

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Implementation of Section 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
	)	

**PETITION FOR RECONSIDERATION**

Telecommunications for the Deaf and Hard of Hearing, Inc. (“TDI”), Trace R&D Center, University of Wisconsin-Madison, and Technology Access Program, Gallaudet University (collectively, the “Joint Commenters”), pursuant to Section 1.429 of the Federal Communications Commission’s (“FCC” or “Commission”) Rules,<sup>1</sup> hereby petition for partial reconsideration of the Commission’s Report and Order and Further Notice of Proposed Rulemaking, released on October 7, 2011, in the above-captioned proceeding.<sup>2</sup> Specifically, the

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<sup>1</sup> 47 C.F.R. § 1.429.

<sup>2</sup> *In the Matter of Implementation of Section 716 and 717 of the Communications Act of 1934, as Enacted by the Twenty-First Century Communications and Video Accessibility Act of 2010 (CG Dkt. 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 Dkt No. 96-198), In the Matter of Accessible Mobile Phone Options for People who are Blind, Deaf-Blind, or Have Low Vision (CG Dkt. No. 10-145), Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd. 14557 (2011) (“Order” or “October Order”).*

Joint Commenters contend that the Commission has incorrectly concluded that the CVAA does not impose regulatory obligations on providers of software that the end user acquires separately from equipment used for advanced communications services.<sup>3</sup> As more fully described below, the Joint Commenters maintain that the Commission’s interpretation is inconsistent with the language and intent of the CVAA and with previous FCC orders and that such interpretation should be revised to reflect that software used for advanced services, regardless of its origin, should comply with Congress’s mandates under the CVAA.

On March 2, 2011, the Commission adopted a Notice of Proposed Rulemaking<sup>4</sup> and requested public comment on Section 716(a)(1) of the CVAA that states that:

a manufacturer of equipment used for advanced communications services, *including end user equipment, network equipment, and software*, shall ensure that the equipment and software shall be accessible to and usable by individuals with disabilities, unless the requirements of this subsection are not achievable.<sup>5</sup>

In interpreting that language, the FCC proposed in the NPRM that the italicized phrase “including end user equipment, network equipment, and software” defined the full range of equipment used for advanced communications and included software installed by the user.<sup>6</sup> Under that construction, the manufacturers of such equipment, end user equipment, network equipment, and software, would be subject to the accessibility obligations of Section 716(a)(1)

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<sup>3</sup> Order, 26 FCC Rcd at 14581, ¶ 58.

<sup>4</sup> *In the Matter of Implementation of Section 716 and 717 of the Communications Act of 1934, as Enacted by the Twenty-First Century Communications and Video Accessibility Act of 2010 (CG Dkt. 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 Dkt No. 96-198), In the Matter of Accessible Mobile Phone Options for People who are Blind, Deaf-Blind, or Have Low Vision (CG Dkt. No. 10-145), Notice of Proposed Rulemaking, 26 FCC Rcd 3133 (2011) (“NPRM”).*

<sup>5</sup> 47 U.S.C. § 617(a)(1) (emphasis added).

<sup>6</sup> NPRM, 26 FCC Rcd at 3143, ¶ 21 (2011).

and the enforcement regime of Section 717.<sup>7</sup> Some of consumer groups expressed support for the FCC’s proposed definition of “end user equipment” to include more than just hardware, as stand-alone software and applications may be necessary to use the hardware or the advanced communications service as intended.<sup>8</sup> Without such functionality, the overall piece of end user equipment or advanced communications service would fail to provide the statutorily required accessibility and usability by individuals with disabilities.

In its *Order*, however, the Commission reached a different conclusion and opted to ignore the statutory language that listed the types of equipment and the entities that produced such equipment as being subject to the CVAA. Instead, the Commission endorsed an interpretation that denied imposing any accessibility obligations on any advanced communications services software provider where that software was not required to be included by the hardware manufacturer in its equipment.<sup>9</sup> In the *Order*, the Commission also concluded that software providers that give consumers the ability to send and receive e-mail, send and receive text messages, make non-interconnected VoIP calls, or otherwise engage in advanced communications, was a provision of ACS to which the accessibility obligations attached.<sup>10</sup> Incredibly, the Commission determined that software that accessed ACS services giving

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<sup>7</sup> See *Order*, 26 FCC Rcd at 14581, ¶ 59.

<sup>8</sup> *In the Matter of Implementation of Section 716 and 717 of the Communications Act of 1934, as Enacted by the Twenty-First Century Communications and Video Accessibility Act of 2010 (CG Dkt. 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 Dkt No. 96-198), In the Matter of Accessible Mobile Phone Options for People who are Blind, Deaf-Blind, or Have Low Vision (CG Dkt. No. 10-145), Comments in Response to Notice of Proposed Rulemaking, p. 3 (April 25, 2011) (comments filed by Telecommunications for the Deaf and Hard of Hearing, Inc., et al.).*

<sup>9</sup> See *Order*, 26 FCC Rcd at 14581, ¶ 60.

<sup>10</sup> *Order*, 26 FCC RCD at 14591, ¶ 86.

consumers the ability to engage in the above-mentioned activities was not considered “the provision of ACS” and that no accessibility obligations were required.<sup>11</sup>

The Commission reached the determination that software was not “equipment used for advanced communications services,” by first asserting that the language of the statute was ambiguous and that the better interpretation was one that did not impose any accessibility obligations on software providers for software used for advanced communications services that end users acquired separately from the hardware they used for such services.<sup>12</sup> The Commission reached this conclusion by ignoring the express language in the statute, failing to note other provisions that gave it the authority to promulgate rules for such software, improperly discounting its prior conclusions, and neglecting the fundamental requirements of accessibility envisioned by the CVAA. Why the Commission concluded that “client software” that allows consumers to use ACS is not software that “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,”<sup>13</sup> especially in light of the underlying rationale for the CVAA, has no logical rationale. Accordingly, the Commission should reconsider its conclusions on those issues.

### **FCC Ignores the Express CVAA Language**

As the Commission points out, one reading of the CVAA provisions “accords more easily with the use of commas surrounding and within the phrase ‘, including end user equipment, network equipment, and software,’” but gives the term “equipment” a broader meaning.<sup>14</sup> Under

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<sup>11</sup> *Order*, 26 FCC Rcd at 14591, ¶ 86, n. 183.

<sup>12</sup> See *Order*, 26 FCC Rcd at 14581, ¶ 58.

<sup>13</sup> *Order*, 26 FCC Rcd at 14591, ¶ 86.

<sup>14</sup> The Commission did not previously have any issues in such an expansive reading of “equipment” in the past. See *infra* and *Implementation of Sections 255 and 251(a)(2) of the*

that reading, “equipment used for advanced communications services,” includes the three separated listed elements – end user equipment, network equipment, and software. Under its second interpretation, the Commission narrows the definition of “equipment” to that of a physical object. The Commission contends in its *Order* that the text of the CVAA does not compel one reading over the other but then goes on to state that the more narrow reading gives a more natural meaning to the word “equipment” and that explains why it was necessary for Congress to say that the manufacturer of equipment used for ACS must make both “equipment and software” accessible. This, of course, totally ignores the fact that the first interpretation is grammatically correct. In support of its conclusion, the Commission contends that it is 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 the phrase under the broader reading).<sup>15</sup>

The *Order*, however, fails to acknowledge that the same principal also applies in reverse. If Congress had intended that “software” was not “equipment,” then the inclusion of the statute’s language that “equipment used for advanced communications services, include[s] end user equipment, network equipment, and software” would be nonsensical. The statute specifically cites “software” as an example of “equipment used for advanced communications services.” Consistent with its reliance on the canon construction that all words in a statute should be given meaning if possible, the Commission should not deem Congress’s inclusion of “software” in the list of what constituted “equipment” as superfluous and to be ignored. Accordingly, the canon

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*Communications Act of 1934, as Enacted by the Telecommunications Act of 1996, Access to Telecommunications Service, Telecommunications Equipment and Customer Premises Equipment by Persons with Disabilities*, WT Docket No. 96-198, Report and Order and Further Notice of Inquiry, 16 FCC Rcd. 6417 (1999) (“*CPE Order*”).

<sup>15</sup> *Order*, 26 FCC Rcd at 14582, ¶ 61.

supports both interpretations. Given that the use of the canon fails to resolve the question, the Commission should consider other factors, such as the text of other CVAA provisions.

### **FCC Ignores Other CVAA Provisions**

Contrary to the Commission’s assertion, Congress did provide the FCC with the authority over the production of advanced communications services software. After examining the CVAA’s legislative history, the FCC doubted that “Congress would have significantly expanded the Commission’s traditional jurisdiction to reach software developers, without any clear statement of such intent.”<sup>16</sup>

Despite the Commission’s statement, the CVAA expressly provided that the Commission had that exact authority. The Commission does not have to delve into the legislative history of the CVAA to reach that conclusion as the language of the statute specifies the Commission’s jurisdiction.

In Section 716(e),<sup>17</sup> Congress required that the Commission within one year after October 8, 2010,<sup>18</sup> promulgate rules necessary to implement the access to advanced communications services and equipment requirements of Section 716. The statute then states that “[i]n prescribing the regulations, the Commission shall ... determine the obligations under this section of manufacturers, service providers, and providers of applications or services accessed over service provider networks ... .”<sup>19</sup> Congress authorized the FCC to determine the requirements of and promulgate regulations for application providers (*i.e.*, software developers) in addition to, not just as part of or provided by, service providers. The Commission therefore cannot conclude that Congress failed to express a clear statement of such intent and rely on that

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<sup>16</sup> *Order*, 26 FCC Rcd. at 14582, ¶ 63.

<sup>17</sup> 47 U.S.C. § 617(e).

<sup>18</sup> 47 U.S.C. § 617(e)(1).

<sup>19</sup> 47 U.S.C. §§ 617(e)(1) & 617(e)(1)(C).

“failure” to justify a narrow interpretation of the obligations of advanced communications services software providers under the CVAA.

### **FCC Improperly Discounts Prior Decisions regarding CPE**

The Commission previously noted in its *CPE Order* that “today’s technologically sophisticated telecommunications networks would be impossible without software.”<sup>20</sup> In that same order the Commission went on to conclude that “software integral to the operation of the telecommunications functions of the equipment, whether sold separately or not” would be considered “equipment” for purposes of the requirements of Section 255.<sup>21</sup> Whether software was “integral” to the functioning of telecommunications equipment was dependant on the function it provided, that is, if the software was “[i]ntegral to the origination, routing, or termination of telecommunications,” then it was considered “equipment” subject to Section 255.<sup>22</sup>

Faced with the virtual identical question, the Commission decided in this *Order* to discount its prior conclusion in the *CPE Order* by contending that the Commission had not reached 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.”<sup>23</sup> As noted above, the Commission does have the authority under the CVAA to generate regulations for software providers. Accordingly, the Commission’s reason for not reaching a similar conclusion as in the *CPE Order* is incorrect.

The Commission’s failure to use the logic of the *CPE Order* also does not make sense. Telephone software was considered “integral to the origination, routing, or termination of

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<sup>20</sup> *CPE Order*, at 6451, ¶ 82.

<sup>21</sup> *CPE Order*, at 6451, ¶ 83.

<sup>22</sup> *CPE Order*, at 6451-52, ¶¶ 82-85.

<sup>23</sup> *See generally Order*, at 14583, ¶ 64.

telecommunications,” and therefore subject to Section 255 requirements. As computers now provide the hardware analogy to the telephone, the software used on to a computer that uses or gives consumers access to ACS is equivalent to the origination and termination function performed by telephone software. Consequently accessibility obligations should be applied. The Commission’s discounting of the precedential value of the *CPE Order* was, therefore, improper and should be revisited.

### **FCC CVAA Obligation Limitation on ACS Client Software is Nonsensical**

The Joint Commenters agree with the Commission’s determination that software that “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”<sup>24</sup> is the provision of ACS to which the accessibility obligations of the CVAA attach. However, to exclude CVAA obligations for client software which the Commission loosely concludes is software that clients use to manage their ACS but that, standing alone, does not provide ACS is nonsensical and directly contradicts the Commission conclusion that software that “gives the consumer the ability to ... engage in advanced communications” is ACS.<sup>25</sup>

E-mail management software by design “gives the consumer the ability to send and receive e-mails.” Such software is the functional equivalent of a telephone -- for which the Commission requires accessibility solutions. A phone, by itself, does not provide a telecommunications service, but when connected to a telephone network allows for communications. Increasingly, software provides the same function. Like a phone, software provides an origination and termination function except on a computer or other smart device

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<sup>24</sup> *Order*, at 14591, ¶ 86.

<sup>25</sup> *See Order*, at 14591, ¶ 86, n.183. Note that such a conclusion conflicts with another Commission conclusion that software bundled with hardware components has CVAA obligations. *See, e.g., id.*, at 14586, ¶ 71

(e.g., tablet, smart phone). However, under the Commission’s current interpretation, software that is developed to use new advanced communications services will not be required to comply with the CVAA’s accessibility obligations unless the software provider also provides an underlying ACS service. That would be equivalent to saying that phones purchased separately from a service do not provide an underlying telecommunication service and therefore should not be subject to telecommunications regulations.

The implications of the Commission’s conclusion are that, at best, the deaf and hard of hearing and other disability communities would be limited to equipment officially sanctioned by an ACS provider and any standalone software that is sold as a bundle elsewhere. In the worse case scenario, those communities will be unable to have any access to ACS services in situations where the officially sanctioned (i.e., company-wide standardized) equipment lacks an accessibility requirement because the software used is “client software” despite its functionality.

### **FCC Ignores the Reason for the CVAA**

The Joint Commenters are struck by the Commission’s failure to recognize the implications of its decision with respect to accessibility obligations related to stand-alone software used for ACS, or to access ACS. As the Commission stated in its opening paragraph of its Order, the CVAA “was enacted to ensure that people with disabilities have access to the incredible and innovative communications technologies of the 21<sup>st</sup>-century.”<sup>26</sup> By limiting accessibility requirements to bundled software and that of the underlying ACS, the Commission has failed its mandate to ensure that the “54 million Americans with disabilities are able to fully utilize and benefit from advanced communications services.”<sup>27</sup>

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<sup>26</sup> *Order*, at 14559, ¶ 1.

<sup>27</sup> *Order*, at 14559-60, ¶ 1.

## Conclusion

For the reasons stated above, the Joint Commenters respectfully request that the Commission reconsider its decision that in order for the CVAA accessibility obligations to trigger software must be part of or bundled with either hardware or services. Instead, the Commission should reaffirm its earlier finding and clear intent of the CVAA that stand-alone software that gives disabled consumers access to ACS should meet Congress' mandated accessibility obligations.

Respectfully submitted,

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