selected from among individuals nominated by national organizations representing such governments and representatives.

(2) SUBJECT MATTER EXPERTS- Individuals who have the technical knowledge and expertise to serve on the Advisory Committee in the fulfillment of its duties, including representatives of--

- (A) providers of interconnected and non-interconnected VoIP services;
- (B) vendors, developers, and manufacturers of systems, facilities, equipment, and capabilities for the provision of interconnected and non-interconnected VoIP services;

- (C) national organizations representing individuals with disabilities and senior citizens;
 - (D) Federal agencies or departments responsible for the implementation of the Next Generation E 9-1-1 system;
 - (E) the National Institute of Standards and Technology; and
 - (F) other individuals with such technical knowledge and expertise.
- (3) REPRESENTATIVES OF OTHER STAKEHOLDERS AND INTERESTED PARTIES- Representatives of such other stakeholders and interested and affected parties as the Chairman of the Commission determines appropriate.
- (c) Development of Recommendations- Within 1 year after the completion of the member appointment process by the Chairman of the Commission pursuant to subsection (b), the Advisory Committee shall conduct a national survey of individuals with disabilities, seeking input from the groups described in subsection (b)(2), to determine the most effective and efficient technologies and methods by which to enable access to emergency services by individuals with disabilities and shall develop and submit to the Commission recommendations to implement such technologies and methods, including recommendations--
- (1) with respect to what actions are necessary as a part of the migration to a national Internet protocol-enabled network to achieve reliable, interoperable communication transmitted over such network that will ensure access to emergency services by individuals with disabilities;
 - (2) for protocols, technical capabilities, and technical requirements to ensure the reliability and interoperability necessary to ensure access to emergency services by individuals with disabilities;
 - (3) for the establishment of technical standards for use by public safety answering points, designated default answering points, and local emergency authorities;
 - (4) for relevant technical standards and requirements for communication devices and equipment and technologies to enable the use of reliable emergency access;
 - (5) for procedures to be followed by IP-enabled network providers to ensure that such providers do not install features, functions, or capabilities that would conflict with technical standards;
 - (6) for deadlines by which providers of interconnected and non-interconnected VoIP services and manufacturers of equipment used for such services shall achieve the actions required in paragraphs (1) through (5), where achievable, and for the possible phase out of the use of current-generation TTY technology to the extent that this technology is replaced with more effective and efficient technologies and methods to enable access to emergency services by individuals with disabilities;
 - (7) for the establishment of rules to update the Commission's rules with respect to 9-1-1 services and E-911 services (as defined in section 158(e)(4) of the National Telecommunications and Information Administration Organization Act (47 U.S.C. 942(e)(4))), for users of telecommunications relay services as new technologies and methods for providing such relay services are adopted by providers of such relay services; and
 - (8) that take into account what is technically and economically feasible.
- (d) Meetings-
- (1) INITIAL MEETING- The initial meeting of the Advisory Committee shall take place not later than 45 days after the completion of the member appointment process by the Chairman of the Commission pursuant to subsection (b).
 - (2) OTHER MEETINGS- After the initial meeting, the Advisory Committee

shall meet at the call of the chairs, but no less than monthly until the recommendations required pursuant to subsection (c) are completed and submitted.

(3) NOTICE; OPEN MEETINGS- Any meetings held by the Advisory Committee shall be duly noticed at least 14 days in advance and shall be open to the public.

(e) Rules-

(1) QUORUM- One-third of the members of the Advisory Committee shall constitute a quorum for conducting business of the Advisory Committee.

(2) SUBCOMMITTEES- To assist the Advisory Committee in carrying out its functions, the chair may establish appropriate subcommittees composed of members of the Advisory Committee and other subject matter experts as determined to be necessary.

(3) ADDITIONAL RULES- The Advisory Committee may adopt other rules as needed.

(f) Federal Advisory Committee Act- The Federal Advisory Committee Act (5 U.S.C. App.) shall not apply to the Advisory Committee.

(g) Implementing Recommendations- The Commission shall have the authority to promulgate regulations to implement the recommendations proposed by the Advisory Committee, as well as any other regulations, technical standards, protocols, and procedures as are necessary to achieve reliable, interoperable communication that ensures access by individuals with disabilities to an Internet protocol-enabled emergency network, where achievable and technically feasible.

(h) Definitions- In this section--

(1) the term 'Commission' means the Federal Communications Commission;

(2) the term 'Chairman' means the Chairman of the Federal Communications Commission; and

(3) except as otherwise expressly provided, other terms have the meanings given such terms in section 3 of the Communications Act of 1934 (47 U.S.C. 153).

TITLE II--VIDEO PROGRAMMING

SEC. 201. VIDEO PROGRAMMING AND EMERGENCY ACCESS ADVISORY COMMITTEE.

(a) Establishment- Not later than 60 days after the date of enactment of this Act, the Chairman shall establish an advisory committee to be known as the Video Programming and Emergency Access Advisory Committee.

(b) Membership- As soon as practicable after the date of enactment of this Act, the Chairman shall appoint individuals who have the technical knowledge and engineering expertise to serve on the Advisory Committee in the fulfillment of its duties, including the following:

(1) Representatives of distributors and providers of video programming or a national organization representing such distributors.

(2) Representatives of vendors, developers, and manufacturers of systems, facilities, equipment, and capabilities for the provision of video programming delivered using Internet protocol or a national organization representing such vendors, developers, or manufacturers.

(3) Representatives of manufacturers of consumer electronics or information technology equipment or a national organization representing such manufacturers.

(4) Representatives of video programming producers or a national organization

representing such producers.

(5) Representatives of national organizations representing accessibility advocates, including individuals with disabilities and the elderly.

(6) Representatives of the broadcast television industry or a national organization representing such industry.

(7) Other individuals with technical and engineering expertise, as the Chairman determines appropriate.

(c) Commission Oversight- The Chairman shall appoint a member of the Commission's staff to moderate and direct the work of the Advisory Committee.

(d) Technical Staff- The Commission shall appoint a member of the Commission's technical staff to provide technical assistance to the Advisory Committee.

(e) Development of Recommendations-

(1) CLOSED CAPTIONING REPORT- Within 6 months after the date of the first meeting of the Advisory Committee, the Advisory Committee shall develop and submit to the Commission a report that includes the following:

(A) A recommended schedule of deadlines for the provision of closed captioning service.

(B) An identification of the performance requirement for protocols, technical capabilities, and technical procedures needed to permit content providers, content distributors, Internet service providers, software developers, and device manufacturers to reliably encode, transport, receive, and render closed captions of video programming, except for consumer generated media, delivered using Internet protocol.

(C) An identification of additional protocols, technical capabilities, and technical procedures beyond those available as of the date of enactment of the Twenty-First Century Communications and Video Accessibility Act of 2010 for the delivery of closed captions of video programming, except for consumer generated media, delivered using Internet protocol that are necessary to meet the performance objectives identified under subparagraph (B).

(D) A recommendation for technical standards to address the performance objectives identified in subparagraph (B).

(E) A recommendation for any regulations that may be necessary to ensure compatibility between video programming, except for consumer generated media, delivered using Internet protocol and devices capable of receiving and displaying such programming in order to facilitate access to closed captions.

(2) VIDEO DESCRIPTION, EMERGENCY INFORMATION, USER INTERFACES, AND VIDEO PROGRAMMING GUIDES AND MENUS- Within 18 months after the date of enactment of this Act, the Advisory Committee shall develop and submit to the Commission a report that includes the following:

(A) A recommended schedule of deadlines for the provision of video description and emergency information.

(B) An identification of the performance requirement for protocols, technical capabilities, and technical procedures needed to permit content providers, content distributors, Internet service providers, software developers, and device manufacturers to reliably encode, transport, receive, and render video descriptions of video programming, except for consumer generated media, and emergency information delivered using Internet protocol or digital broadcast television.

(C) An identification of additional protocols, technical capabilities, and technical procedures beyond those available as of the date of enactment of the Twenty-First Century Communications and Video Accessibility Act of 2010 for the delivery of video descriptions of video programming, except for consumer generated media, and emergency information delivered using Internet protocol that are necessary to meet the performance objectives identified under subparagraph (B).

(D) A recommendation for technical standards to address the performance objectives identified in subparagraph (B).

(E) A recommendation for any regulations that may be necessary to ensure compatibility between video programming, except for consumer generated media, delivered using Internet protocol and devices capable of receiving and displaying such programming, except for consumer generated media, in order to facilitate access to video descriptions and emergency information.

(F) With respect to user interfaces, a recommendation for the standards, protocols, and procedures used to enable the functions of apparatus designed to receive or display video programming transmitted simultaneously with sound (including apparatus designed to receive or display video programming transmitted by means of services using Internet protocol) to be accessible to and usable by individuals with disabilities.

(G) With respect to user interfaces, a recommendation for the standards, protocols, and procedures used to enable on-screen text menus and other visual indicators used to access the functions on an apparatus described in subparagraph (F) to be accompanied by audio output so that such menus or indicators are accessible to and usable by individuals with disabilities.

(H) With respect to video programming guides and menus, a recommendation for the standards, protocols, and procedures used to enable video programming information and selection provided by means of a navigation device, guide, or menu to be accessible in real-time by individuals who are blind or visually impaired.

(3) Consideration of work by standard-setting organizations- The recommendations of the advisory committee shall, insofar as possible, incorporate the standards, protocols, and procedures that have been adopted by recognized industry standard-setting organizations for each of the purposes described in paragraphs (1) and (2).

(f) Meetings-

(1) INITIAL MEETING- The initial meeting of the Advisory Committee shall take place not later than 180 days after the date of the enactment of this Act.

(2) OTHER MEETINGS- After the initial meeting, the Advisory Committee shall meet at the call of the Chairman.

(3) NOTICE; OPEN MEETINGS- Any meeting held by the Advisory Committee shall be noticed at least 14 days before such meeting and shall be open to the public.

(g) Procedural Rules-

(1) QUORUM- The presence of one-third of the members of the Advisory Committee shall constitute a quorum for conducting the business of the Advisory Committee.

(2) SUBCOMMITTEES- To assist the Advisory Committee in carrying out its

functions, the Chairman may establish appropriate subcommittees composed of members of the Advisory Committee and other subject matter experts.

(3) ADDITIONAL PROCEDURAL RULES- The Advisory Committee may adopt other procedural rules as needed.

(h) Federal Advisory Committee Act- The Federal Advisory Committee Act (5 U.S.C. App.) shall not apply to the Advisory Committee.

SEC. 202. VIDEO DESCRIPTION AND CLOSED CAPTIONING.

(a) Video Description- Section 713 of the Communications Act of 1934 (47 U.S.C. 613) is amended--

- (1) by striking subsections (f) and (g);
- (2) by redesignating subsection (h) as subsection (j); and
- (3) by inserting after subsection (e) the following:

(f) Video Description-

(1) REINSTATEMENT OF REGULATIONS- On the day that is 1 year after the date of enactment of the Twenty-First Century Communications and Video Accessibility Act of 2010, the Commission shall, after a rulemaking, reinstate its video description regulations contained in the Implementation of Video Description of Video Programming Report and Order (15 F.C.C.R. 15,230 (2000)), recon. granted in part and denied in part, (16 F.C.C.R. 1251 (2001)), modified as provided in paragraph (2).

(2) MODIFICATIONS TO REINSTATED REGULATIONS- Such regulations shall be modified only as follows:

(A) The regulations shall apply to video programming, as defined in subsection (h), insofar as and programming is transmitted for display on television in digital format.

(B) The Commission shall update the list of the top 25 designated market areas, the list of the top 5 national nonbroadcast networks that at least 50 hours per quarter of prime time programming that is not exempt under this paragraph, and the beginning calendar quarter for which compliance shall be calculated.

(C) The regulations may permit a provider of video programming or a program owner to petition the Commission for an exemption from the requirements of this section upon a showing that the requirements contained in this section be economically burdensome.

(D) The Commission may exempt from the regulations established pursuant to paragraph (1) a service, class of services, program, class of programs, equipment, or class of equipment for which the Commission has determined that the application of such regulations would be economically burdensome for the provider of such service, program, or equipment.

(E) The regulations shall not apply to live or near-live programming.

(F) The regulations shall provide for an appropriate phased schedule of deadlines for compliance.

(G) The Commission shall consider extending the exemptions and limitations in the reinstated regulations for technical capability reasons to all providers and owners of video programming.

(3) INQUIRIES ON FURTHER VIDEO DESCRIPTION REQUIREMENTS- The Commission shall commence the following inquiries not later than 1 year after the completion of the phase-in of the reinstated regulations and shall report to Congress 1 year thereafter on the findings for each of the following:

- `(A) VIDEO DESCRIPTION IN TELEVISION PROGRAMMING- The availability, use, and benefits of video description on video programming distributed on television, the technical and creative issues associated with providing such video description, and the financial costs of providing such video description for providers of video programming and program owners.
- `(B) VIDEO DESCRIPTION IN VIDEO PROGRAMMING DISTRIBUTED ON THE INTERNET- The technical and operational issues, costs, and benefits of providing video descriptions for video programming that is delivered using Internet protocol.
- `(4) Continuing commission authority-
- `(A) In general- The Commission may not issue additional regulations unless the Commission determines, at least 2 years after completing the reports required in paragraph (3), that the need for and benefits of providing video description for video programming, insofar as such programming is transmitted for display on television, are greater than the technical and economic costs of providing such additional programming.
- `(B) Limitation- If the Commission makes the determination under subparagraph (A) and issues additional regulations, the Commission may not increase, in total, the hour requirement for additional described programming by more than 75 percent of the requirement in the regulations reinstated under paragraph (1).
- `(C) Application to designated market areas-
- `(i) In general- After the Commission completes the reports on video description required in paragraph (3), the Commission shall phase in the video description regulations for the top 60 designated market areas, except that the Commission may grant waivers to entities in specific designated market areas where it deems appropriate.
- `(ii) Phase-in deadline- The phase-in described in clause (i) shall be completed not later than 6 years after the date of enactment of the Twenty-First Century Communications and Video Accessibility Act of 2010.
- `(iii) Report- Nine years after the date of enactment of the Twenty-First Century Communications and Video Accessibility Act of 2010, the Commission shall submit to the Committee on Energy of the House of Representatives and the Committee on Commerce, Science, and Transportation of the Senate a report assessing--
- `(I) the types of described video programming that is available to consumers;
- `(II) consumer use of such programming;
- `(III) the costs to program owners, providers, and distributors of creating such programming;
- `(IV) the potential costs to program owners, providers, and distributors in designated market areas outside of the top 60 of creating such programming;
- `(V) the benefits to consumers of such programming;
- `(VI) the amount of such programming currently available; and
- `(VII) the need for additional described programming in

designated market areas outside the top 60.

(iv) Additional market areas- Ten years after the date of enactment of the Twenty-First Century Communications and Video Accessibility Act of 2010, the Commission shall have the authority, based upon the findings, conclusions, and recommendations contained in the report under clause (iii), to phase in the video description regulations for up to an additional 10 designated market areas each year--

(I) if the costs of implementing the video description regulations to program owners, providers, and distributors in those additional markets are reasonable, as determined by the Commission; and

(II) except that the Commission may grant waivers to entities in specific designated market areas where it deems appropriate.

(g) Emergency Information- Not later than 1 year after the Advisory Committee report under subsection (e)(2) is submitted to the Commission, the Commission shall complete a proceeding to--

(1) identify methods to convey emergency information (as that term is defined in section 79.2 of title 47, Code of Federal Regulations) in a manner accessible to individuals who are blind or visually impaired; and

(2) promulgate regulations that require video programming providers and video programming distributors (as those terms are defined in section 79.1 of title 47, Code of Federal Regulations) and program owners to convey such emergency information in a manner accessible to individuals who are blind or visually impaired.

(h) Definitions- For purposes of this section, section 303, and section 330:

(1) VIDEO DESCRIPTION- The term 'video description' means the insertion of audio narrated descriptions of a television program's key visual elements into natural pauses between the program's dialogue.

(2) Video programming- The term 'video programming' means programming by, or generally considered comparable to programming provided by a television broadcast station, but not including consumer-generated media (as defined in section 3).

(b) Closed Captioning on Video Programming Delivered Using Internet Protocol- Section 713 of such Act is further amended by striking subsection (c) and inserting the following:

(c) Deadlines for Captioning-

(1) IN GENERAL- The regulations prescribed pursuant to subsection (b) shall include an appropriate schedule of deadlines for the provision of closed captioning of video programming once published or exhibited on television.

(2) DEADLINES FOR PROGRAMMING DELIVERED USING INTERNET PROTOCOL-

(A) REGULATIONS ON CLOSED CAPTIONING ON VIDEO PROGRAMMING DELIVERED USING INTERNET PROTOCOL- Not later than 6 months after the submission of the report to the Commission required by subsection (e)(1) of the Twenty-First Century Communications and Video Accessibility Act of 2010, the Commission shall revise its regulations to require the provision of closed captioning on video programming delivered using Internet protocol that was published or exhibited on television with captions after the effective date of such regulations.

`(B) SCHEDULE- The regulations prescribed under this paragraph shall include an appropriate schedule of deadlines for the provision of closed captioning, taking into account whether such programming is prerecorded and edited for Internet distribution, or whether such programming is live or near-live and not edited for Internet distribution.

`(C) COST- The Commission may delay or waive the regulation promulgated under subparagraph (A) to the extent the Commission finds that the application of the regulation to live video programming delivered using Internet protocol with captions after the effective date of such regulations would be economically burdensome to providers of video programming or program owners.

`(D) REQUIREMENTS FOR REGULATIONS- The regulations prescribed under this paragraph--

`(i) shall contain a definition of `near-live programming' and `edited for Internet distribution';

`(ii) may exempt any service, class of service, program, class of program, equipment, or class of equipment for which the Commission has determined that the application of such regulations would be economically burdensome for the provider of such service, program, or equipment;

`(iii) shall clarify that, for the purposes of implementation, of this subsection, the terms `video programming distribution' and `video programming providers' include an entity that makes available directly to the end user video programming through a distribution method that uses Internet protocol;

`(iv) and describe the responsibilities of video programming providers or distributors and video programming owners;

`(v) shall establish a mechanism to make available to video programming providers and distributors information on video programming subject to the Act on an ongoing basis;

`(vi) shall consider that the video programming provider or distributor shall be deemed in compliance if such entity enables the rendering or pass through of closed captions and video description signals and make a good faith effort to identify video programming subject to the Act using the mechanism created in (v); and

`(vii) shall provide that de minimis failure to comply with such regulations by a video programming provider or owner shall not be treated as a violation of the regulations.

`(3) Alternate means of compliance- An entity may meet the requirements of this section through alternate means than those prescribed by regulations pursuant to subsection (b), as revised pursuant to paragraph (2)(A) of this subsection, if the requirements of this section are met, as determined by the Commission.'

(c) Conforming Amendment- Section 713(d) of such Act is amended by striking paragraph (3) and inserting the following:

`(3) a provider of video programming or program owner may petition the Commission for an exemption from the requirements of this section, and the Commission may grant such petition upon a showing that the requirements contained in this section would be economically burdensome. During the pendency of such a petition, such provider or owner shall be exempt from the requirements of this section. The Commission shall act to grant or deny any such

petition, in whole or in part, within 6 months after the Commission receives such petition, unless the Commission finds that an extension of the 6-month period is necessary to determine whether such requirements are economically burdensome.'

SEC. 203. CLOSED CAPTIONING DECODER AND VIDEO DESCRIPTION CAPABILITY.

(a) Authority to Regulate- Section 303(u) of the Communications Act of 1934 (47 U.S.C. 303(u)) is amended to read as follows:

(u) Require that, if technically feasible--

(1) apparatus designed to receive or play back video programming transmitted simultaneously with sound, if such apparatus is manufactured in the United States or imported for use in the United States and uses a picture screen of any size--

(A) be equipped with built-in closed caption decoder circuitry or capability designed to display closed-captioned video programming;

(B) have the capability to decode and make available the transmission and delivery of video description services as required by regulations reinstated and modified pursuant to section 713(f); and

(C) have the capability to decode and make available emergency information (as that term is defined in section 79.2 of the Commission's regulations (47 CFR 79.2)) in a manner that is accessible to individuals who are blind or visually impaired; and

(2) notwithstanding paragraph (1) of this subsection--

(A) apparatus described in such paragraph that use a picture screen that is less than 13 inches in size meet the requirements of subparagraph (A), (B), or (C) of such paragraph only if the requirements of such subparagraphs are achievable (as defined in section 716);

(B) any apparatus or class of apparatus that are display-only video monitors with no playback capability are exempt from the requirements of such paragraph; and

(C) the Commission shall have the authority, on its own motion or in response to a petition by a manufacturer, to waive the requirements of this subsection for any apparatus or class of apparatus--

(i) primarily designed for activities other than receiving or playing back video programming transmitted simultaneously with sound; or

(ii) for equipment designed for multiple purposes, capable of receiving or playing video programming transmitted simultaneously with sound but whose essential utility is derived from other purposes.'

(b) Other Devices- Section 303 of the Communications Act of 1934 (47 U.S.C. 303) is further amended by adding at the end the following new subsection:

(z) Require that--

(1) if achievable (as defined in section 716), apparatus designed to record video programming transmitted simultaneously with sound, if such apparatus is manufactured in the United States or imported for use

in the United States, enable the rendering or the pass through of closed captions, video description signals, and emergency information (as that term is defined in section 79.2 of title 47, Code of Federal Regulations) such that viewers are able to activate and de-activate the closed captions and video description as the video programming is played back on a picture screen of any size; and

(2) interconnection mechanisms and standards for digital video source devices are available to carry from the source device to the consumer equipment the information necessary to permit or render the display of closed captions and to make encoded video description and emergency information audible.'

(c) Shipment in Commerce- Section 330(b) of the Communications Act of 1934 (47 U.S.C. 330(b)) is amended--

(1) by striking '303(u)' in the first sentence and inserting '303(u) and (z)';

(2) by striking the second sentence and inserting the following: 'Such rules shall provide performance and display standards for such built-in decoder circuitry or capability designed to display closed captioned video programming, the transmission and delivery of video description services, and the conveyance of emergency information as required by section 303 of this Act.'; and

(3) in the fourth sentence, by striking 'closed-captioning service continues' and inserting 'closed-captioning service and video description service continue'.

(d) Implementing Regulations- The Federal Communications Commission shall prescribe such regulations as are necessary to implement the requirements of sections 303(u), 303(z), and 330(b) of the Communications Act of 1934, as amended by this section, including any technical standards, protocols, and procedures needed for the transmission of--

(1) closed captioning within 6 months after the submission to the Commission of the Advisory Committee report required by section 201(e)(1); and

(2) video description and emergency information within 18 months after the submission to the Commission of the Advisory Committee report required by section 201(e)(2).

(e) Alternate Means of Compliance- An entity may meet the requirements of sections 303(u), 303(z), and 330(b) of the Communications Act of 1934 through alternate means than those prescribed by regulations pursuant to subsection (d) if the requirements of those sections are met, as determined by the Commission.

SEC. 204. USER INTERFACES ON DIGITAL APPARATUS.

(a) Amendment- Section 303 of the Communications Act of 1934 (47 U.S.C. 303) is further amended by adding after subsection (z), as added by section 203 of this Act, the following new subsection:

(aa) Require--

(1) if achievable (as defined in section 716) that digital apparatus designed to receive or play back video programming transmitted in digital format simultaneously with sound, including apparatus designed to receive or display video programming transmitted in digital format using Internet protocol, be designed, developed, and fabricated so that control of appropriate built-in apparatus functions are accessible to and usable by individuals who are blind or visually impaired, except that the Commission may not specify the technical standards, protocols, procedures, and other technical requirements for meeting this requirement;

`(2) that if on-screen text menus or other visual indicators built in to the digital apparatus are used to access the functions of the apparatus described in paragraph (1), such functions shall be accompanied by audio output that is either integrated or peripheral to the apparatus, so that such menus or indicators are accessible to and usable by individuals who are blind or visually impaired in real-time;

`(3) that for such apparatus equipped with the functions described in paragraphs (1) and (2) built in access to those closed captioning and video description features through a mechanism that is reasonably comparable to a button, key, or icon designated by activating the closed captioning or accessibility features; and

`(4) that in applying this subsection the term `apparatus' does not include a navigation device, as such term is defined in section 76.1200 of the Commission's rules (47 CFR 76.1200).'

(b) Implementing Regulations- Within 18 months after the submission to the Commission of the Advisory Committee report required by section 201(e)(2), the Commission shall prescribe such regulations as are necessary to implement the amendments made by subsection (a).

(c) Alternate Means of Compliance- An entity may meet the requirements of section 303(aa) of the Communications Act of 1934 through alternate means than those prescribed by regulations pursuant to subsection (b) if the requirements of those sections are met, as determined by the Commission.

(d) Deferral of Compliance with ATSC Mobile DTV Standard A/153- A digital apparatus designed and manufactured to receive or play back the Advanced Television Systems Committee's Mobile DTV Standards A/153 shall not be required to meet the requirements of the regulations prescribed under subsection (b) for a period of not less than 24 months after the date on which the final regulations are published in the Federal Register.

SEC. 205. ACCESS TO VIDEO PROGRAMMING GUIDES AND MENUS PROVIDED ON NAVIGATION DEVICES.

(a) Amendment- Section 303 of the Communications Act of 1934 (47 U.S.C. 303) is further amended by adding after subsection (aa), as added by section 204 of this Act, the following new subsection:

`(bb) Require--

`(1) if achievable (as defined in section 716), that the on-screen text menus and guides provided by navigation devices (as such term is defined in section 76.1200 of title 47, Code of Federal Regulations) for the display or selection of multichannel video programming are audibly accessible in real-time upon request by individuals who are blind or visually impaired, except that the Commission may not specify the technical standards, protocols, procedures, and other technical requirements for meeting this requirement; and

`(2) for navigation devices with built-in closed captioning capability, that access to that capability through a mechanism is reasonably comparable to a button, key, or icon designated for activating the closed captioning, or accessibility features.

With respect to apparatus features and functions delivered in software, the requirements set forth in this subsection shall apply to the manufacturer of such software.

Source: www.thomas.gov

Bill Text
111th Congress (2009-2010)
S.3828.ENR

S.3828

To make technical corrections in the Twenty-First Century Communications and Video Accessibility Act of 2010 and the amendments made by that Act. (Enrolled Bill [Final as Passed Both House and Senate] - ENR)

*One Hundred Eleventh Congress
of the
United States of America*

AT THE SECOND SESSION

Begun and held at the City of Washington on Tuesday,

the fifth day of January, two thousand and ten

An Act

To make technical corrections in the Twenty-First Century Communications and Video Accessibility Act of 2010 and the amendments made by that Act.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. AMENDMENT OF TWENTY-FIRST CENTURY COMMUNICATIONS AND VIDEO ACCESSIBILITY ACT OF 2010.

The Twenty-First Century Communications and Video Accessibility Act of 2010 is amended--

- (1) by striking the item relating to section 105 in the table of contents in section 1(b) and inserting the following:
`Sec. 105. Relay services for deaf-blind individuals.';
- (2) by striking `requirement' in section 201(e)(1)(B) and inserting `objectives';
- (3) by striking `requirement' in section 201(e)(2)(B) and inserting `objectives';
- (4) by inserting `or digital broadcast television' after `protocol' in section 201(e)(2)(C); and
- (5) by inserting `or digital broadcast television' after `protocol' in section 201(e)(2)(E).

SEC. 2. AMENDMENT OF COMMUNICATIONS ACT OF 1934.

The Communications Act of 1934 (47 U.S.C. 151 et seq.), as amended by the Twenty-First Century Communications and Video Accessibility Act of 2010, is amended--

- (1) by striking `do not' in section 716(d);
- (2) by striking `facilities' in section 716(e)(1)(D) and inserting `facilitate';
- (3) by striking `provider in the manner prescribed in paragraph (3),' in section 717(a)(5)(C) and inserting `provider,';

- (4) by striking `Equal Access to 21st Century Communications Act' in section 719(a) and inserting `Twenty-First Century Communications and Video Accessibility Act of 2010';
- (5) by inserting `low-income' after `accessible by' in section 719(a);
- (6) by striking `and' in section 713(f)(2)(A) and inserting `such';
- (7) by inserting `have' after `that' the first place it appears in section 713(f)(2)(B);
- (8) by inserting `and Commerce' after `Energy' in section 713(f)(4)(C)(iii);
- (9) by striking `programming distribution' in section 713(c)(2)(D)(iii) and inserting `programming distributors';
- (10) by striking `progamming' in section 713(c)(2)(D)(v) and inserting `programming';
- (11) by striking `and video description signals and make' in section 713(c)(2)(D)(vi) and inserting `and makes';
- (12) by striking `by' in section 303(aa)(3) and inserting `for';
- (13) by striking `and' after the semicolon in section 303(bb)(1);
- (14) by striking `features.' in section 303(bb)(2) and inserting `features; and'; and
- (15) by striking the matter following subdivision (2) of section 303(bb) and inserting the following:
 - (3) that, with respect to navigation device features and functions--
 - (A) delivered in software, the requirements set forth in this subsection shall apply to the manufacturer of such software; and
 - (B) delivered in hardware, the requirements set forth in this subsection shall apply to the manufacturer of such hardware.'

Speaker of the House of Representatives.

Vice President of the United States and

President of the Senate.

Source: www.thomas.gov

**STATEMENT OF
CHAIRMAN JULIUS GENACHOWSKI**

Re: *Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010, Section 103(b): Section 715 of the Communications Act of 1934, CG Docket No. 11-47, Implementation of Sections 716 and 717 of the Communications Act of 1934, as Enacted by the Twenty-First Century Communications and Video Accessibility Act of 2010, CG Docket No. 10-213, 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, WT Docket No. 96-198, In the Matter of Accessible Mobile Phone Options for People who are Blind, Deaf-Blind, or Have Low Vision, CG Docket No. 10-145, In the Matter of Video Description: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010, MB Docket No. 11-43.*

The central goal of the 21st Century Communications and Video Accessibility Act, signed into law last fall, is a profoundly important one in a world where communications technologies are increasingly becoming central to participation in our economy and our democracy: to ensure that people with disabilities have access to 21st Century communications technologies.

The statute assigns the FCC a vital role in the implementation of this landmark legislation, and as I've said before, we intend to work with consumer, business, government and non-profit stakeholders to ensure that the Act is implemented quickly and effectively.

We've already taken a number of significant steps:

- We launched a rulemaking to ensure that telephones and other devices used with advanced communications services are compatible with hearing aids.
- We established and held the first meetings of the two Advisory Committees required by the new law: the Video Programming Accessibility Advisory Committee and the Emergency Access Advisory Committee.
- We initiated a proceeding to implement a national equipment distribution program that will bring assistive communications technologies to the deaf-blind community.
- And we have been proactively gathering feedback on how best to set up the clearinghouse of accessible products and services required by the Act.

Today the Commission took three additional steps to fulfill Congress's vision by proposing accessibility rules for advanced communications services, video description rules, and rules to extend participation in the TRS Fund to non-interconnected VoIP service providers.

The rules proposed in the Advanced Communications Item will ensure that individuals with disabilities have access to a wider array of IP-based and other advanced communications services and devices. There's no longer a dispute on this central point: access to technology means access to jobs and full participation in our society and the global economy. With access to broadband, an individual with disabilities can telecommute or run a business out of her home; receive remote health and job-related support; or gain access to online educational classes and digital books.

The proposed rules would give manufacturers and service providers flexibility to implement innovative solutions at the development stage and use third party applications so that they can

make technology accessible in the most cost-effective, efficient manner and so that disabled individuals won't have to wait years or decades to use new technologies.

Building accessibility in early reduces the costs and burdens of compliance, while increasing the benefits to the public.

Consistent with that spirit, the Advanced Communications notice also considers allowing for waivers and exemptions in appropriate cases for small businesses and entrepreneurs that provide advanced communications services and devices, in recognition of the significant value they add to the economy and the fact that they may lack the legal, financial or technical capability to incorporate accessibility features.

We approach this issue in the same spirit that we try to approach all issues: in an effort to promote predictability and reduce uncertainty; taking into account the benefits and costs of our actions and using the best, most innovative and least burdensome tools for achieving the regulatory ends set to us by Congress.

Video description will do for people who are blind or visually impaired what closed-captioning has done for people who are deaf or hard of hearing. By providing a verbal description of scenes in television programming that do not have dialog, video description provides individuals who are blind or visually impaired better access to TV programming and allows these individuals to participate more fully in cultural and civic life.

Video description also offers broader benefits: for example video description has been shown to benefit children with learning disabilities. By reinforcing visual information with an audio description, this technology makes it easier for video programming to capture the attention of children with learning disabilities and enhance their information processing skills.

Finally, in the third item, we propose rules that would require non-interconnected VoIP service providers to contribute to the Telecommunications Relay Service Fund, an important fund that compensates TRS providers for the reasonable costs of providing the service on an interstate basis. These services allow individuals with hearing and speech disabilities to engage in wired and wireless communications in a manner that is functionally equivalent to the ability of individuals without such disabilities. The Commission's rules have required interconnected VoIP providers to contribute to the TRS fund since 2007, and the new Accessibility Law mandates that non-interconnected VoIP service providers do so as well.

Today, I am delighted to move closer to the day when the 36 million Americans who are deaf or hard of hearing and the 25 million Americans who are blind or visually impaired can enjoy all the benefits of new and old communications technologies and services so that they too can participate fully in the economic, civic and cultural life of the nation.

**STATEMENT OF
COMMISSIONER MICHAEL J. COPPS**

Re: *Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010, Section 103(b): Section 715 of the Communications Act of 1934, CG Docket No. 11-47, Implementation of Sections 716 and 717 of the Communications Act of 1934, as Enacted by the Twenty-First Century Communications and Video Accessibility Act of 2010, CG Docket No. 10-213, 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, WT Docket No. 96-198, In the Matter of Accessible Mobile Phone Options for People who are Blind, Deaf-Blind, or Have Low Vision, CG Docket No. 10-145, In the Matter of Video Description: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010, MB Docket No. 11-43.*

One of the best parts of my job as Commissioner is the wonderful and totally inspiring experience of working with numerous disabilities communities. I was thrilled to watch the President sign the Twenty-First Century Communications and Video Accessibility Act into law last October. The legislation tasks the Commission with quick and far-reaching action to expand access and opportunity for persons with disabilities in the digital age. With today's items, we continue our ambitious pace to fulfill the mandates of this important new law and harness technological innovation for persons with disabilities who want to be, need to be and indeed deserve to be, fully participating, mainstream citizens in our society. In the three Notices of Proposed Rulemaking we announce today, the Commission proposes rules to make video programming more accessible to the blind and visually impaired, to ensure the accessibility of advanced communications services and devices, and to expand contributions to our telecommunications relay services (TRS) fund. In particular, I am thrilled that we are moving forward to implement Congress' clear mandate to reinstate the video description rules. I do want to commend CBS, FOX, PBS, TCM and TNT for providing this important service in the interim on their own accord. I look forward to working with my colleagues and all stakeholders as we move forward to implement these rules swiftly and open new doors of digital accessibility for Americans with disabilities.