

**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)	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
)	

REPORT AND ORDER AND FURTHER NOTICE OF PROPOSED RULEMAKING

Adopted: October 7, 2011

Released: October 7, 2011

Comment Date: (45 days after date of publication in the Federal Register)

Reply Comment Date: (75 days after date of publication in the Federal Register)

By the Commission: Chairman Genachowski and Commissioners McDowell and Clyburn issuing separate statements; Commissioner Copps approving in part, dissenting in part and issuing a statement.

TABLE OF CONTENTS

Heading	Paragraph #
I. INTRODUCTION AND BACKGROUND	1
II. EXECUTIVE SUMMARY	13
III. REPORT AND ORDER.....	30
A. Scope and Obligations	30
1. Advanced Communications Services	30
a. General.....	30
b. Interconnected VoIP Service	33
c. Non-interconnected VoIP Service	40
d. Electronic Messaging Service	42

e. Interoperable Video Conferencing Service	46
2. Manufacturers of Equipment Used for Advanced Communications Services.....	52
3. Providers of Advanced Communications Services	81
4. General Obligations.....	91
a. Manufacturers and Service Providers.....	92
b. Providers of Applications or Services Accessed over Service Provider Networks.....	95
c. Network Features.....	97
d. Accessibility of Information Content	100
5. Phased in Implementation	105
B. Nature of Statutory Requirements	114
1. Achievable Standard.....	114
a. Definitions	114
(i) Accessible to and Usable by.....	114
(ii) Disability	117
b. General Approach.....	119
c. Specific Factors	127
(i) Nature and Cost of Steps Needed with Respect to Specific Equipment or Service	127
(ii) Technical and Economic Impact on the Operation	131
(iii) Type of Operations	136
(iv) Extent to which Accessible Services or Equipment are Offered with Varying Functionality, Features, and Prices.....	140
2. Industry Flexibility	149
3. Compatibility.....	158
C. Waivers and Exemptions.....	170
1. Customized Equipment or Services.....	170
2. Waivers for Services or Equipment Designed Primarily for Purposes other than Using ACS.....	179
3. Exemptions for Small Entities – Temporary Exemption of Section 716 Requirements.....	201
D. Additional Industry Requirements and Guidance	210
1. Performance Objectives.....	210
2. Safe Harbors	213
3. Prospective Guidelines	216
E. Section 717 Recordkeeping and Enforcement.....	219
1. Recordkeeping.....	219
2. Enforcement.....	231
a. Overview	231
b. General Requirements	232
c. Informal Complaints.....	241
d. Formal Complaints	241
e. Remedies and Sanctions	275
IV. FURTHER NOTICE OF PROPOSED RULEMAKING.....	279
A. Small Entity Exemption	279

B. Section 718 Implementation.....	292
C. Interoperable Video Conferencing Services.....	301
1. Meaning of Interoperable	301
2. Coverage of Video Mail	306
D. Accessibility of Information Content	308
E. Electronically Mediated Services	309
F. Performance Objectives.....	310
G. Safe Harbors	311
H. Section 718 Recordkeeping and Enforcement.....	315
V. PROCEDURAL MATTERS.....	318
A. <i>Ex Parte</i> Rules – Permit-But-Disclose	318
B. Comment Filing Procedures	319
C. Final Regulatory Flexibility Analysis	321
D. Final Paperwork Reduction Analysis	322
E. Initial Regulatory Flexibility Analysis	324
F. Initial Paperwork Reduction Analysis.....	325
G. Further Information	326
VI. ORDERING CLAUSES.....	327
APPENDIX A - List of Commenters	
APPENDIX B - Final Rules	
APPENDIX C - Proposed Rules	
APPENDIX D - Final Regulatory Flexibility Analysis	
APPENDIX E - Initial Regulatory Flexibility Analysis	
APPENDIX F - Accessibility of Information Content	
APPENDIX G - Performance Objectives	

I. INTRODUCTION AND BACKGROUND

1. In this *Report and Order*, we implement provisions of Section 104 of the “Twenty-First Century Communications and Video Accessibility Act of 2010”¹ (hereinafter referred to as the “CVAA”), which was enacted to ensure that people with disabilities have access to the incredible and innovative communications technologies of the 21st-century. These rules are significant and necessary steps towards ensuring that the 54 million Americans with disabilities² are able to fully utilize and benefit from advanced

¹ 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.) (CVAA). The law was enacted on October 8, 2010. *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, to make technical corrections to the Twenty-First Century Communications and Video Accessibility Act of 2010 and the amendments made by that Act. Hereinafter, all references to the CVAA will be to the CVAA as codified in the Communications Act of 1934, as amended, unless otherwise indicated.

² 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>.

communications services (“ACS”). Given the fundamental role ACS plays in our everyday lives, we believe that the CVAA represents the most significant accessibility legislation since the passage of the Americans with Disabilities Act (“ADA”) in 1990.³

2. In enacting the CVAA, Congress noted that the communications marketplace had undergone a “fundamental transformation” since it last acted on these issues in 1996, when it added Section 255 to the Communications Act of 1934, as amended (hereinafter referred to as “the Communications Act” or “the Act”).⁴ For example, statistics show that as of 2010, “40% of adults use the Internet, e-mail or instant messaging on a mobile phone.”⁵ Congress found, however, that people with disabilities often have not shared in the benefits of this rapid technological advancement.⁶ Implementation of the CVAA is a critical step in addressing this inequity.

3. The actions we take today are consistent with the Commission’s commitment to rapid deployment of and universal access to broadband services for all Americans. As described in the National Broadband Plan, broadband technology can stimulate economic growth and provide opportunity for all Americans.⁷ Only 41% of Americans with disabilities, however, have broadband access at home compared to the national average of 69%.⁸ Congress recognized that this gap must be closed in order to afford persons with disabilities to share fully in the economic, social, and civic benefits of broadband.

4. In keeping with Congress’s clear direction, our actions today advance the accessibility of ACS in a manner that is consistent with our objectives of promoting investment and innovation, while being mindful of the potential burden on industry. We have crafted our rules to provide manufacturers and service providers flexibility in how they achieve accessibility. Our rules encourage efficient accessibility solutions and do

³ Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (1990) (codified at 42 U.S.C. §§ 12101-12213) (ADA).

⁴ 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”).

⁵ 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, e-mail 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.* The report 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.*

⁶ See Senate Report at 1-2; House Report at 19.

⁷ Federal Communications Commission, *Connecting America: The National Broadband Plan* at Recommendation 9.10. (rel. Mar. 16, 2010) (“National Broadband Plan” or “NBP”), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-296935A1.pdf.

⁸ Susannah Fox, Pew Internet, *Americans Living with Disability and their Technology Profile* (January 21, 2011), available at <http://pewinternet.org/Reports/2011/Disability.aspx>.

not require the retrofitting of equipment or services. Further, our rules will phase in over two years, balancing the potentially significant industry-wide changes the law requires with the need to ensure that people with disabilities can take advantage of the benefits of ACS.

5. Today, we specifically take action to implement Sections 716, 717, and 718 of the Act. Section 716 requires that providers of 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.⁹ The CVAA provides flexibility to providers of ACS and manufacturers of ACS equipment by allowing covered entities to comply with Section 716 by either building accessibility features into their equipment or services¹⁰ or relying on third-party applications, peripheral devices, software, hardware, or customer premises equipment (“CPE”) that are available to individuals with disabilities at nominal cost.¹¹ Section 716 grants the Commission the authority to waive the requirements of this section for equipment and services that provide access to ACS but are designed primarily for purposes other than using ACS and to exempt small entities from the requirements of the section.¹² Finally, Section 716 provides that the requirements of the section do not apply to customized equipment or services not offered directly to the public or to such classes of users as to effectively be made available to the public.¹³

6. Section 717 of the Act requires that the Commission establish new recordkeeping and enforcement procedures for manufacturers and providers that are subject to Section 255 and Section 716.¹⁴ It provides that covered entities submit to the Commission an annual certification that records are kept in accordance with the requirements of the section.¹⁵ Every two years after enactment of the CVAA, the Commission is required to file a report to Congress including an assessment of compliance with Sections 255, 716, and 718; the extent of persistent barriers to accessibility with respect to new communications technologies; and a summary of complaints handled, along with their resolutions, over the preceding two years.¹⁶ Section 717 also compels the Comptroller General to conduct a study on the Commission’s enforcement actions, as well as the extent to which the sections’ requirements have affected the development of new technologies, within five years of enactment of the

⁹ See 47 U.S.C. §§ 617(a)(1) and (b)(1).

¹⁰ See 47 U.S.C. §§ 617(a)(2)(A) and (b)(2)(A).

¹¹ See 47 U.S.C. §§ 617(a)(2)(B) and (b)(2)(B).

¹² 47 U.S.C. § 617(h)(1)-(2).

¹³ 47 U.S.C. § 617(i).

¹⁴ 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 Section 717 Recordkeeping and Enforcement, Section III.E, *infra*.

¹⁵ 47 U.S.C. § 618(a)(5)(B).

¹⁶ 47 U.S.C. § 618(b).

CVAA.¹⁷ Finally, Section 717 requires the creation of a clearinghouse for information about the accessibility of products, services, and accessibility solutions and requires the Commission, in coordination with NTIA, to develop an information and educational program to inform the public about the clearinghouse and the protections and remedies in Sections 255, 716, and 718.¹⁸

7. Section 718, which is effective three years after the date of enactment of the CVAA, requires manufacturers and service providers to make Internet browsers built into mobile phones accessible to and useable by people who are blind or have visual impairments, unless doing so is not achievable.¹⁹ Section 718 makes clear that this obligation does not include a requirement to make Internet content, applications, or services accessible to or usable by individuals with disabilities.²⁰ Section 718 also provides flexibility for manufacturers or providers to comply with this section by either building accessibility features into their equipment or services or relying on third-party applications, peripheral devices, software, hardware, or CPE.²¹ Finally, Section 718 amends Section 503 of the Act to provide forfeiture penalties for manufacturers or providers who violate Sections 255, 716, or 718.²²

8. *Procedural history.* On October 21, 2010, the Consumer and Governmental Affairs Bureau (“CGB”) and the Wireless Telecommunications Bureau (“WTB”) jointly 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.²³

9. In March 2011, the Commission issued a *Notice of Proposed Rulemaking*, proposing new accessibility requirements to implement Sections 716 and 717 of the Act.²⁴ In the *Accessibility NPRM*, the Commission proposed that the accessibility requirements of Section 716 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.²⁵ The

¹⁷ 47 U.S.C. § 618(c).

¹⁸ 47 U.S.C. § 618(d), (e).

¹⁹ See 47 U.S.C. § 619.

²⁰ 47 U.S.C. § 619(a)(1)-(2).

²¹ 47 U.S.C. § 619(b).

²² 47 U.S.C. § 619(c).

²³ See *Consumer and Governmental Affairs Bureau and Wireless Telecommunications Bureau Seek Comment on Advanced Communication Provisions of the Twenty-First Century Communications and Video Accessibility Act of 2010*, CG Docket No. 10-213, DA 10-2029, Public Notice, at 2, released October 21, 2010 (“*October Public Notice*”).

²⁴ *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, Notice of Proposed Rulemaking, 26 FCC Rcd 3133, 3142, ¶ 16 (2011) (*Accessibility NPRM*).

²⁵ *Accessibility NPRM*, 26 FCC Rcd at 3142-3151, ¶¶ 19-47.

Commission also sought comment on whether and how it should exercise its authority to adopt exemptions for small entities²⁶ and waivers, both individual and blanket, for offerings that are designed primarily for purposes other than using advanced communications services.²⁷

10. The Commission proposed, in the *Accessibility NPRM*, to define “achievable,” consistent with the statutory language, as “with reasonable effort and expense”²⁸ and proposed to adopt the four statutory factors that could be used to conduct an achievability analysis pursuant to Section 716.²⁹ The Commission also sought comment on whether it should base some of its definitions on the United States Access Board (“Access Board”)³⁰ guidelines and the existing Section 255 rules. Section 255(e) of the Act, as amended, directs the Access Board to develop equipment accessibility guidelines “in conjunction with” the Commission, and periodically to review and update those guidelines.³¹ In accordance with this directive, in March 2010, the Access Board released Draft Guidelines for public comment.³² Although a number of the issues discussed in the instant proceeding overlap with the guidelines now under consideration by the Access Board, the Access Board’s process for developing guidelines is still not complete.

11. In addition, the Commission proposed to adopt the Act’s flexibility to allow manufacturers and service providers to comply with the requirements of Section 716 either by building accessibility features into their equipment or service or by relying

²⁶ *Accessibility NPRM*, 26 FCC Rcd at 3157-58, ¶ 66.

²⁷ *Accessibility NPRM*, 26 FCC Rcd at 3153-56, ¶¶ 52-60.

²⁸ *Accessibility NPRM*, 26 FCC Rcd at 3158-59, ¶¶ 67-69.

²⁹ The Commission proposed to consider the following four factors equally to make achievability determinations: 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; 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. *Accessibility NPRM*, 26 FCC Rcd at 3158-3162, ¶¶ 68-76.

³⁰ The U.S. 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).

³¹ 47 U.S.C. § 255(e). 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*”).

³² *Accessibility NPRM*, 26 FCC Rcd at 3164-3165, ¶¶ 82-83. See also 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>.

on third-party applications or other accessibility solutions.³³ The Commission also proposed, consistent with the Act, to require that manufacturers and service providers make their products compatible with specialized devices commonly used by people with disabilities, when it is not achievable for manufacturers and service providers to make their products accessible to people with disabilities.³⁴

12. To enforce the provisions of Sections 255, 716, 717, and 718, the Commission proposed procedures in the *Accessibility NPRM* to facilitate the filing of complaints,³⁵ including implementing the Congressional 180-day deadline to issue an order resolving informal complaints concerning the accessibility of products.³⁶ If the Commission fails to act on a complaint as prescribed in Section 717, the complainant may file for mandamus in the U.S. Court of Appeals for the District of Columbia to compel the Commission to carry out its responsibility under the section.³⁷ In addition, the Commission proposed that manufacturers and providers subject to Sections 716, 718, and Section 255 maintain records of (1) their efforts to consult with people with disabilities; (2) the accessibility features of their products; and (3) the compatibility of their products with specialized devices, consistent with the Act. The Commission also sought comment on whether it should require entities to maintain other records to demonstrate their compliance with these provisions and sought input on a “reasonable time period” during which covered entities would be required to maintain these records.³⁸ Finally, in the *Accessibility NPRM*, the Commission sought input on steps the Commission and stakeholders could take to ensure that manufacturers and service providers could meet their obligations pursuant to Section 718 by 2013.

II. EXECUTIVE SUMMARY

13. In this *Report and Order*, we conclude that the accessibility requirements of Section 716 of the Act apply to non-interconnected VoIP services, electronic messaging services, and interoperable video conferencing services. We implement rules that hold entities that make or produce end user equipment, including tablets, laptops, and smartphones, responsible for the accessibility of the hardware and manufacturer-provided software used for e-mail, SMS text messaging, and other ACS. We also hold these entities responsible for software upgrades made available by such manufacturers for download by users. Additionally, we conclude that, except for third-party accessibility solutions, there is no liability for a manufacturer of end user equipment for the accessibility of software that is independently selected and installed by the user, or that the user chooses to use in the cloud. We provide the flexibility to build-in accessibility or to use third-party solutions, if solutions are available at nominal cost (including set up

³³ See *Accessibility NPRM*, 26 FCC Rcd at 3136-70, ¶¶ 4, 77-80, 100.

³⁴ *Accessibility NPRM*, 26 FCC Rcd at 3165-67, ¶¶ 85-90, 3170 ¶ 100.

³⁵ *Accessibility NPRM*, 26 FCC Rcd at 3180-83, ¶¶ 126-133.

³⁶ *Accessibility NPRM*, 26 FCC Rcd at 3183-85, ¶¶ 136-139.

³⁷ 47 U.S.C. § 618(a)(6).

³⁸ *Accessibility NPRM*, 26 FCC Rcd at 3176-78, ¶¶ 117, 121.

and maintenance) to the consumer. We require covered entities choosing to use third-party accessibility solutions to support those solutions for the life of the ACS product or service or for a period of up to two years after the third-party solution is discontinued, whichever comes first. If the third-party solution is discontinued, however, another third-party accessibility solution must be made available by the covered entity at nominal cost to the consumer. If accessibility is not achievable either by building it in or by using third-party accessibility solutions, equipment or services must be 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.

14. We also conclude that providers of advanced communications services include all entities that offer advanced communications services in or affecting interstate commerce, including resellers and aggregators. Such providers include entities that provide advanced communications services 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. Consistent with our approach for manufacturers of equipment, we find that a provider of advanced communications services is responsible for the accessibility of the underlying components of its service, including software applications, to the extent that doing so is achievable. A provider will not be responsible for the accessibility of components that it does not provide, except when the provider relies on a third-party solution to comply with its accessibility obligations.

15. We adopt rules identifying the four statutory factors that will be used to conduct an achievability analysis pursuant to Section 716: (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; (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 of 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. Pursuant to the fourth achievability factor, we conclude that covered entities do not have to consider what is achievable with respect to every product, if such entity offers consumers with the full range of disabilities products with varied functions, features, and prices. We also conclude that ACS providers have a duty not to install network features, functions, or capabilities that impede accessibility or usability.

16. We adopt rules pursuant to Section 716(h)(1) to accommodate requests to waive the requirements of Section 716 for ACS and ACS equipment. We conclude that we will grant waivers on a case-by-case basis and adopt two factors for determining the primary purpose for which equipment or a service is designed. We will consider whether the equipment or service is capable of accessing ACS and whether it was designed for multiple purposes but primarily for purposes other than using ACS. In determining whether the equipment or service is designed primarily for purposes other than using ACS, the Commission shall consider the following factors: (i) whether the product was

designed to be used for ACS purposes by the general public; and (ii) whether the equipment or services are marketed for the ACS features and functions.

17. Our new accessibility rules further provide that we may also waive, on our own motion or in response to a petition, the requirements of Section 716 for *classes* of services and equipment that meet the above statutory requirements and waiver criteria. To be deemed a class, members of a class must have the same kind of equipment or service and same kind of ACS features and functions.

18. We further conclude that the Commission has the discretion to place time limits on waivers. The waiver will generally be good for the life of the product or service model or version. However, if substantial upgrades are made to the product that may change the nature of the product or service, a new waiver request must be filed. Parties filing class waiver requests must explain in detail the expected lifecycle for the equipment or services that are part of the class. All products and services covered by a class waiver that are introduced into the market while the waiver is in effect will ordinarily be subject to the waiver for the duration of the life of those particular products and services. For products and services already under development at the time when a class waiver expires, the achievability analysis conducted may take into consideration the developmental stage of the product and the effort and expense needed to achieve accessibility at that point in the developmental stage. To the extent a class waiver petitioner seeks a waiver for multiple generations of similar equipment and services, we will examine the justification for the waiver extending through the lifecycle of each discrete generation.

19. We adopt a timeline for consideration of waiver requests similar to the Commission's timeline for consideration of applications for transfers or assignments of licenses or authorizations relating to complex mergers. We delegate to the Consumer and Governmental Affairs Bureau the authority to act upon all waiver requests, and urge the Bureau to act promptly with the goal of completing action on each waiver request within 180 days of public notice. In addition, we require that all public notices of waiver requests provide a minimum 30-day comment period. Finally, we note that these public notices will be posted and highlighted on a webpage designated for disability-related information in the Disability Rights Office section of the Commission's website.

20. The Commission has already received requests for class waivers for gaming equipment, services, and software, and TVs and Digital Video Players ("DVPs") enabled for use with the Internet. While we conclude that the record is insufficient to grant waivers for gaming and IP-enabled TVs and DVPs, parties may re-file requests consistent with the new waiver rules.

21. We construe Section 716(i) of the Act to provide a narrow exemption from the accessibility requirements of Section 716. Specifically, we conclude that equipment that is customized for the unique needs of a particular entity, and that is not offered directly to the public, is exempt from Section 716. We conclude that this narrow exemption should be limited in scope to customized equipment and services offered to business and other enterprise customers only. We also conclude that equipment manufactured for the unique needs of public safety entities falls within this narrow exemption.

22. We find that the record does not contain sufficient support to adopt a permanent exemption for small entities. Nonetheless, we believe that relief is necessary for small entities that may lack the legal, technical, or financial ability to conduct an achievability analysis or comply with the recordkeeping and certification requirements under these rules. Therefore, we adopt a temporary exemption for ACS providers and ACS equipment manufacturers that qualify as small business concerns under the Small Business Administration's rules and small business size standards. The temporary exemption will expire on the earlier of (1) the effective date of small entity exemption rules adopted pursuant to the *Further Notice of Proposed Rulemaking*, or (2) October 8, 2013.

23. We adopt as general performance objectives the requirements that covered equipment and services be accessible, compatible, and usable. We defer consideration of more specific performance objectives to ensure the accessibility, usability, and compatibility of ACS and ACS equipment until the Access Board adopts Final Guidelines³⁹ and the Emergency Access Advisory Committee (EAAC)⁴⁰ provides recommendations to the Commission relating to the migration to IP-enabled networks. Additionally, consistent with the views of the majority of the commenters, we refrain from adopting any technical standards as safe harbors for covered entities. To facilitate the ability of covered entities to implement accessibility features early in product development cycles, we gradually phase in compliance requirements for accessibility, with full compliance required by October 8, 2013.

24. We also adopt new recordkeeping rules that provide clear guidance to covered entities on the records they must keep to demonstrate compliance with our new rules. We require covered entities to keep the three categories of records set forth in Section 717(a)(5)(A).⁴¹ We remind covered entities that do not make their products or services accessible and claim as a defense that it is not achievable for them to do so, that they bear the burden of proof on this defense.

25. In an effort to encourage settlements, we adopt a requirement that consumers must file a "Request for Dispute Assistance" with the Consumer and Governmental Affairs' Disability Rights Office as a prerequisite to filing an informal complaint with the Enforcement Bureau. We also establish minimum requirements for information that must be contained in an informal complaint. While we also adopt formal complaint procedures, we decline to require complainants to file informal complaints prior to filing formal complaints.

26. In the accompanying *Further Notice of Proposed Rulemaking* ("*Further Notice*"), we seek comment on whether to adopt a permanent exemption for small entities and, if so, whether it should be based on the temporary exemption or some other criteria.

³⁹ See discussion *supra* para. 10. See also Access Board Draft Guidelines.

⁴⁰ The EAAC was established pursuant to Section 106 of the CVAA for the purpose of achieving equal access to emergency services by individuals with disabilities, as part of the migration to a national Internet Protocol-enabled emergency network. Pub. L. No. 111-260, § 106.

⁴¹ 47 U.S.C. § 618(a)(5)(A)(i)-(iii).

We seek comment on the impact of a permanent exemption on providers of ACS and manufacturers of ACS equipment, including the compliance costs for small entities absent a permanent exemption. We also seek comment on the impact of a permanent exemption on consumers, including on the availability of accessible ACS and ACS equipment and on the accessibility of new ACS innovations or ACS equipment innovations. We propose to continually monitor the impact of any small entity exemption, including whether it promotes innovation or whether it has unanticipated negative consequences on the accessibility of ACS.

27. We propose to clarify that Internet browsers are software generally subject to the requirements of Section 716, with the exception of the discrete category of Internet browsers built into mobile phones used by individuals who are blind or have a visual impairment, which Congress singled out for particular treatment in Section 718. We seek to further develop the record on the technical challenges associated with ensuring that Internet browsers built into mobile phones and those browsers incorporated into computers, laptops, tablets, and devices other than mobile phones are accessible to and usable by persons with disabilities.

28. With regard to Section 718, which is not effective until 2013, we seek comment on the best way(s) to implement Section 718 so as to afford affected manufacturers and service providers the opportunity to provide input at the outset, as well as to make the necessary arrangements to achieve compliance at such time as the provisions of Section 718 become effective.

29. To ensure that we capture all the equipment Congress intended to fall within the scope of Section 716, we seek comment on alternative proposed definitions of “interoperable” as used in the term “interoperable video conferencing.” Additionally, we ask whether we should require that video mail service be accessible to individuals with disabilities when provided along with a video conferencing service. We seek to further develop the record regarding specific activities that impair or impede the accessibility of information content. We also seek comment on whether performance objectives should include certain testable criteria. In addition, we seek comment on whether certain safe harbor technical standards will allow the various components in the ACS architecture to work together more efficiently, thereby facilitating accessibility. We also seek comment on the definition of “electronically mediated services,” the extent to which electronically mediated services are covered under Section 716, and how they can be used to transform ACS into an accessible form.

III. REPORT AND ORDER

A. Scope and Obligations

1. Advanced Communications Services

a. General

30. *Background.* 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.⁴² Section 3 of the Act also sets forth definitions for each of these terms.⁴³ In the *Accessibility NPRM*, the Commission proposed to treat any offering that meets the criteria of the statutory definitions as an “advanced communications service.”⁴⁴

31. *Discussion.* We will adopt into our rules the statutory definition of “advanced communications services.” We thus agree with commenters that urge us to include all offerings of services that meet the statutory definitions as being within the scope of our rules.⁴⁵ In doing so, we maintain the balance that Congress achieved in the CAAA between promoting accessibility through a broadly defined scope of covered services and equipment and ensuring industry flexibility and innovation through other provisions of the Act, including limitations on liability, waivers, and exemptions.⁴⁶

32. Some commenters asserted that the Commission should exclude from the definition of advanced communications services such services that are “incidental” components of a product.⁴⁷ We reject this view. Were the Commission to adopt that approach, it would be rendering superfluous Section 716’s waiver provision, which allows the Commission to waive its requirements for services or equipment “designed primarily for purposes other than using advanced communications service.”⁴⁸ Several parties also ask the Commission to read into the statutory definition of advanced communications services the phrase “offered to the public.” They argue that we should exclude from our definition advanced communications services those services that are provided on an “incidental” basis because such services are not affirmatively “offered” by the provider or equipment.⁴⁹ There is nothing in the statute or the legislative history that supports this narrow reading. Section 3(1) of the Act clearly states that the

⁴² See 47 U.S.C. § 153(1).

⁴³ See 47 U.S.C. §§ 153(19), (25), (27), (36).

⁴⁴ *Accessibility NPRM*, 26 FCC Rcd at 3145-6, 3150, ¶¶ 32, 43.

⁴⁵ See IT and Telecom RERCs Comments at 9 and 13. See also ACB Reply Comments at 17-19; AFB Reply Comments at 7. But see TIA Comments at 8; T-Mobile Comments at 3.

⁴⁶ See, e.g., Pub. L. No. 111-260, § 2 (limitation on liability); 47 U.S.C. §§ 617(h)(1) (provision for waivers); 617(h)(2) (provision for exempting small entities); 617(i) (exempting customized equipment and services).

⁴⁷ See, e.g., CEA Comments at 10, 12, and 14; CTIA Comments at 19 and 21; ESA Comments at 3; ITI Comments at 23; OnStar Comments at 6; TIA Comments at 9 and 12; Verizon Comments at 6-7. CEA also suggests that excluding “incidental” non-interconnected VoIP services by definition, rather than by using a waiver process, would also result in the exclusion of these “incidental” services being subject to Telecommunications Relay Service Fund (“TRS Fund”) contributions and FCC Form 499-A filing requirements. CEA Comments at 12-13. See also *Contributions to the TRS Fund*, Notice of Proposed Rulemaking, CG Docket No. 11-47, 26 FCC Rcd 3285 (2011). Any definition adopted in this proceeding does not necessarily determine the outcome in other proceedings.

⁴⁸ See 47 U.S.C. § 617(h)(1). See also Waivers for Services or Equipment Designed Primarily for Purposes other than Using ACS, Section III.C.2, *infra*.

⁴⁹ See, e.g., CEA Comments at 10-11 and 14; T-Mobile Comments at 6; Verizon Comments at 7-8, *citing, inter alia*, 47 U.S.C. §§ 617(a) and (b).

enumerated services are themselves “advanced communications services” when provided, and does not limit the definition to the particular marketing focus of the manufacturers or service providers.⁵⁰

b. Interconnected VoIP Service

33. *Background.* 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 from time to time.⁵¹ 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 customer premises equipment (“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.⁵² In the *Accessibility NPRM*, the Commission proposed to continue to define interconnected VoIP in accordance with section 9.3 of the Commission's rules and sought comment on that proposal.⁵³

34. In addition, 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,”⁵⁴ that is, on October 7, 2010. In the *Accessibility NPRM*, the Commission sought comment on AT&T's suggestion that “the Commission should subject multipurpose 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.”⁵⁵ The Commission also sought comment on alternative interpretations of Section 716(f).

⁵⁰ See 47 U.S.C. § 153(1). We also reject TIA's recommendation that “advanced communications services” be limited to “human-to-human” services. See Letter from Mark Uncapher, Director, Regulatory and Government Affairs, Telecommunications Industry Association, to Marlene H. Dortch, Secretary, FCC, CG Docket No. 10-213, at 2 (filed Sept. 28, 2011) (“TIA Sept. 28 *Ex Parte*”). We note that, while Congress did not indicate that “advanced communications services” must be “human-to-human,” Congress defined, in part, “interconnected VoIP service” as a service that “enables real-time, two-way voice communications” (see para. 32, *infra*), “non-interconnected VoIP service” as a service that “enables real-time voice communications” (see para. 39, *infra*), “electronic messaging service” as a service that “provides real-time or near real-time non-voice messages in text form between individuals” (see para. 41, *infra*), and “interoperable video conferencing services” as a service that “provides real-time video communications” (see para. 45, *infra*), and our rules adopt those definitions.

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

⁵² 47 C.F.R. § 9.3.

⁵³ *Accessibility NPRM*, 26 FCC Rcd at 3145, ¶ 29.

⁵⁴ See 47 U.S.C. § 617(f).

⁵⁵ *Accessibility NPRM*, 26 FCC Rcd at 3145, ¶ 29, citing AT&T Comments in response to *October Public Notice* at 5.

35. *Discussion.* As urged by commenters,⁵⁶ we adopt the definition of “interconnected VoIP service” as having the same meaning as in section 9.3 of the Commission's rules, as such section may be amended from time to time.⁵⁷ Given that this definition has broad reaching applicability beyond this proceeding,⁵⁸ we find that any changes⁵⁹ to this definition should be undertaken in a proceeding that considers the broader context and effects of any such change.

36. We confirm that Section 716(f) means that Section 255, and not Section 716, applies to telecommunications and interconnected VoIP services and equipment offered as of October 7, 2010.⁶⁰ Our proposed rule read, in part, that “the requirements of this part shall not apply to any equipment or services . . . that *were* subject to the requirements of Section 255 of the Act on October 7, 2010.”⁶¹ We decline to amend our proposed rule by substituting the word “were” with the word “are,” as urged by NCTA.⁶² The statute makes clear that any equipment or service that was subject to Section 255 on October 7, 2010, should continue to be subject to Section 255, regardless of whether that equipment or service was offered before or after October 7, 2010. With respect to a *new* service (and equipment used for that service) that was not in existence on October 7, 2010, we believe we have the authority to classify the service as a service subject to either Section 255 or Section 716 (or neither). In addition, Congress anticipated that the definition of interconnected VoIP service may change over time.⁶³ In that event, it is possible, for example, that certain non-interconnected VoIP services that are currently

⁵⁶ See, e.g., CEA Comments at 9; TIA Comments at 8; Verizon Comments at 5-6.

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

⁵⁸ See, e.g., *Contributions to the Telecommunications Relay Services Fund*, CG Docket No. 11-47, FCC 11-38, Notice of Proposed Rulemaking, 26 FCC Rcd. 3285, 3291 ¶¶ 13-14 (2011); *Rules and Regulations Implementing the Truth in Caller ID Act of 2009*, WC Docket No. 11-39, FCC 11-41, Notice of Proposed Rulemaking, 26 FCC Rcd 4128, 4134, ¶ 15 (2011); *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities; E911 Requirements for IP-Enabled Service Providers*, CG Docket No. 03-123 and WC Docket No. 05-196, FCC 08-78, Report and Order, 23 FCC Rcd. 5255, 5257, 5268, ¶¶ 22, 27 (2008); *Implementation of Sections 255 and 251(a)(2) of the Telecommunications Act of 1996: Access to Telecommunications Services, Telecommunications Equipment and Consumer Premises Equipment by Persons with Disabilities*, WT Docket No. 96-98, Order and Notice of Proposed Rulemaking, 22 FCC Rcd 11275, 11280-90, ¶¶ 7-24 (2007); *IP-Enabled Service Providers*, WC Docket No. 04-36, FCC 05-116, First Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 10245, ¶¶ 22-28 (2005).

⁵⁹ See IT and Telecom RERCs Comments at 7 (urging us to amend the definition in section 9.3 of the Commission's rules to delete the word “generally” and to include “successors to the PSTN”).

⁶⁰ See 47 U.S.C. § 617(f). See, e.g., CEA Comments at 9; NCTA Comments at 3 and 6-8; TechAmerica Comments at 3; T-Mobile Comments at 5-6; TWC Comments 8-9; Verizon Comments at 5-6. *But see* Words+ and Compusult Comments at 12 (substantial updates and wholly new interconnected VoIP services and equipment, after October 7, 2010, must comply with Section 716).

⁶¹ See *Accessibility NPRM*, 26 FCC Rcd at 3193, Appendix B.

⁶² See NCTA Comments at 7-8.

⁶³ See 47 U.S.C. § 153(25).

subject to Section 716 may meet a future definition of interconnected VoIP services and yet remain subject to Section 716.

37. With respect to multipurpose devices, including devices used for both telecommunications and advanced communications services, we agree with the vast majority of commenters that argued that Section 255 applies to telecommunications services and to services classified as interconnected VoIP as of October 7, 2010, as well as to equipment components used for those services, and Section 716 applies to non-interconnected VoIP, electronic messaging, and interoperable video conferencing services, as well as equipment components used for those services.⁶⁴ We reject the suggestion of some commenters that such multipurpose devices should be governed exclusively by Section 255.⁶⁵ Nothing in the statute or legislative history indicates that Congress sought to exclude from the requirements of Section 716 a device used for advanced communications merely because it also has telecommunications or interconnected VoIP capability. Rather, both the House Report and the Senate Report state that smartphones represent a technology that Americans rely on daily and, at the same time, a technological advance that is often still not accessible to individuals with disabilities.⁶⁶ If multipurpose devices such as smartphones were subject exclusively to Section 255, then the advanced communications services components of smartphones, which are not subject to Section 255, would not be covered by Section 716. That is, there would be no requirement to make the advanced communications services components of multipurpose devices such as smartphones accessible to people with disabilities. Such an approach would, therefore, undermine the very purpose of the CVAA.⁶⁷

38. Due to the large number of multipurpose devices, including smartphones, tablets, laptops and desktops, that are on the market, if Section 716(f) were interpreted to mean that Section 716 applies only to equipment that is used exclusively for advanced communications services,⁶⁸ and that Section 255 applies only to equipment that is used exclusively for telecommunications and interconnected VoIP services,⁶⁹ almost no devices would be covered by Section 716 and only stand-alone telephones and VoIP phones would be covered by Section 255. That reading would undercut Congress's clear aim in enacting the CVAA.⁷⁰ We also disagree with commenters that suggest that such

⁶⁴ See, e.g., AT&T Comments at 4; CEA Comments at 9-10; IT and Telecom RERCs Comments at 7-8; T-Mobile Comments at 5-6; Verizon Comments at 5-6. See also CEA Reply Comments at 5-6.

⁶⁵ See CTIA Comments at 13; NCTA Comments at 3, 9.

⁶⁶ House Report at 19; Senate Report at 1-2.

⁶⁷ See Words+ and Compusult Comments at 12 (exclusive coverage under Section 255 would undermine virtually all accessibility benefit to be gained by the CVAA).

⁶⁸ See ESA Comments at 3 (application of CVAA requirements should be limited only to "equipment used for advanced communications services," not other purposes); NCTA Comments at 7 (suggesting that Section 716 applies to equipment used only for advanced communications services).

⁶⁹ See AFB Comments at 6.

⁷⁰ Such a result is also contrary to how Section 255 is currently applied to multipurpose equipment and services. Under Commission rules implementing Section 255, "multipurpose equipment . . . is covered by Section 255 only to the extent that it provides a telecommunications function" and not "to all functions . . . (continued....)"

multipurpose devices should be governed exclusively by Section 716.⁷¹ Such an interpretation would render Section 716(f) meaningless.

39. We recognize that the application of Section 255 and Section 716 to such multipurpose devices means that manufacturers and service providers may be subject to two distinct requirements, but as discussed above, we believe any other interpretation would be inconsistent with Congressional intent. As a practical matter, we note that the nature of the service or equipment that is the subject of a complaint – depending on the type of communications involved – will determine whether Section 255 or Section 716, or both, apply in a given context.⁷²

c. Non-interconnected VoIP Service

40. *Background.* 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 “does not include any service that is an interconnected VoIP service.”⁷³ In the *Accessibility NPRM*, the Commission proposed to define “non-interconnected VoIP service” in our rules in the same way and sought comment on that proposal.⁷⁴

41. *Discussion.* The IT and Telecom RERCs urge us to modify the statutory definition of non-interconnected VoIP to read “any VoIP that is not interconnected VoIP.”⁷⁵ They are concerned that the language in Section 3(36) which reads “does not include any service that is an interconnected VoIP service” could be interpreted to mean that if a service “includes both interconnected and non-interconnected VoIP, then all the

(Continued from previous page) _____

whenever the equipment is capable of any telecommunications function.” *Section 255 Report and Order*, 16 FCC Rcd at 6453, ¶ 87. Similarly, “[a]n entity that provides both telecommunications and non-telecommunications services . . . is subject to Section 255 only to the extent that it provides a telecommunications service.” *Section 255 Report and Order*, 16 FCC Rcd at 6450, ¶ 80.

⁷¹ See AFB Comments at 4-6. AFB states that Congress enacted Section 716(f) because industry and advocates agreed “that it would not be fair to apply a brand new set of legal expectations to old technology which, at least in theory, has had to be in compliance with a fifteen-year-old mandate, namely Section 255.” AFB Comments at 4. Nonetheless, AFB claims, for example, that Section 716(a)(1) is “comprehensive and requires that the *equipment* must be accessible, not just those functions of the equipment that are used for advanced communications.” AFB Comments at 5 (emphasis added). AFB asserts that “the fact that the equipment can be used for advanced communications is nothing more and nothing less than the trigger that pulls the equipment in question within the reach of the CVAA.” AFB Comments at 5.

⁷² For example, a complaint about the accessibility of an electronic messaging service on a mobile phone will be resolved in accordance with the mandates of Section 716, while a complaint about the accessibility of the voice-based telecommunications service on the same mobile phone will be resolved in accordance with the mandates of Section 255.

⁷³ 47 U.S.C. § 153(36).

⁷⁴ *Accessibility NPRM*, 26 FCC Rcd at 3145, ¶ 31.

⁷⁵ IT and Telecom RERCs Comments at 8.

non-interconnected [VoIP] is exempt because it is bundled with an interconnected VoIP service.”⁷⁶ In response to these concerns, we clarify that a non-interconnected VoIP service is not exempt simply because it is bundled or provided along with an interconnected VoIP service.⁷⁷ Accordingly, we agree with other commenters that it is unnecessary and not appropriate to change the statutory definition⁷⁸ and hereby adopt the definition of “non-interconnected VoIP service” set forth in the Act.

d. Electronic Messaging Service

42. *Background.* 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.”⁷⁹ In the *Accessibility NPRM*, the Commission proposed to adopt that definition and sought comment on the services included in electronic messaging service.⁸⁰ The Commission also sought comment on whether services and applications that merely provide access to an electronic messaging service, such as a broadband platform that provides an end user access to a web-based e-mail service, are covered.⁸¹

43. *Discussion.* We adopt, as proposed, the definition of “electronic messaging service” contained in the Act.⁸² We agree with most commenters and find it consistent with the Senate and House Reports 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.”⁸³ While some common features of social

⁷⁶ *Id.*

⁷⁷ We interpret the meaning of the clause “does not include any service that is an interconnected VoIP service” to mean that a service that meets the definition of an “interconnected VoIP service” is not a “non-interconnected VoIP service.” See Senate Report at 6 (“Interconnected VoIP services” are specifically excluded from the group of services classified as “non-interconnected VoIP services” under the Act).

⁷⁸ See CTIA Reply Comments at 9-10 (adopting a new definition would cause confusion); Verizon Reply Comments at 5 (Congress defined the term and the Commission has no authority to change it and no other choice but to adopt it).

⁷⁹ 47 U.S.C. § 153(19).

⁸⁰ *Accessibility NPRM*, 26 FCC Rcd at 3146-3147, ¶¶ 33-34.

⁸¹ *Accessibility NPRM*, 26 FCC Rcd at 3146, ¶ 33. In addition, the Commission sought comment on whether the “text leg” of an Internet protocol relay (“IP Relay”) services call is an “electronic messaging service” subject to the requirements of Section 716. *Accessibility NPRM*, 26 FCC Rcd at 3146, ¶ 33. IP Relay is a form of telecommunications relay services (“TRS”) under Section 225 of the Act. See Consumer and Governmental Affairs Bureau, FCC Consumer Facts, *IP Relay Service* at <http://www.fcc.gov/cgb/consumerfacts/iprelay.html> (visited September 27, 2011). We defer consideration of whether Section 716 covers IP Relay as an electronic messaging service until such time as we can address the applicability of Section 716 to all forms of TRS. See note 95, *infra*. Until that time, we encourage all IP Relay providers to make IP Relay accessible to users who are deaf, hard of hearing, deaf-blind, or speech disabled and who have other disabilities, if achievable.

⁸² 47 U.S.C. § 153(19).

⁸³ Senate Report at 6; House Report at 23. See also CEA Comments at 13; IT and Telecom RERCs Comments at 9; Microsoft Comments at 15; T-Mobile Comments at 7; TechAmerica Comments at 3-4; (continued....)

networking sites thus fall outside the definition of “electronic messaging service,” other features of these sites are covered by Sections 716 and 717. The Wireless RERC asserts that, to the extent a social networking system provides electronic messaging services as defined in the Act, those services should be subject to Sections 716 and 717.⁸⁴ While the statute does not specifically reference the use of electronic messaging services as part of a social networking site, the comments referenced above in the Senate and House Reports suggest it was well aware that such aspects of social networking sites would fall under the Act. The reports specifically exclude “messages posted on social networking websites,” but do not exclude the two-way interactive services offered through such websites. We therefore conclude that to the extent such services are provided through a social networking or related site, they are subject to Sections 716 and 717 of the Act.

44. We also find, as proposed in the *Accessibility NPRM*, that the phrase “between individuals” precludes the application of the accessibility requirements to communications in which no human is involved, such as automatic software updates or other device-to-device or machine-to-machine communications.⁸⁵ Such exchanges between devices are also excluded from the definition of electronic messaging service when they are not “messages in text form.”⁸⁶ The definitional requirement that electronic messaging service be “between individuals”⁸⁷ also excludes human-to-machine or machine-to-human communications.⁸⁸

(Continued from previous page) _____

TIA Comments at 10; Verizon comments at 7-8; CEA Reply Comments at 7-8; T-Mobile Reply Comments at 8. While we recognize that Congress’s “primary concerns . . . are focused on more traditional, two-way, interactive services,” we do not interpret that expression of primary concerns or focus to exempt new or less traditional electronic messaging services that fully meet the definition in the Act. Senate Report at 6; House Report at 23.

⁸⁴ Wireless RERC Comments at 3. *See, e.g.*, Facebook Chat information available at <http://www.facebook.com/help/?topic=chat> (visited September 17, 2011) and Facebook Messages information available at http://www.facebook.com/help/?topic=messages_and_inbox (visited September 17, 2011). Similarly, to the extent a social networking system provides “non-interconnected VoIP services” or “interoperable video conferencing services,” as defined in the Act, those services are subject to the accessibility requirements of Sections 716 and 717.

⁸⁵ 47 U.S.C. § 153(19) (definition of “electronic messaging service”). *Accord*, AT&T Comments at 5; CEA Comments at 13; Consumer Groups Comments at 6; CTIA Comments at 20; ESA Comments at 3; ITI Comments at 23-24; Microsoft Comments at 15; T-Mobile Comments at 7; TechAmerica Comments at 3-4; TIA Comments at 10; Verizon Comments at 7-8; VON Coalition Comments at 4-5; Words+ and Compusult Comments at 13; CEA Reply Comments at 7; CTIA Reply Comments at 10-11. *See also* ITI Comments at 23-24 (urging us to limit the definition of “electronic messaging service” to services designed primarily for communication between individuals and to services that involve a store-forward modality).

⁸⁶ 47 U.S.C. § 153(19).

⁸⁷ 47 U.S.C. § 153(19).

⁸⁸ *See* CEA Comments at 13; ITI Comments at 23-24; Microsoft Comments at 15; T-Mobile Comments at 7; VON Coalition Comments at 4-5; CEA Reply Comments at 7; T-Mobile Reply Comments at 8. As a practical matter, however, we agree with AFB that these exclusions will have little practical effect on the experience of the human user as the message recipient or sender. AFB Reply Comments at 6.

45. We conclude that Section 2(a) of the CVAA⁸⁹ exempts entities, such as Internet service providers, from liability for violations of Section 716 when they are acting only to transmit covered services or to provide an information location tool.⁹⁰ Thus, service providers that merely provide access to an electronic messaging service, such as a broadband platform that provides an end user with access to a web-based e-mail service, are excluded from the accessibility requirements of Section 716.

e. Interoperable Video Conferencing Service

46. *Background.* As noted above, an “interoperable video conferencing service” is one of the enumerated “advanced communications services” in the CVAA. Such a service is defined by the CVAA as one “that provides real-time video communications, including audio, to enable users to share information of the user’s choosing.”⁹¹ One question that has arisen is what Congress meant by including the term “interoperable.” In the *Accessibility NPRM*, the Commission noted that earlier versions of the legislation did not include the word “interoperable” in the definition of the term “advanced communications services” and that the definition of “interoperable video conferencing services” in the enacted legislation is identical to the definition of “video conferencing services” found in earlier versions.⁹² In addition, language in the Senate Report regarding “interoperable video conferencing services” is identical to language in the House Report regarding “video conferencing services.”⁹³ Both the Senate Report and the House Report state 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

⁸⁹ Section 2(a) of the CVAA provides that no person shall be liable for a violation of the requirements of the CVAA to the extent that 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” 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, advanced communications services, or equipment used to provide or access advanced communications services.” 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 § 2(b).

⁹⁰ See Pub. L. No. 111-260, § 2(a). See also Senate Report at 5, House Report at 22 (“Section 2 provides liability protection where an entity is acting as a passive conduit of communications made available through the provision of advanced communications services by a third party . . .”); CEA Comments at 14; CTIA Comments at 20; CTIA Reply Comments at 10; NCTA Reply Comments at 3. *But see* Consumer Groups Comments at 6. We disagree with T-Mobile that third-party or web-based electronic messaging services that might be accessed via a mobile device, but are not offered by the underlying Internet service provider, are expressly excluded from the definition of “electronic messaging service.” T-Mobile Comments at 7. Instead, Section 2(a) immunizes Internet service providers that are passive conduits for third-party advanced communications services.

⁹¹ 47 U.S.C. §§ 153(1) and (27).

⁹² *Accessibility NPRM*, 26 FCC Rcd at 3147, ¶ 35, citing S. 3304 and H.R. 3101.

⁹³ See Senate Report at 18; House Report at 38.

access and control these services”⁹⁴ and that “such services may, by themselves, be accessibility solutions.”⁹⁵

47. *Discussion.* Many commenters argue that that the word “interoperable” cannot be read out of the statute, and we agree.⁹⁶ Congress expressly included the term “interoperable,” and therefore the Commission must determine its meaning in the context of the statute. We find, however, that the record is insufficient to determine how exactly to define “interoperable,” and thus we seek further comment on this issue in the *Further Notice* below.

48. We also find that the inclusion of the word “interoperable” does not suggest that Congress sought to *require* interoperability, as some commenters have suggested.⁹⁷ There simply is no language in the CVAA to support commenters’ views that interoperability is required or should be required, or that that we may require video conferencing services to be interoperable because “interoperability” is a subset of “accessibility,” “usability,” and “compatibility” as required by Section 716.⁹⁸

49. We reject CTIA’s argument that personal computers, tablets, and smartphones should not be considered equipment used for interoperable video conferencing service, because these devices are not primarily designed for two-way video conferencing, and accessibility should be required only for equipment designed primarily or specifically for interoperable video conferencing service.⁹⁹ Consumers get their advanced communications services primarily through multipurpose devices, including smartphones, tablets, laptops and desktops. If Section 716 applies only to equipment that

⁹⁴ See Senate Report at 6; House Report at 25.

⁹⁵ *Id.* In addition, the Commission sought comment on whether the “video leg” of a video relay service (“VRS”) call and point-to-point calls made by deaf or hard of hearing consumers who use video equipment distributed by VRS providers are covered under the CVAA. *Accessibility NPRM*, 26 FCC Rcd at 3148-49, ¶¶ 39-40. VRS is a form of telecommunications relay services (“TRS”) under Section 225 of the Act. See Consumer and Governmental Affairs Bureau, FCC Consumer Facts, *IP Relay Service* at <http://www.fcc.gov/cgb/consumerfacts/videorelay.html> (viewed September 27, 2011). We are addressing, in a separate proceeding, a possible restructuring of the VRS program, including issues regarding regulatory structure, equipment and compensation. See *Structure and Practices of the Video Relay Service Program*, Notice of Inquiry, CG Docket No. 10-51, 25 FCC Rcd 8597 (2010) (“*VRS Restructuring NOI*”). Because the resolution of the issues addressed in that proceeding could have an impact on the regulatory treatment of VRS services and equipment, as well as other forms of TRS, we will defer consideration of whether Section 716 covers VRS or point-to-point calls as interoperable video conferencing services until after we resolve the issues raised in the *VRS Restructuring NOI* proceeding. Until that time, we encourage all VRS providers to make VRS and point-to-point video conferencing services accessible to users who are deaf, hard of hearing, deaf-blind, or speech disabled and have other disabilities, if achievable.

⁹⁶ See, e.g., CTIA Comments at 22; ESA Comments at 3; ITI Comments at 24; Microsoft Comments at 4; TechAmerica Comments at 4-5; TIA Comments at 12; T-Mobile Comments at 7; Verizon Comments at 9; VON Coalition Comments at 5-6.

⁹⁷ See IT and Telecom RERCs Comments at 13-14; CSDVRS Reply Comments at 2-4.

⁹⁸ See Consumer Groups Comments at 9-10.

⁹⁹ See, e.g., CTIA Comments at 20-21.

is used exclusively for advanced communications services,¹⁰⁰ almost no devices would be covered by Section 716, and therefore Congress's aims in enacting the statute would be undermined.

50. With respect to webinars and webcasts,¹⁰¹ we find that services and equipment that provide real-time video communications, including audio, *between two or more users*, are “video conferencing services” and equipment, even if they can also be used for video broadcasting purposes (*only from one user*).¹⁰² We disagree, however, with the IT and Telecom RERCs that providing interactive text messaging, chatting, voting, or hand-raising by or between two or more users, along with real-time video communications, including audio, *only from one user*, constitutes a “video conferencing service.”¹⁰³ In this example of a system that provides multiple modes of communication simultaneously, providing text messaging between two or more users is an electronic messaging service. Similarly, telecommunications or VoIP services may be provided as part of a webinar or webcast. The provision of electronic messaging, VoIP, or other services, alongside real-time video communications, including audio, *only from one user*, does not convert the latter into a “video conferencing service.”¹⁰⁴

51. Finally, we agree with commenters that non-real-time or near-real-time features or functions of a video conferencing service, such as video mail, do not meet the definition of “real-time” video communications.¹⁰⁵ We defer consideration to the *Further Notice* as to whether we should exercise our ancillary jurisdiction to require that a video mail service be accessible to individuals with disabilities when provided along

¹⁰⁰ See ESA Comments at 3 (application of CVAA requirements should be limited only to “equipment used for advanced communications services,” not other purposes); NCTA Comments at 7 (suggesting that Section 716 apply to equipment used only for advanced communications services).

¹⁰¹ See *Accessibility NPRM*, 26 FCC Rcd at 3149-50, ¶¶ 41-42.

¹⁰² See Consumer Group Comments at 8 (the application of accessibility requirements is based on the fact that the service and equipment provide the advanced communications as defined in the Act, not on whether the service or equipment may be or is used to also provide another form of communication); IT and Telecom RERCs Comments at 12. *But see* TIA Comments at 10-11 (videos broadcast by one user to multiple participants, and that do not provide for a two-way video exchange of information, are not video conferencing services). In other words, the service and equipment must provide the user with the opportunity, but not the obligation to communicate in the manner as defined in the Act. See Words+ and Compusult Comments at 14. *But see* Microsoft Comments at 3, n.2 (the CVAA does not apply to webinars because they are designed primarily to broadcast information).

¹⁰³ IT and Telecom RERCs Comments at 12. *See also* Words+ and Compusult Comments at 14.

¹⁰⁴ Entities that use advanced communications services and equipment may have legal obligations to ensure the accessibility of their programs and services, including the obligation to communicate effectively, under other disability related statutes such as Section 504 of the Rehabilitation Act of 1973 and the Americans with Disabilities Act of 1990. *See* 29 U.S.C. § 794(d); 42 U.S.C. §§ 12101-12213.

¹⁰⁵ See *Accessibility NPRM*, 26 FCC Rcd at 3149-50, ¶¶ 41-42. *See, e.g.*, CEA Comments at 15-16; CTIA Comments at 21; Verizon Comments at 9; NCTA Reply Comments at 6-7. As a technical matter, “video mail” may not be “real-time” communication, but, as a practical matter, if an interoperable video conferencing service and equipment is accessible, the video mail feature or function will likely also be accessible.

with a video conferencing service.¹⁰⁶ We also do not decide at this time whether our ancillary jurisdiction extends to require other features or functions provided along with a video conferencing service, such as recording and playing back video communications on demand, to be accessible.¹⁰⁷

2. Manufacturers of Equipment Used for Advanced Communications Services

52. *Background.* 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.”¹⁰⁸ In the *Accessibility NPRM*, the Commission sought comment on several issues and proposals relating to how it should interpret this provision.¹⁰⁹

53. The Commission proposed to define “end user equipment” as including hardware;¹¹⁰ “software” as including the operating system,¹¹¹ user interface layer,¹¹² and applications,¹¹³ 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” as equipment used for network services.¹¹⁴ It also sought comment on whether upgrades to software by manufacturers are included in this definition.¹¹⁵

54. The Commission sought comment on the meaning of the phrase “used for advanced communications services” and asked whether equipment subject to Section 716(a) must merely support or be capable of offering advanced communications services on a stand-alone basis.¹¹⁶ Consistent with the Commission’s Section 255 rules, the

¹⁰⁶ See CEA Comments at 15-16 (consideration of video mail is premature); CTIA Comments at 21 (asserting that the definition precludes the exercise of our ancillary jurisdiction). *But see* Consumer Groups Comments at 9 (urging us to exercise our ancillary jurisdiction to require accessibility).

¹⁰⁷ See IT and Telecom RERCs Comments at 12 (asserting that, “if a person with a disability is unable to attend a live videoconference, that person should not lose the ability to access it through a later download or streaming, if non-disabled participants can access it later”).

¹⁰⁸ See 47 U.S.C. § 617(a)(1).

¹⁰⁹ See *Accessibility NPRM*, 26 FCC Rcd at 3142-43, ¶¶ 19-24.

¹¹⁰ See note 142, *infra*.

¹¹¹ See note 143, *infra*.

¹¹² See note 144, *infra*.

¹¹³ See note 145, *infra*.

¹¹⁴ See note 146, *infra*.

¹¹⁵ *Accessibility NPRM*, 26 FCC Rcd at 3143, ¶ 21.

¹¹⁶ 47 U.S.C. § 617(a)(1); *Accessibility NPRM*, 26 FCC Rcd at 3143, ¶ 22.

Commission also proposed to define “manufacturer” as “an entity that makes or produces a product.”¹¹⁷

55. The Commission also sought comment on software upgrades, whether the limitations on liability in Section 2(a) of the CVAA generally preclude manufacturers of end user equipment from being liable for third-party applications that are installed or downloaded by the consumer,¹¹⁸ and whether manufacturers of software used for advanced communications services that is downloaded or installed by the user are covered by Section 716(a).¹¹⁹ Finally, the Commission sought comment on Section 718,¹²⁰ which requires manufacturers and service providers to make Internet browsers built into mobile phones accessible to people who are blind or have visual impairments.¹²¹ Specifically, the Commission sought input on steps the Commission and stakeholders could take to ensure that manufacturers and service providers could meet their obligations by 2013.¹²²

56. *Discussion.* Section 716(a)(1) states the following:

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.¹²³

57. In the *Accessibility NPRM* the Commission proposed to find that developers of software that is used for advanced communications services and that is downloaded or installed by the user rather than by a manufacturer are covered by Section 716(a).¹²⁴ The IT and Telecom RERCs support that proposal on the grounds that coverage should not turn on how a manufacturer distributes ACS software (pre-installed on a device or installed by the user).¹²⁵ Microsoft and the VON Coalition, on the other hand, argue that Section 716(a) must be read as applying only to manufacturers of equipment, that “software” is not “equipment,” and that our proposal would

¹¹⁷ 47 C.F.R. § 6.3(f). See also *Section 255 Report and Order*, 16 FCC Rcd at 6454, ¶ 90.

¹¹⁸ *Accessibility NPRM*, 26 FCC Rcd at 3143, ¶ 21. See also note 89, *supra*.

¹¹⁹ *Accessibility NPRM*, 26 FCC Rcd at 3143, ¶ 24.

¹²⁰ 47 U.S.C. § 619.

¹²¹ *Accessibility NPRM*, 26 FCC Rcd at 3186, ¶¶ 143-144.

¹²² *Accessibility NPRM*, 26 FCC Rcd at 3186, ¶ 144.

¹²³ 47 U.S.C. § 617(a)(1) (emphasis added).

¹²⁴ *Accessibility NPRM*, 26 FCC Rcd at 3143, ¶ 24.

¹²⁵ IT and Telecom RERCs Comments at 4-5.

impermissibly extend the Commission's authority beyond the limits set by Congress in the CVAA.¹²⁶

58. We find that, while the language of Section 716(a)(1) is ambiguous, the better interpretation of Section 716(a)(1) is that it does not impose independent regulatory obligations on providers of software that the end user acquires separately from equipment used for advanced communications services.

59. Section 716(a)(1) can be read in at least two ways. Under one reading, the italicized phrase "including end user equipment, network equipment, and software" defines the full range of equipment manufacturers covered by the Act. Under this construction, manufacturers of end user equipment used for ACS, manufacturers of network equipment used for ACS, and manufacturers of software used for ACS, would all independently be subject to the accessibility obligations of Section 716(a)(1), and to the enforcement regime of Section 717. "Equipment," as used in the phrase "a manufacturer of equipment used for advanced communications services" would thus refer both to physical machines or devices and to software that is acquired by the user separately from any machine or device, and software would be understood to be a type of equipment. This first reading is the interpretation on which we sought comment in the *Accessibility NPRM*.¹²⁷

60. Under a second possible reading, the phrase "manufacturer of equipment" would be given its common meaning as referring to makers of physical machines or devices. If such equipment is used for advanced communications services, then the equipment manufacturer is responsible for making it accessible. Under this reading, the phrase "including end user equipment, network equipment, and software" makes clear that both end user equipment and network equipment, as well as the software included by the manufacturer in such equipment, must be consistent with the CVAA's accessibility mandate.¹²⁸ Thus, to the extent that equipment used for advanced communications services include software components -- for example, operating systems or e-mail clients -- the manufacturer of the equipment is responsible for making sure that both "the equipment *and* software that such manufacturer offers for sale or otherwise distributes in interstate commerce" is accessible.¹²⁹

¹²⁶ Letter from Gerard J. Waldron, Counsel to Microsoft Corp., to Marlene H. Dortch, Secretary, FCC, CG Docket No. 10-213, at 1-2 (filed Sept. 9, 2011) ("Microsoft Sept. 9 *Ex Parte*"); Letter from Glenn S. Richards, Executive Director, Voice on the Net Coalition, to Marlene H. Dortch, Secretary, FCC, CG Docket No. 10-213, at 4-5 (filed Aug. 12, 2011) ("VON Coalition Aug. 12 *Ex Parte*"); Letter from Glenn S. Richards, Executive Director, Voice on the Net Coalition, to Marlene H. Dortch, Secretary, FCC, CG Docket No. 10-213, at 3 (filed Sept. 6, 2011) ("VON Coalition Sept. 6 *Ex Parte*").

¹²⁷ *Accessibility NPRM*, 26 FCC Rcd at 3143, ¶ 21. See also para. 53, *supra* (definitions of end user equipment and software proposed in the *Accessibility NPRM*).

¹²⁸ We have modified the definitions of "end user equipment" and "network equipment" that are proposed in the *Accessibility NPRM* to make clear that such equipment may include both hardware and software components.

¹²⁹ 47 U.S.C. § 617(a)(1) (emphasis added).

61. The text of the CVAA does not compel either of these inconsistent readings. The first, more expansive, reading accords more easily with the use of commas surrounding and within the phrase “, including end user equipment, network equipment, and software,” but it requires giving the term “equipment” a meaning that is far broader than its ordinary usage. In addition, if “equipment” means “software” as well as hardware, then there was no need for Congress to say in the same sentence that “the equipment *and software*” that a manufacturer offers must be made accessible. The second, narrower, reading gives a more natural meaning to the word “equipment” and explains why it was necessary for Congress to say that the manufacturer of equipment used for ACS must make both “equipment and software” accessible. The second reading is thus more consistent with the interpretive canon that all words in a statute should if possible be given meaning and not deemed to be surplusage (as “software” would be in this phrase under the first reading).¹³⁰

62. Looking to other provisions of the CVAA, the language of Section 716(j) is more consistent with the second, narrower understanding of Section 716(a)(1). Section 716(j) establishes a rule of construction to govern our implementation of the Act, stating that Section 716 shall not be construed to require a manufacturer of equipment used for ACS or a provider of ACS “to make every feature and function of every *device or service* accessible for every disability.”¹³¹ The word “device” refers to a physical object and cannot reasonably be construed to also refer to separately-acquired software. If, as in the broader interpretation of Section 716(a)(1), “manufacturer of equipment” includes manufacturers of separately acquired software, then Congress created a rule of construction for Section 716 as a whole that applies to only some of the equipment that is subject to Section 716(a). The narrower interpretation of Section 716(a)(1) produces a more logical result, in that Section 716(j), as it applies to manufacturers of equipment, has the same scope as Section 716(a).

63. Examining the legislative history of the CVAA, we find no indication in either the Senate Report or the House Report that Congress intended to instruct the Commission to regulate directly software developers that are neither manufacturers of equipment nor providers of advanced communications services -- a class of businesses that the Commission historically has not regulated. There is, on the other hand, evidence that Congress had makers of physical objects in mind when it made “manufacturers of equipment” responsible for accessibility. For example, the Senate Report states that the Act requires manufacturers of equipment used for ACS and providers of ACS to “make any such equipment, which they design, develop, *and fabricate*, accessible to individuals with disabilities, if doing so is achievable.”¹³² The Senate Report further says that

¹³⁰ See *Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883); *Astoria Federal Savings & Loan Ass’n v. Solimino*, 501 U.S. 104, 112 (1991); *Sprietsma v. Mercury Marine*, 537 U.S. 51, 63 (2003) (interpreting word “law” broadly could render word “regulation” superfluous in preemption clause applicable to a state “law or regulation”); *Bailey v. United States*, 516 U.S. 137, 146 (1995) (“we assume that Congress used two terms because it intended each term to have a particular, nonsuperfluous meaning”).

¹³¹ 47 U.S.C. § 617(j).

¹³² Senate Report at 7 (emphasis added).

Sections 716(a) and 716(b) “require that manufacturers and service providers, respectively, make their *devices* and services accessible to people with disabilities.”¹³³ Likewise, the House Report states that Sections 716(a) and 716(b) “give manufacturers and service providers a choice regarding how accessibility will be incorporated into a *device* or service.”¹³⁴ Software is not fabricated, nor are software programs or applications referred to as devices.¹³⁵ Particularly in light of this legislative history, we are doubtful that Congress would have significantly expanded the Commission’s traditional jurisdiction to reach software developers, without any clear statement of such intent.

64. We disagree with commenters that suggest that the Commission’s interpretation of “customer premises equipment” (“CPE”) in the *Section 255 Report and Order* compels us to find that software developers that are neither manufacturers of ACS equipment nor providers of ACS are covered under Section 716(a).¹³⁶ First, in the *Section 255 Report and Order*, the Commission found that CPE “includes software integral to the operation of the telecommunications function of the equipment, whether sold separately or not.”¹³⁷ Although the statutory definition of CPE did not reference software, the Commission found that it should construe CPE similarly to how it construed “telecommunications equipment” in the Act, which Congress explicitly defined to include “software integral to such equipment (including upgrades).”¹³⁸ The Commission did not in the *Section 255 Report and Order* reach the issue of whether any entity that was not a manufacturer of the end user equipment or provider of telecommunications services had separate responsibilities under the Act.¹³⁹

¹³³ Senate Report at 7 (emphasis added).

¹³⁴ House Report at 24 (emphasis added).

¹³⁵ Similarly, Section 716(j) of the Act also uses the word “device” as a synonym for “equipment.” 47 U.S.C. § 617(j).

¹³⁶ See, e.g., Letter from Andrew S. Phillips, Counsel to National Association of the Deaf, on behalf of the Coalition of Organizations for Accessible Technology (COAT), to Marlene H. Dortch, Secretary, FCC, CG Docket No. 10-213, at 2 (filed Sept.28, 2011) (“COAT Sept. 28 *Ex Parte*”).

¹³⁷ *Section 255 Report and Order*, 16 FCC Rcd at 6451, ¶ 83.

¹³⁸ CPE is defined in the Act as “equipment employed on the premises of a person (other than a carrier) to originate, route, or terminate telecommunications.” 47 U.S.C. § 153(14). Telecommunications equipment is defined as “equipment, other than customer premises equipment, used by the carrier to provide telecommunications services, and includes software integral to such equipment (including upgrades).” 47 U.S.C. § 153(45).

¹³⁹ When using its ancillary authority to apply similar obligations to interconnected VoIP providers, the Commission imposed obligations on “providers of interconnected VoIP service and to manufacturers of equipment that is specifically designed for that service, including specially designed software, hardware, and network equipment.” But the Commission did not revisit its fundamental conclusions regarding the manufacturers of telecommunications equipment and providers of telecommunications services addressed directly by Section 255. *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*, WC Docket No. 04-36, WT Docket No. 96-196, CG Docket No. 03-123 and CC Docket No. 92-105, 22 FCC Rcd 11275, 11286 ¶ 20 (1997).

65. Second, in the CVAA, Congress gave no indication that it intended the Commission to incorporate, when defining the scope of “equipment and software” for purposes of Section 716(a)(1), the definitions we have established for the different, but analogous, terms (“telecommunications equipment” and “customer premises equipment”) used in Section 255. Here, we interpret the statutory language to include all software, including upgrades, that is used for ACS and that is a component of the end user equipment, network equipment, or of the ACS service – and do not limit software to meaning only software that is integral to the network equipment or end user equipment. As we discuss further in paragraph 86, *infra*, if software gives the consumer the ability to engage in advanced communications, the provider of that software is a covered entity, regardless of whether the software is downloaded to the consumer’s equipment or accessed in the cloud.

66. The purpose of Sections 716 through 718 of the CVAA – to ensure access to advanced communications services for people with disabilities – is fully served by the narrower interpretation of Section 716(a) that we describe above because that interpretation focuses our regulatory efforts where they will be the most productive.

67. Advanced communications services are delivered within a complex and evolving ecosystem.¹⁴⁰ Communications devices are often general-purpose computers or devices incorporating aspects of general-purpose computers, such as smartphones, tablets, and entertainment devices.¹⁴¹ In the *Accessibility NPRM* we observed that such systems are commonly described as having five components or layers: (1) hardware (commonly referred to as the “device”);¹⁴² (2) operating system;¹⁴³ (3) user interface layer;¹⁴⁴ (4) application;¹⁴⁵ and (5) network services.¹⁴⁶ We agree with ITI that three

¹⁴⁰ See *Accessibility NPRM*, 26 FCC Rcd at 3140, ¶¶ 14-15, citing Kaveh Pahlavan & Prashant Krishnamurthy, NETWORKING FUNDAMENTALS: WIDE, LOCAL, & PERSONAL AREA COMMUNICATIONS at 21-25 (John Wiley and Sons Ltd. 2009), and <http://www.qualcomm.com/documents/files/evolution-toward-multimode-future.pdf>, at 3, 8-9.

¹⁴¹ See *Accessibility NPRM*, 26 FCC Rcd at 3140, ¶ 15, citing Kaveh Pahlavan & Prashant Krishnamurthy, NETWORKING FUNDAMENTALS: WIDE, LOCAL, & PERSONAL AREA COMMUNICATIONS 21-23 (John Wiley and Sons Ltd. 2009), and <http://www.qualcomm.com/documents/files/evolution-toward-multimode-future.pdf>, at 3, 8-9.

¹⁴² Advanced communications services may rely on hardware with general-purpose computing functionality that typically includes a central processing unit (“CPU”), several kinds of memory, one or more network interfaces, built-in peripherals, and both generic and dedicated-purpose interfaces to external peripherals. *Accessibility NPRM*, 26 FCC Rcd at 3141, ¶ 15.

¹⁴³ Almost all devices with a CPU have an operating system that manages the system resources and provides common functionality, such as network protocols, to applications. *Accessibility NPRM*, 26 FCC Rcd at 3140, ¶ 15, citing 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).

¹⁴⁴ Most modern devices have a separate user interface layer upon which almost all applications rely to create their graphical user interface, and which is typically provided as a package with the operating system.¹⁴⁴ *Accessibility NPRM*, 26 FCC Rcd at 3140, ¶ 15, citing William Stallings, OPERATING SYSTEMS, INTERNALS AND DESIGN PRINCIPLES, 51, 84-86 (Pearson and Prentice Hall 2009). In many cases, web (continued....)

additional components in the architecture play a role in ensuring the accessibility of ACS: (1) assistive technology (“AT”) utilized by the end user; (2) the accessibility application programming interface (“API”);¹⁴⁷ and (3) the web browser.¹⁴⁸

68. For individuals with disabilities to use an advanced communications service, *all* of these components may have to support accessibility features and capabilities.¹⁴⁹ It is clear, however, that Congress did not give us the task of directly regulating the manufacturers, developers, and providers all of these components. Rather, Congress chose to focus our regulatory and enforcement efforts on the equipment manufacturers and the ACS providers.

69. We believe that end user equipment manufacturers, in collaboration with the developers of the software components of the equipment and related service providers, are best equipped to be ultimately responsible for ensuring that all of the components that the end user equipment manufacturer provides are accessible to and usable by individuals with disabilities.¹⁵⁰ The manufacturer is the one that purchases those components and is therefore in a position to require that each of those components supports accessibility.¹⁵¹ Similarly, as we discuss further below,¹⁵² the provider of an advanced communications service is the entity in the best position to make sure that the

(Continued from previous page) _____

browsers are considered to be part of the user interface layer although they themselves are also an application. *Accessibility NPRM*, 26 FCC Rcd at 3140, ¶ 15.

¹⁴⁵ Software, which may be embedded into the device and non-removable, installed by the system integrator or user, or reside in the cloud, is used to implement the actual advanced communications functionality. *Accessibility NPRM*, 26 FCC Rcd at 3141, ¶ 15, *citing* Media Phone by Intel Corporation. <http://edc.intel.com/Applications/Embedded-Connected-Devices/>.

¹⁴⁶ Advanced communications applications rely on network services to interconnect users. *Accessibility NPRM*, 26 FCC Rcd at 3141, ¶ 15. These networks perform many functions, ranging from user authentication and authorization to call routing and media storage and may also provide the advanced communication applications. *Id.*

¹⁴⁷ ITI uses the term “Accessibility Services” to describe what the Commission refers to as the accessibility API.

¹⁴⁸ Letter from Ken J. Salaets, Director, Information Technology Industry Council, to Marlene H. Dortch, Secretary, FCC, CG Docket No. 10-213 (filed July 8, 2011) (“ITI July 8 *Ex Parte*”). We would note that in its original description of the architecture, the Commission stated that “in many cases, web browsers are considered to be part of the user interface layer, although they themselves are also an application.” *Accessibility NPRM*, 26 FCC Rcd at 3141, ¶ 15.

¹⁴⁹ *Accessibility NPRM*, 26 FCC Rcd at 3142, ¶ 17.

¹⁵⁰ Manufacturers are responsible for the software components of their equipment whether they pre-install the software, provide the software to the consumer on a physical medium such as a CD, or require the consumer to download the software.

¹⁵¹ *But see* Green Reply Comments at 5 (arguing that the operating systems developers, rather than end user equipment manufacturers or other software developers, should be responsible for accessibility, because they are limited in number and have significant resources and contractual leverage).

¹⁵² *See* Providers of Advanced Communications Services, Section III.A.3, *infra*.

components (hardware, software on end user devices, components that reside on the web) it provides and that make up its service all support accessibility.

70. We believe these conclusions will foster industry collaboration between manufacturers of end user equipment, software manufacturers, and service providers and agree with TWC that this collaboration must be a central tenet in the efforts to implement the CVAA.¹⁵³ For example, as Microsoft states, “a laptop manufacturer that builds ACS into its device will need to consult with the developer of the operating system to develop this functionality, and in that way the operating system provider will be deeply involved in solving these problems and promoting innovations in accessibility, such as making an accessibility API available to the manufacturer.”¹⁵⁴ The consumer, who is not a party to any arrangements or agreements, contractual or otherwise, between an end user equipment manufacturer and a software developer, will not be put in the position of having to divine which entity is ultimately responsible for the accessibility of end user equipment used for advanced communications services.

71. We recognize that consumers are able to change many of the software components of the equipment they use for advanced communications services, including, for some kinds of equipment, the operating systems, e-mail clients, and other installed software used for ACS. We believe that, as a practical matter, operating systems and other software that are incorporated by manufacturers into their equipment will also be accessible when made separately available because it will not be efficient or economical for developers of software used to provide ACS to make accessible versions of their products for equipment manufacturers that pre-install the software and non-accessible freestanding versions of the same products. Therefore, we believe that we do not need to adopt an expansive interpretation of the scope of Section 716(a) to ensure that consumers receive the benefits intended by Congress.

72. Section 717(b)(1) of the Act requires us to report to Congress every two years, beginning in 2012. We are required, among other things, to report on the extent to which accessibility barriers still exist with respect to new communications technologies. We intend to pay particular attention in these reports to the question of whether entities that are not directly subject to our regulations, including software developers, are causing such barriers to persist.

73. Finally, the narrower interpretation of the scope of Section 716(a) that we adopt today makes this statutory program more cost-effective than would the more expansive interpretation. Covered entities are subject not only to the substantive requirement that they make their products accessible, if achievable, but also to an enforcement mechanism that includes recordkeeping and certification requirements. This type of enforcement program imposes costs on both industry and the government.

¹⁵³ TWC cautions that requiring service providers to offer particular capabilities (*i.e.*, accessible services) risks being largely meaningless if equipment manufacturers are not required to build the requisite functionality into their consumer devices, and urges the Commission to hold manufacturers to their obligations under the CVAA. TWC Comments at 7.

¹⁵⁴ Microsoft Comments at 12.

Congress made a determination, which we endorse and enforce, that these costs are well justified to realize the accessibility benefits that the CVAA will bring about. But the costs of extending design, recordkeeping, and certification requirements to software developers would be justified only if they were outweighed by substantial additional accessibility benefits.

74. As explained above, it appears that the benefits of accessibility, as envisioned by Congress and supporters of the CVAA, can be largely (and perhaps entirely) realized under the narrower, less costly interpretation of Section 716(a)(1). Furthermore, the biennial review requirement of Section 717(b)(1) ensures that, if our prediction proves incorrect, the Commission will have an occasion to examine whether application of the CVAA's requirements directly to developers of consumer-installed software is warranted, and make any necessary adjustments to our rules to achieve accessibility in accordance with the intent of the CVAA. This biennial review process gives us additional confidence that applying the statute more narrowly and cautiously in our initial rules is the most appropriate policy at this time.

75. With respect to the definition of “manufacturer,” consistent with the Commission’s approach in the *Section 255 Report and Order* and in the *Accessibility NPRM*, we define “manufacturer” as “an entity that makes or produces a product.”¹⁵⁵ As the Commission noted in the *Section 255 Report and Order*, “[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.”¹⁵⁶ We believe this definition encompasses entities that are “extensively involved in the manufacturing process – for example, by providing product specifications.”¹⁵⁷ We also believe this definition includes entities that contract with other entities to make or produce a product; a manufacturer need not own a production facility or handle raw materials to be a manufacturer.¹⁵⁸

76. TechAmerica argues that Section 716(a) should apply only to equipment with a “primary purpose” of offering ACS.¹⁵⁹ We reject this interpretation. As discussed above,¹⁶⁰ consumers commonly access advanced communications services through

¹⁵⁵ *In accord*, CEA Comments at 8; T-Mobile Comments at 4-5 (adopting this definition will help “draw a bright line” between service providers and manufacturers).

¹⁵⁶ *Section 255 Report and Order*, 16 FCC Rcd at 6454, ¶ 90.

¹⁵⁷ *Section 255 Report and Order*, 16 FCC Rcd at 6454, ¶ 90. *See also* ITI Comments at 25.

¹⁵⁸ *See* the North American Industry Classification System (“NAICS”) definition of “manufacturing,” which includes “establishments [that] may process materials or may contract with other establishments to process their materials for them.” 2007 NAICS Definition, Section 31-33 Manufacturing, <http://www.census.gov/cgi-bin/sssd/naics/naicsrch?code=31&search=2007%20NAICS%20Search>. *See also* Exemptions for Small Entities – Temporary Exemption of Section 716 Requirements, Section III.C.3, *infra*, for a detailed discussion of NAICS.

¹⁵⁹ TechAmerica Comments at 3.

¹⁶⁰ *See* para. 67, *supra*. *See also* para. 49, *supra*.

general purpose devices. The CVAA covers equipment “used for ACS,”¹⁶¹ and we interpret this to include general purpose hardware with included software that provides users with access to advanced communications services.

77. Commenters also expressed concerns about the impact of software upgrades on accessibility. The IT and Telecom RERCs state that “[u]pgrades can be used to increase accessibility . . . or they can take accessibility away, as has, unfortunately occurred on numerous occasions.”¹⁶² Wireless RERC urges that “[e]nd-users who buy an accessible device expect manufacturer-provided updates and upgrades to continue to be accessible.”¹⁶³ We agree that the purposes of the CVAA would be undermined if it permitted equipment or services that are originally required to be accessible to become inaccessible due to software upgrades. In accordance with our interpretation of 716(a)(1) above, just as a manufacturer of a device is responsible for the accessibility of included software, that manufacturer is also responsible for ensuring that the software developer maintains accessibility if and when it provides upgrades. However, we agree with CTIA that a manufacturer cannot be responsible for software upgrades “that it does not control and that it has no knowledge the user may select and download.”¹⁶⁴

78. Indeed, we recognize more generally, as ITI urges, that manufacturers of equipment are not responsible for the components over which they have no control.¹⁶⁵ Thus, manufacturers are not responsible for software that is independently selected and installed by users, or for software that users choose to access in the cloud.¹⁶⁶ Furthermore, we generally agree with commenters that a manufacturer is not responsible for optional software offered as a convenience to subscribers at the time of purchase and that carriers are not liable for third-party applications that customers download onto mobile devices – even if software is available on a carrier’s website or application store.¹⁶⁷

79. A manufacturer, however, has a responsibility to consider how the components in the architecture work together when it is making a determination about what accessibility is achievable for its product. If, for example, a manufacturer decides to rely on a third-party software accessibility solution, even though a built-in solution is achievable, it cannot later claim that it is not responsible for the accessibility of the third-party solution.¹⁶⁸ A manufacturer of end-user equipment is also responsible for the

¹⁶¹ 47 U.S.C. § 617(a)(1).

¹⁶² IT and Telecom RERCs Comments at 3.

¹⁶³ Wireless RERC Comments at 2. *See also* Words+ and Compusult Comments at 7.

¹⁶⁴ CTIA Comments at 10.

¹⁶⁵ *See* Letter from Ken J. Salaets, Director, Information Technology Industry Council, to Marlene H. Dortch, Secretary, FCC, CG Docket No. 10-213 (filed Aug. 9, 2011) at 1-2 (“ITI Aug. 9 *Ex Parte*”).

¹⁶⁶ *See, e.g.*, AT&T Comments at 8-9; CTIA Comments at 10; IT and Telecom RERCs Comments at 3; Microsoft Comments at 12; TechAmerica Comments at 2; Wireless RERC Comments at 2.

¹⁶⁷ CTIA Comments at 11; Verizon Comments at 3-4.

¹⁶⁸ *See* Verizon Comments at 3-4.

accessibility of software offered to subscribers if the manufacturer requires or incentivizes a purchaser to use a particular third-party application to access all the features of or obtain all the benefits of a device or service, or markets its device in conjunction with a third-party add-on.¹⁶⁹

80. Because we did not receive a full record on the unique challenges associated with implementing Section 718, we will solicit further input in the accompanying *Further Notice* on how we should proceed. In particular, we seek comment on the unique technical challenges associated with developing non-visual accessibility solutions for web browsers in a mobile phone and the steps that we can take to ensure that covered entities will be able to comply with these requirements on October 8, 2013, the date on which Section 718 becomes effective. Section 718 requires a mobile phone manufacturer that includes a browser, or a mobile phone service provider that arranges for a browser to be included on a mobile phone, to ensure that the browser functions are accessible to and usable by individuals who are blind or have a visual impairment, unless doing so is not achievable. In the accompanying *Further Notice*, we also seek to develop a record on whether Internet browsers should be considered software generally subject to the requirements of Section 716. Specifically, we seek to clarify the relationship between Sections 716 and 718 and solicit comment on the appropriate regulatory approach for Internet browsers that are not built into mobile phones.

3. Providers of Advanced Communications Services

81. *Background.* 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.”¹⁷⁰

82. In the *Accessibility NPRM*,¹⁷¹ and consistent with the *Section 255 Report and Order*,¹⁷² the Commission proposed to find that providers of advanced communications services include all entities that make advanced communications services available in or affecting interstate commerce, including resellers and aggregators. The Commission also proposed to find that “providers of advanced

¹⁶⁹ IT and Telecom RERCs Comments at 4-5. *See also* Words+ and Compusult Comments at 9-10 (suggesting that the service provider should be responsible for accessibility of an application that is “either branded as the service provider’s own or is the sole endorsed option or application in a category” and that service providers should be required to include descriptions of the accessibility interfaces within their software developer kits for third-party developers, along with best practices for accessible user interfaces).

¹⁷⁰ *See* 47 U.S.C. § 617(b)(1).

¹⁷¹ *Accessibility NPRM*, 26 FCC Rcd at 3144, ¶ 26.

¹⁷² *See Section 255 Report and Order*, 16 FCC Rcd at 6450, ¶ 80. The Commission also noted its belief that the general principle it 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” – applies in this context as well. *Accessibility NPRM*, 26 FCC Rcd at 3144, ¶ 26, *citing Section 255 Report and Order*, 16 FCC Rcd at 6450, ¶ 80.

communications services” include entities that provide advanced communications services 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 advanced communications services are made available in or affecting interstate commerce.¹⁷³

83. The Commission also asked whether there are any circumstances in which a service provider would be responsible for the accessibility of third-party services and applications or whether Section 2(a) of the CVAA would generally preclude such a result.¹⁷⁴ Finally, the Commission sought comment on the meaning of offered “in or affecting interstate commerce” and whether there are any circumstances in which advanced communications services that are downloaded or run by the user would not meet this definition.¹⁷⁵

84. *Discussion.* Consistent with the proposal in the *Accessibility NPRM*, we agree with commenters that state that we should interpret the term “providers” broadly and include all entities that make available advanced communications in whatever manner.¹⁷⁶ Such providers include, for example, those that make web-based e-mail services available to consumers; those that provide non-interconnected VoIP services through applications that consumers download to their devices; and those that provide texting services over a cellular network.

85. As is the case with manufacturers, providers of ACS are responsible for ensuring the accessibility of the underlying components of the service, to the extent that doing so is achievable. For example, a provider of a web-based e-mail service could meet its obligations by ensuring its services are coded to web accessibility standards (such as the Web Content Accessibility Guidelines (WCAG)¹⁷⁷), if achievable. For services downloaded onto the OS of a desktop or mobile device, service providers could meet their obligations by ensuring, if achievable, that their services are coded so they can work with the Accessibility API for the OS of the device.¹⁷⁸ Those that provide texting

¹⁷³ *Accessibility NPRM*, 26 FCC Rcd at 3144, ¶ 27.

¹⁷⁴ *Accessibility NPRM*, 26 FCC Rcd at 3144, ¶ 27.

¹⁷⁵ *Accessibility NPRM*, 26 FCC Rcd at 3144, ¶ 27.

¹⁷⁶ Consumer Groups Comments at 5-6.

¹⁷⁷ Web Content Accessibility Guidelines (“WCAG”) explain how to make web content (*e.g.*, information in a web page or web application, including text, images, forms, and sounds) more accessible to people with disabilities. See <http://www.w3.org/WAI/intro/wcag.php> (viewed on September 16, 2011). The WCAG is developed and published by the W3C Web Accessibility Initiative and provides an international forum for industry, disability organizations, accessibility researchers, and government stakeholders. The WCAG is part of a series of accessibility guidelines, including the Authoring Tool Accessibility Guidelines (“ATAG”) and the User Agent Accessibility Guidelines (“UAAG”). *Id.* See also para. 101, *infra* (discussing the WCAG).

¹⁷⁸ Accessibility APIs are specialized interfaces developed by platform owners, which software applications use to communicate accessibility information about user interfaces to assistive technologies. HTML to Platform Accessibility APIs Implementation Guide, W3C Editor's Draft 10 June 2011, available at <http://dev.w3.org/html5/html-api-map/overview.html#aapi> (viewed September 15, 2011).

services over a cellular network, for example, must ensure that there is nothing in the network that would thwart the accessibility of the service, if achievable.

86. COAT raises the concern that some software used for ACS may be neither a component of the end user equipment nor a component of a service and thus would not be covered under the statute.¹⁷⁹ Specifically, COAT argues that H.323¹⁸⁰ video and audio communication is peer-to-peer and does not require a service provider at all.¹⁸¹ Similarly, it argues that it is possible to have large-scale examples of peer-to-peer systems without service providers and that models used in the non-ACS context could be expanded to be used for ACS.¹⁸² We believe that COAT construes the meaning of “provider of advanced communications services” too narrowly. If software gives the consumer the ability to send and receive e-mail, send and receive text messages, make non-interconnected VoIP calls, or otherwise engage in advanced communications, then provision of that software is provision of ACS.¹⁸³ The provider of that software would be a covered entity, and the service, including any provided through a small-scale or large-scale peer-to-peer system, would be subject to the requirements of the statute.¹⁸⁴ This is true regardless of whether the software is downloaded to the consumer’s equipment or accessed in the cloud.

¹⁷⁹ Letter from Andrew S. Phillips, Counsel to National Association of the Deaf, on behalf of the Coalition of Organizations for Accessible Technology (COAT), to Marlene H. Dortch, Secretary, FCC, CG Docket No. 10-213, at 1-2 (filed Sept. 20, 2011) (“COAT Sept. 20 *Ex Parte*”); COAT Sept. 28 *Ex Parte* at 1-2.

¹⁸⁰ H.323 is an ITU Telecommunication Standardization Sector (ITU-T) specification for transmitting audio, video, and data across an Internet Protocol network, including the Internet. The H.323 standard addresses call signaling and control, multimedia transport and control, and bandwidth control for point-to-point and multi-point conferences. Products and applications that are compliant with H.323 can communicate and interoperate with each other. See <http://www.itu.int/rec/T-REC-H.323/en/> (last visited September 27, 2011); Jonathan Davidson, Brian Gracely & James Peters, *Voice over IP fundamentals* pp. 229–230 (Cisco Press 2000).

¹⁸¹ COAT Sept. 20 *Ex Parte* at 2; COAT Sept. 28 *Ex Parte* at 1-2.

¹⁸² COAT suggests that it is possible for ACS to follow the model of such large scale peer-to-peer systems as Diaspora and Bit Torrent. COAT Sept. 20 *Ex Parte* at 2; COAT Sept. 28 *Ex Parte* at 2. Diaspora is an open-source, social networking software that provides a decentralized, peer-to-peer alternative to commercial alternatives such as Facebook and LinkedIn by allowing participants to retain ownership of all the material they use on the site, and retain full control over how that information is shared. See <https://joindiaspora.com/>; see also http://www.pcworld.com/businesscenter/article/211526/opensource_social_network_diaspora_goes_live.html. BitTorrent is a peer-to-peer, closed software program that allows end users to upload or download files and to share files with each other on a distributed basis. See <http://www.bittorrent.com/>.

¹⁸³ On the other hand, provision of client software such as Microsoft Outlook is not provision of ACS. While consumers use such client software to manage their ACS, the client software standing alone does not provide ACS.

¹⁸⁴ We also disagree with COAT’s suggestion that ACS used with an online directory would not be covered. COAT Sept. 28 *Ex Parte* at 2. While online directories are excluded from coverage under the limited liability provisions in Section 2(a)(2) of the CVAA, the ACS used with such directories are covered.

87. We disagree with Verizon’s assertion that the requirement in Section 716(e)(1)(C) that the Commission shall “determine the obligations *under this section* of manufacturers, service providers, and providers of applications or services accessed over service provider networks”¹⁸⁵ compels the conclusion that developers of applications have their own independent accessibility obligations.¹⁸⁶ We note that the regulations that the Commission must promulgate pursuant to Section 716(e) relate to the substantive requirements of the Act found in Sections 716(a)-(d) encompassing accessibility (716(a) and 716(b)); compatibility (716(c)); and network features, functions, and capabilities (716(d)). Each of these obligations applies to manufacturers of ACS equipment and/or providers of ACS. There are no independent substantive requirements in these sections that apply to “providers of applications or services accessed over service provider networks.” We believe the most logical interpretation of this phrase is the one proposed in the *NPRM*: that providers of advanced communications services include entities that provide advanced communications services 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.¹⁸⁷ We adopt this interpretation today, which we believe comports with our analysis above that providers of ACS are responsible for ensuring the accessibility of the underlying components of the service, including the software applications, to the extent that doing so is achievable.

88. We find, however, that a provider of advanced communications services is not responsible for the accessibility of third-party applications and services that are not components of its service and that the limitations on liability in Section 2(a) of the CVAA generally preclude such service provider liability.¹⁸⁸ This approach is consistent with commenters that argue that service providers and manufacturers should be responsible only for those services and applications that they provide to consumers.¹⁸⁹ They explain that they have no control over third party applications that consumers add

¹⁸⁵ 47 U.S.C. § 716(e)(1)(C) (emphasis added).

¹⁸⁶ Verizon Comments at 3-4.

¹⁸⁷ *Accessibility NPRM*, 26 FCC Rcd at 3144, ¶ 27. *See also* IT and Telecom RERCs at 6-7; Words+ and CompuSult Comments at 10. Other commenters assert that aggregators and resellers should also be covered. *See* Consumer Groups Comments at 5; AFB Reply Comments at 3-4.

¹⁸⁸ *See, e.g.*, AT&T Comments at 8-9; CTIA Comments at 10; Microsoft Comments at 12; NetCoalition Comments at 4; Verizon Comments at 3-4; Words+ and CompuSult Comments at 10. CTIA also notes that Section 2(a) exempts from liability providers of networks over which advanced communications services are accessed. CTIA Comments at 10-11. *See also* Senate Report at 5; House Report at 22 (“Section 2 provides liability protection where an entity is acting as a passive conduit of communications made available through the provision of advanced communications services by a third party . . .”). *See also* T-Mobile Comments at 4 (service providers like T-Mobile are not responsible for the accessibility of third-party services and applications); NCTA Reply Comments at 2-3 (networks, acting as conduits, are not liable for the accessibility of services that travel over their networks); T-Mobile Reply Comments at 6. *See also* Network Features, Section III.A.4.c, and Accessibility of Information Content, Section III.A.4.d, *infra*, discussing other obligations of providers of advanced communications and network services.

¹⁸⁹ *See, e.g.*, AT&T Comments at 8; CTIA Comments at 10; Microsoft Comments at 12-13; NetCoalition Comments at 4-5; Verizon Comments at 3-4.

on their own and that such third party applications have the potential to significantly alter the functionality of devices.¹⁹⁰ Notwithstanding that conclusion and consistent with Section 2(b) of the CVAA, we also agree with commenters that the limitation on liability under Section 2(a) does not apply in situations where a provider of advanced communications services relies on a third-party application or service to comply with the accessibility requirements of Section 716.¹⁹¹

89. We also confirm that providers of advanced communications services may include resellers and aggregators,¹⁹² which is consistent with the approach the Commission adopted in the *Section 255 Report and Order*.¹⁹³ Several commenters support that conclusion.¹⁹⁴ We disagree with Verizon's suggestion that, to the extent that a carrier is strictly reselling an advanced communications service as is (without alteration), the sole control of the features and functions rests with the underlying service provider, not the reseller, and the reseller should not have independent compliance obligations.¹⁹⁵ To the extent that the underlying service provider makes those services accessible to and usable by individuals with disabilities in accordance with the CVAA mandates, those services should remain accessible and usable when resold as is (without alteration). Resellers offer services to consumers who may or may not be aware of the identity of the underlying service provider. It is both logical and in keeping with the purposes of the CVAA for consumers to be able to complain against the provider from whom they obtain a service, should that service be inaccessible. While a reseller may not control the features of the underlying service, it does have control over its decision to resell that service. Its obligation, like that of any other ACS provider, is to ensure that the services it provides are accessible, unless that is not achievable.

90. Because the networks used for advanced communications services are interstate in nature, and the utilization of equipment, applications and services on those networks are also interstate in nature, we conclude that the phrase "in or affecting interstate commerce" should be interpreted broadly.¹⁹⁶ Nonetheless, the IT and Telecom RERCs suggest that an entity that has its own network "completely off the grid, that it

¹⁹⁰ See, e.g., AT&T Comments at 8-9; Microsoft Comments at 13.

¹⁹¹ CTIA Comments at 10; Verizon Comments at 4. See also Pub. L. No. 111-260, § 2(b).

¹⁹² "Aggregator" is defined as "any person that, in the ordinary course of its operations, makes telephone services available to the public or to transient users of its premises, for interstate telephone calls using a provider of operator services." 47 U.S.C. § 226(a)(2).

¹⁹³ "[W]ith respect to section 255, Congress intended to use the term 'provider' broadly, to include all entities that make telecommunications services available." *Section 255 Report and Order*, 16 FCC Rcd at 6450, ¶ 80. The Commission explained that an aggregator is a "provider of telecommunications service," even though 47 U.S.C. § 153(50) excludes aggregators from the definition of "telecommunications carrier." *Section 255 Report and Order*, 16 FCC Rcd at 6450, ¶ 80.

¹⁹⁴ See, e.g., Consumer Groups Comments at 5-6; IT and Telecom RERCs Comments at 5; Words+ and Compuconsult Comments at 9. But see Verizon Comments at 4-5.

¹⁹⁵ Verizon Comments at 4-5.

¹⁹⁶ See IT and Telecom RERCs Comments at 7.

creates and maintains, and that does not at any time connect to another grid” would not be covered.¹⁹⁷ We agree that advanced communication services that are available only on a private communications network that is not connected to the Internet, the public switched telephone network (“PSTN”), or any other communications network generally available to the public may not be covered when such services are not “offered in or affecting interstate commerce.” An example of a private communications network is a company internal communications network. Nonetheless, where such providers of advanced communications services are not covered by Section 716, they may have accessibility obligations under other disability related statutes, such as Section 504 of the Rehabilitation Act of 1973¹⁹⁸ or the Americans with Disabilities Act of 1990.¹⁹⁹

4. General Obligations

91. 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.”²⁰⁰ Below, we discuss the obligations of manufacturers and service providers, including the obligations of providers of applications or services accessed over service provider networks.

a. Manufacturers and Service Providers

92. *Background.* With respect to equipment manufacturers and service providers of ACS, the Commission proposed in the *Accessibility NPRM* to adopt general obligations that mirror the language of the statute, similar to the approach taken in sections 6.5 and 7.5 of the Commission’s Section 255 rules.²⁰¹ The Commission also proposed to adopt requirements similar to those in its 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 716.²⁰²

93. *Discussion.* As set forth below, we adopt into our rules the general obligations contained in Sections 716(a)-(e).²⁰³ As the Commission did in the *Section 255 Report and Order*, we find that a functional approach will provide clear guidance to covered entities regarding what they must do to ensure accessibility and usability.²⁰⁴

¹⁹⁷ IT and Telecom RERCs Comments at 7. *See also* ITI Comments at 22 (“A service is an offering to others; it is not software or a functionality developed by an entity solely for internal use. Accordingly, a system that is developed by an individual or organization and not sold to the public cannot be considered covered by the CVAA”).

¹⁹⁸ *See* 29 U.S.C. § 794.

¹⁹⁹ *See* 42 U.S.C. §§ 12101-12213; *see also* ITI Comments at 21.

²⁰⁰ 47 U.S.C. § 617(e)(1)(C).

²⁰¹ *Accessibility NPRM*, 26 FCC Rcd at 3170, ¶ 100.

²⁰² *Accessibility NPRM*, 26 FCC Rcd at 3170-3171, ¶¶ 101-102.

²⁰³ *See* 47 U.S.C. §§ 716(a) – (e).

²⁰⁴ *See Section 255 Report and Order*, 16 FCC Rcd at 6429-6430, ¶ 22.

Consistent with AFB's comments, we modify our rules as proposed to make clear that any third party accessibility solution that a covered entity uses to meet its accessibility obligations must be "available to the consumer at nominal cost and that individuals with disabilities can access."²⁰⁵

- 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.²⁰⁶
- 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.²⁰⁷
- If accessibility is not achievable either by building it into a device or service or by using third-party accessibility solutions available to the consumer at nominal cost and that individuals with disabilities can access, 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.²⁰⁸
- Providers of advanced communications services shall not install network features, functions, or capabilities that impede accessibility or usability.²⁰⁹
- 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.²¹⁰

94. We further adopt in our rules the following key requirements, supported by the IT and Telecom RERCs,²¹¹ with some non-substantive modifications to clarify the rules proposed in the *Accessibility NPRM*.²¹² These requirements are similar to sections

²⁰⁵ AFB Comments at 3; AAPD Reply Comments at 3.

²⁰⁶ See 47 U.S.C. § 617(a)(1).

²⁰⁷ See 47 U.S.C. § 617(b)(1).

²⁰⁸ See 47 U.S.C. § 617(c).

²⁰⁹ See 47 U.S.C. § 617(d).

²¹⁰ See 47 U.S.C. § 617(e)(1)(B).

²¹¹ IT and Telecom RERCs Comments at 33.

²¹² *Accessibility NPRM*, 26 FCC Rcd at 3170-71, ¶ 101.

6.7 – 6.11 of our Section 255 rules²¹³ but are modified to reflect the statutory requirements of Section 716:

- 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.
- Manufacturers and service providers must identify barriers to accessibility and usability as part of such evaluation.²¹⁴
- Equipment used for advanced communications services 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.
- Manufacturers and service providers must ensure access by individuals with disabilities to information and documentation it provides to its 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.²¹⁵

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

95. *Background.* Section 716(e)(1)(C) requires the Commission to “determine the obligations under . . . section [716] of manufacturers, service providers, and providers of applications or services accessed over service provider networks.”²¹⁶ In the *Accessibility NPRM*, the Commission sought comment on what, if any, obligations it should impose on providers of applications or services accessed over service provider networks.²¹⁷ The Commission also sought comment on the meaning of the phrase

²¹³ See 47 C.F.R. §§ 6.7 – 6.11.

²¹⁴ Samuelson-Glushko TLPC argues that “[u]ser testing requirements are vital to ensure usable and viable technology access to citizens with disabilities.” Samuelson-Glushko Reply Comments at 4. While we will not impose specific user testing requirements, we support the practice of user testing and agree with Samuelson-Glushko that user testing benefits individuals with a wide range of disabilities. Samuelson-Glushko Reply Comments at 4-5.

²¹⁵ The IT and Telecom RERCs urge that all information provided with or for a product be available online in accessible form. IT and Telecom RERCs Comments at 33. Although we will not require manufacturers and service providers to build websites, to the extent that they provide customer support online, such websites must be accessible, if achievable.

²¹⁶ 47 U.S.C. § 617(e)(1)(C).

²¹⁷ *Accessibility NPRM*, 26 FCC Rcd at 3144, 3171, ¶¶ 27, 103.

“accessed over service provider networks” and how it applies to applications and services that are downloaded and then run as either native or web applications on the device or to those applications and services accessed through cloud computing.²¹⁸

96. *Discussion.* As noted previously, to the extent they provide advanced communications services, “providers of applications or services accessed over service provider networks” are “providers of advanced communications services” and have the same obligations when those services are accessed over the service provider’s own network or over the network of another service provider.²¹⁹ No party suggested that any additional obligations apply to this subset of providers of ACS, and we do not adopt any today.²²⁰

c. Network Features

97. *Background.* According to 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.”²²¹ In the *Accessibility NPRM*, the Commission proposed incorporating Section 716(d)’s requirements into the Commission’s rules, as the Commission’s Section 255 rules reflect the cognate language in Section 251(a)(2).²²² 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.”²²³ In the *Accessibility NPRM*, the Commission sought comment on whether it should “refrain from enforcing these obligations on network providers” until the Commission identifies and requires the use of industry-recognized standards.²²⁴

98. *Discussion.* As proposed in the *Accessibility NPRM*, we adopt rules that include the requirements set forth in Section 716(d), just as our Section 255 rules reflect the language in Section 251(a)(2). Commenters generally agree that the duty not to impede accessibility is comparable to the duty set forth in Section 251(a)(2) of the Act.²²⁵

99. As stated above, this obligation applies when the accessibility or usability of ACS is incorporated in accordance with recognized industry standards.²²⁶ We agree with industry and consumer commenters that suggest that stakeholder working groups

²¹⁸ *Accessibility NPRM*, 26 FCC Rcd at 3171, ¶ 103.

²¹⁹ See Providers of Advanced Communications Services, Section III.A.3, *supra*.

²²⁰ *But see* para. 86, *supra*.

²²¹ See 47 U.S.C. § 617(d).

²²² *Accessibility NPRM*, 26 FCC Rcd at 3168, ¶ 92.

²²³ Senate Report at 8; House Report at 25.

²²⁴ *Accessibility NPRM*, 26 FCC Rcd at 3168, ¶ 93; CTIA Comments to *October Public Notice* at 15.

²²⁵ AAPD Reply Comments to *October Public Notice* at 4; AFB Reply Comments to *October Public Notice* at 5; Verizon Comments to *October Public Notice* at 5.

²²⁶ See Senate Report at 8; House Report at 25.

should be involved in developing new accessibility standards.²²⁷ As explained in the next section, we believe that there are several potential mechanisms to develop these standards.²²⁸ Accordingly, we recommend that stakeholders either use existing working groups or establish new ones to develop standards that will ensure accessibility as the industry applies network management practices, takes digital rights management measures, and engages in other passive or active activities that may impede accessibility.²²⁹ We do not agree, however, that we should wait to require compliance with our rules governing network features until an industry working group “formulates and offers such standards for the industry.”²³⁰ We agree with ACB that “existing standards and expertise will ensure that manufacturers have sufficient functional approaches” on which to base accessibility and that “[f]urther experience and products will improve this process.”²³¹ We believe this approach provides certainty through the use of recognized industry standards while at the same time recognizing the importance of not unnecessarily delaying the development of accessibility solutions.

d. Accessibility of Information Content

100. *Background.* 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].”²³² The legislative history of the CVAA makes clear that these requirements apply “where the accessibility of such content has been incorporated in accordance with recognized industry standards.”²³³ In the *October Public Notice*, the Bureaus sought comment on how Section 716(e)(1)(B) of the Act should be implemented and the types and nature of information content that should be addressed.²³⁴ Several commenters stressed the importance of developing industry-recognized standards to ensure the delivery of information content.²³⁵ In the *Accessibility NPRM*, the Commission sought further comment on developing industry-recognized standards and how they should be reflected in the Commission’s rules, subject to the limitation on mandating technical

²²⁷ CTIA Comments at 29; IT and Telecom RERCs Comments at 30.

²²⁸ See Accessibility of Information Content, Section III.A.4.d, *infra*.

²²⁹ CTIA Comments at 29; CEA Comments at 30-31; Consumer Groups Comments at 22; IT and Telecom RERCs Comments at 29-30; T-Mobile Comments at 12; CTIA Reply Comments at 25-26; T-Mobile Reply Comments at 13-14.

²³⁰ ACB Reply Comments at 37. *But see* CTIA Comments at 29.

²³¹ ACB Reply Comments at 38.

²³² 47 U.S.C. § 617(e)(1)(B).

²³³ Senate Report at 8; House Report at 25.

²³⁴ *October Public Notice* at 4.

²³⁵ CEA Comments to *October Public Notice* at 14; T-Mobile Comments to *October Public Notice* at 5; CTIA Reply Comments to *October Public Notice* at 16.

standards in Section 716(e)(1)(D).²³⁶ In particular, the Commission sought 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;”²³⁷ (ii) “parallel and associated media channels are not disconnected or blocked;”²³⁸ and (iii) “consumers . . . have the ability to combine text, video, and audio streaming from different origins.”²³⁹ The Commission also sought comment on the best way it could ensure that encryption and other security measures do not thwart accessibility,²⁴⁰ while at the same time ensuring that it promotes “network security, reliability, and survivability in broadband networks.”²⁴¹

101. *Discussion.* As proposed in the *Accessibility NPRM*, we adopt a rule providing that “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.”²⁴² This rule incorporates the text of Section 716(e)(1)(B) and is also consistent with the Commission’s approach in the *Section 255 Report and Order*.²⁴³ We believe that this rule is broad enough to disapprove of accessibility information being “stripped off when information is transitioned from one medium to another” and thus find it unnecessary to add this specific language in the rule itself, as originally suggested by the IT and Telecom RERCs.²⁴⁴

²³⁶ *Accessibility NPRM*, 26 FCC Rcd at 3169, ¶ 96.

²³⁷ *Accessibility NPRM*, 26 FCC Rcd at 3169, ¶ 96 (citing RERC-IT Comments to *October Public Notice* at 7). At the public notice stage, Gregg Vanderheiden first filed comments for RERC-IT but all subsequent filings (reply comments at the public notice stage and comments and reply comments at the NPRM stage) were filed under the collective name of the IT and Telecom RERCs. In their Comments to the NPRM, the IT and Telecom RERCs modified section (i) of its original proposal to read “the accessibility information (e.g., captions or descriptions) are not stripped off when information is transitioned from one medium to another *using industry standards*” (emphasis added).

²³⁸ *Accessibility NPRM*, 26 FCC Rcd at 3169, ¶ 96.

²³⁹ *Accessibility NPRM*, 26 FCC Rcd at 3169, ¶ 96.

²⁴⁰ *Accessibility NPRM*, 26 FCC Rcd at 3169, ¶ 96 (citing ACB Reply Comments to *October Public Notice* at 19).

²⁴¹ *Accessibility NPRM*, 26 FCC Rcd at 3169, ¶ 96 (citing T-Mobile Comments to *October Public Notice* at 5).

²⁴² 47 U.S.C. § 617(e)(1)(B); *Accessibility NPRM*, 26 FCC Rcd at 3197, Appendix B: Proposed Rules.

²⁴³ In our *Section 255 Report and Order*, the Commission added section 6.9 “Information pass through” to the Commission’s rules, which states:

Telecommunications equipment and customer premises equipment shall pass through cross-manufacturer, non-proprietary, industry-standard codes, translation protocols, formats or other information necessary to provide telecommunications in an accessible format, if readily achievable. In particular, signal compression technologies shall not remove information needed for access or shall restore it upon decompression. 47 C.F.R. § 6.9.

²⁴⁴ IT and Telecom RERCs Comments at 31. The IT and Telecom RERCs subsequently filed an *ex parte* reframing and clarifying its initial comments regarding the definition of accessibility of information (continued....)

102. The legislative history of the CVAA makes clear that the requirement not to impair or impede the accessibility of information content applies “where the accessibility of such content has been incorporated in accordance with recognized industry standards.”²⁴⁵ We agree with the IT and Telecom RERCs that sources of industry standards include: (1) international standards from an international standards body; (2) standards created by other commonly recognized standards groups that are widely used by industry; (3) de-facto standards created by one company, a group of companies, or industry consortia that are widely used in the industry.²⁴⁶ We believe that these examples illustrate the wide range of recognized industry standards available that can provide guidance to industry without being overly broad or requiring covered entities to engineer for proprietary networks. We therefore decline to adopt CEA’s proposal that “recognized industry standards are only those developed in consensus-based, industry-led, open processes that comply with American Standards Institute (“ANSI”) Essential Requirements.”²⁴⁷

103. At this time, we are unable to incorporate any aspects of the Access Board criteria or the WCAG into our rules relating to accessibility of information content. Because the Access Board’s process for developing guidelines is still not complete,²⁴⁸ we believe that it would be premature and inefficient to adopt them at this juncture. We acknowledge, however, that the IT and Telecom RERCs support the WCAG developed by the W3C and argue that “these web standards in the proposed Access Board revisions to 508 and 255 ... should definitely be incorporated in the rules.”²⁴⁹ Because technology is changing so quickly, we encourage stakeholders to use existing or form new working groups to develop voluntary industry-wide standards, including on issues such as encryption and other security measures.²⁵⁰ We will monitor industry progress on these issues and evaluate the Access Board guidelines when they are finalized to determine whether any amendments to our rule might be appropriate.

(Continued from previous page) _____

content. See Letter from Gregg Vanderheiden, Director IT Access RERC, Co-Director Telecommunications Access RERC, Trace R&D Center, University of Wisconsin-Madison, to Marlene H. Dortch, Secretary, FCC, CG Docket No. 10-213, at 1-3 (filed June 17, 2011) (“IT and Telecom RERCs June 17 *Ex Parte*”). In the accompanying *Further Notice*, we seek comment on the IT and Telecom RERCs’ specific recommendations regarding how we should interpret and apply the rule.

²⁴⁵ Senate Report at 8; House Report at 25.

²⁴⁶ IT and Telecom RERCs June 17 *Ex Parte* at 4.

²⁴⁷ CEA Comments at 32.

²⁴⁸ See CEA Comments at 33-34.

²⁴⁹ IT and Telecom RERCs Comments at 31. The WCAG are technical specifications developed by industry, disability, and government stakeholders for those who develop web content, web authoring tools, and web accessibility evaluation tools. See <http://www.w3.org/WAI/intro/wcag.php> (viewed on September 16, 2011). As such, we believe it may be appropriate to consider the WCAG an “industry recognized standard” for purposes of applying our rule (*i.e.*, the requirements of our rule would apply where the accessibility of the content has been incorporated consistent with WCAG specifications), rather than incorporating aspects of the WCAG into our rules.

²⁵⁰ IT and Telecom RERCs Comments at 30-31.

104. Finally, we agree with CEA and the IT and Telecom RERCs that, consistent with the CVAA's liability limitations, 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.²⁵¹

5. Phased in Implementation

105. *Background.* Section 716(e) of the CVAA requires the Commission, within one year of the date of enactment of the CVAA, to promulgate regulations implementing Section 716. The accessibility requirements of the CVAA apply to "equipment manufactured after the effective date of the [applicable] regulations" and to "services provided after the effective date of the [applicable] regulations."²⁵² The recordkeeping and annual certification requirements contained in Section 717 of the CVAA take effect "one year after the effective date" of the regulations that implement Section 716.²⁵³

106. *Discussion.* The responsibilities of manufacturers and service providers begin on the effective date of this *Report and Order* and are both prospective and continuing.²⁵⁴ First, the regulations we set forth herein will be effective 30 days after publication in the Federal Register, except for those rules related to recordkeeping and certification. Next, the rules governing recordkeeping and certification will become effective after Office of Management and Budget ("OMB") approval, but, as discussed above,²⁵⁵ no earlier than one year after the effective date of our regulations implementing Section 716.

107. As several commenters recommend,²⁵⁶ we are phasing in the requirements created by the CVAA for covered entities. Beginning on the effective date of these regulations, we expect covered entities to take accessibility into consideration during the design or redesign process for new equipment and services. Covered entities' recordkeeping obligations become effective one year from the effective date of the rules adopted herein. By October 8, 2013, covered entities must be in compliance with all of the rules adopted herein. We find that phasing in these obligations is appropriate due to the need for covered entities to implement accessibility features early in product development cycles,²⁵⁷ the complexity of these regulations,²⁵⁸ and our regulations' effects

²⁵¹ CEA Comments to *October Public Notice* at 14; IT and Telecom RERCs Comments at 31-32.

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

²⁵³ 47 U.S.C. § 618(a)(5)(A).

²⁵⁴ See *Section 255 Report and Order*, 16 FCC Rcd at 6447, ¶ 71.

²⁵⁵ See para. 105, *supra*.

²⁵⁶ See CEA Comments at 39-40; Verizon Comments at 2-3; VON Coalition Comments at 8; CEA Reply Comments at 3-4; CTIA Reply Comments at 4-5; ESA Reply Comments at 22; T-Mobile Reply Comments at 4; TIA Sept. 28 *Ex Parte* at 2; Letter from Scott K. Bergmann, Assistant Vice President, Regulatory Affairs, CTIA – The Wireless Association, to Marlene H. Dortch, Secretary, FCC, CG Docket No. 10-213, at 1 (filed September 30, 2011) ("CTIA Sept. 30 *Ex Parte*").

²⁵⁷ ESA Reply Comments at 5; IT and Telecom RERCs Reply Comments at 2.

on previously unregulated entities. As CEA and ITI have stated, we have utilized phase-in periods previously in similarly complex rulemakings.²⁵⁹ Below, we discuss details of the phase-in process.

108. Beginning on the effective date of these regulations, we expect covered entities to take accessibility into consideration as early as possible during the design or redesign process for new and existing equipment and services and to begin taking steps to “ensure that [equipment and services] shall be accessible to and usable by individuals with disabilities, unless... not achievable [as determined by the four achievability factors.]”²⁶⁰ As part of this evaluation, manufacturers and service providers must identify barriers to accessibility and usability.²⁶¹

109. Beginning one year after the effective date of these regulations, covered entities recordkeeping obligations will become effective.²⁶² As we further explain below, we require covered entities to keep and maintain records in the ordinary course of business that demonstrate that the advanced communications products and services they sell or otherwise distribute are accessible to and usable by individuals with disabilities or demonstrate that it was not achievable for them to make their products or services accessible.²⁶³

110. Beginning on October 8, 2013, products or services offered in interstate commerce must be accessible, unless not achievable, as defined by our rules. Several

(Continued from previous page) _____

²⁵⁸ T-Mobile Reply Comments at 4.

²⁵⁹ CEA Reply Comments at 4 (citing *Closed Captioning Requirements for Digital Television Receivers*, Report and Order, 15 FCC Rcd 16788, 16807, ¶ 56 (2000); *Wireless E911 Location Accuracy Requirements*, Report and Order, 22 FCC Rcd 20105, 20112 ¶ 17 (2007), *voluntarily vacated*, *Rural Cellular Ass’n v. FCC*, 2008 U.S. App. LEXIS 19889 (D.C. Cir. Sept. 17, 2008)); ITI Comments at 19 (citing 47 C.F.R. § 15.119(a); 47 C.F.R. § 15.120(a); 47 C.F.R. § 15.122(a)(1); 47 C.F.R. § 15.117(i)(1)(i)-(iii)); CEA *Ex Parte* in CG Docket No. 10-213 at 2 (citing *Technical Requirements to Enable Blocking of Video Programming based on Program Ratings*, Report and Order, 13 FCC Rcd 11248, 11257 ¶ 23 (1998); *Implementation of Section 304 of the Telecommunications Act of 1996*, Report and Order, 13 FCC Rcd 14775, 14803 ¶ 69 (1998); *Section 68.4(a) of the Commission’s Rules Governing Hearing Aid-Compatible Telephones*, Report and Order, 18 FCC Rcd 16753, 16780 ¶ 65 (2003) (“*Hearing Aid Compatibility R&O*”)).

²⁶⁰ 47 U.S.C. §§ 617(a)(1) and (b)(1). *See also* CTIA Comments at 17; ESA Reply Comments at 5.

²⁶¹ *See Accessibility NPRM*, 26 FCC Rcd at 3170, ¶ 101.

²⁶² 47 U.S.C. § 618(a)(5)(A). We note that certain information collection requirements related to recordkeeping adopted herein are subject to the Paperwork Reduction Act and will be submitted to the OMB for review. Those requirements will become effective after OMB approval but no earlier than one year after the effective date of rules promulgated pursuant to Section 716(e). After OMB approval is obtained, the Consumer and Governmental Affairs Bureau will issue a public notice instructing covered entities when and how to file their annual certification that records are being maintained in accordance with the statute and the rules adopted herein.

²⁶³ Recordkeeping requirements apply to manufacturers and service providers subject to 47 U.S.C. §§ 255, 617 and 619.

commenters have called for at least a two-year phase-in period for these regulations.²⁶⁴ By October 8, 2013, we expect that manufacturers and service providers will be incorporating accessibility features deep within many of their most complex offerings, instead of patching together ad-hoc solutions shortly before enforcement begins.²⁶⁵ Some commenters are concerned that a long phase-in period will leave individuals with disabilities waiting for access to new technologies.²⁶⁶ Although AAPD is correct that many covered entities have been aware of the existence of this rulemaking,²⁶⁷ the specific rules were not in place until now. The Commission is also cognizant of the fact that our new implementing regulations will touch entities not traditionally regulated by this Commission. A phase-in date of October 8, 2013 will give all covered entities the time to incorporate their new obligations into their development processes.²⁶⁸ A two-year phase-in period is also consistent with the Commission's approach in other complex rulemakings, as shown in the chart below:

Commission Proceeding	Phase-in Period
CVAA	2 years
Closed Captioning Requirements for Digital Television ²⁶⁹	2 years

²⁶⁴ See CEA Comments at 39-40; Verizon Comments at 2-3; VON Coalition Comments at 8; CEA Reply Comments at 3-4; CTIA Reply Comments at 4-5; ESA Reply Comments at 22; T-Mobile Reply Comments at 4; CTIA Sept. 30 *Ex Parte* at 1; TIA Sept. 28 *Ex Parte* at 2.

²⁶⁵ See CEA Reply Comments at 5; IT and Telecom RERCs Reply Comments at 2.

²⁶⁶ See, e.g., AAPD Reply Comments at 3-4 (proposing a one-year phase-in period); Letter from Paul W. Schroeder, Vice President, Programs and Policy, AFB, and Mark D. Richert, Director Public Policy, AFB, to Marlene H. Dortch, Secretary, FCC, CG Docket No. 10-213, at 1-2 (filed September 28, 2011) ("AFB Sept. 28 *Ex Parte*"); Letter from Andrew S. Phillips, Policy Attorney, National Association of the Deaf, to Marlene H. Dortch, Secretary, FCC, CG Docket No. 10-213, at 3 (filed September 28, 2011) ("NAD Sept. 28 *Ex Parte*"). See also IT and Telecom RERCs Reply Comments at 4-5.

²⁶⁷ AAPD Reply Comments at 3-4.

²⁶⁸ We believe two years to be consistent with complex consumer electronics development cycles. See, e.g. *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, 11185, ¶¶ 49, 50 (2010) (*Hearing Aid Compatibility FNPRM*).

²⁶⁹ *Closed Captioning Requirements for Digital Television Receivers*, Report and Order, 15 FCC Rcd 16788, 16807, ¶ 56 (2000).

E911 Location Accuracy Requirements ²⁷⁰	5 years
V-chip Implementation ²⁷¹	2 years
Wireless Hearing Aid Compatibility Implementation ²⁷²	4.5 years

111. Also beginning October 8, 2013, the requirements we discuss elsewhere regarding peripheral device compatibility²⁷³ and pass-through of industry standard codes and protocols²⁷⁴ come into effect. The obligation not to impair or impede accessibility or the transmission of accessibility information content through the installation of network, features, functions, or capabilities as clarified above²⁷⁵ also begins October 8, 2013. We also expect covered entities to provide information and documentation about their products and services in accessible formats, as explained earlier, beginning October 8, 2013.²⁷⁶

112. In addition, on October 8, 2013, consumers may begin filing complaints. Prior to that date, the Commission will issue a public notice describing how consumers may file a request for dispute assistance with the CGB Disability Rights Office and informal complaints with the Enforcement Bureau.²⁷⁷ Formal complaints must be filed in accordance with the rules adopted in this *Report and Order*.²⁷⁸ While the CVAA complaint process will not be available to consumers until 2013, we remind industry that it has a current obligation to ensure that telecommunications services and equipment are accessible to and usable by individuals with disabilities. Consumers may file complaints at any time under our existing informal complaint procedures alleging violations of the accessibility requirements for telecommunications manufacturers and service providers under Section 255 of the Communications Act.²⁷⁹ Furthermore, separate from the complaint process, the Disability Rights Office in CGB will be available to assist consumers, manufacturers, service providers and others in resolving concerns about the

²⁷⁰ *Wireless E911 Location Accuracy Requirements*, Report and Order, 22 FCC Rcd 20105, 20112 ¶ 17 (2007), voluntarily vacated, *Rural Cellular Ass'n v. FCC*, 2008 U.S. App. LEXIS 19889 (D.C. Cir. Sept. 17, 2008).

²⁷¹ *Technical Requirements to Enable Blocking of Video Programming based on Program Ratings*, Report and Order, 13 FCC Rcd 11248, 11257, ¶ 23 (1998).

²⁷² *Hearing Aid Compatibility R&O*, 18 FCC Rcd at 16780, ¶ 65.

²⁷³ See Compatibility, Section III.B.3, *infra*.

²⁷⁴ See Accessibility of Information Content, Section III.A.4.d, *supra*.

²⁷⁵ See Network Features, Section III.A.4.c, Accessibility of Information Content, Section III.A.4.d, *supra*.

²⁷⁶ See Manufacturers and Service Providers, Section III.A.4.a, *supra*.

²⁷⁷ See Informal Complaints, Section III.E.2.c, *infra*.

²⁷⁸ See Formal Complaints, Section III.E.2.d, *infra*.

²⁷⁹ 47 C.F.R. § 6.17.

accessibility and usability of advanced communications services and equipment as of the effective date of our rules (*i.e.*, October 8, 2013).²⁸⁰

113. Since ACS manufacturers and service providers must take accessibility into account early in the ACS product development cycle beginning on the effective date of our rules, we anticipate that many ACS products and services with relatively short development cycles will reach the market with accessibility features well before October 8, 2013.

B. Nature of Statutory Requirements

1. Achievable Standard

a. Definitions

(i) Accessible to and Usable by

114. *Background.* 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.²⁸¹ Section 255 of the Act requires telecommunications providers and equipment manufacturers to make their products “accessible to and usable by” people with disabilities if readily achievable.²⁸² In the *Section 255 Report and Order*, the Commission adopted definitions of “accessible” in section 6.3(a) and “usable” in section 6.3(l) of the Commission's rules which incorporated the functional definitions of these terms from the Access Board guidelines.²⁸³ In the *Accessibility NPRM*, the Commission sought comment on whether to continue to define “accessible to and usable by” as it has for its implementation of Section 255, or to make changes to these definitions, based on the Access Board Draft Guidelines that were released for public comment in March 2010.²⁸⁴

115. *Discussion.* Given that commenters generally agree that the Commission's definitions of “accessible” and “usable” in sections 6.3(a) and 6.3(l), respectively, are “well established,” we will continue to define “accessible to and usable by” as the Commission did with regard to implementation of Section 255.²⁸⁵ We agree

²⁸⁰ Consumers may contact the Disability Rights Office by mail, by e-mail to dro@fcc.gov, or by calling 202-418-2517 (voice) or 202-418-2922 (TTY).

²⁸¹ 47 U.S.C. §§ 617(a), (b).

²⁸² 47 U.S.C. § 255.

²⁸³ *Accessibility NPRM*, 26 FCC Rcd at 3164-3165, ¶¶ 82-83. See 47 C.F.R. § 6.3(a) which provides that “[i]nput, control, and mechanical functions shall be locatable, identifiable, and operable...”

²⁸⁴ *Accessibility NPRM*, 26 FCC Rcd at 3164-3165, ¶¶ 82-83. See also Access Board Draft Guidelines.

²⁸⁵ CEA Comments at 29; TIA Comments at 33; Verizon Comments at 13; Wireless RERC Comments at 6; Words+ and Compusult Comments at 29. *But see* VON Coalition Comments at 7 (“when a company makes a good faith reasonable effort to incorporate accessibility features in different products across different lines, it complies with the Act, even if a particular offering is not accessible”). Consistent with most of the record, in Performance Objectives, Section III.D.1, *infra*, we adopt the same approach to implementation that the Commission used with regard to Section 255. In its Reply Comments, the IT and Telecom RERCs disagree with this approach and argue that the requirements in Part 6 of the Commission's (continued....)

with the Wireless RERC that this approach will “reduce both the potential for misunderstanding as well as the regulatory cost of compliance” and promote “the objective of consistency.”²⁸⁶ We also plan to draw from the Access Board’s guidelines once they finalize them.²⁸⁷

116. While we note that there is a great deal of overlap between Section 255’s definition of “accessible” and the criteria outlined in the Access Board Draft Guidelines, at this time, we are unable to incorporate the Access Board’s draft definitions of “accessible” or “usable” into both our Section 255 rules and our Section 716 rules because the Access Board’s process for developing guidelines is not complete.²⁸⁸ Once the Access Board Draft Guidelines are complete, the Commission may revisit its definitions of “accessible” and “usable” and harmonize them with the Access Board’s final definitions, to the extent there are differences.

(ii) Disability

117. *Background.* Section 3(18) of the Act states that the term “disability” has the meaning given such term under Section 3 of the ADA.²⁸⁹ 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 . . .”²⁹⁰ In the *Accessibility NPRM*, the Commission sought comment on whether we should incorporate the ADA’s definition of disability in our Section 716 rules.²⁹¹

118. *Discussion.* Having received only one comment²⁹² on this issue and finding that our current rules incorporate the definition of “disability” from Section 3 of the ADA, we adopt this definition, as proposed, in our Section 716 rules as well.²⁹³ To provide additional guidance to manufacturers and service providers, as the Commission did in the *Section 255 Report and Order*, we note that the statutory reference to

(Continued from previous page) _____
rules should be reframed as goals and testable performance criteria. IT and Telecom RERCs Reply Comments at 5. In the *Further Notice*, we seek comment on the general approach and the specific testable performance criteria suggested by the IT and Telecom RERCs. See Performance Objectives, Section IV.F, *infra*.

²⁸⁶ Wireless RERC Comments at 6. *See also* Verizon Comments at 13.

²⁸⁷ *See* further discussion of their guidelines at Compatibility, Section III.B.3; Performance Objectives, Section III.D.1; Prospective Guidelines, Section III.D.3, *infra*.

²⁸⁸ CEA Comments at 29; Verizon Comments at 13; TIA Comments at 33.

²⁸⁹ 47 U.S.C. § 153(18).

²⁹⁰ 42 U.S.C. § 12102(1).

²⁹¹ *Accessibility NPRM*, 26 FCC Rcd at 3165, ¶ 84.

²⁹² UC Comments at 22-23 (arguing that the CVAA should apply to people with cognitive disabilities).

²⁹³ 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 Congress amended the ADA in 2008 to clarify the definition of “being regarded as having such an impairment” and to provide rules of construction regarding the definition of disability. *See* ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (2008).

“individuals with disabilities” includes people with hearing, vision, movement, manipulative, speech, and cognitive disabilities.²⁹⁴ The definition of “disability,” however, is not limited to these specific groups. Determinations of whether an individual has a disability are decided on a case-by-case basis.

b. General Approach

119. *Background.* The CVAA requires that service providers and manufacturers meet the accessibility requirements of Section 716 “unless [those requirements] are not achievable.”²⁹⁵ Section 716(g) of the Act defines the term “achievable” to mean “with reasonable effort or expense, as determined by the Commission.”²⁹⁶ Section 716 imposes a different standard than Section 255. Specifically, under Section 255, covered entities must ensure the accessibility of their products and services if it is “readily achievable” to do so, which the statute defines, with reference to the ADA, to mean “easily accomplishable and able to be carried out without much difficulty or expense.”²⁹⁷

120. With respect to Section 716(g), the CVAA 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 section [716(g)] 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.²⁹⁸

121. The Senate and House Reports both state that the Commission should “weigh each factor equally when making an achievability determination.”²⁹⁹ The House Report states that, in implementing Section 716, the Commission should “afford

²⁹⁴ See *Section 255 Report and Order*, 16 FCC Rcd at 6428-6429, ¶ 20.

²⁹⁵ 47 U.S.C. §§ 617(a)(1), (b)(1). See *Accessibility NPRM*, 26 FCC Rcd at 3158, ¶ 67. In the accompanying *Further Notice* we propose to exempt certain small businesses from the requirement to perform an achievability analysis. See Section IV.A, *infra*. While that aspect of the *Further Notice* is pending, we will apply the small business exemption on an interim basis. See *Exemptions for Small Entities – Temporary Exemption of Section 716 Requirements*, Section III.C.3, *infra*.

²⁹⁶ 47 U.S.C. § 617(g).

²⁹⁷ 47 U.S.C. § 255(a)(2); 42 U.S.C. § 12181(9).

²⁹⁸ 47 U.S.C. § 617(g).

²⁹⁹ Senate Report at 8; House Report at 25. See *Accessibility NPRM*, 26 FCC Rcd at 3158, ¶ 69.

manufacturers and service providers as much flexibility as possible, so long as each does everything that is achievable in accordance with the achievability factors.”³⁰⁰

122. *Discussion.* As provided in the CVAA and its legislative history, we adopt the Commission’s proposal in the *Accessibility NPRM* to limit our consideration of achievability to the four factors specified in Section 716³⁰¹ and to weigh each factor equally³⁰² when considering whether accessibility is not achievable. We agree with AFB that the CVAA requires covered entities to make their products accessible unless it is “not achievable” to do so and that the Section 716 standard is different from the Section 255 “readily achievable” standard.³⁰³

123. We will be applying the four achievability factors in the complaint process in those cases in which a covered entity asserts that it was “not achievable” to make its equipment or service accessible. Thus, as proposed by AT&T and supported by many of the commenters,³⁰⁴ we will be taking a flexible, case-by-case approach to the determination of achievability. We reject the suggestion by Words+ and Compusult that the Commission should evaluate products and services on a category-by-category basis.³⁰⁵ The approach suggested by Words+ and Compusult would not be consistent with the four factors mandated by Congress.³⁰⁶ We also share the concerns expressed by

³⁰⁰ House Report at 24.

³⁰¹ See CTIA Comments at 24; TechAmerica Comments at 6; TIA Comments at 15; T-Mobile Reply Comments at 11.

³⁰² See CEA Comments at 21; CTIA Comments at 25; T-Mobile Comments at 9; CEA Reply Comments at 12; T-Mobile Reply Comments at 11.

³⁰³ 47 U.S.C. §§ 255, 617(g). See AFB Reply Comments at 11. ACB suggests adding seven more factors to the achievability analysis. These proposed factors, which address the commitment of the manufacturer or service provider to achieving accessibility, include (1) engagement of upper level executives; (2) the budgeting process for accessibility as compared to the overall budget; (3) consideration of accessibility early in the planning process; (4) covered entity devotion of personnel during planning stages to achieving accessibility; (5) inclusion of people with disabilities in testing; (6) devotion of resources to the needs of people with disabilities; and (7) record of delivering accessible products and services. ACB Reply Comments at 25-26. While we do not adopt these as additional achievability factors, we do believe they are useful guidance that will help covered entities meet their obligations under the statute.

³⁰⁴ AT&T Comments at 9; CEA Comments at 21; TechAmerica Comments at 6; TIA Comments at 15; T-Mobile Comments at 9. *Accord*, CTIA Comments at 26 (Commission should interpret the four factors “with the goal of promoting the development and deployment of new advanced communications services”); CEA Reply Comments at 13; T-Mobile Reply Comments at 10-11.

³⁰⁵ Words+ and Compusult Comments at 21. Words+ and Compusult are concerned that the Commission will not be able to evaluate the many products that are introduced each year. This will not be necessary, since the Commission will be evaluating only those products that are the subject of a complaint.

³⁰⁶ See, e.g., Achievable Standard, Section III.B.1, *infra*, discussing the specific factors the Commission will consider when determining achievability, including the nature and cost of the steps needed with respect to the specific equipment or service in question.

NFB and supported by the Consumer Groups³⁰⁷ that flexibility should not be so paramount that accessibility is never achieved.

124. We note that nothing in the statute limits the consideration of the achievability of accessibility to the design and development stage. While we believe in many instances, accessibility is more likely to be achievable if covered entities consider accessibility issues early in the development cycle, there may be other “natural opportunities” for consideration of accessibility.³⁰⁸ Natural opportunities to assess or reassess the achievability of accessibility features may include, for example, the redesign of a product model or service, new versions of software, upgrades to existing features or functionalities, significant rebundling or unbundling of product and service packages, or any other significant modification that may require redesign.³⁰⁹ We agree with Consumer Groups that new versions of software or services or new models of equipment must be made accessible unless not achievable and “that this burden is not discharged merely by having shown that accessibility is not achievable for a previous version or model.”³¹⁰

125. We expect that accessibility will be considered throughout the design and development process and that during this time “technological advances or market changes” may “reduce the effort and/or expense needed to achieve accessibility.”³¹¹ We reject CTIA’s argument that requiring manufacturers and service providers to reassess the accessibility of products and services at key development stages would result in companies refraining from issuing new versions of their products.³¹² Beyond this conclusory statement, nothing in the record supports this contention. We note that no party has asserted that the identical requirement in the Section 255 context hampered innovation and competition, and there appears to be no reason to believe that it will have such an impact here.

126. Consistent with both the *Section 255 Report and Order*³¹³ and the legislative history of the CVAA,³¹⁴ Section 716 does not require manufacturers of equipment to recall or retrofit equipment already in their inventories or in the field. In addition, consistent with our Section 255 implementation, cosmetic changes to a product or service may not trigger a manufacturer or service providers’ reassessment.³¹⁵

³⁰⁷ NFB Reply Comments to *October Public Notice* at 6; Consumer Groups Comments at 16.

³⁰⁸ See *Section 255 Report and Order*, 16 FCC Rcd at 6447, ¶ 71.

³⁰⁹ If, however, a covered entity is required by the Commission to make the next generation of a product or service accessible as a result of an enforcement proceeding, an achievability analysis may not be used for the purpose of determining that such accessibility is not achievable.

³¹⁰ Consumer Groups Comments at 17. See also *Section 255 Report and Order*, 16 FCC Rcd at 6447, ¶ 71.

³¹¹ Consumer Groups Comments at 17; IT and Telecom RERCs Reply Comments at 2.

³¹² CTIA Reply Comments at 23.

³¹³ *Section 255 Report and Order*, 16 FCC Rcd at 6448, ¶ 73.

³¹⁴ Senate Report at 9.

³¹⁵ *Section 255 Report and Order*, 16 FCC Rcd at 6448, ¶ 72.

c. Specific Factors

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

127. *Background.* 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 this section [716(g)] with respect to the specific equipment or service in question.”³¹⁶ Both the Senate and House Reports stress the need for the Commission to focus on the specific equipment or service in question when conducting this analysis.³¹⁷ The House Report also states that “the Commission [should] interpret the accessibility requirements in this provision the same way as it did for Section 255, such that if the inclusion of a feature in a product or service results in a fundamental alteration of that service or product, it is *per se* not achievable to include that feature.”³¹⁸ Accordingly, in the *Accessibility NPRM*, the Commission sought comment on its proposal to interpret the achievability requirements consistent with this directive.³¹⁹ The Commission also sought comment on whether competing products should be considered when determining achievability and the totality of the steps a company needs to take for an achievability analysis.³²⁰

128. *Discussion.* Consistent with the House Report, we find that if the inclusion of an accessibility feature in a product or service results in a fundamental alteration of that product or service, then it is *per se* not achievable to include that accessibility function.³²¹ We find that the most appropriate definition of “fundamental alteration” can be found in the *Section 255 Report and Order*, where the Commission defined it to mean “reduce substantially the functionality of the product, to render some features inoperable, to impede substantially or deter use of the product by individuals without the specific disability the feature is designed to address, or to alter substantially and materially the shape, size or weight of the product.”³²² We caution, however, that in many cases, features such as voice output can be added in ways that do not fundamentally alter the product, even if earlier versions of the product did not have that capability.³²³ Since all accessibility enhancements in one sense require an alteration to the design of a product or service,³²⁴ not all changes to a product or service will be considered

³¹⁶ 47 U.S.C. § 617(g)(1). See *Accessibility NPRM*, 26 FCC Rcd at 3159, ¶ 71.

³¹⁷ Senate Report at 8; House Report at 25.

³¹⁸ House Report at 24-25.

³¹⁹ *Accessibility NPRM*, 26 FCC Rcd at 3158-3159, ¶ 69.

³²⁰ *Accessibility NPRM*, 26 FCC Rcd at 3159-3160, ¶ 71.

³²¹ See House Report at 24-25. See also CEA Comments at 21; IT and Telecom RERCs Comments at 21; ITI Comments at 10; NCTA Comments at 6; TechAmerica Comments at 6; TIA Comments at 15.

³²² *Section 255 Report and Order*, 16 FCC Rcd at 6444, ¶ 62. See also IT and Telecom RERCs Comments at 21.

³²³ See IT and Telecom RERCs Comments at 21.

³²⁴ *Section 255 Report and Order*, 16 FCC Rcd at 6444, ¶ 62.

fundamental alterations. Rather, the alteration to the product or service must be *fundamental* for the accessibility feature to be considered *per se* not achievable. As we explained in the *Section 255 Report and Order*, “the ‘fundamental alteration’ doctrine is a high standard and . . . the burden of proof rests with the party claiming the defense.”³²⁵

129. We disagree with those commenters that argue that we should not consider whether accessibility has been achieved by competing products in determining whether accessibility is achievable under this achievability factor.³²⁶ Rather, if an accessibility feature has been implemented for competing products or services, we find that such implementation may serve as evidence that implementation of the accessibility feature is achievable.³²⁷ To ignore such evidence would deprive the Commission of a key element of determining whether achievability is possible. We note, however, that a covered entity may rebut such evidence by demonstrating that the circumstances of the product or service offered by that particular entity renders the feature not achievable.³²⁸ We will consider all relevant evidence when considering the nature and cost of the steps necessary to achieve accessibility for the particular device or service for the particular covered entity.

130. We also reject CEA’s assertion that this factor requires us to consider “the entire cost of implementing the required accessibility functionality relative to the production cost of the product.”³²⁹ Under the first factor, the Commission is required to consider the *cost* of the steps needed to meet the requirements of this section with respect to the specific equipment or service in question. The first factor, however, does not provide that the costs should be compared to the production cost of the product; indeed, the factor does not provide for a comparison of the costs at all. As explained further below, this inquiry more directly fits under the second factor, which examines directly the economic impact of the cost of the accessibility features.

(ii) Technical and Economic Impact on the Operation

131. *Background.* The second factor in determining whether compliance with Section 716 is “achievable” requires the Commission to consider the “technical and economic impact on the operation of the manufacturer or provider and on the operation of

³²⁵ *Section 255 Report and Order*, 16 FCC Rcd at 6444, ¶ 62. Although we are applying the fundamental alteration doctrine to the achievability analysis as a matter of policy adopted herein, we conform the rule definition of achievability as proposed in Appendix B of the *Accessibility NPRM* to the text of the CVAA, 47 U.S.C. § 617(g)(1), by deleting the discussion of fundamental alteration from the rule text. See Appendix B, *infra*.

³²⁶ CEA Comments at 22 (to do otherwise would force standardization on proprietary technologies, in violation of the CVAA § 3 prohibition on mandating proprietary technology); TechAmerica Comments at 7; TIA Comments at 15-16; T-Mobile Comments at 3, 9-10. See also Verizon Comments at 11; CEA Reply Comments at 12-13; T-Mobile Reply Comments at 10-11.

³²⁷ See Words+ and Compusult Comments at 23.

³²⁸ See T-Mobile Comments at 10.

³²⁹ CEA Comments at 22. See also TechAmerica Comments at 7; Verizon Comments at 11.

the specific equipment or service in question, including on the development and deployment of new communications technologies.”³³⁰ The *Accessibility NPRM* sought comment on ACB’s suggestion that the Commission should compare the cost of making the product accessible with the organization’s entire budget when making assessments.³³¹ It also sought comment on how it should take into account the development and deployment of new communications technologies.³³²

132. *Discussion.* We find that to determine the “economic impact of making a product or service accessible on the operation of the manufacturer or provider,”³³³ it will be necessary to consider both the costs of making a product or service accessible and an entity’s total gross revenues.³³⁴ Consistent with the *Section 255 Report and Order*, we will consider the total gross revenues of the entire enterprise and will not limit our consideration to the gross revenues of the particular subsidiary providing the product or service.³³⁵ CEA argues that the Commission should not be able to consider an entity’s entire budget in evaluating the cost of accessibility because Congress dropped from the final version of the statute a fifth achievability factor which specifically considered “the financial resources of the manufacturer or provider.”³³⁶ We disagree. CEA does not suggest a reason why Congress eliminated this language and does not address the possibility that Congress may have found the factor to be redundant in light of the fact that under the second factor we consider the “economic impact on the operation of the manufacturer or provider.”³³⁷

133. We agree with TIA that some new entrants may not initially have the resources to incorporate particular accessibility features into their products immediately.³³⁸ All covered entities should examine the technical and economic impact on their operations of achieving accessibility, as stated in the language of Section

³³⁰ 47 U.S.C. § 617(g)(2). See Senate Report at 8; House Report at 25.

³³¹ *Accessibility NPRM*, 26 FCC Rcd at 3160, ¶ 71. See also IT and Telecom RERCs Comments at 22-23 (supports ACB); Words+ and Compusult Comments at 23 (supports ACB); ACB Reply Comments at 25. While ACB originally made this argument with respect to first factor, for the reasons explained in the paragraph above, we believe this argument is more appropriately considered under the second factor.

³³² *Accessibility NPRM*, 26 FCC Rcd at 3160, ¶ 72.

³³³ 47 U.S.C. § 617(g)(2).

³³⁴ See TechAmerica Comments at 8; Words+ and Compusult Comments at 23. Cf. ACB Reply Comments at 27 (accessibility is not achievable if the cost of accessibility as compared to the organization’s entire budget is extraordinary).

³³⁵ See *Section 255 Report and Order*, 16 FCC Rcd at 6445-6447, ¶ 70 (“[E]valuate the resources of any parent company, or comparable entity with legal obligations to the covered entity, but permit any covered entity (or parent company) to demonstrate why legal or other constraints prevent those resources from being available to the covered entity.”).

³³⁶ CEA Comments at 11.

³³⁷ 47 U.S.C. § 617(g)(2).

³³⁸ TIA Comments at 16.

716(g)(2).³³⁹ The need to provide an accessibility feature, however, can have a greater impact on a smaller entity than a larger one. In other words, the provision of a particular feature may have negligible impact on a large company but may not be achievable with reasonable effort or expense for a small business.³⁴⁰

134. Some commenters argue that the Commission should consider the cost of implementing accessibility relative to the production cost of the product.³⁴¹ CEA suggests that if the cost of accessibility significantly raises the cost of a particular device, it may result in overpricing the device for consumers, which could result in fewer devices being purchased.³⁴² Similarly, TechAmerica argues that if the cost of an accessibility feature exceeds the cost of having the product in the marketplace, then that accessibility feature is *per se* not achievable.³⁴³ We decline to adopt this *per se* approach. The Commission does recognize, however, that if the nature and cost of the steps needed for accessibility would have a substantial negative technical or economic impact on the ability to produce a product or service, that fact may be taken into consideration when conducting the overall achievability analysis. To completely ignore this fact altogether could discourage manufacturers and service providers from introducing new and innovative products that, for some reason, would require extremely costly accessibility features relative to the cost of the product. Congress's balanced approach in the statute, including its desire to refrain from hampering innovation and investment in technology, require us to consider the cost of accessibility relative to the cost of producing a product in certain situations.

³³⁹ 47 U.S.C. § 617(g)(2). See CEA Comments at 24. We reject the proposals that the economic impact must result in “extraordinary loss of profit” or “undue hardship” for the accessibility feature to be not achievable. See ACB Reply Comments at 27; Coleman Institute and Samuelson-Glushko TLPC Reply Comments at 22. These proposals go well beyond the CVAA’s definition of “achievable” as meaning “with reasonable effort or expense.” 47 U.S.C. § 617(g).

³⁴⁰ For example, a small start up manufacturer may not have the resources to evaluate all the design considerations that must be considered to make a potential product accessible, even though a larger manufacturer might have the resources to do so as a matter of course. A smaller service provider looking for accessible customer premises equipment to provide to its customers may find that the models with accessibility features are available only to larger service providers, or if they are available to the smaller provider, the acquisition price is considerably higher than the price for a larger carrier, thereby rendering such devices cost prohibitive for the smaller provider. Similarly, while a larger service provider may perform as a matter of course a network upgrade that would include the addition of accessibility features, it may not be achievable with reasonable effort or expense for a smaller service provider to perform a similar network upgrade, either because the upgrade is not yet available to the smaller provider or it is cost-prohibitive to the company at that time.

³⁴¹ See CEA Comments at 22-23; TechAmerica Comments at 7; Verizon Comments at 11. Such cost comparisons may be inappropriate given the flexibility permitted under Section 716 to either build the accessibility feature into every product produced or to rely on third-party solutions made available to consumers at nominal cost on a per-product basis.

³⁴² CEA Comments at 23.

³⁴³ TechAmerica Comments at 8.

135. In its comments, ITI proposes that manufacturers and service providers should be given the flexibility to make necessary adjustments during the testing stage prior to fully incorporating accessibility technology. According to ITI, to do otherwise would result in one set of accessibility features for the beta version of a product, and then a second, different set of accessibility features for the final version.³⁴⁴ The VON Coalition argues that manufacturers of devices used for ACS and providers of ACS should not be subject to the CVAA with respect to products they are testing.³⁴⁵ We find that, if a covered entity is testing accessibility features along with the other functions of the product or service, to the extent the beta testing reveals that the accessibility features need modification to work properly, then under such circumstances, accessibility would not be fully achievable at the beta stage but would be considered achievable once the modifications are implemented for the final product design.³⁴⁶ We will not take enforcement action against a manufacturer or service provider in regard to the accessibility of products and services that are being beta tested. We will, however, carefully examine any claim that a product or service is in beta. If it appears that a covered entity is keeping a product or service in beta testing status and/or making it available to the general public for extended periods of time as a means of avoiding accessibility obligations, we will enforce Section 716 with respect to that product or service.

(iii) Type of Operations

136. *Background.* 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.”³⁴⁷ 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.”³⁴⁸ The Commission sought comment on the extent to which it should consider an entity’s status as a new entrant in the advanced communications services market in evaluating achievability and whether the Commission’s analysis would be different if such entity has significant resources or otherwise appears capable of achieving accessibility.³⁴⁹

137. *Discussion.* Consistent with the legislative history,³⁵⁰ we will take into consideration whether a covered entity has experience in the advanced communications

³⁴⁴ ITI Comments at 22.

³⁴⁵ VON Coalition Sept. 6 *Ex Parte* at 5.

³⁴⁶ See OnStar Comments at 8; CEA Reply Comments at 5.

³⁴⁷ 47 U.S.C. § 617(g)(3).

³⁴⁸ Senate Report at 8; House Report at 25-26.

³⁴⁹ *Accessibility NPRM*, 26 FCC Rcd at 3160, ¶ 73.

³⁵⁰ Senate Report at 8; House Report at 25-26.

services market or related markets when conducting an achievability analysis.³⁵¹ We disagree with Words+ and CompuSult's argument that this factor will necessarily provide a competitive advantage to a new entrant.³⁵² All companies that do not qualify for the small business exemption, whether new entrants or incumbents, must engage in an achievability analysis. All companies are required to provide accessibility unless it cannot be done "with reasonable effort or expense."³⁵³ Given the multitude of factors that affect a company's prospects in the marketplace, we do not see much of a competitive advantage arising from the ability of a new entrant to assert this third factor as a defense to a complaint.

138. The degree to which this factor affects a finding of achievability will depend upon a number of considerations. We agree with CEA that the Commission should give little weight to whether a new entrant has experience in other unrelated markets.³⁵⁴ In this regard, we consider the various telecommunications and information technology markets to be related. We agree with T-Mobile that because each service provider has different technical, financial, and personnel resources, with different business models and distinct technology configurations and platforms, this factor requires that we look at each company individually when we consider the impact on the operation of the covered entity of providing the accessibility feature.³⁵⁵

139. In addition, as suggested by the IT and Telecom RERCs and ACB, when applying this factor, we will take into consideration the size of the company.³⁵⁶ We agree that a small start-up company, which may need time to develop its financial resources and learn the field and its requirements, should be treated differently than a larger company with the resources available to more rapidly achieve accessibility features.³⁵⁷ While we reject TIA's suggestion that the size of the company should not matter when applying this factor,³⁵⁸ we agree with TIA that a company's size alone is not a proxy for determining whether accessibility can be achieved.³⁵⁹ Consistent with the legislative

³⁵¹ See CEA Comments at 24; TechAmerica Comments at 8 (taking into consideration a covered entity's status as a comparatively new market entrant in the advanced communications services marketplace will ensure that nascent and groundbreaking products and services are not unnecessarily hindered); TIA Comments at 16.

³⁵² Words+ and CompuSult Comments at 24.

³⁵³ 47 U.S.C. § 617(g).

³⁵⁴ See CEA Comments at 49.

³⁵⁵ T-Mobile Comments at 10.

³⁵⁶ See IT and Telecom RERCs Comments at 23; ACB Reply Comments at 26. As explained in the prior subsection, we will consider the total gross revenues of the entire enterprise and not limit our consideration to the gross revenues of the particular subsidiary providing the product or service.

³⁵⁷ See IT and Telecom RERCs Comments at 23.

³⁵⁸ TIA Comments at 16-17.

³⁵⁹ See TIA Comments at 16-17.

history, we find that the existence of substantial financial resources does not, by itself, trigger a finding of achievability.³⁶⁰

(iv) Extent to which Accessible Services or Equipment are Offered with Varying Functionality, Features, and Prices

140. *Background.* 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.”³⁶¹ The Senate and House Reports state that “the Commission [should] interpret this factor in a similar manner to the way that it has implemented its hearing aid compatibility rules.”³⁶² 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 complies with the HAC standards. Specifically, those rules direct such companies to ensure that hearing aid users are able to select “from a variety of compliant handset models with varying features and prices.”³⁶³ Companies are not, however, required to make all wireless handsets hearing-aid compatible.

141. In the *Accessibility NPRM*, the Commission sought 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.³⁶⁴ At the same time, the Commission also sought comment on whether there are some accessibility features that are so important or easy to include (like a “nib” on the 5 key)³⁶⁵ that they should be deployed on every product, unless it is not achievable to do so.³⁶⁶ Finally, the Commission sought comment on

³⁶⁰ See House Report at 25.

³⁶¹ 47 U.S.C. § 617(g)(4). See also Senate Report at 8; House Report at 26; *Accessibility NPRM*, 26 FCC Rcd at 3160, ¶ 74.

³⁶² House Report at 26; Senate Report at 8.

³⁶³ *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 3424, ¶ 47.

³⁶⁴ *Accessibility NPRM*, 26 FCC Rcd at 3161, ¶ 76.

³⁶⁵ 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.

³⁶⁶ *Accessibility NPRM*, 26 FCC Rcd at 3161-3162, ¶ 76.

whether it should define with more specificity the meaning of “varying degrees of functionality and features” and “differing price points.”³⁶⁷

142. *Discussion.* To satisfy the fourth achievability standard, a covered entity is required by the CVAA to offer people with each type of disability³⁶⁸ accessibility features within a line of products that includes the full range of functionality within the product line as well as a full range of prices within the product line, if achievable.³⁶⁹ We interpret the plain language of the statute and legislative history to mean that covered entities generally need not 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.³⁷⁰

143. Furthermore, to satisfy this factor, offering the full range of accessible products with varying degrees of functionality and features at different price points must be done effectively. We acknowledge the concern expressed by the IT and Telecom RERCs in their comments that company-chosen sets of devices to be made accessible may not provide good representation of the range of products offered by the company, and as a result, accessible versions may not always appear in stores, may not always be available as part of bundles, may be more expensive and difficult to obtain than the comparable non-accessible products, may not always represent the full range of features and prices available to everyone else, may not always be supported by employers and their information technology departments, and may not always be available in certain parts of the country.³⁷¹

144. Because Section 716(g)(4) specifically calls for “varying degrees of functionality and features, and offered at differing price points,”³⁷² we emphasize that accessibility features must be made available within a line of products that includes the

³⁶⁷ In particular, the Commission sought 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.” ACB Reply Comments to *October Public Notice* at 13. See *Accessibility NPRM*, 26 FCC Rcd at 3162, ¶ 76.

³⁶⁸ This includes people with multiple disabilities.

³⁶⁹ See ACB Reply Comments at 30-33; AFB Reply Comments at 11; Consumer Groups Reply Comments at 2-4.

³⁷⁰ See 47 U.S.C. § 617(g)(4). Although a range of accessible products with varying degrees of functionality and features, at differing price points must be offered across a product line for people with the full range of disabilities if achievable, in the context of a complaint proceeding, only the facts of the complaint will be considered. In other words, a complaint proceeding will not consider the accessibility of a product for types of disabilities that are not the subject of the complaint.

³⁷¹ See IT and Telecom RERCs Comments at 24. See also AFB Reply Comments at 12 (if a full range of accessible products is not available, and only top-of-the-line products are accessible, a company should offer at least one accessible alternative at no additional cost beyond the cost for the level of product desired by the customer with a disability).

³⁷² 47 U.S.C. § 617(g)(4).

full range of functionality and prices for that line of products.³⁷³ In other words, if a line of products includes low-end products, it is just as important that low-end products and services be accessible as high-end products and services if achievable.³⁷⁴

145. We decline to mandate ACB's proposal that, for the purpose of making available a range of devices that fit various price ranges along with corresponding accessible features, the devices may be divided into classes, making certain that each class has at least one option that is fully accessible.³⁷⁵ We agree with CEA that mandating such a proposal would be unworkable for some manufacturers and service providers, given that technology and consumer preferences are constantly evolving.³⁷⁶

146. We also share the concern expressed by Words+ and Compusult that the fourth achievability factor not be interpreted in a way that would result in people with disabilities needing to purchase multiple devices to obtain all the disability features that they require.³⁷⁷ We find that a reasonable interpretation of Sections 716(g)(4) and 716(j)³⁷⁸ calls for the bundling of features within a single device to serve a particular type of disability, if achievable. For example, if a series of features, such as a screen reader and a voice interactive menu, were required to be bundled into the same device to render the device accessible to people who are blind, then a common sense interpretation of the statute would require that these features be bundled together if achievable under the four factors.

147. We find that ITI misunderstands Sections 716(g)(4) and 716(j) when it asserts that covered entities are compliant "so long as some reasonable subset of features and services are accessible,"³⁷⁹ because such an approach could result in lack of accessibility over the full range of functionality and prices. After carefully considering Section 716(j), we find a more reasonable interpretation to be that there may be some devices with accessibility features for people with one type of disability, different devices with accessibility features for people with other types of disabilities, and yet other

³⁷³ We therefore reject ITI's assertion that Section 716(g)(4) along with Section 716(j) are to be read to mean the covered entities are compliant "so long as some reasonable subset of features and services are accessible." ITI Comments at 10. We are concerned that ITI's reading of the CVAA would result in lack of accessibility over the full range of functionality and prices.

³⁷⁴ We therefore reject CEA's assertion that mandating a fully accessible low-end device is outside the scope of the CVAA and is not economically viable. See CEA Comments at 26.

³⁷⁵ See ACB Comments to *October Public Notice* at 13; ACB Reply Comments at 30-31. See also IT and Telecom RERCs Comments at 23-24.

³⁷⁶ See CEA Comments at 25-26. See also TechAmerica Comments at 8-9; TIA Comments at 18; CEA Reply Comments at 13.

³⁷⁷ See Words+ and Compusult Comments at 25.

³⁷⁸ The Section 716(j) Rule of Construction provides that "[t]his section [716] 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).

³⁷⁹ ITI Comments at 10.

devices that are not accessible because accessibility is not achievable for those particular devices or because the entity offers a full range of accessible products with varying degrees of functionality and features, at differing price points to discharge its responsibility under Section 716.³⁸⁰ In other words, Section 716(j) provides a rule of reason when interpreting Section 716(g).

148. We decline at this time to designate a list of accessibility features that are easy to achieve.³⁸¹ Not only would such a list become outdated very quickly,³⁸² but it is impossible to assume that any given accessibility feature would be easy to achieve for every device or service.³⁸³ Nevertheless, we strongly encourage, but do not require, all covered entities to offer accessibility features that are easy to achieve with every product.³⁸⁴ By way of example, AFB suggests that audible output of menu functions and on-screen text is easy to achieve.³⁸⁵ Although the record is insufficient to determine whether AFB's assertion is accurate, if a covered entity finds during the course of its achievability analysis that audible output of menu functions and on-screen text is easy to achieve in all of its products, we would encourage the covered entity to install audible output of menu functions and on-screen text in those products. Voluntary universal deployment of accessibility features that are easy to achieve as products evolve will further enable the maximum number of people with disabilities to enjoy access to products that people without disabilities take for granted.

2. Industry Flexibility

149. *Background.* Sections 716(a)(2) and (b)(2) of the Act provide manufacturers and service providers flexibility on how to ensure compliance with the accessibility requirements of the CVAA.³⁸⁶ Specifically, a manufacturer or service provider may comply with these requirements either by building accessibility features

³⁸⁰ See ACB Reply Comments at 31-32. See also AFB Reply Comments at 11 (for a company to successfully argue that the Commission is out of step with section 716(j), the company must prove that compliance is required with respect to all of the company's products and that all of those products are being required to address all disabling conditions); cf. ITI Comments at 10 ("[I]t may not be possible to make ACS accessible to every class of people with disabilities at this time.")

³⁸¹ See CEA Comments at 25 (mandatory list would undermine the flexibility intent of the CVAA); CTIA Comments at 25-26 (such a list would be contrary to both the Section 716(g) achievability factors and the Section 716(j) rule of construction); IT and Telecom RERCs Comments at 23; TIA Comments at 18. *Contra* Words+ and Compusult Comments at 25; AAPD Reply Comments at 6.

³⁸² See CEA Comments at 25; CTIA Comments at 25-26; IT and Telecom RERCs Comments at 23; CEA Reply Comments at 13; Green Reply Comments at 7 (regulations requiring certain types of tools to be built-in will risk the result of reducing competition and incentives for application developers).

³⁸³ See CTIA Comments at 25-26.

³⁸⁴ IT and Telecom RERCs Comments at 23. For example, a nib on a 5 key would be easy to achieve for physical keys, *Accessibility NPRM*, 26 FCC Rcd at 3161, ¶ 76 and n.222, but appears not to be achievable at this time in the case of a touch screen. CTIA Comments at 26.

³⁸⁵ AFB Reply Comments at 11.

³⁸⁶ 47 U.S.C. § 617(a)(2), (b)(2). See *Accessibility NPRM*, 26 FCC Rcd at 3162, ¶ 77.

into the equipment or service or by “using third party applications, peripheral devices, software, hardware, or customer premises equipment that is available to consumers at nominal cost and that individuals with disabilities can access.”³⁸⁷ 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.”³⁸⁸

150. *Discussion.* As urged by several commenters, we confirm that Section 716 allows covered entities the flexibility to provide accessibility through either built-in solutions or third-party solutions, so long as the third-party solutions are available at nominal cost to consumers.³⁸⁹ As suggested by TIA, we find that manufacturers and service providers should be able to rely on a wide range of third-party accessibility solutions and whether such solutions meet the accessibility requirements should be decided on a case-by-case basis.³⁹⁰ Moreover, by putting the decision in the hands of the manufacturers and service providers – those who are in the best position to determine the most economical manner of compliance – we ensure that the aims of the statute will be met in the most cost-effective manner. At the same time, we encourage such manufacturers and service providers who wish to use third party accessibility solutions, to consult with people with disabilities about their accessibility needs because these individuals will be best equipped to provide guidance on which third-party accessibility solutions will be able to meet those needs. Consultation with the disability community will best achieve effective and economical accessibility solutions.

151. The Commission acknowledged in the *Accessibility NPRM* that “universal design,” which is “a concept or philosophy for designing and delivering products and services that are usable by people with the widest possible range of functional capabilities, which include products and services that are directly accessible (without requiring assistive technologies), and products and services that are interoperable with assistive technologies,”³⁹¹ will continue to play an important role in providing accessibility for people with disabilities. At the same time, the Commission acknowledged that, while Section 255 had relied primarily on universal design principles, the industry flexibility provisions of the CVAA reflect that there are new ways to meet

³⁸⁷ 47 U.S.C. § 617(a)(2), (b)(2).

³⁸⁸ House Report at 24.

³⁸⁹ 47 U.S.C. §§ 617(a)(2), (b)(2); *Accessibility NPRM*, 26 FCC Rcd at 3162, ¶ 77. See CEA Comments at 26-27; CTIA Comments at 27; TIA Comments at 19; T-Mobile Comments at 11; Verizon Comments at 12; AAPD Reply Comments at 3; CEA Reply Comments at 14. *Contra* ACB Reply Comments at 34 (built-in solutions should be the priority when technical factors do not prohibit those solutions). See also ITI Comments at 6 (“Where built-in AT is not achievable, the consumer is best served by rules that recognize the value of third-party AT providers. . .”).

³⁹⁰ TIA Comments at 21. See also Green Reply Comments at 8 (the flexibility for the developer to determine what applications to bundle with the operating system and what applications to leave to the secondary marketplace will allow individuals with disabilities to choose the best device for their needs and allow personalization over time).

³⁹¹ 29 U.S.C. § 3002(a)(19). See *Section 255 Report and Order*, 16 FCC Rcd at 6441, ¶ 50, n.138, citing Pub. L. No. 105-394, § 3(a)(17), November 13, 1998 (Assistive Technology Act of 1998).

the needs of people with disabilities that were not envisioned when Congress passed Section 255.³⁹² We agree with Consumer Groups that new and innovative technologies may now be able to more efficiently and effectively meet individual needs by personalizing services and products, than services and products built to perform in the same way for every person.³⁹³ Accordingly, as supported by several commenters, we affirm that the Commission should afford manufacturers and service providers as much flexibility to achieve compliance as possible,³⁹⁴ so long as each does everything that is achievable in accordance with the achievability factors.³⁹⁵

152. As supported by several commenters, we adopt the Commission's proposal in the *Accessibility NPRM* 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.'" ³⁹⁶ We will apply this definition in accordance with the proposal submitted by AFB that in considering whether the cost to the consumer is nominal, we must look at the initial purchase price, including installation, plus the ongoing costs to the consumer to keep the third-party solution up to date and in good working order, and that the total cost to the consumer must be nominal as perceived by the consumer.³⁹⁷ We believe that this approach, which emphasizes the definition of nominal cost as perceived by the consumer, addresses the IT and Telecom RERCs' concerns that our proposed definition of nominal cost provides insufficient guidance and does not take into account that many people with disabilities are poor and already face greater costs for nearly every aspect of their lives.³⁹⁸

³⁹² *Accessibility NPRM*, 26 FCC Rcd at 3162, ¶ 77.

³⁹³ See Consumer Groups Comments at 19; Green Reply Comments at 3-4, 7 (Commission should promote multi-function devices, with accessibility built into the hardware and operating system, customizable to an individual's specific needs through easy, inexpensive software downloads, which would allow a single type of device to be accessible to people with a range of disabilities).

³⁹⁴ CEA Comments at 27; ITI Comments at 8; NCTA Comments at 3, 6; TIA Comments at 19; T-Mobile Comments at 2; TWC Comments at 5-7. For example, a person with low vision may choose a software program that enlarges the size of the text, while a person who is blind may select a screen reader.

³⁹⁵ CEA Comments at 27. See also ITI Comments at 9; Green Reply Comments at 7 (requiring built-in solutions, as compared to after-market sale of a software application, would unduly limit the customizations available to a range of disabilities). See generally *Accessibility NPRM*, 26 FCC Rcd at 3162-3163, ¶ 77.

³⁹⁶ *Accessibility NPRM*, 26 FCC Rcd at 3163, ¶ 78, quoting House Report at 24. See AFB Comments at 4; AT&T Comments at 10; CTIA Comments at 28; TIA Comments at 20; Verizon Comments at 12.

³⁹⁷ See AFB Comments at 4. See also AT&T Comments at 11 (service providers and manufacturers should be permitted to initially subsidize and spread out the cost of an accessibility solution to the consumer so long as the cost at the time of purchase plus all additional costs over time qualify as nominal as perceived by the consumer); Words+ Compusult Comments at 28. *Contra* Green Reply Comments at 9 (do not add on third-party costs to the monthly service fee).

³⁹⁸ See IT and Telecom RERCs Comments at 24. See also ACB Reply Comments at 37 (nominal means "so small or trivial as to be a mere token"); Letter from Andrew S. Phillips, Counsel to National Association of the Deaf, on behalf of the Coalition of Organizations for Accessible Technology ("COAT"), to Marlene H. Dortch, Secretary, FCC, CG Docket No. 10-213, at 2 (filed Oct. 3, 2011) ("COAT Oct. 3 *Ex Parte*") ("people with disabilities are experiencing the highest unemployment rates of any minority (continued....)");

In other words, the definition of nominal cost as perceived by the consumer will take into account the financial circumstances generally faced by people with disabilities.

153. As suggested by several commenters, we will not adopt a fixed percentage definition for nominal cost.³⁹⁹ We are mindful of T-Mobile's concern that we should not interpret the term nominal cost so narrowly as to negate the opportunity for third-party accessibility solutions.⁴⁰⁰ As supported by several commenters, we will therefore determine whether the cost of a third-party solution is nominal on a case-by-case basis,⁴⁰¹ taking into consideration the nature of the service or product,⁴⁰² including its total lifetime cost.⁴⁰³

154. Several commenters also express concerns about the Commission's proposal in the *Accessibility NPRM* that a third-party solution not be more burdensome to a consumer than a built-in solution would be,⁴⁰⁴ arguing that this test would not be workable because it would result in no third-party solutions.⁴⁰⁵ In response to these concerns, we clarify how we intend to interpret those requirements to ensure their workability. Because adaptive communications solutions are often not available with mainstream products and finding these solutions often has been difficult for people with disabilities in the past,⁴⁰⁶ we agree with those commenters that assert that a manufacturer or service provider that chooses to use a third-party accessibility solution has the responsibility to identify, notify consumers of, find, and arrange to install and support the third-party technology along with the covered entity's product to facilitate consumer access to third-party solutions.⁴⁰⁷ We find that the covered entity must support the third-

(Continued from previous page) _____
groups"); Green Reply Comments at 9, 12 (add-on costs should be measured in dollars, not hundreds of dollars; it will do no good to make technologies accessible to people with disabilities if they cannot afford it). *But see* CEA Reply Comments at 15 (it is unworkable to consider nominal cost subjectively from the point of view of the consumer).

³⁹⁹ See CEA Comments at 27; CTIA Comments at 28; TIA Comments at 20; T-Mobile Comments at 11; Verizon Comments at 12; T-Mobile Reply Comments at 13. *Contra* Green Reply Comments at 9.

⁴⁰⁰ See T-Mobile Comments at 10-11; T-Mobile Reply Comments at 13.

⁴⁰¹ See CEA Comments at 27; TIA Comments at 20; Verizon Comments at 12; CEA Reply Comments at 15; CTIA Reply Comments at 25.

⁴⁰² See CEA Comments at 27; Verizon Comments at 12; CTIA Reply Comments at 25.

⁴⁰³ See CEA Comments at 27; CTIA Comments at 28; T-Mobile Comments at 10; CTIA Reply Comments at 25; T-Mobile Reply Comments at 13.

⁴⁰⁴ *Accessibility NPRM*, 26 FCC Rcd at 3164, ¶ 80.

⁴⁰⁵ CEA Comments at 28; TIA Comments at 21; CEA Reply Comments at 14. *Contra* Consumer Groups Comments at 19; IT and Telecom RERCs Comments at 25.

⁴⁰⁶ *Accessibility NPRM*, 26 FCC Rcd at 3164, ¶ 80 n.237.

⁴⁰⁷ See Consumer Groups Comments at 19; IT and Telecom RERCs Comments at 25; ACB Reply Comments at 34; CTIA Reply Comments at 23-24; IT and Telecom RERCs Reply Comments at 3. See also AFB Comments at 4 (covered entities can rely only on third-party solutions that are available in the market). Although we will not adopt the testing requirements proposed by the IT and Telecom RERCs because we believe that the other requirements we adopt herein with respect to third-party solutions will ensure accessibility of ACS products and services to consumers with disabilities, we nevertheless (continued....)

party solution for the life of the ACS product or service or for a period of up to two years after the third-party solution is discontinued, whichever comes first,⁴⁰⁸ provided that another third-party accessibility solution is made available by the covered entity at nominal cost to the consumer. In other words, to ensure accessibility of products and services covered by the CVAA, if another third-party solution is not made available by the covered entity at nominal cost to the consumer, then the covered entity may not discontinue support for the original third-party solution.⁴⁰⁹

155. We agree with those commenters that suggest that we should not impose a requirement to bundle third-party solutions with ACS products and services,⁴¹⁰ because a bundling requirement would provide industry with less flexibility than Congress intended.⁴¹¹ Therefore, third-party solutions can be made available after-market, rather than at the point of purchase,⁴¹² provided that such third-party solutions are made available around the same time as when the product or service is purchased. This will ensure that the consumer has access to the product near the time of purchase, allow for additional implementation steps that may be needed,⁴¹³ and promote innovation by reducing the likelihood of being locked into the accessibility solutions available at the time the product was offered for sale.⁴¹⁴

156. As explained in the preceding paragraphs, the total cost to the consumer of the third-party solution, including set-up and maintenance, must be nominal. We expect the set-up and maintenance for a third-party accessibility solution to be no more difficult

(Continued from previous page)

encourage covered entities to test third-party accessibility solutions with people with disabilities to ensure that such third-party solutions work as intended. *See* IT and Telecom RERCs Comments at 25; *cf.* CTIA Reply Comments at 24 (no obligation in CVAA to test third-party accessibility solutions with other major third-party applications).

⁴⁰⁸ *See* TIA Comments at 21-22; *cf.* CEA Comments at 28; CEA Reply Comments at 14-15 (opposes any requirement to support a third-party solution over the life of the product on the grounds that the covered entity has no direct involvement with such support, which is undertaken by the third-party vendor).

⁴⁰⁹ *See* CTIA Comments at 28 (covered entities should be able to change their means of compliance, as long as the third-party solution remains at nominal cost). We believe that the requirement to provide support for a replacement third-party accessibility solution addresses the concern expressed by the IT and Telecom RERCs Reply Comments at 4 (proposing covered entity support of the third-party solution for the same period as the underlying ACS product is supported).

⁴¹⁰ *Accessibility NPRM*, 26 FCC Rcd at 3164, ¶ 80.

⁴¹¹ *See* CEA Comments at 28 (a bundling requirement would also impose particular relationships between covered entities and third-party vendors); TIA Comments at 22; T-Mobile Comments at 11.

⁴¹² *See* CEA Comments at 27; CTIA Comments at 27; TIA Comments at 21; T-Mobile Comments at 11; Verizon Comments at 12; T-Mobile Reply Comments at 12-13. *Contra* ACB Reply Comments at 34 (third-party solutions cannot be an after-market sale for which the user must perform additional steps to obtain).

⁴¹³ *See* CEA Comments at 27.

⁴¹⁴ *See* CEA Comments at 27-28; CTIA Comments at 28.

than the set-up and maintenance for other applications used by consumers.⁴¹⁵ If the third-party solution by its nature requires technical assistance with set-up or maintenance, we find that the covered entity must either provide those functions, including personnel with specialized skills if needed,⁴¹⁶ or arrange for a third party to provide them.

157. We reject Verizon's argument that manufacturers and service providers should not be required to provide support for the third-party solutions, because such a requirement would effectively require a contractual relationship, including intricate knowledge of the third party's proprietary solution, where none may exist.⁴¹⁷ Verizon's theory would conflict with the plain meaning of Sections 716(a)(2) and (b)(2), which afford manufacturers and service providers the option to rely on third-party solutions to ensure that their products and services are accessible if achievable.⁴¹⁸ If the covered entities elect to offer third-party solutions to achieve accessibility but do not support such third-party solutions, they would be undermining the availability of such solutions.⁴¹⁹

3. Compatibility

158. *Background.* 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.⁴²⁰ 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. 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 telecommunications into a form accessible to individuals with disabilities."⁴²¹

⁴¹⁵ See IT and Telecom RERCs Comments at 25 (a third-party solution needs to be equally compatible, interoperable, and simple to set up and use with the ACS device or service); ACB Comments to *October Public Notice* at 14; ACB Reply Comments at 34 (a third-party solution should not require set-up or maintenance by a person without disabilities); Green Reply Comments at 7-8 (installation should be no more burdensome than installations by a typical user, or in the alternative, no more burdensome than a sales associate at a Verizon store can handle).

⁴¹⁶ Words+ and Compusult Comments at 28 ("third party add-ons are too specialized for ACS's representatives to be properly trained [to] explain, demonstrate, to match a customer's needs or set up for the user.").

⁴¹⁷ See Verizon Comments at 13.

⁴¹⁸ 47 U.S.C. §§ 617(a)(2), (b)(2).

⁴¹⁹ Consumer Groups Reply Comments at 2, 4 (Commission should not allow manufacturers and service providers to rely upon third-party solutions to satisfy CVAA obligations but disclaim any responsibility for the compliance of such third-party solutions); IT and Telecom RERCs Reply Comments at 3 (if a manufacturer does not want the burden of contracts and collaboration with third parties, the manufacturer can opt for a built-in solution).

⁴²⁰ See 47 U.S.C. § 617(c).

⁴²¹ 47 C.F.R. §§ 6.3(g), 7.3(g).

The Commission's Section 255 rules define specialized CPE as customer premises equipment that is commonly used by individuals with disabilities to achieve access.⁴²²

159. For purposes of Section 716, in the *Accessibility NPRM*, the Commission proposed to define peripheral devices as “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.”⁴²³ The Commission also proposed to define specialized CPE, consistent with our Section 255 rules, as “customer premises equipment which is commonly used by individuals with disabilities to achieve access.”⁴²⁴

160. Under our Section 255 rules, we use four criteria for determining compatibility: (i) external electronic 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.⁴²⁵ In the *Accessibility NPRM*, the Commission asked whether the four criteria listed above remain relevant in the context of advanced communications services.⁴²⁶ Noting that a sizeable majority of consumers who previously relied on TTYs for communication are transitioning to more mainstream forms of text and video communications,⁴²⁷ the Commission sought comment on whether it should encourage an efficient transition by phasing out the third and fourth criteria as compatibility components in our Section 716 rules and/or in our Section 255 rules.⁴²⁸ The Commission also sought comment on whether it should ensure that these requirements are phased out only after alternative forms of communication, such as real-time text, are in place.⁴²⁹

161. In the *Accessibility NPRM*, the Commission also sought comment on whether and how it should use the Access Board Draft Guidelines to help define compatibility for purposes of Section 716.⁴³⁰ Finally, the Commission inquired about the

⁴²² 47 C.F.R. §§ 6.3(i), 7.3(i).

⁴²³ *Accessibility NPRM*, 26 FCC Rcd at 3166, ¶ 87.

⁴²⁴ *Accessibility NPRM*, 26 FCC Rcd at 3166, ¶ 87. See 47 C.F.R. §§ 6.3(c), 7.3(c).

⁴²⁵ 47 C.F.R. § 6.3.

⁴²⁶ *Accessibility NPRM*, 26 FCC Rcd at 3166, ¶ 88.

⁴²⁷ *Accessibility NPRM*, 26 FCC Rcd at 3166, ¶ 88.

⁴²⁸ *Accessibility NPRM*, 26 FCC Rcd at 3166, ¶ 88.

⁴²⁹ *Accessibility NPRM*, 26 FCC Rcd at 3166-3167, ¶ 88. 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).

⁴³⁰ *Accessibility NPRM*, 26 FCC Rcd at 3167, ¶ 89.

status of industry development of APIs and whether incorporating criteria related to APIs into our definition of compatibility could promote the development of APIs.⁴³¹

162. *Discussion.* We adopt the definition of “peripheral devices” proposed in the *Accessibility NPRM*.⁴³² We agree with the vast majority of commenters that peripheral devices can include mainstream devices and software,⁴³³ 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.” We did not receive comments on the IT and Telecom RERCs proposal to expand our definition of peripheral devices and decline to adopt their proposal at this time.⁴³⁴ However, we seek further comment in the accompanying *Further Notice* on its proposal.

163. We also adopt the same definition of specialized CPE as is used in our Section 255 rules⁴³⁵ and proposed in the *Accessibility NPRM*.⁴³⁶ The Commission has traditionally interpreted CPE broadly to include wireless devices such as cellular telephone handsets, and we retain the flexibility to construe the scope of specialized CPE consistent with Commission precedent.⁴³⁷ Therefore, changing the regulatory definition of CPE, as the IT and Telecom RERCs suggest, to explicitly include mobile devices

⁴³¹ *Accessibility NPRM*, 26 FCC Rcd at 3167, ¶ 90.

⁴³² See *Accessibility NPRM*, 26 FCC Rcd at 3196, Subpart B – Definitions, § 8.4(r).

⁴³³ See AT&T Comments to *October Public Notice* at 9; CEA Comments to *October Public Notice* at 12; RERC-IT Comments to *October Public Notice* at 6; TIA Comments to *October Public Notice* at 15-16; Words+ Comments to *October Public Notice* at 2; AAPD Reply Comments to *October Public Notice* at 4; AbleLink Reply Comments to *October Public Notice* at 1; ACB Reply Comments to *October Public Notice* at 18; Adaptive Solutions Reply Comments to *October Public Notice* at 1; Compusult Reply Comments to *October Public Notice* at 1; CTIA Reply Comments to *October Public Notice* at 14-15; RERC-IT Reply Comments to *October Public Notice* at 6; Point-and-Read Comments to *October Public Notice* at 1; Wireless RERC Reply Comments to *October Public Notice* at 4; CEA Comments at 29-30; Consumer Groups Comments at 21; IT and Telecom RERCs Comments at 26; T-Mobile Comments at 13; T-Mobile Reply Comments at 15.

⁴³⁴ The IT and Telecom RERCs proposed to define peripheral devices as “devices employed in connection with equipment covered by this part, *including software and electronically mediated services*, to translate, enhance, or otherwise transform advanced communications services into a form accessible to people with disabilities” (emphasis added). IT and Telecom RERCs Comments at 27-28. See *Accessibility NPRM*, 26 FCC Rcd at 3196, Subpart B – Definitions, § 8.4(r).

⁴³⁵ See 47 C.F.R. §§ 6.3(i), 7.3(i). See also 47 C.F.R. §§ 6.3(c), 7.3(c) (defining “customer premises equipment”).

⁴³⁶ See *Accessibility NPRM*, 26 FCC Rcd at 3196, Subpart B – Definitions, § 8.4(v).

⁴³⁷ See, e.g., *Bundling of Cellular Premises Equipment and Cellular Service*, CC Docket No. 91-34, Report and Order, DA 92-207, 7 FCC Rcd 4028, ¶ 9 (1992); *Implementation of the Telecommunications Act of 1996: Telecommunications Carriers’ Use of Customer Proprietary Network Information and Other Customer Information*, CC Docket No. 96-115, Order, DA 98-971, 13 FCC Rcd. 12390, 12394, ¶ 5 (1998).

carried by the user is unnecessary.⁴³⁸ We also note that a mobile device could meet the definition of a peripheral device to the extent that it is used to “translate, enhance, or otherwise transform advanced communications services into a form accessible to people with disabilities.”⁴³⁹

164. Consistent with the Commission’s decision in the *Section 255 Report and Order*, we will require manufacturers and service providers to exercise due diligence to identify the types of peripheral devices and specialized CPE “commonly used” by people with disabilities with which their products and services should be made compatible.⁴⁴⁰ We also find that when determining whether a particular device is commonly used by individuals with disabilities, a manufacturer or provider should look at the use of that device among persons with a particular disability.⁴⁴¹ In addition, we agree with AFB that for compatibility to be achieved, a third party add-on must be an available solution that the consumer can access to make the underlying product or service accessible.⁴⁴² Compliance is not satisfied because a device’s software architecture might someday allow a third party to write an accessibility application.⁴⁴³ We agree with ITI, however, that “a manufacturer or service provider need not make its equipment or service compatible with every peripheral device or piece of customer equipment used to achieve access.”⁴⁴⁴ Covered entities are also not required to test compatibility with every assistive technology device in the market.⁴⁴⁵

165. Consistent with the *Section 255 Report and Order*, we decline to maintain a list of peripheral devices and specialized CPE commonly used by individuals with disabilities or to define how covered entities should test devices which are “commonly used” by people with disabilities, given how quickly technology is evolving.⁴⁴⁶ For the same reason, we agree with the IT and Telecom RERCs that covered entities do not have a duty to maintain a list of all peripheral devices and specialized CPE used by people with disabilities.⁴⁴⁷ At this time, we also decline to limit the definition of “existing” peripheral devices and specialized customer premises equipment to those that are

⁴³⁸ IT and Telecom RERCs Comments at 28. The term “customer premises equipment” means equipment employed on the premises of a person (other than a carrier) to originate, route, or terminate telecommunications. 47 U.S.C. § 153(16).

⁴³⁹ *Accessibility NPRM*, 26 FCC Rcd at 3196, Subpart B – Definitions, § 8.4(r). *See generally*, IT and Telecom RERCs Comments at 28.

⁴⁴⁰ *Section 255 Report and Order*, 16 FCC Rcd at 6435, ¶ 36. *See also* AFB Comments at 3.

⁴⁴¹ *Section 255 Report and Order*, 16 FCC Rcd at 6435, ¶ 36.

⁴⁴² AFB Comments at 3-4; AAPD Reply Comments at 3.

⁴⁴³ AFB Comments at 4.

⁴⁴⁴ ITI Comments at 12. *See also* CTIA Sept. 30 *Ex Parte* at 2.

⁴⁴⁵ TIA Comments at 34.

⁴⁴⁶ *Section 255 Report and Order*, 16 FCC Rcd at 6435, ¶ 36. *But see* ITI Comments at 12; TIA Comments at 33-34.

⁴⁴⁷ IT and Telecom RERCs Comments at 27.

currently sold, as ITI proposes.⁴⁴⁸ As discussed above, we believe that “existing” peripheral devices and specialized customer premises equipment include those which continue to be “commonly used” by people with disabilities.⁴⁴⁹ For example, a particular screen reader may no longer be manufactured,⁴⁵⁰ but could still be “commonly used.” We do note, however, that peripheral devices and specialized customer premises equipment that are no longer sold will eventually cease being “commonly used.” We also believe 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).⁴⁵¹

166. In declining to limit the definition of “existing” peripheral devices and specialized customer premises equipment to those that are currently sold, we recognize that we may be imposing an additional burden on industry resources. We are open to any idea that could facilitate transition without consumers having to bear the costs. In reaching this decision, we acknowledge this additional burden against the benefits of maintaining access for consumers with disabilities to “commonly used” peripheral devices and specialized customer premises equipment. We believe that ensuring that people with disabilities continue to have access to “commonly used” technologies that facilitate their ongoing participation in economic and civic activities outweighs the burden on industry and furthers the statute’s overriding objective “[t]o increase the access of persons with disabilities to modern communications.”⁴⁵²

167. Finding that the four criteria used in our Section 255 rules for determining compatibility remain relevant in the context of advanced communications services, we adopt the following factors 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.⁴⁵³ The Commission declines, at this time, to eliminate or modify (iii) and (iv) of this criteria.⁴⁵⁴ The Commission agrees with Consumer Groups that at this time, “[a] forced phase-out of TTY would impose considerable hardship on a large segment of the

⁴⁴⁸ *But see* ITI Comments at 11-12; ITI July 8 *Ex Parte* at 3.

⁴⁴⁹ *Section 255 Report and Order*, 16 FCC Rcd at 6435, ¶ 36.

⁴⁵⁰ ITI July 8 *Ex Parte* at 3.

⁴⁵¹ *See* 47 U.S.C. § 618(a)(5). 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.”

⁴⁵² Pub. L. No. 111-260, 124 Stat. 2751, pmb1.

⁴⁵³ 47 C.F.R. § 6.3. While we encourage industry to develop standards to promote compatibility and “to develop new and innovative solutions for people with disabilities,” *see* ITI Comments at 13, we note that abiding by such standards does not eliminate covered entities’ obligations to adhere to the four compatibility factors discussed below.

⁴⁵⁴ *But see* CEA Comments at 30; IT and Telecom RERCs Comments at 27.

population the CVAA is intended to protect.”⁴⁵⁵ Therefore, we shall maintain the existing rules for TTY compatibility until alternative forms of communication, such as real-time text, are in place.⁴⁵⁶

168. At this time, the Commission will not incorporate criteria related to APIs or software development kits (SDKs) into our definition of compatibility.⁴⁵⁷ We do agree with commenters, however, that APIs “can facilitate both accessibility (via third-party solutions) as well as compatibility” and “reduce the work needed by both mainstream and assistive technology (AT) developers.”⁴⁵⁸ We encourage stakeholders to use existing working groups -- or form new ones -- to develop and distribute voluntary industry-wide standards, since this approach will offer the industry flexibility in advancing the goals of compatibility articulated in Sections 716 and 255.⁴⁵⁹

169. Several commenters generally support the Access Board’s proposed definition of “compatibility” and the VON Coalition suggests that the Commission should defer to the Access Board’s determination of “compatibility” under Section 508, thereby creating consistency between the CVAA and Section 508.⁴⁶⁰ Because the Access Board has not yet completed its guidelines process, we will not adopt the Access Board’s proposed definition of “compatibility” at this time but may revisit this decision after the Access Board completes its guidelines process.⁴⁶¹

⁴⁵⁵ Consumer Groups at 22; Consumer Groups Reply Comments at 6.

⁴⁵⁶ Until a real time text standard is adopted, we believe that it would be premature to modify the third and fourth criteria as the IT and Telecom RERCs suggest. IT and Telecom RERCs Comments at 28. The provision of real-time text as communications technologies, including those used for 9-1-1 emergency services by people with disabilities, transition from the PSTN to an IP-based environment is being examined by the EAAC. *See supra* note 40. The EAAC held its first meeting on January 14, 2011 and will provide its recommendations to the Commission in December 2011. *See* Pub. L. No. 111-260, § 106(c)(1). The Commission has initiated a rulemaking seeking to accelerate the development and deployment of Next Generation 911 (NG911) technology that will enable the public to send emergency communications to 911 Public Safety Answering Points (PSAPs) via text, photos, videos, and data. *Framework for Next Generation 911 Deployment*, PS Docket No. 10-255, FCC 11-134, Notice of Proposed Rulemaking, (released Sept. 22, 2011).

⁴⁵⁷ CEA Reply Comments at 15. *But see* Microsoft Comments at 14.

⁴⁵⁸ CEA Comments at 30; IT and Telecom RERCs Comments at 29; Words+ and Compusult Comments at 32. *See also* VON Coalition Comments at 8 (“Devices in which accessibility is not achievable but compatibility with assistive technologies is required, accessibility programming interfaces are critical in enabling interoperability between the two.”).

⁴⁵⁹ Words+ and Compusult Comments at 27-28; CEA Reply Comments at 15-16. *See Section 255 Report and Order*, 16 FCC Rcd at 6434, ¶ 35.

⁴⁶⁰ IT and Telecom RERCs Comments at 29; Words+ and Compusult Comments at 31; VON Coalition Comments at 8. *But see* ACB Reply Comments at 38 (agreeing that “the proposed Access Board guidelines may be useful to consider but should not be relied on as anything more than advisory material”); AFB Reply Comments at 12.

⁴⁶¹ CEA Comments at 29-30; TIA Comments at 33; Verizon Comments at 13.

C. Waivers and Exemptions

1. Customized Equipment or Services

170. *Background.* Section 716(i) states that the accessibility requirements of Section 716 “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.”⁴⁶² In the *Accessibility NPRM*, the Commission found that the CVAA’s legislative history evinced Congress’s intent that the Section 716(i) exemption 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.”⁴⁶³ The Commission sought 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. The Commission also sought comment on how to define equipment and services that are “used by members of the general public.”⁴⁶⁴ Finally, the Commission sought 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.

171. *Discussion.* We hereby find that Section 716(i) sets forth a narrow exemption that should be limited in scope to customized equipment and services offered to business and other enterprise customers only. Our decision is consistent with the legislative history of the CVAA, which demonstrates that Congress intended for Section 716(i) to be a narrow exemption limited to specialized and innovative equipment or services built to the unique specifications of businesses:

The Committee recognizes that some equipment and services are customized to the unique specifications requested by an enterprise customer. The Committee believes this narrow exemption will encourage technological innovation by permitting manufacturers and service providers to respond to requests from businesses that require specialized and sometimes innovative equipment to provide their services efficiently. This provision is not intended to create an exemption for equipment and services designed for and used by members of the general public.⁴⁶⁵

172. We also conclude that Section 716’s accessibility requirements do not extend to public safety communications networks and devices, because such networks and devices are “equipment and services that are not offered directly to the public.”⁴⁶⁶ As

⁴⁶² See 47 U.S.C. § 617(i).

⁴⁶³ *Accessibility NPRM*, 26 FCC Rcd at 3152, ¶ 50 (citing House Report at 26).

⁴⁶⁴ *Accessibility NPRM*, 26 FCC Rcd at 3152, ¶ 50.

⁴⁶⁵ House Report at 26.

⁴⁶⁶ See 47 U.S.C. § 617(i). See also Motorola Comments at 4-6,

Motorola points out, this conclusion is consistent with the Commission's recent proposal not to apply its hearing aid compatibility requirements to public safety equipment.⁴⁶⁷ In that proceeding, the Commission proposed to find that insofar as public safety communications networks have different technical, operational, and economic demands than consumer networks, the burdens of compliance would outweigh the public benefits.⁴⁶⁸ For the same reasons, we find that Section 716 should not be imposed on public safety equipment.

173. We disagree with commenters such as Consumer Groups, and Words+ and Compusult who posit that public safety networks and devices should not be exempt from Section 716 because their employees should be covered like the general population.⁴⁶⁹ These commenters argue that exempting public safety networks will create barriers to employment for people with disabilities employed in the public safety sector.⁴⁷⁰ We note, however, that employers, including public safety employers, are subject to accessibility obligations imposed under the ADA.⁴⁷¹ Because employees of public safety institutions are protected by the ADA, and because the equipment we exempt is customized for the unique needs of the public safety community, we conclude that imposing the accessibility requirements of Section 716 on such equipment would create an unnecessary burden on the development of public safety equipment without any concomitant benefit for employees with disabilities. Nonetheless, we 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."⁴⁷²

174. We agree with CEA that products customized by a manufacturer for an enterprise that are not offered directly to the general public are exempt, even if such products are "used by members of the general public."⁴⁷³ We also agree with the IT and Telecom RERCs that if a customized product built to an enterprise customer's unique specifications is later made directly available to the public, it then becomes subject to the CVAA.⁴⁷⁴ Although the legislative history specifies that the exemption set forth in Section 716(i) encompasses equipment/services customized to the "unique specifications

⁴⁶⁷ Motorola Comments at 4-6. See also *Hearing Aid Compatibility FNPRM*, 25 FCC Rcd at 11195, ¶ 82 (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).

⁴⁶⁸ *Hearing Aid Compatibility FNPRM*, 25 FCC Rcd at 11195, ¶ 82.

⁴⁶⁹ Words+ and Compusult Comments at 17; Consumer Groups Comments at 12.

⁴⁷⁰ Words+ and Compusult Comments at 17; Consumer Groups Comments at 12.

⁴⁷¹ See ITI Comments at 21. We therefore have modified the definition of "customized equipment or services" as proposed in the *Accessibility NPRM* to delete the phrase, "but shall not apply to equipment distributed to and services used by public or private sector employees, including public safety employees."

⁴⁷² CSD Reply Comments to *October Public Notice* at 4.

⁴⁷³ CEA Comments at 16-17; CEA Reply Comments at 9-10.

⁴⁷⁴ IT and Telecom RERCs Reply Comments at 4.

requested by an enterprise customer,” we find that where a customized product is subsequently offered directly to the public by the originating manufacturer or service provider, that product is then not serving the unique needs of an enterprise customer and thus should not be exempt from the accessibility requirements of Section 716.

175. We disagree with commenters such as Consumer Groups, the IT and Telecom RERCs, and Words+ and Compusult who advocate that we expand the definition of “public” as used in Section 716(i), to include government agencies, educational organizations, and public institutions.⁴⁷⁵ While Congress clearly meant to draw a distinction between equipment or a service that has been “customized to the unique specifications requested by an enterprise customer” from “equipment and services designed for and used by members of the general public” in enacting the exemption in Section 716(i),⁴⁷⁶ there is no support for the proposition that the use of the term “public” in the foregoing phrase was meant to extend to public institutions. Furthermore, there are many instances where public institutions, acting as enterprise customers, order customized equipment, such as library cataloging systems, whereby such systems would never be designed for, sold to, and used directly by members of the general public. Under Consumer Groups’ approach, a public institution could never be considered an enterprise customer, even when procuring specialized equipment that would not be offered to the public or even other enterprise customers. There is nothing in the statute demonstrating that Congress intended to treat public institutions differently from other enterprise customers who are in need of customized or specialized equipment. Therefore, we decline to expand the definition of the word “public” as used in Section 716(i) to public institutions.⁴⁷⁷

176. We further conclude that customizations to communications devices that are merely cosmetic or do not significantly change the functionalities of the device or service should not be exempt from Section 716. We agree with Words+ and Compusult that the Section 716(i) exemption should be narrowly construed, and further agree with Consumer Groups that manufacturers and service providers should not be able to avoid the requirements of the CVAA through customizations that are “merely cosmetic” or have “insignificant change to functionality” of the product/service.⁴⁷⁸ We note that the majority of commenters support the conclusion that this exemption should not extend to equipment or services that have been customized in “minor ways” or “that are made available to the public.”⁴⁷⁹

⁴⁷⁵ Consumer Groups Comments at 12; IT and Telecom RERCs Comments at 15-16; Words+ and Compusult Comments at 17.

⁴⁷⁶ CTIA Comments at 23. See House Report at 26.

⁴⁷⁷ Equipment, such as general purpose computers, that are used by libraries and schools without customization, and are offered to the general public – *i.e.*, library visitors and students, would not fall within the exemption and must meet the accessibility requirements of Section 716.

⁴⁷⁸ See Consumer Groups Comments at 12; Words+ and Compusult Comments at 17.

⁴⁷⁹ Consumer Groups Comments at 12; CTIA Comments at 23; ITI Comments at 22; Motorola Comments at 3.

177. Beyond the narrow exemption that we carve out today for public safety communications, we refrain from identifying any other particular class of service or product as falling within the Section 716(i) exemption. We disagree with NetCoalition that the exemption should apply to ACS manufacturers or service providers who offer their products to a “discrete industry segment” and only a “relatively small number of individuals.” The exemption is not based on the characteristics of the manufacturer or the provider, but rather, on whether the particular equipment or service in question is unique and narrowly tailored to the specific needs of a business or enterprise.

178. The customized equipment exemption will be self-executing. That is, manufacturers and providers need not formally seek an exemption from the Commission, but will be able to raise 716(i) as a defense in an enforcement proceeding.

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

179. *Background.* Section 716(h)(1) of the Act grants the Commission the authority to waive the requirements of Section 716. Specifically, Section 716(h)(1) states:

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 [Section 716] 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.⁴⁸⁰

Both the House and Senate 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 [ACS] but is, in the judgment of the Commission, designed primarily for purposes other than accessing advanced communications.”⁴⁸¹

180. In the *Accessibility NPRM* the Commission proposed to focus its waiver inquiry on whether the offering is designed primarily for purposes other than using ACS,⁴⁸² and sought comment on substantive factors for its waiver analysis.⁴⁸³ The Commission also sought comment generally on the waiver petition review process, and

⁴⁸⁰ 47 U.S.C. § 617(h)(1).

⁴⁸¹ House Report at 26; Senate Report at 8.

⁴⁸² *Accessibility NPRM*, 26 FCC Rcd at 3153, ¶ 53.

⁴⁸³ *Accessibility NPRM*, 26 FCC Rcd at 3153-54, ¶¶ 54-55.

the extent to which any procedures need to be adopted to ensure the process is effective and efficient.⁴⁸⁴

181. *Discussion.* We adopt the Commission’s proposal to focus our waiver inquiry on whether a multipurpose equipment or service has a feature or function that is capable of accessing ACS but is nonetheless designed primarily for purposes other than using ACS. This approach is founded in the statutory language.⁴⁸⁵ We disagree with the IT and Telecom RERCs’ assertion that our waiver analysis should focus on whether the *features or functions* are designed primarily for purposes other than using ACS.⁴⁸⁶ The statute specifically anticipates waivers for multipurpose *equipment* and *services* or classes of such equipment and services with ACS features or functions.⁴⁸⁷ As the House and Senate Reports explain, “a device designed for a purpose unrelated to accessing advanced communications might also provide, on an incidental basis, access to such services. In this case, the Commission may find that to promote technological innovation the accessibility requirements need not apply.”⁴⁸⁸

182. We will exercise the authority granted under Section 716(h)(1) to waive the requirements of Section 716⁴⁸⁹ through a case-by-case, fact-based analysis on our own motion, or upon petition of a manufacturer of ACS equipment, a provider of ACS, or any interested party.⁴⁹⁰ AT&T and CEA generally support this approach.⁴⁹¹ As we discuss in more detail below, the rule we adopt provides specific guidance on the two factors that we will use to determine whether equipment or service is designed primarily for purposes other than using ACS.

183. We will examine whether the equipment or service was designed to be used for advanced communications service purposes by the general public. We agree that the language of the statute requires an examination of the purpose or purposes for which the manufacturer or service provider designed the product or service and that consumer use patterns may not always accurately reflect design.⁴⁹² Therefore, this is not an examination of post-design uses that consumers may find for a product; but rather, an

⁴⁸⁴ *Accessibility NPRM*, 26 FCC Rcd at 3154-55, ¶¶ 56-58.

⁴⁸⁵ 47 U.S.C. § 617(h)(1). Several commenters support this approach. *See* AT&T Comments at 7; CEA Comments at 19; NetCoalition Comments at 6; VON Coalition Comments at 6.

⁴⁸⁶ IT and Telecom RERCs Comments at 17.

⁴⁸⁷ 47 U.S.C. § 617(h)(1).

⁴⁸⁸ House Report at 26; Senate Report at 8.

⁴⁸⁹ A waiver of the obligations of Section 716 also consequently relieves the waived entity from the recordkeeping and annual certification obligations of Section 717. *See* 47 U.S.C. § 618(a)(5).

⁴⁹⁰ 47 U.S.C. § 617(h)(1) (granting the Commission the authority to waive the requirements of Section 716 “on its own motion or in response to a petition by a manufacturer or provider of advanced communications services or any interested party”).

⁴⁹¹ AT&T Comments at 6; CEA Comments at 17.

⁴⁹² *See* CEA Comments at 19; CTIA Comments at 16-17; ESA Comments at 11; VON Coalition Comments at 6.

analysis of the facts available to the manufacturer or provider and their intent during the design phase. We may, for example, consider the manufacturer or provider's market research, the usage trends of similar equipment or services, and other information to determine whether a manufacturer or provider designed the equipment or service primarily for purposes other than ACS.

184. We note that equipment and services may have multiple primary, or co-primary purposes, and in such cases a waiver may be unwarranted.⁴⁹³ Convergence results in multipurpose equipment and services that may be equally designed for multiple purposes, none of which are the exclusive primary use or design purpose. For instance, many smartphones appear to be designed for several purposes, including voice communications, text messaging, and e-mail, as well as web browsing, two-way video chat, digital photography, digital video recording, high-definition video output, access to applications, and mobile hotspot connectivity.⁴⁹⁴ The CVAA would have little meaning if we were to consider waiving Section 716 with respect to the e-mail and text messaging features of a smartphone on the grounds that the phone was designed in part for voice communications.

185. We will also examine whether the equipment or service is marketed for the ACS features or functions. We agree with many commenters who suggest that how equipment or a service is marketed is relevant to determining the primary purpose for which it is designed.⁴⁹⁵ We will examine how and to what extent the ACS functionality or feature is advertised, announced, or marketed and whether the ACS functionality or feature is suggested to consumers as a reason for purchasing, installing, downloading, or accessing the equipment or service.⁴⁹⁶ We believe the best way to address the IT and Telecom RERCs' concern that a covered entity's assessment of how a product is marketed may be "subjective and potentially self-serving"⁴⁹⁷ is to examine this factor on a case-by-case basis and to solicit public comment on waiver requests, as discussed below.

186. Several commenters suggest additional factors that we should consider when examining the primary purpose for which equipment or service is designed. While some of these factors may be valuable in some cases, we decline to incorporate these factors directly into our rules. However, these factors may help a petitioner illustrate the

⁴⁹³ *But see* TIA Sept. 28 *Ex Parte* at 2 (urging the Commission to consider "a device's or service's single primary purpose").

⁴⁹⁴ *See Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services*, WT Docket No. 10-133 (Terminated), Fifteenth Report, FCC 11-103, ¶¶ 138-144 (rel. June 27, 2011); *Accessibility NPRM*, 26 FCC Rcd at 3140-42, ¶ 15. *See also* Words+ and Compusult Comments at 7.

⁴⁹⁵ AT&T Comments at 7; CEA Comments at 19-20; ESA Comments at 8; Microsoft Comments at 7; NetCoalition Comments at 6; TechAmerica Comments at 5. *See also* TIA Sept. 28 *Ex Parte* at 2. *But see* IT and Telecom RERCs Comments at 17; IT and Telecom RERCs Reply Comments at 2-3.

⁴⁹⁶ As ESA explains, "a marketing campaign for a new product or service is likely to focus upon the most significant or attractive aspects of an offering's design." ESA Comments at 9.

⁴⁹⁷ IT and Telecom RERCs Reply Comments at 3.

purpose for which its equipment or service is primarily designed. For instance ESA suggests we examine “[w]hether the ACS functionality intends to enhance another feature or purpose.”⁴⁹⁸ Microsoft similarly suggests we examine “[w]hether the offering is designed for a ‘specific class of users who are using the ACS features in support of another task’ or as the primary task.”⁴⁹⁹ Whether the ACS functionality is designed to be operable outside of other functions, or rather aides other functions, may support a determination that the equipment or service was or was not designed primarily for purposes other than ACS. Similarly, an examination of the impact of the removal of the ACS feature or function on a primary purpose for which the equipment or service is claimed to be designed may be relevant to a demonstration of the primary purpose for which the equipment or service is designed.⁵⁰⁰ Further, ESA suggests we examine “[w]hether there are similar offerings that already have been deemed eligible for a . . . waiver.”⁵⁰¹ An examination of waivers for similar products or services, while not dispositive for a similar product or service, may be relevant to whether a waiver should be granted for a subsequent similar product or service. These and other factors may be relevant for a waiver petitioner, as determined on a case-by-case basis.

187. Conversely, we believe there is little value in examining other suggested factors on the record. We do not believe that the “processing power or bandwidth used to deliver ACS vis-à-vis other features”⁵⁰² is relevant. No evidence provided supports the notion that there is a direct relationship between the primary purpose for which equipment or service is designed and the processing power or bandwidth allocated to that purpose. For example, text messaging on a wireless handset likely consumes less bandwidth than voice telephony, but both could be co-primary purposes of a wireless handset. Further, we do not believe that an examination of whether equipment or service “provides a meaningful substitute for more traditional communications devices” adds significantly to the waiver analysis.⁵⁰³ The waiver analysis requires an examination of whether the equipment or service is designed primarily for purposes other than using ACS. The inquiry therefore is about the design of the multipurpose service or equipment, not the nature of the ACS component.⁵⁰⁴

⁴⁹⁸ ESA Comments at 8.

⁴⁹⁹ Microsoft Comments at 7 (citing *Accessibility NPRM*, 26 FCC Rcd at 3154, ¶ 55). ESA originally suggested a similar formulation of this factor in its comments in response to the *October Public Notice*. ESA Comments to *October Public Notice* at 8-9.

⁵⁰⁰ See IT and Telecom RERCs Comments at 17.

⁵⁰¹ ESA Comments at 8.

⁵⁰² ESA Comments at 8.

⁵⁰³ Microsoft Comments at 7.

⁵⁰⁴ We also disagree with the IT and Telecom RERCs’ suggestion that “[w]aivers should not be provided to an intentional communication function built into a larger non-communication product, but only to non-communication functions that could incidentally be used to communicate.” IT and Telecom RERCs Comments at 18. Section 716 requires that the equipment or service for which a waiver is sought must be capable of accessing ACS. 47 U.S.C. § 617(h)(1)(A). A key requirement of any ACS is the ability to communicate. Therefore, to even be eligible for a waiver, the equipment or service must include a (continued....)

188. In addition to the above factors we build into our rules and others that petitioners may demonstrate, we intend to utilize our general waiver standard, which requires good cause to waive the rules, and a showing that particular facts make compliance inconsistent with the public interest.⁵⁰⁵ CEA agrees with this approach.⁵⁰⁶ The CVAA grants the Commission authority to waive the requirements of Section 716 in its discretion,⁵⁰⁷ and we intend to exercise that discretion consistent with the general waiver requirements under our rules.⁵⁰⁸

189. We decline to adopt the waiver analysis proffered by AFB and supported by ACB.⁵⁰⁹ AFB urges us to use the four achievability factors to examine waiver petitions.⁵¹⁰ We find that the achievability factors are inappropriate to consider in the context of a waiver. A waiver relieves an entity of the obligations under Section 716, including the obligation to conduct an achievability analysis.⁵¹¹ It would be counter to the purpose of a waiver to condition its grant on an entity's ability to meet the obligations for which it seeks a waiver. As discussed above, our waiver analysis will examine the primary purpose or purposes for which the equipment or service is designed, consistent with the statutory language.⁵¹²

(Continued from previous page) _____
communication function. See AT&T Comments at 4. Finally, we disagree with AFB's argument that we must affirmatively find that "the ACS functionality can only be used when the other product features alleged by the petitioner to be the product's primary functions are being engaged by the user." AFB Reply Comments at 10. While the relationship between the ACS feature or function and the claimed primary purpose of equipment or service is designed is relevant, it is not necessarily dispositive.

⁵⁰⁵ 47 C.F.R. § 1.3; *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)).

⁵⁰⁶ CEA Comments at 20 n.70 ("[T]he Commission should make clear that the waiver provision in the CVAA complements, and does not supplant or replace, the Commission's general waiver and forbearance authority under the Act."). CEA also included a public interest analysis in its waiver request filed on the record in this proceeding. See Letter from Julie M. Kearny, Vice President, Regulatory Affairs, Consumer Electronics Association to Marlene H. Dortch, Secretary, FCC, CG Docket No. 10-213, at 8-10 (filed July 19, 2011) ("CEA July 19 *Ex Parte*"). Further, in its reply comments, ESA included a public interest analysis in its waiver request for "video game offerings." ESA Reply Comments at 16-20.

⁵⁰⁷ 47 U.S.C. § 617(h)(1); House Report at 26; Senate Report at 8.

⁵⁰⁸ CTIA believes that a discretionary process for waivers – specifically the process proposed in the *Accessibility NPRM* – is contrary to "Congress's intent that the accessibility requirements not compromise industry innovation and progress." CTIA Comments at 19. In CTIA's view, the Commission is required to incorporate the statutory waiver language into its definition of ACS. See CTIA Comments at 19. Section 716(h)(1) plainly grants us the authority to waive the requirements of the Act, but does not direct us to do so. See 47 U.S.C. 617(h)(1). Furthermore, use of the term "waive" in the statute and the reference to the possibility of exercising that authority in response to petitions, clearly demonstrates that Congress intended a waiver process. See House Report at 26; Senate Report at 8.

⁵⁰⁹ See AFB Reply Comments at 9-11; ACB Reply Comments at 23.

⁵¹⁰ AFB Reply Comments at 9.

⁵¹¹ See 47 U.S.C. § 617(h)(1) (granting the Commission the authority to "waive the requirements of Section 716").

⁵¹² See discussion *supra* para. 181.

190. The factors we establish here will promote regulatory certainty and predictability for providers of ACS, manufacturers of ACS equipment, and consumers. We intend for these factors to provide clear and objective guidance to those who may seek a waiver and those potentially affected by a waiver. Providers of ACS and ACS equipment manufacturers have the flexibility to seek waivers for services and equipment they believe meet the waiver requirements. While a provider or manufacturer will expend some level of resources to seek a waiver, the provider or manufacturer subsequently will have certainty regarding its obligations under the Act whether or not a waiver is granted.⁵¹³ If a waiver is warranted, the provider or manufacturer can then efficiently allocate resources to other uses.

191. We encourage equipment manufacturers and service providers to petition for waivers during the design phase of the product lifecycle,⁵¹⁴ but we decline to adopt the proposal proffered by AFB to require petitioners to seek a waiver prior to product introduction.⁵¹⁵ The design phase is the ideal time to seek a waiver, but we will not foreclose the ability of a manufacturer or provider to seek a waiver after product introduction. AFB correctly observes: “If inaccessible equipment or services are first deployed in the marketplace, and the subsequently-filed waiver petition is not granted, the company would remain at tremendous risk of being found in violation of the CVAA’s access requirements and exposed to potential penalties.”⁵¹⁶ This reality should encourage equipment and service providers to seek waivers during the design phase without necessitating a mandate.

192. The Commission will entertain waivers for equipment and services individually or as a class. With respect to any waiver, the Commission may decide to limit the time of its coverage, with or without a provision for renewal.⁵¹⁷ Individual

⁵¹³ A manufacturer or provider that receives a waiver will avoid the cost of compliance. A manufacturer or provider that is not granted a waiver can determine its obligations under the Act following an achievability analysis. The opportunity cost to seek a waiver is low since the alternative is compliance with the Act.

⁵¹⁴ See ESA Comments at 2 (“To be practical . . . a manufacturer or provider must know its accessibility obligations before making a product or service available, and thus prior to any consumer use.”); CTIA Comments at 18 (“[A]ccessibility must be considered early in the design process.”).

⁵¹⁵ AFB Reply Comments at 10.

⁵¹⁶ AFB Reply Comments at 10.

⁵¹⁷ Commenters disagree on the appropriate length of waivers and whether waivers should be renewed. For example, the IT and Telecom RERCs, Consumer Groups, AAPD, Green, and ACB suggest that no waiver should be permanent. Consumer Groups Comments at 13; IT and Telecom RERCs Comments at 19; AAPD Reply Comments at 5; ACB Reply Comments at 23; Green Reply Comments at 12-13. Green, ACB, and the IT and Telecom RERCs suggest waivers should last a maximum of 12 months. ACB Reply Comments at 23; Green Reply Comments at 13; IT and Telecom RERCs Comments at 19. Consumer Groups believe two years is sufficient. Consumer Groups Comments at 13. CEA argues for permanent waivers because limitations on the life of a waiver are not in the statute, and “permanent waivers . . . help reduce the burden on industry by eliminating the need to renew waivers.” CEA Comments at 18. VON Coalition argues that “[a]s long as ACS continues to be an ancillary function of the product – and the manufacturer or service provider is not designing or marketing the product based on its ACS features – the waiver should remain.” VON Coalition Comments at 7. Verizon suggests all waivers should last a minimum of 18 months. Verizon Comments at 9. TIA and TechAmerica assert that there should be no (continued....)

waiver requests must be specific to an individual product or service offering.⁵¹⁸ New or different products, including substantial upgrades that change the nature of the product or service, require new waivers.⁵¹⁹ Individual waiver petitioners must explain the anticipated lifecycle for the product or service for which the petitioner seeks a waiver. Individual waivers will ordinarily be granted for the life of the product or service.⁵²⁰ However, the Commission retains the authority to limit the waiver for a shorter duration if the record suggests the waiver should be so limited.

193. We will exercise our authority to grant class waivers in instances in which classes are carefully defined and when doing so would promote greater predictability and certainty for all stakeholders.⁵²¹ For the purpose of these rules, a class waiver is one that applies to more than one piece of equipment or more than one service where the equipment or services share common defining characteristics. For the Commission to grant a class waiver, we will examine whether petitioners have defined with specificity the class of common equipment or services with common advanced communications features and functions for which they seek a waiver, including whether petitioners have demonstrated the similarity of the equipment or service in the class and the similarity of the ACS features or functions.⁵²²

194. In addition, we will examine whether petitioners have explained in detail the expected lifecycle for the equipment or services that are part of the class. Thus, the

(Continued from previous page) _____

arbitrary time limits on waivers and that waivers should remain in effect as long as the conditions under which they were granted are met. TechAmerica Comments at 5; TIA Comments at 14-15. Green urges that we not automatically renew waivers. Green Reply Comments at 13. Given the speed at which communications technologies are evolving and the wide scope of devices and services covered by Section 716, it makes little sense for the Commission to establish a single length of time that would apply to all waivers. Rather, the Commission will determine the appropriateness of time-limited waivers on a case-by-case basis.

⁵¹⁸ This does not preclude combining multiple specific products with common attributes in the same waiver request.

⁵¹⁹ For example, a petitioner that manufactures many similar types of products – similar products of varying design, or similarly designed products with different product numbers – the petitioner must seek a waiver for each discrete product individually. This is analogous to rules implementing Section 255, which require entities to consider “whether it is readily achievable to install any accessibility features in a specific product whenever a natural opportunity to review the design of a service or product arises.” *Section 255 Report and Order*, 16 FCC Rcd at 6447, ¶ 71.

⁵²⁰ See TechAmerica Comments at 5; TIA Comments at 14-15; VON Coalition Comments at 7.

⁵²¹ 47 U.S.C. § 617(h)(1) (granting the Commission the authority to waive the requirements of Section 716 for classes of equipment and services).

⁵²² We distinguish class waivers from categorical waivers. Several commenters urge us to adopt rules that waive the requirements of Section 716 for whole categories of equipment or services. See TechAmerica Comments at 5; TIA Comments at 13; Verizon Comments at 9; CTIA Reply Comments at 18-19. We decline to adopt waivers for broad categories of equipment or services because we believe that the facts specific to each product or product type within a category may differ such that the ACS feature or function may be a primary purpose for which equipment or service within the category is primarily designed. We will utilize a fact-specific, case-by-case determination of all waiver requests. See discussion *supra* para. 181.

definition of the class should include the product lifecycle. All products and services covered by a class waiver that are introduced into the market while the waiver is in effect will ordinarily be subject to the waiver for the duration of the life of those particular products and services.⁵²³ For products and services already under development at the time when a class waiver expires, the achievability analysis conducted at that time may take into consideration the developmental stage of the product and the effort and expense needed to achieve accessibility at that point in the developmental stage.

195. To the extent a class waiver petitioner seeks a waiver for multiple generations of similar equipment and services, we will examine the justification for the waiver extending through the lifecycle of each discrete generation. For example, if a petitioner seeks a waiver for a class of devices with an ACS feature and a two-year product lifecycle, and the petitioner wishes to cover multiple generations of the product, we will examine the explanation for why each generation should be included in the class. If granted, the definition of the class will then include the multiple generations of the covered products or services in the class.

196. While many commenters agree that we should consider class waivers,⁵²⁴ we note that others are concerned that class waivers might lead to a “class of inaccessible products and services”⁵²⁵ well beyond the time that a waiver should be applicable.⁵²⁶ We believe this concern is addressed through our fact-specific, case-by-case analysis of waiver petitions and the specific duration for which we will grant each class waiver.

197. Several commenters urge us to adopt a time period within which the Commission must automatically grant waiver petitions if it has not taken action on them.⁵²⁷ We decline to do so. As the Commission noted in the *Accessibility NPRM*,⁵²⁸ in contrast to other statutory schemes,⁵²⁹ the CVAA does not specifically contemplate a “deemed granted” process. Nonetheless, we recognize the importance of expeditious consideration of waiver petitions to avoid delaying the development and release of products and services.⁵³⁰ We hereby delegate to the Consumer and Governmental Affairs Bureau (“Bureau”) the authority to decide all waiver requests filed pursuant to Section 716(h)(1) and direct the Bureau to take all steps necessary to do so efficiently and

⁵²³ As with ordinarily granting individual waiver requests for the life of the product or service, the Commission retains the authority to limit a class waiver for a shorter duration if the record suggests the waiver should be so limited. *See* discussion *supra* para 192.

⁵²⁴ *See* AT&T Comments at 5-7; CEA Comments at 17-18; ESA Comments at 13-15; Microsoft Comments at 7; NetCoalition Comments at 7; VON Coalition Comments at 7.

⁵²⁵ Words+ and Compusult Comments at 20.

⁵²⁶ *See* IT and Telecom RERCs Comments at 19-20.

⁵²⁷ *See* AT&T Comments at 8; CTIA Comments at 18; ESA Comments at 16; TIA Comments at 14.

⁵²⁸ *Accessibility NPRM*, 26 FCC Rcd at 3155, ¶ 57.

⁵²⁹ *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).

⁵³⁰ *See* CTIA Comments at 18; ESA Comments at 15-17; TIA Comments at 14.

effectively. Recognizing the need to provide certainty to all stakeholders with respect to waivers, we urge the Bureau to act promptly to place waiver requests on Public Notice and to give waiver requests full consideration and resolve them without delay. The Commission also hereby adopts, similar to its timeline for consideration of applications for transfers or assignments of licenses or authorizations relating to complex mergers, a timeline for consideration of applications for waiver of the rules we adopt today. This timeline represents the Commission's goal to complete action on such waiver applications within 180 days of public notice. This 180-day timeline for action is especially important in this context, given the need to provide certainty to both the innovators investing risk capital to develop new products and services, as well as to the stakeholders with an interest in this area. Therefore, it is the Commission's policy to decide all such waiver applications as expeditiously as possible, and the Commission will endeavor to meet its 180-day goal in all cases. Finally, although delay is unlikely, we note that delay beyond the 180-day period in a particular case would not be indicative of how the Commission would resolve an application for waiver.

198. We emphasize that a critical part of this process is to ensure a sufficient opportunity for public input on all waiver requests.⁵³¹ Accordingly, our rules provide that all waiver requests must be put on public notice, with a minimum of a 30-day period for comments and oppositions. In addition, public notices seeking comment on waiver requests will be posted on a webpage designated for disability-related waivers and exemptions in the Disability Rights Office section of the Commission's website, where the public can also access the accessibility clearinghouse⁵³² and other accessibility-related information. We will also include in our biennial report to Congress that is required under Section 717(b)(1) a discussion of the status and disposition of all waiver requests.

199. We recognize that confidentiality may be important for waiver petitioners.⁵³³ Petitioners may seek confidential treatment of information pursuant to section 0.459 of the Commission's rules.⁵³⁴ Several commenters agree with this approach.⁵³⁵ Third parties may request inspection of confidential information under section 0.461 of the Commission's rules.⁵³⁶ We anticipate that confidentiality may be less important for class waiver petitions due to the generic nature of the request; a class waiver petition can cover many devices, applications, or services across many covered entities and will therefore not likely include specific confidential design or strategic information of any covered entity.

⁵³¹ See IT and Telecom RERCs Comments at 19; TechAmerica Comments at 5; ACB Reply Comments at 23.

⁵³² See para. 6, *supra*.

⁵³³ See CEA Comments at 18; ESA Comments at 17.

⁵³⁴ 47 C.F.R. § 0.459.

⁵³⁵ See CEA Comments at 18; ESA Comments at 17; TechAmerica Comments at 5; VON Coalition at 7.

⁵³⁶ 47 C.F.R. § 0.461.

200. ESA urges the Commission to exclude from final rules the class “video game offerings,” which it defines to include video game consoles, operating systems, and games.⁵³⁷ CEA seeks a waiver for “[t]elevision sets that are enabled for use with the Internet,” and “[d]igital video players that are enabled for use with the Internet.”⁵³⁸ We decline to adopt or grant these requests at this time. Instead, we believe that petitioners will benefit from the opportunity to re-file these waiver requests consistent with the requirements of this *Report and Order*. Because of the phase-in period for implementation of these rules,⁵³⁹ petitioners will have flexibility to seek a waiver subsequent to this *Report and Order* without incurring unreasonable compliance expense. We encourage petitioners to seek a waiver for their respective classes of equipment and services consistent with the rules we adopt herein.⁵⁴⁰ We will specify in our biennial Report to Congress⁵⁴¹ any waiver requests granted during the previous two years.

3. Exemptions for Small Entities – Temporary Exemption of Section 716 Requirements

201. *Background.* Section 716(h)(2) states that “[t]he Commission may exempt small entities from the requirements of this section.”⁵⁴² While the Senate Report did not discuss this provision, the House Report notes that 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.”⁵⁴³ Otherwise, the House Report notes, the “application of these requirements in this limited case may slow the pace of technological innovation.”⁵⁴⁴ 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 that may qualify for the exemption.⁵⁴⁵

202. Compliance with the accessibility obligations under Section 716 is generally required, unless compliance is not achievable. The achievability standard

⁵³⁷ ESA Reply Comments at 12. As an initial matter, we believe that if Congress had intended to *exempt* services or equipment, it would have done so explicitly. Instead, Congress granted the Commission the discretion to choose to grant waivers or to create an exemption for small entities; neither is compulsory. See 47 U.S.C. § 617(h)(1), (2). See also House Report at 26; Senate Report at 8.

⁵³⁸ CEA July 19 *Ex Parte* at 2.

⁵³⁹ See Phased in Implementation, Section III.A.5, *supra*.

⁵⁴⁰ For example, a petition for a waiver of equipment and services may need to seek a waiver for each as individual classes, although they may file for them in the same petition.

⁵⁴¹ 47 U.S.C. § 618(b).

⁵⁴² 47 U.S.C. § 617(h)(2).

⁵⁴³ House Report at 26. In particular, the Report recognizes “the importance of small and entrepreneurial innovators and the significant value that they add to the economy.” *Id.*

⁵⁴⁴ House Report at 26.

⁵⁴⁵ House Report at 26.

provides a safeguard for all entities with obligations under Section 716.⁵⁴⁶ In determining achievability, or in response to a complaint, any ACS provider or ACS equipment manufacturer may demonstrate whether accessibility or compatibility with assistive technology is or is not achievable based on the four achievability factors, including “[t]he nature and cost of the steps needed” and “[t]he technical and economic impact on the operation of the manufacturer or provider.”⁵⁴⁷ Exempted small entities, on the other hand, would be relieved of the substantive obligations to consider accessibility, conduct an accessibility achievability analysis, or make their ACS products or services accessible even if achievable, and as a consequence would be relieved of the associated recordkeeping and annual certification requirements.⁵⁴⁸

203. In the *Accessibility NPRM*, the Commission sought comment on whether it should adopt any exemptions from compliance with Section 716 for small entities and, if so, how it should structure the exemptions.⁵⁴⁹

204. *Discussion.* We do not have before us a sufficient record upon which to grant a permanent exemption for small entities.⁵⁵⁰ The record also lacks sufficient information on the criteria to be used to determine which small entities to exempt. We therefore seek comment on such an exemption in the accompanying *Further Notice*. To avoid the possibility of unreasonably burdening “small and entrepreneurial innovators and the significant value that they add to the economy,”⁵⁵¹ we exercise our authority under the Act to temporarily exempt from the obligations of Section 716, and by effect Section 717,⁵⁵² all manufacturers of ACS equipment and all providers of ACS that qualify as small business concerns under the SBA’s rules and size standards, pending development of a record to determine whether small entities should be permanently exempted and, if so, what criteria should be used to define small entities.⁵⁵³ We find that good cause exists for this temporary exemption.⁵⁵⁴

⁵⁴⁶ See Achievable Standard, Section III.B.1, *supra*.

⁵⁴⁷ 47 U.S.C. § 617(g)(1), (2); see Achievable Standard, Section III.B.1, *supra*.

⁵⁴⁸ See 47 U.S.C. § 618(a)(5); see Recordkeeping, Section III.E.1, *supra*. While Section 716(h)(2) of the Act specifically authorizes the Commission to exempt small entities from the requirements of Section 716, the recordkeeping and annual certification requirements of Section 717 are inapplicable to entities that do not have to comply with the obligations of Section 716.

⁵⁴⁹ *Accessibility NPRM*, 26 FCC Rcd at 3157-58, ¶ 66.

⁵⁵⁰ Two commenters proffer specific grounds on which to base a small entity exemption. See NTCA Comments; Blooston Rural Carriers Comments to *October Public Notice*. The current record lacks support for adopting either proposal as a permanent exemption.

⁵⁵¹ House Report at 26.

⁵⁵² See note 557, *supra*.

⁵⁵³ See 13 C.F.R. § 121.201.

⁵⁵⁴ See 5 U.S.C. § 553(b)(B). Consistent with Congressional intent, we have consulted with the SBA in coordination with the Commission’s Office of Communications Business Opportunity. See House Report at 26.

205. Despite the lack of a meaningful substantive record on which to adopt a permanent exemption, without a temporary exemption we run the risk of imposing an unreasonable burden upon small entities and negatively impacting the value they add to the economy.⁵⁵⁵ At the same time, the absence of meaningful comments on any exemption criteria prohibits us from conclusively determining their impact on consumers and businesses. This temporary exemption will enable us to provide relief to those entities that may possibly lack legal, financial, or technical capability to comply with the Act until we further develop the record to determine whether small entities should be subject to a permanent exemption and, if so, the criteria to be used for defining which small entities should be subject to such permanent exemption.

206. We temporarily exempt entities that manufacture ACS equipment or provide ACS that, along with any affiliates, meet the criteria for a small business concern for their primary industry under SBA's rules and size standards.⁵⁵⁶ A small business concern, as defined by the SBA, is an "entity organized for profit, with a place of business located in the United States, and which operates primarily within the United States or which makes a significant contribution to the U.S. economy through payment of taxes or use of American products, materials or labor."⁵⁵⁷ Entities are affiliated under the SBA's rules when an entity has the power to control another entity, or a third party has the power to control both entities,⁵⁵⁸ as determined by factors including "ownership, management, previous relationships with or ties to another concern, and contractual relationships."⁵⁵⁹ A concern's primary industry is determined by the "distribution of receipts, employees and costs of doing business among the different industries in which business operations occurred for the most recently completed fiscal year,"⁵⁶⁰ and other factors including "distribution of patents, contract awards, and assets."⁵⁶¹

207. The SBA has established maximum size standards used to determine whether a business concern qualifies as a small business concern in its primary industry.⁵⁶² The SBA has generally adopted size standards based on the maximum

⁵⁵⁵ Further, given the short statutory deadline, we are unable to seek additional comment on a permanent solution prior to the adoption of the *Report and Order*. We adopt the temporary exemption because we believe it is necessary to grant immediate relief to all small entities pending development of a record to determine whether small entities should be exempted, and if so, what criteria should be used to define small entities.

⁵⁵⁶ 13 C.F.R. §§ 121.101 – 121.201.

⁵⁵⁷ 13 C.F.R. § 121.105(a)(1).

⁵⁵⁸ 13 C.F.R. § 121.103(a)(1).

⁵⁵⁹ 13 C.F.R. § 121.103(a)(2).

⁵⁶⁰ 13 C.F.R. § 121.107.

⁵⁶¹ 13 C.F.R. § 121.107.

⁵⁶² See 13 C.F.R. § 121.201.

number of employees or maximum annual receipts of a business concern.⁵⁶³ The SBA categorizes industries for its size standards using the North American Industry Classification System (“NAICS”), a “system for classifying establishments by type of economic activity.”⁵⁶⁴ Below we identify some NAICS codes for possible primary industry classifications of ACS equipment manufacturers and ACS providers and the relevant SBA size standards associated with the codes.⁵⁶⁵

	NAICS Classification ⁵⁶⁶	NAICS Code	SBA Size Standard ⁵⁶⁷
Services ⁵⁶⁸	Wired Telecommunications Carriers	517110	1,500 or fewer employees
	Wireless Telecommunications Carriers (except satellites)	517210	1,500 or fewer employees
	Telecommunications Resellers	517911	1,500 or fewer employees
	All Other Telecommunications	517919	\$25 million or less in annual receipts
	Software Publishers	511210	\$25 million or less in annual receipts
	Internet Publishing and Broadcasting and Web Search Portals	519130	500 or fewer employees
	Data Processing, Hosting, and Related Services	518210	\$25 million or less in annual receipts

⁵⁶³ 13 C.F.R. § 121.106 (describing how number of employees is calculated); 13 C.F.R. § 121.104 (describing how annual receipts is calculated).

⁵⁶⁴ North American Industry Classification System; Revision for 2012, 76 Fed. Reg. 51240 (Aug. 17, 2011) (“NAICS Final Decision”).

⁵⁶⁵ This is not a comprehensive list of the primary industries and associated SBA size standards of every possible manufacturer of ACS equipment or provider of ACS. This list is merely representative of some primary industries in which entities that manufacture ACS equipment or provide ACS may be primarily engaged. It is ultimately up to an entity seeking the temporary exemption to make a determination regarding their primary industry, and justify such determination in any enforcement proceeding.

⁵⁶⁶ The definitions for each NAICS industry classification can be found by entering the six digit NAICS code in the “2007 NAICS Search” function available at the NAICS homepage, <http://www.census.gov/eos/www/naics/index.html>. The U.S. Office of Management and Budget has revised NAICS for 2012, however, the codes and industry categories listed herein are unchanged. OMB anticipates releasing a 2012 NAICS UNITED STATES MANUAL or supplement in January 2012. See NAICS Final Decision, 76 Fed. Reg. at 51240.

⁵⁶⁷ See 13 C.F.R. § 121.201 for a full listing of SBA size standards by six-digit NAICS industry code. The standards listed in this column establish the maximum size an entity in the given NAICS industry may be to qualify as a small business concern.

⁵⁶⁸ See Providers of Advanced Communications Services, Section III.A.3, *supra*.

Equipment ⁵⁶⁹	Radio and Television Broadcasting and Wireless Communications Equipment Manufacturing	334220	750 or fewer employees
	Electronic Computer Manufacturing	334111	1,000 or fewer employees
	Telephone Apparatus Manufacturing	334210	1,000 or fewer employees
	Other Communications Equipment Manufacturing	334290	750 or fewer employees
	Software Publishers	511210	\$25 million or less in annual receipts
	Internet Publishing and Broadcasting and Web Search Portals	519130	500 or fewer employees

208. This temporary exemption is self-executing. Entities must determine whether they qualify for the exemption based upon their ability to meet the SBA's rules and the size standard for the relevant NAICS industry category for the industry in which they are primarily engaged. Entities that manufacture ACS equipment or provide ACS may raise this temporary exemption as a defense in an enforcement proceeding. Entities claiming the exemption must be able to demonstrate that they met the exemption criteria during the estimated start of the design phase of the lifecycle of the product or service that is the subject of the complaint. If an entity no longer meets the exemption criteria, it must comply with Section 716 and Section 717 for all subsequent products or services or substantial upgrades of products or services that are in the development phase of the product or service lifecycle, or any earlier stages of development, at the time they no longer meet the criteria.⁵⁷⁰

209. The temporary exemption will begin on the effective date of the rules adopted in this *Report and Order*.⁵⁷¹ The temporary exemption will expire on the earlier of (1) the effective date of small entity exemption rules adopted pursuant to the *Further Notice*; or (2) October 8, 2013.

D. Additional Industry Requirements and Guidance

1. Performance Objectives

210. *Background.* Section 716(e)(1)(A) of the Act provides that in prescribing regulations for this section, the Commission shall “include performance objectives to

⁵⁶⁹ See *Manufacturers of Equipment Used for Advanced Communications Services*, Section III.A.2, *supra*.

⁵⁷⁰ Covered entities must consider accessibility, and whether accessibility is achievable, during product design. See *Achievable Standard*, Section III.B.1, *supra*. Covered entities must also comply with the recordkeeping and annual certification obligations in Section 717 of the Act. 47 U.S.C § 618(a)(5); see *Recordkeeping*, Section III.E.1, *supra*. Since the small entity exemption relieves entities of the obligation to conduct an achievability analysis, the exemption focuses on the characteristics of the entity (employee figures or annual receipt data) during the design phase of the product lifecycle.

⁵⁷¹ See *Phased in Implementation*, Section III.A.5, *supra*.

ensure the accessibility, usability, and compatibility of advanced communications services and the equipment used for advanced communications services by individuals with disabilities.”⁵⁷²

211. *Discussion.* As proposed in the *Accessibility NPRM*,⁵⁷³ we adopt as general performance objectives the requirements that covered equipment and services be accessible, compatible and usable. We incorporate into these general performance objectives the outcome-oriented definitions of accessible,⁵⁷⁴ compatibility⁵⁷⁵ and usable,⁵⁷⁶ contained in sections 6.3 and 7.3 of the Commission’s rules. Most commenters in the record support this approach.⁵⁷⁷ The IT and Telecom RERCs, however, disagree and propose that we reframe our Part 6 requirements as goals and testable performance criteria.⁵⁷⁸ Because the IT and Telecom RERCs filed their proposal in their Reply Comments, we seek comment in the accompanying *Further Notice* on the IT and Telecom RERCs’ general approach and on specific testable performance criteria.⁵⁷⁹

212. We do not adopt specific performance objectives at this time. As we discuss in greater detail in Performance Objectives, Section IV.F, *infra*, we will defer consideration of specific performance criteria until the Access Board adopts Final Guidelines.⁵⁸⁰ As proposed in the *Accessibility NPRM*,⁵⁸¹ we will wait until after the

⁵⁷² 47 U.S.C. § 617(e)(1)(A).

⁵⁷³ *Accessibility NPRM*, 26 FCC Rcd at 3172, ¶ 105.

⁵⁷⁴ 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

⁵⁷⁵ 47 C.F.R. § 6.3(b)(1-4).

⁵⁷⁶ 47 C.F.R. § 6.3(l). 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.”

⁵⁷⁷ CEA Comments at 29; Consumer Groups Comments at 22; TIA Comments at 30, 33; T-Mobile Comments at 12; Verizon Comments at 13; Wireless RERC Comments at 6; Words + Compusult Comments at 29; Consumer Groups Reply Comments at 6; T-Mobile Reply Comments at 14. *But see* Microsoft Comments at 13-14.

⁵⁷⁸ IT and Telecom RERCs Reply Comments at 5.

⁵⁷⁹ See Performance Objectives, Section IV.F, *infra*.

⁵⁸⁰ TIA Comments at 32-33.

⁵⁸¹ *Accessibility NPRM*, 26 FCC Rcd at 3172, ¶ 107.

EAAC provides its recommendations on issues relating to the migration to IP-enabled networks, including the adoption of a real-time text standard, to the Commission in December 2011 to update our performance objectives, as appropriate.⁵⁸²

2. Safe Harbors

213. *Background.* 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 716.⁵⁸³

214. The vast majority of commenters responding to the *October Public Notice* opposed establishing technical standards as safe harbors.⁵⁸⁴ CTIA and AT&T asserted that safe harbors would result in *de facto* standards being imposed that would limit the flexibility of covered entities seeking to provide accessibility.⁵⁸⁵ The IT and Telecom RERCs stated that the Commission's rules should not include safe harbors because “technology, including accessibility technology, will develop faster than law can keep up.”⁵⁸⁶ AFB asserted that it is too early in the CVAA’s implementation “to make informed judgments . . . about whether and which safe harbors should be available.”⁵⁸⁷ While ITI supported safe harbors, noting they provide clarity and predictability, it warned against using safe harbors “to establish implicit mandates [that] . . . lock in particular solutions.”⁵⁸⁸ In light of the concerns raised in the record, the Commission proposed not to adopt any technical standards as safe harbors, and sought comment on its proposal.⁵⁸⁹

215. *Discussion.* We decline, at this time, to adopt any technical standards as safe harbors. The majority of commenters either oppose the Commission adopting technical standards as safe harbors or only support the adoption of safe harbors subject to important limitations and qualifications.⁵⁹⁰ CEA, for example, argues that safe harbors

⁵⁸² See AFB Reply Comments at 13 (arguing that this rulemaking informs the work of the EAAC).

⁵⁸³ 47 C.F.R. § 617(e)(1)(D).

⁵⁸⁴ AT&T Comments to *October Public Notice* at 7; CEA Comments to *October Public Notice* at ii and 15; CTIA Comments to *October Public Notice* at 11-12; RERC-IT Comments to *October Public Notice* at 8; ACB Reply Comments to *October Public Notice* at 22; AFB Reply Comments to *October Public Notice* at 7; CTIA Reply Comments to *October Public Notice* at 5; RERC-IT Reply Comments to *October Public Notice* at 7.

⁵⁸⁵ AT&T Comments to *October Public Notice* at 7; CTIA Comments to *October Public Notice* at 11..

⁵⁸⁶ RERC-IT Reply Comments to *October Public Notice* at 7.

⁵⁸⁷ AFB Reply Comments to *October Public Notice* at 7. ACB urges that if the Commission establishes safe harbors, it provide a framework for assessing these standards. ACB Reply Comments to *October Public Notice* at 21-22.

⁵⁸⁸ ITI Comments to *October Public Notice* at 10.

⁵⁸⁹ See, e.g., CEA Comments to *October Public Notice* at 15; Microsoft Comments to *October Public Notice* at 3.

⁵⁹⁰ CEA Comments at 39; IT and Telecom RERCs Comments at 38; ITI Comments at 17; TechAmerica Comments at 9; TIA Comments at 32 (arguing that the Commission should not mandate certain standards, (continued....))

should only be used in limited circumstances and warns that the Commission should not lock in outdated technologies or impose implicit mandates.⁵⁹¹ The IT and Telecom RERCs assert that APIs should be encouraged, but should not be a safe harbor.⁵⁹² ITI, however, argues that we should adopt safe harbors as a “reliable and sustainable method to achieve interoperability between” all of the components necessary to make ACS accessible.⁵⁹³ AFB and Words+ and Compusult argue that it is still too early in the implementation of the CVAA to make informed judgments about whether safe harbor technical standards should be established.⁵⁹⁴ We do not have enough of a record at this time to evaluate ITI’s proposal or to decline to adopt a safe harbor, and seek further comment on this issue in the accompanying *Further Notice*.⁵⁹⁵

3. Prospective Guidelines

216. *Background.* Section 716(e)(2) of the Act requires the Commission to issue prospective guidelines concerning the new accessibility requirements.⁵⁹⁶ 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.”⁵⁹⁷

217. In the *Accessibility NPRM*, the Commission sought comment on a proposal by the RERC-IT, endorsed by ACB, that the Commission use “an approach to the guidelines similar to that used by the World Wide Web Consortium’s Web Content Accessibility Guidelines, which provide mandatory performance-based standards and non-mandatory technology-specific techniques for meeting them.”⁵⁹⁸ The Commission also sought comment on whether any parts of the Access Board’s Draft Guidelines on Section 508 should be adopted as prospective guidelines.⁵⁹⁹ In addition, the Commission

(Continued from previous page) _____
but supporting the use of industry-developed technical standards as a safe harbor for compliance where necessary); VON Coalition Comments at 7-8; Words+ and Compusult Comments at 32; Letter from Ken J. Salaets, Director Information Technology Industry Council, to Marlene H. Dortch, Secretary, FCC, CG Docket No. 10-213, at 3 (filed June 10, 2010).

⁵⁹¹ CEA Comments at 39.

⁵⁹² IT and Telecom RERCs Reply Comments at 4.

⁵⁹³ ITI August 9 *Ex Parte* at 2. See also Letter from Ken J. Salaets, Director, Information Technology Industry Council, to Marlene H. Dortch, Secretary, FCC, CG Docket No. 10-213 (filed Aug. 22, 2011) (“ITI August 11 *Ex Parte*”).

⁵⁹⁴ AFB Reply Comments to *October Public Notice* at 7; Words+ and Compusult Comments at 32.

⁵⁹⁵ Safe Harbors, Section IV.G, *infra*.

⁵⁹⁶ 47 U.S.C. § 617(e)(2).

⁵⁹⁷ See House Report at 25.

⁵⁹⁸ *Accessibility NPRM*, 26 FCC Rcd at 3175, ¶ 115; RERC-IT Comments to *October Public Notice* at 8; ACB Reply Comments to *October Public Notice* at 22.

⁵⁹⁹ *Accessibility NPRM*, 26 FCC Rcd at 3175, ¶ 115. We note that some in industry expressed concern about incorporating parts of the Access Board Draft Guidelines as prospective guidelines. See, e.g., CTIA PN Comments at 12, finding that the Access Board Draft Guidelines were “insufficiently clear to provide (continued....)”

sought comment on the process for developing prospective guidelines, including asking whether the Commission should establish a consumer-industry advisory group to prepare guidelines.⁶⁰⁰

218. *Discussion.* We generally agree with CEA that because the Access Board’s draft guidelines “may still change significantly,” we should allow the Access Board to complete its review and issue Final Guidelines before we adopt prospective guidelines in accordance with Section 716(e)(2) of the Act.⁶⁰¹ We agree with the IT and Telecom RERCs that the Commission does not need to create a separate advisory group to generate prospective guidelines.⁶⁰² We believe that the Access Board will take into account the “needs of specific disability groups, such as those with moderate to severe mobility and speech disorders.”⁶⁰³ Accordingly, we will conduct further rulemaking to develop the required prospective guidelines after the Access Board issues its Final Guidelines.

E. Section 717 Recordkeeping and Enforcement

1. Recordkeeping

219. *Background.* Section 717(a)⁶⁰⁴ requires the Commission to establish new recordkeeping and enforcement procedures for manufacturers and service providers that are subject to Sections 255, 716, and 718 of the Act.⁶⁰⁵ Section 717(a)(5)(A) requires such manufacturers and service providers to “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.”⁶⁰⁶ The statute establishes a one-year period for phasing in the recordkeeping requirements (*i.e.*, the recordkeeping requirement starts one year after the effective date of the rule),⁶⁰⁷ as well as an annual certification of compliance

(Continued from previous page) _____

useful guidance” and “did not offer manufacturers and providers sufficient technological flexibility to enable a seamless transition from traditional devices to IP-based technologies.”

⁶⁰⁰ *Accessibility NPRM*, 26 FCC Rcd at 3175, ¶ 115.

⁶⁰¹ CEA Comments at 38; CEA Reply Comments at 18; 47 U.S.C. § 617(e)(2). *See also* TIA Comments at 32-33. *But see* CTIA Sept. 30 *Ex Parte* at 1 (stating that “it would be contrary to the intent of the statute to subject manufacturers and service providers to an entirely new enforcement regime for services and equipment developed before the Commission articulated a clear set of guidelines for compliance.”)

⁶⁰² IT and Telecom RERCs Comments at 39.

⁶⁰³ Words+ and Compusult Comments at 33.

⁶⁰⁴ 47 U.S.C. § 618(a).

⁶⁰⁵ 47 U.S.C. §§ 255, 617, 619.

⁶⁰⁶ 47 U.S.C. § 618(a)(5)(A)(i)-(iii).

⁶⁰⁷ *Accessibility NPRM*, 26 FCC Rcd at 3178-79, ¶ 123.

requirement.⁶⁰⁸ It also extends a statutory right to confidentiality to cover those records that our rules require a manufacturer or service provider to keep and produce and that are relevant to an informal complaint.⁶⁰⁹ In the *Accessibility NPRM*, the Commission sought comment on implementation of the statutory requirement.

220. *Discussion.* In this *Report and Order*, we adopt rules to implement Congress’s directive that manufacturers and service providers maintain “records of the efforts taken by such manufacturer or provider to implement Sections 255, 716, and 718.”⁶¹⁰ Specifically, we require covered entities to keep the three sets of records specified in the statute.⁶¹¹ However, we remind covered entities that do not make their products or services accessible and claim as a defense that it is not achievable for them to do so, that they bear the burden of proof on this defense.⁶¹² As a result, while we do not require manufacturers and service providers that intend to make such a claim to create and maintain any particular records relating to that claim, they must be prepared to carry their burden of proof.⁶¹³ Conclusory and unsupported claims are insufficient and will cause the Commission to rule in favor of complainants that establish a *prima facie* case that a product or service is inaccessible and against manufacturers or service providers that assert, without proper support, that it was not achievable for them to make their product or service accessible.

221. In this regard, manufacturers and service providers claiming as a defense that it is not achievable must be prepared to produce sufficient records demonstrating:

- the nature and cost of the steps needed to make equipment and services accessible in the design, development, testing, and deployment process⁶¹⁴ to make a piece of equipment or software in

⁶⁰⁸ *Accessibility NPRM*, 26 FCC Rcd at 3176, ¶ 117.

⁶⁰⁹ 47 U.S.C. § 618(a)(5)(C).

⁶¹⁰ 47 U.S.C. § 618(a)(5)(A).

⁶¹¹ 47 U.S.C. § 618(a)(5)(A)(i)-(iii).

⁶¹² *See, e.g.*, AFB Comments at 7 (“[T]he plain meaning of the CVAA is that a covered entity has the burden of proof in demonstrating that it was/is not achievable to afford access to people with disabilities in a given context.”).

⁶¹³ This is consistent with the Commission’s approach set forth in the *Section 255 Report and Order*. In the *Section 255 Report and Order*, the Commission declined to delineate specific documentation requirements for the “readily achievable” analysis, but stated that it “fully expect[ed]” covered entities to maintain records of their efforts during the ordinary course of business that could be presented to the Commission to demonstrate compliance. *Section 255 Report and Order*, 16 FCC Rcd at 6448, ¶ 74. Likewise, while the Section 255 “readily achievable” factors differ from the “achievable” factors set out in the CVAA, manufacturers and service providers subject to Section 255 claiming such a defense bear the burden of proof under the factors set out in the *Section 255 Report and Order* and our rules. *See Section 255 Report and Order*, 16 FCC Rcd at 6439-40, ¶ 48; *see also* 47 C.F.R. § 7.3(h).

⁶¹⁴ Expert affidavits, attesting that accessibility for a product or service was not achievable, created after a complaint is filed or the Commission launches its own investigation would not satisfy this burden. Samuelson-Glushko TLPC argues that “[u]ser testing requirements are vital to ensure usable and viable technology access to citizens with disabilities.” Samuelson-Glushko Reply Comments at 4. While we will (continued....)

the case of a manufacturer, or service in the case of a service provider, usable by individuals with disabilities;⁶¹⁵

- 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;
- the type of operations of the manufacturer or service 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 offered at differing price points.⁶¹⁶

222. Likewise, equipment manufacturers and service providers that elect to satisfy the accessibility requirements using third-party applications, peripheral devices, software, hardware, or customer premises equipment must be prepared to produce relevant documentation.⁶¹⁷

223. We will not mandate any one form for keeping records (*i.e.*, we adopt a flexible approach to recordkeeping). While we establish uniform recordkeeping and enforcement procedures for entities subject to Sections 255, 716, and 718, we believe that covered entities should not be required to maintain records in a specific format.⁶¹⁸

(Continued from previous page) _____

not impose specific user testing requirements, we support the practice of user testing and agree with Samuelson-Glushko that user testing benefits individuals with a wide range of disabilities. Samuelson-Glushko Reply Comments at 4-5.

⁶¹⁵ While we do not define here what cost records a covered entity should keep, in reviewing a defense of not achievable, we will expect such entities to produce records that will assist the Commission in identifying the incremental costs associated with designing, developing, testing, and deploying a particular piece of equipment or service with accessibility functionality versus the same equipment or service without accessibility functionality. Additionally, with respect to services, covered entities should be prepared to produce records that identify the average and marginal costs over the expected life of such service. Records that front load costs to demonstrate that accessibility was not achievable will be given little weight.

⁶¹⁶ 47 U.S.C. §§ 617(g)(1)-(4).

⁶¹⁷ Sections 617(a)(2)(B) and (b)(2)(B) allow manufactures and service providers, respectively, to use third party applications, peripheral devices, software, hardware, or customer premises equipment to satisfy their accessibility requirements, provided they can be accessed by individuals with disabilities and are available at nominal cost.

⁶¹⁸ While we are not requiring that records and documents be kept in any specific format, we exercise our authority and discretion under Sections 403, 4(i), 4(j), 208 and other provisions of the Act and Commission and court precedent to require production of records and documents in an informal and formal complaint process or in connection with investigations we initiate on our own motion in any form that is conducive to the dispatch of our obligation under the Act, including electronic form and formatted for specific documents review software products such as Summation, as well as paper copies. In addition, we require that all records filed with the Commission be in the English language. Where records are in a language other than English, we require the records to be filed in the native language format accompanied by a certified English translation. We adopt our proposal in the *Accessibility NPRM* that if a record that a (continued....)

Allowing covered entities the flexibility to implement individual recordkeeping procedures takes into account the variances in covered entities (*e.g.*, size, experience with the Commission), recordkeeping methods, and products and services covered by the provisions.⁶¹⁹

224. While we are not requiring entities to adopt a standard approach to recordkeeping, we fully expect that entities will establish and sustain effective internal procedures for creating and maintaining records that demonstrate compliance efforts and allow for prompt response to complaints and inquiries. As noted in the *Section 255 Report and Order*, if we determine that covered entities are not maintaining sufficient records to respond to Commission or consumer inquiries, we will revisit this decision.⁶²⁰

225. The statute requires manufacturers and service providers to preserve records for a “reasonable time period.”⁶²¹ Pursuant to this requirement, we adopt a rule that requires a covered entity to retain records for a period of two years from the date the covered entity ceases to offer or in anyway distribute (through a third party or reseller) the product or service to the public. In determining what constitutes a reasonable time period, we believe that records should at a minimum be retained during the time period that manufacturers and providers are offering the applicable products and services to the public. We also believe that a reasonable time period should be linked to the life cycle of the product or service and that covered entities should retain records for a reasonable period after they cease to offer a product or service (or otherwise distribute a product or service through a reseller or other third party). In this regard, based on our experience with other enforcement issues, we note that purchasers of products or services might not file a complaint for up to a year after they have purchased such products or services and that the statute places no limitation preventing consumers from doing this. In addition, some consumers might purchase a product or service from another party one year after the covered entity has ceased making and offering the covered product or service. These ‘resale’ consumers in turn might take up to an additional year to file an accessibility complaint. At the same time, as discussed further in our Enforcement Section below, the Commission may initiate an enforcement investigation into an alleged violation of Section 255, 716, or 718 based on information that a consumer, at any time, brings to the Commission's attention. These documents would thus be relevant to a Commission-initiated investigation. For these reasons, we find that covered entities must retain records for two years after they cease offering (or in any way distributing) a covered product or service to the public.

(Continued from previous page) _____
covered entity must produce “is not readily available, the covered entity must provide it no later than the date of its response to the complaint.” *Accessibility NPRM*, 26 FCC Rcd at 3178-79, ¶ 123.

⁶¹⁹ *Accessibility NPRM*, 26 FCC Rcd at 3178-79, ¶ 123. In the *Section 255 Report and Order*, the Commission also declined to mandate specific efforts or formats for the information collection, and instead held that “companies should have flexibility in addressing this issue.” *Section 255 Report and Order*, 16 FCC Rcd at 6482, ¶ 172.

⁶²⁰ *Section 255 Report and Order*, 16 FCC Rcd at 6482, ¶ 172.

⁶²¹ 47 U.S.C. § 618(a)(5)(A).

226. This will enable consumers to file complaints and the Commission to initiate its own investigations to ensure that, even if the product or service at issue in the complaint is not compliant, the next generation or iteration of the product or service is compliant. Because covered entities must comply with Sections 255, 716, and 718, we find that this two-year document retention rule imposes a minimal burden on covered entities because it ensures that they have the necessary documentation to prove that they have satisfied their legal obligations in response to any complaint filed. Covered entities are reminded, however, that, even upon the expiration of the mandatory two-year document retention rule, it is incumbent on them to prove accessibility or that accessibility was not achievable in the event that a complaint is received. Thus, covered entities should use discretion in setting their record retention policies applicable to the post-two-year mandatory record retention period.

227. The statute requires that an officer of a manufacturer or service provider annually submit to the Commission a certification that records required to be maintained are being kept in accordance with the statute.⁶²² We adopt a rule requiring manufacturers and service providers to have an authorized officer sign and file with the Commission the annual certification required pursuant to Section 717(a)(5)(B) and our rules.⁶²³ The certification must state that the manufacturer or service provider, as applicable, is keeping the records required in compliance with Section 717(a)(5)(A) and section 14.31 of our new rules and be supported with an affidavit or declaration under penalty of perjury, signed and dated by the authorized officer of the company with personal knowledge of the representations provided in the company's certification, verifying the truth and accuracy of the information therein. All such declarations must comply with section 1.16 of our rules and be substantially in the form set forth therein.⁶²⁴ We also require the certification to identify the name and contact details of the person or persons within the company that are authorized to resolve complaints alleging violations of our accessibility rules and Sections 255, 716, and 718 of the Act, and the name and contact details of the person in the company for purposes of serving complaints under Part 14, Subpart D of our new rules.⁶²⁵ Finally, the annual certification must be filed with the Commission on or before April 1st each year for records pertaining to the previous calendar year.⁶²⁶

⁶²² 47 U.S.C. § 618(a)(5)(B).

⁶²³ 47 U.S.C. § 618(a)(5)(B). If the manufacturer or service provider is an individual, the individual must sign. In the case of a partnership, one of the partners must sign on behalf of the partnership and by a member with authority to sign in cases where the manufacturer or service provider is, for example, an unincorporated association or other legal entity that does not have an officer or partner, or its equivalent.

⁶²⁴ See 47 C.F.R. § 1.16.

⁶²⁵ The contact details required for purposes of complaints and service must be the U.S. agent for service for the covered entity. This information will be posted on the FCC's website.

⁶²⁶ CGB will issue a public notice to provide filing instructions prior to the first annual certification, which may be required on or before April 1, 2013. For the first certification filing, manufacturers and service providers must certify that, since the effective date of the rules, records have been kept in accordance with the Commission's rules. CGB will establish a system for online filing of annual certifications. When this system is available, CGB will release a public notice announcing this fact and providing instructions on its (continued....)

228. Section 717(a)(5)(C) requires the Commission to keep confidential only those records that are: (1) filed by a covered entity at the request of the Commission in response to a complaint; (2) created or maintained by the covered entity pursuant to the rules we adopt today; and (3) directly relevant to the equipment or service that is the subject of the complaint.⁶²⁷ Section 717(a)(5)(C) does not require *all* records that the Commission may request a covered entity file in response to a complaint be kept confidential – only those records that the covered entity is required to keep pursuant to our rules adopted herein *and* are directly relevant to the equipment or service at issue. Section 717(a)(5)(C) also does not protect any additional materials such as supporting data or other information that proves the covered entity’s case, nor does it protect records that covered entities are required to keep when responding to a Commission investigation initiated on our own motion.

229. While we recognize the limited scope of the confidentiality protection of Section 717(a)(5)(C), we also recognize that some of the documents falling outside that protection may also qualify for confidentiality under our rules. For those documents submitted in response to a complaint or an investigation, covered entities should follow our existing rules and procedures for protecting confidentiality of records. Accordingly, when a covered entity responds to a complaint alleging a violation of Section 255, 716, or 718 or responds to a Commission inquiry, the covered entity may request confidential treatment of the documentation, information, and records that it files with the Commission under section 0.459 of our rules.⁶²⁸ When covered entities file records that fall within the limited scope of Section 717(a)(5)(C), they may assert the statutory exemption from disclosure under section 0.457(c) of the Commission’s rules.⁶²⁹ In all other cases, covered entities must comply with section 0.459 when seeking protection of their records.⁶³⁰

(Continued from previous page) _____

use. CGB will also update the Disability Rights Office section of the Commission’s website to describe how annual certifications may be filed.

⁶²⁷ 47 U.S.C. § 618(a)(5)(C).

⁶²⁸ 47 C.F.R. § 0.459.

⁶²⁹ 47 C.F.R. § 0.457(c). By adopting this process, we see no need to adopt TIA’s proposal that we specifically amend section 0.457(c) to include Section 717(a)(5)(C) materials. Letter from Mark Uncapher, Director, TIA, to Marlene H. Dortch, Secretary, FCC, CG Docket No. 10-213, at 3 (filed Aug. 26, 2011). We require covered entities to include with their confidentiality requests under Section 0.459 a statement identifying which records, if any, it is asserting a statutory protection under Section 618(a)(5)(C) and to submit a redacted version of these records for the public file together with redacted versions of the documents and information it requests confidential treatment under section 0.459.

⁶³⁰ See 47 C.F.R. § 0.459. We remind covered entities that our rules require such entities to file a redacted copy of their response to a complaint or investigation. We do not believe it serves the public interest of the parties in a complaint process for the Commission to try to determine in the first instance what documents and records the filing party wishes be kept confidential. The party filing documents with the Commission is best suited to make that initial determination. We note that our informal complaint rules require the responding covered entity to serve a non-confidential summary of its complaint answer to the complainant. See Informal Complaints, Section III.E.2.c, *infra*.

230. Finally, as discussed earlier in this *Report and Order*, products or services offered in interstate commerce shall be accessible, unless not achievable, beginning on October 8, 2013.⁶³¹ Pursuant to the statute, one year after the effective date of these regulations, covered entities' recordkeeping obligations become effective.⁶³²

2. Enforcement

a. Overview

231. Section 717 of the Act requires the Commission to adopt rules that facilitate the filing of formal and informal complaints alleging non-compliance with 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.⁶³³ In crafting rules to implement the CVAA's enforcement requirements, our goal is to create an enforcement process that is accessible and fair and that allows for timely determinations, while allowing and encouraging parties to resolve matters informally to the extent possible.

b. General Requirements

232. *Background.* In the *Accessibility NPRM*, the Commission sought comment on whether to require potential complainants to first notify the defendant manufacturer or provider of their intent to file a complaint with the Commission based on an alleged violation of one or more provisions of Section 255, 716, or 718.⁶³⁴ The Commission invited proposals on potential safeguards that the Commission could adopt to ensure that any pre-filing requirement established under the new rules is not onerous on potential complainants.⁶³⁵ In addition, the Commission proposed in the *Accessibility NPRM* not to adopt a standing requirement in order to file a formal or informal complaint under Section 255, 716, or 718.⁶³⁶

233. *Discussion.* Several commenters suggest that a type of pre-filing notice to potential defendants may facilitate the speedy settlement of consumer disputes, which, they say, would save consumers and industry time and money and preserve Commission resources that would otherwise be expended in the informal complaint process.⁶³⁷ These

⁶³¹ See Phased in Implementation, Section III.A.5, *supra*.

⁶³² 47 U.S.C. § 618(a)(5)(A).

⁶³³ 47 U.S.C. § 618(a).

⁶³⁴ *Accessibility NPRM*, 26 FCC Rcd at 3181-82, ¶ 128.

⁶³⁵ *Accessibility NPRM*, 26 FCC Rcd at 3181-82, ¶ 128.

⁶³⁶ *Accessibility NPRM*, 26 FCC Rcd at 3181-82, ¶ 130.

⁶³⁷ See AT&T Comments at 13-14 (arguing that the "vast majority of complaints" may be resolved before they reach the Commission); CEA Comments at 31-32; CTIA Comments at 31-32 (encouraging the Commission to "foster an environment that facilitates greater communication among the parties and informal resolution of concerns wherever possible"). See also *Section 255 Report and Order*, 16 FCC Rcd at 6467, ¶ 119 (encouraging consumers to raise their concerns with manufacturers or service providers prior to filing a Section 255 complaint).

commenters urge the Commission to require potential complainants to notify covered entities of their intent to file an informal complaint generally 30 days before they intend to file such a complaint.⁶³⁸ Others, however, have reported that consumers would experience frustration if required to pre-notify a covered entity directly.⁶³⁹ We recognize the potential benefits of allowing companies an opportunity to respond directly to the concerns of consumers before a complaint is filed. At the same time, we are cognizant of the difficulties that consumers may have in achieving resolution of their issues on their own. For example, consumers may not always be able to figure out, in multi-component products that use communications services, which entity is responsible for failing to provide access.⁶⁴⁰ Therefore, to facilitate settlements, as well as to assist consumers with bringing their concerns to the companies against which they might have a complaint, we adopt a compromise pre-filing requirement that is designed to reap the benefits of informal dispute resolution efforts, but that does not impose an unreasonable burden on consumers by requiring them to approach companies on their own.

234. We will require consumers to file a “Request for Dispute Assistance” (“Request”) with CGB, rather than with a covered entity, prior to filing an informal complaint with the Commission.⁶⁴¹ This requirement to file a Request is a prerequisite to the filing of informal complaints only. It is not a prerequisite to the filing of a formal complaint, as the complainant and the respondent to a formal complaint proceeding are both required to certify in their pleadings that, prior to the filing of the formal complaint, both parties, “in good faith, discussed or attempted to discuss the possibility of settlement.”⁶⁴²

235. This Request should contain: (1) the name, address, e-mail address, and telephone number of the consumer and the manufacturer or service provider against

⁶³⁸ AT&T Comments at 13-14 (should require a 30 day pre-filing notice); CEA Comments at 31-32 (should require an unspecified pre-filing notice period); CTIA Comments at 31-32 (should require a 30 day pre-filing notice period); TechAmerica Comments at 10 (arguing that “the Commission should encourage, if not require, potential complainants” to notify potential respondents of an intent to file a complaint); Letter from Mark Uncapher, Director, TIA, to Marlene H. Dortch, Secretary, FCC, CG Docket No. 10-213, at 2 (filed Sept. 12, 2011) (“TIA Sept. 12 *Ex Parte*”); TIA Sept. 28 *Ex Parte* at 2 (arguing that consumers and covered entities should have 60 days to resolve a dispute before an informal complaint is filed).

⁶³⁹ IT and Telecom RERCs Comments at 39-40 (“[A pre-filing requirement] can lead to frustration and giving up on pursuing the complaint.”).

⁶⁴⁰ See IT and Telecom RERCs Comments at 39-40.

⁶⁴¹ A Request for Dispute Assistance may be sent to CGB in the same manner as an informal complaint, as discussed below, but filers should use the e-mail address dro@fcc.gov if sending their complaint by e-mail. Parties with questions regarding these requests should call CGB at 202-418-2517 (voice), 202-418-2922 (TTY), or visit the Commission’s Disability Rights Office web site at <http://transition.fcc.gov/cgb/dro>. CGB will establish a system for online filing of requests for dispute assistance. When this system is available, CGB will release a public notice announcing this fact and providing instructions on its use. CGB will also update the Disability Rights Office section of the Commission’s website to describe how requests for dispute assistance may be filed.

⁶⁴² See Appendix B, 47 C.F.R. §§ 14.39(a)(8), 14.42(h).

whom the complaint will be made;⁶⁴³ (2) an explanation of why the consumer believes the manufacturer or provider is in violation of Sections 255, 716, or 718 of the Commission's implementing rules, including details regarding the service or equipment and the relief requested and any documentation that supports the complainant's contention; (3) the approximate date or dates on which the consumer either purchased, acquired, or used (or attempted to purchase, acquire, or use) the equipment or service in question; (4) the consumer's preferred format or method of response to the complaint by the Commission and defendant (*e.g.*, letter, facsimile transmission, telephone (voice/TRS/TTY), e-mail, or some other method that will best accommodate the consumer's disability); and (5) any other information that may be helpful to CGB and the defendant to understand the nature of the complaint.

236. CGB will forward a copy of the request to the named manufacturer or service provider in a timely manner. As discussed in the Recordkeeping Section above, we require covered entities to include their contact information in their annual certifications filed with the Commission.⁶⁴⁴ If a covered entity has not filed a certification that includes its contact information,⁶⁴⁵ CGB shall forward the request to the covered entity based on publicly available information, and the covered entity may not argue that it did not have a sufficient opportunity to settle a potential complaint during the dispute assistance process. If, in the course of the CGB dispute assistance process, CGB or the parties learn that the Requester has identified the wrong entity or there is more than one covered entity that should be included in the settlement process, then CGB will assist the parties in ascertaining and locating the correct covered entity or entities for the dispute at issue. In this case, the 30-day period will be extended for a reasonable time period, so that the correct covered entities have notice and an opportunity to remedy any failure to make a product or service achievable or to settle the dispute in another manner.

237. Once the covered entity receives the Request, CGB will then assist the consumer and the covered entity in reaching a settlement of the dispute with the covered entity. After 30 days, if a settlement has not been reached, the consumer may then file an informal complaint with the Commission. However, if the consumer wishes to continue using CGB as a settlement resource beyond the 30-day period, the consumer and the covered entity may mutually agree to extend the CGB dispute assistance process for an additional 30 days and in 30-day increments thereafter.⁶⁴⁶ Once a consumer files an

⁶⁴³ Where the consumer does not have all of this information or cannot identify the appropriate manufacturer or service provider, he or she should provide as much information as possible and work with CGB to identify the appropriate covered entity and its contact information.

⁶⁴⁴ Recordkeeping, Section III.E.1, *supra*. See Appendix B, 47 C.F.R. § 14.31(b).

⁶⁴⁵ Failure to file a certification is a violation of the Commission's rules. See Appendix B, 47 C.F.R. § 14.31(b).

⁶⁴⁶ We find that this is a better approach than the strict 60-day period recommended by TIA (*see* TIA Sept. 12 *Ex Parte* and TIA Sept. 28 *Ex Parte*) because it will encourage more expeditious resolutions while providing greater flexibility to the consumer and the covered entity to continue negotiations on an as needed basis.

informal complaint with the Enforcement Bureau, as discussed below, the Commission will deem the CGB dispute assistance process concluded.⁶⁴⁷

238. In the course of assisting parties to resolve a Section 716 dispute, CGB may discover that the named manufacturer or service provider is exempt from Section 716 obligations under a waiver or the temporary small business exemption.⁶⁴⁸ In such cases, CGB will inform the consumer why the named covered entity has no responsibility to make its service or product accessible, and the dispute assistance process will terminate.

239. We believe that this dispute assistance process provides an appropriate amount of time to facilitate settlements and provide assistance to consumers to rapidly and efficiently resolve accessibility issues with covered entities.⁶⁴⁹ We also believe that this approach will lessen the hesitation of some consumers to approach companies about their concerns or complaints by themselves. Commission involvement before a complaint is filed will benefit both consumers and industry by helping to clarify the accessibility needs of consumers for the manufacturers or service providers against which they may be contemplating a complaint, encouraging settlement discussions between the parties, and resolving accessibility issues without the expenditure of time and resources in the informal complaint process.

240. No parties opposed the Commission's proposal not to adopt a standing requirement or its proposal to continue taking *sua sponte* enforcement actions. The language of the statute supports no standing requirement, stating that "[a]ny person alleging a violation . . . may file a formal or informal complaint with the Commission."⁶⁵⁰ We believe that any person should be able to identify noncompliance by covered entities and anticipate that informal or formal complaints will be filed by a wide range of complainants, including those with and without disabilities and by individuals and consumer groups.⁶⁵¹ Therefore, we find no reason to establish a standing requirement and

⁶⁴⁷ As discussed in Informal Complaints, Section III.E.2.c, *infra*, an informal complainant will be required to certify that it filed a "Request for Dispute Assistance" and to provide the date on which such request for filed.

⁶⁴⁸ See Exemptions for Small Entities – Temporary Exemption of Section 716 Requirements, Section III.C.3, *supra*.

⁶⁴⁹ TIA Aug. 26 *Ex Parte* at 2 (arguing that a pre-complaint, CGB-facilitated process will permit consumers and covered entities to resolve disputes on their own); Letter from Julie M. Kearney, Vice President, Regulatory Affairs, CEA, to Marlene H. Dortch, Secretary, FCC, CG Docket No. 10-213, at 2-3 n.10 (filed Sept. 6, 2011) ("CEA Sept. 6 *Ex Parte*") (expressing general support for TIA's CGB proposal); see Letter from Matthew Gerst, Counsel, CTIA, to Marlene H. Dortch, Secretary, FCC, CG Docket No. 10-213, Attachment at 12 (filed Aug. 11, 2011) ("CTIA Aug. 11 *Ex Parte*") (stating that "[e]arly resolution among parties should be encouraged").

⁶⁵⁰ 47 U.S.C. § 618(a)(3)(A).

⁶⁵¹ As noted in the *Accessibility NPRM*, there is no standing requirement under Sections 255, 716, and 718 or under Section 208 of the Act and our existing rules. See *Accessibility NPRM*, 26 FCC Rcd at 3182-83, ¶ 130. See also *Section 255 Report and Order*, 16 FCC Rcd at 6469, ¶ 125 (also noting that Section 208, Section 255, and the complaint rules do not include a standing requirement); IT and Telecom RERCs (continued....)

adopt the *Accessibility NPRM*'s proposal on standing to file. We also find no reason to modify existing procedures for initiating, on our own motion, Commission and staff investigations, inquiries, and proceedings for violations of our rules and the Act. Irrespective of whether a consumer has sought dispute assistance or filed a complaint on a particular issue, we intend to continue using all our investigatory and enforcement tools whenever necessary to ensure compliance with the Act and our rules.

c. Informal Complaints

241. *Background.* Section 717(a) of the Act requires, in part, that the Commission adopt rules governing the filing of informal complaints that allege violations of Section 255, 716, or 718, and to establish procedures for enforcement actions by the Commission for any such violations, including for filing complaints and answers, consolidation of substantially similar complaints, timelines for conducting investigations and issuing findings, and remedies.⁶⁵²

242. In the *Accessibility NPRM*, the Commission proposed a minimum set of requirements for complainants to include in their informal complaints.⁶⁵³ The Commission stated that the proposed requirements are consistent with its current Section 255 rules and with informal complaint provisions that the Commission has adopted in other contexts.⁶⁵⁴

243. *Discussion.* In crafting rules to govern informal accessibility complaints, we have first examined the requirements of the CVAA, especially our obligation to undertake an investigation to determine whether a manufacturer or service provider has violated core accessibility requirements. While the investigation is pending, the CVAA also encourages private settlement of informal complaints, which may terminate the investigation.⁶⁵⁵ When a complaint is not resolved independently between the parties, however, the Commission must issue an order to set forth and fully explain the determination as to whether a violation has occurred.⁶⁵⁶ Further, if the Commission finds that a violation has occurred, a defendant manufacturer or service provider may be directed to institute broad remedial measures that have implications and effects far beyond an individual complainant's particular situation, as in an order by the

(Continued from previous page) _____

Comments at 40 (agreeing that there is no basis in law for imposing a standing requirement); Words+ and Compusult Comments at 35 (opposing any standing requirement).

⁶⁵² 47 U.S.C. § 618(a)(1)-(4).

⁶⁵³ *Accessibility NPRM*, 26 FCC Rcd at 3183, ¶ 136.

⁶⁵⁴ 47 C.F.R. §§ 1.617 – 1.619 (informal complaints against common carriers); 47 C.F.R. § 1.719 (informal complaints regarding unauthorized changes in subscriber carrier selections); 47 C.F.R. §§ 6.17 - 6.20, 7.17 - 7.20 (informal disabilities complaints under Section 255); 47 C.F.R. §§ 68.417 – 68.420 (informal complaints regarding hearing aid compatibility).

⁶⁵⁵ 47 U.S.C. § 618(a)(8) (“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.”).

⁶⁵⁶ 47 U.S.C. § 618(a)(3)(B).

Commission to make accessible the service or the next generation of equipment.⁶⁵⁷ Finally, the CVAA requires that the Commission hold as confidential certain materials generated by manufacturers and service providers who may be defendants in informal complaint cases.⁶⁵⁸ In addition to these statutory imperatives, we have also carefully considered the comments filed in this proceeding as well as our existing rules that apply to a variety of informal complaints.

244. Taking these factors into account, together with the complexity of issues and highly technical nature of the potential disputes that we are likely to encounter in resolving complaints, the rules we adopt here attempt to balance the interests of both industry and consumers. In this regard, we seek, as much as possible, to minimize the costs and burdens imposed on these parties while both encouraging the non-adversarial resolution of disputes and ensuring that the Commission is able to obtain the information necessary to resolve a complaint in a timely fashion. We discuss these priorities more fully below and set forth both our pleading requirements and the factors that we believe are crucial to our resolution of informal accessibility complaints.

245. We find the public interest would be served by adopting the minimum requirements identified by the Commission in the *Accessibility NPRM* for informal complaints.⁶⁵⁹ Specifically, the rules we adopt today will require informal complaints to contain, at a minimum: (1) the name, address, e-mail 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 Sections 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) a certification that the complainant submitted to the Commission a Request for Dispute Assistance no less than 30 days before the complaint is filed and the date that the Request was filed; (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), e-mail, 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.

246. The minimum requirements we adopt today for informal complaints are aligned with our existing informal complaint rules and the existing rules governing Section 255 complaints and take into account our statutory obligations under the CVAA. They will allow us to identify the parties to be served, the specific issues forming the

⁶⁵⁷ 47 U.S.C. § 618(a)(3)(B)(i).

⁶⁵⁸ 47 U.S.C. § 618(a)(5)(C).

⁶⁵⁹ We also include an additional certification requirement related to our new Dispute Assistance Program. *See* General Requirements, Section III.E.2.b, *supra*.

subject matter of the complaint, and the statutory provisions of the alleged violation, as well as to collect information to investigate the allegations and make a timely accessibility achievability determination. Further, we believe that these requirements create a simple mechanism for parties to bring legitimate accessibility complaints before the Commission while deterring potential complainants from filing frivolous, incomplete, or inaccurate complaints. Accordingly, we decline to relax or expand the threshold requirements for informal accessibility complaints as advocated by some commenters.⁶⁶⁰

247. As the Commission noted in the *Accessibility NPRM*, complaints that do not satisfy the pleading requirements will be dismissed without prejudice to re-file.⁶⁶¹ We disagree with AFB that the Commission should work with a complainant to correct any errors before dismissing a defective complaint.⁶⁶² Under the statute and the rules we adopt today, the complainant in an informal complaint process is a party to the proceeding. The informal complaint proceeding is triggered by the filing of the informal complaint.⁶⁶³ Once the proceeding is initiated, the Commission's role is one of impartial adjudicator – not of an advocate for either the complainant or the manufacturer or service provider that is the subject of the complaint. While we will dismiss defective complaints once filed, we agree with commenters that consumers may need some assistance *before* filing their complaints.⁶⁶⁴ Toward that end, consumers may contact the Commission's Disability Rights Office by sending an e-mail to dro@fcc.gov; calling 202-418-2517 (voice) or 202-418-2922 (TTY), or visiting its website at <http://transition.fcc.gov/cgb/dro> with any questions regarding where to find contact information for manufacturers and service providers, how to file an informal complaint, and what the complaint should contain.

248. By making the Commission's Disability Rights Office available to consumers with questions, and by carefully crafting the dispute assistance process,⁶⁶⁵ we believe that we have minimized any potential minimal burdens that an informal

⁶⁶⁰ See, e.g., CTIA Comments at 34; IT and Telecom RERCs Comments at 41.

⁶⁶¹ *Accessibility NPRM*, 26 FCC Rcd at 3183, ¶ 136. See CEA Sept. 6 *Ex Parte* at 3 (arguing that Commission staff should have discretion to dismiss complaints that are deficient on their face).

⁶⁶² See AFB Reply Comments at 14. In fact, we hope that a majority of consumer issues can be resolved through the dispute assistance process and thereby alleviate the need for consumers to file a complaint at all. See General Requirements, Section III.E.2.b, *supra*.

⁶⁶³ See 47 U.S.C. § 618(a)(3)(B).

⁶⁶⁴ One commenter suggests that it may be difficult for consumers to obtain addresses for potential defendants as required by our rules. AFB Reply Comments at 14 (complainants should be required to provide only the name of the manufacturer and/or service provider and, "if possible," its city and state or country for foreign entities). All manufacturers and service providers subject to Sections 255, 716, and 718 are required to file with the Commission, and regularly update their business address and other contact information. Consumers, therefore, should have a simple means of obtaining this required information. Finally, the Commission may modify content requirements when necessary to accommodate a complainant whose disability may prevent him from providing information required under our rules. *Section 255 Report and Order*, 16 FCC Rcd at 6468-69, ¶ 123.

⁶⁶⁵ See General Requirements, Section III.E.2.b, *supra*.

complaint's content requirements may impose on consumers.⁶⁶⁶ After a consumer has undertaken the dispute assistance process, CGB and the parties should have identified the correct manufacturer or service provider that the consumer will name in the informal complaint.⁶⁶⁷ Indeed, by the conclusion of the dispute assistance process, a consumer should have obtained all the information necessary to satisfy the minimal requirements of an informal complaint.

249. We decline to adopt a requirement suggested by some commenters that consumers be either encouraged or compelled to disclose the nature of their disability in an informal complaint.⁶⁶⁸ Nothing in the statute or the rules we adopt today limits the filing of informal complaints to persons with disabilities or would prevent an advocacy organization, a person without disabilities, or other legal entity from filing a complaint.⁶⁶⁹ Thus, not every informal accessibility complaint will necessarily be filed by an individual with a disability. Further, imposing or even suggesting such a disclosure could have privacy implications and discourage some persons from filing otherwise legitimate complaints. To the extent that a particular disability is relevant to the alleged inaccessibility of a product or service, the complainant is free to choose whether to disclose his or her disability in the statement of facts explaining why the complainant believes the manufacturer or service provider is in violation of Section 255, 716, or 718.⁶⁷⁰

250. We also decline to permit consumers to assert anonymity when filing informal accessibility complaints. One commenter suggests that such a procedure should be made available to complainants who may be concerned about retaliation.⁶⁷¹ Anonymity would preclude the complainant from playing an active role in the adjudicatory process and prevent informal contacts and negotiated settlement between

⁶⁶⁶ Some commenters argue generally that the *Accessibility NPRM's* proposed complaint content requirements impose a burden on consumers. *See, e.g.,* IT and Telecom RERC Comments at 41; AFB Reply Comments at 13-14.

⁶⁶⁷ Some commenters argue that the consumer may not be able to identify which covered entity is responsible for ensuring accessibility. *See* Words+ and Compusult Comments at 36 (“Often the consumer does not make the distinct[ion] between the specific phone and the service provided by the service provider. In fact, many phones are branded by the service provider such that only the most knowledgeable consumer would know who the manufacturer of their device is.”); AFB Reply Comments at 13-14 (consumers frequently are unaware of the manufacturer of the products they use for communications).

⁶⁶⁸ T-Mobile Comments at 15 (Commission should require complainants “to describe with specificity the disability that prompts the complaint and the relief requested”); Words+ and Compusult Comments at 36 (suggesting that such disclosure, although potentially beneficial, should be optional); CEA Reply Comments at 21.

⁶⁶⁹ *See e.g.* General Requirements, Section III.E.2.b, *supra* (declining to attach any standing requirement to informal or formal accessibility complaints).

⁶⁷⁰ In this regard, we agree that it is sufficient for a complainant to describe the alleged inaccessibility in simple and functional terms such as “I can hear my phone’s e-mail menu choices, but my phone won’t read my e-mail aloud to me no matter what I do.” AFB Reply Comments at 14.

⁶⁷¹ IT and Telecom RERCs Comments at 41.

parties to resolve an informal complaint filed with the Commission – a possibility clearly favored by the CVAA.⁶⁷² We recognize, however, that some consumers who wish to remain anonymous may have valuable information that could prompt the Commission to investigate, on its own motion, a particular entity’s compliance with Section 255, 716, or 718. We wish to encourage those consumers who do not want to file a complaint with the Commission, for fear of retaliation or other reasons, to provide the Commission with information about non-compliance with Section 255, 716, or 718. To do so, consumers may anonymously apprise the Commission of possible unlawful conduct by manufacturers or service providers with respect to accessibility and compliance with Section 255, 716, or 718.⁶⁷³ This may trigger an investigation by the Commission on its own initiative, but supplying such information is not tantamount to filing an informal complaint subject to the procedures we adopt today.

251. We also decline to establish deadlines for filing an informal accessibility complaint as requested by one party. Specifically, CTIA contends that complaints should be limited to a specified filing window that is tied to either the initial purchase of the equipment or service or the first instance of perceived inaccessibility.⁶⁷⁴ As a preliminary matter, the statute does not impose a “filing window” or “statute of limitations” on the filing of complaints, and we see no reason to adopt such a limit today. Further, we have no information beyond conjecture to suggest that consumers would be likely to use the informal complaint process to bring stale accessibility issues before the Commission.⁶⁷⁵ The timeliness with which a complaint is brought may, however, have a bearing on its outcome. Complaints that are brought against products or services that are no longer being offered to the public, for example, may be less likely to bring about results that would be beneficial to complainants.

252. Finally, we do not believe that it is necessary to apply more stringent content requirements to informal complaints. We find unpersuasive the contention that complainants should be required to provide some evidentiary showing of a violation beyond the narrative required by new section 14.34(b) of our new rules.⁶⁷⁶ In fact, the

⁶⁷² See 47 U.S.C. § 618(a)(8) (addressing private resolutions of informal complaints and providing that the Commission “shall grant” joint requests for dismissal). Some commenters point to the benefits that accrue to complainants, defendants, and the Commission when accessibility complaints are resolved informally between the parties; AT&T Comments at 13-16; CTIA Comments at 31.

⁶⁷³ The Commission will issue a public notice that will provide a Commission e-mail address and voice and TTY number for the receipt of information from members of the public relating to possible Section 255, 716, or 718 statutory and rule violations. Consumers may provide such information anonymously. The Commission may use this information to launch its own investigation on its own motion. This process should satisfy the IT and Telecom RERCs’ concern that some consumer may wish to provide information but remain anonymous. IT and Telecom RERCs Comments at 41.

⁶⁷⁴ CTIA Comments at 35.

⁶⁷⁵ The Commission examined this issue previously in connection with the Section 255 complaint rules and found that in bringing informal complaints against common carriers, consumers seldom complained about conduct occurring more than a year prior to the filing of a complaint. *Section 255 Report and Order*, 16 FCC Red at 6479, ¶ 153.

⁶⁷⁶ CTIA Comments at 34, 37.

primary evidence necessary to assess whether a violation has occurred resides with manufacturers and service providers, not with consumers who use their products and services. While a consumer should be prepared to fully explain the manner in which a product or service is inaccessible, inaccessibility alone does not establish a violation. Specifically, a violation exists only if the covered product or service is inaccessible and accessibility was, in fact, achievable. To require that a complaint include evidentiary documentation or analysis demonstrating a violation has occurred would place the complainant in the untenable position of being expected to conduct a complex achievability analysis without the benefit of the data necessary for such an analysis simply in order to initiate the informal complaint process.⁶⁷⁷ It is the covered entity that will have the information necessary to conduct such an analysis, not the complainant.

253. While no parties specifically commented on how the Commission should establish separate and identifiable electronic, telephonic, and physical receptacles for the receipt of informal complaints, the Commission has established a process that allows consumers flexibility in the manner in which they choose to file an informal complaint.⁶⁷⁸ Informal complaints alleging a violation of Section 255, 716, or 718 may be transmitted to the Commission via any reasonable means, including by the Commission's online informal complaint filing system, U.S. Mail, overnight delivery, or e-mail.⁶⁷⁹ We encourage parties to use the Commission's online filing system, because of its ease of use. Informal complaints filed using a method other than the Commission's online system⁶⁸⁰ should include a cover letter that references Section 255, 716, or 718 and should be addressed to the Enforcement Bureau. Any party with a question about information that should be included in a complaint alleging a violation of Section 255,

⁶⁷⁷ See IT and Telecom RERCs Comments at 41 (“[Consumers] simply want an accessible product or service. . . . The Commission is in a far better position to investigate the details of the manufacture and distribution, accessibility and achievability of any given product or service than is the consumer.”); AFB Reply Comments at 14 (some consumers may consider themselves unable to fully explain the technical reasons for inaccessibility).

⁶⁷⁸ CGB will establish a system for online filing of informal complaints. When this system is available, CGB will release a public notice announcing this fact and providing instructions on its use. CGB will also update the Disability Rights Office section of the Commission's website to describe how requests for dispute assistance may be filed. Formal complaints must be filed in accordance with Sections 14.38-14.52 of our new rules. See Appendix B attached, adopting new section 14.52, 47 C.F.R. § 14.52 (“Copies; service; separate filings against multiple defendants”); Formal Complaints, Section III.E.2.d, *infra* (adopting, with a few modifications, Commission's general Formal Complaint rules for accessibility complaints).

⁶⁷⁹ The Commission will issue a public notice announcing the establishment of an Enforcement Bureau e-mail address that will accept informal complaints alleging violations of Section 255, 716 or 718 or the Commission's rules.

⁶⁸⁰ The Commission will issue a public notice as soon as its online system is established for filing informal complaints alleging violations of the rules adopted in this *Report and Order*.

716, or 718 should contact the Commission's Disability Rights Office via e-mail at dro@fcc.gov or by calling 202-418-2517 (voice), 202-418-2922 (TTY).⁶⁸¹

254. Once we receive a complaint, we will forward those complaints meeting the filing requirements, discussed above, to the manufacturer or service provider named in the complaint.⁶⁸² To facilitate service of the complaints on the manufacturer or service provider named in the complaint, we adopt the Commission's proposal to require such entities to disclose points of contact for complaints and inquiries under Section 255, 716, or 718 in annual certifications. As discussed in greater detail in General Requirements, Section III.E.2.b, *supra*, failure to file a certification is a violation of our rules. We expect that the parties or the Commission will discover that a covered entity has not filed contact information during the dispute assistance process, that the violation will be remedied during that process, and that the complainant will have the contact information prior to filing a complaint.

255. We believe that requiring such points of contact will facilitate consumers' ability to communicate directly with manufacturers and service providers about accessibility issues or concerns and ensure prompt and effective service of complaints on defendant manufacturers and service providers by the Commission.⁶⁸³ The contact information must, at a minimum, include the name of the person or office whose principal function will be to ensure the manufacturer or service provider's prompt receipt and handling of accessibility concerns, telephone number (voice and TTY), fax number, and both mailing and e-mail addresses. Covered entities must file their contact information with the Commission in accordance with our rules governing the filing of annual certifications.⁶⁸⁴ We intend to make this information available on the Commission's website and also encourage, but do not require, covered entities to clearly and prominently identify the designated points of contact for accessibility matters in, among other places, their company websites, directories, manuals, brochures, and other promotional materials. Providing such information on a company's website may assist consumers in contacting the companies directly and allow them to resolve their accessibility issues, eliminating any need to seek Commission assistance or file a complaint. Because the contact information is a crucial component of the informal complaint process (*i.e.*, service of the complaint on defendants which, in turn, provides

⁶⁸¹ See AFB Reply Comments at 14-15 ("We believe that the final rule should establish a complaint navigation ombudsman function within the Commission to which consumers can turn for advice on proper form and effective content of both formal and informal complaints.").

⁶⁸² In some cases the complaint may allege a violation involving both a manufacturer and a service provider and/or multiple manufacturers and service providers. For clarity, we will refer to manufacturers and service providers in the singular and use of the word "or" in the text means "and/or" as applicable to a given complaint.

⁶⁸³ See CTIA Comments at 33; Verizon Comments at 14-15; Words+ and Compusult Comments at 37.

⁶⁸⁴ Appendix B, § 14.31(b). See Recordkeeping, Section III.E.1, *supra*. CGB will establish a system for online filing of contact information. When this system is available, CGB will release a public notice announcing this fact and providing instructions on its use. CGB will also update the Disability Rights Office section of the Commission's website to describe how contact information may be filed.

defendants with notice and opportunity to respond),⁶⁸⁵ we require that the contact information be kept current.⁶⁸⁶

256. The CVAA provides that the party that is the subject of the complaint be given a reasonable opportunity to respond to the allegations in the complaint before the Commission makes its determination regarding whether a violation occurred. It also allows the party to include in its answer any relevant information (*e.g.*, factors demonstrating that the equipment or advanced communications services, as applicable, are accessible to and usable by individuals with disabilities or that accessibility is not achievable under the standards set out in the CVAA and rules adopted today).⁶⁸⁷ These provisions not only protect the due process rights of defendant manufacturers and service providers in informal complaint cases but also enable the Commission to compile a complete record to resolve a complaint and conduct the required investigation as to whether a violation of Section 255, 716, or 718 has occurred.

257. To implement these provisions of the CVAA, we adopt the Commission's proposal in the *Accessibility NPRM* with one modification⁶⁸⁸ and require answers to informal complaints to: (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 manufacturer's or service provider's basis for determining that it was not achievable to make the product or service accessible and usable; (6) 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;⁶⁸⁹ (7) include a declaration by an officer of the manufacturer or

⁶⁸⁵ It is critical that the Commission have correct information for service. If the complaint is not served to the correct address, it could delay or prevent the applicable manufacturer or service provider from timely responding. Failure to timely respond to a complaint or order of the Commission could subject a party to sanction or other penalties. *See* 47 U.S.C. § 503(b).

⁶⁸⁶ In this regard, whenever the information is no longer correct in any material respect, manufacturers and service providers shall file and update the information within 30 days of any change to the information on file with the Commission. Further, failure to file contact information or to keep such information current will be a violation of our rules warranting an upward adjustment of the applicable base forfeiture under section 1.80 of our rules for "[e]gregious misconduct" and "[s]ubstantial harm." 47 C.F.R. § 1.80(4) Section I (Base Amount for Section 503 Forfeitures) and Section II (Adjustment Criteria for Section 503 Forfeitures). Likewise, the violation will be a "continuous violation" until cured. 47 C.F.R. § 1.80(4) Section II.

⁶⁸⁷ 47 U.S.C. § 618(a)(4).

⁶⁸⁸ We are not requiring defendants to provide the names, titles, and responsibilities of each decision maker in the evaluation process as we initially proposed in the *Accessibility NPRM*. We are, however, preserving our right to request such information on a case-by-case basis.

⁶⁸⁹ We anticipate that much of this documentation will be kept confidential in accordance with our recordkeeping rules adopted today. Appendix B, § 14.31(c).

service provider attesting to the truth of the facts asserted in the answer; (8) set forth any claimed defenses; (9) set forth any remedial actions already taken or proposed alternative relief without any prejudice to any denials or defenses raised; (10) provide any other information or materials specified by the Commission as relevant to its consideration of the complaint; and (11) be prepared or formatted in the manner requested by the Commission and the complainant, unless otherwise permitted by the Commission for good cause shown.⁶⁹⁰ We also adopt the Commission's proposal to allow the complainant ten days, unless otherwise directed by the Commission, to file and serve a reply that is responsive to the matters contained in the answer without the addition of new matters.⁶⁹¹ We do not anticipate accepting additional filings.

258. Defendants must file complete answers, including supporting records and documentation, with the Commission within the 20-day time period specified by the Commission. While we agree with those commenters that argue that a narrative answer or product design summary would be useful,⁶⁹² we disagree that such a response, by itself, is sufficient to allow the Commission to fully investigate and make an accessibility or achievability determination as required by the Act. An answer must comply with all of the requirements listed in the paragraph above and include, where necessary, a discussion of how supporting documents, including confidential documents, support defenses asserted in the answer. We note that, because the CVAA requires that we keep certain of a defendant's documents confidential,⁶⁹³ we will not require a defendant to serve the complainant a confidential answer that incorporates, and argues the relevance of, confidential documents. Instead, we will require a defendant to file a non-confidential summary of its answer with the Commission and serve a copy on the complainant. The non-confidential summary must contain the essential elements of the answer, including any asserted defenses to the complaint, whether the defendant concedes that the product or service at issue was not accessible, and if so, the basis for its determination that accessibility was not achievable, and other material elements of its answer. The non-confidential summary should provide sufficient information to allow the complainant to file a reply, if he or she so chooses.⁶⁹⁴ The Commission may also use the summary to give context to help guide its review of the detailed records filed by the defendant in its answer.

⁶⁹⁰ *Accessibility NPRM*, 26 FCC Rcd at 3184, ¶ 138.

⁶⁹¹ One party, while supporting adoption of this provision, urged the Commission to grant extensions of time liberally for replies. Words+ and Compusult Comments at 37-38. While we will carefully consider requests for extensions of time, we emphasize again that extensions of time will not be routinely granted, particularly because of the strict deadline for the Commission's determination.

⁶⁹² CEA Comments at 46 (narrative response and product design summary will likely better detail accessibility efforts); Verizon Comments at 15-16 (a narrative response from defendants detailing accessibility efforts would often be more appropriate).

⁶⁹³ *See* 47 U.S.C. § 618(a)(5)(C).

⁶⁹⁴ Complainants may also request a copy of the public redacted version of a defendant's answer, as well as seek to obtain records filed by the defendant through a FOIA filing.

259. We are also adopting the Commission's proposal in the *Accessibility NPRM* to require that defendants include in their answers a declaration by an authorized officer of the manufacturer or service provider of the truth and accuracy of the defense. Such a declaration is not "irrelevant" to whether a manufacturer or service provider has properly concluded that accessibility was not achievable,⁶⁹⁵ as it establishes the good faith of the analysis and holds the company accountable for a conclusion that ultimately resulted in an inaccessible product or service. Consistent with requirements for declarations in other contexts, we specify that a declaration here must be made under penalty of perjury, signed and dated by the certifying officer.⁶⁹⁶

260. We are not requiring answers to include the names, titles, and responsibilities of each decisionmaker involved in the process by which a manufacturer or service provider determined that accessibility of a particular offering was not achievable. We agree that such a requirement may be unduly burdensome, given the complexity of the product and service development process.⁶⁹⁷ We will, however, reserve our right under the Act to request such information on a case-by-case basis if we determine during the course of an investigation initiated in response to a complaint or our own motion that such information may help uncover facts to support our determination and finding of compliance or non-compliance with the Act.

261. We decline to adopt CTIA's proposal to incorporate the CVAA's limitation on liability, safe harbor, prospective guidelines, and rule of construction provisions into our rules as affirmative defenses.⁶⁹⁸ CTIA proposes that we adopt a bifurcated approach to our informal complaint process in which the Commission would determine whether certain affirmative defenses⁶⁹⁹ were applicable before requiring the defendant to respond to the complaint in full. We believe that the approach we adopt today is more likely to maximize the efficient resolution of informal complaints than the approach that CTIA recommends. Our rules will afford a defendant ample opportunity to assert all defenses that the defendant deems germane to its case and assures that the Commission has a complete record to render its decision based on that record within the statutory 180-day timeframe. Because the Commission will be considering *all* applicable defenses as part of this process, we believe that singling out certain defenses to incorporate into our rules is unwarranted.

262. We also disagree with those commenters that express concern that the *Accessibility NPRM* did not appear to contemplate that some defendants may claim that their products or services are, in fact, accessible under Section 255, 716, or 718.⁷⁰⁰ As

⁶⁹⁵ CEA Comments at 46.

⁶⁹⁶ 47 C.F.R. § 64.2009(e).

⁶⁹⁷ TIA Comments at 28. *See also* CEA Comments at 46; CTIA Comments at 37-8..

⁶⁹⁸ *See* Letter from Matthew Gerst, Counsel, External & State Affairs, CTIA, to Marlene H. Dortch, Secretary, FCC, CG Docket No 10-213, (filed Sept. 26, 2011) ("CTIA Sept. 26 *Ex Parte*").

⁶⁹⁹ *See* CTIA Sept. 26 *Ex Parte*.

⁷⁰⁰ CEA Comments at 45 (answer requirements "implicitly assume" that the product is not accessible); T-Mobile Comments at 15.

noted above, the rules we adopt today afford defendants ample opportunity to assert such a claim as an affirmative defense to a charge of non-compliance with our rules and to provide supporting documentation and evidence demonstrating that a particular product or service is accessible and usable either with or without third party applications, peripheral devices, software, hardware, or customer premises equipment.⁷⁰¹ We recognize that different information and documentation will be required in an answer depending on the defense or defenses that are asserted. We expect defendants will file all necessary documents and information called for to respond to the complaint and any questions asked by the Commission when serving the complaint or in a letter of inquiry during the course of the investigation. Again, covered entities have the burden of proving that they have satisfied their legal obligations that a product or service is accessible and useable, or if it is not, that it was not achievable.

263. We also disagree with those commenters that contend that the answer requirements, particularly those related to achievability, are “broad and onerous and may subject covered entities to undue burdens.”⁷⁰²

264. According to these parties, defendants will be compelled to produce, within an unreasonably short time frame, voluminous documents that may be of marginal value to complainants or the Commission in making determinations regarding accessibility and achievability of a particular product or service or in ensuring that an individual complainant obtains an accessible service or device as promptly as possible.⁷⁰³ We address these concerns below.

265. We disagree with commenters that the 20-day filing deadline for answers is too short and that we should liberally grant extensions of time within which to file.⁷⁰⁴ We believe that the 20-day filing window is reasonable given the 180-day mandatory

⁷⁰¹ Appendix B, §14.36.

⁷⁰² CEA Comments at 44; CEA Sept. 6, 2011 *Ex Parte* at 3 (expressing concerns regarding sweeping discovery and a wasteful litigation process); TIA Aug. 25, 2011 *Ex Parte* at 3 (arguing that the informal complaint process should avoid “burdensome discovery”). As discussed in more detail in Section III.E.2.d below regarding formal complaints, and as a cursory review of our enforcement rules, sections 14.33 – 14.52, shows, the informal complaint process is vastly streamlined compared to the formal complaint process; thus, we disagree with CTIA that our informal complaint process imposes the “burdens of the formal complaint process.” See CTIA Aug. 11 *Ex Parte*, Attachment at 12.

⁷⁰³ AT&T Comments at 14-15; CEA Comments at 44; ITI Comments at 29; T-Mobile Comments at 15; Verizon Comments at 15-16. Additionally, some parties contend that the answer requirements are especially unwarranted given what they characterize as minimal standards for the complaint itself. See, e.g., CTIA Comments at 36 (“The list is objectively burdensome especially in light of the lack of requirement for an evidentiary basis in the complaint and pre-filing notice that provides an opportunity for resolution.”); ITI Comments at 29 (the Commission should require a prima facie showing in an informal complaint before requiring a respondent to produce documents.)

⁷⁰⁴ AT&T Comments at 17; CEA Comments at 45; CTIA Comments at 40; TIA Comments at 26-27; T-Mobile Comments at 15; Verizon Comments at 14-15.

schedule for resolving informal complaints.⁷⁰⁵ Furthermore, the dispute assistance process, described in General Requirements, Section III.E.2.b, *supra*, requires that consumers and manufacturers or service providers explore the possibilities for non-adversarial resolution of accessibility disputes before a consumer may file a complaint.⁷⁰⁶ Defendants will, therefore, have ample notice as to the issues in dispute even before an informal complaint is filed. In addition, all parties subject to Sections 255, 716, and 718 should already have created documents for their defense due to our recordkeeping rules. As discussed above, this *Report and Order* places manufacturers and service providers on notice that they bear the burden of showing that they are in compliance with Sections 255, 716, and 718 and our implementing rules by demonstrating that their products and services are accessible as required by the statutes and our rules or that they satisfy the defense that accessibility was not readily achievable under Section 255 or achievable under the four factors specified in Section 716.⁷⁰⁷ They should, therefore, routinely maintain any materials that they deem necessary to support their accessibility achievability conclusions and have them available to rebut a claim of non-compliance in an informal complaint or pursuant to an inquiry initiated by the Commission on its own motion.

266. Further, we do not believe additional time to file an answer or provide responsive material is warranted for all complaints based on the possibility that the documentation supporting a covered entity's claim may have been created in a language other than English.⁷⁰⁸ Our recordkeeping rules will require English translations of any records that are subject to our recordkeeping requirements to be produced in response to an informal complaint or a Commission inquiry. Parties may seek extensions of time to supplement their answers with translations of documents not subject to the mandatory recordkeeping requirements. We caution, however, that such requests will not be automatically granted, but will require a showing of good cause.

267. Only a covered entity will have control over documents that are necessary for us to comply with the Act's directive that we (1) "investigate the allegations in an informal complaint" and (2) "issue an order concluding the investigation" that "shall include a determination whether any violation [of Sections 255, 716, or 718 has] occurred."⁷⁰⁹ We reject commenters' concerns that the documentation requirements focus

⁷⁰⁵ We generally allowed 30 days to answer a Section 255 informal complaint in proceedings that carried no requirement for resolution by the Commission within a specified time frame and did not have compulsory recordkeeping requirements. *Section 255 Report and Order*, 16 FCC Rcd at 6471-72, ¶ 133.

⁷⁰⁶ See General Requirements, Section III.E.2.b, *supra*.

⁷⁰⁷ See, e.g., *Section 255 Report and Order*, 16 FCC Rcd at 6444, ¶ 62 (citing *Southeastern Community College v. Davis*, 442 U.S. 397 (1979) and *Alexander v. Choate*, 469 U.S. 287 (1985) to support assigning the burden of proof to the party claiming a defense regarding achievability).

⁷⁰⁸ *But see* CEA Comments at 45 (defendants may need additional time to translate non-English materials); TIA Comments at 28-29 (fact that many companies do not keep documents in English creates burdens).

⁷⁰⁹ 47 U.S.C. § 618(a)(3)(B). We disagree with CEA that this statute grants us authority to *sua sponte* close a complaint proceeding without issuing a final determination whether a violation occurs. Letter from Julie M. Kearney, Vice President, CEA, to Marlene H. Dortch, Secretary, FCC, CG Docket No. 10-213, at 2-3 (continued....)

too strongly on broad compliance investigations rather than on ensuring that an individual complainant is simply able to obtain an accessible product or service.⁷¹⁰ Section 717(a)(1)(B)(i) specifically empowers us to go beyond the situation of the individual complainant and order that a service, or the next generation of equipment, be made accessible.⁷¹¹ Thus, our investigations with respect to informal complaints are directed to violations of the Act and our rules – not narrowly constrained to an individual complainant obtaining an accessible product or service, as commenters suggest. The dispute assistance process, on the other hand, is designed to assist consumers, manufacturers, or service providers in solving individual issues before a complaint is filed. Covered entities will have ample opportunity, therefore, to address the accessibility needs of potential complainants.

268. Finally, we reject the suggestion that if a defendant chooses to provide a possible replacement product to the complainant, the Commission should automatically stay the answer period while the complainant evaluates the new product.⁷¹² First, we expect that in virtually all cases, any replacement products will have been provided and evaluated during the pre-complaint dispute assistance process. Moreover, while suspending pleading deadlines may relieve the parties from preparing answers or replies that would be unnecessary if the manufacturer or service provider is able to satisfy the complainant's accessibility concerns, it would also substantially delay compilation of a complete record and thereby impede our ability to resolve the complaint within the mandatory 180-day timeframe, should private settlement efforts fail. Accordingly, we decline to adopt any procedure by which pleading deadlines would be automatically or otherwise stayed. We emphasize, nonetheless, that the parties are free to jointly request dismissal of a complaint without prejudice for the purpose of pursuing an informal resolution of an accessibility complaint. In such cases, if informal efforts were unsuccessful in providing the complainant with an accessible product or service, the complainant could refile the informal complaint at any time and would not be required to use the dispute assistance process again for that particular complaint.

d. Formal Complaints

269. *Background.* Section 717 states that aggrieved parties may use our more formal adjudicative procedures to pursue accessibility claims against manufacturers or

(Continued from previous page) _____
(filed on July 20, 2011) (arguing that the Commission may determine that a complaint has been resolved based on the defendant's response). However, where the complaint on its face shows that the subject matter of the complaint has been resolved, we may dismiss the complaint as defective for failure to satisfy the pleading requirements as discussed above. In addition, where the allegations in an informal complaint allege a violation related to a particular piece of equipment or service that was the subject of a prior order in an informal or formal complaint proceeding, then the Commission may issue an order determining that the allegations of the instant complaint have already been resolved based on the findings and conclusions of the prior order and such other documents and information that bear on the issues presented in the complaint.

⁷¹⁰ T-Mobile Comments at 15; CEA Reply Comments at 20.

⁷¹¹ 47 U.S.C. § 618(a)(1)(B)(i).

⁷¹² CEA Comments at 48.

service providers for violations of Sections 255, 716, and 718.⁷¹³ Section 717 further directs the Commission to establish regulations that facilitate the filing of such formal claims.⁷¹⁴ In the *Accessibility NPRM*, the Commission proposed rules for filing and resolving formal complaints alleging a violation of Section 255, 716, or 718 of the Act and the Commission rules implementing those sections.⁷¹⁵ In particular, the Commission proposed to require aggrieved parties to follow the Commission's existing formal complaint procedures, as modified in the proposed rules.⁷¹⁶

270. *Discussion.* We adopt the rules the Commission proposed in the *Accessibility NPRM*. Specifically, we require both complainants and defendants 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. The rules also place strict limits on the availability of discovery and subsequent pleading opportunities to present and defend against claims of misconduct.⁷¹⁷

271. We decline to adopt a rule requiring an informal complaint to be filed prior to the filing of a formal complaint.⁷¹⁸ As with the informal complaint process, we do not want to place any unnecessary barriers in the way of those who choose to use the formal complaint process. In this regard, we agree with commenters that to require a party to file an informal complaint as a prerequisite for filing a formal complaint would create an unnecessary obstacle to complainants.⁷¹⁹ Such a prerequisite is not required in any other Commission complaint process and is inconsistent with the CVAA.⁷²⁰ For these reasons, we decline to require that an informal complaint be filed prior to the filing of a formal complaint.

⁷¹³ 47 U.S.C. § 618(a)(3)(A).

⁷¹⁴ 47 U.S.C. § 618(a).

⁷¹⁵ *Accessibility NPRM*, 26 FCC Rcd at 3200, Appendix B (setting forth proposed new rules 47 C.F.R. §§ 14.30-14.52 – 8.37 entitled “Subpart D – Recordkeeping, Consumer Dispute Assistance, and Enforcement”). These proposed rules were based in part on Commission formal complaint rules governing other subject matters. See 47 C.F.R. §§ 1.720 – 1.736.

⁷¹⁶ *Accessibility NPRM*, 26 FCC Rcd at 3187, ¶ 141.

⁷¹⁷ See Appendix B, §§ 14.38-14.52.

⁷¹⁸ ITI Comments at 31 (arguing that the filing of an informal complaint should be a prerequisite to filing a formal complaint).

⁷¹⁹ See IT and Telecom RERCs Comments at 42 (such a requirement would “further inhibit the formal complaint process”).

⁷²⁰ See 47 U.S.C. § 618(a)(3)(A) (“Any person alleging a violation of section 255, . . . [716, or 718] by a manufacturer or provider of service subject to such sections may file a formal or informal complaint with the Commission.”).

272. We disagree with commenters that argue that the formal complaint rules will impose a burden on consumers.⁷²¹ Our rules follow the CVAA in providing complainants with two options for filing complaints alleging accessibility violations. We believe the formal complaint process we adopt today is no more burdensome than necessary given the complexities inherent in litigation generally and is in line with our other formal complaint processes. Like the Commission's other formal complaint processes, the accessibility formal complaint rules allow parties an opportunity to establish their case through the filing of briefs, answers, replies, and supporting documentation; and allow access to useful information through discovery.

273. If a complainant feels that the formal complaint process is too burdensome or complex, the rules we adopt today provide the option to file an informal complaint that is less complex, less costly, and is intended to be pursued without representation by counsel.⁷²² While complainants may see advantages and disadvantages with either of the processes depending on the specifics of their circumstances, both options provide viable means for seeking redress for what a complainant believes is a violation of our rules. Moreover, we believe that potential complainants are in the best position to determine which complaint process and associated remedies (formal or informal) serve their particular needs.

274. We adopt the Commission's proposal in the *Accessibility NPRM* to no longer place formal accessibility complaints on the Accelerated Docket.⁷²³ Twelve years before the CVAA was enacted, in the *Section 255 Report and Order*, the Commission found that the Accelerated Docket rules were appropriate for handling expedited consideration of consumer Section 255 formal complaints.⁷²⁴ In the CVAA, Congress mandated expedited consideration of informal complaints by requiring a Commission Order within 180 days after the date on which a complaint is filed.⁷²⁵ As discussed in *Informal Complaints*, Section III.E.2.c, *supra*,⁷²⁶ we have carefully designed an informal complaint process that will place a minimal burden on complainants, enable both parties to present their cases fully, and require a Commission order within 180 days. We believe that this consumer-friendly, informal complaint process addresses our concerns that consumer complaints be resolved in a timely manner and provides an adequate substitute for formal Accelerated Docket complaints. In addition, given the "accelerated" or 180-

⁷²¹ Words+ and Compusult Comments at 34 (filing a formal complaint and conducting discovery are cost prohibitive and require hiring legal counsel).

⁷²² For example, there is no filing fee associated with filing an informal complaint and the filing can be done by the average consumer. In contrast, there is a filing fee associated with the formal complaint process and, in general, parties are represented by counsel.

⁷²³ See *Accessibility NPRM*, 26 FCC Rcd at 3186, ¶ 141 n.411; 47 C.F.R. § 1.730 (permitting a complainant to seek authorization from the Enforcement Bureau for placement on the bureau's accelerated docket under certain narrow circumstances).

⁷²⁴ *Section 255 Report and Order*, 16 FCC Rcd at 6475-76, ¶¶ 143-146.

⁷²⁵ 47 U.S.C. § 618(a)(3)(B).

⁷²⁶ See *Informal Complaints*, Section III.E.2.c, *supra*.

day resolution time-frame for informal complaints, we believe that retaining an “Accelerated Docket” for formal complaints is no longer necessary and, in fact, may impose an unnecessary restriction on the formal complaint process where, as discussed above, the process involves, among other things, filing of briefs, responses, replies, and discovery. Therefore we decline to adopt the Accelerated Docket rules for Sections 255, 716, and 718 formal complaints.

e. Remedies and Sanctions

275. *Background.* In the *Accessibility NPRM*, the Commission also invited comment on what remedies and other sanctions should apply for violations of Section 255, 716, or 718.⁷²⁷ If the Commission finds a violation of Section 255, 716, or 718, Section 717(a)(3)(B) authorizes us to direct 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 time.”⁷²⁸ Further, Section 718(c) contemplates that we continue to use our Section 503 remedies, as modified by the CVAA, to allow assessment of forfeitures of up to \$100,000 per violation for each day of a continuing violation, with the maximum amount for a continuing violation set at \$1 million, for violations of the Act.⁷²⁹

276. *Discussion.* We intend to adjudicate each informal and formal complaint on its merits and will employ the full range of sanctions and remedies available to us under the Act in enforcing Section 255, 716, or 718.⁷³⁰ Thus, we agree with commenters that the Commission should craft targeted remedies on a case-by-case basis, depending on the record of the Commission’s own investigation or a complaint proceeding.⁷³¹ For this same reason, while we agree with consumer groups that the Commission should act quickly and that time periods should be as short as practicable to ensure that consumers obtain accessible equipment or services in a timely manner,⁷³² without the particular facts of a product or service in front of us, we cannot at this time decide what a “reasonable time” for compliance should be. Nevertheless, as the Commission gains more familiarity with services, equipment, and devices through its own investigations and resolution of complaints, our enforcement orders will begin to establish precedent of consistent injunctive relief, periods of compliance, and other sanctions authorized by the Act.

⁷²⁷ *Accessibility NPRM*, 26 FCC Rcd at 3183, ¶ 132.

⁷²⁸ 47 U.S.C. § 618(a)(3)(B)(i).

⁷²⁹ *See* 47 U.S.C. § 619(c).

⁷³⁰ *See Section 255 Report and Order*, 16 FCC Rcd at 6645, ¶ 115.

⁷³¹ *See* CEA Comments at 43 (Commission should take into account a product’s lifecycle and other market realities); TIA Comments at 29 (remedies should be flexible); CEA Reply Comments at 22. We have already concluded that retrofitting equipment is not an appropriate remedy. *See Accessibility NPRM*, 26 FCC Rcd at 3183, ¶ 133 (citing Senate and House Reports); CEA Comments at 47 (agreeing with that conclusion). *But see* UC Reply Comments at 16 (the Commission should order retrofitting).

⁷³² *See* IT and Telecom RERCs Comments at 42 (“if too much time is afforded, the product or service may be obsolete by the time it is brought into compliance”); Words+ Comments at 38 (the time for compliance should be no more than 18 months). CEA argues that the starting point for a reasonable period of time should be 18 months for equipment and 12 months for services. CEA Comments at 47.

277. We disagree with AT&T's contention that the *Accessibility NPRM's* proposed formal complaint rules exceed the authority granted the Commission under the CVAA.⁷³³ We further disagree with AT&T's specific argument that the Commission does not have authority to adopt proposed rule section 8.25, which provides that "a complaint against a common carrier may seek *damages*."⁷³⁴ As discussed above,⁷³⁵ we designed the formal complaint rules to address potential violations of Section 255, 716, or 718. In the *Section 255 Report and Order*, the Commission decided that a complainant could obtain damages for a Section 255 violation from a common carrier under Section 207.⁷³⁶ We agree, however, with AT&T that CVAA services that constitute information services and are not offered on a common carrier basis would not be subject to the damages provision of Section 207.⁷³⁷

278. Neither the CVAA nor the Act addresses permitting prevailing parties to recover attorney's fees and costs in formal or informal complaint proceedings.⁷³⁸ The Commission cannot award attorney's fees or costs in a Section 208 formal complaint proceeding or in any other proceeding absent express statutory authority.⁷³⁹

⁷³³ AT&T Comments at 18.

⁷³⁴ AT&T Comments at 18 n.31 (arguing that the CVAA does not provide a right for damages).

⁷³⁵ See Formal Complaints, Section III.E.2.d, *supra*.

⁷³⁶ See *Section 255 Report and Order*, 16 FCC Rcd at 6464, ¶ 113. See also 47 U.S.C. § 207 (providing for the recovery of damages caused by a common carrier). The Commission rejected a similar argument that AT&T makes here that Section 255's preclusion of a private court right of action somehow limits the remedies that the Commission may award under the Communications Act. See *id.*; AT&T Comments at 18 (arguing that the CVAA's preclusion of a private right of action limits the Commission's ability to award damages).

⁷³⁷ See AT&T Comments at 18.

⁷³⁸ The IT and Telecom RERCs argue that parties should be awarded attorney's fees and costs. IT and Telecom RERCs Comments at 40. *But see* CEA Reply Comments at 20 (disagreeing that the Commission has such authority); CTIA Reply Comments at 27.

⁷³⁹ *Turner v. FCC*, 514 F.2d 1354 (1975) (affirming the Commission's decision not to grant attorney's fees on the grounds that the Commission cannot do so without "clear statutory power" directly on point); *AT&T Co. v. United Artists Payphone Corp.*, 852 F. Supp. 221 (holding that the Commission has no authority to grant attorney's fees under 47 U.S.C. § 206), *aff'd*, 39 F.3d 411 (1994); *Station Holdings, Inc. v. Mills Fleet Farm, Inc.*, Order, 18 FCC Rcd 12787 ¶ 13 (EB TCD 2003) (in a formal complaint proceeding, neither the Communications Act nor the Commission's rules authorizes attorney's fees); *Implementation of the Telecommunications Act of 1996: Amendment of Rules Governing Procedures to Be Followed When Formal Complaints are Filed Against Common Carriers*, Report and Order, 12 FCC Rcd 22497 ¶ 130 (1997) (the Commission has no authority to award costs, including attorney's fees, in the context of a formal complaint proceeding); *Implementation of the Telecommunications Act of 1996: Amendment of Rules Governing Procedures to Be Followed When Formal Complaints are Filed Against Common Carriers*, Notice of Proposed Rulemaking, 111 FCC Rcd 20823 (1997) (same); *Erdman Tech. Corp. v. US Sprint Comm. Co.*, Memorandum Opinion and Order, 11 FCC Rcd 6339 ¶ 20 (CCB 1996) (same); *Electric Plant Board v. Turner Cable Network Sales, Inc.*, Memorandum Opinion and Order, 9 FCC Rcd 4855 ¶¶ 25-26 (CSB 1994) (in a program access complaint proceeding, citing *Turner v. FCC*, "absent an express grant of authority" under Title V of the Communications Act of 1934, as amended, or the 1992 Cable Act, the Commission has no authority to award attorney's fees); *Pan American Satellite Corp. v. Communications Satellite Corp.*, Memorandum Opinion and Order, 8 FCC Rcd 4502 ¶ 16 (CCB 1993) (in (continued....))

We hope that a majority of consumer issues can be resolved through the dispute assistance process and thereby alleviate the need for consumers to file a complaint at all. We also note that consumers need not incur any attorney's fees by providing the Commission with information that allows the Commission to, on its own motion, launch its own independent investigation, including but not limited to a Letter of Inquiry, into potential violations by a covered entity. Any party that would like to provide the Commission with information indicating that a covered entity's product or service is not in compliance with the Commission's rules may do so, without filing a complaint, by e-mailing or telephoning the Enforcement Bureau.

IV. FURTHER NOTICE OF PROPOSED RULEMAKING

A. Small Entity Exemption

279. As we explained in the accompanying *Report and Order*, Section 716(h)(2) of the Act authorizes the Commission to exempt small entities from the requirements of Section 716, and as an effect, the concomitant obligations of Section 717.⁷⁴⁰ The exemption relieves from Section 716 small entities that may lack the legal, technical, or financial ability to incorporate accessibility features, conduct an achievability analysis, or comply with the Section 717 recordkeeping and certification requirements.⁷⁴¹ In the accompanying *Report and Order*, we found the record insufficient to adopt a permanent exemption or to adopt the criteria to be used to determine which small entities to exempt.⁷⁴² Instead, we exercised our authority to temporarily exempt all manufacturers of ACS equipment and providers of ACS that are small business concerns under applicable SBA rules and size standards.⁷⁴³ The temporary exemption will expire on the earlier of: (1) the effective date of small entity exemption rules adopted pursuant to the *Further Notice of Proposed Rulemaking*; or (2) October 8, 2013.

280. We first seek comment on whether to permanently exempt from the obligations of Section 716, manufacturers of ACS equipment and providers of ACS that qualify as small business concerns under the SBA's rules and size standards and, if so whether to utilize the size standards for the primary industry in which they are engaged

(Continued from previous page) _____

a formal complaint proceeding, the Commission had no authority to award attorney's fees); *Allnet Comm. Services, Inc. v. New York Telephone Co.*, Memorandum Opinion and Order, 8 FCC Rcd 3087 ¶ 36 (1993) (the Commission has no authority to award attorney's fees or costs in a 47 U.S.C. § 208 complaint proceeding); *Amendment of Rules Governing Procedures to Be Followed When Formal Complaints Are Filed Against Common Carriers*, Report and Order, 8 FCC Rcd 2614 ¶ 69 n.71 (1993) (47 U.S.C. § 206 provides attorney's fees in court actions, but not in Commission proceedings); *Comark Cable Fund III v. Northwestern Indiana CATV, Inc.*, Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture, 100 FCC.2d 1244 ¶ 31 n.51 (1985) (in a 47 U.S.C. § 208 proceeding, the Commission has no authority to impose attorney's fees).

⁷⁴⁰ 47 U.S.C. § 617(h)(2). See Exemptions for Small Entities – Temporary Exemption of Section 716 Requirements, Section III.C.3, *supra*.

⁷⁴¹ See Exemptions for Small Entities – Temporary Exemption of Section 716 Requirements, Section III.C.3, *supra*.

⁷⁴² See para. 204, *supra*.

⁷⁴³ See chart at para. 207, *supra*; 13 C.F.R. §§ 121.101 – 121.201.

under the SBA's rules. The SBA criteria were established for the purpose of determining eligibility for SBA small business loans. Are these same criteria appropriate for the purpose of relieving covered entities from the obligations associated with achievability analyses, recordkeeping, and certifications? If these size criteria are not appropriate for a permanent exemption, what are the appropriate size criteria? Are there other criteria that should form the basis of a permanent exemption?

281. As explained in the *Report and Order*, small business concerns under the SBA's rules must meet the SBA size standard for six-digit NAICS codes for the industry in which the concern is primarily engaged.⁷⁴⁴ To determine an entity's primary industry, the SBA "considers the distribution of receipts, employees and costs of doing business among the different industries in which business operations occurred for the most recently completed fiscal year. SBA may also consider other factors, such as the distribution of patents, contract awards, and assets."⁷⁴⁵ We seek comment on the applicability of this rule for the permanent small entity exemption.

282. We seek comment on the applicability of the SBA definition of "business concern."⁷⁴⁶ Under SBA's rules, a business concern is an "entity organized for profit, with a place of business located in the United States, and which operates primarily within the United States or which makes a significant contribution to the U.S. economy through payment of taxes or use of American products, materials or labor."⁷⁴⁷ We also seek comment on the applicability of other SBA rules for determining whether a business qualifies as a small business concern, including rules for determining annual receipts or employees and affiliation between businesses.⁷⁴⁸

283. We also seek comment on alternative size standards that the Commission has adopted in other contexts. In establishing eligibility for spectrum bidding credits, the Commission has adopted alternative size standards for "very small" and "small" businesses.⁷⁴⁹ The Commission has defined "very small" businesses for these purposes as entities that, along with affiliates, have average gross revenues over the three preceding years of either \$3 million or less, or \$15 million or less, depending on the service.⁷⁵⁰ The

⁷⁴⁴ See para. 207, *supra*.

⁷⁴⁵ 13 C.F.R. § 121.107.

⁷⁴⁶ To be a small business concern, entities must meet the definition and requirements of a "business concern" as established by the SBA. See 13 C.F.R. § 121.105.

⁷⁴⁷ 13 C.F.R. § 121.105(a)(1).

⁷⁴⁸ See 13 C.F.R. §§ 121.103, 121.104, 121.106.

⁷⁴⁹ See 47 C.F.R. § 1.2110(f)(2).

⁷⁵⁰ See 47 C.F.R. § 90.912(b) (defining very small business for 800 MHz SMR spectrum licenses as entities, together with affiliates, with average gross revenue over the preceding three years not to exceed \$3 million); 47 C.F.R. § 24.720(b) (defining very small business for PCS Block F spectrum licenses as entities, together with affiliates, with average gross revenue over the preceding three years not to exceed \$15 million). See Section C.3.a & d of the accompanying FRFA for a full listing of the Commission's use of these size standards.

Commission has defined “small” businesses in this context as entities that, along with affiliates, have average gross revenues over the three preceding years of either \$15 million or less, or \$40 million or less, depending on the service.⁷⁵¹ The Commission has also adopted detailed rules for determining affiliation between an entity claiming to be a small business and other entities.⁷⁵² Finally, in at least one instance, the Commission defined a small business in the spectrum auction context as an entity that, along with its affiliates, has \$6 million or less in net worth and no more than \$2 million in annual profits (after federal income tax and excluding carry over losses) each year for the previous two years.⁷⁵³ We seek comment on whether these alternatives -- in whole, in part, or in combination -- should form the basis for a permanent small entity exemption from the requirements of Section 716.

284. The Commission has also used different size standards to define small cable companies and small cable systems, and the Act includes a definition of small cable system operators. The Commission has defined small cable companies as a cable company serving 400,000 or fewer subscribers nationwide,⁷⁵⁴ and small cable systems as a cable system serving 15,000 or fewer subscribers.⁷⁵⁵ The Act defines small cable system operators as “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.”⁷⁵⁶ We seek comment on whether these alternatives – in whole, in part, or in combination – should form the basis for a permanent small entity exemption from the requirements of Section 716.

285. In addition, we seek comment on any other criteria that might form all or part of a permanent small entity exemption. For example, the SBA primarily uses two measures to determine business size -- the maximum number of employees or maximum annual receipts of a business concern – but it has also applied other measures that represent the magnitude of operations of a business within an industry, including “total assets” held by an entity and the “net worth” and “net income” for an entity. Does an

⁷⁵¹ See 47 C.F.R. § 90.912(b) (defining small business for 800 MHz SMR spectrum licenses as entities, together with affiliates, with average gross revenue over the preceding three years not to exceed \$15 million); 47 C.F.R. § 24.720(b) (defining small business for PCS Block F spectrum licenses as entities, together with affiliates, with average gross revenue over the preceding three years not to exceed \$40 million). See Section C.3.a & d of the accompanying FRFA for a full listing of the Commission’s use of these size standards.

⁷⁵² 47 C.F.R. § 1.2110(b).

⁷⁵³ *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).

⁷⁵⁴ 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).

⁷⁵⁵ 47 C.F.R. § 76.901(c).

⁷⁵⁶ 47 U.S.C. § 543(m)(2).

exemption based on some criterion other than employee count or revenues better meet Congressional intent? Commenters are encouraged to explain fully any alternative – including the alternative of adopting no exemption for small entities -- and to specifically support any alternative criteria proffered, including by demonstrating the anticipated impact on consumers and small entities.

286. We also seek comment on whether to limit the exemption to only the equipment or service that is designed while an entity meets the requirements of any small business exemption we may adopt. If an entity offers for sale a new version, update or other iteration of the equipment or service, we seek comment on whether the update automatically should be covered by the exemption or whether the exemption should turn on whether the entity was still capable of meeting the exemption during the design phase of the new version, iteration, or update.

287. We seek comment on whether to make a permanent small entity exemption self-executing. If self-executing, entities would be able to raise the exemption during an enforcement proceeding but would otherwise not be required to formally seek the exemption before the Commission. In this scenario, the entity seeking the exemption would be required to determine on its own whether it qualifies as a small business concern.

288. We seek comment on the impact of a permanent exemption on providers of ACS, manufacturers of ACS equipment, and consumers. What percentage of, or which non-interconnected VoIP providers, wireline or wireless service providers, electronic messaging providers, and ACS equipment manufacturers would qualify as small business concerns under each size standard? Conversely, what percentage of or which providers of ACS or manufacturers of equipment used for ACS are not small business concerns under each size standard? For each ACS and ACS equipment market segment, what percentage of the market is served by entities that are not exempt using each size standard?

289. We seek comment on the compliance costs that ACS providers and ACS equipment manufacturers would incur absent a permanent exemption. What would the costs be for compliance with Section 716 and Section 717 across different providers of ACS and ACS equipment manufacturers if we decline to adopt any permanent exemption or decline to make the temporary exemption permanent? In particular, what are the costs of conducting an achievability analysis, recordkeeping, and providing certifications?

290. We seek comment generally on the impact of a small business exemption on consumers. Are there ACS or ACS equipment that may significantly benefit people with disabilities that are provided or manufactured by entities that might be exempt? If so, what are the services or equipment or the types of services or equipment, and how would the exemption impact people with disabilities? Would a permanent exemption disproportionately impact people with disabilities in rural areas versus urban or suburban areas? How would a permanent exemption impact people with disabilities living on tribal lands? To what extent would a permanent exemption impact the ability of people with disabilities to access new ACS innovations or ACS equipment innovations? Will a permanent exemption have a greater impact on the accessibility of some segments of ACS or ACS equipment than others?

291. We intend to monitor the impact of any exemption, including whether it is promoting innovation as Congress intended or whether it is having unanticipated negative consequences on accessibility of ACS. While we propose not to time limit any exemption, we retain the ability to modify or repeal the exemption if doing so would serve the public interest and is consistent with Congressional intent.⁷⁵⁷ We seek comment on these proposals.

B. Section 718 Implementation

292. Under Section 718, a mobile phone manufacturer that includes a browser, or a mobile phone service provider that arranges for a browser to be included on a mobile phone, must ensure that the browser functions are accessible to and usable by individuals who are blind or have a visual impairment, unless doing so is not achievable.⁷⁵⁸ Congress provided that the effective date for these requirements is three years after the enactment of the CVAA, *i.e.*, October 8, 2013.

293. In enacting Section 718,⁷⁵⁹ we believe that Congress carved out an exception to Section 716 and delayed the effective date to address a special class of browsers for a specific subset of the disabilities community because of the unique challenges of achieving non-visually accessible solutions in a mobile phone and the relative youth of accessible development for mobile platforms. This technical complexity arises because three accessibility technologies, often developed by different parties, must be synchronized effectively together for a browser to be accessible to a blind user of a mobile phone: (1) an accessibility API⁷⁶⁰ of the operating system; (2) the implementation of that API by the browser; and (3) its implementation by a screen reader. Because non-visual accessibility is generally the most technically challenging form of accessibility to accomplish,⁷⁶¹ an accessibility API is needed to render the underlying meaning of key

⁷⁵⁷ Several commenters argue for a time-limited exemption for small entities. *See* Wireless RERC Comments at 5 (“[O]ne year seems appropriate with a reapplication process that requires a stronger burden for renewal.”); ACB Reply Comments at 23-24 (“[W]aivers for covered small entities in question [should] only be granted for a term whose length shall not exceed more than 12 months.”). As long as an entity remains a small entity under our proposed rules, they will be exempt from compliance. However, we will monitor the exemption to ensure it meets Congress’s intent.

⁷⁵⁸ *See* 47 U.S.C. § 619(a). *See also* House Report at 27 (“The Committee also intends that the service provider and the manufacturer are each only subject to these provisions with respect to a browser that such service provider or manufacturer directs or specifies to be included in the device.”)

⁷⁵⁹ *See* 47 U.S.C. § 619.

⁷⁶⁰ An Application Programming Interface (API) is software that an application program uses to request and carry out lower-level services performed by the operating system of a computer or telephone. *See* Harry Newton, *Newton’s Telecom Dictionary*, 68 (CMP Books, 20th ed. 2004).

⁷⁶¹ Non-visual accessibility for mobile browsers typically involves the coordination of several components, as discussed above. *See also* W3C Web Accessibility Initiative, ESSENTIAL COMPONENTS OF WEB ACCESSIBILITY, <http://www.w3.org/WAI/intro/components.php> (last visited Aug. 17, 2011). Making the necessary changes is thus likely to be more difficult. *See* BARBARA VAN SCHEWICK, INTERNET ARCHITECTURE AND INNOVATION 117 (2010) (“In general, the costs of changing an architecture rise with the number and complexity of architectural components involved in the change.”); *cf.* LEN BASS ET AL., SOFTWARE ARCHITECTURE IN PRACTICE 82 (1998) (explaining that sometimes a simple change across more (continued....))

elements of a graphical user interface in an alternate, non-visual form, such as synthetic speech or refreshable Braille. For example, while Microsoft has developed Microsoft Active Accessibility (MSAA), the dominant accessibility API on Windows desktop computers, it has not yet defined and deployed an accessibility API for the current Windows phone platform that can be utilized by browser and screen reader developers for that platform.⁷⁶² Even after an API becomes available, a significant process of coordination, testing, and refinement is needed to ensure that the browser/server and screen reader/client components can interact in a comprehensive and robust manner.

294. Additional lead-time must also be built-in as this kind of technical development and coordination is needed on each mobile platform. Present technological trends have resulted in relatively short generations of mobile platforms, each benefiting from increasing miniaturization of hardware components and increased bandwidth for transmitting data to and from the cloud. Experimentation and innovation with new ways of maximizing the productivity of mobile platforms, given these technological trends, has made accessibility coordination difficult. Finally, additional challenges are presented by the technical limitations posed by mobile platforms (lower memory capacity, low-bandwidth constraints, smaller screens) coupled with the fact that web content often has to be specially formatted to run on mobile platforms.⁷⁶³

295. In the context of discussing the development of accessible mobile phone options for persons who are blind, deaf-blind, or have low vision, the industry has acknowledged the technological shortcomings in the ability of both hardware and software to incorporate accessibility features in mobile phones. Specifically, TIA has indicated that “[not] all mobile devices can support the additional fundamental components needed to provide a full screen reader feature; there may be limitations in the software platform or limitations in the accompanying hardware, e.g., processing power, memory limitations.”⁷⁶⁴ TIA also indicated that more advanced accessibility features are not easily integrated and require the development of specific software codes for each feature on each device. Sprint, however, asserts that over time, mobile phones will eventually evolve like personal computers have, from “out-of-the-box” systems to today’s dynamic, highly customizable systems, as mobile device performance metrics

(Continued from previous page) _____
components may be easier to implement than a complex change across fewer components). In addition to these higher costs of implementation (development, testing, and documentation), coordination and adaptation costs are higher across firm boundaries and rise with the greater number of firms involved. See VAN SCHEWICK at 117, 127, 131-36.

⁷⁶² See Paul Schroeder and Darren Burton, *Microsoft Backtracks on Accessibility in New Mobile Operating System, Commits to Accessibility in Future Windows Phone Platform*, 11 ACCESSWORLD, no. 8, Dec. 2010, available at <http://www.afb.org/afbpress/pub.asp?DocID=aw110802>.

⁷⁶³ Concurrent with the passage of the CVAA has been the rapid increase in, and highly competitive development of, the number of mobile browser offerings in the market place and their hardware and software are significantly different from desktop browsers and each other, even within phones from the same manufacturer. See http://www.pcworld.com/article/230885/attack_of_the_mobile_browsers.html.

⁷⁶⁴ See TIA Comments to the July Public Notice in CG Docket 10-145, at 9.

such as processing speed, power, and memory capacity improve.⁷⁶⁵ In short, as mobile device technologies continue to evolve over time, corresponding improvements in hardware and software will improve accessibility in the future.

296. We seek comment on our proposed clarification that Congress added Section 718 as an exception to the general coverage of Internet browsers as software subject to the requirements of Section 716 for Internet browsers built in or installed on mobile phones used by individuals who are blind or have a visual impairment because of the unique challenges associated with achieving mobile access for this particular community. We also seek comment on the best way(s) to implement Section 718, so as to afford affected manufacturers and service providers the 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.⁷⁶⁶

297. We seek further 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.⁷⁶⁷ Would an accessibility API simplify the process for developing accessible screen readers for mobile phones and if so, should there be a separate API for each operating system that supports a browser? Is there a standard-setting body to develop such APIs or would such a process have to be driven by the manufacturers of mobile operating system software? What are the technical challenges, for both software developers and manufacturers, involved in developing an accessibility API?

298. What are the specific technical challenges involved in developing screen reader software applications for each mobile platform (e.g., iPhone, Android, Windows Mobile)? What security questions are raised by the use of screen readers? Are there specific security risks posed to operating systems by the presence of screen readers? What types of technical support/customer service will mobile phone operators need to provide to ensure initial and continued accessibility in browsers that are built into mobile phones? Are there steps the Commission could take to facilitate effective, efficient, and achievable accessibility solutions?

299. We seek to better understand these technical complexities and how we can encourage effective collaboration among the service providers, and the manufacturers of end user devices, the operating system, the browser, screen readers and other

⁷⁶⁵ See Sprint Comments to the July Public Notice in CG Docket 10-145, at 2.

⁷⁶⁶ See Verizon Comments at 7-8 (suggesting that access to electronic messaging services via a web browser is insufficient to trigger accessibility requirements for the device manufacturer). This issue is related to and was raised in the context of whether services and applications providing access to an electronic messaging service, such as a broadband platform that provides an end user access to a web-based e-mail service, are covered under the Act. *Accessibility NPRM*, 26 FCC Rcd at 3147, ¶ 34. Because browsers may be used to access multiple forms of advanced communications services, we address the obligations of manufacturers with respect to browsers here.

⁷⁶⁷ Code Factory Reply Comments to *October Public Notice* at 1-3.

stakeholders. We particularly welcome input on how the Commission can facilitate the development of solutions to the technical challenges associated with ensuring access to Internet browsers in mobile phones.

300. With respect to equipment and services covered by Section 716, the accompanying *Report and Order* gradually phases in obligations of covered entities with full compliance required on October 8, 2013 in order to encourage covered entities to implement accessibility features early in product development cycles, to take into account the complexity of these regulations, and to temper our regulations' effect on previously unregulated entities. We found this approach to be consistent with Commission precedent where we have utilized phase-in periods in similarly complex rulemakings.⁷⁶⁸ As we have stated above, we believe that Congress drafted Section 718 as a separate provision from Section 716 to emphasize the importance of ensuring access to mobile browsers for people who are blind or visually impaired because of the unique technical challenges associated with ensuring effective interaction between browsers and screen readers operating over a mobile platform. Given these complex technical issues, we seek comment on what steps we should take to ensure that the mobile phone industry will be prepared to implement accessibility features when Section 718 becomes effective on October 8, 2013.

C. Interoperable Video Conferencing Services

1. Meaning of Interoperable

301. In the *Accessibility NPRM*, the Commission asked how to define “interoperable” in a manner that is faithful to both the statutory language and the broader purposes of the CVAA, to ensure that “such services may, by themselves, be accessibility solutions” and “that individuals with disabilities are able to access and control these services” as Congress intended.⁷⁶⁹ Many commenters appear to consider “inter-platform, inter-network, and inter-provider” as requisite characteristics of interoperability.⁷⁷⁰ ITI suggests that “interoperability between platforms is not currently achievable,” but that

⁷⁶⁸ See CEA Reply Comments at 4, (citing *Closed Captioning Requirements for Digital Television Receivers*, Report and Order, 15 FCC Rcd 16788, 16807 ¶ 56 (2000); *Wireless E911 Location Accuracy Requirements*, Report and Order, 22 FCC Rcd 20105, 20112 ¶ 17 (2007), *voluntarily vacated*, *Rural Cellular Ass'n v. FCC*, 2008 U.S. App. LEXIS 19889 (D.C. Cir. Sept. 17, 2008)); ITI Comments at 19, (citing 47 C.F.R. § 15.119(a); 47 C.F.R. § 15.120(a); 47 C.F.R. § 15.122(a)(1); 47 C.F.R. § 15.117(i)(1)(i)-(iii)); CEA *Ex Parte* in CG Docket No. 10-213 at 2 (citing *Technical Requirements to Enable Blocking of Video Programming based on Program Ratings*, Report and Order, 13 FCC Rcd 11248, 11257 ¶ 23 (1998); *Implementation of Section 304 of the Telecommunications Act of 1996*, Report and Order, 13 FCC Rcd 14775, 14803 ¶ 69 (1998); *Hearing Aid Compatibility R&O*, 18 FCC Rcd 16780 ¶ 65).

⁷⁶⁹ *Accessibility NPRM*, 26 FCC Rcd at 3151, ¶ 46, *citing* Senate Report at 6, House Report at 25.

⁷⁷⁰ See CEA Comments at 14-15; CTIA Comments at 22-23; ESA Comments at 3; ITI Comments at 24; Microsoft Comments at 6; TechAmerica Comments at 4-5; TIA Comments at 11. See also Letter from Danielle Coffey, Vice President, Telecommunications Industry Association, to Marlene H. Dortch, Secretary, FCC, CG Docket No. 10-213, at 1 (filed Aug. 10, 2011) (“TIA August 10 *Ex Parte*”) (asserting that this understanding of “interoperable” is reflected in Commission rules and precedent and consistent with the IEEE definition of “interoperable” as the “ability of a system or a product to work with other products without special effort on the part of the consumer”).

Congress recognized that some forms of accessibility will take time and that “[t]his is an example of such a situation.”⁷⁷¹ We are concerned that this proposed definition would exclude virtually all existing video conferencing services and equipment from the accessibility requirements of Section 716, which we believe would be contrary to Congressional intent.⁷⁷²

302. We believe that interoperability is a characteristic of usability for many individuals who are deaf or hard of hearing and for whom video conferencing services are, by themselves, accessibility solutions.⁷⁷³ We also agree with Consumer Groups that “[w]ithout interoperability, communication networks [are] segmented and require consumers to obtain access to multiple, closed networks using particularized equipment.”⁷⁷⁴ For example, video relay service (“VRS”) equipment users must obtain and use other video conferencing services and equipment to engage in real-time video communication with non-VRS-equipment users. In addition to possibly defining “interoperable” as “inter-platform, inter-network, and inter-provider,” ITI also suggests that the term “interoperable” could be defined as “interoperable with [VRS] or among different video conferencing services.”⁷⁷⁵ As an alternative, the IT and Telecom RERCs suggest that a system that publishes its standard and allows other manufacturers or

⁷⁷¹ ITI Comments at 24. *But see* Letter from Andrew S. Phillips, Counsel to National Association of the Deaf, on behalf of the Coalition of Organizations for Accessible Technology (“COAT”), to Marlene H. Dortch, Secretary, FCC, CG Docket No. 10-213, at 2 (filed Sept. 27, 2011) (“COAT Sept. 27 *Ex Parte*”) (urging that “interoperable” “not be defined in a way that will leave this part of the law moot or make it easy for the industry to deliberately make its products non-interoperable”).

⁷⁷² *See* para. 46, *supra*, noting that earlier versions of the legislation did not include the word “interoperable” in the definition of the term “advanced communications services” and that the definition of “interoperable video conferencing services” in the enacted legislation is identical to the definition of “video conferencing services” found in earlier versions. Further, both the Senate Report regarding “interoperable video conferencing services” and the House Report regarding “video conferencing services” are identical and state 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” and that “such services may, by themselves, be accessibility solutions.” *Id.*, *citing* Senate Report at 6, House Report at 25.

⁷⁷³ *See Accessibility NPRM*, 26 FCC Rcd at 3151, ¶ 46, *citing* Senate Report at 6, House Report at 25. For example, in addition to using real-time video communications when communicating in sign language through VRS and point-to-point with other sign language users, real-time video communications provide many deaf and hard of hearing individuals with access to visual communication cues that aid in speech reading.

⁷⁷⁴ Consumer Groups Comments at 11. For example, our TRS rules permit only deaf, hard of hearing, deaf-blind, or speech disabled individuals who communicate in sign language to obtain VRS video conferencing services and equipment. *See Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities; E911 Requirements for IP-Enabled Service Providers*, CG Docket No. 03-123, WC Docket No. 05-196, Second Report and Order and Order on Reconsideration, 24 FCC Rcd 791, 807-808, ¶ 34 (2008). As a result, interoperable video conferencing services are available between VRS users, but not between VRS users and others.

⁷⁷⁵ *See* ITI Comments at 24; IT and Telecom RERCs Comments at 14-15 (suggesting that the interoperability requirements for VRS may be more than what should be required to qualify as “interoperable” under the CVAA).

service providers to build products or services to work with it should be considered interoperable.⁷⁷⁶

303. Accordingly, we seek comment on the following alternative definitions of “interoperable” in the context of video conferencing services and equipment used for those services: (1) “interoperable” means able to function inter-platform, inter-network, and inter-provider; (2) “interoperable” means having published or otherwise agreed-upon standards that allow for manufacturers or service providers to develop products or services that operate with other equipment or services operating pursuant to the standards; or (3) “interoperable” means able to connect users among different video conferencing services, including VRS.

304. We seek comment on each of the above proposed definitions of “interoperable.” Should only one of the proposed definitions be adopted, and should we reject the other two definitions, or should we adopt multiple definitions and find that video conferencing services are interoperable as long as any one of the three definitions is satisfied? In other words, should we consider the three proposed definitions as three alternative tests for interoperability? In regard to the first alternative – “inter-platform, inter-network, and inter-provider” – we seek comment on the extent to which video conferencing services or equipment must be different or distinct to qualify under this definition. In regard to the second alternative, when does a standard determine interoperability? Is publication by a standards-setting body enough, even if only one manufacturer or service provider follows that standard? If a manufacturer or service provider publishes a standard and invites others to utilize it, is that enough to establish interoperability? If not, is interoperability established as soon as a second manufacturer or service provider utilizes the standard? If not, what is enough to establish interoperability? If two or more manufacturers or service providers agree to a standard without publication, is interoperability established? If not, is interoperability established if they invite others to receive a private copy of the standards, but do not publish the standards for public consumption? If video conferencing services can be used to communicate with public safety answering points, does that establish interoperability? If not, what else must be done to establish interoperability? Does the ability to connect to VRS make a video conferencing service “interoperable” or “accessible” or both? If users of different video conferencing services, including VRS, can communicate with each other, does that establish interoperability, even if there are no set standards? If communications among different services is not enough, what then is enough to establish interoperability?

305. Interest in and consumer demand for cross-platform, network, and provider video conferencing services and equipment continues to rise.⁷⁷⁷ We do not

⁷⁷⁶ See IT and Telecom RERCs Comments at 16.

⁷⁷⁷ See Mark Milian, “Why Apple, Google, Microsoft won’t streamline video chat,” CNN, May 16, 2011, available at <http://www.cnn.com/2011/TECH/mobile/05/16/video.chat.standard/> (visited June 15, 2011). See also Stephen Lawson, “Polycom, carriers to tie videoconferencing systems” (article about the new Open Visual Communications Consortium (OVCC), spearheaded by Polycom with Verizon, AT&T, and others as members), Network World, June 1, 2011, available at <http://www.networkworld.com/news/2011/060111-polycom-carriers-to-tie-videoconferencing.html> (visited (continued....))

believe that interoperability among different platforms will “hamper service providers’ attempts to distinguish themselves in the marketplace and thus hinder innovation.”⁷⁷⁸ While we consider this matter more fully in this *Further Notice*, we urge industry “to develop standards for interoperability between video conferencing services as it has done for text messaging, picture and video exchange among carriers operating on different technologies and equipment.”⁷⁷⁹ We also urge industry, consumers, and other stakeholders to identify performance objectives that may be necessary to ensure that “such services may, by themselves, be accessibility solutions” and “that individuals with disabilities are able to access and control these services” as Congress intended.⁷⁸⁰ In other words, what does “accessible to and usable by individuals with disabilities” mean in the context of interoperable video conferencing services and equipment? Are accessibility performance and other objectives different for “interoperable” video conferencing services?⁷⁸¹ Notwithstanding existing obligations under the Act, we propose that industry considers accessibility alongside the technical requirements and standards that may be needed to achieve interoperability so that as interoperable video conferencing services and equipment come into existence, they are also accessible.⁷⁸²

2. Coverage of Video Mail

306. In the *Accessibility NPRM*, the Commission sought comment on whether services that otherwise meet the definition of interoperable video conferencing services but that also provide non-real-time or near real-time functions (such as “video mail”) are covered and subject to the requirements of Section 716.⁷⁸³ If such functions are not covered, the Commission asked whether it should, similar to what it did in the Section 255 context, assert its ancillary jurisdiction to cover video mail.⁷⁸⁴

(Continued from previous page) _____

June 15, 2011). See also Brian Stelter, “Comcast to Offer Customers Skype Video Calls on Their TVs,” *New York Times*, June 13, 2011, available at http://www.nytimes.com/2011/06/14/business/media/14comcast.html?_r=1&ref=todayspaper (visited June 13, 2011). See also TIA August 10 *Ex Parte* at 2-3 (describing the substantial progress and “efforts [] underway on multiple fronts in the quest to bring interoperable video conferencing to consumers”).

⁷⁷⁸ T-Mobile Comments at 7.

⁷⁷⁹ Verizon Comments at 9.

⁷⁸⁰ *Accessibility NPRM*, 26 FCC Rcd at 3151, ¶ 46, citing Senate Report at 6, House Report at 25.

⁷⁸¹ For example, does accessibility for individuals who are deaf or hard of hearing include being enabled to connect with an interoperable video conferencing service call through a relay service other than VRS? How can we ensure that video conferencing services and equipment are accessible to people with other disabilities, such as people who are blind or have low vision, or people with mobility, dexterity, cognitive, or intellectual disabilities?

⁷⁸² Interoperable video conferencing services and equipment, when offered by providers and manufacturers, must be accessible to and usable by individuals with disabilities, as required by Section 716, and such providers and manufacturers are subject to the recordkeeping and annual certification requirements of Section 717 starting on the effective date of these rules.

⁷⁸³ *Accessibility NPRM*, 26 FCC Rcd at 3149-50, ¶ 42.

⁷⁸⁴ 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 (continued....)

307. We agree with commenters that non-real-time or near-real-time features or functions of a video conferencing service, such as video mail, do not meet the definition of “real-time” video communications.⁷⁸⁵ Nonetheless, we do not have a sufficient record as to whether we should exercise our ancillary jurisdiction to require that a video mail service be accessible to individuals with disabilities when provided along with a video conferencing service as we did in the context of Section 255 in regard to voice mail, and we now seek comment on this issue.⁷⁸⁶ The record is also insufficient to decide whether our ancillary jurisdiction extends to require other features or functions provided along with a video conferencing service, such as recording and playing back video communications on demand, to be accessible, and we seek comment on this issue as well.⁷⁸⁷ Do we have other sources of direct authority, besides Section 716, to require that video mail and other features, such as recording and playing back video communications, are accessible to individuals with disabilities? Would the failure to ensure accessibility of video mail and the related equipment that performs these functions undermine the accessibility and usability of interoperable video conferencing services? Similarly, would the failure to ensure accessibility of recording and playing back video communications on demand and the related equipment that performs these functions undermine the accessibility and usability of interoperable video conferencing services?

D. Accessibility of Information Content

308. Section 716(e)(1)(B) of the Act requires the Commission to promulgate regulations providing that 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. In the accompanying *Report and Order*, we adopt this broad rule, incorporating the text of Section 716(e)(1)(B), as

(Continued from previous page) _____

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).” *Accessibility NPRM*, 26 FCC Rcd at 3150, ¶ 42, *citing 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).

⁷⁸⁵ See, e.g., CEA Comments at 15-16; CTIA Comments at 21; NCTA Reply Comments at 6-7; Verizon Comments at 9. As a technical matter, “video mail” may not be “real-time” communication, but, as a practical matter, if an interoperable video conferencing service and equipment is accessible, the video mail feature or function will likely also be accessible.

⁷⁸⁶ See note 784, *supra*. See also CEA Comments at 15-16 (consideration of video mail is premature); CTIA Comments at 21 (asserting that the definition precludes the exercise of our ancillary jurisdiction). *But see* Consumer Groups Comments at 9 (urging us to exercise our ancillary jurisdiction to require accessibility).

⁷⁸⁷ See IT and Telecom RERCs Comments at 12 (asserting that “if a person with a disability is unable to attend a live videoconference, that person should not lose the ability to access it through a later download or streaming, if non-disabled participants can access it later”).

proposed in the *Accessibility NPRM*.⁷⁸⁸ Here, we seek comment on the IT and Telecom RERCs' suggestion that we interpret the phrase "may not impair or impede the accessibility of information content"⁷⁸⁹ to include the concepts set forth below. An excerpt of the IT and Telecom RERCs' proposal regarding how we should interpret and apply our accessibility of information content guidelines is provided in Appendix F, including the following recommendations that covered entities:⁷⁹⁰

- shall not install equipment or features that can't or don't support accessibility information;
- shall not configure network equipment such that it would block or discard accessibility information;
- shall display any accessibility related information that is present in an industry recognized standard format;
- shall not block users from substituting accessible versions of content; and
- shall not prevent the incorporation or passing along of accessibility related information.

E. Electronically Mediated Services

309. In the accompanying *Report and Order*, we declined to expand our definition of peripheral devices to mean "devices employed in connection with equipment covered by this part, *including software and electronically mediated services*, to translate, enhance, or otherwise transform advanced communications services into a form accessible to people with disabilities" as the IT and Telecom RERCs propose).⁷⁹¹ Because the record is insufficient, we seek further comment on the IT and Telecom RERCs' proposal and on the definition of "electronically mediated services." We also seek comment on the extent to which electronically mediated services are covered under Section 716 and how they can be used to transform ACS into an accessible form.⁷⁹²

F. Performance Objectives

310. 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."⁷⁹³ In the *Accessibility NPRM*, the Commission sought comment on how to

⁷⁸⁸ 47 U.S.C. § 617(e)(1)(B); *Accessibility NPRM*, 26 FCC Rcd at 3197, Appendix B: Proposed Rules.

⁷⁸⁹ 47 U.S.C. § 617(e)(1)(B).

⁷⁹⁰ IT and Telecom RERCs June 17 *Ex Parte* at 2.

⁷⁹¹ IT and Telecom RERCs Comments at 27-28 (emphasis added). *See Accessibility NPRM*, 26 FCC Rcd at 3196, Subpart B – Definitions, § 8.4(r).

⁷⁹² IT and Telecom RERCs Comments at 27-28.

⁷⁹³ 47 U.S.C. § 617(e)(1)(A).

make its performance standards testable, concrete, and enforceable.⁷⁹⁴ In the accompanying *Report and Order*, we incorporated into the performance objectives the definitions of accessible,⁷⁹⁵ compatibility,⁷⁹⁶ and usable,⁷⁹⁷ in sections 6.3 and 7.3 of the Commission's rules. In their Reply Comments, however, the IT and Telecom RERCs argued that, instead of relying on our Part 6 requirements, the Commission's performance objectives should include testable criteria.⁷⁹⁸ The IT and Telecom RERCs proposed specific "Aspirational Goal and Testable Functional Performance Criteria"⁷⁹⁹ in their Reply Comments, set forth in Appendix G. We seek comment on those criteria.⁸⁰⁰

G. Safe Harbors

311. As explained in the accompanying *Report and Order*, we decline at this time to adopt technical standards as safe harbors.⁸⁰¹ However, we recognize the importance of the various components in the ACS architecture working together to achieve accessibility and seek comment on whether certain safe harbor technical standards can further this goal.⁸⁰²

312. Specifically, we seek comment on whether, as ITI proposes, ACS manufacturers can ensure compliance with the Act "by programmatically exposing the ACS user interface using one or more established APIs and specifications which support the applicable provisions in ISO/IEC 13066-1:2011."⁸⁰³ Other standards may also form

⁷⁹⁴ *Accessibility NPRM*, 26 FCC Rcd at 3172, ¶ 105.

⁷⁹⁵ 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

⁷⁹⁶ 47 C.F.R. § 6.3(b)(1)-(4).

⁷⁹⁷ 47 C.F.R. § 6.3(l). 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."

⁷⁹⁸ IT and Telecom RERCs Reply Comments at 5, Attachment A.

⁷⁹⁹ See *infra* Appendix G.

⁸⁰⁰ IT and Telecom RERCs Reply Comments at Attachment A.

⁸⁰¹ Safe Harbors, Section III.D.2, *supra*.

⁸⁰² See *Manufacturers of Equipment Used for Advanced Communications Services*, Section III.A.2, *supra*.

⁸⁰³ ITI August 9 *Ex Parte* at 2.

the basis of a safe harbor for compliance with Section 716, including the “W3C/WAI Web Content Accessibility Guidelines, Version 2.0 and Section 508 of the Rehabilitation Act of 1973, as amended.”⁸⁰⁴ We seek comment on the use of these standards, and any others, as safe harbors for compliance with Section 716.

313. For the purpose of keeping safe harbors up-to-date with technology and ensuring ongoing compliance with the Act, we seek comment on whether “it should be the responsibility of the appropriate manufacturer or standards body to inform the Commission when new, relevant APIs and specifications are made available to the market that meet the . . . standard.”⁸⁰⁵ If we decide to adopt a safe harbor based on recognized industry standards, we seek comment on how the industry, consumers, and the Commission can verify compliance with the standard. Should entities be required to self-certify compliance with a safe harbor? Is there a standard for which consumers can easily test compliance with an accessible tool? What are the compliance costs for ACS manufacturers and service providers of the Commission adopting safe harbor technical standards based on recognized industry standards? Will adopting safe harbor technical standards based on recognized industry standards reduce compliance costs for ACS manufacturers and service providers?

314. We recognize tension may exist between the relatively slow standards setting process and the rapid pace of technological innovation.⁸⁰⁶ How should the Commission account for the possibility that the continued development of a standard on which a safe harbor is based may be outpaced by technology? Should we for purposes of determining compliance with a safe harbor apply only safe harbors that were recognized industry standards at the time of the design phase for the equipment or service in question? Is there another time period in the development of the equipment or service that is more appropriate?

H. Section 718 Recordkeeping and Enforcement

315. *Background.* In the *Accessibility NPRM*, the Commission invited comment on recordkeeping requirements for Section 718 covered entities.⁸⁰⁷ The Commission noted that recordkeeping requirements for Section 718 entities would be considered further in light of comments on general Section 718 implementation.⁸⁰⁸ The Commission also sought comment on informal complaint,⁸⁰⁹ formal complaint,⁸¹⁰ and

⁸⁰⁴ Letter from Ken J. Salaets, Director, Information Technology Industry Council, to Marlene H. Dortch, Secretary, FCC, CG Docket No. 10-213, at 2 (filed Aug. 29, 2011).

⁸⁰⁵ ITI August 9 *Ex Parte* at 2.

⁸⁰⁶ See RERC-IT Reply Comments to *October Public Notice* at 7.

⁸⁰⁷ *Accessibility NPRM*, 26 FCC Rcd at 3177-80, ¶¶ 117-123.

⁸⁰⁸ See *Accessibility NPRM*, 26 FCC Rcd at 3178, ¶ 121 n.353.

⁸⁰⁹ *Accessibility NPRM*, 26 FCC Rcd at 3184-86, ¶¶ 134-140.

⁸¹⁰ *Accessibility NPRM*, 26 FCC Rcd at 3186-87, ¶¶ 141-142.

other general requirements for complaints alleging violations of Section 718 and the Commission's implementing rules.⁸¹¹

316. *Discussion.* In the *Report and Order* accompanying this *Further Notice*, we adopt the same recordkeeping and complaint procedures for Section 718 covered entities that we adopt for Section 716 covered entities.⁸¹² Specifically, we adopt recordkeeping requirements for Section 718 covered entities that go into effect one year after the effective date of the rules adopted in the accompanying *Report and Order*.⁸¹³ We also adopt informal complaint and formal complaint procedures as well as other general requirements for complaints filed against Section 718 covered entities for violations of Section 718 and the Commission's implementing rules.⁸¹⁴ These complaint procedures go into effect for Section 718 covered entities on October 8, 2013, three years after the CVAA was enacted.⁸¹⁵

317. In this *Further Notice*, we seek comment on the implementation of Section 718 specifically. In this section, we invite comment on whether the Section 718 recordkeeping requirements, which we adopt in the accompanying *Report and Order*, should be retained or altered in light of the record developed in response to this *Further Notice* on Section 718. We ask that parties suggesting changes to the rules provide an assessment of the relative costs and benefits associated with (1) the rule they wish to see changed and (2) the alternative that they propose.

V. PROCEDURAL MATTERS

A. *Ex Parte* Rules – Permit-But-Disclose

318. The proceeding shall be treated as a “permit-but-disclose” proceeding in accordance with the Commission's *ex parte* rules.⁸¹⁶ Persons making *ex parte* presentations must file a copy of any written presentation or a memorandum summarizing any oral presentation within two business days after the presentation (unless a different deadline applicable to the Sunshine period applies). Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentation must (1) list all persons attending or otherwise participating in the meeting at which the *ex parte* presentation was made, and (2) summarize all data presented and arguments made during the presentation. If the presentation consisted in whole or in part of the presentation of

⁸¹¹ *Accessibility NPRM*, 26 FCC Rcd at 3181-84, ¶¶ 128-133.

⁸¹² See *Accessibility Report and Order*, Section 717 Recordkeeping and Enforcement, Section III.E *supra*.

⁸¹³ See *Accessibility Report and Order*, Recordkeeping, Section III.E.1, *supra*.

⁸¹⁴ See *Accessibility Report and Order*, Section 717 Recordkeeping and Enforcement, Section III.E, *supra*.

⁸¹⁵ See 47 U.S.C. § 619 note (“EFFECTIVE DATE FOR SECTION 718. - Section 718 of the Commissions Act of 1934 . . . shall take effect 3 years after the date of enactment of this Act.”).

⁸¹⁶ 47 C.F.R. §§ 1.1200 *et seq.*

data or arguments already reflected in the presenter's written comments, memoranda or other filings in the proceeding, the presenter may provide citations to such data or arguments in his or her prior comments, memoranda, or other filings (specifying the relevant page and/or paragraph numbers where such data or arguments can be found) in lieu of summarizing them in the memorandum. Documents shown or given to Commission staff during *ex parte* meetings are deemed to be written *ex parte* presentations and must be filed consistent with rule 1.1206(b). In proceedings governed by rule 1.49(f) or for which the Commission has made available a method of electronic filing, written *ex parte* presentations and memoranda summarizing oral *ex parte* presentations, and all attachments thereto, must be filed through the electronic comment filing system available for that proceeding, and must be filed in their native format (e.g., .doc, .xml, .ppt, searchable .pdf). Participants in this proceeding should familiarize themselves with the Commission's *ex parte* rules.

B. Comment Filing Procedures

319. 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 the Commission's Electronic Comment Filing System (ECFS). 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/>.
- Paper Filers: Parties who choose to file by paper must file an original and one copy 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 and boxes 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.

320. 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).

C. Final Regulatory Flexibility Analysis

321. The Regulatory Flexibility Act (RFA)⁸¹⁷ requires that an agency prepare a regulatory flexibility analysis for notice and comment rulemakings, unless the agency certifies that “the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities.”⁸¹⁸ Accordingly, we have prepared a Final Regulatory Flexibility Analysis concerning the possible impact of the rule changes contained in the *Report and Order* on small entities. The Final Regulatory Flexibility Analysis is set forth in Appendix D.

D. Final Paperwork Reduction Analysis

322. This document contains new information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13. It will be submitted to the Office of Management and Budget (OMB) for review under Section 3507(d) of the PRA. OMB, the general public, and other federal agencies are invited to comment on the new information collection requirements contained in this proceeding. In addition, we note that pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, *see* 44 U.S.C. 3506(c)(4), we previously sought specific comment on how the Commission might further reduce the information collection burden for small business concerns with fewer than 25 employees.

323. In this proceeding, we adopt new recordkeeping rules that provide clear guidance to covered entities on the records they must keep to demonstrate compliance with our new rules. We require covered entities to keep the three categories of records set forth in Section 717(a)(5)(A).⁸¹⁹ We also require annual certification by a corporate officer that the company is keeping the required records. We have assessed the effects of these rules and find that any burden on small businesses will be minimal because we have adopted the minimum recordkeeping requirements that allow covered entities to keep records in any format they wish. This approach takes into account the variances in covered entities (*e.g.*, size, experience with the Commission), recordkeeping methods, and products and services covered by the CVAA. Furthermore, this approach provides the greatest flexibility to small businesses and minimizes the impact that the statutorily mandated requirements impose on small businesses. Correspondingly, we considered

⁸¹⁷ *See* 5 U.S.C. § 601–612. The RFA has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

⁸¹⁸ 5 U.S.C. § 605(b).

⁸¹⁹ 47 U.S.C. § 618(a)(5)(A)(i)-(iii).

and rejected the alternative of imposing a specific format or one-size-fits-all system for recordkeeping that could potentially impose greater burdens on small businesses. Moreover, the certification requirement is possibly less burdensome on small businesses than large, as it merely requires certification from an officer that the necessary records were kept over the previous year; this is presumably a less resource intensive certification for smaller entities. Finally, we adopt a requirement that consumers must file a “Request for Dispute Assistance” with the Consumer and Governmental Affairs’ Disability Rights Office as a prerequisite to filing an informal complaint with the Enforcement Bureau. This information request is beneficial because it will trigger Commission involvement before a complaint is filed and will benefit both consumers and industry by helping to clarify the accessibility needs of consumers. It will also encourage settlement discussions between the parties in an effort to resolve accessibility issues without the expenditure of time and resources in the informal complaint process. We also note that we have temporarily exempted small entities from the rules we have adopted herein while we consider, in the *Further Notice*, whether we should grant a permanent exemption, and what criteria should be associated with such an exemption.

E. Initial Regulatory Flexibility Analysis

324. As required by the Regulatory Flexibility Act of 1980 (RFA),⁸²⁰ the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on small entities of the policies and rules proposed in the *Further Notice of Proposed Rulemaking*. The analysis is found in Appendix E. We request written public comment on the analysis. Comments must be filed in accordance with the same deadlines as comments filed in response to the *Further Notice* and must have a separate and distinct heading designating them as responses to the IRFA. The Commission’s Consumer and Governmental Affairs Bureau, Reference Information Center, will send a copy of this *CVAA Further Notice*, including the IRFA, to the Chief Counsel for Advocacy of the Small Business Administration.

F. Initial Paperwork Reduction Analysis

325. The *Further 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 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

⁸²⁰ See 5 U.S.C. § 603.

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 E, *infra*.

G. Further Information

326. For further information, please contact Rosaline Crawford, Consumer and Governmental Affairs Bureau, at 202-418-2075 or rosaline.crawford@fcc.gov; Brian Regan, Wireless Telecommunications Bureau, at 202-418-2849 or brian.regan@fcc.gov; or Janet Sievert, Enforcement Bureau, at 202-418-1362 or janet.sievert@fcc.gov.

VI. ORDERING CLAUSES

327. 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 *Report and Order* IS HEREBY ADOPTED.

328. IT IS FURTHER ORDERED that Parts 1, 6 and 7 of the Commission’s Rules, 47 C.F.R. Parts 1, 6, and 7, ARE AMENDED, and new Part 14 of the Commission’s Rules, 47 C.F.R. Part 14 IS ADDED as specified in Appendix B, effective 30 days after publication of the *Report and Order* in the *Federal Register*, except for the provisions in section 14.17, which contain an information collection that is subject to OMB approval.⁸²¹

329. IT IS FURTHER ORDERED that the information collection contained in this *Report and Order* WILL BECOME EFFECTIVE following approval by the Office of Management and Budget. The Commission will publish a document at a later date establishing the effective date.

330. IT IS FURTHER ORDERED that, pursuant to the authority of 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 *Further Notice of Proposed Rulemaking* IS HEREBY ADOPTED.

331. IT IS FURTHER ORDERED that pursuant to applicable procedures set forth in sections 1.415 and 1.419 of the Commission’s Rules, 47 C.F.R. §§ 1.415, 1.419, interested parties may file comments on this *Further Notice of Proposed Rulemaking* on or before 45 days after publication of the *Further Notice of Proposed Rulemaking* in the *Federal Register* and reply comments on or before 75 days after publication in the *Federal Register*.

332. IT IS FURTHER ORDERED that the Commission's Consumer Information Bureau, Reference Information Center, SHALL SEND a copy of the *Report*

⁸²¹ *See* 5 U.S.C. § 553(d)(3) (“[t]he required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except . . . as otherwise provided by the agency for good cause found and published with the rule”); *see also* 47 C.F.R. §§ 1.103(a), 1.427(b).

and Order and Further Notice of Proposed Rulemaking, including the Final Regulatory Flexibility Analysis and 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, Notice of Proposed Rulemaking, 26 FCC Rcd 3133 (2011).

<u>Abbreviation</u>	<u>Commenter</u>
AFB	Adaptivation, Inc. ¹
AT&T	American Foundation for the Blind
ATIS	AT&T Services, Inc.
	Alliance for Telecommunications Industry Solutions
	Blooston Rural Carriers
CEA	Consumer Electronics Association
Convo	Convo Communications, LLC
Consumer Groups	National Association of the Deaf (NAD), <i>et al.</i>
CSD	Communication Service for the Deaf, Inc.
CTIA	CTIA-The Wireless Association
Eipper	William Eipper
ESA	Entertainment Software Association
IT and Telecom RERCs	Rehabilitation Engineering Research Centers on Universal Interface & Information Technology Access (RERC-IT) and Telecommunications Access (RERC-TA) ²
ITI	Information Technology Industry Council

¹ Jonathan Eckrich is the filer of record.

² Gregg C. Vanderheiden is the filer of record.

Microsoft	Microsoft Corp.
Motorola	Motorola Solutions, Inc.
NCTA	National Cable & Telecommunications Association
NetCoalition	NetCoalition
NTCA	National Telecommunications Cooperative Association
OnStar	OnStar, LLC
Railey	Larry Railey
Sorenson	Sorenson Communications, Inc.
TIA	Telecommunications Industry Association
Time Warner	Time Warner Cable, Inc.
T-Mobile	T-Mobile USA, Inc.
Verizon	Verizon and Verizon Wireless
VON Coalition	Voice on the Net Coalition
Vonage	Vonage Holdings Corporation
Wireless RERC	Wireless RERC
Words+ and Compusult	Words+, Inc. and Compusult Systems, Inc. ³

³ Jeffrey A. Dahlen is the filer of record.

<u>Abbreviation</u>	<u>Reply Commenter</u>
AAPD	American Association of People with Disabilities
AbleLink	AbleLink Technologies ⁴
Adaptive Solutions	Adaptive Solutions ⁵
ACB	American Council of the Blind
AFB	American Foundation for the Blind ⁶
ATIS	Alliance for Telecommunications Industry Solutions
CEA	Consumer Electronics Association
	Code Factory
Coleman Institute and	Coleman Institute and Samuelson-Glushko Tech Law and
	Policy
Samuelson-Glushko TLPC	Clinic ⁷
Compusult	Compusult Limited ⁸
Consumer Groups	National Association of the Deaf (NAD), <i>et al.</i>
CSD	Communication Service for the Deaf, Inc.
CSDVRS	CSDVRS, LLC
CTIA	CTIA-The Wireless Association
ESA	Entertainment Software Association
Garris	Yvonne Garris
Google	Google Inc.
Green	Gillian Green
Hamilton and Purple	Hamilton Relay, Inc. and Purple Communications, Inc.
IT and Telecom RERCs	Rehabilitation Engineering Research Centers on Universal Interface & Information Technology Access (RERC-IT) and Telecommunications Access (RERC-TA) ⁹
Kolesar	Ron Kolesar
Lingraphicare	Lingraphicare America, Inc. ¹⁰

⁴ Joan Cunningham is the filer of record.

⁵ Sherion J. Hollingsworth is the filer of record.

⁶ Mark D. Richert is the filer of record.

⁷ Angela Tse is the filer of record.

⁸ Paul Mitten is the filer of record.

⁹ The IT and Telecom RERCs are the filers of record.

NFB	National Federation of the Blind
Nintendo	Nintendo of America, Inc.
O'Rourke	John O'Rourke
Point-and-Read	Point-and-Read, Inc. ¹¹
Potter	Kurt Potter
Wireless RERC	Rehabilitation Engineering Research Center for Wireless Technologies ¹²
Sandefur	RJ Sandefur
Verizon	Verizon and Verizon Wireless
Vonage	Vonage Holdings Corporation

(Continued from previous page) _____

¹⁰ Andrew Gomory is the filer of record.

¹¹ Benjamin Slotnick is the filer of record.

¹² Wireless RERC is the filer of record.

APPENDIX B**Final Rules**

The Federal Communications Commission amends Parts 1, 6 and 7 and adds new Part 14 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 amends § 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)(5) 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) ***

(5) In any case not covered in paragraphs (b)(1), (b)(2), (b)(3), or (b)(4) 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 amends Part 6 by revising §§ 6.15 and 6.16 as follows.

§ 6.15 Generally.

(a) All manufacturers of telecommunications equipment or customer premises equipment and all providers of telecommunications services, as defined under this subpart are subject to the enforcement provisions specified in the Act and the Commission's rules.

(b) For purposes of 6.15 through 6.23, the term “manufacturers” shall denote manufacturers of telecommunications equipment or customer premises equipment and the term “providers” shall denote providers of telecommunications services.

§ 6.16 Informal or formal complaints

Sections 6.17 through 6.23 of this subpart shall sunset on October 8, 2013. On October 8, 2013, any person may file either a formal or informal complaint against a manufacturer or provider alleging violations of Section 255 or this Part subject to the enforcement requirements set forth in §§ 14.30 through 14.52 of this chapter.

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 amends Part 7 by revising §§ 7.15 and 7.16 as follows:

§ 7.15 Generally

(a) For purposes of §§ 7.15–7.23 of this subpart, the term “manufacturers” shall denote any manufacturer of telecommunications equipment or customer premises equipment which performs a voicemail or interactive menu function.

(b) All manufacturers of telecommunications equipment or customer premises equipment and all providers of voicemail and interactive menu services, as defined under this subpart, are subject to the enforcement provisions specified in the Act and the Commission’s rules.

(c) The term “providers” shall denote any provider of voicemail or interactive menu service.

§ 7.16 Informal or formal complaints

Section 7.17 through 7.23 of this subpart shall sunset on October 8, 2013. On October 8, 2013, any person may file either a formal or informal complaint against a manufacturer or provider alleging violations of Section 255 or this Part subject to the enforcement requirements set forth in §§ 14.30 through 14.52 of this chapter.

Title 47 of the Code of Federal Regulations is amended by adding the following new Part 14:

PART 14 - ACCESS TO ADVANCED COMMUNICATIONS SERVICES AND EQUIPMENT BY PEOPLE WITH DISABILITIES

Subpart A – Scope

- § 14.1 Applicability.
- § 14.2 Limitations.
- § 14.3 Exemption for Customized Equipment or Services.
- § 14.4 Exemption for Small Entities.
- § 14.5 Waivers – Multi-purpose Services and Equipment.

Subpart B – Definitions

- § 14.10 Definitions.

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

- § 14.20 Obligations.
- § 14.21 Performance Objectives.

Subpart D – Recordkeeping, Consumer Dispute Assistance, and Enforcement

- § 14.30 Generally.
- § 14.31 Recordkeeping.
- § 14.32 Consumer Dispute Assistance.
- § 14.33 Informal or formal complaints.
- § 14.34 Informal complaints; form, filing, content, and consumer assistance.
- § 14.35 Procedure; designation of agents for service.
- § 14.36 Answers and Replies to informal complaints.
- § 14.37 Review and disposition of informal complaints.
- § 14.38 Formal Complaints; General pleading requirements.
- § 14.39 Format and content of formal complaints.
- § 14.40 Damages.
- § 14.41 Joinder of complainants and causes of action.
- § 14.42 Answers.
- § 14.43 Cross-complaints and counterclaims.
- § 14.44 Replies.

- § 14.45 Motions.
- § 14.46 Formal complaints not stating a cause of action; defective pleadings.
- § 14.47 Discovery.
- § 14.48 Confidentiality of information produced or exchanged by the parties.
- § 14.49 Other required written submissions.
- § 14.50 Status conference.
- § 14.51 Specifications as to pleadings, briefs, and other documents; subscription.
- § 14.52 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

§ 14.1 Applicability.

Except as provided in §§ 14.2, 14.3, 14.4 and 14.5 of this chapter, the rules in this part apply to:

- (a) Any 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;
- (b) Any provider of advanced communications services that such provider offers in or affecting interstate commerce.

§ 14.2 Limitations.

- (a) Except as provided in paragraph (b), no person shall be liable for a violation of the requirements of the rules in this part with respect to advanced communications services or equipment used to provide or access advanced communications services to the extent such person--
 - (1) transmits, routes, or stores in intermediate or transient storage the communications made available through the provision of advanced communications services by a third party; or
 - (2) 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 advanced communications services or equipment used to provide or access advanced communications services.
- (b) The limitation on liability under paragraph (a) shall not apply to any person who relies on third party applications, services, software, hardware, or equipment to comply with the requirements of the rules in this part with respect to advanced communications services or equipment used to provide or access advanced communications services.

(c) 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.

§ 14.3 Exemption for Customized Equipment or Services.

(a) The rules in this part 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.

(b) A provider of advanced communications services or manufacturer of equipment used for advanced communications services may claim the exemption in paragraph (a) as a defense in an enforcement proceeding pursuant to subpart D of this part, but is not otherwise required to seek such an affirmative determination from the Commission.

§ 14.4 Exemption for Small Entities.

(a) A provider of advanced communications services or a manufacturer of equipment used for advanced communications services to which this part applies is exempt from the obligations of this part if such provider or manufacturer, at the start of the design of a product or service:

- (1) qualifies as a business concern under section 13 C.F.R. §121.105; and
- (2) together with its affiliates, as determined by 13 C.F.R. §121.103, meets the relevant small business size standard established in 13 C.F.R. §121.201 for the primary industry in which it is engaged as determined by 13 C.F.R. §121.107.

(b) A provider or manufacturer may claim this exemption as a defense in an enforcement proceeding pursuant to subpart D of this part, but is not otherwise required to seek such an affirmative determination from the Commission.

(c) This exemption will expire no later than October 8, 2013.

§ 14.5 Waivers – Multipurpose Services and Equipment.

(a) Waiver.

- (1) On its own motion or in response to a petition by a provider of advanced communications services, a manufacturer of equipment used for advanced communications services, or by any interested party, the Commission may waive the requirements of this part 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 –

- (i) is capable of accessing an advanced communications service and;
- (ii) is designed for multiple purposes, but is designed primarily for purposes other than using advanced communications services.

(2) For any waiver petition under this section, the Commission will examine on a case-by-case basis –

- (i) whether the equipment or service is designed to be used for advanced communications purposes by the general public; and
- (ii) whether and how the advanced communications functions or features are advertised, announced, or marketed.

(b) Class Waiver. For any petition for a waiver of more than one advanced communications service or one piece of equipment used for advanced communications services where the service or equipment share common defining characteristics, in addition to the requirements of section 14.5(a)(1) and (2), the Commission will examine the similarity of the service or equipment subject to the petition and the similarity of the advanced communications features or functions of such services or equipment.

(c) Duration.

(1) A petition for a waiver of an individual advanced communications service or equipment used for advanced communications services may be granted for the life of the service or equipment as supported by evidence on the record, or for such time as the Commission determines based on evidence on the record.

(2) A petition for a class waiver may be granted for a time to be determined by the Commission based on evidence on the record, including the lifecycle of the equipment or service in the class. Any class waiver granted under this section will waive the obligations of this part for all advanced communications services and equipment used for advanced communications services subject to a class waiver and made available to the public prior to the expiration of such waiver.

(d) Public Notice. All petitions for waiver filed pursuant to this section shall be put on public notice, with a minimum of a 30-day period for comments and oppositions.

Subpart B – Definitions

§ 14.10 Definitions.

(a) The term *accessible* shall have the meaning provided in § 14.21(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;

- (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 of 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 § 14.21(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 produced or provided to meet unique specifications requested by a business or enterprise customer and not otherwise available to the general public, including public safety networks and devices.
- (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. Such equipment may include both hardware and software components.
- (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 desktop 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, as such section may be amended from time to time.

- (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 network, including, routers, network interface cards, networking cables, modems, and other related hardware. Such equipment may include both hardware and software components.
- (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; and
 - (c) Does not include any service that is 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 *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 any service provider network.
- (t) The term *software* shall mean 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.
- (u) The term *specialized customer premises equipment* shall mean customer premise equipment which is commonly used by individuals with disabilities to achieve access.
- (v) The term *usable* shall have the meaning provided in § 14.21(c) of this part.

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

§ 14.20 Obligations.

(a) General Obligations.

- (1) With respect to equipment manufactured after the effective date of this part, 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 the requirements of this subsection are not achievable.

(2) With respect to services provided after the effective date of this part, 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 the requirements of this subsection are not achievable.

(3) If accessibility is not achievable either by building it in or by using third party accessibility solutions available to the consumer at nominal cost and that individuals with disabilities can access, then a manufacturer or service provider shall ensure that its equipment or service is compatible with existing peripheral devices or specialized customer premises equipment, unless the requirements of this subsection are not achievable.

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

(5) Providers of advanced communications services, manufacturers of equipment used with these services, and providers of 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 14.21 at the design stage as early as possible and must implement such performance objectives, to the extent that they are 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 that the information and documentation that they provide to customers is accessible, if achievable. Such information and documentation includes, but is not limited to, user guides, bills, installation guides for end user devices, and product support communications. The requirement to ensure the information is accessible 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.

§ 14.21 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, Consumer Dispute Assistance, and Enforcement

§ 14.30 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 and parts 6, 7 and this part of the rules.

(b) The requirements set forth in § 14.31 of this subpart shall be effective **[INSERT DATE 30 DAYS PLUS 1 YEAR AFTER PUBLICATION IN THE FEDERAL REGISTER]**.

(c) The requirements set forth in §§ 14.32 through 14.37 of this subpart shall be effective on October 8, 2013.

§ 14.31 Recordkeeping.

(a) Each manufacturer and service provider subject to Section 255, 716, or 718 of the Act, must create and maintain, in the ordinary course of business and for a two year period from the date a product ceases to be manufactured or a service ceases to be offered, records of the efforts taken by such manufacturer or provider to implement Sections 255, 716, and 718 with regard to this product or service, as applicable, including:

(1) information about the manufacturer's or service 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 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.

(1) The certificate must state that the manufacturer or service provider, as applicable, has established operating procedures that are adequate to ensure compliance with the recordkeeping rules in this subpart and that records are being kept in accordance with this section and be supported with an affidavit or declaration under penalty of perjury, signed and dated by the authorized officer of the company with personal knowledge of the representations provided in the company's certification, verifying the truth and accuracy of the information therein.

(2) The certificate shall identify the name and contact details of the person or persons within the company that are authorized to resolve complaints alleging violations of our accessibility rules and Sections 255, 716, and 718 of the Act, and the agent designated for service pursuant to § 14.35(b) of this subpart and provide contact information for this agent. Contact information 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 e-mail address.

(3) The annual certification must be filed with the Commission on April 1, 2013 and annually thereafter for records pertaining to the previous calendar year. The certificate must be updated when necessary to keep the contact information current.

(c) Upon the service of a complaint, formal or informal, on a manufacturer or service provider under this subpart, a manufacturer or service provider must produce to the Commission, upon request, records covered by this section and may assert a statutory request for confidentiality for these records under 47 U.S.C. § 618(a)(5)(C) and § 0.457(c) of this chapter. All other information submitted to the Commission pursuant to this subpart or pursuant to any other request by the Commission may be submitted pursuant to a request for confidentiality in accordance with § 0.459 of this chapter.

§ 14.32 Consumer Dispute Assistance.

(a) A consumer or any other party may transmit a Request for Dispute Assistance to the Consumer and Governmental Affairs Bureau by any reasonable means, including by the Commission's online informal complaint filing system, U.S. Mail, overnight delivery, or e-mail to dro@fcc.gov. Any Requests filed using a method other than the Commission's online system should include a cover letter that references Section 255, 716, or 718 or the rules of parts 6, 7, or this part and should be addressed to the Consumer and Governmental Affairs Bureau. Any party with a question about information that should be included in a Request for Dispute Assistance should e-mail the Commission's Disability Rights Office at dro@fcc.gov or call 202-418-2517 (voice), 202-418-2922 (TTY).

(b) A Request for Dispute Assistance shall include:

- (1) The name, address, e-mail address, and telephone number of the party making the Request (Requester);
- (2) The name of the manufacturer or service provider that the requester believes is in violation of Section 255, 716, or 718 or the rules in this part, and the name,

- address, and telephone number of the manufacturer or service provider, if known;
- (3) An explanation of why the requester believes the manufacturer or service provider is in violation of Section 255, 716, or 718 or the rules in this part, including details regarding the service or equipment and the relief requested, and all documentation that supports the requester's contention;
 - (4) The date or dates on which the requester either purchased, acquired, or used (or attempted to purchase, acquire, or use) the equipment or service in question;
 - (5) The Requester's preferred format or method of response to its Request for Dispute Assistance by CGB or the manufacturer or service provider (*e.g.*, letter, facsimile transmission, telephone (voice/TRS/TTY), e-mail, audio-cassette recording, Braille, or some other method that will best accommodate the Requester's disability, if any);
 - (6) Any other information that may be helpful to CGB and the manufacturer or service provider to understand the nature of the dispute;
 - (7) Description of any contacts with the manufacturer or service provider to resolve the dispute, including, but not limited to, dates or approximate dates, any offers to settle, etc.; and
 - (8) What the Requester is seeking to resolve the dispute.
- (c) CGB shall forward the Request for Dispute Assistance to the manufacturer or service provider named in the Request. CGB shall serve the manufacturer or service provider using the contact details of the certification to be filed pursuant to 14.31(b). Service using contact details provided pursuant to 14.31(b) is deemed served. Failure by a manufacturer or service provider to file or keep the contact information current will not be a defense of lack of service.
- (d) CGB will assist the Requester and the manufacturer or service provider in reaching a settlement of the dispute.
- (e) Thirty days after the Request for Dispute Assistance was filed, if a settlement has not been reached between the Requester and the manufacturer or service provider, the Requester may file an informal complaint with the Commission,;
- (f) When a Requester files an informal complaint with the Enforcement Bureau, as provided in § 14.34, the Commission will deem the CGB dispute assistance process closed and the requester and manufacturer or service provider shall be barred from further use of the Commission's dispute assistance process so long as a complaint is pending.

§ 14.33 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.

§ 14.34 Informal complaints; form, filing, content, and consumer assistance.

(a) An informal complaint alleging a violation of Section 255, 716 or 718 of the Act or parts 6, 7, or this part may be transmitted to the Enforcement Bureau by any reasonable means, including the Commission's online informal complaint filing system, U.S. Mail, overnight delivery, or e-mail. Any Requests filed using a method other than the Commission's online system should include a cover letter that references Section 255, 716, or 718 or the rules of parts 6, 7, or this part and should be addressed to the Enforcement Bureau.

(b) An informal complaint shall include:

- (1) The name, address, e-mail address, and telephone number of the complainant;
- (2) The name, address, and telephone number of the manufacturer or service provider defendant against whom the complaint is made;
- (3) The date or dates on which the complainant or person(s) 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 the Commission's rules, including details regarding the service or equipment and the relief requested, and all documentation that supports the complainant's contention;
- (5) A certification that the complainant submitted to the Commission a Request for Dispute Assistance, pursuant to § 14.32, no less than 30 days before the complaint is filed;
- (6) The complainant's preferred format or method of response to the complaint by the Commission and defendant (*e.g.*, letter, facsimile transmissions, telephone (voice/TRS/TTY), e-mail, audio-cassette recording, Braille, or some other method that will best accommodate the complainant's disability, if any); and
- (7) Any other information that is required by the Commission's accessibility complaint form.

(c) Any party with a question about information that should be included in an Informal Complaint should e-mail the Commission's Disability Rights Office at dro@fcc.gov or call 202-418-2517 (voice), 202-418-2922 (TTY).

§ 14.35 Procedure; designation of agents for service.

- (a) The Commission shall forward any informal complaint meeting the requirements of § 14.34 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 parts 6, 7, or this part, 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. The agent shall be designated in the manufacturer or service provider's annual certification pursuant to § 14.31.

§ 14.36 Answers and replies to informal complaints.

(a) After a complainant makes a *prima facie* case by asserting that a product or service is not accessible, the manufacturer or service provider to whom the informal complaint is directed bears the burden of proving that the product or service is accessible or, if not accessible, that accessibility is not achievable under this part or readily achievable under parts 6 and 7. To carry its burden of proof, a manufacturer or service provider must produce documents demonstrating its due diligence in exploring accessibility and achievability, as required by parts 6, 7, or this part, throughout the design, development, testing, and deployment stages of a product or service. Conclusory and unsupported claims are insufficient to carry this burden of proof.

(b) Any manufacturer or service provider to whom an informal complaint is served by the Commission under this subpart shall file and serve an answer responsive to the complaint and any inquires set forth by the Commission.

- (1) The answer shall:
 - (i) Be filed with the Commission within twenty days of service of the complaint, unless the Commission or its staff specifies another time period;
 - (ii) Respond specifically to each material allegation in the complaint and assert any defenses that the manufacturer or service provider claim;
 - (iii) Include a declaration by an officer of the manufacturer or service provider attesting to the truth of the facts asserted in the answer;
 - (iv) Set forth any remedial actions already taken or proposed alternative relief without any prejudice to any denials or defenses raised;
 - (v) Provide any other information or materials specified by the Commission as relevant to its consideration of the complaint; and
 - (vi) Be prepared or formatted, including in electronic readable format compatible with the Commission's Summation or other software in the manner requested by the Commission and the complainant, unless otherwise permitted by the Commission for good cause shown.
- (2) If the manufacturer's or service provider's answer includes the defense that it was not achievable for the manufacturer or service provider to make its product or service accessible, the manufacturer or service provider shall carry the burden of proof on the defense and the answer shall:
 - (i) Set forth the steps taken by the manufacturer or service provider to make the product or service accessible and usable;
 - (ii) 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 in cases where the manufacturer or service provider alleges it was not achievable to do so;

- (iii) Set forth the manufacturer's basis for determining that it was not achievable to make the product or service accessible and usable in cases where the manufacturer or service provider so alleges; and
- (iv) 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 in cases where the manufacturer or service provider so alleges.

(c) Any manufacturer or service provider to whom an informal complaint is served by the Commission under this subpart shall serve the complainant and the Commission with a non-confidential summary of the answer filed with the Commission within twenty days of service of the complaint. The non-confidential summary must contain the essential elements of the answer, including, but not limited to, any asserted defenses to the complaint, must address the material elements of its answer, and include sufficient information to allow the complainant to file a reply, if the complainant chooses to do so.

- (d) The complainant may file and serve a reply. The reply shall:
- (1) Be served on the Commission and the manufacturer or service provider that is subject of the complaint 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.

§ 14.37 Review and disposition of informal complaints.

- (a) The Commission will investigate the allegations in any informal complaint filed that satisfies the requirements of section 14.34(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 therefore, 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.

§ 14.38 Formal Complaints; 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.

§ 14.39 Format and content of formal complaints.

- (a) Subject to paragraph (d) of this section governing supplemental complaints filed pursuant to § 14.39 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 § 14.38(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 § 14.39 shall conform to the requirements set out in this section and § 14.38 of this subpart, except that the requirements in §§ 14.38(b), 14.39 (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 § 14.39 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 § 14.38(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 § 14.39 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.

§ 14.40 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 § 14.39(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.

§ 14.41 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.

§ 14.42 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 §§ 14.38 and 14.39 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.

§ 14.43 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 §§ 14.38 through 14.40 of this subpart. For purposes of this subpart, the term “cross-complaint” shall include counterclaims.

§ 14.44 Replies.

(a) Within three days after service of an answer containing affirmative defenses presented in accordance with the requirements of § 14.42(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.

§ 14.45 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 § 14.38(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 § 14.51(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 § 14.51(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 § 14.38(g) of this subpart.

§ 14.46 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.

§ 14.47 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 § 14.50(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 § 14.50(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 § 14.45 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.

§ 14.48 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.

§ 14.49 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 §§ 14.39(a)(10)(i), (a)(10)(ii), 14.27(f)(1), (f)(2), and 14.44(d)(1), (d)(2) of this subpart. Any other supporting documentation or affidavits that are 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 § 14.48 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 § 14.50(a) of this subpart.

§ 14.50 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 § 14.51(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.

§ 14.51 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.

§ 14.52 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 § 14.39 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**Proposed Rules**

The Federal Communications Commission proposes to amend Part 14 of Title 47 of the Code of Federal Regulations as follows:

Part 14 of Title 47 of the Code of Federal Regulations is amended as follows:

1. The authority citation for Part 14 reads as follows:

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

2. The Federal Communications Commission proposes amending Part 14 by adding new Subpart E.

Subpart E – Internet Browsers Built Into Telephones Used With Public Mobile Services.

§ 14.60 Internet Browsers built into Mobile Phones.

(a) Accessibility- If a manufacturer of a telephone used with public mobile services (as such term is defined in Section 710(b)(4)(B) of the Act) 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 subpart 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 this subpart 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.

AUTHORITY: 47 U.S.C. 151, 154(i), 154(j), 208, 255, 617, 618, 619

APPENDIX D

Final Regulatory Flexibility Analysis

1. As required by the Regulatory Flexibility Act of 1980, as amended (“RFA”),¹ an Initial Regulatory Flexibility Analysis (“IRFA”) was included in the *Accessibility NPRM* in CG Docket No. 10-213, WT Docket No. 96-198, and CG Docket No. 10-145.² The Commission sought written public comment on the proposals in these dockets, including comment on the IRFA. This Final Regulatory Flexibility Analysis (“FRFA”) conforms to the RFA.³

B. Need for, and Objectives of, the Report and Order

2. The *Report and Order* implements Congress’ mandate that people with disabilities have access to advanced communications services (“ACS”) and ACS equipment. Specifically, these rules 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 ACS plays in today’s world, the Commission believes the CVAA represents the most significant legislation 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.

3. The *Report and Order* implements the requirements of Section 716 of the Act, which requires providers of ACS and manufacturers of equipment used for ACS to make their products accessible to people with disabilities, unless accessibility is not achievable.⁶ The Commission also adopts rules to implement Section 717 of the Act, which requires the Commission to establish new recordkeeping and enforcement procedures for manufacturers and providers subject to Sections 255, 716 and 718.⁷

4. The *Report and Order* applies to ACS, which includes interconnected VoIP, non-interconnected VoIP, electronic messaging service, and interoperable video conferencing

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, Title II, 110 Stat. 857 (1996).

² See *Implementation of Sections 716 and 717 of the Communications Act of 1934, as Enacted by the Twenty-First Century Communications and Video Accessibility Act of 2010; 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, 26 FCC Rcd 3133, 3219 App.C (2010) (“*Accessibility NPRM*”).

³ See 5 U.S.C. § 604.

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 See 47 U.S.C. § 617.

⁷ See 47 U.S.C. § 618.

service.⁸ The *Report and Order* requires manufacturers and service providers subject to Section 716 to 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. If accessibility is not achievable by building in accessibility or relying on third party applications or other accessibility solutions, manufacturers and service providers must make their products compatible with existing peripheral devices or specialized customer premises equipment commonly used by individuals with disabilities to achieve access, unless that is not achievable.

5. The *Report and Order* holds entities that make or produce end user equipment, including tablets, laptops, and smartphones, responsible for the accessibility of the hardware and manufacturer-installed software used for e-mail, SMS text messaging, and other ACS. The *Report and Order* also holds these entities responsible for software upgrades made available by such manufacturers for download by users. Additionally, the *Report and Order* concludes that, except for third party accessibility solutions, there is no liability for a manufacturer of end user equipment for the accessibility of software that is installed or downloaded by a user or made available for use in the cloud.

6. The *Report and Order* requires manufacturers and service providers to consider performance objectives at the design stage as early and consistently as possible and implement such evaluation to the extent that it is achievable. The *Report and Order* incorporates into the performance objectives the outcome-oriented definitions of “accessible,” “compatibility,” and “usable” contained in the rules regarding the accessibility of telecommunications services and equipment. The *Report and Order* adopts the four statutory factors to determine achievability. The *Report and Order* further expands on the fourth achievability factor – the extent to which an offering has varied functions, features, and prices – by allowing entities to not consider what is achievable with respect to every product, if such entity offers consumers with the full range of disabilities varied functions, features, and prices.

7. The *Report and Order* also establishes processes for providers of ACS and ACS equipment manufacturers to seek waivers of the Section 716 obligations, both individual and class, for offerings which are designed for multiple purposes but are designed primarily for purposes other than using ACS. The *Report and Order* clarifies what constitutes “customized equipment or services” for purposes of an exclusion of the Section 716 requirements. Pointing to an insufficient record upon which to grant a permanent exemption for small entities, the *Report and Order* also temporarily exempts all manufacturers of ACS equipment and all providers of ACS from the obligations of Section 716 if they qualify as small business concerns under the Small Business Administration’s (“SBA”) rules and size standards for the industry in which they are primarily engaged.

8. Specifically, the *Report and Order* adopted for this temporary exemption the SBA’s maximum size standards that are used to determine whether a business concern qualifies as a small business concern in its primary industry.⁹ These size standards are based on the maximum number of employees or maximum annual receipts of a business concern.¹⁰ The SBA

⁸ 47 U.S.C. § 153(53).

⁹ See 13 C.F.R. § 121.201.

¹⁰ 13 C.F.R. § 121.106 (describing how number of employees is calculated); 13 C.F.R. § 121.104 (describing how annual receipts is calculated).

categorizes industries for its size standards using the North American Industry Classification System (“NAICS”), a “system for classifying establishments by type of economic activity.”¹¹ The *Report and Order* identified some NAICS codes for possible primary industry classifications of ACS equipment manufacturers and ACS providers and the relevant SBA size standards associated with the codes.¹²

	NAICS Classification ¹³	NAICS Code	SBA Size Standard ¹⁴
Services¹⁵	Wired Telecommunications Carriers	517110	1,500 or fewer employees
	Wireless Telecommunications Carriers (except satellites)	517210	1,500 or fewer employees
	Telecommunications Resellers	517911	1,500 or fewer employees
	All Other Telecommunications	517919	\$25 million or less in annual receipts
	Software Publishers	511210	\$25 million or less in annual receipts
	Internet Publishing and Broadcasting and Web Search Portals	519130	500 or fewer employees
	Data Processing, Hosting, and Related Services	518210	\$25 million or less in annual receipts
Equipment¹⁶	Radio and Television Broadcasting and Wireless Communications Equipment Manufacturing	334220	750 or fewer employees
	Electronic Computer Manufacturing	334111	1,000 or fewer employees
	Telephone Apparatus Manufacturing	334210	1,000 or fewer employees

¹¹ North American Industry Classification System; Revision for 2012, 76 Fed. Reg. 51240 (Aug. 17, 2011) (“*NAICS Final Decision*”).

¹² This is not a comprehensive list of the primary industries and associated SBA size standards of every possible manufacturer of ACS equipment or provider of ACS. This list is merely representative of some primary industries in which entities that manufacture ACS equipment or provide ACS may be primarily engaged. It is ultimately up to an entity seeking the temporary exemption to make a determination regarding their primary industry, and justify such determination in any enforcement proceeding.

¹³ The definitions for each NAICS industry classification can be found by entering the six digit NAICS code in the “2007 NAICS Search” function available at the NAICS homepage, <http://www.census.gov/eos/www/naics/index.html>. The U.S. Office of Management and Budget has revised NAICS for 2012, however, the codes and industry categories listed herein are unchanged. OMB anticipates releasing a 2012 NAICS UNITED STATES MANUAL or supplement in January 2012. See *NAICS Final Decision*, 76 Fed. Reg. at 51240.

¹⁴ See 13 C.F.R. § 121.201 for a full listing of SBA size standards by six-digit NAICS industry code. The standards listed in this column establish the maximum size an entity in the given NAICS industry may be to qualify as a small business concern.

¹⁵ See accompanying *Report and Order* at Section III.A.

Other Communications Equipment Manufacturing	334290	750 or fewer employees
Software Publishers	511210	\$25 million or less in annual receipts
Internet Publishing and Broadcasting and Web Search Portals	519130	500 or fewer employees

9. As stated above, the *Report and Order* indicated that this temporary exemption is self-executing. Under this approach, covered entities must determine whether they qualify for the exemption based upon their ability to meet the SBA's rules and the size standard for the relevant NAICS industry category for the industry in which they are primarily engaged. Entities that manufacture ACS equipment or provide ACS may raise this temporary exemption as a defense in an enforcement proceeding. Entities claiming the exemption must be able to demonstrate that they met the exemption criteria during the estimated start of the design phase of the lifecycle of the product or service that is the subject of the complaint. The *Report and Order* stated that if an entity no longer meets the exemption criteria, it must comply with Section 716 and Section 717 for all subsequent products or services or substantial upgrades of products or services that are in the development phase of the product or service lifecycle, or any earlier stages of development, at the time they no longer meet the criteria.

10. The *Report and Order* indicated that such an exemption was necessary to avoid the possibility of unreasonably burdening "small and entrepreneurial innovators and the significant value that they add to the economy. The *Report and Order* states that the temporary exemption enables us to provide relief to those entities that may possibly lack legal, financial, or technical capability to comply with the Act until we further develop the record to determine whether small entities should be subject to a permanent exemption and, if so, the criteria to be used for defining which small entities should be subject to such permanent exemption. The temporary exemption will begin on the effective date of the rules adopted in the *Report and Order*¹⁷ and will expire the earlier of the effective date of small entity exemption rules adopted pursuant to the *Further Notice of Proposed Rulemaking* ("*Further Notice*") or October 8, 2013.

11. The Commission establishes procedures in the *Report and Order* to facilitate the filing of formal and informal complaints, including a discretionary pre-filing notice procedure to facilitate dispute resolution: as a prerequisite to filing an informal complaint, complainants must first file a "Request for Dispute Assistance" with the Consumer and Governmental Affairs Bureau's Disability Rights Office. In addition, under the rules adopted in the *Report and Order*, manufacturers and providers subject to Section 716 and Section 255 must maintain records of (1) their efforts to consult with people with disabilities; (2) descriptions of the accessibility features of their products and services; and (3) information about the compatibility of their products with peripheral devices or specialized customer premises equipment commonly used by individuals with disabilities to achieve access. The *Report and Order* also reminds covered entities that, while the Commission does not require them to create and maintain any particular records to claim a defense that it is not achievable for them to make their products or services accessible, they bear the burden of proof on this defense.

(Continued from previous page)

¹⁶ See accompanying *Report and Order* at Section III.A.

¹⁷ See accompanying *Report and Order* at Section III.A.5.

C. Summary of the Significant Issues Raised by the Public Comments in Response to the IRFA and Summary of the Assessment of the Agency of Such Issues

12. In response to the *Accessibility NPRM*, one commenter addressed the proposed rules and policies implicated in the IRFA. NTCA requests that the Commission adopt an exemption for small entities from the obligations of Section 716 and the Commission's rules implementing Section 716 for small telecommunications carriers as defined by the SBA.¹⁸ Alternatively, NTCA requests a waiver process for small entities to seek and qualify for a waiver.¹⁹ NTCA argues that small telecommunications companies "lack the size and resources to influence the design or features of equipment . . . [and] the purchasing power to enable them to buy equipment in bulk for a reduced price, or to compel sufficient production to ensure that compliant equipment 'trickles down' to smaller purchasers within a specific timeframe."²⁰

13. As explained in the *Report and Order*, we lack a sufficient record upon which to base a permanent exemption for small entities. However, we believe that some relief is necessary for entities that may be unreasonably burdened by conducting an achievability analysis and complying with the recordkeeping and certification requirements as necessary under the Act and in accordance with the *Report and Order*. Therefore, we exercise our discretion under the Act to temporarily exempt from the obligations of Section 716 providers of ACS and manufacturers of ACS equipment that qualify as small business concerns under the applicable SBA rules and size standards, and seek further comment on whether to exercise our authority to grant a permanent small entity exemption in the accompanying *Further Notice*, and if so, what criteria we should apply for defining which small entities should be subject to such permanent exemption. As such, the *Report and Order* extends temporary relief to all small business concerns that would otherwise have to comply with the Act.

D. Description and Estimate of the Number of Small Entities to Which the Rules Will Apply

14. 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.²¹ The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."²² In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.²³ 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.²⁴

¹⁸ NTCA Comments at 2.

¹⁹ NTCA Comments at 2.

²⁰ NTCA Comments at 3.

²¹ 5 U.S.C. § 604(a)(3).

²² 5 U.S.C. § 601(6).

²³ 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." 5 U.S.C. § 601(3).

²⁴ 15 U.S.C. § 632.

(continued...)

15. To assist the Commission in analyzing the total number of small entities potentially affected by the proposals in the *Further Notice*, we ask commenters to estimate the number of small entities that may be affected. To assist in assessing the nature and number of small entities that face possible significant economic impact by the proposals in the *Further Notice*, 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 and in effect Section 717, 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 and in effect Section 717 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 *Further Notice* and this IRFA seek comment on whether and how the Commission should permanently exempt small entities from the requirements of Section 716 and in effect Section 717 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.

16. Many of the issues raised in the *Further Notice* relate to clarifying obligations on entities already covered by the *Report and Order*, which may affect a broad range of service providers and equipment manufacturers. The *Further Notice* seeks comment on making permanent a temporary exemption for small entities that qualify as small business concerns under the SBA's rules and small business size standards, or some other criteria. Therefore, it is possible that all entities that would be required to comply with Section 716 and Section 717, but are small business concerns or qualify as small entities under some other criteria, will be exempt from the provisions of the proposed rules implementing Section 716 and Section 717. The CVAA, however, does not provide the flexibility for the Commission to adopt an exemption for small entities from compliance with Section 718. Therefore, we estimate below the impact on small entities absent a permanent exemption from Section 716 and Section 717, and small entities that may have to comply with Section 718. Specifically, we analyze the number of small businesses engaged in manufacturing that may be affected by the *Further Notice*, absent a permanent small entity exemption, including manufacturers of equipment used to provide interconnected and non-interconnected VoIP, electronic messaging, and interoperable video conferencing services. We then analyze the number of small businesses engaged as service providers that may be affected by the *Report and Order*, absent a permanent small entity exemption, including providers of interconnected and non-interconnected VoIP, electronic messaging services, interoperable video conferencing services, wireless services, wireline services, and other relevant services.

17. *Small Businesses, Small Organizations, and Small Governmental Jurisdictions.* Our action may, over time, affect small entities that are not easily categorized at present. We therefore describe here, at the outset, three comprehensive, statutory small entity size standards.²⁵ First, nationwide, there are a total of approximately 27.5 million small businesses, according to

(Continued from previous page) _____

²⁵ See 5 U.S.C. §§ 601(3)–(6).

the SBA.²⁶ In addition, a “small organization” is generally “any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.”²⁷ Nationwide, as of 2007, there were approximately 1,621,315 small organizations.²⁸ Finally, the term “small governmental jurisdiction” is defined generally as “governments of cities, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand.”²⁹ Census Bureau data for 2011 indicate that there were 89,476 local governmental jurisdictions in the United States.³⁰ We estimate that, of this total, as many as 88,506 entities may qualify as “small governmental jurisdictions.”³¹ Thus, we estimate that most governmental jurisdictions are small.

1. Equipment Manufacturers

a. Manufacturers of Equipment to Provide VoIP

18. Entities manufacturing equipment used to provide interconnected VoIP, non-interconnected VoIP, or both are generally found in one of two Census Bureau categories, “Electronic Computer Manufacturing”³² or “Telephone Apparatus Manufacturing.”³³ 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 is not possible to separate available data on these two manufacturing categories for VoIP equipment. Our estimates below likely greatly overstate the number of small entities that manufacture equipment used to provide ACS, including 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 possible.

19. *Electronic Computer Manufacturing.* The Census Bureau defines this category to include “establishments primarily engaged in manufacturing and/or assembling electronic

²⁶ See SBA, Office of Advocacy, “Frequently Asked Questions,” <http://web.sba.gov/faqs> (last visited May 6, 2011) (figures are from 2009).

²⁷ 5 U.S.C. § 601(4).

²⁸ INDEPENDENT SECTOR, THE NEW NONPROFIT ALMANAC & DESK REFERENCE (2010).

²⁹ 5 U.S.C. § 601(5).

³⁰ U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2011, Table 427 (2007).

³¹ The 2007 U.S. Census data for small governmental organizations are not presented based on the size of the population in each such organization. There were 89,476 small governmental organizations in 2007. If we assume that county, municipal, township and school district organizations are more likely than larger governmental organizations to have populations of 50,000 or less, the total of these organizations is 52,125. If we make the same assumption about special districts, and also assume that special districts are different from county, municipal, township, and school districts, in 2007 there were 37,381 special districts. Therefore, of the 89,476 small governmental organizations documented in 2007, as many as 89,506 may be considered small under the applicable standard. This data may overestimate the number of such organizations that has a population of 50,000 or less. U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES 2011, Tables 427, 426 (data cited therein are from 2007).

³² 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>.

³³ U.S. Census Bureau, 2007 NAICS Definitions, 334210 Telephone Apparatus Manufacturing, <http://www.census.gov/naics/2007/def/ND334210.HTM>.

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.”³⁴

20. In this category, the SBA deems and electronic computer manufacturing business to be small if it has 1,000 employees or less.³⁵ For this category of manufacturers, Census data for 2007 show that there were 421 establishments that operated that year. Of those 421, 384 had 100 or fewer employees and 37 had 100 or more employees.³⁶ On this basis, we estimate that the majority of manufacturers of equipment used to provide electronic messaging services in this category are small.

21. *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, 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.”³⁷

22. In this category, the SBA deems a telephone apparatus manufacturing business to be small if it has 1,000 or fewer employees.³⁸ For this category of manufacturers, Census data for 2007 shows there were 398 such establishments in operation.³⁹ Of those 398 establishments, 393 (approximately 99%) had 1,000 or fewer employees and, thus, would be deemed small under the applicable SBA size standard.⁴⁰ On this basis, the Commission estimates that approximately 99% or more of the manufacturers of equipment used to provide VoIP in this category are small.

b. Manufacturers of Equipment to Provide Electronic Messaging

23. 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,”⁴¹ “Electronic Computer Manufacturing,”⁴² or “Telephone Apparatus Manufacturing.”⁴³

³⁴ 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>.

³⁵ 13 C.F.R. 121.201, NAICS Code 334111.

³⁶ http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-fds_name=EC0700A1&-_skip=300&-ds_name=EC0731I1&-_lang=en

³⁷ U.S. Census Bureau, 2007 NAICS Definitions, 334210 Telephone Apparatus Manufacturing, <http://www.census.gov/naics/2007/def/ND334210.HTM>.

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

³⁹ U.S. Census Bureau, American FactFinder, 2007 Economic Census, Industry Series, Industry Statistics by Employment Size, NAICS code 334210 (rel. Nov. 16, 2010); <http://factfinder.census.gov>.

⁴⁰ *Id.*

⁴¹ 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>.

24. *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 Radio and Television Broadcasting and Wireless Communications Equipment Manufacturing which is: all such firms having 750 or fewer employees. According to Census Bureau data for 2007, there were a total of 919 establishments in this category that operated for part or all of the entire year. Of this total, 771 had less than 100 employees and 148 had more than 100 employees.⁴⁴ Thus, under this size standard, the majority of firms can be considered small.

25. *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.”⁴⁵

26. In this category the SBA deems an electronic computer manufacturing business to be small if it has 1,000 or fewer employees.⁴⁶ For this category of manufacturers, Census data for 2007 show that there were 421 such establishments that operated that year. Of those 421 establishments, 384 had 1,000 or fewer employees.⁴⁷ On this basis, we estimate that the majority of the manufacturers of equipment used to provide electronic messaging services in this category are small.

27. *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 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

(Continued from previous page) _____

⁴² 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>.

⁴³ U.S. Census Bureau, 2007 NAICS Definitions, 334210 Telephone Apparatus Manufacturing, <http://www.census.gov/naics/2007/def/ND334210.HTM>.

⁴⁴ http://factfinder.census.gov/servlet/IBQTable?_bm=y&-fds_name=EC0700A1&-geo_id=&-_skip=300&-ds_name=EC0731I1&-_lang=en.

⁴⁵ 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>.

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

⁴⁷ http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-fds_name=EC0700A1&-_skip=300&-ds_name=EC0731I1&-_lang=en.

answering machines, LAN modems, multi-user modems, and other data communications equipment, such as bridges, routers, and gateways.”⁴⁸

28. In this category the SBA deems a telephone apparatus manufacturing business to be small if it has 1,000 or fewer employees.⁴⁹ For this category of manufacturers, Census data for 2007 shows that there were 398 such establishments that operated that year.⁵⁰ Of those 398 establishments, 393 (approximately 99%) had 1,000 or fewer employees and, thus, would be deemed small under the applicable SBA size standard.⁵¹ 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.

c. Manufacturers of Equipment Used 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).”⁵²

30. *Other Communications Equipment Manufacturing.* In this category, the SBA deems a business manufacturing other communications equipment to be small if it has 750 or fewer employees.⁵³ For this category of manufacturers, Census data for 2007 show that there were 452 establishments that operated that year. Of the 452 establishments 406 had fewer than 100 employees and 46 had more than 100 employees. Accordingly, the Commission estimates that a substantial majority of the manufacturers of equipment used to provide interoperable and other video-conferencing services are small.⁵⁴

2. Service Providers

a. Providers of VoIP

31. 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.”

⁴⁸ U.S. Census Bureau, 2007 NAICS Definitions, 334210 Telephone Apparatus Manufacturing, <http://www.census.gov/naics/2007/def/ND334210.HTM>.

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

⁵⁰ 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>.

⁵¹ *Id.*

⁵² U.S. Census Bureau, 2007 NAICS Definitions, 334290 Other communications equipment manufacturing, <http://www.census.gov/econ/industry/def/d334290.htm>.

⁵³ 13 C.F.R. 121.201, NAICS Code 334220.

⁵⁴ http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-fds_name=EC0700A1&-_skip=300&-ds_name=EC0731I1&-_lang=en.

32. *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.”⁵⁵

33. In this category, the SBA deems a wired telecommunications carrier to be small if it has 1,500 or fewer employees.⁵⁶ Census data for 2007 shows 3,188 firms in this category.⁵⁷ Of these 3,188 firms, only 44 had 1,000 or more employees. While we could not find precise Census data on the number of firms with in the group with 1,500 or fewer employees, it is clear that at least 3,144 firms with fewer than 1,000 employees would be in that group. On this basis, the Commission estimates that a substantial majority of the providers of interconnected VoIP, non-interconnected VoIP, or both in this category, are small.⁵⁸

34. *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.”⁵⁹

35. In this category, the SBA deems a provider of “all other telecommunications” services to be small if it has \$25 million or less in average annual receipts.⁶⁰ For this category of service providers, Census data for 2007 shows that there were 2,383 such firms that operated that

⁵⁵ U.S. Census Bureau, 2007 NAICS Definitions, 517110 Wired Telecommunications Carriers, <http://www.census.gov/econ/industry/def/d517110.htm>.

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

⁵⁷ http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-_skip=600&-ds_name=EC0751SSSZ5&-_lang=en.

⁵⁸ *Id.* As noted in para. 18 above with regard to the distinction between manufacturers of equipment used to provide interconnected 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 likely overstated because we could not draw in the data a distinction between such providers and those that 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.

⁵⁹ U.S. Census Bureau, 2007 NAICS Definitions, 517919 All Other Telecommunications, <http://www.census.gov/cgi-bin/sssd/naics/naicsrch?code=517919&search=2007%20NAICS%20Search>.

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

year.⁶¹ 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. 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.⁶²

b. Providers of Electronic Messaging Services

36. 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.”

37. *Wireless Telecommunications Carriers (except Satellite)*. Since 2007, the Census Bureau has placed wireless firms within this new, broad, economic census category.⁶³ Prior to that time, such firms were within the now-superseded categories of “Paging” and “Cellular and Other Wireless Telecommunications.”⁶⁴ Under the present and prior categories, the SBA has deemed a wireless business to be small if it has 1,500 or fewer employees.⁶⁵ For the category of Wireless Telecommunications Carriers (except Satellite), Census data for 2007 shows that there were 1,383 firms that operated that year.⁶⁶ 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. 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.⁶⁷ Of these, an estimated 261 have 1,500 or fewer employees and 152 have more than 1,500 employees.⁶⁸ 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.

⁶¹ http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-_skip=900&-ds_name=EC0751SSSZ4&-_lang=en.

⁶² See discussion *supra* note 58, regarding possible overestimation of firms and small entities providing non-interconnected VoIP services.

⁶³ U.S. Census Bureau, 2007 NAICS Definitions, 517210 Wireless Telecommunications Carriers (Except Satellite), <http://www.census.gov/naics/2007/def/ND517210.HTM#N517210>.

⁶⁴ 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>.

⁶⁵ 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).

⁶⁶ 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.

⁶⁷ See *Trends in Telephone Service*, at tbl. 5.3.

⁶⁸ *Id.*

38. *Wired Telecommunications Carriers.* For the 2007 US Census definition of firms included in the category, “Wired Telecommunications Carriers (NAICS Code 517110),” see paragraph 32 above.

39. In this category, the SBA deems a wired telecommunications carrier to be small if it has 1,500 or fewer employees.⁶⁹ Census data for 2007 shows 3,188 firms in this category.⁷⁰ Of these 3,188 firms, only 44 (approximately 1%) had 1,000 or more employees.⁷¹ While we could not find precise Census data on the number of firms in the group with 1,500 or fewer 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 1,500 or fewer employees. On this basis, the Commission estimates that approximately 99% or more of the providers of electronic messaging services in this category are small.

40. *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.”⁷²

41. In this category, the SBA deems an Internet publisher or Internet broadcaster or the provider of a web search portal on the Internet to be small if it has 500 or fewer employees.⁷³ For this category of manufacturers, Census data for 2007 shows that there were 2,705 such firms that operated that year.⁷⁴ Of those 2,705 firms, 2,682 (approximately 99%) had 500 or fewer employees and, thus, would be deemed small under the applicable SBA size standard.⁷⁵ On this basis, the Commission estimates that approximately 99% or more of the providers of electronic messaging services in this category are small.

42. *Data Processing, Hosting, and Related Services.* The Census Bureau defines this category to include “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

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

⁷⁰ 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>.

⁷¹ *Id.*

⁷² U.S. Census Bureau, 2007 NAICS Definitions, 519130 Internet Publishing and Broadcasting and Web Search Portals, <http://www.naics.com/censusfiles/ND519130.HTM>.

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

⁷⁴ 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>.

⁷⁵ *Id.*

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.”⁷⁶

43. In this category, the SBA deems a data processing, hosting, or related services provider to be small if it has \$25 million or less in annual receipts.⁷⁷ For this category of providers, Census data for 2007 shows that there were 14,193 such establishments that operated that year.⁷⁸ Of those 14,193 firms, 12,985 had less than \$10 million in annual receipts, and 1,208 had greater than \$10 million.⁷⁹ Although no data is available to confirm the number of establishments with greater than \$25 million in receipts, the available data confirms the majority of establishments in this category were small. On this basis, the Commission estimates that approximately 96% of the providers of electronic messaging services in this category are small.

c. Providers of Interoperable Video Conferencing Services

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

45. *All Other Telecommunications.* For the 2007 US Census definition of firms included in the category, “All Other Telecommunications (NAICS Code 517919),” see paragraph 34 above.

46. In this category, the SBA deems a provider of “all other telecommunications” services to be small if it has \$25 million or less in average annual receipts.⁸⁰ Census data for 2007 show that there were 2,383 such firms that operated that year.⁸¹ 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. On this basis, Commission estimates that approximately 98% or more of the providers of interoperable video conferencing services are small.

3. Additional Industry Categories.

a. Certain Wireless Carriers and Service Providers

47. *Cellular Licensees.* The SBA has developed a small business size standard for small businesses in the category “Wireless Telecommunications Carriers (except satellite).”⁸² Under that SBA category, a business is small if it has 1,500 or fewer employees.⁸³ The census

⁷⁶ U.S. Census Bureau, 2007 NAICS Definition, 518210 Data Processing, Hosting, and Related Services, <http://www.census.gov/cgi-bin/sssd/naics/naicsrch>.

⁷⁷ 13 C.F.R. § 121.201; NAICS Code 518210.

⁷⁸ http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-fds_name=EC0700A1&-_skip=800&-ds_name=EC0751SSSZ1&-_lang=en.

⁷⁹ *Id.*

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

⁸¹ http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-_skip=900&-ds_name=EC0751SSSZ4&-_lang=en.

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

⁸³ *Id.*

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.”⁸⁴

48. Census data for 2007 shows 1,383 firms in this category.⁸⁵ Of these 1,383 firms, only 15 (approximately 1%) had 1,000 or more employees.⁸⁶ While there is no precise Census data on the number of firms the group with 1,500 or fewer 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%) 1,500 or fewer employees. On this basis, Commission estimates that approximately 99% or more of the providers of electronic messaging services in this category are small.

49. *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.⁸⁷ 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.⁸⁸ The SBA has approved these small business size standards for the 900 MHz Service.⁸⁹ 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.⁹⁰ 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.⁹¹

⁸⁴ U.S. Census Bureau, 2007 NAICS Definitions, Wireless Telecommunications Carriers (Except Satellites) <http://www.census.gov/econ/industry/def/d517210.htm>.

⁸⁵ 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>.

⁸⁶ *Id.*

⁸⁷ 47 C.F.R. § 90.814(b)(1).

⁸⁸ *Id.*

⁸⁹ See Letter from Aida Alvarez, Administrator, Small Business Administration, to Thomas Sugrue, Chief, Wireless Telecommunications Bureau, Federal Communications Commission, dated August 10, 1999.

⁹⁰ 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).

⁹¹ See *Multi-Radio Service Auction Closes*, Public Notice, 17 FCC Rcd 1446 (WTB 2002).

50. 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.

51. 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 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.

52. *AWS Services (1710–1755 MHz and 2110–2155 MHz bands (AWS-1); 1915–1920 MHz, 1995–2000 MHz, 2020–2025 MHz and 2175–2180 MHz bands (AWS-2); 2155–2175 MHz band (AWS-3)).* For the AWS-1 bands, the Commission has defined a “small business” as an entity with average annual gross revenues for the preceding three years not exceeding \$40 million, and a “very small business” as an entity with average annual gross revenues for the preceding three years not exceeding \$15 million.⁹² In 2006, the Commission conducted its first auction of AWS-1 licenses.⁹³ In that initial AWS-1 auction, 31 winning bidders identified themselves as very small businesses.⁹⁴ Twenty-six of the winning bidders identified themselves as small businesses.⁹⁵ In a subsequent 2008 auction, the Commission offered 35 AWS-1 licenses.⁹⁶ Four winning bidders identified themselves as very small businesses, and three of the winning bidders identified themselves as a small business.⁹⁷ For AWS-2 and AWS-3, although we do not know for certain which entities are likely to apply for these frequencies, we note that the AWS-1 bands are comparable to those used for cellular service and personal communications service. The Commission has not yet adopted size standards for the AWS-2 or AWS-3 bands but

⁹² See Service Rules for Advanced Wireless Services in the 1.7 GHz and 2.1 GHz Bands, *Report and Order*, 18 FCC Rcd 25,162, App. B (2003), *modified by* Service Rules for Advanced Wireless Services In the 1.7 GHz and 2.1 GHz Bands, *Order on Reconsideration*, 20 FCC Rcd 14,058, App. C (2005).

⁹³ See *Auction of Advanced Wireless Services Licenses Scheduled for June 29, 2006; Notice and Filing Requirements, Minimum Opening Bids, Upfront Payments and Other Procedures for Auction No. 66*, AU Docket No. 06-30, Public Notice, 21 FCC Rcd 4562 (2006) (“*Auction 66 Procedures Public Notice*”).

⁹⁴ See *Auction of Advanced Wireless Services Licenses Closes; Winning Bidders Announced for Auction No. 66*, Public Notice, 21 FCC Rcd 10,521 (2006) (“*Auction 66 Closing Public Notice*”).

⁹⁵ See *id.*

⁹⁶ See *AWS-1 and Broadband PCS Procedures Public Notice*, 23 FCC Rcd at 7499. Auction 78 also included an auction of broadband PCS licenses.

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 12,749 (2008).

has proposed to treat both AWS-2 and AWS-3 similarly to broadband PCS service and AWS-1 service due to the comparable capital requirements and other factors, such as issues involved in relocating incumbents and developing markets, technologies, and services.⁹⁸

53. *700 MHz Guard Band Licenses.* 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.⁹⁹ 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.¹⁰⁰ 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.¹⁰¹ SBA approval of these definitions is not required.¹⁰² In 2000, the Commission conducted an auction of 52 Major Economic Area (“MEA”) licenses.¹⁰³ 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 and closed in 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.¹⁰⁴

54. *Upper 700 MHz Band Licenses.* In the *700 MHz Second Report and Order*, the Commission revised its rules regarding Upper 700 MHz licenses.¹⁰⁵ On January 24, 2008, the

⁹⁸ *Service Rules for Advanced Wireless Services in the 1915–1920 MHz, 1995–2000 MHz, 2020–2025 MHz and 2175–2180 MHz Bands et al.*, Notice of Proposed Rulemaking, 19 FCC Rcd 19,263, App. B (2005); *Service Rules for Advanced Wireless Services in the 2155–2175 MHz Band*, Notice of Proposed Rulemaking, 22 FCC Rcd 17,035, App. (2007); *Service Rules for Advanced Wireless Services in the 2155-2175 MHz Band*, Further Notice of Proposed Rulemaking, 23 FCC Rcd 9859, App. B (2008).

⁹⁹ *Service Rules for the 746-764 MHz Bands, and Revisions to Part 27 of the Commission’s Rules*, Second Report and Order, 15 FCC Rcd 5299 (2000). Service rules were amended in 2007, but no changes were made to small business size categories. See *Service Rules for the 698-746, 747-762 and 777-792 MHz Bands*, WT Docket No. 06-150, *Revision of the Commission’s Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems*, CC Docket No. 94-102, *Section 68.4(a) of the Commission’s Rules Governing Hearing Aid-Compatible Telephones*, WT Docket No. 01-309, *Biennial Regulatory Review – Amendment of Parts 1, 22, 24, 27, and 90 to Streamline and Harmonize Various Rules Affecting Wireless Radio Services*, WT Docket 03-264, *Former Nextel Communications, Inc. Upper 700 MHz Guard Band Licenses and Revisions to Part 27 of the Commission’s Rules*, WT Docket No. 06-169, *Implementing a Nationwide, Broadband, Interoperable Public Safety Network in the 700 MHz Band*, PS Docket No. 06-229, *Development of Operational, Technical and Spectrum Requirements for Meeting Federal, State and Local Public Safety Communications Requirements Through the Year 2010*, WT Docket No. 96-86, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 8064 (2007).

¹⁰⁰ *Id.* at 5343 ¶ 108.

¹⁰¹ *Id.*

¹⁰² *Id.* at 5343 ¶ 108 n.246 (for the 746-764 MHz and 776-704 MHz bands, the Commission is exempt from 15 U.S.C. § 632, which requires Federal agencies to obtain Small Business Administration approval before adopting small business size standards).

¹⁰³ See *700 MHz Guard Bands Auction Closes: Winning Bidders Announced*, Public Notice, 15 FCC Rcd 18026 (2000).

¹⁰⁴ See *700 MHz Guard Bands Auction Closes: Winning Bidders Announced*, Public Notice, 16 FCC Rcd 4590 (WTB 2001).

¹⁰⁵ *700 MHz Second Report and Order*, 22 FCC Rcd 15289.

Commission commenced Auction 73 in which several licenses in the Upper 700 MHz band were available for licensing: 12 Regional Economic Area Grouping licenses in the C Block, and one nationwide license in the D Block.¹⁰⁶ The auction concluded on March 18, 2008, with 3 winning bidders claiming very small business status (those with attributable average annual gross revenues that do not exceed \$15 million for the preceding three years) and winning five licenses.

55. *Lower 700 MHz Band Licenses.* The Commission previously adopted criteria for defining three groups of small businesses for purposes of determining their eligibility for special provisions such as bidding credits.¹⁰⁷ The Commission defined a “small business” as an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding \$40 million for the preceding three years.¹⁰⁸ A “very small business” is defined as 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.¹⁰⁹ Additionally, the lower 700 MHz Service had a third category of small business status for Metropolitan/Rural Service Area (MSA/RSA) licenses—“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.¹¹⁰ The SBA approved these small size standards.¹¹¹ An auction of 740 licenses (one license in each of the 734 MSAs/RSAs and one license in each of the six Economic Area Groupings (EAGs)) was conducted in 2002. Of the 740 licenses available for auction, 484 licenses were won by 102 winning bidders. Seventy-two of the winning bidders claimed small business, very small business or entrepreneur status and won licenses.¹¹² A second auction commenced on May 28, 2003, closed on June 13, 2003, and included 256 licenses.¹¹³ Seventeen winning bidders claimed small or very small business status, and nine winning bidders claimed entrepreneur status.¹¹⁴ In 2005, the Commission completed an auction of 5 licenses in the Lower 700 MHz band. All three winning bidders claimed small business status.

56. In 2007, the Commission reexamined its rules governing the 700 MHz band in the *700 MHz Second Report and Order*.¹¹⁵ An auction of A, B and E block 700 MHz licenses was held in 2008.¹¹⁶ Twenty winning bidders claimed small business status (those with attributable average annual gross revenues that exceed \$15 million and do not exceed \$40 million for the preceding three years). Thirty three winning bidders claimed very small business status (those

¹⁰⁶ See *Auction of 700 MHz Band Licenses Closes*, Public Notice, 23 FCC Rcd 4572 (WTB 2008).

¹⁰⁷ See *Reallocation and Service Rules for the 698–746 MHz Spectrum Band (Television Channels 52–59)*, Report and Order, 17 FCC Rcd 1022 (2002) (“*Channels 52–59 Report and Order*”).

¹⁰⁸ See *id.*, 17 FCC Rcd at 1087–88 ¶ 172.

¹⁰⁹ See *id.*

¹¹⁰ See *id.*, 17 FCC Rcd at 1088 ¶ 173.

¹¹¹ See *Alvarez Letter 1998*.

¹¹² See *Lower 700 MHz Band Auction Closes*, Public Notice, 17 FCC Rcd 17,272 (2002).

¹¹³ See *Lower 700 MHz Band Auction Closes*, Public Notice, 18 FCC Rcd 11,873 (2003).

¹¹⁴ See *id.*

¹¹⁵ *700 MHz Second Report and Order*, Second Report and Order, 22 FCC Rcd 15,289, 15,359 n.434 (2007).

¹¹⁶ See *Auction of 700 MHz Band Licenses Closes*, Public Notice, 23 FCC Rcd 4572 (2008).

with attributable average annual gross revenues that do not exceed \$15 million for the preceding three years).

57. *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 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.¹¹⁷ Thus under this category and the associated small business size standard, the majority of firms can be considered small.

58. *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.¹¹⁸ 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."¹¹⁹ SBA has approved these small business size standards for the aforementioned bands.¹²⁰ Correspondingly, the Commission adopted a bidding credit of 15 percent for "small businesses" and a bidding credit of 25 percent for "very small businesses."¹²¹ This bidding credit structure was found to have been consistent with the Commission's schedule of bidding credits, which may be found at

¹¹⁷ 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.

¹¹⁸ 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*, Report and Order, 17 FCC Rcd 9980 (2002).

¹¹⁹ 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.

¹²⁰ 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.

¹²¹ 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.

section 1.2110(f)(2) of the Commission's rules.¹²² 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.¹²³ 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.¹²⁴ 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.¹²⁵ 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

59. *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."¹²⁶ 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.¹²⁷ According to Census Bureau data for 2007, there were a total of 939 establishments in this category that operated for part or all of the entire year. Of this total,

¹²² 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).

¹²³ See *Service Rules Notice*, 17 FCC Rcd at 2550-51 ¶ 145.

¹²⁴ 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).

¹²⁵ 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).

¹²⁶ 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>.

¹²⁷ 13 C.F.R. § 121.201, NAICS code 334220.

784 had less than 500 employees and 155 had more than 100 employees.¹²⁸ Thus, under this size standard, the majority of firms can be considered small.

60. *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 Radio and Television Broadcasting and Wireless Communications Equipment Manufacturing which is: all such firms having 750 or fewer employees. According to Census Bureau data for 2007, there were a total of 939 establishments in this category that operated for part or all of the entire year. Of this total, 784 had less than 500 employees and 155 had more than 100 employees.”¹²⁹ Thus, under this size standard, the majority of firms can be considered small.

61. *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.”¹³⁰ 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.¹³¹ According to Census Bureau data for 2007, there were 24,912 firms in this category that operated for the entire year.¹³² Of this total, 22,701 firms had annual sales of under \$5 million; 570 had annual sales and 533 firms had sales of \$5 million or more but less than \$10 million., and 1,641 had annual sales of over 10 million.¹³³ Thus, the majority of firms in this category can be considered small.

c. Wireline Carriers and Service Providers

62. *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

¹²⁸ The NAICS Code for this service is 334220. See 13 C.F.R 121/201. See also http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-fds_name=EC0700A1&-_skip=500&-ds_name=EC0744SSSZ1&-_lang=en.

¹²⁹ The NAICS Code for this service 334220. See 13 C.F.R 121/201. See also http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-fds_name=EC0700A1&-_skip=500&-ds_name=EC0744SSSZ1&-_lang=en.

¹³⁰ <http://www.census.gov/cgi-bin/sssd/naics/naicsrch?code=443112&search=2007%20NAICS%20Search>.

¹³¹ 13 C.F.R. § 121.201, NAICS code 443112.

¹³² http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-fds_name=EC0700A1&-_skip=500&-ds_name=EC0744SSSZ1&-_lang=en.

¹³³ *Id.*

or fewer employees.¹³⁴ Census Bureau data for 2007 shows 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 data, 1,307 carriers reported that they were incumbent local exchange service providers.¹³⁵ Of these 1,307 carriers, an estimated 1,006 have 1,500 or fewer employees and 301 have more than 1,500 employees.¹³⁶ 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.¹³⁷

63. *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.¹³⁸ Census Bureau data for 2007 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.¹³⁹ 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.¹⁴⁰ Of these 1,442 carriers, an estimated 1,256 have 1,500 or fewer employees and 186 have more than 1,500 employees.¹⁴¹ 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.¹⁴² In addition, 72 carriers have reported that they are Other Local Service Providers.¹⁴³ Of the 72, seventy have 1,500 or fewer employees and two have more than 1,500 employees.¹⁴⁴ 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.

¹³⁴ 13 C.F.R. § 121.201, NAICS code 517110.

¹³⁵ 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*).

¹³⁶ See *id.*

¹³⁷ See http://factfinder.census.gov/servlet/IBQTable?_bm=y&-fds_name=EC0700A1&-geo_id=&-_skip=600&-ds_name=EC0751SSSZ5&-_lang=en.

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 See *Trends in Telephone Service*, at tbl. 5.3.

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

64. *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.¹⁴⁵ Census Bureau data for 2007 shows 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.¹⁴⁶ According to Commission data, 359 companies reported that their primary telecommunications service activity was the provision of interexchange services.¹⁴⁷ Of these 359 companies, an estimated 317 have 1,500 or fewer employees and 42 have more than 1,500 employees.¹⁴⁸ 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.

65. *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.¹⁴⁹ Census Bureau data for 2007 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.¹⁵⁰ 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.¹⁵¹ Consequently, the Commission estimates that the majority of OSPs are small entities that may be affected by our proposed rules.

66. *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.¹⁵² 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 1,000.¹⁵³ Thus under this category and the associated small business

¹⁴⁵ 13 C.F.R. § 121.201, NAICS code 517110.

¹⁴⁶ See http://factfinder.census.gov/servlet/IBQTable?_bm=y&-fds_name=EC0700A1&-geo_id=&-_skip=600&-ds_name=EC0751SSSZ5&-_lang=en.

¹⁴⁷ See *Trends in Telephone Service*, at tbl. 5.3.

¹⁴⁸ *Id.*

¹⁴⁹ 13 C.F.R. § 121.201, NAICS code 517110.

¹⁵⁰ See http://factfinder.census.gov/servlet/IBQTable?_bm=y&-fds_name=EC0700A1&-geo_id=&-_skip=600&-ds_name=EC0751SSSZ5&-_lang=en.

¹⁵¹ *Trends in Telephone Service*, at tbl. 5.3.

¹⁵² 13 C.F.R. § 121.201, NAICS code 517911.

¹⁵³ http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-_skip=800&-ds_name=EC0751SSSZ5&-_lang=en.

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.¹⁵⁴ Of these, an estimated 211 have 1,500 or fewer employees and two have more than 1,500 employees.¹⁵⁵ Consequently, the Commission estimates that the majority of local resellers are small entities that may be affected by rules adopted pursuant to the Notice.

67. *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 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 1,000 employees and one operated with more than 1,000.¹⁵⁷ 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,¹⁵⁸ 881 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.

68. *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.¹⁵⁹ Census Bureau data for 2007 shows 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.¹⁶⁰ According to Commission data,¹⁶¹ 657 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.

69. *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.

¹⁵⁴ See *Trends in Telephone Service*, at tbl. 5.3.

¹⁵⁵ *Id.*

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 tbl. 5.3.

¹⁵⁹ 13 C.F.R. § 121.201, NAICS code 517110.

¹⁶⁰ See http://factfinder.census.gov/servlet/IBQTable?_bm=y&-fds_name=EC0700A1&-geo_id=&-_skip=600&-ds_name=EC0751SSSZ5&-_lang=en.

¹⁶¹ *Trends in Telephone Service*, at tbl. 5.3.

Under that size standard, such a business is small if it has 1,500 or fewer employees.¹⁶² 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 1,000.¹⁶³ 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.¹⁶⁴ Of these, all 193 have 1,500 or fewer employees and none have more than 1,500 employees.¹⁶⁵ 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.

70. *800 and 800-Like Service Subscribers.*¹⁶⁶ 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.¹⁶⁷ 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 1,000.¹⁶⁸ 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.¹⁶⁹ 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.

¹⁶² 13 C.F.R. § 121.201, NAICS code 517911.

¹⁶³ http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-_skip=800&-ds_name=EC0751SSSZ5&-_lang=en.

¹⁶⁴ *See Trends in Telephone Service*, at tbl. 5.3.

¹⁶⁵ *Id.*

¹⁶⁶ We include all toll-free number subscribers in this category, including those for 888 numbers.

¹⁶⁷ 13 C.F.R. § 121.201, NAICS code 517911.

¹⁶⁸ http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-_skip=800&-ds_name=EC0751SSSZ5&-_lang=en.

¹⁶⁹ *Trends in Telephone Service*, at tbls. 18.4, 18.5, 18.6, 18.7.

d. Wireless Carriers and Service Providers

71. 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.

72. *Wireless Telecommunications Carriers (except Satellite)*. Since 2007, the Census Bureau has placed wireless firms within this new, broad, economic census category.¹⁷⁰ Prior to that time, such firms were within the now-superseded categories of “Paging” and “Cellular and Other Wireless Telecommunications.”¹⁷¹ Under the present and prior categories, the SBA has deemed a wireless business to be small if it has 1,500 or fewer employees.¹⁷² For the category of Wireless Telecommunications Carriers (except Satellite), Census data for 2007 shows that there were 1,383 firms that operated that year.¹⁷³ 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. 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.¹⁷⁴ Of these, an estimated 261 have 1,500 or fewer employees and 152 have more than 1,500 employees.¹⁷⁵ 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.

73. *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.¹⁷⁶

¹⁷⁰ U.S. Census Bureau, 2007 NAICS Definitions, 517210 Wireless Telecommunications Categories (Except Satellite), <http://www.census.gov/naics/2007/def/ND517210.HTM#N517210>.

¹⁷¹ 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>.

¹⁷² 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).

¹⁷³ 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.

¹⁷⁴ See *Trends in Telephone Service*, at tbl. 5.3.

¹⁷⁵ *Id.*

¹⁷⁶ 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 ¶ 194 (1997).

The SBA has approved these definitions.¹⁷⁷ 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.

74. *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 shows that there were 1,383 firms that operated that year.¹⁷⁸ 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.¹⁷⁹ The 2007 census also contains data for the specific category of “Paging” “that is classified under the seven-number NAICS code 5172101.”¹⁸⁰ 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.¹⁸¹ Consequently, the Commission estimates that the majority of paging providers are small entities that may be affected by our action.

75. *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).¹⁸² Under the SBA small business size standard, a business is small if it has 1,500 or fewer employees.¹⁸³ Census data for 2007 shows that there were 1,383 firms that operated that year.¹⁸⁴ 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

¹⁷⁷ 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*).

¹⁷⁸ 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.

¹⁷⁹ 13 C.F.R. § 121.201, NAICS code 517210.

¹⁸⁰ 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.

¹⁸¹ See *Trends in Telephone Service*, at tbl. 5.3.

¹⁸² 13 C.F.R. § 121.201, NAICS code 517210.

¹⁸³ *Id.*

¹⁸⁴ 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.

carriers reported that they were engaged in wireless telephony.¹⁸⁵ Of these, an estimated 222 have 1,500 or fewer employees and 212 have more than 1,500 employees.¹⁸⁶ 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.¹⁸⁷ Of these, an estimated 261 have 1,500 or fewer employees and 152 have more than 1,500 employees.¹⁸⁸ 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.

76. *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.¹⁸⁹ 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.¹⁹⁰ These small business size standards, in the context of broadband PCS auctions, have been approved by the SBA.¹⁹¹ 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.¹⁹² On April 15, 1999, the Commission completed the re-auction of 347 C-, D-, E-, and F-Block licenses in Auction No. 22.¹⁹³ Of the 57 winning bidders in that auction, 48 claimed small business status and won 277 licenses.

77. 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

¹⁸⁵ *Trends in Telephone Service*, at tbl. 5.3.

¹⁸⁶ *Id.*

¹⁸⁷ *See Trends in Telephone Service*, at tbl. 5.3.

¹⁸⁸ *See id.*

¹⁸⁹ *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 ¶¶ 57–60 (1996) (“*PCS Report and Order*”); *see also* 47 C.F.R. § 24.720(b).

¹⁹⁰ *See PCS Report and Order*, 11 FCC Rcd at 7852 ¶ 60.

¹⁹¹ *See Alvarez Letter 1998*.

¹⁹² *See Broadband PCS, D, E and F Block Auction Closes*, Public Notice, Doc. No. 89838 (rel. Jan. 14, 1997).

¹⁹³ *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 ¶ 46 (1998).

claimed small business status.¹⁹⁴ 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.¹⁹⁵ On May 21, 2007, the Commission completed an auction of 33 licenses in the A, C, and F Blocks in Auction No. 71.¹⁹⁶ Of the 12 winning bidders in that auction, five claimed small business status and won 18 licenses.¹⁹⁷ On August 20, 2008, the Commission completed the auction of 20 C-, D-, E-, and F-Block Broadband PCS licenses in Auction No. 78.¹⁹⁸ Of the eight winning bidders for Broadband PCS licenses in that auction, six claimed small business status and won 14 licenses.¹⁹⁹

78. *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*.²⁰⁰ 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.²⁰¹ A third auction of Narrowband PCS licenses was conducted in 2001. In that auction, five bidders won 317 Metropolitan Trading Areas and nationwide licenses.²⁰² Three of the winning bidders claimed status as a small or very small entity and won 311 licenses.

¹⁹⁴ See *C and F Block Broadband PCS Auction Closes; Winning Bidders Announced*, Public Notice, 16 FCC Rcd 2339 (2001).

¹⁹⁵ See *Broadband PCS Spectrum Auction Closes; Winning Bidders Announced for Auction No. 58*, Public Notice, 20 FCC Rcd 3703 (2005).

¹⁹⁶ See *Auction of Broadband PCS Spectrum Licenses Closes; Winning Bidders Announced for Auction No. 71*, Public Notice, 22 FCC Rcd 9247 (2007).

¹⁹⁷ *Id.*

¹⁹⁸ See *Auction of AWS-1 and Broadband PCS Licenses Closes; Winning Bidders Announced for Auction 78*, Public Notice, 23 FCC Rcd 12749 (WTB 2008).

¹⁹⁹ *Id.*

²⁰⁰ *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*”).

²⁰¹ See Letter to Amy Zoslov, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, FCC, from Aida Alvarez, Administrator, SBA (Dec. 2, 1998).

²⁰² See *Narrowband PCS Auction Closes*, Public Notice, 16 FCC Rcd 18663 (WTB 2001).

79. *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.²⁰³ For this service, the SBA uses the category of Wireless Telecommunications Carriers (except Satellite). Census data for 2007, which supersede data contained in the 2002 Census, show that there were 1,383 firms that operated that year.²⁰⁴ 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.

80. *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 defining “small” and “very small” businesses for purposes of determining their eligibility for special provisions such as bidding credits and installment payments.²⁰⁵ This small business standard 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.²⁰⁶ A “very small business” is defined as 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.²⁰⁷ The SBA has approved these small size standards.²⁰⁸ Auctions of Phase II licenses commenced on and closed in 1998.²⁰⁹ 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.²¹⁰ Thirty-nine small businesses won 373 licenses in the first 220 MHz auction. A second auction included 225 licenses: 216 EA licenses

²⁰³ 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).

²⁰⁴ 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.

²⁰⁵ *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*, Third Report and Order, 12 FCC Rcd 10943, 11068-70 ¶¶ 291-295 (1997).

²⁰⁶ *Id.* at 11068 ¶ 291.

²⁰⁷ *Id.*

²⁰⁸ See Letter to Daniel Phythyon, Chief, Wireless Telecommunications Bureau, Federal Communications Commission, from Aida Alvarez, Administrator, Small Business Administration, dated January 6, 1998 (*Alvarez to Phythyon Letter 1998*).

²⁰⁹ See generally *220 MHz Service Auction Closes*, Public Notice, 14 FCC Rcd 605 (WTB 1998).

²¹⁰ See *FCC Announces It is Prepared to Grant 654 Phase II 220 MHz Licenses After Final Payment is Made*, Public Notice, 14 FCC Rcd 1085 (WTB 1999).

and 9 EAG licenses. Fourteen companies claiming small business status won 158 licenses.²¹¹ A third auction included four licenses: 2 BEA licenses and 2 EAG licenses in the 220 MHz Service. No small or very small business won any of these licenses.²¹² In 2007, the Commission conducted a fourth auction of the 220 MHz licenses.²¹³ Bidding credits were offered to small businesses. A bidder with attributed average annual gross revenues that exceeded \$3 million and did not exceed \$15 million for the preceding three years (“small business”) received a 25 percent discount on its winning bid. A bidder with attributed average annual gross revenues that did not exceed \$3 million for the preceding three years received a 35 percent discount on its winning bid (“very small business”). Auction 72, which offered 94 Phase II 220 MHz Service licenses, concluded in 2007.²¹⁴ In this auction, five winning bidders won a total of 76 licenses. Two winning bidders identified themselves as very small businesses won 56 of the 76 licenses. One of the winning bidders that identified themselves as a small business won 5 of the 76 licenses won.

81. *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.²¹⁵ 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.²¹⁶ The SBA has approved these small business size standards for the 800 MHz and 900 MHz SMR Services.²¹⁷ 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 1996.²¹⁸ 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.²¹⁹ 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.²²⁰ A second

²¹¹ See *Phase II 220 MHz Service Spectrum Auction Closes*, Public Notice, 14 FCC Rcd 11218 (WTB 1999).

²¹² See *Multi-Radio Service Auction Closes*, Public Notice, 17 FCC Rcd 1446 (WTB 2002).

²¹³ See *Auction of Phase II 220 MHz Service Spectrum Scheduled for June 20, 2007, Notice and Filing Requirements, Minimum Opening Bids, Upfront Payments and Other Procedures for Auction 72*, Public Notice, 22 FCC Rcd 3404 (2007).

²¹⁴ See *Auction of Phase II 220 MHz Service Spectrum Licenses Closes, Winning Bidders Announced for Auction 72, Down Payments due July 18, 2007, FCC Forms 601 and 602 due July 18, 2007, Final Payments due August 1, 2007, Ten-Day Petition to Deny Period*, Public Notice, 22 FCC Rcd 11573 (2007).

²¹⁵ 47 C.F.R. §§ 90.810, 90.814(b), 90.912.

²¹⁶ *Id.*

²¹⁷ See *Alvarez Letter 1999*.

²¹⁸ *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).

²¹⁹ *Id.*

²²⁰ 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 18637 (WTB 1996).

auction for the 800 MHz band was conducted in 2002 and included 23 BEA licenses. One bidder claiming small business status won five licenses.²²¹

82. 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 million size standard.²²² 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.²²³ 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.

83. 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.²²⁴ 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.

84. *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.²²⁵ There are approximately 100 licensees in the Air-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.²²⁶ 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.²²⁷ These definitions were approved by the SBA.²²⁸ In May 2006, the Commission

²²¹ See *Multi-Radio Service Auction Closes*, Public Notice, 17 FCC Rcd 1446 (WTB 2002).

²²² 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).

²²³ See *800 MHz SMR Service Lower 80 Channels Auction Closes; Winning Bidders Announced*, Public Notice, 16 FCC Rcd 1736 (WTB 2000).

²²⁴ See generally 13 C.F.R. § 121.201, NAICS code 517210.

²²⁵ 13 C.F.R. § 121.201, NAICS codes 517210.

²²⁶ *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 ¶¶ 28-42 (2005).

²²⁷ *Id.*

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.

85. *Rural Radiotelephone Service.* The Commission has not adopted a size standard for small businesses specific to the Rural Radiotelephone Service.²²⁹ A significant subset of the Rural Radiotelephone Service is the Basic Exchange Telephone Radio System (“BETRS”).²³⁰ 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.²³¹ Census data for 2007 shows that there were 1,383 firms that operated that year.²³² 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.

86. *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.²³³ Census data for 2007 shows that there were 1,383 firms that operated that year.²³⁴ 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.

87. *Fixed Microwave Services.* Microwave services include common carrier,²³⁵ private-operational fixed,²³⁶ and broadcast auxiliary radio services.²³⁷ They also include the Local

(Continued from previous page) _____

²²⁸ 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).

²²⁹ The service is defined in section 22.99 of the Commission’s Rules, 47 C.F.R. § 22.99.

²³⁰ BETRS is defined in sections 22.757 and 22.759 of the Commission’s Rules, 47 C.F.R. §§ 22.757 and 22.759.

²³¹ 13 C.F.R. § 121.201, NAICS code 517210.

²³² 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.

²³³ 13 C.F.R. § 121.201, NAICS code 517210.

²³⁴ 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.

²³⁵ See 47 C.F.R. Part 101, Subparts C and I.

²³⁶ See *id.* Subparts C and H.

Multipoint Distribution Service (“LMDS”),²³⁸ the Digital Electronic Message Service (“DEMS”),²³⁹ and the 24 GHz Service,²⁴⁰ where licensees can choose between common carrier and non-common carrier status.²⁴¹ 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.²⁴² For the category of Wireless Telecommunications Carriers (except Satellite), Census data for 2007 shows that there were 1,383 firms that operated that year.²⁴³ 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.

88. *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.²⁴⁴ 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,²⁴⁵ Under that SBA small business size standard, a business is small if it has 1,500 or fewer employees.²⁴⁶ Census data for 2007 shows that there were 1,383 firms that operated that year.²⁴⁷ 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.

(Continued from previous page) _____

²³⁷ 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.

²³⁸ See 47 C.F.R. Part 101, Subpart L.

²³⁹ See *id.* Subpart G.

²⁴⁰ See *id.*

²⁴¹ See 47 C.F.R. §§ 101.533, 101.1017.

²⁴² 13 C.F.R. § 121.201, NAICS code 517210.

²⁴³ 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.

²⁴⁴ This service is governed by Subpart I of Part 22 of the Commission’s Rules. See 47 C.F.R. §§ 22.1001-22.1037.

²⁴⁵ 13 C.F.R. § 121.201, NAICS code 517210.

²⁴⁶ *Id.*

²⁴⁷ 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.

89. *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.²⁴⁸ 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.²⁴⁹ The SBA has approved these small business size standards.²⁵⁰ 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.

90. *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”).²⁵¹ 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.²⁵² 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.²⁵³ 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 conducted Auction 86, the sale of 78 licenses in the BRS areas.²⁵⁴ The Commission offered three levels of bidding credits: (i) a bidder

²⁴⁸ 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).

²⁴⁹ *Id.*

²⁵⁰ 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).

²⁵¹ *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 ¶ 7 (1995).

²⁵² 47 C.F.R. § 21.961(b)(1).

²⁵³ 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.

²⁵⁴ *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).

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.²⁵⁵ Auction 86 concluded in 2009 with the sale of 61 licenses.²⁵⁶ 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.

91. 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.²⁵⁷ 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."²⁵⁸ 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.²⁵⁹ To gauge small business prevalence for these cable services we must, however, use the most current census data. Census data for 2007 shows that there were 1,383 firms that operated that year.²⁶⁰ 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 of the classifications "firms" does not track the number of "licenses".

²⁵⁵ *Id.* at 8296.

²⁵⁶ *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).

²⁵⁷ 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.

²⁵⁸ U.S. Census Bureau, 2007 NAICS Definitions, 517110 Wired Telecommunications Carriers, (partial definition), www.census.gov/naics/2007/def/ND517110.HTM#N517110.

²⁵⁹ 13 C.F.R. § 121.201, NAICS code 517210.

²⁶⁰ 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.

92. In the 1998 and 1999 LMDS auctions,²⁶¹ 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.²⁶² 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.²⁶³ These definitions of “small business” and “very small business” in the context of the LMDS auctions have been approved by the SBA.²⁶⁴ 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.

93. *218-219 MHz Service.* The first auction of 218-219 MHz spectrum resulted in 174 entities winning licenses for 594 Metropolitan Statistical Area (“MSA”) licenses. Of the 594 licenses, 567 were won by 167 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.²⁶⁵ 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.²⁶⁶ 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.²⁶⁷ These size standards will be used in future auctions of 218-219 MHz spectrum.

94. *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

²⁶¹ 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.)

²⁶² See *LMDS Order*, 12 FCC Rcd at 12545.

²⁶³ *Id.*

²⁶⁴ See Letter to Daniel Phythyon, Chief, Wireless Telecommunications Bureau (FCC) from A. Alvarez, Administrator, SBA (January 6, 1998).

²⁶⁵ 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).

²⁶⁶ *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*”).

²⁶⁷ *Id.*

satellite),” which is 1,500 or fewer employees.²⁶⁸ To gauge small business prevalence for these cable services we must, however, use the most current census data. Census data for 2007 shows that there were 1,383 firms that operated that year.²⁶⁹ 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 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, Teligent²⁷⁰ 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.

95. *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.²⁷¹ “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.²⁷² The SBA has approved these small business size standards.²⁷³ These size standards will apply to the future auction, if held.

96. *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.²⁷⁴ The second has a size standard of \$25 million or less in annual receipts.²⁷⁵

97. 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.”²⁷⁶ Census Bureau data for 2007 show that 512 Satellite Telecommunications firms that operated for that entire

²⁶⁸ 13 C.F.R. § 121.201, NAICS code 517210.

²⁶⁹ 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.

²⁷⁰ 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.

²⁷¹ *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 ¶ 77 (2000); see also 47 C.F.R. § 101.538(a)(2).

²⁷² *Id.*; see also 47 C.F.R. § 101.538(a)(1).

²⁷³ 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).

²⁷⁴ 13 C.F.R. § 121.201, NAICS code 517410.

²⁷⁵ 13 C.F.R. § 121.201, NAICS code 517919.

²⁷⁶ U.S. Census Bureau, 2007 NAICS Definitions, 517410 Satellite Telecommunications.

year.²⁷⁷ Of this total, 464 firms had annual receipts of under \$10 million, and 18 firms had receipts of \$10 million to \$24,999,999.²⁷⁸ Consequently, the Commission estimates that the majority of Satellite Telecommunications firms are small entities that might be affected by our action.

98. 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.”²⁷⁹ For this category, Census Bureau data for 2007 shows that there were a total of 2,383 firms that operated for the entire year.²⁸⁰ Of this total, 2,347 firms had annual receipts of under \$25 million and 12 firms had annual receipts of \$25 million to \$49,999,999.²⁸¹ 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

99. 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.

100. *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.”²⁸² 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

²⁷⁷ See http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-_skip=900&-ds_name=EC0751SSSZ4&-_lang=en.

²⁷⁸ See http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-_skip=900&-ds_name=EC0751SSSZ4&-_lang=en.

²⁷⁹ <http://www.census.gov/cgi-bin/sssd/naics/naicsrch?code=517919&search=2007%20NAICS%20Search>.

²⁸⁰ http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-_skip=900&-ds_name=EC0751SSSZ4&-_lang=en.

²⁸¹ http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-_skip=900&-ds_name=EC0751SSSZ4&-_lang=en.

²⁸² 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).

shows that there were 1,383 firms that operated that year.²⁸³ 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.

101. *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 cable company" is one serving 400,000 or fewer subscribers, nationwide.²⁸⁴ Industry data indicate that, of 1,076 cable operators nationwide, all but eleven are small under this size standard.²⁸⁵ In addition, under the Commission's rules, a "small system" is a cable system serving 15,000 or fewer subscribers.²⁸⁶ Industry data indicate that, of 6,635 systems nationwide, 5,802 systems have under 10,000 subscribers, and an additional 302 systems have 10,000-19,999 subscribers.²⁸⁷ Thus, under this second size standard, most cable systems are small.

102. *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."²⁸⁸ 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.²⁸⁹ Industry data indicate that, of 1,076 cable operators nationwide, all but ten are small under this size standard.²⁹⁰ We note that the Commission neither requests nor collects information on whether cable system operators are affiliated with entities whose gross annual

²⁸³ 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.

²⁸⁴ 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).

²⁸⁵ These data are derived from: R.R. BOWKER, BROADCASTING & CABLE YEARBOOK 2006, TOP 25 CABLE/SATELLITE OPERATORS, pages A-8 & C-2 (data current as of June 30, 2005); WARREN COMMUNICATIONS NEWS, TELEVISION & CABLE FACTBOOK 2006, OWNERSHIP OF CABLE SYSTEMS IN THE UNITED STATES, pages D-1805 to D-1857.

²⁸⁶ 47 C.F.R. § 76.901(c).

²⁸⁷ WARREN COMMUNICATIONS NEWS, TELEVISION & CABLE FACTBOOK 2008, U.S. CABLE SYSTEMS BY SUBSCRIBER SIZE, page F-2 (data current as of Oct. 2007). The data do not include 851 systems for which classifying data were not available.

²⁸⁸ 47 U.S.C. § 543(m)(2); see 47 C.F.R. § 76.901(f) & nn. 1-3.

²⁸⁹ 47 C.F.R. § 76.901(f); see, *FCC Announces New Subscriber Count for the Definition of Small Cable Operator*, Public Notice, 16 FCC Rcd 2225 (Cable Services Bureau 2001).

²⁹⁰ 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).

revenues exceed \$250 million,²⁹¹ and therefore we are unable to estimate more accurately the number of cable system operators that would qualify as small under this size standard.

103. *Open Video Services.* Open Video Service (OVS) systems provide subscription services.²⁹² 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.²⁹³ The OVS framework provides opportunities for the distribution of video programming other than through cable systems. Because OVS operators provide subscription services,²⁹⁴ OVS falls within the SBA small business size standard covering cable services, which is “Wired Telecommunications Carriers.”²⁹⁵ 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.²⁹⁶ In addition, we note that the Commission has certified some OVS operators, with some now providing service.²⁹⁷ Broadband service providers (“BSPs”) are currently the only significant holders of OVS certifications or local OVS franchises.²⁹⁸ 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.²⁹⁹ 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

²⁹¹ 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).

²⁹² *See* 47 U.S.C. § 573.

²⁹³ 47 U.S.C. § 571(a)(3)-(4). *See 13th Annual Report*, 24 FCC Rcd at 606, ¶ 135.

²⁹⁴ *See* 47 U.S.C. § 573.

²⁹⁵ U.S. Census Bureau, 2007 NAICS Definitions, 517110 Wired Telecommunications Carriers, <http://www.census.gov/naics/2007/def/ND517110.HTM#N517110>.

²⁹⁶ *See* http://factfinder.census.gov/servlet/IBQTable?_bm=y&-fds_name=EC0700A1&-geo_id=&-_skip=600&-ds_name=EC0751SSSZ5&-_lang=en.

²⁹⁷ A list of OVS certifications may be found at <http://www.fcc.gov/mb/ovs/csovscer.html>.

²⁹⁸ *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.

²⁹⁹ *See* <http://www.fcc.gov/mb/ovs/csovscer.html> (current as of February 2007).

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

104. *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,³⁰⁰ and (2) All Other Information Services.³⁰¹

105. *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,³⁰² which has an SBA small business size standard of 1,500 or fewer employees.³⁰³ These are also labeled "broadband." The latter are within the category of All Other Telecommunications,³⁰⁴ which has a size standard of annual receipts of \$25 million or less.³⁰⁵ These are labeled non-broadband.

106. 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.³⁰⁶ For the second category, the data show that 1,682 firms operated for the entire year.³⁰⁷ 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.

107. *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

³⁰⁰ 13 C.F.R. § 121.201, NAICS code 519130 (establishing a \$500,000 revenue ceiling).

³⁰¹ 13 C.F.R. § 121.201, NAICS code 519190 (establishing a \$6.5 million revenue ceiling).

³⁰² U.S. Census Bureau, 2007 NAICS Definitions, 517110 Wired Telecommunications Carriers, <http://www.census.gov/naics/2007/def/ND517110.HTM#N517110>.

³⁰³ 13 C.F.R. § 121.201, NAICS code 517110.

³⁰⁴ U.S. Census Bureau, 2007 NAICS Definitions, "517919 All Other Telecommunications," <http://www.census.gov/naics/2007/def/ND517919.HTM#N517919>.

³⁰⁵ 13 C.F.R. § 121.201, NAICS code 517919 (updated for inflation in 2008).

³⁰⁶ 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.

³⁰⁷ U.S. Census Bureau, 2007 Economic Census, Subject Series: Information, "Establishment and Firm Size," NAICS code 5179191 (rel. Nov. 19, 2010) (receipts size).

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.³⁰⁸ The SBA deems businesses in this industry with 500 or fewer employees small.³⁰⁹ 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 to 999 employees.³¹⁰ Consequently, we estimate the majority of these firms are small entities that may be affected by our proposed actions.

108. *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.³¹¹ The SBA has developed a small business size standard for this category; that size standard is \$25 million or less in average annual receipts.³¹² According to Census Bureau data for 2007, there were 8,060 firms in this category that operated for the entire year.³¹³ Of these, 6,726 had annual receipts of under \$25 million, and 155 had receipts between \$25 million and \$49,999,999 million.³¹⁴ Consequently, we estimate that the majority of these firms are small entities that may be affected by our proposed actions.

109. *All Other Information Services.* “This industry comprises establishments primarily engaged in providing other information services (except new syndicates and libraries and archives).”³¹⁵ Our action pertains to interconnected VoIP services, which could be provided by entities that provide other services such as e-mail, 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

³⁰⁸ <http://www.census.gov/cgi-bin/sssd/naics/naicsrch?code=519130&search=2007%20NAICS%20Search>

³⁰⁹ http://www.sba.gov/sites/default/files/Size_Standards_Table.pdf.

³¹⁰ http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-_skip=1000&-ds_name=EC0751SSSZ5&-_lang=en.

³¹¹ U.S. Census Bureau, 2007 NAICS Definitions, “518210 Data Processing, Hosting, and Related Services”; <http://www.census.gov/naics/2007/def/ND518210.HTM#N518210>.

³¹² 13 C.F.R. § 121.201, NAICS code 518210.

³¹³ http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-_skip=1000&-ds_name=EC0751SSSZ4&-_lang=en.

³¹⁴ http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-_skip=1000&-ds_name=EC0751SSSZ4&-_lang=en.

³¹⁵ U.S. Census Bureau, “2002 NAICS Definitions: 519190 All Other Information Services”; <http://www.census.gov/epcd/naics02/def/NDEF519.HTM>.

average annual receipts.³¹⁶ According to Census Bureau data for 2007, there were 367 firms in this category that operated for the entire year.³¹⁷ Of these, 334 had annual receipts of under \$5 million, and an additional 11 firms had receipts of between \$5 million and \$9,999,999.³¹⁸ Consequently, we estimate that the majority of these firms are small entities that may be affected by our action.

E. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements

110. We summarize below the recordkeeping and certification obligations of the *Report and Order*. Additional information on each of these requirements can be found in the *Report and Order*. Again, the *Report and Order* temporarily exempts all providers of ACS and manufacturers of ACS equipment that qualify as small business concerns under the SBA's rules and size standards for the industry in which they are primarily engaged.

111. *Recordkeeping*. The *Report and Order* requires, beginning one year after the effective date of the *Report and Order*, that each manufacturer of equipment used to provide ACS and each provider of such services subject to Sections 255, 716, and 718 not otherwise exempt under the *Report and Order*, maintain certain records. These records document the efforts taken by a manufacturer or service provider to implement Sections 255, 716, and 718. The *Report and Order* adopts the recordkeeping requirements of the CVAA, which specifically include: (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. Additionally, while manufacturers and providers are not required to keep records of their consideration of the four achievability factors, they must be prepared to carry their burden of proof, which requires greater than conclusory or unsupported claims. Similarly, entities that rely on third party solutions to achieve accessibility must be prepared to produce relevant documentation.

112. These recordkeeping requirements are necessary to facilitate enforcement of the rules adopted in the *Report and Order*. The *Report and Order* builds flexibility into the recordkeeping obligations by allowing covered entities to keep records in any format, recognizing the unique recordkeeping methods of individual entities. Because complaints regarding accessibility of a product or service may not occur for years after the release of the product or service, the *Report and Order* requires covered entities to keep records for two years from the date the product ceases to be manufactured or a service is offered to the public.

113. *Annual Certification Obligations*. The CVAA and the *Report and Order* require an officer of providers of ACS and ACS equipment to submit to the Commission an annual certificate that records are kept in accordance with the above recordkeeping requirements, unless

³¹⁶ 13 C.F.R. § 121.201, NAICS code 519190. *See also* http://www.sba.gov/sites/default/files/Size_Standards_Table.pdf

³¹⁷ http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-_skip=1200&-ds_name=EC0751SSSZ4&-_lang=en.

³¹⁸ http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-_skip=1100&-ds_name=EC0751SSSZ4&-_lang=en.

such manufacturer or provider is exempt from compliance with Section 716 under applicable rules.³¹⁹ The certification must be supported with an affidavit or declaration under penalty of perjury, signed and dated by an authorized officer of the entity with personal knowledge of the representations provided in the company's certification, verifying the truth and accuracy of the information. The certification must be filed with the Consumer and Governmental Affairs Bureau on or before April 1 each year for records pertaining to the previous calendar year.

114. *Costs of Compliance.* There is an upward limit on the cost of compliance for covered entities. Under the CVAA and *Report and Order* accessibility is required unless it is not achievable. Under two of the four achievability factors from the Act and adopted in the *Report and Order*, covered entities may demonstrate that accessibility is not achievable based on the nature and cost of steps needed or the technical and economic impact on the entity's operation.³²⁰ Entities that are not otherwise exempt or excluded under the *Report and Order* must nonetheless be able to demonstrate that they conducted an achievability analysis, which necessarily requires the retention of some records. As discussed, the *Report and Order* contains a temporary exemption for small entities from compliance with Section 716 and Section 717, allows for waivers of the obligations of Section 716 and Section 717, and excludes customized equipment from the obligations of Section 716 and Section 717.

F. Steps Taken to Minimize Significant Economic Impact on Small Entities and Significant Alternatives Considered

115. The RFA requires an agency to describe any significant alternatives it considered in developing its approach, which may include the following four alternatives, among others: “(1) the establishment of differing compliance or certification requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance and certification 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.”³²¹

116. For rules adopted that impose some burden on small entities, the Commission considered alternatives where possible, as directed by the RFA. Most significantly, the Commission considered and adopted a temporary exemption for all small entities that qualify as small business concerns under the SBA's rules and size standards. Therefore, while some of the obligations of the *Report and Order* do impose a burden, small entities are generally relieved of these burdens. The rules we adopt in the *Report and Order* also promotes flexibility for entities that do not meet the small entity exemption. All entities may avoid compliance if accessibility is not achievable, may seek a waiver for products or services that are not designed primarily for ACS, and may keep records in any format. Further, in the accompanying *Further Notice* the Commission seeks comment on extending a permanent exemption for small entities. Despite this flexibility and the exemption for qualifying small entities, we discuss below the alternatives considered for rules that may impose a burden on small entities.

117. The rules require covered entities to ensure that products and services are accessible, unless not achievable. This is a statutory requirement, therefore no alternatives were

³¹⁹ 47 U.S.C. 618(a)(5)(B).

³²⁰ See 47 U.S.C. § 617(g).

³²¹ 5 U.S.C. § 603(c)(1)-(c)(4).

considered. However, this requirement has built-in flexibility. All entities may demonstrate that accessibility is unachievable either through building accessibility features into the product or service or by utilizing third party solutions. Achievability is determined through a four factor analysis that examines: The nature and cost of the steps needed to meet the requirements of Section 716(g) 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, including on the development and deployment of new communications technologies; the type of operations of the manufacturer or provider; 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. Through this analysis, an otherwise covered entity can demonstrate that accessibility is not achievable. We note that two of the four factors look at factors that are particularly relevant to small entities: the nature and cost of the steps need to meet the Section 716 requirements and the technical and economic impact on the entity's operations. Therefore, as explained further below, this achievability analysis provides a statutorily based means of minimizing the economic impact of the CVAA's requirements on small entities. Further, when accessibility is not achievable, covered entities must ensure that their products and services are compatible, unless not achievable. This again is a statutory requirement with built-in flexibility though the achievability analysis.

118. The rules require covered entities to consider performance objectives at the design stage as early and consistently as possible. This requirement is necessary to ensure that accessibility is considered at the point where it is logically best to incorporate accessibility. The CVAA and the *Report and Order* are naturally performance-driven. The CVAA and *Report and Order* avoid mandating particular designs and instead focus on an entity's compliance with the accessibility requirements through whatever means the entity finds necessary to make its product or service accessible, unless not achievable. This provides flexibility by allowing all entities, including small entities, to meet their obligations through the best means for a given entity instead of the Commission explicitly mandating a rigid requirement.

119. With respect to recordkeeping and certification requirements, these requirements are necessary in order to demonstrate compliance with the requirements of the *Report and Order* and CVAA and to facilitate an effective and efficient complaint process. As described above, we adopt flexible requirements that allow covered entities to keep records in any format they wish. In the *Report and Order*, we found that this approach took into account the variances in covered entities (*e.g.*, size, experience with the Commission), recordkeeping methods, and products and services covered by the CVAA. Moreover, we found that it also provided the greatest flexibility to small businesses and minimized the impact that the statutorily mandated requirements impose on small businesses. Correspondingly, we considered and rejected the alternative of imposing a specific format or one-size-fits-all system for recordkeeping that could potentially impose greater burdens on small businesses. Furthermore, the certification requirement is possibly less burdensome on small businesses than large, as it merely requires certification from an officer that the necessary records were kept over the previous year; this is presumably a less resource intensive certification for smaller entities.

120. While ensuring accessibility and keeping records may impose some burdens, as discussed, the *Report and Order* includes significant flexibility for small entities. First, the achievability factors in the CVAA may mitigate adverse impacts and reduce burdens on small entities. Under the achievability factors as discussed above, an otherwise covered entity can

demonstrate that accessibility is unachievable and therefore avoid compliance. The first and second factors are particularly relevant to small entities and the special circumstances they face. The first factor considers the nature and cost of the steps needed to meet the requirements with respect to the specific equipment or service in question, and the second considers 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. If achievability is overly expensive or has some significant negative technical or economic impact on a covered entity, the entity can show that accessibility was not achievable as a defense to a complaint.

121. The *Report and Order* also includes significant relief for small and other entities including a temporary exemption from the obligations of Section 716 and Section 717 for qualifying small entities, waiver criteria under which all covered entities may seek a waiver of the obligations of Section 716, and an exemption for customized equipment. Under the *Report and Order*, customized equipment offered to businesses and other enterprise customers is expressly exempt. Additionally, all providers and manufacturers, or classes of providers and manufactures, are able to seek a waiver for equipment or services that are capable of accessing ACS. These two provisions allow any entity, including small entities, to avoid the burden of compliance with the accessibility and recordkeeping requirements if they meet the requirements for either provision.

122. Further, while we could have opted to not exercise our discretionary authority to exempt small entities, we found that even in the absence of meaningful comments regarding whether to grant a permanent small entity exemption, there was good cause to provide temporary relief and avoid imposing an unreasonable burden upon small entities and negatively impacting the value they add to the economy. In the *Report and Order*, we therefore decided some exemption is necessary to provide relief to those entities for which even conducting an achievability analysis would consume an unreasonable amount of resources. Finding good cause for granting such relief, the *Report and Order* temporarily exempts ACS providers and ACS equipment manufacturers that qualify as small business concerns under the SBA's rules and size standards.

123. Specifically, the *Report and Order* temporarily exempts entities that manufacture ACS equipment or provide ACS that, along with any affiliates, meet the criteria for a small business concern for their primary industry under SBA's rules and size standards.³²² A small business concern, as defined by the SBA, is an "entity organized for profit, with a place of business located in the United States, and which operates primarily within the United States or which makes a significant contribution to the U.S. economy through payment of taxes or use of American products, materials or labor."³²³ Entities are affiliated under the SBA's rules when an entity has the power to control another entity, or a third party has the power to control both entities,³²⁴ as determined by factors including "ownership, management, previous relationships with or ties to another concern, and contractual relationships."³²⁵ A concern's primary industry is determined by the "distribution of receipts, employees and costs of doing business among the

³²² 13 C.F.R. §§ 121.101 – 121.201.

³²³ 13 C.F.R. § 121.105(a)(1).

³²⁴ 13 C.F.R. § 121.103(a)(1).

³²⁵ 13 C.F.R. § 121.103(a)(2).

different industries in which business operations occurred for the most recently completed fiscal year,”³²⁶ and other factors including “distribution of patents, contract awards, and assets.”³²⁷ The *Report and Order* stated that if an entity no longer meets the exemption criteria, it must comply with Section 716 and Section 717 for all subsequent products or services or substantial upgrades of products or services that are in the development phase of the product or service lifecycle, or any earlier stages of development, at the time they no longer meet the criteria. The temporary exemption will begin on the effective date of the rules adopted in the *Report and Order*³²⁸ and will expire the earlier of the effective date of small entity exemption rules adopted pursuant to the *Further Notice of Proposed Rulemaking* (“*Further Notice*”) or October 8, 2013.

124. This exemption enables us to provide relief to those entities that may possibly lack legal, financial, or technical capability to comply with the Act until we further develop the record to determine whether small entities should be subject to a permanent exemption and, if so, the criteria to be used for defining which small entities should be subject to such permanent exemption. To that end, we seek further comment on the standards for a permanent exemption in the accompanying *Further Notice*.

G. Federal Rules that May Duplicate, Overlap, or Conflict with Proposed Rules

Section 255(e) of the Act, as amended, 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.³²⁹ We view the Access Board’s current guidelines as well as its draft guidelines³³⁰ as starting points for our interpretation and implementation of Sections 716 and 717 of the Act, 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, our rules do not overlap, duplicate, or conflict with either Access Board Final Rules,³³¹ or (if later adopted) the Access Board Draft Guidelines. Where obligations under Section 255 and Section 716 overlap, for instance for accessibility requirements for interconnected VoIP, we clarify in the *Report and Order* which rules govern the entities’ obligations.

³²⁶ 13 C.F.R. § 121.107.

³²⁷ 13 C.F.R. § 121.107.

³²⁸ See accompanying *Report and Order* at Section III.A.5.

³²⁹ 47 U.S.C. § 255(e).

³³⁰ 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>.

³³¹ See Part 1193 of the Access Board Rules, 36 C.F.R. Part 1193.

APPENDIX E

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 Further Notice of Proposed Rulemaking (“*Further Notice*”). 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 *Further Notice*. The Commission will send a copy of the *Further Notice*, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (“SBA”).² In addition, the *Further Notice* 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 accompanying *Report and Order* implements Congress’ mandate that people with disabilities have access to advanced communications services (“ACS”) and ACS equipment. Specifically, the rules adopted in the *Report and Order* 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

3. The accompanying *Report and Order* implements the requirements of Section 716 of the Act, which requires providers of ACS and manufacturers of equipment used for ACS to make their products accessible to people with disabilities, unless accessibility is not achievable.⁵ The Commission also adopts rules to implement Section 717 of the Act, which requires the Commission to establish new recordkeeping and enforcement procedures for manufacturers and providers subject to Sections 255, 716, and 718.⁶

4. The accompanying *Report and Order* finds the record insufficient to adopt a permanent exemption or to adopt the criteria to be used to determine which small entities to exempt. The *Report and Order* therefore temporarily exempts all manufacturers of ACS equipment and all providers of ACS from the obligations of Section 716 if they qualify as small business concerns under the SBA rules and size

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 See 47 U.S.C. § 617.

⁶ See 47 U.S.C. § 618.

standards for the industry in which they are primarily engaged. The *Report and Order* indicated that such an exemption was necessary to avoid the possibility of unreasonably burdening “small and entrepreneurial innovators and the significant value that they add to the economy.” This self-executing exemption would be applied until the development of a record to determine whether small entities should be permanently exempted and, if so, what criteria should be used to define small entities.⁷

5. The *Report and Order* indicated that SBA has established maximum size standards used to determine whether a business concern qualifies as a small business concern in its primary industry.⁸ The SBA has generally adopted size standards based on the maximum number of employees or maximum annual receipts of a business concern.⁹ The SBA categorizes industries for its size standards using the North American Industry Classification System (“NAICS”), a “system for classifying establishments by type of economic activity.”¹⁰ The *Report and Order* identified some NAICS codes for possible primary industry classifications of ACS equipment manufacturers and ACS providers and the relevant SBA size standards associated with the codes.¹¹

	NAICS Classification ¹²	NAICS Code	SBA Size Standard ¹³
Services ¹⁴	Wired Telecommunications Carriers	517110	1,500 or fewer employees
	Wireless Telecommunications Carriers (except satellites)	517210	1,500 or fewer employees
	Telecommunications Resellers	517911	1,500 or fewer

⁷ See 13 C.F.R. § 121.201.

⁸ See 13 C.F.R. § 121.201.

⁹ 13 C.F.R. § 121.106 (describing how number of employees is calculated); 13 C.F.R. § 121.104 (describing how annual receipts is calculated).

¹⁰ North American Industry Classification System; Revision for 2012, 76 Fed. Reg. 51240 (Aug. 17, 2011) (“*NAICS Final Decision*”).

¹¹ This is not a comprehensive list of the primary industries and associated SBA size standards of every possible manufacturer of ACS equipment or provider of ACS. This list is merely representative of some primary industries in which entities that manufacture ACS equipment or provide ACS may be primarily engaged. It is ultimately up to an entity seeking the temporary exemption to make a determination regarding their primary industry, and justify such determination in any enforcement proceeding.

¹² The definitions for each NAICS industry classification can be found by entering the six digit NAICS code in the “2007 NAICS Search” function available at the NAICS homepage, <http://www.census.gov/eos/www/naics/index.html>. The U.S. Office of Management and Budget has revised NAICS for 2012, however, the codes and industry categories listed herein are unchanged. OMB anticipates releasing a 2012 NAICS UNITED STATES MANUAL or supplement in January 2012. See *NAICS Final Decision*, 76 Fed. Reg. at 51240.

¹³ See 13 C.F.R. § 121.201 for a full listing of SBA size standards by six-digit NAICS industry code. The standards listed in this column establish the maximum size an entity in the given NAICS industry may be to qualify as a small business concern.

			employees
	All Other Telecommunications	517919	\$25 million or less in annual receipts
	Software Publishers	511210	\$25 million or less in annual receipts
	Internet Publishing and Broadcasting and Web Search Portals	519130	500 or fewer employees
	Data Processing, Hosting, and Related Services	518210	\$25 million or less in annual receipts
Equipment ¹⁵	Radio and Television Broadcasting and Wireless Communications Equipment Manufacturing	334220	750 or fewer employees
	Electronic Computer Manufacturing	334111	1,000 or fewer employees
	Telephone Apparatus Manufacturing	334210	1,000 or fewer employees
	Other Communications Equipment Manufacturing	334290	750 or fewer employees
	Software Publishers	511210	\$25 million or less in annual receipts
	Internet Publishing and Broadcasting and Web Search Portals	519130	500 or fewer employees

6. The *Report and Order* indicated that this temporary exemption is self-executing. Under this approach, covered entities must determine whether they qualify for the exemption based upon their ability to meet the SBA's rules and the size standard for the relevant NAICS industry category for the industry in which they are primarily engaged. Entities that manufacture ACS equipment or provide ACS may raise this temporary exemption as a defense in an enforcement proceeding. Entities claiming the exemption must be able to demonstrate that they met the exemption criteria during the estimated start of the design phase of the lifecycle of the product or service that is the subject of the complaint. The *Report and Order* stated that if an entity no longer meets the exemption criteria, it must comply with Section 716 and Section 717 for all subsequent products or services or substantial upgrades of products or services that are in the development phase of the product or service lifecycle, or any earlier stages of development, at the time they no longer meet the criteria. The temporary exemption will begin on the effective date of the rules adopted in the *Report and Order*¹⁶ and will expire the earlier of the effective date of small entity exemption rules adopted pursuant to the *Further Notice* or October 8, 2013. The *Report and Order* states that the temporary

(Continued from previous page) _____

¹⁴ See accompanying *Report and Order* at Section III.A.

¹⁵ See accompanying *Report and Order* at Section III.A.

¹⁶ See accompanying *Report and Order* at Section III.A.5.

exemption enables us to provide relief to those entities that may possibly lack legal, financial, or technical capability to comply with the Act until we further develop the record to determine whether small entities should be subject to a permanent exemption and, if so, the criteria to be used for defining which small entities should be subject to such permanent exemption.

7. In the *Further Notice* we seek comment on whether to make permanent the temporary exemption for manufacturers of ACS equipment and providers of ACS, adopt one or part of alternative size standards the Commission adopted in other contexts, or to adopt any permanent exemption for such entities, subject to repeal or modification by the Commission as necessary to meet Congress's intent.¹⁷ The *Further Notice* also seeks comment on the impact of an exemption on providers of ACS, manufacturers of ACS equipment, and consumers.

8. Specifically, the *Further Notice* seeks comment on whether to permanently exempt from the obligations of Section 716, manufacturers of ACS equipment and providers of ACS that qualify as small business concerns under the SBA's rules and size standards and, if so, whether to utilize the size standards for the primary industry in which they are engaged under the SBA's rules as set forth in the accompanying *Report and Order* as explained above. The *Further Notice* notes that SBA criteria were established for the purpose of determining eligibility for SBA small business loans and asks whether these same criteria are appropriate for the purpose of relieving covered entities from the obligations associated with achievability analyses, recordkeeping, and certifications.

9. The *Further Notice* also seeks comment on alternative size standards that the Commission has adopted in other contexts. The Commission has adopted alternative size standards for very small and small businesses for eligibility for spectrum bidding credits. These alternative sizes include average gross revenue over the preceding three years of \$3 million, \$15 million, or \$40 million, depending on the wireless service. The Commission has also used a different size standard in the spectrum context, specifically for entities that, along with affiliates, have \$6 million or less in net worth and no more than \$2 million in annual profits (after federal income tax and excluding carry over losses) each year for the previous two years. The Commission has also used different size standards to define small cable companies and small cable systems, and the Act includes a definition of small cable system operators. The Commission has defined small cable companies as a cable company serving 400,000 or fewer subscribers nationwide, and small cable systems as a cable system serving 15,000 or fewer subscribers. The Act defines small cable system operators as "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

¹⁷ See 156 CONG. REC. H7168, H7176 (2010) (statement of Rep. Burgess) ("This bill recognizes that some small businesses and fledgling entrepreneurs may not be able to bear the financial burden of these new requirements, so there is the possibility of exemptions for small businesses."). See also *Report and Order* at Section III.C.3.

aggregate exceed \$250,000,000.”¹⁸ The *Further Notice* seeks comment on whether any of these alternatives – in whole, in part, or in combination – should form the basis for a permanent small entity exemption from the requirements of Section 716.

10. The *Further Notice* also asks if these size criteria are not appropriate for a permanent exemption, what the appropriate size criteria would be, and whether there are other criteria that should form the basis of a permanent exemption?

11. The *Further Notice* seeks comment on the impact of a permanent exemption on providers of ACS, manufacturers of ACS equipment, and consumers. Specifically, the *Further Notice* seeks comment on the qualitative and quantitative impact of a permanent exemption based on the temporary exemption, on any of the alternatives discussed, or on some other possible size standard will impact industry sectors engaged in ACS. For example, what percentage of, or which non-interconnected VoIP providers, wireline or wireless service providers, electronic messaging providers, and ACS equipment manufacturers would qualify as small business concerns under each size standard? Conversely, what percentage of or which providers of ACS or manufactures of equipment used for ACS are not small business concerns under each size standard? For each ACS and ACS equipment market segment, what percentage of the market is served by entities that are not exempt using each size standard?

12. The *Further Notice* also seeks comment on the compliance costs that ACS providers and ACS equipment manufacturers would incur absent a permanent exemption. What would the costs be for compliance with Section 716 and Section 717 across different providers of ACS and ACS equipment manufacturers if we decline to adopt any permanent exemption or decline to make the temporary exemption permanent? In particular, what are the costs of conducting an achievability analysis, recordkeeping, and providing certifications?

13. We note that, in addition to the small entity exemption provision, the CVAA sets forth achievability factors that may also mitigate adverse impacts and reduce burdens on small entities. Under the achievability factors, an otherwise covered entity can demonstrate that accessibility is unachievable and therefore avoid compliance. The first and second factors are particularly relevant to small entities and the special circumstances they face. The first factor considers the nature and cost of the steps needed to meet the requirements with respect to the specific equipment or service in question, and the second considers 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.

14. The *Further Notice* seeks further comment on several issues raised in the implementation of Section 716 and 717 of the Act, as well as to seek initial comment on implementing Section 718 of the Act. Specifically, the *Further Notice* seeks comment on three proposed alternative definitions for the term “interoperable” in the context of video conferencing services and equipment used for those services: (1) “interoperable” means able to function inter-platform, inter-network, and inter-provider; (2) “interoperable”

¹⁸ 47 U.S.C. § 543(m)(2).

means having published or otherwise agreed-upon standards that allow for manufacturers or service providers to develop products or services that operate with other equipment or services operating pursuant to the standards; or (3) “interoperable” means able to connect users among different video conferencing services, including VRS. The *Further Notice* also seeks comment on whether we should exercise our ancillary jurisdiction to require that a video mail service be accessible to individuals with disabilities when provided along with a video conferencing service as we did in the context of Section 255 in regard to voice mail. The *Further Notice* seeks comment on several proposals to (1) extend our accessibility of information content guidelines to cover additional concepts; (2) expand our definition of peripheral devices to include electronically mediated services; (3) expand our Part 6 requirements to include testable criteria. We also seek to develop a record on a proposal to define technical standards for safe harbors using the W3C/WAI Web guidelines or ISO/IEC 13066-1:2011. Finally, we seek comment on our proposal to implement Section 718 of the CVAA consistent with the recordkeeping requirements adopted in the *Report and Order*.

15. We seek comment on the preceding topics because even though at present we do not have enough information to propose a specific rule, we believe that during the effective period of the temporary small business exemption, information about these topics will in all likelihood become crucial and indeed determinative of how the implementation of the exemption will be carried out in concrete terms. For example, within the exemption period, technological innovations and advances may make interoperability more available in providing improved access to the deaf/blind community in service areas where interoperability is not yet feasible for technological reasons. Also, technological advances in coverage of video mail or in the availability of safe harbors may become more available and more efficiently operational after the exemption period than they are at present, and thus, during the temporary exemption, these various areas of increased availability and increased effective impact may affect the provision of ACS to the deaf and/or blind community. Hence, because these topics may become pivotal and crucial after the exemption period, we choose to seek comment on these topics at this time because based on our assessment of the admittedly scant record to date, we conclude that such comment may effectively guide the Commission toward a more comprehensive and efficient implementation of the temporary exemption. We also seek comment on implementing Section 718, which requires a mobile phone manufacturer that includes a browser, or a mobile phone service provider that arranges for a browser to be included on a mobile phone, to ensure that the browser functions are accessible to and usable by individuals who are blind or have a visual impairment, unless doing so is not achievable.¹⁹ Under Section 718, mobile phone manufacturers or service providers may achieve compliance by relying on third party applications, peripheral devices, software, hardware, or customer premises equipment. Congress provided that the effective date for these requirements is three years after the enactment of the CVAA, *i.e.*, October 8, 2013.

¹⁹ See 47 U.S.C. § 619(a); *see also* House Report at 27 (“The Committee also intends that the service provider and the manufacturer are each only subject to these provisions with respect to a browser that such service provider or manufacturer directs or specifies to be included in the device.”).

B. Legal Basis

16. The legal basis for any action that may be taken pursuant to the *Further Notice* 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 Rules Will Apply

17. 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.²⁰ The RFA generally defines the term “small entity” as having the same meaning as the terms “small business,” “small organization,” and “small governmental jurisdiction.”²¹ In addition, the term “small business” has the same meaning as the term “small business concern” under the Small Business Act.²² 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.²³

18. To assist the Commission in analyzing the total number of small entities potentially affected by the proposals in the *Further Notice*, we ask commenters to estimate the number of small entities that may be affected. To assist in assessing the nature and number of small entities that face possible significant economic impact by the proposals in the *Further Notice*, 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 and in effect Section 717, 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 and in effect Section 717 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 *Further Notice* and this IRFA seek comment on whether and how the Commission should permanently exempt small entities from the requirements of Section 716 and in effect Section 717 for the purposes of building a record on that issue, we will assume, for the narrow purpose of

²⁰ 5 U.S.C. § 604(a)(3).

²¹ 5 U.S.C. § 601(6).

²² 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.” 5 U.S.C. § 601(3).

²³ 15 U.S.C. § 632.

including a thorough regulatory impact analysis in this IRFA, that no such exemptions will be provided.

19. Many of the issues raised in the *Further Notice* relate to clarifying obligations on entities already covered by the *Report and Order*, which may affect a broad range of service providers and equipment manufacturers. The *Further Notice* seeks comment on making permanent a temporary exemption for small entities that qualify as small business concerns under the SBA's rules and small business size standards, or some other criteria. Therefore, it is possible that all entities that would be required to comply with Section 716 and Section 717, but are small business concerns or qualify as small entities under some other criteria, will be exempt from the provisions of the proposed rules implementing Section 716 and Section 717. The CVAA, however, does not provide the flexibility for the Commission to adopt an exemption for small entities from compliance with Section 718. Therefore, we estimate below the impact on small entities absent a permanent exemption from Section 716 and Section 717, and small entities that may have to comply with Section 718. Specifically, we analyze the number of small businesses engaged in manufacturing that may be affected by the *Further Notice*, absent a permanent small entity exemption, including manufacturers of equipment used to provide interconnected and non-interconnected VoIP, electronic messaging, and interoperable video conferencing services. We then analyze the number of small businesses engaged as service providers that may be affected by the *Report and Order*, absent a permanent small entity exemption, including providers of interconnected and non-interconnected VoIP, electronic messaging services, interoperable video conferencing services, wireless services, wireline services, and other relevant services.

20. *Small Businesses, Small Organizations, and Small Governmental Jurisdictions.* Our action may, over time, affect small entities that are not easily categorized at present. We therefore describe here, at the outset, three comprehensive, statutory small entity size standards.²⁴ First, nationwide, there are a total of approximately 27.5 million small businesses, according to the SBA.²⁵ In addition, a "small organization" is generally "any not-for-profit enterprise which is independently owned and operated and is not dominant in its field."²⁶ Nationwide, as of 2007, there were approximately 1,621,315 small organizations.²⁷ Finally, the term "small governmental jurisdiction" is defined generally as "governments of cities, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand."²⁸ Census Bureau data for 2011 indicate that there were 89,476 local governmental jurisdictions in the United States.²⁹ We estimate that, of this total, as many

²⁴ See 5 U.S.C. §§ 601(3)–(6).

²⁵ See SBA, Office of Advocacy, "Frequently Asked Questions," <http://web.sba.gov/faqs> (last visited May 6, 2011) (figures are from 2009).

²⁶ 5 U.S.C. § 601(4).

²⁷ INDEPENDENT SECTOR, *THE NEW NONPROFIT ALMANAC & DESK REFERENCE* (2010).

²⁸ 5 U.S.C. § 601(5).

²⁹ U.S. CENSUS BUREAU, *STATISTICAL ABSTRACT OF THE UNITED STATES: 2011*, Table 427 (2007).

as 88,506 entities may qualify as “small governmental jurisdictions.”³⁰ Thus, we estimate that most governmental jurisdictions are small.

1. Equipment Manufacturers

a. Manufacturers of Equipment to Provide VoIP

21. Entities manufacturing equipment used to provide interconnected VoIP, non-interconnected VoIP, or both are generally found in one of two Census Bureau categories, “Electronic Computer Manufacturing”³¹ or “Telephone Apparatus Manufacturing.”³² 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 is not possible to separate available data on these two manufacturing categories for VoIP equipment. Our estimates below likely greatly overstate the number of small entities that manufacture equipment used to provide ACS, including 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 possible.

22. *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.”³³

23. In this category, the SBA deems an electronic computer manufacturing business to be small if it has 1,000 employees or less.³⁴ For this category of manufacturers, Census data for 2007 show that there were 421 establishments that

³⁰ The 2007 U.S. Census data for small governmental organizations are not presented based on the size of the population in each such organization. There were 89,476 small governmental organizations in 2007. If we assume that county, municipal, township and school district organizations are more likely than larger governmental organizations to have populations of 50,000 or less, the total of these organizations is 52,125. If we make the same assumption about special districts, and also assume that special districts are different from county, municipal, township, and school districts, in 2007 there were 37,381 special districts. Therefore, of the 89,476 small governmental organizations documented in 2007, as many as 89,506 may be considered small under the applicable standard. This data may overestimate the number of such organizations that has a population of 50,000 or less. U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES 2011, Tables 427, 426 (data cited therein are from 2007).

³¹ 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>.

³² U.S. Census Bureau, 2007 NAICS Definitions, 334210 Telephone Apparatus Manufacturing, <http://www.census.gov/naics/2007/def/ND334210.HTM>.

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

operated that year. Of those 421, 384 had 100 or fewer employees and 37 had 100 or more employees.³⁵ On this basis, we estimate that the majority of manufacturers of equipment used to provide electronic messaging services in this category are small.

24. *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, 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.”³⁶

25. In this category, the SBA deems a telephone apparatus manufacturing business to be small if it has 1,000 or fewer employees.³⁷ For this category of manufacturers, Census data for 2007 shows there were 398 such establishments in operation.³⁸ Of those 398 establishments, 393 (approximately 99%) had 1,000 or fewer employees and, thus, would be deemed small under the applicable SBA size standard.³⁹ On this basis, the Commission estimates that approximately 99% or more of the manufacturers of equipment used to provide VoIP in this category are small.

b. Manufacturers of Equipment to Provide Electronic Messaging

26. 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,”⁴⁰ “Electronic Computer Manufacturing,”⁴¹ or “Telephone Apparatus Manufacturing.”⁴²

³⁵ http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-fds_name=EC0700A1&-_skip=300&-ds_name=EC073111&-_lang=en

³⁶ U.S. Census Bureau, 2007 NAICS Definitions, 334210 Telephone Apparatus Manufacturing, <http://www.census.gov/naics/2007/def/ND334210.HTM>.

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

³⁸ U.S. Census Bureau, American FactFinder, 2007 Economic Census, Industry Series, Industry Statistics by Employment Size, NAICS code 334210 (rel. Nov. 16, 2010); <http://factfinder.census.gov>.

³⁹ *Id.*

⁴⁰ 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>.

⁴¹ 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>.

⁴² U.S. Census Bureau, 2007 NAICS Definitions, 334210 Telephone Apparatus Manufacturing, <http://www.census.gov/naics/2007/def/ND334210.HTM>.

27. *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 Radio and Television Broadcasting and Wireless Communications Equipment Manufacturing which is: all such firms having 750 or fewer employees. According to Census Bureau data for 2007, there were a total of 919 establishments in this category that operated for part or all of the entire year. Of this total, 771 had less than 100 employees and 148 had more than 100 employees.⁴³ Thus, under this size standard, the majority of firms can be considered small.

28. *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.”⁴⁴

29. In this category the SBA deems an electronic computer manufacturing business to be small if it has 1,000 or fewer employees.⁴⁵ For this category of manufacturers, Census data for 2007 show that there were 421 such establishments that operated that year. Of those 421 establishments, 384 had 1,000 or fewer employees.⁴⁶ On this basis, we estimate that the majority of the manufacturers of equipment used to provide electronic messaging services in this category are small.

30. *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 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

⁴³ http://factfinder.census.gov/servlet/IBQTable?_bm=y&-fds_name=EC0700A1&-geo_id=&-_skip=300&-ds_name=EC0731I1&-_lang=en.

⁴⁴ 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>.

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

⁴⁶ http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-fds_name=EC0700A1&-_skip=300&-ds_name=EC0731I1&-_lang=en.

modems, and other data communications equipment, such as bridges, routers, and gateways.”⁴⁷

31. In this category the SBA deems a telephone apparatus manufacturing business to be small if it has 1,000 or fewer employees.⁴⁸ For this category of manufacturers, Census data for 2007 shows that there were 398 such establishments that operated that year.⁴⁹ Of those 398 establishments, 393 (approximately 99%) had 1,000 or fewer employees and, thus, would be deemed small under the applicable SBA size standard.⁵⁰ 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.

c. Manufacturers of Equipment Used to Provide Interoperable Video Conferencing Services

32. 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).”⁵¹

33. *Other Communications Equipment Manufacturing.* In this category, the SBA deems a business manufacturing other communications equipment to be small if it has 750 or fewer employees.⁵² For this category of manufacturers, Census data for 2007 show that there were 452 establishments that operated that year. Of the 452 establishments 406 had fewer than 100 employees and 46 had more than 100 employees. Accordingly, the Commission estimates that a substantial majority of the manufacturers of equipment used to provide interoperable and other video-conferencing services are small.⁵³

⁴⁷ U.S. Census Bureau, 2007 NAICS Definitions, 334210 Telephone Apparatus Manufacturing, <http://www.census.gov/naics/2007/def/ND334210.HTM>.

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

⁴⁹ 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>.

⁵⁰ *Id.*

⁵¹ U.S. Census Bureau, 2007 NAICS Definitions, 334290 Other communications equipment manufacturing, <http://www.census.gov/econ/industry/def/d334290.htm>.

⁵² 13 C.F.R. 121.201, NAICS Code 334220.

⁵³ http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-fds_name=EC0700A1&-skip=300&-ds_name=EC073111&-_lang=en.

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.”⁵⁴

36. In this category, the SBA deems a wired telecommunications carrier to be small if it has 1,500 or fewer employees.⁵⁵ Census data for 2007 shows 3,188 firms in this category.⁵⁶ Of these 3,188 firms, only 44 had 1,000 or more employees. While we could not find precise Census data on the number of firms with in the group with 1,500 or fewer employees, it is clear that at least 3,144 firms with fewer than 1,000 employees would be in that group. On this basis, the Commission estimates that a substantial majority of the providers of interconnected VoIP, non-interconnected VoIP, or both in this category, are small.⁵⁷

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

⁵⁴ U.S. Census Bureau, 2007 NAICS Definitions, 517110 Wired Telecommunications Carriers, <http://www.census.gov/econ/industry/def/d517110.htm>.

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

⁵⁶ http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-_skip=600&-ds_name=EC0751SSSZ5&-_lang=en.

⁵⁷ *Id.* As noted in para. 21 above with regard to the distinction between manufacturers of equipment used to provide interconnected 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 likely overstated because we could not draw in the data a distinction between such providers and those that 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.

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.”⁵⁸

38. In this category, the SBA deems a provider of “all other telecommunications” services to be small if it has \$25 million or less in average annual receipts.⁵⁹ For this category of service providers, Census data for 2007 shows that there were 2,383 such firms that operated that year.⁶⁰ 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. 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.⁶¹

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 Satellite)*. Since 2007, the Census Bureau has placed wireless firms within this new, broad, economic census category.⁶² Prior to that time, such firms were within the now-superseded categories of “Paging” and “Cellular and Other Wireless Telecommunications.”⁶³ Under the present and prior categories, the SBA has deemed a wireless business to be small if it has 1,500 or fewer employees.⁶⁴ For the category of Wireless Telecommunications Carriers (except Satellite), Census data for 2007 shows that there were 1,383 firms that operated that

⁵⁸ U.S. Census Bureau, 2007 NAICS Definitions, 517919 All Other Telecommunications, <http://www.census.gov/cgi-bin/sssd/naics/naicsrch?code=517919&search=2007%20NAICS%20Search>.

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

⁶⁰ http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-_skip=900&-ds_name=EC0751SSSZ4&-_lang=en.

⁶¹ See discussion *supra* note 57, regarding possible overestimation of firms and small entities providing non-interconnected VoIP services.

⁶² U.S. Census Bureau, 2007 NAICS Definitions, 517210 Wireless Telecommunications Carriers (Except Satellite), <http://www.census.gov/naics/2007/def/ND517210.HTM#N517210>.

⁶³ 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>.

⁶⁴ 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).

year.⁶⁵ 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. 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.⁶⁶ Of these, an estimated 261 have 1,500 or fewer employees and 152 have more than 1,500 employees.⁶⁷ 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.

41. *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.

42. In this category, the SBA deems a wired telecommunications carrier to be small if it has 1,500 or fewer employees.⁶⁸ Census data for 2007 shows 3,188 firms in this category.⁶⁹ Of these 3,188 firms, only 44 (approximately 1%) had 1,000 or more employees.⁷⁰ While we could not find precise Census data on the number of firms in the group with 1,500 or fewer 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 1,500 or fewer employees. On this basis, the Commission estimates that approximately 99% or more of the providers of electronic messaging services in this category are small.

43. *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

⁶⁵ 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.

⁶⁶ See *Trends in Telephone Service*, at tbl. 5.3.

⁶⁷ *Id.*

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

⁶⁹ 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>.

⁷⁰ *Id.*

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.”⁷¹

44. In this category, the SBA deems an Internet publisher or Internet broadcaster or the provider of a web search portal on the Internet to be small if it has 500 or fewer employees.⁷² For this category of manufacturers, Census data for 2007 shows that there were 2,705 such firms that operated that year.⁷³ Of those 2,705 firms, 2,682 (approximately 99%) had 500 or fewer employees and, thus, would be deemed small under the applicable SBA size standard.⁷⁴ On this basis, the Commission estimates that approximately 99% or more of the providers of electronic messaging services in this category are small.

45. *Data Processing, Hosting, and Related Services.* The Census Bureau defines this category to include “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.”⁷⁵

46. In this category, the SBA deems a data processing, hosting, or related services provider to be small if it has \$25 million or less in annual receipts.⁷⁶ For this category of providers, Census data for 2007 shows that there were 14,193 such establishments that operated that year.⁷⁷ Of those 14,193 firms, 12,985 had less than \$10 million in annual receipts, and 1,208 had greater than \$10 million.⁷⁸ Although no data is available to confirm the number of establishments with greater than \$25 million in receipts, the available data confirms the majority of establishments in this category were small. On this basis, the Commission estimates that approximately 96% of the providers of electronic messaging services in this category are small.

⁷¹ U.S. Census Bureau, 2007 NAICS Definitions, 519130 Internet Publishing and Broadcasting and Web Search Portals, <http://www.naics.com/censusfiles/ND519130.HTM>.

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

⁷³ 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>.

⁷⁴ *Id.*

⁷⁵ U.S. Census Bureau, 2007 NAICS Definition, 518210 Data Processing, Hosting, and Related Services, <http://www.census.gov/cgi-bin/sssd/naics/naicsrch>.

⁷⁶ 13 C.F.R. § 121.201; NAICS Code 518210.

⁷⁷ http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-fds_name=EC0700A1&-skip=800&-ds_name=EC0751SSSZ1&-lang=en.

⁷⁸ *Id.*

c. Providers of Interoperable Video Conferencing Services

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

48. *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.

49. In this category, the SBA deems a provider of “all other telecommunications” services to be small if it has \$25 million or less in average annual receipts.⁷⁹ Census data for 2007 show that there were 2,383 such firms that operated that year.⁸⁰ 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. On this basis, Commission estimates that approximately 98% or more of the providers of interoperable video conferencing services are small.

3. Additional Industry Categories.

a. Certain Wireless Carriers and Service Providers

50. *Cellular Licensees*. The SBA has developed a small business size standard for small businesses in the category “Wireless Telecommunications Carriers (except satellite).”⁸¹ Under that SBA category, a business is small if it has 1,500 or fewer employees.⁸² 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.”⁸³

51. Census data for 2007 shows 1,383 firms in this category.⁸⁴ Of these 1,383 firms, only 15 (approximately 1%) had 1,000 or more employees.⁸⁵ While there is no precise Census data on the number of firms the group with 1,500 or fewer employees, it

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

⁸⁰ http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-_skip=900&-ds_name=EC0751SSSZ4&-_lang=en.

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

⁸² *Id.*

⁸³ U.S. Census Bureau, 2007 NAICS Definitions, Wireless Telecommunications Carriers (Except Satellites) <http://www.census.gov/econ/industry/def/d517210.htm>.

⁸⁴ 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>.

⁸⁵ *Id.*

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%) 1,500 or fewer employees. On this basis, Commission estimates that approximately 99% or more of the providers of electronic messaging services in this category are small.

52. *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.⁸⁶ 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.⁸⁷ The SBA has approved these small business size standards for the 900 MHz Service.⁸⁸ 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.⁸⁹ 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.⁹⁰

53. 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.

54. 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

⁸⁶ 47 C.F.R. § 90.814(b)(1).

⁸⁷ *Id.*

⁸⁸ See Letter from Aida Alvarez, Administrator, Small Business Administration, to Thomas Sugrue, Chief, Wireless Telecommunications Bureau, Federal Communications Commission, dated August 10, 1999.

⁸⁹ 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).

⁹⁰ See *Multi-Radio Service Auction Closes*, Public Notice, 17 FCC Rcd 1446 (WTB 2002).

firm has over \$15 million in revenues. In addition, we do not know how many of these 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.

55. *AWS Services (1710–1755 MHz and 2110–2155 MHz bands (AWS-1); 1915–1920 MHz, 1995–2000 MHz, 2020–2025 MHz and 2175–2180 MHz bands (AWS-2); 2155–2175 MHz band (AWS-3))*. For the AWS-1 bands, the Commission has defined a “small business” as an entity with average annual gross revenues for the preceding three years not exceeding \$40 million, and a “very small business” as an entity with average annual gross revenues for the preceding three years not exceeding \$15 million.⁹¹ In 2006, the Commission conducted its first auction of AWS-1 licenses.⁹² In that initial AWS-1 auction, 31 winning bidders identified themselves as very small businesses.⁹³ Twenty-six of the winning bidders identified themselves as small businesses.⁹⁴ In a subsequent 2008 auction, the Commission offered 35 AWS-1 licenses.⁹⁵ Four winning bidders identified themselves as very small businesses, and three of the winning bidders identified themselves as a small business.⁹⁶ For AWS-2 and AWS-3, although we do not know for certain which entities are likely to apply for these frequencies, we note that the AWS-1 bands are comparable to those used for cellular service and personal communications service. The Commission has not yet adopted size standards for the AWS-2 or AWS-3 bands but has proposed to treat both AWS-2 and AWS-3 similarly to broadband PCS service and AWS-1 service due to the comparable capital requirements and other factors, such as issues involved in relocating incumbents and developing markets, technologies, and services.⁹⁷

⁹¹ See Service Rules for Advanced Wireless Services in the 1.7 GHz and 2.1 GHz Bands, *Report and Order*, 18 FCC Rcd 25,162, App. B (2003), *modified by* Service Rules for Advanced Wireless Services in the 1.7 GHz and 2.1 GHz Bands, *Order on Reconsideration*, 20 FCC Rcd 14,058, App. C (2005).

⁹² See *Auction of Advanced Wireless Services Licenses Scheduled for June 29, 2006; Notice and Filing Requirements, Minimum Opening Bids, Upfront Payments and Other Procedures for Auction No. 66*, AU Docket No. 06-30, Public Notice, 21 FCC Rcd 4562 (2006) (“*Auction 66 Procedures Public Notice*”).

⁹³ See *Auction of Advanced Wireless Services Licenses Closes; Winning Bidders Announced for Auction No. 66*, Public Notice, 21 FCC Rcd 10,521 (2006) (“*Auction 66 Closing Public Notice*”).

⁹⁴ See *id.*

⁹⁵ See *AWS-1 and Broadband PCS Procedures Public Notice*, 23 FCC Rcd at 7499. Auction 78 also included an auction of broadband PCS licenses.

⁹⁶ 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 12,749 (2008).

⁹⁷ *Service Rules for Advanced Wireless Services in the 1915–1920 MHz, 1995–2000 MHz, 2020–2025 MHz and 2175–2180 MHz Bands et al.*, Notice of Proposed Rulemaking, 19 FCC Rcd 19,263, App. B (2005); *Service Rules for Advanced Wireless Services in the 2155–2175 MHz Band*, Notice of Proposed Rulemaking, 22 FCC Rcd 17,035, App. (2007); *Service Rules for Advanced Wireless Services in the 2155–2175 MHz Band*, Further Notice of Proposed Rulemaking, 23 FCC Rcd 9859, App. B (2008).

56. *700 MHz Guard Band Licenses.* 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.⁹⁸ 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.⁹⁹ 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.¹⁰⁰ SBA approval of these definitions is not required.¹⁰¹ In 2000, the Commission conducted an auction of 52 Major Economic Area (“MEA”) licenses.¹⁰² 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 and closed in 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.¹⁰³

57. *Upper 700 MHz Band Licenses.* In the *700 MHz Second Report and Order*, the Commission revised its rules regarding Upper 700 MHz licenses.¹⁰⁴ On January 24, 2008, the Commission commenced Auction 73 in which several licenses in the Upper 700 MHz band were available for licensing: 12 Regional Economic Area Grouping licenses in the C Block, and one nationwide license in the D Block.¹⁰⁵ The auction concluded on March 18, 2008, with 3 winning bidders claiming very small

⁹⁸ *Service Rules for the 746-764 MHz Bands, and Revisions to Part 27 of the Commission’s Rules*, Second Report and Order, 15 FCC Rcd 5299 (2000). Service rules were amended in 2007, but no changes were made to small business size categories. See *Service Rules for the 698-746, 747-762 and 777-792 MHz Bands*, WT Docket No. 06-150, *Revision of the Commission’s Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems*, CC Docket No. 94-102, Section 68.4(a) of the Commission’s Rules Governing Hearing Aid-Compatible Telephones, WT Docket No. 01-309, *Biennial Regulatory Review – Amendment of Parts 1, 22, 24, 27, and 90 to Streamline and Harmonize Various Rules Affecting Wireless Radio Services*, WT Docket 03-264, *Former Nextel Communications, Inc. Upper 700 MHz Guard Band Licenses and Revisions to Part 27 of the Commission’s Rules*, WT Docket No. 06-169, *Implementing a Nationwide, Broadband, Interoperable Public Safety Network in the 700 MHz Band*, PS Docket No. 06-229, *Development of Operational, Technical and Spectrum Requirements for Meeting Federal, State and Local Public Safety Communications Requirements Through the Year 2010*, WT Docket No. 96-86, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 8064 (2007).

⁹⁹ *Id.* at 5343 ¶ 108.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 5343 ¶ 108 n.246 (for the 746-764 MHz and 776-704 MHz bands, the Commission is exempt from 15 U.S.C. § 632, which requires Federal agencies to obtain Small Business Administration approval before adopting small business size standards).

¹⁰² See *700 MHz Guard Bands Auction Closes: Winning Bidders Announced*, Public Notice, 15 FCC Rcd 18026 (2000).

¹⁰³ See *700 MHz Guard Bands Auction Closes: Winning Bidders Announced*, Public Notice, 16 FCC Rcd 4590 (WTB 2001).

¹⁰⁴ *700 MHz Second Report and Order*, 22 FCC Rcd 15289.

¹⁰⁵ See *Auction of 700 MHz Band Licenses Closes*, Public Notice, 23 FCC Rcd 4572 (WTB 2008).

business status (those with attributable average annual gross revenues that do not exceed \$15 million for the preceding three years) and winning five licenses.

58. *Lower 700 MHz Band Licenses.* The Commission previously adopted criteria for defining three groups of small businesses for purposes of determining their eligibility for special provisions such as bidding credits.¹⁰⁶ The Commission defined a “small business” as an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding \$40 million for the preceding three years.¹⁰⁷ A “very small business” is defined as 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.¹⁰⁸ Additionally, the lower 700 MHz Service had a third category of small business status for Metropolitan/Rural Service Area (MSA/RSA) licenses—“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.¹⁰⁹ The SBA approved these small size standards.¹¹⁰ An auction of 740 licenses (one license in each of the 734 MSAs/RSAs and one license in each of the six Economic Area Groupings (EAGs)) was conducted in 2002. Of the 740 licenses available for auction, 484 licenses were won by 102 winning bidders. Seventy-two of the winning bidders claimed small business, very small business or entrepreneur status and won licenses.¹¹¹ A second auction commenced on May 28, 2003, closed on June 13, 2003, and included 256 licenses.¹¹² Seventeen winning bidders claimed small or very small business status, and nine winning bidders claimed entrepreneur status.¹¹³ In 2005, the Commission completed an auction of 5 licenses in the Lower 700 MHz band. All three winning bidders claimed small business status.

59. In 2007, the Commission reexamined its rules governing the 700 MHz band in the *700 MHz Second Report and Order*.¹¹⁴ An auction of A, B and E block 700 MHz licenses was held in 2008.¹¹⁵ Twenty winning bidders claimed small business status (those with attributable average annual gross revenues that exceed \$15 million and do not exceed \$40 million for the preceding three years). Thirty three winning bidders claimed

¹⁰⁶ See *Reallocation and Service Rules for the 698–746 MHz Spectrum Band (Television Channels 52–59)*, Report and Order, 17 FCC Rcd 1022 (2002) (“*Channels 52–59 Report and Order*”).

¹⁰⁷ See *id.*, 17 FCC Rcd at 1087–88 ¶ 172.

¹⁰⁸ See *id.*

¹⁰⁹ See *id.*, 17 FCC Rcd at 1088 ¶ 173.

¹¹⁰ See *Alvarez Letter 1998*.

¹¹¹ See *Lower 700 MHz Band Auction Closes*, Public Notice, 17 FCC Rcd 17,272 (2002).

¹¹² See *Lower 700 MHz Band Auction Closes*, Public Notice, 18 FCC Rcd 11,873 (2003).

¹¹³ See *id.*

¹¹⁴ *700 MHz Second Report and Order*, Second Report and Order, 22 FCC Rcd 15,289, 15,359 n.434 (2007).

¹¹⁵ See *Auction of 700 MHz Band Licenses Closes*, Public Notice, 23 FCC Rcd 4572 (2008).

very small business status (those with attributable average annual gross revenues that do not exceed \$15 million for the preceding three years).

60. *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 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.¹¹⁶ Thus under this category and the associated small business size standard, the majority of firms can be considered small.

61. *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.¹¹⁷ 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."¹¹⁸ SBA has approved these small business size standards for the aforementioned bands.¹¹⁹ Correspondingly, the Commission adopted a bidding credit of 15 percent for "small businesses" and a bidding credit of 25 percent for "very small businesses."¹²⁰ This bidding credit structure was found to have been consistent with the

¹¹⁶ 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.

¹¹⁷ 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*, Report and Order, 17 FCC Rcd 9980 (2002).

¹¹⁸ 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.

¹¹⁹ 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.

¹²⁰ 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.

Commission's schedule of bidding credits, which may be found at section 1.2110(f)(2) of the Commission's rules.¹²¹ 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.¹²² 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.¹²³ 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.¹²⁴ 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

62. *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."¹²⁵ The SBA has developed a small business size standard for

¹²¹ 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).

¹²² See *Service Rules Notice*, 17 FCC Rcd at 2550-51 ¶ 145.

¹²³ 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).

¹²⁴ 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).

¹²⁵ 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>.

Radio and Television Broadcasting and Wireless Communications Equipment Manufacturing, which is: all such firms having 750 or fewer employees.¹²⁶ According to Census Bureau data for 2007, there were a total of 939 establishments in this category that operated for part or all of the entire year. Of this total, 784 had less than 500 employees and 155 had more than 100 employees.¹²⁷ Thus, under this size standard, the majority of firms can be considered small.

63. *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 Radio and Television Broadcasting and Wireless Communications Equipment Manufacturing which is: all such firms having 750 or fewer employees. According to Census Bureau data for 2007, there were a total of 939 establishments in this category that operated for part or all of the entire year. Of this total, 784 had less than 500 employees and 155 had more than 100 employees.”¹²⁸ Thus, under this size standard, the majority of firms can be considered small.

64. *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.”¹²⁹ 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.¹³⁰ According to Census Bureau data for 2007, there were 24,912 firms in this category that operated for the entire year.¹³¹ Of this total, 22,701 firms had annual sales of under \$5 million; 570 had annual sales and 533 firms had sales of \$5 million or more but less than \$10 million., and 1,641 had annual

¹²⁶ 13 C.F.R. § 121.201, NAICS code 334220.

¹²⁷ The NAICS Code for this service is 334220. See 13 C.F.R 121/201. See also http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-fds_name=EC0700A1&-_skip=500&-ds_name=EC0744SSSZ1&-_lang=en.

¹²⁸ The NAICS Code for this service 334220. See 13 C.F.R 121/201. See also http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-fds_name=EC0700A1&-_skip=500&-ds_name=EC0744SSSZ1&-_lang=en.

¹²⁹ <http://www.census.gov/cgi-bin/sssd/naics/naicsrch?code=443112&search=2007%20NAICS%20Search>.

¹³⁰ 13 C.F.R. § 121.201, NAICS code 443112.

¹³¹ http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-fds_name=EC0700A1&-_skip=500&-ds_name=EC0744SSSZ1&-_lang=en.

sales of over 10 million.¹³² Thus, the majority of firms in this category can be considered small.

c. Wireline Carriers and Service Providers

65. *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.¹³³ Census Bureau data for 2007 shows 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 data, 1,307 carriers reported that they were incumbent local exchange service providers.¹³⁴ Of these 1,307 carriers, an estimated 1,006 have 1,500 or fewer employees and 301 have more than 1,500 employees.¹³⁵ 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.¹³⁶

66. *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.¹³⁷ Census Bureau data for 2007 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.¹³⁸ According to Commission data, 1,442 carriers reported that they were engaged in the provision of either competitive local exchange services or competitive

¹³² *Id.*

¹³³ 13 C.F.R. § 121.201, NAICS code 517110.

¹³⁴ 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*).

¹³⁵ See *id.*

¹³⁶ See http://factfinder.census.gov/servlet/IBQTable?_bm=y&-fds_name=EC0700A1&-geo_id=&-_skip=600&-ds_name=EC0751SSSZ5&-_lang=en.

¹³⁷ 13 C.F.R. § 121.201, NAICS code 517110.

¹³⁸ See http://factfinder.census.gov/servlet/IBQTable?_bm=y&-fds_name=EC0700A1&-geo_id=&-_skip=600&-ds_name=EC0751SSSZ5&-_lang=en.

access provider services.¹³⁹ Of these 1,442 carriers, an estimated 1,256 have 1,500 or fewer employees and 186 have more than 1,500 employees.¹⁴⁰ 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.¹⁴¹ In addition, 72 carriers have reported that they are Other Local Service Providers.¹⁴² Of the 72, seventy have 1,500 or fewer employees and two have more than 1,500 employees.¹⁴³ 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.

67. *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.¹⁴⁴ Census Bureau data for 2007 shows 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.¹⁴⁵ According to Commission data, 359 companies reported that their primary telecommunications service activity was the provision of interexchange services.¹⁴⁶ Of these 359 companies, an estimated 317 have 1,500 or fewer employees and 42 have more than 1,500 employees.¹⁴⁷ 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.

68. *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.¹⁴⁸ Census Bureau data for 2007 show that there were 3,188 firms in this category that operated for the entire year. Of this total, 3,144 had

¹³⁹ See *Trends in Telephone Service*, at tbl. 5.3.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ 13 C.F.R. § 121.201, NAICS code 517110.

¹⁴⁵ See http://factfinder.census.gov/servlet/IBQTable?_bm=y&-fds_name=EC0700A1&-geo_id=&-_skip=600&-ds_name=EC0751SSSZ5&-_lang=en.

¹⁴⁶ See *Trends in Telephone Service*, at tbl. 5.3.

¹⁴⁷ *Id.*

¹⁴⁸ 13 C.F.R. § 121.201, NAICS code 517110.

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.¹⁴⁹ 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.¹⁵⁰ Consequently, the Commission estimates that the majority of OSPs are small entities that may be affected by our proposed rules.

69. *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.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 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.¹⁵³ Of these, an estimated 211 have 1,500 or fewer employees and two have more than 1,500 employees.¹⁵⁴ Consequently, the Commission estimates that the majority of local resellers are small entities that may be affected by rules adopted pursuant to the Notice.

70. *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 employees.¹⁵⁵ Census data for 2007 show that 1,523 firms provided resale services during that year. Of that number, 1,522 operated with fewer than 1,000 employees and one operated with more than 1,000.¹⁵⁶ 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,¹⁵⁷ 881 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,

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*, at 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 tbl. 5.3.

¹⁵⁴ *Id.*

¹⁵⁵ 13 C.F.R. § 121.201, NAICS code 517911.

¹⁵⁶ http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-_skip=800&-ds_name=EC0751SSSZ5&-_lang=en.

¹⁵⁷ *Trends in Telephone Service*, at tbl. 5.3.

the Commission estimates that the majority of toll resellers are small entities that may be affected by our proposed rules.

71. *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.¹⁵⁸ Census Bureau data for 2007 shows 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.¹⁵⁹ According to Commission data,¹⁶⁰ 657 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.

72. *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.¹⁶¹ 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 1,000.¹⁶² 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.¹⁶³ Of these, all 193 have 1,500 or fewer employees and none have more than 1,500 employees.¹⁶⁴ 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.

73. *800 and 800-Like Service Subscribers*.¹⁶⁵ Neither the Commission nor the SBA has developed a small business size standard specifically for 800 and 800-like

¹⁵⁸ 13 C.F.R. § 121.201, NAICS code 517110.

¹⁵⁹ See http://factfinder.census.gov/servlet/IBQTable?_bm=y&-fds_name=EC0700A1&-geo_id=&-_skip=600&-ds_name=EC0751SSSZ5&-_lang=en.

¹⁶⁰ *Trends in Telephone Service*, at tbl. 5.3.

¹⁶¹ 13 C.F.R. § 121.201, NAICS code 517911.

¹⁶² http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-_skip=800&-ds_name=EC0751SSSZ5&-_lang=en.

¹⁶³ See *Trends in Telephone Service*, at tbl. 5.3.

¹⁶⁴ *Id.*

¹⁶⁵ We include all toll-free number subscribers in this category, including those for 888 numbers.

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.¹⁶⁶ 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 1,000.¹⁶⁷ 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.¹⁶⁸ 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

74. 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.

75. *Wireless Telecommunications Carriers (except Satellite)*. Since 2007, the Census Bureau has placed wireless firms within this new, broad, economic census category.¹⁶⁹ Prior to that time, such firms were within the now-superseded categories of “Paging” and “Cellular and Other Wireless Telecommunications.”¹⁷⁰ Under the present

¹⁶⁶ 13 C.F.R. § 121.201, NAICS code 517911.

¹⁶⁷ http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-_skip=800&-ds_name=EC0751SSSZ5&-_lang=en.

¹⁶⁸ *Trends in Telephone Service*, at tbls. 18.4, 18.5, 18.6, 18.7.

¹⁶⁹ U.S. Census Bureau, 2007 NAICS Definitions, 517210 Wireless Telecommunications Categories (Except Satellite), <http://www.census.gov/naics/2007/def/ND517210.HTM#N517210>.

¹⁷⁰ 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>.

and prior categories, the SBA has deemed a wireless business to be small if it has 1,500 or fewer employees.¹⁷¹ For the category of Wireless Telecommunications Carriers (except Satellite), Census data for 2007 shows that there were 1,383 firms that operated that year.¹⁷² 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. 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.¹⁷³ Of these, an estimated 261 have 1,500 or fewer employees and 152 have more than 1,500 employees.¹⁷⁴ 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.

76. *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.¹⁷⁵ The SBA has approved these definitions.¹⁷⁶ 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.

77. *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

¹⁷¹ 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).

¹⁷² 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.

¹⁷³ See *Trends in Telephone Service*, at tbl. 5.3.

¹⁷⁴ *Id.*

¹⁷⁵ 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 ¶ 194 (1997).

¹⁷⁶ 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*).

for 2007 shows 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.¹⁷⁸ The 2007 census also contains data for the specific category of “Paging” “that is classified under the seven-number NAICS code 5172101.”¹⁷⁹ 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.¹⁸⁰ Consequently, the Commission estimates that the majority of paging providers are small entities that may be affected by our action.

78. *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).¹⁸¹ Under the SBA small business size standard, a business is small if it has 1,500 or fewer employees.¹⁸² Census data for 2007 shows that there were 1,383 firms that operated that year.¹⁸³ 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.¹⁸⁴ Of these, an estimated 222 have 1,500 or fewer employees and 212 have more than 1,500 employees.¹⁸⁵ 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

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 13 C.F.R. § 121.201, NAICS code 517210.

¹⁷⁹ 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.

¹⁸⁰ See *Trends in Telephone Service*, at tbl. 5.3.

¹⁸¹ 13 C.F.R. § 121.201, NAICS code 517210.

¹⁸² *Id.*

¹⁸³ 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.

¹⁸⁴ *Trends in Telephone Service*, at tbl. 5.3.

¹⁸⁵ *Id.*

(SMR) Telephony services.¹⁸⁶ Of these, an estimated 261 have 1,500 or fewer employees and 152 have more than 1,500 employees.¹⁸⁷ 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.

79. *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.¹⁸⁸ 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.¹⁸⁹ These small business size standards, in the context of broadband PCS auctions, have been approved by the SBA.¹⁹⁰ 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.¹⁹¹ On April 15, 1999, the Commission completed the re-auction of 347 C-, D-, E-, and F-Block licenses in Auction No. 22.¹⁹² Of the 57 winning bidders in that auction, 48 claimed small business status and won 277 licenses.

80. 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.¹⁹³ Subsequent events concerning Auction 35, including judicial and agency determinations, resulted in a total of 163 C and F Block

¹⁸⁶ See *Trends in Telephone Service*, at tbl. 5.3.

¹⁸⁷ See *id.*

¹⁸⁸ 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 ¶¶ 57–60 (1996) (“*PCS Report and Order*”); see also 47 C.F.R. § 24.720(b).

¹⁸⁹ See *PCS Report and Order*, 11 FCC Rcd at 7852 ¶ 60.

¹⁹⁰ See *Alvarez Letter 1998*.

¹⁹¹ See *Broadband PCS, D, E and F Block Auction Closes*, Public Notice, Doc. No. 89838 (rel. Jan. 14, 1997).

¹⁹² 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 ¶ 46 (1998).

¹⁹³ See *C and F Block Broadband PCS Auction Closes; Winning Bidders Announced*, Public Notice, 16 FCC Rcd 2339 (2001).

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.¹⁹⁴ On May 21, 2007, the Commission completed an auction of 33 licenses in the A, C, and F Blocks in Auction No. 71.¹⁹⁵ Of the 12 winning bidders in that auction, five claimed small business status and won 18 licenses.¹⁹⁶ On August 20, 2008, the Commission completed the auction of 20 C-, D-, E-, and F-Block Broadband PCS licenses in Auction No. 78.¹⁹⁷ Of the eight winning bidders for Broadband PCS licenses in that auction, six claimed small business status and won 14 licenses.¹⁹⁸

81. *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*.¹⁹⁹ 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.²⁰⁰ A third auction of Narrowband PCS licenses was conducted in 2001. In that auction, five bidders won 317 Metropolitan Trading Areas and nationwide licenses.²⁰¹ Three of the winning bidders claimed status as a small or very small entity and won 311 licenses.

¹⁹⁴ See *Broadband PCS Spectrum Auction Closes; Winning Bidders Announced for Auction No. 58*, Public Notice, 20 FCC Rcd 3703 (2005).

¹⁹⁵ See *Auction of Broadband PCS Spectrum Licenses Closes; Winning Bidders Announced for Auction No. 71*, Public Notice, 22 FCC Rcd 9247 (2007).

¹⁹⁶ *Id.*

¹⁹⁷ See *Auction of AWS-1 and Broadband PCS Licenses Closes; Winning Bidders Announced for Auction 78*, Public Notice, 23 FCC Rcd 12749 (WTB 2008).

¹⁹⁸ *Id.*

¹⁹⁹ *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*”).

²⁰⁰ See Letter to Amy Zoslov, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, FCC, from Aida Alvarez, Administrator, SBA (Dec. 2, 1998).

²⁰¹ See *Narrowband PCS Auction Closes*, Public Notice, 16 FCC Rcd 18663 (WTB 2001).

82. *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.²⁰² For this service, the SBA uses the category of Wireless Telecommunications Carriers (except Satellite). Census data for 2007, which supersede data contained in the 2002 Census, show that there were 1,383 firms that operated that year.²⁰³ 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.

83. *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 defining “small” and “very small” businesses for purposes of determining their eligibility for special provisions such as bidding credits and installment payments.²⁰⁴ This small business standard 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.²⁰⁵ A “very small business” is defined as 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.²⁰⁶ The SBA has approved these small size standards.²⁰⁷ Auctions of Phase II licenses commenced on and closed in 1998.²⁰⁸ 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

²⁰² 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).

²⁰³ 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.

²⁰⁴ *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*, Third Report and Order, 12 FCC Rcd 10943, 11068-70 ¶¶ 291-295 (1997).

²⁰⁵ *Id.* at 11068 ¶ 291.

²⁰⁶ *Id.*

²⁰⁷ See Letter to Daniel Phythyon, Chief, Wireless Telecommunications Bureau, Federal Communications Commission, from Aida Alvarez, Administrator, Small Business Administration, dated January 6, 1998 (*Alvarez to Phythyon Letter 1998*).

²⁰⁸ See generally *220 MHz Service Auction Closes*, Public Notice, 14 FCC Rcd 605 (WTB 1998).

(EA) Licenses. Of the 908 licenses auctioned, 693 were sold.²⁰⁹ Thirty-nine small businesses won 373 licenses in the first 220 MHz auction. A second auction included 225 licenses: 216 EA licenses and 9 EAG licenses. Fourteen companies claiming small business status won 158 licenses.²¹⁰ A third auction included four licenses: 2 BEA licenses and 2 EAG licenses in the 220 MHz Service. No small or very small business won any of these licenses.²¹¹ In 2007, the Commission conducted a fourth auction of the 220 MHz licenses.²¹² Bidding credits were offered to small businesses. A bidder with attributed average annual gross revenues that exceeded \$3 million and did not exceed \$15 million for the preceding three years (“small business”) received a 25 percent discount on its winning bid. A bidder with attributed average annual gross revenues that did not exceed \$3 million for the preceding three years received a 35 percent discount on its winning bid (“very small business”). Auction 72, which offered 94 Phase II 220 MHz Service licenses, concluded in 2007.²¹³ In this auction, five winning bidders won a total of 76 licenses. Two winning bidders identified themselves as very small businesses won 56 of the 76 licenses. One of the winning bidders that identified themselves as a small business won 5 of the 76 licenses won.

84. *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.²¹⁴ 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.²¹⁵ The SBA has approved these small business size standards for the 800 MHz and 900 MHz SMR Services.²¹⁶ 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 1996.²¹⁷

²⁰⁹ See *FCC Announces It is Prepared to Grant 654 Phase II 220 MHz Licenses After Final Payment is Made*, Public Notice, 14 FCC Rcd 1085 (WTB 1999).

²¹⁰ See *Phase II 220 MHz Service Spectrum Auction Closes*, Public Notice, 14 FCC Rcd 11218 (WTB 1999).

²¹¹ See *Multi-Radio Service Auction Closes*, Public Notice, 17 FCC Rcd 1446 (WTB 2002).

²¹² See *Auction of Phase II 220 MHz Service Spectrum Scheduled for June 20, 2007, Notice and Filing Requirements, Minimum Opening Bids, Upfront Payments and Other Procedures for Auction 72*, Public Notice, 22 FCC Rcd 3404 (2007).

²¹³ See *Auction of Phase II 220 MHz Service Spectrum Licenses Closes, Winning Bidders Announced for Auction 72, Down Payments due July 18, 2007, FCC Forms 601 and 602 due July 18, 2007, Final Payments due August 1, 2007, Ten-Day Petition to Deny Period*, Public Notice, 22 FCC Rcd 11573 (2007).

²¹⁴ 47 C.F.R. §§ 90.810, 90.814(b), 90.912.

²¹⁵ *Id.*

²¹⁶ See *Alvarez Letter 1999*.

²¹⁷ *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).

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.²¹⁸ 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.²¹⁹ 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.²²⁰

85. 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 million size standard.²²¹ 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.²²² 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.

86. 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.²²³ 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.

87. *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.²²⁴ There are approximately 100 licensees in the Air-Ground Radiotelephone Service, and under that definition, the Commission estimates that almost all of them qualify as small entities

²¹⁸ *Id.*

²¹⁹ 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 18637 (WTB 1996).

²²⁰ See *Multi-Radio Service Auction Closes*, Public Notice, 17 FCC Rcd 1446 (WTB 2002).

²²¹ 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).

²²² See *800 MHz SMR Service Lower 80 Channels Auction Closes; Winning Bidders Announced*, Public Notice, 16 FCC Rcd 1736 (WTB 2000).

²²³ See generally 13 C.F.R. § 121.201, NAICS code 517210.

²²⁴ 13 C.F.R. § 121.201, NAICS codes 517210.

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.²²⁵ 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.²²⁶ These definitions were approved by the SBA.²²⁷ 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.

88. *Rural Radiotelephone Service.* The Commission has not adopted a size standard for small businesses specific to the Rural Radiotelephone Service.²²⁸ A significant subset of the Rural Radiotelephone Service is the Basic Exchange Telephone Radio System (“BETRS”).²²⁹ 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.²³⁰ Census data for 2007 shows that there were 1,383 firms that operated that year.²³¹ 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.

89. *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

²²⁵ *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 ¶¶ 28–42 (2005).

²²⁶ *Id.*

²²⁷ 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).

²²⁸ The service is defined in section 22.99 of the Commission’s Rules, 47 C.F.R. § 22.99.

²²⁹ BETRS is defined in sections 22.757 and 22.759 of the Commission’s Rules, 47 C.F.R. §§ 22.757 and 22.759.

²³⁰ 13 C.F.R. § 121.201, NAICS code 517210.

²³¹ 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.

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.²³² Census data for 2007 shows that there were 1,383 firms that operated that year.²³³ 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.

90. *Fixed Microwave Services.* Microwave services include common carrier,²³⁴ private-operational fixed,²³⁵ and broadcast auxiliary radio services.²³⁶ They also include the Local Multipoint Distribution Service (“LMDS”),²³⁷ the Digital Electronic Message Service (“DEMS”),²³⁸ and the 24 GHz Service,²³⁹ where licensees can choose between common carrier and non-common carrier status.²⁴⁰ 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.²⁴¹ For the category of Wireless Telecommunications Carriers (except Satellite), Census data for 2007 shows that there were 1,383 firms that operated that year.²⁴² 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

²³² 13 C.F.R. § 121.201, NAICS code 517210.

²³³ 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.

²³⁴ See 47 C.F.R. Part 101, Subparts C and I.

²³⁵ See *id.* Subparts C and H.

²³⁶ 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.

²³⁷ See 47 C.F.R. Part 101, Subpart L.

²³⁸ See *id.* Subpart G.

²³⁹ See *id.*

²⁴⁰ See 47 C.F.R. §§ 101.533, 101.1017.

²⁴¹ 13 C.F.R. § 121.201, NAICS code 517210.

²⁴² 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.

Commission estimates that virtually all of the Fixed Microwave licensees (excluding broadcast auxiliary licensees) would qualify as small entities under the SBA definition.

91. *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.²⁴³ 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.²⁴⁴ Under that SBA small business size standard, a business is small if it has 1,500 or fewer employees.²⁴⁵ Census data for 2007 shows that there were 1,383 firms that operated that year.²⁴⁶ 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.

92. *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.²⁴⁷ 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.²⁴⁸ The SBA has approved these small business size standards.²⁴⁹ 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.

93. *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

²⁴³ This service is governed by Subpart I of Part 22 of the Commission's Rules. See 47 C.F.R. §§ 22.1001-22.1037.

²⁴⁴ 13 C.F.R. § 121.201, NAICS code 517210.

²⁴⁵ *Id.*

²⁴⁶ 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.

²⁴⁷ 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).

²⁴⁸ *Id.*

²⁴⁹ 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).

(“EBS”) (previously referred to as the Instructional Television Fixed Service (“ITFS”).²⁵⁰ 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.²⁵¹ 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.²⁵² 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 conducted Auction 86, the sale of 78 licenses in the BRS areas.²⁵³ 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.²⁵⁴ Auction 86 concluded in 2009 with the sale of 61 licenses.²⁵⁵ 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.

94. In addition, the SBA’s Cable Television Distribution Services small business size standard is applicable to EBS. There are presently 2,032 EBS licensees.

²⁵⁰ *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 ¶ 7 (1995).

²⁵¹ 47 C.F.R. § 21.961(b)(1).

²⁵² 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.

²⁵³ *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).

²⁵⁴ *Id.* at 8296.

²⁵⁵ *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).

All but 100 of these licenses are held by educational institutions. Educational institutions are included in this analysis as small entities.²⁵⁶ 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.”²⁵⁷ 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.²⁵⁸ To gauge small business prevalence for these cable services we must, however, use the most current census data. Census data for 2007 shows that there were 1,383 firms that operated that year.²⁵⁹ 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”.

95. In the 1998 and 1999 LMDS auctions,²⁶⁰ 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.²⁶¹ 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.²⁶² These definitions of “small business” and “very small business” in the context of the LMDS auctions have been approved by the SBA.²⁶³ In the first LMDS auction, 104

²⁵⁶ 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.

²⁵⁷ U.S. Census Bureau, 2007 NAICS Definitions, 517110 Wired Telecommunications Carriers, (partial definition), www.census.gov/naics/2007/def/ND517110.HTM#N517110.

²⁵⁸ 13 C.F.R. § 121.201, NAICS code 517210.

²⁵⁹ 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.

²⁶⁰ 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.)

²⁶¹ See *LMDS Order*, 12 FCC Rcd at 12545.

²⁶² *Id.*

²⁶³ See Letter to Daniel Phythyon, Chief, Wireless Telecommunications Bureau (FCC) from A. Alvarez, Administrator, SBA (January 6, 1998).

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.

96. *218-219 MHz Service.* The first auction of 218-219 MHz spectrum resulted in 174 entities winning licenses for 594 Metropolitan Statistical Area (“MSA”) licenses. Of the 594 licenses, 567 were won by 167 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.²⁶⁴ 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.²⁶⁵ 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.²⁶⁶ These size standards will be used in future auctions of 218-219 MHz spectrum.

97. *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.²⁶⁷ To gauge small business prevalence for these cable services we must, however, use the most current census data. Census data for 2007 shows that there were 1,383 firms that operated that year.²⁶⁸ 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

²⁶⁴ 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).

²⁶⁵ *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*”).

²⁶⁶ *Id.*

²⁶⁷ 13 C.F.R. § 121.201, NAICS code 517210.

²⁶⁸ 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.

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, Teligent²⁶⁹ 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.

98. *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.²⁷⁰ "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.²⁷¹ The SBA has approved these small business size standards.²⁷² These size standards will apply to the future auction, if held.

99. *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.²⁷³ The second has a size standard of \$25 million or less in annual receipts.²⁷⁴

100. 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."²⁷⁵ Census Bureau data for 2007 show that 512 Satellite Telecommunications firms that operated for that entire year.²⁷⁶ Of this total, 464 firms had annual receipts of under \$10 million, and 18 firms had receipts of \$10 million to

²⁶⁹ 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.

²⁷⁰ *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 ¶ 77 (2000); *see also* 47 C.F.R. § 101.538(a)(2).

²⁷¹ *Id.*; *see also* 47 C.F.R. § 101.538(a)(1).

²⁷² *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).

²⁷³ 13 C.F.R. § 121.201, NAICS code 517410.

²⁷⁴ 13 C.F.R. § 121.201, NAICS code 517919.

²⁷⁵ U.S. Census Bureau, 2007 NAICS Definitions, 517410 Satellite Telecommunications.

²⁷⁶ *See* http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-_skip=900&-ds_name=EC0751SSSZ4&-_lang=en.

\$24,999,999.²⁷⁷ Consequently, the Commission estimates that the majority of Satellite Telecommunications firms are small entities that might be affected by our action.

101. 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.”²⁷⁸ For this category, Census Bureau data for 2007 shows that there were a total of 2,383 firms that operated for the entire year.²⁷⁹ Of this total, 2,347 firms had annual receipts of under \$25 million and 12 firms had annual receipts of \$25 million to \$49, 999,999.²⁸⁰ 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

102. 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.

103. *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.”²⁸¹ 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 shows that there were 1,383

²⁷⁷ See http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-_skip=900&-ds_name=EC0751SSSZ4&-_lang=en.

²⁷⁸ <http://www.census.gov/cgi-bin/sssd/naics/naicsrch?code=517919&search=2007%20NAICS%20Search>.

²⁷⁹ http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-_skip=900&-ds_name=EC0751SSSZ4&-_lang=en.

²⁸⁰ http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-_skip=900&-ds_name=EC0751SSSZ4&-_lang=en.

²⁸¹ 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).

firms that operated that year.²⁸² 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.

104. *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 cable company" is one serving 400,000 or fewer subscribers, nationwide.²⁸³ Industry data indicate that, of 1,076 cable operators nationwide, all but eleven are small under this size standard.²⁸⁴ In addition, under the Commission's rules, a "small system" is a cable system serving 15,000 or fewer subscribers.²⁸⁵ Industry data indicate that, of 6,635 systems nationwide, 5,802 systems have under 10,000 subscribers, and an additional 302 systems have 10,000-19,999 subscribers.²⁸⁶ Thus, under this second size standard, most cable systems are small.

105. *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."²⁸⁷ 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.²⁸⁸ Industry data indicate that, of 1,076 cable operators nationwide, all but ten are small under this size standard.²⁸⁹

²⁸² 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.

²⁸³ 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).

²⁸⁴ These data are derived from: R.R. BOWKER, BROADCASTING & CABLE YEARBOOK 2006, TOP 25 CABLE/SATELLITE OPERATORS, pages A-8 & C-2 (data current as of June 30, 2005); WARREN COMMUNICATIONS NEWS, TELEVISION & CABLE FACTBOOK 2006, OWNERSHIP OF CABLE SYSTEMS IN THE UNITED STATES, pages D-1805 to D-1857.

²⁸⁵ 47 C.F.R. § 76.901(c).

²⁸⁶ WARREN COMMUNICATIONS NEWS, TELEVISION & CABLE FACTBOOK 2008, U.S. CABLE SYSTEMS BY SUBSCRIBER SIZE, page F-2 (data current as of Oct. 2007). The data do not include 851 systems for which classifying data were not available.

²⁸⁷ 47 U.S.C. § 543(m)(2); see 47 C.F.R. § 76.901(f) & nn. 1-3.

²⁸⁸ 47 C.F.R. § 76.901(f); see, *FCC Announces New Subscriber Count for the Definition of Small Cable Operator*, Public Notice, 16 FCC Rcd 2225 (Cable Services Bureau 2001).

²⁸⁹ 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).

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,²⁹⁰ and therefore we are unable to estimate more accurately the number of cable system operators that would qualify as small under this size standard.

106. *Open Video Services.* Open Video Service (OVS) systems provide subscription services.²⁹¹ 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.²⁹² The OVS framework provides opportunities for the distribution of video programming other than through cable systems. Because OVS operators provide subscription services,²⁹³ OVS falls within the SBA small business size standard covering cable services, which is “Wired Telecommunications Carriers.”²⁹⁴ 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.²⁹⁵ In addition, we note that the Commission has certified some OVS operators, with some now providing service.²⁹⁶ Broadband service providers (“BSPs”) are currently the only significant holders of OVS certifications or local OVS franchises.²⁹⁷ 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.²⁹⁸ Affiliates of Residential

²⁹⁰ 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).

²⁹¹ See 47 U.S.C. § 573.

²⁹² 47 U.S.C. § 571(a)(3)-(4). See *13th Annual Report*, 24 FCC Rcd at 606, ¶ 135.

²⁹³ See 47 U.S.C. § 573.

²⁹⁴ U.S. Census Bureau, 2007 NAICS Definitions, 517110 Wired Telecommunications Carriers, <http://www.census.gov/naics/2007/def/ND517110.HTM#N517110>.

²⁹⁵ See http://factfinder.census.gov/servlet/IBQTable?_bm=y&-fds_name=EC0700A1&-geo_id=&-_skip=600&-ds_name=EC0751SSSZ5&-_lang=en.

²⁹⁶ A list of OVS certifications may be found at <http://www.fcc.gov/mb/ovs/csovscer.html>.

²⁹⁷ 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.

²⁹⁸ See <http://www.fcc.gov/mb/ovs/csovscer.html> (current as of February 2007).

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

107. *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,²⁹⁹ and (2) All Other Information Services.³⁰⁰

108. *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,³⁰¹ which has an SBA small business size standard of 1,500 or fewer employees.³⁰² These are also labeled "broadband." The latter are within the category of All Other Telecommunications,³⁰³ which has a size standard of annual receipts of \$25 million or less.³⁰⁴ These are labeled non-broadband.

109. 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.³⁰⁵ For the second category, the data show that 1,682 firms operated

²⁹⁹ 13 C.F.R. § 121.201, NAICS code 519130 (establishing a \$500,000 revenue ceiling).

³⁰⁰ 13 C.F.R. § 121.201, NAICS code 519190 (establishing a \$6.5 million revenue ceiling).

³⁰¹ U.S. Census Bureau, 2007 NAICS Definitions, 517110 Wired Telecommunications Carriers, <http://www.census.gov/naics/2007/def/ND517110.HTM#N517110>.

³⁰² 13 C.F.R. § 121.201, NAICS code 517110.

³⁰³ U.S. Census Bureau, 2007 NAICS Definitions, "517919 All Other Telecommunications," <http://www.census.gov/naics/2007/def/ND517919.HTM#N517919>.

³⁰⁴ 13 C.F.R. § 121.201, NAICS code 517919 (updated for inflation in 2008).

³⁰⁵ 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.

for the entire year.³⁰⁶ 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.

110. *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.³⁰⁷ The SBA deems businesses in this industry with 500 or fewer employees small.³⁰⁸ 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 to 999 employees.³⁰⁹ Consequently, we estimate the majority of these firms are small entities that may be affected by our proposed actions.

111. *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.³¹⁰ The SBA has developed a small business size standard for this category; that size standard is \$25 million or less in average annual receipts.³¹¹ According to Census Bureau data for 2007, there were 8,060 firms in this category that operated for the entire year.³¹² Of these, 6,726 had annual receipts of under \$25 million, and 155 had receipts between

³⁰⁶ U.S. Census Bureau, 2007 Economic Census, Subject Series: Information, “Establishment and Firm Size,” NAICS code 5179191 (rel. Nov. 19, 2010) (receipts size).

³⁰⁷ <http://www.census.gov/cgi-bin/sssd/naics/naicsrch?code=519130&search=2007%20NAICS%20Search>

³⁰⁸ http://www.sba.gov/sites/default/files/Size_Standards_Table.pdf.

³⁰⁹ http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-_skip=1000&-ds_name=EC0751SSSZ5&-_lang=en.

³¹⁰ U.S. Census Bureau, 2007 NAICS Definitions, “518210 Data Processing, Hosting, and Related Services”; <http://www.census.gov/naics/2007/def/ND518210.HTM#N518210>.

³¹¹ 13 C.F.R. § 121.201, NAICS code 518210.

³¹² http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-_skip=1000&-ds_name=EC0751SSSZ4&-_lang=en.

\$25 million and \$49,999,999 million.³¹³ Consequently, we estimate that the majority of these firms are small entities that may be affected by our proposed actions.

112. *All Other Information Services.* “This industry comprises establishments primarily engaged in providing other information services (except new syndicates and libraries and archives).”³¹⁴ Our action pertains to interconnected VoIP services, which could be provided by entities that provide other services such as e-mail, 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.³¹⁵ According to Census Bureau data for 2007, there were 367 firms in this category that operated for the entire year.³¹⁶ Of these, 334 had annual receipts of under \$5 million, and an additional 11 firms had receipts of between \$5 million and \$9,999,999.³¹⁷ 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

113. We summarize below the recordkeeping and certification obligations of the accompanying *Report and Order*. Additional information on each of these requirements can be found in the *Report and Order*. These requirements will apply to all entities that must comply with Section 716 and Section 718.

114. *Recordkeeping.* The *Report and Order* requires, beginning one year after the effective date of the *Report and Order*, that each manufacturer of equipment used to provide ACS and each provider of such services subject to Sections 255, 716, and 718 not otherwise exempt under the *Report and Order*, maintain certain records. These records document the efforts taken by a manufacturer or service provider to implement Sections 255, 716, and 718. The *Report and Order* adopts the recordkeeping requirements of the CVAA, which specifically include: (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. Additionally, while manufacturers and providers are not required to

³¹³ http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-_skip=1000&-ds_name=EC0751SSSZ4&-_lang=en.

³¹⁴ U.S. Census Bureau, “2002 NAICS Definitions: 519190 All Other Information Services”; <http://www.census.gov/epcd/naics02/def/NDEF519.HTM>.

³¹⁵ 13 C.F.R. § 121.201, NAICS code 519190. *See also* http://www.sba.gov/sites/default/files/Size_Standards_Table.pdf

³¹⁶ http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-_skip=1200&-ds_name=EC0751SSSZ4&-_lang=en.

³¹⁷ http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-_skip=1100&-ds_name=EC0751SSSZ4&-_lang=en.

keep records of their consideration of the four achievability factors, they must be prepared to carry their burden of proof, which requires greater than conclusory or unsupported claims. Similarly, entities that rely on third party solutions to achieve accessibility must be prepared to produce relevant documentation.

115. These recordkeeping requirements are necessary to facilitate enforcement of the rules adopted in the *Report and Order* and proposed in the *Further Notice*. The *Report and Order* builds flexibility into the recordkeeping obligations by allowing covered entities to keep records in any format, recognizing the unique recordkeeping methods of individual entities. Because complaints regarding accessibility of a product or service may not occur for years after the release of the product or service, the *Report and Order* requires covered entities to keep records for two years from the date the product ceases to be manufactured or a service is offered to the public. The *Further Notice* seeks comment on whether any of the recordkeeping and certification requirements should be modified for entities covered under Section 718.

116. *Annual Certification Obligations*. The CVAA and the *Report and Order* require an officer of providers of ACS and ACS equipment submit to the Commission an annual certificate that records are kept in accordance with the above recordkeeping requirements, unless such manufacturer or provider is exempt from compliance with Section 716 under applicable rules.³¹⁸ The certification must be supported with an affidavit or declaration under penalty of perjury, signed and dated by an authorized officer of the entity with personal knowledge of the representations provided in the company's certification, verifying the truth and accuracy of the information. The certification must be filed with the Consumer and Governmental Affairs Bureau on or before April 1 each year for records pertaining to the previous calendar year. The *Further Notice* seeks comment on whether any of the recordkeeping and certification requirements should be modified for entities covered under Section 718.

117. *Costs of Compliance*. There is an upward limit on the cost of compliance. Under the CVAA and *Report and Order* accessibility is required for entities under Section 716 and Section 718 unless it is not achievable. Under two of the four achievability factors from the Act and adopted in the *Report and Order*, which also apply to any rules adopted pursuant to this *Further Notice* implementing Section 718, covered entities may demonstrate that accessibility is not achievable based on the nature and cost of steps needed or the technical and economic impact on the entity's operation.³¹⁹ Entities that are not otherwise exempt or excluded under the *Report and Order*, or subsequent to this *Further Notice*, must nonetheless be able to demonstrate that they conducted an achievability analysis, which necessarily requires the retention of some records.

E. Steps Taken to Minimize Significant Economic Impact on Small Entities and Significant Alternatives Considered

³¹⁸ 47 U.S.C. 618(a)(5)(B).

³¹⁹ See 47 U.S.C. § 617(g).

118. The RFA requires an agency to describe any significant alternatives it 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.”³²⁰

119. We note that the *Further Notice* continues and preserves the steps taken in the *Report and Order* to minimize adverse economic impact on small entities. The *Further Notice* will continue to promote flexibility for all entities in several ways. The *Further Notice* does not alter the ability of an entity with obligations under Section 716 to seek a waiver for products or services that are not designed primarily for ACS, and does not impact the conclusion in the *Report and Order* that customized equipment is excluded. Further, small entities may continue to comply with both Section 716 and Section 718 by demonstrating that accessibility is not achievable, or may rely on third party software, applications, equipment, hardware, or customer premises equipment to meet their obligations under Section 716 and Section 718, if achievable. As stated below, the *Further Notice* also leaves unchanged the requirements adopted in the *Report and Order* that allow covered entities to keep records in any format they wish as this flexibility affords small entities the greatest flexibility to choose and maintain the recordkeeping system that best suits their resources and their needs.

120. The *Further Notice* also seeks comment on making permanent the temporary exemption from the Section 716 and Section 717 obligations for all small entities that was adopted in the accompanying *Report and Order*. Specifically, the *Report and Order* minimized the economic impact on small entities by temporarily exempting entities that manufacture ACS equipment or provide ACS that, along with any affiliates, meet the criteria for a small business concern for their primary industry under SBA’s rules and size standards.³²¹ Correspondingly, the *Further Notice* now seeks to develop a record that would allow the Commission to determine whether to permanently minimize the impact on small entities that are subject to the requirements of Sections 716.

121. The *Further Notice* also seeks comment on alternative approaches to the standards used to provide the temporary small business exemption even as it seeks to develop a record on whether to make the existing exemption a permanent one. In essence, the *Further Notice* looks to the temporary exemption as a proposal for a permanent exemption and seeks to develop record support for continuing to minimize the economic and regulatory impact on small entities. In considering alternatives to the approach proposed for a permanent exemption, the *Further Notice* seeks comment on how it can refine the proposed approach.

³²⁰ 5 U.S.C. § 603(c)(1)-(c)(4).

³²¹ 13 C.F.R. §§ 121.101 – 121.201.

122. With respect to recordkeeping and certification requirements, and as described above, the *Further Notice* leaves unchanged the requirements adopted in the *Report and Order* that allow covered entities to keep records in any format they wish. In the *Report and Order*, we found that this approach took into account the variances in covered entities (*e.g.*, size, experience with the Commission), recordkeeping methods, and products and services covered by the CVAA. Moreover, we found that it also provided the greatest flexibility to small businesses and minimized the economic impact that the statutorily mandated requirements impose on small businesses. Correspondingly, we considered and rejected the alternative of imposing a specific format or one-size-fits-all system for recordkeeping that could potentially impose greater burdens on small businesses. Furthermore, the certification requirement is possibly less burdensome on small businesses than large, as it merely requires certification from an officer that the necessary records were kept over the previous year; this is presumably a less resource intensive certification for smaller entities. The *Further Notice* seeks comment on whether any of the recordkeeping requirements should be modified for entities covered by Section 718.

F. Federal Rules that May Duplicate, Overlap, or Conflict with Proposed Rules

123. Section 255(e) of the Act, as amended, 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.³²² We view the Access Board’s current guidelines as well as its draft guidelines³²³ as starting points for our interpretation and implementation of Sections 716 and 717 of the Act, 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, our rules do not overlap, duplicate, or conflict with either Access Board Final Rules,³²⁴ or (if later adopted) the Access Board Draft Guidelines. Where obligations under Section 255 and Section 716 overlap, for instance for accessibility requirements for interconnected VoIP, we clarify in the *Report and Order* which rules govern the entities’ obligations.

³²² 47 U.S.C. § 255(e).

³²³ 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>.

³²⁴ See Part 1193 of the Access Board Rules, 36 C.F.R. Part 1193.

APPENDIX F

The IT and Telecom RERCs Proposal regarding Accessibility of Information Content

1) Not Impede or Impair

A critical element of the Act is that carriers and product or service providers not impede or impair accessibility through the implementation of their products or services. This is expressed in different ways in the Act but it is useful to create a single concept since the form and format of technologies is changing so rapidly.

The concept of "shall not impede or impair accessibility" would capture succinctly the different concepts or issues that have been identified.

"Shall not impede or impair accessibility or accessibility related information" would cover

- o shall not strip off accessibility information (for example captions or video description, etc) that are present [in media or video-conference information]
- o shall not install equipment or features that can't or don't support accessibility information
 - e.g. equipment or features are not installed that are incapable of supporting any accessibility related content that is present or transmitted across the network.
- o shall not configure network equipment such that it would block or discard accessibility information
 - e.g. on a SIP-based VoIP call that includes text in parallel with voice, the gateways, firewalls, routers, etc are not configured to pass the voice stream but block or drop the text stream.
- o shall convey any accessibility related information that is present in an industry recognized standard format
 - e.g. if captions are included with video (in a standard way) they must not be stripped off purposefully or accidentally during storage
- o shall display any accessibility related information that is present in an industry recognized standard format
 - e.g. if captions are included with video (in a standard way) it must be possible to display them. They can be always displayed, or they can be displayed on request - but they must not be suppressed or inaccessible.

- o shall not block users from substituting accessible versions of content
 - e.g. a video conferencing service/product would not prevent a user from substituting an accessible video in place of an inaccessible version displayed as part of a video-conferencing presentation. For example a version of the video with embedded sign language interpretation obtained from another source or created from the original source by a service that adds the embedded sign language interpreter could be substituted for the original video.
- o shall not prevent the incorporation or passing along of accessibility related information
 - e.g. authoring tools must allow authors to include accessibility information they have (for example captions) with regular information (for example audio-video information) so they can be sent together.

"Shall not impede or impair" would not include, or imply, a requirement to ADD accessibility information - only to "not impede or impair" the integrity, incorporation, or use of accessibility related information/content that is present and/or desired to be conveyed.

APPENDIX G**The IT and Telecom RERCs Proposal regarding Performance Objectives****Aspirational Goal****and****Testable Functional Performance Criteria***The Goal*

That all functionality of an ACS be accessible to people regardless of their abilities or disabilities, including but not limited to people who:

- have low vision or are blind
- have a colorblindness
- are hard of hearing or are deaf
- have impaired speech or are unable to speak
- have limited or no tactile sensitivity
- have limited or no reach, limited or no strength, or limited or no ability to manipulate
- have cognitive, language, or learning disabilities
- have seizure disorders
- have any combination of the above

Testable Performance Criteria

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

NOTE: Testing can be done with assistive technologies where available to users.

- (i) **Operable without vision.** ACS shall provide at least one mode that does not require user vision.

- A sufficient test would be that typical target users, with no prior knowledge of the product, can use it for the first time while blindfolded (unless they are already totally blind), using only standard documentation. Assistive technologies, or existing peripheral devices, or specialized customer premises equipment commonly used by individuals with disabilities to achieve access, that are

available to users of this product can be used as part of the test. Test subjects can be trained in the use of the access technology before the test - but not with the product being tested.

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

■ A sufficient test would be that typical target users with no prior knowledge of the product can use it for the first time while using a device that makes the product visually appear to be at least 3.5 times the typical viewing distance from the user. Assistive technologies available to users of this product can be used as part of the test. Test subjects can be trained in use of the assistive technology before the test - but not with the product being tested.

- (iii) **Operable with little or no color perception.** ACS shall provide at least one mode that does not require user color perception.

■ A sufficient test would be that typical target users with no prior knowledge of the product can use it for the first time while viewing the product through a black and white monitor. Assistive technologies available to users of this product can be used as part of the test. Test subjects can be trained in use of the assistive technology before the test - but not with the product being tested.

- (iv) **Operable without hearing.** ACS shall provide at least one mode that does not require user auditory perception.

■ A sufficient test would be that typical target users with no prior knowledge of the product can use it for the first time while (unless they are already totally deaf) wearing a set of white-noise headsets that prevent hearing of any product sounds, including any natural mechanical sounds from the product, using only standard documentation. Assistive technologies available to users of this product can be used as part of the test. Test subjects can be trained in use of the assistive technology before the test - but not with the product being tested.

- (v) **Operable with limited manual dexterity.** ACS shall provide at least one mode that does not require gestures, pinching, twisting of the wrist, tight grasping, or simultaneous actions.

■ A sufficient test would be that typical target users with no prior knowledge of the product can use it for the first time while using only a 1/8 inch dowel, 12 inches in length, held only within the first 1 inch at the far end from the product. For this provision the dowel can be conductive. Assistive technologies available to users of this product can be used as part of the test. Test subjects can be trained in use of the assistive technology before the test - but not with the product being tested.

- (vi) **Operable with limited reach and strength.** ACS shall provide at least one mode that is operable within ADAAG limits for user reach and strength.

- A sufficient test would be a test that controls needed to access full functionality are within reach (as defined by the reach limits in the current ADAAG for installed or stand alone products) and operable with less than 5 pounds (22.2N) of force in both parallel and perpendicular directions.

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

- A sufficient test would be that typical target users with no prior knowledge of the product can use it for the first time while using a 12 inch non-conducting wooden dowel held at the far end of the dowel from the screen. Assistive technologies available to users of this product can be used as part of the test. Test subjects can be trained in use of the assistive technology before the test - but not with the product being tested.

(viii) **Operable without speech.** ACS shall provide at least one mode that does not require user speech.

- A sufficient test would be that typical target users with no prior knowledge of the product can use it for the first time without using speech.

(ix) **Operable without reading ability.** ACS shall provide at least one mode that does not require any reading ability.

- A sufficient test would be that typical target users with no prior knowledge of the product can use it for the first time while all text on the product and its displays has been covered or replaced using a font where the characters all look alike (e.g. all letters are changed to visually be the letter "k" - though they retain their ASCII or UNICODE value so they can be read by assistive technologies). Assistive technologies available to users of this product can be used as part of the test. Test subjects can be trained in use of the assistive technology before the test - but not with the product being tested.

(x) **Operable without time dependent controls.** ACS shall provide at least one mode that does not require a response time of less than 10 times the average user response time unless the time limit is a required part of a real-time event (for example, an auction), and no alternative to the time limit is possible; or the time limit is essential and extending it would invalidate the activity; or the time limit is longer than 20 hours.

- A sufficient test would be that typical target users with no prior knowledge of the product, for each time limit that is set by the product, can turn off the time limit before encountering it; or can adjust the time limit before encountering it over a wide range that is at least ten times the length of the default setting; or is warned before time expires and given at least 20 seconds (10 times an average user's response time) to extend the time limit with a simple action (for example, "press the space bar"), and the user is allowed to extend the time limit at least ten times.

(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.** ACS shall provide visual information through at least one mode in auditory form.
- (ii) **Availability of visual information for low vision users.** ACS shall provide visual information through at least one mode to users with visual acuity between 20/70 and 20/200 without relying on audio.
 - A sufficient test would be that typical target users with no prior knowledge of the information can read it while using a device that makes the information visually appear to be at least 3.5 times the typical viewing distance from the user. Assistive technologies available to users of this information can be used as part of the test. Test subjects can be trained in use of the assistive technology before the test - but not with this information.
- (iii) **Availability of visual information for users with little or no color perception.** ACS shall provide visual information through at least one mode to users with visual acuity between 20/70 and 20/200 without relying on audio.
 - A sufficient test would be that typical target users with no prior knowledge of the information can use it for the first time while viewing the information through a black and white monitor. Assistive technologies available to users of this information can be used as part of the test. Test subjects can be trained in use of the assistive technology before the test - but not with this information.
- (iv) **Access to moving text.** ACS shall provide moving text in at least one static presentation mode at the option of the user.
- (v) **Availability of auditory information.** ACS shall provide auditory information through at least one mode in visual form or, if an alert, in visual or simple vibratory form.
- (vi) **Availability of auditory information for people who are hard of hearing.** Where understanding of speech is required for the use of ACS which has user controls, ACS shall provide at least one mode that allows user control of volume by at least +15 dB over the default volume level unless the default level is already 80 dB SPL or greater, and provide the user with the ability to freely connect alternative audio devices through an industry standard connection.

Prevention of visually induced seizures. ACS shall provide a mode where information displayed visually does not flash more than 3 times in any one second period unless it is below WCAG 2.0 General Flash and Red Flash Thresholds or equivalent.

Availability of audio cutoff. Where a product is intended for individual user operation and delivers audio output through an external speaker, ACS shall 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.

Non interference with hearing technologies. Product that are held up to the ear during use shall provide one mode where interference with hearing technologies (including hearing aids, cochlear implants, and assistive listening devices) meets M2 or greater for ANSI C63.19-2007.

Note - this specifies a technical standard but is not a design guideline. It is a performance guideline that states what should be achieved but not what technique should be used to meet it.

Hearing aid coupling. Where a product delivers output by an audio transducer which is normally held up to the ear, ACS shall provide a means for effective wireless coupling to hearing aids [meeting standard Section 508 802.2.4 Wireless Adapter], a. **Note:** the Section 508 802.2.4 Wireless Adapter reads:

- i. **802.2.4 Wireless Adapter.** ICT not designed for use in a public location shall provide a wireless adapter that conforms to 802.2.4.1 through 802.2.4.3.
- ii. **802.2.4.1 Size and Battery Life.** The wireless adaptor shall have a similar size and battery life performance to the ICT for which it is provided,
- iii. **802.2.4.2 Without Assistance.** The wireless adaptor shall allow the user to pair the adapter to the product without assistance,
- iv. **802.2.4.3 Without Cable.** The wireless adaptor shall allow the user to pair the adapter to the product without requiring the user to plug in a cable for each use.

Provide Error Correction Assistance. When an error is detected and information for correction is known, this information shall be provided in a manner that meets the other functional performance provisions.

- a. E.g. detectably misspelled or miss-entered data, or invalid actions
- (xii) **Word/Phrase look-up.** ACS with keyboard and mouse or touchscreen shall provide a way for the user to look up the meaning of words or phrases.

(3) **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.

(4) **Compatible:** The term compatible shall mean compatible with peripheral devices and specialized customer premises equipment (equipment on the customer's person or premises), and in compliance with the following provisions, as applicable:

- (i) **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 connection 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 connection and in cross-industry standard format. The cross-industry standard connection shall not require manipulation of a connector by the user.

-
- (ii) **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 connection.
- (iii) **Real-time text connectability.** Products that provide a function allowing voice communication and which do not themselves provide real-time text functionality shall provide a standard non-acoustic connection point for a real-time text device.
- a. If the ACS connects to the PSTN it shall use a TTY format that is supported by all other products and systems including emergency call centers. 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.
 - i. Note: the only TTY format supported universally in the US including emergency systems is TIA-825a
 - b. If the ACS connects to VoIP via SIP it shall use a RTT format that is supported by the largest number of products and systems or allow connection of a device that supports that format.
 - i. Note: At this time, the only RTT format that is widely used on VoIP via SIP and the only one named in emergency standards and guidelines is RFC 4103.
 - c. If the ACS connects to VoIP using any other transport standard it shall provide real-time text using the real-time text interoperability standard chosen for and supported by the largest number of products on that transport.
- (iv) **Real-time text signal compatibility.** Products, including those providing voice communication functionality, shall support use of all cross-manufacturer non-proprietary standard signals used by TTYs and other Real-time text formats..

**STATEMENT OF
CHAIRMAN JULIUS GENACHOWSKI**

Re: 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

Today, we are taking a major step forward in helping Americans with disabilities share in the promise of the broadband revolution. By adopting rules today to implement the Twenty-First Century Communications and Video Accessibility Act, the most significant disabilities legislation since passage of the Americans with Disabilities Act, we will enable individuals with disabilities to fully access the wide array of digital technologies that have done so much to improve Americans' quality of life. As our reliance on technological innovations driven by broadband continues to enhance the way we communicate, this Order will ensure that people with disabilities are not left behind; that they can compete for jobs, participate in online commerce, and engage in civic dialogue using the advanced communications technologies of today – and the technologies of tomorrow that haven't even been invented yet.

In this Order we have observed the balance that Congress struck in the Act - stimulating the development of accessibility solutions that will provide a new world of opportunities for people with disabilities and avoiding counterproductive burdens on product development. The rules we adopt today will promote innovation and investment in this important space and benefit millions of people with disabilities. I thank the staff and my colleagues for their continued dedication to making advanced communications services accessible to all Americans.

**STATEMENT OF
COMMISSIONER MICHAEL J. COPPS
APPROVING IN PART AND DISSENTING IN PART**

Re: 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

Last October, I was thrilled to watch the President sign into law the Twenty First Century Communications and Video Accessibility Act. Thanks to champions on Capitol Hill including Congressman Markey and Senators Pryor and Kerry, the most sweeping civil rights legislation since the Americans with Disabilities Act became the law of the land. The statute confers a great responsibility on the FCC to craft new rules to ensure that the 54 million Americans with disabilities have access to advanced communications services and equipment that are essential for participation in our society. Access to advanced communications services is no longer a luxury, it's a necessity.

Working with many disabilities communities has been one of the great joys of my time at the Commission. These advocates have helped me understand the magnitude and importance of the challenges faced by so many people with disabilities, but also to realize the opportunity we have to apply the wonders of new technologies to help overcome those challenges. Their tireless advocacy is another reason the CVAA is a reality.

There is much to commend about the Order and Further Notice of Proposed Rulemaking the Commission adopts today. In most ways, we have struck the right balance between accessibility requirements and industry flexibility that promotes continued innovation. In particular, I am pleased that the item adopts an interim exemption for small businesses with a definite sunset date that requires the Commission to revisit these definitions in a careful and measured way, based on a full record. Anything less could mean denying people with disabilities in more rural locations served by small providers the benefits of this empowering law. I am also pleased that, while we allow an appropriate amount of time for industry to comply with our new rules, we also make clear that the Commission's door is open to help consumers resolve accessibility problems in the interim.

I thank the Chairman and my fellow Commissioners for working together to greatly improve the process through which the Commission will deal with requests for waiver from the rules. On this point, the Order recognizes the need to process waiver requests in a timely manner, while giving Commission staff the time necessary to review the requests. This will, in my view, prove to be a critical piece of our implementation. I want to caution, though, that this is an area where the exception could swallow the rule if

we're not diligent. The convergence of multiple services into single electronic devices is now the norm – for example, even gaming devices increasingly have functionality that looks like advanced communications services. As we work through these questions, we must be mindful of Congress' intent that people with disabilities have access to new technologies and services.

There is one area, however, where I cannot join in approving the item. I believe that section 716(a)(1) of the Act is clear that all software is subject to accessibility requirements. The Order instead finds the Act ambiguous on this point, and concludes that it's best to read this ambiguity to narrow the Act's accessibility reach. The Order says that much of the same software will be made accessible through a broader interpretation of section 716(b)(1), which governs service providers. Confused? So am I. When Congress said "software," I don't think it was ambiguous. Even if it were ambiguous, I think the better course, one more consistent with the goals of the Act, would be to interpret the ambiguity in favor of greater accessibility, rather than less. It's hard for me to understand why Congress would think that advanced communications software already loaded into a device should be accessible, but the same software bought separately, shouldn't. As a result, I must dissent from this part of the Order.

I want to again thank the Chairman and my fellow Commissioners for meaningful give-and-take as we worked through the legal and technical issues of this proceeding. I also thank the Wireless Telecommunications, Enforcement, and Consumer and Governmental Affairs bureaus for bringing us this item. I am pleased that, on balance, what we do today will bring advanced communications and expanded opportunities to people with disabilities. They have been waiting a long time – and we still have much work to do.

**STATEMENT OF
COMMISSIONER ROBERT M. McDOWELL**

Re: 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

I am pleased to support today's order implementing major provisions of the Twenty-First Century Communications and Video Accessibility Act. I also support the accompanying further notice of proposed rulemaking, which explores several related issues, including the small entity exemption, interoperable video conferencing services, and safe harbor technical standards, among others. We have created a flexible and sensible path forward whereby the 54 million Americans with disabilities will benefit from new Internet-based and digital advanced communications systems that have come to be essential in almost every aspect of life. At the same time, we have provided the certainty necessary for the innovators investing risk capital to continue to satisfy consumer demand with new products and services.

I applaud Chairman Genachowski and his team in achieving the balance sought by Congress as expressed in the statute. Completing this order and further notice was a collaborative effort of which we can all be proud. Thank you also to the folks in Wireless Telecommunications Bureau, the Consumer and Governmental Affairs Bureau, and the Enforcement Bureau for your time, energy and creativity.

**STATEMENT OF
COMMISSIONER MIGNON L. CLYBURN**

Re: 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

When Congress enacted the Twenty-First Century Communications and Video Accessibility Act of 2010, it sent three profound messages. First, as advanced communications services become more prevalent, we should no longer view them as luxuries, but as necessities. Second, the 54 million people living with disabilities in our Nation deserve greater access to these increasingly important services. Third, the communications industry must do more to promote accessibility to this community. The legislative history makes clear that a collaborative, bi-partisan effort was critical to the statute's enactment.

Congress properly directed the Commission to address a number of challenging implementation issues. Perhaps the most difficult one for me was whether we should interpret Section 716(a) of the CVAA to impose independent regulatory obligations on providers of software that the end user acquires separately from equipment used for advanced communications services. I see reasonable arguments on both sides of this issue. I voted to support the interpretation in the Report and Order for a few reasons. First, the interpretation we adopt for Section 716(b), with regard to the services that are covered under the CVAA, includes the services that advocates for people living with disabilities said should be covered. In fact, the Report and Order lists the specific services these advocates cited in a recent ex parte filing. In addition, the biennial review process the Act mandates will give us the opportunity to monitor the industry and determine, in the future, whether application of the CVAA's requirements directly to developers of consumer installed software is warranted. The dispute assistance and enforcement procedures we adopted should create the proper incentives for the industry to negotiate with advocates for the disabled community to promote greater accessibility of advanced communications services. I hope the industry and consumer advocates will approach any remaining disputes with the same collaborative energy that made the Act possible.

I commend Joel Gurin, Ruth Milkman, Rick Kaplan, Michele Ellison, and their talented staff members. They worked diligently, over the past year, to present us with an item that complies with both the language and spirit of the most significant accessibility legislation since the Americans with Disabilities Act.

